Technical and Bibliographic Notes/Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- ☐ Coloured covers/ Couverture de couleur
- ☐ Covers damaged/ Couverture endommagée
- ☐ Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- ☐ Cover title missing/ Le titre de couverture manque
- ☐ Coloured maps/ Cartes géographiques en couleur
- ☐ Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- ☐ Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- ☐ Bound with other material/ Relié avec d'autres documents
- ☑ Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- ☐ Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.

- ☐ Coloured pages/ Pages de couleur
- ☐ Pages damaged/ Pages endommagées
- ☐ Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- ☑ Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- ☐ Pages detached/ Pages détachées
- ☑ Showthrough/ Transparence
- ☐ Quality of print varies/ Qualité inégale de l'impression
- ☐ Includes supplementary material/ Comprend du matériel supplémentaire
- ☐ Only edition available/ Seule édition disponible
- ☐ Pages wholly or partially obscured by errata slips, tissues, etc., have been refilmed to ensure the best possible image/ Les pages totalement ou partiellement obscurcies par un feuillet d'errata, une pelure, etc., ont été filmées à nouveau de façon à obtenir la meilleure image possible.

☑ Additional comments:/ Commentaires supplémentaires: Various pagings. Some pages may film out of focus.

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X	12X	14X	16X	18X	20X	22X	24X	26X	28X	30X	32X
						✓					

THE CRIMINAL CODE.

THE

CRIMINAL CODE

OF THE

DOMINION OF CANADA,

AS AMENDED IN 1893,

WITH

COMMENTARIES, ANNOTATIONS, PRECEDENTS OF INDICTMENTS, &c., &c.

BY

HENRI ELZÉAR TASCHEREAU, LL.D.

One of the Judges of the Supreme Court of Canada.

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

TORONTO:
THE CARSWELL CO. (LTD.), LAW PUBLISHERS, ETC.
1893.

Entered according to Act of the Parliament of Canada, in the year one thousand eight hundred and ninety-three, by THE CARSWELL CO. (Ltd.), in the office of the Minister of Agriculture.

PREFACE.

JULY 1st, 1893.

THE coming into force on this day of the Criminal Code has necessitated a new edition of this work, heretofore published *sub. nom.* "The Criminal Statute Law of Canada." (Two editions, first in 1874, second in 1888.)

In the present volume will be found, besides the text of the Code, under each section thereof to which they respectively apply:

1.—The report of the Imperial Commissioners on the draft Code of 1879, submitted to the Imperial House of Commons in the form of a Bill in 1880, from which the present Code has been in a large measure textually taken:

2.—The cases from England and each of the Provinces of the Dominion brought down to the latest date:

3.—A reference to the Imperial corresponding statute now in force in England:

4.—A reference to the Imperial statutory enactments applying to Canada and to the unrepealed Canadian statutes on the same or cognate subjects:

5.—Copious extracts from Russell, Greaves, Archbold, Bishop and other well known books on Criminal Law:

6.—Forms of indictments adapted to the changes in the law for the offences the more frequently met with in our courts; in many instances, these might be shorter, but, till there is a settled jurisprudence on the new law, it was

deemed prudent not to expose those who have to draft indictments to useless risks:

7.—The changes, extensions, or additions to the law, either italicized in the text of the statute, or pointed out in the annotation. This has been done even in the parts specially relating to justices of the peace, magistrates, coroners, etc., though, as in the previous editions, the size of the book did not allow the annotation of these enactments.

The index of matters and tables of cases have been prepared by C. H. Masters, Esq., of the New Brunswick Bar, assistant reporter to the Supreme Court.

The following synopsis of the principal parts of the new statute to which the attention of the practitioner should be more especially called may prove useful, though it must not be taken as giving more than about one-half of the amendments introduced:

Enactments on magistrates, coroners, justices of the peace, constables, etc.

553. As to jurisdiction, p. 627, *post.*

568-642. A coroner cannot commit for trial: the finding of murder or manslaughter by a coroner's jury is to be reviewable by a magistrate. (*New*).

590. Depositions before a justice on a preliminary inquiry must be read over and signed by the witness and the justice, the accused, the witness and justice *being all present together at the time of such reading and signing:* depositions to be written on one side only of each sheet; may be taken by stenographer; same for depositions on trial of summary convictions, sec. 843, except that the witnesses need not sign their depositions, sec. 856. (*New*).

550. Trials of offenders under sixteen to be private. (*New*).

552. Arrest without warrant, in what cases legal by peace-officers and others. (*Amended*).

562, 796, 818. Affidavit of service of summons at place of abode must state that it was made on some inmate thereof, apparently not under sixteen. (*New*).

562-563. No summons or warrant to be signed in blank. (*New*).

575. Search-warrant authorized for lottery-tickets or instruments. (*New*).

585, 586, 591. (*Amended*).

593. (*New*).

595. (*New*).

784. The summary trials of indictable offences not limited to the police limits of cities. (*New*).

846. Certain objections not fatal. (*New*).

864. No summary conviction for assault if either complainant or accused objects thereto. (*New*).

959. Provisions as to sureties and articles of the peace. (*New*).

Page 948. Enactment as to absence of seal from documents of justices repealed, and not re-enacted.

GENERAL ENACTMENTS—OFFENCES NEW, OR ALTERED, OR EXTENDED.

13. Abolition of rule that a wife committing an offence in presence of her husband acts under coercion.

The rule, however, will still subsist for a wife who is accessory after the fact to her husband. And (*new*) a husband accessory after the fact to his guilty wife *will be presumed to act under coercion*, sec. 63.

16-60. (Drawn by Lord Blackburn for Imperial draft.) This part of the Act in the main represents the existing law as to the circumstances which excuse or justify acts which would otherwise be crimes, and more particularly the law relating to the degree of force which may be used in arresting offenders. Such alterations as it makes are for the most part made necessary by the abolition of the

distinction between felonies and misdemeanours. There are, besides, a few special alterations in particular cases, notice of which is given under each section in this volume. A definite rule is laid down as to the suppression of dangerous riots (ss. 38-43) not materially varying from Lord Chief Justice Tindal's charge to the Grand Jury after the Bristol riots (*see* 1st Stephens Hist. Cr. L. 204), but more explicit and complete. (From Imp. Comm. memo. to Parliament.)

61. Puts the rules as to accessories and abettors in a new form.

64. Any one may be found guilty of attempt to commit an offence although the commission of the offence was impossible under the circumstances.

65. Treason. (*Amended*).

67. Accessory after the fact to treason. (*New*).

72. Inciting to mutiny. (*New*).

120, 121, 122, 123, 124. As to seditious offences. (*New*).

125. Libel on foreign sovereigns (*New*).

126. Spreading false news. (*New*).

127, 128, 129, 130. As to piracy. (*New*).

131. Bribery and corruption of judges, members of parliament, or of a legislature. (*New*).

132. Corruption of peace officers. (*New*).

135. Breach of trust by public officer. (*New*).

137. Selling office. (*New*).

139. Disobedience to orders of court. (*New*).

140. Neglect of peace officer. (*New*).

141. Neglect to aid peace officer. (*New*).

142. Neglect to aid peace officer. (*New*).

145. New provisions as to perjury.

150. False statements. (*New*).

151. Fabricating evidence. (*New*).

152. Conspiracy to bring false accusations. (*New*).

159, 160. As to escapes and rescues. (*New*).

170. Blasphemous libel. (*New*).

177. Indecent acts. (*Amended*).

179. Obscene books, etc. (*New*).

188. Conspiracy to defile. (*New*).

192, 193. As to nuisances. (*New*).

194. Selling things unfit for food.. (*New*).

195, 196, 197, 198. Gaming or disorderly houses. (*New*).

206. Misconduct in respect to dead bodies. (*New*).

210, 211. Amendments of statute concerning duty of parents, masters or husbands to provide necessaries, etc. *See* p. 144, *post*.

227, 228, 229. Alter the law of murder and manslaughter: murder is not now to be defined as "killing with malice aforethought." But killing with malice aforethought does not cease to be murder. Accidental killing of any one in the commission of a felony is not now to be murder. *See* pages 153 to 212, *post*, as to details.

237. Aiding and abetting suicide. (*New*).

238. Attempt to commit suicide. (*New*).

239. Neglect to obtain assistance in child-birth. (*New*).

266. Law as to rape altered.

271. Killing child in mother's womb. (*New*).

283. Abduction of girl under sixteen. (*Amended*).

291. Law of libel as to public meetings. (*New*).

303-305. Law of larceny amended. Embezzlement as a distinct offence abolished. A fraudulent conversion now the gist of the offence, not an unlawful taking. See pages 307 to 340, *post*.

313. The law as to stealing by husband of his wife's property and *vice versa*, and as to receiving by avowterer amended.

314. As to receiving stolen goods. (*Amended*).

315. As to receiving post letters. (*Amended*).

346. Stealing by pick-locks, etc. (*New*).

351. Stealing on railways. (*New*).

353. Provision as to stealing of promissory notes, etc., left out.

356. Previous conviction on charge of stealing. (*Amended*).

365. False statements by promoters, directors of companies. (*Amended*).

366. False accounting by clerks. (*New*).

367. False statement by public officers. (*New*).

369. Punishment increased from six months to ten years.

394. Conspiracy to defraud. (*New*).

396. Practising witchcraft. (*New*).

406. Extortion by threats. (*New*).

408-418. Burglary. (*Amended*).

417. Being masked by night. (*New*).

423. Forgery. (*Amended*).

428. Sending telegram in false name. (*New*).

429. Sending false telegrams or letters. (*New*).

456-457. Personation. (*New*).

478. Previous conviction on offences against coin. (*Amended*).

481. Mischief. (*Amended*).

482. Arson. (*Amended*).

499. Damaging any property by night to amount of $20. (*New*).

502. Punishment decreased from ten years to two years.

503. To destroy an election ballot *or* paper, seven years. By s. 100, c. 8, R. S. C. (*unrepealed*) to destroy any ballot paper, not more than six months.

507*a*. Injuries to harbours. (*New*).

527. Conspiracies. (*New*).

528. Attempts. (*New*).

529. " (*New*).

530. " (*New*).

531-532. Accessories after the fact. (*New*).

PROCEDURE.

534. Effect of criminal offence on civil remedy.

535. Distinction between felony and misdemeanour abolished. (*New*).

539-540. Court of Sessions of the Peace, to have jurisdiction in manslaughter, perjury, forgery, counterfeiting coin, blasphemous libel, bribery at elections. (*New*).

542. No alien to be prosecuted for an offence committed within the jurisdiction of the Admiralty, *even on board a British ship*, without leave of the Governor-General. (*New*).

551. Limitation of time. (*Amended*).

595. (*New*). P. 658 *post*.

610, 611, 612, 613, 616, 617, 619, 626, 627, 629. Indictments. (*Amended*).

631, 632, 633. Pleas in bar. (*Amended*).

640. Abolishes the law of venue. Jurisdiction of courts, not confined to territorial limits. (*New*).

641. Vexatious indictments Act extended to all prosecutions. (*New*).

648. Bench warrant. (*Amended*).

656. Pleas in abatement abolished. (*New*).

660. Court may allow accused not to be present at trial. (*New*).

661. Counsel's addresses to jury. (*Amended*).

666. Challenging the array. (*New*).

667. Calling the panel. (*New*).

668. Number of challenges, how regulated. (*New*).

673. Rules as to jury separating during trial. (*New*).

684. Evidence of any witness in forgery to require corroboration. (*New*).

690. Admissions by prisoner on trial. (*New*).

713. Verdict for a minor offence included in offence charged. (*Amended*).

But if on a charge of larceny, obtaining by false pretenses is proved, or *vice versa*, the prisoner must now be acquitted. (*New*).

723. Variances and amendments. (*Amended*).

729. Any proceedings of the court on a Sunday are legal. (*New*).

731. *Jury de ventre inspiciendo* abolished.

743. Writ of error abolished.

744. Appeal when a reserved case refused. (*New*).

746. Powers of court of appeal. (*Amended*).

747. New trial. (*New*).

748. New trial by order of Minister of Justice. (*New*).

749. Intermediate effects of appeal. (*New*).

832-835. Costs. (*New*).

836. Compensation for loss of property. (*New*).

838. Restitution of stolen property. (*Amended*).

951-952. Punishments in cases not provided for and after previous conviction. (*Amended*).

959. Sureties for the peace, articles of the peace. (*New*).

961. Disabilities by a conviction. (*New*).

962-965. Outlawry and attainder abolished. (*New*).

A TABLE OF REGNAL YEARS.

FOR CONVENIENCE OF REFERENCE TO THE ENGLISH STATUTES AND LAW REPORTS.

Sovereigns.	Commencement of Reign.	Length of Reign.
William I	December 25, 1066	21
William II	September 26, 1087	13
Henry I	August 5, 1100	36
Stephen	December 26, 1135	19
Henry II	December 19, 1154	35
Richard I	September 3, 1189	10
John	May 27, 1199	18
Henry III	October 28, 1216	57
Edward I	November 20, 1272	35
Edward II	July 8, 1307	20
Edward III	January 25, 1327	51
Richard II	June 22, 1377	23
Henry IV	September 30, 1399	14
Henry V	March 21, 1413	10
Henry VI	September 1, 1422	39
Edward IV	March 4, 1461	23
Edward V	April 9, 1483	..
Richard III	June 26, 1483	3
Henry VII	August 22, 1485	24
Henry VIII	April 22, 1509	38
Edward VI	January 28, 1547	7
Mary	July 6, 1553	2
Philip and Mary	July 25, 1554	4
Elizabeth	November 17, 1558	45
James I.	March 24, 1603	23
Charles I.	March 27, 1625	24
The Commonwealth	January 30, 1649	11
Charles II*	May 29, 1660	37
James II.	February 6, 1685	4
William and Mary	February 13, 1689	14
Anne	March 8, 1702	13
George I	August 1, 1714	13
George II	June 11, 1727	34
George III	October 25, 1760	60
George IV	January 29, 1820	11
William IV	June 26, 1830	7
Victoria	June 20, 1837	..

*Although Charles II. did not ascend the throne until 29th May, 1660, his regnal years were computed from the death of Charles I., January 13, 1649, so that the year of his restoration is styled the twelfth of his reign.

A TABLE OF REGNAL YEARS—*Continued.*

1831—1 & 2 Wm. IV.
1832—2 & 3 "
1833—3 & 4 "
1834—4 & 5 "
1835—5 & 6 "
1836—6 & 7 "
1837—7 Wm. IV. and 1 Vic.
1838— 1 & 2 Vic.
1839— 2 & 3 "
1840— 3 & 4 "
1841— 4 & 5 "
1841— 5 "
1842— 5 & 6 "
1843— 6 & 7 "
1844— 7 & 8 "
1845— 8 & 9 "
1846— 9 & 10 "
1847—10 & 11 "
1848—11 & 12 "
1849—12 & 13 "
1850—13 & 14 "
1851—14 & 15 "
1852—15 & 16 "
1853—16 & 17 "
1854—17 & 18 "
1855—18 & 19 "
1856—19 & 20 "
1857—20 "
1857—20 & 21 "
1858—21 & 22 "
1859—22 "
1859—22 & 23 "
1860—23 & 24 "
1861—24 & 25 "
1862—25 & 26 Vic.
1863—26 & 27 "
1864—27 & 28 "
1865—28 & 29 "
1866—29 & 30 "
1867—30 & 31 "
1868—31 & 32 "
1869—32 & 33 "
1870—33 & 34 "
1871—34 & 35 "
1872—35 & 36 "
1873—36 & 37 "
1874—37 & 38 "
1875—38 & 39 "
1876—39 & 40 "
1877—40 & 41 "
1878—41 & 42 "
1879—42 & 43 "
1880—43 & 44 "
1881—44 & 45 "
1882—45 & 46 "
1883—46 & 47 "
1884—47 & 48 "
1885—48 & 49 "
1886—49 & 50 "
1887—50 & 51 "
1888—51 & 52 "
1889—52 "
1889—52 & 53 "
1890—53 & 54 "
1891—54 & 55 "
1892—55 & 56 "
1893—56 & 57 "

THE CRIMINAL CODE, 1892.

[55-56 VIC. c. 29].

AMENDMENT OF 1893.

[56 VIC. c. 32].

ARRANGEMENT OF TITLES.

		Page.
TITLE I.	Introductory provisions	1
II.	Offences against public order, internal and external	46
III.	Offences affecting the administration of law and justice	77
IV.	Offences against religion, morals and public convenience	114
V.	Offences against the person and reputation	143
VI.	Offences against rights of property and rights arising out of contracts and offences connected with trade	336
VII.	Procedure	602
VIII.	Proceedings after conviction	959
IX.	Actions against persons administering the criminal law	979
X.	Repeal, etc.	980
SCHEDULE 1.	Forms	983
2.	Table of Acts repealed	983
APPENDIX.	Acts and parts of Acts which are not affected by this Act	986

TABLE OF CONTENTS.

TITLE I.

INTRODUCTORY PROVISIONS.

PART I.

PRELIMINARY.

Sec.		Page.
1.	Short title	1
2.	Commencement of Act	1
3.	Explanation of terms	1
4.	Meaning of expressions in other Acts retained	6
5.	Offence against statutes of England, Great Britain or the United Kingdom	6
6.	Consequences of committing offence	6

PART II.

MATTERS OF JUSTIFICATION OR EXCUSE.

7.	General rule under common law	7
8.	General rule under this Act	7
9.	Children under seven	7
10.	Children between seven and fourteen	7
11.	Insanity	8
12.	Compulsion by threats	9
13.	Compulsion of wife	11
14.	Ignorance of the law	11
15.	Execution of sentence	12
16.	Execution of process	12
17.	Execution of warrants	14
18.	Execution of erroneous sentence or process	14
19.	Sentence or process without jurisdiction	15
20.	Arresting the wrong person	15
21.	Irregular warrant or process	16
22.	Arrest by peace officer in case of certain offences	16
23.	Persons assisting peace officer	17
24.	Arrest of persons found committing certain offences	17
25.	Arrest after commission of certain offences	17

Sec. Page.
26. Arrest of person believed to be committing certain offences by night 17
27. Arrest by peace officer of person found committing offence.... 17
28. Arrest of person found committing any offence at night..... 18
29. Arrest during flight 18
30. Statutory power of arrest 18
31. Force used in executing sentence or process or in arrest..... 19
32. Duty of persons arresting 19
33. Peace officer preventing escape from arrest for certain offences 19
34. Private person preventing escape from arrest for certain offences..... 20
35. Preventing escape from arrest in other cases..... 20
36. Preventing escape or rescue after arrest for certain offences.. 20
37. Preventing escape or rescue after arrest in other cases..... 20
38. Preventing breach of the peace..... 20
39. Prevention by peace officers of breach of the peace..... 21
40. Suppression of riot by magistrates 21
41. Suppression of riot by persons acting under lawful orders..... 21
42. Suppression of riot by persons without orders..... 22
43. Protection of persons subject to military law 22
44. Prevention of certain offences 22
45. Self-defence against unprovoked assault..... 22
46. Self-defence against provoked assault..... 23
47. Prevention of insult..... 24
48. Defence of movable property against trespasser 24
49. Defence of movable property with claim of right..... 24
50. Defence of movable property without claim of right..... 24
51. Defence of dwelling-house 24
52. Defence of dwelling-house at night 25
53. Defence of real property..... 25
54. Assertion of right to house or land 26
55. Discipline of minors..... 27
56. Discipline on ships 27
57. Surgical operations 27
58. Excess 27
59. Consent to death 27
60. Obedience to *de facto* law 28

PART III.

Parties to the Commission of Offences.

61. Parties to offences..... 28
62. Offence committed other than the offence intended..... 39
63. Accessory after the fact 40
64. Attempts..... 42

TITLE II.

OFFENCES AGAINST PUBLIC ORDER, INTERNAL AND EXTERNAL.

PART IV.

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

Sec.		Page.
65.	Treason	46
66.	Conspiracy	47
67.	Accessories after the fact	47
68.	Levying war by subjects of a state at peace with Her Majesty—subjects assisting	47
69.	Treasonable offences	48
70.	Conspiracy to intimidate a legislature	48
71.	Assaults on the Queen	49
72.	Inciting to mutiny	49
73.	Enticing soldiers or sailors to desert	49
74.	Resisting execution of warrant for arrest of deserters	50
75.	Enticing militiamen or members of the North-west mounted police force to desert	50
76.	Interpretation	50
77.	Unlawfully obtaining and communicating official information	51
78.	Communicating information acquired by holding office	52

PART V.

UNLAWFUL ASSEMBLIES, RIOTS, BREACHES OF THE PEACE.

79.	Definition of unlawful assembly	52
80.	Definition of riot	55
81.	Punishment of unlawful assembly	56
82.	Punishment of riot	56
83.	Reading the Riot Act	56
84.	Duty of justice if rioters do not disperse	57
85.	Riotous destruction of buildings	57
86.	Riotous damage to buildings	58
87.	Unlawful drilling	59
88.	Being unlawfully drilled	59
89.	Forcible entry and detainer	60
90.	Affray	60
91.	Challenge to fight a duel	61
92.	Prize-fighting defined	61
93.	Challenging to fight a prize-fight, etc	62
94.	Engaging as principal in a prize-fight	62
95.	Attending or promoting a prize-fight	62

Sec. Page.
96. Leaving Canada to engage in a prize-fight 62
97. Where the fight is not a prize-fight—discharge or fine 63
98. Inciting Indians to riotous acts 63

PART VI.

Unlawful Use and Possession of Explosive Substances and Offensive Weapons.—Sale of Liquors.

99. Causing dangerous explosions 63
100. Doing anything, or possessing explosive substance, with intent to cause dangerous explosions 64
101. Unlawfully making or possessing explosive substances 64
102. Having possession of arms for purposes dangerous to the public peace 64
103. Two or more persons openly carrying dangerous weapons so as to cause alarm 65
104. Smugglers carrying offensive weapons 65
105. Carrying a pistol or air-gun without justification 65
106. Selling pistol or air-gun to minor 66
107. Having weapons on person when arrested 66
108. Having weapons on the person with intent to injure any person. 67
109. Pointing any firearm at any person 67
110. Carrying offensive weapons about the person 67
111. Carrying sheath-knives 67
112. Exception as to soldiers, etc 67
113. Refusing to deliver offensive weapon to a justice 68
114. Coming armed within two miles of public meeting 68
115. Lying in wait for persons returning from public meeting 68
116. Sale of arms in the North-west Territories 69
117. Possessing weapons near public works 69
118. Sale, etc., of liquors near public works 69
119. Intoxicating liquors on board Her Majesty's ships 70

PART VII.

Seditious Offences.

120. Oaths to commit certain offences 70
121. Other unlawful oaths 71
122. Compulsion in administering and taking oaths 72
123. Seditious offences defined 72
124. Punishment of seditious offences 73
125. Libels on foreign sovereigns 73
126. Spreading false news 73

PART VIII.

Piracy.

Sec.		Page.
127.	Piracy by the law of nations	74
128.	Piratical acts	75
129.	Piracy with violence	75
130.	Not fighting pirates	76

TITLE III.

OFFENCES AGAINST THE ADMINISTRATION OF LAW AND JUSTICE.

PART IX.

Corruption and Disobedience.

131.	Judicial corruption	77
132.	Corruption of officers employed in prosecuting offenders	77
133.	Frauds upon the government	78
134.	Other consequences of conviction for any such offence	80
135.	Breach of trust by public officer	80
136.	Corrupt practices in municipal affairs	81
137.	Selling office, appointment, etc	82
138.	Disobedience to a statute	83
139.	Disobedience to orders of court	83
140.	Neglect of peace officer to suppress riot	83
141.	Neglect to aid peace officer to suppress riot	83
142.	Neglect to aid peace officer in suppressing riot	83
143.	Misconduct of officers intrusted with execution of writs	84
144.	Obstructing public or peace officer in the execution of his duty	84

PART X.

Misleading Justice.

145.	Perjury defined	85
146.	Punishment of perjury	97
147.	False oaths	98
148.	False statement, wilful omission in affidavit, etc	98
149.	Making false affidavit out of province in which it is used	99
150.	False statements	99
151.	Fabricating evidence	99
152.	Conspiring to bring false accusations	100
153.	Administering oaths without authority	101
154.	Corrupting juries and witnesses	101
155.	Compounding penal actions	104

Sec. Page.
156. Corruptly taking a reward for helping to recover stolen property without using diligence to bring offender to trial 105
157. Unlawfully advertising a reward for return of stolen property.. 106
158. Signing false declaration respecting execution of judgment of death 106

PART XI.

Escapes and Rescues.

159. Being at large while under sentence of imprisonment 107
160. Assisting escape of prisoners of war 111
161. Breaking prison 111
162. Attempting to break prison 111
163. Escape from custody after conviction or from prison 111
164. Escape from lawful custody 112
165. Assisting escape in certain cases 112
166. Assisting escape in other cases 112
167. Aiding escape from prison 112
168. Unlawfully procuring discharge of prisoner 113
169. How escaped prisoners shall be punished 113

TITLE IV.

OFFENCES AGAINST RELIGION, MORALS AND PUBLIC CONVENIENCE.

PART XII.

Offences Against Religion.

170. Blasphemous libels 114
171. Obstructing officiating clergyman 115
172. Violence to officiating clergyman 115
173. Disturbing public worship 116

PART XIII.

Offences Against Morality.

174. Unnatural offence 116
175. Attempt to commit sodomy 118
176. Incest 119
177. Indecent acts 120
178. Acts of gross indecency 121
179. Publishing obscene matter 121
180. Posting immoral books, etc 122
181. Seduction of girls under sixteen 123
182. Seduction under promise of marriage 123

Sec. Page.
183. Seduction of a ward, servant, etc..... 124
184. Seduction of females who are passengers on vessels 124
185. Unlawfully defiling women 125
186. Parent or guardian procuring defilement of girl..... 127
187. Householders permitting defilement of girls on their premises.. 128
188. Conspiracy to defile..... 129
189. Carnally knowing idiots, etc..... 130
190. Prostitution of Indian women..... 130

PART XIV.

Nuisances.

191. Common nuisance defined 131
192. Common nuisances which are criminal..... 133
193. Common nuisances which are not criminal..... 133
194. Selling things unfit for food 133
195. Common bawdy-house defined..... 133
196. Common gaming-house defined..... 133
197. Common betting-house defined..... 134
198. Disorderly houses..... 134
199. Playing or looking on in gaming-house 135
200. Obstructing peace officer entering a gaming-house 135
201. Gaming in stocks and merchandise..... 136
202. Habitually frequenting places where gaming in stocks is carried on 136
203. Gambling in public conveyances 136
204. Betting and pool-selling 137
205. Lotteries 138
206. Misconduct in respect to human remains 139

PART XV.

Vagrancy.

207. Vagrant defined..... 140
208. Penalty for vagrancy..... 140

TITLE V.

OFFENCES AGAINST THE PERSON AND REPUTATION.

PART XVI.

Duties tending to the Preservation of Life.

209. Duty to provide the necessaries of life 143
210. Duty of head of family to provide necessaries..... 143
211. Duty of masters to provide necessaries 143

Sec. Page.
212. Duty of persons doing dangerous acts 144
213. Duty of persons in charge of dangerous things 144
214. Duty to avoid omissions dangerous to life 144
215. Neglecting duty to provide necessaries 144
216. Abandoning children under two years of age 149
217. Causing bodily harm to apprentices or servants 151

PART XVII.

Homicide.

218. Homicide defined 205
219. When a child becomes a human being 205
220. Culpable homicide 206
221. Procuring death by false evidence 208
222. Death must be within a year and a day 208
223. Killing by influence on the mind 208
224. Acceleration of death 209
225. Causing death which might have been prevented 209
226. Causing injury the treatment of which causes death 209

PART XVIII.

Murder, Manslaughter, Etc.

227. Definition of murder 210
228. Further definition of murder 210
229. Provocation 211
230. Manslaughter 211
231. Punishment of murder 212
232. Attempts to commit murder 212
233. Threats to murder 222
234. Conspiracy to murder 224
235. Accessory after the fact to murder 225
236. Punishment of manslaughter 225
237. Aiding and abetting suicide 226
238. Attempt to commit suicide 228
239. Neglect to obtain assistance in childbirth 228
240. Concealing dead body of child 229

PART XIX.

Bodily Injuries, and Acts and Omissions causing Danger to the Person.

241. Wounding with intent 233
242. Unlawful wounding 237
243. Shooting at Her Majesty's vessels—wounding customs or inland revenue officers 239

Sec. Page.
244. Disabling or administering drugs with intent to commit an indictable offence 239
245. Administering poison so as to endanger life..... 240
246. Administering poison with intent to injure 240
247. Causing bodily injuries by explosives..... 241
248. Attempting to cause bodily injuries by explosives 241
249. Setting spring-guns and man-traps 243
250. Intentionally endangering the safety of persons on railways.... 245
251. Negligently endangering the safety of persons on railways 245
252. Negligently causing bodily injury to any persons 249
253. Injuring persons by furious driving..... 249
254. Preventing the saving of the life of any person shipwrecked.... 250
255. Leaving holes in the ice and excavations unguarded 250
256. Sending unseaworthy ships to sea 251
257. Taking unseaworthy ships to sea..... 251

PART XX.

Assaults.

258. Assault defined..... 252
259. Indecent assaults on females..... 252
260. Indecent assaults on males 253
261. Consent of child under fourteen no defence 253
262. Assaults causing actual bodily harm 253
263. Aggravated assault 254
264. Kidnapping 258
265. Common assaults..... 259

PART XXI.

Rape and Procuring Abortion.

266. Rape defined 268
267. Punishment for rape 268
268. Attempt to commit rape 268
269. Defiling children under fourteen 274
270. Attempt to commit such offence 274
271. Killing unborn child 275
272. Procuring abortion 275
273. Woman procuring her own miscarriage..... 276
274. Supplying means of procuring abortion..... 276

PART XXII.

Offences against Conjugal and Parental Rights—Bigamy —Abduction.

275. Bigamy defined..... 279
276. Punishment of bigamy 280

Sec. Page.
277. Feigned marriages 287
278. Punishment of polygamy 287
279. Solemnization of marriage without lawful authority..... 288
280. Solemnization of marriage contrary to law 288
281. Abduction of a woman 289
282. Abduction of an heiress 289
283. Abduction of girl under sixteen 292
284. Stealing children under fourteen 295

PART XXIII.

Defamatory Libel.

285. Defamatory libel defined 296
286. Publishing defined 297
287. Publishing upon invitation 297
288. Publishing in courts of justice 297
289. Publishing parliamentary papers..... 297
290. Fair reports of proceedings of parliaments and courts 297
291. Fair report of proceedings of public meetings 297
292. Fair discussion 298
293. Fair comment 298
294. Seeking remedy for grievance 298
295. Answer to inquiries..... 298
296. Giving information 298
297. Selling periodicals containing defamatory libel 298
298. Selling books containing defamatory matter..... 299
299. When truth is a defence..... 299
300. Extortion by defamatory libel..... 299
301. Punishment of defamatory libel known to be false..... 300
302. Punishment of defamatory libel 300

TITLE VI.

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

PART XXIV.

Theft defined.

303. Things capable of being stolen..... 336
304. Animals capable of being stolen..... 337
305. Theft defined..... 338
306. Theft of things under seizure 340
307. Theft of animals 341
308. Theft by agent 341

Sec. Page.
309. Theft by person holding a power of attorney 342
310. Theft by misappropriating proceeds held under direction 342
311. Theft by co-owner 345
312. Concealing gold or silver with intent to defraud partner in claim 345
313. Husband and wife 346

PART XXV.

Receiving Stolen Goods.

314. Receiving property dishonestly obtained 347
315. Receiving stolen post letter or post letter bag 353
316. Receiving property obtained by offence punishable on summary conviction 354
317. When receiving is complete 355
318. Receiving after restoration to owner 355

PART XXVI.

Punishment of Theft and Offences resembling Theft committed by Particular Persons in respect of Particular Things in Particular Places.

319. Clerks and servants 355
320. Agents and attorneys, punishment 369
321. Public servants refusing to deliver up chattels, moneys or books, etc., lawfully demanded of them 369
322. Tenants and lodgers 370
323. Testamentary instruments 370
324. Document of title to lands 370
325. Judicial or official documents 371
326. Stealing post letter bags, etc 372
327. Stealing post letters, packets and keys 372
328. Stealing mailable matter other than post letters 372
329. Election documents 373
330. Railway tickets 373
331. Cattle 373
332. Dogs, birds, beasts and other animals 374
333. Pigeons 375
334. Oysters 375
335. Things fixed to buildings or to land 376
336. Trees in pleasure grounds, etc., of five dollars' value—trees elsewhere of twenty-five dollars' value 377
337. Trees of the value of twenty-five cents 378
338. Timber found adrift 380
339. Fences, stiles and gates 380
340. Failing to satisfy justice that possession of tree, etc., is lawful. 380
341. Roots, plants, etc., growing in gardens, etc. 381

Sec. Page.
342. Roots, plants, etc., growing elsewhere than in gardens, etc..... 382
343. Ores of metals 382
344. Stealing from the person 383
345. Stealing in dwelling-houses 384
346. Stealing by picklocks, etc..... 389
347. Stealing in manufactories, etc..... 389
348. Fraudulently disposing of goods intrusted for manufacture..... 390
349. Stealing from ships, wharfs, etc. 390
350. Stealing wreck..... 392
351. Stealing on railways 392
352. Stealing things deposited in Indian graves..... 393
353. Destroying, etc., documents..... 393
354. Concealing 396
355. Bringing stolen property into Canada 396
356. Stealing things not otherwise provided for 397
357. Additional punishment when value of property exceeds two hundred dollars..... 397

PART XXVII.

Obtaining Property by False Pretenses and other Criminal Frauds and Dealings with Property.

358. Definition of false pretense 397
359. Punishment of false pretense..... 398
360. Obtaining execution of valuable security by false pretense..... 414
361. Falsely pretending to enclose money, etc., in a letter..... 417
362. Obtaining passage by false tickets 417
363. Criminal breach of trust 417

PART XXVIII.

Fraud.

364. False accounting by official 418
365. False statement by official 419
366. False accounting by clerk 419
367. False statement by public officer 421
368. Assigning property with intent to defraud creditors..... 421
369. Destroying or falsifying books with intent to defraud creditors. 421
370. Concealing deeds or encumbrances or falsifying pedigrees..... 421
371. Frauds in respect to the registration of titles to land..... 422
372. Fraudulent sales of property..... 422
373. Fraudulent hypothecation of real property..... 422
374. Fraudulent seizures of land..... 422
375. Unlawful dealings with gold and silver..... 423
376. Warehousemen, &c., giving false receipts—knowingly using the same..... 423

Sec. Page.
377. Owners of merchandise disposing thereof contrary to agreements with consignees who have made advances thereon.. 424
378. Making false statements in receipts for property that can be used under "The Bank Act"—fraudulently dealing with property to which such receipts refer..... 424
379. Innocent partners..... 424
380. Selling vessel or wreck not having title thereto 425
381. Other offences respecting wrecks..... 425
382. Offences respecting old marine stores..... 425
383. Definitions 425
384. Marks to be used on public stores 426
385. Unlawfully applying marks to public stores..... 426
386. Taking marks from public stores..... 427
387. Unlawful possession, sale, &c., of public stores 427
388. Not satisfying justices that possession of public stores is lawful 427
389. Searching for stores near Her Majesty's vessels..... 428
390. Receiving regimental necessaries, &c., from soldiers or deserters 428
391. Receiving, &c., necessaries from mariners or deserters 428
392. Receiving, &c., a seaman's property..... 429
393. Not satisfying justice that possession of seaman's property is lawful..... 429
394. Conspiracy to defraud..... 429
395. Cheating at play..... 430
396. Pretending to practice witchcraft 433

PART XXIX.

Robbery and Extortion.

397. Robbery defined 444
398. Punishment of aggravated robbery 444
399. Punishment of robbery 446
400. Assault with intent to rob 447
401. Stopping the mail..... 447
402. Compelling execution of documents by force 448
403. Sending letter demanding property with menaces 449
404. Demanding with intent to steal 450
405. Extortion by certain threats..... 451
406. Extortion by other threats..... 454

PART XXX.

Burglary and Housebreaking.

407. Definition of dwelling-house, etc..... 469
408. Breaking place of worship and committing offence..... 470
409. Breaking place of worship with intent to commit offence..... 471
410. Burglary defined 471

Sec. Page.
411. Housebreaking and committing an indictable offence..... 475
412. Housebreaking with intent to commit an indictable offence.... 478
413. Breaking shop and committing an indictable offence 480
414. Breaking shop with intent to commit an indictable offence 483
415. Being found in dwelling-house by night..... 483
416. Being found armed with intent to break a dwelling-house 484
417. Being disguised or in possession of housebreaking instruments. 485
418. Punishment after previous conviction..... 488

PART XXXI.

Forgery.

419. Document defined..... 509
420. "Bank note," and "exchequer bill" defined..... 509
421. False document defined 510
422. Forgery defined..... 510
423. Punishment of forgery..... 511
424. Uttering forged documents..... 521
425. Counterfeiting seals 521
426. Counterfeiting seals of courts, registry offices, etc. 522
427. Unlawfully printing proclamation, etc. 522
428. Sending telegrams in false name 522
429. Sending false telegrams 522
430. Possessing forged bank notes 523
431. Drawing document without authority..... 523
432. Using probate obtained by forgery or perjury 524

PART XXXII.

Preparation for Forgery and Offences resembling Forgery.

433. Interpretation of terms 525
434. Instruments of forgery 525
435. Counterfeiting stamps..... 526
436. Falsifying registers 530
437. Falsifying extracts from registers 530
438. Uttering false certificates 531
439. Forging certificates 531
440. Making false entries in books relating to public funds 531
441. Clerks issuing false dividend warrants 532
442. Printing circulars, etc., in likeness of notes 533

PART XXXIII.

Forgery of Trade Marks—Fraudulent Marking of Merchandise.

443. Definitions 533
444. Words or marks on watch cases 535

Sec. Page.
445. Definition of forgery of a trade mark 535
446. Applying trade marks to goods 535
447. Forgery of trade marks, etc. 535
448. Selling goods falsely marked—defence 536
449. Selling bottles marked with trade mark without consent of owner 536
450. Punishment of offences defined in this part 536
451. Falsely representing that goods are manufactured for Her Majesty, etc 537
452. Unlawful importation of goods liable to forfeiture under this part 537
453. Defence where person charged innocently in the ordinary course of business makes instruments for forging trade marks .. 537
454. Defence where offender is a servant 537
455. Exception respecting trade description lawfully applied to goods on 22nd May, 1888, etc 538

PART XXXIV.

Personation.

456. Personation 538
457. Personation at examinations 538
458. Personation of certain persons 539
459. Acknowledging instrument in false name 540

PART XXXV.

Offences relating to the Coin.

460. Interpretation of terms 541
461. When offence completed 541
462. Counterfeiting coins, etc 542
463. Dealing in and importing counterfeit coin 544
464. Manufacture of copper coin and importation of uncurrent copper coin 545
465. Exportation of counterfeit coin 545
466. Making instruments for coining 545
467. Bringing instruments for coining from mints into Canada 549
468. Clipping current gold or silver coin 549
469. Defacing current coins 550
470. Possessing clippings of current coin 550
471. Possessing counterfeit coins 551
472. Offences respecting copper coin 551
473. Offences respecting foreign coins 552
474. Uttering counterfeit gold or silver coins 552
475. Uttering light coins, medals, counterfeit copper coins, etc 554
476. Uttering defaced coin 555

Sec. Page.
477. Uttering uncurrent copper coins 555
478. Punishment after previous conviction 555

PART XXXVI.

ADVERTISING COUNTERFEIT MONEY.

479. Definition 556
480. Advertising counterfeit money, and other offences connected therewith 556

PART XXXVII.

MISCHIEF.

481. Preliminary 557
482. Arson 558
483. Attempt to commit arson 563
484. Setting fire to crops 564
485. Attempt to set fire to crops 564
486. Recklessly setting fire to forest, etc 565
487. Threats to burn, etc 565
488. Attempt to damage by gunpowder 565
489. Mischief on railways 567
490. Obstructing railways 567
491. Injuries to packages in the custody of railways 567
492. Injuries to electric telegraphs, etc. 569
493. Wrecking 570
494. Attempting to wreck 570
495. Interfering with marine signals 570
496. Preventing the saving of wrecked vessels or wreck 571
497. Injuries to rafts of timber and works used for the transmission thereof 571
498. Mischief to mines 572
499. Mischief 575
500. Attempting to injure or poison cattle 579
501. Injuries to other animals 579
502. Threats to injure cattle 580
503. Injuries to poll-books, etc 580
504. Injuries to buildings by tenants 581
505. Injuries to land marks indicating municipal divisions 582
506. Injuries to other land marks 582
507. Injuries to fences, etc 582
507*a*. " " harbours 583
508. Injuries to trees, etc., wheresoever growing 583
509. Injuries to vegetable productions growing in gardens, etc 584
510. Injuries to cultivated roots and plants growing elsewhere 584
511. Injuries not otherwise provided for 585

PART XXXVIII.

CRUELTY TO ANIMALS.

Sec.		Page.
512.	Cruelty to animals	587
513.	Keeping cock-pit	587
514.	The conveyance of cattle	587
515.	Search of premises—penalty for refusing admission to peace officer	588

PART XXXIX.

OFFENCES CONNECTED WITH TRADE AND BREACHES OF CONTRACT.

516.	Conspiracies in restraint of trade	589
517.	What acts done in restraint of trade are not unlawful	589
518.	Prosecution for conspiracy	589
519.	Interpretation	589
520.	Combinations in restraint of trade	589
521.	Criminal breaches of contract	590
522.	Posting up copies of provisions respecting criminal breaches of contract—defacing same	591
523.	Intimidation	591
524.	Intimidation of any person to prevent him from working at any trade	593
525.	Intimidation of any person to prevent him dealing in wheat, etc. —unlawfully preventing seamen from working	595
526.	Intimidation of any person to prevent him bidding for public lands	595

PART XL.

ATTEMPTS—CONSPIRACIES—ACCESSORIES.

527.	Conspiring to commit an indictable offence	596
528.	Attempting to commit certain indictable offences	598
529.	Attempting to commit other indictable offences	598
530.	Attempting to commit statutory offences	598
531.	Accessories after the fact to certain indictable offences	600
532.	Accessories after the fact to other indictable offences	600

TITLE VII.

PROCEDURE.

PART XLI.

GENERAL PROVISIONS.

533.	Power to make rules	602
534.	Civil remedy not suspended though act is a criminal offence	602

Sec. Page.
535. Abolition of distinction between felony and misdemeanour.... 603
536. Construction of Acts..... 603
537. Construction of reference to certain Acts..... 603

PART XLII.

Jurisdiction.

538. Superior Court 604
539. Other courts 604
540. Jurisdiction in certain cases 604
541. Exercising powers of two justices..... 605

PART XLIII.

Procedure in Particular Cases.

542. Offences within the jurisdiction of the Admiralty of England.. 606
543. Disclosing official secrets..... 612
544. Judicial corruption 612
545. Making explosive substances..... 612
546. Sending unseaworthy ships to sea 612
547. Trustee fraudulently disposing of money 612
548. Fraudulent acts of vendor or mortgagor..... 612
549. Uttering defaced coin 612
550. Trial of offenders under sixteen 613
551. Time within which proceedings shall be commenced in certain cases 613
552. Arrest without warrant 616

PART XLIV.

Compelling Appearance of Accused before Justice.

553. Magisterial jurisdiction 627
554. When justice may compel appearance..... 629
555. Offences committed in certain parts of Ontario 629
556. Offences committed in the district of Gaspe 630
557. Offences committed out of jurisdiction 630
558. Information 632
559. Hearing on information 632
560. Warrant in case of offence committed on the seas, &c 632
561. Arrest of suspected deserter 633
562. Contents of summons—service of summons 634
563. Warrant for apprehension in first instance 635
564. Execution of warrant 636
565. Proceeding when offender is not within the jurisdiction of the justice issuing the warrant 637
566. Disposal of person arrested on endorsed warrant..... 638

Sec. Page.
567. Disposal of person apprehended on warrant 638
568. Coroner's inquisition 638
569. Search warrant 638
570. Search for public stores 641
571. Search warrant for gold, silver, &c 642
572. Search for timber, &c., unlawfully detained 642
573. Search for liquors near Her Majesty's vessels 642
574. Search for women in house of ill-fame 642
575. Search in gaming-house 643
576. Search for vagrant 644

PART XLV.

Procedure on Appearance of Accused.

577. Inquiry by justice 644
578. Irregularity in procuring appearance 644
579. Adjournment in case of variance 644
580. Procuring attendance of witnesses 645
581. Service of summons for witnesses 646
582. Warrant for witness after summons 646
583. Warrant for witness in first instance 647
584. Procuring attendance of witnesses beyond jurisdiction of justice 648
585. Witness refusing to be examined 650
586. Discretionary powers of the justice 651
587. Bail on remand 653
588. Hearing may proceed during time of remand 654
589. Breach of recognizance on remand 654
590. Evidence for the prosecution 655
591. Evidence to be read to the accused 656
592. Confession or admission of accused 657
593. Evidence for the defence 657
594. Discharge of the accused 658
595. Person preferring charge may have himself bound over to prosecute 658
596. Committal of accused for trial 659
597. Copy of depositions 660
598. Recognizances to prosecute or give evidence 660
599. Witness refusing to be bound over 662
600. Transmission of documents 664
601. Rule as to bail 665
602. Bail after committal 666
603. Bail by superior court 667
604. Application for bail after committal 667
605. Warrant of deliverance 668
606. Warrant for the arrest of a person about to abscond 668
607. Delivery of accused to prison 668

PART XLVI.

Indictments.

Sec.		Page.
608.	Indictments need not be on parchment	670
609.	Statement of venue	671
610.	Heading of indictment	673
611.	Form and contents of counts	673
612.	Offences may be charged in the alternative	678
613.	Certain objections not to vitiate counts	678
614.	Indictment for high treason or treasonable offence	679
615.	Indictments for libel	679
616.	Indictments for perjury and certain other offences	680
617.	Particulars	680
618.	Indictment for pretending to send money, etc., in letter	681
619.	Indictments in certain cases	681
620.	Property of body corporate	684
621.	Indictment for stealing ores or minerals	685
622.	Indictment for offences in respect to postal cards, etc	685
623.	Indictments against public servants	685
624.	Indictment for offences respecting letter bags, etc	686
625.	Indictment for stealing by tenant or lodger	686
626.	Joinder of counts and proceedings thereon	686
627.	Accessories after the fact, and receivers	697
628.	Indictment charging previous conviction	697
629.	Objections to an indictment	701
630.	Time to plead to indictment	710
631.	Special pleas	714
632.	Depositions and judge's notes on former trial	715
633.	Second accusation	715
634.	Plea of justification in case of libel	726

PART XLVII.

Corporations.

635.	Corporations may appear by attorney	727
636.	*Certiorari*, etc., not required	727
637.	Notice to be served on corporation	727
638.	Proceedings on default	727
639.	Trial may proceed in absence of defendant	727

PART XLVIII.

Preferring Indictment.

640.	Jurisdiction of courts	728
641.	Sending bill before grand jury	729
642.	Coroner's inquisition	732

Sec. Page.
643. Oath in open court not required 733
644. Oath may be administered by foreman 733
645. Names of witnesses to be endorsed on bill of indictment 733
646. Names of witnesses to be submitted to grand jury 733
647. Fees for swearing witnesses 733
648. Bench warrant and certificate 736

PART XLIX.

Removal of Prisoners—Change of Venue.

649. Removal of prisoners 740
650. Indictment after removal 740
651. Change of venue 740

PART L.

Arraignment.

652. Bringing prisoner up for arraignment 751
653. Right of accused to inspect deposition and hear indictment 751
654. Copy of indictment 751
655. Copy of deposition 751
656. Pleas in abatement abolished 752
657. Plea—refusal to plead 752
658. Special provisions in the case of treason 755

PART LI.

Trial.

659. Right to full defence 756
660. Presence of the accused at trial 756
661. Prosecutor's right to sum up 757
662. Qualification of juror 771
663. Jury *de medietate linguæ* abolished 771
664. Mixed juries in the province of Quebec 772
665. Mixed juries in Manitoba 774
666. Challenging the array 774
667. Calling the panel 776
668. Challenges and directions to stand by 777
669. Right to cause jurors to stand aside in case of libel 786
670. Peremptory challenges in case of mixed jury 786
671. Accused persons joining and severing in their challenges 786
672. Ordering a tales 786
773. Jurors shall not be allowed to separate 787
674. Jurors may have fire and refreshments 787
675. Saving power of court 787
676. Proceedings when previous offence charged 791

Sec. Page.
677. Attendance of witnesses 791
678. Compelling attendance of witnesses..... 792
679. Witnesses in Canada but beyond jurisdiction of court 792
680. Procuring attendance of prisoner as witness..... 792
681. Evidence of person dangerously ill may be taken under commission..... 794
682. Presence of prisoner when such evidence is taken 794
683. Evidence may be taken out of Canada under commission 794
684. When evidence of one witness must be corroborated 795
685. Evidence not under oath of child in certain cases 795
686. Deposition of sick witness may be read in evidence 796
687. Depositions on preliminary inquiry may be read in evidence .. 796
688. Depositions may be used on trial for other offences 800
689. Evidence of statement by accused 800
690. Admission may be taken on trial..... 800
691. Certificate of trial at which perjury was committed 800
692. Evidence of coin being false or counterfeit 801
693. Evidence on proceedings for advertising counterfeit money.... 801
694. Proof of previous conviction 801
695. Proof of previous conviction of witness 802
696. Proof of attested instrument..... 805
697. Evidence at trial for child murder..... 805
698. Comparison of disputed writing with genuine..... 805
699. Party discrediting his own witness 806
700. Evidence of former written statements by witness..... 807
701. Proof of contradictory statements by witness..... 808
702. Evidence of place being a common gaming-house 809
703. Other evidence that place is a common gaming-house..... 809
704. Evidence in case of gaming in stocks, &c..... 809
705. Evidence in certain cases of libel 810
706. Evidence in case of polygamy, &c..... 810
707. Evidence of stealing ores or minerals 810
708. Evidence of stealing timber..... 810
709. Evidence in cases relating to public stores..... 810
710. Evidence in case of fraudulent marks on merchandise..... 811
711. Full offence charged—attempt proved..... 811
712. Attempt charged—full offence proved 817
713. Offence charged—part only proved 818
714. On indictment for murder conviction may be of concealment of birth 826
715. Trial of joint receivers..... 827
716. Proceedings against receivers..... 827
717. The same after previous conviction 828
718. Trial for coinage offences 828
719. Verdict in case of libel..... 828
720. Impounding documents..... 828

Sec. Page.
721. Destroying counterfeit coin 829
722. View 829
723. Variance and amendment 829
724. Amendment to be endorsed on the record 830
725. Form of formal record in such case 830
726. Form of record of conviction or acquittal 845
727. Jury retiring to consider verdict 849
728. Jury unable to agree 849
729. Proceedings on Sunday 850
730. Woman sentenced to death while pregnant 850
731. Jury *de ventre inspiciendo* abolished 850
732. Stay of proceedings 851
733. Motion in arrest of judgment on verdict of guilty 852
734. Judgment not to be arrested for formal defects 854
735. Verdict not to be impeached for certain omissions as to jurors .. 860
736. Insanity of accused at time of offence 860
737. Insanity of accused on arraignment or trial 861
738. Custody of persons formerly acquitted for insanity 861
739. Insanity of person to be discharged for want of prosecution 861
740. Custody of insane person 861
741. Insanity of person imprisoned 861

PART LII.

Appeal.

742. Appeal in criminal cases 864
743. Reserving questions of law 864
744. Appeal when no question is reserved 865
745. Evidence for court of appeal 865
746. Powers of court of appeal 865
747. Application for a new trial 872
748. New trial by order of Minister of Justice 873
749. Intermediate effects of appeal 873
750. Appeal to Supreme Court of Canada 873
851. Appeal to Privy Council abolished 874

PART LIII.

Special Provisions.

752. Further detention of person accused 874
753. Question raised at trial may be reserved for decision 874
754. Practice in high court of justice for Ontario 875
755. Commission of court of assize, etc. 875
756. Court of general sessions 875
757. Time for pleading to indictment in Ontario 875
758. Rule to plead 875
759. Delay in prosecution 876

Sec. Page.
760. Calendar of criminal cases in Nova Scotia 876
761. Criminal sentence in Nova Scotia 876

PART LIV.

Speedy Trials of Indictable Offences.

762. Application..... 877
763. Definitions 877
764. Judge to be a court of record..... 877
765. Offences triable under this part 877
766. Duty of sheriff after committal of accused 878
767. Arraignment of accused before judge 878
768. Persons jointly accused 880
769. Election after refusal to be tried by judge..... 880
770. Continuance of proceedings before another judge 880
771. Election after committal under parts lv. or lvi. 880
772. Trial of accused..... 880
773. Trial of offences other than those for which accused is committed 880
774. Powers of judge..... 881
775. Admission to bail..... 881
776. Bail in case of election of trial by jury 881
777. Adjournment..... 881
778. Powers of amendment 881
779. Recognizances to prosecute or give evidence to apply to proceedings under this part 881
780. Witnesses to attend throughout trial 881
781. Compelling attendance of witness 881

PART LV.

Summary Trial of Indictable Offences.

782. Definitions..... 884
783. Offences to be dealt with under this part 884
784. When magistrate shall have absolute jurisdiction 885
785. Summary trial in certain other cases..... 886
786. Proceedings on arraignment of accused 886
787. Punishment for certain offences under this part 886
788. Punishment for certain other offences 887
789. Proceedings for offences in respect to property worth over ten dollars 887
790. Punishment on plea of guilty in such case 887
791. Magistrate may decide not to proceed summarily 887
792. Election of trial by jury to be stated on warrant of committal. 887
793. Full defence allowed 888
794. Proceedings to be in open court 888

Sec. Page.
795. Procuring attendance of witnesses 888
796 Service of summons..... 888
797. Dismissal of charge 888
798. Effect of conviction 888
799. Certificate of dismissal a bar to further proceedings 888
800. Proceedings not to be void for defect in form 888
801. Result of hearing to be filed in court of sessions 889
802. Evidence of conviction or dismissal 889
803. Restitution of property 889
804. Remand for further investigation 889
805. Non-appearance of accused under recognizance 889
806. Application of fines 889
807. Forms to be used 890
808. Certain provisions not applicable to this part 892

PART LVI.

Trial of Juvenile Offenders for Indictable Offences.

809. Definitions 892
810. Punishment for stealing..... 892
811. Procuring appearance of accused..... 893
812. Remand of accused 893
813. Accused to elect how he shall be tried 893
814. When accused shall not be tried summarily 893
815. Summons to witness 894
816. Binding over witness 894
817. Warrant against witness 894
818. Service of summons..... 894
819. Discharge of accused 894
820. Form of conviction 895
821. Further proceedings barred 896
822. Conviction and recognizance to be filed..... 896
823. Quarterly returns..... 896
824. Restitution of property 896
825. Proceedings when penalty imposed on accused is not paid 896
826. Costs 897
827. Application of fines..... 897
828. Costs to be certified by justices..... 897
829. Application of this part..... 898
830. No imprisonment in reformatory under this part 898
831. Other proceedings against juvenile offenders not affected..... 898

PART LVII.

Costs and Pecuniary Compensation—Restitution of Property.

832. Costs 898
833. Costs in case of libel..... 899

Sec. Page.
834. Costs on conviction for assault ... 899
835. Taxation of costs ... 900
836. Compensation for loss of property ... 900
837. Compensation to *bonâ fide* purchaser of stolen property ... 901
838. Restitution of stolen property ... 901

PART LVIII.

Summary Convictions.

839. Interpretation ... 906
840. Application ... 906
841. Time within which proceedings shall be commenced ... 906
842. Jurisdiction ... 907
843. Hearing before justices ... 907
844. Backing warrants ... 908
845. Informations and complaints ... 908
846. Certain objections not to vitiate proceedings ... 908
847. Variance ... 908
848. Execution of warrant ... 909
849. Hearing to be in open court ... 909
850. Counsel for parties ... 909
851. Witnesses to be on oath ... 909
852. Evidence ... 909
853. Non-appearance of accused ... 909
854. Non-appearance of prosecutor ... 910
855. Proceedings when both parties appear ... 910
856. Arraignment of accused ... 910
857. Adjournment ... 910
858. Adjudication by justice ... 911
859. Form of conviction ... 911
860. Disposal of penalties on conviction of joint offenders ... 917
861. First conviction in certain cases ... 917
862. Certificate of dismissal ... 918
863. Disobedience to order of justice ... 919
864. Assaults ... 919
865. Dismissal of complaint for assault ... 919
866. Release from further proceedings ... 920
867. Costs on conviction or order ... 920
868. Costs on dismissal ... 920
869. Recovery of costs when penalty is adjudged ... 920
870. Recovery of costs in other cases ... 920
871. Fees ... 920
872. Provisions respecting convictions ... 921
873. Order as to collection of costs ... 929
874. Endorsement of warrant of distress ... 931
875. Distress not to issue in certain cases ... 932

Sec. Page.
876. Remand of defendant when distress is ordered..... 932
877. Cumulative punishments 932
878. Recognizances 932
879. Appeal..... 933
880. Conditions of appeal 934
881. Proceedings on appeal 937
882. Appeal on matters of form..... 937
883. Judgment to be upon the merits..... 937
884. Costs when appeal not prosecuted..... 938
885. Proceedings when appeal fails..... 938
886. Conviction not to be quashed for defects of form 938
887. *Certiorari* not to lie when appeal is taken 938
888. Conviction to be transmitted to appeal court..... 938
889. Conviction not to be held invalid for irregularity..... 938
890. Irregularities within the preceding section..... 939
891. Protection of justice whose conviction is quashed.... 939
892. Condition of hearing motion to quash..... 939
893. Imperial Act superseded..... 940
894. Judicial notice of proclamation..... 940
895. Refusal to quash..... 940
896. Conviction not to be set aside in certain cases..... 940
897. Order as to costs..... 940
898. Recovery of costs..... 940
899. Abandonment of appeal..... 944
900. Statement of case by justices for review..... 944
901. Tender and payment..... 946
902. Returns respecting convictions and moneys received..... 946
903. Publication, &c., of returns..... 947
904. Prosecutions for penalties under the preceding section..... 948
905. Remedies saved..... 948
906. Defective returns..... 948
907. Certain defects not to vitiate proceedings..... 948
908. Preserving order in court..... 949
909. Resistance to execution of process..... 949

PART LIX.

Recognizances.

910. Render of accused by surety..... 950
911. Bail after render 950
912. Discharge of recognizance 950
913. Render in court 950
914. Sureties not discharged by arraignment or conviction 950
915. Right of surety to render not affected..... 951
916. Entry of fines, etc., on record and recovery thereof 951
917. Officer to prepare lists of persons under recognizance making default 953

Sec. Page.
918. Proceeding on forfeited recognizance not to be taken except on order of judge, etc. 953
919. Recognizance need not be estreated in certain cases 953
920. Sale of lands by sheriff under estreated recognizance 954
921. Discharge from custody on giving security 954
922. Discharge of forfeited recognizance 954
923. Return of writ by sheriff 954
924. Roll and return to be transmitted to Minister of Finance 955
925. Appropriation of moneys collected by sheriff 955
926. Quebec 955

PART LX.

Fines and Forfeitures.

927. Appropriation of fines, etc. 958
928. Application of fines, etc., by Order in Council 958
929. Recovery of penalty or forfeiture 958
930. Limitation of action 958

TITLE VIII.

PROCEEDINGS AFTER CONVICTION.

PART LXI.

Punishments Generally.

931. Punishment after conviction only 959
932. Degrees in punishment 959
933. Liability under different provisions 959
934. Fine imposed shall be in discretion of court 960

PART LXII.

Capital Punishment.

935. Punishment to be the same on conviction by verdict or by confession 960
936. Form of sentence of death 960
937. Sentence of death to be reported to Secretary of State 961
938. Prisoner under sentence of death to be confined apart 961
939. Place of execution 961
940. Persons who shall be present at execution 961
941. Persons who may be present at execution 961
942. Certificate of death 961
943. When deputies may act 962
944. Inquest to be held 963
945. Place of burial 963

Sec. Page.
946. Certificate to be sent to Secretary of State and exhibited at prison 963
947. Omissions not to invalidate execution 963
948. Other proceedings in executions not affected..... 963
949. Rules and regulations as to execution..... 963

PART LXIII.

IMPRISONMENT.

950. Offences not capital how punished 964
951. Imprisonment in cases not specially provided for 964
952. Punishment for offence committed after previous conviction.... 965
953. Imprisonment may be for shorter time than that prescribed.... 966
954. Cumulative punishments 966
955. Imprisonment in penitentiary, &c 966
956. Imprisonment in reformatories..... 967

PART LXIV.

WHIPPING.

957. Sentence of punishment by whipping 968

PART LXV.

SURETIES FOR KEEPING THE PEACE, AND FINES.

958. Persons convicted may be fined and bound over to keep the peace 968
959. Recognizance to keep the peace..... 969
960. Proceedings for not finding sureties to keep the peace. 972

PART LXVI.

DISABILITIES.

961. Consequences of conviction of public official..... 973

PART LXVII.

PUNISHMENTS ABOLISHED.

962. Outlawry..... 974
963. Solitary confinement—pillory 974
964. Deodand 974
965. Attainder..... 975

PART LXVIII.

PARDONS.

966. Pardon by the Crown 976
967. Commutation of sentence 976

Sec. Page.
968. Undergoing sentence equivalent to a pardon 976
969. Satisfying judgment 977
970. Royal prerogative 977
971. Conditional release of first offenders in certain cases 977
972. Conditions of release 977
973. Proceeding on default of recognizance 978
974. Interpretation 978

TITLE IX.

ACTIONS AGAINST PERSONS ADMINISTERING THE CRIMINAL LAW.

975. Time and place of action 979
976. Notice of action 979
977. Defence 979
978. Tender or payment into court 979
979. Costs 979
980. Other remedies saved 979

TITLE X.

REPEAL, ETC.

981. Statutes repealed 980
982. Forms in Schedule one, to be valid 980
983. Application of Act to N. W. T. and Keewatin 981

SCHEDULE 1.—Forms 983
SCHEDULE 2.—Statutes repealed 983
APPENDIX.—Acts and parts of Acts which are not affected by this Act 986

TABLE OF CASES CITED.

A.

		PAGE.
Abbott, R. v.,	2 Cox, 430	406
Abrahams, —	24 L. C. J. 325	694
Abrahams v. R.	6 S. C. R. 10	613, 732
Ackroyd, R. v.,	1 C. & K. 158	699
Adams, —	16 Cox, 544; 22 Q. B. D. 66	122, 304
— —	R. & R. 225	312
— —	1 F. & F. 86	352
— —	1 Den. 38	398, 524, 719, 820
— —	Car. & M. 299	960
Adamson, —	2 Moo. 286	408, 409
Adey, —	1 Den. 571	361
Ady, —	7 C. & P. 140	408
Airey, —	2 East, 30	400
Alison, —	8 C. & P. 418	33, 226
Allday, —	8 C. & P. 136	527
Allen, —	1 Den. 364	8
— —	7 C. & P. 153	12, 194
— —	12 Cox, 193	283
— —	1 B. & S. 850	851
— v. Wright	9 C. & P. 522	626
Allison, *In re*	10 Ex. 561	981
— R. v.,	R. & R. 109	282
— —	16 Cox, 559	613
Amer v. R.	2 S. C. R. 592	874
Amier, —	6 C. & P. 344	476
Anderson v. R.	2 M. & R. 469	519
— —	11 Cox, 198	609
Andrews, R. v.,	Car. & M. 121	477
— —	12 O. R. 184	870
— v. The People	117 Ill. 195	733
Anon —	1 B. & Ad. 382	266
— —	1 Cox, 250	530, 553
— —	1 Russ. 85	817
— —	2 Chit. Rep. 422	529
Apollon, The	9 Wheat. 360	612
Appleby v. Franklin	17 Q. B. D. 93	602
Archer, R. v.,	2 Moo. 283	213, 447, 820, 823
— —	Dears. 449	408
Ardley, —	12 Cox, 23	411
Aris, —	6 C. & P. 348	561
Armellini, *ex parte*,	14 R. L. 311	967
Armstrong, R. v.,	13 Cox, 184	609
Arnold, —	1 Russ. 9	130

		PAGE.
Arnoldi, R. v.,	23 O. R. 201	81
Arscott, —	9 O. R. 541	141
—— v. Lilley,	11 O. R. 153	141
Ashley v. Dundas	5 O. S. (Ont.) 749	619
Ashwell, R. v.,	16 Cox, 1; 16 Q. B. D. 190	334
Aspinall, —	13 Cox, 231, 563	597
Asplin,	12 Cox, 391	501, 515, 527, 530
Asterley, —	7 C. & P. 191	408
Astley, —	2 East P. C. 729	437, 441
Aston, —	2 Russ. 841	505
Athea, —	1 Moo. 329	461
Atkin, —	18 L. C. J. 213	903
Atty.-Gen. v. Beaubien	9 L. C. J. 117	956
Atwood,, R. v.	20 O. R. 574	556
Audley (Lord), R. v.,	3 St. Tr. 402	269, 692
Austin, —	11 Q. L. R. 76	582
—— —	1 C. & K. 621	615
—— —	7 C. & P. 796	692
—— —	Dears. 612	798
—— and King's Cases	2 East P. C. 602	394
Avery, R. v.,	Bell, 150	316
—— —	8 C. & P. 596	515
Ayes, —	R. & R. 166	185
Aylett, —	6 A. & E. 247	849
Ayley, —	15 Cox, 328	281
Azzopardi, —	2 Moo. 288	611

B.

Baby, R. v.,	12 U. C. Q. B. 346	678
Back v. Holmes,	16 Cox, 263	53
Badcock, R. v.,	R. & R. 249	32
Bail, —	7 O. R. 228	518
Bailey, —	12 Cox, 56	363
—— —	12 Cox, 129	396
—— —	4 Cox, 392	430
—— —	1 Moo. 23	461
—— —	Dears. 244	488
—— —	6 Cox, 29	844
—— —	R. & R. 341	464, 467
Bain, —	Ramsay App. Cas. 191	97, 981
—— —	L & C. 129	479, 817
—— —	23 L. C. J. 327	870
Baker, —	1 C. & K. 254	219
—— —	1 Leach, 290	436
Baldwin, —	R. & R. 241	351
Ball, —	Car. & M. 249	401
—— —	8 C. & P. 745	806
—— —	R. & R. 132	871
Balls, —	12 Cox, 96	345, 360, 361, 367

		PAGE.
Bamfield, R. v.,	1 Moo. 416	519
Bank Prosecutions,	R. & R. 378	508
Banks, R. v.,	12 Cox, 393	225
Bannen, —	2 Moo. 309	31, 547
Barber, R. v.,	1 C. & K. 442	38
Barkstead's Case,	Kel. 16	780
Barnard, R. v.,	7 C. & P. 784	402
Barnes, —	12 Jur. N. S. 549	313
—— —	2 Den. 59	402
—— —	L. R. 1 C. C. R. 45	841
Barnes v. White,	1 C. B. 192	981
Barnett, R. v.,	17 O. R. 649	342, 613
Barratt, —	12 Cox, 498	270, 817
Barret, —	1 Salk. 383	615
Barrett, —	L. & C. 263	129, 135
—— —	15 Cox, 658	295
Barry, —	4 F. & F. 389	693
Bartlett, —	2 M. & Rob. 362	516
Barwell v. Winterstoke,	14 Q. B. 704	573
Basset, R. v.,	Greaves' Cons. Acts, 72	267
Bassett, —	10 Ont. P. R. 386	142
Bate, —	11 Cox, 686	232
Bates, —	3 Cox. 201	408
Bathgate, —	13 L. C. J. 299	708
Batstone, —	10 Cox, 20	563
Batty, —	2 Moo. 257	366
Bauld, —	13 Cox, 282	598
Baumer v. The State,	49 Ind. 544	120
Baxter, R. v.,	5 T. R. 83	348, 677
Baynes v. Brewster,	2 U. C. Q. B. 375	21, 622
Beacall, R. v.,	1 Moo. 15	360, 361, 684
Beaney, —	R. & R. 416	373
Beard, —	8 C. & P. 142	762
Beardmore, —	7 C. & P. 497	714
Beatty v. Gillbanks,	15 Cox, 138	53, 55
Beckett v. Dutton,	7 M. & W. 157	836
Beckwith v. Philby,	6 B. & C. 635	619
Bedere, R. v.,	21 O. R. 189	274
Bedingfield, R. v.,	14 Cox, 341	201
Beecham, —	5 Cox, 181	409
Beere, —	2 M. & Rob. 472	789
Beeton, —	1 Den. 414	347
Bell,	8 Ir. R. C. L. 542	231
—— —	12 Cox, 37	732
Bellencoutre, *ex parte*,	17 Cox, 253; (1891) 2 Q. B. 122	344
Belstead, R. v.,	R. & R. 411	370
Belyea, —	James (N.S.) 220	708, 752
Benfield, —	2 Burr. 980, 984	265, 687, 694
Benge, —	4 F. & F. 504	195

		PAGE.
Bennett, R. v.,	Bell, 1	12
—— —	4 F. & F. 1105	253
—— —	R. & R. 289	467, 482
Bent, —	10 O. R. 557	505
—— —	1 Den. 157	705, 981
Berens, —	4 F. & F. 842	760, 761
Bergen v. The People,	17 Ill. 426	120
Beriau, R. v.,	Ramsay's App. Cas. 185	798
Bernard, —	Warb. Lead. Cas. 45	73
—— —	1 F. & F. 240	225, 761
Berriman, —	6 Cox, 388	230
Berry, —	1 Q. B. D. 447	130
—— —	Bell, 95	317
—— —	13 Cox, 189	755, 863
Berthe, —	16 C. L. J. 251	562, 564
Bertrand, —	10 Cox, 618	789
Best, —	2 Moo. 124	104
Betts v. Armstead,	16 Cox, 418; 20 Q. B. D. 771	295
Bice v. Jarvis,	49 J. P. 264	904
Biggs, R. v.,	2 Man. L. R. 18	304
Bignold, —	4 D. & R. 70	765
Bingley, —	R. & R. 446	32
—— —	5 C. & P. 602	443
Binns, —	26 St. Tr. 595	72
Birch, —	1 Leach, 79	498
—— —	1 Den. 185	821
Birchall, —	4 F. & F. 1087	193
Bird, —	17 Cox, 387	97
—— —	12 Cox, 257	325
—— —	2 Den. 94	718, 812, 820
—— —	2 Den. 88	822
—— —	5 Cox, 11	718, 864
—— v. Holbrook,	4 Bing. 628	244
Birkett, R. v.,	R. & R. 86	493
Birmingham, R. v.,	Warb. Lead. Cas. 33	727
Bishop, —	5 Q. B. D. 259	295
Bissell, —	1 O. R. 514	149
Bissonette, —	Ramsay's App. Cas. 190	152
—— —	23 L. C. J. 249	709
Bitton, —	6 C. & P. 92	753
Bjornsen, —	10 Cox, 74	610
Blackburn, —	11 Cox, 157	345
—— —	6 Cox, 333	697
Blackham, —	2 East P. C. 711	439
Blackson, —	8 C. & P. 43	601
Blackstone, —	4 Man. L. R. 296	508, 532
Blakemore, —	2 Den. 410	869
Bleau, —	7 R. L. 571	564
Bloomfield, —	Car. & M. 537	408

		PAGE.
oaler, v. R.,	16 Cox, 488; 21 Q.B.D. 284,	301, 613, 731
Boardman, R. v.,	2 M. & Rob. 147	500
Boden, —	1 C. & K. 395	820
Bolland's case,	1 Leach, 83	499
Bond, R. v.,	1 Den. 517	723
—— v. Conmee,	16 A. R. Ont. 398	948
—— v. Evans,	16 Cox, 461; 21 Q. B. D. 249	12
Booth, R. v.,	12 Cox, 231	294
Bootyman, R. v.,	5 C. & P. 300	361, 680
Borthwick, —	1 East P. C. 350	36
Borrett, —	6 C. & P. 124	356
Borrowes, —	Shirley Lead. Cas. 140	764
Boucher, —	4 C. & P. 562	224
—— —	10 R. L. 183	415
—— —	8 C. & P. 141	764
Boulton, —	1 Den. 508	409
—— —	12 Cox, 87	597
—— —	5 C. & P. 537	683
Bourdeau, R. v.	M. L. R. 7 Q. B. 176	869
Bourdon, —	2 R. L. 713	708
Bowden, —	2 Moo. 285	385, 392
Bowen, —	3 Cox, 483	408
—— —	M. L. R. 7 Q. B. 468	519
—— —	1 Den. 22	530, 678
—— —	9 C. & P. 509	714
—— —	13 Q. B. 790	857
Bowerman, —	17 Cox, 151; (1891) 1 Q. B. 112	344, 394
Bowers, —	10 Cox, 250	361, 363
Bowman, —	6 C. & P. 101, 337	724
Bowray, —	10 Jur. 211	248
Bowyer, —	4 C. & P. 559	562
Box, —	R. & R. 300	516
Boyce, —	1 Moo. 29	234
Brackenridge, —	11 Cox, 96	526
Bradford, —	Bell, 268	247, 569
—— —	2 C. & D. 41	541
Bradlaugh, —	15 Cox, 217	73, 304, 694, 696
—— —	3 Q. B. D. 607	122
—— —	15 Cox, 156	731, 732
—— —	14 Cox, 68	854
Bradshaw, —	38 U. C. Q. B. 564	582, 771
Brain, —	6 C. & P. 349	174, 205
Bramley, —	L. & C. 21	309
—— —	R. & R. 478	320
Brannon, —	14 Cox, 394	42, 601
Brashier v. Jackson	6 M. & W. 549	837, 838
Brawn, R. v.,	1 C. & K. 144	282, 283
Bray, —	15 Cox, 197	233
—— —	3 B. & S. 255; 9 Cox, 215	731

		PAGE.
Bren, R. v.,	L. & C. 346	365
Brettel, —	Car. & M. 609	723
Brewer, —	6 C. & P. 363	508
Brewster, —	8 U. C. C. P. 208	131
Brice, —	15 Q. L. R. 147	131, 786, 868
—— —	7 Man. L. R. 627	253, 274
—— —	R. & R. 450	464, 468, 469
—— —	2 B. & Ald. 606	758
Bridgman, —	Car. & M. 271	714
Brierley, —	14 O. R. 525	280, 281, 611
Briggs, —	1 Moo. 318	216, 234
—— —	Dears. & B. 98	283
—— —	2 M. & Rob. 199	766
Brimilow, —	2 Moo. 122	8, 269, 823
Brisebois, —	15 S. C. R. 421	785, 856
Brisson v. Lafontaine,	8 L. C. J. 173	27
Brookes, R. v.,	Car. & M. 543	836
Brooks, —	1 F. & F. 502	401, 409
—— —	1 Den. 217	615
Brown, —	14 Cox, 144	36
—— —	16 Cox, 715 ; 24 Q. B. D. 357	42, 707, 814, 867, 868
—— —	Car. & M. 314	83
—— —	15 Cox, 199	219
—— —	11 Cox, 517	231
—— —	2 East P. C. 731	437
—— —	2 East P. C. 501	458
—— —	2 East P. C. 487	465
—— —	2 F. & F. 559	506
—— —	3 F. & F. 821	566
—— —	1 Den 291	755
—— —	Warb. Lead. Cas. 236	766
—— —	10 Q. B. D. 381	822
—— v. Foot,	17 Cox, 509	12
—— v. Gugy,	14 L. C. R. 213	131
Brownlow, R. v.,	14 Cox, 216	344
Bruce, —	10 L. C. R. 117	131
Brummit, —	L. & C. 9	869
Brumby, —	3 C. & K. 315	382
Bryan, —	2 Russ. 664	398
—— —	Dears. & B. 265	407, 411
—— —	Warb. Lead. Cas. 170	407
Brydges, *ex parte*,	18 L. C. J. 141	199, 745
Buchanan, R. v.,	8 Q. B. 883	960
Buckley, —	13 Cox, 293	799, 800
Buckmaster, —	20 Q. B. D. 182	312, 399
Budd v. Lucas,	17 Cox, 248	534
Bull, R. v.,	2 F. & F. 201	197
—— —	9 C. & P. 22	203

		PAGE.
Bull, R. v.,	13 Cox, 608	413
—— —	12 Cox, 31	797
Bullard, —	12 Cox, 353	797
Bullock, —	11 Cox, 125	576
—— —	1 Moo. 324 (n)	672, 819
—— —	Dears. 653	857
Bulmer, —	L. & C. 476	409
—— —	5 L. N. 92	718, 871
Buncombe, —	1 Cox, 183	11
Bunkall, —	9 Cox, 419: L. & C. 371	316
Bunn, —	12 Cox, 316	597
Bunting, —	7 O. R. 524	77
Burch, —	4 F. & F. 407	693
Burgess, —	16 Q. B. D. 141	106
—— —	L. & C. 258	213, 227
—— —	L. & C. 293	345
Burgon, —	Dears. & B. 11	407
Burke, —	10 Cox, 519	755
Burns, —	16 Cox, 355	73
—— —	16 Cox, 195	766
Burridge, —	2 M. & Rob. 296	223
Burrowes, —	1 Moo. 274	462
Burrows, —	11 Cox, 258	404
—— —	2 M. & Rob. 124	764
Burt, —	5 Cox, 284	764
Burton, —	13 Cox, 71	29
—— —	6 Cox, 293	333
—— —	1 Moo. 237	365
—— —	16 Cox, 62	399
Butcher, —	Bell, 6	30
—— —	2 M. & Rob. 228	762
Butler v. Turley,	2 C. & P. 585	5 6
Butt, R. v.,	15 Cox, 564	420
Butteris, —	6 C. & P. 147	351
Butterwick, R. v.,	2 M. & Rob. 196	517
Butterworth, —	12 Cox, 132	345
—— —	R. & R. 520	473
Button, R. v.,	11 Q. B. 929	818
—— —	8 C. & P. 660	823
Byrne, —	6 Cox, 475	543

C.

Cadman, R. v.,	1 Moo. 114	214, 215
Callaghan v. The Society,	16 Cox, 101	587
Callan, R. v.,	R. & R. 157	465
Cameron, —	23 N. S. Rep. 150	414
Caminada v. Hulton,	17 Cox, 307	134

		PAGE.
Camfield, R. v.,	1 Moo. 42	684
Campbell, —	11 Cox, 323	169, 189
—— —	1 Moo. 179	309
—— —	2 Leach, 564	386
—— —	11 Q. B. 799	692
Camplin, —	1 Den. 89	270, 964
Canwell, —	11 Cox, 363	238
Carbray, —	14 Q. L. R. 223	615
—— —	13 Q. L. R. 100	735, 798
Carden, —	14 Cox, 359; 5 Q. B. D. 1	303
Cardo, —	17 O. R. 11	270
Carey, —	14 Cox, 214	19, 177
Carlile, —	3 B. & Ad. 161	960
Carney, —	1 Moo. 351	520
Carpenter, —	11 Cox, 600	406
Carr, —	R. & R. 377	219
—— —	R. & R. 198	361, 366
—— —	26 L. C. J. 61	706, 853, 858, 867
—— —	15 Cox, 129	609
Carrell, —	1 Leach 237	461, 462
Carroll, —	7 C. & P. 145	12
—— —	1 Moo. 89	386
Carter, —	1 C. & K. 173	477
—— —	15 Cox, 448	828
Cartwright v. Green,	2 Leach, 952	331
Casbolt, R. v.	11 Cox, 385	615
Case, —	1 Den. 580	253, 262
Casey, —	8 Ir. Rep. C. L. 408	58
—— —	13 Cox, 614	303, 742
Caspar, —	2 Moo. 101	348
Caswell, —	33 U. C. Q. B. 303	381
Catherall, —	13 Cox, 109	275, 811
Cattley v. Loundes,	34 W. R. 139	904
Caudwell, R. v.,	2 Den. 372 (n)	872
Cavendish, —	2 Cox, 176	742
Chadwick, —	6 C. & P. 181	409
—— —	2 M. & Rob. 545	491
Chalking, —	R. & R. 334	481
Chalkley, —	R. & R. 258	575
Chambers, —	12 Cox, 109	521
Chammaillard, R. v.,	18 L. C. J. 149	772
Champneys, —	2 M. & Rob. 26	724
Chandler, R. v.	Dears, 453	149
Channell, —	2 East P. C. 818	431
Chapman, —	12 Cox, 4	186, 622
—— —	1 C. & K. 119	367
—— —	8 C. & P. 558	714
—— —	1 Den. 432	817
Chapple, —	9 C. & P. 355	41

		PAGE.
Chapple, R. v.,	17 Cox, 455	701
Charest —	9 L. N. 114	357
Charles, —	17 Cox, 499	32, 64
Charlesworth, R. v.,	1 B. & S. 460; 2 F. & F. 326	721, 788
Charlewood, —	1 Leach, 409	374
Charnock's Case,	3 Salk. 80	781
Charter v. Greame,	13 Q. B. 216	585, 981
Chasson, R. v.,	3 Pugs (N. B.) 546	201
Chatburn, —	1 Moo. 403	181
Cheeseman, R. v.,	L & C. 140	43, 357, 814
—— —	7 C. & P. 454	191
Cherry, —	2 East P. C. 556	322
Chetwynd, —	23 N. S. Rep. 332	795
Child, —	4 C. & P. 442	56
—— —	L. R. 1 C. C. R. 307; 11 Cox, 64	557, 563
Chiser's Case	T. Raym. 276	332
Chisholm, R. v., Jacob's Case,	7 Man. L. R., 613	275
—— —	R. & R. 297	515
Chisholm v. Doulton,	16 Cox, 675; 22 Q. B. D. 736	12
Chouinard, R. v.,	4 Q. L. R. 220	343
Christopher, —	Bell, 27	329
Chute, —	46 U. C. Q. B. 555	253
Clarence, —	16 Cox, 511; 22 Q B. D. 23	207, 233, 239, 252, 253
—— —	16 Cox. 526	823
Clark, —	R. & R. 181	394
—— —	Dears. 198	699
—— —	10 Cox, 338	867
Clarke, —	1 Moo. 376 (n)	317
—— —	1 C. & K. 421	474, 436
Clarkson, —	17 Cox, 483	53, 55
Clay, —	R. & R. 387	341
Clayburn, —	R. & R. 360	481
Clayton, —	1 C. & K. 128	38, 564
Clement, —	26 U. C. Q. B. 297	677
Clements, —	2 Den. 251	797
Clifford, —	2 C. &. K. 202	30
Closs, —	Dears. & B. 460	431, 502
Cluderay, —	1 Den. 514	814
Cockcroft, —	11 Cox, 410	271
Codd v. Cabe,	1 Ex. D. 352	19
——	13 Cox, 202	257, 622
Coggins, R. v.,	12 Cox, 517	352
Cohen, —	8 Cox, 41	816
Cole, —	2 Leach. 1095	746
Coles, —	16 Cox, 165	95, 801
Coley, —	16 Cox, 226	364
Collicott, —	R. & R. 212	527
Collins, —	L. & C. 471	42, 44, 384, 814

		PAGE.
Collins, R. v.,	2 M. & Rob. 461	491
Colmer, —	9 Cox, 506	230
Combes's case,	Noy 101	491
Comer, R. v.,	1 Leach, 36	473
Commonwealth v. Goodhue,	2 Met. 193	119
—— Magee,	12 Cox, 549	767
—— Murphy,	2 Allen (Mass.) 163	820
Compton, R. v.,	7 C. & P. 139	475
Coney, —	15 Cox, 46; 8 Q. B. D. 534	35, 61, 62
Connell, —	1 C. & K. 190	543
—— —	6 Cox, 178	717, 718
Connor, —	2 Man. L. R. 235	201
Connolly, —	26 U. C. Q. B. 317	275
—— —	2 C. & K. 518	822
—— v. Kent,	17 Cox, 354	591, 597
Considine, R. v.,	8 L. N. 307	791
Coogan, —	1 Leach, 449	515
Cook, —	11 Cox, 542	231
—— v. Beal,	1 Ld. Raym. 176	25
Cooke, R. v.,	8 C. & P. 586	505, 506
—— —	8 C. & P. 582	507, 734
—— —	1 Leach, 105	836
—— —	7 C. & P. 559	838
—— v. Stratford,	13 M. & W. 379	837
Cooper, R. v.,	5 C. & P. 535	36, 37
—— —	1 Den. 459; 2 C. & K. 876	150
—— —	12 Cox, 600	344
—— —	13 Cox, 617	402
Coote, —	L. R. 4 P. C. 599; 12 Cox, 557	797, 799, 800, 802
Copeland, —	Car. & M. 516	407
Corcoran, —	26 U. C. C. P. 134	55, 867
Cordy, —	2 Russ. 556	351
Corey, —	22 N. B. Rep. 543	414
Cormack, —	21 O. R. 213	518
Cornwall, v. R.	33 U. C. Q. B. 106	259, 841
Corporation of London, R. v.,	E. B. & E. 509	902
Corwin, *ex parte*,	24 L. C. J. 104; 2 L. N. 364	750
Cory, R. v.,	10 Cox, 23	324
Cosser, —	13 Cox, 187	313
Cotterill v. Lempriere	17 Cox, 97	678
Cotton, R. v.,	12 Cox, 400	175
Court, —	6 Cox, 202	247
Cowell, —	2 East P. C. 617, 781	350
Cox, —	R. & R. 262	234, 235
—— —	1 F. & F. 90	351
—— —	16 O. R. 228	417
—— —	1 Leach, 71	981
Coxhead v. Richards	2 C. B. 569	298

		PAGE.
Cozlett's case,	2 East P. C. 556	321
Crab, R. v.,	11 Cox, 85	402
Cracknell, R. v.,	10 Cox, 408	453
Craddock, —	2 Den. 31	348, 350
Cramp, —	14 Cox, 390, 401	278
—— —	R. & R. 327	538
Craw, —	8 Cox, 335	34
Crawford, —	1 Den. 100	242
Crawshaw, R. v.,	Bell, 303	11, 135, 139, 771, 960
Creamer, —	10 L. C. R. 404	282
Creighton, —	19 O. R. 339	303, 701
Cregan —	1 Han. (N. B. 36)	823
Cresswell —	13 Cox, 126	281
Crick, —	1 F. & F. 519	196
Crighton, —	R. & R. 62	361
Crisham, —	Car. & M. 187	36
Crisp, —	1 B. & Ald. 282	104
Crofts, —	9 C. & P. 219	700
Cronan, —	24 U. C. C. P. 106	823
Cronin, —	36 U. C. Q. B. 342	501, 561, 845
Cronmire, —	16 Cox, 42	343
Cronyn v. Widder,	16 U. C. Q. B. 356	139
Crook, R. v.,	1 F. & F. 521	196
Crooke, —	2 Str. 901	500
Cropper, —	2 Moo. 18	850
—— v. Horton	8 D. & R. 166	623
Crosby, R. v.,	1 Cox, 10	410
Crossley, —	2 M. & Rob. 17	408
Croteau, —	9 L. C. R. 67	956
Crowe's Case,	1 Lewin, 88	358
Crowther, R. v.,	5 C. & P. 316	500
Crump, —	1 C. & P. 658	374
Crumpton, —	Car. & M. 597	822
Crunden, —	Warb. Lead. Cas. 99	121
Cruse, —	Warb. Lead. Cas. 24	12
—— —	8 C. & P. 541	35
—— —	2 Moo. 53	213, 823
Crutchley, —	7 C. & P. 814	206
Cuddy, —	1 C. & K. 210	35, 180
Cullen, —	1 Moo. 300	520
Cullum, —	12 Cox, 469	364
Cummings, —	16 U. C. Q. B. 15	356, 677, 960, 981
Cumpton, —	Warb. Lead. Cas. 215	19
Cundy v. LeCocq,	13 Q. B. D. 207	295
Cunningham, R. v.,	16 Cox, 420	53, 55
—— —	Bell, 72	236
—— —	Cassels's Dig. 107	521, 866, 874
Curgenwen, —	10 Cox, 152	285
Curran, —	3 C. & P. 397	621

		PAGE.
Curry, R. v.,	2 Moo. 218	519
Curvan, —.	1 Moo. 132	185, 622

D.

Dade, R. v.,	1 Moo. 307	32, 599
Dale, —	6 Cox, 14	216
—— —	16 Cox, 703	279
—— —	7 C. & P. 352	401
Dadson, —	2 Den. 35	626
Daly, —	24 L. C. J. 157	142
Danger, —	Dears. & B. 307	409, 414, 416
Dannelly & Vaughan, R. v.	R. & R. 310	39
Dant, R. v.,	10 Cox, 102; L. & C. 570	192
Daoust, —	9 L. C. J. 85	867
Dart, —	14 Cox, 143	221
Davie v. Briggs	27 U. S. 628	633
Davies, R. v.,	8 Cox, 486	14
—— —	10 Cox, 239	316
—— —	2 East P. C. 709	436
—— —	2 Leach, 876	459
—— —	2 East P. C. 956	503
—— —	5 Cox, 328	692
Davis, —	14 Cox, 563	8
—— —	R. & R. 113	32
—— —	15 Cox, 174	199
—— —	L. & C. 64	257
—— —	6 C. & P. 177	351, 827
—— —	11 Cox, 181	40
—— —	18 U. C. Q. B. 180	410, 481
—— —	R. & R. 322	467, 482
—— —	6 Cox, 369	467, 472
—— —	R. & R. 499	467
—— —	7 C. & P. 785	769
—— v. Lennon,	8 U. C. Q. B. 599	25
—— v. Russell,	5 Bing. 354	626
—— v. Stephenson,	17 Cox, 73	134
Davison, R. v.,	2 F. & F. 250; 8 Cox, 360	789
—— —	7 Cox, 158	844
Davitt, —	11 Cox, 676	47
Day, —	9 C. & P. 722	262
Deacon, —	R. & M. 27	706
Dear v. Knight	1 F. & F. 433	806
Deasy, R. v.,	15 Cox, 334	47
Deaves, —	11 Cox, 227	330
Debaun, —	11 L. N. 323	521
DeBerenger, —	3 M. & S. 73	497
Debruiel, —	11 Cox, 207	336
Deegan, —	6 Man. L. R. 81	509

		PAGE.
Deeley, R. v.,	1 Moo. 303	836
Deer, —	L. & C. 240	318, 352
Deering, —	11 Cox, 298	327
Deery —	26 L. C. J. 129	867
Defoy, —	Ramsay's App. Cas. 193	598
DeKromme, —	17 Cox, 492	597
Delaval, —	3 Burr. 1435	129
Denby, —	1 Leach, 514	735
Densley, —	6 C. & P. 399	351
D'Eon, —	1 W. Bl. 517	73
—— —	3 Burr. 1514	712
Derbyshire, —	2 Q. B. 745	575
Derecourt v. Corbishley,	5 E. & B. 188	622
Derrick, R. v.,	23 L. C. J. 239	787
Despatie, *ex parte*,	9 L. N. 387	141
Devett, R. v.,	8 C. & P. 639	694
DeVidil —	9 Cox, 4	797
Dewitt, —	21 N. B. Rep. 117	394
Dicken, —	14 Cox, 8	275
Dickenson, —	1 Saund. 135	960
Dickinson, —	R. & R. 401	734, 735
Dillet, *in re*,	16 Cox, 241	767
Dilmore, R. v.	6 Cox, 52	797
Dillon, —	10 P. R. Ont. 352	135
—— v. O'Brien,	16 Cox, 245	19
Dilworth, R. v.,	2 M. & Rob. 531	215, 823
Diprose, —	11 Cox, 185	345, 365
Dixon, —	10 Mod. 335	135, 960
—— —	11 Cox, 341	172
—— —	Dears. 580	329
—— —	11 Cox, 178	363
—— —	R. & R. 53	389
—— —	M. & S. 11	432
Dobbs, —	2 East P. C. 513	468
Dodds, —	4 O. R. 390	139
Dodson, —	9 A. & E. 704	585
Doe v. Oliver,	2 Sm. Lead. Cas. 780	785
—— d. Marriott v. Edwards,	5 B. & Ad. 1065	838
Doggett v. Catterns,	16 C. B. N. S. 765	134
Doherty, R. v.,	16 Cox, 306	12, 764
Donally, —	2 East P. C. 713	437
Doody, —	6 Cox, 463	227
Doonan, —	M. L. R. 6 Q. B. 186	394
Dougall, —	18 L. C. J. 85, 90	303, 713, 768, 773
Douglas, —	Car. & M. 193	757
Dove, —	3 Stephen's Hist. 426	8
Dovey v. Hobson,	2 Marsh, 154	856
Dowey, R. v.,	11 Cox, 115	403
Downes, R. v.,	1 Q. B. D. 25	145

		PAGE.
Downey, R. v.,	13 L. C. J. 193	708
Downie, —	13 R. L. 429	598
Downie v. R.	M. L. R. 3 Q. B. 360; 15 S. C. R. 358	97
Downing, R. v.,	1 Den. 52	36, 692, 693
—— —	11 Cox, 580	376
—— v. Capel	36 L. J. M. C. 97	621
Drain, R. v.,	8 Man. L. R. 535	253, 254
Drage, —	14 Cox, 85	828
Drake v. Footitt	7 Q. B. D. 201	58
Draper, R. v.,	1 C. & K. 176	215, 823
Dredge, —	Warb. Lead. Cas. 135	333
Dring, —	Dears. & B. 329	350
Drury, —	3 C. & K. 193	718, 720
Dubois, —	17 Q. L. R. 203	8
Duckworth, R. v.,	17 Cox, 495; [1892] 2 Q. B. 83	43, 220, 822
Dudley, —	15 Cox, 624; 14 Q. B. D. 273	10, 171, 608
Duffin, —	R. & R. 365	214, 234
Duffy, —	9 Ir. L. R. 329	73
Dugal, —	4 Q. L. R. 350	189, 199, 209
Duncan, —	7 Q. B. D. 198	873
Dungey, —	4 F. & F. 99	43, 273, 817, 824
Dunlop, —	11 L. C. J. 186	131
Dunn, —	1 Moo. 146	351, 827
—— —	1 Leach, 57	502
—— —	11 Jur. 287	742
Dunning, —	11 Cox, 651	680
Durocher, —	12 R. L. 697	409, 413
Duval v. R.	14 L. C. R. 52	769
Dwyer, R. v.,	27 L. C. J. 201	286
Dyer, —	2 East P. C. 767	31, 359
Dyke v. Gower	17 Cox, 421	11
Dyson, R. v.,	R. & R. 523	33, 226, 228
—— —	7 C. & P. 305	863

E.

Eagle, R. v.,	2 F. & F. 827	184
Eagleton, R. v.,	Dears. 376, 515	43, 398, 431
Eardly, —	49 J. P. 551	267
Earl of Somerset, R. v.,	19 St. Tr. 804	36
Earnshaw, —	15 East, 456	677
Eastern Archipelago Co. v The Queen,	2 E. & B. 879	960
Edwards, R. v.,	8 C. & P. 611	198
—— —	Warb. Lead. Cas. 132	324
—— —	6 C. & P. 521	394, 448
—— —	6 C. & P. 515	451
—— —	R. & R. 224	789
—— —	8 C. & P. 26	807

		PAGE.
Egginton, R. v.,	2 Leach, 913	482
—— —	2 B. & P. 508	692
—— —	5 E. & B. 100	981
Egre, —	1 P. & B. (N. B.) 189	129
Eldershaw, —	3 C. & P. 396	8
Elliott, —	16 Cox, 710	199
—— —	1 Leach, 175	501
—— v. Osborn,	17 Cox, 346	12, 587
Ellis, R. v.,	22 N. B. Rep. 440	129
—— —	1 F. & F. 309	284
—— —	16 Cox, 469	288
—— —	8 C. & P. 654	447, 821, 825
Elrington, R. v.,	1 B. & S. 688	266
Else, —	R. & R. 142	32
English, —	12 Cox, 171	411
Eno, *ex parte*,	10 Q. L. R. 194	508
Enoch, R. v.,	5 C. & P. 539	173
Epps, —	4 F. & F. 81	516
Etherington, R. v.,	2 Leach, 671	387
Evans, —	17 Cox, 37	97
—— —	L. & C. 252	401
—— —	Car. & M. 298	470
—— —	5 C. & P. 553	520
Ewer v. Ambrose,	3 B. & C. 746	806

F.

Faderman, R. v.,	1 Den. 565	867
Falkingham, —	11 Cox, 475	151
Falkner, —	7 R. L. 544	694
Fallon, —	L. & C. 217	42, 601
Fallows, —	2 Russ. 107	442
Fanning, —	10 Cox, 411	282
Farrell's Case,	2 East P. C. 557	322
Farrell, R. v.,	1 Leach, 322	434
—— —	12 Cox, 605	799
Farre's Case,	Kel. 65	326
Farrington, R. v.,	1 R. & R. 207	560
Farrow, —	Dears. & B. 164	277
Faulkner, —	13 Cox, 550	563, 578
Featherstone, —	Dears. 369	317, 868
Feist, —	Dears. & B. 590	139
Fellowes, —	19 U. C. Q. B. 48	597
Fennell, —	Warb. Lead. Cas. 250	800
Fenton, —	1 Lewin, 179	188
Feore, —	3 Q. L. R. 219	785
Ferens v. O'Brien,	15 Cox, 332	324
Ferguson, R. v.,	1 Lewin, 181	196
—— —	3 Pugs. (N.B.) 612	335

		PAGE.
Ferguson, R. v.,	4 P. & B. (N.B.) 259	353
—— —	Dears. 427	689, 691, 856, 866
Fidler, —	4 C. & P. 449	577
Field, —	1 Leach, 383	527
Fieldhouse, R. v.,	1 Russ. 1030	752
Finney, —	12 Cox, 625	199
Firth, —	11 Cox, 234	322, 695
Fisher, —	8 C. & P. 182	162, 184
—— —	Warb. Lead. Cas. 112	211
—— —	10 Cox, 146	572, 577
Fitch, —	Dears. & B. 187	318
—— —	L. & C. 159	520
Fitzgerald, —	1 Leach, 20	515
Flanagan, —	10 Cox, 561	366
Flannagan, —	R. & R. 187	460
—— —	15 Cox, 403	714
Flatman, —	14 Cox, 396	316
Flattery, —	13 Cox, 388	270
Fletcher, —	10 Cox, 248	270
—— —	8 Cox, 131; Bell, 63	270
—— —	Bell, 65	964
Flint, —	R. & R. 460	402
Flower, —	8 D. & R. 512	390
Flowers, —	16 Cox, 33; 16 Q. B. D. 643	334
Flynn, —	2 P. & B. (N. B.) 321	237, 708, 710
Foley, —	17 Cox, 142	324
Folkes, —	1 Moo. 354	36
Fontaine, —	15 L. C. J. 141	285
Forbes, —	10 Cox, 362	256
—— —	7 C. & P. 224	506
Ford, —	R. & R. 329	177
—— —	M. L. R. 7 Q. B. 413,	394, 413
—— —	14 Q. L. R. 231	732
—— v. Wiley,	16 Cox, 683; 23 Q. B. D. 203	295, 587
Foreman, R. v.	1 L. C. L. J. 70	855
Foster, —	13 Cox, 393	407
—— —	7 C. & P. 495	547
—— —	6 Cox, 25	577
Foulkes, —	13 Cox, 63	364
Fox, —	10 Cox, 502	699, 849
—— v. Gaunt,	3 B. & Ad. 798	622
Francis, R. v.,	12 Cox, 612	412
—— —	R. & R. 209	502
Frankland, —	L. & C. 276	684
Franklin, —	15 Cox, 163	188
Franks, —	2 Leach, 644	553
Fraser, —	1 Moo. 407	853
—— —	14 L. C. J. 245	872
Fray, —	1 East P. C. 236	188

		PAGE.
Freeman, R. v.,	2 Russ. 301	684
Freeth, —	R. & R. 127	402
French, —	11 Cox, 472	520
Fretwell, —	L. & C. 443	235
Friel, —	17 Cox, 325	226, 267, 721
Friend, —	R. & R. 20	143
Frost, —	22 St. Tr. 471	72
—— —	2 Moo. 140	755
—— —	9 C. & P. 159	766
—— —	9 C. & P. 136	779
—— —	Dears. 474	840
Fry, —	Dears. & B. 449	400
Fuidge, —	L. & C. 390; 9 Cox, 430	731
Fullagar, —	14 Cox, 370	314
Fullarton, —	6 Cox, 194	840
Fuller, —	R. & R. 308	43
—— —	1 B. & P. 180	49, 694
—— —	1 Leach, 186	458, 459
Fulton v. James,	5 U. C. C. P. 182	137
Furneaux, R. v.,	R. & R. 335	360
Furnival —	R. & R. 445	469

G.

Gaby, —	R. & R. 178	683
Gadbury, —	8 C. & P. 676	700
Gallagher, —	15 Cox, 291	47
Gale, —	13 Cox, 340	364
Ganes, —	22 U. C. C. P. 185	820, 822
Garbett, —	1 Den. 236	797
Gardner, —	Dears. & B. 40	401
—— —	1 C. & P. 479	450, 452, 453
—— v. Mansbridge,	16 Cox, 281 19 Q. B. D. 217	586
Garland, R. v.,	11 Cox, 224	699, 870
Garner, —	4 F. & F. 346	175
Garrett, —	2 F. & F. 14	316
— — —	Dears. 232	410, 412, 524
Gascoigne, —	2 East P. C. 709	438
Gate Fulford, R. v.,	Dears. & B. 74	870
Gauthreaux's Bail,	9 P. R. (Ont.) 31	957
Gaylor, R. v.,	Dears. & B. 288	38, 182, 188
Gazard, —	8 C. & P. 595	93
Geach, —	9 C. & P. 499	493, 507, 782, 785
Geering, —	18 L. J. M. C. 215	175
George, —	11 Cox, 41	230
Gerrans, —	13 Cox, 158	799
Gibbons, —	R. & R. 442	459
Gibson, —	7 R. L. 573	88
—— —	16 O. R. 704	589, 868

		PAGE.
Gibson, R. v.,	16 Cox, 181	771, 871
Giddins, —	Car. & M. 634	694
Gilbert, —	1 Moo. 185	311
—— —	1 C. & K. 84	482
Gilchrist, —	2 Leach, 657	859
Giles, —	1 Moo. 166	30, 504, 518
—— —	L. & C. 502	400
Gill, —	2 B. & Ald. 204	598
Gillis, —	27 N. B. Rep. 30	353
—— —	6 C. L. T. 203	735
Gillow, —	1 Moo. 85	234
Gilmore, —	15 Cox, 85	246, 718, 720
Gilson, —	R. & R. 138	562
Giorgetti, —	4 F. & F. 546	779
Girdwood, —	1 Leach, 142	223, 224
Gisson, —	2 C. & K. 781	272
Glass, —	M. L. R. 7 Q. B. 405	335, 368
—— —	1 L. N. 41	367
—— —	21 L. C. J. 245	870
—— v. O'Grady,	17 U. C. C. P. 233	25
Gloster, R. v.,	16 Cox, 471	201
Glover, —	L. & C. 466	366
Glyde, —	11 Cox, 103	330
Gnosil, —	1 C. & P. 304	436, 440
Goate, —	1 Ld. Raym. 737	500
Goddard, —	15 Cox, 7	201
Goff —	9 U. C. C. P. 438	398
Gogerley, —	R. & R. 343	31
Goldsmith, —	12 Cox, 479	400, 858
—— —	12 Cox, 594	903
Goldthorpe, —	2 Moo. 240, 244	230, 826
Goode, —	7 A. & E. 536	863
Goodenough, R. v.,	Dears. 210	367
Gooden, —	11 Cox, 672	520
Goodfellow, —	14 Cox, 326	799
Goodhall, —	1 Den. 187	278, 814
—— —	R. & R. 461	400
Gooding, —	Car. & M. 297	836
Goodman, —	22 U. C. C. P. 338	564
Gorbutt, —	Dears. & B. 166	398, 820
Gordon, —	1 Leach, 515	36, 256
—— —	1 Russ. 351	73
—— —	1 East P. C. 315, 352	176
—— —	16 Cox, 622	409
—— —	23 Q. B. D. 354; 16 Cox, 622	415
Goss, —	Bell, 208	407
Gould, —	1 Leach, 338	385
—— —	20 U. C. C. P. 154	508
—— —	3 Burn, 98	789

		PAGE.
Gover, R. v.,	9 Cox, 282	547
Grand Junction Ry. Co. R. v.,	11 A. & E. 128	628
Granger, R. v.,	7 L. N. 247	97
Grant, —	2 L. C. L. J. 276	708
Gray, —	7 C. & P. 164	36
—— —	Dears. & B. 303	150
—— —	17 Cox, 299	408
—— —	L. & C. 365	705, 858
Great Western Railway Co. R. v.,	3 Q. B. 333	628
Green, R. v.,	7 C. & P. 156	194
—— —	3 F. & F. 274	294
—— —	Dears. & B. 113	720, 721
Greenhalgh, R. v.,	Dears. 267	409
Greenwood, —	2 Den. 453	38, 553
—— —	2 C. & K. 339	821
Gregory, —	10 Cox, 459	30, 599, 817
—— —	L. R. 1 C. C. R. 77	228
—— —	5 B. & Ad. 555	960
Grey (Lord), —	3 St. Tr. 519	129
Griffin, —	11 Cox, 402	27, 191
—— —	14 Cox, 308	281
—— v. Coleman,	4 H. & N. 265	622
Griffith v. Taylor,	2 C. P. D. 194	626
Grimes, R. v.,	Fost. 79	391
Grimwade, —	1 Den. 30	223, 450
Groombridge, —	7 C. & P. 582	8
Grove, —	1 Moo. 447	367
Gruncell, —	9 C. & P. 365	321, 333, 351
Guelder, —	Bell, 284	367
Guernsey, —	1 F. & F. 394	307
Gugy, *Ex parte*,	8 L. C. R. 353	303
Gumble, R. v.,	12 Cox, 248	374, 845
Gurford v. Bailey,	3 M. & G. 781	837
Gurney, R. v.,	11 Cox, 414	758
Guttridge, —	9 C. & P. 228	714
—— —	9 C. & P. 471	820, 825

H.

Hadfield, R. v.,	11 Cox, 574	569
Hagan, —	8 C. & P. 167	178, 447
Haigh, —	7 Cox, 403	343
Haigh v. Sheffield,	L. R. 10 Q. B. 102	134
Haines, R. v.,	R. & R. 451	465
Hall, —	3 C. & P. 409	11, 326
—— —	17 Cox, 278	83, 960
—— —	13 Cox, 49	362, 364
—— —	1 Moo. 374	365
—— —	R. & R. 355	465

		PAGE.
Hall, R. v.,	1 T. R. 320	677
Halliday, —	6 Times L. R. 109	172, 238
Hallard, —	2 East P. C. 498	459
Hamilton, —	8 C. & P. 49	384, 386
—— —	1 Leach, 348	385
—— —	1 C. & K. 212	450
—— —	3 Russ. 173	680
Hamilton v. Massie,	18 O. R. 585	27, 83, 959
Hamilton v. Walsh,	23 N. B. Rep. 540	335
Hamilton v. R.,	2 Cox, 11	408
—— —	9 Q. B. 271	857
Hampton's Case,	2 Russ. 303	682
Hancock, R. v.,	R. & R. 70	482
Handcock v. Baker,	2 B. & P. 260	22, 25
Handley, R. v.,	13 Cox, 79	173, 199, 205, 211, 229, 232, 275
—— —	Car. & M. 547	333
Hanway v. Boultbee,	4 C. & P. 350	621
Hapgood, R. v.,	11 Cox, 471	272, 817
Harding, —	R. & R. 125	323
Hardy, —	11 Cox, 656	569
Hare, —	13 Cox, 174	680
Hargreaves, R. v.,	2 F. & F. 790	732
Harley, R. v.,	4 C. & P. 369	30, 214
—— —	8 L. C. J. 280	699
Harman, —	1 Hale. 534	440
Harmwood, R. v.	1 East P. C. 440	818
Harper, R. v.,	14 Cox, 574	502, 517
—— —	7 Q. B. D. 78	517
Harrie, —	6 C. & P. 105	453
Harris, —	5 C. & P. 159	3, 219
—— —	5 B. & Ald. 926	89
—— —	11 Cox, 659	121, 672
—— —	2 Leach, 701	459
—— —	1 Leach, 135	543
—— —	15 Cox, 75	563
—— —	3 Burr, 1330	743
Harrison, —	1 Leach, 47	316
—— —	12 Cox, 19	319
Hart, —	6 C. & P. 106	394
—— —	1 Moo. 486	502
Hartel, —	7 C. & P. 773	760
Hartley, —	R. & R. 139	361
Harvey, —	2 B. & C. 268	167
—— —	1 Leach, 467	314, 374
—— —	11 Cox, 662	548
—— —	L. R. 1 C. C. R. 284	677
Haslam, —	1 Leach, 418	351
Hassell —	L. & C. 58	316

		PAGE.
Haswell, R. v.,	R. & R. 458	109, 110, 576
Hathaway, —	8 L. C. J. 285	521
Haughton, —	5 C. & P. 555	576
Hawkes, —	2 Moo. 60	516
Hawkeswood, R. v.,	1 Leach, 257	502, 503
Hawkins, —	3 C. & P. 392	34
—— —	1 Den. 584	367
Hawtin, —	7 C. & P. 281	358
Haynes, —	1 F. & F. 666	172
Hayward, —	6 C. & P. 157	161, 184
Haywood, —	R. & R. 16	576
Hazell, —	11 Cox, 597	310
Hazelton, —	13 Cox, 1	412
Heane, —	9 Cox, 433; 4 B. & S. 947	708, 732
Hearn, —	Warb. Lead Cas. 204	11
Heath, —	R. & R. 184	43, 546
Heaton, —	3 F. & F. 819	286
Hegarty v. Shine,	14 Cox, 124	239
Hemmings, R. v.,	4 F. & F. 50	327, 435
Hench, —	R. & R. 163	311
Henderson, —	2 Moo. 192	408, 718
Henderson v. Preston,	16 Cox, 445	965
Henkers, R. v.,	16 Cox, 257	293
Hennah, —	13 Cox, 547	241
Henessey, —	35 U. Q. B. 603	396
Henry, —	21 O. R. 113	421
Henshaw, —	L. & C. 444	400
Hensler, —	11 Cox, 570	43, 398, 405
Henson, —	Dears. 24	131
Henwood, —	11 Cox, 526	695
Hermann, —	14 Cox, 279; 4 Q. B. D. 284	551, 553
Heseltine, —	12 Cox, 404	564
Hevey, —	2 East P. C. 858 (n)	498
Hewgill, —	Dears. 315	408
Hewins, —	9 C. & P. 786	838
Hewlitt, —	1 F. & F. 91	25
Heymann v. R.,	12 Cox, 383	854
Heywood, R. v.,	L. & C. 451	688, 696, 856
Hibbert, —	11 Cox, 246	294
—— —	13 Cox, 82	598
Hicklin, —	L. R. 3 Q. B. 360	11, 114
Hickson, —	3 L. N. 139	303, 845
Higgins, —	2 East, 5	499
Higgs, —	2 C. & K. 322	462
Hill, —	R. & R. 190	408
— —	2 Russ. 95	477
— —	2 Moo. 30	493
— —	5 Cox, 233	565
Hillman, —	L. & C. 343	278

		PAGE.
Hillyard v. G. T. R.,	8 O. R. 583	131
Hilton, R. v.,	Bell, 20	350, 869
Hinchcliffe's Case,	1 Lewin, 161	204
Hoare, R. v.,	1 F. & F. 647	316
Hobson, —	Dears. 400	350
Hodges, —	M. & M. 341	378, 381
—— —	8 C. & P. 195	735, 863
Hodgson, —	1 Leach, 6	33
—— —	R. & R. 211	271
—— —	3 C. & P. 422	361, 680
—— —	Dears. & B. 3	494, 499
Hogan, —	2 Den. 277	149, 150
Hogg, —	5 U. C. Q. B. 142	82
Hoggins, —	R. & R. 145	361
Hoke, —	15 R. L. 92	502
Holbrook, —	3 Q. B. D. 60; 4 Q. B. D. 42; 13 Cox, 650; 14 Cox, 185	300, 303
Holchester, R. v.,	10 Cox, 226	758, 761
Holden, —	R. & R. 154	500, 518
—— —	5 B. & Ad. 347	743
Holland, —	2 M. & Rob. 351	158
Hollingberry, —	4 B & C. 329	812, 819, 872
Hollis, R. v.,	12 Cox, 463	278
—— —	8 L. N. 229	293
—— —	15 Cox, 345	334
Holloway, —	1 Den. 370	307, 382, 868
Holloway v. R.,	2 Den. 289	849
Holman, R. v.,	L. & C. 177	690
Holmes, —	Dears. 207	120
—— —	5 R. & G. (N. S.) 498	243
—— —	12 Cox, 137	271
—— —	15 Cox, 343	412
Holroyd, —	2 M. & Rob. 339	246
Holt, R. v.,	8 Cox, 411; Bell, 280	409
Hood, —	1 Moo. 281	25, 186
Hoodless, R. v.,	45 U. C. Q. B. 556	956
Hook, —	Dears. & B. 606	93
Hope, —	17 O. R. 463	416
Hopley, —	Warb. Lead. Cas. 110	27
—— —	2 F. & F. 202	190
Horan, —	6 Ir. R. C. L. 293	904
Horner, —	2 East P. C. 703	436
Hornsby v. Raggett,	17 Cox, 428	134
Horsey, R. v.,	3 F. & F. 287	171
Horton, —	11 Cox, 670	285
Howard v. R.,	10 Cox, 54	680, 857
Howarth, R. v.,	1 Moo. 207	178, 619, 621, 624
—— —	11 Cox, 588	405
Howell, —	9 C. & P. 437	32, 58, 566

		PAGE.
Howes, R. v.,	5 Man. L. R. 339	701
Howie, —	11 Cox, 320	519
Howley, —	L. & C. 159	520
Hubbard, —	14 Cox, 565	201
Huddell, —	20 L. C. J. 301	755
Hudson, —	Bell, 263	430
Hughes, —	Bell, 242	29, 35, 348, 350
—— —	14 Cox, 284	88
—— —	Warb. Lead. Cas. 60	88
—— —	7 Cox, 301	191
—— —	1 Moo. 370	364, 365
—— —	1 F. & F. 355	401
—— —	Warb. Lead. Cas. 190	456, 475
—— —	2 East P. C. 491	468
Hugill, —	2 Russ, 517	389
Huguet, *ex parte*,	12 Cox, 551	797
Humphreys, R. v.,	Car. & M. 601	736
Hungerford, —	2 East P. C. 518	473
Hunt, —	1 Moo. 93	213, 235, 619, 622
—— —	8 C. & P. 642	366
—— —	8 Cox, 495	408
—— —	3 B. & Ald. 444	742
Hunter, —	2 Leach, 631	222
Huntley, —	Bell, 238	348
Hurse, —	2 M. & Rob. 360	553
Hutchinson, —	9 Cox, 555	193
—— —	R. & R. 412	470
—— —	1 Leach, 135 (n)	612
Huxley, —	Car. & M. 596	447

I.

Illidge, R. v.,	1 Den. 404	519
Ilott v. Wilkes,	3 B. & Ald. 304	244
Instan, R. v.,	(1893) 1 Q. B. 450	249
Ion, —	2 Den. 475	504, 528, 553
Isaacs, —	L. & C. 220	278
Israel, —	2 Cox, 263	754

J.

Jackson, R. v.,	17 Cox, 104	3, 219, 220
—— —	7 Cox, 357	170
—— —	1 Leach, 267	387, 451
—— —	3 Camp. 370	402
—— —	2 Russ. 49, 76	836
—— —	19 U. C. C. P. 280	841
Jacobs, —	R. & R. 331	117
—— —	1 Moo. 140	281

		PAGE.
Jacobs, R. v,	12 Cox, 151	313, 325
—— —	16 S. C. R. 433	845
James, —	17 Cox, 24; 24 Q. B. D. 439	29
—— —	5 C. & P. 153	57
—— —	12 Cox, 127	410, 705, 844
—— —	7 C. & P. 553	500, 728
—— —	1 D. & R. 559	623
Jamieson, R. v.,	7 O. R. 149	139
Jarrald, —	L. & C. 301	486, 672
Jarvis, —	2 M. & Rob. 40	41
—— —	1 Moo. 7	450
Jeans, —	1 C. & K. 539	576
Jefferys v. Boosey,	4 H. L. Cas. 815	612
Jellyman, R. v.,	Warb. Lead. Cas. 57	117, 121
Jenkins, —	11 Cox, 250	201
—— —	R. & R. 244	462, 463
Jenks v. Turpin,	13 Q. B. D. 505	134, 135
Jennings, R. v.,	Dears. & B. 447	356
—— —	20 L. C. J. 291	767, 792
Jennison, —	L. & C. 157	400, 409
Jenson, —	1 Moo. 434	361
Jepson, —	2 East P. C. 1115	565
Jervis, —	6 C. & P. 156	347
Jessop, —	16 Cox, 204	33, 172, 226
—— —	Dears. & B. 442	401
Jewell, —	6 Man. L. R. 460	397
John v. R.,	15 S. C. R. 384	43, 273
—— R. v.,	13 Cox, 100	394, 449
Johnson, —	Car. & M. 218	32, 466
—— —	L. & C. 632	253
—— —	15 Cox, 481	294, 295
—— —	L. & C. 489	474, 479, 815
—— —	3 M. & S. 539	692
—— —	Fost. 46	780
—— —	8 Q. B. 102	981
Johnston, —	2 C. & K. 354	174
—— —	2 Moo. 254	400
Joliffe, *ex parte*,	42 L. J. Q. B. 121	624
Jones, R. v.,	11 Cox, 544	193
—— —	12 Cox, 628	199
—— —	2 C. & K. 398; 1 Den. 218	223
—— —	11 Cox, 358	285
—— —	15 Cox, 284	285
—— —	1 Den. 188	333, 372
—— —	8 C. & P. 288	367
—— —	Dears. & B. 555	377
—— —	1 Den. 551	402, 627
—— —	15 Cox, 475	409
—— —	1 Leach, 537	461

		PAGE.
Jones, R. v.,	2 Moo. 293	562, 572
—— —	4 B. & Ad. 345	597
—— —	2 Camp. 131	687, 692
—— —	2 Moo. 94	691
—— —	1 Leach, 452	755
—— —	14 Cox, 3	827
—— —	2 Russ. 364	836
—— —	14 Cox, 528	903
—— v. R.,	3 L. N. 309	790
Jordan, R. v.,	9 C. & P. 118	8
—— —	Warb. Lead. Cas. 2	28
—— —	7 C. & P. 432	457
Jordin v. Crump	8 M. & W. 782	244
Joyce, R. v.,	L. & C. 576	519
Judah, —	7 L. N. 385	413
—— —	8 L. N. 124	413
Justices, The, R. v.,	16 Cox, 143, 196	904

K.

Kain, R. v.,	8 C. & P. 187	454
—— —	15 Cox, 388	758
Kay, —	16 Cox, 292	282
—— —	11 Cox, 529; L. R. 1 C. C. R. 257	524
Kaylor, —	1 Dor. Q. B. R. 364	290
Kealey, —	2 Den. 68	682
Keary, —	14 Cox, 143	862
Kearley v. Tylor,	17 Cox, 328	12
Keena, R. v.,	11 Cox, 123	360
Keighly v. Bell,	4 F. & F. 763	22
Keir v. Leeman,	9 Q. B. 371	104
Keith, R. v.,	Dears. 486	526
Kelleher, —	14 Cox, 48	413
Kelly, —	R. & R. 421	31
—— —	2 C. & K. 379	32
—— —	6 U. C. C. P. 372	55
Kemp v. Neville	10 C. B. N. S. 523	623
Kennett, R. v.,	5 C. & P. 282	56
Kenny, —	13 Cox, 397	318
Kenrick, —	D. & M. 208	406
Kerr, —	26 U. C. C. P. 214	615, 860, 871
—— —	3 L. N. 299	785
Kerrigan, —	L. & C. 383	412
Kessal, —	1 C. & P. 437	185
Kew, —	12 Cox, 355	193
Key, —	2 Den. 347	717, 779
Keyn, —	13 Cox, 403	606, 609, 779
Kilham, —	11 Cox, 561	406, 408
Kimber, —	3 Cox, 223	981

		PAGE.
King, R. v.,	18 O. R. 566	12, 256
—— —	R. & R. 332	31
—— —	1 Cox, 36	106
—— —	12 Cox, 73	368
—— —	7 Q. B. 782	498, 596
—— —	2 Chit. Rep. 217	742
—— v. Poe,	30 J. P. 178	622
Kingston, R. v.	8 East 41	692, 693
Kinloch's Case,	Fost. 16	755, 790
Kinnear, R. v.,	2 M. & Rob. 117	516
—— —	2 B. & Ald. 462	787
Kinsman, —	James (N. S.) 62	606
Kipps, —	4 Cox, 167	294
Kirkham, —	8 C. & P. 115	184
—— —	2 Starkie Ev. 279	459
Kirkwood, —	1 Moo. 304	32
Kitson, —	Dears. 187	560
Kneeshaw v. Collier,	30 U. C. C. P. 265	104
Knewland, R. v.,	2 Leach, 721	438, 860
Knight, —	12 Cox, 102	331
—— —	L. & C. 378	717
—— —	14 Cox, 31	854
Knock, —	14 Cox, 1	23
Knowlden v. R.,	9 Cox, 483; 5 B. & S. 532	613, 731, 732
Kolligs, *In re*,	6 R. L. 213	619

L.

Labouchere, R. v.,	14 Cox, 419	303
Labrie, —	M. L. R. 7 Q. B. 211	288
Lackey, —	1 P. & B. (N. B.) 194	237
Lalanne, —	3 L. N. 16	870
Laliberte, —	1 S. C. R. 117	271
Lambert, —	2 Cox, 309	367
Lamere, —	8 L. C. J. 281	767, 792
Lamirande, *ex parte*,	10 L. C. J. 280	508
Lancaster, R. v.,	16 Cox, 737	82
Lane v. Bennett,	1 M. & W. 70	605, 633
Langford, R. v.,	Car. & M. 602	58
Langhurst, —	10 Cox, 353	713
Langmead, —	L. & C. 427	352, 820
Langton, —	13 Cox, 345	413
Lantz, —	19 N. S. Rep. 1	256
Lapier's Case,	1 Leach, 320	436
Laprise, R. v.,	3 L. N. 139	119
Lara, —	2 East P. C. 819	431
Larkin, —	Dears. 365	840, 857, 870
Latham, —	9 Cox, 516	694
Latimer, —	16 Cox, 70; 17 Q. B. D. 359	233, 234, 238, 578

		PAGE.
Laurier, R. v.,	11 R. L. 184	303
Lavallee, —	16 R. L. 299	413
Lawes, —	1 C. & K. 62	474, 486
Lawrence,—	4 C. & P. 231	465, 472, 475
Laws v. Eltringham	15 Cox, 22 ; 8 Q. B. D. 283	578
Lea, R. v.,	2 Moo. 9	724, 726
—— v. Charrington	16 Cox, 704 ; 23 Q. B. D. 45	643
Le Dante, R. v.,	2 G. & O. (N. S.) 401	236
Ledbitter, —	1 Moo. 76	105
—— —	3 C. & K. 108	797
Ledger, —	2 F. & F. 857	192
Ledwith v. Catchpole,	Cald. 291	619
Leech, R. v.,	Dears. 642	627
Leete v. Hart,	37 L. J. C. P. 157	626
Lefrcy, R. v.,	L. R. 8 Q. B. 134	624
Lee, —	Warb. Lead. Cas. 9	40
—— —	4 F. & F. 63	170, 797
—— —	L. & C. 309	400
—— —	8 Cox, 233	407
—— —	12 Lewin, 154	808
Lees, —	L. & C. 418	407
Leigh, —	1 Leach, 52	391
Lemott's Case,	Kel. 64	326
Lennard, R. v.,	1 Leach, 90	546
Leonard, —	2 Russ. 78	388
—— —	3 L. N. 138	709
Levasseur, —	9 L. N. 386	121
Levecque, —	30 U. C. Q. B. 509	141
Levinger,	22 O. R. 690	508
Lewis, —	6 C. & P. 161	215
—— —	2 C. & P. 628	464
—— —	2 Russ. 841	505
—— —	2 Russ. 1067	558, 578, 981
—— —	Dears. & B. 182	606
Leyman v. Latimer,	14 Cox, 51	977
Lince, R. v.,	12 Cox, 451	409
Light, —	Dears. & B. 332	622
Ling, —	5 Q. L. R. 359 ; 2 L. N. 410	854
Lindsay v. Cundy	13 Cox, 583; 2 Q.B.D, 96; 3 App. Cas. 459	904
Lister, R. v.,	Dears. & B. 209	131, 133
—— —	Dears. & B. 118	367
Lithgo, —	R. & R. 357	481
Little, —	15 Cox, 319	272, 807
Littlechild, —	L. R. 6 Q. B. 293	696
Livingstone v. Massey,	23 U. C. Q. B. 156	602
Lloyd, R. v.,	16 Cox, 235 ; 19 Q. B. D. 213	88
—— —	2 East P. C. 1122	223
—— —	7 C. & P. 318	272
—— —	19 O. R. 352	274, 867

		PAGE.
Lock, R. v.,	12 Cox, 244	118, 261
Lockett, —	7 C. & P. 300	33
Loom, —	1 Moo. 160	836
Lopez, —	Dears. & B. 525	609
Lord Mayor, —	16 Cox, 81; 16 Q. B. D. 772	304
—— —	16 Cox, 77	730
—— Sanchar, —	9 Cox, 189	39
Lovel, —	2 M. & Rob. 39	44
Lovell, —	8 Q. B. D. 185	325
—— —	2 M. & Rob. 236	361
Lovelass, —	6 C. & P. 596	71
Lovett, —	9 C. & P. 462	757
Lowe v. Routledge,	1 Ch. App. 47; L. R. 3 H. L. 100	611
Low's Case,	4 Me. 437	734
Lows v. Telford,	13 Cox, 226	25, 60
Luck, R. v.,	3 F. & F. 483	34
Lumley. —	11 Cox, 274	283
Lynch, —	5 C. & P. 324	184
—— —	20 L. C. J. 187	703, 728, 853, 855
Lynn, —	1 Leach, 497	139
Lyon, —	R. & R. 255	502
Lyons, —	1 Leach, 185	458

M.

Macarthy, R. v.,	Car. & M. 625	713
Macauley, —	1 Leach, 287	436
Macdaniel, —	1 Leach, 44	173
Macdonald, —	L. & C. 85	361
Macintosh, —	2 Leach, 883	502
Mackenzie, —	2 Man. L. R. 168	142
Mackerel, —	4 C. & P. 448	577
Macklin, —	5 Cox, 216	903
Macleod, —	12 Cox, 534	196, 197
—— v. Atty.-Gen. N.S.W.	17 Cox, 341; (1891) A. C. 455	280, 611, 728, 730
Madox, R. v.,	R. & R. 92	392
Maguire, —	13 Q. L. R. 99	303, 771, 772, 786
Maher, —	7 L. N. 82	149
Mailloux, —	3 Pugs. (N. B. 493)	11, 55
Maloney, —	9 Cox, 6	771
Mankeltow, —	Dears. 159	293
Manners, —	7 C. & P. 801	32
Manning, —	Warb. Lead. Cas. 7	28
—— —	2 C. & K. 903 (n)	41
—— —	12 Q. B. D. 241	598
Mansell v. R.,	Dears. & B. 375	785, 849
Mansfield, R. v.,	Car. & M. 140	351
Marcus, —	2 C. & K. 356	497

		PAGE.
Margetts, R. v.,	2 Leach, 930	458
Marks, —	10 Cox, 367	683, 843
Markuss, —	4 F. & F. 356	197
Marriott, —	8 C. & P. 425	143, 198
Marsden, —	11 Cox, 90	236
—— —	17 Cox, 297	274
Marsh, —	1 Den. 505	43, 405
—— —	6 A. & E. 236	734, 849
Marshall, —	11 Cox, 490	362, 363
—— —	R. &. R. 75	502
Martin, —	9 C. & P. 213, 215	43
—— —	21 L. C. J. 156	88
—— —	2 Moo. 123	118, 817
—— —	5 C. & P. 128	158, 209
—— —	3 C. & P. 211	188
—— —	11 Cox, 136	189
—— —	14 Cox, 663; 8 Q. B. D. 54	207, 237
—— —	6 C. & P. 562	271
—— —	11 Cox, 343	379, 555, 699
—— —	10 Cox, 383	401
—— —	R. & R. 108	458
—— —	14 Cox, 375	502
—— —	R. & R. 324	538
—— —	16 Q. L. R. 281	750
—— —	12 Cox, 204	829
—— —	8 A. & E. 481	857
—— —	1 Den. 398; 3 Cox, 447	867
Masters, —	50 J. P. 104	764
Mason, —	17 U. C. C. P. 534	104
—— —	1 East P. C. 239	163
—— —	22 U. C. C. P. 246	371, 396, 706, 709
—— —	2 T. R. 581	400
—— —	R. & R. 419	436
—— —	24 U. C. C. P. 58	450
—— —	2 C. & K. 622	530
Matthews, —	14 Cox, 5	572
—— v. Biddulph,	4 Scott, N. R. 54	622
Maxwell, R. v.,	10 L. C. R. 45	714, 756
May, —	16 L. T. 362	232
—— —	L. & C. 13	362
Mayers, —	12 Cox, 311	270, 817
Mayhew, v. Lock,	2 Marsh. 377; 7 Taun. 63	624
Mayle, R. v.,	11 Cox, 150	362
Maynard, R. v.,	R. & R. 240	746
Mayor of St. John, R. v.,	Chip. Mss. 155	131
Mazagora, R. v.,	R. & R. 291	500
Mazeau, —	9 C. & P. 676	509
Meade's case,	1 Lewin. 184	204

		PAGE.
Meakin, R. v.,	11 Cox, 270	404
Meany, —	L. & C. 213	770
Mears, —	2 Den. 79	129
Medley, —	6 C. & P. 292	131
Meere's case,	2 Russ. 519	370
Mehegan, R. v.,	7 Cox, 145	253
Mellish, —	R. & R. 80	358, 361
Mellor, —	Dears. & B. 468, 494	779, 785, 868, 872
Mercier, —	Q. R. 1 Q. B. 541	752
—— —	1 Leach, 183	753
Merriman v. Hundred of Chippenham,	2 East P. C. 709	439
Michael, R. v.,	2 Moo. 120	30, 174, 215
Middleton,—	12 Cox, 260, 417	307, 329
Middlehurst, R. v.,	1 Burr. 400	819
Migotti v. Colville,	14 Cox, 263, 305; 4 C. P. D. 233	965
Miles, R. v.,	17 Cox, 9; 24 Q. B. D. 423	239, 266, 718, 977
Millhouse, R. v.,	15 Cox, 622	764
Milford, —	20 Q. R. 306	433
Miller, —	13 Cox, 179	294
—— —	2 Moo. 249	365
Milloy, —	6 L. N. 95	798
Mills, —	Dears. & B. 205	401, 404
Mitchell, —	17 Cox, 503	201
—— —	2 Den. 468	446
—— —	2 Q. B. 636	627
—— —	3 Cox, 93,	752, 852
—— v. Defries,	2 U. C. Q. B. 430	27
Moah, R. v.,	Dears. 626	367
Mockford, R. v.,	11 Cox, 16	333
Moffat, —	1 Leach, 431	502
Moffatt v. Barnard,	24 U. C. Q. B. 498	981
Mogg, R. v.,	4 C. & P. 364	576
Mogul S. S. Co. v. McGregor,	23 Q. B. D. 598	241, 597
Moir, R. v.,	Roscoe, Cr. Ev. 714	25, 240
Moland, R. v.,	2 Moo. 276	38, 412
Mole, —	1 C. & K. 417	332
Monaghan, —	11 Cox, 608	248
Mondelet, —	21 L. C. J. 154	203
Monkman, —	8 Man. L. R. 509	16, 257
Moody, —	L. & C. 173	345, 520
Moore, —	1 Leach, 314	33
—— —	3 B. & C. 184	131
—— —	13 Cox, 544	286
—— —	L. & C. 1	329
—— —	1 Leach, 335	436
—— —	2 Dor. Q. B. R. 52	610
Mopsey, —	11 Cox, 143	516, 517
Morby, —	Warb. Lead. Cas. 115	143

		PAGE.
Morby, R. v.,	15 Cox, 35	199
Morfit, —	R. & R. 307	333, 339
Morgan, —	14 Cox, 337	201
Morin, v. R.	16 Q. L. R. 366; 18 S. C. R. 407	785, 872
Morris, R. v.,	10 Cox, 480	226, 267, 721
— —	R. & R. 270	320
— —	9 C. & P. 349	323
— v. Wise,	2 F. & F. 51	382, 621, 622
Morrison, R. v.,	Dell, 158	519
— —	2 P. & B. (N. B.) 682	710
Mortin v. Shoppee,	3 C. & P. 373	260
Morton, R. v.,	2 East P. C. 955	394, 503
Moss, —	Dears. & B. 104	430
Most, —	14 Cox, 583; 7 Q. B. D. 244	73, 225
Mountford, R. v.,	1 Moo. 441	222
Mucklow, —	1 Moo. 160	327
Mulcahy, v. R.	L. R. 3 H. L. 306	47
Mullholland, R. v.,	4 P. & B. (N. B.) 512	824
Muller, —	10 Cox, 43	808
Munday, —	2 Leach, 850	377
Murphy, —	6 C. & P. 103	35
— —	6 C. & P. 103	61
— —	9 L. N. 95	97
— —	17 O. R. 201	135
— —	1 Cox, 108	213
— —	8 C. & P. 297	256, 693
— —	6 Cox, 340	388
— —	2 East P. C. 949	515
— —	2 Q. L. R. 383	789
— —	17 Q. L. R. 305	869
— v. Eills,	2 Han. (N. B.) 347	620
Murrow, R. v.	1 Moo. 456	243
Murry, —	2 East P. C. 496	459
Mussett, —	26 L. T. 429	586
Mutters, —	L. & C. 491	133
— —	L. & C. 511	317
Mycock, —	12 Cox, 28	294
MacDaniel's Case	Fost. 121	98
MacFarlane v. R.,	16 S. C. R. 393	256
MacGrath, R. v.,	11 Cox, 347	438
MacKenzie, —	6 O. R. 165	677
McAthey, —	L. & C. 250	351
McConohy, —	5 R. L. 746	696
McCorkill, —	8 L. C. J. 283	521
McDonagh, —	28 L. R. Ir. 204	587
McDonald, —	8 Man. L. R. 491	454
— —	10 O. R. 553	579
McEneany, —	14 Cox, 87	750
McFee, —	13 O. R. 8	517

		PAGE.
McGrath, R. v.,	Warb. Lead. Cas. 140	325
—— —	14 Cox, 598	566
McGreeay, —	17 Q. L. R. 196	597
McGregor, —	3 B. & P. 106; R. & R. 23	360
McHolme, —	8 Ont. P. R. 452	619
McIntosh, —	2 Cox, 379	158
—— —	2 East P. C. 942	519
McIntyre, —	2 P. E. I. Rep. 154	905
—— —	2 Cox, 379	158
McKale, —	11 Cox, 32	312
—— —	2 East P. C. 942	519
McKay, —	28 N. B. Rep. 564	123
McKeever, —	5 Ir. R. C. L. 86	561
McKenzie, —	17 Cox, 542; (1892) 2 Q. B. 519	593
—— v. Gibson,	8 U. C. Q. B. 100	616
McLaughlin, R. v.,	3 Allen (N.B.) 159	981
McLeod, —	5 P. R. (Ont.) 181	750
McMahon, —	18 O. R. 502	201
McNamara, —	20 O. R. 489	126, 135
McNaughten, —	14 Cox, 576	54
McNevin, —	2 R. L. 711	508
McPherson, —	Dears. & B. 197	44, 385, 478, 812
—— v. Daniels,	10 B. & C. 272	167
McQuarrie, R. v.,	22 U. C. Q. B. 600	413
McQuiggan, —	2 L. C. R. 346	281, 286

N.

Napper, R. v.,	1 Moo. 44	672
Nash, —	2 Den. 493	497, 499
—— v. R.,	9 Cox, 424	854
Nasmith, R. v.,	42 U. C. Q. B. 242	149
Nattrass, —	15 Cox, 73	563
Naylor, —	1 Dor. Q. B. R. 364	290
—— —	10 Cox, 149	408
Neale, —	9 C. & P. 431	57
—— —	1 Den. 36	818
Negus, —	12 Cox, 492	364
Nelson, —	1 O. R. 500	799
Nettleton, —	1 Moo. 259	365
Neville, —	6 Cox, 69	842
Newboult, —	12 Cox, 148	560
Newill, —	1 Moo. 458	562
Newman, —	Dears. 85; 1 E. & B. 268	301
—— —	2 Den. 390	801
Newton, —	11 Ont. P. R. 101	135, 142
—— —	1 C. & K. 469	256
—— —	2 M. & Rob. 503	232, 736
—— —	3 Cox, 492	693

		PAGE.
Newton, R. v.,	13 Q. B. 716	850
Nichol, —	R. & R. 130	262
Nicholas, —	1 Cox, 218	474, 486
Nicholls, —	10 Cox, 476	123
—— —	13 Cox, 75	144, 199
—— —	1 F. & F. 51	351
—— —	9 C. & P. 267	447
—— —	2 Cox, 182	818
Nisbett, —	6 Cox, 320	517
Noake, —	2 C. & K. 620	359
Noakes, —	4 F. & F. 920	197
Noon, —	6 Cox, 137	162, 167
Norris, —	R. & R. 69	377
—— —	9 C. & P. 241	573
North, —	8 Cox, 433	314
Norton, —	16 Cox, 59	410, 708
Nott, —	Car. & M. 288; 9 Cox, 301	103
Nugent, —	11 Cox, 64	107
Nunn, —	10 P. R. (Ont.) 395	940
Nutbrown's Case	2 East P. C. 496	459

O.

Oates, R. v.,	Dears. 459	407
O'Brien, —	5 Q. L. R. 161	584
—— —	15 Cox, 29	720
—— *Ex parte*	15 Cox, 180	73, 304
O'Connell v. R.,	11 Cl. & F. 155, 234	72, 691, 697
O'Connor, R. v.,	15 Cox, 3	430
Oddy, —	2 Den. 264	351, 505, 827
O'Donnell, —	7 Cox, 337	106
Ogden, —	6 C. & P. 631	527
O'Kelly v. Harvey,	15 Cox, 435	53
Oldham, R. v.,	2 Den. 472	487
Olifier, —	10 Cox, 402	294
Oliver, —	Bell, 287	238, 254, 819
—— —	13 Cox, 588	840, 854
O'Neill, —	3 P. & B. (N.B.) 49	265
—— —	11 R. L. 334	447, 824
—— v. Longman,	4 B. & S. 376	594
Orchard, R. v.,	8 C. & P. 565	844
Organ, —	11 Ont. P. R. 497	142
Orman, —	14 Cox, 381	597
Orton, —	14 Cox, 226, 436, 546	54, 966
—— —	Warb. Lead. Cas. 54	61
O'Rourke, —	1 O. R. 464	771
—— —	32 U. C. C. P. 388	871
Osborn, —	7 C. & P. 799	714
—— v. Gillett,	L. R. 8 Ex. 88	602

		PAGE.
Osman, R. v.,	15 Cox, 1	201
Ouellette, —	7 R. L. 222	708
Oulaghan, —	Jebb. 270	850
Overton, —	Car. & M. 655	869
Owen, —	Warb. Lead. Cas. 19	7, 8
—— —	1 Moo. 96	31
—— —	2 Leach, 572	386
—— —	9 C. & P. 83	714
—— —	1 Moo. 118	836
Owens, —	1 Moo. 205	576
Oxford, —	Warb. Lead. Cas. 21	8
Oxfordshire, R. v.,	1 B. & Ad. 289	575
Oxley, R. v.,	3 C. & K. 317	89

P.

Packer, R. v.,	16 Cox, 57	128
Paddle, —	R. & R. 484	223
Page, —	8 C. & P. 122	527, 553
Pain v. Boughtwood,	16 Cox, 747	295
Paine, R. v.,	7 C. & P. 135	467
Palliser, —	4 L. C. J. 276	422
Palmer, —	2 Leach, 978	30
—— —	R. & R. 72	504, 518
Paquet, —	2 L. N. 140	708
Parish, —	7 C. & P. 782	714
Parker, —	2 East P. C. 592	377
—— —	2 Moo. 1	402
Parkin, —	1 Moo. 45	770
Parkinson, —	2 Den. 459	872
Parke's Case,	2 Leach, 614	314
Parkins, R. v.,	1 C. & P. 548	761
Parnell, —	14 Cox, 508	597
Parry, —	7 C. & P. 836	724
Partridge, —	7 C. & P. 551	333
Pascoe, —	1 Den. 456	106
Passey, —	7 C. & P. 282	33
Patent Eureka & Sanitary Manure Co.	13 L. T. 365	742
Patience, R. v.,	7 C. & P. 795	186
Patrick and Pepper,	1 Leach, 253	684
Patteson, R. v.,	36 U. C. Q. B. 129	303, 786, 871
Patterson, —	27 U. C. Q. B. 142	678
Patton, —	13 L. C. R. 311	131
Paul, —	17 Cox. 111 ; 25 Q. B. D. 202	796
Paxton, —	3 L. C. L. J. 117	508
—— —	10 L. C. J. 213	780
—— —	2 L. C. L. J. 162	867
Payne, —	L. R. 1 C. C. R. 27	110

			PAGE.
Payne,	R. v.,	12 Cox. 118	697
Pear	—	1 Leach 212	308, 374
Pearce,	—	2 East P. C. 603	309, 372
——	—	R. & R. 174	383, 476, 677
Pearson,	—	11 Cox, 493	267
Peat,	—	1 Leach, 228	435
Peck,	—	2 Russ. 449	367
——	—	9 A. & E. 686	498, 596
Pedley,	—	1 Leach, 325	88
Pelfryman,	—	2 Leach, 563	859
Pelham,	—	8 Q. B. 959	144
Pelletier,	—	1 R. L. 565	97
——	—	15 L. C. J. 146	709
Peltier,	—	28 St. Tr. 529	73
Pembliton,	—	12 Cox, 607	578
People, The,	v. Alger	1 Parker, 333	124
——	v. Mosher	2 Parker, 195	288
——	v. Murray	14 Cal. 159	119
——	v. Santvoord	9 Cowen, 655	615
Perham, *In re*,		5 H. & N. 30	594
Perkins,	R. v.,	4 C. & P. 537	35, 61
——	—	2 Den. 459	350
Perrott,	—	2 M. & S. 379	413
Perry,	—	Dears. 471	230, 826
——	—	15 Cox, 169	298
——	—	10 R. L. 65	352
——	v. Watts	3 M. & G. 775	837
Petrie,	R. v.,	1 Leach, 294	385
——	—	20 O. R. 317	789, 829
Phelps,	—	Car. & M. 180	17, 622
——	—	2 Moo. 240	820, 822
——	—	1 Russ. 781	825
Philips,	—	8 C. & P. 736	8
Philipps,	—	6 East, 463	61
——	—	2 East P. C. 662	327, 374
Phillips,	—	2 Moo. 252	58
——	—	1 Lewin, 105	505
——	—	R. & R. 369	615
——	—	11 Cox, 142	789
——	—	3 Cox, 226	824
Phillpot,	—	Dears. 179	149, 150
Philp,	—	1 Moo. 263	559, 562
Philpotts,	—	1 C. & K. 112	402, 408
Phipoe,	—	2 Leach, 673	394, 448
Piche,	—	30 U. C. C. P., 409	232
Pickford,	—	4 C. & P. 237	450
Pickup,	—	10 L. C. J. 310	415
Pierce,	—	13 O. R. 226	286, 287
——	—	6 Cox, 117	628

		PAGE.
Pierce, R. v.,	16 Cox, 213	675
—— —	Bell, 235	902
Pigott, —	11 Cox, 44	73
Pike, —	1 Leach, 317	391
Pinkney, —	2 East P. C. 818	431
Pinney, —	5 C. & P. 254	22
—— —	3 B. & Ad. 947	56, 83
Piot, *Ex parte*,	15 Cox, 208	344
Pitman, R. v.,	2 C. & P. 423	373
Pitts, —	Car. & M. 284	172
Plante, —	7 Man. L. R. 537	872
Plummer, —	Kel. 109	33, 34
Pocock, —	17 Q. B. 34	192
Pointon v. Hill,	12 Q. B. D. 306	142
Pool, R. v.,	9 C. & P. 728	820
Poole, —	Dears. & B. 345	382
Pope, —	6 C. & P. 346	332
Popplewell, —	20 O. R. 303	454
Potter, —	2 Den. 235	477
Poulton, —	5 C. & P. 329	173, 205
Power v. Canniff	13 U. C. Q. B. 403	139
Powles, R. v.,	4 C. & P. 571	214
Powner, —	12 Cox, 235	500, 531
Poynton, —	L. & C. 247	372
Pratt, —	1 Moo. 250	311
—— —	8 Cox, 334	407
Preedy, —	17 Cox, 433	134
Pressy, —	10 Cox, 635	130
Prestney, —	3 Cox, 505	586
Preston, —	2 Den. 353	332
Price, —	7 C. & P. 178	26
—— —	12 Q. B. D. 247	139
—— —	8 C. & P. 19	553
—— —	9 C. & P. 729	561
—— v. Seeley	10 Cl. & F. 28	21, 622
Prince, R. v.,	13 Cox, 138	11, 128, 294
—— —	11 Cox, 193	313
Pritchard, —	L. & C. 34; 8 Cox, 461	683, 841, 843
—— —	7 C. & P. 303	754
Privett, —	1 Den. 193	333
Proud, —	L. & C. 97; 9 Cox, 22	365
Provost, —	M. L. R. 1 Q. B. 473	447, 771, 871
Prowes, —	1 Moo. 349	396
Pruntney, —	16 Cox, 344	796, 797
Puddick, —	4 F. & F. 497	274, 760
Puddifoot, —	1 Moo. 247	836
Pulbrook, —	9 C. & P. 37	520
Pulham, —	9 C. & P. 280	39, 601
Purchase, —	Car. & M. 617	359

		PAGE.
Purwood, R. v.	3 A. & E. 815	132
Pym, —	1 Cox, 339	158, 210

Q.

Queen, The, v. Rozan	2 Mauritius Decisions, 35	721
Queen's Case	2 Brod. & B. 288	807, 808
Quinn, R. v.,	1 R. & G. (N. S.) 139	710

R.

Radbourne, R. v.,	1 Leach, 457	797
Radcliffe, —	12 Cox, 474	411
—— —	Fost. 36, 40	754
Radford. —	1 Den. 59	504
Rae, —	11 Cox. 554	324
Rafferty v. The People,	12 Cox, 617	177
Ragg, R. v.,	Bell, 214	407
Ramsay, —	15 Cox, 231	73, 304
Ransford, —	13 Cox, 9	599, 817
Ratcliffe, —	15 Cox, 127	275
—— —	Fost. 40	780
Rawlins, —	2 East P. C. 617	374
—— —	7 C. & P. 150	460
Ray, —	20 O. R. 212	282
Rea, —	12 Cox, 190	282
Read, —	1 Den. 377	260, 269, 275
Read v. Coker,	13 C. B. 850	260
Reane, R. v.,	2 East P. C. 734	437
Reardon, —	L. R. 1 C. C. R. 31	349
Redford, —	11 Cox, 367	366
Redman, —	10 Cox, 159	454
Reece, —	2 Russ. 254	377
Reed, —	Car. & M. 308	11
—— —	12 Cox, 1	121, 141
—— —	2 Moo. 62	519
Reed v. Nutt,	17 Cox, 86; 24 Q. B. D. 669	266
Reid, R. v.,	2 Den. 88	821
Regnier, —	Ramsay's App. Cas. 188	708
Remon, —	16 O. R. 560	141
Rhodes, —	22 O. R. 480	508, 795
Rice, R. v.	3 East, 581	61
—— —	10 Cox, 155; L. R. 1 C. C. R. 21	135, 142
—— —	Bell, 87	377
Richards, —	13 Cox, 611	42, 601
—— —	11 Cox, 43	452, 454
—— —	1 M. & Rob. 177	672
Richardson, R. v.	6 C. & P. 365	351
—— —	8 O. R. 651	872

		PAGE.
Richmond, R. v.,	1 C. & K. 240	548
Rider, —	8 C. & P. 539	764
Ridgeley, —	1 East P. C. 171	547
Ridgway, —	3 F. & F. 838	407
Riel, —	2 Man. L. R. 321	201
Riel, v. R.,	16 Cox, 48; 10 App. Cas. 675	47
Riley, R. v.	16 Cox, 191; 18 Q. B. D. 481	271, 273
—— —	6 Cox, 88; Dears. 149	315
Rinaldi, —	L. & C. 330	526
Ring, —	17 Cox, 491	42, 44, 814
Ritchie, —	1 U. C. L. J. (N. S.) 272	957
Ritson, —	11 Cox, 352	492
Roadley, —	14 Cox, 463	275
Roberts, —	Dears. 539	43, 547
—— —	14 Cox, 101	88, 356
—— —	3 Cox, 74	351
—— —	2 East P. C. 487	464
—— —	2 East P. C. 956	503
—— —	12 Cox, 574	899, 901
—— v. Orchard,	2 H. & C. 769	621
Robertson, R. v.,	L. & C. 483	451
Robins, —	1 C. & K. 456	293
—— —	1 Leach, 290	436
Robinson, —	Bell, 34	338
—— —	R. & R. 321	383, 476
—— —	9 L. C. R. 278	414
—— —	2 Leach, 749	449
—— —	2 M. & Rob. 14	453
—— —	1 Moo. 327	465
—— —	10 Cox, 107	543
—— —	L. & C. 604	554
—— —	2 Burr. 800	960
Robshaw v. Smith,	38 L. T. N. S. 424	298
Robson, R. v.,	L. & C. 93	320
—— —	Warb. Lead. Cas. 139	345
Roche, —	1 Leach, 134	717, 718
Roden, —	12 Cox, 630	175
Roderick, —	7 C. & P. 795	817
Roe, —	11 Cox, 554	324
Roebuck, —	Dears. & B. 24	43, 398, 401, 815
Rogers, —	14 Cox, 22	357
—— —	1 Leach, 89	461
—— —	9 C. & P. 41	519
—— —	2 Moo. 85	548
—— —	2 B. C. L. R. 119	764
Rogier, —	1 D. & R. 284	135
—— —	2 D. & R. 431	430
Rolfe, —	Fost. 266	974
Rose, —	15 Cox, 540	22

		PAGE.
Rose Milne, R. v.,	4 P. & B. (N. B.), 394	776
Rosenberg, —	1 C. & K. 233	318
Rosinski, —	1 Moo. 19	262
Ross, —	M. L. R. 1 Q. B. 227; 28 L. C. J. 261	97, 871
Rosser, —	7 C. & P. 648	387, 789, 791
Rothwell, —	12 Cox, 147	165
Rouleau, —	16 Q. L. R. 322	775
Rowed, —	3 Q. B. 180	121
Rowlands, —	2 Den. 364	594, 596, 851
Rowley, —	Archbold, 632	165
—— —	R. & R. 110	523
Rowton, —	L. & C. 520	766
Roxburgh, —	12 Cox, 8	236
Roy, —	11 L. C. J. 89	430, 597
Ruck, —	1 Russ. 757 (n)	609
Ruckmaboye v. Lulloobhoy Mottichund	8 Moo. P. C. 4	633
Rudge, R. v.,	13 Cox, 17	345, 398, 820
Rudland, —	4 F. & F. 495	273, 274
Rugg, —	12 Cox, 16	148
Russell, —	1 Moo. 356	33, 226, 228, 840, 851
—— —	1 Moo. 377	465, 472
—— —	Car. & M. 247	734
—— —	Ramsay's App. Cas. 199	750
Russett, —	17 Cox, 534	312, 398
Ryalls v. R.,	11 Q. B. 781, 795	692
Ryan, R. v.,	2 M. & Rob. 213	214, 221
—— —	2 Moo. 15	233, 705, 981
Ryland, —	L. R. 1 C. C. R. 99	143, 708
—— —	11 Cox, 101	275, 817
Ryley v. Brown,	17 Cox, 79	718
Rymal, R. v.,	17 O. R. 227	416
Rymes, —	3 C. & K. 326	840

S.

S. v. S.,	16 Cox, 566	602
Sainsbury, R. v.,	4 T. R. 451	530
Sainsbury v. Matthews,	4 M. & W. 343	838
Salmon, R. v.,	14 Cox, 494	149, 199
Salvi, —	10 Cox, 481 (n)	170, 721
Samuels, —	16 R. L. 576	697
Sanders, —	9 C. & P. 79	477
Sandoval, —	Warb. Lead Cas. 43	52
Sansome, —	1 Den. 545	981
Satchwell, —	12 Cox, 449	562
Sattler, —	Dears & B. 525	609
Saunders, —	Plowd. 475	37
—— —	13 Cox, 116	122, 141

		PAGE.
Saunders, R. v.,	7 C. & P. 277	198
—— —	14 Cox, 180	243
—— —	8 C. & P. 265	261
Savage, —	13 Cox, 178	281, 282
—— —	1 C. & K. 75	713
Sawyer, —	R. & R. 294	611
Scalbert, —	2 Leach, 620	789
Schleter, —	10 Cox, 409	754
Schmidt, —	Warb. Lead Cas. 180	349
Schohl v. Kay,	5 Allan (N. B.), 244	602
School, R. v.,	26 U. C. Q. B. 212	692
Scott, —	28 L. C. J. 264	149
—— —	R. & R. 13	683
—— —	1 Leach, 401	716
Scott v. R.,	2 S. C. R. 349; 21 L. C. J. 225	394
Scott, *ex parte*,	9 B. & C. 446	621
Scully, R. v.,	1 C. & P. 319	204
Sears, —	1 Leach, 415	332
Selby, —	16 O. R. 255	508
Sellars, —	6 L. N. 197	303
Sellis, —	7 C. & P. 850	173, 206
Selten, R. v.,	11 Cox, 674	169
Selway, —	8 Cox, 235	443
Semple, —	1 Leach, 420	309, 859
Seneeal, —	8 L. C. J. 287	841, 843
Senior, —	1 Moo. 346	174, 197, 206
Serne, —	16 Cox, 311	211
Serva, —	1 Den. 104	606
Sessinghurst-house Case, R. v.,	1 Hale, 461	33
Seward, R. v.,	1 A. & E. 706	596
Shannon, —	23 N. B. Rep. 1	266
Sharp, —	5 P. R. Ont. 135	610
Sharpe, —	Dears. & B. 160	139
—— —	Dears. 415	628
—— —	2 Lewin, 233	628
Shaw, —	6 C. & P. 372	172
—— —	L. & C. 579	869
—— —	23 U. C. Q. B. 616	981
Sheen, —	2 C. & P. 634	718, 831
Shepherd, —	L. & C. 147	143
—— —	11 Cox, 119	378
Sheppard, —	R. & R. 169	500
—— —	1 Leach, 226	519
—— —	11 Cox, 302	567
Shepperd, —	9 C. & P. 121	311
Sherlock, —	Warb. Lead. Cas. 53	84
Sherwood, —	Dears. & B. 251	407
Sherwood's Case,	1 C. & K. 556	166
Shickle, R. v.,	11 Cox, 189	324

		PAGE.
Shillito v. Thompson,	1 Q. B. D. 12	133
Shimmin, R. v.,	15 Cox, 122	764
Shott, —	3 C. & K. 206	843
Shukard, —	R. & R. 200	504
Shurmer, —	16 Cox, 94	796
Shuttleworth, R. v.,	22 U. C. Q. B. 372	108
—— —	2 Den. 341	779
Sill's Case,	Dears. 132	706, 857
Simmonsto, R. v.,	1 C. & K. 164	282
Simons, —	2 East P. C. 731	437
—— —	2 East P. C. 712	440
Simpson, —	1 Lewin, 172	196
—— —	Dears. 421	384
—— —	5 Jur. 462	745
Sinclair's Case,	2 Lewin, 49	221
Sirois, R. v.,	27 N. B. Rep. 610	624, 852
Skeen, —	Bell, 97	370
Skeet, —	4 F. & F. 931	34
Slack, —	M. L. R. 7 Q. B. 408	366
Sloane, —	92 Au. Leg. 144	145
Slowly, —	12 Cox, 269	311
Small, —	8 C. & P. 46	310
Smiley, —	22 O. R. 686	137
Smith, —	L. & C. 607	143
—— —	8 C. & P. 160	173, 203
—— —	11 Cox, 210	181, 191
—— —	2 L. N. 223	149
—— —	8 C. & P. 153	198
—— —	16 Cox, 170	201
—— —	Dears. 559	217
—— —	Dears. 494	350
—— —	R. & R. 267	361, 367
—— —	R. & R. 516	364
—— —	1 Den. 510	450, 869
—— —	R. & R. 417	457, 467
—— —	2 East P. C. 497	458
—— —	1 M. & Rob. 256	461
—— —	1 Moo. 178	463
—— —	2 M. & Rob. 115	477
—— —	4 P. R. (Ont.), 215	508
—— —	2 Moo. 295	516
—— —	1 Den. 79	519
—— —	L. & C. 168	520
—— —	4 C. & P. 569	562, 573
—— —	L. & C. 131	615
—— —	34 U. C. Q. B. 552	719, 820
—— —	19 O. R. 714	724
—— —	1 F. & F. 36	728
—— —	1 Russ. 749	771

		PAGE.
Smith, R. v.,	R. & R. 339	797
—— —	38 U. C. Q. B. 218	868, 870, 872
—— —	Temple & Mews' Cr. App. Cas. 214	869
—— —	12 Cox, 597	903
—— v. R.	M. L. R. 4 Q. B. 325	142
—— —	2 L. N. 223	149
—— v. Brandram,	2 M. & G. 244	838
—— v. Knowlden,	2 M. & G. 561	838
—— v. Thomasson,	16 Cox, 740	591
Smyth, R. v.,	5 C. & P. 201	60
Smythies, R. v.,	1 Den. 498	728
Snelling, —	Dears. 219	519
Snow v. Hill,	15 Cox, 737; 14 Q. B. D. 588	134
Snowley, R. v.,	4 C. & P. 390	358
Soares, —	R. & R. 25	31, 518
Societe St. Louis v. Villeneuve,	21 L. C. J. 309	139
Solomons, R. v,,	17 Cox, 93	312, 398, 399
Somerton, —	7 B. & C. 463	561
Soucie, —	1 P. & B. (N.B.), 611	800
Spanner, —	12 Cox, 155	468, 469
Sparrow, —	Bell, 298	254
Speed, —	15 Cox, 24	406
Spelman, v. R.	13 L. C. J. 154	855
Spencer, R. v.,	10 Cox, 525	197
—— —	3 C. & P. 420	402
—— —	2 East P. C. 712	440
—— —	Dears. & B. 131	561
—— —	1 C. & K. 159	699
—— —	R. & R. 299	364
Spiller, —	5 C. & P. 333	196
Spilling, —	2 M. & Rob. 107	196
Spires v. Barrick	14 U. C. Q. B. 424	25
Spriggs, R. v.,	1 M. & Rob. 357	464
Sproule, *In re*,	12 S. C. R. 140	750, 870
Sprungli, R. v.,	4 Q. L. R. 110	610
Squire, —	R. & R. 349	361
Stainer, —	11 Cox, 483	366
Stancliffe, —	11 Cox, 318	901, 902
Standley, —	R. & R. 305	33, 323
Stannard, —	L. & C. 349	129, 135
St. Amour, —	5 R. L. 469	732
Stansfeld, —	8 L. N. 123	417, 855
Stanton, —	5 Cox, 324	266
—— —	1 C. & K. 415	273
Stapylton, —	8 Cox, 69	680
Starey v. Chilworth Mfg. Co.	17 Cox, 55	534
Steel, R. v.,	13 Cox, 159	300
—— —	1 Leach, 451	755
—— v. Smith,	1 B. & Ald. 94	677

		PAGE.
Steels, R. v.,	11 Cox, 5	401
Stephens, —	Warb. Lead. Cas. 37	12
—— —	L. R. 1 Q. B. 702	131
—— —	11 Cox, 669	766
—— v. Myers,	4 C. & P. 349	260
Stephenson, R. v.,	15 Cox, 679; 13 Q. B. D. 331	139
—— —	L. & C. 165	797
Sterling, —	1 Leach, 99	515
Sternberg, —	8 L. N. 122	598
Sterne, —	1 Leach, 473	36, 692, 820
Stevens, —	5 East 244	676
Stevenson v. Wilson,	2 L. C. J. 254	21
Steventon, R. v.,	1 C. & K. 55	672
Steward, —	2 East P. C. 702	436
Stewart, —	R. & R. 363	30, 31, 518
—— —	R. & R. 288	43
—— —	25 U. C. C. P. 440	521, 522
—— —	5 Irvine, (Scotch) 310	722
—— —	13 Cox, 296,	799
—— —	8 P. R. (Ont.) 297	957
Stiles, —	2 Russ. 316	836
St. George, —	9 C. & P. 483	219, 220, 756, 821, 825
Stitt, —	30 U. C. C. P. 30	279
St. John Long, R. v.,	4 C. & P. 398	195
—— —	4 C. & P. 423	195
St. Laurent, v. R.	7 Q. L. R. 47	472
Stock, R. v.,	1 Moo. 87	309, 374
—— —	R. & R. 185	460
Stoddart, —	Dickinson's Quarter Sessions, 152	758
Stokes, —	1 Den. 307	676
Stone, —	1 F. & F. 311	402
—— —	1 Den. 181	519
Stonnell, —	1 Cox, 142	699
Stopford, —	11 Cox, 643	235
Story, —	R. & R. 81	402
Stowe, —	2 G. & O. (N.S.) 121	201
Strachan, —	20 U. C. C. P. 182	677
Strahan, —	7 Cox, 85	370
Strange, —	8 C. & P. 172	213, 690
Stroulger, —	16 Cox, 85	855
Stubbs, —	Dears. 555	870
Studd, —	10 Cox, 258	869
Sturge, —	3 E. & B. 734	842
Summers, —	11 Cox, 248	700
Suprani, R. v.,	13 R. L. 577; 6 L. N. 269	695
Suter, —	10 Cox, 577	407
Sutton, —	8 C. & P. 291	341
—— —	2 Str. 1074	546
Sven Seberg, —	11 Cox, 520	610

		PAGE.
Swalwell, R. v.,	12 O. R. 391	940
Swatkins, —	4 C. & P. 548	561, 760
Swindall, —	2 C. & K. 230	33, 36
— —	2 Cox, 141	192
Symonds v. Kurtz	16 Cox, 726	14

T.

Tacey, R. v.,	R. & R. 452	577
Taffs, —	4 Cox, 169	365
Taft, —	1 Leach, 172	501
Tancock, —	13 Cox, 217	717
Taplin, —	2 East. P. C. 712	437
Tasse, —	8 L. N. 98	304
Tatlock, —	13 Cox, 328	344
— v. Harris,	3 T. R. 176	496
Taylor, R. v.,	1 Leach, 360	35
— —	2 Lewin, 215	182
— —	13 Cox, 68	49, 61
— —	9 C. & P. 672	194
— —	11 Cox, 261	238, 819
— —	12 Cox, 627	318
— —	10 Cox, 544	367
— —	R. & R. 418	386
— —	1 Leach, 214	502
— —	1 F. & F. 511	564
— —	15 Cox, 265	597, 764
— —	11 Cox, 340	713
— —	1 C. & K. 213	518
— v. Newman	9 Cox, 314; 4 B. & S. 89	375
— v. McCullough	8 O. R. 309	602
Teague, R. v.,	2 East P. C. 979	503
Tew, —	Dears. 429	752, 866
Thayer, —	5 L. N. 162	598
Theal, v. R.	7 S. C. R. 397	200, 687
The World, R. v.,	13 Cox, 305	304
Thoman, —	12 Cox, 54	578
Thomas, —	Warb. Lead. Cas. 79	329, 430
— —	Carr. Supp. 3rd ed. 295	386
— —	2 Moo. 16	520
— —	13 Cox, 52	555, 699
Thompson, —	1 Moo. 80	185
— —	1 Moo. 78	321, 383
— —	L. & C. 233	313, 402
— —	1 Den. 549	317
— —	1 Leach, 338	385
— —	2 Leach. 771	459
— —	2 East P. C. 515	469
— —	2 Cox, 377	474

		PAGE
Thompson, R. v.,	11 Cox, 362	488
—— —	13 Cox, 181	799
Thorley, —	1 Moo. 343	358
Thorn, —	2 Moo. 210	520
Thurborn, —	1 Den. 387	307, 329
Tierney, —	R. & R. 74	49
—— —	29 U. C. Q. B. 181	552, 860
Timmins, —	Bell, 276	293
Timothy v. Simpson,	1 C. M. & R. 757	21, 622
Tisdale, R. v.,	20 U. C. Q. B. 272	452
Tite, —	L. & C. 29 ; 8 Cox, 458	361
Titley, —	14 Cox, 502	278
Tivey, —	1 C. & K. 704	559
Tivnan, *In re*	5 B. & S. 679	610
Todd, R. v.,	1 Cox, 57	500, 506
Toland, —	22 O. R. 505	508
Tolfrie, —	1 Moo. 243	317
Tollett, —	Car. & M. 112	317, 318
Tolson, —	16 Cox, 629 ; 23 Q. B. D. 168	11, 280, 295
Tongue, —	Bell, 289	365
Topping, —	7 Cox, 103	280
Topple, —	3 R. & C. (N. S.) 566	369
Torpey, —	12 Cox, 45	11
Tower, —	4 P. & B. (N. B.) 168	570
Towers, —	12 Cox, 530,	189, 209
Towle, —	R. & R. 314	35, 228
—— —	2 Marsh. 466	692
Townley, R. v.,	12. Cox 59	324
Townly's Case,	Fost. 7	780
Townsend, R. v.,	Car. & M. 178	356
—— —	1 Den. 167	361
Tracey, —	6 Mod. 30	29
Trainer, —	4 F. & F. 105	194
Tranchant, —	9 L. N. 333	450
Trapshaw, —	1 Leach, 427	461
Trebilcock, —	Dears. & B. 453	332, 771, 868
Tremblay, —	18 L. C. J. 158	746
—— v. Bernier,	21 S. C. R. 309	602
Tremearne, R. v.,	R. & M. 147	706
Trenfield, —	1 F. & F. 43	500
Treveth, —	15 Cox, 289	766
Trevenner, —	2 M. & Rob. 476	382
Triganzie, —	15 O. R. 294	766
Trilloe, —	2 Moo. 260	173, 206
Tucker, —	1 Moo. 134	452
Tuckwell, —	Car. & M. 215	32
Tulley v. Corrie,	10 Cox, 640	241
Turner, R. v.,	9 Cox, 145	285
—— —	1 Moo. 347	351, 601

		PAGE.
Turner, R. v.,	11 Cox, 551	363
—— —	1 Leach, 305	461
—— —	1 Moo. 239; 4 B. & Ald. 510	558, 705, 708, 858, 981
Turton, —	6 Cox, 385	862
Twose, —	Warb. Lead. Cas. 1	11
Tyler, —	8 C. & P. 616	9
—— —	1 Moo. 428	223
Tyers, —	R. & R. 402	360
Tylney, —	1 Den. 319	496, 497, 515
Tymms, —	11 Cox, 645	842
Tyell, —	L. R. 1 C. C. R. 177	869
Tyrie, —	11 Cox, 241	365

U.

United States v. Holmes,	1 Wall. Jr. 1	10
Upton, R. v.,	5 Cox, 298	248

V.

Vamplew, R. v.,	3 F. & F. 520	8
Van Butchell, R. v.,	3 C. & P. 629	195
Vandercomb, —	2 Leach, 708	718, 859
Vane's (Sir H.) Case,	Kel. 15	28
Varley, R. v.,	1 East P. C. 164	543
Vaughan, —	8 C. & P. 276	507
Vaux's Case,	4 Rep. 44	725
Verelst, R. v.,	3 Camp. 432	256
Villensky, —	(1892) 2 Q. B. 597	349, 355
Vilmont v. Bentley,	12 App. Cas. 471	905
Vincent, R. v.,	9 C. & P. 91	53, 57, 73
—— —	2 Den. 464	683, 841
Vodden, —	Dears. 229	770
Vonhoff, —	10 L. C. J. 292	771
Vreones, —	17 Cox, 267; (1891) 1 Q. B. 360	100

W.

Wade, R. v.,	11 Cox, 549	328
—— —	10 Cox, 573	721
—— —	1 Moo. 86	790, 850
Wainwright, R. v.,	13 Cox, 171	768, 799
Waite, —	(1892) 2 Q. B. 600	8, 823
—— —	17 Cox, 554	275
Wakeling, —	R. & R. 504	407
Walker, —	13 Cox, 94	83
—— —	7 O. R. 186	141
—— —	1 C. & P. 320	192
—— —	2 M. & Rob. 446	266

		PAGE.
Walker, R. v.,	1 Moo. 155	323, 371
—— —	Dears. & B. 600	362
—— —	Dears. 358	622
—— v. Mayor of London,	11 Cox, 280	902
Walkley, R. v.,	4 C. & P. 132	350
—— —	2 East P. C. 953	502
Wallace, —	2 Moo. 200	562
—— —	4 C. & P. 132	350
Walne, —	11 Cox, 647	406
Walsby v. Anley,	3 E. & E. 516	594
Walsh, R. v.,	1 Moo. 14	321
Walter, —	14 Cox, 579,	750
Walter, *ex parte*,	Ramsay App. Cas. 183	121
Walters, R. v.,	1 Moo. 13	482
Walton, —	L. & C. 288	451
Warburton,—	11 Cox, 584	597
Ward, —	10 Cox, 42	224, 453, 689
—— —	10 Cox, 573	721, 768
Wardle, —	Car. & M. 647	790
Warren, —	16 O. R. 590	135, 141
Warshaner,—	1 Moo. 466	526, 857
Wason, *ex parte*,	38 L. J. Q. B. 302	730
Waters, R. v.,	12 Cox, 390	110
—— —	1 Den. 356	703, 858
Watkins, —	2 Moo. 217	823
Watson, —	Dears. & B. 348	401
—— v. Boddell,	14 M. & W. 57	623
Watts, R. v.,	6 Cox, 304	394
Wavell, —	1 Moo. 224	410, 524
Waverton,—	2 Den. 340	857
Wealand, R. v.,	16 Cox, 402; 20 Q. B. D. 827	796
Weaver, —	L. R. 2 C. C. R. 85	123
Webb, —	1 M. & Rob. 405	158
—— —	2 Lewin, 196	195
—— —	1 Moo. 431	382
—— —	1 Den. 338	706, 867
—— —	4 F. & F. 862	761
Webster, —	16 Q. B. D. 136	129
—— —	L. & C. 77	345, 841
—— v. Watts,	11 Q. B. 311	21
Wedge, R. v.,	5 C. & P. 298	121
Weeks, —	L. & C. 18	548
Weir, —	1 B. & C. 288	187
Welch, —	2 Den. 78	504, 553
—— —	13 Cox, 121	576
Wellard, —	14 Q. B. D. 63	129
Wells, —	1 F. & F. 109	316
—— v. Abrahams,	L. R. 7 Q. B. 554	602
Wellings, R. v.	14 Cox, 105	798

		PAGE.
Welman, R. v.	Dears. 188; 6 Cox, 153	409
Welsh, —	11 Cox, 336	163
—— —	13 Cox, 121	578
Welton, —	9 Cox, 297	839, 841
Wemyss v. Hopkins,	L. R. 10 Q. B. 378	266
Wenmouth, R. v.,	8 Cox, 348	467, 476
West, R. v.,	2 C. & K. 784	205, 275
—— —	Dears. 402	332
—— —	Dears. & B. 575	400
—— —	1 Den. 258	509
—— —	2 Russ. 1087	577
—— v. Smallwood,	3 M. & W. 418	14
—— v. The State,	1 Wis. 209	123
Westbeer, R. v.,	1 Leach, 12; 2 Str. 1133	371, 812
Western, R. v.,	11 Cox, 93	842
Westley, —	11 Cox, 139	267, 716
—— —	Bell, 193	843
Weston, —	14 Cox, 346	199, 764
Westwood, —	R & R. 495	460, 482
Whalley, —	2 Cox, 231	829
Wheatly, —	2 Burr, 1125	430, 703, 706
Wheeldon, —	8 C. & P. 747	471, 472, 475
Wheeler, —	3 C. & P. 585	470
Whelan, —	28 U. C. Q. B. 2, 108	782, 849
Whiley, —	R. & R. 90	502
Whitehurch, R. v.,	16 Cox, 743; 24 Q. B. D. 420	279, 596, 869
White, R. v.,	R & R. 99	34
—— —	12 Cox, 83	151
—— —	Dears. 203	322
—— —	1 F. & F. 665	352
—— —	2 Moo. 91	366
—— —	1 Den. 208	524
—— —	21 U. C. C. P. 354	677
—— —	3 Camp. 98	761
—— —	2 Cox, 192	766
—— —	1 Leach, 430	850
—— v. R.,	13 Cox, 318	855
—— v. Feast,	L. R. 7 Q. B. 353	586
Whitehead, R. v.,	3 C. & K. 202	196
Whitehurst v. Fincher,	17 Cox, 70	134
Whiteley, R. v.,	1 Lewin, 173	185
Whiteman, —	Dears. 353	378, 578
Whittingham, R. v.,	9 C. & P. 234	573
Wickham, —	10 A. & E. 34	401, 402, 408
Wigg, —	2 Salk. 460	969
Wild's Case,	2 Lewin, 214	204
Wiley, R. v.,	2 Den. 37	349, 816
Wilkes, —	4 Burr. 2577	966
Wilkins, —	L. & C. 89	241

		PAGE.
Wilkinson, R. v.,	R. & R. 470	319
Wilkinson's Case,	1 Leach, 321	322
Wilkinson v. Dutton,	3 B. & S. 821	266
Wilks' Case,	2 East P. C. 957	497, 515
Williams, R. v.,	1 Den. 39	30, 216
—— —	1 Salk. 383	135, 141
—— —	11 Cox, 684	231
—— —	8 C. & P. 286	261
—— —	1 C. & K. 195	315
—— —	1 Moo. 107	341
—— —	6 C. & P. 626	368
—— —	7 C. & P. 354	410
—— —	9 Cox, 338	578
—— —	12 Cox, 101	799
—— —	2 Camp. 646	819
—— —	1 Leach, 536	966
—— v. E. I. Co.	3 East, 192	144
Williamson, R. v.,	3 C. & P. 635	195
—— —	11 Cox, 328	404
Willis, —	1 Moo. 375	308
—— —	12 Cox, 192	700
Willot, —	12 Cox, 68	411
Willoughby, —	2 East P. C. 944	518
Willshire, —	14 Cox, 541	286
Wilson, —	Dears. & B. 127	277
—— —	8 C. & P. 111	312
—— —	R. & R. 115	460
—— —	1 Den. 284	493, 502
—— —	12 Cox, 622	799
—— —	2 Moo. 52	349, 859
Windhill Local Board v. Vint	17 Cox, 41; 45 Ch. D. 351	104, 407
Winkworth, R. v.,	4 C & P. 444	437
Winslow, —	8 Cox, 397	175
Winsor, —	10 Cox, 276; 7 B. & S. 490	721, 788, 850, 869
—— —	6 B. & S. 143	725
Winterbotham —	22 St. Tr. 823	72
Winterbottam —	1 Den. 41	517
Withers, —	1 East P. C. 295	186
Wollaston, —	12 Cox, 180	118, 119, 121, 261
Wolstenholme —	11 Cox, 313	367
Wood, —	1 Moo. 278	216
—— —	14 Cox, 46	272
—— —	3 B. & Ad. 657	851
—— v. Burgess,	16 Cox, 729	295, 534
Woodfield, R. v.,	16 Cox, 314	791
Woodhead, —	1 M. & Rob. 549	389
Woodhall, —	12 Cox, 240	447, 811, 860
Woodhurst, —	12 Cox, 443	262
Woodward, —	L. & C. 122	350

		PAGE.
Woodward, R. v.,	1 Moo. 323	561, 672
Wooldridge, —	1 Leach, 307	544
Woolf, —	1 Chit. Rep. 401	787
Woolford, —	1 M. & Rob. 384	348
Woolley, —	1 Den. 559	401, 848
Woolmer, —	1 Moo. 334	177
Wootton v. Dawkins,	2 C. B. N. S. 412	244
Worrall, R. v.,	7 C. & P. 516	377
Wright, —	9 C. & P. 754	174
—— —	4 F & F. 967	273
—— —	7 Cox, 413	335
—— —	7 C. & P. 159	392
—— —	Styles, 156	443
—— —	1 Lewin, 268	682
—— —	2 F. & F. 320	706, 843
—— —	1 Burr. 543	960
Wycherley, —	8 C. & P. 262	850
Wynne, —	2 East P.C. 664	332

Y.

Yates, R. v.,	15 Cox, 272	732
—— v. R.	15 Cox, 686	732
Yeadon, R. v.,	L. & C. 81	238, 254, 819
Young, —	8 C. & P. 644	35, 180
—— —	1 Russ. 291	111
—— —	10 Cox, 371	185
—— —	14 Cox, 114	270, 869
—— —	5 O. R. 410	353
—— —	3 T. R. 98	401
—— —	1 Leach, 511	687
—— v. R.	3 T. R. 98, 105, 106	692

Z.

Zollverein, The	1 Sw. Adm. Rep. 96	610
Zulueta, R. v.,	1 C. & K. 215; 1 Cox, 20	612, 757

LIST OF ABBREVIATIONS.

A. & E.	Adolphus and Ellis, Reports
B. & Ad.	Barnewall and Adolphus' "
B. & Ald.	Barnewall and Alderson's "
B. & C.	Barnewall and Cresswell's "
B. & P.	Bosanquet and Puller's "
B. & S.	Best and Smith's "
Bing.	Bingham's K. B "
Brod. & B.	Broderip and Bingham's "
Burr.	Burrows' "
C. B.	Common Bench "
C. B. N. S	Common Bench New Series "
Cl. & F.	Clark & Finelly's "
C. & D.	Crawford and Dixon's "
C. & K.	Carrington and Kirwan's N. P. Reports
Car. & M.	Carrington and Marshman " "
C. & P.	Carrington and Payne's " "
Cald.	Caldecott's Reports
Camp.	Campbell's Reports
Carr. Supp.	Carrington's Criminal Law
Chit.	Chitty's "
Chit. Rep.	Chitty's Reports
C. L. J.	Canada Law Journal, Ont
C. L. T.	Canadian Law Times, Ont.
C. M. & R.	Crompton, Meeson & Roscoe's Reports
Co.	Coke's Reports
C. P. D.	Law Reports, Common Pleas Division
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
D. & L.	Dowling and Lowndes' Reports
D. & M.	Davison and Merivale's "
D. & R.	Dowling and Ryland's "
Dears.	Dearsley's " "
Dears. & B.	Dearsley and Bell's Crown Cases
Den.	Denison's Crown Cases
Dor. Q. B. R.	Dorion's Queen's Bench Reports, Montreal
Doug.	Douglas Reports
E. & B.	Ellis and Blackburn's Reports
E. B. & E.	Ellis, Blackburn and Ellis' "

E. & E.	Ellis and Ellis' "
Ex. D.	Law Reports, Exchequer Division
F. & F.	Foster and Finlason's "
Fost.	Foster's Crown Cases
G. & D.	Gale and Davison's Reports
G. & O.	Geldert and Oxley's Nova Scotia Reports
H. & C.	Hurlstone and Coltman's
H. & N.	Hurlstone and Norman's "
Han.	Hannay's New Brunswick "
Ill.	Illinois State "
Ind.	Indiana Reports
Inst.	Coke's Institutes
Ir. R. C. L.	Irish Common Law Reports
Ir. L. R.	Irish Law Reports
J. P.	Justice of the Peace
Jur.	Jurist
Kel.	Kelyng's Crown Cases
L. & C.	Leigh and 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's "
L. J.	Law Journal (England)
L. N.	Legal News, P. Q.
L. R. C. C. R.	Law Reports, Crown Cases Reserved
L. R. C. P.	Law Reports, Common Pleas
L. R. H. L.	Law Reports, English and Irish Appeals
L. R. P. C.	Law Reports, Privy Council
L. R. Q. B.	Law Reports, Queen's Bench
L. T.	Law Times Reports
M. & G.	Manning and Granger's Reports
M. & M.	Moody and Malkin's "
M. & Rob.	Moody and Robinson's "
M. & S.	Maule and Selwyn's "
M. & W.	Meeson and Welsby's "
Man. L. R.	Manitoba Law Reports
Marsh.	Marshall's Reports
M. L. R. Q. B.	Montreal Law Reports, Queen's Bench
Me.	Maine State Reports
Mod.	Modern Reports
Moo.	Moody's Crown Cases

N. B. Rep.	New Brunswick Reports
N. S. Rep.	Nova Scotia Reports
O. R.	Ontario Reports
Ont. A. R.	Ontario Appeal Reports
P. & B.	Pugsley and Burbidge, New Brunswick Reports
Plow.	Plowden's K. B. Report
P. R. (Ont.)	Practice Reports, Ontario
Pugs.	Pugsley's New Brunswick Reports
P. Wms.	Peere Williams, K. B. Reports
Q. B.	Queen's Bench
Q. B. D.	Law Reports, Queen's Bench Division
Q. L. R.	Quebec Law Reports
R. & C.	Russell & Chesley's Nova Scotia Reports
R. & M.	Ryan and Moody's Reports
R. & R.	Russell and Ryan's Reports
Rep.	Coke's Reports.
R. L.	Revue Legale, P. Q.
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
Russ.	Russell on Crimes, 4th ed.
R. & G.	Russell and Geldert's Nova Scotia Reports
Salk.	Salkeld's Reports
S. C. R.	Supreme Court of Canada Reports
St. Tr.	State Trials
Str.	Strange's Reports
Taun.	Taunton's "
T. R.	Term. "
T. Raym.	T. Raymond's "
Tyr.	Tyrwhitt's "
U. C. C. P.	Upper Canada Common Pleas
U. C. Q. B.	Upper Canada Queen's Bench
Warb. Lead. Cas.	Warburton's Leading Cases on Criminal Law
W. R.	Weekly Reporter
Wheat.	Wheaton's Reports
Wil.	Wilson's K. B. Reports.

55-56 VICTORIA.

CHAP. 29.

An Act respecting the Criminal Law.

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

TITLE I.

INTRODUCTORY PROVISIONS.

PART I.

PRELIMINARY.

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

COMMENCEMENT OF ACT.

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

INTERPRETATION CLAUSE.

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

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

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

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

(*d*) The expression "cattle," includes any horse, mule, ass, swine, sheep, or goat, as well as any neat cattle or animal of the bovine species, and by whatever technical or familiar name known, and shall apply to one animal as well as to many; R. S. C. c. 172. s. 1. (*amended*); 24-25 V. c. 96, s. 10, (Imp.).

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

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

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

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

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

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

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

(*g*) The expression "document of title to goods" includes any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought and sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to: R. S. C. c. 164, s. 2 (*a*); 24-25 V. c. 96, s. 1, (Imp.).

(*h*) The expression "document of title to lands" includes any deed, map, paper or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real property, or to any interest in any real property, or any notarial or registrar's copy thereof, or any duplicate instrument, memorial, certificate or document authorized or required by any law in force in any part of Canada respecting registration of titles, and relating to such title; R. S. C. c. 164, s. 2 (*b*); 24-25 V. c. 96, s. 1, (Imp.).

(*i*) The expression "explosive substance" includes any materials for making an explosive substance; also any apparatus, machine, implement, or materials used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; and also any part of any such apparatus, machine or implement; R. S. C. c. 150, s. 2 (*b*); 46 V. c. 3, s. 9, (Imp.).

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

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

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

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

If there are two or more persons, any one or more of whom, with the knowledge and consent of the rest, have any thing in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;

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

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

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

(*o*) The expression "loaded arms" includes any gun, pistol or other arm loaded with gunpowder, or other explosive substance, and ball, shot, slug or other destructive material, or charged with compressed air and ball, shot, slug, or other destructive material, R. S. C. c. 162, s. 1 (*amended*); *R.* v. *Harris*, 5 C. & P. 159; *R.* v. *Jackson*, 17 Cox, 104; 24-25 V. c. 100, s. 19, (Imp.).

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

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

(*p*-1) In the sections of this Act relating to defamatory libel the word "newspaper" shall mean any paper, magazine or periodical containing public news, intelligence or occurrences, or any remarks or observations thereon, printed for sale and published periodically, or in parts or numbers, at intervals not exceeding *thirty-one* days between the publication of any two such papers, parts or numbers, and also any paper, magazine or periodical printed in order to be dispersed and made public, weekly or oftener, or at intervals not exceeding *thirty-one* days, and containing only or principally advertisements; 51 V. c. 44, s. 1 (*amended*).

(*q*) The expression "night" or "night time" means the interval between nine o'clock in the afternoon and six o'clock in the forenoon of the following day, and the expression "day" or "day time" includes the interval between six o'clock in the forenoon and nine o'clock in the afternoon of the same day; R. S. C. c. 164, s. 2; 24-25 V. c. 96. s. 1, (Imp.).

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

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

(*t*) The expressions "person," "owner," and other expressions of the same kind include Her Majesty and all public bodies, bodies corporate, societies, companies, and inhabitants of counties, parishes, municipalities or other districts in relation to such acts and things as they are capable of doing and owning respectively; (*new*). *See* R. S. C. c. 1, s. 4.

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

(*v*) The expression "property" includes:

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

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

(iii) Any postal card, postage stamp or other stamp issued or prepared for issue by the authority of the Parliament of Canada, or of the legislature of any province of Canada, for the payment to the Crown or any corporate body of any fee, rate or duty, and whether still in the possession of the Crown or of any person or corporation; and such postal card or stamp shall be held to be a chattel, and to be equal in value to the amount of the postage, rate or duty expressed on its face in words or figures or both; R. S. C. c. 164, s. 2; 24-25 V. c. 96, s. 1, (Imp.).

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

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

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

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

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

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

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

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

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

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

(*bb*) The expression "trustee" means a trustee on some express trust created by some deed, will or instrument in writing, or by parol, or otherwise, and includes the heir or personal representative of any such trustee, and every other person upon or to whom the duty of such trust has devolved or come, whether by appointment of a court or otherwise, and also an executor and administrator, and an official manager, assignee, liquidator or other like officer acting under any Act relating to joint stock companies, bankruptcy or insolvency, and any person who is, by the law of the province of Quebec, an "*administrateur*" or "*fidéicommissaire*"; and the expression "trust" includes whatever is by that law an "*administration*" or "*fidéicommission*"; R. S. C. c. 164, s. 2 (*c*), (*Amended*); 24-25 V. c. 96, s. 1, (Imp.).

(*cc*) The expression "valuable security" includes any order, exchequer acquittance or other security entitling or evidencing the title of any person to any share or interest in any public stock or fund, whether of Canada or of any province thereof, or of the United Kingdom, or of Great Britain or Ireland, or any British colony or possession, or of any foreign state, or in any fund of any body corporate, company or society, whether within Canada or the United Kingdom, or any British colony or possession, or in any foreign state or country, or to any deposit in any savings bank or other bank, and also includes any debenture, deed, bond, bill, note, warrant, order or other security for money or for payment of money, whether of Canada or of any province thereof, or of the United Kingdom or of any British colony or possession, or of any foreign state, and any document of title to lands or goods as hereinbefore defined wheresoever such lands or goods are situate, and any stamp or writing which secures or evidences title to, or interest in any chattel personal, or any release, receipt, discharge or other instrument, evidencing payment of money, or the delivery of any chattel personal; and every such valuable security shall, where value is material, be deemed to be of value equal to that of such unsatisfied money, chattel personal, share, interest or deposit, for the securing or payment of which, or delivery or transfer or sale of which, or for the entitling or evidencing title to which, such valuable security is applicable, or to that of such money or chattel personal, the payment or delivery of which is evidenced by such valuable security; 53 V. c. 37, s. 20; 24-25 V. c. 96, s. 1, (Imp.).

(*dd*) The expression "wreck" includes the cargo, stores and tackle of any vessel and all parts of a vessel separated therefrom, and also the property of shipwrecked persons; R. S. C. c. 81, s. 2.

(*ee*) The expression "writing" includes any mode in which, and any material on which, words or figures whether at length or abridged are written, printed or otherwise expressed, or any map or plan is inscribed; R. S. C. c. 164, s. 2; *see* R. S. C. c. 1, s. 4.

INTERPRETATION OF OTHER WORDS.

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

The Post Office Act is c. 35 of the Revised Statutes.

CARNAL KNOWLEDGE DEFINED.

SEC. 4a.—Carnal knowledge is complete upon penetration to any, even to the slightest degree, and even without the emission of seed: (*amendment of 1893*).

OFFENCES AGAINST IMPERIAL STATUTES.

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

By 28-29 V. c. 63 (Imp.), any colonial law repugnant to any Act of the Imperial Parliament is, to the extent of that repugnancy, void.

PUNISHMENTS.

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

(*a*) Death, ss. 65, 68, 127, 129, 231, 267, 935 to 949; ss. 6, 7, c. 146 R. S. C.

(*b*) Imprisonment, ss. 950 to 956;

(*c*) Whipping, s. 957;

(*d*) Fine, s. 958;

(*e*) Finding sureties for future good behaviour, s. 958;

(*f*) If holding office under the Crown, to be removed therefrom, s. 961;

(*g*) To forfeit any pension or superannuation allowance, s. 961;

(*h*) To be disqualified from holding office, from sitting in Parliament and from exercising any franchise, s. 961.

(*i*) To pay costs, s. 832;

(*j*) To indemnify any person suffering loss of property by commission of his offence, s. 836.

Why is this enactment limited to offences against "this Act"?

PART II.

MATTERS OF JUSTIFICATION OR EXCUSE.

Common Law Rules.

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

8. The matters provided for in this part are hereby declared and enacted to be justifications or excuses in the case of all charges to which they apply.

"We regard this as one of the most difficult as well as most important portions of the draft Code. . . . 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 risks of a code being so framed as to deprive an accused person of a defence to which the common law entitles him, and that it might become the duty of the Judge to direct the jury that they must find him guilty, although the facts proved that he had a defence on the merits, and would have an undoubted claim to be pardoned by the Crown. While, therefore, digesting and declaring the law as applicable to the ordinary cases, we think that the common law, so far as it affords a defence, should be preserved in all cases not expressly provided for. This we have endeavoured to do by section 19 of the draft Code."—(*Sec. 7 ante*), Imp. Comm. Rep.

Children Under Seven.

9. 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.

That is the common law: 4 Blacks. 23. No proof of the capacity of an infant under seven to commit a crime can be admitted: *see* R. v. Owen, Warb. Lead. Cas. 19.

Children Between Seven and Fourteen.

10. 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.

Such an infant is presumed to be incapable to commit any crime until the contrary is proved, and such a proof must be clear and beyond all doubt: 4 Blacks. 23.

A boy under fourteen cannot, in law, commit a rape; section 266; nor the offence of carnally knowing a girl under fourteen, under section 269, R. v. Waite, [1892], 2 Q. B. 600, nor, any of the offences where carnal connection with a woman is a necessary ingredient of the offence, or any attempt to commit rape or any of the above mentioned offences: compare R. v. Eldershaw, 3 C. & P. 396; R. v. Groombridge, 7 C. & P. 582; R. v. Philips, 8 C. & P. 736; R. v. Jordan, 9 C. & P. 118; R. v. Brimilow, 2 Moo. 122, 1 Russ. 8; R. v. Allen, 1 Den. 364.

A person of the age of fourteen and upwards is presumed to have capacity to commit any crime until the contrary is proved: *see* R. v. Owen, Warb. Lead. Cas. 19; R. v. Vamplew, 3 F. & F. 520.

INSANITY.

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

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

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

See 3 Burn's Just. 180; 1 Russ. 11; R. v. Oxford, Warb. Lead. Cas. 21, and cases there cited; R. v. Davis, 14 Cox, 563; R. v. Dubois, 17 Q. L. R. 203; R. v. Dove, 3 Stephen's Hist. 426.

"Section 22 (*sec. 11, ante*), which relates to insanity, expresses the existing law. The obscurity which hangs over the subject cannot altogether be dispelled until our existing ignorance as to nature of the will and the mind, the nature of the organs by which they operate, the manner and degree in which those

operations are interfered with by disease, and the nature of the diseases which interfere with them, are greatly diminished.

"The framing of the definition has caused us much labour and anxiety; and though we cannot deem the definition to be altogether satisfactory, we consider it as satisfactory as the nature of the subject admits of. Much latitude must, in any case, be left to the tribunal which has to apply the law to the facts in each particular case.

. . . . . .

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 allowances 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."—Imp. Comm. Rep.

Compulsion by Threats.

12. Except as hereinafter provided, compulsion by threats of immediate death or grievous bodily harm from a person actually present at the commission of the offence shall be an excuse for the commission, by a person subject to such threats, and who believes such threats will be executed, and who is not a party to any association or conspiracy, the being a party to which rendered him subject to compulsion, of any offence other than treason as defined in paragraphs *a*, *b*, *c*, *d* and *e* of sub-section one of section sixty-five, murder, piracy, offences deemed to be piracy, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm, and arson; *See R.* v. *Tyler*, 8 *C. & P.* 616, *Warb. Lead Cas.* 31.

"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 otherwise would be punishable. The cases of a person setting up as a defence that he was compelled to commit a crime is of everyday occurrence. There is no doubt on the authorities that compulsion is a defence where the crime is not 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 there 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 in the rebel army. The law was laid down somewhat more favourably for the prisoners than it had been before, as the defence of compulsion was stated to apply not merely to furnishing provisions to the rebel army, but even to joining and serving in that army. It was laid down (*See* Foster 14) that, 'The only force that doth excuse is 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 on 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 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. We have framed section 23 (*sec. 12, ante*) of our Draft Code, to express what we think is the existing law, and what at all events we suggest ought to be the law."—Imp. Comm. Rep.

As to homicide by necessity, *see* R. v. Dudley, 14 Q. B. D. 273, Warb. Lead. Cas. 102; United States v. Holmes, 1 Wall., jr., 1.

COMPULSION OF WIFE. (*New*).

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

This alters the law. All offences committed by a married woman in presence of her husband, except high treason and murder, were presumed to have been committed under coercion: R. v. Torpey, 12 Cox, 45, Warb. Lead. Cas. 26, and cases there cited: R. v. Buncombe, 1 Cox, 183; 1 Russ. 33, and Greaves' note (*n*).

IGNORANCE OF THE LAW.

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

See R. v. Mailloux, 3 Pugs. (N. B.) 493; R. v. Reed, Car. & M. 308; R. v. Hall, 3 C. & P. 409; R. v. Hearn, cited in Warb. Lead. Cas. 204.

Where the criminal quality of an act depends upon its having been wilfully done the actual motive of the offender is immaterial: 7th Rep. Crim. L. Comm 1843, Art. 10. For criminal purposes, the intention to do the act exists where it is wilfully done. Intention and motive are not the same thing: 4th Rep. xv. and 7th Rep. 29.

In R. v. Crawshaw, Bell. 303, the jury found the defendant guilty, but that he did not know perhaps that he was acting contrary to law. But, said the court, the defendant's ignorance of the statute is no excuse for him. As to ignorance of fact, and the rule that "*actus non facit reum nisi mens sit rea*," *see* R. v. Prince, 13 Cox 138; R. v. Tolson, 16 Cox, 629, 23 Q. B. D. 168, Warb. Lead. Cas. 72, and cases there cited: R. v. Twose, Warb. Lead. Cas. 1; R. v. Hicklin, L. R. 3 Q. B. 360; Dyke v. Gower, 17 Cox, 421, and cases cited under section 283, *post*.

Though drunkenness is never an excuse for a crime, yet, where the intention of the guilty party is an element of the offence itself, the fact that the accused was intoxicated at the time may be taken into consideration by the jury in

considering whether he had the intention necessary to constitute the offence charged: R. v. Cruse, Warb. Lead. Cas. 24, and cases there cited: R. v. Doherty, 16 Cox, 306; R. v. Carroll, 7 C. & P. 145; 1 Russ. 12, and Greaves' note.

Ignorance of the law, an excuse in a specified case under section 21, *post.*

As to liability, in criminal law, of masters for the acts of their servants: *see* R. v. Stephens, Warb. Lead. Cas. 37; Bond v. Evans, 16 Cox, 461, 21 Q. B. D. 249; R. v. Bennett, Bell, 1; R. v. Allen, 7 C. & P. 153; Chisholm v. Doulton, 16 Cox, 675, 22 Q. B. D. 736, and cases there cited; Kearley v. Tylor, 17 Cox, 328; Elliott v. Osborn, 17 Cox, 346; Brown v. Foot, 17 Cox, 509.

EXECUTION OF SENTENCE.

15. 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.

That is common law. What the law requires, it justifies. *Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud* (*5 Rep. 115 b.*) *See post,* sections 18 & 19, as to erroneous sentences, and note under section 16 as to the word *justified.*

EXECUTION OF PROCESS.

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

See note under preceding section, and R. v. King, 18 O. R. 566.

"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 a

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 misdemeanour.

"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 now is, from civil as well as from criminal responsibility. And as it is proposed to abolish the distinction between felony and misdemeanour, on which most of the existing law as to arresting without a warrant depends, we think it is necessary to give a new protection from all liability (both civil and criminal) for arrest, in those cases which by the schemes 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, (*22, 23, 24, 27, 28, of this Code*) the word 'justified' is used. A private person is, by the existing law, protected from civil responsibility for arresting without warrant a person who is on reasonable grounds believed to have committed a felony, provided a felony has actually been committed, but not otherwise. In section 35, (*25 of this Code*) 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, (*19, 20, 21, 26, 29, 36, 37, of this Code*) we have used the words 'protected from criminal responsibility.'"—Imp. Comm. Rep.

Parliament clearly assumed that they have the same right to deal with this subject that the Imperial Parliament has:—*Quære?*

EXECUTION OF WARRANTS.

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

See note under section 15: R. v. Davies, 8 Cox, 486, and note under section 16 as to the word *justified.*

A warrant can only be executed by the person to whom it is directed, and if executed by any other this other commits a trespass: Symonds v. Kurtz, 16 Cox, 726.

EXECUTION OF ERRONEOUS SENTENCE OR PROCESS.

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

See West v. Smallwood, 3 M. & W. 418.

"The latter part of this section (in italics) perhaps extends the law."—Imp. Comm. Rep.

See note under section 16 as to the word *justified.*

"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 show that a ministerial officer obeying an order of the court, or the warrant of a magistrate, is justified, if the warrant or order 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 a 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."—Imp. Comm. Rep.

SENTENCE OR PROCESS WITHOUT JURISDICTION.

19. Every officer, gaoler or person executing any sentence, process or warrant, and every person lawfully assisting such officer, gaoler or person, shall be protected from *criminal* responsibility if he acts in good faith under the belief that the sentence or process was that of a court having jurisdiction or that the warrant was that of a court, justice of the peace or other person having authority to issue warrants, and if it be proved that the person passing the sentence or issuing the process acted as such a court under colour of having some appointment or commission lawfully authorizing him to act as such a court, or that the person issuing the warrant acted as a justice of the peace or other person having such authority, although in fact such appointment or commission did not exist or had expired, or although in fact the court or the person passing the sentence or issuing the process was not the court or the person authorized by the commission to act, or the person issuing the warrant was not duly authorized so to act.

See note under section 16 as to the words, "criminal responsibility."

"Though cases of this sort have rarely arisen in practice, we think we are justified by the opinion of Lord Hale (1 Hale, 498) in saying that the order of a court, having a colour of jurisdiction, though acting erroneously, is enough to justify the ministerial officer."—Imp. Comm. Rep.

ARRESTING THE WRONG PERSON. (*New*).

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

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

See note under section 16 as to the words "criminal responsibility."

"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 man 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."—Imp. Comm. Rep.

IRREGULAR WARRANT OR PROCESS.

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

See note under section 16 as to the words "criminal responsibility."

"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 only doing 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."—Imp. Comm. Rep.

See R. v. Monkman, under section 263 *post.*

ARREST BY PEACE OFFICER.

22. 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.

"Peace Officer" defined, section 3. *See* note under section 16, as to the word *justified.* Section 552 defines for what offence an arrest may be made without warrant. This section 22 is a re-enactment of the law as to felonies.

PERSONS ASSISTING PEACE OFFICER.

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

This is the common law. *See* note under section 16 as to the word *justified.*

ARREST WITHOUT WARRANT.

24. 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.

See note under section 16 as to the word *justified.*

See section 552, *post*, as to arrests. It is not clear that it was necessary to enact in these sections that a person who, being by law duly authorized to do so, arrests any one without warrant is justified in so doing.

The words "finds committing" in this and similar enactments are to be construed strictly: R. v. Phelps, Car. & M. 180. *See* remarks under section 552, *post.*

ARREST AFTER COMMISSION OF AN OFFENCE.

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

See sub-section 4, section 552. *See* note under section 16 as to the word *justified.*

ARREST FOR MAJOR OFFENCES COMMITTED BY NIGHT.

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

"Night" defined, section 3. By sub-section 3, section 552, any person may arrest without warrant any one whom he finds by night committing any offence *against this Act.* *See* note under section 16 as to the words "criminal responsibility."

ARREST BY PEACE OFFICER.

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

See note under section 16 as to the word *justified*. "Peace officer" defined, section 3. As to arrest without warrant *see* section 552, sub-section 3, which applies only to offences *against this Act*. An officer is *bound* to arrest in many cases, but the Code has no reference to it.

ARREST OF PERSON COMMITTING AN OFFENCE BY NIGHT.

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

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

The words in italics are a clear error, as reference to sub-section 7, section 552 will show. *See* sub-sections 4 and 7 of section 552. "Night" and "peace officer" defined, section 3. *See* note under section 16 as to the word *justified*.

ARREST DURING FLIGHT

29. 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.

See sub-section 4, section 552. *See* note under section 16 as to the words "criminal responsibility."

"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."—Imp. Comm. Rep.

This and all these akin sections were necessary in the Imperial Code because it contained no section as section 552 of this Code, under which the arrests it authorizes to be made relieves in law the parties making them from all liability whatever, without it being necessary to enact it expressly. What the law authorizes it justifies, and these enactments are superfluous besides being diffuse and, perhaps, in part at least, *ultra vires*.

STATUTORY POWER OF ARREST.

30 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.

MODE OF ARRESTING.

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

See note under sections 33 & 45, *post*, and note under section 16 as to the words "justified" and "criminal responsibility."

See Dillon v. O'Brien, 16 Cox, 245.

DUTY OF PERSONS ARRESTING.

32. 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.*

"This (*sub-section 3*) is believed to alter the common law."—Imp. Comm. Rep.

See Codd v. Cabe, 1 Ex. D. 352; R. v. Carey, 14 Cox, 214; R. v. Cumpton, Warb. Lead. Cas. 215, and cases there cited.

PEACE OFFICER PREVENTING ESCAPE FROM ARREST FOR MAJOR OFFENCES.

33. 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.

See note under section 16 as to the word *justified*.

"Peace officer" defined, section 3.

"It is also 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."—Imp. Comm. Rep.

See section 57, *post*.

PRIVATE PERSON PREVENTING SUCH ESCAPE.

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

See note under section 16 as to the word *justified.*

"There is some obscurity as to the existing law on this point."—(*The words in italics*)—Imp. Comm. Rep.

OTHER PREVENTING ESCAPE FROM ARREST.

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

See note under preceding section.

PREVENTING ESCAPE OR RESCUE IN MAJOR OFFENCES.

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

"This seems to extend the law so far as regards private persons; 2 Hale, 83."—Imp. Comm. Rep.

See note under section 16 as to the words "criminal responsibility."

PREVENTING ESCAPE OR RESCUE IN MINOR OFFENCES.

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

See note under preceding section.

PREVENTING BREACH OF THE PEACE.

38. Every one who witnesses a breach of the peace is *justified* in interfering to prevent its continuance or renewal and may detain any person committing or about to join in or renew such breach of the peace, in order to give him into the custody of a peace officer: provided that the person inter-

fering 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.

See section 142, *post*.

39. Every peace officer who witnesses a breach of the peace, and every person lawfully assisting him, is *justified* (*bound?*) 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.

"Peace officer" defined, section 3.

See Timothy v. Simpson, 1 C. M. & R. 757; Baynes v. Brewster, 2 Q. B. 375; Price v. Seeley, 10 Cl. & F. 28; Webster v. Watts, 11 Q. B. 311. *See* note under section 16 as to the word *justified*.

SUPPRESSION OF RIOT BY MAGISTRATES.

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

"Peace officer" defined, section 3. "Riot" defined, and punishment, section 80 *et seq*. *See* note under section 16 as to the word *justified*. *See* Stevenson v. Wilson, 2 L. C. J. 254. A sheriff or other officer is *bound* to endeavour to suppress a riot: s. 140 *post*.

OTHER SUPPRESSION OF RIOT.

41. Every one, whether subject to military law or not, acting in good faith in obedience to orders given by any sheriff, deputy-sheriff, mayor or other head officer or acting head officer of any county, city, town or district, or by any magistrate or justice of the peace, 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.

See note under section 16 as to the word *justified*.

"Military law" defined, section 3. "Riot" defined, section 80.

"The protection given by this and the following sections to persons obeying the orders of magistrates and military officers is, perhaps, carried to an extent not yet expressly decided; but see the language of Tindal, C.J., in R. v. Pinney, 5 C. & P. 254, and Willes, J., in Keighly v. Bell, 4 F. & F. 763."—Imp. Comm. Rep.

SUPPRESSION OF RIOT, OTHER CASES.

42. Every one, whether subject to military law or not, who in good faith and on reasonable and probable grounds believes that serious mischief will arise from a riot before there is time to procure the intervention of any of the authorities aforesaid, is *justified* in using such force as he, in good faith and on reasonable and probable grounds, believes to be necessary for the suppression of such riot, and as is not disproportioned to the danger which he, on reasonable grounds, believes to be apprehended from the continuance of the riot.

See note under preceding section.

PROTECTION OF PERSONS SUBJECT TO MILITARY LAW.

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

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

See note under section 41.

PREVENTION OF MAJOR OFFENCES.

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

See section 552 as to offences for which arrest without warrant is authorized, and remarks thereunder. *See* note under section 16, as to the word *justified*. *See* Handcock v. Baker, 2 B. & P. 260, and R. v. Rose, 15 Cox, 540.

SELF-DEFENCE—UNPROVOKED ASSAULT.

45. Every one unlawfully assaulted, *not having provoked such assault*, is *justified* in repelling force by force, if the force he uses is not meant to cause

death or grievous bodily harm, and is no more than is necessary for the purpose of self-defence; and every one so assaulted is *justified*, though he causes death or grievous bodily harm, if he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purpose, and if he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

See note under section 16 as to the word *justified*. *See* remarks under section 265, *post*: R. v. Knock, 14 Cox, 1, and cases in Archbold, 755; 3 Blacks. 4; Horrigan, Cases on Self-Defence, 720; *see* section 229, *post*.

"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 qualify 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."—Imp. Comm. Rep.

SELF DEFENCE—PROVOKED ASSAULT.

46. Every one who has without justification assaulted another, or has provoked an assault from that other, may nevertheless justify force subsequent to such assault, if he uses such force under reasonable apprehension of death or grievous bodily harm from the violence of the person first assaulted or provoked, and in the belief, on reasonable grounds, that it is necessary for his own preservation from death or grievous bodily harm: Provided, that he did not commence the assault with intent to kill or do grievous bodily harm, and did not endeavour at any time before the necessity for preserving himself arose, to kill or do grievous bodily harm: Provided also, that before such necessity arose he declined further conflict, and quitted or retreated from it as far as was practicable.

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

See note under preceding section, and section 229, *post*.

PREVENTION OF INSULT.

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

See note under section 16 as to the word *justified*.

"This perhaps extends the law, but it appears reasonable."—Imp. Comm. Rep.

DEFENCE OF MOVEABLE PROPERTY.

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

See note under section 16 as to the word *justified*.

"This puts the possessor in the position of a person acting in self defence contemplated by section 45."—Imp. Comm. Rep.

See note under section 53, *post*.

DEFENCE OF MOVEABLE PROPERTY, OTHER CASE.

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

This and the preceding and the next eleven sections are given as the existing law. *See* note under section 16 as to the words "Criminal responsibility."

ILLEGAL DEFENCE OF MOVEABLE PROPERTY.

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

See note under preceding section.

DEFENCE OF DWELLING HOUSE.

51. 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.

See cases under section 265, *post*, and Imp. Comm. Rep. under section 16 and section 45, *ante*, and 53 *post*; also Horrigan, Cases on Self Defence, 749 *et seq.*

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

See under preceding section.

DEFENCE OF REAL PROPERTY.

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

See Imp. Comm. Rep. under sections 16 and 45 *ante*, and cases under section 265, *post*; 1 Russ. 1028; 1 Burn, 313; Lows v. Telford, 13 Cox, 226, Warb. Lead. Cas. 51: Cook v. Beal, 1 Ld. Raym. 176; Handcock v. Baker, 2 B. & P. 260; R. v. Hewlett, 1 F. & F. 91; R. v. Hood, 1 Moo. 281; Spires v. Barrick, 14 U. C. Q. B. 424; Glass v. O'Grady, 17 U. C. C. P. 233; Davis v. Lennon, 8 U. C. Q. B. 599.

"A full report of the evidence in the case of R. v. Moir, and an imperfect report of Lord Tenterden's summing up are to be found in the annual register for 1830, vol. 72, p. 344. Moir having ordered some fishermen not to trespass on his land by taking a short cut, 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 Moir with a pole. Moir shot him in the arm, and the wound ultimately proved fatal. Before the man died, or indeed was supposed to be in danger, 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 firearms prevent the fishermen from persisting in their trespass, he did use them, and would use them again. Lord Tenterden took a 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. Moir was found guilty of murder and executed. (*See* this case as since stated in R. v. Price, 7 C. & P. 178, and Roscoe, Cr. Evid. 714.) . . . 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:* Co. Lit. 162a. 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. . . . But the defence of possession either of goods or land against a mere trespass, not a crime, does not, strictly speaking, justify even a breach of the peace. The party in lawful possession may justify gently laying his hands on the trespasser and requesting him to depart. If the trespasser resists, and in doing so assaults the party in possession, that party may repel the assault and for that purpose may use any force which he would be justified in using in defence of his person. (*See section 45, ante.*) As is accurately said in 1 Rolle's Abt. Trespass, G. 8, "a justification of a battery in defence of possession, though it arose in the defence of the possession, yet in the end it is the defence of the person."—Imp. Comm. Rep.

ASSERTION OF RIGHT TO HOUSE OR LAND.

54 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.

See note under preceding section.

DISCIPLINE OF MINORS AND ON SHIP.

55. 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.

56. 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.

A parent may in a reasonable manner chastise his child, or a master his servant, or a schoolmaster his scholar, or a gaoler his prisoner, and a captain of a ship any of the crew who have mutinously or violently misconducted themselves: 1 Burn. 314; Mitchell v. Defries, 2 U. C. Q. B. 430; Brisson v. Lafontaine, 8 L. C. J. 173.

As to homicide by correction: *see* R. v. Hopley, Warb. Lead. Cas. 110; R. v. Griffin, 11 Cox, 402.

SURGICAL OPERATIONS.

57. 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.

EXCESS.

58. 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.

See note under section 16, and section 45, *ante*, and Hamilton v. Massie, 18 O. R. 585.

CONSENT TO DEATH NOT LAWFUL.

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

See note under section 16, as to the words "criminal responsibility."

OBEDIENCE TO *De Facto* LAW.

60. 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.

"*See* 11 Hen. VII., c. 1, Sir H. Vane's case, Kelyng 15, and Foster's 4th discourse, p. 402."—Imp. Comm. Rep.

PART III.

PARTIES TO THE COMMISSION OF OFFENCES.

61. 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.

See in R. v. Jordan, Warb. Lead. Cas. 2, and R. v. Manning, *Id.* 7, a collection of cases on the subject of principals and accessories.

See section 237, as to aiding and abetting suicide.

This section is so framed, says the Imperial Commissioners' Report, as to put an end to the nice distinctions between accessories before the fact and principals in the second degree, already practically superseded by chapter 145 Revised Statutes. All are now principals in any offence, and punishable as the actual perpetrator of the offence, as it always has been in treason and misdemeanour. The prosecutor may, at his option, prefer an indictment against the accessories before the fact, and aiders and abettors as principal offenders, whether the party who actually committed

the offence is indicted with them or not; R. v. Tracey, 6 Mod. 30. For instance: A. abetted in the commission of a theft by B. The indictment may charge A. and B. jointly or A. or B. alone as guilty of the offence, in the ordinary form, as if they had actually stolen by one and the same act. Or the indictment, after charging the principal of the offence, may charge the accessory or aider as follows: "*And the jurors aforesaid do further present, that C. D., before the said offence was committed as aforesaid, to wit, on . . . . did incite, move, procure, aid, counsel, hire and command the said A. B. the said offence in manner and form aforesaid to do and commit;*" or, "*that C. D., on the day and year aforesaid, was present, aiding, abetting and assisting the said* A. B. to commit the said offence in manner and form aforesaid." And if the actual offender is not indicted, as follows: "*The jurors, etc., etc., present, that A. B., or that some person or persons to the jurors aforesaid unknown, on . . . . did steal, etc., etc. And the jurors aforesaid do further present that C. D.,*" . . . (*continue as in preceding form*).

In every case where there may be a doubt whether a person be a principal or accessory before the fact, it may be advisable to prefer the indictment against him as a principal, as such an indictment will be sufficient whether it turn out on the evidence that such person was a principal or accessory before the fact, as well as where it is clear that he was either the one or the other but it is uncertain which he was.

It is no objection to an accessory before the fact being convicted that his principal has been acquitted: R. v. Hughes, Bell. 242; R. v. Burton, 13 Cox, 71. And such accessories, aiders and abettors may be arraigned and tried before the actual perpetrator of the offence: 2 Hale, 223; R. v. James, 17 Cox, 24, 24 Q. B. D. 439. In some cases, as in suicide, for instance, the aiders and abettors or accessories only can be indicted. Where the actual perpetrator and the acces-

sories are jointly indicted all may be found guilty of attempting to commit the offence charged: section 711. And, if an attempt only to commit an offence is charged, all may be found guilty, though the full offence is proved; section 712. If the offence charged is not proved, but another offence included in it is proved, they may all be found guilty of the offence so proved: section 713.

The soliciting and inciting a person to commit an offence, where no offence is in fact committed by the person so solicited, is an indictable offence: R. v. Gregory, 10 Cox, 459.

A principal in the first degree is one who is the actor or actual perpetrator of the act. But it is not necessary that he should be actually present when the offence is consummated; for if one lay poison purposely for another who takes it and is killed, he who laid the poison, though absent when it was taken, is a principal in the first degree: Fost. 349; R. v. Harley, 4 C. & P. 369. So, it is not necessary that the act should be perpetrated with his own hands; for if an offence be committed through the medium of an innocent agent the employer, though absent when the act is done, is answerable as a principal in the first degree: *see* R. v. Giles, 1 Moo. 166; R. v. Michael, 2 Moo. 120; R. v. Clifford, 2 C. & K. 202. Thus, if a child, under the age of discretion, or any other instrument excused from the responsibility of his actions by defect of understanding, ignorance of the fact, or other cause, be incited to the commission of murder or any other crime, the inciter, though absent when the fact was committed, is, *ex necessitate*, liable for the act of his agent, and a principal in the first degree: Fost. 349; R. v. Palmer, 2 Leach, 978; R. v. Butcher, Bell, 6. But if the instrument be aware of the consequences of his act he is a principal in the first degree, and the employer, if he be absent when the fact is committed, is an accessory before the fact, and may now be indicted either as such, or as the actual offender: R. v. Stewart, R. & R. 363; R. v. Williams, 1 Den. 39; unless the instrument concur in the

act merely for the purpose of detecting and punishing the employer, in which case he is considered as an innocent agent: R. v. Bannen, 2 Moo. 309.

Principals in the second degree.—Such were called those who were present, aiding and abetting, at the commission of the fact.

Presence, in this sense, is either actual or constructive. It is not necessary that the party should be actually present, an ear or eye-witness of the transaction; he is, in construction of law, present, aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it, should the occasion arise. Thus, if he be outside the house, watching to prevent surprise, or the like, whilst his companions are in the house committing a felony, such constructive presence is sufficient to make him a principal in the second degree: Fost. 347, 350; *see* 1 Russ. 61; 1 Hale, 555: R. v. Gogerly, R. & R. 343; R. v. Owen, 1 Moo. 96. But he must be sufficiently near to give assistance. R. v. Stewart, R. & R. 363; and the mere circumstance of a party going towards a place where a felony is to be committed, in order to assist to carry off the property, and assisting in carrying it off, will not make him a principal in the second degree, unless, at the time of the felonious taking, he were within such a distance as to be *able* to assist in it: R. v. Kelly, R. & R. 421; 1 Russ. 27. So, where two persons broke open a warehouse, and stole thereout a quantity of butter, which they carried along the street thirty yards, and then fetched the prisoner who, being apprised of the robbery, assisted in carrying away the property, it was holden that he was not a principal, but only an accessory after the fact: R. v. King, R. & R. 332; R. v. Dyer, 2 East, P. C. 767. And although an act be committed in pursuance of a previous concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offence is committed, are not principals, but accessories before the fact: R. v. Soares,

R. & R. 25: R. v. Davis, *Id.* 113: R. v Else, *Id.* 142; R. v. Badcock, *Id.* 249; R. v. Manners, 7 C. & P. 801; R. v. Howell, 9 C. & P. 437; R. v. Tuckwell, Car. & M. 215. So, if one of them has been apprehended before the commission of the offence by the other, he can be considered only as an accessory before the fact: R. v. Johnson, Car. & M. 218. But presence during the whole of the transaction is not necessary: for instance, if several combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are, nevertheless, all guilty as principals: R. v. Bingley, R. & R. 446: *see* 2 East, P. C. 768. As, if A. counsel B. to make the paper, C. to engrave the plate, and D. to fill up the names of a forged note, and they do so, each without knowing that the others are employed for that purpose, B., C. and D. may be indicted for the forgery, and A. as an accessory: R. v. Dade, 1 Moo. 307; for, if several make distinct parts of a forged instrument, each is a principal, though he do not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others: R. v. Kirkwood, 1 Moo. 304; R. v. Charles, 17 Cox, 499: *see* R. v. Kelly, 2 C. & K. 379.

There must also be a participation in the act: for although a man be present whilst a felony is committed, if he take no part in it and do not act in concert with those who committed it, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony, or apprehend the felon: 1 Hale, 439; Fost. 350. It is not necessary, however, to prove that the party actually aided in the commission of the offence: if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, in contemplation of law he was present aiding and abetting. So, a participation, the result of a

concerted design to commit a specific offence, is sufficient to constitute a principal in the second degree. Thus, if several act in concert to steal a man's goods, and he is induced by fraud to trust one of them, in the presence of the others, with the possession of the goods, and then another of the party entices the owner away that he who has the goods may carry them off, all are guilty as principals: R. v. Standley, R. & R. 305; 1 Russ. 29; R. v. Passey, 7 C. & P. 282; R. v. Lockett, *Id.* 300. So, it has been holden, that to aid and assist a person to the jurors unknown to obtain money by ring-dropping, is felony, if the jury find that the prisoner was confederate with the person unknown to obtain the money by means of the practice: R. v. Moore, 1 Leach, 314. So, if two persons driving carriages incite each other to drive furiously, and one of them run over and kill a man, it is manslaughter in both: R. v. Swindall, 2 C. &. K. 230. If one encourage another to commit suicide, and be present abetting him while he does so, such person is guilty of murder as a principal; and if two persons encourage each other to self-murder, and one kills himself, but the other fails in the attempt, the latter is a principal in the murder of the other: R. v. Dyson, R. & R. 523; R. v. Russell, 1 Moo. 356; R. v. Alison, 8 C. & P. 418; R. v. Jessop, 16 Cox, 204; but *see* section 237, *post.* So, likewise, if several persons combine for an unlawful purpose to be carried into effect by unlawful means: Fost. 351, 352; particularly, if it be to be carried into effect notwithstanding any opposition that may be offered against it: Fost. 353, 354; and if one of them, in the prosecution of it, kill a man, it is murder in all who are present, whether they actually aid or abet or not: *see* the Sessinghurst-house case, 1 Hale, 461; provided the death were caused by the act of some one of the party in the course of his endeavours to effect the common object of the assembly: 1 Hawk. c. 31, s. 52; Fost. 352.; R. v. Hodgson, 1 Leach, 6; R. v. Plummer, Kel. 109. But it is not sufficient that the common purpose is merely unlawful;

it must either be felonious, or, if it be to commit a misdemeanour, then there must be evidence to show that the parties engaged intended to carry it out at all hazards: R. v. Skeet, 4 F. & F. 931; *see* also R. v. Luck, 3 F. & F. 483; R. v. Craw, 8 Cox, 335. And the act must be the result of the confederacy; for, if several are out for the purpose of committing a felony, and, upon alarm and pursuit, run different ways, and one of them kill a pursuer to avoid being taken, the others are not to be considered as principals in that offence: R. v. White, R. & R. 99. Thus, where a gang of poachers, consisting of the prisoners and Williams attacked a game keeper, beat him, and left him senseless upon the ground, but Williams returned, and whilst the gamekeeper was insensible upon the ground took from him his gun, pocket-book and money, Park, J., held that this was robbery in Williams only: R. v. Hawkins, 3 C. & P. 392. The purpose must also be unlawful; for, if the original object be lawful, and be prosecuted by lawful means, should one of the party in the prosecution of it kill a man, although the party killing, and all those who actually aid and abet him in the act, may, according to circumstances, be guilty of murder or manslaughter, yet the other persons who are present, and who do not actually aid and abet, are not guilty as principals in the second degree: Fost. 354, 355; section 62, *post.*

A mere participation in the act, without a felonious participation in the design, will not be sufficient: 1 East, P. C. 258; R. v. Plummer, Kel. 109. Thus, if a master assault another with malice prepense, and the servant, ignorant of his master's felonious design, take part with him, and kill the other, it is manslaughter in the servant, and murder in the master: 1 Hale, 446. So, on an indictment under the statute, 1 V. c. 85, s. 2, charging A. with the capital offence of inflicting a bodily injury dangerous to life with intent to commit murder, and B. with aiding and abetting him, it was held to be essential, to make out the charge as against

B., that he should have been aware of A's. intention to commit murder: R. v. Cruse, 8 C. & P. 541.

In the case of murder by duelling, in strictness both of the seconds are principals in the second degree; yet Lord Hale considers that, as far as relates to the second of the party killed, the rule of law in this respect has been too far strained; and he seems to doubt whether such second should be deemed a principal in the second degree: 1 Hale, 422, 452. However, it was holden by Patteson, J., that all persons present at a prize-fight, having gone thither with the purpose of seeing the prize-fighters strike each other, were principals in the breach of the peace: R. v. Perkins, 4 C. & P. 537; *see* R. v. Murphy, 6 C. & P. 103, and R. v. Coney, 15 Cox, 46; and upon the same principle, the seconds in a duel, being participators in an unlawful act, would both be guilty of murder, if death were to ensue; and so the law was laid down in R. v. Young, 8 C. &. P. 644; and in R. v. Cuddy, 1 C. & K. 210.

Aiders and abettors were formerly defined to be accessories at the fact, and could not have been tried until the principal had been convicted or outlawed: Fost. 347. But this doctrine is exploded; and it is now settled, that all those who are present aiding and abetting when a felony is committed are principals in the second degree, and may be arraigned and tried before the principal in the first degree has been found guilty: 2 Hale, 223; and may be convicted, though the party charged as principal in the first degree is acquitted: R. v. Taylor, 1 Leach, 360; R. v. Towle, R. & R. 314; R. v. Hughes, Bell, 242.

In treason, and in offences below felony, and in all felonies in which the punishment of principals in the first degree and of principals in the second degree is the same, the indictment may charge all who are present and abet the fact as principals in the first degree: 2 Hawk. c. 25, s. 64; provided the offence permit of participation: Fost. 345; R. v. Hughes, Bell, 242; or specially as aiders and

abettors: R. v. Crisham, Car. & M. 187. But where by particular statutes the punishment was different, then principals in the second degree must have been indicted specially as aiders and abettors: 1 East, P. C. 348, 350; R. v. Sterne, 1 Leach, 473. If indicted as aiders and abettors, an indictment charging that A. gave the mortal blow, and that B., C. and D. were present aiding and abetting, would be sustained by evidence that B. gave the blow, and that A., C. and D. were present aiding and abetting; and even if it appeared that the act was committed by a person not named in the indictment, the aiders and abettors might nevertheless be convicted: R. v. Borthwick. 1 East, P. C. 350; *see* R. v. Swindall, 2 C. & K. 230. And the same though the jury say that they are not satisfied which gave the blow, if they are satisfied that one of them did, and that the others were present aiding and abetting: R. v. Downing, 1 Den. 52. When a prisoner was convicted upon an indictment which charged him with rape as a principal in the first count, and as an aider and abettor in the second, it was holden that the conviction upon the first count was good. R. v. Folkes, 1 Moo. 354; R. v. Gray, 7 C. & P. 164; *see* R. v. Crisham, Car. & M. 187.

Accessories before the fact.—An accessory before the fact is he who, being absent at the time of the felony committed, doth yet procure, counsel, command or abet another to commit a felony: 1 Hale, 615.

If the party be actually or constructively present when the felony is committed he is an aider and abettor, and not an accessory before the fact; for it is essential, to constitute the offence of accessory, that the party should be absent at the time the offence is committed: 1 Hale, 615; R. v. Gordon, 1 Leach, 515; 1 East, P. C. 352; R. v. Brown, 14 Cox, 144.

The procurement may be personal, or through the intervention of a third person: Fost. 125; R. v. Earl of Somerset, 19 St. Tr. 804; R. v. Cooper, 5 C. & P. 535; it may also be

direct, by hire, counsel, command, or conspiracy; or indirect, by evincing an express liking, approbation, or assent to another's felonious design of committing a felony: 2 Hawk. c. 29, s. 16; but the bare concealment of a felony to be committed will not make the party concealing it an accessory before the fact: 2 Hawk. c. 29, s. 23; nor will tacit acquiescence, or words which amount to a bare permission, be sufficient to constitute this offence: 1 Hale, 616 The procurement must be continuing; for if the procurer of a felony repent, and before the felony is committed actually countermand his order, and the principal notwithstanding commit the felony, the original contriver will not be an accessory: 1 Hale, 618. So, if the accessory order or advise one crime, and the principal intentionally commit another; as, for instance, to burn a house, and instead of that he commit a larceny; or to commit a crime against A., and instead of so doing he commit the same crime against B.: the accessory will not be answerable: 1 Hale, 617; but, if the principal commit the same offence against B. by mistake instead of A., it seems it would be otherwise: Fost. 370, *et seq.*; but *see* 1 Hale, 617; 3 Inst. 51. But it is clear that the accessory is liable for all that ensues upon the execution of the unlawful act commanded; as, for instance, if A. command B. to beat C., and he beat him so that he dies, A. is accessory to the murder: *see* section 62, *post*; 1 Hale, 617. Or if A. command B. to burn the house of C., and in doing so the house of D. is also burnt, A. is accessory to the burning of D.'s house: R. v. Saunders, Plowd. 475. So, if the offence commanded be effected, although by different means from those commanded, as, for instance, if J. W. hire J. S. to poison A., and, instead of poisoning him, he shoots him, J. W. is, nevertheless, liable as accessory: Fost. 369, 370; section 62, *post*. Where the procurement is through an intermediate agent it is not necessary that the accessory should name the person to be procured to do the act: R. v. Cooper, 5 C. & P. 535.

Several persons may be convicted on a joint charge against them as accessories before the fact to a particular felony, though the only evidence against them is of separate acts done by each at separate times and places: R. v. Barber, 1 C. & K. 442.

It may be necessary to observe, that it is only in felonies that there can be accessories; in high treason, every instance of incitement, etc., which in felony would make a man an accessory before the fact, will make him a principal traitor: Fost. 341; and he must be indicted as such: 1 Hale, 235. Also, all those who in felony would be accessories before the fact, in offences under felony are principals, and indictable as such: R. v. Clayton, 1 C. & K. 128; R. v. Moland, 2 Moo. 276; R. v. Greenwood, 2 Den. 453; *under section 61, ante, that now applies to all offences.* In manslaughter it has been said there can be no accessories before the fact, for the offence is sudden and unpremeditated; and therefore, if A. be indicted for murder, and B. as accessory, if the jury find A. guilty of manslaughter they must acquit B: 1 Hale, 437, 466, 615; 1 Hawk. c. 30, s. 2. Where, however, the prisoner procured and gave a woman poison in order that she might take it and so procure abortion, and she did take it in his absence, and died of its effects, it was held that he might be convicted as an accessory before the fact to the crime of manslaughter: R. v Gaylor, Dears. & B. 288. In the course of the argument in that case, Bramwell, B., said: "Suppose a man for mischief gives another a strong dose of medicine, not intending any further injury than to cause him to be sick and uncomfortable, and death ensues, would not that be manslaughter? Suppose, then, that another had counselled him to do it, would not he who counselled be an accessory before the fact?

In R. v. Chadwick, Stafford Sum. Ass. 1850, the prisoner was indicted as a principal for murder by arsenic, and the jury found that he procured the arsenic, and caused it to be administered by another person, but was absent when it

was administered; and thereupon it was objected that the 11 & 12 V., c. 46, s. 1, which was similar to chapter 145 Rev. Stat. s. 1, did not apply to murder, but Williams, J., overruled the objection, and refused to reserve the point. Where the principal and accessory are tried together, one being charged as principal and the other as accessory, if the principal plead otherwise than the general issue, the accessory shall not be bound to answer until the principal's plea be first determined: 1 Hale, 624. Where the principal was indicted for larceny in a dwelling-house, and the accessory was charged in the same indictment as accessory before the fact to the said "*felony and burglary*," and the jury acquitted the principal of the burglary, but found him guilty of the larceny, it seems the judges were of opinion that the accessory should have been acquitted; for the indictment charged him as accessory to the burglary only, and the principal being acquitted of that, the accessory should have been acquitted also: R. v. Dannelly and Vaughan, R. & R. 310. Where three persons were charged with a larceny, and two others as accessories, in one count, and the latter were also charged separately in other counts with substantive felonies, it was held that, although the principals were acquitted, the accessories might be convicted on the latter counts: R. v. Pulham, 9 C. & P. 280.

If a man be indicted as accessory in the same felony to several persons, and be found accessory to one, it is a good verdict, and judgment may be passed upon him: R. v. Lord Sanchar, 9 Co. 189; Fost. 361; 1 Hale, 624.

OFFENCES COMMITTED DIFFERENTLY.

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

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

"This is believed to express the existing law: Fost., part 3, and cases under preceding section."—Imp. Comm. Rep.

The mere fact of being stakeholder for a prize fight where one of the combatants was killed does not make one accessory before the fact to the manslaughter: R. v. Taylor, 13 Cox, 68.

ACCESSORY AFTER THE FACT.

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

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

The Imperial Commissioners report this section as declaratory of the existing law, but that is an error. A husband, at common law, cannot aid his wife to escape. Then, section 13, *ante*, seems to have been forgotten in drafting this section 63.

See as to punishment, sections 531, 532. Accessories after the fact to certain offences, not triable at Quarter Sessions, section 540. *See* section 627 as to indictment of accessories after the fact in certain cases: *see* R. v. Lee, Warb. Lead. Cas. 9, for a collection of cases on the subject.

An accessory after the fact is one who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon: 1 Hale, 618; 4 Bl. Com. 37. Any assistance given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, is sufficient to make a man an accessory after the fact; as, for instance, that he concealed him in the house: or shut the door against his pursuers, until he should have an opportunity of escaping: 1 Hale, 619; or took money from him to allow him to escape: or supplied him with money, a horse or other necessaries, in order to enable him to escape: 2 Hawk. c. 29, s. 26; or bribed

the gaoler to let him escape, or conveyed instruments to him to enable him to break prison and escape: 1 Hale, 621.

But merely suffering the principal to escape will not make the party an accessory after the fact, for it amounts at most but to a mere omission: 1 Hale, 619. So, if a person supply a felon in prison with victuals or other necessaries for his sustenance: 1 Hale, 620; or relieve and maintain him if he be bailed out of prison: *Id.*; or if a physician or surgeon professionally attend a felon sick or wounded, although he know him to be a felon. *See* R. v. Chapple, 9 C. & P. 355; R. v. Jarvis, 2 M. & Rob. 40.

A wife is not punishable as accessory for receiving, etc., her husband, although she knew him to have committed felony: 1 Hale, 48, 621; R. v. Manning, 2 C. & K. 903, *n.*; for she is presumed to act under his coercion; but *see* now section 13, *ante*. But no other relation of persons can excuse the wilful receipt or assistance of felons; a father cannot assist his child, a child his parent, a husband his wife, a brother his brother, a master his servant, or a servant his master: 1 Chit. 266. (Section 63 *ante* alters this as to a husband assisting his wife.) Even one may make himself an accessory after the fact to a larceny of his own goods, or to a robbery on himself, by harbouring the thief, or assisting in his escape: Fost. 123. If the wife alone, the husband being ignorant of it, receive any other person being a felon, the wife is accessory, and not the husband: 1 Hale, 621. And if the husband and wife both receive a felon knowingly, it shall be adjudged only the act of the husband, and the wife shall be acquitted: *Id.* (*See* now section 13 *ante*.)

To constitute this offence it is necessary that the accessory have notice, direct or implied, at the time he assists or comforts the felon, that he had committed a felony. It is also necessary that the felony be completed at the time the assistance is given; for, if one wounds another

mortally, and after the wound given, but before death ensues, a person assist or receive the delinquent, this does not make him accessory to the homicide; for until death ensues no murder or manslaughter is committed: 2 Hawk. c. 29, s. 35; 4 Bl. Com. 38.

On an indictment charging a man as a principal felon only, he cannot be convicted of the offence of being an accessory after the fact: R. v. Fallon. L. & C. 217.

The receipt of stolen goods did not at common law constitute the receiver an accessory, but was a distinct misdemeanour, punishable by fine and imprisonment: 1 Hale, 620; *see* now section 314, *post.*

Four prisoners were indicted for murder jointly with two others indicted as accessories after the fact. The prisoners indicted for murder were found guilty of manslaughter, and the other two guilty of having been accessories after the fact to manslaughter. *Held*, on motion in arrest of judgment, that the conviction against the accessories was right: R. v. Richards, 13 Cox, 611; *see* R. v. Brannon, 14 Cox, 394.

ATTEMPTS.

64. 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.

The words in italics were given as new law in the Imperial Commissioners' Report of 1879 in view of R. v. Collins, L. & C. 471, but that case has since been overruled: R. v. Brown, 24 Q. B. D. 357, and R. v. Ring, 17 Cox, 491.

See sections 528, 529, as to punishment in cases not otherwise provided for, and sections 711, 713 as to verdict of attempt under certain circumstances.

Attempts to commit certain crimes are specially provided for in sections 71, 75, 100, 120, 127, 129, 131, 132, 136, 154,

175, 178, 185, 189, 232, 238, 241, 248*b*, 268, 270, 400, 424, 432, 485, 488, 492, 494, 496, 500.

A mere intention to commit a crime is not indictable. Some act is required, but acts only remotely leading towards the commission of an offence are not to be considered as attempts to commit it, whilst acts immediately connected with it are: R. v. Roebuck, Dears. & B. 24; 1 Russ. 83; R. v. Hensler, 11 Cox, 570; R. v. Eagleton, Dears. 515; R. v. Roberts, Dears. 539; R. v. Cheeseman, L. & C. 140.

An assault with intent to commit a crime is an attempt to commit that crime: R. v. Dungey, 4 F. & F. 99. *See* reporter's note in that case and R. v. John, 15 S. C. R. 384.

An attempt to commit a crime is an intent to commit such crime manifested by some overt act, and, in cases of rape, robbery, etc., etc., necessarily includes an assault: Stephen's Cr. L. 49; in such cases, an assault is an attempt and an attempt is an assault; R. v. Martin, 9 C. & P. 213, 215; *see* annotation to section 711, *post;* and R. v. Marsh, 1 Den. 505; R. v. Heath, R. & R. 184; R. v. Stewart, R. & R. 288; R. v. Fuller, R. & R. 308; R. v. Duckworth, 17 Cox, 495.

If A., mistaking a post in the dark for B., and intending to murder B., shoots at the post, he has not committed an attempt to murder, according to the existing law. Does the above section 64 change the law in this respect? Sir James Stephens thinks that article 74 of the Draft Code of 1879 would have had that effect in England: 2 Stephen's Hist., 225. That article reads as follows:—

"An attempt to commit an offence is an act done or omitted with intent to commit that offence, forming part of a series of acts or omissions which would have constituted the offence, if such series of acts or omissions had not been interrupted, either by the voluntary determination of the offender not to complete the offence, or by some other cause.

"Every one who, believing that a certain state of facts exists, does or omits an act, the doing or omitting of which would, if

that state of facts existed, be an attempt to commit an offence, attempts to commit that offence, although its commission in the manner proposed was, by reason of the non-existence of that state of facts at the time of the act or omission, impossible.

"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."

This article of the Imperial Draft Code, and of the Bill of 1879, re-appeared in the Bill of 1880, somewhat altered in shape and phraseology, but not in substance, as will be seen by comparing it with section 64 of this Code, which reproduces it verbatim as it was in that Bill of 1880. It thus seems clear that, in Sir James Stephen's opinion, the supposed case of attempting to murder by shooting at a post, would constitute now, under section 64 of this Code, an indictable attempt to commit murder—*Sed quære? See* Baron Bramwell's remarks in R. v. McPherson, Dears. & B. 197, in 1857, long before the decision in R. v. Collins, L. & C. 471. Sir James Stephens took the law as it was then settled by the case of R. v. Collins, which has since been over-ruled by R. v. Ring, 17 Cox, 491, and it was not necessary for him to distinguish between the case of the shooting at a post and the case of putting the hand in an empty pocket. In neither case, in his opinion, is there an indictable attempt to commit a crime. But though it is now unquestionable, under section 64, that the latter case constitutes an attempt to steal, though there was nothing to steal, it does not follow that the former case constitutes an attempt to murder, though there was no one to kill. Here the assault, a principal ingredient of the offence, is wanting. There was no assault on B., and A. clearly could not be indicted under section 232, *post*, because he did not shoot at any person: R. v. Lovel, 2 Moo. & R. 39. But, for an attempt to steal, the overt act, or commencement of execution of the theft is complete by itself when a man puts his hand into the

pocket of any one to steal whatever there may be in it. No ingredient of the attempt is wanted there. The offender may be arrested *instanter*, whilst no one could arrest a man who is preparing to shoot at a post, in the case first supposed.

That is, no doubt, almost the same question in another form, but yet it serves as a test. The shooting in that case is an attempt to attempt to commit murder, whilst in the case of stealing, the putting the hand in the pocket is the direct attempt to commit the stealing. The shooting is one degree more remote from the murder than the thrust of the hand in the pocket is from the stealing. There may have been no killing, even if B., the person intended to be murdered, had really been shot at, as the shot might either have missed him or only wounded him, and *then* A. would have been guilty of an attempt to murder. Whilst, in the other case, if there is in the pocket anything to steal, the stealing itself is the proximate, and only possible, offence which the man who thrusts his hand in the pocket can commit. Between the shooting at a person with intent to murder and the murder there is an intermediate possible offence, that is, the attempt to murder, if the person shot at is not killed. Between the thrust of the hand in the pocket with intent to steal, and the stealing, there is no such intermediate offence possible. In this last case, therefore, there is a direct attempt to steal, whilst in the first case there is no attempt to murder, not because a murder was not possible, but because, under the terms of subsection 2 of section 64, the act of shooting was too remote from the murder to constitute, in law, an attempt to murder, as there might have been no murder even if B. had actually been shot at.

TITLE II.

OFFENCES AGAINST PUBLIC ORDER, INTERNAL AND EXTERNAL.

PART IV.

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

65. Treason is—

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

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

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

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

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

(*f*) Levying war against Her Majesty either—

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

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

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

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

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

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

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

66. 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. 25 Edw. III, st. 5, c 2.

Limitation, three years, section 551*a*, and see sub-section 2 of section 551. Not triable at quarter sessions, section 540. Compulsion by threats no excuse, section 12.

Requisites of indictment section 614.

Special provisions as to trial for treason, section 658.

Evidence of one witness must be corroborated, section 684. Sections 6 and 7 of chapter 146 Rev. Stat. stand unrepealed.

See Archbold, 755; Stephen's Crim. L. 32; Sir John Kelyng's Crown Cases, p. 7, and a treatise on treason printed therein; Foster's Cr. Law, discourse on High Treason, 183.

Also, R. v. Gallagher, 15 Cox, 291, Warb. Lead. Cas. 39; R. v. Deasy, 15 Cox, 334; Mulcahy v. R. L. R. 3 H. L. 306; R. v. Riel, 16 Cox, 48, 10 App. Cas. 675; R. v. Davitt, 11 Cox, 676.

ACCESSORIES AFTER THE FACT.—(*New*).

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

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

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

Not triable at quarter sessions, section 540. Requisites of indictment, section 614. Special provisions for trial, section 658. This section covers the common law offence of misprision of treason.

LEVYING WAR, ETC., ETC.

68. Every subject or citizen of any foreign state or country at peace with Her Majesty, who—

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

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

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

Every subject of Her Majesty within Canada who—

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

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

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

Not triable at quarter sessions, section 540. Special provisions as to indictment, section 614. Sections 6 and 7 of chapter 146, Revised Statutes, stand unrepealed. They cover the same offences as the above section 68, but the punishment is discretionary, and they may be tried by court-martial. Every subject of Her Majesty *within* Canada who enters Canada with any foreigner with intent to commit any capital offence is, by this enactment, liable to suffer death.

TREASONABLE OFFENCES.

69. Every one is guilty of an indictable offence and liable to imprisonment for life who forms any of the intentions hereinafter mentioned, and manifests any such intention by conspiring with any person to carry it into effect, or by any other overt act, or by publishing any printing or writing; that is to say—

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

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

(*c*) An intention to move or stir any foreigner or stranger with force to invade the said United Kingdom, or Canada, or any other of Her Majesty's dominions or countries under the authority of Her Majesty. R. S. C. c. 146, s. 3; 11-12 V. c. 12, (Imp.).

Not triable at quarter sessions, section 540. Limitation, 3 years, section 551. *See* sub-section 2 of section 551. Special provisions, section 614. *See* annotation under section 65, *ante*.

CONSPIRACY TO INTIMIDATE LEGISLATURE.

70. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who confederates, combines or conspires with any person

to do any act of violence in order to intimidate, or to put any force or constraint upon, any Legislative Council, Legislative Assembly or House of Assembly. R. S. C. c. 146, s. 4.

Not triable at quarter sessions, section 540. Special provisions, section 614.

This enactment does not apply to conspiracies to intimidate the Senate or House of Commons. They are covered partly by sections 65 and 69, *ante*.

ASSAULTS ON THE QUEEN.

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

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

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

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

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

(iii) Discharges any explosive material near Her Majesty;

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

(v) Throws anything at or upon Her Majesty; or

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

5 & 6 V. c. 51 (Imp.). Not triable at quarter sessions, section 540. Special provisions, section 614. As to whipping, section 957.

INCITING TO MUTINY. *(New.)*

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

37 Geo. III. c. 10, (Imp.); 7 W. IV. & 1 V. c. 91, (Imp.). Not triable at quarter sessions, section 540. Special provisions, section 614; R. v. Fuller, 1 B. & P. 180; Archbold, 820; R. v. Tierney, R. & R. 74.

ENTICING SOLDIERS OR SEAMEN TO DESERT.

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

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

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

2. The offender may be prosecuted by indictment, or summarily before two justices of the peace. In the former case he is liable to fine and imprisonment in the discretion of the court, and in the latter to a penalty not exceeding two hundred dollars, and not less than eighty dollars and costs, and in default of payment, to imprisonment for any term not exceeding six months. R. S. C. c. 169, ss. 1 & 4; 6 Geo. IV. c. 5, (Imp.).

Triable at quarter sessions. Section 614 applies, though through error. Arrest of suspected deserters, section 561.

RESISTING WARRANT, ETC., ETC.

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

Arrest of deserters, section 561.

ENTICING MILITIA OR MOUNTED POLICE MEN TO DESERT.

75. Every one is guilty of an offence and liable, on summary conviction, to six months' imprisonment with or without hard labour, who—

(*a*) Persuades any man who has been enlisted to serve in any corps of militia, or who is a member of, or has engaged to serve in the North-west mounted police force, to desert, or attempts to procure or persuade any such man to desert; or

(*b*) Knowing that any such man is about to desert, aids or assists him in deserting; or

(*c*) Knowing that any such man is a deserter, conceals such man or aids or assists in his rescue. R. S. C. c. 41, s. 109; 52 V. c. 25, s. 4.

INTERPRETATION OF TWO NEXT SECTIONS.

76. In the two following sections, unless the context otherwise requires—

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

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

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

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

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

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

Those three sections are re-enactments of the Imperial "Official Secrets Act of 1889" 52 & 53 V. c. 52.

UNLAWFULLY OBTAINING OFFICIAL INFORMATION.

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

(*a*) For the purpose of wrongfully obtaining information—

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

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

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

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

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

(*d*) Having possession of any document relating to any fortress, arsenal, factory, dockyard, camp, ship, office or other like place belonging to Her Majesty, or to the naval or military affairs of Her Majesty, in whatever manner the same has been obtained or taken, at any time wilfully communicates the same to any person to whom he knows the same ought not, in the interests of the state, to be communicated at the time ;

2. Every one who commits any such offence intending to communicate to a foreign state any information, document, sketch, plan, model or knowledge obtained or taken by him, or intrusted to him as aforesaid, or communicates the same to any agent of a foreign state, is guilty of an indictable offence and liable to imprisonment for life. 53 V. c. 10, s. 1.

Not triable at quarter sessions, section 540. No prosecution without consent of Attorney-General, section 543. Section 614 is made to apply, though through error. "Having in possession" defined section 3.

BREACH OF OFFICIAL TRUST.

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

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

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

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

See annotation under preceding section.

The Imperial Foreign Enlistment Act, 33-34 V. c. 90, applies to Canada. *See* R. v. Sandoval, Warb. Lead. Cas. 43.

PART V.

UNLAWFUL ASSEMBLIES, RIOTS, BREACHES OF THE PEACE.

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

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

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

R. v. Vincent, 9 C. & P. 91; O'Kelly v. Harvey, 15 Cox, 435; Beatty v. Gillbanks, 15 Cox, 138; Warb. Lead. Cas. 49; Back v. Holmes, 16 Cox, 263; R. v. Clarkson, 17 Cox, 483; R. v. Cunningham, 16 Cox, 420.

"The definition of an unlawful assembly depends entirely on the common law. The earliest definition of an unlawful assembly is in the Year Book, 21 H. VII. 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 endeavoured 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 neighbourhood 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."—Imp. Comm. Rep.

Divers persons assembled in a room, entrance money being paid, to witness a fight between two persons. The combatants fought in a ring with gloves, each being attended by a second, who acted in the same way as the

second at prize fights. The combatants fought for about 40 minutes with great ferocity, and severely punished each other. The police interfered and arrested the defendants, who were among the spectators.

Upon the trial of an indictment against them for unlawfully assembling together for the purpose of a prize fight, the chairman directed the jury that, if it was a mere exhibition of skill in sparring, it was not illegal; but, if the parties met intending to fight till one gave in from exhaustion or injury received, it was a breach of the law and a prize fight, whether the combatants fought in gloves or not, and left it to the jury to say whether it was a prize fight or not.

Held, that the jury were properly directed: R. v. Orton, 14 Cox, 226; *see* R. v. McNaughten, 14 Cox, 576.

The appellants with a considerable number of other persons, forming a body called "Salvation Army," assembled together in the streets of a town for a lawful object, and with no intention of carrying out their object unlawfully, or by the use of physical force, but knowing that their assembly would be opposed and resisted by other persons, in such a way as would in all probability tend to the committing of a breach of the peace on the part of such opposing persons. A disturbance of the peace having been created by the forcible opposition of a number of persons to the assembly and procession through the streets of the appellants and the Salvation Army, who themselves used no force or violence, it was—

Held, by Field and Cave, JJ., (reversing the decision of the justices), that the appellants had not been guilty of unlawfully and tumultuously assembling, etc., and could not therefore be convicted of that offence, nor be bound over to keep the peace.

Held, also, that knowledge by persons peaceably assembling for a lawful object, that their assembly will be forcibly opposed by other persons, under circumstances likely to lead

to a breach of the peace on the part of such other persons, does not render such assembly unlawful: Beatty v. Gillbanks, 15 Cox, 138; *see* R. v. Clarkson, 17 Cox, 483.

A procession being attacked by rioters a person in it fired a pistol twice. He appeared to be acting alone and nobody was injured.

Held, that he could not be indicted for riot, and, on a case reserved, a conviction on such an indictment was quashed: R. v. Corcoran, 26 U. C. C. P. 134.

On the trial of an indictment for riot and unlawful assembly on the 15th Jan., evidence was given on the part of the prosecution of the conduct of the prisoners on the day previous, for the purpose of showing (as was alleged) that B., in whose office one act of riot was committed, had reason to be alarmed when the prisoners came to his office. The prisoner's counsel thereupon claimed the right to show that they had met on the 14th to attend a school meeting, and to give evidence of what took place at the school meeting, but the evidence was rejected. *Held*, per Allen, C.J., and Fisher and Duff, JJ., (Weldon and Wetmore, JJ., dis.), that the evidence was properly rejected because the conduct of the prisoners on the 14th, could not qualify or explain their conduct on the following day. It is no ground for quashing a conviction for unlawful assembly on one day that evidence of an unlawful assembly on another day has been improperly received, if the latter charge was abandoned by the prosecuting counsel at the close of the case, and there was ample evidence to sustain the conviction. If a man knowingly does acts which are unlawful, the presumption of law is that the *mens rea* exists; ignorance of the law will not excuse him: R. v. Mailloux, 3 Pugs. (N.B.), 493.

RIOT.

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

See R. v. Kelly, 6 U. C. C. P. 372; R. v. Cunningham, 16 Cox, 420, and remarks under preceding section.

Section 12 of chapter 147, R. S. C., provided specially for the punishment of a rout.

PUNISHMENT FOR UNLAWFUL ASSEMBLY.

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

Fine and sureties, section 958. *See post*, under section 83, and *ante*, under section 79. The punishment was two years under the repealed section.

PUNISHMENT OF RIOT.

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

Fine and sureties, section 958. The punishment was four years under the repealed section.

RIOT ACT.

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

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

"God Save the Queen."

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

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

(*b*) Continue together to the number of twelve for thirty minutes after such proclamation has been made, or if they know that its making was hindered as aforesaid, within thirty minutes after such hindrance. R. S. C. c. 147, ss. 1 & 2.

The omission of "God Save the Queen" is fatal. R. v. Child, 4 C. & P. 442; *see* sections 40, 41, 42, *ante*, and Archbold, 955. Limitation, one year, section 551. R. v. Pinney, 3 B. & Ad. 947: R. v. Kennett, 5 C. & P. 282:

R. v. Neale, 9 C. & P. 431; R. v. Vincent, 9 C. & P. 91; R. v. James, 5 C. & P. 153.

IF RIOTERS DO NOT DISPERSE, ETC., ETC.

84. If the persons so unlawfully, riotously and tumultuously assembled together as mentioned in the next preceding section, or twelve or more of them, continue together, and do not disperse themselves, for the space of thirty minutes after the proclamation is made or after such hindrance as aforesaid, it is the duty of every such sheriff, justice and other officer, and of all persons required by them to assist, to cause such persons to be apprehended and carried before a justice of the peace; and if any of the persons so assembled is killed or hurt in the apprehension of such persons, or in the endeavour to apprehend or disperse them, by reason of their resistance, every person ordering them to be apprehended or dispersed, and every person executing such orders, shall be indemnified against all proceedings of every kind in respect thereof: Provided, that nothing herein contained shall, in any way, limit or affect any duties or powers imposed or given by this Act as to the suppression of riots before or after the making of the said proclamation, R. S. C. c. 147, s. 3.

See annotation under preceding section.

RIOTOUS DESTRUCTION OF BUILDINGS.

85. All persons are guilty of an indictable offence and liable to imprisonment for life who, being riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force demolish or pull down, or begin to demolish or pull down, any building, or any machinery, whether fixed or movable, or any erection used in farming land, or in carrying on any trade or manufacture, or any erection or structure used in conducting the business of any mine, or any bridge, waggon-way or track for conveying minerals from any mine. R. S. C. c. 147, s. 9; 24-25 V. c. 97, s. 11, (Imp.).

See next section.

Indictment.—That on at J. S., J. W. and E. W., together with divers other evil-disposed persons, to the jurors aforesaid unknown, unlawfully, riotously and tumultuously did assemble together, to the disturbance of the public peace; and being then and there so unlawfully, riotously and tumultuously assembled together as aforesaid did then and there unlawfully and with force begin to demolish and pull down, the dwelling-house of one J. N., there situate.

See note under next section.

The accused may be convicted of the offence covered by next section, if the evidence warrants it: section 713.

RIOTOUS DAMAGE TO BUILDINGS.

86. All persons are guilty of an indictable offence and liable to seven years' imprisonment who, being riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force injure or damage any of the things mentioned in the last preceding section.

2. *It shall not be a defence to a charge of an offence against this or the last preceding section that the offender believed he had a right to act as he did, unless he actually had such a right.* R. S. C. c. 147, s. 10; 24-25 V. c. 97, s. 12 (Imp.).

"Sub-section 2 removes what is at least a doubt. *See* R. v. Langford, Car. & M. 602; R. v. Casey, 8 Ir. Rep. C. L. 408."—Imp. Comm. Rep.

See R. v. Phillips, 2 Moo. 252; Drake v. Fobtitt, 7 Q. B. D. 201.

Indictment.—That on at S., J. W. and E. W., together with divers other evil-disposed persons, to the said jurors unknown, unlawfully, riotously, and tumultuously did assemble together to the disturbance of the public peace, and being then and there so unlawfully, riotously and tumultuously assembled together as aforesaid, did then and there unlawfully and with force injure a certain dwelling-house of one J. N., there situate. *Add a count stating "damage" instead of "injure."*

The riotous character of the assembly must be proved. It must be proved that these three or more, but not less than three, persons assembled together, and that their assembling was accompanied with some such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as were calculated to inspire people with terror, such as being armed, using threatening speeches, turbulent gestures, or the like. It is a sufficient terror and alarm, if *any one* of the Queen's subjects be in fact terrified: Archbold, 552. Then prove that the assembly began with force to demolish the house in question. It must appear that they began to demolish some part of the *freehold;* for instance, the demolition of moveable shutters is not sufficient: R. v. Howell, 9 C. & P. 437. A demolition by fire is within the Statute. Prove that the defendants were either active in demolishing the house, or present,

aiding and abetting. To convict under section 85, the jury must be satisfied that the ultimate object of the rioters was to demolish the house, and that if they had carried their intention into effect, they would in point of fact have demolished it; for if the rioters merely do an injury to the house, and then of their own accord go away as having completed their purpose it is not a beginning to demolish within this section. But a total demolition is not necessary, though the parties were not interrupted, and the fact that the rioters left a chimney remaining, will not prevent the Statute from applying. But if the demolishing or intent to demolish be not proved, and evidence of riot and injury or damage to the building is produced, the jury may find the defendant guilty of the offence created by section 86.

UNLAWFUL DRILLING.

87. The Governor in Council is authorized from time to time to prohibit assemblies without lawful authority of persons for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms, or for the purpose of practising military exercises, movements or evolutions, and to prohibit persons when assembled for any other purpose so training or drilling themselves or being trained or drilled. Any such prohibition may be general or may apply only to a particular place or district and to assemblies of a particular character, and shall come into operation from the publication in the *Canada Gazette* of a proclamation embodying the terms of such prohibition, and shall continue in force until the like publication of a proclamation issued by the authority of the Governor in Council revoking such prohibition.

2. Every person is guilty of an indictable offence and liable to two years' imprisonment who, without lawful authority and in contravention of such prohibition or proclamation—

(*a*) Is present at or attends any such assembly for the purpose of training or drilling any other person to the use of arms or the practice of military exercises or evolutions; or

(*b*) At any assembly trains or drills any other person to the use of arms or the practice of military exercises or evolutions. R. S. C. c. 147, ss. 4 & 5. 60 Geo. III. and 1 Geo. IV. c. 1, (Imp.). (*Amended.*)

Limitation, 6 months, section 551; *see* Archbold, 822.

UNLAWFULLY BEING DRILLED.

88. Every one is guilty of an indictable offence and liable to two years' imprisonment who, without lawful authority, attends, or is present at, any such assembly as in the last preceding section mentioned, for the purpose of being, or who at any such assembly is, without lawful authority and in contra-

vention of such prohibition or proclamation, trained or drilled to the use of arms or the practice of military exercises or evolutions. R. S. C. c. 147, s. 6.

Limitation, 6 months, section 551.

FORCIBLE ENTRY OR DETAINER.

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

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

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

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

Archbold, 886; R. v. Smyth, 5 C. & P. 201; Lows v. Telford, 13 Cox, 226, Warb. Lead Cas. 51.

"Forcible entry and detainer are offences at common law; and this section, we believe, correctly states the existing law."—Imp. Comm. Rep.

Indictment.—That A. D., C. D., E. F., G. H., and J. K., on day of , in the year of our Lord unlawfully and injuriously and with a strong hand entered into a certain mill, and certain lands and houses, and the sites of a certain mill and certain houses, with the appurtenances, situate in the parish of , in the said county, and then in the possession of one L. M., and unlawfully and injuriously and with a strong hand, expelled and put out the said L.M. from the possession of the said premises, in a manner likely to cause a breach of the peace.

AFFRAY.

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

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

The words "to the alarm of the public" should be inserted after the word "fighting" in the first line. Under section 14, chapter 147 of the Revised Statutes, this offence

was punishable by three months on summary conviction. It must now be proceeded against by indictment.

CHALLENGE TO FIGHT A DUEL.

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

This was an offence at common law: R. v. Rice, 3 East, 581; R. v. Philipps, 6 East, 463: 3 Chit. 487.

PRIZE FIGHTS, ETC., ETC.

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

R. v. Perkins, 4 C. & P. 537; R. v. Murphy, 6 C. & P. 103; R. v. Coney, 15 Cox, 46, 8 Q. B. D. 534; in R. v. Taylor, 13 Cox, 68, it was held that a stakeholder to a prize-fight is not an accessory before the fact nor an abettor to the manslaughter, if one of the combatants is killed, he not being present: *see* R. v. Orton, Warb. Lead. Cas. 54, and R. v. Coney, *Id.* 56.

The following three sections of chapter 153, Revised Statutes are unrepealed.

6. If, at any time, the sheriff of any county, place or district in Canada, any chief of police, any police officer, or any constable, or other peace officer, has reason to believe that any person within his bailiwick or jurisdiction is about to engage as principal in any prize-fight within Canada, he shall forthwith arrest such person and take him before some person having authority to try offences against this Act, and shall forthwith make complaint in that behalf, upon oath, before such person; and thereupon such person shall inquire into the charge, and if he is satisfied that the person so brought before him was, at the time of his arrest, about to engage as a principal in a prize-fight, he shall require the accused to enter into a recognizance, with sufficient sureties, in a sum not exceeding five thousand dollars and not less than one thousand dollars, conditioned that the accused will not engage in any such fight within one year from and after the date of such arrest; and in default of such recognizance, the person before whom the accused has been brought shall commit the accused to the gaol of the county, district or city within which such inquiry takes place, or if there is no common gaol there, then to the common gaol which is nearest to the place where such inquiry is had, there to remain until he gives such recognizance with such sureties.

7. If any sheriff has reason to believe that a prize-fight is taking place or is about to take place within his jurisdiction as such sheriff, or that any persons are about to come into Canada at a point within his jurisdiction, from any place outside of Canada, with intent to engage in, or to be concerned in, or to attend any prize-fight within Canada, he shall forthwith summon a force of the inhabitants of his district or county sufficient for the purpose of suppressing and preventing such fight; and he shall, with their aid, suppress and prevent the same, and arrest all persons present thereat, or who come into Canada as aforesaid, and shall take them before some person having authority to try offences against this Act, to be dealt with according to law, and fined or imprisoned, or both, or compelled to enter into recognizances with sureties, as hereinbefore provided, according to the nature of the case.

10. Every judge of a superior court or of a county court, judge of the sessions of the peace, stipendiary magistrate, police magistrate, and commissioner of police of Canada, shall, within the limits of his jurisdiction as such judge, magistrate or commissioner, have all the powers of a justice of the peace with respect to offences against this Act.

CHALLENGE TO A PRIZE-FIGHT.

93. Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding one thousand dollars and not less than one hundred dollars, or to imprisonment for a term not exceeding six months, *with or without hard labour* or to both, who sends or publishes, or causes to be sent or published or otherwise made known, any challenge to fight a prize-fight or accepts any such challenge, or causes the same to be accepted, or goes into training preparatory to such fight, or acts as trainer or second to any person who intends to engage in a prize-fight. R. S. C. c. 153, s. 2.

PRINCIPAL IN A PRIZE-FIGHT.

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

AIDERS, ABETTORS, ETC.

95. Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding five hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding twelve months, *with or without hard labour* or to both, who is present at a prize-fight as an aid, second, surgeon, umpire, backer, assistant or reporter, or who advises, encourages or promotes such fight. R. S. C. c. 153, s. 5.

See R. v. Coney, 15 Cox, 46, Warb. Lead. Cas. 56, and note under section 92 *ante*.

LEAVING CANADA TO ENGAGE IN A PRIZE-FIGHT.

96. Every inhabitant or resident of Canada is guilty of an offence and liable, on summary conviction, to a penalty not exceeding four hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding six months, *with or without hard labour* or to both, who leaves Canada with intent to engage in a prize-fight without the limits thereof. R. S. C. c. 153, s. 5.

The interpretation clause does not state what is the difference between an inhabitant and a resident.

TRIAL, ETC.

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

Section 7, chapter 147, R. S. C., authorizing the sheriff to prevent by force any prize-fight has not been repealed. *See ante,* under section 92.

INCITING INDIANS TO RIOTOUS ACTS.

98. Every one is guilty of an indictable offence and liable to two years' imprisonment who induces, incites or stirs up any three or more Indians, non-treaty Indians, or half-breeds, apparently acting in concert—

(*a*) To make any request or demand of any agent or servant of the Government in a riotous, routous, disorderly or threatening manner, or in a manner calculated to cause a breach of the peace ; or

(*b*) To do any act calculated to cause a breach of the peace. R. S. C. c. 43, s. 111.

Inciting an Indian to commit any indictable offence is punishable by five years, section 112, chapter 43, R. S. C. even if that indictable offence is itself liable to a lesser punishment.

PART VI.

UNLAWFUL USE AND POSSESSION OF EXPLOSIVE SUBSTANCES AND OFFENSIVE WEAPONS —SALE OF LIQUORS.

99. Every one is guilty of an indictable offence and liable to imprisonment for life who wilfully causes, by any explosive substance, an explosion of a nature likely to endanger life or to cause serious injury to property, whether any injury to person or property is actually caused or not. R. S. C. c. 150, s. 3.

See post annotations under sections 247, 248 & 488.

As to search warrant, section 569 sub-sections 7, 8.—"Explosive substance" defined, section 3. This and the two following sections are re-enactments of the Imperial "Explosive Substances Act of 1883": 46 V. c. 3.

INJURIES BY EXPLOSIVE SUBSTANCES.

100. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who wilfully—

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

(*b*) Makes or has in his possession or under his control any explosive substance with intent by means thereof to endanger life or to cause serious injury to property, or to enable any other person by means thereof to endanger life or to cause serious injury to property—

Whether any explosion takes place or not and whether any injury to person or property is actually caused or not. R. S. C. c. 150, s. 3.

See note under preceding section.

POSSESSION OF EXPLOSIVES.

101. 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 show that he made it or had it in his possession or under his control for a lawful object. R. S. C. c. 150, s. 5; 46 V. c. 3 (Imp.).

"Having in possession" and "Explosive substance" defined, section 3; R. v. Charles, 17 Cox, 499, is a case under the corresponding section of the Imperial act.

POSSESSION OF OFFENSIVE WEAPONS.

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

Limitation, 6 months, section 551. "Having in possession" and "Offensive weapon" defined, section 3; search warrant, section 569. The following sections of chapter 149, Revised Statutes respecting the seizure of arms kept for dangerous purposes are unrepealed.

5. All justices of the peace in and for any district, county, city, town or place, in Canada, shall have concurrent jurisdiction as justices of the peace, with the justices of any other district, county, city, town or place, in all cases with respect to the carrying into execution the provisions of this Act, and with respect to all matters and things relating to the preservation of the public peace under this Act, as fully and effectually as if each of such justices was in the commission of the peace, or was *ex officio* a justice of the peace for each of such districts, counties, cities, towns or places.

7. The Governor in Council may, from time to time, by proclamation, suspend the operation of this Act in any province of Canada or in any particular district, county or locality specified in the proclamation; and from and after the period specified in any such proclamation, the powers given by this Act shall be suspended in such province, district, county or locality; but nothing herein contained shall prevent the Governor in Council from again declaring, by proclamation, that any such province, district, county or locality shall be again subject to this Act and the powers hereby given, and upon such proclamation this Act shall be revived and in force accordingly.

CARRYING OFFENSIVE WEAPONS.

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

Limitation, one month, section 551. "Offensive weapon" defined, section 3.

BEING FOUND WITH SMUGGLED GOODS.

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

As the section reads, there must be both the unlawful possession and the carrying of arms to constitute this offence. Section 213, of chapter 32, Revised Statutes, *An Act respecting the Customs*, is repealed, also sections 98 and 99, of chapter 34, Revised Statutes, *An Act respecting the Inland Revenue.*

CARRYING OF ARMS, SELLING ARMS.

105. Every one is guilty of an offence and liable on summary conviction to a penalty not exceeding twenty-five dollars and not less than five dollars, or to imprisonment for one month, who, not being a justice or a public officer, or a soldier, sailor or volunteer in Her Majesty's service, on duty, or a constable

or other peace officer, and not having a certificate of exemption from the operation of this section as hereinafter provided for, and not having at the time reasonable cause to fear an assault or other injury to his person, family or property, has upon his person a pistol or air-gun elsewhere than in his own dwelling-house, shop, warehouse, or counting-house.

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

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

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

5. Whenever the Governor in Council deems it expedient in the public interest, he may by proclamation suspend the operation of the provisions of the first and second sub-sections of this section respecting certificates of exemption, or exempt from such operation any particular part of Canada, and in either case for such period, and with such exceptions as to the persons hereby affected, as he deems fit. Section 1, c. 148. (*Amended*).

Limitation, one month, s. 551.

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

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

Limitation, one month, s. 551.

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

Limitation, one month, s. 551.

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

Limitation, one month, s. 551.

109. Every one who, without lawful excuse, points at another person any firearm or air-gun, whether loaded or unloaded, is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding *one hundred dollars* and not less than *ten* dollars, or to imprisonment for any term not exceeding thirty days, *with or without hard labour*. R. S. C. c. 148, s. 4.

Limitation, one month, s. 551.

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

Limitation, one month, s. 551.

CARRYING SHEATH-KNIVES IN SEAPORTS.

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

Limitation, one month, s. 551.

The section does not only apply to seaports as the repealed section did. The heading only does. Section 7 of chapter 148, Revised Statutes. "An Act respecting the Improper Use of Firearms and other Weapons" is unrepealed.

LEGAL CARRYING OF ARMS.

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

The words in italics are new.

REFUSAL TO DELIVER ARMS WHEN ATTENDING A PUBLIC MEETING.

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

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

For a conviction under indictment, the punishment would be under section 951, *post;* limitation, one year, section 551. Sections 1, 2, 3, chapter 152, "An Act respecting the Preservation of Peace at Public Meetings," are unrepealed.

COMING ARMED NEAR A MEETING.

114. Every one, except the sheriff, deputy sheriff and justices of the peace for the district or county, or the mayor, justices of the peace or other peace officer for the city or town respectively, in which any public meeting is held, and the constables and special constables employed by them, or any of them, for the preservation of the public peace at such meeting, is guilty of an indictable offence, and liable to a penalty not exceeding one hundred dollars, or to imprisonment for a term not exceeding three months, or to both, who, during any part of the day upon which such meeting is appointed to be held, comes within one mile of the place appointed for such meeting armed with any offensive weapon. R. S. C. c. 152, s. 5.

Limitation, one year, section 551. "Offensive weapon" defined, section 3.

An offender punishable by three months imprisonment should be liable to conviction upon summary proceedings.

LYING IN WAIT FOR PERSONS RETURNING FROM PUBLIC MEETING.

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

Limitation, one year, section 551. Why is the offence under this section indictable?

SALE OF ARMS, NORTH-WEST TERRITORIES.

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

(*a*) Without the permission in writing (the proof of which shall be on him) of the Lieutenant Governor, or of a commissioner appointed by him to give such permission, has in his possession or sells, exchanges, trades, barters or gives to, or with any person, any improved arm or ammunition; or

(*b*) Having such permission sells, exchanges, trades, barters or gives any such arm or ammunition to any person not lawfully authorized to possess the same.

2. The expression "improved arm" in this section means and includes all arms except smooth-bore shot-guns; and the expression "ammunition" means fixed ammunition or ball cartridge. R. S. C. c. 50, s. 101.

Section 101, of chapter 50, R. S. C. *the North West Territories Act*, is unrepealed.

As to search warrant, section 569.

PROTECTION OF PUBLIC WORKS.

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

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

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

2. The provisions of this section do not extend to any person selling intoxicating liquor by wholesale and not retailing the same, if such person is a licensed distiller or brewer.

3. Every one is liable, on summary conviction, for a first offence, to a penalty of forty dollars and costs, and, in default of payment, to imprisonment

for a term not exceeding three months, with or without hard labour,—and on every subsequent conviction to the said penalty and the said imprisonment in default of payment, and also to further imprisonment for a term not exceeding six months, with or without hard labour, who, by himself, his clerk, servant, agent or other person, violates any of the provisions of this or of the preceding section.

4. Every clerk, servant, agent or other person who, being, in the employment of, or on the premises of, another person, violates or assists in violating any of the provisions of this or of the preceding section for the person in whose employment or on whose premises he is, is equally guilty with the principal offender and liable to the same punishment. R. S. C. c. 151, ss. 1, 13, 14 & 15.

Chapter 151, Revised Statutes, "An Act respecting the Preservation of Peace in the vicinity of Public Works," is unrepealed.

CONVEYING LIQUOR, ETC., ETC., ETC., TO HER MAJESTY'S SHIPS.

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

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

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

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

As to arrest without warrant of offenders against this section by any officer, *see* section 552, sub-section 6; as to search for liquor and seizure by such officer, section 573.

PART VII.

SEDITIOUS OFFENCES.—UNLAWFUL OATHS.

OATHS TO COMMIT CERTAIN OFFENCES. *(New).*

120. 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. 52 Geo. III. c. 104 (Imp.).

Not triable at quarter sessions, section 540.

This enactment and the two next are taken from chapter 10 of the Cons. Stat. of Lower Canada, of which sections 5, 6, 7, 8 & 9 remain unrepealed.

OTHER UNLAWFUL OATHS. (*New*).

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

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

(i) To engage in any mutinous or seditious purpose;

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

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

(iv) Not to reveal or discover any unlawful combination or confederacy, or any illegal act done or to be done or any illegal oath or obligation or engagement which may have been administered or tendered to or taken by any person, or the import of any such oath or obligation or engagement; or

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

(*c*) Takes any such oath or engagement: C. S. L. C. c. 10, s. 1. 37 Geo. III. c. 123 (Imp.).

Not triable at quarter sessions, section 540.

R. v. Lovelass, 6 C. & P. 596.

Indictment.—The jurors for our Lady the Queen present, that A. B. on the day of , in the year of our Lord , did unlawfully administer and cause to be administered to one C. D. a certain oath and engagement, purporting, and then intended, to bind the said C. D., not to inform or give evidence against any associate, confederate, or other person of or belonging to a certain unlawful association and confederacy, to wit and which said oath and engagement was then taken by the said C. D.

INDICTMENT FOR TAKING AN UNLAWFUL OATH.

Commence as ante]—did unlawfully take a certain oath and engagement, purporting [*&c., as in the last precedent*]: he, the said C. D., not being then compelled to take the said oath and engagement.

COMPULSION. *(New).*

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

52 Geo. III. c. 104; 37 Geo. III. c. 123, (Imp.).

SEDITIOUS OFFENCES DEFINED. *(New).*

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

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

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

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

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

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

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

"This section appears to us to state accurately the existing law. On this very delicate subject, we do not undertake to suggest any alteration of the law."—Imp. Comm. Rep.

R. v. Frost, 22 St. Tr. 471; R. v. Winterbotham, 22 St. Tr. 823; R. v. Binns, 26 St. Tr. 595; O'Connell v. R., 11

Cl. & F. 155, 234; R. v. Vincent, 9 C. & P. 91; R. v. Pigott, 11 Cox, 44; R. v. Burns, 16 Cox, 355.

The truth of a seditious or blasphemous libel cannot be pleaded as a defence to an indictment: R. v. Duffy, 9 Ir. L. R. 329; R. v. Bradlaugh, 15 Cox, 217; *Ex parte* O'Brien, 15 Cox, 180; R. v. Ramsay, 15 Cox, 231; *see* note under section 170, *post*.

PUNISHMENT. *(New)*.

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

Fine or sureties, section 958. Not triable at quarter sessions, section 540. On an indictment for a seditious libel, the words need not be set out, section 615; *see* note under preceding section.

LIBELS ON FOREIGN SOVEREIGNS. *(New)*.

125. Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful justification, publishes any libel tending to degrade, revile or expose to hatred and contempt in the estimation of the people of any foreign state, any prince or person exercising sovereign authority over any such state.

Not triable at quarter sessions, section 540. Words need not be set out in indictment, section 615; R. v. D'Eon, 1 W. Bl. 517; R. v. Peltier, 28 St. Tr. 529; Shirley's Lead. Cas. Cr. L. 3; R. v. Gordon, 1 Russ. 351; R. v. Bernard, Warb. Lead. Cas. 45; R. v. Most, 14 Cox, 583, 7 Q. B. D. 244, *per* Coleridge, C.J. Fine, in lieu of, or in addition to the punishment, section 958. The intent to disturb peace and friendship between the United Kingdom and the foreign state whose sovereign has been libelled would appear to be necessary to constitute this offence at common law: Stephen, Cr. L. 99.

FALSE NEWS. *(New)*.

126 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.

Not triable at quarter sessions, section 540. Fine and sureties for the peace, section 958.

The 3 Edw. I. c. 34, and 2 Ric. II. c. 25 (now repealed by 50 & 51 V. c. 59), enact that none be so hardy to tell or publish any false news or tales, whereby discord or occasion of discord or slander, may grow between the King and his people, and the great men of the realm. In Chitty's Crim. Law, vol. 2, 527, is a form of indictment for spreading false rumours in order to enhance the price of hops. "It is said to have been resolved by all the judges that all *writers* of false news are indictable and punishable: and probably at this day the fabrication of news likely to produce any public detriment would be considered as criminal": Starkie on Libel, 546, 1st edition. What would constitute a "publishing" under the above section is not clear. In Chitty's form above cited, the publishing is not by writing. The 3 Edw. I. c. 34, has the words "tell or publish." A publication may be oral or written: 2 Starkie, Libel, 141.

PART VIII.

PIRACY. *(New).*

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

(*a*) To death, if in committing or attempting to commit such crime the offender murders, attempts to murder or wounds any person, or does any act by which the life of any person is likely to be endangered;

(*b*) To imprisonment for life in all other cases.

"We have thought it better to leave this offence undefined, as no definition of it would be satisfactory which is not recognized as such by other nations; and, after careful consideration of the subject, we have not been able to discover a definition fulfilling such a condition. We may observe as to this that the subject has been much discussed in the courts of the United

States, and the result appears to justify the course which we have adopted."—Imp. Comm. Rep.

See Stephen's, Cr. L. 104. Not triable at quarter sessions, section 540.

PIRATICAL ACTS. (*New*).

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

(*a*) Being a British subject, on the sea, or in any place within the jurisdiction of the Admiralty of England, under colour of any commission from any foreign prince or state, whether such prince or state is at war with Her Majesty or not, or under 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 Her Majesty's enemies;

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

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

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

(ii) Yields them up voluntarily to any pirate;

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

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

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

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

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

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

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

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

(iii) Conspires or corresponds with any pirate.

See under preceding section.

PUNISHMENT. (*New*).

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

See annotation under section 127.

NOT FIGHTING PIRATES. (*New*).

130. Every one is guilty of an indictable offence and liable to six months' imprisonment, and to forfeit to the owner of the ship all wages then due to him, who, being a master, officer or seaman of any merchant ship which carries guns and arms, does not, when attacked by any pirate, fight and endeavour to defend himself and his vessel from being taken by such pirate, or who discourages others from defending the ship, if by reason thereof the ship falls into the hands of such pirate: 8 Geo. I. c. 24, s. 6, (Imp.).

Not triable at quarter sessions, section 540; fine or sureties, section 958.

TITLE III.

OFFENCES AGAINST THE ADMINISTRATION OF LAW AND JUSTICE.

PART IX.

CORRUPTION AND DISOBEDIENCE.

CORRUPTION OF JUDGES OR MEMBERS OF PARLIAMENT. (*New*).

131. 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.

Not triable at quarter sessions, section 540; no indictment for judicial corruption without the leave of the Attorney-General of Canada, section 544; a common law misdemeanour: *see* R. v. Bunting, 7 O. R. 524.

"In a general code of the criminal law we have thought it right to include the offence of judicial corruption. 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."—Imp Comm. Rep.

CORRUPTION OF PEACE OFFICERS, ETC., ETC. (*New*).

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

(*a*) Being a justice of the peace, peace officer, or public officer, employed in any capacity for the prosecution or detection or punishment of offenders, corruptly accepts or obtains, or agrees to accept or attempts to obtain for himself, or for any other person, any money or valuable consideration, office, place or employment, with the intent to interfere corruptly with the due administration of justice, or to procure or facilitate the commission of any crime, or to protect from detection or punishment any person having committed or intending to commit any crime; or

(*b*) Corruptly gives or offers to any such officer as aforesaid any such bribe as aforesaid with any such intent.

"Peace officer" defined, section 3. Not triable at quarter sessions, section 540; a common law misdemeanour; form of indictment for attempt to bribe a constable: Archbold, 869.

FRAUDS UPON THE GOVERNMENT.

133. Every one is guilty of an indictable offence and liable to a fine of not less than one hundred dollars, and not exceeding one thousand dollars, and to imprisonment for a term not exceeding one year and not less than one month, and in default of payment of such fine to imprisonment for a further time not exceeding six months who—

(*a*) Makes any offer, proposal, gift, loan or promise, or who gives or offers any compensation or consideration, directly or indirectly, to any official or person in the employment of the Government, or to any member of his family, or to any person under his control, or for his benefit, with intent to obtain the assistance or influence of such official or person to promote either the procuring of any contract with the Government, for the performance of any work, the doing of any thing, or the furnishing of any goods, effects, food or materials, the execution of any such contract, or the payment of the price, or consideration stipulated therein, or any part thereof, or of any aid or subsidy, payable in respect thereof; or

(*b*) Being an official or person in the employment of the Government, directly or indirectly, accepts or agrees to accept, or allows to be accepted by any person under his control, or for his benefit, any such offer, proposal, gift, loan, promise, compensation or consideration; or

(c) In the case of tenders being called for by or on behalf of the Government, for the performance of any work, the doing of any thing, or the furnishing of any goods, effects, food or materials, directly or indirectly, by himself or by the agency of any other person on his behalf, with intent to obtain the contract therefor, either for himself or for any other person, proposes to make, or makes, any gift, loan, offer or promise, or offers or gives any consideration or compensation whatsoever to any person tendering for such work or other service, or to any member of his family, or other person for his benefit, to induce such person to withdraw his tender for such work or other service, or to compensate or reward him for having withdrawn such tender; or

(*d*) In case of so tendering, accepts or receives, directly or indirectly, or permits or allows to be accepted or received by any member of his family, or by any other person under his control, or for his benefit, any such gift, loan, offer, promise, consideration or compensation, as a consideration or reward for withdrawing or for having withdrawn such tender; or

(*e*) Being an official or employee of the Government, receives, directly or indirectly, whether personally, or by or through any member of his family, or person under his control, or for his benefit, any gift, loan, promise, compensation or consideration whatsoever, either in money or otherwise, from any person whomsoever, for assisting or favouring any individual in the transaction of any business whatsoever with the Government, or who gives or offers any such gift, loan, promise, compensation or consideration; or

(*f*) By reason of, or under the pretense of, possessing influence with the Government, or with any Minister or official thereof, demands, exacts or receives from any person, any compensation, fee or reward, for procuring from the Government the payment of any claim, or of any portion thereof, or for procuring or furthering the appointment of himself, or of any other person, to any office, place or employment, or for procuring or furthering the obtaining for himself or any other person, of any grant, lease or other benefit from the Government; or offers, promises or pays to such person, under the circumstances and for the causes aforesaid, or any of them, any such compensation, fee or reward; or

(*g*) Having dealings of any kind with the Government through any department thereof, pays any commission or reward, or within one year before or after such dealings, without the express permission in writing of the head of the department with which such dealings have been had, the proof of which permission shall lie upon him, makes any gift, loan, or promise of any money, matter or thing, to any employee or official of the Government, or to any member of the family of such employee or official, or to any person under his control, or for his benefit; or

(*h*) Being an employee or official of the Government, demands, exacts or receives, from such person, directly or indirectly, by himself, or by or through any other person for his benefit, or permits or allows any member of his family, or any person under his control, to accept or receive—

(i) Any such commission or reward; or

(ii) Within the said period of one year, without the express permission in writing of the head of the department with which such dealings have been had, the proof of which permission shall lie upon him, accepts or receives any such gift, loan or promise; or

(*i*) Having any contract with the Government for the performance of any work, the doing of anything, or the furnishing of any goods, effects, food or materials, and having or expecting to have any claim or demand against the Government by reason of such contract, either directly or indirectly, by himself or by any person on his behalf, subscribes, furnishes or gives, or promises to subscribe, furnish or give, any money or other valuable consideration for the purpose of promoting the election of any candidate, or of any number, class or party of candidates to a legislature or to Parliament, or with the intent in any way of influencing or affecting the result of a provincial or Dominion election.

2. If the value of the amount or thing paid, offered, given, loaned, promised, received or subscribed, as the case may be, exceeds one thousand dollars, the offender under this section is liable to any fine not exceeding such value.

3. The words "the Government" in this section include the Government of Canada and the Government of any province of Canada, as well as Her Majesty in the right of Canada or of any province thereof. 54-55 V. c. 23, s. 1; 52-53 V. c. 69 (Imp.).

Not triable at quarter sessions, section 540; limitation, two years, section 551. As to indictments for frauds in certain cases, section 616.

CONSEQUENCES OF A CONVICTION.

134. Every person convicted of an offence under the next preceding section shall be incapable of contracting with the Government, or of holding any contract or office with, from, or under it, or of receiving any benefit under any such contract. R. S. C. c. 173, ss. 22, 23; 54-55 V. c. 23, s. 2.

BREACH OF TRUST BY PUBLIC OFFICER. (*New*).

135. 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.

Not triable at quarter sessions, section 540; fine or sureties, section 958.

"A. an accountant in the office of the paymaster-general, fraudulently omits to make certain entries in his accounts, whereby he enables the cashier to retain large sums of money in his own possession, and to appropriate the interest on such sums to himself after the time when they ought to have been paid to the Crown. A. commits a misdemeanour. 2. A., a commissary-general of stores in the West Indies, makes contracts with B. to supply stores on the condition that B. should divide the profits with A. A. commits a misdemeanour."—Stephen's Cr. L. 121.

No such enactment is to be found in the Imperial Draft Code of 1879, nor in the bill of 1880, though, by the latter, it was proposed to supersede the whole of the common law. And that it was so left out intentionally is evident from the fact that it was provided for in the bill of 1879, s. 71, drafted by Sir James Stephens, who took it from his Digest., Art. 121, from which it has been re-produced *verbatim* in this code.

The defendant, a government officer, having charge of some public dredging, used his own steam-yacht for the purpose of towing the government's dredges, and also used a storehouse of his own for the purpose of stowing government stores. The steam yacht was registered in the name of one of the defendant's friends, in whose name the accounts for the towing were made out and rendered.

The accounts for the storage were sent to the government in the name of another friend of the defendant. The defendant, whose duty it was to audit these accounts, under s. 42, c. 29, R. S. C., certified them as correct, and received the amounts. It was proved that the services charged for were rendered, and that the prices charged were not higher than what the government would have had to pay to any other person performing the same services; also that some of the defendant's superior officers were informed of his doings in the matter and did not interpose to stop them. *Held*, upon a reserved case, that the defendant was guilty of misbehaviour in office: R. v. Arnoldi, 23 O. R. 201. *See* a form of indictment in the report of that case.

CORRUPTION IN MUNICIPAL AFFAIRS.

136. Every one is guilty of an indictable offence and liable to a fine not exceeding one thousand dollars and not less than one hundred dollars, and to imprisonment for a term not exceeding two years and not less than one month, and in default of payment of such fine to imprisonment for a further term not exceeding six months, who directly or indirectly,—

(*a*) Makes any offer, proposal, gift, loan, promise or agreement to pay or give any money or other material compensation or consideration to any member of a municipal council, whether the same is to inure to his own advantage or to the advantage of any other person, for the purpose of inducing such member either to vote or to abstain from voting, at any meeting of the council of which he is a member or at any meeting of a committee of such council, in favour of or against any measure, motion, resolution or question submitted to such council or committee; or

(*b*) Makes any offer, proposal, gift, loan, promise or agreement to pay or give any money or other material compensation or consideration to any member or to any officer of a municipal council for the purpose of inducing him to aid in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person; or

(*c*) Makes any offer, proposal, gift, loan, promise or agreement to pay or give any money or other material compensation or consideration to any officer of a municipal council for the purpose of inducing him to perform or abstain from performing, or to aid in procuring or preventing the performance of, any official act; or

(*d*) Being a member or officer of a municipal council, accepts or consents to accept any such offer, proposal, gift, loan, promise, agreement, compensation or consideration as is in this section before mentioned; or in consideration thereof, votes or abstains from voting in favour of or against any measure, motion, resolution or question, or performs or abstains from performing any official act; or

(*e*) Attempts by any threat, deceit, suppression of the truth or other unlawful means to influence any member of a municipal council in giving or withholding his vote in favour of or against any measure, motion, resolution or question, or in not attending any meeting of the municipal council of which he is a member, or of any committee thereof; or

(*f*) Attempts by any such means as in the next preceding paragraph mentioned to influence any member or any officer of a municipal council to aid in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person, or to perform or abstain from performing, or to aid in procuring or preventing the performance of, any official act: 52 V. c. 42, s. 2.

Not triable at quarter sessions, section 540; limitation, two years, section 551; *see* R. v. Lancaster, 16 Cox, 737; R. v. Hogg, 15 U. C. Q. B. 142.

SELLING OFFICE, APPOINTMENT, ETC., ETC. *(New).*

137. Every one is guilty of an indictable offence who, directly or indirectly—

(*a*) Sells or agrees to sell any appointment to, or resignation of any office, or any consent to any such appointment or resignation, or receives, or agrees to receive, any reward or profit from the sale thereof; or

(*b*) Purchases or gives any reward or profit for the purchase of any such appointment, resignation or consent, or agrees or promises to do so.

Every one who commits any such offence as aforesaid, in addition to any other penalty thereby incurred, forfeits any right which he may have in the office and is disabled for life from holding the same.

2 Every one is guilty of an indictable offence who, directly or indirectly—

(*a*) Receives or agrees to receive any reward or profit for any interest, request or negotiation about any office, or under pretense of using any such interest, making any such request or being concerned in any such negotiation; or

(*b*) Gives or procures to be given any profit or reward, or makes or procures to be made any agreement for the giving of any profit or reward, for any such interest, request or negotiation as aforesaid; or

(*c*) Solicits, recommends or negotiates in any manner as to any appointment to or resignation of any office in expectation of any reward or profit; or

(*d*) Keeps any office or place for transacting or negotiating any business relating to vacancies in, or the sale or purchase of, or appointment to or resignation of offices.

The word "office" in this section includes every office in the gift of the Crown or of any officer appointed by the Crown, and all commissions, civil, naval and military, and all places or employments in any public department or office whatever, and all deputations to any such office and every participation in the profits of any office or deputation.

Common law misdemeanour, 3 Chit. 681. The offence is not triable at quarter sessions, section 540; punishment under s. 951.

DISOBEDIENCE TO STATUTE LAW.

138. Every one is guilty of an indictable offence *and liable to one year's imprisonment* who, without lawful excuse, disobeys any Act of the Parliament of Canada or of any legislature in Canada by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, *unless some penalty or other mode of punishment is expressly provided by law.* R. S. C. c. 173, s. 25 (*amended*).

R. v. Walker, 13 Cox, 94; Stephen's Cr. L. Art. 124; fine or sureties, s. 958; *see* R. v. Hall, 17 Cox, 278, and cases there cited; Hamilton v. Massie, 18 O. R. 585.

The offence which had given rise to this last case would probably now be held to be a not indictable one under the above section 138.

DISOBEDIENCE TO ORDERS OF COURT. *(New).*

139. Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any lawful order other than for the payment of money made by any court of justice, or by any person or body of persons authorized by any statute to make or give such order, unless some penalty is imposed, or other mode of proceeding is expressly provided by law.

Fine or sureties, section 958; Stephen's Cr. L. Art. 125; Archbold, 949.

NEGLECT OF PEACE OFFICER TO SUPPRESS RIOT. *(New).*

140. Every one is guilty of an indictable offence and liable to two years' imprisonment who, being a sheriff, deputy-sheriff, mayor, or other head officer, justice of the peace, or other magistrate, or other peace officer, of any county, city, town, or district, having notice that there is a riot within his jurisdiction, without reasonable excuse omits to do his duty in suppressing such riot.

Fine or sureties, section 958; R. v. Pinney, 3 B. & Ad. 947.

NEGLECT TO AID PEACE OFFICER TO SUPPRESS RIOT. *(New).*

141. Every one is guilty of an indictable offence and liable to one year's imprisonment who, having reasonable notice that he is required to assist any sheriff, deputy-sheriff, mayor or other head officer, justice of the peace, magistrate, or peace officer in suppressing any riot, without reasonable excuse omits so to do.

Fine or sureties, section 958; "peace officer" defined, section 3; R. v. Brown, Car. & M. 314.

NEGLECT TO AID PEACE OFFICER. *(New).*

142. Every one is guilty of an indictable offence and liable to six months imprisonment who, having reasonable notice that he is required to assist any

sheriff, deputy-sheriff, mayor or other head officer, justice of the peace, magistrate, or peace officer, in the execution of his duty in arresting any person, or in preserving the peace, without reasonable excuse omits so to do.

See under preceding section; fine in lieu of or in addition to punishment, section 958: R. v Sherlock, Warb. Lead. Cas. 53

Indictment.—The jurors for our Lady the Queen present that heretofore and before the committing of the offence hereinafter mentioned, to wit, on the day of *A. B.* was lawfully in the custody of *C. D.*, a constable of , on a charge of and the said *A. B.* on the day aforesaid, committed an assault upon the said *C. D.*, being such constable as aforesaid, and a breach of the peace, with intent to resist such his lawful apprehension; and the jurors aforesaid, do further present, that the said *C. D.*, as such constable, there being a reasonable necessity for him so to do, called upon *E. F.*, who was then present, for his assistance, in order to prevent the said assault and breach of the peace; and that the said *E. F.* did unlawfully, wilfully, and knowingly refuse to aid the said *C. D.*, being such constable in the execution of his duty in arresting the said *A. B.*, and to prevent an assault and breach of the peace as aforesaid.

MISCONDUCT OF OFFICERS, ETC., ETC.

143. Every one is guilty of an indictable offence and liable to a fine and imprisonment, who, being a sheriff, deputy-sheriff, coroner, elisor, bailiff, constable or other officer intrusted with the execution of any writ, warrant or process, wilfully misconducts himself in the execution of the same, or wilfully, and without the consent of the person in whose favour the writ, warrant or process was issued, makes any false return thereto. R. S. C. c. 173, s. 29.

Section 934 as to amount of fine, and section 951 as to imprisonment.

OBSTRUCTING PEACE OFFICER, ETC.

144. Every one is guilty of an indictable offence and liable to *ten* years' imprisonment who resists or wilfully obstructs *any public* officer in the execution of his duty or any person acting in aid of such officer.

2. Every one is guilty of an offence and liable on indictment to two years' imprisonment, and on summary conviction before two justices of the peace to six months' imprisonment with hard labour, or to a fine of one hundred dollars, who resists or wilfully obstructs—

(*a*) *Any peace* officer in the execution of his duty or any person acting in aid of any such officer;

(*b*) Any person in the lawful execution of any process against any lands or goods or in making any lawful distress or seizure. R. S. C. c. 162, s. 34.

The punishment was two years under the repealed clause. The increase to ten years gives twelve challenges to the accused, section 668.

"Peace officer" and "public officer" defined, section 3. *See* annotation under section 263, *post*, which covers the same offence and makes it punishable by two years.

PART X.

MISLEADING JUSTICE.

PERJURY.

145. Perjury is an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding as part of his evidence, upon oath or affirmation, whether such evidence is given in open court, or by affidavit or otherwise, and whether such evidence is material or not, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding. Evidence in this section includes evidence given on the *voir dire* and evidence given before a grand jury.

2. Every person is a witness within the meaning of this section who actually gives his evidence, whether he was competent to be a witness or not, *and whether his evidence was admissible or not.*

3. Every proceeding is judicial within the meaning of this section which is held in or under the authority of any court of justice, or before a grand jury, or before either the Senate or House of Commons of Canada, or any committee of either the Senate or House of Commons, or before any Legislative Council, Legislative Assembly or House of Assembly or any committee thereof, empowered by law to administer an oath, or before any justice of the peace, or any arbitrator or umpire, or any person or body of persons authorized by law or by any statute in force for the time being to make an inquiry and take evidence therein upon oath, or before any legal tribunal by which any legal right or liability can be established, *or before any person acting as a court, justice or tribunal, having power to hold such judicial proceeding, whether duly constituted or not and whether the proceeding was duly instituted or not before*

such court or person so as to authorize it or him to hold the proceeding, and although such proceeding was held in a wrong place or was otherwise invalid.

4. Subornation of perjury is counselling or procuring a person to commit any perjury which is actually committed.

The words in italics seem to be new law, or settle doubts which have been raised.

"In framing the above section, we have 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. It seems to us not desirable that a person who has done this should escape from punishment, if he can show some defect in the constitution of the tribunal which he sought to mislead, or some error in the proceedings themselves."—Imp. Comm. Rep.

Perjury, by the common law, appears to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a "*court*" of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not: 3 Russ. 1.

Hawkins, vol. 1, p. 429, has the word "*course*" of justice, instead of "*court*" of justice.

Bishop, Cr. Law, vol. 2, 1015, says a "*course*" of justice, and thinks that the word "*court*" in Russell is a misprint for "course," though Bacon's abridgement, verb. *perjury*, also has "*court*." Roscoe, 747, has also "*court*" of justice, but says that the proceedings are not confined to courts of justice; and a note by the editor of the American sixth edition says a "*course*" of justice is a more accurate expression than a "*court*" of justice.

There is no doubt, however, that, according to all the definition of this offence by the common law the party must be lawfully sworn, the proceeding in which the oath is taken must relate to the administration of justice, the assertion sworn to must be false, the intention to swear falsely must be wilful, and the falsehood material to the matter in question. Promissory oaths, such as those taken by officers for the faithful performance of duties, cannot be the subject of perjury.—Cr. L. Comrs., 5th Report, 51.

False swearing, under a variety of circumstances, has been declared by numerous statutes to amount to perjury, and to be punishable as such. But at common law false swearing was very different from perjury. The offence of perjury, at the common law, is of a very peculiar description, say the Cr. L. Comrs., 5th Rep. 23, and differs in some of its essential qualities from the crime of false testimony, or false swearing, as defined in all the modern Codes of Europe. The definition of the word, too, in its popular acceptation, by no means denotes its legal signification. Perjury, by the common law, is the assertion of a falsehood upon oath in a judicial proceeding, respecting some fact material to the point to be decided in such proceeding; and the characteristic of the offence *is not the violation of the religious obligation of an oath, but the injury done to the administration of public justice by false testimony.*

Here, in Canada, the above section declares to be perjury all oaths, etc., taken or subscribed in virtue of any law, or required or authorized by any such law, as did the repealed statute; and voluntary and extra-judicial oaths, being prohibited, it may be said that, with us, every false oath, *knowingly*, *wilfully* and *corruptly* taken, amounts to perjury and is punishable as such. The interpretation Act, c. 1, Rev. Stat., enacts that the word oath includes a solemn affirmation whenever the context applies to any person and case by whom and in which a solemn affirmation may be made instead of an oath, and in like cases the word *sworn* includes the word *affirmed* or *declared*. *See* ss. 23, 24, Can. Ev. Act, 1893. The words "or whether such evidence is material or not" in the above section 145 are an important alteration of the law on perjury, as it stands in England. As stated before, by the common law, to constitute perjury, the false swearing must be, besides the other requisites, in a *matter material* to the point in question. By the above section this ingredient of perjury is not necessary; *see* Stephen's Digest of Criminal Law, xxxiii.

1st. *There must be a lawful oath.*—R. v. Gibson, 7 R. L. 573; R. v. Martin, 21 L. C. J., 156; R. v. Lloyd, 16 Cox, 235; 19 Q. B. D. 213.

And, therefore, it must be taken before a competent jurisdiction, or before an officer who had legal jurisdiction to administer the particular oath in question. And though it is sufficient *primâ facie* to show the ostensible capacity in which the judge or officer acted when the oath was taken, the presumption may be rebutted by other evidence, and the defendant, if he succeed, will be entitled to an acquittal: 2 Chit. 304; R. v. Roberts, 14 Cox, 101; R. v. Hughes, 14 Cox, 284.

The words in italics in the above section 145 have altered the law to a large extent as to this requisite of an oath impugned for perjury; *see* a collection of cases in R. v. Hughes, Warb. Lead. Cas. 60.

2nd. *The oath must be false*—By this, it is intended that the party must believe that what he is swearing is fictitious; for, it is said, that if, intending to deceive, he asserts of his own knowledge that which may happen to be true, without any knowledge of the fact, he is equally criminal, and the accidental truth of his evidence will not excuse him: 2 Chit. 303. *Bishop's first book of the law, 117.* How far this is the law under the above section remains to be settled by the jurisprudence. And a man may be indicted for perjury, in swearing that he *believes* a fact to be true which he must know to be false: R. v. Pedley, 1 Leach, 325.

3rd. *The false oath must be knowingly, wilfully, and corruptly taken.*—The oath must be taken and the falsehood asserted with deliberation and a consciousness of the nature of the statement made, for if it seems rather to have been occasioned by inadvertency or surprise, or a mistake in the import of the question, the party will not be subjected to those penalties which a corrupt motive alone can deserve: 2 Chit. 303. If an oath is false to the know-

ledge of the party giving it, it is, in law, wilful and corrupt: 2 Bishop, Cr. L. 1043, *et seq.*

It hath been holden not to be material, upon an indictment of perjury at common law, whether the false oath were at all credited, or whether the party in whose prejudice it was intended were, in the event, any way aggrieved by it or not; insomuch as this is not a prosecution grounded on the damage of the party but on the abuse of public justice: 3 Burn's Just. 1227; and that would be so now under the above section.

Indictment for Perjury: The Jurors for Our Lady the Queen present, that heretofore, to wit, at the (*assizes*) holden for the county (*or district*) of on the day of before (*one of the judges of Our Lady the Queen*), a certain issue between one E. F. and one J. H. in a certain action of *covenant* was tried, upon which trial A. B. appeared as a witness for and on behalf of the said E. F. and was then and there duly *sworn* before the said and did then and there, upon his *oath* aforesaid, falsely, wilfully and corruptly depose and *swear* in substance and to the effect following, "*that he saw the said G. H. duly execute the deed on which the said action was brought*," whereas, in truth, the said A. B. did not see the said G. H. execute the said deed, and the said deed was not executed by the said G. H., and the said A. B. did thereby commit wilful and corrupt *perjury*. *See* forms under s. 611, *post*.

Perjury is now triable at quarter sessions, section 540.

The indictment must allege that the defendants swore falsely, wilfully and corruptly; where the word *feloniously* was inserted instead of *falsely*, the indictment, though it alleged that the defendant swore wilfully, corruptly and maliciously, was held bad in substance, and not amendable: R. v. Oxley, 3 C. & K. 317.

If the same person swears contrary at different times, it should be averred on which occasion he swore wilfully, falsely and corruptly: R. v. Harris, 5 B. & Ald. 926.

As to assignments of perjury, the indictment must assign positively the manner in which the matter sworn to is false. A general averment that the defendant falsely swore, etc., etc., upon the whole matter is not sufficient; the indictment must proceed by special averment to negative that which is false: 3 Burn's Just. 1235; but *see* section 616, *post.*

Proof.—It seems to have been formerly thought that in proof of the crime of perjury two witnesses were necessary; but this strictness, if it was ever the law, has long since been relaxed, the true principle of the rule being merely this, that the evidence must be something more than sufficient to counterbalance the oath of the prisoner, and the legal presumption of his innocence: section 684, *post.* The oath of the opposing witness therefore will not avail unless it be corroborated by material and independent circumstances; for otherwise there would be nothing more than the oath of one man against another, and the scale of evidence being thus in one sense balanced, it is considered that the jury cannot safely convict. So far the rule is founded on substantial justice. But it is not precisely accurate to say that the corroborative circumstances must be tantamount to another witness; for they need not be such as that proof of them, standing alone, would justify a conviction, in a case where the testimony of a single witness would suffice for that purpose. Thus, a letter written by the defendant, contradicting his statement on oath, will render it unnecessary to call a second witness. Still, evidence confirmatory of the single accusing witness, in some slight particulars only, will not be sufficient to warrant a conviction, but it must at least be strongly corroborative of his testimony, or to use the quaint but energetic language of Chief Justice Parker, "a strong and clear evidence, and more numerous than the evidence given for the defendant." When several assignments of perjury are included in the same indictment it does not seem to be clearly settled whether, in addition to the testimony of a single witness,

corroborative proof must be given with respect to each, but the better opinion is that such proof is necessary, and that too, although all the perjuries assigned were committed at one time and place. For instance, if a person, on putting in his schedule in the Bankruptcy Court, or on other like occasion, has sworn that he has paid certain creditors, and is then indicted for perjury on several assignments, each specifying a particular creditor who has not been paid, a single witness with respect to each debt will not, it seems, suffice, though it may be very difficult to obtain any fuller evidence. The principle that one witness, with corroborating circumstances, is sufficient to establish the charge of perjury, leads to the conclusion, that without any witness directly to disprove what is sworn, circumstances alone, when they exist in a documentary shape, may combine to the same effect; as they may combine, though altogether unaided by oral proof except the evidence of their authenticity, to prove any other fact connected with the declarations of persons or the business of life. In accordance with these views, it has been held in America that a man may be convicted of perjury on documentary and circumstantial evidence alone, *first*, where the falsehood of the matter sworn to by him is directly proved by written evidence springing from himself, with circumstances showing the corrupt intent; *secondly*, where the matter sworn to is contradicted by a public record, proved to have been well known to the prisoner when he took the oath; and *thirdly*, when the party is charged with taking an oath contrary to what he must necessarily have known to be true, the falsehood being shown by his own letter relating to the fact sworn to, or by any other writings which are found in his possession, and which have been treated by him as containing the evidence of the fact recited in them.

If the evidence adduced in proof of the crime of perjury consists of two opposing statements by the prisoner, and nothing more, he cannot be convicted. For, if one only was delivered under oath, it must be presumed, from the

solemnity of the sanction, that the declaration was the truth, and the other an error or a falsehood; though the latter, being inconsistent with what he has sworn, may form important evidence with other circumstances against him. And if both the contradictory statements were delivered under oath, there is still nothing to show which of them is false when no other evidence of the falsity is given. If, indeed, it can be shown that before making the statement on which perjury is assigned the accused had been tampered with, or if any other circumstances tend to prove that the statement offered as evidence against the prisoner was true, a legal conviction may be obtained, and provided the nature of the statement was such that one of them must have been false *to the prisoner's knowledge* slight corroborative evidence would probably be deemed sufficient. But it does not necessarily follow that because a man has given contradictory accounts of a transaction on two occasions he has therefore committed perjury. For cases may well be conceived in which a person might very honestly swear to a particular fact, from the best of his recollection and belief, and might afterwards from other circumstances be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time. Moreover, when a man merely swears to the best of his memory and belief, it of course requires very strong proof to show that he is wilfully perjured. The rule requiring something more than the testimony of a single witness on indictments for perjury is confined to the proof of the falsity of the matter on which the perjury is assigned. Therefore the holding of the Court, the proceedings in it, the administering the oath, the evidence given by the prisoner, and, in short, all the facts, exclusive of the falsehood of the statement which must be proved at the trial, may be established by any evidence that would be sufficient were the prisoner charged with any other offence. For instance, if the false swearing be that two persons were together at a certain time, and the assignment of perjury

be that they were not together at that time, evidence by one witness that at the time named the one person was at London, and by another witness that at the same time the other person was in York, will be sufficient proof of the assignment of perjury: 2 Taylor on Evidence, par. 876, *et seq.*

On an indictment for perjury alleged to have been committed at the Quarter Sessions, the chairman of the Quarter Sessions ought not to be called upon to give evidence as to what the defendant swore at the Quarter Sessions: R. v. Gazard, 8 C & P. 595.

But this ruling is criticized by Greaves, note *n*, 3 Russ. 86, and Byles, J., in R. v. Harvey, 8 Cox, 99, said that though the judges of Superior Courts ought not to be called upon to produce their notes, yet the same objection was not applicable to the judges of inferior courts, especially where the judge is willing to appear: 3 Burn's Just. 1243.

In R. v. Hook, Dears. & B. 606, will be found an interesting discussion on the evidence necessary upon an indictment for perjury.

The Imperial Statute, corresponding to section 4 of c. 154, Rev. Stat., unrepealed, (*post*, under next section), authorizes the judge to commit, unless such person shall enter into a recognizance and give sureties. Our statute gives power to commit *or* permit such person to enter into a recognizance and give sureties.

Greaves remarks on this last mentioned clause: "The crime of perjury has become so prevalent of late years, and so many cases of impunity have arisen, either for want of prosecution, or for defective prosecution, that this and the following sections were introduced to check a crime which so vitally affects the interests of the community.

"It was considered that by giving to every court and person administering oaths a power to order a prosecution for perjury at the public expense, coupled with a power of commitment in default of bail, many persons would be

deterred from committing so detestable a crime, and in order to effectuate this object the present clause was framed, and as it passed the Lords it was much better calculated to effect that object than as it now stands.

"As it passed the Lords it applied to any justice of the peace. The committee in the Commons confined it to justices in petty and special sessions,—a change much to be regretted, as a large quantity of business is transacted before a single justice or one metropolitan or stipendiary magistrate, who certainly ought to have power to commit under this clause for perjury committed before them.

"Again, as the clause passed the Lords, if an affidavit, etc., were made before one person, and used before another judge or court, etc., and it there appeared that perjury had been committed, such judge or court might commit. The clause has been so altered that the evidence must be given, or the affidavit, etc., made before the judge, etc., who commits. The consequence is that numerous cases are excluded; for instance, a man swears to an assault or felony before one justice, and on the hearing before two it turns out he has clearly been guilty of perjury, yet he cannot be ordered to be prosecuted under this clause. Again, an affidavit is made before a commissioner, the court refer the case to the master and he reports that there has been gross perjury, or the court see on the hearing of the case before them that there has been gross perjury committed, yet there is no authority to order a prosecution under this clause, So, again, a man is committed for trial on the evidence of a witness which is proved on the trial to be false beyond all doubt, yet if such witness be not examined, and do not repeat the same evidence on the trial, the court cannot order him to be prosecuted.

"It is to be observed, that before ordering a prosecution under this clause, the court ought to be satisfied, not only that perjury has been committed, but that there is a 'reasonable cause for such prosecution.' Now it must ever

be remembered that two witnesses, or one witness and something that will supply the place of a second witness are *absolutely essential* to a conviction for perjury. The court, therefore, should not order a prosecution unless it sees that such proof is capable of being adduced at the trial; and as the court has the power, it would be prudent in every case, if practicable, at once to bind over such two witnesses to give evidence on the trial, otherwise it may happen that one or both may not be then forthcoming to give evidence. It would be prudent also for the court to give to the prosecutor a minute of the point on which, in its judgment, the perjury had been committed, in order to guide the framer of the indictment, who possibly may be wholly ignorant otherwise of the precise ground on which the prosecution is ordered. It is very advisable, also, that where the perjury is committed in giving evidence, such evidence should be taken down in writing by some person who can prove it upon the trial, as nothing is less satisfactory or more likely to lead to an acquittal than that the evidence of what a person formerly swore should depend entirely upon mere memory. Indeed, it may well be doubted whether it would be proper to order a prosecution in any case under this Act where there was no minute in writing of the evidence taken down at the time.

"Again, it ought to be clear, beyond all reasonable doubt, that perjury has been *wilfully* committed before a prosecution is ordered": Lord Campbell's Acts, by Greaves, 22.

See section 691 as to proof of trial at which perjury was committed: R. v. Coles, 16 Cox, 165.

It is to be observed that this section is merely remedial, and will not prevent a regular record from being still admissible in evidence, and care must be taken to have such record drawn up in any case where the particular averments in the former indictments may be essential: Lord Campbell's Acts, by Greaves, 27.

Subornation of Perjury.—Subornation of perjury is an offence as perjury itself, and subject to the same punishment.

Section 145, declaring all evidence whatever material with respect to perjury, also applies to subornation of perjury.

Section 691, as to certificate of indictment and trial, applies also to subornation of perjury. Subornation of perjury, by the common law, seems to be an offence in procuring a man to take a false oath, amounting to perjury, who actually taketh such oath: 1 Hawk. 435.

But it seemeth clear that if the person incited to take such an oath do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury, yet it is certain that he is liable to be punished, not only by fine, but also by infamous corporal punishment: 1 Hawk. *loc. cit.* This crime is incitement, section 530.

An attempt to suborn a person to commit perjury, upon a reference to the judges was unanimously holden by them to be a misdemeanour: 1 Russ. 85.

And upon an indictment for subornation of perjury if it appears, at the trial, that perjury was not actually committed, but that the defendant was guilty of the attempt to suborn a person to commit the offence, such defendant may be found guilty of the attempt, section 711.

In support of an indictment for subornation the record of the witness's conviction for perjury is no evidence against the suborners, but the offence of the perjured witness must be again regularly proved. Although several persons cannot be joined in an indictment for perjury, yet for subornation of perjury they may: 3 Burn's Justice, 1246.

Indictment, same as indictment for perjury to the end, and then proceed:—And the Jurors aforesaid further present, that before the committing of the said offence by the

said A. B., to wit, on the day of at C. D. unlawfully, wilfully and corruptly did cause and procure the said A. B. to do and commit the said offence in the manner and form aforesaid.

As perjury, subornation of perjury is now triable at Quarter Sessions.

Indictment quashed, (for perjury) none of the formalities required by section 140 of the Procedure Act having been complied with: R. v. Granger, 7 L. N. 247.

These formalities are now required in all indictments, section 641.

A person accused of perjury cannot have accomplices, and is alone responsible for the crime of which he is accused: R. v. Pelletier, 1 R. L. 565.

Including two charges of perjury in one indictment would not be ground for quashing it. An indictment that follows the form given by the statute is sufficient: R. v. Bain, Ramsay's App. Cas. 191.

The non-production by the prosecution, on a trial for perjury, of the plea which was filed in the civil suit wherein the defendant is alleged to have given false testimony, is not material when the assignment of perjury has no reference to the pleading, but the defendant may, if he wishes, in case the plea is not produced, prove its contents by secondary evidence. It is not essential to prove that the facts sworn to by the defendant, as alleged in the indictment, were material to the issue in the cause in which the defendant was examined: R. v. Ross, M. L. R. 1 Q. B. 227; 28 L. C. J. 261.

As to stenographer's notes and sufficiency of evidence in perjury: *see* Downie v. R., 15 S. C. R. 358, M. L. R. 3 Q. B. 360; R. v. Murphy, 9 L. N. 95; R. v. Evans, 17 Cox, 37; R. v. Bird, 17 Cox, 387.

PUNISHMENT.

146. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who commits perjury or subornation of perjury.

2. *If the crime is committed in order to procure the conviction of a person for any crime punishable by death or imprisonment for seven years or more, the punishment may be imprisonment for life.* R. S. C. c. 154, s. 1.

The words in italics are new: *see* section 221, *post.*

The following section of c. 154 R. S. C. is unrepealed.

4. Any judge of any court of record, or any commissioner before whom any inquiry or trial is held, and which he is by law required or authorized to hold, may, if it appears to him that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, affirmation, declaration, deposition, examination, answer or other proceeding made or taken before him, direct such person to be prosecuted for such perjury, if there appears to such judge or commissioner a reasonable cause for such prosecution,—and may commit such person so directed to be prosecuted until the next term, sittings or session of any court having power to try for perjury in the jurisdiction within which such perjury was committed, or permit such person to enter into a recognizance, with one or more sufficient sureties, conditioned for the appearance of such person at such next term, sittings or session, and that he will then surrender and take his trial and not depart the court without leave,—and may require any person such judge or commissioner thinks fit, to enter into a recognizance conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid.

See remarks under preceding section. A form of indictment under sub-section 2 of this section 146 is given in schedule one, form F. F. *post*, under s. 611, but the words, "penal servitude" therein are a gross error. Section 684, *post*, applies to this section 146. *See* MacDaniel's Case, Fost. 121.

FALSE OATHS. (*New*).

147. 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.

"This is at most a common law misdemeanour in cases not specially provided for by statute, of which there are a considerable number."—Imp. Comm. Rep.

This enactment seems unnecessary. It is covered by sub-section 3 of section 145, *ante.*: section 616, *post* applies.

FALSE OATH, OTHER CASES.

148. Every one is guilty of perjury who—

(*a*) Having taken or made any oath, affirmation, solemn declaration or affidavit whereby any Act or law in force in Canada, or in any province of

Canada, it is required or permitted that facts, matters or things be verified, or otherwise assured or ascertained by or upon the oath, affirmation, declaration or affidavit of any person, wilfully and corruptly, upon such oath, affirmation, declaration or affidavit, deposes, swears to, or makes any false statement as to any such fact, matter or thing; or

(*b*) Knowingly, wilfully and corruptly, upon oath, affirmation, or solemn declaration, affirms, declares, or deposes to the truth of any statement for so verifying, assuring or ascertaining any such fact, matter or thing, or purporting so to do, or knowingly, wilfully and corruptly takes, makes, signs or subscribes any such affirmation, declaration or affidavit, as to any such fact, matter or thing,—such statement, affidavit, affirmation or declaration being untrue, in the whole or any part thereof; R. S. C. c. 154, s. 2.

See notes under sections 145 & 146, *ante*.

FALSE AFFIDAVIT OUT OF PROVINCE WHERE IT IS USED.

149. Every person who wilfully and corruptly makes any false affidavit, affirmation or solemn declaration, out of the province in which it is to be used but within Canada, before any person authorized to take the same, for the purpose of being used in any province of Canada, is guilty of perjury in like manner as if such false affidavit, affirmation or declaration were made before a competent authority in the province in which it is used or intended to be used. R. S. C. c. 154, s. 3.

FALSE STATEMENTS. (*New*).

150. 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.

Section 616 applies. Fine or sureties, section 958.

"It may be doubtful whether this is at present even a common law misdemeanour, but we feel no doubt that it ought to be made indictable."—Imp. Comm. Rep.

FABRICATING EVIDENCE. (*New*).

151. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, with intent to mislead any court of justice or person holding any such judicial proceeding as aforesaid, fabricates evidence by any means other than perjury or subornation of perjury.

Section 616 applies. A verdict of attempt to commit the offence may be given, section 711.

"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 in a trial for shooting at a man with intent to murder him, where the defence was that,

though the accused did fire off a pistol it was not loaded with ball, and the only intent was to frighten. Evidence was given that a pistol ball was found lodged in the trunk of a tree nearly in the line from where the accused fired to where the prosecutor stood. It was afterwards discovered that the ball had been placed in the tree by those concerned in the prosecution in order to supply the missing link in the evidence. Such an offence is as wicked and as dangerous as perjury, but the punishment as a common law offence (if, irrespective of conspiracy, it be an offence), is only fine and imprisonment."—Imp. Comm. Rep.

To mislead a court by the manufacture of false evidence is a misdemeanour. An attempt to do so is also an offence, although in point of fact the court was not misled: R. v. Vreones, 17 Cox, 267, [1891] 1 Q. B. 360.

CONSPIRACY TO BRING FALSE ACCUSATION. (*New*).

152. Every one is guilty of an indictable offence who conspires to prosecute any person for any alleged offence, knowing such person to be innocent thereof, and shall be liable to the following punishment:

(*a*) To imprisonment for fourteen years if such person might, upon conviction for the alleged offence, be sentenced to death or imprisonment for life;

(*b*) To imprisonment for ten years if such person might, upon conviction for the alleged offence, be sentenced to imprisonment for any term less than life.

A common law misdemeanour. Section 616, *post*, applies.

Indictment.—That *A. B.* and *C. D.*, being evil-disposed persons, and wickedly devising, and intending to deprive one *E. F.* of his good name, fame, and reputation, and subject him without just cause to the pains and penalties inflicted by law upon persons guilty of an assault, on , did unlawfully conspire, combine, confederate, and agree, wilfully, unlawfully, and without any reasonable or probable cause in that behalf, to charge and accuse the said *E. F.* of the crime of indecently and unlawfully assaulting the said *A. B.*, knowing the said *E. F.* to be innocent thereof. And the jurors aforesaid further present, that the said *A. B.* and *C. D.*, in pursuance of the said conspiracy, combination, confederacy, and agreement on the day aforesaid, falsely

and maliciously did cause and procure the said *E. F.* to be apprehended and taken into custody by one *E. H.*, then being one of the constables of the police force, and to be conveyed in custody to a certain prison and police-station, and there to be imprisoned.

ADMINISTERING OATHS WITHOUT AUTHORITY.

153. Every justice of the peace or other person who administers, or causes or allows to be administered, or receives or causes or allows to be received any oath or affirmation touching any matter or thing whereof such justice or other person has not jurisdiction or cognizance by some law in force at the time being, or authorized or required by any such law, is guilty of an indictable offence and liable to a fine not exceeding fifty dollars, or to imprisonment for any term not exceeding three months.

2. Nothing herein contained shall be construed to extend to any oath or affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial or punishment of any offence, or to any oath or affirmation required or authorized by any law of Canada, or by any law of the province wherein such oath or affirmation is received or administered, or is to be used, or to any oath or affirmation which is required or authorized by the laws of any foreign country to give validity to an instrument in writing or to evidence designed or intended to be used in such foreign country. R. S. C. c. 141, ss. 1, 2.

Sections 26 and 27 of the *Canada Evidence Act of 1893* re-enact sections 3 & 4 of the Act respecting Extra Judicial Oaths, c. 141, R. S. C.

Section 153 is taken from section 13 of 5 & 6 W. IV, c. 62, of the Imperial Statutes, the preamble of which reads thus:

"Whereas a practice has prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial inquiry, nor in any wise required or authorized by any law; and whereas doubts have arisen whether or not such proceeding is illegal; for the suppression of such practice and removing such doubts, Her Majesty," etc.

Sir William Blackstone, before this statute, had said (Vol. IV, p. 137): "The law takes no notice of any perjury but such as is committed in some court of justice having power to administer an oath; or before some magistrate or proper officer, invested with a similar authority, in some proceedings relative to a civil suit or a criminal prosecu-

tion, for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them. For which reason, it is much to be questioned how far any magistrate is justifiable in taking a voluntary affidavit in any extra-judicial matter, as is now too frequent upon every petty occasion, since it is more than possible that, by such idle oaths, a man may frequently, *in foro conscientiæ*, incur the guilt and, at the same time, evade the temporal penalties of perjury."

"And Lord Kenyon, indeed, in different cases, has expressed a doubt, whether a magistrate does not subject himself to a criminal information for taking a voluntary extra-judicial affidavit.": 3 Burn's, Just. v. Oath.

Indictment.—The Jurors for our Lady the Queen present, that J. S. on . . . . at . . . . being one of the Justices of Our said Lady the Queen, assigned to keep the peace in and for the said county (*or district*), did unlawfully administer to and receive from a certain person, to wit, one A. B., a certain oath, touching certain matters and things, whereof the said J. S., at the time and on the occasion aforesaid, had not any jurisdiction or cognizance by any law in force at the time being, to wit, at the time of administering and receiving the said oath, or authorized, or required by any such law; the same oath not being in any matter or thing touching the preservation of the peace, or the prosecution, trial or punishment of any offence nor being required or authorized by any law of the Dominion of Canada, or by any law of the said Province of . . . . wherein such oath has been so received and administered, and was to be used (*if to be used in another Province add "or by any law of the Province of . . . . wherein the said oath* (*or affidavit*) *was* (*or is*) *to be used"*); nor being an oath required by the laws of any foreign country to give validity to any instrument in writing or to evidence, designed or intended to be used in such foreign country; that is to say, a certain oath touching and concerning; *state the subject-matter of the*

oath or affidavit so as to show that it was not one of which the Justice had jurisdiction or cognizance, and was not within the exceptions.

A county magistrate complained to the bishop of the diocese of the conduct of two of his clergy and to substantiate his charge he swore witnesses before himself, as magistrate, to the truth of the facts: *held*, that the matter before the bishop was not a judicial proceeding, and therefore that the magistrate had brought himself within the statute against voluntary and extra-judicial oaths, and that he had unlawfully administered voluntary oaths, contrary to the enactment of the statute: R. v. Nott, Car. & M. 288, 9 Cox, 301.

In the same case, on motion in arrest of judgment, it was held, that an indictment under the statute (5 & 6 W. IV, c. 62, s. 13) is bad, if it does not so far set out the deposition that the court may judge whether or not it is of the nature contemplated by the statute; that the deposition and the facts attending it should have been distinctly stated, and the matter or writing relative to which the defendant was said to have acted improperly should have been stated to the court in the indictment, so that the court might have expressed an opinion whether the defendant had jurisdiction, the question whether the defendant had jurisdiction to administer the oath being one of law, and to be decided by the court; but the majority of the court thought that it was not necessary to set out the whole oath. Greaves, nevertheless, thinks it prudent to set it out at full length, if practicable, in some counts: 1 Russ. 193, note.

Upon the trial, to establish that the defendant is a justice of the peace, or other person authorized to receive oaths or affidavits, evidence of his acting as such will, *prima facie*, be sufficient: Archbold, 830.

And it is not necessary to show that he acted wilfully

in contravention of the Statute: the doing so, even inadvertently, is punishable: *Id.*

CORRUPTING JURIES AND WITNESSES.

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

(*a*) Dissuades or attempts to dissuade any person by threats, bribes or other corrupt means from giving evidence in any cause or matter, civil or criminal; or

(*b*) Influences or attempts to influence, by threats or bribes or other corrupt means, any juryman in his conduct as such, whether such person has been sworn as a juryman or not; or

(*c*) Accepts any such bribe or other corrupt consideration to abstain from giving evidence, or on account of his conduct as a juryman; or

(*d*) Wilfully attempts in any other way to obstruct, pervert or defeat the course of justice. R. S. C. c. 173, s. 30. (*Amended*).

Sub-section (*b*) covers the common law offence of embracery: 4 Blac. Comm. 140; sub-section (*a*) also was a common law misdemeanour; sub-sections (*c*) and (*d*), *see* 1 Russ. 265; form of indictment, 2 Chit. 235; fine in addition to or in lieu of punishment, section 958; verdict of attempt on an indictment for principal offence, section 711.

As to conspiracy to obstruct, pervert, prevent or defeat the course of justice, section 527, *post.*

COMPOUNDING PENAL ACTIONS.

155. Every one is guilty of an indictable offence and liable to a fine not exceeding the penalty compounded for, who, having brought, or under colour of bringing, an action against any person under any penal statute in order to obtain from him any penalty, compounds the said action without any *order or consent of the court, whether any offence has in fact been committed or not.* R. S. C. c. 173, s. 31. (*Amended*).

This applies to *qui tam* actions. The words in italics are new.

See Keir v. Leeman, 9 Q. B. 371; R. v. Crisp, 1 B. & Ald. 282; R. v. Mason, 17 U. C. C. P. 534: R. v. Best, 2 Moo. 124; Kneeshaw v. Collier, 30 U. C. C. P. 265; Windhill Local Board v. Vint, 17 Cox, 41, 45 Ch. D. 351, and cases there cited, as to compounding misdemeanours.

The repealed statute, chapter 173, section 31, R. S. C. applied only to the Province of Quebec and had "without

the permission or direction of the Crown" instead of "without order or consent of the court."

The court, under the above section 155, would probably require the consent of the Crown before giving its own consent.

TAKING A REWARD FOR HELPING TO RECOVER PROPERTY STOLEN, ETC.

156. Every one is guilty of an indictable offence and liable to seven years' imprisonment who corruptly takes any money or reward, directly or indirectly, under pretense or upon account of helping any person to recover any chattel, money, valuable security or other property which, by any indictable offence, has been stolen, taken, obtained, extorted, converted or disposed of, unless he has used all due diligence to cause the offender to be brought to trial for the same. R. S. C. c. 164, s. 89; 24-25 V. c. 96, s. 101, (Imp.).

As to the meaning of the words "valuable security" and "property," *see ante*, section 3.

Indictment.—The Jurors for Our Lady the Queen, present that A. B. on unlawfully and corruptly did take and receive from one J. N. certain money and reward, to wit, the sum of five dollars of the monies of the said J. N. under pretense of helping the said J. N. to recover certain goods and chattels of him the said J. N. before then stolen, the said A. B. not having used all due diligence to cause the person by whom the said goods and chattels were so stolen, to be brought to trial for the same.

It was held to be an offence within the repealed statute to take money under pretense of helping a man to goods stolen from him, though the prisoner had no acquaintance with the felon, and did not pretend that he had, and though he had no power to apprehend the felon, and though the goods were never restored, and the prisoner had no power to restore them: R. v. Ledbitter, 1 Moo. 76. The section of the repealed statute, under which this case was decided, was similar to the present section: 2 Russ. 575.

If a person know the persons who have stolen any property, and receive a sum of money to purchase such property from the thieves, not meaning to bring them to justice, he is within the statute, although the jury find that he did not

mean to screen the thieves, or to share the money with them, and did not mean to assist the thieves in getting rid of the property by procuring the prosecutrix to buy it: R. v. Pascoe, 1 Den. 456.

A person may be convicted of taking money on account of helping a person to a stolen horse, though the money be paid after the return of the horse: R. v. O'Donnell, 7 Cox, 337. As to the meaning of the words "*corruptly* takes": *see* R. v. King, 1 Cox, 36.

As to compounding crimes: *see* R. v. Burgess, Warb. Lead. Cas. 67; 16 Q. B. D. 141.

UNLAWFULLY ADVERTISING REWARD.

157. Every one is liable to a penalty of two hundred and fifty dollars for each offence, recoverable with costs by any person who sues for the same in any court of competent jurisdiction, who—

(*a*) Publicly advertises a reward for the return of any property which has been stolen or lost, and in such advertisement uses any words purporting that no questions will be asked; or

(*b*) Makes use of any words in any public advertisement purporting that a reward will be given or paid for any property which has been stolen or lost, without seizing or making any inquiry after the person producing such property; or

(*c*) Promises or offers in any such public advertisement to return to any pawnbroker or other person who advanced money by way of loan on, or has bought, any property stolen or lost, the money so advanced or paid, or any other sum of money for the return of such property; or

(*d*) Prints or publishes any such advertisement. R. S. C. c. 164, s. 90.

The penalty is recoverable under section 929, *post*.

Limitation, six months as to offence under (*d*), section 551.

FALSE CERTIFICATE OF EXECUTION OF SENTENCE OF DEATH.

158 Every one is guilty of an indictable offence and liable to two years' imprisonment, who knowingly and wilfully signs a false certificate or declaration when a certificate or declaration is required with respect to the execution of judgment of death on any prisoner. R. S. C. c. 181, s. 19.

This section seems out of place. It should come after section 946, *post*.

Fine in addition to or in lieu of punishment, section 958.

PART XI.

ESCAPES AND RESCUES.

BEING AT LARGE WHILE UNDER SENTENCE. (*New*).

159. 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. 5 Geo. IV. c. 84, s. 22, (Imp.).

"In dealing with the somewhat intricate subject of escapes and rescues 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."—Imp. Comm. Rep.

Not triable at quarter sessions, section 540.

Fine and sureties, section 958.

Sections 1, 2, 6, 32 *et seq.* of 53 V. c. 37, are unrepealed.

Form of indictment: Archbold 884. Proof of a previous conviction, section 694.

What is an escape.—An escape is where one who is arrested gains his liberty without force before he is delivered by due course of law. The general principle of the law on the subject is that as all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it, those who, declining to undergo a legal imprisonment when arrested on criminal process, free themselves from it by any artifice, and elude the vigilance of their keepers, are guilty of an offence of the nature of a misdemeanour. It is also criminal in a prisoner to escape from lawful confinement, though no force or artifice be used on his part to effect such purpose. Thus, if a prisoner go out of his prison without any obstruction, the doors being opened by the consent or negligence of the gaoler, or if he escape in any other manner, without using any kind of force or violence, he will be guilty of a misdemeanour: R. v. Nugent, 11 Cox, 64. The officer by whose default a

prisoner gains his liberty before he is legally discharged is also guilty of the offence of escape, divided in law, then, into two offences, a *voluntary* escape or a *negligent* escape. To constitute an escape there must have been an actual arrest in a criminal matter.

A *voluntary* escape is where an officer, having the custody of a prisoner, knowingly and intentionally gives him his liberty, or by connivance suffers him to go free, either to save him from his trial or punishment, or to allow him a temporary liberty on his promising to return and, in fact, so returning: R. v. Shuttleworth, 22 U. C. Q. B. 372. Though some of the books go to say that, in this last case, the offence would amount to a *negligent* escape only.

A *negligent* escape is where the party arrested or imprisoned escapes against the will of him that arrests or has him in charge, and is not freshly pursued and taken again before he has been lost sight of. And in this case, the law presumes negligence in the officer, till evident proof on his part to the contrary. The sheriff is as much liable to answer for an escape suffered by his officers as if he had actually suffered it himself. A justice of the peace who bails a person not bailable by law is guilty of a negligent escape, and the person so discharged is held to have escaped.

When was an escape a felony, and when a misdemeanour.—An escape by a prisoner himself is no more than a misdemeanour whatever be the crime for which he is imprisoned. Of course, this does not apply to prison-breaking, but simply to the case of a prisoner running away from the officer or the prison without force or violence. This offence falls under section 164, *post.* An officer guilty of a *voluntary* escape is at common law involved in the guilt of the same crime of which the prisoner is guilty, and subject to the same punishment, whether the person escaping were actually committed to some gaol, or under an arrest only and not committed, and whether the offence

be treason, felony or misdemeanour, so that, for instance, if a gaoler *voluntarily* allows a prisoner committed for larceny to escape he is guilty of a felonious escape, and punishable as for larceny; whilst if such prisoner so voluntarily by him allowed to escape was committed for obtaining money by false pretenses, the gaoler is then guilty of a misdemeanour, punishable under the common law by fine or imprisonment, or both, but now under sections 165 and 166, *post.* Greaves, note (*r*), 1 Russ. 587, says that the gaoler might also, in felonies, be tried, as an accessory after the fact, for voluntary escape: *see* 1 Hale 619, 620. A *negligent* escape is always a misdemeanour, and is punishable, at common law, by fine or imprisonment or both.

What is a prison-breaking, and when was it a felony or a misdemeanour? The offence of prison-breach is a breaking and going out of prison by force by one lawfully confined therein. Any prisoner who frees himself from lawful imprisonment, by what the law calls a breaking, commits thereby a felony or a misdemeanour, according as the cause of his imprisonment was of one grade or the other: R. v. Haswell, R & R. 458. But a mere breaking is not sufficient to constitute this offence; the prisoner must have escaped. The breaking of the prison must be an actual breaking, and not such force and violence only as may be implied by construction of law. Any place where a prisoner is lawfully detained is a prison *quoad* his offence, so a private house is a prison if the prisoner is in custody therein. If the prison-breaking is by a person lawfully committed for a misdemeanour it is, as remarked before, a misdemeanour, but if the breaking is by a person committed for felony then his offence amounts to felony.

A prisoner was indicted for breaking out from the lock-up, being then in lawful custody for felony. It appeared that the prisoner and another man had been given into the custody of a police officer, without warrant, on a charge of stealing a watch from the person. They were taken before

a magistrate. No evidence was taken upon oath but the prisoner was remanded for three days. The prisoner broke out of the lock-up and returned to his home. He appeared before the magistrate on the day to which the hearing of the charge had been adjourned, and on the investigation of the charge it was dismissed by the magistrate, who stated that in his opinion it was a lark and no jury would convict. The prisoner contended that the charge having been dismissed by the magistrate he could not be convicted of prison-breaking, citing 1 Hale, 610, 611, that if a man be subsequently indicted for the original offence and acquitted such acquittal would be a sufficient defence to an indictment for breach of prison. But Martin, B., held that a dismissal by the magistrate was not tantamount to an acquittal upon an indictment, and that it simply amounted to this, that the justices did not think it advisable to proceed with the charge, but it was still open to them to hear a fresh charge against him. The prisoner was found guilty: R. v. Waters, 12 Cox, 390.

What is a rescue, and when was it a felony or a misdemeanour?—Rescue is the forcibly and knowingly freeing another from an arrest or imprisonment. A rescue in the case of one charged with felony is felony in the rescuer, and a misdemeanour if the prisoner is charged with a misdemeanour: R. v. Haswell, R. & R. 458. But though, upon the principle that wherever the arrest of a felon is lawful the rescue of him is a felony, it will not be material whether the party arrested for felony, or suspicion of felony, be in the custody of a private person or of an officer, yet, if he be in the custody of a private person, it seems that the rescuer should be shown to have knowledge of the party being under arrest for felony.

See 1 Russ. 581, *et seq.;* 4 Stephen's Comm. 227, *et seq.;* 1 Hale, P. C. 595; 2 Hawk. p. 183; 5 Rep. Cr. L. Com., (1840), p. 53; 2 Bishop, Cr. L. 1066; R. v. Payne, L. R. 1 C. C. R. 27.

For forms of indictment: *see* Archbold, 795; 2 Chit. Cr. L. 165; 5 Burn's Just. 137; 3 Burn's Just. 1332; 2 Burn's Just. 10; R. v. Young, 1 Russ. 291.

By section 711, *post*, upon an indictment for any of these offences the defendant may be found guilty of the attempt to commit the offence charged, if the evidence warrants it.

None of the offences under this part XI are triable at quarter sessions, section 540. Fine when punishment not more than five years, section 958.

ASSISTING ESCAPE OF PRISONERS OF WAR. (*New*).

160. Every one is guilty of an indictable offence and liable to five years' imprisonment who knowingly and wilfully—

(*a*) Assists any alien enemy of Her Majesty, being a prisoner of war in Canada, to escape from any place in which he may be detained; or

(*b*) Assists any such prisoner as aforesaid, suffered to be at large on his parole in Canada or in any part thereof, to escape from the place where he is at large on his parole. 52 Geo. III, c. 156, (Imp.).

BREAKING PRISON.

161. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, by force or violence, breaks any prison with intent to set at liberty himself or any other person confined therein on any criminal charge. R. S. C. c. 155, s. 4.

"Prison" defined, section 3. A verdict under next section may be given, section 711. *See* remarks under section 159, *ante*.

ATTEMPT, ETC., ETC.

162. Every one is guilty of an indictable offence and liable to two years' imprisonment who attempts to break prison, or who forcibly breaks out of his cell, or makes any breach therein with intent to escape therefrom. R. S. C. c. 155, s. 5.

"Prison" defined, section 3; fine and sureties, section 958.

ESCAPE FROM PRISON, ETC., ETC.

163. 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.

See remarks under preceding sections. A verdict of attempt may be given, section 711.

ESCAPE FROM LAWFUL CUSTODY.

164. Every one is guilty of an indictable offence and liable to two years' imprisonment who being in lawful custody other than as aforesaid on any criminal charge, escapes from such custody.

See remarks under preceding sections of this chapter.

ASSISTING ESCAPE IN CERTAIN CASES.

165. 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.

See remarks under preceding sections of this chapter.

ASSISTING ESCAPE IN OTHER CASES.

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

(*a*) Rescues any person, or assists any person in escaping, or attempting to escape, from lawful custody, whether in prison or not, under a sentence of imprisonment for any term less than life, or after conviction of, and before sentence for, or while in such custody upon a charge of any crime punishable with imprisonment for a term less than life; or

(*b*) Being a peace officer having any such person in his lawful custody, or being an officer of any prison in which such person is lawfully confined, voluntarily and intentionally permits him to escape therefrom.

Fine and sureties, section 958. *See* remarks under preceding sections.

The Code does not provide for the offence of a negligent escape by the sheriff or gaoler as section 7 of the repealed statute did as to escape from penitentiaries.

AIDING ESCAPE FROM PRISON.

167. Every one is guilty of an indictable offence and liable to two years' imprisonment who with intent to facilitate the escape of any prisoner lawfully imprisoned conveys, or causes to be conveyed, anything into any prison. R. S. C. c. 155, s. 6; 28-29 V. c. 126, s. 37, (Imp.).

See remarks under preceding sections.

Indictment.—The jurors for our Lady the Queen present, that before and at the time of the committing of the offence hereinafter mentioned, to wit, on the day of , in the year of our Lord , one *A. B.* was a prisoner, and in lawful custody of one *W. S.*, in the common gaol in and for the county of ; and that *E. F.* afterwards and whilst the said *A. B.* was such prisoner and in custody as aforesaid, unlawfully did convey and cause to be conveyed into the gaol aforesaid two steel files, being instruments proper to facilitate the escape of prisoners, and the said files, being such instruments as aforesaid, then unlawfully did deliver and cause to be delivered to the said *A. B.* then being such prisoner in the lawful custody of *W. S.* as aforesaid, without the consent or privity of the said keeper of the said gaol; which said files being such instruments as aforesaid, were so conveyed into the said gaol, and delivered to the said *A. B.* by the said *E. F.* as aforesaid, with the intent to aid and assist the said *A. B.*, so being such prisoner and in custody as aforesaid, to escape from and out of the said gaol, and to facilitate his escape.

UNLAWFUL DISCHARGE OF PRISONER.

168. Every one is guilty of an indictable offence and liable to two years' imprisonment, who knowingly and unlawfully, under colour of any pretended authority, directs or procures the discharge of any prisoner not entitled to be so discharged, and the person so discharged shall be held to have escaped. R. S. C. c. 155, s. 8.

See remarks under preceding sections.

PUNISHMENT.

169. Every one who escapes from custody shall, on being retaken, serve, in the prison to which he was sentenced, the remainder of his term unexpired at the time of his escape, in addition to the punishment which is awarded for such escape; and any imprisonment awarded for such offence may be to the penitentiary or prison from which the escape was made. R. S. C. c. 155, s. 11.

TITLE IV.

OFFENCES AGAINST RELIGION, MORALS AND PUBLIC CONVENIENCE.

PART XII.

OFFENCES AGAINST RELIGION. (*New*).

170. Every one is guilty of an indictable offence and liable to one year's imprisonment who publishes any blasphemous libel.

2. Whether any particular published matter is a blasphemous libel or not is a question of fact. But no one is guilty of a blasphemous libel for expressing in good faith and in decent language, or attempting to establish by arguments used in good faith and conveyed in decent language, any opinion whatever upon any religious subject.

Fine and sureties, section 958; special enactment as to indictments for libel, section 615.

The truth of a blasphemous libel cannot be pleaded as a defence: *see* cases under section 123, *ante;* also R. v. Hicklin, L. R. 3 Q. B. 360, and Archbold, 813.

A blasphemous libel is triable at Quarter Sessions, though not a defamatory nor a seditious libel, section 540. This is new law.

"This section provides a punishment for blasphemous libels, which offence we deem it inexpedient to define otherwise than by the use of that expression. As, however, we consider that the essence of the offence (regarded as a subject for criminal punishment) lies in the outrage which 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."—Imp. Comm. Rep.

OBSTRUCTING CLERGYMEN, ETC., ETC.

171. Everyone is guilty of an indictable offence and liable to two years' imprisonment who—

(*a*) By threats or force, unlawfully obstructs or prevents, or endeavours to obstruct or prevent, any clergyman or other minister in or from celebrating divine service, or otherwise officiating in any church, chapel, meeting-house, *school-house* or other place *for* divine worship, or in or from the performance of his duty in the lawful burial of the dead in any church-yard or other burial place. 24-25 V. c. 100, s. 36, (Imp.).

172. Every one is guilty of an indictable offence and liable to two years' imprisonment who strikes or offers any violence to, or upon any civil process or under the pretense of executing any civil process, arrests any clergyman or other minister who is engaged in or, to the knowledge of the offender, is about to engage in, any of the rites or duties in the next preceding section mentioned, or who, to the knowledge of the offender, is going to perform the same, or returning from the performance thereof.

These two sections are a re-enactment of s. 1, c. 156, R. S. C. Fine or sureties, section 958.

The word *school-house* in the first section is not in the English Act, and the words *for* divine worship are substituted for *of* divine worship. In the Revised Statutes it was "used for."

Indictment for obstructing a clergyman in the discharge of his duty— unlawfully did by force (*threats or force*) obstruct and prevent one J. N., a clergyman, then being the vicar of the parish of B., in the county of M., from celebrating divine service in the parish church of the said parish (*or in the performance of his duty in the lawful burial of the dead in the church-yard of the parish church of the said parish.*)

Prove that J. N. is a clergyman and vicar of the parish of B., as stated in the indictment; that the defendant by force obstructed and prevented him from celebrating divine service in the parish church, etc., etc., or assisted in doing so: Archbold.

Indictment for arresting a clergyman about to engage in the performance of divine service.— unlawfully did arrest one J. N., a clergyman, upon certain civil process, whilst he, the said J. N., as such clergyman as aforesaid,

was going to perform divine service, he the said *(defendant)* then well knowing that the said J. N. was a clergyman, and was so going to perform divine service as aforesaid.

DISTURBING PUBLIC WORSHIP.

173. Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding fifty dollars and costs, and in default of payment to one month's imprisonment, who wilfully disturbs, interrupts or disquiets any assemblage of persons met for religious worship, or for any moral, social or benevolent purpose, by profane discourse, by rude or indecent behaviour, or by making a noise, either within the place of such meeting or so near it as to disturb the order or solemnity of the meeting. R. S. C. c. 156, s. 2.

The Imperial Statutes corresponding to this clause are 52 Geo. III. c. 155, s. 12; 15-16 V. c. 36; 23-24 V. c. 32.

The offences against it are punishable by summary conviction. It seems to be based on c. 92, s. 18, C. S. Can. and c. 22, s. 3. C. S. L. C.

PART XIII.

OFFENCES AGAINST MORALITY.

UNNATURAL OFFENCES.

174. Every one is guilty of an indictable offence and liable to imprisonment for life who commits buggery, either with a human being or with any other living creature. R. S. C. c. 157, s. 1. 24-25 V. c. 100, s. 61, (Imp.).

Indictment.— in and upon one J. N. did make an assault, and then wickedly, and against the order of nature had a venereal affair with the said J. N., and then carnally knew him, the said J. N., and then wickedly, and against the order of nature, with the said J. N., did commit and perpetrate that detestable and abominable crime of buggery.

Sodomy or buggery is a detestable and abominable sin, amongst Christians not to be named, committed by carnal

knowledge against the ordinance of the Creator and order of nature by mankind with mankind, or with brute and beast, or by womankind with brute beast: 3 Inst. 58.

If the offence be committed on a boy under fourteen years of age, it is felony in the agent only: 1 Hale, 670. If by a boy under fourteen on a man over fourteen, it is felony in the patient only: Archbold, 752.

The evidence is the same as in rape, with two exceptions: first, that it is not necessary to prove the offence to have been committed against the consent of the person upon whom it was perpetrated; and secondly, both agent and patient (if consenting) are equally guilty: 5 Burn's Just. 644.

In R. v. Jacobs. R. & R. 331, it was proved that the prisoner had prevailed upon a child, a boy of seven years of age, to go with him in a back-yard; that he, then and there, forced the boy's mouth open with his fingers, and put his private parts into the boy's mouth, and emitted in his mouth; the judges decided that this did not constitute the crime of sodomy.

In one case the majority of the judges were of opinion that the commission of the crime with a woman was indictable; also by a man with his wife: 1 Russ. 939; R. v. Jellyman, Warb. Lead. Cas. 57.

As in the case of rape, penetration alone is sufficient to constitute the offence.

The evidence should be plain and satisfactory in proportion as the crime is detestable.

Upon an indictment under this section, the prisoner may be convicted of an attempt to commit the same, section 711.

The punishment would then be under the next section.

The defendant may also be convicted of either of the offences created by sections 178, 260 or 265, if the evidence warrants it; section 713. *See* section 261 as to indecent assaults on persons under fourteen.

Indictment for bestiality.— with a certain *cow (any animal)* unlawfully, wickedly and against the order of nature had a venereal affair, and then unlawfully, wickedly and against the order of nature, with the said cow did commit and perpetrate that detestable and abominable crime of buggery.

ATTEMPT TO COMMIT SODOMY.

175. Every one is guilty of an indictable offence and liable to ten years' imprisonment who attempts to commit the offence mentioned in the next preceding section. R. S. C. c. 157, s. 2; 24-25 V. c. 100, s. 62, (Imp.).

Indictment.— in and upon one J. N. did make an assault, and him, the said J. N. did then beat, wound and ill-treat, with intent that detestable and abominable crime called buggery with the said J. N. unlawfully, wickedly, diabolically, and against the order of nature to commit and perpetrate.

Where there is consent there cannot be an assault in point of law: R. v. Martin, 2 Moo. 123. A man induced two boys above the age of fourteen years to go with him in the evening to an out of the way place, where they mutually indulged in indecent practices on each others' persons; *Held*, on a case reserved, that under these circumstances, a conviction for an indecent assault could not be upheld: R. v. Wollaston, 12 Cox, 180. But *see* now section 178, *post*.

But the definition of an assault that the act must be *against the will* of the patient implies the possession of an active will on his part, and, therefore, mere submission by a boy eight years old to an indecent assault and immoral practices upon his person, without any active sign of dissent, the child being ignorant of the nature of the assault, does not amount to consent so as to take the offence out of the operation of criminal law: R. v. Lock, 12 Cox, 244. But *see* now section 261, *post*.

The prisoner was indicted for an indecent assault upon a boy of about fourteen years of age. The boy had con-

sented. *Held, on the authority of* R. v. Wollaston, 12 Cox, 180, that the charge was not maintainable: R. v. Laprise, 3 L. N. 139. *See* now section 261, *post.*

Assault with intent to commit sodomy, section 260, *post.*

INCEST.

176. Every parent and child, every brother and sister, and every grandparent and grandchild, who cohabit or have sexual intercourse with each other, shall each of them, if aware of their consanguinity, be deemed to have committed incest, and be guilty of an indictable offence and liable to fourteen years' imprisonment, and the male person shall also be liable to be whipped: Provided that, if the court or judge is of opinion that the female accused is a party to such intercourse only by reason of the restraint, fear or duress of the other party, the court or judge shall not be bound to impose any punishment on such person under this section. 53 V. c. 37, s. 8.

Incest is not an offence at common law. It is a capital offence in Scotland: Wharton L. Lex. v. Incest.

In New Brunswick, by c. 145, Rev. Stat., unrepealed, it is indictable, punishment fourteen years. In Prince Edward Island also, under the Act 24 V. c. 27, unrepealed, incest is indictable, punishment twenty-one years. Also, in Nova Scotia, c. 160, R. S. N. S., punishment two years.

A verdict of common or indecent assault may be given, sections 259, 261, 265, if the evidence warants it, section 713.

Or a verdict of assault with intent to commit an indictable offence, section 263.

A verdict of attempt to commit incest might also under certain circumstances be given, section 711. In the United States, in a case of The People v. Murray, 14 Cal. 159, the court seems to have thought that such a verdict could be given. In Commonwealth v. Goodhue, 2 Met. 193, it was held that one indicted for rape on the person of his daughter might be convicted of incest. But this would not be allowed under this code on a trial for rape, except if the indictment contained also a count for incest: section 626. Then, the verdict would be on the count for incest, if the prisoner had been tried on both counts together.

The *scienter* must be alleged in the indictment. If one of the parties is not aware of the consanguinity he is not guilty. In Bergen v. The People, 17 Ill. 426, it was held that the defendant's admission of relationship with the person with whom he held incestuous intercourse was sufficient proof of such relationship.

Indictment.— that on at A. B. did unlawfully have sexual intercourse with his daughter, C. B., then and there knowing the said C. B. to be his daughter. (*Add another count with "cohabit" instead of "have sexual intercourse." And another one with "commit incest," instead of "have sexual intercourse"*: Baumer v. The State, 49 Ind. 544, Hawley, American Crim. Rep. vol. 1, 354.

Indictment against father and daughter jointly.— that on at A. B. and C. B. father and daughter, did unlawfully have sexual intercourse (*in another count, "did cohabit," and in a third one, "did commit incest"*) together and with one another, the said A. B. then and there knowing the said C. B. to be his daughter, and the said C. B. then and there knowing the said A. B. to be her father.

INDECENT ACTS.

177. Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to a fine of fifty dollars or to six months' imprisonment with or without hard labour, or to both fine and imprisonment, who wilfully—

(*a*) In the presence of one or more persons does any indecent act in any place to which the public have or are permitted to have access; or

(*b*) *Does any indecent act in any place intending thereby to insult or offend any person.* 53 V. c. 37, s. 6.

Section 6 of 53 V. c. 37, is unrepealed. Sub-section (*b*) is given as new by the Imperial Commission. *See* Archbold, 1051; R. v. Holmes, Dears. 207; R. v. Wellard, 14 Q. B. D. 63.

On an indictment at common law for indecent exposure of the person, *Held*, that the exposure must be in an open and public place, but not necessarily generally public and open; if a person indecently exposed his person in a private

yard, so that he might be seen from a public road where there were persons passing, an indictment would lie: R. v. Levasseur, 9 L. N. 386; *Ex parte* Walter, Ramsay's App. Cas. 183; R. v. Harris, 11 Cox, 659.

See R. v. Reed, 12 Cox, 1, *post*, under section 208; R. v. Crunden, Warb. Lead. Cas. 99.

ACTS OF GROSS INDECENCY BY A MALE PERSON WITH ANOTHER MALE.

178. Every male person is guilty of an indictable offence and liable to five years' imprisonment and to be whipped who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person. 53 V. c. 37, s. 5. 48-49 V. c. 69, s. 11 (Imp.).

Fine and sureties, section 958. Verdict of attempt on an indictment to commit the offence in certain cases, section 711; *see* R. v. Jellyman, Warb. Lead. Cas. 57.

The facts proved in R. v. Wollaston, 12 Cox, 180, would now be indictable under this section. So would the facts proved in R. v. Rowed, 3 Q. B. 180. A verdict of attempt to commit sodomy cannot be given on an indictment under this section. The indictment may simply charge that on at A. B., a male person, *in public* (*in another count "in private"*) committed (*or was a party to the commission of*), (*or procured*), (*or attempted to procure the commission of*) an act of gross indecency with C. D., another male person. An indictment charging an attempt by a male person to commit an act of gross indecency with another male person lies under section 529, *post*. Also under section 260, for an indecent assault by a male person on another male person.

PUBLISHING OBSCENE MATTER. (*New*).

179. Every one is guilty of an indictable offence and liable to two years' imprisonment who knowingly, without lawful justification or excuse—

(*a*) Publicly sells, or exposes for public sale or to public view, any obscene book, or other printed or written matter, or any picture, photograph, model or other object, tending to corrupt morals; or

(*b*) Publicly exhibits any disgusting object or any indecent show;

(*c*) Offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any medicine, drug or article intended or represented as a means of preventing conception or causing abortion.

2. No one shall be convicted of any offence in this section mentioned if he proves that the public good was served by the acts alleged to have been done.

3. It shall be a question of law whether the occasion of the sale, publishing, or exhibiting is such as might be for the public good, and whether there is evidence of excess beyond what the public good requires in the manner, extent or circumstances in, to or under which the sale, publishing or exhibition is made, so as to afford a justification or excuse therefor; but it shall be a question for the jury whether there is or is not such excess.

4. The motives of the seller, publisher or exhibitor shall in all cases be irrelevant.

Fine or sureties, section 958. Allegations in indictments, section 615. The corresponding article of the Imperial draft code covered obscene libels.

"We believe that this section as to obscene publications expresses the existing law, but it puts it into a much more definite form than at present. We do not, however, think it desirable to attempt any definition of obscene libel other than that conveyed by the expression itself."—Imp. Comm. Rep.

Sub-section (*c*,) section 207, *post*, covers offences which, in certain cases, would fall under sub-section (*b*) of this section 179.

See R. v. Bradlaugh, 3 Q. B. D. 607; Stephen's Cr. L. Art. 172; R. v. Adams, 16 Cox, 544, 22 Q. B. D. 66, Warb. Lead. Cas., 58; R. v. Saunders, 13 Cox, 116.

POSTING IMMORAL BOOKS, ETC.

180. 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 other publication, matter or thing of an indecent or immoral character; or

(*b*) Any letter upon the outside or envelope of which, or any post card or post band or wrapper upon which, there are words, devices, matters or things of the character aforesaid; or

(*c*) Any letter or circular concerning schemes devised or intended to deceive and defraud the public or for the purpose of obtaining money under false pretenses. R. S. C. c. 35, s. 103. (*Amended*). 47-48 V. c. 76, s. 4, (Imp.).

Fine and sureties, section 958. Indictment, section 616.

This section does not cover letters or writings of an immoral character. The posting to be indictable under this section must be made within Canada, but whether to be

delivered out of Canada or not is immaterial. R. v. McKay, 28 N. B. Rep. 564.

SEDUCTION OF GIRLS BETWEEN FOURTEEN AND SIXTEEN.

181. Every one is guilty of an indictable offence and liable to two years' imprisonment who seduces or has illicit connection with any girl of previously chaste character, of or above the age of fourteen years and under the age of sixteen years. R. S. C. c. 157, s. 3; 53 V. c. 37, s. 3. (*Amended*). 48-49 V. c. 69, s. 5, (Imp.).

Fine and sureties, section 958. Limitation, one year, section 551. One witness only not sufficient if not corroborated, section 684.

Indictment.—. . . . that A. B. on . . . . unlawfully seduced and had illicit connection with one C. D. a girl of previously chaste character, and then being of, (*or above the age of*) fourteen years and under the age of sixteen years.

As to evidence of age *see* R. v. Nicholls, 10 Cox, 476, R. v. Weaver, L. R. 2 C. C. R. 85; R. v. Wedge, 5 C. & P. 298.

If it is proved that the girl was under fourteen the prisoner must be acquitted. He may then be indicted under section 269.

Previous chastity, according to a case in the United States, is not to be presumed; it has to be proved. West v. The State, 1 Wis. 209; *see* Bishop, Stat. Cr. 639. A contrary opinion is held in Archbold. The United States case seems to be correct.

SEDUCTION UNDER PROMISE OF MARRIAGE.

182. Every one, above the age of twenty-one years, is guilty of an indictable offence and liable to two years' imprisonment who, under promise of marriage, seduces *and* has illicit connection with any unmarried female of previously chaste character and under twenty-one years of age. 50-51 V. c. 48, s. 2.

Fine, section 958. Limitation, one year, section 551.

One witness must be corroborated, section 684; subsequent marriage between the parties a good defence, section 184, (*New*).

Indictment.—That A. B. being then above the age of twenty-one years, did seduce under promise of marriage one C. D. then an unmarried female of previously chaste character and then being, the said C. D., under twenty-one years of age, and had illicit connection with her the said C. D.

As to proof of a previous chaste character *see* under preceding section. If the man is married and the girl knows it there can be no offence under this section. The People v. Alger, 1 Parker, 333; Bishop, Stat. Cr. 647.

SEDUCTION OF WARD.

183. Every one is guilty of an indictable offence and liable to two years' imprisonment who, being a guardian, seduces *or* has illicit connection with his ward, and every one who seduces *or* has illicit connection with any woman or girl of previously chaste character and under the age of twenty-one years who is in his employment in a factory, mill or workshop, or who, being in a common employment with him in such factory, mill or workshop, is, in respect of her employment or work in such factory, mill or workshop, under or in any way subject to his control or direction. 53 V. c. 37, s. 4.

Fine, section 958; limitation one year, section 551. Evidence of one witness must be corroborated, section 684. Subsequent marriage between the parties a defence, section 184. Verdict of attempt in certain cases, section 711.

The offence by a guardian on his ward need not have been seduction. Illicit intercourse with his ward constitutes an offence even if his ward was not of a previously chaste character.

Indictment.—That on A. B. being the guardian of one C. D. unlawfully did seduce and have illicit connection with the said C. D. his ward. (*Add another count charging illicit connection only.*)

The offence by an employer on his employee is seduction; the illicit connection must have been with a woman or girl of previously chaste character. Through an error, however, as the section reads, there is no offence whatever of the kind provided for.

SEDUCTION OF FEMALE PASSENGERS ON VESSELS.

184. Every one is guilty of an indictable offence and liable to a fine of our hundred dollars, or to one year's imprisonment, who, being the master or

other officer or a seaman or other person employed on board of any vessel, while such vessel is in any water within the jurisdiction of the Parliament of Canada, under promise of marriage, or by threats, or by the exercise of his authority, or by solicitation, or the making of gifts or presents, seduces *and* has illicit connection with any female passenger.

2. The subsequent intermarriage of the seducer and the seduced is, if pleaded, a good defence to any indictment for any offence against this or either of the two next preceding sections, except in the case of a guardian seducing his ward. R. S. C. c. 65, s. 37.

Evidence of one witness must be corroborated, section 684, (*New*).

Verdict of attempt in certain cases, section 711.

UNLAWFULLY DEFILING WOMEN.

185. Every one is guilty of an indictable offence, and liable to two years' imprisonment with hard labour, who—

(*a*) Procures, or attempts to procure, any girl or woman under twenty-one years of age, not being a common prostitute or of known immoral character, to have unlawful carnal connection, either within or without Canada, with any other person or persons; or

(*b*) Inveigles or entices any such woman or girl to a house of ill-fame or assignation for the purpose of illicit intercourse or prostitution, or knowingly conceals in such house any such woman or girl so inveigled or enticed; or

(*c*) Procures, or attempts to procure, any woman or girl to become, either within or without Canada, a common prostitute; or

(*d*) Procures, or attempts to procure, any woman or girl to leave Canada with intent that she may become an inmate of a brothel elsewhere; or

(*e*) Procures any woman or girl to come to Canada from abroad with intent that she may become an inmate of a brothel in Canada; or

(*f*) Procures, or attempts to procure, any woman or girl to leave her usual place of abode in Canada, such place not being a brothel, with intent that she may become an inmate of a brothel within or without Canada; or

(*g*) By threats or intimidation procures, or attempts to procure, any woman or girl to have any unlawful carnal connection, either within or without Canada; or

(*h*) By false pretenses or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connection, either within or without Canada; or

(*i*) Applies, administers to, or causes to be taken by any woman or girl any drug, intoxicating liquor, matter, or thing with intent to stupefy or overpower so as thereby to enable any person to have unlawful carnal connection with such woman or girl. 53 V. c. 39, s. 9; R. S. C. c. 157, s. 7.

Limitation, one year, section 551. Fine, section 958.

The 53 V. c. 39, cited under this section, is an Act respecting the Toronto Board of Trade.

Search warrant, section 574. Evidence of one witness must be corroborated, section 684. As to indictments charging false pretenses, fraud or fraudulent means, section 616.

This section is a re-enactment of sections 2 & 3 of 48-49 V. c. 69, (Imp.) except (*b*) which is taken from section 7, chapter 157, R. S. C. Under (*a*) and (*b*), the woman or girl must be under twenty-one years of age.

Forms of indictments.—(*A*) . . . that A. B., on etc., at etc., unlawfully did procure (*or attempt to procure*) one C. D., a girl (*or woman*) then being, the said C. D., under the age of twenty-one years, and not a common prostitute or of known immoral character, to have unlawful carnal connection with another person (*or other persons.*)

(*B*) . . . that A. B., on . . . . at . . . . unlawfully inveigled and enticed one C. D., a girl (*or woman*) then being under the age of twenty-one years, she the said C. D. not being then a common prostitute or of known immoral character, to a house of ill-fame (*or assignation*) for the purpose of illicit intercourse and prostitution . . . . (*or*, that on . . . . at . . . . . A. B. unlawfully concealed in a house of ill-fame (*or assignation*) one C. D., a girl (*or woman*) then being, the said C. D., under the age of twenty-one years and not a common prostitute or of known immoral character, and which said C. D. had been unlawfully inveigled and enticed to the said house of ill-fame (*or assignation*) for the purpose of illicit intercourse and prostitution). . . .

(*C.*) . . . . That the said A. B., on etc., at etc., unlawfully did procure (*or attempt to procure*) one C. D., a woman (*or girl*) to become a common prostitute: R. v. McNamara, 20 O. R. 489.

(*D.*) That the said A. B., on etc., at etc., unlawfully did procure (*or attempt to procure*) C. D., a woman (*or girl*) to leave Canada with intent unlawfully that she might become an inmate of a brothel elsewhere.

(*E*) . . . . . that A. B., at . . . . on . . . . unlawfully procured (*or attempted to procure*) one C. D. a woman (*or girl*) to come to Canada from abroad with intent unlawfully that she might become an inmate of a brothel in Canada.

(*F*) . . . that on . . . at . . . A. B., unlawfully procured (*or attempted to procure*) C. D., a woman (*or girl*) to leave her usual place of abode in Canada, to wit, at (*naming her abode*) such place not being a brothel, with intent that she should for the purposes of prostitution become an inmate of a brothel.

(*G.*) . . . . That A. B. on etc., at etc., unlawfully by threats (*or intimidation*) procured (*or attempted to procure*) C. D., a woman (*or girl*) to have unlawful carnal connection with men.

(*H.*) . . . . That A. B. by false pretenses (*or false representations*) unlawfully procured C. D., a woman (*or girl*) not being a common prostitute or of known immoral character, to have unlawful carnal connection with men.

(*I.*) That A. B. on, etc., at etc., unlawfully applied to (*or administered to, or caused to be taken by*) C. D., a woman (*or girl*) a certain drug, intoxicating liquor (*or matter or thing*) with intent to stupefy (*or overpower*) her so as thereby to enable a man to have unlawful carnal connection with her the said C. D.

PARENT OR GUARDIAN PROCURING DEFILEMENT OF WARD.

186. Every one who, being the parent or guardian of any girl or woman,—

(*a*) Procures such girl or woman to have carnal connection with any man other than the procurer; or

(*b*) Orders, is party to, permits or knowingly receives the avails of the defilement, seduction or prostitution of such girl or woman,

Is guilty of an indictable offence, and liable to fourteen years' imprisonment if such girl or woman is under the age of fourteen years, and if such girl or woman is of or above the age of fourteen years to five years' imprisonment. 53 V. c. 37, s. 9.

Limitation, one year, section 551. *One* witness must be corroborated, section 684.

A stranger to a girl under fourteen is liable *to imprisonment for life* if he procures such girl to have carnal connection with any man: sections 61-269; but *a mother* who so procures her child to have carnal connection with a man is punishable by *fourteen years* only. And, in the case of a girl between fourteen and sixteen, the mother who procures her prostitution is punishable by five years whilst a stranger is liable only to two; sections 61-181. This last provision is not a wrong one taken by itself, but to find it in the same section with the first one shows with what carelessness this legislation has been enacted. For a mother to procure the prostitution of her daughter is *less* criminal than if done by a stranger to her daughter, if that daughter is less than fourteen years old. But when the daughter is over fourteen and less than sixteen, the procurement of her prostitution by her mother is *more* criminal than if done by a stranger! and a guardian who is accessory to the prostitution of his seventeen years old ward is liable to five years, but only to two years if he himself seduces that ward: ss. 183-186.

HOUSEHOLDER PERMITTING DEBAUCHERY ON HIS PREMISES.

187. Every one who, being the owner *and* occupier of any premises, or having, or acting or assisting in the management or control thereof, induces or knowingly suffers any girl of such age as in this section mentioned to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally, is guilty of an indictable offence and—

(*a*) Is liable to ten years' imprisonment if such girl is under the age of fourteen years; and

(*b*) Is liable to two years' imprisonment if such girl is of or above the age of fourteen and under the age of sixteen years. R. S. C. c. 157, s. 5; 53 V. c. 37, s. 3; 48-49 V. c. 69, s. 6, (Imp.).

Limitation, one year, section 551. One witness must be corroborated, section 684.

A proviso in the Imperial Act, and in chapter 157 of the R. S. C. s. 5, making it a sufficient defence if it appears that the accused had reasonable cause to believe that the girl was above sixteen, has been struck out: *see* R. v. Packer, 16 Cox, 57; R. v. Prince, 13 Cox, 138, Warb. Lead. Cas. 89.

Indictment under (*a*) . . . . that A. B., on . . . . then being the owner *and* occupier (*the Imperial statute has* ("*or occupier*") (*or having, or acting, or assisting in the management or control*) of certain premises, to wit, a house (*describe it by street and number, or as minutely as possible*) did unlawfully induce (*or unlawfully and knowingly suffered*) a certain girl, to wit, one C. D., then being under the age of fourteen years, to resort to (*or to be in, or upon*) the said premises for the purpose of being unlawfully and carnally known by a man named W. M. (*or by a man*) or by men generally. *Vary in different counts.* If it is proved that the girl is above fourteen, but under sixteen, the conviction may be under (*b*): *see* R. v. Webster, 16 Q. B. D. 136; R. v. Barrett, L. & C. 263, and R. v. Stannard, L. & C. 349. If it is proved that the girl is above sixteen the conviction may be, if the evidence warrants it, under section 185.

CONSPIRACY TO DEFILE. *(New).*

188. Every one is guilty of an indictable offence and liable to two years' imprisonment who conspires with any other person by false pretenses, or false representations or other fraudulent means, to induce any woman to commit adultery or fornication.

Fine, section 958; requirements of indictment, section 616; one witness must be corroborated, section 684: *See* R. v. Lord Grey, 3 St. Tr. 519; R. v. Mears, 2 Den. 79; R. v. Delaval, 3 Burr. 1435. Adultery is an indictable offence in New Brunswick: R. v. Egre, 1 P. & B. 189; R. v. Ellis, 22 N. B. Rep. 440. But it being unlawful, though not indictable in the other provinces, the above section has only the effect of reducing the punishment which, on an indictment at common law, for such conspiracy would be punishable by five years under section 951.

Indictment for conspiracy to procure a woman to have illicit connection with a man. — That *A. B.* and *C. D.*, being persons of wicked and depraved mind and disposition, and contriving, craftily and deceitfully, to debauch and corrupt the morals of *E. F.*, a woman, on the day

of , did conspire, combine, confederate, and agree together, wickedly, knowingly, designedly, and unlawfully, by false pretenses, false representations, and other fraudulent means, to induce the said *E. F.* to have illicit carnal connection and commit fornication with a man, whose name is to the jurors unknown, (*or with A. D.*).

CARNALLY KNOWING IDIOTS.

189. Every one is guilty of an indictable offence and liable to four years' imprisonment who unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of any female idiot or imbecile, insane or *deaf and dumb* woman or girl, under circumstances which do not amount to rape but which prove that the offender knew, at the time of the offence, that the woman or girl was an idiot, or imbecile, or insane or *deaf and dumb*. R. S. C. c. 157, s. 3. 50-51 V. c. 48, s. 1. 48-49 V. c. 69, s. 5, (Imp.).

The words in italics are new: *see* R. v. Berry, 1 Q. B. D. 447. Fine, section 958; one witness must be corroborated, section 684; verdict of attempt in certain cases when full offence charged, section 711.

Indictment.— . . . . that A. B. on . . . . at . . . . unlawfully did indecently assault, and unlawfully and carnally did know (*or did attempt to have unlawful carnal knowledge of*) a certain female idiot called C. D. (*or imbecile and insane woman or girl*) called C. D. (*or deaf and dumb woman or girl*) called C. D. under circumstances that do not amount to rape, he, the said A. B., well knowing at the time of the said offence that the said woman (*or girl*) was an idiot, or (*as the case may be.*)

See R. v. Pressy, 10 Cox, 635, and R. v. Arnold, 1 Russ. 9.

Consent by the female is not a defence. A verdict of common assault or indecent assault may be given, section 713, but not a verdict of attempt to commit rape. If rape or attempt to commit rape is proved the judge may order that the offender be indicted accordingly.

PROSTITUTION OF INDIAN WOMEN.

190. Every one is guilty of an indictable offence and liable to a penalty not exceeding one hundred dollars and not less than ten dollars, or six months' imprisonment—

(*a*) Who, being the keeper of any house, tent or wigwam, allows or suffers any *unenfranchised* Indian woman to be or remain in such house, tent or wigwam, knowing or having probable cause for believing that such Indian woman is in or remains in such house, tent or wigwam with the intention of prostituting herself therein; or

(*b*) Who, being an Indian woman, prostitutes herself therein; or

(*c*) Who, being an *unenfranchised* Indian woman, keeps, frequents or is found in a disorderly house, tent or wigwam used for any such purpose.

2 Every person who appears, acts or behaves as master or mistress, or as the person who has the care or management, of any house, tent or wigwam in which any such Indian woman is or remains for the purpose of prostituting herself therein, is deemed to be the keeper thereof, notwithstanding he or she is not in fact the real keeper thereof. R. S. C. c. 43, ss. 106 & 107. 50-51 V. c. 33, s. 11.

Section 684, *post*, applies. Under c. 33, s. 11, 50-51 V. the enactment contained in this section applied only to Indians. The word "unenfranchised" is new.

PART XIV.

NUISANCES.

Common Nuisance.

191. A common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all Her Majesty's subjects.

4 Blac. Comm. 166; 1 Russ. 421; Stephen's Cr. L. Art. 176 *et seq*, and cases there cited: R. v. Moore, 3 B. & C. 184; R. v. Medley, 6 C. & P. 292; R. v. Henson, Dears. 24; R. v. Lister, Dears. & B. 209; R. v. Stephens, L. R. 1 Q. B. 702; R. v. Brewster, 8 U. C. C. P. 208; Hillyard v. G. T. R. 8 O. R. 583; R. v. Dunlop, 11 L. C. J. 186; R. v. Bruce, 10 L. C. R. 117; R. v. Patton, 13 L. C. R. 311; R. v. Brice, 15 Q. L. R. 147; Brown & Gugy, 14 L. C. R. 213; R. v. The Mayor of St. John, Chipman MSS. 155; 3 Burn's Just. v. Nuisance, 1026, 1068.

"With regard to nuisances we have, in section 151 and section 152, (192, 193, *post*), drawn a line between such nuisances as are and such as are not to be regarded as criminal offences. It seems to us anomalous and objectionable upon all grounds that the law should in any way countenance the proposition that it is a criminal offence not to repair a highway when the liability to do so is disputed in perfect good faith. Nuisances which endanger the life, safety, or health of the public stand on a different footing."

"By the present law, when a civil right such as a 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 V. c. 14, (allowing defendant to be a witness) again recognized the distinction."

"The existing remedy in such cases is not convenient, but it is not within our province to suggest any amendment."—Imp. Comm. Rep.

Indictment.— . . . . . that A. B. . . . . on . . . . . and on divers other days and times as well before as afterwards, at . . . . . (*set forth the nuisance*) (*the defendant will be entitled to particulars. R.* v. *Purwood, 3 Ad. & El. 815, sections 611, 629, post*) and the same nuisance so as aforesaid done, doth yet continue and suffer to remain to the great damage and common nuisance of all the liege subjects of Her Majesty. And the jurors aforesaid present that the said A. B. on the day and year aforesaid did commit a common nuisance which endangered the lives, safety, health, property or comfort (*as the case may be*) of the public (*or by which the public are obstructed in the exercise or enjoyment of a right common to all Her Majesty's subjects, to wit, the right of*) to the great damage and

common nuisance of all the subjects of Her Majesty. Special forms in 3 Burn, *loc. cit.;* R. v. Lister, Dears. & B. 209; R. v. Mutters, L. & C. 491, Saunder's Precedents, 192, *et. seq.*

PENALTY FOR COMMON NUISANCE. *(New).*

192. 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.*

See under preceding section. The words in italics are new law. They are in contradiction with the definition given in the preceding section.

NUISANCES OF A PARTICULAR CHARACTER. *(New).*

193. Any one convicted upon any indictment or information for any common nuisance other than those mentioned in the preceding section, shall not be deemed to have committed a criminal offence; but all such proceedings or judgments may be taken and had as heretofore to abate or remedy the mischief done by such nuisance to the public right.

See annotation under section 191, *ante.*

SELLING THINGS UNFIT FOR FOOD. *(New).*

194. Every one is guilty of an indictable offence and liable to one year's imprisonment who knowingly and wilfully exposes for sale, or has in his possession with intent to sell, for human food, articles which he knows to be unfit for human food.

2. Every one who is convicted of this offence after a previous conviction for the same crime shall be liable to two years' imprisonment.

Fine, section 958. A common law misdemeanour: *see* Shillito v. Thompson, 1 Q. B. D. 12; 1 Russ. 169, and cases there cited. The offence is already covered by chapter 107, R. S. C.: Form, 2 Chit. 555.

COMMON BAWDY HOUSE DEFINED. *(New).*

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

COMMON GAMING HOUSE DEFINED. *(New).*

196. A common gaming-house is—

(*a*) A house, room or place kept by any person for gain, to which persons resort for the purpose of playing at any game of chance; or

(*b*) A house, room or place kept or used for playing therein at any game of chance, or any mixed game of chance and skill, in which—

(i) A bank is kept by one or more of the players exclusively of the others; or

(ii) In which any game is played the chances of which are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the game is managed, or against whom the other players stake, play or bet. 8-9 V. c. 109, s. 2 (Imp.).

Every place where gaming in stocks is carried on is a gaming house: ss. 198 and 201, *post*, and notes thereunder; *see* Jenks v. Turpin, 13 Q. B. D. 505.

COMMON BETTING HOUSE DEFINED.

197. 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. 16-17 V. c. 119 (Imp.).

See Doggett v. Catterns, 19 C. B. N. S. 765; Haigh v. Sheffield, L. R. 10 Q. B. 102; R. v. Preedy, 17 Cox, 433; Whitehurst v. Fincher, 17 Cox, 70; Davis v. Stephenson, 17 Cox, 73; Snow v. Hill, 15 Cox, 737, 14 Q. B. D. 588; Caminada v. Hulton, 17 Cox, 307; Hornsby v. Raggett, 17 Cox, 428.

BAWDY-HOUSE, COMMON GAMING OR BETTING-HOUSE, PUNISHMENT. (*New*).

198. Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house, common gaming-house or common betting-house, as hereinbefore defined.

2. Any one who appears, acts, or behaves as master or mistress, or as the person having the care, government or management, of any disorderly house shall be deemed to be the keeper thereof, and shall be liable to be prosecuted

and punished as such, although in fact he or she is not the real owner or keeper thereof. 25 Geo. II. c. 36, s. 8. 16-17 V. c. 119. 17-18 V. c. 38 (Imp.).

A common law misdemeanour. Ss. 9 & 10 of chapter 158, R. S. C., "an Act respecting Gaming Houses," as to evidence in such cases, are unrepealed. Fine, s. 958. S. 207, *post*, also provides for the offence of keeping a disorderly house.

Section 575, *post*, as to search warrants; ss. 702, 703, as to evidence in such cases, and ss. 783 & 784, as to summary trial.

Husband and wife may be indicted together: R. v. Williams, 1 Salk. 383; R. v. Dixon, 10 Mod. 335; R. v. Warren, 16 O. R. 590. *See* R. v. Crawshaw, Bell, 303; R. v. Barrett, L. & C. 263; R. v. Rogier, 1 D & R. 284; Jenks v. Turpin, 13 Q. B. D. 505; R. v. McNamara, 20 O. R. 489; R. v. Stannard, L. & C. 349; R. v. Newton, 11 Ont. P. R. 101; R. v. Rice, Warb. Lead. Cas. 101, as to what is a bawdy house, or a common gaming house.

PLAYING OR LOOKING ON IN GAMING-HOUSE.

199. Every one who plays or looks on while any other person is playing in a common gaming-house is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding one hundred dollars and not less than twenty dollars, and in default of payment to two months' imprisonment. R. S. C. c. 158, s. 6.

See. R. v. Murphy, 17 O. R. 201

OBSTRUCTING PEACE OFFICER ENTERING GAMING-HOUSE.

200. Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding one hundred dollars, and to six months' imprisonment, with or without hard labour, who—

(*a*) Wilfully prevents any constable or other officer duly authorized to enter any disorderly house, as mentioned in section one hundred and ninety-eight, from entering the same or any part thereof; or

(*b*) Obstructs or delays any such constable or officer in so entering; or

(*c*) By any bolt, chain or other contrivance secures any external or internal door of, or means of access to, any common gaming-house so authorized to be entered; or

(*d*) Uses any means or contrivance whatsoever for the purpose of preventing, obstructing or delaying the entry of any constable or officer, authorized as aforesaid, into any such disorderly house or any part thereof. R. S. C. c. 158, s. 7.

GAMING IN STOCKS AND MERCHANDISE.

201. 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 such shares of stock, goods, wares or merchandise; or

(*b*) Makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any such shares of stock, goods, wares or merchandise in respect of which no delivery of the thing sold or purchased is made or received, and without the *bona fide* intention to make or receive such delivery.

2. But it is not an offence if the broker of the purchaser receives delivery on his behalf, of the article sold, notwithstanding that such broker retains or pledges the same as security for the advance of the purchase money or any part thereof.

3. Every office or place of business wherein is carried on the business of making or signing, or procuring to be made or signed, or negotiating or bargaining for the making or signing of such contracts of sale or purchase as are prohibited in this section is a common gaming-house, and every one who as principal or agent occupies, uses, manages or maintains the same is the keeper of a common gaming-house. 51 V. c. 42, ss. 1 & 3.

This is a re-enactment of the Act against bucket shops. *See* section 704, *post*, as to evidence.

FREQUENTING PLACES WHERE GAMING IN STOCKS IS CARRIED ON.

202. Every one is guilty of an indictable offence and liable to one year's imprisonment who habitually frequents any office or place wherein the making or signing, or procuring to be made or signed, or the negotiating or bargaining for the making or signing, of such contracts of sale or purchase as are mentioned in the section next preceding is carried on. 51 V. c. 42, s. 1, ss. 2.

Fine, section 958.

GAMBLING IN PUBLIC CONVEYANCES.

203. 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 or superior officer in charge of, any railway train or steamboat, station or landing place in or at which any such offence, as aforesaid, is committed or attempted, *must*, with or without warrant, arrest any person whom he has good reason to believe to have committed or attempted to commit the same, and take him before a justice of the peace, and make complaint of such offence on oath, in writing.

3. Every conductor, master or superior officer in charge of any such railway car or steamboat, who makes default in the discharge of any such duty is liable, on summary conviction, to a penalty not exceeding one hundred dollars and not less than twenty dollars.

4. Every company or person who owns or works any such railway car or steamboat must keep a copy of this section posted up in some conspicuous part of such railway car or steamboat.

5. Every company or person who makes default in the discharge of such duty is liable to a penalty not exceeding one hundred dollars and not less than twenty dollars. R. S. C. c. 160, ss. 1, 3, 6. (*Amended*).

Fine, section 958.

BETTING AND POOL-SELLING.

204. Every one is guilty of an indictable offence, and liable to one year's imprisonment, and to a fine not exceeding one thousand dollars, who

(*a*) Uses or knowingly allows any part of any premises under his control to be used for the purpose of recording or registering any bet or wager, or selling any pool; or

(*b*) Keeps, exhibits, or employs, or knowingly allows to be kept, exhibited or employed, in any part of any premises under his control, any device or apparatus for the purpose of recording any bet or wager, or selling any pool; or

(*c*) Becomes the custodian or depositary of any money, property or valuable thing staked, wagered or pledged; or

(*d*) Records or registers any bet or wager, or sells any pool, upon the result—

(i) Of any political or municipal election;

(ii) Of any race;

(iii) Of any contest or trial of skill or endurance of man or beast.

2. The provisions of this section shall not extend to any person by reason of his becoming the custodian or depositary of any money, property or valuable thing staked, to be paid to the winner of any lawful race, sport, game, or exercise, or to the owner of any horse engaged in any lawful race, or to bets between individuals *or made on the race course of an incorporated association during the actual progress of a race meeting.* R. S. C. c. 159, s. 9.

The words in italics are new. Section 783, *post*, as to summary trial of offences under this section: *see* Fulton v. James, 5 U. C. C. P. 182; R. v. Dillon, 10 Ont. P. R. 352; R. v. Smiley, 22 O. R. 686.

LOTTERIES.

205. Every one is guilty of an *indictable* offence and *liable to two years' imprisonment and to a fine not exceeding two thousand dollars*, who—

(*a*) Makes, prints, advertises or publishes, or causes or procures to be made, printed, advertised or published, any proposal, scheme or plan for advancing, lending, giving, selling or in any way disposing of any property, by lots, cards, tickets, or any mode of chance whatsoever; or

(*b*) Sells, barters, exchanges or otherwise disposes of, or causes or procures, or aids or assists in, the sale, barter, exchange or other disposal of, or offers for sale, barter or exchange, any lot, card, ticket or other means or device for advancing, lending, giving, selling or otherwise disposing of any property by lots, tickets or any mode of chance whatsoever.

2. Every one is guilty of an offence and liable on summary conviction to a penalty of twenty dollars, who buys, takes or receives any such lot, ticket or other device as aforesaid.

3. Every sale, loan, gift, barter or exchange of any property, by any lottery, ticket, card or other mode of chance depending upon or to be determined by chance or lot, is void, and all such property so sold, lent, given, bartered or exchanged, is liable to be forfeited to any person who sues for the same by action or information in any court of competent jurisdiction.

4. No such forfeiture shall affect any right or title to such property acquired by any *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.

6. This section does not apply to—

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

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

(*c*) Any distribution by lot among the members or ticket holders of any incorporated society established for the encouragement of art, of any paintings, drawings or other work of art produced by the labour of the members of, or published by or under the direction of, such incorporated society.

(*d*) *The Credit Foncier du Bas-Canada* or *to the Credit Foncier Franco-Canadien*. R. S. C. c. 159.

"Property" defined, section 3. The words in italics are new. By the repealed statute the penalty was only twenty dollars punishable on summary conviction: *see* s. 575, as to

search warrants: R. v. Dodds, 4 O. R. 390; Cronyn v. Widder, 16 U. C. Q. B. 356; R. v. Jamieson, 7 O. R. 149; Power v. Caniff, 18 U. C. Q. B. 403; La Société St. Louis v. Villeneuve, 21 L. C. J. 309; R. v. Crawshaw, Bell, 303.

MISCONDUCT IN RESPECT OF DEAD BODIES. (*New*).

206. 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.

A common law offence. Fine, section 958. To dig up a dead body and sell it for purposes of dissection is an offence: R. v. Lynn, 1 Leach, 497. *See* R. v. Price, 12 Q. B. D. 247; R. v. Stephenson, 13 Q. B. D. 331, 15 Cox, 679, Warb. Lead. Cas. 97; R. v. Sharpe, Dears. & B. 160; R. v. Feist, Dears. & B. 590.

Indictment— that A. B. on the day of in the year of our Lord the churchyard of and belonging to the parish church of the parish of in the said county of unlawfully and wilfully did break and enter, and the grave there in which the body of one C. D., deceased, had lately before then been interred, and there was, unlawfully, wilfully and indecently did dig open, and the body of him the said C. D. out of the grave aforesaid, unlawfully, wilfully and indecently did then take and carry away; *2nd count* (*after* "*open*"), and indecently interfered with the said dead human body: *3rd count*, charging "improperly" instead of "indecently."

PART XV.

VAGRANCY.

207. Every one is a loose, idle or disorderly person or vagrant who—

(*a*) Not having any visible means of maintaining himself lives without employment;

(*b*) Being able to work and thereby or by other means to maintain himself and family wilfully refuses or neglects to do so;

(*c*) Openly exposes or exhibits in any street, road, highway or public place any indecent exhibition. (*Amended*).

(*d*) Without a certificate signed, within six months, by a priest, clergyman or minister of the Gospel, or two justices of the peace, residing in the municipality where the alms are being asked, that he or she is a deserving object of charity, wanders about and begs, or goes about from door to door, or places himself or herself in any street, highway, passage or public place to beg or receive alms;

(*e*) Loiters on any street, road, highway or public place, and obstructs passengers by standing across the footpath, or by using insulting language, or in any other way;

(*f*) Causes a disturbance in or near any street, road, highway or public place, by screaming, swearing or singing, or by being drunk, or by impeding or incommoding peaceable passengers;

(*g*) By discharging 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. R. S. C. c. 157, s. 8.

208. Every loose, idle or disorderly person or vagrant is liable, on summary conviction before two justices of the peace, to a fine not exceeding fifty dollars or to imprisonment, with or without hard labour, for any term not exceeding six months, or to both. R. S. C. c. 157, s. 8.

The following section of c. 157, R. S. C. is unrepealed by section 983 and appendix, though repealed by schedule 2.

(4) If provision is made therefor by the laws of the province in which the conviction takes place, any such loose, idle or disorderly person may, instead of being committed to the common gaol or other public prison, be committed to any house of industry or correction, alms house, work house or reformatory prison.

A conviction under 32 & 33 V. c. 28, (D.) for that V. L. on was a common prostitute, wandering in the public streets of the city of Ottawa, and not giving a satisfactory account of herself contrary to this statute: *Held*, bad, for not shewing sufficiently that she was asked, before or at the time of being taken, to give an account of herself and did not do so satisfactorily: R. v. Levecque, 30 U. C. Q. B. 509. *See* R. v. Arscott, 9 O. R. 541, and Arscott & Lilly, 11 O. R. 153; R. v. Remon, 16 O. R. 560. There may be a joint conviction against husband and wife for keeping a house of ill-fame: R. v. Warren, 16 O. R. 590; R. v. Williams, 1 Salk. 383.

Held, that under the Vagrant Act it is not sufficient to allege that the accused was drunk on a public street, without alleging further that he caused a disturbance in such street by being drunk: *Ex parte* Despatie, 9 L. N. 387.

It is unlawful for men to bathe, without any screen or covering, so near to a public footway frequented by females that exposure of their persons must necessarily occur, and they who so bathe are liable to an indictment for indecency: R. v. Reed, 12 Cox, 1.

To keep a booth on a race course for the purpose of an indecent exhibition is a crime: R. v. Saunders, 13 Cox, 116.

A conviction under 32 & 33 V. c. 28, for keeping a house of ill-fame, imposed payment of a fine and costs to be collected by distress, and in default of distress ordered imprisonment. *Held*, good: R. v. Walker, 7 O. R. 186.

The charge again a prisoner, who was brought up on a writ of habeas corpus, was "for keeping a bawdy house for the resort of prostitutes in the City of Winnipeg."

"Keeping a bawdy house" is, in itself, a substantial offence; so is "keeping a house for the resort of prostitutes." *Held*, nevertheless, that there was but one offence charged and that the commitment was good: R. v. Mackenzie, 2 Man. L. R. 168.

See R. v. Rice, 10 Cox, 155, L. R. 1 C. C. R. 21, Warb. Lead. Cas. 101; R. v. Bassett, 10 Ont. P. R. 386; Pointon v. Hill, 12 Q. B. D. 306: R. v. Daly, 24 L. C. J. 157; R. v. Newton 11 Ont. P. R. 101; R. v. Organ, 11 Ont. P. R. 497; Smith v. R., M. L. R. 4 Q. B. 325.

See s. 576, p. 644, *post*, as to search warrant.

TITLE V.

OFFENCES AGAINST THE PERSON AND REPUTATION.

PART XVI.

DUTIES TENDING TO THE PRESERVATION OF LIFE.

Duties—Definition.

209. 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.

See section 215, *post*: R. v. Friend, R. & R. 20; R. v. Shepherd, L. & C. 147; R. v. Smith, L. & C. 607; R. v. Marriott, 8 C. & P. 425; R. v. Ryland, L. R. 1 C. C. R. 99; R. v. Morby; Warb. Lead. Cas. 115.

DUTY OF PARENT OR GUARDIAN, ETC.

Punishment, Etc.

210. Every one who as parent, guardian, or *head of a family* is under a legal duty to provide *necessaries* for any child *under the age of sixteen years* is criminally responsible for omitting, without lawful excuse, to do so *while such child remains a member of his or her household, whether such child is helpless or not*, if the death of such child is caused, or if his life is endangered or his health is or is likely to be permanently injured, by such omission.

2. Every one who is under a legal duty to provide *necessaries* for his wife, is criminally responsible for omitting, without lawful excuse, so to do, if the death of his wife is caused, or if her life is endangered, or her health is or is likely to be permanently injured by such omission.

See section 215, *post*.

211. Every one who, *as master or mistress*, has contracted to provide necessary food, clothing or lodging for any servant or apprentice *under the age of sixteen years* is under a legal duty to provide the same, and is criminally responsible for omitting, without lawful excuse, to perform such duty, if the

death of such servant or apprentice is caused, or if his life is endangered, or his health has been or is likely to be permanently injured by such omission.

See section 215, *post.*.

212. Every one who undertakes (except in case of necessity) to administer surgical or medical treatment, or to do any other lawful act the doing of which is or may be dangerous to life, is under a legal duty to have and to use reasonable knowledge, skill and care in doing any such act, and is criminally responsible for omitting, without lawful excuse, to discharge that duty if death is caused by such omission.

213. 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.

OMISSIONS DANGEROUS TO LIFE.

214. 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.

PUNISHMENT.

215. Every one is guilty of an indictable offence and liable to three years' imprisonment who, being bound to perform any duty specified in sections two hundred and nine, two hundred and ten and two hundred and eleven without lawful excuse neglects or refuses to do so, unless the offence amounts to culpable homicide. (*Amendment of 1893*).

R. S. C. c. 162, s. 19, 24-25 V. c. 100, s. 26 and 31-32 V. c. 122, s. 37, (Imp.). *See* Williams v. E. I. Co., 3 East, 192; R. v. Nicholls, 13 Cox, 75; R. v. Pelham, 8 Q. B. 959.

Fine in addition to or in lieu of punishment, section 958.

Sections 210 & 211, which replace section 19 of chapter 162, R. S. C., introduce changes in this part of the statutory law.

1. In section 210 the words or "head of a family" are added to the words "parent or guardian." 2. The word "necessaries" in section 210, relating to parent and child and husband and wife, is substituted to the words "necessary food, clothing or lodging," whilst the words "necessary food, clothing or lodging" are retained in section 211, relating to master and servant or apprentice. 3. The words "while such child remains a member of his or her

household, whether such child is helpless or not," in section 210, are new. 4. In both sections the words "under the age of sixteen years" are new. 5. In section 211 the words "has contracted to provide" are substituted to the words "being legally liable."

These three clauses, 209, 210 & 211, are taken, word for word, from the draft of the Imperial Code, with the exception of sub-section 2 of section 210, which is an addition. The Commissioners say in their report, as to these clauses:—

"We believe that this part of the draft code will be found to state in a clear and compendious form the unwritten law upon the subject to which it relates. Section 161, (211 *ante*) is a re-enactment of 24-25 V. c. 100, s. 26, which was itself a re-enactment of 14-15 V. c. 11. That statute was passed in the excitement consequent on the case of R. v. Sloane, Annual Register, vol. 92, p. 144, 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 it is not the existing law. Section 160, (210 *ante*) puts the head of the 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."

The difference in these two sections, 210 and 211, between necessaries and necessary food, clothing or lodging, is a right one. A parent is obliged to supply his child, or a husband his wife, with all the necessaries of life, which would include medical attendance (209 & 210 combined) (*see* R. v. Downes, 1 Q. B. D. 25), whilst a master is only obliged to provide his servant or apprentice with the necessary food, clothing or lodging which he has contracted to so provide.

The only change of importance in the two sections is contained in the words "under sixteen years of age," which require no explanation. The provision of the repealed

section 19 of chapter 162, R. S. C., as to any bodily harm by a master to his apprentice or servant, now forms a separate section, section 217, *post.*

Indictment under sections 209-215 against a gaoler for not providing a prisoner with the necessaries of life. . . . . . that A. B. at . . . . on . . . . and on divers other days before and after, was the keeper of the common gaol for the District of . . . then and there situate, and as such had charge of all the prisoners therein confined; and was under a legal duty to provide all said prisoners with the necessaries of life; that one C. D. was then and there a prisoner detained in the said gaol and as such under the charge of the said A. B.; that the said C. D. was, by reason of his said detention, unable to withdraw himself from such charge and unable to provide himself with the necessaries of life; that the said A. B. was then and there under a legal duty to provide the said C. D. with the necessaries of life, but that the said A. B. not regarding his duty on that behalf, then and there unlawfully did refuse, omit and neglect, without lawful excuse, to provide the said C. D. with the necessaries of life, by means whereof the life of the said C. D. was and is endangered and his health was and is permanently injured (*or is likely to be permanently injured.*)

Indictment under sections 210-215, against a father, for not providing necessaries to his child— . . . . that A. B., the father of one C. D., at . . . . . on . . . . and on divers other days, after and before that day, unlawfully did refuse, neglect and omit, without lawful excuse, to provide for and find the said C. D., his child, with sufficient food, clothing and lodging, and other necessaries of life, the said C. D. being then and there a member of the household of his father, the said A. B., and being, then and there, under the age of sixteen years, and the said A. B. being then and there by law in duty bound to provide food, clothing and other necessaries of life for the said

C. D., his child as aforesaid, by means of which refusal, neglect and omission, the life of the said C. D. was and is endangered, and the health of the said C. D. was and is (*or is likely to be*) permanently injured.

Indictment under sections 210-215 against a husband for not providing necessaries for his wife . . . . that on . . . . at . . . . , and on divers other days before and after, A. B. the husband of one C. D., being then and there under a legal duty to provide necessary food, clothing, lodging, and all other necessaries for the said C. D., his wife, unlawfully did refuse, neglect and omit without lawful excuse to provide for her the necessary food, clothing, lodging and other necessaries, so that the life of the said C. D. was and is thereby endangered, and her health was and is permanently injured *(or is likely to be permanently injured).* . . .

Indictment under sections 211-215 against a master for not providing an apprentice with necessary food.— . . . . That J. S. on . . . . then being the master of J. N. his apprentice, the said J. N. being then under the age of 16 years, and the said J. S. having before the said day contracted to provide for the said J. N. as his apprentice as aforesaid, necessary food (*clothing or lodging*) unlawfully and without lawful excuse, did refuse, omit and neglect to provide the same, so that the life of the said J. N. was and is thereby endangered, (*or the health of the said J. N. has been or is likely to be permanently injured*). (*Add counts varying the statement of the injuries sustained*).

Prove the apprenticeship, if it was by deed by production and proof of the execution of the deed, or in case it be in the possession of the defendant, and there be no counterpart, by secondary evidence of its contents, after due notice given to the defendant, to produce it. In England, it is said in Archbold that the legal liability of the defendant to provide his apprentice with necessary food, clothing or lodging will be inferred, even if it be not expressly stipulated

for, from the apprenticeship itself, but in Canada, upon an indictment under section 211, it must be proved that the defendant had contracted to provide for it, either by parol or in writing. Prove the wilful refusal or neglect of the defendant to provide the apprentice with necessary food, etc., as stated in the indictment, and that by such neglect the prosecutor's life was in danger, or his health was or is likely to be permanently injured.

An indictment alleged in the first count that the prisoner unlawfully and wilfully neglected and refused to provide sufficient food for her infant child five years old, she being able and having the means to do so. The second count charged that the prisoner unlawfully and wilfully neglected and refused to provide her infant child with necessary food, but there was no allegation that she had the ability or means to do so. The jury returned a verdict of guilty, on the ground that if the prisoner had applied to the guardians for relief she would have had it. *Held*, that neither count was proved, as it was not enough that the prisoner could have obtained the food on application to the guardians, and that it is doubtful whether the second count is good in law: R. v. Rugg, 12 Cox, 16.

It is to be remarked that the indictment in that case was under the common law, as, in England, the statute 24 & 25 V. c. 100 applies only to masters and servants. The bill as introduced in the House of Lords extended its provisions to husband and parents, but the Commons restricted it to masters: Greaves, Cons. Acts, 56. By the common law an indictment lies for all misdemeanours of a public nature. Thus it lies for a breach of duty which is not a mere private injury but an outrage upon the moral duties of society; as for the neglect to provide sufficient food or other necessaries for an infant of tender years unable to provide for and take care of itself, for whom the defendant is obliged by duty to provide, so as thereby to injure its health.

But the parent must have a present means or ability to support the child; the possibility of obtaining such relief is not sufficient; and, by the neglect of such duty, the child must have suffered a serious injury. An opportunity of applying to a relieving officer of the union from which the mother would have received adequate relief on application is not a sufficient proof in England of her having present means: R. v. Chandler, Dears. 453; R. v. Hogan, 2 Den. 277; R. v. Phillpot, Dears. 179. But these and similar cases are no authorities under our present statute in Canada.

In an indictment under s. 19, c. 162, R. S. C., it was not necessary to allege that the defendant had the means and was able to provide the food or clothing nor that his neglect to do so endangers the life or affects the health of his wife: R. v. Smith, 2 L. N. 223; R. v. Scott, 28 L. C. J. 264; but now, in an indictment under section 210, it is necessary to allege that the refusal, omission and neglect was without lawful excuse and that by such refusal, omission, and neglect to provide the food, etc., necessary to his wife, her life has been and is endangered, or her health permanently injured, or likely to be permanently injured: *see* R. v. Maher, 7 L. N. 82; R. v. Nasmith, 42 U. C. Q. B. 242.

Held, Armour, J., dissenting, that the evidence of a wife is inadmissible on the prosecution of her husband for refusal to support her, under 32-33 V. c. 20, s. 25; R. v. Bissell, 1 O. R. 514.

As to sections 213 & 214, which are common law rules, *see* annotation under section 220, *post*, and R. v. Salmon, Warb. Lead. Cas. 113, and cases there cited.

ABANDONING INFANTS, ETC., ETC.

216. Every one is guilty of an indictable offence and liable to three years' imprisonment who unlawfully abandons or exposes any child under the age of two years, whereby its life is endangered, or its health is permanently injured.

2. *The words "abandon" and "expose" include a wilful omission to take charge of the child on the part of a person legally bound to do so, and any mode of*

dealing with it calculated to leave it exposed to risk without protection. R. S. C. c. 162, s. 20. 24-25 V. c. 100, s. 27 (Imp.).

Fine, section 958.

The repealed section had the words "or is likely to be permanently injured," and did not have sub-section 2.

Greaves' Note.—This clause is new. It is intended to provide for cases where children are abandoned or exposed under such circumstances that their lives or health may be, or are likely to be, endangered: *see* R. v. Hogan, 2 Den. 277; R. v. Cooper, 1 Den. 459, 2 C. & K. 876; R. v. Phillpot, Dears. 179; R. v. Gray, Dears. & B. 303, which show the necessity for this enactment.

Indictment.— . . . . unlawfully did abandon and expose a certain child called J. N., then being under the age of two years, whereby the life of the said child was endangered (*or whereby the health of such child was and is permanently injured*).

In order to sustain this indictment it is only necessary to prove that the defendant wilfully abandoned or exposed the child mentioned in the indictment, that the child was then under two years of age, and that its life was thereby endangered, or its health has been and is permanently injured

A. and B. were indicted for that they "did abandon and expose a child then being under the age of two years, whereby the life of the child was endangered." A., the mother of a child five weeks old, and B. put the child into a hamper, wrapped up in a shawl, and packed with shavings and cotton wool, and A., with the connivance of B., took the hamper to M., about four or five miles off, to the booking office of the railway station there. She there paid for the carriage of the hamper, and told the clerk to be very careful of it, and to send it to G. by the next train, which would leave M. in ten minutes from that time. She said nothing as to the contents of the hamper, which was addressed, "Mr. Carr's, Northoutgate, Gisbro, with care, to be deliv-

ered immediately," at which address the father of the child (a bastard) was then living. The hamper was carried by the ordinary passenger train, and delivered at its address the same evening. The child died three weeks afterwards, from causes not attributable to the conduct of the prisoners. On proof of these facts, it was objected for the prisoners that there was no evidence that the life of the child was endangered, and that there was no abandonment and no exposure of the child within the meaning of the statute. The objections were overruled and the prisoners found guilty. *Held*, that the conviction should be affirmed: R. v. Falkingham, 11 Cox, 475, Warb. Lead. Cas. 93.

A mother of a child under two years of age brought it and left it outside the father's house (she not living with her husband, the father of it). He was inside the house, and she called out, "Bill, here's your child; I can't keep it. I am gone." The father some time afterwards came out, stepped over the child and went away. About an hour and a half afterwards, his attention was again called to the child still lying in the road. His answer was, "It must bide there for what he knew, and then the mother ought to be taken up for the murder of it." Later on, the child was found by the police in the road, cold and stiff; but, by care, it was restored to animation. *Held*, on a case reserved, that, though the father had not had the custody of the child, yet, as he was by law bound to provide for it, his allowing it to remain where he did was an abandonment and exposure of the child by him, whereby its life was endangered, within the statute: R. v. White, 12 Cox, 83.

ASSAULT BY MASTERS ON SERVANTS, ETC., ETC.

217. Every one is guilty of an indictable offence and liable to three years' imprisonment who, being legally liable as master or mistress to provide for any apprentice or servant, unlawfully does, or causes to be done, any bodily harm to any such apprentice or servant so that the life of such apprentice or servant is endangered or the health of such apprentice or servant has been, or is likely to be, permanently injured. R. S. C. c. 62, s. 19.

Chapter 62, R. S. C. cited under this section is "An Act respecting Copyright."

Fine, section 958. Verdict of common assault may be given; R. v. Bissonette, Ramsay's App. Cas. 190. *See* annotation under sections 211, 215.

Indictment.—. . . . that A. B. on . . . . then being the master of one J. N., his apprentice, and then being legally liable to provide for the said J. N. as his apprentice as aforesaid, unlawfully in and upon the said J. N. did make an assault, and him the said J. N. did then beat, wound and ill-treat, and thereby then did do, cause and occasion bodily harm to the said J. N. his apprentice as aforesaid, whereby the life of the said J. N. was endangered and his health has been and is permanently injured (*or is likely to be permanently injured.*)

HOMICIDE.

Imperial Commissioners' Report.

"The common law definition of murder is "unlawfully killing with malice aforethought." Manslaughter may in effect be defined as "unlawfully 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 means of 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 punishment, 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 circumstances, it will be 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 of '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 dynamite or gunpowder 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 would include 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 (section 175) includes all cases in which death is caused by the infliction of a '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, section 175 in sub-sections (*b*) & (*c*) provides that killing by the administration of stupefying things, or by wilfully stopping the breath, for the purpose in either case of committing any of the specified offences, 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 to prevent him from crying out; the death of B., results. This is murder according to the Draft Code. According to the Bill, it is murder if A. knew that such an act would probably cause death; manslaughter if he did not. A few years ago a case occurred in the Western Circuit, which illustrates the principle on which this portion of the Draft Code is framed better than any hypothetical case. An innocent girl, on her way to church, had to pass over a stile into a narrow, wooded lane, and then go out of it by a stile on the other side. A ruffian who knew this lay in wait for her, muffled her head in a shawl

to stifle her cries, and proceeded to drag her down the lane towards a wood. She died before she reached it. He was executed for the murder. It is plain he did not mean to kill her, indeed his object was frustrated in consequence of her not reaching the wood alive, and he probably was not aware that stifling her breath for so short a time was dangerous to life; but as the law at the time was, and now is, the death having been occasioned by violence used to facilitate the commission of a rape, the offence was murder. And we believe there are few who would not think the law defective if such an offence was not murder."

"Again, A. stabs B. in the leg, not intending to kill him; B. dies. According to the Bill, this would be murder if the jury thought the act showed an intent to do grievous bodily harm, or if, without such intent, it was done with knowledge that it would probably cause death or grievous bodily harm. According to the Draft Code it would be murder if the jury thought the act was meant to cause B. an injury known to A. to be likely to cause death, he being reckless whether it caused death or not. It will thus be seen that the Bill and the Draft Code approach each other very closely."

"There is no substantial difference between the provisions of the Draft Code and the Bill dealing with provocation, though the language and arrangement differ. Each introduces an alteration of considerable importance into the common law. By the existing law, the infliction of a blow, or the sight by the husband of adultery committed with his wife, may amount to provocation which would reduce murder to manslaughter. 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."

The law takes no cognizance of homicide unless death result from bodily injury, occasioned by some act or

unlawful omission, as contra-distinguished from death occasioned by any influence on the mind, or by any disease arising from such influence: *see* s. 223 *post.* The terms "*unlawful omission*" comprehend every case where any one, being under any legal obligation to supply food, clothing or other aid or support, or to do any other act, or make any other provision for the sustentation of life, or prevention of injury to life, is guilty of any breach of duty: s. 209, *ante.* It is essential to homicide of which the law takes cognizance that the party die of the injury done within one year and a day thereafter: s. 222, *post.* In the computation of the year and the day from the time of the injury, the whole of the day on which the act was done, or of any day on which the cause of injury was continuing, is to be reckoned the first. A child in the womb is not a subject of homicide in respect of any injury inflicted in the womb, unless it afterwards be born alive; it is otherwise if a child die within a year and a day after birth of any bodily injury inflicted upon such child whilst it was yet in the womb: 4 Cr. L. Com. Rep. p. XXXII., 8th of March, 1839. S. 219, *post.*

If a man have a disease which in all likelihood would terminate his life in a short time, and another give him a wound or hurt which hastens his death, it is murder or other species of homicide as the case may be: s. 224, *post.* And it has been ruled that though the stroke given is not in itself so mortal but that with good care it might be cured, yet if the party die of this wound within a year and a day, it is murder or other species of homicide as the case may be. And when a wound, not in itself mortal, for want of proper applications or from neglect turns to a gangrene or a fever, and that gangrene or fever is the immediate cause of the death of the party wounded, the party by whom the wound is given is guilty of murder or manslaughter, according to the circumstances; s. 225, *post.* For though the fever or gangrene, and not the

wound, be the immediate cause of death, yet the wound being the cause of the gangrene or fever is the immediate cause of the death, *causa causati*. So if one gives wounds to another, who neglects the cure of them or is disorderly, and doth not keep that rule which a person wounded should do, yet if he die it is murder or manslaughter, according to the circumstances; because if the wounds had not been the man had not died; and therefore neglect or disorder in the person who received the wounds shall not excuse the person who gave them: 1 Russ. 700.

So if a man be wounded, and the wound become fatal from the refusal of the party to submit to a surgical operation: R. v. Holland, 2 M. & Rob. 351; R. v. Pym, 1 Cox, 339; R. v. McIntyre, 2 Cox, 379; R. v. Martin, 5 C. & P. 128; R. v. Webb, 1 M. & Rob. 405. But it is otherwise if death results not from the injury done, but from unskilful treatment, or other cause subsequent to the injury: 4th Rep. Cr. L. Com., p. XXXII., 8th of March, 1839. S. 226, *post*.

Murder is the killing any person under the king's peace, with malice prepense or aforethought, either express or implied by law. Of this description the malice prepense, *malitia precogitata*, is the chief characteristic, the grand criterion by which murder is to be distinguished from any other species of homicide, and it will therefore be necessary to inquire concerning the cases in which such malice has been held to exist. It should, however, be observed that when the law makes use of the term *malice aforethought*, as descriptive of the crime of murder, it is not to be understood merely in the sense of a principle of malevolence to particulars, but as meaning that the act has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit; a heart regardless of social duty, and deliberately bent upon mischief. And in general any formed design of doing mischief may be called malice. And, therefore, not such killing

only as proceeds from premeditated hatred or revenge against the person killed, but also, in many other cases, such killing as is accompanied with circumstances that show the heart to be perversely wicked is adjudged to be of *malice prepense*, and consequently murder: 1 Russ. 667.

Malice may be either *express* or *implied by law*. Express malice is, when one person kills another with a sedate, deliberate mind and formed design; such formed design being evidenced by external circumstances discovering the inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. And malice is implied by law from any deliberate cruel act committed by one person against another, however sudden; thus, where a man kills another suddenly without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. So if a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity be proved. And where one is killed in consequence of such a wilful act as shows the person by whom it is committed to be an enemy to all mankind, the law will infer a general malice from such depraved inclination to mischief. And it should be observed as a general rule, that all homicide is presumed to be malicious, and of course amounting to murder, until the contrary appears from circumstances of alleviation, excuse or justification; and that it is incumbent upon the prisoner to make out such circumstances to the satisfaction of the court and jury, unless they arise out of the evidence produced against him. It should also be remarked that, where the defence rests upon some violent provocation, it will not avail, however grievous such provocation may have been, if it appears that there was an interval of reflection, or a reasonable time for the blood to have cooled before the deadly purpose

was effected. And provocation will be no answer to proof of *express* malice; so that, if, upon a provocation received, one party deliberately and advisedly denounce vengeance against the other, as by declaring that *he will have his blood*, or the like, and afterwards carry his design into execution, he will be guilty of murder; although the death happened so recently after the provocation as that the law might, apart from such evidence of express malice, have imputed the act to unadvised passion. But where fresh provocation intervenes between preconceived malice and the death, it ought clearly to appear that the killing was upon the antecedent malice; for if there be an old quarrel between A. and B. and they are reconciled again, and then upon a new and sudden falling out A. kills B., this is not murder. It is not to be presumed that the parties fought upon the old grudge unless it appear from the whole circumstances of the fact; but if upon the circumstances it should appear that the reconciliation was but pretended or counterfeit and that the hurt done was upon the score of the old malice. then such killing will be murder: 1 Russ. 667.

If a man, after receiving a blow, feigns a reconciliation, and, after the lapse of a few minutes, invites a renewal of the aggression, with intent to use a deadly weapon, and on such renewal uses such weapon with deadly effect, there is evidence of implied malice to sustain the charge of murder. But if, after such reconciliation, the aggressor renews the contest, or attempts to do so, and the other having a deadly weapon about him, on such sudden renewal of the provocation, uses it without previous intent to do so, there is evidence which may reduce the crime to manslaughter: R. v. Selten, 11 Cox, 674. Mr Justice Hannen in his charge to the jury in that case said: "Now, murder is killing with malice aforethought; but though the malice may be harboured for a long time for the gratification of a cherished revenge, it may, on the other hand, be generated in a man's mind according to the character of

that mind, in a short space of time, and therefore it becomes the duty of the jury in each case to distinguish whether such motive had arisen in the mind of the prisoner, and whether it was for the gratification of such malice he committed the fatal act. But the law, having regard to the infirmity of man's nature, admits evidence of such provocation as is calculated to throw a man's mind off its balance, so as to show that he committed the act while under the influence of temporary excitement, and thus to negative the malice which is of the essence of the crime of murder. It must not be a light provocation, it must be a grave provocation; and undoubtedly a blow is regarded by the law as such a grave provocation; and supposing a deadly stroke inflicted promptly upon such provocation, a jury would be justified in regarding the crime as reduced to manslaughter. But if such a period of time has elapsed as would be sufficient to enable the mind to recover its balance, and it appears that the fatal blow has been struck in the pursuit of revenge, then the crime will be murder." Verdict of manslaughter: *see* s. 229, *post.*

In a case of death by stabbing, if the jury is of opinion that the wound was inflicted by the prisoner while smarting under a provocation so recent and so strong that he may be considered as not being at the moment the master of his own understanding, the offence will be manslaughter; but if there has been, after provocation, sufficient time for the blood to cool, for reason to resume its seat, before the mortal wound was given, the offence will amount to murder; and if the prisoner displays thought, contrivance and design in the mode of possessing himself of the weapon, and in again replacing it immediately after the blow was struck, such exercise of contrivance and design denotes rather the presence of judgment and reason than of violent and ungovernable passion: R. v. Hayward, 6 C. & P. 157.

Where a man finds another in the act of adultery with his wife, and kills him or her in the first transport of

passion, he is only guilty of manslaughter and that in the lowest degree; for the provocation is grievous, such as the law reasonably concludes cannot be borne in the first transport of passion; and the court in such cases will not inflict a severe punishment: 1 Russ. 786; *see* s. 229, *post.*

But in the case of the most grievous provocation to which a man can be exposed, that of finding another in the act of adultery with his wife, though it would be but manslaughter if he should kill the adulterer in the first transport of passion, yet if he kill him deliberately, and upon revenge, after the fact, and sufficient cooling time, it would undoubtedly be murder. For let it be observed that in all possible cases deliberate homicide upon a principle of revenge is murder. No man under the protection of the law is to be the avenger of his own wrongs. If they are of a nature for which the laws of society will give him an adequate remedy, thither he ought to resort; but be they of what nature soever, he ought to bear his lot with patience, and remember that vengeance belongeth only to the Most High: Fost. 296.

So, in the case of a father seeing a person in the act of committing an unnatural offence with his son and killing him instantly, this would be manslaughter, but if he only hears of it, and goes in search of the person, and meeting him strikes him with a stick, and afterwards stabs him with a knife, and kills him, in point of law it will be murder: R. v. Fisher, 8 C. & P. 182, Warb. Lead. Cas. 112.

If a blow without provocation is *wilfully* inflicted, the law infers that it was done with malice aforethought, and if death ensues the offender is guilty of murder, although the blow may have been given in a moment of passion: R. v. Noon, 6 Cox, 137.

Even blows previously received will not extenuate homicide upon deliberate malice and revenge, especially where it is to be collected from the circumstances that the

provocation was sought for the purpose of colouring the revenge: R. v. Mason, 1 East, P. C. 239.

In R. v. Welsh, 11 Cox, 336, Keating, J., in summing up the case to the jury, said: "The prisoner is indicted for that he killed the deceased feloniously and with malice aforethought, that is to say, intentionally, without such provocation as would have excused, or such cause as might have justified, the act. Malice aforethought means intention to kill. Whenever one person kills another intentionally he does it with malice aforethought; in point of law the intention signifies the malice. It is for him to show that it was not so by showing sufficient provocation, which only reduces the crime to manslaughter, because it tends to negative the malice. But when that provocation does not appear the malice aforethought implied in the intention remains. By the law of England, therefore, all intentional homicide is *prima facie* murder. It rests with the party charged with and proved to have committed it to show, either by evidence adduced for the purpose, or upon the facts as they appear, that the homicide took place under such circumstances as to reduce the crime from murder to manslaughter. Homicide which would be *prima facie* murder may be committed under such circumstances of provocation as to make it manslaughter, and show that it was not committed with malice aforethought. The question therefore is, first, whether there is evidence of any such provocation as could reduce the crime from murder to manslaughter; and if there be any such evidence, then it is for the jury, whether it was such that they can attribute the act to the violence of passion naturally arising therefrom and likely to be aroused thereby in the breast of a reasonable man. The law, therefore, is not, as was represented by the prisoner's counsel, that if a man commits the crime under the influence of passion it is mere manslaughter. The law is, that there must exist such an amount of provocation as would be excited by the circumstances in the mind

of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion. When the law says that it allows for the infirmity of human nature, it does not say that if a man without sufficient provocation gives way to angry passion, and does not use his reason to control it,—the law does not say that an act of homicide intentionally committed under the influence of that passion is excused, or reduced to manslaughter. The law contemplates the case of a reasonable man, and requires that the provocation shall be such as that such a man might naturally be induced, in the anger of the moment, to commit the act. Now, I am bound to say that I am unable to discover in the evidence in this case any provocation which would suffice, or approach to such as would suffice, to reduce the crime to manslaughter. It has been laid down that mere words or gestures will not be sufficient to reduce the offence, and at all events the law is clear that the provocation must be serious. I have already said that I can discover no proof of such provocation in the evidence. If you can discover it you can give effect to it, but you are bound not to do so unless satisfied that it was serious. What I am bound to tell you is that, in law, it is necessary that there should have been serious provocation in order to reduce the crime to manslaughter, as for instance a blow, and a severe blow, something which might naturally cause an ordinary and reasonably minded man to lose his self-control and commit such an act." Verdict: Guilty of murder.

So also if a man be greatly provoked, as by pulling his nose or other great indignity, and immediately kills the aggressor, though he is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself, yet neither is it murder for there is no previous malice; but it is manslaughter. But in this and every other case of homicide upon provocation, if there be a sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterwards kill the other, this is delib-

erate revenge and not heat of blood, and accordingly amounts to murder: 4 Blacks. 191. S. 229, *post.*

A packer found a boy stealing wood in his master's ground; he bound him to his horse's tail and beat him; the horse took fright and ran away, and dragged the boy on the ground so that he died. This was holden to be murder, for it was a deliberate act and savoured of cruelty: Fost. 292.

At page 632 of Archbold is cited R. v. Rowley; a boy after fighting with another ran home bleeding to his father; the father immediately took a staff, ran three-quarters of a mile, and beat the other boy who died of this blow. And this was holden to be manslaughter only. But Mr. Justice Foster, 294, says that he always thought Rowley's case a very extraordinary one.

Though the general rule of law is that provocation by words will not reduce the crime of murder to that of manslaughter, special circumstances attending such a provocation might be held to take the case out of the general rule; s. 229, *post*, has "any insult." In R. v. Rothwell, 12 Cox, 147, Blackburn, J., in summing up, said: "A person who inflicts a dangerous wound, that is to say a wound of such a nature as he must know to be dangerous, and death ensues, is guilty of murder, but there may be such heat of blood and provocation as to reduce the crime to manslaughter. A blow is such a provocation as will reduce the crime of murder to that of manslaughter. Where, however, there are no blows, there must be a provocation equal to blows; it must be at least as great as blows. For instance a man who discovers his wife in adultery, and thereupon kills the adulterer, is only guilty of manslaughter. 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 provocation of words as will have that effect; for instance, if a 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 his wife it might be manslaughter. Now, in this case, words spoken by the deceased just previous to the blows inflicted by the prisoner were these: 'Aye; but I'll take no more for thee, for I will have no more children of thee; I have done it once, and I'll do it again,' meaning adultery. Now, what you will have to consider is, would these words, which were spoken just previous to the blows, amount to such a provocation as would in an ordinary man, not in a man of violent or passionate disposition, provoke him in such a way as to justify him in striking her as the prisoner did." Verdict of manslaughter.

In Sherwood's Case, 1 C. & K. 556, Pollock, C. B., in summing up said; "It is true that no provocation by words only will reduce the crime of murder to that of manslaughter; but it is equally true that every provocation by blows will not have this effect, particularly when, as in this case, the prisoner appears to have resented the blow by using a weapon calculated to cause death. Still, however, if there be a provocation by blows, which would not of itself render the killing manslaughter, but it be accompanied by such provocation by means of words and gestures as would be calculated to produce a degree of exasperation equal to that which would be produced by a violent blow, I am not prepared to say that the law will not regard these circumstances as reducing the crime to that of manslaughter only."

When A. finding a trespasser upon his land, in the first transport of his passion beat him and unluckily killed him, and it was holden to be manslaughter, it must be understood that he beat the trespasser, not with a mischievous intention, but *merely to chastise* him, and to deter him from a future commission of such a trespass. For if A. had knocked his brains out with a bill or hedge stake, or had killed him by an outrageous beating with an ordinary cudgel, beyond the bounds of a sudden resentment, it would have been murder; these circumstances being some

of the genuine symptoms of the *mala mens*, the heart bent upon mischief, which enter into the true notion of malice in the legal sense of the word. Moir having been greatly annoyed by persons trespassing upon his farm, repeatedly gave notice that he would shoot any one who did so, and at length discharged a pistol at a person who was trespassing, and wounded him in the thigh, which led to erysipelas, and the man died. Moir was convicted of murder and executed: 1 Russ. 718; s. 227, *post*. *See* Imp. Comm. note on that case under s. 53, *ante*.

Malice in its legal sense denotes a wrongful act done intentionally, without just cause or excuse. *Per* Littledale, J., in McPherson v. Daniels, 10 B. & C. 272; and Cresswell, J., in R. v. Noon, 6 Cox, 137:—

"We must settle what is meant by the term *malice*. The legal import of this term differs from its acceptation in common conversation. It is not, as in ordinary speech, only an expression of hatred and ill-will to an individual, but means any wicked or mischievous intention of the mind.

"Thus, in the crime of murder which is always stated in the indictment to be committed with malice aforethought, it is neither necessary in support of such indictment to show that the prisoner had any enmity to the deceased, nor would proof of absence of ill-will furnish the accused with any defence, when it is proved that the act of killing was intentional and done without any justifiable cause." *Per* Best, J., in R. v. Harvey, 2 B. & C. 268.

The nature of implied malice is illustrated by the maxim "*Culpa lata dolo æquiparatur.*"

Malice aforethought, which makes a felonious killing murder, may be practically defined to be not *actual malice or actual aforethought*, or any other particular actual state of the mind, but any such combination of wrongful deed and mental culpability as judicial usage has determined to be sufficient to render that murder which else would be only manslaughter. One proposition is plain: that an

actual intent to take life is not a necessary ingredient in murder, any more than it is in manslaughter. Where the prisoner fired a loaded pistol at a person on horseback, and the ball took effect on another, whose death it caused, the offence was held to be murder; though the motive for firing it was not to kill the man, but only to frighten his horse, and cause the horse to throw him: 2 Bishop, Cr. L. 675, 676, 682; s. 227, *post*.

In Grey's case the defendant, a blacksmith, had broken, with a rod of iron, the skull of his servant, *whom he did not mean to kill*, and this was held to be murder; for, says the report, if a father, master, or school-master will correct his child, servant or scholar, he must do it with such things as are fit for correction, and not with such instruments as may probably kill them: Kel. 99.

A person driving a cart or other carriage happeneth to kill. If he saw or had timely notice of the mischief likely to ensue, and yet drove on, it will be murder; for it was wilfully and deliberately done. If he might have seen the danger, but did not look before him, it will be manslaughter for want of due circumspection. But if the accident happened in such a manner that no want of due care could be imputed to the driver it will be accidental death, and the driver will be excused: Fost. 263.

Further, if there be an evil intent, though that intent extendeth not to death, it is murder. Thus if a man, knowing that many people are in the street, throw a stone over a wall, intending only to frighten them or to give them a little hurt, and thereupon one is killed, this is murder: for he had an ill intent, though that intent extendeth not to death, and though he knew not the party slain: 3 Inst. 57; s. 227, *post*.

Although the malice in murder is what is called "*malice aforethought*," yet there is no particular period of time during which it is necessary it should have existed, or the prisoner should have contemplated the homicide. If, for

example, the intent to kill or to do other great bodily harm is executed the instant it springs into the mind, the offence is as truly murder as if it had dwelt there for a longer period: 2 Bishop, Cr. L. 677.

Where a person fires at another a fire-arm, knowing it to be loaded, and thereupon intending either to kill or to do grievous bodily harm, if death ensues the crime is murder; and, if in such case, the person who fires the weapon, though he does not know that it is loaded, has taken no care to ascertain, it is manslaughter: R. v. Campbell, 11 Cox, 323.

If an action, unlawful in itself, be done deliberately, and with intention of mischief or great bodily harm to particular individuals, or of mischief indiscriminately fall it where it may, and death ensue against or beside the original intention of the party, it will be murder: 1 Russ. 739. If a man deliberately shoot at A. and miss him, but kill B., this is murder: 1 Hale, 438. So where A. gave a poisoned apple to his wife, intending to poison her, and the wife, ignorant of the matter, gave it to a child who took it and died, this was held murder in A., though he, being present at the time, endeavoured to dissuade his wife from giving the apple to the child: Hale, *loc. cit.*; s. 227, *post.*

So if a person give medicine to a woman to procure an abortion, by which the woman is killed, the act was held clearly to be murder, for, though the death of the woman was not intended, the act is of a nature deliberate and malicious, and necessarily attended with great danger to the person on whom it was practised: 1 East, P. C. 230, 254: s. 227*d*, *post.*

Whenever one does an act with the design of committing *any felony, though not a felony dangerous to human life*, yet, if the life of another is accidentally taken, his offence is murder. So if a man set fire to a house, whereby a person in it is burned to death, he is guilty of murder, even if he had no idea that any one was or was likely to

be there: 1 Russ. 741, and *Greaves' note to it. That is not law now; see* ss. 227, 228, *post.*

In R. v. Lee, 4 F. & F. 63, Pollock, C.B., told the jury "that if two or more persons go out to commit a felony with intent that personal violence shall be used in its committal, and such violence is used and causes death, then they are all guilty of murder, even although death was not intended." *That is now limited to the offences mentioned in* s-s. 2, s. 228, *post.*

Where two persons go out with the common object of robbing a third person, and one of them, in pursuit of that common object, does an act which causes the death of that third person, under such circumstances as to be murder in him who does the act, it is murder in the other also: R. v. Jackson, 7 Cox, 357.

If a man intends to maim and causes death, and it can be made out most distinctly that he did not mean to kill, yet if he does acts and uses means for the purpose of accomplishing that limited object, and they are calculated to produce death, and death ensues, by the law of England that is murder, although the man did not mean to kill. It is not necessary to prove an intention to kill; it is only necessary to prove an intention to inflict an injury that might be dangerous to life, and that it resulted in death. A party may be convicted upon an indictment for murder by evidence that would have no tendency to prove that there was any intent to kill, nay, by evidence that might clearly show that he meant to stop short of death, and even take some means to prevent death; but if that illegal act of his produces death that is murder: R. v. Salvi, 10 Cox, *note b.*, 481; s. 227, *post.*

"A common and plain rule on this subject," says Bishop 2 Cr. L. 694, "is that, whenever one does an act with the design of committing any felony, though not a felony dangerous to human life, yet, if the life of another is accidentally taken, his offence is murder." Or in the language of

Baron Bramwell, in R. v. Horsey, 3 F. & F. 287 ; "the law laid down was that where a prisoner, in the course of committing a felony, caused the death of a human being, that was murder, *even though he did not intend it;*" *see Greaves' note*, 1 Russ. 742, & s. 228, s-s. 2, *post.*

And if the act committed or attempted is only a misdemeanour, yet the "*accidental*" causing of death, in consequence of this act, is murder, if the misdemeanour is one endangering human life: Bishop, 2 Cr. L. 691.

If a large stone be thrown at one with a deliberate intention to hurt, though not to kill him, and, by accident, it kill him, or any other, this is murder: 1 Hale, 440, 1 Russ. 742. Also, where the intent is to do some great bodily harm to another, and death ensues, it will be murder: as if A. intend only to *beat* B. in anger, or from preconceived malice, and happen to kill him, it will be no excuse that he did not intend all the mischief that followed: for what he did was *malum in se*, and he must be answerable for all its consequences: he beat B. with an intention of doing him some bodily harm, and is therefore answerable for all the harm he did. In Foster, 261, it is said: "If an action unlawful in itself be done deliberately and with intention of mischief or great bodily harm to particulars, or of mischief indiscriminately fall it where it may, and death ensue *against or beside the original intention of the party*, it will be murder. But if such mischievous intention doth not appear, which is matter of fact and to be collected from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death, because the act upon which death ensued was unlawful."

Extreme necessity of hunger does not justify homicide: R. v. Dudley, 15 Cox, 624, 14 Q. B. D. 273.

If two persons enter into an agreement to commit suicide together, and the means employed kill one of them

only, the survivor is guilty of murder: R. v. Jessop, 16 Cox, 204; s. 237, *post*.

The circumstance of a person having acted under an irresistible influence to the commission of homicide is no defence, if at the time he committed the act he knew he was doing what was wrong: R. v. Haynes, 1 F. & F. 666; *see* s. 11 *ante*.

On an indictment for murder, it being proved that the prisoner, a soldier, shot his officer through the head, the only evidence for the defence being that the act was sudden, without apparent motive, and that he had been addicted to drink, and had been suffering under depression; *Held*, that this was not enough to raise the defence of insanity; that the sole question was whether the prisoner fired the gun intending to kill; and that his expressions soon after the act were evidence of this, and that alleged inadequacy of motive was immaterial, the question being, not motive, but intent: R. v. Dixon, 11 Cox, 341.

Killing a man who was out at night dressed in white as a ghost, for the purpose of frightening the neighbourhood, is murder; it is no excuse that he could not otherwise be taken: 1 Russ. 749.

Forcing a person to do an act which is likely to produce and does produce death is murder; so, if the deceased threw himself out of a window, or in a river, to avoid the violence of the prisoner: 1 Russ. 676; R. v. Pitts, Car. & M. 284; R. v. Halliday, 6 Times L. R. 109; s. 220, *post*.

If two persons fight, and one overpowers the other and knocks him down, and puts a rope round his neck, and strangles him, this will be murder: R. v. Shaw, 6 C. & P. 372.

If a person being in possession of a deadly weapon enters into a contest with another, intending at the time to avail himself of it, and in the course of the contest actually uses it, and kills the other, it will be murder: but if he did

not intend to use it when he began the contest, but used it in the heat of passion, in consequence of an attack made upon him, it will be manslaughter. If he uses it to protect his own life or to protect himself from such serious bodily harm as would give him a reasonable apprehension that his life was in immediate danger, having no other means of defence, and no means of escape, and retreating as far as he can, it will be justifiable homicide: R. v. Smith, 8 C. & P. 160.

A person cannot be indicted for murder in procuring another to be executed, by falsely charging him with a crime of which he was innocent: R. v. Macdaniel, 1 Leach, 44; *see* now s. 221.

Child murder.—To justify a conviction on an indictment charging a woman with the wilful murder of a child of which she was delivered, and which was born alive, the jury must be satisfied affirmatively that the whole body was brought alive into the world; and it is not sufficient that the child has breathed in the progress of the birth: R. v. Poulton, 5 C. & P. 329; R. v. Enoch, 5 C. & P. 539. If a child has been wholly produced from the body of its mother, and she wilfully and of malice aforethought strangles it while it is alive, and has an independent circulation, this is murder, although the child is still attached to its mother by the umbilical cord: R. v. Trilloe, 2 Moo. 260. A prisoner was charged with the murder of her new-born child by cutting off its head: *Held*, that, in order to justify a conviction for murder, the jury must be satisfied that the entire child was actually born into the world in a living state; and that the fact of its having breathed is not a decisive proof that it was born alive, as it may have breathed and yet died before birth: R. v. Sellis, 7 C. & P. 850; R. v. Handley, 13 Cox, 79; s. 219, *post*.

An infant in its mother's womb is not considered as a person who can be killed within the description of murder or manslaughter. The rule is thus: it must be born, every

part of it must have come from the mother, before the killing of it will constitute a felonious homicide: R. v. Wright, 9 C. & P. 754; R. v. Brain, 6 C. & P. 349; 1 Russ. 670; 2 Bishop, Cr. L. 632. Giving a child, whilst in the act of being born, a mortal wound in the head as soon as the head appears, and before the child has breathed, will, if the child is afterwards born alive and dies thereof, and there is malice, be murder; but if there is not malice, manslaughter: R. v. Senior, 1 Moo. 346; 1 Lewin, 183; s. 219, *post.*

Murder by poisoning.—Of all the forms of death by which human nature may be overcome, the most detestable is that of poison: because it can, of all others, be the least prevented either by manhood or forethought: 3 Inst. 48. He that wilfully gives poison to another, that hath provoked him or not, is guilty of wilful murder; the reason is because it is an act of deliberation odious in law, and presumes malice: 1 Hale, 455. A prisoner was indicted for the murder of her infant child by poison. She purchased a bottle of laudanum, and directed the person who had the care of the child to give it a teaspoonful every night. That person did not do so but put the bottle on the mantel-piece, where another little child found it and gave part of the contents to the prisoner's child who soon after died: held, that the administering of the laudanum by the child was as much, in point of law, an administering by the prisoner as if she herself had actually administered it with her own hand: R. v. Michael, 2 Moo. 120. On a trial for murder by poisoning statements made by the deceased in a conversation shortly before the time at which the poison is supposed to have been administered are evidence to prove the state of his health at that time: R. v. Johnston, 2 C. & K. 354. On an indictment for the murder of A., evidence is not admissible that three others in the same family died of similar poison, and that the prisoner was at all the deaths, and administered something

to two of his patients: R. v. Winslow, 8 Cox, 397. On an indictment against a woman for the murder of her husband by arsenic, in September, evidence was tendered, on behalf of the prosecution, of arsenic having been taken by her two sons, one of whom died in December and the other in March subsequently, and also by a third son, who took arsenic in April following but did not die. Proof was given of a similarity of symptoms in the four cases. Evidence was also tendered that she lived in the same house with her husband and sons, and that she prepared their tea, cooked their victuals, and distributed them to the four parties: *held*, that this evidence was admissible for the purpose of proving, first, that the deceased husband actually died of arsenic; secondly, that his death was not accidental; and that it was not inadmissible by reason of its tendency to prove or create a suspicion of a subsequent felony: R. v. Geering, 18 L. J. M. C. 215. Upon the trial of a husband and wife for the murder of the mother of the former by administering arsenic to her, for the purpose of rebutting the inference that the arsenic had been taken by accident evidence was admitted that the male prisoner's first wife had been poisoned nine months previously; that the woman who waited upon her, and occasionally tasted her food, shewed symptoms of having taken poison; that the food was always prepared by the female prisoner; and that the two prisoners, the only other persons in the house, were not affected with any symptoms of poison: R. v. Garner, 4 F. & F. 346. And Archibald, J., after consulting Pollock, C.B., in R. v. Cotton, 12 Cox, 400, *held*, that where a prisoner was charged with the murder of her child by poison, and the defence was that its death resulted from an accidental taking of such poison, evidence to prove that two other children of hers and a lodger in her house had died previous to the present charge after having been attended by her was admissible: *see* R. v. Roden, 12 Cox, 630.

MURDER BY KILLING OFFICERS OF JUSTICE.

Ministers of justice, as bailiffs, constables, watchmen, etc. (either civil or criminal justice), while in the execution of their offices, are under the peculiar protection of the law; a protection founded in wisdom and equity, and in every principle of political justice, for without it the public tranquility cannot possibly be maintained, or private property secured. For these reasons the killing of officers so employed has been deemed murder of malice prepense as being an outrage wilfully committed in defiance of the justice of the kingdom. The law extends the same protection to any person acting in aid of an officer of justice, whether specially called thereunto or not. And a public officer is to be considered as acting strictly in discharge of his duty, not only while executing the process intrusted to him, but likewise while he is coming to perform, and returning from the performance of his duty: s. 228, *post.*

He is under the protection of the law *eundo, morando et redeundo.* And, therefore, if coming to perform his office he meets with great opposition and retires, and in the retreat is killed, this will be murder. Upon the same principles, if he meets with opposition by the way, and is killed before he comes to the place (such opposition being intended to prevent his performing his duty), this will also be murder: Roscoe, 697; 1 Russ. 732. But the defendant must be proved to have known that the deceased was a public officer, and in the legal discharge of his duty as such; for if he had no knowledge of the officer's authority or business the killing will be manslaughter only: s. 229, s-s. 4, *post.*

In order to render the killing of an officer of justice, whether he is authorized in right of his office or by warrant, amount to murder, upon his interference with an affray, it is necessary that he should have given some notification of his being an officer, and of the intent with which he interfered: R. v. Gordon, 1 East, P. C. 315, 352: s. 32, *ante.*

Where a constable interferes in an affray to keep the peace, and is killed, such of the persons concerned in killing him as knew him to be a constable are guilty of murder, and such as did not know it of manslaughter only: 1 Hale, 446. But it hath been adjudged that if a justice of the peace, constable or watchman, or even a private person, be killed in endeavouring to part those whom he sees fighting, the person by whom he is killed is guilty of murder; yet it hath been resolved, that if the third person slain in such a sudden affray do not give notice for what purpose he comes, by commanding the parties in the king's name to keep the peace, or otherwise manifestly shewing his intention to be not to take part in the quarrel but to appease it, he who kills him is guilty of manslaughter only, for he might suspect that he came to side with his adversary: but if the person interposing in such case be an officer within his proper district, and known, or generally acknowledged to bear the office he assumeth, the law will presume that the party killing had due notice of his intent, especially if it be in the day time: 1 Hawk. 101.

Killing an officer will amount to murder, though he had no warrant, and was not present when any felony was committed, and takes the party upon a charge only, and though such charge does not in terms specify all the particulars necessary to constitute the felony: R. v Ford, R. & R. 329; *see* Rafferty v. The People, 12 Cox, 617 R. v. Carey, 14 Cox, 214.

Killing an officer who attempts to arrest a man will be murder, though the officer had no warrant, and though the man has done nothing for which he was liable to be arrested, if the officer has a charge against him for felony, and the man knows the individual to be an officer, though the officer does not notify to him that he has such a charge: R. v. Woolmer, 1 Moo. 334; s. 32, *ante*.

So, where a man seen attempting to commit a felony on fresh pursuit kills his pursuer, it is as much murder as if

the party were killed while attempting to take the defendant in the act, for any person, whether a peace officer or not, has power to arrest a person attempting to commit or actually committing a felony: R. v. Howarth, 1 Moo. 207.

If a person is playing music in a public thoroughfare, and thereby collects together a crowd of people, a policeman is justified in desiring him to go on, and in laying his hand on him and slightly pushing him, if it is only done to give effect to his remonstrance; and if the person, on so small a provocation, strikes the policeman with a dangerous weapon and kills him, it will be murder, but otherwise if the policeman gives him a blow and knocks him down: R. v. Hagan, 8 C. & P. 167.

MURDER.—KILLING BY OFFICERS OF JUSTICE.

Where an officer of justice, in endeavouring to execute his duty, kills a man, this is justifiable homicide, or manslaughter, or murder, according to circumstances. Where an officer of justice is resisted in the legal execution of his duty he may repel force by force; and if, in doing so, he kills the party resisting him, it is justifiable homicide: and this in civil as well as in criminal cases: 1 Hale, 494; 2 Hale, 118. And the same as to persons acting in aid of such officer. Thus if a peace officer have a legal warrant against B. for felony, or if B. stand indicted for felony, in these cases if B. resist, and in the struggle be killed by the officer, or any person acting in aid of him, the killing is justifiable: Fost. 318; s. 33, *et seq.*, *ante*. So, if a private person attempt to arrest one who commits a felony in his presence or interferes to suppress an affray, and he resists, and kill the person resisting, this is also justifiable homicide: 1 Hale, 481, 484. Still there must be an apparent necessity for the killing: for if the officer were to kill after the resisting had ceased, or if there were no reasonable necessity for the violence used upon the part of the officer, the killing would be manslaughter at the least. Also, in order to justify an officer

or private person in these cases, it is necessary that they should, at the time, be in the act of *legally* executing a duty imposed upon them by law, and under such circumstances that, if the officer or private person were killed, it would have been murder; for if the circumstances of the case were such that it would have been manslaughter only to kill the officer or private person, it will be manslaughter at least, in the officer or private person to kill the party resisting: Fost. 318; 1 Hale, 490. If the prisoners in a gaol, or going to a gaol, assault the gaoler or officer, and he, in his defence, kill any of them, it is justifiable, for the sake of preventing an escape: 1 Hale, 496: ss. 35, 36, *ante*.

Where an officer or private person, having legal authority to apprehend a man, attempts to do so, and the man, instead of resisting, flies, or resists and then flies, and is killed by the officer or private person in the pursuit, if the offence with which the man was charged were a treason or a felony, or a dangerous wound given, and he could not otherwise be apprehended, the homicide is justifiable; but if charged with a breach of the peace or other misdemeanour merely, or if the arrest were intended in a civil suit, or if a press-gang kill a seaman or other person flying from them, the killing in these cases would be murder, unless, indeed, the homicide were occasioned by means not likely or intended to kill, such as tripping up his heels, giving him a blow of an ordinary cudgel, or other weapon not likely to kill, or the like; in which case the homicide, at most, would be manslaughter only. In case of a riot or rebellious assembly, the officers endeavouring to disperse the mob are justifiable in killing any of them, both at common law and by the Riot Act, if the riot cannot otherwise be suppressed: Archbold, 646; ss. 36, 40, 83, *ante*.

DUELLING.

Where words of reproach or other sudden provocations have led to blows and mutual combat, and death has ensued, the important inquiry will be, whether the occasion

was altogether sudden and not the result of preconceived anger or malice; for in no case will the killing, though in mutual combat, admit of alleviation if the fighting were upon malice. Thus a party killing another in a deliberate duel is guilty of murder: 1 Russ. 727.

Where, upon a previous agreement, and after there has been time for the blood to cool, two persons meet with deadly weapons, and one of them is killed, the party who occasions the death is guilty of murder, and the seconds also are equally guilty; and with respect to others shewn to be present the question is: Did they give their aid and assistance by their countenance and encouragement of the principals in the contest? mere presence will not be sufficient; but if they sustain the principals either by advice or assistance, or go to the ground for the purpose of encouraging and forwarding the unlawful conflict, although they do not say or do anything, yet, if they are present assisting and encouraging by their presence at the moment when the fatal shot is fired, they are, in law, guilty of the crime of murder: R. v. Young, 8 C. & P. 644.

Where two persons go out to fight a deliberate duel and death ensues, all persons who are present, encouraging and promoting that death, will be guilty of murder. And the person who acted as the second of the deceased person in such a duel may be convicted of murder, on an indictment charging him with being present, aiding and abetting the person by whose act the death of his principal was occasioned: R. v. Cuddy, 1 C. & K. 210; s. 61, *ante*.

MANSLAUGHTER.

(Section 230, post.)

Indictment.— The jurors that A. B. on at in the county did unlawfully kill and slay one

It need not conclude *contra formam statuti:* R. v. Chatburn, 1 Moo. 403. Nor is it necessary where the manslaughter arises from an act of omission, that such act of omission should be stated in the indictment: R. v. Smith, 11 Cox, 210.

Manslaughter is principally distinguishable from murder in this, that though the act which occasions the death is unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder is presumed to be wanting in manslaughter, the act being rather imputed to the infirmity of human nature: Roscoe, 638; Fost. 290.

In this species of homicide malice, which is the main ingredient and characteristic of murder, is considered to be wanting; and though manslaughter is in its degree felonious, yet it is imputed by the benignity of the law to human infirmity; to infirmity which, though in the eye of the law criminal, is considered as incident to the frailty of the human constitution. In order to make an abettor to a manslaughter a principal in the felony, he must be present aiding and abetting the fact committed. It was formerly considered that there could not be any accessories before the fact in any case of manslaughter, because it was presumed to be altogether sudden, and without premeditation. And it was laid down that if the indictment be for murder against A. and that B. and C. were counselling and abetting as accessories before only (and not as *present* aiding and abetting, for such are principals), if A. be found guilty only

of manslaughter, and acquitted of murder, the accessories before will be thereby discharged. But the position ought to be limited to these cases where the killing is sudden and unpremeditated, for there are cases of manslaughter where there may be accessories. Thus a man may be such an accessory by purchasing poison for a pregnant woman to take in order to procure abortion, and which she takes and thereby causes her death: R. v. Gaylor, Dears. & B. 288. If, therefore, upon an indictment against the principal and an accessory after the fact for murder the offence of the principal be reduced to manslaughter, the accessory may be convicted as accessory to the manslaughter: 1 Russ. 783.

Manslaughter is homicide not under the influence of malice: R. v. Taylor, 2 Lewin, 215.

The several instances of manslaughter may be considered in the following order: 1. Cases of provocation. 2. Cases of mutual combat. 3. Cases of resistance to officers of justice, to persons acting in their aid, and to private persons lawfully interfering to apprehend felons, or to prevent a breach of the peace. 4. Cases where the killing takes place in the prosecution of some criminal, unlawful or wanton act. 5. Cases where the killing takes place in consequence of some lawful act being criminally or improperly performed, or of some act performed without lawful authority: 1 Russ. *loc. cit.*

CASES OF PROVOCATION.

Whenever death ensues from the sudden transport of passion, or heat of blood upon a reasonable provocation, and without malice, it is considered as solely imputable to human infirmity and the offence will be manslaughter. It should be remembered that the person sheltering himself under this plea of provocation must make out the circumstances of alleviation to the satisfaction of the court and jury unless they arise out of the evidence produced against him, as the presumption of law deems all homicide to be malicious until the contrary is proved. The most grievous

words of reproach, contemptuous and insulting actions or gestures, or trespasses against lands or goods, will not free the party killing from the guilt of murder, if upon such provocation a deadly weapon was made use of, or an intention to kill, or to do some great bodily harm, was otherwise manifested. But if no such weapon be used, or intention manifested, and the party so provoked give the other a box on the ear or strike with a stick or other weapon not likely to kill, and kill him unluckily and against his intention, it will be only manslaughter. Where an assault is made with violence or circumstances of indignity upon a man's person, as by pulling him by the nose, and the party so assaulted kills the aggressor, the crime will be reduced to manslaughter in case it appears that the assault was resented immediately, and the aggressor killed in the heat of blood, the *furor brevis* occasioned by the provocation. So if A. be passing along the street, and B. meeting him (there being convenient distance between A. and the wall) take the wall of him and jostle him, and thereupon A. kill B., it is said that such jostling would amount to provocation which would make the killing only manslaughter.

And again it appears to have been considered that where A. riding on the road B. whipped the horse of A. out of the track, and then A. alighted and killed B. it was only manslaughter. But in the two last cases it should seem that the first aggression must have been accompanied with circumstances of great violence or insolence; for it is not every trivial provocation which, in point of law, amounts to an assault, that will of course reduce the crime of the party killing to manslaughter. Even a blow will not be considered as sufficient provocation to extenuate in cases where the revenge is disproportioned to the injury, and outrageous and barbarous in its nature: but where the blow which gave the provocation has been so violent as reasonably to have caused a sudden transport of passion and heat of blood, the killing which ensued has been regarded as the consequence

of human infirmity, and entitled to lenient consideration: 1 Russ. 784. For cases on this defence of provocation: *see ante*, pp. 159, *et seq.*

In R. v. Fisher, 8 C. & P. 182, 1 Russ. 725, it was ruled that whether the blood has had time to cool or not is a question for the court and not for the jury, but it is for the jury to find what length of time elapsed between the provocation received, and the act done. But in R. v. Lynch, 5 C. & P. 324; R. v. Hayward, 6 C. & P. 157; R. v. Eagle, 2 F. &. F 827; the question, whether or not the blow was struck before the blood had time to cool and in the heat of passion, was left to the jury; and this seems now settled to be the law on the question. The English commissioners, 4th Report, p. XXV, are also of opinion that "the law may pronounce whether any extenuating occasion of provocation existed, but it is for the jury to decide whether the offender acted solely on that provocation, or was guilty of a malicious excess in respect of the instrument used or the manner of using it:" *see* s. 229, *post.*

Cases of mutual combat.—Where, upon words of reproach, or any other sudden provocation, the parties come to blows, and a combat ensues, no undue advantage being sought or taken on either side, if death happen under such circumstances the offence of the party killing will amount only to manslaughter. If A. has formed a deliberate design to kill B. and after this they meet and have a quarrel and many blows pass, and A. kills B., this will be murder if the jury is of opinion that the death was in consequence of previous malice, and not of the sudden provocation: R. v. Kirkham, 8 C. & P. 115. If, after an exchange of blows on equal terms, one of the parties on a sudden and without any such intention at the commencement of the affray snatches up a deadly weapon and kills the other party with it, such killing will only amount to manslaughter; but it will amount to murder if he placed the weapon, before they began to fight, so that he might use it during

the affray: 1 Russ. 731; R. v. Kessal, 1 C. & P. 437; R. v. Whiteley, 1 Lewin, 173.

Where there had been mutual blows, and then, upon one of the parties being pushed down on the ground, the other stamped upon his stomach and belly with great force, and thereby killed him, it was considered only to be manslaughter: R. v. Ayes, R. & R. 166; *sed quære.*

If two persons be fighting, and another interfere with intent to part them but do not signify such intent, and he be killed by one of the combatants, this is but manslaughter.

A sparring match with gloves fairly conducted in a private room is not unlawful, and therefore death caused by an injury received during such a match does not amount to manslaughter: R. v. Young, 10 Cox, 371.

Cases of resistance to officers of justice, to persons acting in their aid, and to private persons lawfully interfering to apprehend felons or to prevent a breach of the peace. *See* s. 229, s-s. 4. Attempting illegally to arrest a man is sufficient to reduce killing the person making the attempt to manslaughter, though the arrest was not actually made, and though the prisoner had armed himself with a deadly weapon to resist such attempt, if the prisoner was in such a situation that he could not have escaped from the arrest; and it is not necessary that he should have given warning to the person attempting to arrest him before he struck the blow: R. v. Thompson, 1 Moo. 80; s. 229, *post.*

If a constable takes a man without warrant upon a charge which gives him no authority to do so, and the prisoner runs away and is pursued by J. S., who was with the constable at the time, and charged by him to assist, and the man kills J. S. to prevent his retaking him, it will not be murder but manslaughter only; because if the original arrest was illegal the recaption would have been so likewise: R. v. Curvan, 1 Moo. 132.

Where a common soldier stabbed a sergeant in the same regiment who had arrested him for some alleged misdemeanour, *held*, that as the articles of war were not produced, by which the arrest might have been justified, it was only manslaughter as no authority appeared for the arrest: R. v. Withers, 1 East, P. C. 295.

A warrant leaving a blank for the christian name of the person to be apprehended, and giving no reason for omitting it but describing him only as the son of J. S. (it appearing that J. S. had four sons, all living in his house), and stating the charge to be for assaulting A. without particularizing the time, place or any other circumstances of the assault, is too general and unspecific. A resistance to an arrest thereon, and killing the person attempting to execute it, will not be murder: R. v. Hood, 1 Moo. 281. *This is not now law;* s. 229, *post.*

A constable having a warrant to apprehend A. gave it to his son, who in attempting to arrest A. was stabbed by him with a knife which A. happened to have in his hand at the time, the constable then being in sight, but a quarter of a mile off: *held*, that this arrest was illegal, and that if death had ensued this would have been manslaughter only unless it was shown that A. had prepared the knife beforehand to resist the illegal violence: R. v. Patience, 7 C. & P. 795.

In order to justify an arrest even by an officer, under a warrant, for a mere misdemeanour, it is necessary that he should have the warrant with him at the time. Therefore, in a case where the officer, although he had seen the warrant, had it not with him at the time, and it did not appear that the party knew of it; *held*, that the arrest was not lawful; and the person against whom the warrant was issued resisting apprehension and killing the officer; *held*, that it was manslaughter only: R. v. Chapman, 12 Cox, 4: s. 32 *ante.*

"If a prisoner, having been lawfully apprehended by a police constable on a criminal charge, uses violence to the constable, or to any one lawfully aiding or assisting him, which causes death, and does so with intent to inflict grievous bodily harm, he is guilty of murder; and so if he does so only with intent to escape. But if, in the course of the struggle, he accidentally causes an injury it would be manslaughter. Suppose a constable, having a good and a bad warrant, arrest a man on the bad warrant only which he allows the man to read who sees it is void and resists his arrest on that ground, and the result is the death of the officer; if this had been the only authority the officer had the offence would have been only manslaughter; is the man guilty of murder by reason of the good warrant of which he knew nothing? It would seem that there are strong reasons for saying that he would not be guilty of murder. The ground on which the killing an officer is murder is that the killer is wilfully setting the law at defiance, and killing an officer in the execution of his duty. The ground on which the killing of an officer whilst executing an unlawful warrant is manslaughter is that every man has a right to resist an unlawful arrest, and that such an arrest is a sufficient provocation to reduce the killing to manslaughter. In the supposed case the killer would not be setting the law at defiance, but would be resisting to what appeared to him to be an unlawful arrest; and the actual provocation would be just as great as if the bad warrant alone existed. It is of the essence of a warrant that 'the party upon whom it is executed should *know* whether he is bound to submit to the arrest.' (*Per* Coltman, J., in Hoye v. Bush, citing R. v. Weir, 1 B. & C. 288.) And where an arrest is made without a warrant it is of the essence of the lawfulness of the arrest that the party arrested should have either express or implied notice of the cause of the arrest. Now, where a constable in the supposed case arrests on the void warrant, the party arrested has no express notice of the good warrant for it is not shown, and no implied notice of it for everything done by the constable is referable to the void warrant; and, besides, the conduct of the constable is calculated to mislead, and it may well be that the party is innocent, and knows nothing of the offence specified in the valid warrant. Lastly, it must be remembered that in such a case the

criminality of the act depends upon the intention of the party arrested, and that intention cannot in any way be affected by facts of which he is ignorant."

"On the other hand, it would seem to be clear that, where an officer has two or more warrants one of which is bad, and he shows all to the party to be arrested who kills the officer in resisting the arrest, it would be murder, for he was bound to yield obedience to the lawful authority." By Greaves, in notes on "arrest without warrant."—Cox & Saunder's Crim. Law Consol. Acts, p. lxxvii.

Cases where the killing takes place in the prosecution of some criminal, unlawful or wanton act.—Where from an action unlawful in itself, done deliberately and with mischievous intention, death ensues, though against or beside the original intention of the party, it will be murder; and if such deliberation and mischievous intention do not appear, which is matter of fact and to be attested from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter: R. v. Fenton, 1 Lewin, 179; R. v. Franklin, 15 Cox, 163; s. 227, *post.*

And if a person breaking an unruly horse ride him amongst a crowd of people, and death ensue from the viciousness of the animal, and it appear clearly to have been done heedlessly and incautiously only, and not with the intent to do mischief, the crime will be manslaughter: 1 Russ. 849.

Where one, having had his pocket picked, seized the offender, and being encouraged by a concourse of people threw him into an adjoining pond by way of avenging the theft by ducking him but without any intention of taking away his life, this was held to be manslaughter only: R. v. Fray, 1 East, P. C. 236.

Causing the death of a child by giving it spirituous liquors in a quantity quite unfit for its tender age amounts to manslaughter: R. v. Martin, 3 C. & P. 211.

If a man take a gun not knowing whether it is loaded or unloaded and, using no means to ascertain, fires it in the

direction of any other person and death ensues, this is manslaughter: R. v. Campbell, 11 Cox, 323.

The prisoner was charged with manslaughter. The evidence showed that the prisoner had struck the deceased twice with a heavy stick, that he had afterwards left him asleep by the side of a small fire in a country by-lane during the whole of a frosty night in January, and the next morning, finding him just alive, put him under some straw in a barn where his body was found some months after. The jury were directed that if the death of the deceased had resulted from the beating or from the exposure during the night in question, such exposure being the result of the prisoner's criminal negligence, or from the prisoner leaving the body under the straw ill but not dead, the prisoner was guilty of manslaughter: verdict, manslaughter: R. v. Martin, 11 Cox, 136; *see* R. v. Towers, 12 Cox, 530, as to causing death through frightening the deceased; and R. v. Dugal, 4 Q. L. R. 350; s. 223, *post*.

Cases where the killing takes place in consequence of some lawful act being criminally or improperly performed, or of some act performed without lawful authority.—Where a felony has been committed, or a dangerous wound given, and the party flies from justice, he may be killed in the pursuit if he cannot otherwise be taken. And the same rule holds if a felon, after arrest, break away as he is carried to gaol, and his pursuers cannot retake without killing him. But if he may be taken in any case without such severity, it is at least manslaughter in him who kills him, and the jury ought to inquire whether it were done of necessity or not: ss. 33, 58, *ante*.

In making arrests in cases of misdemeanour and breach of the peace (with the exception, however, of some cases of flagrant misdemeanours), it is not lawful to kill the party accused if he fly from the arrest, though he cannot otherwise be overtaken, and though there be a warrant to apprehend him, and generally speaking it will be murder; but

under some circumstances it may amount only to manslaughter, if it appear that death was not intended: 1 Russ. 858.

If an officer, whose duty it is to execute a sentence of whipping upon a criminal, should be so barbarous as to cause the party's death by excessive execution of the sentence, he will at least be guilty of manslaughter: Hawk. c. 29, s. 5.

Killing by correction.—Moderate and reasonable correction may properly be given by parents, masters and other persons, having authority in *foro domestico*, to those who are under their care; but if the correction be immoderate or unreasonable, either in the measure of it or in the instrument made use of for that purpose, it will be either murder or manslaughter, according to the circumstances of the case: ss. 55, 58, *ante*. If it be done with a dangerous weapon, likely to kill or maim, due regard being always had to the age and strength of the party, it will be murder; but if with a cudgel or other thing not likely to kill, though improper for the purpose of correction, it will be manslaughter: 1 Russ. 861.

A schoolmaster who, on the second day of a boy's return to school, wrote to his parent, proposing to beat him severely in order to subdue his alleged obstinacy, and and on receiving the father's reply assenting thereto beat the boy for two hours and a half secretly in the night, and with a thick stick, until he died, is guilty of manslaughter: R. v. Hopley, 2 F. & F. 202.

Where a person in *loco parentis* inflicts corporal punishment on a child, and compels it to work for an unreasonable number of hours and beyond its strength, and the child dies, the death being of consumption but hastened by the ill-treatment, it will not be murder but only manslaughter in the person inflicting the punishment, although it was cruel and excessive, and accompanied by violent and threatening language, if such person believed that the child

was shamming illness, and was really able to do the quantity of work required: R. v. Cheeseman, 7 C. & P. 454.

An infant, two years and a half old, is not capable of appreciating correction; a father therefore is not justified in correcting it, and if the infant dies owing to such correction the father is guilty of manslaughter: R. v. Griffin, 11 Cox, 402.

Death caused by negligence.—Where persons employed about such of their lawful occupation, from whence danger may probably arise to others, neglect the ordinary precautions, it will be manslaughter at least, if death is caused by such negligence: 1 Russ. 864; s. 213, *ante*.

That which constitutes murder when by design and of malice prepense, constitutes manslaughter when arising from culpable negligence. The deceased was with others employed in walling the inside of a shaft. It was the duty of the prisoner to place a stage over the mouth of the shaft, and the death of deceased was occasioned by the negligent omission on his part to perform such duty. He was convicted of manslaughter, and upon a case reserved the conviction was affirmed: R. v. Hughes, 7 Cox, 301; ss. 212, 213, 214, *ante*.

The prisoner, as the private servant of B., the owner of a tramway crossing a public road, was entrusted to watch it. While he was absent from his duty an accident happened and C. was killed. The private Act of Parliament, authorizing the road, did not require B. to watch the tramway: *Held*, that there was no duty between B. and the public, and therefore that the prisoner was not guilty of negligence: R. v. Smith, 11 Cox, 210.

Although it is manslaughter, where death was the result of the joint negligence of the prisoner and others, yet it must have been the direct result wholly or in part of the prisoner's negligence, and his neglect must have been wholly or in part the proximate and efficient cause of the death, and it is not so where the negligence of some other

person has intervened between his act or omission and the fatal result: R. v. Ledger, 2 F. & F. 857; R. v. Pocock, 17 Q. B. 34.

If a person is driving a cart at an unusually rapid rate, and drives over another and kills him, he is guilty of manslaughter though he called to the deceased to get out of the way, and he might have done so if he had not been in a state of intoxication: R. v. Walker, 1 C. & P. 320; s. 220, *post.*

And it is no defence to an indictment for manslaughter where the death of the deceased is shown to have been caused in part by the negligence of the prisoner, that the deceased was also guilty of negligence, and so contributed to his own death. Contributory negligence is not an answer to a criminal charge: R. v. Swindall, 2 Cox, 141.

In summing up in that case, Pollock, C.B., said:

"The prisoners are charged with contributing to the death of the deceased by their negligence and improper conduct; and, if they did so, it matters not whether 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 and negligence of any one person has contributed to the death of another person."

In R. v. Dant, 10 Cox, 102, L. & C. 570, Blackburn, J., said: "I have never heard that upon an indictment for manslaughter, the accused is entitled to be acquitted because the person who lost his life was in some way to blame." And Erle, Channell, Mellor and Montague Smith, JJ., concurred.

And in R. v. Hutchinson, 9 Cox, 555, Byles, J., in his charge to the Grand Jury, said: "If the man had not been killed, and had brought an action for damages, or if his wife and family had brought an action, if he had in any degree contributed to the result an action could not be maintained. But in a criminal case it was different. The Queen was the prosecutor and could be guilty of no negligence; and if both the parties were negligent the survivor was guilty."

And the same learned Judge, in R. v. Kew, 12 Cox, 355, said: "It has been contended if there was contributory negligence on the part of the deceased, then the defendants are not liable. No doubt contributory negligence would be an answer to an action. But who is the plaintiff here? The Queen, as representing the nation; and if they were all negligent together I think their negligence would be no defence."

And Lush, J., in R. v. Jones, 11 Cox, 544, distinctly said that contributory negligence on the part of the deceased was no excuse in a criminal case.

In R. v. Birchall, 4 F. & F. 1087, Willes, J., however, held that where the deceased has contributed to his death by his own negligence, although there may have been negligence on the part of the prisoner, the latter cannot be convicted of manslaughter, observing that, until he saw a decision to the contrary, he should hold that a man was not criminally responsible for negligence for which he would not be responsible in an action. But that case has not been followed.

If a man undertakes to drive another in a vehicle he is bound to take proper care in regard to the safety of the man under his charge; and if by culpably negligent driving he causes the death of the other he will be guilty of manslaughter: R. v. Jones, 11 Cox, 544.

In order to convict the captain of a steamer of manslaughter in causing a death by running down another

vessel, there must be some act of personal misconduct or personal negligence shown on his part: R. v. Allen, 7 C. & P. 153; R. v. Green, 7 C. & P. 156; R. v. Taylor, 9 C. & P. 672.

On an indictment against an engine driver and a fireman of a railway train for the manslaughter of persons killed while travelling in a preceding train, by the prisoner's train running into it, it appeared that on the day in question special instructions had been issued to them, which in some respects differed from the general rules and regulations, and altered the signal for danger so as to make it mean not "stop" but "proceed with caution;" that the trains were started by the superior officers of the company irregularly, at intervals of about five minutes; that the preceding train had stopped for three minutes, without any notice to the prisoners except the signal for caution; and that their train was being driven at an excessive rate of speed, and that then they did not slacken immediately on perceiving the signal, but almost immediately, and that as soon as they saw the preceding train they did their best to stop but without effect: *Held*, first, that the special rules, so far as they were not consistent with the general rules, superseded them; secondly, that if the prisoners honestly believed they were observing them, and they were not obviously illegal, they were not criminally responsible; thirdly, that the fireman being bound to obey the directions of the engine driver, and, so far as appeared, having done so, there was no case against him: R. v. Trainer, 4 F. & F. 105.

Where a fatal railway accident had been caused by the train running off the line, at a spot where rails had been taken up without allowing sufficient time to replace them, and also without giving sufficient, or at all events effective, warning to the engine-driver; and it was the duty of the foreman of plate layers to direct when the work should be done: *Held*, that though he was under the general control

of an inspector of the district, the inspector was not liable but that the foreman was, assuming his negligence to have been a material and a substantial cause of the accident, even although there had also been negligence on the part of the engine-driver in not keeping a sufficient lookout: R. v. Benge, 4 F. & F. 504.

By medical practitioners and quacks.—If a person, *bona fide* and honestly exercising his best skill to cure a patient, performs an operation which causes the patient's death, he is not guilty of manslaughter, and it makes no difference whether such person is a regular surgeon or not, nor whether he has had a regular medical education or not: R. v. Van Butchell, 3 C. & P. 629. A person in the habit of acting as a man midwife tearing away part of the prolapsed uterus of one of his patients, supposing it to be part of the placenta, by means of which the patient dies, is not indictable for manslaughter unless he is guilty of criminal misconduct arising either from the grossest ignorance or from the most criminal inattention: R. v. Williamson, 3 C. & P. 635. A person acting as a medical man, whether licensed or unlicensed, is not criminally responsible for the death of a patient occasioned by his treatment unless his conduct is characterized either by gross ignorance of his art, or by gross inattention to his patient's safety: R. v. St. John Long, 4 C. & P. 398. Where a person undertaking the cure of a disease (whether he has received a medical education or not), is guilty of gross negligence in attending his patient after he had applied a remedy, or of gross rashness in the application of it, and death ensues in consequence of either, he is liable to be convicted of manslaughter: R. v. St. John Long (2nd case), 4 C. & P. 423; s. 212, *ante*.

Where a person grossly ignorant of medicine administers a dangerous remedy to one labouring under a disease, proper medical assistance being at the time procurable, and that dangerous remedy causes death, the person so administering it is guilty of manslaughter: R. v. Webb, 2 Lewin, 196.

In this case Lord Lyndhurst laid down the following rule: "In these cases there is no difference between a licensed physician or surgeon, and a person acting as physician or surgeon without license. In either case, if a party having a competent degree of skill and knowledge makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter."

If a medical man, though lawfully qualified to practice as such, causes the death of a person by the grossly unskilful, or grossly incautious, use of a dangerous instrument, he is guilty of manslaughter: R. v. Spilling, 2 M. & Rob. 107. Any person, whether a licensed medical practitioner or not, who deals with the life or health of any of Her Majesty's subjects is bound to have competent skill, and is bound to treat his or her patients with care, attention and assiduity; and if a patient dies for want of either the person is guilty of manslaughter: R. v. Spiller, 5 C. & P. 333; R. v. Simpson, 1 Lewin, 172; R. v. Ferguson, 1 Lewin, 181. In cases of this nature the question for the jury is always, whether the prisoner caused the death by his criminal inattention and carelessness: R. v. Crick, and R. v. Crook, 1 F. & F. 519, 521; R. v. Macleod, 12 Cox, 534. On an indictment for manslaughter by reason of gross ignorance and negligence in surgical treatment, neither on one side nor on the other can evidence be gone into of former cases treated by the prisoner: R. v. Whitehead, 3 C. & K. 202.

A mistake on the part of a chemist in putting 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 fatal results, the mistake being made under circumstances which rather threw the prisoner off his guard, does not amount to such criminal negligence as will warrant a conviction for manslaughter: R. v. Noakes, 4 F. &. F. 920. On an indictment for manslaughter against a medical man by administering poison by mistake for some other drug it is not sufficient for the prosecution merely to show that the prisoner who dispensed his own drugs supplied a mixture which contained a large quantity of poison; they are bound also to show that this happened through the gross negligence of the prisoner: R. v. Spencer, 10 Cox, 525. A medical man who administered to his mother for some disease, prussic acid, of which she almost immediately died, is not guilty of manslaughter, it not appearing distinctly what the quantity was which he administered, or what quantity would be too great to be administered with safety to life: R. v. Bull, 2 F. & F. 201. If an unskilled practitioner ventures to prescribe dangerous medicines of the use of which he is ignorant, that is culpable rashness for which he will be held responsible: R. v. Markuss, 4 F. & F. 356; R. v. Macleod, 12 Cox, 534.

The prisoner was indicted for the manslaughter of an infant child; the prisoner, who practiced midwifery, was called in to attend a woman who was taken in labour, and when the head of the child became visible the prisoner, being grossly ignorant of the art which he professed, and unable to deliver the woman with safety to herself and the child, as might have been done by a person of ordinary skill, broke and compressed the skull of the infant, and thereby occasioned its death immediately after it was born; the prisoner was found guilty; it was submitted that the child being *en ventre de sa mère* when the wound was given the prisoner could not be guilty of manslaughter; but, upon a case reserved, the judges were unanimously of opinion that the conviction was right: R. v. Senior, 1 Moo. 346; s. 219, *post*.

NEGLECT OF NATURAL DUTIES.

See Section 215, ante.

Lastly, there are certain natural and moral duties towards others which, if a person neglect without malicious intention, and death ensue, he will be guilty of manslaughter. Of this nature is the duty of a parent to supply a child with proper food. When a child is very young and not weaned the mother is criminally responsible if the death arose from her not suckling it when she was capable of doing so: R. v. Edwards, 8 C. & P. 611. But if the child be older the omission to provide food is the omission of the husband, and the crime of the wife can only be the omitting to deliver the food to the child after the husband has provided it: R. v. Saunders, 7 C. & P. 277.

A master is not bound by the common law to find medical advice for his servant; but the case is different with respect to an apprentice, for a master is bound during the illness of his apprentice to find him with proper medicines, and if he die for want of them it is manslaughter in the master: R. v. Smith, 8 C. & P. 153. Where a person undertakes to provide necessaries for a person who is so aged and infirm that he is incapable of doing it for himself, and through his neglect to perform his undertaking death ensues, he is criminally responsible. On an indictment for the murder of an aged and infirm woman by confining her against her will, and not providing her with meat, drink, clothing, firing, medicines and other necessaries, and not allowing her the enjoyment of the open air, in breach of an alleged duty, if the jury think that the prisoner was guilty of wilful neglect, so gross and wilful that they are satisfied he must have contemplated her death, he will be guilty of murder; but if they only think that he was so careless that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter: R. v. Marriott, 8 C. & P. 425.

To render a person liable to conviction for manslaughter through neglect of duty there must be such a degree of culpability in his conduct as to amount to gross negligence : R. v. Finney, 12 Cox, 625 ; R. v. Nicholls, 13 Cox, 75 ; R. v. Handley, 13 Cox, 79 ; R. v. Morby, 15 Cox, 35, Warb. Lead. Cas. 115 ; R. v. Elliott, 16 Cox, 710.

OTHER CASES OF MANSLAUGHTER.

Death resulting from fear, caused by menaces of personal violence and assault, though without battery, is sufficient in law to support an indictment for manslaughter : R. v. Dugal, 4 Q. L. R. 350; ss. 220, 223, *post.*

One who points a gun at another person, without previously examining whether it be loaded or not, will, if the weapon should accidentally go off and kill him towards whom it is pointed, be guilty of manslaughter : R. v. Jones, 12 Cox, 628 ; *see* R. v. Weston, 14 Cox, 346 ; s. 213, *ante.*

Three persons went out together for rifle practice. They selected a field near to a house, and put up a target in a tree at a distance of about a hundred yards. Four or five shots were fired, and by one of them a boy who was in a tree in a garden, at a distance of three hundred and ninety-three yards, was killed. It was not clear which of the three persons fired the shot that killed the boy. *Held*, that all three were guilty of manslaughter: R. v. Salmon, 14 Cox, 494, Warb. Lead. Cas. 113.

If an injury is inflicted by one man upon another, which compelled the injured man, under medical advice, to submit to an operation during which he dies, for that death the assailant is guilty of manslaughter : R. v. Davis, 15 Cox, 174 ; s. 226, *post.*

An indictment for manslaughter will not lie against the managing director of a railway company by reason of the omission to do something which the company, by its charter, was not bound to do, although he had personally promised to do it : *Ex parte* Brydges, 18 L. C. J. 141.

An indictment contained two counts, one charging the prisoner with murdering M. J. T. on the 10th of November, 1881, the other with manslaughter of the said M. J. T. on the same day. The grand jury found a "true bill." A motion to quash the indictment for misjoinder was refused, the counsel for the prosecution electing to proceed on the first count only. *Held*, affirming the judgment of the Supreme Court of New Brunswick, that the motion could not be granted: Theal v. R., 7 S. C. R. 397.

The prisoner was convicted of manslaughter in killing his wife, who died on the 10th Nov., 1881. The immediate cause of her death was acute inflammation of the liver which the medical testimony proved might be occasioned by a blow or fall against a hard substance. About three weeks before her death (17th October preceding), the prisoner had knocked his wife down with a bottle; she fell against a door and remained on the floor insensible for some time; she was confined to her bed soon afterwards and never recovered. Evidence was given of frequent acts of violence committed by the prisoner upon his wife, within a year of her death, by knocking her down and kicking her in the side. The following questions were reserved, viz., whether the evidence of assaults and violence committed by the prisoner upon the deceased, prior to the 10th Nov. or the 17th Oct., 1881, was properly received, and whether there was any evidence to leave to the jury to sustain the charge in the first count of the indictment. *Held*, affirming the judgment of the Supreme Court of New Brunswick, that the evidence was properly received and that there was evidence to submit to the jury that the disease which caused her death was produced by the injuries inflicted by the prisoner: *Id.*

A corporal was tried for murder and convicted of manslaughter. The evidence showed that W. (the deceased), having been confined for intoxication, defendant with two men was ordered by a sergeant to tie him so that he could

not make a noise. The order was not executed so as to stop the noise, and a second order was given to tie W. so that he could not shout. To effect this defendant caused W. to be tied in a certain manner, and he died in that position, *Held*, that whether the illegality consisted in the order of the sergeant, or in the manner in which it was carried out, the defendant might be properly convicted: *held*, also, that the jury were justified in finding that the death of W. was caused or accelerated by the way in which he was tied by defendant, or by his directions: R v. Stowe, 2 G. & O. (N. S.) 121.

In the North West Territories it is not necessary that a trial for murder should be based upon an indictment by a grand jury or a coroner's inquest: R. v. Connor, 2 Man. L. R. 235.

As to insanity as a defence in criminal cases: *see* R. v. Riel, 2 Man. L. R. 321.

Evidence of one crime may be given to show a motive for committing another; and where several felonies are part of the same transaction evidence of all is admissible upon the trial of an indictment for any of them; but where a prisoner indicted for murder, committed while resisting constables about to arrest him, had, with others, been guilty of riotous acts several days before, it is doubtful if evidence of such riotous conduct is admissible, even for the purpose of showing the prisoner's knowledge that he was liable to be arrested, and, therefore, had a motive to resist the officers: R. v. Chasson, 3 Pugs. (N. B.) 546.

As to the admissibility of dying declarations the most recent cases are: R. v. Morgan, 14 Cox, 337; R. v. Bedingfield, 14 Cox, 341; *see* same case in Warb. Lead. Cas. 254; R. v. Hubbard, 14 Cox, 565; R. v. Osman, 15 Cox, 1; R. v. Goddard, 15 Cox, 7; R. v. Smith, 16 Cox, 170; R. v. Gloster, 16 Cox, 471; R. v. Mitchell, 17 Cox, 503; *see* also R. v. Jenkins, 11 Cox, 250, Warb. Lead. Cas. 252, and cases there collected; R. v. McMahon, 18 O. R. 502.

Homicide in self-defence, *i.e.*, committed *se et sua defendendo* in defence of a man's person or property, upon some sudden affray, has been usually classed with homicide *per infortunium*, under the title of *excusable*, as distinct from *justifiable*, because it was formerly considered by the law as in some measure blameable, and the person convicted either of that or of homicide by misadventure forfeited his goods: Fost. 273.

Homicide *se defendendo* seems to be where one, who has no other possible means of preserving his life from one who combats with him on a sudden quarrel, or of defending his person from one who attempts to beat him (especially if such attempt be made upon him in his own house), kills the person by whom he is reduced to such inevitable necessity. And not only he who on assault retreats to a wall or some such straight, beyond which he can go no farther, before he kills the other is judged by the law to act upon unavoidable necessity; but also he who, being assaulted in such a manner and such a place that he cannot go back without manifestly endangering his life, kills the other without retreating at all: Hawk. c. 11, ss. 13-14; ss. 51, 52, *ante*.

In the case of justifiable self-defence the injured party may repel force by force in defence of his person, habitation or property against one who manifestly intendeth and endeavoureth by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if in a conflict between them he happeneth to kill, such killing is justifiable: Fost. 273.

Before a person can avail himself of the defence that he used a weapon in defence of his life he must satisfy the jury that the defence was necessary, that he did all he could to avoid it, and that it was necessary to protect himself from such bodily harm as would give him a reasonable apprehension that his life was in immediate danger. If he

used the weapon having no other means of resistance and no means of escape, in such cases, if he retreated as far as he could, he would be justified: R. v. Smith, 8 C. & P. 160; R. v. Bull, 9 C. & P. 22.

Under the excuse of self-defence the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are justified, the act of the relation being construed as the act of the party himself: 1 Hale, 484; ss. 47, 51, 52, *ante*.

Chance medley, or as it was sometimes written, *chaud medley*, has been often indiscriminately applied to any manner of homicide by misadventure; its correct interpretation seems to be a killing happening in a sudden encounter; it will be manslaughter or self-defence according to whether the slayer was actually striving and combating at the time the mortal stroke was given, or had *bona fide* endeavoured to withdraw from the contest, and afterwards, being closely pressed, killed his antagonist to avoid his own destruction; in the latter case it will be justifiable or excusable homicide, in the former, manslaughter: 1 Russ. 888.

A man is not justified in killing a mere trespasser; but if, in attempting to turn him out of his house, he is assaulted by the trespasser he may kill him, and it will be *se defendendo*, supposing that he was not able by any other means to avoid the assault or retain his lawful possession, and in such a case a man need not fly as far as he can as in other cases of *se defendendo*, for he has a right to the protection of his own house: 1 Hale, 485; ss. 51 *et seq.*, *ante*.

But it would seem that in no case is a man justified in intentionally taking away the life of a mere trespasser, his own life not being in jeopardy; he is only protected from the consequences of such force as is reasonably necessary to turn the wrong-doer out. A kick has been

held an unjustifiable mode of doing so: Wild's Case, 2 Lewin, 214. Throwing a stone has been held a proper mode: Hinchcliffe's Case, 1 Lewin, 161; *see* R. v. Moir, *ante*, p. 25 under s. 53.

Homicide committed in prevention of a forcible and atrocious crime, amounting to felony, is justifiable. As if a man come to burn my house, and I shoot out of my house, or issue out of my house and kill him. So, if A. makes an assault upon B. a woman or maid, with intent to ravish her, and she kills him in the attempt, it is justifiable, because he intended to commit a felony. And not only the person upon whom a felony is attempted may repel force by force, but also his servant or any other person present may interpose to prevent the mischief; and if death ensue the party so interposing will be justified; but the attempt to commit a felony should be apparent and not left in doubt, otherwise the homicide will be manslaughter at least; and the rule does not extend to felonies without force, such as picking pockets, nor to misdemeanours of any kind: 2 Burn, 1314; ss. 51, 52, *ante*.

It should be observed that, as the killing in these cases is only justifiable on the ground of necessity, it cannot be justified unless all other convenient means of preventing the violence are absent or exhausted; thus a person set to watch a yard or garden is not justified in shooting one who comes into it in the night, even if he should see him go into his master's hen roost, for he ought first to see if he could not take measures for his apprehension; but if, from the conduct of the party, he has fair ground for believing his own life in actual and immediate danger, he is justified in shooting him: R. v. Scully, 1 C. & P. 319. Nor is a person justified in firing a pistol on every forcible intrusion into his house at night; he ought, if he have reasonable opportunity, to endeavour to remove him without having recourse to the last extremity: Meade's Case, 1 Lewin, 184.

As to justifiable homicide by officers of justice or other persons in arresting felons: *see ante*, p. 178. As to homicide by misadventure, 2 Burn, 316.

Petit treason was a breach of the lower allegiance of private and domestic faith, and considered as proceeding from the same principle of treachery in private life as would have led the person harbouring it to have conspired in public against his liege lord and sovereign. At common law the instances of this kind of crime were somewhat numerous and involved in some uncertainty; but by the 25 Edw. III. c. 2, they were reduced to the following cases: 1. Where a servant killed his master. 2. Where a wife killed her husband. 3. Where an ecclesiastical person, secular or regular, killed his superior, to whom he owed faith and obedience.

PART XVII.

HOMICIDE.

Definition.

218. Homicide is the killing of a human being by another, directly or indirectly, by any means whatsoever.

When a Child Becomes a Human Being.

219. A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother, whether it has breathed or not, whether it has an independent circulation or not, and whether the navel string is severed or not. The killing of such child is homicide when it dies in consequence of injuries received before, during or after birth.

See ss. 239, 240, 271 *post*; R. v. Poulton, 5 C. & P. 329; R. v. Brain, 6 C. & P. 349; R. v. Handley, 13 Cox, 79. If a mortal wound be given to a child whilst in the act of being born, for instance upon the head as soon as the head

appears and before the child has breathed, it may be murder if the child is afterwards born alive and dies thereof: R. v. Senior, 1 Moo. 346. But the entire child must actually have been born into the world in a living state, and the fact of its having breathed is not a conclusive proof thereof: R. v. Sellis, 7 C. & P. 850; R. v. Crutchley, 7 C. & P. 814. A child is born alive when it exists as a live child, breathing and living by reason of breathing through its own lungs alone, without deriving any of its living or power of living by or through any connection with its mother, but the fact of the child being still connected with the mother by the umbilical cord will not prevent the killing from being murder: R. v. Crutchley, 7 C. & P. 814; R. v. Trilloe, 2 Moo. 260; R. v. West, 2 C. & K. 784. *See post*, s. 697 as to evidence on a charge of murder of a bastard child by his mother.

CULPABLE HOMICIDE.

220. Homicide may be either culpable or not culpable. Homicide is culpable when it consists in the killing of any person, either by an unlawful act or by an omission, without lawful excuse, to perform or observe any legal duty, or by both combined, or by causing a person, by threats or fear of violence, or by deception, to do an act which causes that person's death, or by wilfully frightening a child or sick person.

2. Culpable homicide is either murder or manslaughter.

3. Homicide which is not culpable is not an offence.

This is the common law.

Sections 209, 210, 211, *ante*, when death results from the offences provided for thereby are instances of culpable homicide by omission without lawful excuse to perform a legal duty. Ss. 213 & 214 are nothing but additions to the definition of culpable homicide. S. 255, s-s. 2, *post*, as to any one meeting death by falling through a hole in the ice, unlawfully left unguarded, is also nothing but a corollary of the definition given in the above s. 220. Other illustrations appear *ante* under the headings of murder and manslaughter. It is proper to note here that the Imperial Commissioners, from whose report *all* these sections on homicide are taken *verbatim*, state positively that no altera-

tion is made thereby in the law on the subject as generally understood in modern times. (*See* their report *ante* p. 153.) An exception, however, as to the distinction between murder and manslaughter, and they doubt if it is one, is contained in what is reproduced, *post*, in s-s. 4 of s. 229, as to the killing of an officer of justice making an arrest.

Another exception is contained in what is s-s. 2 of that same s. 229, *post*, which the commissioners give as altering the rule that words can never amount to a provocation sufficient to reduce a killing from murder to manslaughter. (*There are cases to the contrary.*) *See ante*, pp. 159, *et seq.*

Section 237 *post*, is also an alteration of the law as to aiders and abettors to suicide. It is also not now law, though the Imperial Commissioners do not notice it specially as an alteration, that the killing of any one in the attempt to commit *any* felony is murder. This part of the law is modified by s. 228, *post*, and restricted to the killing of any one, whether the offender means or not death to ensue, or knows or not that death is likely to ensue, for the purpose of facilitating the commission of the offence (whether this offence has actually been committed or not) either of treason and the other offences provided for in ss. 65 to 78, or of piracy as provided for in ss. 127, 128, 129, or of escape or rescue from prison or lawful custody, or of resisting lawful apprehension, or of murder, or of rape, or of forcible abduction, or of robbery, or of burglary, or of arson, or for the purpose of facilitating the flight of an offender upon the commission or attempted commission of any of the aforesaid offences ; to constitute murder in such cases, however, the killing, though not intentional, must result from an act done with intention to inflict grievous bodily harm for the purposes aforesaid: (*see* under s. 241, *post*, and R. v. Martin, 8 Q. B. D. 54; R. v. Clarence, 22 Q. B. D. 23, Warb. Lead. Cas. 130, as to what constitutes *to inflict grievous bodily harm*). To cause death by administering any stupefying or overpowering thing, or wilfully stopping the

breath of any one for the purpose of facilitating the commission of any of the above specified offences, or of facilitating the flight of an offender upon the commission or attempted commission of any of the said offences, is also murder under the provisions of s. 228. The other cases where homicide constitutes murder are specified in s. 227. All other criminal homicides constitute manslaughter: ss. 220, 223, 224, 225, 226, 229, 230; *see* annotation, pages 156, *et seq.*, *ante*.

PROCURING DEATH BY FALSE EVIDENCE.

221. Procuring by false evidence the conviction and death of any person by the sentence of the law shall not be deemed to be homicide.

This settles a point upon which some doubt has at times been thrown by some who, according to Foster, viewed the question "rather as divines and casuists than as lawyers": Fost. 132. Lord Coke said, "It is not holden for murder at this day": 3 Inst. 48. A special punishment for perjury in such a case is now provided for by section 146, *ante*.

DEATH WITHIN A YEAR AND A DAY.

222. No one is criminally responsible for the killing of another unless the death take place within a year and a day of the cause of death. The period of a year and a day shall be reckoned inclusive of the day on which the last unlawful act contributing to the cause of death took place. Where the cause of death is an omission to fulfil a legal duty the period shall be reckoned inclusive of the day on which such omission ceased. Where death is in part caused by an unlawful act and in part by an omission, the period shall be reckoned inclusive of the day on which the last unlawful act took place or the omission ceased, whichever happened last.

"This is the existing law": Imp. Comm. Rep.; 4 Blacks. 197.

KILLING BY INFLUENCE ON THE MIND.

223. 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*.

"This (the words in italics) obviates a possible doubt": Imp. Comm. Rep.; *see* 1 Hale, 428. The only difficulty is to prove the connection of the act with the result. It is not quite clear upon what principle this section limits to

the killing of a child, or a sick person the culpability of killing by fright.

In R. v. Towers, 12 Cox, 530, a man was convicted of manslaughter for frightening a child to death. In R. v. Dugal, 4 Q. L. R. 350, a man in Quebec was convicted of manslaughter upon evidence of death from syncope caused by threats of personal violence and assault without battery on the deceased. If magnetism and hypnotism become more commonly practiced, the law of this section may have to be altered.

ACCELERATION OF DEATH.

224. Every one who, by any act or omission, causes the death of another kills that person, although the effect of the bodily injury caused to such other person be merely to accelerate his death while labouring under some disorder or disease arising from some other cause.

This is a well recognized rule, and a common sense one. No one has the right to shorten the life of another. A contrary rule, it is obvious, would lead to singular consequences. *See* 1 Hale, 428; R. v. Martin, 5 C. & P. 128.

THAT DEATH MIGHT HAVE BEEN PREVENTED NO EXCUSE.

225. Every one who, by any act or omission, causes the death of another kills that person, although death from that cause might have been prevented by resorting to proper means.

That is common law.

A. injures B.'s finger. B. is advised by a surgeon to allow it to be amputated, but he refuses to do so, and dies of lockjaw. A. has killed B. When a wound, not in itself mortal, turns to a gangrene or fever, from neglect or want of proper applications, the party by whom the wound was given is guilty of a culpable homicide, murder or manslaughter, according to circumstances. The wound being the cause of the gangrene or fever is the immediate cause of death, *causa causati*.

TREATMENT OF INJURY CAUSING DEATH.

226. Every one who causes a bodily injury, which is of itself of a dangerous nature to any person, from which death results kills that person, although the immediate cause of death be treatment proper or improper applied in good faith.

That is common law. If one wounds another, and competent surgeons perform with ordinary skill an operation to cure the wound, which operation they in good faith think necessary but which results in death, this is a killing by the party who inflicted the wound, though the surgeons were mistaken as to the necessity of the operation, but if the surgeons had acted from bad faith, or had been guilty of negligence in the operation, the party who inflicted the wound is not guilty: *see* R. v. Pym, 1 Cox, 339, Warb. Lead. Cas. 105, and cases there cited.

PART XVIII.

MURDER, MANSLAUGHTER, ETC.

Murder—Definition.

227. Culpable homicide is murder in each of the following cases:

(*a*) If the offender means to cause the death of the person killed;

(*b*) If the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not;

(*c*) If the offender means to cause death or, being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed;

(*d*) If the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

Murder Further Defined.

228. Culpable homicide is also murder in each of the following cases whether the offender means or not death to ensue, or knows or not that death is likely to ensue:

(*a*) If he means to inflict grievous bodily injury for the purpose of facilitating the commission of any of the offences in this section mentioned, or the

flight of the offender upon the commission or attempted commission thereof, and death ensues from such injury ; or

(*b*) If he administers any stupefying or overpowering thing for either of the purposes aforesaid, and death ensues from the effects thereof ; or

(*c*) If he by any means wilfully stops the breath of any person for either of the purposes aforesaid, and death ensues from such stopping of the breath.

2. The following are the offences in this section referred to :—Treason and the other offences mentioned in Part IV. of this Act, piracy and offences deemed to be piracy, escape or rescue from prison or lawful custody, resisting lawful apprehension, murder, rape, forcible abduction, robbery, burglary, arson.

See R. v. Serné, 16 Cox, 311, Warb. Lead. Cas. 108, and remarks under s. 220, *ante;* also R. v. Handley, 13 Cox, 79. The shooting by A. at a fowl to steal it, by which B. is accidentally killed is clearly not now murder. A. criminally sets a house on fire not knowing that there is any one in it, there was, however, some one in it who perishes in the fire, A. will not now be guilty of murder.

PROVOCATION.

229. Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

2. Any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

3. Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact. No one shall be held to give provocation to another by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

4. An arrest shall not necessarily reduce the offence from murder to manslaughter because the arrest was illegal, but if the illegality was known to the offender it may be evidence of provocation.

See R. v. Fisher, Warb Lead. Cas. 112, and cases there cited, and ss. 45, 46, 220 *ante;* also a note to R. v. Allen, in appendix, Stephen's Cr. L. Art. 225.

MANSLAUGHTER.

230. Culpable homicide, not amounting to murder, is manslaughter.

MURDER—PUNISHMENT.

231. Every one who commits murder is guilty of an indictable offence and shall, on conviction thereof, be sentenced to death. R. S. C. c. 162, s. 2; 24-25 V. c. 100, s. 1 (Imp.).

Not triable at Quarter Sessions, s. 540.

Indictment.— that on A. murdered B. (schedule one form F. F., *post*;) under s. 611.

In murder, no count charging any other offence allowed, s. 626, and if evidence proves manslaughter the jury may return a verdict of not guilty of murder but guilty of manslaughter, s. 713; and, on an indictment for child murder, of concealment of birth, if the evidence warrants it, s. 714. As to a previous conviction or acquittal of murder being a bar to an indictment for manslaughter for the same homicide, and *vice versa*: *see* s. 633 *post*.

ATTEMPTS TO COMMIT MURDER.

232. Every one is guilty of an indictable offence and liable to imprisonment for life, who does any of the following things with intent to commit murder; that is to say—

(*a*) Administers any poison or other destructive thing to any person, or causes any such poison or destructive thing to be so administered or taken, or attempts to administer it, or attempts to cause it to be so administered or taken; or

(*b*) By any means whatever wounds or causes any grievous bodily harm to any person; or

(*c*) Shoots at any person, or by drawing a trigger or in any other manner, attempts to discharge at any person any kind of loaded arms; or

(*d*) Attempts to drown, suffocate, or strangle any person; or

(*e*) Destroys or damages any building by the explosion of any explosive substance; or

(*f*) Sets fire to any ship or vessel or any part thereof, or any part of the tackle, apparel or furniture thereof, or to any goods or chattels being therein; or

(*g*) Casts away or destroys any vessel; or

(*h*) By any other means attempts to commit murder. R. S. C. c. 162, ss. 8, 9, 10, 11, 12; 24-25 V. c. 100, ss. 11 to 15 (Imp.).

Not triable at quarter sessions, s. 540. "Explosive substance" defined, s. 3; "loaded arms" defined, s. 3.

The words "whether any bodily injury is effected or not" have been stricken out from the repealed clause, s. 11, R. S. C. c. 162.

It is not necessary on an indictment for wounding with intent to murder that the prosecutor should be in fact wounded in a vital part, for the question is not what the wound is, but what wound was intended: R. v. Hunt, 1 Moo. 93. There is no objection to insert counts on ss. 241, 242, 262 & 265: 3 Burn, 753; R. v. Strange, 8 C. & P. 172; R. v. Murphy, 1 Cox, 108. But it is not necessary, as by s. 713, on the trial of any indictment for wounding with intent to murder, if the intent be not proved the jury may convict of any of the offences falling under these sections. The defendant may also be found guilty of an attempt to commit the offence charged: s. 711; R. v. Cruse, 2 Moo. 53; R. v. Archer, 2 Moo. 283. An attempt to commit suicide is not an attempt to commit murder: R. v. Burgess, L. & C. 258.

Indictment under (a) for administering poison with intent to murder.— that J. S. on unlawfully did administer to one A. B. (*administer or cause to be administered to or to be taken by any person*), a large quantity, to wit, two drachms of a certain deadly poison called white arsenic, (*any poison or other destructive thing*), with intent thereby then unlawfully the said A. B. to kill and murder. (*Add counts stating that the defendant unlawfully, "did cause to be administered to" and unlawfully, "did cause to be taken by" a large quantity, etc., and if the description of poison be doubtful, add counts describing it in different ways and one count stating it to be "a certain destructive thing to the jurors aforesaid unknown."*) *Add a count with intent to commit murder.*

The indictment must allege the thing administered to be poisonous or destructive; and therefore an indictment for administering sponge mixed with milk, not alleging the

sponge to be destructive, was holden bad: R. v. Powles, 4 C. & P. 571.

If there be any doubt whether the poison was intended for A. B. add a count, stating the intent to be to "commit murder" generally: R. v. Ryan, 2 M. & Rob. 213; R. v. Duffin, R. & R. 365.

If a person mix poison with coffee, and tell another that the coffee is for her, and she takes it in consequence, it seems that this is an administering; and, at all events, it is causing the poison to be taken. In R. v. Harley, 4 C. & P. 369, it appeared that a coffee pot, which was proved to contain arsenic, mixed with coffee, had been placed by the prisoner by the side of the grate; the prosecutrix was going to put out some tea, but on the prisoner telling her that the coffee was for her, she poured out some for herself, and drank it, and in about five minutes became very ill. It was objected that the mere mixing of poison, and leaving it in some place for the person to take it was not sufficient to constitute an administering. Park, J., said: "There has been much argument whether, in this case, there has been an administering of this poison. It has been contended that there must be a manual delivery of the poison, and the law, as stated in Ryan & Moody's Report, goes that way: R. v. Cadman, 1 Moo. 114; but as my note differs from that report, and also from my own feelings, I am inclined to think that some mistake has crept into that report. It is there stated that the judges thought the swallowing of the poison not essential, but my recollection is that the judges held just the contrary. I am inclined to hold that there was an administering here; and I am of opinion that, to constitute an administering it is not necessary that there should be a delivery by the hand." 1 Russ. 988, and Greaves, note (*n*).

An indictment stating that the prisoner gave and administered poison is supported by proof that the prisoner gave the poison to A. to administer as a medicine to B.

with intent to murder B., and that A. neglecting to do so, it was accidentally given to B. by a child, the prisoner's intention to murder continuing: R. v. Michael, 2 Moo. 120.

Where the prisoner, having mixed corrosive sublimate with sugar, put it into a parcel, directing it to "*Mrs. Daws, Townhope,*" and left it on the counter of a tradesman, who sent it to Mrs. Daws who used some of the sugar, Gurney, J., held it to be an administering: R. v. Lewis, 6 C. & P. 161.

And if the indictment contains a count "*with intent to commit murder,*" generally the preceding case, R. v. Lewis, is clear law: Archbold, 653.

Evidence of administering at different times may be given to show the intent: Archbold, 650; 1 Russ. 1004, *et seq.* The intent to murder must be proved by circumstances from which that intent may be implied.

No verdict for assault can be given upon an indictment under s. 232 (*a*); R. v. Dilworth, 2 M. & Rob. 531; R. v. Draper, 1 C. &. K. 176; but a verdict for the offence, covered by section 245 or 246, or for the attempt to poison, may be given: ss. 711, 713.

Indictment under (*a*) *for attempting to poison with intent.*— unlawfully did attempt to administer (*attempt to administer to, or attempt to cause to be administered or to be taken by*) to one J. N. a large quantity, to wit, two drachms of a certain deadly poison called white arsenic (*any poison or other destructive thing*), with intent thereby then unlawfully the said J. N. to kill and murder,

(*Add a count stating the intent "to commit murder," generally. Add counts charging that the defendant "attempted to cause to be administered to" and that he "attempted to cause to be taken by J. N. the poison.*")

In R. v. Cadman, 1 Moo. 114, the defendant gave the prosecutrix a cake containing poison, which the prosecutrix merely put into her mouth, and spit out again, and did not

swallow any part of it. These circumstances would now support an indictment under the above clause.

Where the prisoner put salts of sorrel in a sugar basin, in order that the prosecutor might take it with his tea, it was held an attempt to administer: R. v. Dale, 6 Cox, 14.

Greaves on this clause remarks: "Where the prisoner delivered poison to a guilty agent, with directions to him to cause it to be administered to another in the absence of the prisoner, it was held that the prisoner was not guilty of an attempt to administer poison, within the repealed acts. R. v. Williams, 1 Den. 39; and the words 'attempt to cause to be administered to, or to be taken by' were introduced in this section to meet such cases."

Indictment under (b) for wounding with intent to murder.—one J. N. unlawfully did wound (*wound or cause any grievous bodily harm*) with intent, etc., (*as in the last precedent*). Add a count "with the intent to commit murder" generally.

The instrument or means by which the wound was inflicted need not be stated, and, if stated, would not confine the prosecutor to prove a wound by such means: R. v. Briggs, 1 Moo. 318.

As the general term "wound" includes every "stab" and "cut" as well as other wound, that general term has alone been used in these Acts. All, therefore, that it is now necessary to allege in the indictment is, that the prisoner did wound the prosecutor; and that allegation will be proved by any wound, whether it be a stab, cut, or other wound. *Greaves, Cons. Acts.* 45. The word "wound" includes incised wounds, punctured wounds, lacerated wounds, contused wounds, and gunshot wounds: Archbold, 664.

But to constitute a wound, within the meaning of this statute, the continuity of the skin must be broken: R. v. Wood, 1 Moo. 278.

The whole skin, not the mere cuticle or upper skin, must be divided: Archbold, 665.

But a division of the internal skin, within the cheek or lip, is sufficient to constitute a wound within the statute: Archbold, 665.

"The statute says 'by any means whatsoever,' so that it is immaterial by what means the wound is inflicted, provided it be inflicted with the intent alleged: R. v. Harris, R. v. Stevens, R. v. Murrow and Jenning's case, and other similar cases cannot therefore be considered as authorities under the present law": Greaves, Cons. Acts, 45.

Indictment under (c) for shooting with intent to murder.

a certain gun, then loaded with gunpowder and divers leaden shot, at and against one J. N. unlawfully did shoot, with intent thereby then unlawfully (*as in the last precedent.*) (*Add also counts stating "with intent to commit murder" generally. Also a count for shooting with intent to maim, etc.,*) under s. 241 *post.*

In order to bring the case within the above section it must be proved that the prisoner intended by the act charged to cause the death of the suffering party. This will appear either from the nature of the act itself, or from the conduct and expressions used by the prisoner: Roscoe, 720.

Upon an indictment for wounding Taylor with intent to murder him, it appeared that the prisoner intended to murder one Maloney, and, supposing Taylor to be Maloney, shot at and wounded Taylor; and the jury found that the prisoner intended to murder Maloney, not knowing that the party he shot at was Taylor, but supposing him to be Maloney, and that he intended to murder the individual he shot at, supposing him to be Maloney, and convicted the prisoner; and upon a case reserved, it was held that the conviction was right, for though he did not intend to kill the particular person, he meant to murder the man at whom he shot: R. v. Smith, Dears. 559; 1 Russ. 1001.

It seems doubtful whether it must not appear, in order to make out the intent to murder, that that intent existed in the mind of the defendant at the time of the offence, or whether it would be sufficient if it would have been murder had death ensued: Archbold, 652.

On this question, Greaves, *note* (*g*) 1 Russ. 1003, remarks: "It seems probable that the intention of the Legislature, in providing for attempts to commit murder, was to punish every attempt where, in case death had ensued, the crime would have amounted to murder. . . The tendency of the cases, however, seems to be that an actual intent to murder the particular individual injured must have been shown. . . Where a mistake of one person for another occurs, the cases of shooting, etc., may, perhaps, admit of a different consideration from the cases of poisoning. In the case of shooting at one person under the supposition that he is another, although there be a mistake, the prisoner must intend to murder that individual at whom he shoots; it is true he may be mistaken in fact as to the person, and that it may be owing to such mistake that he shoots at such person, but still he shoots with intent to kill that person. So in the case of cutting; a man may cut one person under a mistake that he is another person, but still he must intend to murder the man whose throat he cuts. In R. v. Mister, the only count charging an intent to murder was the first, and that alleged the intent to be to murder Mackreth; and although on the evidence it was perfectly clear that Mister mistook Mackreth for Ludlow, whom he had followed for several days before, yet he was convicted and executed, and I believe the point never noticed at all. The case of poisoning one person by mistake for another seems different, if the poison be taken in the absence of the prisoner; for in such case, he can have no actual intent to injure that person. These difficulties, however, seem to be obviated by the present statute, which, instead of using the words "with intent to murder such

person," has the words " with intent to commit murder "

In all cases of doubt, as to the intention, it would be prudent to insert one count for shooting at A. with intent to murder him ; another " with intent to commit murder ; " and a third for shooting at A. with intent to murder the person really intended to be killed, and if the party intended to be killed were unknown, a count for shooting at A. with intent to murder a person to the jurors unknown.

A verdict under ss. 241 & 265 may be given, s. 713 ; also for attempt, if the evidence warrants it, s. 711 ; *see* remarks under preceding section.

The definition of the words "loaded arms" in s. 3, is reproduced with a slight alteration in words from c. 100, s. 19, 24 & 25 V. (Imp.), upon which Greaves remarks: "This clause is new and is intended to meet every case where a prisoner attempts to discharge a gun, etc., loaded in the barrel, but which misses fire for want of priming or of a copper cap, or from any like (other) cause. R. v. Carr, R. & R. 377; and R. v. Harris, 5 C. & P. 159, cannot therefore be considered as authorities under this Act": *see* R. v. Jackson, *post*, p. 220.

Indictment under (c) for attempting to shoot with intent, etc.— did, by drawing the trigger (drawing a trigger or in any other manner) of a certain pistol then loaded in the barrel with gun-powder and one leaden bullet (or with a ball cartridge) unlawfully attempt to discharge the said pistol at and against one J. N. with intent (as in the last precedent.) (*Add a count charging an intent to commit murder, and counts for attempting to shoot with intent to maim*, under s. 241, though the prisoner may be found guilty under that section without such a count: R. v. Baker, 1 C. & K. 254). A verdict of common assault may also in certain cases be given, s. 713. If one draws, during a quarrel, a pistol from his pocket, but is prevented from using it by another person, there is no offence against this section: R. v. St. George, 9 C. & P. 483; R. v. Brown, 15

Cox, 199. R. v. St. George is now overruled by R. v. Duckworth, 17 Cox, 495, [1892], 2 Q. B. 83.

See remarks under preceding form.

Upon an indictment for attempting to discharge a loaded arm with intent to murder, the prisoner may be found guilty of the charge upon evidence that he had pointed at the prosecutor a revolver loaded in some of its chambers with ball cartridges, but not in others, saying that he would shoot him, and that he had pulled the trigger of the revolver, but that the hammer had fallen upon a chamber which contained an empty cartridge: *per* Charles, J., R. v. Jackson, 17 Cox, 104.

Indictment under (d) for attempting to drown with intent to murder.— unlawfully did take one J. N. into both the hands of him the said J. S., and unlawfully did cast, throw, and push the said J. N. into a certain pond, wherein there was a great quantity of water, and did thereby then unlawfully attempt the said J. N. to drown and suffocate, with intent thereby then unlawfully the said J. N. to kill and murder, (*Add a count charging generally that the defendant did attempt to drown J. N. and counts charging the intent to be to commit murder.*)

It has been held that upon an indictment for attempting to drown it must be shown clearly that the acts were done with intent to drown. An indictment alleged that the prisoner assaulted two boys, and with a boat-hook made holes in a boat in which they were, with intent to drown them. The boys were attempting to land out of a boat they had punted across a river, across which there was a disputed right of ferry; the prisoner attacked the boat with his boat-hook in order to prevent them, and by means of the holes which he made in it caused it to fill with water, and then pushed it away from the shore, whereby the boys were put in peril of being drowned. He might have got into the boat and thrown them into the water; but he confined his attack to the boat itself, as if to prevent the

landing, but apparently regardless of the consequences. Coltman, J., stopped the case, being of opinion that the evidence against the prisoner showed his intention to have been rather to prevent the landing of the boys than to do them any injury: Sinclair's Case, 2 Lewin 49; R. v. Dart, 14 Cox, 143.

A verdict of common assault may be given, s. 713.

Indictment under (e). that on J. S. unlawfully did, by the explosion of a certain explosive substance, that is to say, gunpowder, destroy (*destroy or damage*) a certain building situate with intent thereby then unlawfully one J. N. to kill and murder. (*Add a count, stating the intent to be generally "to commit murder."*)

In R. v. Ryan, 2 M. & Rob. 213, Parke and Alderson held that a count alleging with intent to *commit murder*, generally, is sufficient.

The jury may return a verdict of guilty of an attempt to commit the offence, s. 711.

Indictment under (f) and (g). unlawfully did set fire to (*cast away or destroy*) a certain ship called with intent thereby then to kill and murder one. (*Add a count stating the intent to "commit murder" generally*).

Indictment under (h).— did, by then (*state the act*) attempt unlawfully one J. N. to kill and murder. (*Add a count charging the intent to be to commit murder.*)

Greaves says: "This section is entirely new, and contains one of the most important amendments in these Acts. It includes every attempt to murder not specified in any preceding section. It will therefore embrace all those atrocious cases where the ropes, chains or machinery used in lowering miners into mines have been injured with intent that they may break, and precipitate the miners to the bottom of the pit. So, also, all cases where steam engines are injured, set on work, stopped, or anything put into

them, in order to kill any person who may fall into it. So, also, cases of sending or placing infernal machines with intent to murder: *see* R. v. Mountford, 1 Moo. 441. Indeed, the malicious may now rest satisfied that every attempt to murder, which their perverted ingenuity may devise, or their fiendish malignity suggest, will fall within some clause of this Act, and may be visited with penal servitude for life. In any case where there may be a doubt whether the attempt falls within the terms of any of the preceding sections, a count framed on this clause should be added."

A verdict under ss. 241, 242 & 265 may be given, s. 713, if the evidence warrants it.

THREATS BY LETTER TO MURDER.

233. Every one is guilty of an indictable offence and liable to ten years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person. R. S. C. c. 173, s. 7. 24-25 V. c. 100, s. 16 (Imp.).

Not triable at quarter sessions, s. 540.

A verdict of attempt allowed, s. 711, if the evidence warrants it. "Writing" defined, s. 3.

Indictment. that J. S. on at unlawfully did send to one J. N. a certain letter (*or writing*) directed to the said J. N., by the name and description of Mr. J. N, threatening to kill and murder the said J. N. he the said (*defendant*) then well knowing the contents of the said letter, which said letter is as follows, that is to say And the jurors aforesaid that the said on at unlawfully did utter a certain writing (*as in the first count*).

In R. v. Hunter, 2 Leach, 631, the court said: "In an indictment for sending a threatening letter, the letter must be set out in order that the court may judge from the face of the indictment whether it is or is not a threatening letter within the meaning of the statute on which the indictment is founded."

The same ruling had been held in R. v. Lloyd, 2 East, P. C. 1122.

Under s. 613 *post* an indictment would not be quashed for the omission of the letter, but it is undoubtedly more correct to set it out.

Greaves says on this clause: "The words *directly or indirectly causes to be received,* are taken from the 9 Geo. IV. c. 55, s. 8, and introduced here in order to prevent any difficulty which might arise as to a case not falling within the words *send, deliver or utter.* The words *to any other person* in the 10 & 11 V. c. 66, s. 1, were advisedly omitted, in order that ordering, sending, delivering, uttering, or causing to be received may be included. If, therefore, a person were to send a letter or writing without any address by a person with direction to drop it in the garden of a house in which several persons lived, or if a person were to drop such a letter or writing anywhere, these cases would be within this clause. In truth, this clause makes the offence to consist in sending, etc., any letter or writing which contains a threat to kill or murder any person whatsoever, and it is wholly immaterial whether it be sent, etc., to the person threatened or to any other person. The cases, therefore, of R. v. Paddle, R. & R. 484; R. v. Burridge, 2 M. & Rob. 296; R. v. Jones, 2 C. & K. 398, 1 Den. 218; and R. v. Grimwade, 1 Den. 30, are not to be considered as authorities on this clause, so far as they decide that the letter must be sent, etc., to the party threatened. In every indictment on this and the similar clauses in the other acts, a count should be inserted alleging that the defendant uttered the writing without stating any person to whom it was uttered."

Where the threat charged is to kill or murder, it is for the jury to say whether the letter amounts to a threat to kill or murder: R. v. Girdwood, 1 Leach, 142; R. v. Tyler, 1 Moo. 428.

The bare delivery of the letter, though sealed, is evidence of a knowledge of its contents by the prisoner in certain cases: R. v. Girdwood, 1 Leach, 142.

And in the same case, it was held that the offender may be tried in the county where the prosecutor received the letter, though he may also be tried in the county where the sending took place.

In R. v. Boucher, 4 C. & P. 562, the following letter was held to contain a threat to murder:—"You are a rogue, thief and vagabond, and if you had your deserts, you should not live the week out; I shall be with you shortly, and then you shall nap it, my banker. Have a care, old chap, or you shall disgorge some of your illgotten gains, watches and cash, that you have robbed the widows and fatherless of. Don't make light of this, or I'll make light of you and yours. Signed, *Cut-throat.*"

Where an indictment contained three counts, each charging the sending of a different threatening letter, Byles, J., held that the prosecutor must elect on which count he would proceed, though any letter leading up to or explaining the letter on which the trial proceeded would be admissible: R. v. Ward, 10 Cox, 42; *see* s. 626, *post.*

CONSPIRACY TO MURDER.

234. Every one is guilty of an indictable offence and liable to *fourteen years'* imprisonment, who—

(*a*) Conspires or agrees with any person to murder or to cause to be murdered any other person, whether the person intended to be murdered is a subject of Her Majesty or not; or is within Her Majesty's dominions or not; or

(*b*) Counsels or attempts to procure any person to murder such other person anywhere, *although such person is not murdered in consequence of such counselling or attempted procurement.* R. S. C. c. 162, s. 3. (*Amended*). 24-25 V. c. 100, s. 4 (Imp.).

Not triable at quarter sessions, s. 540. The words in italics are new, and unnecessary. As to conspiracies generally: *see* remarks under s. 527, *post.*

Indictment. that J. S., J. T., and E. T., on unlawfully and wickedly did conspire, confederate and agree together one J. N. unlawfully to kill and murder.

See 1 Russ. 967; 3 Russ. 664; R. v. Bernard, 1 F. & F. 240; 2 Stephen's Hist. 12.

In R. v. Banks, 12 Cox, 393, upon an indictment under this clause, the defendants were convicted of an attempt to commit the misdemeanour charged. In R. v. Most, 14 Cox, 583, the defendant having written a newspaper article encouraging the murder of foreign potentates, was found guilty of an offence under the corresponding clause of the Imperial Act.

Would any one conspiring in Canada with another person in the United States to himself murder any one in the United States be subject to indictment under s. 234?

ACCESSSORY AFTER THE FACT TO MURDER.

235. Every one is guilty of an indictable offence, and liable to imprisonment for life, who is an accessory after the fact to murder. R. S. C. c. 162, s. 4. 24-25 V. c. 100, s. 67 (Imp.).

Not triable at quarter sessions, s. 540. *See* remarks under s. 63, *ante*, and s. 532, *post*.

PUNISHMENT OF MANSLAUGHTER.

236. Every one who commits manslaughter is guilty of an indictable offence, and liable to imprisonment for life. R. S. C. c. 162, s. 5. (*Amended*). 24-25 V. c. 100, s. 5 (Imp.).

Indictment.— that A. B. on at unlawfully did kill and slay one and thereby committed manslaughter.

The evidence is the same as in murder, with this exception, that in murder the prosecutor need only prove the homicide without going into evidence of the circumstances under which it was committed in manslaughter; he must give evidence of all the facts in the case, so as to prove the homicide to be manslaughter. As to the cases in which a homicide amounts to manslaughter only, and not to murder, *see ante*, ss. 229, 230, and remarks pages 181 *et seq*. A summary conviction for assault under s. 42 of 24 & 25 V. c. 100, is not a bar to a subsequent indictment for manslaughter, upon the death of the man assaulted consequent

upon the same assault: R. v. Morris, 10 Cox, 480; R. v. Friel, 17 Cox, 325; *see* ss. 866 & 969, *post*.

AIDING AND ABETTING SUICIDE. (*New*).

237. 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.

This is new. By the common law suicide is murder, and if one encourage another to commit suicide, and is present abetting him while he does so, such person is guilty of murder as a principal, and if two persons encourage each other to self murder and one kills himself, and the other one fails, the latter is a principal in the murder of the other: R. v. Dyson, R. & R. 523; R. v. Russell, 1 Moo. 356; R. v. Alison, 8 C. & P. 418; R. v. Jessop, 16 Cox, 204. Now, under analogous facts, he would be indictable under this s. 237 for counselling the other to commit suicide, and also under the next section for attempting himself to commit suicide.

A *felo de se*, or felon of himself, is a person who, being of sound mind and of the age of discretion, voluntarily killeth himself: 3 Inst. 54.

If a man give himself a wound, intending to be *felo de se*, and dieth not within a year and a day after the wound, he is not *felo de se: Id.*

The following passages from Hale and Hawkins may be usefully inserted here:—

"It is not every melancholy or hypochondriacal distemper that denominates a man *non compos*, for there are few who commit this offence but are under such infirmities, but it must be such an alienation of mind that renders them to be madmen, or frantic, or destitute of the use of reason; a lunatic killing himself in a fit of lunacy is not *felo de se;* otherwise it is, if it be at another time." 1 Hale, 412.

"But here, I cannot but take notice of a strange notion which has unaccountably prevailed of late, that every one

who kills himself must be *non compos* of course; for it is said to be impossible that a man in his senses should do a thing so contrary to nature and all sense and reason. If this argument be good self-murder can be no crime, for a madman can be guilty of none; but it is wonderful that the repugnancy to nature and reason, which is the highest aggravation of this offence, should be thought to make it impossible to be any crime at all, which cannot but be the necessary consequence of this position that none but a madman can be guilty of it. May it not, with as much reason, be argued that the murder of a child or of a parent is against nature and reason, and consequently that no man in his senses can commit it": 1 Hawk. c. 9, s. 2.

In England the attempt to commit suicide is not an attempt to commit murder, within 32 & 33 V. c. 20, but still remains a common law misdemeanour: R. v. Burgess, L. & C. 258; R. v. Doody, 6 Cox, 463.

An aider and abettor, called a principal in the second degree, is one who is actually or constructively present when an offence is committed; one who counsels or procures the commission of an offence, but is absent when it is committed, is called at common law an accessory before the fact. Both are now treated as principals: s. 61, *ante*; but that section does not apply as to punishment where the offence of counselling or of aiding and abetting is made a distinct offence. As to what is a counselling or procurement *see* remarks under the said section.

Indictment.— that on at one A. B. committed suicide, and that on divers days before the said offence was committed by the said A. B., as aforesaid, C. D. did unlawfully move, procure, aid, counsel, hire and command the said A. B. the said offence and suicide to do and commit (*or, that C. D. was present and aiding and abetting the said A. B. in the commission of the said offence and suicide.*)

If the suicide was not committed yet the inciting to it is an offence: R. v. Gregory, L. R. 1 C. C. R. 77; so is the conspiracy by two persons to commit suicide together, s. 527.

See R. v. Dyson, R. & R. 523; R. v. Russell, 1 Moo. 356. This last case applies only to an accessory, not to an aider and abettor: R. v. Towle, R. & R. 314.

A. and B. go out together with a gun to kill D. A. fires the shot, but his gun bursts and kills himself (A). A. has committed suicide, and B. was aider and abettor to that suicide.

ATTEMPT TO COMMIT SUICIDE. (*New*).

238. Every one who attempts to commit suicide is guilty of an indictable offence and liable to two years' imprisonment.

See remarks under preceding section; fine, s. 958.

Indictment.— that A. B. on unlawfully and wilfully did attempt and endeavour to unlawfully kill himself and thereby to commit suicide.

NEGLECT BY A MOTHER IN CHILD-BIRTH TO OBTAIN ASSISTANCE. (*New*).

239. Every woman is guilty of an indictable offence who, with either of the intents hereinafter mentioned, being with child and being about to be delivered, neglects to provide reasonable assistance in her delivery, if the child is permanently injured thereby, or dies, either just before, or during, or shortly after birth, unless she proves that such death or permanent injury was not caused by such neglect, or by any wrongful act to which she was a party, and is liable to the following punishment:

(*a*) If the intent of such neglect be that the child shall not live, to imprisonment for life;

(*b*) If the intent of such neglect be to conceal the fact of her having had a child, to imprisonment for seven years.

See ante, remarks under s. 219.

This is new. It is taken from the English bill of 1880. The Imperial Commissioners reported thereon as follows:

"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. . . . This section will afford a means of punishment for child murder where there would be a practical difficulty in obtaining a conviction for that offence."

Under a charge of child murder the accused cannot be found guilty of this new offence created by s. 239. A verdict of concealment of birth may be given if the evidence warrants it, s. 713. The punishment would then be under next section.

If R. v. Handley, 13 Cox, 79, is good law, the offence covered by this s. 239 would at common law, when the child dies after birth, be murder or manslaughter.

It is not easy to imagine a case where it would be possible to obtain a conviction under this section, where a child dies *before*, even if it is only *just before*, his birth. The expression itself "dies before his birth" is not a happy one; *see* s. 219, *ante*.

The words "unless she proves," etc., are utterly useless. Either the prosecutor's case must be proved or not. If it is, the jury must convict; if not, they must acquit; and it is not if it is not proven that the death or injury was caused by the neglect.

Indictment under (a).— that A. B. on at a then and there being with child and about to be delivered, did unlawfully, with intent that her said child should not live, neglect to provide reasonable assistance in her delivery, whereby her said child was permanently injured, (*or died during or shortly after birth.*) A verdict of guilty under s-s. (*b*) may be given upon this indictment if the evidence warrants it.

CONCEALING DEAD BODY OF A CHILD.

240. Every one is guilty of an indictable offence, and liable to *two years'* imprisonment, who disposes of the dead body of any child in any manner, with intent to conceal the fact that its mother was delivered of it, whether the child died before, or during, or after birth. R. S. C. c. 162, s. 49. (*Amended*). 24-25 V. c. 100, s. 60 (Imp.).

Fine, s. 958. A conviction for this offence may be given upon an indictment for child murder, s. 714.

The enactment applies not only to a mother, but to every one who disposes of the dead body of a child with intent to conceal its birth. The repealed clause had the words "by any *secret disposition.*"

Indictment.— that A. B., on was delivered of a child; and that subsequently, on , the said child having died, the said A. B. did unlawfully dispose of the dead body of the said child by secretly burying it with intent to conceal the fact that she had been delivered of it. (*State the means of concealment specially.*)

In R. v. Berriman, 6 Cox, 388, Erle, J., told the jury that this offence cannot be committed unless the child had arrived at that stage of maturity at the time of birth that it might have been a living child. But in a later case, R. v. Colmer, 9 Cox, 506, Martin, J., ruled that the offence is complete on a fœtus delivered in the fourth or fifth month of pregnancy, not longer than a man's finger, but having the shape of a child.

Final disposition of the body is not material, and hiding it in a place from which a further removal was contemplated would support the indictment: R. v. Goldthorpe, 2 Moo. 244; R. v. Perry, Dears. 471.

Leaving the dead body of a child in two boxes, closed but not locked or fastened, one being placed inside the other in a bedroom but in such a position as to attract the attention of those who daily resorted to the room, is not a secret disposition of the body within the meaning of the statute: R. v. George, 11 Cox, 41.

What is a secret disposition of the dead body of a child within the statute is a question for the jury, depending on the circumstances of the particular case. Where the dead body of a child was thrown into a field, over a wall 4½ feet high separating the yard of a public house from the field,

and a person looking over the wall from the yard might have seen the body, but persons going through the yard or using it in the ordinary way would not, it was held, on a case reserved, that this was an offence within the statute: R. v. Brown, 11 Cox, 517, Warb. Lead. Cas. 94.

Although the fact of the prisoner having placed the dead body of her newly-born child in an unlocked box is not of itself sufficient evidence of a criminal concealment of birth, yet all the attendant circumstances of the case must be taken into consideration in order to determine whether or not an offence has been committed: R. v. Cook, 11 Cox, 542.

In order to convict a woman of attempting to conceal the birth of her child, under s. 711, *post*, a dead body must be found and identified as that of the child of which she is alleged to have been delivered. A woman, apparently pregnant, while staying at an inn, at *Stafford*, received by post, on the *28th of August, 1870, a Rugby newspaper with the Rugby post mark upon it.* On the same day, her appearance and the state of her room seemed to indicate that she had been delivered of a child. She left for Shrewsbury next morning, carrying a parcel. That afternoon a parcel was found in a waiting room at *Stafford* station. It contained the dead body of a newly-born child, wrapped in *a Rugby Gazette, of August 27th, bearing the Rugby postmark.* There is a railway from Stafford to Shrewsbury, but no proof was given of the woman having been at Stafford Station: *Held*, that this evidence was not sufficient to identify the body found as the child of which the woman was said to have been delivered, and would not therefore justify her conviction for concealment o birth: R. v. Williams, 11 Cox, 684.

Where death not proved conviction is illegal: R. v. Bell, 8 Ir. R. C. L. 542.

A, being questioned by a police-constable about the concealment of a birth, gave an answer which caused the

officer to say to her, "It might be better for you to tell the truth and not a lie." *Held*, that a further statement made by A. to the policeman after the above inducement was inadmissible in evidence against her, as not being free and voluntary. A. was taken into custody the same day, placed with two accomplices, B. and C. and charged with concealment of birth. All three then made statements. *Held*, that those made by B. and C. could not be deemed to be affected by the previous inducement to A. and were, therefore, admissible against B. and C. respectively, although that made by A. was not so. The prisoners were sent for trial, but before their committal they received the formal caution from the magistrate as to anything they might wish to say. Whereupon A. made a statement which was taken down in writing, as usual, and attached to the deposition: *Held*, that this latter statement of A. might be read at the trial as evidence against herself. Mere proof that a woman was delivered of a child and allowed two others to take away its body is insufficient to sustain an indictment against her for concealment of birth: R. v. Bate, 11 Cox, 686.

A woman delivered of a child born alive endeavoured to conceal the birth thereof by depositing the child while alive in a corner of a field, when it died from exposure. *Held*, that she could not be indicted under the above section: R. v. May, 16 L. T. 362.

The prisoner who lived alone had placed the dead body of her new born child behind a trunk in the room she occupied, between the trunk and the wall. On being charged with having had a child she at first denied it. *Held*, sufficient to support a conviction for concealment of birth: R. v. Pichè, 30 U. C. C. P. 409.

See other cases under s. 714 *post*, and R. v. Handley 13 Cox, 79.

PART XIX.

BODILY INJURIES, AND ACTS AND OMISSIONS CAUSING DANGER TO THE PERSON.

Wounding with Intent.

241. Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to maim, disfigure or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, unlawfully by any means wounds or causes any grievous bodily harm to any person, or shoots at any person, or, by drawing a trigger, or in any other manner, attempts to discharge any kind of loaded arms at any person. R. S. C. c. 162, s. 13 (*Amended*); 24-25 V. c. 100, s. 18 (Imp.).

The repealed clause contained the words "unlawfully *and maliciously* by any means *whatsoever*."

"Loaded arms" defined, s. 3: *see* R. v. Latimer, 16 Cox, 70, Warb. Lead. Cas. 117; and R. v. Clarence, Warb. Lead. Cas. 130, 22 Q. B. D. 23.

An indictment under the English clause charging that the prisoner did "inflict" grievous bodily harm instead of "cause" is sufficient: R. v. Bray, 15 Cox, 197.

Indictment for wounding with intent to maim.—that J. S. on one J. N. unlawfully did wound, with intent in so doing him the said J. N. thereby there to maim (*add count stating "with intent to disfigure" and one "with intent to disable." Also one stating "with intent to do some grevious bodily harm." And if necessary, one "with intent to prevent (or resist) the lawful apprehension of.*) *See* form F. F. schedule one under s. 611 *post*, in which the words "did actual bodily harm" are quite wrong.

An indictment under the repealed act, charging the act to have been done "feloniously, wilfully and maliciously" was held bad, the words of the statute, then being "unlawfully and maliciously:" R. v. Ryan, 2 Moo. 15. In practice the first count of the indictment is generally for wounding with intent to murder. These counts are allowed to be joined in the same indictment.

This clause includes every wounding done without lawful excuse with any of the intents mentioned in it; from the act itself malice will be inferred: R. v. Latimer, 17 Q. B. D. 359, Warb. Lead. Cas. 117, and cases there cited.

The instrument or means by which the injury was inflicted need not be stated in the indictment, and if stated need not be proved as laid: R. v. Briggs, 1 Moo. 318. And in the same case it was held that upon an indictment which charged a wound to have been inflicted by striking with a stick and kicking with the feet, proof that the wound was caused either by striking with a stick or kicking was sufficient, though it was uncertain by which of the two the injury was inflicted.

In order to convict of the offence the intent must be proved as laid; hence the necessity of several counts charging the offence to have been committed with different intents. If an indictment alleged that the defendant cut the prosecutor with intent to disable, and to do some grievous bodily harm, it will not be supported by proof of an intention to prevent a lawful apprehension: R. v. Duffin, R. &. R. 365; R. v. Boyce, 1 Moo. 29; unless for the purpose of affecting his escape the defendant also harboured one of the intents stated in the indictment: R. v. Gillow, 1 Moo. 85; for where both intents exist it is immaterial which is the principal and which the subordinate. Therefore where, in order to commit a rape, the defendant cut the private parts of an infant, and thereby did her grievous bodily harm, it was holden that he was guilty of cutting with intent to do her grievous bodily harm, notwithstanding his principal object was to commit the rape: R. v. Cox, R. & R. 362. So also, if a person wound another in order to rob him, and thereby inflict grievous bodily harm, he may be convicted on a count charging him with an intent to do grievous bodily harm.

An indictment charging the prisoner with wounding A. with intent to do him grievous bodily harm, is good although it is proved that he mistook A. for somebody else, and that he intended to wound another person: R. v. Stopford, 11 Cox, 643: *see* R. v. Hunt 1 Moo. 93.

The prisoner was indicted for shooting at A. with intent to do him grievous bodily harm. He fired a pistol into a group of persons who had assaulted and annoyed him, among whom was A., without aiming at A. or any one in particular, but intending generally to do grievous bodily harm, and wounded A. *Held*, on a case reserved, that he was rightly convicted: R. v. Fretwell, L. & C. 443.

With respect to the intents mentioned in the statute it may be useful to observe that to *maim* is to injure any part of a man's body which may render him in fighting less able to defend himself, or annoy his enemy; to disfigure is to do some external injury which may detract from his personal appearance; and to disable is to do something which creates a permanent disability, and not merely temporary injury: Archbold, 666. It is not necessary that a grievous bodily harm should be either permanent or dangerous; if it be such as seriously to interfere with health or comfort that is sufficient; and, therefore, where the defendant cut the private parts of an infant, and the wound was not dangerous, and was small, but bled a good deal, and the jury found that it was a grievous bodily harm, it was holden that the conviction was right: R. v. Cox, R. & R. 362.

Where the intent laid is to prevent a lawful apprehension it must be shown that the arrest would have been lawful; and where the circumstances are not such that the party must know why he is about to be apprehended it must be proved that he was apprised of the intention to apprehend him: Archbold, 667.

While the defendant was using threatening language to a third person a constable in plain clothes came up and

interfered. The defendant struck the constable with his fist, and there was a struggle between them. The constable went away for assistance, and was absent for an hour; he changed his plain clothes for his uniform and returned to defendant's house with three other constables. They forced the door and entered the house. The defendant refused to come down, and threatened to kill the first man who came up to take him. The constables ran upstairs to take him, and he wounded one of them in the struggle that took place. *Held*, upon a case reserved, that the apprehension of the prisoner at the time was unlawful, and that he could not be convicted of wounding the constable with intent to prevent his lawful apprehension: R. v. Marsden, 11 Cox, 90.

Upon an indictment for an assault with intent to do grievous bodily harm a plea of guilty to a common assault may be received if the prosecution consents: R. v. Roxburgh, 12 Cox, 8.

Upon an indictment for any offence under this clause the jury may find a verdict of guilty of an attempt to commit it, s. 711.

A verdict of common assault may also be found, s. 713.

And, if the prosecutor fail in proving the intent, the defendant may be convicted of unlawfully wounding, and sentenced under the next section.

And where three are indicted for malicious wounding with intent to do grievous bodily harm the jury may convict two of the offence under s. 241, and the third of unlawfully wounding under s. 242: R. v. Cunningham, Bell, 72.

Where a prisoner was indicted for feloniously wounding with intent to do grievous bodily harm: *Held*, that the intention might be inferred from the act: R. v. LeDante, 2 G. & O. (N. S.) 401.

L. was tried on an indictment under 32 & 33 V. c. 20, containing four counts. The first charged that he did

unlawfully, etc., kick, strike, wound and do grievous bodily harm to W., with intent, etc., to maim; the second charged an assault, as in first, with intent to disfigure; the third charged intent to disable; the fourth charged the intent to do some grievous bodily harm. The prisoner was found guilty of a common assault. *Held*, that L. was rightly convicted, s. 51 of the Act, 32 & 33 V. c. 20, authorizing such conviction: R. v. Lackey, 1 P. & B. (N. B.) 194.

An indictment for doing grievous bodily harm, which alleged that the prisoner did "feloniously" stab, cut and wound, etc., instead of alleging, in the terms of the 17th section of 32 & 33 V. c. 20, that he did "unlawfully" and "maliciously" stab, etc., is good: a defective indictment is amendable under 32 & 33 V. c. 29, s. 32, and any objection to it for any defect apparent on the face thereof must be taken by demurrer or motion to quash the indictment before the defendant has pleaded and not afterwards: R. v. Flynn, 2 P & B. (N. B.) 321.

UNLAWFUL WOUNDING.

242. Every one is guilty of an indictable offence and liable to *three years'* imprisonment who unlawfully wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument. R. S. C. c. 162, s. 14 (*Amended*). 24-25 V. c. 100, s. 20 (Imp.).

The repealed clause contained the words "and maliciously." Fine, s. 958.

Indictment for unlawfully wounding.— one J. N unlawfully did wound (*wound or inflict any grievous bodily harm upon*). (*Add a count charging that the defendant "did inflict grievous bodily harm upon J. N.*")—

The act must have been done maliciously. Malice would in most cases be presumed: 3 Burn, 754; R. v. Martin, 14 Cox, 633, 8 Q. B. D. 54.

See remarks under preceding section and R. v. Martin, 8 Q. B. D. 54.

But general malice alone constitutes the offence. Malice against the person wounded is not a necessary in-

gredient of the offence. So if any one, intending to wound A., accidentally wounds B., he is guilty of an offence under this clause: R. v. Latimer, 16 Cox, 70, 17 Q. B. D. 359.

Upon an indictment for assaulting, beating, wounding and inflicting grievous bodily harm, the prisoner may be convicted of a common assault: R. v. Oliver, Bell, 287.

Upon an indictment charging that the prisoner "unlawfully and maliciously did assault one H. R., and did then and there unlawfully and maliciously kick and wound him, the said H. R., and thereby then and there did unlawfully and maliciously inflict upon the said H. R. grievous bodily harm, against" the jury may return a verdict of guilty of a common assault merely: R. v. Yeadon, L. & C. 81.

In R. v. Taylor, 11 Cox, 261, the indictment was as follows:— "That Taylor on unlawfully and maliciously did wound one Thomas and the jurors that the said Taylor did unlawfully and maliciously inflict grievous bodily harm upon the said Thomas."

Upon this indictment the jury returned a verdict of common assault, and upon a case reserved the conviction was affirmed.

In R. v. Canwell, 11 Cox, 263, a verdict of common assault was also given upon an indictment containing only one count for maliciously and unlawfully inflicting grievous bodily harm, and the conviction was affirmed upon a case reserved.

The defendant may be found guilty of the attempt to commit the offence charged, s. 711.

To cause any one by threats of violence to do an act, under the impulsion of fright, by which he is grievously injured is a criminal offence under this section: R. v. Halliday, 6 Times, L. R. 109.

A man does not inflict grievous bodily harm on his wife within the meaning of this section by communicating to

her a venereal disease: R. v. Clarence, 16 Cox, 511, 22 Q. B. D. 23, Warb. Lead. Cas. 130; *see* Hegarty v. Shine, 14 Cox, 124. A previous conviction for an assault bars an indictment for unlawful wounding based on the same facts: R. v. Miles, 17 Cox, 9.

SHOOTING AT HER MAJESTY'S VESSELS—WOUNDING AN OFFICER ON DUTY.

243. Every one is guilty of an indictable offence and liable to *fourteen years'* imprisonment who wilfully—

(*a*) Shoots at any vessel belonging to Her Majesty or in the service of Canada; or

(*b*) Maims or wounds *any public officer* engaged in the execution of his duty or any person acting in aid of such officer. R. S. C. c. 32, s. 213; c. 34, s. 99 (*Amended*).

"Public officer" defined, s. 3. The punishment is altered. The repealed enactments applied only to customs or inland revenue officers.

CHOKING OR DRUGGING WITH INTENT.

244. Every one is guilty of an indictable offence and liable to *imprisonment for life* and to be whipped, who with intent thereby to enable himself or any other person to commit, or with intent thereby to assist any other person in committing any indictable offence—

(*a*) By any means whatsoever, attempts to choke, suffocate or strangle any other person, or by any means calculated to choke, suffocate or strangle, attempts to render any other person insensible, unconscious or incapable of resistance; or

(*b*) Unlawfully applies or administers to, or causes to be taken by, or attempts to apply or administer to, or attempts or causes to be administered to or taken by, any person, any chloroform, laudanum or other stupefying or overpowering drug, matter or thing. R. S. C. c. 162, ss. 15 & 16 (*Amended*). 24-25 V. c. 100, ss. 21, 22. 26-27 V. c. 44 (Imp.).

Indictment for attempting to choke.— unlawfully did attempt by then (*state the means*), to choke, suffocate and strangle one J. N. (*suffocate or strangle any person, or*), with intent thereby then to enable him, the said A. B., the monies, goods, and chattels of the said J. N., from the person of the said J. N., unlawfully to steal. (*Add counts varying the statement of the overt acts, and of the intent.*)

This clause is new, and is directed against those attempts at robbery which have been accompanied by violence to the throat: Greaves, Cons. Acts, 54.

In certain cases a verdict of common assault may be given upon an indictment for this offence, s. 713.

Indictment for attempting to drug.— unlawfully did apply and administer to one J. N. (*or cause*) certain chloroform with intent thereby (*intent as in the last precedent*).

If it be not certain that it was chloroform, or laudanum, that was administered, add a count or counts stating it to be "a certain stupefying and overpowering drug and matter to the jurors aforesaid unknown." Add also counts varying the intent if necessary.

As to what constitutes an "administering, or attempting to administer": *see* remarks under s. 232, *ante*.

ADMINISTERING POISON SO AS TO ENDANGER LIFE.

245. Every one is guilty of an indictable offence and liable to *fourteen years'* imprisonment who unlawfully administers to, or causes to be administered to or taken by any other person, any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm. R. S. C. c. 162, s. 17; 24-25 V. c. 100, s. 23 (Imp.).

The words "and maliciously" were in the repealed section after "unlawfully": *see* remarks under next section, and under ss. 241 and 242, *ante*.

ADMINISTERING POISON WITH INTENT TO INJURE.

246. Every one is guilty of an indictable offence and liable to *three years'* imprisonment who unlawfully administers to, or causes to be administered to or taken by, any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve or annoy such person. R. S. C. c. 162, s. 18. 24-25 V. c. 100, s. 24 (Imp.).

The words "and maliciously" were in the repealed section after "unlawfully."

Fine, s. 958.

Under an indictment under s. 245 the jury may find the prisoner guilty of the offence provided for in s. 246.

Indictment under s. 245 for administering poison so as to endanger life.— unlawfully did administer to one J. N. (*or cause*), a large quantity, to wit, two

drachms of a certain deadly poison called white arsenic, and thereby then did endanger the life of the said J. N.

Add a count stating that the defendant "did cause to be taken by J. N. a large quantity of " and if the kind of poison be doubtful, add counts describing it in different ways, and also stating it to be "a certain destructive thing, (or a certain noxious thing) to the jurors aforesaid unknown." There should be also a set of counts stating that the defendant thereby "inflicted upon J. N. grievous bodily harm."

Administering cantharides to a woman with intent to excite her sexual passion, in order to obtain connexion with her, is an administering with intent to injure, aggrieve or annoy, within the meaning of s. 246: R. v. Wilkins, L. & C. 89.

If the poison is administered merely with intent to injure, aggrieve or annoy, which in itself would merely amount to an offence under s. 246, yet if it does, in fact, inflict grievous bodily harm, this amounts to an offence under s. 245: Tulley v. Corrie, 10 Cox, 640.

But to constitute this offence the thing administered must be noxious in itself, and not only when taken in excess: R. v. Hennah, 13 Cox, 547.

"An intent to injure, in strictness, means more than an intent to do harm. It connotes an intent to do wrongful harm": *per* Bowen, L.J., Mogul Co. v. McGregor, 23 Q. B. D. 598.

CAUSING BODILY INJURIES BY EXPLOSIVES.

247. Every one is guilty of an indictable offence and liable to *imprisonment for life* who unlawfully and by the explosion of any explosive substance burns, maims, disfigures, disables or does any grievous bodily harm to any person. R. S. C. c. 162, s. 21. 24-25 V. c. 100, s. 28 (Imp.).

The words "and maliciously" were in the repealed section after "unlawfully."

See remarks under next section.

248. Every one is guilty of an indictable offence and liable, in case (*a*) to *imprisonment for life* and in case (*b*) to *fourteen years'* imprisonment, who unlawfully—

(*a*) With intent to burn, maim, disfigure or disable any person, or to do some grievous bodily harm to any person, whether any bodily harm is effected or not—

(i) Causes any explosive substance to explode;

(ii) Sends or delivers to, or causes to be taken or received by, any person any explosive substance, or any other dangerous or noxious thing;

(iii) Puts or lays at any place, or casts or throws at or upon, or otherwise applies to, any person any corrosive fluid, or any destructive or explosive substance; or

(*b*) Places or throws in, into, upon, against or near any building, ship or vessel any explosive substance, with intent to do any bodily injury to any person, *whether or not any explosion takes place* and whether or not any bodily injury is effected. R. S. C. c. 162, ss. 22 and 23. 24-25 V. c. 100, ss. 29 & 30 (Imp.).

The words in italics are not in the Imperial Act.

"Explosive substance" defined, s. 3.

The words "and maliciously" were in the repealed section after "unlawfully."

Indictment under s. 248 for sending an explosive substance with intent, etc. unlawfully did send (*or deliver to or cause to be taken or received by*) to one J. N., a certain explosive substance and dangerous and noxious thing, to wit, two drachms of fulminating silver, and two pounds weight of gunpowder, with intent in so doing him the said J. N. thereby then to burn (*maim, disfigure or disable, or do some grievous bodily harm*). (*Add counts varying the injury and intent*).

Indictment under s. 248 for throwing corrosive fluid, with intent, etc. unlawfully did cast and throw upon one J. N. a certain corrosive fluid, to wit, one pint of oil of vitriol, with intent in so doing him the said J. N., thereby then to burn. (*Add counts varying the injury and the intent.*)

In R. v. Crawford, 1 Den. 100, the prisoner was indicted for maliciously throwing upon P. C., certain destructive matter, to wit, one quart of boiling water, with intent, etc. The prisoner was the wife of P. C., and when he was asleep she, under the influence of jealousy, boiled a quart of water, and poured it over his face and into one of his ears, and

ran off boasting she had boiled him in his sleep. The injury was very grievous. The man was for a time deprived of sight, and had frequently lost for a time the hearing of one ear. The jury having convicted, the judges held that the conviction was right.

In R. v. Murrow, 1 Moo. 456, it was held, where the defendant threw vitriol in the prosecutor's face, and so wounded him, that this wounding was not the "wounding" meant by the 9 Geo. IV. c. 31, s. 12; but it would now fall under this statute. The question of intent is for the jury: R. v. Saunders, 14 Cox, 180.

Indictment under s. 247 for burning by gunpowder.—

unlawfully, by the explosion of a certain explosive substance, that is to say, gunpowder, one J. N. did burn (*Add counts varying the statement of the injury, according to circumstances.*)

Indictment charged defendants with having unlawfully, knowingly and wilfully deposited in a room in a lodging or boarding house (described) in the city of Halifax, near to certain streets or thoroughfares and in close proximity to divers dwelling houses, excessive quantities of a dangerous and explosive substance called dynamite, in excessive and dangerous quantities, by reason whereof the inhabitants, etc., were in great danger: *Held*, good, without alleging carelessness, or that the quantities deposited were so great that care would not produce safety: R. v. Holmes, 5 R. & G. (N. S.) 498.

SETTING SPRING GUNS, TRAPS, ETC., ETC.

249. 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 gun or trap usually set or placed with the intent of destroying vermin or *noxious animals*. R. S. C. c. 162, s. 24. 24-25 V. c. 100, s. 31 (Imp.).

The last three words are new: *see* Wootton v. Dawkins, 2 C. B. N. S. 412; Bird v. Holbrook, 4 Bing. 628; Ilott v. Wilkes, 3 B. & Ald. 304; Jordin v. Crump 8 M. & W. 782.

Fine, s. 958.

The English Act has the following additional proviso: "Provided also that nothing in this section shall be deemed to make it unlawful to set or place or cause to be set or placed, or to be continued set or placed, from sunset to sunrise, any spring-gun, man-trap, or other engine which shall be set or placed, or caused or continued to be set or placed, in a dwelling-house for the protection thereof."

Indictment.— unlawfully did set and place, and caused to be set and placed, in a certain garden situate a certain spring-gun which was then loaded and charged with gunpowder and divers leaden shot, with intent that the said spring-gun, so loaded and charged as aforesaid, should inflict grievous bodily harm upon any trespasser who might come in contact therewith.

Prove that the defendant placed or continued the spring-gun loaded in a place where persons might come in contact with it; and if any injury was in reality occasioned state it in the indictment, and prove it as laid. The intent can only be inferred from circumstances, as the position of the gun, the declarations of the defendant, and so forth; any injury actually done will, of course, be some evidence of the intent: Archbold.

A dog-spear set for the purpose of preserving the game is not within the statute, if not set with the intention to do grievous bodily harm to human beings: 1 Russ. 1052.

The instrument must be calculated to destroy life or cause grievous bodily harm, and proved to be such; and, if the prosecutor, while searching for a fowl among some bushes

in the defendant's garden, came in contact with a wire which caused a loud explosion, whereby he was knocked down, and slightly injured about the face, it was held that the case was not within the statute, as it was not proved what was the nature of the engine or substance which caused the explosion, and it was not enough that the instrument was one calculated to create alarm: 1 Russ. 1053.

INJURIES TO RAILWAYS, ETC.

250. Every one is guilty of an indictable offence and liable to *imprisonment for life* who unlawfully—

(*a*) With intent to injure or to endanger the safety of any person travelling or being upon any railway,

(i) Puts or throws upon or across such railway any wood, stone, or other matter or thing;

(ii) Takes up, removes or displaces any rail, railway switch, sleeper or other matter or thing belonging to such railway, or injures or destroys any track, bridge or fence of such railway, or any portion thereof;

(iii) Turns, moves or diverts any point or other machinery belonging to such railway;

(iv) Makes or shows, hides or removes any signal or light upon or near to such railway;

(v) Does or causes to be done any other matter or thing with such intent; or

(*b*) Throws, or causes to fall or strike at, against, into or upon any engine, tender, carriage or truck used and in motion upon any railway any wood, stone or other matter or thing, with intent to injure or endanger the safety of any person being in or upon such engine, tender, carriage or truck, or in or upon any other engine, tender, carriage or truck of any train of which such first mentioned engine, tender, carriage or truck forms part. R. C. S. c. 162, ss. 25 & 26. 24-25 V. c. 100, s. 32-33 (Imp.).

The words "and maliciously" were in the repealed section after "unlawfully."

See remarks under next section.

ENDANGERING SAFETY OF PERSON ON RAILWAY.

251. Every one is guilty of an indictable offence and liable to *two years'* imprisonment who, by any unlawful act, or by any wilful omission or neglect of *duty*, endangers or causes to be endangered the safety of any person conveyed or being in or upon a railway, or aids or assists therein. R. S. C. c. 162, s. 27. 24-25 V. c. 100, s. 34 (Imp.).

Fine, s. 958. A verdict of attempt may be given, if the evidence warrants it, s. 711.

The words "of duty" in this last section are not in the English Act.

Indictment under s. 251 for endangering by wilful neglect the safety of railway passengers. that J. S. on unlawfully did, by a certain wilful omission and neglect of his duty, that is to say, by then wilfully omitting and neglecting to turn certain points in and upon a certain railway called in the parish which points it was then the duty of him, the said J. S., to turn, endanger the safety of certain persons then conveyed and being in and upon the said railway . (*Add counts varying the statement of defendant's duty, etc.*)

An acquittal of the offence under s. 250 was no bar to an indictment for the offence under s. 251: R. v. Gilmore, 15 Cox, 85; but now it would be as a verdict for the offence provided for in s. 251 can be given on an indictment under s. 250: s. 713, *post*.

See post, remarks under s. 489. The forms of indictments there given may form a guide for indictments under the present section.

Prove that it was the duty of the defendant to turn the points; that he wilfully omitted and neglected to do so; and that, by reason of such omission and neglect, the safety of the passengers or other persons conveyed or being on the railway was endangered (which words will include, not only passengers, but officers and servants of the railway company): Archbold.

In R. v. Holroyd, 2 M. & Rob. 339, it appeared that large quantities of earth and rubbish were found placed across the railway, and the prosecutor's case was that this had been done by the defendant wilfully and in order to obstruct the use of the railway; and the defendant's case was that the earth and rubbish had been accidentally dropped on the railway: Maule, J., told the jury, that if the rubbish had been dropped on the rails by mere accident the defendant was not guilty; but "it was by no

means necessary, in order to bring the case within this Act, that the defendant should have thrown the rubbish on the rails expressly with the view to upset the train of carriages. If the defendant designedly placed these substances, having a tendency to produce an obstruction, not caring whether they actually impeded the carriages or not, that was a case within the Act." And on one of the jury asking what was the meaning of the term "wilfully," then used in the statute, the learned judge added "he should consider the act to have been *wilfully* done, if the defendant *intentionally* placed the rubbish on the line, knowing that it was a substance likely to produce an obstruction; if, for instance, he had done so in order to throw upon the company's officers the necessary trouble of removing the rubbish." This decision may afford a safe guide to the meaning of the term *wilful* in this clause, 251: Greaves, Cons. Acts, 62. In the other clauses the word *wilfully* is now replaced by *unlawfully*.

On s. 250 (*b*) Greaves says:—"The introduction of the word *at* extends this clause to cases where the missile fails to strike any engine or carriage. Other words were introduced to meet cases where a person throws into or upon one carriage of a train, when he intended to injure a person being in another carriage of the same train, and similar cases. In R. v. Court, 6 Cox, 202, the prisoner was indicted for throwing a stone against a tender with intent to endanger the safety of persons on the tender, and it appeared that the stone fell on the tender but there was no person on it at the time, and it was held that the section was limited to something thrown upon an engine or carriage having some person therein, and consequently that no offence within the statute was proved; but now this case would clearly come within this clause."

In R. v. Bradford, Bell, 268, it was held that a railway not yet opened for passengers, but used only for the carriage of materials and workmen, is a railway within the statute.

In R. v. Bowray, 10 Jur. 211, 1 Russ. 1058, on an indictment for throwing a stone on a railway so as to endanger the safety of passengers, it was held that the intention to injure is not necessary, if the act was done wilfully, and its effect be to endanger the safety of the persons on the railway.

It is not necessary that the defendant should have entertained any feeling of malice against the railway company, or against any person on the train; it is quite enough to support an indictment under the statute if the act was done mischievously, and with a view to cause an obstruction of a train: R. v. Upton, 5 Cox, 298.

Two boys went upon premises of a railway company, and began playing with a heavy cart which was near the line. Having started the cart it ran down an embankment by its own impetus. One boy tried to divert its course; the other cried to him "let it go." The cart ran on without pushing until it passed through a hedge, and a fence of posts and rails, and over a ditch on to the railway; it rested so close to the railway lines as to obstruct any carriages passing upon them. The boys did not attempt to remove it: *Held*, that as the first act of moving the cart was a trespass, and therefore an unlawful act, and as the jury found that the natural consequence of it was that the cart ran through the hedge and so on to the railway, the boys might be properly convicted: R. v. Monaghan, 11 Cox, 608.

Indictment under s. 250 (b). that on at A. B. unlawfully did throw (*or cause to fall or strike against, into or upon*) upon a certain carriage (*engine, tender, carriage, or truck*), then and there used upon a certain railway there, called a certain large piece of wood (*any wood, stone, or other matter or thing*) with intent thereby then and there to endanger the safety of one C. D., then and there being in (*in or upon*) the said carriage (*engine, tender, carriage or truck*): *see* a form in schedule one, *post*, form F. F., under s. 611.

CAUSING INJURY BY NEGLIGENCE.

252. Every one is guilty of an indictable offence and liable to *two years'* imprisonment who, by any unlawful act, or by doing negligently or omitting to do any act which it is his duty to do, causes grievous bodily injury to any other person. R. S. C. c. 162, s. 33.

Fine, s. 958.

This clause is not in the English Act. It is nearly in the same terms as s. 251, except that this last one applies only to passengers by railway endangered by the unlawful act or neglect, or omission of duty.

An injury resulting from an omission does not subject the person causing it to punishment unless such omission be unlawful. An omission is deemed unlawful whensoever it is a breach of some duty imposed by law, or gives cause to a civil action: 2nd Report Cr. L. Com. 14 May, 1846; *see* R. v. Instan, [1893], 1 Q. B. 450.

Mr. Starkie, one of the English Commissioners, in a separate report, objected strongly to such an enactment, and the framers of the Imperial Statutes have thought proper to leave it out.

This section uses the term "bodily injury" instead of "bodily harm" used in the next section and in s. 241, *et seq.* Did the drafter intend to make a distinction between the two? Probably not.

INJURY BY FURIOUS DRIVING.

253. Every one is guilty of an indictable offence and liable to *two years'* imprisonment who, having the charge of any carriage or vehicle, by wanton or furious driving, or racing or other wilful misconduct, or by wilful neglect, does or causes to be done any bodily harm to any person. R. S. C. c. 162, s. 28. 24-25 V. c. 100, s. 35 (Imp.).

Indictment.— being then a coachman, and then having charge of a certain carriage and vehicle called an omnibus, unlawfully did, by the wanton and furious driving of the said carriage and vehicle by him the said (*defendant*) cause certain bodily harm to be done to one J. N.

This section includes all carriages and vehicles of every description, both public and private. *Wilful* means *voluntary*: Greaves, Cons. Acts, 63.

See remarks under s. 251 as to the word "wilful," and under s. 262 as to the words "bodily harm."

PREVENTING ANY SHIPWRECKED PERSON FROM SAVING HIS LIFE. (*As amended in 1893.*)

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

(*a*) Who prevents or impedes, or endeavours to prevent or impede any shipwrecked person in his endeavour to save his life; or

(*b*) Who without reasonable cause prevents or impedes, or endeavours to prevent or impede, any person in his endeavour to save the life of any shipwrecked person. R. S. C. c. 81, s. 36. 24-25 V. c. 100, s. 17 (Imp.).

"Shipwrecked person" defined, s. 3.

Indictment.— that before and at the time of the committing of the offence hereinafter mentioned, to wit, on a certain ship was wrecked, stranded and cast on shore, and that A.B., on the day and year aforesaid, did unlawfully prevent and impede (*or endeavour to prevent and impede*) one C.D., a shipwrecked person then endeavouring to save his life from the said ship so wrecked, stranded, and cast on shore, in his endeavours to save his life.

LEAVING HOLES IN THE ICE, ETC., ETC., UNGUARDED.

255. Every one is guilty of an offence and liable, on summary conviction, to a fine or imprisonment with or without hard labour (or both) who—

(*a*) Cuts or makes, or causes to be cut or made, any hole, opening, aperture or place, of sufficient size or area to endanger human life, through the ice on any navigable or other water open to or frequented by the public, and leaves such hole, opening, aperture or place, while it is in a state dangerous to human life, whether the same is frozen over or not, uninclosed by bushes or trees or unguarded by a guard or fence of sufficient height and strength to prevent any person from accidentally riding, driving, walking, skating or falling therein; or

(*b*) Being the owner, manager or superintendent of any abandoned or unused mine or quarry or property upon or in which any excavation has been or is hereafter made, of a sufficient area and depth to endanger human life, leaves the same unguarded and uninclosed by a guard or fence of sufficient height and strength to prevent any person from accidentally riding, driving, walking or falling thereinto; or

(*c*) Omits within five days after conviction of any such offence to make the inclosure aforesaid or to construct around or over such exposed opening or excavation a guard or fence of such height and strength.

2. Every one whose duty it is to guard such hole, opening, aperture or place is guilty of manslaughter if any person loses his life by accidentally falling therein while the same is unguarded. R. S. C. c. 162, ss. 29, 30, 31 & 32.

This sub-section (*b*) provides for what would be manslaughter under s. 220, or at common law. An analogous enactment in England is contained in 50 & 51 V. c. 19.

SENDING OR TAKING AN UNSEAWORTHY SHIP TO SEA.

256. Every one is guilty of an indictable offence and liable to *five years'* imprisonment who—

Sends, or attempts to send, or is a party to sending, a ship registered in Canada to sea, or on a voyage on any of the inland waters of Canada, or on a voyage from any port or place on the inland waters of Canada to any port or place on the inland waters of the United States, or on a voyage from any port or place on the inland waters of the United States to any port or place on the inland waters of Canada in such unseaworthy state, by reason of overloading or underloading or improper loading, or by reason of being insufficiently manned, or from any other cause, that the life of any person is likely to be endangered thereby, unless he proves that he used all reasonable means to insure her being sent to sea or on such voyage in a seaworthy state or that her going to sea or on such voyage in such unseaworthy state was, under the circumstances, reasonable and justifiable. 52 V. c. 22, s. 3.

257. Every one is guilty of an indictable offence and liable to five years' imprisonment who, being the master of a ship registered in Canada, knowingly takes such ship to sea, or on a voyage on any of the inland waters of Canada, or on a voyage from any port or place on the inland waters of Canada to any port or place on the inland waters of the United States, or on a voyage from any port or place in the United States to any port or place on the inland waters of Canada, in such unseaworthy state, by reason of overloading or underloading or improper loading, or by reason of being insufficiently manned, or from any other cause, that the life of any person is likely to be endangered thereby, unless he proves that her going to sea or on such voyage in such unseaworthy state was, under the circumstances, reasonable and justifiable. 52 V. c. 22, s. 3. 39-40 V. c. 80 (Imp.).

Fine, s. 958.

By s. 546, as amended in 1893, no prosecution is allowed for the offences under s. 256 and s. 257 without the consent of the Minister of Marine and Fisheries. This consent must precede the information or complaint before the magistrate, when prosecution begins by information or complaint.

PART XX.

ASSAULTS.

Definition.

258. 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.*

As to the words in italics: *see* R. v. Clarence, 16 Cox, 511, 22 Q. B. D. 23, Warb. Lead. Cas. 130. This definition covers an assault and battery, as well as a simple assault: *see post* remarks under ss. 262 and 265.

Indecent Assaults on Females.

259. Every one is guilty of an indictable offence and liable to *two years'* imprisonment, and to be whipped, who—

(*a*) Indecently assaults any female; or

(*b*) Does anything to any female by her consent which but for such consent would be an indecent assault, such consent being obtained by false and fraudulent representations as to the nature and quality of the act. 53 V. c. 37, s. 12. 24-25 V. c. 100, s. 52 (Imp.).

Fine, s. 958

See s. 685, *post*, as to evidence of young children upon a charge of an indecent assault; also s. 25 of *The Canada Evidence Act 1893*, and s. 261.

Indictment.— one A. D. a female, unlawfully and indecently did assault, and her, the said A. D. did then beat, wound and ill treat, and other wrongs to the said A. D. did, to the great damage of the said A. D.

Upon the trial of the prisoner, a school teacher, for an indecent assault upon one of his scholars, it appeared that he forbade the prosecutrix telling her parents what had happened, and they did not hear of it for two months. After the prosecutrix had given evidence of the assault evidence was tendered of the conduct of the prisoner towards her subsequent to the assault: *Held*, that the evidence was admissible as tending to show the indecent

quality of the assault, and as being, in effect, a part or continuation of the same transaction as that with which the prisoner was charged: R. v. Chute, 46 U. C. Q. B. 555; *see* R. v. Drain, under s. 262, *post*.

As to sub-section (*b*) of s. 259, *see* R. v. Bennett, 4 F. & F. 1105; R. v. Case, 1 Den. 580; R. v. Clarence, 16 Cox, 511, 22 Q. B. D. 23, Warb. Lead. Cas. 130.

INDECENT ASSAULTS ON MALES.

260. Every one is guily of an indictable offence and liable to *ten years'* imprisonment and to be whipped who assaults any person with intent to commit sodomy, or who, being a male, indecently assaults any other male person. R. S. C. c. 157, s. 2. (*Amended*).

Attempt to commit sodomy is provided for by s. 175.

See ante, notes under ss. 174, 175, 178, and *post*, under s. 261.

An indictment under this clause is defective even after verdict if it does not aver in express terms that the accused and the assaulted party are males: R. v. Montminy on a case reserved, Q. B. Quebec, May, 1893.

See form, *ante*, under s. 178.

CONSENT OF CHILDREN UNDER 14 NO DEFENCE.

261. It is no defence to a charge or indictment for any indecent assault on a young person under the age of fourteen years to prove that he or she consented to the act of indecency. 53 V. c. 37, s. 7. 43-44 V. c. 45, s. 2 (Imp.).

This enactment applies to assaults on males as well as on females; R. v. Mehegan, 7 Cox, 145; R. v. Johnson, L. & C. 632, and that class of cases are not now law; *see* R. v. Brice, 7 Man. L. R. 627.

This enactment applies to all offences which include an indecent assault.

ACTUAL BODILY HARM.

262. Every one who commits any assault which occasions actual bodily harm is guilty of an indictable offence and liable to *three years'* imprisonment. R. S. C. c. 162, s. 35.

Fine, s. 958.

In R. v. Clarence, 16 Cox, 511, 22 Q. B. D. 23, Warb. Lead. Cas. 130, it was held that a husband who communicates a venereal disease to his wife cannot be indicted for causing her actual bodily harm.

Indictment for an assault occasioning actual bodily harm. — that J. S., on in and upon one J. N. did make an assault, and him the said J. N. did then beat, wound and ill-treat, thereby then occasioning to the said J. N. actual bodily harm, and other wrongs to the said J. N. then did, to the great damage of the said J. N.

The defendant may be convicted of a common assault upon an indictment for occasioning actual bodily harm: R. v. Oliver, Bell, 287; R. v. Yeadon, L. & C. 81; s. 713, *post*.

The intent to do bodily harm, or premeditation, is not necessary to convict upon an indictment under this section; thus a man who commits an assault the result of which is to produce bodily harm is liable to be convicted under this section, though the jury find that the bodily harm formed no part of the prisoner's intention, and was done without premeditation, under the influence of passion: R. v. Sparrow, Bell, 298.

The actual bodily harm mentioned in this section would include any hurt or injury calculated to interfere with the health or comfort of the prosecutors; it need not be an injury of a *permanent* character, nor need it amount to what would be considered to be *grievous* bodily harm.

On an indictment for assault and battery occasioning actual bodily harm the evidence proved only a common assault or an assault and battery: *Held*, on a case reserved, that the accused was not a competent witness on his own behalf under c. 174, s. 216.

A statement by the man assaulted, made immediately after the assault and in presence of the accused, was held admissible: R. v. Drain, 8 Man. L. R. 535.

AGGRAVATED ASSAULTS, ETC.

263. Every one is guilty of an indictable offence and liable to *two years'* imprisonment who—

(*a*) Assaults any person with intent to commit any indictable offence; or

(*b*) Assaults any public or peace officer engaged in the execution of his duty, or any person acting in aid of such officer; or

(*c*) Assaults any person with intent to resist or prevent the lawful apprehension or detainer of himself, or of any other person, for any offence; or

(*d*) Assaults any person in the lawful execution of any process against any lands or goods, or in making any lawful distress or seizure, or with intent to rescue any goods taken under such process, distress or seizure. R. S. C. c. 162 s. 34.

(*e*) On any day whereon any poll for any election, parliamentary or municipal, is being proceeded with, within the distance of two miles from the place where such poll is taken or held, assaults or beats any person. R. S. C. c. 8, s. 77.

Section 77 of c. 8, R. S. C. (unrepealed), of which the above s-s. (*e*) is a partial re-enactment, applies only to battery, and the prosecution if taken under that Act is limited by one year, and punishable by five years, s. 951, *post*.

Fine, s. 958. "Public officer" and "peace officer" defined, s. 3.

Indictment under (*a*). in and upon one J. N. unlawfully did make an assault, and him the said J. N. did beat, wound and ill-treat with intent him the said J. N. unlawfully to kill and murder. (*Add a count for a common assault*).

Every attempt to commit an offence against the person of an individual without his consent involves an assault. Prove an attempt to commit such an offence, and prove it to have been done under such circumstances that, had the attempt succeeded, the defendant might have been convicted of the offence. If you fail proving the intent, but prove the assault, the defendant may be convicted of the common assault.

Indictment under (*b*). in and upon one J. N. then being a peace officer, to wit, a constable (*any peace officer in the execution of his duty, or any person acting in aid of*) and then being in the due execution of his duty as such constable, did make an assault, and him, the said J. N., so being in the execution of his duty as aforesaid, did then beat, wound and ill-treat, and other wrongs to the said J. N., then did, to the great damage of the said J. N. (*Add a count for a common assault.*)

Prove that J. N. was a peace officer, as stated in the indictment, by showing that he had acted as such.

It is a maxim of law that "*omnia præsumuntur rité et solenniter esse acta donec probetur in contrarium*," upon which ground it will be presumed, even in a case of murder, that a man who has acted in a public capacity or situation was duly appointed: R. v. Verelst, 3 Camp. 432; R. v. Gordon, 1 Leach, 515; R. v. Murphy, 8 C. & P. 297; R. v. Newton, 1 C. & K. 469; Taylor, on Evidence, par. 139, 431. Prove that J. N. was in the due execution of his duty, and the assault: MacFarlane v. R., 16 S. C. R. 393, and R. v. King, 18 O. R. 566; R. v. Lantz, 19 N. S. Rep. 1. If you fail in proving that J. N. was a peace officer, or that he was acting lawfully as such, the defendant may be convicted of a common assault.

The fact that the defendant did not know that the person assaulted was a peace officer, or that he was acting in the execution of his duty, is no defence: R. v. Forbes, 10 Cox, 362.

Sections 144 & 263 (*b*) ought to form only one: 144 s-s. 1, is for resisting or obstructing a *public* officer in the execution of his duty: punishment, ten years; 263 is for assaulting a *public* or *peace* officer in the execution of his duty: punishment, two years; then s-s. 2, s. 144, again provides for the offence of resisting or wilfully obstructing any *peace* officer in the execution of his duty: punishment, two years. Ten years for resisting a *public* officer, and, by the same clause, two years for resisting a *peace* officer. By the interpretation clause, s. 3, the expression "peace officer" includes a "Mayor, Warden, Reeve, Sheriff, Deputy Sheriff, Sheriff's officer and Justice of the peace, and also the Warden, Keeper or guard of a penitentiary, or 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."

So that, by 263, an *assault* on a Mayor, Reeve or Warden, in the execution of his duty, is punishable by *two*

years, and by 144, *obstructing* him in the execution of his duty is punishable by *ten* years.

In an indictment for obstructing a sheriff's officer in executing a writ of *fi. fa.* the writ contained a mis-statement as to the date of the judgment on which it was issued.

Held, on a case reserved, that the writ being regular on its face the sheriff was bound to execute it The error was a mere irregularity which might have been amended and the prisoner was rightly convicted: R. v. Monkman, 8 Man. L. R. 509.

Indictment under (*c*).— in and upon one J. N., did make an assault, and him, the said J. N., did then beat, wound and ill-treat with intent in so doing to resist and prevent (*resist or prevent*) the lawful apprehension of (*himself or of any other person*) for a certain offence, that is to say (*state the offence generally*). (*Count for common assault*).

It must be stated and proved that the apprehension was lawful: *see* R. v. Davis, L. & C. 64. If this and the intent be not proved a verdict of common assault may be given. But it must be remembered that resistance to an illegal arrest is justifiable, and if, in a case where a warrant is necessary and the officer making an arrest has not the warrant with him, the party whom he tries to arrest, resists and assaults him, he cannot be convicted of an assault on an officer in the due execution of his office: Codd v. Cabe, 13 Cox, 202.

Indictment under (*d*).— in and upon J. N. did unlawfully make an assault, the said J. N. then and there making in his quality of a duly appointed bailiff of a lawful seizure under authority of justice, and whilst the said J. N. was making the said lawful seizure in his said quality.

Indictment under (*e*).— in and upon one J. N., unlawfully did make an assault, on a day whereon a poll for

an election for was being proceeded with at in to wit, on and within the distance of two miles from the place where such poll was held.

KIDNAPPING.

264. Every one is guilty of an indictable offence and liable to *seven years'* imprisonment who, without lawful authority, forcibly seizes and confines or imprisons any other person within Canada, or kidnaps any other person with intent—

(*a*) to cause such other person to be secretly confined or imprisoned in Canada against his will; or

(*b*) to cause such other person to be unlawfully sent or transported out of Canada against his will; or

(*c*) to cause such other person to be sold or captured as a slave, or in any way held to service against his will.

2. Upon the trial of any offence under this section the non-resistance of the person so kidnapped or unlawfully confined thereto shall not be a defence, unless it appears that it was not caused by threats, duress or force or exhibition of force. R. S. C. c. 162, s. 46.

At common law kidnapping is a misdemeanour, punishable by fine and imprisonment: 1 Russ. 962.

The forcible stealing away of a man, woman or child from their own country, and sending them into another, was capital by the Jewish and also by the civil law. This is unquestionably a very heinous crime, as it robs the sovereign of his subjects, banishes a man from his country, and may, in its consequences, be productive of the most cruel and disagreeable hardships: 4 Blacks. 219.

By the above section transportation to a foreign country is not necessarily an ingredient in this offence.

The defendant may be found guilty of an attempt to kidnap upon an indictment for kidnapping, s. 711.

A verdict of assault may also be given if the evidence warrants it, s. 713.

Indictment.— with force and arms unlawfully an assault did make on one A. B., and did then and there, without lawful authority, unlawfully and forcibly seize and imprison the said A. B., within the Dominion of Canada (*or confine or kidnap*) with intent the said A. B. unlawfully

and forcibly to cause to be unlawfully transported out of Canada, against his will.

Held, on the trial of an indictment for kidnapping under 32 & 33 V. c. 20, s. 69, that the intent required applies to the seizure and confinement as well as to the kidnapping, and the indictment should state such intent: Cornwall v. R., 33 U. C. Q. B. 106.

COMMON ASSAULT.

265. Every one who commits a common assault is guilty of an indictable offence and liable, if convicted upon an indictment, to *one year's* imprisonment, or to a fine not exceeding one hundred dollars, and on summary conviction to a fine not exceeding twenty dollars and costs, or to two months' imprisonment with or without hard labour. R. S. C. c. 162, s. 36.

See s. 109, *ante*, as to pointing firearms at any person, and s. 258 as to definition of an assault.

Indictment for a common assault.— that C. D., on the at in and upon one A. B., an assault did make, and him the said A. B. then and there did beat, wound and ill-treat, and then and there to him other wrongs and injuries did.

A common assault may be prosecuted either by indictment or under the Summary Convictions clauses, 839, *et seq. post.*

Costs on conviction for assault, s. 834, *post.*

An assault is an attempt or offer, with force and violence, to do a corporal hurt to another, whether from malice or wantonness; as by striking at him with or without a weapon, though the party striking misses his aim; so drawing a sword, throwing a bottle or glass with intent to wound or strike, presenting a loaded gun or pistol at a person within the distance to which the gun or pistol will carry, or pointing a pitchfork at a person standing within reach, holding up one's fist at him in a threatening or insulting manner, or with such other circumstances as denote at the time an intention, coupled with a present ability, of using actual violence against his person, will amount to an assault: 1 Burn, 308.

It had been said that the presenting a gun or pistol at a person within the distance to which it will carry, though in fact not loaded, was an assault, but later authorities have held that, if it be not loaded, it would be no assault to present it and pull the trigger: 1 Burn, *loc. cit*: *see* s. 109, *ante*.

One charged with an assault and battery may be found guilty of the assault, and yet acquitted of the battery; but every battery includes an assault; therefore on an indictment for assault and battery, in which the assault is ill-laid, if the defendant be found guilty of the battery it is sufficient: 1 Hawk. 110; *see* note to R. v. Read, 1 Den. 377.

Mere words will not amount to an assault, though perhaps they may in some cases serve to explain a doubtful action: 1 Burn 309.

If a man strike at another, but at such a distance that he cannot by possibility touch him, it is no assault. But if A. advances in a threatening attitude with his fists clenched towards B., with an intention of striking him, so that his blow would have almost immediately reached B., if he had not been stopped by a third person, this would be an assault in point of law, though at the particular moment when A. was stopped he was not near enough for his blow to take effect: Stephens v. Myers, 4 C. & P. 349.

To collect a number of workmen round a person who tuck up their sleeves and aprons and threaten to break his neck if he did not go out of the place, through fear of whom he did go out, amounts to an assault. There is the intention and present ability and a threat of violence causing fear: Read v. Coker, 13 C. B. 850.

So riding after a person and obliging him to run away into a garden to avoid being beaten is an assault: Mortin v. Shoppee, 3 C. & P. 373.

Any man wantonly doing an act of which the direct consequence is that another person is injured commits an

assault at common law, though a third body is interposed between the person doing the act and the person injured. Thus to drive a carriage against another carriage in which a person is sitting, or to throw over a chair on which a person is sitting, whereby the person in the carriage or on the chair, as the case may be, is injured, is an assault. So encouraging a dog to bite, or wantonly riding over a person with a horse, is an assault: 1 Burn, 309; 1 Russ. 1021.

In R. v. Wollaston, 12 Cox, 182, Kelly, C.B., said: "If anything is done by one being upon the person of another, to make the act an assault it must be done without the consent and against the will of the person upon whom it is done. Mere submission is not consent, for there may be submission without consent, and while the feelings are repugnant to the act being done. Mere submission is totally different from consent. But in the present case there was actual participation by both parties in the act done, and complete mutuality:" and the defendant was acquitted as the boys, aged above fourteen, upon whom he was accused of having indulged in indecent practices, had been willing and assenting parties to what was done. But *see* now s. 178, *ante*.

But if resistance be prevented by fraud it is an assault. If a man, therefore, have connection with a married woman, under pretense of being her husband, he is guilty of an assault: R. v. Williams, 8 C. & P. 286; R. v. Saunders, 8 C. & P. 265; now, of rape; s. 266 *post*.

In R. v. Lock, 12 Cox, 244, upon a case reserved, it was held that the definition of an assault that the act must be *against the will* of the patient implies the possession of an active will on his part, and, therefore, the mere submission by a child of tender years (eight years old) to an indecent assault, without any active sign of dissent, the child being ignorant of the nature of the assault, does not amount to consent so as to take the offence out of the operation of criminal law.

In R. v. Woodhurst, 12 Cox, 443, on an indictment for carnal knowledge of a girl above ten years of age and under twelve, and also for an assault, it was held on the latter count that, although consent would be a defence, consent extorted by terror or induced by the influence of a person in whose power the girl feels herself, is not really such consent as will have that effect; following R. v. Day, 9 C. & P. 722; R. v. Nichol, R. & R. 130; R. v. Rosinski, 1 Moo. 19; R. v. Case, 1 Den. 580; 1 Russ. 933.

An unlawful imprisonment is also an assault for it is a wrong done to the person of a man, for which, besides the private satisfaction given to the individual by action, the law also demands public vengeance, as it is a breach of the King's peace, a loss which the State sustains by the confinement of one of its members, and an infringement of the good order of society: 4 Blacks. 518. It has been supposed that every imprisonment includes a battery, but this doctrine was denied in a recent case, where it was said by the Court that it was absurd to contend that every imprisonment included a battery: 1 Russ. 1025.

A battery in the legal acceptation of the word includes beating and wounding: Archbold, 659. Battery seemeth to be, when any injury whatsoever, be it ever so small, is actually done to the person of a man in an angry or revengeful, or rude, or insolent manner, as by spitting in his face, or throwing water on him, or violently jostling him out of the way: 1 Hawk. c. 15, s. 2. For the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stages of it, every man's person being sacred, and no other having a right to meddle with it in any, the slightest, manner: 1 Russ. 1021.

The touch or hurt must be with a hostile intention, and, therefore, a touch given by a constable's staff, for the purpose of engaging a person's attention only, is not a battery: 1 Burn, 312.

Whether the act shall amount to an assault must in every case be collected from the intention; and if the injury committed were accidental and undesigned it will not amount to a battery: 1 Russ. 1025.

Striking a horse, whereon a person is riding and whereby he is thrown, is a battery on him, and the rider is justified in striking a person who wrongfully seizes the reins of his horse, and in using all the violence necessary to make him loose his hold. A wounding is where the violence is such that the flesh is opened; a mere scratch may constitute a wounding: 1 Burn, 312.

Even a mayhem is justifiable if committed in a party's own defence. But a person struck has merely a right to *defend* himself, and strike a blow in his defence, but he has no right to revenge himself; and if, when all the danger is past, he strikes a blow not necessary he commits an assault and battery. And in no case should the battery be more than necessary for self defence: 1 Burn, 312; ss. 45, 46, 58, *ante*.

The mere offer of a person to strike another is sufficient to justify the latter's striking him; he need not stay till the other has actually struck him.

A husband may justify a battery in defence of his wife, a wife in defence of her husband, a parent in defence of his child, a child in defence of his parent, a master in defence of his servant and a servant in defence of his master; but in all these cases the battery must be such only as was necessary to the defence of the party or his relation, for if it were excessive, if it were greater than was necessary for mere defence, the prior offence will be no justification: s. 47, *ante*. So a person may lay hands upon another to prevent him from fighting, or committing a breach of the peace, using no unnecessary violence. If a man without authority attempt to arrest another illegally it is a breach of the peace, and any other person may lawfully interfere to prevent it, doing no more than is necessary for that purpose.

Churchwardens and private persons are justified in gently laying their hands on those who disturb the performance of any part of divine service, and turning them out of church: 1 Burn, 314.

A parent may in a reasonable manner chastise his child or a master his servant, or a schoolmaster his scholar, or a gaoler his prisoner, and a captain of a ship any of the crew who have mutinously or violently misconducted themselves: 1 Burn; ss. 55, 56, 58, *ante*.

So might a military officer order a moderate correction for disobedience of orders: 1 Burn, 314.

A party may justify a battery by showing that he committed it in defence of his possession, as, for instance, to remove the prosecutor out of his close or house,—or to remove a servant, who, at night, is so misconducting himself as to disturb the peace of the household,—or to remove a person out of a public house, if the party be misconducting himself, or to prevent him from entering the defendant's close or house,—to restrain him from taking or destroying his goods,—from taking or rescuing cattle, etc., in his custody upon a distress,—or to retake personal property improperly detained or taken away,—or the like: ss. 48 *et seq. ante*.

In the case of a trespass in law merely *without actual force*, the owner of the close, or house, etc., must first request the trespasser to depart, before he can justify laying his hands on him for the purpose of removing him; and even if he refuse he can only justify so much force as is necessary to remove him. But if the trespasser use force then the owner may oppose force to force; and in such a case, if he be assaulted or beaten he may justify even a wounding or mayhem in self-defence, as above mentioned. In answer to a justification in defence of his possession it may be shown that the battery was excessive, or that the party assaulted, or some one by whose authority he acted, had a right of way or other easement over the close, or the like: 1 Burn, 313.

"It should be observed with respect to an assault by a man on a party endeavouring to dispossess him of his land, that where the injury is a mere breach of a close, in contemplation of law the defendant cannot justify a battery without a request to depart; but it is otherwise where any actual violence is committed, as it is lawful in such a case to oppose force by force; therefore, if a person break down the gate, or come into a close *vi et armis*, the owner need not request him to be gone, but may lay hands on him immediately; for it is but returning violence with violence. If a person enters another's house with force and violence the owner of the house may justify turning him out, using no more force than is necessary, without a previous request to depart; but if the person enters quietly the other party cannot justify turning him out without previous request": 1 Russ. 1028; *see* ss. 53, *et seq. ante.*

It appears to have been formerly holden that a person could not be prosecuted upon one indictment for assaulting two persons, each assault being a distinct offence; but a subsequent decision has established the contrary: R. v. Benfield, 2 Burr. 984.

There is a manifest distinction between endeavouring to turn a person out of a house into which he has previously entered quietly, and resisting a forcible attempt to enter; in the first case a request to depart is necessary but not in the latter. In a criminal prosecution by the wife of O., for assault made upon her in entering her husband's house, the defence was that she had no right to enter, and that her intention was to take away property which she had no legal right to take, but *held*, on a case reserved, that this would not justify the assault, there being no previous request made of her to leave the house, nor any statement of her intention, or an attempt to take anything: R. v. O'Neill, 3 P. & B. (*N.B.*) 49.

An indictment declaring that the prisoner did "beat, wound and ill-treat" A. was held to be substantially an

indictment for a common assault: R. v. Shannon, 23 N. B. Rep. 1.

If the charge is, as under s. 864, *post*, before the magistrate on a legal complaint, and the evidence goes to prove an offence committed which he has no jurisdiction to hear and determine, as if, on a complaint of an assault, the evidence go to show that a rape or assault with intent to commit a felony has been committed, he may, if he disbelieves the evidence as to the rape or intent, convict as to the residue of it of an assault: Wilkinson v. Dutton, 3 B. & S. 821; Anon, 1 B. & Ad. 382.

In this last case Lord Tenterden held that the magistrate had *found* that the assault was not accompanied by any attempt to commit felony, and that, *quoad hoc*, his decision was final.

In R. v. Walker, 2 M. & Rob. 446, Coltman, J., gave the same interpretation to the clause.

In R. v. Elrington, 1 B. & S. 688, it was held that the magistrate's certificate of dismissal, as under s. 865, 866 *post*, is a bar to an indictment for an unlawful assault occasioning actual bodily harm, arising out of the same circumstances: *see* Wemyss v. Hopkins, L. R. 10 Q. B. 378.

In R. v. Stanton, 5 Cox, 324, Erle, J., said that, in his opinion, a summary conviction before justices of the peace (in England, the law requires two) is a bar to an indictment for a felonious assault arising out of the same facts.

In R. v. Miles, 17 Cox, 9, Warb. Lead. Cas. 320, a conviction of assault was held to be, at common law, a bar to a subsequent indictment for unlawful wounding: *see* ss. 866 & 969, *post*. *See* Reed v. Nutt, 17 Cox, 86, 24 Q. B. D. 669, as to a magistrate granting a certificate illegally.

But a summary conviction for assault is no bar to a subsequent indictment for manslaughter, upon the death of the man assaulted consequent upon the same assault:

R. v. Morris, 10 Cox, 480; R. v. Basset, Greaves, Cons. Acts, 72; R. v. Friel, 17 Cox, 325.

Where an assault charged in an indictment and that referred to in a certificate of dismissal by a magistrate appear to have been on the same day it is *prima facie* evidence that they are one and the same assault, and it is incumbent on the prosecutor to show that there was a second assault on the same day if he alleges that such is the case. The defendant having appeared before the magistrate 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 those facts: R. v. Westley, 11 Cox, 139.

When a question of title to lands arises before him the magistrate's jurisdiction is at an end, and he cannot inquire into or adjudicate upon an excess of force or violence which may be used in the assertion of a title to lands: R. v. Pearson, 11 Cox, 493; s. 842, *post*.

A person making a *bona fide* claim of right to be present as one of the public in a law court at the hearing of a suit is not justified in committing an assault upon a police constable and an official who endeavours to remove him. Such a claim of right does not oust the jurisdiction of the magistrate who has to try the charge of assault, and he may refuse to allow cross-examination and to admit evidence in respect of such a claim: R. v. Eardly, 49 J.P. 551.

By s. 864, *post*, a magistrate cannot now try summarily a charge of assault if either the person aggrieved or the accused objects thereto.

PART XXI.

RAPE AND PROCURING ABORTION.

Definition.

266. 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 representation as to the nature and quality of the act.

2. No one under the age of fourteen years can commit this offence.

"3. Carnal knowledge is complete upon penetration to any, even the slightest degree, and even without the emission of seed. R. S. C. c. 174, s. 226."

Sub-section 3 now forms s. 4*a*, in Part I. (amendment of 1893).

The words in italics reproduce the Imperial Act 48 & 49 V. c. 69. s. 4.

Punishment.

267. Every one who commits rape is guilty of an indictable offence and liable to suffer death, or to imprisonment for life. R. S. C. c. 162, s. 37. 24-25 V. c. 100, s. 48 (Imp.).

The repealed section enacted a minimum punishment of seven years.

Attempt.

268. Every one is guilty of an indictable offence and liable to seven years' imprisonment who attempts to commit rape. R. S. C. c. 162, s. 38.

The repealed section enacted a minimum punishment of two years.

Rape and attempt to commit rape are not triable at quarter sessions, s. 540. *See* appendix to 2nd edit. of this book for a note on rape by Greaves.

Indictment.— that A. B. on in and upon one C. D., a woman, unlawfully and violently did make an assault and her the said C. D. violently and without her consent unlawfully did ravish and carnally know.

Averment of woman's age unnecessary: 2 Bishop, Cr. Proc. 954.

Rape has been defined to be the having unlawful and carnal knowledge of a woman, by force, and against her will: 1 Russ. 904.

To constitute the offence there must be penetration, or *res in re*, in order to constitute the "carnal knowledge" which is a necessary part of the offence. But a very slight penetration is sufficient, though not attended with the deprivation of the marks of virginity: 1 Russ. 912.

A boy under fourteen years of age is presumed by law incapable to commit a rape, and therefore he cannot be guilty of it, nor of an assault with intent to commit it; and no evidence is admissible to show that, in point of fact, he could commit the offence of rape: *see* R. v. Read, 1 Den. 377. But on an indictment for rape he may be found guilty of a common assault or of an indecent assault: s. 713; R. v. Brimilow, 2 Moo. 122. A husband cannot be guilty of a rape upon his wife, but he may be guilty as an accessory before the fact or an aider and abettor to it: *see* R. v. Audley (Lord), 3 St. Tr. 402. The offence of rape may be committed though the woman at last yielded to the violence, if such her consent was forced by fear of death or by duress.

It will not be any excuse that the woman was first taken with her own consent if she were afterwards forced against her will; nor will it be an excuse that she consented after the fact, or that she was a common strumpet, or the concubine of the ravisher. Circumstances of this kind, however, though they do not necessarily prevent the offence from amounting to a rape, yet are material to be left to the jury in favour of the party accused, especially in doubtful cases. The notion that if the woman conceived it could not be a rape, because she must, in such case, have consented, appears to be quite exploded: 1 Russ. 905.

Upon the trial of an indictment for rape upon an idiot girl the proper direction to the jury is that if they are satisfied that the girl was in such a state of idiocy as to

be incapable of expressing either consent or dissent, and that the prisoner had connection with her without her consent, it is their duty to find him guilty: R. v. Barratt, 12 Cox, 498. In R. v. Fletcher, 10 Cox, 248, the law was so given, but the evidence of non-consent was declared insufficient. The accused upon such an indictment may now be found guilty of the offence provided for in s. 189, *ante*, if the evidence warrants it, s. 713.

If a woman is incapable of resisting it is no defence that she did not resist: R. v. Fletcher, 8 Cox, 131, Bell, 63; R. v. Camplin, 1 Den. 89; R. v. Flattery, 13 Cox, 388; R. v. Cardo, 17 O.R. 11. If a man has or attempts to have connection with a woman while she is asleep it is no defence that she did not resist, as she is then incapable of resisting. The man can therefore be found guilty of a rape, or of an attempt to commit a rape: R. v. Mayers, 12 Cox, 311; R. v. Young, 14 Cox, 114.

It is clear that the party ravished is a competent witness. But the credibility of her testimony must be left to the jury, upon the circumstances of fact which concur with that testimony. Thus if she be of good fame; if she presently discovered the offence and made search for the offender; if she showed circumstances and signs of the injury, whereof many are of that nature that women only are proper examiners; if the place where the act was done were remote from inhabitants or passengers; if the party accused fled for it; these, and the like, are concurring circumstances which give greater probability to her evidence. But if, on the other hand, the witness be of evil fame, and stand unsupported by others; if, without being under the control or the influence of fear, she concealed the injury for any considerable time after she had the opportunity of complaining; if the place where the fact is alleged to have been committed was near to persons by whom she might probably have been heard, and yet she made no outcry; if she has given wrong descriptions of the

place; these, and the like circumstances, afford a strong though not conclusive presumption that her testimony is feigned: 1 Russ. 692.

The character of the prosecutrix as to general chastity may be impeached by *general* evidence, as by showing her general light character, etc., but evidence of connection with other persons than the prisoner cannot be received.

In R. v. Hodgson, R. & R. 211, the woman in the witness box was asked: Whether she had not before had connection with other persons, and whether she had not before had connection with a particular person (named). The court ruled that she was not obliged to answer the question. In the same case the prisoner's counsel offered a witness to prove that the woman had been caught in bed about a year before this charge with a young man. The court ruled that this evidence could not be received. These rulings were subsequently maintained by all the judges.

Although you may cross-examine the prosecutrix as to particular acts of connection with other men (and she need not answer the question unless she likes), you cannot, if she deny it, call witnesses to contradict her: R. v. Cockcroft, 11 Cox, 410; R. v. Laliberté, 1 S. C. R. 117.

But she may be cross-examined as to particular acts of connection with the prisoner, and if she denies them witnesses may be called to contradict her R. v. Martin, 6 C. & P. 562; R. v. Riley, 16 Cox, 191, 18 Q. B. D. 481, Warb. Lead. Cas. 128.

On the trial of an indictment for an indecent assault, the defence being consent on the part of the prosecutrix, she denied on cross-examination having had intercourse with a third person, S. *Held*, that S. could not be examined to contradict her upon this answer. This rule applies to cases of rape, attempts to commit a rape, and indecent assaults in the nature of attempts to commit a rape: R. v. Holmes, 12 Cox, 137.

It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death, but it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused though never so innocent: 1 Hale, 634.

Upon an indictment under section 267, the jury may find the prisoner guilty of an attempt to commit rape under s. 268; R. v. Hapgood, 11 Cox, 471; or may find a verdict of common assault, or indecent assault.

Under s. 268, for an assault with intent to commit rape, the indictment may be as follows: in and upon one A. B., a woman (or girl), unlawfully did make an assault, with intent her, the said A. B., violently and unlawfully without her consent, to ravish and carnally know. (*Add a count for a common assault*), though it is not necessary.

If, upon trial for this offence, the offence under s. 267 be proved the defendant is not therefore entitled to an acquittal, s. 712, *post*.

On an indictment for an assault with intent to commit a rape Patteson, J., held that evidence of the prisoner having, on a prior occasion, taken liberties with the prosecutrix was not receivable to show the prisoner's intent; also, that in order to convict of assault with intent to commit rape the jury must be satisfied, not only that the prisoner intended to gratify his passion on the person of the prosecutrix, but that he intended to do so at all events, and notwithstanding any resistance on her part: R. v. Lloyd, 7 C. & P. 318.

When a man is charged with rape all that the woman said to other persons in his absence shortly after the alleged offence is admissible in evidence: R. v. Wood, 14 Cox, 46; *see* R. v. Little, 15 Cox, 319.

In R. v. Gisson, 2 C. & K. 781, it was held that an acquittal on an indictment for a rape could not be successfully pleaded to a subsequent indictment for an assault

with intent to commit a rape, because a verdict for the attempt to commit the offence could not be received on an indictment charging the offence itself. But that case is not now to be followed. The case of R. v. Dungey, 4 F. & F. 99, is a clear authority that upon a trial for rape the defendant may be found guilty of an attempt to commit it. In fact there can now be no doubt upon this; s. 711, *post*, is clear. *See* cases cited under that section.

An assault with intent to commit rape is very different from an assault with intent to have an improper connection. The former is with intent to have connection by force and against the will of the woman: R. v. Stanton, 1 C. & K. 415; R. v. Wright, 4 F. & F. 967; R. v. Rudland, 4 F. & F. 495; R. v. Dungey, 4 F. & F. 99.

An indictment for an attempt to commit rape is always in the form of an assault with intent to commit rape, as in R. v. Riley, 16 Cox, 191, for instance. And in R. v. Dungey, *ubi supra*, the judge charged the jury that they could, on an indictment for rape, find the prisoner guilty of an assault with intent to commit rape.

In this Code, however, a difference is made between an attempt to commit an offence and an assault with intent to commit it; ss. 175-260.

In a case of John v. R., in British Columbia, upon a writ of error, the court held that, upon an indictment for rape, the prisoner had been lawfully convicted of an assault with intent to commit rape. That decision was upheld by the Supreme Court: John v. R., 15 S. C. R. 384.

In R. v. Wright, 4 F. & F. 967, the prisoner was indicted for rape and for assault with intent to commit rape. Under ss. 626 and 713, *post*, there is not the least room to doubt that this can now be done, whatever doubts may have existed in that case.

In a case of rape the counsel for the prosecution should not tell the jury that to acquit the prisoner is to find the

woman guilty of perjury: R. v. Rudland, and R. v. Puddick, 4 F. & F. 495, 497.

On trial for rape evidence was that of a woman alone which, in view of previous admissions and the circumstances, was unsatisfactory: *Held*, evidence was properly submitted to jury, but court directed that attention of Executive should be called to the case: R. v. Lloyd, 19 O. R. 352.

What is sufficient evidence? R. v. Bedere, 21 O. R. 189.

CARNALLY KNOWING A GIRL UNDER FOURTEEN

269. Every one is guilty of an indictable offence and liable to imprisonment for life, and to be whipped, who carnally knows any girl under the age of fourteen years, not being his wife, *whether he believes her to be of or above that age or not.* 53 V. c. 37, s. 12 (*Amended*). 48-49 V. c. 69, s. 4 (Imp.).

The repealed section enacted a minimum punishment of five years; *see* remarks and form of indictment under next section.

The words in italics are not in the English Act. They are unnecessary. The girl there must be under thirteen. Proof of penetration is sufficient: R. v. Marsden, 17 Cox, 297.

ATTEMPT.

270. Every one who attempts to have unlawful carnal knowledge of any girl under the age of fourteen years is guilty of an indictable offence and liable to two years' imprisonment, and to be whipped. 53 V. c. 37, s. 12. 48-49 V. c. 69, s. 4 (Imp.).

See s. 685 as to evidence of young children in trials under these two sections. This section 270 has no other effect but to reduce the punishment, which, without it, would be seven years' imprisonment, s. 528.

Indictment under s. 269.— in and upon one A. N., a girl under the age of fourteen years, to wit, of the age of twelve years, unlawfully did make an assault, and her, the said A. N., then and there did unlawfully and carnally know.

The evidence is the same as in rape, with the exception that the consent or non-consent of the girl is immaterial independently of the enactment contained in s. 261. *See* R. v. Brice, 7 Man. L. R. 627.

Upon the trial of an indictment under these clauses the jury may, under s. 713, find the defendant guilty of a common assault, or an indecent assault: R. v. Read, 1 Den. 377; R. v. Connolly, 26 U. C. Q. B. 317; R. v. Roadley, 14 Cox, 463; even if the girl assented: s. 261, *ante*.

Under s. 711, *post*, the defendant may be convicted, if indicted under s. 269, of an attempt to commit the offence charged, if the evidence warrants it: R. v. Ryland, 11 Cox, 101; R. v. Catherall, 13 Cox, 109; but a boy under fourteen cannot be convicted of such attempt: R. v. Waite, 17 Cox, 554.

An indictment for rape still lies for ravishing a girl under fourteen: R. v. Dicken, 14 Cox, 8; R. v. Ratcliffe, 15 Cox, 127.

Indictment that prisoner in and upon one J., a girl under fourteen, feloniously did make an assault, and her, the said J., then and there feloniously did unlawfully and carnally know and abuse, etc; evidence of consent; general verdict of guilty affirmed: R. v. Chisholm, Jacobs' Case, 7 Man. L. R. 613.

KILLING CHILD IN HIS MOTHER'S WOMB. (*New*).

271. Every one is guilty of an indictable offence and liable to imprisonment for life who causes the death of any child which has not become a human being, in such a manner that he would have been guilty of murder if such child had been born.

2. No one is guilty of an 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.

See ss. 219 & 239 *ante*: R. v. West, 2 C. & K. 784; R. v. Handley, 13 Cox, 79. This is a new offence. No verdict for concealment of birth can be given upon an indictment under this section, in the absence of an express enactment to allow it.

PROCURING ABORTION.

272. Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully administers to her or causes to be taken by her any drug or other noxious thing, or unlawfully uses any

instrument or other means whatsoever with the like intent. R. S. C. c. 162, s. 47. 24-25 V. c. 100, s. 58 (Imp.).

WOMAN PROCURING HER OWN MISCARRIAGE.

273 Every woman is guilty of an indictable offence and liable to seven years' imprisonment who, *whether with child or not*, unlawfully administers to herself or permits to be administered to her any drug or other noxious thing, or unlawfully uses on herself or permits to be used on her any instrument or other means whatsoever with intent to procure miscarriage. R. S. C. c. 162, s. 47 (*Amended*). 24-25 V. c. 100, s. 58 (Imp.).

The words in italics are new.

SUPPLYING MEANS OF PROCURING ABORTION.

274. Every one is guilty of an indictable offence and liable to two years' imprisonment who unlawfully supplies or procures any drug or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she is or is not with child. R. S. C. c. 162, s. 48. 24-25 V. c. 100, s. 59 (Imp.).

Section 273, as it reads, is an absurdity. It ought to read as in the English Act, and s. 47, c. 162, R. S. C., "Every woman being with child."

Indictment for woman administering poison to herself, with intent or, etc. that C. D., late of on at and being then with child, with intent to procure her own miscarriage, did unlawfully administer to herself one drachm of a certain poison (*or noxious thing*) called (*or did unlawfully use a certain instrument or means*) to wit.

Indictment for administering poison to a woman, with intent to procure abortion.— that C. D. on unlawfully did administer to (*or cause to be taken by*) one S. P. one ounce weight of a certain poison, called (*or noxious thing called*) with intent then and thereby to cause the miscarriage of the said S. P.

Indictment for using instrument with the like intent. — unlawfully did use a certain instrument called a upon the person of one S. P., with intent then and thereby to cause the miscarriage of the said S. P.

In order to constitute an offence under s. 273, as it was in the repealed clause, the woman must be with child,

though not necessarily quick with child. The poison or other noxious thing must have been administered, or the instrument used, with the intent to procure the miscarriage. It must be proved, according to the fact stated in the indictment, that the woman administered to herself, etc., or that the defendant administered, etc., or caused to be taken, etc., the drug, as therein stated, and that the drug was noxious, or that the defendant used the instrument, *or other means*, mentioned in the manner described in the indictment: 1 Burn, 14.

Where the prisoner gave the prosecutrix the drug for the purpose of procuring abortion, and the prosecutrix took it for that purpose in the prisoner's absence, this was held to be a causing of it to be taken within s. 272: R. v. Wilson, Dears. & B. 127; R. v. Farrow, Dears. & B. 164.

A man and woman were jointly indicted for feloniously administering to C. a noxious thing to the jurors unknown with intent to procure miscarriage. C., being in the family way, went to the male prisoner, who said he would give her some stuff to put her right, and gave her a light coloured medicine, and told her to take two spoonfuls till she became in pain. She did so and it made her ill. She then went to him again, and he said the safest course would be to get her a place to go to. He told her that he had found a place for her at L., and gave her some more of the stuff, which he said would take effect when she got there. They went together to L. and met the female prisoner, who said she had been down to the station several times the day before to meet them. C. then began to feel pain and told the female prisoner. Then the male prisoner told what he had given C. They all went home to the female prisoner's, and the male prisoner then gave C. another bottle of similar stuff in the female prisoner's presence, and told her to take it like the other. She did so and became very ill, and the next day had a miscarriage,

the female prisoner attending her and providing all things. *Held*, that there was evidence that the stuff administered was a noxious thing within the 24 & 25 V. c. 100, s. 58 (Imp.). Also that there was evidence of the female being an accessory before the fact, and a party, therefore, to the administering of the noxious thing: R. v. Hollis, 12 Cox, 463.

Under s. 272, the fact of the woman being pregnant is immaterial: R. v. Goodhall, 1 Den. 187. But the prisoner must have believed her to be pregnant, otherwise there could be no intent under the section. Under an indictment for this offence the prisoner may be convicted of an attempt to commit it: s. 711; *see* R. v. Cramp, 14 Cox, 390 & 401, and Warb. Lead Cas. 120.

Indictment under s. 274.— unlawfully did procure (*supply or procure*) a large quantity, to wit, two ounces of a certain noxious thing called savin, he the said (*defendant*) then well knowing that the same was then intended to be unlawfully used and employed with intent to procure the miscarriage of one A. N.

The drug supplied must be a poison or noxious thing, and the supplying an innoxious drug, whatever may be the intent of the person supplying it, is not an offence against the enactment: R. v. Isaacs, L. & C. 220.

In order to constitute the offence within the meaning of this section it is not necessary that the intention of employing the noxious drug should exist in the mind of the woman; it is sufficient if the intention to procure abortion exists in the mind of the defendant: R. v. Hillman, L. & C. 343.

The prisoner may be convicted of an attempt to commit this offence, upon an indictment under this section, s. 711.

Supplying a noxious thing with the intent to procure abortion is an offence under this section, whether the woman is pregnant or not: R. v. Titley, 14 Cox, 502.

Giving oil of savin to procure abortion is indictable: R. v. Stitt, 30 U. C. C. P. 30.

In R. v. Dale, 16 Cox, 703, upon the trial of an offence, as provided for in s. 272, *ante*, evidence was admitted that at various times, before and after the offence charged, the prisoner had caused other miscarriages by similar means.

See R. v. Whitchurch, 16 Cox, 743, 24 Q. B. D. 420, on a conspiracy to procure abortion.

PART XXII.

OFFENCES AGAINST CONJUGAL AND PARENTAL RIGHTS—BIGAMY—ABDUCTION.

Definition.

275. Bigamy is—

(*a*) The act of a person who, being married, goes through a form of marriage with any other person *in any part of the world*; or

(*b*) The act of a person who goes through a form of marriage in *any part of the world* with any person whom he or she knows to be married; or

(*c*) The act of a person who goes through a form of marriage with more than one person simultaneously or on the same day. R. S. C. c 37, s. 10. (*The Act cited is on Railways*).

2. A "form of marriage" is any form either recognized as a valid form by the law of the place where it is gone through, or though not so recognized, is such that a marriage celebrated there in that form is recognized as binding by the law of the place where the offender is tried. Every form shall for the purpose of this section be valid, notwithstanding any act or default of the person charged with bigamy, if it is otherwise a valid form. The fact that the parties would, if unmarried, have been incompetent to contract marriage shall be no defence upon a prosecution for bigamy.

3. No one commits bigamy by going through a form of marriage—

(*a*) *If he or she in good faith and on reasonable grounds believes his wife or her husband to be dead; or*

(*b*) If his wife or her husband has been continually absent for seven years then last past and he or she is not proved to have known that his wife or her husband was alive at any time during those seven years; or

(*c*) If he or she has been divorced from the bond of the first marriage; or

(*d*) If the former marriage has been declared void by a court of competent jurisdiction. R. S. C. c. 161, s. 4.

4. No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage. R. S. C. c. 161, s. 4.

The words in italics settle the law as it was held to be heretofore by the decision in R. v. Tolson, 16 Cox, 629, 23 Q. B. D. 168, Warb. Lead. Cas. 72.

As to the competency of a colonial legislature to punish bigamy committed outside of the colony, *see* MacLeod v. The Attorney-General of New South Wales, 17 Cox, 341, [1891], A. C. 455; and R. v. Brierly, 14 O. R. 525; R. v. Topping, 7 Cox, 103.

PUNISHMENT.

276. Every one who commits bigamy is guilty of an indictable offence and liable to seven years' imprisonment.

2. Every one who commits this offence after a previous conviction for a like offence shall be liable to fourteen years' imprisonment. R. S. C. c. 161, s. 4. 53 V. c. 37, ss. 10, 11. 24-25 V. c. 100, s. 57 (Imp.).

Sub-section 2 is new.

Indictment.— that J. S. on at the parish of in the did marry one A. C., spinster, and her the said A. C. then and there had for his wife; and that the said J. S. afterwards, and whilst he was so married to the said A. C., as aforesaid, to wit, on the day at unlawfully did marry and take to wife one M. Y., and to her the said M. Y. was then and there married, the said A. C., his former wife, being then alive.

Bigamy is the offence of a husband or wife marrying again during the life of the first wife or husband. It is not strictly correct to call this offence *bigamy*; it is more properly denominated *polygamy*, i. e., having a plurality of wives or husbands at once, while bigamy according to the canonists consists in marrying two virgins successively, one *after* the death of the other, or in once marrying a widow.

Upon an indictment for bigamy, the prosecutor must prove: 1st, the two marriages; 2nd, the identity of the parties: Roscoe, 294.

The law will not, in cases of bigamy, presume a marriage valid to the same extent as in civil cases: R. v. Jacobs, 1 Moo. 140.

The first wife or husband is not a competent witness to prove any part of the case, but the second wife or husband is after the first marriage is established, for she or he is not legally a wife or husband: R. v. Ayley, 15 Cox, 328.

The first marriage must be a valid one. The time at which it was celebrated is immaterial, and whether celebrated in this country or in a foreign country is also immaterial: Archbold, 883.

If celebrated abroad it may be proved by any person who was present at it; and circumstances should also 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. Proof that a ceremony was performed 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: R. v. Cresswell, 13 Cox, 126; *see* R. v. Savage 13 Cox 178; and R. v. Griffin, 14 Cox, 308; R. v. Brierly 14 O. R. 525.

In the case of R. v. McQuiggan, 2 L. C. R. note, 346, the proof of the first marriage was attempted to be made by the voluntary examination of the accused, taken before Thomas Clancy the committing magistrate, but this being irregular and defective its reception was successfully objected to by the counsel for the prisoner. The Crown then tendered the evidence of Mr. Clancy as to the story the prisoner told him when taken before him after his arrest. This the Court held to be good evidence, and allowed it to

go to the jury; this was the only evidence of the first marriage, the prisoner having on that occasion, as Mr. Clancy deposed, confessed to him that he was guilty of the offence as charged, and at the same time expressed his readiness to return and live with his first wife. The second marriage was proved by the evidence of the clergyman who solemnized it.

In R. v. Creamer, 10 L. C. R. 404, upon a case reserved, the Court of Queen's Bench ruled, that upon the trial of an indictment for bigamy the admission of the first marriage by the prisoner, unsupported by other testimony, is sufficient to support a conviction.

In R. v. Newton, 2 M. & Rob. 503: and R. v. Simmonsto, 1 C. & K. 164, it was held that the prisoner's admissions, deliberately made, of a prior marriage in a foreign country are sufficient evidence of such marriage, without proving it to have been celebrated according to the law of the country where it is stated to have taken place: *contra*, R. v. Savage, 13 Cox, 178; R. v. Ray, 20 O. R. 212.

A first marriage, though *voidable*, if not absolutely *void* will support an indictment for bigamy: Archbold, 886: *see* R. v. Kay, 16 Cox, 292.

As to the second marriage it is immaterial whether it took place in Canada, or elsewhere, provided, if it took place out of Canada, the defendant be a subject of Her Majesty resident in Canada, whence he had left to commit the offence.

The offence will be complete, though the defendant assume a fictitious name at the second marriage: R. v. Allison, R. & R. 109; R. v. Rea, 12 Cox, 190.

Though the second marriage would have been void, in any case, as for consanguinity or the like, the defendant is guilty of bigamy: R. v. Brawn, 1 C. & K. 144.

In R. v. Fanning, 10 Cox, 411, a majority of the judges of the Irish Court of Criminal Appeal held, contrary to R.

v. Brawn, 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, but the Court of Criminal Appeal, by sixteen judges, in R. v. Allen, 12 Cox, 193, Warb. Lead. Cas. 75, since decided, as in R. v. Brawn, that the invalidity of the second marriage, on account of relationship, does not prevent its constituting the crime of bigamy. That is clearly so in Canada now by s. 275, *ante*.

It must be proved that the first wife was living at the time the second marriage was solemnized, which may be done by some person acquainted with her and who saw her at the time or afterwards: Archbold, 887. On a prosecution for bigamy it is incumbent on the prosecutor to prove that the husband or wife, as the case may be, was alive at the date of the second marriage. There is no presumption of law of the continuance of the life of the party for seven years after the date at which he or she was proved to have been alive. The existence of the party at an antecedent period may or may not afford a reasonable inference that he or she was alive at the date of the second marriage; but it is purely a question of fact for the jury: R. v. Lumley, 11 Cox, 274.

On the trial of a woman for bigamy, whose 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 that he was alive, but that she had the means of acquiring knowledge of that fact, had she chosen to make use of them. It was held that upon this finding the conviction could not be supported: R. v. Briggs, Dears. & B. 98.

On this last case, Greaves, 1 Russ., 270, note 1, remarks: "The case was argued only on the part of the prisoner, and the court studiously avoided determining on which side the onus of proof as to the knowledge of the first husband being alive lay, and yet the point seems very clear.

It is plain that the latter part of the section in the 9 Geo. IV, c. 31, s. 22, and in the new Act is in the nature of a proviso. Now no rule is better settled than that if an exception comes by way of proviso, whether it occurs in a subsequent part of the Act, or in a subsequent part of the same section containing the enactment of the offence, it must be proved in evidence by the party relying upon it. Hence it is that no indictment for bigamy ever negatives the exceptions as contained in the proviso, and hence it follows that the proof of those exceptions lies on the prisoner; if it was otherwise, the prosecutor would have to prove more than he has alleged. Then the proviso in terms requires proof both of the absence of the party for seven years, *and* that the party shall not have been known by the prisoner to have been living within that time, and consequently it lies on the prisoner to give evidence of *both;* and as the Legislature has required proof of both, it never could have been intended that proof of the one should be sufficient evidence of the other. When, however, the prisoner has given evidence to negative his knowledge that the party is alive, the onus may be thrown on the prosecutor to shew that he had that knowledge; and in accordance with this view is the dictum of Willes, J., in R. v. Ellis, 1 F. and F. 309, that 'if the husband has been living apart from his wife for seven years, under such circumstances as to raise a probability that he supposed that she was dead when he was re-married, evidence may be necessary that he knew his first wife was alive.' As to the manner in which the case should be left to the jury, it should seem that the proper course is to ask them whether they are satisfied that the prisoner was married twice, and that the person whom he first married was alive at the time of the second marriage; and, if they are satisfied of these facts, to tell them that it then lies upon the prisoner to satisfy them that there was an absence for seven years, and also that during the whole of those seven years he was ignorant that his first wife was alive, and that unless he has proved both those facts to their

satisfaction they ought to convict him. It is perfectly clear that the question is not whether he knew that his first wife was alive *at the time of the second marriage*, for he may have known that she was alive within the seven years, and yet not know that she was alive at the time of the second marriage, and, if he knew that she was alive *at any time within the seven years*, he ought to be convicted."

If it appears that the prisoner and his first wife had lived apart for seven years before he married again mere proof that the first wife was alive at the time of the second marriage will not warrant a conviction, but some affirmative evidence must be given to show that the accused was aware of this fact: R. v. Curgenwen, 10 Cox, 152; R. v. Fontaine, 15 L. C. J. 141; *see* R. v. Jones, 15 Cox, 284.

In 1863 the prisoner married Mary Anne Richards, lived with her about a week and then left her. It was not proved that he had since seen her. In 1867 he married Elizabeth Evans, his first wife being then alive. The court left it to the jury to declare if they were satisfied that the prisoner knew his first wife was alive at the time of the second marriage, and ruled that positive proof on that point was not absolutely necessary. The prisoner was found guilty, and on a case reserved the conviction was affirmed: R. v. Jones, 11 Cox, 358.

In R. v. Horton, 11 Cox, 670, Cleasby, B., summed up as follows: "It is submitted that, although seven years had not passed since the first marriage, yet if the prisoner reasonably believed (which pre-supposes proper grounds of belief) that his first wife was dead he is entitled to an acquittal. It would press very hard upon a prisoner if under such circumstances he could be convicted, when it appeared to him as a positive fact that his first wife was dead. The case of R. v. Turner, 9 Cox, 145, shows that this was the view of Baron Martin, a judge of as great experience as any on the bench now, and I am not disposed to act contrary to his opinion. You must find the prisoner

guilty, unless you think that he had fair and reasonable grounds for believing, and did honestly believe, that his first wife was dead." The jury returned a verdict of guilty, and the judge sentenced the prisoner to imprisonment for three days, remarking that he was quite satisfied with the verdict, and that he should inflict a light sentence, as he thought the prisoner really believed his first wife was dead although he was not warranted in holding that belief: *see* R. v. Moore, 13 Cox, 544.

On an indictment for bigamy a witness proved the first marriage to have taken place eleven years ago, and that the parties lived together some years, but could not say how long, it might be four years. Wightman, J., said: "How is it possible for any man to prove a negative? How can I ask the prisoner to prove that he did not know that his wife was living?" There is no evidence that the prisoner knew that his wife was alive, and there is no offence proved: R. v. Heaton, 3 F. & F. 819.

In R. v. McQuiggan, 2 L. C. R. 340, the court ruled that in an indictment for bigamy, under the Canadian Statute, it is absolutely necessary, when the second marriage has taken place in a foreign country, that the indictment should contain the allegations that the accused is a British subject, that he is or was resident in this Province, and that he left the same with intent to commit the offence: *see also* R. v. Pierce, 13 O. R. 226.

On a trial for bigamy the Crown having proved the prisoner's two marriages it is for him then to prove the absence of his first wife during seven years preceding the second marriage; and when such absence is not proved it is not incumbent on the Crown to establish the prisoner's knowledge that the first wife was living at the time of the second marriage: R. v. Dwyer, 27 L. C. J. 201: *see* R. v. Willshire, 14 Cox, 541.

The prisoner was convicted of bigamy under 32 & 33 V. c. 20, s. 58. The first marriage was contracted in Toronto

and the second in Detroit. The judge at the trial directed the jury that if prisoner was married to his first wife in Toronto and to his second in Detroit they should find him guilty. *Held*, a misdirection, and that the jury should have been told, in addition, that before they found him guilty they ought to be satisfied of his being, at the time of his second marriage, a subject of Her Majesty resident in Canada, and that he had left Canada with intent to commit the offence. *Held*, also, that it was incumbent on the Crown to prove these facts. *Quœre*, *per* Wilson, C.J., whether the trial should not have been declared a nullity: R. v. Pierce, 13 O. R. 226.

FEIGNED MARRIAGES.

277. Every one is guilty of an indictable offence and liable to *seven* years' imprisonment who procures a feigned or pretended marriage between himself and any woman, or who knowingly aids and assists in procuring such feigned or pretended marriage. R. S. C. c. 161, s. 2.

The punishment was *two* years by the repealed section. The alteration gives twelve challenges instead of four.

See s. 684, *post*, as to evidence on a prosecution under this enactment.

Under the repealed statute any offence under the corresponding section had to be prosecuted within a year: that limitation of time has not been re-enacted.

This offence was first created by 49 V. c. 52, s. 3. The male offender only is punishable.

POLYGAMY.

278. Every one is guilty of an indictable offence and liable to imprisonment for five years, and to a fine of five hundred dollars, who—

(*a*) Practices, or, by the rights, ceremonies, forms, rules or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by any other method whatsoever, and whether in a manner recognized by law as a binding form of marriage or not, agrees or consents to practise or enter into

(i) any form of polygamy;

(ii) any kind of conjugal union with more than one person at the same time;

(iii) what among the persons commonly called Mormons is known as spiritual or plural marriage;

(iv) who lives, cohabits, or agrees or consents to live or cohabit, in any kind of conjugal union with a person who is married to another, or with a person who lives or cohabits with another or others in any kind of conjugal union; or

(*b*) Celebrates, is a party to, or assists in any such rite or ceremony which purports to make binding or to sanction any of the sexual relationships mentioned in paragraph (*a*) of this section; or

(*c*) Procures, enforces, enables, is a party to, or assists in the compliance with or carrying out of, any such form, rule or custom which so purports; or

(*d*) Procures, enforces, enables, is a party to, or assists in the execution of, any such form of contract which so purports, or the giving of any such consent which so purports. 53 V. c. 37, s. 11.

As to evidence in trials for offences against this section: *see* s. 706, *post.*

See R. v. Labrie, M. L. R. 7 Q. B. 211, where it was held that mere cohabitation is not an offence punishable under this enactment. Also The People v. Mosher 2 Parker 195. In R. v. Liston, Toronto, April, 1893 (unreported), Armour, C.J., also held that adultery is not indictable under the above enactment.

SOLEMNIZATION OF MARRIAGE WITHOUT AUTHORITY.

279. Every one is guilty of an indictable offence and liable to a fine, or to two years' imprisonment, or to both, who—

(*a*) Without lawful authority, the proof of which shall lie on him, solemnizes or pretends to solemnize any marriage; or

(*b*) Procures any person to solemnize any marriage knowing that such person is not lawfully authorized to solemnize such marriage, or knowingly aids or abets such person in performing such ceremony. R. S. C. c. 161, s. 1. 4 Geo. IV. c. 76, s. 21 (Imp.).

Limitation two years, s. 551. There was none under the repealed statute.

Indictment.— that A. B., on at without lawful authority, did unlawfully solemnize (*or pretend to solemnize*) a marriage between one C. D. and one M. N.

See R. v. Ellis, 16 Cox, 469.

SOLEMNIZING A MARRIAGE CONTRARY TO LAW.

280. Every one is guilty of an indictable offence and liable to a fine, or to one year's imprisonment, who, being lawfully authorized, knowingly and

wilfully solemnizes any marriage in violation of the laws of the province in which the marriage is solemnized. R. S. C. c. 161, s. 3.

A limitation of two years has not been re-enacted.

Indictment.— that A. B., at on being a clergyman of and lawfully authorized to marry, did unlawfully solemnize a marriage between one C. D., and one E. F., before proclamation of banns in violation of the laws of the Province of in which the said marriage was solemnized.

ABDUCTION.

281. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, with intent to marry or carnally know any woman, *whether married or not*, or with intent to cause any woman to be married to or carnally known by any other person, takes away or detains any woman of any age against her will. R. S. C. c. 162, s. 43 (*Amended*). 24-25 V. c. 100, s. 54 (Imp.).

The words in italics are new.

The words "by force" were inserted before "takes away" in the repealed clause; *see* notes under next section.

Indictment.— unlawfully did take away (*or detain*) one A. B., against her will, with intent her, the said A. B., to marry (*or*) *(If the intent is doubtful, add a count stating it to be to "carnally know," or to cause her to be married to one N. S., or to some persons to the jurors unknown, or to cause her to be carnally known by, etc.)*: 1 Burn, 12.

A verdict for assault or for an attempt to commit the offence charged, may be given, if the evidence warrants it: ss. 711, 713, *post*.

ABDUCTION.

282. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, *with intent to marry or carnally know* any woman, or with intent to cause any woman to be married or carnally known by any person—

(*a*) from motives of lucre takes away or detains against her will any such woman of any age who has any interest, whether legal or equitable, present or future, absolute, conditional or contingent, in any real or personal estate, or who is a presumptive heiress or co-heiress or presumptive next of kin to any one having such interest; or

(*b*) fraudulently allures, takes away or detains any such woman, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, *with intent to marry or carnally know her.*

2. Every one convicted of any offence defined in this section is incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or in which she has any interest, or which comes to her as such heiress, co-heiress or next of kin; and if any such marriage takes place such property shall, upon such conviction, be settled in such manner as any court of competent jurisdiction, upon any information at the instance of the Attorney-General appoints. R. S. C. c. 162, s. 42. 24-25 V. c. 100, s. 53 (Imp.).

The words in italics in s-s. (*b*) are a repetition.

"Attorney-General" defined, s. 3.

On the trial of an indictment for an offence under s-s. (*b*) of this section, it is not necessary to prove that the accused knew that the girl he abducted had an interest in any property: R. v. Kaylor, 1 Dor. Q. B. R. 364.

It is not necessary that an actual marriage or defilement should take place. Under the first part of this section, the taking or detaining must be *from motives of lucre* and *against the will of the woman*, coupled with an intent to marry or carnally know her or cause her to be married or carnally known by any other person.

Indictment under (*a*).— from motives of lucre, did unlawfully take away and detain ("*take away or detain*") one A. N. against her will, she, the said A. N., then having a certain present and absolute interest in certain real estate (*any interest, whether legal or equitable, present or future, absolute, conditional or contingent in any real or personal estate*) with intent her, the said A. N., to marry (*or carnally know her, or cause her to be married or carnally known by*). (*Add a count stating generally the nature of some part of the property and, if the intent be doubtful, add counts varying the intent.*) *See* another form, in 3 Chit. C. L. 818.

Indictment under (*b*).— fraudulently allured (*took away or detained*) one A. B., out of the possession and against the will of C. D., her father, she, the said A. B.,

then being under the age of twenty-one years, and having a certain present interest in with intent, her, the said A. B., to marry (*or carnally know, or cause to be married or, etc., etc., etc.*) (*Add counts, if necessary, varying the statement as to the property, possession, or intents.*)

Under the second part of the section the offence consists in the fraudulent allurement of a woman under twenty-one out of the possession of or against the will of her parent or guardian, coupled with an intent to marry or carnally know her, or cause her to be married or carnally known by another person, but, for this offence, no motives of lucre are mentioned, nor should it have been committed against the will of the woman, though she must be an heiress, or such a woman as described in the first lines of this section.

The taking under the first part of this section must be against the will of the woman; but it would seem that, although it be with her will, yet, if that be obtained by fraud practised upon her, the case will be within the Act; for she cannot whilst under the influence of fraud be considered to be a free agent.

If the woman be taken away in the first instance with her own consent, but afterwards refuse to continue with the offender, the offence is complete, because if she so refuse, she may from that time as properly be said to be taken against her will as if she had never given her consent at all, for, till the force was put upon her, she was in her own power: 1 Burn, 8.

Moveover the *detaining against* her will is by itself an offence.

It seems, also, that it is not material whether a woman so taken contrary to her will at last consents thereto or not, for if she were in force at the time the offence is complete at the time of the taking, and the offender is not to escape from the provisions of the statute by having prevailed over the weakness of the woman by such means.

The second part of this section expressly contemplates the case of a girl, under twenty-one, whose co-operation has been obtained by influence over her mind, and who has been taken out of the possession of her parent or guardian by means of a fraud practised upon them and against their will, or by force, against their will, but with her consent. If a girl, under twenty-one, is taken away or detained against her own will, or her consent is obtained through fear, that case would be within the first part of this section. The woman, though married, may be a witness against the offender: Archbold, 700.

"If, therefore," says Taylor, on Evidence, par. 1236, "a man be indicted for the forcible abduction of a woman with intent to marry her, she is clearly a competent witness against him if the force were continuing against her till the marriage. Of this last fact also she is a competent witness, and the better opinion seems to be that she is still competent, notwithstanding her subsequent assent to the marriage and her voluntary co-habitation; for otherwise, the offender would take advantage of his own wrong."

Under s. 711 the prisoner may be found guilty of an attempt to commit the offence charged and punished under s. 528.

Under s. 713 the prisoner may be found guilty of an assault, if the evidence warrants such finding.

ABDUCTION—GIRL UNDER SIXTEEN.

283. Every one is guilty of an indictable offence and liable to *five* years' imprisonment who unlawfully takes or causes to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her.

2. *It is immaterial whether the girl is taken with her own consent or at her own suggestion or not.*

3. *It is immaterial whether or not the offender believed the girl to be of or above the age of sixteen.* R. S. C. c. 162, s. 44 (*Amended*). 24-25 V. c. 100, s. 55, and 48-49 V. c. 69, s. 7 (Imp.).

Sub-sections. 2 and 3 are new enactments though not new law. Fine, s. 958.

The intent to marry or carnally know is not an ingredient of this offence. The only intent which is material is the intent to deprive the parent or legal guardian of the possession of the child. No motives of lucre are necessary. A woman may be guilty of this offence.

It is immaterial whether the girl consents or not, and the taking need not be by force, actual or constructive: R. v. Mankletow, 1 Russ. 954, Dears. 159. Where a parent countenances the loose conduct of the girl the jury may infer that the taking is not against the parent's will. Ignorance of the girl's age is no defence: 1 Russ. 952; R. v. Robins, 1 C. & K. 456. It is not necessary that the taking away should be for a permanency; it is sufficient if for the temporary keeping of the girl: R. v. Timmins, Bell, 276.

On an indictment for abducting a girl under sixteen years of age it appeared that the girl, when abducted, had left her guardian's house for a particular purpose with his sanction: *Held*, that she had not ceased to be in his possession under the statute: R. v. Mondelet, 21 L. C. J. 154; *see* R. v. Henkers, 16 Cox, 257.

On a trial for taking an unmarried girl under the age of sixteen out of the possession of her guardian;

Held, 1st. That evidence of her being badly treated by her guardian is inadmissible. 2nd. That secondary evidence of the age of the child is admissible. 3rd. That in this case the defendant was not guilty of taking the child out of the possession of the guardian: R. v. Hollis, 8 L. N. 229.

To pick up a girl in the streets and take her away is not to take her out of the possession of any one. The prisoner met a girl under sixteen years of age in a street, and induced her to go with him to a place at some distance, where he seduced her and detained her for some hours. He then took her back to where he met her, and she returned home to her father. In the absence of any evi-

dence that the prisoner knew, or had reason for knowing, or that he believed that the girl was under the care of her father at the time, *held* by the court of Criminal Appeal that a conviction under this section could not be sustained: R. v. Green, 3 F. & F. 274; R v. Hibbert, 11 Cox, 246.

One who takes an unmarried girl under the age of sixteen years out of the possession and against the will of her father or mother is guilty of this offence, although he may not have had any bad motive in taking her away, nor means of ascertaining her age, and although she was willing to go: R. v. Booth, 12 Cox, 231; R. v. Kipps, 4 Cox, 167.

The defence in Booth's case was that the prisoner, actuated by religious and philanthropic motives, had taken the girl from her parents in order to save her from seclusion in a convent. He was found guilty and sentenced.

A girl who is away from her home is still in the custody or possession of her father, if she intends to return; it is not necessary to prove that the prisoner knew the girl to be under sixteen; the fact of the girl being a consenting party cannot absolve the prisoner from the charge of abduction; this section is for the protection of parents: R. v. Mycock, 12 Cox, 28; R. v. Olifier, 10 Cox, 402; R. v. Miller, 13 Cox, 179.

Indictment.— unlawfully did take (*or cause to be taken*) one A. B. out of the possession and against the will of E. F., her father, she, the said A. B., being then an unmarried girl, and under the age of sixteen years, to wit, of the age of , etc. (*If necessary add a count stating E. F. to be a person having the lawful care and charge of the said A. B., or that the defendant unlawfully did cause to be taken one): see* R. v. Johnson, 15 Cox, 481.

It is no defence to an indictment under this section that the prisoner believed the girl to be eighteen: R. v. Prince, 13 Cox, 138, Warb. Lead. Cas. 89.

It was held in R. v. Bishop, 5 Q. B. D. 259, that under a statute which prohibits the receiving of lunatics for treatment in a house not duly licensed, the owner of a house who had received lunatics was guilty of the offence created by the statute, though the jury found that he believed honestly and on reasonable grounds that the persons received were not lunatics.

"I do not think that the maxim as to the *mens rea* has so wide an application as it is sometimes considered to have. In old time, and as applicable to the common law or to earlier statutes, the maxim may have been of general application; but a difference has arisen owing to the greater precision of modern statutes. It is impossible now to apply the maxim generally to all statutes, and it is necessary to look at the object of each act to see whether and how far knowledge is of the essence of the offence created": *Per* Stephen, J., in Cundy v. LeCocq, 13 Q. B. D. 207.

See R. v. Tolson, 16 Cox, 629, 23 Q. B. D. 168, as to *mens rea*; also Betts v. Armstead, 16 Cox, 418, 20 Q. B. D. 771; Ford v. Wiley, 16 Cox, 683, 23 Q. B. D. 203; Wood v. Burgess, 16 Cox, 729; Pain v. Boughtwood, 16 Cox, 747; and cases under s. 14, *ante*.

STEALING CHILDREN UNDER FOURTEEN.

284. Every one is guilty of an indictable offence and liable to seven years imprisonment who, with intent to deprive any parent or guardian, or other person having the lawful charge, of any child under the age of fourteen years, of the possession of such child, or with intent to steal any article about or on the person of such child, unlawfully—

(*a*) takes or entices away or detains any such child; or

(*b*) receives or harbours any such child knowing it to have been dealt with as aforesaid.

2. Nothing in this section shall extend to any one who gets possession of any child, claiming in good faith a right to the possession of the child. R. S. C. c. 162, s. 45 (*Amended*). 24-25 V. c. 100, s. 56 (Imp.).

The words "by force or fraud" were in the repealed clause.

See R. v. Johnson, 15 Cox, 481, Warb. Lead. Cas. 91; and R. v. Barrett, 15 Cox, 658.

Indictment.— unlawfully did take away *(take away, or entice away, or detain)* one A. N., a child then under the age of fourteen years, to wit, of the age of seven years, with intent thereby then to deprive one A. S., the father of the said A. N., of the possession of the said A. N., his said child, against . And the jurors that the said afterwards, to wit, on the day and year aforesaid, unlawfully did take away *(or etc.,)* the said A. N., a child then under the age of fourteen years, to wit, of the age of seven years, with intent thereby then to steal, take and carry away divers articles, that is to say then being upon and about the person of the said child. *(Add counts stating that the defendant did entice away,* or *did detain, if necessary).*

Upon the trial of any offence contained in this section the defendant may, under s. 711, be convicted of an attempt to commit the same.

All those claiming a right to the possession of the child are specially exempted from the operation of this section, by s-s. 2.

PART XXIII.

DEFAMATORY LIBEL.

Definition.

285. A defamatory libel is matter published, without legal justification or excuse, likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or designed to insult the person to whom it is published.

2. Such matter may be expressed either in words legibly marked upon any substance whatever, or by any object signifying such matter otherwise than by words, and may be expressed either directly or by insinuation or irony.

See remarks under s. 302.

PUBLISHING DEFINED.

286. 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.

PUBLISHING UPON INVITATION.

287. No one commits an offence by publishing defamatory matter on the invitation or challenge of the person defamed thereby, nor if it is necessary to publish such defamatory matter in order to refute some other defamatory statement published by that person concerning the alleged offender, if such defamatory matter is believed to be true, and is relevant to the invitation, challenge or the required refutation, and the publishing does not in manner or extent exceed what is reasonably sufficient for the occasion.

PUBLISHING IN COURTS, ETC., ETC., ETC.

288. No one commits an offence by publishing any defamatory matter, in any proceedings held before or under the authority of any court exercising judicial authority, or in any inquiry made under the authority of any statute or by order of her Majesty, or of any of the departments of Government, Dominion or provincial.

PUBLISHING PARLIAMENTARY PAPERS, ETC., ETC.

289. 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.

See s. 705, *post*, and ss. 6 & 7, c. 163, R. S. C. p. 306, *post*.

PROCEEDINGS OF PARLIAMENT AND COURTS, ETC., 51-52 V. c. 64 (IMP.).

290. No one commits an offence by publishing in good faith, for the information of the public, a fair report of the proceedings of the Senate or House of Commons, or any committee thereof, or of any such Council or Assembly, or any committee thereof, or of the public proceedings preliminary or final heard before any court exercising judicial authority, nor by publishing, in good faith, any fair comment upon any such proceedings.

PROCEEDINGS OF PUBLIC MEETINGS (*New*).

291. 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.

FAIR DISCUSSION.

292. 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.

FAIR COMMENT.

293. No one commits an offence by publishing fair comments upon the public conduct of a person who takes part in public affairs.

2. No one commits an offence by publishing fair comments on any published book or other literary production, or any composition or work of art or performance publicly exhibited, or any other communication made to the public on any subject, if such comments are confined to criticism on such book or literary production, composition, work of art, performance or communication.

SEEKING REMEDY FOR GRIEVANCE.

294. No one commits an offence by publishing defamatory matter for the purpose, in good faith, of seeking remedy or redress for any private or public wrong or grievance from a person who has, or is reasonably believed by the person publishing to have, the right or be under obligation to remedy or redress such wrong or grievance, if the defamatory matter is believed by him to be true, and is relevant to the remedy or redress sought, and such publishing does not in manner or extent exceed what is reasonably sufficient for the occasion.

ANSWER TO INQUIRIES.

295. No one commits an offence by publishing, in answer to inquiries made of him, defamatory matter relating to some subject as to which the person by whom, or on whose behalf, the inquiry is made has, or on reasonable grounds is believed by the person publishing to have, an interest in knowing the truth, if such matter is published for the purpose, in good faith, of giving information in respect thereof to that person, and if such defamatory matter is believed to be true, and is relevant to the inquiries made, and also if such publishing does not in manner or extent exceed what is reasonably sufficient for the occasion.

GIVING INFORMATION.

296. No one commits an offence by publishing to another person defamatory matter for the purpose of giving information to that person with respect to some subject as to which he has, or is, on reasonable grounds, believed to have, such an interest in knowing the truth as to make the conduct of the person giving the information reasonable under the circumstances: Provided that such defamatory matter is relevant to such subject, and that it is either true, or is made without ill-will to the person defamed, and in the belief, on reasonable grounds, that it is true.

See Coxhead v. Richards, 2 C. B. 569; Robshaw v. Smith, 38 L. T. N. S. 424; R. v. Perry, 15 Cox, 169.

RESPONSIBILITY OF PROPRIETOR OF NEWSPAPER OR OF SELLER OF A LIBEL.

297. Every proprietor of any newspaper is presumed to be criminally responsible for defamatory matter inserted and published therein, but such

presumption may be rebutted by proof that the particular defamatory matter was inserted in such newspaper without such proprietor's cognizance, and without negligence on his part.

2 General authority given to the person actually inserting such defamatory matter to manage or conduct, as editor or otherwise, such newspaper, and to insert therein what he in his discretion thinks fit, shall not be negligence within this section unless it be proved that the proprietor, when originally giving such general authority, meant that it should extend to inserting and publishing defamatory matter, or continued such general authority knowing that it had been exercised by inserting defamatory matter in any number or part of such newspaper.

3. No one is guilty of an offence by selling any number or part of such newspaper, unless he knew either that such number or part contained defamatory matter, or that defamatory matter was habitually contained in such newspaper. R. S. C. c. 163, s. 5 (*Amended*).

"Newspaper" defined, s. 3, *ante*.

SELLING LIBELS, ETC.

298. No one commits an offence by selling any book, magazine, pamphlet or other thing, whether forming part of any periodical or not, although the same contains defamatory matter, if, at the time of such sale, he did not know that such defamatory matter was contained in such book, magazine, pamphlet or other thing.

2. The sale by a servant of any book, magazine, pamphlet or other thing, whether periodical or not, shall not make his employer criminally responsible in respect of defamatory matter contained therein unless it be proved that such employer authorized such sale knowing that such book, magazine, pamphlet or other thing contained defamatory matter, or, in case of a number or part of a periodical, that defamatory matter was habitually contained in such periodical.

WHEN TRUTH IS A DEFENCE.

299. It shall be a defence to an indictment or information for a defamatory libel that the publishing of the defamatory matter in the manner in which it was published was for the public benefit at the time when it was published, and that the matter itself was true. R. S. C. c. 163, s. 4.

See s. 634, p. 305, *post*.

EXTORTION BY DEFAMATORY LIBEL.

300. 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* [illegible] *refused "any such money," appointment or office.* R. S. C. c. 163, s. 1 (*Amended*). 6-7 V. c. 96, s. 3 (Imp.).

PUNISHMENT OF DEFAMATORY LIBEL WITH SCIENTER.

301. Every one is guilty of an indictable offence and liable to *two years'* imprisonment or to a fine not exceeding four hundred dollars, or to both, who publishes any defamatory libel knowing the same to be false. R. S. C. 163, s. 2.

PUNISHMENT OF DEFAMATORY LIBEL.

302. Every one is guilty of an indictable offence and liable to one year's imprisonment, or to a fine not exceeding two hundred dollars, or to both, who publishes any defamatory libel. R. S. C. c. 163, s. 3.

All of these sections from s. 285 are taken, with the exception of s. 291, from the Imperial Draft Code of 1879, which the commissioners reported to be a re-enactment of the existing law. On ss. 297 & 298 they remark, however, that they have made some alteration so as to meet a difference of judicial opinion on the construction of the corresponding enactments in 6 & 7 V. c. 96, citing R. v. Holbrook, 4 Q. B. D. 42.

The Imperial statutes on libel by newspapers are 44 & 45 V. c. 60, and 51 & 52 V. c. 64.

The costs of showing cause against a rule for the filing of an information are covered by s. 833, p. 306, *post*: R. v. Steel, 13 Cox, 159.

Indictment for a falsedefamatory libel.— . . . . that J. S., unlawfully, and maliciously intending to injure, and prejudice one J. N., and to deprive him of his good name and reputation, and to bring him into public contempt or ridicule and disgrace, on . . . , unlawfully and maliciously did write and publish, and cause and procure to be written and published, a false and defamatory libel, in the form of a letter directed to the said J. N. (*or, if the publication were in any other manner, omit the words, "in the form," etc.*), containing divers false and defamatory matters and things of and concerning the said J. N., and of and concerning etc., (*here insert such of the subjects of the libel as it may be necessary to refer to by the innuendoes, in setting out the libel*), according to the tenor and effect following, that is to say (*here set out the libel, together with such innuendoes as may be necessary to render it intelligible*), he, the said

J. S., then well knowing the said defamatory libel to be false: *see* form H, under s. 611 & s. 615, p. 304, *post.*

Imprisonment not exceeding two years, and fine, s. 301. If the prosecutor fail to prove the *scienter* the defendant may nevertheless be convicted of publishing a defamatory libel, and punished by fine, or imprisonment not exceeding one year, or both: s. 302; Boaler v. R. 16 Cox, 488, 21 Q. B. D. 284. The defendant may plead, in addition to the plea of not guilty, that the matters charged were true, and that it was for the public benefit that they should be published, setting forth the particular facts by reason of which the publication was for the public benefit.

The offence of libel is not triable at quarter sessions: s. 540.

The defendant may allege and prove the truth of the libel, in the manner and subject to the conditions mentioned in s. 299.

The following may be the form of the special plea: And for a further plea in this behalf, the said J. S. saith that Our Lady the Queen ought not further to prosecute the said indictment against him, because he saith that it is true that (*etc., alleging the truth of every libellous part of the publication*); and the said J. S. further saith, that before and at the time of the publication in the said indictment mentioned (*state here the facts which rendered the publication of benefit to the public*); by reason whereof it was for the public benefit that the said matters so charged in the said indictment should be published. And this, etc. This plea may be pleaded with the general issue. Evidence that the identical charges contained in a libel had, before the time of composing and publishing the libel which is the subject of the indictment, appeared in another publication which was brought to the prosecutor's knowledge, and against the publisher of which he took no legal proceedings, is not admissible under this section: R. v. Newman Dears. 85, 1 E. & B. 268. Where the plea con-

tains several charges, and the defendant fails in proof of any of the matters alleged in it, the jury must of necessity find a verdict for the crown; and the court, in giving judgment, is bound to consider whether the guilt of the defendant is aggravated or mitigated by the plea, and by the evidence given to prove or disprove it, and form its own conclusion on the whole case.

The replication may be as follows:—And as to the plea of the said J. S., by him secondly above pleaded, the said A. B. (the clerk of assize or clerk of the peace) saith that by reason of anything in the said second plea alleged, Our said Lady the Queen ought not to be precluded from further prosecuting the said indictment against the said J. S., because he saith, that he denies the said several matters in the said second plea alleged, and saith that the same are not, nor are nor is any or either of them, true. And this he, the said A. B., prays may be inquired of by the country, etc. And the said J. S. doth the like. Therefore, etc.

Indictment for threatening to publish a defamatory libel, etc., with intent to extort money under s. 300.—unlawfully did threaten one J. N. to publish a certain libel of and concerning him the said J. N. ("*if any person publishes, or threatens to publish, any libel upon any other person, or offers to abstain from publishing, or offers to prevent the publishing of a defamatory libel*), with intent thereby then to extort money from the said J. N. ("*with intent to extort any money, or with intent 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*"). If it be doubtful whether the matter threatened to be published be libellous, add a count charging that the defendant "did propose to the said J. N. to abstain from printing and publishing a certain matter and thing touching the said J. N. (*or one J. F.*) with intent, etc."

What is a libel? Duties of grand jurors on an indictment for libel: 10 L. N. 361.

Information for a libel: *Ex parte* Gugy, 8 L. C. R. 353.

Under s. 299 the magistrate has no jurisdiction to receive evidence of the truth of the libel upon an information: R. v. Carden, 5 Q. B. D. 1, 14 Cox, 359.

In a case of libel it is no ground to change the venue that many of the defendant's witnesses reside at a distance, and the defendant has no funds to bring them to that venue: R. v. Casey, 13 Cox, 614.

On s. 299 *see* R. v. Laurier, 11 R. L. 184; on s. 297 *see* R. v. Holbrook, 3 Q. B. D. 60, 4 Q. B. D. 42, 13 Cox, 650, 14 Cox, 185. As to right of the Crown to set aside jurors in cases of libel: *see* R. v. Patteson, 36 U. C. Q. B. 129, and R. v. Maguire, 13 Q. L. R. 99; and s. 669, *post*.

It must be proved upon an indictment against the proprietor of a newspaper that the defendant was proprietor or publisher of the journal at the time of the publication of the libel. That he is such at the time of the trial is not sufficient: R. v. Sellars, 6 L. N. 197.

Under s. 634, p. 305, *post*, *see* R. v. Dougall, 18 L. C. J. 85.

The defendant was indicted for a malicious libel, and specially pleaded the truth of the libel as well as the plea of not guilty. Under this plea he endeavoured to prove justification. *Held*, that evidence was not admissible, as, under the statute, to be allowed to justify, the defendant has to plead not only that the publication was true, but also that it was made for the public good: R. v. Hickson, 3 L. N. 139; s. 299, *ante*.

See R. v. Labouchere, 14 Cox, 419, as to the sufficiency of a plea of justification, and R. v. Creighton, 19 O. R. 339.

As to what constitutes a guilty knowledge under s. 301, and that it is for the jury to decide under a plea of justifi-

cation if the statement complained of is true, and if it was published for the public benefit: *see* R. v. Tassé, 8 L. N. 98.

No action for libel by a wife against her husband: R. v. Lord Mayor, 16 Q. B. D. 772, 16 Cox, 81.

On an accusation for libel it is no defence that the libel was published with "no personal malice": R. v. "The World," 13 Cox, 305.

The truth of a seditious or blasphemous libel cannot be pleaded to an indictment for such libel. S. 299, *ante*, of the Act does not apply to such libels, but s. 297 applies: R. v. Bradlaugh, 15 Cox, 217; R. v. Ramsay, 15 Cox, 231; *Ex parte* O'Brien, 15 Cox, 180.

Held, 1. A criminal information (for libel) will not be granted except in case of a libel on a person in authority, and in respect of duties pertaining to his office.

2. Where a libel was directed against M., who was at the time attorney general, but alleged improper conduct upon his part when he was a judge, an information was refused.

3. The applicant for a criminal information must rely wholly upon the court for redress, and must come there entirely free from blame.

4. Where there is foundation for a libel, though it falls far short of justification, an information will not be granted: R. v. Biggs, 2 Man. L. R. 18.

See ss. 634 & 719, p. 305, *post*, as to plea of justification and trial, and R. v. Adams, 16 Cox, 544, 22 Q. B. D. 66, where an obscene letter sent to a young woman was held to constitute a defamatory libel.

PROCEDURE SECTIONS ON LIBEL.

Form of Indictment.

615. No count for publishing a blasphemous, seditious, obscene or defamatory libel, or for selling or exhibiting an obscene book, pamphlet, newspaper or other printed or written matter, shall be deemed insufficient on the ground that it does not set out the words thereof: Provided that the court may order that a particular shall be furnished by the prosecutor stating what passages in

such book, pamphlet, newspaper, printing or writing are relied on in support of the charge.

2. A count for libel may charge that the matter published was written in a sense which would make the publishing criminal, specifying that sense without any prefatory averment showing how that matter was written in that sense. And on the trial it shall be sufficient to prove that the matter published was criminal either with or without such innuendo.

PLEA OF JUSTIFICATION.

634. Every one accused of publishing a defamatory libel may plead that the defamatory matter published by him was true, and that it was for the public benefit that the matters charged should be published in the manner and at the time when they were published. Such plea may justify the defamatory matter in the sense specified, if any, in the count, or in the sense which the defamatory matter bears without any such specification; or separate pleas justifying the defamatory matter in each sense may be pleaded separately to each as if two libels had been charged in separate counts.

2. Every such plea must be in writing, and must set forth the particular fact or facts by reason of which it was for the public good that such matters should be so published. The prosecutor may reply generally denying the truth thereof.

3. The truth of the matters charged in an alleged libel shall in no case be inquired into without such plea of justification unless the accused is put upon his trial upon any indictment or information charging him with publishing the libel knowing the same to be false, in which case evidence of the truth may be given in order to negative the allegation that the accused knew the libel to be false.

4. The accused may, in addition to such plea, plead not guilty and such pleas shall be inquired of together.

5. If when such plea of justification is pleaded the accused is convicted, the court may, in pronouncing sentence, consider whether his guilt is aggravated or mitigated by the plea. R. S. C. c. 174, ss. 148, 149, 150 & 151.

TRIAL IN PROVINCE WHERE NEWSPAPER PUBLISHED.

640. (2) Every proprietor, publisher, editor or other person charged with the publication in a newspaper of any defamatory libel shall be dealt with, indicted, tried and punished in the province in which he resides, or in which such newspaper is printed. 51 V. c. 44, s. 2.

JUROR CANNOT BE ORDERED TO STAND ASIDE.

669. The right of the Crown to cause any juror to stand aside until the panel has been gone through shall not be exercised on the trial of any indictment or information by a private prosecutor for the publication of a defamatory libel. R. S. C. c. 174, s. 165.

TRIAL AND VERDICT.

719. On the trial of any indictment or information for the making or publishing of any defamatory libel, on the plea of not guilty pleaded, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon

the whole matter put in issue upon such indictment or information, and shall not be required or directed, by the court or judge before whom such indictment or information is tried, to find the defendant guilty merely on the proof of publication by such defendant of the paper charged to be a defamatory libel, and of the sense ascribed to the same in such indictment or information; but the court or judge before whom such trial is had shall, according to the discretion of such court or judge, give the opinion and direction of such court or judge to the jury on the matter in issue as in other criminal cases; and the jury may, on such issue, find a special verdict if they think fit so to do; and the defendant, if found guilty, may move in arrest of judgment on such ground and in such manner as he might have done before the passing of this Act. R. S. C. c. 174, s. 152. 32 Geo. III. c. 60. ss. 1, 2, 3, 4 (Imp.).

Costs.

833. In the case of an indictment or information by a private prosecutor for the publication of a defamatory libel if judgment is given for the defendant, he shall be entitled to recover from the prosecutor the costs incurred by him by reason of such indictment or information either by warrant of distress issued out of the said court, or by action or suit as for an ordinary debt. R. S. C. c. 174, ss. 153 & 154.

Costs against a defendant fall under s. 832.

The following sections of c. 163, R. S. C. are unrepealed.

6. Every person against whom any criminal proceedings are commenced or prosecuted in any manner for or on account of or in respect of the publication of any report, paper, votes or proceedings, by such person or by his servant, by or under the authority of any Legislative Council, Legislative Assembly or House of Assembly, may bring before the court in which such proceedings are so commenced or prosecuted, or before any judge of the same, first giving twenty-four hours' notice of his intention so to do, to the prosecutor in such proceedings, or to his attorney or solicitor, a certificate under the hand of the speaker or clerk of any Legislative Council, Legislative Assembly or House of Assembly, as the case may be, stating that the report, paper, votes or proceedings as the case may be, in respect whereof such criminal proceedings have been commenced or prosecuted, was or were published by such person, or by his servant, by order or under the authority of any Legislative Council, Legislative Assembly or House of Assembly, as the case may be, together with an affidavit verifying such certificate; and such court or judge shall thereupon immediately stay such criminal proceedings, and the same shall be and shall be deemed and taken to be finally put an end to, determined and superseded by virtue hereof. 24 V. (P. E. I.), c. 31, s. 1. 3-4 V. c. 9, s. 1 (Imp.).

7. In case of any criminal proceedings hereafter commenced or prosecuted for or on account or in respect of the publication of any copy of such report, paper, votes or proceedings, the defendant, at any stage of the proceedings, may lay before the court or judge such report, paper, votes or proceedings, and such copy, with an affidavit verifying such report, paper, votes or proceedings, and the correctness of such copy; and the court or judge shall immediately stay such criminal proceedings, and the same shall be and shall be deemed to be finally put an end to, determined and superseded by virtue hereof. 24 V. (P.E.I.), c. 31, s. 2. 3-4 V. c. 9, s. 2 (Imp.).

LARCENY.

GENERAL REMARKS.

(*From 2nd Edition.*)

Larceny, at common law, is the wrongful taking and carrying away of the personal goods of any one from his possession, with a felonious intent to convert them to the use of the offender, without the consent of the owner: 2 East, P. C. 553; the word "felonious" showing that there is no colour of right to excuse the act, and the "intent" being to deprive the owner permanently of his property: R. v. Thurborn, 1 Den. 387; R. v. Guernsey, 1 F. & F. 394; R. v. Holloway, 1 Den. 370; 2 Russ. 146, note by Greaves; R. v. Middleton, 12 Cox, 417.

It is not, however, an essential ingredient of the offence that the taking should be for a cause of gain, *lucri causa*; a fraudulent taking, with intent wholly to deprive the owner of his property, or with intent to destroy it, is sufficient.

Larceny is either *simple*, that is, unaccompanied by any other aggravating circumstance, or *compound*, that is, when it is accompanied by the aggravating circumstances of taking from the house or person, or both.

Larceny was formerly divided into grand larceny and petit larceny; but this distinction is now abolished.

By s. 357, *post*, a more severe punishment may be inflicted when the value of the article stolen is over two hundred dollars, but then this value must be alleged in the indictment and duly proved on the trial, otherwise the larceny is punishable under s. 356, when no special punishment is provided for.

The requisites of the offence are:

The taking.
The carrying away.
The goods taken.
The owner of the goods
The owner's dissent from the taking.
The felonious intent in taking.

THE TAKING.

To constitute the crime of larceny at common law there must be a taking or severance of the thing from the actual or constructive possession of the owner; for all felony includes trespass, and every indictment must have the words *feloniously took* as well as *carried away;* from whence it follows that, if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away: 1 Hawk. p. 142. As in the case of a wife carrying away and converting to her own use the goods of her husband, for husband and wife are one person in law, and, consequently, there can be no taking so as to constitute larceny: 1 Hale, 514; and the same if the husband be jointly interested with others in the property so taken: R. v. Willis, 1 Moo. 375; *see* now s. 305, *post.*

The taking, however, may be by the hand of another: 2 East, P. C. 555; as if the thief procure a child within the age of discretion to steal goods for him, it will be the same as if he had taken them himself, and the taking in such case should be charged to him: 1 Hale, 507.

Where the offender unlawfully acquired the possession of goods, as by fraud or force, with an intent to steal them, the owner still retaining his property in them, such offender will be guilty of larceny in embezzling them. Therefore, hiring a horse on pretense of taking a journey, and immediately selling it, is larceny; because the jury found the defendant acted *animo furandi* in making the contract, and the parting with the *possession* merely had not changed the nature of the property: R. v. Pear, 1 Leach, 212. And so,

where a person hires a post-chaise for an indefinite period, and converts it to his own use, he may be convicted of larceny if his original intent was felonious: R. v. Semple, 1 Leach, 420.

So, where the prisoner, intending to steal the mail bags from the post office, procured them to be let down to him by a string from the window of the post office, under pretense that he was the mail guard, he was held guilty of larceny: R. v. Pearce, 2 East, P. C. 603.

Where the prisoner was hired for the special purpose of driving sheep from one fair to another, and, instead of doing so, drove them, the following morning after he received them, a different road, and sold them; the jury having found that, at the time he received the sheep, he intended to convert them to his own use, and not drive them to the specified fair, the judges were unanimously of opinion that he was rightly convicted of larceny: R. v. Stock, 1 Moo. 87.

Where the prisoner covered some coals in a cart with slack, and was allowed to take the coals away, the owner believing the load to be slack, and not intending to part with his property in the coals, it was held a larceny of the coals: R. v. Bramley, L. & C. 21.

Prevailing upon a tradesman to bring goods proposed to be bought to a given place, under pretense that the price shall then be paid for them, and further prevailing upon him to leave them there in the care of a third person, and then getting them from that person without paying the price, is a felonious taking, if, *ab initio*, the intention was to get the goods from the tradesman and not pay for them: R. v. Campbell, 1 Moo. 179.

In another case a person by false pretenses induced a tradesman to send by his servant to a particular house goods of the value of two shillings and ten pence, with change for a crown piece. On the way he met the servant, and induced him to part with the goods and the change for a crown piece, which afterwards was found to

be bad. Both the tradesman and the servant swore that the latter had no authority to part with the goods or change without receiving the crown piece in payment, though the former admitted that he intended to sell the goods, and never expected them back again: it was held that the offence amounted to larceny: R. v. Small, 8 C. & P. 46.

The prosecutor met a man and walked with him During the walk, the man picked up a purse, which he said. he had found, and that it was dropped by the prisoner. He then gave it to the prisoner who opened it, and there appeared to be about forty pounds in gold in it. The prisoner appeared grateful, and said he would reward the man and the prosecutor for restoring it. The three then went to a public house and had some drink. Prisoner then showed some money, and said if the man would let him have ten pounds, and let him go out of his sight, he would not say what he would give him. The man handed what seemed to be ten pounds in money, and the prisoner and prosecutor then went out together. They returned, and prisoner appeared to give the ten pounds back and five pounds more. Prisoner then said he would do the same for the prosecutor, and by that means obtained three pounds in gold, and the prosecutor's watch and chain from him. The prisoner and the man then left the public house, and made off with the three pounds and the watch and chain At the trial the prosecutor said he handed the three pounds and the watch and chain to the men in terror, being afraid they would do something to him, and not expecting they would give him five pounds. *Held*, that the prisoner was properly convicted of larceny: R. v. Hazell, 11 Cox, 597.

Prosecutor sold onions to the prisoners who agreed to pay ready money for them. The onions were unloaded at a place indicated by the prisoners, and the prosecutor was then induced to make out and sign a receipt which the prisoners got from him, and then refused to restore

the onions or pay the price. The jury convicted the prisoners of larceny, and said that they never intended to pay for the onions, and that the fraud was meditated by them from the beginning. *Held*, that the conviction was right: R. v. Slowly, *et al.*, 12 Cox, 269.

So, taking goods the prisoner has bargained to buy is felonious if, by the usage, the price ought to be paid before they are taken, and the owner did not consent to their being taken, and the prisoner, when he bargained for them, did not intend to pay for them, but meant to get them into his possession and dispose of them for his own benefit without paying for them: R. v. Gilbert, 1 Moo. 185.

So, getting goods delivered into a hired cart, on the express condition that the price shall be paid for them before they are taken from the cart, and then, getting them from the cart without paying the price, will be larceny if the prisoner never had the intention to pay, but had, *ab initio*, the intention to defraud: R. v. Pratt, 1 Moo. 250.

So, where the prosecutor, intending to sell his horse, sent his servant with it to the fair, but the servant had no authority to sell or deal with it in any way, and the defendants, by fraud, induced the servant to part with the possession of the horse under colour of an exchange for another, intending all the while to steal it; this was holden to be larceny: R. v. Sheppard, 9 C. & P. 121.

So, where the prisoner, pretending to be the servant of a person who had bought a chest of tea deposited at the East India Company's warehouse, got a request paper and permit for the chest, and took it away with the assent of a person in the company's service who had the charge of it, it was held that this was larceny: R. v. Hench, R. & R. 163.

Prisoner and a confederate went to prosecutor's shop to buy something, and put down a florin in payment. Prosecutor put the florin into the till and placed the change on the counter, which the prisoner took up. The confederate said, "You need not have changed," and threw down a

penny on the counter, which the prisoner took up, and put a sixpence in silver and sixpence in copper down, and asked prosecutor to give him a shilling for it. Prosecutor took a shilling from the till, and put it on the counter when prisoner said, "You may as well give me the florin back and take it all." Prosecutor took the florin from the till and put it on the counter, expecting to receive two shillings of the prisoner's money in lieu of it. Prisoner took up the florin, and prosecutor took up the silver sixpence and the sixpence in copper, and the shilling put down by herself, and was putting them in the drawer when she saw that she had only got one shilling of the prisoner's money and her own shilling; but, at that moment, her attention was diverted by the confederate, and both confederate and prisoner quitted the shop. *Held*, upon a case reserved, that this was a case of larceny, for the transaction of exchange was not complete; prosecutor had not parted with the property in the florin: R. v. McKale, 11 Cox, 32; R. v. Russett, 17 Cox, 534.

On the other hand, if the owner give his property voluntarily, whatever false pretense be used to obtain it, no felony can be committed: 1 Hale, 506; R. v. Adams, R. & R. 225; R. v. Buckmaster, 20 Q. B. D. 182, Warb. Lead. Cas. 158.

Thus where, in a case of ring-dropping, the prisoners prevailed on the prosecutor to buy the share of the other party, and the prosecutor was prevailed on to part with his money, intending to part with it for ever and not with the possession of it only, it was held by Coleridge, J., that this was not a larceny: R. v. Wilson, 8 C. & P. 111; *see* R. v. Solomons, 17 Cox, 93, Warb. Lead. Cas. 160; R. v. Russett, 17 Cox, 534.

It was the duty of the prisoner to ascertain the amount of certain dock dues payable by the prosecutors, and having received the money from their cash keeper to pay the dues to those who were entitled to them. He falsely

represented a larger sum to be due than was due, and, paying over the real amount, converted the difference to his own use. This was held not to be a larceny: R. v. Thompson, L. & C. 233.

So, where the prisoner was sent by his fellow workmen to get their wages, and received the money from the employer done up in separate pieces of paper, and converted the money to his own use, it was held upon an indictment laying the property in the employer that the prisoner could not be convicted, he being the agent of the workmen: R. v. Barnes, 12 Jur. N. S. 549; and *see* R. v. Jacobs, 12 Cox, 151.

A cashier of a bank has a general authority to part with his employer's money in payment of such cheques as he may think genuine; where, therefore, money has been obtained from a cashier at a bank on a forged cheque knowingly it does not amount to the crime of larceny: R. v. Prince, 11 Cox, 193. In this case Bovill, C.J., said: "The distinction between larceny and false pretenses is very material. The one is a felony and the other is a misdemeanour; and although, by reason of modern legislation, it has become not of so much importance as formerly, it is still desirable to keep up the distinction. To constitute a larceny there must be a taking of the property against the will of the owner, which is the essence of the crime of larceny. The authorities cited by the counsel for the prisoner show that where the property has been obtained voluntarily from the owner, or a servant acting within the scope of his authority, the offence does not amount to larceny. The cases cited for the prosecution were cases where the servant who parted with the property had a limited authority only. In the present case the cashier of the bank was acting within his authority in parting with the possession and property in the money. Under these circumstances the conviction must be quashed."

And if credit be given for the property, for ever so short a time, no felony can be committed in converting it: 2 East, P. C. 677.

Thus, obtaining the delivery of a horse *sold*, on promise to return immediately and pay for it, and riding off, and not returning, is no felony: R. v. Harvey, 1 Leach, 467; but *see* now s. 305, *post*.

So, where the prisoner, with a fraudulent intent to obtain goods, ordered a tradesman to send him a piece of silk, to be paid for on delivery, and upon the silk being sent accordingly gave the servant who brought it bills which were mere fabrications, and of no value; it was holden not to be larceny on the ground that the servant *parted with the property* by accepting such payment as was offered, though his master did not intend to give the prisoner credit: Parkes's Case, 2 Leach, 614.

The prisoner, having entered into a contract with the prosecutors for the purchase of some tallow, obtained the delivery orders from the prosecutors by paying over to them a cheque for the price of the tallow, and, when the cheque was presented, there were no assets. *Held*, not to be a larceny of the delivery orders by a trick, but a lawful possession of them by reason of the credit given to the prisoner in respect of the cheque: R. v. North, 8 Cox, 433.

To constitute larceny at common law there must be an original felonious design. Lord Coke draws a distinction between such as gain possession *animo furandi* and such as do not. He says: "The intent to steal must be when it comes to his hands or possession; for if he hath the possession of it once lawfully, though he hath the *animus furandi* afterwards, and carrieth it away, it is no larceny." Therefore, when a house was burning, and a neighbour took some of the goods to save them but afterwards converted them to his own use, it was held no felony: 1 Leach, 411.

But if the original intent be wrongful, though not a felonious trespass, a subsequent felonious appropriation is larceny. So, where a man drove away a flock of lambs from a field, and in doing so inadvertently drove away along with them a lamb, the property of another person,

and, as soon as he discovered that he had done so, sold the lamb for his own use, and then denied all knowledge of it. *Held*, that as the act of driving the lamb from the field in the first instance was a trespass, as soon as he resolved to appropriate the lamb to his own use the trespass became a felony: R. v. Riley, Dears. 149, 6 Cox, 88.

It is peculiarly the province of the jury to determine with what intent any act is done; and, therefore, though in general he who has a possession of anything on delivery by the owner cannot commit larceny thereof at common law, yet, that must be understood, first, where the possession is absolutely changed by the delivery, and next, where such possession is not obtained by fraud, and with a felonious intent. For if, under all the circumstances of the case, it be found that a party has taken goods from the owner, although by his delivery, with an intent to steal them such taking amounts to felony: 2 East, P. C. 685.

Overtures were made by a person to the servant of a publican to induce him to join in robbing his master's till. The servant communicated the matter to the master, and, some weeks after the servant, by the direction of the master, opened a communication with the person who had made the overtures, in consequence of which he came to the master's premises. The master, having previously marked some money, it was, by his direction, placed upon the counter by the servant in order that it might be taken up by the party who had come for the purpose. It was so taken up by him. *Held*, larceny in such party: R. v. Williams, 1 C. & K. 195.

If the party obtained possession of the goods lawfully, as upon a trust for, or on account of, the owner, by which he acquires a special property therein, he cannot *at common law* be afterwards guilty of felony in converting them to his own use, unless by some new and distinct act of taking, as by severing part of the goods from the rest, with intent to convert them to his own use, he thereby determines the

privity of the bailment and the special property thereby conferred upon him: 1 Hale, 504; 2 East, P. C. 554. But that is not now law; *see* s. 305, *post.*

See R. v. Wells, 1 F. & F. 109, where it was held that a carrier who, receiving money to procure goods, obtained and duly delivered the goods but fraudulently retained the money, may be convicted of larceny as a bailee.

A man cannot, however, be convicted of larceny as a bailee unless the bailment was to re-deliver the *very same* chattel or money: R. v. Hoare, 1 F. & F. 647; R. v. Garrett, 2 F. & F. 14; R. v. Hassall, L. & C. 58.

The prisoner was intrusted by the prosecutor with money to buy a load of coals, which were to be brought to the prosecutor's by the prisoner in his own cart, the prisoner being paid for his services including the use of his horse and cart. He bought a load of coals in his own name, and on the way to the prosecutor's abstracted a portion of the coal and converted it to his own use, delivering the rest of the coal to the prosecutor as and for the whole load. *Held*, that he was rightly convicted of larceny as a bailee: R. v. Bunkall, L. & C. 371, 9 Cox, 419.

A carrier employed by the prosecutor to deliver in his, the prisoner's, cart a boat's cargo of coals to persons named in a list, to whom only he was authorized to deliver them, and having fraudulently sold some of the coals and appropriated the proceeds, was properly convicted of larceny as a bailee: R. v. Davies, 10 Cox, 239.

If the goods of a husband be taken with the consent or privity of the wife it is not larceny: R. v. Harrison, 1 Leach, 47; R. v. Avery, Bell, 150; *see* now s. 313, *post.*

However, it is said that if a woman steal the goods of her husband, and give them to her avowterer, who, knowing it, carries them away, the avowterer is guilty of felony:

Dalt. c. 104. And where a stranger took the goods of the husband *jointly* with the wife this was holden to be larceny in him, he being her adulterer: R. v. Tolfree, 1 Moo. 243, overruling R. v. Clarke, 1 Moo. 376, note (*a*); *see* s. 313, *post*.

Also, in R. v. Featherstone, Dears. 369, the prisoner was charged with stealing twenty-two sovereigns and some wearing apparel. The prosecutor's wife took from the prosecutor's bedroom thirty-five sovereigns and some articles of clothing, and left the house, saying to the prisoner, who was in a lower room: "It's all right, come on." The prisoner and the prosecutor's wife were afterwards seen together, and were traced to a public house where they slept together. When taken into custody the prisoner had twenty-two sovereigns on him. The jury found the prisoner guilty on the ground that he received the sovereigns from the wife knowing that she took them without the authority of her husband. Upon a case reserved it was held that the conviction was right. Lord Campbell, C.J., in delivering the judgment, said: "We are of opinion that this conviction is right. The general rule of law is that a wife cannot be found guilty of larceny for stealing the goods of her husband, and that is upon the principle that the husband and the wife are, in the eye of the law, one person; but this rule is properly and reasonably qualified when she becomes an adulteress. She thereby determines her quality of wife, and her property in her husband's goods ceases": *see* R. v. Berry, Bell, 95.

And so it is even though no adultery has been committed, but the goods are taken with the intent that the wife shall elope and live in adultery with the stranger: R. v. Tollett, C. & M. 112; R. v. Thompson, 1 Den. 549.

And if a servant, by direction of his master's wife, carries off his master's property, and the servant and wife go off together with the property with the intention of committing adultery, the servant may be indicted for stealing the property: R. v. Mutters, L. & C. 511.

It seems, however, that if a wife elopes with an adulterer it is no larceny in the adulterer to assist in carrying away her necessary wearing apparel: R. v. Fitch, Dears. & B. 187, overruling on this point the direction of Coleridge, J., in R. v. Tollett, cited *supra*; *see* s. 313, *post*.

The prisoner who had lodged at the prosecutor's house left it, and the next day the prosecutor's wife also left, taking a bundle with her, which, however, was not large enough to contain the things which, the evening she left, it was found had been taken from the house. Two days after all the things were found in the prisoner's cabin, or on his person, in a ship in which the prosecutor's wife was, the prisoner and the prosecutor's wife having taken their passage in the ship as man and wife. It was held that from these facts the jury were justified in drawing the inference that the prisoner had received the property knowing it to have been stolen: R. v. Deer, L. & C. 240. But an adulterer cannot be convicted of stealing the goods of the husband brought by the wife to his house, in which the adultery is afterwards committed, merely upon evidence of their being there, unless they be traced to his personal possession: R. v. Rosenberg, 1 C. & K. 233. When a wife absconds from the house of her husband with her avowterer the latter cannot be convicted of stealing the husband's money missing on their departure, unless he be proved to have taken some active part, either in carrying away or in spending the money stolen: R. v. Taylor, 12 Cox, 627.

Nor can an avowterer be found guilty of felonious receiving of the husband's property taken by the wife, as a wife cannot steal her husband's property: R. v. Kenny, 13 Cox, 397; *see* now s. 313, *post*.

The prisoner eloped with the prosecutor's wife, travelling in a cart which the wife took from her husband's yard. The prisoner sold the pony, cart and harness in the presence of the wife, who did not object to the sale, and received the proceeds, which she retained after paying the

prisoner a sovereign he had expended in obtaining lodging while they were living in a state of adultery. *Held*, that the presence of the woman did not alter the offence; that the fact that he negotiated the sale and received part of the proceeds was sufficient; from the circumstances, the prisoner must have known that the pony, cart and harness were not the property of the woman; and that if the jury were of opinion he had that knowledge they were bound to convict him: R. v. Harrison, 12 Cox, 19; R. v. Flatman, 14 Cox, 396.

Under certain circumstances, indeed, a man may commit felony of his own goods; as if A. bail goods to B. and afterwards, *animo furandi*, steal the goods from B. with design to charge him for the value of them, this is felony: 1 Hale, 513; 2 East, P. C. 558.

So where A., having delivered money to his servant to carry to a certain place, disguised himself, and robbed the servant on the road, with intent to charge the hundred, this was held robbery in A.: 2 East, P. C. 558.

If a man steal his own goods from his own bailee, though he has no intent to charge the bailee but his intent is to defraud the King, yet, if the bailee had an interest in the possession and could have withheld it from the owner, the taking is a larceny: R. v. Wilkinson, R. & R. 470. But it is said in Roscoe, Cr. Evid. 597: "It may be doubted whether the law has not been somewhat distorted in this case in order to punish a flagrant fraud."

Bishop, 2 Cr. L. 790, says: "If one, therefore, has transferred to another a special property in goods, retaining in himself the general ownership, or, if the law has made such transfer, he commits larceny by taking them with felonious intent."

So if a man steal his goods *in custodia legis*. But "if the goods stolen were the general property of the defendant, who took them from the possession of one to whose care they had been committed, as for instance, from an

officer seizing them on an execution against the defendant, it must be shown that the latter knew of the execution and seizure; otherwise the required intent does not appear. The presumption, in the absence of such knowledge, would be, that he took the goods supposing he had the right so to do": 2 Bishop, Cr. Proc. 749; *see* s. 306, *post.*

If a part owner of property steal it from the person in whose custody it is, and who is *responsible for its safety*, he is guilty of larceny: R. v. Bramley, R. & R. 478.

A wife may steal the goods of her husband which have been bailed or delivered to another person, or are in the possession of a person who has a temporary special property in them: 1 Hale, 513.

The wife cannot commit larceny in the company of her husband; for it is deemed his coercion, and not her own voluntary act. Yet, if she do in his absence, and by his mere command, she is then punishable as if she were sole: R. v. Morris, R. & R. 270; R. v. Robson, L. & C. 93; *see* now s. 13, *ante.*

THE CARRYING AWAY.

(*See s. 305, s-s. 4, post.*)

To constitute larceny there must be a *carrying away*, asportation, as well as a taking. The least removing of the thing taken *from the place where it was before* is sufficient for this purpose, though it be not quite carried off. And, upon this ground, the guest, who, having taken off the sheets from his bed, with an intent to steal them, carried them into the hall, and was apprehended before he could get out of the house, was adjudged guilty of larceny. So, also, was he, who, having taken a horse in a close, with an intent to steal him, was apprehended before he could get him out of the close. And such was the case of him who, intending to steal plate, took it out of the trunk wherein it was, and laid it on the floor, but was surprised before he could remove it any further: 2 East, P. C. 555; 3 Burn, 214. Or if a servant, *animo furandi*, take his master's hay

from his stable, and put it into his master's waggon : R. v. Gruncell, 9 C. & P. 365.

H. was indicted for stealing a quantity of currants, which were packed in the forepart of a waggon. The prisoner had laid hold of this parcel of currants, and had got near the tail of the waggon with them, when he was apprehended; the parcel was afterwards found near the middle of the waggon. On this case being referred to the twelve judges they were unanimously of opinion that, as the prisoner had *removed* the property from the spot where it was originally placed, with intent to steal, it was a *taking and carrying away*: Cozlett's Case, 2 East, P. C. 556.

Prisoner had lifted up a bag from the bottom of a boot of a coach, but was detected before he had got it out; it did not appear that it was entirely removed from the space it at first occupied in the boot, but the raising it from the bottom had completely removed each part of it from the space that specified part occupied: *Held*, that this was a complete *asportation:* R. v. Walsh, 1 Moo. 14.

The offence of simple larceny is complete, if the defendant drew a book from the inside pocket of the prosecutor's coat about an inch above the top of the pocket, though the prosecutor then suddenly putting up his hand the defendant let the book drop, and it fell back into the prosecutor's pocket: R. v. Thompson, 1 Moo. 78.

On the other hand, a mere change of *position* of the goods will not suffice to make out a carrying away. So, where W. was indicted for stealing a wrapper and some pieces of linen cloth, and it appeared that the linen was packed up in the wrapper in the common form of a long square, which was laid length-way in a waggon, and that the prisoner set up the wrapper on one end in the waggon for the greater convenience of taking the linen out, and cut the wrapper all the way down for that purpose, but was apprehended before he had taken anything; all the judges agreed that this was no larceny, although his intention to

steal was manifest. For a carrying away, in order to constitute felony, must be a removal of the goods from the place where they were; and the felon must, for the instant at least, have the entire and absolute possession of them: R. v. Cherry, 2 East, P. C. 556.

So, where one had his keys tied to the strings of his purse in his pocket, which W. attempted to take from him and was detected with the purse in her hand, but the strings of the purse still hung to the owner's pocket by means of the keys, this was ruled to be no *asportation*: Wilkinson's case, 1 Leach, 321; *see* s. 711, *post*.

So in another case, where A. had his purse tied to his girdle, and B. attempted to rob him; in the struggle the girdle broke, and the purse fell to the ground; B. not having previously taken hold of it, or picked it up afterwards, it was ruled to be no taking: 1 Hale, 533; *see* s. 711, *post*.

Upon an indictment for robbery the prisoner was found to have stopped the prosecutor as he was carrying a feather bed on his shoulders, and told him to lay it down, or he would shoot him, on which the prosecutor laid the bed on the ground, but the prisoner was apprehended before he could take it up so as to remove it from the spot where it lay, the judges were of opinion that the offence was not complete: Farrell's case, 2 East, P. C. 557.

Where the prisoner, by means of a pipe and stopcock, turned off the gas belonging to a company before it came into the meter, and so consumed the gas, it was held that there was a sufficient severance of the gas in the entrance pipe to constitute an *asportavit*: R. v. White, Dears. 203; R. v. Firth, 11 Cox, 234.

If the thief once take possession of the thing the offence is complete, though he afterwards return it: 3 Burn, 215.

Where it is one continuing transaction, though there be several distinct *asportations* in law by several persons, yet all may be indicted as principals who concur in the felony

before the final carrying away of the goods from the virtual custody of the owner; 2 East, P. C. 557; and if several persons act in concert to steal a man's goods, and he is induced by fraud to trust one of them, in the presence of the others, with the possession of the goods, and another of them entice him away that the man who has his goods may carry them off, all are guilty of felony; the receipt by one is a felonious taking by all: R. v. Standley, R. & R. 305.

And where property which the prosecutors had bought was weighed out in the presence of their clerk, and delivered to their carter's servant to cart, who let other persons take away the cart and dispose of the property for his benefit jointly with that of the other persons, it was held, that the carter's servant, as well as the other persons, was guilty of larceny at common law: R. v. Harding, R. & R. 125.

THE GOODS TAKEN.

The property taken must, to constitute larceny at common law, be *personal* property, and of some intrinsic value, though it need not be of the value of some coin known to the law: R. v. Morris, 9 C. & P. 349; 3 Burn, 216; R. v. Walker, 1 Moo. 155; *see* s. 303, *post.*

Things real, or which savour of the realty, choses in action, as deeds, bonds, notes, etc., cannot be the subject of larceny, at common law: *see* s. 303, *post.*

No larceny, at common law, can be committed of such animals in which there is no property, either absolute or qualified; as of beasts that are *ferœ naturæ* and unreclaimed. But if they are reclaimed or confined, or are practically under the care and dominion of the prosecutor and may serve for food, it is otherwise: *see* s. 304, *post.*

So young pheasants, hatched by a hen, and under the care of the hen in a coop, although the coop is in a field at a distance from the dwelling-house, and although the pheasants are designed ultimately to be turned out and to

become wild, are the subject of larceny: R. v. Cory, 10 Cox, 23.

Partridges were reared from eggs by a common hen; they could fly a little, but still remained with the hen as her brood, and slept under her wings at night, and from their inability to escape were practically in the power and dominion of the prosecutor: *Held*, that they were the subject of larceny at common law: R. v. Shickle, 11 Cox, 189.

The prisoner was indicted for stealing one dead partridge, and the proof was that the partridge was wounded, but was picked up or caught by the prisoner while it was alive but in a dying state: *Held*, that the indictment was not proved: R. v. Roe, 11 Cox, 554. What value necessary in property to be subject to larceny: R. v. Edwards, Warb. Lead. Cas. 132.

Rabbits were netted, killed, and put in a place of deposit, viz: a ditch, on the land of the owner of the soil on which the rabbits were caught, and some three hours afterwards the poachers came to take them away, one of whom was captured by gamekeepers who had previously found the rabbits, and lay in wait for the poachers: *Held*, that this did not amount to larceny: R. v. Townley, 12 Cox, 59, Warb. Lead. Cas. 133. But a trespasser who, having cut grass on another man's land, leaves it there, but returns and carries it away afterwards, commits larceny: R. v. Foley, 17 Cox, 142. Water in the pipes of a company may be the subject of larceny: Ferens v. O'Brien, 15 Cox, 332.

AGAINST OWNER'S CONSENT.

The taking must be against the will of the owner. The primary inquiry to be made is, whether the taking were *invito domino*, that is to say, without the will or approbation of the owner; for this is of the very essence of larceny and its kindred offence, robbery: 3 Burn, 218.

But where a servant, being solicited to become an accomplice in robbing his master's house, informed his

master of it, and the master thereupon told him to carry on the affair, consented to his opening the door leading to the premises, and to his being with the robbers during the robbery, and also marked his property, and laid it in a place where the robbers were expected to come: it was holden, that this conduct of the master was no defence to an indictment against the robbers: *see* Bishop, 1 Cr. L. 262, and 2 Cr. L. 811.

An indictment charged the stealing of "nineteen shillings in money" of the moneys of A. B. It appeared that A. B. got into a merry-go-round at a fair, and handed the prisoner a sovereign in payment for the ride, asking her to give change. The prisoner gave A. B. eleven pence, and said she would give the rest when the ride was finished. After the ride was over the prisoner said A. B. only gave her one shilling, and refused to give her the nineteen shillings change: *Held*, that the prisoner could not be convicted upon this indictment of stealing nineteen shillings: R. v. Bird, 12 Cox, 257.

B., making a purchase from the prisoner, gave him half a sovereign in mistake for a sixpence. Prisoner looked at it and said nothing but put it into his pocket. Soon afterwards B. discovered the mistake, and returned and demanded the restoration of the half sovereign. Prisoner said "all right, my boy; I'll give it to you," but he did not return it, and was taken into custody: *Held*, not to be a larceny: R. v. Jacobs, 12 Cox, 151. Obtaining money from any one by frightening him, is larceny: R. v. Lovell, 8 Q. B. D. 185; R. v. McGrath, Warb. Lead. Cas. 140.

THE FELONIOUS INTENT.

The taking and carrying away must, to constitute larceny at common law, be with a *felonious intent* entertained at the time of the taking: *see* now s-s. 3, s. 305, *post*.

Felony is always accompanied with an evil intention, and, therefore, shall not be imputed to a mere mistake.

As where persons break open a door in order to execute a warrant which will not justify such a proceeding: for in such case there is no *felonious* intention: 1 Hawk. 142.

For it is the mind that makes the taking of another's goods to be felony, or a bare trespass only; but, because the variety of circumstances is so great, and the complication thereof so mingled, that it is impossible to prescribe all the circumstances evidencing a felonious intent or the contrary, the same must be left to the due and attentive consideration of the judge and jury: wherein, the best rule is, in doubtful matters, rather to incline to acquittal than conviction. Only, in general, it may be observed, that the ordinary discovery of a felonious intent is, the party doing it secretly, or, being charged with the goods, denying it: 1 Hale, 509.

And if goods be taken on claim of right or property in them it will be no felony; at the same time, it will be matter of evidence whether they were, *bona fide*, so taken, or whether they were not taken from the person actually possessing them, with a thievish and felonious intent, and therefore, obtaining possession of goods by a fraudulent claim of right, or by a fraudulent pretense of law, and then running away with them, would be a felony: 1 Hale, 507; Lemott's case and Farre's case, Kelyng, 64, 65.

The prisoner had set wires, in which game was caught. The prosecutor, a game-keeper, took them away for the use of the lord of the manor, while the prisoner was absent. The prisoner demanded his wires and game, with menaces, and under the influence of fear the prosecutor gave them up. The jury found that the prisoner acted under a *bona fide* impression that the game and wires were his property, and that he merely, by some degree of violence, gained possession of what he considered his own. It was held no robbery, there being no *animus furandi*: R. v. Hall, 3 C. & P. 409.

And where a letter, directed to J. O. at St. Martin's Lane, Birmingham, inclosing a bill of exchange drawn in favour of J. O., was delivered to the defendant, whose name was J. O., and who resided near St. Martin's Lane, Birmingham; but, in truth, the letter was intended for a person of the name of J. O. who resided in New Hall Street; and the prisoner, who, from the contents of the letter, must have known that it was not intended for him, applied the bill of exchange to his own use; the judges held that it was no larceny, because at the time when the letter was delivered to him the defendant had not the *animus furandi*: R. v. Mucklow, 1 Moo. 160.

And to constitute larceny at common law the intent must be to deprive the owner, not temporarily, but permanently, of his property: R. v. Philipps, 2 East, P. C. 662; R. v. Hemmings, 4 F. & F. 50; but *see* now s. 305, *post*.

Money was given to the prisoner for the purpose of paying turnpike tolls at two gates on his journey. Twelve days afterwards, on being asked if he had paid the toll at one of the gates, the prisoner said he had not, that he had gone by a parish road which only crossed the road at that gate, and so no toll was payable there, and that he had spent the money on beer for himself and his mates. The prisoner having been convicted of larceny of the money, but it not appearing on a case reserved as to whether the facts proved a larceny, and that the question of felonious intention had been distinctly left to the jury, the court quashed the conviction: R. v. Deering, 11 Cox, 298.

In all cases of larceny the questions whether the defendant took the goods knowingly or by mistake; whether he took them *bona fide* under a claim of right or otherwise; and whether he took them with an intent to return them to the owner, or to deprive the owner of them altogether, and to appropriate and convert them to his own use, are questions entirely for the consideration of the

jury, to be determined by them upon a view of the particular facts of the case: 1 Leach, 422.

Upon an indictment for larceny it appeared that the prisoner had been instructed by the wife of the prosecutor to repair an umbrella. After the repairs were finished, and it had been returned to the prosecutor's wife, a dispute arose as to the bargain made. The prisoner thereupon carried away the umbrella as a security for the amount alleged by him to be due for repairing it. Blackburn, J., left it to the jury to say whether the taking by the prisoner was an honest assertion of his right, or only a colourable pretense to obtain possession of the umbrella; verdict, not guilty: R. v. Wade, 11 Cox, 549.

A depositor in a post office savings bank obtained a warrant for the withdrawal of ten shillings, and presented it with his depositor's book to a clerk at the post office, who, instead of referring to the proper letter of advice for ten shillings, referred by mistake to another letter of advice for eight pounds, sixteen shillings and ten pence, and placed that sum upon the counter. The clerk entered eight pounds, sixteen shillings and ten pence in the depositor's book as paid, and stamped it. The depositor took up that sum and went away. The jury found that he had the *animus furandi* at the moment of taking the money from the counter, and that he knew the money to be the money of the postmaster general when he took it up, and found him guilty of larceny. *Held*, by a majority of the judges, that he was properly convicted of larceny. *Per* Cockburn, C.J., Blackburn, Mellor, Lush, Grove, Denman and Archibald, JJ., that the clerk and therefore, the postmaster general, having intended that the property in the money should belong to the prisoner through mistake, the prisoner knowing of the mistake, and having the *animus furandi* at the time, was guilty of larceny. *Per* Bovill, C.J., Kelly, C.B., and Keating, J., that the clerk, having only a limited authority under the

letter of advice, had no power to part with the property in the money to the prisoner, and that, therefore, the conviction was right. *Per* Pigott, B., that, before possession of the money was parted with, and while it was on the counter, the prisoner had the *animus furandi*, and took it up, and was therefore guilty of larceny. *Per* Martin, B., Bramwell, B., Brett, J., and Cleasby, B., that the money was not taken *invito domino*, and therefore that there was no larceny. *Per* Bramwell, B., and Brett, J., that the authority of the clerk authorized the parting with the possession and property in the entire sum laid down on the counter: R. v. Middleton, 12 Cox, 260, 417.

Larceny by finding.—As to concealing treasure trove, *see* R. v. Thomas, Warb. Lead. Cas. 79. If a man lose goods and another find them, and, not knowing the owner, convert them to his own use, this has been said to be no larceny, even although he deny the finding of them, or secrete them. But the doctrine must be taken with great limitation, and can only apply where the finder *bona fide* supposes the goods to have been lost or abandoned by the owner, and not to a case in which he colours a felonious taking under that pretense: *see* R. v. Thurborn, 1 Den. 387, Warb. Lead. Cas. 149, and cases there collected.

The true rule of law resulting from the authorities on the subject has been pronounced to be that "if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny; but, if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny:" R. v. Dixon, Dears. 580; R. v. Christopher, Bell, 27.

In R. v. Moore, L. & C. 1, 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, and that at the time he picked it up he did not know, nor had he reasonable means of knowing, who the owner was; that he afterwards acquired knowledge who the owner was, and after that converted the note to his own use; that he intended, when he found the note, to take it to his own use and deprive the owner of it, whoever he was; and that he believed, when he found it, that the owner could be found. It was held that upon these findings the defendant was rightly convicted of larceny. It is to be observed that in the last mentioned case, although the prisoner at the time he found the bank note did not know, nor had reasonable means of knowing, who the owner was, yet that he *did believe* at the time of the finding that the owner could be found.

The case of R. v. Glyde, 11 Cox, 103, shows that the belief by the prisoner at the time of the finding of the chattel that he could find the owner is a necessary ingredient in the offence, and that it is not sufficient that he intended to appropriate the chattel at the time of finding it, and that he acquired the knowledge of who the owner was before he converted it to his own use. In that case the prisoner found a sovereign on the highway, believing it had been accidentally lost; but, nevertheless, with a knowledge that he was doing wrong, he at once determined to appropriate it, notwithstanding it should become known to him who the owner was. The owner was speedily made known to him, and the prisoner refused to give up the sovereign. There was, however, no evidence that he believed, at the time of finding the sovereign, that he could ascertain who the owner was, and the prisoner was, therefore, held not guilty of larceny.

In R. v. Deaves, 11 Cox, 227, the facts were that the prisoner's child, having found six sovereigns in the street, brought them to the prisoner, who counted them and told some bystanders that the child had found a sovereign. The

prisoner and the child then went down the street to the place where the child had found the money, and found a half-sovereign and a bag. On the same evening, about two hours after the finding, the prisoner was told that a woman had lost money, upon which the prisoner told her informant to mind her own business, and gave her half a sovereign. It was held by the majority of the Irish Court of Criminal Appeal that this case would not be distinguished from R. v. Glyde, *supra;* that there was nothing to show that at the time the child brought her the money the prisoner knew the property had an owner, or, at all events, to show that she was under the impression that the owner could be found, and that, therefore, the conviction of the prisoner for larceny must be quashed.

Prisoner received from his wife a ten pound Bank of England note, which she had found, and passed it away. The note was endorsed "E. May" only, and the prisoner, when asked to put his name and address on it by the person to whom he passed it, wrote on it a false name and address. When charged at the police station the prisoner said he knew nothing about the note. The jury were directed that, if they were satisfied that the prisoner could, within a reasonable time, have found the owner, and if instead of waiting the prisoner immediately converted the note to his own use, intending to deprive the owner of it, it would be larceny. The prisoner was convicted but, upon a case reserved, it was held that the conviction was wrong, and that the jury ought to have been asked whether the prisoner, at the time he received the note, believed the owner could be found: R. v. Knight, 12 Cox, 102.

It is clearly larceny if the defendant, at the time he appropriates the property, knows the owner; and, therefore, where a bureau was given to a carpenter to repair, and he found money secreted in it which he kept and converted to his own use, it was held to be larceny: Cartwright v. Green, 2 Leach, 952.

So if a hackney coachman convert to his own use a parcel left by a passenger in his coach by mistake, it is felony if he knows the owner, or if he took him up or set him down at any particular place, where he might have inquired for him: R. v. Wynne, 2 East, P. C. 664; R. v. Sears, 1 Leach, 415.

So, in every case where the property is not, properly speaking, lost, but only mislaid, under circumstances which would enable the owner to know where to look for and find it, as where a purchaser at a stall of the defendant in a market left his purse on the stall, the person who fraudulently appropriates property so mislaid is guilty of larceny: R. v. West, Dears. 402.

And 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, converts it to his own use, such conversion will amount to larceny: R. v. Pope, 6 C. & P. 346; R. v. Mole, 1 C. & K. 417; R. v. Preston, 2 Den. 353.

Doing an act openly doth not make it the less a felony, in certain cases: 3 Burn, 223. So, where a person came into a seamstress's shop, and cheapened goods, and ran away with the goods out of the shop, openly, in her sight, this was adjudged to be a felony: Chiser's Case, T. Raym. 276.

Returning the goods will not purge the offence if the prisoner took them originally with the intent of depriving the owner of them, and of appropriating them to his own use. In R. v. Trebilcock, Dears. & B. 453, the jury found the prisoner guilty, but recommended him to mercy, "believing that he intended immediately to return the property:" *Held*, that the conviction was right: the recommendation of the jury is no part of the verdict.

The felonious quality consists in the *intention* of the prisoner to defraud the owner, and to apply the thing stolen to his own benefit or use.

The intent need not be *lucri causa*: R. v. Morfit, R. & R. 307; R. v. Gruncell, 9 C. & P. 365; R. v. Handley, Car. & M. 547; R. v. Privett, 1 Den. 193; R. v. Jones, 1 Den. 188.

Possession of stolen property recently after its loss, if unexplained, is presumptive evidence that the party in possession stole it. Such presumption will, however, vary according to the nature of the property stolen, and whether it be or not likely to pass readily from hand to hand: R. v. Partridge, 7 C. & P. 551, Warb. Lead. Cas. 182.

Prisoner was found with dead fowls in his possession of which he could give no account, and was tracked to a fowl house where a number of fowls were kept, and on the floor of which were some feathers corresponding with the feathers of one found on the prisoner from the neck of which feathers had been removed. The fowl-house, which was closed over night, was found open in the morning. The spot where the prisoner was found was twelve hundred yards from the fowl-house, and the prosecutor, not knowing the number of fowls kept, could not swear that he had lost any: *Held*, that there was evidence to support a conviction for larceny: R. v. Mockford, 11 Cox, 16; *see* R. v. Dredge, Warb. Lead. Cas. 135.

On the first floor of a warehouse a large quantity of pepper was kept in bulk. The prisoner was met coming out of the lower room of the warehouse, where he had no business to be, having on him a quantity of pepper of the same kind as that in the room above. On being stopped he threw down the pepper and said, "I hope you will not be hard with me." From the large quantity in the warehouse it could not be proved that any pepper had been taken from the bulk. It was objected that, as there was no direct proof that any pepper had been stolen, the judge was bound to direct an acquittal, but the court of Criminal Appeal held that there was evidence to warrant a conviction: R. v. Burton, 6 Cox, 293.

To obtain money by the trick known as "ringing the changes" is larceny: R. v. Hollis, 15 Cox, 345.

A. was indicted for larceny under the following circumstances:—R., intending to lend A. a shilling, handed him a sovereign, believing it to be a shilling. A., when he received the sovereign, believed it to be a shilling, and did not know until subsequently that it was not a shilling. Immediately A. became aware that it was a sovereign, and although he knew that R. had not intended to part with the possession of a sovereign, but only with the possession of a shilling, and although he could easily have returned the sovereign to R., fraudulently appropriated it to his own use. Prisoner was convicted of larceny. Upon a case reserved, seven judges held the conviction right, and seven were of opinion that these facts did not constitute larceny: R. v. Ashwell, 16 Cox, 1, 16 Q. B. D. 190.

In R. v. Flowers, 16 Cox, 33, 16 Q. B. D. 643, *held*, that where money or goods have been innocently received a subsequent fraudulent appropriation will not render the receiver guilty of larceny, the above lastly cited case not being an authority to the contrary.

A declaration made by a prisoner tried on an indictment for larceny, before he was charged with the crime, in answer to a question asked him where he got the property, is evidence on his behalf.

On the trial of an indictment for larceny of a watch the prisoner's counsel called a witness, W., who stated that the prisoner was drinking at a public house on the evening when the alleged offence was committed, and had the watch with him; that W. went home with the prisoner, and they sat down in the house; that while they were sitting there the prisoner fell upon the floor and the watch fell out of his pocket, and W. picked it up and asked him where he got it. His answer to this question was rejected. The prisoner being convicted, it was held by the court, on a case reserved, that the evidence should have been

received, and the conviction was quashed : R. v. Ferguson, 3 Pugs. (N. B.) 612.

H. and W. were jointly indicted for stealing. H. was found guilty, but the jury could not agree as to W., and were discharged from giving a verdict as to him. *Held*, that the verdict warranted the conviction of H.: R. v. Hamilton and Walsh, 23 N. B. Rep. 540.

Evidence of a general deficiency in the books of a clerk not sufficient to support a charge of larceny : R. v. Glass, M. L. R. 7 Q. B. 405 ; *see* R. v. Wright, 7 Cox, 413. Now, evidence of a general deficiency would, it seems, support an indictment for theft, s. 305, *post*.

TITLE VI.

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

PART XXIV.

What Things Can be Stolen.

303. *Every inanimate thing* whatever which is the property of any person, and which either is or may be made moveable, shall henceforth be capable of being stolen as soon as it becomes moveable, although it is made moveable in order to steal it: Provided, that nothing growing out of the earth of a value not exceeding twenty-five cents shall (except in the cases hereinafter provided) be deemed capable of being stolen.

Section 337, *post*, provides for the stealing of trees of a value not exceeding twenty-five cents.

By the above section, whatever remained of the common law rule as to fixtures, things growing, minerals, choses in action, is superseded. The reason why things growing under the value of twenty-five cents are excepted is the harshness of exposing every person to be treated as a thief who picked a flower in a garden or cut a stick from a hedge: 3 Stephen's Hist. 162.

"The rules that documents evidencing certain rights, and that land and things 'savouring 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."—Imp. Comm. Rep.

ANIMALS CAPABLE OF BEING STOLEN.

304. All tame living creatures, whether tame by nature or wild by nature and tamed, shall be capable of being stolen; but tame pigeons shall be capable of being stolen so long only as they are in a dovecote or on their owner's land.

2. All living creatures wild by nature, such as are not commonly found in a condition of natural liberty in Canada, shall, if kept in a state of confinement, be capable of being stolen, not only while they are so confined but after they have escaped from confinement.

3. All other living creatures wild by nature shall, if kept in a state of confinement, be capable of being stolen so long as they remain in confinement or are being actually pursued after escaping therefrom, but no longer.

4. A wild living creature shall be deemed to be in a state of confinement so long as it is in a den, cage or small inclosure, stye or tank, or is otherwise so situated that it cannot escape and that its owner can take possession of it at pleasure.

5. Oysters and oyster brood shall be capable of being stolen when in oyster beds, layings, and fisheries which are the property of any person, and sufficiently marked out or known as such property.

6. Wild creatures in the enjoyment of their natural liberty shall not be capable of being stolen, nor shall the taking of their dead bodies by, or by the orders of, the person who killed them before they are reduced into actual possession by the owner of the land on which they died, be deemed to be theft.

7. Every thing produced by or forming part of any living creature capable of being stolen, shall be capable of being stolen.

As to the stealing of pigeons when away from their owner's land, *see post*, s. 333.

As to stealing oysters, *see post* s. 334.

"As to animals, one rule of the existing law is founded on the principle that to steal animals used for food or labour 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 practically abandoned. Sheep stealing is no longer a capital crime, and dog stealing is a statutory offence; but the distinction still gives its form to the law, and occasionally produces results of a very undesirable kind. It has been lately held, for instance, that as a dog is not the subject of larceny at common law, it is not a crime to obtain by false pretenses two

valuable pointers: R. v. Robinson, Bell, 34. It seems to us that this rule is quite unreasonable, and that all animals which are the subject of property should also be the subject of larceny. This, however, suggests the question, what wild animals are the subject of property, and how long do they continue to be so? This question must be considered in reference to living animals *feræ naturæ* in the enjoyment of their natural liberty; living animals *feræ naturæ* escaped from captivity; and pigeons which, singularly enough, form a class by themselves. The existing law upon this subject, is that a wild living animal in the enjoyment of its natural liberty is not the subject of property; but that when dead it becomes the property of the person on whose land it dies, in such a sense that he is entitled to take it from a trespasser, but not in such a sense that the person who took it away, on killing it, is guilty of theft. This is specially important in reference to game. This state of the law we do not propose to alter. As to living animals *feræ naturæ* in captivity, we think they ought to be capable of being stolen.

"When such an animal escapes from captivity, a distinction appears to us to arise which deserves recognition. If the animal is one which is commonly found in a wild state in this country it seems reasonable that on its escape it should cease to be property.

"A person seeing such an animal in a field may have no reasonable grounds for supposing that it had just escaped from captivity.

"If, however, a man were to fall in with an animal imported as a curiosity, at great expense, 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 a wild animal should, on escaping from confinement, still be the subject of larceny, unless it be one commonly found wild in this country."—Imp. Comm. Rep.

DEFINITION OF THEFT.

305. Theft or stealing is the act of fraudulently and without colour of right taking, or *fraudulently and without colour of right converting to the use of any person*, anything capable of being stolen, with intent—

(*a*) to deprive the owner, or any person having any special property or interest therein, *temporarily* or absolutely of such thing or of such property or interest; or

(*b*) to pledge the same or deposit it as security ; or

(*c*) to part with it under a condition as to its return which the person parting with it may be unable to perform ; or

(*d*) to deal with it in such a manner that it cannot be] restored in the condition in which it was at the time of such taking and conversion.

2. The taking or conversion may be fraudulent, although effected without secrecy or attempt at concealment.

3. It is immaterial whether the thing converted was taken for the purpose of conversion, or whether it was, at the time of the conversion, in the lawful possession of the person converting.

4. Theft is committed when the offender moves the thing or causes it to move or to be moved, or begins to cause it to become moveable, with intent to steal it.

5. Provided, that no factor or agent shall be guilty of theft by pledging or giving a lien on any goods or document of title to goods intrusted to him for the purpose of sale or otherwise, for any sum of money not greater than the amount due to him from his principal at the time of pledging or giving a lien on the same, together with the amount of any bill of exchange accepted by him for or on account of his principal.

6. *Provided, that if any servant, contrary to the orders of his master, takes from his possession any food for the purpose of giving the same or having the same given to any horse or other animal belonging to or in the possession of his master, the servant so offending shall not, by reason thereof, be guilty of theft.* R. S. C. c. 164, s. 63.

The words in italics "fraudulently and without colour of right, converting to the use of any person," have the effect of abolishing the distinction between embezzlement and larceny. By that definition the gist of the offence of theft is now a fraudulent conversion, and not an unlawful taking : 3 Stephen's Hist. 166. The word "temporarily" is *new*, and was not in the English draft. It may have been inserted so as to include the enactment of s. 85 R. S. C. c. 164, but is nevertheless wrong. S-s. 6 (*new*) is a partial re-enactment of 26 & 27 V. c. 103, (Imp.), by which the case of R. v. Morfit, R. & R. 307, is not now law in England.

"Technicalities of more importance connected with the taking are those which have led to the distinction between theft and embezzlement. The immediate consequence of the doctrine that a wrongful taking is of the essence of theft is, that if a person obtains possession of a thing innocently, and afterwards fraudulently misappropriates it, he is guilty of no offence. This doctrine has been qualified by a number of statutory exceptions,

each of which has been attended with difficulties of its own. . . . . 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 on the subject.

"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 ss. 249, 250 & 251 (*ss. 308, 309, 310, post*). It is essential to all of these offences that there should be the *animus furandi*, that guilty intention which makes the difference between a trespass and a theft."—Imp. Comm. Rep.

THEFT OF THINGS UNDER SEIZURE.

306. Every one commits theft and steals the thing taken or carried away who, whether pretending to be the owner or not, secretly or openly, takes or carries away, or causes to be taken or carried away, without lawful authority, any property under lawful seizure and detention. R. S. C. c. 164, s. 50.

Punishment, s. 356, *post*.

The words "and whether with or without force and violence" were in the repealed clause.

Bishop, 2 Cr. L. 790, says: "If one, therefore, has transferred to another a special property in goods, retaining in himself the general ownership, or, if the law has made such transfer, he commits larceny by taking them with felonious intent."

So if a man steal his goods *in custodia legis*. But "if the goods stolen were the general property of the defendant, who took them from the possession of one to whose care they had been committed, as, for instance, from an officer seizing them on an execution against the defendant, it must be shown that the latter knew of the execution and seizure;

otherwise the required intent does not appear. The presumption, in the absence of such knowledge, would be, that he took the goods, supposing he had the right so to do": 2 Bishop, Cr. Proc. 749.

Section 212, c. 32, R. S. C. contains an enactment in a similar sense as to goods seized by the customs officers.

KILLING ANIMALS TO STEAL CARCASES, ETC.

307. Every one commits theft and steals the creature killed who kills any living creature capable of being stolen with intent to steal the carcase, skin, plumage or any part of such creature. R. S. C. c. 164, s. 8. (*Amended*). 24-25 V. c. 96, s. 11. (Imp.).

Punishment, s. 356, *post*.

The repealed section applied to "animals" instead of "living creatures."

Indictment.— one sheep of the goods and chattels of I. N. unlawfully did steal.

Cutting off part of a sheep, in this instance the leg, while it is alive, with intent to steal it, will support an indictment for killing with intent to steal, if the cutting off must occasion the sheep's death: R. v. Clay, R. & R. 387.

So on the trial of an indictment for killing a ewe with intent to steal the carcase, it appeared that the prisoner wounded the ewe by cutting her throat, and was then interrupted by the prosecutor, and the ewe died of the wounds two days after. It was found by the jury who convicted the prisoner that he intended to steal the carcase of the ewe. The court held the conviction right: R. v. Sutton, 8 C. & P. 291. It is immaterial whether the intent was to steal the whole or part only of the carcase: R. v. Williams, 1 Moo. 107.

Any one killing cattle with intent to steal the carcase, should be indicted under s. 499, *post*.

THEFT BY AGENT.

308. Every one commits theft who having received any money or valuable security or other thing whatsoever, on terms requiring him to account for or pay the same, or the proceeds thereof, or any part of such proceeds, to any other person, though not requiring him to deliver over in specie the

identical money, valuable security or other thing received, fraudulently converts the same to his own use, or fraudulently omits to account for or pay the same or any part thereof, or to account for, or pay such proceeds or any part thereof, which he was required to account for or pay as aforesaid.

2. Provided, that if it be part of the said terms that the money or other thing received, or the proceeds thereof, shall form an item in a debtor and creditor account between the person receiving the same and the person to whom he is to account for or pay the same, and that such last mentioned person shall rely only on the personal liability of the other as his debtor in respect thereof, the proper entry of such money or proceeds, or any part thereof, in such account, shall be a sufficient accounting for the money, or proceeds, or part thereof so entered, and in such case no fraudulent conversion of the amount accounted for shall be deemed to have taken place. R. S. C. c. 164, s. 61, *et seq.* (*Amended*). 24-25 V. c. 96, s. 75 *et seq.* (Imp.).

"Valuable security" defined, s. 3; *see post*, under s. 310, and R. v. Barnett, 17 O. R. 649.

THEFT BY PERSON HOLDING POWER OF ATTORNEY.

309. Every one commits theft who, being intrusted, either solely or jointly with any other person, with any power of attorney for the sale, mortgage, pledge or other disposition of any property, real or personal, whether capable of being stolen or not, fraudulently sells, mortgages, pledges or otherwise disposes of the same or any part thereof, or fraudulently converts the proceeds of any sale, mortgage, pledge or other disposition of such property, or any part of such proceeds, to some purpose other than that for which he was intrusted with such power of attorney. R. S. C. c. 164, s. 62. (*Amended*). 24-25 V. c. 96, s. 77, (Imp.).

See under next section.

THEFT OF PROCEEDS UNDER DIRECTION.

310. Every one commits theft who, having received, either solely or jointly with any other person, any money or valuable security or any power of attorney for the sale of any property, real or personal, with a direction that such money, or any part thereof, or the proceeds, or any part of the proceeds of such security, or such property, shall be applied to any purpose or paid to any person specified in such direction, in violation of good faith and contrary to such direction, fraudulently applies to any other purpose or pays to any other person such money or proceeds, or any part thereof.

2. Provided, that where the person receiving such money, security or power of attorney, and the person from whom he receives it, deal with each other on such terms that all money paid to the former would, in the absence of any such direction, be properly treated as an item in a debtor and creditor account between them, this section shall not apply unless such direction is in writing. R. S. C. c. 164, s. 60. (*Amended*).

There is under this code no "embezzlement" as a distinct offence: *see* Imp. Commissioners' Report under s. 305, p. 339, *ante*.

"Valuable security" defined, s. 3.

Punishment under three next preceding sections: ss. 320, 357, *post*. What was embezzlement is now theft purely and simply.

Under s. 310 the direction need not be in writing (except as *per proviso*) as it was needed to be in s. 60 of the repealed statute. But the power of attorney mentioned in s. 309 must be in writing: R. v. Chouinard, 4 Q. L. R. 220; and the power of attorney mentioned in s. 310 would have also to be in writing. As to who is an agent: *see* R. v. Cosser, 13 Cox, 187; R. v. Cronmire, 16 Cox, 42.

The indictment under these three sections may be drawn in the usual short form for simple theft but care must be taken at the trial that the evidence brings the facts within the statute: R. v. Haigh, 7 Cox, 403. Special indictments may be in the following forms:—

Indictment under s. 308.— that A. B. on did receive from C. D., a sum of one thousand dollars, the property of the said C. D. on terms requiring him the said A. B. to pay the said sum of one thousand dollars to one M. N. and that the said A. B. afterwards, in violation of good faith and contrary to his obligation, fraudulently did convert the said sum to his own use and benefit and did thereby steal the same.

Indictment under s. 309.— that A. B. on being intrusted by C. D. with a power of attorney for the sale of a certain piece of land having afterwards sold the same did fraudulently convert the proceeds of the said sale, to wit, the sum of to some purpose other than that for which he was intrusted with such power of attorney by unlawfully applying the said proceeds to his own use and benefit, and did thereby steal the said proceeds, to wit, the said sum of

Indictment under s. 309.— that A. B. on did give a power of attorney and thereby intrust to C. D., one hundred bales of cotton, of the value of four thousand dollars, for the purpose of selling the same, and that the

said C. D. afterwards, contrary to and without the authority of the said A. B., for his own benefit, and in violation of good faith, unlawfully did deposit the said cotton with E. F. of as and by way of a pledge, lien and security, for a sum of money, to wit, four hundred dollars, by the said C. D., then borrowed and received of and from the said E. F., and that the said C. D. did thereby steal the said one hundred bales of cotton of the goods and chattels of the said A. B.

Indictment under s. 310.— that A. B. on did intrust C. D. with a certain large sum of money, to wit, the sum of four hundred dollars, with a direction to the said C. D. to pay the said sum of money to a certain person specified in the said direction, and that the said C. D. afterwards, to wit, on in violation of good faith and contrary to the terms of such direction, fraudulently did convert to his own use and benefit the said sum of money so to him intrusted as aforesaid, and that the said C. D. thereby did steal the said money of the goods and chattels of the said A. B. (*A count should be added stating particularly to whom the money was to be paid*).

See R. v. Cooper, 12 Cox, 600; R. v. Tatlock, 13 Cox, 328; R. v. Fullagar, 14 Cox, 370; R. v. Brownlow, 14 Cox, 216; *Ex parte* Piot, 15 Cox, 208; R. v. Bowerman, 17 Cox, 151, (1891) 1 Q. B. 112, Warb. Lead. Cas. 177; *Ex parte* Bellencoutre, 17 Cox, 253, [1891] 2 Q. B. 122.

The changes in the law introduced by this code must not be lost sight of in the reference to these cases. All criminal breaches of common law trusts are now either theft under the preceding sections, or punishable under s. 363, *post*, and the distinctions of larceny by bailees, or embezzlements or frauds by agents, bankers, factors, attornies, etc., are superseded. The imperfections in the English law alluded to by the Judges in *Ex parte* Bellencoutre, 17 Cox, 253, [1891] 2 Q. B. 122, have now been removed in Canada.

THEFT BY CO-OWNER.

311. Theft may be committed by the owner of anything capable of being stolen *against a person having a special property or interest therein, or by a person having a special property or interest therein against the owner thereof, or by a lessee against his reversioner*, or by one of several joint owners, *tenants in common* or partners of, or in any such thing against the other persons interested therein, *or by the directors, public officers or members of a public company, or body corporate, or of an unincorporated body or society associated together for any lawful purpose, against such public company or body corporate or unincorporated body or society*. R. S. C. c. 164, s. 58. (*Amended*). 31-32 V. c. 116, s. 1, (Imp.).

See R. v. Robson, Warb. Lead. Cas. 139.

Indictment.— that on at Thomas Butterworth, of was a member of a certain co-partnership, to wit, a certain co-partnership carrying on the business of and trading as waste dealer, and which said co-partnership was constituted and consisted of the said Thomas Butterworth and of John Joseph Lee, trading as aforesaid; and, thereupon, the said Thomas Butterworth, at aforesaid, during the continuance of the said co-partnership, and then being a member of the same as aforesaid, to wit, on the day and year aforesaid, eleven bags of cotton waste of the property of the said co-partnership unlawfully did steal: R. v. Butterworth, 12 Cox, 132.

See R. v. Balls, 12 Cox, 96, for an indictment against a partner for embezzlement, now theft, of partnership property; also, R. v. Blackburn, 11 Cox, 157.

A partner, at common law, may be guilty of larceny of the partnership's property; so may a man be guilty of larceny of his own goods: R. v. Webster, L. & C. 77; R. v. Burgess, L. & C. 299; R. v. Moody, L. & C. 173; that is when the property is stolen from another person in whose custody it is, and who is responsible for it. *See also*, R. v. Diprose, 11 Cox, 185, and R. v. Rudge, 13 Cox, 17.

CONCEALING GOLD OR SILVER WITH INTENT, ETC.

312. Every one commits theft who, with intent to defraud his co-partner, co-adventurer, joint tenant or tenant in common, in any mining claim, or in any share or interest in any such claim, secretly keeps back or conceals any gold or silver found in or upon or taken from such claim. R. S. C. c. 164 s. 31.

Not in the Imperial Statute.

Punishment under s. 356, *post*.

Indictment may be as for simple theft: ss. 611, 613. As to search warrant, s. 571.

HUSBAND AND WIFE. (*New*).

313. No husband shall be convicted of stealing, during co-habitation, the property of his wife, and no wife shall be convicted of stealing, during co-habitation, the property of her husband; but while they are living apart from each other either shall be guilty of theft if he or she fraudulently takes or converts anything which is, by law, the property of the other in a manner which, in any other person, would amount to theft.

2. Every one commits theft who, while a husband and wife are living together, knowingly—

(*a*) assists either of them in dealing with anything which is the property of the other in a manner which would amount to theft if they were not married; or

(*b*) receives from either of them anything, the property of the other, obtained from that other by such dealing as aforesaid.

"By the present law a husband or wife cannot steal from his wife or her husband, even if they are living apart, although by recent legislation the wife is capable of possessing separate property.

"So long as co-habitation 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."—Imp. Comm. Rep.

PART XXV.

RECEIVING STOLEN GOODS.

314. Every one is guilty of an indictable offence, and liable to fourteen years' imprisonment, who receives *or retains in his possession* anything obtained *by any offence punishable on indictment, or by any acts wheresoever committed, which, if committed in Canada after the commencement of this Act, would have constituted an offence punishable upon indictment* knowing such thing to have been so obtained. R. S. C. c. 164, s. 82. 24-25 V. c. 96, s. 91 (Imp.).

The words in italics are new. *See* s. 627, *post*, as to indictment of receivers in certain cases; also ss. 715, 716, 717 as to trial, and s. 3, *ante*, as to what constitutes "having in possession." See remarks under next section.

Obtaining by false pretenses is punishable by *three* years, s. 359; but knowingly receiving anything so obtained is punishable by *fourteen* years.

Receiving property obtained by *any indictable* offence abroad is punishable under this section; s. 355 is limited to theft and the thief himself.

Indictment against a receiver of stolen goods.— that A. B., on at one silver tankard, of the goods and chattels of J. N. before then unlawfully stolen, did unlawfully receive and have, he the said A. B. at the time when he so received the said silver tankard as aforesaid, then well knowing the same to have been stolen.

Any number of receivers at different times of stolen property may be charged with substantive felonies in the same indictment, s. 627, *post*.

And where the indictment contains several counts for larceny, describing the goods stolen as the property of different persons, it may contain the like number of counts, with the same variations, for receiving the same goods: R. v. Beeton, 1 Den. 414. It is not necessary to state by whom the stealing was committed: R. v. Jervis, 6 C. & P. 156; and, if stated, it is not necessary to aver that the principal

has not been convicted: R. v. Baxter, 5 T. R. 83. Where an indictment charged Woolford with stealing a gelding, and Lewis with receiving it knowing it to have been "so feloniously stolen as aforesaid," and Woolford was acquitted, Patteson, J., held that Lewis could not be convicted upon this indictment, and that he might be tried on another indictment, charging him with having received the gelding knowing it to have been stolen by some person unknown: R. v. Woolford, 1 M. & Rob. 384; 2 Russ. 556.

An indictment charging that a certain evil-disposed person feloniously stole certain goods, and that C. D. and E. F. feloniously received the said goods knowing them to be stolen, was holden good against the receivers, as for a substantive felony: R. v. Caspar, 2 Moo. 101. The defendant may be convicted both on a count charging him as accessory before the fact and on a count for receiving: R. v. Hughes, Bell, 242. The first count of the indictment charged the prisoner with stealing certain goods and chattels; and the second count charged him with receiving "the goods and chattels aforesaid of the value aforesaid so as aforesaid feloniously stolen." He was acquitted on the first count but found guilty on the second: *Held*, that the conviction was good: R. v. Huntley, Bell, 238; R. v. Craddock, 2 Den. 31.

Indictment against the principal and receiver jointly.— that C. D. on at one silver spoon and one table-cloth, of the goods and chattels of A. B., unlawfully did steal, and the jurors aforesaid, do further present, that J. S. afterwards, on the goods and chattels aforesaid, so as aforesaid stolen, unlawfully did receive and have, he the said J. S. then well knowing the said goods and chattels to have been stolen.

Indictment against the receiver as accessory, the principal having been convicted.— that heretofore, to wit, at the general sessions of the holden at on it was presented, that one J. T. (*continuing the for-*

mer indictment to the end; reciting it, however, in the past and not in the present tense:) upon which said indictment the said J. T., at aforesaid, was duly convicted of the theft aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B. after the committing of the said theft as aforesaid, to wit, on the goods and chattels aforesaid, so as aforesaid stolen, unlawfully did receive and have, he the said A. B. then well knowing the said goods and chattels to have been stolen.

Indictment against a receiver where the principal offence is obtaining under false pretenses.— on at one silver tankard of the goods and chattels of J. N. then lately before unlawfully, knowingly, and designedly obtained from the said J. N. by false pretenses, unlawfully did receive and have, he the said A. B. at the time when he so received the said silver tankard as aforesaid, then well knowing the same to have been unlawfully, knowingly, and designedly obtained from the said J. N. by false pretenses.

The indictment must allege the goods to have been obtained by false pretenses, and known to have been so; it is not enough to allege them to have been "unlawfully obtained, taken and carried away": R. v. Wilson, 2 Moo. 52.

At common law receivers of stolen goods were only guilty of a misdemeanour, even when the thief had been convicted of felony: Fost. 373.

The goods must be stolen goods when they are received. If the owner has resumed possession, though the receiver does not know it, there is no receiving of stolen property: R. v. Villensky [1892], 2 Q. B. 597; *see* s. 318 *post;* R. v. Schmidt, Warb. Lead. Cas. 180.

There may be a criminal receiving from a first receiver: R. v. Reardon, L. R. 1 C. C. R. 31.

The goods must be so received as to divest the possession out of the thief: R. v. Wiley, 2 Den. 37. But a person

having a joint possession with the thief may be convicted as a receiver: R. v. Smith, Dears. 494. Manual possession is unnecessary; it is sufficient if the receiver has a control over the goods: R. v. Hobson, Dears. 400; R. v. Smith, Dears. 494; *see ante*, s. 3, and *post*, s. 317, as to the words "having in possession." The defendant may be convicted of receiving although he assisted in the theft: R. v. Dyer, 2 East, P. C. 767; R. v. Craddock, 2 Den. 31; R. v. Hilton, Bell, 20; R. v. Hughes, Bell, 242. But not if he actually stole the goods: R. v. Perkins, 2 Den. 459. Where the jury found that a wife received the goods without the knowledge or control of her husband, and apart from him, and that he afterwards adopted his wife's receipt, no active receipt on his part being shown, it was held that the conviction of the husband could not be sustained; R. v. Dring, Dears. & B. 329; but *see* R. v. Woodward, L. & C. 122.

There must be a receiving of the thing stolen, or of part of it; and where A. stole six notes of £100 each and having changed them into notes of £20 each, gave some of them to B.: it was held that B. could not be convicted of receiving the said notes, for he did not receive the notes that were stolen: R. v. Walkley, 4 C. & P. 132. But where the principal was charged with sheep-stealing, and the accessory with receiving "twenty pounds of mutton, parcel of the goods," it was held good: R. v. Cowell, 2 East, P. C. 617, 781. In the last case the thing received is the same, for part, as the thing stolen, though passed under a new denomination, whilst in the first case nothing of the article or articles stolen have been received, but only the proceeds thereof. And, says Greaves' note, 2 Russ, 561, it is conceived that no indictment could be framed for receiving the proceeds of stolen property. The section only applies to receiving *the* chattel stolen, knowing *that* chattel to have been stolen. In the case of gold or silver, if it were melted after the stealing an indictment for receiving it might be supported, because it would still be the *same* chattel though

altered by the melting; but where a £100 note is changed for other notes the identical chattel is gone and a person might as well be indicted for receiving the money for which a stolen horse was sold, as for receiving the proceeds of a stolen note.

The receiving must be subsequent to the theft. If a servant commit a larceny at the time the goods are received both servant and receiver are principals, but if the goods are received subsequently to the act of larceny it becomes a case of principal and receiver: R. v. Butteris, 6 C. & P. 147; R. v. Gruncell, 9 C. & P. 365; R. v. Roberts, 3 Cox, 74.

The receiving need not be *lucri causa*; if it is to conceal the thief, it is sufficient: R. v. Richardson, 6 C. & P. 365; R. v. Davis, 6 C. & P. 177.

There must be some evidence that the goods were stolen by another person, R. v. Densley, 6 C. & P. 399; R. v. Cordy 2 Russ. 556.

A husband may be convicted of receiving property which his wife has stolen, R. v. McAthey, L. & C. 250, if he receive it knowing it to have been stolen.

The principal felon is a competent witness to prove the larceny: R. v. Haslam, 1 Leach, 418. But his confession is not evidence against the receiver, R. v. Turner, 1 Moo. 347, unless made in his presence and assented to by him: R. v. Cox, 1 F. & F. 90. If the principal has been convicted the conviction, although erroneous, is evidence against the receiver until reversed: R. v. Baldwin, R. & R. 241.

To prove guilty knowledge other instances of receiving similar goods stolen from the same person may be given in evidence, although they form the subject of other indictments, or are antecedent to the receiving in question: R. v. Dunn, 1 Moo. 146; R. v. Davis, 6 C. & P. 177; R. v. Nicholls, 1 F. & F. 51; R. v. Mansfield, Car. & M. 140. But evidence cannot be given of the possession of goods stolen from a different person: R. v. Oddy, 2 Den. 264; *see* now s.

716, *post.* Where the stolen goods are goods that have been found the jury must be satisfied that the prisoner knew that the circumstances of the finding were such as to constitute larceny: R. v. Adams, 1 F. & F. 86. Belief that the goods are stolen, without actual knowledge that they are so, is sufficient to sustain a conviction: R. v. White, 1 F. & F. 665.

Recent possession of stolen property is not generally alone sufficient to support an indictment under this section: 2 Russ. 555; R. v. Perry, 10 R. L. 65. However, in R. v. Langmead, L. & C. 427, the judges would not admit this as law, and maintained the conviction for receiving stolen goods grounded on the recent possession by the defendant of stolen property: *see* also R. v. Deer, L. & C. 240.

An indictment charged S. with stealing eighteen shillings and sixpence, and G. with receiving the same. The facts were: S. was a barman at a refreshment bar, and G. went up to the bar, called for refreshments and put down a florin. S. served G., took up the florin, and took from his employer's till some money, and gave G. as his change eighteen shillings and six pence, which G. put in his pocket and went away with. On leaving the place he took some silver from his pocket and was counting it when he was arrested. On entering the bar signs of recognition took place between S. and G., and G. was present when S. took the money from the till. The jury convicted S. of stealing and G. of receiving. *Held*, that this was evidence which the judge ought to have left to the jury as reasonable evidence upon which G. might have been convicted as a principal in the second degree, and that, therefore, the conviction for receiving could not be sustained: R. v. Coggins, 12 Cox, 517.

On the trial of a prisoner on an indictment charging him with receiving property which one M. had feloniously stolen, etc., the crime charged was proved, and evidence for the defence was given to the effect that M. had been

tried on a charge of stealing the same property and acquitted. The counsel for the crown then applied to amend the indictment by striking out the allegation that M. had stolen the property, and inserting the words "some evil disposed person" which was allowed. *Held*, 1. That the record of the previous acquittal of M. formed no defence on the trial of this indictment, and was improperly received in evidence. 2. That the amendment was improperly allowed: R. v. Ferguson, 4 P. &. B. (N.B.) 259.

Defendant sold to C., among other things, a horse power and belt, part of his stock in the trade of a butcher in which he also sold a half interest to C. The horse power had been hired from one M. and at the time of the sale the term of hiring had not expired. At its expiry M. demanded it and C. claimed that he had purchased it from the defendant. Defendant then employed a man to take it out of the premises where it was kept and deliver it to M., which he did. Defendant was summarily tried before a police magistrate and convicted of an offence against 32 & 33 V. c. 21, s. 100. *Held*, that the conviction was bad, there being no offence against that section. Remarks upon the improper use of criminal law in aid of civil rights: R. v. Young, 5 O. R. 410.

On an indictment for receiving stolen goods it is not necessary to prove by positive evidence that the property found in the possession of the prisoner belongs to the prosecutor: R. v. Gillis, 27 N. B. Rep. 30.

RECEIVING STOLEN POST-LETTER, ETC.

315. Every one is guilty of an indictable offence and liable to five years' imprisonment who receives *or retains in his possession* any (*stolen*) post letter, post letter bag, *or any chattel, money or valuable security, parcel or other thing*, the stealing whereof is hereby declared to be an indictable offence knowing the same to have been stolen. R. S. C. c. 35, ss. 83, 84 (*Amended*). 7 Wm. IV. & 1 V. c. 36, s. 30 (Imp.).

See ss. 622 & 627, *post*, as to indictment and trial; also ss. 715, 716, 717, *post*: ss. 326 & 327 are the

enactments on the stealing of post letters, etc. *See* s. 4, *ante*, for definitions of expressions in the Post Office Act.

Indictment.— that A. B., on at one post letter the property of the postmaster-general before then, from and out a certain post letter bag unlawfully stolen, unlawfully did receive and retain in his possession, he, the said A. B., then well knowing the said letter to have been stolen.

Why is the punishment less under this clause than under the preceding one?

For stealing, the fact that the article stolen is a post letter is an aggravation, and renders it liable to imprisonment for life, s. 326, whilst stealing money or other things is punishable by only seven years, s. 356; but for criminal receiving of a stolen post letter, the offence is punishable only by five years, whilst the criminal receiving of any other stolen thing is fourteen years! Then, this s. 315 enacts that every one is guilty of an indictable offence punishable by five years, who receives *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, whilst s. 314 enacts a punishment of fourteen years against any one who knowingly receives anything obtained by *any offence punishable on indictment*. The consequence is that s. 314 does not apply to *any chattel, money or valuable security, parcel or other thing*, the stealing whereof is declared by the Code to be an indictable offence. Its provisions are cut down by s. 315. This last section, it may be assumed, was intended to apply only to money or valuable security *stolen out of a post letter*, but it does not say it.

RECEIVING PROPERTY—OTHER CASES.

316. Every one who receives *or retains in his possession* anything, knowing the same to be unlawfully obtained, the stealing of which is punishable on summary conviction, either for every offence, or for the first and second offence only, is guilty of an offence and liable on summary conviction, for every first, second or subsequent offence of receiving, to the same punishment as if he were

guilty of a first, second or subsequent offence of stealing the same. R. S. C. c. 164, s. 84. 24-25 V. c. 96, s. 97 (Imp.).

This enactment is singularly worded.

WHEN RECEIVING COMPLETE.

317. The act of receiving anything unlawfully obtained is complete as soon as the offender has, either exclusively or jointly with the thief or any other person, possession of or control over such thing, or aids in concealing or disposing of it.

See cases, *ante*, under s. 314.

RECEIVING AFTER RESTORATION TO OWNER.

318. When the thing unlawfully obtained has been restored to the owner, or when a legal title to the thing so obtained has been acquired by any person, a subsequent receiving thereof shall not be an offence although the receiver may know that the thing had previously been dishonestly obtained.

See cases, *ante*, under s. 314, and R. v. Villensky, [1892], 2 Q. B. 597.

PART XXVI.

PUNISHMENT OF THEFT AND OFFENCES RESEMBLING THEFT COMMITTED BY PARTICULAR PERSONS IN RESPECT OF PARTICULAR THINGS IN PARTICULAR PLACES.

THEFT BY CLERKS OR SERVANTS.

319. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who—

(*a*) being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, steals anything belonging to or in the possession of his master or employer; or

(*b*) being a cashier, assistant cashier, manager, officer, clerk or servant of any bank, or savings bank, steals any bond, obligation, bill obligatory or of credit, or other bill or note, or any security for money, or any money or effects of such bank or lodged or deposited with any such bank;

(*c*) being employed in the service of Her Majesty, or of the Government of Canada or the Government of any province of Canada, or of any municipality, steals anything in his possession by virtue of his employment. R. S. C. c. 164, ss. 51, 52, 53, 54 & 59 (*Amended*). 24-25 V. c. 96, s. 67 *et seq.* (Imp.).

See s. 623, *post*, as to indictments against public servants.

Special provisions as to embezzlement by post-office officers are contained in s. 105, c. 35, R. S. C.

There is no such thing as *embezzlement* under the Code. What constituted *embezzlement* is now theft.

Indictment under (*a*).— on was clerk to J. N., and that the said J. S., whilst he was such clerk to the said J. N., as aforesaid, to wit, on the day and year aforesaid, certain money to the amount of forty dollars, ten yards of linen cloth, and one hat, of and belonging to the said J. N., his master, unlawfully did steal.

Indictment under (*b*).— being employed in the public service of Her Majesty, and being intrusted, by virtue of such employment, with the receipt, custody, management and control of a certain valuable security, to wit,

did then and there, whilst he was so employed as aforesaid, receive and take into his possession the said valuable security, and the said valuable security then fraudulently and unlawfully did steal: *see* R. v. Cummings, 16 U. C. Q. B. 15.

If the defendant is not shown to be the clerk or servant of J. N., but a larceny is proved, he may be convicted of the larceny merely, and punishable then under s. 356, *post*: R. v. Jennings, Dears. & B. 447. It is not necessary by the statute that the goods stolen should be the property of the master; the words of the statute are, belonging to, or in the possession of the master. A second count stating the goods "then being in the possession" of the master, may be added.

Evidence of acting in the capacity of an officer employed by the crown is sufficient to support an indictment; and the appointment need not be regularly proved: R. v. Townsend, Car. & M. 178; R. v. Borrett, 6 C. & P. 124; R. v. Roberts, 14 Cox, 101

Upon the trial of any offence under this section, the jury, if the evidence warrants it may convict of an attempt to commit the same, under s. 711.

As to what is sufficient evidence of an attempt to steal: *see* R. v. Cheeseman, L. & C. 140.

On an indictment for larceny as servants the evidence showed that the complainant advanced money to the prisoners to buy rags, which they were to sell to the complainant at a certain price, their profit to consist in the difference between the rate they could buy the rags at, and this fixed price. The prisoners consumed the money in drinks and bought no rags. *Held*, no larceny: R. v. Charest, 9 L. N. 114; but now these same facts would constitute a theft under s. 305, *ante*.

It was the prisoner's duty as a country traveller to collect moneys and remit them at once to his employers. On the 18th of April he received money in county Y. On the 19th and 20th he wrote to his employers not mentioning that he had received the money; on the 21st, by another letter, he gave them to understand that he had not received the money. The letters were posted in county Y. and received in county M. *Held*, that the prisoner might be tried in county M. for the offence of embezzling the money: R. v. Rogers, 14 Cox, 22.

Embezzlement means the appropriation to his own use by a servant or clerk of money or chattels received by him for or on account of his master or employer. Embezzlement differs from larceny in this, that in the former the property misappropriated is not at the time in the actual or legal possession of the owner, whilst in the latter it is. The distinctions between larceny and embezzlement were often extremely nice and subtle and it was sometimes difficult to say under which head the offence ranged. But embezzlement and theft are now offences of the same nature.

Greaves says: "The words of the former enactment s-s. (*a*) were "shall *by virtue of such employment* receive

or take into his possession any chattel, etc., for, or in the name, or on the account of his master." In the present clause, the words "by virtue of such employment" are advisedly omitted in order to enlarge the enactment, and get rid of the decisions on the former enactment. The clause is so framed as to include every case where any chattel, etc., is delivered to, received or taken possession of by the clerk or servant, for *or* in the name *or* on account of the master. If therefore a man pay a servant money for his master the case will be within the statute, though it was neither his duty to receive it, nor had he authority to do so; and it is perfectly just that it should be so; for, if my servant receive a thing, which is delivered to him for me, his possession ought to be held to be my possession just as much as if it were in my house or in my cart. And the effect of this clause is to make the possession of the servant the possession of the master wherever any property comes into his possession within the terms of this clause, so as to make him guilty of embezzlement if he converts it to his own use. The cases of R. v. Snowley, 4 C. & P. 390; Crow's Case, 1 Lewin, 88; R. v. Thorley, 1 Moo. 343; R. v. Hawtin, 7 C. & P. 281; R. v. Mellish, R. & R. 80, and similar cases are consequently no authorities on this clause. It is clear that the omission of the words in question, and the change in the terms in this clause, render it no longer necessary to prove that the property was received by the defendant by virtue of his employment; in other words, that it is no longer necessary to prove that the defendant had authority to receive it. . . ." Greaves adds: 'Mr. Davis says "still it must be the master's money which is received by the servant, and not money wrongfully received by the servant by means of false pretenses or otherwise.' This is plainly incorrect. A.'s servant goes to B., who owes A. £10, and falsely states that A. has sent him for the money, whereupon B. pays him the money. This case is clearly within the clause; for the money is delivered to *and* received *and* taken into

possession by him for *and* in the name *and* on the account of his master, so that the case comes within every one of the categories of the clause, and if it came within any one it would suffice; in fact, no case can be put where property is delivered to a servant for his master that does not come within the clause, and it is perfectly immaterial what the moving cause of the delivery was": Greaves, Cons. Acts, 156.

The words "by virtue of his employment" are inserted in s-s. (*c*).

If the defendant has been guilty of other acts of stealing within the period of six months, the same not exceeding three in number, may be charged in the same indictment in separate counts, (s. 626), as follows: And the jurors aforesaid, do further present, that the said J. S., afterwards, and within six calendar months from the time of the committing of the said offence in the first count of this indictment charged and stated, to wit, on in the year aforesaid, being then employed as clerk to the said A. B., did then, and whilst he was so employed as last aforesaid, receive and take into his possession certain other money to a large amount, to wit, to the amount of for and in the name and on the account of the said A. B., his said master, and the said last mentioned money then, and within the said six calendar months, fraudulently and unlawfully did steal; and so the jurors aforesaid upon their oath aforesaid, do say, that the said J. S. then, in manner and form aforesaid, the said money, the property of the said A. B., his said master, from the said A. B., his said master, unlawfully did steal, *(and so on for a third count, if required.)*

The indictment must show *by express words* that the different sums were stolen within the six months: R. v. Noake, 2 C. & K. 620; R. v. Purchase, Car. & M. 617. It was the duty of the defendant, an agent and collector of a coal club, to receive payment, by small weekly instalments, and to send in weekly accounts on Tuesdays, and on each

Tuesday to pay the gross amount received into the bank to the credit of the club; the defendant was a shareholder and co-partner in the society, and indicted as such; the indictment charged him with three different acts of embezzlement during six months; each amount as charged was proved by the different payments of smaller sums, making altogether each amount charged; *held*, that the indictment might properly charge the embezzlement of a gross sum and be proved by evidence of smaller sums received at different times by the prisoner, and that it was not necessary to charge the embezzlement of each particular sum composing the gross sum, and that, although the evidence might show a large number of small sums embezzled, the prosecution was not to be confined to the proof of three of such small sums only; R. v. Balls, 12 Cox, 96; R. v. Furneaux, R. & R. 335; R. v. Flower, 8 D. & R. 512; R. v. Tyers, R. & R. 402, holding it necessary in all cases of embezzlement to state specifically in the indictment some article embezzled, are not now law. In case the indictment alleges the embezzlement of money such allegation, so far as regards the description of the property, is sustained by proof that the offender embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or by proof that he embezzled any piece of coin or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to some other person, and such part shall have been returned accordingly; but an indictment for embezzling money is not proved by showing merely that the prisoner embezzled a cheque without evidence that the cheque had been converted into money: R. v. Keena, 11 Cox, 123. The indictment must allege the goods embezzled to be the property of the master: R. v. McGregor, 3 B. & P. 106, R. & R. 23; R. v. Beacall, 1 Moo. 15; and it has been said that it must show that the

defendant was servant at the time: R. v. Somerton, 7 B. & C. 463. *See*, however, R. v. Lovell, 2 M. & Rob. 236. It is not necessary to state from whom the money was received: R. v. Beacall, 1 Moo. 15, and *note* in R. v. Crighton, R. & R. 62. But the judge may order a particular of the charge to be furnished to the prisoner: R. v. Bootyman, 5 C. & P. 300; R. v. Hodgson, 3 C. & P. 422; s. 613, *post*.

A female servant is within the meaning of the Act: R. v. Smith, R. & R. 267; so is an apprentice though under age: R. v. Mellish, R. & R. 80; and any clerk or servant, whether to person in trade or otherwise: R. v. Squire, R. & R. 349; R. v. Townsend, 1 Den. 167; R. v. Adey, 1 Den. 571. A clerk of a savings bank, though elected by the managers, was held to be properly described as clerk to the trustees: R. v. Jenson, 1 Moo. 434. The mode by which the defendant is remunerated for his services is immaterial, and now, if he has a share or is a co-partner in the society whose monies or chattels he embezzled, he may be indicted as if he was not such shareholder or co-partner: R. v. Hartley, R. & R. 139; R v. Macdonald, L. & C. 85; R. v. Balls, 12 Cox, 96. So, where the defendant was employed as a traveller to take orders and collect money, was paid by a percentage upon the orders he got, paid his own expenses, did not live with the prosecutors, and was employed as a traveller by other persons also, he was holden to be a clerk of the prosecutors within the meaning of the Act: R. v. Carr, R. & R. 198; R. v. Hoggins, R. & R. 145; R. v. Tite, L. & C. 29, 8 Cox, 458. Where the prisoner was employed by the prosecutors as their agent for the sale of coals on commission, and to collect monies in connection with his orders, but he 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: R. v. Bowers, 10 Cox, 250. In delivering judgment in that case, Erle, C.J., observed: "The cases have established that a clerk or servant must be under the orders of his master, or employed

to receive the monies of his employer, to be within the statute; but if a man be intrusted to get orders and to receive money, getting the orders where and when he chooses, and getting the money where and when he chooses, he is not a clerk or servant within the statute: *see* R. v. Walker, Dears. & R. 600; R. v. May, L. & C. 13; R. v. Hall, 13 Cox, 49. A person whose duty it is to obtain orders where and when he likes, and forward them to his principal for execution, and then has three months within which to collect the money for the goods sent, is not a clerk or servant; if such a person, at the request of his principal, collects a sum of money from a customer, with the obtaining of whose order he has had nothing to do, he is a mere volunteer, and is not liable to be prosecuted for embezzlement if he does not pay over or account for the money so received: R. v. Mayle, 11 Cox, 150. The prisoner was employed by a coal merchant under an agreement whereby "he was to receive one shilling per ton procuration fee, payable out of the first payment, four per cent. for collecting, and three pence on the last payment; collections to be paid on Friday evening before 5 p.m., or Saturday before 2 p.m." He received no salary, was not obliged to be at the office except on the Friday or Saturday to account for what he had received; he was at liberty to go where he pleased for orders: *Held*, that the prisoner was not a clerk or servant within the statute relating to embezzlement. R. v. Marshall, 11 Cox, 490. Prisoner was engaged by U., at weekly wages to manage a shop; U. then assigned all his estate and effects to R. and a notice was served on prisoner to act as the agent of R. in the management of the shop. For fourteen days afterwards R. received from U. the shop moneys. Then the shop money was taken by U. as before. Prisoner received his weekly wages from U. during the whole time. Some time after a composition deed was executed by R. and U. and U.'s creditors, by which R. reconveyed the estate and effects to U., but this deed was not registered until after the embezzlement charged against the

prisoner; *Held*, that prisoner was the servant of U. at the time of the embezzlement: R. v. Dixon, 11 Cox, 178. The prisoner agreed with the prosecutor, a manufacturer of earthenware, to act as his traveller, and "diligently employ himself in going from town to town, in England, Ireland and Scotland, and soliciting orders for the printed and decorated earthenware manufactured by the prosecutor, and that he would not, without the consent in writing of the prosecutor, take or execute any order for vending or disposing of any goods of the nature or kind aforesaid for or on account of himself or any other person." It was further agreed that the prisoner should be paid by commission, and should render weekly accounts. The prosecutor subsequently gave the prisoner written permission to take orders for two other manufacturers. The prisoner being indicted for embezzlement: *Held*, that he was a clerk or servant of the prosecutor within the meaning of the statute: R. v. Turner, 11 Cox, 551. Lush, J., in this case, said: "If a person says to another carrying on an independent trade, 'if you get any orders for me I will pay you a commission,' and that person receives money and applies it to his own use, he is not guilty of embezzlement, for he is not a *clerk* or *servant*; but if a man says; 'I employ you and will pay you, not by salary, but by commission,' the person employed is a servant. In the first case the person employing has no control over the person employed; in the second case the person employed is subject to the control of the employer. And on this, this case was distinguished from R. v. Bowers, and R. v. Marshall, *supra*. So, in R. v. Bailey, 12 Cox, 56, the prisoner was employed as traveller to solicit orders, and collect the moneys due on the execution of the orders, and to pay over moneys on the evening of the day when collected, or the day following. The prisoner had no salary but was paid by commission. The prisoner might get orders where and when he pleased within his district. He was to be exclusively in the employ of the prosecutors, and to give the whole of his time, the

whole of every day, to their service. *Held*, that the prisoner was a clerk and servant within the statute": *see* R. v. Foulkes, 13 Cox, 63.

A person engaged to solicit orders and paid by commission on the sums received, which sums he was forthwith to hand over to the prosecutors, was at liberty to apply for orders, when he thought most convenient, and was not to employ himself to any other person. *Held*, not a clerk or servant within the statute; the prisoner was not under the control and bound to obey the orders of the prosecutors: R. v. Negus, 12 Cox, 492, Warb. Lead. Cas. 185; R. v. Hall, 13 Cox, 49; R. v. Coley, 16 Cox, 226.

Prisoner was employed by O. to navigate a barge, and was entitled to half the earnings after deducting the expenses. His whole time was to be at O.'s service, and his duty was to account to O. on his return after every voyage. In October prisoner was sent with a barge load of bricks to London, and was there forbidden by O. to take manure for P. Notwithstanding this prisoner took the manure, and received £4 for the freight which he appropriated to his own use. It was not proved that he carried the manure or received the freight for his master, and the person who paid the £4 did not know for whom it was paid. *Held*, that the prisoner could not be convicted of embezzlement, as the money was not received by him in the name of or for, or on account of his master: R. v. Cullum, 12 Cox, 469; *see* R. v. Gale, 13 Cox, 340.

It is not necessary that the employment should be permanent; if it be only occasional it will be sufficient. Where the prosecutor having agreed to let the defendant carry out parcels when he had nothing else to do, for which the prosecutor was to pay him what he pleased, gave him an order to receive two pounds, which he received and embezzled, he was holden to be a servant within the meaning of the Act: R. v. Spencer, R. & R. 299; R. v. Smith, R. & R. 516. And in R. v. Hughes, 1 Moo. 370,

where a drover, who was employed to drive two cows to a purchaser and receive the purchase money, embezzled it, he was holden to be a servant within the meaning of the Act by the Judges; but the Judge presiding at the trial seemed to be of a contrary opinion, and R. v. Nettleton, 1 Moo. 259; R. v. Burton, 1 Moo. 237, appear to be adverse to R. v. Hughes: *see* R. v. Tongue, Bell 289; R. v. Hall, 1 Moo. 374; R. v. Miller, 2 Moo. 249; R. v. Proud, L. & C. 97, 9 Cox, 22. The treasurer of a friendly society, into whose hands the monies received on behalf of the society were to be paid, and who was to pay no money except by an order signed by the secretary and countersigned by the chairman or a trustee, and who by the statute was bound to render an account to the trustees, and to pay over the balance on such accounting when required, but was not paid for his services, is not a clerk or servant, and cannot be indicted for embezzlement of such balance: R. v. Tyrie, 11 Cox, 241. And before the statute making it larceny or embezzlement for a partner to steal or embezzle any of the co-partnership property, the secretary of a friendly society, and himself a member of it, could not be convicted on an indictment for embezzling the society's monies, laying the property in, and describing him as the servant of, A. B. (another member of the society) and others, because the "others" would have comprised himself, and so the indictment would in fact have charged him with embezzling his own money, as his own servant: R. v. Diprose, 11 Cox, 185; R. v. Taffs, 4 Cox, 169; R. v. Bren, L. & C. 346. But a stealing by a partner is now provided for by s. 311 *ante*.

The trustees of a benefit building society borrowed money for the purpose of their society on their individual responsibility; the money, on one occasion, was received by their secretary and embezzled by him: *Held*, that the secretary might be charged in the indictment for embezzlement of the property of W. and others, W. being one of the

trustees, and a member of the society; R. v. Redford, 11 Cox, 367. A person cannot be convicted of embezzlement as clerk or servant to a society which, in consequence of administering an unlawful oath to its members, is unlawful, and prohibited by law: R. v. Hunt, 8 C. & P. 642. But an unregistered friendly society or trades union may prosecute its servants for embezzlement of its property, though some of its rules may be void as being in restraint of trade, and contrary to public policy. Rules in a trades union or society imposing fines upon members for working beyond certain hours, or for applying for work at a firm where there is no vacancy, or for taking a person into a shop to learn weaving where no vacant loom exists, though void as being in restraint of trade, do not render the society criminally responsible: R. v. Stainer, 11 Cox, 483. If the clerk of several partners embezzle the private money of one of them it is an embezzlement within the Act, for he is a servant of each. So where a traveller is employed by several persons and paid wages, to receive money he is the individual servant of each: R. v. Carr, R. & R. 198; R. v. Batty, 2 Moo. 257. So a coachman, employed by one proprietor of a coach to drive a certain part of the journey, and to receive money and hand it over to him, may be charged with embezzling the money of that proprietor, though the money, when received, would belong to him and his partners: R. v. White, 2 Moo. 91.

In R. v. Glover, L. & C. 466, it was held that a county court bailiff, who has fraudulently misappropriated the proceeds of levies made under county court process, cannot be indicted for embezzling the monies of the high-bailiff, his master; these monies are not the property of the high-bailiff. A distraining broker employed exclusively by the prosecutor, and paid by a weekly salary and by a commission, is a servant within the statute: R. v. Flanagan, 10 Cox, 561.

Where the prisoner was charged with embezzlement, but his employer who made the engagement with him was

not called to prove the terms thereof, but only his managing clerk, who knew them through repute alone, having been informed of them by his employer, it was held that there was no evidence to go to the jury that the prisoner was servant to the prosecutor: R. v. Taylor, 10 Cox, 544.

Money received by the defendant from his master himself for the purpose of paying it to a third person, and appropriated by the defendant, is larceny: R. v. Peck, 2 Russ. 449; R. v. Smith, R. & R. 267; R. v. Hawkins, 1 Den. 584; R. v. Goodenough, Dears. 210.

In R. v. Grove, 1 Moo. 447, a majority of the Judges (eight against seven) are reported to have held that an indictment for embezzlement might be supported by proof of a general deficiency of monies that ought to be forthcoming, without showing any particular sum received and not accounted for. *See also*, R. v. Lambert, 2 Cox, 309; R. v. Moah, Dears. 626. But in R. v. Jones, 8 C. & P. 288, where, upon an indictment for embezzlement, it was opened that proof of a general deficiency in the prisoner's accounts would be given, but none of the appropriation of a specific sum, Anderson, B., said: "Whatever difference of opinion there might be in R. v. Grove, (*ubi supra*) that proceeded more upon the particular facts of that case than upon the law; 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. *See also*, R. v. Lister, Dears. & B. 118; R. v. Guelder, Bell, 284; Greave's note, 2 Russ. 455; R. v. Chapman, 1 C. & K. 119, 2 Russ. 460, and R. v. Wolstenholme, 11 Cox, 313; R. v. Balls, 12 Cox, 96.

On a trial for embezzlement, *held*, that evidence of a general deficiency having been given the conviction was right, though it was not proved that a particular sum coming from a particular person on a particular occasion, was embezzled by the prisoner: R. v. Glass, 1 L. N. 41; R. v. Slack, M. L. R. 7 Q. B. 408.

But a general deficiency alone is not sufficient to support an indictment for larceny: R. v. Glass M. L. R. 7 Q. B. 405. If it was sufficient before the Code to support an indictment for embezzlement, it would seem that it would be sufficient now to support an indictment for larceny.

A conductor of a tramway car was charged with embezzling three shillings. It was proved that on a certain journey there were fifteen threepenny fares, and twenty-five twopenny fares, and the conductor was seen to give tickets to each fare and to receive money from each, but what sum did not appear. He made out a way bill for the journey debiting himself with only nine threepenny fares and sixteen twopenny fares. The mode of accounting was to deliver the way bills for each journey to a clerk, and to hand in all the money received during each day on the following morning. The prisoner's money should have been £3 1s. 9d., according to his way bills for the day, but he paid in only £3 0s. 8d. *Held*, that there was sufficient evidence of the receipt of seven shillings and eleven pence, the total amount of fares of the particular journey, and of the embezzlement of three shillings, part thereof: R. v. King, 12 Cox, 73.

Where the indictment contains only one count, charging the receipt of a gross sum on a particular day, and it appears in evidence that the money was received in different sums on different days, the prosecutor will be put to his election, and must confine himself to one sum and one day: R. v. Williams, 6 C. & P. 626.

The prisoner, not having been in the employment of the prosecutor, was sent by him to one Milner with a horse as to which Milner and the prosecutor, who owned the horse, had had some negotiations, with an order to Milner to give the bearer a cheque if the horse suited. On account of a difference as to the price the horse was not taken and the prisoner brought him back. Afterwards the prisoner, with-

out any authority from the owner, took the horse to Milner and sold it as his own property, or professing to have a right to dispose of it, and received the money, giving a receipt in his own name.

Held, that a conviction for embezzlement could not be sustained as the prisoner, when he received the money, did not receive it as a servant or clerk but sold the horse as his own and received the money to his own use: R. v. Topple, 3 R. & C. (N. S.) 566.

PUNISHMENT UNDER SECTIONS 308, 309, 310.

320. Every one is guilty of an indictable offence and liable to *fourteen years'* imprisonment who steals anything by any act or omission amounting to theft under the provisions of sections three hundred and eight, three hundred and nine and three hundred and ten.

See ante, ss. 308, 309, 310, pp. 341 & 342.

PUBLIC SERVANTS REFUSING TO DELIVER UP BOOKS, ETC.

321. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, being employed in the service of Her Majesty or of the Government of Canada or the Government of any province of Canada, or of any municipality, and intrusted by virtue of such employment with the keeping, receipt, custody, management or control of any chattel, money, valuable security, book, paper, account or document, refuses or fails to deliver up the same to any one authorized to demand it. R. S. C. c. 164, s. 55. (*Amended*).

See s. 623 as to indictment. The repealed clause made this offence an embezzlement. The present one does not make it a theft. "Valuable security" defined, s. 3. A special enactment as to postmasters is contained in s. 101, c. 35, R. S. C.

Indictment.— that A. B. on at being employed in the service of the Government of Canada as a and intrusted by virtue of such employment with the books and papers of his office, did unlawfully refuse (*or fail*) to deliver up the said books and papers to C. D., then and there duly authorized to demand the said books and papers. It would seem that after an officer has ceased to be in the employment of Her Majesty, it might be contended that this section does not apply.

STEALING BY TENANTS AND LODGERS.

322. Every one who steals any chattel or fixture let to be used by him or her in or with any house or lodging is guilty of an indictable offence and liable to *two years'* imprisonment, and if the value of such chattel or fixture exceeds the sum of twenty-five dollars to *four* years' imprisonment. R. S. C. c. 164, s. 57. 24-25 V. c. 96, s. 74 (Imp.).

Fine, s. 958.

If the indictment be for stealing a chattel it may be, by s. 625 *post*, in the common form for larceny, and in case of stealing a fixture the indictment may be in the same form as if the offender were not a tenant or lodger, and the property may be laid either in the owner or person letting to hire.

There may be a conviction of an attempt to commit any offence mentioned in this section, upon a trial for that offence, s. 711, *post*.

By common law a lodger had a special property in the goods which were let with his lodgings; during the lease he, and not the landlord, had the possession; therefore the landlord could not maintain trespass for taking the goods; in consequence, the taking by the lodger was not felonious: Meere's Case, 2 Russ. 519; R. v. Belstead, R. & R. 411. Hence, the statutory enactments on the subject.

STEALING TESTAMENTARY INSTRUMENTS.

323. Every one is guilty of an indictable offence and liable to imprisonment for life who, either during the life of the testator or after his death, steals the whole or any part of a testamentary instrument, whether the same relates to real or personal property, or to both. R. S. C. c. 164, s. 14. 24-25 V. c. 96, s. 29 (Imp.).

"Testamentary instrument" defined, s. 3.

Indictment.— a certain will and testamentary instrument of one J. N. unlawfully did steal. (*Add counts varying description of the will, etc.*)

The cases of R. v. Skeen, Bell 97, and R. v. Strahan, 7 Cox, 85, are not now law: Greaves Cons. Acts, 126.

STEALING DOCUMENTS OF TITLE TO LANDS OR GOODS.

324. Every one is guilty of an indictable offence and liable to three years' imprisonment who steals the whole or any part of any document of title to lands *or goods*. R. S. C. c. 164, s. 13. 24-25 V. c. 96, s. 28 (Imp.).

See s. 3 for definitions of "title to lands or goods."

Fine, s. 958. The words in italics are new.

Indictment.— a certain document of title to lands, the property of J. N., being evidence of the title of the said J. N. to a certain real estate called in which said real estate the said J. N. then had and still hath an interest, unlawfully did steal.

STEALING JUDICIAL DOCUMENTS.

325. Every one is guilty of an indictable offence and liable to three years' imprisonment who steals the whole or any part of any record, writ, return, affirmation, recognizance, *cognovit actionem*, bill, petition, answer, decree, panel, process, interrogatory, deposition, affidavit, rule, order or warrant of attorney, or of any original document whatsoever of, or belonging to any court of justice, or relating to any cause or matter begun, depending or terminated in any such court, or of any original document in any wise relating to the business of any office or employment under Her Majesty, and being or remaining in any office appertaining to any court of justice, or in any government or public office. R. S. C. c. 164, s. 15 (*Amended*). 24-25 V. c. 96, s. 30 (Imp.).

Indictment for stealing a record.— a certain judgment-roll of the Court of Our Lady the Queen, before the Queen herself, unlawfully did steal.

Stealing rolls of parchment will be larceny at common law, though they be the records of a court of justice, unless they concern the realty: R. v. Walker, 1 Moo. 155; but it is not so if they concern the realty: R. v. Westbeer, 1 Leach, 13.

A commission to settle the boundaries of a manor is an instrument concerning the realty, and not the subject of larceny at common law: R. v. Westbeer, *loc. cit.*

An indictment describing an offence within 32 & 33 V. c. 21, s. 18, as feloniously stealing an information taken in a police court, is sufficient after verdict: R. v. Mason, 22 U. C. C. P. 246.

The destroying, taking, concealing, etc., judicial documents is provided for by ss. 353 & 354, *post.*

STEALING POST LETTER BAGS, ETC.

326. Every one is guilty of an indictable offence and liable to imprisonment for life, or for any term not less than *three years* who steals—

(*a*) a post letter bag; or

(*b*) a post letter from a post letter bag, or from any post office, or from any officer or person employed in any business of the post office of Canada, or from a mail; or

(*c*) a post letter containing any chattel, money or valuable security; or

(*d*) any chattel, money or valuable security from or out of a post letter. R. S. C. c. 35, ss. 79, 80 & 81. 7 Wm. IV. & 1 V. c. 36 (Imp.).

"Valuable security" defined, s. 3.

See s. 4, *ante*, as to meaning of words in enactments relating to post office, and s. 624, *post*, as to indictment.

Indictment.— that A. B., on unlawfully did steal one post letter, the property of the postmaster-general, from a post letter bag (*or from a post office*) (*or a post letter containing a sum of money*) (*or a sum of money out of a post letter*).

To unlawfully open a post letter bag is punishable by five years: ss. 82, 89, c. 35, R. S. C.; *see* R. v. Jones, 1 Den. 188; R. v. Pearce, 2 East P. C. 603; R. v. Poynton, L. & C. 247.

STEALING LETTERS, ETC.

327. Every one is guilty of an indictable offence and liable to imprisonment for any term not exceeding *seven* years, and not less than three years, who steals—

(*a*) any post letter, except as mentioned in paragraph (*b*) of section three hundred and twenty-six;

(*b*) any parcel sent by parcel post, or any article contained in any such parcel; or

(*c*) any key suited to any lock adopted for use by the Post Office Department, and in use on any Canada mail or mail bag. R. S. C. c. 35, ss. 79, 83 & 88.

See under preceding section.

STEALING OTHER MAILABLE MATTER.

328. Everyone is guilty of an indictable offence and liable to five years' imprisonment who steals any printed vote or proceeding, newspaper, printed paper or book, packet or package of patterns or samples of merchandise or goods, or of seeds, cuttings, bulbs, roots, scions or grafts, or any post card or other mailable matter (not being a post letter) sent by mail. R. S. C. c. 35, s. 90.

Fine, s. 958; *see* remarks under s. 326, *ante*.

STEALING ELECTION DOCUMENTS.

329. Every one is guilty of an indictable offence and liable *to a fine in the discretion of the court, or* to seven years' imprisonment, *or to both fine and imprisonment* who steals, or unlawfully takes from any person having the lawful custody thereof, or from its lawful place of deposit for the time being, any writ of election, or any return to a writ of election, or any indenture, poll-book, voters' list, certificate, affidavit or report, ballot or any document or paper made, prepared or drawn out according to or for the requirements of any law in regard to *Dominion*, provincial, municipal or civic elections. R. S. C. c 8, s. 102; c. 164, s. 56.

The words in italics are new. S. 102, c. 8, R. S. C. is unrepealed. *See* under s. 551, *post*, a reference to the above section.

STEALING RAILWAY TICKETS, ETC.

330. Every one is guilty of an indictable offence and liable to *two* years' imprisonment who steals any tramway, railway or steamboat ticket, or any order or receipt for a passage on any railway or in any steamboat or other vessel. R. S. C. c. 164, s. 16.

Fine, s. 958.

STEALING CATTLE.

331. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals any cattle. R. S. C. c. 164, ss. 7 & 8.

See ante, s. 3, for interpretation of the word *cattle*.

Indictment.— that J. S. on at one horse of the goods and chattels of J. N. unlawfully did steal. (*The indictment must give the animal one of the descriptions mentioned in the statute; otherwise the defendant can be punished as for simple larceny merely*): R. v. Beaney, R. & R. 416.

If a person go to an inn, and direct the ostler to bring out his horse, and point out the prosecutor's horse as his, and the ostler leads out the horse for the prisoner to mount, but, before the prisoner gets on the horse's back, the owner of the horse comes up and seizes him, the offence of horse-stealing is complete: R. v. Pitman, 2 C. & P. 423.

The prisoners enter another's stable at night, and take out his horses, and ride them 32 miles, and leave them at an inn, and are afterwards found pursuing their journey on foot. On a finding by the jury that the prisoners took the

horses merely with intent to ride and afterwards leave them, and not to return or make any further use of them, *held*, trespass and not larceny: R. v. Philipps, 2 East, P. C. 662. But now, it would be theft under s. 305, *ante*.

If a horse be purchased and delivered to the buyer, it is no felony though he immediately ride away with it without paying the purchase money: R. v. Harvey, 1 Leach, 467.

If a person stealing other property take a horse, not with intent to steal it, but only to get off more conveniently with the other property, such taking of the horse is not a felony: R. v. Crump, 1 C. & P. 658.

Obtaining a horse under the pretense of hiring it for a day, and immediately selling it, is a felony at common law if the jury find the hiring was *animo furandi*: R. v. Pear, 1 Leach, 212; R. v. Charlewood, 1 Leach, 409: *see* now s. 305, *ante*. It is larceny (at common law) for a person hired for the special purpose of driving sheep to a fair to convert them to his own use, the jury having found that he intended so to do at the time of receiving them from the owner: R. v. Stock, 1 Moo. 87; *see* now s. 305, *ante*. Where the defendant removed sheep from the fold into the open field, killed them, and took away the skins merely, the judges held that removing the sheep from the fold was a sufficient driving away to constitute larceny: R. v. Rawlins, 2 East P. C. 617.

Any variance between the indictment and the proof, in the description of the animal stolen, may be amended: s. 723, *post;* R. v. Gumble, 12 Cox, 248.

STEALING DOGS, BIRDS, ETC.

332. Every one is guilty of an offence and liable on summary conviction to a penalty not exceeding twenty dollars over and above the value of the property stolen, or to one months' imprisonment with hard labour, who steals any dog, or any bird, beast or other animal ordinarily kept in a state of confinement or for any domestic purpose, *or for any lawful purpose of profit or advantage.*

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable to three months' imprisonment with hard labour. R. S. C. c. 164, s. 9. 24-25 V. c. 96, ss. 18, 21 (Imp.).

The words in italics are not in the English Act.

For injuries to such animals, *see* s. 501, *post*.

KILLING PIGEONS, ETC.

333. Every one who unlawfully *and wilfully* kills, wounds or takes any house-dove or pigeon, under such circumstances as do not amount to theft, is guilty of an offence and liable, *upon complaint of the owner thereof*, on summary conviction, to a penalty not exceeding ten dollars over and above the value of the bird. R. S. C. c. 164, s. 10. 24-25 V. c. 96, s. 23 (Imp.).

The words in italics are new.

This clause does not extend to killing pigeons under a claim of right: Taylor v. Newman, 9 Cox, 314, 4 B. & S. 89; *see ante*, s. 304, and note.

This section is out of place. It ought to be under Part XXXVII. *post*.

STEALING OYSTERS.

334. Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals oysters or oyster brood.

2. Every one is guilty of an indictable offence and liable to three months imprisonment who unlawfully and wilfully uses any dredge or net, instrument or engine whatsoever, within the limits of any oyster bed, laying or fishery, being the property of any other person, and sufficiently marked out or known as such, for the purpose of taking oysters or oyster brood, although none are actually taken, or unlawfully and wilfully with any net, instrument or engine, drags upon the ground of any such fishery.

3. Nothing herein applies to any person fishing for or catching any swimming fish within the limits of any oyster fishery with any net, instrument or engine adapted for taking swimming fish only. R. S. C. c. 164, s. 11. 24-25 V. c. 96, s. 26 (Imp.).

See s. 304, s-s. 5, *ante*, and s. 619 (*e*), *post*.

Indictment for stealing oysters or oyster brood.— from a certain oyster-bed called the property of J. N. and sufficiently marked out and known as the property of the said J. N., one thousand oysters unlawfully did steal.

Indictment for using a dredge in the oyster fishery of another.— within the limits of a certain oyster-bed called the property of J. N., and sufficiently marked out and known as the property of the said J. N., unlawfully

and wilfully did use a certain dredge for the purpose of then and there taking oysters.

In support of an indictment for stealing oysters in a tidal river it is sufficient to prove ownership by oral evidence as, for instance, that the prosecutor and his father for forty-five years had exercised the exclusive right of oyster fishing in the *locus in quo*, and that in 1846 an action had been brought to try the right, and the verdict given in favour of the prosecutor: R. v. Downing, 11 Cox, 580.

STEALING THINGS FIXED TO BUILDINGS

335. Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper, brass or other metal, or any utensil or fixture, whether made of metal or other material, or of both, respectively fixed in or to any building whatsoever, or anything made of metal fixed in any land, being private property, or for a fence to any dwelling-house, garden or area, or in any square or street, or in any place dedicated to public use or ornament, or in any burial ground. R. S. C. c. 164, s. 17.

The repealed section covered the "ripping, severing, cutting and breaking" of the things therein specified, as well as the stealing thereof.

At common law larceny could not be committed of things attached to the freehold. Hence, the necessity heretofore of such statutory enactments. But in this Code they are perfectly useless.

This part of the Commissioners' draft, recopied *verbatim* in this Code, well says Sir James Stephens, "is needlessly minute, and shows an undue anxiety to avoid changes in the existing law which might greatly simplify it": 3 Stephen's Hist. 167. It would have been better perhaps to leave out such a provision as this one contained in s. 335 than the one relating to the stealing of promissory notes and other valuable securities as has been done in s. 353, *post*.

This enactment extends the offence much further than the prior Acts did, as it includes all utensils and fixtures of whatever materials made, either fixed to buildings or in land, or in a square or street. A church, and indeed all

buildings are within the Act, and an indictment for stealing lead fixed to a certain building without further description will suffice: Greaves' note; R. v. Parker, 2 East P. C. 592; R. v. Norris, R. & R. 69. An unfinished building boarded on all sides, with a door and a lock, and a roof of loose gorse, was held a building within the statute: R. v. Worrall, 7 C. & P. 516. So also where the lead stolen formed the gutters of two sheds built of brick, timber and tiles upon a wharf fixed to the soil, it was held that this was a building within the Act: R. v. Rice, Bell, 87. But a plank used as a seat, and fixed on a wall with pillars, but with no roof, was held not to be a building: R. v. Reece, 2 Russ. 254. Where a man, having given a false representation of himself, got into possession of a house under a treaty for a lease of it, and then stripped it of the lead, the jury, being of opinion that he obtained possession of the house with intent to steal the lead, found him guilty, and he afterwards had judgment: R. v. Munday, 2 Leach, 850.

The prisoners were found guilty of having stolen a copper sun-dial fixed upon a wooden post in a churchyard. Conviction held right: R. v. Jones, Dears. & B. 555.

The ownership of the building from which the fixture is stolen must be correctly laid in the indictment: 2 Russ. 255. If necessary, it may now be amended at the trial, and if not laid in the indictment at all the omission will not vitiate it.

Indictment for stealing metal, etc.— two hundred pounds weight of iron, the property of J. N., then fixed in a certain land then being private property, to wit, in a garden of the said J. N., situate did unlawfully steal.

TREES, SAPLINGS, ETC.

336. Every one is guilty of an indictable offence and liable to *two* years' imprisonment who steals the whole or any part of any tree, sapling or shrub, or any underwood, the thing stolen being of the value of twenty-five dollars, or of the value of five dollars if the thing stolen grows in any park, pleasure

ground, garden, orchard or avenue, or in any ground adjoining or belonging to any dwelling-house. R. S. C. c. 164, s. 18. 24-25 V. c. 96, s. 32 (Imp.).

Fine, s. 958.

Injuring trees is provided for in s. 508, *post.*

The words "grounds adjoining" mean grounds in active contact with the dwelling-house. Whether the ground be a park or garden, etc., is a question for the jury. It seems it is not material that it should be in every part of it a park or garden: R. v. Hodges, M. & M. 341. The amount of injury mentioned in this and the following section must be the actual injury to the tree or shrub itself, and not the consequential injury resulting from the act of the defendant: R. v. Whiteman, Dears. 353. The respective values of several trees, or of the damage thereto, may be added to make up the twenty-five dollars, in case the trees were cut down, or the damage done as part of one continuous transaction: R. v. Shepherd, 11 Cox, 119.

Indictment for stealing trees, etc., in parks, etc., of a value above five dollars.— one oak tree of the value of eight dollars, the property of J. N., then growing in a certain park of the said J. N., situate in the said park, unlawfully did steal.

Indictment under first part of the section.— one ash tree of the value of thirty dollars, the property of J. N., then growing in a certain close of the said J. N., situate in the said close, unlawfully did steal.

It is not necessary to prove that the close was not a park or garden, etc.

STEALING SAPLINGS, SHRUBS, ETC.

337. Every one who steals the whole or any part of any tree, sapling or shrub, or any underwood, the value of the article stolen, or the amount of the damage done, being twenty-five cents at the least, is guilty of an offence and liable on summary conviction, to a penalty not exceeding twenty-five dollars over and above the value of the article stolen or the amount of the injury done.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable on summary conviction, to three months' imprisonment with hard labour.

3. Every one, who, having been twice convicted of any such offence, afterwards commits any such offence is guilty of an indictable offence and liable to five years' imprisonment. R. S. C. c. 164, s. 19. 24-25 V. c. 96, s. 33 (Imp.).

Fine, under s-s. 3, s. 958.

Injuring trees, etc.: *see post*, s. 508, *et seq.*

Indictment under s-s. 3.— that J. S. on one oak sapling of the value of forty cents, the property of J. N., then growing in certain land situate unlawfully did steal, and the jurors aforesaid, do say, that heretofore, and before the committing of the offence herein before mentioned, to wit, on at the said J. S. was duly convicted before J. P., one of Her said Majesty's justices of her peace for the said district of for that he, the said J. S., on (*as in the first conviction*); and the said J. S. was thereupon then and there adjudged, for his said offence, to forfeit and pay the sum of twenty dollars, over and above the value of the said tree so stolen as aforesaid, and the further sum of forty cents, being the value of the said tree, and also to pay the further sum of for costs; and in default of immediate payment of the said sums, to be imprisoned in the common gaol of the said district of for the space of unless the said sums should be sooner paid. And the jurors aforesaid, do further say, that heretofore and before the committing of the offence first hereinbefore mentioned, to wit, on at the said J. S. was duly convicted before O. P., one of Her said Majesty's justices of the peace for the said district of for that he (*setting out the second conviction in the same manner as the first, and proceed thus*). And so, the jurors aforesaid, do say, that the said J. S., on the day and year first aforesaid, the said oak sapling of the value of forty cents, the property of the said J. N., then growing in the said land situate unlawfully did steal: Greaves on s. 116 of the *Larceny Act*, and 37 of the *Coin Act;* R. v. Martin, 11 Cox, 343; *see* s. 628 and s. 676, *post*, as to previous convictions.

TIMBER FOUND ADRIFT.

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

(*a*) without the consent of the owner thereof:

(i) fraudulently takes, holds, keeps in his possession, collects, conceals, receives, appropriates, purchases, sells or causes or procures or assists to be taken possession of, collected, concealed, received, appropriated, purchased or sold, any timber, mast, spar, saw-log or other description of lumber which is found adrift in, or cast ashore on the bank or beach of, any river, stream or lake;

(ii) wholly or partially defaces or adds, or causes or procures to be defaced or added, any mark or number on any such timber, mast, spar, saw-log or other description of lumber, or makes or causes or procures to be made any false or counterfeit mark on any such timber, mast, spar, saw-log or other description of lumber; or

(*b*) refuses to deliver up to the proper owner thereof, or to the person in charge thereof, on behalf of such owner, or authorized by such owner to receive the same, any such timber, mast, spar, saw-log or other description of lumber. R. S. C. c. 164, s. 87.

Fine, s. 958.

See s. 572, *post*, as to search warrant, and s. 708, as to evidence.

STEALING FENCES, ETC.

339. Every one who steals any part of any live or dead fence, or any wooden post, pale, wire or rail set up or used as a fence, or any stile or gate, or any part thereof respectively, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the value of the article or articles so stolen or the amount of the injury done.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable, on summary conviction, to three months' imprisonment with hard labour. R. S. C. c. 164, s. 21. 24-25 V. c. 96, s. 34, (Imp.).

Injuring fences, etc.: *see* s. 507, *post*.

UNLAWFUL POSSESSION OF TREE, SAPLING, ETC.

340. Every one who, having in his possession or on his premises with his knowledge, the whole or any part of any tree, sapling or shrub, or any underwood, or any part of any live or dead fence, or any post, pale, wire, rail, stile or gate, or any part thereof, of the value of twenty-five cents at the least, is taken or summoned before a justice of the peace, and does not satisfy such justice that he came lawfully by the same, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding ten dollars, over and above the value of the article so in his possession or on his premises. R. S. C. c. 164, s. 22.

"Having in possession" defined: s. 3.

This section does not apply to cord-wood: R. v. Caswell, 33 U. C. Q. B. 303.

PLANTS, ETC., IN GARDENS.

341. Every one who steals any plant, root, fruit or vegetable production growing in any garden, orchard, pleasure ground, nursery ground, hot-house, green-house or conservatory is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the value of the article so stolen or the amount of the injury done, or to one month's imprisonment with or without hard labour.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is guilty of an indictable offence and liable to *three* years' imprisonment. R. S. C. c. 164, s. 23. 24-25 V. c. 96, s. 36 (Imp.).

Fine, s. 958; injuring plants, etc., s. 509, *post*.

The words *plant* and *vegetable production* do not apply to young fruit trees: R. v. Hodges, M. & M. 341. Stealing trees would fall under ss. 336 and 337.

Indictment under s-s. 2.— that J. S., on twenty pounds' weight of grapes, the property of J. N., then growing in a certain garden of the said J. N., situate unlawfully did steal; and the jurors aforesaid, do say that, heretofore, and before the committing of the offence hereinbefore mentioned, to wit, on at the said J. S., was duly convicted before J. P., one of Her Majesty's justices of the said district of for that he, the said J. S., on (*as in the previous conviction*) and the said J. S., was thereupon then and there adjudged for the said offence to forfeit and pay the sum of twenty dollars, over and above the value of the article so stolen as aforesaid, and the further sum of six shillings, being the amount of the said injury; and also to pay the sum of ten shillings for costs, and in default of immediate payment of the said sums, to be imprisoned in for the space of unless the said sum should be sooner paid, and so the jurors aforesaid, do say, that the said J. S., on the day and in the year first aforesaid, the said twenty pounds' weight of grapes, the property of the said J. N., then growing in the said garden of the said J. N., situate unlawfully did steal.

See ss. 628 and 676, *post*, as to previous convictions.

PLANTS ETC., NOT IN GARDENS.

342. Every one who steals any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard, pleasure ground, or nursery ground, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding five dollars over and above the value of the article so stolen or the amount of the injury done, or to one months' imprisonment with hard labour.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable to three months' imprisonment with hard labour. R. S. C. c. 164, s. 24. 24-25 V. c. 96, s. 37 (Imp.).

Injuring roots, etc., s. 510, *post.*

Clover has been held to be a cultivated plant: R. v. Brumby, 8 C. & K. 315; but it was doubted whether grass were so: Morris v. Wise, 2 F. & F. 51.

STEALING ORE, MINERALS, ETC.

343. Every one is guilty of an indictable offence and liable to *two* years' imprisonment who steals the ore of any metal, or any quartz, lapis calaminaris, manganese, or mundic, or any piece of gold, silver or other metal, or any wad, black cawk, or black lead, or any coal, or cannel coal, *or any marble, stone or other mineral*, from any mine, bed or vein thereof respectively.

2. It is not an offence to take, for the purposes of exploration or scientific investigation, any specimen or specimens of any ore or mineral from any piece of ground uninclosed and not occupied or worked as a mine, quarry or digging. R. S. C. c. 164, s. 25. 24-25 V. c. 96, s. 38 (Imp.).

Fine, s. 958.

See ss. 571, 621 & 707, which apply to this section.

Sections 312 and 354 provide for the concealing of gold and silver from a mine, or of anything that can be stolen.

The words "or any marble, stone, or other mineral" are not in the English Act.

R. v. Webb, 1 Moo. 431; R. v. Holloway, 1 Den. 370; R. v. Poole, Dears. & B. 345, would now fall under s. 354, *post.* It must be alleged and proved that the ore was stolen from the mine: R. v. Trevenner, 2 M. & Rob. 476.

Indictment.— twenty pounds' weight of copper ore, the property of J. N., from a certain mine of copper ore of the said J. N., situate unlawfully did steal.

STEALING FROM THE PERSON.

344. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals any chattel, money or valuable security from the person of another. R. S. C. c. 164, s. 32. 24-25 V. c. 96, s. 40 (Imp.).

"Valuable security" defined, s. 3; and *see* remarks under s. 353, *post.*

Indictment for stealing from the person.— one watch, one pocket-book and one pocket handkerchief of the goods and chattels of J. N., from the person of the said J. N., unlawfully did steal.

The words "from the person of the said J. N." constitute the characteristic of this offence, as distinguished from simple larceny; the absence of force, violence or fear distinguishes it from robbery.

The indictment need not negative the force or fear necessary to constitute robbery; and though it should appear upon the evidence that there was such force or fear, the punishment for stealing from the person may be inflicted: R. v. Robinson, R. & R. 321; R. v. Pearce, R. & R. 174.

To constitute a stealing from the person the thing taken must be completely removed from the person. Where it appeared that the prosecutor's pocket-book was in the inside front pocket of his coat, and the prosecutor felt a hand between his coat and waistcoat attempting to get the book out, and the prosecutor thrust his right hand down to his book, and on doing so brushed the prisoner's hand; the book was just lifted out of the pocket an inch above the top of the pocket, but returned immediately into the pocket; it was held by a majority of the judges that the prisoner was not rightly convicted of stealing from the person, because from first to last the book remained about the person of the prosecutor, but the judges all agreed that the simple larceny was complete. Of ten judges, four were of opinion that the stealing from the person was complete: R. v. Thompson, 1 Moo. 78.

Where the prosecutor carried his watch in his waistcoat pocket, fastened to a chain, which was passed through a button-hole of the waistcoat, and kept there by a watch-key at the other end of the chain; and the defendant took the watch out of the pocket, and forcibly drew the chain and key out of the button-hole, but the point of the key caught upon another button, and the defendant's hand being seized the watch remained there suspended, this was held a sufficient severance. The watch was no doubt temporarily, though but for a moment, in the possession of the prisoner: R. v. Simpson, Dears. 421. In this case Jervis, C.J., said he thought the minority of the judges in Thompson's case, *supra*, were right.

Where a man went to bed with a prostitute, leaving his watch in his hat, on the table, and the woman stole it whilst he was asleep, it was held not to be stealing from the person, but stealing in the dwelling-house: R. v. Hamilton, 8 C. & P. 49.

Upon the trial of any indictment for stealing from the person, if no asportation be proved the jury may convict the prisoner of an attempt to commit that offence, under s. 711.

In R. v. Collins, L. & C. 471, it was held that there can only be an attempt to commit an act, where there is such a beginning as if uninterrupted would end in the completion of the act, and that if a person puts his hand into a pocket with intent to steal, he cannot be found guilty of an attempt to steal, if there was nothing in the pocket. But that case is overruled: *see* s. 64, p. 42, *ante*, and cases cited.

STEALING IN A DWELLING-HOUSE.

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

(*a*) steals in any dwelling-house any chattel, money or valuable security to the value in the whole of twenty-five dollars or more; or,

(*b*) steals any chattel, money or valuable security in any dwelling-house, and by any menace or threat puts any one therein in bodily fear. R. S. C. c. 164, ss. 45 & 46. 24-25 V. c. 96, ss. 60, 61 (Imp.).

As to the meaning of the words "valuable security": *see ante*, s. 3, and remarks under s. 353, *post*.

Indictment under (*a*).— one silver sugar basin, of the value of twenty-five dollars, of the goods and chattels of A. B., in the dwelling-house of the said A. B., situate unlawfully did steal.

If no larceny is proved the defendant must of course be acquitted altogether, except if the jury should find him guilty of the attempt to commit the offence *charged*, under s. 711, but the jury could not find him guilty of an attempt to commit a simple larceny: R. v. McPherson, Dears. & B. 197; but *see* now s. 713.

The word "*dwelling-house*" has the same meaning as in burglary. If the proof fails to prove the larceny to have been committed in a dwelling-house or in the dwelling-house described, or that the value of the things stolen at any one time amounts to twenty-five dollars, the defendant must be acquitted of the compound offence, and may be found guilty of the simple larceny only.

The goods must be stolen to the amount of twenty-five dollars or more at one and the same time: R. v. Petrie, 1 Leach, 294; R. v. Hamilton, 1 Leach, 348; 2 Russ. 85.

It has been held in several cases that, if a man steal the goods of another in his own house, R. v. Thompson, R. v. Gould, 1 Leach, 338, it is not within the statute, but these cases appear to be overruled by R. v. Bowden, 2 Moo. 285. Bowden was charged with having stolen Seagall's goods in his, Bowden's house, and having been found guilty the conviction was affirmed. Where a lodger invited an acquaintance to sleep at his lodgings, without the knowledge of his landlord, and, during the night, stole his watch from his bed's head, it was doubted at the trial whether the lodger was not to be considered as the owner of the house with respect to the prosecutor; but the judges held that the defendant was properly convicted of stealing in the dwelling-house of the landlord; the goods were under the protection

of the dwelling-house: R. v. Taylor, R. & R. 418. If the goods be under the protection of the *person* of the prosecutor, at the time they are stolen, the case will not be within the statute; as, for instance, where the defendant procured money to be delivered to him for a particular purpose and then ran away with it: R. v. Campbell, 2 Leach, 564; and so, where the prosecutor, by the trick of ring-dropping, was induced to lay down his money upon the table, and the defendant took it up and carried it away: R. v. Owen, 2 Leach, 572. For a case to be within the statute the goods must be under the protection of the house. But property left at a house for a person supposed to reside there will be under the protection of the house, within the statute. Two boxes belonging to A., who resided at 38 Rupert street, were delivered by a porter, whether by mistake or design did not appear, at No. 33 in the same street; the owner of the house imagining that they were for the defendant who lodged there delivered them to him; the defendant converted the contents of the boxes to his own use, and absconded; it was doubted at the trial whether the goods were sufficiently within the protection of the dwelling-house to bring the case within the statute, but the judges held that they were: R. v. Carroll, 1 Moo. 89. If one on going to bed put his clothes and money by the bedside these are under the protection of the dwelling-house and not of the person; and the question whether goods are under the protection of the dwelling-house, or in the personal care of the owner, is a question for the court, and not for the jury: R. v. Thomas, Carr. Supp. 3rd Ed. 295. So where a man went to bed with a prostitute, having put his watch in his hat on a table, and the woman stole the watch while he was asleep; this was held to be a stealing in a dwelling-house, and not a stealing from the person: R. v. Hamilton, 8 C. & P. 49. But if money be stolen from under the pillow of a person sleeping in a dwelling-house this is not stealing in the dwelling-house within the meaning of the Act: 2 Russ. 84. In ascertaining the value of the articles

stolen the jury may use that general knowledge which any man can bring to the subject, but if it depends on any particular knowledge of the trade by one of the jurymen this juryman must be sworn and examined as a witness: R. v. Rosser, 7 C. & P. 648. Under s-s. (*b*) the indictment must expressly allege that some person in the house was put in fear by the defendant: R. v. Etherington, 2 Leach, 671.

The observations, *post*, under the head "Burglary" upon questions which may arise as to what shall be deemed a dwelling-house, will apply to the offence under this clause: 2 Russ. 78.

The value, if amounting to twenty-five dollars, had better always be inserted, as then, if no menace or threat, or no person in the house being put in fear, are proved, the defendant may be convicted of stealing in the dwelling-house to the value of twenty-five dollars, under s-s. (*a*). If there is no proof of a larceny in a dwelling-house, or the dwelling house alleged, or if the goods stolen are not laid and proved to be of the value of twenty-five dollars, the defendant may still be convicted of simple larceny if the other aggravating circumstances are not proved.

The value is immaterial if some person was in the house at the time, and was put in bodily fear by a menace or threat of the defendant, which may either be by words or gesture: R. v. Jackson, 1 Leach, 267.

It is clear that no breaking of the house is necessary to constitute this offence; and it should seem that property might be considered as stolen in the dwelling-house, within the meaning of the statute, if a delivery of it out of the house should be obtained by threats, or an assault upon the house by which some persons therein should be put in fear. But questions of difficulty may perhaps arise as to the degree of fear which must be excited by the thief. Where, however, the prosecutor, in consequence of the threat of an armed mob, fetched provisions out of his house

and gave them to the mob, who stood outside the door, this was holden not to be a stealing in the dwelling house: R. v. Leonard, 2 Russ. 78. But Greaves adds: "It is submitted with all deference that this decision is erroneous; the law looks on an act done under the compulsion of terror as the act of the person causing that terror just as much as if he had done it actually with his own hands. Any asportation, therefore, of a chattel under the effects of terror is in contemplation of law the asportation of the party causing the terror": *Note* g, 2 Russ. *loc. cit.*

It does not appear to have been expressly decided under the repealed statute whether or not it was necessary to prove the actual sensation of fear felt by some person in the house, or whether fear was to be implied, if some person in the house were conscious of the fact at the time of the robbery. But it was suggested as the better opinion, and was said to have been the practice, that proof should be given of an actual fear excited by the fact, when committed out of the presence of the party, so as not to amount to a robbery at common law. And it was observed that where the fact was committed in the presence of the party, possibly it would depend upon the particular circumstances of the transaction whether fear would or would not be implied; but that clearly, if it should appear that the party in whose presence the property was taken was not conscious of the fact at the time, the case was not within that statute. But now, by the express words of the statute, the putting in fear must have been by an actual menace or threat: 2 Russ. 79; Archbold, 401.

A person outside a house may be a principal in the second degree to menaces used in the house; menaces used out of the house may be taken into consideration with menaces used in the house: R. v. Murphy, 6 Cox, 340.

Upon the trial of any offence mentioned in this section the jury may, under s. 711, convict of an attempt to commit such offence.

Indictment under (b).— one silver basin (*of the value of twenty-five dollars*) of the goods and chattels of J. N., in the dwelling house of the said J. N., situate unlawfully did steal; one A. B. then, to wit, at the time of the committing of the offence aforesaid being in the said dwelling-house, and therein by the said (*defendant*) by a certain menace and threat then used by the said (*defendant*) then being put in bodily fear. (As to value, *see ante* p. 387.)

STEALING BY PICKLOCKS, ETC. (*New*).

346. 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.

This enactment is taken from the English draft code.

Indictment.— that A. B. on at unlawfully did steal by means of a picklock (*false key or other instrument*) the sum of *ten dollars*, of the goods and chattels of C. D., from a receptacle for property locked and secured.

STEALING IN MANUFACTORIES.

347. Every one is guilty of an indictable offence and liable to *five* years' imprisonment who steals, to the value of two dollars, any woollen, linen, hempen or cotton yarn, or any goods or articles of silk, woollen, linen, cotton, alpaca or mohair, or of any one or more of such materials mixed with each other or mixed with any other material, while laid, placed or exposed, during any stage, process or progress of manufacture, in any building, field or other place. R. S. C. c. 164, s. 47. 24-25 V. c. 96, s. 62 (Imp.).

Fine, s. 958. Injuring such goods, s. 499. *post*.

If you prove the larceny, but fail to prove the other circumstances so as to bring the case within the statute, the defendant may be found guilty of the simple larceny only.

Goods remain in "a stage, process or progress of manufacture," though the texture be complete, if they be not yet brought into a condition fit for sale: R. v. Woodhead, 1 M. & Rob. 549. *See* R. v. Hugill, 2 Russ. 517; R. v. Dixon, R. & R. 53.

Upon the trial of any offence mentioned in this section the jury may, under s. 711, convict the prisoner of an attempt to commit the same.

Indictment.— on thirty yards of linen cloth, of the value of four dollars, of the goods and chattels of J. N., in a certain building of the said J. N., situate unlawfully did steal, whilst the same were laid, placed and exposed in the same building, during a certain state, process and progress of manufacture. *(Other counts may be added, stating the particular process and progress of manufacture in which the goods were when stolen.)*

FRAUD IN DISPOSAL OF GOODS FOR MANUFACTURE.

348. Every one is guilty of an indictable offence and liable to *two* years' imprisonment, when the offence is not within the next preceding section, who, having been intrusted with, for the purpose of manufacture or for a special purpose connected with manufacture, or employed to make, any felt or hat, or to prepare or work up any woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax or silk, or any such materials mixed with one another, or having been so intrusted, as aforesaid, with any other article, materials, fabric or thing, or with any tools or apparatus for manufacturing the same, fraudulently disposes of the same or any part thereof. R. S. C. c. 164, s. 48. 6-7 V. c. 40, s. 2 (Imp.).

Fine, s. 958.

Indictment.— that A. B. on at having been intrusted with, for the purpose of manufacture, a large quantity of, to wit of felt, of the goods and chattels of C. D., fraudulently disposed of the same (*or any part thereof*).

STEALING FROM SHIPS, WHARVES, ETC.

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

(*a*) steals any goods or merchandise in any vessel, barge or boat of any description whatsoever, in any haven or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such haven, port, river or canal; or

(*b*) steals any goods or merchandise from any dock, wharf or quay adjacent to any such haven, port, river, canal, creek or basin. R. S. C. c. 164, s. 49. 24-25 V. c. 96, s. 63 (Imp.).

See sched. one, form F. F., under s. 611 *post*.

Indictment for stealing in a vessel on a navigable river.— on twenty pounds weight of indigo of the goods and merchandise of J. N., then being in a certain ship called the Rattler upon the navigable river Thames, in the said ship, unlawfully did steal.

Indictment for stealing from a dock.— on twenty pounds weight of indigo of the goods and merchandise of J. M., then being in and upon a certain dock adjacent to a certain navigable river called the Thames, from the said dock, unlawfully did steal.

The value is immaterial, and need not be laid. If the prosecutor fails to prove any of the circumstances necessary to bring the case within the statute, but proves a larceny, the defendant may be convicted of the simple larceny.

The construction of the old statutes was generally confined to such goods and merchandise as are usually lodged in ships, or on wharves or quays; and therefore where Grimes was indicted for stealing a considerable sum of money out of a ship in port, though great part of it consisted in Portugal money, not made current by proclamation, but commonly current, it was ruled not to be within the statute: R. v. Grimes, Fost. 79: R. v. Leigh, 1 Leach, 52. The same may be said of the present statute, by reason of the substitution of the words "goods or merchandise" for the words "chattel, money or valuable security" which are used in other parts of the Act: Archbold.

It would not be sufficient, in an indictment for stealing goods from any vessel on a certain navigable river, to prove in evidence that the vessel was aground in a dock in a creek of the river, unless the indictment were amended: R. v. Pike, 1 Leach, 317. The words of the statute are "*in* any vessel," and it is therefore immaterial whether the defendant succeeded in taking the goods from the ship or not, if there was a sufficient asportation in the ship to constitute larceny: 3 Burn, 254.

The words of the statute are "from any dock," so that, upon an indictment for stealing from a dock, wharf, etc., a mere removal will not suffice; there must be an actual removal *from* the dock, etc: Archbold, 409.

A man cannot be guilty of this offence in his own ship: R. v. Madox, R. & R. 92; but *see* R. v. Bowden, 2 Moo. 285. And now, s. 305, *ante*, would apply to such a case, being stealing by fraudulent conversion.

The luggage of a passenger going by steamer is within the statute. The prisoners were indicted for stealing a portmanteau, two coats and various other articles, in a vessel upon the navigable River Thames. The property in question was the luggage of a passenger going on board the Columbian steamer from London to Hamburg; and it was held that the object of the statute was to protect things on board a ship, and that the luggage of a passenger came within the general description of goods: R. v. Wright, 7 C. & P. 159.

Upon an indictment for any offence mentioned in this section the jury may convict of an attempt to commit the same, under s. 711, if the evidence warrants it.

STEALING WRECKS.

350. Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals any wreck. R. S. C. c. 81, s. 36 (c). 24-25 V. c. 96, s. 64, (Imp.).

"Wreck" defined, s. 3.

Indictment.— that on at a certain ship, the property of a person or persons to the jurors unknown (*or of*) was stranded, and that A. B., on the said day, ten pieces of oak planks, being parts of the said ship (*or twenty pounds weight of cotton of the goods and merchandize of a shipwrecked person belonging to the said ship*), unlawfully did steal.

STEALING ON RAILWAYS. (*New*).

351. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals anything *in* or *from* any railway station or building, or *from* any engine, tender or vehicle of any kind on any railway.

Indictment.— that A. B., at on unlawfully did steal a leather portmanteau of the goods and chattels of C. D. in (*or from*) a railway station, to wit, the station there situate belonging to the Canadian Pacific Railway.

The value is immaterial. A verdict for attempt, s. 711, or for simple larceny, s. 713, may be given if the evidence warrants it. In the first case, the punishment would be under s. 528, *post:* in the latter case, under s. 356.

See remarks under s. 349 as to the words *in* or *from* in this section.

STEALING THINGS IN INDIAN GRAVE.

352. Every one who steals, or unlawfully injures or removes, any image, bones, article or thing deposited in or near any Indian grave is guilty of an offence and liable, on summary conviction, for a first offence to a penalty not exceeding one hundred dollars or to three months' imprisonment, and for a subsequent offence to the same penalty and to six months' imprisonment with hard labour. R. S. C. c. 164, s. 98. (*Amended*).

This enactment by the repealed statute applied only to British Columbia.

DESTROYING DOCUMENTS.

353. Every one who destroys, cancels, conceals or obliterates any document of title to *goods* or lands, or any valuable security, testamentary instrument, or judicial, official or other document, for any fraudulent purpose, is guilty of an indictable offence and liable to the same punishment as if he had stolen such document, security or instrument. R. S. C. c. 164, ss. 12, 13, 14. (*Amended*). 24-25 V. c. 96, ss. 27, 28, 29 (Imp.).

See ante remarks under s. 335. S. 101, c. 35, R. S. C., provides for certain offences of the same nature by postmasters.

"Document of title to goods or lands," "valuable security" and "testamentary instrument" defined, s. 3. Punishment, for stealing testamentary instruments, is provided for by s. 323; documents of title to lands or goods, by s. 324; and judicial or official document, by s. 325. For stealing other documents not specially provided for in this Code, and for promissory notes, bills of exchange, and other valuable securities, the punishment falls under

ss. 356 & 357. The repealed section (12, c. 164, R. S. C.) provided in express terms for the stealing of such securities, but the Code has no express provision on the subject. S. 303 is the only one under which the stealing of these securities may be held to be indictable: s. 353 merely assumes that they are.

As to what constitutes a "valuable security," it must be remarked that the interpretation given to this word, in s. 3, *ante*, is wider or, at least, more explicit than the interpretation given in the Imperial Act, 24 & 25 V. c. 96, s. 1. The case of Scott v. R., 2 S. C. R. 349, and (in first instance) 21 L. C. J. 225, refers to a number of cases as to unstamped documents, where stamps are necessary. R. v. Phipoe, 2 Leach, 673, and R. v. Edwards, 6 C. & P. 521, would now fall under s. 405, *post*. An instrument need not be negotiable to be a "valuable security" under the statute: R. v. John, 13 Cox, 100. *See* Austin and King's cases, 2 East P. C. 602; R. v. Hart, 6 C. & P. 106; R. v. Clark, R. & R. 181; R. v. Watts, 6 Cox, 304; R. v. Morton, 2 East P. C. 955; R. v. Dewitt, 21 N. B. 17; R. v. Bowerman, 17 Cox, 151, [1891] 1 Q. B. 112. The cheque of a firm before it is endorsed by the payee, and while still in the hands of one of the members of the firm, is not a valuable security within the meaning of this Act: R. v. Ford, M. L. R. 7 Q. B. 413; but a receipt is: R. v. Doonan, M. L. R. 6 Q. B. 186.

Indictment under s. 353.— on a certain valuable security, to wit, one bill of exchange for the payment of one hundred dollars (*drawn*) unlawfully did, for a fraudulent purpose, destroy and cancel (*conceal or obliterate*), the said bill of exchange, being then due and unsatisfied. (*In another count detail the purpose.*)

Upon an indictment for taking a record from its place of deposit, with a fraudulent purpose, the mere taking is evidence from which fraud may fairly be presumed, unless it be satisfactorily explained.

The first count charged the prisoner with stealing a certain process of a court of record, to wit, a certain warrant of execution issued out of the county court of Berkshire, in an action wherein one Arthur was plaintiff and the prisoner defendant. The second count stated that at the time of committing the offence hereinafter mentioned, one Brooker had the lawful custody of a certain process of a court of record, to wit, a warrant of execution out of the county court of that defendant intending to prevent the due course of law, and to deprive Arthur of the rights, benefits and advantages from the lawful execution of the warrant, did take from Brooker the said warrant, he, Brooker, having then the lawful custody of it. Brooker was the bailiff who had seized the defendant's goods, under the said writ of execution. The prisoner, a day or two afterwards, forcibly took the warrant out of the bailiff's hand, and kept it. He then ordered him away, as having no more authority, and, on his refusal to go, forcibly turned him out. The prisoner was found guilty, and the conviction affirmed upon a case reserved. Cockburn, C.J., said: "I think that the first count of the indictment which charges larceny will not hold. There was no taking *lucri causa*, but for the purpose of preventing the bailiff from having lawful possession. Neither was the taking *animo furandi*. I may illustrate it by the case of a man who, wishing to strike another person, sees him coming along with a stick in his hand, takes the stick out of his hand, and strikes him with it. That would be an assault, but not a felonious taking of the stick. There is, however, a second count in the indictment which charges in effect that the prisoner took the warrant for a fraudulent purpose. The facts show that the taking was for a fraudulent purpose. He took the warrant forcibly from the bailiff, in order that he might turn him out of possession. That was a fraud against the execution creditor, and was also contrary to the law. I am therefore of opinion that it amounts to a fraudulent purpose within the enactment, and that the

conviction must be affirmed": R. v. Bailey, 12 Cox, 129. Such a case would now fall under next section.

Maliciously destroying an information or record of the police court is a felony within 32 & 33 V. c. 21, s. 18; R. v. Mason, 22 U. C. C. P. 246.

CONCEALING. (*New*).

354. 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.

Fine, s. 958. *See* remarks and cases under ss. 343 and 353, *ante*. S. 26, c. 164, R. S. C. was confined to the concealing of minerals.

Indictment.— on did unlawfully take (*or obtain, remove or conceal*) ten bushels of oats, the property of of the value of five dollars, for a fraudulent purpose, to wit, for the purpose of

BRINGING BY THIEF INTO CANADA OF ANYTHING STOLEN ELSEWHERE.

355. Every one is guilty of an indictable offence and liable to *seven* years' imprisonment who, *having obtained elsewhere than* in Canada any property by any act which, if done in Canada, would have amounted to *theft, brings* such property into *or has the same in Canada*. R. S. C. c. 164, s. 88. (*Amended*).

"Property" defined, s. 3: *see* R. v. Hennessey, 35 U. C. Q. B. 603.

The repealed section extended to property obtained by false pretenses. There is no statutory enactment of this kind in England: R. v. Prowes, 1 Moo. 349; R. v. Debruiel, 11 Cox, 207. One was proposed in the draft code.

Receiving in Canada property stolen abroad by any other person does not fall under the above clause. It falls under s. 314, *ante*.

On a charge of having in possession goods stolen in a foreign country not always necessary to prove state of the law in that country. Crown proved that prisoner had in Canada property taken in another country under circumstances which would have made it felony in Canada if so

taken there. Offence held proved. Allegation in indictment that prisoner "feloniously had taken and carried away," the goods does not impose any additional burden of proof on the Crown: R. v. Jewell, 6 Man. L. R. 460.

PUNISHMENT IN OTHER CASES.

356. Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals anything for the stealing of which no punishment is otherwise provided, *or commits in respect thereof any offence for which he is liable to the same punishment as if he had stolen the same.*

2. The offender is liable to ten years' imprisonment if he has been previously convicted of *theft.* R. S. C. c. 164, ss. 5, 6 & 85. (*Amended*).

As to previous convictions, *see* ss. 628, 676. The words "any felony" stood in lieu of the word "theft" in the repealed clause. The words in italics are superfluous.

PUNISHMENT WHEN VALUE EXCEEDS $200.

357. If the value of anything stolen, or in respect of which any offence is committed for which the offender is liable to the same punishment as if he had stolen it, exceeds the sum of two hundred dollars, the offender is liable to *two* years' imprisonment, in addition to any punishment to which he is otherwise liable for such offence. R. S. C. c. 164, s. 86. (*Amended*).

The indictment must specially aver that the value exceeds two hundred dollars. The additional punishment was seven years by the repealed clause, which also applied to obtaining by false pretenses.

PART XXVII.

OBTAINING PROPERTY BY FALSE PRETENSES AND OTHER CRIMINAL FRAUDS AND DEALINGS WITH PROPERTY.

DEFINITION.

358. A false pretense is a representation, either by words or otherwise, of a matter of fact either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation.

2. Exaggerated commendation or depreciation of the quality of anything is not a false pretense, unless it is carried to such an extent as to amount to a fraudulent misrepresentation of fact.

3. It is a question of fact whether such commendation or depreciation does or does not amount to a fraudulent misrepresentation of fact.

This definition is taken from the English draft, where it is given as existing law.

PUNISHMENT.

359. Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud, by any false pretense, *either directly or through the medium of any contract obtained by such false pretense, obtains anything capable of being stolen*, or procures anything capable of being stolen to be delivered to any other person than himself. R. S. C. c. 164, s. 77. (*Amended*).

As to what things are capable of being stolen, *see* remarks under s. 353, *ante*.

The first part of this section is based on 24 & 25 V. c. 96, s. 88, the second part on s. 89 of the Imperial Act.

Section 198 of the Procedure Act, which allowed a conviction for obtaining under false pretenses on a trial for larceny, and s. 196 of the same Act which enacted that on a trial for obtaining under false pretenses, if a larceny was proved the defendant could nevertheless be found guilty of the offence charged, have not been re-enacted: 3 Stephen's Hist. 162; R. v. Adams, 1 Den. 38; R. v. Rudge, 13 Cox, 17; R. v. Bryan, 2 Russ. 664, *note*; R. v. Solomons, 17 Cox, 93; R. v. Gorbutt, Dears. & B. 166.

By s. 711, upon an indictment under this section, the jury may return a verdict of guilty of an attempt to commit the offence charged, if the evidence warrants it: R. v. Roebuck, Dears. & B. 24; R. v. Eagleton, Dears. 376, 515; R. v. Hensler, 11 Cox, 570; R. v. Goff, 9 U. C. C. P. 438.

By ss. 613 and 616 *post*, in indictments for obtaining or attempting to obtain under false pretenses, a general intent to defraud is a sufficient allegation, and it is not necessary to allege any ownership of the chattel, money or valuable security.

To constitute the offence of obtaining goods by false pretenses three elements are necessary. 1st, the statement upon which the goods are obtained must be untrue; 2nd, the prisoner must have known at the time he made the statement that it was untrue; 3rd, the goods must have been obtained by reason and on the representation of that false statement: R. v. Burton, 16 Cox, 62; *see* R. v. Buckmaster and R. v. Solomons, Warb. Lead. Cas. 158, 160; R. v. Russett, 17 Cox, 534.

The distinction between larceny and false pretenses is that, if by means of any trick or artifice the owner of property is induced to part with the possession only, still meaning to retain the right of property, the taking by such means will amount to larceny; but if the owner part with not only the possession of the goods, but the right of property in them also, the offence of the party obtaining them will not be larceny, but the offence of obtaining goods by false pretenses.

Indictment.— that J. S., on unlawfully, and with a fraudulent intent, did falsely pretend to one A. B. that he, the said J. S., then was the servant of one O. K., of tailor, (*the said O. K. then and long before being well known to the said A. B., and a customer of the said A. B. in his business and way of trade as a woollen draper*), and that he, the said J. S., was then sent by the said O. K. to the said A. B. for five yards of superfine woollen cloth, by means of which said false pretenses, the said J. S. did then unlawfully and fraudulently obtain from the said A. B. five yards of superfine woollen cloth.

A form is given in schedule one, F. F.: *see* under s. 611. Under s. 982, an indictment drawn upon that form is sufficient. But, to avoid the necessity of giving particulars, which the court will not refuse to the defendant, ss. 616, 617, the false pretenses should be averred in the indictment. It is not necessary, however, as heretofore, to aver that the *false pretenses were not true.*

The pretense must be set out in the indictment: R. v. Mason, 2 T. R. 581; R. v. Goldsmith, 12 Cox, 479; *see* now s. 616, *post*. And it must be stated to be false: R. v. Airey, 2 East, 30. And it must be of some existing fact; a pretense that the defendant will do some act, or that he has got to do some act is not sufficient: R. v. Goodhall, R. & R. 461; R. v. Johnston, 2 Moo. 254; R. v. Lee, L. & C. 309. Where the pretense is partly a misrepresentation of an existing fact, and partly a promise to do some act, the defendant may be convicted, if the property is parted with in consequence of the misrepresentation of fact, although the promise also acted upon the prosecutor's mind: R. v. Fry, Dears. & B. 449; R. v. West, Dears. & B. 575; R. v. Jennison, L. & C. 157, Warb. Lead. Cas. 167.

Where the pretense, gathered from all the circumstances, was that the prisoner had power to bring back the husband of the prosecutrix, though the words used were merely promissory that she, the prisoner, would bring him back, it was held a sufficient pretense of an existing fact, and that it is not necessary that the false pretense should be made in express words, if it can be inferred from all the circumstances attending the obtaining of the property: R. v. Giles, L. & C. 502.

Where the indictment alleged that the prisoner pretended to A.'s representative that she was to give him twenty shillings for B., and that A. was going to allow B. ten shillings a week, it was held that it did not sufficiently appear that there was any false pretense of an existing fact: R. v. Henshaw, L. & C. 444.

An indictment alleged that the prisoner obtained a coat by falsely pretending that a bill of parcels of a coat, value £0 14s. 6d. of which £0 4s. 6d. had been paid on account, and £0 10s. 0d. only was due, was a bill of parcels of another coat of the value of twenty-two shillings. The evidence was that the prisoner's wife had selected the £0 14s. 6d. coat for him, subject to its fitting him, and had paid

£0 4s. 6d. account, for which she on received a bill of parcels giving credit for that amount. On trying on the coat it was found to be too small, and the prisoner was then measured for one to cost twenty-two shillings. When that was made it was tried on by the prosecutor, who was not privy to the former part of the transaction. The prisoner when the coat was given to him handed the bill of parcels for the £0 14s. 6d. and also £0 10s. 0d. to the prosecutor, saying "There is £0 10s. 0d. to pay." The bill was receipted, and the prisoner took the twenty-two shillings coat away with him. The prosecutor stated that believing the bill of parcels to refer to the twenty-two shillings coat he parted with that coat on payment of £0 10s. 0d. otherwise he should not have done so: *Held*, that there was evidence to support a conviction on the indictment: R. v. Steels, 11 Cox, 5.

So the defendant may be convicted although the pretense is of some existing fact, the falsehood of which might have been ascertained by inquiry by the party defrauded: R. v. Wickham, 10 A. & E. 34; R. v. Woolley, 1 Den. 559; R. v. Ball, C. & M. 249; R. v. Roebuck, Dears. & B. 24; or against which common prudence might have guarded: R. v. Young, 3 T. R. 98; R. v. Jessop, Dears. & B. 442; R. v. Hughes, 1 F. & F. 355. If, however, the prosecutor knows the pretense to be false: R. v. Mills, Dears. & B. 205; or does not part with the goods in consequence of defendant's representation: R. v. Roebuck, Dears. & B. 24; or parts with them before the representation is made: R. v. Brooks, 1 F. & F. 502; or in consequence of a representation as to some future fact: R. v. Dale, 7 C. & P. 352; or if the obtaining of the goods is too remotely connected with the false pretense, which is a question for the jury: R. v. Gardner, Dears. & B. 40; R. v. Martin, 10 Cox, 383, Warb. Lead. Cas. 173; or if the prosecutor continues to be interested in the money alleged to have been obtained, as partner with the defendant, R. v. Watson, Dears. & B. 348; R. v. Evans, L. & C. 252; or the object of the false pretense

is something else than the obtaining of the money: R. v. Stone, 1 F. & F. 311, the defendant cannot be convicted.

Falsely pretending that he has bought goods to a certain amount, and presenting a check-ticket for them: R. v. Barnes, 2 Den. 59; or overstating a sum due for dock dues or custom duties: R. v. Thompson, L. & C. 233; will render the prisoner liable to be convicted under the statute (*See* reporter's note to this last case.)

The pretense need not be in words but may consist of the acts and conduct of the defendant. Thus the giving a cheque on a banker with whom the defendant has no account: R. v. Flint, R. & R. 460; R. v. Jackson, 3 Camp. 370; R. v. Parker, 2 Moo. 1; R. v. Spencer, 3 C. & P. 420; R. v. Wickman, 10 A. & E. 34; R. v. Philpotts, 1 C. & K. 112; R. v. Freeth, R. & R. 127; or the fraudulently assuming the name of another to whom money is payable: R. v. Story, R. & R. 81; R. v. Jones, 1 Den. 551; or the fraudulently assuming the dress of a member of one of the universities, is a false pretense within the statute: R. v. Barnard, 7 C. & P. 784, Warb. Lead. Cas. 162.

The prisoner obtained a sum of money from the prosecutor by pretending that he carried on an extensive business as an auctioneer and house agent, and that he wanted a clerk, and that the money was to be deposited as security for the prosecutor's honesty as such clerk. The jury found that the prisoner was not carrying on that business at all. *Held*, that this was an indictable false pretense: R. v. Crab, 11 Cox, 85; R. v. Cooper, 13 Cox, 617.

The defendant, knowing that some old country bank notes had been taken by his uncle forty years before, and that the bank had stopped payment, gave them to a man to pass, telling him to say, if asked about them, that he had taken them from a man he did not know. The man passed the notes, and the defendant obtained value for them. It appears that the bankers were made bankrupt. *Held*, that the defendant was guilty of obtaining money by

false pretenses, and that the bankruptcy proceedings need not be proved: R. v. Dowey, 11 Cox, 115.

The indictment alleged that the prisoner was living apart from her husband under a deed of separation, and was in receipt of an income from her husband, and that he was not to be liable for her debts, yet that she falsely pretended to the prosecutor that she was living with her husband, and was authorized to apply for and receive from the prosecutor goods on the account and credit of her husband, and that her husband was then ready and willing to pay for the goods. The evidence at the trial was that the prisoner went to the prosecutor's shop and selected the goods, and said that her husband would give a cheque for them as soon as they were delivered, and that she would send the person bringing the goods to her husband's office, and that he would give a cheque. When all the goods were delivered the prisoner told the man who delivered them to go to her husband's office, and that he would pay for them. The man went but could not see her husband, and ascertained that there was a deed of separation between the prisoner and her husband, which was shown to him. He communicated what he had learned to the prisoner who denied the deed of separation. The goods were shortly after removed and pawned by the prisoner. The deed of separation between the prisoner and her husband was put in evidence, by which it was stipulated that the husband was not to pay her debts; and it was proved that she was living apart from her husband, and receiving an annuity from him, and that she was also cohabiting with another man. *Held*, that the false pretenses charged were sufficiently proved by this evidence: R. v. Davis, 11 Cox, 181.

On an indictment for fraudulently obtaining goods in a market by falsely pretending that a room had been taken at which to pay the market people for their goods, the jury found that the well known practice was for buyers to

engage a room at a public house, and that the prisoner, pretending to be a buyer, conveyed to the minds of the market people that she had engaged such a room, and that they parted with their goods on such belief: *Held,* there being no evidence that the prisoner knew of such a practice, and the case being consistent with a promise only on her part to engage such a room and pay for the goods there, the conviction could not be sustained: R. v. Burrows, 11 Cox, 258.

On the trial of an indictment against the prisoner for pretending that his goods were unencumbered, and obtaining thereby eight pounds from the prosecutor with intent to defraud, it appeared that the prosecutor lent money to the prisoner at interest, on the security of a bill of sale on furniture, a promissory note of prisoner and another person and a declaration made by prisoner that the furniture was unencumbered. The declaration was untrue at the time it was handed to the prosecutor, the prisoner having a few hours before given a bill of sale for the furniture to another person, but not to its full value: *Held,* that there was evidence to go to the jury in support of a charge of obtaining money by false pretenses: R. v. Meakin, 11 Cox, 270.

A false representation as to the value of a business will not sustain an indictment for obtaining money by false pretenses. On an indictment for obtaining money by false pretenses it appeared that the prisoner, on engaging an assistant from whom he received a deposit, represented to him that he was doing a good business, and that he had sold a good business for a certain large sum, whereas the business was worthless and he had been bankrupt: *Held,* that the indictment could not be sustained upon either of the representations: R. v. Williamson, 11 Cox, 328.

It has been seen, *ante,* that in R. v. Mills, Dears. & B. 205, Warb. Lead. Cas. 172, it was held that the defendant cannot be convicted if the prosecutor knows the pretense

to be false. The defendant, however, in such cases may, under s. 711, *post*, be found guilty of an attempt to commit the offence charged, or be, in the first instance, indicted for the attempt. In R. v. Hensler, 11 Cox, 570, the prisoner was indicted for attempting to obtain money by false pretenses in a begging letter. In reply to the letter the prosecutor sent the prisoner five shillings; but he stated in his evidence at the trial that he knew that the statements contained in the letter were untrue; it was held, upon a case reserved that the prisoner might be convicted, on this evidence, of attempting to obtain money by false pretenses. But an indictment for an attempt to obtain property by false pretenses must specify the attempt: R. v. Marsh, 1 Den. 505. The proper course is to allege the false pretenses, and to deny their truth in the same manner as in an indictment for obtaining property by false pretenses, and then to allege that by means of the false pretenses the prisoner attempted to obtain the property; *note* by Greaves, 2 Russ. 698.

An indictment charged that the prisoner falsely pretended that he had got a carriage and pair, and expected it down to T. that day or the next, and that he had a large property abroad. The evidence was that the prisoner was at E., assuming to be a man of position and wealth, but was in a destitute condition, and could not pay his hotel and other bills. That three days after he came to T., and induced prosecutor to part with goods on the representation that he had just come from abroad and had shipped a large quantity of wine to R., from England, and expected his carriage and pair to come down, and that he had taken a large house at T., and was going to furnish it: *Held*, that the false pretenses charged were sufficient in point of law, and also that the evidence was sufficient to sustain a conviction: R. v. Howarth, 11 Cox, 588.

Prisoner was indicted for obtaining from George Hislop, the master of the workhouse of the Strand Union, one pint

of milk and one egg, by falsely pretending that a certain child then brought by him had been by him found in Leicester Square, whereas these facts were untrue. The facts were that the prisoner was waiter at an hotel in George Street, Hanover Square. A female servant there, named Spires, had been delivered of a child by him, which was put out to nurse. The child falling ill the nurse brought it to the hotel, and the prisoner, saying that he would find another nurse, took the woman with him to Westminster, where the nurse put the child into his arms and went away. He took it to the work-house of St. Martin-in-the-Fields, which is in the Strand Union, and delivered it to the Master, stating that he had found it in Leicester Square. It was by the master delivered to the nurse to be taken care of, and the nurse fed it with the pint of milk and egg which was the subject of the charge of the indictment as the property obtained by the false pretenses alleged: *Held*, that this evidence did not sustain the indictment, and that the food given to the child was too remote an object: R. v. Carpenter, 11 Cox, 600.

In R. v. Walne, 11 Cox, 647, the conviction was also quashed on the deficiency of the evidence, as no false pretense of an existing fact was proved: *see* R. v. Speed, 15 Cox, 24.

Prisoner by falsely pretending to a liveryman that he was sent by another person to hire a horse for him for a drive to E., obtained the horse. The prisoner returned in the same evening but did not pay for the hire: *Held*, that this was not an obtaining of a chattel with intent to defraud within the meaning of the statute. To constitute such an offence, there must be an intention to deprive the owner of the property: R. v. Kilham, 11 Cox, 561, Warb. Lead. Cas. 175. It may, perhaps, be stealing now in Canada.

There may be a false pretense made in the course of a contract, by which money is obtained under the contract: R. v. Kenrick, D. & M. 208; R. v. Abbott, 2 Cox, 430;

R. v. Burgon, Dears. & B. 11; as to weight or quantity of goods sold when sold by weight or quantity: R. v. Sherwood, Dears. & B. 251; R. v. Ragg, Bell, 214; R. v. Goss, Bell, 208; R. v. Lees, L. & C. 418; R. v. Ridgway, 3 F. & F. 838; but, in all such cases, there must be a misrepresentation of a definite fact.

But "puffing" or a mere false representation as to quality is not indictable: R. v. Bryan, Dears. & B. 265, and the comments upon it by the judges, in Ragg's case, Bell, 214; R. v. Pratt, 8 Cox, 334; *see* R. v. Foster, 13 Cox, 393. Thus representing a chain to be gold, which turns out to be made of brass, silver and gold, the latter very minute in quantity, is not within the statute: R. v. Lee, 8 Cox, 233; *sed quære?* And *see* Greaves' observations, 2 Russ. 664, and R. v. Suter, 10 Cox, 577; and cases collected in R. v. Bryan, Warb. Lead. Cas. 170.

It is not a false pretense, within the statute, that more money is due for executing certain work than is actually due, for that is a mere wrongful overcharge: R. v. Oates, Dears. 459. So, where the defendant pretended to a parish officer, as an excuse for not working, that he had no clothes, and thereby obtained some from the officer, it was held that he was not indictable, the statement being rather a false excuse for not working than a false pretense to obtain goods: R. v. Wakeling, R. & R. 504.

Where the prisoner pretended, first, that he was a single man, and next, that he had a right to bring an action for breach of promise, and the prosecutrix said that she was induced to pay him money by the threat of the action, but she would not have paid it had she known the defendant to be a married man, it was held that either of these two false pretenses was sufficient to bring the case within the statute: R. v. Copeland, Car. & M. 516.

Where the prisoner represented that he was connected with J. S., and that J. S. was a very rich man, and obtained goods by that false representation, it was held within the

statute: R. v. Archer, Dears. 449. Obtaining by falsely pretending to be a medical man or an attorney is within the statute: R. v. Bloomfield, Car. & M. 537; R. v. Asterley, 7 C. & P. 191.

It is no objection that the moneys have been obtained only by way of a loan: R. v. Crossley, 2 M. & Rob. 17; 2 Russ. 668, and R. v. Kilham, 11 Cox, 561.

Obtaining goods by false pretenses intending to pay for them is within the statute: R. v. Naylor, 10 Cox, 149, Warb. Lead. Cas. 169.

It must be alleged and proved that the defendant knew the pretense to be false at the time of making it: R. v. Henderson, 2 Moo. 192; R. v. Philpotts, 1 C. & K. 112; R. v. Gray, 17 Cox, 299. After verdict, however, an indictment following the words of the statute is sufficient: R. v. Bowen, 3 Cox, 483; Hamilton v. R. in error, 2 Cox, 11. It is no defence that the prosecutor laid a trap to draw the prisoner into the commission of the offence: R. v Adamson, 2 Moo. 286; R. v. Ady, 7 C. & P. 140.

Upon a charge of obtaining money by false pretenses it is sufficient if the actual substantial pretense, which is the main inducement to part with the money, is alleged in the indictment, and proved, although it may be shewn by evidence that other matters not laid in the indictment in some measure operated upon the mind of the prosecutor as an inducement for him to part with his money: R. v. Hewgill, Dears. 315. The indictment must negative the pretenses by special averment, and the false pretense must be proved as laid. Any variance will be fatal, unless amended: 3 Burn, 277. But proof of part of the pretense, and that the money was obtained by such proof is sufficient: R. v. Hill, R. & R. 190; R. v. Wickham, 10 A. & E. 34; R. v. Bates, 3 Cox, 201; *see* s. 616 and form F. F., sched one, under s. 611.

But the goods must be obtained by means of some of the pretenses laid: R. v. Hunt, 8 Cox, 495; R. v. Jones, 15

Cox, 475. And where the indictment alleged a pretense which in fact the prisoner did at first pretend, but the prosecutor parted with his property in consequence of a subsequent pretense, which was not alleged, it was held that the evidence did not support the indictment: R. v. Bulmer, L. & C. 476.

Where money is obtained by the joint effect of several mis-statements, some of which are not and some are false pretenses within the statute, the defendant may be convicted: R. v. Jennison, L. & C. 157; but the property must be obtained by means of one of the false pretenses charged, and a subsequent pretense will not support the indictment: R. v. Brooks, 1 F. & F. 502; *see* R. v. Lince, 12 Cox, 451.

Parol evidence of the false pretense may be given, although a deed between the parties, stating a different consideration for parting with the money, is produced, such deed having been made for the purpose of the fraud: R. v. Adamson, 2 Moo. 286. So also parol evidence of a lost written pretense may be given: R. v. Chadwick, 6 C. & P. 181. On an indictment for obtaining money from A., evidence that the prisoner about the same time obtained money from other persons by similar false pretenses is not admissible: R. v. Holt, 8 Cox, 411, Bell, 280. But other false pretenses at other times to the same persons are admissible, if they are so connected as to form one continuing representation, which it is the province of the jury to determine: R. v. Welman, Dears. 188, 6 Cox, 153. *See* R. v. Durocher, 12 R. L. 697.

Inducing a person by a false pretense to accept a bill of exchange is not within this section: R. v. Danger, Dears. & B. 307; *see* R. v. Gordon, 16 Cox, 622; *see* s. 360, *post.*

A railway ticket obtained by false pretenses is within the statute, R. v. Boulton, 1 Den. 508; R. v. Beecham, 5 Cox, 181; ss. 330, 359; and so is an order by the president of a burial society on a treasurer for the payment of money: R. v. Greenhalgh, Dears. 267.

Where the defendant only obtains credit and not any specific sum by the false pretenses it is not within the statute: R. v. Wavell, 1 Moo. 224; R. v. Garrett, Dears. 232; R. v. Crosby, 1 Cox, 10.

There must be an intent to defraud. Where C. B.'s servant obtained goods from A.'s wife by false pretenses, in order to enable B., his master, to pay himself a debt due from A., on which he could not obtain payment from A., it was held that C. could not be convicted: R. v. Williams, 7 C. & P. 354. But it is not necessary to allege nor to prove the intent to defraud any person in particular. *With intent to defraud* are the words of the statute.

But these words "with intent to defraud" are a material and necessary part of the indictment; their omission is fatal, and cannot be remedied by an amendment inserting them. By Lush, J., R. v. James, 12 Cox, 127; R. v. Davis, 18 U. C. Q. B. 180; R. v. Norton, 16 Cox, 59. *At the trial* the court might, it seems, allow the amendment; s. 723, *post*.

An indictment for false pretenses charged that the defendant falsely pretended that he had a lot of trucks of coal at a railway station on demurrage, and that he required forty coal bags. The evidence was that defendant saw prosecutor and gave him his card, "J. W. and Co., timber and coal merchants," and said that he was largely in the coal and timber way, and inspected some coal bags, but objected to the price. The next day he called again, showed prosecutor a lot of correspondence, and said that he had a lot of trucks of coal at the railway station under demurrage, and that he wanted some coal bags immediately. Prosecutor had only forty bags ready, and it was arranged that defendant was to have them, and pay for them in a week. They were delivered to defendant, and prosecutor said he let the defendant have the bags in consequence of his having the trucks of coal under demurrage, at the station; there was evidence as to the defendant having taken premises, and doing a small business in coal,

but he had no trucks of coal on demurrage at the station. The jury convicted the prisoner, and on a case reserved the judges held that the false pretense charged was not too remote to support the indictment, and that the evidence was sufficient to maintain it: R. v. Willot, 12 Cox, 68.

The prisoner induced the prosecutor to buy a chain by knowingly and falsely asserting, (*inter alia*), "it is a 15-carat fine gold, and you will see it stamped on every link." In point of fact, it was little more than 6-carat gold: *Held*, upon a case reserved, that the above assertion was sufficient evidence of the false representation of a definite matter of fact to support a conviction for false pretenses: R. v. Ardley, 12 Cox, 23; R. v. Bryan, Dears. & B. 265, was said by the judges not to be a different decision, but that there was in that case no definite matter of fact falsely represented: *see* Warb. Lead. Cas. 170.

On an indictment for inducing the prosecutor, by means of false pretenses, to enter into an agreement to take a field for the purpose of brick-making, in the belief that the soil of the field was fit to make bricks, whereas it was not, he being himself a brickmaker, and having inspected the field and examined the soil: *Held*, that nevertheless, if he had been induced to take the field by false and fraudulent representations by the defendant of the specific matters of fact relating to the quality and character of the soil, as, for instance, that he had himself made good bricks therefrom, the indictment would be sustained: *Held*, also, that it would be sufficient, if he was partly and materially, though not entirely, influenced by the false pretenses: R. v. English, 12 Cox, 171.

If the possession only and not the property has been passed by the prosecutor the offence is larceny and not false pretenses: R. v. Radcliffe, 12 Cox, 474.

All persons who concur and assist in the fraud are principals, though not present at the time of making the

pretense or obtaining the property: R. v. Moland, 2 Moo. 276; R. v. Kerrigan, L. & C. 383.

On the last part of this s. 359, Greaves says: "This clause is new. It is intended to meet all cases where any person by means of any false pretense induces another to part with property to any person other than the party making the pretense. It was introduced to get rid of the narrow meaning which was given to the word 'obtain' in the judgments in R. v. Garrett, Dears. 232, according to which it would have been necessary that the property should either have been actually obtained by the party himself, or for his benefit. * * This clause includes every case where a defendant by any false pretense causes property to be delivered to *any other person*, for the use either of the person making the pretense, or *of any other person*. It, therefore, is a very wide extension of the law as laid down in R. v. Garrett, and plainly includes every case where any one, with intent to defraud, causes any person by means of any false pretense to part with any property to any person whatsoever."

Prisoner was indicted for an attempt to obtain money from a pawnbroker by false pretenses, (*inter alia*) that a ring was a diamond ring. To show guilty knowledge evidence that he had shortly before offered other false articles of jewellery to other pawnbrokers was held to be properly admissible: R. v. Francis, 12 Cox, 612, Warb. Lead. Cas. 176.

Goods fraudulently obtained by prisoner on his cheque on a bank where he had no funds: *Held*, that he cannot be found guilty of having falsely represented that he had money in the bank, but that he was guilty of falsely representing that he had authority to draw the cheque, and that they were good and valid orders for the payment of money: R. v. Hazelton, 13 Cox, 1, Warb. Lead. Cas. 164.

See R. v. Holmes, 15 Cox, 343, as to where is the jurisdiction when offence is committed by a letter.

Prisoner convicted of obtaining his wages by false pretenses in representing falsely that he had performed a condition precedent to his right to be paid : R. v. Bull, 13 Cox, 608.

The indictment must state the pretense which is pretended to have been false, and must negative the truth of the matter so pretended with precision : R. v. Kelleher, 14 Cox, 48. *See* R. v. Perrott, 2 M. & S. 379 ; *see* s. 616 and form F. F., sched. one, under s. 611

Obtaining by false pretenses. What constitutes false pretenses : R. v. Durocher, 12 R. L. 697 ; R. v. Judah, 7 L. N. 385 ; R. v. Lavallée, 16 R. L. 299 ; R. v. Ford, M. L. R. 7 Q. B. 413.

To prove intent to defraud, evidence of similar frauds having recently been practiced upon others is admissible : R. v. Durocher, 12 R. L. 697.

An indictment for obtaining board under false pretenses is too general : R. v. McQuarrie, 22 U. C. Q. B. 600.

A clause of a deed by which the borrower of a sum of money falsely declares a property well and truly to belong to him may constitute a false pretense : R. v. Judah, 8 L. N. 124.

On a trial for obtaining under false pretenses property of a joint stock company, parol evidence that the company has acted as an incorporated company is sufficient evidence of its incorporation : R. v. Langton, 13 Cox, 345.

The prisoner who had been discharged from the service of A. went to the store of D. and S. and represented herself as still in the employ of A., who was in the habit of dealing there, and asked for goods in A.'s name, which were put up accordingly, but sent to A.'s house instead of being delivered to the prisoner. The prisoner, however, went directly from the store to A.'s house, and remaining in the kitchen with the servant until the clerk delivered the parcel, snatched it from the servant, saying " that is for me, I was going to

see A." but, instead of going in to see A., went out of the house with the parcel. Conviction for having obtained goods from D. & S. by false pretenses, held good: R. v. Robinson, 9 L. C. R. 278.

Where the prosecutor had laid a trap for the prisoner who had written to induce him to buy counterfeit notes, and prisoner gave him a box which he pretended contained the notes, but which, in fact, contained waste paper and received the prosecutor's watch and $50.

Held, that the prisoner was rightly convicted of obtaining the prosecutor's property under false pretenses: R. v. Corey, 22 N. B. Rep. 543; *see* R. v. Cameron, 23 N. S. 150.

OBTAINING VALUABLE SECURITY BY FALSE PRETENSES.

360. Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud or injure any person by any false pretense, causes or induces any person to execute, make, accept, endorse or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal on any paper or parchment in order that it may afterwards be made or converted into or used or dealt with as a valuable security. R. S. C. c. 164, s. 78. 24-25 V. c. 96, s. 90 (Imp.).

"Valuable security" defined, s. 3.

See remarks under s. 353. *See* ss. 613, 616, as to indictment.

On the corresponding clause Greaves says: "This clause is principally new; it will include such cases as R. v. Danger, Dears. & B. 307."

Indictment.— that A. B., on unlawfully, knowingly and designedly did falsely pretend to one J. N., that by means of which false pretense the said A. B. did then unlawfully and fraudulently induce the said J. N. to accept a certain bill of exchange, that is to say, a bill of exchange for five hundred dollars, with intent thereby then to defraud and injure the said J. N., whereas, in truth and in fact (*here negative the false pretenses*).

Prisoner was indicted at the Court of Queen's Bench for having induced, by false and fraudulent pretenses, one B., a farmer, to endorse a promissory note for $170.45 and

moved to quash on the ground that the indictment did not state that the endorsement in question had been declared false in any manner by competent authority, etc., nor that the said endorsement had been obtained for the purpose of converting the said note or paper-writing into money—Motion rejected. And a motion to quash, on the ground that the crown prosecutor, representing the attorney general, had refused to furnish to prisoner the particulars of the false pretenses charged, although demanded, was refused: R. v. Boucher, 10 R. L. 183.

Proof that the defendant had obtained from the prosecutor a promissory note on a promise to pay the plaintiff what he owed him out of the proceeds of the note when discounted is not sufficient to sustain a conviction of obtaining a signature with intent to defraud under this section: R. v. Pickup, 10 L. C. J. 310.

An indictment charging prisoner with unlawfully and fraudulently, with intent to defraud them, inducing prosecutors to "make a certain valuable security," to wit, a promissory note for £100 by the false pretense that he was prepared to pay them or one of them £100; held good. It must be taken by necessary inference to allege a false pretense of an existing fact, viz., that he was prepared to pay prosecutors £100 and had the money ready for them on their signing the note. It also showed the offence of fraudulently causing a person to "make a valuable security" under 24 & 25 V. c. 96, s. 90, though note might not be of value until delivered to prisoner: R. v. Gordon, 23 Q. B. D. 354, 16 Cox, 622.

Prisoner fraudulently induced prosecutor to sign a contract for seed wheat, representing that he was agent of H. named in contract. H. afterwards induced prosecutor to give him a note for price of wheat, though contract did not provide for a note. Prosecutor swore he gave note because he had entered into the contract. Indictment for, by false pretenses, fraudulently inducing prosecutor to write his

name on a paper so that it might be afterwards dealt with as a valuable security; 2nd count, for procuring, by false pretenses, prosecutor to deliver to H. a valuable security. *Held*, on case reserved, that charge of false pretenses could be sustained as well as where the money was obtained or note procured to be given through the medium of a contract, as when obtained or procured without a contract; that a note instead of money was given did not relieve prisoner from consequences of his fraud; giving of note was direct result of the fraud upon which the contract was procured and that defendant was properly convicted on 1st count under c. 174, s. 78. But *held*, that note before delivery to H. was not a valuable security, but only a paper on which prosecutor had written his name so that it might be used as such, and conviction on 2nd count could not stand: R. v. Danger, Dears. & B. 307, followed; R. v. Rymal, 17 O. R. 227.

Prisoner indicted on two counts. First, for obtaining from H. a note with intent to defraud; second, inducing H, to make a note with said intent. Evidence showed that prisoner's agent obtained from H. an order on prisoner for wheat which H. was to put out on shares and to pay prisoner $240 on delivery, and equally divide balance of proceeds with holder of order. Later, prisoner by false and fraudulent representations as to quality of wheat, etc., induced H. to sign a note, telling him it would not be negotiable. Evidence was given, subject to objection, of similar frauds on others, and that prisoner was pursuing a series of like frauds. Prisoner was convicted.

Held, on case reserved, that conviction should be sustained on second count, as evidence showed that H. signed note on faith of representations made and not merely to secure the carrying out of the contract; that it was immaterial that a note was given when the order called for cash, and that the evidence objected to was admissible: R. v. Hope, 17 O. R. 463.

FALSELY PRETENDING TO INCLOSE MONEY IN A LETTER.

361. Every one is guilty of an indictable offence and liable to three years' imprisonment who, wrongfully and with wilful falsehood, pretends or alleges that he inclosed and sent, or caused to be inclosed and sent, in any post letter any money, valuable security or chattel, which in fact he did not so inclose and send or cause to be inclosed and sent therein. R. S. C. c. 164, s. 79. (*Amended*).

This section is not in the English statutes: "Valuable security" defined, s. 3. *See* s. 618, *post*, as to indictment and trial under this section.

OBTAINING PASSAGE BY FALSE TICKETS.

362. Every one is guilty of an indictable offence and liable to six months' imprisonment who, by means of any false ticket or order, or of any other ticket or order, fraudulently and unlawfully obtains or attempts to obtain any passage on any carriage, tramway or railway, or in any steam or other vessel. R. S. C. c. 164, s. 81.

The clause provides for the offence and the attempt to commit the offence. Under s. 711, *post*, upon the trial of an indictment for any offence the jury may convict of the attempt to commit the offence charged, if the evidence warrants it.

CRIMINAL BREACH OF TRUST.

363. 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. R. S. C. c. 164, s. 65. 24-25 V. c. 96, s. 80, (Imp.).

See R. v. Cox, 16 O. R. 228; R. v. Stansfeld, 8 L. N. 123.

Section 197 of the Procedure Act, which allowed a conviction under this clause though a larceny was proved, has not been re-enacted in express terms.

"Trustee" defined, s. 3.

By s. 547, *post*, no prosecution is to be commenced under this section without the consent of the Attorney-General of the province.

Indictment.— that A. B., at on then being the trustee of certain property under the will of

for a certain public (or charitable) purpose, to wit, for unlawfully, with intent to defraud and in violation of his trust, did convert and appropriate the same to a use not authorized by the said trust, and for a purpose other than the said public (or charitable) purpose, contrary to s. 363 of the Criminal Code of 1892.

PART XXVIII.

FRAUD.

By Directors, Etc.

364. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being a director, manager, public officer or member of any body corporate or public company, with intent to defraud—

(*a*) destroys, alters, mutilates or falsifies any book, paper, writing or valuable security belonging to the body corporate or public company; or

(*b*) makes, or concurs in making, any false entry, or omits or concurs in omitting to enter any material particular, in any book of account or other document. R. S. C. c. 164, s. 68. 24-25 V. c. 96, s. 83 (Imp.).

"Valuable security" defined, s. 3.

Section 197 of the Procedure Act, which applied to the repealed section, has not been re-enacted.

Sections 97 *et seq.* of the Banking Act, 53 V. c. 31, provide for offences by bank officers.

Indictment against a director for destroying or falsifying books, etc.— that C. D., on then being a director of a certain body corporate, called unlawfully, with intent to defraud, did destroy (*alter, or mutilate, or falsify*) a certain book (*or paper, or writing, or valuable security*), to wit, belonging to the said body corporate.

FALSE STATEMENT BY PROMOTERS, DIRECTORS, ETC.

365. Every one is guilty of an indictable offence and liable to five years' imprisonment who, being a *promoter*, director, public officer or manager of any body corporate or public company, *either existing or intended to be formed*, makes, circulates or publishes, or concurs in making, circulating or publishing, *any prospectus*, statement or account which he knows to be false in any material particular, with intent to induce persons (*whether ascertained or not*) to become shareholders or partners, or with intent to deceive or defraud the members, shareholders or creditors, or any of them (*whether ascertained or not*), of such body corporate or public company, or with intent to induce any person to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof. R. S. C. c. 164, s. 69 (*Amended*). 24-25 V. c. 96, s. 84 (Imp.).

The words in italics are new.

Fine, s. 958; "Property" and "public officer" defined, s. 3.

Indictment against a director for publishing fraudulent statements.— that before and at the time of the committing of the offences hereinafter mentioned, C. D. was a director of a certain public company, called and that he, the said C. D., so being such director as aforesaid, on did unlawfully circulate and publish a certain statement and account, which said statement was false in certain material particulars, that is to say, in this, to wit, that it was therein falsely stated that (*state the particulars*), he the said C. D., then well knowing the said written statement and account to be false in the several particulars aforesaid, with intent thereby then to deceive and defraud J. N., then being a shareholder of the said public company (*or with intent*) . (*Add counts stating the intent to be to deceive and defraud "certain persons to the jurors aforesaid unknown, being shareholders of the said public company," and also varying the allegation of the intent as in the section*): *see* s. 616, *post*.

FALSE ACCOUNTING BY CLERKS. (*New*).

366. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being or acting in the capacity of an officer, clerk, or servant, with intent to defraud—

(*a*) destroys, alters, mutilates or falsifies any book, *paper writing*, valuable security or document which belongs to or is in the possession of his

employer, or has been received by him for or on behalf of his employer, or concurs in so doing; or

(*b*) makes, or concurs in making, any false entry in, or omits or alters, or concurs in omitting or altering, any material particular from, any such book, *paper writing*, valuable security or document. 38-39 V. c. 24 (Imp.).

There should be a comma between *paper* and *writing*.

"Valuable security" and "writing" defined, s. 3.

Indictment.— that A. B., on, &c., at, &c., being then clerk (*officer, servant, or any person employed or acting in the capacity of a clerk, officer, or servant*) to C. D., did then and whilst he was such clerk to the said C. D. as aforesaid, unlawfully, wilfully, and with intent to defraud, destroy, to wit, by burning the same (*destroy, alter, mutilate, or falsify*) a certain book (*any book, paper, writing, valuable security, or document*), to wit, a cash-book, which said book then belonged to (*which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer*) the said C. D., his employer.

Second Count.—That the said A. B., on the day and in the year aforesaid, being then clerk to the said C. D., did then and whilst he was such clerk to the said C. D., as aforesaid, unlawfully, wilfully, and with intent to defraud, make (*make or concur in making any false entry in, or omit, or alter, or concur in omitting, or altering any material particular*) a certain false entry in a certain book (*from, or in any such book, paper, writing, valuable security, or document*), to wit, a cash book which said book then belonged to the said C. D., his employer, by falsely entering in such books under the date of a sum of , as having been paid on that day to one E. F., whereas in truth and in fact the said sum of was not paid on the said day to the said E. F. as he, the said A. B., well knew at the time when he made such false entry as aforesaid, and which said entry was in the words and figures following (*setting it out*); *see* R. v. Butt, 15 Cox, 564.

False Statement by Public Officer. (*New*).

367. Every one is guilty of an indictable offence and liable to five years' imprisonment, and to a fine not exceeding five hundred dollars, who, being an officer, collector or receiver, intrusted with the receipt, custody or management of any part of the public revenues, knowingly furnishes any false statement or return of any sum of money collected by him or intrusted to his care, or of any balance of money in his hands or under his control.

This section is a re-enactment of 50 Geo. III. c. 59, s, 2, with an increased punishment. It ought to form part of the preceding section.

Assigning with Intent to Defraud.

368. Every one is guilty of an indictable offence and liable to a fine of eight hundred dollars and to one year's imprisonment who—

(*a*) with intent to defraud his creditors, or any of them,

(i) makes, or causes to be made, any gift, conveyance, assignment, sale, transfer or delivery of his property;

(ii) removes, conceals or disposes of any of his property; or

(*b*) with the intent that any one shall so defraud his creditors, or any one of them, receives any such property. R. S. C. c. 173, s. 28.

This is a re-enactment of c. 26, s. 20, C. S. U. C. *See* R. v. Henry, 21 O. R. 113.

Destroying Books with Intent to Defraud.

369. Every one is guilty of an indictable offence and liable to *ten years'* imprisonment who, with intent to defraud his creditors, or any of them, destroys, alters, mutilates or falsifies any of his books, papers, writings or securities, or makes, or is privy to the making of, any false or fraudulent entry in any book of account or other document. R. S. C. c. 173, s. 27.

This is also taken from c. 26, C. S. U. C. Under the repealed clause the punishment was *six months'* imprisonment.

Concealing Deeds or Incumbrances.

370. Every one is guilty of an indictable offence and liable to a fine, or to two years' imprisonment, or to both, who being a seller or mortgagor of land, or of any chattel, real or personal, or chose in action, or the solicitor or agent of any such seller or mortgagor (and having been served with a written demand of an abstract of title by or on behalf of the purchaser or mortgagee before the completion of the purchase or mortgage) conceals any settlement, deed, will or other instrument material to the title, or any encumbrance, from such purchaser or mortgagee, or falsifies any pedigree upon which the title depends, with intent to defraud and in order to induce such purchaser or mortgagee to accept the title offered or produced to him. R. S. C. c. 164, s. 91.

No prosecution without leave of Attorney-General of the Province; s. 548.

FRAUD IN REGISTRATION.

371. Every one is guilty of an indictable offence and liable to three years' imprisonment who, acting either as principal or agent, in any proceeding to obtain the registration of any title to land or otherwise, or in any transaction relating to land which is, or is proposed to be, put on the register, knowingly and with intent to deceive makes or assists or joins in, or is privy to the making of, any material false statement or representation, or suppresses, conceals, assists or joins in, or is privy to the suppression, withholding or concealing from, any judge or registrar, or any person employed by or assisting the registrar, any material document, fact or matter of information. R. S. C. c. 164, ss. 96 & 97.

This section, by the repealed Act, applied only to British Columbia.

Fine, s. 958.

FRAUDULENT SALES, HYPOTHECATIONS, SEIZURES, ETC.

372. Every one is guilty of an indictable offence and liable to one year's imprisonment, and to a fine not exceeding two thousand dollars, who, knowing the existence of any unregistered prior sale, grant, mortgage, hypothec, privilege or encumbrance of or upon any real property, fraudulently makes any subsequent sale of the same, or of any part thereof. R. S. C. c. 164, ss. 92 & 93.

See R. v. Palliser, 4 L. C. J. 276.

373. Every one who pretends to hypothecate, mortgage, or otherwise charge any real property to which he knows he has no legal or equitable title is guilty of an indictable offence and liable to one year's imprisonment, and to a fine not exceeding one hundred dollars.

2. The proof of the ownership of the real estate rests with the person so pretending to deal with the same. R. S. C. c. 164, ss. 92 & 94.

374. 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. R. S. C. c. 164, ss. 92 & 95.

Fine, s. 958. These three sections, by the repealed statute, applied only to the Province of Quebec. Why s. 374 has also not been either extended to the other Provinces or repealed, has not been explained.

UNLAWFUL DEALINGS WITH GOLD.

375. Every one is guilty of an indictable offence and liable to two years' imprisonment, who—

(*a*) being the holder of any lease or license issued under the provisions of any Act relating to gold or silver mining, or by any persons owning land supposed to contain any gold or silver, by fraudulent device or contrivance defrauds or attempts to defraud Her Majesty, or any person, of any gold, silver or money payable or reserved by such lease, or, with such intent as aforesaid, conceals or makes a false statement as to the amount of gold or silver procured by him; or

(*b*) not being the owner or agent of the owners of mining claims then being worked, and not being thereunto authorized in writing by the proper officer on that behalf named in any Act relating to mines in force in any province of Canada, sells or purchases (except to or from such owner or authorized person) any quartz containing gold, or any smelted gold or silver, at or within three miles of any gold district or mining district, or gold mining division; or

(*c*) purchases any gold in quartz, or any unsmelted or smelted gold or silver, or otherwise unmanufactured gold or silver, of the value of one dollar or upwards (except from such owner or authorized person), and does not, at the same time, execute in triplicate an instrument in writing, stating the place and time of purchase, and the quantity, quality and value of gold or silver so purchased, and the name or names of the person or persons from whom the same was purchased, and file the same with such proper officer within twenty days next after the date of such purchase. R. S. C. c. 164, ss. 27, 28 & 29.

Fine, s. 958; s. 569 for search warrant, and s. 621 for indictment.

WAREHOUSEMEN GIVING FALSE RECEIPTS.

376. Every one is guilty of an indictable offence and liable to three years' imprisonment, who—

(*a*) being the keeper of any warehouse, or a forwarder, miller, master of a vessel, wharfinger, keeper of a cove, yard, harbour or other place for storing timber, deals, staves, boards, or lumber, curer or packer of pork, or dealer in wool, carrier, factor, agent or other person, or a clerk or other person in his employ, knowingly and wilfully gives to any person a writing purporting to be a receipt for, or an acknowledgment of, any goods or other property as having been received into his warehouse, vessel, cove, wharf, or other place, or in any such place about which he is employed, or in any other manner received by him, or by the person in or about whose business he is employed, before the goods or other property named in such receipt, acknowledgment or writing have been actually delivered to or received by him as aforesaid, with intent to mislead, deceive, injure or defraud any person, although such person is then unknown to him; or

(*b*) knowingly and wilfully accepts, transmits or uses any such false receipt or acknowledgment or writing. R. S. C. c. 164, s. 73.

Fine, s. 958; *see* s. 379. This is not in the Imperial Act.

FRAUDS IN TRADE, ETC.

377. Every one is guilty of an indictable offence and liable to three years' imprisonment, who—

(*a*) having, in his name, shipped or delivered to the keeper of any warehouse, or to any other factor, agent or carrier, to be shipped or carried, any merchandise upon which the consignee has advanced any money or given any valuable security afterwards, with intent to deceive, defraud or injure such consignee, in violation of good faith, and without the consent of such consignee, makes any disposition of such merchandise different from and inconsistent with the agreement made in that behalf between him and such consignee at the time of or before such money was so advanced or such negotiable security so given; or

(*b*) knowingly and wilfully aids and assists in making such disposition for the purpose of deceiving, defrauding or injuring such consignee.

2. No person commits an offence under this section who, before making such disposition of such merchandise, pays or tenders to the consignee the full amount of any advance made thereon. R. S. C. c. 164, s. 74.

Fine, s. 958; *see* s. 379. This is not in the Imperial Act.

OTHER FRAUDS.

378. Every person is guilty of an indictable offence and liable to three years' imprisonment who—

(*a*) wilfully makes any false statement in any receipt, certificate or acknowledgment for grain, timber or other goods or property which can be used for any of the purposes mentioned in *The Bank Act*; or

(*b*) having given, or after any clerk or person in his employ has, to his knowledge, given, as having been received by him in any mill, warehouse, vessel, cove or other place, any such receipt, certificate or acknowledgment for any such grain, timber or other goods or property,—or having obtained any such receipt, certificate or acknowledgment, and after having endorsed or assigned it to any bank or person, afterwards, and without the consent of the holder or endorsee in writing, or the production and delivery of the receipt, certificate or acknowledgment, wilfully alienates or parts with, or does not deliver to such holder or owner of such receipt, certificate or acknowledgment, the grain, timber, goods or other property therein mentioned. R. S. C. c. 164, s. 75.

Fine, s. 958; *see* next section. This is not in the Imperial Act.

379. If any offence mentioned in any of the three sections next preceding is committed by the doing of anything in the name of any firm, company or co-partnership of persons, the person by whom such thing is actually done, or who connives at the doing thereof, is guilty of the offence, and not any other person. R. S. C. c. 164, s. 76.

Section 197 of c. 174, R. S. C., which applied to the three preceding sections, has not been re-enacted.

SELLING WRECKS, ETC.

380. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, not having lawful title thereto, sells any vessel or wreck found within the limits of Canada. R. S. C. c. 81, s. 36 (*d*).

"Wreck" defined, s. 3.

OTHER OFFENCES RESPECTING WRECK.

381. Every one is guilty of an indictable offence and liable, on conviction on indictment to two years' imprisonment, and on summary conviction before two justices of the peace to a penalty of four hundred dollars or six months' imprisonment, with or without hard labour, who—

(*a*) secretes any wreck, or defaces or obliterates the marks thereon, or uses means to disguise the fact that it is wreck, or in any manner conceals the character thereof, or the fact that the same is such wreck, from any person entitled to inquire into the same; or

(*b*) receives any wreck, knowing the same to be wreck, from any person, other than the owner thereof or the receiver of wrecks, and does not within forty-eight hours inform the receiver thereof;

(*c*) offers for sale or otherwise deals with any wreck, knowing it to be wreck, not having a lawful title to sell or deal with the same; or

(*d*) keeps in his possession any wreck, knowing it to be wreck, without a lawful title so to keep the same, for any time longer than the time reasonably necessary for the delivery of the same to the receiver; or

(*e*) boards any vessel which is wrecked, stranded or in distress against the will of the master, unless the person so boarding is, or acts by command of, the receiver. R. S. C. c. 81, s. 37.

OFFENCES—MARINE STORES—PUBLIC STORES, ETC.

382. Every person who deals in the purchase of old marine stores of any description, including anchors, cables, sales, junk, iron, copper, brass, lead and other marine stores, and who, by himself or his agent, purchases any old marine stores from any person under the age of sixteen years, is guilty of an offence and liable, on summary conviction, to a penalty of four dollars for the first offence and of six dollars for every subsequent offence.

2. Every such person who, by himself or his agent, purchases or receives any old marine stores into his shop, premises or places of deposit, except in the day-time between sunrise and sunset, is guilty of an offence and liable, on summary conviction, to a penalty of five dollars for the first offence and of seven dollars for every subsequent offence.

3. Every person, purporting to be a dealer in old marine stores, on whose premises any such stores which were stolen are found secreted is guilty of an indictable offence and liable to five years' imprisonment. R. S. C. c. 81, s. 35.

383. In the next six sections, the following expressions have the meaning assigned to them herein:

(*a*) The expression "public department" includes the Admiralty and the War Department, and also any public department or office of the Government

of Canada, or of the public or civil service thereof, or any branch of such department or office;

(*b*) The expression "public stores" includes all stores under the care, superintendence or control of any public department as herein defined, or of any person in the service of such department;

(*c*) The expression "stores" includes all goods and chattels, and any single store or article. 50-51 V. c. 45 s. 2.

Section 570, as to search-warrant.

The Imperial statute on public stores is 38 & 39 V. c. 25.

384. The following marks may be applied in or on any public stores to denote Her Majesty's property in such stores, and it shall be lawful for any public department, and the contractors, officers and workmen of such department, to apply such marks, or any of them, in or on any such stores:—

Marks appropriated for Her Majesty's use in or on Naval, Military, Ordnance, Barrack, Hospital and Victualling Stores.

STORES.	MARKS.
Hempen cordage and wire rope.	White, black or coloured threads laid up with the yarns and the wire, respectively.
Canvas, fearnought, hammocks and seamen's bags.	A blue line in a serpentine form.
Bunting.	A double tape in the warp.
Candles.	Blue or red cotton threads in each wick or wicks of red cotton.
Timber, metal and other stores not before enumerated	The broad arrow, with or without the letters W. D.

Marks appropriated for use on Stores, the property of Her Majesty in the right of Her Government of Canada.

STORES.	MARKS.
Public stores.	The name of any public department, or the word "Canada," either alone or in combination with a Crown or the Royal Arms.

50-51 V. c. 45, s. 3. 53 V. c. 38.

385. Every one is guilty of an indictable offence and liable to *two* years' imprisonment who, without lawful authority the proof of which shall lie on him, applies any of the said marks in or on any public stores. 50-51 V. c. 45, s. 4.

Fine, s. 958; *see* s. 709 as to offences under this and the four next following sections.

Indictment.— that A. B., on the day of , unlawfully and without lawful authority applied a certain mark, to wit, a double tape in the warp, in and on certain stores, to wit, five hundred yards of bunting.

386. Every one is guilty of an indictable offence and liable to *two* years' imprisonment who, with intent to conceal Her Majesty's property in any public stores, takes out, destroys or obliterates, wholly or in part, any of the said marks. 50-51 V. c. 45, s. 5.

Fine, s. 958.

Indictment.— The jurors for our lady the Queen present that J. S., on the first day of June, in the year of our Lord , unlawfully, with intent to conceal Her Majesty's property in the stores hereinafter mentioned, took out ("*takes out, destroys, or obliterates, wholly or in part*") from 100 yards of canvas, which said canvas was then stores of and belonging to Her Majesty, and under the care, superintendence and control of the (*as the case may be*), a certain mark, to wit, a blue line in a serpentine form, which said mark was then applied on the said canvas in order to denote Her said Majesty's property therein.

387. 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, is guilty of an indictable offence and liable on conviction on indictment to one year's imprisonment and, if the value thereof does not exceed twenty-five dollars, on summary conviction, before two justices of the peace, to a fine of one hundred dollars or to six months' imprisonment, with or without hard labour. 50-51 V. c. 45, ss. 6 & 8.

Fine, s. 958.

Indictment.— that T. V., on the day of , without lawful authority, unlawfully possessed ("*receives, possesses, keeps, sells, or delivers*") five hundred yards of canvas, which said canvas was then naval stores of and belonging to Her Majesty, and then bore a certain mark ("*any such mark as aforesaid,*"), to wit, a blue line in a serpentine form, then applied thereon, in order to denote Her Majesty's property in naval stores so marked, the said T. V., then well knowing the said canvas to bear the said mark.

388. Every one, not being in Her Majesty's service, or a dealer in marine stores or a dealer in old metals, in whose possession any public stores bearing any such mark are found who, when taken or summoned before two justices of the peace, does not satisfy such justices that he came lawfully by such stores so found, is guilty of an offence and liable, on summary conviction, to a fine of twenty-five dollars ; and

2. If any such person satisfies such justices that he came lawfully by the stores so found, the justices, in their discretion, as the evidence given or the circumstances of the case require, may summon before them every person through whose hands such stores appear to have passed; and

3. Every one who has had possession thereof, who does not satisfy such justices that he came lawfully by the same, is liable, on summary conviction of having had possession thereof, to a fine of twenty-five dollars, and in default of payment to three months' imprisonment with or without hard labour. 50-51 V. c. 45, s. 9.

Having in possession, defined, s. 3.

389. Every one who, without permission in writing from the Admiralty, or from some person authorized by the Admiralty in that behalf, creeps, sweeps, dredges, or otherwise searches for stores in the sea, or any tidal or inland water, within one hundred yards from any vessel belonging to Her Majesty, or in Her Majesty's service, or from any mooring place or anchoring place appropriated to such vessels, or from any mooring belonging to Her Majesty, or from any of Her Majesty's wharfs or docks, victualling or steam factory yards, is guilty of an offence and liable, on summary conviction before two justices of the peace, to a fine of twenty-five dollars, or to three months' imprisonment, with or without hard labour. 50-51 V. c. 45, ss. 11 & 12.

RECEIVING SOLDIERS' OR SAILORS' NECESSARIES.

390. Every one is guilty of an indictable offence and liable on conviction on indictment to five years' imprisonment, and on summary conviction before two justices of the peace to a penalty not exceeding forty dollars, and not less than twenty dollars and costs, and, in default of payment, to six months' imprisonment, with or without hard labour, who—

(*a*) buys, exchanges or detains, or otherwise receives from any soldier, militiaman or deserter any arms, clothing or furniture belonging to Her Majesty, or any such articles belonging to any soldier, militiaman or deserter as are generally deemed regimental necessaries according to the custom of the army; or

(*b*) causes the colour of such clothing or articles to be changed; or

(c) exchanges, buys or receives from any soldier or militiaman any provisions, without leave in writing from the officer commanding the regiment or detachment to which such soldier belongs. R. S. C. c. 169, ss. 2 & 4.

391. Every one is guilty of an indictable offence and liable, on conviction on indictment, to five years' imprisonment, and on summary conviction before two justices of the peace to a penalty not exceeding one hundred and twenty dollars, and not less than twenty dollars and costs, and in default of payment to six months' imprisonment, who buys, exchanges or detains, or otherwise receives, from any seaman or marine, upon any account whatsoever, or has in his possession, any arms or clothing, or any such articles, belonging to any seaman, marine or deserter, as are generally deemed necessaries according to the custom of the navy. R. S. C. c. 169, ss. 3 & 4.

Fine, s. 958. "Having in possession" defined, s. 3; *see* next section. These four sections, 390, 391, 392, 393, should form only one.

392. Every one is guilty of an indictable offence who detains, buys, exchanges, takes on pawn or receives, from any seaman or any person acting for a seaman, any seaman's property, or solicits or entices any seaman, or is employed by any seaman to sell, exchange or pawn any seaman's property, unless he acts in ignorance of the same being seaman's property, or of the person with whom he deals being or acting for a seaman, or unless the same was sold by the order of the Admiralty or Commander-in-Chief.

2. The offender is liable, on conviction on indictment to five years' imprisonment, and on summary conviction to a penalty not exceeding one hundred dollars; and for a second offence, to the same penalty, or, in the discretion of the justice, to six months' imprisonment, with or without hard labour.

3. The expression "seaman" means every person, not being a commissioned, warrant or subordinate officer, who is in or belongs to Her Majesty's navy, and is borne on the books of any one of Her Majesty's ships in commission, and every person, not being an officer as aforesaid, who, being borne on the books of any hired vessel in Her Majesty's service, is, by virtue of any Act of Parliament of the United Kingdom for the time being in force for the discipline of the navy, subject to the provisions of such Act.

4. The expression "seaman's property" means any clothes, slops, medals, necessaries or articles usually deemed to be necessaries for sailors on board ship, which belong to any seaman.

5. The expression "Admiralty" means the Lord High Admiral of the United Kingdom, or the Commissioners for executing the office of Lord High Admiral. R. S. C. c. 171, ss. 1 & 2.

393. Every one in whose possession any seaman's property is found who does not satisfy the justice of the peace before whom he is taken or summoned that he came by such property lawfully is liable, on summary conviction, to a fine of twenty-five dollars. R. S. C. c. 171, s. 3.

"Having in possession" defined, s. 3.

CONSPIRACY TO DEFRAUD. (*New*).

394. Every one is guilty of an indictable offence and liable to seven years' imprisonment who conspires with any other person, by deceit or falsehood or other fraudulent means, to defraud the public or any person, ascertained or unascertained, or to affect the public market price of stocks, shares, merchandise or anything else publicly sold, whether such deceit or falsehood or other fraudulent means would or would not amount to a false pretense as hereinbefore defined.

Sections 613, 616, as to indictment.

This is a common law misdemeanour;

Indictment.— that A. B. and C. D., on unlawfully, fraudulently and deceitfully did conspire and agree together to defraud the public by falsely 3 Chit. 1139, 1164.

A conspiracy for concealing treasure trove might, perhaps, be indictable under this section. By s. 3, the word *person* includes Her Majesty. As to the offence of concealing treasure trove, *see* R. v. Thomas, Warb. Lead. Cas. 79.

CHEATING AT PLAY, ETC.

395. Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud any person, cheats in playing at any game, or in holding the stakes, or in betting on any event. R. S. C. c. 164, s. 80. (*Amended*). 8-9 V. c. 109, s. 17 (Imp.).

Fine, s. 958; ss. 613, 616, as to indictment.

Indictment.— that A. B., on in playing at and with cards (*any game*) unlawfully did, with intent to defraud C. D., and others, cheat, (*or unlawfully did by fraud and cheating win from the said C. D. a sum of one hundred dollars.*)

See R. v. Moss, Dears. & B. 104; R. v. Hudson, Bell, 263; R. v. Rogier, 2 D. & R. 431; R. v. Bailey, 4 Cox, 392; R. v. O'Connor, 15 Cox, 3.

The Imperial Act, 14 & 15 V. c. 100, s. 29 (*Lord Campbell's Act,*) also provides for the punishment of cheats, frauds and conspiracies, not otherwise specially provided for.

In R. v. Roy, 11 L. C. J. 89, Mr. Justice Drummond said: "The only cheats or frauds punishable at common law are the fraudulent obtaining of the property of another by any deceitful and illegal practice, or token, *which affects or may affect the public, or such frauds as are levelled against the public justice of the realm.*"

It is not every species of fraud or dishonesty in transactions between individuals which is the subject matter of a criminal charge at common law: 2 East, P. C. 816.

Fraud, to be the object of criminal prosecution, must be of that kind which in its nature is calculated to defraud numbers, as false weights or measures, false tokens, or where there is a conspiracy; *per* Lord Mansfield: R. v. Wheatly, 2 Burr. 1125.

So cheats, by means of a bare lie, or false affirmation in a private transaction, as if a man selling a sack of corn falsely affirms it to be a bushel, where it is greatly deficient, has been holden not to be indictable: R. v. Pinkney, 2 East, P. C. 818.

So, in R. v. Channell, 2 East, P. C. 818, it was held that a miller charged with illegally taking and keeping corn could not be criminally prosecuted.

And in R. v. Lara, cited in 2 East, P. C. 819, it was held that selling sixteen gallons of liquor for and as eighteen gallons, and getting paid for the eighteen gallons, was an unfair dealing and an imposition, but not an indictable offence.

The result of the cases appears to be, that if a man sell by *false weights*, though only to one person, it is an indictable offence, but if, without false weights, he sell, even to many persons, a *less quantity* than he pretends to do, it is not indictable: 2 Russ. 610; R. v. Eagleton, Dears. 376, 515.

If a man, in the course of his trade, openly and publicly carried on, were to put a false mark or token upon an article, so as to pass it off as a genuine one, when in fact it was only a spurious one, and the article was sold and money obtained by means of that false token or mark, that would be a cheat at common law, but the indictment, in such a case, must show clearly that it was by means of such false token that the defendant obtained the money: by Chief Justice Cockburn, in R. v. Closs, Dears. & B. 460.

Offences of this kind would now generally fall under the "*Trade Marks Offences*," s. 443, *post*.

Frauds and cheats by forgeries or false pretenses are also regulated by statute.

All frauds affecting the crown or the public at large are indictable, though arising out of a particular transaction or contract with a private party. So the giving to any person

unwholesome victuals, not fit for a man to eat, *lucri causa*, or from malice and deceit is an indictable misdemeanour: 2 East, P. C. 821, 822. And if a baker sell bread containing alum in a shape which renders it noxious, although he gave directions to his servants to mix it up in a manner which would have rendered it harmless, he commits an indictable offence; he who deals in a perilous article must be wary how he deals; otherwise, if he observe not proper caution, he will be responsible. The intent to injure in such cases is presumed, npon the universal principle that when a man does an act of which the probable consequence may be highly injurious, the intention is an inference of law resulting from doing the act: R. v. Dixon, 3 M. & S. 11.

If a person maim himself in order to have a more specious pretense for asking charity, or to prevent his being enlisted as a soldier, he may be indicted: 1 Hawk. 108.

In indictments for a cheat or fraud at common law it is not sufficient to allege generally that the cheat or fraud was effected by means of certain false tokens or false pretenses, but it is necessary to set forth what the false tokens or pretenses were, so that the court may see if the false tokens or pretenses are such within the law: 2 East, P. C. 837. But the indictment will be sufficient if upon the whole it appears that the money has been obtained by means of the pretense set forth, and that such pretense was false: 2 East, P. C. 838; *see* s. 616, *post*.

It would seem that s. 838, *post*, does not apply to cheats and frauds at common law, and that, therefore, the court has no power of awarding restitution of the property fraudulently obtained, upon convictions on indictments other than those brought for stealing or receiving stolen property: 2 East, P. C. 839.

Upon an indictment for any offence, if it appears 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, the jury may convict of the attempt: s. 711, *post*.

PRACTISING WITCHCRAFT, ETC. (*New*).

396. 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.

Fine, s. 958.—This section is a re-enactment of 9 Geo. II. c. 5, s. 4: *see* R. v. Milford, 20 O. R. 306; 2 Stephen's Hist. 430.

ROBBERY.

The crime of robbery is a species of theft, aggravated by the circumstances of a taking of the property *from the person or whilst it is under the protection of the person by means either of violence* "or" *putting in fear*: 4th Rep. Cr. L. Commrs. LXVII.

Robbery is larceny committed by violence from the person of one put in fear: 2 Bishop, Cr. L. 1156.

To constitute this offence there must be: 1. A larceny embracing the same elements as a simple larceny; 2. violence, but it need only be slight for anything which calls out resistance is sufficient, or, what will answer in place of actual violence, there must be such demonstrations as put the person robbed in fear. The demonstrations of fear must be of a physical nature; and 3. the taking must be from what is technically called the "person," the meaning of which expression is, not that it must necessarily be from the actual contact of the person, but it is sufficient if it is from the personal protection and presence: Bishop, Stat. Cr. 517.

1. *Larceny.*—Robbery is a compound larceny, that is, it is larceny aggravated by particular circumstances. Thus, the indictment for robbery must contain the description of the property stolen as in an indictment for larceny; the ownership must be in the same way set out, and so of the

rest. Then if the aggravating matter is not proved at the trial the defendant may be convicted of the simple larceny. If a statute makes it a larceny to steal a thing of which there could be no larceny at common law then it becomes, by construction of law, a robbery to take this thing forcibly and feloniously from the person of one put in fear: 2 Bishop, Cr. L. 1158, 1159, 1160. An actual taking either by force or upon delivery must be proved, that is, it must appear that the robber actually got *possession* of the goods. Therefore if a robber cut a man's girdle in order to get his purse, and the purse thereby fall to the ground, and the robber run off or be apprehended before he can take it up, this would not be robbery, because the purse was never in the possession of the robber: 1 Hale, P. C. 553.

But it is immaterial whether the taking were by force or upon delivery, and if by delivery it is also immaterial whether the robber have compelled the prosecutor to it by a direct demand in the ordinary way, or upon any colourable pretense.

A carrying away must also be proved as in other cases of larceny. And therefore where the defendant, upon meeting a man carrying a bed, told him to lay it down or he would shoot him, and the man accordingly laid down the bed, but the robber, before he could take it up so as to remove it from the place where it lay, was apprehended, the judges held that the robbery was not complete: R. v. Farrell, 1 Leach, 322.

But a momentary possession, though lost again in the same instant, is sufficient. James Lapier was convicted of robbing a lady, and taking from her person a diamond earring. The fact was that as the lady was coming out of the Opera house she felt the prisoner snatch at her earring and tear it from her ear. which bled, and she was much hurt, but the earring fell into her hair where it was found after she returned home. The judges were all of opinion that the earring being in the possession of the prisoner for

a moment, separate from the lady's person, was sufficient to constitute robbery, although he could not retain it but probably lost it again the same instant: 2 East, P. C. 557.

If the thief once takes possession of the thing the offence is complete, though he afterwards return it; as if a robber, finding little in a purse which he had taken from the owner, restored it to him again, or let it fall in struggling, and never take it up again, having once had possession of it: 2 East, *loc. cit.;* 1 Hale, 533; R. v. Peat, 1 Leach, 228.

The taking must have been done *animo furandi,* as in larceny, and against the will of the party robbed, that is, that they were either taken from him by force and violence, or delivered up by him to the defendant, under the impression of that degree of fear and apprehension which is necessary to constitute robbery.

Where, on an indictment for robbery, it appeared that the prosecutor owed the prisoner money, and had promised to pay him five pounds, and the prisoner violently assaulted the prosecutor and so forced him then and there to pay him his debt, Erle, C.J., said that it was no robbery, there being no felonious intent: R. v. Hemmings, 4 F. & F. 50.

2. *Violence.*—The prosecutor must either prove that he was actually in bodily fear from the defendant's actions, at the time of the robbery, or he must prove circumstances from which the court and jury may presume such a degree of apprehension of danger as would induce the prosecutor to part with his property; and in this latter case, if the circumstances thus proved be such as are calculated to create such a fear, the court will not pursue the inquiry further, and examine whether the fear actually existed. Therefore, if a man knock another down, and steal from him his property whilst he is insensible on the ground, that is robbery. Or suppose a man makes a manful resistance, but is overpowered, and his property taken

from him by the mere dint of superior strength, this is a robbery: Fost. 128; R. v. Davies, 2 East, P. C. 709.

One Mrs. Jeffries, coming out of a ball, at St. James' Palace, where she had been as one of the maids of honour, the prisoner snatched a diamond pin from her head-dress with such force as to remove it with part of the hair from the place in which it was fixed, and ran away with it: *Held*, to be a robbery: R. v. Moore, 1 Leach, 335. *See* Lapier's Case, 1 Leach, 320.

Where the defendant laid hold of the seals and chain of the prosecutor's watch, and pulled the watch out of his fob, but the watch, being secured by a steel chain which went round the prosecutor's neck, the defendant could not take it until, by pulling and two or three jerks, he broke the chain, and then ran off with the watch; this was holden to be robbery: R. v. Mason, R. & R. 419. But merely snatching property from a person unawares, and running away with it, will not be robbery: R. v. Steward, 2 East, P. C. 702; R. v. Horner, *Id.* 703; R. v. Baker, 1 Leach, 290; R. v. Robins, do. do.; R. v. Macauley, 1 Leach, 287; because fear cannot, in fact, be presumed in such a case. When the prisoner caught hold of the prosecutor's watch-chain, and jerked his watch from his pocket with considerable force, upon which a scuffle ensued and the prisoner was secured, Garrow, B., held that the force used to obtain the watch did not make the offence amount to robbery, nor did the force used afterwards in the scuffle; for the force necessary to constitute robbery must be either immediately before or at the time of the larceny, and not after it: R. v. Gnosil, 1 C. & P. 304. The rule, therefore, appears to be well established, that no sudden taking or snatching of property unawares from a person is sufficient to constitute robbery, unless some injury be done to the person, or there be a previous struggle for the possession of the property, or some force used to obtain it: 2 Russ. 104.

If a man take another's child, and threaten to destroy him unless the other give him money, this is robbery: R. v. Reane, 2 East, P. C. 734; R. v. Donally, *Id.* 713. So where the defendant, at the head of a mob, came to the prosecutor's house and demanded money, threatening to destroy the house unless the money were given, the prosecutor therefore gave him five shillings, but he insisted on more, and the prosecutor, being terrified, gave him five shillings more; the defendant and the mob then took bread, cheese and cider from the prosecutor's house, without his permission, and departed, this was holden to be a robbery as well of the money as of the bread, cheese and cider: R. v. Simons, 2 East, P. C. 731; R. v. Brown, *Id.* So where, during some riots at Birmingham, the defendant threatened the prosecutor that unless he would give a certain sum of money he should return with the mob and destroy his house, and the prosecutor, under the impression of this threat, gave him the money, this was holden by the judges to be robbery: R. v. Astley, 2 East, P. C. 729. So where, during the riots of 1780, a mob headed by the defendant came to the prosecutor's house, and demanded half a crown, which the prosecutor, from terror of the mob, gave, this was holden to be robbery, although no threats were uttered: R. v. Taplin, 2 East, P. C. 712. Upon an indictment for robbery it appeared that a mob came to the house of the prosecutor, and with the mob the prisoner, who advised the prosecutor to give them something to get rid of them, and prevent mischief, by which means they obtained money from the prosecutor; and Parke, J., after consulting Vaughan and Anderson, JJ., admitted evidence of the acts of the mob at other places before and after on the same day, to show that the advice of the prisoner was not *bona fide*, but in reality a mere mode of robbing the prosecutor: R. v. Winkworth, 4 C. & P. 444. Where the prosecutrix was threatened by some person at a mock auction to be sent to prison, unless she paid for some article they pretended was knocked down to her, although she never bid for it; and they accordingly

called in a pretended constable, who told her that unless she gave him a shilling she must go with him, and she gave him a shilling accordingly, not from any apprehension of personal danger but from a fear of being taken to prison, the judges held that the circumstances of the case were not sufficient to constitute the offence of robbery; it was nothing more than a simple duress, or a conspiracy to defraud: R. v. Knewland, 2 Leach, 721; 2 Russ. 118; *see* s. 404, *post*. In R. v. MacGrath, 11 Cox, 347, a woman went into a mock auction room, where the prisoner professed to act as auctioneer. Some cloth was put up by auction, for which a person in the room bid 25 shillings. A man standing between the woman and the door said to the prisoner that she had bid 26 shillings for it, upon which the prisoner knocked it down to the woman. She said she had not bid for it, and would not pay for it, and turned to go out. The prisoner said she must pay for it before she would be allowed to go out, and she was prevented from going out. She then paid 26 shillings to the prisoner, because she was afraid, and left with the cloth; the prisoner was indicted for larceny, and having been found guilty the conviction was affirmed; but Martin, B., was of opinion that the facts proved also a robbery. Where the defendant, with an intent to take money from a prisoner who was under his charge for an assault, handcuffed her to another prisoner, kicked and beat her whilst thus handcuffed, put her into a hackney coach for the purpose of carrying her to prison, and then took four shillings from her pocket for the purpose of paying the coach hire, the jury finding that the defendant had previously the intent of getting from the prosecutrix whatever money she had, and that he used all this violence for the purpose of carrying his intent into execution, the judges held clearly that this was robbery: R. v. Gascoigne, 2 East, P. C. 709. Even in a case where it appeared that the defendant attempted to commit a rape upon the prosecutrix, and she, without any demand from him, gave him some money to desist, which he put into his

pocket, and then continued his attempt until he was interrupted; this was holden by the judges to be robbery, for the woman from violence and terror occasioned by the prisoner's behaviour and to redeem her chastity, offered the money which it is clear she would not have given voluntarily, and the prisoner, by taking it, derived that advantage to himself from his felonious conduct, though his original intent was to commit a rape: R. v. Blackham, 2 East, P. C. 711.

And it is of no importance under what pretense the robber obtains the money if the prosecutor be forced to deliver it from actual fear, or under circumstances from which the court can presume it. As, for instance, if a man with a sword drawn ask alms of me, and I give it him through mistrust and apprehension of violence, this is felonious robbery. Thieves come to rob A., and finding little about him force him by menace of death to swear to bring them a greater sum, which he does accordingly, this is robbery; not for the reason assigned by Hawkins, because the money was delivered while the party thought himself bound in conscience to give it by virtue of the oath, which in his fear he was compelled to take; which manner of stating the case affords an inference that the fear had ceased at the time of the delivery, and that the owner then acted solely under the mistaken compulsion of his oath. But the true reason is given by Lord Hale and others; because the fear of that menace still continued upon him at the time he delivered the money: 2 East, P. C. 714. Where the defendant, at the head of a riotous mob, stopped a cart laden with cheeses, insisting upon seizing them for want of a permit; after some altercation he went with the driver, under pretense of going before a magistrate, and during their absence the mob pillaged the cart; this was holden to be a robbery: Merriman v. Hundred of Chippenham, 2 East, P. C. 709. On this case, it is well observed that the opinion that it amounted to a robbery must have been grounded upon the consideration that the

first seizure of the cart and goods by the defendant, being by violence and while the owner was present, constituted the offence of a robbery: 2 Russ. 111.

So where the defendant took goods from the prosecutrix to the value of eight shillings, and by force and threats compelled her to take one shilling under pretense of payment for them, this was holden to be a robbery: Simon's Case and Spencer's Case, 2 East, P. C. 712. The fear must precede the taking. For if a man privately steal money from the person of another, and afterwards keep it by putting him in fear, this is no robbery, for the fear is subsequent to the taking: R. v. Harman, 1 Hale, 534; and R. v. Gnosil, 1 C. & P. 304.

"It remains further to be considered of what nature this fear may be. This is an inquiry the more difficult, because it is nowhere defined in any of the acknowledged treatises upon the subject. Lord Hale proposes to consider what shall be said a putting in fear, but he leaves this part of the question untouched. Lord Coke and Hawkins do the same. Mr. Justice Foster seems to lay the greatest stress upon the necessity of the property's being taken *against the will of* the party, and he leaves the circumstance of fear out of the question; or that at any rate, when the fact is attended with circumstances of evidence or terror, the law, *in odium spoliatoris*, will presume fear if it be necessary, where there appear to be so just a ground for it. Mr. Justice Blackstone leans to the same opinion. But neither of them afford any precise idea of the nature of the fear or apprehension supposed to exist. Staundford defines robbery to be a felonious taking of anything from the person or in the presence of another, *openly and against his will;* and Bracton also rests it upon the latter circumstance. I have the authority of the judges, as mentioned by Willes, J., in delivering their opinion in *Donally's Case*, in 1779, to justify me in not attempting to draw the exact line in this case; but thus much, I may venture to

state, that on the one hand the fear is not confined to an apprehension of bodily injury, and, on the other hand, it must be of such a nature as in reason and common experience is likely to induce a person to part with his property against his will, and to put him, as it were, under a temporary suspension of the power of exercising it through the influence of the terror impressed; in which case fear supplies, as well in sound reason as in legal construction, the place of force, or an actual taking by violence, or assault upon the person": 2 East, P. C. 713.

It has been seen, *ante*, R. v. Astley, 2 East, P. C. 729, that a threat to destroy the prosecutor's house is deemed sufficient by law to constitute robbery, if money is obtained by the prisoner in consequence of it. This is no exception to the law which requires violence or fear of bodily injury, because one without a house is exposed to the inclement elements; so that to deprive a man of his house is equivalent to inflicting personal injury upon him. In general terms, the person robbed must be, in legal phrase, put in fear. But if force is used there need be no other fear than the law will imply from it; there need be no fear in fact. The proposition is sometimes stated to be that there must be either force or fear, while there need not be both. The true distinction is doubtless that, where there is no actual force, there must be actual fear, but where there is actual force the fear is conclusively inferred by the law. And within this distinction, assaults where there is no actual battery, are probably to be deemed actual force. Where neither this force is employed, nor any fear is excited, there is no robbery, though there be reasonable grounds for fear: 2 Bishop, Cr. L. 1174; *see* s. 404, *post*.

From the person.—The goods must be proved to have been taken *from the person* of the prosecutor. The legal meaning of the word *person*, however, is not here, that the taking must necessarily be from the actual contact of the body, but if it is from under the personal protection that

will suffice. Within this doctrine the person may be deemed to protect all things belonging to the individual within a distance, not easily defined, over which the influence of the personal presence extends. If a thief, says Lord Hale, come into the presence of A., and, with violence and putting A. in fear, drive away his horse, cattle or sheep, he commits robbery. But if the taking be not either directly from his person or in his presence it is not robbery. In robbery, says East, 2 P. C. 707, it is sufficient if the property be taken in the presence of the owner; it may not be taken immediately from his person, so that there be violence to his person, or putting him in fear. As where one, having first assaulted another, takes away his horse standing by him; or, having put him in fear, drives his cattle out of his pasture in his presence, or takes up his purse which the other in his fright had thrown into a bush. Or, adds Hawkins, rob my servant of my money before my face, *after having first assaulted me*: 1 Hawk. 214. 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 his 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 prisoners intended to take the bundle, why did they assault the prosecutor, and not the person who had it: R. v. Fallows, 2 Russ. 107. The prisoners were convicted of a simple larceny. *Quære*, whether if the indictment had been for robbing the brother, who was carrying the bundle, it might not have been sustained, as

it was the violence of the prisoners that made him put it down and it was taken in his presence. In R. v. Wright, Styles, 156, it was holden that if a man's servant be robbed of his master's goods in the sight of his master, this is robbery of the master: *note* by Greaves.

Where, on an indictment for robbery and stealing from the person, it was proved that the prosecutor, who was paralyzed, received, whilst sitting on a sofa in a room, a violent blow on the head from one prisoner, whilst the other prisoner went and stole a cash-box from a cupboard in the same room; it was held that the cash-box being in the room in which the prosecutor was sitting, and he being aware of that fact, it was virtually under his protection; and it was left to the jury to say whether the cash-box was under the protection of the prosecutor at the time it was stolen: R. v. Selway, 8 Cox, 235.

The taking must be charged to be with violence from the person, and against the will of the party; but it does not appear certain that the indictment should also charge that he was put in fear, though this is usual, and, therefore, safest to be done.

But in the conference on Donally's case, where the subject was much considered, it was observed by Eyre, B., that the more ancient precedents did not state the putting in fear, and that, though others stated the putting in corporeal fear, yet the putting in fear of life was of modern introduction. Other judges considered that the gist of the offence was the taking by violence, and that the putting in fear was only a constructive violence, supplying the place of actual force. In general, however, as was before observed, no technical description of the fact is necessary, if upon the whole it plainly appears to have been committed with violence against the will of the party: 2 East, P. C. 783.

The ownership of the property must be alleged the same as in an indictment for larceny. The value of the articles stolen need not necessarily be stated. In R. v. Bingley, 5

C. & P. 602, the prisoner robbed the prosecutor of a piece of paper, containing a memorandum of money that a person owed him, and it was held sufficient to constitute a robbery.

PART XXIX.

ROBBERY AND EXTORTION.

Definition.

397. 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.

Aggravated Robbery.

398. Every one is guilty of an indictable offence and liable to imprisonment for life *and to be whipped* who—

(*a*) robs any person and at the time of, or immediately before or immediately after, such robbery wounds, beats, strikes, or uses any personal violence to, such person; or

(*b*) being together with any other person or persons robs, or assaults with intent to rob, any person; or

(*c*) being armed with an offensive weapon or instrument robs, or assaults with intent to rob any person. R. S. C. c. 164, s. 34. 24-25 V. c. 96, s. 43 (Imp.).

This clause provides for five offences: 1. Being armed with any offensive weapon or instrument, robbing any person.

2. Being so armed, assaulting any person with intent to rob this person.

3. Together with one or more person or persons, robbing any other person.

4. Together with one or more person or persons, assaulting any person with intent to rob this person.

5. Robbing any person, and at the time of or immediately before, or immediately after such robbery, wound-

ing, beating, striking, or using any other personal violence to *any* person.

1. *Indictment for a robbery by a person armed*.....that J. S., on.....at.....being then armed with a certain offensive weapon and instrument, to wit, a bludgeon, in and upon one D. unlawfully did make an assault, and him the said D. in bodily fear and danger of his life then unlawfully did put, and a sum of money, to wit, the sum of ten dollars, of the moneys of the said D., then unlawfully and violently did steal.....

2. *Indictment for an assault by a person armed with intent to commit robbery*.....that J.S. on.....at..... being then armed with a certain offensive weapon and instrument, called a bludgeon, in and upon one D. unlawfully did make an assault, with intent the moneys, goods and chattels of the said D. from the person and against the will of him the said D., then unlawfully and violently to steal.....

3. *Indictment for robbery by two or more persons in company*.....that A. B. and D. H. together, in and upon one J. N. unlawfully did make an assault, and him the said J. N. in bodily fear and danger of his life then and there together unlawfully did put, and the moneys of the said J. N. to the amount of.....from the person and against the will of the said J. M. then unlawfully and violently together did steal. (*If one only of them be apprehended it will charge him by name together with a certain other person, or certain other persons, to the jurors aforesaid unknown*).

4. *Indictment for, together with one or more person or persons, assaulting with intent to rob.*—Can be drawn on forms 2 and 3.

5. *Robbery accompanied by wounding, etc.*— that J. N. at on in and upon one A. M. unlawfully did make an assault, and him the said A. M. in bodily fear

and danger of his life then unlawfully did put, and the moneys of the said A. M. to the amount of ten dollars and one gold watch, of the goods and chattels of the said A. M. from the person and against the will of the said A. M. then unlawfully and violently did steal, and that the said J. N. immediately before he so robbed the said A. M. as aforesaid, the said A. M. did unlawfully wound.

(*It will be immaterial, in any of these indictments, if the place where the robbery was committed be stated incorrectly.*)

The observations *ante*, applicable to robbery generally, apply to these offences.

Under indictment No. 1 the defendant may be convicted of the robbery only, or of an assault with intent to rob. The same, under indictments numbers 3 and 5. And wherever a robbery with aggravating circumstances, that is to say, either by a person armed, or by several persons together, or accompanied with wounding, is charged in the indictment, the jury may convict of an assault with intend to rob, attended with the like aggravation, the assault following the nature of the robbery: R. v Mitchell, 2 Den. 468, and remarks upon it, in Dears. 19.

By s. 713 a verdict of common assault may be returned if the evidence warrants it. And by s. 711, if the offence has not been completed, a verdict of guilty of the attempt to commit the offence charged may be given, if the evidence warrants it.

Upon an indictment for robbery charging a wounding the jury may convict of unlawful wounding under s. 242, or of an assault causing actual bodily harm under s. 262.

See remarks under next section.

PUNISHMENT OF ROBBERY.

399. Every one who commits robbery is guilty of an indictable offence and liable to fourteen years' imprisonment. R. S. C. c. 164, s. 32.

Indictment for robbery.— in and upon one J. N. unlawfully did make an assault, and him, the said J. N., in bodily fear and danger of his life then did put, and

the moneys of the said J. N., to the amount of ten dollars, from the person and against the will of the said J. N. then unlawfully and violently did steal.

The indictment may charge the defendant with having assaulted several persons and stolen different sums from them, if the whole was one transaction.

If the robbery be not proved the jury may return a verdict of an assault with intent to rob, if the evidence warrants it, and then the defendant is punishable as under s. 400. By s. 713, if the intent be not proved a verdict of common assault may be given: R. v. Archer, 2 Moo 283; R. v. Hagan, 8 C. & P. 167; R. v. Ellis, 8 C. & P. 654; R. v. Nicholls, 9 C. & P. 267; R. v. Woodhall, 12 Cox, 240, is not to be followed here, as the enactment to the same effect is now, in England, repealed.

The word "together" is not essential in an indictment for robbery against two persons to show that the offence was a joint one: R. v. Provost, M. L. R. 1 Q. B. 477.

ASSAULT WITH INTENT TO ROB.

400. Every one who assaults any person with intent to rob him is guilty of an indictable offence and liable to three years' imprisonment. R. S. C. c. 164, s. 33; 24-25 V. c. 96 s. 42 (Imp.).

Fine, s. 958: *see* annotation under the three next preceding sections.

Indictment.— in and upon one C. D., unlawfully did make an assault with intent the moneys, goods and chattels of the said C. D., from the person and against the will of the said C. D. unlawfully and violently to steal: R. v. Huxley, Car. 2 M. 596; R. v. O'Neil, 11 R. L. 334.

STOPPING THE MAIL WITH INTENT TO ROB.

401. Every one is guilty of an indictable offence and liable to imprisonment for life, or to any term not less than five years, who stops a mail with intent to rob or search the same. R. S. C. c. 35, s. 81. 7 Wm. IV. and 1 V. c. 36 (Imp.).

Section 4, *ante*, as to definitions, and s. 624, *post*, as to indictment.

Indictment.— a certain mail for the conveyance of post letters, unlawfully did stop with intent to rob the same.

A verdict of attempt may be given, if the evidence warrants it, s. 711.

COMPELLING EXECUTION OF DOCUMENTS.

402. Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to defraud, or injure, by unlawful violence to or restraint of the person of another, or by the threat that either the offender or any other person will employ such violence or restraint, unlawfully compels any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal upon any paper or parchment, in order that it may be afterwards made or converted into or used or dealt with as a valuable security. R. S. C. c. 173, ss. 5 & 6 (*Amended*). 24-25 V. c. 96, s. 48 (Imp.).

The obtaining money by accusing or threatening to accuse of any treason, felony or any crime, now falls under ss. 405-406, *post.*

"Valuable security" defined, s. 3.

On this clause, Greaves says: "This clause is new. It will meet all such cases as R. v. Phipoe, 2 Leach, 673, and R. v. Edwards, 6 C. & P. 521, where persons by violence to the person or by threats induce others to execute deeds, bills of exchange or other securities.

The defendants, husband and wife, were indicted under this clause, for having by threats of violence and restraint induced the prosecutor to write and affix his name to the following document: "London, July 19th, 1875. I hereby agree to pay you £100 on the 27th inst, to prevent any action against me."

Held, that this document was not a promissory note, but was an agreement to pay money for a valid consideration which could be sued upon and was therefore a valuable security. To constitute a valuable security within the meaning of the statute an instrument need not be negotiable. A wife who takes an independent part in the commission of a crime when her husband is not present is not

protected by her coverture: R. v. John, 13 Cox, 100; *see* cases under s. 405, *post*.

See that case of R. v. John as to form of indictment.

EXTORTION BY LETTER.

403. Every one is guilty of an indictable offence and liable to *fourteen years'* imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property, chattel, money, valuable security or other valuable thing. R. S. C. c. 173, s. 1. 24-25 V. c. 96, s. 44 (Imp.).

"Valuable security" and "writing" defined, s. 3.

An indictment on this clause should always contain a count for uttering without stating the person to whom the letter or writing is uttered: Greaves, Cons. Acts, 135.

Indictment for sending a letter, demanding money with menaces.— that J. S., on unlawfully did send to one J. N. a certain letter, directed to the said J. N. by the name and description of Mr. J. N., of demanding money from the said J. N. with menaces, and without reasonable or probable cause, he the said J. S. then well knowing the contents of the said letter; and which said letter is as follows, that is to say, (*here set out the letter verbatim*). And the jurors aforesaid, do further present, that the said J. S. on the day and in the year aforesaid, unlawfully did utter a certain writing demanding money from the said J. N. with menaces and without any reasonable or probable cause, he the said J. S. then well knowing the contents of the said writing and which said writing is as follows, that is to say (*here set out the writing verbatim*). *See* s. 613.

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, this was holden to amount to a demand: R. v. Robinson, 2 Leach, 749. The demand must be with menaces, and without any 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 of money, and not to the accusation threatened by the defendant to be made against the prosecutor; and it is, therefore, immaterial in point of law, whether the accusation be true or not: R. v. Hamilton, 1 C. & K. 212; R. v. Gardner, 1 C. & P. 479. A letter written to a banker, stating that it was intended by some one to burn his books and cause his bank to stop, and that if 250 pounds 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, was held to be a letter demanding money with menaces: R. v. Smith, 1 Den. 510. The judges seemed to think that this decision did not interfere with R. v. Pickford, 4 C. & P. 227. In R. v. Pickford the injury threatened was to be done by a third person. It is immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury or accusation to be caused or made by the offender, or by any other person. *See* R. v. Tranchant, 9 L. N. 333 and R. v. Grimwade, 1 Den. 30.

32 & 33 V. c. 21, s. 43 made it a felony to send "any letter demanding of any person with menaces, and without any reasonable or probable cause, any money, etc." *Held*, that the words "without reasonable or probable cause" apply to the money demanded, and not to the accusation threatened to be made: R. v. Mason, 24 U. C. C. P. 58.

DEMANDING WITH INTENT TO STEAL.

404. 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. R. S. C. c. 173, s. 2. 24-25 V. c. 96, s. 45 (Imp.).

The repealed clause had the words "or by force" after menaces. The words in italics are new.

Indictment.— unlawfully with menaces did demand of A. B. the money of him the said A. B. with intent the said money from the said A. B. unlawfully to steal.

The prosecutor must prove a demand by the defendant of the money or other thing stated in the indictment "by menaces" with intent to steal it. It is not necessary to prove an express demand in words; the statute says "with menaces." "Demands," and menaces are of two kinds, by words or by gestures; so 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, it should seem to be sufficient proof of the allegation of demand in the indictment: R. v. Jackson, 1 Leach, 267. If a person, with menaces, demand money of another, who does not give it him, because he has it not with him, this is a felony within the statute; but if the party demanding the money knows that it is not then in the prosecutor's possession, and only intends to obtain an order for the payment of it, it is otherwise: R. v. Edwards, 6 C. & P. 515. That would now fall under this section.

See R. v. Walton, L. & C. 288; R. v. Robertson, L. & C. 483; 3 Russ. 203, *note* by Greaves.

Why is the punishment only two years under this section, and fourteen under the next preceding one?

EXTORTION BY CERTAIN THREATS.

405. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, with intent to extort or gain anything from any person—

(*a*) accuses or threatens to accuse either that person or any other person, *whether the person accused or threatened with accusation is guilty or not*, of

(i) any offence punishable by law with death or imprisonment *for seven years or more*;

(ii) any assault with intent to commit a rape, or any attempt or endeavour to commit a rape, *or any indecent assault*;

(iii) *carnally knowing or attempting to know any child so as to be punishable under this Act*;

(iv) any infamous offence, that is to say, buggery, an attempt or assault with intent to commit buggery, *or any unnatural practice, or incest*;

(v) counselling or procuring any person to commit any such infamous offence; or

(*b*) threatens that any person shall be so accused by any other person; or

(c) causes any person to receive a document containing such accusation or threat, knowing the contents thereof;

(d) by any of the means aforesaid compels or attempts to compel any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal upon or to any paper or parchment, in order that it may be afterwards made or converted into or used or dealt with as a valuable security. R. S. C. c. 173, ss. 3, 4, 1, 5, & 6 (*Amended*). 24-25 V. c. 96, ss. 46, 47, 48 (Imp.).

The words in italics are new.

"Valuable security," defined, s. 3.

Extortion at common law: *see* R. v. Tisdale, 20 U. C. Q. B. 272.

Indictment.— that J. S., on unlawfully did send to one J. N., a certain letter, directed to the said J. N., by the name and description of Mr. J. N., threatening to accuse him, the said J. N., of having attempted and endeavoured to commit the abominable crime of buggery with him the said J. S., with a view and intent thereby then to extort and gain money from the said J. N., he the said J. S., then well knowing the contents of said letter, and which said letter is as follows, to wit (*here set out the letter verbatim*): *see* s. 613.

An indictment for sending a letter threatening to accuse a man of an infamous crime need not specify such crime for the specific crime the defendant threatened to charge might intentionally by him be left in doubt: R. v. Tucker, 1 Moo. 134. The threat may be to accuse another person than the one to whom the letter was sent. It is immaterial whether the prosecutor be innocent or guilty of the offence threatened to be imputed to him; s-s. (*a*): R. v. Gardner, 1 C. & P. 479; R. v. Richards, 11 Cox, 43.

Where it was doubtful from the letter what charge was intended parol evidence was admitted to explain it, and the prosecutor proved that having asked the prisoner what he meant by certain expressions in the letter, the prisoner said that he meant that the prosecutor had taken indecent liberties with his person; the judges held the conviction to be right: R. v. Tucker, 1 Moo. 134.

The court will, after the bill is found, upon the application of the prisoner, order the letter to be deposited with an officer, in order that the prisoner's witnesses may inspect it: R. v. Harrie, 6 C. & P. 105.

In R. v. Ward, 10 Cox, 42, on an indictment containing three counts for sending three separate letters, evidence of the sending of one only was declared admissible. The threat need not be by letter under s. 405.

It is immaterial whether the menaces or threats hereinbefore mentioned be of accusation to be caused or made by the offender or by any other person;" s-s. (*b*).

Indictment.— unlawfully did threaten one J. N., to accuse him the said J. N., of having attempted and endeavoured to commit the abominable crime of buggery with the said J. S., with a view and intent thereby then to extort and gain money from the said J. N.

It must be a threat to accuse, or an accusation; if J. N. be indicted or in custody of an offence, and the defendant threaten to procure witnesses to prove the charge, this will not be a threat to accuse within the meaning of the statute. But it need not be a threat to accuse before a judicial tribunal; a threat to charge before any third person is sufficient: R. v. Robinson, 2 M. & Rob. 14. It is immaterial whether the prosecutor be innocent or guilty of the offence charged, and therefore, although the prosecutor may be cross-examined as to his guilt of the offence imputed to him, with a view to shake his credit, yet no evidence will be allowed to be given, even in cross-examination of another witness, to prove that the prosecutor was guilty of such offence: R. v. Gardner, 1 C. & P. 479; R. v. Cracknell, 10 Cox, 408. Whether the crime of which the prosecutor was accused by the prisoner was actually committed is not material in this, that the prisoner is equally guilty if he intended by such accusation to extort money; but it is material in considering the question whether, under the circumstances of the case, the intention

of the prisoner was to extort money or merely to compound a felony: R. v. Richards, 11 Cox, 43. In Archbold, 482, this last decision seems not to be approved of.—A person threatening A's father that he would accuse A. of having committed an abominable offence upon a mare for the purpose of putting off the mare, and forcing the father, under terror of the threatened charge to buy and pay for her at the prisoner's price, is guilty of threatening to accuse within this section: R. v. Redman, 10 Cox, 159, Warb. Lead. Cas. 142. On the trial of an indictment for threatening to accuse a person of an abominable crime, with intent to extort money, and by intimidating the party by the threat, in fact obtaining the money, the jury need not confine themselves to the consideration of the expression used before the money was given, but may, if those expressions are equivocal, connect with them what was afterwards said by the prisoner when he was taken into custody: R. v. Kain, 8 C. & P. 187.

See R. v. Popplewell, 20 O. R. 303.

As to what is a "valuable security," *see* cases under ss. 353 and 402.

A letter sent to a tavern keeper demanding a sum of money and threatening, in default of payment, to bring a prosecution under the Liquor License Act, is not a menace within the meaning of c. 173, s. 1.

The test is whether or not the menace is such as a firm and prudent man might and ought to have resisted: R. v. McDonald, 8 Man. L. R. 491.

EXTORTION BY OTHER THREATS. (*New*).

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

(*a*) with intent to extort or gain anything from any person accuses or threatens to accuse either that person or any other person of any offence other than those specified in the last section whether the person accused or threatened with accusation is guilty or not of that offence; or

(*b*) with such intent as aforesaid, threatens that any person shall be so accused by any person; or

(*c*) causes any person to receive a document containing such accusation or threat knowing the contents thereof; or

(*d*) by any of the means aforesaid, compels or attempts to compel any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal upon or to any paper or parchment, in order that it may be afterwards made or converted into, or used or dealt with as a valuable security.

"At present a policeman or gamekeeper who levies blackmail under threats of larceny or poaching, if criminally responsible at all, is only punishable with imprisonment and fine."—Imp. Comm. Rep.

This section extends the provisions of the preceding section to threats of every accusation whatever.

BURGLARY.

GENERAL REMARKS.

See R. v. Hughes, Warb. Lead. Cas. 190, and cases there cited.

Burglary, or nocturnal housebreaking, *burgi latrocinium*, which, by our ancient law, was called *hamesecken*, has always been looked upon as a very heinous offence for it always tends to occasion a frightful alarm, and often leads by natural consequence to the crime of murder itself. Its malignity also is strongly illustrated by considering how particular and tender a regard is paid by the law of England to the immunity of a man's house, which it styles its castle, and will never suffer to be violated with impunity; agreeing herein with the sentiments of Ancient Rome, as expressed in the words of Tully (*Pro Domo.* 41) "*quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civium?*" For this reason no outward doors can, *in general*, be broken open to execute any civil process, though, in criminal cases, the public safety supersedes the private. Hence, also, in part arises the animadversion of the law upon eavesdroppers, nuisancers, and incendiaries; and to this principle it must be assigned, that a man may assemble people together lawfully (at least if they do not exceed eleven), without danger of raising a riot, rout or unlawful assembly, in order to protect and defend his house, which he is not permitted to do in any other case: 4 Stephens' Blacks. 104; s. 79, s-s. 3 *ante*.

Burglary is a breaking and entering the mansion-house of another in the night, with intent to commit *some felony* within the same, whether such felonious intent be executed or not: now any indictable offence, s. 410, *post*. In which definition there are four things to be considered, the *time*, the *place*, the *manner*, and the *intent*.

The time.—The time must be by night and not by day, for in the day time there is no burglary. As to what is reckoned night and what day for this purpose, anciently the day was accounted to begin only at sunrising, and to end immediately upon sunset; but the better opinion afterwards was that if there were daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it was no burglary. But this did not extend to moonlight, for then many midnight burglaries would have gone unpunished; and besides, the malignity of the offence does not so properly arise from its being done in the dark, as at the dead of night, when all creation is at rest. But the doctrines of the common law on this subject are no longer of practical importance, as it is enacted by s. 3, *ante*, that the night commences at nine of the clock in the afternoon of each day, and concludes at six of the clock in the forenoon of the next succeeding day, and the day includes the remainder of the twenty-four hours. The breaking and entering must both be committed in the night-time; if the breaking be in the day, and the entering in the night, or *vice versa*, it is no burglary: *see* s. 410, *post;* 1 Hale, 551. But the breaking and entering need not be both done in the same night; for if thieves break a hole in a house one night, with intent to enter another night and commit felony and come accordingly another night and commit a felony, this seems to be burglary, for the breaking and entering were both *noctanter*, though not the same night: 2 Russ. 39. The breaking on Friday night with intent to enter at a future time, and the entering on the Sunday night constitute burglary: R. v. Smith, R. & R. 417. And then, the burglary is supposed to have taken place on the night of the entry, and is to be charged as such: 1 Hale, 551. In Jordan's Case, 7 C. & P. 432, it was held that where the breaking is on one night and the entry on another, a party present at the breaking, but absent at the entry, is a principal.

The place.—The breaking and entering must take place in a *mansion* or *dwelling-house* to constitute burglary.

At common law, Lord Hale says that a church may be the subject of burglary, 1 Hale, 559, on the ground, according to Lord Coke, that a church is the mansion house of God, though Hawkins, 1 vol. 133, does not approve of that *nicety*, as he calls it, and thinks that burglary in a church seems to be taken as a distinct burglary from that in a house. However, this offence is now provided for: ss. 408 and 409, *post*.

What is a *dwelling house*?—*See* s. 407, *post*. From all the cases it appears that it must be a place of actual *residence*. Thus a house under repairs, in which no one lives though the owner's property is deposited there, is not a place in which burglary can be committed: R. v. Lyons, 1 Leach, 185; in this case neither the proprietor of the house, nor any of his family, nor any person whatever had yet occupied the house.

In Fuller's Case, 1 Leach, 186, note, the defendant was charged of a burglary in the dwelling-house of Henry Holland. The house was new built, and nearly finished; a workman who was constantly employed by Holland slept in it for the purpose of protecting it, but none of Holland's family had yet taken possession of the house, and the Court held that it was not the dwelling-house of Holland, and that where the owner has never by himself or by any of his family slept in the house, it is not his dwelling house, so as to make the breaking thereof burglary, though he has used it for his meals, and all the purposes of his business: *see* R. v. Martin, R. & R. 108.

If a porter lie in a warehouse for the purpose of protecting goods, R. v. Smith, 2 East, P. C. 497, or a servant lie in a barn in order to watch thieves, R. v. Brown, 2 East, P. C. 501, this does not make the warehouse or barn a dwelling-house in which burglary can be committed. But if the agent of a public company reside at a warehouse belonging to his employers this crime may be committed by breaking it, and he may be stated to be the owner: R. v. Margetts, 2 Leach,

930. Where the landlord of a dwelling-house, after the tenant, whose furniture he had bought, had quitted it, put a servant into it to sleep there at night, until he should re-let it to another tenant, but had no intention to reside in it himself, the judges held that it could not be deemed the dwelling-house of the landlord: R. v. Davies, 2 Leach, 876. So where the tenant had put all his goods and furniture into the house, preparatory to his removing to it with his family, but neither he nor any of his family had as yet slept in it, it was holden not to be a dwelling-house in which burglary can be committed: R. v. Hallard, 2 East, P. C. 498; R. v. Thompson, 2 Leach, 771. And the same has been ruled when under such circumstances the tenant had put a person, not being one of the family, into the house for the protection of the goods and furniture in it, until it should be ready for his residence: R. v. Harris, 2 Leach, 701; R. v. Fuller, 1 Leach, 186. A house will not cease to be the house of its owner, on account of his occasional or temporary absence, even if no one sleep in it provided the owner has an *animus revertendi*: R. v. Murry, 2 East, P. C. 496; and in R. v. Kirkham, 2 Starkie, Ev. 279, Wood, B., held that the offence of stealing in a dwelling-house had been committed, although the owner and his family had left six months before, having left the furniture and intending to return: *Id.*, Nutbrown's Case, 2 East, P. C. 496. And though a man leaves his house and never means to live in it again, yet if he uses part of it as a shop, and lets his 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 his servant and family will be a habitation by him, and the shop may still be considered as part of his dwelling-house: R. v. Gibbons, R. & R. 442. But where the prosecutor and upholsterer left the house in which he had resided with his family, without any intent of returning to live in it, and took a dwelling-house elsewhere, but still retained the former house as a warehouse and workshop; two women employed by him as workwomen in his

business, and not as domestic servants, slept there to take care of the house, but did not have their meals there, or use the house for any other purpose than sleeping in it as a security to the house; the judges held that this was not properly described as the dwelling-house of the prosecutor: R. v. Flannagan, R. & R. 187. The occupation of a servant in that capacity, and not as tenant, is in many cases the occupation of a master, and will be a sufficient residence to render it the dwelling-house of the master: R. v. Stock, R. & R. 185; R. v. Wilson, R. & R. 115. Where the prisoner was indicted for burglary in the dwelling-house of J. B., J. B. worked for one W., who did carpenter's work for a public company, and put J. B. into the house in question, which belonged to the company, to take care of it, and some mills adjoining. J. B. received no more wages after than before he went to live in the house. It was held not rightly laid: R. v. Rawlins, 7 C. & P. 150. If a servant live in a house of his master's at a yearly rent the house cannot be described as the master's house: R. v. Jarvis, 1 Moo. 7. Every permanent building, in which the renter or owner and his family dwell and lie, is deemed a dwelling-house, and burglary may be committed in it. Even a set of chambers in an inn of court or college is deemed a distinct dwelling-house for this purpose. And it will be sufficient if any part of his family reside in the house. Thus where a servant boy of the prosecutor always slept over his brew-house, which was separated from his dwelling-house by a public passage, but occupied therewith, it was holden, upon an indictment for burglary, that the brew-house was the dwelling-house of the prosecutor, although, being separated by the passage, it could not be deemed to be part of the house in which he himself actually dwelt: R. v. Westwood, R. & R. 495. 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: 1 Hale, 557; but if it be a permanent building, though used only for the purpose of a fair, it is a dwelling-house: R. v.

Smith, 1 M. & Rob. 256. So even a loft, over a stable, used for the abode of a coachman, which he rents for his own use and that of his family, is a place which may be burglariously broken: R. v. Turner, 1 Leach, 305. If a house be divided, so as to form two or more dwelling-houses within the meaning of the word in the definition of burglary, and all internal communication be cut off, the partitions become distinct houses and each part will be regarded as a mansion: R. v. Jones, 1 Leach, 537. But a house the joint property of partners in trade in which their business is carried on may be described as the dwelling-house of all the partners, though only one of the partners reside in it: R. v. Athea, 1 Moo. 329. If the owner, who lets out apartments in his house to other persons, sleep under the same roof and have but one outer door common to him and his lodgers, such lodgers are only inmates and all their apartments are parcel of the one dwelling-house of the owner. But if the owner do not lodge in the same house, or if he and the lodgers enter by different outer-doors, the apartments so let out are the mansion for the time being of each lodger respectively, even though the rooms are let by the year: 2 East, P. C. 505. If the owner let off a part, but do not dwell in the part he reserves for himself, then the part let off is deemed in law the dwelling-house of the party who dwells in it, whether it communicates internally with the other part or not; but the part he has reserved for himself is not the subject of burglary; it is not his dwelling-house for he does not dwell in it, nor can it be deemed the dwelling-house of the tenant for it forms no part of his lodging: R. v. Rogers, R. v. Carrell, R. v. Trapshaw, 1 Leach, 89, 237, 427. If the owner let the whole of a dwelling-house, retaining no part of it for his or his family's dwelling, the part each tenant occupies and dwells in is deemed in law to be the dwelling-house of such tenant, whether the parts holden by the respective tenants communicate with each other internally or not: R. v. Bailey,

1 Moo. 23; R. v. Jenkins, R. & R. 244; R. v. Carrell, 1 Leach, 237.

The term *dwelling-house* includes in its legal signification all out-houses occupied with and immediately communicating with the dwelling-house. But by s. 407, *post*, no building, although within the same curtilage with any dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of this Act, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from the one to the other. Where the prosecutor's house consisted of two living-rooms, another room used as a cellar, and a wash-house on the ground floor, and of three bed-rooms upstairs, one of them over the wash-house and the bedroom over the house-place communicated with that over the wash-house, but there was no internal communication between the wash-house and any of the rooms of the house, but the whole was under the same roof, and the defendant broke into the wash-house, and was breaking through the partition-wall between the wash-house and the house-place, it was holden that the defendant was properly convicted of burglary in breaking the house: R. v. Burrowes, 1 Moo., 274. But where adjoining to the house was a kiln, one end of which was supported by the wall of the house, and adjoining to the kiln a dairy, one end of which was supported by the wall of the kiln, the roofs of all three being of different heights, and there being no internal communication from the house to the dairy, it was held that burglary was not committed by breaking into the dairy: R. v. Higgs, 2 C. & K. 322. To be within the meaning of this section the building must be occupied with the house in the same right; and therefore where a house let to and occupied by A. adjoined and communicated with a building let to and occupied by A. and B., it was holden that the building could not be considered a part of the dwelling-

house of A.: R. v. Jenkins, R. & R. 244. If there be any doubt as to the nature of the building broken and entered a count may be inserted for breaking and entering a building within the curtilage, under s. 413, *post.*

It has always been held necessary to state with accuracy in the indictment to whom the dwelling-house belongs: *see* now, s. 613, *post.* But in all cases of doubt the pleader should vary in different counts the name of the owner, although there can be little doubt that a variance in this respect would be amended at the trial: Archbold, 496. As to the local description of the house it must be proved as laid; if there is a variance between the indictment and evidence in the parish, etc., where the house is alleged to be situate, the defendant must be acquitted of the burglary unless an amendment be made. To avoid difficulty different counts should be inserted, varying the local description. If the house be not proved to be a dwelling-house the defendant must be acquitted of the burglary but found guilty of the simple larceny, if larceny is proved: Archbold, 489, 496.

The manner.—There must be both a *breaking* and an *entering* of the house: *see* s. 407, *post.* The breaking is either actual or constructive. Every entrance into the house by a trespasser is not a breaking in this case. As if the door of a mansion-house stand open and the thief enter, this is not breaking; so if the window of the house be open, and a thief with a hook or other engine draweth out some of the goods of the owner, this is no burglary because there is no actual breaking of the house. But if the thief breaketh the glass of a window, and, with a hook or other engine draweth out some of the goods of the owner, this is burglary for there was an actual breaking of the house: 1 Hale, 551. Where a window was a little open, and not sufficiently so to admit a person, and the prisoner pushed it wide open and got in, this was held to be sufficient breaking: R. v. Smith, 1 Moo. 178; s. 407, *post.*

If there be an aperture in a cellar window to admit light, through which a thief enter in the night, this is not burglary: R. v. Lewis, 2 C. & P. 628; R. v. Spriggs, 1 M. & Rob. 357. There is no need of any demolition of the walls or any manual violence to constitute a breaking. Lord Hale says: "and these acts amount to an actual breaking, viz., opening the casement, or breaking the glass window, picking open a lock of a door with a false key, or putting back the lock with a knife or dagger, unlatching the door that is only latched, to put back the leaf of a window with a dagger." In Roberts' case, 2 East, P. C. 487, where a glass window was broken, and the window opened with the hand, but the shutters on the inside were not broken, this was ruled to be burglary by Ward, Powis and Tracy, JJ.; but they thought this the extremity of the law; and, on a subsequent conference, Holt, C.J., and Powell, C.J., doubting and inclining to another opinion, no judgment was given. In Bailey's Case, R. & R. 341, it was held by nine judges that introducing the hand between the glass of an outer window and an inner shutter is a sufficient entry to constitute burglary. If a thief enter by the chimney it is a breaking, for that is as much closed as the nature of things will permit. And it is burglarious breaking though none of the rooms of the house are entered. Thus, in R. v. Brice, R. & R. 450, the prisoner got in at a chimney and lowered himself a considerable way down, just above the mantel piece of a room on the ground floor. Two of the judges thought he was not in the dwelling-house till he was below the chimney-piece. The rest of the judges, however, held otherwise, that the chimney was part of the dwelling-house, that the getting in at the top was breaking of the dwelling-house, and that the lowering himself was an entry therein.

Where the prisoner effected an entry by pulling down the upper sash of a window, which had not been fastened but merely kept in its place by the pulley weight, the

judges held this to be a sufficient breaking to constitute burglary, even although it also appeared that an outside shutter, by which the window was usually secured, was not closed or fastened at the time: R. v. Haines, R. & R. 451. Where an entry was effected, first into an outer cellar by lifting up a heavy iron grating that led into it, and then into the house by a window, and it appeared that the window, which opened by hinges, had been fastened by means of two nails as wedges, but could, notwithstanding, easily be opened by pushing, the judges held that opening the window so secured was a breaking sufficient to constitute burglary: R. v. Hall, R. &. R. 355. So where a party thrust his arm through the broken pane of a window, and in so doing broke some more of the pane, and removed the fastenings of the window and opened it: R. v. Robinson, 1 Moo. 327.

But if a window thus opening on hinges, or a door, be not fastened at all opening them would not be a breaking within the definition of burglary. Even where the heavy flat door of a cellar, which would keep closed by its own weight, and would require some degree of force to raise it, was opened; it had bolts by which it might have been fastened on the inside, but it did not appear that it was so fastened at the time, the judges were divided in opinion whether the opening of this door was such a breaking of the house as constituted burglary: R. v. Callan, R. &. R. 157. It was holden in Brown's Case that it was: 2 East, P.C. 487. In R. v. Lawrence, 4 C. & P. 231, it was holden that it was not. In R. v. Russell, 1 Moo. 377, it was holden that it was. *See* s. 407, *post.*

Where the offender, with intent to commit a felony, obtains admission by some artifice or trick for the purpose of effecting it he will be guilty of burglary, for this is a constructive breaking. Thus, where thieves, having an intent to rob, raised the hue-and-cry, and brought the constable, to whom the owner opened the door; and when

they came in they bound the constable and robbed the owner, this was held a burglary. So if admission be gained under pretense of business, or if one take lodging with a like felonious intent and afterwards rob the landlord, or get possession of a dwelling-house by false affidavits, without any colour of title, and then rifle the house, such entrance being gained by fraud, it will be burglarious. In Hawkins' Case she was indicted for burglary; upon evidence it appeared that she was acquainted with the house, and knew that the family were in the country, and meeting with the boy who kept the key she prevailed upon him to go with her to the house by the promise of a pot of ale: the boy accordingly went with her, opened the door and let her in, whereupon she sent the boy for the pot of ale, robbed the house and went off, and this being in the night time it was adjudged that the prisoner was clearly guilty of burglary: 2 East, P. C. 485. If a servant conspire with a robber, and let him into the house by night, this is burglary in both: 1 Hale, 553; for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt. But if a servant, pretending to agree with a robber, open the door and let him in for the purpose of detecting and apprehending him, this is no burglary for the door is lawfully open: R. v. Johnson, Car. & M. 218.

And the breaking necessary to constitute burglary is not restricted to the breaking of the outer wall or doors or windows of a house; if the thief got admission into the house by the outer door or windows being open, and afterwards breaks or unlocks an inner door for the purpose of entering one of the rooms in the house, this is burglary: 1 Hale, 553; 2 East, P. C. 488. So if a servant open his master's chamber door, or the door of any other chamber not immediately within his trust, with a felonious design, or if any other person lodging in the same house, or in a public inn, open and enter another's door with such evil intent, it is burglary: 2 East, P. C. 491; 1 Hale, 553; R.

v. Wenmouth, 8 Cox, 348. The breaking open chests is not burglary: 1 Hale, 554. The breaking must be of some part of the house; and therefore, where the defendant opened an area gate with a skeleton key, and then passed through an open door into the kitchen, it was holden not to be a breaking, there being no free passage from the area to the house in the hours of sleep: R. v. Davis, R. & R. 322; R. v. Bennett, R. & R. 289; R. v. Paine, 7 C. & P. 135. It is essential that there should be an entry as well as a breaking, and the entry must be connected with the breaking: 1 Hale, 555; R. v. Davis, 6 Cox, 369; R. v. Smith, R. & R. 417. It is deemed an entry when the thief breaketh the house, and his body or any part thereof, as his foot or his arm, is within any part of the house; or when he putteth a gun into a window which he hath broken, though the hand be not in, or into a hole of the house which he hath made, with intent to murder or kill, this is an entry and breaking of the house; but if he doth barely break the house, without any such entry at all, this is no burglary: 3 Inst. 64; 2 East, P. C. 490. Thieves came by night to rob a house; the owner went out and struck one of them; another made a pass with a sword at persons he saw in the entry, and, in so doing, his hand was over the threshold: this was adjudged burglary by great advice: 2 East, P. C. 490.

In Gibbon's Case evidence that the prisoner in the night time cut a hole in the window-shutters of a shop, part of a dwelling-house, and putting his hand through the hole took out watches, etc. was holden to be burglary although no other entry was proved: 2 East, P. C. 490. Introducing the hand through a pane of glass, broken by the prisoner, between the outer window and the inner shutter, for the purpose of undoing the window latch, is a sufficient entry: R. v. Bailey, R. & R. 341. So would the mere introduction of the offender's finger: R. v. Davis, R. & R. 499. So an entry down a chimney is a sufficient entry in the house for

a chimney is part of the house: R. v. Brice, R. & R. 450; s. 407, *post*.

It is even said that discharging a loaded gun into a house is a sufficient entry: 1 Hawk. 132. Lord Hale, 1 vol. 155, is of a contrary opinion, but adds *quære*? 2 East, P. C. 490, seems to incline towards Hawkins' opinion. Where thieves bored a hole through the door with a centre-bit, and parts of the chips were found in the inside of the house, this was holden not a sufficient entry to constitute burglary: R. v. Hughes, 2 East, P. C. 491. If divers come in the night to do a burglary, and one of them break and enter, the rest of them standing to watch at a distance, this is burglary in all: 1 Burn, 550.

In R. v. Spanner, 12 Cox, 155, Bramwell, B., held, that an attempt to commit a burglary may be established on proof of a breaking with intent to rob the house, although there be no proof of an actual entry. The prisoner was indicted for burglary, but no entry having been proved a verdict for an attempt to commit a burglary was given.

The intent.—There can be no burglary but where the indictment both expressly alleges, and the verdict also finds, an intention to commit *some felony* (now any indictable offence); for if it appear that the offender meant only to commit a trespass, as to beat the party or the like, he is not guilty of burglary: 1 Hale, 561. The intent must be proved as laid. 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 holden fatal: R. v. Dobbs, 2 East, P. C. 513. It is immaterial whether the felonious intent be executed or not; thus, they are burglars who, with a felonious intent, break any house or church in the night, although they take nothing away. And herein this offence differs from robbery, which requires that something be taken though it be not material of what value. The felonious intent with which the prisoner broke and entered the house cannot be proved by positive testimony;

it can only be proved by the admission of the party, or by circumstances from which the jury may presume it. Where it appears that the prisoner actually committed a felony after he entered the house this is satisfactory evidence and almost conclusive that the intent with which he broke and entered the house was to commit that felony. Indeed, the very fact of a man's breaking and entering a dwelling-house in the night time is strong presumptive evidence that he did so with intent to steal, and the jury will be warranted in finding him guilty upon this evidence merely: R. v. Brice, R. & R. 450; R. v. Spanner, 12 Cox, 155. If the intent be at all doubtful it may be laid in different ways in different counts: R. v. Thompson, 2 East, P. C. 515; 2 Russ. 45. It seems sufficient, in all cases where a felony has actually been committed, to allege the commission of it, as that is sufficient evidence of the intention. But the intent to commit a felony (now any indictable offence), and the actual commission of it, may both be alleged; and in general this is the better mode of statement: R. v. Furnival, R. & R. 445.

As to punishment *see post*, s. 410.

PART XXX.

BURGLARY AND HOUSEBREAKING.

Definitions.

407. In this part the following words are used in the following senses:

(*a*) "Dwelling-house" means a permanent building the whole or any part of which is kept by the owner or occupier for the residence therein of himself, his family or servants, or any of them, although it may at intervals be unoccupied;

(i) A building occupied with, and within the same curtilage with, any dwelling-house shall be deemed to be part of the said dwelling-house if there is between such building and dwelling-house a communication, either immediate or by means of a covered and inclosed passage, leading from the

one to the other, but not otherwise. R. S. C. c. 164, s. 36. 24-25 V. c. 96, s. 53 (Imp.).

(*b*) To "break" means to break any part, internal or external, of a building, or to open by any means whatever (including lifting, in the case of things kept in their places by their own weight), any door, window, shutter, cellar-flap or other thing intended to cover openings to the building, or to give passage from one part of it to another;

(i) An entrance into a building is made as soon as any part of the body of the person making the entrance, or any part of any instrument used by him, is within the building;

(ii) Every one who obtains entrance into any building by any threat or artifice used for that purpose, or by collusion with any person in the building, or who enters any chimney or other aperture of the building permanently left open for any necessary purpose, shall be deemed to have broken and entered that building.

These definitions are taken from the English draft where they are given as existing law.

BREAKING PLACES OF WORSHIP.

408. Every one is guilty of an indictable offence and liable to *fourteen years'* imprisonment who breaks and enters *any place of public worship* and commits *any indictable offence* therein, *or who having committed any indictable offence therein,* breaks out of such place. R. S. C. c. 164, s. 35. (*Amended*). 24-25 V. c. 96, s. 50 (Imp.).

A tower of a parish church is a part of the church; so is the vestry: R. v. Wheeler, 3 C. & P. 585; R. v. Evans, Car. & M. 298.

The goods of a dissenting chapel, vested in trustees, cannot be described as the goods of a servant put in charge of the chapel and the things in it: R. v. Hutchinson, R. & R. 412. Where the goods belonging to a church are stolen they may be laid in the indictment to be the goods of the parishioners: 2 Russ. 73.

Indictment for breaking and entering a church and stealing therein.— a place of public worship, to wit, the church of the parish of in the county of unlawfully did break and enter, and there, in the said church, one silver cup of the goods and chattels of unlawfully did steal: *see* ss. 619-620.

Indictment for stealing in and breaking out of a church.— that at A. B., one silver cup,

of the goods and chattels of in a place of public worship, to wit, the church of the said parish there situate, unlawfully did steal, and that the said (*defendant*) so being in the said church as aforesaid, afterwards, and after he had so committed the said offence in the said church, as aforesaid, on the day and year aforesaid, unlawfully did break out of the said church: *see* ss. 619-620.

If a chapel which is private property be broken and entered lay the property as in other cases of larceny. If the evidence fails to prove the breaking and entering a church, etc., the defendant may be convicted of simple larceny. Upon the trial of any offence under this section the jury may, under s. 711, convict of an attempt to commit such offence.

BREAKING PLACE OF WORSHIP WITH INTENT.

409. Every one is guilty of an indictable offence and liable to seven years' imprisonment who breaks and enters *any place of public worship* with intent to commit *any indictable offence* therein. R.S. C. c. 164, s. 42 (*amended*). 24-25 V. c. 96, s. 57 (Imp.)

See form under s. 412, *post.*

BURGLARY—PUNISHMENT.

410. Every one is guilty of the indictable offence called burglary, and liable to imprisonment for life, who—

(*a*) breaks and enters a dwelling-house by night with intent to commit *any indictable offence* therein; or

(*b*) breaks out of any dwelling-house by night, either after committing *an indictable offence* therein, or after having entered such dwelling-house, either by day or by night, with intent to commit *an indictable offence* therein. R. S. C. c. 164, s. 37 (*Amended*). 24-25 V. c. 96, ss. 51, 52 (Imp.).

Section 3, *ante*, declares what is "night."

If a person commits a felony in a house, and afterwards breaks out of it in the night-time, this is burglary, although he might have been lawfully in the house; if, therefore, a lodger has committed a larceny in the house and in the night-time even lifts a latch to get out of the house with the stolen property, this is a burglarious breaking out of the house: R. v. Wheeldon, 8 C. & P. 747.

It has been held that getting out of a house by pushing up a new trap-door, which was merely kept down by its own weight, and on which fastenings had not yet been put, but the old trap-door, for which this new one was substituted, had been secured by fastenings, was not a sufficient breaking out of the house: R. v. Lawrence, 4 C. & P. 231. On this case Greaves says: "unless a breaking *out* of a house can be distinguished from the breaking *into* a house, this case seems overruled by R. v. Russell, 1 Moo. 377."

If the felon, to get out of the dwelling-house, should break an inside door the case would plainly enough be within the statute. But the facts of the cases seem not to have raised the question, absolutely to settle it, whether where the intent is not to get out the breach of an inner door by a person already within, having made what is tantamount to a felonious entry, but not by breaking, is sufficient to constitute burglary, if there is no entry through the inner door thus broken. There are indications that the breaking alone in such circumstances may be deemed enough: R. v. Wheeldon, *supra*. On the other hand, it was held that burglary is not committed by an entry, with felonious intent, into a dwelling-house, without breaking, followed by a mere breaking, without entry, of an inside door: R. v. Davis, 6 Cox, 369; 2 Bishop Cr. L. 100. But in Kelyng's Cr. C. 104, it is said that if a servant in the house, lodging in a room remote from his master in the night-time, draweth the latch of a door to come into his master's chamber, with an intent to kill him, this is burglary.

On any indictment for burglary the prisoner may be convicted of the offence of breaking the dwelling-house under s. 412, *post*.

On an indictment for burglary the prisoner cannot be found guilty of felonious receiving: St. Laurent v. R., 7 Q. L. R. 47.

Indictment for burglary and larceny to the value of twenty-five dollars.— that J. S., on about the hour of eleven of the clock, of the night of the same day, the dwelling-house of J. N., situate unlawfully and burglariously did break and enter, with intent the goods and chattels of one K. O. in the said dwelling-house then being, unlawfully and burglariously to steal; and then in the said dwelling-house, one silver sugar basin, of the value of ten dollars, six silver table-spoons of the value of ten dollars, and twelve silver tea-spoons of the value of ten dollars, of the goods and chattels of the said K. O. in the said dwelling-house then being found, unlawfully and burglariously did steal.

Upon this indictment the defendant, if all the facts are proved as alleged, may be convicted of burglary; if they are all proved, with the exception that the breaking was by night, the defendant may be convicted of housebreaking, under s. 411; if no breaking be proved, but the value of the property stolen proved to be, as alleged, over twenty-five dollars, the verdict may be of stealing in a dwelling-house to that amount, under s. 345, *ante;* if no satisfactory evidence be offered to show, either that the house was a dwelling-house or some building communicating therewith, or that it was the dwelling-house of the party named in the indictment, or that it was locally situated as therein alleged, or that the stolen property was of the value of twenty-five dollars, still the defendant may be convicted of a simple larceny; s. 713: 1 Taylor, Ev. 216; R. v. Comer, 1 Leach, 36; R. v. Hungerford, 2 East, P. C. 518. Where several persons are indicted together for burglary and larceny the offence of some may be burglary and of the others only larceny: R. v. Butterworth R. & R. 520. *See post,* remarks under s. 415.

If no indictable offence was committed in the house the indictment should be as follows:—

that A. B., on about the hour of eleven in the night of the same day, at the dwelling-house of J. N. there situate, unlawfully and burglariously did break and enter, with intent the goods and chattels of the said J. N. in the said dwelling-house then and there being found, then and there unlawfully and burglariously to steal.

The terms of art usually expressed by the averment "burglariously did break and enter" are essentially necessary to the indictment. The word *burglariously* cannot be expressed by any other word or circumlocution; and the averment that the prisoner broke and entered is necessary, because a breaking without an entering, or an entering without a breaking, will not make burglary: 2 Russ. 50: *see* s. 611, *post*. The offence must be laid to have been committed in a mansion-house or dwelling-house, the term *dwelling-house* being that more usually adopted in modern practice. It will not be sufficient to say a *house:* 2 Russ. 46; 1 Hale, 550. It has been said that the indictment need not state whose goods were intended to be stolen, or were stolen: R. v. Clarke, 1 C. & K. 421; R. v. Nicholas, 1 Cox, 218; R. v. Lawes, 1 C. & K. 62; nor specify which goods, if an attempt or an intent to steal only is charged: R. v. Johnson, L. & C. 489: *see* s. 613, *post*.

It is better to state at what hour of the night the acts complained of took place, though it is not necessary that the evidence should correspond with the allegation as to the exact hour; it will be sufficient if it shows the acts to have been committed in the night as this word is interpreted by the statute. However, in R. v. Thompson, 2 Cox, 377, it was held that the hour need not be specified, and that it will be sufficient if the indictment alleges *in the night*.

Indictment for burglary by breaking out.— that J. S., on about the hour of eleven in the night of the same day, being in the dwelling-house of K. O., situate

one silver sugar-basin of the value of ten dollars, six silver table-spoons of the value of ten dollars, and twelve silver tea-spoons of the value of ten dollars, of the goods and chattels of the said K. O., in the said dwelling-house of the said K. O., then being in the said dwelling-house, unlawfully did steal, and that he, the said J. S., being so as aforesaid in the said dwelling-house, and having committed the offence aforesaid, in manner and form aforesaid, afterwards, to wit, on the same day and year aforesaid, about the hour of eleven in the night of the same day, unlawfully and burglariously did break out of the said dwelling-house of the said K. O.

An indictment alleging "did break to get out" or "did break and get out" is bad; the words of the statute are "break out:" R. v. Compton, 7 C. & P. 139. *See pages 471 et seq. ante;* R. v. Lawrence, 4 C. & P. 231; R. v. Wheeldon, 8 C. & P. 747, and remarks on burglary. If it be doubtful whether an indictable offence can be proved, but there be sufficient evidence of an intent to commit such an offence, a count may be added stating the intent. To prove this count the prosecutor must prove the entry, the intent as in other cases, and the breaking out.

Upon the trial of any offence hereinbefore mentioned the jury may convict of an attempt to commit such offence, if the evidence warrants it, under s. 711, *post.*

HOUSEBREAKING AND COMMITTING AN OFFENCE.

411. Every one is guilty of the indictable offence called housebreaking, and liable to fourteen years' imprisonment, who—

(*a*) breaks and enters any dwelling-house by day and commits *any indictable offence* therein; or

(*b*) breaks out of any dwelling-house by day after having committed *any indictable offence* therein. R. S. C. c. 164, s. 41 (*Amended*). 24-25 V. c. 96, s. 56 (Imp.).

See cases cited in R. v. Hughes, Warb. Lead. Cas. 190.

The words "schoolhouse, shop, warehouse or counting-house," in the repealed section have been omitted: *see post,* s. 413.

The breaking and entering must be proved in the same manner as in burglary, 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, the defendant may, notwithstanding, be convicted upon this indictment: R. v. Pearce, R. & R. 174; R. v. Robinson, R. & R. 321; Archbold, 399. And so, also, any breaking and entering which would be sufficient in a case of burglary would be sufficient under this section. Thus, where the prisoner burst open an inner door in the inside of a house, and so entered a shop, in order to steal money from the till, it was held that this was a sufficient breaking to support an indictment for housebreaking: R. v. Wenmouth, 8 Cox, 348. The value of the goods is immaterial if a breaking and entry be proved; but if proved and alleged to be of the value of twenty-five dollars, the prisoner may be convicted of the offence described in s. 345, *ante;* if the prosecutor succeed in proving the larceny, but fail in proving any of the other aggravating circumstances, the defendant may be convicted of simple larceny. The same accuracy in the statement of the ownership and situation of the dwelling-house is necessary in an indictment for this offence as in burglary. But it must be remembered that any error in these matters may now be amended.

As in simple larceny, the least removal of the goods from the place where the thief found them, though they are not carried out of the house, is sufficient upon an indictment for house-breaking. It appeared that the prisoner, after having broken into the house, took two half-sovereigns out of a bureau in one of the rooms, but being detected he threw them under the grate in that room; it was held that if they were taken with a felonious intent this was a sufficient removal of them to constitute the offence: R. v. Amier, 6 C. & P. 344.

As to what was a shop under the repealed section (*see post*, s. 413), it was once said that it must be a shop for the

sale of goods, and that a mere workshop was not within the clause: R. v. Sanders, 9 C. & P. 79; but in R. v. Carter, 1 C. & K. 173, Lord Denman, C.J., declined to be governed by the preceding case, and held that a blacksmith's shop, used as a workshop only, was within the statute. A warehouse means a place where a man stores or keeps his goods which are not immediately wanted for sale; R. v. Hill, 2 Russ. 95. Upon an indictment for breaking and entering a counting-house, owned by Gamble, and stealing therein, it appeared that Gamble was the proprietor of extensive chemical works, and that the prisoner broke and entered a building, part of the premises, which was commonly called the machine-house, and stole therein a large quantity of money. In this building, there was a weighing machine, at which all goods sent out were weighed, and one of Gamble's servants kept in that building a book in which he entered all goods weighed and sent out. The account of the time of the men employed in different departments was taken in that building and their wages were paid there; the books in which their time was entered were brought to that building for the purpose of making the entries and paying the wages. At other times they were kept in another building called the office, where the general books and accounts of the concern were kept. It was objected that this was not a counting-house; but, upon a case reserved, the judges held that it was a counting-house within the statute: R. v. Potter, 2 Den. 235.

An indictment for house-breaking is good if it alleges that the prisoner broke and entered the dwelling-house, and the goods of in the said dwelling-house then and there being found, then and there (omitting "in the said dwelling-house") unlawfully did steal: R. v. Andrews, Car. & M. 121, overruling R. v. Smith, 2 M. & Rob 115, which Coleridge, J., said Patteson, J., was himself since satisfied had been wrongly decided: 2 Russ. 76, note by Greaves.

Indictment.— the dwelling-house of J. N., situate unlawfully did break and enter, by day, with intent the goods and chattels of the said J. N., in the said dwelling-house then being, unlawfully to steal, and one dressing-case of the value of twenty-five dollars, of the goods and chattels of the said J. N., then in the said dwelling-house, then unlawfully did steal.

Upon the trial of an indictment for an offence under this section the jury may, under s. 711, convict the defendant of an attempt to commit the same, if the evidence warrants it. But they can only convict of the attempt to commit the identical offence charged in the indictment; the prisoner was indicted for breaking and entering a dwelling-house, and stealing therein certain goods specified in the indictment, the property of the prosecutor. It was proved at the trial that at the time of the breaking the goods specified were not in the house, but there were other goods there, the property of the prosecutor; the prisoner had not had time to steal anything, having been caught immediately after his entering the house. The jury acquitted the prisoner of the felony charged, but found him guilty of breaking and entering the dwelling-house of the prosecutor, and attempting to steal his goods therein. *Held*, that the conviction was wrong, and that an attempt must be to do that which, if successful, would amount to the felony charged: R. v. McPherson, Dears. & B. 197. The prisoner, under such circumstances, may be convicted of breaking and entering *with intent* to commit an indictable offence, under s. 412, *post*. But only if, as in the form above given, the intent is alleged, which was not the case in R. v. McPherson. *See* s. 64, p. 42, *ante*.

HOUSEBREAKING WITH INTENT.

412. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, by day, breaks and enters any dwelling-house with intent to commit *any indictable offence* therein. R. S. C. c. 164, s. 42 (*Amended*). 24-25 V. c. 96, s. 57 (Imp.).

The words "schoolhouse, shop, warehouse and counting house" were in the repealed clause.

Indictment.— on the dwelling-house of J. N., situate unlawfully did break and enter by day with intent to commit an indictable offence therein, to wit, the goods and chattels of the said J. N., in the said dwelling-house there being, then to steal.

Where there is only an attempt it is not always possible to say what goods the would-be thief meant to steal, and an indictment for an attempt to commit larceny need not specify the goods intended to be stolen: R. v. Johnson, L. & C. 489.

Upon an indictment under this section the prisoner may be convicted, under s. 711, of attempting to commit the offence charged: R. v. Bain, L. & C. 129.

Greaves says: "This clause is new, and contains a very important improvement in the law. Formerly the offence here provided was only a misdemeanour at common law. Now it often happened that such an offence was very inadequately punished as a misdemeanour, especially since the night was made to commence at nine in the evening; for at that time, in the winter, in rural districts, the poor were often in bed. Nor could anything be much more unreasonable than that the same acts done just after nine o'clock at night should be liable to penal servitude for life, but if done just before nine they should only be punishable as a misdemeanour. It is clear that if, on the trial of an indictment for burglary with intent to commit a felony, it should appear that the breaking and entry were before nine o'clock the prisoner might be convicted under this clause. But upon an indictment *in the ordinary form* for house-breaking, the prisoner could not be convicted under this clause, because it does not allege an intent to commit a felony (as in McPherson's Case, *ante*, under last preceding section). It will be well, however, to alter the form of these indictments, and to allege a breaking and

entry with intent to commit some felony (any indictable offence), in the same manner as in an indictment for burglary with intent to commit felony, and then to allege the felony that is supposed to have been committed in the house. If this be done, then, if the evidence fail to prove the commission of that felony, but prove that the prisoner broke and entered with intent to commit it, he may be convicted under this clause."

BREAKING SHOP, SCHOOL-HOUSE, ETC., AND COMMITTING AN OFFENCE.

413. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, either by day or night, breaks and enters and commits *any indictable offence* in a school-house, shop, warehouse or counting house, or any building within the curtilage of a dwelling house, but not so connected therewith as to form part of it under the provisions hereinbefore contained. R. S. C. c. 164, s. 40 *(Amended)*. 24-25 V. c. 96, ss. 55-56 (Imp.).

Section 407 defines what is within the curtilage.

See ante, under s. 411 what is a shop, or warehouse, or counting-house: also as to indictment.

"Curtilage" is a court-yard, enclosure or piece of land near and belonging to a dwelling-house.—*Toml. Law Dict.*

The breaking and entering must be proved in the same manner as in burglary, except that it is immaterial whether it was done in the day or night. If this proof fail the defendant may be convicted of simple larceny.

The building described in the statute is "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," that is, not communicating with the dwelling-house, either immediately or by means of a covered and enclosed passage leading from the one to other as described in s. 407. To break and enter such a building was, before the present statute, burglary, or house-breaking, and although this enactment, which expressly defines the building meant thereby to be a building within the *curtilage*, appears to exclude many of those buildings which were formerly deemed parcel of the dwelling-house, from their adjoining the dwelling-house, and being occupied there-

with, although not within any common enclosure or curtilage, yet some of the cases decided upon these subjects may afford some guide to the construction of the present section. Where the defendant broke into a goose-house, which opened into the prosecutor's yard, into which yard the prosecutor's house also opened, and the yard was surrounded, partly by other buildings of the homestead, and partly by a wall in which there was a gate leading to the road, and some of the buildings had doors opening into the lane, as well as into the yard, the goose-house was holden to be part of the dwelling-house: R. v. Clayburn, R. & R. 360. Where the prosecutor's house was at the corner of the street, and adjoining thereto was a workshop, beyond which a coach-house and stable adjoined, all of which were used with the house and had doors opening into a yard belonging to the house, which yard was surrounded by adjoining buildings and was altogether enclosed, but the shop had no internal communication with the house, had a door opening into the street, and its roof was higher than that of the house, the workshop was holden to be a parcel of the dwelling-house: R. v. Chalking, R. &. R. 334. So, a warehouse which had a separate entrance from the street, and had no internal communication with the dwelling-house with which it was occupied but was under the same roof, and had a back door opening into the yard into which the house also opened and which enclosed both, was holden to be part of the dwelling-house: R. v. Lithgo, R. & R. 357. So, where in one range of buildings the prosecutor had a warehouse and two dwelling-houses, formerly one house, all of which had entrances into the street, but had also doors opening into an enclosed yard belonging to the prosecutor, and the prosecutor let one of the houses between his house and the warehouse together with certain easements in the yard, it was holden that the warehouse was parcel of the dwelling-house of the prosecutor; it was so before the division of the house and remained so afterwards: R. v.

Walters, 1 Moo. 13. And where the dwelling-house of the prosecutor was in the centre of a space of about an acre of land, surrounded by a garden wall, the front wall of a factory, and the wall of the stable-yard, the whole being the property of the prosecutor who used the factory, partly for his own business and partly in a business in which he had a partner, and the factory opened into an open passage into which the outer door of the dwelling-house also opened, it was holden that the factory was properly described as the dwelling-house of the prosecutor: R. v. Hancock, R. & R. 170. But a building separated from the dwelling-house by a public thoroughfare cannot be deemed to be part of the dwelling-house: R. v. Westwood, R. & R. 495. So neither is a wall, gate or other fence, being part of the outward fence of the curtilage, and opening into no building but into the yard only, part of the dwelling-house: R. v. Bennett, R. & R. 289. Nor is the gate of an area, which opens into the area only, if there be a door or fastening to prevent persons from passing from the area into the house, although that door or other fastening may not be secured at that time: R. v. Davis, R. & R. 322.

Where the building broken into was in the fold-yard of the prosecutor's farm, to get to which from the house it was necessary to pass through another yard called the pump-yard into which the back door of the house opened, the pump-yard being divided from the fold-yard by a wall four feet high in which there was a gate, and the fold-yard being bounded on all sides by the farm buildings, a wall from the house, a hedge and gates, it was held that the building was within the curtilage: R. v. Gilbert, 1 C. & K. 84. *See* R. v. Egginton, 2 Leach, 913.

Indictment.— a certain building of one J. N., situate unlawfully did break and enter, the said building then being within the curtilage of the dwelling-house of the said J. N. there situate, and by the said J. N. then and there occupied therewith, and there being then

and there no communication between the said building and the said dwelling-house, either immediate or by means of any covered and enclosed passage leading from the one to the other, with intent the goods and chattels of the said J. N. in the said building then being to steal, and that the said J. S. then and there, in the said building, one silver watch of the goods and chattels of the said J. N. did steal.

This count may be added to an indictment for burglary, house-breaking or stealing in a dwelling-house to the amount of twenty-five dollars, and should be added whenever it is doubtful whether the building is in strictness a dwelling-house. If the evidence fail to prove the actual stealing, but the breaking, entry and intent to steal be proved, the prisoner may be convicted, under this indictment, of the offence described in s. 414, as this indictment alleges the intent as well as the act.

Under s. 711 a verdict of guilty of an attempt to commit the offence charged may be given upon an indictment on this section, if the evidence warrants it.

BREAKING SHOP, SCHOOL-HOUSE, ETC., WITH INTENT.

414. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, either by day or night, breaks and enters any of the buildings mentioned in the last preceding section with intent to commit *any indictable offence* therein. R. S. C. c. 164, s. 42 *(Amended)*. 24-25 V. c. 96, s. 57 (Imp.).

See remarks under ss. 412 & 413, *ante*.

BEING FOUND IN DWELLING-HOUSE BY NIGHT.

415. Every one is guilty of an indictable offence and liable to seven years' imprisonment who unlawfully enters, or is in, any dwelling-house by night with intent to commit *any indictable offence* therein. R. S. C. c. 164, s. 39. 24-25 V. c. 96, s. 54 (Imp.).

Greaves says: "This clause is new and contains a great improvement of the law. It frequently happened on the trial of an indictment for burglary where no property had been stolen that the prisoner escaped altogether for want of sufficient proof of the house having been broken into, though there was no moral doubt that it had been so. This

clause will meet all such cases. It will also meet all cases where any door or window has been left open, and the prisoner has entered by it in the night. It is clear that if, on the trial of an indictment for burglary with intent to commit a felony, the proof of a breaking should fail, the prisoner might nevertheless be convicted of the offence created by this clause for such an indictment contains everything that is required to constitute an offence under this clause, in addition to the allegation of the breaking, and the prisoner may be acquitted of the breaking and convicted of the entering with intent to commit felony, in the same way as on an indictment for burglary and stealing he may be acquitted of the breaking and convicted of the stealing. And this affords an additional reason why, in an indictment for burglary and committing a felony, there should always be introduced an averment of an intent to commit a felony, so that if the proof of the commission of the felony and of the breaking fail the prisoner may nevertheless be convicted of entering by night with intent to commit it."

Indictment.— that J. S., on about the hour of eleven in the night of that same day, the dwelling of K. O., situate unlawfully did enter, with intent the goods and chattels of the said K. O., in the said dwelling-house then being, to steal.

As to what is night, and what is a dwelling-house, in the interpretation of this clause the same rules as for burglary must be followed. Under s. 711 the jury may, if the evidence warrants it, convict of an attempt to commit the offence charged upon an indictment under this section.

BEING FOUND ARMED WITH INTENT.

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

(*a*) armed with any dangerous or offensive weapon or instrument *by day*, with intent to break or enter into any *dwelling-house*, and to commit *any indictable offence* therein; or

(*b*) armed as aforesaid by night, with intent to break into *any* building and to *commit any indictable offence* therein. R. S. C. c. 164, s. 43 (*Amended*). 24-25 V. c. 96, s. 58 (Imp.).

"Offensive weapon" defined, s. 3.

The punishment was three years under the repealed clause.

The word "by day" is new. *By day* the offence is as to a dwelling-house only. *By night* it is as to any building: *see* form of indictment under next section.

BEING DISGUISED OR IN POSSESSION OF HOUSE-BREAKING INSTRUMENTS.

417. Every one is guilty of an indictable offence and liable to *five* years' imprisonment who is found—

(*a*) having in his possession by night, without lawful excuse (the proof of which shall lie upon him) any instrument of housebreaking; or

(*b*) having in his possession *by day* any such instrument with intent to commit any indictable offence; or

(*c*) *having his face masked or blackened, or being otherwise disguised, by night, without lawful excuse (the proof whereof shall lie on him);* or

(*d*) having his face masked or blackened, or being otherwise disguised, *by day*, with intent to commit any indictable offence. R. S. C. c. 164, s. 43 (*Amended*). 24-25 V. c. 100, s. 58 (Imp.).

"Having in possession," defined, s. 3.

The words in italics are new.

Sub-sections (*b*), (*c*), (*d*) are also new or extensions of the repealed statute.

"It is thought that being disguised by night affords sufficient *prima facie* evidence of a criminal intent."—Imp. Comm. Rep.

The punishment was three years under the repealed clause.

Indictment under s. 416 for being found by night armed.— that A. B. on about the hour of eleven of the night of the same day at was found unlawfully armed with a certain dangerous and offensive weapon (*or instrument*), with intent to break and enter into a dwelling-house (*or any other building*) of C. D. there situate, and the goods and chattels in the said dwelling-house (*or any other building*), then being, unlawfully to steal.

It is not necessary to aver that the goods and chattels were the property of any particular person: R. v. Lawes, R. v. Clarke, 1 C. & K. 62, 421; R. v. Nicholas, 1 Cox, 218.

See, ante, s. 3, as to the interpretation of the word "night."

In R. v. Jarrald, L. & C. 301, it was held, upon a case reserved, that an indictment under the repealed section, for being found by night armed with a dangerous and offensive weapon and instrument, with intent to break and enter into a building and commit a felony therein, must specify, as in burglary, the building to be broken into. Crompton, J., was of opinion that the particular felony intended must also be specified.

On this case Greaves, 2 Russ. 70, note *g*, says: "With all deference it is submitted that this decision is clearly erroneous. The ground on which Cockburn, C.J., rests the decision of the first point (as to a particular house to be specified, *now* s. 417) is answered by the second clause of the same section; for, under it, the mere possession, without lawful excuse, of any instrument of housebreaking in the night constitutes the offence without any intent to commit felony at all; and this offence is plainly one step further from the attempt to commit a felony than where the intent to commit some felony exists, though the particular felony is not yet fixed . . . As to the rules of criminal pleading these seem, in this case, to have been misconceived. It is quite a mistake to suppose that these rules require the specification of particulars where it is impracticable to specify them. Wherever this is the case the rules allow general or other statements instead. . . . It cannot be doubted that this decision, instead of promoting the object of the Act in this respect, is substantially a repeal of it, for it is hardly conceivable that, in the majority of cases, it will be possible to prove an intent to commit any particular felony."

To this Cave answers, (3 Burn, 252, *note a*): " . . . . But a close consideration of the statute appears to confirm it (the decision in *Jarrald's Case*): it may well be that in all the other cases except 'having implements of house-breaking' an intent must be clearly proved; for the 'being armed with a dangerous weapon' or 'having the face blacked' or 'being by night in a dwelling-house' are clearly no offences unless done for a felonious purpose. And the very essence of the offence is such felonious purpose. But, with regard to 'having instruments of house-breaking,' the statute implies the intent from the nature of the instrument, and throws the proof of innocence upon the prisoner. The general intention of the statute is thus well carried out; for if a man be found by night anywhere with house-breaking implements, or such as the jury shall think he intended to use as such, he may be indicted for that offence. But if he has not any house-breaking implements, but is 'armed with a dangerous weapon' not usable for house-breaking, then the particular intent under s. 416 must be laid and proved as laid."

Indictment under s. 417 (a) for having in possession, by night, implements of house-breaking.— on about the hour of eleven in the night of the same day, at was found, he the said (*defendant*) then and there, by night as aforesaid, unlawfully having in his possession, without lawful excuse, certain implements of house-breaking (to wit).

An instrument capable of being used for lawful purposes is within the statute if the jury find that such instrument may also be used for the purposes of house-breaking, and that the prisoner intended to use it as an implement of house-breaking when found at night in possession of it: R. v. Oldham, 2 Den. 472.

Where an indictment for having in possession without lawful excuse certain implements of house-breaking by night the jury found the prisoners guilty of the possession without

lawful excuse, but that there was no evidence of an intent to commit a felony, and the indictment omitted the words "with intent to commit a felony," it was held that the omission did not render the indictment bad, and that it was not necessary to prove an intent to commit a felony: R. v. Bailey, Dears. 244.

Indictment under s. 417 (d) for being found by day with a disguised face with intent to commit an indictable offence.

that at on A. B. was found by day, then and there having his face blackened (*masked, blackened or otherwise disguised*) with intent then and there to kill and murder one C. D.

In R. v. Thompson, 11 Cox, 362, *held*, that where several persons are found out together by night for the common purpose of house-breaking and one only is in possession of house-breaking implements all may be found guilty of the misdemeanour created by this section, for the possession of one is in such case the possession of all. *See* s. 3 for definition of "having in possession."

PUNISHMENT AFTER PREVIOUS CONVICTION.

418. Every one who, after a previous conviction for any *indictable offence*, is convicted of *an indictable offence* specified in this part for which the punishment on a first conviction is less than fourteen years' imprisonment is liable to *fourteen years'* imprisonment. R. S. C. c. 164, s. 44 *(Amended)*. 24-25 V. c. 96, s. 59 (Imp.).

The imprisonment was for ten years under the repealed clause. As to trial of an offence after a previous conviction *see post*, ss. 628 and 676.

FORGERY.

GENERAL REMARKS.

"To forge is metaphorically taken from the smith who beateth upon his anvil; and forgeth what fashion and shape he will; the offence is called *crimen falsi*, and the offender *falsarius*, and the Latin word, to forge, is *falsare* or *fabricare*": Coke, 3 Inst. 169.

"Forgery is the fraudulent making or alteration of a writing, to the prejudice of another's right": 4 Blacks. 247.

"Forgery is the false making of an instrument with intent to prejudice any public or private right": 3rd Rep. Crim. Law Comm. 10th June, 1847, p. 34; ss. 421, 422, *post*.

"Forgery is the fraudulent making of a false writing which, if genuine, would be apparently of some legal efficacy": Bishop, 2 Cr. L. 523.

"The characteristic of the crime of forgery is the false making of some written or other instrument for the purpose of obtaining credit by deception. The relation this offence bears to the general system may be thus briefly established. In most affairs of importance the intentions, assurances, or directions of men are notified and authenticated by means of written instruments. Upon the authenticity of such instruments the security of many civil rights, especially the right of property, frequently depends; it is, therefore, of the highest importance to society to exclude the numerous frauds and injuries which may obviously be perpetrated by procuring a false and counterfeited written instrument, to be taken and acted on as genuine. In reference to frauds of this description it is by no means essential that punishment should be confined to cases of actually accomplished fraud; the very act of falsely making and

constructing such an instrument with the intention to defraud is sufficient, according to the acknowledged principles of criminal jurisprudence, to constitute a crime,—being in itself part of the endeavour to defraud, and the existence of the criminal intent is clearly manifested by an act done in furtherance and in part execution of that intention. The limits of the offence are immediately deducible from the general principle already adverted to. As regards the subject matter, the offence extends to every writing used for the purpose of authentication.

"The crime is not confined to the falsification of mere writings; it plainly extends to seals, stamps, and all other visible marks of distinction by which the truth of any fact is authenticated, or the quality or genuineness of any article is warranted, and, consequently, where a party may be deceived and defrauded, from having been by false signs induced to give credit where none was due. With respect to the false making of any such instrument the offence extends to every instance where the instrument is, under the circumstances, so constructed as to induce a party to give credit to it as genuine and authentic in a point where it is false and deceptive. And in this respect a forged instrument differs from one which is merely false and untrue in stating facts which are false. Where the instrument is forged, as where a certificate purporting to be signed by an authorized officer was not, in truth, signed by him, a party to whom it is shown is deceived in being induced to suppose that the fact certified is accredited by the officer whose certificate it purports to be, and he is deceived in that respect whether the fact certified be true or false. If, on the other hand, such a certificate be in truth signed by the officer whose name it bears, the instrument is not forged although the fact certified be falsely certified, for here the party receiving the certificate is deceived, not by being falsely induced to believe that the officer had accredited the instrument by his signature, but from the officer having

falsely certified the fact. The instrument may, therefore, be forged although the fact authenticated be true. The instrument may be genuine although the fact stated be false. Where money or other property is obtained by an instrument of the latter description, that is, where it is false merely as containing a false statement or representation, the offence belongs to the class of obtaining money or other property by false pretenses": 5th Rep. Crim. Law Comm. 22nd of April, 1840.

"Consistently with the principles which govern the offence of forgery an instrument may be falsely made although it be signed or executed by the party by whom it purports to be signed or executed. This happens where a party is fraudulently induced to execute a will, a material alteration having been made, without his knowledge, in the writing; for, in such a case, although the signature be genuine the instrument is false, because it does not truly indicate the testator's intentions, and it is the forgery of him who so fraudulently caused such will to be signed, for he made it to be the false instrument which it really is:" Cr. Law Comm. Rep. *loc. cit.*

This passage of the Criminal Law Commissioners seems to be based on a very old case, cited in Noy's Reports, 101, Combes's Case; but in a more recent case, R. v. Collins, 2 M. & Rob. 461, it was held that fraudulently to induce a person to execute an instrument, on a misrepresentation of its contents, is not a forgery; and, in a case of R. v. Chadwick, 2 M. & Rob. 545, that to procure the signature of a person to a document, the contents of which have been altered without his knowledge, is not a forgery: *see* Stephen's Cr. L. Art. 356, illustrations, 10, 11.

The report (*loc. cit.*) of the criminal law commissioners continues as follows: "Upon similar grounds, an offender may be guilty of a false making of an instrument although he sign or execute it in his own name, in case it be false in any material part, and calculated to induce another to give

credit to it as genuine and authentic where it is false and deceptive. This happens where one, having conveyed land, afterwards, for the purpose of fraud, executes an instrument purporting to be a prior conveyance of the same land; here, again, the instrument is designed to obtain credit by deception, as purporting to have been made at a time earlier than the true time of its execution."

This doctrine was approved of in a case, in England, of R. v. Ritson, 11 Cox, 352, and it was there held, upon a case reserved, that a man may be guilty of forgery by making a false deed in his own name. Kelly, C.B., delivering the judgment of the court, said: "I certainly entertained some doubt at one time upon this case, because most of the authorities are of an ancient date, and long before the passing of the statutes of 11 Geo. IV. and 1 Will. IV., and 24 & 25 V. However, looking at the ancient authorities and the text books of the highest repute, such as Com. Dig., Bacon's Abr., 3 Co. Inst., and Foster's C. L. 117, they are all uniformly to the effect, not that every instrument containing a false statement is a forgery, but that every instrument which is false in a material part, and which purports to be that which it is not, or to be executed by a person who is not the real person, or which purports to be dated on a day which is not the real day whereby a false operation is given to it, is forgery."

"Forgery, *at common law*, was an offence in falsely and fraudulently making and altering any matter of record or any other authentic matter of a public nature, as a parish register or any deed or will, and punishable by fine and imprisonment. But the mischiefs of this kind increasing it was found necessary to guard against them by more sanguinary laws. Hence we have several Acts of Parliament declaring what offences amount to forgery, and which inflict severer punishments than there were at the common law": Bacon's Abr. vol. 3, 277. Curwood, 1 Hawk. 263, is of opinion that this last definition is wholly inapplicable

to the crime of forgery *at common law*, as, even at *common law*, it was forgery to make false "*private*" writings.

"The notion of forgery does not seem so much to consist in the counterfeiting a man's hand and seal, which may often be done innocently, but in the endeavouring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another, which he is in no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation which in truth and justice it ought not to have": 1 Hawk. 264.

The definitions containing only the words "with intent to defraud" without the words "with intent to deceive" seem defective. In fact, there are many acts held to be forgery where no intent to defraud, as this expression is commonly understood, exists in the mind of the person committing the act; as, for instance, if the person, forging a note, means to take it up, and even has taken it up, so as not to defraud any one, this is clearly forgery if he issued it, and got money or credit or anything upon it: R. v. Hill, 2 Moo. 30; R. v. Geach, 9 C. & P. 499; or forging a bill payable to the prisoner's own order, and uttering it without indorsement: R. v. Birkett, R. & R. 86; or if one, while knowingly passing a forged bank note, agrees to receive it again should it prove not to be genuine, or if a creditor executes a forgery of the debtor's name to get from the proceeds payment of a sum of money due him: R. v. Wilson, 1 Den. 284; or if a party forges a deposition to be used in court, stating merely what is true, to enforce a just claim. All these acts are forgery; yet where is the intent to defraud in these cases? It may be said that the law infers it. But why make the law infer the existence of what does not exist? Why not say that "forgery is the false making of an instrument with intent to defraud or *deceive*." *See* now s. 422, *post*. The word "*deceive*" would cover all the

cases above cited; in each of these cases, the intent of the forger is that the instrument forged should be used as good, should be taken and received as signed and made by the person whose name is forged, in consequence, to deceive *quoad hoc*, and for this, though he did not intend to defraud, though no one could possibly be defrauded by his act, he is in law guilty of forgery: *see* 2 Russ. 774.

It is true that the court of Crown cases reserved, in England, held in R. v. Hodgson, Dears. & B. 3, that, upon an indictment for forgery at common law, it is necessary to prove, not only an intent to defraud, but also an intent to defraud a particular person, though, when this case was decided, the statute in England (14 & 15 V. c. 100, s. 8,) enacted that it was not necessary in indictments for forgery to allege an intent to defraud any particular person: s. 613, *post*. In this Hodgson's case the prisoner had forged and uttered a diploma of the college of surgeons; the jury found that the prisoner forged the document with the general intent to induce the belief that it was genuine, and that he was a member of the college, and that he showed it to certain persons with intent to induce such belief in them, but that he had no intent, in forging or uttering it, to commit any particular fraud or specific wrong to any individual.

Though the offence charged in this case was under the common law, it must be remembered that s. 8, of 14 & 15 V. c. 100, applied to indictments under the common law as well as to indictments under the statutes, as now also do s. 44 of the English Forgery Act and ss. 422, s-s. 3 and 613, *post*.

Greaves remarks on the decision in this case:—

"As the clause of which this is a re-enactment, 44 of the English Act, was considered in R. v. Hodgson, and as that case appears to me to have been erroneously decided, it may be right to notice it here. The prisoner was indicted at common law for forging and uttering a diploma of the

college of surgeons, and the indictment was in the common form. The college of surgeons has no power of conferring any degree or qualification, but before admitting persons to its membership it examines them as to their surgical knowledge, and, if satisfied therewith, admits them, and issues a document called a diploma, which states the membership. The prisoner had forged one of these diplomas. He procured one actually issued by the college of surgeons, erased the name of the person mentioned in it, and substituted his own. He hung it up in his sitting-room, and, on being asked by two medical practitioners whether he was qualified, he said he was, and produced this document to prove his assertion. When a candidate for an appointment as vaccinating officer he stated he had his qualification, and would show it if the clerk of the guardians, who were to appoint to the office, would go to his gig; he did not, however, then produce or show it. The prisoner was found guilty, the fact to be taken to be, that he forged the document with the general intent to induce a belief that it was genuine, and that he was a member of the college of surgeons, and that he showed it to two persons with the particular intent to induce such belief in these two persons, but that he had no intent in forging or in altering, to commit any particular fraud, or any specific wrong to any individual. And upon a case reserved it was held that the 14 & 15 V. c. 100, s. 8, altered the form of pleading only, and did not alter the character of the offence charged, and that the law as to that is the same as if the statute had not been passed; and that, in order to make out the offence of forgery at common law, there must have been, at the time the instrument was forged, an intention to defraud some particular person. Now, this judgment is clearly erroneous. The 14 & 15 V. c. 100, s. 8, does, in express terms, alter the law as well as the form of the indictment, for it expressly enacts, '*that on the trial* of any of the offences in this section mentioned (*forging, uttering, disposing of or putting off any instrument whatsoever*) it shall not be necessary to *prove* that

the defendant did the act charged with an intent to defraud.' The judgment, therefore, and the clause in the Act are directly in contradiction to each other, and, consequently, the former cannot be right. The clause was introduced advisedly for the very purpose of altering the law. *See my note to Lord Campbell's Acts, page 13.* It is a fallacy to suppose that there must have been an intent to defraud any particular person at the time of forging the document. In Tatlock v. Harris, 3 T. R. 176, that great lawyer, Shepherd, said in argument, 'it is no answer to a charge of forgery to say that there was no *special* intent to defraud any *particular* person, because a *general intent* to defraud is sufficient to constitute the crime;' and this position was not denied by that great lawyer, Wood, who argued on the other side, and was apparently adopted by the court. It is cited in 1 Leach, 216, *note* (*a*); 3 Chit. Cr. L. 1036; and, as far as we are aware, was never doubted before this case. Indeed, in R. v. Tylney, 1 Den. 319, it seems to have been assumed on all hands to be the law. There the prisoners forged a will, but there was no evidence to show that any one existed who could have been defrauded by it, and the judges were equally divided whether a count for forgery with intent to defraud some person unknown could, under such circumstances, be supported. It is obvious that this assumed that if there had been evidence that there was any one who might have been defrauded, though there was no evidence that the prisoners even knew of the existence of any such person, the offence would have been forgery. Indeed it would be very startling to suppose that a man who forged a will, intending to defraud the next of kin, whoever they might happen to be, was not guilty of forgery because he had only that general intent."

"The point is too obvious to have escaped that able criminal lawyer, Mr. Prendergast, and, as he did not take it, he clearly thought it wholly untenable, and so, also, must the judges who heard the case. *See* also the observations

of Cresswell, J., in R. v. Marcus, 2 C. & K 356. In R. v. Nash, 2 Den. 493, Maule, J., expressed a very strong opinion that it was not necessary, in order to prove an intent to defraud, that there should be any person who could be defrauded, and this opinion was not dissented from by any of the other judges."

"It has long been settled that making any instrument, which is the subject of forgery, in the name of a non-existing person is forgery, and in Wilks' Case, 2 East, P. C. 957, all the judges were of opinion that a bill of exchange drawn in fictitious names was a forged bill. Now, every one knows that, at the time when such documents are forged, the forger has no intent to defraud any particular person, but only an intent to defraud any person whom he may afterwards meet with, and induce to cash the bill; and no suggestion has ever been made in any of these cases that that offence was not forgery. The ground of the present judgment seems to have been that formerly the particular person who was intended to be defrauded must have been named in the indictment; no doubt it is a general rule of criminal pleading that the names of persons should be stated, but this rule is subject to the exception that, wherever the stating the name of any person in an indictment is highly inconvenient or impracticable, the name need not be stated, for *lex neminem cogit ad vana seu impossibilia.* Therefore, the names of inhabitants of counties, hundreds and parishes need never be stated; so, too, where there is a conspiracy to defraud tradesmen in general the names need not be stated. So, where there is a conspiracy to raise the funds, it is not necessary to state the names of the persons who shall afterwards become purchasers of stock, for the defendants could not, except by a spirit of prophecy, divine who would be the purchasers on a subsequent day'; *per* Lord Ellenborough, C.J., in R. v. De Berenger, 3 M. & S. 73; which reason is equally applicable to the case where, at the time of forging an instrument, there is no

intent to defraud any particular person. Indeed, it is now clearly settled that, where a conspiracy is to defraud indefinite individuals, it is unnecessary to name any individuals: R. v. Peck, 9 A. & E. 686; R. v. King, 7 Q. B. 782. This may be taken to be a general rule of criminal pleading, and it has long been applied to forgery. In R. v. Birch, 1 Leach, 79, the prisoners were convicted of forging a will, and one count alleged the intent to be 'to defraud the person or persons who would by law be entitled to the messuages' whereof the testator died seized. And it has been the regular course in indictments for forging wills, at least ever since that case, to insert counts with intent to defraud *the heir-at-law* and the *next of kin*, generally: 3 Chit. Cr. L. 1069. It is true that in general there have also been counts specifying the heir-at-law or the next of kin by name. But in R. v. Tylney, 1 Den. 319, there was no such count. No objection seems ever to have been taken to any such general count. So, also, in any forgery with intent to defraud the inhabitants of a county, hundred or parish the inhabitants may be generally described. These instances clearly show that it is not necessary in forgery any more than in other cases to name individuals where there is either great inconvenience or impracticability in doing so. A conviction for conspiracy to negotiate a bill of exchange, the drawers of which were a fictitious firm, and thereby fraudulently to obtain goods from the *King's subjects*, although it did not appear that any particular person to be defrauded was contemplated at the time of the conspiracy, has been held good: R. v. Hevey, 2 East, P. C. 858, note (*a*); and this case bears considerably on the present question. If a person forged a bill of exchange with intent to defraud any one whom he might afterwards induce to cash it, and he uttered it to A. B., it cannot be doubted that he would be guilty of uttering with intent to defraud A. B., and it would indeed be strange to hold that he was guilty of uttering, but not of forging, the bill. No doubt the offence of forgery consists in the intent to deceive or de-

fraud; but a general intent to defraud is just as criminal as to defraud any particular individual. In each case there is a wrongful act done with a criminal intent, which, according to R. v. Higgins, 2 East, 5, is sufficient to constitute an indictable offence. In the course of the argument Erle, J., said: "Would it not have been enough to allege an intent to deceive divers persons to the jurors unknown, to wit, all the patients of his late master?" This approaches very nearly to the correct view, viz., that it would have been enough before the 14 & 15 V. c. 100, s. 8, to have alleged and proved an intent to deceive any persons who should afterwards become his patients. Wightman, J., during the argument said: "The question is, whom did he intend to deceive when the forgery was committed?" And Jervis, C.J., said: "The intent must not be a roving intent but a specific intent." Now, if these remarks are confined to a count for forging they are correct, though, in Bolland's Case, 1 Leach, 83, the prisoner was executed for forging an indorsement in the name of a non-existing person, with intent to defraud a person whom he does not even seem to have known when he forged the indorsement."

"But it cannot be doubted that a man may be guilty of intending to defraud divers persons at different times by the same instrument, as where he tries to utter a forged note to several persons one after another, in which case he may be convicted of uttering with intent to defraud each of them. Thus much has been said, because it is very important that the law on the subjects discussed in this note should not be left in uncertainty, and it is much to be regretted that R. v. Hodgson, Dears. & B. 3, was ever decided as it was, as it may encourage ignorant pretenders to fabricate diplomas, and thereby not only to defraud the poor of their money, but to injure their health": Greaves, Cons. Acts, 303.

In R. v. Nash, 2 Den. 493, Maule, J., said: "The recorder seems to have thought, that in order to prove an

intent to defraud there should have been some person defrauded or who might possibly have been defrauded. But I do not think that at all necessary. A man may have an intent to defraud, and yet there may not be any person who could be defrauded by his act. Suppose a person with a good account at his bankers, and a friend, with his knowledge, forges his name to a cheque, either to try his credit, or to imitate his handwriting, there would be no intent to defraud though there would be parties who might be defrauded. But where another person has no account at his bankers, but a man supposes that he has, and on that supposition forges his name, there would be an intent to defraud in that case although no person could be defrauded."

And in R. v. Mazagora, R. & R. 291, it has been holden that the jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, although from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose upon him; and although the object was general to defraud whoever might take the instrument, and the intention of defrauding, in particular, the person who would have to pay the instrument, if genuine, did not enter into the prisoner's contemplation. *See* R. v. Crooke, 2 Str. 901; R. v. Goate, 1 Ld. Raym. 737; R. v. Holden, R. & R. 154. And even if the party to whom the forged instrument is uttered believes that the defendant did not intend to defraud him, and swears it, this will not repel the presumption of an intention to defraud: R. v. Sheppard, R. & R. 169; R. v. Trenfield, 1 F. & F. 43, is wretchedly reported, and cannot be relied upon: 2 Russ. 790, *note* by Greaves; *see* also R. v. Crowther, 5 C. & P. 316, and R. v. James, 7 C. & P. 553, on the question of the necessary intent to defraud, in forgery; and R. v. Boardman, 2 M. & Rob. 147; R. v. Todd, 1 Cox, 57. It has been held, in R. v. Powner, 12 Cox, 235, that, in all cases, an intent to defraud must be alleged. This doctrine seems to have been since repudiated

by Martin, B., in R. v. Asplin, 12 Cox, 391; *see* R. v. Cronin, 36 U. C. Q. B. 342.

It should be observed that the offence of forgery may be complete though there be no publication or uttering of the forged instrument, for the very making with a fraudulent intention, and without lawful authority, of any instrument which, at common law or by statute, is the subject of forgery, is of itself a sufficient completion of the offence before publication, and though the publication of the instrument be the medium by which the intent is usually made manifest yet it may be proved as plainly by other evidence: 2 East, P. C. 855. 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, the prisoner was found guilty, and no one even thought of raising the objection that the note had never been published: R. v. Elliot, 1 Leach, 175. At the present time most of the statutes which relate to forgery make the publication of the forged instrument, with knowledge of the fact, a substantive felony.

Not only the fabrication and false making of the whole of a written instrument, but a fraudulent insertion, alteration, or erasure, even of a letter, in *any material part* of a true instrument, and even if it be afterwards executed by another person, he not knowing of the deceit, or the fraudulent application of a true signature to a false instrument for which it was not intended, or *vice versa*, are as much forgeries as if the whole instrument had been fabricated. As by altering the date of a bill of exchange after acceptance whereby the payment was accelerated: 2 East, P. C. 855.

Even where a man, upon obtaining discount of a bill, indorsed it in a fictitious name, when he might have obtained the money as readily by indorsing it in his own name, it was holden to be a forgery: R. v. Taft, 1 Leach, 172; R. v.

Taylor, 1 Leach, 214; R. v. Marshall, R. & R. 75; R. v. Whiley, R. & R. 90; R. v. Francis, R. & R. 209.

It is a forgery for a person having authority to fill up a blank acceptance or a cheque for a certain sum, to fill up the bill or cheque for a larger sum: R. v. Hart, 1 Moo. 486; In *re* Hoke, 15 R. L. 92; (ss. 421, 422, *post*); and the circumstance of the prisoner alleging a claim on his master for the greater sum, as salary then due, is immaterial even if true: R. v. Wilson, 1 Den. 284.

A forgery must be of some document or writing; therefore the putting an artist's name in the corner of a picture, in order falsely to pass it off as an original picture by that artist, is not a forgery; R. v. Closs, Dears. & B. 460; though it may be a cheat at common law, s. 419, *post*.

The false signature *by a mark* is forgery: R. v. Dunn, 1 Leach, 57.

When the writing is invalid on its face it cannot be the subject of forgery, because it has no legal tendency to effect a fraud. It is not indictable, for example, to forge a will attested by a less number of witnesses than the law requires: R. v. Wall, 2 East, P.C. 953; R. v. Martin, 14 Cox, 375, Warb. Lead. Cas. 188; R. v. Harper, 14 Cox, 574; R. v. Moffat, 1 Leach, 431.

But a man may be indicted for forging an instrument which, if genuine, could not be made available by reason of some circumstance not appearing upon the face of the instrument, but to be made out by extrinsic evidence: R. v. Macintosh, 2 Leach, 883. So, a man may be indicted for forging a deed, though not made in pursuance of the provisions of particular statutes requiring it to be in a particular form: R. v. Lyon, R. & R. 255. Signing a name of a non-existing person is a forgery: R. v. White, cited in R. v. Martin, Warb. Lead. Cas. 188.

And a man may be convicted of forging an unstamped instrument though such instrument can have no operation in law: R. v. Hawkeswood, 1 Leach, 257; *see* s. 422,

s-s. 4, *post*. This question, a few years afterwards, again underwent considerable discussion, and was decided the same way, though, in the meantime, the law with regard to the procuring of bills and notes to be subsequently stamped, upon which in R. v. Hawkeswood the judges appear in some degree to have relied, had been repealed. The prisoner was indicted for knowingly uttering a forged promissory note. Being convicted the case was argued before the judges, and for the prisoner it was urged that the 31 Geo. III. c. 25, s. 19, which prohibits the stamps from being afterwards affixed, distinguished the case from R. v. Hawkeswood. Though two or three of the judges doubted at first the propriety of the latter case if the matter were *res integra*, yet they all agreed that, being an authority in point, they must be governed by it; and they held that the statute 31 Geo. III. made no difference in the question. Most of them maintained the principle in R. v. Hawkeswood to be well founded, for the Acts of Parliament referred to were mere revenue laws, meant to make no alteration in the crime of forgery but only to provide that the instrument should not be available for recovering upon it in a court of justice, though it might be evidence for a collateral purpose; that it was not necessary to constitute forgery that the instrument should be available; that the stamp itself might be forged, and it would be a strange defence to admit, in a court of justice, that because the man had forged the stamp he ought to be excused for having forged the note itself, which would be setting up one fraud in order to protect him from the punishment due to another: R. v. Morton, 2 East, P. C. 955. The same principle was again recognized in R. v. Roberts and R. v. Davies, 2 East, P. C. 956, and in R. v. Teague, 2 East, P. C. 979, where it was holden that, supposing the instrument forged to be such on the face of it as would be valid, provided it had a proper stamp, the offence was complete.

As to the uttering.—These words, *utter, uttering*, occur frequently in the law of forgery, counterfeiting and the like;

meaning, substantially, to offer. *See* s. 424 *post*, where the word utter is dropped. In ss. 431, 435, 437, 438 however it is used. If one offers another a thing, as, for instance, a forged instrument or a piece of counterfeit coin, intending it shall be received as good, he utters it, whether the thing offered be accepted or not. It is said that the offer need not go so far as a tender: R. v. Welch, 2 Den. 78; R. v. Ion., 2 Den. 475. But, to constitute an uttering, there must be a complete attempt to do the particular act the law forbids, though there may be a complete conditional uttering, as well as any other, which will be criminal. The words "pay," "put off," in a statute are not satisfied by a mere uttering or by a tender; there must be an acceptance also: Bishop, Stat. Cr. 306.

Showing a man an instrument, the uttering of which would be criminal, though with an intent of raising a false idea in him of the party's substance, is not an uttering. Nor will the leaving it, afterwards, sealed up, with the person to whom it was shown, under cover, that he may take charge of it as being too valuable to be carried about, be an uttering: R. v. Shukard, R. & R. 200. But the showing of a forged receipt to a person with whom the defendant is claiming credit for it was held to be an offering or uttering, though the defendant refused to part with the possession of it: R. v. Radford, 1 Den. 59.

Giving a forged note to an innocent agent or an accomplice that he may pass it is a disposing of and putting it away: R. v. Giles, 1 Moo. 166. So, if a person knowingly deliver a forged bank note to another, who knowingly utters it accordingly, the prisoner who delivered such note to be put off may be convicted of having disposed of and put away the same: R. v. Palmer, R. & R. 72.

On the charge of uttering the guilty knowledge is a material part of the evidence. *Actus non facit reum nisi mens sit rea.* If there is no guilty knowledge, if the person who utters a forged instrument really thinks it

genuine, there is no *mens rea* with him; he commits no offence. Therefore the prosecutor must prove this guilty knowledge by the defendant to obtain a conviction. S. 424, *post.*

This is not capable of direct proof. It is in nearly all cases proved by evidence of facts from which the jury may presume it: Archbold, 570 And by a laxity of the general rules of evidence, which has long prevailed in the English Courts, the proof of collateral facts is admitted to prove the guilty knowledge of the defendant. Thus, on an indictment for knowingly uttering a forged instrument, or a counterfeit bank note, or counterfeit coin, proof of the possession, or of the prior or *subsequent* utterance, either to the prosecutor himself *or to other persons,* of other false documents or notes, or bad money, *though of a different description,* and though themselves *the subjects of separate indictments,* is admissible as material to the question of *guilty knowledge* or intent: Taylor, Evid., 1 vol. par. 322; R. v. Aston, 2 Russ. 841; R. v. Lewis, 2 Russ. 841; R. v. Oddy, 2 Den. 264. But in these cases it is essential to prove distinctly that the instruments offered in evidence of guilty knowledge were themselves forged: Taylor, *loc. cit*: R. v. Bent, 10 O. R. 557.

It seems also, that though the prosecutor may prove the uttering of other forged notes by the prisoner, and his conduct at the time of uttering them, he cannot proceed to show what the prisoner said or did at another time with respect to such uttering; for these are collateral facts, too remote for any reasonable presumption of guilt to be founded upon them, and such as the prisoner cannot by any possibility be prepared to contradict: Taylor, *loc. cit.*; R. v. Phillips, 1 Lewin, 105; R. v. Cooke, 8 C. & P. 586. In Phillips' case the judge said: "That the prosecutor could not give in evidence anything that was said by the prisoner at a time collateral to a former uttering in order to show that what he said at the time of such former

uttering was false, because the prisoner could not be prepared to answer or explain evidence of that description; that the prisoner is called upon to answer all the circumstances of a case under consideration, but not the circumstances of a case which is not under consideration; that the prosecutor is at liberty to show other cases of the prisoner having uttered forged notes, and likewise his conduct at the time of uttering them; but that what he said or did *at another time collateral to such other utterings* could not be given in evidence, as it was impossible that the prisoner could be prepared to combat it." *See* R. v. Brown, 2 F. & F. 559, and remarks of Crompton, J., therein on R. v. Cooke, cited *ante*, and R. v. Forbes 7 C. & P. 224. The rule, in such cases, seems to be that you cannot bring collateral evidence of a collateral fact, or that you cannot bring evidence of a collateral circumstance of a collateral fact.

The prosecutor must also prove that the uttering was accompanied by an intent to defraud, as to which *see* remarks, *ante*, on the necessity of this intent in forgery, generally. Baron Alderson told the jury, in R. v. Hill 2 Moo. 30, that if they were satisfied that the prisoner uttered the bill as true, knowing at the time that it was forged, and meaning that the person to whom he offered it should believe it to be genuine, they were bound to infer that he intended to defraud this person, and this ruling was held right by all the judges. And in R. v. Todd, 1 Cox, 57, Coleridge, J., after consulting Cresswell, J., said: "If a person forge another person's name, and utter any bill, note, or other instrument with such signature, knowing it not to be the signature of the person whose signature he represents it to be, but intending it to be taken to be such by the party to whom it is given, the inference, as well in point of fact as of law, is strong enough to establish the intent to defraud, and the party so acting becomes responsible for the legal consequences of his act, whatever may have been

his motives. The natural, as well as the legal, consequence is that this money is obtained, for which the party obtaining it professes to give but cannot give a discharge to the party giving up the money on the faith of it. Supposing a person in temporary distress puts another's name to a bill, intending to take it up when it becomes due but cannot perform it, the consequence is that he has put another under the legal liability of his own act, supposing the signature to pass for genuine": *see* R. v. Vaughan, 8 C. & P. 276; R. v. Cooke, 8 C. & P. 582; R. v. Geach, 9 C. & P. 499.

At common law any one convicted of forgery was incompetent as a witness, but now no one is incompetent by reason of interest or crime: *The Canada Evidence Act, 1893*, s. 3.

Indictment.— that A. B. on unlawfully did forge, knowing it to be false, a certain (*here name the document*) which said forged document is as follows that is to say (*here set out the document verbatim*) with intent thereby to defraud, and with intent that the said document should be used as genuine (*or acted upon as genuine*) to the prejudice of (*name, as the case may be*) or of any one who would accept, take, or deal with the said forged document.

And the jurors aforesaid do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, unlawfully and knowingly did forge a certain other (*state the instrument forged by any name or designation by which it is usually known*), with intent thereby then to defraud; and that the said document should be used as genuine (*or acted upon as genuine*) to the prejudice of any one who thereafter would accept, take or deal with or come by the said forged document.

And the jurors aforesaid do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, unlawfully did utter, offer, dispose of, and put off, as if it

were genuine (*use, deal with, or attempt to use, etc.*, s. 424), a certain forged document, which said forged document is as follows, that is to say (*here set out the instrument verbatim*), with intent thereby then to defraud, he, the said J. S., at the time he so uttered, offered, disposed of, and put off the said last-mentioned forged document as aforesaid, well knowing the same to be forged.

See R. v. Brewer, 6 C. & P. 363, and s. 613, *post*, as to indictments, and s. 569 as to search warrant.

The evidence of a single witness is not sufficient if not corroborated; s. 684, *post*. The repealed s. 218, c. 174, R. S. C. applied only to an interested witness: R. v. Selby, 16 O. R. 255; R. v. Rhodes, 22 O. R. 480; 10 & 11 V. c. 9, s. 21; Bank Prosecutions, R. & R. 378.

At common law forgery is a misdemeanour, punishable by fine or imprisonment, or both, at the discretion of the court. The court of Quarter Sessions now has jurisdiction in cases of forgery, s. 539, *post*.

But a provincial Act authorizing police magistrates to try cases of forgery is unconstitutional: R. v. Toland, 22 O. R. 505; *see* R. v. Levinger, 22 O. R. 690. A prisoner extradited from the United States on a charge of forgery may, upon an indictment for forgery, be found guilty of a criminal uttering: R. v. Paxton, 3 L. C. L. J. 117. Making false entries in a book does not constitute the crime of forgery: *Ex parte* Lamirande, 10 L. C. J. 280; *see* R. v. Blackstone, 4 Man. L. R. 296, and *Ex parte* Eno, 10 Q. L. R. 194. Definition of the term *forgery* considered, *Re* Smith, 4 P. R. (Ont.) 215; R. v. Gould, 20 U. C. C. P. 154.

Where the prisoner was indicted for forging a note for $500, having changed a note of which he was the maker from $500 to $2,500: *Held*, a forgery of a note for $500, though the only fraud committed was on the endorser: R. v. McNevin, 2 R. L. 711.

In consideration of law, every *alteration* of an instrument amounts to a forgery of the whole, and an indictment for *forgery* will be supported by proof of a *fraudulent alteration*, though, in cases where a genuine instrument has been altered, it is perhaps better to allege the *alteration* in one count of the indictment: s. 422, s-s. 2. *post*.

If several concur in employing another to make a forged instrument, knowing its nature, they are all guilty of the forgery: R. v. Mazeau, 9 C. & P. 676; R. v. Dade, 1 Moo. 307. All are now principals in forgery, as in all other offences, by s. 61.

A joint and several bond was executed by prisoner under an assumed name for a fraudulent purpose. There was no proof whether the other signatures were forged or not. An indictment that prisoner had forged the bond was sustained: R. v. Deegan, 6 Man. L. R. 81; *see* s. 459.

PART XXXI.

FORGERY.

Document Defined.

419. A document means in this part any paper, parchment, or other material used for writing or printing, marked with matter capable of being read, but does not include trade marks on articles of commerce, or inscriptions on stone or metal or other like material.

Bank Note, Etc., Defined.

420. "Bank note" includes all negotiable instruments issued by or on behalf of any person, body corporate, or company carrying on the business of banking in any part of the world, or issued by the authority of the Parliament of Canada or of any foreign prince, or state, or government, or any governor or other authority lawfully authorized thereto in any of Her Majesty's dominions, and intended to be used as equivalent to money, either immediately upon their issue or at some time subsequent thereto, and all bank bills and bank post bills;

(*a*) "Exchequer bill" includes exchequer bonds, notes, debentures and other securities issued under the authority of the Parliament of Canada, or under the authority of any legislature of any province forming part of Canada, whether before or after such province so became a part of Canada.

Section 129 of c. 174, R. S. C., as to description of bank notes in indictments, has not been re-enacted.

FALSE DOCUMENT, ETC. DEFINED.

421. The expression "false document" means—

(*a*) a document the whole or some material part of which purports to be made by or on behalf of any person who did not make or authorize the making thereof, or which, though made by, or by the authority of, the person who purports to make it is falsely dated as to time or place of making, where either is material; or

(*b*) a document the whole or some material part of which purports to be made by or on behalf of some person who did not in fact exist; or

(*c*) a document which is made in the name of an existing person, either by that person or by his authority, with the fraudulent intention that the document should pass as being made by some person, real or fictitious, other than the person who makes or authorizes it.

2. It is not necessary that the fraudulent intention should appear on the face of the document, but it may be proved by external evidence.

FORGERY DEFINED.

422. Forgery is the making of a false document, knowing it to be false with the intention that it shall in any way be used or acted upon as genuine, to the prejudice of any one, whether within Canada or not, or that some person should be induced, by the belief that it is genuine, to do or refrain from doing anything, whether within Canada or not.

2. Making a false document includes altering a genuine document in any material part, and making any material addition to it or adding to it any false date, attestation, seal or other thing which is material, or by making any material alteration in it, either by erasure, obliteration, removal or otherwise.

3. Forgery is complete as soon as the document is made with such knowledge and intent as aforesaid, though the offender may not have intended that any particular person should use or act upon it as genuine, or be induced, by the belief that it is genuine, to do or refrain from doing anything.

4. Forgery is complete although the false document may be incomplete, or may not purport to be such a document as would be binding in law, if it be so made as, and is such as to indicate that it was intended, to be acted on as genuine.

"The crime of forgery was an offence at common law, the punishment of which was only fine and imprisonment. 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 V. 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 ss. 313 to 317 (*ss. 419 to 422, ante*), both inclusive.—Imp. Comm. Rep.

PUNISHMENT

423. Every one who commits forgery of the documents hereinafter mentioned is guilty of an indictable offence and liable to the following punishment:—

(*A*) To imprisonment for life if the document forged purports to be, or was intended by the offender to be understood to be or to be used as—

(*a*) any document having impressed thereon or affixed thereto any public seal of the United Kingdom or any part thereof, or of Canada or any part thereof, or of any dominion, possession or colony of Her Majesty: R. S. C. c. 165, s. 4; or

(*b*) any document bearing the signature of the Governor-General, or of any administrator, or of any deputy of the Governor, or of any Lieutenant-Governor, or any one at any time administering the government of any province of Canada: R. S. C. c. 165, s. 5; or

(*c*) any document containing evidence of, or forming the title or any part of the title to, any land or hereditament, or to any interest in or to any charge upon any land or hereditament, or evidence of the creation, transfer or extinction of any such interest or charge; or

(*d*) any entry in any register or book, or any memorial or other document made, issued, kept or lodged under any Act for or relating to the registering of deeds or other instruments respecting or concerning the title to or any claim upon any land or the recording or declaring of titles to land: R. S. C. c. 165, s. 38; or

(*e*) any document required for the purpose of procuring the registering of any such deed or instrument or the recording or declaring of any such title: R. S. C. c. 165, s. 38; or

(*f*) any document which is made, under any Act, evidence of the registering or recording or declaring of any such deed, instrument or title: R. S. C. c. 165, s. 38; or

(*g*) *any document which is made by any Act evidence affecting the title to land*; or

(*h*) any notarial act or document or authenticated copy, or any *procès-verbal* of a surveyor or authenticated copy thereof: R. S. C. c. 165, s. 38; or

(*i*) any register of births, baptisms, marriages, deaths or burials authorized or required by law to be kept, or any certified copy of any entry in or extract from any such register : R. S. C. c. 165, s. 43 ; (*see post*, s. 436) ; or

(*j*) any copy of any such register required by law to be transmitted by or to any registrar or other officer : R. S. C. c. 165, s. 44 ; or

(*k*) any will, codicil or other testamentary document, either of a dead or living person, or any probate or letters of administration, whether with or without the will annexed : R. S. C. c. 165, s. 27 ; or

(*l*) any transfer or assignment of any share or interest in any stock, annuity or public fund of the United Kingdom or any part thereof, or of Canada or any part thereof, or of any dominion, possession or colony of Her Majesty, or of any foreign state or country, or receipt or certificate for interest accruing thereon : R. S. C. c. 165, ss. 8 & 25 ; or

(*m*) any transfer or assignment of any share or interest in the debt of any public body, company or society, British, Canadian or foreign, or of any share or interest in the capital stock of any such company or society, or receipt or certificate for interest accruing thereon : R. S. C. c. 165, s. 8 ; or

(*n*) any transfer or assignment of any share or interest in any claim to a grant of land from the Crown, or to any scrip or other payment or allowance in lieu of any such grant of land : R. S. C. c. 165, s. 8 ; or

(*o*) any power of attorney or other authority to transfer any interest or share hereinbefore mentioned, or to receive any dividend or money payable in respect of any such share or interest : R. S. C. c. 165, s. 8 ; or

(*p*) any entry in any book or register, or any certificate, coupon, share, warrant or other document which by any law or any recognized practice is evidence of the title of any person to any such stock, interest or share, or to any dividend or interest payable in respect thereof : R. S. C. c. 165, s. 11 ; or

(*q*) any exchequer bill or endorsement thereof, or receipt or certificate for interest accruing thereon : R. S. C. c. 165, s. 13 ; or

(*r*) any bank note or bill of exchange, promissory note or cheque, or any acceptance, endorsement or assignment thereof : R. S. C. c. 165, ss. 18, 25 & 28 ; or

(*s*) any scrip in lieu of land : R. S. C. c. 165, s. 13 ; or

(*t*) any document which is evidence of title to any portion of the debt of any dominion, colony, or possession of Her Majesty, or of any foreign state, or any transfer or assignment thereof : or

(*u*) any deed, bond, debenture, or writing obligatory, or any warrant, order, or other security for money or payment of money, whether negotiable or not, or endorsement or assignment thereof : R. S. C. c. 165, ss. 26 & 32 ; or

(*v*) any accountable receipt or acknowledgment of the deposit, receipt, or delivery of money or goods, or endorsement or assignment thereof : R. S. C. c. 165, s. 29 ; or

(*w*) *any bill of lading, charter-party, policy of insurance, or any shipping document accompanying a bill of lading, or any endorsement or assignment thereof* ; or

(*x*) *any warehouse receipt, dock warrant, dock-keeper's certificate, delivery order, or warrant for the delivery of goods, or of any valuable thing, or any endorsement or assignment thereof;* or

(*y*) *any other document used in the ordinary course of business as proof of the possession or control of goods, or as authorizing, either on endorsement or delivery, the possessor of such document to transfer or receive any goods.*

FOURTEEN YEARS.

(*B*) To fourteen years' imprisonment if the document forged purports to be, or was intended by the offender to be understood to be, or to be used as—

(*a*) any entry or document made, issued, kept or lodged under any Act for or relating to the registry of any instrument respecting or concerning the title to, or any claim upon, any personal property : R. S. C. c. 165, s. 38.

(*b*) any public register or book not hereinbefore mentioned appointed by law to be made or kept, or any entry therein : R. S. C. c. 165, s. 7.

SEVEN YEARS.

(*C*) To seven years' imprisonment if the document forged purports to be, or was intended by the offender to be understood to be, or to be used as—

(*a*) any record of any court of justice, or any document whatever belonging to or issuing from any court of justice, or being or forming part of any proceeding therein. (*a. b. c. d. e. are an extension of the law*, s. 34, c. 165, R. S. C.); or

(*b*) any certificate, office copy, or certified copy or other document which, by any statute in force for the time being, is admissible in evidence ; or

(*c*) any document made or issued by any judge, officer or clerk of any court of justice, or any document upon which, by the law or usage at the time in force, any court of justice or any officer might act ; or

(*d*) any document which any magistrate is authorized or required by law to make or issue ; or

(*e*) any entry in any register or book kept, under the provisions of any law, in or under the authority of any court of justice or magistrate acting as such ; or

(*f*) any copy of any letters patent, or of the enrolment or enregistration of letters patent, or of any certificates thereof : R. S. C. c. 165, s. 6 ; or

(*g*) any license or certificate for or of marriage : R. S. C. c. 165, s. 42; or

(*h*) *any contract or document which, either by itself or with others, amounts to a contract, or is evidence of a contract ;* or

(*i*) *any power or letter of attorney or mandate ;* or

(*j*) any authority or request for the payment of money, or for the delivery of goods, or of any note, bill, or valuable security : R. S. C. c. 165, s. 29 ; or

(*k*) any acquittance or discharge, or any voucher of having received any goods, money, note, bill or valuable security, or any instrument which is evidence of any such receipt : R. S. C. c. 165, s. 29 ; or

(*l*) *any document to be given in evidence as a genuine document in any judicial proceeding ;* or

(*m*) any ticket or order for a free or paid passage on any carriage, tramway or railway, or on any steam or other vessel: R. S. C. c. 165, s. 33; or

(*n*) any document other than those above mentioned: R. S. C. c. 165, s. 76.

The words in italics are additions to the enumeration contained in the repealed statute. The punishments have been altered in some cases. Ss. 86 & 87, c. 35, R. S. C., provide for the forgery of stamps, money orders, etc., and s. 100, c. 8, for the forgery of ballot papers at elections. Upon the trial of any forgery the jury may, if the evidence warrants it, convict the prisoner of an attempt to commit the same; s. 711. The punishment then, where none is specially provided, falls under ss. 528 or 529.

Under the above s. 423, by s-s. (*A.u.*,) forging a warrant or order for money or payment of money is punishable by a life imprisonment, whilst, s-s. (*C.j.*), forging any authority or request for the payment of money is punishable by seven years. What is the difference between these documents? Why that great difference in the punishment? Then by s-s. (*A.v.*) forging any accountable receipt or acknowledgment of the deposit, receipt or delivery of money or goods is punishable by a life imprisonment, whilst s-s. (*C.k.*,) forging any acquittance or discharge, or any voucher of having received any goods or money, or any instrument which is evidence of any such receipt, is punishable by *seven* years!

The punishment for forging a railway ticket is *seven* years; for forging a custom house mark or brand, s. 210, c. 32, R. S. C., two hundred dollars, on summary conviction; for forging any other custom house document, five years' penitentiary; s. 211, c. 32, R. S. C.; for forging election ballot papers, six months; s. 100, c. 8, R. S. C.; for forging a post office stamp, imprisonment for life; s. 86, c. 35, R. S. C.; but for forging an inland revenue stamp only fourteen years; s. 435, post. It is only five years, however, for criminally receiving a stolen post letter, whilst

it is fourteen for receiving any other stolen property; ss. 314, 315, *ante*.

(*A.*) (*i.*)—FORGERY OF MARRIAGE REGISTER.

In R. v. Asplin, 12 Cox, 391, it was held by Martin, B., that upon an indictment for making a false entry in a marriage register it is not necessary that the entry should be made with intent to defraud, and that it is no defence that the marriage solemnized was null and void, being bigamous; also that, if a person knowing his name to be A,, signs another name without authority, he is guilty, and it is immaterial that he is a third witness, the Marriage Act only requiring two.

(*A.*) (*k.*)—FORGERY OF WILLS.

The judges were equally divided upon the question whether, in the absence of the existence of some person who could have been defrauded by the forged will, a count for forging it with intent to defraud a person or persons unknown could be supported: R. v. Tylney, 1 Den. 319.

Forgery may be committed by the false making of the will of a living person, or of a non-existing person: R. v. Murphy, 2 East, P. C. 949; Wilks's case, 2 East P. C. 957; R. v. Sterling, 1 Leach, 99; R. v. Coogan, 1 Leach 449; R. v. Avery, 8 C. & P. 596. So, though it be signed by the wrong christian name of the person whose will it purports to be: R. v. Fitzgerald, 1 Leach 20; ss. 421, 422, *ante*.

(*A.*) (*r.*)—BANK NOTES, BILLS OF EXCHANGE, PROMISSORY NOTES.

A bill payable ten days after sight, purporting to have been drawn upon the Commissioners of the Navy by a lieutenant, for the amount of certain pay due to him, has been holden to be a bill of exchange: R. v. Chisholm, R. & R. 297. So a note promising to pay A. & B., "stewardesses" of a certain benefit society, or their "successors," a certain sum of money on demand, has been holden to be a

promissory note within the meaning of the Act. It is not necessary that the note should be negotiable: R. v. Box, R. & R. 300. An instrument drawn by A. on B., requiring him to pay to the administrators of C. a certain sum, at a certain time "without acceptance," is a bill of exchange: R. v. Kinnear, 2 M. & Rob. 117. So, though there be no person named as drawee, the defendant may be indicted for uttering a forged acceptance on a bill of exchange: R. v. Hawkes, 2 Moo. 60. For the act of putting the acceptance is a sort of estoppel to say it was not a bill of exchange, but, without acceptance, this instrument is not a bill of exchange: R. v. Curry, 2 Moo. 218.

In R. v. Mopsey, 11 Cox, 143, the acceptance to what purported to be a bill of exchange was forged, but at the time it was so forged the document had not been signed by the drawer, and it was held that, in consequence, the document was not a bill of exchange. And 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 indorsed by the drawer, and accepted by the drawer, cannot, in an indictment for forgery or uttering, be treated as a bill of exchange: R. v. Bartlett, 2 M. & Rob. 362. But 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: R. v. Smith, 2 Moo. 295. A nurseryman and seedsman got his foreman to accept two bills, the acceptance having no addition, description or address, and afterwards, without the acceptor's knowledge, he added to the direction a false address but no description, and represented in one case that the acceptance was that of a customer, and in the other case that it was that of a seedsman, there being in fact no such person at the supposed false address: *held*, that in the one case, the former, he was not guilty of forgery of the acceptance, but that, in the other case, he was: R. v. Epps, 4 F. & F. 81. A bill of exchange was made payable to A, B, C, D, or other

forged executrixes. The indictment charged that the prisoner forged on the back of the bill a certain indorsement, which indorsement was as follows (naming one of the executrixes); *Held*, a forged indorsement, and indictment sufficient: R. v. Winterbottom, 1 Den. 41. Putting off a bill of exchange of A. an existing person, as the bill of exchange of A. a fictitious person, is a felonious uttering of the bill of a fictitious drawer: R. v. Nisbett, 6 Cox, 320. If there are two persons of the same name, but of different descriptions or additions, and one signs his name with the description or addition of the other for the purpose of fraud, it is forgery: R. v. Webb, cited in Bayley on Bills, 432.

There can be no conviction for forgery of an indorsement of a bill of exchange under the above section if the bill of exchange itself is not a complete instrument as such: R. v. Harper, 14 Cox, 574.

W. a bailiff had an execution against prisoner and H. M. and to settle same it was arranged to give a note made by A. M. and indorsed by A. D. M. A note was drawn up payable to the order of A. D. M., and prisoner took it away and brought it back with the name A. D. M. indorsed. It was then signed by A. M. and given to the bailiff. The indorsement was a forgery, and prisoner was indicted for forging an indorsement on a promissory note, and convicted. *Held*, following R. v. Butterwick, 2 M. & Rob. 196; R. v. Mopsey, 11 Cox, 143; and R. v. Harper, 7 Q. B. D. 78, that the conviction could not be sustained on the indictment as framed as the instrument, for want of the maker's name at the time of the forgery, was not a promissory note; nor could it stand on the count for uttering as after it was signed it was never in prisoner's possession: R. v. McFee, 13 O. R. 8.

Held, that the alteration of a $2 Dominion note to one of the denomination of $20, such alteration consisting in the addition of a cypher after the figure 2, wherever that figure occurred in the margin of the note, was forgery, and

the prisoner was rightly convicted therefor: R. v. Bail, 7 O. R. 228.

Where in an instrument, in form of a promissory note, a blank is left for payee's name it is not a completed note so as to support a conviction for forgery, or for forging indorsement, nor is it a document, writing or instrument within c. 165, ss. 46, 47 or 50.

Semble, it might be forgery at common law: R. v. Cormack, 21 O. R. 213.

An indictment need not state, in the counts for uttering, to whom the note was disposed of: R. v. Holden, R. & R. 154. The intent to defraud any particular person need not be alleged or proved.

Under the counts for uttering evidence may be given that the defendant offered or tendered the note in payment, or that he actually passed it, or otherwise disposed of it to another person. 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 this to be within the Act, although it was objected that the prisoner had been solicited to commit the act proved against him by the bank themselves, by means of their agents: R. v. Holden, R. & R. 154. So where A. gave B. a forged note to pass for him, and upon B.'s tendering it in payment of some goods it was stopped; the majority of the judges held that A., by giving the note to B., was guilty of disposing of and putting away the note within the meaning of the Act: R. v. Palmer, R. & R. 72; R. v. Soares, R. & R. 25; R. v. Stewart, R. & R. 363; and R. v. Giles, 1 Moo. 166, where it was held that giving a forged note to an innocent agent, or an accomplice, that he may pass it is a disposing of, and putting it away, within the meaning of the statute.

(*A*) (*u*) WARRANT, ORDER FOR PAYMENT, ETC.

A draft upon a banker, although it be post-dated, is a warrant and order for the payment of money: R. v. Taylor, 1 C. & K. 213; R. v. Willoughby, 2 East, P. C. 944. So is

even a bill of exchange: R. v. Sheppard, 1 Leach, 226; R. v. Smith, 1 Den. 79. An order by a foreman to his employer to pay a specific sum falls under the statute: R. v. Bowen, M. L. R. 7 Q. B. 468. An order need not specify any particular sum to fall under the statute: R. v. McIntosh, 2 East, P. C. 942. 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 shown by averments to be such: R. v. Curry, 2 Moo. 218. In R. v. Howie, 11 Cox, 320, it was held that a seaman's advance note was not an order for payment of money. It would seem, however, to be an *undertaking* for the payment of money within the statute: R. v. Bamfield, 1 Moo. 416; R. v. Anderson, 2 M. & Rob. 469; R. v. Reed, 2 Moo. 62; R. v. Joyce, L. & C. 576. The statute applies as well to a written promise for the payment of money by a third person as by the supposed party to the instrument: R. v. Stone, 1 Den. 181. An instrument, professing to be a scrip certificate of a railway company, is not an undertaking within the statute: R. v. West, 1 Den. 258. But perhaps the present section would cover this case.

In R. v. Rogers, 9 C. & P. 41, it was held that a warrant for the payment of money need not be addressed to any particular person: *see* R. v. Snelling, Dears. 219.

As to what is a warrant or order for the delivery of goods the following cases may be cited: A pawnbroker's ticket is a warrant for the delivery of goods: R. v. Morrison, Bell, 158. 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 within the statute: R. v. Illidge, 1 Den. 404. A request for the delivery of

goods need not be addressed to any one; s. 423 (*C*) (*j*): R. v. Carney, 1 Moo. 351; R. v. Cullen, 1 Moo. 300; R. v. Pulbrook, 9 C. & P. 37. Nor need it be signed by a person who can compel a performance of it, or who has any authority over or interest in the goods: R. v. Thomas, 2 Moo. 16; R. v. Thorn, 2 Moo. 210. Formerly, if upon an indictment for the misdemeanour of obtaining goods under false pretenses a felonious forgery were proved, the judge had to direct an acquittal: R. v. Evans, 5 C. & P. 553. But, by the abolition of the distinction between felonies and misdemeanours, it would seem that the judge may, under the same circumstances, take a verdict for the offence charged.

As to what is a receipt under this section 423, (A) (*v*), the additions in the present clause render many of the cases on the subject of no practical importance. A turnpike toll-gate ticket is a receipt for money within this section: R. v. Fitch, R. v. Howley, L. & C. 159. 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: R. v. Moody, L. & C. 173; R. v. Smith, L. & C. 168. A document called a "clearance" issued to members of the Ancient Order of Foresters' Friendly Society certified that the member had paid all his dues and demands, and authorized any Court of the Order to accept the bearer as a clearance member: *Held*, that this was not a receipt for money under this section: R. v. French, 11 Cox, 472. An ordinary railway ticket is not an acquittance, or receipt, within this section: R. v. Gooden, 11 Cox, 672; but now, by s. 423, (C) (*m*), forging a railway ticket is a distinct offence. The prisoner being pressed by a creditor for the payment of £35 obtained further time by giving an I. O. U. for £35 signed by himself, and also purporting to be signed by W.; W.'s name was a forgery: *Held*, that the

instrument was a security for the payment of money by W: R. v. Chambers, 12 Cox, 109.

An indictment for forging a receipt 423, (*A*) (*v*), must allege a receipt either of money or of goods: R. v. McCorkill, 8 L. C. J. 283. But the intent to defraud any particular person need not be alleged: R. v. Hathaway, 8 L. C. J. 285; *see In re* Debaun, 11 L. N. 323.

The evidence of the uttering of a forged *indorsement* of a negotiable check or order is insufficient to sustain a conviction for uttering *a forged order* or check: R. v. Cunningham, Cassel's Dig. 107.

The prisoner was indicted for forging a request for the payment of money, s. 423 (*C*) (*j*) the said request consisting of a forged telegram upon which he obtained $85: *Held*, a forgery as charged: R. v. Stewart, 25 U. C. C. P. 440.

UTTERING, ETC.

424. Every one is guilty of an indictable offence who, knowing a document to be forged, uses, deals with, or acts upon it, or attempts to use, deal with, or act upon it, or causes or attempts to cause any person to use, deal with, or act upon it, as if it were genuine, and is liable to the same punishment as if he had forged the document.

2. It is immaterial where the document was forged.

The word "utter" has been left out of this clause, though retained in ss. 431, 435, 437, 438 and in the sections relating to the coin, s. 460, *et seq.*

COUNTERFEITING SEALS.

425. Every one is guilty of an indictable offence and liable to imprisonment for life who unlawfully makes or counterfeits any public seal of the United Kingdom or any part thereof, or of Canada or any part thereof, or of any dominion, possession or colony of Her Majesty, or the impression of any such seal, or uses any such seal or impression, knowing the same to be so counterfeited. R. S. C. c. 165, s. 4 *(Amended)*. 24-25 V. c. 98, s. 1 (Imp.).

No intent to defraud necessary.

Indictment.— that A. B., on the seal of the Dominion of Canada, falsely and unlawfully did counterfeit.

(*Add a count for uttering, using, dealing with or . . . knowing the same to be so counterfeit.*)

COUNTERFEITING SEAL OF COURT.

426. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who unlawfully makes or counterfeits any seal of a court of justice, or any seal of or belonging to any registry office or burial board, or the impression of any such seal, or uses any such seal or impression knowing the same to be counterfeited. R. S. C. c. 165, ss. 35, 38 & 43 (*Amended*). 24-25 V. c. 98, ss. 28, 31 & 36 (Imp.).

See under preceding section.

UNLAWFULLY PRINTING PROCLAMATION.

427. Every one is guilty of an indictable offence and liable to seven years' imprisonment who prints any proclamation, order, regulation or appointment, or notice thereof, and causes the same falsely to purport to have been printed by the Queen's Printer for Canada, or the Government Printer for any province of Canada, as the case may be, or tenders in evidence any copy of any proclamation, order, regulation or appointment which falsely purports to have been printed as aforesaid, knowing that the same was not so printed. R. S. C. c. 165, s. 37.

The repealed clause provided also for the forgery of any certificate of any proclamation, etc.: *see* s. 423, (*C*) (*l*). *ante*. The *Canada Evidence Act of 1893* provides for the proof of proclamations, etc.

SENDING TELEGRAMS IN FALSE NAME. (*New*).

428. 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 a telegram.

Indictment.— that A. B., at on unlawfully, with intent to defraud, did cause a telegram purporting to be an order for money, to be sent to as being sent by the authority of one C. D., knowing that it was not sent by the authority of the said C. D., with intent that such telegram should be acted on as being sent by the said C. D.

See R. v. Stewart, p. 521 *ante*.

SENDING FALSE TELEGRAMS OR LETTERS. (*New*).

429. Every one is guilty of an indictable offence and liable to two years' imprisonment who, with intent to injure or alarm any person, sends, causes, or procures to be sent any telegram or letter or other message containing matter which he knows to be false.

Fine, s. 958.

Indictment.— that A. B., on at unlawfully did send (*cause or procure to be sent*) a telegram to one C. D. containing matter which he, the said A. B., knew to be false, with intent to injure (*or alarm*) the said C. D. (*Add another count giving the telegram in full if possible*).

The clause seems to cover the case of a telegram or letter sent to one person with intent to injure or alarm any other person, as well as the person to whom it is sent.

POSSESSION OF FORGED BANK NOTES.

430. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, without lawful authority or excuse (the proof whereof shall lie on him), purchases or receives from any person, or has in his custody or possession, any forged bank note, or forged blank bank note, whether complete or not, knowing it to be forged. R. S. C. c. 165, s. 19 (*Amended*). 24-25 V. c. 98, s. 13 (Imp.).

As to what constitutes a criminal possession *see* s. 3.

Indictment.—The Jurors for Our Lady the Queen present, that A. B. on unlawfully and without lawful authority or excuse, had in his custody and possession five forged bank notes for the payment of ten dollars each, the said A. B. then well knowing the said several bank notes and each and every of them respectively to be forged.

In R. v. Rowley, R. & R. 110, it was held that every uttering included having in custody and possession, and, by some of the judges, that without actual possession, if the notes had been put in any place under the prisoner's control, and by his direction, it was a sufficient possession within the statute.

Upon the trial for an offence of purchasing forged notes under this section the jury may, if the evidence warrants it, under s. 711, convict the prisoner of an attempt to commit the same.

DRAWING DOCUMENTS PER PROCURATION WITHOUT AUTHORITY.

431. Every one is guilty of an indictable offence who, with intent to defraud and without lawful authority or excuse, makes or executes, draws, signs, accepts or endorses, in the name or on the account of another person, by procuration or otherwise, *any document*, or makes use of or utters any such

document knowing it to be so made, executed, signed, accepted or endorsed, and is liable to the same punishment as if he had forged such document. R. S. C. c. 165, s. 30 (*Amended*). 24-25 V. c. 98, s. 24 (Imp.).

Greaves says: "This clause is framed in order to make persons punishable who, without authority, make, accept or endorse bills "per procuration."

The words "any document" instead of the enumeration contained in the repealed clause are an extension: *see* R. v. Kay, 11 Cox, 529, L. R. 1 C. C. R. 257. "Document," defined, s. 419; R. v. White, 1 Den. 208 cannot now be followed.

DEMANDING PROPERTY UPON FORGED INSTRUMENTS.

432. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who—

(*a*) demands, receives, obtains or causes, or procures to be delivered or paid to any person, anything under, upon, or by virtue of any forged instrument knowing the same to be forged, or under, upon, or by virtue of any probate or letters of administration, knowing the will, codicil, or testamentary writing on which such probate or letters of administration were obtained to be forged, or knowing the probate or letters of administration to have been obtained by any false oath, affirmation, or affidavit; or

(*b*) attempts to do any such thing as aforesaid. R. S. C. c. 165, s. 45. 24-25 V. c. 98, s. 38 (Imp.).

The words "with intent to defraud" were in the repealed section.

Greaves says: "This clause is new. It is intended to embrace every case of demanding, etc., any property whatsoever upon forged instruments, and to include bringing an action on any forged bill of exchange, note, or other security for money. The words 'procures to be delivered or paid to any person' were inserted to include cases where one person by means of a forged instrument causes money to be paid to another person, and to avoid the difficulty which had arisen in the cases as to obtaining money by false pretenses: R. v. Wavell, 1 Moo. 224; R. v. Garrett, Dears. 232."

In R. v. Adams, 1 Den. 38, the prisoner had obtained goods at a store with a forged order; this was held not to be larceny; it would now fall under this clause.

The clause covers the attempt to commit the offence, as well as the offence itself, and under s. 711, on an indictment for the offence, a verdict for the attempt to commit it may be given if the evidence warrants it.

PART XXXII.

PREPARATION FOR FORGERY AND OFFENCES RESEMBLING FORGERY.

Interpretation of Terms.

433. In this part the following expressions are used in the following senses:—

(*a*) "Exchequer bill paper" means any paper provided by the proper authority for the purpose of being used as exchequer bills, exchequer bonds, notes, debentures, or other securities mentioned in section four hundred and twenty;

(*b*) "Revenue paper" means any paper provided by the proper authority for the purpose of being used for stamps, licenses, or permits, or for any other purpose connected with the public revenue.

Instruments of Forgery and Counterfeiting.

434. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, without lawful authority or excuse (the proof whereof shall lie on him)—

(*a*) makes, begins to make, uses or knowingly has in his possession, any machinery or instrument or material for making exchequer bill paper, revenue paper or paper intended to resemble the bill paper of any firm or body corporate, or person carrying on the business of banking: R. S. C. c. 165, ss. 14, 16, 20 & 24; or

(*b*) engraves, or makes upon any plate or material anything purporting to be, or apparently intended to resemble, the whole or any part of any exchequer bill or bank note: R. S. C. c. 165, ss. 20, 22 & 24; or

(*c*) uses any such plate or material for printing any part of any such exchequer bill or bank note: R. S. C. c. 165, ss. 22 & 23; or

(*d*) knowingly has in his possession any such plate or material as aforesaid: R. S. C. c. 165, ss. 22 & 23; or

(*e*) makes, uses or knowingly has in his possession any exchequer bill paper, revenue paper, or any paper intended to resemble any bill paper of any firm, body corporate, company, or person, carrying on the business of banking,

or any paper upon which is written or printed the whole or any part of any exchequer bill, or of any bank note: R. S. C. c. 165, ss. 15, 16, 20 & 24.

(*f*) engraves or makes upon any plate or material anything intended to resemble the whole or any distinguishing part of any bond or undertaking for the payment of money used by any dominion, colony or possession of Her Majesty, or by any foreign prince or state, or by any body corporate, or other body of the like nature, whether within Her Majesty's dominions or without: R. S. C. c. 165, s. 25; or

(*g*) uses any such plate or other material for printing the whole or any part of such bond or undertaking: R. S. C. c. 165, s. 25; or

(*h*) knowingly offers, disposes of, or has in his possession any paper upon which such bond or undertaking, or any part thereof, has been printed: R. S. C. c. 165, s. 25 (*Amended*). 24-25 V. c. 98, ss. 9 & 19 (Imp.).

"Having in possession" defined, s. 3; *see* R. v. Brackenridge, 11 Cox, 96; R. v. Keith, Dears. 486, and Greaves' *note* on it in 2 Russ. 874; R. v. Warshaner, 1 Moo. 466; R. v. Rinaldi, L. & C. 330. A verdict of attempt may be given, if the evidence warrants it, s. 711.

COUNTERFEITING STAMPS.

435. Every one is guilty of an indictable offence and liable to *fourteen years'* imprisonment who—

(*a*) fraudulently counterfeits any stamp, whether impressed or adhesive, used for the purposes of revenue by the Government of the United Kingdom or of Canada, or by the Government of any province of Canada, or of any possession or colony of Her Majesty, or by any foreign prince or state; or

(*b*) knowingly sells or exposes for sale, or utters or uses any such counterfeit stamp; or

(*c*) without lawful excuse (the proof whereof shall lie on him) makes, or has knowingly in his possession, any die or instrument capable of making the impression of any such stamp as aforesaid, or any part thereof; or

(*d*) fraudulently cuts, tears or in any way removes from any material any such stamp, with intent that any use should be made of such stamp or of any part thereof; or

(*e*) fraudulently mutilates any such stamp with intent that any use would be made of any part of such stamp; or

(*f*) fraudulently fixes or places upon any material, or upon any such stamp, as aforesaid, any stamp or part of a stamp which, whether fraudulently or not, has been cut, torn, or in any other way removed from any other material or out of or from any other stamp; or

(*g*) fraudulently erases, or otherwise, either really or apparently, removes, from any stamped material any name, sum, date, or other matter or thing thereon written, with the intent that any use should be made of the stamp upon such material;

(*h*) knowingly and without lawful excuse (the proof whereof shall lie upon him) has in his possession any stamp or part of a stamp which has been

fraudulently cut, torn, or otherwise removed from any material, or any stamp which has been fraudulently mutilated, or any stamped material out of which any name, sum, date, or other matter or thing has been fraudulently erased or otherwise, either really or apparently, removed: R. S. C. c. 165, s. 17 (*Amended.*) 32-33 V. c. 49. 33-34 V. c. 58 (Imp.); 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.

Sub-section (*h*) is an extension of the repealed statute.

Section 210, c. 32, R. S. C., as to counterfeiting custom-house brands, etc., is unrepealed.

As to indictment *see* s. 622.

See R. S. C. c. 35, s. 86, as to forgery of postal stamps.

As to what constitutes a criminal possession *see ante*, s. 3.

See R. v. Collicott, R. & R. 212, and R. v. Field, 1 Leach, 383, and general remarks on forgery. The words "with intent to defraud" are not necessary in the indictment since the statute does not contain them: R. v. Asplin, 12 Cox, 391.

It was held, in R. v. Ogden, 6 C. & P. 631, under a similar statute, that a fraudulent intent was not necessary, but in a case of R. v. Allday, 8 C. & P. 136, Lord Abinger ruled the contrary: "The Act of Parliament, he said, does not say that an intent to deceive or defraud is essential to constitute this offence, but it is a serious question whether a person doing this thing innocently, and intending to pay the stamp duty, is liable to be transported. I am of opinion, and I hope I shall not be found to be wrong, that to constitute this offence there must be a guilty mind. It is a maxim older than the law of England that a man is not guilty unless his mind be guilty."

Lord Abinger, in R. v. Page, 8 C. & P. 122, held, upon the same principle, that giving counterfeit coin in charity, knowing it to be such, is not criminal, though in the statute

there are no words with respect to defrauding. But this is overruled, as stated by Baron Alderson, in R. v. Ion, 2 Den. 475; and Greaves well remarks (on R. v. Page): "As every person is taken to intend the probable consequence of his act, and as the probable consequence of giving a piece of bad money to a beggar is that that beggar will pass it to some one else, and thereby defraud that person, *quære*, whether this case rests upon satisfactory grounds? In any case a party *may* not be defrauded by taking base coin, as he *may* pass it again, but still the probability is that he will be defrauded, and that is sufficient: 1 Russ. 126, note (*z*).

And are there not cases where a party, receiving a counterfeit coin or a false note, not only *may* not be defrauded but will *certainly not* be defrauded. As for example, suppose that during an election any one buys an elector's vote, and pays it with a forged bill,—is the uttering of this bill, with guilty knowledge, not criminal? Yet, the whole bargain is a nullity; the seller has no right to sell; the buyer has no right to buy; if he buys, and does not pay, the seller has no legal or equitable claim against him, though *he* may have fulfilled his part of the bargain. If the buyer does not pay he *does not* defraud the seller; he *cannot* defraud him, since he does not owe him anything; it, then, cannot be said that he defrauds him in giving him in payment a forged note. Why see in this a fraud, and no fraud in giving a counterfeit note, in charity, to a beggar? Nothing is due to this beggar, and he is not defrauded of anything by receiving this forged bill, nor is that elector, who has sold his vote, defrauded of anything, since nothing was due to him; they are both *deceived* but not *defrauded*. In the general remarks on forgery, *ante*, an opinion was expressed that forgery would be better described as "a false making with the intent to defraud or *deceive*." When the statute makes no mention of the intention does it not make the act prohibited a crime in itself, apart from the intention? Of course, it is a maxim of law that "*actus non facit reum*

nisi mens sit rea" or as said in other words, by Starkie, 1 Cr. Pl. 177, that, "to render a party criminally responsible, a vicious will must concur with a wrongful act." "But," continues Starkie, "though it be universally true, that a man cannot become a criminal unless his mind be in fault, it is not so general a rule that the guilty intention must be averred upon the face of the indictment." And then, for example, does not the man who forges a stamp, or, *scienter*, utters it, do wilfully an unlawful act? Does not the law say that this act, by itself, is criminal? Has parliament not the right to say: "The forging, false-making a stamp, or knowingly uttering it, is a felony, by itself, whether the person who does it means wrong, or whether he means right, or whether he means nothing at all?" And this is exactly what it has said with regard to stamps, the Great Seal, records of the courts of justice, etc. It has said of these: "They shall be sacred, inviolable; you shall not deface them, imitate them, falsify, or alter them in any way or manner whatsoever, and if you do, you will be a felon." And to show that, as regards these documents, the intent to defraud was not to be a material element of the offence, it has expressly, in all the other clauses of the statute, where it *did* require this intent to make the act criminal, inserted the words "with intent to defraud," and left them out in these clauses. And no one would be prepared to say, that the maxim, "*la fin justifie les moyens*," has found its introduction into the English criminal law; and that, for instance, a clerk of a court of justice is not guilty of a criminal act, if he alters a record, provided that the alteration is done with a *good intent*, and to put the record as *he* thinks it ought to be, and should, in fact, be. Is it not better to say that, in such cases, the guilty mind, the evil intent, the *mens rea*, consist in the wilful disobedience to a positive law, in the infraction of the enactments of the legislative authority? (From 2nd Edit.).

As to intention and "*mens rea*," *see* 2 Steph. Hist. 110, and cases under s. 14, p. 11 *ante*.

"What the law says shall not be done, it becomes illegal to do, and is therefore the subject matter of an indictment, without the addition of any corrupt motives": R. v. Sainsbury, 4 T. R. 451.

The definition in s. 422 of this Code does not make an intent to defraud an ingredient of the offence: and, under it, one who buys a vote with a forged bank bill is undoubtedly guilty of forgery or of a criminal uttering: *see* R. v. , 1 Cox, 250.

DESTROYING, ETC., REGISTERS.

436. Every one is guilty of an indictable offence and liable to *fourteen years'* imprisonment, who

(*a*) unlawfully destroys, defaces or injures any register of births, baptisms, marriages, deaths or burials required or authorized by law to be kept in Canada, or any part thereof, or any copy of such register, or any part thereof required by law to be transmitted to any registrar or other officer; or

(*b*) unlawfully inserts in any such register, or any such copy thereof, any entry, known by him to be false, of any matter relating to any birth, baptism, marriage, death or burial, or erases from any such register or document any material part thereof. R. S. C. c. 165, ss. 43 & 44 (*Amended*). 24-25 V. c. 98, ss. 36 & 37 (Imp.).

See next section.

Indictment.— that A. B., on at unlawfully did destroy, deface and injure a certain register of which said register was then and there kept as the register of marriages of the parish of and as such was then and there in the lawful custody of : R. v. Bowen, 1 Den. 22; *see* R. v. Asplin, 12 Cox, 391; R. v. Mason, 2 C. & K. 622.

FALSE EXTRACTS FROM REGISTERS.

437. Every one is guilty of an indictable offence and liable to *ten* years imprisonment, who—

(*a*) *being a person authorized or required by law* to give any certified copy of any entry in any such register as in the last preceding section mentioned, certifies any writing to be a true copy or extract, knowing it to be false, or knowingly utters any such certificate;

(*b*) unlawfully and for any fraudulent purpose takes any such register or certified copy from its place of deposit or conceals it;

(*c*) *being a person having the custody* of any such register or certified copy, permits it to be so taken or concealed as aforesaid. R. S. C. c. 165, s. 44 (*Amended*). 24-25 V. c. 98, s. 37 (Imp.).

Uttering False Certificates.

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

(*a*) being by law required to certify that any entry has been made in any such register as in the two last preceding sections mentioned makes such certificate knowing that such entry has not been made; or

(*b*) being by law required to make a certificate or declaration concerning any particular required for the purpose of making entries in such register knowingly makes such certificate or declaration containing a falsehood; or

(*c*) being an officer having custody of the records of any court, or being the deputy of any such officer, *wilfully* utters a false copy or certificate of any record; or

(*d*) not being such officer or deputy *fraudulently* signs or certifies any copy or certificate of any record, or any copy of any certificate, as if he were such officer or deputy. R. S. C. c. 165, ss. 35 & 43 (*Amended*). 24-25 V. c. 98, ss. 28 & 36 (Imp.).

See R. v. Powner, 12 Cox, 235.

The words "wilfully" appears only in s-s. (*c*), and "fraudulently" only in s-s. (*d*).

Forging Certificates.

439. 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. R. S. C. c. 165, s. 35 (*Amended*). 24-25 V. c. 98, ss. 28 & 29 (Imp.).

False Entries in Public Registers.

440. Every one is guilty of an indictable offence and liable to *fourteen* years' imprisonment who, with intent to defraud—

(*a*) makes any untrue entry or any alteration in any book of account kept by the Government of Canada, or of any province of Canada, or by any bank for any such Government, in which books are kept the accounts of the owners of any stock, annuity or other public fund transferable for the time being in any such books, or who, in any manner, wilfully falsifies any of the said books; or

(*b*) makes any transfer of any share or interest of or in any stock, annuity or public fund, transferable for the time being at any of the said banks, in the name of any person other than the owner of such share or interest. R. S. C. c. 165, s. 11 (*Amended*). 24-25 V. c. 98, s. 5 (Imp.).

Indictment for making false entries of stock.— unlawfully did wilfully alter certain words and figures, that is to say (*here set out the words and figures, as they were before the alteration*) in a certain book of account kept by , in which said book the accounts of the owners of certain stock, annuities and other public funds, to wit, the (*state the stock*) which were then transferable at were then kept and entered, by (*set out the alteration and the state of the account or item when so altered*) with intent thereby then to defraud.

Indictment for making a transfer of stock in the name of a person not the owner.— unlawfully did wilfully make a transfer of a certain share and interest of and in certain stock and annuities, which were then transferable at the bank of , to wit, the share and interest of in the (*state the amount and nature of the stock*), in the name of one C. D., he the said C. D., not being then the true and lawful owner of the said share and interest of and in the said stock and annuities, or any part thereof, with intent thereby then to defraud.

Where a bank clerk made certain false entries in the bank books under his control, for the purpose of enabling him to obtain the money of the bank improperly.

Held, that he was not guilty of forgery: R. v. Blackstone, 4 Man. L. R. 296.

False Dividend Warrants.

441. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being in the employment of the Government of Canada, or of any province of Canada, or of any bank in which any books of account mentioned in the last preceding section are kept, with intent to defraud, makes out or delivers any dividend warrant, or any warrant for the payment of any annuity, interest or money payable at any of the said banks, for an amount greater or less than that to which the person on whose account such warrant is made out is entitled. R. S. C. c. 165, s. 12. 24-25 V. c. 98, s. 6 (Imp.).

Indictment.— then being a clerk of and employed and intrusted by the said unlawfully did knowingly make out and deliver to one J. N. a certain

dividend warrant for a greater amount than the said J. N. was then entitled to, to wit, for the sum of five hundred dollars; whereas, in truth and in fact, the said J. N. was then entitled to the sum of one hundred dollars only, with intent thereby then to defraud.

CIRCULARS IN LIKENESS OF NOTES.

442. Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to a fine of one hundred dollars or three months' imprisonment, or both, who designs, engraves, prints or in any manner makes, executes, utters, issues, distributes, circulates or uses any business or professional card, notice, placard, circular, hand-bill or advertisement in the likeness or similitude of any bank note, or any obligation or security of any Government or any bank. 53 V. c. 31, s. 3.

Summary conviction.—S. 3 of 53 V. c. 31 cited under this section is the section enacting to what banks the Banking Act applies. S. 63 is the one that ought to have been cited.

PART XXXIII.

FORGERY OF TRADE MARKS—FRAUDULENT MARKING OF MERCHANDISE.

443. In this part—

(*a*) The expression "trade mark" means a trade mark or industrial design registered in accordance with *The Trade Mark and Design Act* and the registration whereof is in force under the provisions of the said Act, and includes any trade mark which, either with or without registration, is protected by law in any British possession or foreign state to which the provisions of section one hundred and three of the Act of the United Kingdom, known as *The Patents, Designs, and Trade Marks Act*, 1883, are, in accordance with the provisions of the said Act, for the time being applicable;

(*b*) The expression "trade description" means any description, statement, or other indication, direct or indirect—

(i) as to the number, quantity, measure, gauge or weight of any goods;

(ii) as to the place or country in which any goods are made or produced;

(iii) as to the mode of manufacturing or producing any goods;

(iv) as to the material of which any goods are composed;

(v) as to any goods being the subject of an existing patent, privilege or copyright;

And the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, is a trade description within the meaning of this part;

(*c*) The expression "false trade description" means a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect; and the fact that a trade description is a trade mark, or part of a trade mark, shall not prevent such trade description being a false trade description within the meaning of this part;

(*d*) The expression "goods" means anything which is merchandise or the subject of trade or manufacture;

(*e*) The expression "covering" includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame or wrapper; and the expression "label" includes any band or ticket;

(*f*) The expressions "person, manufacturer, dealer, or trader," and "proprietor" include any body of persons corporate or unincorporate;

(*g*) The expression "name" includes any abbreviation of a name.

2. The provisions of this part respecting the application of a false trade description to goods extend to the application to goods of any such figures, words or marks, or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are.

3. The provisions of this part respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and the expression "false name or initials" means, as applied to any goods, any name or initials of a person which—

(*a*) are not a trade mark, or part of a trade mark;

(*b*) are identical with, or a colourable imitation of, the name or initials of a person carrying on business in connection with goods of the same description, and not having authorized the use of such name or initials;

(*c*) are either those of a fictitious person or of some person not *bona fide* carrying on business in connection with such goods. 51 V. c. 41, s. 2. 25-26 V. c. 88 (Imp.).

This part is a re-enactment of 50 & 51 V. c. 28 (Imp.). *See* Wood v. Burgess, 16 Cox, 729; Starcy v. The Chilworth Mfg. Co., 17 Cox, 55; Budd v. Lucas, 17 Cox, 248. Ss. 15,

16, 18, 22, 23 of 51 V. c. 41 (*as amended in 1893*) are unrepealed; sched. 2. Limitation of 3 years for any offence under Part XXXIII., s. 551: *see* s. 710 as to evidence.

444. Where a watch case has thereon any words or marks which constitute, or are by common repute considered as constituting, a description of the country in which the watch was made, and the watch bears no such description, those words or marks shall *prima facie* be deemed to be a description of that country within the meaning of this part, and the provision of this part with respect to goods to which a false description has been applied, and with respect to selling or exposing, or having in possession, for sale, or any purpose of trade or manufacture, goods with a false trade description, shall apply accordingly; and for the purposes of this section the expression "watch" means all that portion of a watch which is not the watch case. 51 V. c. 41, s. 11.

445. Every one is deemed to forge a trade mark who either—

(*a*) without the assent of the proprietor of the trade mark makes that trade mark or a mark so nearly resembling it as to be calculated to deceive; or

(*b*) falsifies any genuine trade mark, whether by alteration, addition, effacement or otherwise.

2. And any trade mark or mark so made or falsified is, in this part, referred to as a forged trade mark. 51 V. c. 41, s. 3.

446. Every one is deemed to apply a trade mark, or mark, or trade description to goods who—

(*a*) applies it to the goods themselves; or

(*b*) applies it to any covering, label, reel, or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade or manufacture; or

(*c*) places, incloses or annexes any goods which are sold or exposed or had in possession for any purpose of sale, trade or manufacture in, with or to any covering, label, reel, or other thing to which a trade mark or trade description has been applied; or

(*d*) uses a trade mark or mark or trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade mark or mark or trade description.

2. A trade mark or mark or trade description is deemed to be applied whether it is woven, impressed or otherwise worked into, or annexed or affixed to, the goods, or to any covering, label, reel or other thing.

3. Every one is deemed to falsely apply to goods a trade mark or mark who, without the assent of the proprietor of the trade mark, applies such trade mark, or a mark so nearly resembling it as to be calculated to deceive. 51 V. c. 41, s. 4.

447. Every one is guilty of an indictable offence who, with intent to defraud—

(*a*) forges any trade mark; or

(*b*) falsely applies to any goods any trade mark, or any mark so nearly resembling a trade mark as to be calculated to deceive; or

(*c*) makes any die, block, machine or other instrument, for the purpose of orging) 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 nstrument, for the purpose of forging a trade mark; or

(*f*) causes any of such things to be done. 51 V. c. 41, s. 6.

Punishment, under s. 450.

Indictment.— that A. B. on with intent to defraud unlawfully did forge a certain trade mark, to wit (*or unlawfully did falsely apply to certain goods to wit*) (*any goods*) a certain trade mark to wit (*or a mark so nearly resembling a certain trade mark, to wit*) as to be calculated to deceive. (*Add a count charging "did cause to be forged or, falsely applied"* (*as the case may be*).

448. Every one is guilty of an indictable offence who sells or exposes, or has in his possession, for sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark, or mark so nearly resembling a trade mark as to be calculated to deceive, is falsely applied, as the case may be, unless he proves—

(*a*) that having taken all reasonable precaution against committing such an offence he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark or trade description; and

(*b*) that on demand made by or on behalf of the prosecutor he gave all the information in his power with respect to the persons from whom he obtained such goods or things; and

(*c*) that otherwise he had acted innocently. 51 V. c. 41, s. 6.

Punishment under s. 450.

449. Every one is guilty of an indictable offence who sells, or exposes or offers for sale, or traffics in, bottles marked with a trade mark, blown or stamped or otherwise permanently affixed thereon, without the assent of the proprietor of such trade mark. 51 V. c. 41, s. 7.

Punishment under s. 450.

450. Every one guilty of any offence defined in this part is liable—

(*a*) on conviction on indictment to two years' imprisonment, with or without hard labour, or to fine, or to both imprisonment and fine; and

(*b*) on summary conviction, to four months' imprisonment, with or without hard labour, or to a fine not exceeding one hundred dollars; and in

case of a second or subsequent conviction to six months' imprisonment, with or without hard labour, or to a fine not exceeding two hundred and fifty dollars.

2. In any case every chattel, article, instrument or thing, by means of, or in relation to which, the offence has been committed shall be forfeited. 51 V. c. 41, s. 8.

451. Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding one hundred dollars who falsely represents that any goods are made by a person holding a royal warrant, or for the service of Her Majesty or any of the royal family, or any Government department of the United Kingdom or of Canada. 51 V. c. 41, s. 21.

452. Every one is guilty of an offence and liable, on summary conviction, to a penalty of not more than five hundred dollars nor less than two hundred dollars who imports or attempts to import any goods which, if sold, would be forfeited under the provisions of this part, or any goods manufactured in any foreign state or country which bear any name or trade mark which is or purports to be the name or trade mark of any manufacturer, dealer or trader in the United Kingdom or in Canada, unless such name or trade mark is accompanied by a definite indication of the foreign state or country in which the goods were made or produced; and such goods shall be forfeited. 51 V. c. 41, s. 22.

453. Any one who is charged with making any die, block, machine or other instrument for the purpose of forging, or being used for forging, a trade mark, or with falsely applying to goods any trade mark, or any mark so nearly resembling a trade mark as to be calculated to deceive, or with applying to goods any false trade description, or causing any of the things in this section mentioned to be done, and proves—

(*a*) that in the ordinary course of his business he is employed, on behalf of other persons, to make dies, blocks, machines or other instruments for making or being used in making trade marks, or, as the case may be, to apply marks or descriptions to goods, and that in the case which is the subject of the charge he was so employed by some person resident in Canada, and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and

(*b*) that he took reasonable precaution against committing the offence charged; and

(*c*) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark or trade description; and

(*d*) that he gave to the prosecutor all the information in his power with respect to the person by or on whose behalf the trade mark, mark or description was applied;—

Shall be discharged from the prosecution, but is liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence. 51 V. c. 41, s. 5.

454. No servant of a master, resident in Canada, who *bona fide* acts in obedience to the instructions of such master, and, on demand made by or on

behalf of the prosecutor, gives full information as to his master, is liable to any prosecution or punishment for any offence defined in this part. 51 V. c. 41, s. 20.

455. The provisions of this part with respect to false trade descriptions do not apply to any trade description which, on the 22nd day of May, 1888, was lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods: Provided, that where such trade description includes the name of a place or country, and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, and the goods are not actually made or produced in that place or country, such provisions shall apply unless there is added to the trade description, immediately before or after the name of that place or country, in an equally conspicuous manner with that name, the name of the place or country in which the goods were actually made or produced, with a statement that they were made or produced there. 51 V. c. 41, s. 19.

PART XXXIV.

PERSONATION. (*New*).

456. Every one is guilty of an indictable offence, and liable to fourteen years' imprisonment who, with intent fraudulently to obtain any property, personates any person, *living or dead*, or administrator, wife, widow, next of kin or relation of any person. 37-38 V. c. 36 (Imp.).

"Property" defined, s. 3.

Indictment.— unlawfully, falsely, and deceitfully did personate one J. N. with intent fraudulently to obtain . . . .

See 2 Russ. 1011: R. v. Martin and R. v. Cramp. R. & R. 324, 327.

PERSONATION AT EXAMINATIONS. (*New*).

457. Every one is guilty of an *indictable* offence, and liable on indictment *or summary conviction* to one year's imprisonment, or to a fine of one hundred dollars, who falsely, with intent to gain some advantage for himself or some other person, personates a candidate at any competitive or qualifying examination, held under the authority of any law or statute or in connection with any university or college, or who procures himself or any other person to be personated at any such examination, or who knowingly avails himself of the results of such personation.

See under next section.

PERSONATING OWNERS OF STOCK.

458. Every one is guilty of an indictable offence and liable to *fourteen* years' imprisonment who falsely and deceitfully personates—

(*a*) any owner of any share or interest of or in any stock, annuity, or other public fund transferable in any book of account kept by the Government of Canada or of any province thereof, or by any bank for any such Government; or

(*b*) any owner of any share or interest of or in the debt of any public body, or of or in the debt or capital stock of any body corporate, company, or society; or

(*c*) any owner of any dividend, coupon, certificate or money payable in respect of any such share or interest as aforesaid; or

(*d*) any owner of any share or interest in any claim for a grant of land from the Crown, or for any scrip or other payment or allowance in lieu of such grant of land; or

(*e*) any person duly authorized by any power of attorney to transfer any such share, or interest, or to receive any dividend, coupon, certificate or money, on behalf of the person entitled thereto—

and thereby transfers or endeavours to transfer any share or interest belonging to such owner, or thereby obtains or endeavours to obtain, as if he were the true and lawful owner or were the person so authorized by such power of attorney, any money due to any such owner or payable to the person so authorized, or any certificate, coupon, or share warrant, grant of land, or scrip, or allowance in lieu thereof, or other document which, by any law in force, or any usage existing at the time, is deliverable to the owner of any such stock or fund, or to the person authorized by any such power of attorney. R. S. C. c. 165, ss. 9 & 10 (*Amended*). 24-25 V. c. 98, ss. 3 & 4 (Imp.), and 33-34 V. c. 58 (Imp.).

Indictment.— unlawfully did, falsely and deceitfully personate one J. N., the said J. N. then being the owner of a certain share and interest in certain stock and annuities, which were then transferable at the bank of , to wit, (*state the amount and nature of the stock;*) and that the said A. B. thereby did then transfer the said share and interest of the said J. N. in the said stock annuities, as if he, the said A. B., were then the true and lawful owner thereof.

Upon the trial of any indictment for any offence under this section the jury may, if the evidence warrants it, under s. 711, convict the prisoner of an attempt to commit the same.

ACKNOWLEDGING INSTRUMENT IN FALSE NAME.

459. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, without lawful authority or excuse (the proof of which shall lie on him) acknowledges, in the name of any other person, before any court, judge or other person lawfully authorized in that behalf, any recognizance of bail, or any *cognovit actionem, or consent for judgment*, or judgment or any deed or other instrument. R. S. C. c. 165, s. 41 (*Amended*). 24-25 V. c. 98, s. 34 (Imp.).

Indictment.— on did without lawful authority or excuse, before (*the said then being lawfully authorized in that behalf*) unlawfully acknowledge fraudulently a certain recognizance of bail in the name of in a certain cause then pending in wherein A. B. was plaintiff and C. D. defendant.

PART XXXV.

OFFENCES RELATING TO THE COIN.

Sections 26, 29, 30, 31, 32, 33 & 34 of c. 167, R. S. C., are unrepealed. Sections 692, 718 & 721 post apply to offences against this part.

460. In this part, unless the context otherwise requires, the following words and expressions are used in the following senses :—

(*a*) "Current gold or silver coin," includes any gold or silver coin coined in any of Her Majesty's mints, or gold or silver coin of any foreign prince or state or country, or other coin lawfully current, by virtue of any proclamation or otherwise, in any part of Her Majesty's dominions.

(*b*) "Current copper coin," includes copper coin coined in any of Her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of Her Majesty's dominions.

(*c*) "Copper coin," includes any coin of bronze or mixed metal and every other kind of coin other than gold or silver.

(*d*) "Counterfeit" means false, not genuine.

(i) Any genuine coin prepared or altered so as to resemble or pass for any current coin of a higher denomination is a counterfeit coin.

(ii) A coin fraudulently filed or cut at the edges so as to remove the milling, and on which a new milling has been added to restore the appearance of the coin, is a counterfeit coin.

(*e*) "Gild" and "silver," as applied to coin, include casing with gold or silver respectively, and washing and colouring by any means whatsoever with any wash or materials capable of producing the appearance of gold or silver respectively.

(*f*) "Utter" includes "tender" and "put off." R. S. C. c. 167, s. 1. 24-25 V. c. 99, s. 1 (Imp.).

When Offence Complete.

461. Every offence of making any counterfeit coin, or of buying, selling, receiving, paying, tendering, uttering, or putting off, or of offering to buy, sell, receive, pay, utter or put off, any counterfeit coin is deemed to be complete, although the coin so made or counterfeited, or bought, sold, received, paid, tendered, uttered or put off, or offered to be bought, sold, received, paid, *tendered*, uttered or put off, was not in a fit state to be uttered, or the counterfeiting thereof was not finished or perfected. R. S. C. c. 167, s. 27. 24-25 V. c. 99, s. 30 (Imp.).

The word in *italic* is not in the Imperial Act. *See* R. v. Bradford 2 C. & D. 41.

COUNTERFEITING COINS, ETC.

462. 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. R. S. C. c. 167, ss. 3 & 4. 24-25 V. c. 99, ss. 2 & 3 (Imp.).

Indictment.— that J. S., on ten pieces of false and counterfeit coin, each piece thereof resembling and apparently intended to resemble and pass for a piece of current gold coin, called a sovereign, falsely and unlawfully did make and counterfeit.

It is rarely the case that the counterfeiting can be proved directly by positive evidence; it is usually made out by circumstantial evidence, such as finding the necessary coining tools in the defendant's house, together with some pieces of the counterfeit money in a finished, 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. Before the modern statutes which reduced the offence of coining from treason to felony, if several conspired to counterfeit the Queen's coin, and one of them actually did so in pursuance of the conspiracy, it was treason in all, and they might all have been indicted for counterfeiting the Queen's coin generally: 1 Hale, 214; they may, likewise, now all be indicted as principals under s. 61 *ante*.

A variance between the indictment and the evidence in the number of the pieces of coin, alleged to be counterfeited, is immaterial; but a variance as to the denomination of such coin, as guineas, sovereigns, shillings, would be fatal, unless amended. By the old law the counterfeit coin produced in evidence must have appeared to have that degree of resemblance to the real coin that it would be likely to be received as the coin for which it was intended to pass by persons using the caution customary in taking money. In R. v. Varley, 1 East, P. C. 164, the defendant had counterfeited the semblance of a half-guinea upon a piece of gold previously hammered, but it was not round, nor would it pass in the condition in which it then was, and the judges held that the offence was incomplete. So, in R. v. Harris, 1 Leach, 135, where the defendants were taken in the very act of coining shillings, but the shillings coined by them were taken 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 incomplete; but now by s. 461 the offence of counterfeiting shall be deemed complete although the coin made or counterfeited shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected.

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: s. 692. If it become a question whether the coin, which the counterfeit money was intended to imitate, be current coin, it is not necessary to produce the proclamation to prove its legitimation; it is a mere question of fact to be left to the jury upon evidence of usage, reputation, etc.: 1 Hale, 196, 212, 213. It is not necessary to prove that the counterfeit coin was uttered or attempted to be uttered: R. v. Robinson, 10 Cox, 107; R. v. Connell, 1 C. & K. 190; R. v. Byrne, 6 Cox, 475.

By s. 711, if upon the trial it appears that the defendant did not complete the offence charged, but was only guilty of an attempt to commit the same, a verdict may be given of guilty of the attempt.

DEALING IN, IMPORTING COUNTERFEIT COIN.

463. Every one is guilty of an indictable offence and liable to imprisonment for life who, without lawful authority or excuse the proof whereof shall lie on him—

(*a*) buys, sells, receives, pays or puts off, or offers to buy, sell, receive, pay or put off, at or for a lower rate or value than the same imports, or was apparently intended to import, any counterfeit coin resembling or apparently intended to resemble or pass for any current gold or silver coin; or

(*b*) imports or receives into Canada any counterfeit coin resembling or apparently intended to resemble or pass for, any current gold or silver coin knowing the same to be counterfeit. R. S. C. c. 167, ss. 7 & 8. 24-25 V. c. 99, ss. 6 & 7 (Imp.).

Indictment under (*a*).— ten pieces of counterfeit coin, each piece thereof resembling a piece of the current gold coin, called a sovereign, falsely, deceitfully and unlawfully, and without lawful authority or excuse did put off to one J. N. at and for a lower rate and value than the same did then import.

Prove that the defendant put off the counterfeit coin as mentioned in the indictment. In R. v. Wooldridge, 1 Leach, 307, it was holden that the putting off must be complete and accepted. But the words "offer to buy, sell," etc., in the above clause would now make the acceptation immaterial.

If the names of the persons to whom the money was put off can be ascertained, they ought to be mentioned and laid severally in the indictment; but if they cannot be ascertained the same rule will apply which prevails in the case of stealing the property of persons unknown: 1 Russ. 135.

Indictment under (*b*).— ten thousand pieces of counterfeit coin, each piece thereof resembling a piece of the current silver coin called a shilling, falsely, deceitfully and unlawfully, and without lawful authority or excuse, did

import into Canada,—he the said J. S. at the said time when he so imported the said pieces of counterfeit coin, well knowing the same to be counterfeit.

The guilty knowledge of the defendant must be averred in the indictment and proved.

COPPER COIN.

464. Every one who manufactures in Canada any copper coin, or imports into Canada any copper coin, other than current copper coin, with the intention of putting the same into circulation as current copper coin, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars for every pound Troy of the weight thereof; and all such copper coin so manufactured or imported shall be forfeited to Her Majesty. R. S. C. c. 167, s. 28.

The repealed section said copper "or brass" coin.

EXPORTATION.

465. Every one is guilty of an indictable offence and liable to *two years'* imprisonment who, without lawful authority or excuse the proof whereof shall lie on him, exports or puts on board any ship, vessel or boat, *or on any railway or carriage or vehicle of any description whatsoever*, for the purpose of being exported from Canada, any counterfeit coin resembling or apparently intended to resemble or pass for any current coin *or for any foreign coin of any prince, country or state*, knowing the same to be counterfeit. R. S. C. c. 167, s. 9. 24-25 V. c. 99, s. 8 (Imp.).

Fine, s. 958.

The words in italics are not in the Imperial Act.

The clause covers the attempt to export in certain cases. Sections 529 & 711 would cover other cases of attempts.

Indictment.— one hundred pieces of counterfeit coin, each piece thereof resembling a piece of the current coin called a sovereign, falsely, deceitfully and unlawfully, without lawful authority or excuse, did export from Canada, he the said C. D. at the time when he so exported the said pieces of counterfeit coin, then well knowing the same to be counterfeit.

MAKING INSTRUMENTS FOR COINING.

466. Every one is guilty of an indictable offence and liable to imprisonment for life who, without lawful authority or excuse the proof whereof shall lie on him, makes or mends, or begins or proceeds to make or mend, or buys or sells, or has in his custody or possession—

(*a*) any puncheon, counter puncheon, matrix, stamp, die, pattern or mould, in or upon which there is made or impressed, or which will make or impress, or which is adapted and intended to make or impress, the figure, stamp or apparent resemblance of both or either of the sides of any current gold or silver coin, or of any coin of any foreign prince, state or country, or any part or parts of both or either of such sides; or

(*b*) any edger, edging or other tool, collar, instrument or engine adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures apparently resembling those on the edges of any such coin, knowing the same to be so adapted and intended; or

(c) any press for coinage, or any cutting engine for cutting, by force of a screw or of any other contrivance, round blanks out of gold, silver or other metal or mixture of metals, or any other machine, knowing such press to be a press for coinage, or knowing such engine or machine to have been used or to be intended to be used for or in order to the false making or counterfeiting of any such coin. R. S. C. c. 167, s. 24. 24-25 V. c. 99, s. 24 (Imp.).

Indictment for making a puncheon for coining.—one puncheon, in and upon which there was then made and impressed the figure of one of the sides, that is to say, the head side of a piece of the current silver coin, commonly called a shilling, knowingly, falsely, deceitfully and unlawfully, and without lawful authority or excuse, did make.

Prove that the defendant made a puncheon, as stated in the indictment; and prove that the instrument in question is a puncheon included in the statute. The words in the statute "upon which there is made or impressed" apply to the puncheon which being convex bears upon it the figure of the coin; and the words "which will make or impress" apply to the counter puncheon, which being concave will make and impress. However, although it is more accurate to describe the instruments according to their actual use, they may be described either way: R. v. Lennard, 1 Leach, 90. 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 this statute, and, consequently the difficulty in R. v. Sutton, 2 Str. 1074, where the instrument was capable of making the sceptre only cannot now occur: *see* R. v. Heath, R. & R. 184.

And 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 is sufficient to prove that the prisoner made the mould and a part of the impression, though he had not completed the entire impression: R. v. Foster, 7 C. & P. 495. It is not necessary to prove under this branch of the statute the *intent* of the defendant: the mere similitude is treated by the Legislature as evidence of the intent; neither is it essential to show that money was actually made with the instrument in question: R. v. Ridgeley, 1 East, P. C. 171. The proof of lawful authority or excuse, if any, lies on the defendant. Where the defendant employed a die sinker to make, for a pretended innocent purpose, a die calculated to make shillings; and the die-sinker, suspecting fraud, informed the authorities at the mint, and under their directions made the die for the purpose of detecting prisoner; it was held that the die-sinker was an innocent agent and the defendant was rightly convicted as a principal: R. v. Bannen, 2 Moo. 309.

The *making* and *procuring* dies and other materials, with intent to use them in coining Peruvian half-dollars in England, not in order to utter them here, but by way of trying whether the apparatus would answer, before sending it out to Peru, to be there used in making the counterfeit coin for circulation in that country, was held to be an indictable misdemeanour at common law: R. v. Roberts, Dears. 539; 1 Russ. 100. A galvanic battery is a machine within the section: R. v. Gover, 9 Cox, 282.

Indictment for having a puncheon in possession.—one puncheon in and upon which there was then made and impressed the figure of one of the sides, that is to say, the head side of a piece of the current silver coin commonly called a shilling, knowingly, falsely, deceitfully and unlawfully, and without lawful authority or excuse, had in his custody and possession.

An indictment which charged that the defendant feloniously had in his possession a mould "upon which said mould was made and impressed the figure and apparent resemblance" of the obverse side of a sixpence, was held bad on demurrer, as not sufficiently showing that the impression was on the mould at the time when he had it in his possession: R. v. Richmond, 1 C. & K. 240.

As to evidence of possession *see* s. 3, *ante*; R. v. Rogers, 2 Moo. 85. The prisoner had occupied a house for about a month before the police entered it, and found two men and two women there, one of whom was the wife of the prisoner. The men attacked the police, and the women threw something into the fire. The police succeeded, however, in preserving part of what the women threw away, which proved to be fragments of a plaster-of-Paris mould of a half-crown. The prisoner came in shortly afterwards, and, on searching the house, a quantity of plaster-of-Paris was found up-stairs. An iron ladle and some fragments of plaster-of-Paris moulds were also found. It was proved that the prisoner, thirteen days before the day in question, had passed a bad half-crown, but there was no evidence that it had been made in the mould found by the police. He was afterwards tried and convicted for uttering the base half-crown. It was held that there was sufficient evidence to justify the conviction, and that, on a trial for felony, other substantive felonies which have a tendency to establish the scienter of the defendant may be proved for that purpose: R. v. Weeks, L. & C. 18. In R. v. Harvey, 11 Cox, 662, it was *held:* 1. That an indictment under this section is sufficient if it charges possession without lawful excuse, as excuse would include authority; 2. That the words "the proof whereof shall lie on the accused" only shift the burden of proof, and do not alter the character of the offence; 3. That the fact that the Mint authorities, upon information forwarded to them, gave authority to the die maker to make the die, and that the police gave permission

to him to give the die to the prisoner, who ordered him to make it, did not constitute lawful authority or excuse for prisoner's possession of the die; 4. That, to complete the offence, a felonious intent is not necessary; and, upon a case reserved, the conviction was affirmed.

Indictment for making a collar.— one collar adapted and intended for the marking of coin round the edges with grainings apparently resembling those on the edges of a piece of the current gold coin called a sovereign, falsely, deceitfully and unlawfully, without lawful authority or excuse, did make, he the said J. S. then well knowing the same to be so adapted and intended as aforesaid.

It must be proved, upon this indictment that the defendant knew the instrument to be adapted and intended for the marking of coin round the edges.

It must be remarked that the said clause expressly applies to tools for marking foreign coin, as well as current coin.

BRINGING INSTRUMENTS INTO CANADA.

467. Every one is guilty of an indictable offence and liable to imprisonment for life who, without lawful authority or excuse the proof whereof shall lie on him, knowingly conveys out of any of Her Majesty's mints into Canada, any puncheon, counter puncheon, matrix, stamp, die, pattern, mould, edger, edging or other tool, collar, instrument, press or engine, used or employed in or about the coining of coin, or any useful part of any of the several articles aforesaid, or any coin, bullion, metal or mixture of metals. R. S. C. c. 167, s. 25. 24-25 V. c. 99, s. 25 (Imp.).

CLIPPING CURRENT GOLD OR SILVER COIN.

468. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who impairs, diminishes or lightens any current gold or silver coin with intent that the coin so impaired, diminished, or lightened may pass for current gold or silver coin. R. S. C. c. 167, s. 5. 24-25 V. c. 99, 4 (Imp.).

Indictment.— ten pieces of current gold coin, called sovereigns, falsely, deceitfully and unlawfully did impair, with intent that each of the ten pieces so impaired might pass for a piece of current gold coin, called a sovereign.

The act of impairing must be shown, either by direct evidence of persons who saw the prisoner engaged in it, or by presumptive evidence, such as the possession of filings and of impaired coin, or of instruments for filing, etc. The intent to pass off the impaired coin must then appear. This may be done by showing that the prisoner attempted to pass the coin so impaired, or that he carried it about his person, which would raise a presumption that he intended to pass it. And if the coin were not so defaced by the process by impairing, as apparently to affect its currency, it would, under the circumstances, without further evidence, be a question for the jury, whether the diminished coin was intended to be passed: Roscoe on Coining, 19.

DEFACING CURRENT COIN.

469. Every one is guilty of an indictable offence and liable to one year's imprisonment who defaces any current gold, silver or copper coin by stamping thereon any names or words, whether such coin is or is not thereby diminished or lightened, and afterwards tenders the same. R. S. C. c. 167, s. 17. 24-25 V. c. 99, s. 16 (Imp.).

Fine, s. 958.

Indictment for defacing coin.— one piece of the current silver coin, called a half-crown, unlawfully did deface, by then stamping thereon certain names and words, to wit . . . .

Prove that the defendant defaced the coin in question, by stamping on it any names or words, or both. It is not necessary to prove that the coin was thereby diminished or lightened.

POSSESSING CLIPPINGS, ETC.

470. Every one is guilty of an indictable offence and liable to seven years' imprisonment who unlawfully has in his custody or possession any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution or otherwise, which have been produced or obtained by impairing, diminishing or lightening any current gold or silver coin, knowing the same to have been so produced or obtained. R. S. C. c. 167, s. 6. 24-25 V. c. 99, s. 5 (Imp.).

"Having in possession" defined, s. 3.

Greaves remarks: "This clause is new. It has frequently happened that filings and clippings, and gold dust

have been found under such circumstances as to leave no doubt that they were produced by impairing coin but there has been no evidence to prove that any particular coin had been impaired. This clause is intended to meet such cases."

POSSESSING COUNTERFEIT COIN.

471. Every one is guilty of an indictable offence and liable to three years' imprisonment who has in his custody or possession, knowing the same to be counterfeit, and with intent to utter the same or any of them—

(*a*) any counterfeit coin resembling, or apparently intended to resemble or pass for, any current gold or silver coin ; or

(*b*) three or more pieces of counterfeit coin resembling, or apparently intended to resemble or pass for, any current copper coin. R. S. C. c. 167, 12 & 16. 24-25 V. c. 99, ss. 11 & 15 (Imp.).

"Having in possession" defined, s. 3.

Fine, s. 958. Search warrant, s. 569.

The punishment under (*b*) was only one year by the repealed Act.

Indictment for having in possession counterfeit gold or silver coin with intent, etc. unlawfully, falsely and deceitfully had in his custody and possession four pieces of counterfeit coin, resembling the current silver coin called with intent to utter the said pieces of counterfeit coin, he the said J. S. then well knowing the said pieces of counterfeit coin to be counterfeit.

See R. v. Hermann, 4 Q. B. D. 284, 14 Cox, 279, Warb. Lead. Cas. 77.

OFFENCES RESPECTING COPPER COIN.

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

(*a*) makes, or begins to make, any counterfeit coin resembling, or apparently intended to resemble or pass for any current copper coin ; or

(*b*) without lawful authority or excuse, the proof of which shall lie on him, knowingly—

(i) makes or mends, or begins or proceeds to make or mend, or buys or sells, or has in his custody or possession, any instrument, tool or engine adapted and intended for counterfeiting any current copper coin;

(ii) buys, sells, receives, pays or puts off, or offers to buy, sell, receive, pay or put off, any counterfeit coin resembling, or apparently intended to resemble or pass for, any current copper coin, at or for a lower rate of value

than the same imports, or was apparently intended to import. R. S. C. c. 167, s. 15. 24-25 V. c. 99, s. 14 (Imp.).

Fine, s. 958. The punishment was seven years under the repealed Act. *See* s. 463 *ante*.

FOREIGN COINS.

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

(*a*) makes, or begins to make, any counterfeit coin or silver coin resembling, or apparently intended to resemble or pass for, any gold or silver coin of any foreign prince, state or country, not being current coin;

(*b*) without lawful authority or excuse, the proof of which shall lie on him—

(i) brings into or receives in Canada any such counterfeit coin, knowing the same to be counterfeit;

(ii) has in his custody or possession any such counterfeit coin knowing the same to be counterfeit, and with intent to put off the same; or

(*c*) utters any such counterfeit coin; or

(*d*) makes any counterfeit coin resembling, or apparently intended to resemble or pass for, any copper coin of any foreign prince, state or country, not being current coin. R. S. C. c. 167, ss. 19, 20, 21, 22 & 23. 24-25 V. c. 99, s. 18, *et seq.* (Imp.).

Fine, s. 958. "Having in possession" defined, s. 3. *See* R. v. Tierney, 29 U. C. Q. B. 181.

UTTERING COUNTERFEIT COIN.

474. Every one is guilty of an indictable offence and liable to *fourteen* years' imprisonment who utters any counterfeit coin resembling, or apparently intended to resemble or pass for, any current gold or silver coin, knowing the same to be counterfeit. R. S. C. c. 167, s. 10. 24-25 V. c. 99, s. 9 (Imp.).

Under the Imperial Act the imprisonment is *one* year.

Indictment.— one piece of counterfeit coin resembling a piece of the current gold coin, called a sovereign, unlawfully, falsely and deceitfully did utter to one J. N. he the said then well knowing the same to be counterfeit.

Prove the tendering, uttering or putting off the sovereign in question, and prove it to be a base and counterfeit sovereign. Where a good shilling was given to a Jew boy for fruit, and he put it into his mouth under pretense of trying whether it were good, and then taking a bad shilling out of his mouth instead of it, returned it to the prosecutor,

saying that it was not good; this (which is called *ringing the changes*) was holden to be an uttering, indictable as such: R. v. Franks, 2 Leach, 644. The giving of a piece of counterfeit money in charity is not an uttering, although the person may know it to be counterfeit; as in cases of this kind, there must be some intention to defraud: R. v. Page, 8 C. & P. 122. But this case has been overruled: R. v. Ion, 2 Den. 475; 1 Russ. 126; *see* R. v. ——— 1 Cox, 250.

A prisoner went into a shop, asked for some coffee and sugar, and in payment put down on the counter a counterfeit shilling: the prosecutor said that the shilling was a bad one, whereupon the prisoner quitted the shop, leaving the shilling and also the coffee and sugar: held that this was an uttering and putting off within the statute: R. v. Welch, 2 Den. 78. The prisoner and J. were indicted for a misdemeanour in uttering counterfeit coin. The uttering was effected by J. in the absence of the prisoner, but the jury found that they were both engaged on the evening on which the uttering took place in the common purpose of uttering counterfeit shillings, and that in pursuance of that common purpose J. uttered the coin in question: *Held*, that the prisoner was rightly convicted as a principal, there being no accessories in a misdemeanour: R. v. Greenwood, 2 Den. 453. If two jointly prepare counterfeit coin, and utter it in different shops apart from each other but in concert, intending to share the proceeds, the utterings of each are the joint utterings of both, and they may be convicted jointly: R. v. Hurse, 2 M. & Rob. 360; *see* R. v. Hermann, 4 Q. B. D. 284, Warb. Lead Cas. 77.

Husband and wife were jointly indicted for uttering counterfeit coin: *Held*, that the wife was entitled to an acquittal, as it appeared that she uttered the money in the presence of her husband: R. v. Price, 8 C. & P. 19; *see* now s. 13, *ante*.

Proof of the guilty knowledge by the defendant must be given. This of course must be done by circumstantial

evidence. If, for instance, it be proved that he uttered, either on the same day or at other times, whether before or after the uttering charged, base money, either of the same or of a different denomination, to the same or to a different person, or had other pieces of base money about him when he uttered the counterfeit money in question; this will be evidence from which the jury may presume a guilty knowledge: 1 Russ. 127.

UTTERING LIGHT COINS.

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

(*a*) utters, as being current, any gold or silver coin of less than its lawful weight, knowing such coin to have been impaired, diminished or lightened, otherwise than by lawful wear; or

(*b*) with intent to defraud utters, as or for any current gold or silver coin, any coin not being such current gold or silver coin, or any medal, or piece of metal or mixed metals, resembling, in size, figure and colour, the current coin as or for which the same is so uttered, such coin, medal or piece of metal or mixed metals so uttered being of less value than the current coin as or for which the same is so uttered; or

(*c*) utters any counterfeit coin resembling or apparently intended to resemble or pass for any current copper coin, knowing the same to be counterfeit. R. S. C. c. 167, ss. 11, 14 & 16. 24-25 V. c. 99, ss. 10, 13 & 15 (Imp.).

Fine, s. 958.

A person was convicted, under the above section, of putting off, as and for a half sovereign, a medal of the same size and colour, which had on the obverse side a head similar to that of the Queen, but surrounded by the inscription "Victoria, Queen of Great Britain," instead of "Victoria Dei Gratia," and a round guerling and not square, and no evidence was given as to the appearance of the reverse side, nor was the coin produced to the jury; it was held that there was sufficient evidence that the medal resembled, in figure, as well as size and colour, a half sovereign: R. v. Robinson, L. & C. 604; the medal was produced, but, in the course of his evidence, one of the witnesses accidentally dropped it, and it rolled on the floor; strict search was made for it for more than half an hour, but it could not be found.

UTTERING DEFACED COIN.

476. Every one who utters any coin defaced by having stamped thereon any names or words, is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding ten dollars. R. S. C. c. 167, s. 18.

See s. 469, *ante*.

No prosecution without the consent of the Attorney-General; s. 549.

UTTERING UNCURRENT COPPER COIN.

477. Every one who utters, or offers in payment, any copper coin, other than current copper coin, is guilty of an offence and liable, on summary conviction, to a penalty of double the nominal value thereof, and in default of payment of such penalty to eight days' imprisonment. R. S. C. c. 167, s. 33.

PUNISHMENT AFTER PREVIOUS CONVICTION.

478. Every one who, after a previous conviction of any offence *relating to the coin under this or any other Act*, is convicted of any offence *specified in this part* is liable to the following punishment :—

(*a*) to imprisonment for life, if otherwise fourteen years would have been the longest term of imprisonment to which he would have been liable ;

(*b*) to fourteen years' imprisonment, if otherwise seven years would have been the longest term of imprisonment to which he would have been liable ;

(*c*) to seven years' imprisonment, if otherwise he would not have been liable to seven years' imprisonment. R. S. C. c. 167, s. 13 (*Amended*). 24-25 V. c. 99, s. 12 (Imp.).

The words in italics are new.

The punishments are altered.

See R. v. Thomas, 13 Cox, 52.

See ss. 628 and 676 as to procedure when a previous offence is charged, corresponding to s. 116 of the Imperial Larceny Act, and s. 37 of the Imperial Coin Act: R. v. Martin, 11 Cox, 343.

This enactment is intended to provide for a subsequent *indictable* offence after a previous conviction for an *indictable* offence. Unfortunately, the section does not say what it means, and any one convicted, for instance, of uttering defaced coin under s. 476 and fined ten dollars, is liable to *seven* years imprisonment on a subsequent conviction for any offence specified in this part, s. 536.

PART XXXVI.

ADVERTISING COUNTERFEIT MONEY.

479. In this part the expression "counterfeit token of value" means any spurious or counterfeit coin, paper money, inland revenue stamp, postage stamp, or other evidence of value, by whatever technical, trivial or deceptive designation the same may be described. 51 V. c. 40, s. 1.

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

(*a*) prints, writes, utters, publishes, sells, lends, gives away, circulates or distributes any letter, writing, circular, paper, pamphlet, handbill or any written or printed matter advertising, or offering or purporting to advertise or offer for sale, loan, exchange, gift or distribution, or to furnish, procure or distribute, any counterfeit token of value, or what purports to be a counterfeit token of value, or giving or purporting to give, either directly or indirectly, information where, how, of whom, or by what means any counterfeit token of value, or what purports to be a counterfeit token of value, may be procured or had; or

(*b*) purchases, exchanges, accepts, takes possession of or in any way uses, or offers to purchase, exchange, accept, take possession of or in any way use, or negotiates or offers to negotiate with a view of purchasing or obtaining or using any such counterfeit token of value, or what purports so to be; or

(*c*) in executing, operating, promoting or carrying on any scheme or device to defraud, by the use or by means of any papers, writings, letters, circulars or written or printed matters concerning the offering for sale, loan, gift, distribution or exchange of counterfeit tokens of value, uses any fictitious, false or assumed name or address, or any name or address other than his own right, proper and lawful name; or

(*d*) in the execution, operating, promoting or carrying on, of any scheme or device offering for sale, loan, gift or distribution, or purporting to offer for sale, loan, gift or distribution, or giving or purporting to give information, directly or indirectly, where, how, of whom or by what means any counterfeit token of value may be obtained or had, knowingly receives or takes from the mails, or from the post office, any letter or package addressed to any such fictitious, false or assumed name or address, or name other than his own right, proper or lawful name. 51 V. c. 40, ss. 2 & 3.

See s. 693 as to evidence.

On indictment for offering to purchase counterfeit tokens of value prisoner cannot be convicted on evidence that notes which he offered to purchase were not counterfeit but genuine bank notes unsigned, though he offered to purchase in belief that they were counterfeit: R. v. Attwood, 20 O. R. 574.

PART XXXVII.

MISCHIEF.

481. Every one who causes any event by an act which he knew would probably cause it, being reckless whether such event happens or not, is deemed to have caused it wilfully for the purposes of this part.

2. Nothing shall be an offence under any provision contained in this part unless it is done without legal justification or excuse, and without colour of right.

3. Where the offence consists in an injury to anything in which the offender has an interest, the existence of such interest, if partial, shall not prevent his act being an offence, and if total, shall not prevent his act being an offence, if done with intent to defraud. R. S. C. c. 168, ss. 60 & 61 (*Amended*). 24-25 V. c. 97, ss. 58 & 59 (Imp.).

" Part xxxiv. (xxxvii. of this code), is founded on the provisions of 24 & 25 V. c. 97 (c. 168, R. S. C.), in which the word 'maliciously' very frequently occurs. Section 381 (481) is meant to give what we believe to be the legal effect of that word. The first portion of the section is intended to meet such state of facts as that in the case of R. v. Child, L. R. 1 C. C. R. 307, 12 Cox, 64, Warb. Lead. Cas. 193, 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 a tenant for years burning his landlord's house commits an offence, though in so doing he burns his own leasehold, and a freeholder burning his own house commits an offence, if he does so with intent to defraud the insurers. The rest of this part re-enacts 24 & 25 V. c. 97, with little substantial alteration."—Imp. Comm. Rep.

Greaves says on the section corresponding to s-s. 3, s. 481: " This clause is new and a very important amendment. It extends every clause of the Act not already so extended to persons in possession of the property injured, provided they intend to injure or defraud any other person. It therefore brings tenants within the provisions of the Act, whenever they injure the demised premises, or anything growing on or annexed to them, with intent to injure their landlords."

By s. 613, *post*, in any indictment, it is sufficient to allege that the person accused did the act with intent to defraud, as the case may be, without alleging an intent to defraud any particular person, and no count shall be deemed objectionable on the ground that it does not contain the name of the person injured, or attempted, or intended to be injured.

ARSON.

482. Every one is guilty of the indictable offence of arson and liable to imprisonment for life who wilfully sets fire to any building or structure *whether such building, erection or structure is completed or not*, or to any stack of vegetable produce or of mineral or vegetable fuel, or to any mine or any well of oil or other combustible substance, or to any ship or vessel, whether completed or not, or to any timber or materials placed in any shipyard for building or repairing or fitting out any ship, or to any of Her Majesty's stores or munitions of war. R. S. C. c. 168, ss. 2 to 8, 19, 28, 46 & 47 (*Amended*, 24-25 V. c. 97, ss. 1 to 6, 17, 26, 42 & 43 (Imp.).

The words in italics settle a mooted point.

Indictment.— that A. B., on at unlawfully and wilfully, without legal justification or excuse, and without colour of right did set fire to a certain building, to wit, a dwelling-house of C. D.: *see* R. v. Turner, 1 Moo. 239; R. v. Lewis, 2 Russ. 1067.

The definition of arson at common law is as follows: arson is the malicious and wilful burning the house of another, and to constitute the offence there must be an actual burning of some part of the house, though it is not necessary that any flames should appear: 3 Burn, 768. But now the words of the statute are *set fire to*, merely; and, therefore, it is not necessary in an indictment to aver that the house was burnt, nor need it be proved that the house was actually consumed. But under the statute, as well as at common law, there must be an actual burning of some part of the house; a bare intent or attempt to do it is not sufficient. But the burning or consuming of any part of the house, however trifling, is sufficient, although the fire be afterwards extinguished. Where on an indictment it was proved that the floor of a room was scorched; that it was charred in a trifling way; that it had been at a

red heat but not in a blaze, this was held a sufficient burning to support the indictment. But where a small faggot having been set on fire on the boarded floor of a room, the boards were thereby scorched black but not burnt, and no part of the wood was consumed, this was held not sufficient.

The time stated in the indictment need not be proved as laid; if the offence be proved to have been committed at any time before or after, provided it be some day before the finding of the indictment by the grand jury, it is sufficient. Where the indictment alleged the offence to have been committed in the night time and it was proved to have been committed in the day time, the judges held the difference to be immaterial. The parish is material, for it is stated as part of the description of the house burnt. Wherefore, if the house be proved to be situate in another parish the defendant must be acquitted, unless the variance be amended: *see* now ss. 611, 613, *post*. If a man intending to commit a felony, by accident set fire to another's house, this, it should seem, would be arson. If intending to set fire to the house of A. he accidentally set fire to that of B., it is felony. Even if a man by wilfully setting fire to his own house, burns also the house of one of his neighbours it will be felony; for the law in such a case implies malice, particularly if the party's house were so situate that the probable consequence of its taking fire was that the fire would communicate to the houses in its neighbourhood. And generally if the act be proved to have been done wilfully, it may be inferred to have been done maliciously, unless the contrary be proved: Archbold, 625; R. v. Tivey, 1 C. & K. 704; R. v. Philp, 1 Moo. 263.

It is seldom that the wilful burning by the defendant can be made out by direct proof; the jury, in general, have to adjudicate on circumstantial evidence. Where a house was robbed and burned, 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 evidence tending to prove him guilty of the arson. So where the question is whether the burning was accidental or wilful, evidence is admissible 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 commission of the like offence against the same property. 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 demeanour which showed indifference or gratification, was rejected.

Upon an indictment for any offence mentioned in this part the jury may, under s. 711, convict the prisoner of an attempt to commit the same, and thereupon he may be punished in the same manner as if he had been convicted on an indictment for such attempt: ss. 528, 529.

See R. v. Newboult, 12 Cox, 148, and R. v. Farrington, 1 R. & R. 207, as to intent.

It is immaterial whether the building, house, etc., be that of a third person or of the defendant himself; but in the latter case, the intent to defraud cannot be inferred from the act itself, but it must be alleged and proved by other evidence. In R. v. Kitson, Dears. 187, the prisoner was indicted for arson, in setting fire to his own house with intent to defraud an insurance office. Notice to produce the policy was served too late on the defendant, and it was held that secondary evidence of the policy was not admissible. "But it must not, however, be understood, said Jervis, C.J., "that it is absolutely necessary in all cases to produce the policy, but the intent to defraud alleged in the indictment must be proved by proper evidence."

Defendant was charged with having set fire to a building, the property of one J. H., "with intent to defraud." The case opened by the Crown was that the prisoner in-

tended to defraud several insurance companies, but the legal proof of the policies was wanting, and an amendment was allowed by striking out the words "with intent to defraud." The evidence showed that several persons were interested as mortgagees of the building, a large hotel, and J. H. as owner of the equity of redemption. It was left to the jury to say whether the prisoner intended to injure any of those interested. They found a verdict of guilty. *Held*, that the amendment was authorized and proper, and the conviction was warranted by the evidence. The indictment in such a case is sufficient without alleging any intent, there being no such averment in the statutory form; but an intent to injure or defraud must be shown on the trial: R. v. Cronin, 36 U. C. Q. B. 342.

An indictment for setting fire to a stack of beans, R. v. Woodward, 1 Moo. 323; or barley, R. v. Swatkins, 4 C. & P. 548, is good; for the court will take notice that beans are pulse, and barley, corn: s. 487, *post*. A stack composed of the flax-plant with the seed or grain in it, the jury finding that the flax-seed is a grain, was held to be a stack of grain: R. v. Spencer, Dears. & B. 131. The prisoner was indicted for setting fire to a stack of wood, and it appeared that the wood set fire to consisted of a score of faggots heaped on each other in a temporary loft over the gateway. *Held*, this not to be a stack of wood: R. v. Aris, 6 C. & P. 348. Where the defendant set fire to a summer-house in a wood, and the fire was thence communicated to the wood, he was held to be properly convicted on an indictment charging him with setting fire to the wood: R. v. Price, 9 C. & P. 729. An indictment for setting fire to a cock of hay cannot be sustained under a statute making it an offence to set fire to a stack of hay: R. v. McKeever, 5 Ir. R. C. L. 86. A quantity of straw, packed on a lory, in course of transmission to market, and left for the night in the yard of an inn, is not a stack of straw within 24 & 25 V. c. 97, s. 17 (Imp.), (19 of our repealed

statute), and the setting fire thereto wilfully and maliciously is not felony: R. v. Satchwell, 12 Cox, 449; s. 487 *post*.

Section 19 of repealed statute did not apply to manufactured lumber; R. v. Berthé, 16 C. L. J. 251.

It is equally an offence within this section to set fire to a mine in the possession of the party himself, provided it is proved to be done with intent to injure or defraud any other person. The mine may be laid as the property of the person in possession of or working it, though only as agent: R. v. Jones, 2 Moo. 293.

As to setting fire to ships.—A pleasure boat, eighteen feet long, was set fire to and Patteson, J., inclined to think that it was a vessel within the meaning of the Act, but the prisoner was acquitted on the merits, and no decided opinion was given: R. v. Bowyer, 4 C. & P. 559. Upon an indictment for firing a barge, Alderson, J., seemed to doubt if a barge was within the meaning of the statute: R. v. Smith, 4 C. & P. 569. The burning of a ship of which the defendant was a part owner is within the statute: R. v. Wallace, 2 Moo. 200.

In R. v. Philp, 1 Moo. 263, there was no proof of malice against the owners, and the ship was insured for more than its value, but the court thought that the defendant must be taken to contemplate the consequences of his act, and held that, as to this point, the conviction was right: *see* R. v. Newill, 1 Moo. 458. The destruction of a vessel by a part-owner shows an intent to prejudice the other part-owners, though he has insured the whole ship and promised that the other part-owners should have the benefit thereof: R. v. Philp, 1 Moo. 263. The underwriters on a policy of goods fraudulently made are within the statute, though no goods be put on board: *Idem*. If the intent be laid to prejudice the underwriters then prove the policy, and that the ship sailed on her voyage: R. v. Gilson, R. & R. 138.

A sailor goes on a ship to steal rum. While tapping the casks a lighted match held by him set the rum on fire, and a conflagration ensued which destroyed the vessel. *Held*, that a conviction for arson of the ship could not be upheld: R. v. Faulkner, 13 Cox, 550.

ATTEMPT.

483. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who *wilfully* attempts to set fire to anything mentioned in the last preceding section, or who wilfully sets fire to any substance so situated that he knows that anything mentioned in the last preceding section is likely to catch fire therefrom. R. S. C. c. 168, ss. 9, 10, 20, 29 & 48 (*Amended*). 24-25 V. c. 97, ss. 7, 8, 18, 27 & 44 (Imp.).

See R. v. Child, Warb. Lead. Cas. 193, and cases there cited.

"Wilfully attempt" in this section is not a happy expression. Can any one be said to *not wilfully attempt?*

Indictment.— at unlawfully and wilfully did attempt, without legal justification or excuse and without colour of right, to set fire to a certain dwelling-house (building) of F. N.

Where the prisoners were indicted for setting fire to letters in a post-office, divers persons being in the house, it was held that there was no evidence of any intent, but it was what is vulgarly called a lark, and even if the house had been burned they would not have been guilty: R. v. Batstone, 10 Cox, 20.

A person maliciously sets fire to goods in a house with intent to injure the owner of the goods, but he had no malicious intention to burn the house, or to injure the owner of it. The house did not take fire but would have done so if the fire had not been extinguished: *Held*, that if the house had thereby caught fire, the setting fire to it would not have been within this section, as, under the circumstances, it would not have amounted to felony: R. v. Nattrass, 15 Cox, 73; R. v. Harris, 15 Cox, 75. But *see* now s. 481.

It is not necessary in a count in an indictment laid under this section to allege an intent to defraud, and it is

sufficient to follow the words of the section without substantively setting out the particular circumstances relied on as constituting the offence. Evidence of experiments made subsequently to the fire is admissible in order to show the way in which the building was set fire to: R. v. Heseltine, 12 Cox, 404.

The words "with intent to injure or defraud" have been left out of these sections.

Lighting a match by the side of a stack with intent to set fire to it is an attempt to set fire to it, because it is an act immediately and directly tending to the execution of the crime: R. v. Taylor, 1 F. & F. 511. On an indictment against two prisoners for attempting to set fire, one prisoner had not assisted in the attempt, but had counselled and encouraged the other; both were convicted: R. v. Clayton, 1 C. & K. 128.

See R. v. Goodman, 22 U. C. C. P. 338.

SETTING FIRE TO CROPS, TREES, LUMBER.

484. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who wilfully sets fire to—

(*a*) any crop, whether standing or cut down, or any wood, forest, coppice or plantation, or any heath, gorse, furze or fern; or

(*b*) any tree, lumber, timber, logs, or floats, boom, dam or slide, and thereby injures or destroys the same. R. S. C. c. 168, ss. 18 & 12 (*Amended*), 24-25 V. c. 97, s. 16 (Imp.).

Indictment under s. 12 of repealed statute quashed, for want of the words "so as to injure or to destroy": R. v. Berthé, 16 C. L. J. 251. Such an indictment bad, even after verdict: R. v. Bleau, 7 R. L. 571.

See form of indictment under s. 482, to which add for an offence under s-s. (*b*) "and thereby injured (*or destroyed*) the same," or "injured *and* destroyed the same."

ATTEMPT.

485. Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully attempts to set fire to anything mentioned in the last preceding section, or who wilfully sets fire to any substance so situated that he knows that anything mentioned in the last preceding section

is likely to catch fire therefrom. R. S. C. c. 168, s. 20 (*Amended*). 24-25 V. c. 97, s. 18 (Imp.).

See remarks under the last three sections.

SETTING FIRE TO FORESTS, ETC.

486. Every one is guilty of an indictable offence and liable to two years' imprisonment who, by such negligence as shows him to be reckless or wantonly regardless of consequences, or in violation of a provincial or municipal law of the locality, sets fire to any forest, tree, manufactured lumber, square timber, logs or floats, boom, dam or slide on the Crown domain, or land leased or lawfully held for the purpose of cutting timber, or on private property, on any creek or river, or rollway, beach or wharf, so that the same is injured or destroyed.

2. The magistrate investigating any such charge may, in his discretion, if the consequences have not been serious, dispose of the matter summarily, without sending the offender for trial, by imposing a fine not exceeding fifty dollars, and in default of payment by the committal of the offender to prison for any term not exceeding six months, with or without hard labour. R. S. C. c. 168, s. 11.

Fine, s. 958.

Indictment.— that A. B. on at acting with reckless negligence and wantonly regardless of consequences (*or in violation of a provincial* "or" *a municipal law*) did unlawfully set fire to a forest then and there situate on the Crown domain, so that the said forest was injured (*or destroyed.*)

THREATS TO BURN.

487. Every one is guilty of an indictable offence and liable to ten years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to burn or destroy any building, or any rick or stack of grain, hay or straw or other agricultural produce, or any grain, hay or straw or other agricultural produce in or under any building, or any ship or vessel. R. S. C. c. 173, s. S. 24-25 V. c. 97, s. 50 (Imp.).

See remarks under ss. 233 & 482, *ante.*

A threat to burn standing corn is not within the statute: R. v. Hill, 5 Cox, 233; *See* R. v. Jepson, 2 East, P. C. 1115, *note* (*a*), as to what constitutes a threat. *See* s. 959 *post*, as to articles of the peace.

ATTEMPT TO DAMAGE BY EXPLOSIVES.

488. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who wilfully places or throws any explosive substance

into or near any building or ship with intent to destroy or damage the same or any machinery, working tools, or chattels whatever, whether or not any explosion takes place. R. S. C. c. 168, ss. 14 & 49. 24-25 V. c. 97, ss. 10-45 (Imp.).

"Explosives" defined, s. 3.

Indictment for throwing gunpowder into a house with intent, etc.— at unlawfully and wilfully did throw into the dwelling-house of J. N., a large quantity, to wit, two pounds of a certain explosive substance, that is to say, gunpowder, with intent thereby then to destroy the said dwelling-house. (*Add counts varying the statement of the act, and also stating the intent to be to damage the house.*)

Indictment under s. 99 for destroying by explosion part of a dwelling-house, so as to endanger life.— wilfully and unlawfully did, by the explosion of a certain explosive substance, that is to say gunpowder, destroy a certain part of the dwelling-house of J. N., situate one A. N., then being in the said dwelling-house, so as to endanger the life of the said A. N. (*Add counts for throwing down and damaging part of the dwelling-house,*) under s. 488: *See* R. v. McGrath, 14 Cox, 598; and ss. 99, 100, 247, 248 & 499, which also provide for offences by explosives.

Prove that the defendant by himself or with others destroyed or was present aiding and abetting in the destruction of some part of the dwelling-house in question, by the explosion of gunpowder or other explosive substance mentioned in the indictment: R. v. Howell, 9 C. & P. 437. It has been held that firing a gun loaded with powder through the keyhole of the door of a house, in which were several persons, and by which the lock of the door was blown to pieces, is not within this section: R. v. Brown, 3 F. & F. 821. But Greaves is of opinion that this case would bear reconsideration: 2 Russ. 1045 *note*. Prove that it was the dwelling-house of J. N., and situate as described in the indictment. Prove that the act was done maliciously, that is, wilfully and not by accident. Prove also

upon an indictment as *ante* under s. 99 that A. N. was in the house at the time. No intent need be laid or proved. In R. v. Sheppard, 11 Cox, 302, it was held that, in order to support an indictment under this section, it is not enough to show simply that gunpowder or other explosive substance was thrown against the house, but it must also be shown that the substance was in a condition to explode at the time it was thrown, although no actual explosion did result.

MISCHIEF ON RAILWAYS.

489. Every one is guilty of an indictable offence and liable to five years' imprisonment who, *in manner likely to cause danger to valuable property, without endangering life or person*—

(*a*) places any obstruction upon any railway, or takes up, removes, displaces, breaks or injures any rail, sleeper or other matter or thing belonging to any railway; or

(*b*) shoots or throws anything at an engine or other railway vehicle; or

(*c*) interferes without authority with the points, signals or other appliances upon any railway; or

(*d*) makes any false signal on or near any railway; or

(*e*) wilfully omits to do any act which it is his duty to do; or

(*f*) does any other unlawful act.

2. Every one who does any of the acts above mentioned *with intent to cause such danger* is liable to imprisonment for life. R. S. C. c. 168, ss. 37 & 38 (*Amended*). 24-25 V. c. 97, s. 35.

490. Every one is guilty of an indictable offence and liable to two years' imprisonment who, by any act or wilful omission obstructs or interrupts, or causes to be obstructed or interrupted, the construction, maintenance or free use of any railway or any part thereof, or any matter or thing appertaining thereto or connected therewith. R. S. C. c. 168, ss. 38 & 39 (*Amended*). 24-25 V. c. 97, s. 36 (Imp.).

491. Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the value of the goods or liquors so destroyed or damaged, or to one month's imprisonment, with or without hard labour, or to both, who—

(*a*) wilfully destroys or damages anything containing any goods or liquors in or about any railway station or building or any vehicle of any kind on any railway, or in any warehouse, ship or vessel, with intent to steal or otherwise unlawfully to obtain or to injure the contents, or any part thereof; or

(*b*) unlawfully drinks or wilfully spills or allows to run to waste any such liquors, or any part thereof. R. S. C. c. 38, s. 62. 51 V. c. 29, s. 297.

Section 489 is clumsily worded.

See s. 711 as to a verdict of attempt to commit the offence charged in certain cases.

The prisoners were indicted in several counts for wilfully and maliciously placing a stone upon the North Woolwich Railway, with intent to damage, injure, and obstruct the carriages travelling upon it.

It appeared that the prisoners, who were respectively aged thirteen and fourteen, had placed a stone on the railway in such a way as to interfere with the machinery of the points, and prevent them from acting properly, so that if a train had come up while the stone remained as placed by the prisoners it would have been thrown off the line, and a serious accident must have been the consequence. Gutteridge held up the points whilst Upton dropped in the stone.

Wightman, J., told the jury that in order to convict the prisoners it was necessary, in the first place, to prove that they had wilfully placed the stone in the position stated upon the railway: and secondly, that it was done maliciously, and with the purpose of causing mischief. It was his duty to inform them that it was not necessary that the prisoners should have entertained any feelings of malice against the railway company, or against any person travelling upon it; it was quite enough to support the charge if the act was done with a view to some mischievous consequence or other, and if that fact was made out the jury would be justified in finding the prisoners guilty, notwithstanding their youth. They were undoubtedly very young, but persons of their age were just as well competent to form an opinion of the consequences of an act of this description as an adult person. *Verdict*, guilty upon the counts charging an intent to obstruct the engine: R. v. Upton (*Greaves Lord Campbell's Acts, Appendix*).

Indictment under s-s. 1.— unlawfully did put and place a piece of wood upon a certain railway called in with intent thereby then to obstruct, upset, over-

throw, and injure a certain engine and certain carriages using the said railway, and in manner likely to cause danger to such engine and carriages. (*The intent may be laid in different ways, in different counts, if necessary*).

Prove that the defendant placed the piece of wood upon or across the railroad as described in the indictment, or was present aiding and assisting in doing so. The intent may be inferred from circumstances from which the jury may presume it. In general, the act being done wilfully, and its being likely to obstruct or upset the railway train, would be sufficient *prima facie* evidence of an intent to do so.

Upon an indictment under s. 489 the defendant may be convicted of the offence under s. 490, if the evidence warrants it: R. v. Bradford, Bell, 268. A line of railway constructed under an Act of Parliament, but not yet opened for public traffic, and used only for the carriage of materials and workmen, is within the statute: *Idem.* A drunken man got upon the railway and altered the signals and thereby caused a luggage train to pull up and proceed at a very slow pace: *Held*, upon a case reserved, that this was a causing of an engine and a carriage using a railway to be obstructed: R. v. Hadfield, 11 Cox, 574, Warb. Lead. Cas. 87. A person improperly went upon a line of railway and purposely attempted to stop a train approaching by placing himself on the space between two lines of rails, and holding up his arms in the mode adopted by inspectors of the line when desirous of stopping a train: *Held*, that this amounted to the offence of unlawfully obstructing an engine or carriage using a railway: R. v. Hardy, 11 Cox, 656.

INJURIES TO TELEGRAPHS.

492. Every one is guilty of an indictable offence and liable to *two years'* imprisonment who wilfully—

(*a*) destroys, removes or damages anything which forms part of, or is used or employed in or about any electric or magnetic telegraph, electric light, telephone or fire-alarm, or in the working thereof, or for the transmission of electricity for other lawful purposes; or

(*b*) prevents or obstructs the sending, conveyance or delivery of any communication by any such telegraph, telephone or fire-alarm, or the transmission of electricity for any such electric light or for any such purpose as aforesaid.

2. Every one who wilfully, by any overt act, attempts to commit any such offence is guilty of an offence and liable, on summary conviction, to a penalty not exceeding fifty dollars, or to three months' imprisonment, with or without hard labour. R. S. C. c. 168, ss. 40 & 41 (*Amended*). 24-25 V. c. 97, ss. 37 & 38 (Imp.).

Fine, s. 958. A verdict for attempt to commit the offence charged may be given upon an indictment under (*a*) & (*b*); s. 711.

WRECKING.

493. Every one is guilty of an indictable offence and liable to imprisonment for life who wilfully—

(*a*) casts away or destroys any ship, whether complete or unfinished; or

(*b*) does any act tending to the immediate loss or destruction of any ship in distress; or

(*c*) interferes with any marine signal, or exhibits any false signal, with intent to bring a ship or boat into danger. R. S. C. c. 168, ss. 46 & 51 (*Amended*). 24-25 V. c. 97, ss. 42 & 47 (Imp.).

494. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who attempts to cast away or destroy any ship, whether complete or unfinished. R. S. C. c. 168, s. 48 (*Amended*).

Upon an indictment under s. 493 (*a*) a verdict may be given for the offence covered by s. 494; s. 711.

See R. v. Tower, 4 P. & B. (N. B.) 168.

Indictment for exhibiting false signals.— that before and at the time of committing the offence hereinafter mentioned, a certain ship, the property of some person or persons to the jurors aforesaid unknown, was sailing on a certain river called near unto and that J. S. on well knowing the premises, whilst the said ship was so sailing on near unto the said parish as aforesaid, wilfully and unlawfully did exhibit a false light, with intent thereby to bring the said ship into danger.

MARINE SIGNALS, BUOYS.

495. Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully alters, removes or conceals, or attempts to alter, remove or conceal, any signal, buoy or other sea mark used for the purposes of navigation.

2. Every one who makes fast any vessel or boat to any such signal, buoy, or sea mark is liable, on summary conviction, to a penalty not exceeding ten dollars, and in default of payment to one month's imprisonment. R. S. C. c. 168, ss. 52 & 53 (*Amended*). 24-25 V. c. 97, s. 48.

No intent need be charged in the indictment. This section includes the offence and the attempt to commit the offence.

Indictment.— that J. S., on upon the river called. unlawfully did wilfully remove a certain buoy then used for the purposes of navigation.

Verdict of attempt may be given if the evidence warrants it; s. 711.

PREVENTING SAVING OF WRECK.

496. Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully prevents or impedes, or endeavours to prevent or impede—

(*a*) the saving of any vessel that is wrecked, stranded, abandoned or in distress; or

(*b*) any person in his endeavour to save such vessel.

2. Every one who wilfully prevents or impedes, or endeavours to prevent or impede, the saving of any wreck is guilty of an indictable offence and liable, on conviction on indictment, to two years' imprisonment, and on summary conviction before two justices of the peace, to a fine of four hundred dollars or six months' imprisonment, with or without hard labour. R. S. C. c. 81, ss. 36 (*b*) & 37 (*c*).

"Wreck" defined, s. 3.

INJURIES TO RAFTS, ETC.

497. Every one is guilty of an indictable offence and liable to two years' imprisonment who wilfully—

(*a*) breaks, injures, cuts, loosens, removes or destroys, in whole or in part, any dam, pier, slide, boom or other such work, or any chain or other fastening attached thereto, or any raft, crib of timber or saw-logs; or

(*b*) impedes or blocks up any channel or passage intended for the transmission of timber. R. S. C. c. 168, s. 54.

Fine, s. 958.

Indictment.— that A. B. on in unlawfully and wilfully, without legal justification or excuse and without colour of right, did cut a certain boom then and there lying on the river called the said boom being then and there the property of J. S., of .

MISCHIEF TO MINES.

498. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, with intent to injure a mine or oil well, or obstruct the working thereof—

(*a*) causes any water, earth, rubbish or other substance to be conveyed into the mine or oil well or any subterranean channel communicating with such mine or well; or

(*b*) damages any shaft or any passage of the mine or well; or

(*c*) damages, with intent to render useless, any apparatus, building, erection, bridge or road belonging to the mine or well, whether the object damaged be complete or not; or

(*d*) hinders the working of any such apparatus; or

(*e*) damages or unfastens, with intent to render useless, any rope, chain or tackle used in any mine or well or upon any way or work connected therewith. R. S. C. c. 168, ss. 30 & 31 (*Amended*). 24-25 V. c. 97, ss. 28 & 29 (Imp.).

Indictment under (*a*).— unlawfully and without legal justification or excuse and without colour of right, did cause a quantity of water to be conveyed into a certain mine of J. N., situate with intent thereby then to injure the said mine and obstruct the working thereof.

Acts causing the damages mentioned in this section done in the *bona fide* exercise of a supposed right and without a wicked mind are not indictable: R. v. Matthews, 14 Cox, 5; R. v. Jones, 2 Moo. 293; R. v. Fisher, Warb. Lead. Cas. 195.

Indictment under (*e*). a certain steam engine, the property of J. N. for the draining and working of a certain mine of the said J. N. and belonging to the said mine, unlawfully did, without legal justification or excuse, and without colour of right, damage with intent to render it useless and to injure the said mine and obstruct the working thereof.

See s. 711 as to a verdict for attempt to commit the offence charged in certain cases.

Prove that the defendant pulled down or destroyed the engine, as alleged. 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 holden to be an *erection* used in conducting the business of the mine,

within the meaning of the statute: R. v. Whittingham, 9 C. & P. 234. Wrongfully setting a steam-engine in motion, without its proper machinery attached to it, and thereby damaging it and rendering it useless, is within the section: R. v. Norris, 9 C. & P. 241. A trunk of wood used to convey water to wash the earth from the ore was held to be an erection used in conducting the business of a mine within the meaning of the statute: Barwell v. Winterstoke, 14 Q. B. 704.

The intent must be alleged in the indictment: R. v. Smith, 4 C. & P. 569.

MISCHIEF.

499. Every one is guilty of the indictable offence of mischief who wilfully destroys or damages any of the property hereinafter mentioned, and is liable to the punishments hereinafter specified :—

(*A*) to imprisonment for life if the object damaged be—

(*a*) a dwelling-house, ship or boat, and the damage be caused by an explosion, and any person be in such dwelling-house, ship or boat, and the damage causes actual danger to life ; or

(*b*) a bank, dyke or wall of the sea, or of any inland water, natural or artificial, or any work in, on, or belonging to any port, harbour, dock or inland water, natural or artificial, and the damage causes actual danger or inundation ; or

(*c*) any bridge (whether over any stream of water or not) or any viaduct, or aqueduct, over or under which bridge, viaduct or aqueduct any highway, railway or canal passes, and the damage is done with intent and so as to render such bridge, viaduct or aqueduct, or the highway, railway or canal passing over or under the same, or any part thereof, dangerous and impassable ; or

(*d*) a railway damaged with the intent of rendering and so as to render such railway dangerous or impassable. R. S. C. c. 168, ss. 13, 32 & 49 ; c. 32, s. 213.

(*B*) to fourteen years' imprisonment if the object damaged be—

(*a*) a ship in distress or wrecked, or any goods, merchandise or articles belonging thereto ; or

(*b*) any cattle or the young thereof, and the damage be caused by killing, maiming, poisoning or wounding.

(*C*) to seven years' imprisonment if the object damaged be—

(*a*) a ship damaged with intent to destroy or render useless such ship ; or

(*b*) a signal or mark used for purposes of navigation ; or

(*c*) a bank, dyke or wall of the sea or of any inland water or canal, or any materials fixed in the ground for securing the same, or any work belonging to any port, harbour, dock, or inland water or canal ; or

(*d*) a navigable river or canal damaged by interference with the flood gates or sluices thereof or otherwise, with intent and so as to obstruct the navigation thereof ; or

(*e*) the flood gate or sluice of any private water with intent to take or destroy, or so as to cause the loss or destruction of, the fish therein ; or

(*f*) a private fishery or salmon river damaged by lime or other noxious material put into the water with intent to destroy fish then being or to be put therein ; or

(*g*) the flood gate of any mill-pond, reservoir or pool cut through or destroyed ; or

(*h*) goods in process of manufacture damaged with intent to render them useless ; or

(*i*) agricultural or manufacturing machines, or manufacturing implements, damaged with intent to render them useless ; or

(*j*) a hop bind growing in a plantation of hops, or a grape vine growing in a vineyard. R. S. C. c. 168, ss. 16, 17, 21, 33, 34, 50 & 52.

(*D*) to five years' imprisonment if the object damaged be—

(*a*) a tree, shrub or underwood growing in a park, pleasure ground or garden, or in any land adjoining or belonging to a dwelling-house, injured to an extent exceeding in value five dollars ; or

(*b*) a post letter bag or post letter ; or

(*c*) any street letter box, pillar box or other receptacle established by authority of the Postmaster-General for the deposit of letters or other mailable matter ; or

(*d*) any parcel sent by parcel post, any packet or package of patterns or samples of merchandise or goods, or of seeds, cuttings, bulbs, roots, scions or grafts, or any printed vote or proceeding, newspaper, printed paper or book or other mailable matter, not being a post letter, sent by mail ; or

(*e*) any property, real or personal, corporeal or incorporeal, for damage to which no special punishment is by law prescribed, damaged *by night* to the value of twenty dollars. R. S. C. c. 168, ss. 22, 23, 38 & 58 ; c. 35, ss. 79, 91, 96 & 107. 53 V. c. 37, s. 17.

(*E*) To two years' imprisonment if the object damaged be—

(*a*) any property, real or personal, corporeal or incorporeal, for damage to which no special punishment is by law prescribed, damaged to the value of twenty dollars. R. S. C. c. 168, ss. 36, 42 & 58. 53 V. c. 37, s. 17 (*Amended*).

The punishments are altered in some of these cases. "Night" and "cattle" defined, s. 3. The words "by night" in (*D*) (*e*) are new.

The Imperial Act on malicious injuries is 24 & 25 V. c. 97; also, 39 V. c. 13, as to poisoning cattle.

Indictment for damaging a river bank (*A*) (*b*).—

a certain part of the bank of a certain river, called the river situate unlawfully and wilfully,

without legal justification or excuse, and without colour of right, did cut down and break down, by means whereof certain lands were then overflowed and damaged (*or were in actual danger of being inundated*). As to verdict for an attempt to commit the offence charged upon an indictment for the offence itself, in certain cases, *see* s. 711.

INJURIES TO BRIDGES, ETC. (*A*) (*c*).

This clause by the words *whether over any stream of water or not* does away with the difficulties raised in R. v. Oxfordshire, 1 B. & Ad. 289, and R. v. Derbyshire, 2 Q. B. 745.

Indictment for destroying a bridge.— a certain bridge, situate unlawfully and wilfully, without legal justification or excuse, and without colour of right, did destroy, with intent, and so as to render the said bridge impassable.

Indictment for damaging a bridge.— unlawfully and wilfully, without legal justification or excuse, and without colour of right, did damage a certain bridge, situate with intent, and so as to thereby render the said bridge dangerous and impassable.

KILLING OR WOUNDING CATTLE. (*B*) (*b*).

Indictment for killing, or wounding, a horse.— one horse of the goods and chattels of J. N. unlawfully and wilfully, without legal justification or excuse, and without colour of right, did kill (*or wound*).

A verdict for the attempt, punishable under next section, may be given if the evidence warrants it, s. 711.

The particular species of cattle killed, maimed, wounded or poisoned must be specified; an allegation that the prisoner maimed certain cattle is not sufficient: R. v. Chalkley, R. & R. 258. "Cattle" defined, s. 3 *ante*.

No malice against the owner is necessary. The words "or injured" as to cattle were in the repealed clause. Other acts of administering poison to cattle are admissible

in evidence to show the intent with which the drug is administered: R. v. Mogg, 4 C. & P. 364. The word *wound* is contradistinguished from a permanent injury, such as maiming, and a *wounding* need not be of a permanent nature: R. v. Haywood, 2 East, P. C. 1076, R. & R. 16.

In R. v. Jeans, 1 C. & K. 539, it was held that where part of the tongue of a horse was torn off there was no offence against the statute, because no instrument was used. But, under the present statute, the same act was held to be a wounding within this section: R. v. Bullock, 11 Cox, 125. Upon a case reserved, in R. v. Owens, 1 Moo. 205, it was held that pouring acid into the eye of a mare, and thereby blinding her, is a maiming; setting fire to a building with a cow in it, and thereby *burning the cow* to death, is a killing within the statute: R. v. Haughton, 5 C. & P. 555.

The prisoner by a reckless and cruel act caused the death of a mare. The jury found that he did not intend to kill, maim or wound the mare, but that he knew that what he did would or might kill, maim or wound the mare, and that he nevertheless did the act recklessly, and not caring whether the mare was injured or not. *Held*, that there was sufficient malice to support the conviction: R. v. Welch, 13 Cox, 121.

Indictment for breaking down the flood-gate of a fish pond (*B*) (*e*).— the flood-gate of a certain private fish-pond of one J. N., situate unlawfully and wilfully, without legal justification or excuse, and without colour of right, did break down, damage and destroy with intent thereby then to take and destroy the fish in the said pond then being.

Indictment for putting lime into a salmon river (*B*) (*f*).— unlawfully and wilfully, without legal justification or excuse and without colour of right, did by putting a large quantity, to wit, ten bushels of lime into it, damage a certain salmon river, situate with intent thereby then to destroy the fish in the said river then being.

INJURIES TO MANUFACTURING MACHINES, ETC. *(C)(i).*

Taking away part of a frame and thereby rendering it useless, R. v. Tacey, R. & R. 452, and screwing up parts of an engine and reversing the plug of the pump, thereby rendering it useless and liable to burst: R. v. Fisher, 10 Cox, 146, Warb. Lead Cas. 195, are damaging within the Act, although no actual permanent injury be done. If a threshing machine be taken to pieces and separated by the owner the destruction of any part of it is within the statute: R. v. Mackerel, 4 C. & P. 448. So is the destruction of a water-wheel by which a threshing machine is worked: R. v. Fidler, 4 C. & P. 449. So though the sideboards of the machine be wanting, without which it will act but not perfectly, it is within the statute. But if the machine be taken to pieces, and in part destroyed by the owner from fear, the remaining parts do not constitute a machine within the statute: R. v. West, 2 Russ. 1087. It is not necessary that any part of the machine should be broken; a dislocation or disarrangement is sufficient: R. v. Foster, 6 Cox, 25.

Indictment under (D) (a). two elm trees, the property of J. N., then growing in a certain park of the said J. N., situate in unlawfully and wilfully, without legal justification or excuse and without colour of right, did cut and damage, thereby then doing injury to the said J. N. to an amount exceeding the sum of five dollars, to wit, the amount of ten dollars. (*A count may be added for cutting with intent to steal the trees, under s. 336.*

Indictment under (D) (e). ten elm trees, the property of J. N., then growing in a certain close of the said J. N., situate unlawfully and wilfully, without legal justification or excuse and without colour of right, did cut and damage by night, thereby then doing injury to the said J. N. to an amount exceeding the sum of twenty dollars, to wit, the sum of twenty-five dollars. (*Add a count under s. 336.*)

See s. 711, as to a verdict for an attempt to commit the offence charged upon an indictment for the offence, in certain cases. A variance in the number of trees is not material. It must be proved, under (*D*) (*a*), that the tree was growing in a park, and that the damage done exceeds five dollars.

Under (*D*) (*e*) the damage must not be less than twenty dollars and must have been done by night. The amount of injury done means the actual injury done to the trees by the defendant's act; it is not sufficient to bring the case within the statute that, although the amount of such actual injury is less than twenty dollars, the amount of *consequential* damage would exceed twenty dollars: R. v. Whiteman Dears. 353; *see* R. v. Lewis, 2 Russ. 1067, as to indictment; R. v. Williams, 9 Cox, 338; R. v. Thoman, 12 Cox, 54.

Defendant was indicted for unlawfully and maliciously committing damage upon a window in the house of the prosecutor. Defendant, who had been fighting with other persons in the street after being turned out of a public house, went across the street, and picked up a stone which he threw at them. The stone missed them, passed over their heads, and broke a window in the house. The jury found that he intended to hit one or more of the persons he had been fighting with, and did not intend to break the window: *Held*, that upon this finding the prisoner was not guilty of the charge within this section; to support a conviction of this nature there must be a wilful and intentional doing of an unlawful act in relation to the property damaged: R. v. Pembliton, 12 Cox, 607; *see* on this last case R. v. Welsh, 13 Cox, 121; R. v. Faulkner, 13 Cox, 550, and R. v. Latimer, 16 Cox, 70.

The words "real or personal property" mean actual, tangible property, not a mere legal right: Laws v. Eltringham, 15 Cox, 22, 8 Q. B. D. 283.

Two indictments were preferred against defendants for feloniously destroying the fruit trees respectively of M. and C. The offences charged were proved to have been committed on the same night, and the injury complained of was done in the same manner in both cases. Defendants were put on trial on the charge of destroying the trees of M. and evidence relative to the offence charged in the other indictment was admitted as showing that the offences had been committed by the same persons.

Held, that such evidence was properly received: R. v. McDonald, 10 O. R. 553.

ATTEMPTS TO KILL, ETC., CATTLE.

500. Every one is guilty of an indictable offence and liable to *two years'* imprisonment who wilfully—

(*a*) attempts to kill, maim, wound, poison or injure any cattle, or the young thereof; or

(*b*) places poison in such a position as to be easily partaken of by any such animal. R. S. C. c. 168, s. 44.

"Cattle" defined, s. 3; fine, s. 958. *See* remarks under preceding section. The punishment was not defined in the repealed clause.

As to attempts generally *see* remarks under s. 64. This s. 500 has no other effect than to reduce the punishment, which, without it, would be seven years under ss. 499-528.

INJURIES TO OTHER ANIMALS.

501. Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding one hundred dollars over and above the amount of injury done, or to three months' imprisonment with or without hard labour, who wilfully kills, maims, wounds, poisons or injures any dog, bird, beast, or other animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, *or kept for any lawful purpose.*

2. Every one who, having been convicted of any such offence, afterwards commits any offence under this section, is guilty of an indictable offence, and liable to a fine or imprisonment, or both, in the discretion of the court. 53 V. c. 37, s. 16. R. S. C. c. 168, s. 45 (*Amended*).

The punishment under s-s. 2 is provided for by s. 951.

Greaves says: "This clause is new, and is a great improvement of the law, as it will protect domestic animals

from malicious injuries. It includes any beast or animal, not being cattle, which is the subject of larceny at common law. It also includes birds which are the subject of larceny at common law, such as all kinds of poultry and, under certain circumstances, swans and pigeons. So also it includes any bird, beast or other animal ordinarily kept in a state of confinement, though not the subject of larceny, such as parrots and ferrets; and it is to be observed that the words *ordinarily kept in a state of confinement*, are a description of the mode in which the animals are usually kept, and do not render it necessary to prove that the bird or animal was confined at the time when it was injured. Lastly the clause includes any bird or animal kept for any domestic purpose, which clearly embraces cats."

As to a verdict of attempt to commit the offence charged in certain cases *see* s. 711.

The words *or kept for any lawful purpose* cover all animals kept in a circus, menagerie, etc.

THREATS TO INJURE CATTLE.

502. Every one is guilty of an indictable offence and liable to *two* years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to kill, maim, wound, poison, or injure any cattle. R. S. C. c. 173, s. 8. 24-25 V. c. 97, s. 50 (Imp.).

See ante, under s. 487.

Fine, s. 958. "Cattle" defined, s. 3.

The punishment was *ten* years by the repealed clause. It is still *ten* years, under s. 487, for sending a letter threatening to burn any building, stack of grain, etc. Why it should be *two* years under this section and *ten* under s. 487 is not clear.

INJURIES TO POLL-BOOKS, ETC.

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

(*a*) destroys, injures or obliterates, or causes to be destroyed, injured or obliterated; or

(*b*) makes or causes to be made any erasure, addition of names or interlineation of names in or upon—

any writ of election, or any return to a writ of election, or any indenture, poll-book, voters' list, certificate, affidavit or report, or any document, *ballot* or paper made, prepared or drawn out according to any law in regard to *Dominion*, provincial, municipal or civic elections. R. S. c. 168, s. 55 (*Amended*).

The words "Dominion" and "ballot" are new. They were not required; s. 102 of c. 8, R. S. C. fully covers them.

See under s. 551, *post*, a reference to the above section.

Indictment.— that A. B. at on unlawfully and wilfully, without legal justification or excuse, and without colour of right, did destroy (*injure or obliterate*) a certain writ of election (*describe*) prepared and drawn out according to a law of the Dominion of Canada, to wit, the Act (*as the case may be*).

To destroy any ballot *or* paper is by the above section punishable by *seven* years. To destroy any *ballot paper*, or a ballot box, or a packet of ballot papers is, by s. 100, c. 8, R. S. C., punishable by any term not exceeding *six* months!

INJURIES BY TENANTS.

504. 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. R. S. C. c. 168, s. 15 (*Extended*). 24-25 V. c. 97, s. 13 (Imp.).

The words in italics are new.

Fine, s. 958.

Indictment.— that on A. B. was possessed of a certain dwelling-house, situate then held by him as tenant for a term of years then unexpired; and that the said A. B., being so possessed as aforesaid, on the day and year aforesaid, did wilfully, to the prejudice of C. D., the owner, without legal justification or excuse, and without colour of right, pull down and demolish the said dwelling-

house (*or begin to pull down "or" demolish the said dwelling-house or any part thereof.*)

INJURIES TO LAND MARKS.

505. Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully pulls down, defaces, alters or removes any mound, land mark, post or monument lawfully erected, planted or placed to mark or determine the boundaries of any province, county, city, town, township, parish or other municipal division. R. S. C. c. 168, s. 56.

506. Every one is guilty of an indictable offence and liable to *five years'* imprisonment who wilfully defaces, alters or removes any mound, land mark, post or monument lawfully placed *by any land surveyor* to mark any limit, boundary or angle of any concession, range, lot or parcel of land.

2. It is not an offence for any land surveyor in his operations to take up such posts or other boundary marks when necessary, if he carefully replaces them as they were before. R. S. C. c. 168, s. 57.

The words "*pulls down*" in s. 505 are omitted from s. 506. "So are the words *erected or planted.*"

The words "*by any land surveyors*" in s. 506 are not in s. 505.

The offence mentioned in s. 506 can only be committed in relation to boundaries or land marks which have been *legally* placed by a land surveyor: R. v. Austin, 11 Q. L. R. 76.

The punishment for the offence covered by s. 506 was three months' imprisonment, or a fine of one hundred dollars, or both, by the repealed clause.

INJURIES TO FENCES, STILES, ETC.

507. 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 upon any land, marsh, swamp or land covered by water, on or as the boundary or part of the boundary line thereof, or in lieu of a fence thereto.*

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable, on summary conviction, to three months' imprisonment with hard labour. R. S. C. c. 168, s. 27. 53 V. c. 38, s. 15. 24-25 V. c. 97, s. 25 (Imp.).

The words in italics are not in the English Act.

The act must have been done *maliciously* (wilfully) to be punishable under this clause: R. v. Bradshaw, 38 U. C. Q. B. 564; *see* s. 481, *ante.*

INJURIES TO HARBOURS.

507a. Every one is guilty of an offence, and liable, on summary conviction, to a penalty not exceeding fifty dollars, who wilfully and without the permission of the Minister of Marine and Fisheries (the burden of proving which permission shall lie on the accused) removes any stone, wood, earth or other material, forming a natural bar necessary to the existence of a public harbour, or forming a natural protection to such bar. (Amendment of 1893).

INJURIES TO TREES, 25 CENTS.

508. Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding *twenty-five* dollars over and above the amount of injury done, or to *two* months' imprisonment with or without hard labour, who wilfully destroys or damages the whole or any part of any tree, sapling or shrub, or any underwood, wheresoever the same is growing, the injury done being to the amount of twenty-five cents, at the least.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable, on summary conviction, to a penalty not exceeding *fifty* dollars over and above the amount of the injury done, or to *four* months' imprisonment with hard labour.

3. Every one who, having been twice convicted of any such offence, afterwards commits any such offence, is guilty of an indictable offence and liable to two years' imprisonment. R. S. C. c. 168, s. 24. 24-25 V. c. 97, s. 22 (Imp.).

The punishments are altered.

If the injury does not amount to twenty-five cents the defendant may be punished under s. 511, *post*.

See s. 907, *post*, where it has been forgotten that the words "cut, break, root up" of the repealed clause have been left out in s. 508.

Indictment after two previous convictions for cutting or damaging trees to the value of twenty-five cents wheresoever growing.— that J. S., on one elm tree, the property of J. N., then growing on a certain land of the said J. N. in the unlawfully and wilfully, without legal justification or excuse, and without colour of right, did destroy and damage, thereby then doing injury to the said J. N., to the amount of forty cents. And the jurors aforesaid do say, that heretofore and before the committing of the offence hereinbefore mentioned (*stating the two previous convictions and concluding as in form p. 379, ante*). *See* ss. 628 and 676 as to indictments and procedure in indictable offences committed after previous convictions, and for

which a greater punishment may be inflicted on that account.

If, in answer to a charge under this section, the defendant sets up a *bona fide* claim of right the justices of the peace have no jurisdiction : R. v. O'Brien, 5 Q. L. R. 161.

DESTROYING VEGETABLES.

509. Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the amount of the injury done, or to three months' imprisonment with or without hard labour, who wilfully destroys, or damages with intent to destroy, any vegetable production growing in any garden, orchard, nursery ground, house, hot-house, green-house or conservatory.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is guilty of an indictable offence, and liable to two years' imprisonment. R. S. C. c. 168, s. 25. 24-25 V. c. 97, s. 23 (Imp.).

510. Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding five dollars over and above the amount of the injury done, or to one month's imprisonment with or without hard labour, who wilfully destroys, or damages with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard or nursery ground.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable, on summary conviction, to three months' imprisonment with hard labour. R. S. C. c. 168, s. 26. 24-25 V. c. 97, s. 24 (Imp.).

Indictment under s. 509 for destroying plants after a previous conviction.— that J. S., on one dozen heads of celery, the property of J. N., in a certain garden of the said J. N., situate then growing, unlawfully and wilfully, without legal justification or excuse, and without colour of right, did destroy. And the jurors aforesaid do say that heretofore and before the committing of the offence hereinbefore mentioned (*state the previous conviction*). And so, the jurors aforesaid, do say that the said J. S. on the day and year first aforesaid, one dozen heads of celery, the property of J. N., in a certain garden of the said J. N., situate then growing, unlawfully and wilfully, without legal justification or excuse, and without colour of right, did destroy.

OTHER INJURIES.

511. Every one who wilfully commits any damage, injury or spoil to or upon any real or personal property *either corporeal or incorporeal*, and either of a public or private nature, for which no punishment is hereinbefore provided, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars, and such further sum, not exceeding twenty dollars, as appears to the justice to be a reasonable compensation for the damage, injury or spoil so committed,—which last mentioned sum of money shall, in the case of private property, be paid to the person aggrieved; and if such sums of money, together with the costs, if ordered, are not paid, either immediately after the conviction, or within such period as the justice at the time of the conviction appoints, the justice may cause the offender to be imprisoned for any term not exceeding two months, with or without hard labour.

2. Nothing herein extends to—

(*a*) any case where the person acted under a fair and reasonable supposition that he had a right to do the act complained of; or

(*b*) any trespass, not being wilful and malicious, committed in hunting or fishing or in the pursuit of game. R. S. C. c. 168, s. 59. 53 V. c. 37, s. 18. 24-25 V. c. 97, s. 52 (Imp.).

The words in italics were introduced by the Act of 1890.

The proviso in s-s. 3 of the repealed clause extending this enactment in express terms to trees, etc., where the damage is less than twenty-five cents has not been re-enacted: *see* R. v. Dodson, 9 A. & E. 704, and Charter v. Greame, 13 Q. B. 216.

The word "herein" is s-s. 2, would apply to the whole Act, and not merely to this section by R. S. C. c. 1, s. 7, s-s 5. It is clear, however, that here it applies only to this section.

W. was summoned before the justices under this clause. He was in the employment of D., and by his order he forcibly entered a garden belonging to and in the occupation of F. accompanied by thirteen other men, and cut a small ditch, from forty to fifty yards in length, through the soil. F. and his predecessors in title had occupied the garden for thirty-six years, and during the whole time there had been no ditch upon the site of part of that cut by D. For the defence D. was called, who stated that, fifteen years before, there had been an open ditch in the land which

received the drainage from the highway, and that he gave directions for the ditch to be cut by W. in the exercise of what he considered to be a public right. The justices found that W. had no fair and reasonable supposition that he had a right to do the act complained of, and accordingly convicted him: *Held*, that by the express words of the section and proviso the jurisdiction of the justices was not ousted by the mere *bona fide* belief of W. that his act was legal, and that there was evidence on which they might properly find that he did not act under the fair and reasonable supposition required by the statute: White v. Feast, L. R. 7 Q. B. 353.

A conviction by justices under s. 52, c. 97, 24 & 25 V. (s. 511, *ante*), cannot be brought up by *certiorari*, on the ground that they had no jurisdiction inasmuch as the defendant had set up a *bona fide* claim of right, but the exemption is impliedly restricted to cases where the justices are reasonably satisfied of the fair and reasonable character of the claim: R. v. Mussett, 26 L. T. 429.

See R. v. Prestney, 3 Cox, 505; Butler v. Turley, 2 C. & P. 585; Gardner v. Mansbridge, 16 Cox, 281, 19 Q. B. D. 217.

PART XXXVIII.

CRUELTY TO ANIMALS.

Section 7 of c. 172 R. S. C. is unrepealed. All prosecutions under this part are subject to three months limitation; s. 551. See remarks under next section.

512. Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding fifty dollars, or to three months' imprisonment with or without hard labour, or to both, who—

(*a*) wantonly, cruelly or unnecessarily beats, binds, ill-treats, abuses, overdrives or tortures any cattle, poultry, dog, domestic animal or bird; or

(*b*) while driving any cattle or other animal is, by negligence or ill-usage in the driving thereof, the means whereby any mischief, damage or injury is done *by* any cattle or other animal; or

(*c*) in any manner encourages, aids or assists at the fighting or baiting of any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature. R. S. C. c. 172, s. 2.

The Imperial Act on cruelty to animals is 12 & 13 V. c. 92, amended by 17 & 18 V. c. 60, and 39 & 40 V. c. 77: *see* Elliott v. Osborn, 17 Cox, 346. As to dishorning cattle *see* Ford v. Wiley, 16 Cox, 683, 23 Q. B. D. 203; Callaghan v. The Society, 16 Cox, 101; and R. v. McDonagh, 28 L. R. Ir. 204.

513. Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding fifty dollars, or to three months' imprisonment, with or without hard labour, or to both, who builds, makes, maintains or keeps a cock-pit on premises belonging to or occupied by him, or allows a cock-pit to be built, made, maintained or kept on premises belonging to or occupied by him.

2. All cocks found in any such cock-pit, or on the premises wherein such cock-pit is, shall be confiscated and sold for the benefit of the municipality in which such cock-pit is situated. R. S. C. c. 172, s. 3.

Sections 4 & 5 of c. 172, R. S. C. have not been re-enacted. *See* s. 552, s-s. 2, as to arrest without warrant for offences against this and the preceding section.

514. No railway company within Canada whose railway forms any part of a line of road over which cattle are conveyed from one province to another province, or from the United States to or through any province, or from any part of a province to another part of the same, and no owner or master of any vessel carrying or transporting cattle from one province to another province, or within any province, or from the United States through or to any province,

shall confine the same in any car, or vessel of any description, for a longer period than twenty-eight hours without unlading the same for rest, water and feeding for a period of at least five consecutive hours, unless prevented from so unlading and furnishing water and food by storm or other unavoidable cause, or by necessary delay or detention in the crossing of trains.

2. In reckoning the period of confinement the time during which the cattle have been confined without such rest, and without the furnishing of food and water, on any connecting railways or vessels from which they are received, whether in the United States or in Canada, shall be included.

3. The foregoing provisions as to cattle being unladen shall not apply when cattle are carried in any car or vessel in which they have proper space and opportunity for rest, and proper food and water.

4. Cattle so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof or, in case of his default in so doing, by the railway company, or owner or master of the vessel transporting the same, at the expense of the owner or person in custody thereof; and such company, owner or master shall in such case have a lien upon such cattle for food, care and custody furnished and shall not be liable for any detention of such cattle.

5. Where cattle are unladen from cars for the purpose of receiving food, water and rest, the railway company then having charge of the cars in which they have been transported shall, except during a period of frost, clear the floors of such cars, and litter the same properly with clean saw-dust or sand before reloading them with live stock.

6. Every railway company, or owner or master of a vessel, having cattle in transit, or the owner or person having the custody of such cattle, as aforesaid, who knowingly and wilfully fails to comply with the foregoing provisions of this section, is liable for every such failure on summary conviction to a penalty not exceeding one hundred dollars. R. S. C. c. 172, ss. 8, 9, 10 & 11.

515. Any peace officer or constable may, at all times, enter any premises where he has reasonable grounds for supposing that any car, truck or vehicle, in respect whereof any company or person has failed to comply with the provisions of the next preceding section, is to be found, or enter on board any vessel in respect whereof he has reasonable grounds for supposing that any company or person has, on any occasion, so failed.

2. Every one who refuses admission to such peace officer or constable is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars and not less than five dollars, and costs, and in default of payment to thirty day's imprisonment. R. S. C. c. 171, s. 12.

Ch. 171 cited under this section is an Act respecting Seamen.

PART XXXIX.

OFFENCES CONNECTED WITH TRADE AND BREACHES OF CONTRACT.

CONSPIRACY—COMBINATIONS.

516. 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.

The "Trade Unions' Act" is c. 131, R. S. C. S. 12, s-s. 5 of c. 173, R. S. C., and ss. 4 & 5 of 52 V. c. 41 remain unrepealed. As to conspiracies generally *see post*, under s. 527.

517. The purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful within the meaning of the next preceding section. R. S. C. c. 131, s. 22.

For the Imperial Statutes *see* Archbold, 20th edition, p. 1006. *See also* R. v. Gibson, 16 O. R. 704.

518. No prosecution shall be maintainable against any person for conspiracy in refusing to work with or for any employer or workman, or for doing any act or causing any act to be done for the purpose of a trade combination, unless such act is an offence punishable by statute. 53 V. c. 37, s. 19.

519. The expression "trade combination" means any combination between masters or workmen or other persons for regulating or altering the relations between any persons being masters or workmen, or the conduct of any master or workman in or in respect of his business or employment, or contract of employment or service; and the expression "act" includes a default, breach or omission. R. S. C. c. 173, s. 13.

520. Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years' imprisonment, and if a corporation is liable to a penalty not exceeding ten thousand dollars and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company, unlawfully—

(*a*) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or

(*b*) to restrain or injure trade or commerce in relation to any such article or commodity; or

(*c*) to unduly prevent, limit or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or

(*d*) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property. 52 V. c. 41, s. 1.

Not triable at quarter sessions; s. 540.

CRIMINAL BREACH OF CONTRACT.

521. Every one is guilty of an indictable offence and liable on indictment, or on summary conviction before two justices of the peace, to a penalty not exceeding one hundred dollars or to three months' imprisonment, with or without hard labour, who—

(*a*) wilfully breaks any contract made by him knowing, or having reasonable cause to believe, that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or to cause serious bodily injury, or to expose valuable property, whether real or personal, to destruction or serious injury; or

(*b*) being, under any contract made by him with any municipal corporation or authority, or with any company, bound, agreeing or assuming to supply any city or any other place, or any part thereof, *with electric light or power*, gas or water, wilfully breaks such contract knowing, or having reasonable cause to believe, that the probable consequences of his so doing, either alone or in combination with others, will be to deprive the inhabitants of that city or place, or part thereof, wholly or to a great extent, of their supply of power, light, gas or water; or

(*c*) being, under any contract made by him with a railway company, bound, agreeing or assuming to carry Her Majesty's mails, or to carry passengers or freight, or with Her Majesty, or any one on behalf of Her Majesty, in connection with a Government railway on which Her Majesty's mails, or passengers or freight are carried, wilfully breaks such contract knowing, or having reason to believe, that the probable consequences of his so doing, either alone or in combination with others, will be to delay or prevent the running of any locomotive engine, or tender, or freight or passenger train or car, on the railway.

2. Every municipal corporation or authority or company which, being bound, agreeing or assuming to supply any city, or any other place, or any part thereof, with *electric light or power*, gas or water, wilfully breaks any contract made by such municipal corporation, authority, or company, knowing or having reason to believe that the probable consequences of its so doing will be to deprive the inhabitants of that city or place or part thereof wholly, or to a great extent, of their supply of *electric light or power*, gas or water, is liable to a penalty not exceeding *one thousand dollars*.

3. Every railway company which, being bound, agreeing or assuming to carry Her Majesty's mails, or to carry passengers or freight, wilfully breaks any contract made by such railway company, knowing or having reason to believe that the probable consequences of its so doing will be to delay or prevent the running of any locomotive engine or tender, or freight or passenger train or car on the railway is liable to a penalty not exceeding one hundred dollars.

4. It is not material whether any offence defined in this section is committed from malice conceived against the person, corporation, authority or

company with which the contract is made or otherwise. R. S. C. c. 173, ss. 15, 16, 17 & 18. 38-39 V. c. 86 (Imp.).

The words in italics are new.

522. Every such municipal corporation, authority, or company, shall cause to be posted up at the *electrical works*, gas works, or water-works, or railway stations, as the case may be, belonging to such corporation, authority or company, a printed copy of this and the preceding section in some conspicuous place, where the same may be conveniently read by the public; and as often as such copy becomes defaced, obliterated or destroyed shall cause it to be renewed with all reasonable despatch.

2. Every such municipal corporation, authority or company which makes default in complying with such duty is liable to a penalty not exceeding twenty dollars for every day during which such default continues.

3. Every person unlawfully injuring, defacing or covering up any such copy so posted up is liable, on summary conviction, to a penalty not exceeding ten dollars. R. S. C. c. 173, s. 19.

INTIMIDATION.

523. Every one is guilty of an indictable offence and liable, on indictment or on summary conviction before two justices of the peace, to a fine not exceeding one hundred dollars or to three months' imprisonment with or without hard labour who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain—

(*a*) uses violence to such other person, or his wife or children, or injures his property; or

(*b*) intimidates such other person, or his wife or children, by threats of using violence to him, her or any of them, or of injuring his property; or

(*c*) persistently follows such other person about from place to place; or

(*d*) hides any tools, clothes or other property owned or used by such other person, or deprives him of, or hinders him in, the use thereof; or

(*e*) with one or more other persons follows such other person, in a disorderly manner, in or through any street or road; or

(*f*) besets or watches the house or other place where such other person resides or works, or carries on business or happens to be. R. S. C. c. 173, s. 12.

Sub-section 5 of s. 12, c. 173, R. S. C. is unrepealed,

This is a re-enactment of 38 & 39 V. c. 86, s. 7, (Imp.). *See* Smith v. Thomasson, 16 Cox, 740, Warb. Lead. Cas. 205, and cases there cited, and Connor v. Kent, 17 Cox, 354.

Indictment for picketting.— that A. B., C. D., and E. F., unlawfully and wickedly, and unjustly devising, contriving, and intending to injure and aggrieve one G. H.

and I. J., carrying on business as (*stating the business*) and obstruct them in the business of their lawful calling and business, did on the day of conspire to molest and obstruct the said G. H. and I. J., then being such (*stating the business*), in their lawful calling, by watching and besetting the house where the said G. H. and I. J. carried on their said business, situate as aforesaid, with a view to cause them to dismiss and cease to employ divers workmen, to wit (*naming them*).

Second count. . . that the said A. B., C. D., and E. F., unlawfully contriving and intending to injure and aggrieve the workmen then being employed by the said G. H. and I. J., and obstruct them in the pursuit of their lawful calling, unlawfully did on the day and at the place aforesaid conspire to molest and obstruct K. L. and other workmen in their lawful calling, by watching and besetting the house and place of business situate as aforesaid wherein the said G. H. and I. J. then carried on their said business, wherein the said K. L. and other workmen happened to be, with a view to coerce the said K. L. and other workmen, and induce them to quit their said employment.

INTIMIDATION OF WORKMEN.

Indictment.— that heretofore, before and at the time of committing the offence hereinafter in this count mentioned, A. B. carried on trade and business as a (*stating his trade*) at in the county of , and that C. D. and E. F. were workmen, and were hired and employed by and worked as workmen for the said A. B. in his said trade and business. And the jurors aforesaid do further present that (*naming all the defendants*) on the day of did unlawfully by threats and intimidation endeavour to force one C. D. and E. F., then being workmen hired and employed by and working for the said A. B. in his said trade and business as aforesaid, to depart from their said hiring, employment and work.

Second count. . . and the jurors aforesaid, do further present that heretofore and at the time of the committing the offence hereinafter in this count mentioned the said A. B. carried on his said trade and business (*state his trade*) aforesaid, in the county aforesaid, and that the said C. D. and E. F. were workmen, and were hired and employed by and worked as workmen for the said A. B. in his said trade and business as aforesaid. And the jurors aforesaid, do further present that the said (*naming the defendants*) on the day and year aforesaid, did by unlawfully molesting and obstructing the said C. D. and E. F., endeavour to force the said C. D. and E. F., so being such workmen hired and employed by and working for the said A. B., in his said trade and business as aforesaid, to depart from their said hiring, employment, and work.

In a conviction for following in a disorderly manner with a view to compel any other person to abstain from doing any act which he has a legal right to do, the acts which the defendant attempted to obstruct must be specified: R. v. McKenzie, [1892] 2 Q. B. 519, 17 Cox, 542.

INTIMIDATION—ASSAULT.

524. Every one is guilty of an indictable offence and liable to *two* years imprisonment who, in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or of any unlawful combination or conspiracy respecting any trade, business or manufacture, or respecting any person concerned or employed therein, unlawfully assaults any person, or, *in pursuance of any such combination or conspiracy, uses any violence or threat of violence to any person with a view to hinder him from working or being employed at such trade, business or manufacture.* R. S. C. c. 173, s. 9.

Fine, s. 958.

The words in *italics* are not in the English Act, 24 & 25 V. c. 100, s. 41, from which the enactment was first re-produced in Canada. They cover any violence or threat of violence with a view to hinder any person from working or being employed at a trade, business or manufacture, in pursuance of a combination or conspiracy respecting such trade, business or manufacture.

Indictment for an assault in pursuance of a conspiracy to raise wages.— that J. S., J. W., and E. W., on did amongst themselves conspire, combine, confederate, and agree together to raise the rate of wages then usually paid to workmen and labourers in the art, mystery and business of cotton spinners; and that the said (*defendants*) in pursuance of the said conspiracy, on the day and year aforesaid, in and upon one J. N., unlawfully did make an assault, and him the said J. N., did then beat, wound and ill-treat, and other wrongs to the said J. N., did, to the great damage of the said J. N. (*Add a count stating that the defendants assaulted J. N., "in pursuance of a certain conspiracy before then entered into by the said (defendants) to raise the rate of wages of workmen and labourers in the art, mystery and business of cotton-spinners;" also a count for a common assault.*)

For a number of workmen to combine to go in a body to a master and say that they will leave the works, if he does not discharge two fellow workmen in his employ, was an unlawful combination by threats to force the prosecutor to limit the description of his workmen: Walsby v. Anley, 3 E. & E. 516. And a combination to endeavour to force workmen to depart from their work by such a threat as that they would be considered as blacks, and that other workmen would strike against them all over London, was unlawful: In *re* Perham, 5 H. & N. 30. So also was a combination with a similar object to threaten a workman by saying to him that he must either leave his master's employ, or lose the benefit of belonging to a particular club and have his name sent round all over the country: O'Neill v. Longman, 4 B. & S. 376. But those cases are not now law. An indictment or commitment alleging the offence to be a conspiracy to force workmen to depart from their work by threats need not set out the threats: In *re* Perham, *supra*; *see* ss. 611, 613, *post*.

See R. v. Rowlands, 2 Den. 364.

INTIMIDATION, ETC., OTHER CASES.

525. Every one is guilty *of an indictable offence* and liable, on indictment or on summary conviction before two justices of the peace, *to a fine not exceeding one hundred dollars*, or to three months' imprisonment with or without hard labour, who—

(*a*) beats or uses any violence or threat of violence to any person with intent to deter or hinder him from buying, selling or otherwise disposing of any wheat or other grain, flour, meal, malt or potatoes or other produce or goods, in any market or other place ; or

(*b*) beats or uses any such violence or threat to any person having the charge or care of any wheat or other grain, flour, meal, malt or potatoes, while on the way to or from any city, market, town or other place with intent to stop the conveyance of the same ; or

(*c*) by force or threats of violence, or *by any form of intimidation whatsoever*, hinders or prevents or *attempts to hinder or prevent* any seaman, stevedore, ship carpenter, *ship labourer* or other person employed to *work at or on board any ship or vessel or to do any work connected with the loading or unloading thereof*, from working at or exercising any lawful trade, business, calling or occupation in or for which he is so employed ; *or with intent so to hinder or prevent, besets or watches such ship, vessel or employee* ; or

(*d*) beats or uses any violence to, or makes any threat of violence against, any such person with intent to hinder or prevent him from working at or exercising the same, *or on account of his having worked at or exercised the same.* R. S. C. c. 173, s. 10. 50-51 V. c. 49.

526. Every person is guilty of an indictable offence and liable to a fine not exceeding four hundred dollars, or to two years' imprisonment, or to both, who, before or at the time of the public sale of any Indian lands, or public lands of Canada, or of any province of Canada, by intimidation, or illegal combination, hinders or prevents, or attempts to hinder or prevent, any person from bidding upon or purchasing any lands so offered for sale. R. S. C. c. 173, s. 14.

The words in italics in s. 525 are partly additions made to the Revised Statute c. 173, s. 11 by the Act, 50 & 51 V. c. 49. The words "or unfair management" were in the section for which s. 526 is substituted.

PART XL.

ATTEMPTS—CONSPIRACIES—ACCESSORIES.

CONSPIRACIES. (*New*).

527. 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.

See R. v. Rowlands, 3 Den. 364, and R. v. Whitchurch, 16 Cox, 743, for forms of indictment.

Treasonable conspiracies are provided for by ss. 66 & 69; conspiracies to intimidate a legislature, by s. 70; seditious conspiracies, by s. 123; conspiracies to bring false accusations, by s. 152; conspiracies to defile women, by s. 188; conspiracies to murder, by s. 234; conspiracies to defraud, by s. 394; conspiracies in restraint of trade with assault or threats of violence, by s. 524.

Conspiracies to commit any of the offences which are not triable at quarter sessions are themselves not triable at quarter sessions; s. 540.

The result of this enactment of s. 527 is that, in a number of instances, the conspiracy to commit an offence, whether that offence was committed or not, is more severely punished than the offence itself would be. To obtain passage on a railway by a false ticket for instance, is punishable by *six months*' (s. 362), but the conspiracy by two or more persons to do so is punishable by *seven years*' imprisonment.

Conspiracy is a combination of two or more persons to accomplish some unlawful purpose, or a lawful purpose by unlawful means. This is the definition of conspiracy as given by Lord Denman in R. v. Seward, 1 A. & E. 706; and though questioned by the learned judge himself in R. v. Peck, 9 A. & E. 686, as an antithetical definition, and in R. v. King, 7 Q. B. 782, as not sufficiently compre-

hensive, it seems to be so far adopted as the most correct definition of this offence: R. v. Jones, 4 B. & Ad. 345; 3 Russ. 116. Bishop 2 Cr. L. 171, has in clear and concise terms said "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." *See also* R. v. Bunn, 12 Cox, 316; R. v. Fellowes, 19 U. C. Q. B. 48; Mogul S. S. Co. v. McGregor, 23 Q. B. D. 598; Connor v. Kent, 17 Cox, 354, and R. v. de Kromme, 17 Cox, 492; R. v. McGreevy, 17 Q. L. R. 196.

But the word "unlawful" used in these definitions of conspiracy does not mean "indictable" or "criminal" only. The combining to injure another by fraud, or to do a civil wrong or injury to another, is an indictable conspiracy. So in a case where the prisoner and L. were in partnership, and there being notice of dissolution prisoner conspired with W. & P. in order to cheat L. on a division of assets at the dissolution, by making it appear by entries in the books that P. was a creditor of the firm, and by reason thereof partnership property was to be abstracted for the alleged object of satisfying P., it was held that this was an indictable conspiracy: R. v. Warburton, 11 Cox, 584; *see* R. v. Aspinall, 13 Cox, 231 and 563; R. v. Orman, 14 Cox, 381, Warb. Lead. Cas. 81.

Mr. Justice Drummond, in R. v. Roy, 11 L. C. J. 89, has given the following definition of conspiracy: "A conspiracy is an agreement by two persons (not being husband and wife), or more, to do or cause to be done an act prohibited by penal law, or to prevent the doing of an act ordered under legal sanction by any means whatsoever, or to do or cause to be done an act whether lawful or not by means prohibited by penal law:" R. v. Boulton, 12 Cox, 87; R. v. Parnell, 14 Cox, 508; R. v. Taylor, 15 Cox, 265, 268.

On an indictment for conspiracy to defraud by obtaining goods on false pretenses the false pretenses need not

be set up: R. v. Gill, 2 B. & Ald. 204; Thayer v. R., 5 L. N. 162; *see* s. 616.

An indictment for conspiracy with intent to defraud,—declared insufficient: R. v. Sternberg, 8 L. N. 122.

What are the necessary allegations in an indictment for conspiracy: R. v. Downie, 13 R. L. 429; *see* also Defoy v. R., Ramsay's App. Cas. 193.

Acts done to coerce others to quit their employment in pursuance of a conspiracy are indictable: R. v. Hibbert, 13 Cox, 82; R. v. Bauld, 13 Cox, 282.

Where two persons are indicted for conspiring together, and they are tried together, both must be acquitted or both convicted: R. v. Manning, 12 Q. B. D. 241, Warb. Lead. Cas. 84.

ATTEMPTS TO COMMIT OFFENCES. (*New*).

528. Every one is guilty of an indictable offence and liable to seven years' imprisonment who attempts, in any case not hereinbefore provided for, to commit *any indictable* offence for which the punishment is imprisonment for life, or for fourteen years, or for any term longer than fourteen years.

529. Every one who attempts to commit *any indictable* offence for committing which the longest term to which the offender can be sentenced is less than fourteen years, and no express provision is made by law for the punishment of such attempt, is guilty of an indictable offence and liable to imprisonment for a term equal to one-half of the longest term to which a person committing the indictable offence attempted to be committed may be sentenced.

530. 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.

See s. 64, *ante*, and ss. 711 and 712, *post*, and notes thereunder.

As to a fine in certain cases *see* s. 958.

Attempts to commit offences punishable under the code by summary convictions are not covered by these sections. Neither is the inciting to commit any indictable offence. Section 530 makes it an *indictable* offence to attempt to commit, or to incite, or attempt to incite any one to com-

mit an offence punishable *under summary conviction* under any other statute: s. 536.

When an offence is not triable at quarter sessions the attempt to commit that offence is likewise not triable at quarter sessions: s. 540.

Indictment at common law for inciting to commit an offence.— that A. B. on falsely, wickedly and unlawfully did solicit and incite one C. D. unlawfully to steal of the goods and chattels of E. F.

See R. v. Gregory, 10 Cox, 459, and R. v. Ransford, 13 Cox, 9, and cases there cited. The punishment falls under s. 951, *post*.

Inciting to murder is covered by s. 234, and inciting to mutiny by s. 72.

"What is an attempt to commit an offence? This is a question much easier to ask than to answer, and, as far as I am competent to judge, no general rule can be laid down upon the subject, but each case must depend upon its own particular circumstances. As the means by which, and the modes in which crimes may be committed are innumerable, so the modes in which attempts to commit crimes may be made must be innumerable also; and not only so, but the nature of one attempt to commit a crime may totally vary from the nature of another attempt to commit the same crime. Thus, a murder may be committed by a single stab, and so an attempt to murder may be made by a single stab; whilst, on the other hand, a murder may be committed by administering small doses of poison at intervals during a considerable space of time, in such a manner that the death is the result of the combined effects of all the poisonings, and would not have been caused by one or even the greater part of them. In such a case, if death has not ensued, although the poisoner might well be convicted of an administration of poison with *intent* to murder, by proof even of one administration of poison, yet a single administration could not, perhaps, be considered a proof of an attempt to murder, both because the murder was not intended to be committed by it, and because it could not be committed by it.

"These supposed cases may serve to show under what varied circumstances attempts to commit offences may have to be considered, and yet these cases are confined to acts which would have actually been the means of committing the crime if it had been effected. It seems, however, to be clear that whenever the act, or acts, done are such that, if they produced their intended effect, the crime would have been completed, an attempt to commit that crime is proved; and consequently, upon every charge of an attempt to commit an offence, the primary consideration would seem to be, whether the acts done by the prisoner could have effected the crime intended." Greaves' attempts to commit crimes.

ACCESSORIES AFTER THE FACT. (*New*).

531. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, in any case where no express provision is made by this Act for the punishment of an accessory, is accessory after the fact to any indictable offence for which the punishment is, on a first conviction, imprisonment for life, or for fourteen years, or for any term longer than fourteen years.

532. Every one who is accessory after the fact to any indictable offence for committing which the longest term to which the offender can be sentenced is less than fourteen years, and no express provision is made for the punishment of such accessory, is guilty of an indictable offence and liable to imprisonment for a term equal to one-half of the longest term to which a person committing the indictable offence to which he is accessory may be sentenced.

As to a fine in certain cases: s. 958.

When an offence is not triable at quarter sessions the offence of being an accessory after the fact to that offence is likewise not triable at quarter sessions: s. 540. *See* s. 63, *ante*, for definition: as to indictments, s. 627, *post*.

Indictment against an accessory after the fact with the principal. After stating the offence of the principal.—And the jurors aforesaid do further present that C. D. well knowing the said A. B. to have done and committed the said offence in form aforesaid, afterwards to wit, on the day and year aforesaid, him the said A. B. unlawfully did receive, harbour, comfort and assist in order to enable him the said A. B. to escape.

Indictment against an accessory after the fact, the principal being convicted. After stating the offence of the principal

and the conviction, charge the accessory thus.— And the jurors aforesaid do further present that C. D. well knowing the said A. B. to have done and committed the said offence after the same was committed as aforesaid, to wit, on the day and year aforesaid, him the said A. B. did unlawfully receive, harbour, comfort and assist in order to enable him the said A. B. to escape.

Against an accessory after the fact when the principal is unknown.

The jurors present that some person or persons to the jurors aforesaid unknown, on unlawfully did steal of the goods and chattels of E. F. And the jurors aforesaid do further present that C. D. well knowing the said person to have done and committed the said offence, afterwards did unlawfully receive, harbour, comfort and assist the said person in order to enable him to escape.

See R. v. Blackson, 8 C. & P. 43; R. v. Pulham, 9 C. & P. 280.

When the principal is, as allowed by ss. 711 & 713, found guilty of another offence than the one directly charged, the accessories after the fact jointly tried with him may also be found guilty of being accessories to the offence so found against the principal: R. v. Richards, 13 Cox, 611.

On an indictment charging a man as a principal offender only he cannot be convicted of being an accessory after the fact: R. v. Fallon, L. & C. 217; the two offences are separate and distinct: R. v. Brannon, 14 Cox, 394.

The accessory may always controvert the guilt of the principal: 1 Russ. 75. But when the principal has been convicted the record of the conviction throws upon the defendant the burden of proving the principal's innocence: 1 Chit. Cr. L. 273; 2 Bish. Cr. Proc. c. 12; R. v. Turner 1 Moo. 347.

TITLE VII.

PROCEDURE.

PART XLI.

GENERAL PROVISIONS.

Power to Make Rules.

533. Every superior court of criminal jurisdiction may at any time, with the concurrence of a majority of the judges thereof present at any meeting held for the purpose, make rules of court, not inconsistent with any statute of Canada, which shall apply to all proceedings relating to any prosecution, proceeding or action instituted in relation to any matter of a criminal nature, or resulting from or incidental to any such matter, and in particular for all or any of the purposes following :—

(*a*) For regulating the sittings of the court or of any division thereof, or of any judge of the court sitting in chambers, except in so far as the same are already regulated by law.

(*b*) For regulating in criminal matters the pleading, practice and procedure in the court, including the subjects of *mandamus*, *certiorari*, *habeas corpus*, prohibition, *quo warranto*, bail and costs, and the proceedings under section nine hundred of this Act.

(*c*) Generally for regulating the duties of the officers of the court and every other matter deemed expedient for better attaining the ends of justice and carrying the provisions of the law into effect.

2. Copies of all rules made under the authority of this section shall be laid before both houses of Parliament at the session next after the making thereof, and shall also be published in the *Canada Gazette*. 52 V. c. 40.

Civil Remedy—Effect of Criminal Offence on.

534. After the commencement of this Act no civil remedy for any act or omission shall be suspended or affected by reason that such act or omission amounts to a criminal offence.

"This seems to be the existing law."—Imp. Comm. Rep.

See Wells v. Abrahams, L. R. 7 Q. B. 554, Warb. Lead. Cas. 261; Osborn v. Gillett, L. R. 8 Ex. 88; S. v. S. 16 Cox, 566; Schohl v. Kay, 5 Allen (N.B.), 244; Livingstone v. Massey, 23 U. C. Q. B. 156; Appleby v. Franklin, 17 Q.B.D. 93; Taylor v. McCullough, 8 O. R. 309; Tremblay v. Bernier, 21 S. C. R. 309.

ABOLITION OF DISTINCTION BETWEEN FELONY AND MISDEMEANOUR. (*New*).

535. After the commencement of this Act the distinction between felony and misdemeanour shall be abolished, and proceedings in respect of all indictable offences (except so far as they are herein varied) shall be conducted in the same manner.

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

"For a long time past this has ceased to be the case. Most felonies are no longer punishable with death; and many misdemeanours are now punished 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 pretenses, a misdemeanour; why bigamy should be a felony, and perjury a misdemeanour; why child-stealing should be a felony, and abduction a misdemeanour. The result of this arbitrary classification is, that the right to be bailed, the liability to be arrested without warrant, and, to a certain extent, the right of the court to order the payment of the costs of prosecutions, vary in a manner equally arbitrary and unreasonable."—Imp. Comm. Rep.

CONSTRUCTION OF ACTS. (*New*).

536. Every Act shall be hereafter read and construed as if any offence for which the offender may be prosecuted by indictment (howsoever such offence may be therein described or referred to), were described or referred to as an "indictable offence"; and as if any offence punishable on summary conviction were described or referred to as an "offence"; and all provisions of this Act relating to "indictable offences" or "offences" (as the case may be) shall apply to every such offence.

2. Every commission, proclamation, warrant or other document relating to criminal procedure, in which offences which are indictable offences or offences (as the case may be) as defined by this Act are described or referred to by any names whatsoever, shall be hereafter read and construed as if such offences were therein described and referred to as indictable offences or offences (as the case may be).

CONSTRUCTION OF CERTAIN OTHER ACTS. (*New*).

537. In any Act in which reference is made to *The Speedy Trials Act* the same shall be construed, unless the context requires otherwise, as if such

reference were to Part LIV. of this Act; any Act referring to *The Summary Trials Act* shall be construed, unless the context forbids it, as if such reference were to Part LV. of this Act; and every Act referring to *The Summary Convictions Act* shall be construed, unless the context forbids it, as if such reference were to Part LVIII. of this Act.

PART XLII.

JURISDICTION.

Superior Courts.

538. 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. R. S. C. c. 174, s. 3.

"Superior Courts" defined, s. 3.

Sessions of the Peace and Other Courts.

539. 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. R. S. C. c. 174, s. 4 (*Amended*).

See remarks under next section.

Offences in the Exclusive Jurisdiction of Superior Courts.

(*Amended*)

540. No such court as mentioned in the next preceding section has power to try any offence under the following sections, that is to say:

Part IV.—sections sixty-five, treason; sixty-seven, accessories after the fact to treason; sixty-eight, sixty-nine and seventy, treasonable offences; seventy-one, assault on the Queen; seventy-two, inciting to mutiny; seventy-seven, unlawfully obtaining and communicating official information; seventy-eight, communicating information acquired by holding office.

Part VII.—Sections one hundred and twenty, administering, taking or procuring the taking of oaths to commit certain crimes; one hundred and twenty-one, administering, taking or procuring the taking of other unlawful oaths; one hundred and twenty-four, seditious offences; one hundred and twenty-five, libels on foreign sovereigns; one hundred and twenty-six, spreading false news.

Part VIII.—Piracy; any of the sections in this part.

Part IX.—Sections one hundred and thirty-one, judicial corruption; one hundred and thirty-two, corruption of officers employed in prosecuting offenders; one hundred and thirty-three, frauds upon the Government; one hundred and thirty-five, breach of trust by a public officer; one hundred and thirty-six, corrupt practices in municipal affairs; one hundred and thirty-seven (*a*), selling and purchasing offices.

Part XI.—Escapes and rescues; any of the sections in this part.

Part XVIII.—Sections two hundred and thirty-one, murder; two hundred and thirty-two, attempts to murder; two hundred and thirty-three, threats to murder; two hundred and thirty-four, conspiracy to murder; two hundred and thirty-five, accessory after the fact to murder.

Part XXI.—Sections two hundred and sixty-seven, rape; two hundred and sixty-eight, attempt to commit rape.

Part XXIII.—Defamatory libel; any of the sections in this part.

Part XXXIX.—Section five hundred and twenty, combinations in restraint of trade.

Part XL.—Conspiring or attempting to commit, or being accessory after the fact to any of the foregoing offences.

Are not triable at quarter sessions, the offences under ss. 65, 67, 68, 69, 70, 71, 72, 77, 78, 120, 121, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 135, 136, 137*a*, 159 to 169, both inclusive, 231, 232, 233, 234, 235, 267, 268, 285, to 302, both inclusive, 520, and conspiracies, attempts or being accessory after the fact to any of the foregoing offences. The principal change in this section, coupled with s. 539, are the additions to the courts of quarter sessions' jurisdiction of manslaughter, perjury, subornation of perjury, forgery, counterfeiting coin, offences under ss. 247, 248, and of blasphemous libel.

The terms of s. 539 are so wide that s. 116 of c. 8, R. S. C., stands virtually repealed, and that consequently bribery at elections is now triable at quarter sessions. Every offence whatever is now so triable, except those specially mentioned in s. 540. This may have been an oversight of the law-giver, but in the law-giver alone lies the right to remedy its consequences: Lane v. Bennett, 1 M. & W. 70.

EXERCISING POWERS OF TWO JUSTICES.

541. The judge of the Sessions of the Peace for the city of Quebec, the judge of the Sessions of the Peace for the city of Montreal, and every *recorder*, police magistrate, district magistrate or stipendiary magistrate appointed for

any territorial division, and every magistrate authorized by the law of the province in which he acts to perform acts usually required to be done by two or more justices of the peace, may do alone whatever is authorized by this Act to be done by any two or more justices of the peace, and the several forms in this Act contained may be varied so far as necessary to render them applicable to such case. R. S. C. c. 174, s. 7.

The word *recorder* is new.

PART XLIII.

PROCEDURE IN PARTICULAR CASES.

OFFENCES WITHIN THE JURISDICTION OF THE ADMIRALTY. (*New*).

542. Proceedings for the trial and punishment of a person *who is not a subject of Her 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.

See s. 560 as to warrant of arrest.

The courts of Canada have no jurisdiction over a foreigner who commits an offence on a foreign ship on the high seas outside of one marine league from the coast: R. v. Serva, 1 Den. 104, R. v. Lewis, Dears. & B. 182; R. v. Keyn, 13 Cox, 403; R. v. Kinsman, James (N.S.), 62. But if such an offence is committed within one marine league of the coast then they have jurisdiction in virtue of the *Territorial Waters Jurisdiction Act of 1878*, 41 & 42 V. c. 73 (Imp.), by which it is enacted 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, that is within one marine league from the shore, is an offence within the jurisdiction of the admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried and punished accordingly.

It is further enacted by that Act that, in Canada, (in any of Her Majesty's dominions) proceedings for the trial of a foreigner for a crime committed on board a foreign ship, within one marine league of the coast shall not be instituted except with the leave of the Governor-General (or officer for the time being administering the government, 52 & 53 V. c. 63 Imp.) in which such proceedings are to be instituted, and on his certificate that it is expedient that such proceedings should be instituted, and that, on the trial, it shall not be necessary to aver, in any indictment or information, that such consent or certificate of the Governor-General 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 certificate of the Governor shall be sufficient evidence of such consent, as required by the said Act. It is also enacted that proceedings before the magistrate to bring the offender to trial may be had before the consent of the Governor-General is given.

The 12 & 13 V. c. 96, s. 1 (Imp.), enacts that all offences committed upon the sea, or within the jurisdiction of the Admiralty shall, in any colony where the prisoner is charged with the offence or brought there for trial, be dealt with as if the offence had been committed upon any water situate within the limits of the colony and within the limits of the local jurisdiction of the courts of criminal jurisdiction of such colony.

And s. 3 of the same Act enacts that: when any person shall die in any colony of any stroke, poisoning or hurt, such person having been feloniously stricken, poisoned or hurt upon the sea or within the limits of the admiralty, *or at any place out of the colony*, every offence committed in respect of any such case may be dealt with, inquired of tried, determined and punished in such colony in the same manner in all respects as if such offence had been wholly committed in that colony, and if any person in any colony, shall be charged with any such offence as aforesaid in

respect of the death of any person who having been feloniously stricken, poisoned or hurt, shall have died of such stroke, poisoning or hurt upon the sea, or any where within the limits of the Admiralty, such offence shall be held for the purposes of the Act to have been wholly committed upon the sea.

The 17 & 18 V. c. 104, s. 267, Imp., enacts that all offences against property or person committed in, or at any place, either ashore or afloat, out of Her Majesty's dominions by any master, seaman, or apprentice who at the time when the offence is committed is or within three months previously has been, employed in any British ship are deemed to be offences of the same nature respectively, and are liable to the same punishments respectively, and may be inquired of, heard, tried, and determined and adjudged in the same manner, and by the same courts in the same places, as if such offences had been committed within the jurisdiction of the Admiralty of England; *see* R. v. Dudley, 14 Q. B. D. 273.

The 18 & 19 V. c. 91, s. 21, Imp., enacts 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 harbour, 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 within the jurisdiction of any court of justice in Her Majesty's dominions which would have had cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction, such court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits. Then, it is enacted that nothing contained in that section shall affect the 12 & 13 V. c. 96, (*ubi supra*).

By the Imperial *Merchant Shipping Amendment Act*, 30 & 31 V. c. 124, s. 11, it is enacted that:

"If any British subject commits any crime or offence on board any British ship, or on board any foreign ship to which he does not belong, any court of justice in Her Majesty's Dominions, which would have had cognizance of such crime or offence 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 or offence had been committed as last aforesaid."

See R. v. Armstrong, 13 Cox, 184.

A crime committed by a British subject on board a foreign ship to which he belongs, does not fall under this clause.

By 28 & 29 V. c. 63 (Imp.), any colonial law repugnant to an Act of the Imperial Parliament is, to the extent of such repugnancy, void. And by the *Courts (Colonial) Jurisdiction Act*, 1874, 37 V. c. 27 (Imp.), it is provided for the punishment of offences tried in a colony but committed elsewhere.

The words used in statutes "dealt with" apply to justices of the peace; "inquired of" to the grand jury; "tried" to the petit jury and "determined and punished" to the court; by Lord Wensleydale in R. v. Ruck, note (*y*), 1 Russ. 757.

A prisoner is "found," within the meaning of s. 21, of 18 & 19 V. c. 91, *ubi supra*, wherever he is actually present, and the court, where he is present, under that Act, has jurisdiction to try him, even if he has been brought there by force as a prisoner: R. v. Lopez, R. v. Sattler, Dears. & B. 525.

On jurisdiction as to offences committed within the limits of the Admiralty *see* Archbold, 33; 1 Russ. 762; 1 Burn, 42, and R. v. Keyn, 13 Cox, 403; R. v. Carr, 15 Cox, 129; R. v. Anderson, 11 Cox, 198.

By 41 & 42 V. c. 73 (Imp.), *The Territorial Waters Jurisdiction Act* of 1878, above mentioned, the decision in R. v. Keyn, *ubi supra*, is not now to be followed. The large inland lakes of Ontario are within the jurisdiction of the Admiralty: R. v. Sharp, 5 P. R. Ont. 135.

Where a person dies in this Province from ill-treatment received on board a British ship at sea, the trial for manslaughter against the person who ill-treated him must take place in the district where the man died, not where he was apprehended: R. v. Moore, 2 Dor. Q. B. R. 52; but *see* now s. 640, *post*. On an indictment for an offence committed on board a British ship upon the high seas, it is not necessary in order to prove the nationality of the ship to produce its register, but the fact that she sailed under the British flag is sufficient: R. v. Moore, 2 Dor. Q. B. R. 52; *see* R. v. Bjornsen, 10 Cox, 74, and R. v. Sven Seberg, 11 Cox, 520.

In an indictment for a larceny committed on board a British vessel, it is sufficient to say *upon the sea*, without saying upon the *high seas*: R. v. Sprungli, 4 Q. L. R. 110.

As to offences committed by British subjects in foreign countries, "the laws of Great Britain affect her own subjects everywhere," says Dr. Lushington, in the Zollverein, 1 Sw. Adm. Rep, 96; and "an offence may be cognizable triable and justiciable in two places, *e.g.*, a murder by a British subject in a foreign country. A British subject who commits a murder in the United States of America may be tried and punished here by our municipal law, which is made to extend to its citizens in every part of the world." *Per* Cockburn, C.J., *Re* Tivnan, 5 B. & S. 679.

Special statutory authority, however, is required to empower any court to exercise jurisdiction over such offences as; without such special authority, a court has jurisdiction only over offences committed within the limits of its territorial jurisdiction. By s. 9, 24 & 45 V. c. 100, for instance, it is expressly enacted that any murder or

manslaughter committed *any where on land* out of the kingdom, *whether within* the Queen's dominions or not, and whether the person killed were a subject of Her Majesty or not, may be tried in any county in England in which the offender shall be apprehended. It would consequently appear, singular though it be, that a murder committed in the United States by a Canadian is triable in England if the offender can be apprehended there, but that it is not triable in Canada. It follows probably from the decision of the Privy Council in the case of Macleod v. Attorney-General, 17 Cox, 341 [1891], A. C. 455, that a colonial legislature has not the same right in this respect as the Imperial Parliament has. "For," said Turner, L.J., in Low v. Routledge, 1 Ch. App. 47, L. R. 3 H. L. 100, the law of a colony cannot extend beyond its territorial limits." However, the Parliament of Canada has never, it would seem, without special authority from the Imperial Parliament, legislated over crimes committed abroad; (*see*, however, ss. 127, 128, *ante*). On the contrary, apparently to keep within its territorial limits, it has restricted the exercise of its jurisdiction over bigamy, committed out of Canada, by s-s. 4, of s. 275 of this Code, as it had by its previous legislation, over British subjects resident in Canada leaving Canada with intent to commit bigamy: R. v. Brierly, 14 Q. R. 525. And the Imperial Act, 23 & 24 V. c. 122, which empowers the colonial legislatures to pass an enactment similar to the one that was contained in s. 9 of the Procedure Act c. 174, R. S. C. (*now repealed*) for the trial in the colony of a murder committed abroad, when the person murdered died in the colony, and *vice versa*, was passed, as said in the preamble, because doubts had been entertained of the power of a colonial legislature to pass such a law.

For statutes, commentaries and cases on the question, *see* R. v. Sawyer, R. & R. 294; R. v. Azzopardi, 2 Moo. 288; 5 Geo. IV. c. 114, s. 10; 6 & 7 V. c. 94 (Imp.); 24 & 25 V.

c. 100, ss. 9, 57 (Imp.); 33 & 34 V. c. 90, s. 4; The Apollon, 9 Wheat. 360; 1 Bishop's Cr. L. 109, 115, 123, Stat. Cr. 141, 587; Hutchinson's Case, note, 1 Leach, 135; Wheaton Intern. Law, 3rd English Edit., page 178; R. v. Zulueta, 1 C. & K. 215; 22 American Jur. 381, "on the extent of the Criminal Law"; Jefferys v. Boosey, 4 H. L. Cas. 815; Story, Conflict of Laws, par. 620; Fœlix, *dr. intern. privé*, par. 548.

PREVIOUS CONSENT OF ATTORNEY-GENERAL OR MINISTER OF MARINE REQUIRED FOR PROSECUTIONS UNDER CERTAIN SECTIONS.

543. No person shall be prosecuted for the offence of unlawfully obtaining and communicating official information, as defined in sections seventy-seven and seventy-eight, without the consent of the Attorney-General or of the Attorney-General of Canada. 23 V. c. 10, s. 4.

544. No one holding any judicial office shall be prosecuted for the offence of judicial corruption, as defined in section one hundred and thirty-one, without the leave of the Attorney-General of Canada.

545. If any person is charged before a justice of the peace with the offence of making or having explosive substances, as defined in section one hundred, no further proceeding shall be taken against such person without the consent of the Attorney-General except such as the justice of the peace thinks necessary, by remand or otherwise, to secure the safe custody of such person. R. S. C. c. 150, s. 5.

546. No person shall be prosecuted for any offence under section two hundred and fifty six or two hundred and fifty-seven, without the consent of the Minister of Marine and Fisheries. 52 V. c. 22 s. 3, (*as amended in 1893*).

547. No proceeding or prosecution against a trustee for a criminal breach of trust, as defined in section three hundred and sixty-three, shall be commenced without the sanction of the Attorney-General. R. S. C. c. 164, s. 65.

548. No prosecution for concealing deeds and encumbrances, as defined in section three hundred and seventy, shall be commenced without the consent of the Attorney-General, given after previous notice to the person intended to be prosecuted of the application to the Attorney-General for leave to prosecute. R. S. C. c. 164, s. 91.

549. No proceeding or prosecution for the offence of uttering defaced coin, as defined in section four hundred and seventy-six, shall be taken without the consent of the Attorney-General. R. S. C. c. 167, s. 18.

The words "Attorney-General" mean the Attorney-General or the Solicitor-General of the Province, s. 3.

Where the previous consent of the Attorney-General or some other officer is required for a prosecution, that

applies to the preliminary proceedings before the magistrate.

See R. v. Allison, 16 Cox, 559; Knowlden v. R., 9 Cox, 483; Boaler v. R., 16 Cox, 488; R. v. Barnett, 17 O. R. 649. By s. 613, as amended in 1893, it is not necessary to aver such consent in the indictment.

Section 549 requires the consent of the Attorney-General for a prosecution under the summary convictions clauses.

The power to give the consent in question in these sections cannot be delegated: Abrahams v. The Queen, 6 S. C. R. 10.

TRIALS OF OFFENDERS UNDER 16. (*New*).

550. The trials of all persons apparently under the age of sixteen years shall, so far as it appears expedient and practicable, take place without publicity, and separately and apart from that of other accused persons and at suitable times to be designated and appointed for that purpose.

This is a directory enactment, and entirely left to the discretion of the court. It is not to be found in the Imperial draft Code of 1879.

LIMITATION OF TIME. (*Amended*).

551. No prosecution for an offence against this Act, or action for penalties or forfeiture, shall be commenced—

(*a*) After the expiration of three years from the time of its commission if such offence be—

(i) treason, except treason by killing Her Majesty or where the overt act alleged is an attempt to injure the person of Her Majesty (Part IV., section sixty-five);

(ii) treasonable offences (Part IV., section sixty-nine);

(iii) any offence against Part XXXIII., relating to the fraudulent marking of merchandise; nor

(*b*) After the expiration of two years from its commission if such offence be—

(i) a fraud upon the Government (Part IX., section one hundred and thirty-three);

(ii) a corrupt practice in municipal affairs (Part IX., section one hundred and thirty-six);

(iii) unlawfully solemnizing marriage (Part XXII., section two hundred and seventy-nine); nor

(*c*) After the expiration of one year from its commission if such offence be—

(i) opposing reading of Riot Act and assembling after proclamation (Part V., section eighty-three);

(ii) refusing to deliver weapon to justice (Part VI., section one hundred and thirteen);

(iii) coming armed near public meeting (section one hundred and fourteen);

(iv) lying in wait near public meeting (section one hundred and fifteen);

(v) seduction of girl under sixteen (Part XIII,, section one hundred and eighty-one);

(vi) seduction under promise of marriage (section one hundred and eighty-two);

(vii) seduction of a ward, etc. (section one hundred and eighty-three);

(viii) unlawfully defiling women (section one hundred and eighty-five);

(ix) parent or guardian procuring defilement of girl (section one hundred and eighty-six);

(x) householders permitting defilement of girls on their premises (section one hundred and eighty-seven); nor

(*d*) After the expiration of six months from its commission if the offence be—

(i) unlawful drilling (Part V., section eighty-seven);

(ii) being unlawfully drilled (section eighty-eight);

(iii) having possession of arms for purposes dangerous to the public peace (Part VI., section one hundred and two);

(iv) proprietor of newspaper publishing advertisement offering reward for recovery of stolen property (Part X., section one hundred and fifty-seven, paragraph *d*); nor

(*e*) After the expiration of three months from its commission if the offence be cruelty to animals under sections five hundred and twelve and five hundred and thirteen, Part XXXVIII.; nor

(ii) railways violating provisions relating to conveyance of cattle (Part XXXIX., section five hundred and fourteen);

(iii) refusing peace officer admission to car, etc. (section five hundred and fifteen);

(*f*) After the expiration of one month from its commission if the offence be—

(i) improper use of offensive weapons (Part VI., sections one hundred and three, and one hundred and five to one hundred and eleven inclusive).

2. No person shall be prosecuted, under the provisions of section sixty-five or section sixty-nine of this Act, for any overt act of treason expressed or declared by open and advised speaking unless information of such overt act, and of the words by which the same was expressed or declared, is given upon oath to a justice within six days after the words are spoken and a warrant for the apprehension of the offender is issued within ten days after such information is given.

The laying of the information and subsequent proceedings are the commencement of the prosecution. So, if a statute enacts that an offence must be prosecuted within a certain time, the information must be within that time, but not necessarily the indictment: R. v. Barret, 1 Salk. 383; R. v. Austin, 1 C. & K. 621; R. v. Kerr, 26 U. C. C. P. 214, and cases there cited: R. v. Casbolt, 11 Cox, 385; R. v. Brooks, 1 Den. 217; R. v. Smith, L. & C. 131; *see* R. v. Carbray, 14 Q. L. R. 223.

In criminal cases it is not necessary for a defendant relying on a statute of limitation to plead it in bar: sec. 631 It devolves upon the prosecuting power to show by legal evidence that the prosecution was commenced within the statutory period, if the indictment appears to have been found after the expiration of that period; Bish. Stat. Cr. par. 264; R. v. Phillips, R. & R. 369; 1 Chit. 283, 385; even where the enactment limiting the time is contained in a clause separate from the clause creating the offence.

In a case of The People v. Santvoord, 9 Cowen 655, the Supreme Court of New York held that though the crime appears by the indictment itself to be barred by the statute of limitation, this is no ground for arresting judgment. That decision cannot be supported where the statute is absolute and without restrictions.

Section 117 of c. 8 R. S. C. which limits to one year the time to prosecute *any indictable* offence under that Act does not affect prosecutions under ss. 329 & 503 *ante*, though they are mere re-enactments of s. 102 of said c. 8. Under s. 933 *post*, the prosecution may be brought under either of these Acts. So that if brought under c. 8, the limitation is one year. If under the Code, there is no limitation. The punishment is also not the same in s. 329 as it is s. 102 of c. 8. *See* remarks under s. 503.

The same for battery committed on a polling day, s-s (*e*), s. 263, *ante*, and s. 77 of c. 8, R. S. C. If indicted under the latter the punishment is five years, s. 951, *post*, and

limitation of time, one year; if under the former, the punishment is two years, and there is no limitation of time.

ARREST WITHOUT WARRANT. (*Amended*).

552. Any one found committing any of the offences mentioned in the following sections, may be arrested without warrant by any one, that is to say:

Part IV.—Sections sixty-five, treason; sixty-seven, accessories after the fact to treason; sixty-eight, sixty-nine and seventy, treasonable offences; seventy-one, assaults on the Queen; seventy-two, inciting to mutiny.

Part V.—Sections eighty-three, offences respecting the reading of the Riot Act; eighty-five, riotous destruction of buildings; eighty-six, riotous damage to buildings.

Part VII.—Sections one hundred and twenty, administering, taking or procuring the taking of oaths to commit certain crimes; one hundred and twenty-one, administering, taking or procuring the taking of other unlawful oaths.

Part VIII.—Sections one hundred and twenty-seven, piracy; one hundred and twenty-eight, piratical acts; one hundred and twenty-nine, piracy with violence.

Part XI.—Sections one hundred and fifty-nine, being at large while under sentence of imprisonment; one hundred and sixty-one, breaking prison; one hundred and sixty-three, escape from custody or from prison; one hundred and sixty-four, escape from lawful custody.

Part XIII.—Section one hundred and seventy-four, unnatural offence.

Part XVIII.—Sections two hundred and thirty-one, murder; two hundred and thirty-two, attempt to murder; two hundred and thirty-five, being accessory after the fact to murder; two hundred and thirty-six, manslaughter; two hundred and thirty-eight, attempt to commit suicide.

Part XIX.—Sections two hundred and forty one, wounding with intent to do bodily harm; two hundred and forty-two, wounding; two hundred and forty-four, stupefying in order to commit an indictable offence; two hundred and forty-seven and two hundred and forty-eight, injuring or attempting to injure by explosive substances; two hundred and fifty, intentionally endangering persons on railways; two hundred and fifty-one, wantonly endangering persons on railways; two hundred and fifty-four, preventing escape from wreck.

Part XXI.—Sections two hundred and sixty-seven, rape; two hundred and sixty-eight, attempt to commit rape; two hundred and sixty-nine, defiling children under fourteen.

Part XXII.—Section two hundred and eighty-one, abduction of a woman.

Part XXV.—Section three hundred and fourteen, receiving property dishonestly obtained.

Part XXVI.—Sections three hundred and twenty, theft by agent, etc.; three hundred and fifty-five, bringing into Canada things stolen.

Part XXIX.—Sections three hundred and ninety-eight, aggravated robbery; three hundred and ninety-nine, robbery; four hundred, assault with intent to rob; four hundred and one, stopping the mail; four hundred and

two, compelling execution of documents by force; four hundred and three, sending letter demanding with menaces; four hundred and four, demanding with intent to steal; four hundred and five, extortion by certain threats.

Part XXX.—Sections four hundred and eight, breaking place of worship and committing an indictable offence; four hundred and nine, breaking place of worship with intent to commit an indictable offence; four hundred and ten, burglary; four hundred and eleven, housebreaking and committing an indictable offence; four hundred and twelve, housebreaking with intent to commit an indictable offence: four hundred and thirteen, breaking shop and committing an indictable offence; four hundred and fourteen, breaking shop with intent to commit an indictable offence; four hundred and fifteen, being found in a dwelling house by night; four hundred and sixteen, being armed, with intent to break a dwelling house; four hundred and seventeen, being disguised or in possession of housebreaking instruments.

Part XXXI.—Sections four hundred and twenty-three, forgery; four hundred and twenty-four, uttering forged documents; four hundred and twenty-five, counterfeiting seals; four hundred and thirty, possessing forged bank notes; four hundred and thirty-two, using probate obtained by forgery or perjury.

Part XXXII.—Sections four hundred and thirty-four, making, having or using instrument for forgery or uttering forged bond or undertaking; four hundred and thirty-five, counterfeiting stamps; four hundred and thirty-six, falsifying registers.

Part XXXIV.—Section four hundred and fifty-eight, personation of certain persons.

Part XXXV.—Sections four hundred and sixty-two, counterfeiting gold and silver coin; four hundred and sixty-six, making instruments for coining; four hundred and sixty-eight, clipping current coin; four hundred and seventy, possessing clipping of current coin; four hundred and seventy-two, counterfeiting copper coin; four hundred and seventy-three, counterfeiting foreign gold and silver coin; four hundred and seventy-seven, uttering counterfeit current coin.

Part XXXVII.—Sections four hundred and eighty-two, arson; four hundred and eighty-three, attempt to commit arson; four hundred and eighty-four, setting fire to crops; four hundred and eighty-five, attempting to set fire to crops: four hundred and eighty-eight, attempt to damage by explosives; four hundred and eighty-nine, mischief on railways; four hundred and ninety-two, injuries to electric telegraphs, etc., four hundred and ninety-three, wrecking; four hundred and ninety-four, attempting to wreck; four hundred and ninety-five, interfering with marine signals; four hundred and ninety-eight, mischief to mines; four hundred and ninety-nine, mischief.

2. Any one found committing any of the offences mentioned in the following sections, may be arrested without warrant by a peace officer:

Part XXVII.—Sections three hundred and fifty-nine, obtaining by false pretense; three hundred and sixty, obtaining execution of valuable securities by false pretense.

Part XXXV.—Sections four hundred and sixty-five, exporting counterfeit coin; four hundred and seventy-one, possessing counterfeit current coin; four

hundred and seventy-three, paragraph (*b*), possessing counterfeit foreign gold or silver coin; four hundred and seventy-three, paragraph (*d*), counterfeiting foreign copper coin.

Part XXXVII.—Sections four hundred and ninety-seven, cutting booms, or breaking loose rafts or cribs of timber or saw-logs; five hundred, attempting to injure or poison cattle.

Part XXXVIII.—Sections five hundred and twelve, cruelty to animals; five hundred and thirteen, keeping cock-pit.

3. A peace officer may arrest, without warrant, any one whom he finds committing any offence *against this Act*, and any person may arrest, without warrant, any one whom he finds by night committing any offence *against this Act*. R. S. C. c. 174, s. 27.

4. Any one may arrest, without warrant, a person whom he, on reasonable and probable grounds, believes to have committed an offence and to be escaping from, and to be freshly pursued by, those whom the person arresting, on reasonable and probable grounds, believes to have lawful authority to arrest such person.

5. The owner of any property on or in respect to which any person is found committing an offence *against this Act*, or any person authorized by such owner, may arrest without warrant the person so found, who shall forthwith be taken before a justice of the peace to be dealt with according to law. R. S. C. c. 174, s. 24.

6. Any officer in Her Majesty's service, any warrant or petty officer in the navy, and any non-commissioned officer of marines may arrest without warrant any person found committing any of the offences mentioned in section one hundred and nineteen of this Act.

7. Any peace officer may, without a warrant, take into custody any person whom he finds lying or loitering in any highway, yard or other place during the night, and whom he has good cause to suspect of having committed, or being about to commit, any indictable offence, and may detain such person until he can be brought before a justice of the peace, to be dealt with according to law;

(*a*) No person who has been so apprehended shall be detained after noon of the following day without being brought before a justice of the peace. R. S. C. c. 174, s. 28.

Section 26, R. S. C. c. 174, has not been re-enacted. It authorized any one to arrest any person offering stolen property for sale. The insertion of the words "against this Act" in s-ss. 3 & 5 is a gross error. S-s. 2 is a redundant enactment; it is covered by s-s. 3. This Code is silent as to the cases where a peace officer, or any one, *is bound* to arrest an offender.

Sections 16 to 44, *ante*, are enactments concerning arrests generally. "Night" and "peace officer" defined, s. 3.

Prisoner arrested and detained upon a telegram from persons in France and England: Kolligs, *in re*, 6 R. L. 213; *see* R. v. McHolme, 8 P. R. (Ont.) 452.

"At common law, if a constable or peace officer sees any person committing a felony, he not only *may*, but he *must* and is *bound* to apprehend the offender. And not only a constable or peace officer, but "*all persons* who are present when a felony is committed, or a dangerous wound given, are *bound* to apprehend the offender, on pain of being fined and imprisoned for their neglect, unless they were under age at the time: (2 Hawk. 115); and it is *the duty* of *all* persons to arrest without warrant any person *attempting* to commit a felony; (R. v. Hunt, 1 Moo. 93; R. v. Howarth, 1 Moo. 207). So any person may arrest another for the purpose of putting a stop to a breach of the peace committed in his presence: 2 Hawk. P. C. 115; 1 Burn, 295, 299). A peace officer may arrest any person without warrant, on a reasonable *suspicion of felony*, though that doctrine does not extend to misdemeanours. And even a private person has that right. But there is a distinction between a private person and a constable as to the power to arrest any one upon suspicion of having committed a felony, which is thus stated by Lord Tenterden, C.J., in Beckwith v. Philby, 6 B. & C. 635."

"In order to justify a private person in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has been actually committed: (*see* Ashley v. Dundas, 5 O. S. (Ont.) 749); whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities: (*see* McKenzie v. Gibson, 8 U. C. Q. B. 100.) This distinction is perfectly settled. The rule as to private persons was so stated by Genney, in the Year Book, 9 Edw. IV. already mentioned, and has been fully settled ever since the case of Ledwith v. Catchpole,

(Cald. 291, A. D. 1783);" Greaves, on arrest without warrant: *see* Murphy v. Eills, 2 Han. (N. B.) 347.

It has been contended that at common law any private person may also arrest a person found committing a misdemeanour. This doctrine having been denied, in England, by a correspondent of the *Times*, Mr. Greaves published, on the question, an article, (*Appendix to Greaves' Crim. Acts*) too long for insertion here, but from which the following extracts give fully the author's views on the question :—

"On these authorities it seems to be perfectly clear that any private person may lawfully apprehend any person whom he may catch in the attempt to commit any felony, and take him before a justice to be dealt with according to law."

"I have now adduced abundantly sufficient authorities to prove that the general assertion in the paper (in the *Times*), that 'a private individual is not justified in arresting without a warrant a person found committing a misdemeanour' cannot be supported. On the contrary, those authorities very strongly tend to show that any private individual may arrest any person whom he catches committing any misdemeanour. It is quite true that I have been unable to find any express authority which goes to that extent; but it must be remembered that where the question turns on some common law rule, there never can have been any authority to lay down any general rule; each case must necessarily be a single instance of a particular class; and, as in larceny, notwithstanding the vast number of cases which have been decided, no complete definition of the offence has ever yet been given by any binding authority, so in the present case we must not be surprised if we find no general rule established."

"But when we find that all misdemeanours are of the same class; that it is impossible to distinguish in any satisfactory way between one and another, and that in the only case (Fox v. Gaunt) where such a distinction was

attempted, the court at once repudiated it; and when, on the question whether a party indicted for a misdemeanour was entitled to be discharged on *habeas corpus*, Lord Tenterden, C.J., said, in delivering the judgment of the court, 'I do not know how for this purpose, to distinguish between one class of crimes and another. It has been urged that the same principle will warrant an arrest in the case of a common assault. That certainly will follow: *Ex parte* Scott, 9 B. & C. 446. And when, above all, the same broad principle that it is for the common good that all offenders should be arrested, applies to every misdemeanour, and that principle has been the foundation of the decision from the earliest times, and was the ground on which Timothy v. Simpson was decided; the only reasonable conclusion seems to be that the power to arrest applies to all misdemeanours alike, wherever the defendant is caught in the act."

It has been held that where a statute gives a power to arrest a person *found committing an offence*, he must be taken in the act, or in such continuous pursuit that from the finding until the apprehension, the circumstances constitute one transaction: R. v. Howarth, 1 Moo. 207; Roberts v. Orchard, 2 H. & C. 769; and therefore, if he was found in the next field with property in his possession suspected to be stolen out of the adjoining one, it is not sufficient: R. v. Curran, 3 C. & P. 397; but if seen committing the offence it is enough, if the apprehension is on quick pursuit: Hanway v. Boultbee, 4 C. & P. 350. The person must be immediately apprehended; therefore, probably, the next day would not be soon enough, though the lapse of time necessary to send for assistance would be allowable: Morris v. Wise, 2 F. & F. 51; but an interval of three hours between the commission of the offence and the discovery and commencement of pursuit is too long to justify an arrest without warrant under these statutes: Downing v. Capel, 36 L. J. M. C. 97.

The person must be forthwith taken before a neighbouring justice, and, therefore, it is not complying with the statute to take him to the prosecutor's house first, though only half a mile out of the way: Morris v. Wise, 2 F. & F. 51; unless, indeed, it were in the night time, and then he might probably be kept in such a place until the morning: R. v. Hunt, 1 Moo. 93.

But no person can, in general, be apprehended without warrant for a mere misdemeanour not attended with a breach of the peace, as perjury or libel: King v. Poe, 30 J. P. 178; and a private individual cannot arrest another, without warrant, on the ground of suspicion of his having been guilty of a misdemeanour; nor can, in this case, constables and peace officers: Mathews v. Biddulph, 4 Scott, N. R. 54; Fox v. Gaunt, 3 B. & Ad. 798; Griffin v. Coleman, 4 H. & N. 265. Neither can any person, not even a constable, arrest a person without a warrant on a charge of misdemeanour; R. v. Curvan, 1 Moo. 132; R. v. Phelps, Car. & M. 180; R. v. Chapman, 12 Cox, 4; Codd v. Cabe, 13 Cox, 202; except when such person is *found* committing the offence by the person making the arrest in the cases, as *ante*, where the statute specially authorizes him to do so. And though *any* person can make an arrest to prevent a breach of the peace, or put down a riot or an affray, yet, after the offence is over, even a constable cannot apprehend any person guilty of it, unless there is danger of its renewal: Price v. Seeley, 10 C. & F. 28; Baynes v. Brewster, 2 Q. B. 375; Derecourt v. Corbishley, 5 E. & B. 188; Timothy v. Simpson, 1 C. M. & R. 757: R. v. Walker, Dears. 358. In R. v. Light, Dears. & B. 332, it appeared that the constable, while standing outside the defendant's house, saw him take up a shovel and hold it in a threatening attitude over his wife's head, and heard him at the time say, "If it was not for the policeman outside I would split your head open;" that in about twenty minutes afterwards the defendant left his house, after saying that he would

leave his wife altogether, and was taken into custody by the constable, who had no warrant, when he had proceeded a short distance in the direction of his father's residence; the prisoner resisted and assaulted the constable, for which he was tried and found guilty, and, upon a case reserved, the judges held that the conviction was right, and that the constable had the right to apprehend the defendant. "A constable, as conservator of the peace," said Williams, J., "has authority, equally with all the rest of Her Majesty's subjects, to apprehend a man where there is reasonable ground to believe that a breach of the peace will be committed; and it is quite settled that where he has witnessed an assault he may apprehend as soon after as he conveniently can. He had a right to apprehend the prisoner and detain him until he was taken before justices, to be dealt with according to law. He had a right to take him, not only to prevent a further breach of the peace, but also that he might be dealt with according to law in respect of the assault which he had so recently seen him commit."

Arrest, without warrant, for contempt of court.—Judges of courts of record have power to commit to the custody of their officer, *sedente curia*, by oral command, without any warrant made at the time: Kemp v. Neville, 10 C. B. N. S. 523. This proceeds upon the ground that there is in contemplation of law a record of such commitment, which record may be drawn up when necessary: Watson v. Bodell, 14 M. & W. 57; 1 Burn, 293; for the like reason no warrant is required for the execution of sentence of death: 2 Hale, 408. If a contempt be committed in the face of a court, as by rude and contumelious behaviour, by obstinacy, perverseness, or prevarication, by breach of the peace or any wilful disturbance whatever, the judge may order the offender to be instantly, without any warrant, apprehended and imprisoned, at his, the judge's, discretion, without any further proof or examination: 2 Hawk. 221; Cropper v. Horton, 8 D. & R. 166; R. v. James, 1 D. & R. 559;

but the commitment must be for a time certain, and if by a justice of the peace, for a contempt of himself in his office, it must be by warrant in writing: Mayhew v. Locke, 2 Marsh. 377, 7 Taun. 63; and the jurisdiction with regard to contempt, which belongs to *inferior courts*, and in particular to the county court, is confined to contempts committed in the court itself: *Ex parte* Joliffe, 42 L. J. Q. B. 121. This last case rests principally on the 9 & 10 V. c. 96 (Imp.), which gives to county courts power to commit for contempt committed in face of the court, but is silent as to contempt committed out of court: *see* 4 Stephens' Com. 341; R. v. Lefroy, L. R. 8 Q. B. 134.

Time, place and manner of arrest.—A person charged on a criminal account may be apprehended at any time in the day or night. The 29 Car. 2, c. 7, s. 6, prohibited arrests on Sundays, except in cases of treasons, felonies and breaches of the peace, but now warrant of arrest for any indictable offence may be executed on a Sunday: *see* s. 564, *post*. No place affords protection to offenders against the criminal law, and they may be arrested anywhere, and wherever they may be: Bacon's Abr. Verb. Trespass.

As to the manner of arresting without warrant by a private person, he is bound, previously to the arrest, to notify to the party the cause for which he arrests, and to require him to submit; but such notification is not necessary where the party is in the actual commission of the offence, or where fresh pursuit is made after any such offender, who, being disturbed, makes his escape; so a constable arresting without warrant is bound to notify his authority for such arrest, unless the offender be otherwise acquainted with it, except, as in the case of private individuals, where the offender is arrested in the actual commission of the offence, or on fresh pursuit: R. v. Howarth, 1 Moo. 207.

If a felony be committed, or a felon fly from justice, or a dangerous wound be given, it is the duty of every man

to use his best endeavours for preventing an escape, and if, in the pursuit, the felon be killed *where he cannot be otherwise overtaken*, the homicide is justifiable. This rule is not confined to those who are present so as to have ocular proof of the fact, or to those who first come to the knowledge of it, for if in these cases fresh pursuit be made the persons who join in aid of those who began the pursuit are under the same protection of the law. But if he may be taken in any case without such severity, it is, at least, manslaughter in him who kills, and the jury ought to inquire whether it were done of necessity or not: 1 East, P. C. 298; but this is not extended to cases of misdemeanour or arrest in civil proceedings, though in a case of riot or affray, if a person interposing to part the combatants, giving notice to them of his friendly intention, should be assaulted by them or either of them and in the struggle should happen to kill, this will be justifiable homicide: Fost. 272. However, supposing a felony to have been actually committed, but not by the person suspected and pursued, the law does not afford the same indemnity to such as of their own accord, or upon mistaken information that a felony had been committed, engage in the pursuit, how probable soever the suspicion may be; but constables acting on reasonable suspicion of felony are justified in proceeding to such extremities when a private person may not be; but the constable must know, or at least have reasonable ground for suspecting, that a felony has been committed; for a constable was convicted of shooting at a man, with intent to do him some grievous bodily harm, whom he saw carrying wood out of a copse which he had been employed to watch, and who, by running away, would have escaped if he had not fired, for unless the man had been previously summarily convicted for the same offence he had not committed a felony, and though he had been so previously convicted the constable was not aware of it. And the conviction was affirmed by the court of crown cases reserved. "We all think the conviction right," said

Pollock, C.B., "the prisoner was not justified in firing at Waters, because the fact that Waters was committing a felony was not known to the prisoner at the time: R. v. Dadson, 2 Den. 35.

What was an "immediate arrest" under ss. 24 & 25 of the repealed statute, was a question for the jury: Griffith v. Taylor, 2 C. P. D. 194.

On the clause corresponding to s. 26, of the repealed statute, Greaves says:

"As to what constitutes a reasonable cause, in such cases, depends very much on the particular facts and circumstances in each instance; the general rule being that the grounds must be such that any reasonable person, acting without passion or prejudice, would fairly have suspected the party arrested of being the person who committed the offence, though the words of the statute seem to authorize the apprehension of the person offering, whether *he* be suspected or not: Allen v. Wright, 8 C. & P. 522. A bare surmise or suspicion is plainly insufficient: Leete v. Hart, 37 L. J. C. P. 157; Davis v. Russell, 5 Bing. 354."

These cases apply to s-s. 4 of s. 552.

PART XLIV.

COMPELLING APPEARANCE OF ACCUSED BEFORE JUSTICE. (*Amended.*)

553. For the purposes *of this Act*, the following provisions shall have effect with respect to the jurisdiction of justices:

(*a*) Where the offence is committed in any water, tidal or other, between two or more magisterial jurisdictions, such offence may be considered as having been committed in either of such jurisdictions. R. S. C. c. 174, s. 11.

(*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. R. S. C. c. 174, s. 10;

(*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. R. S. C. c. 174, ss. 11-12, and c. 35, s. 110.

Sub-section (*b*) is taken from the 7 Geo. IV., c. 64, s. 12 of the Imperial Acts, with the substitution of five hundred yards for one mile.

That distance is to be measured in a direct line from the border, and not by the nearest road: R. v. Wood, 5 Jur. 225.

This clause does not enable the prosecutor to *lay* the offence in one county and *try* it in the other, but only to lay *and* try it in either: R. v. Mitchell, 2 Q. B. 636. *See* also on this clause: R. v. Jones, 1 Den. 551; R. v. Leech, Dears. 642.

Murder, like all other offences, must regularly, according to the common law, be inquired of in the county in

which it was committed. It appears, however, to have been a matter of doubt at the common law whether, when a man died in one county of a stroke received in another, the offence could be considered as having been completely committed in either county; but by the 2 & 3 Edw. VI. c. 24, s. 2, it was enacted that the trial should be in the county where the death happened.

Under the said s-s. (*b*), where the blow is given in one county, and the death takes place in another, the trial may be in either of these counties: 1 Russ. 753. This applies to coroners, when a felony has been committed, but not when the death is the result of an accident: R. v. Great Western Railway Company, 3 Q. B. 333 and note by Greaves, 1 Russ. 754; R. v. Grand Junction R. Co., 11 A. & E. 128.

Sub-section (*c*) is taken from the 7 Geo. IV. c. 64, s. 13, of the Imperial Statutes.

This enactment is not confined in its operation to the carriages of common carriers or to public conveyances, but if property is stolen from any carriage employed on any journey the offender may, by virtue of the above section, be tried in any county through any part whereof such carriage shall have passed in the course of the journey during which such offence shall have been committed: R. v. Sharpe, Dears. 415.

As to the effect of the words "in or upon" in this section, *see* R. v. Sharpe, 2 Lewin 233.

Where the evidence is consistent with the fact of an article having been abstracted from a railway carriage, either in the course of the journey through the county of A., or after its arrival at its ultimate destination in the county of B., and the prisoner is indicted under the above section, the case must go to the jury, who are to say whether they are satisfied that the larceny was committed in the course of the journey or afterwards: R. v. Pierce, 6 Cox, 117.

WHEN JUSTICE MAY COMPEL APPEARANCE.

554. Every justice may issue a warrant or summons as hereinafter mentioned to compel the attendance of an accused person before him, for the purpose of preliminary inquiry in any of the following cases:

(*a*) If such person is accused of having committed *in any place whatever* an indictable offence triable in the province in which such justice resides, and is, or is suspected to be, within the limits over which such justice has jurisdiction, or resides or is suspected to reside within such limits;

(*b*) If such person, wherever he may be, is accused of having committed an indictable offence within such limits;

(*c*) If such person is alleged to have anywhere unlawfully received property which was unlawfully obtained within such limits;

(*d*) *If such person has in his possession, within such limits, any stolen property.*

What are the offences committed out of a province that are triable in that province? This Code does not say.

OFFENCES IN CERTAIN PARTS OF ONTARIO.

555. All offences committed in any of the unorganized tracts of country in the province of Ontario, including lakes, rivers and other waters therein, not embraced within the limits of any organized county, or within any provisional judicial district, may be laid and charged to have been committed and may be inquired of, tried and punished within any county of such province; and such offences shall be within the jurisdiction of any court having jurisdiction over offences of the like nature committed within the limits of such county, before which court such offences may be prosecuted; and such court shall proceed therein to trial, judgment and execution or other punishment for such offence, in the same manner as if such offence had been committed within the county where such trial is had.

2. When any provisional judicial district or new county is formed and established in any of such unorganized tracts, all offences committed within the limits of such provisional judicial district or new county, shall be inquired of, tried and punished within the same, in like manner as such offences would have been inquired of, tried and punished if this section had not been passed.

3. Any person accused or convicted of any offence in any such provisional district may be committed to any common gaol in the province of Ontario; and the constable or other officer having charge of such person and intrusted with his conveyance to any such common gaol, may pass through any county in such province with such person in his custody; and the keeper of the common gaol of any county in such province in which it is found necessary to lodge for safe keeping any such person so being conveyed through such county in custody, shall receive such person and safely keep and detain him in such common gaol for such period as is reasonable or necessary; and the keeper of any common gaol in such province, to which any such person is committed as aforesaid, shall receive such person and safely keep and detain him in such common gaol under his custody until discharged in due course of law, or bailed in cases in which bail may by law be taken. R. S. C. c. 174, s. 14.

OFFENCES IN GASPE.

556. Whenever any offence is committed in the district of Gaspe, the offender, if committed to gaol before trial, may be committed to the common gaol of the county in which the offence was committed, or may, in law, be deemed to have been committed, and if tried before the Court of Queen's Bench, he shall be so tried at the sitting of such court held in the county to the gaol of which he has been committed, and if imprisoned in the common gaol after trial he shall be so imprisoned in the common gaol of the county in which he has been tried. R. S. C. c. 174, s. 15.

OFFENCES COMMITTED OUT OF JURISDICTION. (*Amended*).

557. The preliminary inquiry may be held either by one justice or by more justices than one: Provided that if the accused person is brought before any justice charged with an offence committed out of the limits of the jurisdiction of such justice, such justice may, after hearing both sides, order the accused at any stage of the inquiry to be taken by a constable before some justice having jurisdiction in the place where the offence was committed. The justice so ordering shall give a warrant for that purpose to a constable, which may be in the form A in schedule one hereto, or to the like effect, and shall deliver to such constable the information, depositions and recognizances if any taken under the provisions of this Act, to be delivered to the justice before whom the accused person is to be taken, and such depositions and recognizances shall be treated to all intents as if they had been taken by the last-mentioned justice.

2. Upon the constable delivering to the justice the warrant, information, if any, depositions and recognizances, and proving on oath or affirmation, the handwriting of the justice who has subscribed the same, such justice, before whom the accused is produced, shall thereupon furnish such constable with a receipt or certificate in the form B in schedule one hereto, of his having received from him the body of the accused, together with the warrant, information, if any, depositions and recognizances, and of his having proved to him, upon oath or affirmation, the handwriting of the justice who issued the warrant.

4. If such justice does not commit the accused for trial, or hold him to bail, the recognizances taken before the first mentioned justice shall be void.

A.——(*Section* 557.)

WARRANT TO CONVEY BEFORE A JUSTICE OF ANOTHER COUNTY.

Canada,
Province of ,
County of .

Whereas information upon oath was this day made before the undersigned that A. B. of , on the day of , in the year , at , in the county of (*state the charge.*)

And whereas I have taken the deposition of X. Y. as to the said offence.

And whereas the charge is of an offence committed in the county of

This is to command you to convey the said (*name of accused*), of , before some justice of the last-mentioned county, near the above place, and to deliver to him this warrant and the said deposition.

Dated at , in the said county of , this day of , in the year

J. S.,
J. P., (Name of county,)

To of

B.—(*Section* 557.)

RECEIPT TO BE GIVEN TO THE CONSTABLE BY THE JUSTICE FOR THE COUNTY IN WHICH THE OFFENCE WAS COMMITTED.

Canada,
Province of ,
County of

I, J. L., a justice of the peace in and for the county of , hereby certify that W. T., peace officer of the county of , has, on this day of , in the year , by virtue of and in obedience to a warrant of J. S., Esquire, a justice of the peace in and for the county of , produced before me one A. B., charged before the said J. S. with having (*etc., stating shortly the offence*), and delivered him into the custody of by my direction, to answer to the said charge, and further to be dealt with according to law, and has also delivered unto me the said warrant, together with the information (*if any*) in that behalf, and the deposition (*s*) of C. D. (*and of*), in 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.)

INFORMATION.

558. Any one who, upon reasonable or probable grounds, believes that any person has committed an indictable offence *against this Act* may make a complaint or lay an information in writing and under oath before any magistrate or justice of the peace having jurisdiction to issue a warrant or summons against such accused person in respect of such offence.

2. Such complaint or information may be in the form C. in schedule one hereto, or to the like effect.

The words "against this Act" are a grave mistake. As to a warrant *see* s. 563.

C.—(*Section* 558.)

INFORMATION AND COMPLAINT FOR AN INDICTABLE OFFENCE.

Canada,
Province of ,
County of .

The information and complaint of C. D. of , (*yeoman*), taken this day of , in the year before the undersigned (*one*) of Her Majesty's justices of the peace in and for the said county of , who saith that (*etc., stating the offence*).

Sworn before (*me*), the day and year first above mentioned, at .

J. S.,
J. P., (*Name of county*).

HEARING ON INFORMATION.

559. Upon receiving any such complaint or information the justice shall hear and consider the allegations of the complainant, and if of opinion that a case for so doing is made out he shall issue a summons, or warrant, as the case may be, in manner hereinafter mentioned; *and such justice shall not refuse to issue such summons or warrant only because the alleged offence is one for which an offender may be arrested without warrant.* R. S. C. c. 174, s. 30.

OFFENCES COMMITTED ON THE HIGH SEAS.

560. Whenever any indictable offence is committed on the high seas, or in any creek, harbour, haven or other place in which the Admiralty of England have or claim to have jurisdiction, and whenever any offence is committed *on land beyond the seas* for which an indictment may be preferred or the offender may be arrested in Canada, any justice for any territorial division in which any person charged with, or suspected of, having committed any such offence is or is suspected to be, may issue his warrant, in the form D in schedule one hereto, or to the like effect to apprehend such person, to be dealt with as herein and hereby directed. R. S. C. c. 174, s. 32.

"Beyond the seas" in England, means *outside* of the realm. The words have been recopied here from the English Act to mean outside of Canada, it must be assumed. It may be that the United States are *beyond the seas* in the construction of this enactment: Lane v. Bennet, 1 M. & W. 70; Ruckmaboye v. Lulloobhoy Mottichund, 8 Moo. P. C. 4; Davie v. Briggs, 97 U. S. 628. But it would have been better to say "outside of Canada."

This enactment assumes that there are offences committed *on land beyond the seas* that are indictable in Canada. What these offences are, and under what circumstances they are indictable in Canada, is not to be found in the Code. Likewise for offences committed within the jurisdiction of the Admiralty, the Code is silent as to Canada's jurisdiction. Sections 8 & 9 of c. 174, R. S. C. are repealed, and probably intended to be covered by s. 640: *sed quære?*

D.—(*Section* 560.)

WARRANT TO APPREHEND A PERSON CHARGED WITH AN INDICTABLE OFFENCE 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.*

ARREST OF SUSPECTED DESERTERS.

561. Every one who is reasonably suspected of being a deserter from Her Majesty's service may be apprehended and brought for examination before any justice of the peace, and if it appears that he is a deserter he shall be confined in gaol until claimed by the military or naval authorities, or proceeded against according to law. R. S. C. c. 169, s. 6.

2. No one shall break open any building to search for a deserter unless he has obtained a warrant for that purpose from a justice of the peace,—such warrant to be founded on affidavit that there is reason to believe that the deserter is concealed in such building, and that admittance has been demanded and refused; and every one who resists the execution of any such warrant shall incur a penalty of eighty dollars, recoverable on summary conviction in like manner as other penalties under this Act. R. S. C. c. 169, s. 7.

Section 9 of c. 169, R. S. C. is unrepealed.

SUMMONS.

562. Every summons issued by a justice *under this Act* shall be directed to the accused, and shall require him to appear at a time and place to be therein mentioned. Such summons may be in the form E in schedule one hereto, or to the like effect. *No summons shall be signed in blank.*

2. Every such summons shall be served by a constable or other peace officer upon the person to whom it is directed, either by delivering it to him personally or, if such person cannot conveniently be met with, by leaving it for him at his last or most usual place of abode *with some inmate thereof apparently not under sixteen years of age.*

3. The service of any such summons may be proved by the oral testimony of the person effecting the same *or by the affidavit of such person purporting to be made before a justice.* R. S. C. c. 174, ss. 40, 41 & 42.

E.—(*Section* 562.)

SUMMONS TO A PERSON CHARGED WITH AN INDICTABLE OFFENCE.

Canada,
Province of ,
County of .

To A. B. of , (*labourer*):

Whereas you have this day been charged before the undersigned , a justice of the peace in and for the said county of , for that you on , at , (*stating shortly the offence*): These are therefore to command you, in Her Majesty's name, to be and appear before (*me*) on , at o'clock in the (fore) noon, at , or before such other justice or justices of the peace for the same county of , as shall then be there, to answer to the said charge, and to be further dealt with according to law. Herein fail not.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of county.*)

WARRANT OF APPREHENSION.

563. The warrant issued by a justice for the apprehension of the person against whom an information or complaint has been laid, as provided in section five hundred and fifty-eight, may be in the form F in schedule one hereto, or to the like effect. *No such warrant shall be signed in blank.*

2. Every such warrant shall be under the hand and seal of the justice issuing the same, and may be directed, either to any constable by name, or to such constable and all other constables within the territorial jurisdiction of the justice issuing it, or generally to all constables within such jurisdiction.

3. The warrant shall state shortly the offence for which it is issued, and shall name or otherwise describe the offender, and it shall order the officer or officers to whom it is directed to apprehend the offender and bring him before the justice or justices issuing the warrant, or before some other justice or justices to answer to the charge contained in the said information or complaint, and to be further dealt with according to law. It shall not be necessary to make such warrant returnable at any particular time, but the same shall remain in force until it is executed.

4. The fact that a summons has been issued shall not prevent any justice from issuing such warrant at any time before or after the time mentioned in the summons for the appearance of the accused; and where the service of the summons has been proved and the accused does not appear, or when it appears that the summons cannot be served, the warrant (form G) may issue. R. S. C. c. 174, ss. 31, 43, 44 & 46.

F.—(*Section* 563.)

WARRANT IN THE FIRST INSTANCE TO APPREHEND A PERSON CHARGED WITH AN INDICTABLE OFFENCE.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of .

Whereas A. B. of , (*labourer*), has this day been charged upon oath before the undersigned , a justice of the peace in and for the said county of , for that he, on , at , did (*etc., stating shortly the offence*): These are therefore to command you, in Her Majesty's name, forthwith to apprehend the said A. B., and to bring him before (*me*) (or some other justice of the peace in and for the said county of), to answer unto the said charge, and to be further dealt with according to law.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of County.*)

G.—(*Section* 563.)

WARRANT WHEN THE 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 Her Majesty's name, to be and appear before (*me*) on at o'clock in the (fore) noon, at , or before such other justice or justices of the peace as should then be there, to answer to the said charge and to be further dealt with according to law; and whereas the said A. B. has neglected to be or appear at the time and place appointed in and by the said summons, although it has now been proved to (*me*) upon oath that the said summons was duly served upon the said A. B.; These are therefore to command you in Her Majesty's name, forthwith to apprehend the said A. B., and to bring him before (*me*) or some other justice of the peace in and for the said county of , to answer the said charge, and to be further dealt with according to law.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (*Name of county.*)

EXECUTION OF WARRANT.

564. Every such warrant may be executed by arresting the accused wherever he is found in the territorial jurisdiction of the justice by whom it is issued, or in the case of fresh pursuit, at any place in an adjoining territorial division within seven miles of the border of the first-mentioned division. R. S. C. c. 174, ss. 47 & 48.

2. Every such warrant may be executed by any constable named therein, or by any one of the constables to whom it is directed, whether or not the

place in which it is to be executed is within the place for which he is a constable.

3. Every warrant authorized *by this Act* may be issued and executed on a Sunday or statutory holiday. R. S. C. c. 174, ss. 37, 47 & 48.

The words "by this Act" are wrong; they constitute a limitation that clearly was not intended.

PROCEEDING WHEN ACCUSED IS OUT OF THE JURISDICTION.

565. If the person against whom any warrant has been issued cannot be found within the jurisdiction of the justice by whom the same was issued, but is or is suspected to be in any other part of Canada, any justice within whose jurisdiction he is or is suspected to be, upon proof being made on oath or affirmation of the handwriting of the justice who issued the same, shall make an endorsement on the warrant, signed with his name, authorizing the execution thereof within his jurisdiction; and such endorsement shall be sufficient authority to the person bringing such warrant, and to all other persons to whom the same was originally directed, and also to all constables of the territorial division where the warrant has been so endorsed, to execute the same therein and to carry the person against whom the warrant issued, when apprehended, before the justice who issued the warrant, or before some other justice for the same territorial division. Such endorsement may be in the form H. in schedule one hereto. R. S. C. c. 174, s. 49.

H.—(*Section* 565.)

ENDORSEMENT IN BACKING A WARRANT.

Canada,
Province of ,
County of .

Whereas proof upon oath has this day been made before me , a justice of the peace in and for the said county of , that the name of J. S. to the within warrant subscribed, is of the handwriting of the justice of the peace within mentioned: I do therefore hereby authorize W. T. who brings to me this warrant and all other persons to whom this warrant was originally directed, or by whom it may be lawfully executed, and also all peace officers of the said county of , to execute the same within the said last mentioned county.

Given under my hand, this day of , in the year, at , in the county aforesaid.

J. L.,
J. P., (*Name of county.*)

DISPOSAL OF PERSON SO ARRESTED.

566. If the prosecutor or any of the witnesses for the prosecution are in the territorial division where such person has been apprehended upon a warrant endorsed as provided in the last preceding section the constable or other person or persons who have apprehended him may, if so directed by the justice endorsing the warrant, take him before such justice, or before some other justice for the same territorial division; and the said justice may thereupon take the examination of such prosecutor or witnesses, and proceed in every respect as if he had himself issued the warrant. R. S. C. c. 174, s. 50.

DISPOSAL OF PERSON APPREHENDED. (*New*).

567. When any person is arrested upon a warrant he shall, except in the case provided for in the next preceding section, be brought as soon as is practicable before the justice who issued it or some other justice for the same territorial division, and such justice shall either proceed with the inquiry or postpone it to a future time, in which latter case he shall either commit the accused person to proper custody or admit him to bail or permit him to be at large on his own recognizance according to the provisions hereinafter contained.

CORONER'S INQUISITION. (*New*).

568. Every coroner, upon any inquisition taken before him whereby any person is charged with manslaughter or murder, shall (if the person or persons, or either of them, affected by such verdict or finding be not already charged with the said offence before a magistrate or justice), by warrant under his hand, direct that such person be taken into custody and be conveyed, with all convenient speed, before a magistrate or justice; or such coroner may direct such person to enter into a recognizance before him, with or without a surety or sureties, to appear before a magistrate or justice. In either case, it shall be the duty of the coroner to transmit to such magistrate or justice the depositions taken before him in the matter. Upon any such person being brought or appearing before any such magistrate or justice, he shall proceed in all respects as though such person had been brought or had appeared before him upon a warrant or summons.

This virtually gives an appeal from the coroner's jury to a single magistrate, who consequently, though heretofore he had not even the right to bail any one charged by a verdict of the coroner's jury, will now have the right to set him free altogether.

SEARCH WARRANTS.

569. Any justice who is satisfied by information upon oath in the form J in schedule one hereto, that there is reasonable ground for believing that there is in any building, receptacle, or place—

(*a*) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed; or

(*b*) anything which there is reasonable ground to believe will afford evidence as to the commission of any such offence; or

(*c*) anything which there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which the offender may be arrested without warrant—

may at any time issue a warrant under his hand authorizing some constable or other person named therein to search such building, receptacle or place, for any such thing, and to seize and carry it before the justice issuing the warrant, or some other justice for the same territorial division to be by him dealt with according to law. R. S. C. c. 174, ss. 51 & 52.

2. Every search warrant shall be executed by day, *unless the justice shall by the warrant authorize the constable or other person to execute it at night.*

3. Every search warrant may be in the form I in schedule one hereto, or to the like effect.

4. When any such thing is seized and brought before such justice he may detain it, taking reasonable care to preserve it till the conclusion of the investigation; and, if any one is committed for trial, he may order it further to be detained for the purpose of evidence on the trial. If no one is committed, the justice shall direct such thing to be restored to the person from whom it was taken, except in the cases next hereinafter mentioned, unless he is authorized or required by law to dispose of it otherwise. In case any improved arm or ammunition in respect to which any offence under section one hundred and sixteen has been committed has been seized, it shall be forfeited to the Crown. R. S. C. c. 50, s. 101.

5. If under any such warrant there is brought before any justice any forged bank note, bank note-paper, instrument or other thing, the possession whereof in the absence of lawful excuse is an offence under any provision of this or any other Act, the court to which any such person is committed for trial or, if there is no commitment for trial, such justice may cause such thing to be defaced or destroyed. R. S. C. c. 174, s. 55.

6. If under any such warrant there is brought before any justice, any counterfeit coin or other thing the possession of which with knowledge of its nature and without lawful excuse is an indictable offence under any provision of Part XXXV. of this Act (s. 460), every such thing as soon as it has been produced in evidence, or as soon as it appears that it will not be required to be so produced, shall forthwith be defaced or otherwise disposed of as the justice or the court directs. R. S. C. c. 174, s. 56.

7. Every person acting in the execution of any such warrant may seize any explosive substance which he has good cause to suspect is intended to be used for any unlawful object,—and shall, with all convenient speed, after the seizure, remove the same to such proper place as he thinks fit, and detain the same until ordered by a judge of a superior court to restore it to the person who claims the same. R. S. C. c. 150, s. 11.

8. Any explosive substance so seized shall, in the event of the person in whose possession the same is found, or of the owner thereof, being convicted of any offence under Part VI. of this Act (s. 99), be forfeited; and the same shall be destroyed or sold under the direction of the court before which such person is convicted, and, in the case of sale, the proceeds arising therefrom shall be paid to the Minister of Finance and Receiver General, for the public uses of Canada. R. S. C. c. 150, s. 12.

9. If offensive weapons believed to be dangerous to the public peace are seized under a search warrant the same shall be kept in safe custody in such place as the justice directs, unless the owner thereof proves, to the satisfaction of such justice, that such offensive weapons were not kept for any purpose dangerous to the public peace; and any person from whom any such offensive weapons are so taken may, if the justice of the peace upon whose warrant the same are taken, upon application made for that purpose, refuses to restore the same, apply to a judge of a superior or county court for the restitution of such offensive weapons, upon giving ten days' previous notice of such application to such justice; and such judge shall make such order for the restitution or safe custody of such offensive weapons as upon such application appears to him to be proper. R. S. C. c. 149, ss. 2 & 3.

10. If goods or things by means of which it is suspected that an offence has been committed under Part XXXIII. (ss. 443 *et seq.*) are seized under a search warrant, and brought before a justice, such justice and one or more other justice or justices shall determine summarily whether the same are or are not forfeited under the said Part XXXIII.; and if the owner of any goods or things which, if the owner thereof had been convicted, would be forfeited under this Act, is unknown or cannot be found, an information or complaint may be laid for the purpose only of enforcing such forfeiture, and the said justice may cause notice to be advertised stating that unless cause is shown to the contrary at the time and place named in the notice, such goods or things will be declared forfeited; and at such time and place the justice, unless the owner, or any person on his behalf, or other person interested in the goods or things, shows cause to the contrary, may declare such goods or things, or any of them, forfeited. 51 V. c. 41, s. 14.

J.—(*Section* 569.)

INFORMATION TO OBTAIN A SEARCH WARRANT.

Canada,
Province of ,
County of .

The information of A. B., of , in the said county (*yeoman*) taken this day of , in the year , before me, J. S., Esquire, a justice of the peace, in and for the county (*describe things to be searched for and offence in respect of which search is made*), of , who says that and that he has just and reasonable cause to suspect, and suspects, that the said goods and chattels, or some part of them are concealed in the (*dwelling-house, &c.*) of C. D., of , in the said county, (*here add the causes of suspicion, whatever they may be*): Wherefore (*he*) prays that a search warrant may be granted to him to search the (*dwelling-house, &c.*), of the said C. D., as

aforesaid, for the said goods and chattels so feloniously stolen, taken and carried away as aforesaid.

Sworn (*or* affirmed) before me the day and year first above mentioned, at , in the said county of

J. S.,

J. P., (Name of county.)

I.—(*Section* 569.)

WARRANT TO SEARCH.

Canada, }
Province of , }
County of . }

Whereas it appears on the oath of A. B. of , that there is reason to suspect that (*describe things to be searched for and offence in respect of which search is made*) are concealed in at

This is, therefore, to authorize and require you to enter between the hours of (*as the justice shall direct*) into the said premises, and to search for the said things, and to bring the same before me or some other justice.

Dated at , in the said county of , this day of , in the year .

J. S.,

J. P., (Name of county).

To of

SEARCH FOR PUBLIC STORES.

570. Any constable or other peace officer, if deputed by any public department, may, within the limits for which he is such constable or peace officer, stop, detain and search any person reasonably suspected of having or conveying in any manner any public stores, defined in section three hundred and eighty-three, stolen or unlawfully obtained, or any vessel, boat or vehicle in or on which there is reason to suspect that any public stores stolen or unlawfully obtained may be found.

2. A constable or other peace officer shall be deemed to be deputed within the meaning of this section if he is deputed by any writing signed by the person who is the head of such department, or who is authorized to sign documents on behalf of such department. 50-51 V. c. 45, s. 10.

SEARCH WARRANT FOR GOLD.

571. On complaint in writing made to any justice of the county, district or place, by any person interested in any mining claim, that mined gold or gold-bearing quartz, or mined or unmanufactured silver or silver ore, is unlawfully deposited in any place, or held by any person contrary to law, a general search warrant may be issued by such justice, as in the case of stolen goods, including any number of places or persons named in such complaint; and if, upon such search, any such gold or gold-bearing quartz, or silver or silver ore, is found to be unlawfully deposited or held, the justice shall make such order for the restoration thereof to the lawful owner as he considers right.

2. The decision of the justice in such case is subject to appeal as in ordinary cases coming within the provisions of Part LVIII (s. 839, *post*). R. S. C. c. 174, s. 53.

A proviso as to security to be given on such appeal is now to be found in s. 880 *post*.

SEARCH FOR TIMBER.

572. If any constable or other peace officer has reasonable cause to suspect that any timber, mast, spar, saw-log or other description of lumber, belonging to any lumberman or owner of lumber, and bearing the registered trade mark of such lumberman or owner of lumber, is kept or detained in any saw-mill, mill-yard, boom or raft, without the knowledge or consent of the owner, such constable or other peace officer may enter into or upon the same, and search or examine, for the purpose of ascertaining whether such timber, mast, spar, saw-log or other description of lumber is detained therein without such knowledge and consent. R. S. C. c. 174, s. 54.

SEARCH FOR LIQUORS NEAR HER MAJESTY'S VESSELS.

573. Any officer in Her Majesty's service, any warrant or petty officer of the navy, or any non-commissioned officer of marines, with or without seamen or persons under his command, may search any boat or vessel which hovers about or approaches, or which has hovered about or approached, any of Her Majesty's ships or vessels mentioned in section one hundred and nineteen, Part VI. of this Act, and may seize any intoxicating liquor found on board such boat or vessel; and the liquor so found shall be forfeited to the Crown. 50-51 V. c. 46, s. 3.

SEARCH IN HOUSES OF ILL-FAME.

574. Whenever there is reason to believe that any woman or girl mentioned in section one hundred and eighty-five, Part XIII., has been inveigled or enticed to a house of ill-fame or assignation, then upon complaint thereof being made under oath by the parent, *husband*, master or guardian of such woman or girl, or in the event of such woman or girl having no known parent, *husband*, master nor guardian in the *place* in which the offence is alleged to have been committed, by any other person, to any justice of the peace, or to a judge of any court authorized to issue warrants in cases of alleged offences against the criminal law, such justice of the peace or judge of the court may issue a warrant to enter, by day or night, such house of ill-fame or assignation, *and if necessary use force for the purpose of effecting such entry*

whether by breaking open doors or otherwise, and to search for such woman or girl, and bring her, and the person or persons in whose keeping and possession she is, before such justice of the peace, or judge of the court, who may, on examination, order her to be delivered to her parent, *husband*, master or guardian, or to be discharged, as law and justice require. R. S. C. c. 157, s. 7. 48-49 V. c. 69, s. 10 (Imp.).

The word "province" instead of "a place" was in the repealed clause, in the eighth line.

Under the repealed clause, this provision applied only to women under 21 years of age. The words in italics are new: *see* Lea v. Charrington, 16 Cox, 704, 23 Q. B. D. 45.

SEARCH IN GAMING-HOUSE.

575. If the chief constable or deputy chief constable of any city or town, or other officer authorized to act in his absence, reports in writing to any of the commissioners of police or mayor of such city or town, or to the police magistrate of any town, that there are good grounds for believing, and that he does believe, that any house, room or place within the said city or town is kept or used as a common gaming or betting-house as defined in Part XIV., sections one hundred and ninety-six, and one hundred and ninety-seven, *or is used for the purpose of carrying on a lottery, or for the sale of lottery tickets, contrary to the provisions of Part XV.*, section two hundred and five, whether admission thereto is limited to those possessed of entrance keys or otherwise, the said commissioners or commissioner, or mayor, or the said police magistrate, may, by order in writing, authorize the chief constable, deputy chief constable, or other officer as aforesaid, to enter any such house, room or place, with such constables as are deemed requisite by the chief constable, deputy chief constable or other officer,—and, if necessary, to use force for the purpose of effecting such entry, whether by breaking open doors or otherwise,—and to take into custody all persons who are found therein, and to seize, as the case may be (1) all tables and instruments of gaming, and all moneys and securities for money, or (2) *all instruments or devices for the carrying on of such lottery, and all lottery tickets found in such house or premises.* R. S. C. c. 158, s. 2.

2. The chief constable, deputy chief constable or other officer making such entry, in obedience to any such order, may, with the assistance of one or more constables, search all parts of the house, room or place which he has so entered, where he suspects that tables or instruments of gaming or betting, or any instruments or devices for the carrying on of such lottery or any lottery tickets, are concealed, and all persons whom he finds in such house or premises, and seize all tables and instruments of gaming, *or any such instruments or devices or lottery tickets as aforesaid, which he so finds.* R. S. C. c. 158, s. 3.

3. The police magistrate or other justice of the peace before whom any person is taken by virtue of an order or warrant under this section, may direct any cards, dice, balls, counters, tables or other instruments of gaming, used in playing any game, and seized under this Act in any place used as a common gaming-house, *or any such instruments or devices for the carrying on of a lottery, or any such lottery tickets as aforesaid*, to be forthwith destroyed, and

any money or securities seized under this section shall be forfeited to the Crown for the public uses of Canada. R. S. C. c. 158, s. 5.

4. The expression "chief constable" includes chief of police, city marshal or other head of the police force of any city, town or place. R. S. C. c. 158, s. 1.

5. The expression "deputy chief constable" includes deputy chief of police, deputy *or assistant* city marshal or other deputy head of the police force of any city, town or place, *and the expression "police magistrate" includes stipendiary magistrates.*

SEARCH FOR VAGRANT.

576. Any stipendiary or police magistrate, mayor or warden, or any two justices of the peace, upon information before them made, that any person described in Part XV. (s. 207), as a loose, idle or disorderly person, or vagrant, is or is reasonably suspected to be harboured or concealed in any disorderly house, bawdy-house, house of ill-fame, tavern or boarding-house, may, by warrant, authorize any constable or other person to enter at any time such house or tavern, and to apprehend and bring before them or any other justices of the peace, every person found therein so suspected as aforesaid. R. S. C. c. 157, s. 8.

PART XLV.

PROCEDURE ON APPEARANCE OF ACCUSED.

577. When any person accused of an indictable offence is before a justice, whether voluntarily or upon summons, or after being apprehended with or without warrant, or while in custody for the same or any other offence, the justice shall proceed to inquire into the matters charged against such person in the manner hereinafter defined.

This applies to *all* indictable offences, not only to those under *this Act*.

NO FORMAL OBJECTION.

578. No irregularity or defect in the substance or form of the summons or warrant, and no variance between the charge contained in the summons or warrant and the charge contained in the information, or between either and the evidence adduced on the part of the prosecution at the inquiry, shall affect the validity of any proceeding at or subsequent to the hearing. R. S. C. c. 174, s. 58.

JUSTICE MAY POSTPONE HEARING.

579. If it appears to the justice that the person charged has been deceived or misled by any such variance in any summons or warrant, he may

adjourn the hearing of the case to some future day, and in the meantime may remand such person, or admit him to bail as hereinafter mentioned. R. S. C. c. 174, s. 59.

PROCURING ATTENDANCE OF WITNESSES.

580. If it appears to the justice that any person being or residing within *the province* is likely to give material evidence either for the prosecution *or for the accused* on such inquiry he may issue a summons under his hand, requiring such person to appear before him at a time and place mentioned therein to give evidence respecting the charge, *and to bring with him any documents in his possession or under his control relating thereto.*

2. Such summons may be in the form K. in schedule one hereto, or to the like effect. R. S. C. c. 174, s. 60.

The words "the province" are substituted for the word "Canada": *see* s. 584. The other words in italics are extensions of the enactment. The repealed clause required that the witness be made to appear material by oath or affirmation. That is now required only for a warrant: s. 582.

K.—(*Section* 580.)

SUMMONS TO A WITNESS.

Canada
Province of , }
County of }

To E. F., of ,(labourer):

Whereas information has been laid before the undersigned , a justice of the peace in and for the said county of , that A. B. (*&c., as in the summons or warrant against the accused*), and it has been made to appear to me upon (*oath*), that you are likely to give material evidence for (*the prosecution*); These are therefore to require you to be and to appear before me on next, at o'clock in the (fore) noon, at , or before such other justice or justices of the peace of the same county of , as shall then be there, to testify what you know concerning the said charge so made against the said A. B. as aforesaid. Herein fail not.

Given under my hand and seal, this day of in the year , at , in the county aforesaid.

J. S [SEAL.]

J. P., (*Name of county.*)

SERVICE ON WITNESS. (*Amended*).

581. 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.* R. S. C. c. 174, s. 61.

WARRANT AGAINST A WITNESS. (*Amended*).

582. If any one to whom such last-mentioned summons is directed does not appear at the time and place appointed thereby, and no just excuse is offered for such non-appearance, then (after proof upon oath that such summons has been served as aforesaid, *or that the person to whom the summons is directed is keeping out of the way to avoid service*) the justice before whom such person ought to have appeared, *being satisfied by proof on oath that he is likely to give material evidence* may issue a warrant under his hand to bring such person at a time and place to be therein mentioned before him or any other justice in order to testify as aforesaid.

2. The warrant may be in the form L. in schedule one hereto, or to the like effect. Such warrant may be executed anywhere within the territorial jurisdiction of the justice by whom it is issued, or, if necessary, endorsed as provided in section five hundred and sixty-five, and executed anywhere in *the province* but out of such jurisdiction. R. S. C. c. 174, s. 61.

3. If a person summoned as a witness under the provisions of this part is brought before a justice on a warrant issued in consequence of refusal to obey the summons such person may be detained on such warrant before the justice who issued the summons, or before any other justice in and for the same territorial division who shall then be there, or in the common gaol, or any other place of confinement, or in the custody of the person having him in charge, with a view to secure his presence as a witness on the day fixed for the trial; or in the discretion of the justice such person may be released on recognizance, with or without sureties, conditioned for his appearance to give evidence as therein mentioned, and to answer for his default in not attending upon the said summons as for contempt; and the justice may, in a summary manner, examine into and dispose of the charge of contempt against such person, who, if found guilty thereof, *may be fined or imprisoned, or both, such fine not to exceed twenty dollars, and such imprisonment to be in the common gaol, without hard labour, and not to exceed the term of one month,* and may also be ordered to pay the costs incident to the service and execution of the said summons and warrant and of his detention in custody. 51 V. c. 45, s. 1.

(The conviction under this section may be in the form PP in schedule one hereto.) *See under s. 781.*

L. (*Section* 582.)

WARRANT WHEN A WITNESS HAS NOT OBEYED THE SUMMONS.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of

Whereas information having been laid before , a justice of the peace, in and for the said county of , that A. B. (*&c., as in the summons*); and it having been made to appear to (*me*) upon oath that E. F. of , (*labourer*), was likely to give material evidence for (*the prosecution*), (*I*) duly issued (*my*) summons to the said E. F., requiring him to be and appear before (*me*) on , at , or before such other justice or justices of the peace for the same county, as should then be there to testify what he knows respecting the said charge so made against the said A. B., as aforesaid; and whereas proof has this day been made upon oath before (*me*) of such summons having been duly served upon the said E. F.; and whereas the said E. F. has neglected to appear at the time and place appointed by the said summons, and no just excuse has been offered for such neglect: These are therefore to command you to bring and have the said E. F. before (*me*) on at o'clock in the (fore) noon, at , or before such other justice or justices for the same county, as shall then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S. [SEAL.]

J. P., (*Name of county.*)

WARRANT FOR WITNESS IN FIRST INSTANCE.

583. If the justice is satisfied by evidence upon oath that any person *within the province*, likely to give material evidence either for the prosecution or for the accused, will not attend to give evidence without being compelled so to do, then instead of issuing a summons, he may issue a warrant in the first instance. Such warrant may be in the form M. in schedule one hereto, or to

the like effect, and may be executed anywhere within the jurisdiction of such justice, or, if necessary, endorsed as provided in section five hundred and sixty-five, and executed anywhere *in the province* but out of such jurisdiction. R. S. C. c. 174, s. 62.

M.—(*Section* 583.)

WARRANT FOR A WITNESS IN THE FIRST INSTANCE.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of

Whereas information has been laid before the undersigned , a justice of the peace, in and for the said county of , that (*&c., as in the summons*); and it having been made to appear to (*me*) upon oath, that E. F. of , (*labourer*); is likely to give material evidence for the prosecution, and that it is probable that the said E. F. will not attend to give evidence unless compelled to do so: These are therefore to command you to bring and have the said E. F. before (*me*) on , at o'clock in the (fore) noon, at , or before such other justice or justices of the peace for the same county as shall then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL]

J. P., (*Name of county.*)

WITNESSES OUT OF THE PROVINCE. (*New*).

584. If there is reason to believe that any person residing anywhere in Canada out of the province and not being within the province, is likely to give material evidence either for the prosecution or for the accused, any judge of a Superior Court or a County Court, on application therefor by the informant or complainant, or the Attorney-General, or by the accused person or his solicitor or some person authorized by the accused, may cause a writ of subpœna to be issued under the seal of the court of which he is a judge, requiring such person to appear before the justice before whom the inquiry is being held or is intended to be held at a time and place mentioned therein to give evidence respecting the charge and to bring with him any documents in his possession or under his control relating thereto.

2. Such subpœna shall be served personally upon the person to whom it is directed and an affidavit of such service by a person effecting the same purporting to be made before a justice of the peace, shall be sufficient proof thereof.

3. If the person served with a subpœna as provided by this section, does not appear at the time and place specified therein, and no just excuse is offered for his non-appearance, the justice holding the inquiry, after proof upon oath that the subpœna has been served, may issue a warrant under his hand directed to any constable or peace officer of the district, county or place where such person is, or to all constables or peace officers in such district, county or place, directing them or any of them to arrest such person and bring him before the said justice or any other justice at a time and place mentioned in such warrant in order to testify as aforesaid.

4. The warrant may be in the form N in schedule one hereto or to the like effect. If necessary, it may be endorsed in the manner provided by section five hundred and sixty-five, and executed in a district, county or place other than the one therein mentioned.

N.—(*Section* 584.)

WARRANT WHEN A WITNESS HAS NOT OBEYED THE SUBPŒNA.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of

Whereas information having been laid before , a justice of the peace, in and for the said county, that A. B. (*etc, as in the summons*); and there being reason to believe that E. F., of , in the province of (*labourer*), was likely to give material evidence for (*the prosecution*), a writ of subpœna was issued by order of , judge of (*name of court*) to the said E. F., requiring him to be and appear before (*me*) on at or before such other justice or justices of the peace for the same county as should then be there, to testify what he knows respecting the said charge so made against the said A. B., as aforesaid; and whereas proof has this day been made upon oath before (*me*) of such writ of subpœna having been duly served upon the said E. F., and whereas the said E. F. has neglected to appear at the time and place appointed by the said writ of subpœna, and no just excuse has been offered for such neglect: These are

therefore to command you to bring and have the said E. F. before (*me*) on at o'clock in the (fore) noon), at , or before such other justice or justices for the same county as shall then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid.

Given under *my* hand and seal, this day of , in the year , at in the county aforesaid.

J. S., [SEAL]

J. P., (Name of county).

WITNESS REFUSING TO BE EXAMINED.

585. Whenever any person appearing, either in obedience to a summons or subpœna, or by virtue of a warrant, or being present and being verbally required by the justice to give evidence, refuses to be sworn, or having been sworn, refuses to answer such questions as are put to him, *or refuses or neglects to produce any documents which he is required to produce, or refuses to sign his depositions* without in any such case offering any just excuse for such refusal, such justice may adjourn the proceedings for any period not exceeding *eight* clear days, and may in the meantime by warrant in form O in schedule one hereto, or to the like effect, commit the person so refusing to gaol, unless he sooner consents to do what is required of him. *If such person upon being brought up upon such adjourned hearing, again refuses to do what is so required of him, the justice, if he sees fit, may again adjourn the proceedings, and commit him for the like period, and so again from time to time until such person consents to do what is required of him.*

2. Nothing in this section shall prevent such justice from sending any such case for trial, or otherwise disposing of the same in the meantime, according to any other sufficient evidence taken by him. R. S. C. c. 174, s. 63.

O.—(*Section* 585.)

WARRANT OF COMMITMENT OF A WITNESS FOR REFUSING TO BE SWORN OR TO GIVE EVIDENCE.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the county of , and to the keeper of the common gaol at , in the said county of

Whereas A. B. was lately charged before , a justice of the peace in and for the said county of , for that

(*etc., as in the summons*); and it having been made to appear to (*me*) upon oath that E. F. of , was likely to give material evidence for the prosecution (*I*) duly issued (*my*) summons to the said E. F., requiring him to be and appear before me on , at , or before such other justice or justices of the peace for the same county as should then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid; and the said E. F. now appearing before (*me*) (*or* being brought before (*me*) by virtue of a warrant in that behalf), to testify as aforesaid, and being required to make oath or affirmation as a witness in that behalf, now refuses so to do (*or* being duly sworn as a witness now refuses to answer certain questions concerning the premises which are now here put to him, and more particularly the following) without offering any just excuse for such refusal: These are therefore to command you, the said constables or peace officers, or any one of you, to take the said E. F. and him safely to convey to the common gaol at , in the county aforesaid, and there to deliver him to the keeper thereof, together with this precept: And (*I*) do hereby command you, the said keeper of the said common gaol to receive the said E. F. into your custody in the said common gaol, and him there safely keep for the space of days, for his said contempt, unless in the meantime he consents to be examined, and to answer concerning the premises; and for 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.*)

DISCRETIONARY POWERS OF THE JUSTICE. (*Amended*).

586. A justice holding the preliminary inquiry may in his discretion—

(*a*) permit or refuse permission to the prosecutor, his counsel or attorney to address him in support of the charge, either by way of opening or summing up the case, or by way of reply upon any evidence which may be produced by the person accused;

(*b*) receive further evidence on the part of the prosecutor after hearing any evidence given on behalf of the accused;

(c) adjourn the hearing of the matter from time to time, and change the place of hearing, if from the absence of witnesses, the inability of a witness who is ill to attend at the place where the justice usually sits, or from any other reasonable cause, it appears desirable to do so, and may remand the accused if required by warrant in the form P in schedule one hereto: Provided that no such remand shall be for more than eight clear days, the day following that on which the remand is made being counted as the first day; and further provided, that if the remand is for a time not exceeding three clear days, the justice may verbally order the constable or other person in whose custody the accused then is or any other constable or person named by the justice in that behalf, to keep the accused person in his custody and to bring him before the same or such other justice as shall be there acting at the time appointed for continuing the examination; R. S. C. c. 174, ss. 64, 65.

(d) order that no person other than the prosecutor and accused, *their counsel and solicitor* shall have access to or remain in the room or building in which the inquiry is held (which shall not be an open court), if it appears to him that the ends of justice will be best answered by so doing: R. S. C. c. 174, s. 67.

(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.

P.—(*Section* 586.)

WARRANT REMANDING A PRISONER.

Canada,
Province of ,
County of

To all or any of the constables and other peace officers in the said county of , and to the keeper of the common gaol at , in the said county.

Whereas A. B. was this day charged before the undersigned , a justice of the peace in and for the said county of , for that (*&c., as in the warrant to apprehend*), and it appears to (*me*) to be necessary to remand the said A. B.: These are therefore to command you, the said constables and peace officers, or any of you, in Her Majesty's name, forthwith to convey the said A. B. to the common gaol at , in the said county, and there to deliver him to the keeper thereof, together with this precept: And I hereby command you the said keeper to receive the said A. B. into your custody in the said common gaol, and there safely keep him until the day of (*instant*), when I hereby command you to have him at , at o'clock in the (fore) noon of the same day before (*me*)

or before such other justice or justices of the peace for the said county as shall then be there, to answer further to the said charge, and to be further dealt with according to law, unless you shall be otherwise ordered in the meantime.

Given under my hand and seal, this day of in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of county.*)

BAIL ON REMAND.

587. If the accused is remanded under the next preceding section the justice may discharge him, upon his entering into a recognizance in the form Q in schedule one hereto, with or without sureties in the discretion of the justice, conditioned for his appearance at the time and place appointed for the continuance of the examination. R. S. C. c. 174, s. 67.

Q.—(*Section* 587.)

RECOGNIZANCE OF BAIL INSTEAD OF REMAND ON AN ADJOURNMENT OF EXAMINATION.

Canada,
Province of ,
County of .

Be it remembered that on the day of in the year , A. B., of , (*labourer*), L. M., of , (*grocer*), and N. O., of , (*butcher*), personally came before me , a justice of the peace for the said county, and severally acknowledged themselves to owe to our Sovereign Lady the Queen, her heirs and successors, the several sums following, that is to say: the said A. B. the sum of , and the said L. M., and N. O., the sum of , each, of good and lawful current money of Canada, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Lady the Queen, her heirs and successors, if he, the said A. B., fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned, at before me.

J. S.,

J. P., (*Name of county*).

CONDITION.

The condition of the within (*or* above) written recognizance is such that whereas the within bounden A. B. was this day (*or* on last past) charged before me for that (*&c., as in the warrant*); and whereas the examination of the witnesses for the prosecution in this behalf is adjourned until the day of (*instant*): If, therefore, the said A. B. appears before me on the said day of (*instant*), at o'clock in the (fore) noon, or before such other justice or justices of the peace for the said county as shall then be there, to answer (*further*) to the said charge, and to be further dealt with according to law, the said recognizance to be void, otherwise to stand in full force and virtue.

HEARING MAY PROCEED BEFORE REMAND IS OVER.

588. The justice may order the accused person to be brought before him, or before any other justice for the same territorial division, at any time before the expiration of the time for which such person has been remanded, and the gaoler or officer in whose custody he then is shall duly obey such order. R. S. C. c. 174, s. 66.

BREACH OF RECOGNIZANCE.

589. If the accused person does not afterwards appear at the time and place mentioned in the recognizance the said justice, or any other justice who is then and there present, having certified upon the back of the recognizance the non-appearance of such accused person, in the form R in schedule one hereto, may transmit the recognizance to the clerk of the court where the accused person is to be tried, or other proper officer appointed by law, to be proceeded upon in like manner as other recognizances; and such certificate shall be *prima facie* evidence of the non-appearance of the accused person. R. S. C. c. 174, s. 68.

R.—(*Section* 589.)

CERTIFICATE OF NON-APPEARANCE TO BE ENDORSED ON THE RECOGNIZANCE.

I hereby certify that the said A. B. has not appeared at the time and place in the above condition mentioned, but therein has made a default, by reason whereof the within written recognizance is forfeited.

J. S.,

J. P., (*Name of county.*)

EVIDENCE FOR THE PROSECUTION. (*Amended*).

590. When the accused is before a justice holding an inquiry, such justice shall take the evidence of the witnesses called on the part of the prosecution.

2. The evidence of the said witnesses shall be given upon oath and in the presence of the accused; and the accused, his counsel or solicitor, shall be entitled to cross-examine them.

3. The evidence of each witness shall be taken down in writing in the form of a deposition, which may be in the form S in schedule one hereto, or to the like effect.

4. Such deposition shall, at some time before the accused is called on for his defence, be read over to and signed by the witness and the justice, *the accused, the witness and justice being all present together at the time of such reading and signing.*

5. *The signature of the justice may either be at the end of the deposition of each witness, or at the end of several or of all the depositions in such a form as to show that the signature is meant to authenticate each separate deposition.*

6. *Every justice holding a preliminary inquiry is hereby required to cause the depositions to be written in a legible hand and on one side only of each sheet of paper on which they are written.* R. S. C. c. 174, s. 69.

7. *Provided that the evidence upon such inquiry or any part of the same may be taken in shorthand by a stenographer who may be appointed by the justice, and who before acting shall make oath that he shall truly and faithfully report the evidence; and where evidence is so taken, it shall not be necessary that such evidence be read over to or signed by the witness, but it shall be sufficient if the transcript be signed by the justice and be accompanied by an affidavit of the stenographer that it is a true report of the evidence.*

S.—(*Section* 590.)

DEPOSITION OF A WITNESS.

Canada,
Province of ,
County of .

The deposition of X. Y. of , taken before the undersigned, a justice of the peace for the said county of , this day of , in the year , at (*or* after notice to C. D. who stands committed for in) the presence and hearing of C. D. who stands charged that (*state the charge*). The said deponent saith on his (*oath or affirmation*) as follows: (*Insert deposition as nearly as possible in words of witness.*)

(*If depositions of several witnesses are taken at the same time, they may be taken and signed as follows:*)

The depositions of X. of , Y. of Z. of &c., taken in the presence and hearing of C. D., who stands charged that

The deponent X. (*on his oath or affirmation*) says as follows:

The deponent Y. (*on his oath or affirmation*) says as follows;

The deponent Z. (*on his oath, &c., &c.*)

(*The signature of the justice may be appended as follows:*)

The depositions of X., Y., Z., &c., written on the several sheets of paper, to the last of which my signature is annexed, were taken in the presence and hearing of C. D. and signed by the said X., Y., Z., respectively in his presence. In witness whereof I have in the presence of the said C. D. signed my name.

J. S.,
J. P., (*Name of county.*)

EVIDENCE TO BE READ TO THE ACCUSED. (*Amended*).

591. After the examination of the witnesses produced on the part of the prosecution has been completed, *and after the depositions have been signed as aforesaid, the justice, unless he discharges the accused person, shall ask him whether he wishes the depositions to be read again, and unless the accused dispenses therewith shall read or cause them to be read again.* When the depositions have been again read, *or the reading dispensed with,* the accused shall be addressed by the justice in these words, or to the like effect:

"Having heard the evidence, do you wish to say anything in answer to the charge? You are not bound to say anything, but whatever you do say will be taken down in writing and may be given in evidence against you at your trial. You must clearly understand that you have nothing to hope from any promise of favour and nothing to fear from any threat which may have been held out to you to induce you to make any admission or confession of guilt, but whatever you now say may be given in evidence against you upon your trial notwithstanding such promise or threat."

2. Whatever the accused then says in answer thereto shall be taken down in writing in the form T in schedule one hereto, or to the like effect, and shall be signed by the justice and kept with the depositions of the witnesses and dealt with as hereinafter mentioned. R. S. C. c. 174, ss. 70 & 71.

See s. 689, *post.*

T.—(*Section* 591.)

STATEMENT OF THE ACCUSED.

Canada,
Province of ,
County of .

A. B. stands charged before the undersigned , a justice of the peace in and for the county aforesaid, this day of , in the year , for that the said A. B., on , at (*&c., as in the captions of the depositions*); and the said charge being read to the said A. B., and the witnesses for the prosecution, C. D. and E. F., being severally examined in his presence, the said A. B. is now addressed by me as follows: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you at your trial. You must clearly understand that you have nothing to hope from any promise of favour, and nothing to fear from any threat which may have been held out to induce you to make any admission or confession of guilt, but whatever you now say may be given in evidence against you upon your trial, notwithstanding such promise or threat." Whereupon the said A. B. says as follows: (*Here state whatever the prisoner says and in his very words, as nearly as possible. Get him to sign it if he will*).

A. B.

Taken before me, at , the day and year first above mentioned.

J. S., [SEAL.]
J. P., (*Name of county.*)

ADMISSIONS BY ACCUSED.

592. Nothing herein contained shall prevent any prosecutor from giving in evidence any admission or confession, or other statement, made at any time by the person accused or charged, which by law would be admissible as evidence against him. R. S. C. c. 174, s. 72.

EVIDENCE FOR THE DEFENCE. (*New*).

593. After the proceedings required by section five hundred and ninety-one are completed the accused shall be asked if he wishes to call any witnesses.

2. Every witness called by the accused who testifies to any fact relevant to the case shall be heard, and his deposition shall be taken in the same manner as the depositions of the witnesses for the prosecution.

DISCHARGE OF ACCUSED.

594. When all the witnesses on the part of the prosecution *and the accused* have been heard the justice shall, if upon the whole of the evidence he is of opinion that no sufficient case is made out to put the accused upon his trial, discharge him; and in such case any recognizances taken in respect of the charge shall become void, unless some person is bound over to prosecute under the provisions next hereinafter contained. R. S. C. c. 174, s. 73.

ACCUSER MAY HAVE HIMSELF BOUND OVER. (*Amended*).

595. If the justice discharges the accused, and the person preferring the charge desires to prefer an indictment respecting the said charge, he may require the justice to bind him over to prefer and prosecute such an indictment and thereupon the justice shall take his recognizance to prefer and prosecute an indictment against the accused before the court by which such accused would be tried if such justice had committed him, and the justice shall deal with the recognizance, information and depositions in the same way as if he had committed the accused for trial.

2. Such recognizance may be in the form U in schedule one hereto, or to the like effect.

3. If the prosecutor so bound over at his own request does not prefer and prosecute such an indictment, or if the grand jury do not find a true bill, or if the accused is not convicted upon the indictment so preferred, the prosecutor shall, if the court so direct, pay to the accused person his costs, including the costs of his appearance on the preliminary inquiry.

4. The court before which the indictment is to be tried or a judge thereof may in its or his discretion order that the prosecutor shall not be permitted to prefer any such indictment until he has given security for such costs to the satisfaction of such court or judge. R. S. C. c. 174, s. 80.

Sub-section 1 is an extension to all offences whatever of an enactment that applied only to the offences falling under the vexatious indictments clause: R. S. C. c. 174, s. 140.

U.—(*Section* 595.)

FORM OF RECOGNIZANCE WHERE THE PROSECUTOR REQUIRES THE JUSTICE TO BIND HIM OVER TO PROSECUTE AFTER THE CHARGE IS DISMISSED.

Canada,
Province of ,
County of .

Whereas C. D. was charged before me upon the information of E. F. that C. D. (*state the charge*), and upon the hearing of the

said charge I discharged the said C. D., and the said E. F. desires to prefer an indictment against the said C. D. respecting the said charge, and has required me to bind him over to prefer such an indictment at (*here describe the next practicable sitting of the court by which the person discharged would be tried if committed*).

The undersigned E. F. hereby binds himself to perform the following obligation, that is to say, that he will prefer and prosecute an indictment respecting the said charge against the said C. D. at (*as above*). And the said E. F. acknowledges himself bound to forfeit to the Crown the sum of $, in case he fails to perform the said obligation.

E. F.

Taken before me.

J. S.,

J. P. (*Name of county.*)

COMMITTAL FOR TRIAL.

596. If a justice holding a preliminary inquiry thinks that the evidence is sufficient to put the accused on his trial, he shall commit him for trial by a warrant of commitment, which may be in the form V in schedule one hereto, or to the like effect. R. S. C. c. 174, s. 73.

V.—(*Section* 596.)

WARRANT OF COMMITMENT.

Canada,
Province of ,
County of .

To the constable of , and to the keeper of the (*common gaol*) at , in the said county of

Whereas A. B. was this day charged before me, J. S., one of Her Majesty's justices of the peace in and for the said county of , on the oath of C. D. of (*farmer*), and others for that (*&c., stating shortly the offence*): These are therefore to command you the said constable to take the said A. B,, and him safely to convey to the (*common gaol*) at aforesaid, and there to deliver him to the keeper thereof, together with this precept: And I do hereby command you the said keeper of the said (*common gaol*) to receive the said A. B. into your custody in

the said (*common gaol*), and there safely keep him until he shall be thence delivered by due course of law.

Given under my hand and seal, this day of in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of county.*)

COPY OF DEPOSITIONS.

597. Every one who has been committed for trial, whether he is bailed or not, may be entitled at any time before the trial to have copies of the depositions, and of his own statement, if any, from the officer who has custody thereof, on payment of a reasonable sum not exceeding five cents for each folio of one hundred words. R. S. C. c. 174, s. 74.

RECOGNIZANCES TO PROSECUTE OR GIVE EVIDENCE. (*Amended*).

598. When any one is committed for trial the justice holding the preliminary inquiry may bind over to prosecute some person willing to be so bound, and bind over every witness whose deposition has been taken, and whose evidence in his opinion is material, to give evidence at the court before which the accused is to be indicted.

2. Every recognizance so entered into shall specify the name and surname of the person entering into it, his occupation or profession if any, the place of his residence *and the name and number if any of any street in which it may be, and whether he is owner or tenant thereof or a lodger therein.*

3. Such recognizance may be either at the foot of the deposition or separate therefrom, and may be in the form W, X or Y in schedule one hereto, or to the like effect, and shall be acknowledged by the person entering into the same, and be subscribed by the justice or one of the justices before whom it is acknowledged.

4. Every such recognizance shall bind the person entering into it to prosecute or give evidence (both or either as the case may be), before the court by which the accused shall be tried.

5. All such recognizances and all other recognizances taken under this Act shall be liable to be estreated in the same manner as any forfeited recognizance to appear is by law liable to be estreated by the court before which the principal party thereto was bound to appear. R. S. C. c. 174, ss. 75 & 76.

6. Whenever any person is bound by recognizance to give evidence before a justice of the peace, or any criminal court, in respect of any offence *under this Act*, any justice of the peace, if he sees fit, upon information being made in writing and on oath, that such person is about to abscond, or has absconded, may issue his warrant for the arrest of such person; and if such person is arrested any justice of the peace, upon being satisfied that the ends of justice would otherwise be defeated, may commit such person to prison until the time at which he is bound by such recognizance to give evidence, unless in the meantime he produces sufficient sureties; but any person so arrested shall be

entitled on demand to receive a copy of the information upon which the warrant for his arrest was issued. 48-49 V. c. 7, s. 9.

A notice to the person bound is not now required. The exception as to married women and infants has been left out: s-s. 6 applied heretofore to the *Explosive Substances Act.*

W.—(*Section* 598.)

RECOGNIZANCE TO PROSECUTE.

Canada,
Province of ,
County of ,

Be it remembered that on the day of , in the year , C. D. of , in the of , in the said county of , (*farmer*), personally came before me , a justice of the peace in and for the said county of , and acknowledged himself to owe to our Sovereign Lady the Queen, her heirs and successors, the sum of , of good and lawful current money of Canada, to be made and levied of his goods and chattels, lands and tenements, to the use of our said Sovereign Lady the Queen, her heirs and successors, if the said C. D. fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned at , before me.

J. S.,
J. P., (Name of county).

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.

X.—(*Section* 598.)

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.

Y.—(*Section* 598.)

RECOGNIZANCE TO GIVE EVIDENCE.

(*Same as the last form but one, to the asterisk,* and then thus*): —And there gives such evidence as he knows upon the charge to be then and there preferred against the said A. B. for the offence aforesaid, then the said recognizance to be void, otherwise to remain in full force and virtue.

WITNESSES REFUSING TO BE BOUND OVER.

599. Any witness who refuses to enter into or acknowledge any such recognizance as aforesaid may be committed by the justice holding the inquiry by a warrant in the form Z in schedule one hereto, or to the like effect, to the prison for the place where the trial is to be had, there to be kept until after the trial, or until the witness enters into such a recognizance as aforesaid before a justice of the peace having jurisdiction in the place where the prison is situated: Provided that if the accused is afterwards discharged any justice having such jurisdiction may order any such witness to be discharged by an order which may be in the form AA in the said schedule, or to the like effect. R. S. C. c. 174, ss. 78 & 79.

Z.—(*Section* 599.)

COMMITMENT OF A WITNESS FOR REFUSING TO ENTER INTO THE RECOGNIZANCE.

Canada,
Province of ,
County of .

To all or any of the peace officers in the said county of ,
and to the keeper of the common gaol of the said county
of , at , in the said county of

Whereas A. B. was lately charged before the undersigned (*name of the justice of the peace*), a justice of the peace in and for the said county of , for that (*&c., as in the summons to the witness*), and it having been made to appear to (*me*) upon oath that E. F., of , was likely to give material evidence for the prosecution, (*I*) duly issued (*my*) summons to the said E. F., requiring him to be and appear before (*me*) on , at or before such other justice or justices of the peace as should then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid; and the said E. F. now appearing before (*me*) (or being brought before (*me*) by virtue of a warrant in that behalf to testify as aforesaid), has been now examined before (*me*) touching the premises, but being by (*me*) required to enter into a recognizance conditioned to give evidence against the said A. B., now refuses so to do: These are therefore to command you the said peace officers, or any one of you, to take the said E. F. and him safely convey to the common gaol at , in the county aforesaid, and there deliver him to the said keeper thereof, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said E. F. into your custody in the said common gaol, there to imprison and safely keep him until after the trial of the said A. B. for the offence aforesaid, unless in the meantime the said E. F. duly enters into such recognizance as aforesaid, in the sum of before some one justice of the peace for the said county, conditioned in the usual form to appear at the court by which the said A. B. is or shall be tried, and there to give evidence upon the charge which shall then and there be preferred against the said A. B. for the offence aforesaid.

Given under my hand and seal this day of , in the year , at , in the county aforesaid.

J. S.,

J. P., (*Name of county.*)

AA.—(*Section* 599.)

SUBSEQUENT ORDER TO DISCHARGE THE WITNESS.

Canada,
Province of ,
County of .

To the keeper of the common gaol at , in the county of , aforesaid.

Whereas by (*my*) order dated the day of (*instant*) reciting that A. B. was lately before then charged before (*me*) for a certain offence therein mentioned, and that E. F. having appeared before (*me*) and being examined as a witness for the prosecution on that behalf, refused to enter into recognizance to give evidence against the said A. B., and I therefore thereby committed the said E. F. to your custody, and required you safely to keep him until after the trial of the said A. B. for the offence aforesaid, unless in the meantime he should enter into such recognizance as aforesaid; and whereas for want of sufficient evidence against the said A. B., the said A. B. has not been committed or holden to bail for the said offence, but on the contrary thereof has been since discharged, and it is therefore not necessary that the said E. F. should be detained longer in your custody: These are therefore to order and direct you the said keeper to discharge the said E. F. out of your custody, as to the said commitment, and suffer him to go at large.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of county.*)

TRANSMISSION OF DOCUMENTS. (*Amended*).

600. The following documents shall, as soon as may be after the committal of the accused, be transmitted to the clerk or other proper officer of the court by which the accused is to be tried, that is to say, the information if any, the depositions of the witnesses, *the exhibits thereto,* the statement of the accused, and all recognizances entered into, *and also any depositions taken before a coroner if any such have been sent to the justice.*

2. When any order changing the place of trial is made the person obtaining it shall serve it, or an office copy of it, upon the person then in possession of the said documents, who shall thereupon transmit them and the indictment,

if found, to the officer of the court before which the trial is to take place. R. S. C. c. 174, ss. 77, 102.

RULE AS TO BAIL.

601. When any person appears before any justice charged with an indictable offence *punishable by imprisonment for more than five years* other than treason or an offence punishable with death, or an offence under Part IV. of this Act (s. 65), and the evidence adduced is, in the opinion of such justice, sufficient to put the accused on his trial, but does not furnish such a strong presumption of guilt as to warrant his committal for trial, the justice, jointly with some other justice, may admit the accused to bail upon his procuring and producing such surety or sureties as, in the opinion of the two justices, will be sufficient to ensure his appearance at the time and place when and where he ought to be tried for the offence; and thereupon the two justices shall take the recognizances of the accused and his sureties, conditioned for his appearance at the time and place of trial, and that he will then surrender and take his trial and not depart the court without leave; and in any case in which the offence committed or suspected to have been committed is an offence *punishable by imprisonment for a term less than five years* any one justice before whom the accused appears may admit to bail in manner aforesaid, and such justice *or justices* may, in his or their discretion, require such bail to justify upon oath as to their sufficiency, which oath the said justice *or justices* may administer; and in default of such person procuring sufficient bail, such justice *or justices* may commit him to prison, there to be kept until delivered according to law.

2. The recognizance mentioned in this section shall be in the form BB in schedule one to this Act. R. S. C. c. 174, s. 81.

BB.—(*Section* 601).

RECOGNIZANCE OF BAIL.

Canada,
Province of ,
County of .

Be it remembered that on the day of , in the year , A, B. of , (*labourer*), L. M. of , (*grocer*), and N. O. of , (*butcher*), personally came before (*us*) the undersigned, (*two*) justices of the peace for the county of , and severally acknowledged themselves to owe to our Sovereign Lady the Queen, her heirs and successors, the several sums following, that is to say: the said A. B. the sum of , and the said L. M. and N. O. the sum of , each, of good and lawful current money of Canada, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Sovereign Lady the Queen, her heirs and successors, if he, the said A. B., fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned, at before us.

J. S.,
J, N.,
J. P., (*Name of county.*)

CONDITION.

The condition of the within (*or* above) written recognizance, is such that whereas the said A. B. was this day charged before (*us*), the justices within mentioned for that (*etc., as in the warrant*); if, therefore, the said A. B. appears at the next court of oyer and terminer (*or* general gaol delivery *or* court of General or Quarter Sessions of the Peace) to be holden in and for the county of , and there surrenders himself into the custody of the keeper of the common gaol (*or* lock-up house) there, and pleads to such indictment as may be found against him by the grand jury, for and in respect to the charge aforesaid, and takes his trial upon the same, and does not depart the said court without leave, then the said recognizance to be void, otherwise to stand in full force and virtue.

BAIL AFTER COMMITTAL.

602. In case of any offence other than treason or an offence punishable with death, or an offence under Part IV. of this Act, (s. 65), where the accused has been finally committed as herein provided, any judge of any superior or county court, having jurisdiction in the district or county within the limits of which the accused is confined, may, in his discretion, on application made to him for that purpose, order the accused to be admitted to bail on entering into recognizance with sufficient sureties before two justices, in such amount as the judge directs, and thereupon the justices shall issue a warrant of deliverance as hereinafter provided, and shall attach thereto the order of the judge directing the admitting of the accused to bail.

2. Such warrant of deliverance shall be in the form CC in schedule one to this Act. R. S. C. c. 174, s. 82.

CC.—(*Section* 602.)

WARRANT OF DELIVERANCE OF BAIL BEING GIVEN FOR PRISONER ALREADY COMMITTED.

Canada,
Province of ,
County of .

To the keeper of the common gaol of the county of at , in the said county.

Whereas A. B. late of , (*labourer*) has before (*us*) (*two*) justices of the peace in and for the said county of , entered into his own recognizance, and found sufficient sureties for his appearance at the next court of oyer and terminer or general gaol delivery (*or* court of General or Quarter Sessions of the Peace), to be holden in and for the county of , to answer our Sovereign Lady the Queen, for that (*etc., as in the commitment*), for which he was taken and committed to your said common gaol: These are therefore to command you, in Her Majesty's name, that if the said A. B. remains in your custody in the said common gaol for the said cause, and for no other, you shall forthwith suffer him to go at large.

Given under our hands and seals, this day of in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. N., [SEAL.]
J. P., (*Name of county.*)

BAIL BY SUPERIOR COURT.

603. No judge of a county court or justices shall admit any person to bail accused of treason or an offence punishable with death, or an offence under Part IV. of this Act, s. 65, nor shall any such person be admitted to bail, except by order of a superior court of criminal jurisdiction for the province in which the accused stands committed, or of one of the judges thereof, or, in the province of Quebec, by order of a judge of the Court of Queen's Bench or Superior Court. R. S. C. c. 174, s. 83.

APPLICATION FOR BAIL AFTER COMMITTAL.

604. When any person has been committed for trial by any justice the prisoner, his counsel, solicitor or agent may notify the committing justice, that he will, as soon as counsel can be heard, move before a superior court of the province in which such person stands committed, or one of the judges thereof, or the judge of the county court, if it is intended to apply to such judge, under section six hundred and two, for an order to the justice to admit such prisoner to bail,—whereupon such committing justice shall, as soon as may be, transmit to the clerk of the Crown, or the chief clerk of the court, or the clerk of the county court or other proper officer, as the case may be, endorsed under his hand and seal, a certified copy of all informations, examinations and other evidence, touching the offence wherewith the prisoner has been charged, together with a copy of the warrant of commitment, and the packet containing the same shall be handed to the person applying therefor, for transmission, and it shall be certified on the outside thereof to contain the information concerning the case in question. R. S. C. c. 174, s. 93.

2. Upon such application to any such court or judge the same order concerning the prisoner being bailed or continued in custody, shall be made as if the prisoner was brought up upon a *habeas corpus*. R. S. C. c. 174, s. 94.

3. If any justice neglects or offends in anything contrary to the true intent and meaning of any of the provisions of this section, the court to whose officer any such examination, information, evidence, bailment or recognizance ought to have been delivered, shall, upon examination and proof of the offence, in a summary manner, impose such fine upon every such justice as the court thinks fit. R. S. C. c. 174, s. 95.

Warrant of Deliverance.

605. Whenever any justice or justices admit to bail any person who is then in any prison charged with the offence for which he is so admitted to bail, such justice or justices shall send to or cause to be lodged with the keeper of such prison, a warrant of deliverance under his or their hands and seals, requiring the said keeper to discharge the person so admitted to bail if he is detained for no other offence, and upon such warrant of deliverance being delivered to or lodged with such keeper he shall forthwith obey the same. R. S. C. c. 174, s. 84.

Warrant for Arrest of Person about to Abscond. (*New*).

606. Whenever a person charged with any offence has been bailed in manner aforesaid, it shall be lawful for any justice, if he sees fit, upon the application of the surety or of either of the sureties of such person and upon information being made in writing and on oath by such surety, or by some person on his behalf, that there is reason to believe that the person so bailed is about to abscond for the purpose of evading justice, to issue his warrant for the arrest of the person so bailed, and afterwards, upon being satisfied that the ends of justice would otherwise be defeated, to commit such person when so arrested to gaol until his trial or until he produces another sufficient surety or other sufficient sureties, as the case may be, in like manner as before. 14-15 V. c. 93, s. 17 (Imp.).

Delivery of Accused to Prison.

607. The constable or any of the constables, or other person to whom any warrant of commitment authorized by this or any other Act or law is directed, shall convey the accused person therein named or described to the gaol or other prison mentioned in such warrant, and there deliver him, together with the warrant, to the keeper of such gaol or prison, who shall thereupon give the constable or other person delivering the prisoner into his custody, a receipt for the prisoner, setting forth the state and condition of the prisoner when delivered into his custody.

2. Such receipt shall be in the form DD in schedule one hereto. R. S. C. c. 174, s. 85.

DD.—(*Section* 607.)

GAOLER'S RECEIPT TO THE CONSTABLE FOR THE PRISONER.

I hereby certify that I have received from W. T., constable, of the county of , the body of A. B., together with a warrant under the hand and seal of J. S., Esquire, justice of the peace for the said county of , and that the said A. B. was sober, (*or as the case may be*), at the time he was delivered into my custody.

P. K.,

Keeper of the common gaol of the said county.

PART XLVI.

INDICTMENTS.

608. It shall not be necessary for any indictment or any record or document relative to any criminal case to be written on parchment. R. S. C. c. 174, s. 103.

By the interpretation clause, s. 3, *ante*, the word *indictment* includes *information, presentment, plea, record, etc.*

By the 4 Geo. II. c. 26, and 6 Geo. II. c. 14, "all indictments, informations, inquisitions and presentments shall be in English, and be written in a common legible hand, and not court hand, on pain of £50 to him that shall sue in three months."

No part of the indictment must contain any abbreviation, or express any number or date by figures, but these as well as every other term used, must be expressed in words at length, except where a fac-simile of an instrument is set out: 3 Burn, 35; 1 Chit. 175.

Formerly, like all other proceedings, they were in Latin, and though Lord Hale thinks this language more appropriate, as not exposed to so many changes and alterations, "it was thought in modern times to be of very greater use and importance," says his annotator *Emlyn*, "that they should be in a language capable of being known and understood by the parties concerned, whose lives and liberties were to be affected thereby."

Before confederation in Ontario and Quebec, the indictment in cases of high treason only had to be written on parchment: C. S. C. c. 99, s. 20.

By s. 133 of the *British North America Act*, the French language may be used in any of the courts of Quebec and in any court in Canada established under that Act.

STATEMENT OF VENUE.

609. It shall not be necessary to state any venue in the body of any indictment, and the district, county or place named in the margin thereof, shall be the venue for all the facts stated in the body of the indictment; but if local description is required such local description shall be given in the body thereof. R. S. C. c. 174, s. 104.

This section is taken from s. 23, 14 & 15 V. c. 100, of the Imperial statutes, upon which Greaves says: "This section was framed with the intention of placing the statement of venue upon the same footing in criminal cases upon which it was placed in civil proceedings by Reg. Gen., H. T., 4 Wm. IV. By this section, in all cases, except where some local description is necessary, no place need be stated in the body of the indictment; thus in larceny, robbery, forgery, false pretenses, etc., no venue need be stated in the body of the indictment. In such cases, before the passing of this Act, although it was considered necessary to state some parish or place, it was quite immaterial whether the offence was committed there or at any other parish in the county. On the other hand, in burglary, sacrilege, stealing in a dwelling house, etc., the place where the offence was committed must be stated in the indictment. It was necessary so to state it before the Act, and to prove the statement as alleged, and so it is still, subject ever to the power of amendment given by the first section." (*See* now, ss. 611, 613, *post.*)

"The *venue*, that is, the county in which the indictment is preferred, is stated in the margin thus "*Middlesex*," or "*Middlesex*, to wit," but the latter method is the most usual. In the body of the indictment a special venue used to be laid, that is, the facts were in general stated to have arisen in the county in which the indictment was preferred." 3 Burn, 21.

"The place (or *special venue*, as it is technically termed) must be such as in strictness the jury who are to try the cause should come from. At common law, the jury, in strictness, should have come from the town, hamlet, or

parish, or from the manor, castle, or forest, or other known place out of a town, where the offence was committed, and for this reason, besides the county, or the city, borough, or other part of the county to which the jurisdiction of the court is limited, it was formerly necessary to allege that every material act mentioned in the indictment was committed in such a place.

Under ss. 611, 613, no indictment will now probably be quashed for want of a sufficient description.

The cases in which a local description has been held to be necessary in the body of the indictment, are:

Burglary, 2 Russ. 47; house-breaking, R. v. Bullock, 1 Moo. 324, note (*a*); stealing in a dwelling-house, under section corresponding to s. 345 *ante*: R. v. Napper, 1 Moo. 44; being found, by night, armed, with intent to break into a dwelling-house, under section corresponding to s. 417, *ante*, and all offences under part XXX., *ante*: R. v. Jarrald L. & C. 301; riotously demolishing churches, houses, machinery, etc., or injuring them, under sections corresponding to ss. 85, 86, *ante*: R. v. Richards, 1 M. & Rob. 177; maliciously firing a dwelling-house, perhaps an out-house, and probably all offences that fell under ss. 2, 3, 4, 5, 6, 7, 8, 9, 10, 13 & 14 of the repealed Act, as to malicious injuries to property, but not the offences under ss. 18, 19, 20, 21, of the same Act: R. v. Woodward, 1 Moo. 323; forcible entry, Archbold, 50; nuisances to highways: R. v. Steventon, 1 C. & K. 55; malicious injuries to sea-banks, milldams, or other local property, Taylor, Ev., 1 vol., par. 227; not repairing a highway, in which even a more accurate description is necessary, as the situation of the road within the parish, etc.; indecent exposure in a public place, R. v. Harris, 11 Cox, 659.

But in most cases of want of local description, where necessary, or of variance between the proof and the allegations in the indictment respecting the place, local descrip-

tion, etc., the courts would now allow an amendment, or order particulars.

It is well remarked in Taylor Ev., vol. 1, par. 228:

"It would be extremely difficult to advance any sensible argument in favour of this distinction which the law recognizes between local and transitory offences. On an indictment, indeed, against a parish for not repairing a highway, it may be convenient to allege, as it will be necessary to prove, that the spot out of repair is within the parish charged, . . . but why a burglar should be entitled to more accurate information respecting the house he is charged with having entered, than the highway robber can claim as to the spot where his offence is stated to have been committed, it is impossible to say: either full information should be given in all cases or in none."

HEADING OF INDICTMENTS. (*New*).

610. It shall not be necessary to state in any indictment that the jurors present upon oath or affirmation.

2. It shall be sufficient if an indictment begins in one of the forms EE in schedule one hereto, or to the like effect.

3. Any mistake in the heading shall upon being discovered be forthwith amended, and whether amended or not shall be immaterial.

E. E. (*Sections* 610, 626.)

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

The jurors for our Lady the Queen present that

(*Where there are more counts than one, add at the beginning of each count*):

"The said jurors further present that

See, as to forms, generally, s. 982, *post*.

FORM AND CONTENTS OF COUNTS. (*New*).

611. Every count of an indictment shall contain, and shall be sufficient if it contains, in substance a statement that the accused has committed some indictable offence therein specified.

2. Such statement may be made in popular language without any technical averments or any allegations of matter *not essential to be proved*.

3. Such statement may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence or in any

words sufficient to give the accused notice of the offence with which he is charged.

4. Every count shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him, and to identify the transaction referred to: Provided that the absence or insufficiency of such details shall not vitiate the count.

5. A count may refer to any section or sub-section of any statute creating the offence charged therein, and in estimating the sufficiency of such count the court shall have regard to such reference.

6. Every count shall in general apply only to a single transaction.

EXAMPLES OF THE MANNER OF STATING OFFENCES.

F. F. (*Section* 611.)

(*a*) A. murdered B. at , on (s. 231).

(*b*) A. stole a sack of flour *from* a ship called the at , on (s. 349).

(*c*) A. obtained by false pretenses from B., a horse, a cart and the harness of a horse at , on (s. 359).

(*d*) A. committed perjury with intent to procure the conviction of B. for an offence punishable *with penal servitude*, namely robbery, by swearing on the trial of B. for the robbery of C. at the Court of Quarter Sessions for the county of Carleton, held at Ottawa, on the day of , 1879; first that he, A. saw B. at Ottawa, on the day of ; secondly, that B. asked A. to lend B. money on a watch belonging to C.; thirdly, etc. (S. 146, s-s. 2); *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, (s. 146, s-s. 1).

(*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 (*grievous?*) bodily harm to B. (*or* D.) (S. 241).

(*g*) A. with intent to injure or endanger the safety of persons on the Canadian Pacific Railway, did an act calculated to inter-

fere 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*). (Ss. 250, 489).

(*h*) A. published a defamatory libel on B. in a certain newspaper, called the , on the day of A.D. , which libel was contained in an article headed or commencing (*describe with so much detail as is sufficient to give the accused reasonable information as to the part of the publication to be relied on against him*), and which libel was written in the sense of imputing that the said B. was (*as the case may be*). (S. 302.)

The first sub-section of this s. 611 cannot, probably bear the construction that the wording of it taken literally would, at first, suggest. The whole Act taken together does not seem to allow of such a construction. Section 614, for instance, as to treason, is directly against it. An indictmen for obtaining by false pretenses is, perhaps, the only one that can be laid, without an averment of the intent, where the intent is necessary to constitute the offence, and this, because the form FF given in schedule one does not aver the intent: s. 982 *post*; *see* R. v. Pierce, 16 Cox, 213. But the same form, in all the 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 s. 618, for instance, which specially decrees that in an indictment under s. 361, it shall not be necessary to allege or to prove that the act was done with intent to defraud, though s. 361 has no mention whatever of an intent to defraud, and ss. 618, 619, 620, 621, 622, 623, 624, 625 would be superfluous. Section 733 also provides for the case where the indictment does not state any indictable offence, and s. 723, s-s. 2, likewise assumes that indictments are not always to be so carelessly drawn as s. 611 would, at first sight, seem to allow.

Sub-section 2 of this s. 611 may perhaps dispense of, for instance, the word "burglariously" in indictments for burglary, but leaves it necessary to aver all matter *necessary to be proved.* S-s. 3 will, probably, not receive a wider construction than the same enactment, as reproduced in s. 734, as to indictments for any offence against this Act has heretofore received. *See post,* under that section.

Sub-sections 4 & 6 are no additions to the law. S-s. 5 may help an indictment in certain cases. *See* remarks, *post,* under s. 629.

"The rule is, that, with certain exceptions, all the circumstances necessary to constitute the offence charged should be stated with certainty and precision, to the end that the defendant may be enabled to form a judgment whether or not they constitute an indictable offence, and so demur or plead accordingly; or that he may be enabled to plead *autrefois acquit,* or *convict* or *a pardon,* in bar of a subsequent prosecution for the same offence; and in order also that the court may know what judgment may legally be passed in the event of a conviction. The courts, however, will construe the words of an indictment according to their ordinary and usual acceptation; and as regards technical expressions—these they will construe according to their technical meaning, and if the sense of a word be ambiguous in its ordinary acceptation it will be construed according as the context and subject matter may require, in order to render the whole consistent and sensible; and in doing so, the courts will disregard ungrammatical language if the real meaning be sufficiently expressed: R. v. Stevens, 5 East, 244; R. v. Stokes, 1 Den. 307. But although the courts will thus construe the averments of an indictment so as to give effect to them, they will not supply the omission of anything which is essential. If, therefore, any necessary averment is omitted no intendment will be made in its favour—the rule upon the subject being that the courts will presume the negative of everything

that has not been expressly affirmed, and the affirmative of everything which has not been expressly negatived": Saunders.

If there be any exception contained in the same clause of the Act which creates the offence the indictment must show negatively that the defendant does not come within the exception: R. v. Earnshaw, 15 East 456; R. v. Baxter, 5 T. R. 83; R. v. Pearce, R. & R. 174. If, however, the exception or proviso be in a subsequent clause or statute, or, although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, it is matter of defence, and need not be negatived in the indictment: R. v. Hall, 1 T. R. 320; Steel v. Smith, 1 B. & Ald. 94; R. v. White, 21 U. C. C. P. 354; R. v. Strachan, 20 U. C. C. P. 182; R. v. MacKenzie, 6 O. R. 165.

In an indictment under s. 431 of this Code, for instance, it must be averred that the defendant made the document *with intent to defraud and without lawful authority or excuse.* An indictment, however, which would negative only "lawful excuse" and not "lawful authority" would be sufficient: R. v. Harvey, L. R. 1 C. C. R. 284. As to the rules of evidence in such cases, *see* Taylor, Ev. par. 344, *et seq.*

An indictment for indecent assault by a male on another male (*see* s. 260 *ante*) is defective, even after verdict, if it does not aver that defendant is a male: R. v. Montminy, Quebec, Q. B. May, 1893.

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 Imp. 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 under s. 933 *post.* 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. S-s. 2 of this s. 611 assumes negatively that all matter of fact necessary to be proved must be alleged in the indictment. It still remains the rule that an indictment which does not substantially set down all the elements of the offence is void : *see* 1 Bishop, Cr. Proc. 98.

OFFENCES MAY BE CHARGED IN THE ALTERNATIVE. (*New*).

612. A count shall not be deemed objectionable on the ground that it charges in the alternative several different matters, acts or omissions which are stated in the alternative in the enactment describing any indictable offence or declaring the matters, acts or omissions charged to be an indictable offence, or on the ground that it is double or multifarious: Provided that the accused may at any stage of the trial apply to the court to amend or divide any such count on the ground that it is so framed as to embarrass him in his defence.

2. *The court, if satisfied that the ends of justice require it, may order any count to be amended or divided into two or more counts, and on such order being made such count shall be so divided or amended, and thereupon a formal commencement may be inserted before each of the counts into which it is divided.*

Though the statute is in the disjunctive the offence may be charged in the conjunctive. An indictment under s. 436 for instance, which charges that the defendant did destroy, deface *and* injure a register is not bad for duplicity or multifariousness, though the section says "destroy, deface *or* injure": R. v. Bowen, 1 Den. 22, and cases there cited ; also R. v. Patterson, 27 U. C. Q. B. 142. The above section permits of an alternative charge only where the statute itself describes the offence in the alternative. A charge made in the alternative as a general rule is no charge at all; the defendant either did one thing *or* the other ; *per* Gurney, B., in R. v. Bowen, *ubi supra*. An indictment that would charge an offence in the disjunctive would be bad, if not amended, though the defect would be cured by verdict under s. 734.

See R. v. Baby, 12 U. C. Q. B. 346, and Cotterill v. Lempriere, 17 Cox, 97.

CERTAIN OBJECTIONS NOT FATAL. (*New*).

613. (*As amended in 1893*). No count shall be deemed objectionable or insufficient on any of the following grounds ; that is to say :

(*a*) that it does not contain the name of the person injured, or intended, or attempted to be injured ; or

(*b*) that it does not state who is the owner of any property therein mentioned ; or

(*c*) that it charges an intent to defraud without naming or describing the person whom it was intended to defraud ; or

(*d*) that it does not set out any document which may be the subject of the charge ; or

(*e*) that it does not set out the words used where words used are the subject of the charge ; or

(*f*) that it does not specify the means by which the offence was committed ; or

(*g*) that it does not name or describe with precision any person, place or thing : or

(*h*) in cases where the consent of any person is required before a prosecution can be instituted, that it does not state that such consent has been obtained :

Provided that the court may, if satisfied that it is necessary for a fair trial, order that a particular further describing such document, words, means, person, place or thing be furnished by the prosecutor.

These are extended re-enactments of various clauses of the Procedure Act, c. 174, R. S. C. ss. 112, 114. 116, 117, 130. S-s. (*c*) assumes that it is necessary in some cases to allege an intent to defraud. *See post*, under s. 617, for the case where particulars have been ordered.

INDICTMENTS FOR HIGH TREASON.

614. Every indictment for treason or for any offence against Part IV. of this Act must state overt acts, and no evidence shall be admitted of any overt act not stated unless it is otherwise relevant as tending to prove some overt act stated.

2. The power of amending indictments herein contained shall not extend to authorize the court to add to the overt acts stated in the indictment.

This should apply only to ss. 65 & 69. It is erroneously made to apply to all the sections of part IV.

INDICTMENTS FOR LIBEL.

615. No count for publishing a blasphemous, seditious, obscene or defamatory libel, or for selling or exhibiting an obscene book, pamphlet, newspaper or other printed or written matter, shall be deemed insufficient on the ground that it does not set out the words thereof : Provided that the court may order that a particular shall be furnished by the prosecutor stating what passages in such book, pamphlet, newspaper, printing or writing are relied on in support of the charge.

2. A count for libel may charge that the matter published was written in a sense which would make the publishing criminal, specifying that sense with-

out any prefatory averment showing how that matter was written in that sense. And on the trial it shall be sufficient to prove that the matter published was criminal either with or without such innuendo.

See form of indictment for a defamatory libel under s. 611, *ante*.

INDICTMENTS FOR PERJURY AND OTHER OFFENCES. (*New*).

616. No count charging perjury, the making of a false oath or of a false statement, fabricating evidence or subornation, or procuring the commission of any of these offences, shall be deemed insufficient on the ground that it does not state the nature of the authority of the tribunal before which the oath or statement was taken or made, or the subject of the inquiry, or the words used or the evidence fabricated, or on the ground that it does not expressly negative the truth of the words used : Provided that the court may, if satisfied that it is necessary for a fair trial, order that the prosecutor shall furnish a particular of what is relied on in support of the charge.

2. No count which charges any false pretense, or any fraud, or any attempt or conspiracy by fraudulent means, shall be deemed insufficient because it does not set out in detail in what the false pretenses or the fraud or fraudulent means consisted : Provided that the court may, if satisfied as aforesaid, order that the prosecutor shall furnish a particular of the above matters or any of them.

3. No provision hereinbefore contained in this part as to matters which are not to render any count objectionable or insufficient shall be construed as restricting or limiting in any way the general provisions of section six hundred and eleven. R. S. C. c. 174, ss. 107, 108. 14-15 V. c. 100, ss. 20, 21 (Imp.).

See R. v. Dunning, 11 Cox, 651; and R. v. Hare, 13 Cox, 174. *See* forms of indictments for false pretenses and for perjury in form FF of schedule 1, under s. 611, *ante*. The sections on perjury are 145, *et seq.* on false pretenses, 358, *et seq.*; for conspiracies *see* under s. 527; Howard v. R., 10 Cox, 54, cannot now be followed.

PARTICULARS. (*New*).

617. When any such particular as aforesaid is delivered a copy shall be given without charge to the accused or his solicitor, and it shall be entered in the record and the trial shall proceed in all respects as if *the indictment had been amended in conformity with such particular*.

2. In determining whether a particular is required or not, and whether a defect in the indictment is material to the substantial justice of the case or not, the court may have regard to the depositions.

See R. v. Hamilton, 3 Russ. 173, and Greaves' *note* where particulars were ordered by the court: R. v. Stapylton, 8 Cox, 69; R. v. Hodgson, 3 C. & P. 422; R. v. Bootyman,

5 C. & P. 300. Any bill of particulars may itself be amended at the trial under s. 723. An application for particulars should be made before the trial, but the court has full discretionary powers in the matter: s-s. 3, s. 723.

INDICTMENT UNDER SECTION 361.

618 It shall not be necessary to allege, in any indictment against any person for wrongfully and wilfully pretending or alleging that he inclosed and sent, or caused to be inclosed and sent, in any post letter, any money, valuable security or chattel, or to prove on the trial, that the act was done with intent to defraud. R. S. C. c. 174, s. 113.

This enactment is useless. It was in the original statute of 1869, because there the offence was made one of obtaining money under false pretenses. But now s. 361 does not contain such an enactment, and does not require an intent to defraud.

INDICTMENTS IN CERTAIN CASES. (*Amended*).

619. An indictment shall be deemed sufficient in the cases following:

(*a*) If it be necessary to name the joint owners of any real or personal property, whether the same be partners, joint tenants, parceners, tenants in common, joint stock companies or trustees, and it is alleged that the property belongs to one who is named, and another or others as the case may be;

(*b*) If it is necessary for any purpose to mention such persons and one only is named;

(*c*) If the property in a turnpike road is laid in the trustees or commissioners thereof without specifying the names of such trustees or commissioners;

(*d*) If the offence is committed in respect to any property in the occupation or under the management of any public officer or commissioner, and the property is alleged to belong to such officer or commissioner without naming him;

(*e*) If, for an offence under section three hundred and thirty-four, the oyster bed, laying or fishery is described by name or otherwise, without stating the same to be in any particular county or place. R. S. C. c. 174, ss. 118, 119, 120, 121 & 123.

Sub-sections (*a*) & (*b*) are taken from the Imperial Act, 7 Geo. IV. c. 64, s. 14. Formerly, where goods stolen were the property of partners, or joint-owners, all the partners or joint owners must have been correctly named in the indictment, otherwise the defendant would have been acquitted.

The word "*parceners*" refers to a tenancy which arises when an inheritable estate descends from the ancestor to

several persons possessing an equal title to it: Wharton, Law Lexicon.

It must be remembered that the words in s. 619, s-s. (*a*) are, "*another or others;*" and if an indictment allege property to belong to A. B. and *others*, and it appears that A. B. has only one partner, it is a variance.

The prisoner was indicted for stealing the property of G. Eyre "and *others*," and it was proved that G. Eyre had only one partner; it was held, *per* Denman, Com. Serj., that the prisoner must be acquitted: Hampton's Case. 2 Russ. 303. So where a count for forgery laid the intent to be to defraud S. Jones "and *others*," and it appeared that Jones had only one partner, it was held that the count was not supported: R. v. Wright, 1 Lewin, 268.

In R. v. Kealey, 2 Den. 68, the defendant was indicted for the common law misdemeanour of having attempted, by false pretenses made to J. Baggally and others, to obtain from the said J. Baggally and others one thousand yards of silk, the property of the said J. Baggally and others, with intent to cheat the said J. Baggally and others of the same. J. Baggally and others were partners in trade, and the pretenses were made to J. Baggally; but none of the partners were present when the pretenses were made, nor did the pretenses ever reach the ear of any of them. It was objected that there was a variance, as the evidence did not show that the pretenses were made to J. Baggally and others; but the objection was overruled by Russell Gurney, Esq., Q. C., and, upon a case reserved, the conviction was held right.

Greaves, in note (*a*), 2 Russ. 304, says on this case: "It is clear that the 7 Geo. IV. c. 64, s. 14 (s. 619 *ante*) alone authorizes the use of the words 'and others;' for, except for that clause, the persons must have been named. There the question really was, whether that clause authorized the use of it in this allegation. The words are, 'whenever it shall be necessary to mention, *for any purpose whatsoever*,

any partners, etc.,' ('if it be necessary *for any purpose* to mention,' etc., s. 619, *ante*). Now it is plain that the prisoner had applied to Baggally to purchase the goods of the firm, and the inference from the statement in the indictment is that he had actually made a contract for their purchase, and, if that contract had been alleged, it must have been alleged as a contract with the firm, and it was clearly correct to allege an attempt to make a contract as made to the firm also."

Now such a variance as mentioned in Hampton's and Wright's cases, *ubi supra*, would not be fatal, if amended: 3 Burn, 25; *see* s. 723 *post;* and R. v. Pritchard, L. & C. 34; R. v. Vincent, 2 Den. 464; R. v. Marks, 10 Cox, 367.

It is not necessary that a strict legal partnership should exist: Where C. & D. carried on business in partnership, and the widow of C., upon his death, without taking out administration, acted as partner, and the stock was afterwards divided between her and the surviving partner, but, before the division, part of the stock was stolen; it was holden that the goods were properly described as the goods of D. and the widow: R. v. Gaby, R. & R. 178.

And where a father and son carried on business as farmers; the son died intestate, after which the father continued the business for the joint benefit of himself and the son's next of kin; some sheep were stolen, and were laid to be the property of the father and the son's next of kin, and all the judges held it right: R. v. Scott, R. & R. 13.

In an indictment for stealing a Bible, a hymn-book, etc., from a Methodist chapel, the goods were laid as the property of John Bennett and others, and it appeared that Bennett was one of the Society, and a trustee of the chapel: Parke, J., held that the property was correctly laid in Bennett: R. v. Boulton, 5 C. & P. 537.

In R. v. Pritchard, L. & C. 34, it was held that the property of a banking co-partnership may be described as the

property of one of the partners specially named and others, under the clause in question. *See* s. 620, *post*, as to bodies corporate, and the property under their control: R. v. Beacall, 1 Moo. 15.

On s-s. (*c*), it has been held that if a person employed by a trustee of turnpike tolls to collect them lives in the toll house rent free, the property in the house, in an indictment for burglary, may be laid in the person so employed by the lessee, he having the exclusive possession, and the toll house not being parcel of any premises occupied by his employer: R. v. Camfield, 1 Moo. 42.

PROPERTY OF BODY CORPORATE.

620. All property, real and personal, whereof any body corporate has, by law, the management, control or custody, shall, for the purpose of any indictment or proceeding against any other person for any offence committed on or in respect thereof, be deemed to be the property of such body corporate. R. S. C. c. 174, s. 122.

This clause is not in the English statutes. It was held in England, without this clause, that when goods of a corporation are stolen they must be laid to be the property of the corporation in their corporate name and not in the names of the individuals who comprise it: R. v. Patrick and Pepper, 1 Leach, 253.—So in R. v. Freeman, 2 Russ. 301, the prisoner was indicted for stealing a parcel, the property of the London and North Western Railway Company. The parcel was stolen from the Lichfield Station, which had been in the possession of the company for three or four years, by means of their servants, but no statute was produced which authorized the company to purchase the Trent Valley Line; an Act incorporating the company was, however, produced. It was held that, as a corporation is liable in trover, trespass and ejectment, they might have an actual possession though it might be wrongful, which would support the indictment.

In R. v. Frankland, L. & C. 276, it was held: 1st. That the incorporation of a private company must be proved by legal and documentary evidence; 2nd. That partners in a

company not incorporated might be proved to be such by parol evidence; 3rd. That Thomas Bolland and others, who were described in the indictment as the owners of the property embezzled, being partners in a company not incorporated, the indictment was supported by proof that the money was the property of the company.

By s. 613, *ante*, no count is objectionable on the ground that it does not contain the name of the person injured, or defrauded, or that it does not state the owner of any property therein described, or that it does not name any one with precision.

INDICTMENTS FOR STEALING ORES, ETC.

621. In an indictment for any offence mentioned in section three hundred and forty-three or three hundred and seventy-five of this Act, it shall be sufficient to lay the property in Her Majesty, or in any person or corporation, in different counts in such indictment; and any variance in the latter case, between the statement in the indictment and the evidence adduced, may be amended at the trial; and if no owner is proved the indictment may be amended by laying the property in Her Majesty. R. S. C. c. 174, s. 124.

See under ss. 343 & 375, *ante*.

OFFENCES AS TO POSTAGE STAMPS, ETC.

622. In any indictment for any offence committed in respect of any postal card, postage stamp or other stamp issued or prepared for issue by the authority of the Parliament of Canada, or of the legislature of any province of Canada, or by, or by the authority of any corporate body for the payment of any fee, rate or duty whatsoever, the property therein may be laid in the person in whose possession, as the owner thereof, it was when the offence was committed, or in Her Majesty if it was then unissued or in the possession of any officer or agent of the Government of Canada or of the Province by authority of the legislature whereof it was issued or prepared for issue. R. S. C. c. 174, s. 125.

See interpretation clause, s. 3.

INDICTMENTS UNDER SECTIONS 319-321.

623. In every case of theft or fraudulent application or disposition of any chattel, money or valuable security under sections three hundred and nineteen (*c*) and three hundred and twenty-one of this Act, the property in any such chattel, money or valuable security may, in any warrant by the justice of the peace before whom the offender is charged, and in the indictment preferred against such offender, be laid in Her Majesty, or in the municipality, as the case may be. R. S. C. c. 174, s. 126.

INDICTMENTS AS TO MAIL BAGS, ETC.

624. When an offence is committed in respect of a post letter bag, or a post letter, or other mailable matter, chattel, money or valuable security sent by post, the property of such post letter bag, post letter, or other mailable matter, chattel, money or valuable security may, in the indictment preferred against the offender, be laid in the Postmaster-General; and it shall not be necessary to allege in the indictment, or to prove upon the trial or otherwise, that the post letter bag, post letter or other mailable matter, chattel or valuable security was of any value.

2. The property of any chattel or thing used or employed in the service of the post office, or of moneys arising from duties of postage, shall, except in the cases aforesaid, be laid in Her Majesty, if the same is the property of Her Majesty, or if the loss thereof would be borne by Her Majesty, and not by any person in his private capacity.

3. In any indictment against any person employed in the post office of Canada for any offence against this Act, or against any person for an offence committed in respect of any person so employed, it shall be sufficient to allege that such offender or such other person was employed in the post office of Canada at the time of the commission of such offence, without stating further the nature or particulars of his employment. R. S. C. c. 35, s. 111.

See ss. 3 and 4, *ante*, for interpretation of terms.

STEALING BY TENANT OR LODGER.

625. An indictment may be preferred against any person who steals any chattel let to be used by him in or with any house or lodging, or who steals any fixture so let to be used, in the same form as if the offender was not a tenant or lodger, and in either case the property may be laid in the owner or person letting to hire. R. S. C. c. 174, s. 127. 24-25 V. c. 96, s. 74 (Imp.).

See s. 322, *ante*.

JOINDER OF COUNTS. (*New*).

626. Any number of counts for any offences whatever may be joined in the same indictment, and shall be distinguished in the manner shown in the form EE in schedule one hereto, or to the like effect: *Provided that to a count charging murder no count charging any offence other than murder shall be joined.*

2. When there are more counts than one in an indictment each count may be treated as a separate indictment.

3. If the court thinks it conducive to the ends of justice to do so, it may direct that the accused shall be tried upon any one or more of such counts separately. Such order may be made either before or in the course of the trial, and if it is made in the course of the trial the jury shall be discharged from giving a verdict on the counts on which the trial is not to proceed. The counts in the indictment which are not then tried shall be proceeded upon in all respects as if they had been found in a separate indictment.

4. Provided that, unless there be special reasons, no order shall be made preventing the trial at the same time of any number of distinct charges of

theft not exceeding three, alleged to have been committed within six months from the first to the last of such offences, *whether against the same person or not.*

5. *If one sentence is passed upon any verdict of guilty on more counts than one, the sentence shall be good if any of such counts would have justified it.*

The proviso in s-s. 1 is new as statutory law, though in practice no count for any other offence was joined to a count for murder: *see* Theal v. R., 7 S. C. R. 397. The last words of s-s. 4 are also new law. Sub-section 5 extends to all offences a rule that applied exclusively to misdemeanours.

See form EE under s. 610, p. 673, *ante.*

In R. v. Jones, 2 Camp. 131, Lord Ellenborough said: "In point of law there is no objection to a man being tried on one indictment for several offences of the same sort. It is usual, in felonies, for the judge, *in his discretion*, to call upon the counsel for the prosecution to select one felony, and to confine themselves to that; but this practice has never been extended to misdemeanours."

In R. v. Benfield, 2 Burr. 980, an information against five for riot and libel had been filed, on which three of them were acquitted of the whole charge, and Benfield and Saunders found guilty of the libel. It was objected that several distinct defendants charged with several and distinct offences cannot be joined together in the same indictment or information, because the offence of one is not the offence of the others. But it was determined that several offences may be joined in one and the same indictment or information, if the offence wholly arises from such a joint act as is criminal in itself, without any regard to any particular default of the defendant which is peculiar to himself; as, for instance, it may be joint for keeping a gaming house, or for singing together a libellous song, but not for exercising a trade without having served an apprenticeship, because each trader's guilt must arise from a defect peculiar to himself, and 2 Hawk. 140 was said to be clear and express in this distinction.

In Young's case, 1 Leach, 511, Buller, J., said: "In misdemeanours the case in Burrow, R. v. Benfield, 2 Burr.

980, shews that it is no objection to an indictment that it contains several charges. The case of felonies admits of a different consideration; but even in such cases, it is no objection in this stage of the prosecution (writ of error). On the face of an indictment every count imports to be for a different offence, and is charged as at different times; and it does not appear on the record whether the offences are or are not distinct. But, if it appear before the defendant has pleaded or the jury are charged, that he is to be tried for separate offences, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in the challenge of the jury; for he might object to a juryman trying one of the offences, though he might have no reason to do so in the other. But these are only matters of prudence and discretion. If the judge who tries the prisoner does not discover it in time, I think he may put the prosecutor to make his election on which charge he will proceed. I did it at the last sessions at the Old Bailey, and hope that, in exercising that discretion, I did not infringe on any rule of law or justice. But, if the case has gone to the length of a verdict, it is no objection in arrest of judgment. If it were it would overturn every indictment which contains several counts."

In the case of R. v. Heywood, L. & C. 451, this decision in *Young's case* was followed by the court of crown cases reserved, and it was held, that, although it is no objection in point of law to an indictment that it charges the prisoner with *several different* felonies in different counts, yet, as matter of practice, a prisoner ought not, in general, to be charged with different felonies in different counts of an indictment; as, for instance, a murder in one count, and a burglary in another, or a burglary in the house of A. in one count, and a "distinct" burglary in the house of B. in another, or a larceny of the goods of A. in one count, and a "distinct" larceny of the goods of B. at a different time in another, because such a course of proceeding is calcu-

lated to embarrass the prisoner in his defence. And where it has been done, and an objection is taken to the indictment on that ground before the prisoner has pleaded or the jury are charged, the judge *in his discretion may* quash the indictment, or put the prosecutor to elect. But it is no objection in arrest of judgment, or on a writ of error. *See* s. 734 *post*. Thus, where an indictment charged the prisoner in three several counts with three several felonies in sending three separate threatening letters, Byles, J., compelled the prosecutor to elect upon which count he would proceed: R. v. Ward, 10 Cox, 42. And since different judgments are required, it seems that the joinder of a count for a felony with another for a misdemeanour, would be holden to be bad upon demurrer, or after a *general* verdict, upon motion in arrest of judgment: 1 Starkie, Cr. Pl. 43; 1 Stephen's Hist. 291. But now under s. 626, *ante*, that is not so.

So in R. v. Ferguson, Dears. 427, where the prisoner, having been indicted for a felony and a misdemeanour in two different counts of one indictment, and found guilty, not *generally*, but of the felony only, the prisoner moved in arrest of judgment, against the misjoinder of counts, the judge reserved the decision, and Lord Campbell, C.J., delivering the judgment of the court of Crown cases reserved said: "There is really no difficulty in the world in this case, and I must say that I regret that the learned recorder, for whom I have a great respect, should have thought it necessary to reserve it. The question is, whether the indictment was bad on account of an alleged misjoinder of counts. The prisoner was convicted on the count for felony only, and it is the same thing as if he had been convicted upon an indictment containing that single count; and it is allowed that there was abundant evidence to warrant that conviction. There is not the smallest pretense for the objection, that the indictment also contained a count for misdemeanour, and it does not admit of any argument."

So in R. v. Holman, L. & C. 177, where the prisoner was charged in an indictment by one count for embezzlement and the other for larceny as a bailee. At the close of the case for the prosecution it was objected that the indictment was bad for misjoinder of counts, and that the objection was fatal, although not taken till after plea pleaded and the jury had been charged; and, upon the court proposing to direct the counsel for the prosecution to elect on which count he would proceed, the prisoner's counsel further contended that the indictment was so absolutely bad that the election of counts was inadmissible.

The court directed the counsel for the prosecution to elect on which count he would proceed, reserving, at the request of the prisoner's counsel, the points raised by him as above stated for the consideration of the court for Crown cases reserved. The counsel for the prosecution elected to proceed on the second count, and upon that count the prisoner was convicted, and the conviction affirmed.

Where the defendant was indicted, in several counts, for stabbing with intent to murder, with intent to maim and disable, and with intent to do some grievous bodily harm, it was holden that the prosecutor was not bound to elect upon which count he would proceed, notwithstanding the judgment is by the statute different, being on the first count capital, and on the others transportation: R. v. Strange, 8 C. & P. 172; Archbold, 70.

When the enactment contained in s. 713, *post*, was in force in England, 7 Wm. IV. and 1 V. c. 85, s. 11, a prisoner was charged in one indictment with feloniously stabbing with intent—first, to murder; second to maim; third, to disfigure; fourth, to do some grievous bodily harm; to which was added a count for a common assault. The case was far advanced before the learned judge was aware of this, and at first he thought of stopping it; but as it was rather a serious one he left the case, without noticing the last count, to the jury, who (properly as the

learned judge thought upon the facts) convicted the prisoner; and the counsel for the prosecution then, being aware of the objection of misjoinder, requested that the verdict might be taken on the last count for felony, which was done accordingly; and this was held right by all the judges: R. v. Jones, 2 Moo. 94.

Here, in Canada, now, there is no objection to a count for a common assault, in an indictment for any offence where, under s. 713, the jury may find a verdict for the assault. But, of course, such a count is not necessary, as the jury may, in that case, convict of the assault without its being alleged in the indictment: *see* 1 Bishop's Cr. Proc. 446.

In any case not falling under s. 713 the prosecutor may be ordered to proceed on one of the counts only. If the defendant does not take the objection and allows the trial to proceed the conviction will be legal, if a verdict is taken *distinctly* on one of the counts. If a verdict is given of guilty generally, without specifying on which of the counts, the conviction will be held bad on motion in arrest of judgment, or in error. For how could the court know what sentence to give if it is not clear what offence the jury have found the prisoner guilty of. But s-s. 5 of s. 626 would seem to alter the law in this respect: *see* 1 Starkie, Cr. Pl. 43; R. v. Jones, 2 Moo. 94; R. v. Ferguson, Dears. 427; O'Connell v. R., 11 Cl. & F. 155.

Though in law the right to charge different felonies in one indictment cannot be denied, yet, in practice the court, in such a case, will always oblige the prosecutor to elect and proceed on one of the charges only: Dickinson's Quarter Sessions, 190.

But the same offence may be charged in different ways, in different counts of the same indictment, to meet the several aspects which it is apprehended the case may assume in evidence, or in which it may be seen in point of law, and it is said in Archbold, p. 72: "Although a prose-

cutor is not, in general, permitted to charge a defendant with different felonies in different counts, yet he may charge the same felony in different ways in several counts in order to meet the facts of the case; as, for instance, if there be a doubt whether the goods stolen, or the house in which a burglary or larceny was committed, be the goods or house of A. or B., they may be stated in one count as the goods or house of A., and in another as the goods or house of B.: *see* R. v. Egginton, 2 B. & P. 508; R. v. Austin, 7 C. & P. 796. And the verdict may be taken generally on the whole indictment: R. v. Downing, 1 Den. 52. But, inasmuch as the word 'felony' is not *nomen collectivum* (as 'misdemeanour' is: *see* Ryalls v. R., 11 Q. B. 781, 795), if the verdict and judgment, in such case, be against the defendant for 'the felony aforesaid,' it will be bad unless the verdict and judgment be warranted by each count of the indictment": Campbell v. R., 11 Q. B. 799, 814; *see* 1 Bishop's Cr. Proc. 449.

In R. v. Sterne, 1 Leach, 473, 2 East P. C. 701, the defendant was charged in two counts with two distinct felonies on the same facts, and found guilty of a third one that was included in those charged. In R. v. Audley (Lord), 3 St. Tr. 401, the prisoner was tried at the same time upon three indictments for three different felonies: *see* also R. v. Kershaw, 1 Lewin, 218; R. v. School, 26 U. C. Q. B. 212.

Indictments for misdemeanours may contain several counts for different offences, and, as it seems, though the judgments upon each be different: Young v. R., 3 T. R. 98, 105, 106; R. v. Towle, 2 Marsh. 466; R. v. Johnson, 3 M. & S. 539; R. v. Kingston, 8 East, 41; and *see* R. v. Benfield, 2 Burr. 980; R. v. Jones, 2 Camp. 131; Dickinson's Q. S. 190; Starkie's Cr. Pl. 43; R. v. Davies, 5 Cox, 328. Even where several different persons were charged in different counts with offences of the same nature, the court held that it was no ground for a demurrer, though it might be for an application to the discretion of the court to quash the

indictment: R. v. Kingston, 8 East, 41. Where two defendants were indicted for a conspiracy and a libel, and at the close of the case for the prosecution, there was evidence against both as to the conspiracy but against one only as to the libel, the judge then put the prosecutor to elect which charge he would proceed upon: R. v. Murphy, 8 C. & P. 297. On an indictment for conspiracy to defraud by making false lists of goods destroyed by fire, one set of counts related to a fire in June, 1864, and another to a fire in November, 1864. The prosecution was compelled to elect which charge of conspiracy should be first tried, and to confine the evidence wholly to that in the first instance: R. v. Barry, 4 F. & F. 389. And on an indictment against the manager and secretary of a joint-stock bank, containing many counts, some charging that the defendants concurred in publishing false statements of the affairs of the bank, and others that they conspired together to do so, the prosecutors were put to elect on which set of counts they would rely: R. v. Burch, 4 F. & F. 407.

If there be several offenders that commit the same offence, as if several commit a robbery, or burglary, or murder, they may be joined in one indictment. And for separate offences of the same nature several persons may be indicted in the same indictment if they are indicted *separaliter*, severally, so that twenty persons may be indicted for keeping twenty different disorderly houses; 2 Hale, 173. In fact, formerly, in the criminal courts, there was only one indictment against all the prisoners; the jury at the end of the day retired and considered all the cases they had heard during the day, and then gave all the verdicts in the different cases together; *per* Denman, C.J., in R. v. Newton, 3 Cox, 492; and *per* Alderson, B., in R. v. Downing, 1 Den. 52.

Counts for different misdemeanours on which the judgment is of the same nature may be joined in the same indictment, and on such counts judgment may, and indeed

ought to be, separately entered: R. v. Orton, 14 Cox, 436, 546; R. v. Bradlaugh, 15 Cox, 217.

Counts for different misdemeanours of the same class may be joined in the same indictment: R. v. Abrahams, 24 L. C. J. 325.

Although, in general, it is not permitted to include two different felonies under different counts of an indictment, yet the same offence may be charged in different ways in different counts of the same indictment. Thus, in the first count the accused may be charged with having stolen wood belonging to A., and in another with having stolen wood belonging to B.: R. v. Falkner, 7 R. L. 544.

If an assault is on two or more persons, or if by one act any one steals various articles, whether belonging to the same person or the property of two or more persons, or kills or wounds more than one, the offence may be charged as one in the indictment, in the same count: R. v. Benfield, 2 Burr. 980; form in 3 Chit. 823. Though it may also, perhaps, be charged in different indictments; *see* cases under s. 632 *post*. *See* R. v. Devett, 8 C. & P. 639; R. v. Giddins, Car. & M. 634; R. v. Fuller, 1 B. & P. 180; Latham v. R., 9 Cox, 516.

Sub-section 4 of s. 626 is a reproduction of ss. 111 & 134, c. 174, R. S. C. 24 & 25 V. c. 96, ss. 6, 71 (Imp.).

The word "month" therein means a calendar month: Interpretation Act, c. 1, Rev. Stat.

Section 202, c. 174, R. S. C. has not been re-enacted, so that the indictment, now, must charge three acts of stealing. That s. 202 allowed the proof of three acts of stealing where the indictment charged only one.

The effect of this legislation is to restrain the power of the court with respect to the doctrine of election. The court cannot, unless there be special reasons, put the prosecutor to his election where the indictment charges three acts of larceny within six months. But on the other hand, the

court is not bound to put the prosecutor to his election in other cases, but is left to its discretion, according to the old practice.

By means of a secret junction pipe with the main of a gas company, a mill was supplied with gas, which did not pass through the gas meter, and which was consumed without being paid for. This continued to be done for some years. *Held*, on an indictment for stealing 1,000 cubic feet of gas on a particular day, the entire evidence might be given, as there was one continuous act of stealing all the time, and that s. 6 of the Imperial Larceny Act, s. 202, of c. 174, R. C. S. as to the prosecutor electing on three separate takings within six months, did not apply: R. v. Firth, 11 Cox, 234.

An indictment charged an assistant to a photographer with stealing on a certain day divers articles belonging to his employer. It did not appear when the articles were taken, whether at one or more times, but only that they were found in the prisoner's possession on the 17th of January, 1870, and that one particular article could not have been taken before March, 1868, but the prosecution abandoned the case as to this article: *Held*, that this was not a case in which the prosecutor should be put to elect upon which taking to proceed: R. v. Henwood, 11 Cox, 526.

When it appears by the evidence that the felonious receiving was one continuous act during a certain period of time, extending over two years, the court will not compel the prosecutor to elect, even if it be proved that some of the articles received by the accused were so received at divers fixed dates extending over more than six months, and on more than three occasions: R. v. Suprani, 13 R. L. 577, 6 L. N. 269.

It seems that, where three acts of larceny are charged in separate counts there may also be three counts for

receiving: R. v. Heywood, L. & C. 451. There is no doubt of that under this Code.

Greaves says: "It frequently happened before this statute passed, that a servant or clerk stole sundry articles of small value from his master at different times, and in such a case it was necessary to prefer separate indictments for each distinct act of stealing, and on the trial it not seldom happened that the jury, having their attention confined to the theft of a single article of small value, improperly acquitted the prisoner on one or more indictments. The present section remedies these inconveniences, and places several larcenies from the same person in the same position as several embezzlements of the property of the same person, so that the prosecutor may now include three larcenies of his property committed within the space of six calendar months in the same indictment": Lord Campbell's Acts, by Greaves, 19.

The indictment need not charge that the subsequent larcenies were committed within six months after the commission of the first: R. v. Heywood, L. & C. 451. And it is not necessary, now, that the three acts of stealing should be from the same person.

JOINDER OF DEFENDANTS—SEPARATE TRIALS.

Two parties accused of the same offence on the same indictment are not entitled as of right to a separate defence either in felonies or misdemeanours: R. v. McConohy, 5 R. L. 746.

In R. v. Littlechild, L. R. 6 Q. B. 293, it was held that it is in the discretion of the court to grant a separate trial or not.

In R. v. Gravel (*Montreal, Q. B. March, 1877,*) for subornation of perjury, separate trials were refused, Ramsay, J. In R. v. Bradlaugh, 15 Cox, 217, for libels, separate trials were granted. Where several persons are jointly indicted the judge will not allow a separate trial on the

ground that the depositions disclose statements and confessions made by one prisoner implicating another which are calculated to prejudice the jury, and that there is no legal evidence disclosed against the other prisoner: R. v. Blackburn, 6 Cox, 333.

The prosecution has always a right to a separate trial: 1 Bishop, Cr. Proc. 1034; 2 Hawk. c. 41, par. 8.

See, on the question, 1 Chit. C. L. 535; 1 Starkie, Cr. Pl. 36; 1 Bishop, Cr. Proc. 463, 1018; 1 Wharton, 433; R. v. Payne, 12 Cox, 118; O'Connell v. R., 11 Cl. & F. 155.

For conspiracy and riot there can be no severance of trial: 1 Wharton, 434; Starkie's Cr. Pl. 26, *et seq.*

Each count must by itself disclose an offence, and the allegations in one count cannot help the other counts: R. v. Samuels, 16 R. L. 576.

ACCESSORIES AFTER THE FACT AND RECEIVERS. (*Amended*).

627. Every one charged with being an accessory after the fact to an offence, or with receiving any property knowing it to have been stolen, may be indicted, whether the principal offender or other party to the offence or person by whom such property was so obtained has or has not been indicted or convicted, or is or is not amenable to justice, and such accessory may be indicted either alone as for a substantive offence or jointly with such principal or other offender or person.

2. When any property has been stolen any number of receivers at different times of such property, or of any part or parts thereof, may be charged with substantive offences in the same indictment, and may be tried together, whether the person by whom the property was so obtained is or is not indicted with them, or is or is not in custody or amenable to justice. R. S. C. c. 174, ss. 133, 136 & 138. 24-25 V. c. 96, ss. 6, 91 & 93 (Imp.).

See ss. 63, 314, 531, & 532, *ante*; also, ss. 715, 716, & 717, *post*, as to trial of receivers. This enactment does not seem to apply to the receiving of property obtained by false pretenses.

AFTER A PREVIOUS CONVICTION.

628. In any indictment for any indictable offence, committed after a previous conviction or convictions for any indictable offence or offences or for any offence or offences (and for which a greater punishment may be inflicted on that account), it shall be sufficient, after charging the subsequent offence, to

state that the offender was at a certain time and place, or at certain times and places, convicted of an indictable offence, or of an offence or offences, as the case may be, *and to state the substance and effect only, omitting the formal part of the indictment and conviction, or of the summary conviction, as the case may be, for the previous offence*, without otherwise describing the previous offence or offences. R. S. C. c. 174, s. 139

See s. 676, *post*, as to trial, and s. 694 as to proof.

This clause is taken from s. 116 of the English Larceny Act, 24 & 25 V. c. 96, s. 37 of the English Coin Act, 24 & 25 V. c. 99, and of s. 9, 34 & 35 V. c. 112. The words in *italics* are not in s. 116 of the English Larceny Act but are in s. 37 of the Coin Act. They clearly take away the necessity, before existing, of setting out at length the previous indictment, etc., and of giving in evidence a copy of that indictment.

"The proceedings on the arraignment and trial are to be as follows; (*see* s. 676, *post*):

"The defendant is first to be arraigned on that part only of the indictment which charges the subsequent offence; that is to say, he is to be asked whether he be guilty or not guilty of that offence. If he plead not guilty, or if the court order a plea of not guilty to be entered for him, then the jury are to be charged in the first instance to try the subsequent offence only. If they acquit of that offence the case is at an end; but if they find him guilty of the subsequent offence, or if he plead guilty to it on arraignment, then the defendant is to be asked whether he has been previously convicted as alleged, and if he admit that he has he may be sentenced accordingly; but if he deny it, or stand mute of malice, or will not answer directly to such question, then the jury are to be charged to try whether he has been so previously convicted, and this may be done without swearing them again, and then the previous conviction is to be proved in the same manner as before this Act passed."

"The proviso as to giving evidence of the previous conviction if the prisoner gives evidence of his good character remains unaltered": Greaves' *note*.

See R. v. Martin, 11 Cox, 343; R. v. Thomas, 13 Cox, 52; R. v. Harley, 8 L. C. J. 280; form of indictment under s. 337, p. 379 *ante*, and Greaves' *note*, in 2nd edit. of this work, p. 754.

In R. v. Clark, Dears. 198, it was held that any number of previous convictions may be alleged in the same indictment, and, if necessary, proved against the prisoner; by the aforesaid section this is undoubtedly also allowed.

In R. v. Fox, 10 Cox, 502, upon a writ of error by the Crown to increase the sentence, the Irish court of criminal appeal perceived that it appeared from the record that the provisions of s. 116 of the Larceny Act, under which the indictment had been tried, as to the arraigning of the prisoner, etc., had been neglected, and, thereupon, quashed the conviction.

In R. v. Spencer, 1 C. & K. 159, it was held that the indictment need not state the judgment, but the introduction of the words given in italics *supra*, in clause 628, seems to require the statement of the judgment. It will certainly be more prudent to allege it.

The certificate, s. 694, must state that judgment was given for the previous offence and not merely that the prisoner was convicted: R. v. Ackroyd, 1 C. & K. 158; R. v. Stonnell, 1 Cox, 142; for the judgment might have been arrested, and the statute says the certificate is to contain the substance and *effect* of the indictment and conviction for the previous offence; until the sentence there is no perfect conviction.

At common law a subsequent offence is not punishable more severely than a first offence; it is only when a statute declares that a punishment may be greater after a previous conviction that this clause 628 applies. So in an indictment for a misdemeanour, as for obtaining money by false pretenses, a previous conviction for felony cannot be charged: R. v. Garland, 11 Cox, 224. And then this clause does not prevent the prosecution from disregarding, if it chooses, the

fact of a previous conviction and from proceeding as for a first offence. But the court cannot take any notice of a previous conviction, unless it were alleged in the indictment and duly proved on the trial, for giving a greater punishment than allowed by law for the first offence: R. v. Summers, 11 Cox, 248; R. v. Willis, 12 Cox, 192.

To complete the proof required on a previous conviction charged in the indictment, when the prisoner does not admit it, it must be proved that he is the same person that is mentioned in the certificate produced, but it is not necessary for this to call any witness that was present at the former trial; it is sufficient to prove that the defendant is the person who underwent the sentence mentioned in the certificate: R. v. Crofts, 9 C. & P. 219; 2 Russ. 322.

By s. 676, *post*, it is enacted that if upon such a trial for a subsequent offence, the defendant gives evidence of his good character, it shall be lawful for the prosecutor to give in reply evidence of the previous conviction before the verdict on the subsequent offence is returned, and then the previous conviction forms part of the case for the jury on the subsequent offence.

It has been held on this proviso that if the prisoner cross-examines the prosecution's witnesses, to show that he has a good character, the previous conviction may be proved in reply: R. v. Gadbury, 8 C. & P. 676.

This doctrine was confirmed in R. v. Shrimpton, 2 Den. 319, where Lord Campbell, C.J., delivering the judgment of the court, said: "It seems to me to be the natural and necessary interpretation to be put upon the words of the proviso in the statute, that if, whether by himself or by his counsel, the prisoner attempts to prove a good character, either directly, by calling witnesses, or indirectly, by cross-examining the witnesses for the Crown, it is lawful for the prosecutor to give the previous conviction in evidence for the consideration of the jury." In the course of the argument Lord Campbell said that, however, he would not admit

evidence of a previous conviction if a witness for the prosecution, being asked by the prisoner's counsel some question which has no reference to character, should happen to say something favourable to the prisoner's character.

It is said in 2 Russ. 354: "It is obvious, that where the prisoner gives evidence of his good character the proper course is for the prosecutor to require the officer of the court to charge the jury with the previous conviction, and then to put in the certificate and prove the identity of the prisoner in the usual way. If the prisoner gives such evidence during the course of the case for the prosecution then this should be done before the case for the prosecution closes; but if the evidence of character is given after the case for the prosecution closes then the previous conviction must be proved in reply." *See* s. 952, *post*, as to punishment in certain cases.

PRELIMINARY OBJECTIONS TO INDICTMENT. (*Amended*).

629. Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer, or motion to quash the indictment, before the defendant has pleaded, and not afterwards, *except by leave of the court or judge before whom the trial takes place*, and every court before which any such objection is taken may, if it is thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared; and no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act. R. S. C. c. 174, s. 143.

The words in italics are new and, it seems, relate to an objection taken at the *trial*, and must be read in connection with s. 723, *post*. S. 733, *post*, gives the right to move in arrest of judgment when the indictment (*as amended, when amended*) does not charge an indictable offence. "Indictment" defined, s. 3, and includes pleas: *see* R. v. Creighton, 19 O. R. 339. When should a motion to quash be made? R. v. Chapple, 17 Cox, 455. That case, however, only applies to defects that are cured by verdict: *see* R. v. Howes, 5 Man. L. R. 339.

"It may be observed, that as the power to amend is vested entirely in the *discretion* of the courts, a case can-

not be reserved under the 11 & 12 V. c. 78 (establishing the court of Crown cases reserved), as to the propriety of making an amendment, as that statute only authorizes the reservation of 'a question of law.' If, however, a case should arise in which the question was, whether the court had *jurisdiction* to make a particular amendment—in other words, whether a particular amendment fell within the terms of the statute, there the court might reserve a case for the opinion of the judges as to that point, as that would clearly be a mere question of law": Lord Campbell's Acts, by Greaves, p. 2.

The Imperial statute, from which this clause is taken, reads as follows:

"Every objection to any indictment for any *formal* defect apparent on the face thereof shall be taken by demurrer or motion to quash such indictment *before the jury shall be sworn*, and not afterwards; and every court before which any such objection shall be taken *for any formal defect* may, if it be 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": 14 & 15 V. c. 100, s. 25.

Greaves says on this clause: "Under this section all formal objections *must* be taken before the jury are sworn. They are no longer open upon a motion in arrest of judgment or on error. By the common law many formal defects were amendable: *see* 1 Chit. 297, and the cases there cited; and it has been the common practice for the grand jury to consent, at the time they were sworn, that the court should amend matters of form. The power of amendment, therefore, given in express terms by this section, seems to be no additional power, but rather the revival of a power that had rarely, if ever, been exercised of late years."

A motion for arrest of judgment will always avail to the defendant for defects apparent on the face of the indictment, when these defects are such that thereby no offence in law appears charged against the defendant: R. v. Lynch, 20 L. C. J. 187; s. 733, *post*. Such an indictment cannot be aided by verdict, and such defects are not cured by verdict. As said in R. v. Waters, 1 Den. 356: "There is a difference between an indictment which is bad for charging an act which as laid is no crime and an indictment which is bad for charging a crime defectively; the latter may be aided by verdict, the former cannot."

If the indictment charges no offence there can be no waiver of the objection to it. It is void. Even where a statute requires the objection to be taken at an early stage, or not at all, a conviction on such a defective indictment cannot be sustained. *See* R. v. Montminy, p. 677, *ante*.

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.

In a criminal charge *there is no latitude of intention* to include anything more than is charged; the charge must be explicit enough to support itself. *Per* Lord Mansfield, in R. v. Wheatly, 2 Burr. 1127.

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. (Subject now to amendments at the trial under s. 723, *post.*)

It must not be forgotten that when the clerk of the court, on the grand jury returning the bill, asked them to agree that the court should amend matters of form in the indictment, the grand jury gave their assent, but on the express condition that no matter of substance should be altered. Who are the accusers on an indictment? The grand jury, and to their accusation only has the prisoner to answer. This accusation cannot be changed into another one, at any time, without the consent of the accuser: 1 Chit. 298, 324. And if they have brought against the prisoner an accusation of an offence not known in law the court cannot turn it into an offence known in law by *adding* to the indictment.

This section, though the word "formal" is not in it as in the English Act, must be interpreted as obliging the defendant to demur or move to quash before joining issue for defects apparent on the face of the indictment, *which the court has the power to amend.* In cases where the court has not the power to amend the defect or omission the motion for arrest of judgment will avail to the defendant as heretofore. And this clause itself supposes cases where the court has not the power to amend, when it says that: "No motion in arrest for 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*," giving it clearly to be understood that a "motion for arrest of judgment shall be allowed for any defect in the indictment which could not have been taken advantage of by demurrer or amended under the authority *of this Act*," leaving the question reduced to: *What are the amendments allowed under the authority of this Act?* Which can be, it seems, very easily answered. Of course this clause has no reference to the amendments allowed *on*

the trial, by s. 723, *post*. Then the only other clause in the Act relating to amendments is this s. 629. And it does not authorize amendments in matters of substance or material to the issue. For instance, heretofore if the word "feloniously" in an indictment for felony had been omitted the court could not allow its insertion. This would have been *adding* to the offence charged by the grand jury, and a change of its nature and gravity. *See* note (*a*) by Greaves, 1 Russ. 935; R. v. Gray, L. & C. 365.

And in an indictment intended to be for burglary the word "burglariously," if omitted, could not have been inserted by amendment. It would have been charging the defendant with burglary, when the grand jury had not charged him with that offence. And in England, in an indictment intended to be for murder, if it is barely alleged that the mortal stroke was given feloniously, or that the defendant *murdered*, etc., without adding *of malice aforethought*, or if it only charges that he *killed* or *slew* without averring that he *murdered* the deceased, the defendant can only be convicted of manslaughter: 1 East, P. C. 345; 1 Chit. 243; 3 Chit. 737, 751. And why? Because the offence charged is manslaughter, not murder. And the court has not the power by any amendment to try for *murder* a defendant whom the grand jury has charged with *manslaughter*.

And even in the case of a misdemeanour, on an indictment for obtaining money by false pretenses, if the words "*with intent to defraud*" are omitted in the indictment there is no offence charged, and the court cannot allow their insertion by amendment: R. v. James, 12 Cox, 127, *per* Lush, J. *See* now form under s. 611, *ante*. So if a statute makes it an offence to do an act "wilfully" or "maliciously" the indictment is bad if it does not contain these words: R. v. Bent, 1 Den. 157; R. v. Ryan, 2 Moo. 15; R. v. Turner, 1 Moo. 239; it does not charge the defendant with a crime. An amendment which alters the

nature and quality of the offence will not be made: R. v. Wright, 2 F. & F. 320.

And whether the defendant takes advantage of an objection of this nature, or not, makes no difference. Nay, even after verdict, even without a motion in arrest of judgment, the court is obliged to arrest the judgment if the indictment is insufficient: R. v. Wheatly, 2 Burr. 1127; 1 Chit. 303; R. v. Turner, 1 Moo. 239; R. v. Webb, 1 Den. 338; *see* also Sill's Case, Dears. 132.

These omissions are not *defects* in the sense of this word as used in this section; they make the indictment no indictment at all, or, at least, the indictment charges the defendant with no crime or offence.

On these principles the Court of Queen's Bench, in Quebec, decided R. v. Carr, 26 L. C. J. 61.

In that case the indictment was under s. 10, of c. 20, 32 & 33 V., now s. 232, *ante*, for an attempt to murder. A verdict of guilty was given, but the court being of opinion that the indictment was defective on its face, and that words material to the constitution of the offence charged were omitted therein, granted a motion to arrest the judgment and quash the indictment, though the prosecutor invoked s. 32 of the Act then in force, now s. 629, *ante*, and contended that the prisoner was too late to take the objection.

Section 629 leaves the law of amendments what it is at common law. It leaves to the judge the discretion of allowing or refusing the amendment, and in matter of substance no such amendment can be allowed. An irregularity may be amendable, but a nullity is incurable, and it has been held that the court itself, *ex proprio motu*, will refuse to try an indictment on which plainly no good judgment can be rendered: R. v. Tremearne, R. & M. 147; R. v. Deacon, R. & M. 27.

The ruling in the case of R. v. Mason, 22 U. C. C. P. 246, is not a contrary decision. The concluding remarks

of Gwynne, J., show that the court in that case did not hold that no arrest of judgment or reversal on error should, *in any case*, be granted for *any* defect *whatever* in the indictment apparent on the face thereof. What can be gathered from these remarks, taken together with those of Hagarty, C.J., is, that it was there held that the objections taken would not have been good grounds of demurrer, or that if they had been raised by demurrer the court would have had the power to amend the indictment in such particulars, and that, therefore, the defendant was too late to raise these objections after verdict. And this ruling was perfectly right.

As remarked, *ante*, if the defect is one which the court could amend the objection must be taken *in limine litis*; a plea of not guilty may then be a waiver of the right to take advantage of such a defect. But if the indictment is defective in a matter of substance a plea of not guilty is no waiver. Nay, more, a plea of guilty is no waiver, and does not prevent the defendant from taking exceptions in arrest of judgment to defects apparent on the record: 1 Chit. 431; 2 Hawk. 466; R. v. Brown, 24 Q. B. D. 357. The court, as said before, cannot allow an amendment adding, for instance, to the offence charged, or having the effect to make the indictment charge an offence where none, in law, was charged, or to change the nature of the offence charged by the grand jury, and the statute obliges to demur or move to quash before plea only for objections based on *amendable* defects.

It is true, as remarked by one of the learned judges in R. v. Mason, that the last part of this clause of our statute, taking away, in express words, the motion in arrest of judgment, is not in the Imperial statute; but it will be seen, *ante*, that Mr. Greaves, who framed the English clause, is of opinion that even without these words it has the same effect; the words, *and not afterwards*, in the English Act, cannot be interpreted otherwise: *see* s. 733, *post*.

Another difference between the two Acts consists in the words, *before the defendant has pleaded*, in the Canadian Act, instead of, *before the jury shall be sworn*, in the English one. This is not an important change, however. In all cases a demurrer must be pleaded before the plea of "not guilty," though the same may not strictly be said of the motion to quash: R. v. Heane, 9 Cox, 433. And the judge may allow a plea of "not guilty" to be withdrawn in order to give the defendant his right to demur or move to quash for any substantial defect. *See* cases under s. 657, *post*.

Greaves' Note, MSS., on the foregoing remarks as contained in first edition: "I altogether concur in the remarks on the omission of 'formal' before 'defect' in the 14 & 15 V. c. 100, s. 25. If construed according to the terms under the new clause a man might be hanged for what was really no crime, because he was too ignorant to perceive the defect in the *statement of the offence* in due time."

If the indictment does not charge any offence the court cannot amend it so as to make it charge an offence: R. v. Norton, 16 Cox, 59; *see* R. v. Flynn, 2 P. & B. (N.B.) 321.

Indictments may be signed by the clerk of the crown, or by a counsel prosecuting for the crown "for and in the name of the Attorney-General of the province": R. v. Grant, 2 L. C. L. J. 276; R. v. Downey, 13 L. C. J. 193; R. v. Ouellette, 7 R.L. 222; R. v. Regnier, Ramsay's App. Cas. 188.

A defective indictment may be quashed on motion as well as on demurrer: R. v. Bathgate, 13 L. C. J. 299: *see* R. v. Ryland, L. R. 1 C. C. R. 99; R. v. Belyea, James (N.S.) 220.

Everything that is necessary to constitute the offence must be alleged in the indictment: R. v. Bourdon, 2 R. L. 713. *See* Bishop, 1 Cr. Proc. 98, 124.

On an indictment for defrauding a bank the indictment was amended by adding the words "a body corporate": R. v. Paquet, 2 L. N. 140.

Defendant was indicted as mistress of a certain girl called *Marie*. At the trial the indictment was amended by striking out that she was such mistress, and inserting the girl's right name: R. v. Bissonette, 23 L. C. J. 249. *See* also R. v. Leonard, 3 L. N. 138.

An indictment for perjury, based on an oath alleged to have been made before the "judge of the general sessions of the peace in and for the said district" instead of "before the judge of the sessions of the peace in and for the city of Montreal," may be amended after plea: R. v. Pelletier, 15 L. C. J. 146.

It is not a misjoinder of counts to add allegations of a previous conviction for misdemeanour as counts to a count for larceny; and the question, at all events, can only be raised by demurrer or motion to quash the indictment, under 32 & 33 V. c. 29, s. 32, s. 629, *ante*. And where there has been a demurrer to such allegations as insufficient in law, and judgment in favour of the prisoner, but he is convicted on the felony count, a court of error will not re-open the matter on the suggestion that there is a misjoinder of counts: where a prisoner arraigned on such an indictment pleads "not guilty" and is tried at a subsequent assize when the count for larceny only is read to the jury: *Held* no error, as the prisoner was given in charge on the larceny count only: R. v. Mason, 22 U. C. C. P. 246.

Defendant was convicted on an indictment charging him with feloniously receiving goods of three different persons (naming them) knowing the same to have been feloniously stolen: *held*, that the defendant, having pleaded to the indictment, could not, in arrest of judgment, object that it was bad as charging him with receiving goods not alleged to have been feloniously stolen, as the defect was aided by the verdict under the Act of 1869, c. 29, s. 32, and the fact of three different offences being charged in the indictment, if objectionable at all, could not be taken advantage of after verdict. An order for an extra jury panel under R. S. (N. S.)

3d Ser., c. 92, s. 37, is valid although not signed by a majority of the judges: R. v. Quinn, 1 R. & G. (N. S.) 139.

An indictment charged that the prisoner did steal, take and carry away, etc., without charging that it was done feloniously. Before pleading the prisoner's counsel moved to quash the indictment. After argument the presiding judge allowed the indictment to be amended, under 32 & 33 V. c. 20, s. 32, s. 629, *ante*, by adding the word "feloniously." The prisoner was found guilty upon the amended indictment.

Held, on a case reserved, that the indictment without the word *feloniously* was bad and that it was not amendable under the said section: R. v. Morrison, 2 P. & B. (N. B.) 682; *see* R. v. Flynn, 2 P. & B. (N. B.) 321.

TIME TO PLEAD.

630. No person prosecuted shall be entitled as of right to traverse or postpone the trial of any indictment preferred against him in any court, or to imparl, or to have time allowed him to plead or demur to any such indictment: Provided always, that if the court before which any person is so indicted, upon the application of such person or otherwise, is of opinion that he ought to be allowed a further time to plead or demur or to prepare for his defence, or otherwise, such court may grant such further time and may adjourn the trial of such person to a future time of the sittings of the court or to the next or any subsequent session or sittings of the court, and upon such terms, as to bail or otherwise, as to the court seem meet, and may, in the case of adjournment to another session or sitting, respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session or sittings without entering into any fresh recognizances for that purpose. R. S. C. c. 174, s. 141.

See ss. 757, 758, 759, *post*, on special enactments for Ontario.

Formerly, it was always the practice in felonies to try the defendant at the same assizes: 1 Chit. C. L. 483; but it was not customary nor agreeable to the general course of proceedings, unless by consent of the parties, or where the defendant was in gaol, to try persons indicted for misdemeanours during the same term in which they had pleaded not guilty or traversed the indictment: 4 Blacks. 351.

Traverse took its name from the French *de travers*, which is no other than *de transverso* in Latin, signifying *on the other side;* because as the indictment on the one side chargeth the party, so he, on the other side, cometh in to discharge himself.

The word *traverse* is only applied to an issue taken upon an indictment for a misdemeanour; and it should rather seem applicable to the fact of putting off the trial till a following sessions or assizes, then to the joining of the issue; and therefore, perhaps, the derivation is from the meaning of the word *transverto*, which, in barbarous Latin, is to go over, *i. e.*, to go from one sessions, etc., to another, and thus it is that the officer of the court asks the party whether he be ready to try then, or will traverse over to the next sessions, etc., but the issue is joined immediately by pleading not guilty: 5 Burn, 1019.

To *traverse* properly signifies the general issue or plea of *not guilty:* 4 Stephens' Comm. 419.

To *imparl* is to have license to settle a litigation amicably, to obtain delay for adjustment: Wharton's Law Lexicon, *verbo* "*imparl.*"

The above s. 630 is taken from the 60 Geo. III. & 1 Geo. IV. c. 4, ss. 1 & 2, and the 14 & 15 V. c. 100, s. 27.

On the 14 & 15 V. c. 100, s. 27, Greaves says:—

"This section is intended wholly to do away with traverses, which were found to occasion much injustice. A malicious prosecutor could formerly get a bill for any frivolous assault found by the grand jury, and cause the defendant to be apprehended during the sitting of the court; and then he was obliged to traverse till the next session or assizes, as he could not compel the prosecutor to try the case at the sessions or assizes at which the bill was found. This led to the expense of the traverse-book and sundry fees, which operated as a great hardship on the defendant, not unfrequently an innocent person. Again, the defendant,

in many instances, has been able to turn his right to traverse into a means of improperly putting the prosecutor to expense and inconvenience. The intention of the section is to abolish traverses altogether, and to put misdemeanours precisely on the same footing in this respect as felonies. In felonies, the prisoner has no right to postpone his trial, but the court, on proper grounds, will always postpone the trial. Under this section, therefore, no defendant in a case of misdemeanour can insist on postponing his trial; but the court in any case, upon proper grounds being adduced, not only may, but ought to, order the trial to be postponed. If, therefore, a witness be absent, or ill, or there has not been reasonably sufficient time for the defendant to prepare for his defence, or there exist any other ground for believing that the ends of justice will be better answered by the trial taking place at a future period, the court would exercise a very sound discretion in postponing the trial accordingly."

There are several cases in which, upon a proper application, the court will put off the trial. And it has been laid down that no crime is so great, and no proceedings so instantaneous, but that the trial may be put off if sufficient reasons are adduced to support the application; but to grant a postponement of a trial on the ground of the absence of witnesses, three conditions are necessary; 1st, the court must be satisfied that the absent witnesses are material witnesses in the case; 2nd, it must be shown that the party applying has been guilty of no laches or neglect in omitting to endeavour to procure the attendance of these witnesses; and, 3rd, the court must be satisfied that there is a reasonable expectation that the attendance of the witnesses can be procured at the future time to which it is prayed to put off the trial: R. v. D'Eon, 3 Burr. 1514.

But if an affidavit is given that, on cross-examination, one of the absent witnesses for the prosecution who has been bound over to appear can give material evidence for

the prisoner, this is sufficient ground for postponing the trial, without showing that the defence has made any endeavour to procure this witness's attendance as the prisoner was justified in believing that, being bound over, the witness would be present: R. v. Macarthy, Car. & M. 625.

In R. v. Savage, 1 C. & K. 75, the court required an affidavit stating what points the absent witness was expected to prove, so as to form an opinion as to the witness being material or not.

The party making an application to postpone a trial, on the ground of the absence of a witness, is not bound in his affidavit to disclose all that the absent witness can testify to, but he must show that the absent witness is likely to prove some fact which may be allowed to go to the jury; he must also show the probability of having the witness at a later term: R. v. Dougall, 18 L. C. J. 85.

The court will postpone until the next assizes the trial of a prisoner charged with murder, on an affidavit by his mother that she would be enabled to prove by several witnesses that he was of unsound mind, and that she and her family were in extreme poverty, and had been unable to procure the means to produce such witnesses, and that she had reason to believe that if time were given to her the requisite funds would be provided: R. v. Langhurst, 10 Cox, 353.

But the affidavit of the prisoner's attorney, setting forth the information he had received from the mother, is insufficient: *Idem.*

Upon an indictment for a murder recently committed the court will postpone the trial, upon the affidavit of the prisoner's attorney that he had not had sufficient time to prepare for the defence, the affidavit suggesting the possibility of a good ground of defence: R. v. Taylor, 11 Cox, 340.

If the application is made by the defendant, he shall be remanded and detained in custody until the next assizes or sessions; but where the application is made by the prosecutor, it is in the discretion of the court either, on consideration of the circumstances of each particular case, to detain the defendant in custody, or admit him to bail, or to discharge him on his own recognizance: R. v. Beardmore, 7 C. & P. 497; R. v. Parish, 7 C. & P. 782; R. v. Osborn, 7 C. & P. 799; R. v. Bridgman, Car. & M. 271. But, as a general rule, after a bill has been found, if the offence be of a serious nature, the court will not admit the prisoner to bail: R. v. Chapman, 8 C. & P. 558; R. v. Guttridge, 9 C. & P. 228; R. v. Owen, 9 C. & P. 83; R. v. Bowen, 9 C. & P. 509; 5 Burn, 1032.

The production of fresh evidence on behalf of the prosecution (not known or forthcoming at the preliminary investigation, and not communicated to the defence a reasonable time before the trial) may be a ground for postponing the trial, on the request of the defence, if it appears necessary to justice: R. v. Flannagan, 15 Cox, 403.

On the finding of an indictment for perjury application was made for defendant to appear by counsel and plead: *Held*, that he should submit to the jurisdiction of the court, and appear himself, before he can be allowed to take any proceedings therein: R. v. Maxwell, 10 L. C. R. 45.

AUTREFOIS ACQUIT, ETC. (*Amended*).

631. The following special pleas and no others may be pleaded according to the provisions hereinafter contained, that is to say, a plea of *autrefois acquit*, a plea of *autrefois convict*, a plea of pardon, and such pleas in cases of defamatory libel as are hereinafter mentioned.

2. All other grounds of defence may be relied on under the plea of not guilty.

3. The pleas of *autrefois acquit*, *autrefois convict*, and pardon may be pleaded together, and if pleaded shall be disposed of before the accused is called on to plead further; and if every such plea is disposed of against the accused he shall be allowed to plead not guilty.

4. In any plea of *autrefois acquit* or *autrefois convict* it shall be sufficient for the accused to state that he has been lawfully acquitted or convicted, as

the case may be, of the offence charged in the count or counts to which such plea is pleaded, indicating the time and place of such acquittal, or conviction. R. S. C. c. 174, s. 146.

5. On the trial of an issue on a plea of *autrefois acquit* or *autrefois convict* to any count or counts, if it appear that the matter on which the accused was given in charge on the former trial is the same in whole or in part as that on which it is proposed to give him in charge, and that he might on the former trial, *if all proper amendments had been made which might then have been made*, have been convicted of all the offences of which he may be convicted on the count or counts to which such plea is pleaded, the court shall give judgment that he be discharged from such count or counts.

6. If it appear that the accused might on the former trial have been convicted of any offence of which he might be convicted on the count or counts to which such plea is pleaded, but that he may be convicted on any such count or counts of some offence or offences of which he could not have been convicted on the former trial, the court shall direct that he shall not be convicted on any such count or counts of any offence of which he might have been convicted on the former trial, but that he shall plead over as to the other offence or offences charged.

632. On the trial of an issue on a plea of *autrefois acquit* or *convict* the depositions transmitted to the court on the former trial, *together with the judge's and official stenographer's notes if available*, and the depositions transmitted to the court on the subsequent charge, shall be admissible in evidence to prove or disprove the identity of the charges. *See* ss. 694 & 726, *post*.

633. 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.

The words in italics in the fifth line of s-s. 5 of s. 631 and in the second line of s. 632 are new. Section 633 seems open to a construction that would make it an extension of the law. Sections 799, 821, 866 & 969, *post*, contain enactments on acquittals or convictions in special cases as a bar to all further proceedings for the same cause.

Sub-section 4 of s. 631 is taken from the 14 & 15 V. c. 100, s. 28, of the Imperial Statutes.

It is a sacred maxim of law that "*nemo bis vexari debet pro eadem causa*," no man ought to be twice tried, or

brought into jeopardy of his life or liberty more than once, for the same offence.

"This enactment very properly," says Greaves, Lord Campbell's Acts, 31, "abbreviates the form of pleas of *autrefois acquit* and *autrefois convict*, and renders it unnecessary to set forth the previous indictment, and to make the many averments of identity, and so forth, which were requisite before the passing of this statute."

These pleas are of the class called special pleas in bar; such pleas may be pleaded *ore tenus*.

The following is the form of a plea of *autrefois acquit*, when drawn up in answer to the whole of the indictment:

"And the said J. S., in his own proper person cometh into court here, and having heard the said indictment read, saith, that our said Lady the Queen ought not further to prosecute the said indictment against the said J. S., because he saith that heretofore, to wit, at (describe the court correctly) he, the said J. S., was lawfully acquitted of the said offence charged in the said indictment and this he, the said J. S., is ready to verify. Wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the present indictment specified": Archbold, 132.

If there is more than one count in the indictment it is better to plead to each: R. v. Westley, 11 Cox, 139. By s. 3, *ante*, the word *indictment* includes *pleas*, so that all the rules as to amending indictments apply to pleas. The defendant might before the Code plead over to the indictment, in felonies, at the same time as pleading such special pleas, but now, under s-s. 3 of s. 631, that cannot be done.

The jury must first determine the plea of former acquittal or conviction. The prisoner has the right of challenge in the usual way: 2 Hale, P. C. 267*d*; R. v. Scott, 1 Leach, 401. *See* remarks, *post*, under s. 667, as to challenges. If the verdict is in favour of the prisoner, and finds the plea

proved, the prisoner is discharged, and the trial is at an end. If, on the contrary, the jury find the plea "not proved" and the prisoner then pleads not guilty, they are charged again, if both the prosecutor and the accused do not ask for another jury, this time to inquire of the second issue, *i. e.*, on the plea of not guilty, and the trial proceeds as if no plea in bar had been pleaded: 1 Chit. 461; 2 Hale, 255; R. v. Knight, L. & C. 378. They then need not be sworn *de novo* to try this second issue: R. v. Key, 2 Den. 347. But if both the accused and the prosecutor do not consent to have the same jury a new jury has to be chosen to try the issue of not guilty; another and quite separate trial then takes place: s-s. 6, s. 667; R. v. Roche, 1 Leach, 134. Formerly, when such pleas contained the first indictment, with the judgment, etc., detailed at full length, the prosecutor could demur to it, and then the court pronounced on that demurrer without the intervention of a jury; but now, with the general form allowed by the statute, the prosecutor meets the plea with a general replication, entered only when the record is made up, after trial, though not necessarily actually pleaded, and the issue must be determined by a jury: *see* R. v. Connell, 6 Cox, 178; Archbold, 133; *note* by Greaves, 2 Russ. 161; R. v. Tancock, 13 Cox, 217.

This replication and the *similiter*, (as to which *see* s. 734, *post*,) when so entered upon the record, may be as follows:

"And hereupon A. B., who prosecutes for our said Lady the Queen in this behalf, says that by reason of anything in the said plea of the said J. S. above pleaded in bar to the present indictment, our said Lady the Queen ought not to be precluded from prosecuting the said indictment against the said J. S., because he says that the said J. S. was not lawfully acquitted of the said offence charged in the said indictment, in manner and form as the said J. S. hath above in his said plea alleged; and this he, the said A. B.,

prays may be inquired of by the country. And the said J. S. doth the like."

For a form of plea of *autrefois acquit* or *autrefois convict* to one count only of the indictment *see* Lord Campbell's Acts, by Greaves, 88; R. v. Connell, 6 Cox, 178; R. v. Bird, 5 Cox, 11.

When any one is indicted for an offence and acquitted he cannot afterwards be indicted for the same offence, provided the first indictment were such that *he could have been lawfully convicted on it;* and if he be thus indicted a second time he may plead *autrefois acquit*, and it will be a good bar to the indictment. And an acquittal in a foreign country by a competent tribunal is a bar to an indictment for the same offence in this country: Hutcheson's Case, *note* to R. v. Roche, 1 Leach, 134.

The true test by which the question, whether such a plea is a sufficient bar in any particular case, may be tried is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first: R. v. Bulmer, 5 L. N. 92; R. v. Sheen, 2 C. & P. 634: R. v. Bird, 2 Den. 94; R. v. Drury, 3 C. & K. 193; R. v. Miles, 17 Cox, 9; Ryley v. Brown, 17 Cox, 79; though in R. v. Gilmore, 15 Cox, 85, some doubt has been thrown on the accuracy of that proposition.

Thus, an acquittal upon an indictment for burglary and larceny may be pleaded to an indictment for a larceny of the same goods, because upon the former indictment the defendant might have been convicted of the larceny. But if the first indictment were for a burglary, with intent to commit a larceny, and did not charge an actual larceny, an acquittal on it would not be a bar to a subsequent indictment for the larceny: 2 Hale, 245; R. v. Vandercomb, 2 Leach 716; because the defendant could not have been convicted of the larceny on the first indictment. An acquittal upon an indictment for murder may be pleaded in bar of another indictment for manslaughter, because the

defendant could be convicted of the manslaughter on the first indictment. So, an acquittal upon an indictment for manslaughter is, it seems, a bar to an indictment for murder, for they differ only in degree: 2 Hale, 246; 1 Chit. 555. S-s. 2 of s. 633 is now conclusive on the point.

Now, also, no one can, after being acquitted on an indictment for any offence, be indicted for an attempt to commit it, for he might have been convicted of the attempt on the previous indictment: s. 711, *post.* An acquittal for the murder of a child is a bar to an indictment for concealing the birth of the same child, because by s. 714, *post*, the defendant upon the first indictment might have been found guilty of concealing the birth: R. v. Ryland, *note* by Greaves, 2 Russ. 55.

So a person acquitted of an offence including an assault, and for which assault the defendant might have been convicted under s. 713, *post*, cannot be subsequently indicted for this assault: R. v. Smith, 34 U. C. Q. B. 552.

So, also, a person indicted and acquitted on an indictment for a robbery, cannot afterwards be indicted for an assault with intent to commit it. But now a person indicted for larceny and acquitted may afterwards be indicted on the same facts for obtaining by false pretenses, and a person indicted for obtaining by false pretenses and acquitted may afterwards be prosecuted for larceny on the same facts, as ss. 196-198 of c. 174 R. S. C. have not been re-enacted: R. v. Henderson, 2 Moo. 192 and Greaves *note* to it, 2 Russ. 55; Stephens Hist. Cr. L. 162; 2 Taylor, Ev. Pars. 15, 16; R. v. Adams 1 Den. 38. If a man be indicted in any manner for receiving stolen goods, he cannot afterwards be prosecuted again on the same facts. This rule is equally applicable though the first indictment be against the defendant jointly with others, and the second against him alone, and upon the first indictment the prisoner has been acquitted, and the others found guilty, because he might have been convicted on the first: R. v.

Dann, 1 Moo. 424. *See* R. v. O'Brien, 15 Cox, 29, Warb. Lead. Cas. 229, and R. v. Miles, *Id.* 230. R. v. Gilmore, 15 Cox, 85, cannot be followed in Canada, because under s. 713, *post*, the defendant, in such a case, may be convicted upon a first charge of the offence subsequently charged in that case.

But the prisoner must have been put in jeopardy on the first indictment. If by reason of some defect in the record, either in the indictment, the place of trial, the process, or the like, the defendant was not lawfully liable to suffer judgment for the offence charged against him in the first indictment, as it stood at the time of the verdict, he has not been in jeopardy, in the sense which entitles him to plead the former acquittal or conviction in bar of a subsequent indictment; R. v. Drury, 3 C. & K. 193; R. v. Green, Dears. & B. 113.

"In general," says Starkie, Cr. Pl. 320, "where the original indictment is insufficient no acquittal founded upon that insufficiency can be available, because the defendant's life was never really placed in jeopardy, and therefore the reason for allowing the plea entirely fails."

And 1 Chit. Cr. L. 454, says: "And hence we may observe that the great general rule upon this part of the subject is, that the previous indictment must have been one upon which the defendant could legally have been convicted, upon which his life or liberty was not merely in imaginary but in actual danger, and consequently in which there was no material error . . . Upon the same principle, where the defendant was acquitted merely on some error of indictment, or variance in the recitals, he may be indicted again upon the same charge, for the first proceedings were merely nugatory. Thus, if an indictment for larceny lay the property in the goods in the wrong person the party may be acquitted, and afterwards tried on another, stating it to be the property of the legal owner."

And even now, that an amendment is allowed in such a case, and that the court, on the first indictment, might have substituted the name of the legal owner for the wrong one first alleged, if the indictment was not, in fact, so amended, the plea of *autrefois acquit* cannot be sustained; the indictment must be considered as it was, not as it might have been made; the court was not bound to amend, and the indictment to be considered is the indictment upon which the jury in the first case gave their verdict: R. v. Green, Dears. & B. 113; though it may be contended that the wording of s-s. 5 of s. 631 may now make a change in this respect.

An abortive trial without verdict cannot be pleaded as an acquittal; the acquittal, in order to be a bar, must be by verdict on a trial. Thus if after the jury are sworn, and the prisoner given in charge to them, the judge, in order to prevent a failure of justice by a refusal of a witness to give his evidence, or by reason of the non-agreement of the jury to a verdict, or by reason of the death or such illness of a juryman as to necessitate the discharge of the jury before verdict, does so discharge them without coming to a verdict, in all these and analogous cases the prisoner must be tried again: R. v. Winsor, 10 Cox, 276, 7 B. & S. 490; R. v. Charlesworth, 1 B. & S. 460; 1 Burn, 348; 2 Russ, 62, *note* by Greaves; R. v. Ward, 10 Cox, 573.

A previous summary conviction for an assault is not a bar to an indictment for manslaughter of the party assaulted, dead since, founded upon the same facts: R. v. Morris, 10 Cox, 480; R. v. Friel, 17 Cox, 325.

A person was acquitted of an assault with intent to murder, but was convicted of an assault with intent to do grievous bodily harm, and the prosecutor, having subsequently died, he was indicted for murder, and it was held right: R. v. Salvi, 10 Cox, 481, *note*. *See* The Queen v. Rozan, 2 Mauritius Decisions 35.

And these two cases cannot be questioned. There can never be the crime of murder till the party assaulted dies; the crime has no existence, in fact or law, till the death of the party assaulted. Therefore, it cannot be said that one is tried for the same crime when he is tried for assault during the life, and tried for murder after the death, of the injured party. That new element of the injured person's death is not merely a supervening aggravation but it creates a new crime; *per* Lord Ardmillan, in Stewart's Case, (Scotland), 5 Irvine, 310. S. 633, *ante*, will probably be held not to apply where the aggravation results from facts subsequent to the first indictment.

A man steals twenty pigs at the same time, can he be charged with twenty larcenies of one pig, in twenty different indictments? After verdict on the first indictment can he maintain a plea of *autrefois acquit* or *autrefois convict* in answer to the subsequent indictments?

It may be said that, in principle, a man who steals twenty pigs, at the same time, commits but one larceny, but one criminal act. Suppose a man steals a bag containing three bushels of potatoes, could he be charged with three larcenies of one bushel each, in three different indictments, or with two larcenies in two indictments, one of the bag, and one of the potatoes? Or if a man steals ten pounds in ten one pound notes, can he be charged in ten different indictments with ten different larcenies of one pound?

Then A., at one shot, murders B. and C., though the shot was directed at B. only; has he committed one murder or two murders? If he is tried for the murder of B. and acquitted, can he plead *autrefois acquit* to an indictment charging him with the murder of C.? Of course not. He is guilty of two murders.

In all these cases there has been only one criminal act, only one actual execution of a criminal design, only one guilty impulse of the mind; yet, it appears to be settled that

where *several chattels* are stolen at the same time, an acquittal on an indictment for stealing one of them is no bar to an indictment for stealing another of them, although it appear that both were taken by the same act: 8th Rep. Cr. L. Comm., 5th July, 1845.

"And thus it hath happened," says Hale, vol. 2, p. 245, "that a man acquitted for stealing the horse hath yet been arraigned and convicted for stealing the saddle, though both were done at the same time." And in R. v. Brettel, Car. & M. 609, 2 Russ. 60, it was held that where the prisoner had been convicted of stealing one pig, he might be tried for stealing another pig at the same time and place; but as the prisoner was undergoing his sentence upon the conviction already given against him, the Judge (Cresswell, J.) thought that the second indictment should be abandoned, and this was done.

Erle, J., in R. v. Bond, 1 Den. 517, seemed to be of opinion that *one* act of taking could not be *two* distinct crimes. He said: "I do not think it necessary in a plea of *autrefois convict*, to allege the identity of the specific chattel charged to be taken (under the old form of such pleas). Suppose the first charge to be taking a coat; the second, to be taking a pocket-book; *autrefois convict* pleaded: parol evidence showing that the pocket-book was in the pocket of the coat. I think that I would support the plea because it would show a previous conviction for the *same act of taking*."

But a *note* by Greaves, 2 Russ. 60, thinks this dictum erroneous, and the reporter, in Denison, in a foot note to the case says: "*Quære*, whether a plea of *autrefois acquit* or *convict* would be supported by mere proof of the *same act of taking?* Suppose a purse stolen containing ten sovereigns, five belonging to A., five to B. Two indictments preferred one charging prisoner with a theft from A., the other with a theft from B.; a conviction of the theft from A. If the same act of taking were the gist of the crime, he

could plead *autrefois convict* to the indictment of stealing from B. It seems that, to support a plea of *autrefois convict or acquit*, there must be proof of '*a taking of the same thing from the same party at the same time.*'"

If, according to this note, in the case where ten sovereigns are stolen at one and the same time, in the same purse, five belonging to A., five to B., two crimes have been committed by one act, it follows that in the case of the stealing of a bag containing potatoes, if the bag belongs to A., and the potatoes to B., two larcenies may be charged, one of the bag and one of the potatoes. *See* R. v. Champneys, 2 M. & Rob. 26.

The proof, on a plea of this nature, lies on the defendant, and he is to begin: Archbold, 133; 2 Russ. 62, *note* by Greaves.

In order to prove a formal acquittal or conviction, if it took place at a previous session or in a different court, the prisoner must produce the record regularly drawn up: R. v. Bowman, 6 C. & P. 101, 337. But if it took place at the same assizes, the original indictment, with the notes of the clerk of the court upon it, are sufficient evidence: R. v. Lea, 2 Moo. 9 (called R. v. Parry, in 7 C. &. P. 836).

But *see* ss. 694, 726, 865 & 866 *post*. If any issue of fact as to identity of charges, or of persons, etc., is raised it must be tried by a jury as in R. v. Lea, 2 Moo. 9. *See* s. 690, *post*.

Conviction for unlawfully taking girl of sixteen out of possession of her father not a bar under *autrefois convict* to indictment for seduction of same girl: R. v. Smith 19 O.R. 714.

Greaves' MSS. *note*:—"The next question is, supposing the judges of C. C. R. were to hold that evidence had been improperly received or rejected, and simply determined to arrest or reverse the judgment, could the prisoner be indicted *de novo*, and tried and convicted for the same

offence? And it is perfectly clear that he could. Nothing, except a verdict of guilty or not guilty on a valid indictment, and a lawful and still existing judgment on such verdict can afford a bar to another prosecution for the very same offence. *See* my *note*, 2 Russ. 69 *et seq.* R. v. Winsor, 6 B. & S. 143-7-190; 2 Hale, 246; Vaux's Case, 4 Rep. 44."

"I have said on a *valid indictment*. Now an indictment may be either actually valid or valid as against the crown in some cases; for a very material distinction exists between an acquittal and conviction upon a bad indictment. If *autrefois acquit* be pleaded and the former indictment is bad upon the face of it, the plea fails, because the judgment may and is to be supposed to have been upon that defect, as it is simply *quod eat sine die* (3 Inst. 214, 2 Hale, 248, 394). But if a prisoner be convicted and sentenced on an insufficient indictment a plea of *autrefois convict* will be good unless the judgment has been reversed: 2 Hale, 247; for the judgment could only be given on the verdict. So if a special verdict be found, and the court erroneously adjudges it to be no felony, *autrefois acquit* is a good plea as long as that judgment is unreversed on error: 2 Hale, 246. And in the case of an acquittal, if the judgment has been *quod eat inde quietus*, as the ancient form is in case of acquittal upon not guilty pleaded, that could never refer to the defect of the indictment, but to the very matter of the verdict, and the prisoner could not be indicted again until the judgment had been reversed on error: 2 Hale, 394."

"Whenever a plea of *autrefois acquit* or *convict* in the short form allowed by the 14 & 15 V. c. 100, s. 28, is pleaded, if the former indictment, or other part of the record be bad on the face of it, the question arises whether the replication should not set out the record and conclude with a demurrer. If the objection was the only answer to the plea, it would seem to be the better course. A jury might in such

a case err, as they certainly did in R. v. Lea, 2 Moo. 9, where, against the direction of the judge, and without any reasonable evidence, they found for the prisoners, and it was held that the verdict could not be set aside. A judge might also decide erroneously against the crown; and, if a verdict passed for the prisoner, there would be great doubt whether any remedy existed. A case could not be reserved under the Act, for there would not be any conviction, and error would not be available, for the former record could not appear on the subsequent record, and there is grave doubt as to a special verdict in such a case. But if judgment were given against the crown on such a replication as I have suggested, error might remedy the mischief."

634. PLEA OF JUSTIFICATION IN CASE OF LIBEL.

See ante, under s. 302, p. 305.

PART XLVII.

CORPORATIONS.

635. Every corporation against which a bill of indictment is found at any court having criminal jurisdiction shall appear by attorney in the court in which such indictment is found and plead or demur thereto. R. S. C. c. 174, s. 155.

See R. v. Birmingham, Warb. Lead. Cas. 33.

636. No writ of *certiorari* shall be necessary to remove any such indictment into any superior court with the view of compelling the defendant to plead thereto; nor shall it be necessary to issue any writ of *distringas*, or other process, to compel the defendant to appear and plead to such indictment. R. S. C. c. 174, s. 156.

637. The prosecutor, when any such indictment is found against a corporation, or the clerk of the court when such indictment is founded on a presentment of the grand jury, may cause a notice thereof to be served on the mayor or chief officer of such corporation, or upon the clerk or secretary thereof, stating the nature and purport of such indictment, and that, unless such corporation appears and pleads thereto in two days after the service of such notice, a plea of not guilty will be entered thereto for the defendant by the court, and that the trial thereof will be proceeded with in like manner as if the said corporation had appeared and pleaded thereto. R. S. C. c. 174, s. 157.

638. If such corporation does not appear in the court in which the indictment has been found, and plead or demur thereto within the time specified in the said notice, the judge presiding at such court may, on proof to him by affidavit of the due service of such notice, order the clerk or proper officer of the court to enter a plea of "not guilty" on behalf of such corporation, and such plea shall have the same force and effect as if such corporation had appeared by its attorney and pleaded such plea. R. S. C. c. 174, s. 158.

639. The court may—whether such corporation appears and pleads to the indictment, or whether a plea of "not guilty" is entered by order of the court—proceed with the trial of the indictment in the absence of the defendant in the same manner as if the corporation had appeared at the trial and defended the same; and in case of conviction, may award such judgment and take such other and subsequent proceedings to enforce the same as are applicable to convictions against corporations. R. S. C. c. 174, s. 159.

PART XLVIII.

PREFERRING INDICTMENT.

JURISDICTION. (*New*).

640. Every court of criminal jurisdiction in Canada is, subject to the provisions of Part XLII. (s. 538), competent to try all offences *wherever* committed, *if the accused is found* or apprehended or is in custody within the jurisdiction of such court, or if he has been committed for trial to such court or ordered to be tried before such court, *or before any other court the jurisdiction of which has by lawful authority been transferred to such first mentioned court under any Act for the time being in force:* Provided that nothing in this Act authorizes any court in one province of Canada to try any person for any offence committed entirely in another province, except in the following case:

2. Every proprietor, publisher, editor, or other person charged with the publication in a newspaper of any defamatory libel shall be dealt with, indicted, tried and punished in the province in which he resides, or in which such newspaper is printed. 51 V. c. 44, s. 2.

This section extends to all cases, the provision heretofore to be found in various statutes that the accused may be tried in any district where he is apprehended or in custody: *see* R. v. Lynch, 20 L. C. J. 187; R. v. Smith, 1 F. & F. 36; R. v. James, 7 C. & P. 553; R. v. Smythies, 1 Den. 498, and *note* (*c*) to 1 Russ. 274. S-s. 2 is given as an exception to the proviso in s-s. 1. But it is clearly not an exception to the enactment of that proviso that any offence committed entirely in one Province shall not be triable in another Province.

See ante, under s. 542, the Imperial statutory provisions as to the trial in the colonies of offences committed abroad or within the jurisdiction of the Admiralty.

The words "wherever committed" in s. 640 must receive a limited construction, and be read as if the words "in Canada" were added thereto: Macleod v. The Attorney-General, 17 Cox, 341, (1891), A.C. 455. Parliament cannot have intended to legislate on offences committed abroad by any one, even by foreigners, as this enactment taken

literally would infer. The English draft code was more happily worded. It said "every court competent to try offences triable in England or Ireland shall be competent to try all such offences wherever committed if the accused is found, etc. What this s. 640 means is, what was meant by the English draft, namely, that all courts otherwise competent to try an offence shall be competent to try it irrespectively of the place where it was committed, the place of trial being determined by the costs and expenses, the convenience of the court, the witnesses, and the person accused, the county where the offence was committed, being, of course, as a general rule, the best place for the purpose: 1 Stephens' Hist. 278. The Code is silent as to what are the offences committed on the high seas or abroad, on land, either wholly or partly, that can be tried in Canada: *see* remarks under s. 542, *ante*. The Imperial draft code had two special articles on the subject, but they have not been reproduced.

MODES OF PROSECUTION. (*New*).

641. Any one who is bound over to prosecute any person, whether committed for trial or not, may prefer a bill of indictment for the charge on which the accused has been committed, or in respect of which the prosecutor is so bound over, or for any charge founded upon the facts or evidence disclosed on the depositions taken before the justice. The accused may at any time before he is given in charge to the jury apply to the court to quash any count in the indictment on the ground that it is not founded on such facts or evidence, and the court shall quash such count if satisfied that it is not so founded. And if at any time during the trial it appears to the court that any count is not so founded, and that injustice has been or is likely to be done to the accused in consequence of such count remaining in the indictment, the court may then quash such count and discharge the jury from finding any verdict upon it.

2. The Attorney-General or any one by his direction or any one with the written consent of a judge of any court of criminal jurisdiction or of the Attorney-General, may prefer a bill of indictment for any offence before the grand jury of any court specified in such consent; and any person may prefer any bill of indictment before any court of criminal jurisdiction by order of such court.

3. It shall not be necessary to state such consent or order in the indictment. An objection to an indictment for want of such consent or order must be taken by motion to quash the indictment before the accused person is given in charge.

4. Save as aforesaid no bill of indictment shall after the commencement of this Act be preferred in any province in Canada.

The words "Attorney-General" include the solicitor-general: s. 3.

This enactment extends to all offences whatever the provisions of s. 140, c. 174, R. S C., which applied only to certain specified offences. The grand jury are not now at liberty to find a bill upon their own knowledge only; and the right to go directly before them and prefer a bill against any one is taken away. No one, as a general rule, is now liable to be indicted without a preliminary inquiry being first held before a magistrate. The only exceptions are those contained in s-s. 2 of the above s. 641. Criminal informations will lie as heretofore, though there may be some difficulty to determine in what cases, owing to the silence of the Code on the subject, the distinction between felonies and misdemeanours being abolished, and the remedy by information being given in England only in cases of misdemeanours.

By s. 595, *ante*, if the magistrate dismisses the charge and refuses to commit or bail the person accused, he is bound, if required to do so, to take the prosecutor's recognizance to prosecute the charge: R. v. Lord Mayor, 16 Cox, 77; *see Ex parte Wason*, 38 L. J. Q. B. 302.

This clause 641 forms in England the Acts known as the "Vexatious Indictments Acts" 22 & 23 V. c. 17; 30 & 31 V. c. 35; 44 & 45 V. c. 60 and 48 & 49 V. c. 69, and the enactment applies there only to certain specified offences.

The order of a judge in a court of civil jurisdiction ordering any one to be prosecuted for perjury under s. 4 of c. 154, R. S. C. (unrepealed, *see*, *ante*, p. 98) is not covered by s-s. 2 of s. 641, as it was by s. 140 of the Procedure Act.

As to jurisdiction of a state over offences committed abroad by its own subjects *see* cases under s. 542, *ante*, and Macleod v. Attorney General, 17 Cox, 341, [1891] A.C. 455. The offence committed abroad in that last case

was committed by a British subject, but that fact does not seem to have been specially alluded to, or else it was assumed that a colony has not, in such cases, like the Imperial Parliament, jurisdiction over offences committed abroad.

It is not necessary by s-s. 3 that the performance of any of the conditions mentioned in this section should be averred in the indictment or proved before the petit jury: Knowlden v. R. (in error) 5 B. & S. 532, 9 Cox, 483; Boaler v. R. 16 Cox, 488, 21 Q. B. D. 284. When the indictment is preferred by the direction in writing of a judge of competent jurisdiction, it is for the judge to whom the application is made for such direction to decide what materials ought to be before him, and it is not necessary to summon the party accused or to bring him before the judge; the court will not interfere with the exercise of the discretion of the judge under this clause: R. v. Bray, 3 B. & S. 255, 9 Cox, 215.

The provisions of the above statute must be complied with in respect to every count of an indictment to which they are applicable, and any count in which they have not been complied with must be quashed, but the motion to quash need not necessarily be made before plea pleaded: R. v. Fuidge, L. & C. 390, 9 Cox, 430; R. v. Bradlaugh, 15 Cox, 156. So if an indictment contains one count for obtaining money by false pretenses on the 26th of September, 1873, and another count for obtaining money by false pretenses on the 29th of September, 1873, though the false pretenses charged be the same in both cases, the second count must be quashed, if the defendant appears to have been committed only for the offence of the 26th September, and if the second offence is not disclosed by the depositions.

Where three persons were committed for conspiracy, and afterwards the Solicitor-General, acting under this clause, directed a bill to be preferred against a fourth person, who had not been committed, and all four were indicted together

for the same conspiracy, such a course was held unobjectionable: Knowlden v. R. (in error), 5 B. & S. 532, 9 Cox, 483.

Where it is made clear, either on the face of an indictment or by affidavit, that it has been found without jurisdiction, the court will quash it on motion of the defendant, even after he has pleaded: R. v. Heane, 4 B. & S. 947, 9 Cox, 433.

A prosecutor who has required the magistrates to take his recognizances to prosecute under s. 595 when the magistrates have refused to commit or to bail for trial the person charged, must either go on with the prosecution or have his recognizances forfeited, as it would defeat the object of the statute if he was allowed to move to have his recognizances discharged: R. v. Hargreaves, 2 F. & F. 790.

Held, that where one of the preliminary formalities mentioned in this section is required, the direction by a Queen's counsel then acting as crown prosecutor, for and in the name of the Attorney-General, is not sufficient. The Attorney-General or Solicitor-General alone can give the direction: Abrahams v. R., 6 S. C. R. 10; R. v. Ford, 14 Q. L. R. 231.

A person heretofore prosecuting under s. 140 of the Procedure Act had no right to be represented by any other counsel than the representative of the Attorney-General: R. v. St. Amour, 5 R. L. 469. As to the interpretation of the said section: *see*, further, R. v. Bradlaugh, 15 Cox, 156; also R. v. Bell, 12 Cox, 37; R. v. Yates, 15 Cox, 272, and Yates v. R. 15 Cox, 686.

CORONER'S INQUISITION. (*New*).

642. After the commencement of this Act no one shall be tried upon any coroner's inquisition.

By s. 568, the coroner cannot now commit any one for trial. He must send any one charged by his inquest before a magistrate.

OATH BEFORE GRAND JURY.

643. It shall not be necessary for any person to take an oath in open court in order to qualify him to give evidence before any grand jury. R. S. C. c. 174, s. 173.

644. The foreman of the grand jury or any member of the grand jury who may, for the time being, act on behalf of the foreman in the examination of witnesses, may administer an oath to every person who appears before such grand jury to give evidence in support of any bill of indictment; and every such person may be sworn and examined upon oath by such grand jury touching the matters in question. R. S. C. c. 174, s. 174.

645. The name of every witness examined, or intended to be examined, shall be endorsed on the bill of indictment; and the foreman of the grand jury, or any member of the grand jury so acting for him, shall write his initials against the name of each witness sworn by him and examined touching such bill of indictment. R. S. C. c. 174, s. 175.

646. The name of every witness intended to be examined on any bill of indictment shall be submitted to the grand jury by the officer prosecuting on behalf of the Crown, and no others shall be examined by or before such grand jury unless upon the written order of the presiding judge. R. S. C. c. 174, s. 176.

647. Nothing in this Act shall affect any fees by law payable to any officer of any court for swearing witnesses, but such fees shall be payable as if the witnesses had been sworn in open court. R. S. C. c. 174, s. 177.

Sections 643, 644 & 645 are re-enactments of the Imperial Act, 19 & 20 V. c. 54. S. 646 would, perhaps, be held not to apply to private prosecutions, *sed quære?*

The omission by the foreman to write his initials against the name of each witness sworn *and* examined would give to the prisoner the right, before plea, to ask that the indictment be sent back to the grand jury with a direction to the foreman to so initial the names of the witnesses examined. In a case in Illinois, under a similar enactment, it was held that the statute requiring the foreman of the grand jury to note on the indictment the names of the witnesses upon whose evidence the same is found is mandatory, and that a disregard of this requirement would, no doubt, be sufficient ground to authorize the court, upon a proper motion, to quash the indictment: Andrews v. The People, 117 Ill., 195.

See Thompson on Juries, 724.

Under s. 629, *ante*, a motion to quash the indictment upon such a ground must be made before plea, and upon such a motion the court would send the indictment back to the grand jury to remedy the defect. If the grand jury has been discharged the indictment, it seems, must be quashed.

With the grand jury's consent the witnesses before them are examined by the crown prosecutor or clerk of the crown, or by the private prosecutor or his solicitor. But the grand jury must be alone during their deliberations: 1 Chit. 315; 3 Burn, 36; charge to grand jury, Drummond, J., 4 R. L. 364; Stephen's Cr. Proc. Art. 190; and 1 Hist. Cr. L. 273, 274.

Not more than twenty-three grand jurors should be sworn in. But any number from twelve to twenty-three constitute a legal grand jury. At least twelve of them must agree to find a true bill. If twelve do not agree, they must return "not found," or "not a true bill," or "*ignoramus*"; this last form, however, is not now often used: 4 Stephen's Bl. 375 (10th edit.); 1 Chit. 322; 2 Burr. 1089; 3 Burn, 37; R. v. Marsh, 6 A. & E. 236; Dickinson's Quarter Sess. 183; Stephen's Cr. Proc. Art. 186; Low's case, 4 Me. 437; 1 Whart. Cr. L. pars. 463, 497. In addressing the grand jury, in Montreal, Queen's Bench. June 1st, 1893, Wurtele, J., instructed them that to find an accusation founded or *to declare it unfounded* twelve at least must concur. The italicized words contain a palpable error.

The court will not inquire whether the witnesses were properly sworn before the grand jury: R. v. Russell, C. & M. 247, but *see* R. v. Dickinson, *post*.

The court will not receive an affidavit of a grand juror as to what passed in the grand jury room upon the subject of the indictment: R. v. Marsh, 6 A. & E. 236; nor allow one of them to be called as a witness to explain the finding: R. v. Cooke, 8 C. & P. 582.

On the trial of Alexander Gillis for murder, his counsel called the foreman of the grand jury which found the bill

against him to prove that a witness's evidence before the grand jury was different from that given by the witness on the trial. The counsel for the crown objected that a grand juror could not be allowed to give evidence of what took place in the grand jury room: *Held*, that a grand juror's obligation to keep secret what transpired before the grand jury only applied to what took place among the grand jurors themselves, and did not prevent his being called to prove what a witness had said: R. v. Gillis, 6 C. L. T. 203.

On this point, *see* Taylor, Ev. par. 863. Also, Stephen Ev., Art. 114, where it is said: "It is also doubtful whether a grand juror may give evidence as to what any witness said when examined before the grand jury." *See* s. 145, *ante*, as to perjury committed before a grand jury.

A grand jury cannot on a suspicion that a witness called before them has been tampered with by the prisoner receive in evidence his written examination given at the preliminary investigation for the purpose of finding a bill: R. v. Denby, 1 Leach, 514.

Depositions not taken in presence of the accused cannot be submitted to the grand jury: R. v. Carbray, 13 Q. L. R. 100.

A grand jury have no right to ignore a bill on account of insanity, either when the offence was committed or at the time when the bill is preferred: R. v. Hodges, 8 C. & P. 195.

In R. v. Dickinson, R. & R. 401, it being discovered after conviction that the witnesses had been examined before the grand jury without being sworn, the judge thought the objection came too late, and sentenced the prisoner. Subsequently, without deciding on the validity of the objection, the judge thought that, as a matter of discretion, it was better to direct application to be made for a pardon.

As to whether a bill once thrown out by the grand jury can be submitted *de novo* during the same term of the

court, *see* R. v. Humphreys, Car. & M. 601; R. v. Newton, 2 M. & Rob. 503. By observing either one or the other of the preliminary formalities required by s. 641 a new bill founded on the same facts may, it would seem, be preferred during the same term.

Witnesses may be examined before the petit jury whose names are not on the back of the indictment: Archbold, 86.

BENCH WARRANT. (*Amended*).

648. When any one against whom an indictment has been duly preferred and has been found, and who is then at large, does not appear to plead to such indictment, whether he is under recognizances to appear or not—

(*a*) *the court before which the accused ought to have been tried may issue a warrant for his apprehension, which may be executed in any part of Canada;*

(*b*) the officer of the court at which the said indictment is found or (if the place or trial has been changed) the officer of the court before which the trial is to take place, shall, at any time after the time at which the accused ought to have appeared and pleaded, grant to the prosecutor, upon application made on his behalf and upon payment of twenty cents, a certificate of such indictment having been found. The certificate may be in the form GG in schedule one hereto, or to the like effect. Upon production of such certificate to any justice for the county or place in which the indictment was found, or in which the accused is or resides or is suspected to be or reside, such justice shall issue his warrant to apprehend him, and to cause him to be brought before such justice, or before any other justice for the same county or place, to be dealt with according to law. The warrant may be in the form HH in schedule one hereto, or to the like effect.

2. If it is proved upon oath before such justice that any one apprehended and brought before him on such warrant is the person charged and named in such indictment, such justice shall, without further inquiry and examination, either commit him to prison by a warrant which may be in the form II in schedule one hereto, or to the like effect, or admit him to bail as in other cases provided; *but if it appears that the accused has without reasonable excuse broken his recognizance to appear he shall not in any case be bailable as of right.*

3. If it is proved before the justice upon oath that any such accused person is at the time of such application and production of the said certificate as aforesaid confined in any prison for any other offence than that charged in the said indictment, such justice shall issue his warrant directed to the warden or gaoler of the prison in which such person is then confined as aforesaid, commanding him to detain him in his custody until by lawful authority he is removed therefrom. Such warrant may be in the form JJ. in schedule one hereto, or to the like effect. R. S. C. c. 174, ss. 33, 34 & 35. 11 & 12 V. c. 42, s. 3, Imp.: Archbold, 89.

GG.—(*Section* 648.)

CERTIFICATE OF INDICTMENT BEING FOUND.

Canada,
Province of ,
County of .

I hereby certify that at a Court of (Oyer and Terminer, *or* General Gaol Delivery, *or* General Sessions of the Peace) holden in and for the county of , at , in the said (county), on , a bill of indictment was found by the grand jury against A. B., therein described as A. B. late of (*labourer*), for that he (*&c., stating shortly the offence*), and that the said A. B. has not appeared or pleaded to the said indictment.

Dated this day , in the year

Z. X.
(*Title of officer.*)

HH.—(*Section* 648.)

WARRANT TO APPREHEND A PERSON INDICTED.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of

Whereas it has been duly certified by J. D., clerk of the (*name the court*) (*or* E. G., deputy clerk of the Crown *or* clerk of the peace, *or as the case may be*), in and for the county of , that (*etc., stating the certificate*). These are therefore to command you in Her Majesty's name forthwith to apprehend the said A. B., and to bring him before (*me*) or some other justice or justices of the peace in and for the said county to be dealt with according to law.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (*Name of county.*)

II.—(*Section* 648.)

WARRANT OF COMMITMENT OF A PERSON INDICTED.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of , and the keeper of the common gaol, at , in the said county of

Whereas by a warrant under the hand and seal of , (*a*) justice of the peace in and for the said county of , dated , after reciting that it had been certified by J. D., (*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 Her Majesty's name, forthwith to apprehend the said A. B., and to bring him before (*him*) the said justice of the peace or before some other justice or justices in and for the said county, to be dealt with according to law; and whereas the said A. B. has been apprehended under and by virtue of the said warrant, and being now brought before (*me*) it is hereupon duly proved to (*me*) upon oath that the said A. B. is the same person who is named and charged as aforesaid in the said indictment: These are therefore to command you, the said constables and peace officers, or any of you, in Her Majesty's name, forthwith to take and convey the said A. B. to the said common gaol at , in the said county of , and there to deliver him to the keeper thereof, together with this precept; and (*I*) hereby command you the said keeper to receive the said A. B. into your custody in the said gaol, and him there safely to keep until he shall thence be delivered by due course of law.

Given under (*my*) hand and seal, this day of in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (Name of county.)

JJ.—(*Section* 648.)

WARRANT TO DETAIN 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 Her Majesty's name, to detain the said A. B. in your custody in the common gaol aforesaid, until by a writ of *habeas corpus* he shall be removed therefrom, for the purpose of being tried upon the said indictment, or until he shall otherwise be removed or discharged out of your custody by due course of law.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (*Name of county.*)

PART XLIX.

REMOVAL OF PRISONERS—CHANGE OF VENUE.

649. The Governor in Council or the Lieutenant-Governor in Council of any province may, if, from the insecurity or unfitness of any gaol of any county or district for the safe custody of prisoners, or for any other cause, he deems it expedient so to do, order any person charged *with an indictable offence* confined in such gaol or for whose arrest a warrant has been issued, to be removed to any other place for safe keeping or to *any* gaol, which place or gaol shall be named in such order, there to be detained until discharged in due course of law, or removed for the purpose of trial to the gaol of the county or district in which the trial is to take place; and a copy of such order, certified by the clerk of the Queen's Privy Council for Canada, or the clerk of the Executive Council, or by any person acting as such clerk of the Privy Council or Executive Council, shall be sufficient authority to the sheriffs and gaolers of the counties or districts respectively named in such order, to deliver over and to receive the body of any person named in such order. R. S. C. c. 174, s. 97.

2. The Governor in Council or a Lieutenant-Governor in Council may, in any such order, direct the sheriff in whose custody the person to be removed then is, to convey the said person to the place or gaol in which he is to be confined, and in case of removal to another county or district shall direct the sheriff or gaoler of such county or district to receive the said person, and to detain him until he is discharged in due course of law, or is removed for the purpose of trial to any other county or district. R. S. C. c. 174, s. 98.

3. The Governor in Council or a Lieutenant-Governor in Council may make an order as hereinbefore provided in respect of any person under sentence of imprisonment or under sentence of death,—and in the latter case, the sheriff to whose gaol the prisoner is removed shall obey any direction given by the said order or by any subsequent order in council, for the return of such prisoner to the custody of the sheriff by whom the sentence is to be executed. R. S. C. c. 174, s. 100.

650. If after such removal a true bill for any indictable offence is returned by any grand jury of the county or district from which any such person is removed, against any such person, the court into which such true bill is returned, may make an order for the removal of such person, from the gaol in which he is then confined, to the gaol of the county or district in which such court is sitting, for the purpose of his being tried in such county or district. R. S. C. c. 174, s. 99.

CHANGE OF VENUE.

651. Whenever it appears to the satisfaction of the court or judge hereinafter mentioned, that it is expedient to the ends of justice that the trial of any person charged with an indictable offence should be held in some dis-

trict, county or place other than that in which the offence is supposed to have been committed, or would otherwise be triable, the court before which such person is or is liable to be indicted may, at any term or sitting thereof, and any judge who might hold or sit in such court may, at any other time, either before or after the presentation of a bill of indictment, order that the trial shall be proceeded with in some other district, county or place within the same province, named by the court or judge in such order; but such order shall be made upon such conditions as to the payment of any additional expense thereby caused to the accused, as the court or judge thinks proper to prescribe.

2. Forthwith upon the order of removal being made by the court or judge, the indictment, if any has been found against the prisoner, and all inquisitions, informations, depositions, recognizances and other documents relating to the prosecution against him, shall be transmitted by the officer having the custody thereof to the proper officer of the court at the place where the trial is to be had, and all proceedings in the case shall be had, or, if previously commenced, shall be continued in such district, county or place, as if the case had arisen or the offence had been committed therein.

3. The order of the court, or of the judge, made under this section, shall be a sufficient warrant, justification and authority, to all sheriffs, gaolers and peace officers, for the removal, disposal and reception of the prisoner, in conformity with the terms of such order; and the sheriff may appoint and empower any constable to convey the prisoner to the gaol in the district, county or place in which the trial is ordered to be had.

4. Every recognizance entered into for the prosecution of any person, and every recognizance, as well of any witness to give evidence, as of any person for any offence, shall, in case any such order, as provided by this section, is made, be obligatory on each of the persons bound by such recognizance as to all things therein mentioned with reference to the said trial, at the place where such trial is so ordered to be had, in like manner as if such recognizance had been originally entered into for the doing of such things at such last mentioned place: Provided that notice in writing shall be given either personally or by leaving the same at the place of residence of the persons bound by such recognizance, as therein described, to appear before the court, at the place where such trial is ordered to be had. R. S. C. c. 174, s. 102.

See s. 600, s-s. 2.

By this section, 651, the court or judge has a discretionary power of a wide extent: "*Whenever it appears to the satisfaction of the court or judge*," it says, and when the court or judge declares that it so appears, the matter *quoad hoc* is at an end, the venue is changed, and the trial must take place in the district, county or place designated in the order.

The words of the statute require that the court or judge be satisfied that the change of venue *is expedient to the ends of justice.* Mr. Justice Sanborn, in *Ex parte* Brydges, 18

L. C. J. 141, said that "the common law discourages change of venue, and it is only to be granted with caution and upon strong grounds."

The following cases decided in England may be usefully noticed here:

Where there was a prospect of a fair trial the court refused to change the venue, though the witnesses resided in another county: R. v. Dunn, 11 Jur. 287.

The court will not permit the venue in an indictment to be changed for any other cause than the inability to obtain a fair trial in the original jurisdiction: R. v. Patent Eureka and Sanitary Manure Company, 13 L. T. 365.

The court has no power to change the venue in a criminal case, nor will they order a suggestion to be entered on the roll to change the place of trial in an information for libel, on the ground of inconvenience and difficulty in securing the attendance of the defendant's witnesses: R. v. Cavendish, 2 Cox, 176.

Change of venue asked for upon the ground on an indictment for conspiracy to destroy foxes, that the gentlemen who were likely to serve on the jury were much addicted to fox-hunting refused: R. v. King, 2 Chit. Rep. 217.

It is no ground to change the venue that the defendant's witnesses are all resident in another county and that he has no funds to bring them for his trial: R. v. Casey, 13 Cox, 614.

The court will remove an indictment for a misdemeanour from one county to another, if there is reasonable cause to apprehend or suspect that justice will not be impartially administered in the former county: R. v. Hunt, 3 B. & Ald. 444; 2 Chit. 130.

The court has a discretionary power of ordering a suggestion to be entered on the record of an indictment for felony, removed thither by *certiorari*, for the purpose of

awarding the jury process into a foreign county; but this power will not be exercised unless it is absolutely necessary for the purpose of securing an impartial trial: R. v. Holden, 5 B. &. Ad. 347.

In the case of R. v. Harris, *et al.*, 3 Burr. 1330, the private prosecutors, in their affidavit on an application made by them for a change of the venue, went no further than to swear generally "that they *verily believed* that there could not be a fair and impartial trial had by a jury of the City of Glouçester," without giving any particular reasons or grounds for entertaining such a belief. The case to be tried was an information against the defendants, as aldermen of Gloucester, for a misdemeanour in refusing to admit several persons to their freedom of the city, who demanded their admission, and were entitled to it, and in consequence to vote at the then approaching election of members of Parliament for that city, and whom the defendants did admit after the election was over; but would not admit them till after the election, and thereby deprived them of their right of voting at it. The prosecutors had moved for this rule on a supposition "that the citizens of the city could not but be under an influence or prejudice in this matter." The application was refused.

"There must be a clear and solid foundation for it," said Lord Mansfield; "now, in the present case, this general swearing to apprehension and belief only is not a sufficient ground for entering such a suggestion, especially as it is sworn on the other side that there is a list returned up, consisting of above six hundred persons duly qualified to serve. Surely a person may espouse the interest of one or another candidate at an election, without thinking himself obliged to justify, or being even inclined to defend, the improper behaviour of the friends or agents of such candidate."

"The place of trial," said Mr. Justice Denison, "ought not to be altered from that which is settled and established

by the common law, unless there shall appear a clear and plain reason for it, which cannot be said to be the present case."

"Here is no fact suggested," said Mr. Justice Foster, "to warrant the conclusion that there cannot be a fair and impartial trial had by a jury of the City of Gloucester. It is a conclusion without premises. The reason given, or rather the *supposition*, would hold as well in all cases of riots at elections. This is no question relating to the interest of the voters; it is only whether the defendants, the persons particularly charged with this misdemeanour, have personally acted corruptly or not."

"There was no rule better established," said Mr. Justice Wilmot, "than that all causes shall be tried in the county, and by the neighbourhood of the place where the fact is committed; and, therefore, that rule ought never to be infringed, unless it plainly appears that a fair and impartial trial cannot be had in that county; . . It does not follow that because a man voted on one side or on the other he would therefore perjure himself to favour that party when sworn upon a jury. God forbid! The freemen of this corporation are not at all interested in the personal conduct of these men upon this occasion; the same reasoning would just as well include all cases of election riots."

It may be remarked on this case: (1) That the application for a change of the venue was made by the prosecution, and there is no doubt that much stronger reason must then be given than when the application is made by the defendant; (2) That the case dates from 1762, and that in some of the more recent cases on this point, the court seems to have granted such an application, *on the part of the defendant*, with less reluctance. This is easily explained; it must have been an unheard of thing, at first, to change the venue, at common law, at the time where the jurors themselves were the witnesses, and the only witnesses; where they were selected for each case because they were supposed to

know the facts. Where no other witnesses, no evidence whatever was offered to them, it may well be presumed that a change in the venue was not allowable under any circumstances. The rule must then invariably, inflexibly, have been that the venue should always be laid in the county where the offence was committed. The strictness of the rule can have been relaxed only by degrees, and even when, for a long period, the strongest reason in support of it had ceased to exist, by the changes which have given us the present system of jury trial, it is not surprising to find the judges still adhering to it as much as possible. But, insensibly, a change is perceptible in the decisions, and now, under our statute, there is no doubt that every time, for any reason whatever, *it is expedient to the ends of justice* that a change in the venue, upon any criminal charge, should take place, it should be granted whether applied for by the prosecution or by the defence.

Another decision, in England, on the question may be noticed here:

The court removed an indictment from the Central Criminal Court, and changed the venue from London to Westminster, where it was a prosecution instituted by the Corporation of London for a conspiracy in procuring false votes to be given at an election to the office of bridge-master: R. v. Simpson, 5 Jur. 462.

A case in the Province of Quebec gave rise to a full discussion on this section: *Ex parte* Brydges, 18 L. C. J. 141.

In this case, a coroner's jury in the district of Quebec returned a verdict of manslaughter against the defendant, a resident of Montreal. The coroner issued his warrant, upon which the defendant was arrested; he gave bail, and then, in Montreal, before Mr. Justice Badgley, a judge of the Court of Queen's Bench, made application in chambers for a change in the venue; the only affidavit, in support of the application, was the defendant's, who swore that he could not have a fair trial in the district of Quebec. The

crown was served with a notice of the application, and resisted it; Mr. Justice Badgley, however, granted it, and ordered that the trial should take place in Montreal, deciding (1) that, under the statute, a judge of the Court of Queen's Bench, in chambers in Montreal, may order the change of the venue from Quebec to Montreal, of the trial of a person charged with the commission of an offence in the Quebec district, and (2) that this order may be given immediately after the arrest of the prisoner.

On this last point there is no room for doubt. By the statute, as soon as a person is *charged* with an offence, the application can be made, and there is no doubt, that in Brydges' case such an application could even have been made before the issuing of the warrant of arrest against him. The finding by the coroner's inquisition of manslaughter against him was the *charge*. From the moment this finding was delivered by the jury Brydges *stood charged* with manslaughter; *see* now s. 568, *ante*. In fact, this finding was equivalent to a true bill by a grand jury, and upon it he had, if remaining intact, to stand his trial, whether or not a bill was later submitted to the grand jury, whether the grand jury found "a true bill," or a "no bill" in the case. *See* R. v. Maynard, R. & R. 240; R. v. Cole, 2 Leach, 1095; and the authorities cited in R. v. Tremblay, 18 L. C. J. 158.

Upon the other point decided, in this case, by Mr. Justice Badgley, as to the jurisdiction he had to grant the order required, there seemed at first to be more doubt. But the question was set at rest by the judgment afterwards given in the case by Ramsay and Sanborn, JJ., who entirely concurred with Mr. Justice Badgley in his ruling on the question, as follows:

Ramsay, J.—"Before entering on the merits of these rules it becomes necessary to deal with a question of jurisdiction which has been raised on the part of the crown. It is urged that this case is not properly before us, and

that if it is, that the law under which it is brought before the court, sitting in this district, is of so inconvenient and dangerous a character that it should be altered. With the inconvenience of the law we have nothing to do; neither ought we to express any opinion as to whether the grounds on which the learned judge who gave the order to change the venue were slight or not, provided he had jurisdiction. The whole question rests on the interpretation of s. 11 of the Criminal Procedure Act of 1869. That section is in these words: (His Lordship read the section.)

"We have only to ask whether, at the time this order was given, Judge Badgley was a judge who might hold or sit in the Court of Queen's Bench. If so, he had jurisdiction.

"But we are told that the statute evidently intended that the judge giving the order should be actually sitting in the district in which the offence is alleged to have taken place. There is no trace of any such intention in the statute and there is no rule of interpretation of statutes so well established as this, that where the words of a statute are clear and sufficient they must be taken as they stand. If courts take upon themselves, under the pretext of interpreting the law, to diminish or extend the clearly expressed scope of a statute, they are usurping the powers of the legislature, and assuming a responsibility which in no way devolves on them. In the particular case before us it does not appear clear to my mind that it was the intention of the legislature to limit the power to change the venue to a judge sitting in the district where the offence was said to be committed. In the first place, our statute goes far beyond the old law, which, I believe, is still unchanged in England. Not only is the power given here to a judge in chambers to change the venue, but he may do so before the bill of indictment is either laid or found. The object was to protect a man from being even put to trial by a prejudiced grand jury, and this could only be effectually

done by giving the power to any judge who could hold or sit in the court to change the venue, for it will be observed that in 1869, when the Act was passed, there were many districts in this Province in which there was no resident judge, and in Ontario the judges of the superior courts all live in Toronto, and, so far as I know, in each of the other Provinces, they live in the capital town. Unless, then, there was to be a particular provision for the Province of Quebec the law had to be drawn as we find it. Besides this the Court of Queen's Bench is not for the district but for the whole Province. The object of dividing the Province into districts is for convenience in bringing suits, but the jurisdiction of the court is general. This has never been doubted, and it has been the practice both in England and this country to bail in the place where the prisoner is arrested. In the case of *Blossom*, where the taking of bail was vigorously resisted by the crown, this court, sitting at Quebec, bailed the prisoner who was in jail here. This is going a great deal farther, but the power of the court to bail was not, and, I think, could not, be questioned. We are told that great inconvenience might arise if this statute be not restrained. This is really no valid objection to the law. There are no facultative acts which may not be abused one way or another. A discretionary power involves the possibility of its indiscreet exercise, but that is not ground for us to annul the law creating it. In this case the inconveniences referred to are not specially apparent —the prisoner arrested in Montreal was bailed there, and made his application to have the venue changed to the district where he resided and where he actually was. The order made by Mr. Justice Badgley could hardly then be used as a precedent for an abusive use of the statute. It must be understood that in saying this I do not refer to the sufficiency or insufficiency of the affidavit on which the order was given, which is not in any way before us, but solely to the circumstance of the accused being actually before the judge here. As the point is a new one, and as

questions of jurisdiction are always delicate, we would willingly have reserved it for the decision of all the judges; but the Act allowing us to reserve cases is unfortunately as much too narrow as the statute before us appears to Mr. Ritchie to be too wide in its phraseology. We can only reserve after conviction, and irregular reservations for the opinion of the judges have no practically good results. We must, therefore, give the judgment to the best of our ability, and I must say for my own part that I cannot see any difficulty in the matter. The words of the statute are perfectly unambiguous, and there is no reason to say that they lead to any absurd conclusion."

Sanborn, J.—"First, as to the jurisdiction. It is objected that the venue was improperly changed, and that this inquisition ought to be before the court at Quebec. If we are not 'legally' possessed of the inquisition of course we cannot entertain these motions to quash. This has been fully and exhaustively treated by the President of the court. It is merely for us to inquire: Had Mr. Justice Badgley the power to order the trial to take place here instead of in the district of Quebec where the accident occurred? The 11th section of the Criminal Procedure Act undoubtedly gives that power. He was a judge, entitled to sit at the court *where the party was sent for trial.* The jurisdiction of any of the judges of the Queen's Bench is not local for any district, but extends to all parts of the Province."

The words "he was a judge, entitled to sit at the court *where the party was sent for trial,*" in Mr. Justice Sanborn's remarks appear not supported by the statute. It is the court at which the party charged with a crime was at first liable to be indicted, or any judge who might hold or sit in *that court,* who have jurisdiction in the matter, *not the court where the party is sent for trial nor a judge who can hold and sit in such last mentioned court.* Of course, in Brydges' case this distinction could not be made, as Mr. Justice

Badgley, who gave the order to change the venue, could sit in the court at Quebec as well as in Montreal, and in Montreal as well as in Quebec. But suppose that such an application is made to a judge who can hold or sit in a court of quarter sessions, at which the party charged is *or is* liable to be indicted; and there are not many cases where a party accused is *not liable* to be indicted before the court of quarter sessions; the statute gives jurisdiction only to the court of quarter sessions of and for the locality where the trial should take place, in the ordinary course of law, or to a judge thereof, and not to a court or judge of another locality; and the judge of the quarter sessions for Montreal, for instance, could not, in a case from the district of Quebec, order the trial to take place in Montreal, though he would be a judge entitled to sit at the court *where the party was sent for trial.*

See in *Re* Sproule, 12 S. C. R. 140, questions as to change of venue, and R. v. Martin, 16 Q. L. R. 281.

Change of venue allowed upon prisoner's solicitor's affidavit that from conversations he had had with the jurors, he was convinced of a strong prejudice against the prisoner: R. v. McEneany, 14 Cox, 87; *see* R. v. Walter, 14 Cox, 579.

Held, that 32 & 33 V. c. 20, s. 11, does not authorize any order for the change of the place of trial of a prisoner in any case where such change would not have been granted under the former practice, the statute only affecting procedure: R. v. McLeod, 5 P. R. (Ont.) 181.

The power so granted is purely discretionary, but, where application is made on the part of the accused, it will be a sufficient ground that persons might be called on the jury whose opinions might be tainted with prejudice, and whom the prisoner could not challenge: R. v. Russell, Ramsay's App. Cas. 199. *See Ex parte* Corwin, 24 L. C. J. 104, 2 L. N. 364.

As to the carrying out of the sentence where venue has been changed, *see post*, s. 733, s-s. 4.

PART L.

ARRAIGNMENT. (*Amended*).

652. If any person against whom any indictment is found is at the time confined for some other cause in the prison belonging to the jurisdiction of the court by which he is to be tried, the court may by order in writing, without a writ of *habeas corpus*, direct the warden or gaoler of the prison or *sheriff or other person having the custody of the prisoner* to bring up the body of such person *as often as may be required for the purposes of the trial*, and such warden, gaoler, *sheriff or other person* shall obey such order. R. S. C. c. 174, s. 101. 30-31 V. c. 35 (Imp.).

"Prison" defined, s. 3.

RIGHT TO INSPECT DEPOSITIONS, ETC.

653. Every accused person shall be entitled at the time of his trial to inspect, without fee or reward, all depositions, or copies thereof, taken against him and returned into the court before which such trial is had, *and to have the indictment on which he is to be tried read over to him if he so requires*. R. S. C. c. 174, s. 180.

This is the 6 & 7 Wm. IV. c. 114, s. 4 of the Imperial Statutes. *See* s. 597, *ante*.

COPY OF INDICTMENT.

654. Every person indicted for any offence shall, before being arraigned on the indictment, be entitled to a copy thereof on paying the clerk *five* cents per folio *of one hundred words* for the same, if the court is of opinion that the same can be made without delay to the trial, but not otherwise. R. S. C. c. 174, s. 181.

The cost was *ten* cents by the repealed statute. At common law, the prisoner was not entitled to a copy of the indictment in treason and felonies.

COPY OF DEPOSITIONS.

655. Every person indicted shall be entitled to a copy of the depositions returned into court on payment of *five* cents per folio *of one hundred words* for the same, provided, if the same are not demanded before the opening of the assizes, term, sittings or sessions, the court is of opinion that the same can be made without delay to the trial, but not otherwise; but the court may, if it sees fit, postpone the trial on account of such copy of the depositions not having been previously had by the person charged. R. S. C. c. 174, s. 182, 11-12 V. c. 42, s. 27 (Imp.).

The cost was ten cents by the repealed statute. *See* s. 597, *ante*.

PLEAS IN ABATEMENT ABOLISHED. (*New*).

656. No plea in abatement shall be allowed after the commencement of this Act. Any objection to the constitution of the grand jury may be taken by motion to the court, and the indictment shall be quashed if the court is of opinion both that such objection is well founded and that the accused has suffered or may suffer prejudice thereby, but not otherwise. R. S. C. c. 174, s. 142 part.

The repealed clause applied only to certain pleas in abatement. An objection that the grand jury was composed of more than twenty-three members should now be taken by motion: see Bishop, 1 Cr. P. 884. It is only objections to the *constitution* of the grand jury that this section provides for. The Code makes no provision on the constitution of the grand jury, with the exception of s. 662, *post*; in R. v. Mitchel, 3 Cox 93, an objection that a grand juror was disqualified was taken by a plea in abatement. There is no such thing known to the criminal law as a challenge to the grand jury: R. v. Mercier, Q. R. 1 Q. B. 541.

It seems that an objection that the witnesses have not been properly sworn before giving their evidence before the grand jury is a question of law that can be reserved for the Court of Appeal: R. v. Tew, Dears, 429.

The prosecutor has the right to move to quash the finding of the grand jury: R. v. Fieldhouse, 1 Russ. 1030.

Though an objection to the constitution of the grand jury may be well founded, yet the indictment is not to be quashed if the court is of opinion that the accused has not suffered or will not suffer prejudice thereby by the objection. *See* R. v. Belyea, James (N.S.) 220.

PLEA—REFUSAL TO PLEAD. (*Amended*).

657. When the accused is called upon to plead he may plead either guilty or not guilty, or such special plea as is hereinbefore provided for.

2. If the accused *wilfully* refuses to plead, or will not answer directly, the court may order the proper officer to enter a plea of not guilty. R. S. C. c. 174, ss. 144, 145.

The words "stands mute of malice" in the repealed clause are replaced by "wilfully refuses to plead."

This clause is taken from 7 & 8 Geo. IV. c. 28, ss. 1 & 2 of the Imperial statutes.

Formerly, to stand mute was to confess, and, if the defendant stood mute of malice, he was immediately sentenced. In the case of R. v. Mercier, 1 Leach, 183, the prisoner being arraigned, stood mute. The court ordered the sheriff to return a jury *instanter*, to try whether the prisoner stood mute obstinately, or by the visitation of God. A jury being accordingly returned, the following oath was administered to them: "You shall diligently inquire and true presentment make for and on behalf of Our Sovereign Lord the King, whether Francis Mercier, the now prisoner at the bar, being now here indicted for the wilful murder of David Samuel Mondrey, stands mute fraudulently, wilfully and obstinately, or by the providence and act of God, according to your evidence and knowledge." The jury examined the witnesses in open court, and returned as their verdict that the prisoner stood mute of malice and not by the visitation of God. Whereupon the court immediately passed sentence of death upon the prisoner who was accordingly executed on the Monday following.

A prisoner who had been previously tried and convicted, but whose trial was deemed a nullity on account of some informality in swearing the witnesses, was again arraigned upon an indictment for the same offence and refused to plead, alleging that he had been already tried. Littledale, J., and Vaughan, B., ordered a plea of not guilty to be entered for him: R. v. Bitton, 6 C. & P. 92.

A person deaf and dumb was to be tried for a felony; the judge ordered a jury to be empannelled to try whether he was mute by the visitation of God; the jury found that he was so; they were then sworn to try whether he was able to plead which they found in the affirmative, and the defendant by a sign pleaded not guilty; the judge then

ordered the jury to be empannelled to try whether the defendant was now sane or not, and, on this question, directed them to say whether the defendant had sufficient intellect to understand the course of the proceedings to make a proper defence, to challenge the jurors and comprehend the details of the evidence, and that, if they thought he had not, they should find him of non-sane mind: R. v. Pritchard, 7 C. & P. 303.

It seems that where a prisoner who is called on to plead remains mute the court cannot hear evidence to prove that he does so through malice, and then enter a plea of not guilty under this section; but a jury must be empannelled to try the question of malice, and it is upon their finding that the court is authorized to enter the plea: R. v. Israel, 2 Cox, 263.

A prisoner, when called upon to plead to an indictment, stood mute. A jury was empannelled and sworn to try whether he was mute of malice or by the visitation of God. A verdict of mute of malice having been returned the court ordered a plea of not guilty to be entered on the record: R. v. Schleter, 10 Cox, 409.

A collateral issue of this kind is always tried *instanter* by a jury empannelled for that purpose. In fact there is, properly speaking, no issue upon it; it is an inquest of office. No peremptory challenges are allowed: R. v. Radcliffe, Fost. 36, 40. The jury may be chosen amongst the jurors in attendance for the term of court, but must be returned by the sheriff, on the spot, as a special panel: Dickinson's Quarter Sessions, 481. If the jury return a verdict of "mute by the visitation of God," as where the prisoner is deaf or dumb, or both, a plea of not guilty is to be entered, and the trial is to proceed in the usual way, but in so critical a case great diligence and circumspection ought to be exercised by the court; all the proceedings against the prisoner must be examined with a critical eye, and every possible assistance consistent with the rules of

law given to him by the court: R. v. Steel, 1 Leach 451. In the case of R. v. Jones, *note*, 1 Leach 452, the jury returned that the prisoner was "mute by the visitation of God." It appearing that the prisoner, who was deaf and dumb, could receive and communicate information by certain signs, a person skilled in those signs was sworn to act as interpreter and the trial then proceeded.

By s. 737, *post*, it is provided for the case where an accused is insane: *see* R. v. Berry, 13 Cox, 189. Formerly, after the prisoner had pleaded "not guilty," he was asked by the clerk: "*How wilt thou be tried?*" To have his trial he had to answer, if a commoner, "*By God and the country:*" if a peer, "*By God and my peers.*" If he refused to answer, the indictment was taken *pro confesso*, and he stood convicted: 4 Blacks. 341.

Plea of guilty allowed to be withdrawn: R. v. Huddell, 20 L. C. J. 301. *See* R. v. Brown, 1 Den. 291, and cases there cited; also, Kinloch's case, Fost. 16.

SPECIAL PROVISIONS IN TREASON.

658. When any one is indicted for treason, or for being accessory after the fact to treason, the following documents shall be delivered to him after the indictment has been found, and at least ten days before his arraignment; that is to say:

(*a*) a copy of the indictment;

(*b*) a list of the witnesses to be produced on the trial to prove the indictment; and

(*c*) a copy of the panel of the jurors who are to try him returned by the Sheriff.

2. The list of the witnesses and the copy of the panel of the jurors must mention the names, occupations, and places of abode of the said witnesses and jurors.

3. The documents aforesaid must all be given to the accused at the same time and in the presence of two witnesses.

4. This section shall not apply to cases of treason by killing Her Majesty, or to cases where the overt act alleged is any attempt to injure her person in any manner whatever, or to the offence of being accessory after the fact to any such treason. 7 Anne, c. 21, s. 11. 6 Geo. IV. c. 50. 39-40 Geo. III. c. 96. 5 & 6 V. c. 11 (Imp.).

See R. v. Frost, 2 Moo. 140; R. v. Burke, 10 Cox, 519.

PART LI.

TRIAL.

659. Every person tried for any indictable offence shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto by counsel learned in the law. R. S. C. c. 174 s. 178. 6-7 Wm. IV. c. 114 (Imp.).

See remarks under the two next sections.

PRESENCE OF THE ACCUSED AT TRIAL.

660. 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.*

Sub-section 2 is new as to offences heretofore known as felonies.

The defendant should in all cases, as a general rule, appear in person to plead and to receive his sentence. In cases where the punishment may be for more than five years, (*see* s. 668) the court will probably not allow the defendant to be out of court, except for grave reasons, and under particular circumstances. A defendant should submit to the jurisdiction of the court and appear in person before his plea can be received: R. v. Maxwell, 10 L. C. R. 45.

The following cases on the practice may serve as guides in the future notwithstanding the change introduced by s-s. 2 of s. 660.

A prisoner charged with felony, whether he has been on bail or not, must be at the bar, viz., in the dock during his trial, and cannot take his trial at any other part of the court, even with the consent of the prosecutor: R. v. St. George, 9 C. & P. 483. A merchant was indicted for an offence against the Act of parliament prohibiting slave-trading (felony). His counsel applied to the court to allow him to sit by him, not on the ground of his position in

society, but because he was a foreigner, and several of the documents in the case were in a foreign language, and it would, therefore, be convenient for his counsel to have him by his side, that he might consult him during his trial: *Held*, that the application was one which ought not to be granted: R. v. Zulueta, 1 C. & K. 215, 1 Cox, 20. A similar application by a captain in the army was also refused in R. v. Douglas, Car. & M. 193. But in misdemeanours a defendant who is on bail and surrenders to take his trial need not stand at the bar to be tried: R. v. Lovett, 9 C. & P. 462.

COUNSEL'S ADDRESSES TO THE JURY. (*Amended*).

661. If an accused person, or any one of several accused persons being tried together, is defended by counsel, such counsel shall, at the end of the case for the prosecution, declare whether he intends to adduce evidence or not on behalf of the accused person for whom he appears; and if he does not thereupon announce his intention to adduce evidence *the counsel for the prosecution may address the jury by way of summing up.*

2. Upon every trial for an indictable offence, whether the accused person is defended by counsel or not, he or his counsel shall be allowed, if he thinks fit, to open his case, and after the conclusion of such opening to examine such witnesses as he thinks fit, and when all the evidence is concluded to sum up the evidence. *If no witnesses are examined for the defence the counsel for the accused shall have the privilege of addressing the jury last, otherwise such right shall belong to the counsel for the prosecution:* Provided, that the right of reply shall be always allowed to the Attorney-General or Solicitor-General or to *any* counsel acting on behalf *of either of them.* R. S. C. c. 174, s. 179. 28 V. c. 18, s. 2 (Imp.).

The words in italics in s-s. 2 seem in contradiction with the last part of s-s. 1. The corresponding section in the Imp. draft Code is differently worded. However, as it is, this s. 661 probably bears a construction that brings no substantial change in the law. The reply is now given to *any* counsel acting on behalf of the *Attorney-General or Solicitor-General* instead of to any *Queen's* counsel *acting on behalf of the Crown.* The addresses of counsel are, therefore, to take place as follows:—*First case: When no evidence for the defence:* Counsel for the Crown opening the case: Crown's evidence. *Defendant or his counsel declares that he has no evidence to adduce*; counsel for the Crown

sums up: defendant or his counsel addresses jury; reply of counsel for the Crown, but only by Attorney or Solicitor-General, or counsel, acting on behalf of either of them. *Second case: where the defence adduces evidence.* Crown prosecutor opens the case: evidence of the Crown; defendant or his counsel addresses the jury: defendant's evidence; defendant or his counsel sums up; reply of prosecution in all cases. In the first case, the counsel for the prosecution seldom in practice exercises both the rights of summing up and replying, and should not do so except for special reasons: R. v. Holchester, 10 Cox, 226; if the counsel, however, is not the Attorney-General or Solicitor-General, or a counsel acting on behalf of either of them, he has to sum up the evidence, after it is over and before the defendant or his counsel addresses the jury, if he thinks proper to do so, as he is not allowed to reply; if he is the Attorney-General or Solicitor-General, or a counsel acting on behalf of either of them, he, in practice, does not sum up, as he is entitled to reply whether the defendant adduces evidence or not, though in England this right is very seldom exercised where no evidence, or evidence as to character only, is offered. In the second case, in practice, the defence addresses the jury only after its evidence is over; two addresses would generally have no other result but to lengthen the trial, and fatigue judge, counsel and jury: *see* R. v. Kain, 15 Cox, 388, and Archbold, 178.

Opening of counsel for prosecution.—A prosecutor conducting his case in person, and who is to be examined as a witness in support of the indictment, has no right to address the jury as counsel: R. v. Brice, 2 B. & Ald. 606; R. v. Stoddart, Dickinson's Quarter Sessions, 152; R. v. Gurney, 11 Cox, 414, where a note by the reporter, supported by authorities, says that such is the law whether the prosecutor is to be a witness or not.

Sergeant Talfourd, in Dickinson's Quarter Sessions, 495, on the duties of the counsel for the prosecution, says:

"When the counsel for the prosecution addresses the jury he ought to confine himself to a simple statement of the facts which he expects to prove; but in cases where the prisoner has no counsel he should particularly refrain from stating any part of the facts, the proof of which from his own brief appears doubtful, except with proper qualification; for he will either produce on the minds of the jurors an impression which the mere failure of the evidence may not remove in instances where the prisoner is unable to comment on it with effect; or may awaken a feeling against the case for the prosecution which in other respects it may not deserve. The court, too, if watchful, cannot fail, in the summing up, to notice the discrepancy between the statement and the proof. But in all cases, as well of felony as misdemeanour, where a prisoner has counsel, not only may the facts on which the prosecution rests be stated, but they may be reasoned on, so as to anticipate any line of defence which may probably be adopted. For as counsel for parties charged with felony may now address the jury in their defence, as might always have been done in misdemeanour, the position of parties charged with either degree of offence is thus assimilated in cases where they have counsel, and it is no longer desirable for the prosecutor's counsel to abstain from observing generally on the case he opens in such manner as to connect its parts in any way he may think advisable to demonstrate the probability of guilt and the difficulty of an opposite conclusion. But even here he should refrain from indulging in invective, and from appealing to the prejudices or passions of the jury; for it is neither in good taste nor right feeling to struggle for a conviction as an advocate in a civil cause contends for a verdict."

On the duties of counsel, in opening the case for the prosecution, it is said in Archbold, 178: "In doing so he ought to state *all* that it is proposed to prove, as well declarations of the prisoners as facts, so that the jury may see if there be a discrepancy between the opening state-

ments of counsel and the evidence afterwards adduced in support of them: *per* Parke, B., R. v. Hartel, 7 C. & P. 773; R. v. Davis, 7 C. & P. 785; unless such declarations should amount to a *confession*, where it would be improper for counsel to open them to the jury; R. v. Swatkins, 4 C. & P. 548. The reason for this rule is that the circumstances under which the confession was made may render it inadmissible in evidence. The general effect only of any confession said to have been made by a prisoner ought, therefore, to be mentioned in the opening address of the prosecutor's counsel."

Mr. Justice Blackburn, in R. v. Berens, 4 F. & F. 842, Warb. Lead. Cas. 237, said that the position of prosecuting counsel in a criminal case is not that of an ordinary counsel in a civil case, but that he is acting in a *quasi* judicial capacity, and ought to regard himself as part of the court: that while he was there to conduct his case, he was to do it at his discretion, but with a feeling of responsibility, not as if trying to obtain a verdict, but to assist the judge in fairly putting the case before the jury, and nothing more.

In R. v. Puddick, 4 F. & F. 497, it is said *per* Crompton, J.: "The counsel for the prosecution are to regard themselves as ministers of justice, and not to struggle for a conviction as in a case at *nisi prius*; nor be betrayed by feelings of professional rivalry to regard the question at issue as one of professional superiority, and a contest for skill and pre-eminence."

Summing up by counsel for the prosecution, where the defence brings no evidence.—It has already been remarked that in practice, if the counsel for the prosecution has the right of reply and intends to avail himself of it, it would be a waste of time for him to sum up; but if the counsel has not the right of reply he will perhaps find it useful to review the evidence as it has been adduced, and give some explanations to the jury. But it has been held in R. v. Puddick, 4 F. & F. 497, that the counsel for the prosecution

ought not, in summing up the evidence, to make observations on the prisoner's not calling witnesses, unless, at all events, it has appeared that he might be fairly expected to be in a position to do so, and that neither ought counsel to press it upon the jury that if they acquit the prisoner they may be considered to convict the prosecutor or prosecutrix of perjury. Nor is it the duty of counsel for the prosecution to sum up in every case in which the prisoner's counsel does not call witnesses. The statute gives him the right to do so, but that right ought only to be exercised in exceptional cases, such as where erroneous statements have been made and ought to be corrected, or when the evidence differs from the instructions. The counsel for the prosecution is to state his case before he calls the witnesses; then, when the evidence has been given, either to say simply, "I say nothing," or "I have already told you what would be the substance of the evidence, and you see the statement which I made is correct;" or in exceptional cases, as if something different is proved from what he expected, to address to the jury any suitable explanation which may be required: R. v. Berens, 4 F. & F. 842, reporter's *note;* R. v. Holchester, 10 Cox, 226; R. v. Webb, 4 F. & F. 862. By the Canada Evidence Act of 1893, 56 V. c. 31, s. 4, it is enacted that the failure of the accused or of his wife or husband to testify shall not be made the subject of comment by the judge or by counsel for the prosecution in addressing the jury.

The defence.—The defendant cannot have the assistance of counsel in examining and cross-examining witnesses, and reserve to himself the right of addressing the jury: R. v. White, 3 Camp. 98; R. v. Parkins, 1 C. & P. 548. But *see post* as to statements by him to the jury. But if the defendant conducts his own case counsel will be allowed to address the court for him on points of law arising in the case: *Idem.* Not more than two counsel are entitled to address the court for a prisoner during the trial upon a point of law: R. v. Bernard, 1 F. & F. 240.

The counsel for the defendant may comment on the case for the prosecution. He may adduce evidence to any extent, and even introduce new facts, provided he can establish them by witnesses. He cannot, however, assume as proved that which is not proved. Nor will he be allowed to state anything which he is not in a situation to prove, or to state the prisoner's story as the prisoner himself might have done: R. v. Beard, 8 C. & P. 142; R. v. Butcher, 2 M. & Rob. 228.

At a meeting of all the judges, in 1881, in England 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 prisoner should state to the jury as alleged existing facts, matters which they have been told in their instructions, on the authority of the prisoner, but which they do not propose to prove in evidence": Archbold, 180.

Bishop says, 1 Cr. Proc. 311: "No lawyer ought to undertake to be a witness for his client, except when he testifies under oath, and subjects himself to cross-examination, and speaks of what he personally knows. Therefore, the practice, which seems to be tolerated in many courts, of counsel for defendants protesting in their addresses to the jury that they believe their clients to be innocent, should be frowned down and put down, and never be permitted to show itself more. If a prisoner is guilty and he communicates the facts fully to counsel in order to enable the latter properly to conduct the defence, then, if the counsel is an honest man, he cannot say he believes the prisoner innocent; but if he is a dishonest man he will as soon say this as anything. Thus a premium is paid for professional lying. Again, if the counsel is a man of high reputation, a rogue will impose upon him by a false story to make him an "innocent agent" in communicating a falsehood to the jury. Lastly, a decent regard for the orderly administration of justice requires that only legal evidence be

produced to the jury, and the unsworn statement of the prisoner's counsel, that he believes the prisoner innocent, is not legal evidence. It is the author's cherished hope that he may live to see the day when no judge, sitting where the common law prevails, will ever, in any circumstances, permit such a violation of fundamental law, of true decorum, and of high policy to take place in his presence as is involved in the practice of which we are now speaking."

On the same subject it is said in 3 Wharton's Cr. L. 3010: "Nor is it proper for counsel in any stage of the case to state their personal conviction of their client's innocence. To do so is a breach of professional privilege, well deserving the rebuke of the court. The defendant is to be tried simply by the legal evidence adduced in the case; and to intrude on the jury statements not legal evidence is an interference with public justice of such a character that, if persisted in, it becomes the duty of the court, in all cases where this can be done constitutionally, to discharge the jury and continue the case. That which would be considered a high misdemeanour in third parties cannot be permitted to counsel. And where the extreme remedy of discharging the jury is not resorted to, any undue or irregular comment by counsel may be either stopped at the time by the court, or the mischief corrected by the judge when charging the jury."

Summing up by the defence.—The counsel for the prisoner or the prisoner himself is entitled at the close of the examination of his witnesses to sum up the evidence: R. v. Wainwright, 13 Cox, 171. In practice, it is the only time when the counsel for the prisoner addresses the jury, and what has just been said on the defence generally applies to the address to the jury, whether made before or after the examination of witnesses.

The rule formerly was that if the prisoner's counsel has addressed the jury the prisoner himself will not be allowed

to address the jury also: R. v. Boucher, 8 C. & P. 141; R. v. Burrows, 2 M. & Rob. 124; R. v. Rider, 8 C. & P. 539. But the following cases show that there seems now in England to be no well settled rule on the subject. Here, in Canada, now that by the Evidence Act of 1893, 56 V. c. 31, s. 4, the prisoner is a competent witness, he probably will not be allowed to make a statement to the jury. As he is at liberty to give his story upon oath, he should not be allowed to protect himself from cross-examination by making the same statement not upon oath.

A person on his trial defended by counsel is not entitled to have his explanation of the case to the jury made through the mouth of his counsel, but may, at the conclusion of his counsel's address, himself address the jury and make such statements, subject to this, that what he says will be treated as additional facts laid before the court, and entitling the prosecution to the reply: R. v. Shimmin, 15 Cox, 122; *see* reporter's *note*, and R. v. Doherty, 16 Cox, 306, Warb. Lead. Cas. 242.

In R. v. Weston, 14 Cox, 346, the prisoner's counsel was allowed to make a statement on behalf of his client.

Per Stephen, J., A prisoner may make a statement to the jury provided he does so before his counsel's address to the jury: R. v. Masters, 50 J. P. 104.

A prisoner on his trial defended by counsel may, at the conclusion of his counsel's address, make a statement of facts to the jury, but the prosecution will be entitled to reply: R. v. Rogers, 2 B. C. L. R. 119.

In R. v. Taylor, 15 Cox, 265, the prisoners were allowed to address the jury after their counsel: *see* R. v. Millhouse, 15 Cox, 622, where the judge said that could be allowed only where the prisoner called no witnesses.

In R. v. Borrowes, cited in Shirley's Leading Cases, 140, the court held that a prisoner defended by counsel is not entitled to address the jury as a matter of right.

The Reply.—If the defendant brings no evidence the counsel for the prosecution is not allowed to reply, except if he be the Attorney-General or Solicitor-General, or counsel acting on behalf of either of them.

On this privilege to reply it is said in 1 Taylor Ev., par. 362: "But as this is a privilege, or rather a prerogative which stands opposed to the ordinary practice of the courts, the true friend of justice will do well to watch with jealousy the parties who are entitled to exercise it. Mr. Horne, so long back as the year 1777, very properly observed that the Attorney-General would be grievously embarrassed to produce a single argument of reason or justice on behalf of his claim, and, as the rule which precludes the counsel for the prosecution from addressing the jury in reply when the defendant has called no witnesses has been very long thought to afford the best security against unfairness in ordinary trials, this fact raises a natural suspicion that a contrary rule may have been adopted, and may still be followed in State prosecutions, for a different and less legitimate purpose. It is to be hoped that ere long this question will receive the consideration which its importance demands, and that the Legislature, by an enlightened interference, will introduce one uniform practice in the trial of political and ordinary offenders."

If the defendant gives any evidence, whether written or parol, the counsel for the prosecution has a right to reply. If witnesses are called merely to give evidence to character the counsel for the prosecution is strictly entitled to reply, though in England, in such cases, the practice is not to reply.

In R. v. Bignold, 4 D. & R. 70, Lord Tenderden revived an important rule, originally promulgated by Lord Kenyon, and by which a reply is allowed to the counsel for the prosecution if the counsel for the defendant, in his address to the jury, states any fact or any document which is not

already in evidence, although he afterwards declines to prove the fact or put in the writing: 5 Burn, 357; *see* R. v. Trevelli, 15 Cox, 289; R. v. Stephens, 11 Cox, 669; R. v. Burns, 16 Cox, 195, Warb. Lead. Cas. 240.

Evidence in reply.—Whenever the defendant gives evidence to prove new matter by way of defence, which the Crown could not foresee, the counsel for the prosecution is entitled to give evidence in reply to contradict it, but then he does not address the jury in reply before going into that evidence. The general rule is that the evidence in reply must bear directly or indirectly upon the subject-matter of the defence, and ought not to consist of new matter unconnected with the defence, and not tending to controvert or dispute it. This is the general rule, made for the purpose of preventing confusion, embarrassment and waste of time; but it rests entirely in the discretion of the judge whether it ought to be strictly enforced or remitted as he may think best for the discovery of truth and the administration of justice: 2 Phillips' Ev. 408; R. v. Briggs, 2 M. & Rob. 199; R. v. Frost, 9 C. & P. 159. Where the counsel for the Crown has, *per incuriam*, omitted to put in a piece of evidence before commencing his reply, and the course of justice might be interfered with if the evidence were not given, the court may permit the evidence to be given: R. v. White 2 Cox, 192. If evidence of his good character is given on behalf of a prisoner, evidence of his bad character may be given in reply: R. v. Rowton, L. & C. 520, overruling R. v. Burt, 5 Cox, 284; *see* R. v. Brown, Warb. Lead. Cas. 236; R. v. Triganzie, 15 O. R. 294.

Defendant's reply on evidence adduced in answer to his own.—When evidence is adduced for the prosecution in reply to the defendant's proof the defendant's counsel has a right to address the jury on it, confining himself to its bearings and relations, before the general replying address of the prosecution: Dickinson's Quart. Sess. 565.

Witnesses may be recalled: R. v. Lamere, 8 L. C. J. 281; R. v. Jennings, 20 L. C. J. 291; 2 Taylor, Ev. par. 1331.

Charge by the judge to the jury.—It is the duty of the president of the court, the case on both sides being closed, to sum up the evidence. His address ought to be free from all technical phraseology, the substance of the charge plainly stated, the attention of the jury directed to the precise issue to be tried, and the evidence applied to that issue. It may be necessary, in some cases, to read over the whole evidence, and, when requested by the jury, this will, of course, be done; but in general it is better merely to state its substance: 5 Burn, 357; 1 Chit. 632; *see Re* Dillet, 16 Cox, 241, for a conviction set aside by the Privy Council on account of the unfairness of the charge.

In 12 Cox, 549, the editors reported a case from the United States, preceding it with the following remarks: "Although an American case, the principles of the criminal law being the same as in England, and the like duties and powers of the judge being recognized, a carefully prepared judgment on an important question that may arise here at some time has been deemed worthy of a place for any future reference."

The case is Commonwealth v. Magee, Philadelphia, December, 1873, decided by Pierce, J., as follows, on a motion for a new trial and in arrest of judgment on the ground of misdirection in the charge to the jury:

Pierce, J., in his judgment, said: "The evidence against the defendant was clear and explicit by two witnesses, who testified to having bought and drunk liquors at the defendant's place within this year. The defendant offered no testimony."

"There was nothing in the manner or matter of the witnesses to call in question their veracity, or in the slightest degree to impugn their evidence; the counsel for the

defence did not in any manner question the truth of their evidence, but confined his address to the jury to an attack upon the law and the motives of the prosecutors. Were the jury, under these circumstances, at liberty to disregard their oaths and acquit the defendant? They had been solemnly sworn to try the case according to the evidence, and a regard to their oaths would lead them but to one conclusion, the guilt of the defendant. The counsel for the Commonwealth states the charge to have been: 'The judge declared that he had no hesitation in saying that, under the evidence, it was the duty of the jury to render a verdict of guilty under the bill of indictment.' But no matter which form of expression was used, it was the evidence to which I had just called their attention that indicated their duty, and in view of which the remark was made. I perceive no error in this. It was not a direction to the jury to convict the defendant. It was simply pointing them to their duty. Jurors are bound to observe their oaths of office, whether it will work a conviction or acquittal of a defendant, and they are not at liberty to disregard uncontradicted and unquestioned testimony at their will and pleasure. Where, however, the testimony is contradicted by testimony on the other side, or a witness is impeached in his general character, or by the improbability of his story, or his demeanour, it would be an unquestionable error in a judge to assume that the facts testified to by him had been proved."

In 3 Wharton's Cr. L., par. 3280, it is said: "Can a judge direct a jury peremptorily to acquit or convict if, in his opinion, this is required by the evidence? Unless there is a statutory provision to the contrary this is within the province of the court, supposing that there is no disputed fact on which it is essential for the jury to pass." *See*, also, 1 Wharton Cr. L., par. 82*a*.

See charge to the jury in R. v. Dougall, 18 L. C. J. 90.

In R. v. Wadge (July 27th, 1878), for murder, Denman, J., remarked that "he had to take exception to the request

made to the jury by the counsel for the defence, that, 'if they had any doubt about the case, they should give the prisoner the benefit of it.' That was an expression frequently employed by counsel in defending prisoners, but it was a fallacious and an artful one, and intended to deceive juries. The jury had no right to grant any benefit or boon to any one, but only to be just and do their duty."

In R. v. Glass (Montreal, Q. B., March, 1877), the counsel for the defence after the judge's charge asked him to instruct the jury with regard to any doubt they might have in the case. Ramsay, J., answered, "No, I shall not when there is no doubt."

When the judge has summed up the evidence he leaves it to the jury to consider of their verdict. If they cannot agree by consulting in their box they withdraw to a convenient place, appointed for the purpose, an officer being sworn to keep them, as follows, in all capital cases, (and in other cases, when so ordered by the court, s. 673): "You shall well and truly keep this jury, you shall not suffer any person to speak to them, neither shall you speak to them yourself, unless it be to ask them if they are agreed on their verdict. So help you God:" 1 Chit. 632; 5 Burn, 357.

But this formality need not appear on the face of the record. The precautions taken for the safe keeping of the jury are noted by the clerk in the register, but they form no part of what is technically known as the record. Consequently the regularity or sufficiency of this part of the proceedings cannot be questioned upon a writ of error: Duval v. R., 14 L. C. R. 52.

The jury coming back to the box the prisoner is brought to the bar. The clerk then calls the jurors over by their names, and asks them whether they agree on their verdict; if they reply in the affirmative, he then demands who shall say for them to which they answer, their foreman. He then addresses them as follows: "Gentlemen, are you

agreed on your verdict; how say you, is the prisoner at the bar (*or naming him if the defendant is bailed or not in court*) guilty of the offence whereof he stands indicted, or not guilty?" If the foreman says guilty, the clerk of the court addresses them as follows: "Hearken to your verdict as the court recordeth it; you say that the prisoner at the bar (*or as the case may be*) is guilty (*or "not guilty," if such is the verdict received*) of the offence whereof he stands indicted; that is your verdict, and so say you all." The verdict is then recorded. The assent of all the jury to the verdict pronounced by their foreman in their presence is to be conclusively inferred. But the court may, before recording the verdict, either *proprio motu*, or on demand of either party, poll the jury, that is to say, demand of each of them successively if they concur in the verdict given by their foreman: 2 Hale, 299: Bacon's Abr. Verb. juries, p. 768; 1 Bishop, Cr. Proc. 1003.

The mere entry, by the clerk, of the verdict does not necessarily constitute a final recording of it. If it appear promptly, say after three or four minutes, that it is not recorded according to the intention of the jury it may be vacated and set right: R. v. Parkin, 1 Moo. 45; even if the prisoner has been discharged from the dock he will be immediately brought back, on the jury which had not left the box saying that "not guilty" has been entered by mistake, and that "guilty" is their verdict: R. v. Vodden, Dears. 229.

A judge is not bound to receive the first verdict which the jury gives, but may send them to reconsider it. Pollock, C.B., said, in R. v. Meany, L. & C. 213: "A judge has a right, and in some cases it is his bounden duty, whether in a civil or a criminal case, to tell the jury to reconsider their verdict. He is not bound to receive their verdict unless they insist upon his doing so; and where they reconsider their verdict, and alter it, the second, and not the first, is really the verdict of the jury." *See* R. v. Smith, 1

Russ. 749; Archbold, 166; Bacon's Abr. Verb. "verdict;" 5 Burn, 358; 1 Chit. 647; R. v. Maloney, 9 Cox, 6; 2 Hale, 309.

A recommendation to mercy by the jury is not part of their verdict: R. v. Trebilcock, Dears. & B. 453; R. v. Crawshaw, Bell, 303.

The saying that "a judge is bound to be counsel for the prisoner" is erroneous: *Per* Wills, J., in R. v. Gibson, 16 Cox, 181.

QUALIFICATION OF JURORS.

662. Every person qualified and summoned as a grand or petit juror, according to the laws in force for the time being in any province of Canada, shall be duly qualified to serve as such juror in criminal cases in that province. R. S. C. c. 174, s. 160.

The following words were in the repealed clause: "whether such laws were in force or were or are enacted by the Legislature of the Province before or after such province became a part of Canada, but subject always to any provision in any Act of the Parliament of Canada, and in so far as such laws are not inconsistent with any such Act.

The Jurors and Juries Acts of Ontario and Quebec, and s. 160 of the Dominion Criminal Law Procedure Act, are constitutional: R. v. Provost, M. L. R. 1 Q. B. 477; R. v. Bradshaw, 38 U. C. Q. B. 564; R. v. O'Rourke, 1 O. R. 464.

The defendant in a criminal case has no right to a communication of the petit jury list: R. v. Maguire, 13 Q. L. R. 99.

JURIES DE MEDIETATE LINGUÆ ABOLISHED AS TO ALIENS.

663. No alien shall be entitled to be tried by a jury *de medietate linguæ* but shall be tried as if he was a natural born subject. R. S. C. c. 174, s. 161.

Ever since the 28 Ed. III. c. 13, aliens, under our criminal law, have been entitled to be tried by a jury composed of one half of citizens and one half of aliens or foreigners, if so many of these could be had. It seems to have been thought necessary, in R. v. Vonhoff, 10 L. C. J. 292, that these six aliens should be natives of the country to which the defendant alleged himself to belong, but the

better opinion seemed to be that six aliens were required, without regard to nationality. S. 2 of 28 Ed. III. c. 13, says "the other half of aliens."

However, this is now of historical interest only, and by the above clause aliens, all through the Dominion, when indicted before a criminal court, are on the same footing as British subjects as to the composition of the jury.

In England also, now, an alien is not entitled to a jury *de medietate linguæ*: 33 & 34 V. c. 14 (Imp.).

MIXED JURIES IN PROVINCE OF QUEBEC.

664. In those districts in the province of Quebec in which the sheriff is required by law to return a panel of petit jurors composed one half of persons speaking the English language, and one half of persons speaking the French language, he shall in his return specify separately those jurors whom he returns as speaking the English language, and those whom he returns as speaking the French language respectively; and the names of the jurors so summoned shall be called alternately from such lists. R. S. C. c. 174, s. 166.

The right to a *medietate linguæ* jury exists in misdemeanours as in felonies: R. v. Maguire, 13 Q. L. R. 99.

Sub-section 2 of s. 7, 27 & 28 V. c. 41 (1864), clearly gives that right to *any* prosecuted party. And though the Quebec Legislature, by 46 V. c. 16, s. 62 (1883), has repealed the said Act, this particular clause, giving the right to a mixed jury, must be considered as still in force, the Quebec Legislature not having had the right to repeal it. Otherwise, there is no statute in the Province giving the right to a mixed jury in any case whatever, s. 664, *ante*, merely taking it for granted that the right exists. If the Quebec Legislature had the power to repeal that clause the Dominion Parliament had not the right to enact for Manitoba s. 167 of the Procedure Act, now s. 665, *post*.

Where in a case of felony, in which one half of the jury, on the application of the prisoner, were sworn as being skilled in the French language, it was discovered after verdict that one of such French half was not so skilled in the French language; *held*, that the trial and verdict were null and void: R. v. Chamaillard, 18 L. C. J. 149.

The right to have a jury, composed of at least one half of persons skilled in the language of the defence, must, undoubtedly, both in Manitoba and Quebec, be exercised *upon arraignment.* Immediately, after arraignment the *venire* is presumed to have issued, and if it issues without this order the jurors must be summoned in the usual manner, that is to say, without regard to language.

In R. v. Dougall, 18 L. C. J. 85, it was held by Mr. Justice Ramsay: 1st. That where defendant has asked for a jury composed one half of the language of the defence six jurors speaking that language *may* first be put into the box, before calling any juror of the other language; 2nd. That the right of the Crown to tell jurors "to stand aside," exists for misdemeanours as well as for felonies; 3rd. That when to obtain six jurors speaking the language of the defence all speaking that language have been called, the Crown is still at liberty to challenge to stand aside, and is not held to show cause until the whole panel is exhausted. Mr. Justice Ramsay said that the calling the jurors' names alternately from the English and French lists, mentioned in s. 40, now s. 664, *ante,* is only directory, and applies only to the calling of the jury in ordinary cases, where no order has been given for a jury composed of one half English and one half French. The case was reserved, by the learned judge, for the consideration of the full court, but only on the one point thirdly above mentioned, given in the summary of the report of the decision of the court, at page 242, 18 L. C. J., as follows; "Where to obtain six jurors speaking the language of the defence (English), the list of jurors speaking that language was called, and several were ordered by the Crown to stand aside; and the six English-speaking jurors being sworn the clerk re-commenced to call the panel alternately from the list of jurors speaking the English and French languages, and one of those (English) previously ordered to "stand aside" was again called: *Held,* that the previous "stand aside" stood good

until the panel was exhausted by all the names on both lists being called."

MIXED JURIES IN MANITOBA.

665. Whenever any person who is arraigned before the Court of Queen's Bench for Manitoba demands a jury composed, for the one half at least, of persons skilled in the language of the defence, if such language is either English or French, he shall be tried by a jury composed for the one half at least of the persons whose names stand first in succession upon the general panel and who, on appearing and not being lawfully challenged, are found, in the judgment of the court, to be skilled in the language of the defence.

2. Whenever, from the number of challenges or any other cause, there is in any such case a deficiency of persons skilled in the language of the defence the court shall fix another day for the trial of such case, and the sheriff shall supply the deficiency by summoning, for the day so fixed, such additional number of jurors skilled in the language of the defence as the court orders, and as are found inscribed next in succession on the list of petit jurors. R. S. C. c. 174, s. 167.

See remarks under preceding section.

CHALLENGING THE ARRAY. (*New*).

666. Either the accused or the prosecutor may challenge the array on the ground of partiality, fraud, or wilful misconduct on the part of the sheriff or his deputies by whom the panel was returned, *but on no other ground.* The objection shall be made in writing, and shall state that the person returning the panel was partial, or was fraudulent, or wilfully misconducted himself, as the case may be. Such objection may be in the form KK in schedule one hereto, or to the like effect.

2. If partiality, fraud or wilful misconduct, as the case may be, is denied the court shall appoint any two indifferent persons to try whether the alleged ground of challenge is true or not. If the triers find that the alleged ground of challenge is true in fact, or if the party who has not challenged the array admits that the ground of challenge is true in fact, the court shall direct a new panel to be returned.

This is taken in part from 39 & 40 V. c. 78, s. 17 (Imp.) (for Ireland).

KK.—(*Section* 666.)

CHALLENGE TO ARRAY.

Canada,
Province of ,
County of .

The Queen v. C. D. The said A. B., who prosecutes for our Lady the Queen (*or* the said C. D., *as the case may be*) challenges the array of the panel on the ground that it was returned by X. Y., sheriff of the county of (*or* E. F., deputy of X. Y., sheriff of the county of , *as the case may be*), and that the said X. Y. (*or* E. F., *as the case may be*) was guilty of partiality (*or* fraud, *or* wilful misconduct) on returning said panel.

Relationship between the sheriff and the prosecutor or the defendant are no more by themselves grounds for challenging the array, and R. v. Rouleau, 16 Q. L. R. 322 cannot now be followed. The form above given is very general, but the court may order the party challenging to give particulars: *see* Archbold, 171.

A challenge to the array is an exception to the whole panel of jurors returned, and must be made before the swearing of any of the jury is commenced.

The ground of the challenge may be either that some fact exists inconsistent with the impartiality of the sheriff, or other officer returning the panel, or that some fact exists which makes it improbable that he should be impartial, or that some fact exists which does, in fact, interfere with his impartiality.

The challenge must be in writing, and must set forth the fact on which it is grounded. The court must decide whether the alleged fact is in itself a good cause of challenge, in which case it is called a principal challenge, or whether it is merely a fact from which partiality may or may not be inferred, in which case it is called a challenge to the favour, or that the sheriff has been guilty of some default in returning the panel.

If the court holds that the alleged fact is a good cause for a principal challenge, and the alleged fact is denied, or if the court holds that the alleged fact is good as a challenge to the favour, and either the fact or the partiality sought to be inferred from it, or both, are denied, two triers must be appointed by the court to try the facts in dispute.

If the triers find in favour of the challenge the panel is quashed, and a new one is ordered to be returned by the coroners or other officers. If they find against the challenge the panel is affirmed: Stephen's Cr. Proc. Art. 280.

Held, in an indictment against R. M., that it was ground of principal challenge to the array that the prisoner's husband had an action pending against the sheriff for an assault committed on the prisoner: R. v. Rose Milne, 4 P & B. (N. B.) 394. This case cannot now be followed.

CALLING THE PANEL. (*New*).

667. If the array is not challenged, or if the triers find against the challenge, the officer of the court shall proceed to call the names of the jurors in the following manner: The name of each juror on the panel returned, with his number on the panel and the place of his abode, shall be written on a distinct piece of card, such cards being all as nearly as may be of an equal size. The cards shall be delivered to the officer of the court by the sheriff or other officer returning the panel, and shall, under the direction and care of the officer of the court, be put together in a box to be provided for that purpose, and shall be shaken together.

2. The officer of the court shall in open court draw out the said cards, one after another, and shall call out the name and number upon each such card as it is drawn, until such a number of persons have answered to their names as in the opinion of the court will probably be sufficient to provide a full jury after allowing for challenges of jurors and directions to stand by.

3. The officer of the court shall then proceed to swear the jury, each juror being called to swear in the order in which his name is so drawn, until, after subtracting all challenges allowed and jurors directed to stand by, twelve jurors are sworn. If the number so answering is not sufficient to provide a full jury such officer shall proceed to draw further names from the box, and call the same in manner aforesaid, until, after challenges allowed and directions to stand by, twelve jurors are sworn.

4. If by challenges and directions to stand by the panel is exhausted without leaving a sufficient number to form a jury those who have been directed to stand by shall be again called in the order in which they were drawn, and shall be sworn, unless challenged by the accused, or unless the prosecutor challenges them and shows cause why they should not be sworn: Provided that if before

any such juror is sworn other jurymen in the panel become available the prosecutor may require the names of such jurymen to be put into and drawn from the box in the manner hereinbefore prescribed, and such jurors shall be sworn, challenged, or ordered to stand by, as the case may be, before the jurors originally ordered to stand by are again called.

5. The twelve men who in manner aforesaid are ultimately sworn shall be the jury to try the issues on the indictment, and the names of the men so drawn and sworn shall be kept apart by themselves until such jury give in their verdict or until they are discharged; and then the names shall be returned to the box, there to be kept with the other names remaining at that time undrawn, and so *toties quoties* as long as any issue remains to be tried.

6. Provided that when the prosecutor and accused do not object thereto the court may try any issue with the same jury that has previously tried or been drawn to try any other issue, without their names being returned to the box and redrawn, or if the parties or either of them object to some one or more of the jurors forming such jury, or the court excuses any one or more of them, then the court may order such persons to withdraw, and may direct the requisite number of names to make up a complete jury to be drawn, and the persons whose names are so drawn shall be sworn.

7. Provided also, that an omission to follow the directions in this section shall not affect the validity of the proceedings.

This section is taken from the 39 & 40 V. c. 78, s. 19 (Imp.), for Ireland.

CHALLENGES, ETC.

668. Every one indicted for treason or any offence punishable with death is entitled to challenge twenty jurors peremptorily.

2. Every one indicted for any offence, other than treason or an offence punishable with death, for which he may be sentenced to imprisonment for more than five years, is entitled to challenge twelve jurors peremptorily.

3. Every one indicted for any other offence is entitled to challenge four jurors peremptorily.

4. Every prosecutor and every accused person is entitled to any number of challenges on any of the following grounds; that is to say:

(*a*) that any juror's name does not appear in the panel: Provided that no misnomer or misdescription shall be a ground of challenge if it appears to the court that the description given in the panel sufficiently designates the persons referred to; or

(*b*) that any juror is not indifferent between the Queen and the accused; or

(*c*) that any juror has been convicted of any offence for which he was sentenced to death or to any term of imprisonment with hard labour or exceeding twelve months; or

(*d*) that any juror is an alien.

5. No other ground of challenge than those above-mentioned shall be allowed.

6. If any such challenge is made the court may in its discretion require the party challenging to put his challenge in writing. The challenge may be in

the form LL in schedule one hereto, or to the like effect. The other party may deny that the ground of challenge is true.

7. If the ground of challenge is that the jurors' names do not appear in the panel, the issue shall be tried by the court on the *voir dire* by the inspection of the panel, and such other evidence as the court thinks fit to receive.

8. If the ground of challenge be other than as last aforesaid the two jurors *last* sworn, or if no jurors have then been sworn then two persons present whom the court may appoint for that purpose shall be sworn to try whether the juror objected to stands indifferent between the Queen and the accused, or has been convicted, or is an alien, as aforesaid, as the case may be. If the court or the triers find against the challenge the juror shall be sworn. If they find for the challenge he shall not be sworn. If after what the court considers a reasonable time, the triers are unable to agree the court may discharge them from giving a verdict, and may direct other persons to be sworn in their place.

9. The Crown shall have power to challenge four jurors peremptorily, and may direct any number of jurors not peremptorily challenged by the accused to stand by until all the jurors have been called who are available for the purpose of trying that indictment.

10. The accused may be called upon to declare whether he challenges any *jurors* peremptorily or otherwise, before the prosecutor is called upon to declare whether he requires such juror to stand by, or challenges him either for cause or peremptorily. R. S. C. c. 174, ss. 163 & 164. (*Amended*).

LL.—(*Section* 668.)

CHALLENGE TO POLL.

Canada,
Province of, ,
County of .

The Queen
v.
C.D.,

The said A.B., who prosecutes, &c (*or* the said C.D., *as the case may be*) challenges G.H., on the ground that his name does not appear in the panel (*or* "that he is not indifferent between the Queen and the said C.D.," *or* "that he was convicted and sentenced to ('death' *or* '*penal servitude*,' *or* 'imprisonment with hard labour,' *or* 'exceeding twelve months,'" *or* "that he is disqualified as an alien."

"Jurors" in second line of s-s. 10 ought to be "juror."

The word "last" in s-s. 8 constitutes a change in the law as given in Bacon's Abr. Juries E. 12: 3 Blacks. 363; 2 Hale, 275; and Archbold, 176, that the two first jurors sworn are to try all the subsequent challenges. The rule

that when the challenge is made to the first juror and disallowed by the two triers chosen by the court, then this first juror is joined to the two triers till another juror is sworn is not reproduced. *See* s. 675.

A challenge to the polls is an exception to some one or more individual juror or jurors. It may be made orally. *See* s-s. 6, *ante*. After issue joined between the crown and the prisoner, when the jury is called and before they are sworn, is the only time when the right of challenge can be exercised: R. v. Key, 2 Den. 347; R. v. Shuttleworth, 2 Den. 341 1; Stephen's Hist. 302. In R. v. Giorgetti, 4 F. & F. 546, it was held that the challenge must be made before the book is given into the hands of the juror, and before the officer has recited the oath, and it comes too late afterwards though made before the juror has kissed the book. In R. v. Frost, 9 C. & P. 136, it was held that the challenge of a juror, either by the Crown or by the prisoner, must be before the oath is commenced. The moment the oath has begun it is too late. The oath is begun by the juror taking the book, having been directed by the officer of the court to do so. But if the juror takes the book without authority neither party wishing to challenge is to be prejudiced thereby. But a juror may be challenged even after being sworn if the prosecutor consents: Bacon's Abr. Verb. Juries, 11; 1 Chit. 545; R. v. Mellor, Dears. & B. 494, *per* Wightman, J.

By s-s. 10 of s. 668, the prisoner may be compelled to exhaust all his challenges before the Crown is called upon to show cause for its challenges or order to stand aside: 1 Stephen's Hist. 303.

It is obvious that each juror must be sworn separately in all cases, *see* s-s. 3, s. 667, *ante*.

The accused is to be informed before the swearing of the jurors that if he will challenge them or any of them he must challenge them as they come to the book to be sworn and before they are sworn; the following is the

usual form: "Prisoner, these good men, whose names you shall now hear called, are the jurors who are to pass between our Sovereign Lady the Queen and you upon your trial *(in a capital case, upon your life and death)*; if, therefore, you would challenge them or any of them, you must challenge them as they come to the book to be sworn, and before they are sworn, and you shall be heard": 1 Chit. 531.

The accused must make all his challenges in person, even in cases where he has counsel: 1 Chit. 546; 2 Hawk. 570. The practice is not uniform on that point.

To enable the accused to make his challenges he is entitled to have the whole panel read over, in order that he may see who they are that appear: 2 Hawk. 570; Townly's case, Fost. 7.

A challenge to the polls is either peremptory or for cause; a peremptory challenge is such as is allowed to be made to a juror without assigning any cause; the number of these challenges allowed in each particular case is settled by s. 668, *ante*.

Peremptory challenges are not allowed upon any collateral issue: R. v. Ratcliffe, Fost. 40; Barkstead's case, Kel. 16; Johnson's case, Fost. 46; R. v. Paxton, 10 L. C. J. 213.

Hale, 2 P. C. 267*d*, says that no peremptory challenges are allowed to the defendant "if he had pleaded any foreign plea in bar or in abatement, which went not to the trial of the felony, but of some collateral matter only." And it is added, in Bacon's Abr. Verb. Juries, 9, that "this peremptory challenge seems by the better opinion to be only allowable when the prisoner pleads the general issue." This would seem to take away the right of peremptorily challenging on the trial of pleas of "*autrefois acquit*," or "*autrefois convict*." But it is not so; the issue on a plea of this kind is not a collateral issue. And it is said in 2 Hale, *loc. cit.*, that if a man plead not guilty, or *plead any*

other matter of fact triable by the same jury, and plead over to the felony, he has his peremptory challenges. By collateral issues must be understood, for instance, where a criminal *convict* pleads any matter allowed by law in bar of execution, as pregnancy, pardon, an act of grace, or, as in Ratcliffe's case, above cited, when a person brought to the bar to receive his sentence says that he is not the same person that was convicted, the issues in these cases being always tried by a jury *instanter*.

Where several persons are tried by the same jury each of such persons has a right to his full number of peremptory challenges in all cases where the right of peremptory challenge exists; and if twenty men were indicted for the same offence by one indictment yet every prisoner should be allowed his full number of peremptory challenges. They may join in their challenges, if they wish to be tried together, and then they can only challenge amongst them to the number allowed to one: s. 671, *post*. But if they refuse to do so the Crown has the right of trying each, or any number of them less than the whole, separately from the others, in order to prevent the delay which might arise from the whole panel being exhausted by the challenges: 1 Chit. 535.

So, in Charnock's case, 3 Salk. 80 (in many books erroneously called Charwick,) three being indicted together, Holt, C.J., told them "that each of them had liberty to challenge thirty-five of those who were returned upon the panel to try them, without showing any cause; but that if they intended to take this liberty, then they must be tried separately and singly, as not joining in the challenges; but, if they intended to join in the challenges, then they could challenge but thirty-five in the whole, and might be tried jointly upon the same indictment;" accordingly, they all three joined in their challenges and were tried together and found guilty.

A challenge to the polls for cause is either *principal* or *for favour:* it is allowed to both the prosecutor and the defendant: Archbold, 152.

It is said in Archbold, 156: "The defendant in treason or felony may, for cause shown, object to all or any of the jurors called, *after* exhausting his peremptory challenges of thirty-five or twenty." If this means that the prisoner must first exhaust all his peremptory challenges, before being allowed to challenge for cause, it is an error, and was so held by the Court of Queen's Bench, in Ontario, in R. v. Whelan, 28 U. C. Q. B. 2, confirmed by the Court of Appeal, 28 U. C. Q. B. 108, in which case, it was unanimously held that the prisoner is entitled to challenge for cause before exhausting his peremptory challenges, Richards, C.J., concurring, though he had at first at the trial, on Archbold's passage above cited, ruled that the prisoner, before being allowed to challenge for cause, must first have exhausted his peremptory challenges.

If the prosecutor or the defendant have several causes of challenge against a juror he must take them all at the same time: Bacon's Abr. Verb. juries, 11; 1 Chit. 545.

If a juror be challenged for cause and found to be indifferent he may afterwards be challenged peremptorily, if the number of the peremptory challenges is not exhausted: 1 Chit. 545; R. v. Geach, 9 C. & P. 499.

The most important causes of a *principal* challenge to the polls are: 1. *Propter defectum*, on account of some personal objection, as alienage, minority, old age, insanity, present state of drunkenness, deafness, or a want of the property qualifications required by law. 2. *Propter affectum*, on the ground of some presumed or actual partiality in the juror who is objected to; as if he be of affinity to either party, or in his employment, or is interested in the event, or if he has eaten or drunk at the expense of one of the parties, if the juror has expressed his wishes as to the

result of the trial, or his opinion of the guilt or innocence of the defendant, also if he was one of the grand jurors who found the indictment upon which the prisoner is then arraigned, or any other indictment against him on the same facts. 3. *Propter delictum*, on the ground of infamy as where the juror has been convicted of treason, felony, perjury, conspiracy, or any other infamous offence; *see* s. 668, *ante*.

A challenge to the polls for favour is founded on the allegation of facts not sufficient in themselves to warrant the court in inferring undue influence or prejudice, but sufficient to raise suspicion thereof, and to warrant inquiry whether such influence or prejudice in fact exists. The cases of such a challenge are manifestly numerous, and dependent on a variety of circumstances, for the question to be tried is whether the juryman is altogether indifferent as he stands unsworn. If a juror has been entertained in the party's house, or if they are fellow-servants, are cited as instances of facts upon which a challenge for favour may be taken: 1 Chit. 544.

In the case of a *principal* challenge to the polls the court, without triers, examines either the juror challenged, or any witness or evidence then offered, to ascertain the truth of the fact alleged as a ground of challenge, if this fact is not admitted by the adverse party; and if the ground is made out to the satisfaction of the court, the challenge is at once allowed, and the juror set aside.

In these cases, the necessary conclusion in law of the fact alleged against the juror is that he is not indifferent, and this, as a matter of law, must be decided by the court.

But in the case of a challenge for favour the matter of challenge is left to the discretion of triers. In this case the grounds of such challenge are not such that the law necessarily infers partiality therefrom, as, for instance,

relationship; but are reasonable grounds to suspect that the juror will act under some undue influence or prejudice.

Bishop says, 1 Cr. Proc. 905: "It is plain that the line which separates the challenge for principal cause and the challenge to the favour must be either very artificial, or very uncertain."

And Wharton, 3 Cr. L. 3125, says: "The distinction, however, between challenges for favour and those for principal cause is so fine that it is practically disregarded."

The oath taken by the triers is as follows: "*You shall well and truly try whether A. B., one of the jurors, stands indifferent to try the prisoner at the bar, and a true verdict give according to the evidence. So help you God.*"

No challenge of triers is admissible: 1 Chit. 549.

The oath to be administered to the witnesses brought 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.*"

If this challenge is made to the first juror, and before any one has been sworn, then the court will direct two indifferent persons, not returned of the jury, to act as triers; if they find against the challenge the juror will be sworn, *and be joined with the triers in determining the next challenges.* Such has been the rule heretofore, though, as noted above, it is not enacted in s. 668.

But as soon as two jurors have been found indifferent and have been sworn then the office of the first two triers ceases, and every subsequent challenge is referred to the decision of the two first jurors sworn: 3 Blacks. 363; (now the two last, s. 668). If the challenge is made when there is yet only one juror sworn, one trier is chosen by each party, and added to the juryman sworn, and the three, together, try the challenges till a second juror is sworn: 1 Chit. 549; Bacon's Abr. Verb. Juries, E. 12; 2 Hale, 274; s. 675.

The trial then proceeds by witnesses before the triers, in open court; the juror objected to may also be examined, having first been sworn as follows:

"*You shall true answer make to all such questions as the court shall demand of you. So help you God.*"

The challenging party first addresses the triers and calls his witnesses; then the opposite party addresses them and calls witnesses if he sees fit, in which case the challenger has a reply. But in practice there are no addresses in such cases. The judge sums up to the triers who then say if the juror challenged stands indifferent or not; this verdict is final: Roscoe, 197, 198. But a juror challenged by one side and found to be indifferent may still be challenged by the other: 1 Chit. 545.

See R. v. Mellor, Dears. & B. 468; Morin v. R., 16 Q. L. R. 366, 18 S. C. R. 407; Brisebois v. The Queen, 15 S. C. R. 421; Bowsse v. Cannington, cited in Doe v. Oliver, 2 Sm. Lead. Cas. 780; Mansell v. R., Dears. & B. 375; R. v. Geach, 9 C. & P. 499; 1 Chit. 547; 4 Blacks. 353. In Morin v. R. *ubi supra*, the result in the Supreme Court was that the court had no jurisdiction to determine the question raised. All that was said upon the merits of that question is *obiter*.

On a trial for forgery the panel of petit jurors contained the names of Robert Grant and Robert Crane. Robert Grant, as was supposed, was called and went into the box. After conviction, and before the jury left the box, it was discovered that Robert Crane had by mistake answered to the name of Robert Grant, and that Robert Crane was really the person who had served on the jury: *held*, a mis-trial: R. v. Feore, 3 Q. L. R. 219.

The prisoner should challenge before the juror takes the book in his hand, but the judge, in his discretion, may allow the challenge afterwards before the oath is fully administered: R. v. Kerr, 3 L. N. 299.

CHALLENGE BY THE CROWN IN LIBEL CASES.

669. Special provision as to the right of the Crown to cause any juror to stand aside in a libel case. *See ante*, under s. 302, p. 305.

On a public prosecution for libel by order of the Attorney-General this section does not apply: R. v. Maguire, 13 Q. L. R. 99. But in all trials for libels upon private individuals this section applies, even when the prosecution is conducted by a counsel appointed by and representing the Attorney-General: R. v. Patteson, 36 U. C. Q. B. 129.

But it is restricted to cases of libel: R. v. Brice, 15 Q. L. R. 147.

CHALLENGES IN CASE OF MIXED JURORS.

670. 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 six hundred and sixty-four or six hundred and sixty-five, the number of peremptory challenges to which he is entitled shall be divided, so that he shall only have the right to challenge one half of such number from among the English speaking jurors, and one half from among the French speaking jurors. R. S. C. c. 174, ss. 166 & 67.

This applies to Quebec and Manitoba: ss. 664, 665, *ante*. When the accused has only four peremptory challenges this s. 670 does not apply. The crown exercises its challenges without regard to the language of the jurors.

JOINT TRIALS.

671. 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.

That has always been the law; *see* remarks, *ante*, under s. 668.

ORDERING TALES.

672. Whenever after the proceedings hereinbefore provided the panel has been exhausted, and a complete jury cannot be had by reason thereof, then, *upon request made on behalf of the Crown*, the court may order the sheriff or other proper officer forthwith to summon such number of persons whether qualified jurors or not as the court deems necessary and directs in order to make a full jury; and such jurors may, if necessary, be summoned by word of mouth.

2. The names of the persons so summoned shall be added to the general panel, *for the purposes of the trial*, and the same proceedings shall be taken as to calling and challenging such persons and as to directing them to stand by as are hereinbefore provided for with respect to the persons named in the original panel. R. S. C. c. 174, s. 168.

This is a re-enactment.

JURORS NOT TO SEPARATE. (*New*).

673. The trial shall proceed continuously, subject to the power of the court to adjourn it. Upon every such adjournment the court may in all cases, if it thinks fit, direct that during the adjournment the jury shall be kept together, and proper provision made for preventing the jury from holding communication with any one on the subject of the trial. Such direction shall be given in all cases in which the accused may upon conviction be sentenced to death. In other cases, if no such direction is given, the jury shall be permitted to separate.

2. *No formal adjournment of the court shall hereafter be required, and no entry thereof in the Crown book shall be necessary.* R. S. C. c. 174, s. 169.

JURORS MAY HAVE FIRE, ETC. (*New*).

674. Jurors, after having been sworn, shall be allowed at any time before giving their verdict the use of fire and light when out of court, and shall also be allowed reasonable refreshment. 53 V. c. 57, s. 21.

SAVING CLAUSE.

675. Nothing in this Act shall alter, abridge or affect any power or authority which any court or judge has when this Act takes effect, or any practice or form in regard to trials by jury, jury process, juries or jurors, except in cases where such power or authority is expressly altered by or is inconsistent with the provisions of this Act. R. S. C. c. 174, s. 170.

Section 673 alters the law; s. 674 was first enacted in 1890.

On a trial for felony the jury could not be allowed to separate during the progress of the trial, and where such separation took place it was a mis-trial, and the court then directed that the party convicted be tried again as if no trial had been had in such case: R. v. Derrick, 23 L. C. J. 239.

It seems to have always been admitted that in misdemeanours the jury might be allowed to separate during the trial: R. v. Woolf, 1 Chit. Rep. 401; R. v. Kinnear, 2 B. & Ald. 462.

There is no doubt that, generally speaking, the judge ought not to allow the jury to separate in cases where the

punishment may be for over five years' imprisonment. In fact, some judges never allow the jury to separate and if it can be done without too much inconvenience, this is, perhaps, the best practice. When, however, such separation is permitted, the judge ought to caution the jury against holding conversation with any person respecting the case, or suffering it in their presence, or reading newspaper reports or comments regarding it, or the like: *see* 1 Bishop, Cr. Proc. 996. They are not allowed to separate after they have retired to consider their verdict: s. 727.

The doctrine that "a jury sworn and charged in case of life or member cannot be discharged by the court, but they ought to give a verdict," is exploded, and it may now be considered as established law that a jury sworn and charged with a prisoner, even in a capital case, may be discharged by the judge at the trial without giving a verdict, if a necessity—that is a high degree of need—for such discharge is made evident to his mind. If after deliberating together the jury say that they have not agreed, and that they are not likely to agree, the judge may discharge them. It lies absolutely in his discretion how long they should be kept together, and his determination on the subject cannot be reviewed in any way: R. v. Charlesworth, 2 F. & F. 326, 1 B. & S. 460; Winsor v. R. (in error), 7 B. & S. 490, 10 Cox, 276; s. 728 *post.*

In the course of the trial one of the jurors had, without leave, and without it being noticed by any one, left the jury box and also the court-house, whereupon the court discharged the jury without giving a verdict, and a fresh jury was empannelled. The prisoner was then tried anew, and convicted before the fresh jury: *Held*, by the Court of Criminal Appeal, that the course pursued was right: R. v. Ward, 10 Cox, 573.

If a juryman is taken ill, so as to be incapable of attending through the trial, the jury may be discharged, and the trial and examination of witnesses begun over

again another juror being added to the eleven; but in that case the prisoner should be offered his challenges over again as to the eleven, and the eleven should be sworn *de novo:* R. v. Edwards, R. & R. 224; *see* also R. v. Scalbert, 2 Leach, 620; R. v. Beere, 2 M. & Rob. 472; R. v. Gould, 3 Burn, 98.

In R. v. Murphy, 2 Q. L. R. 383, after the prisoner had been given in charge to the jury, the case was adjourned for one day on account of his counsel's illness.

But when such a trial has to be begun over again it is not regular, whether the prisoner assents to it or not, instead of having the witnesses examined anew *viva voce*, to simply call and swear them over again and then read over the notes of their evidence taken by the judge on the first trial, even if, then, each witness is asked if what was read was true, and is submitted at the pleasure of the counsel on either side to fresh oral examination and cross-examination: R. v. Bertrand, 10 Cox, 618.

Although each juryman may apply to the subject before him that general knowledge which any man may be supposed to have, yet if he be personally acquainted with any material particular fact he is not permitted to mention the circumstance privately to his fellows, but he must submit to be publicly sworn and examined, though there is no necessity for his leaving the box, or declining to interfere in the verdict: R. v. Rosser, 7 C. & P. 648; 2 Taylor, Ev. par. 1244; 3 Burn 96; *see* R. v. Petrie, 20 O. R. 317.

A juror was summoned in error but not returned in the panel, and in mistake was sworn to try a case during the progress of which these facts were discovered. The jury were discharged and a fresh jury constituted: R. v. Phillips, 11 Cox, 142. It is not necessary when a jury are discharged without giving a verdict to state on the record the reason why they are so discharged: R. v. Davison, 2 F. & F. 250, 8 Cox, 360.

The rule is that the right to discharge the jury without giving a verdict ought not to be exercised except in some

case of physical necessity, or where it is hopeless that the jury will agree, or where there have been some practices to defeat the ends of justice. If after the prisoner is given in charge, though before any evidence is given, it is discovered that a material witness for the prosecution is not acquainted with the nature of an oath, it is not a sufficient ground for discharging the jury so that the witness might be instructed before the next assizes upon that point, and a verdict of acquittal must be entered if the prosecution has no other sufficient evidence: R. v. Wade, 1 Moo. 86. R. v. White, 1 Leach, 430, seems a contrary decision, but is now overruled by the above last cited case. Where, during the trial of a felony, it was discovered that the prisoner had a relation on the jury, Erskine, J., after consulting Tindal, C.J., held that he had no power to discharge the jury but that the trial must proceed: R. v. Wardle, Car. & M. 647.

If it appear during a trial that the prisoner, though he has pleaded not guilty, is mad, the judge may discharge the jury of him, that he may be tried after the recovery of his understanding: 1 Hale, 34: *see post*, sections 737, *et seq.*, and remarks thereunder.

In Kinloch's case, Fost. 16, 23, *et seq.*, it was held that a jury can be lawfully discharged in order to allow the defendant to withdraw his plea of "not guilty," and to plead in bar.

On a writ of error the record showed that on the trial the judge discharged the jury after they were sworn, in consequence of the disappearance of a witness for the crown, and the prisoner was remanded. *Held*, that the judge had a discretion to discharge the jury which a court of error could not review; that the discharge of the jury without a verdict was not equivalent to an acquittal, and that the prisoner might be put on trial again: Jones v. R., 3 L. N. 309.

A jury had been sworn on the previous day to try the prisoner on an indictment for murder. In the course of the

trial one of the jurors was discharged because he came from a house where there was small-pox. The case being resumed before a new jury the prisoner contended that, having been once put in jeopardy of his life, no new trial could be had. The court overruled the objection: R. v. Considine, 8 L. N. 307.

A juror may be a witness. He is then sworn without leaving the jury box: 2 Taylor, Ev., par. 1244. *See* R. v. Rosser, 7 C. & C. 648. Under s. 675 it seems that the whole of s. 7 of the 27 & 28 V. c. 41 (1864), is still in force in the Province of Quebec, (*see* remarks under s. 664, *ante*), except s-s. 8 & 9 thereof, which are repealed by 49 V. c. 4 (D.).

PROCEEDINGS WHEN PREVIOUS CONVICTION CHARGED.

676. The proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows, that is to say: the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he pleads not guilty, or if the court orders a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if the jury finds him guilty, or if on arraignment he pleads guilty, he shall then, and not before, be asked whether he was so previously convicted as alleged in the indictment; and if he answers that he was so previously convicted the court may proceed to sentence him accordingly, but if he denies that he was so previously convicted, or stands mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall, for all purposes, be deemed to extend to such last mentioned inquiry: Provided, that if upon the trial of any person for any such subsequent offence, such person gives evidence of his good character, the prosecutor may, in answer thereto, give evidence of the conviction of such person for the previous offence or offences before such verdict of guilty is returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence. R. S. C. c. 174, s. 207.

See s. 628, *ante*, and remarks thereunder: R. v. Woodfield, 16 Cox, 314.

WITNESSES' ATTENDANCE.

677. Every witness duly subpœnaed to attend and give evidence at any criminal trial before any court of criminal jurisdiction shall be bound to attend and remain in attendance throughout the trial. R. S. C. c. 174, s. 210.

COMPELLING ATTENDANCE OF WITNESSES.

678. Upon proof to the satisfaction of the judge of the service of the subpœna upon any witness who fails to attend or remain in attendance, or upon its appearing that any witness at the preliminary examination has entered into a recognizance to appear at the trial, and has failed so to appear, and that the presence of such witness is material to the ends of justice, the judge may, by his warrant, cause such witness to be apprehended and forthwith brought before him to give evidence and to answer for his disregard of the subpœna; and such witness may be detained on such warrant before the judge or in the common gaol with a view to secure his presence as a witness, or, in the discretion of the judge, he may be released on a recognizance, with or without sureties, conditioned for his appearance to give evidence and to answer for his default in not attending or not remaining in attendance; and the judge may, in a summary manner, examine into and dispose of the charge against such witness, who, if he is found guilty thereof, shall be liable to a fine not exceeding one hundred dollars, or to imprisonment, with or without hard labour, for a term not exceeding ninety days or to both. R. S. C. c. 174, s. 211.

As to re-calling witnesses *see* R. v. Lamère, 8 L. C. J. 181; R. v. Jennings, 20 L. C. J. 291; 2 Taylor, Ev. par. 1331.

WITNESS OUT OF THE JURISDICTION.

679. If any witness in any criminal case cognizable by indictment in any court of criminal jurisdiction at any term, sessions or sittings of any court in any part of Canada, resides in any part thereof, not within the ordinary jurisdiction of the court before which such criminal case is cognizable, such court may issue a writ of subpœna, directed to such witness, in like manner as if such witness was resident within the jurisdiction of the court; and if such witness does not obey such writ of subpœna the court issuing the same may proceed against such witness for contempt or otherwise, or bind over such witness to appear at such days and times as are necessary, and upon default being made in such appearance may cause the recognizances of such witness to be estreated, and the amount thereof to be sued for and recovered by process of law, in like manner as if such witness was resident within the jurisdiction of the court. R. S. C. c. 174, s. 212.

WITNESS FROM GAOL OR PENITENTIARY.

680. When the attendance of any person confined in any prison in Canada, or upon the limits of any gaol, is required in any court of criminal jurisdiction in any case cognizable therein by indictment, the court before whom such prisoner is required to attend may, or any judge of such court, or of any superior court or county court may, before or during any such term or sittings at which the attendance of such person is required, make an order upon the warden or gaoler of the prison, or upon the sheriff or other person having the custody of such prisoner, to deliver such prisoner to the person named in such order to receive him; and such person shall, at the time prescribed in such order, convey such prisoner to the place at which such person is required to attend, there to receive and obey such further order as to the said court seems meet. R. S. C. c. 174, s. 213.

At common law writs of subpœna have no force beyond the jurisdictional limits of the court from which they issue, but, by the above clause, 679, any court of criminal jurisdiction in Canada may summon a witness from any other part of Canada, for instance, a criminal court in Quebec can summon a witness in Nova Scotia, or *vice versa*, and if the subpœna is not obeyed the court may proceed against the witness in like manner as if such witness were resident within the jurisdiction of the court. In England, 46 Geo. III. c. 92 contains a provision of the same nature. In criminal cases the witness is bound to attend even if he has not been tendered his expenses: 3 Russ. 575; Roscoe, Ev. 104.

Section 680 renders unnecessary, in criminal matters, the writ of *habeas corpus ad testificandum*. It seems to go very far, and might lead to serious consequences; it, for instance, authorizes a judge of the court of quarter sessions, or of the county court in any part of the Dominion, to order the removal of a prisoner from any other part of the Dominion. Moreover, this removal is not, as in England, to be made under the same care and custody as if the prisoner was brought under a writ of *habeas corpus*, and by the officer under whose custody the witness is, but by any other person named by the judge in his order, thereby, against all notions on the subject, releasing for a while a prisoner from the custody of his gaoler, who, of course, ceases, *pro tempore*, to be responsible for his safe keeping. The Imperial Act on the subject is the 16 & 17 V. c. 30, s. 9. Though our statute does not expressly require it, an affidavit stating the place and cause of confinement of the witness, and further that his evidence is material, and that the party cannot, in his absence, safely proceed to trial, should be given in support of the application. And if the prisoner be confined at a great distance from the place of trial, the judge will, perhaps, require that the affidavit should point out in what manner his testimony is material: 2 Taylor, Ev. par. 1149.

The word "prison" includes any penitentiary, s. 3.

EVIDENCE OF PERSON ILL MAY BE TAKEN UNDER COMMISSION.

681. Whenever it is made to appear at the instance of the crown, or of the prisoner or defendant, to the satisfaction of a judge of a superior court, or a judge of a county court having criminal jurisdiction, that any person, who is dangerously ill, and who, in the opinion of some licensed medical practitioner, is not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, such judge may, by order under his hand, appoint a commissioner to take in writing the statement on oath or affirmation of such person.

2. Such commissioner shall take such statement and shall subscribe the same and add thereto the names of the persons, if any, present at the taking thereof, and if the deposition relates to any indictable offence for which any accused person is already committed or bailed to appear for trial shall transmit the same, with the said addition, to the proper officer of the court at which such accused person is to be tried ; and in every other case he shall transmit the same to the clerk of the peace of the county, division or city in which he has taken the same, or to such other officer as has charge of the records and proceedings of a superior court of criminal jurisdiction in such county, division or city, and such clerk of the peace or other officer shall preserve the same and file it of record, and upon order of the court or of a judge transmit the same to the proper officer of the court where the same shall be required to be used as evidence. R. S. C. c. 174, s. 220.

See s. 686, *post.*

PRESENCE OF PRISONER.

682. Whenever a prisoner in actual custody is served with, or receives, notice of an intention to take the statement mentioned in the last preceding section the judge who has appointed the commissioner may, by an order in writing, direct the officer or other person having the custody of the prisoner to convey him to the place mentioned in the said notice for the purpose of being present at the taking of the statement; and such officer or other person shall convey the prisoner accordingly, and the expenses of such conveyance shall be paid out of the funds applicable to the other expenses of the prison from which the prisoner has been conveyed. R. S. C. c. 174, s. 221.

See s. 686, *post.*

COMMISSION OUT OF CANADA.

683. Whenever it is made to appear, at the instance of the Crown, or of the prisoner or defendant, to the satisfaction of the judge of any superior court, or the judge of a county court having criminal jurisdiction, that any person who resides out of Canada is able to give material information relating to any indictable offence for which *a prosecution is pending*, or relating to any person accused of such offence, such judge may, by order under his hand, appoint a commissioner or commissioners to take the evidence, upon oath, of such person.

2. Until otherwise provided by rules of court, the practice and procedure in connection with the appointment of commissioners under this section, the taking of depositions by such commissioners, and the certifying and return

thereof, and the use of such depositions as evidence at the trial, shall be, as nearly as practicable, the same as those which prevail in the respective courts in connection with the like matters in civil causes. 53 V. s. 37, s. 23.

Order for examination of witness out of jurisdiction under 53 V. c. 37, s. 23 should not provide that evidence so taken should be read before the grand jury: R. v. Chetwynd, 23 N. S. Rep. 332.

WHEN EVIDENCE MUST BE CORROBORATED.

684. No person accused of an offence under any of the hereundermentioned sections shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused:

(*a*) Treason, Part IV., section sixty-five;

(*b*) Perjury, Part X., section one hundred and forty-six;

(*c*) Offences under *Part XIII* sections one hundred and eighty-one to one hundred and ninety inclusive;

(*d*) Procuring feigned marriage, Part XXII., section two hundred and seventy-seven;

(*e*) Forgery, Part XXXI., section four hundred and twenty-three.

Section 218, c. 174 R. S. C., as to evidence in cases of forgery, required corroboration only of an interested witness: *see* R. v. Rhodes, 22 O. R. 480.

EVIDENCE OF CHILD IN CERTAIN CASES.

685. Where, upon the hearing or trial of any charge for carnally knowing or attempting to carnally know a girl under fourteen or of any charge under section two hundred and fifty-nine for indecent assault, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received though not given upon oath if, in the opinion of the court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

2. But no person shall be liable to be convicted of the offence, unless the testimony admitted by virtue of this section, and given on behalf of the prosecution, is corroborated by some other material evidence in support thereof implicating the accused.

3. Any witness whose evidence is admitted under this section is liable to indictment and punishment for perjury in all respects as if he or she had been sworn. 53 V. c. 37, s. 13. 48-49 V. c. 69, s. 4 (Imp.).

See s. 25 of the Canada Evidence Act, 1893, 56 V. c. 31.

This provision applies to the trial of offences under ss. 259, 269, & 270, *ante*.

See R. v. Wealand, 16 Cox, 402, 20 Q. B. D. 827; R. v. Paul, 17 Cox, 111, 25 Q. B. D. 202; R. v. Pruntey, 16 Cox, 344. The evidence so given would be evidence to support any verdict allowed in virtue of s. 713, *post*, on an indictment for any of the offences provided for in ss. 259, 269 & 270. Held, in that sense, by Court of Queen's Bench, Montreal, May 26th, 1893, in R. v. Grantyers.

DEPOSITIONS TO BE READ IN EVIDENCE.

686. If the evidence of a sick person has been taken under commission as provided in section six hundred and eighty-one, and upon the trial of any offender for any offence to which the same relates, the person who made the statement is proved to be dead, or if it is proved that there is no reasonable probability that such person will ever be able to attend at the trial to give evidence, such statement may, upon the production of the judge's order appointing such commissioner, be read in evidence, either for or against the accused, without further proof thereof,—if the same purports to be signed by the commissioner by or before whom it purports to have been taken, and if it is proved to the satisfaction of the court that reasonable notice of the intention to take such statement was served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person or his counsel or solicitor had, or might have had, if he had chosen to be present, full opportunity of cross-examining the person who made the same. R. S. C. c. 174, s. 220.

See s. 681, *ante*.

The notice required by this section is a written notice. Whether it has been a reasonable notice, and whether the opportunity for cross-examination was sufficient or not, are questions for the judge at the trial: R. v. Shurmer, 16 Cox, 94.

DEPOSITIONS TO BE READ IN EVIDENCE.

687. If upon the trial of any accused person it is proved upon the oath or affirmation of any credible witness that any person whose deposition has been taken by a justice in the preliminary or other investigation of any charge is dead, or so ill as not to be able to travel, or is absent from Canada, and if it is also proved that such deposition was taken in the presence of the person accused, and that he, his counsel or solicitor, had a full opportunity of cross-examining the witness, then if the deposition purports to be signed by the justice by or before whom the same purports to have been taken it shall be read as evidence in the prosecution without further proof thereof, unless it is proved that such deposition was not in fact signed by the justice purporting to have signed the same. R. S. C. c. 174, s. 222. 11-12 V. c. 43, s. 17, (Imp.).

See R. v. Pruntey, 16 Cox, 344; R. v. Bullard, 12 Cox, 353; R. v. Bull, 12 Cox, 31; R. v. Clements, 2 Den. 251; R. v. Stephenson, L. & C. 165, Warb. Lead. Cas. 233; R. v. De Vidil, 9 Cox, 4; *Ex parte* Huguet, 12 Cox, 551.

Doubts have arisen in England whether, under this last cited clause of the Imperial Act, the prosecution must have been identically for the same offence as charged against the prisoner by the depositions against him as taken by the magistrate, and it has even been held that a deposition taken on a charge of assault could not afterwards be received on an indictment for wounding: R. v. Ledbetter, 3 C. & K. 108. Though in the subsequent case of R. v. Beeston, Dears. 405, it was held by the court of criminal appeal that a deposition taken on a charge, either of assault and robbery, of doing grievous bodily harm, or of feloniously wounding with intent to do grievous bodily harm, can, after the death of the witness, be read upon a trial for murder or manslaughter, where the two charges relate to the same transaction, yet it seems by the report of the case that if the charges on the two occasions had been substantially different the deposition would not have been admissible: *see* R. v. Lee, 4 F. & F. 63; R. v. Radbourne, 1 Leach, 457; R. v. Smith, R. & R. 339; R. v. Dilmore, 6 Cox, 52. But in Canada, by s. 688, *post*, all doubts on the question are removed, and a deposition taken on "*any*" charge against a person may be read as evidence in the prosecution of such person for "*any other offence*," when the deposition is otherwise admissible.

Prisoner's deposition.—The depositions on oath of a witness legally taken are admissible evidence against him if he is subsequently tried on a criminal charge. The only exception is in the case of answers to questions which he objected to, when his evidence was taken, as tending to criminate him but which he has been improperly compelled to answer: R. v. Coote, L. R. 4 P. C. 599, 12 Cox, 557; R. v. Garbett, 1 Den. 236. Where a witness claims protection on

the ground that an answer may criminate him, and he is compelled to answer, the answer is inadmissible whether he claim the protection in the first instance or after having given some answers tending to criminate himself: R. v. Garbett, *ubi supra*. But it seems that the part of the deposition given before such witness has so claimed the protection of the court is admissible: R. v. Coote, *ubi supra*. And the witness need not have been cautioned or put upon his guard as to the tendency of the question in order to render his answer admissible. *See*, now, s. 5 of the Canada Evidence Act, 1893, 56 V. c. 31. S. 591, *ante*, is applicable to accused persons only and not to witnesses; and s. 592 enacts specially that "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." *See* 3 Russ. 418, and R. v. Coote, *ubi supra*. Also, R. v. Wellings, 14 Cox, 105, and R. v. Beriau, Ramsay's App. Cas. 185.

The fact alone of the witness residing abroad at the time of the trial is not sufficient to admit his deposition: R. v. Austin, Dears. 612.

On a trial for murder the examination of the deceased cannot be put in evidence if the prisoner had not the opportunity to cross-examine him, he having knowledge that it was his interest to do so: R. v. Milloy, 6 L. N. 95.

Depositions not taken in presence of the accused cannot be submitted to the grand jury under s. 687: R. v. Carbray, 13 Q. L. R. 100.

The deposition, regularly taken by the committing magistrate, of a witness was allowed to be read at the trial, for the reason that a medical man proved that the witness was old, and that he thought, under her state of nervousness, that she would faint at the idea of coming into court, though he was of opinion that she could go to London to see a doctor without difficulty or danger: *held*, that her

deposition ought not to have been received: R. v. Farrell, 12 Cox, 605; R. v. Thompson, 13 Cox, 181.

The deposition of a witness who has travelled to the assize town, but is too ill to attend court, may be read before the grand jury: R. v. Wilson, 12 Cox, 622; R. v. Gerrans, 13 Cox, 158; R. v. Goodfellow, 14 Cox, 326.

Depositions taken abroad under the Merchant Shipping Act may be received in evidence if the witness cannot be had: R. v. Stewart, 13 Cox, 296.

Too much importance ought not to be attached to the variations between what a witness says at the trial and what his deposition before the magistrate makes him say, if there is a substantial concordance between both: R. v. Wainwright, 13 Cox, 171.

On a charge of murder, to prove malice or motive against the prisoner the deposition of the deceased against him, taken before the magistrates on another charge, was held admissible: R. v. Buckley, 13 Cox, 293; R. v. Williams, 12 Cox, 101.

Upon a prosecution for uttering forged notes the deposition of one S., taken before the Police Magistrate on the preliminary investigation, was read upon the following proof that S. was absent from Canada. R. swore that S. had, a few months before, left his (R.'s) house where she (S.) had, for a time, lodged; that he had since twice heard from her in the U. S. but not for six months. The chief constable of Hamilton, where the prisoner was tried, proved ineffectual attempts to find S., by means of personal inquiries in some places, and correspondence with the police of other cities. S. had for some time lived with the prisoner as his wife:

Held, upon a case reserved, Cameron, J., dis., that the admissibility of the deposition was in the discretion of the judge at the trial, and that it could not be said that he had wrongfully admitted it: R. v. Nelson, 1 O. R. 500.

DEPOSITIONS MAY BE USED FOR OTHER OFFENCES.

688. Depositions taken in the preliminary or other investigation of any charge against any person may be read as evidence in the prosecution of such person for any other offence, upon the like proof and in the same manner, in all respects, as they may, according to law, be read in the prosecution of the offence with which such person was charged when such depositions were taken. R. S. C. c. 174, s. 224.

The deposition on oath of a witness is evidence against him on his trial if he is subsequently charged with a crime: R. v. Coote, 12 Cox, 557, L. R. 4 P. C. 599: *see* R. v. Buckley, *ante*, under s. 687, and remarks under that section.

EVIDENCE OF PRISONER'S STATEMENT.

689. The statement made by the accused person before the justice may, if necessary, upon the trial of such person, be given in evidence against him without further proof thereof, unless it is proved that the justice purporting to have signed the same did not in fact sign the same. R. S. C. c. 174, s. 223. 11-12 V. c 48, s. 18 (Imp.).

As to confessions under inducements *see* R. v. Fennell, Warb. Lead. Cas. 250, and cases there cited.

See R. v. Soucie, 1 P. & B. (N.B.) 611. S. 689 must be read in connection with s. 591 *ante*.

ADMISSIONS ON TRIAL. (*New*).

690. 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.

"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."—Imp. Comm. Rep.

EVIDENCE ON TRIAL FOR PERJURY.

691. A certificate containing the substance and effect only, omitting the formal part, of the indictment and trial for any offence, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court whereat the indictment was tried, or among which such indictment has been filed, or by the deputy of such clerk or other officer, shall, upon the trial of an indictment for perjury or subornation of perjury, be sufficient evidence of the trial of such indictment without proof of the signature or official character of the person appearing to have signed the same. R. S. C. c. 174, s. 225. 14-15 V. c. 100, s. 22 (Imp.).

It is to be observed that this section is merely remedial and will not prevent a regular record from being still admissible in evidence, and care must be taken to have such record drawn up in any case where the particular averments in the former indictment may be essential: Lord Campbell's Acts, by Greaves, 27.

Before the same court, though not during the same term, the production by the officer of the court of the indictment with the entries thereon and the docket entries is sufficient: R. v. Newman, 2 Den. 390. But the record or a certificate under the above section are necessary when before another court: R. v. Coles, 16 Cox, 165.

EVIDENCE ON TRIAL UNDER SECTIONS 460, ET SEQ.

692. When, upon the trial of any person, it becomes necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer or other officer of Her Majesty's mint, or other person employed in producing the lawful coin in Her Majesty's dominions or elsewhere, whether the coin counterfeited is current coin, or the coin of any foreign prince, state or country, not current in Canada, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness. R. S. C. c. 174, s. 229.

The usual practice is to call as a witness a silversmith of the town where the trial takes place, who examines the coin in court, in the presence of the jury: Davis's Cr. L. 235.

EVIDENCE UNDER SECTION 480.

693. On the trial of any person charged with the offences mentioned in section four hundred and eighty, any letter, circular, writing or paper offering or purporting to offer for sale, loan, gift or distribution, or giving or purporting to give information, directly or indirectly, where, how, of whom or by what means any counterfeit token of value may be obtained or had, or concerning any similar scheme or device to defraud the public, shall be *prima facie* evidence of the fraudulent character of such scheme or device. 51 V. c. 40, s. 4.

PROOF OF PREVIOUS CONVICTION.

694. A certificate containing the substance and effect only, omitting the formal part, of any previous indictment and conviction for any indictable offence, or a copy of any summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court before which the offender was first convicted, or to which such summary conviction was returned, or by the deputy of such clerk or officer, shall, upon

proof of the identity of the person of the offender, be sufficient evidence of such conviction without proof of the signature or official character of the person appearing to have signed the same. R. S. C. c. 174, s. 230.

See ss. 628 & 676 *ante*, to which this s. 694 is intended to apply: *see* 34 & 35 V. c. 112, s. 18 (Imp.). The enactment does not extend to proof of a previous acquittal.

PREVIOUS CONVICTION OF WITNESS.

695. A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction; and a certificate, as provided in the next preceding section, shall, upon proof of the identity of the witness as such convict, be sufficient evidence of his conviction, without proof of the signature or the official character of the person appearing to have signed the certificate. R. S. C. c. 174, s. 231.

This enactment is taken from the 28 V. c. 18, s. 6, of the Imperial statutes, *An Act for Amending the Law of Evidence and Practice on Criminal Trials.*

Questions tending to expose the witness to criminal accusation, punishment or penalty need not be answered; no one can be forced to criminate himself. But this privilege can be invoked only by the witness himself. Nor is the judge bound to warn the witness of his right, though he may deem it proper to do so: 2 Taylor Ev. par. 1319; R. v. Coote, L. R. 4 P. C. 599, 12 Cox, 557. Whether the answer may tend to criminate the witness, or expose him to a penalty or forfeiture, is a point which the court will determine, under all the circumstances of the case, as soon as the protection is claimed, but without requiring the witness fully to explain how the effect would be produced; for, if this were necessary, the protection which the rule is designed to afford to the witness would at once be annihilated.

It is now decided, contrary to an opinion formerly entertained by several of the judges, that the mere declaration of a witness on oath that he believes that the answer will tend to criminate him will not suffice to protect him from answering, when the other circumstances of the case are such as to induce the judge to believe that the answer

would not really have that tendency. In all cases of this kind the court must see from the surrounding circumstances, and the nature of the evidence which the witness is called to give, that reasonable ground exists for apprehending danger to the witness from his being compelled to answer. When, however, the fact of such danger is once made to appear, considerable latitude should be allowed to the witness in judging for himself of the effect of a particular question; for it is obvious that a question, though at first sight apparently innocent, may, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. On the whole, as Lord Hardwicke once observed, "these objections to answering should be held to very strict rules," and, in some way or other, the court should have the sanction of an oath for the facts on which the objection is founded: 2 Taylor Ev. par. 1311.

If the prosecution to which the witness might be exposed, or his liability to a penalty or forfeiture, is barred by lapse of time, the privilege has ceased and the witness must answer: 2 Taylor Ev. par. 1312.

Whether a witness is bound to answer any question, the direct and immediate effect of answering which might be to degrade his character, seems doubtful, although where the transaction as to which the witness is interrogated forms any material part of the issue he will be obliged to answer, however strongly his evidence may reflect on his character.

Where, however, the question is not directly material to the issue, but is only put for the purpose of testing the character and consequent credit of the witness, there is much more room for doubt. Several of the older *dicta* and authorities tend to show that in such case the witness is not bound to answer; but the privilege, if it still exists, is certainly much discountenanced in the practice of modern times. Even Lord Ellenborough, who is reported to have held on one occasion that a witness was not bound to state

whether he had not been sentenced to imprisonment in a house of correction, and on another, that the question could not so much as be put to him, seems in a later case to have disregarded the rules thus enunciated by himself; for, on a witness declining to say whether or not he had been confined for theft in gaol, his Lordship harshly observed: "If you do not answer the question I will send you there."

No doubt cases may arise where the judge, in the exercise of his discretion, would very properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries into discreditable transactions of a remote date might, in general, be rightly suppressed; for the interests of justice can seldom require that the errors of a man's life, long since repented of, and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant. So questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, might very fairly be checked. But the rule of protection should not be further extended; for if the inquiry relates to transactions comparatively recent, bearing directly upon the moral principles of the witness, and his present character for veracity, it is not easy to perceive why he should be privileged from answering, notwithstanding the answer may disgrace him. It has, indeed, been termed a harsh alternative to compel a witness either to commit perjury or to destroy his own reputation; but, on the other hand, it is obviously most important that the jury should have the means of ascertaining the character of the witness, and of thus forming something like a correct estimate of the value of his evidence. Moreover, it seems absurd to place the mere feelings of a profligate witness in competition with the substantial interests of the parties in the cause: 2 Taylor Ev. pars. 1313, 1314, 1315; 3 Russ. 543, 547.

By the words "*or refuses to answer*" in the said section (and these words are also in the Imperial statute), it would,

at first sight, seem that the witness questioned as to a previous conviction is not bound to answer; but it is obvious that this is not so; and the above quotation from Taylor goes to show clearly that the question, if insisted upon by the court, must be answered. Indeed, in a great many cases, the party putting the question could not be expected to be ready, on the spot, to prove the conviction of the witness otherwise than by himself.

By the Canada Evidence Act, 1893, 56 V. c. 31, s. 5, no one is now excused from answering any question upon the ground that the answer may tend to criminate him.

PROOF OF ATTESTED INSTRUMENTS.

696. It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise as if there had been no attesting witness thereto. R. S. C. c. 174, s. 232.

This is, *verbatim*, s. 7 of 28 V. c. 18 of the Imperial statutes. Formerly the rule was that if an instrument, on being produced, appeared to be signed by subscribing witnesses, one of them, at least, should be called to prove its execution. The above clause abrogates this rule. It applies only to instruments to the validity of which attestation is not requisite.

EVIDENCE AT TRIAL FOR CHILD MURDER.

697. The trial of any woman charged with the murder of any issue of her body, male or female, which being born alive would, by law, be bastard, shall proceed and be governed by such and the like rules of evidence and presumption as are by law used and allowed to take place in respect to other trials for murder. R. S. C. c. 174, s. 227.

If the mother of an illegitimate child endeavoured privately to conceal his birth and death she was presumed to have murdered it, unless she could prove that the child was born dead. Taylor, on Ev., note 7, p. 128, justly says that this rule was barbarous and unreasonable.

COMPARISON OF WRITINGS.

698. Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the

same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute. R. S. C. c. 174, s. 233.

This enactment is taken from the 28 V. c. 18 of the Imperial statutes, and is, *verbatim*, s. 8 thereof. Before this enactment, it was an established rule that, in a criminal case, handwriting could not be proved by comparing a paper with any other papers acknowledged to be genuine; neither the witness nor the jury were allowed to compare two writings with each other, in order to ascertain whether both were written by the same person: 2 Taylor Ev. par. 1667.

PARTY DISCREDITING HIS OWN WITNESS.

699. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement. R. S. C. c. 174, s. 234.

This is s. 3 of the 28 & 29 V. c. 18 of the Imperial statutes, *An Act for Amending the Law of Evidence and Practice on Criminal Trials.*

In the Province of Quebec a similar enactment is contained in Article 269 of the Code of Civil Procedure.

The word *adverse* in the above clause does not mean merely *unfavourable* but *hostile*; 2 Taylor Ev. par. 1282. However, in Dear v. Knight, 1 F. & F. 433, Erle, J., appears to have regarded a witness as "adverse," simply because he made a statement contrary to what he was called to prove.

The first part of the clause seems to have always been the law. It was decided in Ewer v. Ambrose, 3 B. & C. 746, that if a witness called to prove a fact prove the contrary his credit could not be impeached by general evidence, but, in R. v. Ball, 8 C. & P. 745, that the party is at liberty to make out his case by other and contradictory evidence. The portion of the clause allowing a party to

prove that his witness made at any time a different account of the same transaction seems to be new law according to the said case of R. v. Ball, *ubi supra*. *See* R. v. Little, 15 Cox, 319.

FORMER WRITTEN STATEMENTS BY WITNESS.

700. Upon any trial a witness may be cross-examined as to previous statements made by him in writing, or reduced to writing, relative to the subject-matter of the case, without such writing being shown to him; but if it is intended to contradict the witness by the writing his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; and the judge, at any time during the trial, may require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he thinks fit: Provided that a deposition of the witness, purporting to have been taken before a justice on the investigation of the charge and to be signed by the witness and the justice, returned to and produced from the custody of the proper officer, shall be presumed *prima facie* to have been signed by the witness. R. S. C. c. 174, s. 235.

The words "upon any trial" mean "upon any trial *in any criminal case.*" This enactment is reproduced from s. 5 of 28 V. c. 18 of the Imperial statutes, *An Act for Amending the Law of Evidence and Practice on Criminal Trials*: upon which *see* 2 Taylor Ev. pars. 1301, 1302, 1303; 3 Russ. 550. The general rule was that, when a contradictory statement alleged to have been made by the witness was contained in a letter or other writing, the cross-examining party should produce the document as his evidence, and have it read, in order to base any questions to the witness upon it. The above clause abrogates this rule, under which was excluded one of the best tests by which the memory and integrity of a witness can be tried: 2 Taylor Ev. par. 1301. Before the abrogation of the rule the 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: R. v. Edwards, 8 C. & P. 26. And it was irregular to question a witness as to the contents of a former declaration, affidavit, letter or any writing made or written by him, or taken in writing as his declaration or deposition, without first having the said writing read: The Queen's case, 2 Brod. & B. 288.

The prosecution cannot use or refer to the depositions without putting them in: R. v. Muller, 10 Cox, 43.

But if the former declarations of the witness were not in writing, but merely by parol, he may be cross-examined on the subject of it, and if he deny it another witness may be called to prove it, if it be a matter relevant to the issue; if not relevant to the issue, the witness' answer is conclusive: 2 Taylor Ev. par. 1295.

PROOF OF CONTRADICTORY STATEMENT BY WITNESS.

701. If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness and he shall be asked whether or not he did make such statement. R. S. C. c. 174, s. 236.

This enactment is taken from s. 4 of the 28 V. c. 18 of the Imperial statutes.

Formerly there was some difference of opinion as to whether, in such a case, proof might be given that the witness had made the statement denied by him. It must be observed that the clause applies only to a statement *relative to the subject matter of the case.* If it is not *relative to the subject matter of the case* the answer given by the witness must be taken as conclusive. It seems that questions respecting the motives, interest or conduct of the witness, as connected with the cause or with either of the parties, are relevant *quoad* this enactment, though Coleridge, J., in R. v. Lee, 2 Lewin, 154, held that if a witness denies that he has tampered with the other witnesses evidence to contradict him cannot be received. This case was before the statute, and does not specially apply to a *former statement* made by a witness. As to the last part of the clause it is based on a principle always received under the rules of evidence. It was held in the Queen's case, 2 Brod. & B. 311, that where a witness for a prosecution has been examined in chief, the defendant cannot afterwards give evidence

of any declaration by such witness, or of acts done by him, to procure persons corruptly to give evidence in support of the prosecution, unless he has previously cross-examined such witness as to such declarations or acts.

EVIDENCE—COMMON GAMING-HOUSE.

702. 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 one hundred and ninety-eight, that such house, room or place is used as a common gaming-house, and that the persons found in the room or place where such tables or instruments of gaming are found were playing therein although no play was actually going on in the presence of the chief constable, deputy chief constable or other officer entering the same under a warrant or order issued under this Act, or in the presence of those persons by whom he is accompanied as aforesaid. R. S. C. c. 158, s. 4. 8-9 V. c. 109, s. 2 (Imp.).

This provision applies to prosecutions under s. 198, p. 134, *ante*. As to search warrant *see* s. 575, p. 643. *See* next section.

Sections 9 & 10 R. S. C. c. 158, on the same subject are unrepealed.

703. It shall be *prima facie* evidence in any prosecution for keeping a common gaming-house under section one hundred and ninety-eight of this Act that a house, room or place is used as a common gaming-house, and that the persons found therein were unlawfully playing therein—

(*a*) if any constable or officer authorized to enter any house room or place, is wilfully prevented from, or obstructed or delayed in, entering the same or any part thereof; or

(*b*) if any such house, room or place is found fitted or provided with any means or contrivance for unlawful gaming, or with any means or contrivance for concealing, removing or destroying any instruments of gaming. R. S. C. c. 158, s. 8. 17-18 V. c. 38, s. 2 (Imp.).

EVIDENCE OF GAMING IN STOCKS.

704. Whenever, on the trial of a person charged with making an agreement for the sale or purchase of shares, goods, wares or merchandise in the manner set forth in section two hundred and one, it is established that the person so charged has made or signed any such contract or agreement of sale or purchase, or has acted, aided or abetted in the making or signing thereof, the burden of proof of the *bona fide* intention to acquire or to sell such goods, wares or merchandise, or to deliver or to receive delivery thereof, as the case may be, shall rest upon the person so charged. 51 V. c. 42, s. 2.

See s. 201, *ante*.

EVIDENCE IN CERTAIN CASES OF LIBEL.

705. In any criminal proceeding commenced or prosecuted for publishing any extract from, or abstract of any paper containing defamatory matter and which has been published by or under the authority of the Senate, House of Commons or any Legislative Council, Legislative Assembly or House of Assembly, such paper may be given in evidence, and it may be shown that such extract or abstract was published in good faith and without ill-will to the person defamed, and if such is the opinion of the jury, a verdict of not guilty shall be entered for the defendant. *Amendment of 1893.*

EVIDENCE OF POLYGAMY.

706. In the case of any indictment under section two hundred and seventy-eight (*b*), (*c*) and (*d*), no averment or proof of the method in which the sexual relationship charged was entered into, agreed to, or consented to, shall be necessary in any such indictment, or upon the trial of the person thereby charged; nor shall it be necessary upon such trial to prove carnal connection had or intended to be had between the persons implicated. 53 V. c. 37, s. 11.

See s. 278, *ante.*

EVIDENCE OF STEALING MINERALS.

707. In any prosecution, proceeding or trial for stealing ores or minerals the possession, contrary to the provisions of any law in that behalf, *or* any smelted gold or silver, or any gold-bearing quartz, or any unsmelted or otherwise unmanufactured gold or silver, by any operative, workman or labourer actively engaged in or on any mine, shall be *primâ facie* evidence that the same has been stolen by him. R. S. C. c. 164, s. 30.

See s. 571 as to search warrant. As to stealing of ores of metals, etc., *see* s. 343.

EVIDENCE UNDER SECTION 338.

708. In any prosecution, proceeding or trial for any offence under section three hundred and thirty-eight a timber mark, duly registered under the provisions of the *Act respecting the Marking of Timber*, on any timber, mast, spar, saw-log or other description of lumber, shall be *primâ facie* evidence that the same is the property of the registered owner of such timber mark; and possession by the offender, or by others in his employ or on his behalf, of any such timber, mast, spar, saw-log or other description of lumber so marked, shall, in all cases, throw upon the offender the burden of proving that such timber, mast, spar, saw-log or other description of lumber came lawfully into his possession, or into the possession of such others in his employ or on his behalf. R. S. C. c. 174, s. 228.

The Act respecting the marking of timber is c. 64, R. S. C. *See* ss. 338 and 572, *ante.*

EVIDENCE UNDER SECTIONS 385, ET SEQ.

709. In any prosecution, proceeding or trial under sections three hundred and eighty-five to three hundred and eighty-nine inclusive for offences relating to public stores proof that any soldier, seaman or marine was actually doing

duty in Her Majesty's service shall be *primâ facie* evidence that his enlistment, entry or enrolment has been regular.

2. If the person charged with the offence relating to public stores mentioned in article three hundred and eighty-seven was, at the time at which the offence is charged to have been committed, in Her Majesty's service or employment, or a dealer in marine stores, or a dealer in old metals, knowledge on his part that the stores to which the charge relates bore the marks described in section three hundred and eighty-four shall be presumed until the contrary is shown. 50-51 V. c. 45, s. 13. 38-39 V. c. 25 (Imp.).

See ss. 384, *et seq.*

EVIDENCE OF FRAUDULENT TRADE MARKS.

710. In any prosecution, proceeding or trial for any offence under Part XXXIII. relating to fraudulent marks on merchandise, if the offence relates to imported goods evidence of the port of shipment shall be *prima facie* evidence of the place or country in which the goods were made or produced. 51 V. c. 41, s. 13.

2. Provided that in any prosecution for forging a trade mark the burden of proof of the assent of the proprietor shall lie on the defendant.

See ss. 443, *et seq.*

VERDICT OF ATTEMPT.

711. When the complete commission of the offence charged is not proved but the evidence establishes an attempt to commit the offence, the accused may be convicted of such attempt and punished accordingly. R. S. C. c. 174, ss. 183, 185.

This section does not apply to murder, s. 713. *See* remarks under ss. 64 and 529; and as to punishment, in cases not specially provided for, ss. 528, 529 and 951. Under s. 713 the defendant may be convicted of attempting to commit any offence included in the offence charged.

This clause is taken from s. 9 of 14 & 15 V. c. 100 of the English statutes, upon which Greaves has the following remarks:

"As the law existed before the passing of this Act (except in the case of the trial for murder of a child, and the offences falling within the 1 V. c. 85, s. 11,) there was no power upon the trial of an indictment for any felony to find a verdict against a prisoner for anything less than a felony, or upon the trial of an indictment for a misdemeanour to find a verdict for an attempt to commit such misdemeanour: *see* R. v. Catherall, 13 Cox, 109; R. v. Woodhall, 12 Cox, 240;

R. v. Bird, 2 Den. 94; 1 Chit. 251, 639. At the same time the general principle of the common law was, that upon a charge of felony or misdemeanour composed of several ingredients the jury might convict of so much of the charge as constituted a felony or misdemeanour: R. v. Hollingberry, 4 B. & C. 329. The reason why, upon an indictment for felony, the jury could not convict of a misdemeanour, was said to be that thereby the defendant would be deprived of many advantages; for if he was indicted for the misdemeanour he might have counsel, a copy of his indictment, and a special jury: R. v. Westbeer, 2 Str. 1133, 1 Leach, 12. The prisoner is now entitled, in cases of felony, to counsel, and to a copy of the depositions, and though not entitled to a copy of the indictment yet as a matter of courtesy his counsel is always permitted to inspect it. With regard to a special jury, in the great majority of cases a prisoner would not desire it, and it can in no case be obtained unless the indictment has been removed by *certiorari*. Very little ground, therefore, remained for objecting to the jury being empowered to find a verdict of guilty of an attempt to commit a felony upon an indictment for such felony, and the prisoner obviously gains one advantage by it, as where he is charged with a felony he may peremptorily challenge jurymen, which he could not do if indicted for a misdemeanour. No prejudice, therefore, being likely to arise to the prisoner, and considerable benefit in the administration of criminal justice being anticipated by the change, the jury are now empowered, upon the trial of any indictment for a felony, to convict of an attempt to commit that particular felony, and upon the trial of any indictment for a misdemeanour to convict of an attempt to commit that particular misdemeanour."

In R. v. McPherson, Dears. & B. 197, the prisoner was indicted for breaking and entering a dwelling-house, and stealing therein certain goods specified in the indictment, the property of the prosecutor. At the time of the break-

ing and entering the goods specified were not in the house but there were other goods there the property of the prosecutor. The jury acquitted the prisoner of the felony charged but found him guilty of breaking and entering the dwelling-house of the prosecutor, and *attempting to steal his goods therein: Held*, by the court of criminal appeal, that the conviction was wrong, as there was no attempt to commit the "*felony charged*" within the meaning of the aforesaid section.

Cockburn, C.J., said: "The effect of the statute is, that if you charge a man with stealing certain specified goods, he may be convicted of an attempt to commit "the felony or misdemeanour charged;" but can you convict him of stealing other goods than those specified? If you indict a man for stealing your watch you cannot convict him of attempting to steal your umbrella. I am of opinion that this conviction cannot be sustained. The prisoner was indicted for breaking and entering the dwelling-house of the prosecutor, and stealing therein certain specified chattels. The jury found specially that, although he broke and entered the house with the intention of stealing the goods of the prosecutor, before he did so somebody else had taken away the chattels specified in the indictment; now, by the recent statute it is provided, that where the proof falls short of the principal offence *charged* the party may be convicted of an attempt to commit the *same*. The word attempt clearly conveys with it the idea, that if the attempt had succeeded the offence charged would have been committed, and therefore the prisoner might have been convicted if the things mentioned in the indictment or any of them had been there; but attempting to commit a felony is clearly distinguishable from intending to commit it. An attempt must be to do that which, if successful, would amount to the felony charged; but here the attempt never could have succeeded, as the things which the indictment charges the prisoner with stealing had been already

removed, stolen by somebody else. The jury had found him guilty of attempting to steal the goods of the prosecutor, but not the goods specified in the indictment."

An attempt to commit a felony can only be made out where, if no interruption had taken place, the felony itself could have been committed. The prisoner was indicted for attempting to commit a felony by putting his hand into A.'s pocket, with intent to steal the property in the said pocket then being. The evidence was that he was seen to put his hand into a woman's pocket, but there was no proof that there was anything in the pocket: *held*, that on the assumption that there was nothing in the pocket the prisoner could not be convicted of the attempt charged: R. v. Collins, L. & C. 471; though he was guilty of an assault with intent to commit a felony. But that case is overruled; *see* s. 64, *ante*, and R. v. Brown, 24 Q. B. D. 357; R. v. Ring, 17 Cox, 491.

Greaves says, referring to the cases of R. v. McPherson, and R. v. Collins: "There can be no doubt that this and the preceding decision were right upon the grounds that the indictment in the former alleged the goods to be in the house, which was disproved, and the latter to be in the pocket, which was not proved." Attempts to commit crimes, by Greaves, Cox & Saunders' Cons. Acts, cix.

But the case of R. v. Goodhall, 1 Den. 187, where it was held that on an indictment for using an instrument with intent to procure the miscarriage of a woman, the fact of the woman not being pregnant is immaterial, Greaves admits, is a direct authority that a man may be convicted of an attempt to do that which it was impossible to do. And if a person administers any quantity of poison, however small, however impossible that it could have caused death, yet if it were done with the intent to murder the offence of administering poison with intent to murder is complete: R. v. Cluderay, 1 Den. 514; 1 Russ. 901, note by Greaves.

It was held in R. v. Johnson, L. & C. 489, that an indictment for an attempt to commit a larceny, which charges the prisoner with attempting to steal the goods and chattels of A., without further specifying the goods intended to be stolen, is sufficiently certain.

In R. v Cheeseman, L. & C. 140, Blackburn, J., said: "If the actual transaction has commenced which would have ended in the crime if not interrupted there is clearly an attempt to commit the crime."

In R. v Roebuck, Dears. & B. 24, the prisoner was indicted for obtaining money by false pretenses. It appeared that the prisoner offered a chain in pledge to a pawnbroker, falsely and fraudulently stating that it was a silver chain, whereas in fact it was not silver, but was made of a composition worth about a farthing an ounce. The pawnbroker tested the chain, and finding that it withstood the test he, relying on his own examination and test of the chain, and not placing any reliance upon the prisoner's statement, lent the prisoner ten shillings, the sum he asked, and took the chain as a pledge; the jury found the prisoner guilty of the attempt to commit the misdemeanour charged against him: *held*, that the conviction was right.

It is said in 2 Russ. 599, on this right given to convict the defendant of the attempt to commit the offence charged: "There are some offences which may be attempted to be committed, whilst there are others which cannot be so attempted. It is obvious that where an offence consists in an act that is done, there may be an attempt to do that act which will be an attempt to commit that offence. But where an offence consists in an omission to do a thing, or in such a state of things as may exist without anything being done, it should seem that there can be no attempt to commit such offence. Thus if an offence consists in omitting or neglecting to turn the points of a railway, it may well be doubted whether there could be an attempt to

commit that offence. And a very nice question might perhaps be raised on an indictment on the 9 & 10 Wm. III. c. 41, s. 2, for *having possession* of marked stores, where the evidence failed to prove that the stores actually came into the prisoner's possession though an attempt to get them into his possession, as in R. v. Cohen, 8 Cox, 41, and knowledge of their being marked, might be proved; for in order to constitute the offence of having possession of anything it is not necessary to prove any act done, and, therefore, it would be open to contend that there could not be an attempt to commit such an offence."

It is to be observed, however, that s. 387, *ante*, corresponding to the 9 & 10 Wm. III. c. 41, s. 2 (Imp.), cited as above in 2 Russ., has the words "receives, possesses;" and on a count charging the receiving of stores there seems no reason to doubt that there might be a conviction of an attempt to receive; for receiving clearly includes an act done. Thus in R. v. Wiley, 2 Den. 37, where a prisoner went into a coach office and endeavoured to get possession of stolen fowls which had come by a coach, there seems no reason why she might not have been convicted of an attempt to receive the fowls.

Can there be an attempt to commit an assault? Greaves says: "In principle there seems no satisfactory ground for doubting that there may be such an attempt. Although an assault may be an attempt to inflict a battery on another, as where A. strikes at B. but misses him, yet it may not amount to such an attempt, as where A. holds up his hand in a threatening attitude at B., within reach of him, or points a gun at him without more. Is not the true view this—that every offence must have its beginning and completion, and is not whatever is done which falls short of the completion an attempt, provided it be sufficiently proximate to the intended offence? Pointing a loaded gun is an assault. Is not raising the gun in order to point it an attempt to assault?

In R. v. Ryland, 11 Cox, 101, it was held that under an indictment for unlawfully assaulting and having carnal knowledge of a girl between ten and twelve years of age the prisoner may be convicted of the attempt to commit that offence, though the child was not unwilling that the attempt should be made.

In R. v. Hapgood, 11 Cox, 471, H. was indicted for rape, and W. for aiding and abetting. Both were acquitted of felony, but H. was found guilty of attempting to commit the rape, and W. of aiding H. in the attempt. The conviction was affirmed both as to W. and H. *See* R. v. Bain, L. & C. 129, *and note* (*a*) *thereto:* R. v. Mayers, 12 Cox, 311: R. v. Barratt, 12 Cox, 498: R. v. Dungey, 4 F. & F. 99.

Many cases of attempts to commit indictable offences may now fall under s. 263, *ante*, which provides for the punishment of any one who assaults any person with intent to commit any indictable offence.

The prisoner wrote a letter to a boy of fourteen inciting him to commit an unnatural offence: *held*, that this was an attempt to incite to commit a crime, and a misdemeanour. Any step taken with a view to the commission of a misdemeanour is a misdemeanour; *per* Lord Denman in R. v. Chapman, 1 Den. 432.

The attempt or inciting to commit a felony or a misdemeanour is a misdemeanour: R. v. Martin, 2 Moo. 123; R. v. Roderick, 7 C. & P. 795; Anon, 1 Russ. 85; R. v. Ransford, 13 Cox, 9. *See* R. v. Gregory, 10 Cox, 459.

ATTEMPT CHARGED, FULL OFFENCE PROVED.

712. When an attempt to commit an offence is charged but the evidence establishes the commission of the full offence, the accused shall not be entitled to be acquitted, but the jury may convict him of the attempt, unless the court before which such trial is had thinks fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for the complete offence

2. Provided that after a conviction for such attempt the accused shall not be liable to be tried again for the offence which he was charged with attempting to commit. R. S. C. c. 174, s. 184.

Section 184, R. S. C. c. 174, upon which the above section is based enacted that if upon a trial for a misdemeanour a felony was also proved the prisoner was not therefore to be acquitted. It was taken from the 14 & 15 V. c. 100, s. 12 of the Imperial Acts, upon which Greaves says: "This section was introduced to put an end to all questions as to whether on an indictment for a misdemeanour, in case upon the evidence it appeared that a felony had been committed, the defendant was entitled to be acquitted on the ground that the misdemeanour merged in the felony: R. v. Neale, 1 Den. 36; R. v. Button, 11 Q. B. 929. The discretionary power to discharge the jury is given in order to prevent indictments being collusively or improperly preferred for misdemeanours where they ought to be preferred for felonies, and also to meet those cases where the felony is liable to so much more severe a punishment than the misdemeanour, that it is fitting that the prisoner should be tried and punished for the felony. For instance, if on an indictment for attempting to commit a rape it clearly appeared that the crime of rape was committed it would be right to discharge the jury."

Formerly, where upon an indictment for an assault with intent to commit rape a rape was actually proved, an acquittal would have been directed on the ground that the misdemeanour was merged in the felony: R. v. Harmwood, 1 East, P. C. 440; R. v. Nicholls, 2 Cox, 182; though in R. v. Neale, 1 Den. 36, cited, *ante*, by Greaves, it was held before this enactment that where a prisoner was indicted for carnally knowing a girl between ten and twelve years of age, and it was proved that he had committed a rape upon her, he was not thereby entitled to be acquitted.

OFFENCE CHARGED PART ONLY PROVED.

713. Every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or he may be convicted of an attempt to commit any offence so included:

2. Provided, that on a count charging murder, if the evidence proves manslaughter but does not prove murder the jury may find the accused not guilty of murder but guilty of manslaughter, but shall not on that count find the accused guilty of any other offence.

This is an extension of s. 191, c. 174, R. S. C. The abolition of the distinction between felonies and misdemeanours by itself alone extends very largely the number of cases where a verdict may be given for another offence than that one directly charged, as it has always been a principle of the common law that upon a charge of an offence composed of several ingredients the jury might, as a general rule, convict of any offence included in the one directly charged: R. v. Hollingberry, 4 B. & C. 330; though on an indictment for a felony the jury could not convict of a misdemeanour. Where an indictment contains divisible averments, as that the defendant "forged and caused to be forged," proof of either averment is sufficient: R. v. Middlehurst, 1 Burr. 400; and where a defendant is charged with composing, printing and publishing a libel he may be convicted of printing and publishing: R. v. Williams, 2 Camp. 646; a verdict of manslaughter may always be given, at common law, on a charge of murder, "Because, say the books, manslaughter is included in the charge of murder": Fost. 328. Greater offences include the lesser of a kindred character. On an indictment founded on a statute the defendant can be found guilty at common law: 2 Hale, 191, 192; 1 Chit. 638; 2 Gabbett, 525. *See* R. v. Bullock, 1 Moo. 324 note; R. v. Oliver, Bell, 287; R. v. Yeadon, L. & C. 81; R. v. Taylor, 11 Cox, 261. Where the offence appears from the evidence to be of a higher degree than is charged in the indictment it is in the discretion of the court to discharge the jury, and to direct another indictment to be preferred: 1 Chit. 639; but if the offence charged is proved the court may receive a verdict upon it; the defendant cannot complain of having been found guilty of a lesser offence than what he might have been found guilty of on another indictment. But a verdict for an offence of a higher degree than the one

charged can never be received. By s. 713 a verdict for the attempt to commit any offence included in the offence charged may be given, and on a count for murder no other verdict can be given than for either murder or manslaughter; or on a charge of child murder for concealment of birth; s. 714; but, on an indictment for manslaughter, a verdict may be given for any offence included in that charge. *See* R. v. Bird, 2 Den. 94; R. v. Phelps, 2 Moo. 240; R. v. Ganes, 22 U. C. C. P. 185; R. v. Smith, 34 U. C. Q. B. 552.

On an indictment for stealing from the person a verdict for stealing simply may be given: R. v. Sterne, 1 Leach 473; a conviction may be returned for any minor offence which was substantially charged by the residue of the indictment after striking out that portion of which the defendant was acquitted: Commonwealth v. Murphy, 2 Allen Mass. 163; but the offence found must be the offence proved: R. v. Gorbutt, Dears. & B. 166; R. v. Langmead, L. & C. 427; R. v. Adams, 1 Den. 38; R. v. Rudge, 13 Cox, 17.

The following decisions on the repealed clause may be usefully referred to for the construction of s. 713.

In a joint indictment for felony one may be found guilty of the felony and the other of assault under this clause: R. v. Archer, 2 Moo. 283. In an indictment for felony a conviction cannot be given under this clause of an assault completely independent and distinct, but only of such an assault as was connected with the felony charged: R. v. Guttridge, 9 C. & P. 471; and that case was followed in R. v. Phelps, 2 Moo. 240, and in R. v. Bird, 2 Den. 94. The case of R. v. Pool, 9 C. & P. 728, where Baron Gurney held that if a felony was charged and a misdemeanour of an assault proved the defendant might be convicted of the assault although that assault should not be connected with the felony, stands, therefore, overruled. In R. v. Boden, 1 C. & K. 395, it was held that on an indictment for assaulting with intent to rob, if that intent is negatived by the

jury, the prisoner may be convicted of assault under this enactment. In R. v. Birch, 1 Den. 185, upon a case reserved, it was held that upon an indictment for robbery the defendant, under this clause, may be found guilty of a common assault. The judges thought, upon consulting all the authorities, that this enactment was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor was it to be extended to all cases in which the indictment for a felony on the face of it charged an assault. *See* also R. v. Ellis, 8 C. & P. 654. But they were of opinion that, in order to convict of an assault under this section, the assault must be included in the charge on the face of the indictment, and also be part of the very act or transaction which the crown prosecutes as a felony by the indictment. And it was suggested that it would be prudent that all indictments for felony including an assault, should state the assault in the indictment.

In R. v. Greenwood, 2 C. & K. 339, it was held by Wightman, J., that if on an indictment for robbery with violence the robbery was not proved the prisoner could not be found guilty of the assault only, unless it appeared that such assault was committed in the progress of something which, when completed, would be, and with intent to commit, a felony.

In R. v. Reid, 2 Den. 88, it was held by five judges that the verdict of assault allowed by this clause must be for an assault as a misdemeanour, and not for a felonious assault, and this has never since been doubted.

In R. v. St. George, 9 C. & P. 483, the prisoner was charged with attempting to fire a pistol with intent, etc. The question was whether the prisoner could be convicted of an assault committed with his hand prior to having drawn out the pistol. Baron Parke held that the prisoner could only be found guilty of that assault which was involved in and connected with firing the pistol; but that

case is overruled: *see* R. v. Brown, 10 Q. B. D. 381 ; R. v. Duckworth, 17 Cox, 495, [1892] 2 Q. B. 83.

In R. v. Phelps, 2 Moo. 240, the prisoner with others was indicted for murder. It was proved that Phelps, in a scuffle, struck the deceased once or twice and knocked him down ; that after this Phelps went away to his own home and took no further part in the affray ; that, about a quarter of an hour afterwards, the deceased, on the same spot, was again assaulted by other parties, and received then an injury of which he died on the spot. On these facts the jury acquitted Phelps of the felony and found him guilty of the assault. But the judges were unanimously of opinion that the conviction was wrong, as for a verdict of assault under the clause mentioned the assault must be such as forms one constituent part of the greater charge of felony, not a distinct and separate assault as this was.

In R. v. Crumpton, Car. & M. 597, Patteson, J., held that, in manslaughter, a jury should not convict a prisoner of an assault unless it conduced to the death of the deceased, even though the death itself was not manslaughter. *See* also R. v. Connor, 2 C. & K. 518.

In the case of R. v. Ganes, 22 U. C. C. P. 185, already cited, the court followed the rule laid down by the majority in R. v. Bird, and decided that a verdict of assault cannot be given upon an indictment for murder or manslaughter. It may be remarked that, in this case, Chief Justice Hagarty distinctly said that his own individual opinion was wholly with that of the minority in R. v. Bird, viz., that, in such cases, a verdict of assault is legal.

In Quebec, in the cases of R. v. Carr (2nd case,) R. v. Wright, R. v. Taylor, and upon indictments charging either murder or manslaughter, verdicts of "guilty of assault" have been given, and received, unquestioned.

In R. v. Walker (Salacia case,) Quebec, 1875, for manslaughter, Dorion, C.J., charged the jury that they were at liberty to return a verdict of common assault.

Upon an indictment for rape, or for an assault with intent to commit rape, a boy under fourteen may be convicted of a common assault or an indecent assault, though not of an attempt to commit rape: R. v. Brimilow, 2 Moo. 122. *See* R. v. Waite, (1892) 2 Q. B. 600.

Upon an indictment for feloniously assaulting with intent to murder, a verdict of common assault may be given: R. v. Cruse, 2 Moo. 53; R. v. Archer, 2 Moo. 283.

But to authorize such a verdict the felony *charged* must necessarily include an assault on the person, and, for instance, on an indictment for administering poison with intent to murder, a verdict of assault cannot be given under this clause. Nor can it be given on an indictment for burglary with intent to ravish: R. v. Watkins, 2 Moo. 217; R. v. Dilworth, 2 M. & Rob. 531; R. v. Draper, 1 C. & K. 176; but such a verdict may be given, if the indictment charges an assault, and the wilfully administering of deleterious drugs: R. v. Button, 8 C. & P. 660; *per* Stephen, J., "Poisoning is not an assault: R. v. Clarence, 16 Cox, 526.

In R. v. Cregan, 1 Han. (N. B.) 36, on an indictment for murder, the jury found the prisoner guilty of an assault only, but that such assault did not conduce to the death of the deceased. The court held this conviction illegal and not sustained by the statute.

In R. v. Cronan, 24 U. C. C. P. 106, the Ontario Court of Common Pleas held that upon an indictment for shooting with a felonious intent the prisoner, if acquitted of the felony, may be convicted of a common assault, and that to discharge a pistol loaded with powder and wadding at a person, within such a distance that he might have been hit, is an assault.

In R. v. Goadby it appears to have been held that a verdict of assault cannot be received on an indictment for feloniously stabbing with intent to do grevious bodily harm, but this case seems very questionable, says Greaves, note (*d*), 2 Russ. 63.

A prisoner accused of assault with intent to rob may be found guilty of a simple assault: R. v. O'Neill, 11 R. L. 334.

The case of R. v. Dungey, 4 F. & F. 99, where it was held that after an acquittal upon an indictment for rape the prisoner may be indicted for a common assault, is not law in Canada, under ss. 631-713.

Held, that on an indictment for murder in the short form given in schedule A. to c. 29, of 32 & 33 V., a prisoner cannot be convicted of an assault under s. 51 of that chapter; *held*, also, that the fact of the prisoner's counsel having, at the trial, consented that he could be convicted, and requested the judge so to direct the jury, did not preclude him from afterwards objecting to the validity of the conviction on this ground: *see* R. v. Sirois, 27 N. B. Rep. 610; R. v. Mulholland, 4 P. & B. (N.B.) 512.

Greaves' following note to R. v. Phillips, 3 Cox, 226, may be inserted here.

"It may admit of some doubt whether the construction of s. 11 of the 1 V. c. 85, is finally settled. The framer of the clause probably intended that the clause should apply to those cases where, upon an indictment for a felony, including an assault, the jury should acquit on the ground that the felony, although attempted, was not completed. But if such were the intention the words do not so clearly express it as they ought, as they authorize the jury to convict 'of assault' on any indictment for felony 'where the crime charged shall include an assault.' These words are so general that they might include any assault, whether at the time of the felony charged or not; and the learned judges have therefore been obliged to put some limitation upon them, and the proper limitation seems to be that which has been put upon them by the very learned Baron in R. v. St. George, namely that the assault must be an assault involved in and connected with the felony charged: and it is submitted that it must be such an assault as is

essential to constitute part of the crime charged. A felony including an assault may be said to consist of the assault, the intent to commit the felony, and the actual felony. Thus in robbery there is the assault, the intent to rob, and the actual robbery; and in such a case it is submitted the assault, of which the prisoner may be convicted, must be such an assault as constitutes one step towards the proof of the robbery. Upon this the question arises whether an assault, where the jury negative any intention to commit a felony, is within the section, and it is submitted that it is not, as such an assault cannot be said to be involved in or connected with the felony charged in any manner whatsoever. It is true that an assault is included in the felony but it is an assault coupled with an intent, and if the jury negative the intent such an intent in no way tends to prove the felony; and it certainly would be a great anomaly if the prisoner was indicted for a felony, and the jury found he had no intention of committing a felony, that he might be sentenced to three years' imprisonment and hard labour, while if he had been indicted for the offence of which he was really guilty he could only be sentenced to three years' imprisonment without hard labour. R. v. Ellis, 8 C. & P. 654, therefore seems deserving of reconsideration, and the more so as it was decided before R. v. Guttridge, 9 C. & P. 471; R. v. St. George, 9 C. & P. 483; R. v. Phelps, Gloucester Sum. Ass. MSS. cited 1 Russ. 781. The intention, no doubt, was to punish attempts to commit felonies including assaults, and it is to be regretted that the provision, instead of being what it is, was not that upon any indictment for felony, if the jury should think that the felony was not completed, they might find the prisoner guilty of an attempt to commit the felony charged in the indictment."

In that case of R. v. Phillips four persons were indicted for a felony. Three were found guilty of the felony and one of common assault.

VERDICT OF CONCEALMENT OF BIRTH ON A CHARGE OF CHILD MURDER.

714. If any person tried for the murder of any child is acquitted thereof the jury by whose verdict such person is acquitted may find, in case it so appears in evidence, that the child had recently been born, and that such person did, by some secret disposition *of such child* or of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the court may pass such sentence as if such person had been convicted upon an indictment for the concealment of birth. R. S. C. c. 174, s. 188.

See s. 240 as to the offence of concealment of birth.

Section 714 is taken from 24 & 25 V. c. 100, s. 60, (Imp.), upon which Greaves remarks: "Cases have not unfrequently occurred where endeavours have been made to conceal the birth of children, and there has been no evidence to prove that the mother participated in those endeavours, though there has been sufficient evidence that others did so, and under the former enactments, under such circumstances, all must have been acquitted. The present clause is so framed as to include every person who uses any such endeavour, and it is quite immaterial under it whether there be any evidence against the mother or not."

Under the former enactments a person assisting the mother in concealing a birth would only have been indictable as an aider or abettor; but a person so assisting would come within the terms of this clause as a principal.

The terms of the former enactments were "by secret burying or otherwise disposing of the dead body," and on these terms many questions had arisen: *see* R. v. Goldthorpe, 2 Moo. 240; R. v. Perry, Dears. 471. Under this clause "any secret disposition" is sufficient.

Under the former enactments the mother alone could be convicted of this offence where she was tried for the murder of her child. Under this clause any person tried for the murder of a child may be convicted of this offence whether the mother be convicted or not. The words "of such child" are not in the Imperial Act.

TRIAL OF JOINT RECEIVERS.

715. If, upon the trial of two or more persons indicted for jointly receiving any property, it is proved that one or more of such persons separately received any part or parts of such property, the jury may convict, upon such indictment, such of the said persons as are proved to have received any part or parts of such property. R. S. C. c. 174, s. 200. 24-25 V. c. 96, s. 94, (Imp.).

See s. 314, *et seq.*, as to the offence of receiving stolen goods.

PROCEEDINGS AGAINST RECEIVERS.

716. When proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given, at any stage of the proceedings, that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property which forms the subject of the proceedings taken against him to be stolen: Provided, that not less than three days' notice in writing has been given to the person accused that proof is intended to be given of such other property, stolen within the preceding period of twelve months, having been found in his possession; and such notice shall specify the nature or description of such other property, and the person from whom the same was stolen. R. S. C. c. 174, s. 203. 34-35 V. c. 112, s. 19, (Imp.).

See s. 314, *et seq.*, for the offence of receiving stolen goods.

The cases of R. v. Oddy, 2 Den. 264; R. v. Dunn, 1 Moo. 146; and R. v. Davis, 6 C. & P. 177, are not law since the above enactment.

Upon an indictment for receiving stolen goods evidence may be given under this section that there was found in the possession of the prisoner other property stolen within the preceding twelve months, although such other property is the subject of another indictment against him: R. v. Jones, 14 Cox, 3.

In order to show guilty knowledge, under this section, it is not sufficient merely to prove that "other property stolen within the preceding period of twelve months" had at some time previously been dealt with by the prisoner, but it must be proved that such "other property" was found in the possession of the prisoner at the time when he is found in possession of the property which is the subject

of the indictment: R. v. Drage, 14 Cox, 85; R. v. Carter, 15 Cox, 448, Warb. Lead. Cas. 183.

THE SAME AFTER PREVIOUS CONVICTION.

717. When proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has, within five years immediately preceding, been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen: Provided, that not less than three days' notice in writing has been given to the person accused that proof is intended to be given of such previous conviction; and it shall not be necessary, for the purposes of this section, to charge in the indictment the previous conviction of the person so accused. R. S. C. c. 174, s. 204. 34-35 V. c. 112, s. 19 (Imp.).

See s. 314, *et seq.*, as to the offence of receiving stolen goods.

EVIDENCE UNDER SECTIONS 460, ET SEQ.

718. Upon the trial of any person accused of any offence respecting the currency or coin, or against the provisions of Part XXXV., no difference in the date or year or in any legend marked upon the lawful coin described in the indictment, and the date or year or legend marked upon the false coin counterfeited to resemble or pass for such lawful coin, or upon any die, plate, press, tool or instrument used, constructed, devised, adapted or designed for the purpose of counterfeiting or imitating any such lawful coin, shall be considered a just or lawful cause or reason for acquitting any such person of such offence; and it shall, in any case, be sufficient to prove such general resemblance to the lawful coin as will show an intention that the counterfeit should pass for it. R. S. C. c. 174, s. 205.

See s. 460, *et seq.*, for offences relating to the coin. This s. 718 is not in the English Act. It was s. 31 of 32 & 33 V. c. 18 of Canada.

719. Verdict in case of libel, *see ante*, under s. 302, p. 305.

IMPOUNDING DOCUMENTS.

720. Whenever any instrument which has been forged or fraudulently altered is admitted in evidence the court or the judge or person who admits the same may, at the request of any person against whom the same is admitted in evidence, direct that the same shall be impounded and kept in the custody of some officer of the court or other proper person for such period and subject to such conditions, as to the court, judge or person admitting the same seems meet. R. S. C. c. 174, s. 208.

This clause is not in the Imperial statutes. It was originally taken from c. 101, s. 2, C. S. U. C; *see* s. 569, s-s. 5.

DESTROYING COUNTERFEIT COIN.

721. If any false or counterfeit coin is produced on any trial for an offence against Part XXXV., the court shall order the same to be cut in pieces in open court, or in the presence of a justice of the peace, and then delivered to or for the lawful owner thereof, if such owner claims the same. R. S. C. c. 174, s. 209.

See ss. 460, *et seq.*, as to offences relating to the coin, and s. 569, s-s. 6, as to search warrant. The repealed clause applied to all courts. This one applies only to criminal courts.

VIEW.

722. On the trial of any person for an offence *against this Act* the court may, if it appears expedient for the ends of justice, at any time after the jurors have been sworn to try the case and before they give their verdict, direct that the jury shall have a view of any place, thing or person, and shall give directions as to the manner in which, and the persons by whom, the place, thing or person shall be shown to such jurors, and may for that purpose adjourn the trial and the costs occasioned thereby shall be in the discretion of the court. R. S. C. c. 174, s. 171.

2. When such view is ordered, the court shall give such directions as seem requisite for the purpose of preventing undue communication with such jurors: Provided that no breach of any such directions shall affect the validity of the proceedings. R. S. C. c. 174, ss. 171, 172.

This is more a re-enactment of the Imperial Act, 39 & 40 V. c. 18, s. 11, (for Ireland) than of s. 171, c. 174, R. S. C. *Quære*, if evidence is improperly received by the jury during such view: R. v. Martin, 12 Cox, 204. View ordered in R. v. Whalley, 2 Cox, 231 (*see* this case as to forms); *Anon*, 2 Chit. Rep. 422. If witnesses accompany the jury so as to give explanations to them the prisoner has a right to be present: *see* R. v. Petrie, 20 O. R. 317.

VARIANCE AND AMENDMENTS AT TRIAL.

723. If on the trial of any indictment there appears to be a variance between the evidence given and the charge in any count in the indictment, either as found or as amended, or as it would have been if amended in conformity with any particular supplied as provided in sections six hundred and fifteen and six hundred and seventeen, the court before which the case is tried may, if of opinion that the accused has not been misled or prejudiced in his

defence by such variance, amend the indictment or any count in it or any such particular so as to make it conformable with the proof.

2. If it appears that the indictment has been preferred under some other Act of Parliament instead of under this Act, or under this instead of under some other Act, or that there is in the indictment, or in any count in it, an omission to state or a defective statement of anything requisite to constitute the offence, or an omission to negative any exception which ought to have been negatived, but that the matter omitted is proved by the evidence, the court before which the trial takes place, if of opinion that the accused has not been misled or prejudiced in his defence by such error or omission, shall amend the indictment or count as may be necessary.

3. The trial in either of these cases may then proceed in all respects as if the indictment or count had been originally framed as amended: Provided that if the court is of opinion that the accused has been misled or prejudiced in his defence by any such variance, error, omission or defective statement, but that the effect of such misleading or prejudice might be removed by adjourning or postponing the trial, the court may in its discretion make the amendment and adjourn the trial to a future day in the same sittings, or discharge the jury and postpone the trial to the next sittings of the court, on such terms as it thinks just.

4. In determining whether the accused has been misled or prejudiced in his defence the court which has to determine the question shall consider the contents of the depositions, as well as the other circumstances of the case.

5. Provided that the propriety of making or refusing to make any such amendment shall be deemed a question for the court, and that the decision of the court upon it may be reserved for the Court of Appeal, or may be brought before the Court of Appeal like any other decision on a point of law. R. S. C. c. 174, ss. 237, 238, 239. (*Amended*).

AMENDMENT TO BE ENDORSED.

724. In case an order for amendment as provided for in the next preceding section is made it shall be endorsed on the record; and all other rolls and proceedings connected therewith shall be amended accordingly by the proper officer and filed with the indictment, among the proper records of the court. R. S. C. c. 174, s. 240.

FORMAL RECORD IN SUCH CASE.

725. If it becomes necessary to draw up a formal record in any case in which an amendment has been made as aforesaid, such record shall be drawn up in the form in which the indictment remained after the amendment was made, without taking any notice of the fact of such amendment having been made. R. S. C. c. 174, s. 243.

These clauses are taken with alterations from the 14 & 15 V. c. 100, of the Imperial statutes (Lord Campbell's Act), in relation to which Greaves remarks:—

"This is one of the most important sections in the Act, and, if the power given by it be properly exercised, will

tend very materially to the better administration of criminal justice. Formerly, if any variance occurred between any allegation in an indictment, and the evidence adduced in support of it, the prisoner was entitled to be acquitted. This led to much inconvenience. It caused the multiplication of counts, varying the statement in as many ways as it was possible to conceive the evidence could support, and thereby greatly increased the expense of the prosecution. It sometimes led to the entire escape of heinous offenders, for it happened in some cases that the grand jury were discharged before the acquittal took place; and though such acquittal in many cases would not have operated as a bar to another indictment, yet the prosecutor chose rather to submit to the first defeat than to prefer another indictment at a subsequent assizes; and even in some cases an acquittal took place under such circumstances that the prisoner was enabled successfully to plead it in bar to another indictment. Thus in Sheen's case, 2 C. & P. 634, where the prisoner had been indicted for the murder of Charles William Beadle, and acquitted on the ground that the name of the deceased could not be proved, to a subsequent indictment, which charged him with the murder of Charles William, he pleaded the former acquittal, and that the deceased was as well known by the name mentioned in the one indictment as by the name mentioned in the other, and so the jury found. This case clearly shows that the preferring a new bill was not in all cases sufficient to prevent a failure of justice in consequence of a variance; and many like cases have occurred."

"The provisions as to the amendment of variances in criminal cases have been gradually extended. The first statute which introduced the power of amendment was the 9 Geo. IV. c. 15, which empowered any judge at *nisi prius*, or any court of oyer and terminer and general gaol delivery, to amend any variance, in cases of misdemeanors, between any matter *in writing or in print*, and the recital thereof on the record. After this statute had been in opera-

tion for the full period of twenty years, and no injurious consequences had been found to arise from it, the 11 & 12 V. c. 46, s. 4, empowered any court of oyer and terminer and general gaol delivery to amend any variance, *in any offence whatever, between any matter in writing or in print* and the recital thereof on the record. And the provisions of this Act were extended to the sessions, as far as they are applicable to offences within their jurisdiction, by the 12 & 13 V. c. 45, s. 10."

"As these enactments only applied to variances between matters in writing and the record a very numerous class of variances was left unprovided for, and the first clause in this Act was intended to apply to all such variances."

"It is to be carefully noticed, also, that an amendment is only prohibited where the defendant may be prejudiced in his defence upon the merits, not in his defence simply. (S. 723 is to be read, it is assumed, as if the words "upon the merits" were therein inserted after "defence" in the eighth line.) Indeed, wherever any variance occurs which makes an amendment necessary it may be truly said that the defendant may be prejudiced in his defence by making it, for if the amendment be not made the defendant would be entitled to be acquitted. The prejudice, therefore, to the defendant, which is to prevent an amendment, is properly confined to a prejudice in his defence *upon the merits*, which plainly means a substantial, and not a formal or technical, defence to the charge made against him."

"With regard to the cases in which an amendment ought to be made or refused, as the questions whether the variance be material to the merits of the case, and whether the defendant may be prejudiced in his defence on the merits by making an amendment, are questions which must necessarily depend on the particular charge and particular circumstances of each case, it is impossible to lay down any general rule by which the court may be guided in all cases; indeed it is very possible that the very same iden-

tical variance which ought unquestionably to be amended in one case, ought just as clearly not to be amended in another, as it may so happen that the amendment in the one case could not possibly prejudice the prisoner in his defence on the merits, but in the other might materially prejudice the prisoner in such defence."

"Cases may easily be put where no doubt can exist that the variance is not material to the merits, and that the defendant cannot be prejudiced by an amendment in his defence on the merits. For instance, a man steals a sheep in the night out of a field, being ignorant at the time of the name of the owner of the sheep; in such a case it is very difficult to conceive that the name of the owner can be material to the merits, or that the defendant can be prejudiced in his defence by the name of the owner being amended according to the proof. So, also, if a man were to shoot into a crowd and wound or kill an individual, the name of such individual could hardly by possibility be material. In each case, however, the court must form its own judgment upon a consideration of the whole facts of the case, and the manner in which the variance is brought under its notice; and it may not unfrequently be material to see whether any such question has been raised before the committing magistrate: for if the case has proceeded before the sitting magistrate without any such question being raised that may afford some ground at least for concluding that the defendant did not consider the point material to his defence, and that it is not entitled to be so considered upon the trial."

"Before determining upon making an amendment the court should receive all the evidence applicable to the particular point, otherwise it might happen that that which appeared to be a variance upon the evidence at one stage of the trial might afterwards be shewn to be no variance by the evidence at a later period of the trial; and if the court were to amend on the evidence at the earlier period,

it would be obliged to direct an acquittal upon the evidence at the subsequent period, for *the clause gives no power to amend the same identical particular more than once.*"

"Again, in order to ascertain whether the prisoner may be prejudiced in his defence by the amendment, the court ought to look, not only to the facts in evidence on the part of the prosecution at the time when the amendment is applied for, but also to the defence already set up, or intended to be set up; for which purpose it may, perhaps, in some cases be necessary to examine a witness or two on behalf of the defendant and the contents of the depositions: s. 723 s-s. 4."

"It must be remembered that the question is one entirely for the court, and that the court must decide it itself; and, generally speaking, where this is the case the court will not determine the question before it on the evidence on one side, but will permit the other side immediately to introduce any evidence that may bear upon the question, so that the whole facts relating to the particular question may be before the court at once."

"Thus—to mention an analogous case—where the plaintiff proposed to put in evidence an account signed by the defendant, and the defendant proposed to exclude the account, on the ground that it had been delivered to the plaintiff, an attorney, in his character of attorney for the defendant, Erle, J., held that the defendant was entitled immediately to put in a letter, and call a witness to prove that the account was so delivered, though the plaintiff's case was not closed: Cleave v. Jones, Hereford Summer Assizes, 1851. It must be noticed, also, that the power to amend clearly does not extend to altering the charge in the indictment from one offence to another offence. For instance, an indictment for 'forging' could not be altered into an indictment for 'uttering,' nor an indictment for 'stealing' into an indictment for 'obtaining by false pretenses.'"

"Equally clear is it that the amendment ought not to be made so to apply to a different transaction. Every offence, however simple it may be, consists of a number of particulars; it must have time, and place, and its component parts, all of which together constitute one individual transaction. Now the real meaning of the clause is that, provided you keep to the same identical transaction, you may amend any such error as is mentioned in the clause as to one or more of the particulars included in such transaction. For instance, a burglary is charged in the house of James Jones, in the parish of Winkill, and stealing the goods of John Jeffs. The evidence shows that a burglary was committed in every respect as alleged, except that the goods were the property of James Jeffs. There an amendment would clearly be right. But suppose, instead of such a case, it was proposed to prove a burglary at another time, at another place in another man's house, and the stealing of other goods; this clearly would not be a case for amendment. The proper mode to consider the question is this: the grand jury have had evidence of one transaction upon which they found the bill; the case before the petty jury ought to be confined to the same transaction, but if it is, it may turn out that, either through insufficient investigation or otherwise, the grand jury have been in error as to some particular or other, and upon the trial the error is discovered. Now this is just the case to which the clause applies. A civil case may afford an apt illustration. The plaintiffs declared on a promissory note for £250, made by *the defendant*, dated the 9th of November, 1838, payable to the plaintiffs, or their order, on *demand*; the defendant pleaded that he did not make the note; the plaintiffs proved on the trial a *joint and several* promissory note for £250, made by the defendant *and his wife*, dated the 6th of November, payable *twelve months after date*, with interest. There was no proof of the existence of any other note. Although it was objected that there was a material variance in the substantial parts of the note, the date, the parties, and the period

of its duration, it was held that the declaration was properly amended so as to make it correspond with the note produced; for it was a mere misdescription, and it was just the case in which the Legislature intended that the discretionary power of amendment should be exercised: Beckett v. Dutton, 7 M. &. W. 157."

"The following appear to be the sort of variances which are amendable. In an indictment for bigamy, a woman described as a 'widow' who is proved to be unmarried: R. v. Deeley, 1 Moo. 303; or as 'Ann Gooding,' where the register described her as 'Sarah Ann Gooding': R. v. Gooding, Car. & M. 297. In an indictment for night poaching describing a wood as 'The Old Walk,' its real name being 'The Long Walk': R. v. Owen, 1 Moo. 118. In an indictment for stealing 'a cow,' which was 'a heifer'; Cooke's case, 1 Leach, 105; 'a sheep," which turned out to be 'a lamb': R. v. Loom, 1 Moo. 160; or 'ewe': R. v. Puddifoot, 1 Moo. 247; 'a filly,' which was a 'mare': R. v. Jones, 2 Russ. 364; 'a spade,' which turned out to be the iron part without any handle: R. v. Stiles, 2 Russ. 316. So in an indictment for a nuisance, by not repairing, or by obstructing a highway, the termini of the highway might be amended. So where an indictment alleges a burglary, or house-breaking, in the parish of St. Peter, in the county of W., and it appears that only part of the parish is situated in such county, the indictment may be amended: R. v. Brookes, Car. & M. 543; R. v. Jackson, 2 Russ. 49, 76."

"Such are some of the instances in which amendments would clearly be right, but it is easy to suggest other cases in which an amendment ought not to be made. Suppose, on the trial of an indictment for stealing a sheep, evidence were given of stealing a cow, or *vice versa*, or on an indictment for stealing geese it were proposed to prove stealing fowls; these are cases in which no amendment ought to be made; it is impossible to conceive that the grand jury can have made such a mistake, and the offence, though in law

the same, and liable to the same punishment, is obviously as different as if it were different in law, and liable to a different punishment."

"Many decisions have been rendered by the courts in civil cases as to the instances in which amendments ought to be made, and some of the principles laid down in those decisions may form a useful guide in questions arising under this clause, and they are, therefore, here introduced."

"It has been well laid down by a great judge, that the fairest test of whether a defendant can be prejudiced by an amendment is this: 'Supposing the defendant comes with evidence that would enable him to meet the case as it stands on the record unamended would the same enable him to meet it as amended': *per* Rolfe, B., Cooke v. Stratford, 13 M. & W. 379. If whatever would be available as a defence under the indictment, as it originally stood, would be equally so after the alteration was made, and any evidence the defendant might have would be equally applicable to the indictment in the one form as in the other, the amendment would not be one by which the defendant could be prejudiced in his defence, or in a matter material to the merits: Gurford v. Bayley, 3 M. & G. 781. If the transaction is not altered by the amendment, but remains precisely the same, the amendment ought to be allowed: Cooke v. Stratford, 13 M. & W. 379. But if the amendment would substitute a different transaction from that alleged it ought not to be made: Perry v. Watts, 3 M. & G. 775; Brashier v. Jackson, 6 M. & W. 549; and the court will look at all the circumstances of the case to ascertain whether the transaction would be changed by the amendment. If the amendment would render it necessary to plead a different plea the amendment ought not to be made: Perry v. Watts, 3 M. & G. 775; Brashier v. Jackson, 6 M. & W. 549."

"It was laid down in two cases of perjury, which were tried some years ago, that amendments in criminal cases

ought to be made sparingly under the 9 Geo. IV. c. 15; R. v. Cooke, 7 C. & P. 559; R. v. Hewins, 9 C. & P. 786. These cases occurred at a time when amendments in criminal cases were looked upon with great disfavour; but the opinion of the Legislature, evidenced by the 11 & 12 V. c. 46, s. 4, the 12 & 13 V. c. 45, s. 10, and the present statute, clearly is in favour of amendments being made in all cases where the amendment is not material to the merits, and the prisoner is not prejudiced by it. In civil suits, the 9 Geo. IV. c. 15, and the 3 & 4 Wm. IV. c. 42, s. 23, *being remedial acts*, have always received a liberal construction; Smith v. Brandram, 2 M. & G. 244; Smith v. Knowlden, 2 M. & G. 561; Sainsbury v. Matthews, 4 M. & W. 343; and it has been held, that the fact of an action being a harsh and oppressive proceeding on the part of a landlord, who was taking advantage of a forfeiture in order to get possession of property on which the defendant had laid out a large sum of money, was not a consideration which ought to influence a judge against allowing an amendment; for if the amendment did not prejudice the defendant in his defence it ought to be allowed: *Doe d.* Marriott v. Edwards, 5 B. & Ad. 1065. . . . . "The amendment must be made in the course of the trial, and certainly before the jury give their verdict, because the trial is to proceed and the jury are to give their opinion upon the amended record: *per* Alderson, B., Brashier v. Jackson, 6 M. & W. 549. It would be better, indeed, in all cases to make it immediately before any further evidence is given, and where the amendment is ordered in the course of the case for the prosecution it certainly should be made before the defence begins, for it is to the amended record that the defence is to be made."

In England the provision re-enacted in s. 725, *ante*, applies to all amendments including those made in virtue of the enactment re-produced in s. 629, *ante;* but it is clear that the substitution of the words "as aforesaid" in the said s. 725 of our Act for the words "under the provi-

sions of this Act" in the English corresponding clause has the effect of rendering the enactment of s. 725 not applicable to amendments made under the said s. 629, and that in the case of such an amendment having been made it must so appear if a formal record has to be drawn up.

Sub-section 2 of s. 723 extends the power of amendment to a very large extent. In practice, however, it may not be acted upon frequently. If the indictment charges no offence the courts will not replace the grand jury. And it will not often happen that a case will come to trial before it is discovered that the indictment is so defective that it really charges no offence. Should that happen, all that the counsel for the defence has to do, is not then to notice the defect at all. If a verdict is given against his client the objection will be open to him on arrest of judgment: s. 733. The court, on that motion, will not have power to make amendments of which no mention has been made before the verdict.

Sub-section 5 of s. 723 makes the propriety of making or refusing to make any such amendment a question for the court: it does not seem clear how it could ever have been a question for the jury.

The right to reserve a case upon such an amendment is *new*. Any decision upon such a question was always held not to be a question of law but one entirely in the discretion of the judge.

Greaves, in 3 Russ. 324, has the following additional remarks on the English statute:—

"It has been well laid down by a very learned judge (Byles, J., in R. v. Welton, 9 Cox, 297,) that a statute like the 14 & 15 V. c. 100, should have a wide construction, and should not be interpreted in favour of technical strictness, and there are very strong reasons why a liberal construction should be made on such a statute. If a prisoner is acquitted on the ground of a variance he may be again more correctly indicted, and wherever this course is adopted

the effect of an acquittal on such a variance is to put both the prosecutor and prisoner to additional trouble and expense. And in case where no fresh indictment is preferred the result is that the costs of the prosecution are thrown away, and an offender, possibly a very notorious one, escapes the punishment he deserves. In every case where an acquittal takes place in consequence of a variance the court may order a fresh indictment to be preferred, and the prisoner to be detained in prison or admitted to bail till it is tried, and it may be well for the court, where a variance occurs, to consider whether the prisoner might not fairly be presented with the option either of having the amendment made or of being indicted anew in a better form."

In R. v. Russel, 1 Moo. 356, the prisoner consented to a sentence though he had been unlawfully convicted, and the court sentenced him accordingly.

WHEN THE AMENDMENT MUST BE MADE.

It had been laid down in R. v. Rymes, 3 C. & K. 326, that an amendment should not be allowed after the counsel for the defence has addressed the jury, but this case is now no authority, and an amendment may be allowed after the prisoner's counsel has addressed the jury: R. v. Fullarton, 6 Cox, 194.

But it must be made before verdict: R. v. Frost, Dears. 474; R. v. Larkin, Dears. 365; R. v. Oliver, 13 Cox, 588.

"Upon full consideration," says Greaves, 3 Russ. 329, "it seems that the verdict is the dividing line. Any one familiar with criminal trials must have met with cases where variances have not been discovered until just before the verdict is given, and the only limit to the time for amendment is in the words 'on the trial,' and the trial is clearly continuing until the verdict, as the power to amend is given '*whenever* on the trial' there shall appear to be any variance."

"Before making an amendment the court should receive all the evidence bearing upon the point; and as this is a question to be determined by the court, but is not to be left to the jury, the evidence bearing upon it which may be in the possession of the prisoner may be interposed when the point arises in the course of the case for the prosecution, and this is much the best course, as the court is thereby enabled to dispose of the point at once; indeed, it is now settled that in all cases, whether civil or criminal, where a question is to be decided by the court, the proper course is for the judge to receive the evidence on both sides at once, and then to determine the question."

DECISIONS ON THE STATUTE.

The clause gives no power to amend the same identical particular more than once, and the court will not amend an amendment: R. v. Barnes, L. R. 1 C. C. R. 45.

And when an indictment is amended at the trial the court of Crown cases reserved cannot consider it as it originally stood, but only in its amended form: R. v. Pritchard, L. & C. 34; R. v. Webster, L. & C. 77.

Under this statute, an amendment in the name of the owner of stolen property, by substituting a different owner than the one alleged, may be made at the trial: R. v. Vincent, 2 Den. 464; R. v. Senecal, 8 L. C. J. 287; *see* Cornwall v. R., 33 U. C. Q. B. 106, and R. v. Jackson, 19 U. C. C. P. 280.

In R. v. Welton, 9 Cox, 297, the prisoner was charged with throwing Annie Welton into the water with intent to murder her; there being no proof of the name of the child it was held by Byles, J., that the indictment might be amended by striking out "Annie Welton" and inserting "a certain female child whose name is to the jurors unknown."

An indictment alleged that a footway led from a turnpike-road into the town of Gravesend, but the highway was

a carriage way from the turnpike-road to the top of Orme House Hill, and from thence to Gravesend it was a footway, and the nuisance alleged was between the top of Orme House Hill and Gravesend; it was held that the indictment might be amended by substituting a description of a footway running from Orme House Hill to Gravesend as this appeared to be the very sort of case for which the statute provides: R. v. Sturge, 3 E. & B. 734.

Where an indictment for perjury alleged that the crime was committed on a trial for burning a *barn*, and it was proved that the actual charge was one of firing a *stack of barley*, it was held that the words *stack of barley* might be inserted instead of *barn*: R. v. Neville, 6 Cox, 69.

Where the indictment stated that the prisoner had committed perjury at the hearing of a summons before the magistrates charging a woman with being "drunk" whereas the summons was really for being "drunk and disorderly," the court held that it had power, under this statute, to amend the indictment by adding the words "and disorderly": R. v. Tymms, 11 Cox, 645.

In an indictment for perjury the perjury was alleged to have been committed at a petty sessions of the peace, at Tiverton, in the county of Devon, before John Lane and Samuel Garth, then respectively being justices of the peace assigned to keep the peace in and for *the said county*, and acting in and for the borough of Tiverton, in the said county. It appeared by the proof that these gentlemen were justices for the borough of Tiverton only, and were not justices for the county. Blackburn, J., allowed the indictment to be amended by striking out the words, *the said county*, so as to make the averment be, "justices assigned to keep the peace in and for, and acting in and for the borough of Tiverton, in the said county." The court of criminal appeal held that the judge had power so to amend: R. v. Western, 11 Cox, 93.

The secretary of a friendly society, of which A. B. and others were the trustees, was charged with embezzling

money belonging to the society. In the indictment, the property was laid as of "A. B. and others," without alleging that they were trustees of the society: *held*, that the indictment might be amended by adding the words, "trustees of:" R. v Marks, 10 Cox, 367; *see* R. v. Senecal, 8 L. C. J. 287.

The description of an Act of parliament in an indictment may be amended: R. v. Westley, Bell, 193.

In an indictment for larceny of property belonging to a banking company the property was laid to be in the manager of the bank; the banking business was carried on by a joint-stock banking company, and there were more than twenty partners or shareholders. The judge amended the indictment by stating the property to be in "W. (one of the partners) and others:" *held*, that this amendment was right: R. v. Pritchard, L. & C. 34, 8 Cox, 461.

But an amendment changing the offence charged to another offence should not be allowed. Where the prisoner was indicted for a statutable felonious forgery, but the evidence only sustained a forgery at common law, the prosecutor was not allowed to amend the indictment by striking out the word "feloniously," and thus convert a charge of felony into one of misdemeanour: R. v. Wright, 2 F. & F. 320.

So upon an indictment for having carnal knowledge of a girl between ten and twelve years of age, it appearing by the proof that she was under ten, Maule, J., held that the indictment could not be amended: R. v. Shott, 3 C. & K. 206.

The words "felonious" or "feloniously," if omitted, can never be allowed to be inserted: 1 Russ, 935, note (*a*) by Greaves. An amendment altering the nature or quality of the offence charged cannot be allowed.

When an indictment against two bankrupts alleged that they embezzled a part of their personal estate to the value of £10—to wit, certain bank-notes and certain

moneys, and it rather seemed that the money converted was foreign money, it was held that "moneys" meant English moneys, and the court refused to amend the indictment: R. v. Davison, 7 Cox, 158. But Greaves is of opinion that the case seems to be one in which an amendment clearly might have been made: 3 Russ. 327.

An indictment alleged that the prisoner pretended that he had served a certain order of affiliation on J. Bell; but the evidence was, that the prisoner had said that he had left the order with the landlady at the Chesterfield Arms, where Bell lodged, he being out; it was held that this variance was not amendable under the English statute, as it was not a variance in the name or description of any matter or thing named or described in the indictment: R. v. Bailey, 6 Cox, 29. But in Canada such a variance would be amendable, being covered by the more general terms of the statute.

A woman charged with the murder of her husband was described as "A., wife of J. O., late of ," the judge ordered this to be amended by striking out the word "wife," and inserting the word "widow: R. v. Orchard, 8 C. & P. 565.

Where, in an indictment for false pretenses, the words "with intent to defraud" are omitted, the indictment is bad, and cannot be amended under this statute: *per* Lush, J., R. v. James, 12 Cox, 127. The form given in form F. F. schedule one under s. 611, *ante*, omits the words "with intent to defraud.

An indictment charged the prisoner with stealing nineteen shillings and sixpence. At the trial, it was objected by the prisoner's counsel that there was no case, for the evidence showed that if the prisoner was guilty of stealing anything it was of stealing a sovereign. Thereupon the court amended the indictment by striking out the words nineteen shillings and sixpence," and inserting in lieu thereof "one sovereign." The jury found the prisoner guilty of

stealing a sovereign: *held,* that the court had power to amend under the 14 & 15 V. c. 100, s. 1 : R. v. Gumble, 12 Cox, 248.

The words "with intent to defraud" allowed to be struck out of an indictment: R. v. Cronin, 36 U. C. Q. B. 342.

If an indictment for libel contains merely a general allegation that the newspaper in which it appeared circulated in the district of Montreal, an amendment for the purpose of alleging publication in that District of the special article complained of is not allowable: R. v. Hickson, 3 L. N. 139.

Where two or more names are laid in an indictment under an *alias dictum,* proof of one only will be sufficient: R. v. Jacobs, 16 S. C. R. 433.

FORM OF RECORD.

726. In making up the record of any conviction or acquittal on any indictment it shall be sufficient to copy the indictment with the plea pleaded thereto, without any formal caption or heading; and the statement of the arraignment and the proceedings subsequent thereto shall be entered of record in the same manner as before the passing of this Act, subject to any such alterations in the forms of such entry as are, from time to time, prescribed by any rule or rules of the superior courts of criminal jurisdiction respectively,—which rules shall also apply to such inferior courts of criminal jurisdiction as are therein designated. R. S. C. c. 174, s. 244.

There is no statutory enactment, in England, corresponding to this one, and there the caption has, yet, to be entered of record immediately before the indictment, when the record has to be made up in form.

The record of judicial proceedings in criminal cases is always, in the first instance, taken down by the clerk of the court in the way of short entries made upon his docket, or of endorsements upon papers filed, and the like. When he has to make the extended record, or record proper, resort is had to these docket entries, to the documents filed, and to the several endorsements upon them, which serve as *memoranda* for him. The record, formally made up, is the history or narration of the proceedings in the case, stating:

1st. The court before which the indictment was found, and where and when holden.

2ndly. The grand jurors by whom it was found.

3rdly. The time and place where it was found, and that the indictment was found under oath.

(*These three particulars form the caption.*)

4thly. The indictment.

5thly. The appearance or bringing in of the defendant into court.

6thly. The arraignment.

7thly. The plea.

8thly. The joinder in issue, or *similiter*.

9thly. The award of the jury process.

10thly. The verdict.

11thly. The *allocutus*, or asking of the defendant why sentence should not be passed on him.

12thly. The sentence.

It is probably now only to prove *autrefois acquit or autrefois convict* that it will be necessary to draw up a formal record, as ss. 694, 695 and 743 take away the necessity of so doing in the other cases where it could have been wanted.

The necessity of a formal caption or heading to a made-up record is taken away by section 726.

The caption of the indictment is no part of the indictment itself, but only the style or preamble thereto, the formal history of the proceedings before the grand jury: 2 Hale, 165; 1 Starkie, Cr. Pl. 233. 2 Hawk. 349; 1 Chit. 325; Archbold, 37; 1 Bishop, Cr. Proc. 655.

The form of the caption is as follows:

Dominion of Canada. } In the Court of Queen's Bench,
Province of Quebec. } Crown Side.

District of Quebec.—Be it remembered, that at a term of the Court of Queen's Bench, crown side, holden at the

city of Quebec, in and for the said district of Quebec, on the day of , (*the first day of the term,*) in the year of our Lord , upon the oath of (*insert the names of the grand jurors*) good and lawful men of the said district, now here sworn and charged to inquire for our Sovereign Lady the Queen, and for the body of the said district, it is presented in the manner following, that is to say: (*this ends the caption*).

Then the record continues to recite the indictment, etc., as follows, and by s. 726, may commence here:

District of Quebec.—The Jurors for our Lady the Queen present, that John Jones, on the fifth day of June, in the year of our Lord one thousand eight hundred and seventy, wilfully and unlawfully did kill and murder one Patrick Ray, whereupon the sheriff of the aforesaid district is commanded, that he omit not for any liberty in his bailiwick, but that he take the said John Jones, if he may be found in his bailiwick, and him safely keep to answer to the murder whereof he stands indicted. And afterwards, to wit, at the same term of the said Court of Queen's Bench, before the said Court of Queen's Bench, on the said day of , in the said year of our Lord , here cometh the said John Jones under the custody of William Brown, Esquire, sheriff of the district aforesaid (in whose custody in the gaol of the district aforesaid, for the cause aforesaid, he had been before committed), being brought to the bar here in his proper person by the said sheriff, to whom he is here also committed. And he, the said John Jones, forthwith being demanded concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, saith that he is not guilty thereof, and therefore he puts himself upon the country. And the honourable George Irvine, Attorney-General of our said Lady the Queen, who prosecutes for our said Lady the Queen in this behalf, doth the like. Therefore let a jury thereupon immediately come before the said

court of free and lawful men of the said district of Quebec, by whom the truth of the matter may be the better known, and who are not of kin to the said John Jones, to recognize upon their oath whether the said John Jones be guilty of the offence in the indictment above specified or not guilty; because, as well, the said George Irvine, who prosecutes for our said Lady the Queen in this behalf, as the said John Jones have put themselves upon the said jury. And the jurors of the said jury, by the sheriff for this purpose empannelled and returned—to wit (*naming the twelve*)—being called, come, who to speak the truth of and concerning the premises being chosen, tried and sworn, upon their oath, say that the said John Jones is guilty of the offence aforesaid on him above charged, in manner and form aforesaid as by the said indictment is above supposed against him. And thereupon it is forthwith demanded of the said John Jones, if he hath or knoweth anything to say why the said court here ought not, upon the premises and verdict aforesaid to proceed to judgment against him; who nothing further saith, unless he has before said. Whereupon, all and singular the premises being seen and fully understood by the said court here, it is considered and adjudged by the said court here that the said John Jones be taken to the common gaol of the said district of Quebec, from whence he came, and that he be taken from thence to the place of execution, on Friday, the day of , next ensuing, and there be hanged by the neck until he be dead; and the court orders and directs the said execution to be done on the said John Jones in the manner provided by law.

If the defendant against whom an indictment has been found happen to be present in court, or in the custody of the court, he may at once be arraigned upon the indictment without previous process: 1 Chit. 338; Archbold, 78.

Then the record, when made up, instead of the words "whereupon the sheriff of the aforesaid district is commanded," etc., as in the above form, must read "Where-

upon, to wit, on the said day of , at the same term of the said Court of Queen's Bench, before the said Court of Queen's Bench here cometh the said John Jones under the custody of William Brown, Esquire, sheriff of the district aforesaid (in whose custody, in the gaol of the district aforesaid, he stood before committed)," etc.

In the report of the case of Mansell v. R., Dears & B. 375, may be seen a lengthy form of a record with all the proceedings on the challenges of jurors; also in R. v. Fox, 10 Cox, 502; Whelan v. R., 28 U. C. Q. B. 2; Holloway v. R., 2 Den. 289; and 4 Blacks. Appendix.

By s. 673 no formal adjournment need be entered.

In the case of Whelan v. R., cited *supra*, it was held in Upper Canada that if, notwithstanding s. 52, c. 99, Con. Stat. Can), (now s. 726 of this Code) a formal caption is prefixed to the indictment this caption may be rejected if it proves defective.

In R. v. Aylett, 6 A. & E. 247, *note*, and R. v. Marsh, 6 A. & E. 236, it was held that it is not necessary to name the grand jurors in the caption.

JURY RETIRING.

727. If the jury retire to consider their verdict they shall be kept under the charge of an officer of the court in some private place, and no person other than the officer of the court who has charge of them shall be permitted to speak or to communicate in any way with any of the jury without the leave of the court.

2. Disobedience to the directions of this section shall not affect the validity of the proceedings: Provided that if such disobedience is discovered before the verdict of the jury is returned the court, if it is of opinion that such disobedience has produced substantial mischief, may discharge the jury and direct a new jury to be sworn or empanelled during the sitting of the court, or postpone the trial on such terms as justice may require.

JURY UNABLE TO AGREE.

728. 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 postone 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.

PROCEEDINGS ON SUNDAY.

729. The taking of the verdict of the jury or other proceeding of the court shall not be invalid by reason of its happening on Sunday.

See remarks, *ante*, under s. 675. S. 729 removes a doubt that was raised in Winsor v. R., 10 Cox, 276; and R. v. Cropper, 2 Moo. 18.

The closing of the term discharges the jury from giving a verdict, and the defendant may be tried again: Newton's Case, 13 Q. B. 716; 3 Wharton, 3168.

That a witness is not sufficiently advanced in years or religiously instructed to understand the nature of an oath, if found out only after the jury has been sworn, is no ground for discharging a jury and ordering the trial to be postponed: R. v. Wade, 1 Moo. 86; R. v. Oulaghan, Jebb, 270. The case of R. v. White, 1 Leach, 430, does not support the summary given by the reporter.

JURY DE VENTRE INSPICIENDO.

730. If sentence of death is passed upon any woman she may move in arrest of execution on the ground that she is pregnant. If such a motion is made the court shall direct one or more registered medical practitioners to be sworn to examine the woman *in some private place*, either together or successively, and to inquire whether she is with child of a quick child or not. If upon the report of *any of them* it appears to the court that she is so with child execution shall be arrested till she is delivered of a child, or until it is no longer possible in the course of nature that she should be so delivered.

731. After the commencement of this Act no jury *de ventre inspiciendo* shall be empanelled or sworn.

This is the law in Ireland, 39 & 40 V. c. 78, s. 13, with the exception of the words "in some private place" which, it seems, were thought necessary in Canada. The oath to be administered to the medical practitioner or practitioners in open court may be as follows:

"You swear that you will search and try the prisoner at the bar whether she be with child of a quick child or not, and thereof a true verdict give according to your skill and understanding. So help you God." Quick with child is having conceived; with quick child is when the child is quickened: *per* Gurney, B., in R. v. Wycherley,

8 C. & P. 262; *see* R. v. Russell, 1 Moo. 356, and the reporter's note to R. v. Wycherley, *ubi supra*. S. 730 would seem to allow of the execution of a pregnant woman if the child has not quickened. That construction no court would give however. The law of England does not punish fœticide as a crime but it does not authorize it or legalise it. As a jury of matrons always did, formerly, the medical practitioner will always, when the woman is pregnant, report that she is with child of a quick child. *Enceinte* with a quick child, or quick with child, mean the same thing, says 2 Hale, 413. After the woman has been delivered, or when the time within which in the course of nature she should have been delivered, has elapsed she must be brought into court again to be sentenced *de novo*, or that a day be fixed for her execution: 1 Hale, 368. She could not, at common law, plead pregnancy a second time; but under s. 730 it seems that it could now be done.

NOLLE PROSEQUI. (*New*).

732. The Attorney-General may, at any time after an indictment has been found against any person for any offence, and before judgment is given thereon, direct the officer of the court to make on the record an entry that the proceedings are stayed by his direction, and on such entry being made all such proceedings shall be stayed accordingly.

2. The Attorney-General may delegate such power in any particular court to any counsel nominated by him.

The words "Attorney-General" include the Solicitor-General, s. 3.

On an indictment for a public nuisance or any offence of a public nature, or in which the public have an interest, the Attorney-General can proceed with the case if the private prosecutor refuses or neglects to do so: R. v. Wood, 3 B. & Ad. 657.

The Attorney-General may in his discretion, and should as a general rule, not give such a direction at the request of the defendant without hearing the private prosecutor, if any there is: R. v. Allen, 1 B. & S. 850; 1 Chit. 479; *see* R. v. Rowlands, 2 Den. 364.

A *nolle prosequi* does not operate as an acquittal, and a fresh indictment may be preferred; but it puts an end to the indictment upon which it is fyled: R. v. Mitchell, 3 Cox, 93, and cases there cited. There is no plea of *lis pendens* or *autrefois arraigned* allowed in criminal cases, and that an indictment for the same offence is pending is no bar. The court will see that the defendant is not punished twice or unjustly harassed: *see* R. v. Sirois, 27 N. B. Rep. 610.

MOTION IN ARREST OF JUDGMENT.

733. If the jury find the accused guilty, or if the accused pleads guilty, the judge presiding at the trial shall ask him whether he has anything to say why sentence should not be passed upon him according to law; but the omission so to ask shall have no effect on the validity of the proceedings.

2. The accused may at any time before sentence move in arrest of judgment on the ground that the indictment does not (after any amendment which the court is willing to and has power to make) state any indictable offence.

3. The court may in its discretion either hear and determine the matter during the same sittings or reserve the matter for the Court of Appeal as herein provided. If the court decides in favour of the accused, he shall be discharged from that indictment. If no such motion is made, or if the court decides against the accused upon such motion, the court may sentence the accused during the sittings of the court, or the court may in its discretion discharge him on his own recognizance, or on that of such sureties as the court thinks fit, or both, to appear and receive judgment at some future court or when called upon. If sentence is not passed during the sitting, the judge of any superior court before which the person so convicted afterwards appears or is brought, or if he was convicted before a court of general or quarter sessions, the court of general or quarter sessions at a subsequent sitting may pass sentence upon him or direct him to be discharged.

4. When any sentence is passed upon any person after a trial had under an order for changing the place of trial the court may, in its discretion, either direct the sentence to be carried out at the place where the trial was had or order the person sentenced to be removed to the place where his trial would have been had but for such order, so that the sentence may be there carried out.

Sections 743, *et seq.*, provide for reserving a case for the Court of Appeal. The court has no power to make any amendment on a motion in arrest of judgment. S-s. 4 relates to a change of venue under s. 651.

The defendant, after conviction, may move at any time in arrest of judgment before the sentence is actually pronounced upon him. This motion can be grounded only on

some objection arising on the face of the record itself, and no defect in the evidence, or irregularity at the trial, can be urged at this stage of the proceedings But any want of sufficient certainty in the indictment, as in the statement of time or place (where material), or of the facts and circumstances constituting the offence, by omitting to state or not stating definitely anything requisite to constitute the offence, or by omitting to negative any exception which ought to have been negatived or otherwise, will be a ground for arresting the judgment, if not amended before verdict or cured by the verdict.

The court will, *ex proprio motu*, arrest the judgment, even if the defendant omits to move for it, when it is satisfied that the defendant has not been found guilty of any offence in law. If a substantial ingredient of the offence does not appear on the face of the indictment the court will arrest the judgment: R. v. Carr, 26 L. C. J. 61. Judgment will also be arrested if the court does not appear by the indictment to have had jurisdiction over the offence charged: 8th Crim. L. Com. Report, 162; R. v. Fraser, 1 Moo. 407; R. v. Lynch, 20 L. C. J. 187.

A party convicted of felony must be present in court, in order to move in arrest of judgment; so a party convicted of a misdemeanour unless his presence be dispensed with at the discretion of the court: 1 Chit. 663; Cr. L. Com. Rep. *loc. cit.*

If the judgment be arrested the indictment and all the proceedings thereupon are set aside and judgment of acquittal is given by the court, but such acquittal is no bar to a fresh indictment: Archbold, 170; 8th Cr. L. Com. Rep. 163; 3 Burn, 58.

Section 245, c. 174, R. S. C. as to formal defects cured by verdict has not been re-enacted.

When the verdict is quashed for informalities, or any other grounds than the real merits of the case, the entry on the record should state it in these words, "and because it

appears that the said indictment is not sufficient (*or as the case may be*), therefore it is considered and adjudged that the defendant go thereof without delay," so as to prevent a plea of "*autrefois acquit*": 1 Chit. 719.

See cases under next section.

JUDGMENT NOT TO BE ARRESTED FOR FORMAL DEFECTS.

734. Judgment, after verdict upon an indictment for any offence *against this Act*, shall not be stayed or reversed for want of a *similiter*, nor by reason that the jury process has been awarded to a wrong officer, upon an insufficient suggestion—nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors,—nor because any person has served upon the jury who was not returned as a juror by the sheriff or other officer; and where the offence charged is an offence created by any statute, or subjected to a greater degree of punishment by any statute, the indictment shall, after verdict, be held sufficient, if it describes the offence in the words of the statute creating the offence, or prescribing the punishment, although they are disjunctively stated or appear to include more than one offence, or otherwise. R. S. C. c. 174, s. 246. 7 Geo. IV. c. 64, s. 21 (Imp.).

The repealed section applied to any indictable offence. This one applies only to offences under the code.

See Heymann v. R., 12 Cox, 383, and R. v. Knight, 14 Cox, 31 as to aider by verdict and what defects are cured by verdict; also Nash v. R., 9 Cox, 424.

Verdict will only cure defective statements. An absolute and total omission in the indictment is not cured by verdict: R. v. Bradlaugh, 14 Cox, 68. *See* R. v. Montminy, *ante*, p. 677.

No amendment allowed after verdict: R. v. Oliver, 13 Cox, 588.

In an indictment for perjury, alleged to have been committed in a certain cause, "wherein one Adrien Girardin, of the Township of Kingsey, in the district of Arthabaska, trader, and Thomas Ling, of the same place, farmer, *was defendant*." The omission of the words *was plaintiff* in the description of the plaintiff held fatal, and conviction quashed: R. v. Ling, 5 Q. L. R. 359, 2 L. N. 410.

In an indictment for obstructing an officer of excise under 27 & 28 V. c. 3: *held*, that the omission in the indictment of the averment that at the time of the obstruction

the officer was acting in the discharge of his duty under the authority of the said statute was not a defect of substance, but a formal error, which was cured by the verdict: Spelman v. R., 13 L. C. J. 154.

The defendant was indicted in the District of Beauharnois for perjury committed in the District of Montreal, but there was no averment in the indictment that he had been apprehended or that he was in custody in the District of Beauharnois at the time of finding the indictment: *Held* bad, even after verdict: R. v. Lynch, 20 L. C. J. 187, 7 R. L. 553.

A defect such as the omission of the word "company" in an indictment for embezzling money from the Grand Trunk Railway Company of Canada is cured by verdict: R. v. Foreman, 1 L. C. L. J. 70.

Defect in an indictment cured by verdict: R. v. Stansfeld, 8 L. N. 123; also in R. v. Stroulger, 16 Cox, 85.

An indictment too vague and too general in its language is not cured by verdict: White v. R., 13 Cox, 318.

Under this clause, the first defect cured by verdict is the want of a similiter. The similiter is the joinder in issue, contained in the record (*see ante*, under s. 726 for form of a record) in these words: "And , who prosecutes for our said Lady the Queen in this behalf, doth the like."

The second defect cured by verdict under this clause is the wrongful award of the jury process upon an insufficient suggestion. The jury process is usually directed to the sheriff, but if one of the parties represents that the sheriff is interested, or of kin to one of the parties, or in any way disqualified to act in the case, an entry of this suggestion is made on the back of the indictment first, and then on the record, when it is made up formally; and then the jury process is awarded to the coroner, if not disqualified, and if disqualified then to two elisors named by the court and sworn, in which last case the return is final, and no challenge to the array is allowed: Jervis, Coroners, 54; 1 Chit. 514;

Wharton, Law Lexicon, *Verbo* "elisors;" Archbold, 154. By the above clause these formalities cannot be questioned or investigated after verdict, and no misnomer or misdescription of the officer returning the process or of any of the jurors can invalidate the verdict: *see* now s. 666, and remarks thereunder; *see* s. 735, *post.*

This clause says thirdly that no motion in arrest of judgment or writ of error will avail on the ground that any person has served upon the jury who was not returned as a juror by the sheriff or other officer: *see* Dovey v. Hobson, 2 Marsh. 154; R. v. Brisebois, 15 S. C. R. 427.

The fourth and most important part of this section consists in the words: "And where the offence charged is an offence *created by any statute*, or subjected to a *greater* degree of punishment *by any statute*, the indictment shall, *after verdict*, be held sufficient, if it describes the offence in the words of the statute creating the offence, or prescribing the punishment, although they be disjunctively stated or appear to include more than one offence, *or otherwise*": *see* ss. 611 to 626.

What is the meaning of these two last words "*or otherwise*," is not clear. "Although *they* be disjunctively stated" means "although *the words* be disjunctively stated" "as unlawfully or maliciously" instead of "unlawfully and maliciously."

The words "or appear to include more than one offence" are not new law: *see* R. v. Ferguson, Dears. 427; R. v. Heywood, L. & C. 451; and remarks under s. 626, *ante.*

The words "subjected to a greater degree of punishment" mean greater than it was at common law.

The following decisions on the interpretation of the part of this clause rendering valid, after verdict, indictments describing the offence in the words of the statute creating it, or subjecting it to a greater degree of punishment, may be usefully inserted here.

In R. v. Larkin, Dears. 365, it was held that if an indictment charging a felonious receiving of stolen goods does not aver that the prisoner knew the goods to have been so stolen, it is defective, and the defect is not cured by verdict.

An indictment under 14 & 15 V. c. 100, s. 49, for procuring the defilement of a girl by false pretenses, false representations or other fraudulent means, did not set out or allege what were the false pretenses, false representations or other fraudulent means. The defendant, having been found guilty, brought a writ of error on this ground, and the conviction was quashed: Howard v. R., 10 Cox, 54. *See* now, s. 616, *ante*.

In R. v. Warshaner, 1 Moo. 466, an indictment for having unlawfully in possession *five florins*, was held sufficient after verdict, though not showing what *florins* were and their value, it being a foreign coin, as the indictment described the offence in the words of the statute creating it.

After verdict defective averments in the second count of an indictment are cured by reference to sufficient averments in the first count: R. v. Waverton, 2 Den. 340.

Formerly, if in an indictment for obtaining property by false pretenses it did not appear who was the owner of the property so alleged to have been unlawfully obtained, the defect was not cured by verdict, and notwithstanding the above clause in such a case a conviction, upon a writ of error, would have been quashed; R. v. Bullock, Dears. 653; Sill. v. R., Dears. 132; R. v. Martin, 8 A. & E. 481.

In R. v. Bowen, 13 Q. B. 790, the indictment was for obtaining by false pretenses, and did not contain the word "knowingly" with "unlawfully" but the court held the conviction good after verdict, as the indictment was in the words of the statute: *see* Hamilton v. R., 9 Q. B. 271 and R. v. Martin, 8 A. & E. 481.

But an indictment for felony must always allege that the act which forms the subject matter of the indictment

was done feloniously; if an indictment for felony does not contain the word "feloniously" it is bad, though in the words of the statute creating the offence, and is not cured by verdict: R. v. Gray, L. & C. 365.

If an indictment under s. 83 of the Larceny Act, c. 164, R. S. C., alleges the goods to have been "unlawfully obtained, taken, and carried away, and that the receiver knew them to have been unlawfully obtained" instead of "unlawfully obtained by false pretenses" the indictment is bad and not cured by verdict: *see* R. v. Wilson, 2 Moo. 52.

An indictment under the same section charged that defendant "unlawfully did receive goods which had been unlawfully, and knowingly, and fraudulently obtained by false pretenses with intent to defraud, as in this count before mentioned," but omitting to set out what the particular false pretenses were: *held*, that the objection, if at any time valid, was cured by the verdict of guilty: R. v. Goldsmith, 12 Cox, 479.

In R. v. Carr, 26 L. C. J. 61, the court quashed the indictment on the ground of the omission therein of the words "feloniously, wilfully, and of his malice aforethought," though the form given in the schedule of the Procedure Act then in force for the offence created by the clause under which the prisoner was indicted had not these words.

There is a difference between an indictment which is bad for charging an act which as laid is no crime, and an indictment which is bad for charging a crime defectively. The latter may be aided by verdict, the former cannot: R. v. Waters, 1 Den. 356; *see ante*, remarks under s. 629.

When an indictment is quashed or judgment upon it arrested for 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: 1 Bishop, Cr. Proc. 739; 2 Hale, 237; 2 Hawk. 514; R. v. Turner, 1 Moo. 239; *see* Greaves' note in 3 Russ. 321.

In R. v. Vandercomb, 2 Leach, 708, the jury, by the direction of the court, acquitted the prisoners, as the charge as laid against them had not been proved; but as it resulted from the evidence adduced that another offence had been committed by the prisoners, and as the grand jury were not discharged, the prisoners were detained in custody in order to have another indictment preferred against them.

In R. v. Semple, 1 Leach, 420, the court quashed the indictment, upon motion of the prisoner, upon the ground of informality, but ordered the prisoner to be detained till the next session: *see* also 1 Chit. 304.

So, upon a demurrer, if the defendant succeeds he only obtains a little delay, for the judgment is that the indictment be quashed, and the defendant will be detained in custody until another accusation has been preferred against him, except, of course, where the demurrer has established that the defendant has not committed any legal offence whatsoever, in which case he will be altogether discharged from custody: 1 Chit. 442.

In R. v. Gilchrist, 2 Leach, 657, the prisoner was found guilty of forgery, but, upon motion in arrest of judgment, the court held that the indictment, being repugnant and defective, the prisoner should be discharged from it, but that as the objection went only to the form of the indictment, and not to the merits of the case, the prisoner should be remanded to prison until the end of the session to afford the prosecutor an opportunity, if he thought fit, of preferring another and better indictment against him: *see* also R. v. Pelfryman, 2 Leach, 563.

In Archbold, page 166, it is said: Upon the delivery of the verdict, if the defendant be thereby acquitted on the merits, he is forever free and discharged from that accusation, and is entitled to be immediately set at liberty, unless there be some other legal ground for his detention. If he be acquitted from some defect in the proceedings, so that the acquittal could not be pleaded in bar of another indict-

ment for the same offence, *he may be detained to be indicted afresh.* So in 1 Chit. 649, and R. v. Knewland, 2 Leach, 721.

An indictment having been held bad on demurrer it was quashed so that another indictment might be preferred, not that defendants be discharged: R. v. Tierney, 29 U. C. Q. B. 181.

In R. v. Bulmer, Montreal, Nov., 1881, though the indictment had been quashed on demurrer, the court refused to liberate the prisoner, and ordered his detention till the following term.

In R. v. Woodhall, 12 Cox, 240, the verdict was held to be illegal, but the prisoners were bound over to appear at a future session.

CERTAIN OMISSIONS AS TO JURORS NOT FATAL.

735. No omission to observe the directions contained in any Act as respects the qualification, selection, balloting or distribution of jurors, the preparation of the jurors' book, the selecting of jury lists, the drafting panels from the jury lists or the striking of special juries, shall be a ground for impeaching any verdict, or shall be allowed for error upon appeal to be brought upon any judgment rendered in any criminal case. R. S. C. c. 174, s. 247. (Amended in 1893.)

This is a statute of Upper Canada extended to all the Dominion. This clause does not take away the right of challenging the array.

A conviction, not by a special jury, in cases where the statute enacts that an offence shall be tried by special jury, is a nullity: R. v. Kerr, 26 U. C. C. P. 214.

INSANITY.

736. Whenever it is given in evidence upon the trial of any person charged with any indictable offence that such person was insane at the time of the commission of such offence, and such person is acquitted, the jury shall be required to find, specially, whether such person was insane at the time of the commission of such offence, and to declare whether he is acquitted by it on account of such insanity; and if it finds that such person was insane at the time of committing such offence the court before which such trial is had shall order such person to be kept in strict custody in such place and in such manner as to the court seems fit, until the pleasure of the Lieutenant-Governor is known. R. S. C. c. 174, s. 252.

737. If at any time after the indictment is found, and before the verdict s given, it appears to the court that there is sufficient reason to doubt whether the accused is then, on account of insanity, capable of conducting his defence, the court may direct that an issue shall be tried whether the accused is or is not then on account of insanity unfit to take his trial.

2. If such issue is directed before the accused is given in charge to a jury for trial on the indictment such issue shall be tried by any twelve jurors. If such issue is directed after the accused has been given in charge to a jury for trial on the indictment such jury shall be sworn to try this issue in addition to that on which they are already sworn.

3. If the verdict on this issue is that the accused is not then unfit to take his trial the arraignment or the trial shall proceed as if no such issue had been directed. If the verdict is that he is unfit on account of insanity the court shall order the accused to be kept in custody till the pleasure of the Lieutenant-Governor of the province shall be known, and any plea pleaded shall be set aside and the jury shall be discharged.

4. No such proceeding shall prevent the accused being afterwards tried on such indictment. R. S. C. c. 174, s. 252.

738. If any person before the passing of this Act, whether before or after the first day of July, one thousand eight hundred and sixty-seven, was acquitted of any such offence on the ground of insanity at the time of the commission thereof, and has been detained in custody as a dangerous person by order of the court before which such person was tried, and still remains in custody, the Lieutenant-Governor may make a like order for the safe custody of such person during pleasure. R. S. C. c. 174, s. 254.

739. If any person charged with an offence is brought before any court to be discharged for want of prosecution, and such person appears to be insane, the court shall order a jury to be empanelled to try the sanity of such person, and if the jury so empanelled finds him insane the court shall order such person to be kept in strict custody, in such place and in such manner as to the court seems fit, until the pleasure of the Lieutenant-Governor is known. R. S. C. c. 174, s. 256.

740. In all cases of insanity so found the Lieutenant-Governor may make an order for the safe custody of the person so found to be insane, in such place and in such manner as to him seems fit. R. S. C. c. 174, ss. 253 & 257.

741. The Lieutenant-Governor, upon such evidence of the insanity of any person imprisoned in any prison other than a penitentiary for an offence, or imprisoned for safe custody charged with an offence, or imprisoned for not finding bail for good behaviour or to keep the peace, as the Lieutenant-Governor considers sufficient, may order the removal of such insane person to a place of safe-keeping; and such person shall remain there, or in such other place of safe-keeping, as the Lieutenant-Governor from time to time orders, until his complete or partial recovery is certified to the satisfaction of the Lieutenant-Governor, who may then order such insane person back to imprisonment, if then liable thereto, or otherwise to be discharged. R. S. C. c. 174, s. 258.

It is said in 1 Russ. 29: *see* R. v. Keary, 14 Cox, 143: "If a man in his sound memory commits a capital offence, and before arraignment for it he becomes mad, he ought not to be arraigned for it because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner become mad he shall not be tried, as he cannot make his defence. If, after he is tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced, and if after judgment he becomes of non-sane memory execution shall be stayed; for, peradventure, says the humanity of the English law, had the prisoner been of sound memory he might have alleged something in stay of judgment or execution. And, by the common law, if it be doubtful whether a criminal who at his trial is, in appearance, a lunatic, be such in truth or not, the fact shall be investigated. And it appears that it may be tried by the jury who are charged to try the indictment, or by an inquest of office to be returned by the sheriff of the county wherein the court sits, or, being a collateral issue, the fact may be pleaded and replied to *ore tenus*, and a *venire* awarded returnable *instanter*, in the nature of an inquest of office. *See*, now, s-s. 2 of s. 737. And if it be found that the party only feigns himself mad, and he refuses to answer or plead, he would formerly have been dealt with as one who stood mute, but now a plea of not guilty may be entered."

The above sections on the procedure in the case of insane prisoners are taken from the 39 & 40 Geo. III. c. 94, and the 3 & 4 V. c. 54.

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 the sanity is always presumed: R. v. Turton, 6 Cox, 385.

It has been seen, *ante*, under s. 668, that no peremptory challenges are allowed on collateral issues.

The jury may judge of the sanity or insanity of the prisoner from his demeanour in their presence without any evidence: R. v. Goode, 7 A. & E. 536.

The jury are sworn as follows:—"You shall diligently inquire and true presentment make for and on behalf of our Sovereign Lady the Queen, whether A. B., the prisoner, be insane or not, and a true verdict give according to the best of your understanding; so help you God."

If a prisoner has not, at the time of his trial, from the defect of his faculties sufficient intelligence to understand the nature of the proceedings against him, the jury ought to find that he is not sane, and upon such finding he may be ordered to be kept in custody: R. v. Dyson, 7 C. & P. 305.

A grand jury have no right to ignore a bill against any person on account of his insanity, either when the offence was committed or at the time of preferring the bill, however clearly shown: R. v. Hodges, 8 C. & P. 195; 1 Russ. 32; Dickinson's Quarter Sessions, 476.

If at any stage of the trial it is thought that the prisoner has not sufficient intelligence to understand the nature of the proceedings the jury should pass upon it under the above s. 737: R. v. Berry, 13 Cox, 189.

PART LII.

APPEAL.

742. An appeal from the verdict or judgment of any court or judge having jurisdiction in criminal cases, or of a magistrate proceeding under section seven hundred and eighty-five, on the trial of any person for an indictable offence, shall lie upon the application of such person, if convicted, to the Court of Appeal in the cases hereinafter provided for, and in no others.

2. Whenever the judges of the Court of Appeal are unanimous in deciding an appeal brought before the said court their decision shall be final. If any of the judges dissent from the opinion of the majority an appeal shall lie from such decision to the Supreme Court of Canada as hereinafter provided.

Writ of Error Abolished—Cases Reserved.

743. *No proceeding in error shall be taken in any criminal case begun after the commencement of this Act:*

2. The court before which any accused person is tried may, either during or after the trial, reserve any question of law arising either on the trial or on any of the proceedings *preliminary, subsequent,* or *incidental thereto,* or arising out of the direction of the judge, for the opinion of the Court of Appeal in manner hereinafter provided.

3. *Either the prosecutor* or the accused may during the trial either orally or in writing apply to the court to reserve any such question as aforesaid, *and the court, if it refuses so to reserve it, shall nevertheless take a note of such objection.*

4. After a question is reserved the trial shall proceed as in other cases.

5. If the result is a conviction the court may in its discretion respite the execution of the sentence or postpone sentence till the question reserved has been decided, and shall in its discretion commit the person convicted to prison or admit him to bail with one or two sufficient sureties, in such sums as the court thinks fit, to surrender at such time as the court directs.

6. If the question is reserved, a case shall be stated for the opinion of the Court of Appeal.

Section 259 c. 174, R. S. C., is the repealed clause on cases reserved.

Even in cases of misdemeanours, and where the prisoner was on bail before his trial, the court is not bound to admit the prisoner to bail during the pendency of a reserved case: R. v. Bird, 5 Cox, 11; *see* as to intermediate effects of an appeal, s. 749, *post.*

APPEAL WHEN A RESERVED CASE REFUSED. (*New*).

744. If the court refuses to reserve the question the party applying may, with the leave in writing of the Attorney-General, move the Court of Appeal as hereinafter provided. The Attorney-General may in his discretion give or refuse such leave.

2. The Attorney-General, or any person to whom such leave as aforesaid is given, may on notice of motion to be given to the accused or prosecutor, as the case may be, move the Court of Appeal for leave to appeal. The Court of Appeal may upon the motion, and upon considering such evidence (if any) as they think fit to require, grant or refuse such leave.

3. If leave to appeal is granted a case shall be stated for the opinion of the Court of Appeal as if the question had been reserved.

4. If the sentence is alleged to be one which could not by law be passed, either party may without leave, upon giving notice of motion to the other side, move the Court of Appeal to pass a proper sentence.

5. If the court has arrested judgment, and refused to pass any sentence, the prosecutor may without leave make such a motion.

EVIDENCE FOR COURT OF APPEAL.

745. On any appeal or application for a new trial the court before which the trial was had shall, if it thinks necessary, or if the Court of Appeal so desires, send to the Court of Appeal a copy of the whole or of such part as may be material of the evidence or the notes taken by the judge or presiding justice at the trial. *The Court of Appeal may, if only the judge's notes are sent and it considers such notes defective, refer to such other evidence of what took place at the trial as it may think fit.* The Court of Appeal may in its discretion send back any case to the court by which it was stated to be amended or re-stated. R. S. C. c. 174, s, 264.

POWERS OF COURT OF APPEAL.

746. Upon the hearing of any appeal under the powers hereinbefore contained, the Court of Appeal may—

(*a*) confirm the ruling appealed from; or

(*b*) if of opinion that the ruling was erroneous, and that there has been a mis-trial in consequence, *direct a new trial;* or

(*c*) *if it considers the sentence erroneous, or the arrest of judgment erroneous, pass such a sentence as ought to have been passed or set aside any sentence passed by the court below, and remit the case to the court below with a direction to pass the proper sentence;* or

(*d*) if of opinion in a case in which the accused has been convicted that the ruling was erroneous, and that the accused ought to have been acquitted, direct that the accused shall be discharged, which order shall have all the effects of an acquittal; or

(*e*) *direct a new trial;* or

(*f*) make such other order as justice requires: *Provided that no conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was*

done at the trial or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned on the trial: Provided that if the Court of Appeal is of opinion that any challenge for the defence was improperly disallowed a new trial shall be granted.

2. *If it appears to the Court of Appeal that such wrong or miscarriage affected some count only of the indictment the court may give separate directions as to each count and may pass sentence on any count unaffected by such wrong or miscarriage which stands good, or may remit the case to the court below with directions to pass such sentence as justice may require.*

3. The order or direction of the Court of Appeal shall be certified under the hand of the presiding chief justice or senior puisne judge to the proper officer of the court before which the case was tried, and such order or direction shall be carried into effect. R. S. C. c. 174, s. 263.

The words "Court of Appeal" and "Attorney-General," defined, s. 3.

Writs of error are abolished in all the cases *begun after the commencement of this Act.*

Only the grounds upon which the Court of Appeal are not unanimous are open to the appellant in a criminal case before the Supreme Court: *per* Ritchie, C.J., R. v. Cunningham, Cass. Dig. 107.

A case should not be reserved on frivolous grounds: R. v. Ferguson, Dears. 427; R. v. Tew, Dears. 429.

The passages of the above sections 742, *et seq.*, which are in italics, are those where it is thought that the law is either altered, extended, or settled on doubtful points.

As heretofore, no question of practice, or on points left to the discretion of the judge, and only questions of law, can be reserved by the judge at the trial, or brought before the Court of Appeal. The only exception to this rule is contained in s-s. 5 of s. 723.

Section 783, *post*, which allows a judge to reserve his final decision on questions raised at the trial of offences under the code, applies now to all the Dominion. It previously applied only to Ontario, but to all trials whatever. It seems to apply to all questions raised at the trial, not only to questions of law.

Question whether there is sufficient evidence to support charge cannot be reserved, being a question for the jury;

whether there is any evidence is a question of law for the judge: R. v. Lloyd, 19 O. R. 352.

The Imperial corresponding statute is 11 & 12 V. c. 78.

The statute gives no jurisdiction to the court of crown cases reserved to hear a case reserved on a judgment on a demurrer. There must have been a trial and a conviction to give jurisdiction to this court: R. v. Faderman, 1 Den. 565; R. v. Paxton, 2 L. C. L. J. 162.

If a prisoner pleads guilty to the charge alleged in the indictment no question of law can be reserved, as none can be said to have arisen on the trial: R. v. Clark, 10 Cox, 338. But that case is overruled by R. v. Brown, 16 Cox, 715, 24 Q. B. D. 357.

In R. v. Daoust, 9 L. C. J. 85, the defendant having been found guilty of felony, a motion for a new trial had been granted by Mr. Justice Mondelet At the next term of the court the prosecutor moved to fix a day for this new trial before Mr. Justice Aylwin, who then reserved for the court of crown cases reserved the question whether a second trial could be had in a case of felony. The Court held that the question was properly reserved, and that the statute gave them jurisdiction to decide it: 10 L. C. J. 221. It may be doubted whether they had jurisdiction *before* the second trial and conviction, if a second conviction there had been.

A question raised in the court below by a motion in arrest of judgment is a question arising on the trial, and properly reserved: R. v. Martin, 1 Den. 398, 3 Cox, 447; R. v. Carr, 26 L. C. J. 61; R. v. Deery, 26 L. C. J. 129; R. v. Corcoran, 26 U. C. C. P. 134.

The statute gives jurisdiction to the court of crown cases reserved to take cognizance of defects apparent on the face of the record when questions upon them have been reserved at the trial: R. v. Webb, 1 Den. 338.

What a jury may say in recommending a prisoner to mercy is not a matter upon which a case should be

reserved. When the jury say guilty there is an end to the matter; that is the verdict, and a recommendation to mercy is no part of the verdict: R. v. Trebilcock, Dears. & B. 453.

The insufficiency of an indictment upon a motion to quash is not a question that can be reserved: R. v. Gibson, 16 O. R. 704.

On a trial for murder the name of A. a juror on the panel was called; B. another juror on the same panel appeared by mistake, answered to the name of A. and was sworn as a juror. The prisoner was convicted and sentenced to death. The next day this irregularity in the jury was discovered, when the judge, being informed of it, reserved the question as to the effect of the mistake on the trial: *held*, by eight judges, against six that the conviction must stand: R. v. Mellor, Dears. & B. 468. The judges were divided on the question whether the court of crown cases reserved had jurisdiction over the case.

The court expects cases reserved to be submitted in a complete form, and will ordinarily refuse to send back a case for amendment; R. v. Holloway, 1 Den. 370.

A case may be reserved after the trial, and even after the sessions of the court are over: ss. 743 and 753; R. v. Brown, 16 Cox, 715, 24 Q.B.D. 357; R. v. Smith, 38 U. C. Q. B. 218; R. v. Mellor, Dears. & B. 468; R. v. Whitchurch, 16 Cox, 743. If the judge who presided at the trial is unable to send up the case reserved any judge of the same court may do it: R. v. Featherstone, Dears. 369.

When the case reserved is upon the evidence the whole of the evidence should not be made part of the case, but merely the material facts established by the evidence: R. v. Gibson, 16 O. R. 704.

New trial granted upon a case reserved: R. v. Brice, 15 Q. L. R. 147.

The defendant must be present when a motion is made by his counsel to reserve a case: R. v. Murphy, 17 Q. L. R. 305.

If a counsel should think that any material point raised at the trial has been omitted in the case it would be proper for him to communicate with the judge who reserved the case, and suggest any amendment that in his judgment may be necessary: R. v. Smith, Temple & Mews' Crim. App. Cases, 214. Where a case reserved does not, in the opinion of the counsel, fairly raise all the points that were in issue, the proper course is to apply to the judge reserving to amend it: R. v. Smith, 1 Den. 510; *see* R. v. Winsor, 10 Cox, 276; R. v. Young, 14 Cox, 114.

The court will not send a case back for amendment on the mere application of counsel, but will do so if on the argument it appears that it is imperfectly stated: R. v. Hilton, Bell, 20; R. v. Bourdeau, M. L. R. 7 Q. B. 176. Where a case reserved has been re-stated by order of the court an application, supported by affidavit, to have it again re-stated will be refused. This court has no jurisdiction to interfere compulsorily with the judge's exercise of his discretion: R. v. Studd, 10 Cox, 258.

The court must deal with the case as it is stated, and upon the evidence returned by the judge: R. v. Brummitt, L. & C. 9; *see*, now, s. 745. The Court of Appeal may now order the stenographer's notes to be sent up.

By the express words of the statute the court of crown cases reserved has its jurisdiction limited to the question of law reserved and mentioned in the case sent up; it has no right to adjudicate on any other question: R. v. Tyree, L. R. 1 C. C. R. 177; R. v. Blakemore, 2 Den. 410; R. v. Smith, Temple and Mews' Cr. App. Cases 214; R. v. Shaw, L. & C. 579.

So, in R. v. Overton, Car. & M. 655, on a crown case reserved, it was held that the judges will not allow the

prisoner's counsel to argue objections that are apparent on the face of the indictment unless they were reserved by the judge, but will leave the prisoner to his writ of error.

The rule that a jury should not convict on the unsupported evidence of an accomplice is a rule of practice only, and not a rule of law, and questions of law only can be reserved: R. v. Stubbs, Dears. 555, Warb. Lead. Cas. 12; Contra, R. v. Smith, 38 U. C. Q. B. 218. But *see* later case of R. v. Andrews, 12 O. R. 184.

The court of crown cases reserved cannot amend the indictment: R. v. Garland, 11 Cox, 224. Where an amendment, without which the indictment was bad, had been improperly made at the trial, after verdict, this court ordered the record to be restored to its original state, and a verdict of not guilty to be entered: R. v. Larkin, Dears. 365; *see*, now, s. 723, s-s. 5.

On the argument of a case reserved the counsel for the defendant must begin: R. v. Gate Fulford, Dears. & B. 74.

On a motion for a new trial from a conviction for perjury: *Held*, that the trial (under s. 259 of the Procedure Act, c. 174, R. S. C.) is not terminated until sentence is rendered, and a "question which has arisen on the trial" (which arises on the trial) does not necessarily mean a question that was raised at the trial, but extends to one that took its rise at the trial, and therefore a point not raised by the defence may be reserved by the court: R. v. Bain, 23 L. C. J. 327.

No reserved case can be had where no conviction: R. v. Lalanne, 3 L. N. 16.

It is not necessary that the prisoner be present at the hearing of a reserved case: R. v. Glass, 21 L. C. J. 245; *see Re* Sproule, 12 S. C. R. 140.

Where the prisoner has been put on his trial on an indictment containing six counts charging him with shooting with intent to murder, and was found guilty on the first

count, which verdict was afterwards set aside on a reserved case for insufficiency of that first count: *held*, that he could not be tried again on the other counts, as they all referred to the same act of shooting; prisoner discharged on plea of *autrefois acquit:* R. v. Bulmer, 5 L. N. 92.

Held, that when a case reserved for the consideration of the full court does not contain a question which, in the opinion of the full court, it is essential to decide in connection with such case, it may be sent back for amendment: R. v. Provost, M. L. R. 1 Q. B. 473.

A reserved case may be amended at the request of the defendant during the argument thereon before the full court, by adding the evidence taken at the trial: R. v. Ross, M. L. R. 1 Q. B. 227.

If illegal evidence has been allowed to go to the jury, though without objection from the prisoner, the verdict must be quashed if that evidence *might* have affected the verdict, though apart from it there is sufficient evidence to support the verdict. The law on this in criminal cases is what it was in civil cases before the Judicature Act. The case of R. v. Ball, R. & R. 132, reviewed; R. v. Gibson, 16 Cox, 181. But now by s. 746 (*f*), it is expressly enacted that the illegal admission or rejection of evidence is no ground to set aside a verdict unless the Court of Appeal finds that some substantial wrong has been occasioned thereby to the defendant.

Challenging the array of the jury panel is not a matter which can be reserved under C. S. U. C. c. 112: R. v. O'Rourke, 32 U. C. C. P. 388.

But otherwise, if the question is one relating to the proper constitution of the petit jury: R. v. Kerr, 26 U. C. C. P. 214.

The decision of the judge in directing certain jurors to stand aside is a question of law arising at the trial which he can reserve: R. v. Patteson, 36 U. C. Q. B. 129. But *see*

R. v. Smith, 38 U. C. Q. B. 218; *see* R. v. Mellor, Dears. & B. 468, cited *ante*, and Morin v. R., 18 S. C. R. 407, and cases there cited.

A police magistrate cannot reserve a case for the opinion of a superior court, under C. S. U. C. c. 112, as he is not within the terms of that Act: R. v. Richardson, 8 O. R. 651; *see* ss. 742 and 900.

Challenge to the array is a question of law arising on the trial which may be reserved. If Crown demurs to the challenge, and judgment on demurrer is given, it becomes a matter of record and cannot be reserved: R. v. Plante, 7 Man. L. R. 537.

NEW TRIAL. (*New*).

747. After the conviction of any person for *any* indictable offence the court before which the trial takes place may, either during the sitting or afterwards, give leave to the person convicted to apply to the Court of Appeal for a new trial on the ground that the verdict was against the weight of evidence. The Court of Appeal may, upon hearing such motion, direct a new trial if it thinks fit.

2. In the case of a trial before a Court of General or Quarter Sessions such leave may be given, during or at the end of the session, by the judge or other person who presided at the trial.

Under this clause a condition precedent to any application for a new trial in all offences whatever is the permission of the court before which the conviction took place, and, that permission being obtained, the Court of Appeal grants or rejects the application as it thinks proper: s. 745 applies to applications for new trials. No new trial is allowed to the crown. The only ground for the application mentioned in this section is that the verdict was against the weight of evidence. The application to the court before which the trial took place may be made during the sitting of the court or *afterwards*. The rule heretofore has been that the defendant or defendants must be present in court when the motion is made for a new trial, unless some special ground be laid for dispensing with the rule: R. v. Caudwell, 2 Den., *note a*, 372, 1 Chit. 658; R. v. Parkinson, 2 Den. 459; R. v. Fraser, 14 L. C. J. 245; R. v. Hollingberry, 4 B. & C. 329.

See R. v. Duncan, 7 Q. B. D. 198, Warb. Lead. Cas. 260, and cases there cited as to practice in England on new trials.

NEW TRIAL BY ORDER OF THE MINISTER OF JUSTICE (*New*).

748. If upon any application for the mercy of the Crown on behalf of any person convicted of an indictable offence, the Minister of Justice entertains a doubt whether such person ought to have been convicted, he may, instead of advising Her Majesty to remit or commute the sentence, after such inquiry as he thinks proper, by an order in writing direct a new trial at such time and *before such court* as he may think proper.

This is new. It virtually gives an appeal from the courts to the Minister of Justice. The sentence, if for imprisonment, is not suspended by the order of the Minister of Justice under this clause, nor is provision made to admit the person convicted to bail.

INTERMEDIATE EFFECTS OF APPEAL. (*New*).

749. The sentence of a court shall not be suspended by reason of any appeal, unless the court expressly so directs, except where the sentence is that the accused suffer death, or whipping. The production of a certificate from the officer of the court that a question has been reserved, or that leave has been given to apply for a new trial, or of a certificate from the Attorney-General that he has given leave to move the Court of Appeal, or of a certificate from the Minister of Justice that he has directed a new trial, shall be a sufficient warrant to suspend the execution of any sentence of death or whipping.

2. In all cases it shall be in the discretion of the Court of Appeal in directing a new trial to order the accused to be admitted to bail.

Sub-section 2, it seems, applies as well to new trials ordered under s. 746 as to new trials under s. 747.

APPEAL TO SUPREME COURT.

750. Any person convicted of any indictable offence, whose conviction has been affirmed on an appeal taken under section seven hundred and forty-two, may appeal to the Supreme Court of Canada against the affirmance of such conviction; and the Supreme Court of Canada shall make such rule or order thereon, either in affirmance of the conviction or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect: Provided that no such appeal can be taken if the Court of Appeal is unanimous in affirming the conviction, nor unless notice of appeal in writing has been served on the Attorney-General within fifteen days after such affirmance or such further time as may be allowed by the Supreme Court of Canada or a judge thereof.

2. Unless such appeal is brought on for hearing by the appellant at the session of the Supreme Court during which such affirmance takes place, or the

session next thereafter if the said court is not then in session, the appeal shall be held to have been abandoned, unless otherwise ordered by the Supreme Court or a judge thereof.

3. The judgment of the Supreme Court shall, in all cases, be final and conclusive. 50-51 V. c. 50, s. 1.

See R. v. Cunningham, Cass. Dig. 107, and Amer v. The Queen, 2 S. C. R. 592.

No Appeals to Privy Council.

751. Notwithstanding any royal prerogative, or anything contained in *The Interpretation Act* or in *The Supreme and Exchequer Courts Act*, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal or authority, by which in the United Kingdom appeals or petitions to Her Majesty in Council may be heard. 51 V. c. 43, s. 1.

The Privy Council has not had to pass yet on the constitutionality of this clause.

PART LIII.

SPECIAL PROVISIONS.

752. Whenever any person in custody *charged with an indictable offence* has taken proceedings before a judge or criminal court having jurisdiction in the premises by way of *certiorari*, *habeas corpus* or otherwise, to have the legality of his imprisonment inquired into, such judge or court may, *with* or without determining the question, make an order for the further detention of the person accused, and direct the judge or justice under whose warrant he is in custody, or any other judge or justice, to take any proceedings, hear such evidence, or do such further act as in the opinion of the court or judge may best further the ends of justice.

It is not clear what this enactment is intended for. It seems to be out of place where it stands in the Act.

Decision May Be Reserved.

753. Any judge or other person presiding at the sittings of a court at which any person is tried for an indictable offence *under this Act*, whether he is the judge of such court or is appointed by commission or otherwise to hold such sittings, may reserve the giving of his final decision on questions raised

at the trial; and his decision, whenever given, shall be considered as if given at the time of the trial. R. S. C. c. 174, s. 269.

This, by the repealed clause, applied only to Ontario. The words "under this Act" are new.

PRACTICE IN ONTARIO.

754. The practice and procedure in all criminal cases and matters in the High Court of Justice of Ontario *which are not provided for in this Act*, shall be the same as the practice and procedure in similar cases and matters *heretofore*. R. S. C. c. 174, s. 270.

It is not clear why a similar enactment for all the provinces has been left out, though Parliament undoubtedly had grave reasons for it.

COURTS IN ONTARIO.

755. If any general commission for the holding of a court of assize and *nisi prius*, oyer and terminer or general gaol delivery is issued by the Governor-General for any county or district in the province of Ontario, such commission shall contain the names of the justices of the Supreme Court of Judicature for Ontario, and may also contain the names of the judges of any of the county courts in Ontario, and of any of Her Majesty's counsel learned in the law *duly* appointed for the province of Upper Canada, or for the province of Ontario, and if any such commission is for a provisional judicial district such commission may contain the name of the judge of the district court of the said district.

2. The said courts shall be presided over by one of the justices of the said Supreme Court, or in their absence by one of such county court judges or by one of such counsel, or in the case of any such district by the judge of such district court. R. S. C. c. 174, s. 271.

756. It shall not be necessary for any court of General Sessions in the province of Ontario to deliver the gaol of all prisoners who are confined upon charges of theft, but the court may leave any such cases to be tried at the next court of oyer and terminer and general gaol delivery, if, by reason of the difficulty or importance of the case, or for any other cause, it appears to it proper so to do. R. S. C. c. 174, s. 272.

757. If any person is prosecuted in any division of the High Court of Justice for Ontario for any *indictable* offence, by information there filed, or by indictment there found or removed into such court, and appears therein in term time in person, or, in case of a corporation, by attorney, to answer to such information or indictment, such defendant, upon being charged therewith, shall not imparl to a following term, but shall plead or demur thereto within four days from the time of his appearance; and in default of his pleading or demurring within four days as aforesaid judgment may be entered against such defendant for want of a plea. R. S. C. c. 174, s. 273.

758. If such defendant appears to such information or indictment by attorney, he shall not imparl to a following term, but a rule, requiring him to

plead, may forthwith be given and served, and a plea to such information or indictment may be enforced, or judgment in default may be entered in the same manner as might have been done formerly in cases in which the defendant had appeared to such information or indictment by attorney in a previous term; but the court, or any judge thereof, upon sufficient cause shown for that purpose, may allow further time for such defendant to plead or demur to such information or indictment. R. S. C. c. 174, s. 274.

759. If any prosecution for *an indictable* offence, instituted by the Attorney-General for Ontario in the said court, is not brought to trial within twelve months next after the plea of not guilty has been pleaded thereto, the court in which such prosecution is depending, upon application made on behalf of any defendant in such prosecution of which application twenty days' previous notice shall be given to such Attorney-General, may make an order authorizing such defendant to bring on the trial of such prosecution; and thereupon such defendant may bring on such trial accordingly unless a *nolle prosequi* is entered to such prosecution. R. S. C. c. 174, s. 275.

The necessity of these last three sections is not clear. They applied heretofore only to misdemeanours.

SPECIAL PROVISIONS FOR NOVA SCOTIA.

760. In the province of Nova Scotia a calendar of the criminal cases shall be sent by the clerk of the Crown to the grand jury in each term, together with the depositions taken in each case and the names of the different witnesses, and the indictments shall not be made out, except in Halifax, until the grand jury so directs. R. S. C. c. 174, s. 276.

761. A judge of the Supreme Court of Nova Scotia may sentence convicted criminals on any day of the sittings at Halifax, as well as in term time. R. S. C. c. 174, s. 277.

PART LIV.

SPEEDY TRIALS OF INDICTABLE OFFENCES.

762. The provisions of this part do not apply to the North-West Territories or the district of Keewatin. 52 V. c. 47, s. 3.

763. In this part, unless the context otherwise requires,—

(*a*) the expression "judge" means and includes,—

(i) in the province of Ontario, any judge of a county court, junior judge or deputy judge authorized to act as chairman of the General Sessions of the Peace, and also the judges of the provisional districts of Algoma and Thunder Bay, and the judge of the district court of Muskoka and Parry Sound, authorized respectively to act as chairman of the General Sessions of the Peace;

(ii) in the province of Quebec, in any district wherein there is a judge of the sessions, such judge of sessions and in any district wherein there is no judge of sessions but wherein there is a district magistrate, such district magistrate, and in any district wherein there is neither a judge of sessions nor a district magistrate, the sheriff of such district;

(iii) in each of the provinces of Nova Scotia, New Brunswick and Prince Edward Island, any judge of a county court;

(iv) in the province of Manitoba the chief justice, or a puisne judge of the Court of Queen's Bench, or any judge of a county court;

(v) in the province of British Columbia the chief justice or a puisne judge of the Supreme Court, or any judge of a county court;

(*b*) the expression "county attorney" or "clerk of the peace" includes in the provinces of Nova Scotia, New Brunswick and Prince Edward Island, any clerk of a county court, and in the province of Manitoba, any Crown attorney, the prothonotary of the Court of Queen's Bench, and any deputy prothonotary thereof, any deputy clerk of the peace, and the deputy clerk of the Crown and pleas for any district in the said province. 52 V. c. 47, s. 2.

764. The judge sitting on any trial under this part, for all the purposes thereof and proceedings connected therewith or relating thereto, shall be a court of record, and in every province of Canada, except the province of Quebec, such court shall be called "The County Court Judge's Criminal Court" of the county or union of counties or judicial district in which the same is held.

2. The record in any such case shall be filed among the records of the court over which the judge presides, and as part of such records. 52 V. c. 47, s. 4.

765. Every person committed to gaol for trial on a charge of being guilty of any of the offences *which are mentioned in section five hundred and*

thirty-nine as being within the jurisdiction of the General or Quarter Sessions of the Peace, may, with his own consent (of which consent an entry shall then be made of record), and subject to the provisions herein, be tried in any province under the following provisions out of sessions and out of the regular term or sittings of the court, whether the court before which, but for such consent, the said person would be triable for the offence charged, or the grand jury thereof, is or is not then in session, and if such person is convicted he may be sentenced by the judge. 52 V. c. 47, s. 5.

766. Every sheriff shall, within twenty-four hours after any prisoner charged as aforesaid is committed to gaol for trial, notify the judge in writing that such prisoner is so confined, stating his name and the nature of the charge preferred against him, whereupon, with as little delay as possible, such judge shall cause the prisoner to be brought before him. 52 V. c. 47, s. 6.

767. The judge, upon having obtained the depositions on which the prisoner was so committed, shall state to him,

(*a*) that he is charged with the offence, describing it;

(*b*) that he has the option to be forthwith tried before such judge without the intervention of a jury, or to remain in custody or under bail, as the court decides, to be tried in the ordinary way by the court having criminal jurisdiction.

2. If the prisoner demands a trial by jury the judge shall remand him to gaol; but if he consents to be tried by the judge without a jury the county solicitor, clerk of the peace or other prosecuting officer shall prefer the charge against him for which he has been committed for trial, and if, upon being arraigned upon the charge, the prisoner pleads guilty, the prosecuting officer shall draw up a record as nearly as may be in one of the forms MM or NN in schedule one to this Act; such plea shall be entered on the record, and the judge shall pass the sentence of the law on such prisoner, which shall have the same force and effect as if passed by any court having jurisdiction to try the offence in the ordinary way. 52 V. c. 47, s. 6.

MM.—(*Section* 767).

FORM OF RECORD WHEN THE PRISONER PLEADS NOT GUILTY.

Canada,
Province of ,
County of .

Be it remembered that A. B. being a prisoner in the gaol of the said county, committed for trial on a charge of having on day of , in the year , stolen, 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.

NN.—(*Section* 767).

FORM OF RECORD WHEN THE PRISONER PLEADS GUILTY.

Canada,
Province of ,
County of .

Be it remembered that A. B. being a prisoner in the gaol of the said county, on a charge of having on the day of , in the year , stolen, 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 intervention of a jury, consented to be so tried; and that the said A. B. being then arraigned upon the said charge, he pleaded guilty thereof, whereupon I sentenced the said A. B. to (*here insert such sentence as the law allows and the judge thinks right*).

Witness my hand this day of , in the year

O. K.,
Judge.

768. If one of two or more prisoners charged with the same offence demands a trial by jury, and the other or others consent to be tried by the judge without a jury, the judge, in his discretion, may remand all the said prisoners to gaol to await trial by a jury. 52 V. c. 47, s. 8.

769. If under Part LV. (sec. 782), or Part LVI. (sec. 809), any person has been asked to elect whether he would be tried by the magistrate or justices of the peace, as the case may be, or before a jury, and he has elected to be tried before a jury, and if such election is stated in the warrant of committal for trial, the sheriff and judge shall not be required to take the proceedings directed by this part. 52 V. c. 47, s. 9.

2. But if such person, after his said election to be tried by a jury, has been committed for trial he may, at any time before the regular term or sittings of the court at which such trial by jury would take place, notify the sheriff that he desires to re-elect; whereupon it shall be the duty of the sheriff to proceed as directed by section seven hundred and sixty-six, and thereafter the person so committed shall be proceeded against as if his said election in the first instance had not been made. 53 V. c. 37, s. 30.

770. Proceedings under this part commenced before any judge may, where such judge is for any reason unable to act, be continued before any other judge competent to try prisoners under this part in the same judicial district, and such last mentioned judge shall have the same powers with respect to such proceedings as if such proceedings had been commenced before him, and may cause such portion of the proceedings to be repeated before him as he shall deem necessary. 53 V. c. 37, s. 30.

771. If, on the trial under Part LV. (sec. 782), or Part LVI. (sec. 809), of this Act of any person charged with any offence triable under the provisions of this part, the magistrate or justices of the peace decide not to try the same summarily, but commit such person for trial, such person may afterwards, with his own consent, be tried under the provisions of this part. 52 V. c. 47, s. 10.

772. If the prisoner upon being so arraigned and consenting as aforesaid pleads not guilty the judge shall appoint an early day, or the same day, for his trial, and the county attorney or clerk of the peace shall subpœna the witnesses named in the depositions, or such of them and such other witnesses as he thinks requisite to prove the charge, to attend at the time appointed for such trial, and the judge may proceed to try such prisoner, and if he be found guilty sentence shall be passed as hereinbefore mentioned; but if he be found not guilty the judge shall immediately discharge him from custody, so far as respects the charge in question. 52 V. c. 47, s. 11.

773. The county attorney or clerk of the peace or other prosecuting officer may, with the consent of the judge, prefer against the prisoner a charge or charges for any offence or offences for which he may be tried under the provisions of this part other than the charge or charges for which he has been committed to gaol for trial, although such charge or charges do not appear or are not mentioned in the depositions upon which the prisoner was so committed. 52 V. c. 47, s. 12.

774. The judge shall, in any case tried before him, have the same power as to acquitting or convicting, or convicting of any other offence than that charged, as a jury would have in case the prisoner were tried at a sitting of any court mentioned in this part, and may render any verdict which may be rendered by a jury upon a trial at a sitting of any such court. 52 V. c. 47, s. 13.

775. If a prisoner elects to be tried by the judge without the intervention of a jury the judge may, in his discretion, admit him to bail to appear for his trial, and extend the bail, from time to time, in case the court be adjourned or there is any other reason therefor; and such bail may be entered into and perfected before the clerk. 52 V. c. 47, s. 14.

776. If a prisoner elects to be tried by a jury the judge may, instead of remanding him to gaol, admit him to bail, to appear for trial at such time and place and before such court as is determined upon, and such bail may be entered into and perfected before the clerk. 52 V. c. 47, s. 15.

777. The judge may adjourn any trial from time to time until finally terminated. 52 V. c. 47, s. 16.

778. The judge shall have all powers of amendment which any court mentioned in this part would have if the trial was before such court. 52 V. c. 47, s. 17.

779. Any recognizance taken under section five hundred and ninety-eight of this Act, for the purpose of binding a prosecutor or a witness, shall, if the person committed for trial elects to be tried under the provisions of this part, be obligatory on each of the persons bound thereby, as to all things therein mentioned with reference to the trial by the judge under this part, as if such recognizance had been originally entered into for the doing of such things with reference to such trial: Provided, that at least forty-eight hours' notice in writing shall be given, either personally or by leaving the same at the place of residence of the persons bound by such recognizance as therein described, to appear before the judge at the place where such trial is to be had. 53 V. c. 37, s. 29.

780. Every witness, whether on behalf of the prisoner or against him, duly summoned or subpœnaed to attend and give evidence before such judge, sitting on any such trial, on the day appointed for the same, shall be bound to attend and remain in attendance throughout the trial; and if he fails so to attend he shall be held guilty of contempt of court, and may be proceeded against therefor accordingly. 52 V. c. 47, s. 18.

781. Upon proof to the satisfaction of the judge of the service of subpœna upon any witness who fails to attend before him, as required by such subpœna, and upon such judge being satisfied that the presence of such witness before him is indispensable to the ends of justice, he may, by his warrant, cause the said witness to be apprehended and forthwith brought before him to give evidence as required by such subpœna, and to answer for his disregard of the same; and such witness may be detained on such warrant before the said

judge, or in the common gaol, with a view to secure his presence as a witness; or, in the discretion of the judge, such witness may be released on recognizance with or without sureties, conditioned for his appearance to give evidence as therein mentioned, and to answer for his default in not attending upon the said subpœna, as for a contempt; and the judge may, in a summary manner, examine into and dispose of the charge of contempt against the said witness who, if found guilty thereof, may be fined or imprisoned, or both, such fine not to exceed one hundred dollars, and such imprisonment to be in the common gaol, with or without hard labour, and not to exceed the term of ninety days, and *he may also be ordered to pay the costs incident to the execution of such warrant and of his detention in custody.*

2. Such warrant may be in the form OO and the conviction for contempt in the form PP in schedule one to this Act, and the same shall be authority to the persons and officers therein required to act to do as therein they are respectively directed. 52 V. c. 47, s. 19.

The words in italics in s. 781 are new.

OO.—(*Section* 781.)

WARRANT TO APPREHEND WITNESS.

Canada,
Province of ,
County of ,

To all or any of the constables and other peace officers in the said county of .

Whereas it having been made to appear before me, that E. F., of , in the said county of , was likely to give material evidence on behalf of the prosecution (*or* defence, *as the case may be*) on the trial of a certain charge of (*as theft, or as the case may be*), against A. B., and that the said E. F. was duly subpœnaed (*or* bound under recognizance) to appear on the day of , in the year , at , in the said county at o'clock (forenoon *or* afternoon, *as the case may be*), before me, to testify what he knows concerning the said charge against the said A. B.

And whereas proof has this day been made before me, upon oath of such subpœna having been duly served upon the said E. F., (*or* of the said E. F. having been duly bound under recognizance to appear before me, *as the case may be*); and whereas the said E. F. has neglected to appear at the trial and place appointed, and no just excuse has been offered for such

neglect: These are therefore to command you to take the said E. F. and to bring him and have him forthwith before me, to testify what he knows concerning the said charge against the said A. B., and also to answer his contempt for such neglect.

Given under my hand this day of , in the year .

O. K.,
Judge.

PP.—(*Sections* 582, 781.)

CONVICTION FOR CONTEMPT.

Canada,
Province of ,
County of ,

Be it remembered that on the day of , in the year , in the county of , E. F. is convicted before me, for that he the said E. F. did not attend before me to give evidence on the trial of a certain charge against one A. B. of (*theft, or as the case may be*), although duly subpœnaed (*or* bound by recognizance to appear and give evidence in that behalf, *as the case may be*) but made default therein, and has not shown before me any sufficient excuse for such default, and I adjudge the said E. F., for the said offence, to be imprisoned in the common gaol of the county of , at , for the space of , there to be kept at hard labour (*and in case a fine is also intended to be imposed, then proceed*) and I also adjudge that the said E. F. do forthwith pay to and for the use of Her Majesty a fine of dollars, and in default of payment, that the said fine, with the cost of collection, be levied by distress and sale of the goods and chattels of the said E. F. (*or in case a fine alone is imposed, then the clause of imprisonment is to be omitted.*)

Given under my hand at , in the said county of , the day and year first above mentioned.

O. K.,
Judge.

PART LV.

SUMMARY TRIAL OF INDICTABLE OFFENCES.

782. In this part, unless the context otherwise requires, (*a*) the expression "magistrate" means and includes—

(i) in the provinces of Ontario, Quebec and Manitoba, any recorder, judge of a county court, being a justice of the peace, commissioner of police, judge of the sessions of the peace, police magistrate, district magistrate, or other functionary or tribunal, invested by the proper legislative authority, with power to do alone such acts as are usually required to be done by two or more justices of the peace, and acting within the local limits of his or of its jurisdiction;

(ii) in the provinces of Nova Scotia and New Brunswick, any recorder, judge of a county court, stipendiary magistrate or police magistrate, acting within the local limits of his jurisdiction, and any commissioner of police and any functionary, tribunal or person invested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more justices of the peace;

(iii) in the provinces of Prince Edward Island and British Columbia and in the district of Keewatin, any two justices of the peace sitting together, and any functionary or tribunal having the powers of two justices of the peace;

(iv) in the North-West Territories, any judge of the Supreme Court of the said territories, any two justices of the peace sitting together, and any functionary or tribunal having the powers of two justices of the peace;

(*b*) the expression "the common gaol or other place of confinement," in the case of any offender whose age at the time of his conviction does not, in the opinion of the magistrate, exceed sixteen years, includes any reformatory prison provided for the reception of juvenile offenders in the province in which the conviction referred to takes place, and to which by the law of that province the offender may be sent; and

(*c*) the expression "property" includes everything included under the same expression or under the expression "valuable security," as defined by this Act, and in the case of any "valuable security," the value thereof shall be reckoned in the manner prescribed in this Act. R. S. C. c. 176, s. 2.

783. Whenever any person is charged before a magistrate;

(*a*) with having committed theft, or obtained money or property by false pretenses, or unlawfully received stolen property, and the value of the property alleged to have been stolen, obtained or received, does not, in the judgment of the magistrate, exceed ten dollars; or

(*b*) with having attempted to commit theft; or

(*c*) with having committed an aggravated assault by unlawfully and maliciously inflicting upon any other person, either with or without a weapon

or instrument, any grievous bodily harm, or by unlawfully and maliciously wounding any other person ; or

(*d*) with having committed an assault upon any female whatsoever, or upon any male child whose age does not, in the opinion of the magistrate, exceed fourteen years, such assault being of a nature which cannot, in the opinion of the magistrate, be sufficiently punished by a summary conviction before him under any other part of this Act, and such assault, if upon a female, not amounting, in his opinion, to an assault with intent to commit a rape ; or

(*e*) with having assaulted, obstructed, molested or hindered *any peace officer or public officer* in the lawful performance of his duty, or with intent to prevent the performance thereof ; or

(*f*) with keeping or being an inmate, or habitual frequenter of any disorderly house, house of ill-fame or bawdy-house : or

(*g*) with using or knowingly allowing any part of any premises under his control to be used—

(i) for the purpose of recording or registering any bet or wager, or selling any pool ; or

(ii) keeping, exhibiting, or employing, or knowingly allowing to be kept, exhibited or employed, any device or apparatus for the purpose of recording or registering any bet or wager, or selling any pool ; or

(*h*) becoming the custodian or depositary of any money, property, or valuable thing staked, wagered or pledged ; or

(*i*) recording or registering any bet or wager, or selling any pool, upon the result of any political or municipal election, or of any race, or of any contest or trial of skill or endurance of man or beast,—

the magistrate may, subject to the provisions hereinafter made, hear and determine the charge in a summary way. R. S. C. c. 176, s. 3.

784. The jurisdiction of such magistrate is absolute in the case of any person charged with keeping or being an inmate or habitual frequenter of any disorderly house, house of ill-fame or bawdy-house, and does not depend on the consent of the person charged to be tried by such magistrate, nor shall such person be asked whether he consents to be so tried ; nor do the provisions of this part affect the absolute summary jurisdiction given to any justice or justices of the peace in any case by any other part of this Act. R. S. C. c. 176, s. 4.

The words "within the police limits of any city in Canada" were inserted in the repealed Act after the word *charged* in the second line.

2. The jurisdiction of the magistrate is absolute in the case of any person who, being a seafaring person and only transiently in Canada, and having no permanent domicile therein, is charged, either within the city of Quebec as limited for the purpose of the police ordinance, or within the city of Montreal as so limited, or in any other seaport city or town in Canada where there is such magistrate, with the commission therein of any of the offences hereinbefore mentioned, and also in the case of any other person charged with any such

offence on the complaint of any such seafaring person whose testimony is essential to the proof of the offence; and such jurisdiction does not depend on the consent of any such person to be tried by the magistrate, nor shall such person be asked whether he consents to be so tried. R. S. C. c. 176, s. 5.

3. The jurisdiction of a stipendary magistrate in the province of Prince Edward Island, and of a magistrate in the district of Keewatin, under this part, is absolute without the consent of the person charged. 52 V. c. 46, s. 1.

This sub-section extended to British Columbia by the repealed Act.

785. If any person is charged, in the province of Ontario before a police magistrate or before a stipendiary magistrate in any county, district or provisional county in such province, with having committed any offence for which he may be tried at a Court of General Sessions of the Peace, or if any person is committed to a gaol in the county, district or provisional county, under the warrant of any justice of the peace, for trial on a charge of being guilty of any such offence, such person may, with his own consent, be tried before such magistrate, and may, if found guilty, be sentenced by the magistrate to the same punishment as he would have been liable to if he had been tried before the Court of General Sessions of the Peace. R. S. C. c. 176, s. 7.

786. Whenever the magistrate, before whom any person is charged as aforesaid, proposes to dispose of the case summarily under the provisions of this part, such magistrate, after ascertaining the nature and extent of the charge, but before the formal examination of the witnesses for the prosecution and before calling on the person charged for any statement which he wishes to make, shall state to such person the substance of the charge against him, and (if the charge is not one that can be tried summarily without the consent of the accused) shall then say to him these words, or words to the like effect: "Do you consent that the charge against you shall be tried by me, or do you desire that it shall be sent for trial by a jury at the (*naming the court at which it can probably soonest be tried*);" and if the person charged consents to the charge being summarily tried and determined as aforesaid, or if the power of the magistrate to try it does not depend on the consent of the accused, the magistrate shall reduce the charge to writing and read the same to such person, and shall then ask him whether he is guilty or not of such charge. If the person charged confesses the charge the magistrate shall then proceed to pass such sentence upon him as by law may be passed in respect to such offence, subject to the provisions of this Act; but if the person charged says that he is not guilty, the magistrate shall then examine the witnesses for the prosecution, and when the examination has been completed, the magistrate shall inquire of the person charged whether he has any defence to make to such charge, and if he states that he has a defence the magistrate shall hear such defence, and shall then proceed to dispose of the case summarily. R. S. C. c. 176, ss. 8 & 9.

787. In the case of an offence charged under paragraph (*a*) or (*b*) of section seven hundred and eighty-three, the magistrate, after hearing the whole case for the prosecution and for the defence, shall, if he finds the charge proved, convict the person charged and commit him to the common gaol or

other place of confinement, there to be imprisoned, with or without hard labour, for any term not exceeding six months. R. S. C. c. 176, s. 10.

788. In any case summarily tried under paragraph (*c*), (*d*), (*e*), (*f*), (*g*), (*h*) or (*i*) of section seven hundred and eighty-three, if the magistrate finds the charge proved, he may convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labour, for any term not exceeding six months, or may condemn him to pay a fine not exceeding, with the costs in the case, one hundred dollars, or to both fine and imprisonment not exceeding the said sum and term; and such fine may be levied by warrant of distress under the hand and seal of the magistrate, or the person convicted may be condemned, in addition to any other imprisonment on the same conviction, to be committed to the common gaol or other place of confinement for a further term not exceeding six months, unless such fine is sooner paid. R. S. C. c. 176, s. 11.

789. When any person is charged before a magistrate with theft or with having obtained property by false pretenses, or with having unlawfully received stolen property, and the value of the property stolen, obtained or received exceeds ten dollars, and the evidence in support of the prosecution is, in the opinion of the magistrate, sufficient to put the person on his trial for the offence charged, such magistrate, if the case appears to him to be one which may properly be disposed of in a summary way, and may be adequately punished by virtue of the powers conferred by this part, shall reduce the charge to writing, and shall read it to the said person, and, unless such person is one who can be tried summarily without his consent, shall then put to him the question mentioned in section seven hundred and eighty-six, and shall explain to him that he is not obliged to plead or answer before such magistrate, and that if he does not plead or answer before him, he will be committed for trial in the usual course. R. S. C. c. 176, s. 12.

790. If the person charged as mentioned in the next preceding section consents to be tried by the magistrate, the magistrate shall then ask him whether he is guilty or not guilty of the charge, and if such person says that he is guilty, the magistrate shall then cause a plea of guilty to be entered upon the proceedings, and sentence him to the same punishment as he would have been liable to if he had been convicted upon indictment in the ordinary way; and if he says that he is not guilty, the magistrate shall proceed as provided in section seven hundred and eighty-six. 52 V. c. 46, s. 2.

791. If, in any proceeding under this part, it appears to the magistrate that the offence is one which, owing to a previous conviction of the person charged, or from any other circumstance, ought to be made the subject of prosecution by indictment rather than to be disposed of summarily, such magistrate may, before the accused person has made his defence, decide not to adjudicate summarily upon the case; but a previous conviction shall not prevent the magistrate from trying the offender summarily, if he thinks fit so to do. R. S. C. c. 176, s. 14.

792. If, when his consent is necessary, the person charged elects to be tried before a jury, the magistrate shall proceed to hold a preliminary inquiry

as provided in Parts XLIV. and XLV., and if the person charged is committed for trial, shall state in the warrant of committal the fact of such election having been made. R. S. C. c. 176, s. 15.

798. In every case of summary proceedings under this part the person accused shall be allowed to make his full answer and defence, and to have all witnesses examined and cross-examined by counsel or solicitor. R. S. C. c. 176, s. 16.

794. Every court held by a magistrate for the purposes of this part shall be an open public court.

795. The magistrate before whom any person is charged under the provisions of this part may, by summons, require the attendance of any person as a witness upon the hearing of the case, at a time and place to be named in such summons, and such magistrate may bind, by recognizance, all persons whom he considers necessary to be examined, touching the matter of such charge, to attend at the time and place appointed by him and then and there to give evidence upon the hearing of such charge; and if any person so summoned, or required or bound as aforesaid, neglects or refuses to attend in pursuance of such summons or recognizance, and if proof is made of such person having been duly summoned as hereinafter mentioned, or bound by recognizance as aforesaid, the magistrate before whom such person should have attended may issue a warrant to compel his appearance as a witness. R. S. C. c. 176, s. 18.

796. Every summons issued under the provisions of this part may be served by delivering a copy of the summons to the person summoned, or by delivering a copy of the summons to some inmate of such person's usual place of abode *apparently over sixteen years of age;* and every person so required by any writing under the hand of any magistrate to attend and give evidence as aforesaid shall be deemed to have been duly summoned. R. S. C. c. 176, s. 19.

797. Whenever the magistrate finds the offence not proved, he shall dismiss the charge, and make out and deliver to the person charged a certificate under his hand stating the fact of such dismissal. R. S. C. c. 176, s. 20.

798. Every conviction under this part shall have the same effect as a conviction upon indictment for the same offence. R. S. C. c. 176, s. 22.

799. Every person who obtains a certificate of dismissal or is convicted under the provisions of this part, shall be released from all further or other criminal proceedings for the same cause. R. S. C. c. 176, s. 23.

800. No conviction, sentence or proceeding under the provisions of this part shall be quashed for want of form; and no warrant of commitment upon a conviction shall be held void by reason of any defect therein, if it is therein alleged that the offender has been convicted, and there is a good and valid conviction to sustain the same. R. S. C. c. 176, s. 24.

801. The magistrate adjudicating under the provisions of this part shall transmit the conviction, or a duplicate of a certificate of dismissal, with the written charge, the depositions of witnesses for the prosecution and for the defence, and the statement of the accused, to the next court of General or Quarter Sessions of the Peace or to the court discharging the functions of a court of General or Quarter Sessions of the Peace, for the district, county or place, there to be kept by the proper officer among the records of the court. R. S. C. c. 176. s. 25.

802. A copy of such conviction, or of such certificate of dismissal, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction or dismissal for the offence mentioned therein, in any legal proceedings. R. S. C. c. 176, s. 26.

803. The magistrate by whom any person has been convicted under the provisions of this part may order restitution of the property stolen, or taken *or obtained by false pretenses*, in any case in which the court before whom the person convicted would have been tried but for the provisions of this part, might by law order restitution. R. S. C. c. 176, s. 27.

See s. 838, *post.*

804. Whenever any person is charged before any justice or justices of the peace, with any offence mentioned in section seven hundred and eighty-three, and in the opinion of such justice or justices the case is proper to be disposed of summarily by a magistrate, as herein provided, the justice or justices before whom such person is so charged may, if he or they see fit, remand such person for further examination before the nearest magistrate in like manner in all respects as a justice or justices are authorized to remand a person accused for trial at any court, under Part XLV., section five hundred and eighty-six; but no justice or justices of the peace, in any province, shall so remand any person for further examination or trial before any such magistrate in any other province. Any person so remanded for examination before a magistrate in any city, may be examined and dealt with by any other magistrate in the same city. R. S. C. c. 176, ss. 28, 29 & 30.

805. If any person suffered to go at large, upon entering into such recognizance as the justice or justices are authorized, under Part XLV., section five hundred and eighty-seven, to take on the remand of a person accused, conditioned for his appearance before a magistrate, does not afterwards appear, pursuant to such recognizance, the magistrate before whom he should have appeared shall certify, under his hand on the back of the recognizance, to the clerk of the peace of the district, county or place, or other proper officer, as the case may be, the fact of such non-appearance. and such recognizance shall be proceeded upon in like manner as other recognizances; and such certificate shall be *prima facie* evidence of such non-appearance *without proof of the signature of the magistrate thereto.* R. S. C. c. 176, s. 31.

806. Every fine and penalty imposed under the authority of this part shall be paid as follows, that is to say :—

(*a*) In the province of Ontario, to the magistrate who imposed the same, or to the clerk of the court or clerk of the peace, as the case may be, to be paid over by him to the county treasurer for county purposes;

(*b*) In any new district in the province of Quebec, to the sheriff of such district, as treasurer of the building and jury fund for such district, to form part of such fund,—and if in any other district in the said province, to the prothonotary of such district to be applied by him, under the direction of the Lieutenant-Governor in Council, towards the keeping in repair of the court-house in such district, or to be added by him to the moneys and fees collected by him for the erection of a court-house and gaol in such district, so long as such fees are collected to defray the cost of such erection;

(*c*) In the provinces of Nova Scotia and New Brunswick, to the county treasurer for county purposes; and

(*d*) In the provinces of Prince Edward Island, Manitoba and British Columbia, to the treasurer of the province. R. S. C. c. 176, s. 32.

807. Every conviction or certificate may be in the form QQ, RR, or SS in schedule one hereto applicable to the case, or to the like effect; and whenever the nature of the case requires it, such forms may be altered by omitting the words stating the consent of the person to be tried before the magistrate, and by adding the requisite words, stating the fine imposed, if any, and the imprisonment, if any, to which the person convicted is to be subjected if the fine is not sooner paid. R. S. C. c. 176, s. 33.

FORMS UNDER PART LV.

QQ.—(*Section* 807.)

CONVICTION.

Canada,
Province of ,
County of .

Be it remembered that on the day of , in the year , at , A. B., being charged before me, the undersigned, , of the said (*city*) (and consenting to my trying 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 to hard labour) for the term of

Given under my hand and seal, the day and year first above mentioned, at aforesaid.

J. S., [SEAL.]
J. P., (Name of county.)

RR.—(*Section* 807.)

CONVICTION UPON A PLEA OF GUILTY.

Canada,
Province of ,
County of .

Be it remembered that on the day of , in the year , at , A. B. being charged before me, the undersigned, , of the said *(city)* (and consenting to my trying the charge summarily), for that he, the said A. B., *(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 to hard labour) for the term of

Given under my hand and seal, the day and year first above mentioned, at aforesaid.

J. S., [SEAL.]
J. P., (Name of county.)

SS.—*(Section* 807.)

CERTIFICATE OF DISMISSAL.

Canada,
Province of ,
County of .

I, the undersigned, , of the city *(or as the case may be)* of , certify that on the day of , in the year , at aforesaid, A. B., being charged before me (and consenting to my trying the charge summarily), for that he, the said A. B., *(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.

J. S., [SEAL.]
J. P., (Name of county.)

808. The provisions of this Act relating to preliminary inquiries before justices, except as mentioned in sections eight hundred and four and eight hundred and five and of Part LVIII., shall not apply to any proceedings under this part. Nothing in this part shall affect the provisions of Part LVI., and this part shall not extend to persons punishable under that part so far as regards offences for which such persons may be punished thereunder. R. S. C. c. 176, ss. 34 & 35.

PART LVI.

TRIAL OF JUVENILE OFFENDERS FOR INDICTABLE OFFENCES.

809. In this part, unless the context otherwise requires—

(*a*) The expression "two or more justices," or "the justices" includes,—

(i) in the provinces of Ontario and Manitoba any judge of the county court being a justice of the peace, police magistrate or stipendiary magistrate, or any two justices of the peace, acting within their respective jurisdictions;

(ii) in the province of Quebec any two or more justices of the peace, the sheriff of any district, except Montreal and Quebec, the deputy sheriff of Gaspe, and any recorder, judge of the Sessions of the Peace, police magistrate, district magistrate or stipendiary magistrate acting within the limits of their respective jurisdictions;

(iii) in the provinces of Nova Scotia, New Brunswick, Prince Edward Island, and British Columbia, and in the district of Keewatin, any functionary or tribunal invested by the proper legislative authority with power to do acts usually required to be done by two or more justices of the peace;

(iv) in the North-west Territories, any judge of the Supreme Court of the said territories, any two justices of the peace sitting together, and any functionary or tribunal having the powers of two justices of the peace;

(*b*) The expression "the common gaol or other place of confinement includes any reformatory prison provided for the reception of juvenile offenders in the province in which the conviction referred to takes place, and to which, by the law of that province, the offender may be sent. R. S. C. c. 177, s. 2.

810. Every person charged with having committed, or having attempted to commit any offence which is theft, or punishable as theft, and whose age, at the period of the commission or attempted commission of such offence, does not, in the opinion of the justice before whom he is brought or appears, exceed the age of sixteen years, shall, upon conviction thereof in open court, upon his

own confession or upon proof, before any two or more justices, be committed to the common gaol or other place of confinement within the jurisdiction of such justices, there to be imprisoned, with or without hard labour, for any term not exceeding three months, or, in the discretion of such justices, shall forfeit and pay such sum, not exceeding twenty dollars, as such justices adjudge. R. S. C. c. 177, s. 3.

811. Whenever any person, whose age is alleged not to exceed sixteen years, is charged with any offence mentioned in the next preceding section, on the oath of a credible witness, before any justice of the peace, such justice may issue his summons or warrant, to summon or to apprehend the person so charged to appear before any two justices of the peace, at a time and place to be named in such summons or warrant. R. S. C. c. 177, s. 4.

812. Any justice of the peace, if he thinks fit, may remand for further examination or for trial, or suffer to go at large, upon his finding sufficient sureties, any such person charged before him with any such offence as aforesaid.

2. Every such surety shall be bound by recognizance conditioned for the appearance of such person before the same or some other justice or justices of the peace for further examination, or for trial before two or more justices of the peace as aforesaid, or for trial by indictment at the proper court of criminal jurisdiction, as the case may be.

3. Every such recognizance may be enlarged, from time to time, by any such justice or justices to such further time as he or they appoint; and every such recognizance not so enlarged shall be discharged without fee or reward, when the person has appeared according to the condition thereof. R. S. C. c. 177, ss. 5, 6 & 7.

813. The justices before whom any person is charged and proceeded against under the provision of this part before such person is asked whether he has any cause to show why he should not be convicted, shall say to the person so charged, these words, or words to the like effect:

"We shall have to hear what you wish to say in answer to the charge against you; but if you wish to be tried by a jury, you must object now to our deciding upon it at once."

2. And if such person, or a parent or guardian of such person, then objects, no further proceedings shall be had under the provisions of this part; but the justices may deal with the case according to the provision set out in Parts XLIV. and XLV., as if the accused were before them thereunder. R. S. C. c. 177, s. 8.

814. If the justices are of opinion, before the person charged has made his defence, that the charge is, from any circumstance, a fit subject for prosecution by indictment, or if the person charged, upon being called upon to answer the charge, objects to the case being summarily disposed of under the provisions of this part, the justices shall not deal with it summarily, but may proceed to hold a preliminary inquiry as provided in Parts XLIV. and XLV. (Ss. 553, 577).

2. In case the accused has elected to be tried by a jury, the justices shall state in the warrant of commitment the fact of such election having been made. R. S. C. c. 177, s. 9.

815. Any justice of the peace may, by summons, require the attendance of any person as a witness upon the hearing of any case before two justices, under the authority of this part, at a time and place to be named in such summons. R. S. C. c. 177, s. 10.

816. Any such justice may require and bind by recognizance every person whom he considers necessary to be examined, touching the matter of such charge, to attend at the time and place appointed by him and then and there to give evidence upon the hearing of such charge. R. S. C. c. 177, s. 11.

817. If any person so summoned or required or bound, as aforesaid, neglects or refuses to attend in pursuance of such summons or recognizance, and if proof is given of such person having been duly summoned, as hereinafter mentioned, or bound by recognizance, as aforesaid, either of the justices before whom any such person should have attended may issue a warrant to compel his appearance as a witness. R. S. C. c. 177, s. 12.

818. Every summons issued under the authority of this part may be served by delivering a copy thereof to the person, or to some inmate, *apparently over sixteen years of age*, at such person's usual place of abode, and every person so required by any writing under the hand or hands of any justice or justices to attend and give evidence as aforesaid, shall be deemed to have been duly summoned. R. S. C. c. 177, s. 13.

819. If the justices, upon the hearing of any such case, deem the offence not proved, or that it is not expedient to inflict any punishment, they shall dismiss the person charged,—in the latter case on his finding sureties for his future good behaviour, and in the former case without sureties, and then make out and deliver to the person charged a certificate in the form TT in schedule one to this Act, or to the like effect, under the hands of such justices, stating the fact of such dismissal. R. S. C. c. 177, s. 14.

FORMS UNDER PART LVI.

TT.—(*Section* 819.)

CERTIFICATE OF DISMISSAL.

Canada, } , justices of
Province of , } the peace for the of
County 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.]

---

820. The justices before whom any person is summarily convicted of any offence hereinbefore mentioned, may cause the conviction to be drawn up in the form UU in schedule one hereto, or in any other form to the same effect, and the conviction shall be good and effectual to all intents and purposes.

2. No such conviction shall be quashed for want of form, or be removed by *certiorari* or otherwise into any court of record; and no warrant of commitment shall be held void by reason of any defect therein, if it is therein alleged that the person has been convicted, and there is a good and valid conviction to sustain the same. R. S. C. c. 177, ss. 16 & 17.

UU.—(*Section* 820.)

CONVICTION.

Canada,
Province of ,
County of ,

Be it remembered that on the day of , in the year , at , in the county of , A. B. is convicted before us, J. P. and J. R., justices of the peace for the said county (*or* me, S. J., *recorder*, of the , of , *or as the case may be*) for that he, the said A. B., did (*specify the offence and the time and place when and where the same was committed, as the case may be, but without setting forth the evidence*), and we, the said J. P. and J. R. (*or* I, the said S. J.), adjudge the said A. B., for his said offence to be imprisoned in the , (*or* to be imprisoned in the , and there kept at hard labour), for the space of, (*or* we) (*or* I) adjudge the said A. B., for his said offence, to forfeit and pay (*here state the penalty*

actually imposed), and in default of immediate payment of the said sum, to be imprisoned in the , (*or* to be imprisoned in the , and kept at hard labour) for the term of , unless the said sum is sooner paid.

Given under our hands and seals (*or* my hand and seal) the day and year first above mentioned.

J. P. [SEAL.]
J. R. [SEAL.]
or S. J. [SEAL.]

---

821. Every person who obtains such certificate of dismissal, or is so convicted, shall be released from all further or other criminal proceedings for the same cause. R. S. C. c. 177, s. 15.

822. The justices before whom any person is convicted under the provisions of this part shall forthwith transmit the conviction and recognizances to the clerk of the peace or other proper officer, for the district, city, county or union of counties wherein the offence was committed, there to be kept by the proper officer among the records of the court of General or Quarter Sessions of the Peace, or of any other court discharging the functions of a court of General or Quarter Sessions of the Peace. R. S. C. c. 177, s. 18.

823. Every clerk of the peace, or other proper officer, shall transmit to the Minister of Agriculture a quarterly return of the names, offences and punishments mentioned in the convictions, with such other particulars as are, from time to time, required. R. S. C. c. 177, s. 19.

824. 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.

See s. 838, *post*.

2. If such property is not then forthcoming, the justices, whether they award punishment or not, may inquire into and ascertain the value thereof in money; and, if they think proper, order payment of such sum of money to the true owner, by the person convicted, either at one time or by instalments, at such periods as the justices deem reasonable.

3. The person ordered to pay such sum may be sued for the same as a debt in any court in which debts of the like amount are, by law, recoverable, with costs of suit, according to the practice of such court. R. S. C. c. 177, ss. 20, 21 & 22.

[*Parliament, by this enactment, assumes the right to give a right of action in the civil courts against minors.*

825. Whenever the justices adjudge any offender to forfeit and pay a pecuniary penalty under the authority of this part, and such penalty is not forthwith paid they may, if they deem it expedient, appoint some future day

for the payment thereof, and order the offender to be detained in safe custody until the day so appointed, unless such offender gives security to the satisfaction of the justices, for his appearance on such day; and the justice (*justices ?*) may take such security by way of recognizance or otherwise in their discretion.

2. If at any time so appointed such penalty has not been paid, the same or any other justices of the peace may, by warrant under their hands and seals, commit the offender to the common gaol or other place of confinement within their jurisdiction, there to remain for any time not exceeding three months, reckoned from the day of such adjudication. R. S. C. c. 177, ss. 23 & 24.

826. The justices before whom any person is prosecuted or tried for any offence cognizable under this part may, in their discretion, at the request of the prosecutor or of any other person who appears on recognizance or summons to prosecute or give evidence against such person, order payment to the prosecutor and witnesses for the prosecution, of such sums as to them seem reasonable and sufficient, to reimburse such prosecutor and witnesses for the expenses they have severally incurred in attending before them, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein,—and may order payment to the constables and other peace officers for the apprehension and detention of any person so charged.

2. The justices may, although no conviction takes place, order all or any of the payments aforesaid to be made, when they are of opinion that the persons, or any of them, have acted in good faith. R. S. C. c. 177, ss. 25 & 26.

827. Every fine imposed under the authority of this part shall be paid and applied as follows, that is to say:—

(*a*) In the Province of Ontario to the justices who impose the same or the clerk of the county court, or the clerk of the peace, or other proper officer, as the case may be, to be by him or them paid over to the county treasurer for county purposes;

(*b*) In any new district in the province of Quebec to the sheriff of such district as treasurer of the building and jury fund for such district to form part of such fund, and in any other district in the province of Quebec to the prothonotary of such district, to be applied by him, under the direction of the Lieutenant-Governor in Council, towards the keeping in repair of the court-house in such district or to be added by him to the moneys or fees collected by him for the erection of a court-house or gaol in such district, so long as such fees are collected to defray the cost of such erection;

(*c*) In the provinces of Nova Scotia and New Brunswick to the county treasurer, for county purposes; and

(*d*) In the provinces of Prince Edward Island, Manitoba and British Columbia to the treasurer of the province. R. S. C. c. 177, s. 27.

828. The amount of expenses of attending before the justices and the compensation for trouble and loss of time therein, and the allowances to the constables and other peace officers for the apprehension and detention of the offender, and the allowances to be paid to the prosecutor, witnesses and constables for attending at the trial or examination of the offender, shall be ascertained by and certified under the hands of such justices; but the amount of

the costs, charges and expenses attending any such prosecution, to be allowed and paid as aforesaid, shall not in any one case exceed the sum of eight dollars.

2. Every such order of payment to any prosecutor or other person, after the amount thereof has been certified by the proper justices of the peace as aforesaid, shall be forthwith made out and delivered by the said justices or one of them, or by the clerk of the peace or other proper officer, as the case may be, to such prosecutor or other person, upon such clerk or officer being paid his lawful fee for the same, and shall be made upon the officer to whom fines imposed under the authority of this part are required to be paid over in the district, city, county or union of counties in which the offence was committed, or was supposed to have been committed, who, upon sight of every such order, shall forthwith pay to the person named therein, or to any other person duly authorized to receive the same on his behalf, out of any moneys received by him under this part, the money in such order mentioned, and he shall be allowed the same in his accounts of such moneys. R. S. C. c. 177, ss. 28 & 29.

829. The provisions of this part shall not apply to any offence committed in the provinces of Prince Edward Island or British Columbia, or the district of Keewatin, punishable by imprisonment for two years and upwards; and in such provinces and district it shall not be necessary to transmit any recognizance to the clerk of the peace or other proper officer. R. S. C. c. 177, s. 30.

830. The provisions of this part shall not authorize two or more justices of the peace to sentence offenders to imprisonment in a reformatory in the province of Ontario. R. S. C. c. 177, s. 31.

831. Nothing in this part shall prevent the summary conviction of any person who may be tried thereunder before one or more justices of the peace, for any offence for which he is liable to be so convicted under any other part of this Act or under any other Act. R. S. C. c. 177, s. 8, part.

PART LVII.

COSTS AND PECUNIARY COMPENSATION—RESTITUTION OF PROPERTY.

832. Any court by which and any judge under Part LIV. or magistrate under LV. by whom judgment is pronounced or recorded, upon the conviction of any person for treason or any indictable offence, in addition to such sentence as may otherwise by law be passed, may condemn such person to the payment of the whole or any part of the costs or expenses incurred in and about the prosecution and conviction for the offence of which he is convicted,

if to such court it seems fit so to do; and the payment of such costs and expenses, or any part thereof, may be ordered by the court to be made out of any moneys taken from such person on his apprehension (if such moneys are his own), or may be enforced at the instance of any person liable to pay or who has paid the same in such and the same manner (subject to the provisions of this Act) as the payment of any costs ordered to be paid by the judgment or order of any court of competent jurisdiction in any civil action or proceeding may for the time being be enforced: Provided, that in the meantime, and until the recovery of such costs and expenses from the person so convicted as aforesaid, or from his estate, the same shall be paid and provided for in the same manner as if this section had not been passed; and any money which is recovered in respect thereof from the person so convicted, or from his estate, shall be applicable to the reimbursement of any person or fund by whom or out of which such costs and expenses have been paid or defrayed: 33-34 V. (U. K.) c. 23, s. 3.

Part LIV. is comprised between ss. 762 and 781, *ante*, speedy trials of indictable offences; and Part LV. between ss. 782 and 808, summary trial of indictable offences.

This section is new. The only case where costs could previously be allowed in a criminal case was in assault by s. 248, R. S. C. c. 174: *see post*, s. 834.

See R. v. Roberts, 12 Cox, 574.

COSTS AGAINST A PROSECUTOR IN A CASE OF LIBEL.

833. In the case of an indictment or information by a private prosecutor for the publication of a defamatory libel if judgment is given for the defendant, he shall be entitled to recover from the prosecutor the costs incurred by him by reason of such indictment or information either by warrant of distress issued out of the said court, or by action or suit as for an ordinary debt. R. S. C. c. 174, ss. 153 & 154.

See ante, under s. 302. The costs against a defendant are provided for by the preceding section.

COSTS ON CONVICTION FOR ASSAULT.

834. If a person convicted on an indictment for assault, whether with or without battery and wounding, is ordered to pay costs as provided in section eight hundred and thirty-two he shall be liable unless the said costs are sooner paid, to three months' imprisonment, in addition to the term of imprisonment, if any, to which he is sentenced for the offence, and the court may, by warrant in writing, order the amount of such costs to be levied by distress and sale of the goods and chattels of the offender, and paid to the prosecutor, and the surplus, if any, arising from such sale, to the owner; and if such sum is so levied, the offender shall be released from such imprisonment. R. S. C. c. 174, ss. 248 & 249 24-25 V. c. 100, ss. 74, 75 (Imp.).

TAXATION OF COSTS. (*New*).

835. 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*.

COMPENSATION FOR LOSS OF PROPERTY.

836. A court on the trial of any person on an indictment may, if it thinks fit, upon the application of *any* person aggrieved and *immediately after* the conviction of the offender, award any sum of money, not exceeding one thousand dollars, by way of satisfaction or compensation for any loss of property suffered *by the applicant* through or by means of the offence of which such person is so convicted; and the amount awarded for such satisfaction or compensation shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and the order for payment of such amount may be enforced in such and the same manner as in the case of any costs ordered by the court to be paid under section eight hundred and thirty-two. 33-34 V. (U.K.) c. 23, s. 4.

"Property" defined, s. 3.

This section is new. It enables any person aggrieved to get a judgment from the court, without a jury, for any amount up to one thousand dollars against the party convicted, even where that court has no jurisdiction in civil matters.

"The discretionary power given by this section is far more extensive than the power conferred by 24 & 25 V. c. 96, s. 100 (s. 838, *post*), and if it is exercised in every case to which it may in strictness be applicable, will compel a criminal court at the close of many trials for felony to enter upon complicated inquiries involving the expenditure of a large amount of time and labour."

"It is probable, however, that criminal courts will decline to exercise the powers thus conferred upon them except in very simple cases, and will, in the majority of instances, leave the applicant to enforce his rights by the ordinary civil procedure."

"In the case of serious personal injuries, caused by a felonious act, no compensation could be awarded under this section in respect of the personal injuries. And even

where the personal injuries, caused by the felonious act, had incapacitated the prosecutor from earning his livelihood, it would seem that this would not be such a loss of property as would form the subject of compensation under this section": Archbold.

COMPENSATION TO PURCHASER OF STOLEN PROPERTY.

837. When any prisoner has been convicted, either summarily or otherwise, of any theft or other offence, including the stealing or unlawfully obtaining any property, and it appears to the court, by the evidence, that the prisoner sold such property or part of it to any person who had no knowledge that it was stolen or unlawfully obtained, and that money has been taken from the prisoner on his apprehension, the court may, on application of such purchaser and on restitution of the property to its owner, order that out of the money so taken from the prisoner (*if it is his*) a sum not exceeding the amount of the proceeds of the sale be delivered to such purchaser. R. S. C. c. 174, s. 251.

The words in italics are new. They are in conformity with the remarks of the judges in R. v. Roberts, 12 Cox, 574.

The Imperial Act is 30 & 31 V. c. 35, s. 9. The Imperial Act does not expressly provide for the case of goods obtained by false pretenses. The section provides for the case of a *sale* only of the stolen property: *see* R. v. Stancliffe, 11 Cox, 318; R. v. Roberts, 12 Cox, 574.

RESTITUTION OF STOLEN PROPERTY. (*As amended in 1893*).

838. If any person who is guilty of any indictable offence *in stealing, or knowingly receiving, any property* is indicted for such offence, by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, or is tried before a judge or justice for such offence under any of the foregoing provisions and convicted thereof, the property shall be restored to the owner or his representative.

2. In every such case the court or tribunal before which such person is tried for any such offence shall have power to award, from time to time, writs of restitution for the said property or to order the restitution thereof in a summary manner; *and the court or tribunal may also, if it sees fit, award restitution of the property taken from the prosecutor, or any witness for the prosecution, by such offence although the person indicted is not convicted thereof if the jury declares, as it may do, or if, in case the offender is tried without a jury, it is proved to the satisfaction of the court or tribunal by whom he is tried, that such property belongs to such prosecutor or witness, and that he was unlawfully deprived of it by such offence.*

3. If it appears before any award or order is made, that any valuable security has been *bona fide* paid or discharged by any person liable to the

payment thereof, or, being a negotiable instrument, has been *bona fide* taken or received by transfer or delivery, by any person, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had, *by any indictable offence, been stolen, or if it appears that the property stolen has been transferred to an innocent purchaser for value who has acquired a lawful title thereto*, the court or tribunal shall not award or order the restitution of such security or property.

4. Nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker or other agent intrusted with the possession of goods or documents of title to goods, for any indictable offence under sections three hundred and twenty or three hundred and sixty-three of this Act. R. S. C. c. 174, s. 250.

Sections 803 and 824 *ante* also provide for restitution of stolen property in certain cases.

The words in italics in s-s 2 are not in the English Act, 24 & 25 V. c. 96, s. 100.

The repealed clause covered property obtained by false pretenses. The words in italics in s-s. 3 are new.

The prisoners were convicted of feloniously stealing certain property. The judge who presided at the trial made an order, directing that property found in the possession of one of the prisoners, not part of the property stolen, should be disposed of in a particular manner: *held*, that the order was illegal, and that a judge has no power, either by common law or by statute, to direct the disposal of chattels in the possession of a convicted felon, not belonging to the prosecutor: R. v. Pierce, Bell, 235; R. v. Corporation of London, E. B. & E. 509.

The case of Walker v. Mayor of London, 11 Cox, 280, has no application in Canada. In R. v. Stancliffe, 11 Cox, 318, it was held that the repealed section applied to cases of false pretenses as well as felony, and that the fact that the prisoner parted with the goods to a *bona fide* pawnee did not disentitle the original owner to the restitution of the goods: *see* 2 Russ. 355.

The court was bound by the repealed statute to order restitution of property obtained by false pretenses and the subject of the prosecution, in whose hands soever it was found; and so likewise of property received by a person

knowing it to have been stolen or obtained by false pretenses; but the order was strictly limited to property identified at the trial as being the subject of the charge; therefore it did not extend to property in the possession of innocent third persons which was not produced and identified at the trial as being the subject of the indictment: R. v. Goldsmith, 12 Cox, 594.

An order of restitution of property stolen will extend only to such property as is produced and identified in the course of the trial, and not to all the articles named in the indictment, unless so produced and identified and in the possession of the court: R. v. Smith, 12 Cox, 597.

It was held, on this clause: R. v. Atkin, 18 L. C. J. 213; that the court will not give an order for the restitution of stolen goods where the ownership is the subject of a dispute in the civil courts: *see* R. v. Macklin, 5 Cox, 216.

Restitution can be ordered to the owner only: R. v. Jones, 14 Cox, 528.

See 1 Hale, 543; 4 Blacks. 363.

A. Blenkarn took premises at 37 Wood street, and wrote to the plaintiffs at Belfast ordering goods of them. The letters were dated 37 Wood street, and signed A. Blenkarn & Co. in such a way as to look like "A. Blenkiron & Co.," there being an old established firm of Blenkiron & Sons at 123 Wood street. One of the plaintiffs knew something of that firm, and the plaintiffs entered into a correspondence with Blenkarn, and ultimately supplied the goods ordered, addressing them to "A. Blenkiron & Co., 37 Wood street."

The fraud having been discovered Blenkarn was indicted and convicted for obtaining goods by falsely pretending that he was Blenkiron & Sons.

Before the conviction the defendant had purchased some of the goods *bona fide* of Blenkarn without notice of the fraud, and resold them to other persons. The plaintiffs

having brought an action for the conversion of the goods: *Held*, that the plaintiffs intended to deal with Blenkiron & Sons, and therefore there was no contract with Blenkarn; that the property of the goods never passed from the plaintiffs; and that they were accordingly entitled to recover in the action: Lindsay v. Cundy, 13 Cox, 583, 2 Q. B. D. 96, 3 App. Cas. 459.

The plaintiff had stolen money of the defendant, and had been prosecuted for it but acquitted on a technical ground. The plaintiff had, previously to the prosecution, converted the money into goods, which were now in the possession of the defendant as being the proceeds of the money stolen from him by the plaintiff. The plaintiff brought an action to claim the said goods. *Held*, that he had no right of action: Cattley v. Loundes, 34 W. R. 139.

A thief's money in the hands of the police after his conviction is not a debt of the police to the thief, and cannot be attached under garnishee proceedings: Bice v. Jarvis, 49 J. P. 264.

Under this section the court can order the restitution of the proceeds of the goods as well as of the goods themselves, if such proceeds are in the hands of the criminal or of an agent who holds them for him: R. v. The Justices, 16 Cox, 143, 196.

A man was convicted of stealing cattle, which he had sold since in market overt and had been resold immediately also in market overt, the purchasers being in good faith. Restitution ordered to the person from whom they had been stolen: R. v. Horan, 6 Ir. R. C. L. 293; but *see* now s-s. 3 of s. 838 *ante*.

M. was indicted for stealing $95 in bank notes and acquitted. He applied to have $37 in notes, found on his person when arrested, returned to him which the prosecutor resisted. The statute of P. E. I., 6 Wm. IV. c. 22, s. 38, enacts that "when a prisoner is not convicted the court may, if it sees fit, order restitution of the property

where it clearly appears to have been stolen from the owner. When arrested prisoner had the money sewed up in his trousers, and among the notes was a $5 note, bank of N. B., $5 note, bank of Halifax, and a $5 note, bank of Montreal. Prisoner said he put the money there to hide it from the police. Prosecutor had sworn that he had carefully counted the money before the robbery, and that it included a $5 bank of N. B. note, and a $5 bank of Halifax note.

Held, that the evidence was not sufficient to identify the notes as the prosecutor's, and the application must be granted: The Queen v. McIntyre, 2 P. E. I. Rep. 154.

A leading case on this section in England is now Vilmont v. Bentley, 12 App. Cas. 471, Warb. Lead. Cas. 256, which, however, cannot be followed in Canada under s-s. 3 of s. 838, *ante*.

PART LVIII.

SUMMARY CONVICTIONS.

839. In this part, unless the context otherwise requires—

(*a*) the expression "justice" means a justice of the peace and includes two or more justices if two or more justices act or have jurisdiction, and also a police magistrate, a stipendiary magistrate and any person having the power or authority of two or more justices of the peace;

(*b*) the expression "clerk of the peace" includes the proper officer of the court having jurisdiction in appeal under this part, as provided by section eight hundred and seventy-nine;

(*c*) the expression "territorial division" means district, county, union of counties, township, city, town, parish or other judicial division or place;

(*d*) the expression "district" or "county" includes any territorial or judicial division or place in and for which there is such judge, justice, justice's court, officer or prison as is mentioned in the context:

(*e*) the expression "common gaol" or "prison" means any place other than a penitentiary in which persons charged with offences are usually kept and detained in custody. R. S. C. c. 178, s. 2.

840. Subject to any special provision otherwise enacted with respect to such offence, act or matter, this part shall apply to—

(*a*) every case in which any person commits, or is suspected of having committed, any offence or act over which the Parliament of Canada has legislative authority, and for which such person is liable on summary conviction to imprisonment, fine, penalty or other punishment;

(*b*) every case in which a complaint is made to any justice in relation to any matter over which the Parliament of Canada has legislative authority, and with respect to which such justice has authority by law to make any order for the payment of money or otherwise. R. S. C. c. 178, s. 3.

841. In the case of any offence punishable on summary conviction if no time is specially limited for making any complaint, or laying any information in the Act or law relating to the particular case, the complaint shall be made, or the information shall be laid within six months from the time when the matter of complaint or information arose, except in the North-west Territories, where the time within which such complaint may be made, or such information may be laid, shall be extended to twelve months from the time when the matter of the complaint or information arose. 52 V. c. 45, s. 4.

The repealed clause extended the limitation of twelve months to the territory east of Portneuf on the north shore of the St. Lawrence.

842. Every complaint and information shall be heard, tried, determined and adjudged by one justice or two or more justices as directed by the Act or law upon which the complaint or information is framed or by any other Act or law in that behalf.

2. If there is no such direction in any Act or law then the complaint or information may be heard, tried, determined and adjudged by any one justice for the territorial division where the matter of the complaint or information arose: Provided that every one who aids, abets, counsels or procures the commission of any offence punishable on summary conviction, may be proceeded against and convicted either in the territorial division or place where the principal offender may be convicted, or in that in which the offence of aiding, abetting, counselling or procuring was committed.

3. Any one justice may receive the information or complaint, and grant a summons or warrant thereon, and issue his summons or warrant to compel the attendance of any witnesses for either party, and do all other acts and matters necessary preliminary to the hearing, even if by the statute in that behalf it is provided that the information or complaint shall be heard and determined by two or more justices.

4. After a case has been heard and determined one justice may issue all warrants of distress or commitment thereon.

5. It shall not be necessary for the justice who acts before or after the hearing to be the justice or one of the justices by whom the case is to be or was heard and determined.

6. If it is required by any Act or law that an information or complaint shall be heard and determined by two or more justices, or that a conviction or order shall be made by two or more justices, such justices shall be present and acting together during the whole of the hearing and determination of the case.

8. No justice shall hear and determine any case of assault or battery, in which any question arises as to the title to any lands, tenements, hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice. R. S. C. c. 178, ss. 4, 5, 6, 7, 8, 9, 12, and 73.

See s. 864, *post*, as to cases of assault.

843. The provisions of Parts XLIV. and XLV. of this Act relating to compelling the appearance of the accused before the justice receiving an information under section five hundred and fifty-eight, and the provisions respecting the attendance of witnesses on a preliminary inquiry and the taking of evidence thereon, shall, so far as the same are applicable, except as varied by the sections immediately following, apply to any hearing under the provisions of this part: Provided that whenever a warrant is issued in the first instance against a person charged with an offence punishable under the provisions of this part, the justice issuing it shall furnish a copy or copies thereof, and cause a copy to be served on the person arrested at the time of such arrest.

2. Nothing herein contained shall oblige any justice to issue any summons to procure the attendance of a person charged with an offence by information laid before such justice whenever the application for any order may, by law, be made *ex parte*. R. S. C. c. 178, ss. 13 to 17 and 21. *Quære?*

844. The provisions of section five hundred and sixty-five relating to the endorsement of warrants shall apply to the case of any warrant issued under the provisions of this part against the accused, whether before or after conviction, and whether for the apprehension or imprisonment of any such person. R. S. C. c. 178, s. 22. 52 V. c. 45, s. 4.

845. It shall not be necessary that any complaint upon which a justice may make an order for the payment of money or otherwise shall be in writing, unless it is so required by some particular Act or law upon which such complaint is founded.

2. Every complaint upon which a justice is authorized by law to make an order, and every information for any offence or act punishable on summary conviction, may, unless it is herein or by some particular Act or law otherwise provided, be made or had without any oath or affirmation as to the truth thereof.

3. Every complaint shall be for one matter of complaint only, and not for two or more matters of complaint, and every information shall be for one offence only, and not for two or more offences; and every complaint or information may be laid or made by the complainant or informant in person, or by his counsel or attorney or other person authorized in that behalf. R. S. C. c. 178, ss. 23, 24 and 26.

New.

846. *No information, complaint, warrant, conviction or other proceeding under this part shall be deemed objectionable or insufficient on any of the following grounds; that is to say:*

(a) that it does not contain the name of the person injured, or intended or attempted to be injured; or

(b) that it does not state who is the owner of any property therein mentioned; or

(c) that it does not specify the means by which the offence was committed; or

(d) that it does not name or describe with precision any person or thing:

Provided that the justice may, if satisfied that it is necessary for a fair trial, order that a particular further describing such means, person, place or thing be furnished by the prosecutor.

847. No objection shall be allowed to any information, complaint, summons or warrant for any alleged defect therein, in substance or in form, or for any variance between such information, complaint, summons or warrant and the evidence adduced on the part of the informant or complainant at the hearing of such information or complaint.

2. Any variance between the information for any offence or act punishable on summary conviction and the evidence adduced in support thereof as to the time at which such offence or act is alleged to have been committed, shall not be deemed material if it is proved that such information was, in fact, laid within the time limited by law for laying the same.

3. Any variance between the information and the evidence adduced in support thereof, as to the place in which the offence or act is alleged to have been committed, shall not be deemed material if the offence or act is proved to

have been committed within the jurisdiction of the justice by whom the information is heard and determined.

4. If any such variance, or any other variance between the information, complaint, summons or warrant, and the evidence adduced in support thereof, appears to the justice present and acting at the hearing to be such that the defendant has been thereby deceived or misled, the justice may, upon such terms as he thinks fit, adjourn the hearing of the case to some future day. R. S. C. c. 178, s. 28.

848. A summons may be issued to procure the attendance, on the hearing of any charge under the provisions of this part, of a witness who resides out of the jurisdiction of the justices before whom such charge is to be heard, and such summons and a warrant issued to procure the attendance of a witness, whether in consequence of refusal by such witness to appear in obedience to a summons or otherwise, may be respectively served and executed by the constable or other peace officer to whom the same is delivered or by any other person, as well beyond as within the territorial division of the justice who issued the same. 51 V. c. 45, ss. 1 & 3.

849. The room or place in which the justice sits to hear and try any complaint or information shall be deemed an open and public court, to which the public generally may have access so far as the same can conveniently contain them. R. S. C. c. 178, s. 33.

850. The person against whom the complaint is made or information laid shall be admitted to make his full answer and defence thereto, and to have the witnesses examined and cross-examined by counsel or attorney on his behalf.

2. Every complainant or informant in any such case shall be at liberty to conduct the complaint or information, and to have the witnesses examined and cross-examined, by counsel or attorney on his behalf. R. S. C. c. 178, ss. 34 & 35.

851. Every witness at any hearing shall be examined upon oath or affirmation, and the justice before whom any witness appears for the purpose of being examined shall have full power and authority to administer to every witness the usual oath or affirmation. R. S. C. c. 178, s. 36.

Sections 37 and 38 of c. 178 are left out.

852. If the information or complaint in any case negatives any exemption, exception, proviso or condition in the statute on which the same is founded it shall not be necessary for the prosecutor or complainant to prove such negative, but the defendant may prove the affirmative thereof in his defence if he wishes to avail himself of the same. R. S. C. c. 178, s. 47.

853. In case the accused does not appear at the time and place appointed by any summons issued by a justice on information before him of the commission of an offence punishable on summary conviction, then if it appears to the satisfaction of the justice that the summons was duly served a reasonable time before the time appointed for appearance, such justice may proceed *ex parte* to hear and determine the case in the absence of the defendant, as fully

and effectually, to all intents and purposes, as if the defendant had personally appeared in obedience to such summons, or the justice may, if he thinks fit, issue his warrant as provided by section five hundred and sixty-three of this Act and adjourn the hearing of the complaint or information until the defendant is apprehended. R. S. C. c. 178, s. 39.

854. If, upon the day and at the place so appointed, the defendant appears voluntarily in obedience to the summons in that behalf served upon him, or is brought before the justice by virtue of a warrant, then, if the complainant or informant, having had due notice, does not appear by himself, his counsel or attorney, the justice shall dismiss the complaint or information unless he thinks proper to adjourn the hearing of the same until some other day upon such terms as he thinks fit. R. S. C. c. 178, s. 41.

855. If both parties appear, either personally or by their respective counsel or attorneys, before the justice who is to hear and determine the complaint or information, such justice shall proceed to hear and determine the same. R. S. C. c. 178, s. 42.

856. If the defendant is present at the hearing the substance of the information or complaint shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted, or why an order should not be made against him, as the case may be.

2. If the defendant thereupon admits the truth of the information or complaint, and shows no sufficient cause why he should not be convicted, or why an order should not be made against him, as the case may be, the justice present at the hearing shall convict him or make an order against him accordingly.

3. If the defendant does not admit the truth of the information or complaint, the justice shall proceed to inquire into the charge and for the purposes of such inquiry shall take the evidence of witnesses both for the complainant and accused *in the manner provided by Part XLV. in the case of a preliminary inquiry; Provided that the prosecutor or complainant is not entitled to give evidence in reply if the defendant has not adduced any evidence other than as to his general character; provided further, that in a hearing under this section the witnesses need not sign their depositions.* R. S. C. c. 178, ss. 43, 44, 45 & 46.

857. Before or during the hearing of any information or complaint the justice may, in his discretion, adjourn the hearing of the same to a certain time or place to be then appointed and stated in the presence and hearing of the party or parties, or of their respective solicitors or agents then present, but no such adjournment shall be for more than *eight* days.

2. If, at the time and place to which the hearing or further hearing is adjourned, either or both of the parties do not appear, personally or by his or their counsel or solicitors respectively, before the justice or such other justice as shall then be there, the justice who is then there may proceed to the hearing or further hearing as if the party or parties were present.

3. If the prosecutor or complainant does not appear the justice may dismiss the information, with or without costs, as to him seems fit.

4. Whenever any justice adjourns the hearing of any case he may suffer the defendant to go at large or may commit him to the common gaol or other prison within the territorial division for which such justice is then acting, or to such other safe custody as such justice thinks fit, or may discharge the defendant upon his recognizance, with or without sureties at the discretion of such justice, conditioned for his appearance at the time and place to which such hearing or further hearing is adjourned.

5. Whenever any defendant who is discharged upon recognizance, or allowed to go at large, does not appear at the time mentioned in the recognizance, or to which the hearing or further hearing is adjourned, the justice may issue his warrant for his apprehension. R. S. C. c. 178, ss. 48, 49, 50 & 51.

858. The justice, having heard what each party has to say, and the witnesses and evidence adduced, shall consider the whole matter, and, unless otherwise provided, determine the same and convict or make an order against the defendant, or dismiss the information or complaint, as the case may be. R. S. C. c. 178, s. 52.

859. If the justice convicts or makes an order against the defendant a minute or memorandum thereof shall then be made, for which no fee shall be paid, and the conviction or order shall afterwards be drawn up by the justice on parchment or on paper, under his hand and seal, in such one of the forms of conviction or of orders from VV to AAA inclusive in schedule one to this Act as is applicable to the case or to the like effect. R. S. C. c. 178, s. 53.

FORMS UNDER PART LVIII.

VV.—(*Section* 859).

CONVICTION FOR A PENALTY TO BE LEVIED BY DISTRESS AND IN DEFAULT OF SUFFICIENT DISTRESS, BY IMPRISONMENT.

Canada,
Province of ,
County of .

Be it remembered that on the day of , in the year , at , in the said county, A. B. is convicted before the undersigned, a justice of the peace for the said county, for that the said A. B. *(etc., stating the offence, and the time and place when and where committed)*, and I adjudge the said A. B. for his said offence to forfeit and pay the sum of $ *(stating the penalty, and also the compensation, if any)*, to be paid

and applied according to law, and also to pay to the said C. D. the sum of , for his costs in this behalf; and if the said several sums are not paid forthwith, (*or* on or before the of next), * I order that the same be levied by distress and sale of the goods and chattels of the said A. B., and in default of sufficient distress, * I adjudge the said A. B. to be imprisoned in the common gaol of the said county, at , in the said county of , (there to be kept at hard labour, *if such is the sentence*) for the term of , unless the said several sums and all costs and charges of the said distress (and of the commitment and conveying of the said A. B. to the said gaol) are sooner paid.

Given under my hand and seal, the day and year first above mentioned, at , in the county aforesaid.

J. S., [SEAL].

J. P., (Name of county).

* *Or when the issuing of a distress warrant would be ruinous to the defendant and his family, or it appears he has no goods whereon to levy a distress, then instead of the words between the asterisks* * say, "inasmuch as it is now made to appear to me that the issuing of a warrant of distress in this behalf would be ruinous to the said A. B. and his family," (*or*, "that the said A. B. has no goods or chattels whereon to levy the said sums by distress").

WW.—(*Section* 859.)

CONVICTION FOR A PENALTY, AND IN DEFAULT OF PAYMENT IMPRISONMENT.

Canada,
Province of ,
County of .

Be it remembered that on the day of in the year , at , in the said county, A. B. is convicted before the undersigned, a justice of the peace for the said county for that he the said A. B. *etc., stating the offence and the time and place when and where it was committed)*, and I adjudge the said A. B. for his said offence to forfeit and pay the sum of *(stating the penalty and the compensation, if any)* to be paid and applied according to law; and also to pay to the

said C. D. the sum of for his costs in this behalf; and if the said several sums are not paid forthwith (*or*, on or before next), I adjudge the said A. B. to be imprisoned in the common gaol of the said county, at , in the said county of (and there to be kept at hard labour) for the term of , unless the said sums and the costs and charges of conveying the said A. B. to the said common gaol are sooner paid.

Given under my hand and seal, the day and year first above mentioned at , in the county aforesaid.

J. S., [SEAL.]

J. P., (Name of county).

XX.—(*Section* 859.)

CONVICTION WHEN THE PUNISHMENT IS BY IMPRISONMENT, ETC.

Canada,
Province of ,
County of .

Be it remembered that on the day of , in the year , at , in the said county, A. B. is convicted before the undersigned, , a justice of the peace in and for the said county, for that he the said A. B. (*&c., stating the offence, and the time and place when and where it was committed*); and I adjudge the said A. B., for his said offence, to be imprisoned in the common gaol of the said county, at , in the county of , (and there to be kept at hard labour) for the term of ; and I also adjudge the said A. B. to pay to the said C. D. the sum of , for his costs in this behalf, and if the said sum for costs are not paid forthwith (*or* on or before next,) then * I order that the said sum be levied by distress and sale of the goods and chattels of the said A. B.; and in default of sufficient distress in that behalf, * I adjudge the said A. B. to be imprisoned in the said common gaol (and kept there at hard labour) for the term of , to commence at and from the term of his imprisonment aforesaid, unless the said sum for costs is sooner paid.

Given under my hand and seal, the day and year first above mentioned at , in the county aforesaid.

J. S. [SEAL.]

J. P., (*Name of county.*)

**Or when the issuing of a distress warrant would be ruinous to the defendant and his family, or it appears that he has no goods whereon to levy a distress, then, instead of the words between the asterisks* * * *say*, "inasmuch as it is now made to appear to me that the issuing of a warrant of distress in this behalf would be ruinous to the said A. B. and his family," (*or*, "that the said A. B. has no goods or chattels whereon to levy the said sum for costs by distress").

YY.—*Section* 859.)

ORDER FOR PAYMENT OF MONEY TO BE LEVIED BY DISTRESS AND IN DEFAULT OF DISTRESS IMPRISONMENT.

Canada,
Province of ,
County of .

Be it remembered that on , complaint was made before the undersigned, , a justice of the peace in and for the said county of , for that (*stating the facts entitling the complainant to the order, with the time and place when and where they occurred*), and now at this day, to wit, on , at , the parties aforesaid appear before me the said justice (*or* the said C. D. appears before me the said justice, but the said A. B., although duly called, does not appear by himself, his counsel or attorney, and it is now satisfactorily proved to me on oath that the said A. B. was duly served with the summons in this behalf, which required him to be and appear here on this day before me or such justice or justices of the peace for the county, as should now be here, to answer the said complaint, and to be further dealt with according to law); and now having heard the matter of the said complaint, I do adjudge the said A. B. to pay to the said C. D. the sum of forthwith (*or* on or before next, *or as the Act or law requires*), and also to pay to the said said C. D. the sum of for his costs in this behalf; and if the said several sums are not paid forthwith (*or*

on or before next), then, * I hereby order that the same be levied by distress and sale of the goods and chattels of the said A. B. and in default of sufficient distress in that behalf * I adjudge the said A. B. to be imprisoned in the common gaol of the said county, at , in the said county of , and there kept at hard labour) for the term of , unless the said several sums, and all costs and charges of the said distress (and the commitment and conveyance of the said A. B. to the said common gaol) are sooner paid.

Given under my hand and seal, this day of , in the year , at in the county aforesaid.

J. S., [SEAL.]

J. P., (Name of county.)

**Or, when the issuing of a distress warrant would be ruinous to the defendant and his family, or it appears he has no goods whereon to levy a distress, then, instead of the words between the asterisks * * say* "inasmuch as it is now made to appear to me that the issuing of a warrant of distress in this behalf would be ruinous to the said A. B. and his family," (*or* "that the said A. B. has no goods or chattels whereon to levy the said sums by distress").

ZZ.—(*Section* 859.)

ORDER FOR PAYMENT OF MONEY, AND IN DEFAULT OF PAYMENT IMPRISONMENT.

Canada,
Province of ,
County of .

Be it remembered that on complaint was made before the undersigned, , a justice of the peace in and for the said county of , for that (*stating the facts entitling the complainant to the order, with the time and place when and where they occurred*), and now on this day, to wit, on , at , the parties aforesaid appear before me the said justice (*or* the said C. D. appears before me the said justice, but the said A. B., although duly called, does not appear by himself, his counsel or attorney, and it is now satisfactorily proved to me upon oath that the said A. B. was duly served with the summons in this behalf, which required him to be and appear here this

day before me, or such justice or justices of the peace for the said county, as should now be here, to answer to the said complaint, and to be further dealt with according to law), and now having heard the matter of the said complaint, I do adjudge the said A. B. to pay to the said C. D. the sum of forthwith (*or* on or before next, *or as the Act or law requires*), and also to pay to the said C. D. the sum of for his costs in this behalf; and if the said several sums are not paid forthwith (*or* on or before next), then I adjudge the said A. B. to be imprisoned in the common gaol of the said county at , in the said county of , (there to be kept at hard labour *if the Act or law authorizes this*) for the term of unless the said several sums (and costs and charges of commitment and conveying the said A. B. to the said common gaol) are sooner paid.

Given under my hand and seal this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (Name of county).

AAA.—(*Section* 859.)

ORDER FOR ANY OTHER MATTER WHERE THE DISOBEYING OF IT IS PUNISHABLE WITH IMPRISONMENT.

Canada,
Province of ,
County of .

Be it remembered that on , complaint was made before the undersigned, , a justice of the peace in and for the said county of , for that (*stating the facts entitling the complainant to the order, with the time and place where and when they occurred*); and now on this day, to wit, on , at , the parties aforesaid appear before me the said justice (*or* the said C. D. appears before me the said justice, but the said A. B., although duly called, does not appear by himself, his counsel or attorney, and it is now satisfactorily proved to me, upon oath, that the said A. B. was duly served with the summons in this behalf, which required him to be and appear here this day before me, or such justice or justices of the peace for the said

county, as should now be here to answer to the said complaint and to be further dealt with according to law; and now having heard the matter of the said complaint, I do adjudge the said A. B. to (*here state the matter required to be done*), and if, upon a copy of the minute of this order being served upon the said A.B., either personally or by leaving the same for him at his last or most usual place of abode, he neglects or refuses to obey the same, in that case I adjudge the said A. B., for such his disobedience, to be imprisoned in the common gaol of the said county, at in the said county of , (there to be kept at hard labour, *if the statute authorizes this*), for the term of unless the said order is sooner obeyed, and I do also adjudge the said A. B. to pay to the said C. D. the sum of for his costs in this behalf, and if the said sum for costs is not paid forthwith (*or* on or before next), I order the same to be levied by distress and sale of the goods and chattels of the said A. B., and in default of sufficient distress in that behalf I adjudge the said A. B. to be imprisoned in the said common gaol (there to be kept at hard labour) for the space of , to commence at and from the termination of his imprisonment aforesaid, unless the said sum for costs is sooner paid.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of county.*)

---

860. When several persons join in the commission of the same offence, and upon conviction thereof each is adjudged to pay a penalty which includes the value of the property, or the amount of the injury done, no further sum shall be paid to the person aggrieved than such amount or value, and costs, if any, and the residue of the penalties imposed shall be applied in the same manner as other penalties imposed by a justice are directed to be applied. R. S. C. c. 178, s. 54.

861. Whenever any person is summarily convicted before a justice of any offence against *Parts XX.* to XXX. inclusive or Part XXXVII. of this Act and it is a first conviction, the justice may, if he thinks fit, discharge the offender from his conviction upon his making such satisfaction to the person aggrieved, for damages and costs, or either of them, as are ascertained by the justice. R. S. C. c. 178, s. 55.

862. If the justice dismisses the information or complaint he may, when required so to do, make an order of dismissal in the form BBB in schedule one hereto, and he shall give the defendant a certificate in the form CCC in the said schedule, which certificate, upon being afterwards produced, shall, without further proof, be a bar to any subsequent information or complaint for the same matter, against the same defendant. R. S. C. c. 178, s. 56.

BBB.—(*Section* 862.)

FORM OF ORDER OF DISMISSAL OF AN INFORMATION OR COMPLAINT.

Canada,
Province of ,
County of .

Be it remembered that on , information was laid (*or* complaint was made) before the undersigned, , a justice of the peace in and for the said county of , for that *(&c., as in the summons of the defendant)* and now at this day, to wit, on , at , *(if at any adjournment insert here:* " to which day the hearing of this case was duly adjourned, of which the said C. D. had due notice,") both the said parties appear before me in order that I should hear and determine the said information (*or* complaint) (*or* the said A. B. appears before me, but the said C. D., although duly called, does not appear); [whereupon the matter of the said information (*or* complaint) being by me duly considered, it manifestly appears to me that the said information (*or* complaint) is not proved; and] *(if the informant or complainant does not appear, these words may be omitted,)* I do therefore dismiss the same, and do adjudge that the said C. D. do pay to the said A. B. the sum of , for his costs incurred by him in defence in his behalf; and if the said sum for costs is not paid forthwith (*or* on or before), I order that the same be levied by distress and sale of the goods and chattels of the said C. D., and in default of sufficient distress in that behalf, I adjudge the said C. D. to be imprisoned in the common gaol of the said county of , at , in the said county of (and there kept at hard labour) for the term of , unless the said sum for costs, and all costs and charges of the said distress (and of the commitment and conveying of the said C. D. to the said common gaol) are sooner paid.

Given under my hand and seal, this day of in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (Name of county).

CCC.—(*Section* 862.)

FORM OF CERTIFICATE OF DISMISSAL.

Canada,
Province of
County of

I hereby certify that an information (*or* complaint) preferred by C. D. against A. B. for that (*&c., as in the summons*) was this day considered by me, a justice of the peace in and for the said county of , and was by me dismissed (with costs)

Dated at , this day of , in the year.

J. S.,

J. P., (Name of county).

---

863. Whenever, by any Act or law, authority is given to commit a person to prison, or to levy any sum upon his goods or chattels by distress, for not obeying an order of a justice, the defendant shall be served with a copy of the minute of the order before any warrant of commitment or of distress is issued in that behalf; and the order or minute shall not form any part of the warrant of commitment or of distress. R. S. C. c. 178. s. 57.

864. Whenever any person unlawfully assaults or beats any other person, any justice may summarily hear and determine the charge, *unless at the time of entering upon the investigation the person aggrieved or the person accused objects thereto.*

2. If such justice is of opinion that the assault or battery complained of is, *from any other circumstance*, a fit subject for prosecution by indictment, he shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as if he had no authority finally to hear and determine the same. R. S. C. c. 178, s. 73.

See s. 842, s-s. 8, *ante*.

865. 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 dis-

missal, and shall deliver such certificate to the person against whom the complaint was preferred. R. S. C. c. 178, s. 74.

866. If the person against whom any such complaint has been preferred, by or on the behalf of the person aggrieved, obtains such certificate, or, having been convicted, pays the whole amount adjudged to be paid or suffers the imprisonment, or imprisonment with hard labour, awarded, he shall be released from all further or other proceedings, civil or criminal, for the same cause. R. S. C. c. 178, s. 75.

867. In every case of a summary conviction, or of an order made by a justice, such justice may, in his discretion, award and order in and by the conviction or order that the defendant shall pay to the prosecutor or complainant such costs as to the said justice seem reasonable in that behalf, and not inconsistent with the fees established by law to be taken on proceedings had by and before justices. R. S. C. c. 178, s. 58.

868. Whenever the justice, instead of convicting or making an order, dismisses the information or complaint, he may, in his discretion, in and by his order of dismissal, award and order that the prosecutor or complainant shall pay to the defendant such costs as to the said justice seem reasonable and consistent with law. R. S. C. c. 178, s. 59.

869. The sums so allowed for costs shall, in all cases, be specified in the conviction or order, or order of dismissal, and the same shall be recoverable in the same manner and under the same warrants as any penalty, adjudged to be paid by the conviction or order, is to be recovered. R. S. C. c. 178, s. 60.

870. Whenever there is no such penalty to be recovered such costs shall be recoverable by distress and sale of the goods and chattels of the party, and in default of distress, by imprisonment, with or without hard labour, for any term not exceeding one month. R. S. C. c. 178, s. 61.

871. The fees mentioned in the following tariff and no others shall be and constitute the fees to be taken on proceedings before justices in proceedings under this part:—

Fees to be taken by Justices of the Peace or their Clerks.

	$ c.
1. Information or complaint and warrant or summons	0 50
2. Warrant where summons issued in first instance	0 10
3. Each necessary copy of summons or warrant	0 10
4. Each summons or warrant to or for a witness or witnesses. (Only one summons on each side to be charged for in each case, which may contain any number of names. If the justice of the case requires it, additional summonses shall be issued without charge)	0 10
5. *Information for warrant for witness and warrant*	0 50
6. *Each necessary copy of summons or warrant for witness*	0 10
7. For every recognizance	0 25
8. For hearing and determining case	0 50
9. *If case lasts over two hours*	1 00

	$ c.
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

Constables' Fees.

1. Arrest of each individual upon a warrant	1 00
2. Serving summons	0 25
3. Mileage to serve summons or warrant, per mile (one way) necessarily travelled	0 10
4. Same mileage when service cannot be affected, but only upon proof of due diligence.	
5. Mileage taking prisoner to gaol, exclusive of disbursements necessarily expended in his conveyance	0 10
7. Attending justices on trial *in one or more cases, per hour*	0 25
8. Mileage travelled to attend trial (when public conveyance can be taken only reasonable disbursements to be allowed) *one way per mile*	0 10
9. Serving warrant of distress and returning same	1 00
10. Advertising under warrant of distress	1 00
11. Travelling to make distress or to search for goods to make distress, when no goods are found (*one way*) *per mile*	0 10
12. Appraisements, whether by one appraiser or more, 2 cents in the dollar on the value of the goods.	
13. Commission on sale and delivery of goods. 5 cents in the dollar on the net produce of the goods. 52 V. c. 45, s. 2 & Sch.	

Witnesses' Fees.

1. *Each day attending trial*	0 75
2. *Mileage travelled to attend trial* (*one way*) *per mile*	0 10

872. Whenever a conviction adjudges a pecuniary penalty or compensation to be paid, or an order requires the payment of a sum of money, whether the Act or law authorizing such conviction or order does or does not provide a mode of raising or levying the penalty, compensation or sum of money, or of enforcing the payment thereof, the justice by his conviction, or order after adjudging payment of such penalty, compensation or sum of money, with or without costs, may order and adjudge—

(*a*) that in default of payment thereof forthwith, or within a limited time, such penalty, compensation or sum of money shall be levied by distress and

sale of the goods and chattels of the defendant, and, if sufficient distress cannot be found, that the defendant be imprisoned in the common gaol or other prison of the territorial division for which the justice is then acting, in the manner and for the time directed by the Act or law authorizing such conviction or order or by this Act, or for any period not exceeding three months, if the Act or law authorizing the conviction or order does not specify imprisonment, or does not specify any term of imprisonment, unless such penalty, compensation or sum of money and costs, if the conviction or order is made with costs, and the expenses of the distress and of conveying the defendant to gaol are sooner paid; or

(*b*) that in default of payment of the said penalty, compensation or sum of money, and costs if any forthwith or within a limited time, the defendant be imprisoned in the common gaol or other prison of the said territorial division in the manner and for the time mentioned in the said Act or law, or for any period not exceeding three months if the Act or law authorizing the conviction or order does not specify imprisonment, or does not specify any term of imprisonment, unless the said sums with the like costs and expenses are sooner paid.

2. The justice making the conviction or order mentioned in the paragraph lettered (*a*) of sub-section one of this section may issue a warrant of distress in the form DDD or EEE, as the case requires; and in the case of a conviction or order under the paragraph lettered (*b*) of the said sub-section, a warrant in one of the forms FFF or GGG may issue;

(*a*) if a warrant of distress is issued and the constable or peace officer charged with the execution thereof returns (form III) that he can find no goods or chattels whereon to levy thereunder, the justice may issue a warrant of commitment in the form JJJ.

3. Where by virtue of an Act or law so authorizing the justice by his conviction adjudges against the defendant payment of a penalty or compensation, and also imprisonment, as punishment for an offence, he may, if he thinks fit, order that the imprisonment in default of distress or of payment, as provided for in this section, shall commence at the expiration of the imprisonment awarded as a punishment for the offence.

4. The like proceeding may be had upon any conviction or order made as provided by this section as if the Act or law authorizing the same had expressly provided for a conviction or order in the above terms. R. S. C. c. 178, ss. 62, 66, 67 & 68.

DDD.—(*Section* 872.)

WARRANT OF DISTRESS UPON A CONVICTION FOR A PENALTY.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of

Whereas A. B., late of , *(labourer)*, was on this day (*or* on last past) duly convicted before , a justice of the peace, in and for the said county of , for that (*stating the offence, as in the conviction*), and it was thereby adjudged that the said A. B. should, for such his offence, forfeit and pay (*&c., as in the conviction*), and should also pay to the said C. D. the sum of , for his costs in that behalf; and it was thereby ordered that if the said several sums were not paid (forthwith) the same should be levied by distress and sale of the goods and chattels of the said A. B., and it was thereby also adjudged that the said A. B., in default of sufficient distress, should be imprisoned in the common gaol of the said county, at , in the said county of (and there kept at hard labour) for the space of , unless the said several sums and all costs and charges of the said distress, and of the commitment and conveying of the said A. B. to the said common gaol were sooner paid; * And whereas the said A. B., being so convicted as aforesaid, and being (now) required to pay the said sums of and has not paid the same or any part thereof, but therein has made default: These are, therefore, to command you, in Her Majesty's name forthwith to make distress of the goods and chattels of the said A. B.; and if within days next after the making of such distress, the said sums, together with the reasonable charges of taking and keeping the distress, are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale unto me, the convicting justice (*or* one of the convicting justices), that I may pay and apply the same as by law directed, and may render the overplus, if any, on demand, to the said A. B.; and if no such distress is found, then to certify the same unto me, that such further proceedings may be had thereon as to law appertain.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (Name of county).

EEE.—(*Section* 872.)

WARRANT OF DISTRESS UPON AN ORDER FOR THE PAYMENT OF MONEY.

Canada,
Province of ,
County of .

To all or any of the peace officers in the said county of ,

Whereas on , last past, a complaint was made before , a justice of the peace in and for the said county, for that (*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 labour) for the term of , unless the said several sums and all costs and charges of the distress (and of the commitment and conveying of the said A. B. to the said common gaol) were sooner paid; * And whereas the time in and by the said order appointed for the payment of the said several sums of , and has elapsed, but the said A. B. has not paid the same, or any part thereof, but therein has made default: These are, therefore, to command you, in Her Majesty's name, forthwith to make distress of the goods and chattels of the said A. B.; and if within the space of days after the making of such distress, the said last mentioned sums, together with the reasonable charges of taking and keeping the said distress, are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale unto me (*or some other of the convicting justices, as the case may be*), that I (*or* he) may pay or apply the same as by law directed, and may render the overplus, if any, on demand to the said A. B.; and if no such distress can be found,

then to certify the same unto me, to the end that such proceedings may be had therein, as to law appertain.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of county.*)

FFF.—(*Section* 872.)

WARRANT OF COMMITMENT UPON A CONVICTION FOR A PENALTY IN THE FIRST INSTANCE.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of , and to the keeper of the common gaol of the said county of , at in the said county of

Whereas A. B., late of , (*labourer*), was on this day convicted before the undersigned , a justice of the peace in and for the said county, for that (*stating the offence, as in the conviction*), and it was thereby adjudged that the said A. B., for his offence, should forfeit and pay the sum of (*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 labour) for the term of , unless the said several sums (and the costs and charges of conveying the said A. B. to the said common gaol) were sooner paid; And whereas the time in and by the said conviction appointed for the payment of the said several sums has elapsed, but the said A. B. has not paid the same, or any part thereof, but therein has made default; These are, therefore, to command you, the said peace officers, or any one of you, to take the said A. B., and him safely to convey to the common gaol at aforesaid, and there to deliver him to the said keeper thereof, together with this precept: And I do hereby command you, the said keeper of the

said common gaol, to receive the said A. B. into your custody in the said common gaol, there to imprison him (and keep him at hard labour) for the term of , unless the said several sums (and costs and charges of carrying him to the said common gaol, amounting to the further sum of), are sooner paid unto you, the said keeper; and for your so doing, this shall be your sufficient warrant.

Given under my hand and seal, this day of in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of county.*)

GGG.—(*Section* 872.)

WARRANT OF COMMITMENT ON AN ORDER IN THE FIRST INSTANCE.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of , and to the keeper of the common gaol of the county of , at , in the said county of .

Whereas, on last past, complaint was made before the undersigned , a justice of the peace in and for the said county of , for that (*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 labour) for the term of , unless the said several sums (and the costs and charges of conveying the said A. B. to the said common

gaol *as the case may be*) were sooner paid; And whereas the time in and by the said order appointed for the payment of the said several sums of money has elapsed, but the said A. B. has not paid the same, or any part thereof, but therein has made default; These are, therefore, to command you, the said peace officers, or any of you, to take the said A. B. and him safely to convey to the said common gaol, at aforesaid, and there to deliver him to the keeper thereof, together with this precept; And I do hereby command you, the said keeper of the said common gaol, to receive the said A. B. into your custody in the said common gaol, there to imprison him (and keep him at hard labour) for the term of , unless the said several sums (and the costs and charges of conveying him to the said common gaol, amounting to the further sum of), are sooner paid unto you the said keeper; and for your so doing, this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of county.*)

III.—(*Section* 872.)

CONSTABLE'S RETURN TO A WARRANT OF DISTRESS.

I, W. T., constable, of , in the county of , hereby certify to J. S., Esquire, a justice of the peace in and for the county of , that by virtue of this warrant I have made diligent search for the goods and chattels of the within mentioned A. B., and that I can find no sufficient goods and chattels of the said A. B. whereon to levy the sums within mentioned.

Witness my hand, this day of , one thousand eight hundred and

W. T.

JJJ.—(*Section* 872.)

WARRANT OF COMMITMENT FOR WANT OF DISTRESS.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the county of , and to the keeper of the common gaol of the said county of , at , in the said county.

Whereas (*&c., as in either of the foregoing distress warrants*, DDD or EEE, *to the asterisk*, * *and then thus*): And whereas, afterwards on the day of , in the year aforesaid, I, the said justice, issued a warrant to all or any of the peace officers of the county of , commanding them, or any of them, to levy the said sums of and by distress and sale of the goods and chattels of the said A. B.; And whereas it appears to me, as well by the return of the said warrant of distress, by the peace officer who had the execution of the same, as otherwise, that the said peace officer has made diligent search for the goods and chattels of the said A. B., but that no sufficient distress whereon to levy the sums above mentioned could be found: These are, therefore, to command you, the said peace officers, or any one of you, to take the said A. B., and him safely to convey to the common gaol at , aforesaid, and there deliver him to the said keeper, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said A. B. into your custody, in the said common gaol, there to imprison him (and keep him at hard labour) for the term , unless the said several sums and all the costs and charges of the said distress (and of the commitment and conveying of the said A. B. to the said common gaol) amounting to the further sum of , are sooner paid unto you, the said keeper: and for so doing this shall be your sufficient warrant.

Given under my hand and seal, this day of in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of county.*)

873. When any information or complaint is dismissed with costs the justice may issue a warrant of distress on the goods and chattels of the prosecutor or complainant, in the form KKK, for the amount of such costs; and, in default of distress, a warrant of commitment in the form LLL may issue: Provided that the term of imprisonment in such case shall not exceed one month. R. S. C. c. 178, s. 70.

KKK.—(*Section* 873.)

WARRANT OF DISTRESS FOR COSTS UPON AN ORDER FOR DISMISSAL OF AN INFORMATION OR COMPLAINT.

Canada,
Province of ,
District of .

To all or any of the constables and other peace officers in the said county of

Whereas on last past, information was laid (*or* complaint was made) before , a justice of the peace in and for the said county of , for that (*&c., as in the order of dismissal*) and afterwards, to wit, on , at , both parties appearing before , in order that (I) should hear and determine the same, and the several proofs adduced to (me) in that behalf, being by (me) duly heard and considered, and it manifestly appearing to (me) that the said information (*or* complaint) was not proved, (I) therefore dismissed the same and adjudged that the said C. D. should pay to the said A. B. the sum of , for his costs incurred by him in his defence in that behalf; and (I) ordered that if the said sum for costs was not paid (forthwith) the same should be levied on the goods and chattels of the said C. D., and (I) adjudged that in default of sufficient distress in that behalf the said C. D. should be imprisoned in the common gaol of the said county of , at , in the said county of , (and there kept at hard labour) for the space of , unless the said sum for costs, and all costs and charges of the said distress, and of the commitment and conveying of the said A. B. to the said common gaol, were sooner paid; And whereas the said C. D. being now required to pay to the said A. B. the said sum for costs, has not paid the same, or any part thereof, but therein has made default: These are, therefore, to command you, in

Her Majesty's name, forthwith to make distress of the goods and chattels of the said C. D., and if within the term of days next after the making of such distress, the said last mentioned sum, together with the reasonable charges of taking and keeping the said distress, shall not be paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale to (*me*) that (I), may pay and apply the same as by law directed, and may render the overplus (if any) on demand to the said C. D., and if no distress can be found, then to certify the same unto *me* (or to any other justice of the peace for the same county), that such proceedings may be had therein as to law appertain.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of county.*)

LLL.—(*Section* 873.)

WARRANT OF COMMITMENT FOR WANT OF DISTRESS.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of , and to the keeper of the common gaol of the said county of , at , in the said county of

Whereas (*&c., as in form KKK to the asterisk,* * *and then thus*): And whereas afterwards, on the day of , in the year aforesaid, I, the said justice, issued a warrant to all or any of the peace officers of the said county, commanding them, or any one of them, to levy the said sum of , for costs, by distress and sale of the goods and chattels of the said C. D.: And whereas it appears to me, as well by the return to the said warrant of distress of the peace officer charged with the execution of the same, as otherwise, that the said peace officer has made diligent search for the goods and chattels of the said C. D., but that no sufficient distress whereon to levy the sum above mentioned could be found: These are, therefore, to com-

mand you, the said peace officers, or any one of you, to take the said C. D., and him safely convey to the common gaol of the said county, at aforesaid, and there deliver him to the keeper thereof, together with this precept; And I hereby command you, the said keeper of the said common gaol, to receive the said C. D. into your custody in the said common gaol, there to imprison him (and keep him at hard labour) for the term of , unless the said sum, and all the costs and charges of the said distress (and of the commitment and conveying of the said C. D. to the said common gaol, amounting to the further sum of), are sooner paid unto you the said keeper; and for you so doing, this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S.. [SEAL.]

J. P., (*Name of County.*)

---

874. 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 endorsements shall be in the form HHH in schedule one to this Act. R. S. C. c. 178, s. 63.

HHH.—(*Section* 874.)

ENDORSEMENT IN BACKING A WARRANT OF DISTRESS.

Canada,
Province of ,
County of .

Whereas proof upon oath has this day been made before me a justice of the peace in and for the said county, that

the name of J. S. to the within warrant subscribed is of the handwriting of the justice of the peace within mentioned, I do therefore authorize W. T., who brings me this warrant, and all other persons to whom this warrant was originally directed, or by whom the same may be lawfully executed, and also all peace officers in the said county of , to execute the same within the said county.

Given under my hand, this day of , one thousand eight hundred and .

O. K.,
J. P., (*Name of county.*)

---

875. Whenever it appears to any justice that the issuing of a distress warrant would be ruinous to the defendant and his family, or whenever it appears to the justice, by the confession of the defendant or otherwise, that he has no goods and chattels whereon to levy such distress, then the justice, if he deems it fit, instead of issuing a warrant of distress, may commit the defendant to the common gaol or other prison in the territorial division, there to be imprisoned, with or without hard labour, for the time and in the manner he would have been committed in case such warrant of distress had issued and no sufficient distress had been found. R. S. C. c. 178, s. 64.

876. Whenever a justice issues a warrant of distress as hereinbefore provided, he may suffer the defendant to go at large, or verbally, or by a written warrant in that behalf, may order the defendant to be kept and detained in safe custody, until return has been made to the warrant of distress unless the defendant gives sufficient security, by recognizance or otherwise, to the satisfaction of the justice, for his appearance, at the time and place appointed for the return of the warrant of distress, before him or before such other justice for the same territorial division as shall then be there. R. S. C. c. 178, s. 65.

877. Whenever a justice, upon any information or complaint, adjudges the defendant to be imprisoned, and the defendant is then in prison undergoing imprisonment upon conviction for any other offence, the warrant of commitment for the subsequent offence shall be forthwith delivered to the gaoler or other officer to whom it is directed; and the justice who issued the same, if he thinks fit, may award and order therein that the imprisonment for the subsequent offence shall commence at the expiration of the imprisonment to which the defendant was previously sentenced. R. S. C. c. 178, s. 69.

878. Whenever a defendant gives security by or is discharged upon recognizance and does not afterwards appear at the time and place mentioned in the recognizance, the justice who took the recognizance, or any justice who is then present, having certified upon the back of the recognizance the non-appearance of the defendant, may transmit such recognizance to the proper officer in the province appointed by law to receive the same, to be

proceeded upon in like manner as other recognizances; and such certificate shall be *prima facie* evidence of the non-appearance of the said defendant.

2. Such certificate shall be in the form MMM in schedule one to this Act. The proper officer to whom the recognizance and certificate of default are to be transmitted, in the province of Ontario, shall be the clerk of the peace of the county for which such justice is acting, except in the district of Nipissing as to which district the proper officer shall be the clerk of the peace for the county of Renfrew; and the Court of General Sessions of the Peace for such county shall, at its then next sitting, order all such recognizances to be forfeited and estreated, and the same shall be enforced and collected in the same manner and subject to the same conditions as any fines, forfeitures or amercements imposed by or forfeited before such court; and in the other provinces of Canada, the proper officer to whom any such recognizance and certificate shall be transmitted, shall be the officer to whom like recognizances have been heretofore accustomed to be transmitted under the law in force before the passing of this Act; and such recognizances shall be enforced and collected in the same manner as like recognizances have heretofore been enforced and collected. R. S. C. c. 178, ss. 71 & 72.

MMM.—(*Section* 878.)

CERTIFICATE OF NON-APPEARANCE TO BE ENDORSED ON THE DEFENDANT'S RECOGNIZANCE.

I hereby certify that the said A. B. has not appeared at the time and place in the said condition mentioned, but therein has made default, by reason whereof the within written recognizance is forfeited.

J. S., [SEAL.]
J. P., (Name of county.)

---

879. Unless it is otherwise provided in any special Act under which a conviction takes place or an order is made by a justice for the payment of money or dismissing an information or complaint, any person who thinks himself aggrieved by any such conviction or order, the prosecutor or complainant, as well as the defendant, may appeal, in the province of Ontario, to the Court of General Sessions of the Peace; in the province of Quebec, to the Court of Queen's Bench, Crown side; in the provinces of Nova Scotia, New Brunswick and Manitoba, to the county court of the district or county where the cause of the information or complaint arose; in the province of Prince Edward Island, to the Supreme Court; in the province of British Columbia, to the county or district court, at the sitting thereof which shall be held nearest to the place where the cause of the information or complaint arose; and in the North-west Territories, to a judge of the Supreme Court of the said territories, sitting without a jury, at the place where the cause of the information or complaint arose, or the nearest place thereto where a court is appointed to be held.

2. In the district of Nipissing such person may appeal to the Court of General Sessions of the Peace for the county of Renfrew. 51 V. c. 45, s. 7. 52 V. c. 45, s. 6.

Sub-section 2 extended by the repealed clause to the district of Muskoka and others.

880. Every right of appeal shall, unless it is otherwise provided in any special Act, be subject to the conditions following, that is to say :—

(*a*) If the conviction or order is made more than fourteen days before the sittings of the court to which the appeal is given, such appeal shall be made to the then next sittings of such court; but if the conviction or order is made within fourteen days of the sittings of such court, then to the second sittings next after such conviction or order;

(*b*) The appellant shall give to the respondent, or to the justice who tried the case for him, a notice in writing, in the form NNN in schedule one to this Act, of such appeal, within ten days after such conviction or order;

(*c*) The appellant, *if the appeal is from a conviction adjudging imprisonment,* shall either remain in custody until the holding of the court to which the appeal is given, or shall enter into a recognizance in the form OOO in the said schedule with two sufficient sureties, before a justice, conditioned personally to appear at the said court, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as are awarded by the court; or, if the appeal is against any conviction or order, whereby only a penalty or sum of money is adjudged to be paid, the appellant (although the order directs imprisonment in default of payment), instead of remaining in custody as aforesaid, or giving such recognizance as aforesaid, may deposit with the justice convicting or making the order such sum of money as such justice deems sufficient to cover the sum so adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal; and upon such recognizance being given, or such deposit being made, the justice before whom such recognizance is entered into, or deposit made, shall liberate such person, if in custody;

(*d*) In case of an appeal from the order of a justice, pursuant to section five hundred and seventy-one, for the restoration of gold or gold-bearing quartz, or silver or silver ore, the appellant shall give security by recognizance to the value of the said property to prosecute his appeal at the next sittings of the court and to pay such costs as are awarded against him;

(*e*) The court to which such appeal is made shall thereupon hear and determine the matter of appeal and make such order therein, with or without costs to either party, including costs of the court below, as seems meet to the court,—and, in case of the dismissal of an appeal by the defendant and the affirmance of the conviction or order, shall order and adjudge the appellant to be punished according to the conviction or to pay the amount adjudged by the said order, and to pay such costs as are awarded,—and shall, if necessary, issue process for enforcing the judgment of the court; and whenever, after any such deposit has been made as aforesaid, the conviction or order is affirmed, the court may order the sum thereby adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal, to be paid out of the money deposited, and the residue, if any, to be repaid to the appellant; and whenever, after any such deposit, the conviction or order is quashed, the court shall order the money to be repaid to the appellant;

(*f*) The said court shall have power, if necessary, from time to time, by order endorsed on the conviction or order, to adjourn the hearing of the appeal from one sittings to another, or others, of the said court;

(*g*) Whenever any conviction or order is quashed on appeal, as aforesaid, the clerk of the peace or other proper officer shall forthwith endorse on the conviction or order a memorandum that the same has been quashed; and whenever any copy or certificate of such conviction or order is made, a copy of such memorandum shall be added thereto, and shall, when certified under the hand of the clerk of the peace, or of the proper officer having the custody of the same, be sufficient evidence, in all courts and for all purposes, that the conviction or order has been quashed. 51 V. c. 45, s. 8. 53 V. c. 37, s. 24.

NNN.—(*Section* 880.).

NOTICE OF APPEAL AGAINST A CONVICTION OR ORDER.

To C. D., of , and , (*the names and additions of the parties to whom the notice of appeal is required to be given.*)

Take notice, that I, the undersigned, A. B., of , intend to enter and prosecute an appeal at the next General Sessions of the Peace (*or other court, as the case may be*), to be holden at , in and for the county of , against a certain conviction (*or* order) bearing date on or about the day of , instant, and made by (you) J. S., Esquire, a justice of the peace in and for the said county of , whereby I, the said A. B. was convicted of having (*or* was ordered) to pay , (*here state the offence as in the conviction, information, or summons, or the amount adjudged to be paid, as in the order, as correctly as possible.*)

Dated at , this day of , one thousand eight hundred and .

A. B.

MEMORANDUM.—*If this notice is given by several defendants, or by an attorney, it may be adapted to the case.*

OOO.—(*Section* 880.)

FORM OF RECOGNIZANCE TO TRY THE APPEAL.

Canada,
Province of ,
County of .

Be it remembered that on , A.B., of , (*labourer*), and L. M., of , (*grocer*), and N. O., of , (*yeoman*),

personally came before the undersigned , a justice of the peace in and for the said county of , and severally acknowledged themselves to owe to our Sovereign Lady the Queen, the several sums following, that is to say, the said A.B. the sum of , and the said L.M. and N.O. the sum of , each, of good and lawful money of Canada, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Lady the Queen, Her heirs and successors, if he the said A. B. fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned at , before me:

J. S.,

J. P. (*Name of county*).

The condition of the within (*or* the above) written recognizance is such that if the said A.B. personally appears at the (next) General Sessions of the Peace (*or other court discharging the functions of the Court of General Sessions, as the case may be*), to be holden at , on the day of , next, in and for the said county of , and tries an appeal against a certain conviction, bearing date the day of , (*instant*), and made by (me) the said justice, whereby he, the said A. B., was convicted, for that he, the said A.B., did, on the day of , at , in the said county of , (*here set out the offence as stated in the conviction*); and also abides by the judgment of the court upon such appeal and pays such costs as are by the court awarded, then the said recognizance to be void, otherwise to remain in full force and virtue.

FORM OF NOTICE OF SUCH RECOGNIZANCE TO BE GIVEN TO THE APPELLANT AND HIS SURETIES.

Take notice, that you, A. B., are bound in the sum of , and you L. M. and N. O. in the sum of , each, that you the said A. B. will personally appear at the next General Sessions of the Peace to be holden at , in and for the said county of , and try an appeal against a conviction (*or* order) dated the day of , (*instant*) whereby you A. B. were convicted of (*or* ordered, &c.), (*stating offence or the subject*

of the order shortly), and abide by the judgment of the court upon such appeal and pay such costs as are by the court awarded, and unless you the said A. B. personally appear and try such appeal and abide by such judgment and pay such costs accordingly, the recognizance entered into by you will forthwith be levied on you and each of you.

Dated at , this day of , one thousand eight hundred and

---

881. When an appeal against any summary conviction or decision has been lodged in due form, and in compliance with the requirements of this part the court appealed to shall try, and shall be the absolute judge, as well of the facts as of the law, in respect to such conviction or decision; and any of the parties to the appeal may call witnesses and adduce evidence, whether such witnesses were called or evidence adduced at the hearing before the justice or not, either as to the credibility of any witness, or as to any other fact material to the inquiry; but any evidence taken before the justice at the hearing below, signed by the witness giving the same and certified by the justice, may be read on such appeal, and shall have the like force and effect as if the witness was there examined: Provided, that the court appealed to is satisfied, by affidavit or otherwise, that the personal presence of the witness cannot be obtained by any reasonable efforts. 53 V. c. 37, s. 25.

882. No judgment shall be given in favour of the appellant if the appeal is based on an objection to any information, complaint or summons, or to any warrant to apprehend a defendant issued upon any such information, complaint or summons, for any alleged defect therein, in substance or in form, or for any variance between such information, complaint, summons or warrant and the evidence adduced in support thereof at the hearing of such information or complaint, unless it is proved before the court hearing the appeal that such objection was made before the justice before whom the case was tried and by whom such conviction, judgment or decision was given, or unless it is proved that notwithstanding it was shown to such justice that by such variance the person summoned and appearing or apprehended had been deceived or misled, such justice refused to adjourn the hearing of the case to some further day, as herein provided. R. S. C. c. 178, s. 79.

883. In every case of appeal from any summary conviction or order had or made before any justice, the court to which such appeal is made shall, notwithstanding any defect in such conviction or order, and notwithstanding that the punishment imposed or the order made may be in excess of that which might lawfully have been imposed or made, hear and determine the charge or complaint on which such conviction or order has been had or made, upon the merits, and may confirm, reverse or modify the decision of such justice, or may make such other conviction or order in the matter as the court thinks just, and may by such order exercise any power which the justice whose decision is appealed from might have exercised, and such conviction or order shall have the same effect and may be enforced in the same manner as if it had been made

by such justice. The court may also make such order as to costs to be paid by either party as it thinks fit.

2. Any conviction or order made by the court on appeal may also be enforced by process of the court itself. 53 V. c. 37, s. 26.

884. The court to which an appeal is made, upon proof of notice of the appeal to such court having been given to the person entitled to receive the same, though such appeal was not afterwards prosecuted or entered, may, if such appeal has not been abandoned according to law, at the same sittings for which such notice was given, order to the party or parties receiving the same such costs and charges as are thought reasonable and just by the court, to be paid by the party or parties giving such notice; and such costs shall be recoverable in the manner provided by this Act for the recovery of costs upon an appeal against an order or conviction. R. S. C. c. 178, s. 81.

885. If an appeal against a conviction or order is decided in favour of the respondents, the justice who made the conviction or order, or any other justice for the same territorial division, may issue the warrant of distress or commitment for execution of the same, as if no appeal had been brought. R. S. C. c. 178, s. 82.

886. No conviction or order affirmed, or affirmed and amended, in appeal, shall be quashed for want of form, or be removed by *certiorari* into any superior court, and no warrant or commitment shall be held void by reason of any defect therein, provided it is therein alleged that the defendant has been convicted, and there is a good and valid conviction to sustain the same. R. S. C. c. 178, s. 83.

887. No writ of *certiorari* shall be allowed to remove any conviction or order had or made before any justice of the peace if the defendant has appealed from such conviction or order to any court to which an appeal from such conviction or order is authorized by law, or shall be allowed to remove any conviction or order made upon such appeal. R. S. C. c. 178, s. 84.

888. Every justice before whom any person is summarily tried, shall transmit the conviction or order to the court to which the appeal is herein given, in and for the district, county or place wherein the offence is alleged to have been committed, before the time when an appeal from such conviction or order may be heard, there to be kept by the proper officer among the records of the court; and if such conviction or order has been appealed against, and a deposit of money made, such justice shall return the deposit into the said court; and the conviction or order shall be presumed not to have been appealed against, until the contrary is shown.

2. Upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence. R. S. C. c. 178, s. 86. 51 V. c. 45, s. 9.

889. No conviction or order made by any justice of the peace and no warrant for enforcing the same, shall, on being removed by *certiorari* be held invalid for any irregularity, informality or insufficiency therein, provided that

the court or judge before which or whom the question is raised is, upon perusal of the depositions, satisfied that an offence of the nature described in the conviction, order or warrant, has been committed, over which such justice has jurisdiction, and that the punishment imposed is not in excess of that which might have been lawfully imposed for the said offence; and any statement which, under this Act or otherwise, would be sufficient if contained in a conviction, shall also be sufficient if contained in an information, summons, order or warrant: Provided that the court or judge, where so satisfied as aforesaid, shall, even if the punishment imposed or the order made is in excess of that which might lawfully have been imposed or made, have the like powers in all respects to deal with the case as seems just as are by section eight hundred and eighty-three conferred upon the court to which an appeal is taken under the provisions of section eight hundred and seventy-nine. R. S. C. c. 178 s. 87. 53 V. c. 37, s. 27.

890. The following matters amongst others shall be held to be within the provisions of the next preceding section:—

(*a*) The statement of the adjudication, or of any other matter or thing, in the past tense instead of in the present;

(*b*) The punishment imposed being less than the punishment by law assigned to the offence stated in the conviction or order, or to the offence which appears by the depositions to have been committed;

(*c*) The omission to negative circumstances, the existence of which would make the act complained of lawful, whether such circumstances are stated by way of exception or otherwise in the section under which the offence is laid, or are stated in another section.

2. But nothing in this section contained shall be construed to restrict the generality of the wording of the next preceding section. R. S. C. c. 178, s. 88.

891. If an application is made to quash a conviction or order made by a justice, on the ground that such justice has exceeded his jurisdiction, the court or judge to which or whom the application is made, may, as a condition of quashing the same, if the court or judge thinks fit so to do, provide that no action shall be brought against the justice who made the conviction, or against any officer acting under any warrant issued to enforce such conviction or order. R. S. C. c. 178, s. 89.

892. The court having authority to quash any conviction, order or other proceeding by or before a justice may prescribe by general order that no motion to quash any conviction, order or other proceeding by or before a justice and brought before such court by *certiorari*, shall be entertained unless the defendant is shown to have entered into a recognizance with one or more sufficient sureties, before a justice or justices of the county or place within which such conviction or order has been made, or before a judge or other officer, as may be prescribed by such general order, or to have made a deposit to be prescribed in like manner, with a condition to prosecute such writ of *certiorari* at his own costs and charges, with effect, without any wilful or affected delay, and, if ordered so to do, to pay the person in whose favour the conviction, order or other proceeding is affirmed, his full costs and charges to be taxed

according to the course of the court where such conviction, order or proceeding is affirmed. R. S. C. c. 178, s. 90.

893. The second section of the Act of the Parliament of the United Kingdom, passed in the fifth year of the reign of His Majesty King George the Second, and chaptered nineteen, shall no longer apply to any conviction, order or other proceeding by or before a justice in Canada, but the next preceding section of this Act shall be substituted therefor, and the like proceedings may be had for enforcing the condition of a recognizance taken under the said section as might be had for enforcing the condition of a recognizance taken under the said Act of the Parliament of the United Kingdom. R. S. C. c. 178, s. 91.

See R. v. Nunn, 10 P. R. Ont., 395, and R. v. Swalwell, 12 O. R. 391, and preceding section.

894. No order, conviction or other proceeding shall be quashed or set aside, and no defendant shall be discharged, by reason of any objection that evidence has not been given of a proclamation or order of the Governor in Council, *or of any rules, regulations, or by-laws made by the Governor in Council in pursuance of a statute of Canada* or of the publication of such proclamation, order, *rules, regulations or by-laws* in the *Canada Gazette;* but such proclamation, order, *rules, regulations and by-laws* and the publication thereof shall be judicially noticed. 51 V. c. 45, s. 10.

895. If a motion or rule to quash a conviction, order or other proceeding is refused or discharged, it shall not be necessary to issue a writ of *procedendo*, but the order of the court refusing or discharging the application shall be a sufficient authority for the registrar or other officer of the court forthwith to return the conviction, order and proceedings to the court or justice from which or whom they were removed, and for proceedings to be taken thereon for the enforcement thereof, as if a *procedendo* had issued, which shall forthwith be done. R. S. C. c. 178, s. 93.

896. Whenever it appears by the conviction that the defendant has appeared and pleaded, and the merits have been tried, and the defendant has not appealed against the conviction, where an appeal is allowed, or if appealed against, the conviction has been affirmed, such conviction shall not afterwards be set aside or vacated in consequence of any defect of form whatever, but the construction shall be such a fair and liberal construction as will be agreeable to the justice of the case. R. S. C. c. 178, s. 94.

897. If upon any appeal the court trying the appeal orders either party to pay costs, the order shall direct the costs to be paid to the clerk of the peace or other proper officer of the court, to be paid over by him to the person entitled to the same, and shall state within what time the costs shall be paid. R. S. C. c. 178, s. 95.

898. 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 pay-

ment of any fee to which he is entitled, shall grant to the person so applying, a certificate that the costs have not been paid; and upon production of the certificate to any justice in and for the same territorial division, such justice may enforce the payment of the costs by warrant of distress in manner aforesaid, and in default of distress may commit the person against whom the warrant has issued in manner hereinbefore mentioned, for any term not exceeding *one month*, unless the amount of the costs and all costs and charges of the distress and also the costs of the commitment and conveying of the party to prison, if the justice thinks fit so to order (the amount thereof being ascertained and stated in the commitment), are sooner paid. The said certificate shall be in the form PPP and the warrants of distress and commitment in the forms QQQ and RRR respectively in schedule one to this Act. R. S. C. c. 178, s. 96.

PPP.—(*Section* 898.)

CERTIFICATE OF CLERK OF THE PEACE THAT THE COSTS OF AN APPEAL ARE NOT PAID.

Office of the clerk of the peace for the county of

Title of the Appeal.

I hereby certify that 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 eight hundred and

G. H.,
Clerk of the Peace.

QQQ.—(*Section* 898.)

WARRANT OF DISTRESS FOR COSTS OF AN APPEAL AGAINST A CONVICTION OR ORDER.

Canada,
Province of ,
County of ,

To all or any of the constables and other peace officers in the said county of

Whereas (&c., *as in the warrants of distress, DDD or FFF.; and to the end of the statement of the conviction or order, and then thus*): And whereas the said A. B. appealed to the Court of General Sessions of the Peace (*or other court discharging the functions of the Court of General Sessions, as the case may be*), for the said county, against the said conviction or order, in which appeal the said A. B. was the appellant, and the said C. D. (*or* J. S., Esquire, the justice of the peace who made the said conviction or order) was the respondent, and which said appeal came on to be tried and was heard and determined at the last General Sessions of the Peace (*or other court, as the case may be*) for the said county, holden at , on , and the said court thereupon ordered that the said conviction (or order) should be confirmed (or quashed) and that the said (appellant) should pay to the said (respondent) the sum of for his costs incurred by him in the said appeal, which said sum was to be paid to the clerk of the peace for the said county, on or before the day of , one thousand eight hundred and , to be by him handed over to the said C. D.; and whereas the clerk of the peace of the said county has, on the day of (*instant*), duly certified that the said sum for costs had not been paid:* These are, therefore, to command you, in Her Majesty's name, forthwith to make distress of the goods and chattels of the said A. B., and if, within the term of days next after the making of such distress, the said last mentioned sum, together with the reasonable charges of taking and keeping the said distress, are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale to the clerk of the peace for the said county of , that he may pay and apply the same as by law directed; and if no such distress can be found,

then to certify the same unto me or any other justice of the peace for the same county that such proceeding (proceedings) may be had therein as to law appertain.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

O. K., [SEAL.]

J. P., (*Name of county.*)

RRR.——(*Section* 898.)

WARRANT OF COMMITMENT FOR WANT OF DISTRESS IN THE LAST CASE.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of

Whereas (*&c., as in form* QQQ, *to the asterisk* * *and then thus*): And whereas, afterwards, on the day of , in the year aforesaid, I, the undersigned, issued a warrant to all or any of the peace officers in the said county of , commanding them, or any of them, to levy the said sum of , for costs, by distress and sale of the goods and chattels of the said A. B.; And whereas it appears to me, as well by the return to the said warrant of distress of the peace officer who was charged with the execution of the same, as otherwise, that the said peace officer has made diligent search for the goods and chattels of the said A. B., but that no sufficient distress whereon to levy the said sum above mentioned could be found: These are, therefore, to command you, the said peace officer, or any one of you, to take the said A. B., and him safely to convey to the common gaol of the said county of , at aforesaid, and there deliver him to the said keeper thereof, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said A. B. into your custody in the said common gaol, there to imprison him (and keep him at hard labour) for the term of , unless the said sum and all costs and charges of the said distress (and for the commitment and conveying of the said A. B. to the said common gaol,

amounting to the further sum of), are sooner paid unto you, the said keeper; and for so doing this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

O. K., [SEAL]

J. P., (*Name of county.*)

---

899. *An appellant may abandon his appeal by giving to the opposite party notice in writing of his intention six clear days before the sitting of the court appealed to, and thereupon the costs of the appeal shall be added to the sum if any adjudged against the appellant by the conviction or order, and the justice shall proceed on the conviction or order as if there had been no appeal. R. S. O. (1887), c. 74, s. 8.*

900. In this section the expression "the court" means and includes any superior court of criminal jurisdiction for the province in which the proceedings herein referred to are carried on.

2. Any person aggrieved, the prosecutor or complainant as well as the defendant, who desires to question a conviction, order, determination or other proceeding of a justice under this part, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to such justice to state and sign a case setting forth the facts of the case and the grounds on which the proceeding is questioned, and if the justice declines to state the case, may apply to the court for an order requiring the case to be stated.

3. The application shall be made and the case stated within such time and in such manner as is, from time to time, directed by rules or orders under section five hundred and thirty-three of this Act.

4. The appellant at the time of making such application, and before a case is stated and delivered to him by the justice, shall in every instance, enter into a recognizance before such justice or any other justice exercising the same jurisdiction, with or without surety or sureties, and in such sum as to the justice seems meet, conditioned to prosecute his appeal without delay, and to submit to the judgment of the court and pay such costs as are awarded by the same; and the appellant shall, at the same time, and before he shall be entitled to have the case delivered to him, pay to the justice such fees as he is entitled to; and the appellant, if then in custody, shall be liberated upon the recognizance being further conditioned for his appearance before the same justice, or such other justice as is then sitting, within ten days after the judgment of the court has been given, to abide such judgment, unless the judgment appealed against is reversed.

5. If the justice is of opinion that the application is merely frivolous, but not otherwise, he may refuse to state a case, and shall on the request of the applicant sign and deliver to him a certificate of such refusal; provided that the justice shall not refuse to state a case where the application for that purpose is made to him by or under the direction of Her Majesty's Attorney-General of Canada, or of any province.

6. Where the justice refuses to state a case, it shall be lawful for the appellant to apply to the court, upon an affidavit of the facts, for a rule calling upon the justice, and also upon the respondent, to show cause why such case should not be stated; and such court may make such rule absolute, or discharge the application, with or without payment of costs, as to the court seems meet; and the justice upon being served with such rule absolute, shall state a case accordingly, upon the appellant entering into such recognizance as hereinbefore provided.

7. The court to which a case is transmitted under the foregoing provisions shall hear and determine the question or questions of law arising thereon, and shall thereupon affirm, reverse or modify the conviction, order or determination in respect of which the case has been stated, or remit the matter to the justice with the opinion of the court thereon, and may make such other order in relation to the matter, and such orders as to costs, as to the court seems fit; and all such orders shall be final and conclusive upon all parties: Provided always, that any justice who states and delivers a case in pursuance of this section shall not be liable to any costs in respect or by reason of such appeal against his determination.

8. The court for the opinion of which a case is stated shall have power, if it thinks fit, to cause the case to be sent back for amendment; and thereupon the same shall be amended accordingly, and judgment shall be delivered after it has been amended.

9. The authority and jurisdiction hereby vested in the court for the opinion of which a case is stated may, subject to any rules and orders of court in relation thereto, be exercised by a judge of such court sitting in chambers, and as well in vacation as in term time.

10. After the decision of the court in relation to any such case stated for their opinion, the justice in relation to whose determination the case has been stated, or any other justice exercising the same jurisdiction, shall have the same authority to enforce any conviction, order or determination which has been affirmed, amended or made by such court as the justice who originally decided the case would have had to enforce his determination if the same had not been appealed against; and no action or proceeding shall be commenced or had against a justice for enforcing such conviction, order or determination by reason of any defect in the same.

11. If the court deems it necessary or expedient any order of the court may be enforced by its own process.

12. No writ of *certiorari* or other writ shall be required for the removal of any conviction, order or other determination in relation to which a case is stated under this section or otherwise, for obtaining the judgment or determination of a superior court on such case under this section.

13. In all cases where the conditions, or any of them, in any recognizance entered into in pursuance of this section have not been complied with, such recognizance shall be dealt with in like manner as is provided by section eight hundred and seventy-eight with respect to recognizances entered into thereunder.

14. Any person who appeals under the provisions of this section against any determination of a justice from which he is entitled to an appeal under

section eight hundred and seventy-nine of this Act, shall be taken to have abandoned such last mentioned right of appeal finally and conclusively and to all intents and purposes.

15. Where, by any special Act, it is provided that there shall be no appeal from any conviction or order, no proceedings shall be taken under this section in any case to which such provision in such special Act applies. 53 V. c. 37, s. 28. 42-43 V. c. 49, (Imp.).

901. Whenever a warrant of distress has issued against any person, and such person pays or tenders *to the peace officer* having the execution of the same, the sum or sums in the warrant mentioned, together with the amount of the expenses of the distress up to the time of payment or tender, *the peace officer* shall cease to execute the same. R. S. C. c. 198 (178), s. 97.

2. Whenever any person is imprisoned for non-payment of any penalty or other sum, he may pay or cause to be paid to the keeper of the prison in which he is imprisoned, the sum in the warrant of commitment mentioned, together with the amount of the costs and charges and expenses therein also mentioned, and the keeper shall receive the same, and shall thereupon discharge the person, if he is in his custody for no other matter. *He shall also forthwith pay over any moneys so received by him to the justice who issued the warrant.* R. S. C. c. 198 (178), s. 98.

902. Every justice shall, quarterly, on or before the second Tuesday in each of the months of March, June, September and December in each year, make to the clerk of the peace or other proper officer of the court having jurisdiction in appeal, as herein provided, a return in writing, under his hand, of all convictions made by him, and of the receipt and application by him of the moneys received from the defendants,—which return shall include all convictions and other matters not included in some previous return, and shall be in the form SSS in schedule one to this Act.

2. If two or more justices are present, and join in the conviction, they shall make a joint return.

3. In the province of Prince Edward Island such return shall be made to the clerk of the court of assize of the county in which the convictions are made, and on or before the fourteenth day next before the sitting of the said court next after such convictions are so made.

4. Every such return shall be made in the said district of Nipissing, in the province of Ontario, to the clerk of the peace for the county of Renfrew, in the said province. R. S. C. c. 178, s. 99. (*Amended.*)

5. Every justice, to whom any such moneys are afterwards paid, shall make a return of the receipts and application thereof, to the court having jurisdiction in appeal as hereinbefore provided,—which return shall be filed by the clerk of the peace *or the proper officer of such court* with the records of his office. R. S. C. c. 178, s. 100.

6. Every justice, before whom any such conviction takes place or who receives any such moneys, who neglects or refuses to make such return thereof, or wilfully makes a false, partial or incorrect return, or wilfully receives a larger amount of fees than by law he is authorized to receive, shall incur a penalty of eighty dollars, together with costs of suit, *in the discretion of the*

court, which may be recovered by any person who sues for the same by action of debt or information in any court of record in the province in which such return ought to have been or is made. R. S. C. c. 178, s. 101.

7. One moiety of such penalty shall belong to the person suing, and the other moiety to Her Majesty, for the public uses of Canada.

SSS.—(*Section* 902.)

RETURN of convictions made by me (or *us as the case may be*), during the quarter ending , 18 .

Name of the Prosecutor.	Name of the Defendant.	Nature of the Charge.	Date of Conviction.	Name of Convicting Justice.	Amount of Penalty, Fine or Damage.	Time when paid or to be paid to the said Justice.	To whom paid over by the said Justice.	If not paid, why not, and general observations if any.

J. S., Convicting Justice,

or

J. S. and O. K., Convicting Justices (*as the case may be.*)

---

903. The clerk of the peace of the district or county in which any such returns are made, or the proper officer, other than the clerk of the peace, to whom such returns are made, shall, within seven days after the adjournment of the next ensuing General or Quarter Sessions, or of the term or sitting of such other court as aforesaid, cause the said returns to be posted up in the court-house of the district or county, and also in a conspicuous place in the office of such clerk of the peace, or other proper officer, for public inspection, and the same shall continue to be so posted up and exhibited until the end of the next ensuing General or Quarter Sessions of the Peace, or of the term or sitting of such other court as aforesaid; and for every schedule so made and exhibited by such clerk or officer, he shall be allowed such fee as is fixed by competent authority. R. S. C. c. 178, s. 103.

2. Such clerk of the peace or other officer of each district or county, within twenty days after the end of each General or Quarter Sessions of the Peace, or the sitting of such court as aforesaid, shall transmit to the Minister of Finance and Receiver-General a true copy of all such returns made within his district or county. R. S. C. c. 178, s. 104.

The repealed clause also required publication in a newspaper.

904. All actions for penalties arising under the provisions of section nine hundred and two shall be commenced within six months next after the cause of action accrues, and the same shall be tried in the district, county or place wherein such penalties have been incurred; and if a verdict or judgment passes for the defendant, or the plaintiff becomes non-suit, or discontinues the action after issue joined, or if, upon demurrer or otherwise, judgment is given against the plaintiff, the defendant shall, *in the discretion of the court*, recover his costs of suit, as between solicitor and client, and shall have the like remedy for the same as any defendant has by law in other cases. R. S. C. c. 178, s. 102.

905. Nothing in the three sections next preceding shall have the effect of preventing any person aggrieved from prosecuting, by indictment, any justice, for any offence, the commission of which would subject him to indictment at the time of the coming into force of this Act. R. S. C. c. 178, s. 105.

906. No return purporting to be made by any justice under this Act shall be vitiated by the fact of its including, by mistake, any convictions or orders had or made before him in any matter over which any Provincial Legislature has exclusive jurisdiction, or with respect to which he acted under the authority of any provincial law. R. S. C. c. 178, s. 106.

907. 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 having been committed in different modes, or in respect of one or other of several articles, either conjunctively or disjunctively, for example, in charging an offence under section five hundred and eight of this Act it may be alleged that "the defendant unlawfully did cut, break, root up and otherwise destroy or damage a tree, sapling or shrub"; and it shall not be necessary to define more particularly the nature of the act done, or to state whether such act was done in respect of a tree, or a sapling, or a shrub. R. S. C. c. 178, s. 107.

The words "cut, break, root up" of the repealed s. 24, c. 168, R. S. C. have been left out of s. 508, *ante*, and are consequently erroneously inserted in this clause. S. 108, relating to seal on documents by justices has not been re-enacted; *see* Bond v. Conmee, 16 A. R. Ont. 398, confirmed in Supreme Court, March 20, 1890.

908 Every judge of Sessions of the Peace, *chairman of the court of General Sessions of the Peace*, police magistrate, district magistrate or stipendiary magistrate, shall have such and like powers and authority to preserve order in the said courts during the holding thereof, and by the like ways and means as now by law are or may be exercised and used in like cases and for the like purposes by any court in Canada, or by the judges thereof, during the sittings thereof. R. S. C. c. 178, s. 109.

909. Every judge of the Sessions of the Peace, *chairman of the court of General Sessions of the Peace*, recorder, magistrate, district magistrate or stipendiary magistrate, whenever any resistance is offered to the execution of any summons, warrant of execution or other process issued by him, may enforce the due execution of the same by the means provided by the law for enforcing the execution of the process of other courts in like cases. R. S. C. c. 178, s. 110.

PART LIX.

RECOGNIZANCES.

Render of Accused by Surety.

910. Any surety for any person charged with any indictable offence may upon affidavit showing the grounds therefor, with a certified copy of the recognizance, obtain from a judge of a superior court or from a judge of a county court having criminal jurisdiction, *or in the province of Quebec from a district magistrate,* an order in writing under his hand, to render such person to the common gaol of the county where the offence is to be tried.

2. The sureties, under such order, may arrest such person and deliver him, with the order, to the gaoler named therein, who shall receive and imprison him in the said gaol, and shall be charged with the keeping of such person until he is discharged by due course of law. R. S. C. c. 179, ss. 1 & 2.

The words in italics are new.

Bail after Render.

911. The person rendered may apply to a judge of a superior court, or in cases in which a judge of a county court may admit to bail, to a judge of a county court, to be again admitted to bail, who may on examination allow or refuse the same, and make such order as to the number of the sureties and the amount of recognizance as he deems meet,—which order shall be dealt with in the same manner as the first order for bail, and so on as often as the case requires. R. S. C. c. 179, s. 3.

Discharge of Recognizance.

912. On due proof of such render, and certificate of the sheriff, proved by the affidavit of a subscribing witness, that such person has been so rendered, a judge of the superior or county court, as the case may be, shall order an entry of such render to be made on the recognizance by the officer in charge thereof, which shall vacate the recognizance, and may be pleaded or alleged in discharge thereof. R. S. C. c. 179, s. 4.

Render in Court.

913. The sureties may bring the person charged as aforesaid into the court at which he is bound to appear, during the sitting thereof, and then, by leave of the court, render him in discharge of such recognizance at any time before trial, and such person shall be committed to gaol, there to remain until discharged by due course of law; but such court may admit such person to bail for his appearance at any time it deems meet. R. S. C. c. 179, s. 5.

Sureties Not Discharged by Arraignment or Conviction.

914. The arraignment or conviction of any person charged and bound as aforesaid, shall not discharge the recognizance, but the same shall be effectual

for his appearance for trial or sentence, as the case may be; nevertheless the court may commit such person to gaol upon his arraignment or trial, or may require new or additional sureties for his appearance for trial or sentence, as the case may be, notwithstanding such recognizance; and such commitment shall be a discharge of the sureties. R. S. C. c. 179, s. 6.

RIGHT OF SURETY TO RENDER NOT AFFECTED.

915. Nothing in the foregoing provisions shall limit or restrict any right which a surety now has of taking and rendering to custody any person charged with any such offence, and for whom he is such surety. R. S. C. c. 179, s. 7.

ENTRY OF FINES, ETC., ON RECORD AND RECOVERY THEREOF.

916. Unless otherwise provided, all fines, issues, amercements and forfeited recognizances, the disposal of which is within the legislative authority of the Parliament of Canada, set, imposed, lost or forfeited before any court of criminal jurisdiction shall, within twenty-one days after the adjournment of such court be fairly entered and extracted on a roll by the clerk of the court, or in case of his death or absence, by any other person, under the direction of the judge who presided at such court, which roll shall be made in duplicate and signed by the clerk of the court, or in case of his death or absence, by such judge.

2. If such court is a superior court of criminal jurisdiction one of such rolls shall be filed with the clerk, prothonotary, registrar or other proper officer—

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

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

(*c*) in the province of Prince Edward Island, of the Supreme Court of Judicature of that province;

(*d*) in the province of Manitoba, of the Court of Queen's Bench of that province; and

(*e*) in the North-west Territories, of the Supreme Court of the said territories,—

on or before the first day of the term next succeeding the court by or before which such fines or forfeitures were imposed or forfeited.

3. If such court is a court of General Sessions of the Peace, or a county court, one of such rolls shall remain deposited in the office of the clerk of such court.

4. The other of such rolls shall, as soon as the same is prepared, be sent by the clerk of the court making the same, or in case of his death or absence, by such judge as aforesaid, with a writ of *fieri facias* and *capias*, according to the form TTT in schedule one to this Act, to the sheriff of the county in and for which such court was holden; and such writ shall be authority to the sheriff for proceeding to the immediate levying and recovering of such fines, issues, amercements and forfeited recognizances, on the goods and chattels, lands and tenements of the several persons named therein, or for taking into custody the bodies of such persons respectively, in case sufficient goods and chattels, lands or tenements cannot be found, whereof the sums required can be made;

and every person so taken shall be lodged in the common gaol of the county, until satisfaction is made, or until the court into which such writ is returnable, upon cause shown by the party, as hereinafter mentioned, makes an order in the case, and until such order has been fully complied with.

5. The clerk of the court shall, at the foot of each roll made out as herein directed, make and take an affidavit in the following form, that is to say:

"I, A. B. (*describing his office*), make oath that this roll is truly and carefully made up and examined, and that all fines, issues, amercements, recognizances and forfeitures which were set, lost, imposed or forfeited, at or by the court therein mentioned, and which in right and due course of law, ought to be levied and paid, are, to the best of my knowledge and understanding, inserted in the said roll; and that in the said roll are also contained and expressed all such fines as have been paid to or received by me, either in court or otherwise, without any wilful discharge, omission, misnomer or defect whatsoever. So help me God;"

Which oath any justice of the peace for the county is hereby authorized to administer. R. S. C. c. 179, ss. 8, 9 & 15.

Not applicable to Quebec.

TTT.—(*Section* 916.)

WRIT OF FIERI FACIAS.

Victoria, by the Grace of God, &c.

To the sheriff of , Greeting:

You are hereby commanded to levy of the goods and chattels, lands and tenements, of each of the persons mentioned in the roll or extract to this writ annexed, all and singular the debts and sums of money upon them severally imposed and charged, as therein is specified; and if any of the said several debts cannot be levied, by reason that no goods or chattels, lands or tenements can be found belonging to the said persons, respectively, then, and in all such cases, that you take the bodies of such persons, and keep them safely in the gaol of your county, there to abide the judgment of our court (*as the case may be*) upon any matter to be shown by them, respectively, or otherwise to remain in your custody as aforesaid, until such debt is satisfied unless any of such persons respectively gives sufficient security for his appearance at the said court, on the return day hereof, for which you will be held answerable; and what you do in the premises make appear before us in our court (*as the case may be,*) on the day of , term next, and have then

and there this writ. Witness, &c., G. H., clerk (*as the case may be*).

OFFICER TO PREPARE LISTS OF PERSONS UNDER RECOGNIZANCE MAKING DEFAULT.

917. If any person bound by recognizance for his appearance (or for whose appearance any other person has become so bound) to prosecute or give evidence on the trial of any indictable offence, or to answer for any common assault, or to articles of the peace, makes default, the officer of the court by whom the estreats are made out, shall prepare a list in writing, specifying the name of every person so making default, and the nature of the offence in respect of which such person, or his surety, was so bound, together with the residence, trade, profession or calling of every such person and surety,—and shall, in such list, distinguish the principals from the sureties, and shall state the cause, if known, why each such person did not appear, and whether, by reason of the non-appearance of such person, the ends of justice have been defeated or delayed. R. S. C. c. 179, s. 10.

PROCEEDING ON FORFEITED RECOGNIZANCE NOT TO BE TAKEN EXCEPT ON ORDER OF JUDGE, ETC.

918. Every such officer shall, before any such recognizance is estreated, lay such list before the judge or one of the judges who presided at the court, or if such court was not presided over by a judge, before two justices of the peace who attended at such court, and such judge or justices shall examine such list, and make such order touching the estreating or putting in process any such recognizance as appears just, subject, in the province of Quebec, to the provisions hereinafter contained; and no officer of any such court shall estreat or put in process any such recognizance without the written order of the judge or justices of the peace before whom respectively such list has been laid. R. S. C. c. 179, s. 11.

RECOGNIZANCE NEED NOT BE ESTREATED IN CERTAIN CASES.

919. Except in the cases of persons bound by recognizance for their appearance, or for whose appearance any other person has become bound to prosecute or give evidence on the trial of any indictable offence, or to answer for any common assault, or to articles of the peace, in every case of default whereby a recognizance becomes forfeited, if the cause of absence is made known to the court in which the person was bound to appear, the court, on consideration of such cause, and considering also, whether, by the non-appearance of such person the ends of justice have been defeated or delayed, may forbear to order the recognizance to be estreated; and, with respect to all recognizances estreated, if it appears to the satisfaction of the judge who presided at such court that the absence of any person for whose appearance any recognizance was entered into, was owing to circumstances which rendered such absence justifiable, such judge may make an order directing that the sum forfeited upon such estreated recognizance shall not be levied.

2. The clerk of the court shall, for such purpose, before sending to the sheriff any roll, with a writ of *fieri facias* and *capias*, as directed by section nine hundred and sixteen, submit the same to the judge who presided at the court,

and such judge may make a minute on the said roll and writ of any such forfeited recognizances and fines as he thinks fit to direct not to be levied; and the sheriff shall observe the direction in such minute written upon such roll and writ, or endorsed thereon: and shall forbear accordingly to levy any such forfeited recognizance or fine. R. S. C. c. 179, ss. 12 & 13.

Not applicable to Quebec.

SALE OF LANDS BY SHERIFF UNDER ESTREATED RECOGNIZANCE.

920. If upon any writ issued under section nine hundred and sixteen, the sheriff takes lands or tenements in execution, he shall advertise the same in like manner as he is required to do before the sale of lands in execution in other cases; and no sale shall take place in less than twelve months from the time the writ came to the hands of the sheriff. R. S. C. c. 179, s. 14.

Not applicable to Quebec.

DISCHARGE FROM CUSTODY ON GIVING SECURITY.

921. If any person on whose goods and chattels a sheriff, bailiff or other officer is authorized to levy any such forfeited recognizance, gives security to the said sheriff or other officer for his appearance at the return day mentioned in the writ, in the court into which such writ is returnable, then and there to abide the decision of such court, and also to pay such forfeited recognizance, or sum of money to be paid in lieu or satisfaction thereof, together with all such expenses as are adjudged and ordered by the court, such sheriff or officer shall discharge such person out of custody, and if such person does not appear in pursuance of his undertaking, the court may forthwith issue a writ of *fieri facias* and *capias* against such person and the surety or sureties of the person so bound as aforesaid. R. S. C. c. 179, s. 16.

Not applicable to Quebec.

DISCHARGE OF FORFEITED RECOGNIZANCE.

922. The court, into which any writ of *fieri facias* and *capias* issued under the provisions of this part is returnable, may inquire into the circumstances of the case, and may in its discretion, order the discharge of the whole of the forfeited recognizance, or sum of money paid or to be paid in lieu or satisfaction thereof, and make such order thereon as to such court appears just; and such order shall accordingly be a discharge to the sheriff, or to the party, according to the circumstances of the case. R. S. C. c. 179, s. 17.

Not applicable to Quebec.

RETURN OF WRIT BY SHERIFF.

923. The sheriff, to whom any writ is directed under this Act, shall return the same on the day on which the same is made returnable, and shall state, on the back of the roll attached to such writ, what has been done in the execution thereof; and such return shall be filed in the court into which such return is made. R. S. C. c. 179, s. 18.

Not applicable to Quebec.

ROLL AND RETURN TO BE TRANSMITTED TO MINISTER OF FINANCE.

924. A copy of such roll and return, certified by the clerk of the court into which such return is made, shall be forthwith transmitted to the Minister of Finance and Receiver-General, with a minute thereon of any of the sums therein mentioned, which have been remitted by order of the court, in whole or in part, or directed to be forborne, under the authority of section nine hundred and nineteen. R. S. C. c. 179, s. 19.

Not applicable to Quebec.

APPROPRIATION OF MONIES COLLECTED BY SHERIFF.

925. The sheriff or other officer shall, without delay, pay over all moneys collected under the provisions of this part by him, to the Minister of Finance and Receiver-General, or other person entitled to receive the same. R. S. C. c. 179, s. 20.

SPECIAL PROVISIONS FOR QUEBEC.

926. The provisions of sections nine hundred and sixteen and nine hundred and nineteen to nine hundred and twenty-four, both inclusive, shall not apply to the province of Quebec, and the following provisions shall apply to that province only :

2. Whenever default is made in the condition of any recognizance lawfully entered into or taken in any criminal case, proceeding or matter, in the province of Quebec, within the legislative authority of the Parliament of Canada, so that the penal sum therein mentioned becomes forfeited and due to the Crown, such recognizance shall thereupon be estreated or withdrawn from any record or proceeding in which it then is—or where the recognizance has been entered into orally in open court—a certificate or minute of such recognizance, under the seal of the court, shall be made from the records of such court.

(*a*) Such recognizance, certificate or minute, as the case may be, shall be transmitted by the court, recorder, justice of the peace, magistrate or other functionary before whom the cognizor, or the principal cognizor, where there is a surety or sureties, was bound to appear, or to do that, by his default to do which the condition of the recognizance is broken, to the Superior Court in the district in which the place where such default was made is included for civil purposes, with the certificate of the court, recorder, justice of the peace, magistrate or other functionary as aforesaid, of the breach of the condition of such recognizance, of which and of the forfeiture to the Crown of the penal sum therein mentioned, such certificate shall be conclusive evidence ;

(*b*) The date of the receipt of such recognizance or minute and certificate by the prothonotary of the said court, shall be endorsed thereon by him, and he shall enter judgment in favour of the Crown against the cognizor for the penal sum mentioned in such recognizance, and execution may issue therefor after the same delay as in other cases, which shall be reckoned from the time when the judgment is entered by the prothonotary of the said court ;

(*c*) Such execution shall issue upon fiat or *præcipe* of the Attorney-General, or of any person thereunto authorized in writing by him ; and the Crown shall be entitled to the costs of execution and to costs on all proceedings in the case subsequent to execution, and to such costs, *in the discretion of the court*, for the entry of the judgment, as are fixed by any tariff.

3. Nothing in this section contained shall prevent the recovery of the sum forfeited by the breach of any recognizance from being recovered by suit in the manner provided by law, whenever the same cannot, for any reason, be recovered in the manner provided in this section ;

(*a*) In such case the sum forfeited by the non-performance of the conditions of such recognizance shall be recoverable, with costs, by action in any court having jurisdiction in civil cases to the amount, at the suit of the Attorney-General of Canada or of Quebec, or other person or officer authorized to sue for the Crown; and in any such action it shall be held that the person suing for the Crown is duly empowered so to do, and that the conditions of the recognizance were not performed, and that the sum therein mentioned is, therefore, due to the Crown, unless the defendant proves the contrary.

4. In this section, unless the context otherwise requires, the expression "cognizor" includes any number of cognizors in the same recognizance, whether as principals or sureties.

5. When a person has been arrested in any district for an offence committed within the limits of the province of Quebec, and a justice of the peace has taken recognizances from the witnesses heard before him or another justice of the peace, for their appearance at the next session or term of the court of competent criminal jurisdiction, before which such person is to undergo his trial, there to testify and give evidence on such trial, and such recognizances have been transmitted to the office of the clerk of such court, the said court may proceed on the said recognizances in the same manner as if they had been taken in the district in which such court is held. R. S. C. c. 179, ss. 21, 22 and 23.

The mere failure of the party to answer, when called, in the term subsequent to that in which he was arraigned could not operate as a forfeiture of his bail: The Atty.-General v. Beaulieu, 3 L. C. J. 117.

On an information against the bail or surety of a person charged with subornation of perjury, *held*, that after the accused has pleaded guilty to an indictment, no default can be entered against him, except on a day fixed for his appearance, and that it is the duty of the court to estreat the recognizances in cases like the present: R. v Croteau, 9 L. C. R. 67.

A recognizance taken before a police magistrate under 32 & 33 V. c. 30, s. 44, (D.), omitted the words "to owe": *Held*, fatal, and that an action would not lie upon the instrument as a recognizance : R. v. Hoodless, 45 U. C. Q. B. 556.

Held, that the forfeiture of a recognizance to appear was a debt sufficient to support the application for an attachment under the Absconding Debtor's Act, and that such writ may be granted at the suit of the crown, where the defendant absconds to avoid being arrested for a felony: R. v. Stewart, 8 P. R. Ont. 297.

A recognizance of bail put in on behalf of a prisoner, recited that he had been indicted at the court of general sessions of the peace for two separate offences, and the condition was, that he should appear at the next sitting of said court, and plead to such indictment as might be found against him by the grand jury; at the next of said sittings, the accused did not appear, and no new indictment was found against him: *Held*, that the recitals sufficiently showed the intention to be that the accused should appear and answer the indictments already found, and that an order estreating the recognizance was properly made: *Re* Gauthreaux's Bail, 9 P. R. Ont. 31.

If no indictment is found, the non-appearance of the defendant does not forfeit the recognizance: R. v. Ritchie, 1 U. C. L. J. (N. S.) 272.

PART LX.

FINES AND FORFEITURES.

Appropriation of Fines, Etc.

927. Whenever no other provision is made by any law of Canada for the application of any fine, penalty or forfeiture imposed for the violation of any such law, the same shall belong to the Crown for the public uses of Canada.

2. Any duty, penalty or sum of money, or the proceeds of any forfeiture, which is, by any Act, given to the Crown, shall, if no other provision is made respecting it, form part of the Consolidated Revenue Fund of Canada, and shall be accounted for and otherwise dealt with accordingly. R. S. C. c. 180, ss. 2 & 4.

Application of Fines, Etc., by Order in Council.

928. The Governor in Council may from time to time direct that any fine, penalty or forfeiture, or any portion thereof, which would otherwise belong to the Crown for the public uses of Canada, be paid to any provincial, municipal or local authority, which wholly or in part bears the expenses of administering the law under which such fine, penalty or forfeiture is imposed, or that the same be applied in any other manner deemed best adapted to attain the objects of such law and to secure its due administration. R. S. C. c. 180, s. 3.

Recovery of Penalty or Forfeiture.

929. Whenever any pecuniary penalty or any forfeiture is imposed for any violation of any Act, and no other mode is prescribed for the recovery thereof, such penalty or forfeiture shall be recoverable or enforceable, with costs, in the discretion of the court, by civil action or proceeding at the suit of Her Majesty only, or of any private party suing as well for Her Majesty as for himself—in any form allowed in such case by the law of that province in which it is brought—before any court having jurisdiction to the amount of the penalty in cases of simple contract—upon the evidence of any one credible witness other than the plaintiff or party interested; and if no other provision is made for the appropriation of any penalty or forfeiture so recovered or enforced, one moiety shall belong to Her Majesty, and the other moiety shall belong to the private party suing for the same if any, and if there is none, the whole shall belong to Her Majesty. R. S. C. c. 180, s. 1.

Limitation of Action.

930. No action, suit or information shall be brought or laid for any penalty or forfeiture under any such Act except within two years after the cause of action arises or after the offence is committed, unless the time is otherwise limited by such Act. R. S. C. c. 180, s. 5.

TITLE VIII.

PROCEEDINGS AFTER CONVICTION.

PART LXI.

PUNISHMENTS GENERALLY.

PUNISHMENT AFTER CONVICTION ONLY.

931. Whenever a person doing a certain act is declared to be guilty of any offence, and to be liable to punishment therefor, it shall be understood that such person shall only be deemed guilty of such offence and liable to such punishment after being duly convicted of such act. R. S. C. c. 181, s. 1.

DEGREES IN PUNISHMENT.

932. Whenever it is provided that the offender shall be liable to different degrees or kinds of punishment, the punishment to be inflicted shall, subject to the limitations contained in the enactment, be in the discretion of the court or tribunal before which the conviction takes place. R. S. C. c. 181, s. 2.

LIABILITY UNDER DIFFERENT PROVISIONS.

933. Whenever any offender is punishable under two or more Acts or two or more sections of the same Act, he may be tried and punished under any of such Acts or sections; but no person shall be twice punished for the same offence. R. S. C. c. 181, s. 3.

This section enacts that where an offender is punishable under two or more Acts, or two or more sections of the same Act, he may be punished under either. This is taken from the Imperial Code, but the Imperial Code went further, and enacted that thereafter no offence should be indictable at common law. This s. 933 of this Code leaves the common law in force. The rule is, that if a common law misdemeanour is made subject to a greater punishment by statute it may still be proceeded against as a common law misdemeanour; but if a common law misdemeanour is made a felony the misdemeanour has ceased to exist; and where an offence punishable at common law is made by statute punishable by a summary conviction both remedies exist: Hamilton v. Massie, 18 O. R. 585; 2 Hawk. c. 25, s 4;

R. v. Wigg, 2 Salk. 460; R. v. Wright, 1 Burr. 543; R. v. Robinson, 2 Burr. 800; R. v. Carlile, 3 B. & Ald. 161; R. v. Gregory, 5 B. & Ad. 555; R. v. Crawshaw, Bell, 303; Bishop, Stat. Cr. par. 163 to 166 and s. 245; R. v. Dickenson, 1 Saund. 135. Also *per* Williams, J., in Eastern Archipelago Co. v. the Queen, 2 E. & B. 879; R. v. Adams, Car. and M. 299; R. v. Dixon, 10 Mod. 335; R. v. Buchanan, 8 Q. B. 883; R. v. Hall, 17 Cox, 278.

A prisoner should be able to gather from the indictment whether he is charged with an offence at the common law; or under a statute or, if there should be several statutes applicable to the subject under which statute he is charged, *per* Esten, V.-C., R. v. Cummings, 15 U. C. Q. B. 16.

FINE IMPOSED SHALL BE IN DISCRETION OF COURT.

934. Whenever a fine may be awarded or a penalty imposed for any offence, the amount of such fine or penalty shall within such limits, if any, as are prescribed in that behalf, be in the discretion of the court or person passing sentence or convicting, as the case may be. R. S. C. c. 181, s. 33.

PART LXII.

CAPITAL PUNISHMENT.

PUNISHMENT TO BE THE SAME ON CONVICTION BY VERDICT OR BY CONFESSION.

935. Every one who is indicted as principal or accessory for any offence made capital by any statute, shall be liable to the same punishment, whether he is convicted by verdict or on confession, *and this as well in the case of accessories as of principals*. R. S. C. c. 181, s. 4.

FORM OF SENTENCE OF DEATH.

936. In all cases where an offender is sentenced to death the sentence or judgment to be pronounced against him shall be, that he be hanged by the neck until he is dead. R. S. C. c. 181, s. 5.

A judgment may be altered at any time during the assizes; and a reprieve may be granted or taken off by a

judge, although the session may be adjourned or finished, and this, by reason of common usage: 2 Hale, 412; Dyer, 205.

REPORT BY THE JUDGE.

937. In the case of any prisoner sentenced to the punishment of death, the judge before whom such prisoner has been convicted shall forthwith make a report of the case to the Secretary of State, for the information of the Governor General; and the day to be appointed for carrying the sentence into execution shall be such as, in the opinion of the judge, will allow sufficient time for the signification of the Governor's pleasure before such day, and if the judge thinks such prisoner ought to be recommended for the exercise of the royal mercy, or if, from the non-decision of any point of law reserved in the case, or from any other cause, it becomes necessary to delay the execution, he, or any other judge of the same court, or who might have held or sat in such court, may, from time to time, either in term or in vacation, reprieve such offender for such period or periods beyond the time fixed for the execution of the sentence as are necessary for the consideration of the case by the Crown. R. S. C. c. 181, s. 8.

TREATMENT OF PERSONS CONDEMNED TO DEATH.

938. Every one who is sentenced to suffer death shall, after judgment, be confined in some safe place within the prison, apart from all other prisoners; and no person except the gaoler and his servants, the medical officer or surgeon of the prison and a chaplain or a minister of religion, shall have access to any such convict, without the permission in writing of the court or judge before whom such convict has been tried, or of the sheriff. R. S. C. c. 181, s. 9.

EXECUTION TO BE PRIVATE.

939. Judgment of death to be executed on any prisoner shall be carried into effect within the walls of the prison in which the offender is confined at the time of execution. R. S. C. c. 181, s. 10.

WHO MAY BE PRESENT.

940. The sheriff charged with the execution, and the gaoler and medical officer or surgeon of the prison, and such other officers of the prison and such persons as the sheriff requires, shall be present at the execution. R. S. C. c. 181, s. 11.

941. Any justice of the peace for the district, county or place to which the prison belongs, and such relatives of the prisoner or other persons as it seems to the sheriff proper to admit within the prison for the purpose, and any minister of religion who desires to attend, may also be present at the execution. R. S. C. s. 181, s. 12.

CERTIFICATE OF DEATH.

942. As soon as may be after judgment of death has been executed on the offender, the medical officer or surgeon of the prison shall examine the body of the offender, and shall ascertain the fact of death, and shall sign a

certificate thereof, in the form UUU in schedule one hereto, and deliver the same to the sheriff.

2. The sheriff and the gaoler of the prison, and such justices and other persons present, if any, as the sheriff requires or allows, shall also sign a declaration in the form VVV in the said schedule to the effect that judgment of death has been executed on the offender. R. S. C. c. 181, ss. 13 & 14.

As to a false certificate of execution *see* s. 158, *ante*.

FORMS UNDER TITLE VIII.

UUU.—(*Section* 942.)

CERTIFICATE OF EXECUTION OF JUDGMENT OF DEATH.

I, A. B., surgeon (*or as the case may be*) of the (*describe the prison*), hereby certify that I, this day, examined the body of C. D., on whom judgment of death was this day executed in the said prison; and that on such examination I found that the said C. D. was dead.

(Signed), A. B.

Dated this day of , in the year

VVV.—(*Section* 942.)

DECLARATION OF SHERIFF AND OTHERS.

We, the undersigned, hereby declare that judgment of death was this day executed on C. D., in the (*describe the prison*) in our presence.

Dated this day of , in the year

E. F., Sheriff of——
L. M., Justice of the Peace for——
G. H., Gaoler of——
&c., &c.

WHEN DEPUTIES MAY ACT.

943. The duties imposed upon the sheriff, gaoler, medical officer or surgeon by the two sections next preceding, may be and, in his absence, shall be performed by his lawful deputy or assistant, or other officer or person ordinarily acting for him, or conjointly with him, *or discharging* the duties of any such officer. R. S. C. c. 181, s. 15.

INQUEST BY CORONER.

944. A coroner of a district, county or place to which the prison belongs, wherein judgment of death is executed on any offender, shall, within twenty-four hours after the execution, hold an inquest on the body of the offender; and the jury at the inquest shall inquire into and ascertain the identity of the body, and whether judgment of death was duly executed on the offender; and the inquisition shall be in duplicate, and one of the originals shall be delivered to the sheriff.

2. No officer of the prison and no prisoner confined therein shall, in any case, be a juror on the inquest. R. S. C. c. 181, ss. 16 & 17.

BURIAL OF THE BODY.

945. The body of every offender executed shall be buried within the walls of the prison within which judgment of death is executed on him, unless the Lieutenant-Governor in Council *orders otherwise*. R. S. C. c. 181, s. 18.

CERTIFICATE.

946. Every certificate and declaration, and a duplicate of the inquest required by this Act, shall in every case be sent with all convenient speed by the sheriff to the Secretary of State, or to such other officer as is, from time to time, appointed for the purpose by the Governor in Council; and printed copies of such several instruments shall, as soon as possible, be exhibited and shall, for twenty-four hours at least, be kept exhibited on or near the principal entrance of the prison within which judgment of death is executed. R. S. C. c. 181, s. 20.

As to false certificate *see* s. 158, *ante*.

NO ILLEGALITY FROM CERTAIN OMISSIONS.

947. The omission to comply with any provision of the preceding sections of this part shall not make the execution of judgment of death illegal in any case in which such execution would otherwise have been legal. R. S. C. c. 181, s. 21.

948. Except in so far as is hereby otherwise provided, judgment of death shall be carried into effect in the same manner as if the above provisions had not been passed. R. S. C. c. 181, s. 22.

RULES AND REGULATIONS.

949. The Governor in Council may, from time to time, make such rules and regulations to be observed on the execution of judgment of death in every prison, as he, from time to time, deems expedient for the purpose, as well of guarding against any abuse in such execution, as also of giving greater solemnity to the same, and of making known without the prison walls the fact that such execution is taking place.

2. All such rules and regulations shall be laid upon the tables of both Houses of Parliament within six weeks after the making thereof, or, if Parliament is not then sitting, within fourteen days after the next meeting thereof. R. S. C. c. 181, ss. 44 & 45.

The Imperial Act on capital executions is 31 V. c. 24.

Of course, when possible, it seems better that the sentence of death, and, in fact, any sentence, be passed by the judge who held the trial; but it is not an absolute necessity, and any judge of the same court may pronounce the sentence: 2 Hale, 405; 1 Chit. 697; R. v. Camplin, 1 Den. 89, as cited in R. v. Fletcher, Bell, 65.

If a case reserved is undecided, or if a writ of error is still pending, or if the Governor has not yet given his decision upon the case, or if a woman sentenced to death is pregnant, or if the prisoner becomes insane after the sentence, a reprieve may be granted either by the Governor, or any judge of the court where the trial was held, in term or in vacation: 1 Chit. 758; 2 Hale, 412.

It is clear that if, from any mistake or collusion, the criminal is cut down before he is really dead, and afterwards revives, he ought to be hanged again, for the judgment being "to be hanged by the neck till he be dead," is satisfied only by the death of the criminal: 1 Chit. 788; 2 Hale, 412.

PART LXIII.

IMPRISONMENT.

950. Every one who is convicted of any offence not punishable with death shall be punished in the manner, if any, prescribed by the statute especially relating to such offence. R. S. C. c. 181, s. 23.

951. Every person convicted of any indictable offence for which no punishment is specially provided, shall be liable to imprisonment for *five* years.

2. Every one who is summarily convicted of any offence for which no punishment is specially provided, shall be liable to a penalty not exceeding *fifty* dollars, or to imprisonment, with or without hard labour, for a term not exceeding *six* months, or to both. R. S. C. c. 181, s. 24 (as amended in 1893).

Imprisonment for life was the penalty for felonies by the repealed clause. By the above clauses, such felonies as

those enacted by s. 212, c. 32, and s. 94, c. 34, R. S. C. are now punishable only by five years or a mere fine; s. 958, *post*.

Twenty dollars and three months was the maximum on summary convictions in the repealed clause.

Imprisonment for one calendar month how computed: Migotti v. Colville, 4 C. P. D. 233, 14 Cox, 263, 305; Henderson v. Preston, 16 Cox, 445.

952. Every one who is convicted of an *indictable offence* not punishable with death, committed after a previous conviction for an *indictable offence*, is liable to imprisonment for *ten* years, unless some other punishment is directed by any statute for the particular offence,—in which case the offender shall be liable to the punishment thereby awarded, and not to any other. R. S. C. c. 181, s. 25. (*Amended*).

This is a singular piece of legislation if it means anything. All and every one of the indictable offences for which no special statutory punishment is provided, whether falling under this code or otherwise, are to be punished more severely if committed by one who has previously been convicted of an indictable offence. But for those falling under the code, and where the punishment is provided for, that is for every one of them, except a few, where the punishment has been "clerically" forgotten, (ss. 113, 137, 143, 501, for instances), a previous conviction of an indictable offence does not, as a rule, render an offender liable to a greater punishment. Section 356, which amends the law so as to limit it to previous convictions for *theft*, and ss. 418 & 478 as to burglary and offences against the coin are the only ones that provide for a greater punishment after a previous conviction. Why such a distinction? Evidently, we have here another piece of legislation by inadvertence. Bribery, undue influence and subornation of personation at federal elections, for instance, are under ss. 951 and 952 punishable by five years penitentiary, and, if the offender has been previously convicted of an indictable offence, by ten years.

A train conductor drunk on duty, or who allows any baggage or freight car to be placed in the rear of the passenger cars (51 V. c. 29, ss. 291, 292) is likewise punishable by five years penitentiary, and, upon a second conviction, by ten years, whilst the forgery of a custom house mark or brand is only punishable upon summary conviction by a two hundred dollars fine: s. 210, c. 32, R. S. C.

MINIMUM TERM OF IMPRISONMENT.

953. Every one who is liable to imprisonment for life, or for any term of years, or other term, may be sentenced to imprisonment for any shorter term: Provided, that no one shall be sentenced to any shorter term of imprisonment than the minimum term, if any, prescribed for the offence of which he is convicted. R. S. C. c. 181, s. 26.

CUMULATIVE PUNISHMENTS.

954. When an offender is convicted of more offences than one, before the same court or person at the same sitting, or when any offender, under sentence or undergoing punishment for one offence, is convicted of any other offence, the court or person passing sentence may, on the last conviction, direct that the sentences passed upon the offender for his several offences shall take effect one after another. R. S. C. c. 181, s. 27.

See R. v. Wilkes, 4 Burr. 2577; R. v. Williams, 1 Leach, 536; R. v. Orton, 14 Cox, 436 and 546.

PENITENTIARY, ETC.

955. Every one who is sentenced to imprisonment for life, or for a term of years, not less than two, shall be sentenced to imprisonment in the penitentiary for the province in which the conviction takes place.

2. Every one who is sentenced to imprisonment for a term less than two years shall, if no other place is expressly mentioned, be sentenced to imprisonment in the common gaol of the district, county or place in which the sentence is pronounced, or if there is no common gaol there, then in that common gaol which is nearest to such locality, or in some lawful prison or place of confinement, other than a penitentiary, in which the sentence of imprisonment may be lawfully executed.

3. Provided that where any one is sentenced to imprisonment in a penitentiary, and at the same sittings or term of the court trying him is sentenced for one or more other offences to a term or terms of imprisonment less than two years each, he may be sentenced for such shorter terms to imprisonment in the same penitentiary, such sentences to take effect from the termination of his other sentence.

4. Provided further that any prisoner sentenced for any term by any military, naval or militia court-martial, or by any military or naval authority under any Mutiny Act, may be sentenced to imprisonment in a penitentiary; and if such prisoner is sentenced to a term less than two years, he may be so

tenced to imprisonment in the common gaol of the district, county or place in which the sentence is pronounced, or in such other prison or place of confinement as is provided by sub-section two of this section with respect to persons sentenced thereunder.

5. Imprisonment in a penitentiary, in the Central Prison for the province of Ontario, in the Andrew Mercer Ontario Reformatory for females, and in any reformatory prison for females in the province of Quebec, shall be with hard labour, whether so directed in the sentence or not.

6. Imprisonment in a common gaol, or a public prison, other than those last mentioned, shall be with or without hard labour, in the discretion of the court or person passing sentence, if the offender is convicted on indictment, or under the provisions of Parts LIV. or LV. (Ss. 762, 782), or before a judge of the Supreme Court of the North-west Territories, and in other cases may be with hard labour, if hard labour is part of the punishment for the offence of which such offender is convicted—and if such imprisonment is to be with hard labour, the sentence shall so direct.

7. The term of imprisonment, in pursuance of any sentence, shall, unless otherwise directed in the sentence, commence on and from the day of passing such sentence, but no time during which the convict is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced.

8. Every one who is sentenced to imprisonment in any penitentiary, gaol, or other public or reformatory prison, shall be subject to the provisions of the statutes relating to such penitentiary, gaol or prison, and to all rules and regulations lawfully made with respect thereto. R. S. C. c. 181, s. 28; 53 V. c. 37, s. 31.

Under s-s. 7, a confinement in a lunatic asylum does not interrupt the sentence: *Ex parte* Armellini, 14 R. L. 311.

REFORMATORIES.

956. The court or person before whom any offender whose age at the time of his trial does not, in the opinion of the court, exceed sixteen years, is convicted, whether summarily or otherwise, of any offence punishable by imprisonment, may sentence such offender to imprisonment in any reformatory prison in the province in which such conviction takes place, subject to the provisions of any Act respecting imprisonment in such reformatory; and such imprisonment shall be substituted, in such case, for the imprisonment in the penitentiary or other place of confinement by which the offender would otherwise be punishable under any Act or law relating thereto: Provided, that in no case shall the sentence be less than two years' or more than five years' confinement in such reformatory prison; and in every case where the term of imprisonment is fixed by law to be more than five years, then such imprisonment shall be in the penitentiary.

2. Every person imprisoned in a reformatory shall be liable to perform such labour as is required of such person. R. S. C. c. 181, s. 29.

PART LXIV.

Whipping.

957. Whenever whipping may be awarded for any offence, the court may sentence the offender to be once, twice or thrice whipped, within the limits of the prison, under the supervision of the medical officer of the prison; and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence: and, 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.

2. Whipping shall not be inflicted on any female. R. S. C. c. 181, s. 30.

PART LXV.

SURETIES FOR KEEPING THE PEACE, AND FINES.

958. Every court of criminal jurisdiction and every magistrate under Part LV. (s. 782) before whom any person shall be convicted of an offence and shall not be sentenced to death, shall have power in addition to any sentence imposed upon such person, to require him forthwith to enter into his own recognizances, or to give security to keep the peace, and be of good behaviour *for any term not exceeding two years*, and that such person in default shall be imprisoned for not more than one year after the expiry of his imprisonment under his sentence, or until such recognizances are sooner entered into or such security sooner given, and any person convicted of an indictable offence punishable with imprisonment for five years or less may be fined in addition to or in lieu of any punishment otherwise authorized, *in which case the sentence may direct that in default of payment of his fine, the person so convicted shall be imprisoned until such fine is paid, or for a period not exceeding five years, to commence at the end of the term of imprisonment awarded by the sentence or forthwith as the case may require.* R. S. C. c. 181, s. 31. (*As amended in 1893*).

The words in italics are new: *see* s. 934, *ante*, as to amount of fine when specified. "Security" defined by Interpretation Act, R. S. C. c. 1.

RECOGNIZANCE TO KEEP THE PEACE—ARTICLES OF THE PEACE. (*New*).

(*As amended in 1893.*)

959. Whenever any person is charged before a justice with an offence triable under Part LVIII. which, in the opinion of such justice is directly against the peace, and the justice after hearing the case is satisfied of the guilt of the accused, and that the offence was committed under circumstances which render it probable that the person convicted will be again guilty of the same or some other offence against the peace unless he is bound over to good behaviour, such justice may, in addition to, or in lieu of, any other sentence which may be imposed upon the accused, require him forthwith to enter into his own recognizances (*recognizance*), or to give security to keep the peace and be of good behaviour for any term not exceeding twelve months.

2. Upon complaint by or on behalf of any person that on account of threats made by some other person or on any other account, he, the complainant, is afraid that such other person will do him, his wife or child some personal injury, or will burn or set fire to his property, the justice before whom such complaint is made may, if he is satisfied that the complainant has reasonable grounds for his fears, require such other person to enter into his own recognizances (*recognizance*), or to give security, to keep the peace, and to be of good behaviour, for a term not exceeding twelve months.

3. The provisions of Part LVIII. shall apply so far as the same are applicable to proceedings under this section, and the complainant and defendant and witnesses may be called and examined, and cross-examined, and the complainant and defendant shall be subject to costs as in the case of any other complaint.

4. If any person so required to enter into his own recognizances (*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 WWW, XXX and YYY, with such variations and additions as the circumstances may require, may be used in proceedings under this section.

The forms XXX and YYY, taken originally from 16 V. c. 178 (for Upper Canada), are not in conformity with this enactment.

As to articles of the peace, *see* Bacon's Abr. v. surety of the peace; Archbold's Quart. Sess. 268; Magisterial Guide, Greenwood & Martin, 758; Clarke's Magistrates' Manual, 2nd edit., 542.

No provision is made for the recourse against the sureties where the principal breaks the peace within the time specified.

"Security" defined, Interpretation Act, R. S. C. c. 1.

WWW.—(*Section* 959.)

COMPLAINT BY THE PARTY THREATENED, FOR SURETIES FOR THE PEACE.

Canada,
Province of ,
County of .

The information (*or* complaint) of C. D., of , in the said county of , (*labourer*), (*if preferred by an attorney or agent, say*—by D. E., his duly authorized agent (*or* attorney), in this behalf, taken upon oath, before me, the undersigned, a justice of the peace, in and for the said county of , at in the said county of , this day of , in the year , who says that A. B., of , in the said county, did, on the day of (instant *or* last past), threaten the said C. D, in the words or to the effect following, that is to say: (*set them out, with the circumstances under which they were used*); and that from the above and other threats used by the said A. B. towards the said C. D., he, the said C. D., is afraid that the said A. B. will do him some bodily injury, and therefore prays that the said A. B. may be required to find sufficient sureties to keep the peace and be of good behaviour towards him, the said C. D.; and the said C. D. also says that he does not make this complaint against nor require such sureties from the said A. B. from any malice or ill-will, but merely for the preservation of his person from injury.

XXX.—(*Section* 959.)

FORM OF RECOGNIZANCE FOR THE SESSIONS.

Canada,
Province of ,
County of .

Be it remembered that on the day of , in the year , A. B. of (*labourer*), L. M. of and N. O. of , (*butcher*), personally came before (*us*) the undersigned, (*two*) justices of the peace for the county of and severally acknowledged themselves to owe to our Lady the Queen the several sums following, that is to say: the said A. B.

the sum of , and the said L. M. and N. O. the sum of each, of good and lawful money of Canada, to be made and levied of their goods and chattels, lands and tenements respectively, to the use of our said Lady the Queen, Her heirs and successors, if he, the said A. B., fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned, at before us.

J. S.,
J. T.,
J. P.'s (*Name of county.*)

The condition of the within (*or* above) written recognizance is such that if the within bound A. B., (of, &c.), * appears at the next Court of General Sessions of the Peace. (*or other Court discharging the functions of the Court of General Sessions*), to be holden in and for the said county of , to do and receive what is then and there enjoined him by the court, and in the meantime* keeps the peace and is of good behaviour towards Her Majesty and her liege people, and specially towards C. D. (of &c.) for the term of now next ensuing, then the said recognizance to be void, otherwise to stand in full force and virtue.

The words between the asterisks * * to be used only where the principal is required to appear at the sessions of such other court.

YYY.—(*Section* 959.)

FORM OF COMMITMENT IN DEFAULT OF SURETIES.

Canada,
Province of ,
County of .

To all or any of the other peace officers in the county of and to the keeper of the common gaol of the said county, at , in the said county.

Whereas on the day of (*instant*), complaint on oath was made before the undersigned (*or* J. L., Esquire, a justice of the peace in and for the said county of , by C. D., of , in the said county, (*labourer*), that A. B., of (&c.), on the day of , at aforesaid, did

threaten (*&c., follow to the end of complaint, as in form above, in the past tense, then*): And whereas the said A. B. was this day brought and appeared before me, the said justice (*or* J. L. Esquire, a justice of the peace in and for the said county of), to answer unto the said complaint; and having been required by me to enter into his own recognizance in the sum of , with two sufficient sureties in the sum of each, * as well for his appearance at the next General Sessions of the Peace (*or other court discharging the functions of the Court of General Sessions, or as the case may be*), to be held in and for the said county of , to do what shall be then and there enjoined him by the court, as also in the meantime * to keep the peace and be of good behaviour towards Her Majesty and her liege people, and especially towards the said C. D., has refused and neglected, and still refuses and neglects, to find such sureties: These are, therefore, to command you, and each of you, to take the said A. B., and him safely to convey to the (common gaol) at aforesaid, and there to deliver him to the keeper thereof, together with this precept: and I do hereby command you, the said keeper of the said (common gaol), to receive the said A. B. into your custody in the said (common gaol), there to imprison him until the said next General Sessions of the Peace (*or the next term or sitting of the said court discharging the functions of the Court of General Sessions, or as the case may be*), unless he, in the meantime, finds sufficient sureties as well for his appearance at the said Sessions (or court) as in the meantime to keep the peace as aforesaid.

Given under my hand and seal, this day of in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (*Name of county.*)

The words between the asterisks * * to be used when the recognizance is to be so conditioned.

NOTICE WHEN ANY ONE IS IMPRISONED FOR WANT OF SURETIES.

960. Whenever any person who has been required to enter into a recognizance with sureties to keep the peace and be of good behaviour has, on account of his default therein, remained imprisoned for two weeks, the sheriff, gaoler or warden shall give notice, in writing, of the facts to a judge of a

Superior Court, or to a judge of the County Court of the county or district in which such gaol or prison is situate, and in the cities of Montreal and Quebec to a judge of the sessions of the peace for the district, or, in the North-west Territories to a stipendiary magistrate,—and such judge or magistrate may order the discharge of such person, thereupon or at a subsequent time, upon notice to the complainant or otherwise, or may make such other order as he sees fit, respecting the number of sureties, the sum in which they are to be bound and the length of time for which such person may be bound. R. S. C. c. 181, s. 32. 51 V. c. 47, s. 2.

PART LXVI.

DISABILITIES. (*New*).

961. If any person hereafter convicted of treason or any indictable offence for which he is sentenced to death or imprisonment for a term exceeding five years, holds at the time of such conviction any office under the Crown or other public employment, or is entitled to any pension or superannuation allowance payable by the public, or out of any public fund, such office or employment shall forthwith become vacant, and such pension or superannuation allowance or emolument shall forthwith determine and cease to be payable, unless such person receives a free pardon from Her Majesty, within two months after such conviction, or before the filling up of such office or employment, if given at a later period; and such person shall become, and (until he suffers the punishment to which he is sentenced, or such other punishment as by competent authority is substituted for the same, or receives a free pardon from Her Majesty) shall continue thenceforth incapable of holding any office under the Crown, or other public employment, or of being elected, or sitting, or voting, as a member of either House of Parliament, or of exercising any right of suffrage or other parliamentary or municipal franchise. 33-34 V. (U. K.) c. 23, s. 2.

2. The setting aside of a conviction by competent authority shall remove the disability herein imposed.

PART LXVII.

PUNISHMENTS ABOLISHED.

962. Outlawry in criminal cases is abolished. (*New*).

963. The punishment of solitary confinement or of the pillory shall not be awarded by any court. R. S. C. c. 181, s. 34.

964. There shall be no forfeiture of any chattels, which have moved to or caused the death of any human being, in respect of such death. R. S. C. c. 181, s. 35.

By the common law, *omnia quæ movent ad mortem sunt Deo danda*. Hence the word "deodand," which signified a personal chattel which had been the immediate occasion of the death of any reasonable creature, and which, in consequence, was forfeited to the Crown, to be applied to pious uses, and distributed in alms by the High Almoner. Whether the death were accidental or intended, whether the person whose chattel had caused the death participated in the act or not, was immaterial. The cart, the horse, the sword, or anything which had occasioned the death of a human being, or the value thereof, was forfeited, if the party died within a year and a day from the wound received. And for this object the coroner's jury had to inquire what instrument caused the death, and to establish the value of it. But the jury used to find a nominal value only, and confine the deodand to the very thing or part of the thing itself which caused the death, as, if a waggon, to one of the wheels only: R. v. Rolfe, Fost. 266; 1 Hawk. 74; 1 Blacks. 300. This forfeiture, "which seemeth to have been originally founded rather in the superstition of an age of extreme ignorance than in the principles of sound reason and true policy," Fost. 266, was abolished in England on the 1st day of September, 1846, by the 9 & 10 V. c. 62.

ATTAINDER ABOLISHED. (*New.*)

965. From and after the passing of this Act no confession, verdict, inquest, conviction or judgment of or for any treason or indictable offence or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture or escheat; Provided that nothing in this section shall affect any fine or penalty imposed on any person by virtue of his sentence, or any forfeiture in relation to which special provision is made by any Act of the Parliament of Canada. 33-34 V. (U. K.) c. 23, ss. 1, 6 & 5. R. S. C. c. 181, ss. 36-37.

By the common law, a man convicted of treason or felony stands *attaint*. By this attainder, he loses his civil rights and capacities, and becomes dead in law, *civiliter mortuus*: 1 Stephens' Comm. 141. He forfeits to the King all his lands and tenements, as well as his personal estate, his blood is corrupted, so that nothing can pass by inheritance to, from or through him: 4 Blacks. 380, 387. But the lands or tenements are not vested in the Crown during the life of the offender, *without office or office-found* which is a finding by a jury of a fact which entitles the Crown to the possession of such lands or tenements: Wharton's Law Lexicon.

PART LXVIII.

PARDONS.

966. The Crown may extend the royal mercy to any person sentenced to imprisonment by virtue of any statute, although such person is imprisoned for non-payment of money to some person other than the Crown.

2. Whenever the Crown is pleased to extend the royal mercy to any offender convicted of an indictable offence punishable with death or otherwise, and grants to such offender either a free or a conditional pardon, by warrant under the royal sign manual, countersigned by one of the principal Secretaries of State, or by warrant under the hand and seal-at-arms of the Governor General, the discharge of such offender out of custody, in case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon of such offender, under the great seal, as to the offence for which such pardon has been granted; but no free pardon, nor any discharge in consequence thereof, nor any conditional pardon, nor the performance of the condition thereof, in any of the cases aforesaid, shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced, on a subsequent conviction for any offence other than that for which the pardon was granted. R. S. C. c. 181, ss. 38 & 39.

Commutation.

967. The Crown may commute the sentence of death passed upon any person convicted of a capital offence to imprisonment in the penitentiary for life, or for any term of years not less than two years, or to imprisonment in any gaol or other place of confinement for any period less than two years, with or without hard labour; and an instrument under the hand and seal-at-arms of the Governor General, declaring such commutation of sentence, or a letter or other instrument under the hand of the Secretary of State or of the Under Secretary of State, shall be sufficient authority to any judge or justice, having jurisdiction in such case, or to any sheriff or officer to whom such letter or instrument is addressed, to give effect to such commutation, and to do all such things and to make such orders, and to give such directions, as are requisite for the change of custody of such convict, and for his conduct to and delivery at such gaol or place of confinement or penitentiary, and his detention therein, according to the terms on which his sentence has been commuted. R. S. C. c. 181, s. 40.

Undergoing Sentence.

968. When any offender has been convicted of an offence not punishable with death, and has endured the punishment to which such offender was adjudged,—or if such offence is punishable with death and the sentence has been commuted, then if such offender has endured the punishment to which his sentence was commuted, the punishment so endured shall, as to the offence whereof the offender was so convicted, have the like effect and conse-

quences as a pardon under the great seal; but nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced, on a subsequent conviction for any other offence. R. S. C. c. 181, s. 41.

See Leyman v. Latimer, 14 Cox, 51.

UNDERGOING PUNISHMENT A BAR TO ANOTHER PROSECUTION.

969. When any person convicted of any offence has paid the sum adjudged to be paid, together with costs, if any, under such conviction, or has received a remission thereof from the Crown, or has suffered the imprisonment awarded for non-payment thereof, or the imprisonment awarded in the first instance, or has been discharged from his conviction by the justice of the peace in any case in which such justice of the peace may discharge such person, he shall be released from all further or other criminal proceedings *for the same cause*. R. S. C. c. 181, s. 42.

See s. 866, *ante*, and 24 & 25 V. c. 100, ss. 44, 45 (Imp.).

This enactment applies only to summary convictions, and creates a bar to ulterior criminal, not to civil proceedings. *See* R. v. Miles, 17 Cox, 9, 24 Q. B. D. 423, Warb. Lead. Cas. 230, and cases there cited.

ROYAL PREROGATIVE.

970. Nothing in this part shall in any manner limit or affect Her Majesty's royal prerogative of mercy. R. S. C. c. 181, s. 43.

CONDITIONAL RELEASE OF FIRST OFFENDERS.

971. In any case in which a person is convicted before any court of any offence punishable with not more than two years' imprisonment, and no previous conviction is proved against him, if it appears to the court before which he is so convicted, that, regard being had to the youth, character, and antecedents of the offender, to the trivial nature of the offence, and to any extenuating circumstances under which the offence was committed, it is expedient that the offender be released on probation of good conduct, the court may instead of sentencing him at once to any punishment, direct that he be released on his entering into a recognizance, with or without sureties, and during such period as the court directs, to appear and receive judgment when called upon, and in the meantime to keep the peace and be of good behaviour.

2. The court may, if it thinks fit, direct that the offender shall pay the costs of the prosecution, or some portion of the same, within such period and by such instalments as the court directs. 52 V. c. 44, s. 2.

972. The court, before directing the release of an offender under the next preceding section, shall be satisfied that the offender or his surety has a fixed place of abode or regular occupation in the county or place for which the court acts, or in which the offender is likely to live during the period named for the observance of the conditions. 52 V. c. 44, s. 4.

973. If a court having power to deal with such offender in respect of his original offence or any justice of the peace is satisfied by information on oath that the offender has failed to observe any of the conditions of his recognizance, such court or justice of the peace may issue a warrant for his apprehension.

2. An offender, when apprehended on any such warrant, shall, if not brought forthwith before the court having power to sentence him, be brought before the justice issuing such warrant or before some other justice in and for the same territorial division, and such justice shall either remand him by warrant until the time at which he was required by his recognizance to appear for judgment, or until the sitting of a court having power to deal with his original offence, or admit him to bail (with a sufficient surety) conditioned on his appearing for judgment.

3. The offender when so remanded may be committed to a prison, either for the county or place in or for which the justice remanding him acts, or for the county or place where he is bound to appear for judgment; and the warrant of remand shall order that he be brought before the court before which he was bound to appear for judgment, or to answer as to his conduct since his release. 52 V. c. 44, s. 3.

974. In the three next preceding sections the expression "court" means and includes any superior court of criminal jurisdiction, any "judge" or court within the meaning of Part LV., and any "magistrate" within the meaning of Part LVI. of this Act. 52 V. c. 44, s. 1.

TITLE IX.

ACTIONS AGAINST PERSONS ADMINISTERING THE CRIMINAL LAW.

975. Every action and prosecution against any person for anything purporting to be done in pursuance of any Act of the Parliament of Canada relating to criminal law, shall, unless otherwise provided, be laid and tried in the district, county or other judicial division, where the act was committed and not elsewhere, and shall not be commenced except within six months next after the act committed. R. S. C. c. 185, s. 1.

976. Notice in writing of such action and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action. R. S. C. c. 185, s. 2.

977. In any such action the defendant may plead the general issue, and give the provisions of this title and the special matter in evidence at any trial had thereupon. R. S. C. c. 185, s. 3.

978. No plaintiff shall recover in any such action if tender of sufficient amends is made before such action brought, or if a sufficient sum of money is paid into court by or on behalf of the defendant after such action brought. R. S. C. c. 185, s. 4.

979. If such action is commenced after the time hereby limited for bringing the same, or is brought or the venue laid in any other place than as aforesaid, a verdict shall be found or judgment shall be given for the defendant; and thereupon or if the plaintiff becomes nonsuit, or discontinues any such action after issue joined, or if upon demurrer or otherwise judgment is given against the plaintiff, the defendant shall, in the discretion of the court, recover his full costs as between solicitor and client, and shall have the like remedy for the same as any defendant has by law in other cases; and although a verdict or judgment is given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge, before whom the trial is had, certifies his approval of the action. R. S. C. c. 185, s. 5.

980. Nothing herein shall prevent the effect of any Act in force in any Province of Canada, for the protection of justices of the peace or other officers from vexatious actions for things purporting to be done in the performance of their duty. R. S. C. c. 185, s. 6.

TITLE X.

REPEAL, ETC.

981. The several Acts set out and described in schedule two to this Act shall, from and after the date appointed for the coming into force of this Act, be repealed to the extent stated in the said schedule.

2. (As amended in 1893.) The provisions of this Act which relate to procedure shall apply to all prosecutions commenced on or after the day upon which this Act comes into force, in relation to any offence, whensoever committed. The proceedings in respect of any prosecution commenced before the said date otherwise than under the Summary Convictions Act, shall, up to the time of committal for trial, be continued as if this Act had not been passed, and after committal for trial shall be subject to all the provisions of this Act relating to procedure, so far as the same are applicable thereto. The proceedings in respect of any prosecutions commenced before the said day, under the Summary Convictions Act, shall be continued and carried on as if this Act had not been passed.

Sub-section 1 of this s. 981 is intended to enact that the repeal of the divers Acts, described in schedule two, shall come into force on the 1st of July, 1893, the date fixed by s. 2, for the coming into force of the code. A simple way to do so, and the usual way in statutory language, would have been to merely enact that the several Acts mentioned in the schedule are repealed. The code and the repeal clause would then have come into force together; but, as the section reads, it is open to the construction that whilst the code comes into force on the 1st of July, the repeal of the divers Acts mentioned takes effect only on the 2nd of July.

FORMS.

982. The several forms in schedule one to this Act, varied to suit the case or forms to the like effect, shall be deemed good, valid and sufficient in law. R. S. C. c. 174, s. 278; c. 178, s. 111.

These forms are inserted under the sections to which they respectively apply.

See also Interpretation Act: R. S. C. c. 1, s. 7, s-s. 44, as to forms generally.

Some of these forms are nothing but "snares to entrap persons." The form of indictment, for instance, in schedule one, FF *d.* (*see* under s. 611, *ante*), for the offence provided for by s. 146, s-s. 2, cannot be followed. The words "penal servitude" in it are nonsensical. There is no such punishment in Canada. The form in the Imperial draft Code of 1879 has been slavishly copied, without paying attention to the differences in the punishments in England and Canada. The form for the offence provided for by s. 241 is also totally wrong. There is no such offence as *doing actual* bodily harm to any one with intent to maim.

See R. v. Johnson, 8 Q. B. 102; R. v. Kimber, 3 Cox, 223. Compare Barnes v. White, 1 C. B. 192; in re Allison, 10 Ex. 561; R. v. Sansome, 1 Den. 545; Egginton's case, 5 E. & B. 100; Charter v. Greame, 13 Q. B. 216; R. v. Bain, Ramsay's App. Cas. 191; R. v. Davis, 18 U. C. Q. B. 180; R. v. Shaw, 23 U. C. Q. B. 616; Moffatt v. Barnard, 24 U. C. Q. B. 498; R. v. Turner, 1 Moo. 239, 4 B. & Ald. 510; R. v. Bent, 1 Den. 157; R. v. Cox, 1 Leach 71; R. v. Ryan, 2 Moo. 15; R. v. Lewis, 2 Russ. 1067; R. v. Cummings, 16 U. C. Q. B. 15; R. v. McLaughlin, 3 Allen, (N. B.), 159.

APPLICATION OF THE ACT, ETC.

983. The provisions of this Act extend to and are in force in the North-West Territories and the district of Keewatin except in so far as they are inconsistent with the provisions of the *North-West Territories Act* or *The Keewatin Act* and the amendments thereto.

2. Nothing in this Act shall affect any of the laws relating to the government of Her Majesty's land or naval forces.

3. Nothing herein contained shall affect the Acts and parts of Acts in the appendix to this Act. And in construing such parts reference may be had to the repealed portions of the Acts of which respectively they form parts, as well as to any sections of this Act which have been substituted therefor, or which deal with like matters.

This s-s. 3 and the appendix, taken together, are not always in accord with s. 981 and sched. 2. The latter one, for instance, repeals the whole of c. 157 of the Revised Statutes. The former enacts that one sub-section of it is

in force. (This has since been remedied by the Amendment Act of 1893). Two sections of c. 158, and two of c. 163 are left unrepealed by sched. 2, but are not to be found in the appendix, though it is headed "Acts and parts of Acts which are not affected by this Act." Seven sections of c. 167 are left unrepealed by sched. 2, but six only could find place in the appendix. One sub-section of c. 173 is left unrepealed by sched. 2, but there is no trace of it in the appendix. To compensate for it it would seem only three sections of 51 V. c. 41, are left unrepealed by sched. 2, whilst five sections of it are in the appendix. One section out of thirteen of 53 V. c. 37, left unrepealed by sched. 2 is not in the appendix. It clearly was erroneously left unrepealed, but this one error added to the other ones shows with what carelessness the whole work has been done.

Then the Act respecting the postal service is given as c. 36 of the Revised Statutes, instead of c. 35; s. 86, and others of that Act have been left unrepealed whilst other penal sections have been repealed. S. 6 of 53 V. c. 37 is left unrepealed, though re-enacted by s. 177 of the code. Ss. 5, 6, 13, 14, & 15 of c. 151 R. S. C. are left unrepealed though re-enacted in ss. 117 & 118. S. 101 of c. 50 R. S. C., is also left unrepealed, though re-enacted in s. 116. S. 102, c. 8, R. S. C., is left unrepealed, though re-enacted in ss. 329 and 503. S. 1 of c. 152, R. S. C., is left unrepealed though re-enacted by and clashing with s. 113. S. 3 of c. 141, R. S. C. was left as unrepealed, but it had been repealed in 1890 by 53 V. c. 37, s. 41. The Canada Evidence Act of 1893 has since repealed the whole of that c. 141.

SCHEDULE ONE.

FORMS.

See under the various sections to which the forms respectively apply.

SCHEDULE TWO.

ACTS REPEALED.

Acts Repealed.	Title.	Extent of Repeal.
C.S.L.C. c.10	An Act respecting seditious and unlawful Associations and oaths.	Secs 1, 2, 3 & 4.
R.S.C. c. 32	An Act respecting the Customs.	Sec. 213.
" 34	An Act respecting the Inland Revenue.	Secs. 98 & 99.
" 36	An Act respecting the Postal Service.	Secs. 79 to 81, 83, 84, 88, 90, 91, 96, 103, 107, 110 & 111.
" 38	An Act respecting Government Railways	Sec. 62.
" 41	An Act respecting the Militia and Defence of Canada.	Sec. 109.
" 43	An Act respecting Indians	Secs. 106 (ss. 2) & 111.
" 65	An Act respecting Immigration and Immigrants.	Sec 37.
" 81	An Act respecting Wrecks, Casualties and Salvage	Secs. 35 to 37.
" 141	An Act respecting Extra-judicial oaths	Secs. 1 & 2.
" 145	An Act respecting Accessories.	The whole Act.
" 146	An Act respecting Treason and other offences against the Queen's authority.	The whole Act, except secs. 6 & 7.
" 147	An Act respecting Riots, unlawful assemblies and breaches of the peace	The whole Act.
" 148	An Act respecting the improper use of firearms and other weapons.	The whole Act, except sec. 7.
" 149	An Act respecting the seizure of arms kept for dangerous purposes.	The whole Act, except secs. 5 & 7.
" 150	An Act respecting Explosive Substances	The whole Act.
" 152	An Act respecting the preservation of peace at Public Meetings.	The whole Act, except secs 1, 2 & 3.
" 153	An Act respecting Prize-fighting.	The whole Act except secs 6, 7 & 10.
" 154	An Act respecting Perjury.	The whole Act, except sec. 4.
" 155	An Act respecting Escapes and Rescues.	The whole Act.
" 156	An Act respecting offences against Religion.	The whole Act.
" 157	An Act respecting offences against Public Morals and Public Convenience.	The whole Act, except sec. 8, subsec. 4 as amended in 1893.
" 158	An Act respecting Gaming houses.	The whole Act, except secs. 9 & 10.
" 159	An Act respecting Lotteries Betting and Pool-selling.	The whole Act.
" 160	An Act respecting Gambling in public conveyances	The whole Act.
" 161	An Act respecting offences relating to the Law of Marriage.	The whole Act.

ACTS REPEALED—*Continued.*

ACTS REPEALED.	TITLE.	EXTENT OF REPEAL.
R. S. C. c. 162	An Act respecting offences against the Person.	The whole Act.
" 163	An Act respecting Libel.	The whole Act, except secs. 6 & 7.
" 164	An Act respecting Larceny and similar offences.	The whole Act.
" 165	An Act respecting Forgery.	The whole Act.
" 167	An Act respecting offences relating to the Coin.	The whole Act, except secs. 26 & 29 to 34 inclusive.
" 168	An Act respecting malicious injuries to Property.	The whole Act
" 169	An Act respecting offences relating to the Army and Navy	The whole Act, except sec. 9.
" 171	An Act respecting the protection of Property of Seamen in the Navy.	The whole Act.
" 172	An Act respecting Cruelty to Animals.	The whole Act, except sec. 7.
" 173	An Act respecting Threats, Intimidation and other offences.	The whole Act, except sec. 12 (s-s. 5).
" 174	An Act respecting Procedure in Criminal Cases.	The whole Act.
" 176	An Act respecting the summary administration of Criminal Justice.	The whole Act.
" 177	An Act respecting Juvenile Offenders.	The whole Act.
" 178	An Act respecting summary proceedings before Justices of the Peace.	The whole Act.
" 179	An Act respecting Recognizances.	The whole Act.
" 180	An Act respecting Fines and Forfeitures.	The whole Act.
" 181	An Act respecting Punishments, Pardons and the Commutation of Sentences.	The whole Act.
" 185	An Act respecting Actions against persons administering the Criminal Law.	The whole Act.
50-51 V. c. 33	An Act to amend the Indian Act.	Sec. 11.
" 45	An Act respecting Public Stores.	The whole Act.
" 46	An Act respecting the conveyance of liquors on board Her Majesty's Ships in Canadian Waters.	The whole Act.
" 48	An Act to amend the Act respecting offences against Public Morals and Public Convenience.	The whole Act.
" 49	An Act to amend the Revised Statutes, Chapter one hundred and seventy-three, respecting Threats, Intimidation and other offences.	The whole Act.
" 50	An Act to amend the Law respecting Procedure in Criminal Cases.	The whole Act.
51 V. c. 29	An Act respecting Railways	Sec. 297.
" 40	An Act respecting the advertising of Counterfeit Money.	The whole Act.
" 41	An Act to amend the law relating to Fraudulent Marks on Merchandise.	The whole Act, except secs. 15, 16, 18, 22 & 23.
" 42	An Act respecting gaming in Stocks and Merchandise.	The whole Act.
" 43	An Act further to amend the Law respecting Procedure in Criminal Cases.	The whole Act.
" 44	An Act further to amend *The Criminal Procedure Act.*	The whole Act.
" 45	An Act to amend Chapter one hundred and seventy-eight of the Revised Statutes of Canada: *The Summary Convictions Act*	The whole Act.
" 47	An Act to amend the Revised Statutes of Canada, Chapter one hundred and eighty-one, respecting Punishments, Pardons and the Commutation of Sentences	The whole Act.
52 V. c. 22	An Act to amend the Revised Statutes, Chapter seventy-seven, respecting the safety of Ships	Sec. 3.
" 25	An Act to amend the Revised Statutes respecting the North-west Mounted Police Force.	Sec. 4.
" 40	An Act respecting Rules of Court in relation to Criminal Matters.	The whole Act.

ACTS REPEALED—*Continued.*

ACTS REPEALED.		TITLE.	EXTENT OF REPEAL.
52 V. c.	41	An Act for the prevention and suppression of Combinations formed in restraint of Trade.	The whole Act, except secs. 4 & 5.
"	42	An Act respecting Corrupt Practices in Municipal Affairs.	The whole Act.
"	44	An Act to permit the conditional release of first offenders in certain cases.	The whole Act.
"	45	An Act to amend *The Summary Convictions Act*, Chapter one hundred and seventy-eight of the Revised Statutes, and the Act amending the same.	The whole Act.
"	46	An Act to amend *The Summary Trials Act.*	The whole Act.
"	47	An Act to make further provision respecting the Speedy Trial of certain Indictable Offences.	The whole Act.
53 V. c.	10	An Act to prevent the disclosure of official documents and information.	The whole Act.
"	31	An Act respecting Banks and Banking.	Sec. 63.
"	37	An Act further to amend the Criminal Law.	The whole Act, except secs. 1, 2, 6, 32, to end.
"	38	An Act to amend the Public Stores Act.	The whole Act.
54-55 V. c.	23	An Act respecting Frauds upon the Government.	The whole Act.

APPENDIX.

ACTS AND PARTS OF ACTS WHICH ARE NOT AFFECTED BY THIS ACT.

R. S. C. CHAPTER 50.

An Act respecting the North-west Territories.

101. In this section—

(*a*) The expression "improved arm" means and includes all arms except smooth bore shot guns ;

(*b*) The expression "ammunition" means fixed ammunition or ball cartridge.

2. Every person who, in the territories,—

(*a*) Without the permission in writing (the proof of which shall be on him) of the Lieutenant-Governor, or of a commissioner appointed by him to give such permission, has in his possession or sells, exchanges, trades, barters or gives to, or with any person, any improved arm or ammunition, or—

(*b*) Having such permission, sells, exchanges, trades, barters or gives any such arm or ammunition to any person not lawfully authorized to possess the same,—

Shall, on summary conviction before a judge of the Supreme Court or two justices of the peace, be liable to a penalty not exceeding two hundred dollars, or to imprisonment for any term not exceeding six months, or to both.

3. All arms and ammunition which are in the possession of any person, or which are sold, exchanged, traded, bartered or given to or with any person in violation of this section, shall be forfeited to the Crown, and may be seized by any constable or other peace officer; and any judge of the Supreme Court or justice of the peace may issue a search warrant to search for and seize the same, as in the case of stolen goods.

4. The Governor in Council may, from time to time, make regulations respecting :—

(*a*) The granting of permission to sell, exchange, trade, barter, give or possess arms or ammunition ;

(*b*) The fees to be taken in respect thereof ;

(*c*) The returns to be made respecting permissions granted; and—

(*d*) The disposition to be made of forfeited arms and ammunition.

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

6. The Governor in Council may, from time to time, declare by proclamation that upon and after a day therein named this section shall be in force in the territories, or in any place or places therein in such proclamation designated; and upon and after such day but not before the provisions of this section shall take effect and be in force accordingly.

7. The Governor in Council may, in like manner, from time to time, declare this section to be no longer in force in any such place or places, and may again, from time to time, declare it to be in force therein.

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

R. S. C. CHAPTER 146.

An Act respecting Treason and other Offences against the Queen's Authority.

6. If any person, being a citizen or subject of any foreign state or country at peace with Her Majesty, is or continues in arms against Her Majesty, within Canada, or commits any act of hostility therein, or enters Canada with design or intent to levy war against Her Majesty, or to commit any felony therein, for which any person would, in Canada, be liable to suffer death, the Governor General may order the assembling of a militia general court-martial for the trial of such person, under *The Militia Act;* and upon being found guilty by such court-martial of offending against the provisions of this section, such person shall be sentenced by such court-martial to suffer death, or such other punishment as the court awards.

7. Every subject of Her Majesty, within Canada, who levies war against Her Majesty, in company with any of the subjects or citizens of any foreign state or country then at peace with Her Majesty, or enters Canada in company with any such subjects or citizens with

intent to levy war on Her Majesty, or to commit any such act of felony as aforesaid, or who, with the design or intent to aid and assist, joins himself to any person or persons whomsoever, whether subjects or aliens, who have entered Canada with design or intent to levy war on Her Majesty, or to commit any such felony within the same, may be tried and punished by a militia court-martial, in the same manner as any citizen or subject of a foreign state or country at peace with Her Majesty may be tried and punished under the next preceding section.

R. S. C. CHAPTER 148.

An Act respecting the improper use of Firearms and other Weapons.

7. The court or justice before whom any person is convicted of any offence against the provisions of the preceding sections, shall impound the weapon for carrying which such person is convicted, and if the weapon is not a pistol, shall cause it to be destroyed; and if the weapon is a pistol, the court or justice shall cause it to be handed over to the corporation of the municipality in which the conviction takes place, for the public uses of such corporation.

2. If the conviction takes place where there is no municipality, the pistol shall be handed over to the Lieutenant-Governor of the province in which the conviction takes place, for the public uses thereof in connection with the administration of justice therein.

R. S. C. CHAPTER 149.

An Act respecting the Seizure of Arms kept for dangerous purposes.

5. All justices of the peace in and for any district county, city, town or place, in Canada, shall have concurrent jurisdiction as justices of the peace, with the justices of any other district, county, city, town or place, in all cases with respect to the carrying into execution the provisions of this Act, and with respect to all matters and things relating to the preservation of the public peace under this Act, as fully and effectually as if each of such justices was in the commission of the peace, or was *ex officio* a justice of the peace for each of such districts, counties, cities, towns or places.

7. The Governor in Council may, from time to time, by proclamation, suspend the operation of this Act in any province of Canada or in any particular district, county or locality specified in the proclamation; and from and after the period specified in any such proclamation, the powers given by this Act shall be suspended in such province, district, county or locality; but nothing herein contained shall prevent the Governor in Council from again declaring, by proclamation, that any such province, district, county or locality shall be again subject to this Act and the powers hereby given, and upon such proclamation this Act shall be revived and in force accordingly.

R. S. C. CHAPTER 151.

An Act respecting the Preservation of Peace in the vicinity of Public Works.

INTERPRETATION.

1. In this Act, unless the context otherwise requires,—

(*a*) The expression "this Act" means such section or sections thereof, as are in force, by virtue of any proclamation, in the place or places with reference to which the Act is to be construed and applied;

(*b*) The expression "commissioner" means a commissioner under this Act;

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

(*d*) The expression "intoxicating liquor" means and includes any alcoholic, spirituous, vinous, fermented or other intoxicating liquor, or any mixed liquor, a part of which is spirituous or vinous, fermented or otherwise intoxicating;

(*e*) The expression "district county or place," includes any division of any province for the purposes of the administration of justice in the matter to which the context relates;

(*f*) The expression "public work" means and includes any railway, canal, road, bridge or other work of any kind, and any mining

operation constructed or carried on by the Government of Canada, or of any province of Canada, or by any municipal corporation, or by any incorporated company, or by private enterprise.

PROCLAMATION.

2. The Governor in Council may, as often as occasion requires, declare, by proclamation, that upon and after a day therein named, this Act, or any section or sections thereof, shall be in force in any place or places in Canada in such proclamation designated, within the limits or in the vicinity whereof any public work is in course of construction, or in such places as are in the vicinity of any public work, within which he deems it necessary that this Act, or any section or sections thereof, should be in force, and this Act, or any such section or sections thereof, shall, upon and after the day named in such proclamation, take effect within the places designated therein.

2. The Governor in Council may, in like manner, from time to time, declare this Act, or any section or sections thereof, to be no longer in force in any such place or places,—and may again, from time to time, declare this Act, or any section or sections thereof, to be in force therein.

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

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

WEAPONS.

3. On or before the day named in such proclamation, every person employed on or about any public work, to which the same relates, shall bring and deliver up, to some commissioner or officer appointed for the purposes of this Act, every weapon in his possession, and shall obtain from such commissioner or officer a receipt for the same.

4. Every weapon found in the possession of any person employed, as aforesaid, after the day named in any proclamation and within the limits designated in such proclamation, may be seized by any justice of the peace, commissioner, constable or other peace officer,—and shall be forfeited to the use of her Majesty.

5. Every one employed upon or about any public work, within the place or places in which this Act is then in force, who, upon or after the day named in such proclamation, keeps or has in his possession or under his care or control, within any such place, any

weapon, shall incur a penalty not exceeding four dollars and not less than two dollars for every such weapon found in his possession.

Section 117 of the code.

6. Every one who, for the purpose of defeating this Act, receives or conceals, or aids in receiving or concealing, or procures to be received or concealed, within any place in which this Act is at the time in force, any weapon belonging to or in the custody of any person employed on or about any public work, shall incur a penalty not exceeding one hundred dollars and not less than forty dollars, and a moiety of such penalty shall belong to the informer and the other moiety to Her Majesty, for the public uses of Canada.

Section 117 of the code.

7. Any commissioner or justice of the peace, constable or peace officer, or any person acting under a warrant, in aid of any constable or peace officer, may arrest and detain any person employed on any public work, found carrying any weapon, within any place in which this Act is, at the time, in force, at such time and in such manner as, in the judgment of such commissioner, justice of the peace, constable or peace officer, or person acting under a warrant, affords just cause of suspicion that it is carried for purposes dangerous to the public peace; and every one so employed, who so carries any such weapon, is guilty of a misdemeanour,—and the justice of the peace or commissioner arresting such person, or before whom he is brought under such a warrant, may commit him for trial for a misdemeanour, unless he gives sufficient bail for his appearance at the next term or sitting of the court before which the offence can be tried, to answer to any indictment to be then preferred against him.

8. Any commissioner appointed under this Act, or any justice of the peace having authority within the place in which this Act is at the time in force, upon the oath of a credible witness that he believes that any weapon is in the possession of any person or in any house or place contrary to the provisions of this Act, may issue his warrant to any constable or peace officer to search for and seize the same,—and he, or any person in his aid, may search for and seize the same in the possession of any person, or in any such house or place.

9. If admission to any such house or place is refused after demand such constable or peace officer, and any person in his aid, may enter the same by force, by day or by night, and seize any such weapon and deliver it to such commissioner; and unless the person in whose possession or in whose house or premises the same is found, within four days next after the seizure, proves to the satisfaction of such com-

missioner or justice of the peace that the weapon so seized was not in his possession nor in his house nor place contrary to the meaning of this Act, such weapon shall be forfeited to the use of Her Majesty.

10. All weapons declared forfeited under this Act shall be sold or destroyed under the direction of the commissioner by whom or by whose authority the same are seized, and the proceeds of such sale, after deducting necessary expenses, shall be received by such commissioner and paid over by him to the Minister of Finance and Receiver-General, for the public uses of Canada.

11. Whenever this Act ceases to be in force within the place where any weapon has been delivered and detained in pursuance thereof, or whenever the owner or person lawfully entitled to any such weapon satisfies the commissioner that he is about to remove immediately from the limits within which this Act is at the time in force, the commissioner may deliver up to the owner or person authorized to receive the same, any such weapon, on production of the receipt given for it.

12. Every commissioner under this Act shall make a monthly return to the Secretary of State of all weapons delivered to him, and by him detained under this Act.

INTOXICATING LIQUOR.

13. Upon and after the day named in such proclamation and during such period as such proclamation remains in force, no person shall, at any place within the limits specified in such proclamation, sell, barter or, directly or indirectly, for any matter, thing, profit or reward, exchange, supply or dispose of, any intoxicating liquor; nor expose, keep or have in possession any intoxicating liquor intended to be dealt with in any such way.

2. The provisions of this section shall not extend to any person selling intoxicating liquor by wholesale, and not retailing the same, if such person is a licensed distiller or brewer.

14. Every one who, by himself, his clerk, servant, agent or other person, violates any of the provisions of the next preceding section, is guilty of an offence against this Act, and, on a first conviction, shall be liable to a penalty of forty dollars and costs, and, in default of payment, to imprisonment for a term not exceeding three months,—and on every subsequent conviction, to the said penalty and the said imprisonment in default of payment, and also to further imprisonment for a term not exceeding six months.

Section 118 of the code adds, with or without hard labour.

15. Every clerk, servant, agent or other person who, being in the employment of, or on the premises of another person, violates or assists in violating any of the provisions of the thirteenth section of this Act, for the person in whose employment or on whose premises he is, shall be equally guilty with the principal offender, and shall be liable to the penalties mentioned in the next preceding section.

16. If any person makes oath or affirmation before any commissioner or justice of the peace, that he has reason to believe, and does believe that any intoxicating liquor with respect to which a violation of the provisions of the thirteenth section of this Act has been committed or is intended to be committed is, within the limits specified in any proclamation by which this Act has been proclaimed to be in force, on board of any steamboat, vessel, boat, canoe, raft or other craft, or in or about any building or premises, or in any carriage, vehicle or other conveyance, or at any place, the commissioner or justice of the peace shall issue a search warrant to any sheriff, police officer, constable or bailiff who shall forthwith proceed to search the steamboat, vessel, boat, canoe, raft, other craft, building, premises, carriage, vehicle, conveyance or place described in such search warrant; and if any intoxicating liquor is found therein or thereon the person executing such search warrant shall seize the intoxicating liquor and the barrels, casks, jars, bottles or other packages in which it is contained and shall keep it and them secure until final action is had thereon.

2. No dwelling-house in which, or in part of which or on the premises whereof, a shop or a bar is not kept, shall be searched, unless the said informant also makes oath or affirmation that some offence in violation of the provisions of the thirteenth section of this Act has been committed therein or therefrom within one month next preceding the time of making his said information for a search warrant.

3. The owner, keeper or person in possession of the intoxicating liquor so seized, if he is known to the officer seizing the same, shall be summoned forthwith by the commissioner or justice of the peace who issued the search warrant to appear before such commissioner or justice of the peace; and if he fails so to appear, or if it appears to the satisfaction of such commissioner or justice of the peace that a violation of the provisions of the thirteenth section of this Act has been committed or is intended to be committed, with respect to such intoxicating liquor, it shall be declared forfeited, with any package in which it is contained, and shall be destroyed by authority of the written order to that effect of such commissioner or justice, and in his presence or in the presence of some person appointed by him to witness

the destruction thereof ; and the commissioner or justice or the person so appointed by him, and the officer by whom the said intoxicating liquor has been destroyed, shall jointly attest, in writing upon the back of the said order, the fact that it has been destroyed.

4. The owner, keeper or person in possession of any intoxicating liquor seized and forfeited under the provisions of this section may be convicted of an offence against the thirteenth section of this Act without any further information laid or trial had, and shall be liable to the penalties mentioned in the fourteenth section of this Act.

17. If the owner, keeper or possessor of intoxicating liquor seized under the next preceding section is unknown to the officer seizing the same, it shall not be condemned and destroyed until the fact of such seizure, with the number and description of the packages, as near as may be, has been advertised for two weeks, by posting up a written or a printed notice and description thereof, in at least three public places of the place where it was seized.

2. If it is proved within such two weeks, to the satisfaction of the commissioner or justice by whose authority such intoxicating liquor was seized, that with respect to such intoxicating liquor no violation of the provisions of the thirteenth section of this Act has been committed or is intended to be committed, it shall not be destroyed, but shall be delivered to the owner, who shall give his receipt therefor in writing upon the back of the search warrant, which shall be returned to the commissioner or justice who issued the same ; but if, after such advertisement as aforesaid, it appears to such commissioner or justice that a violation of the provisions of the thirteenth section of this Act has been committed or is intended to be committed, then such intoxicating liquor, with any package in which it is contained, shall be forfeited and destroyed, according to the provisions of the next preceding section.

18. Any payment or compensation, whether in money or securities for money, labour or property of any kind, for intoxicating liquor sold, bartered, exchanged, supplied or disposed of, contrary to the provisions of the thirteenth section of this Act, shall be held to have been criminally received without consideration, and against law, equity and good conscience, and the amount or value thereof may be recovered from the receiver by the person making, paying or furnishing such payment or compensation ; and all sales, transfers, conveyances, liens and securities of every kind, which either in whole or in part have been made or given for or on account of intoxicating liquor sold, bartered, exchanged, supplied, or disposed of contrary to the provisions of the thirteenth section of this Act, shall be void

against all persons, and no right shall be acquired thereby; and no action of any kind shall be maintained, either in whole or in part, for or on account of intoxicating liquor sold, bartered, exchanged, supplied or disposed of, contrary to the provisions of the said section.

19. In any prosecution under this Act for any offence with respect to intoxicating liquor, it shall not be necessary that any witness should depose directly to the precise description of the liquor with respect to which the offence has been committed, or to the precise consideration therefor, or to the fact of the offence having been committed with his participation or to his own personal and certain knowledge; but the commissioner or justice of the peace trying the case, so soon as it appears to him that the circumstances in evidence sufficiently establish the offence complained of, shall put the defendant on his defence, and in default of such evidence being rebutted, shall convict the defendant accordingly.

GENERAL PROVISIONS.

20. Any commissioner or justice of the peace may hear and determine, in a summary manner, any case arising within his jurisdiction under this Act; and every person making complaint against any other person for violating this Act, or any provision thereof, before such commissioner or justice, may be admitted as a witness; and the commissioner or justice of the peace before whom the examination or trial is had, may, if he thinks there was probable cause for the prosecution, order that the defendant shall not recover costs, although the prosecution fails.

21. All the provisions of every law respecting the duties of justices of the peace in relation to summary convictions and orders, and to appeals from such convictions, and for the protection of justices of the peace when acting as such, or to facilitate proceedings by or before them in matters relating to summary convictions and orders, shall, in so far as they are not inconsistent with this Act, apply to every commissioner or justice of the peace mentioned in this Act or empowered to try offenders against this Act; and every such commissioner shall be deemed a justice of the peace within the meaning of any such law, whether he is or is not a justice of the peace for other purposes.

22. On the trial of any proceeding, matter or question under this Act, the person opposing or defending, and the wife or husband of such person, shall be competent to give evidence.

23. No action or other proceeding, warrant judgment, order or other instrument or writing, authorized by this Act or necessary to

carry out its provisions, shall be held void or be allowed to fail for defect of form.

21. Every action brought against any commissioner or justice of the peace, constable, peace officer or other person, for anything done in pursuance of this Act, shall be commenced within six months next after the alleged cause of action arises; and the venue shall be laid or the action instituted in the district or county or place where the cause of action arose; and the defendant may plead the general issue and give this Act and the special matter in evidence; and if such action is brought after the time limited, or the venue is laid or the action brought in any other district, county or place than as above prescribed, the judgment or verdict shall be given for the defendant; and in such case, or if the judgment or verdict is given for the defendant on the merits, or if the plaintiff becomes nonsuited or discontinues after appearance is entered, or has judgment rendered against him on demurrer, the defendant shall be entitled to recover double costs.

R.S.C. CHAPTER 152.

An Act respecting the Preservation of Peace at Public Meetings.

1. Any justice of the peace within whose jurisdiction any public meeting is appointed to be held, may demand, have and take of and from any person attending such meeting, or on his way to attend the same, any offensive weapon, such as firearms, swords, staves, bludgeons, or the like, with which any such person is so armed, or which any such person has in his possession; and every such person who, upon such demand, declines or refuses to deliver up, peaceably and quietly, to such justice of the peace, any such offensive weapon as aforesaid, is guilty of a misdemeanour, and such justice may thereupon record the refusal of such person to deliver up such weapon, and adjudge him to pay a penalty not exceeding eight dollars,—which penalty shall be levied in like manner as penalties are levied under the *Act respecting summary proceedings before Justices of the Peace*, or such person may be proceeded against by indictment or information, as in other cases of misdemeanour; but such conviction shall not interfere with the power of such justice, or any other justice of the peace, to take such weapon, or cause the same to be taken from such person, without his consent and against his will, by such force as is necessary for that purpose.

2. Upon reasonable request to any justice of the peace, to whom any such weapon has been peaceably and quietly delivered as aforesaid, made on the day next after the meeting has finally dispersed, and not before, such weapon shall, if of the value of one dollar or upwards be returned by such justice of the peace to the person from whom the same was received.

3. No such justice of the peace shall be held liable to return any such weapon, or make good the value thereof, if the same, by unavoidable accident, has been actually destroyed or lost out of the possession of such justice without his wilful default.

R. S. C. CHAPTER 153.

An Act respecting Prize-fighting.

6. If, at any time the sheriff of any county, place or district in Canada, any chief of police, any police officer, or any constable, or other peace officer, has reason to believe that any person within his bailiwick or jurisdiction is about to engage as principal in any prize-fight within Canada, he shall forthwith arrest such person and take him before some person having authority to try offences against this Act, and shall forthwith make complaint in that behalf, upon oath, before such person; and thereupon such person shall inquire into the charge, and if he is satisfied that the person so brought before him was, at the time of his arrest, about to engage as a principal in a prize-fight, he shall require the accused to enter into a recognizance, with sufficient sureties, in a sum not exceeding five thousand dollars and not less than one thousand dollars, conditioned that the accused will not engage in any such fight within one year from and after the date of such arrest; and in default of such recognizance, the person before whom the accused has been brought shall commit the accused to the *gaol* of the county, district or city within which such inquiry takes place, or if there is no common *gaol* there, then to the common *gaol* which is nearest to the place where such inquiry is had, there to remain until he gives such recognizance with such sureties.

7. If any sheriff has reason to believe that a prize-fight is taking place or is about to take place within his jurisdiction as such sheriff, or that any persons are about to come into Canada at a point within his jurisdiction, from any place outside of Canada, with intent to engage in, or to be concerned in, or to attend any prize-fight within Canada, he shall forthwith summon a force of the inhabitants of his district or county sufficient for the purpose of suppressing and pre-

venting such fight,—and he shall, with their aid, suppress and prevent the same, and arrest all persons present thereat, or who come into Canada as aforesaid, and shall take them before some person having authority to try offences against this Act, to be dealt with according to law, and fined or imprisoned, or both, or compelled to enter into recognizances with sureties, as hereinbefore provided, according to the nature of the case.

10. Every judge of a superior court or of a county court, judge of the sessions of the peace, stipendiary magistrate, police magistrate, and commissioner of police of Canada, shall, within the limits of his jurisdiction as such judge, magistrate or commissioner, have all the powers of a justice of the peace with respect to offences against this Act.

R. S. C. CHAPTER 154.

An Act respecting Perjury.

See p. 98 ante.

R. S. C. CHAPTER 157.

An Act respecting Offences against Public Morals and Public Convenience.

8. * * * * * * * * *

(4) If provision is made therefor by the laws of the province in which the conviction takes place, any such loose, idle or disorderly person may, instead of being committed to the common gaol or other public prison, be committed to any house of industry or correction, alms house, work house or reformatory prison.

R. S. C. CHAPTER 167.

An Act respecting Offences relating to the Coin.

29. Any two or more justices of the peace, on the oath of a credible person, that any copper or brass coin has been unlawfully manufactured or imported, shall cause the same to be seized and detained, and shall summon the person in whose possession the same is found, to appear before them ; and if it appears to their satisfaction,

on the oath of a credible witness, other than the informer, that such copper or brass coin has been manufactured or imported in violation of this Act, such justice shall declare the same forfeited, and shall place the same in safe keeping to await the disposal of the Governor General, for the public uses of Canada.

30. If it appears, to the satisfaction of such justices, that the person in whose possession such copper or brass coin was found, knew the same to have been so unlawfully manufactured or imported, they may condemn him to pay the penalty aforesaid with costs, and may cause him to be imprisoned for a term not exceeding two months, if such penalty and costs are not forthwith paid.

31. If it appears, to the satisfaction of such justices, that the person in whose possession such copper or brass coin was found was not aware of it having been so unlawfully manufactured or imported, the penalty may, on the oath of any one credible witness, other than the plaintiff, be recovered, from the owner thereof, by any person who sues for the same in any court of competent jurisdiction.

32. Any officer of Her Majesty's customs may seize any copper or brass coin imported or attempted to be imported into Canada in violation of this Act, and may detain the same as forfeited, to await the disposal of the Governor General, for the public uses of Canada.

33. Every one who utters, tenders or offers in payment any copper or brass coin, other than current copper coin, shall forfeit double the nominal value thereof.

2. Such penalty may be recovered, with costs, in a summary manner, on the oath of one credible witness, other than the informer, before any justice of the peace, who, if such penalty and costs are not forthwith paid, may cause the offender to be imprisoned for a term not exceeding eight days.

34. A moiety of any of the penalties imposed by any of the five sections next preceding, but not the copper or brass coins forfeited under the provisions thereof, shall belong to the informer or person who sues for the same, and the other moiety shall belong to Her Majesty, for the public uses of Canada.

R.S.C. CHAPTER 169.

An Act respecting Offences relating to the Army and Navy.

9. One moiety of the amount of any penalty recovered under any of the preceding sections shall be paid over to the prosecutor or

person by whose means the offender has been convicted, and the other moiety shall belong to the Crown.

R.S.C. CHAPTER 172.

An Act respecting Cruelty to Animals.

7. Every pecuniary penalty recovered with respect to any such offence shall be applied in the following manner, that is to say: one moiety thereof to the corporation of the city, town, village, township, parish, or place in which the offence was committed, and the other moiety, with full costs, to the person who informed and prosecuted for the same, or to such other person as to the justices of the peace seems proper.

---

51 VICT. CHAPTER 41.

An Act to amend the Law relating to Fraudulent Marks on Merchandise.

15. Any goods or things forfeited under any provision of this Act, may be destroyed or otherwise disposed of in such a manner as the court, by which the same are declared forfeited, directs; and the court may, out of any proceeds realized by the disposition of such goods (all trade marks and trade descriptions being first obliterated), award to any innocent party any loss he may have innocently sustained in dealing with such goods.

16. On any prosecution under this Act the court may order costs to be paid to the defendant by the prosecutor, or to the prosecutor by the defendant, having regard to the information given by and the conduct of the defendant and prosecutor respectively.

18. On the sale or in the contract for the sale of any goods to which a trade mark or mark or trade description has been applied, the vendor shall be deemed to warrant that the mark is a genuine trade mark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee.

22. The importation of any goods which, if sold, would be forfeited under the foregoing provisions of this Act, and of goods manufactured in any foreign state or country which bear any name or trade mark which is or purports to be the name or trade mark of any manufacturer, dealer or trader in the United Kingdom or in Canada, is hereby prohibited, unless such name or trade mark is accompanied by a definite indication of the foreign state or country in which the goods were made or produced; and any person who imports or attempts to import any such goods shall be liable to a penalty of not more than five hundred dollars, nor less than two hundred dollars, recoverable on summary conviction, and the goods so imported or attempted to be imported shall be forfeited and may be seized by any officer of the Customs and dealt with in like manner as any goods or things forfeited under this Act.

2. Whenever there is on any goods a name which is identical with or a colourable imitation of the name of a place in the United Kingdom or in Canada, such name, unless it is accompanied by the name of the state or country in which it is situate, shall, unless the Minister of Customs decides that the attaching of such name is not calculated to deceive (of which matter the said Minister shall be the sole judge) be treated, for the purposes of this section, as if it was the name of a place in the United Kingdom or in Canada.

3. The Governor in Council may, whenever he deems it expedient in the public interest, declare that the provisions of the two sub-sections next preceding shall apply to any city or place in any foreign state or country; and after the publication in the *Canada Gazette* of the Order in Council made in that behalf, such provisions shall apply to such city or place in like manner as they apply to any place in the United Kingdom or in Canada, and may be enforced accordingly.

4. The Governor in Council may, from time to time, make regulations, either general or special, respecting the detention and seizure of goods, the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and seizure, and may, by such regulations, determine the information, notices and security to be given, and the evidence necessary for any of the purposes of this section, and the mode of verification of such evidence.

5. The regulations may provide for the reimbursing by the informant to the Minister of Customs of all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent upon such detention.

6. Such regulations may apply to all goods the importation of which is prohibited by this section, or different regulations may be made respecting different classes of such goods or of offences in relation to such goods.

7. All such regulations shall be published in the *Canada Gazette* and shall have force and effect from the date of such publication.

23. This Act shall be substituted for chapter one hundred and sixty-six of the Revised Statutes, respecting the fraudulent marking of merchandise, which is hereby repealed.

---

52 VICT. CHAPTER 41.

An Act for the Prevention and Suppression of Combinations formed in Restraint of Trade.

4. Where an indictment is found against any person for offences provided against in this Act, the defendant or person accused shall have the option to be tried before the judge presiding at the court at which such indictment is found, or the judge presiding at any subsequent sitting of such court, or at any court where the indictment comes on for trial, without the intervention of a jury; and in the event of such option being exercised the proceedings subsequent thereto shall be regulated, in so far as may be applicable, by *The Speedy Trials Act.*

5. An appeal shall lie from any conviction under this Act by the judge without the intervention of a jury to the highest court of appeal in criminal matters in the province where such conviction shall have been made, upon all issues of law and fact; and the evidence taken in the trial shall form part of the record in appeal, and for that purpose the court before which the case is tried shall take note of the evidence and of all legal objections thereto.

---

53 VICT. CHAPTER 37.

An Act further to Amend the Criminal Law.

ESCAPES AND RESCUES.

1. Section nine of chapter one hundred and fifty-five of the Revised Statutes of Canada, *An Act respecting Escapes and Rescues*, is hereby repealed and the following section is substituted therefor:—

"**9.** Every one who, being sentenced to imprisonment or detention in, or being ordered to be detained in, any reformatory prison, reformatory school, industrial refuge, industrial home or industrial school, escapes or attempts to escape therefrom, is guilty of a misdemeanour, and may be dealt with as follows :—

"The offender may, at any time, be apprehended without warrant and brought before any magistrate, who, upon proof of his identity,—

"(*a*) In the case of an escape or attempt to escape from a reformatory prison or a reformatory school, shall remand him thereto for the remainder of his original term of imprisonment or detention ; or,—

"(*b*) In the case of an escape or attempt to escape from an industrial refuge, industrial home, or industrial school,—

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

"(2) If the officer in charge of such refuge, home or school certifies in writing that the removal of such offender to a place of safer or stricter imprisonment is desirable, and if the governing body of such refuge, home or school applies for such removal, and if sufficient cause therefor is shown to the satisfaction of such magistrate, may order the offender to be removed to and to be kept imprisoned, for the remainder of his original term of imprisonment or detention, in any reformatory prison or reformatory school in which by law such offender may be imprisoned for a misdemeanour,—and when there is no such reformatory prison or reformatory school, may order the offender to be removed to and to be so kept imprisoned in any other place of imprisonment to which the offender may be lawfully committed ;

"(*c*) And in any case mentioned in the preceding paragraphs (*a*) and (*b*) of this sub-section, or if the term of his imprisonment or detention has expired, the magistrate may, after conviction, sentence the offender to such additional term of imprisonment or detention, as the case may be, not exceeding one year, as to such magistrate seems a proper punishment for the escape or attempt to escape."

2. Every one who, being sentenced to imprisonment or detention in, or being ordered to be detained in any industrial refuge, industrial home or industrial school, by reason of incorrigible or vicious conduct, or with reference to the general discipline of the institution, is beyond the control of the officer in charge of such institution, is guilty of a misdemeanour, and may be dealt with as follows :—

(*a*) The offender may, at any time before the expiration of his term of imprisonment or detention, be brought without warrant before any magistrate, and if the officer in charge of such refuge, home or school certifies in writing that the removal of such offender to a place of stricter imprisonment is desirable, and if the governing body of such refuge, home or school applies for such removal, and if sufficient cause therefor is shown to the satisfaction of such magistrate, he may order the offender to be removed to and to be kept imprisoned, for the remainder of his original term of imprisonment or detention, in any reformatory prison or reformatory school in which by law such offender may be imprisoned for a misdemeanour; and when there is no such reformatory prison or school the magistrate may order the offender to be removed to and to be so kept imprisoned in any other place of imprisonment to which the offender may be lawfully committed;

(*b*) The magistrate may, after conviction, sentence the offender to such additional term of imprisonment, not exceeding one year, as to such magistrate seems a proper punishment for the incorrigible conduct of the offender.

PUBLIC AND REFORMATORY PRISONS.

Certified Industrial Schools, Ontario.

32. The Governor General, by warrant under his hand, may at any time in his discretion (the consent of the Provincial Secretary of Ontario having been first obtained), cause any boy who is imprisoned in a reformatory or gaol in that province, under sentence for an offence against a law of Canada, and who is certified by the court, judge or magistrate, by whom he was tried to have been, in the opinion of such court, judge or magistrate, at the time of his trial, of or under the age of thirteen years, to be transferred for the remainder of his term of imprisonment to a certified industrial school in the province.

33. Where, under any law of Canada, any boy is convicted in Ontario, whether summarily or otherwise, of any offence punishable by imprisonment, and the court, judge, stipendiary or police magistrate by whom he is so convicted is of opinion that such boy does not exceed the age of thirteen years, such court, judge or magistrate may sentence such boy to imprisonment in a certified industrial school for any term not exceeding five years and not less than two years: Provided, that no boy shall be sentenced to any such school unless public notice has been given in the *Ontario Gazette* and has not been countermanded, that such school is ready to receive and maintain boys sentenced under laws of the Dominion; Provided also, that no

such boy shall be detained in any certified industrial school beyond the age of seventeen years.

Halifax Industrial School.

34. Section sixty-one of chapter one hundred and eighty-three of the Revised Statutes, intituled *An Act respecting Public and Reformatory Prisons*, is hereby repealed and the following substituted therefor :—

"**61.** Whenever any boy, who is a Protestant and a minor apparently under the age of sixteen years, is convicted in Nova Scotia of any offence for which by law he is liable to imprisonment, the judge, stipendiary magistrate, justice or justices by whom he is so convicted may sentence such boy to be detained in the Halifax Industrial School for any term not exceeding five years, and not less than two years."

35. Section sixty-two of the said Act is hereby repealed and the following substituted therefor :—

"**62.** No such sentence shall be pronounced unless or until provision has been made by the municipality within which such conviction is had, out of its funds, for the support of boys so sentenced, at the rate of not less than sixty dollars per annum for each boy."

St. Patrick's Home, Halifax.

36. Section sixty-five of the said Act is hereby repealed and the following substituted therefor :—

"**65.** Whenever any boy, who is a Roman Catholic and apparently under the age of sixteen years, is convicted in Nova Scotia of any offence for which by law he is liable to imprisonment, the judge, stipendiary magistrate, justice or justices by whom he is so convicted may sentence such boy to be detained in Saint Patrick's Home at Halifax for any term not exceeding five years, and not less than two years ; but no such sentence shall be pronounced unless or until provision has been made by the municipality within which such conviction is had, out of its funds, for the support of boys so sentenced at the rate of not less than sixty dollars per annum for each boy."

37. Section sixty-six of the said Act is hereby repealed and the following substituted therefor :—

"**66.** The superintendent, or head of the said home, may at any time notify the mayor, warden or other chief magistrate of any municipality, that no prisoners, beyond those already under sentence in such home, will be received therein ; and after such notification no such sentence shall be pronounced in such municipality until notice has been received by such mayor, warden or chief magistrate, from the said superintendent or head, that prisoners will again be received in the said home."

38. The six preceding sections shall not, nor shall any of them, come into force until the same shall have been proclaimed by the Governor in Council.

39. The said Act is hereby further amended by adding at the end thereof the following sections :—

"PART VI.

"MANITOBA.

"*Manitoba Reformatory for Boys.*

"**78.** If any boy, who, at the time of his trial, appears to the court to be under the age of sixteen years, is convicted of any offence for which a sentence of imprisonment for a period of three months or longer, but less than five years, may be imposed upon an adult convicted of the like offence, and the court before which such boy is convicted is satisfied that a due regard for the material and moral welfare of the boy manifestly requires that he should be committed to the Manitoba reformatory for boys, then such court may sentence the boy to be imprisoned in such reformatory for such term as the court thinks fit, not being greater than the term of imprisonment which could be imposed upon an adult for the like offence, and may further sentence such boy to be kept in such reformatory for an indefinite time after the expiration of such fixed term ; Provided, that the whole period of confinement in such reformatory shall not exceed five years from the commencement of his imprisonment.

"**79.** If any boy, apparently under the age of sixteen years, is convicted of any offence, punishable by law on summary conviction, and thereupon is sentenced and committed to prison in any common gaol for a period of fourteen days at the least, any judge of any one of the superior courts, or any judge of a county court, in any case occurring within his county, may examine and inquire into the circumstances of such case and conviction, and when he considers the

material and moral welfare of the boy requires such sentence, he may, as an additional sentence for such offence, sentence such boy to be sent either forthwith or at the expiration of his imprisonment in such gaol, to such reformatory, to be there detained for the purpose of his industrial and moral education for an indefinite period, not exceeding in the whole five years, from the commencement of his imprisonment in the common gaol.

80. Every boy so sentenced shall be detained in such reformatory until the expiration of the fixed term, if any, of his sentence, unless sooner discharged by lawful authority, and thereafter shall, subject to the provisions hereof and to any regulations made as hereinafter provided, be detained in such reformatory for a period not to exceed five years from the commencement of his imprisonment, for the purpose of his industrial and moral education.

"**81.** A copy of the sentence of the court, duly certified by the proper officer, or the warrant or order of the judge or other magistrate by whom any boy is sentenced to confinement in such reformatory, shall be a sufficient authority to the sheriff, constable or other officer who is directed, verbally or otherwise, so to do, to convey such boy to the common gaol of the county where such sentence is pronounced, and for the gaoler of such gaol to receive and detain such boy, until some person, lawfully authorized, requires the delivery of such boy for removal to the reformatory.

"**82.** If any boy sentenced to be confined in such reformatory is in such a weak state of health that he cannot safely or conveniently be removed to the reformatory, he may be detained in the common gaol or other place of confinement in which he is, until he is sufficiently recovered to be safely and conveniently removed to the reformatory.

"**83.** No boy shall be discharged from such reformatory at the termination of his term of confinement, if then labouring under any contagious or infectious disease, or under any acute or dangerous illness, but he shall be permitted to remain in such reformatory until he recovers from such disease or illness: Provided that any boy remaining in such reformatory for any such cause shall be under the same discipline and control as if his term was still unexpired.

"**84.** Any sheriff or other person having the custody of any offender sentenced to imprisonment in the said reformatory, may detain the offender in the common gaol of the county or district in which such offender is sentenced, or other place of confinement in

which such offender is, until some person lawfully authorized in that behalf requires such offender's delivery for the purpose of being conveyed to such reformatory.

"**85**. Whenever the time of any offender's sentence in such reformatory, under any law within the legislative authority of the Parliament of Canada, expires on a Sunday, such offender shall be discharged on the previous Saturday, unless such offender desires to remain until the Monday following."

10. The provisions of this Act in respect to the Manitoba reformatory for boys shall not come into force until the same shall have been proclaimed by the Governor in Council.

INDEX.

(The figures in this index refer to the pages).

A.

ABANDON—
child under two years of age, 149
definition of, in enactment, 149

ABATEMENT—
plea in, abolished, 752

ABDUCTION—
of woman for purpose of marriage or carnal knowledge, 289
form of indictment, 289
of heiress the same, 289
actual marriage or defilement not necessary to constitute offence, 290
consent of heiress obtained by fraud, 291
detention against her will an offence though heiress consent at first, 291
offence not condoned by subsequent consent, 291
form of indictment, 290
of woman under twenty-one for purpose of marriage or carnal knowledge, 290
woman may be witness against offender though married, 292
form of indictment, 290
of girl under sixteen, 292
consent of girl and belief of offender as to her age immaterial, 292
offence may be committed by a woman, 293
form of indictment, 294
of children under fourteen, 295
form of indictment, 296

ABETTOR—28
See AIDER AND ABETTOR.

ABOLITION—
of distinction between felony and misdemeanour, 603
of plea in abatement, 752
of jury *de ventre inspiciendo*, 850
of writ of error, 864
of outlawry, 974
of punishment by solitary confinement and the pillory, 974
of deodand, 974
of attainder, forfeiture and escheat as a consequence of conviction, etc., 974

ABOMINABLE CRIME—
committing, with human being, etc., 116
remarks on, 117
form of indictment, 116

ABOMINABLE CRIME—*Continued.*
for bestiality, 118
attempt to commit, 118
form of indictment, 118
assault with intent to commit, 253
consent of child under fourteen no defence, 253
extortion by threats to accuse of, 451
forms of indictment, 452, 453

ABORTION—
procuring, by administering drug, etc., 275
women procuring on herself, 276
supplying means of procuring, 276
forms of indictment, 276-278

ABROAD—
offences committed, 606-611

ABSENCE—
of wife or husband for seven years, second marriage not bigamy, 279

ACCEPTANCE—
of bill of exchange, etc., forgery of, 512

ACCESSORY—
before the fact, a party to and guilty of offence, 28
defined, 36
may be indicted as principal, 28
alone or jointly with perpetrator, 29
may be convicted though principal acquitted, 29
soliciting and inciting commission of offence indictable, though offence not committed, 30
offence committed through innocent agent, 30
principals in second degree, 31
actual presence not necessary, 31
Abettor of person committing suicide guilty of murder as principal, 33
combining for unlawful purpose, 33
mere participation in the act not sufficient, 34
seconds to duel are principals in second degree, 35
all present abetting felony the like, 35
may be tried before principal is convicted, 35
distinction between aider and abettor and, 36
how commission of offence may be procured, 37
none in treason, 38
in manslaughter, 38
AFTER THE FACT, 40
defined, 40
offence by married person, 40
not by merely suffering principal to escape, 41
nor by attending on felon in prison, 41
wife not, by receiving, etc., husband or *vice versa*, 40, 41
applies to no other relationship, 41
must have notice that offence was committed, 41

ACCESSORY—*Continued.*
no conviction as, on indictment as principal, 42
may be indicted jointly with principal, 42
receiver of stolen goods not, at common law, 42
to treason, 47
to murder, 225
punishment, 600
indictment of, 697

ACCOMPLICE—
none in perjury, 97
that evidence of, requires corroboration not a question that can be reserved, 870

ACCOUNTING—
false, by clerk, 419

ACQUITTAL—
on plea of antrefois acquit or convict, 715
when a bar to subsequent indictment, 718
must be by verdict, on a trial, to be a bar, 721
of accused for insanity, custody, 861

ACQUITTANCE—
for receipt of money, etc., forgery of, 513

ACT—
expression "any" and "any other" defined, 1
definition of, as to offences connected with trade, 589
criminal, construction of, 603
offences punishable under two or more, 959

ACTION—
compounding penal, 104
civil, not suspended, 602
against juvenile offender, 896
against persons administering criminal law, 979
time and place of, 979
notice of, 979
defence to, 979
tender or payment into court, 979
costs, 979
other remedies saved, 979

ACTION QUI TAM—104

ACTUS NON FACIT REUM—11, 504

ADDRESS OF COUNSEL—
to jury on trial, how regulated, 757
counsel acting for attorney or solicitor-general entitled to reply, 757
when no evidence for defence, 757
when defence adduces evidence, 758
on opening for prosecution, 758
summing up by Crown counsel when no evidence for defence, 760
for defence, 761

ADDRESS OF COUNSEL—*Continued.*
summing up by defence, 763
reply, 765
defendant's reply on evidence of prosecution in reply, 766

ADJOURNMENT—
of preliminary inquiry, for variance, 644
of inquiry from time to time at discretion of magistrate, 652
of trial, no formal necessary, 787
of trial, on amendment, 830
of speedy trial, 881
of trial on summary conviction proceedings, for variance, 909
of such trial in discretion of justice, 910
not for more than eight days, 910

ADMINISTRATION OF JUSTICE—
CORRUPTION AND DISOBEDIENCE—
corruption of judges or members of parliament, 77
peace officers, etc., 77
frauds upon the Government, 78
consequences of conviction, 80
breach of trust by public officer, 90
corruption in municipal affairs, 81
selling office, appointment, etc., 82
disobedience to statute law, 83
disobedience to orders of court, 83
neglect of peace officer to suppress riot, 83
neglect to aid peace officer to suppress riot, 83
neglect to aid peace officer, 83
misconduct of officers, 84
obstructing peace officer, etc., 84
MISLEADING JUSTICE—
perjury, 85
subornation of perjury, 86
punishment for perjury, etc., 97
false oaths, 98
false affidavit out of province, 99
false statements, 99
fabricating evidence, 99
conspiracy to bring false accusation, 100
administering oaths without authority, 101
corrupting juries and witnesses, 104
attempting in any other way to obstruct course of justice, 104
compounding penal actions, 104
reward for recovery of stolen property, 105
unlawfully advertising reward, 106
false certificate of execution of sentence of death, 106
ESCAPES AND RESCUES—
being at large while under sentence, 107
assisting escape of prisoners of war, 111

ADMINISTRATION OF JUSTICE—*Continued.*
breaking prison, 111
attempt to break prison, etc., 111
escape from prison, etc., 111
escape from lawful custody, 112
assisting escape in certain cases, 112
in other cases, 112
aiding escape from prison, 112
unlawful discharge of prisoner, 113
punishment for escape, 113

ADMIRALTY—
offences committed within the jurisdiction of, leave of Governor General required for prosecution, 606
jurisdiction of, 607
offences within jurisdiction of, warrant, 632

ADMISSION—
to bail by justice, 665
after committal, 666
by prisoner at trial, 800
to bail under provisions for speedy trial, 881

ADULTERER—
killing by husband when committing adultery with wife is manslaughter, 161
killing in revenge after the act, murder, 162
with wife, stealing husband's goods, 316

ADULTERY—
an indictable offence in New Brunswick, 129
conspiracy to induce woman to commit, 129
form of indictment, 129
wife committing, may be guilty of stealing husband's goods, 317

ADVERTISEMENT—
of reward for return of stolen property, 106

AFFIDAVIT—
perjury by false statement in, 98
false, out of Province where used, 99
justice, etc., unlawfully taking, 101
form of indictment, 102
evidence of authority of justice, 103

AFFIRMATION—
See AFFIDAVIT.

AFFRAY—
punishment for, 60

AGENT—
innocent, commission of offence by, 30
theft by, 341
form of indictment, 343
conversion by, of property entrusted, 342

AGENT—*Continued.*
form of indictment, 343
misappropriation of money, etc., entrusted, 342
form of indictment, 344
punishment, 369

AGGRAVATED ASSAULT, 254
See ASSAULT.

AGGRESSION—
foreign, by subject of peaceful state, 47
by British subject in company with foreigner, 48

AIDER AND ABETTOR—
is a party to and guilty of offence, 28
principals in second degree defined as, 31
presence at commission of offence may be actual or constructive, 32
presence during whole transaction not necessary, 32
participation in act necessary, 32
in suicide, 33
unlawful combination, 33
seconds to duel, 35
may be tried before principal is convicted, 35
none in treason, 35
commission of offence, how procured, 37
in manslaughter, 38
assisting militiamen, etc., to desert, 50
at prize fight, 62
assisting escape of prisoners of war, 111
assisting escape from prison, 112
to suicide, 226

ALIEN—
not entitled to jury *de medietate linguæ*, 771

ALLEGIANCE—
endeavour to seduce from, 49

ALLOCUTUS—
part of formal record, 846
when to take place, 852

ALTERATION—
of document, forgery, 510

ALTERNATIVE—
offences may be charged in the, 678

AMENDMENT—
on preliminary objections—701
powers of court for, 829
propriety of making, may be reserved, 830
to be endorsed on record, 830
formal record in case of, 830
remarks on, 830

AMENDMENT—*Continued.*
examples of, 836
test as to prejudice by, 837
statute allowing to be liberally construed, 839
when it must be made, 830
decisions on the statute, 841

ANIMALS—
capable of being stolen, 337
killing, with intent to steal carcase, 341
stealing cattle, 373
stealing dogs, etc., 374
killing, 573-575
attempting to kill, etc., cattle, 579
other injuries to, 579
threats to injure cattle, 580
cruelty to, 587
See CRUELTY TO ANIMALS.

ANIMUS FURANDI, 325, 340
See FELONIOUS INTENT.

APPEAL—
court of definition, 2
general provisions, 864
writ of error abolished, 864
cases reserved, 864
when reserved case refused, 865
evidence for court of, 865
powers of court of, 865
intermediate effects of, 873
to supreme court of Canada, 873
to privy council abolished, 874
from summary convictions, 933

APPEARANCE—
on preliminary inquiry, compelling, 627-629

APPREHENSION—
assault to resist or prevent, 254
of suspected deserter, 633
warrant in first instance for, on preliminary inquiry, 635
in one district for offence in another, 637

APPRENTICE—
correction of by master, 27
duty of master to provide for, 143
punishment for neglect, 144
remarks on enactment, 145
form of indictment, 147
evidence on trial against master, 147
assault by master on, 151
form of indictment, 152

AQUEDUCT—
wilfully destroying or damaging, 573

ARMS—
loaded, defined, 3
producing near, or aiming at, Her Majesty, 49
unlawful drilling to use of, 59
carrying or selling, 65
selling or giving to minor, 66
having on person when arrested, 66
possessing with intent to do injury, 67
legal carrying of, 67
refusing to deliver, when attending public meeting, 68
coming armed near meeting, 68
sale of, in North-west Territories, 69
And see OFFENSIVE WEAPONS.
FIRE-ARMS.

ARRAIGNMENT—
proceedings on, 751
refusal to plead, 752
special provisions in treason, 755

ARRAY—
challenge to, 774
of grand jury, no challenge to, 752

ARREST—
of wrong person, justified, 15
by peace officer, justified, 16
without warrant, by any one of person found committing offence, 17
by any one without warrant after commission of offence, 17
for major offence committed by night, 17
without warrant, by peace officer, or person found committing offence, 17
without warrant, by any one, of person found committing offence by night, 18
during flight, 18
statutory power of, not affected, 18
necessary force in making, 19
production of process or warrant if required, 19
notice of cause of arrest to be given, 19
consequence of failure to produce or give notice, 19
by peace officer, for major offence, necessary force to prevent escape, 19
by private person the same, 20
by any one for minor offence, the like, 20
preventing escape or rescue in major offence, 20
in minor offence, 20
of deserter, resisting execution of warrant for, 50
assault to resist or prevent, 254
form of indictment, 257
without warrant, for what offences lawful, 616
by private person, 619

ARREST—*Continued.*
for contempt of court, 623
time, place and manner of, 624
And see WARRANT.
ARREST OF JUDGMENT—
formal defects, none for, 701
motion for, 852
ARSON—
setting fire to buildings, etc , 558
remarks on, 558
attempt to commit, 563
form of indictment, 563
setting fire to crops, trees, etc., 564
attempt, 564
setting fire to forests, etc., 565
form of indictment, 565
threats to burn, 565
ARTICLES OF THE PEACE—
estreating recognizance for, 953
when ordered, forms, etc., 969
ASPORTATION—
necessary in theft, 320, 338
ASSAULT—
self-defence against unprovoked, 22
provoked, 23
provocation may be by blows, words or gestures, 23
accompanied with insult, defence against, 24
in defence of moveable property, 24
real property, 25
on person entering on property under claim of title, 27
with intent, is an attempt, 43
on the Queen, 49
in committing piratical act, 75
definition of, 252
indecent, on females, 252
form of indictment, 252
with intent to commit sodomy, 253
indecent on males, 253
consent of children under fourteen, no defence, 253
occasioning actual bodily harm, 253
form of indictment, 253
AGGRAVATED ASSAULTS—
with intent to commit indictable offence, 254
form of indictment, 255
on public or peace officer in execution of his duty, 254
form of indictment, 255
evidence at trial, 255
with intent to resist or prevent apprehension, 254
form of indictment, 257

ASSAULT—*Continued.*
on person executing process against lands, etc., 255
form of indictment, 257
at or near polling place, 255
form of indictment, 257
common, 259
form of indictment, 259
remarks on, 259
and battery, 260
mere words not an, 260
unlawful imprisonment an, 262
with intent to commit rape, 268
form of indictment, 272
with intent to carnally know, 274
form of indictment, 274
by person armed with intent to rob, 444
form of indictment, 445
with intent to rob, 447
form of indictment, 447
with intent to rape, etc., threatening to accuse of, 451
to prevent one working at trade, etc., 593
on ship, 595
buying grain, etc., 595
verdict of, on other charge, 819
costs on conviction for, 899
summary conviction, 919

ASSEMBLY—
for religious worship, disturbing, etc., 116

ASSEMBLY, UNLAWFUL—52
See UNLAWFUL ASSEMBLY.

ASSIGNMENT—
of property with intent to defraud creditors, 421

ASSIZES—
of Ontario, commission to judge of, 875

ATTAINDER—
abolished, 974

ATTEMPT—
act done with intent to commit an offence is an, whether or not commission is possible, 42
sections of code relating to, 42
remarks on, 43
to assault Her Majesty, 49
to induce person to take unlawful oath, 71
form of indictment, 71
to influence member of municipal council, 82
to obstruct, etc., the course of justice, 104
to break prison, 111

ATTEMPT—*Continued.*
to commit sodomy, 118
form of indictment, 118
by male, to procure commission of indecent act with a male, 121
form of indictment, 121
to defile women, 125
forms of indictment, 126
to carnally know idiot, etc., 130
form of indictment, 130
to commit murder, 212
forms of indictment, 213-222
to commit suicide, 228
to choke or drug, 239
forms of indictment, 239, 240
to injure by explosives, 241
forms of indictment, 242
to commit rape, 268
form of indictment, 268
to have carnal knowledge of girl under fourteen, 274
to commit arson, 563
form of indictment, 563
to set fire to crops, etc., 564
to damage by explosives, 565
to cast away ship, 570
to kill, etc., cattle, 579
to commit certain indictable offences, 598
to commit statutory offences, 598
verdict of, on indictment for offence, 811
full offence proved, on indictment for, 817
to commit offence included in indictment, 818

ATTENDANCE—
of witness on preliminary inquiry, summons to procure, 645
service of summons, 646
warrant of summons not obeyed, 646
warrant in first instance, 647
of witness out of province, procuring, 648
of witness at trial, 791-793
at summary trial, 888

ATTORNEY—
fraudulently selling, etc., property under power of attorney, or converting proceeds, 342
disposing of money, etc., contrary to direction, 342
punishment, 369

ATTORNEY-GENERAL—
definition of, as used in code, 1
consent of, to prosecution required in certain cases, 612
applies to preliminary inquiry, 613
power to give consent cannot be delegated, 613
may prefer indictment for any offence, 729
may grant fiat for appeal on refusal to, to reserve case, 865

AUTREFOIS ACQUIT, AUTREFOIS CONVICT—
plea of, 714
direction of court on issue, 715
remarks on, 715
form of plea, 715
trial of issue, 716
form of replication to plea, 717

AVERMENT—678, 686, 818
See INDICTMENT.

AVOWTERER—
theft by, 316

B.

BAIL—
rule as to, 665
after committal, 666
by superior court, 667
application for, after committal, 667
discharge of, warrant of deliverance, 668
person under, arrest of when about to abscond, 668
when case reserved, 864
on order for new trial, 873
render of accused by surety, 950

BAILEE—
larceny by, 344

BALLOT—
stealing, etc., 373
forgery of election, 514
destroying, 580

BANK—
stealing by officers of, 355

BANKER—
expression in code defined, 2

BANK NOTE—
forging, 512
forged, possession of, 523
engraving, or making plate for engraving, 525
printing, etc., circular in likeness of, 533

BANK OFFICER—
stealing by, 355
making out false dividend warrant, 532

BAPTISM—
forging register of, 512
destroying, etc., registry of, 530
making false entry in register, 530

BAPTISM—*Continued.*
giving false certificate of registry, 530
uttering false certificate, 531

BARRATRY—
of ship, 570
attempt to commit, 570

BASTARD—
evidence at trial for murder of, 805

BATHING—
in public, 120, 141

BATTERY—
what constitutes, 262
when justified, 263

BAWDY HOUSE—
common, defined, 133
punishment for keeping, 134
being keeper or inmate of, 140
summary trial for, jurisdiction of magistrate absolute, 885.

BEGGAR—
is a loose, idle or disorderly person or vagrant, 140

BENCH WARRANT—
to compel appearance at trial, 736

BESETTING HOUSE—
to prevent person carrying on business, 591

BESTIALITY—118
See ABOMINABLE CRIME.

BETTING—
and pool-selling, 137

BETTING HOUSE—
common, defined, 131
punishment for keeping, 134

BEYOND THE SEAS—
offences committed, 633

BIGAMY—
what constitutes, 279
punishment for, 280
form of indictment, 280

BILL OF EXCHANGE—
forgery of, 512

BILL OF LADING—
included in expression of "document of title to goods," 2
forgery of, 512

BIRD—
stealing, 374
injuring, 579

BIRTH—
neglect to obtain assistance in childbirth, 228
concealment of, 229
forging register, 512
destroying, etc., register of, 530
making false entry in registry, 530
giving false certificate of registry, 530
uttering false certificate, 531
verdict of concealment of, on indictment for murder, 826

BLASPHEMOUS LIBEL—
punishment for, 114
triable at quarter sessions, 114

BOAT—
damaging by explosion, 573

BODILY HARM—
to apprentice, 151
causing, with intent to murder, 212
inflicting, with intent to maim, etc., 233
wounding, etc., 237
by administering poison, 240
by explosives, 241
by setting man-traps, etc., 243
negligently causing, 249
causing, by furious driving, 249
assault occasioning, 253

BODILY INJURY—
negligence causing, 249

BODY CORPORATE—
officer, etc., of, destroying or falsifying books, 418
promoter, etc., of, making false statement, 419
making or possessing means of forging bill paper of, 525

BOND—
included in definition of valuable security, 5
forging, 512

BOOKS OF ACCOUNT—
fraudulent entry in, 421

BOOM—
injuries to, 571

BOUGHT AND SOLD NOTES—
included in expression, "document of title to goods," 2

BREACH OF CONTRACT—590

BREACH OF THE PEACE—
preventing continuance or renewal, 20
arrest of person found committing, 21
inciting Indians to commit, 63
lying in wait to provoke commission of, 68
See RIOT.
UNLAWFUL ASSEMBLY.

BREACH OF TRUST—
by public officer, 80
when indictable, 344
punishment for, 417

BREAKING PRISON—109-111

BRIBERY—
of judges, etc., 77
of peace officers, 77
of Government official, 78,
consequences of conviction, 80
in municipal affairs, 81
at elections, triable at Quarter Sessions, 605

BRIDGE—
injuries to, 573

BRITISH COLUMBIA—
meaning of "judge" in, in speedy trial provisions, 877
meaning of "magistrate" in summary trials, 884
application of fines on summary trial, 889
meaning of "justices" in provisions for trial of juvenile offenders, 892
special provisions as to trial of juvenile offenders in, 898
appeal from summary convictions in, 933
provisions as to estreat of recognizances, 951

BUCKET SHOPS—
Act against, 136

BUGGERY—
See ABOMINABLE CRIME.

BROTHEL—
enticing woman or girl into, 125

BUILDING—
riotous destruction of, 57
riotous damage to, 58
stealing things fixed to, 376
setting fire to, 558
attempt, 563
threats to burn, 565
attempt to damage by explosives, 565
injuries to, by tenants, 581

BULLION—
gold or silver, unlawful possession of, 550

BUOY—
altering, removing, etc., 570

BURGLARY—
general remarks on, 456
definitions, 469
breaking place of worship, 470, 471
punishment for, 471
house-breaking, 475, 478
breaking shop, etc., 480, 483
being found in dwelling-house by night, 483
being found armed or disguised, etc., 484, 485
punishment after previous conviction, 488
local description in indictment, 672

BURIAL—
misconduct as to, 139
forging register of, or copy, 512
board, counterfeiting seal of, 522
destroying, or offences as to, 530, 531

C.

CALENDAR MONTH—
in computing time for punishment, 965

CANAL—
injuries to bank of, etc., 573, 574

CAPACITY—
to commit any offence, child under seven none, 7
of child between seven and fourteen, 7
of person of fourteen and upwards, presumed, 8
of boy under fourteen to commit rape, 8, 269

CAPITAL OFFENCES—
what are, 6

CAPITAL PUNISHMENT—
provisions respecting, 960

CAPTION—
of indictment, not necessary, 845
what is, 846

CARCASE—
killing animal to steal, 341

CARDS—
cheating at, 430

CARNAL KNOWLEDGE—
complete on proof of any penetration, 6
by under fourteen cannot be guilty of, 8
procuring, or attempting to procure, of woman or girl under twenty-one

CARNAL KNOWLEDGE—*Continued.*
the same by threats or intimidation, 125
or by false pretenses or representations, 125
attempting to have by stupefying woman or girl, 125
form of indictment for procuring, etc., 126
for procuring by threats, 127
by false pretenses, 127
by stupefying, 127
of ward, parent or guardian procuring, 127
of girl under sixteen, householder permitting, 128
of idiot or imbecile, insane or deaf and dumb woman or girl, 130
consent in such case no defence, 130
form of indictment, 130
of girl under fourteen, 274
form of indictment, 274
attempt, 274
consent not material, 274
abduction of woman with intent to marry or have, 289
abduction of heiress the same, 289
or of woman under twenty-one, 290

CASE—
statement of, by justices, 944

CASE RESERVED—
questions of law may be reserved, 864
case to be stated for Court of Appeal, 864
appeal when court refuses to reserve, 865
evidence for Court of Appeal, 865
powers of Court of Appeal, 865
intermediate effects, 873
appeal to Supreme Court of Canada, 873
general remarks, 866

CAT—
killing, etc., 580

CATTLE—
definition, 2
stealing, 373
killing, etc., 573
form of indictment, 575
attempt to kill, 579
threats to kill, 580
conveyance by railways, care of, 587
cruelty to, 587

CERTIFICATE—
of warehouse keeper, included in expression "document of title to goods," 2
of registration, in "document of title to lands," 2
false, of execution of death sentence, 106
of stock, forging, 512

CERTIFICATE—*Continued.*
of marriage, forging, 513
of dockkeeper forging, 513
of registry of birth, etc., uttering false, 531
certified copy of document, etc., forging, 531
of indictment for bench warrant, 736
of trial at which perjury was committed, 800
of previous conviction, 801
of witness, 802
of dismissal at summary trial, 888
at trial of juvenile offender, 894
at summary conviction, 918, 919, 920

CERTIORARI—
court may make rules for, 602
not required in indictment against corporation, 727
not to lie when appeal is taken from summary conviction, 938
in summary conviction proceedings, 938, 939, 945

CHALLENGE—
by Crown, in libel, 305
to grand jury, not allowed, 752
to array, 774
to jurors, 777
in case of mixed juries, 786
in joint trial, 786

CHANCE MEDLEY—
what is, 203

CHARGE—
by judge to jury, 767

CHASTISEMENT—
reasonable, by parent or master, justified, 27

CHEATING—
at play, 430
at common law, 430

CHEQUE—
forgery of, 512

CHILD—
under seven, cannot commit offence, 7
between seven and fourteen, when capable, 7
of fourteen and upwards, capacity presumed, 8
duty to provide necessaries for, 143
under two years of age, abandoning, 149
when, becomes a human being, 205
concealing birth of, 229
under fourteen, consent no defence to indecent assault, 253
under fourteen defiling, 274
attempt, 274
unborn, killing, 275

CHILD—*Continued.*
under fourteen, stealing, 295
evidence of, *not under oath*, 795
bastard, trial for murder, 805
trial for murder of, verdict may be for concealing birth, 826

CHILD MURDER—
remarks on, 173

CHLOROFORM—
drugging by, with intent, 239

CHOKE—
with intent to commit indictable offence, 239

CHURCH—
preventing clergymen officiating in, 115
breaking and entering, 470, 471

CHURCHYARD—
preventing burial in, 115

CIVIL REMEDY—
not affected by criminal offence, 602

CLERGYMAN—
obstructing in discharge of duty, 115

CLERK—
and servants, stealing by, 355
falsification of accounts by, 419
issuing false dividend warrants, 532

CODICIL—
included in expression "testamentary instrument," 5
stealing, 370
forgery of, 512
obtaining by forged, 524

COCK-PIT—
keeping, 587

COERCION—
of wife, 11
See COMPULSION.

COIN—
offences relating to, 541
interpretation of terms, 541
counterfeiting coins, etc., 542
dealing in and importing counterfeit, 544
copper, 545
exportation, 545
making instruments for coining, 555
bringing instrument into Canada, 549
clipping current, 549
defacing current, 550

COIN—*Continued.*
possessing clippings, etc., 550
possessing counterfeit, 551
copper, offences respecting, 551
foreign, 552
counterfeit, uttering, 552
uttering light coins, 554
uttering defaced, 555
uncurrent copper, uttering, 555
punishment after previous conviction, 555
uttering defaced, consent of Atty.-Gen. required for prosecution, 612
counterfeit, found under search warrant, 639
false or counterfeit, evidence on trial of, 801
trial for coinage offences, 828
counterfeit, destroying on trial, 829

COMBINATION—
in restraint of trade, 589

COMMENCEMENT—
of prosecution, what is, 615

COMMISSION—
to examine witnesses, 794

COMMON ASSAULT—
definition, 259
punishment, 239.

COMMUTATION OF SENTENCE—

COMMON LAW—
rules of, adopted, 7
offences under, 959

COMMON NUISANCE—
definition, 131
criminal, 133
not criminal, 133

COMPENSATION—
for loss of property, 900
to purchaser of stolen property, 901

COMPOUNDING FELONY—105

COMPULSION—
by threats, 9
of wife, 11

CONCEALING—
birth of child, 229
treasure trove, 329, 430
gold or silver to defraud partner, 345
timber found adrift, 380
documents of title, etc., 393

CONCEALING—*Continued.*
anything capable of being stolen, 396
deeds, etc., 421

CONFESSION—
of accused, may be given in evidence, 657
punishment on, same as on verdict, 960

CONJUNCTIVE OR DISJUNCTIVE AVERMENTS—
when allowed, 678
on summary convictions, 948

CONSENT—
to infliction of death on one's self unlawful, 27
to indecent acts, 117, 121, 130, 252, 269
to abduction, 292, 293

CONSERVATORY—
stealing plants, etc., in, 381
destroying same, 584

CONSPIRACY—
to kill or do bodily harm to Her Majesty, 46
to levy war with to depose Her Majesty, etc., 46
when treason, overt act of is overt act of treason, 47
to commit treasonable offence, 48
to intimidate legislature, 48
seditious, 72
to bring false accusation, 100
to defile women, 129
to murder, 224
to defraud, 429
in restraint of trade, 593
in other cases, 596
indictment for, 680

CONSTABLE—
is a peace officer, 4

CONTEMPT—
of court, arrest without warrant for, 623
by witness at speedy trial, 881

CONTRACT—
criminal breach of, 590

CONTRIBUTORY NEGLIGENCE—
in manslaughter, 192

CONVERSION—
fraudulent, of property is theft, 339

CONVICTION—
See PREVIOUS CONVICTION.
SUMMARY CONVICTION.

CO-PARTNER—
in mine, concealing gold or silver, 345

CORONER—
inquisition of, 638, 732
inquest after execution of death sentence, 963

CORPORATION—
indictment against, 727

CORRECTION—
reasonable, of child, etc, 27
homicide by, 27, 190

CORROBORATION—
for what offences required, 795

CORROSIVE FLUID—
attempt to cause bodily injury by, 242

CORRUPTION—
of judges, etc., 77
of officers prosecuting, 77
in municipal affairs, 81

COSTS—
in case of libel, 306
on speedy trial, 881
on trial of juvenile offenders, 897
in proceedings for indictable offences, 898
on conviction for assault, 899
taxation of, 900
on summary conviction, 920
tariff of fees, 920

COUNSEL—757
See ADDRESS OF COUNSEL.

COUNT—
of indictment, what expression includes, 3
joinder of, 686

COUNTERFEITING—
great seal, 521
seal of court, etc., 522

COUNTY—
defined, 2

COURSE OF JUSTICE—
attempt to obstruct, 104

COURT OF APPEAL—
definition of, 2
See APPEAL.

CREDITOR—
assigning property with intent to defraud, 421
false entries in books with intent, 421

CRIMINAL RESPONSIBILITY—
protection from, for acts done, 12
See JUSTIFICATION AND EXCUSE.

CROPS—
setting fire to, 564
attempt, 564

CROWN CASES RESERVED—864
See CASE RESERVED.

CUMULATIVE PUNISHMENTS—966

CURTILAGE—
what is, 469

CUSTOMS—
officer of, is a public officer, 4
forging mark or brand, etc., of, 514

D.

DAM—
injuries to, 571

DEAD BODIES—
misconduct in respect of, 139

DEAF AND DUMB PERSON—
seduction of, 130

DEATH—
punishment of, when, 6
no one can consent to infliction of, on himself, 27
register of, forging, 512
false entry in, 530
uttering false certificate of, 531
execution of sentence of, 960

DEBENTURES—
forgery of, 512

DECLARATION—
voluntary, in lieu of oath, 98, 99

DEEDS—
included in document of title to lands, 2
concealing, 421
forgery of, 512

DEFAMATORY LIBEL—296
See LIBEL.

DEFICIENCY—
general, when evidence of larceny, 335

DEFILEMENT—
of women, 125
conspiracy for, 129

DEFINITIONS—1

DE MEDIETATE LINGUÆ—
jury abolished, 771

DEMURRER—
to indictment, 701

DEODAND—
abolished, 974

DEPOSITION—
accused entitled to inspect, and have copy of, 751
of sick person, how taken, 794
of person abroad, 794
may be used at trial, 796

DESERT—DESERTER—49, 50, 633

DETAINER—
forcible entry and, 60

DIRECTORS—
of company, offences by, 418, 419

DISABILITIES—

DISGUISE—
being disguised, when indictable, 485

DISOBEDIENCE—
to statute, 83
to orders of court, 83

DISORDERLY HOUSE—
is common bawdy-house, etc, 134
keeping, etc., 134, 140

DISTRICT—
definition of, 2

DIVIDEND WARRANT—
false, clerks issuing, 532
divisible averments, 686, 818

DOCK—
presence of prisoner in, 756

DOCUMENT—
of title to goods and lands, defined, 2
defined for purposes of forgery, 509

DOG—
stealing, 374
injuries to, 579

DOMESTIC ANIMALS—
stealing, 374
injuries to, 579

DRILLING—
unlawful, offences as to, 59

DRIVING—
furious, doing bodly harm by, 249

DROWN—
attempt to, 212

DRUG—
administering to woman for purpose of carnal connection, 125
administering, with intent, 239
administering to procure abortion, 275

DRUNKENNESS—
no excuse for crime, 11

DUEL—
seconds to, are principals in second degree, 35
challenge to fight, 61
killing in, 179

DUTIES—
tending to preservation of life, neglect of, 143, 198

DWELLING-HOUSE—
preventing breaking and entering justified, 24
the like by night, 25
stealing in, 384
definition in burglary, 469
offences as to, 471, 475, 478, 483, 484
destroying, etc., 573
injuries to, by tenants, 581

DYING DECLARATION—
admissibility of, in evidence, 201

E.

ELECTION—
day of, assault on, 254
indictment, 257
documents of, stealing, 373
destroying, 580
doctrine of, as to different charges of theft, 686

ELECTRIC TELEGRAPH—
injuries to, 569

ELECTRICITY—
breach of contract to supply, 590

EMBEZZLEMENT—339, 340, 344

EMBRACERY—104

ENGINE—
of railways, 245, 567
for working in mine, injury to, 573

ENGRAVING—
exchequer bill or note, 525

ENLISTMENT—
foreign act of, in force in Canada, 52

ENTRY—
forcible, and detainer, 60

ERROR
writ of, abolished, 864
remarks on, 866

ESCAPES AND RESCUES—
after committing offence, 18
from arrest for major offence, peace officer preventing, 19
private person preventing, 20
from arrest for minor offence, preventing, 20
or rescue in major offence preventing, 20
in minor offence, 20
offences by, 107 to 113

ESTREAT—
of recognizance, 951
in Quebec, 955

EVIDENCE—
when to be corroborated, 795
of child not under oath, 795
in certain cases, 801, 809
And see DEPOSITION.

EXAMINATION—
personation at, 538

EXCHEQUER BILLS—
defined, 510, 525
forgery of, 525

EXCUSABLE HOMICIDE—
remarks on, 202

EXCUSE—7
See JUSTIFICATION AND EXCUSE.

EXECUTION—
of sentence of death, 960

EXPLOSIVE SUBSTANCE—
definition, 2
offences by, 63
bodily injuries by, 241
damage to building, etc., by, 565, 573
consent of Attorney-General required for prosecution, 612
seized under search warrant, 638

EXPOSURE—
of person, 120, 141

EXTORTION—
by defamatory libel, 299
at common law, 422
robbery and, 444
by threats, 451, 454
EXTRA-JUDICIAL OATHS—101

F.

FACTOR—
fraudulent dealing with goods, 424
FALSE EVIDENCE—
procuring death by, 97, 208
FALSE NEWS—
spreading, 73
FALSE PERSONATION—
of owner of property, 538
at examinations, 538
of owner of stock, 539
FALSE PRETENCES—
obtaining property by, 397
punishment for, 398
remarks on, 398
obtaining valuable security by, 414
FALSE RECEIPTS—
in dealing with property, 424
FALSE SIGNALS—
exhibiting, to bring ship into danger, 570
FALSE WEIGHTS OR MEASURES—
selling goods by, 430
FEAR—
death caused by, 208
FELO DE SE—
aiding and abetting, 226
FELONIOUS INTENT—
in theft, formerly required, 325
FELONY AND MISDEMEANOUR—
distinction between, abolished, 603
FEMALE—
seduction of, under promise of marriage, 124
passengers on vessels, seduction of, 124
idiot, etc., carnally knowing, 130
indecent assault on, 252
FENCE—
stealing, 380
injuries to, 582

FERAE NATURÆ—
animals, when capable of being stolen, 323, 337

FINDING—
larceny by, 329

FINDING OF INDICTMENT
expression defined, 2

FINE—
in discretion of court when not fixed, 960
in addition or in lieu of punishment, 968

FINES AND FORFEITURES—
provisions respecting, 958

FIRE-ARMS—
pointing at any person, 67

FISH—
destroying, in private waters, 574, 576

FIXTURES—
on buildings, stealing, 376
injury by tenant, 581

FOOD—
selling things unfit for, 133

FORCIBLE ENTRY—
and detainer, 60

FOREIGN AGGRESSIONS—47

FOREIGN ENLISTMENT ACT—
in force in Canada, 52

FOREIGN SOVEREIGNS—
libel on, 73

FOREST—
setting fire to by negligence, 565

FORFEITURE—
fines and, 958
on conviction, abolished, 974

FORGERY—
general remarks, 489
provisions respecting, 509
definition, 510
punishment, 511
uttering, 521
possessing forged bank notes, 523
demanding property on forged instrument, 524
preparations for, 525
of certificates, 531
uttering false certificates, 531
of trade marks, 533

FORGERY—*Continued.*
on trial for, evidence must be corroborated, 795
comparison of writings on trial, 805

FORMAL OBJECTIONS—
to proceedings before indictment, 701

FORMALITIES—
previous to indictment, 729

FORM—
matters of, in summary convictions, 937

FORMS—
in schedule two to be valid, 980

FRAUD—
upon the Government, 78
in dealing with property, 418
in Government contracts, 590

FRAUDULENT INTENT—
remarks on, 493

FRAUDULENT MARKING OF MERCHANDISE—533

FRUIT—
stealing, 381
destroying, 584

FURIOUS DRIVING—
doing bodily harm by, 249

G.

GAMBLING—
in stocks, 136
in public conveyance, 136
in stocks, evidence, 809

GAMING HOUSE—
common, defined, 133
playing in, etc., 135

GAOL—
included in term "prison," 4
common, defined for summary conviction, 906

GARDEN—
stealing in, 381
destroying vegetables, etc., in, 584

GAS—
stealing, 322, 695
criminal, breach of contract to supply, 590

GASPE—
special provisions as to, 630

GATE—
stealing, 380
destroying or damaging, 582

GENERAL DEFICIENCY—
when evidence of larceny, 335

GIRL—
between fourteen and sixteen, seduction, 123
unlawfully defiling, 125
defilement, parent or guardian procuring, 127
householder permitting, 128
idiot, etc., carnally knowing, 130
under fourteen, defiling, 274
attempt, 274
under sixteen, abduction, 292

GLASS—
fixed to building, stealing, 376

GOLD—
offences as to, 345, 382, 642

GOODS—
document of title to, defined, 2
in progress of manufacture, stealing, 389, 390
destroying, etc., 574
defined as to fraudulent marking of merchandise, 534

GOVERNMENT—
frauds upon, 78
frauds in contracts with, 590

GRAND JURY—
proceedings before, 729, 733
objections to constitution of, 752
no challenge to any of, 752
not to ignore bill for insanity of accused, 863
special provision as to Nova Scotia, 876

GRAND LARCENY—
and petit larceny, distinction abolished, 307

GRAIN—
false receipt for, 424
intimidation to prevent delay in, 595

GREAT SEAL—
forgery of, 521

GREENHOUSE—
stealing fruit, etc., in, 381
destroying, etc., same, 584

GRIEVOUS BODILY HARM—
See BODILY HARM.

GUARDIAN—
seducing ward, 124
procuring defilement of ward, 127
duty to provide necessaries for ward, 143

GUILTY—
case can be reserved though prisoner pleads, 867

H.

HABEAS CORPUS—
ad testificandum, abolished, 793
special provision, 874

HANDWRITING—
disputed, comparison with genuine, 805

HARBOUR—
injuries to, 573, 583

HARD LABOUR—
imprisonment in penitentiary, etc., to be with, whether in sentence or not, 966
in other prison must be in sentence, 967

HAVING IN POSSESSION—
definition, 2

HIGH COURT OF JUSTICE—
of Ontario, is "Court of Appeal" and "Superior Court of Criminal Jurisdiction," 2, 4

HIGH SEAS—
offences committed on, 606
warrant for offence committed on, 632

HIGH TREASON—46
See TREASON.

HOLES—
in ice, leaving unguarded, 250

HOLIDAY—
warrant may be executed on, 637

HOMICIDE—
by neglecting natural duties, 143, 198
Imperial Commissioners' report on, 153
remarks on, 156
definition, 205
culpable, 206
And see MURDER, MANSLAUGHTER.

HOP-BINDS—
destroying, etc., 574

HORSE—
included in term "cattle," 2

HOT-HOUSE—
stealing fruit, etc., in, 381
destroying same, 584

HOUSE—
See DWELLING-HOUSE.

HOUSE-BREAKING—
See BURGLARY.

HOUSE OF ILL-FAME—
See BAWDY-HOUSE.

HOUSEHOLDER—
permitting defilement of girl on premises, 128

HUSBAND AND WIFE—
compulsion of wife not presumed, 11
neither accessory after the fact for receiving, etc., the other after commission of offence, 40
duty to provide necessaries, 143
search warrant for wife in house of ill-fame, 642

HUMAN REMAINS—
misconduct in respect of, 139

HYPOTHECATION—
fraudulent, of real property, 422

I.

ICE—
leaving hole in, unguarded, 250

IDIOT—
girl, seduction of, 130

IGNORANCE OF LAW—
not an excuse for crime, 11

IMMORAL BOOKS—
publishing, etc., 121
posting, 122

IMPARL—
accused not entitled to, etc., 710
special provision as to Ontario, 875

IMPERIAL STATUTES—
offences against, 6

IMPOUNDING DOCUMENTS—
procedure at trial, 828

IMPRISONMENT—
provisions as to, 964

INCEST—119
provisions as to, 119
in Maritime Provinces, unrepealed statutes as to, 119

INCITING—
indictable, though offence incited not committed, 30
to drive furiously whereby death is caused is manslaughter, 33
to mutiny, 49
Indian to riot, 63
or attempting to incite, 598

INDECENT ACTS—
punishment for, 120, 121
acts of gross indecency—121, 141

INDECENT ASSAULT—
on males, 121, 253
on females, 252
consent of child under fourteen no defence, 253

INDECENT EXPOSURE—120, 141

INDECENT EXHIBITION—140

INDIAN—
inciting to riot, 63
woman, prostitution of, 130

INDIAN GRAVES—
stealing things deposited in, 393

INDICTMENT—
definition, 3
finding the, what expression includes, 2
provisions respecting, 670
in special cases, 681, 685-6
against corporations, 727
preferring, 728
special provision for Nova Scotia, 876

INDORSEMENT—
of bill of exchange, etc., forging, 512, 513
of warrant, 637
of warrant for witness, 649

INFAMOUS CRIME—116
See ABOMINABLE CRIME.

INFANT—
child under seven cannot commit offence, 7
duty to provide necessaries for, 143
under two years of age, abandoning, 149
See CHILD.

INFECTION—
communicating, is not an assault, 253

INFORMATION—
included in expressions "indictment" and "finding the indictment," 2, 3
for common nuisance, 132, 133
before magistrate, 632

INLAND REVENUE—
officer of, is a public officer, 4
forging stamp of, 514, 526

INNOCENT AGENT—
For offence committed by, absent employer is principal in first degree, 30

INNUENDO—
in libel, 305

INQUIRY—
preliminary, by magistrate, 627, 644

INQUISITION—
by coronor, 638, 732

INSANITY—
when an excuse for crime, 8
of prisoner, 860

INSULT—
repelling assault accompanied by, 24
provocation by, in homicide, 211

INTENT TO DEFRAUD—
in forgery, 493

INTERPRETATION—
of terms, 1

INTIMIDATION—
to prevent person doing lawful act, 591
and assault, 593
to prevent business, 595

INTOXICATING LIQUOR—
definition, 3
sale of, near public works, 69
taking on board Her Majesty's vessels, 70
giving to woman or girl in order to have carnal connection, 125

J.

JOINDER—
of counts, 686
of defendants, 696
of accessory and principal, 697
of offences, none on summary conviction proceedings, 908

JEOPARDY—
necessary to make conviction a bar, 715
no one to be put in, twice for an offence, 715

JOINT TENANTS—
how described in indictment, 681

JUDGE—
judicial corruption, 77
forging document issued by, 513
charge to jury, 767

JUDICIAL CORRUPTION—77

JUDICIAL DOCUMENTS—
stealing, 371
forgery of, 513

JURISDICTION—
of superior courts, 604
of courts of general or quarter sessions, 60
of the admiralty, offences within, 606
magisterial, 627
of courts, 728
in cases of libel against newspapers, 728

JURORS—
corrupting, 104
grand, evidence by, 734
not to separate on trial, 787
to have fire, etc., 787

JURY—
addresses to, 757
charge, 767
polling the, 770
who qualified to serve on, 771
de medietate linguæ abolished, 771
mixed, in Quebec, 772
in Manitoba, 774
challenging array, 774
calling panel, 776
challenges and directions to stand by, 777
challenge by Crown in libel cases, 786
challenges in case of mixed, 786
challenges in joint trials, 786
ordering tales, 767
saving clause as to, 787

JURY—*Continued.*
discharge of, 788
view by, 829
retiring to consider verdict, 849
unable to agree, 849
proceedings on Sunday, 850
de ventre inspiciendo abolished, 850
And see GRAND JURY.

JUSTICE—
definition, 3
See MAGISTRATE.

JUSTICE OF THE PEACE—
term "justice" includes, 3
unlawfully administering oath, 101
functionaries exercising powers of two, 605.
And see MAGISTRATE.

JUSTIFICATION OR EXCUSE—
common law rules as to, 7
children under seven, 7
between seven and fourteen, 7
insanity, 8
compulsion by threats, 9
of wife, 11
drunkenness, 11
ignorance of law, 11
"justified" and "criminal responsibility" explained, 12
execution of sentence, 12
process, 12
warrants, 14
erroneous sentence or warrant, 14
sentence or process without jurisdiction, 15
arresting wrong person, 15
irregular warrant or process, 16
arrest by peace officer for offence supposed to have been committed, 16
persons assisting peace officer, 17
arrest without warrant, 17
arrest after commission of offence, 17
arrest for major offence committed by night, 17
arrest by peace officer of person found committing offence, 17
arrest during flight, 18
necessary force may be used to arrest, 19
process or warrant to be produced if required and notice of cause of arrest given, 19
effect of failure to produce or give notice, 19
peace officer preventing escape from arrest, 19
private person preventing escape, 20
necessary force may be used, 20
preventing escape or rescue in major offences—protection from criminal responsibility, 20

JUSTIFICATION OR EXCUSE—*Continued.*
the same as to minor offences, 20
preventing breach of the peace, 20
arrest of person found committing breach of the peace, 21
peace officer receiving into custody party to breach of the peace, 21
suppression of riot by magistrates, 21
by any one, 21
necessary force may be used, 22
protection of persons subject to military law, 22
necessary force may be used to prevent commission of major offence, 22
self-defence, unprovoked assault, 22
provoked assault, 23
provocation may be by blows, words or gestures, 23
force may be used to prevent insult, 24
one in possession of moveable property may resist taking by trespassers, 24
protection from criminal responsibility in defending possession of moveable property, 24
one in unlawful possession not protected against owner, 24
necessary force to prevent breaking and entering of dwelling-house may be used, 24
and to prevent breaking and entering by night, 25
defence of real property against trespassers, 25
entry on house or land under assertion to title, 26
discipline of child, pupil or apprentice, 27
on board ship, 27
protection from criminal responsibility in performing surgical operation, 27
using force in excess of what is authorized, 27
consent to infliction of death no excuse, 27
act done in obedience to *de facto* law, 28

JUVENILE OFFENDERS—
trial of, 892
conditional release of, on first offence, 977

K.

KEEPER—
of penitentiary or prison is a "peace officer," 4

KEEWATIN—
for proceedings in, expression "Attorney-General" means Attorney-General of Canada, 1
no speedy trial in, 877
summary trial in 884, 885
trial of juvenile offenders in, 892, 898

KEY—
used by post office department, stealing, 372
stealing by means of, 389

KIDNAPPING—
what constitutes, 258
remarks on, 258
form of indictment, 258

KILLING—
by correction, 27, 190
by influence on the mind, 208
cattle, 341, 573
pigeons, 375
See HOMICIDE, MURDER.

L.

LAND—
document of title to, defined, 2
included in "valuable security," 5
stealing things fixed to, 336
document of title to, stealing, 370
things fixed to, stealing, 376

LAND MARKS—
offences as to, 582

LARCENY—
GENERAL REMARKS ON—307
the taking, 308
the carrying away, 320
the goods taken, 323
must be against owner's will or consent, 324
intent required, 325
by finding, 329
evidence, etc., 332
general deficiency in books of clerk, 335
PROVISIONS RESPECTING—336
what things can be stolen, 337
animals capable of being stolen, 337
definition of theft, 338
theft of things under seizure, 340
theft by agent, 341
by attorney, 342
of proceeds under direction, 342
by co-owner, 345
by co-partners in mining claims, 345
by husband and wife, 346
by clerks or servants, 355
by agents, etc., punishment, 369
by tenants or lodgers, 370
of testamentary instruments, 370
of judicial documents, 371
of post letter bags, etc., 372
of letters and other mailable matter, 372

LARCENY—*Continued.*
of election documents, 373
of railway tickets, 373
of cattle, 373
of dogs, birds, etc., 374
of oysters, 375
of things fixed to buildings, 376
of trees, saplings, etc., 377, 378
of timber found adrift, 380
of fences, styles, etc., 380
unlawful possession of trees, fences, etc., 380
of plants in gardens, 381
not in gardens, 382
of ores, minerals, etc., 382
stealing from the person, 383
stealing in a dwelling-house, 384
stealing by pick-locks, etc., from any receptacle, 389
stealing goods in process of manufacture, 389
stealing in ships or from wharves, etc., 390
stealing wrecks, 392
stealing on railways, 392
stealing things in Indian grave, 393
destroying documents, 393
stealing promissory notes, 393
concealing anything capable of being stolen, 396
thief bringing into Canada anything stolen abroad, 396
punishment for, when not provided for, 397
when value exceeds $200: 397
search warrant for things stolen, 638
three acts of, committed within six months may be tried together, 686
on indictment for, no verdict for obtaining by false pretenses allowed, and *vice versa*, 719
summary trial, 884
trial of juvenile offenders, 892
compensation to purchaser of stolen property, 901
restitution of stolen property, 901

LAUDANUM—
administering, with intent to commit indictable offence, 239

LAW OF MARRIAGE—279
See MARRIAGE.

LEAD—
on buildings, stealing, 376

LEASE—
of mine, fraud by holder of, 423

LEGISLATURE—
conspiracy to intimidate, 48

LETTER—
threats by, to murder, 222
stealing, 372

LETTER—*Continued.*
falsely pretending to enclose money in, 417
demanding with menaces by, 449
causing person to receive, containing threat, 452
threatening by, to burn, 565
to injure cattle, 580

LETTERS PATENT—
forgery of, 513

LEVYING WAR—
to depose Her Majesty or compel Her to change Her measures, 46
conspiring to, for such purpose, 46
subject of state at peace with Her Majesty, 47
British subject in company with same, 48
against Her Majesty, conspiring, 48

LIBEL—
seditious, 72
on foreign sovereign, 73
obscene, 121
defamatory, defined, 296
publishing, defined, 297
upon invitation, 297
in courts, etc., 297
parliamentary papers, 297
report of proceedings of parliament and courts, 297
public meetings, 297
fair discussion and comment, 298
seeking remedy for grievance, 298
answer to inquiries, 298
giving information, 298
responsibility of proprietor, etc., of newspaper, 298
selling libels, 299
when truth is a defence, 299
defamatory, extortion by, 299
punishment, 300
general remarks and cases, 300
procedure on, 304, 305
former act unrepealed, 306
defamatory, not triable at quarter sessions, 605
indictments for, 679
against newspapers, jurisdiction, 728
evidence in certain cases, 810

LIME—
destroying fish in river by, 574

LIMITATION—
of time to commence proceedings in certain cases, 613
what is commencement of prosecution, 615
need not be pleaded in criminal cases, 615

LIMITATION—*Continued.*
of time in offences under Dominion Elections Act, 615
in proceedings on summary conviction, 906
action against justice for not making returns of convictions, 948
action for penalty, 958
against persons administering the criminal law, 979

LIQUOR—
in package on railway, damaging, 567
See INTOXICATING LIQUOR.

LOADED ARMS—
definition, 3

LODGER—
tenant or, stealing by, 370

LOOSE, IDLE AND DISORDERLY—
what persons are, 140
search warrant, 644

LOST PROPERTY—
larceny by finding, 329

LOTTERIES—
provisions respecting, 138
tickets for, etc., seized under search warrant, 643

LUCRI CAUSA—
abduction of heiress, 289, 293
larceny need not be, 333
nor receiving, 351

LUNATIC—8, 860
See INSANITY.

M.

MACHINERY—
riotous destruction of, 57
damage to, 58
wilful damage to, 574
remarks, 577

MAGISTRATE—
suppressing riot, 21
reading Riot Act, 56
duty of, if rioters do not disperse, 57
certain to have powers of two justices, 665
jurisdiction in indictable offences, 627
meaning of expression, in summary trial proceedings, 884
may try juvenile offenders, 892
jurisdiction in summary convictions, 906
actions against, 979

MAIL—
definition, 6
offences as to, 372
stopping with intent to rob, 447

MAILABLE MATTER—
definition, 6
stealing, 372

MAIM—
wounding with intent, 233
or wound a public officer, 239
by explosives, 241
one's self to obtain charity, 432
cattle, 573
attempt, 579

MALE PERSON—
indecent assault by, 116, 121, 253

MALICE—
in murder, 153, 167
in mischief, 557

MALICIOUS INJURIES—557
See MISCHIEF.

MANSLAUGHTER—
remarks on, 181
provisions as to, 211
definition, 211
punishment for, 225
triable at Quarter Sessions, 605
conviction or acquittal for, a bar to subsequent indictment for murder, 715
conviction for, on indictment for murder, 819, 822
And see HOMICIDE.
MURDER.

MANTRAPS—
setting, with intent to do bodily harm, 243

MANUFACTORY—
destroying or damaging, 57, 58
stealing goods entrusted, etc., 389
fraudulently disposing of goods entrusted, 390
damaging goods in, 574, 577

MARINE STORES—
offences respecting, 425
search warrant, 641

MARINE—
receiving, etc., regimental necessaries from, 428, 429

MARRIAGE—
bigamy, 279
feigned, 287
polygamy, 287
unlawfully solemnizing, 288
solemnizing an unlawful, 288
abduction for purpose of, 289
license or certificate, forging, 513
register of, destroying, etc., 530
false extracts and certificates of, 530, 531

MARRIED WOMEN—
See HUSBAND AND WIFE.

MASKED—
being, when indictable, 485

MASTER—
of ship, taking unseaworthy ship to sea, 251
consent of Minister of Marine required for prosecution, 612

MASTER AND SERVANT—
criminal liability of master for acts of servant, 12
master may use reasonable force in correction of apprentice, 27
neglect by master of natural duties, 143
assaults by masters on servants, 151
master may justify battery in defence of servant, 263

MATRONS—
jury of, abolished, 850

MAYHEM—
when justifiable, 263

MEDICAL PRACTITIONER—
surgical operation by, 27
killing by, 195

MEETINGS—
public, offences respecting, 68
religious, disturbing, 116

MENACES—
stealing in dwelling-house with, 384
sending letter demanding property with, 449
demanding with, 450

MENS REA—
necessary to offence, 11, 295

METAL—
on buildings, stealing, 376
stealing ore of, 382

MILITARY LAW—
definition, 3
protection of persons subject to, 22
code cannot affect government of Her Majesty's forces.

MILITIA—
enticing members of, to desert, 50
purchasing, etc., regimental necessaries, 428

MILL POND—
destroying flood gate of, 574

MINERALS—
stealing, 382

MINES—
punishment for leaving unguarded, 250
concealing gold, etc., to defraud partner in, 345
stealing ore, etc., from, 382
fraud by lessee or licensee of, 423
mischief to, 572
search warrant, 642

MISADVENTURE—
homicide by, 205

MISBEHAVIOUR IN OFFICE—80

MISCARRIAGE—
attempt to procure, 275-276

MISCHIEF—
causing damage, 557
arson, 558
attempt to commit arson, 563
damage by explosives, 565
on railways, 567
injuries to telegraphs, 569
wrecking, etc., 570-571
to mines, 572
punishments, 573
injuries to cattle, etc., 579-580
to poll-books, 580
by tenants, 581
to land marks, 582
to fences, etc., 582
to harbours, 583
to trees, etc., 583-584
other injuries, 585

MISCONDUCT—
in office, 80
of officers entrusted with execution of writ, 84

MISDEMEANOURS—
felony and, distinction abolished, 603

MISFEASANCE IN OFFICE—80

MISPRISION—
of treason, 47

MORALITY, OFFENCES AGAINST—
unnatural offences, 116, 118
incest, 119
indecent acts, 120, 121
publishing obscene matter, 121
posting immoral books, 122
seduction, 123, 124
unlawfully defiling women, 125-129
carnally knowing idiots, etc., 130
prostitution of Indian women, 130

MORTGAGE—
making fraudulent, 422
fraudulently concealing, 422

MOTION IN ARREST OF JUDGMENT—852

MOTIVE—
not the same as intent, in criminal law, 11
need not be proved, in case of disobedience to statute, 530

MUNICIPALITY—
definition, 3
corruption in municipal affairs, 81
stealing by employees of, 355
employee of, refusing to give up books, 369
stealing documents of election in, 373
destroying, etc., same, 580

MURDER—
remarks on homicide, 153
definitions, 210
provocation to reduce to manslaughter, 211
punishment for, 212
attempts to commit, 212
threats by letter to, 222
conspiracy to, 224
accessory after the fact to, 225
by suicide, 226
no other offence can be joined in indictment for, 686
on indictment for, conviction only for murder or manslaughter, 819

MUTE—
seduction of deaf, 130
on arraignment, standing, 752

MUTINY—
inciting to, 49
sentence under Act of imprisonment, 966

N.

NECESSARIES—
duty to provide wife, child, etc., with, 143
punishment for neglect, 144
NECESSITY—
homicide by, 10, 171
NEGATIVE AVERMENTS—
in indictments, 676, 677
on summary convictions, 909
NEGLIGENCE—
death caused by, 144, 191, 198
contributory, in homicide, 192
causing bodily injury by, 245, 249
setting fire to forest by, 565
NEW BRUNSWICK—
"Court of Appeal" in, 2
"Superior Court of Criminal Jurisdiction," 5
incest in, unrepealed statute, 119
adultery in, 129
speedy trials in, definitions, 877
summary trials, 884
trial of juvenile offenders, 890
application of fines, 890
definitions, 892
application of fines generally, 897
appeal from summary convictions, 933
recovery of fines on estreated recognizance, 951
NEW TRIAL—
court may order, on case reserved, 865
when granted, 872
by order of Minister of Justice, 873
may be ordered by Supreme Court of Canada, 873
NEWS—
publishing false, 73
NEWSPAPER—
defined in respect to libel, 3
advertising reward for return of stolen property in, 106
responsibility of proprietor of, 298
trial for libel must be in province where newspaper published, 305
indictment against, for libel must allege publication in the district, 845
NIGHT—
or "night time" defined, 3
arrest of person committing offence by, 17, 18
defence of dwelling-house entered by, 24
what is, in burglary, 457
breaking shop, etc., by, 480, 483
being found in dwelling house by, 483
being found armed at, with intent, 484

NIGHT—*Continued.*
being masked or disguised, or in possession of house-breaking implements at, 485
damaging any property by, 574
arrest without warrant of person found committing offence by, 618
of person loitering on highway by, 618

NIPISSING—
special provisions as to, in sections 878, 879, 902

NOLLE PROSEQUI—851

NORTH WEST MOUNTED POLICE—
enticing members of, to desert, 50

NORTH-WEST TERRITORIES—
expression "Attorney-General" means Attorney-General of Canada in, 1
Supreme Court of is a "Court of Appeal," 2
"Superior Court of Criminal Jurisdiction," 5
sale of arms in, 69
no speedy trials in, 877
summary trials, 884
trial of juvenile offenders, 892
application of fines, 951
limitation of time for proceedings on summary convictions, 906
imprisonment in, 967
code applies to, 981

NOT GUILTY—
plea of, on refusal to plead, 752

NOTARIAL ACTS—
forgery of, 511

NOTICE—
of cause of arrest, to be given on executing warrant or process, 19
in proceedings against receivers, 827
to surety in recognizance to prosecute, not required, 661
of indictment against corporation, 727
of motion for leave to appeal on case reserved, 865
of appeal to Supreme Court of Canada, 873

NOVA SCOTIA—
"Court of Appeal" in, 2
"Superior Court of Criminal Jurisdiction," 5
incest, unrepealed statute in, 119
special provisions as to indictable offences, 876
speedy trial in, 877
summary trial, 884
trial of juvenile offenders, 892
application of fines, 890
definitions, 892
application of fines generally, 897
appeal from summary convictions, 933
recovery of fines on estreated recognizance, 951

NUISANCE—
common, defined, 131
penalty for common, 133
of particular character, 133
selling things unfit for food, 133
common bawdy-house defined, 133
common gaming-house, 133
common betting-house, 134
punishment for keeping bawdy-house, etc., 134
offences as to gaming-house, 135
gambling in stocks, 136
public conveyance, 136
betting and pool selling, 137
lotteries, 138
misconduct in respect of dead bodies, 139

O.

OATH—
to commit certain offences, 70, 72
administering without authority, 101
OBJECTION—
certain objections not fatal, 678
to indictment, how taken, 701
on summary convictions not fatal, 908
OBSCENE MATTER—
publishing, mailing, etc., 121, 122
OBSTRUCTION—
peace or public officer, etc., 84
of peace officer entering gaming house, 135
of railways, 567
OBTAINING—
by false pretenses, 397
passage by false ticket, 417
OFFENCES AGAISNT THE LAW OF MARRIAGE—279
See MARRIAGE.
OFFENCES AGAINST THE PERSON AND REPUTATION—143
See PERSON.
OFFENCES AGAINST RIGHTS OF PROPERTY—336
See THEFT, FALSE PRETENSES, FORGERY, MISCHIEF.
OFFENCES AGAINST PUBLIC MORALS—114.
See PUBLIC MORALS.
OFFENCES AGAINST PUBLIC ORDER—46
See PUBLIC ORDER.
OFFENCES AGAINST RELIGION—114
See RELIGION.

OFFENSIVE WEAPON—
definition, 4
unlawful use and possession of, 63
possession, 64
carrying, 65
smugglers carrying, 65
carrying about the person, 67
at public meetings, etc., 68
near public works, 69

OFFICE—
selling, appointment, etc., 82
official corruption, 77
disabilities by conviction, 80, 973

OFFICER—
judicial corruption, 77
employed in prosecutions, corruption of, 77
entrusted with execution of writ, misconduct of, 84
of justice, killing, 176
killing by, 178
And see PEACE OFFICERS.
PUBLIC OFFICERS.

OFFICIAL CORRUPTION—77

OFFICIAL SECRETS—
unlawfully communicating, etc., 50, 51, 52

OIL WELL—
conveying water, etc., into unlawfully, 572

OMISSION—
to provide necessaries of life, 143
dangerous to life, duty to avoid, 144
to perform legal duties, homicide by, 191, 199
See NEGLIGENCE.

ONTARIO—
"Court of Appeal" in, 2
"Superior Court of Criminal Jurisdiction," 5
offences in certain parts of, 629
practice in, 875
provisions as to courts in, 875
speedy trials in, definitions, 877
summary trials in, definitions, 884
by magistrate in, 886
application of fines, 890
trial of juvenile offenders, definitions, 892
application of fines, 897
summary convictions, appeal, 933
returns in certain parts, 946
recovery of fines on estreated recognizance, 951
imprisonment in, special provisions, 967

ORCHARD—
stealing fruit, etc., from, 381, 382
destroying fruit, etc., in, 584

ORDERS—
of court, disobedience to, 83
for payment of money, forging, 512, 518
for delivery of goods, forging, 512, 518
for passage on railway, etc., 514

ORE—
of metals, stealing from mine, 382
indictment for stealing, 685

OUTLAWRY—
abolished, 974

OVERT ACTS—
in treason, 47
limitation of time, 614
indictment must state, 679
special provisions as to indictment not to apply, 755
indictment not to apply, 755

OWNER—
definition, 4
of any property against which offence is committed, may arrest offender, 618

OYSTER BEDS—
unlawful dredging, 337
indictment for, 681

OYSTERS—
capable of being stolen, 337
stealing, 375
indictment for, 681

P.

PANEL—
of Jury, stealing, 371
See CHALLENGE.
JURY.

PARDON—
provisions as to, 976

PARENT—
may use reasonable force in correction of child, 27
duty to provide necessaries, 143
may justify battery in defence of child, 263, 264

PARLIAMENT—
levying war to intimidate, 46
conspiring to levy war to intimidate 48,

PARLIAMENT—*Continued.*
disobeying act of, 83
publishing report of proceedings not libel, 297

PARTIES TO OFFENCES—28
See ACCESSORY.
AIDERS AND ABETTORS.

PARTNER—
theft by, 345
in mining claim, concealing gold, etc., 345

PAWNBROKER—
ticket, is a warrant for delivery of goods, 519

PEACE—
breach of, 52
articles of, 969
See ARTICLES OF THE PEACE.
RIOT.

PEACE OFFICER—
defined, 4
justification in making arrest, 16-21
neglect of, to suppress riot, 83
neglect to aid, 83
obstructing, in execution of duty, 84
assault on, 254
arrest by, without warrant, 617, 619

PENALTY—
limitation of action for, 958

PENETRATION—
in carnal knowledge, 6, 269

PENITENTIARY—
included in term "prison," 4
escape from, 112
imprisonment in, 966

PEREMPTORY CHALLENGE—777
See CHALLENGE.

PERJURY—
provisions as to, 85
subornation, 86, 96
punishment for, 97
lawful oath necessary, 88
indictment, 89
evidence, 90
false oath is, 98
judge may commit for, at trial, 98
false affidavit out of Province, 99
false statements, 99

PERJURY—*Continued.*
fabricating evidence, 99
triable at Quarter Sessions, 605
provisions as to indictment, 680
when evidence must be corroborated, 795
evidence of child not under oath, 795
evidence of trial where committed, 800

PERSON—
definition, 4
stealing from the, 383

PERSON AND REPUTATION, OFFENCES AGAINST—
DUTIES TENDING TO PRESERVATION OF LIFE—
duties—definition, 143
duty of parent, guardian, etc., 142
omissions dangerous to life, 144
punishments, 144
abandoning infants, etc., 149
assaults by masters on servants, etc., 151
HOMICIDE—
remarks, 153
definition, 205
when child becomes a human being, 205
culpable homicide, 206
procuring death by false evidence, 208
death within a year and a day, 208
killing by influence on the mind, 208
acceleration of death, 209
that death might have been prevented no excuse, 209
treatment of injury causing death, 209

MURDER, MANSLAUGHTER, ETC.—
See MURDER and MANSLAUGHTER.

BODILY INJURIES, ETC.—233
See BODILY HARM.

ASSAULTS—252
See ASSAULT.

RAPE AND PROCURING ABORTION—268
See RAPE.
ABORTION.

OFFENCES AGAINST CONJUGAL RIGHTS, ETC.—279
See BIGAMY, MARRIAGE, ABDUCTION.

DEFAMATORY LIBEL—296
See LIBEL.

PERSONATION—
to obtain property, 538
at examinations, 538
of owner of stock, 539

PETIT LARCENY—
distinction between grand larceny and, abolished, 307

PETIT TREASON—
what constituted, 205

PICKLOCK—
stealing by means of, 389

PICTURES—
obscene, selling, etc., 121

PIGEON—
capable of being stolen, 337
killing with intent, 375

PILLORY—
punishment by, abolished, 974

PIRACY—74

PLACE—
district, county and, defined together, 2

PLANT—
stealing, 381, 382
destroying, 584

PLAY—
cheating at, 430

PLEA—
included in expression "indictment," 3
of justification in libel, 305
objections to indictment to be before, 701
to indictment, time, 710
in bar, 714
of corporation, 727
in abatement abolished, 752
refusal to plead, 752

PLEDGE—
unlawful, by attorney, etc., 342

POISON—
killing by, 174
attempt to murder by, 212
to cause bodily harm by, 240
administering to procure abortion, 276
poisoning not an assault, 823

POLL—
challenge to, for favour, 779, 783

POLL-BOOKS—
stealing, 373
destroying, 580

POLLING JURY—770

POLYGAMY—
provisions respecting, 287
POND—
mill-pond, damaging, 574
POOL SELLING—
betting and, 137
POSSESSION—
having in, defined, 2
of stolen goods, presumptive evidence of larceny, 333
of stolen property, evidence on trial of receiver, 827
POST—
stealing, 380
damage to, 582
POST LETTER—
definition, 6
receiving stolen, 353
stealing, 372
POST LETTER BAG—
definition, 6
receiving stolen, 353
stealing, 372
POST OFFICE—
definition, 6
stealing key of, 372
forging postal stamps, 527
sections of act repealed, 983
POSTPONEMENT—
of trial, 710, 713
POWER OF ATTORNEY—
theft of property held under, 342
forgery of, 513, 523
PRACTICE—
of courts as to juries, saving clause, 787
in courts of Ontario, 875
PREGNANCY—
of woman sentenced to death, 850
PRESENTMENT—
included in term "indictment," 3
PRESUMPTION—
of capacity to commit crime, person of fourteen and upwards, 8
of sanity, 8
of compulsion of wife, none, 11
of larceny by possession of stolen goods, 333
PRETENSES—397
SEE FALSE PRETENSES.
PREVIOUS CONVICTION—
stealing domestic animals after, 374
stealing trees, etc., after, 378

PREVIOUS CONVICTIONS—*Continued.*
fences, etc., after, 380
plants, etc., in gardens, 381
not in gardens, 382
stealing after, 397
burglary, etc., after, 488
offence as to coin after, 555
damaging fences, etc., after, 582
trees, etc., 583
vegetables, etc., 584
indictment charging, 697
proceedings on, 791
proof of, 801, 802
may be given in evidence against receiver, 828
punishment after, 965
PRINCE EDWARD ISLAND—
"Court of Appeal" in, 2
"Superior Court of Criminal Jurisdiction," 5
incest in, unrepealed statute, 119
speedy trials in, definitions, 877
summary trials, special provisions, 886
trial of juvenile offenders, the same, 898
application of fines, 890
definitions, 892
general application of fines, 897
appeal from summary convictions, 897
return of convictions, 946
recovery of fines on estreated recognizances, 951
PRINCIPAL—
in first degree defined, 30
offence committed through agent, 30
in second degree defined, 31
all are, in treason, 35
See ACCESSORY.
AIDERS AND ABETTORS.
PRISON—
definition, 4
escapes and rescues, 107, 113
See GAOL.
PENITENTIARY.
PRISON BREACH—107-113
PRISONER—
removal of, 740
arraignment, 751
presence at trial, 756
statement of, to jury, 763, 764
procuring attendance of, as witness, 792
presence at taking evidence under commission, 794
statement of, before magistrate, evidence at trial, 800

PRISONERS OF WAR—
assisting escape of, 111
PRIVY COUNCIL—
appeal to, abolished, 874
PRIZE FIGHT—
offences as to, 61, 62
PROCEDURE—
general provisions, 602
jurisdiction, 604
procedure in particular cases, 606
compelling appearance of accused before justice, 627
procedure on appearance of accused, 644
indictments, 670
corporations, 727
preferring indictment, 728
removal of prisoners—change of venue, 740
arraignment, 751
trial, 756
appeal, 864
special provisions, 874
speedy trials of indictable offences, 877
summary trials of indictable offences, 884
trial of juvenile offenders for indictable offences, 892
costs and pecuniary compensation—restitution of property, 898
summary convictions, 906
recognizances, 950
fines and forfeitures, 958
PROCEEDINGS AFTER CONVICTION—
punishments, 959
capital punishments, 966
imprisonment, 964
whipping, 968
sureties for keeping the peace, and fines, 968
disabilities, 973
punishments abolished, 974
pardons, 976
actions against magistrates, etc., 479
PROCESS—
officer justified in executing, 12
erroneous, 14
irregular, 16
issued without jurisdiction, 15
PROCLAMATION—
under Riot Act, 56
unlawfully printing, 522
proof of, 522
PROCURING—
commission of offence, 28
indecent act by a male on a male, 121
defilement of girl, etc., 125, 127

PROMISSORY NOTE—
stealing, 393
obtaining execution of, by false pretenses, 414
by force, 448, 452
forgery of, 512, 515

PROPERTY—
definition, 4
defence of, 24
defence by one without claim of right not justified, 24
defence of real, 25
assertion of right to, how enforced, 26
stolen, compensation to purchaser, 900
restitution of stolen, 901

PROPERTY, OFFENCES AGAINST RIGHTS OF—307

PROSECUTION—
commencement of, what is, 615

PROSTITUTE—
procuring a girl or woman to become, 125
Indian woman, 130
loose, idle and disorderly person, 140
See BAWDY-HOUSE.

PROVOCATION—
to assault, 23
to reduce murder to manslaughter, 156, 161, 162, 182
provisions as to, 211

PUBLIC MEETINGS—
coming armed within two miles of, 68
lying in wait for person returning from, 68

PUBLIC OFFICER—
definition, 4
breach of trust by, 80
obstructing, in execution of duty, 84
assault on, 254

PUBLIC ORDER, OFFENCES AGAINST—
treason, 46
levying war, 47
treasonable offences, 48
conspiracy to intimidate legislature, 48
assaults on the Queen, 49
inciting to mutiny, 49
enticing soldiers or seamen to desert, 49
resisting warrant to search for deserter, 50
enticing militiamen, etc. to desert, 50
unlawfully obtaining or communicating official information, 51
breach of official trust, 52

PUBLIC SERVICE—
persons in, unlawfully communicating official information, 51, 52
stealing by persons, 355

PUBLIC SERVICE—*Continued.*
refusal to deliver up books, etc., 369
false statement of receipts, etc., 421
PUBLIC STORES—
offences as to, 425
PUBLIC WORKS—
protection of, 69
PUBLIC WORSHIP—
disturbing, 115, 116
PUBLICATION—
of false news, 73, 74
of libel, 296, 297

Q.

QUALIFICATION—
of grand jurors, how attacked, 752
of jurors, 771
QUARRY—
punishment for leaving unguarded so as to endanger life, 250
QUARTER SESSIONS—
jurisdiction of, 604
QUEBEC—
"Court of Appeal" in, 2
"Superior Court of Criminal Jurisdiction," 5
fraudulent seizures of land in, 422
speedy trials in, definitions, 877
summary trials, 884
application of fines, 890
trial of juvenile offenders, definitions, 892
application of fines, 897
appeal from summary convictions, 933
estreated recognizances in, 951, 955
imprisonment in, special provisions, 967
QUEEN—
treason by killing, etc., 46
See TREASON
QUI TAM ACTIONS, 104

R.

RACE—
betting on, 137
RAFT—
breaking, injuring, etc., 571
RAILWAY—
intentionally endangering safety of persons on, 245
negligently endangering safety, 245
tickets, stealing, 373

RAILWAY—*Continued.*
stealing on, 392
forging tickets, 514
mischief on, 567
damage to, with intent, 573
conveyance of cattle by, 587
breach of contract to carry mails by, 590

RAPE—
boy under fourteen years cannot commit, 8, 269
provisions respecting, 268

RECEIPT—
false, warehouseman giving, 423
false, statements in certain, 424
forgery of, 512, 520

RECEIVING STOLEN GOODS—
provisions as to, 347
stolen post letter, 353
other cases, 354
when receiving complete, 355
after restoration to owner, 355
proceedings and trial, 697, 827, 828

RECOGNIZANCE—
stealing, 371
provisions as to, 950
when and how estreated, 953
special provisions for Quebec, 955
to keep the peace, 969

RECORD—
included in expression "indictment," 3
stealing, 371
form of, on trial on indictment, 845

RECORDER—
has powers of two justices, 605
can hold a summary trial, 884
can try juvenile offenders, 892

REFORMATORY—
term "prison" includes, 4
imprisonment in, 967

REGISTER—
of deeds, false entry in, 511
of births, etc., forging, 512
forging public, 513
of court, forging entry in, 513
destroying, etc., any, 530
false extracts from, 530
uttering false certificates of, 531
public, false entries in, 531

RELIGION, OFFENCES AGAINST—
blasphemous libels, 114
interfering with, 115

REPLICATION—
expression "indictment" includes, 3

REPLY—
right of Attorney-General to, 757
of counsel, 765
evidence in, 766

REPRIEVE—
may be granted by court, 960,961

REQUEST—
for payment of money, forging, 513, 521

RESPITE—
of execution of sentence, 960, 961

RESCUE—107
See ESCAPES AND RESCUES.

RESERVOIR—
damaging flood gate of, 574

RESTITUTION—
of stolen property, 901

RESTRAINT OF TRADE—
offences as to, 589

REVENUE—
false statement of, by official, 421
stamps for, counterfeiting, etc., 526

REWARD—
taking, for helping to recover stolen property, 105
for return of stolen property, advertising, 106

RING DROPPING—
trick of, 33, 312

RINGING THE CHANGES—
obtaining money by trick of, 311, 334

RIOT—
suppression of by magistrates, 21
by any one, 21
necessary force may be used, 22
persons subject to military law justified in obeying command to suppress, 22
definition of, 55
punishment, 55
reading Riot Act, 56
destruction of building by, 57, 58

RIVER—
navigable, damaging, 574

ROAD—
turnpike, property in, how averred, 681

ROBBERY—
remarks on, 433
aggravated, 444
punishment, 446
assault with intent to commit, 447
stopping mail with intent, 447

ROUT—
provisions as to repeal, 56

S.

SAILOR—
enticing to desert, 49
carrying arms, 67
buying, etc., necessaries of, 428
advance note of, not an order for payment of money, 519
preventing from working on ship, 595

SALE—
of things unfit for human food, 133
fraudulent, of property, 422
by false weights, 431

SALE OF OFFICE—82

SALMON RIVER—
throwing lime in with intent to destroy fish, 574

SALVATION ARMY—
meetings of, not an unlawful assembly, 54

SANITY—
always presumed, 8

SEA-BANK—
damaging, etc., 573

SEAL—
great, forgery of, 521
of court, etc., forging, 522
formality of a, on magistrates' documents, 948

SEAMEN—49
See SAILOR.

SEARCH WARRANT—
provisions as to, 638
public stores, 641
gold, etc., 642
timber, etc., 642
liquors near Her Majesty's vessels, 642
girl in house of ill-fame, 642
gaming house, 643
vagrant, 644

SECURITY—
valuable, defined, 5
See VALUABLE SECURITY.

SE DEFENDENDO—
See SELF DEFENCE.

SEDITIOUS OFFENCES—
unlawful oaths, 70
definition 72

SEDUCTION—
of girl between fourteen and sixteen, 123
under promise of marriage, 123
of ward, servant, etc., 124
of female passengers on vessels, 124

SEIZURE—
things under, stealing, 319, 340
fraudulent, of land, 422

SELF-DEFENCE—
to repel unprovoked assault, 22
provoked assault, 23
from assault accompanied with insult, 24
committing homicide in, 202

SENTENCE—
lawful, officer justified in executing, 12
erroneous, execution of, 14
without jurisdiction, 15
of death, false certificate of, 106
on trial, special provision for Nova Scotia, 876
of death, form of, 960
how carried out, 961

SEPARATE TRIALS—
when parties entitled to, 696.

SERVANT—
correction of, by master, 27
duty of master to provide necessaries for, 143
assaults on, 151
may justify battery in defence of master, 263
troublesome, removing from house by force, justifiable, 264
taking his master's food for feeding cattle not theft, 339
larceny by, 355

SESSIONS OF THE PEACE—
See QUARTER SESSIONS.

SEVERANCE OF DEFENCE—
parties entitled to, 696
separate challenges on, 786

SHERIFF—
is a "peace officer," 4
proclamation by, in case of riot, 56
challenge to array for partiality, etc., of, 774
duties of in executing sentence of death, 960

SHIP—
discipline on board of, justified, 27
placing, etc., explosives substance in, setting fire to, etc., with intent to murder, 212
with intent, 241
unseaworthy, sending or taking to sea, 251
stealing in, 390
setting fire to, 558
attempt, 563
attempt to damage, by explosives, 565
casting away, etc., 570
destroying or damaging by explosives, 573
preventing seaman, etc., from working on, 595

SHIPWRECKED PERSON—
definition, 4
preventing, from saving his life, 250

SHOOTING—
attempt to murder by, 212
with intent to maim, etc., 233
at Her Majesty's vessels, 239

SHOP—
breaking and entering, 480

SIGNAL—
of railway, interfering with, so as to endanger life, 245
to endanger property, 567
marine interfering with, 570

SIMILITER—
in caption of record, 846
judgment not arrested for want of, 854

SMUGGLERS—
carrying offensive weapons, 65

SOCIETY—
unlawful, 70, 71

SODOMY—116
See ABOMINABLE CRIME.

SOLICITING—
to commit offence, 30
to murder, 224
See ACCESSORY.
AIDER AND ABETTOR.

SOLICITOR GENERAL—
expression "Attorney General" includes, 1

SOLITARY CONFINEMENT—
punishment by, abolished, 974

SOVEREIGN—
treasonable offences against, 46
See TREASON.

SPEEDY TRIALS—
of indictable offences, provisions for, 877

SPRING GUNS—
and man-traps, setting, 243

STACK—
of corn, etc., setting fire to, 561
of grain, etc., threats to burn, 565

STAMP—
included in expression "property," 4
counterfeiting, 526, 527

STATEMENT—
by prisoner to jury, 764

STATEMENT OF CASE—
by judge for Court of Appeal, 864
by justices for review, 944

STATUTE—
imperial, offence against, 6
disobedience to, 83

STAY OF EXECUTION—
of sentence of death by pregnant woman, 850
on judge's report, 961

STEALING—
See LARCENY.

STEAMBOAT—
ticket for passage on, stealing, 373
forging, 514

STENOGRAPHER'S NOTES, 655, 715, 869

STILE—
stealing, 380
destroying, 582

STOCK—
included in term "valuable security," 5
transfer, etc., of, forging, 512
personating owner of, 539

STOLEN GOODS—
See RECEIVING STOLEN GOODS.

STORES—425
See PUBLIC STORES.
STRANGLING—
attempt to commit murder by, 212
with intent to commit offence, 239
STUPEFYING—
girl or women with intent to have carnal connection, 125
with intent to commit indictable offence, 239
SUBORNATION OF PERJURY—85
See PERJURY.
SUBPŒNA—
for witness on preliminary inquiry, 645
out of province, 648
SUBSEQUENT OFFENCE—
See PREVIOUS CONVICTION.
SUFFOCATING—
attempt to commit murder by, 212
with intent to commit indictable offence, 239
SUICIDE—
abettor in, guilty of murder as principal, 33
aiding and abetting, 226
SUMMARY CONVICTION—
proceedings on, 906
SUMMARY TRIALS—
of indictable offences, provision for, 884
not limited to cities, 885.
SUMMONS—
for appearance of accused, 632, 634
SUNDAY—
warrant may be issued and executed on, 636
jury may return verdict on, 850
SUPERIOR COURT OF CRIMINAL JURISDICTION—
definition, 4
jurisdiction of, 604
SUPREME COURT OF CANADA—
appeals to, 873
SURETIES—
of bail, rendering, 950
for keeping the peace, etc., 968
articles of the peace, 969
SURGEON—
when justified in performing operation, 27
See MEDICAL PRACTITIONER.
SURVEYOR—
removing landmark placed by, 582

T.

TAKING—
necessary in theft, 308

TALES—
ordering on trial, 786

TELEGRAPH—
damage to, 569

TELEPHONE—
damage to, 569

TENANT—
stealing fixtures, 370
injury to building by, 581

TENANT IN COMMON—
theft by, 345
indictment may name one as owner of property, 681

TENDER—
of payment, on distress warrant,

TERMS—
used in code, explanation of, 1

TERRITORIAL DIVISION—
definition, 5

TESTAMENTARY INSTRUMENT—
definition, 5
stealing, 370
forgery of, 512
forged, obtaining probate by, 524

THEFT—
See LARCENY

THREATS—
compulsion by, when an excuse, 9
procuring connection with girl or woman by, 126
to murder, 222
extortion by, 451, 454
to burn, 565
to injure cattle, 580
articles of the peace for, 969

THRESHING MACHINE—
damage to, 577

TICKETS—
railway, etc., stealing, 373
forging, 514

TIMBER—
found adrift, stealing, 380
destroying, etc., 571
search warrant for, 642

TIME—
limitation of, for prosecution, 613

TITLE—
of Act, 1
to goods, document of, defined, 2
to lands, 2
See DOCUMENT OF TITLE

TRADE—
conspiracies in restraint of, 589
combinations in restraint of, 589

TRADE MARKS—
forgery of, 533, 535

TRADE UNION—
not unlawful, 589

TRAINING—
unlawful, to use of arms, 59

TRAVERSE—
to indictments, 710, 711

TREASON—
participators in act of, all principals in first degree, 35, 38
what acts constitute, 46
accessories after the fact to, 47
levying, or entering Canada with intent to levy war, 47
the same with citizens of foreign state at peace with Her Majesty, 48
indictment for, 679
special provisions as to trial, 755

TREASONABLE OFFENCES—
conspiracy, etc., to dispose Her Majesty, 48
to levy war against, or compel Her Majesty to change Her measures, 48
to intimidate the Parliament of the United Kingdom or Canada, 48
to induce foreigners to invade Her Majesty's dominions, 48
indictment for, 679

TREASURE—TROVE—
concealing, 329
conspiracy to conceal, 430

TREES—
stealing, 377, 377, 378
unlawful possession, 380
destroying or damaging, 583

TRESPASS—
necessary force may be used to resist, 24, 25

TRIAL—
on indictment, 756
speedy trial, 877
summary trial, 884
of juvenile offenders, 892
See NEW TRIAL.

TRICK—
larceny by, 311, 334
obtaining by false pretenses, 399

TRUST—
breach of, by public officer, 80
criminal breach of, 417

TRUSTEE—
expression defined, 5

TURNPIKE—
road, property in how laid in indictment, 681

U.

UNDERTAKING—
for payment of money, forging, 519
seaman's advance note is, 519

UNDERWRITERS—
setting fire to, etc., ship with intent to defraud, 562

UNDUE INFLUENCE—
to obtain favours from Government, 78
municipality, 81

UNLAWFUL ASSEMBLY—
definition, 52
punishment for, 56

UNLAWFUL COMBINATION—
in restraint of trade, 589

UNLAWFUL CONSPIRACY—
meaning of term "unlawful," 596

UNLAWFUL DISCHARGE—
of prisoner, 113

UNLAWFUL DRILLING—
and training to use of arms, 59

UNLAWFUL OATHS—
to commit certain offences, 70
compulsion against, 72
administering, 101

UNLAWFUL SOCIETIES—70, 71

UNLAWFUL WOUNDING—237

UNNATURAL OFFENCE—
provisions respecting, 116
See ABOMINABLE CRIME.

UNSEAWORTHY SHIPS—
sending and taking to sea, 251

UTTERING—
intent in, 504
forged document, 521, 523, 530, 531
counterfeit coin defined, 541
provisions as to, 541, 552, 554, 555

V.

VAGRANT—
loose, idle and disorderly persons defined as, 140
search warrant for, 644

VALUABLE SECURITY—
definition, 5, 394
stealing from post letter, 372
stealing from the person, 383
stealing, in dwelling house, 384
destroying, etc., 393
obtaining execution of, by false pretense, 414
compelling execution of, by force, 448
extortion of, by letter, 449
by threats, 451, 454
forgery of, 513

VARIANCE—
amending at trial for, 829
in summary convictions, 908

VEGETABLE PRODUCTS—
stealing from garden, etc., 381, 382
destroying in garden, etc., 584

VENIRE DE NOVO—
Not provided for in code.

VENUE—
offences committed on transit, etc., 627
statement of, in indictment, 671
jurisdiction of courts, 728
change of, 740

VERDICT—
judge not bound to accept first, 770
recommendation to mercy no part of, 771
of attempt when allowed, 811
when attempt charged full offence proved, 817
for a minor offence included in offence charged, 818
of concealment of birth on charge of child murder, 826

VERDICT—*Continued.*
jury retiring to consider, 849
may be taken on Sunday, 849
judgment not arrested for formal defects in, 854

VESSELS
See SHIP.

VEXATIOUS INDICTMENTS—
provisions now extended to all cases, 729

VIADUCT—
damaging with intent, 573

VIEW—
by jury on trial, 829

VOLUNTARY ESCAPE—
what is, 108

VOLUNTARY OATHS—
administering, 101

W.

WALL—
of the sea, etc., damaging, 573

WAR—
levying by subject of state at peace, 47
prisoners of, assisting escape, 111

WAREHOUSE—
keepers of, giving false receipts, 423, 424
breaking and entering, 480, 483

WARRANT—
officer justified in executing, 14
irregular, 16
arrest without, in what cases, 616
remarks on, 618
for offence out of jurisdiction, 630
on the high seas, 632
for apprehension of offender, 635
execution of, etc., 636
search warrants, 638
special cases, 641, 643
for vagrant, 644
for witness, 646-648
of remand on inquiry, 652
of commitment, 659
of deliverance, 668
for arrest of person about to abscond, 668
India, included in expression "document of title of goods," 2
dock, the same, 2

WARRANT—*Continued.*
for delivery of goods the like, 2
forgery of, 518, 519

WARRANT OF ATTORNEY—
stealing, 371

WARRANT FOR PAYMENT—
included in expression "valuable security," 5
forgery of, 518

WEAPON—
See OFFENSIVE WEAPON.

WEIGHTS AND MEASURES—
false, selling goods by, 430

WHARF—
stealing goods from, 390

WHIPPING—
punishment of, 968

WIFE—
compulsion of not presumed, 11
not accessory after the fact by receiving, etc., husband after commission of offence, 40, 41
duty of husband to provide necessaries, 143
stealing goods of husband, 316, 317, 346

WILL—
term "testamentary instrument" includes, 5
stealing, 370
forgery of, 512
forged, obtaining probate by, 524

WITCHCRAFT—
pretending to practice, 433

WITNESS—
procuring attendance of, at preliminary inquiry, 646
at trial, to remain in attendance throughout, 791
compelling attendance, 792
sick, evidence taken on commission, 794
out of Canada, 794

WOMAN, OFFENCES AGAINST—
See ABORTION.
FEMALE.
GIRL.
RAPE.

WOOD—
setting fire to, 564

WOOLEN GOODS—
stealing, 389

WORDS—
provocation to assault by, 23
killing by, 156, 165, 182

WOUNDING—
with intent to murder, 212
to maim, etc., 233
unlawful, 237
public officer in execution of duty, 239
and robbery, 444

WRECK—
definition, 6
stealing, 392
causing, 570
preventing saving of, 571

WRIT—
misconduct of officer entrusted with execution, 84
stealing, 371
of election, stealing, 373
destroying, 580

WRIT OF ERROR—
abolished, 864

WRITING—
definition, 6
destroying, falsifying, etc., by directors, etc., 418
by clerks, 419
included in term "document" as to forgery, 509

YARN—
cotton, stealing, etc., 389