CANADIAN CRIMINAL PROCEDURE

AS THE SAME RELATES TO

Summary Convictions and Summary Trials

WITH AN APPENDIX OF FORMS

COMPILED BY

The Hon. T. MAYNE DALY, P.C., K.C.

Of the Manitoba Bar.

Police Magistrate, Winnipeg.

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TABLE OF ABBREVIATIONS.

Alta. L. R.	Alberta Law Reports.
A. R.	Appeal Reports, Ontario.
B. C. R.	British Columbia Law Reports.
C. C. C.	Canadian Criminal Cases.
C. L. J.	Canada Law Journal.
C. L. T. Occ. N.	Canadian Law Times Occasional Notes.
C. P.	Common Pleas Reports, Ontario.
D. R.	Decision Reports, Quebec.
Draper	Draper's Reports, Ontario.
E. L. R.	Eastern Law Reporter.
L. C. G.	Local Courts Gazette, Ontario.
L. C. J.	Lower Canada Jurist.
L. C. L. J.	Lower Canada Law Journal.
L. C. R.	Lower Canada Reports.
M. L. R.	Manitoba Law Reports.
Mont. L. R.	Montreal Law Reports.
N. B. R.	New Brunswick Reports.
N. S. R.	Nova Scotia Reports.
O. L. R.	Ontario Law Reports.
O. R.	Ontario Reports.
O. W. R.	Ontario Western Reporter.
O. S.	Upper Canada Queen's Bench Reports, old series.
Q. P. R.	Quebec Practice Reports.
Q. Q. B.	Quebec Official Reports, Queen's Bench.
Q. S. C.	Quebec Official Reports, Superior Court.
Sask. L. R.	Saskatchewan Law Reports.
S. C. R.	Supreme Court Reports, Canada.
Taylor	Taylor's Reports, Ontario.
Terr. L. R.	North-West Territories Law Reports.
U. C. L. J.	Upper Canada Law Journal.
U. C. R.	Upper Canada Queen's Bench Reports.
W. L. R.	Western Law Reporter.

ERRATA

Page 141, line 23, read "invalid" instead of "valid."

Page 238, line 36, read "exceptions" instead of "executions."

Page 415 for Magna "Charta," read Magna "Carta."

Page 416, line 30, read "31" Car. II. instead of "29" Car. II.

Page 419, line 16, read "sustained" for "restrained."

NOTE.—Any errors in the cases cited have been corrected in the table of cases.

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Canadian Criminal Procedure.

CHAPTER I.

INTRODUCTION.

Canada has one advantage over the Mother Country in this, that its criminal laws have been codified. Instead of the student, the lawyer, the Judges, or the magistrates, having to look through a number of statutes to find the law relating to certain crimes, or to ascertain the mode of procedure in criminal matters, they now find it all in the Criminal Code, Chapter 146 of the Revised Statutes of Canada (1906), and in the Acts since passed amending the Code.

A bill entitled an "Act respecting the Criminal Law" was introduced by Sir John Thompson, then Minister of Justice, in the House of Commons in the year 1892. On the 2nd April, 1892, Sir John Thompson moved the second reading of the Bill. The Act was given the Royal assent on the 9th July, 1892, and came into force on the first day of July, 1893, as provided in the second section of the Act.

When moving the second reading of the Bill, Sir John Thompson stated that it was founded on the English Draft Code, prepared by the Royal Commission in 1880, on Stephens' Digest of the Criminal Law (edition 1887), Burbidge's Digest of the Canadian Criminal Law (1889), and the Canadian Statutory Law. England had been trying for sixty years up to that time, to reduce her criminal law into a Code, but it had not then, and has not yet been perfected by Statute.

Sir John also said, "The present bill aims at a codification of both Common and Statutory law, but it does not aim at completely superseding the Common law, while it does not aim at completely superseding the Statutory law relating to crimes."

"The Common law will still exist and be referred to; and in that respect the Code will have the elasticity so much desired by those who are opposed to codification on general principles."

The use of the words "malice" and "maliciously" is discontinued. The term "larceny" is abolished, and the term "theft" adopted instead. The distinction between "felonies" and "mis-

demeanours" is abolished. In the Code all crimes are referred to as "indictable offences."

After the bill was read a second time, on motion of Sir John Thompson, it was referred to a special committee of members of both Houses of Parliament. The writer had the honour of being a member of the Joint Committee, and recollects well the careful consideration that the Committee gave to the Bill.

Both in Committee and in the House, Sir John Thompson exhibited a wonderful mastery of the subject and an intimate knowledge with every detail, and it was no doubt in a large measure due to this fact that the Bill passed with so little controversy.

"The Criminal Code" of Canada will always remain as a monument to one of the ablest men who ever sat in the House of Commons of Canada.

Full credit should also be given to the then Deputy Minister of Justice, the late Mr. Justice Sedgewick, and to the then officers of the Department of Justice who lent their valuable aid in the draughtmanship of the Code. It is only those who before the passing of this Act, were engaged in practice before the Criminal Courts, or who sat upon the bench as Judges, Magistrates or Justices of the Peace, can fully recognize the boon that was conferred when the Criminal Law and Criminal Procedure were all included in one statutory enactment.

As previously stated, the Code came into force on the first day of July, 1893. Since then the Code has been amended from time to time, and was revised in 1906, at the time of the revision of the other Dominion Statutes.

Since the revision of the Code in 1906, no work relating to the rights, powers and duties of Justices of the Peace and Magistrates has been published in Canada, and it has been suggested to me that the time is ripe for such a publication. I have undertaken the work with considerable trepidation, since, while my desire will be to make the contents of this book easily understood by those for whom it is primarily intended, viz., justices of the peace and magistrates, yet at the same time I cannot overlook the fact that the work to be fully efficient must commend itself to the legal profession and to those who may require to use it for reference, and must therefore be more or less technical in statement. The work, like others of a similar nature, will be founded upon the Criminal Code, and is really a compilation of that statute so far as relates to procedure in summary trials before Magistrates and Justices of the Peace.

Criminal Law in Canada.

By section 91 of the British North America Act, 1867, the exclusive legislative authority of the Parliament of Canada extends to all matters coming within certain classes of subjects enumerated therein, amongst them being (27) "The criminal law, except the constitution of the Courts of criminal jurisdiction, but including the procedure in criminal matters."

By section 92 of the same Act, it is provided that "In each Province, the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated."

Amongst these subjects are, "(14) The administration of justice in the Province, including the constitution, maintenance and organization of provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in these Courts."

It will thus be seen that to the Parliament of Canada belongs the exclusive right to enact criminal laws, and laws relating to criminal procedure.

The constitution, maintenance and organization of the Courts before whom are to be tried those who are charged with crime is vested in the legislature of each Province.

By section 96 of the B. N. A. Act, the Judges of the Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick, shall be appointed by the Governor-General. The salaries of all these Judges are fixed and paid by the Parliament of Canada.

And by section 101 of the B. N. A. Act, "The Parliament of Canada may, notwithstanding anything in this Act, from time to time provide for the constitution, maintenance and organization of a General Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the law of Canada." See *Valin* v. *Langlois*, 3 S. C. R. 1.

By virtue of this enactment, Parliament may create new Courts of criminal jurisdiction and appoint judicial officers, notwithstanding that "the constitution, maintenance and organization of provincial Courts of criminal jurisdiction," is declared by section 92 to be exclusively within provincial jurisdiction. The only instance in which advantage has been taken of this power is in the appointment of stipendiary magistrates and the establishment of their courts along and in the vicinity of public works, such as railways.

These provisions of the British North America Act have often been the subject of controversy, and decisions in Canadian Courts and in the Privy Council.

In the case of the *Citizens Insurance Co.* v. *Parsons* (1881), 1 Cartwright 265, both sections 91 and 92 of the B. N. A. Act were much discussed. It was pointed out by the Privy Council that no rule can be laid down to define the actual limits of the various powers given to Parliament and the Legislatures respectively.

In the *Queen* v. *Holland*, 4 C. C. C. p. 79, Judge Drake says: "The powers overlap, and in some instances the Provinces can legislate until the subject matter is dealt with as a whole by the Dominion. When this takes place, provincial legislation has to give way to the Dominion."

See *St. Francois* v. *Continental H. & L. Co. C. R.* (1909), A. C. 49.

The conflict of powers likely to arise under secs. 91 and 92 of B. N. A. Act were also fully discussed by the Privy Council in the case of *Attorney-General of Ontario* v. *Attorney-General of Canada* (1896), A. C. 348. See *Attorney-General of Manitoba* v. *Manitoba License Holders' Association* (1902), A. C. 77.

In the case of the *Attorney-General of Ontario* v. *Hamilton Street Railway Co.* (1903), A. C. 524, 7 C. C. C. 326, it was decided by the Privy Council that the "Ontario Lord's Day Act" is *ultra vires* of the Ontario Legislature, as the subject matter thereof comes under the classification of "Criminal Law," which by B. N. A. Act is under the exclusive legislative authority of the Parliament of Canada.

In delivering the judgment of the Court, the Lord Chancellor said: "The reservation of the criminal law for the Dominion of Canada is given in clear and intelligible words which must be considered according to their natural and ordinary signification." And see *Ex parte Green*, 35 N. B. R. 137, *McLaughlin* v. *Recorders' Court of Montreal*, 4 Q. P. R. 304, *In re Sunday Laws*, 25 O. C. C. N. 77, 35 S. C. R. 581, *Stark* v. *Schuster*, 14 Man. L. R. 672, *R.* v. *Panos* (1909), 14 C. C. C. 291. We have thus ascertained that while the Parliament of Canada may alone enact laws relating to crime, and also may establish "additional Courts for the better administration of the laws of Canada," yet the administration of justice and the constitution of the Courts of criminal jurisdiction are almost exclusively undertaken and executed by the Provinces.

Magistrates and Justices of the Peace.

The delegation of the administration of justice to the Provinces gives the right to the Provinces to appoint Justices of the Peace. The right of the Crown in the Dominion to appoint Justices of the Peace and Magistrates is a prerogative right, and is also conferred by the B. N. A. Act, and can be exercised at any time.

See Part III. of the Code, sections 142-154, and sec. 2.

In the Northwest Territories as they now exist, and the Yukon Territory, the power to appoint Stipendiary Magistrates is vested in the Governor-General in Council. In the Provinces, appointments are made by the Lieutenant-Governor in Council.

Justices of the Peace are either appointed by Commission, or are such for the time being by virtue of their holding some other office.

In some Provinces, mayors of cities and towns are declared to be *ex officio* Justices of the Peace. Reeves of municipalities are also *ex officio* Justices of the Peace; in Ontario and British Columbia the Judges of the Supreme Court of Canada, the Judge of the Exchequer Court of Canada and the Judges of the Supreme Court of Judicature. In Manitoba, Judges of the County Court are *ex officio* Justices of the Peace. Every Police and Stipendiary Magistrate and Recorder during his term of office is *ex officio* a Justice of the Peace.

Commissioners of Police appointed by the Governor-General in Council, Commissioners and Assistant Commissioners of R. N. W. M. P., are vested with powers of two Justices of the Peace. Superintendents of the force are Justices of the Peace *ex officio*. Indian agents, officers appointed under the Fishery Act, returning officers and deputy returning officers under the Dominion Election Act, from their appointment till the day after the election, are Conservators of the Peace.

The office of Justice of the Peace was first instituted by the Statute *1 Edward III. c. 2-5, 16, A. D. 1327.* It was provided that for the better maintaining and keeping of the peace, in every county good and lawful men should be assigned by commission of the King.

In England, Justices of the Peace were described as judges of record appointed by the Queen to be justices within certain limits for the conservation of the peace, and for the execution of divers

things comprehended within their commission and within divers statutes committed to their charge. (Dalt. c. 2.)

In *4 Institute, 170*, Lord Coke says: "That the whole Christian world hath not the like office as Justice of the Peace if duly executed."

Before the institution of Justices of the Peace, there were Conservators of the Peace in every county, whose office (according to their names) was to conserve the King's Peace, and to protect the obedient and innocent subjects from force and violence.

These Conservators by the ancient and common law were by force of the King's writ chosen by the freeholders in the County Court out of the principal men in the county.

By the Statute of Edward III. no other power was given than that of keeping the peace; the title of Justice was not even conferred. The title and power of exercising justice came afterward.

The majority of Justices of the Peace in Canada hold their offices by virtue of the Commissions appointing them. No qualification is required of a Justice of the Peace who is *ex officio*. But all Justices of the Peace appointed by commission in Ontario, Quebec and Manitoba must have a property qualification.

In the other Provinces no property qualification is required.

By the Statute *13 Rich. II., s. 1, c. 7*, and the *2 Henry V., s. 2, c. 1*, the justices shall be made within the counties of the most sufficient knights, esquires and gentlemen of the law.

By the Statute of *1 Mary*, no sheriff shall exercise the office of a Justice of the Peace during the time that he acts as sheriff. And the reason seems to be because he cannot act at the same time both as judge and officer, for so he would command himself to exercise his own precepts. (Dalt. c. 3.)

And if he be made a Coroner this, by some opinions, is a display of his authority of a Justice of the Peace. (Dalt. c. 3.)

By *6 & 7 Vict. c. 73, s. 33*, no attorney or solicitor shall act as a Justice of the Peace while he continues in the business or practice of an attorney or solicitor.

By *1 Edward VI., c. 7, s. 4*, if a Justice of the Peace be created a duke, archbishop, marquis, earl, viscount, baron, bishop, knight judge or sergeant-at-law, this taketh not away his authority of a Justice of the Peace.

Qualification.

The first enactment in England relating to the qualifications of Justices of the Peace as regards estate is *18 George II., c. 20, s. 1.* The recital is as follows: "By many Acts of Parliament of late years made the power and authority of Justices of the Peace is greatly increased, whereby it is become of the utmost consequence to the common weal to provide against persons of mean estate acting as such. And whereas the laws now in force are not sufficient for that purpose." It is enacted: "That from and after the 25th day of March, 1746, no person shall be capable of being a Justice of the Peace or of acting as such, for any county, riding or division within that part of Great Britain called England, or the principality of Wales, who shall not have either in law or equity to and for his own use and benefit in possession a freehold, copyhold or customary estate for life, or for some greater estate, &c., lying and being in England or Wales of the clear yearly value of £100 over and above all encumbrances."

An oath of qualification had to be taken, and to act without taking the oath involved a penalty of £100.

Ontario, Quebec and Manitoba have followed the English law requiring Justices of the Peace to have property qualification and to take the oath respecting the same.

How and by Whom Appointed.

The following is a summary of the laws of the different Provinces and Territories of Canada relating to the appointment of Justices of the Peace and Police Magistrates, and their powers.

ONTARIO.

R. S. O. Cap. 86 (1897), (amended in 1904, Cap. 13; 1907, Cap. 23; 1909, Cap. 26.)

Justices of the Peace are appointed by the Lieutenant-Governor in Council under the Great Seal, or under the Privy Seal of the Lieutenant-Governor, as the case may require. The justices are appointed for each county, city, town, provisional, judicial or territorial district or provisional county. Except when otherwise specially provided, "all Justices of the Peace appointed in Ontario

shall be of the most sufficient persons dwelling in the counties, districts or places respectively, for which they are appointed."

They must have a property qualification by being in actual possession to and for their own use and benefit of an estate in free and common socage in absolute property, or for life, etc., in lands, tenements or hereditaments lying and being in the Province of or above $1,200 over and above what will satisfy all encumbrances.

Each Justice of the Peace is required to take and subscribe an oath of qualification and oath of office before entering upon his duties, and within three months from the date of Commission under which he is appointed. These oaths must be filed with the Clerk of the Peace for the county or district in which the justice is to act.

The penalty for acting without taking the oath of qualification, or acting without being qualified, is forfeiture of $100, to be recovered by action with full costs.

THE OATH OF QUALIFICATION is as follows:

I, A. B., of do swear that I truly and bona fide have to and for my own property use and benefit such an estate as qualifies me to act as Justice of the Peace for the County (or as the case may be) of according to the true intent and meaning of the Act respecting the qualification and appointment of Justices of the Peace, to wit: (nature of such estate, whether land, and if land designating it), and that the same is lying and being (or is coming out of) lands and tenements and hereditaments situate within the township (or in several townships, or as the case may be) of .

So help me God.

J. P.

THE OATH OF OFFICE is as follows:

I, A. B., of the in the County of , do swear that I will well and truly serve our Sovereign Lord the King (or the reigning Sovereign for the time being) in the office of the Justice of the Peace, and I will do right to all manner of people after the law and usages of the Province without fear or favor, affection or ill-will. So help me God.

Under the Statute, Justices are not required to have a legal estate. It is sufficient if the land, though mortgaged in fee, exceeds by $1,200 the amount of the mortgage. *Fraser* v. *McKenzie*, 28 U. C. R. 255.

As all Justices of the Peace appointed in Ontario, Quebec and Manitoba are to be "of the most sufficient persons," the object of the qualification was to carry out this idea, namely, that Justices should be men of worth and standing in the community.

The interest of a Justice of the Peace in property in respect of which he qualifies as such, as required by R. S. O. 1887, c. 71, s. 9, need not be of itself of the value of $1,200.

It is sufficient if he has in lands which are of the value of $1,200 over and above all rents and charges payable out of or affecting the same, such an estate or interest as is mentioned in the section, whatever the value of the estate or interest may be. *Weir* v. *Smyth*, 19 A. R. 433.

On this subject of property qualification, see the cases of *Squier* v. *Wilson*, 15 C. P. 284; *Crandell* v. *Nott*, 30 C. P. 63.

If a Commission of the Peace issues, and in it are included the names of some who were appointed under a former Commission and who had taken the necessary oath of office as a justice of the peace, it is not necessary for these persons to again take such oaths.

All persons appointed to judicial offices in Canada are required to take the oaths of allegiance and of office before acting in their judicial capacity, and a person temporarily appointed to be Deputy Recorder of Montreal is under the same obligation.

The accused having raised the point that the Deputy Recorder had not taken the oaths, at the trial it was held that he could not claim to be in the position of a Judge *de facto*, but so far as the prisoner was concerned, he was a mere intruder in the office. *Ex parte Eliza Mainville*, 1 C. C. C. 528.

The failure of a judicial officer to take the oath of allegiance and the oath of office when he has acted as the holder of the office, and his qualification, is not challenged by the accused at the trial, held he was a Judge *de facto*, and the judgment rendered by him was valid and binding.

A Judge *de facto* is one who exercises the duties of a Judge under colour of an appointment, and whose possession of the office and exercise of its functions are acknowledged and acquiesced in by those who appear before him and by the public; he is one who has the reputation of being the Judge he assumes to be, and yet is not a good Judge in point of law.

WURTELE, J., in *Ex parte Thomas Curry*, 1 C. C. C. 532. See also *O'Neil* v. *Attorney-General*, 1 C. C. C. 303; *R.* v. *Gibson*, 3 C. C. C. 451.

By the provisions of *R. S. O., chapter 93,* all Justices of the Peace must make quarterly returns of all fines, forfeitures and penalties or damages, and of receipt and application of the money received. The return must be in writing and under the hand of the justices, and shall be filed with the Clerk of the Peace on or before the second Tuesday in March, June, September and December in each year in the form given in schedule to the Act. The penalty for neglect is $80 and full costs, to be recovered in a Court of Record.

The Clerk of the Peace is required to publish a schedule of these returns, within two weeks of receipt of same, in a public newspaper, and within the same period to post them up in the Court House and in his own office for public inspection.

See amendment in 1904, chap. 10, sec. 10.

See also *section 1133* of the Code as to quarterly returns to be made of convictions and monies received. By the amendment of 1907, cap. 23, Justices of the Peace may use the town hall of any municipality which has no Police Magistrate for the hearing of cases brought before them, but not so as to interfere with its ordinary use.

POLICE MAGISTRATES IN ONTARIO.

R. S. O. Cap. 87, amended 1907, Cap. 23, Sec. 5.

In Ontario every city and town having more than 5,000 inhabitants shall have a Police Magistrate, his salary to be paid by the city or town. Every other town may have a Police Magistrate if the Lieutenant-Governor in Council sees fit to make an appointment.

The Lieutenant-Governor may also appoint a second Police Magistrate in a city if a resolution affirming the expediency thereof is passed by a vote of two-thirds of members of the Council present. The salary to be paid by the Council at rate determined upon by the Council and approved by the Lieutenant-Governor.

Every Police Magistrate shall *ex officio* be a Justice of the Peace for the whole county or union of counties, or district for which he has been appointed.

In case of illness or absence, or at the request of the Police Magistrate, any two or more Justices of the Peace may act in his place in any matters within the jurisdiction of the Police Magistrate, and they shall have in such cases all the powers which, by any Statute of the Province, are given to Police Magistrates. One

Justice of the Peace may act whenever by law one Justice has jurisdiction in that behalf.

By *cap. 23, sec. 39* (*1907*), "In case of illness or absence from the county of a Police Magistrate any other Police Magistrate within the county, whether appointed for the county, city, town or village therein, shall have all the powers and perform all the duties of the Police Magistrate during such illness or absence, and to continue and complete any proceeding begun before him, notwithstanding the Police Magistrate may have recovered or returned."

A Police Magistrate has the powers of two Justices of the Peace.

No Justice of the Peace shall admit to bail or discharge a prisoner, or adjudicate upon or otherwise act in any case for a town or city where there is a Police Magistrate, except at Court of General Sessions of the Peace, or in case of illness, or absence, or at the request of the Police Magistrate.

County Councils may pass resolutions affirming the expediency of the appointment of a Police Magistrate for the county or part of county, and the Lieutenant-Governor may make such appointment. The salary to be paid by the county.

A Police Magistrate is not required to have any property qualification, but he must take his oath of office, which is practically the same as that prescribed for Justices of the Peace. He must file his oath of office with the Clerk of the Peace. He need not act outside of the limits of the city, town or place for which he is Police Magistrate unless he sees fit to do so.

Questions concerning the territorial jurisdiction of Police Magistrates in Ontario have been the subject of judicial decision upon several occasions. The most important cases will be found cited in the judgment of Judge Macdougall in *The Queen* v. *McLean*, 3 C. C. C. 323.

In that case it was held that a Police Magistrate *ex officio* possessing the power of two Justices of the Peace, has power to try a case arising in the county, sitting anywhere in the county, the only restriction upon his acting in the City of Toronto being that he could not try a case originating in the city except in the illness, absence, or at the request of the Police Magistrate for the city.

Vexatious Actions against Justices.

R. S. O. cap. 88. In Ontario there is a special statutory enactment dealing with actions brought against Justices of the Peace

and Police Magistrates. These officers are liable to be sued for acts done by them in the execution of their duty as such Justices. First, with respect to any matter within their jurisdiction as such Justices. In these cases it shall be expressly alleged in the statement of claim that the act was done maliciously and without reasonable and probable cause. Second, for any act done by a Justice of the Peace in a matter in which by law *he has not jurisdiction*, or in which he has exceeded his jurisdiction, or for any act done under a conviction or order, or warrant issued by the Justice of the Peace in such matter, any person injured may maintain an action without making any allegation in his statement of claim that the act complained of was done maliciously and without reasonable and probable cause.

If a Justice of the Peace makes a conviction or order and a warrant of distress, or of commitment, has been granted therein by some other Justice of the Peace *bona fide* and without collusion, the action by reason of any defect in the conviction or order, will not lie against the Justice of the Peace who issued the warrant, but must be brought against the Justice who made the conviction or order.

No action can be brought for anything done under a conviction or order until the conviction or order has been quashed, either upon appeal, or upon application to the High Court.

These provisions are treated at further length in the next chapter.

By *Chapter 92 R. S. O. (1897)*, all Police Magistrates must keep records of all convictions in a book ruled in the same manner as the form of conviction in the Act respecting returns of convictions and fines by Justices of the Peace. These entries are to be made forthwith upon the happening of the event in respect of which information is to be given. Such records shall be open for inspection. The penalty for neglect of making such entry within one month after conviction takes place is $80 and full costs, to be recovered in a Court of Record.

Certified returns of entries in the Record Book is to be made on or before the first Tuesday of March, June, September and December of every year to the Clerk of the Peace of the county for or within which he is Police Magistrate, and to the Inspector of legal offices at Toronto.

Security for Costs.

R. S. O. Chap. 89. An Act to provide for security for costs in certain actions against Justices of the Peace.

The defendant (J. P.) may at any time after the service of the writ apply to the Court, or to a Judge for security for costs.

The application is to be made on notice and affidavit stating the nature of the action, and that the plaintiff is not possessed of property sufficient to cover the costs of the action.

If the order is granted, proceedings are stayed till security is given. By the amendment of 1901, cap. 12, unless the security is furnished within the time stated in the order the action is to be dismissed.

Fees to be Charged by Justices of the Peace.

R. S. O. 1897, chap. 95, amended in 1904, cap. 13. 1. The fees mentioned in the schedule to this Act and no other shall be and constitute the fees to be taken by Justices of the Peace or by their clerks for the duties and services therein mentioned, and shall be the costs to be charged in summary proceedings or convictions before the Justice when no other fees are expressly prescribed.

2. *As amended in 1904, chap. 13.* In cases not provided for by the preceding section, Police Magistrates not receiving salary and Justices of the Peace shall be entitled to receive the sum of $2 for all services of every kind connected with the case, when the time occupied does not exceed two hours, the said fees to be paid by the county.

3. The penalty for charging excessive fees is forfeiture of $40, recoverable on complaint before the County Judge.

As to fees to be taken by Justices under Part XV. of the Code, *vide* sec. 770 of the Code, and schedule thereto.

QUEBEC.

By *Articles 3333 to 3381, Revised Statutes of Quebec (1909)*, which relate to Justices of the Peace, it is provided that Justices of the Peace may be appointed by commission under the Great Seal. All Justices of the Peace appointed in the several districts shall be of the most sufficient persons dwelling in the said districts respectively.

The qualification and oath of qualification are practically the same as in Ontario, already referred to at length. This oath and the oath of office must be filed with the Clerk of the Peace for the district.

The penalty for justices acting without having taken the oath and not being qualified is $100 with full costs, to be recovered by suit.

When not otherwise specially provided by law, no advocate shall be a Justice of the Peace during the time he continues his practice.

Whenever any vessel belonging to His Majesty's navy is in the Gulf or River St. Lawrence, every officer attached or belonging to such vessel and holding commission of Vice-Admiral, Post-Captain, Captain or Commander in His Majesty's Navy, and any Lieutenant having command of such vessel, shall be *ex officio* a Justice of the Peace for the Districts of Gaspe, Saguenay and Rimouski, while such vessels remain within the limits of the Province. They are exempt from residence and property qualification, and it is not necessary for them to take the oath of office.

Police Magistrates.

By *Article 3282*, the Lieutenant-Governor may from time to time appoint by commission under his hand, fit and proper persons to be and act as Police Magistrates within any one, or more districts of the Province.

It is not necessary for anyone so appointed to have any property qualification, or to be resident in any district for which he may be appointed.

Every Police Magistrate shall keep minutes of every proceeding had by and before him, and shall keep such accounts, make such returns and collect such information within his jurisdiction, and perform such other duties as the Lieutenant-Governor may from time to time prescribe and require. All monies arising from penalties, forfeitures and fines imposed or collected by Police Magistrates are to be accounted for in such manner as the Lieutenant-Governor may direct.

The Lieutenant-Governor may direct Police Magistrates to appoint constables to act under them, and the Police Magistrate may at his pleasure remove any such constable. Every police constable so appointed shall obey the lawful commands of the Magistrate and be subject to his government.

Police Magistrates must take oath of office and file same with the Clerk of the Peace for the district.

The Lieutenant-Governor may by special Commission appoint Justices of the Peace, whose jurisdiction shall extend over the whole Province, or such districts as are named in such Commission. It shall not be necessary for such Justices of the Peace to reside, or possess real estate in the Province.

All Justices of the Peace shall keep registers with faithful minutes or memo. at length of every conviction at any time made by them. When two Justices of the Peace sit the register shall be kept by the senior Justice of the Peace and be subscribed by the junior Justice present during the proceedings which have been had.

In Quebec, Montreal and Three Rivers, these registers are to be kept by Clerks of the Peace.

All Justices of the Peace must make quarterly returns to the Clerk of the Peace.

A Justice of the Peace may appoint one or more constables, if need be, to execute the orders of such Justice of the Peace, who may administer the requisite oath, which oath shall be registered in the register of such Justice of the Peace.

Article 2594 provides for the protection of Justices of the Peace, Magistrates and other officers.

District Magistrates.

The Lieutenant-Governor may appoint by Commission under the Great Seal one or more District Magistrates, who shall be advocates of at least five years' standing, who shall, upon their appointment, cease practising. The Lieutenant-Governor may also establish Magistrates' Court for counties, cities and towns.

These Magistrates have the power of one or more Justices of the Peace and of the Judge of Sessions. They have both civil and criminal jurisdiction.

Stipendiary Magistrates.

The Lieutenant-Governor of Quebec may appoint Stipendiary Magistrates, called Judges of the Sessions of the Peace, for the Cities of Quebec and Montreal, with jurisdiction over the whole Province to perform the duties of Justices of the Peace, and such duties as may be from time to time directed by the Provincial Secretary.

Recorders.

All powers and jurisdiction conferred upon the Judges of the Sessions of the Peace for the Cities of Quebec and Montreal, or upon two or more Justices of the Peace, by the provisions of the following section, were vested in and may be exercised by the Recorders and by the Recorders' Courts of and for the said cities, and by those who by law act in the absence on account of sickness or otherwise of the said Recorders, or when there is no Recorder, and discharge the duties of that office.

By *Section 582 of the Code*, Courts of General or Quarter Sessions of the Peace in the Cities of Montreal and Quebec, when presided over by a Recorder, or Judge of the Sessions of the Peace, have power to try any indictable offence, except as mentioned in *Section 583*.

See *Section 588* of the Code as to trial of offences committed in Gaspé.

NOVA SCOTIA.

Justices of the Peace.

Under the provisions of *Chapter 38 R. S. N. S. (1900)*, the Governor (sic) in Council may from time to time by Commission under the Great Seal of the Province, or the Seal-at-arms, appoint such and so many Justices of the Peace in and for the several and respective counties of the Province as he deems expedient and proper.

The holder of a liquor license is not eligible for appointment. No property qualification is required. The oath of office in Form "A," schedule to the Act, may be sworn before the Warden, or Clerk of the Crown for the district in which the person resides.

The Clerks of the Crown shall keep a record of each person sworn, shewing the date sworn. A copy of the record shall be evidence. The Governor-in-Council may remove any person from office, and the notice of such removal must be published in the *Royal Gazette* for the Province.

Chapter 39 removes certain disqualifications by reason of being a ratepayer, etc.

Chapter 40 provides for the protection of Justices of the Peace and Stipendiary Magistrates, and is similar to the Ontario Act.

Chapter 42. Constables' Protection Act.

Stipendiary Magistrates.

Chapter 33 R. S. N. S. (1900). Stipendiary Magistrates shall be appointed by the Governor in Council, one for every incorporated town, who shall hold office during good behaviour. He shall be paid a salary by the town council not less than $150 per annum. The Governor in Council may also appoint Stipendiary Magistrates for each county, who shall hold office during pleasure. These Magistrates shall be paid the fees of their office, but the council may at any time by resolution grant an annual salary and receive the fees to its own use. Such Stipendiary shall have jurisdiction throughout the whole county for which he is appointed, and such larger area as is prescribed by any special law.

A Stipendiary shall have the power of a Police Magistrate and of two Justices of the Peace. He shall, by virtue of his office, be a J. P. for the whole of the county in which he presides. In case of the illness or absence of a Stipendiary, two Justices of the Peace may act. He must take and subscribe the oath of office and file the same. A town solicitor is not disqualified from acting as a Stipendiary Magistrate.

Under *Chapter 41 R. S. N. S.*, a Stipendiary Magistrate has powers to swear in constables to hold office not more than thirty days.

Under the same Act a municipal council may, at the annual meeting, appoint as many persons as it sees fit to be constables, and may likewise dismiss them.

The council may also appoint a Chief Constable for one year. Three Justices of the Peace may appoint special constables in the event of a riot or unlawful assembly. The Governor in Council may appoint Provincial Constables.

NEW BRUNSWICK.

By *Chapter 58 Con. Stat. N. B.* (*1903*), it shall be lawful for the Lieutenant-Governor, by and with the advice of the Executive Council, at any time or times to appoint under the Great Seal of the Province such and so many Justices of the Peace in and for the several and respective counties of the Province as may be deemed expedient and proper.

Justices of the Peace must take the oath of office before the Clerk of the Peace for the county, or city for which he shall be appointed. A record of such swearing is to be kept by the Clerk.

The Lieutenant-Governor in Council may appoint Stipendiary, or Police Magistrates within any county, and such shall be a court having and exercising all criminal, or quasi criminal, jurisdiction conferred upon Stipendiary, or Police Magistrates by law.

The Lieutenant-Governor may fix the town, or parish, where the court is to be held. All Stipendiary, or Police Magistrates shall be *ex officio* Justices of the Peace for the county over which they have jurisdiction. Each Stipendiary, or Police Magistrate is created, declared and constituted a Court, and to have powers conferred by any Act of Parliament of Canada. They are to have jurisdiction over complaints, etc., arising within the county under Dominion or Provincial Summary Convictions Acts, and all powers of Justices of the Peace in any matter or proceeding, also to have alone all powers of two Justices of the Peace.

These Magistrates are granted civil jurisdiction to the same extent and in the same manner as the Parish Court Commissioners have by the provisions of chap. 120 of the Consolidated Statutes. They must take prescribed oath of office before the Clerk of the Peace for the County, and file the same in his office.

PRINCE EDWARD ISLAND.

By the Statute *50 Victoria, Chap. 2* (*1887*), *Rev. Stat. 1891, Chaps. 93 and 143*, the Lieutenant-Governor in Council may appoint, under the Great Seal, such and so many Justices of the Peace in and for the several and respective counties of the Province as may be deemed expedient and proper.

The oath of office must be taken before the Chief Justice of the Supreme Court, or any Assistant Judge, or before the County Court Judge of the county in which the Justice of the Peace resides.

Upon being sworn, the Judge shall deliver to such person being sworn a certificate in writing under his hand that such person did duly take the oath before him.

Before entering upon his duties the Justice of the Peace must file this certificate in the office of the Provincial Secretary, who is to keep a record of the same.

The Lieutenant-Governor in Council may remove any Justice of the Peace, and notice of such removal must be given in the Royal Gazette.

No sheriff or deputy shall act as a Justice of the Peace during his term of office. (*1888*), *51 Vic. cap. 1, P. E. I.*

BRITISH COLUMBIA.

The appointment of Magistrates and Justices of the Peace is regulated by the "Magistrates' Act," *cap. 127, Rev. Statutes* (*1897*).

The Lieutenant-Governor in Council may appoint by Commission, under the Great Seal of the Province, fit and proper persons to be Stipendiary Magistrates for any county or electoral district in the Province, and may by order in Council cancel and revoke the Commission, or appointment. All Commissions are limited to the county, or electoral district.

The Lieutenant-Governor, whenever he shall think fit, may issue either a general commission of the peace, or supplementary commissions of the peace, appointing by letters patent under the public seal of the Province Justices of the Peace in and for any county or electoral district. Such appointments may be cancelled by order in Council.

Every Judge of the Supreme Court of Canada, of the Exchequer Court of Canada, and of the Supreme Court of British Columbia shall be *ex officio* a Justice of the Peace for the Province. All disqualifications by reason of being a ratepayer are removed.

Oaths of allegiance are set forth in schedules A. and B. to the Act.

These oaths are to be taken before a Justice of the Peace, and when taken, the same are to be transmitted to the Provincial Secretary, who shall file the same among the records of his office. These oaths must be taken and transmitted within thirty days from the appointment.

Returns are to be made quarterly, on or before the second Tuesday in the months of March, June, September and December in each year, of all convictions made by him, and the application of moneys received. The penalty for neglect in making these returns is $200 and full costs of suit.

All fines, save those specially appropriated to the Justice of the Peace, or to any municipality, shall be paid to the Provincial Treasurer monthly.

Oath of Office.

I, , swear that as a Stipendiary Magistrate, or Justice of the Peace, for the County or Electoral District of , in the Province of British Columbia, in all articles in the King's Commission to me directed, I will do equal right to the poor and to the rich after my cunning, wit and power, and after the laws and customs of the Realm and Statutes thereof made. And that I will take nothing for my office as Stipendiary Magistrate, or Justice of the Peace, to be done, but of the King and fees accustomed, and costs limited by Statute. So help me God.

Oath of Allegiance.

I, , do solemnly promise and swear that I will be faithful, and bear true allegiance to His Majesty, King George the Fifth, His heirs and successors. So help me God.

Chapter *128 of Rev. Stat. B. C.* provides for the protection of magistrates. The provisions of this Act are taken from the Imperial Statute *11 & 12 Vict. chap. 44.*

MANITOBA.

R. S. Man. Chap. 104 (1902), "The Manitoba Magistrates' Act."

The Lieutenant-Governor in Council may, whenever he shall think the public interest requires him to do so, appoint one or more Police Magistrates, and may define the territorial limits of their

separate and respective jurisdiction, and he may at any time remove, suspend or dispense with any of such officers, and re-appoint other, or others, in his or their stead, at pleasure.

Every Police Magistrate shall have, and exercise within the limits of his territorial jurisdiction, all the powers and authority vested in a Police Magistrate, a Stipendiary Magistrate, or two or more Justices of the Peace sitting and acting together under any law, or statute in force in Manitoba.

It shall be lawful for the Lieutenant-Governor in Council, whenever he shall think fit, to appoint under the Great Seal one or more Justices of the Peace in and for any city, town or other municipality in the Province of Manitoba, or for the whole Province.

Whenever a new Commission shall be issued, all and such like former commissions shall become absolutely revoked and cancelled, but nothing shall prevent the re-appointment of any Justice of the Peace named in such former Commission if the Lieutenant-Governor shall think fit. All justices appointed shall be chosen from amongst the most competent persons dwelling in the said portions respectively.

No barrister, attorney or solicitor shall be appointed, or act, as a Justice of the Peace during the time he continues his practice as such. Sheriffs and Coroners shall not be competent or qualified to be Justices of the Peace, or act as such during the time they exercise their offices. Provided the Lieutenant-Governor in Council may, under special circumstances and in view of public convenience, confer under the Great Seal upon one and the same person the office of Coroner, or Justice of the Peace.

A Police Magistrate does not require any property qualification.

A Justice of the Peace must be the owner in fee simple for his own use of land in the Province of the value of $500 over and above all incumbrances affecting the same.

The oath of qualification is as follows:

I, A. B., of , in the said Province of Manitoba, do swear that I truly and *bona fide* have to and for my own proper use and benefit an estate in fee simple in lands situate in the Province of Manitoba of such a value as doth qualify me to act as a Justice of the Peace according to the true intent and meaning of the Statute in that behalf, and that such lands are the following (parish or township, range, etc.) So help me God.

A certificate of such oath being taken and subscribed as aforesaid shall be forthwith deposited by the Justice of the Peace who has taken the same in the office of the Provincial Secretary.

No person shall be published in the Manitoba Gazette as a Justice of the Peace until and after the said person has strictly and fully complied with the requirements of the two last preceding sections of the Act.

On demand, the Provincial Secretary shall deliver an attested copy of the oath, in writing, to any person paying twenty-five cents for the same. Such copy when produced in the trial of any issue shall have the same force and effect as the original would have if produced.

The penalty for acting without taking and subscribing the oath, or without being qualified, shall for every offence be $100 with full costs.

Then follow provisions as to actions being brought against Justices of the Peace not being properly qualified.

All fines and penalties imposed for offences committed under this, or any Provincial Act, for which no special mode of procedure is prescribed, may be recovered or imposed in a summary manner before any one Justice of the Peace.

All the provisions of the Acts of Parliament of Canada relating to summary convictions and proceedings before Police Magistrates and Justices of the Peace shall apply to all prosecutions and proceedings before Police Magistrates and Justices of the Peace made under the Statutes of the Province of Manitoba, so far as the same are consistent with such Statutes of Manitoba, and so far as they are made applicable by "The Manitoba Summary Convictions Act."

Except where otherwise specially provided, all appeals from convictions or orders of Police Magistrates or Justices of the Peace, shall be brought under the provisions of the said Acts of the Parliament of Canada.

All Police Magistrates and Justices of the Peace are required to make semi-annual returns before the 30th June and December in each and every year, in duplicate, one to be sent to the Attorney-General of the Province and the other to the Provincial Treasurer. Such return must shew the convictions and orders made, the damages or penalty and costs imposed, the amounts received for fines, forfeitures, penalties, or damages, or costs, and the receipt and application by him of moneys received from any person so convicted.

In case of convictions, or other dispositions before two or more Justices of the Peace, all the Justices of the Peace present and joining therein shall forthwith make a return in the manner aforesaid.

Refusal and neglect to make returns within thirty days of the time required of the notice from the Provincial Treasurer, and after the expiry of thirty days from such notice, will mean the publication of such default in the Manitoba Gazette during two successive issues, giving thirty days more for making such return, and default still continuing, the name of the Magistrate, or Justice of the Peace so in default will be erased from the Commission, and his appointment will be cancelled.

Semi-annual returns must also be made shewing the disposition of all cases, matters and proceedings had or taken before him upon any trial, case or hearing, where no conviction has taken place, or where matters have been otherwise settled or disposed of. In default of such return his name will be struck off the Commission of the Peace.

The return shall be made in form "A" to the Act. Default will also subject Magistrates and Justices of the Peace to a penalty of $80 with full costs of suit, to be recovered by any person who sues for the same.

Protection is afforded to Magistrates and Justices of the Peace as provided in the Act.

SASKATCHEWAN.

6 Edward VII. Chapter 19 (1906), as amended by Chapter 14 of 7 Edward VII. (1907).

The Lieutenant-Governor may appoint under the Great Seal Justices of the Peace for the Province.

No one who is not a British subject, either by birth or naturalization, shall be appointed. No advocate who is practising his profession can be appointed a Justice of the Peace.

The usual oath of office is prescribed.

All the provisions of Part XV. of the Criminal Code shall apply to all proceedings before Justices of the Peace under and by virtue of any law in force in the Province, or municipal by-laws, and to appeals from convictions or orders made thereunder.

Return of all fines, etc., payable to the Province shall forthwith after receipt of same be transmitted to the Attorney-General, with a statement in form " A," schedule to the Act.

And in the months of January and July in each year, and before the 15th day thereof, Justices of the Peace shall make returns in writing signed by them to the Attorney-General, shewing the result, disposition of or action taken upon or in regard to any such matter. These returns must be made in form " B," schedule to the Act. Default in making these returns subjects the Justice, after certain formalities have been complied with, to having his name published in the Gazette. And if he still neglects after thirty days from the publication of his default in the Gazette, then his name will be erased from the Commission of the Peace.

A defaulting Justice of the Peace is also liable to a penalty of $100, with full costs of suit.

By *Chapter 14*, the Lieutenant-Governor may appoint a Police Magistrate in and for every city and incorporated town. These Magistrates are paid by the council out of the revenue of the city or town, such annual salary as may be agreed upon between the municipality and the Magistrate. If a city has paid a Police Magistrate $1,000 per annum, the Provincial Secretary may recoup the city to the extent of $500; or if a town has paid $600 per annum, the Provincial Treasurer may pay to the town council $300.

No person shall be appointed a Police Magistrate unless he is a member of the bar of the Supreme Court of Saskatchewan.

Every Police Magistrate shall have the power of two Justices of the Peace, and to perform all the duties of his office under the Criminal Code. The jurisdiction of a Police Magistrate is confined to the city, or town for which he is appointed.

Police Magistrates and their clerks, or partners, shall not act as agent, solicitor or barrister in any cause, matter, prosecution or proceeding of a criminal nature, or act in any matter which by law may be tried, or investigated by a Police Magistrate, or Justice of the Peace.

No qualification as to property is required, but each Police Magistrate must take the oath of office prescribed; these oaths must be transmitted to the Attorney-General.

All provisions of Part XV. of the Criminal Code and amending Acts shall apply to all proceedings before Police Magistrates under, or by virtue of any law or under municipal by-laws, and to appeals from convictions or orders.

Police Magistrates must keep records in a book to be provided by the Council, to be called "The Police Office Record Book," ruled in the same manner as the form of return of convictions set out in the schedule to the Act. A Police Magistrate shall from time to time enter in the said book the information required to be given in the form of said returns. Entries are to be made forthwith, and in case a fine or penalty imposed is not collected within three months after the imposition thereof, the cause for the same not being collected shall be written in the column of remarks. This record book shall be open for inspection.

The penalty for not making proper entry within the month of the conviction is $100 with full costs, to be recovered by the Attorney-General by suit in the Supreme Court.

All fines and moneys received by Police Magistrates shall be forthwith transmitted to the Attorney-General in the form Statement A.

ALBERTA.

6 Edward VII. (1906), Chapter 18.

The Lieutenant-Governor in Council may appoint Police Magistrates in the Province, and they shall have all the powers now, or hereafter vested in two Justices of the Peace under any law in Canada, and shall exercise jurisdiction in and for such part of the Province as is defined by Order in Council appointing them, or by any Order in Council amending the same.

No person shall be appointed a Police Magistrate unless he has been admitted and has practised as an advocate, barrister or solicitor in the Northwest Territories, or in the Province, or one of the Provinces of Canada, for a period of not less than three years.

All Police Magistrates and Justices of the Peace shall hold office during pleasure of the Lieutenant-Governor in Council, and their appointments may be revoked at any time.

The Lieutenant-Governor may appoint Justices of the Peace for the Province who shall have jurisdiction as such throughout the same.

No person who is not a British subject by birth, or naturalization, shall be appointed a Justice of the Peace.

When not otherwise specially provided for by law, no advocate shall be appointed, or act, as a Justice of the Peace during the time he continues to practice as such.

This shall not apply to any advocate appointed as a Police Magistrate.

Every Police Magistrate and Justice of the Peace before he is gazetted as such and takes upon himself to act as such, shall take and subscribe the oath of allegiance and oath of office.

Oath of Office.

I, ..., of the ..... in the District (or as the case may be), do swear that I will well and truly serve our Sovereign Lord, King George the Fifth, in the office of Police Magistrate (or Justice of the Peace), and that I will do right to all manner of people after the laws and usages of this Province without fear or favor, affection or ill-will.

So help me God.

This oath is to be forthwith, after the same is taken, transmitted or delivered to the Clerk of the Executive Council, and shall be filed in his office.

All the provisions of Part LVIII. (now XV.) of the Criminal Code shall apply to all proceedings before Police Magistrates and Justices of the Peace under or by virtue of any law in force in the Province.

Returns of fines and penalties are to be transmitted to the Attorney-General with statement as in form "A" in the schedule to the Act.

Before the 15th day of January and July in each year every Police Magistrate and Justice of the Peace shall make a return in writing signed by him, to the Attorney-General, shewing the result, disposition of, or action taken upon, or in regard to any matter of any nature whatsoever which is concerned, tried, heard, revised or adjudged upon by him. This return is to be in Form "B" in the schedule to the Act.

There is the usual provision to enforce these returns, the same as in Saskatchewan.

NORTH-WEST TERRITORIES.

Chapter 62, R. S. Canada.

"Territories" means the Northwest Territories, "which comprise the Territories formerly known as Rupert's Land and the Northwest Territory, except such portions thereof as form Manitoba, Saskatchewan and Alberta, and the Yukon Territories, together with all British territories and possessions in North America, and all islands adjacent thereto not included within any Province, except the Colony of Newfoundland and its dependencies."

The Governor-General in Council may appoint such numbers of persons as Stipendiary Magistrates from time to time as may be deemed expedient.

Every Stipendiary Magistrate shall have and may exercise the powers, authorities and functions which are vested in a Judge of the Supreme Court by the Northwest Territories Act and amendments thereto on the 31st day of August, 1905.

Stipendiary Magistrates must take the following oath:

I, ..., do solemnly and sincerely promise and swear that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as Stipendiary Magistrate of the Northwest Territory. So help me God.

Such oath may be taken before the Commissioner for the Northwest Territory, or before a Stipendiary Magistrate.

The Commissioner of N. W. T. may, subject to any orders made in that behalf from time to time by the Governor-General in Council, issue orders to the Royal Northwest Mounted Police in aid of the administration of civil and criminal justice, and for the general peace, order and good government of the Territories.

The procedure in criminal cases shall, subject to any Act of the Parliament of Canada, conform as nearly as may be to the procedure existing in like matters in England on the 15th day of July, 1870.

No grand jury shall be summoned or sit in the Territories.

A Stipendiary Magistrate shall have and exercise the powers of a Justice of the Peace, or of any two Justices of the Peace, under any laws or ordinances in force in the Territories.

Provision is made for summary trials of certain specified offences by Stipendiary Magistrates.

By Chapter 32, 6-7 Edward VII. (1907), the Northwest Territories Act was amended by providing that the Commissioners of the Royal Northwest Mounted Police while in the Territories shall have all the jurisdiction, powers and authority of a Stipendiary Magistrate appointed under section 32 of the said Act. While in the Northwest Territories the Commissioner, every member of the Council appointed under section 6 of the said Act, every Stipendiary Magistrate appointed under section 32 thereof, and every commissioned officer of the Royal Northwest Mounted Police shall *ex officio* have, possess and exercise all the jurisdiction, powers and authority of a Justice of the Peace, and of two Justices of the Peace, under any laws or ordinances in force in the Territories; and the Governor in Council may by Commission appoint such other persons Justices of the Peace having each the jurisdiction, powers and authority of two Justices of the Peace within the Territories, as is deemed expedient.

YUKON TERRITORY.

The Yukon Act, Chapter 63, R. S. C., Section 105.

While in the Territory, the Commissioner, each member of the Council, every Judge of the Court and every commissioned officer of the Royal Northwest Mounted Police shall *ex officio* have, possess and exercise all the powers of a Justice of the Peace, or of two Justices of the Peace, under any laws or ordinances, civil or criminal, in force in the Territory; and the Governor in Council may by Commission appoint such other persons Justices of the Peace or Police Commissioners, having each the powers of two Justices of the Peace within the Territory, as may be deemed desirable.

Section 106. All persons possessing the powers of two Justices of the Peace in the Territory shall also be Coroners in and for the Territory.

Sec. 89. The Governor in Council may appoint Police Magistrates for Dawson and White Horse in the Territory, who shall reside at those places respectively, and shall ordinarily exercise their functions there, but who also shall have jurisdiction in such portions of the Territory as are defined in their Commission. Each person shall hold office during pleasure, and shall be debarred from practising professionally while holding office.

Such Magistrates must be advocates, barristers or solicitors in one of the Provinces of Canada of not less than three years.

They are *ex officio* Justices of the Peace within territorial limits of their jurisdiction, with authority and jurisdiction of two Justices of the Peace and Magistrates for the purposes of Part XVI. of the Criminal Code.

Each of the Judges of the Territorial Court has the criminal jurisdiction of a Police Magistrate.

Offences Committed in Unorganized Territory.

By Section 586 of the Code (as amended 1907).

All offences committed in any part of Canada not in a Province duly constituted as such, and not in the Yukon Territory, may be inquired of and tried within any district, county or place in any Province so constituted, or in the Yukon Territory, as may be most convenient. (2) Such offences shall be within the jurisdiction of any Court having jurisdiction over offences of the like nature committed within the limits of such district, county or place. (3) Such Court shall proceed to trial, judgment and execution for any such offence in the same manner as if such offence had been committed within the district, county or place where the trial is had.

Sec. 587. Such Provincial and Yukon Courts shall have the same powers as they have with reference to offences within their ordinary jurisdiction.

The Royal Northwest Mounted Police.

Chapter 91, R. S. C., Section 12.

The Commissioner and Assistant Commissioners have the powers of two Justices of the Peace under this Act, or any Act in force in the Provinces of Saskatchewan and Alberta, and the Northwest Territories and Yukon Territory.

The Superintendent and such other officers as the Governor in Council approves shall be *ex officio* Justices of the Peace.

Every constable of the force shall be a constable in and for the two Provinces and the Northwest Territories and Yukon Territory for carrying out any laws or ordinances in force there.

The Commissioner and other officers are empowered to exercise in any Province in Canada and adjacent to the said Provinces of Saskatchewan and Alberta, or Northwest Territories or Yukon Territory, and every constable is empowered to exercise in every Province of Canada for the purposes of carrying out the criminal law and other laws of Canada, like powers and duties as are in the last preceding section assigned to him with respect to the said two Provinces and the said Northwest and Yukon Territories.

While so exercising powers or performing duties outside of the two Provinces and Northwest and Yukon Territories, a member of the force shall be subject to the Royal Northwest Mounted Police Act.

Every member of the force must take the oath of allegiance and the prescribed oath of office.

The "Keewatin Act" has been repealed, and the territory heretofore known as "Keewatin" is now included within the Northwest Territories, and criminal and civil matters therein are governed by *Chapter 62, R. S. C.*

Oath of Allegiance.

Chapter 78, R. S. Can.

Every person in Canada who, either of his own accord, or in compliance with any lawful requirements made of him, or in obedience to the directions of any Act, or law in force in Canada, save and except the British North America Act, 1867, desires to take an oath of allegiance, shall have administered to him and take the oath in the following form *and no other:*

I, A. B., do solemnly promise and swear that I will be faithful and bear true allegiance to His Majesty, King George V. (or reigning Sovereign for the time being) as lawful Sovereign of the United Kingdom of Great Britain and Ireland, of the British possessions beyond the seas, and of this Dominion of Canada, dependent on and belonging to the said Kingdom, and that I will defend him to the utmost of my power against all traitorous conspiracies or attempts whatsoever, which shall be made against His person, Crown and dignity, and that I will do my utmost endeavours to disclose and make known to His Majesty, His heirs or successors, all treasons, or traitorous conspiracies and attempts which I shall know to be against Him or any of them, and all this I do swear without any equivocation, mental evasion or secret reservation.

So help me God.

CHAPTER II.

The Criminal Code and Procedure Thereunder.

The Criminal Code of 1892, and as amended, was revised in 1906, and is found in the Revised Statutes of Canada, chapter 146. It is now referred to as the Revised Code. By section 1 it is provided that the Act may be cited as the "Criminal Code." This Revised Code has been amended in 1907, 6-7 Edw. VII. Cap. 8. in 1908, 7-8 Edw. VII. Cap. 18, and in 1909 by the Criminal Code Amendment Act, 1909, 8-9 Edw. VII. Cap. 9, and in 1910 by 9-10 Edw. VII. Caps. 10, 12 and 13.

The Revised Code is divided into XXV. parts, and contains 1,152 sections.

PART I. deals with Preliminary matters, as follows: Interpretation, secs. 1-7; Application of the Code, secs. 8-15; Matters of justification or excuse, secs. 16-18; Parties to offences, secs. 69-72.

PART II.—Offences against Public Order, Internal and External.

Interpretation, sec. 73.

Treason and other offences against the King's authority and person, secs. 74-86.

Unlawful assemblies, riots, breaches of the peace, secs. 87-110.

Explosive substances and offensive weapons, secs. 111-128.

Seditious offences, secs. 129-136.

Piracy, secs. 137-140.

Liquor on H. M. ships, sec. 141.

PART III.—The Peace near Public Works, secs. 142-154.

PART IV.—Interpretation, sec. 155.

PART V.—Offences against Religion, Morals and Public Convenience, secs. 197 to 239.

PART VI.—Offences against the person and reputation, secs. 240 to 334.

PART VII.—Offences against the rights of property and rights arising out of contracts and offences connected with trade, secs. 335 to 508.

PART VIII.—Wilful and Forbidden Acts in Respect of Certain Property, secs. 509 to 545.

PART IX.—Offences Relating to Bank Notes, Coin and Counterfeit Money, secs. 546 to 569.

PART X.—Attempts, Conspiracies, Accessories, secs. 570-575.

PART XI.—Jurisdiction.

Rules of Court, sec. 576.

General Jurisdiction, secs. 577-583.

Special Jurisdiction, secs. 584-588.

PART XII.—Special Procedure and Powers, secs. 589-645.

PART XIII.—Compelling Appearance of Accused before Justices, secs. 646-667.

PART XIV.—Procedure on Appearance of Accused, secs. 668-704.

PART XV.—Summary Convictions, secs. 705-770.

PART XVI.—Summary Trial of Indictable Offences, secs. 771-799.

PART XVII.—Trial of Juvenile Offenders for Certain Indictable Offences, secs. 800-821.

PART XVIII.—Speedy Trials of Indictable Offences, secs. 822-842.

PART XIX.—Procedure by Indictment, secs. 843 to 1025.

PART XX.—Punishment, Fines, etc., secs. 1026 to 1085.

PART XXI.—Render by Sureties and Recognizances, secs. 1086-1119.

PART XXII.—Extraordinary Remedies: Habeas Corpus, Certiorari, etc., secs. 1120-1132.

PART XXIII.—Returns, secs. 1133-1139.

PART XXIV.—Limitation of Actions, secs. 1140-1151.

PART XXV.—Sec. 1152 and Forms Nos. 1-75.

It will not be necessary, for the purposes of this work, to deal specifically with any of the Parts of the Code except those that relate to, or bear upon procedure.

Incidentally of course, the matters referred to governed by other Parts of the Code will be referred to. We will, however, deal principally with Parts XI. to XXV.

Parts II. to X. concern crimes and offences, defining their nature and providing for their punishment.

The reader is referred to the annotated works on the Criminal Code of Mr. Cranskhaw, Mr. Tremeear and Mr. Lear for further elucidation upon those Parts of the Code.

There are, however, several sections of the Code which have a general application to criminal law, which it might be well to notice and consider.

PART I.

General.

Application of this Act.

8. Nothing in this Act shall affect any of the laws relating to the government of His Majesty's land and naval forces. 55-56 V., c. 29, s. 983.

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

By "The Northwest Territories Act," *R. S. C. 1886, c. 50, s. 11,* it was provided: "That the laws of England relating to civil and criminal matters, as the same existed on the 15th day of July, 1870, shall be in force in the Territories in so far as applicable, and not repealed or altered by any Act of the Parliament of the United Kingdom or the Parliament of Canada, or by ordinance of the Lieutenant-Governor in Council."

And by section 65 of the same Act, "The procedure in criminal cases in Court shall conform as nearly as may be to the procedure existing in like cases in England on the 15th July, 1870."

APPLICATION OF THE CRIMINAL LAW OF ENGLAND.

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

QUEBEC.

The Province of Quebec, from the signing of the Treaty of Paris, 10th February, 1763, by which France ceded Canada to Great Britain, until 1774, was governed by the constitution created by letters patent under the Great Seal of Great Britain. The province, during this period, remained in an unsettled state, owing to the uncertainty that prevailed as to the laws actually in force.

In October, 1774, the new constitution became law. This is contained in what is known as the "Quebec Act," *14 Geo. III. c. 83.*

By this Act it was provided that, so far as property and civil rights were concerned, they were to be governed by the French Code of Civil Procedure. But the criminal law of England should alone obtain, to the exclusion of every other Criminal Code which might have prevailed before 1764. The "Quebec Act" extended the boundaries of the Province of Quebec, as defined in the proclamation of 1763. The province was extended on the south and west to the frontier of New England, Pennsylvania, New York Province, the Ohio and the left bank of the Mississippi, and on the north to the Hudson's Bay Territory. This included the territory afterwards comprised within the limits of Upper Canada, now Ontario.

By the Constitutional Act of 1791, *31 Geo. III., c. 31,* Canada was divided into two provinces, Upper and Lower Canada. By this Act the Criminal law of England was to obtain in both provinces.

The first meeting of the Legislature of Upper Canada was held at Newark (now Niagara), on the 17th September, 1792, and was formally opened on that day by Lieutenant-Governor Simcoe.

This, it will be noticed, is the day mentioned in the above section (10). It is the criminal law of England as it existed on that day, &c., . . . that shall be the criminal law of the Province of Ontario.

This was declared by an Act of the Legislature of Upper Canada, *40 Geo. III., c. 81,* passed in July, 1800.

The provisions of sec. 10 of the Code are therefore a simple re-affirmation of *40 Geo. III., c. 81, U. C.*, except in so far as the criminal law of England on the 17th September, 1792, has been repealed by any Act, &c., &c.

The English Champerty laws were introduced and continued in Upper and Lower Canada, now Quebec and Ontario, under the Quebec Act, 1774.

See *Meloche* v. *Deguire* (1903), 8 C. C. C. 89.

Maintenance is an indictable offence in the Province of Ontario. *Hopkins* v. *Smith* (1901), 21 Occ. N. 377, 1 O. L. R. 659.

British Columbia.

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

Province of Manitoba.

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

Effect of Act on Remedies.

13. No civil remedy for any act or omission shall be suspended or affected by reason that such act or omission amounts to a criminal offence. 55-56 V., c. 29, s. 534.

At common law (apart from statutory provisions) a person may be exposed for one and the same act to an action for damages to the injured person, and a criminal proceeding for the breach of the peace, and sometimes statutes specially provide that an offender shall be liable both to civil and criminal proceedings.

At the same time it is right and is the practice to take the one matter into consideration in proceeding on the other: for instance, when an action is pending judgment will not be given on an information for assault. *R.* v *Mahon,* 4 A. & E. 575.

Technically speaking, in such a case there is no estoppel on the justices from proceeding unless, perhaps, where the proceeding be-

fore them, though nominally criminal, is actually for the vindication of the party injured rather than for the ends of justice. But the safe practical rule for the justices to act upon would seem to be this, when it appears that civil proceedings are pending in respect of the same matter, to dismiss the complaint, or pass a nominal sentence, unless there has been an outrage on public order; or unless by statutory provisions (as in the case of trade marks) the civil and criminal proceedings are not to interfere with each other. Should the second proceeding be merely to indemnify the complainant from an alleged wrong a previous civil decision as to the same matter will be conclusive; thus judgment against a servant in the County Court for a wrongful dismissal is an answer to an application to justices to enforce payment of wages: *Paley*, 8th Ed., pp. 171-172; *Routledge* v. *Hislop*, 29 L. J. M. C. 90; *Pease* v. *Chaytor*, 3 B. & S. 620; *Hindley* v. *Haslam*, 39 B. D. 81; *Wells* v. *Abrahams*, L. R. 7 Q. B. 554; *Schol* v. *Kay*, 5 Allen N. B. 244; *Livingstone* v. *Massey*, 23 U. C. R. 156; *Taylor* v. *McCullough*, 8 O. R. 309; *Tremblay* v. *Bernier*, 21 S. C. R. 309; *Brown* v. *Dalby*, 7 U. C. R. 162.

A constitutional question has been raised in reference to this section as to whether or not it is an interference with provincial rights.

See *Paquet* v. *Lavoie* (1898), 6 C. C. C. 314.

In *Doyle* v. *Bell* (1884), 11 A. R. 326, it was held that the jurisdiction of the provincial legislature over "property and civil rights" does not preclude the Parliament of Canada from giving to an informer the right to recover by a civil action a penalty imposed as a punishment for bribery at a Dominion election. The Dominion Election Act, 1874, provided that all penalties and forfeitures (other than fines in cases of misdemeanour) imposed by the Act shall be recoverable, with full costs of suit, by any person suing for the same action of debt in any court in the province having competent jurisdiction.

As to dismissal of complaint for assault being a release from all further proceedings, civil and criminal, see sections 733 and 734 of the Code.

Felony and Misdemeanour.

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

The Criminal Code of 1892 was intended to make complete and exhaustive provision as to the subjects with which it deals, in so far at all events as its provisions relate to procedure.

The common law procedure as to use of depositions taken upon a preliminary inquiry at the trial is superseded by the provisions of the Code. See section 999. *R.* v. *Snelgrove* (1906), 12 C. C. C. 189.

When a certain practice would have been permissible in case of misdemeanour, and not permissible in case of felony, the practice has been to apply the rule as in cases of misdemeanour, and such is the intention of the Code. *R.* v. *Fox* (1903), 7 C. C. C. 457. See also *R.* v. *Cameron* (1897), 1 C. C. C. 169; *Ex parte Fortier,* 6 C. C. C. 191.

Offences Punishable under Different Acts.

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

A prisoner should be able to gather from the indictment whether he is charged with an offence at common law or under a statute, or if there should be several statutes applicable to the subject, under which statute he is charged. *Esten, V.C.R.* v. *Cummings,* 15 U. C. R. 16.

The accused was an officer in the public service. He was found guilty of misbehaviour in office, which is an indictable offence at common law. Held, that to constitute the offence it was not essential that pecuniary damage should have resulted to the public by reason of such irregular conduct, nor that the defendant should have acted from corrupt motives. *R.* v. *Arnoldi,* 23 O. R. 201.

The common law jurisdiction as to crime is still operative, notwithstanding the Code, and even in cases provided for by the Code unless there is such repugnancy as to give prevalence to the latter law. *R.* v. *Cole* (1902), 5 C. C. C. 330.

The rule is that if a common law offence is made subject to greater punishment by statute it may still be proceeded against as a common law offence, but if a common law offence is made by statute punishable by a summary conviction both remedies exist. *Hamilton* v. *Massie,* 18 O. R. 585.

A person who has been convicted of an assault by a Court of Summary Jurisdiction, but has been discharged without any

sentence, fine or imprisonment, or given security to be of good behaviour, cannot afterwards be convicted on an indictment for the same assault. *R.* v. *Miles,* 24 Q. B. D. 423, and see *R.* v. *King* (1897), 1 Q. B. 214.

A summary conviction for assault is no bar to an indictment for manslaughter when the party assaulted has subsequently died from the effect of the blow. *R.* v. *Morris,* L. R. 1 C. C. 90; 36 L. J. M. C. 84.

But a man who has been either acquitted or convicted before justices for assault cannot afterwards be indicted for felonious wounding in the same transaction. *R.* v. *Walker,* 2 M. & R. 446, and see *Wemyss* v. *Hopkins,* L. R. 10 Q. B. 378.

A conviction before a competent tribunal and unreversed will operate as an estoppel in a criminal proceeding upon the points decided by it. *R.* v. *J. J. Houghton,* 1 El. & B. 501; *R.* v. *J. J. Bristol,* 22 L. T. 213; *Justice* v. *Gosling,* 31 L. J. C. P. 21.

At common law a former conviction or acquittal, whether on a criminal summary proceeding or an indictment, will be an answer to an information of a criminal nature before justices founded on the same facts. The true test to shew that such previous conviction or acquittal is a bar is whether the evidence necessary to support the second proceeding would have been sufficient to procure a legal conviction on the first. COLERIDGE, J., in *R.* v. *Drury,* 3 C. & K. 193, 18 L. J. M. C. 189.

Where a man is indicted for an offence and acquitted he cannot be again indicted for the same offence, provided the first indictment were such that he could have been lawfully convicted on it.

If so indicted a second time he may plead *autrefois acquit.* *Russell* (6th Ed.), Vol. I., p. 38.

"The defence does not arise on a plea of *autrefois acquit,* but on the well established rule at common law, that where a person has been convicted and punished for an offence by a court of competent jurisdiction, *transit in rem judicatam,* that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter." *Lord Blackburn,* at p. 381; *Weymss* v. *Hopkins* (1895), L. R. 10 Q. B. 378.

The principle of *res judicata* applies equally to an acquittal as to a conviction.

Where a person has been acquitted by a court of competent jurisdiction, the acquittal is a bar to all further proceedings to

punish him for the same matter, although a plea *autrefois acquit* may not be allowed because of the different nature of the charges. *R.* v. *Quinn* (1905), 10 C. C. C. 412.

A charge of theft does not implicitly include that of receiving stolen goods. An accused, who is acquitted of theft, remains subject to the accusation of receiving, and cannot, by reason of his acquittal, set up the defence of *autrefois acquit*. *R.* v. *Groulx* (1908), Q. R. 18 K. B. 118; 15 C. C. C. 20. See *R.* v. *Cross*, 6 E. L. R. 414; 14 C. C. C. 171.

Common Law Justification or Excuse.

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

"The Common Law is reason dealing by the light of experience in human affairs." *1 Blackstone, 472.*

Common Law, in the widest sense of the word, is that part of the law of England which, before the Judicature Acts, was administered by the common law tribunals as opposed to equity, or that part of the law of England which was administered by the Court of Chancery. *Sweet's Law Dict., 193.*

By the Common Law one meant those maxims, principles and forms of judicial proceedings which have no written law to prescribe or warrant them, but which, founded on the law of nature and the dictates of reason, have, by usage and custom, become interwoven with the written laws, and by such incorporation form a part of the municipal code of each state, or nation which has emerged from the loose and erratic habits of savage life to civilization, order and a government of law. *Am. & Eng. Encyc., Vol. 6, 269.*

Parliament never intended to repeal the Common Law, except in so far as the Code either expressly or by implication repeals it. So that if the facts stated in an indictment constituted an indictable offence at Common Law, and the offence is not dealt with in the Code, then unquestionably an indictment will be at Common Law, even if the offence has been dealt with in the Code, but merely by way of statement of what is law, then both are in force. Sedgewick, J., at p. 405 (1900); *Union Colliery* v. *The Queen*, 4 C. C. C. 400, 31 S. C. R. 81.

Vide remarks of Sir John Thompson in his speech in introducing the bill quoted in the last chapter.

It is a misdemeanour at Common Law to incite a witness to give particular evidence when the inciter does not know whether it is true or false, and it is not necessary to prove that the evidence was in fact given or was actually false to the knowledge of the witness. *R.* v. *Cole* (1902), 5 C. C. C. 330.

Where the charge in respect of which the accused person has been committed for trial is an offence at Common Law not provided for by the Code and formerly a misdemeanour, one justice of the peace may commit for trial and admit to bail as at Common Law. *Ibid.*, and see *R.* v. *Carlile*, 3 B. & Ald. 161.

There is at Common Law, apart from any statutory authority, inherent power in the Court to order one or more Grand Juries to be summoned. *R.* v. *McGuire*, 4 C. C. C. 12.

INFANTS.

17. No person shall be convicted of an offence by reason of any act or omission of such person when under the age of seven years. 55-56 V., c. 29, s. 9.

18. No person shall be convicted of an offence by reason of an act or omission of such person when of the age of seven, but under the age of fourteen years, unless he was competent to know the nature and consequences of his conduct, and to appreciate that it was wrong. 55-56 V., c. 29, s. 10.

These two sections will be considered together. Infants under the age of discretion ought not to be punished by any criminal prosecution whatever. *1 Hawkins, P. C. 2.*

Under seven years of age indeed an infant cannot be guilty of felony, for then a felonious discretion is almost an impossibility in nature, but at eight years old he may be guilty of felony.

Also under fourteen, though an infant, shall be *prima facie* adjudged to be *doli capax;* yet if it appears to the Court and jury that he was *doli capax,* and could not discern between good and evil, he may be convicted and suffer. Thus a girl of thirteen has been burnt for killing her mistress; and one boy of ten and another of nine years old, who had killed their companion, have been sentenced to death, and he of ten actually hanged; because it appeared upon their trials that the one hid himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt and a discretion to discern between good and evil. *2 Blackstone, pp. 22 & 23.*

But in all such cases the evidence of that malice, which is to supply age, ought to be strong and clear beyond all doubt and contradiction. *Ibid.*

Where a child between the age of seven and fourteen years is indicted for felony, two questions are to be left to the jury: first, whether he committed the offence; and secondly, whether at the time he had a guilty knowledge that he was doing wrong. *R.* v. *Owen*, 4 C. & P. 236, and see *Arch. Ple. & Ev., 21st Ed., pp. 19 & 20.*

The accused being under fourteen years of age is, by the common law of England, assumed to be physically incompetent to commit the crime with which he is charged (Sodomy under sec. 220), and I find no provisions in the Code altering the common law in this respect. Section 10 (now 18) of the Code, in my opinion, refers solely to the mental capacity to distinguish between right and wrong, and not to physical ability to commit crime. RITCHIE, J., *p. 14. R.* v. *Hartlen* (1898), 2 C. C. C. 12.

As to incapacity for a child under fourteen to commit rape, see *Sec. 298, 2, of the Code.*

An infant under the age of fourteen years is presumed by law unable to commit rape, and therefore, it seems, cannot be guilty of it, and though in other felonies *malitia supplet ætatem*, in some cases, as hath been shewn, yet it seems as to this fact the law presumes him impotent as well as wanting discretion. *1 Hale, P. C. 630.*

A charge of perjury cannot be sustained against a boy under fourteen without proof of guilty knowledge of wrong doing. *R.* v. *Carvery* (1906), 11 C. C. C. 331.

A person of the age of fourteen and upwards is presumed to have capacity to commit any crime until the contrary is proved. *R.* v. *Vamplew*, 3 F. & F. 520.

A boy under fourteen years of age cannot be convicted of having carnal knowledge of a girl under fourteen years (see Code, s. 301); nor of 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 like mentioned offences. *R.* v. *Waite* (1892), 2 Q. B. 600.

Evidence of a child of tender years who is tendered as a witness may be received without oath. *See Sec. 1003 of the Code.*

The child must, in the opinion of the Judge or Justice, be possessed of sufficient intelligence, and understand the duty of speaking the truth, to justify the reception of the evidence. No case shall be decided upon such evidence alone, and such evidence

must be corroborated by some other material evidence. *See Sec. 16, Canada Evidence Act.*

As to proof of age of a child, boy or girl, and inference as to age from appearance, see *section 984 of the Code.*

INSANITY.

19. 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 an act or omission was wrong.

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

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

Blackstone, Vol. 4, page 24, says:

"In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities; no, not even for treason itself. Also, 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 becomes mad, he shall not be tried, for how can he make his defence? If after he be tried and found guilty he loses his senses before judgment, judgment shall not be pronounced, and if after the judgment he becomes of an insane 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." *1 Hale, P. C. 34.*

Every person at the age of discretion is, unless the contrary be proved, presumed by law to be sane and accountable for his actions. But if there be an incapacity or defect of the understanding, as there can be no consent of the will, so the act cannot be culpable. This species of non-volition is either natural, accidental or affected, it is either perpetual or temporary, and may be reduced to three general heads: 1. Idiocy or natural fatuity. 2. Adventitious insanity. 3. The vice of drunkenness which produces a perfect, though temporary, frenzy or insanity, usually denominated *dementia affectata,* or acquired madness. *Arch. Pl. & Ev., 21st Ed., p. 21.*

The vice of drunkenness will not excuse the commission of any crime, and an offender under the influence of intoxication can de-

rive no privilege from a madness voluntarily contracted, but is answerable to the law equally as if he had been in the full possession of his faculties at the time. *1 Hale, 32; Co. Litt, 247; 1 Hawk, c. 1, 56.* Although it has been said that upon an indictment for murder the intoxication of the defendant may be taken into consideration as a circumstance to shew that the act was not premeditated. *R.* v. *Grindley,* 1 Russ. 8; *R.* v. *Thomas,* 7 C. & P. 817; *R.* v. *Makin,* Id. 297; but see *R.* v. *Carroll,* Id. 145.

When the crime alleged is such that the intention of the accused is one of its constituent elements, the jury may look at the fact that he was in drink in considering whether he formed the intent necessary to constitute the crime. STEPHEN, J., *R.* v. *Doherty,* 16 Cox C. C. 306.

Delirium tremens caused by drinking, if it produces such a degree of madness, although only temporary, as to render a person incapable of distinguishing right from wrong, relieves him from criminal responsibility for any act committed by him while under its influence. *R.* v. *Davis* (1881), STEPHEN, J., 14 Cox 563.

As to intoxication of accused being evidence of incapacity to understand the quality of his act, see *R.* v. *Blythe* (1909), 15 C. C. C. 224.

If the accused sets up insanity he must accept the *onus probandi.* *R.* v. *Layton* (1849), 4 Cox C. C. 149, that is, the burden of proof of insanity is upon the defence. *McNaghten's Case,* 10 Cl. & F. 200; *R.* v. *Stokes,* 3 C. & K. 185.

It seems clear, however, that, to excuse a man from punishment on the ground of insanity, it must be proved distinctly that he was not capable of distinguishing right from wrong at the time he did the act, and did not know it to be an offence against the laws of God and nature. See *R.* v. *Offord,* 5 C. & P. 168.

Where the intellectual faculties are sound, mere moral insanity, —where a person knows perfectly well what he is doing, and that he is doing wrong, but has no control over himself, and acts under an uncontrollable impulse,—does not render him irresponsible. *R.* v. *Burton,* 3 F. & F. 772.

Whether the prisoner were sane or insane at the time the act was committed, is a question of fact triable by the jury, and dependent upon the previous and contemporaneous acts of the party.

Upon a question of insanity a witness of medical skill may be asked whether, assuming certain facts, proved by other witnesses, to be true, they in his opinion indicate insanity. *R.* v. *Francis,* 4

Cox C. C. 57, *per* ALDERSON, B., and CRESWELL, J. *R.* v. *Searle*, 1 M. & Rob. 75.

Counsel will not be allowed, upon a question of insanity, to quote in his address to the jury the opinion of medical writers as expressed in their books. *R.* v. *Crouch*, 1 Cox 94; *R.* v. *Taylor*, 13 Cox 77, *per* BRETT, J.

See the answers of the Judges to questions propounded to them by the House of Lords in *R.* v. *McNaughton*, *ubi supra*.

A Grand Jury have no authority by law to ignore a bill upon the ground of insanity; it is their duty to find the bill, and then the Court, either on arraignment or trial, may order the detention of the prisoner during the pleasure of the Crown. *R.* v. *Hodges*, 8 C. & P. 195.

As to the defence of insanity raised on the trial of an indictment, see *ss. 966 to 970* of the Code.

A case may be reserved at the instance of the Crown upon a question of law as to whether there was any evidence of insanity to support the jury's verdict of not guilty upon that ground. *R.* v. *Phinney* (*No. 1*) (1903), 6 C. C. C. 469.

A remand by a magistrate in a preliminary inquiry must be by warrant; if made for more than three clear days it is essential that the accused should be personally present before the magistrate. A remand for eight days for the purpose of a medical examination of the accused as to sanity cannot be made on the mere suggestion of the police officer without bringing the accused personally before the magistrate. *Re Sarault* (1905), 9 C. C. C. 448.

Insanity may be proved without medical testimony, and may be inferred from the behaviour of the accused and facts proved. *R.* v. *Dart*, 14 Cox C. C. 143. See also *Duclos* v. *St. Jean de Dieu Asile*, Q. R. 32 S. C., 12 C. C. C. 278.

INTENT—MENS REA.

There is probably no maxim known to our law of more beneficial operation than that which requires a criminal intent in order to fix a criminal responsibility. It is generally expressed in the words "*actus non facit reum, nisi mens sit rea*," and while it is of very limited application in civil proceedings, it is almost universally applied to those which are of a criminal nature. *Paley, 8th Ed., pp. 172-73.*

An offence implies intention in the offender, and "wilfully" is in general equivalent to "knowingly and fraudulently." *Per* ERLE, J., in *R.* v. *Badger*, 6 El. & Bl. 137.

Where there must be a *mens rea* to constitute an offence, an honest claim of right, however absurd, will frustrate a summary conviction; but when the absence of *mens rea* is not necessarily a defence, the person who sets up a claim of right must shew some grounds for its assertion, and if he fails to do so, is liable to be convicted of the offence charged against him. *Watkins* v. *Major*, L. R. 19 C. P. 662, 44 L. J. M. C. 164.

As a general rule, no penal consequences are incurred where there has been no personal neglect or default, and a *mens rea* is essential to an offence under a penal enactment unless a contrary intention appears by express language or necessary inference. *Dickinson* v. *Fletcher*, L. R. 9 C. P. 1, 43 L. J. M. C. 25; *Aberdare Local Board* v. *Hammett*, L. R. 10 Q. B. 162, 44 L. J. M. C. 49.

"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 times and as applicable to common law, and 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 charged." STEPHEN, J., in *Cundy* v. *Lecocq*, 13 Q. B. D. 307, and see *Christie* v. *Cooper*, 69 L. T. 708.

Under ordinary circumstances an offence implies a *mens rea*, but there are exceptions, and in this case the question is whether, for the offence created by this statute, the knowledge of the person who is the seller in fact, and who is the agent of the licensee to sell, is sufficient to justify the conviction of the licensee. *Lord Alverstone* in *Emery* v. *Nolloth* (1903), 2 K. B. 269, 72 L. J. K. B. 620; and see *Brock* v. *Mason* (1902), 2 K. B. 743, 72 L. J. K. B. 19.

"It is a general principle of our criminal law that there must be, as an essential ingredient in a criminal offence, some blameworthy condition of mind; sometimes it is negligence, sometimes it is malice, sometimes guilty knowledge, but, as a general rule, there must be something of that kind which is designated by the expression *mens rea*. Moreover, it is a principle of our criminal law that the condition of mind of the servant is not to be imputed to the master," &c., &c. *Per* CAVE, J., at p. 741, in *Chisholm* v. *Doulton*

(1889), 22 Q. B. D. Approved in *Somerset* v. *Wade* (1894), 1 Q. B. p. 576; and see also *Massey* v. *Morris* (1894), 2 Q. B. 412; *Bank of New South Wales* v. *Piper* (1897), 66 L. J. P. C. p. 76.

Upon a charge under the fishery regulations of having sturgeon in possession of the accused and appellant, under the size prescribed by law, the doctrine of *mens rea* applies, and a conviction of the master for his servant having possession of the fish without his master's authority, or knowledge or connivance, was quashed. *R.* v. *Vachon* (1900), 3 C. C. C. 558.

Where the state of mind or intention is made an element by the statute, e.g., where a statute inflicts a penalty on any person wantonly doing a certain act, and such act is done by the agent of an incorporated company, some knowledge of the particulars ought to be brought home to the manager to render him liable. *Small* v. *Warr*, 45 J. P. 20.

A guilty mind is necessarily implied as an essential ingredient of bigamy under the Code; if, therefore, the accused had an honest and reasonable belief that she was unmarried before she went through the form of marriage (the subject of the charge) it would be a good defence. *R.* v. *Sellars* (1905), 9 C. C. C. 153.

On a trial of a charge of theft accomplished by a peculiar method of presenting a bank bill of large denomination in making a small purchase, and managing to receive back too much change. Held, that evidence of a similar practice in other cases was receivable to shew criminal intent. *R.* v. *McBerny*, 29 N. S. R. 327, 3 C. C. C. 339.

Defendant was convicted of selling apples packed in packages in which the face surface gave a false representation of the contents of the packages. The mere exposing for sale under such conditions held an offence under s. 7 of 1 Edw. VII. c. 27, irrespective of whether the possessor knew of the fraudulent packing or was negligently ignorant of it. *R.* v. *James*, 6 C. C. C. 159, 4 O. L. R. 537.

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

The word "knowingly," in s. 179 (now 207) of the Code, makes it incumbent on the prosecution to give some evidence of knowledge of the contents of the obscene matter as being possessed by the defendant. *R.* v. *Beaver* (1905), 9 C. C. C. 415, 9 O. L. R. 418.

It is not necessary to prove knowledge by the liquor dealer of the identity of the person supplied with the liquor in order to sustain a conviction, under the Liquor License Act of New Brunswick, for the sale of liquor to an interdict. *R.* v. *Dias,* 1 C. C. C. 534.

As to descriptions of offences in examples shewn in the Code forms, and their scope, see *R.* v. *Skelton* (1898), 4 C. C. C. 467.

Where it is a simple omission to perform a statutory duty, a *mens rea,* in the ordinary sense of that term, or the absence of good faith, is not necessary to justify a verdict of guilty. An intentional omission to do what the statute requires to be done is sufficient. *R.* v. *Lewis,* 7 C. C. C. 261, 6 O. L. R. 132; and see *R.* v. *Lyon,* 2 C. C. C. 242.

Murder—Life insurance. *R.* v. *Hammond,* 1 C. C. C. 373.

Poisoning—Intent—Proof of. *R.* v. *Sternaman,* 1 C. C. C. 1.

Undertaking to tell fortunes. *R.* v. *Starcott,* 4 C. C. C. 437.

Proof of immoral relationship—Motive. *R.* v. *Barsalon,* 4 C. C. C. 347.

Drugs for securing miscarriage. *R.* v. *Karn,* 5 C. C. C. 543.

Assault with intent to commit murder. *Re Kelly* (1902), 5 C. C. C. 541.

Demand with menaces—Intent to steal. *R.* v. *Lyon,* 2 C. C. C. 242.

Threatening letter—Intent to extort. *R.* v. *Dixon,* 2 C. C. C. 589.

Entering dwelling in night time with intent to assault. *R.* v. *Higgins,* 10 C. C. C. 456.

Wounding with intent—Verdict of "guilty without malicious intent." *R.* v. *Wasyl Kapij,* 9 C. C. C. 186.

Finding of watch, pawning—Criminal intent. *R.* v. *Slavin,* 21 Occ. N. 54.

False pretences. *R.* v. *Cadden,* 4 Terr. L. R. 119.

On a charge of unlawfully and maliciously killing cattle (under R. S. C. c. 43), it appeared that the animal was killed by the prisoners when it was in a helpless and dying condition, and that the prisoners thought it was an act of mercy to kill it. Held, that the killing was not malicious; that the implication of malice was rebutted, and in fact had been rebutted, a *mens rea* on the part of the prisoners being disproved. *R.* v. *Menuel,* 1 Terr. L. R. 487.

Manslaughter—Master and servant—Negligence. *R.* v. *Brown,* 1 Terr. L. R. 475, and see *R.* v. *Chisholm,* 14 C. C. C. 15.

Wounding with intent to disable. *Slaughenwhite* v. *The King*, 35 S. C. R. 607.

Accused were charged with maiming four stallions. A malicious intent must still be shewn in the minds of accused. Accused claimed that what was done was done for the protection of their mares. Held, that the Alberta Ordinance respecting stallions and bulls gives ample protection, and points out the course to be adopted by persons aggrieved. The accused were convicted. *R.* v. *Kroesing*, 10 W. L. R. 649.

Selling liquor to Indians. A knowledge that purchaser is an Indian is not essential to the offence. *R.* v. *Pickard* (1908), 14 C. C. C. 33.

False bank return. Materiality of wilful intent or guilty knowledge. *R.* v. *Browne* (1909), 14 C. C. C. 247.

Selling liquor to railway employee on duty. Want of knowledge no defence. *R.* v. *Treaver* (1908), 14 C. C. C. 443.

Liquor License Law. Unlicensed premises and illegal sales. Occupant "permitting" same. *R.* v. *Irish* (1909), 14 C. C. C. 458.

Murder—Negativing intent. *R.* v. *Blythe* (1909), 15 C. C. C. 225.

Abortion—Operating with intent. *R.* v. *Cook* (1909), 15 C. C. C. 41.

COMPULSION OF WIFE.

21. No presumption shall be made that a married woman committing an offence does so under compulsion because she commits it in the presence of her husband. 55-56 V., c. 29, s. 13.

The following is a brief statement of the common law respecting the presumption of coercion of the wife by the husband, which is now abrogated by the above enactment, and is no longer law. The same sound principle which excuses those who have no mental will in the perpetration of an offence, protects from the punishment of the law those who commit crimes in subjection to the power of others, and not as a result of an uncontrolled free action proceeding from themselves. *4 Bl. Com. 27, 1 Hale 43.*

This protection also exists in the public and private relations of society; public, as between subject and prince, obedience to existing laws being a sufficient extenuation of civil guilt before a municipal tribunal; and private, proceeding from the matrimonial subjection of the wife to the husband, from which the law presumes

a coercion which in many cases excuses the wife from the consequences of criminal misconduct. *1 Hale 44.*

In general, if a crime be committed by a *feme covert* in the presence of her husband, the law presumes that she acted under his immediate coercion, and excuses her from punishment. *1 Hale 45 5-6.*

These presumptions of the coercion of the wife by the husband may be rebutted by evidence, and if it appear that the wife was principally instrumental in the commission of the crime, acting voluntarily and not by restraint of her husband, although he was present and concurred, she will be guilty and liable to punishment. *1 Hale 516. R.* v. *Cohen,* 11 Cox 99; *R.* v. *Torpey,* 12 Cox 45.

This protection was not allowed in crimes which are *mala in se* and prohibited by the law of nature, nor in such as are heinous in their character, or dangerous in their consequences, and therefore if a married woman be guilty of treason, murder, or offences of the like description, in company with and by coercion of her husband, she is punishable equally as if she were sole. *1 Hale 45, 47, 48. R.* v. *Merring,* 2 C. & K. 903.

IGNORANCE OF THE LAW.

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

Ignorance of the law will not excuse from the consequences of guilt any person who has capacity to understand the law. *1 Hale 42.*

If the offence be committed in England, a foreigner cannot be excused because he does not know the law. *R.* v. *Esop,* 7 C. & P. 456.

And the same if it be committed in an English ship on the high seas, which is in law part of the territory of England. *R.* v. *Lopez, R.* v. *Settler, Dean & B.* 525.

Ignorance or mistake of the *fact* may, in some cases, be allowed as an excuse for the advertent commission of a crime; as, for instance, if a man, intending to kill a thief in his own house, kills one of his own family, he will be guilty of no offence, *1 Hale 42, 43. R.* v. *Levitt,* Cro. Car. 538.

But this rule proceeds upon a supposition that the original intention was lawful: for if an unforeseen consequence ensue from an act which was in itself unlawful, and its original nature wrong

and mischievous, the actor is criminally responsible for whatever consequences may ensue. 4 *Bl. Com.* 27.

Ignorance of the law is an excuse where anyone acts 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. See *Sec. 29 of the Code.* See also *R.* v. *Moodie,* 20 U. C. R. 399; *R.* v. *Mailloux,* 3 Pugsley (N.B.) 493; *R.* v. *Madden,* 10 L. C. Jurist 344.

Breaches of the Peace.

46. Every one who witnesses a breach of the peace is justified in interfering to prevent its continuance or renewal and may detain any person committing or about to join in or renew such breach of the peace, in order to give him into the custody of a peace officer, if the person interfering uses no more force than is reasonably necessary for preventing the continuance or renewal of such breach of the peace, or than is reasonably proportioned to the danger to be apprehended from the continuance or renewal of such breach of the peace. 55-56 V., c. 29, s. 38.

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

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

Affrays (from *affraier,* to terrify) are the fighting of two or more persons in some public place to the terror of His Majesty's subjects: for if the fighting be in private it is no affray, but an assault. Affrays may be suppressed by any private person present, who is justifiable in endeavouring to part the combatants, whatever consequences may ensue. But more especially the constable, or other similar officer however dominated, is bound to keep the peace, and to that purpose may break doors to suppress an affray, or apprehend the affrayers, and may either carry them before a justice or imprison them by his own authority for a convenient space till the heat is over, and may then perhaps also make them find sureties for the peace. *1 Hawk.* P. C. 137.

The common law right, and duty of conservators of the peace and of all persons (according to their power), is to keep the peace and to disperse, and, if necessary, to arrest those who break it, is obvious and well settled. *1 Hawk.* P. C. C. 63, s. 13. *Grant* v. *Moser,* 5 M. & G. 123.

SUPPRESSION OF RIOT BY MAGISTRATE, &C.

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

See *Sec. 94 for neglect to suppress riot.*

Riots, routs and unlawful assemblies must have three persons at least to constitute them.

An unlawful assembly is where three or more do assemble themselves together to do an unlawful act, as to pull down inclosures, to destroy a warren or the game therein; and part without doing it, or make a motion towards it. See *Sec. 87 of the Code.*

A rout is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common or way, and make some advances towards it. (A rout is now a riot).

A riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel, as, if they beat a man, or hunt and kill game in another's park, chase, warren or liberty; or do any other unlawful act, as removing a nuisance in a violent and tumultuous manner. *3 Coke, Inst.* 176; *1 Hawk P. C.* 159. See *Sec. 88 of the Code.*

And by the Statute, 13 Henry IV., any two justices, together with the sheriff or under sheriff of the county, may come with the *posse comitatus,* if need be, and suppress any such riot, assembly or rout, arrest the rioters and record upon the spot the nature and circumstances of the whole transaction, which record alone shall be sufficient conviction of the offenders. *Blackstone,* Vol. 4, 146.

SUPPRESSION OF RIOT BY MILITARY.

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

2. It shall be a question of law whether any particular order is manifestly unlawful or not. 55-56 V., c. 29, s. 41.

50. Every one, whether subject to military law or not, who in good faith and on reasonable and probable grounds believes that serious mis-

chief will arise from a riot before there is time to procure the intervention of any of the authorities aforesaid, is justified in using such force as he, in good faith and on reasonable and probable grounds, believes to be necessary for the suppression of such riot, and as is not disproportioned to the danger which he, on reasonable grounds, believes to be apprehended from the continuance of the riot. 55-56 V., c. 29, s. 42.

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

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

52. Every one is justified in using such force as may be reasonably necessary in order,—

(*a*) to prevent the commission of any offence for which, if committed, the offender might be arrested without warrant, and the commission of which would be likely to cause immediate and serious injury to the person or property of any one; or,

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

By the common law every private individual may lawfully endeavour, of his own authority and without any warrant or sanction from a magistrate, to suppress a riot, by every means in his power.

He may disperse, or assist in dispersing, those assembled, and stay those engaged in it from executing their purpose, as well as stop and prevent others whom he may see coming up from joining the rest. If the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of a Magistrate, it is the duty of every subject to act for himself, and upon his own responsibility, in suppressing a riotous and tumultuous assembly, and the law will protect him in all that he honestly does in prosecution of this purpose. *Phillips* v. *Eyre*, L. R. 6 Q. B. 15, *per* WILLES, J.

UNLAWFUL ASSEMBLIES AND RIOTS.

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

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

3. An assembly of three or more persons for the purpose of protecting the house of any one of their number against persons threatening to break and enter such house in order to commit any indictable offence therein is not unlawful. 55-56 V., c. 29, s. 79.

We have already given the common law definitions of unlawful assemblies and riots.

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

A procession of the Salvation Army was forcibly opposed by a number of persons, but no violence was used by the Salvation Army members. Held, that the assembly of the latter was not unlawful, and that a man is not to be convicted for doing a lawful act, although he knows that his doing it may cause another to do an unlawful act. *Beatty* v. *Gillbanks* (1882), 9 Q. B. D. 308, 15 Cox 138.

It is not necessary to first read the Riot Act or to proclaim the meeting unlawful before using force to disperse it. The magistrates and police are justified in dispersing an assembly which is unlawful.

After a refusal to disperse, force may be used to compel them to do so, and the persons resisting may be punished as rioters. See *O'Kelly* v. *Harvey,* 15 Cox 435; *Redford* v. *Birley,* 1 St. Tr. (N.S.) 1071-1239; *R.* v. *Mole,* 3 St. Tr. (N.S.) 1312; *R.* v. *Jones,* 6 St. Tr. (N.S.) 811; *R.* v. *Fursey* (1833), St. Tr. (N.S.) 543, 6 C. & P. 81; *R.* v. *St. Vincent,* 9 C. & P. 91; *Bock* v. *Holmes,* 16 Cox 263; *R.* v. *Clarkson,* 17 Cox 483; *R.* v. *Orton,* 14 Cox 226; *R.* v. *Mailloux,* 3 Pugsley, N. B. 493.

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

The mere fact of holding a meeting in a street does not necessarily imply the impeding or incommoding of peaceable passengers, and proof of actual impeding or incommoding is essential to justify a conviction. *R.* v. *Kneeland,* Q. R. 11 K. B. 85; 6 C. C. C. 81.

RIOT.

88. A riot is an unlawful assembly which has begun to disturb the peace tumultuously. 55-56 V., c. 29, s. 80.

89. Every member of an unlawful assembly is guilty of an indictable offence and liable to one year's imprisonment. 55-56 V., c. 29, s. 81.

90. Every rioter is guilty of an indictable offence and liable to two years' imprisonment with hard labour. 55-56 V., c. 29, s. 82.

The accused was convicted for a riot and assault, and the jury found him guilty of a riot, but not of assault. Held, that a conviction for riot could not be sustained, the assault, the object of the riotous assembly, not having been executed; although the defendant might have been guilty of riot, or joining in an unlawful assembly. *R.* v. *Kelly,* 6 C. P. 372.

A procession having been attacked by rioters, the prisoner one of the processionists, and in no way connected with the rioters, was proved to have fired off a pistol on two occasions—first in the air, and then at the rioters. So far as appears from the evidence, the prisoner acted alone and not in connection with anyone else. Held, that a conviction for riot could not be sustained. The prisoner having been indicted jointly with a number of the rioters on a charge of riot and convicted, upon a case reserved after the verdict, the conviction was quashed. *R.* v. *Corcoran,* 26 C. P. 134.

READING THE RIOT ACT.

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

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

"GOD SAVE THE KING."

The proclamation must be read correctly. Where the magistrate, in reading the proclamation, omitted the words "God save the King," it was held that persons remaining could not be capitally convicted. *R.* v. *Child,* 4 C. & P. 442.

Before the proclamation can be read, a riot must exist, and the effect of the proclamation will not change the character of the meeting, but will make those guilty of felony who do not disperse within an hour after the proclamation is read. *R.* v. *Furzey,* 6 C. & P. 81.

By Sec. 93 of the Code, the time for dispersion after the proclamation is made is fixed at "thirty minutes."

In reference to the duties of a magistrate in repelling a riot, see Mr. Justice Littledale's address to the jury in *R.* v. *McPhinney,* 5 C. & P. 254-261.

92. 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. 55-56 V., c. 29, s. 83.

93. If the persons so unlawfully, riotously and tumultuously assembled together, or twelve or more of them, continue together, and do not disperse themselves, for the space of thirty minutes after the proclamation is made or after such hindrance as aforesaid, it is the duty of every such sheriff, justice and other officer, and of all persons required by them to assist, to cause such persons to be apprehended and carried before a justice.

2. If any of the persons so assembled are 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, are indemnified against all proceedings of every kind in respect thereof.

3. Nothing in this section contained shall, in any way, limit or affect any duties or powers imposed or given by this Act as to the suppressoin of riots before or after the making of the said proclamation. 55-56 V., c. 29, s. 84.

By Sec. 1140 of the Code, no prosecution for any offence against Sec. 92 shall be commenced after the expiration of one year from its commission.

94. Every sheriff, deputy sheriff, mayor or other head officer, justice, or other magistrate, or other peace officer, of any county, city, town, or district, who has notice that there is a riot within his jurisdiction, who, without reasonable excuse, omits to do his duty in supressing such riot, is guilty of an indictable offence and liable to two years' imprisonment. 55-56 V., c. 29, s. 140.

95. Every one is guilty of an indictable offence and liable to one year's imprisonment who, having reasonable notice that he is required to assist any sheriff, deputy sheriff, mayor, or other head officer, justice, magistrate, or peace officer in suppressing any riot, without reasonable excuse omits to do so. 55-56 V., c. 29, s. 141.

96. 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, wagonway or track for conveying minerals from any mine. 55-56 V., c. 29, s. 85.

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

2. It shall not be a defence to a charge of an offence against this or the last preceding section that the offender believed he had a right to act as he did, unless he actually had such a right. 55-56 V., c. 29, s. 86.

Parties to Offences.

69. Every one is a party to and guilty of an offence who,—

(*a*) actually commits it; or,

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

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

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

2. If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose. 55-56 V., c. 29, s. 61.

Accessories.

By the provisions of this Section the common law distinction between principals and accessories before the fact is abolished. All are now principals, whether or not they are actual perpetrators of the crime. The old rule defined parties to offences as follows: The general definition of a principal in the first degree is one who is the actor or actual perpetrator of the fact: 1 *Hale*, 233, 615. 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. *Vaux's Case*, 4 Rep. 446; *R.* v. *Harley*, 4 C. & P. 369.

Principals in the second degree are those who are 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. *Foster*, 347, 350; 1 *Hale*, 555. *R.* v. *Owen*, 1 Moody C. C. 296. But he must be sufficiently near to give assistance. *R.* v. *Stewart*, R. & R. 363.

There must 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 commit, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony, or apprehend the felony. 1 *Hale*, 439.

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, as we have seen, 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 of the offence. 1 *Hale*, 615.

Now, by the provisions of Sec. 69, all these distinctions between principals of the first and second degree, and between principals and accessories before the fact, are done away with. They are all now parties of equal degree and guilty of an offence who (1) actually commit it; (2) who do, or omit to do, an act for the purpose of aiding the commission of it; (3) who abet or aid in the commission of it, or, (4) who counsel or procure any person to commit it.

"The effect of this enactment (Sec. 69), is that persons who do anything for the purpose of aiding another person to commit an offence, or who abet another person in commission of an offence, are themselves considered guilty of the offence and become liable to be prosecuted, tried, convicted and punished as if they had themselves committed it." WURTELE, J., p. 474. *R.* v. *Roy* (1900), 3 C. C. C. 472.

The rule of law now is that any person who, before the commission of an offence, does something to aid in its being committed, or to help, or to facilitate its commission, or to furnish the means to accomplish its commission, although he may not be present when the offence is actually perpetrated, may be treated and dealt with as a principal, and such person falls directly under paragraph (b) of Section 61 (now Sec. 69) of the Criminal Code, as having done an act for the purpose of aiding any person to commit an offence; then the person who, under the old rule of law, would have been principal in the second degree by abetting the perpetrator in the commission of an offence falls under paragraph (c), and may likewise be dealt with as a principal. *Ibid.* p. 476. See *R.* v. *Smith* (1876), 38 U. C. R. 218, 227.

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

If a person sees that a crime is about to be committed in his presence and does not interfere to prevent it, that is not a participation rendering him liable, without evidence that he was there in pursuance of a common unlawful purpose with the principal offender. *R.* v. *Curtley,* 27 U. C. R. 613.

In order to be an aider and abettor, it is not necessary that the person who thus participates in an offence should be present during the commission of some incident constituting the offence; it is sufficient that he aids and abets while a part of the criminal transaction is taking place, either at its commencement, or during its progression, or later, but proximately at its consummation, or indeed while some act is being done which may enter into the offence though it might be consummated without it.

In the case of theft, the crime is generally complete when the thief takes and carries away the object which he had formed the design to steal. And anyone who knowingly assists a thief to conceal stolen property which he is in the actual and proximate act of carrying away, renders aid to the actual perpetrator and principal and becomes an accessory to the crime, and under the provisions of the Criminal Code can be dealt with like a principal. WURTELE, J., 360-61. *R.* v. *Campbell* (1899), 2 C. C. C. 357.

Aid rendered to the principal offenders after the commission of the crime is alone insufficient to justify the conviction of the person so aiding as a principal under Sec. 61 (now 69). *R.* v. *Graham* (1898), 2 C. C. C. 389. See *R.* v. *Hodge* (1898), 2 C. C. C. 350.

Theft by the fraudulent appropriation by the principal and a fraudulent receiving by an accessory before the fact of the property so appropriated may take place at the same time and by the same act. *R.* v. *McIntosh* (1894), 5 C. C. C. 254, 23 S. C. R. 180.

A broker who merely acts as such for two parties, one a buyer and the other a seller, without having any pecuniary interest in the transaction beyond his fixed commission, and without any guilty knowledge on his part of the intention of the contracting parties to gamble in stocks or merchandise, is not liable to prosecution under Sec. 201, pp. (a) and (b) (now Secs. 231, 232) of the Code, nor as an accessory under Sec. 61 (now 69). *R.* v. *Dowd* (1899), 4 C. C. C. 170; and see *R.* v. *Harkness* (*No. 1*) (1904), 10 C. C. C. 193; *R.* v. *Hendrie* (1905) 10 C. C. C. 298.

Where two prisoners (abettor and principal) are jointly indicted, but an order is made for their separate trial, the one is an admissible witness for the other, and is bound to testify, although

he may prevent his evidence being used against himself at a subsequent trial. *R.* v. *Blair* (1905), 10 C. C. C. 354.

The accused was the owner of a motor car, and was sitting in the front seat with a lady who was driving the car, and it was going at the rate of fifty miles an hour, which was dangerous to the public. On appeal from a conviction it was held that the conviction was right, and that the appellant was aiding and abetting the offence, and as such might properly be convicted himself as having done the unlawful act complained of, and that it was not necessary to charge him with aiding and abetting. *DuCros* v. *Lambourne* (1907), 1 K. B. 40.

Counselling a woman in Canada to submit in a foreign country to an abortion, which in Canada would be an indictable offence, is not in itself indictable in Canada if the operation is performed in a foreign country. *R.* v. *Walkem* (1908), 14 C. C. C. 122, and see *R.* v. *McCready* (1909), 14 C. C. C. 482.

Under Sec. 428 of the Code, in offences against Secs. 425, 426 and 427, " the person by whom such thing is actually done, or who connives at the doing thereof, is alone guilty of the offence."

This provision safeguards innocent partners where an offence mentioned in the three sections above named is committed, " by the doing of anything in the name of any firm, company or co-partnership of persons."

Accessories After the Fact.

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

2. Every one who counsels or procures another to be a party to an offence is a party to every offence which that other commits in consequence of such counselling or procuring, and which the person counselling or procuring knew, or ought to have known, to be likely to be committed in consequence of such counselling or procuring. 55-56 V., c. 29, s. 62.

71. 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 became an accessory after the fact thereto, by receiving, comforting or assisting in his presence and by his authority any other person who has been a party to such offence in order to enable her husband or such other person to escape. 55-56 V., c. 29, s. 63.

574. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, in any case where no express provision is made by this Act for the punishment of an accessory, is accessory after the fact

to any indictable offence for which the punishment is, on a first conviction, imprisonment for life, or for fourteen years, or for any term longer than fourteen years. 55-56 V., c. 29, s. 531.

575. Every one who is accessory after the fact to any indictable offence for committing which the longest term to which the offender can be sentenced is less than fourteen years, if no express provision is made for the punishment of such accessory, is guilty of an indictable offence and liable to imprisonment for a term equal to one-half of the longest term to which a person committing the indictable offence to which he is accessory may be sentenced. 55-56 V., c. 29, s. 532.

See *Section 266* of the Code. Counselling murder.

The common law definition of 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 B. 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: *Dalton,* 530-1; 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 that he was in prison and J. W. 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 to a mere omission. 1 *Hale,* 619.

He must be proved to have done some act to assist the felon personally. *R.* v. *Chapple,* 9 C. & P. 355. But if he employ another person to do so, he will be equally guilty as if he harboured or relieved him himself. *R.* v. *Jarvis,* 2 M. & Rob. 40.

A wife is not punishable as accessory for receiving, &c., her husband, although she knew him to have committed felony. 1 *Hale,* 48, 621; *R.* v. *Manning,* 2 C. & A. 903, for she is presumed to act under his coercion.

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. *Ibid.*

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. *Ibid.*

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. 2 *Hawk.* c. 29, s. 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,* 32 L. J. M. C. 66.

By Section 849 of the Code, an accessory after the fact to any offence may be indicted without the principal offender being indicted or convicted. He may either be indicted alone or jointly with the principal offender.

ATTEMPTS TO COMMIT OFFENCES.

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

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

The general rule was that an attempt to commit a misdemeanour is a misdemeanour, whether the offence is created by Statute, or was an offence at common law. *R.* v. *Roderick,* 7 C. & P. 795, *per* PARKER, B.

It was formerly held that an attempt to commit a crime can only, in point of law, be made out where, if no interruption had taken place, the attempt could have been carried out successfully, so as to constitute the offence which the accused is charged with attempting to commit. *R.* v. *Collins,* L. & C. 471, 33 L. J. M. C. 177.

When the complete commission of an offence charged is not proved, but the evidence establishes an attempt to commit the offence, the accused may be convicted of such attempt and punished accordingly. *Sec. 949 of the Code.*

When an attempt to commit an offence is charged, but the evidence establishes the commission of the full offence, the accused shall not be entitled to be acquitted, but the jury may convict him of the attempt, unless the Court before which such trial is had thinks fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for the complete offence. (2) After a conviction for such attempt the accused shall not be liable to be tried again for the offence

which he was charged with attempting to commit. *Sec. 950 of the Code*, and *R.* v. *Taylor* (1895), 5 C. C. C. 89.

An assault with intent to commit an offence is an attempt to commit such offence, and on an indictment for rape a conviction for an assault with intent to commit rape is valid. *John* v. *The Queen*, 15 S. C. R. 385.

Attempt to commit murder, *R.* v. *Lapiere* (1897), 1 C. C. C. 413. Attempt to commit abortion, *R.* v. *Hamilton* (1897), 4 C. C. C. 251. Theft from the person, conviction of attempt, *R.* v. *Morgan* (*No. 2*) (1901), 5 C. C. C. 272. Attempt to carnally know girl under 14, *R.* v. *DeWolfe* (1904), 9 C. C. C. 38. Attempt to commit rape, assault with intent to commit rape, *R.* v. *Preston* (1905), 9 C. C. C. 201.

Is an "assault with intent to commit rape" an attempt to commit the felony charged within the meaning of Section 183, R. S. C. C. 174 (now Ses. 949 Criminal Code)? "I am of the opinion that, *prima facie*, unless there is some enactment shewing a contrary intention and therefore calling for a narrower construction of Section 183, that it clearly is so. This opinion is founded on the consideration that an indictment for the common law misdemeanour of an attempt to commit a felony always alleged the particular overt act of which the attempt consisted, and further, that inasmuch as an attempt to commit a crime is, as Mr. Justice Stephens defines it (Stephens' Digest Criminal Law, 4th Ed., Art. 49), 'an act done with intent to commit that crime, and forming part of a series of acts which would constitute the actual commission if it were not interrupted,' (a definition which has the support of ample judicial authority as the learned author shews in the illustrations appended to his text), so the converse holds good that an assault with intent to commit rape is an attempt to commit that offence. . . The only purpose and effect of Section 38 (R. S. C. 1886, c. 162) (now Ses. 300 of the Code), was, as it seems to me, to affix a new and precise punishment to this particular species of the misdemeanour of attempting to commit a felony. . . . The whole subject of the Section manifestly was to define the punishment for an offence which always constituted a misdemeanour at common law, and for which the 183rd Section of the Procedure Act, R. S. C. 174 (now Sec. 949 of the Code), had provided there might be a conviction on an indictment for the felony." STRONG, J., *John* v. *The Queen* (1888), 15 S. C. R. 384. See Section 949 of the Code, *ante*.

Attempts to Commit Offences Generally.

By the Code, attempts to commit the following crimes are declared to be an indictable offence:

Sec. 188. To break prison.

Sec. 203. To commit sodomy.

Sec. 216. To procure girl for defilement.

Sec. 216 (c). Procuring girl for prostitution.

Sec. 216 (d). To procure a girl to leave Canada to become an inmate of a brothel elsewhere.

Sec. 216 (f) To procure girl to leave her abode to become an inmate of a brothel in Canada.

Sec. 216 (g) To procure carnal connection by threats.

Sec. 264. Who, with intent to commit murder, attempts to

(a) administer poison.

(b) to shoot at any person, or by any other means attempts to commit murder.

Sec. 270. Suicide.

Sec. 280. Bodily injury by explosives.

Sec. 300. Attempts to commit rape.

Sec. 302. To defile children under 14.

Sec. 303. To procure abortion.

Sec. 304. Miscarriage.

Sec. 454. To compel execution, alteration or destruction of document.

Sec. 467. To use forged document.

Sec. 478 (b). To obtain anything by forged instrument or by probate of forged will.

Sec. 512. To commit arson.

Sec. 514. To set fire to crops, or trees or timber.

Sec. 521. To damage telegraph, telephone or fire-alarm.

Sec. 523. To cast away or destroy any ship.

Sec. 536. To kill, maim, wound or poison cattle.

Attempts—Conspiracies.

570. Every one is guilty of an indictable offence and liable to seven years' imprisonment who attempts, in any case not hereinbefore provided for, to commit any indictable offence for which the punishment is imprisonment for life, or for fourteen years, or for any term longer than fourteen years. 55-56 V., c. 29, s. 528.

571. 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 longest term to which a person committing the indictable offence attempted to be committed may be sentenced. 55-56 V., c. 29, s. 529.

572. Every one is guilty of an indictable offence and liable to one year's imprisonment who attempts to commit any offence under any statute for the time being in force and not inconsistent with this Act, or incites or attempts to incite any person to commit any such offence, and for the punishment of which no express provision is made by such statute. 55-56 V., c. 29, s. 530.

CONSPIRACY.

Sec. 573 of the Code provides for all cases of conspiracy not hereinbefore provided for, as follows:

573. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, in any case not hereinbefore provided for, conspires with any person to commit any indictable offence. 55-56 V., c. 29, s. 527.

The other Sections of the Code relating to conspiracy are as follows:

Sec. 75. Overt acts of treason.

Sec. 78. Conspiracy in relation to deposing His Majesty, (b) to levy war, (c) to induce invasion.

Sec. 79. Conspiracy to intimidate a legislature.

Sec. 178. Conspiring to bring false accusation.

Sec. 218. Conspiracy to defile any woman.

Sec. 226. Conspiring to murder.

Sec. 444. Conspiring to defraud the public or any person generally.

Sec. 496. Conspiracy in restraint of trade.

Sec. 863. Indictment relating to conspiracy by fraudulent means.

A conspiracy is an agreement between two or more persons—

1. Falsely to charge another with a crime punishable by law either from a malicious, or vindictive motive, or feeling, toward the party, or for the purpose of extorting money from him.

2. Wrongfully to injure, or prejudice, a third person, or any body of men, in any other manner.

3. To commit any offence punishable by law.

4. To do any act with intent to pervert the course of justice.

5. To effect a legal purpose with a corrupt intent, or by improper means.

6. To which may be added conspiracies or combinations by employees or workmen in the course of trade disputes. *Arch. Pl. & Ev.*, 21st Ed. (1893), 1100, and see the cases there cited.

The indictment in the first place must charge the conspiracy. And in stating the object of the conspiracy the same certainly is not required as in an indictment for the offence, etc., conspired to be committed; as for instance an indictment for conspiring to defraud a person of "divers goods" has been held sufficient. *R.* v. *Blake*, 6 Q. B. 126, 13 L. J. M. C. 131; *Sydsorff* v. *R.*, 11 Q. B. 245.

So an indictment charging a conspiracy "by divers false pretences and indirect means to cheat and defraud of his monies" was held good. *R.* v. *Gompertz*, 9 Q. B. 824; *R.* v. *Gill*, 2 B. & Ad. 204; *R.* v. *Aspinall*, 2 Q. B. D. 60; and it is not necessary in order to maintain such an indictment to prove that such a false pretence as would, if money had been obtained on it by one person alone, have been sufficient to sustain an indictment against him for obtaining money by false pretences. *R.* v. *Hudson*, Bell, 263, 29 L. J. M. C. 145.

But a conspiracy to defraud the creditors of W. E. (not saying what) is too general. *R.* v. *Fowle*, 4 C. & P. 592.

It is usual to set out the overt acts, that is to say, those acts which may have been done by any one or more of the conspirators in order to effect the common purpose of the conspiracy. But this is not essentially necessary: the conspiracy itself is the offence, and whether anything have been done in pursuance of it or not is immaterial. *R.* v. *Gill*, 2 B. & Ald. 205; *R.* v. *Seward*, 1 A. & E. 706; *R.* v. *Kenrick*, 5 Q. B. D. 49; 12 L. J. M. C. 135; and see sec. 863 of the Code.

A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. But where two agree to carry it into effect the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object, or for the use of criminal means. *Mulcahy* v. *The Queen*, L. R. 3 H. L. E. & J. pp. 306, 317.

Overt acts which are laid and proved against some of the defendants may be looked at as against all of them to shew the nature and objects of the conspiracy. *R.* v. *Esdaile*, 1 F. & F. 213.

An indictment for conspiracy to defraud is good without setting out any overt act, and the name of the person injured or intended to be injured need not be stated therein. *R.* v. *Hutchinson* (1904), 8 C. C. C. 486; and see *R.* v. *Patterson* (1895), 2 C. C. C. 339.

It is not necessary to prove that the defendants actually met together and concerted the proceeding; it is sufficient if the jury are satisfied from the conduct of the accused, either together or severally, that they were acting in concert. *R.* v. *Fellowes* (1859), 19 U. C. R. 48, 58; *Farquar* v. *Robertson*, 13 P. R. 156.

There is no unvarying rule that the agreement to conspire must first be established before the particular acts of the individuals implicated are admissible. BOYD, C., at p. 480. *R.* v. *Connelly* (1894), 1 C. C. C. 468.

An indictment for a conspiracy may be tried in any county in which an overt act has been committed in pursuance of the original illegal combination and design. *Ibid.* It was competent for the jury to group the detached facts and view them as indicating a well understood or concerted purpose on the part of all the actors and privies. *Ibid.*

It is now, as I think, entirely beyond question that a conspiracy can be established without any proof of the agreement in fact between or amongst the alleged conspirators. FERGUSON, J., p. 490, *ibid.*, citing *R.* v. *Fellowes*, 19 U. C. R. 48, at pp. 57-58, and see 25 O. R. 151.

A conspiracy to defraud is indictable although the object was to commit a civil wrong, and although if carried out the act agreed upon would not constitute a crime. MACMAHON, J., pp. 212-213, citing *R.* v. *Warburton*, L. R. 1 C. C. R. 274; *R.* v. *Deffries* (1894), 1 C. C. C. 207; 24 O. R. 645; and *R.* v. *Tamblyer*, 25 O. R. 645.

One conspirator may be indicted and convicted without joining the others although they are living and within the jurisdiction. And a conspiracy to defraud is indictable although the conspirators were unsuccessful in carrying out the fraud. *R.* v. *Frawley* (1894), 1 C. C. C. 253, 25 O. R. 431. See *R.* v. *Carlin* (No. 2) (1903), 6 C. C. C. 507; Q. R. 12 K. B. 483.

An indictment for conspiracy to defraud may properly charge that the conspiracy was with persons unknown, if neither the Crown nor the private prosecutor had definite information of the

identity of the alleged co-conspirators. *R.* v. *Johnston* (1902), 6 C. C. C. 232.

The objection that the indictment is bad because it unnecessarily condescends to state the details of the proposed fraud is clearly untenable. The offence is the conspiracy to defraud by fraudulent means; the description of the means is mere subterfuge as far as concerns the efficiency of the indictment. (See sections 852 and 855 of the Code.)

The general effect of the provisions with regard to these matters is to wipe out technicalities and to make a criminal trial a simple and business-like proceeding. HUNTER, C.J., p. 491, *R.* v. *Hutchinson* (1904), 8 C. C. C. 486, 11 B. C. R. 34.

It is not necessary in an indictment for conspiracy to set out any overt acts, and the name of the person injured or intended to be injured need not be stated therein. *Ibid.*

You may not introduce evidence to impeach the character of your own witness, but you may go on with the proof of the issue although the consequence of so doing may be to discredit the witness in whole or in part. *Ibid*, pp. 494-495.

Extradition will lie as for a separate crime in respect of an overt act of a conspiracy which constitutes one of the crimes mentioned in the extradition treaty between Canada and the United States. *Re Gaynor* v. *Greene* (No. 3), 9 C. C. C. 205.

As to indictment see *R.* v. *Goodfellow* (1906), 10 C. C. C. 425; *R.* v. *Sinclair* (1906), 12 C. C. C. 20; *R.* v. *Plummer* (1902), 2 K. B. 339; *R.* v. *Brailsford* (1905), 2 K. B. 730; *R.* v. *Gibson*, 16 O. R. 904.

Trade combines see *R.* v. *Elliott* (1905), 9 C. C. C. 505, 9 O. L. R. 648.

Two or more corporations may be indicted for conspiracy in furthering of a trade combine under Sec. 498 of the Code without joining a personal defendant. *R.* v. *Central Supply Assn. Ltd.* (1907), 12 C. C. C. 371.

Evidence of the nature of the conspiracy alleged may be given before proof of the criminal agreement. *Ibid.*

Traders may legally organize for the protection and advancement of their common interests, provided that the interests of the public are not to be unduly impaired. *R.* v. *Gage* (No. 1), 1907, 13 C. C. C. 415.

Before the acts of one conspirator can be given in evidence against another, it must be shewn that a conspiracy existed, that the alleged conspirators were parties to the same and that the

acts in question were done in furtherance of the common design. *R.* v. *Gage* (No. 2), 1908, 13 C. C. C. 428, 7 W. L. R. 564, & 18 M. L. R. 175.

The offence of conspiring to unduly prevent or lessen competition in the sale or supply of an article of commerce under Sec. 498 (d) of the Code may exist without regard to the question whether the effect of the combine has been to raise or lower prices. *R.* v. *Clarke*, (No. 1) 1907, 14 C. C. C. 46.

Where a defendant is arraigned and tried alone upon a charge of conspiracy, he may be convicted and sentenced without first proceeding with the trial of the co-conspirators. *R.* v. *Clarke* (No. 2), 1908, 14 C. C. C. 58. 9 W. L. R. 243, 1 Alta. L. R. 358.

Where a conspiracy is shewn to have been carried on in two counties there is jurisdiction to commit for trial and to hold the trial itself in either of the counties, or in another county within the same province, if the accused persons are apprehended in such other county. (Sec. 577 of the Code). *R.* v. *O'Gorman* (1909), 15 C. C. C. 173, 18 O. L. R. 427, 13 O. W. R. 1189.

CORROBORATION.

1002. No person accused of any offence under any of the hereunder mentioned sections shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused:—

(*a*) Treason, Part II., section seventy-four;

(*b*) Perjury, Part IV., section one hundred and seventy-four;

(*c*) Offences under Part V., sections two hundred and eleven to two hundred and twenty, inclusive;

(*d*) Procuring feigned marriage, Part VI., section three hundred and nine;

(*e*) Forgery, Part VII., sections four hundred and sixty-eight to four hundred and seventy inclusive. 55-56 V., c. 29, s. 684; 56 V., c. 32, s. 1.

Part V. secs. 211 to 220 inclusive, apply to offences against women and girls, seduction, carnal knowledge and defilement.

Part VII. secs. 468 to 470 inclusive, apply to forgeries of public documents and signatures of officials, bills, government stock transfers, powers of attorney, bank notes, scrip, warehouse receipts, etc., books in Registry Offices, Court Records and any documents not mentioned in these sections.

At common law one witness was sufficient in all cases (with the exception of perjury) both before the Grand Jury and at the trial. 2 Hawk. c. 46, s. 2.

In high treason where the overt act alleged is the assassination of the King or any direct attempt against his life or person, one witness is sufficient. 39 & 40 Geo. III. c. 93; 5 & 6 Vic. c. 51, s. 1.

One witness is sufficient to prove a collateral fact, as for instance to prove that the defendant is a natural born subject or the like. *R.* v. *Vaughan*, 5 St. Trials, 29.

CHAPTER III.

JURISDICTION OF JUSTICES IN GENERAL.

We have seen that in all the Provinces justices of the peace and magistrates are appointed by the Lieutenant-Governor in council under the Great Seal of the Province. But the territorial limits differ. Some are appointed for counties, districts, cities and towns; others are appointed for the whole Province. It is necessary therefore for all appointees to look carefully to their commissions and ascertain the limits within which they can exercise their jurisdiction.

A justice of the peace cannot exercise his judicial functions elsewhere than within the limits of his territorial jurisdiction. *R.* v. *Dowling* (1889), 17 O. R. 698; *R.* v. *Hughes* (1884), 17 N. S. R. 194.

His judicial acts must be done within the territorial limits of the district, county or place for which he is appointed. *R.* v. *Totness,* 18 L. J. M. C. 46; *R.* v. *Stockton,* 7 Q. B. 520.

He may be specially authorized by statute, or his commission, or the order in council appointing him, to exercise his judicial function elsewhere. The judicial acts of a justice (who is not authorized otherwise) are when performed outside of the territory for which he is appointed absolutely null and void.

Where a police magistrate for the County of Brant, whose commission excluded the City of Brantford, convicted the defendant of an offence against the Canada Temperance Act, committed at a place in the county outside of the city, and the information was laid, the charge heard and adjudicated upon and the conviction made in the City of Brantford, it was held that the magistrate had no jurisdiction. *Re* v. *Beemer,* 15 O. R. 266.

An accused was charged under section 206 of the Code and was convicted by the Stipendiary Magistrate of Vancouver County, acting for and at the request of the Police Magistrate of Vancouver. The conviction was made under section 777 of the Code. Held, that the magistrate had no jurisdiction under sub-sec. 2 of that section as he is not a Stipendiary Magistrate for the City of Vancouver. *R.* v. *Nar Singh,* 10 W. L. R. 523.

A justice cannot do any coercive act (unless authorized by a particular statute) out of his county, but voluntary information and recognizances are good if taken by him anywhere. 2 Haw-

kins, c. 8, s. 78. That is to say, a Justice may perform ministerial acts out of his jurisdiction. Paley on Convictions, 8th ed. 19. *Langwith* v. *Dawson*, 30 C. P. 375. But see *R.* v. *Ettinger*, 3 C. C. C. 387.

Instances of judicial acts are admitting to bail, taxing costs, issuing warrants of distress, or commitment.

Ministerial acts which may be done by the Justice anywhere are —receiving an information, the backing of a warrant, granting a certificate of dismissal of a complaint, &c. See Paley, 8th ed., 21 and 22, and cases there cited. Receiving an information is now held to be a judicial act. *R.* v. *Ettinger*, 3 C. C. C. 387.

A magistrate will be presumed to be acting within the territorial limits of his jurisdiction in the absence of evidence to the contrary. *R.* v. *Fearman*, 22 O. R. 456.

The acts of a justice are either ministerial or judicial.

Acts which relate to the preservation of the peace, the preliminary investigation of indictable offences, the issuing of a summons or a warrant—the binding over of witnesses to give evidence, of the complainant to prosecute, the admitting of the accused to bail, or committing him for trial, are ministerial acts. In the matter of offences over which justices exercise a summary jurisdiction their acts are both judicial and ministerial—ministerial so far as that which they have done to bring the accused before them, and judicial in the hearing and determining of the case.

The test of an act being judicial or ministerial, is whether the justices are entitled to withhold their assent, if they think fit, or whether they can be compelled by mandamus, or rule, to do the act in question. Per WIGHTMAN, J., in *Staverton* v. *Ashburton*, 24 L. J. M. C. 53.

Persons exercising judicial functions, but being also required to perform ministerial acts, may be sued for damages occasioned by their neglect to perform the latter, and formerly no allegation of malice was necessary in such action. *Ferguson* v. *Kinnoull*, 9 Cl. & Fin. 251.

If a statute refers a matter to "any two justices" they must be justices having jurisdiction according to the rules of the common law or by statute, and such words do not enable them to act out of their jurisdiction either in respect of its local limits or otherwise. *Re Peerles*, 1 Q. B. 143, 153. Paley, 8th ed., 22.

See also *R.* v. *Giovanetti*, 5 C. C. C. 157; *R.* v. *Beamer*, 8 C. C. C. 398; *R.* v. *Townshend*, 9 C. C. C. 94; *Ex parte Tait*, 10 C. C. C. 513.

As to the general question of the jurisdiction of justices of the peace sitting in the absence of police magistrates: see *R.* v. *Gordon*, 16 O. R. 64; *R.* v. *Lynch*, 19 O. R. 664.

The appointment of a county police magistrate does not supersede a like previous appointment of another person; both will have jurisdiction unless the latter appointment is expressed to be in the place and stead of the former. *R.* v. *Spellman*, 12 C. C. C. 99.

Other Qualifications.

A justice is not only required to act within his territorial jurisdiction, but he must be duly qualified before he acts, and he must not be disqualified by reason of interest, bias, or partiality.

In Ontario, Quebec and Manitoba, justices of the peace, as we have seen, must have the necessary property qualifications and must take and subscribe the oath of qualification and oath of office and file the same. In all the other provinces and the territories where no property qualification is required, justices of the peace must take and subscribe the oath of office as prescribed and file the same with the officer indicated by the statute. Magistrates must do the same.

Barristers, solicitors and advocates are not eligible as justices of the peace while they continue to practice. Sheriffs and coroners, except as to the latter in special cases, are also ineligible. In England a clerk to the justices cannot act as a justice of the peace. *R.* v. *Douglas* (1898), 1 Q. B. 560.

The acts done by a justice of the peace who is not duly qualified and taken the oath at the session, are not absolutely void, and therefore the person executing the warrant of such justice is not answerable in an action of trespass. *Margate Pier Co.* v. *Hannam*, 3 B & A. 266.

Where a single justice of the peace has authority to try a charge he may ask other justices to sit with him, and a conviction made by all of them jointly is valid. *R.* v. *Leconte* (1906), 11 C. C. C. 41.

A police magistrate for one town in a county has no jurisdiction to try a charge for an offence against a provincial statute committed in another town having its own police magistrate in the same county, except at the request of the latter or in his illness or absence, notwithstanding the provisions of R. S. O. 1897, ch. 87, sec. 30.

When sitting elsewhere than in the town for which he is police magistrate a magistrate is *ex officio* a justice of the peace for the

whole county, and under section 30 R. S. O. ch. 87, he has jurisdiction in offences against provincial laws to exercise the powers of two justices, but not the powers of another police magistrate. In this case MAGEE, J., delivered a dissenting opinion, and the judgment of BRITTON, J., in *R.* v. *Spellman* (1907), 12 C. C. C. 99, was discussed. *R.* v. *Halmer* (1907), 12 C. C. C. 235. See Ontario Statutes, 1907, cap. 23, sec. 39.

The above decision is upon a question of jurisdiction over matters within the legislative authority of Ontario, and does not affect or enlarge the general jurisdiction of magistrates under the criminal law. See section 653 of the Code.

Authority of magistrates to act between date of order-in-council appointing him and his formal commission. Held, appointment effective from the date of O. C. appointing him. *R.* v. *Reedy* (1908), 14 C. C. C. 256.

An authority given by the statute to *two* cannot be executed by *one* justice, but if given to one justice it may be executed by any greater number. If the complaint be directed to be made to any justice, though the statute should require the final determination to be by two the complaint is well lodged before one. *Paley,* 8th ed., 38. See section 708 of the Code.

The calling of a magistrate sitting in case as a witness does not of itself disqualify him from further acting in the case. *R.* v. *Sproule,* 14 O. R. 375.

Where the magistrate himself was called as a witness for the defendant and refused to be sworn, if advantage is sought to be taken of such refusal it should be made apparent to the Court that he was required *bonâ fide* as a witness; that he could give evidence material upon the question it was proposed to interrogate him upon, and that the party complaining has been prejudiced by the refusal. *Ex parte Flanagan,* 2 C. C. C. 513, 34 N. B. R. 326.

All the cases on the question as to whether a judge or juror can properly be a witness in a case he is trying will be found in *R.* v. *Petrie,* 20 O. R. 317, and see *Ex parte Hebert,* 4 C. C. C. 153.

The Court refused to quash a conviction under the Canada Temperance Act, 1878, on the ground that one of the convicting magistrates had not the necessary property qualification, the defendant not having negatived, the magistrate being a person within the term of the exception or proviso of sec. 7 R. S. O. 1877, c. 71; *R.* v. *Hodkins,* 12 O. R. 387.

Where a police magistrate appointed under R. S. O. 1887, c. 72, is paid a salary by the municipality instead of by fees, such

salary being in no way dependent on any fines which he may impose, he has no pecuniary interest in the fines and so is not thereby disqualified. *Semble*, that in such a case there would have been no disqualification at common law. *R.* v. *Fleming*, 27 O. R. 122.

Disqualification by Reason of Interest.

Magistrates and justices of the peace should not take any part, in any way, in any case in which they have any personal interest of any kind whatsoever, whether pecuniary or otherwise, no matter how small that interest may be.

No magistrate, however duly authorized in all other respects, can act judicially in a case wherein he is himself a party. The plain principle of justice that no one can be a judge in his own cause, pervades every branch of the law, and is as ancient as the law itself. Co. Litt. 141A. This is so fundamental a maxim as not to be overruled by any prescription. Lord Coke and Lord Holt both go so far as to question whether even an Act of Parliament has power to ordain that the same person shall be both party and Judge. *Paley*, 8th ed., 44.

The Lord Chancellor had granted relief sought by a company in which he was a shareholder. The House of Lords held that he was disqualified on the ground of interest from sitting as a Judge in the cause, and that his decree must be reversed, but it was at the same time decided to be merely voidable and not void. *Dimes* v. *Grand Junction Canal Co.*, 3 H. of L. 759-785.

If one of the justices sitting is interested it will invalidate the decision of all the justices even though a majority may have been in favour of the decision without counting the vote of the interested party.

A disqualified interest does not only apply to a pecuniary interest, but if the interest is not pecuniary it must be a substantial interest.

No matter how small the pecuniary interest in the subject matter is, the justice is disqualified, likewise a real bias in favour of one of the parties; but the mere possibility of bias in favour of one of the parties does not of itself avoid a justice's decision. *R.* v. *J. J. Dublin* (1894), 2 Q. B. Ir. 527; *R.* v. *Meyer*, 1 Q. B. D. 173; *R.* v. *Rand*, L. R. 1 Q. B. 233; *R.* v. *Justices of Sunderland* (1901), 2 K. B. 357.

If a justice has such an interest as might give him a real bias in the matter he should not only take no part in the decision

which would render it void, but should entirely withdraw during the whole case. *Ibid.*

On all occasions the Court of King's Bench has expressed its strong disapprobation of justices sitting in judgment upon matters in which they are either directly or indirectly interested.

Not only should persons interested in a decision take no part in it, but they should also avoid giving any ground for the belief that they influence others in arriving at a decision. Upon the trial of a parish appeal one of the justices who was a rated inhabitant of the appellant parish was on the bench during the hearing, and in the course of the proceedings referred the chairman of the quarter sessions to some of the documents put in evidence. Upon an observation being made that he was interested, he stated that he should take no part in the decision, but he remained in Court until the judgment, which was in favour of the appellants, was given. It was sworn that he did not vote or give any opinion upon the question, or influence the decision of the other justices, but the order of sessions was held to be invalid by reason of his presence and interference. *R.* v. *J. J. Suffolk*, 18 Q. B. 416, and see *R.* v. *J. J. Hereford*, 2 D. & L. 500.

The Court will not enter into a discussion as to the extent of the influence exercised by an interested party, and it is no answer to the objection that there was a majority in favour of the judgment without counting his vote, nor that he withdrew before the decision, if he appear to have joined in discussing the matter with the other magistrates. *R.* v. *J. J. Hertford*, 6 Q. B. 753. See also *R.* v. *Budden*, 60 J. P. 160.

Whenever there is a real likelihood that the Judge would from kindred, or any other causes, have a bias in favour of one of the parties, it would be very wrong for him to act; and we are not to be understood to say that where there is a real bias of this sort this Court will not interfere. *Blackburn J. R.* v. *Rand*, L. R. 1 Q. B. 230.

Where a Judge is a member of a small class of privileged persons he cannot adjudicate in proceedings taken against a person for an infringement of the privilege of such a class. *R.* v. *Huggins* (1895), 1 Q. B. 563.

A party who has no knowledge of the interest at the time of the inquiry does not waive the objection on that ground by appearing and taking part in the proceedings. *R.* v. *Sheriff of Warwickshire*, 3 W. R. 164, and see *Ex parte McEwan* (1906), 12 C. C. C. 97.

But if a party in a criminal proceeding, knowing the interest, consents to the interested magistrate acting, he cannot afterwards raise any objection upon this ground. *R.* v. *Cheltenham Commissioners*, 1 Q. B. 467; *R.* v. *J. J. Antrim* (1895), 2 Ir. R. 603.

An order for prohibition was granted against two Justices of the Peace on the ground that they were disqualified from adjudicating on a charge for a violation of the Canada Temperance Act, by reason of their being associated with a Temperance Alliance, of which the president was the party prosecuting, and which association benefited by any fine imposed. *Daignault* v. *Emerson*, 5 C. C. C. 534.

A magistrate who is engaged in the same kind of a business as a trader prosecuted under a transient trader's license law is thereby disqualified from adjudicating on the charge. FALCONBRIDGE, J., who delivered the judgment of the Divisional Court, said: "It is only necessary to read the affidavit of the convicting magistrate to see that he was disqualified to sit or adjudicate on this case by reason of his being engaged in the same kind of business as the defendant. . . . We are not going to weigh in nice scales the extent to which the mayor and the defendant are rivals in trade, nor are we bound by the mayor's statement that he does not consider that the defendant is conducting a business in opposition to his, the mayor's and convicting magistrate's. *R.* v. *Leeson* (1901), 5 C. C. C. 184.

The defendant was convicted before a stipendiary magistrate presiding in the town of Truro of selling intoxicating liquors, contrary to law. The magistrate was a ratepayer of the town, and received a fixed salary as stipendiary, payable out of the funds of the town, to which half the penalty imposed became payable. Held, that the magistrate was disqualified by interest from acting in the matter. *Tupper* v. *Murphy*, 3 R. & G. N. S. 173.

A magistrate is not disqualified from hearing an information under the Summary Convictions Act by reason of the defendant's wife being the widow of a deceased son of the magistrate. *Ex parte Wallace*, 26 N. B. R. 593.

A conviction for cruelty to animals was quashed because one of the justices was the father of the complainant. In *re Holman*, 3 R. & G. N. S. R. 375.

In an assault case the complainant was the daughter of the convicting justice. Held improper for the justice to sit and try the case, the complainant being his daughter, and that this was a good ground for quashing the conviction. *R.* v. *Langford*, 15 O. R. 52.

A magistrate is incompetent under the "Canada Temperance Act" if his grandfather is a brother of the defendant's great grandmother. *Ex parte Longley,* 28 N. B. R. 656.

The cases relating to disqualification of a justice of the peace or magistrate by reason of interest, are referred to fully in *R.* v. *Klemp,* 10 O. R. 143.

It is not a ground for disqualification that the justice and the counsel who conducted the prosecution are partners in business as attorneys, provided they have no joint interest in the fees earned by the counsel in the prosecution, or in any fees payable to the justice on the trial of the information. *R.* v. *Grimmer* 25 N. B. R. 424.

Two of the four convicting justices were licensed auctioneers for the county and persisted in sitting after objection taken on account of the interest, though the case might have been disposed of by one justice. Held, that they were disqualified, and the conviction was quashed and they were ordered to pay the costs. *R.* v. *Chapman,* 1 O. R. 582.

See also *Campbell* v. *McIntosh* (1872), 1 P. E. I. R. 423; *Regina* v. *Hart,* 2 B. C. R. 264; *Ex parte Scribner,* 32 N. B. R. 175; *R.* v. *Major,* 29 N. S. R. 373; *Ex parte McCoy,* 1 C. C. C. 410; *Ex parte McEwan* (1906), 12 C. C. C. 97; *R.* v. *Batson,* 12 C. C. C. 62; *Ex parte McCleave* (1908), 14 C. C. C. 18; *Ex parte Gallagher* (1908), 14 C. C. C. 38; *R.* v. *Lorrimer* (1909), 14 C. C. C. 430.

To invalidate a conviction on the ground of bias in the convicting magistrate it is not necessary that actual bias should be proved, and the conviction will be quashed if the facts justify a reasonable apprehension of bias. If the accused is aware of the disqualifying circumstances at the time of the hearing before the magistrate he should take objection then to the magistrate acting.

Where the prosecutor is the magistrate's father and the statute under which the prosecution is brought entitles the prosecutor to a share of any fine imposed the justice is disqualified from adjudicating in the case. Conviction quashed. Meredith, C.J.: "It is of the utmost importance I think, in a comparatively new country, such as this, where the magistrates are for the most part untrained men, and in many cases having necessarily but a limited knowledge of the law which they are called upon to administer, that the supervising power of the Court over their decisions should be fully exercised to prevent adjudications being given effect to where they are at variance with the fundamental principles upon which our law is and must be administered in order

to command the respect of the community, or where the constitution of the tribunals by which they are pronounced is such as to create a well founded suspicion of unfairness." *R.* v. *Steele* (1895), 2 C. C. C. 433.

In *R.* v. *Steele*, Meredith, C.J., quotes and reviews nearly all of the leading English cases upon the subject of interest and bias.

The connection of the magistrate with a society which supplied funds, part of which were used to make the purchase upon which the prosecution of illegal sale of liquor was based, because of his being an honorary member of the society, but not entitled to take any part in its affairs, is not a ground of disqualification. *R.* v. *Herrell* (1898), 1 C. C. C. 510. See also *Leeson* v. *General Council of Medical Education* (1889), 43 C. D. 366; *Allison* v. *General Council* (1894), 1 Q. B. 750; *Ex parte Van Burskirk*, 13 C. C. C. 234.

Where the magistrate is interested the proper course to take is to apply for a writ of prohibition. *R.* v. *Brown*, 16 O. R. 41.

A writ of *certiorari* will also lie where there is a real bias. *R.* v. *Justice of Sunderland* (1901), K. B. 357; *R.* v. *Hain*, 12 T. L. R. 323.

The objection should be taken at the outset of the case. If the parties go on and do not take the objection it will be waived. *Wakefield* v. *West Riding & G. Ry.*, 10 Cox 162; *R.* v. *J. J. Antrim* (1895), 2 Q. B. Ir. 603; *R.* v. *Steele, supra.* See also *R.* v. *Stone*, 23 O. R. 46; *R.* v. *Clarke*, 20 O. R. 642. See section 578 of the Code as to trial of cases under section 501 for intimidation.

Question of Title to Land.

Section 709 of the Code: "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."

The justices' jurisdiction is only to enquire into the good faith of the parties alleging title and they must not convict where a real question as to the right to property is raised between the parties. Their jurisdiction is at an end, and the question of right must be settled by a higher tribunal. By convicting the justices would be settling a question of property conclusively and without remedy if their decision happened to be wrong. Blackburn, J., in *R.* v. *Stimpson*, 4 B. & S. 301; *R.* v. *Davidson*, 45 U. C. R. 91.

It has always been held as a maxim that where the title to property is in question the exercise of a summary jurisdiction by justices of the peace is ousted. This principle is not founded upon any legislative provision, but is a qualification which the law itself raises in the execution of penal statutes, and is always implied in this construction, and so rigid is this rule that even where a Statute allows the accused to go into the question of title, he is not obliged to do so and may object to the jurisdiction of the justices. *R.* v. *Burnaby,* 1 Salk. 181; *Johnston* v. *Moldon,* 30 L. R. Ir. 15; *R.* v. *Cridland,* 7 El. & Bl. 853.

When a *bona fide* claim is made which is not obscure or impossible, the justices have no jurisdiction and ought not to convict or make any further inquiry. *Scott* v. *Baring,* 18 Cox 128; *R.* v. *Taylor,* 257; *R.* v. *Cridland, supra.*

The jurisdiction of a justice is not to be ousted by a mere pretence of title or even by a *bona fide* claim of right which in law cannot exist. *R.* v. *Wrottlelesey,* 1 B. & A. 648; *Simpson* v. *Wells,* 41 L. J. M. C. 105; *Hargreaves* v. *Diddams,* 44 L. J. M. C. 178.

If the justices believe there is a *bona fide* question of title they have no jurisdiction. *Legg* v. *Pardoe,* 9 C. B. N. S. 289.

Where the matter is doubtful they should stop their proceedings as they cannot give themselves jurisdiction by a false decision. *R.* v. *Numely,* E. B. & E. 852; *R.* v. *Stimpson,* 72 L. J. M. C. 208.

Where in the prosecution for an injury done to grown trees to the value of twenty-five cents, the defendant set up and proved a *bona fide* claim of title the Court held that the jurisdiction of the justice was ousted. *R.* v. *O'Brien,* 5 Q. L. R. 161.

Where a justice proceeded with a charge of destroying a line fence. Held, the magistrate should have stopped the trial as soon as he found that the title to land was in question. *Ex parte Roy,* 12 C. C. C. 533.

If the facts lead to one conclusion only and that against the defendant, and there is no contradictory evidence, then there is no *bona fide* question of title and the jurisdiction will not be ousted. *Moberley* v. *Collingwood,* 25 O. R. 625.

When the defendant was estopped from denying the title of plaintiff, or of claiming title in himself, there is no *bona fide* claim of title and jurisdiction is not ousted. *Bank of Montreal* v. *Gilchrist,* 6 A. R. 659; *Wickham* v. *Lee,* 12 Q. B. 521.

See also *R.* v. *McDonald* (1883), 2 O. R. 511 and 12 O. R. 381; *R.* v. *Magistrate Bally Castle,* 9 L. T. R. N. S. 88; *Walkins* v. *Major,* 33 L. T. R. N. S. 352; *R.* v. *Lacoursiere,* 8 M. L. R.

302; *Robichaud* v. *LaBlanc* (1898), 34 C. L. J. 324 (N.B.); Paley, 8th ed., 157-165.

See Part VIII. of the Code, section 510, as to mischief, under which is included the wilful destruction or damage to any property. The question of title is liable to arise in these cases. Section 539 deals with cases of injuries to property not already provided for in the preceding section. A limitation to proceedings under this section is provided by section 540 as follows:

540. Nothing in the last preceding section extends to (*a*) any case where the person acted under a fair and reasonable supposition that he had a right to do the act complained of, or

(*b*) any trespass not being wilful and malicious committed in hunting or fishing, or in the pursuit of game.

Under this section the magistrate's jurisdiction in respect of a charge of wilful injury to property is not ousted unless the act was done under a fair and reasonable supposition of right, and the magistrate has jurisdiction to summarily try the charge notwithstanding the mere belief of the accused that he had a right to do the act complained of.

What the sections require in order to oust the jurisdiction of the magistrate is that the act shall be done under a fair and reasonable supposition of right. Whether such supposition is warranted is for the magistrate to determine upon the evidence. LISTER, J.A., p. 32, *R.* v. *Davy*, 4 C. C. C. 28.

I quite agree that magistrates cannot give themselves jurisdiction or retain jurisdiction by finding a particular fact one way, if the evidence is clearly the other way. COCKBURN, C.J., in *Wheat* v. *Yeast* (1872), L. R. 7 Q. B. 353.

See also *Denny* v. *Thwaites* (1876), 2 Ex. D. 21; *Reece* v. *Miller* (1882), 8 Q. B. D. 626; *Ex parte Vaughan* (1866), L. R. 2 Q. B. 114.

ASSOCIATE JUSTICES AND PRIORITY.

Where a single justice of the peace has authority to try a charge he may ask other justices to sit with him and a conviction made by all of them jointly is valid. *R.* v. *Leconte*, 11 C. C. C. 41. See section 708 of the Code.

All the justices in each county are equal in authority, but as it would be contrary to the public interest as well as indecent that there should be a contest between different justices, we must lay down the rule that when a party charged comes, or is brought before a magistrate in obedience to a summons or warrant, no

other magistrate shall interfere in the investigation of, or adjudication upon the charge, except at his request. ARMOUR, C.J., p. 51. A conviction by the justice who summoned the accused and heard the charge will be upheld although three other justices attended the hearing and purported to dismiss the charge, if these justices sat without the request or consent of the summoning justice. There was evidence also that the other justices were present at the request of the defendant. *R.* v. *McRae,* 2 C. C. C. 49.

While the general principles governing in a competition amongst justices as to authority are expressed in the judgment of ARMOUR, C.J. (*R.* v. *McRae*), quoted above, it may be added that it is laid down that the jurisdiction in any particular case attaches in the first set of justices, duly authorized, who have possession and cognizance of the fact to the exclusion of the separate jurisdiction of all others. So that the acts of any other, except in conjunction with the first, are not only void, but such a breach of law as subjects them to indictment. *R.* v. *Sainsbury,* 4 T. R. 456; *R.* v. *Great Marlow,* 2 East. 244.

An authority given by a Statute to *two* cannot be executed by *one* justice, but if given to one justice it may be executed by any greater number. If the complaint be directed to be made to any justice, though the Statute should require the final determination to be by two, the complaint is well lodged before one. Paley, 8th ed. 38.

As will be seen later in discussing procedure under the different sections of the Code relating to the issuing of process, there are cases where justices other than those who issued the process, or were first seized of the case, may act. See sec. 708 of the Code.

As to matters within the jurisdiction of two justices both should be present when the information is laid and the summons granted, but only one need sign the information, and the conviction should shew on its face the facts necessary to give jurisdiction to the one not signing. *R.* v. *McKenzie,* 23 N. S. R. 6; *R.* v. *Brown,* 23 N. S. R. 21; *R.* v. *Ettinger,* 3 C. C. C. 387.

In cases tried under the Summary Act purely ministerial duties, such as receiving the complaint, issuing the warrant, etc., may be done by one justice, even where the statute under which the proceedings were taken provides that the case shall only be tried by two justices. *Bonquet* v. *Gagnon,* Q. R. 23 S. C. 35.

A justice of the peace acting in the illness, or absence, or at the request of a police magistrate, should be designated as so acting in warrants or other process, otherwise the latter will be

invalid. A warrant signed by a Justice of the Peace so acting, in which he is described as "police magistrate," is void.

The initials "J.P." following the signature of the person issuing a warrant do not describe him with sufficient fullness as a justice of the peace for the city or county in which the warrant purports to be issued. *R.* v. *Lyons,* 2 C. C. C. 218. See also *R.* v. *Hodge,* 23 O. R. 450; *R.* v. *Hong Lee,* 10 W. L. R. 376; *R.* v. *Duggan,* 21 C. L. T. 35.

Where evidence on a preliminary inquiry is commenced before one justice of the peace and finished before two justices, a committal by the two justices is irregular unless both have heard all the evidence. *R.* v. *Nunn,* 2 C. C. C. 429; *Re Guerin* (1888), 16 Cox C. C. 596; and see *R.* v. *Milne,* 25 C. P. 94.

A verbal conviction by two justices cannot be reversed, after one has gone away, by one of them and another justice, but either of two convicting justices has a right to change his mind before the conviction is drawn up, the effect then being that there is no conviction, but it would not be well to proceed again for the same offence. *Jones* v. *Williams,* 36 L. T. 559, 46 L. J. M. C. 270.

Where more than one justice is present the decision is that of the majority. The chairman has no casting vote. If the justices are equally divided there can be no adjudication, and the case may be again heard on a fresh information or complaint, or adjourned to the next sitting, when it can be reheard with the assistance of other justices. *Paley,* 8th Ed. 125; *Kinnis* v. *Groves,* 19 Cox 42; *Ex parte Evans* (1894), A. C. 16.

After the justices, or a justice, have once given judgment, and after the Court is closed, they have no power to re-open the inquiry. Their judgment can be appealed from, or moved against by *certiorari.*

Locality of Crime or Offence.

All crime is local, and the jurisdiction over the crime belongs to the county where the crime is committed. *Macleod* v. *New South Wales* (1891), A. C. 455. See *R.* v. *Blythe,* 1 C. C. C. 284.

The offence of having in his possession a dog which has worried, injured and destroyed sheep is committed where the dog is kept, and not where the sheep have been worried, injured or destroyed. *R.* v. *Duering,* 5 C. C. C. 135.

A magistrate may hold a preliminary inquiry in respect of an indictable offence committed in the same Province outside of his

territorial jurisdiction if the accused is, or is expected to be, within the limits over which such magistrate has jurisdiction, or resides or is suspected to reside within such limits. *R.* v. *Burke,* 5 C. C. C. 29. See ss. 653 and 577 of the Code.

If an accused person is charged with having committed an indictable offence within the limits over which a justice has jurisdiction, the justice may issue a warrant or summons. Sec. 653 (*b*) of the Code.

A magistrate's jurisdiction to make a summary conviction must appear on the face of the proceedings, or he will be presumed to have acted without jurisdiction. The conviction did not shew where the offence had been committed, or that it had been committed in Manitoba. *Johnston* v. *O'Reilly,* 12 C. C. C. 219.

Where the information upon which a summary conviction is based charges that the offence was committed at a named locality stated to be within the province for which the magistrate has jurisdiction, a conviction in the same terms will be presumed to have been made for an offence within the same territorial jurisdiction, although no evidence was given to shew that the locality specified is within the limits of that province. Application by the defendant company to quash a conviction for an offence under s. 6 of the Lord's Day Act. *R.* v. *C. P. Railway Co.* (1908), 14 C. C. C. 1.

Where the accused was charged with making, circulating and publishing false statements in reference to the financial status of a company, and these statements were mailed from a place in Ontario to parties in Montreal, the offence, though commenced in Ontario, is completed in Quebec by the delivery of the letters to the parties to whom they were addressed. The Courts of Quebec were held to have jurisdiction to try the accused if he has been duly committed for trial by a magistrate of the district. *R.* v. *Gillespie* (*No. 2*) (1898), 2 C. C. C. 309. See *R.* v. *Girdwood,* 2 East P. C.; *R.* v. *Esser,* 2 East P. C.; *R.* v. *Burdett,* 4 B. & Ald. 95. In these cases it was held that the accused was rightly committed and tried in the judicial district where the letters had been addressed and delivered to the parties threatened, although written and posted in another district. And see *R.* v. *Jones,* 1 Den. 558.

Where the offence was committed in the county of Middlesex, in which county the accused resided, and proceedings against them were commenced in Toronto, and the accused were arrested in London (which is in Middlesex) and brought to Toronto for trial. Held, they could not be tried in Toronto, notwithstanding provisions of 577 and 653 of the Code. *Rex* v. *O'Gorman et al.,* 18 O. L. R. 427.

Where once the Parliament of Canada has given jurisdiction to a provincial Court, whether superior or inferior, or to a judicial officer to perform judicial functions in the adjudicating of matters over which the Parliament of Canada has exclusive jurisdiction, no provincial legislation, in our opinion, is necessary in order to enable effect to be given to such parliamentary enactments. SEDGEWICK, J. *Re Vancini (No. 2)* (1904), 8 C. C. C. 228, 34 S. C. R. 621.

Accused was arrested in Halifax in December, 1903, and charged with shopbreaking and theft in November, 1903, from premises situate at the town of Sydney in Nova Scotia. He was arrested in Halifax and was brought before and consented to be tried summarily by the Stipendiary Magistrate for the City of Halifax, he pleaded guilty, was convicted and sentenced to five years in the penitentiary at Dorchester.

The convict applied to a Judge of the Supreme Court of New Brunswick (in which province Dorchester is situated) for a writ of *habeas corpus*. This application was referred to the full Court, and the writ was refused. The Supreme Court of N. B. held that the Halifax stipendiary had jurisdiction while acting within the local limits of his jurisdiction to summarily try the prisoner with his consent (Code ss. 771, 777), for an offence committed outside of his territorial jurisdiction, but in the same province. *Ex parte Seeley* (1908), 13 C. C. C. 259.

Seeley then applied to Mr. Justice Girouard of the Supreme Court of Canada for a writ of *habeas corpus;* this application was refused, and the prisoner then appealed to the Supreme Court from this refusal.

The Supreme Court of Canada affirmed the judgment of the Supreme Court of New Brunswick by dismissing the application. The Chief Justice, Sir Charles Fitzpatrick, in the concluding paragraph of his judgment, says: "I construe sections 554, 557 and 785 (now in Revised Code (1906), ss. 653, 665 and 777) taken together to mean that when an offence is committed *within the limits of a province* and presence, however transitory, of the accused in any part of that province, will justify the exercise of as full and complete jurisdiction as if the offence was committed where the offender is apprehended, leaving the magistrate a discretionary power to send the prisoner for further inquiry, or for trial before the justice having jurisdiction over the locus where the offence was committed." *Re Seeley* (1908), 14 C. C. C. 270, 41 S. C. R. 5.

On matters of jurisdiction, see the following sections of the Code: 576, 577 *et seq.*, Part XI., and s. 653, Part XIII.

CHAPTER IV.

RESPONSIBILITY OF JUSTICES AND REMEDIES AGAINST THEM.

Magistrates and justices of the peace may render themselves liable in damages and to criminal proceedings if they exercise the functions of their office illegally.

The general rule is that a justice, like other judges, is not liable for any mistake, or error of judgment, or for anything he does judicially when acting within his jurisdiction, although he may be wrong. *Gordon* v. *Denison*, 24 O. R. 576, 22 A. R. 315, and cases there cited.

In *Dawkins* v. *Poulet*, L. R. 5 Q. B., it was held that an action would not lie against a County Court Judge or a military officer for words maliciously and not *bona fide* spoken by them, in the course of the discharge of their duty.

It would seem, from the principle of recent cases in England, that a justice cannot be sued for acts done maliciously in the course of dealing with a matter over which he has jurisdiction. *Scott* v. *Stansfield*, L. R. 3 Ex. 220. See also *Dawkins* v. *Rokeby*, L. R. H. L. 744; *Garner* v. *Coleman*, 19 C. P. 106; *Agnew* v. *Stuart*, 21 U. C. R. 396.

When a justice acts without jurisdiction, or in excess of it, he becomes liable to an action whether he be acting judicially or ministerially. *Davis* v. *Russell*, 5 Bing. 354; *Cripps* v. *Durden*, Cowp. 640; 1 Smith's L. C. (11th Ed.) 658.

But when means of knowledge, as distinguished from knowledge actual or imputed, is relied upon to sustain an action against a justice acting judicially for an act done without jurisdiction, the action will lie only when he has acted maliciously and without reasonable and probable cause. *Johnston* v. *McDaw*, 30 Ir. C. L. R. 65.

Where a justice of the peace acts judicially in a matter in which by law he has jurisdiction and his proceedings appear to be good upon the face of them, no action will lie against him, or if an action is brought, the proceedings themselves will be a sufficient justification. *Brittain* v. *Kinnaird*, 1 B. & B. 432; *Fawcett* v. *Fowles*, 7 B. & C. 394; *R.* v. *Farmers* (1892), 1 Q. B. 637.

VEXATIOUS ACTIONS AGAINST JUSTICES.

In the Statutes of the Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, relating to the protection of justices, which are summarized in Chapter I, and which are founded upon the English Statute, 11 & 12 Vic. c. 44, it is provided that in actions brought against police magistrates or justices of the peace for any act done by them in the execution of their duties with respect to matters within their jurisdiction, it shall be expressly alleged in the statement of claim that the act was done maliciously and without reasonable or probable cause, and if at the trial the plaintiff fails to prove such allegation, he shall be non-suited or a verdict given for the defendant.

For any act done by justices in matters in which by law they have not jurisdiction, or in which they have exceeded their jurisdiction, or for any act done under a conviction, order, or warrant issued by them in such matter, any person injured may maintain an action against the justices as he might have done before the passing of the Act, without making any allegation in his statement of claim that the act complained of was done maliciously and without reasonable and probable cause.

If one justice makes a conviction or order and another justice in good faith issues and signs a warrant of distress or commitment thereunder, the action, if any, must be against the justice who made the conviction or order.

In case any justice of the peace has granted a warrant of distress or commitment upon a conviction or order which either before or after the granting of the warrant has been confirmed upon appeal, it is provided that no action can be brought against the justice by reason of any defect in the conviction, or order for anything done under the warrant.

No action can be brought for anything done under a conviction in a matter of which by law the justice has not jurisdiction or in which he shall have exceeded his jurisdiction until the conviction or order has been quashed either on appeal or on application to High Court.

It has been held that by this provision no action can be brought for anything done under a conviction so long as it has not been quashed and is still in force, whether there was jurisdiction to make the conviction or not. *Arscott* v. *Lilley*, 11 O. R. 153, 14 A. R. 297.

In an action against magistrates it was ascertained that the conviction was not under seal. Held, that it was not necessary that

the conviction should have been quashed before action. *Haacke* v. *Adamson*, 14 C. P. 201, and *McDonald* v. *Stuckey*, 31 U. C. R. 577, followed. *Bond* v. *Conmee*, 15 O. R. 716, 16 A. R. 398. See *Hunter* v. *Gilkison*, 7 O. R. 735, *McLellan* v. *McKinnon*, 1 O. R. 219.

When a warrant was improperly endorsed, held, that it was not necessary to quash the conviction before action brought, as the arrest was not anything done under a conviction or order within R. S. O. 1887, c. 73, s. 4. *Jones* v. *Grace*, 17 O. R. 681. See also *Basche* v. *Matthews*, 36 L. J. C. P. 296; *Gates* v. *Devenish*, 6 U. C. R. 260; *Briggs* v. *Spilsburg*, *Taylor* 245; *Graham* v. *McArthur*, 25 U. C. R. 478.

If an action of trespass be brought against a magistrate for convicting a person and causing him to be imprisoned in a case where the magistrate had jurisdiction, the plaintiff must be non-suited if a valid and subsisting conviction be proved and adduced. *Stamp* v. *Sweetland*, 14 L. J. M. C. 184; *Mould* v. *Williams*, 5 Q. B. 469.

If a justice exceeds the authority the law gives him in his ministerial acts he thereby subjects himself to an action, *e.g.*, if he commits a prisoner for re-examination for an unreasonable time, although he do so from no improper motive, he is liable to an action for false imprisonment. *Davis* v. *Copper*, 10 B. & C. 28.

If a justice commit a man for a supposed crime where there has in fact been no accusation against him, he is liable to an action for trespass for false imprisonment. *Morgan* v. *Hughes*, 2 T. R. 225; but if he commit him for a reasonable time, although the statute under which he is acting gives him no authority to do so, he is not liable to an action, for authority so to commit is given to justices. *Gelen* v. *Hall*, 27 L. J. M. C. 78.

If the justice act without jurisdiction, or in excess of it, he is liable whether his acts are judicial or ministerial. A mere irregularity, or erroneous judgment, will not be an excess of jurisdiction. There must be an act done which there is no jurisdiction to do. *Parker* v. *Etter*, 33 N. S. R. 52.

After a conviction by a magistrate is quashed an action on the case will not be against him unless the acts complained of be proved to have been committed by him without any reasonable or probable cause and maliciously, and the question of malice must be left to the jury. *Burney* v. *Gorham*, 1 C. P. 358.

If a magistrate cause a party to be wrongfully imprisoned without any reasonable cause until he gives his note to obtain a discharge, the magistrate is liable in trespass. *Brennan* v. *Hatelie*, 6 O. S. 308.

A justice of the peace who issues a warrant without jurisdiction, as on an insufficient information, is liable to an action for trespass for assault and false imprisonment, and the question of reasonable and probable cause cannot arise in such a case as this, but only in a case where the justice has jurisdiction. *Whittier* v. *Diblee*, 15 N. B. R. 243.

In an action for malicious prosecution it appeared that the defendant was a justice of the peace and as such acquired his knowledge of the circumstances on which he preferred the charge against the defendant. Held, clearly no ground for requiring that express malice should be proved against him. *Orr* v. *Spooner*, 19 U. C. R. 154.

It has been held that the first and second sections of 11 & 12 Vic. c. 44, which our statutes have followed, should be read together, and that section 2 only applies to those cases where the particular proceeding in respect of which an action is brought against a justice is in itself an excess of jurisdiction. For instance, when a justice to an otherwise good conviction added an illegal alternative that in default of payment of the penalty and costs or sufficient distress, the convicted person should be put in stocks, it was held that if this alternative had been enforced the justice would not have been entitled to the benefit of section 1. *Barton* v. *Bricknell*, 13 Q. B. 393.

So where justices convicted a man, under 6 & 7 Vic. c. 68, for illegally performing stage plays, the conviction contained no adjudication of costs, but the warrant of distress recited the conviction as if it did, and the defendant, before the issue of the warrant of distress, was detained to enforce payment of the penalty, which afterwards was levied together with the costs under the warrant, held that whether they had power to adjudicate costs or not, they had not done so, and that the imprisonment and distress were an "excess of jurisdiction" within section 2. *Leary* v. *Patrick*, 15 Q. B. 19, L. J. M. C. 211.

The protection of a magistrate depends not on general jurisdiction over the subject matter but over the particular matter or individual. Therefore, where a justice issued his warrant to apprehend a party to answer a charge of assault upon a deposition taken in the absence of the justice, he not at any time seeing, examining or hearing the defendant, he was held liable to an action for trespass, although he otherwise had jurisdiction over the charge. *Caudle* v. *Seymour*, 1 Q. B. 889.

A magistrate has no right to detain a person, who is well known, to answer a charge of misdemeanour, verbally intimated to the

magistrate, but without a regular information. *R.* v. *Birnie,* 1 Mood. v. R. 5 C. & P. 206; *Hazeldine* v. *Grove,* 3 Q. B. 997.

A commitment for part of the sum adjudged by the conviction to be paid is not authorized by the Summary Conviction Act and is illegal.

The plaintiff was convicted under the Canada Temperance Act, and adjudged to pay a fine and costs to be levied by distress if not paid forthwith, and in default of sufficient distress to be imprisoned. He paid the costs but not the fine, and a distress warrant was issued against him. Nothing being made under the distress, a warrant of commitment was issued and he was imprisoned. Held, reversing 17 O. R. 706, that the commitment was bad. *Snider* v. *Brown,* 17 A. R. 173. See *Eastman* v *Reid,* 6 U. C. R. 611.

Where a justice of the peace has jurisdiction to try a complaint and there has been no regular information, but the conviction and warrant of commitment are defective, he is not liable in trespass for anything done prior to the conviction. *Sewell* v. *Oliver,* 4 Allan, N. B. 394.

The defendant, as a justice, issued a warrant against the plaintiff upon a complaint for detaining some clothes. The plaintiff, upon being told by the constable that he had a warrant, went alone to the defendant, the defendant heard the evidence in presence of plaintiff and plaintiff was allowed to go away without giving bail and returned the next day when defendant discharged him. Held, that no imprisonment was proved, and that the defendant, having jurisdiction over the subject matter of the complaint, was not liable in trespass even if the information was insufficient in form. *Thorpe* v. *Oliver,* 20 U. C. R. 264.

Detention pending adjournment. Held that defendant will not be held liable for the plaintiff's sufferings caused by the condition of the lock-up, for he had remanded him only, giving no express directions to put him there. The defendant had offered to take bail but plaintiff refused to give it, saying, "Send me to gaol," and the defendant ordered the constable to take him into custody. The constable thereupon put him in lock-up, which was cold and uncomfortable. *Crawford* v. *Beattie,* 39 U. C. R. 13.

The falsity of a charge cannot give a cause of action against a magistrate who acts upon the assumption and belief of its truth, and an allegation that he acted without any just cause upon a false charge, but not charging malice, means only that the charge being false he had no just cause. *Sprung* v. *Anderson,* 23 C. P. 152.

Illegal arrest, excessive punishment, see *McIver* v. *McGillivray,* 24 Occ. N. 142, 237.

Plaintiff was arrested upon a warrant issued by defendant, a justice, and brought before him. Defendant examined the plaintiff but took no evidence, and said he could not bail plaintiff, and committed him to gaol on a warrant reciting he was charged before him to give evidence. Held, defendant liable in trespass. *Connors* v. *Darling*, 23 U. C. R. 541.

A magistrate having entertained a case under the Master and Servants Act, R. S. O. c. 157, s. 12, and convicted the plaintiff notwithstanding more than a month had elapsed since the termination of the engagement, and although he was told that he had no jurisdiction and was shewn a professional opinion to that effect and referred to the statutes. Held, that the jury were warranted in finding that he did not *bona fide* believe that he was acting in the execution of his duty in a matter within his jurisdiction, and that he was therefore not entitled to notice of action. *Cummins* v. *Moore*, 37 U. C. R. 130. See also *Cross* v. *Wilcox*, 39 U. C. R. 187; *Anderson* v. *Wilson*, 25 O. R. 91; *Jones* v. *Grace*, 17 O. R. 681; *Hallett* v. *Wilmot*, 40 U. C. R. 263; *McLellan* v. *McKinnon*, 1 O. R. 269; *Hunter* v. *Gilkison*, 7 O. R. 735; *McKinley* v. *Munsie*, 15 C. P. 230; *Stewart* v. *Hazen*, 2 Allan N. B. R. 14; *Kalar* v. *Cornwall*, 8 U. C. R. 681; *Graham* v. *McArthur*, 25 U. C. R. 498; *Regina* v. *Morris*, 21 U. C. R. 392; *Dickson* v. *Crabbe*, 24 U. C. R. 494; *Moffat* v. *Barnard*, 24 U. C. R. 498.

Compelling Performance of Duties.

The sixth section of the Act (R. S. O. c. 88) provides for an application to the Court for an order *nisi* requiring a justice to do any act relating to the duties of his office.

If a justice refuses to do any act either of the Superior Courts of Common Law may, under this section, order him to do it.

Although the Courts will thus interfere, yet if they think that the justice has acted rightly in refusing to do it, they will not compel him to do it. *R.* v. *Hartley*, 31 L. J. M. C.; *R.* v. *Deverell*, 3 E. & B. 372. The Court will not grant a rule merely to set the justice in motion. *R.* v. *Kesteven*, J. J., 13 L. J. M. C. 78.

If a justice refuses without good cause to act according to the duties of his office, the proper course is to proceed under this section of the Act. *Delaney* v. *McNabb*, 21 C. P. 563; *R.* v. *Bristol*, 18 Jur. 426 n; *R.* v. *Clee*, 21 L. J. M. C. 112.

As such a rule is a substitute for a *mandamus*, the Court will not grant it if the proper remedy was by way of appeal to the quarter sessions. *R.* v. *Oxfordshire*, 18 L. J. M. C. 222.

The Court will inquire into the validity of the order before compelling the justice to enforce it by distress and will refuse to do so if the order appears to be invalid. *R.* v. *Collins*, 21 L. J. M. C. 73; *R.* v. *Browne*, 13 Q. B. 654.

When a magistrate has *bona fide* exercised his discretion in refusing to do any act relating to the duties of his office, such as to grant a summons for an indictable offence, the Court has no jurisdiction to compel the magistrate to review this decision, or to order him to exercise his discretion in any particular way. The statute only extends to cases where the magistrate does not consider the propriety of doing, or not doing, the act in question. *Ex parte Lewis*, 16 Cox C. C. 449.

There must be a refusal to adjudicate before the Act can be invoked. *R.* v. *Paynter*, 26 L. J. M. C. 102.

Where the magistrate has heard and adjudicated, the section does not apply. *R.* v. *Dayman*, 7 E. & B. 328.

See also *Re Clee*, L. J. M. C. 112; *R.* v. *Blanshard*, 18 L. J. M. C. 110; *R.* v. *Ingham*, 17 Q. B. 884, as to costs.

By s. 12 of the Act (R. S. O. c. 88), if any action is brought, where by this Act it is enacted no such action shall be brought under the particular circumstances, a Judge of the Court in which the action is pending shall, upon application of the defendant and upon an affidavit of facts, dismiss the action with or without costs in his discretion.

In an action against a justice of the peace for false imprisonment, and for acting in his office maliciously and without reasonable and probable cause, an application was made before statement of claim to set aside the proceedings under s. 12, R. S. O. 1887, c. 73, on the ground that the conviction of the plaintiff made by the defendant had not been quashed. It appeared, however, that plaintiff was arrested and imprisoned under a warrant issued by the defendant which had no conviction to support it, and the Court held that the case was not within the section. *Per* ROBERTSON, J. The plaintiff had a complete cause of action without setting aside the conviction. *Per* MEREDITH, J. The application was premature. *Webb* v. *Spears*, 15 P. R. 232.

By s. 13, no action shall be brought against any justice of the peace for anything done by him in the execution of his office unless the same is commenced within six months next after the act complained of was committed.

As to whether action commenced in time, see *Hardy* v. *Ryle*, 9 B. & C. 603; *Massey* v. *Johnson*, 12 East. 67; *Watson* v. *Fournier*, 14 East. 491. See also s. 1143 of the Code.

There may be a series of acts connected together, and yet each giving rise to a cause of action. *Collins* v. *Rose*, 5 M. & W. 194.

In an action against a justice for illegal distress, the limited period begins to run from the entry on the plaintiff's premises and not from the date of the conviction. *Polley* v. *Fordham* (1904), 2 K. B. 345, 90 L. T. 755.

Notice of Action.

By s. 14, R. S. O. 88, the justice is entitled to one calendar month's notice of the action. The notice shall be in writing and served upon the justice. This means a clear month's notice exclusive of the first and last days or the day of giving notice and suing out the writ. *Dempsey* v. *Dougherty*, 7 U. C. R. 313; *Young* v. *Higgon*, 6 M. & W. 49. See also s. 1144 of the Code.

Where the notice was served on 28th March, and the writ issued out on the 29th April, this was held sufficient as being at least one month's notice. *McIntosh* v. *Vansteenburg*, 8 U. C. R. 248, and see *Hatch* v. *Taylor*, 14 N. B. R. 39.

Whenever the act complained of is one which had been done by a magistrate intending to act as such, however mistaken upon a subject matter within his jurisdiction, he is entitled to a notice under the Act. *Weller* v. *Toke*, 9 East. 364.

And although the subject matter of complaint might arise out of the local jurisdiction of the justice, yet if he had authority over the subject matter he was still entitled to notice. *Prestidge* v. *Woodman*, 1 B. & C. 13.

A justice of the peace is entitled to notice of action whenever the act which is complained of is done by him in the honest belief that he was acting in the execution of his duty as a magistrate in the premises. *Sprung* v. *Anderson*, 23 C. P. 159. See also *Friel* v. *Ferguson*, 15 C. P. 584. See also *Scott* v. *Reburn*, 25 O. R. 450, and cases there cited.

The test is whether or not the defendant *bona fide* believed in the existence of facts which, if they existed, would give him jurisdiction. *Mote* v. *Milne*, 31 N. S. R. 372; *Chamberlain* v. *King*, L. R. 6 C. P. 474; *Griffith* v. *Taylor*, 2 C. P. D. 194.

A magistrate is entitled to notice although he has acted without jurisdiction. When it was clear that defendant had acted as a justice of the peace and there was no evidence of malice, except the want of jurisdiction, it was held not necessary to entitle him to notice to leave it to the jury to say whether he had acted in good faith. *Bross* v. *Huber*, 18 U. C. R. 282.

Where a magistrate acts in direct contravention of the statute in issuing a warrant without the proper information, or without even a verbal charge having been laid against the plaintiff and there is no evidence of *bona fide* on his part, he is not entitled to notice of action. *Friel* v. *Ferguson* 15 C. P. 584.

In *McGinness* v. *Dafoe* (1896), 3 C. C. C. 139, it was held that a justice of the peace who illegally issues a warrant without having received a sworn information in respect of the charge is liable in trespass for the arrest made thereunder, and he cannot justify the commanding of the constable to make the arrest by shewing that he, the justice, had a reasonable suspicion that an offence had been committed. A question was raised as to the notice of action. The defendant contended that the notice served was defective. The plaintiff relied upon it as sufficient, and in the alternative set up that no notice was necessary. Burton, J.A., who delivered the judgment of the Court of Appeal, says, at page 147: "It was simply a notice of action for trespass and nothing more. As we hold the notice to be sufficient, it is perhaps hardly necessary to determine whether, under the circumstances, notice was necessary. I certainly do not wish to intimate any opinion that it was not." The principle on which we decided *Snider* v. *Brown*, 17 A. R. 173, fully supports the defendant's right to notice of action. See also the cases cited by the learned Judge on pages 148 and 149 as to notice.

As to the form of the notice, see *Upper* v. *McFarland*, 5 U. C. R. 101; *Gillespie* v. *Wright*, 14 U. C. R. 52; *McGinnis* v. *Dafoe*, 23 A. R. 704, 27 O. R. 117; *Bond* v. *Conmee*, 16 A. R. 398, 15 O. R. 716.

The notice must state the cause of action explicitly. *McGilvery* v. *Gault*, 17 N. B. R. 641.

The notice must state the time of arrest and imprisonment complained of. *Sprung* v. *Anderson*, 23 C. P. 152. See *Scott* v. *Reburn*, 25 O. R. 450; *Parkyn* v. *Staples*, 19 C. P. 240; *Oliphant* v. *Leslie*, 24 U. C. R. 398.

The notice must contain a statement of the place where the trespass or injury was committed. *Kemble* v. *McGarry*, 6 O. S. 570; *Madden* v. *Shewer*, 2 U. C. R. 115.

If the notice wrongly stated the name of the township in which the arrest took place, it is insufficient. *Aldrich* v. *Humphrey*, 19 O. R. 427.

The place where the plaintiff was imprisoned must be correctly stated. *Cronkhite* v. *Sommerville*, 3 U. C. R. 129.

The notice must shew that the defendant acted maliciously. *Scott* v. *Reburn*, 25 O. R. 450.

Unless his acts were without jurisdiction. *Hatch* v. *Taylor*, 14 N. B. R. 39.

The particular court in which it is proposed to bring the action must be specified. *Bross* v. *Huber*, 18 U. C. R. 282; *Neville* v. *Ross*, 22 C. P. 487.

The form prescribed by the statute must be strictly followed in the notice of action. *McCrum* v. *Foley*, 6 P. R. 164.

No objection that plaintiff declares by a different attorney from the one by whom the notice was given and process issued. *McKenzie* v. *Mewburn*, 6 O. S. 486.

Where a defendant, after accepting service of an informal notice, added, "and agree to accept the same as sufficient notice of action to me under the statute," it was held that he could not afterwards rely on a defect in the notice. *Donaldson* v. *Haley*, 13 C. P. 87.

No particular addition or description of the magistrate need be given in the notice. *Haacke* v. *Adamson*, 14 C. P. 201.

The notice must declare the place of residence of the attorney. *Bates* v. *Walsh*, 6 U. C. R. 498; *Armstrong* v. *Bowes*, 12 C. P. 539; *Gillespie* v. *Wright*, 14 U. C. R. 52.

Where the name and place of residence of the plaintiff's attorney were not endorsed on the notice, but added inside at the foot of it, this was held sufficient. *Bross* v. *Huber*, 15 U. C. R. 625; and see also *McGillivray* v. *Gault*, 17 N. B. R. 641; *Osborn* v. *Gough*, 3 B. & P. 551, and *Taylor* v. *Fenwick*, 7 T. R. 635.

Statement of plaintiff's place of abode in the notice. *Moran* v. *Palmer*, 13 C. P. 528; *Jones* v. *Grace*, 17 O. R. 681; *Neill* v. *McMillan*, 25 U. C. R. 485; *McDonald* v. *Stuckey*, 31 U. C. R. 577; *Vening* v. *Steadman*, 9 S. C. R. 206.

This notice may be served before the conviction, order or warrant complained of has been quashed under the fourth section of the Act. *Haylock* v. *Sparke*, 22 L. J. M. C. 67.

A justice acting without qualification is not entitled to a notice of action. *Crabb* v. *Longworth*, 4 C. P. 283.

Neither is notice of action necessary in an action for not returning a conviction. *Grant* v. *McFadden*, 11 C. P. 122.

The tendency of Courts has been rather to extend than restrict the protection afforded to peace officers professing to act in the

execution of their duty by notices of action. *Per* BARKER, J., in *White* v. *Hamm* (1903), 36 N. B. R. 237.

In England, by the Public Authorities Protection Act (1893), all enactments that notice of action be given are repealed; but an opportunity of tendering amends must still be given. *Paley*, 8th Ed. 504.

TENDER OF AMENDS.

By s. 17 of the Act (R. S. O.) the justice, after notice of action and before suit, may tender amends, and after the commencement of the action he may pay money into Court in addition to the tender or independently thereof.

Tender without payment of the money into Court will entitle the defendant to a verdict. *Gidney* v. *Dibblee*, 15 N. B. R. 388.

The New Brunswick Act (1903), c. 63, provides that where the plaintiff shall be entitled to recover in any action against a justice he shall not have a verdict for any damages beyond two cents or any costs of suit, if it shall be proved that he was guilty of the offence of which he was convicted, etc. In an action for false imprisonment brought against a magistrate who, without jurisdiction, had committed to prison the plaintiff for making default in payment of a fine imposed upon him for selling liquor without a license, evidence was offered and admitted in proof of the plaintiff's innocence of the charge. Held, that the evidence was properly received, and that the plaintiff, in order to prove his innocence, was not confined to such evidence as had been given before the magistrate in the trial of the information. *Labelle* v. *McMillan*, 34 N. B. R. 488. See also *Smith* v. *Simmons*, 15 N. B. R. 203; *Campbell* v. *Flewelling*, N. B. R. 403; *McGillvery* v. *Gault*, 19 N. B. R. 217.

COSTS OF ACTION.

Section 22 R. S. O. provides for the payment of costs where malice and want of probable cause are alleged. When an action against a magistrate is dismissed it should be with costs to the defendant between solicitor and client. *Arscott* v. *Lilley*, 14 A. R. 283.

Held, that plaintiff should not have costs on the Superior Court scale when his damages are assessed for $25, the recovery being within the jurisdiction of an inferior Court. *Ireland* v. *Pitcher*, 11 P. R. 403.

Security for Costs.

R. S. O. c. 89 provides for security for costs in actions against justices. As we have seen in c. 1, page 13, the Act was amended in 1901, c. 12, 1 Edw. VII., enacting that unless security is furnished within the time specified in the order the action is to be dismissed. Held, that the Court should be less exacting as to the character of the property where the person is a *bona fide* resident than in the ordinary case of a stranger who seeks to justify upon property within the jurisdiction; the test is, is it such property as would be forthcoming and available in execution? And when the plaintiff had property, partly real and partly personal, to the value of $800 over and above his debts, incumbrances and exemptions, security for costs was not ordered. *Bready* v. *Robertson*, 14 P. R. 7. See *Regina* v. *Armstrong*, 13 P. R. 306; *Parkes* v. *Baker*, 17 P. R. 345; *Thompson* v. *Williamson*, 16 P. R. 368; *Southwick* v. *Hare*, 15 P. R. 222, and *Ashcroft* v. *Tyson*, 17 P. R. 42.

Criminal Information.

If the misconduct of magistrates besides being productive of private injury be such as to call for punishment upon public grounds, as where it proceeds not from error but from private interest, or resentment, an information will be directed by the Court to be filed against the offender upon a proper application, supported by affidavits. But an information is never granted for an irregularity arising merely from ignorance or mistake. *R.* v. *Cozens*, 2 Doug. 426; *R.* v. *Fielding*, 2 Burr. 720; *R.* v. *Young & Pitts*, 1 Burr. 556.

It will not be granted *on behalf* of a magistrate for unwritten words imputing to him malversation in his office, if the words were not spoken at the time when he was acting and did not tend to a breach of the peace. *Ex part Duke of Marlborough*, 5 Q. B. 955, and see *R.* v. *Burn*, 7 A. & E. 190.

A magistrate is entitled to six days' notice of a motion for a criminal information against him for violation of his duty. The action must be made in sufficient time to enable the party accused to answer the same term. *R.* v. *Heustis*, 2 N. S. R. 101. See *R.* v. *Heming*, 5 B. & A. 666, and *Ex parte Feutman*, 2 A. & E. 127.

The misconduct must have arisen in connection with his public duties. *R.* v. *Arrowsmith*, 2 Dowl. N. S. 704.

And where a criminal information is applied for against a magistrate for improperly convicting a person of an offence, the Court will not entertain the motion however bad the conduct of the magistrate may appear, unless the party applying make oath that he is not really guilty of the offence of which he was convicted. *R.* v. *Webster*, 3 T. R. 388.

In all cases of an application for a criminal information against a magistrate for anything done by him in the exercise of the duties of his office, the question has always been not whether the act done might, upon a full and mature investigation, be found strictly right, but from which motive it had proceeded, whether from dishonest, oppressive or corrupt motive or from mistake, or error; in the former case alone they have become the objects of punishment. *R.* v. *Brown*, 3 B. & Ald. 432-4. See also *Reg. Ex rel. Stark* v. *Ford*, 3 C. P. 309; *Bustard* v. *Schofield*, 4 O. S. 11; *In re Recorder of Toronto*, 23 U. C. R. 376; *R.* v. *Barrow*, 3 B. & A. 434; *R.* v. *Whately*, 4 M. & Ry. 431; *R.* v. *Badger*, 4 Q. B. 468.

Evidence of a corrupt motive must be shewn in order to obtain leave to exhibit a criminal information against a justice of the peace for acting corruptly. *R.* v. *Currie* (1906), 11 C. C. C. 343. See *Paley*, 8th Ed., pp. 45, and 511 to 517.

Return of Convictions.

In addition to the provisions of the provincial statutes requiring justices to make quarterly returns of convictions and orders, there are also the provisions under Part XXIII. of the Code as follows:

PART XXIII.

Returns.

1133. Every justice shall, quarterly, on or before the second Tuesday in each of the months of March, June, September and December in each year, make to the clerk of the peace or other proper officer of the Court having jurisdiction in appeal, as herein provided, a return in writing, under his hand, of all convictions made by him, and of the receipt and application by him of the moneys received from the defendants.

2. Such return shall include all convictions and other matters not included in some previous return, and shall be in form 75.

3. If two or more justices are present, and join in the conviction, they shall make a joint return.

4. Every justice, to whom any such moneys are afterwards paid, shall make a return of the receipt and application thereof, to the Court having

jurisdiction in appeal as hereinbefore provided, which shall be filed by the clerk of the peace or the proper officer of such Court with the records of his office.

5. In the province of Prince Edward Island such return shall be made to the clerk of the Court of Assize of the county in which the convictions are made, and on or before the fourteenth day next before the sitting of the said Court next after such convictions are so made.

6. Every such return shall be made in the district of Nipissing, in the province of Ontario, to the clerk of the peace for the county of Renfrew, in the said province. 55-56 V., c. 29, s. 902.

1134. Every justice, before whom any conviction takes place, or who receives any such moneys, who neglects or refuses to make such return thereof, or wilfully makes a false, partial or incorrect return, or wilfully receives a larger amount of fees than by law he is authorized to receive, and every justice who upon or in connection with, or under colour or pretence of, any information, complaint or judicial proceeding or inquiry had or taken before him, wilfully exacts, receives, appropriates or retains any fees, moneys or payments which he is not by law authorized to receive or to be paid, shall incur a penalty of eighty dollars, together with costs of suit, in the discretion of the Court, which may be recovered by any person who sues for the same by action of debt or information in any Court of record in the province in which such return ought to have been or is made.

2. One moiety of such penalty shall belong to the person suing, and the other moiety to His Majesty for the public uses of Canada.

3. Nothing in this section shall have the effect of preventing any person aggrieved from prosecuting, by indictment, any justice, for any offence, the commission of which would have subjected him to indictment immediately before the first day of July, one thousand eight hundred and ninety-three. 55-56 V., c. 29, ss. 902 and 905, 4 E. VII., c. 9, s. 1.

1135. When any certificate is granted under section one hundred and eighteen of this Act, the justice granting it shall forthwith make a return thereof to the proper officer in the county, district or place in which such certificate has been granted for receiving returns under this Part.

2. On default of making such return within ninety days after a certificate is granted, the justice shall be liable, on summary conviction, to a penalty of not more than ten dollars. 55-56 V., c. 29, s. 905.

1136. Every commissioner under Part III. of this Act shall make a monthly return to the Secretary of State of all weapons delivered to him, and by him detained under Part III. R. S., c. 151, s. 12.

1137. The clerk of the peace of the district or county to whom returns under this Part are made, or the proper officer, other than the clerk of the peace, to whom such returns are made, shall, within seven days after the adjournment of the then next ensuing general or quarter sessions, or of the term or sitting of such other Court having jurisdiction in appeal as aforesaid, cause the said returns to be posted up in the courthouse of the district or county, and also in a conspicuous place in the office of such clerk of the peace, or other proper officer, for public inspection, and the same shall continue to be so posted up and exhibited until the end of the next ensuing general or quarter sessions of the peace, or for the term or sitting of such other Court as aforesaid.

2. For every schedule so made and exhibited by such clerk or officer, he shall be allowed such fee as is fixed by competent authority.

3. Such clerk of the peace or other officer of each district or county, within twenty days after the end of each general or quarter sessions of the peace, or the sitting of such Court as aforesaid, shall transmit to the Minister of Finance a true copy of all such returns made within his district or county. 55-56 V., c. 29, s. 903.

1138. No return purporting to be made by any justice under this Act shall be vitiated by the fact of its including, by mistake, any convictions or orders had or made before him in any matter over which any provincial legislature has exclusive jurisdiction, or with respect to which he acted under the authority of any provincial law. 55-56 V., c. 29, s. 906.

1139. Every clerk of the peace or other proper officer shall transmit to the Minister of Agriculture a quarterly return of the names of offenders, the offences and punishments mentioned in convictions transmitted to him under Part XVII. of this Act. 55-56 V., c. 29, s. 823.

It will be noticed that the neglect to return moneys received, or to make false returns, or to wilfully take, exact, receive, appropriate and retain any fees or moneys not authorized, subjects the justice in default to a penalty of $80. The only noticeable difference between the provisions of the Code and that of the Provincial Statutes is that the Code (1134 (2)) provides that one moiety of the penalty shall belong to the person suing, and the other to His Majesty, whereas in the Provincial Statutes one moiety goes to the party suing and the other to His Majesty in right of the province.

The provisions of sub-section 3 of section 1134 are important to be read in connection with what has gone before on the subject of criminal information.

If the conviction as returned is defective in form, the justice may make out another according to the evidence adduced before him and return it to the sessions. *R.* v. *Bennett*, 3 O. R. 45.

The fact of the conviction being appealed from does not relieve the justice from the penalty on non-return of the conviction under R. S. O. 93. *Murphy q. t.* v. *Harvey*, 9 C. P. 578. See also *Kelly q. t.* v. *Cowan*, 9 U. C. R. 104.

Notice of appeal against the conviction being given, or the abandonment of the appeal, will not affect the duty of the justice in making his return. *McLennan q. t.* v. *McIntyre*, 12 O. R. 546.

The question as to the conviction being right or wrong is immaterial, and when a magistrate has actually convicted and imposed a fine it is no defence that he had no jurisdiction to convict. *Bagley q. t.* v. *Curtis*, 15 C. P. 366; *O'Reilly q. t.* v. *Allan*, 11 U. C. R. 411.

The neglect of the justice to return the conviction made by him as prescribed, renders him liable under the statutes to a separate penalty for each conviction not returned, and not merely to one penalty for not making a general return of such conviction. *Darragh q. t.* v. *Patterson*, 25 C. P. 529. See also the following *qui tam* decisions: *Keenahan* v. *Egleson*, 22 U. C. R. 626; *Ollard* v. *Owens*, 29 U. C. R. 515; *McLellan* v. *Brown*, 12 C. P. 542; *Ball* v. *Fraser*, 18 U. C. R. 100; *Corsant* v. *Taylor*, 23 C. P.

607; *Atwood* v. *Rosser*, 30 C. P. 628; *Longeway* v. *Avison*, 8 O. R. 357; *Hunt* v. *Shaver*, 22 A. R. 202; *Stinson* v. *Guess*, 1 C. L. J. 191; *Brush* v. *McTaggart*, 16 C. P. 415; *Clemens* v. *Bemer*, 7 C. L. J. 126; *Drake* v. *Preston*, 34 U. C. R. 257; *Metcalf* v. *Reeve*, 9 U. C. R. 263.

In *McGillivray* v. *Muir*, (1903) 7 C. C. C. 360, it was held by FERGUSON and MACMAHON, JJ., sitting as a *divisional* Court, that the provisions of section 902 of the Code (now section 1134) applied only to fees received under the summary convictions part of the Code. And that a wilful receiving of unauthorized fees means receiving them intentionally with a knowledge that there is no legal right to collect them. MACMAHON, J., at pages 363-364, says: "The ground principally relied upon in support of the appeal was that the Act only applies to cases where a justice acting under the Summary Convictions Act wilfully received a larger amount of fees than by the tariff he was authorized to receive. And as the fee he charged was in connection with an indictable offence for which no fee is authorized either by the tariff of the Province, or of the Dominion, no action could be maintained against him for the penalty." . . . "Our Acts already referred to authorize the taking by the justices of the fees mentioned therein solely in cases where the magistrate has jurisdiction under the Acts relating to summary convictions, and it is for an infraction of either of these Acts by wilfully taking a larger fee in such cases that he may be *penalized*. There is no Act of Parliament authorizing the taking of a fee on a charge made for an indictable offence which was claimed and taken by the defendants in this case, and he cannot be sued for a penalty for none is attached. That is the effect of *Bowman* v. *Blyth*, 7 E. & B. 26. The defendant might have been indicted for *extortion* under section 905 (now section 157) of the Criminal Code. See *R.* v. *Tisdale* (1860), 20 U. C. R. 272."

Section 157 of the Code is as follows:

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

(*a*) being a justice, peace officer, or public officer, employed in any capacity for the prosecution or 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 officer aforesaid any such bribe as aforesaid with any such intent. 55-56 V., c. 29.

By section 2 of the Code, sub-sections 18, 26 and 29, a "justice," a "peace officer" and a "public officer" are defined as follows:

> (18) 'justice' means a justice of the peace, and includes two or more justices, if two or more justices act or have jurisdiction, and also a police magistrate, a stipendiary magistrate and any person having the power or authority of two or more justices of the peace·
>
> (26) 'peace officer' includes a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer, and justice of the peace, and also the warden, keeper or guard of a penitentiary and the gaoler or keeper of any prison, and any police officer, police constable, bailiff, constable or other person employed for the preservation and maintenance of the public peace, or for the service or execution of civil process;
>
> (29) 'public officer' includes any inland revenue or customs officer, officer of the army, navy, marine, militia, Royal Northwest Mounted Police, or other officer engaged in enforcing the laws relating to the revenue, customs, trade or navigation of Canada;

Where application is made to a magistrate to take and receive an information for an indictable offence which he cannot deal with summarily, he cannot demand any fees: ROBERTSON, J., at page 321, *R.* v. *Meehan* (No. 2), (1902), 5 C. C. C. 312.

MANDAMUS AND PROHIBITION.

There are two other remedies which may be invoked against justices to compel them either to do some act relating to the duties of their office, or to refrain from doing some act in excess of their jurisdiction. The first is by mandamus and the second by prohibition.

Mandamus. We have seen that by R. S. O. 88, sec. 6, an application may be made to a Judge to compel a justice of the peace to do any act relating to the duties of his office which he has refused to do. In modern practice this mode of procedure is adopted in preference to applying for a mandamus. *Re Delaney* v. *McNabb*, 21 C. P. 563.

In Ontario and Manitoba writs of mandamus and prohibition have been abolished, and orders of the Court having the same effect are substituted therefor. For the practice relating to mandamus and prohibition, see *Holmested & Langton*, 3rd ed., pages 1293 and 1308.

Mandamus is a command issuing in the King's name out of the Court of King's Bench or High Court directed to any person, corporation, or inferior Court of judicature, requiring them to do some particular thing therein specified, which appertains to their office and duty. It is a high prerogative writ of a most exten-

sively remedial nature. Being a prerogative writ, it runs into all privileged places. *R.* v. *Commissioners of Excise,* 2 T. R. 385.

It is always granted where there is a specific legal right, but no other specific legal remedy, or where it is doubtful whether there is. *R.* v. *Wyndham,* Cowp. 378; *R.* v. *St. Catherine Dock Company,* 4 B. & A. 360; *R.* v. *Jeyes,* 3 A. & E. 416; *R.* v. *Nottingham,* 6 A. & E. 355, S. C. And not where a party has a specific legal remedy: *R.* v. *Bishop of Chester,* 1 T. R. 396; or a remedy in equity: *R.* v. *Marquis of Stafford,* 3 T. R. 646.

It is not a writ grantable of right but by prerogative, and it is the absence, or want, of a specific legal remedy which gives the Court jurisdiction. *R.* v. *Bristol Dock Co.,* 2 Selwyn N. P. 1062.

But the Court will not grant a mandamus commanding justices to do that which may render them liable to an action of which the event may be doubtful. *R.* v. *Dayrell,* 1 B. & C. 485; *R.* v. *Broderip,* 5 B. & C. 239; *R.* v. *Hughes,* 3 A. & E. 425.

No case has been cited, nor have I been able to find any where a mandamus issued to recall a sentence already passed and to impose another. . . . I find in Short on Informations, p. 250: "Mandamus is not granted to undo an act already done. The Court will not allow the validity of the act done to be tried in this way." The Court has always refused to allow an application for a mandamus to be made the occasion or excuse for obtaining the opinion of the Court on some doubtful question of law. BRITTON, J., at page 206. I cannot command the police magistrate to open the conviction and re-consider, or re-convict. That is unquestionably a judicial act, and as to that no complaint is made by any one. If the penalty is now changed the defendant may be deprived of his right to appeal. The defendants' rights must be considered. BRITTON, J., at page 210, held that a mandamus does not lie to compel an inferior Court to render a judgment in terms conformable to the opinion of the superior Court, nor to correct the erroneous decision of an inferior Court in a matter within its jurisdiction, unless by such decision the jurisdiction is denied. *R.* v. *Case* (No. 1) (1903), 7 C. C. C. 204, and see *R.* v. *Case* (No. 2), 7 C. C. C. 212.

The province of the writ of mandamus in so far as it affects the action of inferior Courts, is not to be extended for the purpose of compelling them to render a particular judgment in accordance with the views of the higher Court. *High on Extraordinary Remedies,* 3rd ed., sec. 149. See *The Queen* v. *Justices of Middlesex* (1839), 9 A. & E. 540.

The interference of the Court by mandamus is occasioned by inferior Courts, or persons, refusing to proceed in some course prescribed by law and not in consequence of any misapprehension, or error in that course, provided they have entered upon it. Lord Denman, at 547, *R. E. Eastern Counties R. W. Co.*, 10 A. & E. 331; *R.* v. *Hewes*, 3 A. & E. 725.

When a magistrate decides erroneously that he has no jurisdiction to receive an information, a mandamus will lie to compel him to do so; but when he has considered the material on which the application is based and refused to grant the summons, the Court will not interfere by mandamus. *R.* v. *Meehan* (No. 2), 5 C. C. C. 312.

An application for a mandamus against a magistrate is a civil, not a criminal, proceeding. The procedure is governed in Ontario by the Ontario Judicature Act, and the application for an order absolute must be made to a single Judge in Court and not to a Divisional Court. *R.* v. *Meehan* (No. 1), 5 C. C. C. 307.

The law does not oblige a magistrate to issue his warrant except when in his opinion a case for so doing is made out; he is not obliged to give all his reasons, he has merely to express his opinion. That the magistrate did not properly appreciate the evidence submitted upon an application for the issue of the warrant of arrest for an indictable offence, is not a ground for a mandamus to compel him to issue a warrant. *Thompson* v. *Desnoyers* (1899), 3 C. C. C. 68.

The County Court Judge having heard argument and given a decision on the legal merits, the Court has no right to decide or inquire whether such decision was right or wrong. Mandamus to re-open appeal for the purpose of hearing evidence refused. *Strang* v. *Gellatly* (1904), 8 C. C. C. 17.

A rule nisi was granted for a mandamus to compel a justice to issue a warrant of distress for costs in a case wherein the defendant has been convicted and fined under the Fisheries Act for illegal fishing. The Minister of Marine remitted both the fine and costs, on motion to make the rule absolute; the Court was equally divided and no order was made. See judgment of BARKER, J., at page 45, and cases cited by him. *Ex parte Gilbert* (1904), 10 C. C. C. 38.

The accused on acquittal in the Court of General Sessions in Ontario is entitled to a copy of the record of such acquittal, and a mandamus will lie to the Clerk of the Peace to enforce delivery of the same. *R.* v. *Scully* (1901), 5 C. C. C. 1.

"It was the duty of the police magistrate upon receiving the information to hear and consider the allegations of the informant, and if of the opinion that cause for issuing a warrant or summons was not made out, to refuse it, and having so acted this Court has no jurisdiction over him. It is his judgment not mine, nor that of any other Judge, or Court, which is to be exercised under section 559 (now section 655) of the Criminal Code. See *Ex p. Lewis* (1888), 21 Q. B. D.; *R.* v. *Paynter* (1857), 7 E. & B., and *R.* v. *Dayman* (1857), 7 E. & B. 672. This application must therefore be refused." MEREDITH, J., *Re E. J. Parke* (1899), 3 C. C. C. C. 122.

In cases of madamus for returns, or false returns, by justices the provisions set out in 2 Edw. VII. cap. 1, sec. 10 (1902) Ont., are substituted for 9 Anne, cap. 25.

PROHIBITION.

Prohibition is the proper remedy when an inferior Court is exceeding its jurisdiction, but not when it has committed an error in law, or good conscience. *Liddal* v. *Gibson,* 17 U. C. R. 98.

Prohibition is an extreme measure and granted summarily only in a very plain case of the unlawful exercise of jurisdiction by a subordinate tribunal. *Re Cummings & Carelton,* 25 O. R. 607.

Where neither the information nor the evidence before the magistrate discloses any offence against the law, prohibition may be granted by a superior Court pending an adjournment ordered by the magistrate for the purpose of deliberating on his finding. Prohibition may be granted *ex parte* under Nova Scotia Crown Rule 72 in respect of an illegal prosecution under the Nova Scotia Liquor License Act. *R.* v. *Breen* (1904), 8 C. C. C. 146.

"Prohibition will not lie unless there is a lack of jurisdiction in the judicial officer or Court dealing with the proceedings. Much latitude is contemplated in the course of this preliminary investigation, both in the way of varying and amending and in the reception of evidence, so that the scope of the inquiry may be enlarged and matters touched upon beyond the scope of the original charge. This consideration has been overlooked in regard to many of the cases cited. I mean the wide distinction which exists between the magistrate who has plenary jurisdiction to try the offence in a summary way, and the justice who is dealing with a preliminary inquiry in respect to an indictable offence which is to be passed on to another tribunal for trial. The distinction is adverted to very

clearly by Lord Russell, C.J., in *The Queen* v. *Brown* (1895), 1 Q. B. at pp. 126-127." BOYD, C., at p. 91. . . "In prohibition, the only question is whether the justices had jurisdiction. If they had refused to hear legal evidence, or decided improperly upon the evidence, that would be misconduct, but it would be different from acting illegally and without jurisdiction, *Regina* v. *Higgins*, 8 Q. B. at p. 150, note in the report of 10 Jurist, *sub nomine Ex parte Higgins* (1843), 838, it is said, the remedy for misconduct would be criminal information, and if they act maliciously they are liable to an action on the case." BOYD, C., page 93. In this case the magistrate holding a preliminary inquiry refused to order particulars in a general charge of "conspiracy to defraud the public," and application for an order of prohibition was refused. *R.* v. *Phillips* (1906), 11 C. C. C. 89.

No doubt in a proper case and for a proper excess of jurisdiction, the superior Court may, in virtue of article 1003 of the Code of Civil Procedure of this province, issue a writ of prohibition to displace, or interfere, in a criminal case with the control, must be exercised in the manner and form provided by law. It does not mean that the superior Court, which is a civil tribunal without criminal jurisdiction, has a right by its writ of prohibition even after judgment, but, as article 50 says, this control must be exercised in the manner and form provided by law. It does not mean that the superior Court, which is a civil tribunal without criminal jurisdiction, has a right by its writ of prohibition to displace or interfere in a criminal case with the procedure or remedies provided for the case by the Federal Legislature, which has exclusive jurisdiction in criminal law and procedure. Thus in *Audet & Doyon*, 10 Q. L. R., MCCORD, J., in delivering the judgment of the majority of the Court, said: "Prohibition is an extraordinary remedy, and should not be employed where the party has a complete remedy in some other and more ordinary form." TRENHOLME, J., pp. 237, 238. In this case, the Court of King's Bench (Appeal side), Quebec, annulled and quashed a writ of prohibition that had been granted to restrain the enforcement of a summary conviction in a case of selling liquor to Indians. The Court held that a writ of prohibition should not be granted to restrain the enforcement of a summary conviction in a criminal matter while another adequate remedy is available, viz., an appeal from the conviction or a stated case. *R.* v. *Amyot* (1906), 11 C. C. C. 232. See also *Laliberte & Fortin*, 2 Que. Q. B. 573; *Tessier* v. *Desnoyers*, 17 Q. S. C. 35.

Prohibition will not lie to restrain the issue and enforcement of a distress warrant by a justice upon a conviction regular on its

face, and which was within the jurisdiction of the justice making it, such acts being ministerial and not judicial. *R.* v. *Coursey*, 27 O. R. 181.

Prohibition will not issue to prevent a hearing where the magistrate has jurisdiction. *Brandy* v. *Lafontaine*, 17 Q. S. C. 396.

"It is a principle of universal application and one which lies at the foundation of the law of prohibition, that the jurisdiction is strictly confined to cases where no other remedy exists, and it is always a sufficient reason for withholding the writ that the party aggrieved has another complete remedy at law." *High on Extraordinary Remedies.*

It has to be remembered that the writ of prohibition is a discretionary writ only, and will not be granted unless there is a clean failure of jurisdiction. DRAKE, J., p. 84. *R.* v. *Chipman* (1897), 1 C. C. C. 81.

Prohibition will not be granted by way of review or appeal, but for the purpose only of keeping an inferior Court within the limits of the jurisdiction from which it has departed or is about to depart. *H. B. Co.* v. *Joanette*, 23 S. C. R. 415.

Held on motion for prohibition, that there was an authority for the return of the information to the convicting justice after the quashing of the conviction, as the section of the Criminal Code 1892 (section 895) only applies in cases where before that section a *procedendo* would have been issued to send back a record; that the information was therefore not properly before the Justice when he issued the second summons, and that he had no jurisdiction to proceed upon it, and a prohibition was granted without costs. *R.* v. *Zickrick*, 11 M. L. R. 452.

If the want of jurisdiction of an inferior Court is apparent on the face of the proceedings, the defendant may move at any time for prohibition; but if it does not so appear, he should first raise the objection in the inferior Court. *Wright* v. *Arnold*, 6 M. L. R. 1, and see *Rutherford* v. *Walls*, 8 M. L. R. 96; *Gibbins* v. *Chadwick*, 8 M. L. R. 209; and *Maxwell* v. *Clark*, 10 M. L. R. 406; see also *Farquharson* v. *Morgan* (1894), 1 Q. B. 552; *Broad* v. *Perkins*, 21 Q. B. D. 553; and *Sherwood* v. *Cline*, 17 O. R. 30.

It is also a well recognized doctrine that a writ of prohibition is not to be granted to the applicant therefor as a matter of absolute right; but that it is in the discretion of the Court to grant or refuse it. *Short & Mellor's Crown Office Practice*, p. 81. And see *Doidge* v. *Minnus*, 12 M. L. R. 618, and *R.* v. *Nunn*, 15 M. L. R. 288.

Prohibition will be granted upon the application of a stranger to the proceedings when a justice is clearly exceeding his jurisdiction, as such is a contempt of the Crown. *Worthington* v. *Jefries*, L. R. 10 C. P. 379; *Chambers* v. *Green*, L. R. 20 Eq. 552; *Wallace* v. *Allan*, L. R. 10 C. P. 607. See *Re Hickson & Wilson*, 17 C. L. T. 303.

The application for prohibition may be made at the outset of the proceedings, or at the latest stage if the want of jurisdiction is apparent, and there remains anything to prohibit. *Bragill* v. *Johns*, 24 O. R. 209.

An appeal is no bar to prohibition. *Re Rochon*, 31 O. R. 122, but pending an appeal no prohibition will be allowed. *Wiltsey* v. *Ward*, 9 P. R. 216.

The application may be made to a Judge of the High Court in Chambers. *R.* v. *Cushing*, 26 A. R. 248.

CHAPTER V.

INFORMATION AND COMPLAINT.

As all things have their beginning so it is with criminal proceedings. There must be a commencement, and that is made by the laying of an information, or making a complaint, before a justice.

It is requisite in all summary proceedings of a penal nature that there should be an information or complaint, which is the basis of all the subsequent proceedings and without which the justice is not authorized in intermeddling except where he is empowered by statute to convict on view. *Paley, 8th ed., p. 75.*

The distinction between an information and complaint is that an information is *laid* against a person charged with the commission of, or who is suspected to have committed an offence for which he is liable by law on summary conviction to be imprisoned, or fined or otherwise punished. A complaint against a person is *made* when that person is liable by law to have an order made upon him by a justice for payment of money, or to do some act which he has refused or neglected to do contrary to law.

The proceeding which forms the ground work of a *conviction* is termed "laying" or "exhibiting an information," while the similar proceeding for the obtaining of an *order* of justices is termed making a "complaint." *Paley, 8th ed., pp. 76 and 184.*

As we have seen in Chapter II., by section 14 of the Code the distinction between felony and misdemeanours is abolished.

This distinction may be illustrated by the fact that under the old law obtaining money by false pretences was classed as a misdemeanour, while larceny, burglary, arson and other more heinous crimes were felonies. Under the Code all crimes are classed in the category of indictable offences.

There are some, but not many, indictable offences that can be tried and disposed of by summary conviction, under Part XV. of the Code. For instance, common assault; this is an indictable offence (vide sec. 291), but under sec. 732 the justice may summarily hear and determine the charge—subject to sub-sec. 2. The application of Part XV. of the Code is governed by section 706,

and upon reference to that section it will be noticed that the provisions are limited:—

(a) To offences or acts for which a person is liable on summary conviction to imprisonment, &c., and (b), to all cases where a complaint is made to a justice where he can make a summary order.

It is necessary for a justice to bear in mind these limitations when an information or complaint is made or laid before him, and after a recital of the facts to ascertain from looking at the several provisions of the Code relating to specific offences as to whether or not he can deal summarily with the offence charged.

If the offence is an indictable one and there is no provision for its being tried summarily then if a warrant is to issue the information will require to be in writing and made under oath. See section 654 of the Code.

If the offence is punishable on summary conviction, then the complaint or information need not be in writing or under oath. See section 710 of the Code.

It is discretionary with the justice to issue either a summons or warrant as he thinks best. *R.* v. *McGregor* (1895), 2 C. C. C. 410, 413.

If a warrant is to issue then the information must be under oath. *R.* v. *McNutt,* 3 C. C. C. 184; *R.* v. *McDonald* (1896), 3 C. C. C. 287.

It is provided by section 711 of the Code that whenever a warrant is issued in the first instance against a person for an offence punishable on summary conviction, then the justice issuing the warrant shall furnish a copy or copies of the same and cause a copy to be served on the person arrested at the time of his arrest.

It is the duty of everyone executing a warrant to have it with him and to produce it if required, and any person making an arrest should, when practicable, give notice of the warrant or of the cause of the arrest. See sec. 40 of the Code.

The magistrate is himself to exercise the discretionary power given under secs. 655 and sec. 711 to issue either a summons or a warrant on a sworn information received by him, that being a judicial act. *R.* v. *Ettinger* (1899), 3 C. C. C. 387; *R.* v. *McGregor,* ante; *Thompson* v. *Desnoyers* (1899), 3 C. C. C. 68.

The distinction between indictable offences and offences punishable on summary conviction is defined by the "Interpretation Act," R. S. C. (1906), cap. I., sec. 28, as follows:—

28. Every Act shall be read and construed as if any offence for which the offender may be,—

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

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

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

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

In view of the provisions of Part XVI. of the Code, which provides for the summary trial of indictable offences, and the extended powers given to and the increased responsibilities assumed by magistrates thereunder, the question of the sufficiency of informations dealt with under this part becomes increasingly important and especially so in view of the enlarged provisions of section 777 of the Code. And all magistrates who accept the responsibility of dealing with indictable offences under this part of the Code should scrutinize the information and see that it contains all the necessary ingredients. The information takes the place of the indictment as it contains the offence with which the accused is charged.

After the accused consents to summary trial before a magistrate under Code, section 786 (now sec. 778), it is not necessary for the magistrate to again "reduce the charge to writing" if that had been done before the consent was given, and it is sufficient for the magistrate to read to the accused the charge already written. TOWNSHEND, J., p. 465; *R.* v. *Shepherd* (1902), 6 C. C. C. 463.

It has been held that upon a summary trial with the consent of the accused that section 951 (then 713) applies to summary trials as well as to trials upon indictments—also that the word "count" as used in sec. 2 (16) and sec. 951, include an information before a justice for an indictable offence. In this case Coolen was charged with assault occasioning bodily harm; he consented to be tried summarily and was convicted of common assault only. The conviction was upheld. *R.* v. *Coolen* (1904), 8 C. C. C. 157.

It is to be noted that in sec. 778 the words "information" and "indictment" are neither used nor referred to. The word "charge" is used only and comprehends "the information" used in summary convictions and "indictment" in jury trials. The magistrate on putting the accused to his election must state that he is "charged" with the offence, describing it. If the person charged consents then the magistrate shall reduce the charge to writing. The offence that is described must be the offence set out in the information; the charge is, therefore, based on the information.

In *Jackson* v. *Humphreys*, 11 Mod. 69, HOLT, C.J., said that "charge" was a vulgar expression, "but not a legal one." To charge is to accuse of crime—charges imply an original complaint made in the first instance preliminary to a formal trial for a crime. *Ryan* v. *People*, 79 N. Y. 598.

Sec. 2 (16) declares that the expressions "indictment" and "count" respectively include information and presentment as well as indictment. Section 951 is as follows:—

951. Every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or he may be convicted of an attempt to commit any offence so included.

2. On a count charging murder, if the evidence proves manslaughter, but does not prove murder, the jury may find the accused not guilty of murder but guilty of manslaughter, but shall not on that count find the accused guilty of any other offence. 55-56 V., c. 29, s. 713.

It is not necessary that the lesser offence should be expressly charged on the face of the indictment. It will be sufficient if the offence charged must of necessity include it. *R.* v. *Smith* (1874), 34 U. C. R. 552; *R.* v. *Bird*, 5 Cox C. C. 1. See *R.* v. *Edwards* (1898), 2 C. C. C. 96; *R.* v. *Clarke*, 12 C. C. C. 300.

The information being the substratum of the magistrate's jurisdiction and in the nature of an indictment, must contain a complete statement of the offence; for the evidence can only support the original charge, but can by no means extend or supply what is wanting in the information. *R.* v. *Bains*, 2 Salk. 680; *R.* v. *Wheatman*, Ding. 232.

It is proposed to consider the provisions of the Code as to making complaints and laying informations for indictable offences and for offences punishable by summary conviction together. First, taking up informations respecting indictable offences.

In my opinion to prefer a charge under the Speedy Trial sections of the Code is preferring a document very analogous to an indictment. GRAHAM, J., p. 84 (1909); *R.* v. *Cross*, 171.

It is absolutely essential in all proceedings to convict a party of an offence created or prohibited under a penal statute, that there should be some information or complaint previously laid before the convicting or some other justice. *R.* v. *Tudor*, 1 Ld. Raynor 510; *R.* v. *Birnie*, 5 C. & P. 206.

Generally speaking any person may be the informer, but sometimes the statute giving the penalty allows only particular persons to be the informer. In summary convictions by sections 710 of the Code, sec. 4, every complaint or information may be made or laid by the complainant or informant in person or by his counsel, or attorney, or other person authorized in that behalf. See *R.* v. *St. Louis* (1897), 1 C. C. C. 141, 144.

Informations for indictable offences are laid under the provisions of secs. 654 and 655 of the Code. The latter was amended in 1909, giving power to the justice to procure the attendance of witnesses and of compelling them to testify under oath respecting the allegations of the complaint. The justice has a hearing before he makes up his mind that a case has been made up for issuing a summons or a warrant.

It is only required in criminal matters that the information should give a concise and legal description of the offence charged, and that it should contain the same certainty as an indictment. Of course the description of the charge must include every ingredient required by the statute to constitute the offence. The statement of the offence may be in the words of the enactment describing it or declaring the transactions charged to be an indictable offence. . . .

It is essential that whatever words may be used should be sufficient to give the accused notice of the offence with which he is charged and to identify the transactions referred to. The absence or the insufficiency of particulars does not vitiate an indictment nor an information; but if it should be made to appear that there is reasonable necessity for more specific information, the Court or magistrate may on the application of the accused person, order that further particulars be given, but such an order is altogether within the judicial discretion of the Judge or magistrate. WURTELE, J., pp. 328-329. *R.* v. *France* (1898), 1 C. C. C. 321.

The information must be in writing and under oath as provided in section 654. And it must set forth facts disclosing an offence, and there is no right to issue a warrant where assuming the facts sworn to be true, no offence is shewn. *Ex p. Boyce*, 24 N. B. R. 347.

Where there is a right to arrest without a warrant and after arrest a written charge, not an oath, is read over to the prisoner, and the prisoner consents to be tried summarily, the magistrate has complete jurisdiction to deal with the case. *R.* v. *McLean* (1901), 5 C. C. C. 67.

Without an information properly laid a justice has no jurisdiction to issue a warrant, and if he does so he is liable in trespass. *Appleton* v. *Lepper,* 20 C. P. 138; *McGuiness* v. *Dafoe* (1896), 3 C. C. C. 139.

If a justice, after an offender is brought before him on a warrant, commit him for trial where there is no prosecution, no examination of witnesses, and no confession of guilt under the statute, he is liable in trespass. *Appleton* v. *Lepper,* 20 C. P. 138; *Connors* v. *Darling,* 23 U. C. R. 541.

To give the magistrate jurisdiction there must be either an information for a criminal offence, or the information must be waived by the accused. *Crawford* v. *Beattie,* 39 U. C. R. 26; *Caudle* v. *Seymour,* 1 Q. B. 889; *R.* v. *Fletcher,* L. R. 1 C. C. R. 320; or the accused must be in the presence of the magistrate and while there be charged with the offence, and must then submit to answer it. *R.* v. *Hughes,* 4 Q. B. D. 614.

It matters not by what means the defendant is brought before the magistrate. If in fact he is present and the magistrate has jurisdiction over the person and offence he may lawfully proceed with the hearing. The improper arrest does not go to the jurisdiction of the magistrate. *Ex parte Giberson* (1898), 4 C. C. C. 537, and see *McGuiness* v. *Dafoe* (1896), 3 C. C. C. 139.

A written information on a preliminary inquiry is for the protection of the accused, so that he may know the charge against him, but if the magistrate on being verbally informed of the offence by the accused himself, issues a summons and the accused attends on its return, a commitment for trial may be made on the depositions taken upon the preliminary inquiry without an information in writing The committing justice has jurisdiction over the accused on his attending in answer to the summons, although objection was taken to the want of an information. If a warrant has issued it would have been different. *R.* v. *Thompson* (1909), 15 C. C. C. 162.

Where the justice had issued a warrant of arrest informally and without oath, the defendant having no knowledge of this defect, made no objection to the same at the hearing of the charge. Held that the irregularity in the process of bringing the defendant before the Court had no effect on the jurisdiction and the

defendant and a person who committed perjury on the hearing were rightly convicted. *R.* v. *Hughes* (1879), 4 Q. B. D. 614, and see *Gray* v. *Commissioner of Customs* (1884), 48 J. P. 343, and see *Ex parte Sonier*, 2 C. C. C. 121.

The recital of the information in a warrant is not conclusive evidence of the information having been laid, and evidence may be given to shew that as a matter of fact such information was not laid. *Friel* v. *Ferguson*, 15 C. P. 584.

If the information discloses no offence in law it will not authorise the issue of a warrant by a magistrate, as there is nothing to found his jurisdiction. *Stephens* v. *Stephens*, 24 C. P. 424; *Grimes* v. *Miller*, 23 A. R. 764; *Anderson* v. *Wilson*, 25 O. R. 96.

An information for false pretences is not objectionable for not setting out the false pretences with which the defendant is charged, if it follows the form in which an indictment for the same offence may be framed. *R.* v. *Richardson*, 8 O. R. 651. Such irregularities or variances will not affect the validity of any proceeding at or subsequent to the hearing. See sec. 669 of the Code.

Informations before justices must be taken as nearly as possible in the language used by the party complaining. *McNellis* v. *Gartshore*, 2 C. P. 464.

It is improper for a magistrate to place a legal construction on the words of the complainant which they do not bear out. For instance, if the statement of the complainant shews trespass only the magistrate should not construe it as an indictable offence or describe it as such in the information. *Rogers* v. *Hassard*, 2 A. R. 507.

If by reasonable intendment the information can be read as disclosing a criminal offence, the rule is so to read it. *Lawrenson* v. *Hill*, 10 Ir. L. C. L. R. 177; See *R.* v. *Halley* (1893), 4 C. C. C. 510.

What Information should Contain.

(1) The information should contain the name, address and occupation of the informer.

(2) The day and year of taking the information and the place where the same is taken.

(3) The description of the justice who receives the information, shewing his name and authority.

(4) The name of the offender, or accused, or some other description of him or her.

(5) The time and place of the commission of the offence.

(6) The statement of the offence itself.

These several matters will now be shortly considered in their order.

(1) *The name and occupation of the informer must be given so that the accused may know who his accuser is.*

As we have seen, an information can be laid by anyone for an indictable offence: sec. 654 of the Code. And by sec. 710, by the informant in person, or by his counsel, attorney or other person authorised by him in that behalf.

A sworn information merely stating that the complainant had just cause to suspect and believe and does suspect and believe that the defendant has committed the offence charged triable under the Summary Convictions Act, will not authorize a justice to issue his warrant to arrest in the first instance. It is the duty of a justice, before issuing a warrant, to examine upon oath the complainant or his witnesses as to the facts upon which suspicion and belief are founded and to exercise his own judgment thereon. *Ex parte Boyce*, 24 N. B. R. 347, followed in *Ex parte Coffon* (1905), 11 C. C. C. 48, and *R.* v. *Lizotte* (1905), 10 C. C. C. 316.

An information stating in general terms that the informant had reason to believe and did suspect and believe that the party charged had committed an offence without stating the grounds of his information, and apparently without making them known to the magistrate, will not authorize a justice to issue a warrant to arrest in the first instance. *Ex parte Grundy* (1906), 12 C. C. C. 65.

"I am of opinion that this case is not distinguishable from *R.* v. *Walker* (13 O. R. 83), that the information being the basis of the subsequent proceedings and without which the justice is not authorized to act, must contain that which the statute contemplates, namely, "the causes of suspicion whatever they may be," in order to satisfy the justice that there is reasonable ground for believing "that there is in the place to be searched"—"anything which there is reasonable ground to believe will afford evidence as to the commission of," the offence charged. CLUTE, J., p. 60, *R.* v. *Kehr* (1906), 11 C. C. C. 52.

Where there is an absolute positive statement by the informer at the time of the laying of the information on oath, before the magistrate issuing the warrant, of the sale or keeping for sale of

the liquor, that is sufficient. That is a sufficient declaration upon which to issue a warrant. HANNINGTON, J., p. 276; *Ex parte Madden* (1908), 13 C. C. C. 273.

Section 655 (1) of the Code is applicable under sec. 711 to an information leading to a summary conviction, and if the sworn information be upon mere information and belief of the deponent without stating the facts upon which such belief is founded, the justice must examine the informant and decide whether or not his statements justify the arrest of the accused before he issues a warrant. *R.* v. *Lorrimer* (1909), 14 C. C. C. 430.

(2) *The day and year and place where taken.*

The day and year on which an information is exhibited must be stated therein as well that it may appear to be subsequent to the offence, and prior to all the other proceedings, as in order to ascertain that the prosecution is within the time limited by the particular statute on which it is founded. *R.* v. *Kent,* Lord Raym. 1546; *R.* v. *Fuller,* 1 Idem 510. In *R.* v. *Kent* the conviction was quashed because the information was set out to be exhibited on 2nd Nov., 1 Geo. II., and the conviction was laid to be on 2nd Oct., 1 Geo. II.

The place also where the information is stated to be received must be stated in it, in order to shew that the magistrate at the time was acting within his jurisdiction. *Kite & Lanes case,* 1 B. & C. 101.

If a magistrate's summons is issued on an information purporting to have been sworn at a specific time and place, and the defendant appears thereon and pleads to the charge, the proceedings will not be quashed on certiorari because it is afterwards shewn that the information was not in fact sworn at such time and place. *Ex parte Sonier* (1896), 2 C. C. C. 121.

Where the statutory offence is the furnishing of intoxicating liquor to a person known to the accused to have been interdicted, and a time limit is provided for laying information therefor, an information within the time, but omitting to charge knowledge of the interdicted, cannot be amended to include such statement after the expiry of the time limit. The original information in such case alleges no offence, and is consequently to be treated on amendment as a new information. *R.* v. *Guerlin* (1909), 15 C. C. C. 251, and see cases *ante.*

Upon taking an information the magistrate is not bound to issue a summons or warrant upon the same day notwith-

standing the words "this day" in the statutory form (5 and 6), but may take time to consider whether a case is made out for so doing. Where a statute provides that information thereunder shall be laid within a fixed number of days after the offence, but makes no limitation as to the summons, or other proceedings, the summons calling upon the accused to answer may be issued after the period of limitation upon an information taken within the period. *R.* v. *Hudgins* (1907), 12 C. C. C. 223.

Laying the information is the commencement of a prosecution. *Thorpe* v. *Priestnall* (1897), 1 Q. B. 159; *R.* v. *Lennox* (1878), 3 U. C. R. 28; *R.* v. *Kerr*, 26 C. P. 214; *R.* v. *Ettinger*, 3 C. C. C. 377-391.

The justice is required to hear and consider the allegation in the complaint or information and the issue of the summons is dependent upon his opinions as to whether or not a case is made out. This I think must be held to be a judicial act on the authority of *Hope* v. *Evered*, 17 Q. B. D. 338, and *Lea* v. *Charrington*, 22 Q. B. D. 45 and 272, per RITCHIE, J., pp. 389-90, in *R.* v. *Ettinger*, 3 C. C. C. 387.

This decision is more important than at first appears in view of the fact that it has always been recognized that the receiving of an information was a ministerial act and consequently one of the rights which a justice might exercise outside the limits of his jurisdiction; according to this decision a justice can no longer exercise that right as the receiving of an information for indictable offences is now declared to be a judicial act. See section 655.

The general rule is that a justice is not liable for any mistake or error of judgment or for anything he does judicially when acting within his jurisdiction, though he may be wrong. *Gordon* v. *Denison*, 24 O. R. 576, 22 A. R. 315.

If a justice exceeds the authority given him in his ministerial acts even within his jurisdiction, he thereby subjects himself to an action, as if he commits a prisoner for re-examination for an unreasonable time, although he does so from no improper motive, he is liable to an action for trespass for false imprisonment. *Davis* v. *Capper*, 10 B. & C. 28, and see cases cited in chapter on Jurisdiction, *ante*.

The limitations as to time for commencing the prosecution of criminal offences under the Code, and of actions and penalties or forfeiture under any Act, is governed by Part XXIV. of the Code, sections 1140 to 1151.

By section 1142 offences punishable on summary convictions, 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 information laid within six months from the time when the matter of the complaint or information arose, except in the North-West Territories and the Yukon Territory, where the time is extended to twelve months.

The provisions of this section apply only to cases arising and in which proceedings have been taken under the summary conviction sections of the Code. Where a man was indicted for rape and the jury found him guilty of common assault only, it was objected that there could be no conviction for common assault as the complaint was not made or information laid within six months from the time when the matter of complaint or information arose. It was held that the indictment being for rape and it being assumed that the information or complaint was one charging the same offence, there can be no pretence that the offence charged was "an offence punishable on summary conviction," or one that could be tried under the provisions of the Code relating to summary convictions. *R.* v. *Edwards* (1898), 2 C. C. C. 96, and see *R.* v. *McKinnon*, 5 C. C. C. 301; *R.* v. *Lee How* (1901), 4 C. C. C. 551; *R.* v. *Boutilier* (1904), 8 C. C. C. 82; *R.* v. *Adams* (1892), 24 N. S. R. 559.

As it did not appear by the information that it was laid within six months after the commission of the offence, or that the defendant had committed the offence within six months previous to its being laid . . . the magistrate was acting without jurisdiction, and should be prohibited from proceeding further in the matter. *R.* v. *Breen* (1904), 8 C. C. C. 186; see *Dixon* v. *Wells*, 25 Q. B. D. 249, and Paley, 8th ed., p. 60, and cases there cited, and see also *R.* v. *Clark* (1906), 12 C. C. C. 485, and cases there cited, and *In re Fisher* v. *The Village of Carman* (1905), 15 M. L. R. 475.

Where the law requires that a prosecution shall be commenced within a limited time after the commission of the offence, it is sufficient if the information is laid within that time. *R.* v. *Barrett*, 1 Salk. 383.

But when the law provides that a person shall be convicted within a stated time after the commission of the offence, the mere laying of the information within that time will not suffice; the conviction itself must be made within the time limited or it will be void. *R.* v. *Mainwaring*, 29 L. J. M. C. 278.

(3) *The description of the justice who receives the information, shewing his name and authority.*

The information must be laid before a magistrate having jurisdiction over the subject-matter of the charge. *R.* v. *Dowling* (1889), 17 O. R. 698, and see sections 577, 653, 654 of the Code.

One justice is competent to receive it except, as it seems, when the statute on which the information is founded expressly requires it to be laid before two justices. See section 708 of the Code.

The authority of justices of the peace appointed by commission from the Crown is limited to the respective counties therein specified, and that of the magistrates in separate jurisdictions is confined to their respective districts: it is in no case attached to the person so as to be capable of being exerted elsewhere than within those limits.

They can only exercise their powers while they are themselves within the limits of their district. But they may exercise acts that are purely ministerial, such as receiving informations, taking recognizances, etc., elsewhere than within their county. Any judicial act done and performed by them is utterly void unless done within their district, except where it is otherwise specially provided by statute. However, since the decision of RITCHIE, J., in *R.* v. *Ettinger*, that under the provisions of sec. 655 the taking of an information for an indictable offence is a judicial act, a justice should never receive an information outside the limits of his jurisdiction.

If anything is directed to be done, by or before a magistrate or justice of the peace, it shall be done by or before one whose jurisdiction or powers extend to the place where such thing is to be done. *R.* v. *Beemer*, 15 O. R. 266, and see *R.* v. *Fearman*, 22 O. R. 456.

See the chapter on "Jurisdiction of Justices," and cases there cited, *ante*, page 69, and see *Paley, 8th ed., p. 211.*

The Interpretation Act, R. S. C. (1906) cap. 1, sec. 31, contains general provisions as to the jurisdiction of magistrates and justices of the peace as follows:—

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

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

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

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

See sections 584, 653 and 707 of the Code.

(4) *The name of the offender or accused or some other description of him or her.*

If there are several offenders each must be named.

Apart from statutory provisions no man is to escape because his name is not known, and if he refuses to disclose it he may be described as a person whose name is unknown to the magistrate and identified by some fact; for instance that he is personally brought before them by a certain constable.

In like manner the name of the person or persons aggrieved should be accurately stated if known, and if not it should be so stated. *Paley, 8th ed., 211,* and cases there cited.

In summary convictions it is no longer necessary to the validity of the information, and the same shall not be deemed objectionable or insufficient because it "does not contain the name of the person injured, or intended or attempted to be injured." See 723 (*a*) of the Code.

(5) *The date, or time, of the commission of the offence.*

It is not necessary that the time should be laid according to the truth, for if it be stated previously to the finding of the indictment, and the place be within the county, or to the extent of the Court's jurisdiction, a variance between the indictment and evidence in time where the offence was committed will not be material. *2 Inst. 318.*

It is, however, necessary to state the day and year according to the fact where the precise date of a fact is a necessary ingredient in the offence. *R.* v. *Trehearne,* 1 Moo. C. C. 298.

It is not necessary to mention the hour in an indictment (2 Hawk., ch. 25, sec. 76); and if it be stated no exception is allowed to it, *Combe* v. *Pitt,* 3 Burr. 1434, except in cases of burglary, when it must be laid for the purpose of shewing that the offence was committed in the night time.

Though the day, or year, be mistaken in the indictment, yet if the offence were committed in the same county, though at another time, the offender ought to be found guilty. *2 Hale, 179.*

By sec. 128 of "The Criminal Procedure Act," ch. 174, R. S. C. 1886, it was provided that no indictment should be held to be insufficient for omitting to state the time at which any offence was committed, in any case where time is not of the essence of the offence, or for stating the time imperfectly, or for stating the offence to have been committed on a day subsequent to the finding of the indictment or on an impossible day, or on a day that never happened. These provisions were taken from the Imperial Act, 14 & 15 Vic. ch. 100, sec. 24. They were not reenacted in the Code *ipsissima verba,* but are presumably included in and covered by sections 852, 853. Section 855 provides that no count shall be deemed objectionable or insufficient for the reason only that certain statements which are enumerated are not contained in the count. Amongst these we find no reference to time. In fact in none of these sections nor in section 859 relating to particulars, is time referred to. Sections 852, 853, 854 and 855 enact as follows:—

General Provisions as to Counts.

852. Every count of an indictment shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some indictable offence therein specified.

2. Such statement may be made in popular language without any technical averments or any allegations of matter not essential to be proved.

3. Such statement may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence, or in any words sufficient to give the accused notice of the offence with which he is charged.

4. Form 64 affords examples of the manner of stating offences. 55-56 V., c. 29, s. 611.

853. Every count of an indictment shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him, and to identify the transaction referred to: Provided that the absence or insufficiency of such details shall not vitiate the count.

2. A count may refer to any section or subsection of any statute creating the offence charged therein, and in estimating the sufficiency of such count the Court shall have regard to such reference.

3. Every count shall in general apply only to a single transaction. 55-56 V., c. 29, s. 611.

854. A count shall not be deemed objectionable on the ground that it charges in the alternative several different matters, acts or omissions which are stated in the alternative in the enactment describing any indictable offence or declaring the matters, acts or omissions charged to be an indictable offence, or on the ground that it is double or multifarious. 55-56 V., c. 29, s. 612.

855. No count shall be deemed objectionable or insufficient for the reason only,—

(*a*) that it does not contain the name of the person injured, or intended, or attempted to be injured; or,

(*b*) that it does not state who is the owner of any property therein mentioned; or,

(c) that it charges an intent to defraud without naming or describing the person whom it was intended to defraud; or,
(d) that it does not set out any document which may be the subject of the charge; or,
(e) that it does not set out the words used where words used are the subject of the charge; or,
(f) that it does not specify the means by which the offence was committed; or,
(g) that it does not name or describe with precision any person, place or thing; or,
(h) that it does not in cases where the consent of any person, official or authority is required before a prosecution can be instituted, state that such consent has been obtained.

2. No provision contained in this Part as to matters which are not to render any count objectionable or insufficient shall be construed as restricting or limiting in any way the general provisions of sections eight hundred and fifty-two and eight hundred and fifty-three. 55-56 V., c. 29, ss. 613 and 616; 56 V., c. 32, s. 1.

Amongst the "details of circumstances" mentioned in sec. 853, the time should be given in all cases where it is the essence of the offence.

The evidence must support the charge by proof of every material fact, assigning a specific date and place to the offence.

Any variance between the information and the evidence adduced in support thereof as to the parish, or township, in which the offence is alleged to have been committed, is not to be deemed material, provided it be proved to have been committed within the jurisdiction of the justices hearing the information. *Paley, 8th ed., 138, 139.*

On the ground that the magistrate's jurisdiction is limited in local extent the place where the offence was committed should be stated in the conviction as well as proved by the evidence, in order that the complaint may be one over which the magistrate's cognizance extends. The reports of cases applicable to this point, as well as the direction in the statutory form, establish that the facts which form the subject of the conviction must appear to have arisen at some place within the jurisdiction of the convicting magistrate. *Paley, 8th ed., p. 216.*

An application to quash a conviction for selling liquor contrary to sec. 130 of the Liquor Act of Manitoba, was made on the ground that the conviction did not shew where the offence had been committed or that it had been committed in Manitoba. MATHERS, J.: "It is a well known principle that the jurisdiction of an inferior court must appear on the face of the proceedings or it will be presumed to have acted without jurisdiction. *Johnston* v. *O'Reilley* (1906), 12 C. C. C. 219. See *Re Donnelley*, 20 C. P. 165; *R.* v. *Spain* (1889), 18 O. R. 385; *R.* v. *Shepherd* (1902), 6 C. C. C. 463, and 9 Am. & Eng. Encyc. 536.

See also secs. 577, 653 and 665 of the Code and the chapter on jurisdiction, *ante*, page 69.

If a particular locality be an ingredient in the offence charged the information must define the requisite locality by express allegation. *R.* v. *Fletcher*, 13 L. J. N. C. 16.

Courts and magistrates are indeed bound ex officio to take notice of the known divisions of the Kingdom as to whether such a place is within or without the bills of mortality. *R.* v. *Vasey*, Bosc. 138; *R.* v. *St. Maurice*, 16 Q. B. 908. But not so for the local situation and distances of different places in the counties from each other. *Deybell's Case*, 4 B. & A. 243; *R.* v. *Edwards*, 1 East. 279; *Thorne* v. *Jackson*, 3 C. B. 661.

A conviction by a justice of the peace shewed on its face that the offence was "committed at Pincher Creek in the said Province," following the words of the information. The caption in the information and in the conviction mentioned the Province of Alberta. Pincher Creek is in the Province of Alberta, but this was not disclosed in the evidence. *Held*, that judicial notice can be taken of such a fact of local geography and that the conviction was not invalid for want of jurisdiction. *R.* v. *C. P. Ry. Co.* (1908), 8 W. L. R. 825, 1 Alta. L. R. 341, 14 C. C. C. 1.

Where the time of the offence is stated in a summary conviction as being between two dates and includes a period prior to the time limit for which information could be laid, the conviction will be quashed for want of jurisdiction if the evidence does not shew that the offence was in fact committed within the time limit. *Ex parte Hebert* (1908), 15 C. C. C. 165.

An allegation of the place of the offence is a material one and necessary to be proved to confer jurisdiction where the accused was not found or apprehended in the same county in which the trial is to take place. *R.* v. *O'Gorman* (1909), 15 C. C. C. 173.

By section 844 of the Code it is not necessary to state any venue in the body of any indictment, and the district, county or place named in the margin thereof shall be the venue for all the facts stated in the body of the indictment. (2) If local description is required such local description shall be given in the body of the indictment.

The word "venue" in this section means the place where the crime is charged to have been committed. KILLAM, J., *Smitheman* v. *The King* (1905), 9 C. C. C. 17, 35 S. C. R. 490.

By sec. 2, sub-sec. (16) "indictment" and "count" respectively include information and presentment as well as indictment, etc. See *R.* v. *Coolen* (1904), 8 C. C. C. 157.

It would thus appear that stating the place in the margin of the information would be sufficient, and it need not be set out in the body of the information, except as provided by sec. 844 (2), if local description is required.

There are several cases in which local description is required to be set out in the body of the information or indictment, for instance: (*a*) Burglary, *R.* v. *St. Johns,* 9 C. & P. 40; (*b*) Housebreaking, *R.* v. *Bullock,* cited in 1 Moore C. C. 324; (*c*) Stealing in a dwelling-house, *R.* v. *Napper,* 1 Moore, C. C. 44; (*d*) Being found by night armed with intent to break into a dwelling, &c., and to commit felony therein, *R.* v. *Jarrold,* L. & C. 301, 33 L. J. M. C. 258; (*e*) Sacrilege, Arch. C. Prac. 365; (*f*) Riotously demolishing churches, houses, machinery, &c., *R.* v. *Richards,* 1 M. & Rob. 177; (*g*) Maliciously firing a dwelling-house, perhaps an out-barn, but not a stack, *R.* v. *Woodward,* 1 Moore C. C. 323; (*h*) Forcible entry, 2 Len. 186; (*i*) Nuisance to highways, *R.* v. *Steventon,* 1 C. & K. 55; (*j*) Malicious injuries to sea banks, mill dams or other local property, 1 Taylor Ev. 268, 10th edition.

There are also some other exceptions to what may now be considered as the general rules that the statement of time and place in an indictment is unnecessary, and that the omission of it or any mistake respecting it is immaterial. 1. The dates of bills of exchange and other written instruments must be truly stated when necessarily set out. 2. Deeds must be pleaded either according to the date they bear, or to the day on which they were delivered. 3. If any time stated in the indictment is to be proved by matter of record, it must be truly stated. 4. If the precise date of a fact be a necessary ingredient it must be truly stated; see *R.* v. *Trehearne,* 1 Moody C. C. 298. 5. If the statute on which the indictment is framed give the penalty to the poor of the parish in which the offender was committed, the parish must be truly stated. 6. Where a place named is part of the description of a written instrument, or is to be proved by matter of record, it must be truly stated. 7. If the place where the fact occurred be a necessary ingredient in the offence, it must be truly stated, and any variance in these several respects between the indictment and the evidence will be fatal and the defendant must be acquitted unless the variance be amended at the trial.

Where a place is required to be stated as a matter of local description any variance between the description of it in the

indictment and the evidence would, unless amended, be fatal. Thus for instance in indictments for stealing in the dwelling-house, etc., for burglary, for arson, or for forcible entry or the like, if there be any variance between the indictment and evidence in the name of the parish or place where the house is situate, or in any other description given of it, it will be fatal unless amended. See Archibald's Plea. and Evi., 21st ed. (1893), pp. 57, 58. As to variance and amendment of indictments, see secs. 889 to 893 of the Code.

Where the offence is begun in one county and completed in another the venue may be laid in either county. *R.* v. *Murdock*, 8 E. L. & E. R. 577; *R.* v. *Taylor*, 2 Leach 974; Code, sec. 584.

A person summoned but not arrested for trespassing on a railway track is not liable to be tried elsewhere than in the local jurisdiction wherein the offence was committed. *R.* v. *Hughes* (1895), 2 C. C. C. 332.

By section 584 of the Code offences committed on water between two or more magisterial jurisdictions or near the boundary between jurisdiction and in respect to rail or vehicle or vessels passing through several jurisdictions, may be considered as having been committed in any one of such jurisdictions. See *R.* v. *Burke* (1900), 5 C. C. C. 29. *R.* v. *Hughes* (1896), 5 C. C. C. 53.

Special Jurisdiction.

584. For the purposes of this Act,—

(*a*) where the offence is committed in or upon any water, tidal or other, or upon any bridge, between two or more magisterial jurisdictions, such offence may be considered as having been committed in either of such jurisdictions;

(*b*) where the offence is committed on the boundary of two or more magisterial jurisdictions, or within the distance of five hundred yards from any such boundary, or is begun within one magisterial jurisdiction and completed within another, such offence may be considered as having been committed in any one of such jurisdictions;

(*c*) where the offence is committed on or in respect to a mail, or a person conveying a post letter bag, post letter or anything sent by post, or on any person, or in respect of any property, in or upon any vehicle employed in a journey, or on board any vessel employed on any navigable river, canal or other inland navigation, the person accused shall be considered as having committed such offence in any magisterial jurisdiction through which such vehicle or vessel passed in the course of the journey or voyage during which the offence was committed; and where the centre or other part of the road, or any navigable river, canal or other inland navigation along which the vehicle or vessel passed in the course of such journey or voyage, is the boundary of two or more magisterial jurisdictions, the person accused of having committed the offence may be considered as having committed it in any one of such jurisdictions. 55-56 V., c. 29, s. 553; 63-64 V., c. 46, s. 3.

For offences committed on the high seas see sec. 656; or for desertion from His Majesty's service, see sec. 657. These sections will be dealt with later on.

By sec. 591 of the Code it is provided:—

591. Proceedings for the trial and punishment of a person who is not a subject of His Majesty, and who is charged with any offence committed within the jurisdiction of the Admiralty of England, shall not be instituted in any Court in Canada except with the leave of the Governor-General, and on his certificate that it is expedient that such proceedings should be instituted.

The great inland lakes of Canada are within the Admiralty jurisdiction, and offences committed on them are as though committed on the high seas, and any magistrate of this Province (Ontario) has authority to inquire into offences committed on said lakes although in American waters. *R.* v. *Sharpe*, 5 P. R. 135.

By sec. 855 (*h*) of the Code, no count shall be deemed objectionable or insufficient in cases where the consent of any person, official or authority is required before a prosecution can be instituted that it does not state that such consent has been obtained.

(6) *The statement of the offence itself.*

We have seen by sec. 852 of the Code that a count in an indictment will be sufficient if it contains a statement that the accused has committed one of the indictable offences therein specified. Such statement may be made in popular language without any technical averments of matter not essential to be proved and such statement may be in the words of the enactment describing the offence . . . or in any words sufficient to give the accused notice of the offence with which he is charged. See Form 64.

Each count of an indictment must contain a statement of all the essential ingredients which constitute an offence. *R.* v. *Weir* (No. 5) (1900), 3 C. C. C. 499.

Every count shall in general apply only to a single transaction. See sec. 853 (3).

Section 723 of the Code contains the provisions relating to defects and objections in informations, warrants, &c., issued under Part XV. relating to Summary Convictions, as follows:—

DEFECTS AND OBJECTIONS.

723. No information, complaint, warrant, conviction or other proceeding under this Part shall be deemed objectionable or insufficient on any of the following grounds, that is to say,—

(*a*) that it does not contain the name of the person injured, or intended or attempted to be injured; or,

(*b*) that it does not state who is the owner of any property therein mentioned; or,

(*c*) that it does not specify the means by which the offence was committed; or,

(*d*) that it does not name or describe with precision any person or thing.

2. The justice may, if satisfied that it is necessary for a fair trial, order that a particular, further describing such means, person, place or thing, be furnished by the prosecutor.

3. The description of any offence in the words of the Act or any order, by-law, regulation or other document creating the offence, or any similar words, shall be sufficient in law. 63-64 V., c. 46, s. 3.

In the subject under discussion the provisions of sub-section 3 of sec. 723 are immediately material. These provisions of sec. 723 are taken from the Imperial Act, 11 and 12 Vic. ch. 43. Before this Act the information must have contained an exact description of the offence. And now where 11 and 12 Vic. ch. 43 is not applied and the information is recited in the conviction, a direct and positive charge must be stated against the defendant; it does not suffice to state merely facts amounting to a presumption of guilt, however sufficient such facts may be as prima facie evidence against him. Thus where the charge in an information (under the 8 Anne, ch. 18, sec. 3, for selling bread under the size) was that the bread wanting so much weight was bought *in the shop* of the defendant, it was held that the charge ought to have been more direct, viz., of the sale of so much bread *by the defendant*, for though the fact of a servant selling in his master's shop is good evidence against the master, still it is not evidence, and what is evidence merely is not enough to be laid in the information. *R.* v. *Bradley*, 10 Mod. 155. All the facts necessary to support the proceeding must be expressly alleged and not left to be gathered by inference or intendment. The description of the charge must include in express terms every ingredient required by the statute to constitute the offence, for nothing must be left for intendment or inference or argument for helping out the description. *R.* v. *Jukes*, 8 T. R. 536; *R.* v. *Fuller*, 1 Ld. Raym. 509; *R.* v. *Trelawney*, 1 T. R. 22.

A statement of the offence by way of recital will not do. *R.* v. *Crowhurst*, 2 Lord Raym. B. 63. It must not be stated in the alternative or disjunctive. A conviction on the 6 Geo. IV. c. 108, s. 49, for being on board a boat liable to forfeiture, by sec. 3, and having casks attached thereto "of the description used, or intended to be used for the smuggling of spirits," was held bad. *R.* v. *Pain*, 5 B. & C. 251. It must not be stated in an argumentative way. 1 Salk. 373.

The information must not charge more than one offence on the same count, otherwise it will be bad for duplicity. Thus a

conviction under 11 Geo. IV. & Will. IV., c. 64, for keeping a house open for the sale of beer, and selling beer and suffering it to be drunk on the premises at a time of day prohibited by an order of justices, and fining the party charged in a single penalty for "the offence," was held bad as charging more than one distinct offence. *Newman* v. *Bendyshe*, 10 A. & E. 11. See sec. 710 of the Code, sub-sec. 3, "Every information shall be for one offence only, and not for two or more offences."

A person cannot be charged with one offence and convicted of two offences. *R.* v. *Farrar* (1980), 1 Ter. L. R. 308.

If objection is taken before the magistrate all but one charge should be struck out, and evidence heard as to that one only. *R.* v. *Alward* (1894), 25 O. R. 519.

In my opinion it was the duty of the justice when the objection was taken to have amended the information by striking out all but one of the charges and to have heard the evidence upon that charge only. The fact that he overruled the objection and proceeded to hear the evidence upon the three charges, renders the conviction void. Scott, J., in *R.* v. *Austin* (1905), 10 C. C. C. 34.

A conviction for keeping a house of ill-fame on a date named "and on other days and times before that day," is sufficiently certain as to time and does not constitute a charge of a distinct offence upon each of those days. *R.* v. *Williams* (1876), 37 U. C. R. 540; *Onley* v. *Gee*, 30 L. J. M. C. 222.

The information charged that the defendant "within the space of 30 days last past, to wit, on the 30th and 31st day of July, 1892," did unlawfully sell liquor. The Court was divided in opinion as to whether the information charged two several offences, or only the single offence of selling unlawfully within the thirty days; it was held that the defect was one "in substance and form" within the meaning of section 847 (now 724) and did not invalidate an otherwise valid conviction for a single offence. *R.* v. *Hazen* (1893), 20 A. R. 633.

In drawing an information or indictment under sec. 517 of the Code (injuries to railways) it is not sufficient to allege that the accused "did unlawfully in a manner likely to cause danger to valuable property without endangering life or person do an *unlawful act*," without giving some particulars shewing in what the alleged unlawful act consisted; and such an information or indictment is bad as not disclosing any offence. *R.* v. *Porte* (1908), 18 M. L. R. 222, 14 C. C. C. 238.

In the information the charge must be set out in such distinct terms that the accused may know exactly what he has to answer, for the accused cannot be convicted of a different offence from that contained in the information. *Martin* v. *Pridgeon*, 25 L. J. M. C. 179; *Ex p. Hogue*, 3 L. C. R. 94.

A concise and legal description of the offence should be given. *R.* v. *France*, 1 C. C. C. 321.

Now every count of an indictment must contain a statement of all the essential ingredients which together constitute the offence with which an accused person is charged, and any omission of any such essential ingredient renders an indictment or a count ineffectual, as no verdict and judgment can be founded on it, consequently such omission renders the indictment or count null and void. A formal defect or an imperfect averment in an indictment or in a count may be corrected by the Court when an objection is raised, but matters of substance cannot be amended, and essential allegations which have been entirely omitted cannot be added by the Court. WURTELE, J., p. 503, *R.* v. *Weir* (No. 5), 3 C. C. C. 499.

The informant having with him a collie dog, was passing the house of the accused when the accused and his son claimed the dog as theirs and took possession of it. The informant went to a magistrate and stated the facts of the case to him, the magistrate drew an information stating that the accused did on that day "unlawfully have and keep in his possession and take away a black collie dog . . . the property of the complainant," which was sworn to by the informant, and upon it the magistrate issued a search warrant and delivered it to a constable who took the dog out of possession of the accused. The constable then laid an information against the accused charging that he "unlawfully did have and keep in his possession a black collie dog, the property of W. H. W."

Summons was issued and both parties appeared before the magistrate with their counsel and witnesses. The counsel for the accused objected to the information and summons for that they did not charge the accused with any offence, whereupon at the request of the informant and his counsel, the information was amended by inserting after the words "unlawfully did" the words "steal and take away and." After hearing witnesses and the parties the magistrate dismissed the charge. The accused brought an action against the informant for malicious prosecution; at the trial the Judge withdrew the case from the jury and entered a non-suit upon the ground that reasonable and probable cause had been shewn. On appeal the Divisional Court set aside

the judgment and granted a new trial. The defendant (informant) having merely stated the facts of the case to the magistrate and having, as it is admitted, stated them fairly, is not liable in damages for the erroneous view of the magistrate that he had jurisdiction to issue a search warrant, nor for the subsequent action of the magistrate in summoning the plaintiff before him in order apparently to dispose of the question as to the property in the dog. But when the proceedings began before the magistrate the plaintiff's counsel pointed out that no criminal offence was charged, and that the magistrate had, therefore, no jurisdiction; there is evidence that the defendant assented to the alteration in the information which then distinctly charged the plaintiff with the crime of theft and to the prosecution of the plaintiff on that charge . . . . In my opinion the learned Judge should have left the case to the jury, telling them that if they found that the defendant had authorized the charge of theft, and if he honestly believed at the time the proceedings before the magistrate, when the information was amended, that the plaintiff had stolen his dog, they should find for the defendant, otherwise they should find for the plaintiff. STREET, J., pp. 62, 63; *Pring* v. *Wyatt* (1903), 7 C. C. C. 60.

An information charging that the plaintiff did "abstract from the table in the house of John Evans a paper being a valuable security for money," does not charge an indictable offence. *Smith* v. *Evans,* 13 C. P. 60.

An information that "the said Ellen Kennedy has the key of a house in her possession, the property of the complainant's agent," contains nothing which by reasonable intendment can be construed as charging a criminal offence. *Lawrence* v. *Hill,* 10 Ir. C. L. R. 177.

An information which stated that A. B. had neglected to return a gun which had been lent to him and for which he had been repeatedly asked, was not construed as charging criminality. *McDonald* v. *Bulwer,* 11 L. T. 27.

An information charging that the plaintiff "came to my house and sold me a promissory note for the amount of ninety dollars, purporting to be made against J. M. in favour of F. A., and I find out the said note to be a forgery," sufficiently imparts that the plaintiff had uttered the forged note knowing it to be forged, to give the magistrate jurisdiction to issue a warrant of arrest. *Anderson* v. *Wilson,* 20 O. R. 91, and see *Thorpe* v. *Oliver,* 20 U. C. R. 264.

Every indictment must be framed with certainty so as to clearly identify the accusation, and as a general rule the name of the person against whom an offence has been committed should be given and any property which has been the subject of an offence should be described. But in certain cases a crime might go unpunished if it should be impossible to give the name of the party against whom the crime has been committed, and in such cases it is sufficient as an exception to the general rule, for the grand jury to state that it has been committed against a person to the jurors unknown. . . . In the present case the indictment is consequently valid as it was sufficient to allege that the prisoner attempted to steal from the person of an unknown person. WURTELE, J., at pp. 91, 92; *R.* v. *Taylor* (1895), 5 C. C. C. 89.

Both by common law and under art. 64 (now section 72) of the Criminal Code, every attempt to commit a crime is an indictable offence and the indictment sets out clearly an attempt to steal. *Ibid.* p. 93.

An indictment should describe the offence charged with such particularity as will inform the accused of the specific acts for which he is called upon to answer. The indictments merely stated the offence in the language of the section of the Code, and did not set out the particular facts constituting the offence and was quashed. *R.* v. *Beckwith* (1903), 7 C. C. C. 450.

CHAPTER VI

SUMMONS AND WARRANT OF ARREST.

Indictable Offences and Summary Convictions.

653. 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. 55-56 V., c. 29, s. 554.

Under this section of the Code we have to deal with summonses or warrants issued for the purpose of preliminary inquiry in indictable offences. And by sec. 711 of the Code it is provided that the provisions of this part (Part XIII.) and Part XIV. "relating to compelling the appearance of the accused before the justices receiving an information for an indictable offence and the provisions respecting the attendance of witnesses on a preliminary inquiry and the taking of evidence thereon, shall, so far as the same are applicable, except as varied by the sections immediately to follow, apply to any hearing under the provisions of this Part (XV.). Provided that whenever a warrant 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."

We will, therefore, in this chapter consider generally the issuing of warrants or summonses under both parts of the Code and for all offences:—

The distinction between indictable offences and those dealt with under the Summary Conviction Clauses, Part XV., has been referred to previously as defined by sec. 28 of chap. 1, R. S. C., "The Interpretation Act," and sec. 28 of the Code.

Under sec. 653 of the Code it is noticed that the justice may issue his warrant or summons to compel the attendance of the accused person before him.

(1) If the indictable offence has been committed "in any place whatever," triable in the province in which the justice resides, and if such person is or is suspected to be, or resides or is suspected to reside within the limits over which the justice has jurisdiction. It therefore makes no difference where the offence was committed so long as it is within the province in which the justice presides and is triable there. His jurisdiction does not extend outside the province for which he has been commissioned a justice. But the accused must be, or suspected to be, within the limits, or reside, or is suspected to reside, within the limits over which the justices issuing the warrant has jurisdiction at the time the same is issued.

An accused person brought before a justice charged with an offence committed out of the limits of the justice, is dealt with under the provisions of section 665 of the Code. The justice, after hearing both sides, may 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. This, however, is permissive only. See *R.* v. *Bushe* (1900), 5 C. C. C. 29. The justice need not exercise this jurisdiction unless he wishes to, but may at once hand the accused over to the authorities where the crime has been committed.

(2) The second provision of sec. 653 (b) provides for the apprehension of accused persons wherever they may be, who have committed an indictable offence "within" the limits over which the justice has jurisdiction. If such person against whom any warrant has been issued cannot be found within the jurisdiction of the justice who issued the warrant, then such warrant may be endorsed by any justice in Canada within whose jurisdiction the accused is or is suspected to be.

After endorsement the warrant can be executed and the person apprehended whenever found within the territorial division where the warrant has been so endorsed. See sec. 662 as to endorsement of warrants and requirements respecting the same.

By the amendments of 1909 a further provision has been made by adding a sub-section to 662 (4), providing for the apprehension of a person, under a backed warrant, who is in any prison within the province where the warrant is backed.

By the amendment of 1909 to sec. 629 of the Code a search warrant may now be backed and executed outside the jurisdiction of the justice who issued the same.

(3) Sub-sec. (c) covers the cases of receiving stolen property, no matter where unlawfully received, if such property has been

unlawfully obtained within the limits over which the justice has jurisdiction.

(4) If such person has any stolen property in his possession while residing or being within such limits. The issuing of a summons so as to notify the person accused of the accusation against him is founded upon the rules of natural justice, one of which is that the accused should have an opportunity of being heard before he is condemned. *R.* v. *Simpson*, 10 Mod. 379; *R.* v. *Dyer*, 1 Salk. 181.

"The laws of God and man both give a party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man on one occasion that even God himself did not pass sentence upon Adam before he was called upon to make his defence." Per FORTESCUE, J., in *R.* v. *Cambridge*, 1 Stra. 557.

No proposition can be more clearly established "than that a man cannot incur loss of liberty, or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him unless, indeed, the legislature has expressly or impliedly given an authority to act without that necessary preliminary." PARKE, B., p. 171; *Bonaker* v. *Evans*, 16 Q. B. 162.

A magistrate has discretion to refuse the issue of a summons after a *prima facie* case is made out, where, if the offence were proved, he would dismiss the summons at the hearing. *R.* v. *Bros*, 85 L. T. 581; *R.* v. *Kenny*, 86 L. T. 753.

Upon a sufficient information properly laid and where there is no reasonable doubt of their jurisdiction, the magistrates are bound to hear and determine whether they should not issue a summons or a warrant, and proceed to a hearing, and if they refuse to do so they will be compelled by rule or mandamus. *R.* v. *Benn*, 6 T. R. 198.

If the information be for a penalty or the non-payment of money, the justice should in general issue a summons in the first instance before he grants a warrant, unless it is probable that the party will abscond as soon as he hears of the information, or the object of the prosecution will be otherwise defeated. *R.* v. *J. J. Stafford*, 3 A. & E. 425.

The summons should be directed to the party against whom the charge is laid, and should be under the hand and seal of the justice himself who issued it.

The intention of the summons being to afford the person accused the means of making his defence, it should contain the

substance of the charge and fix a day and place for his appearance, allowing a sufficient time for the attendance of himself and his witnesses.

A summons to appear immediately upon the receipt thereof has been thought insufficient in one case. *R.* v. *Mallinson,* 2 Burr. 681.

In another, an objection made to the summons that it was to appear on the same day was only removed by the fact of the defendant having actually appeared, and so waived any irregularity in the notice. *R.* v. *Johnston,* 1 Str..

It is equally necessary that it should be to appear at a place certain, otherwise the party commits no default by not appearing, and the magistrate cannot proceed in the defendant's absence upon a summons defective in these particulars without making himself liable to an action. *R.* v. *Simpson,* 1 Str. 44.

The summons should require the party to appear before the same justice or justices who received the information and issued the summons, or "before such other justice or justices of the peace for the same county as shall then be there, to answer to the said charge and to be further dealt with according to law." See sec. 658 of the Code and form 5.

RECEIVING INFORMATION AND COMPLAINT.

654. Any one who, upon reasonable or probable grounds, believes that any person has committed an indictable offence under this Act may make a complaint or lay an information in writing and under oath before any magistrate or justice having jurisdiction to issue a warrant or summons against such accused person in respect of such offence.

2. Such complaint or information may be in form 3, or to the like effect. 55-56 V., c. 29, s. 558.

655. Upon receiving any such complaint or information the justice shall hear and consider the allegations of the complainant, and the evidence of his witnesses, if any, and if of opinion that a case for so doing is made out, he shall issue a summons or warrant, as the case may be, in manner hereinafter provided."

2. Such justice shall not refuse to issue such summons or warrant only because the alleged offence is one for which an offender may be arrested without warrant. 55-56 V., c. 29, s. 559.

3. The justice shall in connection with such hearing have the same power of procuring the attendance of witnesses and of compelling them to testify as under Part XIV.

4. The evidence of witnesses, if any, at such hearing shall be given upon oath, and the evidence of each witness shall be taken down in writing in the form of a deposition, and, subject to the provisions of section 683, which, so far as applicable, shall apply to such hearing, shall be read over to and signed by the witness and signed by the justice."

The amendments of 1909 are in a measure a re-enactment of sec. 38 of the old Criminal Procedure Act, ch. 174, R. S. C. 1887. It was therein provided, "if it is intended to issue a warrant in

the first instance against the person charged, an information and complaint thereof (a) in writing on the oath or affirmation of the informant, or of *some witness or witnesses* in that behalf, shall be laid before such justice."

The justice is not bound to bring witnesses before him. Where there is an absolute positive statement by the informer at the time of the laying of the information, on oath, before the magistrate issuing the warrant, of the sale or keeping for sale of the liquor, that is sufficient. Per HANNINGTON, J., p. 276, in *Ex parte Madden* (1908), 13 C. C. C. 273.

A sufficient information by competent persons relating to a matter within the magistrate's cognizance gives him jurisdiction irrespective of the truth of the facts contained in it. His authority to act does not depend upon the veracity or falsehood of the statement, or upon the evidence being sufficient to establish the *corpus delecti* brought under investigation, and he will be protected although the information may disclose no legal evidence, or purport to be founded upon inadmissible evidence, or upon mixed allegations of law and fact. *Cave* v. *Mountain*, 1 M. & G. 257, 264, *R.* v. *Rotherham*, 3 Q. B. 776.

As on the one hand the information is not invalidated by reason of the statements being false, so on the other, it cannot be rendered valid by the testimony offered in support of it, for the office of the evidence is to prove, not to supply, a legal charge. *R.* v. *Wheatman*, Doug. 435; *Wiles* v. *Cooper*, 3 A. & E. 524-531; Paley, 8th ed., p. 76.

Upon taking an information the magistrate is not bound to issue a summons or warrant upon the same day, notwithstanding the words "this day" in the statutory forms (Forms 5 and 6), but may take time to consider whether a case is made out for so doing. *R.* v. *Hudgins* (1907), 12 C. C. C. 223.

The magistrate is not bound to issue process under section 655. It is a matter entirely in his discretion and he is not bound to state his reason for refusing, he has simply to express his opinion after considering the complaint.

It was the duty of the police magistrate upon receiving the information, to hear and consider the allegations of the informant, and if of the opinion that cause for issuing a warrant or summons was not made out, to refuse it. And having so acted the Court has no jurisdiction over him. It is his judgment, not mine, nor that of any other Judge or Court which is to be exercised under sec. 559 (now 655) of the Criminal Code. See *Ex p. Lewis* (1888), 21 Q. B. D. 191; *R.* v. *Paynter* (1857), 7 E. & B.,

and *R.* v. *Dayman* (1857), 7 E. & B. 672. Application for mandamus refused. Per MEREDITH, J., p. 125. *Re E. J. Parke* (1899) 3 C. C. C. 122.

The law does not oblige a magistrate to issue his warrant except when in his opinion a case for so doing is made out; he is not obliged to give all his reasons, he has merely to express his opinion. I do not see how it is possible for the Court under the circumstances to say that the magistrate has omitted, neglected, or refused to perform the duty of his office. TAIT, A.C.J., p. 70. *Thompson* v. *Desnoyers* (1899), 3 C. C. C. 68.

A warrant should never issue, except when the charge is of a serious nature, when a summons will be equally effective. *O'Brien* v. *Brabner*, 78 L. T. 409.

It is no objection to a conviction that the complainant has not sworn till after the information to obtain a warrant was filled up and written out by the magistrate, nor does it make any difference that the information was laid by the constable who afterwards arrested the defendant. *Ex p. Basler*, 27 N. B. R. 40.

Where a magistrate has refused a summons on the ground that the information does not disclose an indictable offence, the High Court of Justice has no jurisdiction to review his decision either as to law or as to fact, and therefore in such a case a rule under 11 & 12 Vic. ch. 44, sec. 5, calling upon the magistrate to shew cause why he should not hear and determine the application for a summons, will not be granted. *Ex parte Lewis*, 21 Q. B. D. 191.

Where the complaint is laid upon information and belief and the causes of suspicion are not disclosed therein, the justice should examine the complainant and his witnesses, *ex parte* under oath, touching the grounds of suspicion; and the justice should grant a warrant of arrest only in case he himself entertains the like suspicion as a result of such investigation. *Ex parte Coffon* (1905), 11 C. C. C. 48, and see *Ex parte Boyce*, 24 N. B. R. 347; *R.* v. *McDonald*, 24 N. S. R. 44. *R.* v. *McDonald*, 29 N. S. R. 35; *Weir* v. *Choquet*, 6 Rev. de Jur. 121.

SUMMONS.

658. Every summons issued by a justice under this Act shall be directed to the accused, and shall require him to appear at a time and place to be therein mentioned.

2. Such summons may be in form 5, or to the like effect.

3. No summons shall be signed in blank.

4. Every such summons shall be served by a constable or other peace officer upon the person to whom it is directed, either by delivering it to him personally or, if such person cannot conveniently be met with, by leaving it for him at his last or most usual place of abode with some inmate thereof apparently not under sixteen years of age.

5. The service of any such summons may be proved by the oral testimony of the person affecting the same or by the affidavit of such person purporting to be made before a justice. 55-56 V., c. 29, s. 562.

"The justice is required to hear and consider the allegations in the complaint, or information, and the issue of the summons is dependent upon his opinion as to whether or not a case has been made out. This I think must be held to be a judicial act on the authority of *Hope* v. *Everand*, 17 Q. B. D. 338, and *Lea* v. *Charrington*, 22 Q. B. D. 45 and 272." Per RITCHIE, J., p. 389-90; *R.* v. *Ettinger*, 3 C. C. C. 387.

Only ministerial acts, and not acts which are judicial, could be legally performed in Court on a Sunday under the common law. *R.* v. *Winsor*, 10 Cox C. C. 276, 305, 322.

By sub-sec. 3 of sec. 661 post, a warrant authorized by this Act may be issued and executed on a Sunday, or statutory holiday.

There is no authorization for the issue of a summons on a Sunday, or statutory holiday. Any one found guilty of an indictable offence may be arrested on a Sunday, or statutory holiday. See *Rawlins* v. *Ellis*, 16 M. & W. 172; 29 Car. 2, chap. 7.

If a party has wrongfully escaped he may be retaken on a Sunday without a warrant. *Atkinson* v. *Jameson*, 5 T. R. 25.

But bail cannot take the defendant on a Sunday in order to surrender him. *Brooks* v. *Warren*, 2 Bla. Rep. 1273.

A warrant of arrest to answer charge for an offence punishable on summary conviction may be issued and executed on Sunday. The magistrate on Sunday also accepted bail for the defendant's appearance on another day, and the defendant appeared accordingly. Held, the magistrate has jurisdiction to proceed with the case whether taking bail was invalid or not. *R.* v. *McGillivray* (1907), 13 C. C. C. 113. And see *Ex parte Garland*, 8 C. C. C. 134; and *Ex parte Lorimer* (1907), 12 C. C. C. 339, and *R.* v. *Cavelier* (1896), 1 C. C. C. 134.

No summons shall be signed in blank. This means that the summons must be properly filled up and be complete in every respect before it is signed by the justice.

SERVICE OF THE SUMMONS.

The service of the summons must, if possible, be personal; if the constable cannot serve, or find the person to whom the summons is directed, he can then effect service by leaving it for him (*a*) at his last, or usual place of abode; (*b*) with some inmate thereof apparently not under sixteen years of age.

Where a summons was served upon a wife who carried on business for her husband in his absence, the service was held good service upon the husband although served upon his wife, at his place of business. *R.* v. *McAuley*, 14 O. R. 643.

When the defendant was in the United States from before the date of the information until after the hearing the service on the wife was held insufficient. *Ex p. Fleming,* 14 C. L. T. Occ. N. 106.

When the husband was out of the province and did not return till after the hearing and service was made on his wife at his usual place of abode during such absence, held not good service. Conviction quashed. *Ex p. Donovan,* 32 N. B. R. 374 (1894), 3 C. C. C. 286, and see *Ex parte Simpson,* 37 C. L. T. 510.

The words "last or most usual place of abode" mean present place of abode if the party has any, and the last which he had if he had ceased to have any. *Ex p. Rice,* 19 L. J. M. C. 151. *R.* v. *Higham,* 7 E. & B. 557; *R.* v. *Farmer* (1892), 1 Q. B. 637.

Place of business is in general a place of abode within statutes, providing for service of notice. *Mason* v. *Bibly,* 33 L. J. M. C. 105; *Flower* v. *Allen,* 2 H. & C. 688.

If the service be otherwise than personal the nature of the summons must be explained to the person with whom it is left. *R.* v. *Smith,* L. R. 10 Q. B. 604, per QUAIN, J.

Leaving a copy at the house by delivering the same to a person on the premises apparently residing there, as a servant, will be sufficient. *Ibid.* Such person must not apparently be under sixteen years of age.

Where a copy of a summons was left with an adult person at the defendant's residence, and there was no proof before the magistrate that this adult person was an inmate of the defendant's last or usual place of abode, or that any effort had been made to serve the defendant personally with a copy of the summons, the Court held that this service was insufficient and refused to admit evidence given before the magistrate as to service. Conviction quashed. *Re Barron* (1897), 4 C. C. C. 465.

Where substitutional service is relied upon there must be proof that the person served was an inmate of the defendant's last, or most usual place of abode, and that such person was apparently of the age of sixteen, or upwards. Service on a hotel clerk at the hotel of which the defendant was the proprietor, and in which he usually resided, was held insufficient without proof that the hotel clerk made the hotel his place of residence. *Ex parte Wallace,* 19 C. L. T. 406.

Service on a person proved to be sixteen and over and to be employed at the defendant's residence as a domestic servant, held sufficient. *R.* v. *Chandler,* 14 East. 267.

It must be shewn under oath by affidavit, or oral testimony, that the defendant could not be conveniently met with so as to effect personal service. *R.* v. *Carrigan*, 17 C. L. J. 224.

Where no time is limited by the particular statute the service should be made a reasonable time before the period appointed therein for appearance. *McQueen* v. *Jackson* (1903), 2 K. B. 163.

It is for the justices to decide the question of sufficiency of service, and the Court will not interfere with their decision unless it clearly appears that there was, in fact, no service, or that the defendant was not allowed the interval fixed by the particular statute between the service and the time limited for appearance, or that the justices have mistaken the law as to the kind of service required, and have therefore declined to entertain the matter. *In re Williams*, 21 L. J. M. C. 46. See *Ex parte Haywood*, 15 Q. B. 121; *Robinson* v *Lanaghan*, 2 Exch. 333; *Ex parte Rice Jones*, 19 L. J. M. C. 151 S. C.; *Mitchell* v. *Foster*, 12 A. & E.; *R.* v. *Goodrich Estate*, 19 L. J. Q. B. 405; *Mason* v. *Bibby*, 33 L. J. M. C. 105.

In *Re Williams*, 21 L. J. M. C. 46, ERLE, J., said, "as a general rule service at nine o'clock in the morning of one day to appear at eleven in the morning of the next day was a reasonable service although the defendant was not at home when the summons was left, and did not return till eleven at night."

The summons should be served a reasonable time before the day appointed in it for the defendant's appearance. Two days, or more, would generally be deemed reasonable. *Ibid.*

As to what is a reasonable time, see *R.* v. *Dibblee*, 32 N. B. R. 242, and *Ex parte Hogan*, 32 N. B. R. 247.

An affidavit of service of a copy in the usual form shewing that a copy of the summons was delivered and left with the defendant at his place of residence on a certain day, will be sufficient. *R.* v. *McAulay*, 14 O. R. 643, and see *Ex parte Quirk*, 33 C. L. J. 405.

The affidavit of service of a summons may be taken before any justice of the peace. A commissioner for taking affidavits has no power to swear to the affidavit of service of a summons. *R.* v. *Golding*, 15 N. B. R. 385.

The usual mode of proving service of a summons is for the constable who served the copy to make oath to that effect before the justice who is presiding in the Court on the day the defendant is summoned to appear, but such proof can be made before any justice of the peace residing within the limits.

In *R.* v. *Smith*, L. R. 10 Q. B. 604, COCKBURN, C.J.: said: "To convict an accused person unheard is a dangerous exercise of power, there being an alternative mode of procedure by issuing a warrant to apprehend him. Justices ought to be very cautious how they proceed in the absence of a defendant, unless they have strong grounds for believing that the summons has reached him and that he is wilfully disobeying it." In this case the defendant was a fisherman and went to sea in pursuit of his calling on the 9th March, and on the same day a summons for assault was taken out against him, requiring him to appear to answer the charge upon the 12th. On that day, it having been found that a summons was served on the defendant on the 10th, by leaving it with his mother at his usual place of abode, the justices convicted him in his absence. Before the 9th April he returned from sea and was arrested under the conviction. The Court held that there was no evidence before the justices, that a reasonable time had elapsed between the time of the service of the summons and the day for the hearing the summons and the justices had therefore no jurisdiction to convict.

A summons requiring the defendant to appear immediately, or on the same day he is served, is irregular. *R.* v. *Langford*, 15 O. R. 52.

When a statute fixed no period for delay between the service and the return of the summons it was held that a service on the defendant at his domicile twenty miles from the place where he was by the writ summoned to appear on the following day at 10 o'clock in the forenoon, the service being effected about 3 o'clock in the afternoon of the day preceding, was not reasonable and the plaintiff could not legally proceed. *Ex p. Church*, 14 L. C. R. 318.

Where the constable found the door of the defendant's house fastened and he spoke to the defendant through a closed window explaining the nature of the process, and then placed a copy of the summons under the door informing the defendant of this fact, after this he returned to the window and shewed the original summons to the defendant who said "that will do," held the service was sufficient. *Ex p. Campbell*, 26 N. B. R. 590, and see *R.* v. *McAuley*, 14 O. R. 643.

In effecting a service of a summons under this section of the Code the constable is performing a duty of his office and any assault upon him will render the offender liable for assaulting a constable in the execution of his duty. See section 296 of the Code.

A summons may be issued upon an information before a justice of the peace for an offence punishable on summary conviction, although the information has not been sworn, but before a warrant can issue, there must be an information in writing and under oath. *R.* v. *McDonald* (1896), 3 C. C. C. 287.

A summons was issued on the 20th June, 1905, for the defendant's appearance on 21st June at 10 o'clock in the forenoon, at the Town Court Room, Truro. The defendant was personally served on the 20th in the streets of Truro, where he carried on business, with a copy of the summons. The defendant complained that he was not served a reasonable time before the time appointed for his appearance. He did not appear at the time appointed and the magistrate proceeded in his absence, and made a conviction against the defendant. On a case stated by the magistrate the question of sufficiency of notice was alone discussed. Held, the service was reasonable. *R.* v. *Craig* (1905), 10 C. C. C. 249.

What the defendant in the above case should have done was to have appeared personally, or by counsel, and asked for an adjournment upon the ground that he had not had time to prepare his defence.

When the day of the week and the day of the month mentioned in the return day in a summons issued by a magistrate do not conform, the summons is not valid as for an impossible day, but the day of the month governs. *Ex parte Tompkins* (1906), 12 C. C. C. 552.

It was held by a Divisional Court, FALCONBRIDGE and STREET, JJ., that the procedure of the Criminal Code as to summary conviction applied as well to corporations as to natural persons. Notice of a summons by justices under the summary conviction clauses of the Code may be given in a manner similar to a notice of indictment under sec. 918 of the Code. *R.* v. *Toronto Railway Co.* (1898), 2 C. C. C. 471.

On the other hand the Supreme Court of New Brunswick has held that clauses of the Criminal Code relating to summary convictions do not apply to corporations. *Ex parte Woodstock Electric Light Co.* (1898), 4 C. C. C. 107.

The matter is now set at rest in the amendments to the Code in 1909 by inserting immediately after sec. 720, section 720a, which provides that when the defendant is a corporation the summons may be served upon the mayor, or chief officer of such corporation, or upon the clerk or secretary of the like officer thereof, and may be in the same form as if the defendant was a natural

person. (2) The corporation in such case shall appear by atttorney.

It is to be noted that these provisions as to corporations apply only to offences punishable under the summary conviction sections of the Code, Part XV.

A magistrate has no summary jurisdiction to adjudicate upon, or to hold a preliminary inquiry, respecting an indictable offence against a corporation. The proper proceeding in such cases is by indictment under sec. 916 of the Code. *R.* v. *T. Eaton Co. Ltd.* (1898), 2 C. C. C. 252, and as to indicting corporations see *Union Colliery Co.* v. *Regina* (1900), 4 C. C. C. 400, and 31 S. C. R. 81, and *R.* v. *Great West Laundry Co.* (1900), 3 C. C. C. 514.

To force on the trial of a case without giving the defendant time to prepare his defence is contrary to natural justice and the conviction will be set aside. *R.* v. *Eli*, 10 O. R. 727, and see *R.* v. *McKenzie*, 23 N. S. R. 6-23.

Waiver of Irregularity.

If the defendant actually appears and pleads there is no longer any question upon the sufficiency or regularity of the summons, or its service. *Taylor* v. *Clemson*, 11 Cl. & Fin. 610, 642; *R.* v. *Preston*, 12 Q. B. 825; *R.* v. *Ward*, 3 Cox 279.

Where what is assumed to be done is a nullity there is nothing that can be waived, but where there is an irregularity it can be waived. *Boyle* v. *Sacker*, 39 Ch. Div.; *Fry* v. *Moore*, 23 Q. B. D. 395; *Whiffen* v. *J. J. Malling* (1892), 1 Q. B. 362.

A summons is not avoided by reason of the justice who signed the same dying or ceasing to hold office. Criminal proceedings do not lapse by the death of the informant. *R.* v. *Truelove*, 5 Q. B. D. 336.

Although the defendant has failed to appear after the summons in a summary conviction offence, the information may be amended to correct the date of the offence, but not to charge a different offence. *Ex parte Tomkins, ubi supra; Ex parte Doherty*, 1 C. C. C. C. 84, distinguished.

"A flood of authorities might be cited in support of the proposition that no process is at all necessary when the accused being bodily before the justices the charge is made in his presence and he appears and answers it." *Hawkins, J. R.* v. *Hughes*, 4 Q. B. D. 626.

"But whether the summons was good or bad I imagine it is now law sufficiently well established that a person who appears

in answer to a summons and takes his trial and chances of acquittal, is considered as having waived any objection to the summons . . . ' The defendant having appeared to the summons he was exactly in the same position as if he had been most properly, legally and technically summoned without the slightest irregularity." MORRIS, C.J., in *R.* v. *J. J. of Carrick-on-Suir*, 16 Cox 571.

Where the justices have jurisdiction to hear the information and no objection is taken at the time to any informality in the form of the information, the justices have jurisdiction to convict. *R.* v. *Bradley*, 63 L. J. M. C. 183.

The non-attendance of the party does not authorize a judgment without a due examination of the facts upon oath with the same formality as if he were present and made defence.

It appears to be doubtful whether it is competent to justices to convict upon a plea of guilty by a solicitor in the absence of the defendant. *R.* v. *Aves*, 24 L. T. 64.

Where a special Act provided that in all prosecutions under it particulars of the offence of which the seller is accused shall be stated in the summons, the omissions of such particlars from the summons does not deprive the justices of jurisdiction, but merely entitles the defendant to an adjournment of the hearing in the event of the justices being satisfied that he is prejudiced by such omission. *Neal* v. *Devenish* (1894), 1 Q. B. 544.

If the defendant appears any irregularity in the summons, or even the want of a summons altogether, becomes immaterial "unless the statute creating the offence imposes the necessity of some such step." *R.* v. *Shaw*, 34 L. J. M. C. 169; *R.* v. *Stone*, 1 East 649.

Where a defendant having appeared in answer to a summons before justices during the hearing of the case forcibly leaves the Court, the justices may adjourn, and at the adjourned sitting, if the defendant does not appear, may in his absence convict him of the offence with the commission of which he was charged. *R.* v. *J. J. Carrick-on-Suir*, 16 Cox 571.

But a defendant who has been summoned from without the jurisdiction of the justices, for an offence that has taken place also out of their jurisdiction, does not by his appearance on the summons cure the defect of want of jurisdiction. *Johnson* v. *Colam*, L. R. 10 Q. B. 544, 44 L. J. M. C.

An objection raised on a motion to quash the conviction that the information was taken before only one justice of the peace

was overruled, it being held to have been waived by the defendant's appearance. *R.* v. *Clarke*, 20 O. R. 642.

The defendant being present in Court on a charge of drunkenness which was disposed of, was, without any summons having been issued, charged with another offence, namely, selling liquor without a license. The information was read over to him and he pleaded not guilty, and evidence for the prosecution having been given he asked for and obtained an enlargement till the next day, when on his not appearing, he was convicted in his absence and fined $50 and costs. Held, that under these circumstances the issuing of a summons was waived. *R.* v. *Clarke*, 19 O. R. 605.

When the information was not sworn at the place and time stated the defendant's appearance and objection only on other grounds was held to waive the defect. *Ex parte Sonier* (1896), 2 C. C. C. 121; and see section 668 of the Code.

An irregular adjournment of summary proceedings before a magistrate is waived by the accused afterwards appearing for trial without taking objection thereto and adducing evidence. *R.* v. *Miller* (1909), 15 C. C. C. 87, and see *R.* v. *Hazen*, 20 A. R. 633, and *R.* v. *Heffernan*, 13 O. R. 616.

Unless dispensed with by statute or waived, there must be some previous summons or notice to the party charged, of the hearing of the charge against him. *R.* v. *Dyer*, 6 Mod. 41; *R.* v. *University of Cambridge*, 8 Mod. 154; *Harper* v. *Carr*, 7 T. R. 270; *R.* v. *Beun*, 6 T. R. 198.

This may be waived by appearing, pleading and defending. But asking an adjournment for the purpose of procuring evidence is not necessarily a waiver. *R.* v. *Vrooman* (1886), 3 M. L. R. 509.

Prohibition will be granted against a justice to prevent his proceeding under a second summons after the quashing of a conviction for want of service of the first summons, or of appearance thereunder. *R.* v. *Zickrick* (1897), 5 C. C. C. 380.

The proof of the service of the summons may be proved by the oral testimony of the person affecting the same, or by the affidavit of such person purporting to be made before a justice. Sub-section 5, sec. 658 of the Code.

It is important that the constable serving the summons should attend to prove the service, for if the person served does not appear the magistrate would have no right either to issue a warrant, or to proceed otherwise in the absence of the defendant without proof that he was duly served. *R.* v. *McEachren*, 13 N. S. R. 321; see sec. 660 (5) of the Code.

Proof by a policeman that he served a copy of the summons on the defendant personally, and that the defendant resided in the town in which prosecution was begun, and process issued, is sufficient to shew a service within the magistrate's jurisdiction. *Moore* v. *Sharkey*, 26 N. B. R. 7.

A magistrate has no jurisdiction to proceed in the absence of the accused in a summary proceeding without evidence that the summons was served a reasonable time before the hearing. *Re O'Brien* (1905), 10 C. C. C. 142. See *R.* v. *Craig* (1905), 10 C. C. C. 249.

NON-APPEARANCE OF THE ACCUSED.

In case the service of the summons has been proved and the accused does not appear, or when it appears the summons cannot be served, a warrant in form 7 may issue. Section 660 (5) of the Code.

The person charged with committing an indictable offence must be before the justice either voluntarily, by summons, or after being apprehended by warrant, before the justice can proceed to inquire into the matters charged against such persons. See sec. 668 of the Code.

The justice cannot proceed with a preliminary inquiry unless the accused person is present at the hearing. By sec. 682 of the Code the evidence for the prosecution "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."

"There never has been a time since the abolition of the Star Chamber system of trial, when a person accused of an indictable offence in an English Court has not been entitled to hear the evidence brought against him, and to cross-examine the witnesses, and no evasion, or variation, of that rule has ever been sanctioned when brought before the attention of the Superior Court." Per HALL, J., in *R.* v. *Lepine* (1900), 4 C. C. C. 145, and see *R.* v. *Traynor* (1901), 4 C. C. C. 410, and *R.* v. *Watts*, 33 L. J. M. C. 63.

In respect to offences punishable on summary conviction the procedure is different. In summary convictions if the accused does not appear at the time and place appointed by the summons and 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. Or the justice, if he thinks fit, may issue his warrant as provided in secs. 659 and 660, and adjourn the hearing till the defendant is apprehended. See sec. 718 of the Code.

The authority of the magistrate to determine the case in the absence of the defendant, in default of his appearance, must be restricted to the particular charge in the original information. *Ex parte Doherty* (1894), 1 C. C. C. 84.

The hearing may be adjourned from time to time although the accused be not present, provided the adjournments are made in the presence and hearing of his solicitor or agent. *Proctor* v. *Parker* (1899), 3 C. C. C. 374.

A magistrate has no jurisdiction to issue a warrant of arrest in the first instance under the summary conviction clauses of the Code (Part XV.) upon an information pledging the informant's suspicion and belief, but not stating the grounds therefor, without first examining the informant or his witnesses as to the grounds of suspicion. *Ex parte Grundy* (1906), 12 C. C. C. 65.

Where this objection was taken on the hearing but overruled the conviction was quashed. *Ibid.*

A warrant of arrest to answer a charge for offence punishable on summary conviction may be issued and executed on a Sunday. *Re McGillivray* (1907), 13 C. C. C. 113.

Where the summons issued under the summary conviction procedure is for an offence different from that set out in the information, the magistrate acquires no jurisdiction over the accused on his failure to attend on the return of the summons, and a conviction made on behalf of appearance will be set aside. Sections 669 and 724 of the Code do not apply when jurisdiction has not been properly acquired over the accused. *Ex parte Melanson* (1908), 13 C. C. C. 251.

Warrant of Arrest.

659. The warrant issued by a justice for the apprehension of the person against whom an information or complaint has been laid as provided in section six hundred and fifty-four may be in form 6, or to the like effect.

2. No such warrant shall be signed in blank. 55-56 V., c. 29, s. 563.

660. Every warrant shall be under the hand and seal of the justice issuing the same, and may be directed, either to any constable by name, or to such constable and all other constables within the territorial jurisdiction of the justice issuing it, or generally to all constables within such jurisdiction.

2. The warrant shall state shortly the offence for which it is issued, and shall name or otherwise describe the offender, and it shall order the officer or officers to whom it is directed to apprehend the offender and bring him before the justice, or justices issuing the warrant, or before some other justice or justices, to answer to the charge contained in the information or complaint, and to be further dealt with according to law.

3. It shall not be necessary to make such warrant returnable at any particular time, but the same shall remain in force until it is executed.

4. The fact that a summons has been issued shall not prevent any justice from issuing a warrant at any time before or after the time mentioned in the summons for the appearance of the accused.

5. In case the service of the summons has been proved and the accused does not appear, or when it appears that the summons cannot be served, a warrant in form 7 may issue. 55-56 V., c. 29, s. 563.

We will consider sections 659 and 660 together. We have seen that by the provisions of sections 654 and 655 of the Code, a prerequisite to a justice issuing a warrant is that he shall have received and taken an information or complaint in writing and under oath, and the justice should hear and consider the allegations of the complainant and the evidence of his witnesses if any, and if he is of opinion that a case for so doing is made out, he shall then issue a summons or warrant as the case may be. The question whether a summons or a warrant should issue in the first instance, is one entirely in the discretion of the justice. He will be guided altogether by circumstances, taking into consideration the nature of the offence charged, the facts alleged and bearing in mind that the object to be attained is to secure the attendance of the accused.

It is to be noted, (*a*) that the warrant must not be signed in blank; (*b*) it must be under the hand and seal of the justice issuing the same; (*c*) it 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; (*d*) the warrant shall state shortly the offence for which it is issued—in this respect it should state the offence as set out in the information; (*e*) it shall name or otherwise describe the offender, this is important; (*f*) it shall order the officer, or officers, to whom it is directed, to apprehend the offender and bring him before the justice or justices issuing the warrant, or before some other justice or justices to answer the charge contained in the information or complaint.

As the person apprehended is to answer the charge contained in the information, or complaint, this makes it almost imperative that the offence stated shortly in the warrant should follow the description of the offence as set out in the information; (*g*) it shall not be necessary to make the warrant returnable at any particular time; it will remain in force until executed.

The fact of a summons having issued will not prevent a warrant being issued at any time either before, or after, the time mentioned in the summons for the appearance of the accused. Section 660 (4) of the Code.

In case the service of the summons has been proved and the accused does not appear, or if it appears that the summons cannot be served, a warrant in form 7 may then issue. *Ibid.* (5)

It is safe, but perhaps not necessary, in the body of the warrant, to shew the place where it is made, yet it seems necessary to set forth the county in the margin at least if it be not set forth in the body. *2 Hawkins, ch. 13, sec. 23.*

Upon looking at forms 6 and 7 it will be noticed that the venue is stated in the margin.

The warrant ought regularly to mention the name of the party to be attached, and must not be left in general, or with blanks to be filled up by the party afterwards. *2 Hale 114; Dalt. ch.* 169.

If the name of the party to be arrested be unknown the warrant may be issued against him by the best description the nature of the case will allow, as "the body of a man whose name is unknown, but whose person is well known and who is employed as the driver of cattle and wears a badge No. 573." *1 Hale 577.*

A warrant to apprehend Hood (omitting the christian name) of B. in the parish of F., by "whatsoever name he may be called or known, the son of Samuel Hood to answer, &c.," was held defective as omitting the christian name, assigning no reason for the omission nor giving any distinguishing particulars of the individual, and the conviction of the prisoner because he had resisted was held wrong. *R.* v. *Hood,* 1 M. & M. 281.

If there be a mistake in the name of the supposed offender, or if the name of the officer be inserted without authority, and after the issuing of the warrant, or if the officer exceeds the limits of his authority and be killed, this will amount to no more than manslaughter in the person whose liberty is thus invaded. *Cole* v. *Hindson,* 6 T. R. 236, *Foster 312.*

But if the warrant be filled up by the magistrate before he issues it, though after he signed it, the proceeding is regular and killing the officer endeavouring to arrest the party, is murder. *R.* v. *Inhabitants of Winwick,* 8 T. R. 455. This would hardly seem to be the present law in view of the positive enactment in sub-sec 2 of sec. 659 of the Code, which provides that no warrant shall be signed in blank. The words however are: "No such warrant;" the warrant referred to is "the warrant issued by a jus-

tice," as provided in the first sub-section. So a fair construction would be that no warrant shall be issued that is signed in blank, to be filled up after issue; but that the justice might sign the warrant before he fills it up, provided he does not issue it.

The safe plan always to pursue is to fill up the warrant before signing it.

A general warrant upon a complaint of robbery to apprehend all persons suspected and to bring them before a justice hath been ruled void, and false imprisonment is against him that issues such a warrant. *1 Hale 580; 2 Hale 112.* So a general warrant to apprehend the authors, printers and publishers of a libel without naming them is illegal. *Marcy* v. *Leach,* 1 Bla. Rep. 555; 19 Howell's State Trials, 1002.

The warrant should state the specific offence with which the party is charged. *Caudle* v. *Seymour,* 1 Gale & D. 889; 1 A. & Ellis N. S. 889 S. C.

The following warrant was in the above case held to be bad: "I do hereby in Her Majesty's name command you and every of you, upon sight hereof, to apprehend and bring before me, one of Her Majesty's justices of the peace, the body of (the plaintiff) of whom you shall have notice, to answer to all such matters and things as on Her Majesty's behalf shall be objected against him on oath by Mary Ann Warner of, &c., for an assault committed upon her upon the 24th instant."

The warrant need not be returnable at a place certain. *4 Black Com. 291.*

It ought to set forth the year and day wherein it is made, that, in an action brought upon arrest by virtue of it, it may appear to have been prior to such arrest and also in case where the statute directing the prosecution to be within such a time, that it may appear that the prosecution is commenced within such time limited. *2 Hawk. ch. 13, sec. 22.* And it is in general better to state the place where the warrant is made. *Dalt. ch. 169.*

If forms 6 and 7 of the Code are strictly followed these requirements will be met with.

In case of a warrant by more than one justice, in determining whether they shall issue it, the justices must, it seems, be acting together, but it is not necessary that all of them should be present when each executes it. *Battye* v. *Gresley,* 8 East 319.

A warrant to arrest for embezzlement should shew that the defendant was, or had been, a clerk or servant, or was, or had been, employed in that capacity, and that he had received property said to have been embezzled by him, or that it has been delivered

to him, or taken into his possession for, or in the name or on account of his master or employer. *McGregor* v. *Scarlet,* 7 P. R. 20 (see sec. 359 of the Code).

A warrant issued by a justice founded on an information which discloses no criminal offence cannot be sustained by proof that there was in fact parol evidence on oath given which conveyed a criminal charge. *Lawrenson* v. *Hill,* 10 Ir. C. L. R. 177.

A written and sworn information is essential before a warrant can be legally issued. *Friel* v. *Ferguson* (1865), 16 U. C. C. P. 584.

Where the warrant omitted to state the fact that the information on which it was issued was not taken on oath, whereas as a fact it had been so taken, held at most an irregularity which would be covered by sec. 669. *Kingstone* v. *Wallace* (1886), 25 N. B. R. 573.

A justice who illegally issues a warrant without having received a sworn information in respect of the charge is liable in trespass for the arrest made thereunder, and he cannot justify the commanding of the constable to make the arrest by shewing that he the justice had a reasonable suspicion that an offence had been committed. *McGuiness* v. *Dafoe* (1896), 3 C. C. C. 139, and see *R.* v. *McDonald* (1896), 3 C. C. C. 287.

As to a peace officer making an arrest on suspicion without warrant. See sec. 30 of the Code.

If the accused is in fact present before the magistrate and the magistrate has jurisdiction over the person and offence he may lawfully proceed with the hearing of the charge notwithstanding that the warrant on which the accused was arrested was executed by a person not legally qualified for that purpose. *Ex parte Giberson* (1898), 4 C. C. C. 537; and see *R.* v. *Hughes,* 8 Q. B. D. 614; and see *R.* v. *McLean* (1901), 5 C. C. C. 67.

An objection that a warrant of arrest was unstamped under provincial tariff, held objection waived as not being taken on preliminary hearing, too late when made for the first time on hearing of speedy trial. *R.* v. *Rodrigue* (1907), 13 C. C. C. 249.

Law stamps are not payable by the Crown in criminal proceedings before a district magistrate in Quebec. *Ibid.*

Where there is an absolute and positive statement by the informant in the sworn information of the commission of the offence by the accused, a warrant of arrest may be issued without an examination of the informant or of his witnesses. *Ex parte Madden* (1908), 13 C. C. C. 273.

Failure to serve at the time of arrest a copy of the warrant to apprehend does not go to the jurisdiction of the magistrate, and is not a ground for setting aside a conviction. *Ibid.* ***Ex parte Coffon,*** 11 C. C. C. 48, distinguished.

The above relates to warrants issued in offences under summary conviction clauses.

A justice of the peace who issues a warrant of arrest without inquiring into the grounds which the complainant had to suspect the accused, becomes liable towards the latter under the laws of Quebec, when the complaint was not justified by any serious reasonable or probable ground. *Murfina* v. *Sauvè* (1901), 6 C. C. C. 275; and see *R.* v. *Lizotte,* 10 C. C. C. 316.

It is not essential that a magistrate should add to his signature to a warrant the full designation of his office and the name of the district for which he was appointed, if such is recited in the body of the warrant. *R.* v. *Lee* (1909), 14 C. C. C. 322.

A warrant of arrest for perjury is sufficient under sec. 1152 of the Code if it charges that the accused committed perjury by swearing that he did not do a particular act specified without alleging therein that the statement was sworn with intent to mislead the Court. *Ibid.*

Prisoner was arrested in Halifax by police department of that city on request by telegram from Chief of Detectives, Montreal. The telegram stated that a warrant had been sworn out in Montreal for Lee Chu's arrest. On *habeas corpus* proceedings the Chief of Halifax Police returned a warrant issued in Montreal by Bazin, P.M., of that city, the warrant being endorsed by Geo. H. Fielding, stipendiary magistrate for Halifax. "I am not I think called upon to say whether the arrest was lawful in the first instance. I think I cannot discharge the prisoner when a warrant duly executed is returned to me as the cause of his detention with the endorsement by the stipendiary magistrate of the city authorizing its execution." RUSSELL, J., at p. 327. *Ibid.* For arrest on telegram, see *R.* v. *Cloutier* (1898), 2 C. C. C. 43.

As all warrants of arrest are directed to a constable or other peace officers or constables, they alone can execute the same. A warrant cannot be directed to any one except a constable or peace officer, and no one else can legally execute the same by arresting the accused. Any constable or peace officer to whom a warrant is directed is bound to execute the same.

A peace officer executing a warrant of arrest is exempt from criminal responsibility therefor by section 29 of the Code "if he

in good faith and without culpable ignorance and negligence believes that the warrant or process is good in law." Ignorance of the law in such a case can be an excuse. It shall be a question of law whether the facts of which there is evidence may or may not constitute culpable ignorance or negligence in the belief of the person executing the warrant that the same is good in law. See sec. 29 of the Code, and *Gaul* v. *Ellice* (1902), 6 C. C. C. 15.

Where a warrant is directed to a certain person, as for instance the constable of A, that is the constable of such division, it cannot be lawfully executed by any other person. *R.* v. *Saunders*, L. R. 1 C. C. 75; see also *Symonds* v. *Kurtz*, 53 J. P. 727, and see *Jones* v. *Ross*, 3 U. C. R. 328.

EXECUTION OF THE WARRANT.

661. Every such warrant may be executed by arresting the accused wherever he is found in the territorial jurisdiction of the justice by whom it is issued, or, in the case of fresh pursuit, at any place in an adjoining territorial division within seven miles of the border of the first-mentioned division.

2. Every such warrant may be executed by any constable named therein or by any one of the constables to whom it is directed, whether or not the place in which it is to be executed is within the place for which he is a constable.

3. Every warrant authorized by this Act may be issued and executed on a Sunday or statutory holiday. 55-56 V., c. 29, s. 564.

The officer to whom a warrant is directed and delivered ought with all speed and secrecy to find out the party and then to execute this warrant. *Dalt. ch. 169.*

When the party named in the warrant employs others to assist him he must be so near as to be acting in the arrest in order to render it legal. *Blatch* v. *Archer*, Cowper 66.

An arrest in the night is good both at the suit of the Queen, and of the subject, else the party may escape. *9 Rep. 66.*

By sub-sec. 3 of sec. 661 a warrant may be both issued and executed on a Sunday, or statutory holiday.

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

A person, it seems, may be twice apprehended under the same warrant if the purposes of the warrant have not been effected. *Dickenson* v. *Brown*, Peake's Rep. 234, and *R.* v. *O'Hearon* (No. 2), (1901), 5 C. C. C. 531; and see *Ex parte Doherty* (1899), 5 C. C. C. 94.

Bare words will not constitute an arrest without laying hold of the party or otherwise restraining his liberty. *Jenner* v.

Sparkles, 1 Salk. 79. See cases collected in 1 Chit. Arch. Prac. 7th ed., 532.

The directions of the warrant must be strictly observed, or the party executing it will not be justified in his acts, and may be treated as a trespasser, as if the warrant be to arrest A and he arrest B. *2 Hawk. ch. 13, sec. 31. Price* v. *Messenger*, 2 B. & P. 162; *Bell* v. *Oakley*, 2 M. & Sel. 261.

A person sworn and commonly known and acting within his own precinct need not shew his warrant, but he ought to acquaint the party with the substance of it. *2 Hawk. ch. 13, sec. 28.*

But by sec. 40 of the Code, it is the duty of everyone executing any process or warrant to have it with him and to produce it if required.

And where practical the officer should give notice of the process or warrant under which he acts, or of the cause of the arrest. *Ibid.*

An officer giveth sufficient notice what he is when he saith to the party, "I arrest you in the Queen's name," and in such case the party at his peril ought to obey him, though he knoweth him not to be an officer; and if he have no lawful warrant the party grieved may have his action for false imprisonment. *Dalt. 169.*

The doctrine that even a known officer is not obliged to shew his authority when demanded was considered as dangerous because it may affect the party criminally in the event of resistance, and if homicide ensues the legality of the warrant enters materially into the merits of the question. And Lord Kenyon observed that he did not think a person is bound to take it for granted that another who says he has a warrant against him without producing it speaks the truth. *Hall* v. *Riche*, 8 T. R. 188.

A constable went to the plaintiff's house with a warrant for his arrest, shewed him the warrant, allowed him to take a copy of it and then he accompanied the constable to the magistrate, who after examining him, dismissed the plaintiff. In an action against the magistrate for assault and false imprisonment a verdict was given for the defendant (the magistrate). Upon shewing cause against a rule for setting aside the verdict, MANSFIELD, C.J., held that as the plaintiff went voluntarily before the magistrate, the warrant being made no other use of than as a summons, this was not arrest and therefore the verdict was right. *Arrowsmith* v. *Le Mesurier*, 2 B. & P. 211, and see *Russen* v. *Lucas*, 1 C. & P. 153.

And if the constable come unto the party and require him to go before the justice that is no arrest or imprisonment. *Dalt. ch. 170.*

If the constable act out of his precinct, or be not sworn and commonly known, he must shew his warrant if demanded. *2 Hawk. ch. 13, sec. 28.*

Otherwise the party may make resistance and needs not to obey it. *Dalt. ch. 169.*

In no case is a constable required to part with the warrant out of his own possession, for that is his justification. *R.* v. *Wyatt,* 2 Ld. Ray. 1196.

Where a constable tells a person given in to his charge that he must go with him before a magistrate, and the person goes quietly and without force being used, it is an arrest. See *Chinn* v. *Morris,* 2 C. & P. 361; *Joyce* v. *Perrin,* 3 U. C. O. S. 300, and see *Pocock* v. *Moore,* Ry. & M. 321, and *Forsyth* v. *Gordon,* 32 C. L. J. 499.

No one should be handcuffed unless from the nature of the offence and the supposed character of the prisoner, or for violent resistance to arrest, or attempt to escape, or for some other sufficient reason the constable has reasonable apprehension that the prisoner would otherwise escape, or that there is danger that he might do so. *Wright* v. *Court,* 4 B. & C. 596; *Griffin* v. *Coleman,* 4 H. & N. 265; *Hamilton* v. *Massie,* 18 O. R. 585.

The party arrested should not be treated with any unnecessary harshness beyond what is actually necessary for his safe custody. *Ibid.*

It is well to note here the provisions of sec. 39 and sec. 66 of the Code as follows:—

39. Every one executing any sentence, warrant or process, or in making any arrest, and every one lawfully assisting him, is justified, or protected from criminal responsibility, as the case may be, in using such force as may be necessary to overcome any force used in resisting such execution or arrest, unless the sentence, process or warrant can be executed or the arrest effected by reasonable means in a less violent manner. 55-56 V., c. 29, s. 31.

While force may be used in executing a warrant it must be only such force as may be necessary to overcome any force used in resisting the execution on arrest. Such force must not be excessive.

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

As to the case of breaking open doors in order to apprehend offenders it is to be observed that the law doth never allow of such extremities but in cases of necessity, and therefore no one can justify breaking open another's doors to make an arrest unless he first signify to those in the house the cause of his coming, and request them to give admittance. *2 Hawk. ch. 14, sec. 1; Lannock* v. *Brown,* 2 B. & Ald. 592.

No precise words are required in a case of this kind; it is sufficient that the party had notice that the officer cometh not as a man trespasser, but claiming to act under a proper authority, provided that the officer has a legal warrant (*Fost.* 137).

But where a person authorized to arrest another who is sheltered in a house is denied quietly to enter it in order to take him, it seems generally to be agreed that he may justify breaking open the doors in the following instances:—

(1) Upon a *capias* grounded upon an indictment for any crime whatsoever; or upon a *capias* from the Chancery or King's Bench to compel a man to find securities for the peace, or good behaviour, or even upon a warrant from a justice of the peace for such purpose. *2 Hawk. ch. 14, sec. 3.*

Where a party has been guilty of contempt of Court and process has been issued against him for it, outer doors may be broken open to execute it. *Seymour Case,* Cro. Eliz. 909, 5 Rep. 92; and see *Burdett* v. *Abbott,* 14 East. 157.

(2) When one known to have committed a treason or felony, or to have given another a dangerous wound, is pursued either with or without a warrant by a constable, or a private person. But where one lies under a probable suspicion only and is not indicated, it seems the better opinion at this day that no one can justify the breaking open doors in order to apprehend him. *Hawk. ch. 14, sec. 7; Hale 91; Coke 4 East. 177.*

But upon a warrant for probable cause of suspicion of felony the person to whom such warrant is directed may break open doors to take the person suspected, if upon demand he will not surrender himself, as well as if there had been an express and positive charge against him; and so (he says) hath the common practice obtained notwithstanding the contrary opinion of Lord Coke: for in such case the process is for the King and therefore a *non omittas* is implied. *1 Hale 580, 583; 2 Hale 117.*

And as he may break open such person's own house, so much more may he break open the house of another to take him; for so the sheriff may do so upon a civil process; but then he must at his peril see that the felon be there; for if the felon be not

there, he is a trespasser to the stranger whose house it is. *2 Hale 177, Seymour Case,* 5 Rep. 92.

But it seems that he that arrests as a private man barely upon suspicion of felony cannot justify the breaking open of doors to arrest the party suspected, but he doth it at his peril, that is if in truth he be a felon, then it is justifiable, but if he be innocent, but upon a reasonable cause suspected, it is not justifiable. *1 Hale 82.*

But a constable in such case may justify; another reason of the difference is this: because in the former case it is but a thing permitted to private persons to arrest for suspicion, and they are not punishable if they omit it; and, therefore, they cannot break open doors; but in case of a constable, he is punishable if he omit it on complaint. *2 Hale 92.*

And in general an officer upon any warrant from a justice either for the peace or good behaviour, or in any case where the King is party, may by force break open a man's house to arrest the offender. *Dalt. ch. 169.*

It is justifiable for a private person to break and enter the house of another and imprison his person in order to prevent him murdering his wife. *Handcock* v. *Baker,* 2 B. & P. 260.

But a private person is not justified on arresting or giving in charge of a policeman without a warrant, a party who has been engaged in an affray unless the affray is still continuing, or there is reasonable ground for apprehending that he intends to renew it. *Price* v. *Seeley* (1843), 10 C. & Fin. (III.) 28.

A private person cannot of his own authority arrest another for a breach of the peace after it is over. *3 Hawk. 164;* see sec. 46 of the Code.

As to persons other than peace officers making an arrest, or assisting in the same, see the following sections of the Code: 28, 29, 31, 32, 33, 34 and 36.

By section 36 everyone is justified in arresting without warrant any person whom he finds by night committing any offence. And see further secs. 37, 42, 43, 44, 45, 46.

As noted previously it is the duty of every one executing a warrant to have it with him and to produce it if required, and this is governed by sec. 40 of the Code as follows:—

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

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

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

A man's house is his castle for safety and repose to himself and his family; but if a stranger who is not of the family upon a permit taketh refuge in the house of another, this rule doth not extend to *him*, it is not *his* castle, he cannot claim the benefit of sanctuary therein. *Fost. 320*, and *Seymour Case, supra.*

And it is always to be remembered that this rule must be confined to the case of arrest upon process in civil suits only; for where a felony hath been committed, or a dangerous wound given, or even where a minister of justice cometh armed with process founded upon a breach of the peace, the party's own house is no sanctuary for him; in these cases the justice which is due to the public must supersede every pretence of private inconvenience. *Fost. 320.*

In all these cases, if an officer, to serve any warrant, enter into a house, the doors being open, and then the doors are locked upon him, he may break them open in order to regain his liberty. *2 Hawk. 14, sec. 11.*

If the party arrested escapes the officer upon fresh pursuit may take him again and again, so often as he escapeth, although he were out of view, in that he shall fly into another town or country. *Dalt. ch. 169.*

No one shall break open any building to search for a deserter without a warrant for the purpose. See sec. 657 of the Code. *supra.*

As provided by sec. 661, in case of fresh pursuit the accused may be arrested on the warrant at any place in an adjoining territorial division within seven miles of the border of the first mentioned division.

The "first mentioned division" is the territorial division in which the warrant issued.

By sec. 2, sub-sec. 36 of the Code, a territorial division is defined as follows:—

36. "Territorial division" includes any county, union of counties, township, city, town, parish or other judicial division or place to which the context applies.

The seven miles mentioned are measured, not by the nearest practicable road, but by a straight line from point to point on the horizontal plane "as the crow flies." *Lake* v. *Butler*, 24 L. J. Q. B. N. S. 273; *R.* v. *Walden*, 9 Q. B. 76.

Warrants may not only be executed on Sundays, but upon statutory holidays.

"Holiday" is defined by sec. 34, sub-sec. 11 of "The Interpretation Act," R. S. C. ch. 1, as follows:—

11. "Holiday" includes Sundays, New Year's Day, the Epiphany, Good Friday, the Ascension, All Saints' Day, Conception Day, Easter Monday, Ash Wednesday, Christmas Day, the birthday or the day fixed by proclamation for the celebration of the birthday of the reigning sovereign, Victoria Day, Dominion Day, the first Monday in September, designated *Labour Day*, and any day appointed by proclamation for a general fast or thanksgiving.

"Dominion Day" is the first of July, and if that date falls on a Sunday then the second of July.

"Victoria Day" is the 24th of May, and if that day falls on a Sunday then the twenty-fifth of May.

A preliminary enquiry cannot be held on a statutory holiday. *R.* v. *Murray* (1897), 1 C. C. C. 452.

And such an enquiry cannot be held on a Sunday. *R.* v. *Cavelier* (1896), 1 C. C. C. 134; *Re Cooper*, 5 P. R. 256; and see *Ex parte Garland*, 8 C. C. C. 385; and see *R.* v. *Gillivray* (1907), 13 C. C. C. 113.

Under the common law only ministerial acts and not judicial acts could be legally performed on Sunday; it was a *dies non juridicus*. *2 Coke, 264-65; R.* v. *Winsor* (1866), 10 Cox 276.

As a warrant can only issue after an information in writing and under oath has been received by a justice, it therefore follows that an information or complaint may be taken and laid upon a Sunday or statutory holiday. As it has been held in *R.* v. *Ettinger, supra*, that an information is a "judicial act," this means a considerable departure from the common law, under which ministerial acts could only be performed on Sunday.

Backing the Warrant.

662. If the person against whom any warrant has been issued cannot be found within the jurisdiction of the justice by whom the same was issued, but is or is suspected to be in any other part of Canada, any justice within whose jurisdiction he is or is suspected to be, upon proof being made on oath or affirmation of the handwriting of the justice who issued the same, shall make an endorsement on the warrant, signed with his name, authorizing the execution thereof within his jurisdiction.

2. Such endorsement shall be sufficient authority to the person bringing such warrant, and to all other persons to whom the same was originally directed, and also to all constables of the territorial division where the warrant has been so endorsed, to execute the same therein and to carry the person against whom the warrant issued when apprehended, before the justice who issued the warrant, or before some other justice for the same territorial division.

3. Such endorsement may be in form 8. 55-56 V., c. 29, s. 565.

FORM 8.

(Section 662.)

Endorsement in Backing a Warrant.

Canada,
Province of
County of

Whereas proof upon oath has this day been made before me , a justice of the peace in and for the said county of , that the name of J. S. to the within warrant subscribed, is of the handwriting of the justice of the peace within mentioned: I do therefore hereby authorize W. T., who brings to me this warrant, and all other persons to whom this warrant was originally directed, or by whom it may be lawfully executed, and also all peace officers of the said county of , to execute the same within the said last mentioned county.

Given under my hand, this day of , in the year , at , in the county aforesaid.

J. L.,
J. P., (name of county.)

The backing of a warrant is a purely ministerial act, and the justice who issued the warrant is responsible for an arrest under it, although the warrant is backed by another justice and executed in another county. *Jones* v. *Grace,* 17 O. R. 681.

The endorsements on the warrant must shew that the signature of the justice issuing the warrant was proved to the justice backing it. *Reid* v. *Maybee,* 31 U. C. C. P. 348.

An arrest made in an outside county before the warrant is backed is not legal, but if this defect is remedied the accused may be held or re-arrested on a warrant so endorsed without his being first set free from the original custody. *Southwick* v. *Hare* (1893), 24 O. R. 528.

"If the warrant itself be defective, if it be not enforced by a proper officer, or if it be executed out of the jurisdiction without being backed by the proper magistrate . . . the party may legally resist the attempt to apprehend him and even third persons may lawfully interfere to oppose it, doing no more than is necessary for that purpose." *Chitty's Crim. Law,* vol. I., p. 60.

"For 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." LORD ELLENBORO in *King* v. *Owen,* 5 East 308.

By the Criminal Code Amendment Act of 1909, sub-section 4 was added to sec. 662, making provision for the execution of warrants against persons who are confined in any prison within the

province and bringing them before justices on preliminary inquiry as follows:—

"4. If the person against whom such warrant has been issued is then confined for some other cause in any prison within the province then, upon application to the judge of any superior, county or district court, and upon production to him of the warrant with an affidavit setting forth the above facts, such judge if he is satisfied that the ends of justice require it, may make an order in writing addressed to the warden or keeper of such prison, or to the sheriff or other person having the custody of the prisoner, to bring up the body of such person before the justice who is holding the preliminary inquiry, from day to day, as may be necessary for the purposes of such inquiry, and such warden, keeper, sheriff or other person, upon being paid his reasonable charges in that behalf, shall obey such order." 8 9 E. VII., c. 9.

A warrant issued for the apprehension of a person charged with an indictable offence may be executed anywhere in Canada provided the warrant is backed in accordance with the provisions of this section. If a person against whom the warrant is issued cannot be found in the county in which it has been backed, the warrant may be backed again in any other county and so on from county to county and province to province until the offender is apprehended. And if the offender has not been so apprehended and returns to the county in which the warrant was originally issued he may still be apprehended there on the original warrant notwithstanding such backings.

It is to be remembered that by the provisions of sub-sec. 3 of sec. 660 of the Code—*supra*—a warrant is not returnable at any particular time, and it remains in force until it is executed.

Offences Committed on the Seas.

656. 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 4 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.

The Admiralty jurisdiction of England extends over British vessels when in the river of foreign territory where the tide ebbs and flows, and where great ships go. All persons, whatever their nationality, while on board British vessels on the high seas, or in foreign rivers where the tide ebbs and flows, are likewise amenable to British law. *R.* v. *Carr*, 52 L. J. M. C. 12.

The great inland lakes of Canada are within the admiralty jurisdiction, and offences committed on them are as though com-

mitted on the high seas, and therefore any magistrate has authority to inquire into offences committed on the lakes, though in American waters. *R.* v. *Sharpe,* 5 P. R. 135.

Arrest of Suspected Deserters.

657. 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.

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.

3. 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.

Procedure After Arrest.

If the arrest be by virtue of a warrant, when the officer hath made the arrest he is forthwith to bring the party according to the direction of the warrant. *Wright* v. *Cant,* 4 B. & C. 596.

If it be to bring the party before the justice who granted the warrant specially then the officer is bound to bring him before the same justice; but if the warrant be to bring him before any justice of the county then it is in the election of the officer to bring him before what justice he thinks fit and not in the election of the prisoner. *Foster's Case,* 5 Rep. 59b; *1 Hale 582, 2 Hale 112.*

But if the time be unseasonable, as in or near the night whereby he cannot attend the justice, or if there be danger of a present rescue, or if the party be sick, he may secure him in the stocks(?) or in a house till the next day or such time as it may be reasonable to bring him. *2 Hale 120.*

And when he hath brought him to the justice yet he is in law still in his custody till the justice discharge, or bail, or commit him. *Ibid.*

But it is said the constable is not bound to return the warrant itself, but may keep it for his own justification, in case he should be questioned for what he had done, but only to return what he had done upon it. *R.* v. *Wyatt,* 2 Ld. Raym. 1196; 1 East P. C. 319.

The procedure under the Code when an arrest is made upon an endorsed or backed warrant is provided for by sec. 663, as follows:

663. If the prosecutor or any of the witnesses for the prosecution are in the territorial division where such person has been apprehended upon a warrant endorsed as provided in the last preceding section, the constable or other person or persons who have apprehended him may, if so directed by the justice endorsing the warrant, take him before such justice, or before some other justice for the same territorial division; and the said justice may thereupon take the examination of such prosecutor or witnesses, and proceed in every respect as if he had himself issued the warrant. 55-56 V., c. 29, s. 566.

In other cases where an arrest has been made, the procedure is provided by sec. 664.

664. When any person is arrested upon a warrant he shall, except in the case provided for in the last preceding section, be brought as soon as is practicable before the justice who issued it or some other justice for the same territorial division, and such justice shall either proceed with the inquiry or postpone it to a future time, in which latter case he shall either commit the accused person to proper custody or admit him to bail, or permit him to be at large on his own recognizance, according to the provisions hereinafter contained. 55-56 V., c. 29, s. 567.

By section 664 of the Code we have seen that when any person is arrested on a warrant, except in cases provided for by section 663, he shall be brought as soon as practicable before the justice who issued the warrant or some other justice for the same territorial division. The justice before whom the offender is brought shall either proceed with the inquiry or postpone it to a future day. If a postponement is granted the accused shall either be committed to proper custody, or be admitted to bail, or be permitted to be at large on his own recognizance.

Offences Committed out of Jurisdiction.

Where an accused person is brought before any justice charged with an offence committed out of the limits of the jurisdiction of such justice the proceedings are governed by sections 665 and 666 of the Code, as follows:—

665. The preliminary inquiry may be held either by one justice or by more justices than one.

2. If the accused person is brought before any justice charged with an offence committed out of the limits of the jurisdiction of such justice, such justice may, after hearing both sides, order the accused at any stage of the inquiry to be taken by a constable before some justice having jurisdiction in the place where the offence was committed.

3. The justice so ordering shall give a warrant for that purpose to a constable, which may be in form 9, or to the like effect, and shall deliver to such constable the information, depositions and recognizances, if any, taken under the provisions of this Act, to be delivered to the justice before whom the accused person is to be taken, and such depositions and recognizances shall be treated to all intents as if they had been taken by the last-mentioned justice. 55-56 V., c. 29, s. 557.

666. Upon the constable delivering to the justice the warrant, information, if any, depositions and recognizances, and proving on oath or affirmation, the handwriting of the justice who has subscribed the same, such justice, before whom the accused is produced, shall thereupon furnish such constable with a receipt or certificate in form 10, of his having received from him the body of the accused, together with the warrant, information, if any, depositions and recognizances, and of his having proved to him, upon oath or affirmation, the handwriting of the justice who issued the warrant.

CORONER'S INQUISITION.

667. Every coroner, upon any inquisition taken before him whereby any person is charged with manslaughter or murder, shall, if the person or persons, or either of them, affected by the verdict or finding is not already charged with the said offence before a magistrate or justice, by warrant under his hand, direct that such person be taken into custody and be conveyed, with all convenient speed, before a magistrate or justice; or such coroner may direct such person to enter into a recognizance before him, with or without a surety or sureties, to appear before a magistrate or justice.

2. In either case, it shall be the duty of the coroner to transmit to such magistrate or justice the depositions taken before him in the matter.

3. Upon any such person being brought or appearing before any such magistrate or justice, he shall proceed in all respects as though such person had been brought or had appeared before him upon a warrant or summons. 55-56 V., c. 29, s. 568.

In general it is the most important duty of a coroner to take inquests of unnatural and sudden deaths, and this whether they arise by accident, *felo de se*, or in prison.

When it happens that any person comes to an unnatural death the township shall give notice thereof to the coroner. Otherwise if the body be interred before he come, the township shall be amerced. *1 Burns' Justice, 1211.*

We are only concerned here with the duties of a coroner as to the apprehension of any person who is charged upon any inquisition before him with manslaughter or murder.

If the person affected by the verdict or finding of the coroner's jury is not already charged with the offence before a magistrate or justice, it is then the duty of the coroner to issue his warrant directing such person to be taken into custody and be conveyed before a magistrate, or justice; or the coroner may accept bail from the person for his appearance before the magistrate, or justice.

(2) In either case it is the duty of the coroner to transmit the depositions taken before him to the magistrate.

(3) Upon any such person so arrested or on bail being brought or appearing before any magistrate, or justice, the latter shall proceed in all respects as if the person had appeared before him upon a warrant or summons, that is proceed to hold a preliminary inquiry as provided in Part XIV.

By sec. 940 of the Code it is provided that no one shall be tried upon any coroner's inquisition.

A person who has been charged by a coroner's inquisition with being responsible for the death of another shall be proceeded against as provided in sec. 667 now under discussion. And he shall be entitled to a preliminary inquiry before a magistrate or justice, and it is not until after such accused person has been committed for trial under the provisions of Part XIV., and by a warrant of commitment under sec. 690, that such person shall be held for trial for the offence with which he was charged by the coroner's inquisition. And then before he is tried the grand jury must find a true bill against him.

Under the common law the practice was as follows:—

Where the inquisition contains the subject matter of accusation of any person it is equivalent to the finding of a grand jury and such person may be tried and convicted on it. *2 Hale 61.*

And if an indictment be found for the same offence and the defendant be acquitted on the one, he must be arraigned on the other, to which he may, however, effectually plead his former acquittal. *2 Hale 61.*

It is the practice to prefer an indictment to the grand jury and to try the party accused upon both proceedings at the same time, by which means the form of a second trial is unnecessary. *R.* v. *Culliford,* 1 Salk. 382.

As stated above this mode of procedure no longer obtains, and the verdict or finding of a coroner's jury has no other effect than to justify the procedure provided for by sec. 667 of the Code.

A coroner's inquest cannot legally be held upon a Sunday. *Re Cooper,* 5 P. R. 256.

Although the proceedings were not thereby made illegal, yet the Court declared it inexcusable carelessness upon the part of the coroner when the depositions, the finding of the jury and the signatures of the jury and the coroner were all written in pencil. *R.* v. *Winegarner,* 17 O. R. 208.

The inquisition of a coroner is defective if it does not identify the body of the deceased as that of the person with whose death the prisoner is charged; if the evidence shews a felony the prisoner may be recommitted. *R.* v. *Berry,* 9 P. R. 123.

A coroner has jurisdiction to hold and is justified in holding an inquest if he honestly believes information which has been given him to be true, which, if true, would make it his duty to hold such inquest. *R.* v. *Stephenson,* 13 Q. B. D.; 15 Cox 379.

See the statutes of the different provinces relating to coroners.

To burn a dead body instead of burying it is not a misdemeanour unless it is so done as to amount to a public nuisance. If an inquest ought to be held upon a dead body it is a misdemeanour so to dispose of the body as to prevent the coroner from holding an inquest. *R.* v. *Price,* 12 Q. B. D. 247.

A coroner's inquisition is a Court of Record and a Criminal Court. *R.* v. *Hammond* (1898), 1 C. C. C. 373; 29 O. R. 211; *Thomas* v. *Churton* (1862), 2 B. & S. 475.

A witness before a Coroner's Court is compelled under the Canada Evidence Act to answer incriminating questions, such Court being a Criminal Court and a Court of Record, and proceedings before the coroner are within the jurisdiction of the Federal Parliament, although no one is there charged with the offence of causing the death of the deceased. *Ibid.;* and see *R.* v. *Hereford* (1860), 3 E. & E. 115; *Black, vol. 4, 274.*

A coroner is not a "justice" within the meaning of sec. 687 (now 999) of the Code, which provides for the use of the depositions taken on a preliminary inquiry upon the trial of an accused person, where the person who gave evidence is dead, or too ill to travel or absent from Canada. *R.* v. *Graham* (1898), 2 C. C. C. 388.

The signed deposition of a witness at a coroner's inquest may be used on the cross-examination of the witness at the trial for the purpose of contradiction. *R.* v. *Laurin* (No. 3) (1902), 5 C. C. C. 548.

A Coroner's Court is a Court of Record and the coroner is a Judge of a Court of Record. A coroner has power himself to summon the coroner's jury by a mere verbal direction to the jurors. A post mortem examination may be directed by the coroner and proceeded with under his direction before the impanelling of the jury. *Davidson* v. *Garrett* (1899), 5 C. C. C. 280.

Coroner summoning a grand jury by order of the Court. *R.* v. *McGuire* (1898), 4 C. C. C. 12.

A coroner who is a necessary witness by reason of having attended the deceased professionally as a physician during the illness from which death resulted is disqualified from holding the inquest. *Re Haney* v. *Mead* (1898), 34 C. L. J. 330.

CHAPTER VII.

PRELIMINARY INQUIRY.

Part XIV. of the Criminal Code.

In the previous chapter we dealt with matters of procedure relating to and governing the attendance of persons accused of indictable offences before a justice, either by summons or by warrant.

We will now proceed to discuss the nature of the proceedings when the accused is before the justice. Such persons may so come either of their own volition, or by summons, or by being arrested on a warrant. It is then the duty of the magistrate to inquire into the matters charged against such persons. For this purpose he may summons witnesses to attend before him, and if they neglect to so attend, after being summoned, upon proof being made to him on oath of the service of the summons and that the person summoned is likely to give material evidence, the justice may issue a warrant to bring such person before him. This warrant may be executed anywhere within the territorial jurisdiction of the justice, or if necessary it can be backed, or endorsed, as provided by section 662, and executed anywhere in the province out of such jurisdiction.

And if the justice is satisfied by evidence on oath that any person within the province likely to give evidence, either for the prosecution or for the accused, will not attend to give evidence without being compelled to do so, then instead of issuing a summons he may issue a warrant in the first instance. This warrant can be executed anywhere within the jurisdiction of the justice, or if necessary be backed, or endorsed, as provided by sec. 662.

Any person residing anywhere in Canada out of the province, and who is not in the province, who is likely to give material evidence, either for the prosecution or for the defence, may be subpœnaed to attend the inquiry, such subpœna being obtained by order of a Judge. And if anyone served with such subpœna fails to attend the hearing and to obey the subpœna, he may, upon proof of the service of the subpœna, and his not offering any just excuse for his non-attendance, be arrested on a warrant issued for that purpose, and this warrant can be executed anywhere in Canada upon being properly backed or endorsed.

A justice has wide powers in holding a preliminary inquiry; he may regulate the course of the inquiry in any way which may appear to him desirable, and which is not inconsistent with the provisions of the Code.

PART XIV.

PROCEDURE ON APPEARANCE OF ACCUSED BEFORE JUSTICE.

Jurisdiction.

668. When any person accused of an indictable offence is before a justice, whether voluntarily or upon summons, or after being apprehended with or without warrant, or while in custody for the same or any other offence, the justice shall proceed to inquire into the matters charged against such person in the manner hereinafter directed. 55-56 V., c. 29, s. 577.

The justice cannot proceed in the absence of the accused even though he be represented by counsel or solicitor. *R.* v. *Lepine* (1900), 4 C. C. C. 145; *R.* v. *Commins*, 4 D. & R. M. C.; *R.* v. *Paine*, 5 Mod. 163.

If the magistrate on an application for process erroneously holds that the offence is not indictable, and that he therefore has no jurisdiction to hold a preliminary inquiry in respect thereof, a mandamus will lie to compel him to do so. *R.* v. *Meehan* (1902), 5 C. C. C. 312.

"If the magistrate has not exercised his jurisdiction this Court will compel him to do so, for parties have a right to his exercise of that jurisdiction, and he has no right to refuse to do so. But if it has been exercised however erroneously, this Court, which is not a Court of Appeal from the magistrate, has no power whatever to correct or review his exercise of his jurisdiction. LORD COLERIDGE, in *Ex parte McMahon*, 48 J. P. 70.

"There is a broad distinction between magistrates declaring to exercise jurisdiction, and exercising it honestly but erroneously." Per MATTHEW, J., *Ibid.*

If the duty is of a judicial character its performance will be enforced only where it has been refused, and not where it has been improperly performed. *R.* v. *Middlesex JJ.* (1839), 9 A. & E. 540, at p. 546; *R.* v. *Richards* (1851), 20 L. J. Q. B. 351.

Where the magistrate conducted the hearing as a preliminary inquiry, binding over all the witnesses to give evidence in a superior Court, and at the conclusion of the examination of the wit-

nesses for the prosecution addressed the defendant as provided by sec. 591 (now sec. 684), then after hearing the evidence for the defence convicted the defendant of common assault and fined him. Held, that the conviction was bad. *Ex parte Duffy* (1901), 8 C. C. C. 277.

The above is an example of a magistrate mixing up a summary trial with a preliminary inquiry.

In a preliminary inquiry there are three courses for a justice to follow:—

(1) If after he has heard the whole of the evidence he is of the opinion that no sufficient case is made out to put the accused upon his trial, he should discharge him. See section 687 of the Code.

(2) If on the other hand the justice thinks that the evidence is sufficient to put the accused on his trial he should then commit him for trial by a warrant of commitment. See sec. 690 of the Code.

(3) If the offence charged is not treason or murder, or an offence under secs. 76 to 86 inclusive of the Code, and in the opinion of the justice the evidence adduced is 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 with some other justice, or a magistrate alone, may admit the accused to bail upon his producing sureties to the satisfaction of the justice, sufficient to ensure his appearance at his trial. This recognizance is Form 28. See sec. 696 of the Code.

Magistrates or justices have no authority to grant bail for a person committed for trial under sec. 690. Bail in such cases can alone be granted by a Judge of a Supreme Court, or of a County Court. See sec. 700 of the Code.

"Much latitude is contemplated in the course of this preliminary investigation, both in the way of varying and amending, and in the reception of evidence, so that the scope of the inquiry may be enlarged, and matters touched upon beyond the scope of the original charge. This consideration has been overlooked in regard to many of the cases cited. I mean the wide distinction which exists between the magistrate who has plenary jurisdiction to try the offence in a summary way, and the justice who is dealing with a preliminary inquiry in respect to an indictable offence which is to be passed in to another tribunal for trial. The distinction is adverted to very clearly by LORD RUSSELL, C.J., in *The Queen* v. *Brown* (1895), 1 Q. B. 119 at pp. 126 and 127." BOYD, C., p. 91, in *R.* v. *Phillips* (1906), 11 C. C. C. 89.

The refusal of a magistrate holding a preliminary inquiry to order particulars in a general charge of "conspiracy to defraud the public" is not a ground for prohibition. *Ibid.*

An information laid in general terms charging that the accused did in specified years "conspire with others whose names are unknown, by deceit, falsehood and other fraudulent means to defraud the public," sufficiently states an offence under the Code, sec. 394 (now sec. 444), to give jurisdiction to a magistrate to hold a preliminary inquiry. *Ibid.* As to particulars see secs. 859, 860 and 863 of the Code.

The magistrate who holds a preliminary inquiry on a charge preferred may commit an accused person, on any one or more charges disclosed by the evidence. *R.* v. *Mooney* (1905), 11 C. C. C. 333.

"There is no law which prohibits a justice making the preliminary investigation from committing the prisoner for trial for several different indictable offences the commission of which is disclosed by the evidence. He is then merely putting the prisoner on his trial. His duty is to inquire into the matters charged against the prisoner. After the inquiry has been made the justice should discharge the prisoner if the evidence does not justify his further detention. But if the evidence is sufficient to put him on trial the justice is obliged to commit him for trial. The evidence may justify him to commit on the original charge made in the information, or some one, or more, indictable offences." MADORE, J., at p. 334. *Ibid.*

Magistrates conducting a preliminary inquiry must not on its conclusion convict the accused of a lesser offence over which they may have summary jurisdiction, although such offence was proved by the evidence adduced. *R.* v. *Mines* (1894), 1 C. C. C. 217.

It appears that in this case, *R.* v. *Mines*, the magistrates' jurisdiction was founded upon an information charging the defendant with shooting with intent to murder. The magistrates were thus charged with the duty of investigating that offence, and committing for trial if they found a *prima facie* case had been proved. Not finding sufficient evidence to warrant this course they adopted the expedient of seeking to punish the defendant in a short way as if they were conducting a summary trial, and convicted the defendant of "procuring a revolver with intent thereby unlawfully to do injury to one J. S."

BOYD, C., in delivering judgment said, p. 218: "The jurisdiction invoked was to commit for trial; they of their own motion

changed this at the close of the case into jurisdiction to convict. That is an unwarrantable course; to convict on a charge not formulated, as to which the evidence was not addressed, upon which the defendant was not called to make his defence, and as to which no complaint was laid before them." *Ibid.*

"An accused person may upon a preliminary inquiry waive the preliminary examination into the charge, and consent to be committed for trial without any deposition being taken."

This statement is from the head-note in *R.* v. *Gibson* (1896), 3 C. C. C. 451. There is nothing in either the judgment of MEAGHER, J., or GRAHAM, E.J., which would warrant this conclusion, or its being laid down as a legal proposition. GRAHAM, E.J., does not even refer to the point. All that MEAGHER, J., says at page 461, is, "Nor is there any provision enabling an accused party to waive the preliminary examination and consent to be committed for trial. Such a course would, I suppose, be open to the accused."

It is humbly submitted that such a course is not open and would be entirely opposed both to the letter and the spirit of the enactments in the Code relating to preliminary inquiry. The introduction of such a loose, unauthorized, mode of conducting an inquiry into an indictable offence is to be deprecated.

It is entirely foreign to British ideas of criminal investigation and it is to be hoped will never be tolerated. As there is no provision in the Code enabling an accused party to waive the preliminary inquiry, it is evident that such a provision was purposely omitted.

Section 668 of the Code specifically provides that when any person accused of an indicable offence is before a justice . . . "the justice shall proceed to inquire into the matters charged against such person in the manner hereinafter directed." One need not stop to consider the directions as contained in the sections of the Code immediately following 668 as to enlarging the hearing, and so on, but pass on to section 682, where it is laid down that "where 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." This is sufficiently imperative. Such evidence shall be given upon oath, and in the presence of the accused, and shall be taken down in writing and read over and signed, when not taken in shorthand.

The justice is not only required to take the evidence, but before he can either discharge the accused or commit him for trial, he must base or form his opinion, in the former case, "upon the

whole of the evidence," and in the latter where he "thinks that the evidence is sufficient" to put the accused on his trial. (*Vide* sec. 690).

One can trace these provisions of the Code, Part XIV., relating to preliminary inquiries, back to the Imperial Act *11 and 12 Vic. ch. 42*, where these provisions had their origin, and nothing will be found to warrant any such suggestion, either by decided cases, or by statutory enactment, that "an accused person can waive examination of witnesses upon a preliminary inquiry."

The provisions of the Code relating to preliminary investigation into indictable offences are very necessary and most essential to the proper administration of justice, and it is highly important that magistrates should avoid any departure from the same.

The evidence in a preliminary inquiry must be taken in the presence of the justice. Where a magistrate swore the witnesses, and they were then taken into another room and their evidence in chief taken in shorthand by a stenographer, and not in the presence of the magistrate, such depositions were illegally taken, although the counsel for the accused had the opportunity of afterwards cross-examining the witnesses before the magistrate. *R.* v. *Traynor* (1901), 4 C. C. C. 410.

It is not competent for magistrates, where an information charges an offence which they have no jurisdiction to try summarily, to convert the charge into one which they have jurisdiction to try, and to so try it on the original information. *R.* v. *Dungey* (1901), 5 C. C. C. 38.

Where a magistrate is applied to for process in respect of an indictable offence which cannot be dealt with summarily, no fees can be demanded by him therefor. *R.* v. *Meehan* (*No. 2*) (1902), 5 C. C. C. 312.

A person discharged by a justice on a preliminary inquiry for an indictable offence may be summoned again before the same, or another justice, on a fresh information for the same offence. If the accused is committed for trial on the second inquiry the depositions on the first, when accused is discharged, need not be transmitted to the clerk of the peace. *R.* v. *Hannay* (1905), 11 C. C. C. 23.

There is no doubt that a charge dismissed by one magistrate may be heard by another. MARTIN, J., p. 25, *ibid.*

A preliminary inquiry is, of course, as its name implies, not final in its nature. *R.* v. *Guerin*, 16 Cox 596-601.

At common law a dismissal by magistrates is not tantamount to an acquittal upon indictment. *R.* v. *Waters*, 12 Cox 390.

But under the Code in summary trials for indictable offences under Part XVI., by secs. 790 and 791, an acquittal is a bar to a charge upon a fresh information for the same offence. *R.* v. *Cameron* (1901), 4 C. C. C. 385.

Magistrates and justices should bear in mind the difference in holding a preliminary inquiry under Part XIV., and in trying a case under Parts XV. and XVI. of the Code.

Under Part XIV. the proceedings are of the nature of an inquiry, to see whether the accused should be tried for the offence charged against him before another tribunal. In such an inquiry, they are not concerned with the guilt or innocence of the accused, and are not called upon to make any pronouncement respecting the same. If in the opinion of the justice a sufficient case is not made out to put the accused on trial, then he should be discharged. On the other hand, if of the opinion that the evidence is sufficient to put the accused upon his trial, then the justice shall commit him for trial by a warrant of commitment.

Under Parts XV. and XVI., the justice is to ascertain from the evidence as to whether or not the accused is guilty of the offence with which he is charged.

Under Part XV., the justice having heard what each party has to say, and the witnesses and evidence adduced, shall consider the whole matter and determine the same, and convict or make an order against the defendant, or dismiss the information or complaint as the case may be. This means a final determination of the matter so far as the justice is concerned. See sec. 726.

If the justice dismisses the information he may, when so required, make an order of dismissal and give the defendant a certificate. This certificate when produced shall without further proof be a bar to any subsequent information or complaint for the same matter against the defendant. See sec. 730 of the Code.

Under Part XVI., the proceedings, so far as the final results are concerned, are identical with a trial upon an indictment before a judge and jury, except that the magistrate acts as both judge and jury. If he finds the charge proved, he then convicts the accused of the offence with which he is charged, and commits the accused to gaol or otherwise penalizes him as he sees fit. And such conviction shall have the same effect as a conviction upon an indictment for the same offence. See sec. 791. If the magistrate finds the offence not proved, he shall dismiss the charge, and

make out and deliver to the person charged a certificate of dismissal. See sec. 790.

And by sec. 792, 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.

"It has never been contended that the discharge of a person accused of a felony committed within the province when brought up before a justice of the peace for examination, whether such charge should be attributable to the infirmity of the judgment of the justice, or the insufficiency of the evidence adduced before him, operates as a bar to the same person being again brought before another justice and committed upon the same charge, upon the same or different evidence." GWYNNE, J., in *R.* v. *Morton*, 19 C. P. 14-22, 23, 26.

On a preliminary inquiry before two justices, if one decides in favor of committal and the other to dismiss, the preferable course is to adjourn the inquiry, to be heard *de novo* after calling in other justices.

The disagreement of two justices holding a preliminary inquiry is not equivalent to a dismissal of the charge although no adjournment is made and nothing further is done in the prosecution.

The justices might have been compelled by mandamus to make an order whereby the preliminary inquiry would be terminated either by a dismissal of the charge, or the commital of the accused for trial. *Durand* v. *Forrester* (1908), 15 C. C. C. 125; 18 Man. R. 444, and see *Kinnis* v. *Groves*, 67 L. J. Q. B. 584, and *Bagg* v. *Colquhoun* (1904), 1 K. B. 556, and *Baxter* v. *Gordon*, 13 O. L. R. 598.

When an accused person is summoned to appear before a justice of the peace having jurisdiction to conduct the proceedings without associate justices, other justices of the peace are not entitled to interfere in the preliminary inquiry, or to be associated with the summoning justice except at the latter's request. *R.* v. *McRae* (1897), 2 C. C. C. 49.

If it is made to appear to the justice that there is a reasonable necessity for more specific information to identify the transaction referred to in the complaint, the justice may on the application of the accused order that further and better particulars should be given, but such an order is entirely in the discretion of the justice. *R.* v. *France* (1898), 1 C. C. C. 321, and see *R.* v. *Stapylton*, 8 Cox, 69.

The accused upon arrest shewed signs of insanity. The magistrate upon being advised of this fact by the police officers adjourned the preliminary hearing and directed her commitment for the purpose of medical examination without having the accused before him. Held, the prisoner could only be remanded after having been personally brought before the justice. *Re Sarault* (1905), 9 C. C. C. 448.

A preliminary inquiry in a criminal matter commenced before one magistrate cannot be continued by another. But if the magistrate who commenced the inquiry dies, or is deposed from office, or resigns or goes abroad, another magistrate may act, but he must commence *de novo*. *Bertrand* v. *Angers*, Q. R. 21 S. C. 213.

IRREGULARITIES AND VARIANCES.

669. No irregularity or defect in the substance or form of the summons or warrant, and no variance between the charge contained in the summons or warrant and the charge contained in the information, or between either and the evidence adduced on the part of the prosecution at the inquiry, shall affect the validity of any proceeding at or subsequent to the hearing. 55-56 V., c. 29, s. 578.

670. If it appears to the justice that the person charged has been deceived or misled by any such variance in any summons or warrant, he may adjourn the hearing of the case to some future day, and in the meantime may remand such person, or admit him to bail as hereinafter mentioned. 55-56 V., c. 29, s. 579.

An information and warrant of arrest thereunder, charging the accused as an accessory to the violation of a statute named, without specifying the fact as to which he is alleged to be an accessory, is void for uncertainty.

Such a warrant charges no offence, and neither it nor a remand thereon is validated by sec. 578 (now sec. 669) of the Code. *R.* v. *Holley* (1893), 4 C. C. C. 510.

As to amendment of indictment in the event of variance, see sec. 889. And adjournment if the accused has been misled, or prejudiced, by variance, sec. 890 of the Code.

If the information incorrectly describes the ownership of any property, *Ralph* v. *Hadnel*, 44 L. J. M. C. 145, or the date of the offence is incorrectly stated, the information should be amended. *Mayor of Exeter* v. *Heamon*, 37 L. J. 535.

But where the wrong person is summoned it is otherwise; in such a case there should be a new summons. *Oxford* v. *Sankey*, 54 J. P. 564.

The charge of stealing "in and from a building" is for one offence only. *R.* v. *White* (1901), 4 C. C. C. 430.

A conviction under the Army Act for "buying, exchanging, taking in pawn, detaining or receiving" a war medal from a soldier, held as charging one offence only, and not bad for uncertainty. *R.* v. *Brine* (1904), 8 C. C. C. 54.

PROCURING ATTENDANCE OF WITNESSES.

671. If it appears to the justice that any person being or residing within the province is likely to give material evidence either for the prosecution or for the accused, on such inquiry he may issue a summons under his hand, requiring such person to appear before him at a time and place mentioned therein to give evidence respecting the charge, and to bring with him any documents in his possession or under his control relating thereto.

2. Such summons may be in form 11, or to the like effect. 55-56 V., c. 29, s. 580.

672. Every such summons shall be served by a constable or other peace officer upon the person to whom it is directed either personally, or, if such person cannot conveniently be met with, by leaving it for him at his last or most usual place of abode with some inmate thereof apparently not under sixteen years of age. 55-56 V., c. 29, s. 581.

673. If any one to whom such last-mentioned summons is directed does not appear at the time and place appointed thereby, and no just excuse is offered for such non-appearance, then after proof upon oath that such summons has been served as aforesaid, or that the person to whom the summons is directed is keeping out of the way to avoid service, the justice before whom such person ought to have appeared, if satisfied by proof on oath that such person is likely to give material evidence, may issue a warrant under his hand to bring such person at a time and place to be therein mentioned before him or any other justice in order to testify as aforesaid.

2. The warrant may be in form 12, or to the like effect.

3. Such warrant may be executed anywhere within the territorial jurisdiction of the justice by whom it is issued, or, if necessary, endorsed as provided in section six hundred and sixty-two and executed anywhere in the province out of such jurisdiction.

It would seem that the magistrate has a power to bring before him any witnesses who may be able to give material evidence on behalf of the defendant. *3 Just. Coke, 79; 4 Bla. Com. 359.*

A witness cannot refuse to attend on being served with a summons, or warrant, until his expenses are paid. *R.* v. *James,* 1 C. & P. 322.

Only the justice before whom the information is laid has authority to issue a summons for a witness under this section (671). It gives no authority to a justice who is a stranger to the proceedings instituted to summon a witness to appear before the justice who took the information. *Byrne* v. *Arnold,* 24 N. B. R. 161.

A justice cannot be ordered to attend at the house of an infirm witness to take his depositions. *Ex parte Kimbalton,* 25 J. P. 759, 5 L. T. 347.

The above refers to the trial of offences under Summary Convictions, Part XV. of the Code.

As to indictable offences it is provided by sec. 995 of the Code that the evidence of any person dangerously ill may be taken under commission, and this either at the instance of the Crown, or of the prisoner or defendant. The Commissioner is appointed by the order of a Judge. The provision of this section can be invoked in preliminary inquiry. See *R.* v. *Verral, post.*

At the trial of an indictable offence the presiding Judge may, with the consent of counsel for the Crown and for the prisoner respectively, adjourn the hearing to a private house within the same county for the purpose of taking there the evidence of a witness who is too ill to be moved therefrom, and may order that the Court and jury proceed there for that purpose. *R.* v. *Rogers* (1902), 6 C. C. C. 419.

In the above case the trial Judge, HANNINGTON, J., sitting in appeal, said, "Besides, as the case shews, I took precaution to obtain the consent of the prisoner's counsel to what was done, and as this is a matter not going to the jurisdiction of the Court the prisoner is bound by that."

Two of the other Judges, MCLEOD and GREGORY, JJ., also seem to base their judgment upon the fact that the course adopted was by consent of the prisoner's counsel. Query, if counsel had not consented? This seems to be answered by BARKER J., who said: "This trial was properly commenced when the learned Judge thought that it was in the interest of justice to adjourn the Court to another place. I think that he had the right to do it."

If it is in the interest of justice to adjourn the Court to a place other than where it usually sits, for the purpose of examining a witness who is too ill to attend the Court, and the prisoner is present at such examination, or if he is represented by counsel, his counsel is also present, and full opportunity is given for the cross-examination of the witness, there seems nothing to prevent such a proceeding so far as reason and law can provide, it being done "in the interest of justice." There is no provision in the Code against such a proceeding.

Besides, such a course of action is permissible in the conduct of a preliminary inquiry, by special provision, see sub-sec. (c) of sec. 679 of the Code, *post*, where it is provided that the justice may 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."

This action has been taken by the writer in a preliminary hearing where a witness was so badly injured that he could not attend

the Court, and an adjournment was had to the house of the witness, and the evidence taken in his bed-room, the prisoner and his counsel being present and full opportunity for cross-examination given. Evidence has also been taken in this way at the bedside of a patient in hospital, the prisoner and his counsel being present. See *R.* v. *Trevane* (1902), 6 C. C. C. 125, 4 O. L. R. 875.

The whole proceedings of the examination should be in the presence and hearing of the accused and of the justice. *R.* v. *Paine*, 5 Mod. 163; *R.* v. *Commins*, 4 D. & R. U. C. 94.

The witness should be informed as to the purpose for which he is required to give evidence, or, in other words, that there is a person under charge against whom he is required to give evidence. *Cropper* v. *Horton*, 4 D. & R. M. C. 42.

The summons to the witness issued under sec. 671, form 11, should be directed to the witness, and a short statement of the offence with which the accused is charged similar to that in the summons, or warrant, should be set out, and the time and place where the witness is to attend. If he is to bring with him any documents, or papers, this should be so stated, and the documents, or papers, so specified in such a manner by name and date or otherwise so they can be identified to the witness. This is called a *duces tecum*, which commands him to attend with the documents in question. It is no excuse that the legal custody of the instrument belongs to another, if it be in the actual custody of the witness. *Amey* v. *Long*, 9 East. 485.

If the document requires no proof from the witness, and the party by whom he is called does not wish to examine him, he need not be sworn, and if sworn by mistake be cannot be cross-examined. *Perry* v. *Gibson*, 1 A. & E. 48.

Every summons for a witness shall be served by a constable, or other peace officer, either personally upon the person to whom it is directed, or by leaving it for him at his last or usual place of abode with some inmate thereof apparently not under sixteen years of age.

The mode of service of such a summons is practically the same as that of a summons issued against an offender, and for further particulars as to such service see the last chapter.

If the witness fails to obey the summons then, after proof upon oath (*a*) that such summons has been served as aforesaid, (*b*) or that the person to whom the summons is directed is keeping out of the way to avoid service, (*c*) if satisfied by proof on

oath that such person is likely to give material evidence, the justice before whom such person ought to have appeared may issue a warrant to bring such person at a time and place to be therein mentioned before him or any other justice to testify. The warrant is to be in Form 12, and can be executed anywhere in the territorial jurisdiction of the justice by whom it is issued, or if necessary, be endorsed, or backed, as provided in section 662 of the Code, and executed anywhere in the province out of such jurisdiction.

Where a magistrate had refused to issue a warrant for a witness MEAGHER, J., at page 559, said:

"I shall assume that the magistrate's conclusion was erroneous. I do so for the present purposes only, and not because I think the law is so. I do not wish to be understood as giving an opinion one way or the other, but may say that my inclination is to hold that he has a discretion in the matter and although the reason for his conclusion may not be sound, other sufficient reasons may have existed which justified the refusal of the application. It can be readily seen that if the magistrate is bound to issue a warrant in every instance, and for every witness who fails to yield obedience to a summons to appear and testify, the defendant is possessed of a powerful weapon by which he may effectively delay the trial, and especially so if he summons a party who colludes with him and agrees not to appear upon summons." *R.* v. *Clements* (1901), 4 C. C. C. 553.

The proceedings in *R.* v. *Clements* were under the N. S. Liquor License Act, but the reasoning of MEAGHER, J., equally applies to preliminary inquiries under the Code, and it is submitted that the wording of sec. 673 strengthens the view that the question of issuing the warrant is one in the discretion of the justice.

SECURING ATTENDANCE OF WITNESSES AT TRIALS.

By section 971 of the Code it is provided that 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.

Section 977 provides for compelling the attendance of witnesses at the trial by warrant issued by the trial Judge.

Section 973 provides for the apprehension of persons within the province who are likely to give material evidence by warrant issued by any Judge of a Superior or County Court, and for the detention of such person till he gives evidence, or for his release on recognizance conditioned for his appearance to give evidence.

Section 974 provides for issuing subpœnas for witnesses in criminal cases and service of the same anywhere in Canada.

Section 975. And if the subpœna is disobeyed proceedings may be taken by the Court against such witness for contempt or otherwise.

And by sec. 976. The Courts of the several provinces are declared to be auxiliary to one another for the purposes of this Act, "The Criminal Code," and any order, judgment or decree, made by the Court issuing the writ of supœna may be enforced, or acted upon, by any Court in the province in which such witness resides.

Where a police magistrate acting within his jurisdiction issues his warrant for the arrest of a witness who has not appeared in obedience to a subpœna, he is not in the absence of malice, liable in damages even though he may have erred as to the sufficiency of the evidence to justify the arrest. The right of the police to search or handcuff a person arrested on a warrant to compel attendance as a witness, and the duty of the constable making th arrest, is considered by MACLENNAN, J.A., in *Gordon* v *Denison*, 22 A. R. 315 and 24 O. R. 576.

PROCEDURE AGAINST DEFAULTING WITNESS.

674. 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 as for contempt for his default in not attending upon the said summons.

2. The justice may, in a summary manner, examine into and dispose of the charge of contempt against such person, who, if found guilty, shall be liable to a fine not exceeding twenty dollars, or to imprisonment in the common gaol, without hard labour, for a term not exceeding one month, or to both such fine and imprisonment, and may also be ordered to pay the costs incident to the service and execution of the said summons and warrant and of his detention in custody.

3. The conviction under this section may be in form 13. 55-56 V., c. 29, s. 582.

WARRANT FOR WITNESS.

675. If the justice is satisfied by evidence on oath that any person within the province, likely to give material evidence either for the prosecution or for the accused, will not attend to give evidence without being compelled so to do, then instead of issuing a summons, he may issue a warrant in the first instance.

2. Such warrant may be in form 14, or to the like effect, and may be executed anywhere within the jurisdiction of such justice, or, if necessary, endorsed as provided in section six hundred and sixty-two and executed anywhere in the province out of such jurisdiction. 55-56 V., c. 29, s. 583.

676. If there is reason to believe that any person residing anywhere in Canada out of the province who is not within the province, is likely to give material evidence either for the prosecution or for the accused, any Judge of a superior Court or a County Court, on application therefor by the informant or complainant, or the Attorney-General, or by the accused person or his solicitor or some person authorized by the accused, may cause a writ of subpœna to be issued under the seal of the Court of which he is a Judge, requiring such person to appear before the justice before whom the inquiry is being held or is intended to be held at a time and place mentioned therein, to give evidence respecting the charge and to bring with him any documents in his possession or under his control relating thereto.

2. Such subpœna shall be served personally upon the person to whom it is directed, and an affidavit of such service by a person effecting the same purporting to be made before a justice, shall be sufficient proof thereof. 55-56 V., c. 29, s. 584.

As to enforcing the execution of process, sec. 608 of the Code provides as follows:—

608. Every Judge of the Sessions of the Peace, chairman of the Court of General Sessions of the Peace, recorder, police magistrate, district magistrate or stipendiary magistrate, whenever any resistance is offered to the execution of any summons, warrant of execution or other process issued by him, may enforce the due execution of the same by the means provided by the law for enforcing the execution of the process of other Courts in like cases. 55-56 V., c. 29, s. 909; 56 V., c. 32, s. 1.

A magistrate has no right to issue a warrant for the apprehension of a person to attend to find bail for his appearance as a witness at the assizes, although it is sworn that the witness is material, and had refused to obey a summons which previously had been issued, to give evidence before the magistrate. *Evans* v. *Rees*, 12 A. & E. 55. Such a case as the above now comes within the provisions of sec. 973 of the Code.

Warrant for Defaulting Witness.

677. If the person served with a subpœna as provided by the last preceding section, does not appear at the time and place specified therein, and no just excuse is offered for his non-appearance, the justice holding the inquiry, after proof upon oath that the subpœna has been served, may issue a warrant under his hand directed to any constable or peace officer in the district, county or place where such person is, or to all constables or peace officers in such district, county or place, directing him, them or any of them to arrest such person and bring him before the said justice or any other justice at a time and place mentioned in such warrant in order to testify as aforesaid.

2. The warrant may be in form 15, or to the like effect; and if necessary, may be endorsed in the manner provided by section six hundred and sixty-two and executed in a district, county or place other than the one therein mentioned. 55-56 V., c. 29, s. 584.

From a consideration of these sections of the Code it will be seen that no matter where a person resides, or happens to be, in

Canada, if there is reason to believe, and it is established upon oath, that such person is likely to give material evidence, either for the Crown or for the accused, such person can be brought before a justice holding a preliminary inquiry respecting an indictable offence, no matter where such inquiry is being held.

Where a witness is subpœnaed to give evidence in a criminal case where the charge is for an indictable offence he must attend without pre-payment of his expenses or witness fees. *R.* v. *James*, 1 C. & P. 322.

As a general rule the Department of the Attorney-General in each province provides the necessary money required for securing the attendance of witnesses upon criminal trials.

Not only are the Crown and the defence entitled to the presence of material witnesses who reside or are living in any part of Canada, but also if such persons reside out of Canada, their evidence either for the Crown or the defence can be secured by Commission under the provisions of sec. 997, as follows:—

Evidence by Commission.

997. Whenever it is made to appear, at the instance of the Crown, or of the prisoner or defendant, to the satisfaction of the Judge of any Superior Court, or the Judge of a County Court having criminal jurisdiction, that any person who resides out of Canada is able to give material information relating to any indictable offence for which a prosecution is pending, or relating to any person accused of such offence, such Judge may, by order under his hand, appoint a commissioner or commissioners to take the evidence, upon oath, of such person.

2. Until otherwise provided by rules of Court, the practice and procedure in connection with the appointment of commissioners, under this section, the taking of depositions by such commissioners, and the certifying and return thereof, and the use of such depositions as evidence, shall be as nearly as practicable the same as those which prevail in the respective Courts in connection with like matters in civil causes.

3. The depositions taken by such commissioners may be used as evidence at the trial.

4. Subject to such rules of Court or to the practice or procedure aforesaid, such depositions may, by the direction of the presiding Judge, be read in evidence before the grand jury. 55-56 V., c. 29, s. 683; 58-59 V., c. 40, s. 1; 63-64 V., c. 46.

A Commission to take evidence in a foreign country for use upon a prosecution for an indictable offence may be ordered under sec. 683 (now 997) of the Code while the preliminary inquiry is proceeding. And such evidence is admissible as well at the preliminary inquiry as before the grand jury and the petit jury on the trial of the accused. *R.* v. *Verrall* (1895), 6 C. C. C. 325.

"The time at which and the circumstances under which the order may be applied for and obtained all tend to shew that the evidence procured under it may be used at any stage of the in-

quiry at which evidence may be given relating to the offence, or to the prisoner accused of the offence." ARMOUR, C.J., p. 328. *ibid.*, and see *R.* v. *Chetwyad* (1891), 23 N. S. R. 332.

An order may be made under sec. 683 (now 997) for taking in Canada, under Commission, the evidence of material witnesses who reside out of Canada, but are temporarily within the jurisdiction of the Court, and about to return to their own country. *R.* v. *Baskett* (1902), 6 C. C. C. 61.

Any evidence taken under Commission may be objected to at the trial on the ground of the irregularity of the Commissioner's appointment. The application of the procedure in civil cases by sub-section 2 of sec. 997 does not confer a like right of appeal as in civil cases from the order appointing the Commissioners. *R.* v. *Johnston* (1892), 2 B. C. R. 87.

In a prosecution for libel it was held that the defendant was not bound to anticipate his plea to the indictment, and was entitled to all the time up to his arraignment to consider whether he would plead justification. The evidence proposed to be taken abroad under Commission being only as to that plea which had only then been entered, the defendant could not have made the application earlier. Commission ordered. *R.* v. *Nicol* (1898), 5 C. C. C. 31.

"Under the authorities I am of the opinion that if the costs are to be taxed according to the laws governing the taxation of costs in civil cases, that the evidence taken on Commission and not used at the trial on which a verdict was obtained could not be taxed against the successful party, neither could the costs of the abortive trials. Each trial would be considered a *venire de novo* and the question is, does the language used in section 833 (now sec. 1047), authorize the taxation of any other or different costs than such as would be allowed in a civil case." DRAKE, J., p. 11, *R.* v. *Nicoll* (1901), 6 C. C. C. 8.

WITNESSES REFUSING TO BE EXAMINED.

678. 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 16, or to the like effect, commit the person so refusing to gaol, unless he sooner consents to do what is required of him.

2. If such person, upon being brought up upon such adjourned hearing, again refuses to do what is required of him, the justice, if he sees fit, may again adjourn the proceedings, and commit him for the like period, and so

again from time to time until such person consents to do what is required of him.

3. Nothing in this section shall prevent such justice from sending any such case for trial, or otherwise disposing of the same in the meantime, according to any other sufficient evidence taken by him. 55-56 V., c. 29, s. 585.

As we have previously stated the witness should be informed as to the purpose for which he is required to give evidence.

A witness cannot be committed for refusing to answer without there is a person charged with an offence and without he (the witness) is apprised of that fact and the nature of the charge. *Cropper* v. *Horton*, 4 D. & R. M. C. 42.

To justify the commitment for refusing to answer a question, the question put must be one upon which the party may be lawfully compelled to answer, and therefore the commitment in such a case should set forth the question and answers, if any, so that the Court may be enabled to judge of their propriety. In *re Hadland*, 1 Dowl. N. S. 835.

Where a witness who was summoned by Commission of a bankrupt under the 6 Geo. IV., ch. 16, sec. 35, was required by the Commissioners to read certain entries in a ledger, and on his refusal to do so was committed by them for refusing to answer a question, it was held that the request to read was neither in form, nor substance, a question, and that the commitment was illegal. *Isaac* v. *Impey*, 10 B. & C. 442.

A justice may commit a *femme covert* who was a material witness upon a charge of felony brought before him, and who refused to appear at the Sessions to give evidence, or to find sureties for her appearance. *Bennett* v. *Watson*, 3 M. & Sel. 1.

To justify a magistrate in committing a witness under this section (678) it must appear not only that the witness refused without just excuse to answer, but that the question asked was in some way relevant to the issue. *R.* v. *Ayotte* (1905), 9 C. C. C. 133.

Facts relevant to the issue are facts which tend either directly or indirectly to prove or disprove a fact in issue or some relevant fact.

Thus, facts which constitute a link in the chain of proof, or affect the credit of a witness, or the admissibility of a document are relevant. Phipson on Evidence, 4th ed., p. 39.

Powers of Justices.

679. A justice holding a preliminary inquiry may in his discretion,—

(*a*) permit or refuse permission to the prosecutor, his counsel or attorney, to address him in support of the charge, either by way of opening or summing up the case, or by way of reply upon any evidence which may be produced by the person accused;

(*b*) receive further evidence on the part of the prosecutor after hearing any evidence given on behalf of the accused;

(*c*) adjourn the hearing of the matter from time to time, and change the place of hearing, if from the absence of witnesses, the inability of a witness who is ill to attend at the place where the justice usually sits, or from any other reasonable cause, it appears desirable to do so, and may remand the accused, if required, by warrant in form 17. Provided that no such remand shall be for more than eight clear days, the day following that on which the remand is made being counted as the first day;

(*d*) order that no person other than the prosecutor and accused, their counsel and solicitors, shall have access to or remain in the room or building in which the inquiry is held, if it appears to him that the ends of justice will be best answered by so doing;

(*e*) regulate the course of the inquiry in any way which may appear to him desirable, and which is not inconsistent with the provisions of this Act.

2. If any remand under this section is for a time not exceeding three clear days the justice may verbally order the constable or other person in whose custody the accused then is, or any other constable or person named by the justice in that behalf, to keep the accused person in his custody and to bring him before him or such other justice as shall then be acting at the time appointed for continuing the examination. 55-56 V., c. 29, s. 586.

The remand, if for more than three clear days, must be by warrant, and the accused must be present in Court when such remand takes place. *R.* v. *Sarault* (1905), 9 C. C. C. 448.

A remand for medical examination as to the insanity of the accused cannot be made in the absence of the accused; he or she must be present within the hearing and view of the magistrate. *Ibid.*

And see *R.* v. *Halley* (1893), 4 C. C. C. 510.

Where evidence on a preliminary inquiry is commenced before one justice of the peace and he is joined by another justice of the peace, and the hearing is continued and concluded before the two, a committal by the two is irregular because they did not jointly hear all the evidence. *Re Nunn* (1899), 2 C. C. C. 429.

"It is contrary to all my ideas and experiences of justice for depositions taken before one magistrate to be considered by another magistrate sufficient evidence to commit a prisoner upon, without having seen the demeanour of the witnesses when they were giving their evidence, and so being in a position to judge for himself of the truth of their statements, . . . I think the proceedings ought to be conducted throughout by the same magistrate who has heard the witnesses and observed their demeanour. The principle of the common law is clear upon the matter." WILLIS, J., in *Re Guerin* (1888), 16 Cox 596.

The words "for continuing the examination" at the end of sec. 679 are what has puzzled the writer as well as others who have had to deal with matters coming within the province of this section.

The puzzle is why these words are there in conjunction with the preceding words "such other justice as shall then be acting at the time appointed."

It could never have been contemplated that "continuing the examination" meant that an examination already commenced before one justice could be continued before another, since, to paraphrase what is so well expressed by MR. JUSTICE WILLIS in the above quotation, "such a mode of procedure would be contrary to one's ideas and experiences of justice."

Then what do the words mean? They appear in the Imperial Act, 11 & 12 Vic. ch. 42, and were incorporated in the Canadian Statute, 32-33 Vic. ch. 30, sec. 42, and appear in the same way in the Criminal Procedure Act, ch. 174, Revised Statutes of Canada (1887), sec. 65.

One cannot find any express decision bearing upon the question as to whether an inquiry can be commenced before one justice and continued and ended before another except the cases cited. The reason presumably is that no one, except through gross ignorance, would think of such a proceeding, and the question has thus never arisen. There should be no doubt or question about it. Surely the law never contemplated such a course of action being pursued. What really is meant seems to be, that if the justice who began the inquiry, or examination, is unable to attend through illness or absence, or has died in the meantime, then the hearing will not lapse in consequence of such event, but the same may be continued by another justice.

Not that this second justice should start where the first justice left off, but that he will continue the examination by commencing *de novo*, and proceeding as if the first examination had never been held.

In the happening of such an event as that a preliminary hearing will have to be continued by another justice, owing to the absence of the justice who began the hearing, the depositions taken before the first justice should be preserved intact and not destroyed. Since in the event of a witness who has been examined before the first justice dying or leaving Canada prior to the continuance of the examination, before the second justice, and it being impossible to take his or her evidence over again, such depositions if taken in conformity with the provisions of the Code, would be available for use at the trial under the provisions of sec. 999.

Justice's Decision.

The justice should take and complete the examination of all concerned and discharge or commit the accused for trial as soon as the nature of the case will permit him, but he is in all cases allowed a reasonable time for this purpose before he makes his final decision. See *Re Ying Foy* (1909), 15 C. C. C. 14.

The time of the detainer must be no longer than is necessary for such purpose, and the magistrate ought not arbitrarily to commit the party. *Davis* v. *Capper*, 10 B. & C. 28.

If the examinations do not take place in proper time an action will lie against the justice, and the commitment would be void *ab initio*. *Arbuckle* v. *Taylor*, 3 Dow's Rep. 184.

In *Davis* v. *Capper, supra,* it was fully settled that trespass will lie against a magistrate for committing a party charged with felony for re-examination for an unreasonable time, though without any improper motive.

A warrant for commitment on remand for an unreasonable time, i.e., beyond eight clear days (the day following that on which the remand is made being counted as the first day) is wholly void.

"A commitment for further examination is not a proceeding against the party, but a proceeding for his benefit. It is a proceeding with a view to protect him against a commitment for trial, if, during a reasonable time for examination, it can be found there is no ground upon which there ought to be a commitment for custody in order to trial. And if you were to say that where a party is committed for further examination bail shall be required before that further examination takes place, you put him to this inconvenience that he must give security to stand a trial which he may never have to stand." Per Lord Eldon in *Arbuckle* v. *Taylor*, 3 Dowling 183, 184.

Where a complaint of a criminal nature is made before justices, which the evidence shews to be one they have no jurisdiction to determine summarily, they should either dismiss the complaint or commit the person charged for trial, and not convict him of a minor offence included in the offence shewn. In *Re Thompson*, 30 L. J. M. C. 19, and see *R.* v. *Miner*, 1 C. C. C. 217; *R.* v. *Dungey*, 5 C. C. C. 38; *Ex parte Duffy*, 8 C. C. C. 277.

The examination may take place either in public or private, and the justices may if necessary exclude all persons.

It has been held in England that a justice may exclude an attorney, or counsel, if he likes. *Cox* v. *Coleridge*, 1 B. & C. 37;

Collier v. *Hicks*, 2 B. & Ad. 663; and see *Daubney* v. *Cooper*, 10 B. & C. 277.

But not the accused. *R.* v. *Caumins*, 4 D. & R. 94; *R.* v. *Griffiths*, 16 Cox 46.

A justice should not exclude the counsel for the accused unless for misconduct, or contempt of Court. It should never be done if it can be avoided, and if done a memorandum of such fact should be set out on the face of the proceedings, and reasons given for such exclusion. Because it is one of the conditions precedent to the use at the trial of depositions taken in a preliminary inquiry "that such deposition was taken in the presence of the person accused, and that he, or his counsel or solicitor if present, had a full opportunity of cross-examining the witness"; some question might arise if counsel was wrongfully excluded as to the admissibility of a deposition taken in counsel's involuntary absence.

The accused himself has of course the right to cross-examine the witness, but if he has engaged counsel and the latter is excluded for no good reason, it might be argued that the accused or his counsel had not "a full opportunity of cross-examining the witness."

The section under consideration, 679 (*d*), specifically provides that the justice may in his discretion "order that no person, other than the prosecutor and accused, their counsel and solicitors, shall have access to or remain in the room or building in which the inquiry is held, &c." As to excluding the public from trial Courts see sec. 645 of the Code.

A private prosecutor is no party to a criminal prosecution, and cannot insist that he or his counsel shall aid in the conduct of the same when the proper Crown officer has undertaken the prosecution and refuses assistance from other counsel. *R.* v. *Gilmore* (1903), 7 C. C. C. 219.

"But though it is the right of everyone to make a complaint with a view to the institution of criminal proceedings, and also under certain circumstances to prefer a bill of indictment, yet the prosecutor is no party to the prosecution, nor indeed bound by any judgment that may be made in it. He may with the consent of the proper authorities proceed in the name of the Sovereign; but against the will of both parties he has no power over or voice in the proceedings." MEREDITH, J., *Ibid.*

BAIL ON REMAND.

680. The justice may order the accused person to be brought before him, or before any other justice for the same territorial division, at any

time before the expiration of the time for which such person has been remanded, and the gaoler or officer in whose custody he then is shall duly obey such order. 55-56 V., c. 29, s. 588.

681. If the accused is remanded as aforesaid, the justice may discharge him, upon his entering into a recognizance in form 18, with or without sureties, in the discretion of the justice, conditioned for his appearance at the time and place appointed for the continuance of the examination. 55-56 V., c. 29, s. 587.

These elements are to be taken into consideration by the justice in determining whether the prisoner should be admitted to bail or not, viz., the gravity of the crime, the weight of the evidence, and the severity of the punishment, with regard to the probability of his appearance to take his trial. *Re Robinson,* 23 L. J. Q. B. 286; *R.* v. *Barronet,* 1 E. & B. 1; *R.* v. *Scaife,* 9 Dowl. 553.

Accomplices should never be allowed to go on bail because they are so likely to abscond, notwithstanding that it is intended they should give evidence for the prosecution. *R.* v. *Beardmore,* 7 C. & P. 497.

A mandamus was granted where the hearing had been adjourned for a longer period on account of an action pending between the accused and other persons for a libel arising out of similar matter. *R.* v. *Evans,* 62 L. T. 470.

At the expiration of a remand by warrant for eight clear days a further remand for another eight days and so on may be made. A remand for an unreasonable time would be void. *Cummons* v. *Darling,* 23 U. C. R. 547, 51.

Such further remand should be evidenced in writing under the hand of the justice by endorsement on the back of the warrant of commitment.

Where a person is given into custody without a warrant on a charge of an indictable offence and is afterwards brought before a magistrate he may remand the accused without taking any evidence upon oath. *R.* v. *Waters,* 12 Cox 390.

If a prisoner who is remanded is taken by the constable to a lockup instead of to the gaol, without any express direction by the magistrate to take him to the lockup, the magistrate is not responsible for the prisoner's sufferings from cold, &c., in the lockup. *Crawford* v. *Beattie,* 39 U. C. R. 13.

A warrant of remand signed with the addition of the letters "J.P." after the signature, and containing a reference in the body of it to the signer, or "some other justice" for the county. Held, the warrant was good. *Ex parte Hilchie* (1906), 11 C. C. C. 85.

Evidence for Prosecution on Oath.

682. When the accused is before a justice holding an inquiry, such justice shall take the evidence of the witnesses called on the part of the prosecution.

2. The evidence of the said witnesses shall be given upon oath and in the presence of the accused; and the accused, his counsel or solicitor, shall be entitled to cross-examine them.

3. The evidence of each witness shall be taken down in writing in the form of a deposition, which may be in form 19, or to the like effect.

4. Such deposition shall in the presence of the accused, and of the justice, at some time before the accused is called on for his defence, be read over to and signed by the witness and the justice.

5. The signature of the justice may either be at the end of the deposition of each witness, or at the end of several or of all the depositions in such a form as to shew that the signature is meant to authenticate each separate deposition.

Administering Oaths.

By section 13 of "The Canada Evidence Act" it is provided that "Every Court and Judge and every person having by law, or consent of parties, authority to hear and receive evidence, shall have power to administer an oath to every witness who is legally called to give evidence before that Court, Judge or person."

The usual proceeding in administering the oath is for the witness to hold the New Testament, or Bible, in his right hand, which should be bare and ungloved. And the witness should be addressed as follows: "The evidence that you will give to the Court touching the matters in question shall be the truth, the whole truth, and nothing but the truth, So help you God," or another form which is often used is as follows: "You swear that you shall true answer make to all such questions as may be demanded of you—So help you God."

The witness then kisses the book. If the witness is a Jew he should be sworn with his hat on, and upon the Pentateuch.

The nationality and religious belief of the witness should be ascertained before he is sworn.

If a witness has without objection been sworn in the usual form no subsequent objection can be taken to his testimony on the ground that being of a different faith the oath is not in a form affecting his conscience. *Sells* v. *Hoare*, 3 Brod. & Bing. 232, or that some other form is more binding. *The Queen's Case*, 2 Brod & Bing. 284. Mohammedans are sworn on the Koran. The witness places his right hand flat upon the book and putting his left upon his forehead brings his head down to the book; the magistrate, or clerk, whichever administers the oath, then asks him if he

is bound by this ceremony to speak the truth, and the witness replies that he is. *Phipson's 4th ed. 429.*

Chinese are sometimes sworn by the ceremony of breaking a saucer in the witness box. The person administering the oath then says, "You shall tell the truth and the whole truth: the saucer is cracked, and if you do not tell the truth your soul will be cracked like the saucer." *R.* v. *Entrehman,* Car. & M. 248.

Another form is for the witness to write several characters upon paper, which he burns, praying that his soul may be similarly burnt if he swears falsely, while the most binding oath is said to consist in the witness cutting off a cock's head with a like invocation. *Phipson, 4th ed., 429-30.*

Held, that a Canton Chinaman who is not a Christian should have the "chicken oath" administered to him instead of the paper oath. *R.* v. *Ah Wooey* (1902), 8 C. C. C. 25.

For the form of such oath and mode of administering the same *vide* this case.

The oath as administered to white people can also be administered to Chinamen who profess Christianity, or say that it is binding on their conscience.

"It seems to me that when a man without objection takes the oath in the form ordinarily administered to persons of his race or belief, as the case may be, he is then under a legal obligation to speak the truth, and cannot be heard to say that he was not sworn." HUNTER, C.J., p. 471; *R.* v. *Lai Ping* (1904), 8 C. C. C. 467.

The administration of the Chinese paper oath to a Chinaman at his own suggestion is binding upon him to tell the truth, otherwise he lays himself open to penalty for perjury. *Ibid.*

Ruthenians, Buckowinians, Roumanians, Poles and Russians, either Greek, or Roman Catholic, are sworn upon the crucifix.

Two candlesticks with candles in them are placed in front of the witness and between the candles is placed the crucifix. The candles are lighted, the witness holds up the thumb and first two fingers of his right hand and the following oath is then administered: "You swear by God Almighty, Father, Son and Holy Ghost, and by the Virgin Mary and all that is Holy, that the evidence you will give to the Court shall be the truth, the whole truth and nothing but the truth, so help you God." The witness repeats the oath as it is administered word by word, and at its conclusion kisses the crucifix. This is the mode and manner in which the oath is administered in all parts of Austria and Russian Poland, and is used in all criminal courts in Winnipeg.

AFFIRMATION.

By sec. 14 of the Canada Evidence Act:—

14. If a person called or desiring to give evidence, objects, on grounds of conscientious scruples, to take an oath, or is objected to as incompetent to take an oath, such person may make the following affirmation:

"I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth."

2. Upon the person making such solemn affirmation, his evidence shall be taken and have the same effect as if taken under oath. 56 V., c. 31, s. 23.

Any witness whose evidence is admitted under this section shall be liable to indictment and punishment for perjury in all respects as if he had been sworn. Sec. 15 (2). Witnesses who affirm do so with the right hand uplifted.

The oath is usually administered in Scotland by the witness (who like all witnesses stands when the oath is being administered) holding up his right hand and repeating after the person administering the oath, no book being used, "I swear by Almighty God that I will speak the truth, the whole truth and nothing but the truth."

WITNESSES WHO NEED NOT BE SWORN.

Where a child of tender years is offered as a witness and such child does not, in the opinion of the Judge, justice, or other presiding officer, understand the nature of an oath, the evidence of such child may be given, if in the opinion of the Judge, justice or other presiding officer, as the case may be, such child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

No case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence. Sec. 16 Can. Ev. Act.

"Some independent material evidence must be given which corroborates, in plain Anglo-Saxon, strengthens, the evidence of the opposite or interested party. If the evidence offered is admissible, if it supports the evidence of the party, it is corroborative evidence, and it is then for the Judge, or jury, to say what weight is to be attached to it. Nor is corroboration required to be directed to any particular fact or part of the evidence, it is the 'evidence' of the party which is to be corroborated by some 'other material evidence.'" OSLER, J.A., p. 170, in *Radford* v. *MacDonald* (1891), 18 A. R. 167. See *Parker* v. *Parker*, 22 C. P.

113; *R.* v. *De Wolfe* (1904), 9 C. C. C. 38. As to corroboration being necessary in certain cases before conviction can be secured, see sec. 1002 of the Code.

"A mere scintilla is not sufficient. At the same time the corroborating evidence need not be sufficient in itself to establish the case. The direct testimony of a second witness is unnecessary, the corroboration may be afforded by circumstances." KILLAM, J., in *Thompson* v. *Coulter* (1903), 34 S. C. R. 261.

Facts which tend to render more probable the truth of a witness's testimony on any material point, are admissible in corroboration thereof, although otherwise irrelevant to the issue, and although happening before the date of the fact to be corroborated. *Wilcox* v. *Gotfrey*, 26 L. T. N. S. 481.

But facts which are not more consistent with the truth of such testimony than the reverse are inadmissible. The corroborative facts and evidence must, however, be proved otherwise than by the testimony of the witness to be corroborated. *Owen* v. *Moberley*, 64 J. P. 88. And the question of the admissibility is one of law for the Judge and not one of fact for the jury. *Bessela* v. *Sterm*, 2 C. P. D., p. 267.

DEAF MUTES.

By sec. 6 of the Canada Evidence Act a witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible.

The evidence of a deaf mute may be given either by signs made with the fingers through an interpreter, or by writing; the latter is the better mode where the witness can write, as he can then write the answers to the questions put to him. See *Morrison* v. *Lennard*, 3 C. & P. 127, per BEST, C.J.

The oath can be administered to these witnesses in the same way.

OTHER WITNESSES.

A man who has no religion whatever, or no religion that can bind his conscience to speak the truth, is excluded from being a witness. *Omichund* v. *Barkes*, Willes Rep. p. 549; *Madan* v. *Catarrach*, 7 H. & N. 360.

It is not indeed essential that a witness shall be a Christian or believe in the Old Testament; it is sufficient if he believe in a God, and that divine punishment will be the certain consequences

of perjury; and it seems immaterial whether the witness believes that the punishment will be inflicted in this world or the next. *Taylor Ev.*, sec. 1252. Defect of religious belief is never presumed, it must be proved by the party objecting. *Ibid.*

Mohammedans, Turks and Moors may be witnesses.

Exclusion of Witnesses.

Before the examination commences the Crown may demand that the witnesses should retire in order that each may be questioned in the absence of the others.

And the same order will be made on the request of the accused, but as a matter of indulgence and not of right. 4 Harg. State Trials 754. *R.* v. *Paughen*, Holt 689. See *R.* v. *Murphy*, 8 C. & P. 297, and *Southey* v. *Nash*, 7 C. & P. 632.

It is not usual to exclude witnesses who are merely to prove matters of form, medical witnesses or witnesses as to character.

Competent Witnesses.

As witnesses must give their evidence in the presence of the accused he must be present in Court. A person shall not be incompetent to give evidence by reason of interest or crime. Sec. 3 Can. Ev. Act.

Every person charged with an offence and the wife or husband, as the case may be, of the person charged, shall be a competent witness for the defence and whether the person is charged solely or jointly with any other person. Sec. 4 Can. Ev. Act.

And the wife and husband are both competent and compellable witnesses for the prosecution without the consent of the person charged in offences against sections 202 to 206 inclusive; 211 to 219 inclusive; 238, 239, 244, 245, 298 to 302 inclusive; 307 to 311 inclusive; 313 to 316 inclusive, of the Code. *Ibid.*

Disclosures of communications between husband and wife during marriage are not compellable. *Ibid.*

No witness shall be excused from answering any question on the ground that the answer may tend to criminate him. If the witness objects to answer any question on the ground that his answer may tend to criminate him, his answer shall not be used against him in any criminal trial, or proceeding against him, other than perjury in the giving of such evidence. Sec. 5 Can. Ev. Act.

Not more than five expert witnesses may be called on either side without the leave of the Court. Sec. 7. *Ibid.*

For further information as to evidence see chapter on Canada Evidence Act, *post.*

A witness called merely for the purpose of producing a document need not be sworn. *Perry* v. *Gibson,* 1 A. & E. 48.

Evidence for Prosecution.

In taking evidence for the prosecution in an inquiry several things have to be borne in mind as being required by the section of the Code (687) now under consideration.

(1) The evidence must be given upon oath; any one who objects to take an oath or is incompetent to do so, may affirm. And children need not be sworn unless in the opinion of the justice the child understands the nature of an oath.

(2) Such evidence must be given in the presence of the accused, and the accused, or if he has a counsel or solicitor, the latter shall be entitled to cross-examine him. As has been pointed out, this is a right which cannot and must not be denied to the accused.

(3) The evidence of each witness shall be taken down in writing in the form of a deposition which may be in Form 19, or to the like effect.

There must be a proper caption or heading to the deposition; a deposition without a caption will not be received. *R.* v. *Newton,* 1 F. & F. 641. But one caption will be enough for the deposition of any number of witnesses in the same case taken at the hearing, provided the sheets of paper upon which the depositions have been taken are fastened or annexed together so as to form a connected whole. *R.* v. *Johnstone,* 2 C. & K. 354; *R.* v. *Parker,* L. R. 1 C. C. 225, and see *R.* v. *Hamilton* (1898), 2 C. C. C. 390, and 12 M. L. R. 354.

To avoid all difficulty the justice should follow Form 19 faithfully.

It is necessary in the caption to state the charge against the accused. In *R.* v. *Newton, supra,* it did not appear upon the caption that the prisoner was charged with an indictable offence, and it was held that this defect could not be cured by parol evidence, and a deposition with such a defect is not admissible evidence upon proof of deponent's death.

As much of the examination as is material must be put down, what the accused says, and the depositions used by the witnesses

should be put down in the very words and not in any law technicalities, or words not made use of by them. *Mills* v. *Carlett*, 6 Bing. 85; *Cohen* v. *Morgan*, 6 D. & R. 8; *R.* v. *Roche*, 6 Car & Marsh 341.

The deposition should be taken in the first person thus, "I saw, etc., at such a time and place," instead of saying, "he this examinant" and "he this deponent," terms which many witnesses do not understand, and perhaps which may conceive to mean some other person. *5 Burns' Justice*, p. 403.

The deposition should contain the full evidence, cross-examination and re-examination (if any) as well as the examination in chief. Any interruption by the accused should be taken down and may be evidence against him. *R.* v. *Stripp*, Dears 648.

If the accused, or his counsel, state that they do not wish to cross-examine, this fact should be noted in the deposition.

That which is clearly irrelevant, or not admissible as evidence, ought not to be admitted.

If the justice has any doubt as to the admissibility he should take down the question and answer and note that the same is objected to. It will then be left for the higher tribunal to decide the question of admissibility.

The deposition should contain not only all the material statements given in evidence by the witnesses, but also the objections of counsel and rulings made by the magistrate thereon—these should be noted. *R.* v. *Grady*, 7 C. & P. 650, and *R.* v. *Thomas*, *Ibid.* p. 817.

(4) The deposition must be read over to and signed by the witnesses and the justice, both of which acts must be performed in the presence of the justice and the accused.

This, of course, is not necessary, where the evidence is taken in shorthand by a sworn stenographer, under the provisions of sec. 683 of the Code.

Evidence so taken need not be read over to or signed by the witness; the transcript is required to be signed by the justice accompanied by an affidavit of the stenographer that it is a true report of the evidence.

(5) The witness is entitled to make any corrections before he signs the deposition. This only applies to *bona fide* mistakes or omissions, and should not be allowed so as to permit the witness to change, or contradict, the statements he has already made. The best plan is to add at the foot of the deposition any material alteration, or addition, the witness desires to make. The omission

of witnesses to sign their depositions in summary conviction proceedings is not a matter affecting the jurisdiction of the magistrate to make a conviction. *Ex parte Doherty* (1894), 3 C. C. C. 310, and see *R.* v. *Scott*, 26 O. R. 646.

The signature of the justice may be either at the end of the deposition of each witness, or at the end of all the depositions in such form as to authenticate each separate deposition. This is done by complying with the concluding paragraph of Form 19.

Although the witness is not required to sign the transcript of the depositions taken in shorthand it is necessary that the justice should do so.

Depositions to which the magistrate has affixed his signature, although not at the foot or end thereof, are sufficiently signed. *R.* v. *Jodrey* (1905), 9 C. C. C. 477.

If any witness is unable to speak English his evidence can be given through an interpreter. The interpreter should be first sworn; the oath can be as follows: "You swear that you will well and truly interpret the evidence that shall be given by the witness or witnesses in this matter of The King against Brown for burglary (or as the case may be), so help you God."

It is not necessary that the interpreter shall be freshly sworn upon the appearance of each witness. If he is once sworn to truly interpret during the proceedings, that is sufficient.

The name of the interpreter and the fact of his being sworn should be recorded on the face of the depositions.

Depositions in Shorthand.

683. Every justice holding a preliminary inquiry shall cause the depositions to be written in a legible hand and on one side only of each sheet of paper on which they are written: Provided that the evidence upon such inquiry or any part of the same may be taken in shorthand by a stenographer who may be appointed by the justice and who before acting shall make oath that he shall truly and faithfully report the evidence.

2. Where evidence is so taken, it shall not be necessary that such evidence be read over to or signed by the witness, but it shall be sufficient if the transcript be signed by the justice and be accompanied by an affidavit of the stenographer that it is a true report of the evidence. 55-56 V., c. 29, s. 590.

The stenographer must first be sworn before he proceeds to take the evidence. The form of oath may be as follows: "You swear that you will truly and faithfully report in shorthand and transcribe all the evidence which may be given in this matter of The King against ..... charged with ..... so help you God."

The fact of the stenographer being appointed and sworn, and his name, should be recorded on the face of the depositions.

AFFIDAVIT OF STENOGRAPHER.

Province of)
County of)
District of)

The King
against
Smithson for "Burglary."

I, *A.B.*, of the of in the of (*occupation*) make oath and say as follows:—

1. That I am the stenographer appointed by (name of magistrate or J.P.), one of His Majesty's police magistrates or justices of the peace in and for the to report the evidence in this matter.

2. The evidence so reported and transcribed by me is set out in the sheets of paper hereto annexed, and the same is a true and faithful transcript of the said evidence as taken by me in shorthand in this matter.

Sworn, &c.

DEPOSITIONS TO BE READ OVER—STATEMENT OF ACCUSED.

684. After the examination of the witnesses produced on the part of the prosecution has been completed, and after the depositions have been signed as aforesaid, the justice unless he discharges the accused person, shall ask him whether he wishes the depositions to be read again, and unless the accused dispenses therewith shall read or cause them to be read again.

2. When the depositions have been again read, or the reading dispensed with, the accused shall be addressed by the justice in these words, or to the like effect:

"Having heard the evidence, do you wish to say anything in answer to the charge? You are not bound to say anything, but whatever you do say will be taken down in writing and may be given in evidence against you at your trial. You must clearly understand that you have nothing to hope for 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."

3. Whatever the accused then says in answer thereto shall be taken down in writing in form 20, or to the like effect, and shall be signed by the justice and kept with the depositions of the witnesses and dealt with as hereinafter provided. 55-56 V., c. 29, s. 591.

The accused should not be put upon his oath at this stage of the inquiry, and only when he volunteers to give evidence upon his own behalf.

The statement is not made under oath, and if his statement as taken down and signed by the magistrate concludes "taken and sworn before me," it is not receivable in evidence, and the Judge will neither allow the magistrate's clerk to prove that in fact it was not sworn, nor will he receive parol evidence of what the prisoner said. *R.* v. *Rivers*, 7 C. & P. 177; *R.* v. *Hornage*, 1 Stark Rep. 242. But see *R.* v. *Skelton, post.*

The prisoner's signature is not essentially necessary but only for precaution and for the facility of future proof. *In Lambe's Case*, 2 Leach C. C. 625.

It is usual and quite proper for the magistrate to get the prisoner's signature to the statement even if, as is usual, he only says "I am not guilty," or "I have nothing to say."

The signature of the accused to such statement may be afterwards used against him upon the charge of forgery upon which he was committed for the purpose of comparing the handwriting with the alleged forgery. *R.* v. *Golden* (1905), 10 C. C. C. 278.

An accused person by going into the witness box and giving evidence in his own behalf, is not bound to write so as to provide a specimen of his handwriting for comparison with a document in evidence. *R.* v. *Grinder* (1905), 10 C. C. C. 335.

The provisions of this section are directory, and a statement in writing not prefaced with the statutory words, made by a prisoner to the committing magistrate, was admitted in evidence, upon evidence by the committing magistrate that he had verbally cautioned the prisoner to the effect required by the statute before receiving the statement in question. *R.* v. *Kalabeen et al.*, 1 B. C. R., pt. 1, 1.

At a preliminary hearing the accused was addressed by the justice in the words set out in sec. 684. He then made a statement, but before making it he was, at his own request, sworn. The statement was taken down in writing and signed by the accused. Upon this statement being offered in evidence by the Crown at the trial and upon its reception being objected to, the trial Judge (WETMORE, J.) admitted the statement, holding that it was none the less a statement under sec. 591 (now 684) of the Code, because the defendant at his own request had been sworn before he made it, and if it was not a statement made under that section the defendant was a competent witness under sec. 4 of the Canada Evidence Act, and having offered his evidence under oath and it having been received, it was not subject to the proviso in sec. 5 of the Canada Evidence Act. It was admissible under the general provisions of the Evidence Act and by virtue of sec. 592

(now 685) of the Code. *R.* v. *Skelton* (1898), 4 C. C. C. 467. and see *R.* v. *Soucie,* 1 P. & B. N. B. R. 611.

This decision is not an authority for the statement being taken under oath even if the accused desires to be sworn. His reply in answer to the question, or any statement he chooses to make, should be taken down in writing and signed. He can be told that if he desires to give evidence under oath he can do so later on as provided by sec. 686.

If the statement be headed according to the section it is evidence against the accused on its mere production and without proof of the mode in which it was taken, unless indeed it can be shewn that the signature of the justice is forged. *R.* v. *Sansome,* 4 Cox 203. A statement has been admitted which was not signed by either the justice or the accused. *R.* v. *Bond,* 4 Cox 231.

If the statement is not headed in the prescribed form, or if it contains erasures or interlineations, it will probably be necessary to call the justice or his clerk to explain the conditions under which it was taken. *Taylor on Evidence,* 892.

As any statement voluntarily made by the accused is at common law admissible against him, the only advantage conferred by the statute is to simplify the proof of the confession and to render it of more weight. And where the examination is from some informality inadmissible under the statute, or where it has not been reduced to writing, the statement, if voluntarily made, or acknowledged, by the prisoner may still be proved as a confession at common law. *Roscoe Cr. Evidence,* 51-54; *R.* v. *Thomas,* 13 Cox 77-8; *R.* v. *Erdheim* (1896), 2 Q. B. 260; *Phipson,* 4th ed., 447.

The taking of the statutory examination will not exclude proof of any admission made by the accused before, or after, the examination, or of anything incidentally said by him during it, and before being cautioned. *R.* v. *Wilkinson,* 8 C. & P. 662; *R.* v. *Christopher,* 2 C. & K. 994; *R.* v. *Harris,* 1 Moody C. C. 338; *R.* v. *Stripp,* 7 Cox 97.

Statements made by the accused before the justice on a former investigation, but not incorporated in the examination returned, are also admissible. *Ibid.* As has been previously stated, depositions taken on a preliminary inquiry may be read as evidence at the trial of the accused in certain events, *e.g.,* when the witness is dead, or so ill as not to be able to travel, or is absent from Canada, under the provisions of sec. 999 of the Code.

This makes it all the more imperative that justices should be impressed with the importance and necessity of seeing that every

and all the requirements and enactments of the Code relating to preliminary inquiries are carried out to the letter; the evidence must be properly taken, and thus preserved it can be used at the trial if any of the contingencies arise as provided for in sec. 999.

The caution in sec. 684 is applicable to the accused only and not to any witnesses, so that a deposition of any witness, regularly taken, may be used against him afterwards without any caution having been given, if he should be accused of crime. *R.* v. *Coate,* 18 L. R. 4 P. C. App. 599.

By sec. 1001 of the Code, 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.

Confessions and Admissions.

685. 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.

In criminal cases, a confession made by the accused voluntarily is evidence against him of the facts stated. But a confession made after suspicion has attached to, or a charge been preferred against him, and which has been induced by any promise or threat relating to the charge and made by, or with the sanction of, a person in authority, is deemed *not to be voluntary,* and is inadmissible. *Phipson,* 4th ed., p. 241.

Statements made by the accused *before* the crime, *e.g.*, as to his motives and intentions, or the instruments obtained to commit it, are receivable against him as admissions irrespective of the above limitations. *R.* v. *Crossfield,* 26 How. St. Tr. 314-5; *Wigmore,* s. 1050.

The ground of rejection of confessions which are not voluntary is the danger that the prisoner may be induced by hope, or fear, to criminate himself falsely. Tay. s. 874; 3 Russ. Cr. 479.

It is now settled that it lies upon the prosecution to establish, and not upon the accused to negative, the voluntariness of the confession, it being the duty of the prosecution to satisfy itself on the point before putting the statement in. *R.* v. *Thompson* (1893), 2 Q. B. 12; *R.* v. *Rose,* 18 Cox 717.

A confession duly made and satisfactorily proved is generally sufficient to warrant a conviction without corroboration. *R.* v.

Nickles, L. R. 8 C. L. 50, 58; *R.* v. *Sullivan,* 16 Cox 347; *Archbd. Crim. Pl.,* 23rd ed., 338.

Confessions of murder, bigamy, and crime involving title to property form exceptions to this rule; and see section 1002 of the Code.

(*a*) To exclude a confession the inducements must have been held out by a person in authority, that is, someone engaged in the arrest, detention, examination or prosecution of the accused; or by someone acting in the presence and without the dissent of such a person. See *Phipson,* 4th ed., at p. 243, and cases there cited.

(*b*) A promise or threat in order to exclude a confession must *relate to the charge,* that is, must reasonably imply that the prisoner's position with reference to it will be rendered better or worse according as he does or does not confess. It need not, however, be *express,* but may be implied from the conduct of the person in authority, the declaration of the prisoner, or the circumstances of the case. *R.* v. *Gillis,* 11 Cox 69. Nor need it be made directly to the prisoner; it is sufficient if it may reasonably be presumed to have come to his knowledge, providing, of course, it appears to have induced the confession. *R.* v. *Thompson, supra.*

On the other hand, *fear* alone, without threats, will not exclude a confession. Nor will a promise or threat to *one prisoner* exclude a confession made by another who was present and heard the inducement. *R.* v. *Jacobs,* 4 Cox 54; *R.* v. *Bate,* 11 Cox 686. Nor will an inducement to confess as to *one crime* invalidate a confession as to a different one. *R.* v. *Warner,* 3 Russ. Cr., 6th ed., 489, unless both are parts of the same transaction.

(*c*) If the impression produced by the promise or threat is clearly shewn to have been removed, *e.g.,* by the lapse of time, or by any intervening caution given by some person of superior (but not of equal or inferior authority) to the person holding out the inducement, a confession subsequently made will be strictly receivable.

(*d*) The whole confession must be taken although containing matter favourable to the prisoner, though the jury may attach different degrees of credit to the different parts. And if the confession implicates others their names cannot be omitted, though the Judge should warn the jury that it is only evidence against the maker. *Phipson,* p. 246.

(*e*) It is in general immaterial to whom a voluntary confession has been made—statements made by the accused to the prosecutor, or which he has been overheard muttering to himself, if

otherwise than in his sleep; or made in confidence to a fellow prisoner, or to his wife, or solicitor, are admissible against him. *Phipson, 246.*

Prevailing Doctrine.

But the doctrine in England at present and the prevailing doctrine in the United States is, that evidence of any confession is receivable unless there has been some inducement held out by some person who had, or was supposed to have, authority to assure the accused the promised good. *6 Am. & Eng. Encly. 548.*

The well known rule as to the admission, or rejection, of a confession made by a prisoner is to the effect that no confession by the prisoner is admissible which is made in consequence of any threat, or inducement, of a temporal nature having reference to the charge against the prisoner made or held out by a person in authority. Dubuc, J., p. 518, and see Bain, J., at p. 524, in *R.* v. *Todd* (1901), 4 C. C. C. 514.

The general rule is that a free and voluntary confession made by a person accused of an offence is receivable in evidence against him as the highest and most satisfactory proof of guilt, because it is fairly presumed that no man would make such a confession against himself if the facts confessed were not true. *R.* v. *Lambe*, 2 Leach C. C. 625.

Whatever justification there might be for a person in authority endeavouring to worm a confession out of a suspected person, there was certainly no justification of such a resort to falsehood. The statement "You might as well own up as to have it brought out in a Court of justice," made to the accused, was equivalent to "if you do not tell us it will be brought out in a Court of justice." Such a threat made by a person in authority renders the confession inadmissible. *R.* v. *Macdonald* (1896), 2 C. C. C. 221.

The burden is on the Crown to prove that a confession of guilt made to a person in authority was free and voluntary. *R.* v. *Pah-Cah-Pah-Ne-Capi*, 4 C. C. C. 93; and see *R.* v. *Tutty* (1905), 9 C. C. C. 544.

It must be proved affirmatively to the satisfaction of the trial Judge that it was made freely and voluntarily and not in response to any threat, or suggestion, of advantage to be inferred either directly, or indirectly, used by a person in a position of authority in connection with the prosecution. *R.* v. *Ryan* (1905), 9 C. C. C. 347; 9 O. L. R. 137.

Held, that a rector of a parish was a person in authority, and that the statement to him by a boy concerning an assault on another boy was not voluntary, and so not admissible in evidence. *R.* v. *Royds*, 10 B. C. R. 407.

Confessions Made After Arrest.

After arrest the accused ought to be warned and made to understand that he was being questioned with the object of extracting admissions to be used against him. *R.* v. *Kay* (1904), 9 C. C. C. 404, 11 B. C. R. 157. In this case the statements were made after arrest of the accused in answer to questions put by the chief constable. "In such a case it is not in my opinion sufficient for the prosecution simply to shew that no inducement was put forward by way of threat or promise express, or implied. The arrest and charge are in themselves a challenge to the accused to speak, an inducement within the rule. The accused ought, therefore, to have been warned of the consequences of speech, and made to understand that he was being questioned with the object of extracting admissions to be used against him." Duff, J., p. 404, *ibid.*, and see *R.* v. *Charcoal* (1897), 4 C. C. C. 93.

"In my opinion when a prisoner is once taken into custody a policeman should ask no questions at all without administering the usual caution." Hawkins, J. (1898); *R.* v. *Hestia*, 19 Cox 16.

In *Rogers* v. *Hawkins*, 19 Cox 122, Russell, C.J. and Mathew, J., disapproved of the following judgment by Cave, J.:—

"It is quite right for a police constable, or any other police officer, when he takes a person into custody to charge him, and let him know what it is he is taken up for, but the prisoner should be previously cautioned because the very fact of charging induces a prisoner to make a statement, and he should have been informed that such a statement may be used against him. The law does not allow a Judge or the jury to put the questions in open Court to prisoners, and it would be monstrous if the law permitted a police officer to go without anyone being present to see how the matter was conducted, and put a prisoner through an examination and then produce the effects of that examination against him. Under these circumstances a policeman should keep his mouth shut and his ears open. He is not bound to stop a prisoner in making a statement; his duty is to listen and report, but it is quite another matter that he should put questions to prisoners." Cave, J., in *R.* v. *Male & Cooper* (1893), 17 Cox

689. In *R.* v. *Brackenbury*, 17 Cox (1893), MR. JUSTICE DAY took an opposite view and received such evidence. See the cases collected in *Phipson*, at p. 245.

The general principle governing the receivability of statements made by the accused person to persons in authority is stated by MR. JUSTICE CAVE, at p. 645, as follows:—

"If these principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford to magistrates a simple test by which the admissibility of a confession may be decided. They have to ask: Is it proved affirmatively that the confession was free and voluntary—that is, was it preceded by any inducement held out by a person in authority to make a statement? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible." *R.* v. *Thompson* (1893), 2 Q. B. 12, 17 Cox 641.

While the opinion of the Judges in England seems to differ the law at all events in Ontario seems to be well settled, and one of the best expressions of the law is as follows:—

"The great weight of authority is in support of the conclusion that answers given in response to the officer in charge are to be received in evidence so long as they are not evoked, or extorted, by inducements, or threats. The general principle is that admissions made to the officer in charge even in response to questions may be received if the presiding Judge is satisfied that they were not unduly, or improperly, obtained, which depends on the circumstances of each case." BOYD, C., p. 98; *R.* v. *Elliott* (1899), 3 C. C. C. 95.

"We think, although we reprehend the practice of questioning prisoners, that we cannot come to the conclusion that evidence obtained by such questioning is inadmissible The great weight of authority in England and Ireland, and all the cases in which the point has been considered by a Court for Crown cases reserved, go to shew that the evidence is admissible. We must leave it to the legislature to determine whether the practice of cross-examining prisoners is legally to obtain hereafter. We hold the evidence admissible and affirm the conviction." ARMOUR, C.J., in *R.* v. *Day* (1890), 20 O. R. 209.

This last decision as stated by BOYD, C., in *R.* v. *Elliott*, settled the law in Ontario upon this subject. As to the law in Quebec see *R.* v. *Viau*, 7 Que. Q. B. 362.

Statements made by a prisoner in a cell to a person whom he reasonably supposed to be an agent sent by his counsel to inter-

view him regarding the defence, are as much privileged as would be statements made to the counsel himself. When persons concealed themselves outside the cell in a position to overhear such statements in pursuance of a scheme previously planned, the interview should be treated as one with several persons who had fraudulently adopted the character of the counsel's representatives and the cloak of privilege should be applied to what was heard by the listeners without, as well as the one within the cell. *R.* v. *Choney* (1908), 17 M. L. R. 469.

"Generally speaking, it may be said that it is no objection to the admissibility of a prisoner's confession that it was obtained by means of a trick, or artifice practised upon him by the officer or other person to whom it was made." OSLER, J.A., at p. 33 in *R.* v. *White* (1908), 15 C. C. C. 30.

A confession is admissible, although it is elicited in answer to a question which assumes the prisoner's guilt, or is obtained by artifice or deception. *Joy on Confessions, p. 42; Arch. Cr. P. & Ev. 22nd ed., 1900, p. 306; Roscoe, 13th ed., p. 44.*

But not if it appears that such an admission was suggested to the prisoner by a peace officer with inducements and was shortly after made to a Crown officer as a result of such inducement. *R.* v. *Hope Young* (1905), 10 C. C. C. 466. Where a constable gave the usual caution to a prisoner, but afterwards said to him, "The truth will go better than a lie—if anyone prompted you to do it, you had better tell about it," whereupon the prisoner said that he did the act complained of. Held, the admission was not receivable in evidence and conviction grounded thereon was improper. *R.* v. *Fennell,* 7 Q. B. D. 147, followed: *R.* v. *Romp,* 170 O. R. 567. Statements to constable and coroners, see *R.* v. *Finkle,* 15 C. P. 453. Statements to detectives, see *R.* v. *Attwood,* 20 O. R. 574; *R.* v. *Day,* 20 O. R. 209.

"But so far as I am aware I know of no decision saying it is the legal duty of the constable to administer that caution. This much is clear, that when a constable arrests a prisoner and states the charge as he should do, he is prohibited from questioning the prisoner; and if the prisoner is questioned by the constable and makes any answers, those answers are not to be used against him. The only statements that can be used are those made voluntarily by the accused without undue pressure or fear, or inducement, or threat . . . I think the law is in this condition that if the constable stands pat and says nothing and the prisoner make a voluntary statement, that statement is admissible." HUNTER, C.J., at trial in *R.* v. *Bruce* (1907), 12 C. C. C. 275.

By sec. 978 of the Code, 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. This does not apply to preliminary inquiries, but to the trial of the person summarily, or by indictment.

Evidence of statements made by a person since deceased, immediately after an assault upon him, under apprehension of further danger and requesting assistance and protection, is admissible as part of the *res gestæ*, even though the person accused of the offence was absent at the time when such statements were made. *R.* v. *Beddingfield*, 14 Cox 341; *R.* v. *Foster*, 6 C. & P., and *Aveson* v. *Kinnaird*, 6 East 188, followed.

Statements not coincident in point of time with the occurrence of the assault, but uttered in the presence and hearing of the accused and under such circumstances that he might reasonably have been expected to have made some explanatory reply to remarks in reference to them, are admissible in evidence. *Gilbert* v. *The King* (1907), 28 S. C. R. 284.

WITNESSES FOR THE DEFENCE.

686. After the proceedings required by section six hundred and eighty-four are completed the accused shall be asked if he wishes to call any witnesses.

2. Every witness called by the accused who testifies to any fact relevant to the case shall be heard, and his deposition shall be taken in the same manner as the depositions of the witnesses for the prosecution. 55-56 V., c. 29, s. 593.

Unless the accused can call witnesses whose evidence will establish his innocence of the charge, or explain away the circumstances adduced in evidence by the prosecution in such a way as to clear him, it is not generally wise from the prisoner's point of view to call witnesses at this stage.

Experienced counsel very seldom avail themselves of this opportunity of going into the evidence for the defence, being content with the cross-examination of the witnesses for the prosecution, and reserving their full defence till the trial.

LORD DENMAN, C.J., in *R.* v. *Smith*, 2 C. & K. 818, said: "If a person in whose possession stolen property is found give a reasonable account of how he came by it, and makes reference to some known person as the person from whom he received it, the magistrate should send for that person and examine him, as it may be that his statement may entirely exonerate the accused person and put an end to the charge." And see *R.* v. *Crowhunt*,

1 C. & K. 370, and *R.* v. *Hughes*, 1 Cox 176; *R.* v. *Debley*, 2 C. & K. 818; *R.* v. *Harman*, 2 Cox 487; *R.* v. *Wilson*, 2 Dears 157. As to the general right of a person charged before a magistrate with an indictable offence to call witnesses for the defence, see *In re Phipps*, 8 A. R. 77, and see *R.* v. *Meyer*, 11 P. R. 477.

ADJUDICATION AND SUBSEQUENT STEPS AND BAIL.

687. When all the witnesses on the part of the prosecution and the accused have been heard the justice shall, if upon the whole of the evidence he is of opinion that no sufficient case is made out to put the accused upon his trial, discharge him.

2. In such case any recognizances taken in respect of the charge shall become void, unless some person is bound over to prosecute under the provisions of the next following section. 55-56 V., c. 29, s. 594.

The justice is not called upon to decide the guilt or innocence of the accused, but after considering the whole evidence he has to form an opinion as to whether, or not, a sufficient case has been made out to put the accused upon his trial. It is not for the justice to balance, or weigh the evidence as if he was trying the accused for the offence charged.

If the witnesses for the accused have explained away the facts given in evidence by the witnesses for the prosecution which go to the root of the matter and they establish the prisoner's innocence, or the utter improbability of the story put up by the prosecution, this will render further proceedings unnecessary and the accused should be discharged.

If, on the other hand, there is a flat contradiction of testimony between the witnesses for the prosecution and those for the defence in material features of the case, then it is well to commit the accused in order that a jury may have an opportunity of hearing the evidence and deciding the truth of the conflicting statements.

If the justice feels that the witnesses for the prosecution are unworthy of belief, or the evidence offered by them establishes a very slender case and there is a likelihood that if the case is sent for trial the jury will acquit him, he should discharge the accused.

It is to be borne in mind that a dismissal by a justice on a preliminary inquiry is not an acquittal of the accused, and that it is open to the Crown to lay another charge against him for the same offence. *R.* v. *Waters*, 12 Cox 390; *R.* v. *Morton*, 19 C. P. 26; *Re Hanney* (1905), 11 C. C. C. 23, and *R.* v. *Guerin*, 16 Cox 596-601, all *supra*.

As to the magistrate's discretion to re-open the inquiry after evidence heard and nothing has been shewn against the accused, see *Belanger & Mulvena*, Q. R. 22 S. C. 37. To justify the committal of an accused person for trial or for extradition, it is only necessary that the evidence should be such as amounts to probable cause to believe him guilty. It is not necessary that it be sufficiently conclusive to authorize his conviction. WURTELE, J., p. 273. *Ex parte Feinberg* (1901), 4 C. C. C. 270.

To commit only requires that the circumstances proved are sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is probably guilty of the offence with which he is charged. *Ibid.*

BINDING OVER PROSECUTOR.

688. 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 form 21, or to the like effect. 55-56 V., c. 29, s. 595.

689. If the prosecutor so bound over at his own request does not prefer and prosecute such an indictment, or if the grand jury does not find a true bill, or if the accused is not convicted upon the indictment so preferred, the prosecutor shall, if the Court so direct, pay to the accused person his costs, including the costs of his appearance on the preliminary inquiry.

2. The Court before which the indictment is to be tried or a Judge thereof may in its or his discretion order that the prosecutor shall not be permitted to prefer any such indictment until he has given security for such costs to the satisfaction of such Court or Judge. 55-56 V., c. 29, s. 595.

If the information, or evidence, do not disclose a criminal offence the justice is not called upon to bind the prosecutor over under sec. 688. *Ex parte Wason*, L. R. 4 Q. B. 573; *R.* v. *London Justices*, 16 Cox 77.

As to anyone bound over under sec. 688 preferring indictment, see secs. 871, 872 and 873 of the Code. And see *R.* v. *Hoo Yoke* (1905), 10 C. C. C. 211.

As to costs incurred as provided by sec. 689, see *R.* v. *St. Louis* (1897), 1 C. C. C. 141; and see *R.* v. *Hart*, 45 U. C. R. 1; *May* v. *Reid*, 16 A. R. 150; and *R.* v. *Fitzgerald*, 1 C. C. C. 420. 29 O. R. 203.

Commitment for Trial.

690. If a justice holding a preliminary inquiry thinks that the evidence is sufficient to put the accused on his trial, he shall commit him for trial by a warrant of commitment, which may be in form 22, or to the like effect. 55-56 V., c. 29, s. 596.

A justice's warrant of commitment for trial must describe an offence for which a commitment for trial can be legally made. *Ex parte Welsh* (1898), 2 C. C. C. 35.

Justices may substitute a good warrant of commitment for a bad one. That is they may return an amended, or fresh, warrant with the writ of certiorari, and if it is sufficient the Court will not inquire into the validity of a previous warrant under which the prisoner was committed. *Re Plunkett* (1895), 1 C. C. C. 365, 3 B. C. R. 484.

A mandamus will not be granted to compel a magistrate to issue a warrant upon an information alleging an indictable offence, when the magistrate is of opinion that a case for so doing has not been made out, and after hearing the allegation of the complainant. *Thompson* v. *Desnoyer* (1899), 3 C. C. C. 68; Q. R. 16 S. C. 253.

Prisoner had been committed under a warrant which was defective. Subsequent to the service on the gaoler of a writ of *habeas corpus* he received another warrant which was regular. Held that the second warrant was valid and sufficient to detain the prisoner in custody. *R.* v. *House*, 2 M. L. R. 58.

One justice may sign a warrant of commitment. A warrant may be partly written and partly printed. The warrant was addressed to the keeper of the common gaol at the City of Winnipeg instead of to the keeper of the common gaol of the Eastern Judicial District. Held, sufficient, as there can be no uncertainty as to the person to whom the warrant is addressed, there being only one common gaol in Winnipeg. But the prisoner was discharged as the warrant did not disclose an offence known to the law. *R.* v. *Holden* (1886), 3 M. L. R. 579.

Held, that the warrant of commitment was insufficient as it contained no mandatory words directing the keeper of the gaol to receive the prisoner into his custody, and there imprison and keep him for a specified time, &c. *R.* v. *Barnes* (1887), 4 M. L. R. 448.

The warrant must shew where the prisoner is to be confined. *Re King*, 37 C. L. J. 317.

A warant of commitment that A "did steal a certain waggon" was held sufficient without alleging absence of any colour of right, or laying property in any person. *R.* v. *Leet*, 20 C. L. T. Occ. N. 46.

The act of the magistrate in committing for trial or admitting to bail cannot be reviewed on *certiorari*. *R.* v. *J. J. Roscommon* (1894), 2 Q. B. Ir. 158. After committing he is *functus officio*. See *R.* v. *Lusington* (1894), 1 Q. B. 420.

The warrant is bad as it does not shew the jurisdiction of the magistrate. He had jurisdiction only as being stipendiary magistrate for the district and not as a justice of the peace, but he is described as a justice of the peace. It cannot be inferred from the letters "P. M." appended to his signature that he was stipendiary for that district, he might be stipendiary for some other district. Prisoner discharged. HUNTER, C.J., *R.* v. *Hong Lee*, (1909), 1 C. C. C. 39.

Commitments to the custody of gaolers, &c., must be in writing (or part writing and part printing), under the hand and seal of the justice making the commitment, directed to the gaoler, or keeper, of prison, mentioning the time and place of making it. *2 Hawk. P. C., ch. 10, 513.*

The name, office and authority of the justice ought to be shewn on the face of the warrant. *2 Hale 122.* See further, "Chapter on Summary Convictions," Chap VIII. The duties of a constable receiving a warrant of commitment are prescribed by sec. 904 of the Code.

COPY OF DEPOSITIONS.

691. Every one who has been committed for trial, whether he is bailed out or not, shall be entitled at any time before the trial to have copies of the depositions, and of his own statement, if any, from the officer who has custody thereof, on payment of a reasonable sum not exceeding five cents for each folio of one hundred words. 55-56 V., c. 29, s. 597.

In *R.* v. *Smith*, 1 Stra. 126, a rule was granted to compel a justice of the peace to cause an examination taken before him to be produced at the trial and to give the party a copy in the meantime.

In an action for a malicious prosecution a rule was obtained for the committing magistrate to shew cause why he should not permit the plaintiff to inspect and take a copy of the information at his own expense and cause the original to be produced at the trial. *Welch* v. *Richards*, Barnes 468.

A court stenographer is a public official against whom a mandamus may issue for non-performance of his official duty to furnish an applicant with a copy of evidence taken at a criminal trial. *R.* v. *Campbell* (1905), 10 C. C. C. 326.

RECOGNIZANCE TO PROSECUTE OR GIVE EVIDENCE.

692. 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 form 23, 24 or 25, or to the like effect, and shall be acknowledged by the person entering into the same, and be subscribed by the justice or one of the justices before whom it is acknowledged.

4. Every such recognizance shall bind the person entering into it to prosecute or give evidence (both or either as the case may be), before the Court by which the accused shall be tried. 55-56 V., c. 29, s. 598.

5. If it is made to appear to the justice that any person to be so bound over as a witness is without means or without sufficient means, or if other reasons therefor satisfactory to him are shewn, the justice may require that a surety or sureties be procured and produced and join in the recognizance, or that a sum of money be deposited with the justice, sufficient in his opinion to insure the appearance of such person at the trial and the giving of his evidence.

Sub-section 5 was added by the amendments to the Code in 1909. Infants and married women who cannot legally bind themselves must procure others to be bound for them. Infancy however is no ground for discharging a forfeited recognizance to appear and prosecute for a felony. *13 Price 673.*

Recognizances need not be signed by the persons entering into them, but they are required to be signed by the justice taking them.

It is suggested that a person depositing a sum of money as provided by sub-sec. 5 should at the same time enter into a personal recognizance and the deposit be accepted as ancillary to the bond.

See sec. 840 of the Code as to recognizances taken under this section being obligatory when the person committed elects to take a speedy trial under Part XVIII. of the Code.

Recognizances taken under this section upon a Sunday are regular. HANNINGTON, J., in *ex parte Garland* (1901), 8 C. C. C. 385.

If the recognizance is for the next Court of competent jurisdiction it only requires appearance at that Court, not at a later one. *Re Cohen's Bail,* 16 C. L. T. Occ. N., 217. As to *estreat* of recognizances, see *post.*

WARRANT FOR ABSCONDING WITNESS.

693. Whenever any person is bound by recognizance to give evidence before a justice, or any criminal Court, in respect of any offence under this Act, any justice, if he sees fit, upon information being made in writing and on oath, that such person is about to abscond, or has absconded, may issue his warrant for the arrest of such person.

2. If such person is arrested, any justice, upon being satisfied that the ends of justice would otherwise be defeated, may commit such person to prison until the time at which he is bound by such recognizance to give evidence, unless in the meantime he produces sufficient sureties.

3. Any person so arrested shall be entitled on demand to receive a copy of the information upon which the warrant for his arrest was issued. 55-56 V., c. 29, s. 598.

694. Any witness who refuses to enter into or acknowledge any such recognizance as aforesaid may be committed by the justice holding the inquiry by a warrant in form 26, or to the like effect, to the prison for the place where the trial is to be had, there to be kept until after the trial, or until the witness enters into such recognizance as aforesaid before a justice having jurisdiction in the place where the prison is situated.

2. If the accused is afterwards discharged any justice having such jurisdiction may order any such witness to be discharged by an order which may be in form 27, or to the like effect.

695. The information, if any, the depositions of the witnesses, the exhibits thereto, the statement of the accused, and all recognizances entered into, and also any depositions taken before a coroner, if any such have been sent to the justice, shall as soon as may be after the committal of the accused, be transmitted to the clerk or other proper officer of the Court by which the accused is to be tried.

2. When any order changing the place of trial is made the person obtaining it shall serve it, or an office copy of it, upon the person then in possession of the said documents, who shall thereupon transmit them and the indictment, if found, to the officer of the Court before which the trial is to take place. 55-56 V., c. 29, s. 600.

RULE AS TO BAIL.

696. When any person appears before any justice charged with an indictable offence punishable by imprisonment for more than five years, other than treason or an offence punishable with death or an offence under any of the sections seventy-six to eighty-six inclusive, and the evidence adduced is, in the opinion of such justice, sufficient to put the accused on his trial, but does not furnish such a strong presumption of guilt as to warrant his committal for trial, the justice, jointly with some other justice, may admit the accused to bail upon his procuring and producing such surety or sureties as, in the opinion of the two justices, will be sufficient to ensure his appearance at the time and place when and where he ought to be tried for the offence; and thereupon the two justices shall take the recognizances of the accused and his sureties, conditioned for his appearance at the time and place of trial, and that he will then surrender and take his trial and not depart the Court without leave.

2. In any case in which the offence committed or suspected to have been committed is an offence punishable by imprisonment for a term less

than five years, any one justice before whom the accused appears may admit to bail in manner aforesaid, and such justice or justices may, in his or their discretion, require such bail to justify upon oath before him or them as to their sufficiency.

3. In default of such person procuring sufficient bail, such justice or justices may commit him to prison, there to be kept until delivered according to law.

4. The recognizance mentioned in this section shall be in Form 28. 55-56 V., c. 29, s. 601.

In *R.* v. *Gibson* (1896), 3 C. C. C. 451, MEAGHER, J., at page 461, says: "There does not appear to be any provision in the Code which requires the justice when he discharges the accused, or acting under the provisions of sec. 601 (now 696), he bails him and does not commit him, to transmit the depositions to any Court or officer."

It is true that there is no specific provision as to transmitting the depositions when the accused is released under sec. 696, yet the practice is to send all the depositions, &c., along with the recognizance, to the proper officer, the same as if the accused had been committed under sec. 695.

The recognizance entered into by the accused when admitted to bail under this section (Form 28) is identical with the recognizance which he and his sureties would enter into if he had been committed to gaol and then admitted to bail on a Judge's order.

Besides it is necessary that the information, depositions, &c., should be sent by the justice to the proper officer as under sec. 695, in order that they may be perused by the Crown officers for consideration as to whether or not an indictment will be preferred against the accused. This matter is dealt with at length in order that justices may not be misled by the fact that there are no specific provisions in the Code for the transmission of the papers when they choose to exercise the authority given them by this section of the Code. There is no doubt but that the papers should be dealt with exactly as under sec. 695. In considering this sec. 696 several things are to be observed.

(1) The proceedings are not applicable when the accused is charged with (*a*) treason, (*b*) with an offence punishable with death, (*c*) or offences under any of the sections of the Code 76 to 86 inclusive.

These offences are: Sec. 76, Accessory to treason; 77, Levying war by subject of a foreign state that is at peace with His Majesty; 78, Treasonable offences; 79, Conspiracy to intimidate a legislature; 80, Assault upon the King; 81, Inciting to mutiny; 82, Persuading enlisted soldier to desert, or concealing a deserter; 83, Resisting execution of a search warrant for a de-

serter; 84, Persuading men to desert from militia, R. N. W. M. P., &c. (which is not an indictable offence and therefore should not be included); 85, Entering fortress, camp, ship, &c., for wrongfully obtaining information; 86, Communicating information acquired in office.

(2) Where the offence is punishable by imprisonment for more than five years two justices must join in admitting the accused to bail and taking the recognizance. A police, or stipendiary magistrate, can act alone, as they exercise the powers of two justices.

(3) Where the offence is punishable by imprisonment for a term less than five years, one justice before whom the accused appears may admit to bail.

(4) And the justice or justices may require the bail to justify upon oath before him or them as to their sufficiency.

(5) In default of the accused procuring sufficient bail the justice may commit him to prison to await his trial.

(6) The recognizance shall be in Form 28.

Any one admitted to bail under sec. 696 of the Code is not deprived of his right to a speedy trial under sec. 823, Part XVIII. of the Code. See *R.* v. *Lawrence* (1896), 1 C. C. C. 295, and *R.* v. *Burke*, 24 O. R. 64.

697. Where the offence is one triable by the Court of General or Quarter Sessions of the Peace and the justice is of opinion that it may better or more conveniently be so tried, the condition of the recognizance may be for the appearance of the accused at the next sittings of that Court notwithstanding that a sitting of a superior Court of criminal jurisdiction capable of trying the offence intervenes.

This section applies in Ontario and Quebec since they are the only provinces in Canada that have Courts of General, or Quarter Sessions.

Bail after Committal.

698. In case of any offence other than treason or an offence punishable with death, or an offence under any of the sections seventy-six to eighty-six inclusive, where the accused has been finally committed as herein provided, any Judge of any superior or County Court, having jurisdiction in the district or county within the limits of which the accused is confined, may, in his discretion, on application made to him for that purpose, order the accused to be admitted to bail on entering into a recognizance with sufficient sureties before two justices, in such amount as the Judge directs, and thereupon the justices shall issue a warrant of deliverance as hereinafter provided, and shall attach thereto the order of the Judge directing the admitting the accused to bail.

2. Such warrant of deliverance shall be in Form 29.

699. No Judge of a County Court or justices shall admit any person to bail accused of treason or an offence punishable with death, or an offence under any of the sections seventy-six to eighty-six inclusive, nor shall any person be admitted to bail, except by order of a superior Court of criminal jurisdiction for the province in which the accused stands committed, or of one of the Judges thereof, or, in the province of Quebec, by order of a Judge of the Court of King's Bench or Superior Court.

700. 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 ninety-eight, for an order to the justice to admit such prisoner to bail.

2. Such committing justice shall, as soon as may be, after being so notified, transmit to the clerk of the Crown, or the chief clerk of the Court, or the clerk of the County Court, or other proper officer, as the case may be, endorsed under his hand and seal, a certified copy of all informations, examinations and other evidence touching the offence wherewith the prisoner has been charged, together with a copy of the warrant of commitment, and the packet containing the same shall be handed to the person applying therefor for transmission, and it shall be certified on the outside thereof to contain the information concerning the case in question.

3. If any justice neglects to comply with the foregoing provisions of this section, according to the true intent and meaning thereof, the Court, to whose officer any such information, examination, other evidence, or warrant of commitment ought to have been delivered, shall, upon examination and proof of the offence in a summary manner, impose such fine upon such justice as the Court thinks fit.

These sections will be considered together. The proceedings for bail are commenced, as provided in sec. 700, by the prisoner, or his counsel, notifying the committing justice that he will, as soon as counsel can be heard, move either before a superior Court, or a Judge thereof, or before a Judge of a County Court, under the provisions of sec. 698, for an order to the justice to admit such prisoner to bail.

As soon as he is thus notified the justice shall transmit to the proper officer a certified copy of all informations, examinations, &c., touching the offence wherewith the prisoner has been charged and also a copy of the warrant of commitment, in a packet under his hand and seal, and the packet may be handed for transmission to the persons applying therefor. The packet shall be certified on the outside thereof to contain the information covering the case in question.

Neglect upon the part of the justice to comply with these provisions will subject him to a fine on summary trial by the Court to whose officer he shall have transmitted the papers.

The application for bail is made to a Judge of a superior Court, or County Court. A justice, or magistrate, has no power to bail after an accused person has been committed for trial; he is then *functus officio*. A Judge of a County Court has no power

to grant bail, and no justice on the order of a County Court Judge shall admit any one to bail who is accused of treason, or of an offence punishable with death, nor of offences under secs. 76 to 86 inclusive.

It is entirely in the discretion of the Judge to whom the application is made as to whether he will make an order for bail, or not.

When a true bill has been found on an indictment for murder, bail will usually be refused. *R.* v. *Keeler,* 7 P. R. 117, and see *ex parte Maguire* (1857), 7 L. C. R. 57.

If the depositions afford a presumption of guilt at least so strong that a grand jury would in the opinion of the Judge before whom the application is made for bail, find a true bill against the accused for murder, the application should be refused. *R.* v. *Mullady et al.* (1868), 4 P. R. 314.

Prisoners charged with murder will not be admitted to bail unless under any unusual circumstances, as where facts are adduced to the Court which establish that it is unlikely that the indictment can be sustained. *R.* v. *Murphy* (1853), 2 N. S. R. 158.

The Court has undoubted power to admit to bail in case of murder. *Re Bartlemy,* 1 E. & B. 8.

Where a *habeas corpus* has been issued the Court has power to admit persons to bail when accused of any felony, including murder. *R.* v. *Fitzgerald,* 3 U. C. R. (O.S.) 300; *R.* v. *Higgins,* 4 U. C. R. (O.S.) 83.

Bail are sureties taken by a person duly authorized for the appearance of a defendant charged with an indictable offence, at a certain day and place, to answer and be justified by law. *Hale's Sum., 96 Dalt. 1.*

The defendant is placed in the custody of his bail, who may re-seize him if they have reason to suppose that he is about to fly, and bring him before a justice, who will commit the prisoner in discharge of his bail. *Ibid.* See sec. 703 and sec. 1088 of the Code.

If insufficient bail has been taken, or if the sureties become afterwards insufficient, the accused may be ordered by any magistrate to find sufficient sureties and in default may be committed to prison; and the justice who admitted a defendant to bail upon insufficient sureties is responsible if the defendant does not appear. *Hale's Sum., P. C. 97.*

If the defendant cannot immediately find sureties he shall be admitted to bail upon finding them at any time before conviction. *1 Burr. 460.*

It is for the Court to exercise a sound discretion, and if satisfied that notwithstanding the ordering of bail the prisoners are, in view of all the circumstances, likely to be forthcoming at the proper time to answer the charge, bail may be ordered. HARRISON, C.J., at p. 120, *R.* v. *Keeler* (1877), 7 P. R. 117, and cases there cited.

On an application for bail for persons committed for trial on charges of personation at an election, KILLAM, J., said, p. 32: "In such cases there is not only the danger of parties fleeing to avoid punishment, but that bail may be intentionally forfeited to avoid scandal." *R.* v. *Stewart et al.* (1900), 4 C. C. C. 131.

Where a person has been committed upon a charge of wilful murder found by a coroner's jury upon evidence sufficient to support the finding, a superior Court will not admit him to bail especially when the accused has made a statement admitting his participation in the affair out of which the charge of murder arises. *Ex parte Barronnet* (1852), 1 E. & B. 1.

"In determining whether or not to admit an accused person to bail the principal thing to be considered is therefore the probability of his appearing for trial, and to determine this question it is proper to consider the nature of the offence charged and its punishment, the strength of the evidence against the accused, his character, his means and his standing. Where a serious doubt exists as to the guilt of the accused and he is entitled to the benefit of every reasonable doubt, his application for bail should be granted. Then again if on the evidence it stands indifferent whether the accused is guilty, or innocent, the rule generally is to admit him to bail, but if on the contrary his guilt is beyond dispute the general rule is not to grant the application for bail unless the opportunities to escape do not appear to be possible and the probability of his appearing for trial is consequently considerable, if not sure." WURTELE, J., p. 193. *Ex parte Fortier* (1902), 6 C. C. C. 191, 13 Que. K. B. 151.

The test to govern the discretion of the Court on an application for bail is the probability of the accused appearing to take his trial. The Court in applying the test will be guided by a consideration of the nature of the crime charged, the severity of the possible punishment, and the probability of a conviction. *R.* v. *Gottfriedson* (1906), 10 C. C. C. 239.

A superior Court has jurisdiction to admit to bail while the preliminary inquiry is pending before the magistrate, several remands having taken place without the Crown tendering any evidence, the reason offered being that witnesses were required from

a distance. In this case the Judge made it a condition that the proposed sureties must attend before the magistrate and submit to an examination as to their means and property and their reliability. *R.* v. *Hall* (1907), 12 C. C. C. 492; and see *R.* v. *Cox* (1888), 16 P. R. 228.

The Judges of the Court of King's Bench in the plenitude of that power which they enjoy at common law, may in their discretion admit persons to bail in *all cases* whatsoever, though committed by justices of the peace, or others, for crimes in which superior jurisdiction would not venture to interfere, and the only exception in their discretionary authority is where the commitment is for an attempt, or in execution. *R.* v. *Marks*, 3 East 163, 2 Hale 129, 2 Hawk. ch. 15; *Rudd's Case*, 1 Cowper 333, and see the cases cited in *Burn's Justice* at page 370.

Even where the commitment is in execution the Court where a *certiorari* has issued to bring up a conviction under which a party is in prison will admit him to bail until the case is determined by the Court. *R.* v. *Lord*, 16 L. J. M. C. 15.

The power however is to be exercised in the discretion of the Court and none can claim its benefits *de jure*. *2 Hale 129*.

The Judges seldom admit a person to bail where magistrates have properly refused it, without some particular circumstances are shewn to exist in his favour. *Bac. Ab. Bail D.* *R.* v. *Gallagher*, 7 Ir. C. L. R. 19.

The ill health of the party in custody is not of itself sufficient ground to induce the Court to bail him, but where he has been for some time in prison so that his life is actually in danger the Court might perhaps bail. *R.* v. *Bishop*, 1 Chit. C. L. 99. They will not admit him to bail where the complaint is constitutional. *R.* v. *Wyndham*, 1 Stra. 4. Nor where the illness arises from the acts of the prisoner. *Harvey of Coombes' Case*, 10 Mod. 334.

Bail is custody and he is constructively in gaol; and he has the same right to be released from this custody as he would have to be released from imprisonment. *Per* WURTELE, J., in *R.* v. *Cameron* (1897), 1 C. C. C. 169.

An order for bail may be rescinded and the accused re-committed if it be shewn that the bail put in was fictitious. *R.* v. *Mason*, 5 P. R. 125.

A witness committed on a bench warrant for perjury may be released on bail by the same Judge who made the order of committal. *Re Ruthven*, 2 C. C. C. 39.

Where the charge for which a person has been committed for trial is a misdemeanour at common law and not provided for in the Code one justice of the peace may commit for trial and also admit to bail as at common law. *R.* v. *Cole* (1902), 5 C. C. C. 330.

"I should be very slow to admit to bail a person who has been arrested or committed for extradition. I cannot recall an instance of its having been done, though possibly a search, had I the time to make it, might shew that it is not absolutely without precedent." OSLER, J.A., in *Re Watts* (1902), 5 C. C. C. 538.

The sureties ought to be at least two men of ability but whose sufficiency, as well as the sum to be expressed in their recognizance, are it is said left in a just degree to the discretion of the magistrates, and therefore they may examine them upon oath as to the value of their property. *2 Hale 125.*

The Judge granting the order for bail directs or fixes the amount of the bail, so that what the justices or magistrates who are to admit to bail should be most concerned about is the "sufficiency" of the bail. The accused should produce, or procure, such sureties as in the opinion of the justice will be sufficient to ensure the appearance of the accused at the time and place appointed for his trial. Each of the sureties should be well able to answer the sum in which he is bound. The sureties should justify, that is make affidavit, as to their being freeholders, or householders, and that they are worth the amount for which they have become surety, over and above what will pay their debts and liabilities and every sum for which they are liable, and setting out a description of the property owned by the sureties.

The recognizance to be used is Form No. 28, and must be entered into before two justices. A recognizance can be taken by a police magistrate, or a stipendiary magistrate, they having the power of two justices.

Where a prisoner has been tried and found guilty of murder and sentenced to death, but an appeal secured a new trial, he should not be admitted to bail pending his second trial unless there has been "any unreasonable and any unjust delay" upon the part of the Crown in bringing on the second trial. *McCraw* v. *The King* (1907), 13 C. C. C. 337.

ORDER FOR BAIL.

701. Upon application for bail as aforesaid to any such Court or Judge the same order concerning the prisoner being bailed or continued in custody, shall be made as if the prisoner was brought up upon a *habeas corpus*.

702. 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.

The justices cannot admit to bail until they have received the order of a Judge granting bail. The order fixes the amount of the bail and the justices will guide themselves accordingly. Any two justices who have jurisdiction may admit to bail—it need not be the justices who committed the accused. The justices shall attach to the warrant of deliverance the order of the Judge directing the admitting of the accused to bail. The warrant of deliverance is to be directed to the keeper of the prison where the accused is detained, and is to be signed by the justices admitting to bail, and must be under seal. For the nature of the warrant see Form 29.

Person Bailed Absconding.

703. 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. 55-56 V., c. 29, s. 606.

The procedure to be adopted by the sureties under the provisions of this section 703, is for one of the sureties, or some person authorized by him, or acting on his behalf, to lay an information before a justice of the peace having jurisdiction. And the justice may then issue his warrant for the arrest of the person bailed who is about to abscond. The warrant may be executed in the same manner as a warrant to arrest in the first instance. If the person is apprehended under the warrant he will appear before the justice in the usual way, and if the justice after hearing the evidence adduced is satisfied that the ends of justice would otherwise be defeated, commit such person to gaol until his trial, or until he produces other sufficient sureties in like manner as before.

Delivery of Accused to Gaoler.

704. The constable or any of the constables, or other person to whom any warrant of commitment authorized by this or any other Act or law

is directed, shall convey the accused person therein named or described to the gaol or other prison mentioned in such warrant, and there deliver him, together with the warrant, to the keeper of such gaol or prison, who shall thereupon give the constable or other person delivering the prisoner into his custody, a receipt for the prisoner, setting forth the state and condition of the prisoner when delivered into his custody.

2. Such receipt shall be in form 30. 55-56 V., c. 29.

ESTREAT OF RECOGNIZANCE.

If the condition of a recognizance entered into, either by a party or his bail, be broken, the recognizance is forfeited, and on its being *estreated* the parties become debtors to the Crown for the sums in which they are respectively bound. The word *estreat* (extractum) signifies a true note of an original writing, as amerciaments imposed in the rolls of a Court from which they were extracted (or *estreated*), and it is so used in *Westm. ch. 2, Termes de la Ley. Archbold Pl. & Ev. 21st ed., 100.*

For the provisions of the Code relating to the tender of accused by sureties and the estreats of recognizances, see Part XXI. of the Code, secs. 1086 to 1119.

It seems that the defendant and his bail cannot be called upon their recognizance except on the day on which he is bound to appear; if he is called on any other day notice must be given of the intention. *R.* v. *Adams,* 1 Burns' Justice.

The bail are not entitled to have their recognizance discharged without submitting to the terms of paying the costs incurred. *R.* v. *Lyon,* 3 Burr. 1461; *R.* v. *Finmore,* 8 T. R. 409; *R.* v. *Turner,* 15 East 570.

If the principal do not appear and the recognizance be forfeited and the penalty paid by the bail, yet the principal continues amenable to the law whenever he can be taken. The persons, or bodies, of the bail are not liable under the recognizance. *R.* v. *Dalton,* 2 Stra. 911, 2 Hale 125.

See *Re McArthur's Bail* (1897), 3 C. C. C. 105; *In re Talbot's Bail* (1892), 23 O. R. 65; *R.* v. *Hamilton* (1899), 3 C. C. C. 1; *R.* v. *Young* (1901), 4 C. C. C. 580; *Re Barrett's Bail* (1903), 7 C. C. C. 1; *R.* v. *Bole* (1905), 9 C. C. C. 500; *R.* v. *May* (1905), 9 C. C. C. 529; *Re Pippey* (1908), 14 C. C. C. 305.

CHAPTER VIII.

SUMMARY CONVICTIONS.

PART XV. OF THE CRIMINAL CODE.

Interpretation.

705. In this Part, unless the context otherwise requires,—

(*a*) "territorial division" means district, county, union of counties, township, city, town, parish or other judicial division or place;

(*b*) "the Court" in the sections of this Part relating to justices stating or signing cases means and includes any superior Court of criminal jurisdiction for the province in which the proceedings in respect of which the case is sought to be stated are carried on;

(*c*) "district" or "county" includes any territorial or judicial division or place in and for which there is such Judge, justice, justice's Court, officer or prison as is mentioned in the context;

(*d*) "common gaol" or "prison" for the purpose of this Part means any place other than a penitentiary in which persons charged with offences are usually kept and detained in custody;

(*e*) "clerk of the peace" includes the proper officer of the Court having jurisdiction in appeal under this Part, and, in the province of Saskatchewan or Alberta, and in the Northwest Territories, means the clerk of the Supreme Court of the judicial district within which conviction under this Part takes place or an order is made. R. S., c. 50, s. 102; 55-56 V., c. 29, ss. 839 and 900.

APPLICATION OF PART XV.

706. 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. 55-56 V., c. 29, s. 840.

It is provided by sec. 29 of the Interpretation Act, R. S. C. ch. 1, as follows: "Unless the context otherwise requires a reference in any Act to (*a*) The Summary Convictions Act shall be construed as a reference to Part XV. of the Criminal Code."

In previous chapters we have dealt fully with the responsibility of justices and magistrates in the performance of their duties and the exercise of their powers within their jurisdiction. Also

as to the laying of informations and the issuing of warrants and summons, and reference can be had to the chapter dealing with these matters, since there is no necessity for repeating all the authorities given, or the text.

Jurisdiction.

707. Every complaint and information shall be heard, tried, determined and adjudged by one justice or two or more justices as directed by the Act or law upon which the complaint or information is framed or by any other Act or law in that behalf.

2. If there is no such direction in any Act or law then the complaint or information may be heard, tried, determined and adjudged by any one justice for the territorial division where the matter of the complaint or information arose: Provided that every one who aids, abets, counsels or procures the commission of any offence punishable on summary conviction, may be proceeded against and convicted either in the territorial division or place where the principal offender may be convicted, or in that in which the offence of aiding, abetting, counselling or procuring was committed. 55-56 V., c. 29, s. 842.

708. 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.

2. After a case has been heard and determined one justice may issue all warrants of distress or commitment thereon.

3. It shall not be necessary for the justice who acts before or after the hearing to be the justice or one of the justices by whom the case is to be or has been heard and determined.

4. If it is required by any Act or law that an information or complaint shall be heard and determined by two or more justices, or that a conviction or order shall be made by two or more justices, such justices shall be present and acting together during the whole of the hearing and determination of the case.

The examination and punishment of offences in a summary manner by justices of the peace out of the sessions . . . are founded entirely upon a special authority conformed and regulated by statute. But, where owing to some omissions in the statute the power to convict summarily is not given in express words, the justices may still proceed when it may reasonably be implied from the rest of the statute that such jurisdiction was intended to be given them. *Paley* 8th ed., p. 16.

Thus when a statute declared that any person exposing in a public place where animals are commonly exposed for sale, any animal infected with a contagious or infectious disease, should be deemed guilty of an offence and should be liable to pay a penalty not exceeding £20, it was held that although there were no express words making the penalties recoverable by summary procedure, yet that a jurisdiction was impliedly conferred upon jus-

tices to deal summarily with offences under the statute. *Cullen* v. *Primble*, L. R. 7 Q. B. 416; 26 L. T. 691; *Johnson* v. *Colam*, L. R. 10 Q. B. 544, 32 L. T. 725.

Whether a Judge or magistrate in any matter has jurisdiction and power to act, depends on the construction of the law invoked, as the authority for the jurisdiction and power claimed by him, and the question is essentially one of law and therefor susceptible of being reserved. WURTELE, J., p. 137; *R.* v. *Paquin* (1898), 2 C. C. C. 134. See *R.* v. *Ackers* (No. 3) 1910, 16 C. C. C. 222.

No new offence is cognizable by justices of the peace out of their sessions unless expressly made so by Act of Parliament, nor can any power expressly given to a justice, to do a particular act, be enlarged by inference. *Paley, p. 17.*

As the power vested in justices is of a special kind where any matter is referred to a particular description of justices the authority of all others should be excluded by that express designation. Dalt. ch. 27. And therefore when a statute refers the matter to the next justice, no other but the one answering that description has any authority. *Saunders' Case*, 1 Wms. Saund. 262.

If the statute refers the matters to justices in or near the place where it took place, notwithstanding this it seems that any justice of the county has jurisdiction over it. *R.* v. *Jennings*, 3 Keb. 383.

If a statute merely refers the matter to "any two justices," these terms mean any two justices having jurisdiction by common law or Act of Parliament, and does not enable justices to act out of their jurisdiction either in respect of its local limit or otherwise. *In re Peerless*, 1 Q. B. 143.

As already stated in the chapter on jurisdiction, all the justices of each district are equal in authority and the jurisdiction in any particular case attaches in the first justice, or set of justices, or magistrate, duly authorized, who have possession and cognizance of the fact to the exclusion of the separate jurisdiction of all others. *R.* v. *Sainsbury*, 4 T. R. 456.

Where power is given to two justices finally to hear and determine any offence, or when they are to do any other judicial act, it is necessary that they should be together to hear the evidence and to consult together at the time when they give judgment. *Battye* v. *Gresley*, 8 East 319; *R.* v. *Forrest*, 3 T. R. 38.

We have already dealt at length with the question of justices not acting where they are interested and likely to be biased, nor

to act in their own cases. Yet when a justice is assaulted or (in the doing his office esspecially) shall be abused to his face, and no other justice present with him, then it seems he may commit such offender until he shall find sureties for the peace, or good behaviour, as the case shall require, but if any other justice be present, it were fitting to desire his aid. Dalt. 713, *R.* v. *Reed*, 1 Str. 420.

When a thing is appointed by statute to be done by, or before, one person certain, such thing cannot be done by, or before, any other; and by strict express designation of one, all others are excluded and their proceedings therein are *coram non judice*. Dalt. ch. 6. *Fisten's Case*, 11 Rep. 59, 64.

An authority given by statute to two cannot be executed by one. *Ibid.*

Whatsoever any one justice alone may do, the same also may lawfully be done by any two or more justices. *Halton's Case*, 2 Salk. 477, Dalt. ch. 6, sec. 8.

The execution of the powers confided to justices of the peace in summary convictions is generally watched by the Courts with jealousy, such summary convictions being derogatory to the liberty of the subject, and all powers given in restraint of liberty must be strictly pursued. *Bracy's Case*, 1 Salk. 349; *Wilkes* v. *Wright*, 2 Cr. & M. 201.

In some cases the justice has a discretionary duty to take cognizance of the matter; in others, as is most usual, the duty is imperative. Upon this discretionary power it may be observed, that, where an Act of Parliament gives power to justices of the peace to take order in any matter, according to their discretion, this shall be understood according to the rules of reason, law and justice and not by private opinion. *3 Burns' Justice, p. 137.*

It has been observed by LORD MANSFIELD, C.J., that this discretionary power where applied to a Court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful, but legal and regular. *R.* v. *Wilkes*, 4 Burr. 2539.

"The discretion to be exercised by a Court or a Judge is not a wild, but a sound discretion, and to be confined within their limits, within which an honest man, competent to discharge the duties of his office, ought to confine himself." LORD KENYON, in *Wilson* v. *Rastall*, 4 T. R. 757.

One justice of the peace has power at the return days of the summons to adjourn the proceedings until a future day though the jurisdiction to hear the case is given to two justices.

Wherever the concurrence of two justices is requisite for any judicial act they must be present and acting together during the whole of the hearing and determination of the case.

Where a verbal adjudication was made by two justices in petty sessions and the formal order being afterwards drawn up was signed by one on the 1st March and by the other on the 3rd, it was held valid. *Ex parte Johnston,* 32 L. J. N. C. 193.

Title to Land in Question.

709. No justice shall hear and determine any case of assault or battery, in which any question arises as to the title to any lands, tenements, hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice. 55-56 V., c. 29, s. 842.

Under sec. 709, it has been held that justices cannot proceed to inquire into and determine by summary conviction any excess of force alleged to have been used in the assertion of title. *R.* v. *Pearson,* L. R. 5 Q. B. 237; 22 L. T. 126.

To oust the summary jurisdiction of justices on the ground that a *bona fide* question of title arises, it is sufficient to shew that the act complained of as a trespass was committed in the exercise of a supposed right which the alleged trespasser *bona fide* believed that he possessed. *Mathews* v. *Carpenter,* 16 L. R. Ir. 420.

The claim, however, must be *bona fide,* and not a mere pretence to oust jurisdiction whether it raises a question of title, or of any other matter which the justices cannot decide; and it is for the justices to say whether the claim be *bona fide,* or a mere pretence. *R.* v. *Mussett,* 25 L. T. 429; *R. J. J. Derbyshire,* 11 W. R. 780.

If the assault was independent of the question of title, the fact that there was such a question is no defence even if the assault arose out of a dispute between the parties as to the title of land. *R.* v. *Edwards,* 4 W. R. 287.

Though the defendants were acting upon supposed rights, yet if they exceeded what was necessary for the assertion or protection of these rights and thus committed damage, they were responsible criminally for such excess. *R.* v. *Clements* (1898), 1 Q. B. 556. And see *R.* v. *Davidson,* 45 U. C. R. 91; *R.* v. *McDonald,* 12 O. R. 381.

This section, 709, applies only to common assaults. *Miller* v. *Lea*, 25 A. R. 428.

The question is also dealt with in the chapter on jurisdiction, and see *3 Burns' Justice*, 1138.

Information and Complaint.

710. It shall not be necessary that any complaint upon which a justice may make an order for the payment of money or otherwise shall be in writing, unless it is so required by the particular Act or law upon which such complaint is founded.

2. Every complaint upon which a justice is authorized by law to make an order, and every information for any offence or act punishable on summary conviction, may, unless it is by this Part or by some particular Act or law otherwise provided, be made or had without any oath or affirmation as to the truth thereof.

3. Every complaint shall be for one matter of complaint only, and not for two or more matters of complaint, and every information shall be for one offence only, and not for two or more offences.

4. Every complaint or information may be laid or made by the complainant or informant in person, or by his counsel or attorney or other person authorized in that behalf.

A sufficient information by competent persons relating to a matter within the magistrate's cognizance gives him jurisdiction irrespective of the truth of facts contained in it. His authority to act does not depend upon the veracity, or falsehood, of the statements, or upon the evidence being sufficient or insufficient to establish the *corpus delictus* brought under investigation, and he will be protected although the information may disclose no legal evidence or purport to be founded upon inadmissible evidence, or upon mixed allegations of law and fact. *Cave* v. *Mountain*, 1 M. & G. 257-264.

As on the one hand the information is not invalidated by reason of the statement being false, so on the other, it cannot be rendered valid by the testimony offered in support of it, for the office of the evidence is to prove, not to supply a legal charge. *R.* v. *Wheatman*, Doug. 425; *Wiles* v. *Cooper*, 3 A. & E. 524, 531.

A Court of summary jurisdiction has no power to convict of a common assault unless the party aggrieved, or some one on his behalf, complains of the assault with a view to the adjudication of the Court upon it. *Nicholson* v. *Booth*, 57 L. J. M. C. 43, 58 L. T. 187.

When Information should be Laid.

The information must be laid, or complaint made, within the time limited by the particular statute on which it is founded; if no

period is fixed by the statute, it must be within six calendar months from the time when the matter of the information arose.

Except in the North-West Territories and the Yukon Territory, where the time within which the complaint shall be made, or information laid, shall be twelve months from the time when the matter of the complaint or information arose. See sec. 1142 of the Code. See *R.* v. *Edwards* (1898), 2 C. C. C. 96.

A summary prosecution in Ontario for erecting a wooden building within the fire limits contrary to a municipal by-law is barred if complaint is not laid until after the expiration of six months from the date of the offence. *R.* v. *McKinnon* (1902), 5 C. C. C. 301.

Where the proceedings are in respect to a debt due to the Crown and there is no express provision as to limitation applying to the Crown, a general statute of limitations will not govern. *R.* v. *Lee How* (1901), 4 C. C. C. 551. See *R.* v. *Boutilier* (1904), 8 C. C. C. 83; *R.* v. *Breen* (1904), 8 C. C. C. 146; *R.* v. *Bennett*, 1 O. R. 445.

"If a defendant does not ask for time, or object to a case going on after amendment made, indeed if he requests the prosecutor to go on rather than have delay, I think under ordinary principles he cannot afterward object that he had not sufficient time." GRAHAM, E.J., p. 491; *R.* v. *Clark* (*No. 2*), 12 C. C. C. 485, and see OSLER, J.A., pp. 643-44, in *R.* v. *Hazen* (1893), 20 A. R. 633.

It was also decided in *R.* v. *Clark*, that where the time limit for bringing a prosecution is contained in a separate section of the statute creating the offence, it is not necessary that the conviction should shew on its face that the limitation has not been exceeded.

Where the offence is the neglect, or refusal, to do an act, as to supply a copy of accounts, the six months' limit dates from the time of the demand and refusal. *Dudley Gas Co.* v. *Warrington*, 50 L. J. M. C. 69, 44 L. T. 475.

The complaint for a fraudulent removal of goods is required by 11 Geo. II., c. 19, s. 4, to be made in writing by the landlord, his bailiff, servant or agent, and where it did not appear on the face of the adjudication, or commitment, that it had been so made, the party committed under it was discharged. *R.* v. *Fuller*, 2 D. & L. 98; *Coster* v. *Wilson*, 3 M. & W. 411.

A married woman may be convicted on a penal statute if she has committed an offence without the coercion actual, or implied, of her husband, and it is not necessary that her husband should be

joined in the conviction. *R.* v. *Cruse,* 8 C. & P. 541; *R.* v. *Crofts,* 2 Str. 1120.

An infant may be convicted on a penal statute provided he was sufficiently *doli capax,* to incur responsibility. *R.* v. *Sutton,* 3 A. & E. 597; *Burnard* v. *Haggis,* 14 C. B. N. S. 45; *Wright* v. *Leonard,* 11 C. B. N. S. 258.

Who is Responsible to the Law.

By sec. 17 of the Code, "No person should be convicted of an offence by reason of any act or omission of such person, when under the age of seven years."

The general rule of law is that no one can be made criminally responsible for the acts of third persons, but in some cases a man may be brought within a penal statute by the acts of his agents or servants. The employment of an agent in the defendant's usual course of business is sufficient evidence in such cases, whence the magistrates, if they think fit, presume that such an agent was authorized to do the prohibited act with which it is sought to charge the principal. *Attorney-General* v. *Siddon,* 1 C. & J. 220; *R.* v. *Stephens,* 35 L. J. Q. B. 251; *Bosley* v. *Davies,* 1 Q. B. D. 84.

As to when the keeper of a place of public resort is responsible as principal for the acts of his servants, and the servant is responsible as aider and abettor. See *Wilson* v. *Stewart,* 3 B. & S. 913.

As to aiding, abetting, counselling or procuring the commission of offences. See secs. 69 and 70 of the Code, and Chap. II., page 56.

An aider and abettor may be convicted though the principal be acquitted. *R.* v. *Burton,* 32 L. T. 539, 13 Cox 71.

An information may be against one of several joint owners of property in proceedings for a wrongful act. *R.* v. *J. J. Monmouth,* 26 L. J. M. C. 183.

Where the act is such that several may join in it, all the offenders may be legally included in the same information and conviction. *Ex parte Biggins,* 26 J. P. 244; *R.* v. *Crisland,* 7 El. & B. 853.

But where separate convictions were drawn up upon a joint information, the Court refused to order the justices to alter the conviction by making it a joint one. *Re Clee and Osborne,* 21 L. J. M. C. 112.

On a joint information a person is not entitled as of right to be tried separately, it is a matter of discretion for the justices. *R.* v. *Littlechild,* L. R. 6 Q. B. 293.

Requisites of Information.

Whenever the information is required by statute to be in writing, that form must be preserved, but, unless expressly directed, it is not necessary that it should be so. *R.* v. *Millan,* 22 L. J. M. C. 108; *Ex parte Perham,* 5 H. & N. 30.

As we have seen, unless the letter of the statute so requires it, it is not requisite that the information, or complaint, be upon *oath* unless of course a warrant to apprehend the person charged is issued in the first instance instead of a summons, or a search warrant is applied for; in that event the information must always be under oath. See *R.* v. *McDonald* (1896), 3 C. C. C. 287.

The information stated in general terms that the informant had reason to believe, and did suspect and believe, that the party charged had committed an offence, without stating the grounds of his information, and, apparently, without making them known to the magistrate. Held, that there had been no proper information upon which a warrant could issue. It is the duty of the justice before issuing the warrant to examine upon oath the complainant or his witnesses as to the facts upon which such suspicion and belief are founded and to exercise his own judgment thereon. See *Ex parte Grundy* (1906), 12 C. C. C. 65; *Ex parte Coffon* (1905), 11 C. C. C. 48, and *Ex parte Boyce,* 24 N. B. R. 247.

If the information charges more than one offence, it should be amended by striking out all but one of the charges, and only the evidence on that charge should be heard. See *R.* v. *Austin* (1905), 10 C. C. C. 34, and *R.* v. *Hazen,* 20 A. R. 633, and *R.* v. *Alward,* 25 O. R. 519.

A principal and an abettor may be charged in the same information, and the offence may be laid as having been committed on divers days and times between two dates. *Only* v. *Gee,* 30 L. J. M. C. 22.

The inclusion of two offences in one information is a "defect in substance" within the meaning of sec. 724 of the Code, *post,* and no objection to the information can be allowed in respect of it. If on the hearing it is objected that the information discloses two offences, the prosecutor may be required to elect on which charge he will proceed, and the information amended accordingly.

It must be determined by the particular statute whether several acts in the same day, and acts extending over several days, constitute but one offence or several. *R.* v. *Scott,* 33 L. J. M. C. 15, and see *Bartholomew* v. *Wiseman,* 8 T. R. 147.

See sec. 725 *post,* as to charging two offences, or uncertainty in stating the offence to have been committed in different modes, &c.

Summons and Warrant.

711. The provisions of Parts XIII. and XIV. relating to compelling the appearance of the accused before the justice receiving an information for an indictable offence and the provisions respecting the attendance of witnesses on a preliminary inquiry and the taking of evidence thereon, shall, so far as the same are applicable, except as varied by the sections immediately following, apply to any hearing under the provisions of this Part: Provided that whenever a warrant is issued in the first instance against a person charged with an offence punishable under the provisions of this Part, the justice issuing it shall furnish a copy or copies thereof, and cause a copy to be served on the person arrested at the time of such arrest.

2. Nothing herein contained shall oblige any justice to issue any summons to procure the attendance of a person charged with an offence by information laid before such justice whenever the application for any order may, by law, be made *ex parte.* 55-56 V., c. 29, s. 843.

All matters relating to the issue of summons and warrants, and practice pertaining to the same, is fully gone into in Chap. VI., and reference can be made thereto for further precedents.

It is discretionary with the magistrate to issue either a summons or a warrant. Meredith, C.J., at p. 413. *R.* v. *McGregor* (1895), 2 C. C. C. 410. See *Murfina* v. *Sauve* (1901), 6 C. C. C. 275; *R.* v. *Ettinger* (1899), 3 C. C. C. 387.

The application of sub-sec. 2 of sec. 711 is illustrated by the case of the Public Health Act, or Health By-law, providing for the condemnation of unsound meat upon the order of a justice; such order may be made *ex parte* without notice to the owner of the meat. *R.* v. *White,* 43 J. P. *Thomas* v. *Van Os* (1900), 2 Q. B. 448; *Waye* v. *Thompson,* 15 Q. B. D. 342.

Where there is no doubt in the mind of the justice as to his jurisdiction and a sufficient information has been laid, he is then bound to hear and determine as to whether or not he should issue a summons, or a warrant, and proceed in due course to the hearing of the complaint. If he refuses to do so, he will be compelled by rule or mandamus. *R.* v. *Benn,* 6 T. R. 198.

If the information be for a penalty, or the non-payment of money, the justice should in general issue a summons in the first instance, before he grants a warrant, unless there is a probability

that the party will abscond as soon as he knows of the information, or the object of the prosecution will otherwise likely be defeated.

Attention is called to the proviso in sec. 711 that where a warrant is issued in the first instance, the justice issuing it shall furnish a copy or copies thereof and cause a copy of it to be served on the person arrested at the time of such arrest.

This proceeding differs from an arrest under a warrant for an indictable offence, where no copy is required to be served, it only being necessary for the person executing the warrant to have it with him and to produce it if required. See sec. 40 of the Code.

As sec. 711 incorporates into this Part the provisions of Parts XIII. and XIV. of the Code relating to compelling the appearance of the accused before the justice, &c., for convenience of reference, we repeat secs. 658, 660, 661 and 662, which relate to and govern the issuing of a summons and the service of the same, and the formalities surrounding the issue of warrants.

SUMMONS.

658. 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 therein mentioned. Such summons may be in the FORM E in SCHEDULE ONE hereto, (2) or to the like effect. No summons shall be signed in blank.

2. Every such summons shall be served by a constable or other peace officer upon the person to whom it is directed, either by delivering it to him personally or, if such person cannot conveniently be met with, by leaving it for him at his last or most usual place of abode with some inmate thereof apparently not under sixteen years of age.

3. The service of any such summons may be proved by the oral testimony of the person effecting the same or by the affidavit of such person purporting to be made before a justice.

A summons may be served outside as well as within the territorial limits of the justice by whom it issued. *Ex parte O'Regan* (1909), 16 C. C. C. 110.

WARRANT.

660. Every warrant shall be under the hand and seal of the justice issuing the same, and may be directed, either to any constable by name, or to such constable, and all other constables within the territorial jurisdiction of the justice issuing it, or generally to all constables within such jurisdiction.

2. The warrant shall state shortly the offence for which it is issued, and shall name or otherwise describe the offender, and it shall order the officer or officers to whom it is directed to apprehend the offender and bring him before the justice or justices issuing the warrant, or before some other justice or justices, to answer to the charge contained in the said information or complaint, and to be further dealt with according to law.

3. It shall not be necessary to make such warrant returnable at any particular time, but the same shall remain in force until it is executed.

4. The fact that a summons has been issued shall not prevent any justice from issuing a warrant at any time before or after the time mentioned in the summons for the appearance of the accused.

5. In case the service of the summons has been proved and the accused does not appear, or when it appears that the summons cannot be served, a warrant FORM (7) may issue.

661. Every such warrant may be executed by arresting the accused whenever 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-mentinoed division.

2. Every such warrant may be executed by any constable named therein, or by any one of the constables to whom it is directed, whether or not the place in which it is to be executed is within the place for which he is constable.

3. Every warrant authorized by this Act may be issued and executed on a Sunday or statutory holiday.

BACKING WARRANTS.

712. The provisions of section six hundred and sixty-two relating to the endorsement of warrants shall apply to the case of any warrant issued under the provisions of this Part against the accused, whether before or after conviction, and whether for the apprehension or imprisonment of any such person. 55-56 V., c. 29, s. 844.

Section 662 is also added, which is as follows, with the amendment thereto made in 1909:—

OFFENDER OUT OF JURISDICTION.

662. If the person cannot be found within the jurisdiction of the justice by whom the same was issued, but is or is suspected to be in any other part of Canada, any justice within whose jurisdiction he is, or is suspected to be, upon proof being made on oath or affirmation of the handwriting of the justice who issued the same, shall make an endorsement on the warrant, signed with his name, authorizing the execution thereof within his jurisdiction.

2. Such endorsement shall be sufficient authority to the person bringing such warrant, and to all other persons to whom the same was originally directed, and also to all constables of the territorial division where the warrant has been so endorsed, to execute the same therein and to carry the person against whom the warrant issued, when apprehended, before the justice who issued the warrant, or before some other justice for the same territorial division.

3. Such endorsement may be in the form 8.

The fact of a person being arrested outside the jurisdiction of the justice without the warrant being backed, although irregular, is not a ground for releasing the accused on *habeas corpus*. *R.* v. *Whiteside* (1904), 8 C. C. C. 478.

And the following is the endorsement:—

FORM 8.

ENDORSEMENT IN BACKING A WARRANT.

Canada,
Province of
County of

Whereas proof upon oath has this day been made before me, , a justice of the peace in and for the said county of , that the name of J. S. to the within warrant subscribed, is of the handwriting of the justice of the peace within mentioned: I do hereby authorize W. T., who brings me this warrant and all other persons to whom this warrant was originally directed, or by whom it may be lawfully executed, and also all peace officers of the said county of , to execute the same within the said last mentioned county.

Given under my hand, this day of in the year , at , in county aforesaid.

J. I.,
J. P., (Name of County.)

As to the service of a summons the sufficiency of the same is generally a question for the justices to decide, and the Court will not interfere with their decision unless it clearly appears that there was in fact no service, or that the defendant was not allowed the interval fixed by the particular statute between the service and the time limited for appearance, or that the justices have mistaken the law as to the kind of service required and have therefore declined to entertain the matter. See *Paley*, 8th ed., p. 108, and cases there cited.

Where an information had been laid for an assault and a summons therein had been served on the defendant, but before the day of hearing the informant gave the defendant notice that the summons was withdrawn, it was held that the magistrates were justified in dismissing the information and granting to the defendant a certificate of dismissal. *Vaughan* v. *Bradshaw*, 30 L. J. C. P. 93.

SUMMONS FOR WITNESS OUT OF JURISDICTION.

713. 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 justice before whom such charge is to be heard.

2. Every such summons and every warrant issued to procure the attendance of a witness, whether in consequence of refusal by such witness to appear in obedience to a summons or otherwise, may be respectively served and executed by the constable or other peace officer to whom the same is delivered or by any other person, as well beyond as within the territorial division of the justice who issued the same. 55-56 V., c. 29, s. 848.

By sec. 711 the provisions of Parts XIII. and XIV. respecting the attendance of witnesses on a preliminary hearing and the taking

of evidence thereon, shall, as far as the same are applicable, except as varied in this part, apply to any hearing under the provisions of this part. Reference should be made to secs. 671 to 677, both inclusive, in the preceding chapter and the notes thereon and cases cited.

As to who are competent and compellable witnessess, see the previous chapter and the Canada Evidence Act, *post*.

Trial—Open Court.

714. The room or place in which the justice sits to hear and try any complaint or information shall be deemed an open and public Court, to which the public generally may have access so far as the same can conveniently contain them. 55-56 V., c. 29, s. 849.

By sec. 645 of the Code, the Court or Judge or justice may order that the public be excluded from the room and place in which the Court is being held during the trial of the offences specified and set out in that section.

And such an order may be made in any other case in which the Court, Judge or justice may be of opinion that the same will be in the interests of public morals.

Magistrates have the same powers to preserve order in Courts held by them, and may exercise the like ways and means of enforcing order as are used in like cases and for the like purposes by any Court in Canada. This power is vested in magistrates by sec. 607 of the Code, as follows:—

Preserving Order in Court.

607. Every Judge of the 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 Courts held by them during the holding thereof, and by the like ways and means as now by law are or may be exercised and used in like cases and for the like purposes by any Court in Canada, or by the judges thereof, during the sittings thereof. 55-56 V., c. 29, s. 908.

"Where a power resides in any Court, or Judge, to commit for contempt, it is the peculiar privilege of such Court or Judge to determine upon the facts, and it does not properly belong to any higher tribunal to examine into the truth of the case. But however indecent may have been the conduct of the parties committed we cannot do otherwise than discharge them from custody on this warrant. It is not denied that a justice of the peace while sitting in the discharge of his duty, examining parties upon a criminal charge, has power to protect himself from insult and to repress

disorder by committing for contempt any person who shall violently, or indirectly, interrupt his proceedings, or conduct himself insultingly towards him. And it may be assumed for the present, that where any person present behaves himself in such a manner as to obstruct the justice's proceedings, he may order him at once into custody and direct him to be withdrawn, so as to remove at once the obstruction to the administration of justice; or may commit him till he finds sureties to keep the peace." ROBINSON, C. J., in *Re Clarke and Heermans*, 7 U. C. R. at p. 225.

In *Young* v. *Taylor*, 23 O. R. 513, it was held that a *justice of the peace* holding Court under the Summary Convictions Act had no power summarily to punish for contempt *facie curiæ*, at any rate without a formal adjudication and a warrant setting out the contempt. *Armour* v. *Boswell*, 6 O. S. 153, followed. 2. That the justice had the power to remove persons who by disorderly conduct obstructed, or interfered with the business of the Court. If the justice had issued his warrant for the commitment of the plaintiff and had stated in it sufficient grounds for his commitment, the Court could not have reviewed the facts alleged therein, but there being no warrant the justice was bound to establish such facts upon the trial as would justify his course.

FALCONBRIDGE, J., who in his judgment gives an exhaustive review of the authorities, says, at p. 536.—

"The conclusions at which I have arrived on the cases, are:—

"(1) A justice of the peace acting as such under the provisions of the Summary Convictions Act, has not the power summarily to punish contempt *in facie curiæ*, at any rate without a formal adjudication, and a warrant setting out the contempt.

"(2) He has the power to remove persons who by disorderly conduct obstruct, or interfere, with the business of the Court."

In *Armour* v. *Boswell*, 6 O. S. 153, 352 and 450, the plaintiff was brought before the defendants, justices of the peace, charged with an offence under 4 Wm. IV. ch. 4, for which the defendants had power to convict summarily; and while before the defendants, the plaintiff, it was alleged, assaulted one of the defendants and insulted them and they directed a constable to arrest him without issuing any warrant of commitment, and he was arrested and left in custody for a short time, and for this he recovered damages against the defendants, because they had acted illegally in directing his arrest without a warrant.

Jurisdiction to try offences summarily has been conferred upon justices of the peace by the statute law only, and they have no other powers than those which are given to them by such law, and in the absence of any statute law conferring, otherwise than as above stated, they will exercise the same at the peril of incurring an action for damages.

The power is given to magistrates specifically by sec. 607 now under consideration, and consequently they may exercise the same in like cases and for the like purposes as their powers are exercised by any Court in Canada or by the Judges thereof, "during the sittings thereof."

It would seem that magistrates can only exercise this power when the contempt is in the face of the Court and not outside the Court room. *R.* v. *Lefroy,* L. R. 8 Q. B. 134, and see *Re Scaife,* 5 B. C. R. 153; *R.* v. *Pacquette,* 11 P. R. 463.

As to witnesses refusing to be sworn and examined, or neglecting to produce documents and the powers of justices respecting the same, see sec. 678 of the Code and notes thereto in previous chapter.

Conduct of Trial.

715. The person against whom the complaint is made or information laid shall be admitted to make his full answer and defence thereto, and to have the witnesses examined and cross-examined by counsel, solicitor or agent on his behalf.

2. Every complainant or informant in any such case shall be at liberty to conduct the complaint or information, and to have the witnesses examined and cross-examined, by counsel or attorney on his behalf. 55-56 V., c. 29, s. 850.

716. Every witness at any hearing shall be examined upon oath or affirmation, by the justice before whom such witness appears for the purpose of being examined.

2. A Judge of any superior or County Court may appoint a commissioner or commissioners to take the evidence upon oath of any person who resides out of Canada and is stated to be able to give material information relating to an offence for which a prosecution is pending under this Part, or relating to any person accused of such offence, in the circumstances and in the manner, *mutatis mutandis,* in which he might do so under section nine hundred and ninety-seven; and all the provisions of the said section, in respect of matters arising thereunder, shall apply *mutatis mutandis* to matters arising under this section: Provided that no such appointment shall be made without the consent of the Attorney-General. 55-56 V., c. 29, s. 851; 6 E. VII., c. 5, s. 1.

In all cases wheresoever any man is authorized to examine witnesses, such examination shall be taken and construed to be as the law will, i.e., upon oath. *Dalt.,* c. 6, s. 6.

The oath must be administered to each witness *before* he is examined, and administering it afterwards is irregular, for the witness

ought to be under the sanction of an oath the whole time he is giving his evidence. *R.* v. *Kiddy*, 4 D. & R. 734.

The judicial discretion which a justice has to exercise on cases brought before him must be based on the evidence taken before him, and it is not competent for him to act upon evidence taken before another justice. *R.* v. *Guerin*, 58 L. J. M. C. 42, and see page 184.

The evidence must support the charge by proof of every material fact assigning a specific *date* and *place* to the offence. The degree of evidence and the credit due to the witnesses, provided it be legally admissible, is exclusively for the judgment of the justice. *Ex parte Aldridge*, 4 D. & R. 83.

As to the magistrate being himself called as a witness, see *Ex parte Flannigan* (1897), 2 C. C. C. 513, 34 N. B. R. 326; *Ex parte Hebert* (1898), 4 C. C. C. 153, and see *supra*, page 72.

As to appearance by counsel, or solicitor, see *R.* v. *Doherty* (1899), 3 C. C. C. 505; *R.* v. *O'Hearn* (1901), 5 C. C. C. 187.

The information charged two offences; upon objection being taken at the hearing the information was amended so as to charge one offence, and that on a date different from either of the dates named in the summons served. The defendant was then, for the first time, made aware of the actual charge which he was called upon to meet. He applied for an adjournment and this was refused, and the trial proceeded without defendant having any witnesses present and without opportunity to present a defence apparently substantial and *bona fide*. The defendant was convicted and imprisoned. Held, on *habeas corpus* and *certiorari* proceedings, that refusal of the magistrate to grant the adjournment asked was in fact and deed to deny him that opportunity "to make full answer and defence which the Code says he shall have." To permit the confinement of the defendant to continue "would, under the circumstances, be contrary to natural justice and to the principles of our law." *Regina* v. *Eli* (1886), 10 O. R. 727-733. An order will issue for the discharge of the prisoner from custody. ANGLIN, J., pp. 532 and 533, in *R.* v. *Farrell* (1907), 12 C. C. C. 524. See *R.* v. *Butterfield* (1909), 15 C. C. C. 101.

EXECUTIONS AND EXEMPTIONS.

"**717.** Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, by-law, regulation or other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and whether it is or

is not so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant."

The above is sec. 717 as amended in 1909. See *R.* v. *Boomer* (1907), 13 C. C. C. 98.

As a general rule, the affirmative is to be proved and not the negative of any fact which is stated, unless under peculiar circumstances when the general rule does not apply; for when the fact lies peculiarly within the knowledge of one party, it is easy for him to prove it, but often impossible for the other. *R.* v. *Turner*, 5 M. & S. 206.

Non-appearance of the Accused.

718. In case the accused does not appear at the time and place appointed by any summons issued by a justice on information before him of the commission of an offence punishable on summary conviction then, if it appears to the satisfaction of the justice that the summons was duly served a reasonable time before the time appointed for appearance, such justice may proceed *ex parte* to hear and determine the case in the absence of the defendant, as fully and effectually, to all intents and purposes, as if the defendant had personally appeared in obedience to such summons, or the justice may, if he thinks fit, issue his warrant as provided by sections six hundred and fifty-nine and six hundred and sixty and adjourn the hearing of the complaint or information until the defendant is apprehended. 55-56 V., c. 29, s. 853; 56 V., c. 32, s. 1.

In case the accused does not appear, there are two modes of procedure open to the justice:—

(1) If it appears to his satisfaction that the summons was duly served a reasonable time before the time appointed for appearance, he may proceed *ex parte* to hear and determine the case in the absence of the defendant as fully and effectually to all interests and purposes as if the defendant had personally appeared. As to service of summons "a reasonable time before," see *Re O'Brien* 10 C. C. C. 142; *R.* v. *Craig*, 10 C. C. C. 249; *R.* v. *Levesque*, 8 C. C. C. 505.

(2) Or the justice may issue his warrant for the apprehension of the defendant as provided by secs. 659 and 660, and adjourn the hearing until the defendant is apprehended.

In proceeding in the absence of the defendant there must be a due examination of witnesses under oath to substantiate the charges as fully and with the same formality as if he were present and made his defence.

It is to be remembered that the accused may appear by counsel, solicitor or agent, so that if the defendant does not appear personally, but by counsel, solicitor or agent, then the provisions of this section 718 will not apply. The appearance of the accused "at

the time and place appointed" means either his personal appearance or by counsel, solicitor or agent.

If the accused does not appear and the justice proceeds *ex parte* the information cannot be amended by substituting a different offence from that set out in the information as laid and which the accused was summoned to defend, and the justice cannot then proceed to conviction on the amended information.

"It seems so contrary to all principle that a person charged with a specific offence in an information and summons to answer that offence, should at the hearing and in his absence be convicted of an entirely different offence and practically acquitted of the offence which he was summoned to answer; no Act should be construed so as to bring about such a result unless the provisions were plain and ambiguous. . . . I think the case which the magistrate is authorized to go on and determine *ex parte* is the one which the party has been summoned to answer, not a new one altogether." BARKER, J., p. 86, *Ex parte Doherty* (1894), 1 C. C. C. 84; and see *R.* v. *Lyons* (1905), 10 C. C. C. 130, and *R.* v. *Hornbrook, Ex parte Madden,* and *Ex parte McCormick,* 38 N. B. R., 4 E. L. R. 508.

As to amendment of the information at the hearing the defendant being present and not objecting and proceeding with his defence, see *R.* v. *Bennett,* 3 O. R. 45.

Where there is a variance between the informations and the evidence in support, and the defendant is thereby deceived, or misled, the justice may adjourn the hearing to some future day so as to give the defendant an opportunity of meeting the new case that has been made out by the prosecutor. See sec. 724 (4), *post.*

The hearing may be adjourned from time to time under this section, although the accused be not present, provided the adjournments are made in the presence and hearing of his solicitor or agent. *Proctor* v. *Parker* (1899), 3 C. C. C. 374, 12 M. L. R. 528.

Parties who do not see fit to appear must ascertain the dates to which proceedings are adjourned, or disregard them at their peril. KILLAM, J., *ibid.* See *R.* v. *Kennedy* (1889), 17 O. R. 159; *R.* v. *Mabee* (1889), 17 O. R. 194.

An attorney authorized to appear and defend cannot plead guilty so as to authorize a conviction without evidence when the defendant is absent. *Ex parte Erickson,* 31 N. B. R. 296.

Where the defendant has failed to appear the information may be amended so as to correct the date of the offence, but not to charge a different offence. *Ex parte Tompkins* (1906), 12 C. C. C. 552.

NON-APPEARANCE OF PROSECUTOR.

719. If, upon the day and at the place so appointed, the defendant appears voluntarily in obedience to the summons in that behalf served upon him, or is brought before the justice by virtue of a warrant, then, if the complainant or informant, having had due notice, does not appear by himself, his counsel, solicitor or agent, the justice shall dismiss the complaint or information unless he thinks proper to adjourn the hearing of the same until some other day upon such terms as he thinks fit. 55-56 V., c. 29, s. 854.

720. If both parties appear, either personally or by their respective counsel, solicitors or agents, before the justice who is to hear and determine the complaint or information such justice shall proceed to hear and determine the same. 55-56 V., c. 29, s. 855.

If after the issue of the summons and before the day appointed for the hearing by the justice the parties compromise the matter and inform the justice of this fact, the justice still has jurisdiction to convict and may, after taking evidence in the case, legally adjudicate thereon notwithstanding the compromise. *R.* v. *J. J. Wiltshire*, 8 L. T. 242; *R.* v. *Truelove*, 14 Cox C. C. 408.

A defendant not present at the time, but represented by attorney, may be convicted of a third offence under "The Canada Temperance Act." *Ex parte Grieves*, 29 N. B. R. 543.

CORPORATIONS.

720A When the defendant is a corporation the summons may be served on the mayor or chief officer of such corporation, or upon the clerk or secretary or the like officer thereof, and may be in the same form as if the defendant were a natural person.

2. The corporation in such case shall appear by attorney, and if it does not appear the justice may proceed as in other cases.

This section, 720a, was added in 1909. See *R.* v. *Toronto Railway Co.* (1898), 2 C. C. C. 471.

ARRAIGNMENT OF ACCUSED.

721. If the defendant is personally present at the hearing the substance of the information or complaint shall be stated to him, and he shall be asked if he has any cause to 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 XIV. in the case of a preliminary inquiry.

4. The prosecutor or complainant is not entitled to give evidence in reply if the defendant has not adduced any evidence other than as to his general character.

5. In a hearing under this Part the witnesses need not sign their depositions. 55-56 V., c. 29, s. 856.

It is only where the defendant is personally present that the substance of the information is read or stated to him. If the defendant admits the truth of the information, in other words "pleads guilty" to the charge, and shews no sufficient cause why he should not be convicted, or an order made against him, then the justice shall convict him or make an order against him and impose the penalty. The justice is required to make a minute or memorandum of any conviction or order against a defendant. See sec. 727, *post*.

If the accused appears personally, or by counsel, and he desires to offer any preliminary objection to the information or summons, all such objection should be taken, and the ruling of the justice thereon noted before the defendant pleads, otherwise the objection will be waived.

The defendant may appear and ask time in order that he may consult his solicitor before pleading, and it is usual to grant such a request if made *bona fide*, and to grant an adjournment for a reasonable time.

If the defendant appears and pleads not guilty and asks for an adjournment in order to summons witnesses and prepare for his defence, an adjournment should be made for such time as seems reasonable in the case.

No adjournments shall be for more than eight days. Adjournments are in the discretion of the justice. They must be made to a certain time and place appointed and stated in the presence of the parties, or their counsel then present. See sec. 722.

A refusal to adjourn the case for the purpose of the defendant obtaining legal assistance does not go to the jurisdiction of the justice so as to enable the defendant to quash a conviction on *certiorari* for this cause. *R.* v. *Biggins*, 5 L. T. 605; and see *Ex parte Hopwood* (1850), 15 Q. B. 121; *R.* v. *J. J. Cambridgeshire*,

44 J. P. 168, and see *R.* v. *Irving* (1908), 14 C. C. C. 489, and cases *post*, under sec. 422.

If the charge is not admitted, and the defendant pleads not guilty and the trial is proceeded with, the inquiry is to proceed "in the matter provided by Part XIV. in the case of preliminary inquiry."

Upon reading sec. 682 *infra*, which contains the provision governing the taking of the evidence of witnesses in the case of preliminary inquiry, and upon bearing in mind the provisions of secs. 718, 720, and sub-sec. 5 of sec. 721, being the section now under consideration, it will be noticed that it will be both impossible and unnecessary in all cases to comply with the provisions of sec. 682.

For example, by 682 (2), the evidence of the said witnesses shall be given upon oath "and in the presence of the accused."

By sec. 718 the justice may proceed *ex parte* in the absence of the accused when he has been served with the summons a reasonable time before the hearing. The justice can thereupon proceed to take the evidence of the witnesses for the complainant in the absence of the accused. This is a plain contravention of sec. 682 (2).

Again, by sec. 720, the justice may proceed to hear and determine the complaint or information if both parties appear either personally or by their respective counsel, solicitors or agents—so that the accused may be absent from the hearing and the justice may proceed to take the evidence in his absence and not in his presence; and see sec. 722 (2) as to hearing on adjournment where parties do not appear.

And by sub-sec. 5 of sec. 721, in a hearing under this part the witnesses need not sign their depositions. Whereas by 682 (4) the depositions must be read over and signed by both the witness and the justice in the presence of the accused.

What presumably is meant, and at all events what is usually done, is to take the evidence of the witnesses "as nearly as may be" in the manner provided by sec. 682. The following rules should be strictly followed:—

(1) Every witness at any hearing shall be examined upon oath or affirmation. (Sec. 716).

(2) The evidence of each witness shall be taken down in writing in the form of a deposition, which may be in form 19 or to the like effect. Sec. 682 (3).

(3) Although sec. 721 (5) says that the depositions under this part need not be signed, it is always a wise precaution to read over the deposition to each witness and get him, or her, to sign it.

(4) The signature of the justice may be either at the end of the deposition of each witness, or at the end of all the depositions, in such form as to shew that the signature is meant to authenticate each separate deposition. Sec. 682 (5).

(5) The depositions may be taken in shorthand, as provided by sec. 683 of the Code. In this event they need not be either read over to the witnesses, or signed by them. It is sufficient if the transcript is signed by the justice before whom they are taken and verified by the affidavit of the stenographer. See the last chapter.

The omission to read over to the witnesses their respective depositions does not go to the jurisdiction of the magistrate. *Ex parte Steeves* (1908), 15 C. C. C. 160, and see *Ex parte Gallagher*, 14 C. C. C. 38; *Ex parte Doherty*, 3 C. C. C. 310; *R.* v. *Ridehough*, 12 C. C. C. 360.

The evidence of the witnesses must be taken in writing, and this not having been done, the conviction is bad. *Denault* v. *Robida* (1894), 8 C. C. C. 501.

"The conviction is clearly bad. There is nothing to shew on what evidence the prisoner was convicted, or even to shew how he pleaded, there being no record kept of the proceedings. It is new to me to learn that the validity, or the scope of a conviction is to depend on the justices' memory, which may not be called into action for months, or even years after the event. If there is no record, how can there be any effective remedy or appeal?" HUNTER, C.J., p. 314, in *R.* v. *McGregor* (1905), 10 C. C. C. 313, and see *Re LaCroix* (1907), 12 C. C. C. 297.

The stenographer who took the evidence was not sworn to take the evidence before he took down the same.

"The evidence not being taken as provided by law, is not evidence at all, and therefore there is no evidence taken that can be read. I think this is a matter going to the jurisdiction. The taking down of the evidence, as has been said in some of the cases which I have cited, is a matter both for the protection of the magistrate and the protection of the public, and there can be no protection in the true sense of the word either for the magistrate,

or for the public, unless the reporter takes down the evidence under the solemnity of his oath. I therefore think that this is a matter which affects the jurisdiction and is such an error as will be sufficient to quash the conviction." CRAIG, J., 103, 104; *R.* v. *L'Hereux* (1908), 14 C. C. C. 100.

A person accused and convicted of a charge of vagrancy consented that the depositions need not be taken down in writing, and such consent was noted in the record of the proceedings. Held, on *certiorari*, "that when the person of the accused and the subject matter of the charge are within the cognizance of the tribunal, a consent, which affects procedure only, will in the absence of any special circumstances forbidding it, establish a legal waiver . . . I conclude the consent given by Jameson was effective in law." Conviction sustained. DAVIDSON, J., p. 362; *R.* v. *Jameson* (1907), 12 C. C. C. 360, and see *R.* v. *Warilow* (1908), 14 C. C. C. 117, and *R.* v. *Degan* (1908), 14 C. C. C. 148.

The plea of guilty whether made before, or after, whatever examination there may have been of the informant, dominates the matter. The conviction is in terms based upon it alone, and where the prisoner had pleaded guilty to a charge of vagrancy and was sentenced to six months' imprisonment and moved to quash the conviction because the evidence was not taken down in writing, the motion was refused and the conviction sustained. *R.* v. *Goulet* (1907), 12 C. C. C. 365.

The magistrate who convicts must have heard the evidence and not allowed it to be taken in his absence by his clerk, or any other person. *R.* v. *Inhabitants of Darton*, 12 A. & E. 78; *R.* v. *Watts*, 33 L. J. M. C. 63.

If one of the justices who subsequently takes part in the conviction is not present at the hearing of the summons until a portion of the evidence has been given, the witnesses should be resworn and should again give their evidence, and it is not sufficient that the evidence already given should be read over to such justice. The parties, however, may waive such an irregularity. *R.* v. *Jeffreys*, 22 L. T. 786.

The judicial discretion which a magistrate has to exercise in cases brought before him must be based on the evidence taken before him, and it is not competent for him to act upon evidence taken before another magistrate. *R.* v. *Guerin*, 58 L. J. M. C. 42, 60 L. T. 538.

The evidence must support the charge by proof of every material fact assigning a specific date and place to the offence.

The degree of evidence and the credit to be given the witnesses, provided the evidence is legally admissible, is entirely for the justice to consider and adjudicate upon. *Ex parte Aldridge,* 4 D. & R. 83, and see *R.* v. *Highmore,* 2 Ld. Raym. 1220; *R.* v. *Jeffries,* 1 T. R. 241.

ADJOURNMENT.

722. Before or during the hearing of any information or complaint the justice may, in his discretion, adjourn the hearing of the same to a certain time or place to be then appointed and stated in the presence and hearing of the party or parties, or of their respective counsel, solicitors or agents then present, but no such adjournment shall be for more than eight days.

2. If, at the time and place to which the hearing or further hearing is adjourned, either or both of the parties do not appear, personally or by his or their counsel, solicitors or agents respectively, before the justice or such other justices as shall then be there, the justice who is then there may proceed to the hearing or further hearing as if the party or parties were present.

3. If the prosecutor or complainant does not appear the justice may dismiss the information, with or without costs as to him seems fit.

4. Whenever any justice adjourns the hearing of any case he may suffer the defendant to go at large or may commit him to the common gaol or other prison within the territorial division for which such justice is then acting, or to such other safe custody as such justice thinks fit, or may discharge the defendant upon his recognizance, with or without sureties at the discretion of such justice, conditioned for his appearance at the time and place to which such hearing or further hearing is adjourned.

5. Whenever any defendant who is discharged upon recognizance, or allowed to go at large, does not appear at the time mentioned in the recognizance or to which the hearing or further hearing is adjourned, the justice may issue his warrant for his apprehension. 55-56 V., c. 29, s. 857.

The justice should be careful to record, or note, all adjournments; this is conveniently done by endorsing a memo. on the back of the information. It can be in this form, "Remanded till Friday the 10th day of July, A.D. 1910, at 10 a.m." (Sgd.) John Brown, J.P.

Be sure to record the day of the week and date and hour, and to sign the minute. If adjournments take place during the trial, these can be noted on the face of the proceedings, at the conclusion of each day's proceedings.

The adjournment may be either before or during the hearing, and (a) it is in the discretion of the justice; (b) it must be to a certain time or place; (c) to be then appointed and stated in the presence and hearing; (d) of the party or parties; (e) or of their respective counsel, solicitors or agents, then present; (f) but no such adjournment shall be for more than eight days. The eight days should be computed from and exclusive of the day of the adjournment. *R.* v. *Collins,* 14 O. R. 613.

When the hearing is adjourned the justice may (1) suffer the defendant to go at large; (2) or commit him to prison; (3) or discharge the defendant upon his recognizance with, or without, sureties conditional for his appearance at the time and place to which the hearing is adjourned.

As to the magistrate's discretion, see *R.* v. *Irwin* (1908), 14 C. C. C. 489.

This discretionary power of adjournment should be exercised according to the rules of reason, law and justice, and not by the private opinion, or humour of the justice.

In most cases where a justice of the peace is imperatively called upon to act, and generally where a statute directs the doing of a thing for the sake of justice, or the public good, the word *may* is the same as the word *shall*, and is imperative on the justice to proceed. *R.* v. *Barlow*, 2 Salk. 609; *R.* v. *The Bailiffs of Eye*, 4 B & Ald. 271.

If the parties do not appear personally, or by counsel, at the time and place fixed at the adjournment, the justice may proceed to the hearing, or further hearing as if the parties were present.

And if the prosecutor or complainant does not appear the justice may dismiss the information with or without costs as to him seems meet.

The adjournment must not be *sine die*, or without day, but to a day certain and named in the presence of the parties, or their solicitor, so as to enable them to be present. And this rule applies where an adjournment is had for the purpose of delivering judgment. *R.* v. *Guerin* (1897), 2 C. C. C. 153, and see *R.* v. *Morse* (1890), 22 N. S. R. 298; *R.* v. *Gough*, 22 N. S. R. 516.

Where the defendant appeared before the magistrate and pleaded not guilty to a charge of selling liquor without a license and asked for an adjournment which was refused:—Held, that the conviction should be quashed on the ground that when the defendant denied that he was guilty but required reasonable time to produce other witnessess who could probably be speedily procured, reasonable time should be allowed him. A defendant should be duly summoned and fully heard. *R.* v. *Lorenzo* (1909), 14 O. W. R. 1038, 16 C. C. C. 19; and see *R.* v. *Major* (1909), 14 O. W. R. 1111.

On a motion to quash a conviction for selling liquor without a license on the ground that the magistrate had refused the defendant an adjournment, it was held that the evidence shewed that the

defendant had been given a fair trial and that any further delay would not have assisted the defendant. Motion refused. *R.* v. *Lorenzo, supra,* distinguished. *R.* v. *Luigi* (1909), 14 O. W. R. 1081, 16 C. C. C. 25.

Where an adjournment is made at the close of the hearing for the purpose of delivering judgment, the justice is not confined to the limit of time mentioned in sec. 722, but may adjourn for a longer period, but such adjournment must be to day certain and fixed, and in the presence of the parties, so that they may be present when the decision is given, otherwise the accused might be deprived of his right of appeal. See *R.* v. *Hall,* 12 P. R. 142; *R.* v. *Alexander,* 17 O. R. 458. See also *R.* v. *French* (1887), 13 O. R. 80, and *R.* v. *Hefferman,* 13 O. R. 616.

As to waiver of right to adjournment on amendment of the information, see *R.* v. *Clarke* (1906), 12 C. C. C. 485, and *R.* v. *Farrell* (1907), 12 C. C. C. 524.

If the accused appear at the time and place mentioned in the summons, and the justices shall not attend, he is not to go away, but must wait during the remaining part of the day, for many things may happen to hinder the justices' immediate attention. *1 Burns' Justice,* p. 1131, and see *R.* v. *Wipper* (1901), 5 C. C. C. 17.

In other words the accused should attend at the time and place mentioned, and if the Court is sitting wait till his case is called. Or if the Court is not sitting, to make inquiry and ascertain when the justice will sit and wait till the justice arrives. In the absence of the magistrate the clerk of the Court has no power to adjourn the hearing of a complaint. *Parè* v. *Recorder of Montreal* (1905), 10 C. C. C. 295.

After hearing all the evidence in support of the charge, the defendant should be called upon for his defence, and the magistrate is bound to hear any relevant evidence tendered by him. *R.* v. *Holland,* 37 U. C. R. 214; *R.* v. *Sproule,* 14 O. R. 373; *R.* v. *Nunn,* 10 P. R. 395; *R.* v. *Meyer,* 11 P. R. 477.

Besides protesting against and commenting on the validity, or effect, of the evidence tendered against him, the accused may defend himself by proving that he is within some proviso, or exception, which excuses or justifies the fact charged, or that the act complained of was done under an asserted authority, or pursuant to a *bona fide* claim of right of property, for where the title to property comes in question the exercise of a summary jurisdiction by justices of the peace is generally ousted. *R.* v. *Burnaby,* 1 Salk. 181; and see sec. 709, *supra.*

Excluding Witnesses.

In many cases, it may be proper to examine witnesses apart from the others, and for that purpose to require witnesses to withdraw during the examination.

On the application of either party the Court may direct that all the witnesses but the one under examination shall leave the Court. And this right may be exercised by the justice at any time, but it is most usual to be asked for and exercised at the commencement of the hearing. See *R.* v. *Murphy*, 8 C. & P. 297, and *Southey* v. *Nash*, 7 C. & P. 632.

Defects and Objections.

723. No information, complaint, warrant, conviction or other proceeding under this Part shall be deemed objectionable or insufficient on any of the following grounds, that is to say,—

(*a*) that it does not contain the name of the person injured, or intended or attempted to be injured; or,

(*b*) that it does not state who is the owner of any property therein mentioned; or,

(*c*) that it does not specify the means by which the offence was committed; or,

(*d*) that it does not name or describe with precision any person or thing.

2. The justice may, if satisfied that it is necessary for a fair trial, order that a particular, further describing such means, person, place or thing, be furnished by the prosecutor.

3. The description of any offence in the words of the Act or any order, by-law, regulation or other document creating the offence, or any similar words, shall be sufficient in law. 63-64 V., c. 46, s. 3.

If the date of the offence is incorrectly stated, the information should be amended: *Mayor of Exeter* v. *Heaman*, 37 L. T. 534. And if the ownership of the property is incorrectly described, the information should be amended: *Ralph* v. *Hurrell*, 44 L. J. M. C. 145, 32 L. T. 816.

When a statute in describing an offence, makes use of general terms which will include a variety of circumstances, it is not enough that the information should follow the very words of the statute, but it is necessary to state what particular fact prohibited has been committed, or what particular fact enjoined has been omitted. *R.* v. *James*, Cald. 458.

Variance or Defect in Information, Etc.

724. 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. 55-56 V., c. 29, s. 847.

This provision does not extend to the case where the information has been laid, and the party summoned for an offence and the justice has convicted him of another and different offence and under a different Act of Parliament. *Martin* v. *Pridgeon*, 28 L. J. M. C. 179; *R.* v. *Brickhall*, 33 L. J. M. C. 156.

But where an information was laid under 4 Geo. IV. c. 34-53, against the defendant for unlawfully absenting himself from the service, and alleged a contract "with B, and others," and at the hearing it appeared that "B and others" constituted an incorporated company, this was held to be a variance cured by a similar section, 11 & 12 Vic. c. 43, 51; *Whittle* v. *Frankland*, 31 L. J. M. C. 81; 2 B. & S. 49.

The misstatement or omission of any material averment in the information is not cured by any statement in the evidence specified in the conviction, for the defendant can be convicted only of the charge in the information, and that must be sufficient to support the conviction, the evidence being held to prove only and not to supply the defects in the information. *R.* v. *Wheaton*, Doug. 232.

Where a clerical error is manifest on the face of the document, it will be read as it ought to have stood. *R.* v. *Williams*, 21 L. J. M. C. 150.

If on the hearing, it is objected that the information discloses two offences, the prosecutor may be required to elect on which charge he will proceed. *Rodgers* v. *Richards* (1892), 1 Q. B. 555; 66 L. T. 261, and see *Bartholomew* v. *Wiseman*, 56 J. P. 455.

It is well to bear in mind that by the provision of sec. 723 (3), the description of any offence in the words of the Act, or any

order, by-law, regulation or other document, shall be sufficient in law, see *Smith* v. *Moody* (1903), 1 K. B. 56.

An information on its face purports to be the information of B., whereas it was signed and sworn to by McN. At the hearing, the magistrate erased B.'s name and wrote over them the name of McN., who had signed and sworn to the information. The defendant's counsel raised the objection that the information should be resworn; this was not done. The objection, however, was noted by the magistrate. The defendant pleaded not guilty, the trial proceeded and he was convicted. On an appeal from a decision granting a writ of *certiorari* to remove the conviction, it was held that the information was bad; it should have been re-sworn. Held, further, that having stated his objection, and having caused the same to be noted, there was nothing further for the defendant to do, he being under arrest, and by proceeding with the trial and cross-examining witnesses, he did not thereby waive the objection to the information not being re-sworn. *R.* v. *McNutt* (1896), 3 C. C. C. 184. See further the chapter on information and complaint and cases there cited, and notes to sec. 710, *infra*.

A warrant of commitment under a summary conviction must shew on its face that the justice who issued it had authority at the place where the offence occurred, and an objection such as this is not cured by sec. 846 (now 723). *R.* v. *Gow* (1906), 11 C. C. C. 81.

CERTAIN DEFECTS NOT TO VITIATE PROCEEDINGS.

725. No information, summons, conviction, order or other proceeding shall be held to charge two offences, or shall be held to be uncertain on account of its stating the offence to have been committed in different modes, or in respect of one or other of several articles, either conjunctively or disjunctively, for example, in charging an offence under section 533 it may be alleged that "the defendant unlawfully did cut, break, root up and otherwise destroy and damage a tree, sapling or shrub"; and it shall not be necessary to define more particularly the nature of the act done, or to state whether such act was done in respect of a tree, or a sapling, or a shrub.

See *R.* v. *White* (1901), 4 C. C. C. 430; *R.* v. *McDonald* (1898), 6 C. C. C. 1; *R.* v. *Brine* (1904), 8 C. C. C. 54.

ADJUDICATION.

726. 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.

The judgment of the justice should be confined to the subject-matter of the complaint laid before him. *R.* v. *Soper*, 3 B. & C. 857.

The evidence must support the charge as laid in the information, and the justice cannot be required to hear evidence which ought not to affect his decision in the matter before him. *R.* v. *Minshall*, 1 N. & M. 277.

If an information is laid for sureties to keep the peace, the justice has no jurisdiction to convict the defendant of an assault as well as order him to find sureties to keep the peace upon evidence of an assault as well as threats, when the informant protests against the justices dealing with the case as one of assault. *R.* v. *Deny*, 20 L. J. M. C. 189.

It is otherwise if the information is laid for assault or other offence and the defendant is convicted, as in that event the justice may, in lieu, or in addition to any other sentence, require the defendant to give security, or enter into his own recognizance to keep the peace for twelve months. See sec. 748, *post*.

The degree of credit due to the evidence on either side is entirely for his consideration, and a justice of the peace in summary proceedings is substituted for a jury, so far as relates to the conviction, that is, to the finding of the party guilty, or not guilty. He should judge therefore of the guilt or innocence of the defendant from the evidence in the same manner as if he were upon a jury; if the evidence be such as to leave no reasonable doubt upon his mind of the guilt of the defendant he should convict him, if otherwise he should acquit him. *1 Burns' Justice, p. 1142; R.* v. *Reason*, 6 T. R. 326; *R.* v. *Smith*, 8 T. R. 590.

If any reasonable doubt exists in the mind of the magistrate, the party charged is entitled to the benefit of that doubt. Such cases it is to be recollected differ very materially indeed from those where mere civil rights are concerned, and where the mere preponderance of evidence may be sufficient to decide the question. *2 Stark. Ev. 414, ibid.*

It is sufficient to authorize a conviction that there is such evidence before the justice as might in an action, or on an indictment, be left to a jury, and the Court of Queen's Bench when the conviction is brought before it will not examine further to see whether the conclusion drawn by the justice be, or be not, the inevitable conclusion from the evidence. *R.* v. *Davis*, 6 T. R. 178.

And if the justices think fit to dismiss the charge, although there appear *prima facie* ground for a conviction, their acquittal

cannot be questioned, since no other Court can judge of the credit due to witnesses which it did not hear examined. *R.* v. *Reason*, 6 T. R. 326; *R.* v. *Ridgway*, 5 B. & A. 527.

The magistrate has no right to act upon any personal knowledge he may be supposed to have—he must act upon evidence adduced before him. *Taylor*, C.J., p. 202; *R.* v. *Herrell* (1898), 12 M. L. R. 198.

As to the suggested personal knowledge of the magistrate that could not be acted on any more than the magistrate seeing Herrell make a sale of intoxicating liquor could turn around and convict him of doing so without taking evidence. That should be sworn evidence of a witness who could be cross-examined and whose depositions could be taken down in writing. *Killam*, J., p. 210, *ibid.*

When the justice dismisses the case he may, when required, make an order of dismissal in form 37, and shall then give the defendant a certificate of dismissal in form 38. See sec. 730, *post*.

Two justices holding summary proceedings must act together throughout. After adjournment, the justices met again upon a conviction, and drew up what they intended to be a formal conviction and signed it; but when the day which they had appointed for delivering judgment came, only one of the justices attended and producing the paper they both had signed, he read it as the conviction of both magistrates. I do not think that is acting—as required by the statute—together to the end. *Gregory*, J., p. 190; *Ex parte McCorquindale*, 15 C. C. C. 187.

Conviction.

727. 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 31 to 36 inclusive as is applicable to the case or to the like effect.

Minute of Conviction.

Notice that the minute, or memorandum, "shall" be made; this means it is imperative that it should be made; the omission to make the same may be a ground for quashing the conviction. This memo. can be in the following form:—

"Judgment. Fined ($10), and ($2.35) costs of the Court, or in default of payment..... days (or months) imprisonment in the .... gaol at H. L." (Hard labour).

"John Brown,
J.P."

If the penalty is to be recovered by distress, say "or in default, distress," all that is required is a minute or memorandum signed by the justice, which will contain sufficient information upon which to base the order, or conviction, afterwards drawn up, and to indicate the true adjudication of the justice.

It was held that, where in the minute of adjudication the costs were fixed at $5.20, and the conviction required the defendant to pay $5.27 costs, the conviction was bad. *R.* v. *Elliott*, 12 O. R. 524.

Held that inasmuch as the conviction and warrant of commitment varied from the minute of adjudication in that they stated that the defendant should be kept at hard labour, the minute not containing such, the variance was fatal and the conviction quashed. *Ex parte Carmichael* (1903), 8 C. C. C. 19.

The formal conviction must follow the adjudication because it must be in accordance with the fact, and the fact is as shewn by the minute of conviction. *R.* v. *Hartley* (1890), 20 O. R. 481-85.

The minute of conviction should state the adjudication of the justices both as to the amount of the fine and the mode of enforcing it, whether by distress, or imprisonment, so as to be a complete judgment in substance. *R.* v. *Perley* (1885), 25 N. B. R. 43.

The minute of adjudication did not contain any statement as to the term of imprisonment. Conviction quashed. *Ex parte Hill* (1891), 31 N. B. R. 84.

A variance between the minute and the conviction whereby the minute omitted any reference to the costs of distress and conveying to gaol will not invalidate the formal conviction, because such costs are obligatory when a summary conviction imposes a fine, and awards distress and imprisonment in default of distress. *R.* v. *Beagan* (*No. 2*) (1902), 36 N. S. Rep. 208, and 6 C. C. C. 56, and notes thereto.

A conviction which is in proper form will not be granted by reason of its being founded upon a minute of adjudication which does not disclose an offence in law, if the Court is satisfied upon perusal of the depositions that the offence for which the formal conviction was made was in fact committed. *R.* v. *Whiffen* (1900), 4 C. C. C. 141.

The justice may correct in his minute any mistake he made in computing costs, although he had previously announced the incor-

rect amount. The minute need not contain everything necessary to a perfect conviction. *R.* v. *McDonald*, 26 N. S. R. 94.

A minute of conviction for selling liquor without a license in contravention of R. S. O. c. 245, stated that in default of payment of the fine and costs imposed, the same was to be levied by distress, and in default of distress imprisonment for three months. The section (72) on which the conviction took place did not authorize distress, but only imprisonment on default in payment, and the Court held that the fact of minute directing distress did not prevent the justice from drawing up and returning in answer to a *certiorari* a conviction, omitting the provisions as to distress. This being done, the amended conviction was held good under sec. 105 of R. S. O. c. 245. *R.* v. *Hartley*, 20 O. R. 481, and see *R.* v. *Richardson*, 20 O. R. 514; *R.* v. *Hazen*, 23 A. R. 633; *R.* v. *McAnn*, 4 B. C. R. 587.

When the adjudication did not provide for distress, but directed imprisonment in default of payment of the fine and costs, it was held that a conviction could not be made directing distress, and on default imprisonment, and that a conviction which did not follow the adjudication was invalid. *R.* v. *Cantillon*, 19 O. R. 197.

Where a minute of conviction mentioned no definite time for payment of the penalty, it was held that the conviction must be taken to require payment forthwith. *R.* v. *Butler*, 32 C. L. J. 594, and see *R.* v. *Caister*, 30 U. C. R. 247.

The minute of conviction need not state the amount of costs where costs are awarded. Unless the defendant requires it for the purpose of payment, it is sufficient that the amount is stated in the conviction. *Ex p. Porter*, 28 N. B. R. 537.

"What the magistrate did was without making any minute, to draw up the conviction. I think that the minute may well be the conviction extended, if done at the time when the minute should be made in lieu of it. It is a full and complete conviction, and contains all the requisites of the (so-called) minute, and is in that sense a minute. I think it was a sufficient compliance with the provisions of the Act." VANWART, J., p. 515; *Ex parte Flannagan* (1897), 2 C. C. C. 513. (See *Ex parte VanBuskirk* (1907), 13 C. C. C. 234.)

While this judgment expresses good common sense, it would be well for justices not to follow this practice, first because it is irregular and not in compliance with the letter of the law, and secondly, because this decision is not binding upon the Court of any other

province, and another Court might take an entirely different view of the matter.

"Then there is a variance between the minute of conviction and the conviction. The minute provides for payment of the 'costs of conveying to gaol,' and the conviction for the 'costs and charges of the said distress and of conveying' to gaol. In my opinion, it is necessary for the magistrate to insert the provision as to the costs of distress and conveyance to gaol in the minute. The statute fixes that and the magistrate had no discretion to adjudicate in regard to it, or power to deal with it. He need insert nothing, I think, which the law supplies as a consequence of the sentence. The provision is properly set out in the conviction, and as its insertion in the minute was necessary the variance is immaterial." GRAHAM, E.J., at p. 132; *R.* v. *Vantassel (No. 1)*, (1894), 5 C. C. C. 128.

The conviction provided for the imprisonment of the defendant for forty days "unless the said sums (the penalties and costs of conviction)," and the costs and charges of the said distress, shall be sooner paid." The minute of conviction, after providing for the forty days' imprisonment, added, "unless the said sums shall be sooner paid." The conviction having omitted the provision as to costs of conveyance to gaol, the conviction was held to be bad. *R.* v. *Vantassel (No. 2)* (1894), 5 C. C. C. 133, and see *Ex parte Whalen*, 29 N. B. R. 146.

At the conclusion of the case the magistrate wrote, "I adjudge the defendant to pay a fine of twenty dollars and costs in default to thirty days gaol, liquor to be forfeited to His Majesty, and sold to wholesale dealers, proceeds to go towards public hospital."

Held a sufficient minute of conviction if the justice had power in law to make it.

The statute under which the conviction was made authorized imprisonment for a period not exceeding "one month." It was argued that thirty days might exceed a month, because the month of February has ordinarily twenty-eight days. Held nothing in this argument, and the conviction was sustained. *Ex parte Rogers* (1903), 7 C. C. C. 314.

DRAWING UP THE CONVICTION OR ORDER.

A conviction may be described as a record containing a memorial of the proceedings had under the authority of a penal statute

before justices of the peace, or commissioners, only authorized to receive an information and proceed to judgment. *1 Salk. 377.*

The general requirements of a conviction are that it should be precise and certain, and shew that the convicting magistrate has power to convict, that the requisite proceedings preliminary to the conviction have been duly taken, and that the defendant has been guilty of the offence charged upon him.

The general qualities of a conviction in substance are first, that it be full and correct, and secondly, as the whole jurisdiction in summary proceedings is founded upon and solely derived from special Acts of Parliament, it is fundamentally required, in a conviction for any offence, that the directions of the particular statute relative to that offence should appear upon the face of it to have been substantially complied with, both as regards the subject-matter of the offence being clearly brought within the meaning of the Act and also the final judgment. *Paley, 8th ed., 195.*

And if the charge falls short of the legal description of the offence, the omission is not cured by any allegation of its being done *unlawfully* or *fraudulently*, or the like, or by stating that it was against the form of the statute; for the last allegation is no more than a legal inference which must be supported by the premises, or by the meaning of the charge being understood by the party charged, and having been held time out of mind. *R.* v. *Jukes*, 8 T. R. 536; *Atty.-Genl.* v. *Le Revert*, 6 M. & W.; *Colborne* v. *Stockdale*, 1 Stra. 493; *Re Geswood*, 2 E. & B. 252; *Fletcher* v. *Calthorp*, 6 Q. B. 880, 889; *Ex parte Hopkins*, 61 L. J. Q. B. 240.

The charge should be positive and certain in order that the defendant may be protected from a second accusation for the same fact, and in order also that the judgment may appear appropriate to the offence.

An offence cannot be charged *disjunctively*, or in the alternative in a conviction. *1 Salk. 372; 2 Hawk. c. 25, s. 59.* Though it may perhaps be so in an order. *R.* v. *Middlehurst*, 1 Burn. 399.

The charge in a conviction must be certain, and must be so stated as to be pleadable in a second prosecution for the same offence. *R.* v. *Haggard* (1870), 30 U. C. R. 152.

The conviction must be in respect of a single, distinct, positive and definite charge, except where the statute dispenses with any of these requirements. *R.* v. *Coulson* (1893), 24 O. R. 246; 1 C. C. C. 114.

A conviction for doing worldly labour on Sunday contrary to the Lord's Day Act is void for uncertainty unless the acts which constitute the offence are specified. *R.* v. *Somers* (1892), 4 C. C. C. 46; 24 O. R. 244.

A conviction under sec. 517 (f) of the Code for doing an unlawful act in a railway yard, in a manner likely to cause danger to life, or person, is bad for uncertainty if it does not disclose the nature of the unlawful act. *R.* v. *Porte* (1908), 14 C. C. C. 238.

"The conviction here is bad, because it does not specify the particular act, or acts, which constituted the alleged practising of medicine. . . . But the magistrate had jurisdiction, and we ought therefore to look at the evidence to see if an offence was committed, and if so we should amend the conviction; but looking at all the evidence, we cannot come to the conclusion that an offence was committed of the nature specified in the conviction." ARMOUR, C. J., *p. 117; R.* v. *Coulson* (1893), 1 C. C. C. 114, 24 O. R. 246; *Re Donnelly*, 20 C. P. 165, and see *R.* v. *Whalen* (1900), 4 C. C. C. 277.

The disclosure in the evidence of the defendant of several illegal sales made on the same day will not invalidate a conviction thereon for illegally selling liquor, although the conviction does not specify to which particular sale or sales the same relates. *R.* v. *Moore* (1898), 2 C. C. C. 57.

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

A conviction for using profane language in a public store is invalid unless the words complained of are set out therein. *R.* v. *Smith* (1899), 2 C. C. C. 485.

A conviction for wilful injury to property did not specify either the nature of the property injured, or the nature of the injury thereto. Held void for uncertainty and prisoner discharged. *R.* v. *Leary* (1904), 8 C. C. C. 141.

A village by-law provided that all pool-rooms in the village should be closed from 8.30 p.m. every Saturday until 7 a.m. the following Monday, and should remain closed on every other day from 10 p.m. until 6 a.m. the following day; the defendant was convicted for that "he did refuse to close a pool-room occupied by him in the village of Carman after the hour of half-past eight, contrary to the by-law of the village in that behalf." Held, the conviction bad, and should be quashed on the following grounds: 1. It did not state that the pool-room had been kept open after half-

past eight *in the afternoon*. 2. It did not state that it was on a Saturday, or Sunday, the offence was committed; the pool-room might have kept open until 10 o'clock p.m. 3. The conviction did not give the date when the offence had been committed, and for all that it stated, it might have been before the by-law came into operation, or more than six months before the information was laid. In *re Fisher and the Village of Carman* (1905), 15 M. L. R. 475, and 9 C. C. C. 451.

If the information charges more than one offence, all but one should be struck out upon objection being taken; where the objection was overruled and evidence taken on the several charges until the conclusion of informant's case, when all but one charge was abandoned, a conviction upon that one is invalid and was quashed on appeal. *R.* v. *Austin* (1905), 10 C. C. C. 34.

The information was for "keeping liquor for sale," the summons issued and served on the defendant was for "selling liquor contrary to law," and the defendant not appearing and after hearing evidence for the prosecution, the defendant was convicted for "keeping liquor for sale." Held, conviction bad because the defendant had never been summoned to answer the charge of which he was convicted. *Ex parte Melanson* (1908), 13 C. C. C. 251.

A summary conviction for being "a loose, idle person or vagrant," without specifying in what the vagrancy consisted under secs. 207, 208, 846 (now 238-197 (c.) 239, 723), is clearly bad. "You might as well charge a man generally with being a thief; the accused was entitled to know under what sub-section of section 207 (now 238) he was charged, that is what the facts were on which the prosecution relied." HUNTER, C.J., in *R.* v. *McCormack* (1903), 7 C. C. C. 135; 9 B. C. R. 497, and see *R.* v. *Young* (1905), 12 C. C. C. 109.

A summary conviction for vagrancy is void for multifariousness, if it charges a defendant with both (a) obstructing passengers in the street, and (b) with causing a disturbance in the street, these being separate offences under clauses (a) and (b) of sec. 238 of the Code.

And a conviction for causing a disturbance in a public place and being thereby a vagrant, must specify one of the means of causing the disurbance which are specified in clauses (f), i.e., screaming, swearing or singing, or by impeding or incommoding peaceable passengers. *R.* v. *Code* (1908), 13 C. C. C. 372.

In *Smith* v. *Moody* (1903), 1 K. B. 56, Lord Alverstone, C.J., at p. 60, said: "The second objection to the conviction is

that it does not sufficiently specify the property of the respondent which the appellant is alleged to have injured, the only words used being 'did injure the property of' the respondent. I have come to the conclusion that this objection is good and must prevail. I was at first inclined to think that the defect was cured by s. 39 of the Summary Jurisdiction Act, 1879, which provides that 'the description of any offence in the words of the Act creating the offence,' or in similar words, shall be sufficient in law, but on further considering the question, which is undoubtedly one of importance, it seems to me that it could not have been intended by that section to do away with the old rule of criminal practice which requires that fair information and reasonable particularity as to the nature of the offence must be given in indictments and convictions. All that is meant by s. 39 is, that the offence itself need only be described in the words of the statute creating it."

It is an essential ingredient of the offence of vagrancy for a prostitute wandering in the public streets and not giving a satisfactory account of herself, that the officer should request an explanation from the woman, and the onus is on the Crown to prove both the request and the failure to give a satisfactory explanation. The conviction which omitted to set out that the accused was asked to give an account of herself before arrest, was held bad.

Notwithstanding the provision of sec. 723 (3) of the Code that the description of any offence in the words of the Act, or creating the offence, or any similar words shall be sufficient in law, it is still necessary to specify in the conviction whatever the accused has done which brings him within the words of the statute. *Smith* v. *Moody, supra,* and *Cotterill* v. *Lempriere,* 24 Q. B. D. 639, referred to. CRAIG, J., in *R.* v. *Harris* (1908), 13 C. C. C. 393.

"I think that section 39 of the Summary Jurisdiction Act of 1899, which provides that it is sufficient to describe the offence in the words of the statute creating the offence, cannot be supposed to have been intended to break down the very important rule which has prevailed now for at least 300 years in the administration of justice with respect to the sufficiency of particulars in a conviction. I do not think for a moment that it was intended to relieve persons who had to draw up convictions from inserting anything which was necessary as an ingredient of the offence of which the particular defendant had been found guilty. When one comes to the description of the offence itself then it is quite sufficient if it is described in the terms of the statute, however general they may be. At the same time the old rule must prevail that

whatever is necessary to shew that the person convicted has done something which brought him within the words of the statute, must still be specified. It is not that there is any insufficiency in the description of the offence itself. The description of the offence follows the words of the statute; and there is insufficiency with respect to the ingredients of the offence which the appellant has committed and for which he has been convicted. I think specific information as to the injury to the property ought to have been given in the conviction." WILLS, J., in *Smith* v. *Moody, supra.*

If a statute gives summary proceedings for various offences specified in several sections, a conviction is bad which leaves it uncertain under which section it took place. *Charter* v. *Greame,* 13 Q. B. 216.

Where a conviction proceeded on a repealed statute the Court quashed the conviction although it might have been supported under the repealing Act if the justices had professed to proceed under it. *Michell* v. *Brown,* 1 E. & E. 267, 28 L. J. M. C. 53.

A conviction alleged in the words of the statute that the defendant unlawfully and maliciously committed damage, injury and spoil to and upon the real and personal property of the Long Point Company. Held not sufficient because it was not alleged what the particular act was which was done by the defendant that constituted the damage complained of. *R.* v. *Spain,* 18 O. R. 385.

Where there is no provision making it sufficient to use the words of the statute a conviction is bad for uncertainty, if it does not specify the act or acts which constitute the offence under the statute. *R.* v. *Somers,* 24 O. R. 244.

A conviction in the form prescribed by the Criminal Code will not be held bad because it also contains recitals shewing certain adjournments of the hearing before the justice, but not shewing that no adjournments had been made for a longer period than the eight days allowed although more than three matters had defined from the commencement to the end of the proceeding. It is not necessarily to be inferred from the statement of certain facts which were not required to be stated, that other circumstances necessary to the jurisdiction of the magistrate did not exist. *Proctor* v. *Parker* (1899), 12 M. L. R. 528, 3 C. C. C. 374.

The description of the offence must at least be as particular as that used by the statute. Any words which do not sufficiently describe the offence will not do, but a variation from the precise

words is not fatal, if the words are such as bring the case within the plain meaning of an Act of Parliament.

As a general rule where an Act in describing the offence makes use of general terms which embrace a variety of circumstances, it is not enough to follow in a conviction the words of the statute, but it is necessary to state what particular facts prohibited had been committed.

Particular sums, or quantities, must be specified in the conviction.

A defendant was convicted for refusing to account and pay over the money received by him as a collector. The conviction was quashed because no particular sum was specified nor the times when the money was charged to be received was to enable him to defend himself upon a second charge. The Court said it was one entire nonfeasance charged both in the conviction and commitment and they would not sever them. *R.* v. *Catherall,* Str. 900.

In a conviction for taking and destroying fish, the number or quantity of fish taken, killed or destroyed by the defendants should be stated. *R.* v. *Marshall,* 2 Keb. 594.

A conviction under the Fisheries Act, Canada, which merely specified the offence as "illegal fishing," is bad for uncertainty. *Ex parte Dixon* (1903), 7 C. C. C. 336.

In those cases where a magistrate is directed to award compensation according to the injury, or to assess a penalty by way of damages, it is requisite that particulars as to quantities should be enumerated in the conviction.

"In trespass the nature and number of things ought to be mentioned, and much more in a conviction where all imaginable certainty is requisite." Ld. Holt, C.J., in *R.* v. *Burnaby,* 2 Ld. Raym. 900.

An indictment for selling in unlawful measures *divers quantities* of ale, was held too general and bad on demurrer. *R.* v. *Gibb,* 1 Str. 497.

As to the *manner* of alleging the quantity of the article in question, a conviction for buying a certain quantity of wheat, to wit, fifteen bushels of wheat (contrary to the Lord's Day Act, 22 & 23 Car. II., c. 12), has been held sufficiently certain. *Charter* v. *Greame,* 13 Q. B. 216.

Several Offences.

A conviction for two offences is bad. A conviction "for creating a disturbance and acting in a disorderly manner by fighting on the street and breaking the peace contrary to the by-law and statute in that behalf," held defective. And if it impose imprisonment with hard labour in default of payment, it being uncertain whether it is made under the statute, or by-law, and if the latter hard labour being unauthorized. *R.* v. *Washington*, 46 U. C. R. 221.

A conviction for two several and distinct offences, but imposing one penalty only, is bad where it does not appear for which offence the penalty is inflicted. *R.* v. *Gravelle*, 10 O. R. 735.

Where a defendant was convicted for that he "did in or about the month of June, 1880, on various occasions," commit the offence charged in the information and a fine was inflicted "for his said offence," conviction held bad as shewing the commission of more than one offence. *R.* v. *Clennan*, 8 P. R. 418.

Where the Consolidated Ordinance, sec. 102 N. W. T., provided that several offences may be included in the one information and the magistrate adjudged the accused guilty of each offence, and the Ordinance, sec. 106, also provided that convictions for several offences may be made although committed on the same day. Held it was not necessary that separate convictions should be drawn up, but the fines may be imposed in and by the one conviction adjudging a forfeiture in respect of each offence. *R.* v. *Whiffen* (1900), 4 C. C. C. 141.

The Ordinance did not authorize imprisonment at hard labour in default of payment of the fine, and in answer to a *certiorari* the magistrate returned an amended conviction omitting the hard labour. Held that the conviction was not bad by reason of its being at variance with the minute of adjudication which had imposed hard labour. *Ibid.* And see *Simpson* v. *Lock* (1903), 7 C. C. C. 294.

A conviction must be under seal. In re *Ryer* v. *Plows*, 46 U. C. R. 206; *Bond* v. *Conmee*, 15 O. R. 716; 16 A. R. 398. In this latter case a paper purporting to be a conviction signed by the magistrate but not under seal was returned to a *certiorari* issued in aid of a *habeas corpus*. Conviction was held to be a nullity as it was not under seal. See also Craig, J., at p. 104, *R.* v. *Heureux* (1908), 14 C. C. C. 100.

In summary cases when the hearing is fixed at some place distant from the residence of the defendant it might result in the denial of justice, but if there is jurisdiction in the justice who tries the case, this Court will not interfere by prohibition. DRAKE, J., p. 83, *R.* v. *Chipman* (1897), 1 C. C. C. 81.

NAMES OF THE PARTIES.

When there are several offenders each must be specifically named in the conviction. The omission of the Christian name of any of them is fatal. *R.* v. *McDonald,* 34 C. L. J. 475.

The name of the informant, or complainant, must appear on the face of the conviction in some form. *R.* v. *Hennessy,* 8 U. C. L. J. 299.

If the defendant pleads to an assumed name he cannot, after conviction, object that it is not his real name. *Ex p. Corrigan,* 9 Q. B. D. 43.

The justices are not bound by the names contained in the information, but may draw up the conviction with what appear to be the proper ones. *Whittle* v. *Frankland,* 31 L. J. U. C. 81, 2 B. & S. 49.

If an offender refuses to give his name and it is not disclosed he may be described as a person whose name is unknown to the justices, and identified by some fact, for instance that he is personally brought before them by a certain constable. *R.* v. ——, R. R. 489.

If the name or names of the persons aggrieved are not known it should be so stated; if known they should be accurately stated. *2 Hale 181.*

A summary conviction describing the defendant as "Mrs. Morgan" was held bad. *R.* v. *Morgan,* 1 B. C. R. pt. I., 245.

The name and style of the magistrate, or justices, by whom the conviction was made must be set forth in the conviction, so that it may appear that they are justices of the county, or district, where the offence is stated to have happened; this is necessary in order that their jurisdiction may be shewn upon the face of the proceedings. See *R.* v. *Walsh,* 2 O. R. 206; *Ex p. Bradlaugh,* 3 Q. B. D. 509; *R.* v. *Bradley,* 17 Cox 739; and see *R.* v. *Young,* 5 O. R. 184-400; *R.* v. *McGregor,* 26 O. R. 115; *R.* v. *Akerman,* 1 B. C. R. 255.

Time and Place.

The conviction must specify the time and place of committing the act complained of. The precise day need not be named, but it will be sufficient if the fact be alleged to have happened *between* such a day and such a day, provided the last of the days specified is within the time limited. See *R.* v. *Wallace*, 4 O. R. 127; *R.* v. *Butter*, 32 C. L. J. 594, and *R.* v. *Adams*, 24 N. S. R. 559.

Alleging that the act was done at a certain place in the township of A. is sufficient, if a public act shews that that township is within the county for which the justice is appointed. *R.* v. *Shaw*, 23 U. C. R. 616; see also *R.* v. *Young*, 7 O. R. 88; *Ex p. Macdonald*, 27 S. C. R. 683, and *R.* v. *Oberlander* (1910), 16 C. C. C. 244.

A conviction stated the offence to have been committed in the county of Norfolk. The information charged the offence as in the municipality of North Cypress in the county of Norfolk in the province of Manitoba. By statute the municipality of North Cypress was in the county of Norfolk. In the absence of any affidavit denying that the magistrate had jurisdiction. Held, that an objection that no offence within the province had been shewn was untenable. But costs unwarranted by statute having been imposed the conviction was held bad. *Re Bibby* (1890), 6 M. L. R. 472.

A conviction for keeping a house of ill-fame must name a place at which the offence was committed, and it is not sufficient to allege that the offence was committed at the city of Toronto without further description of the particular locality. The conviction should describe the place in such a way as by street and number that the particular house could be easily identified. *R.* v. *Cyr*, 12 P. R. 24.

A conviction for keeping a house of ill-fame on the 11th October and on other days and times before that day. Held sufficiently certain as to time. The information described the parties as of the township of East Whitby, and had "county of Ontario" in the margin. It charged that they kept a house of ill-fame but did not expressly allege that they did so in that township or county. The evidence, however, shewed that their place at which such house was kept was in East Whitby, in which the justice had jurisdiction. Held sufficient. *R.* v. *Williams*, 37 U. C. R. 540.

The defendant was convicted by the S. M. for the city of Halifax of the offence of "keeping a disorderly house, that is to say,

a common bawdy house, on the 21st April, 1901, and on divers other days and times during the month of April, 1901," and was fined, &c. Held, dismissing application for *habeas corpus*, that the offence as charged did not constitute more than one offence, and that the word "keeping" implied a continuous offence. *R.* v. *Keeping*, 34 N. S. R. 442.

An objection was taken to the conviction that on its face it is for an offence committed between the 8th and 11th days of March, 1908 (the information was laid on the last named day), leaving it uncertain whether the offence was committed before the information was laid. "There is nothing in the point. The information on which the conviction is made could not very well have reference to an offence after the information was made." BARKER, C.J., in *Ex parte Wilson* (1908), 14 C. C. C. 32.

NEGATIVING EXEMPTIONS.

One of the most essential points to be carefully attended to in describing the offence charged is, that every exemption, excuse or qualification which accompanies the description of the offence in the enacting clause, be positively negatived.

This consideration would lead to a conclusion that it is necessary to negotiate all the provisions annexed to the offence, whether by the same or any other clause of statute, as well as those in the enacting clause. The rule however seems, as established in practice, to be restricted to those of the latter description only. *Paley, 8th ed., p. 253.*

The rule, therefore, and distinction resulting from these and confirmed by the cases mentioned in the sequel, seem to be clear, viz., that all circumstances of exemptions and modification, whether applying to the *offence*, or to the *person*, that are either originally introduced into, or incorporated by reference with the enacting clause, must be distinctly enumerated and negatived; *but* that such matters of excuse as are given by other distinct clauses or provisoes need not be specifically set out, or negatived. *Paley, 8th ed., p. 256.*

It is not necessary to notice the proviso merely because it is placed in the same section of the printed Act, unless it is also a part of the enacting sentence, for statutes are not described into sections upon the rolls of Parliament. It is immaterial whether the exception be in another section, or in another Act of Parliament, if distinctly referred to and engrafted into the enacting clause. *Paley, 8th ed., p. 257.*

By the *fifth* sec. of 1 Jac. 1, c. 22, it is enacted that no person shall carry on the trade of a tanner, except under certain qualifications therein mentioned; the *seventh* section enacts that no person shall buy or contract for any rough trades, &c., but such person *as by virtue of that Act* might lawfully use the trade of a tanner. In a conviction upon this section it was held not to be sufficient to set forth, in the words of it, that the defendant was not such a person *as by virtue of that Act* might lawfully use the trade of a tanner, but the conviction must particularly negative his being within any of the enumerated exceptions mentioned in the fifth section. *R.* v. *Pratten,* 6 T. R. 559.

If an exception occurs in the description of the offence the exception must be negatived. But if the exception is by way of proviso and does not alter the offence, but merely states what persons are to take advantage of it, the onus is on the accused to plead and prove himself within the proviso. *R.* v. *Strauss* (1897), 5 B. C. R. 486; 1 C. C. C. 103.

The difference between the exception being by way of proviso, or following the enactment, is illustrated by the two cases following:—

(1) A by-law of the city of London, Ontario, enacted that "no person shall in any of the streets, or in the market-place of the city of London, blow any horn, ring any bell, beat any drum, play any flute, pipe or other musical instrument, or start or make, &c., &c., any noise calculated to disturb the inhabitants of the said city. *Provided* always that nothing herein contained shall prevent the playing of musical instruments by any military band of Her Majesty's regular Army, or of any military corps lawfully organized under the laws of Canada." The defendant was convicted for beating a drum. On an application to quash the conviction it was held not necessary that either the conviction, or commitment, should shew that the defendant did not come within the exception in the proviso. *R.* v. *Nunn* (1884), 10 P. R. 395.

(2) A conviction for selling liquor on a Sunday omitted to state that the liquor was not supplied upon a requisition for medicinal purposes. Held bad, since the enactment prohibiting the sale was immediately followed by these words, "save and except in cases where a requisition for medicinal purposes, signed by a licensed medical practitioner or by a justice of the peace, is produced by the vendee or his agent." *R.* v. *White* (1871), 21 C. P. 354. See also *R.* v. *McFarlane,* 17 C. L. J. 29; *R.* v. *Smith,* 31 O. R.; *R.* v. *McKenzie,* 6 O R. 165.

A statute declaring certain acts committed by "any person not legally empowered . . . without the owners' permission," to be unlawful. A conviction stating the acts done, but not negativing powers and permission. Held bad, *R.* v. *Morgan* (1887), 5 M. L. R. 63.

These rules are not now of the same value and importance as formerly in view of the provisions of secs. 1124 and 1125 of the Code relating to the removal of convictions by *certiorari*, and the powers given to the Court or Judge.

It is provided by sub-sec. (c) of sec. 1125 as follows:—

"(c) The omission to negative circumstances the existence of which would make the act complained of lawful, whether such circumstances are stayed by way of exception or otherwise, in the section under which the offence is laid, or are stated in another section."

Forfeiture of the Penalty.

The conviction must adjudge a forfeiture of the penalty. Upon consulting the form 32 it will be seen that the adjudication is as follows:—

"And I adjudge the said A. B. for his said offence *to forfeit* and pay the sum of $ . . . &c., &c., to be paid and applied according to law, &c., &c., and if the said several sums are not paid forthwith, &c., I adjudge the said A. B. to be imprisoned, &c., &c."

The defendant was convicted and adjudged "to forthwith pay $100 and in default of payment to be imprisoned for six months." Held, no adjudication or forfeiture and prisoner discharged. *R.* v. *Crowell* (1897), 2 C. C. C. 34.

The conviction adjudged imprisonment "and also to pay a fine of $5, to be paid and applied according to law." Held, invalid for want of adjudication of forfeiture. *R.* v. *Buttress* (1900), 3 C. C. C. 536; see *R.* v. *Newton*, 11 P. R. 98, and *R.* v. *Cyr*, 12 P. R. 24.

In awarding punishment the justice should be careful not to exceed the authority given him by the statute.

A conviction containing an adjudication far in excess of that which might lawfully have been imposed will not be amended upon *certiorari*. *Leanard* v. *Pelletier* (1903), 9 C. C. C. 19. As to wrongfully awarding compensation for killing a dog under sec. 537 of the Code, see *R.* v. *Annie Cook* (1910), 16 C. C. C. 234.

Convictions Generally.

A conviction by two justices for taking certain timber feloniously or unlawfully. Held bad, for it should not have been in the alternative; if the taking was unlawful only, not felonious, it should have been shewn how unlawful, and also that the offence came under some statute which gave the justice power to convict. *R.* v. *Craig,* 21 U. C. R. 552.

Where the conviction purported to be for an offence against a by-law, but shewed no such offence, it was quashed, and it was held that it could not be supported as warranted by the general law. In *Re Bates,* 40 U. C. R. 284.

Defendant was convicted of allowing his cattle to go at large in the township of Cornwallis. Held that the conviction was bad in that it did not set out the by-law or ordinance of the sessions creating the offence, and that the objection was covered by the ground taken in the rule that the conviction did not shew any offence for which it could be lawfully made. *Starn* v. *Hedles,* 4 R. & G. N. S. R. 84.

A conviction for selling intoxicating liquor contrary to the provisions of the Canada Temperance Act contained no reference to the Act, did not shew when the offence was committed and merely adjudged that the defendants pay $100 for selling intoxicating liquors. Held bad. The information and warrant cannot be looked at to see that an offence has been committed. *Woodlock* v. *Dickie,* 6 R. & G. N. S. R.; 6 C. L. T. 142.

If a statute specifies the grounds of forfeiture the conviction must shew specifically the *particular* fact which forms the ground of forfeiture, in order that the Court may see the penalty has been properly imposed and be quite sure that the convicting justice has not mistaken the law. *Ex parte John Smith,* 3 D. & R. 461.

A conviction is bad if it charges the offence in the alternative. Where it was set out in the conviction that the defendant "did kill, take, destroy *or* attempt to kill, take and destroy," the fish, the Court quashed the conviction for insufficiency. *R.* v. *Sadler,* 2 Chit. 519.

If one of the ingredients required by the statute be the *knowledge* of the party, nothing short of a direct averment to that effect is sufficient. *Dickinson* v. *Fletcher,* L. R. 9 C. P. 1.

"It is a rule with respect to summary proceedings before justices on penal statutes that after conviction, nothing can be

intended, so as to get rid of any defect in point of form. Everything necessary to support the conviction must appear on the face of the proceedings, and must be established by regular proof, or by the admission of the party of that which is not proved." HOLROYD, J., in *R.* v. *Duman*, 1 Chit. 155.

All the facts necessary to support the proceedings must be expressly alleged and not left to be gathered by inference, or intendment.

Upon a conviction under 11 Geo. II., c. 19, for a fraudulent removal of goods to avoid distress it was held that, as the justices have no jurisdiction except where one party is *landlord* and the other *tenant*, it must appear upon the face of their order that the party removing the goods was *tenant*, and that it cannot be supplied by intendment. *R.* v. *Davis*, 5 B. & A. 551.

In order to justify a conviction for offering goods for sale without a license under the old English Act relating to hawkers and pedlars, the charge must bring the defendants within the description of persons requiring a license and that it is not enough to allege that he sold as a hawker and pedlar. *R.* v. *Turner*, 4 B. & A. 510.

The defendant was charged with an offence against the Lord's Day Act of Ontario, R. S. O. 1897, ch. 246, and adjudged to pay a fine. Upon motion for a rule nisi to quash the conviction. Held, that the finding of the magistrate upon a question of fact within his jurisdiction would not be reviewed upon *certiorari*: the remedy, if any, was by appeal. Rule refused. *R.* v. *Urquart*, 4 C. C. C. 256.

The prisoner was charged with being a vagrant, and having failed to appear on the return day of the summons he was convicted without any proof having been made of the service of the summons on him. The conviction was quashed. *R.* v. *Levesque*, 8 C. C. C. 505.

Defendant was convicted of unlawfully and knowingly assisting the importation of an alien and foreigner into Canada under contract and agreement made previous to his importation to perform labour and services in Canada contrary to 60 and 61 Vict. ch. 11 (D.) as amended by 61 Vict. ch. 2, and 6 Ed. VII. ch. 13.

Held that the written consent did not comply with the intention of the statute as it should contain a general statement of the offence alleged to have been committed, mentioning the name of the person in respect of whom the offence is alleged to have been committed, and the time and place with sufficient certainty to

identify the particular offence intended to be charged. Conviction quashed. *R.* v. *Breckenridge,* 6 O. W. R. 501, 10 O. L. R. 459.

Where a conviction was made for ninety days' imprisonment instead of three months, as authorized by the statute, conviction quashed, as it may possibly be for more than three calendar months, and amendment refused. *R.* v. *Gavin,* 1 C. C. C. 59, 30 N. S. R. 162.

A conviction under a by-law must shew the by-law that the Court may judge its sufficiency. And it must shew by what municipality the by-law was passed. *R.* v. *Osler,* 32 U. C. R. 324.

The death of the prosecutor, who is also informant, after a summary conviction, before the service on him of an order *nisi* to quash, does not prevent the Court from dealing with the matter and from quashing the conviction. *R.* v. *Fitzgerald,* 29 O. R. 203.

On an application to quash the convicting justice must be made a party to the rule. *R.* v. *Law,* 27 U. C. R. 260.

A conviction for "procuring" a pistol with intent unlawfully to do injury to another person, is not a sufficient conviction for "having on his person a pistol, &c.," and is bad as not disclosing an offence known to the law. *R.* v. *Mines* (1894), 1 C. C. C. 217, 25 O. R. 577.

A person shall only be deemed guilty of an offence and liable to punishment after being duly convicted, and this is enacted by sec. 1027 of the Code as follows:—

1027. Whenever a person doing a certain act is declared to be guilty of any offence, and to be liable to punishment therefor, it shall be understood that such person shall only be deemed guilty of such offence and liable to such punishment after being duly convicted of such act. 55-56 V., c. 29, s. 931.

Orders of Justices.

In considering this section 727, we have so far confined ourselves to convictions and must not lose sight of the fact that the section relates to orders as well as convictions.

In Burns' Justice, vol. 3, p. 1108, it is said: "It is not easy to fix any rule for distinguishing in the abstract between what things are the subject of *orders* of justice and what of *convictions.*"

By sec. 727 the conviction or order afterwards drawn up shall be "in such one of the forms of convictions or of orders from 31 to 36 inclusive as is applicable to the case, or to the like effect."

Upon reference to these, it will be noticed that the forms of conviction are for "penalties." And the adjudication is expressed to be for both "forfeiture" and payment, whereas the forms of orders are for the "payment of money," and the adjudication is for "payment" only, omitting the "forfeiture." In a conviction the defendant is adjudged for his offence "to forfeit and pay," whereas in an order he is adjudged "to pay" simply.

A conviction states the offence and the time and place when and where it was committed. An order states the facts entitling the complainant to the order with the time and place when and where they occurred.

A conviction is based upon an information for an offence. An order is based upon a complaint. For instance, under the Masters and Servants Act in a claim for wages, the servant complains that so much wages are due to him, naming the amount, and if so found by the justice he orders the master to pay the wages, he does not impose a penalty, so that the adjudication of the justice in a case of this kind will be authenticated by way of an order and not conviction.

Upon a complaint laid by a servant for non-payment of wages the justice should order the payment of the wages and not impose a penalty. *In re Follansby and McArthur* (1874), Man. R. Temp. Wood 4.

In matters relating to landlord and tenant; the committal of lunatics; of matters concerning children under the Children's Protection Act, and in various other matters outside the Criminal Code, justices adjudicate by way of order instead of conviction.

Before the statute of 4 Geo. II., convictions were always recorded in Latin, whereas orders were returned in English.

There is no material distinction between the mode of construing an order and a conviction, whatever favourable intendment may be made in support of the former, when once the essential point of jurisdiction is established. *R.* v. *Downshire*, 6 N. & M. 105; *Day* v. *King*, 5 A. & E. 367; *R.* v. *Hulcott*, 6 T. R. 583.

It must expressly appear on the face of the order that the justices had jurisdiction to make it, and the facts raising such jurisdiction should be shewn, or it will be bad.

The order must state that the party against whom it is made was duly summoned to answer the charge, or that he was present at the hearing, unless the statute allows the order to be made *ex parte*.

The charge should be stated with the same degree of certainty and precision as in a conviction and the hearing and adjudication must also be stated.

An order may be good in part and bad for the residue, whereas a conviction is an entire judgment and indivisible; if any material part be faulty it vitiates the whole. *R.* v. *Catherall,* 1 T. R. 249.

The neglect or refusal to obey an order of justices concerning a matter over which they have jurisdiction, after the order has been personally served on the party required by the order to do the act, is an offence indictable at common law as a misdemeanour, notwithstanding a specific penalty is provided by the statute for the neglect of that duty which the order is intended to enforce. *R.* v. *Robinson,* 2 Burr. 799; *R.* v. *Harris,* 4 T. R. 205; *R.* v. *Kingston,* 8 East 41; *R.* v. *Hollis,* 2 Stark 536; *R.* v. *Terrall,* 20 L. J. M. C. 39; *R.* v. *Walker,* L. R. 10 Q. B. 355.

An order of justices which is bad in part may be enforced as to the good part, provided that on the face of the order the two parts are clearly separable, and it is not necessary in such case to quash the bad part of the order before enforcing the residue. *R.* v. *Green,* 20 L. J. M. C. 168.

The signature is an essential part of the order and the order cannot be considered as made until reduced into writing and signed by the justice. *R.* v. *Flintstine,* 10 Jur. 475.

As to serving minute of order before issuing warrant of commitment or distress. See sec. 731 of the Code.

Conclusion.

The conviction or order is required to be drawn up on parchment or on paper under the hand and seal of the justice.

An order having an impression made on it with ink by means of a wooden block was held sufficient. *R.* v. *St. Paul's Covent-Garden,* 7 Q. B. 232, 14 L. J. M. C. 109.

Justices need not sign their Christian names at full length, their usual signature is sufficient followed by their description of office as "J.P.," "P.M.," "S.M."

Wherever a conviction is made by two justices they must both sign and seal the same, though only the signature of one of them is required to the distress warrant and commitment.

It is essentially necessary that the date should be properly filled in, as this becomes material where the time for conviction is limited by statute. And it must be under the seal of the justice as well as signed by him.

A magistrate can amend his conviction at any time before the return of a *certiorari*. *R.* v. *McCarthy*, 11 O. R. 657, and see *Simpson* v. *Lock*, 7 C. C. C. C. 294. And see *Ex parte Giberson* (No. 1), 1909, 16 C. C. C. C. 66.

Joint Offenders.

728. When several persons join in the commission of the same offence, and upon conviction thereof each is adjudged to pay a penalty which includes the value of the property or the amount of the injury done, no further sum shall be paid to the person aggrieved than such amount or value and costs, if any, and the residue of the penalties imposed shall be applied in the same manner as other penalties imposed by a justice are directed to be applied. 55-56 V., c. 29, s. 860.

The defendants E. R. and H. R., his wife, were jointly convicted for having wantonly, cruelly and unnecessarily beaten, illused and abused a yoke of oxen the property of J. W. D., and for such offence were adjudged to pay a fine of $20 and $22.46 for costs, and in default to be imprisoned. The Court held that the offence was single in its nature and only one penalty could be awarded, but it ought to be several against each defendant, otherwise one who had paid his proportional part might be kept in prison until the other had paid the residue. *Re Rice*, 20 N. S. R. 294.

A conviction of two persons in partnership for an offence, several in its nature, and adjudging that they should forfeit and pay, &c., is bad, for a joint conviction in such case is bad; the penalty should have been imposed severally. *Ex parte Howard*, 25 N. B. R. 191.

First Conviction and Payment of Damages.

729. Whenever any person is summarily convicted before a justice of any offence against Part VI., or Part VII., except section four hundred and nine and sections four hundred and sixty-six to five hundred and eight inclusive, or against Part VIII., except sections five hundred and forty-two to five hundred and forty-five inclusive, and it is a first conviction, the justice may, if he thinks fit, discharge the offender from his conviction upon his making such satisfaction to the person aggrieved, for damages and costs, or either of them, as are ascertained by the justice. 55-56 V., c. 29, s. 861.

Part VI. of the Code deals with offences against the person and reputation. The only offences enumerated in this part which are

punishable upon summary conviction and to which sec. 729 can apply are as follows:—

Sec. 287. (a) Cutting holes in ice and leaving the same unguarded.

(b) Leaving abandoned mine unguarded.

(c) Omits within five days after conviction to guard and inclose the same.

Sec. 291. Common assault.

Part VII. deals with offences against rights of property and rights arising out of contracts and offences connected with trade.

The only offences under this part punishable on summary conviction are:—

Sec. 374. Stealing trees, saplings, shrubs or underwood of the value of twenty-five cents.

Sec. 375. Stealing plants, vegetables or fruit from gardens, orchards, &c.

Sec. 376. Stealing cultivated plants, not growing in a garden, &c.

Sec. 377. Stealing fences, stiles or gates.

Sec. 385. Stealing things deposited in Indian graves.

Sec. 393. Unlawfully killing or wounding pigeons or house doves.

Sec. 395, Possessing trees, &c., without being able to account therefor.

Sec. 401. Receiving, or retaining, property unlawfully obtained, the stealing of which is punishable on summary conviction.

Sec. 409. Which is excepted from the provisions of sec. 729, relates to personation at competitive, or qualifying, examination.

Sec. 430. Secreting wreck, or receiving, selling, keeping or boarding a wrecked vessel.

Sec. 431. Purchasing old marine stores from persons under 16 years of age.

Sec. 435. Unlawful possession and sale, etc., of public stores.

Sec. 436. Dealers being in possession of public stores unlawfully.

Sec. 437. Searching for stores near Her Majesty's vessels, wharfs or docks.

Sec. 438. Receiving clothing, furniture, provisions, &c., from soldiers or deserters.

Sec. 439. Receiving necessaries from seamen.

Sec. 440. Receiving in pawn or otherwise seaman's property.

Sec. 441. Not justifying possession of same.

Secs. 466 to 508 inclusive are excepted. Why Secs. 466 to 490? None of the offences under these sections are punishable on summary conviction.

Part VIII. relates to wilful and forbidden acts in respect of certain property.

Sec. 515. Recklessly setting fire to forests.

Sec. 519. Wilfully damaging goods in railways or vessels.

Sec. 527. Removing natural bar necessary for a harbour.

Sec. 530. Wilful destruction of fences, walls, stiles, gates, &c.

Sec. 533. Injuries to trees, saplings, shrubs, etc.

Sec. 534. Injuries to vegetables, productions in gardens.

Sec. 535. Injuries to roots or plants elsewhere than in gardens.

Sec. 537. Injuries to dogs, birds or other animals not cattle.

Sec. 539. Injuries and spoil to property for which no punishment is provided in previous sections of the Code.

The following are the excepted sections:—

Sec. 542. Cruelty to animals.

Sec. 543. Keeping a cock pit.

Sec. 544. Conveyance of cattle by railway without proper rest and nourishment.

The justice can only apply the provisions of this section where it is a first conviction, and for the offences above enumerated, and it is a matter entirely in his own discretion, "if he thinks fit," and he must first convict the offender before he can exercise this discretion, since the offender is to be "discharged from his conviction" upon his making such satisfaction to the person aggrieved.

Dismissing Complaint.

Certificate of Dismissal.

730. If the justice dismisses the information or complaint, he may, when required so to do, make an order of dismissal in form 37, and he shall give the defendant a certificate in form 38 which, upon being after-

wards produced, shall without further proof, be a bar to any subsequent information or complaint for the same matter, against the same defendant. 55-56 V., c. 29, s. 862.

From a perusal of form 37, it will be seen that it provides for dismissal as well when both parties have appeared, and the matter of the information or complaint has been duly considered by the justice, and where the complaint or informant does not appear.

This matter was considered by the Supreme Court of New Brunswick, when it was held by ALLEN, C.J., WELDON, WETMORE, KING and FRASER, JJ., that the certificate of dismissal provided for by sec. 43 of the Summary Conviction Act may be granted as well where the informant neglects to appear and the complaint is dismissed on that ground, as where he does appear and the information is dismissed on the merits. By PALMER, J., that such certificate can only be granted where there has been a hearing and the information dismissed. Held also (WELDON and WETMORE, JJ., dissenting), that the magistrate or other officers, before whom an informant for an offence against the Canada Temperance Act is being heard, if a certificate of dismissal for the same offence is relied upon as a bar to his proceeding, has a right to enquire whether the previous prosecution was real and *bona fide* or was instituted fraudulently and collusively. *Ex parte Phillips*, 24 N. B. R. 119.

A prosecutor of a complaint cannot appeal from the order of a magistrate dismissing the complaint as by R. S. O. 1877 c. 74, s. 4, the practice of appealing in such case is assimilated to that under 33 Vic. c. 47, Canada, which confines the right of appeal to the defendant.

A prohibition was ordered, but without costs, as the objection to the jurisdiction had not been taken in the Court below. In *Re Murphy and Cornish*, 8 P. R. 420.

See sec. 749 as to appeals where it is provided that "any person who thinks himself aggrieved by any such conviction, or order or dismissal, the prosecutor or complainant, as well as the defendant, may appeal."

The decision of the above case is therefore no longer applicable to appeals under the summary conviction clauses, part XV.

MINUTE OF ORDER TO BE SERVED.

731. Whenever, by any Act or law, authority is given to commit a person to prison, or to levy any sum upon his goods or chattels by distress, for not obeying an order of a justice, the defendant shall be served with a copy of the minute of the order before any warrant of commitment or of distress is issued in that behalf.

2. The order or minute shall not form any part of the warrant of commitment or of distress. 55-56 V., c. 29, s. 863.

The distress warrant may issue at any time after adjudication and before the formal order has been drawn up, provided a minute of the order has been served. *Ratt* v. *Parkinson et al.*, 20 L. J. U. C. 210; *R.* v. *J. J. Huntingdon*, 20 L. J. M. C. 208.

It is to be noted that this section refers to orders and not convictions. No minute of a conviction need be served nor a copy of the conviction.

The defendant is entitled to a copy of the conviction from the convicting justice on application for the same.

Common Assault.

732. Whenever any person is charged with common assault any justice may summarily hear and determine the charge.

2. If the justice finds the assault complained of to have been accompanied by an attempt to commit some other indictable offence, or is of opinion that the same is, from any other circumstance, a fit subject for prosecution by indictment, he shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as if he had no authority finally to hear and determine the same. 63-64 V., c. 46, s. 3.

This section applies only to common assaults as distinguished from aggravated assaults (sec. 296), and assaults occasioning actual bodily harm (sec. 295). See *Miller* v. *Lea*, 25 A. R. 428.

An assault is defined by sec. 290 of the Code as follows:—

Definition of Assault.

290. An assault is the act of intentionally applying force to the person of another, directly or indirectly, or attempting or threatening, by any act or gesture, to apply force to the person of another, if the person making the threat has, or causes the other to believe, upon reasonable grounds, that he has present ability to effect his purpose, and in either case, without the consent of the other or with such consent, if it is obtained by fraud. 55-56 V., c. 29, s. 258.

291. 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. 55-56 V., c. 29, s. 265.

By sec. 291 the punishment for a common assault on summary conviction shall not exceed $20 and costs, or 2 months' imprisonment with or without hard labour.

And as we have seen by the provisions of sec. 709 of the Code no justice shall hear and determine any case of assault or battery in which any question arises as to the title to any lands, &c.,

or as to any bankruptcy or insolvency or any execution under the process of any Court of justice.

Sub-section (2) of sec. 732 enables a justice to commit the defendant for trial if he thinks the assault is a fit subject for indictment, so that as the case develops from the evidence, and the justice realizes that the matter is of a serious nature, he can refuse to adjudicate, but may proceed as upon a preliminary inquiry and either commit the defendant for trial under sec. 690 or proceed under sec. 696.

Dismissal of Complaint of Assault.

733. If the justice, upon the hearing of any case of assault or battery upon the merits where the information is laid by or on behalf of the person aggrieved, under the last preceding section, deems the offence not to be proved, or finds the assault or battery to have been justified, or so trifling as not to merit any punishment, he shall dismiss the complaint and shall forthwith make out a certificate under his hand stating the fact of such dismissal, and shall deliver such certificate to the person against whom the complaint was preferred. 55-56 V., c. 29, s. 865.

734. If the person against whom any such information has been laid, by or on behalf of the person aggrieved, obtains such certificate, or, having been convicted, pays the whole amount adjudged to be paid or suffers the imprisonment, or imprisonment with hard labour, awarded, he shall be released from all further or other proceedings, civil or criminal, for the same cause. 55-56 V., c. 29, s. 866.

There must have been a hearing of the case upon the merits, that is, both parties have appeared and evidence has been adduced upon behalf of all parties and a full inquiry made by the justice.

Where a complainant gave notice to the defendant that he would not attend before the magistrate or offer evidence in support of the charge of assault, and did not in fact attend or offer evidence, but the defendant appeared and obtained from the magistrate a certificate of dismissal under this section.

Held, that there had not been a hearing upon the merits and the magistrate had no jurisdiction to grant the certificate, and that the latter was therefore no bar to an action in which the validity of the certificate might be inquired into. *Reed* v. *Nutt*, 24 Q. B. D. 669. But see *Vaughan* v. *Bradshaw*, 9 C. B. N. S. 103, 30 L. J. C. P. 93.

The provisions of these sections are *intra vires* of the Parliament of Canada. *Fleck* v. *Brisbin*, 26 O. R. 423.

A charge of "shooting and wounding with intent to do grievous bodily harm" came on before two justices of the peace for preliminary hearing. The information was laid by a peace officer, and the person aggrieved attended the hearing, having been

subpœnaed, and gave evidence. Of their own motion the justices changed the charge to one of common assault and convicted and fined the accused accordingly. Held, that the justices had no right to alter the charge to one of common assault and their certificate of conviction and payment of the fine was a nullity and no bar under sec. 866 (now 724) of the Code, to an action by the person aggrieved to recover damages. *Miller* v. *Lea*, 25 A. R. 428.

The crime of assault may be committed though the party assaulted may have consented to fight. *R.* v. *Coney* (1882), 8 Q. B. D. 534, followed. *R.* v. *Buchanan* (1898), 12 M. L. R. 190.

The granting of the certificate is a ministerial act consequent on the dismissal. The application for it need not be made in the presence of the other party and it may be made at any time, the word "forthwith" in the statute meaning forthwith on an application for it, and not forthwith on the dismissal of the information. *Hancock* v. *Somes*, 1 E. & E. 795; *Costar* v. *Hetherington*, 1 E. & E. 802.

A certificate of dismissal of a charge of assault is a bar to an indictment for unlawful wounding where the transaction is the same. *R.* v. *Elrington*, 31 L. J. M. C. 14.

The objection of *res judicata* must be taken at the hearing before the justice, and should not be reserved as a ground of quashing the conviction after it is made. *R.* v. *Herrington*, 12 W. R. 40.

An entry in a justice's note book when proved, is sufficient proof of an adjudication. *R.* v. *Hutchings*, 6 Q. B. D. 300.

Section 866 (now 734) bars civil action only where the charge is triable summarily under sec. 864 (now 732), and does not affect, or bar, where the charge is for an assault causing actual bodily harm, an indictable offence. *Nevills* v. *Ballard* (1897), 1 C. C. C. 434; and see *Larin* v. *Boyd* (1904), 11 C. C. C. 74, and *Clermont* v. *Lagacè* (1897), 2 C. C. C. 1. Where a person is charged with aggravated assault and consents to be tried summarily by a magistrate and either pleads guilty, or is found guilty, and is fined and pays his fine and the costs, the conviction will be a bar to further criminal proceedings upon the same charge, but it will not relieve him from a civil action for damages. *Clarke* v. *Rutherford* (1901), 5 C. C. C. 13. As to a summary conviction being a bar to a civil action for damages see *Hebert* v. *Hebert* (1909), 16 C. C. C. 199.

The singular feature of the first case just quoted is that it seems to have escaped the attention of the Judge that the justice of the peace has no jurisdiction whatever in the premises to make the conviction that he did, and the same was bad; the proceedings being void by reason of the fact that the justice assumed and acted as if he had authority and jurisdiction of a police magistrate, his only authority as a fact being to hold a preliminary hearing and commit for trial if the evidence warranted it.

R. v. *Brindly* (1906), 12 C. C. C. 170, reports the conflicting opinions of GRAHAM, E.J., and RUSSELL, J., in *habeas corpus* proceedings as to whether, or not, a conviction for common assault imposing a sentence of sixty days was good in law. As sec. 291 fixes the punishment at two months, it was contended upon behalf of the accused that sixty days might mean more than two months.

GRAHAM, E.J., said: "There is in my opinion no reasonable possibility of the sentence exceeding the statutory period, and therefore no ground for discharging her." He refused the order asked for.

The application was renewed before RUSSELL, J., who said: "If the conviction may so operate as to detain the prisoner in gaol for a longer period than she would be detained if the justice had inserted 'two months' as the law directs, then it seems to me it must be a bad conviction. Prisoner's counsel has pointed out several ways in which this may happen." No one appeared in opposition to the motion, and RUSSELL, J., made the order absolute discharging the prisoner.

This decision indicates how necessary it is for justices to follow explicitly the wording of the statute when awarding punishment. When the statute provides for two months' imprisonment it means that period, it does not mean, nor state, sixty days, and justices should govern themselves accordingly.

COSTS ON CONVICTION OR ORDER.

735. 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. 55-56 V., c. 29, s. 867.

736. Whenever the justice, instead of convicting or making an order, dismisses the information or complaint, he may, in his discretion, in and by his order or dismissal, award and order that the prosecutor or complainant shall pay to the defendant such costs as to the said justice seem reasonable and consistent with law. 55-56 V., c. 29, s. 868.

"Laws which impose penalties are subject to a strict construction, and the punishment and all its incidents must be mentioned in clear and unambiguous language; they must be established by positive enactment, and cannot be gathered from implication and still less by conjecture. Statutes which give costs in penal proceedings are likewise to be construed strictly inasmuch as such costs are an increment of the penalty. In laws imposing penalties and allowing costs in penal proceedings the rule is that the construction most beneficial to the offenders must be adopted." WURTELE, J., at p. 123, in *Ex parte Lon Kai Long* (1897), 1 C. C. C. 120.

In the above case the defendant, along with others of his countrymen, was convicted under a by-law of the City of Montreal requiring public laundries to take out licenses. The defendant was fined $40 with $2 costs, and in default two months' imprisonment, "unless the tax and costs and the charges for conveying him to gaol should be sooner paid." The City charter and the by-law did not contain any enactment providing for the costs and charges for conveyance to gaol. Consequently the warrant of commitment was held bad and irregular and quashed. *Ibid.*

A warrant of commitment in default of a fine for smuggling under the Customs Act was held invalid because the amount of the expenses of conveying the defendant to gaol was not fixed in that instrument. *R.* v. *McDonald* (1898), 2 C. C. C. 504.

The making up of the costs is a ministerial act and does not go to the jurisdiction. If the magistrate in making up the costs has not acted *bona fide* he is liable to a criminal information; or if, with no dishonest intention, he has taken too much for costs, he may be made to refund the excess, but his conviction is good. *Ex parte Howard* (1893), 32 N. B. R. 237, followed in *Ex parte Rayworth* (1896), 34 N. B. R. 74, 2 C. C. C. 230.

A conviction directed that the defendant be imprisoned for a term specified unless such fine and costs, &c., and the *costs of commitment* were sooner paid. These words "costs of commitment" are irregular and may be treated as surplusage, and the fact of their being included in the conviction will not invalidate it. *R.* v. *Doherty* (1899), 3 C. C. C. 505.

A warrant of commitment for non-payment of a penalty should ascertain and set forth the costs of commitment and conveying to gaol, as they have not been ascertained in the conviction. OSLER, J.A., at p. 92, *R.* v. *Murdock* (1900), 4 C. C. C. 82, 27 A. R. 443.

The costs of conveying the defendant to gaol who had been convicted for a third offence under the Nova Scotia Liquor License Act, are not legal. And where the amount of such costs is stated in the warrant of commitment, it is improperly included and cannot be treated as surplusage, and the warrant was held to be bad. *R.* v. *Doherty, infra,* distinguished. *Re J. W. King* (1901), 4 C. C. C. 426; and see *R.* v. *Townsend* (No. 3), 1906, 11 C. C. C. 153.

The conviction is also open to the objection on the ground of the application of the penalty, the award of the costs to the justice instead of to the informant. *R.* v. *Roche* (1900), 32 O. R. 20, 4 C. C. C. 64; see *R.* v. *Law Baw* (1903), 7 C. C. C. 468.

If the conviction adjudges a pecuniary penalty and a distress to realize the same, and in default of sufficient distress that defendant be imprisoned, the costs of distress and of conveying the defendant to gaol are not in the discretion of the justice, but must be included in the formal conviction. *R.* v. *Vantassel* (1894), 5 C. C. C. 128 and 133, and see *R.* v. *Beagan* (No. 2), 6 C. C. C. 56.

The resolution of a municipal council to put an invalid conviction in force, or to pay any costs of putting it in force, is *ultra vires.* It transcends the statutory powers of any municipal council to award funds for illegal purposes. BOYD, C., at p. 21, *Gaul* v. *Ellice,* 6 C. C. C. 15.

By sec. 735 it is in the discretion of the justice to award costs. The costs must be awarded by the conviction or order, that is the amount must appear on the face of the conviction and must agree with the amount stated in the minute of adjudication. The costs awarded are to be such as to the justice seems reasonable and must not be inconsistent with, that is, must not exceed, the fees established by law to be taken on proceedings had by and before justices.

By sec. 770 the fees therein mentioned and no others shall be and constitute the fees to be taken on proceedings before justices under this part. As to excessive costs see *R.* v. *Morris* (1910), 16 C. C. C. 1.

Unless therefore the Provincial Act relating to summary convictions, or some special Act governing the matter in hand, otherwise provides, no justice can charge other or larger fees than those enumerated in the tariff in sec. 770, or the tariffs set out in the Provincial Acts. See *R.* v. *Laird* (1889), 1 Terr. L. R. 179.

In this case a justices' order dismissing an information ordered the informant to pay as costs a sum which included items for

"rent of hall," "counsel fee," "compensation for wages" and "railway fare." Held that none of these items could legally be charged as costs, and that therefore the order was bad so far as it awarded any costs.

It was also held that the Court could not amend the order by deducting the illegal items; though it could amend by striking out in toto all that part of the order relating to costs.

And see *R.* v. *Elliott,* 12 O. R. 524, and *R.* v. *Tebo,* 1 Terr. L. R. 196; *Re Bibby,* 6 M. L. R. 472.

By ch. 13, Ontario Statutes, 1904, amending R. S. O. ch. 13, police magistrates not receiving salary, and all justices of the peace, shall be entitled to receive $2 for all services of every kind connected with the case where the time occupied by the hearing does not exceed two hours, and said fees shall be paid by the county.

And by ch. 23, Ontario Statutes, 1907, amending R. S. O. ch. 86, justices of the peace may use the town hall of any municipality, which has no police magistrate, for the hearing of cases brought before him, but not so as to interfere with its ordinary use.

The Dominion tariff does not apply under provincial law. *R.* v. *Excell,* 20 O. R. 633.

The awarding of costs to the owner of two dogs, the information having been laid by his wife, instead of to the informant, is a mere irregularity which is cured by sec. 1124 of the Code. *Ex parte Grey* (1906), 12 C. C. C. 481.

Section 1124 provides that no conviction or order made by any justice, and no warrant for enforcing the same, shall on being removed by certiorari, be held invalid for any irregularity, informality or insufficiency therein, if the Court or Judge before which the question is raised upon perusal of the deposition is satisfied that an offence of the nature described in the conviction, etc., has been committed, etc.

See also sec. 754 of the Code in case of an appeal taken under the provisions of sec. 749.

Where excessive costs are included in a summary conviction the Court on *certiorari* has power under sec. 1124 to amend the conviction by reducing the costs to the proper items. *R.* v. *Morris, supra.*

It is not necessary to fix and state in the conviction the costs and charges of conveying the defendant to gaol in default of pay-

ment of the fine enforced. It is not necessary now to state the amount of such costs and charges in the commitment, as form 41 differs from Form F. F. F., in the original Code of 1892.

In Form F. F. F. after the words "and costs and charges of conveying him to the said common gaol," followed the words, "amounting to the further sum of ."

These words "amounting to the further sum of ," are omitted from Form 41, and it reads "unless the said several sums and the costs and charges of the commitment and of the conveying of the said A.B. to the said common gaol are sooner paid unto you, etc." See *R.* v. *Code* (1908), 13 C. C. C. 372.

Some authoritative statement from the justice as to the amount "of the costs and charges of the commitment and of the conveying of the accused to the gaol," will have to be conveyed to the gaoler in order that he may know the amount required to be paid by the accused before he can release him. It is suggested that if the justice who issues the warrant possesses the necessary information as to these costs and charges, to enable him to do so, he should endorse the amount upon the warrant and authenticate such endorsement by his signature. Or, if the justice is not in a position to compute the amount of such costs and charges, then he should instruct the constable to whom he delivers the warrant to make such endorsement when he hands the warrant to the gaoler.

This omission in Form 41, and other forms of warrants of commitment, was no doubt made advisedly, as in a great many cases justices living some distance from the gaol to which the accused has been committed would have to guess as to the actual amount of such costs and charges.

By item 5 in the Tariff, sec. 770, the constable is entitled to mileage taking prisoner to gaol "exclusive of the disbursements necessarily expended in his conveyance." How could a justice know in advance so as to insert the true amount in the warrant of commitment, what these disbursements would be? The constable is the only one who can know since he is the person who will make the disbursements. It is therefore presumably contemplated by the change in the forms of commitment that the practice to be followed hereafter will be for the constable by endorsement on the warrant, or otherwise, to state to the gaoler what these "costs and charges" will be. It is better for the constable to endorse them on the warrant as there is then a record of them easily found.

A conviction adjudging the defendant to pay a sum of costs without saying to whom the costs are to be paid is void under this section. The conviction should order the costs to be paid to the complainant. *R.* v. *Mabey*, 37 U. C. R. 248.

"As the License Act does not fix a tariff of costs the justices could allow such costs as they considered reasonable. There was jurisdiction to order costs to be paid and the objection in the rule that the sum awarded for costs is excessive and unwarranted by law cannot be entertained." *R.* v. *Sanderson*, 12 O. R. 178; *R.* v. *Brown*, 16 O. R. 41); BAIN, J., p. 494, *R.* v. *Starkey* (1891), 7 M. L. R. 489.

COSTS ON DISMISSAL.

Where the prosecutor, or complainant, is ordered to pay the defendant's costs as provided by sec. 736, the justice, on default of payment of the same, may issue a warrant of distress on the goods and chattels of the prosecutor, or complainant, in Form 45, for the amount of such costs, and in default of distress a warrant of commitment, in Form 46, may issue. See sec. 742 *post*. The term of imprisonment shall not exceed one month.

RECOVERY OF COSTS.

737. The sums so allowed for costs shall, in all cases, be specified in the conviction or order, or order of dismissal, and the same shall be recoverable in the same manner and under the same warrants as any penalty, adjudged to be paid by the conviction or order, is to be recovered. 55-56 V., c. 29, s. 869.

738. 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. 55-56 V., c. 29, s. 870.

The costs need not be set out in detail item by item, only the aggregate amount. The costs that shall be specified do not include costs of conveying the accused to gaol. The words used in the section are "the sums so allowed for costs;" these sums so allowed are the costs awarded under the powers invested by sec. 735. Costs of the commitment and of the conveying of the defendant to gaol are governed by sec. 739 (2) *post*.

"I think that in this section 870 (now 738) the words 'such penalty' refer to the previous section, 'penalty adjudged to be paid,' also that the words 'to be recovered,' apply rather to a pecuniary penalty than to a penalty of imprisonment." GRAHAM, E.J., p. 9. *R.* v. *Johnston* (No. 1), (1906), 11 C. C. C. 6.

What the Justice may Adjudge.

739. Whenever a conviction adjudges a pecuniary penalty or compensation to be paid, or an order requires the payment of a sum of money, whether the Act or law authorizing such conviction or order does or does not provide a mode of raising or levying the penalty, compensation or sum of money, or of enforcing the payment thereof, the justice by his conviction or order after adjudging payment of such penalty, compensation or sum of money, with or without costs, may order and adjudge,—

(*a*) that in default of payment thereof forthwith, or within a limited time, such penalty, compensation or sum of money and costs, if the conviction or order is made with costs, shall be levied by distress and sale of the goods and chattels of the defendant, and, if sufficient distress cannot be found, that the defendant be imprisoned in the manner and for the time directed by the Act or law authorizing such conviction or order or by this Act, or for any period not exceeding three months, if the Act or law authorizing the conviction or order does not specify imprisonment, or does not specify any term of imprisonment, unless such penalty, compensation or sum of money and costs, if the conviction or order is made with costs, and the costs are charges of the distress and of the commitment and of the conveying of the defendant to gaol, are sooner paid; or,

(*b*) that in default of payment of the said penalty, compensation or sum of money, and costs, if any, forthwith or within a limited time, the defendant be imprisoned in the manner and for the time mentioned in the said Act or law, or for any period not exceeding three months, if the Act or law authorizing the conviction or order does not specify imprisonment, or does not specify any term of imprisonment, unless the same and the costs and charges of the commitment and of the conveying of the defendant to gaol are sooner paid.

2. Whenever under such Act or law, imprisonment with hard labour may be ordered or adjudged in the first instance as part of the punishment for the offence of the defendant, the imprisonment in default of distress or of payment may be with hard labour. 55-56 V., c. 29, s. 872; 57-58 V., c. 57, s. 1; 63-64 V., c. 46, s. 3.

This section was amended in 1909 by striking out the words "distress and of the" in the 9th line of paragraph (*b*).

Paragraph (*a*) provides for distress and sale of the goods and chattels of the defendant in default of his payment of the penalty compensation, or sum of money, or costs. If sufficient distress cannot be found then the defendant may be imprisoned. If the Act, or law authorizing the conviction, or order, does not specify the imprisonment, then the imprisonment shall not exceed three months.

Paragraph (*b*) provides for imprisonment in the first instance in default of payment.

See sec. 731 as to requisites before issue of warrants of commitment or distress.

Warrant of Distress.

The justice making the conviction, or order mentioned in paragraph (*a*), may issue a warrant of distress, in Forms 39 or 40.

Form 39 is for distress upon a conviction for a penalty and Form 40 is for distress upon an order for the payment of money. See sec. 741, *post*.

When it appears to the 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 or chattels wherein to levy distress, then the justice instead of issuing a warrant of distress may commit the defendant to gaol. See sec. 744, *post*.

A distress warrant can be backed, or endorsed, for execution outside the jurisdiction of the justice. See sec. 743, *post*.

Upon looking at Forms 39 and 40 it will be seen that the constable, or peace officer, who executes the warrant is commanded in His Majesty's name forthwith to make distress of the goods and chattels of the defendant.

The defendant is given a certain number of days specified in the warrant after the making of the distress, to pay the amounts specified together with costs of distress, and if payment is not made then the goods and chattels distrained are to be sold and the money arising from the sale is to be paid to the justice issuing the warrant.

If no distress can be found then that fact is to be certified to the justice by the constable executing the warrant "to the end that such proceedings may be had therein as to law appertain."

Where distress is ordered the warrant of distress must be executed in its terms, and if there is no distress found, then the officer executing the warrant must make his return to the justice (Form 43) before a warrant of commitment can issue for the imprisonment of the defendant for want of distress. This warrant is Form 44.

If the conviction orders distress, and before a warrant of distress has been executed and a return thereto made, the justice issues a warrant of commitment, his action in so doing and the warrant, arrest and imprisonment are all illegal and will subject the justice to an action for damages.

If, on the other hand, the magistrate satisfies himself that no sufficient distress can be found, and the constable has done the same and made his return accordingly, the magistrate will be justified in issuing his warrant of commitment, and will not be liable, although it subsequently appears that there was sufficient distress. See *R.* v. *Sanderson* (1886), 12 O. R. 178, and *Moffat*

v. *Barnard*, 24 U. C. R. 498, and *McLellan* v. *McKinnon*, 1 O. R. 219.

The constable will be liable in damages if he makes an untrue return knowing it to be false. *R.* v. *Sanderson, supra.*

If the warrant of commitment for want of distress (Form 44) omits to recite the fact of a distress warrant having issued and of a return having been made of no sufficient distress, and that no sufficient distress could be found, or that a distress was dispensed with by the justice under sec. 744, it will be invalid. See *R.* v. *Skinner* (1905), 9 C. C. C. 558, and *R.* v. *Rawding* (1903), 7 C. C. C. 436.

Where a commitment provided that the prisoner shall be detained until the fine shall be paid to the keeper of the gaol, it was held that the payment to the gaoler is justified by law, although the conviction said that the fine is to be paid to the clerk of the Recorders Court. *R.* v. *Bougie* (1899), 3 C. C. C. 487.

Under a warrant of distress upon a conviction for an offence against the second part of the Canada Temperance Act, the defendant's property must be levied on, though it consists of intoxicating liquors only, and is in a country where the Act is in force. *Ex parte Fitzpatrick* (1893), 5 C. C. C. 191.

When both fine and imprisonment are authorized as punishment for a statutory offence upon summary conviction, the magistrate has discretion to enforce either a fine alone, or imprisonment alone, or both, unless the particular statute specially provides otherwise. *Ex parte Kent* (1903), 7 C. C. C. 447.

Degrees of Punishment.

Section 1028 of the Code provides as to the degrees of punishment. Section 1029 places it in the discretion of the Court as to the amount of fine or penalty.

These sections of the Code are as follows:—

1028. Whenever it is provided that the offender shall be liable to different degrees or kinds of punishment, the punishment to be inflicted shall, subject to the limitations contained in the enactment, be in the discretion of the court or tribunal before which the conviction takes place. 55-56 V., c. 29, s. 932.

1029. Whenever a fine may be awarded or a penalty imposed for any offence, the amount of such fine or penalty shall, within such limits, if any, as are prescribed in that behalf, be in the discretion of the court or person passing sentence or convicting, as the case may be. 55-56 V., c. 29, s. 934.

When a tender was made to the gaoler at 7.50 p.m. of the whole sum required to be paid by the warrant of commitment the prisoner was entitled to his release. The gaoler was not justified in refusing the tender, simply because there were prison rules to the effect that no person would or could be released on payment of his fine after 5 o'clock in the afternoon, until the next morning. *R.* v. *Colahan* (1907), 12 C. C. C. 283.

Under the Municipal Clauses Act, B. C., 1896, sec. 81, it is not necessary to issue the distress thereby authorized before issuing a commitment, but the latter course may be taken as an alternative procedure. *R.* v. *Petersky* (1897), 1 C. C. C. 91.

Under the Inland Revenue Act of Canada, it is necessary that the amount of the costs and charges of conveying to gaol should be stated in the warrant and being omitted from the warrant the prisoner was discharged. *R.* v. *Corbett* (1899), 2 C. C. C. 499.

IMPRISONMENT IN THE FIRST INSTANCE.

By paragraph (*b*) of sec. 739 the justice may order that in default of payment of the penalty, &c., forthwith, or within a limited time, the defendant shall be imprisoned for the time mentioned in the Act, or law, or for any period not exceeding three months if the Act or law authorizing the conviction or order does not specify any term of imprisonment.

And by sub-sec. (2) whenever imprisonment with hard labour may be ordered, or adjudged, in the first instance, as part of the punishment, the imprisonment in default of distress, or of payment, may be with hard labour.

This provision as to hard labour in default of distress applies only where imprisonment with hard labour in the first instance might have been imposed in addition to a fine with imprisonment in default of distress or payment. See *R.* v. *Clark* (No. 1) (1906), 12 C. C. C. 17, and *R.* v. *Horton* (1897), 3 C. C. C. 84; *R.* v. *McIver* (1903), 7 C. C. C. 183.

Where the conviction imposes a longer term of imprisonment than the statute permits, the Court, upon the return of a writ of *certiorari* and a perusal of the depositions, has power to amend the conviction by reducing the term of imprisonment to the statutory limit. *R.* v. *McKenzie* (1907), 12 C. C. C. 435. See sec. 1124 of the Code.

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. Section 3 of the Prisons and Reformatories Act, ch. 148, R. S. C. 1906. See *R.* v. *Robinson* (1907), 12 C. C. C. 447.

Release from Further Proceedings.

Any person convicted of any offence who has paid the sum adjudged to be paid with costs, or has received a remission from the Crown, or has suffered the imprisonment awarded, shall be released from all further, or other, criminal proceedings for the same cause. This is provided for by sec. 1079 of the Code as follows:—

1079. When any person convicted of any offence has paid the sum adjudged to be paid, together with costs, if any, under such conviction, or has received a remission thereof from the Crown, or has suffered the imprisonment awarded for non-payment thereof, or the imprisonment awarded in the first instance, or has been discharged from his conviction by the justice in any case in which such justice may discharge such person, he shall be released from all further or other criminal proceedings for the same cause.

1080. Nothing in this Part shall in any manner limit or affect His Majesty's royal prerogative of mercy.

Imprisonment in Addition to Fine.

740. Where, by virtue of an Act or law so authorizing, the justice by his conviction adjudges against the defendant payment of a penalty or compensation, and also imprisonment, as punishment for an offence, he may, if he thinks fit, order that the imprisonment in default of distress or of payment, shall commence at the expiration of the imprisonment awarded as a punishment for the offence.

2. The like proceeding may be had upon any conviction or order made in accordance with this or the last preceding section as if the Act or law authorizing the conviction or order had expressly provided for a conviction or order in the terms permitted by this or the last preceding section. 55-56 V., c. 29, s. 872.

The conviction adjudged the defendant to pay a fine and costs forthwith and in default of payment imprisonment unless the fine and costs were sooner paid. The defendant moved to quash the conviction on the ground that the conviction should have adjudged the fine and costs to be levied by distress and for want of sufficient distress, and for want only could the imprisonment be adjudged. Held, the convicting justice was fully empowered to make the adjudication he did, and that the conviction is in good form. *Ex parte Casson* (1897), 2 C. C. C. 483, and *Ex parte Gorman et al.* (1898), 4 C. C. C. 305.

Enforcing Adjudication.

741. The justice making the conviction or order mentioned in paragraph (*a*) of section seven hundred and thirty-nine may issue a warrant of distress in Form 39 or 40, as the case requires, and in the case of a conviction or order under paragraph (*b*) of the said section, a warrant in one of the Forms 41 or 42 may issue.

2. If a warrant of distress is issued and the constable or peace officer charged with the execution thereof returns (Form 43) that he can find no goods or chattels whereon to levy thereunder, the justice may issue a warrant of commitment in Form 44.

A warrant of distress founded upon a defective order or conviction is bad. It should be warranted by the conviction. *Day* v. *King*, 5 A. & E. 359; *R.* v. *Wyatt*, 2 Ld. Raym. 1189.

In reading this section (741) one naturally concludes that it is only the justice who made the conviction, or order, who can issue the distress warrant or warrant of commitment. But upon reference to sec. 708 it will be seen that:—

(2) After a case has been heard and determined one justice may issue all warrants of distress or commitment thereon, and

(3) It shall not be necessary for the justice who acts before or after the hearing to be the justice, or one of the justices by whom the case is to be, or has been heard or determined.

So that the warrant may be issued by the justice or justices who made the conviction, or by any justice of the same county, or place, having jurisdiction. And it may be issued by one justice

A warant of distress is to be executed by or under the directions of a constable or peace officer.

By sec. 2 (26) of the Code a peace officer includes amongst others mentioned, "any police officer, police constable, bailiff, constable, or other person employed for the prevention and maintenance of the public peace or for the service or execution of civil process."

If the warrant be directed to all constables generally the law is that no one in particular can execute it out of his own district (unless it has been endorsed under sec. 743), it being directed to him only by his name of office and no one having authority *eo nomine*, out of his district.

But if the warrant is directed to a particular constable, or peace officer, by name, he then may execute it anywhere within the jurisdiction of the justice. *R.* v. *Weir*, 1 B. & C. 288.

If it is directed to more than one person in several or disjunctive terms it may be executed by any one, but if to two or

more jointly it seems they all must execute it. *Paley, 8th ed., 336.*

When the person named in the warrant employs others to assist him he should be so near as to be acting in the execution of the warrant at the time of its execution. *5 Burns' Justice, 1132.*

The warrant may be executed at any time while it is in force, that is until it is fully executed, and it is not avoided by reason of the justice who signed it dying, or ceasing to hold office. The constable should receive and remove the goods at once. He will be held for trespass if he remains an unnecessary long time on the premises of the defendant.

A person against whose goods a distress warrant has issued may pay, or tender, to the constable, or peace officer having the warrant the sums therein mentioned, together with the costs and charges of distress up to the time of payment and thereupon the peace officer shall cease to execute the warrant. See sec. 747, *post.*

Unless he can find sufficient goods upon which he can realize by sale enough to satisfy in full the amount required to be levied and costs of distress the constable should not execute the warrant. If part only of the amount required is realized the defendant cannot subsequently be committed for the balance.

If part of the money has been realized, or paid, it must be repaid to the defendant before a warrant of commitment can be issued. *Snider* v. *Brown,* 17 A. R. 173.

See further as to warrants of commitment, the chapter on warrants and summons.

Where the warrant of commitment in execution returned to a writ of *habeas corpus* states only a charge of the offence and not a conviction therefor, the prisoner should be discharged. *R.* v. *Nelson* (1908), 15 C. C. C. 10.

Distress and Commitment for Costs.

742. When any information or complaint is dismissed with costs the justice may issue a warrant of distress on the goods and chattels of the prosecutor or complainant, in Form 45, for the amount of such costs; and, in default of distress, a warrant or commitment in Form 46 may issue.

2. The term of imprisonment in such case shall not exceed one month. 55-56 V., c. 29, s. 873.

See cases cited under secs. 735 and 736, *infra.*

A warrant of distress can only be lawfully executed by the person to whom it is directed and he cannot delegate his authority. See *Symonds* v. *Kentz,* 16 Cox 726.

By sec. 40 of the Code it is the duty of every one executing any process, or warrant, to have it with him and to produce it if required. See notes to previous sections.

PROCEEDINGS PENDING EXECUTION OF DISTRESS WARRANT.

745. Whenever a justice issues a warrant of distress as hereinbefore provided, he may suffer the defendant to go at large, or verbally, or by a written warrant in that behalf, may order the defendant to be kept and detained in safe custody, until return has been made to the warrant of distress, unless the defendant gives sufficient security, by recognizance or otherwise, to the satisfaction of the justice, for his appearance, at the time and place appointed for the return of the warrant of distress, before him or before such other justice for the same territorial division as shall then be there. 55-56 V., c. 29, s. 876.

746. Whenever a justice, upon any information or complaint, adjudges the defendant to be imprisoned, and the defendant is then in prison undergoing imprisonment upon conviction for any other offence, the warrant of commitment for the subsequent offence shall be forthwith delivered to the gaoler or other officer to whom it is directed.

2. The justice who issued the same, if he thinks fit, may award and order therein that the imprisonment for the subsequent offence shall commence at the expiration of the imprisonment to which the defendant was previously sentenced.

By sec. 1055 it is provided that 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 an offence, is convicted of any other offence, the Court, or person, passing sentence may on the last conviction direct that the sentence passed upon the offender for his several offences shall take effect one after the other.

A prisoner convicted of two offences at the same sittings of the Court was sentenced on each offence to three months in gaol without anything been said as to the sentences being concurrent, or otherwise; having served one term of three months he applied for an order for *habeas corpus*—the order was refused. *Ex parte Bishop* (1895), 1 C. C. C. 118.

Unless the justice expresses that the sentences for two offences shall run concurrently, they will run consecutively, that is take effect one after the other.

Under a summary conviction the term of imprisonment of a person not then in custody commences from the date of his arrest under the warrant of commitment. *R.* v. *McDonald* (1898), 6 C. C. C. 1.

A separate commitment for each conviction should be issued, one to commence and take effect on the expiration of the other.

By section 1056 of the Code, 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.

1056 (c) In the Provinces of Manitoba and British Columbia any one sentenced to imprisonment for a term less than two years, may be sentenced to imprisonment in any one of the common gaols in those Provinces unless a special prison is prescribed by law.

PAYMENT OF FINE AND COSTS.

747. 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 costs and charges of the distress up to the time of payment or tender, the peace officer shall cease to execute the same.

2. Whenever any person is imprisoned for non-payment of any penalty or other sum, he may pay or cause to be paid to the keeper of the prison in which he is imprisoned, the sum in the warrant of commitment mentioned, together with the amount of the costs and charges therein also mentioned, and the keeper shall receive the same, and shall thereupon discharge the person, if he is in his custody for no other matter.

3. Such keeper shall forthwith pay over any moneys so received by him to the justice who issued the warrant.

The defendant appeared before the justice, acknowledged that he was guilty of the offences with which he was charged and asked what fines he would be required to pay, and was told by the justice what the fines and costs would amount to, and thereupon paid the amount to the justice. There was no adjudication by the justice upon this occasion and nothing was done to dispense with the attendance of the defendant before the justice at the hour for which he was summoned to answer the charges which had been made against him. The defendant attended before the justice at the hour for which he had been summoned. The informations had in the meantime been amended, charging the alleged infractions of the Act as second offences. The informations were read to the defendant as amended, and he pleaded guilty. He pleaded guilty on a further charge and was fined on both charges, and paid the fines and costs. The defendant moved to quash the convictions on the ground amongst others that the justice had adjudicated upon the charges when he accepted the fine and costs from him before the hour of trial. Motion was dismissed. *R.* v. *Renaud* (1909), 15 C. C. C. 246.

SURETIES TO KEEP THE PEACE.

748. Whenever any person is charged before a justice with any offence triable under this Part which, in the opinion of such justice, is directly aginst 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 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 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 this Part shall apply, so far as the same are applicable, to proceedings under this section, and the complainant and defendant and witnesses may be called and examined, and cross-examined, and the complainant and defendant shall be subject to costs as in the case of any other complaint.

4. If any person so required to enter into his own recognizance or give security as aforesaid, refuses or neglects so to do, the same or any other justice may order him to be imprisoned for any term not exceeding twelve months.

5. The Forms 48, 49 and 50, with such variations and additions as the circumstances may require, may be used in proceedings under this section. 55-56 V., c. 29, s. 959; 56 V., c. 32, s. 1.

The provisions of this section relate only to persons charged before a justice with any offence triable under this Part, that is by way of summary conviction.

The power here given to a justice is to be invoked by him:

(*a*) When in his opinion the offence charged is directly against the peace; and when after hearing the case he is satisfied of the guilt of the accused; and,

(*b*) 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. A person may be bound over in addition to any other punishment, or in lieu of it the accused may be required forthwith to enter into his own recognizance or to find sureties. Another condition of bond is that he will keep the peace and be of good behaviour for any term not exceeding twelve months.

It is well to notice here that the term must not exceed twelve months, since under sec. 1058 of the Code a magistrate, and every Court of criminal jurisdiction, may bind convicted persons over

in addition to any sentence for any term not exceeding two years. The recognizance under sec. 1058 may be in Form 49 the same as under sec. 748. Magistrates should bear this distinction in mind as to the length of terms for which they can bind persons over. When acting under this Part XV. the term must not exceed twelve months, and under Part XVI. they may make the term for any period not exceeding two years. How this difference will apply is illustrated as follows:—If a person is charged and convicted of common assault on summary conviction under this Part, in addition, or in lieu of fine and imprisonment, the justice can bind the person over to keep the peace for twelve months. Whereas if the person had been charged before a magistrate under Part XVI. with common assault as an indictable offence, which it is, the magistrate could on conviction bind the person over to keep the peace for two years.

Complaint of Threats.

Sub-sec. (2) of sec. 748 deals with complaints of threats made by some other person against the complainant, and on account of such threats, or on any other account, he, the complainant, is afraid such other person will do him, his wife or child, some personal injury, or will burn, or set fire to, his property, the justice may, if he is satisfied the complainant has reasonable ground for his fears, require such other person to enter into his own recognizance, or to give security, that is, furnish sureties, to keep the peace and take of good behaviour for a term not exceeding twelve months.

The information or complaint to be made in proceeding under this sub-sec. is Form 48. The information may either be laid by the complainant himself, or by his duly authorized agent, or attorney. The form should be strictly followed. The words used and the circumstances under which they were used should be set out with exactitude. If the exact words cannot be given the effect of the same must be given; the information reads, "threaten the said C. D. in the words or to the effect following:" It is an important ingredient in the information that the complaint is not made, nor the sureties asked from any malice or ill will, but merely for the preservation of the complainant's person from injury. Upon the complaint being made the justice may either issue a summons to the defendant, or a warrant for his arrest, the same as in any other proceedings under this Part.

(3) The complainant and defendant and witnesses may be called and examined and cross-examined and all proceedings had as in other cases under this Part. And both the complainant and

defendant shall be subject to costs as in the case of any other complaint. That is if the justice sees fit to dismiss the complaint he can mulct the complainant in costs; if on the other hand, he is satisfied that the complainant has reasonable ground for his fears and the defendant is required to enter into a recognizance, the justice can also require the defendant to pay the costs of the Court.

(4) If the person so required to enter into his own recognizance, or to give security, refuses or neglects so to do, the justice may order him to be imprisoned for any term not exceeding twelve months.

The form of commitment in default of sureties is Form 50. This warrant recites the complaint and the adjudication and default, and commands the apprehension of the defendant. And the term of imprisonment is fixed; if the defendant finds sureties to keep the peace in terms of the order he can be liberated, otherwise he must serve the prescribed term.

A person committed under sec. 1058 for default shall not be imprisoned for more than one year.

The liberty of persons who have been imprisoned in default of finding sureties shall be made the subject of judicial inquiry under the provisions of sec. 1059 of the Code, which is as follows:—

Proceedings When Person Remains in Prison.

1059. Whenever any person who has been required to enter into a recognizance with sureties, to keep the peace and be of good behaviour, or not to engage in any prize-fight has, on account of his default therein, remained imprisoned for two weeks, the sheriff, gaoler or warden shall give notice, in writing, of the facts, to a Judge of a superior Court, or to a Judge of the County Court of the county or district in which such gaol or prison is situate, or, in the cities of Montreal and Quebec, to a Judge of the Sessions of the Peace for the district, or, in the Northwest Territories, to a stipendiary magistrate.

2. Such Judge or magistrate may order the discharge of such person, thereupon or at a subsequent time, upon notice to the complainant or otherwise, or may make such other order as he sees fit, respecting the number of sureties, the sum in which they are to be bound and the length of time for which such person may be bound. 55-56 V., c. 29, s. 960.

The sheriff, &c., must give the prescribed notice after the defaulter has remained imprisoned for two weeks. The Judge may order, that is, it is in his discretion to do so, the discharge of such person, but after notice to the complainant.

A warrant of commitment for default in finding sureties to keep the peace must shew on its face that the complainant feared bodily injury from the defendant on account of his threat, and that complaint was not made nor sureties required from any

malice or ill will, but merely for the preservation of his person from injury. In this case these essential ingredients were omitted from the warrant; the same was held bad and prisoner discharged. *R.* v. *McDonald* (1897), 2 C. C. C. C. 64.

Verbal threats made to burn the complainant's building is not an indictable offence, but the person making such threats can be proceeded against under sec. 959 (2), (now 748) (2) of the Code to find sureties to keep the peace. *Ex parte Welch* (1898), 2 C. C. C. 35.

Threats to burn or destroy any building, &c., made in writing is an indictable offence. See sec. 516 of the Code.

A warrant of commitment which omitted to state the amount for which security should be given, or that the defendant had refused or neglected to find sureties, was held illegal and invalid, and the prisoner was discharged. *Re John Doe* (1893), 3 C. C. C. 370.

Where the prisoner was ordered to find sureties and to pay the complainant's costs, and "if the said sum for costs were not paid forthwith," the prisoner was adjudged to be imprisoned in gaol for one month, unless the recognizance was sooner entered into and the said sureties sooner found, and the said sum for costs sooner paid, and the prisoner refusing to comply with the order, was committed to gaol. Upon motion to discharge the prisoner it was held that secs. 959 (3) (now 748) (3) and 870 (now 738) gave the authority and procedure respectively for imposing and collecting the costs in a case like the present, and that under the last mentioned section the prisoner could be imprisoned for the non-payment only in default of distress. The order in awarding imprisonment without distress as a means of recovering these costs was, therefore, bad as an excess of jurisdiction, and the prisoner held thereunder was entitled to his discharge. *R.* v. *Power* (1902), 6 C. C. C. C. 378.

Where a stipendiary magistrate took a recognizance to keep the peace in Form XXX. (now Form 49) without referring on the face of the recognizance to the section of the Code under which he was acting or otherwise shewing jurisdiction, it is to be assumed that he was proceeding in his capacity of a justice of the peace under section 959 (now 748) to which that form was (then) alone applicable, and the term exceeding twelve months the recognizance was held void. *Re Sarah Smith's Bail* (1903), 6 C. C. C. C. 416.

Form 49 is no longer alone applicable to section 748, since by sub-sec. (2) of sec. 1058 it is provided that "and such recognizance may be in Form 49." And by sub-sec. (5) of sec. 748 the Forms 48, 49 and 50, with such variations and additions as the circumstances may require, may be used in proceedings under this section. No trouble can arise if justices take the precaution of shewing their jurisdiction upon the face of the warrant and guide themselves by the requirements of the different sections.

Justices should exercise due care and be satisfied that sufficient grounds have been established for requiring sureties to keep the peace, for if they make the order through error, or want of proper consideration, although they have full jurisdiction in the premises, yet they may render themselves liable to an action for damages. *Fullerton* v. *Switzer*, 13 U. C. R. 575.

It would seem that there is no appeal from an order made by a justice under sub-sec. (2) of sec. 748.

Sub-sec. (3) provides that the provisions of this Part shall apply, *so far as the same are applicable*, to proceedings under this section. There is nothing in the section as to a right of appeal, and in the absence of such express enactment, the provisions of sec. 749 relating to appeals will not apply.

That section, unless it is otherwise provided in any special Act, applies only to (a) a conviction; (b) or an order made by a justice for the payment of money; (c) or dismissing an information or complaint. As an order made by a justice under sub-sec. (2) of 748 does not come within either of these classes, there is consequently no appeal.

See dictum of WALLACE, Co. J., p. 70, in *R.* v. *Doyle* (1906), 12 C. C. C. 69, and *R.* v. *Tregarthew*, 5 B. & A. 678.

If any person against whom an order is made requiring him to enter into his own recognizance, or give security, refuses, or neglects, so to do, and he is imprisoned for his default, such person has all the rights preserved to him that any one else has who has been committed to gaol, and may apply on *habeas corpus* and *certiorari* for his release. *R.* v. *Dunn*, 12 A. & E. 599. But the Court will not hear affidavits controverting the facts alleged in the articles of peace. *S. P. Reg.* v. *Stanhope*, 12 A. & E. 620.

To justify a magistrate in binding over a defendant there must be an act on his part which, if not unlawful in itself, would produce as a natural consequence an unlawful act by other persons. LORD ALVERSTONE, C.J., in *Wise* v. *Denning* (1902), 1 K. B. 175.

The defendant gave evidence that complainant had used threatening language towards him. It was found as a fact by the justices that there was a real danger of a breach of the peace on the part of both parties, and they accordingly bound them both over to keep the peace and be of good behaviour. The defendant had not lodged any formal complaint under oath against the complainant. The latter appealed and the Court held that the justices had jurisdiction under the circumstances to make the order. *R.* v. *Wilkins* (1907), 2 K. B. 380.

Manner of Taking Recognizance.

When the justice has fixed the amount in which the defendant and the sureties (if any) are to be bound, the recognizance may be enterd into before any other justice and not necessarily the justice making the order. The recognizance must be made to the King, and it must contain the name, place of abode, and trade or calling of both principal and sureties, and the sums in which they are bound. It is sufficient to call the parties by their names and to state the substance of the recognizance to them. The parties need not sign, their verbal acknowledgment is sufficient. After stating the substance of the recognizance to them the usual way is to say to the parties "Are you content?" and upon their giving their assent, the justice proceeds to sign the recognizance himself, it being imperative that the justice taking a recognizance should sign the same.

A recognizance is a matter of record presently so soon as it is taken and acknowledged, although it be not made up. *Dalt.* ch. 168.

If a man is bound by his recognizance to appear before a certain Court and he appears accordingly, the Court may respite his recognizance until another time upon his application, if in the opinion of the Court it is right so to do. *R.* v. *Drummond*, 11 Mod. 200. And in that case he will be bound to appear at such enlarged time. But the Court will not discharge it or allow it to be withdrawn unless they are satisfied that the condition of it has been substantially complied with. See *R.* v. *Paul*, 6 C. & P. 323.

Appeal from Convictions or Orders.

749. Unless it is otherwise provided in any special Act under which a conviction takes place or an order is made by a justice for the payment

of money or dismissing an information or complaint, any person who thinks himself aggrieved by any such conviction or order or dismissal, the prosecutor or complainant, as well as the defendant, may appeal,—

(*a*) In the province of Ontario, when the conviction adjudges imprisonment only, to the Court of General Sessions of the Peace; and in all other cases to the Division Court of the division of the county in which the cause of the information or complaint arose;

(*b*) in the province of Quebec, to the Court of King's Bench, Crown side;

(*c*) in the provinces of Nova Scotia, New Brunswick and Manitoba, to the County Court of the district or county where the cause of the information or complaint arose;

(*d*) in the province of British Columbia, to the County Court, at the sitting thereof which shall be held nearest to the place where the cause of the information or complaint arose;

(*e*) in the province of Prince Edward Island, to the Supreme Court;

(*f*) in the province of Saskatchewan or Alberta, to a Judge of the Supreme Court of the Northwest Territories pending the abolition of that Court by the legislature of the province, and thereafter to a Judge of such Court in either of the said provinces as may in respect of that province be substituted by the legislature thereof for the Supreme Court of the Northwest Territories;

(*g*) in the Northwest Territories, to a stipendiary magistrate; and,

(*h*) in the Yukon Territory, to a Judge of the Territorial Court.

2. In the case of the provinces of Saskatchewan and Alberta, and of the Northwest Territories and the Yukon Territory, the Judge or stipendiary magistrate hearing any such appeal shall sit without a jury at the place where the cause of the information or complaint arose, or at the nearest place thereto where a Court is appointed to be held. 55-56 V., c. 29, s. 879; 4-5 E. VII., c. 3, s. 16; c. 10, ss. 1 and 2; c. 27, s. 8; c. 42, s. 16.

Sub-sec. 2 relating to appeals in the district of Nipissing was repealed in 1908 by 6, 7 Edw. VII. ch. 18.

The right of appeal is granted to any person who thinks himself aggrieved by any conviction, or order, or dismissal, and the prosecutor, or complainant, as well as the defendant, may appeal. And it matters not whether the conviction adjudges imprisonment, or a penalty by way of fine or both.

If a statute gives a right of appeal to "a person who shall think himself aggrieved," these words mean a person who is immediately aggrieved by the act done and not to one who is consequentially aggrieved. *R.* v. *J. J. of Middlesex,* 3 B. & A. 938.

And such an enactment only means to give an appeal to any one who has legal ground for saying that he is aggrieved. *Harrut* v. *Bayley,* 6 E. & B. 218, 25 L. J. M. C. 107.

If trustees are enabled by a local Act to sue or be sued in the name of one of them, he may appeal under the words, "party grieved," though not personally aggrieved, and notice of appeal and recognizance may be given and entered into by him only. *R.* v. *J. J. Suney,* 5 A. & E. 407.

As to who is not a party aggrieved see *R.* v. *Edwards*, 5 B. & Ad. 407; *R.* v. *Dewhurst*, 5 B. & Ad. 405.

A corporation may be a "person aggrieved." *Cortis* v. *Kent Waterworks Co.*, 7 B. & C. 314.

Justices are not required to give any information to a party of his right to appeal, and he is bound to know the law in this respect, or else lose the benefit of it.

A person who has pleaded guilty and been convicted and fined notwithstanding his plea of guilty, has a right of appeal. So far as the facts relating to his guilt or innocence are concerned, he is not a person aggrieved within the meaning of sec. 879 (now 749). Citing *Harrup* v. *Bayly*, *infra*, *R.* v. *Brook* (1902), 7 C. C. C. C. 216.

By paragraph (b) of section 749 the appeal in Quebec is to the Court of King's Bench, Crown side.

Where an appeal was taken to the Court of Queen's Bench from a summary conviction for an offence against a provincial statute, it was held that the Court had no jurisdiction to hear the appeal since appeals under sec. 879 (now 749) only applied by virtue of sec. 840 (now 706) to offences, or matters, over which the Parliament of Canada has legislative authority *Lecours* v. *Hurtubise* (1899), 2 C. C. C. 521, and see *Superior* v. *City of Montreal*, 3 C. C. C. 379.

Sec. 706 provides that, subject to any special provision otherwise enacted with respect to such offence, act or matter, this Part XV. 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, etc., and (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, etc.

So that in the absence of any provincial enactment making Part XV. applicable to summary convictions for offences against provincial Acts, no appeal will lie under sec. 749 from a summary conviction for an offence against a provincial Act.

By paragraph (a) in Ontario when appeals are from convictions adjudging imprisonment the appeal lies only to the Court of General Sessions of the Peace, and in all other cases to the Division Court of the division in which the cause of complaint arose.

In an appeal to the Court of General Sessions of the Peace in Ontario an appellant cannot demand a jury to try his appeal. *R.* v. *Milloy* (1900), 4 C. C. C. 116.

Appeals from summary convictions and the costs payable in respect thereof are founded upon the statute law; and the provisions of the law regarding them in England and in this country are essentially different.

Where an appeal is heard and determined against the appellant by a Court of Quarter Sessions, the formal order need not be drawn up at the same sitings, as the Court of General Sessions of the Peace is a continuing Court. The respondent's costs may be taxed at the next sittings and a formal order drawn up and the costs included therein *nunc pro tunc*, if necessary. ARMOUR, C.J., p 460. *Bothwell* v. *Burnside* (1900), 4 C. C. C. 450.

Where a prosecution is instituted by a police officer in his own name as informant for an offence against a municipal by-law, such officer is a party to all proceedings both before the magistrate and on appeal, and the municipality should not be named as a party to the appeal nor could costs be awarded in its favour. *Ibid.*

Where the agent of a society laid an information, and after hearing the case was dismissed, the society gave notice of appeal in its own name. Held, that the informant himself was alone entitled to appeal, and that the society had no *locus standi* to present the appeal as the society was not a party to the proceedings before the justices. *Canadian Society* v. *Lauzon* (1899), 4 C. C. C. 354.

In appeals from convictions under the Nova Scotia Liquor License Act the effect of the statute is to require the County Court Judge to try the case *de novo*, and to make such conclusions upon the evidence as he thinks just whether new evidence has been taken before him or not. *R.* v. *McNutt* (1900), 4 C. C. C. 392. Followed in *R.* v. *Baird* (1908), 13 C. C. C. 240.

An appeal lies from a conviction made under the Fisheries Act of Canada, notwithstanding the special appeal given to the Minister of Marine and Fisheries by the Act. This special appeal may be made and taken after the disposal of the appeal to the County Court. *R.* v. *Townsend et al.* (1901), 5 C. C. C. 143.

In an appeal from a summary conviction the decision of the County Court is final and conclusive both as to law and fact, and after such decision the appellant is bound by the result of it, and a superior Court has no jurisdiction to entertain an application for a writ of *habeas corpus*. *R.* v. *Beamish* (1901), 5 C. C. C. 388.

The decision of the County Court on an appeal from a summary conviction being *res adjudicata* between the parties is a bar to the application for a "stated case." And where the County Court has affirmed the conviction it is not open to the accused to have "a case stated" to a superior Court. *R.* v. *Townsend* (No. 2) (1902), 6 C. C. C. 519.

In a hearing upon the merits of a writ of *certiorari* it was held that the petitioner in taking his writ of *certiorari* had waived his right of appeal. *Denault* v. *Robida* (1894), 8 C. C. C. 501.

In an appeal from a conviction under the B. C. Summary Convictions Act the conviction in question was bad on its face, and on the hearing of the appeal a motion was made to quash it. It was argued for the respondents that under this Act the Judge must hear evidence and try the case *de novo* in any event.

After hearing argument the County Court Judge gave judgment allowing the appeal and quashed the conviction with costs. Upon an application for *mandamus* to compel the Judge to hear evidence and determine the appeal on the merits it was held by IRVING, J., on the authority of *R.* v. *J. J. of Middlesex*, 46 L. J. M. C. 225, 2 Q. B. D. 516, that the Court had no power to interfere by *mandamus*, there having been a decision by the County Court Judge on the legal merits, and that as the Judge had heard argument on the question, and given a decision on the legal merits, the Court had no right to decide or inquire whether such decision was right or wrong. *Strong* v. *Gellatly* (1904), 8 C. C. C. 17.

"The defendants lost their appeal through the fault and design of the convicting justice, and I think that this Court having the case before them and being the supervisor of all inferior Courts, and the only tribunal before which persons wronged, as the defendants have been, can seek a remedy, and as the circumstances are altogether exceptional and take the case out of the principle of the cases which decided that a *certiorari* will not be granted where an appeal has been given, should decide that the rule be made absolute to quash the conviction, and that the defendants are not deprived of their right to seek a remedy by *certiorari* merely because they had taken some action for an appeal, unless the right is taken away by statute, which, as I have already said, is not the case where the Court below had no jurisdiction. The facts and circumstances of this case clearly bring it within the rule that a *certiorari* will go in cases where

another remedy is given in exceptional cases." HANNINGTON, J., p. 456, *Ex parte Cowan* (1904), 9 C. C. C. 454.

Where an appeal against a summary conviction was quashed for irregularity due to the fault of the magistrate in returning the deposit, the Court granted a writ of *certiorari* to remove the conviction notwithstanding the abortive appeal and the conviction was quashed. *R.* v. *Alford* (1902), 10 C. C. C. 61.

All requirements of a statute providing for taking and perfecting an appeal are deemed jurisdictional and must be strictly complied with; want of jurisdiction which appears on the face of the proceedings cannot be waived, and the Court upon want of jurisdiction so appearing must dismiss the appeal whether the point is raised by counsel for the respondent or not. MACGILLIVRAY, Co. J., p. 407. *R.* v. *Dolliver Mining Co.* (1906), 10 C. C. C. 405.

The Court has jurisdiction to award costs to the respondent on dismissing an appeal for want of jurisdiction through a defect in the notice of appeal. *Ibid.*

When on appeal from a summary conviction the County Court Judge affirmed the conviction, but reduced the sentence and imposed the sentence in the absence of the prisoner, it was held that the adjudication of imprisonment having been made in the absence of the prisoner the same was irregular and that he must be discharged. *R.* v. *Johnston* (No. 2) (1906), 11 C. C. C. 10.

The above decision was disapproved in *Johnston* v. *Robertson* (1908), 13 C. C. C. 452.

Where an exemption, or exception, is not negatived in the information, sec. 717 of the Code does not apply, and the onus is not upon the accused of proving that he is within the exception. The appellate Court cannot amend the information when the evidence before the magistrate fails to disclose the offence of which, by the amendment of the conviction, it is sought to declare the defendant guilty. "In the present case the information did not negative the exception to sec. 54 of the Liquor License Act protecting sales to vendees holding requisitions for the purchase of liquor for medicinal purposes. Therefore the provisions of the Criminal Code casting upon the defendant the onus of proving affirmatively that he was within this exception, did not apply. The burden was upon the prosecutor to adduce evidence that the sale in respect of which the charge is laid was not within the exception of sec. 54. There was no evidence whatever before the magistrate on this point." ANGLIN, J., pp. 101, 102. Appeal

from order quashing convictions dismissed. *R.* v. *Boomer* (1907), 13 C. C. C. 98.

For diverse views and divided opinions upon the question as to the proper Court to which an appeal is to be made in Nova Scotia under secs. 749 and 750 of the Code, likewise as to the computation of time which should intervene between the conviction and the sittings of the Court hearing the appeal, see *R.* v. *Johnston* (1908), 13 C. C. C. 179.

The difficulties presented by the decision in *R.* v. *Johnston* have been settled by the amendments made in 1909 to sec. 750 (a), which provides that the appeal shall be to sittings of the Court in the county where the cause of the information, or complaint, arose, in the one case to the sittings next after and in the other to the second sittings after the conviction or order.

The justice having imposed the maximum fine on a first conviction upon a plea of guilty, upon appeal the fine was reduced, it being held that upon an appeal from a summary conviction the Court is the absolute judge of facts as well as law, and that it is the duty of the Court to deal with the case *de novo* on its merits, following *R.* v. *McNutt*, 4 C. C. C. 398; *R.* v. *Baird* (1908), 13 C. C. C. 240, and see *R.* v. *Power* (1908), 14 C. C. C. 264.

Where on an appeal the Judge affirms the conviction of the magistrate, but reduces the term of imprisonment, he may make such order without the accused attending personally before him. *R.* v. *Johnston*, 11 C. C. C. 10, disapproved; *Johnston* v. *Robertson* (1908), 13 C. C. C. 452.

Objection was taken to the conviction that on its face it is for an offence committed between the 8th and 11th days of March, 1908 (the information was laid on the last named day), leaving it uncertain whether the offence was committed before the information was laid. "There is nothing in the point. The information on which the conviction is made could not very well have reference to an offence committed after the information was made," BARKER, C.J. (1908), *Ex parte Wilson*, 14 C. C. C. 32.

It was objected (1) that the conviction did not shew that the liquor license by-law was in force at the time of the alleged offence; (2) that the conviction must set out the particular acts relied on; (3) that the conviction should include a specific amount as to costs of conveying to gaol in default of sufficient distress. Held, all to be clearly matters of form inasmuch as they can be removed by apt amendments. Conviction was affirmed. *R.* v. *Sing Kee* (1909), 14 C. C. C. 420.

A defendant gave notice of appeal from a summary conviction and subsequently obtained an order for *certiorari*, also an order *nisi* to quash the conviction. After these orders were obtained the defendant served notice of his grounds of appeal. Held, that under the circumstances the Court could not interfere by *certiorari* as the appeal proceedings are pending. Order *nisi* discharged. *Ex parte McCorquindale* (1908), 15 C. C. C. 187.

On a charge against a license holder for supplying liquor to an interdicted person, the prosecutor must prove both the service of the notice of interdiction, and that the person interdicted was in the habit of drinking to excess. The prosecutor will not be allowed an appeal to supplement his case by adducing such evidence. Conviction quashed. *R.* v. *Morrison* (1909), 15 C. C. C. 215.

The finding of a magistrate upon a question of fact within his jurisdiction will not be reviewed by the Court upon *certiorari*, but the defendant's remedy if any is by appeal. *R.* v. *Urquhart* (1899), 4 C. C. C. 256.

An appeal does not lie from a justice's order made under sec. 748 (2) requiring a person to find sureties to keep the peace. After two weeks' imprisonment in default of finding sureties the defendant may apply to a Judge of a superior Court under sec. 1059 of the Code for a release. *R.* v. *Mitchell* (1908), 13 C. C. C. 344.

Section 4 of the Quebec Sunday Observance Act, which enacts that fines for its violation may be recovered before certain magistrates, or two justices of the peace, "under the provisions of Part XV. of the Criminal Code," has not the effect of embodying the appeal provisions of Part XV. in the provincial statute. *R.* v. *Ouimet* (1908), 14 C. C. C. 136.

On an appeal from a summary conviction there is no authority for a reference being made by the appellate Court to a superior Court of criminal jurisdiction of a point of law arising on the appeal, even if the question is whether or not the appeal was lodged in due form. *R.* v. *Mischowsky* (1909), 15 C. C. C. 364.

Where the right of appeal from a summary conviction has been taken away by the statute the Court will not on *certiorari* consider the weight of evidence, or revise the decision of the magistrate as to guilt, unless there was a complete absence of evidence as to some essential element of the offence. *R.* v. *Dubuc* (1909), 15 C. C. C. 353.

Procedure on Appeal.

"**750.** Unless it is otherwise provided in the special Act,—

"(*a*) if a conviction or order is made more than fourteen days before a sittings of a Court to which an appeal is given, such appeal shall be made to that sittings; but if the conviction or order is made within fourteen days of a sittings the appeal shall be made to the second sittings next after such conviction or order: Provided that in the province of Nova Scotia the appeal shall be to a sittings of the Court in the county where the cause of the information or complaint arose; in the one case to the sittings next after and in the other to the second sittings after the conviction or order;

"(*b*) the appellant shall give notice of his intention to appeal by filing in the office of the clerk of the Court appealed to, and serving the respondent or the justice who tried the case with a copy thereof, a notice in writing setting forth with reasonable certainty the conviction or order appealed against, and the Court appealed to, within ten days after the conviction or order complained of;

"(*c*) the appellant, if the appeal is from a conviction or order adjudging imprisonment, shall either remain in custody until the holding of the Court to which the appeal is given, or shall within the time limited for filing a notice of intention to appeal, enter into a recognizance in Form 51 with two sufficient sureties before a County Judge, clerk of the peace or justice for the county in which such conviction or order has been made, conditioned personally to appear at the said Court and try such appeal, and to abide the judgment of the Court thereupon, and to pay such costs as are awarded by the Court; or if the appeal is from a conviction or order whereby a penalty or sum of money is adjudged to be paid, the appellant shall within the time limited for filing the notice of intention to appeal, in cases in which imprisonment upon default of payment is directed, either remain in custody until the holding of the Court to which the appeal is given, or enter into a recognizance in Form 51 with two sufficient sureties as hereinbefore set out, or deposit with the justice making the conviction or order an amount sufficient to cover the sum so adjudged to be paid, together with such further amount as such justice deems sufficient to cover the costs of the appeal; and, in cases in which imprisonment in default of payment is not directed, deposit with such justice an amount sufficient to cover the sum so adjudged to be paid, together with such further amount as such justice deems sufficient to cover the costs of the appeal; and upon such recognizance being entered into or deposit made the justice before whom such recognizance is entered into or deposit made shall liberate such person if in custody;

"(*d*) in case of an appeal from the order of a justice pursuant to section six hundred and thirty-seven for the restoration of gold or gold-bearing quartz, or silver or silver ore, the appellant shall give security by recognizance to the value of the said property to prosecute his appeal at the proper sittings of the Court, and to pay such costs as are awarded against him."

The above is section 750 as amended in 1909. The chief changes relate to the provisions in paragraph (*a*) as to appeals in Nova Scotia.

The outstanding defect in these provisions for appeal is that through want of proper restriction the right is frequently abused by a class of people who represen the worst element in any country.

Reference is here made to appeals from convictions for vagrancy coming under paragraphs (*i*), (*j*), (*k*), and (*l*) of sec. 238 of the Code.

Both men and women convicted for the offences covered by these paragraphs, who can raise the necessary money, employ a lawyer who gives the notice of appeal required and then applies to any justice, generally a justice who is an entire stranger to the facts of the case, or the character of the person who has been convicted, and this justice accepts the bail offered without any affidavit of justification (since none is required); the recognizances are entered into, or deposit made, and in due course the justice issues his order for the liberation of the accused. This order is delivered to the gaoler and *presto* the prisoner is released. And it is an open boast among this class of people that any one who has the money and can hire a lawyer can get out of gaol? After their release they walk the streets of the city, and as they term it, 'give the laugh to the police.'

When the hearing of the appeal comes on the appellant is not present and cannot be found, having departed hence, the bail are found to be men of straw and the ends of justice have been defeated.

All this reflects upon our administration of justice and lowers the respect for the law in the very class of people it is most necessary to control.

No desire is expressed that this class of people should be deprived of their right of appeal—on the contrary—but what is suggested and earnestly advocated is that the procedure relating to their appeals should be so amended and regulated as to provide against the farcical proceedings that obtain as the law now stands.

A simple remedy would be a provision that no appeals should be allowed from convictions under sec. 238, unless leave therefor has been first applied for and granted by a Judge of the County Court, and after notice of such application had been served upon a representative of the Crown, and after the Judge has read the evidence taken before the convicting justice. Also that if leave is granted bail should be fixed by the Judge and order made providing that the sureties offered should justify.

Notice of Appeal.

The notice of intention to appeal must be filed in the office of the clerk of the Court appealed to. A copy must be served

upon either the respondent, or the justice who tried the case. One or the other must be served, but it is not necessary to serve both.

The notice must be in writing and must set forth with reasonable certainty the conviction, or order, appealed against and the Court appealed to, that is the name of the Court and the date of its sittings at which the appeal is to be heard, and should be addressed to the prosecutor.

The notice must be served and filed within ten days after the conviction or order complained of.

It is no longer necessary to serve a notice setting forth the grounds of appeal.

A notice of appeal from a summary conviction not having been addressed to any person, was held insufficient to give jurisdiction, and declared invalid, and appeal quashed accordingly. *Cragg* v. *Lamarsh* (1898), 4 C. C. C. 246; and see *Keohan* v. *Cook*, 1 N. W. T. Rep. No. 1, 54.

The form of notice N.N.N. that appeared in the schedule of the Code before the revision in 1906 has been omitted. So that any persons preparing a notice will have to exercise their own skill and judgment and follow closely the requirements of this section. Proper forms will be found in the appendix. Vide "contents of notice," *post*.

If notice of appeal has not been given in time and the recognizance entered into, or other matter required to be done before the appellate can proceed with his appeal, the objection could probably be taken at any time, for it would shew that the Court had no jurisdiction to entertain the appeal. *R.* v. *Cronch*, 35 U. C. R. 433-9.

Notice had been duly given and admission thereof made by the respondent and the recognizance had been properly entered into and filed with the clerk of the peace. At the hearing counsel for the respondent objected that there had been no proof of the recognizance and afterwards continued the case, not pressing his objection, and only renewing it at the close of the case. It was held that this constituted an admission that the necessary recognizance had been entered into. *Ibid.;* and see *R.* v. *Esseny*, 7 P. R. 290.

The notice was neither addressed to, nor served upon the prosecutor, but was addressed to and served upon one of the justices who signed the conviction, and by affidavit it appeared that when the notice was so served this justice was verbally informed

that it was for the prosecutor. Held, notwithstanding the fact that the justice when served, was told it was for the respondent (prosecutor), that this did not cure the defect. *Hosteller* v. *Thomas* (1899), 5 C. C. C. 10.

The meaning of appealing is giving notice to your adversary of your intention to appeal. *Ex parte Laffery*, 5 Ch. D. 365, approved in appeal in *Christofer* v. *Croll*, 16 Q. B. D. 66 (C.A.), where the Court held an appeal was brought when notice of appeal was served. The appellant gave notice of appeal to the Supreme Court by way of stated case; that appeal coming on it was dismissed for non-compliance with statutory conditions precedent. The appellant then gave notice of appeal to the County Judge. Held, in view of the provisions of sec. 96 of the Act, ch. 176 R. S. B. C. 1897, that the appellant having stated a case for the opinion of the Supreme Court, had thereby abandoned his right of appeal to the County Court. Appeal quashed. *Cooksley* v. *Toomaten Oota* (1901), 5 C. C. C. 26.

Where a notice of appeal is served on the justice who tried the case instead of upon the respondent, it must shew on its face that it was so served on the justice for the respondent. *Can. Society* v. *Lauzon* (1899), 4 C. C. C. 354; and see *R.* v. *Jack* (1902), 5 C. C. C. 160.

A notice of appeal under the B. C. Summary Con. Act is sufficient if addressed to the convicting magistrate only, and served on him only. The notice need not recite that the appellant is a "person aggrieved" by the decision appealed from. *R.* v. *Jordan* (1902), 5 C. C. C. 438.

The section 71 of the B. C. Act provides that the appellant shall give to the respondent, or to the convicting justice *for him*, a notice in writing, &c., &c. The section of the Code now under consideration, 750, as amended in 1909, provides for service upon the respondent, "or the justice who tried the case," with a copy of the notice filed. It does not say that the copy left with the justice is for the respondent.

In *Ex parte Doherty* (1885), 25 N. B. R. 38, the appeal was taken under the provisions of Statute of Canada, 33 Vic. ch. 27. This Act provided for the notice being given to the justice for the prosecutor. In his judgment ALLEN, C.J., said: "I think the applicant did all that was necessary to perfect his right of appeal when he gave the notice of appeal to the police magistrate, and entered into the recognizance required by the Act 33 Vic. ch. 27. The second sub-section of that Act directs that a person intending to appeal from a conviction, or order, of a justice

shall give to the prosecutor, or complainant, or to the convicting justice, or one of the convicting justices for him, a notice in writing of such appeal within four days, &c. . . . The notice of appeal in this case was given to the police magistrate and it correctly describes the conviction against which the party intended to appeal. But it is contended that the notice should have stated on its face that it was given to him for the prosecutor. I do not think this was necessary. The Act having stated that the notice might be given to the convicting justice for the prosecutor, the justice must be taken to know for what purpose it was given to him and the form, and the form of the notice prescribed by the Act, allows of such variations as are necessary to meet such case."

In *R.* v. *Jordan, supra,* MR. JUSTICE IRVING said (p. 441): "The decision *Ex parte Doherty* seems to me right and more consistent with the views expressed by the late MR. JUSTICE GWYNNE in *R.* v. *Nichol et al.* (1896), 40 U. C. R. at p. 79: 'We must read these notices not with a critical eye, but literally *ut res magis valeat,* and so as to uphold, not defeat, the right of appeal given to parties summarily convicted,' and I think between the conflicting decisions, I ought to be guided by the decision of the Supreme Court of New Brunswick in this matter, particularly so, when so eminent a Judge as the late MR. JUSTICE KING assented to the decision."

In *R.* v. *Jordan,* the notice was addressed only to the convicting magistrate, and not to the prosecutor, but it was served upon both the magistrate and upon the solicitors for the informant or prosecutor.

In *Re Doherty* the notice was directed to and served only upon the magistrate.

The significance of all the decisions is somewhat lessened by the fact of the change in the section to what it now reads, already noted, namely, that the former notice which occasioned so much difference of opinion is no longer a part of the Code, and that under this section the notice may be served either upon the prosecutor, or the justice who tried the case. Nothing is said as to whom it is to be directed. However, it is well in this, as in other matters of procedure, to exercise a little common sense and the suggestion is made that the notice should be addressed to both the prosecutor and the justice and both should be served. The justice should be served, for how otherwise would he properly become aware of the necessity of complying with the requirements of sec. 757, *post,* by which he is to transmit the convic-

tion, or order, to the Court to which the appeal is given. The prosecutor should be served because his rights are likely to be affected, he being the one person who is interested in maintaining the conviction, and the appeal in these cases being in the nature of a new trial, he should have due opportunity of preparing his case on appeal.

It is submitted that the whole of the provisions of this part of the Code relating to appeal should be recast and the mode and manner of appeal simplified and all opportunity for technical objections be removed.

The office of the notice is to inform the respondent that some particular conviction is appealed against and care should be taken that they cannot be misled on this subject, and therefore the names of the appellants, the intent to appeal, the sessions to which the appeal is to be made, as well as the nature of the conviction itself, should be contained in the notice. Notices will not be critically construed, and if they substantially give the respondents the requisite information they will, apart from statutory provision, be held sufficient. All the statutory conditions must be accurately fulfilled. *R.* v. *Ah Yin* (No. 1), (1902), 6 C. C. C. 63.

Held, that notice which had been served upon two of the justices who had taken the information, issued the summons, heard the evidence and signed the conviction, the other J. P. having signed the conviction at a subsequent time, was sufficient, following *Ex parte Doherty, supra; R.* v. *Davitt* (1904), 7 C. C. C. 514.

Notice objected to on the ground that it did not state that appeal was being made to "the next sittings" of the Judge in Battleford, but only gave notice that the appellants would appeal to the Judge sitting at Battleford. Held, that the notice did not comply with the statute and is insufficient. *R.* v. *Brimacombe* (1905), 10 C. C. C. 168.

A notice of appeal in typewriting is a notice in writing within the meaning of the section (880), now (750). And a notice of appeal is not invalid because it is not signed. *R.* v. *Bryson* (1903), 10 C. C. C. 398.

There being no form of notice now and nothing being said in sec. 750 (b) as to the notice requiring to be signed, presumably no signature is required; however, it is better to be on the safe side and see that all notices are signed.

It is the appellant who is to give the notice; the appellant may be "any person who thinks himself aggrieved by such conviction

or order, or dismissal" (sec. 749); it may therefore not be the prosecutor himself who appeals but some one else "who is aggrieved." It is well then, if for no other reason than the purposes of identification, that the appellant should sign the notice, either personally or by his solicitor.

The respondent could not be found and a copy of the notice of appeal was sent by registered mail to the respondent addressed to Edmonton, and another addressed to Winnipeg, and a copy served on his advocate and another on a grown person of the last known place of abode of the respondent, which is a boarding house.

Held, that such service was not authorized by sec. 750 of the Code, and that personal service is intended by that section, and leave to allow the substitutional service as above was refused. *Olsen* v. *Cameron* (1907), 12 C. C. C. 195.

As sec. 750 has been amended since the above decision and service can now be made either upon the respondent, or the justice who tried the case, the hardship entailed by not being able to effect personal service upon the defendant no longer prevails. However, the one or other of them must now be served personally; there is no provision for substitutional service upon either of them. But if the justice is personally served then a copy may be served upon the solicitor for the respondent if such service is thought needful, but in this instance it is the personal service upon the justice that will alone be a true compliance with the Act.

Contents of the Notice.

As sec. 750 now reads the essential ingredients of the notice are: (1) it must shew the intention to appeal; (2) and set forth with reasonable certainty the conviction or order appealed against; and (3) the Court appealed to.

The following passage from Paley, 8th ed., page 382, illustrates the requirements: "The notice of appeal need not be in any special form. As the object of the notice is to inform the respondent that some particular conviction is to be appealed against, care should be taken that they cannot be misled on this subject, and therefore the names of the appellants, the intention to appeal, the sessions at which and the justices before whom the conviction took place, as well as the nature of the conviction itself, should be contained in the notice."

Notices, however, will not be critically construed, and if they substantially give the respondents the requisite information they will (apart from statutory provision) be held sufficient. *R.* v. *J. J. Denbighshire,* 9 Dowl. P. C. 509; *R.* v. *J. J. Oxfordshire,* 4 Q. B. 177; *R.* v. *West Houghton,* 5 Q. B. 300.

Where the notice stated an intention to appeal to the borough sessions (the appeal properly being to the county sessions) it was held that these words might be rejected as surplusage if they did not mislead. *R.* v. *J. J. Buckingham,* 4 E. & B. 259; *R.* v. *Liverpool,* 15 Q. B. 1070.

If acted upon then the notice could not be taken as good for the county sessions afterwards. *R.* v. *J. J. Salop,* 24 L. J. U. C. 14.

All the statutory provisions must be accurately fulfilled so that where a statute gives an appeal to a person by any particular description the notice should bring the appellant within it; thus when a statute gives a right of appeal to a party aggrieved on giving notice in writing, the notice should state that the party appealing is aggrieved by the conviction. *R.* v. *J. J. West Riding York,* 7 B. & C. 678; *R.* v. *Blackawtor,* 10 B. & C. 792.

In *R.* v. *Jordan, supra,* on appeal under the B. C. Summary Convictions Act, MR. JUSTICE IRVING held that it was not necessary that the notice should state that the appellant was the "person aggrieved," the Act and the form in the schedule not requiring that to be alleged.

If giving notice be prevented by the act of God, as by the death of the person to whom it was given, notice will be dispensed with. *R.* v. *J. J. Leceister,* 15 Q. B. 88.

Where full notice of an appeal has been given and there is no countermand of the notice, the sessions are justified in refusing to respite the appeal on the ground of the absence of a witness, unless the appellant pay the costs of the day. *R.* v. *J. J. Monmouth,* 1 B. & Ad. 895.

When the respondent was dead at the time the notice of appeal was sent it was held that the sessions should nevertheless hear the appeal. *R.* v. *J. J. Leceister,* 15 Q. B. 88.

Criminal proceedings do not lapse by the death of the informant. *R.* v. *Truelove,* 5 Q. B. D. 336.

If the time for giving notice has not passed the appellant may abandon his first notice and give another. *R.* v. *J. J. West Riding of York,* 3 T. R. 778.

Recognizance or Deposit.

If the appeal is from a conviction, or order, adjudging imprisonment the appellant shall either remain in custody until the holding of the Court to which the appeal is given, or he shall within the time limited for filing a notice of intention to appeal (that is within ten days of the conviction or order has been made), enter into a recognizance in Form 51 with two sufficient sureties before a County Judge, clerk of the peace, or justice for the county in which such conviction or order has been made.

The requirements as to the recognizance are: (*a*) it must be entered into within ten days after the conviction or order complained of; (*b*) it must be entered into by the appellant with two sufficient sureties; (*b*) and can be entered into before either a County Judge, a clerk of the peace, or a justice of the peace for the county in which the conviction or order has been made; (*d*) it must be in Form 51; (*e*) the condition shall be that the appellant will personally appear at the Court appealed to and will abide the judgment of the Court thereupon and will pay such costs as are awarded by the Court.

It will not suffice that the recognizance be entered into in Court on the day for hearing the appeal, it must be entered into and filed before the sittings of the Court to which the appeal is made. See *Kent* v. *Olds*, 7 U. C. L. J. 21; *Re Myers & Wonnacot*, 23 U. C. R. 611; *Bestwick* v. *Bell*, 1 Terr. L. R. 193; *R.* v. *Crouch*, 35 U. C. R. 433, and *R.* v. *King* (1900), 4 C. C. C. 128.

The sureties must be sufficient sureties. This is a matter for the justice taking the recognizance to fully satisfy himself upon and he should be very particular in this regard. It is not necessary that the sureties should make affidavits of justification, the matter of sufficiency being left entirely to the justice. See *Cragg* v. *Lemarsh, supra.*

When it is remembered that upon the recognizance being entered into the justice shall liberate such person if in custody, it will be recognized as most important that the sureties should be men of substance and freeholders.

The recognizance must be in Form 51, since it is not stated that it may be in that form or one like it, the words of the section being imperative: "Shall . . . enter into a recognizance in Form 51." In looking at Form 51 it will be seen that a form is given of a notice of the recognizance to the appellant, and his sureties. There is nothing in sec. 750 as to it being necessary

to serve this notice, but the fact of it being made part of Form 51 implies the necessity of it being made out and served since otherwise the recognizance in Form 51 will not be complete.

It is not necessary that the recognizance should be entered into before the justice who made the conviction or order; any justice having jurisdiction, or County Judge, or clerk of the peace may take it.

The condition of the recognizance is that the appellant will "personally appear" and try the appeal and abide by the judgment of the Court upon such appeal, and pay such costs as are by the Court awarded.

Held, that the omission of the word "personally" makes the recognizance defective. *Ex parte Sprague* (1903), 8 C. C. C. 109.

The necessity for the condition that the appellant shall appear personally will be manifest to one as proper, when it is recollected that the appellant has been liberated from custody till his appeal is heard against a conviction, or order, awarding him imprisonment; if his appeal is dismissed and he is not personally present in Court, how could the conviction or order appealed against be enforced against him? It is therefore requisite that the appellant should attend in person and be present in Court during the whole time the appeal is being heard; it will not suffice that he is represented by counsel.

The appeal and the giving of a recognizance under this section operates as a suspension, or stay of proceedings, for the enforcement of the penalties imposed by the conviction, either by way of imprisonment, or pecuniary penalty. *Simington* v. *Colbourne* (1900), 4 C. C. C. 367.

Where several defendants appealed from a summary conviction the recognizance entered into was that of the appellants and only *one* surety held insufficient and appeal quashed. *R.* v. *Joseph et al.* (1900), 4 C. C. C. 126.

An appeal is not a general, or common law right. It is an exceptional provision enacted by a statute, and to be availed of the conviction imposed by the statute must be strictly complied with. They and all of them are conditions precedent. A notice that the persons convicted intend to appeal is not an appeal. It is an idle formality if not accompanied either by the surrender of the accused into custody, or by their entering into recognizance with *two* sufficient sureties that they will try the appeal and abide by the judgment of the Court therein and pay such costs as may be awarded against them. HALL, J., *ibid.*, p. 127. As to

giving notice of appeal being an appeal, see *R.* v. *Howard,* 6 C. L. T. 526; *R.* v. *Lynch,* 12 O. R. 378.

The condition in the recognizance entered into was to "personally appear at the next general sessions and enter an appeal against, etc.," the words "and try" being omitted after the word "enter," without which it was urged the chairman of the general sessions had no authority to hear the appeal. Held, that the appeal having been entered according to the condition in the recognizance and the appellant having appeared to prosecute the appeal, the sessions could not refuse to hear the appeal. *R.* v. *Tricker* (1905), 10 C. C. C. 217.

Appeal where Penalty Imposed.

If the appeal is from a conviction, or order, adjudging a penalty, or sum of money, to be paid and in default imprisonment, the appellant shall within the same time limit, viz., within ten days after the conviction, or order, is made, either remain in custody or enter into a recognizance in Form 51 with two sufficient sureties the same as where the imprisonment alone was adjudged and as hereinbefore set forth.

Deposit.

Or deposit with the justice making the conviction or order an amount sufficient to cover the sum adjudged to be paid together with such further amount as such justice deems sufficient to cover the costs of appeal.

In cases in which imprisonment in default of payment is not directed, a deposit shall be made with the justice of an amount sufficient to cover the sum adjudged to be paid together with such further amount as the justice deems sufficient to cover the costs of appeal.

In the first class of cases where the appeal is from a conviction or order adjudging a penalty, or payment, of a sum of money and in default of payment imprisonment, the appellant has three courses open to him: (1) to remain in gaol; (2) to enter into a recognizance with two sufficient sureties, or (3) to make the deposit with the justice. And where no imprisonment is imposed he makes a deposit only.

The deposit must be made within the ten days after the conviction or order, it must be made with the justice who made the conviction or order, and it must be of an amount sufficient to

cover the fine, or sum, adjudged to be paid and also such further sum as the justice deems sufficient to cover the costs of appeal.

In fixing the amount sufficient to cover the costs of appeal the justice should include the witness fees likely to be paid. The amount to be deposited for costs will differ in the different provinces, and the justice should inform himself as to what these costs are usually taxed at before he fixes the amount, and it is well to be on the safe side and fix a liberal amount.

Where a deposit in lieu of recognizance is not made until after the sittings of the appellate Court for which notice was given, the appeal cannot be heard—appeal quashed. *McShadden* v. *Lachance* (1901), 5 C. C. C. 43.

"I think that the obligation laid on an appellant by the Code extends beyond the mere leaving of the money with the justice. Its return by the justice into Court, before the time for hearing the appeal, must in some way have been secured, and even if what was done had been sufficient it could not be established by affidavit." McDOUGALL, Co.J., at p. 25. In default of the justice having paid the deposit into Court the appeal was quashed. *R.* v. *Gray* (1900), 5 C. C. C. 24.

The provisions of sec. 750 as amended in 1909, and as it now stands, providing for a deposit in lieu of recognizance, were in the original Code, sec. 880 (*c*). In the amendment made to this section in 1905, all the provisions relating to deposit were eliminated. But they have been restored by the amendment of 1909, and now the procedure as to appeals in so far as a deposit is concerned are the same as in the original Code.

However, in amending the Code in 1909, and re-enacting paragraph (*c*) of sec. 880 of the original Code, the provisions of sec. 888 of the original Code have been overlooked. Section 888 amongst other things provided that if on an appeal a deposit of money had been made, the justice should return the deposit to the Court appealed to. And as we have seen in *R.* v. *Gray*, *supra*, the omission upon the part of the justice to return the deposit into Court invalidated the appeal. Presumably the provision of sec. 888 has been omitted advisedly. At all events as the Code now stands there is no provision in it requiring the justice to return the deposit into Court.

Section 757, which replaces sec. 888, provides that the justice shall transmit the conviction, or order, to the Court to which the appeal is given 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.

If the justice is required to transmit the conviction, or order, it seems only reasonable and necessary that he should also transmit all else connected with the conviction. As it is a condition precedent to the appeal being heard that the deposit should be made with the justice, it naturally follows that along with the conviction, or order, the justice should also transmit the deposit. How otherwise can the appellate Court know if the appeal has been perfected?

In *R.* v. *Gray* JUDGE MACDOUGALL held that "even if what is done had been sufficient it could not be established by affidavit."

It might be argued that in lieu of any specific enactment providing for the transmission by the justice of the deposit it is not necessary that the deposit should be in Court. As against this it is to be remembered that the right of appeal is by statutory enactment only, and is not an inherent right, and it should appear upon the face of the proceedings that the statutory conditions precedent have been complied with, otherwise the Court will dismiss the appeal for want of jurisdiction.

How can it be established to the Court that the deposit has been made, and how can the deposit be available for the purposes for which it was deposited, if the money is not in the custody of the Court to which the appeal is made? It is submitted that even in the absence of a re-enactment of the provisions of the original section 888, which specifically enacted that the justice should return the deposit to the Court appealed to, it is still requisite and necessary that such return should be made by the justice and the appellant should look to it that it is done. See *R.* v. *Neuberger* (1902), 6 C. C. C. 142, and *R.* v. *Dalliver* (1906), 10 C. C. C. 406, and see sub-sec. (2) of sec. 751.

HEARING OF THE APPEAL.

751. The Court to which such appeal is made shall thereupon hear and determine the matter of appeal and make such order therein, with or without costs to either party, including costs of the Court below, as seems meet to the Court, and, in case of the dismissal of an appeal by the defendant and the affirmance of the conviction or order, shall order and adjudge the appellant to be punished according to the conviction or to pay the amount adjudged by the order, and to pay such costs as are awarded, and shall, if necessary, issue process for enforcing the judgment of the Court.

2. In any case where a deposit has been made as provided in paragraph (c) of section seven hundred and fifty, if the conviction or order is affirmed, the Court may order that the sum thereby adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal, shall be paid out of the money deposited, and that the residue, if any, shall be paid to the appellant; and if the conviction or order is quashed the Court shall order the money be repaid to the appellant."

3. The Court to which such appeal is made shall have power, if necessary, from time to time, by order endorsed on the conviction or order, to adjourn the hearing of the appeal from one sittings to another, or others, of the said Court.

4. Whenever any conviction or order is quashed on appeal, the clerk of the peace or other proper officer shall forthwith endorse on the conviction or order a memorandum that the same has been quashed.

5. Whenever any copy or certificate of such conviction or order is made, a copy of such memorandum shall be added thereto, and shall, when certified under the hand of the clerk of the peace, or of the proper officer having the custody of the same, be sufficient evidence, in all Courts and for all purposes, that the conviction or order has been quashed. 55-56 V., c. 29, s. 880; 4-5 E. VII., c. 10, s. 4.

This section was also amended in 1909 by sub-sec. 2 being repealed, and the present enactment being substituted.

The hearing of the appeal is by the Court, that is by the Judge alone, as there is no right to a jury. See *R.* v. *Mallory* (1900) 4 C. C. C. 116.

The Court has power from time to time to adjourn the hearing from one sittings to another, or others, of the Court, so that there may be more than one adjournment. But these adjournments must be by order of the Court and such order must be endorsed upon the conviction or order. These requirements are imperative and should be looked to. No other order will be sufficient; it must be "by order endorsed on the conviction or order," if made otherwise it will be irregular.

If the conviction, or order, is quashed on appeal a memorandum that the same has been quashed must forthwith be endorsed on the conviction, or order, by the proper officer. This is required for the purpose of evidence in all Courts and for all purposes that the conviction, or order, has been quashed.

No copy of a conviction, or order, that has been quashed, or a certificate of the same, will be of any use as such evidence unless such copy or certificate has added thereto a copy of such memorandum.

If an appeal is dismissed for want of compliance with the prescribed forms, as service of notice, or of not entering into the recognizance within the time required, or making the deposit in manner required, the right of appeal is gone and cannot be renewed at any future sittings of the Court. See *R.* v. *J. J. West Riding of York*, 3 T. R. 776; *R.* v. *J. J. Middlesex*, 9 Dowl. P. C. 163.

Judgment on Appeal Final.

752. When an appeal against any summary conviction or order has been lodged in due form, and in compliance with the requirements of this Part, the Court appealed to shall try, and shall be the absolute judge, as well of the facts as of the law, in respect to such conviction or order.

2. Any of the parties to the appeal may call witnesses and adduce evidence whether such witnesses were called or evidence adduced at the hearing before the justice or not, either as to the credibility of any witness, or as to any other fact material to the inquiry.

3. Any evidence taken before the justice at the hearing below, certified by the justice, may be read in such appeal, and shall have the like force and effect as if the witness was there examined if the Court appealed to is satisfied by affidavit or otherwise, that the personal presence of the witness cannot be obtained by any reasonable efforts. 55-56 V., c. 29, s. 881.

It is a condition precedent to the Court trying, or hearing, the appeal, that the same has been lodged in due form and in compliance with the requirements of Part XV. of the Code. See *R.* v. *Ah Yin*, 6 C. C. C. 66.

At the hearing the first thing to be done by the appellant after opening his case is to prove his notice of appeal, unless the same is admitted. This proof is requisite to establish that the appeal has been lodged in the form and in compliance with the Act.

After the notice has been properly proved, or has been admitted, the general practice is for the clerk of the Court to read the conviction returned by the convicting justice. The Court can only take notice of the record of conviction returned by the justice. *R.* v. *Allen*, 16 East 333, 346; *Boston* v. *Carew*, 5 D. & R. 558.

If an appeal is called and adjourned to the next session at the request of the respondent's counsel, he may notwithstanding require proof of due notice of appeal when the case comes on to be heard. *R.* v. *J. J. Middlesex*, 2 Dowl. N. S. 719; *R.* v. *J. J. Hertford*, 4 B. & A. 561.

If any objection arise on the face of the conviction the appellant usually begins, and if he does so he is bound to state all his objections thereto at once in order that they may be met on the other side, so that all discussion relating to such objection may be had and decision therein given before the hearing on the merits commences.

If no objections are taken to the conviction, or such objections are overruled, the respondent will then open his case upon the merits. Both parties are entitled to 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 facts material to the inquiry. *R.* v. *Washington* (1881), 46 U. C. R. 881.

Any evidence taken before the justice at the hearing below may be read on the appeal. But such evidence must be certified by the justice. And it shall have the like form and effect as if the witness was examined at the hearing on appeal, if the Court

appealed to is satisfied by affidavit, or otherwise, that the personal presence of the witness cannot be obtained by any reasonable efforts. This implies that it is necessary that proof to the satisfaction of the Court shall be given as to the efforts that have been made to secure the attendance of the absent witness before his depositions can be read. This is the natural deduction from the language used and yet the sub-section is so unhappily worded that it might be open to the construction that the only reason for the affidavit, or other proof, "that the personal presence of the witness cannot be obtained," is that in default of such affidavit the evidence may be read, but it will not have the "like force and effect as if the witness was then examined."

This sub-section lacks the certainty and precision of the language used in sec. 999 relating to the reading of depositions taken at a preliminary inquiry. However, be ready with your affidavits to prove the efforts that have been made to secure the personal presence of the witness, as this will likely be required of you before you can tender and use the evidence taken before the justice.

Witnesses living outside the province may be subpœnaed and compelled to attend a hearing on appeal, and a Judge may even make an order for a subpœna under sec. 676 of the Code, the provisions of which section being extended to Part XV. by sec. 711, as we have already seen. See *R.* v. *Gillespie*, 16 P. R. 155.

Judgment on Merits.

754. 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 may make such order as to costs to be paid by either party as it thinks fit.

2. Such conviction or order shall have the same effect and may be enforced in the same manner as if it had been made by such justice.

3. Any conviction or order made by the Court on appeal may also be enforced by process of the Court itself. 55-56 V., c. 29.

Where the conviction differs from the minute of conviction the Court may alter the conviction so as to make it conform to the minute, but if they are alike and the conviction happens to be wrong the Court has no power to amend since it cannot interfere

with the adjudication. See *R.* v. *Elliott,* 12 O. R. 524; *R.* v. *Walsh,* 2 O. R. 206; *R.* v. *Menary,* 19 O. R. 691; *McLennan* v. *McKinnon,* 1 O. R. 691.

This section applies to an appeal by the prosecutor from the order of the justice dismissing the complaint. And where an order is made by the County Court Judge allowing the appeal and convicting the accused, the prosecutor's costs of appeal can be included in the costs awarded by the Judge's conviction and payment thereof may be enforced by a distress warrant and imprisonment in default. *R.* v. *Hawbolt* (1900), 4 C. C. C. 229.

On an appeal by way of stated case, it is discretionary with the Court to hear an objection not taken before the justice. A conviction for two separate offences may be quashed, although the accused did not appear before the justice. *Simpson* v. *Locke* (1903), 7 C. C. C. 294.

On an appeal from a summary conviction had upon a plea of guilty, the case should not be re-opened. "To open up the matter at this stage would be tantamount to allowing the defendant to withdraw his plea of 'guilty' after he was convicted on that plea." MARTIN, J., *R.* v. *Bowman* (1898), 2 C. C. C. 89.

Where the Legislative Assembly have provided that the provisions of Part LVIII. (now Part XV.) of the Criminal Code shall apply to such appeals, and has also enacted that no appeal shall lie unless an affidavit of merits be filed, the latter is a condition precedent of the appeal in addition to those contained in sec. 880 (now sec. 751) of the Code, notwithstanding the provision of sec. 881 (now sec. 752) that where the requirements of Part LVIII. (now Part XV.) have been complied with, the Court shall try the appeal. *R.* v. *McLeod* (1901), 6 C. C. C. 23.

Where the costs and charges of conveying to gaol are imposed in case of non-payment of the fine under the "Ontario Summary Convictions Act," the amount thereof must be stated in the conviction, but a conviction improper in that respect may be amended under 2 Edw. VII. (Ont.), ch. 12, sec. 15, upon an appeal, by striking out the award of such costs. *Collins* v. *Horning* (1903), 6 C. C. C. 514.

COSTS WHERE APPEAL NOT PROSECUTED.

755. The Court to which an appeal is made, upon proof of notice of the appeal to such Court having been given to the person entitled to receive the same, whether such notice has been properly given or not, and although such appeal has not been afterwards prosecuted or entered, may, if such

appeal has not been abandoned according to law, at the same sittings for which such notice was given, order to the party or parties receiving the same such costs and charges as are thought reasonable and just by the Court to be paid by the party or parties giving such notice.

2. Such costs shall be recoverable in the manner provided by this Act for the recovery of costs upon an appeal against an order or conviction. 55-56 V., c. 29, s. 884; 57-58 V., c. 57, s. 1.

Proof of notice of appeal is made a condition precedent to the Court exercising the jurisdiction here given, and it is immaterial whether such notice has been properly given or not. The inclusion of these latter words in this section render the decision in *Re Madden,* 31 U. C. R. 333, and *R.* v. *Becker,* 20 O. R. 676, no longer applicable.

Where the notice of appeal is given for a certain Court there is no jurisdiction to award costs against the appellant in respect of the proceedings in appeal at any other sittings than the one for which notice was given. *McShadden* v. *Lachance* (1901), 5 C. C. C. 43.

The order for costs should direct payment thereof to be made to the "clerk of the peace, or other proper officer of the Court." See sec. 758, *post,* and *Gay* v. *Mathews,* 33 L. J. M. C. 14.

It is the Court to which "an appeal is made," that is authorized to make the order as to costs. The appeal to be properly made must strictly comply with the requirements of sec. 750, and it is submitted that, notwithstanding proof of notice of appeal being given, it will be the duty of the Court to inquire as to whether, or not, the requirements of paragraph (c) of sec. 750 have also been complied with before the order as to costs can be made.

If the appeal has been abandoned according to law, that is in accordance with the provision of sec. 760, *post,* then no order can be made.

The costs awarded under this section shall be "such costs and charges as are thought reasonable and just by the Court."

These costs, it would appear, must be fixed, or taxed, by the Court during the sitting at which the order is made, and the amount thereof must be set out in the minute of judgment, or order, made, unless taxed out of sessions by consent and the amount afterwards filled in the order. See *Bothwell* v. *Burnside* (1900), 4 C. C. C. 450, 31 O. R. 695, and see *R.* v. *McIntosh,* 28 O. R. 603.

Where the sessions are adjourned to a future day the costs may be finally settled at the adjourned sessions. *R.* v. *Hants,* 33 L. J. M. C. 184.

If no adjournment, and nothing said about costs, they cannot be given or taxed at the next subsequent sessions. *R.* v. *Staffordshire*, 7 E. & B. 935.

If the parties consent to have the costs taxed out of Court, this can be done and judgment entered *nunc pro tunc*. *Freeman* v. *Reid*, 9 C. B. N. S. 301. Or there may be a waiver. *Ex parte Watkins*, 26 J. P. 71.

Consent to tax costs out of Court may be inferred from the universal custom to do so. *Midland R'y Co.* v. *Edmonton*, 17 Cox 731.

Proceedings where Appeal Fails.

756. 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. 55-56 V., c. 29, s. 885.

It was held by Mr. Justice Wetmore in *Simington* v. *Colborne* (1900), 4 C. C. C. 367, in a well considered judgment in which the majority of the Court concurred, that reading this section along with sec. 751 (then sec. 880), that an appeal under sec. 880 (now 751) "has the effect of suspending the operation of the conviction, or order, appealed against."

In other words, that upon an appeal from a summary conviction being perfected as required by sec. 751, the same operates as a stay of proceedings, and the person convicted does not suffer the loss of any rights until his appeal has been dismissed and the conviction thereby affirmed.

Serious consequences are apt to arise under the provisions of this section, 756, unless the Judge of Appeal, or the Crown authorities, are alert after "an appeal against a conviction or order is decided in favour of the respondents." The warrant which is authorized by this section can only issue in the event of no previous warrant having been issued for the execution of the conviction.

The practice always followed upon the conviction of a person, say for an offence against the provisions of sec. 238, vagrancy, is for a warrant to issue forthwith committing the prisoner to gaol, and he is placed in custody accordingly. And it is not until after he is in custody and held under the warrant of commitment that he gives the necessary notice and obtains bail and his release under the provisions of sec. 751.

Upon the appeal being heard, and the conviction being affirmed, the convicting magistrate is *functus officio* and cannot issue his warrant as provided by sec. 756 since he has already performed that duty. And unless the Judge hearing the appeal, or the officers of the Court, are astute in taking the accused into custody under the order of the appellate Court, he is apt to get away. See *R.* v. *Arscott* (1885), 9 O. R. 541.

By sub-sec. 3 of sec. 754 it is provided as follows: "Any conviction or order made by the Court on appeal may also be enforced by process of the Court itself."

Section 751 also provides that "in case of the dismissal of an appeal by the defendant and the affirmance of the conviction, or order, the Court shall order and adjudge the appellant to be punished according to the conviction," &c.

We therefore find that the appellate Court is vested with full authority for the enforcement of the conviction. And where an appellant has been in custody under the warrant of the convicting justice and released on perfecting his appeal under sec. 750, and the conviction has been affirmed on appeal, the only authority for re-committing the appellant to gaol to serve out the balance of his sentence is that of the appellate Court, since, as has already been pointed out, the convicting justice is *functus officio,* and cannot issue another warrant of commitment. Care should therefore be taken to see that after a conviction is affirmed on appeal that the defendant is immediately taken into custody by the order of the appellate Court.

Transmission of Conviction by Justice.

757. Every justice before whom any person is summarily tried, shall transmit the conviction or order to the Court to which the appeal is by this Part given, in and for the district, county or place wherein the offence is alleged to have been committed, before the time when an appeal from such conviction or order may be heard, there to be kept by the proper officer among the records of the court.

2. The conviction or order shall be presumed not to have been appealed against, until the contrary is shown.

3. Upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the Court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence.

4. In any case when a conviction or order is required by this Part after appeal to be enforced by any justice, the clerk of the Court to which the appeal was had, or other proper officer, shall remit such conviction, or order, and all papers therewith sent to the Court of Appeal, excepting any notice of intention to appeal and recognizance to such justice to be by him proceeded upon as in such case directed by this Part.

Apart from the provisions of sec. 888 (now 747), it is the duty of the justice to return the information and depositions with the conviction. *R.* v. *Rondeau* (1903), 9 C. C. C. 520.

"The provisions of sec. 757 are general and apply to every conviction or order made by a justice whether there is an appeal or not. It is the duty of the magistrate to comply with sec. 757, and he ought to have the documents filed before the Court opens. I am not prepared to say what the consequences may be to him if he does not, but, as stated in my opinion, the provision is only directory; if it is in Court when the appeal is called on for hearing I think it is sufficient for the purposes of the appeal. I can find no case that holds that these papers should be filed before the Court opens." WETMORE, C.J., p. 197; *R.* v. *Williamson* (1908), 13 C. C. C. 195; and see *In re Ryer and Plows,* 46 U. C. R. 206; and see *Harwood* v. *Williamson* (1908), 14 C. C. C. 76.

If the conviction or order has not been returned to the sessions, a *subpœna duces tecum* should be served upon the clerk to the justices by whom it is made, and if the order, or conviction, has been served upon the respondent, it will be advisable also to give him a notice to produce it. The same course must be adopted with regard to other documents which the parties require to give in evidence at the hearing. *Paley,* 8th ed., p. 397, and see *Barker* v. *Davis,* 50 L. J. M. C. 140.

Where a witness served with a *subpœna duces tecum* does not attend, or attends and refuses to produce the document (not on the ground of privilege), secondary evidence cannot be given of its contents, the only remedy being to punish the witness for a contempt. *R.* v. *Llanfaethly,* 2 E. & B. 940; *Phelps* v. *Prew,* 3 E. & B. 430.

As to return of convictions, see *R.* v. *Whalen,* 45 U. C. R. 396; *R.* v. *Monaghan* (1897), 2 C. C. C. 488; *R.* v. *Ashcroft* (1899), 2 C. C. C. 385; *R.* v. *Rondeau* (1903), 9 C. C. C. 523.

And see the judgment of HARVEY, J., in *R.* v. *Gehrke* (1906), 11 C. C. C. 109, where he goes very fully into the Ontario cases upon the subject and adopts the reasoning of WETMORE, J., in *R.* v. *Monaghan,* and holds that a writ of *certiorari,* and a return thereto by the convicting justice, are requisite for the purpose of bringing the conviction before the Court on an application to quash the same, notwithstanding the fact that the original conviction is on file in the Court at the time sent there under the provisions of sec. 888 (now sec. 757) of the Code.

And see *R.* v. *Macdonald* (*No. 2*) (1902), 5 C. C. C. 279, where it was held by the Supreme Court of Nova Scotia, that a motion to quash a summary conviction cannot be entertained by a Superior Court without a writ of *certiorari* for that purpose and a return to such writ.

Costs of Appeal and Recovery Thereof.

758. 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.

759. If such costs are not paid within the time so limited, and the person ordered to pay the same has not been bound by any recognizance conditioned to pay such costs, the clerk of the peace or his deputy, on application of the person entitled to the costs, or of any person on his behalf, and on payment of any fee to which he is entitled, shall grant to the person so applying, a certificate that the costs have not been paid.

2. Upon production of the certificate to any justice in and for the same territorial division, such justice may enforce the payment of the costs by warrant of distress, and in default of distress may by warrant commit the person against whom the warrant of distress has issued, for any term not exceeding one month, unless the amount of the costs and all costs and charges of the distress and also the costs of the commitment and of the conveying of the party to prison, if the justice thinks fit so to order, are sooner paid.

3. The said certificate shall be in Form 52 and the warrants of distress and commitment in Forms 53 and 54 respectively. 55-56 V., c. 29, s. 898.

Proceedings by way of *certiorari* against a summary conviction is not an appeal to which sec. 758 refers, and an *ex parte* order for payment of costs upon the dismissal of a motion for *certiorari* directing that the costs should be paid to the clerk of the peace, &c., was discharged. *R.* v. *Graham* (1898), 1 C. C. C. 405.

The issuing of a warrant of commitment under sec. 759 is discretionary and not compulsory. See *Delaney* v. *McNab*, 21 C. P. 563.

Abandonment of Appeal.

760. An appellant may abandon his appeal by giving to the opposite party notice in writing of his intention six clear days before the sitting of the Court appealed to, and thereupon the costs of the appeal shall be added to the sum, if any, adjudged against the appellant by the conviction or order, and the justice shall proceed on the conviction or order as if there had been no appeal. 55-56 V., c. 29, s. 899.

Six clear days are to be reckoned exclusively of both the first and last days. *Re Sams & Toronto*, 9 U. C. R. 181.

If the proper notice of abandonment is not given, sec. 755 will apply.

The costs of appeal are to 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. This means that the justice may, if necessary, proceed by warrant of distress not only to collect the original sum required to be paid by the defendant, but there shall be added thereto the costs of appeal.

These costs of appeal may include solicitor's costs and counsel fees. See *R.* v. *McIntosh*, 28 O. R. 603.

STATING A CASE.

761. Any person aggrieved, the prosecutor or complainant as well as the defendant, who desires to question a conviction, order, determination or other proceeding of a justice under this Part, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to such justice to state and sign a case setting forth the facts of the case and the grounds on which the proceeding is questioned, and if the justice declines to state the case, may apply to the Court for an order requiring the case to be stated.

"2. The application shall be made and the case stated within such time and in such manner as is from time to time directed by rules or orders made under section five hundred and seventy-six of this Act.

"3. If there be no rule or order otherwise providing,—

"(a) the application shall be made in writing to the justice and a copy thereof left with him, and may be made at any time within seven clear days from the date of the proceeding to be questioned;

"(b) the case shall be stated within three calendar months after the date of the application, and after the recognizance hereinafter referred to has been entered into; and

"(c) the applicant shall within three days after receiving the case transmit it to the Court, first giving notice in writing of such appeal, with a copy of the case as signed and stated, to the other party to the proceeding which is questioned."

By sec. 576 of the Code power is given to every Superior Court of criminal jurisdiction to make rules for regulating the practice in criminal matters, and among other things the proceedings on application to a justice to state and sign a case for the opinion of the Courts as to a conviction, order, determination or other proceeding before him.

The application is to be made and the case stated within such time and in such manner as is from time to time directed by rules or orders made under sec. 576 of the Code.

And by the amendment of 8-9 Edw. VII. c. 9, s. 2—if there be no rule, or order, otherwise providing—then the application must be made in writing to the justice and copy left with him, and may be made at any time within seven clear days from the date of the proceedings to be questioned. If more than one justice pre-

sided when the decision was given, then the application should be made to both of the justices. See *Westmore* v. *Paine*, (1891), 1 Q. B. 482.

The case must be stated within three calendar months after the date of application and after the recognizance has been entered into.

After receiving the case the applicant must, within three days thereafter, transmit it to the Court. The applicant is also required, before he transmit the case to the Court, to give notice in writing of the appeal and serving a copy of the case as signed and stated, to the other party to the proceeding in question. The requirements of the statute as to the mode and manner of application for a case must be strictly complied with and they cannot be waived by the parties, or justices. *Lockhart* v. *St. Albans*, 21 Q. B. D. 188.

It is to be noted that any person aggrieved whether prosecutor, or complainant, or defendant, may question the conviction, order, or determination, or other proceeding of a justice under Part XV. The appeal by way of stated case under this and the subsequent sections is therefore confined to proceedings by way of summary convictions taken and concluded under Part XV., and does not apply to proceedings under Part XVI.

The only grounds of appeal allowable by way of stated case under this section are:—(1) That the decision appealed from "is erroneous in point of law," or (2) is "in excess of jurisdiction."

A case will therefore not be quashed upon a question of fact.

The Superior Court is concerned alone as to whether or not the decision of the justice is erroneous in point of law, and to see whether the facts are sufficient to warrant the legal conclusion which the justices have drawn from the facts. See *Cornwall* v. *Sanders*, 3 B. & S. 206; *Taylor* v. *Oram*, 31 L. J. M. C. 252, and *R.* v. *Raffles*, 45 L. J. M. C. 61.

As to who is a "person aggrieved," see notes to sec. 749.

As we will see by sec. 762, at the time of making his application and before a case is stated and delivered to him by the justice, the applicant must in every instance enter into a recognizance before such justice or some other justice having jurisdiction, conditioned to prosecute his appeal without delay and to submit to the judgment of the Court and pay the costs awarded against him, if any. The applicant must also, at the same time and before the case is delivered to him, pay the justice such fees as he is entitled to.

If the appellant is in custody he shall be liberated upon the recognizance being further conditional for his appearance before the justice within ten days after the judgment of the Court has been given, to abide such judgment, unless the judgment appealed against is reversed.

Where rules of Court have been made under the authority of sec. 576 of the Code regulating the proceedings for application to a justice to state and sign a case, these rules must be strictly complied with in every respect, since a proper compliance with the same is a condition precedent to the appeal being heard. See *R.* v. *Earley (No. 2)* (1906), 10 C. C. C. 336; *South Staffordshire* v. *Stone* (1887), 19 Q. B. D. 168; *Lockhart* v. *St. Albans* (1888), 21 Q. B. D. 188; *R.* v. *Earley (No. 1)* (1906), 10 C. C. C. 280.

The time limited for appeals from summary convictions has no application to a stated case. *R.* v. *Ferguson* (1906), 11 C. C. C.

An objection of law which arises from the facts stated in the case may be taken and decided by the Court, although not raised before the justice. *Knight* v. *Hallowell*, L. R. 9 Q. B. 412.

And on an appeal by way of stated case from a summary conviction it is discretionary with the Court to hear and determine an objection which was not taken before the justice. *Simpson* v. *Lock* (1903), 7 C. C. C. 294.

The questions of law to be determined upon a stated case under sec. 761, are those only which have first been raised before the justice, and which are specified and set forth in the stated case. *R.* v. *Nugent* (1904), 9 C. C. C. 1.

A police magistrate who has made a conviction under the Alien Labour Act, is not *persona designata*, and he may state a case for the opinion of the Court under sec. 761 of the Code. *R.* v. *Breckinridge* (1905), 10 C. C. C. 180.

Upon the hearing of a case stated by a justice under the Nova Scotia Summary Convictions Act, the conviction having imposed the proper money penalty, but having affixed a term of imprisonment not authorized. the Court amended the conviction by inserting the term of imprisonment applicable under the statutory provision. See R. S. N. S. c. 100, ss. 146, 147, allowing such amendment. *R.* v. *Power* (1908), 14 C. C. C. 264.

"The ruling by a magistrate as to the admissibility of evidence is not a 'proceeding' within the meaning of sec. 761 of the Code, nor is it a 'determination,' and it is certainly not a 'conviction' or 'order.' We should not therefore have been asked to decide as to the admissibility of evidence," etc. RIDDELL, J., at p. 118.

"The police magistrate has made the evidence a part of the case; that he should not have done. The Act is precise that he should 'sign a case setting forth the facts of the case and the grounds on which the proceeding is questioned'; then our jury is to determine the 'questions of law arising thereon.' We should have nothing before us but the facts and the grounds aforesaid." RIDDELL, J., at p. 125. *R.* v. *Dominion Athletic Club* (1909), 15 C. C. C. 106.

Where the justices did not deliver the case to the appellant within the time fixed by the Rules of Court, but it was established that the appellant had done all that was practicable for him to do, it was held that he should not lose his right to appeal. It was also held that the recognizance of the appellant alone was a compliance with the provisions of the Code. *R.* v. *Turnbull* (1909), 15 C. C. C. 1.

Where a case is stated under Part XV. of the Code, or under the Ontario Summary Convictions Act, it is to be heard by the High Court and not by the Court of Appeal. *R.* v. *Henry* (1910), 16 C. C. C. 73.

Paragraph (b) of sub-sec. 3 of sec. 761, requires that "the case shall be stated within three calendar months after the date of the application and after the recognizance has been entered into." These words have been held to be directory only as to the duties of the justices after notice, and an application to strike out a case not stated within the time fixed by this rule was refused. *Hughes* v. *Wavertree Local Board* (1894), 10 T. L. R. 355, and 58 J. P. 654.

When an appellant has done all that he can to comply with the statute, but through the act of the other party he has been prevented from fulfilling its conditions, there may be a relaxation of the rule in his favour. *Woodhouse* v. *Woods*, 29 L. J. M. C. 149.

And where the respondent could not be found it was held sufficient to serve on the solicitor, who appeared before the magistrate, the notice of appeal and copy of the case within three days, it appearing that they had afterwards come to her hands. *Syred* v. *Carruthers*, E. B. & E. 469, 27 L. J. M. C. 273.

If after the expiration of three days the case remain in the appellants' hands it becomes wholly inoperative, and if he take it back to the justices they have no power of amending it, and if they do so, in fact, the appellant does not gain a further period of three days from the amendment for transmitting the case to the Court. Query, whether the justice can amend the case within three days after they have delivered it to the appellant? *Gloucester Board of Health* v. *Chandler*, 32 L. J. M. C. 66, 7 L. T. 722.

Where an appellant received the case from the justices on Good Friday and transmitted it to the proper Court on the following Wednesday, it was held that, as the offices of the Court were closed from Friday until Wednesday, the appellant had transmitted the case as soon as it was possible for him to do so, and therefore had sufficiently complied with the requirements of the statute. *Mayer* v. *Harding*, L. R. 2 Q. B. 410, 16 L. T. 429.

The Crown office rules provide that every special case shall be divided into paragraphs, each of which as nearly as may be is to be confined to a distinct portion of the subject, and is to be numbered consecutively. As in some of the provinces of Canada there are no rules, it will be well to be guided by the Crown office rules as to the preparation of the case.

On the argument the appellant always begins, and, as a rule, only one counsel will be heard on each side.

If the respondent does not appear the appellant must shew that the decision of the justice is wrong before he can obtain the judgment of the Court. *Syred* v. *Carruthers, supra.*

The Appellate Court will not decide on the weight and sufficiency of the evidence, but will accept the finding of the justice upon the facts within their jurisdiction as conclusive, whatever may be the opinion of the Court as to the value of the evidence. *Cornwall* v. *Sanders*, 3 B. & S. 206, 32 L. J. M. C. 6.

The Court has only to see whether the determination is erroneous "in point of law." See *Taylor* v. *Oram, supra.*

Justices have no right to be heard in support of their decision upon the argument of a case stated by them for the opinion of the Court. *Smith* v. *Butler*, 16 Q. B. D. 349.

Recognizance by Appellant.

762. The appellant at the time of making such application, and before a case is stated and delivered to him by the justice, shall, in every instance, enter into a recognizance before such justice or some other justice exercising the same jurisdiction, with or without surety or sureties, and in such sum as to the justice seems meet, conditioned to prosecute his appeal without delay, and to submit to the judgment of the Court and pay such costs as are awarded by the same; and the appellant shall, at the same time, and before he shall be entitled to have the case delivered to him, pay to the justice such fees as he is entitled to.

2. The appellant, if then in custody, shall be liberated upon the recognizance being further conditioned for his appearance before the same justice, or such other justice as is then sitting, within ten days after the judgment of the Court has been given, to abide such judgment, unless the judgment appealed against is reversed. 55-56 V., c. 29, s. 900.

"762A. Where, pending an application for the statement of a case, the justice dies or quits office the applicant may, on notice to the other

party or parties, apply to the Court to state a case itself, and if a case is thereupon stated it may be dealt with as if it had been duly stated by the said justice.

"2. Before any such case is stated by the Court the applicant shall enter into recognizances as provided by section 762."

It is a condition precedent to a case being stated and delivered to the applicant, that the appellant in every instance should enter into a recognizance with, or without, sureties, and in such sum as to the justice seems meet. And a cash deposit cannot be accepted in lieu of recognizance. Ree *R.* v. *Geiser* (1901), 5 C. C. C. 154.

If the appellant is in custody he shall be liberated upon the recognizance being further conditioned for his appearance before the same justices, or such other justice as is then sitting, within ten days, after judgment of the Court has been given to abide such judgment, unless the judgment appealed against is reversed.

If the judgment of the Court sustains the conviction and the appellant is required to serve the balance of the sentence originally imposed by the conviction appealed against, he will have to be committed to gaol by the order or warrant of the appellate Judge.

The convicting justice has exhausted his powers as to commitment by issuing the original warrant of commitment under which the appallant was taken into custody; the justice is then *functus officio*.

Would the appellate Court have power by its judgment to authorize the convicting justice, or any other justice, to issue a warrant of commitment? It is thought not.

In the absence of a direct order, or warrant, issued by the appellate Court itself authorizing the recommitment of the appellant to gaol to serve the balance of his sentence, it is submitted that there is no power resting in either the convicting justice, or any other justice, to authorize his arrest and imprisonment. There is left the remedy of estreating the recognizance under Part XXI. of the Code.

This submission is made notwithstanding the provision of sec. 767, *post*. By that section, it is true, power is given to the convicting justice to enforce this conviction, order, or determination, which has been affirmed, but how can he do so if he has already exhausted his power by committing the appellant to gaol?

Sub-section 2 of sec. 767 gives the Court power to enforce the order of the Court by its own process, and it is advised that this power should be invoked, otherwise guilty men and women will go free. This has happened in the experience of the writer through the neglect and inattention of Crown officers.

Forms of stated case, recognizance and other forms relating to stated cases will be found in the appendix.

Where the recognizance was entered into on the day following the delivery of the case, it was held not to be a sufficient compliance with the Rules. *Stanhope* v. *Thorsby*, L. R. 1 C. P. 420, 14 L. T. 332.

Refusal to State a Case.

763. If the justice is of opinion that the application is merely frivolous, but not otherwise, he may refuse to state a case, and shall on the request of the applicant sign and deliver to him a certificate of such refusal: Provided that the justice shall not refuse to state a case where the application for that purpose is made to him by or under the direction of the Attorney-General of Canada, or of any province. 55-56 V., c. 29, s. 900.

764. Where the justice refuses to state a case, it shall be lawful for the applicant to apply to the Court, upon an affidavit of the facts, for a rule calling upon the justice, and also upon the respondent, to show cause why such case should not be stated; and such Court may make such rule absolute, or discharge the application, with or without payment of costs, as to the Court seems meet.

2. The justice upon being sered with such rule absolute, shall state a case accordingly, upon the appellant entering into such recognizance as hereinbefore provided. 55-56 V., c. 29, s. 900.

Form of certificate of refusal will be found in the appendix.

If the justices acquit, in a case in which they ought to inflict a merely nominal penalty, the High Court is not compelled to order them to state a special case. *R.* v. *Davy et al.* (1899), 2 Q. B. 307, 80 L. T. 798.

In England there is no appeal from the Divisional Court where they refuse to grant an order *nisi* for a *mandamus* to compel the magistrate to state a case upon a point of law arising in a criminal cause, or matter. Lord Esher, M.R., in *Ex parte Schofield* (1891), 2 Q. B. 429; *R.* v. *Sparling*, 21 W. R. 461, 60 L. J. M. C. 157. As to ordering a justice to state a case, see *R.* v. *Shiel* (1900), 19 Cox 507.

When a question of law is involved the justice cannot refuse to state a case on the ground that the question is merely frivolous. *R.* v. *Pollard*, 14 L. T. 599.

Nor can the justice refuse to state a case on the ground that the objection had not been formally brought to his notice, where such an objection goes to the root of the whole matter, and though he is bound to know the law, the Court will not in such a case give costs of the application to compel him to state a case. *Ex parte Markham*, 21 L. T 748.

The Court will not express any opinion except upon the facts appearing in the case. *St. James* v. *St. Mary,* 29 L. J. M. C. 26.

The duty of the Court is simply to answer the question of law put to them by the magistrate. *Buckmaster* v. *Reynolds,* 13 C. B. N. S. 62.

Where the justices state the grounds for finding the facts the Court may consider whether they are sufficient in law. *Tyrrell* v. *Flannagan* (1901), 2 Q. B. Ir. 423.

The question to be decided must be one which strictly arises on the trial. *R.* v. *Gibson,* 16 O. R. 704; *R.* v. *Barnett,* 17 O. R. 649.

A question arising *before* the commencement of the trial cannot be reserved for the opinion of the Court under the Criminal Code. See *Brisbois* v. *The Queen* (1888), 15 S. C. R. 421; *Morin* v. *The Queen* (1890), 18 S. C. R. 407.

Where an objection was taken that the justices had improperly received evidence, a rule to state a case was refused. It must appear that the decision was wrong in law. *R.* v. *Modesfield,* 2 L. T. 352, 13 Q. B. 881.

A right of appeal must be given by express enactment and cannot be extended by an equitable construction to cases not distinctly enumerated. *R.* v. *Stock,* 8 A. & E. 405; *Christie* v. *St. Luke, Chelsea,* 8 E. & B. 992, 27 L. J. M. C. 153.

The case is usually drawn up by the appellants' solicitor, and a copy served on the prosecutor, or respondent, together with a notice of settling the same before the justice; or a memorandum endorsed on the case and signed by the solicitor for the respondent that he agrees, will be sufficient. The case can then be submitted to the justice and finally settled, and a copy and notice of appeal as required by paragraph (c) of sub-sec. 2 of sec. 761, served on the other party to the proceeding, viz., the respondent.

Hearing of Stated Case.

765. The Court to which a case is transmitted shall hear and determine the question or questions of law arising thereon, and shall thereupon affirm, reverse or modify the conviction, order or determination in respect of which the case has been stated, or remit the matter to the justice with the opinion of the Court thereon, and may make such other order in relation to the matter, and such orders as to costs, as to the Court seems fit; and all such orders shall be final and conclusive upon all parties.

2. No justice who states and delivers a case shall be liable to any costs in respect or by reason of such appeal against his determination. 55-56 V., c. 29, s. 900.

766. 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.

2. The authority and jurisdiction of the Court for the opinion of which a case is stated may, subject to any rules and orders of Court in relation thereto, be exercised by a Judge of such Court sitting in chambers, and as well in vacation as in term time. 55-56 V., c. 29, s. 900.

The Court has no authority to say anything further than that the justice was right, or wrong, in his decision, and to answer the questions submitted. No case should be granted unless some doubtful point of law has been raised of sufficient importance to be submitted to the Court. See BLACKBURN, J., in *St. Botolph* v. *White Chapel*, 2 L. T. 507; see *St. James* v. *St. Mary, supra*, and *Buckmaster* v. *Reynolds, supra*.

Where the case is not sufficiently explicit, it may be sent back for amendment. *Crowther* v. *Boult*, 13 Q. B. D. 680; *Christie* v. *St. Luke, supra; Hodgson* v. *Little*, 16 C. B. N. S. 202; *Pedgrift* v. *Chevalier*, 8 C. B. N. S. 246.

On a mere suggestion that there has been misconduct, or negligence, in drawing up a case, the Court will not send it back for amendment. *Townshend* v. *Read*, 4 L. T. 447.

By sec. 1151 of the Code, it is provided that no action or proceeding shall be commenced, or had, against a justice for enforcing a conviction, order or determination affirmed, amended or made by the Court under sec. 765.

COSTS.

If the conviction is quashed as a rule the costs are given against the prosecutor or respondent. *Venables* v. *Hardman*, 1 E. & E. 79.

If the appellant drops or abandons his appeal by way of stated case, he will be ordered to pay the costs of the respondent. *Crowther* v. *Boult*, 13 Q. B. D. 680.

A justice who states and delivers a case cannot be made liable for the costs of the appeal; it is otherwise if the justice improperly refuses to state a case, he may then be ordered to pay the costs of an application to compel him to state it. *R.* v. *Bradford*, 48 J. P. 149; see also sub-sec. 2 of sec. 765.

ENFORCEMENT OF CONVICTION BY JUSTICES.

767. After the decision of the Court in relation to any case stated for their opinion, the justice in relation to whose determination the case has been stated, or any other justice exercising the same jurisdiction, shall have the same authority to enforce any conviction, order or determination which has been affirmed, amended or made by such Court as the justice who

originally decided the case would have had to enforce his determination if a case had not been stated.

2. If the Court deems it necessary or expedient any order of the Court may be enforced by its own process. 55-56 V., c. 29, s. 900.

768. No writ of *certiorari* or other writ shall be required for the removal of any conviction, order or other determination in relation to which a case is stated as aforesaid for obtaining the judgment or determination of a superior Court on such case. 55-56 V., c. 29, s. 900.

769. Every person for whom a case is stated as aforesaid in respect of any determination of a justice from which he is entitled to an appeal under section seven hundred and forty-nine, shall be taken to have abandoned his said right of appeal finally and conclusively and to all intents and purposes.

2. Where, by any special Act, it is provided that there shall be no appeal from any conviction or order, no proceedings shall be taken to have a case stated or signed as aforesaid in any case to which such provision as to appeal in such special Act applies. 55-56 V., c. 29, s. 900.

JUSTICES' FEES UNDER PART XV. OF THE CODE.

770. The fees mentioned in the following tariff and no others shall be and constitute the fees to be taken on proceedings before justices under this Part:—

Fees to be taken by Justices of the Peace or their Clerks.

1. Information or complaint and warrant or summons	$0 50
2. Warrant where summons issued in first instance	0 10
3. Each necessary copy of summons or warrant	0 10
4. Each summons or warrant to or for a witness or witnesses. Only one summons on each side to be charged for in each case, which may contain any number of names. If the justice of the case requires it, additional summonses shall be issued without charge)	0 10
5. Information for warrant for witness and warrant	0 50
6. Each necessary copy of summons or warrant for witness	0 10
7. For every recognizance	0 25
8. For hearing and determining case	0 50
9. If case lasts over two hours	1 00
10. Where one justice alone cannot lawfully hear and determine the case the same fee for hearing and determining to be allowed to the associate justice.	
11. For each warrant of distress or commitment	0 25
12. For making up record of conviction or order where the same is ordered to be returned to sessions or on *certiorari*	1 00
But in all cases which admit of a summary proceeding before a single justice and wherein no higher penalty than $20 can be imposed, there shall be charged for the record of conviction not more than	0 50
13. For copy of any other paper connected with any case, and the minutes of the same if demanded, per folio of 100 words	0 05
14. For every bill of costs when demanded to be made out in detail (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 50
2. Serving summons	0 25
3. Mileage to serve summons or warrant, per mile (one way) necessarily travelled	0 10
4. Same mileage when service cannot be effected, but only upon proof of due diligence.	

5. Mileage taking prisoner to gaol, exclusive of disbursements necessarily expended in his conveyance	$0 10
6. Attending justices on trial, for each day necessarily employed in one or more cases, when engaged less than four hours	1 00
7. Attending justices on trial, for each day necessarily employed in one or more cases, when engaged more than four hours	1 50
8. Mileage travelled to attend trial (when public conveyance can be taken, only reasonable disbursements to be allowed) one way per mile	0 10
9. Serving warrant of distress and returning same	1 00
10. Advertising under warrant of distress	1 00
11. Travelling to make distress or to search for goods to make distress, when no goods are found (one way) per mile	0 10
12. Appraisements, whether by one appraiser or more—two cents in the dollar on the value of the goods.	
13. Commission on same and delivery of goods—five cents in the dollar on the net proceeds.	

Witnesses' Fees.

1. Each day attending trial	$0 75
2. Mileage travelled to attend trial (one way) per mile	0 10

Interpreter's Fees.

1. Each day attending trial	$2 00
2. Mileage travelled to attend trial (one way) per mile	0 10

A magistrate cannot properly demand fees when the proceedings cannot be dealt with summarily. *R.* v. *Meehan* (*No. 2*) (1902), 5 C. C. C. 312, 3 O. L. R. 361.

CHAPTER IX.

SUMMARY TRIAL OF INDICTABLE OFFENCES.

Part XVI. of the Code.

The object and intention of the provisions of this part of the Code is to provide an expeditious mode of trying indictable offences, in order that time and expense may be saved, and that an opportunity may be offered to persons charged with offences of taking a summary trial without having to go through the formality of a preliminary inquiry and then trial by a jury, or by a County Court Judge under the provisions of Part XVIII. of the Code.

As originally framed, these summary trials were restricted to the class of cases mentioned in secs. 773, 774, 775 and the first part of sec 777, these provisions being taken from R. S. C. c. 176, and their origin is no doubt based upon the English Summary Jurisdiction Act of 1879.

By 63-64 Vic. c. 46 (Canada), sec. 776 was added, and by section 3 of the same Act. the very important provisions of subsection 2 of sec. 777 were also added.

These several sections require to be very carefully considered by the uninitiated, and magistrates should make themselves thoroughly conversant with their provisions before proceeding under them.

As at present framed, the provisions of Part XVI. are certainly somewhat involved and confusing, and it seems a pity that when the Code was revised in 1906 the whole of Part XVI. was not recast and simplified.

The question of the jurisdiction exercised under these sections and punishment awarded under convictions made for offences tried summarily by magistrates, have been the subject of many decisions in the Courts of the different provinces, as will appear when the various cases are cited, and some of these decisions are in conflict.

The trend of recent amendments is to enlarge the scope and powers of city magistrates, and we think this is wise, both in the interests of efficiency and economy in the administration of justice, and also in the interest and well being of those who are unfortunate enough to bring themselves within the pale of the law.

INTERPRETATION.

771. In this Part, unless the context otherwise requires,—

(*a*) "magistrate" means and includes,

(i) in the provinces of Ontario, Quebec and Manitoba, any recorder, Judge of a County Court if a justice of the peace, commissioner of police, Judge of the sessions of the peace, and police magistrate, district magistrate, or other functionary or tribunal, invested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more justices, and acting within the local limits of his or of its jurisdiction,

(ii) in the provinces of Nova Scotia and New Brunswick, any recorder, Judge of a County Court, stipendiary magistrate or police magistrate, acting within the local limits of his jurisdiction, and any commissioner of police and any functionary, tribunal or person invested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more justices of the peace,

(iii) in the provinces of British Columbia and Prince Edward Island, any two justices sitting together, and any functionary or tribunal having the powers of two justices,

(iv) in the province of Saskatchewan or Alberta, any Judge of the Supreme Court of the Northwest Territories, pending the abolition of that Court by the legislature of the province, and thereafter any Judge of such Court in either of the said provinces as may in respect of that province be substituted by the legislature thereof for the Supreme Court of the Northwest Territories; any two justices sitting together, and any functionary or tribunal having the powers of two justices,

(v) in the Northwest Territories, any stipendiary magistrate, any two justices sitting together and any functionary or tribunal having the powers of two justices,

(vi) In the Yukon Territory, any Judge of the Territorial Court, any two justices sitting together and any functionary or tribunal having the powers of two justices,

(vii) in all the provinces, where the defendant is charged with any of the offences mentioned in paragraphs (*a*) and (*f*) of section seven hundred and seventy-three, any two justices sitting together;

(*b*) "the common gaol or other place of confinement," in the case of any offender whose age at the time of his conviction does not, in the opinion of the magistrate, exceed sixteen years, includes any reformatory prison provided for the reception of juvenile offenders in the province in which the conviction referred to takes place, and to which by the law of that province the offender may be sent; and,

(*c*) "property" includes everything within the meaning of "valuable security," as defined by this Act.

2. In any case where the value of any valuable security is necessary to be determined it shall be reckoned in the manner prescribed by section four. 55-56 V., c. 29, s. 782; 58-59 V., c. 40, s. 1.

By paragraph (b) of sec. 29 of the *Interpretation Act*, R. S. C. chap. 146, it is provided that *The Summary Trials Act* shall be construed as a reference to Part XVI. of the Criminal Code.

From a careful perusal of section 771, it will be noted that the word "magistrate" in this part has a different meaning in the different provinces.

For instance in Ontario, Quebec and Manitoba, it includes "a Judge of a County Court if a justice of the peace," whereas in Nova Scotia and New Brunswick it means any Judge of a County Court, whether he is a justice of the peace or not.

It includes a commissioner of police only in Ontario, Quebec, Manitoba, Nova Scotia and New Brunswick, and not in the other provinces or territories.

Stipendiary magistrates are not mentioned *per se* as being included in Ontario, Quebec, Manitoba, Saskatchewan, Alberta, British Columbia or the Yukon, unless they can be classed under the head of "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," etc.

Stipendiary magistrates in these provinces certainly come within this category, yet why not mention them specifically in paragraph (i.) as they are in paragraphs (ii.) and (v.)?

There can be no doubt that stipendiary magistrates are included in all the provinces, otherwise sec. 777 would be inconsistent with and repugnant to secs. 771-773. In sec. 777, it will be noticed that stipendiary magistrates are specifically mentioned, and being given this extended jurisdiction by sec. 777, they are certainly also clothed with the limited powers given by sec. 773.

In British Columbia, Prince Edward Island, the Northwest Territories and Yukon Territory, magistrate includes "any two justices sitting together." And in Saskatchewan and Alberta, "any two justices." The words "sitting together" are omitted in paragraph iv., the draughtsman thinking no doubt these words were superfluous; perhaps they are, but they should either be omitted in all the paragraphs or included also in that relating to Saskatchewan and Alberta. Two justices cannot properly try a case unless they are sitting together, and yet in the absence of an express enactment to this effect in paragraph iv., a question as to jurisdiction might arise.

And in all the provinces where the defendant is charged with any of the offences mentioned in paragraphs (a) and (f) of section 773, a magistrate includes and means two justices sitting together.

Paragraph (a) of section 773 relates to theft, or obtaining money or property by false pretences, or unlawfully receiving stolen property, where the value of the property does not exceed $10.

And paragraph (f) relates to keeping a disorderly house under sec. 228.

By sub-section 2, valuable securities are to be determined by section 4 of the Code, which is as follows:—

4. Valuable security shall, where value is material, be deemed to be of value equal to that of the unsatisfied money, chattel personal, share, interest or deposit, for the securing or payment of which, or delivery or transfer or sale of which, or for the entitling or evidencing title to which, such valuable security is applicable or to that of such money or chattel personal, the payment or delivery of which is evidenced by such valuable security. 55-56 V., c. 29, s. 3.

Application of Part XVI.

772. Nothing in this Part shall affect the provisions of Part XVII., and this Part shall not extend to persons punishable under that Part so far as regards offences for which such persons may be punished thereunder. 55-56 V., c. 29, s. 808.

Part XVII. relates to the trial of juvenile offenders for indictable offences.

Jurisdiction.

773. Whenever any person is charged before a magistrate,—

(*a*) with theft, or obtaining money or property by false pretences, or unlawfully receiving stolen property, where the value of the property does not, in the judgment of the magistrate, exceed ten dollars; or,

(*b*) with attempt to commit theft; or,

(*c*) with unlawfully wounding or inflicting grievous bodily harm upon any other person, either with or without a weapon or instrument; or,

(*d*) with indecent assault upon a male person whose age does not, in the opinion of the magistrate, exceed fourteen years, when such assault is of a nature which cannot, in the opinion of the magistrate, be sufficiently punished by a summary conviction before him under any other Part; or with indecent assault upon a female, not amounting, in the magistrate's opinion, to an assault with intent to commit a rape; or,

(*e*) with assaulting or obstructing any public or peace officer engaged in the execution of his duty, or any person acting in aid of such officer; or,

(*f*) with keeping a disorderly house under section 228; or,

(*g*) with any offence under section two hundred and thirty-five;

the magistrate may, subject to the subsequent provisions of this Part, hear and determine the charge in a summary way. 55-56 V., c. 29, s. 783.

The "magistrate" referred to in this section includes and means magistrates as defined by section 771. And in all the provinces any two justices of the peace sitting together have jurisdiction to try offenders charged under paragraphs (a) and (f). And it is only in British Columbia, Prince Edward Island, Saskatchewan, Alberta, the Northwest Territories and the Yukon Territory

that two justices of the peace mean and include a magistrate having jurisdiction to try offences enumerated in the other paragraphs of this section.

The question has been raised as to whether the word "theft" includes "theft from the person," and it has been the subject of judicial inquiry and decision.

In *R.* v. *Coulin* (1897), 1 C. C. C. 41, BOYD, C., in his judgment, at page 45, says: "I favour the argument of Mr. DuVernet, that the word 'theft' as used in section 783 (now sec. 773), is of generic import, and is meant to cover the case of 'stealing from the person,' etc."

The definition of the word "theft," as used in sec. 793 (now 773), was not decisive of the case of *R.* v. *Coulin*, since the accused had been tried and convicted by the police magistrate of the city of Hamilton, having first consented to be so tried, so that the magistrate had complete jurisdiction in any event under the provisions of sec. 777. And see *R.* v. *Morgan*, *post*.

This brings us to a discussion of an important feature relating to the jurisdiction of the magistrates under this part, which might as well be disposed of here.

It is necessary to make it clear that all the magistrates who have jurisdiction to try the offences mentioned in sec. 773 have not the jurisdiction to try offences which may be tried by a Court of General Sessions of the Peace, as provided by section 777.

Police and stipendiary magistrates in any county or district or provisional county in Ontario, and police and stipendiary magistrates of cities and incorporated towns having a population of not less than 2,500, in all the provinces, and the recorder of any such city or town, if he exercises judicial functions, and the Judges of the Territorial Courts and police magistrates in the Yukon Territory, and district magistrates and Judges of Sessions in Quebec, have each and all of them power to try any indictable offences for which an offender may be tried at a Court of General Sessions, under the provisions of sec. 777.

The magistrate mentioned in section 773 is the magistrate meant and included and defined in section 771. And while in this class of magistrates are included those mentioned in sec. 777, yet many of those mentioned in 771 are excluded from general jurisdiction given by sec. 777. For instance, while a police or stipendiary magistrate appointed for a county or district in Nova Scotia, and whose jurisdiction does not extend to or include a city or town of under 2,500 inhabitants in his county or district, would have complete jurisdiction to hear and determine the

various offences enumerated in section 773, yet such a magistrate is not vested with the general authority given by sec. 777.

While any and all police magistrates in Manitoba, Saskatchewan, Alberta, and British Columbia have jurisdiction under sec. 773, the class of magistrates in these provinces who have jurisdiction under sec. 777 is limited to those police magistrates whose jurisdiction extends to cities and incorporated towns of not less than 2,500.

Or, to put it in another way, while a magistrate having jurisdiction in an incorporated town in the above provinces of say 2,000 people can exercise the power vested in him by section 773, this same magistrate cannot exercise the general authority given to magistrates under sec. 777, and his jurisdiction will be thus limited so long as the population of his town remains under 2,500.

Whenever any person is charged before a magistrate with any of the offences enumerated in sec. 773, the magistrate may, subject to the subsequent provisions of this part, hear and determine the charge in a summary way.

That is, a magistrate may hear and determine the charge; he is not compelled to do so, and, as we will notice presently, it is entirely optional with the magistrate whether or no he exercises the jurisdiction given him by this Part.

If he does undertake to hear and determine the charge, then the magistrate must so hear it after having fully complied with the subsequent provisions of this Part, that is, he must follow strictly the procedure set out in sec. 778, and subsequent sections relating to procedure.

A magistrate having a prisoner before him upon a charge of theft, may convict such prisoner of attempting to commit the theft. *R.* v. *Morgan* (1901), 5 C. C. C. 63.

The offence of theft from the person is sufficiently described in the conviction in popular language as "picking the pocket of a person." *Ibid.*

In *R.* v. *Crossen* (1899), 12 M. L. R. 571 and 3 C. C. C. 152, the writ of *certiorari* applied for was granted on the ground that the offence charged came within section 783 (e) of the Code and subsequent sections, and that the parties could not have been tried summarily except by compliance with sec. 786 (now sec. 778) of the Code, notwithstanding the provisions of sec. 144 (now sec. 169).

This decision is not understandable as reported. The report must be imperfect. Perhaps what did occur was that the justices

inflicted punishment beyond their jurisdiction on summary conviction. As to the power of two justices trying a case like this summarily without having to comply with the procedure laid down in sec. 778, there can be no possible doubt. Sec. 144 of the old Code, now sec. 169, expressly enacts that every one guilty of the offence is liable "on summary conviction before two justices of the peace to six months' imprisonment with hard labour, or to a fine of one hundred dollars." Surely this enactment clearly establishes that a person charged for an offence under sec. 144 (now 169), can be convicted by two justices on summary conviction.

If the justices in *R.* v. *Crossen* proceeded under the summary conviction clause (now Part XV.) and the punishment they awarded did not exceed the limit prescribed by sec. 144 (now 169), with all due deference, it is hard to comprehend the decision as reported.

The question as to the offence of resisting a peace officer in the execution of his duty being tried summarily by two justices of the peace, or by a police magistrate, by way of summary conviction under Part XV., has been the subject of two decisions in the Courts of British Columbia.

The first case is that of *R.* v. *Nelson* (1901), 4 C. C. C. 461, in which case the accused was tried by the police magistrate of Victoria by way of a summary conviction.

MR. JUSTICE DRAKE, at p. 463, says, speaking of the decision in *R.* v. *Crossen, supra:* "No reasons are given for this judgment, and although the Court giving this judgment is entitled to the greatest respect, yet until I have some reasons given for the views there adopted, I hesitate to follow it. To do so would be to ignore the language of sec. 144 (now 169) to which, in my opinion, full effect can be given."

In *R.* v. *Jack* (*No. 2*) (1902), 5 C. C. C. 304, MR. JUSTICE WALKEM held that "The summary convictions referred to in sec. 144 (now 169) means a summary conviction under Part LVIII. (now XV.) of the Code, and such the present conviction is." It was also held that that section, 144 (now 169), is not controlled by secs. 783 and 784 (now secs. 773 and 774).

The learned Judge also said, "It will thus be apparent that the punishment mentioned in sec. 788 (now sec. 781) differs materially from that mentioned in sec. 144 (now 169), although the offence is the same. Section 783 (now sec. 773) also contains the word 'assaulted,' which is absent in sec. 144 (now 169)."

The offence of "assaulting" a peace officer under sec. 296 of the Code is an indictable offence and punishable by two years' im-

prisonment, and can only be disposed of summarily by a magistrate acting under the powers vested in him by sec. 777. See also *R.* v. *Van Koolberger* (1909), 16 C. C. C. 228.

Section 773, the one that has most frequently engaged the attention of our Superior Courts by way of appeal, on *certiorari* and *habeas corpus* proceedings, is paragraph (f) "keeping a disorderly house under sec. 228."

In the original Code, and until the amendment of 1909 (8-9 Edw. VII. c. 9), this section read "with keeping, or being an inmate, or habitual frequenter of any disorderly house, house of ill-fame or bawdy house." As the paragraph now stands it is limited to "keeping a disorderly house under section 228."

Inmates and habitual frequenters of houses of ill-fame are dealt with by paragraphs (j) and (k) or sec. 238 of the Code. Vagrancy section.

A person convicted of keeping a disorderly house under sec. 228 has a right of appeal as provided by sec. 797, *post*.

See the notes to sec. 238 in Crankshaw, 3rd ed. (1910), at pp. 251-257. Also Tremeear, 2nd ed. (1908), pp. 170-178.

Disorderly House.

Section 228, as amended in 1909 (8-9 Edw. VII. c. 9), is as follows:—

228. Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house, common gaming-house, common betting-house, or opium joint, as hereinbefore defined.

2. Any one who appears, acts or behaves as master or mistress, or as the person having the care, government or management, of any disorderly house, shall be deemed to be the keeper thereof, and shall be liable to be prosecuted and punished as such, although in fact he or she is not the real owner or keeper thereof. 55-56 V., c. 29, s. 198.

A common bawdy house is defined by sec. 225 of the Code, a common gaming house by sec. 226, a common betting house by sec. 227, and an opium joint by sec. 227A. See the notes in Crankshaw and Tremeear to these several sections.

As to searching for women in houses of ill-fame, see sec. 640 of the Code.

Searching gaming houses, betting houses and lotteries, see sec. 641. Search and seizure in opium joints, see sec. 642A. Searching for vagrants in disorderly houses, see sec. 643.

As to *prima facie* evidence in prosecutions under sec. 228 for keeping a gaming house, or playing or looking on under sec. 229, see the provisions of secs. 985 and 986 of the Code.

Search for Women in Houses of Ill-fame.

640. Whenever there is reason to believe that any woman or girl mentioned in section two hundred and sixteen of this Act, has been inveigled or enticed to a house of ill-fame or assignation, then upon complaint thereof being made under oath by the parent, husband, master or guardian of such woman or girl, or in the event of such woman or girl having no known parent, husband, master or guardian in the place in which the offence is alleged to have been committed, by any other person, to any justice, or to a Judge of any Court authorized to issue warrants in cases of alleged offences against the criminal law, such justice or Judge may issue a warrant to enter, by day or night, such house of ill-fame or assignation, and if necessary use force for the purpose of effecting such entry whether by breaking open doors or otherwise, and to search for such woman or girl, and bring her and the person or persons in whose keeping and possession she is, before such justice or Judge, who may, on examination, order her to be delivered to her parent, husband, master or guardian, or to be discharged, as law and justice require. 55-56 V., c. 29, s. 574.

Searching Gaming and Betting Houses.

641. If the chief constable or deputy chief constable of any city, town, incorporated village or other municipality or district, organized or unorganized, or place, or other officer authorized to act in his absence, reports in writing to any of the commissioners of police or to the mayor or chief magistrate or to the police, stipendiary or district magistrate of such city, town, incorporated village or other municipality, district or place, or to any police, stipendiary or district magistrate having jurisdiction there, or if there be no such mayor, or chief magistrate, or police, stipendiary or district magistrate, to any justice having such jurisdiction, that there are good grounds for believing, and that he does believe that any house, room or place within the said city or town, incorporated village or other municipality, district or place, is kept or used as a common gaming or betting house, as defined in sections two hundred and twenty-six and two hundred and twenty-seven, or is used for the purpose of carrying on a lottery, or for the sale of lottery tickets, or for the purpose of conducting or carrying on any scheme, contrivance or operation for the purpose of determining the winners in any lottery contrary to the provisions of section two hundred and thirty-six, whether admission thereto is limited to those possessed of entrance keys or otherwise, such commissioner, mayor, chief magistrate, police, stipendiary or district magistrate or justice may, by order in writing, authorize the chief constable, deputy chief constable, or other officer as aforesaid, to enter any such house, room or place, with such constables as are deemed requisite by him, and if necessary to use force for the purpose of effecting such entry, whether by breaking open doors or otherwise, and to take into custody all persons who are found therein, and to seize, as the case may be, all tables and instruments of gaming or betting, and all moneys and securities for money, and all instruments or devices for the carrying on of such lottery, or of such scheme, contrivance or operation, and all lottery tickets, found in such house or premises, and to bring the same before the person issuing such order or any justice, to be by him dealt with according to law.

2. The chief constable, deputy chief constable or other officer making such entry, in obedience to any such order, may, with the assistance of one or more constables, search all parts of the house, room or place which he has so entered, where he suspects that tables or instruments of gaming or betting, or any instruments or devices for the carrying on of such

lottery or of such scheme, contrivance or operation, or any lottery tickets, are concealed, and all persons whom he finds in such house or premises, and seize all tables and instruments of gaming or betting, or any such instruments or devices or lottery tickets as aforesaid, which he so finds.

3. The person issuing such order or the justice before whom any person is taken by virtue of an order under this section, may direct any cards, dice, balls, counters, tables or other instruments of gaming or used in playing any game, or of betting, or any such instruments or devices for the carrying on of a lottery, or for the conducting or carrying on of any such scheme, contrivance or operation, or any such lottery tickets, so seized as aforesaid, to be forthwith destroyed, and any money or securities so seized shall be forfeited to the Crown for the public uses of Canada. 58-59 V., c. 40, s. 1.

"Chief Constable" and "Deputy Chief Constable" are defined by sub-secs. (6 and (9) of sec. 2 of the Code as follows:—

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

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

As to the powers of a deputy high constable proceeding under sec. 641, see *O'Neill* v. *Attorney-General of Canada* (1896), 1 C. C. C. 303, 26 S. C. R. 122.

Powers of Magistrate as to Examination of Persons Apprehended under Section 641.

642. The person issuing such order or the justice before whom any person who has been found in any house, room or place, entered in pursuance of any order under the last preceding section, is taken by virtue of such order, may require any such person to be examined on oath and to give evidence touching any unlawful gaming in such house, room or place, or touching any act done for the purpose of preventing, obstructing or delaying the entry into such house, room or place, or any part thereof, of any constable or officer authorized to make such entry; and any such person so required to be examined as a witness who refuses to make oath accordingly, or to answer any question, shall be subject to be dealt with in all respects as any person appearing as a witness before any justice or Court in obedience to a summons or subpœna and refusing without lawful cause or excuse to be sworn or to give evidence, may, by law, be dealt with.

2. Every person so required to be examined as a witness, who, upon such examination, makes true disclosure, to the best of his knowledge, of all things as to which he is examined, shall receive from the Judge, justice, magistrate, examiner or other judicial officer before whom such proceeding is had, a certificate in writing to that effect, and shall be freed from all criminal prosecutions and penal actions, and from all penalties, forfeitures and punishments to which he has become liable for anything done before that time in respect of any act of gaming regarding which he has been so examined, if such certificate states that such witness made a true disclosure in respect to all things as to which he was examined; and any action, indictment or proceeding pending or brought in

any Court against such witness in respect of any act of gaming regarding which he was so examined, shall be stayed, upon the production and proof of such certificate, and upon summary application to the Court in which such action, indictment or proceeding is pending, or any Judge thereof, or any Judge of any of the superior Courts of any province. R. S., c. 158, ss. 9 and 10.

Search and Seizure in Opium Joints.

"**642A** The provisions of sections 641 and 642 shall apply to searches in opium joints and to the seizure of devices, pipes or apparatus for preparing for smoking or inhaling, or for smoking or inhaling opium, and all couches, beds and chairs in such joints, and to the proceedings thereupon."

Search for Vagrants in Disorderly Houses.

643. Any stipendiary or police magistrate, mayor or warden, or any two justices, upon information before them made, that any person described in Part V. as a loose, idle or disorderly person, or vagrant, is or is reasonably suspected to be 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, every person found therein so suspected as aforesaid. 55-56 V., c. 29, s. 576.

Prima Facie Evidence of Gaming Houses.

985. When any cards, dice, balls, counters, tables or other instruments of gaming used in playing any unlawful game are found in any house, room or place suspected to be used as a common gaming house, and entered under a warrant or order issued under this Act, or about the person of any of those who are found therein, it shall be *prima facie* evidence, on the trial of a prosecution under section two hundred and twenty-eight or section two hundred and twenty-nine, that such house, room or place is used as a common gaming house, and that the persons found in the room or place where such instruments of gaming are found were playing therein, although no play was actually going on in the presence of the officer entering the same under such warrant or order, or in the presence of the persons by whom he is accompanied. 63-64 V., c. 46, s. 3.

986. In any prosecution under section two hundred and twenty-eight for keeping a common gaming house, or under section two hundred and twenty-nine for playing or looking on while any other person is playing in a common gaming house, it shall be *prima facie* evidence that a house, room or place is used as a common gaming house, and that the persons found therein were unlawfully playing therein,—

(*a*) if any constable or officer authorized to enter such house, room or place, is wilfully prevented from, or obstructed or delayed in entering the same or any part thereof; or,

(*b*) if any such house, room or place is found fitted or provided with any means or contrivance for unlawful gaming, or with any means or contrivance for concealing, removing or destroying any instruments of gaming. 63-64 V., c. 46, s. 3.

An omission has been made in not extending the provisions of secs. 985 and 986 to opium joints.

Further consideration of procedure in relation to offences pertaining to disorderly houses will be reserved till sec. 774 is under review.

Offences under sec. 235, mentioned in paragraph (g) of sec. 773, are in relation to betting and pool selling. Section 235 was repealed and a new section substituted in the amendments made to the Code in 1910; these are important and should be referred to.

The provisions of sec. 985 do not relieve the prosecutor from the onus of proof required to establish that the place was kept for gain and that persons resorted to the house for the purpose of playing. *R.* v. *See Wo* (1910), 16 C. C. C. 213.

Charges against Corporations.

"**773A** When the person to be so charged is a corporation, the summons may be served on the mayor or chief officer of such corporation, or upon the clerk or secretary or the like officer thereof, and may be in the same form as if the defendant were a natural person.

"2. The corporation in such case shall appear by attorney, who may on its behalf elect, and confess or deny the charge, and thereupon the case shall proceed as if the defendant were a natural person.

"3. If the corporation does not appear and confess or deny the charge, the magistrate may proceed in the absence of the defendant, as upon a preliminary investigation."

This amendment was made in 1909. Presumably it includes all corporations, municipal and otherwise, although it does not say so. A "corporation" is not defined in either the Interpretation Act, R. S. C. ch. 1, nor in sec. 2 of the Code. There is no doubt it includes a municipal corporation since it speaks of the "mayor" of such corporation. All doubt would have been spared if the words "municipal or otherwise" had followed the word "corporation" in the first line. Evidently the use of the words "chief officer" and "secretary" have been thought sufficient to identify incorporations other than municipal, and pending amplification by future amendment we will in the meantime read the section as including all corporations since that may be accepted as a reasonable intendment.

Absolute Jurisdiction of Magistrate.

Disorderly House.

"**774.** The jurisdiction of the magistrate is absolute in the case of any person charged with keeping a disorderly house, or with being an inmate or habitual frequenter of a common bawdy-house, and does not depend on the consent of the person charged to be tried by such magistrate, nor shall such person be asked if he consents to be so tried.

"2. The provisions of this Part do not affect any absolute summary jurisdiction given to justices by any other Part of this Act."

The disorderly house referred to is that mentioned in sec. 228, and includes bawdy, common gaming and common betting houses, or opium joints, as already referred to.

This section gives city magistrates a very extensive jurisdiction since they can try the offence of keeping a disorderly house without the consent of the person charged. A disorderly house is an indictable offence punishable with one year's imprisonment. Under this section, therefore, a magistrate, if he finds the person charged, guilty, can (a) imprison him, or her, for a period of one year, or, (b) acting under sec. 1035 (by the provisions of which a fine may be imposed either in addition to, or in lieu of any punishment otherwise authorized), he may fine only, with imprisonment in default of payment of the fine.

A person may also be charged as a vagrant with being a keeper or inmate of a disorderly house, bawdy house or house of ill-fame, or house for the resort of prostitutes under paragraph (j) of sec. 238, and as a vagrant for being in the habit of frequenting such houses under paragraph (k) of sec. 238.

Everyone charged as a vagrant under sec. 238 for these offences may be tried before one or more justices of the peace on summary conviction under Part XV. of the Code. See sec. 707.

The punishment prescribed by sec. 239 for anyone convicted on summary conviction for these offences is limited to a fine not exceeding $50, or to imprisonment, with or without hard labour, for any term not exceeding six months, or to both.

Whereas if a person is charged under sec. 773 (f) with keeping a disorderly house under sec. 228 and tried before a magistrate under sec. 771, the punishment prescribed by sec. 781 is imprisonment with or without hard labour for any term not exceeding six months, or a fine not exceeding, with costs in the case, $100, or to both fine and imprisonment.

And yet there is the further punishment which may be given by a magistrate sitting under sec. 777, and that is the imprisonment for one year prescribed by sec. 238, or a fine (which may go as high as $1,000) in addition to or in lieu of imprisonment as provided for by sec. 1035.

Therefore if a person is charged before a magistrate with keeping a disorderly house and the proceedings are taken under sec. 777, the magistrate has not only absolute jurisdiction to try the case without the consent of the person charged, but he has a choice of punishment which he may mete out. He is not limited to the fine of $100, or punishment by six months' imprisonment, as provided by sec. 781, but he may impose a year's imprisonment as

provided by sec. 228, or in addition, or in lieu thereof, a fine as provided by sec. 1035.

This has been explained minutely and at length since a city magistrate, without experience and who has not looked thoroughly into the matter, may imagine that he is governed as to punishment entirely by sec. 781, and can only fine $100, or give six months' imprisonment, and is very apt to overlook the alternative punishment prescribed by sec. 228.

The "disorderly house" mentioned in paragraph (j) of sec. 238 is *ejusdem generis*, a bawdy house, or house of ill-fame, and does not refer to a common gaming house, or betting house or opium joint referred to in sec. 228. See *R.* v. *France* and *R.* v. *Lee Guey, post.*

It is to be noticed that paragraph (f) of sec. 773 refers only to a disorderly house under sec. 228, and does not include an inmate, or habitual frequenter of a common bawdy house, so that the jurisdiction given to a magistrate to try these latter offences summarily is given alone by sec. 774, whereas, if it can be so expressed, he is vested with a double jurisdiction to try a charge of keeping a disorderly house by both secs. 773 and 774. Previous to the amendment of 1909 inmates and habitual frequenters of bawdy houses were included in paragraph (f) of sec. 773.

Upon an examination of the information a magistrate can readily ascertain as to whether the charge of keeping a disorderly house, to wit: a bawdy house, is laid under sec. 238 or 228. If under the former, the charge should always conclude with the words "being thereby a loose, idle and disorderly person and a vagrant."

As it is only under sec. 238 that inmates and frequenters of bawdy houses can be dealt with, the charge in these informations, like all other charges under sec. 238, should conclude with these words. As to habitual frequenters, see *R.* v. *Lamotte* (1908), 15 C. C. C. 62.

Where a woman was convicted before the stipendiary magistrate of Halifax of being an inmate of a house of ill-fame in the City of Halifax and sentenced to imprisonment with hard labour for one day and to pay the sum of $60, and in default of payment to a further imprisonment for six months unless the said sum be sooner paid, on *habeas corpus* proceedings to test the legality of her imprisonment, MR. JUSTICE RITCHIE held that "the jurisdiction of the magistrate to try the offence under Part XV. (now XVI.) of the Code and inflict the punishment he has awarded is quite clear, and no ground has been shewn for the discharge of the prisoner."

Counsel for the prisoner contended that the punishment awarded was in excess of that authorized by the Code, which is limited, so far as relates to the offence charged, to that prescribed by sec. 208 (now sec. 209). *R.* v. *Roberts* (1901), 4 C. C. C. 253. See also *R.* v. *Earley* (*No. 3*) (1906), 14 C. C. C. 10.

Although this judgment was sound at the time it was delivered, it cannot govern now since the amendment of 1909 has cut out the words "or being an inmate or habitual frequenter of any disorderly house, &c." And the only punishment that can now be inflicted for this offence, as already pointed out, is that prescribed by sec. 239 of the Code, viz.: $50 and costs or six months.

The change made in paragraph (j) of sec. 773 by the amendment of 1909 was, no doubt, occasioned by the judgment of the Court of Appeal for Ontario in *R.* v. *Lee Guey* (1907), 13 C. C. C. 80, which followed the reasoning of the majority decision of the Court of Appeal in Quebec in *R.* v. *France* (1898), 1 C. C. C. 321.

In *R.* v. *Lee Guey* the Court held that the meaning of the words "disorderly house," as used in sec. 238 (j), as well as in sec. 773, is governed by the rule "*noscitur a sociis*," and are therefore restricted to houses of the same class as houses of ill-fame or bawdy houses. This is the meaning given to the words "disorderly house" in sec. 238 (j), the vagrancy clause.

At page 83 in his judgment, OSLER, J.A., says: "The case appears to me to be a very plain one for the application to secs. 773 and 774 of the rules *ejusdem generis*, or its congener, the rule as to the construction of associated words *noscitur a sociis*, and to call for the limitation of the term 'disorderly house' to one of the class or character of those specifically mentioned in the words which immediately follow it, viz., houses of ill-fame or bawdy houses."

In *Ex parte John Cook* (1895), 3 C. C. C. 72, MR. JUSTICE DRAKE of the Supreme Court of B. C. held that a police magistrate had jurisdiction to deal with gaming houses as falling within the category of disorderly houses as defined by sec. 198 (now 228).

The learned Judge also held that the jurisdiction of the magistrate was optional, the language used being that he *may* determine the charge in a summary way. He says: "If he concludes to exercise the jurisdiction, the person charged cannot object, and the Act further provides that if, after having commenced the investigation under Part LV. (now XV.) he may even then—sec. 791 (now sec. 784)—at the close of the evidence for the prosecution send up the case for trial. Therefore the magistrate cannot be compelled by mandamus to hear and determine the present

charge. Where a discretion is vested in a subordinate officer or tribunal, the Court cannot compel a particular course to be adopted; the exercise of the discretion by the officer or tribunal is a complete justification."

The above decision, so far as it holds that "a gaming house comes within the meaning of a 'disorderly house' in sec. 783 (now 773)," is in direct conflict with *R.* v. *France* and *R.* v. *Lee Guey*, *supra*. And see *R.* v. *Ah Sam* (1907), 12 C. C. C. 538.

In *R.* v. *Flynn* (1905), 9 C. C. C. 550, MR. JUSTICE CRAIG of the Yukon Court disapproved of *R.* v. *France* and concurred in the dissenting judgment of BOSSE, J.

It is now all settled by the amendment of 1909, and jurisdiction is clearly given to magistrates to hear and determine all charges which may be brought for keeping any kind of disorderly house under sec. 228.

In *R.* v. *Sarah Smith* (1905), 9 C. C. C. 338, RUSSELL, J., reserved the following point for the consideration of the Supreme Court of Nova Scotia:—

"Does either sec. 207 (j) (now sec. 238) or 783 (f) (now 773) of the Criminal Code repeal sec. 198 (now 228) of the Code? If so, the defendant will be entitled to have the conviction against her quashed."

The prisoner was indicted under secs. 195 (now 225) and 198 (now 228) with keeping a disorderly house, to wit, a common bawdy house in the City of Halifax. The prisoner was convicted, but not sentenced, pending the decision of the full Court.

The Court held that sec. 783 (f) (now 773) is pure procedure and enables the offence to be disposed of by a summary trial when the defendant is brought before a magistrate charged with the offence. . . . "The object of Parliament was plain, viz., to enable the prosecutor to proceed either by indictment, or by summary conviction, and the punishment is adapted to the tribunal which in either case is called on to deal with the offender. It has dealt with the subject of assault in the same way, and there are alternative penalties and tribunals." The conviction was affirmed.

The amendment to sec. 773 (f) in 1909 disposes of the decision of WEATHERBE, J., in *R.* v. *Keeping* (1901), 4 C. C. C. 494, which, so far as it relates to the question of jurisdiction, is hard to understand.

A conviction made by a magistrate in respect to a charge under Part XVI. of the Code of an indictable offence which the magistrate has absolute jurisdiction to try without the consent of the

accused, is subject to be inquired into upon *habeas corpus* and *certiorari* proceedings. And this, notwithstanding the provisions of sec. 798 (now 791), which declares that "Every conviction under this Part shall have the same effect as a conviction upon indictment for the same offence." *R.* v. *St. Clair* (1900), 3 C. C. C. 551.

A conviction upon a charge of keeping, or being an inmate of a bawdy house, should not be made upon evidence of general reputation only. The prosecution should be required to produce proof of acts, or conduct, from which the character of the house may be inferred. The conduct of the women when arrested and what they said may properly be considered in support of the charge. *Ibid.*

On a charge of being an inmate of a bawdy house, the evidence given by the witnesses on the hearing of the charge against the keeper may, with the consent of the accused, or her counsel, be read as evidence in the case. *Ibid.*

Where a person was convicted before a magistrate of being an inmate of a bawdy house and was fined $90 and $6.25 costs, or in default six months' imprisonment, the conviction omitted the words "being charged before me;" on a motion to quash the conviction, it was held that the conviction was made under Part LV. (now XVI.) as upon a summary trial, and the motion was dismissed. *R.* v. *Ames* (1903), 10 C. C. C. 52. By the amendment of 1909, *supra*, the fine is now limited to $50, under sec. 238, for the offence of being an inmate, &c.

Sub-section (2) of sec. 774 provides that the provisions of this Part do not affect any absolute summary jurisdiction given to justices by any other part of this Act.

This means that the fact of a magistrate having absolute jurisdiction to try the offences enumerated in the Part does not interfere with his trying the same offences by way of summary conviction under Part XV. if such offences can be so tried.

For instance, he has jurisdiction under Part XVI. to try the offences enumerated in sec. 238, vagrancy, and this jurisdiction is not interfered with by reason of his having absolute jurisdiction to try some of the offences enumerated in that section of the Code under the powers given him in this Part.

Seafaring Persons.

775. The jurisdiction of the magistrate is absolute in the case of any person who, being a seafaring person and only transiently in Canada, and having no permanent domicile therein, is charged, either within the city of Quebec as limited for the purpose of the police ordinance, or within the city of Montreal as so limited, or in any other seaport city or town in

Canada where there is such magistrate, with the commission therein of any of the offences in this Part previously mentioned, and also in the case of any other person charged with any such offence on the complaint of any such seafaring person whose testimony is essential to the proof of the offence.

2. Such jurisdiction does not depend on the consent of any such person to be tried by the magistrate, nor shall such person be asked whether he consents to be so tried. 55-56 V., c. 29, s. 784.

Absolute Jurisdiction in Certain Provinces.

776. The jurisdiction of the magistrate in the provinces of British Columbia, Prince Edward Island, Saskatchewan and Alberta, and in the Northwest Territories and Yukon Territory, under this Part, is absolute without the consent of the party charged, except in cases coming within the provisions of section seven hundred and seventy-seven, and except in cases under sections seven hundred and eighty-two and seven hundred and eighty-three, where the person charged is not a person who under section seven hundred and seventy-five, can be tried summarily without his consent. 63-64 V., c. 46, s. 3.

The exceptions to the absolute jurisdiction given by this section are as follows:—

Section 777. The cases which come within the provisions of sec. 777 are all offences for which a person may be tried at a Court of General Sessions of the Peace.

The only offences that cannot be tried at a Court of General Sessions of the Peace are those enumerated in sec. 583 of the Code, which, see *post*.

Cases coming under secs. 782 and 783 are theft, false pretences, receiving stolen property, where the value of the property stolen, obtained or received exceeds ten dollars.

Section 783 provides as to consent and trial. And the exceptions under these sections, 782, and 783, only apply where the person charged is not a person who, under sec. 775, can be tried summarily without his consent, viz., a seafaring person.

The provisions of this section, therefore, mean that the jurisdiction of magistrates in the provinces mentioned is absolute without the consent of the party charged, to hear and determine any charges for the offences enumerated in sec. 773. In all the other provinces the magistrates have jurisdiction, "subject to the provisions of this part," viz., they must first have the consent of the party charged to try the offences enumerated in sec. 773, save as provided by sec. 774, relating to disorderly houses. Why this extended jurisdiction is given to magistrates in these several provinces, to the exclusion of the same class of magistrates in other provinces, one is at a loss to understand. There are unorganized territories in all the other provinces as well as in the provinces mentioned, so that cannot be the reason.

Where two men were convicted by two justices of the peace in British Columbia for stealing a coat of the value of less than ten dollars, it was held that the defendants had a right of appeal from the conviction, notwithstanding the fact that under sec. 784 (3) (now sec. 776) the jurisdiction of the justices was absolute in B. C. in cases of this kind. *R.* v. *Wirth*, 1 C. C. C. 231. And see *R.* v. *Jack* (*No. 2*) (1902), 5 C. C. C. 304.

Magistrates given Jurisdiction of General Sessions of the Peace.

777. "If any person is charged in the province of Ontario before a police magistrate or before a stipendiary magistrate in any county, district or provisional county in such province, with having committed any offence for which he may be tried at a Court of General Sessions of the Peace, or if any person is committed to a gaol in the county, district or provisional county, under the warrant of any justice, for trial on a charge of being guilty of any such offence, such person may, with his own consent, be tried before such magistrate, and may, if found guilty, be sentenced by the magistrate to the same punishment as he would have been liable to if he had been tried before the Court of General Sessions of the Peace.

"2. This section shall apply also to district magistrates and Judges of the sessions in the province of Quebec, and to police and stipendiary magistrates of cities and incorporated towns having a population of not less than 2,500 according to the last decennial or other census taken under the authority of an Act of the Parliament of Canada, and to the recorder of any such city or town if he exercises judicial functions, and to Judges of the Territorial Court and police magistrates in the Yukon Territory.

"3. Sections seven hundred and eighty and seven hundred and eighty-one do not extend or apply to cases tried under this section. 63-64 V., c. 46, s. 3.

"4. Where an offence charged is punishable with imprisonment for a period exceeding five years the Attorney-General may require that the charge be tried by a jury, and may so require notwithstanding that the person charged has consented to be tried by a magistrate under this section, and thereupon the magistrate shall have no jurisdiction to try or sentence such person under this section.

"5. The jurisdiction of the magistrate under this section in cities having a population of not less than 25,000 according to the last decennial or other census taken under the authority of an Act of the Parliament of Canada, is absolute, and does not depend upon the consent of the accused, in the case of any person charged with theft, or with obtaining property by false pretence, or with unlawfully receiving stolen property when the value of the property alleged to have been stolen, obtained or received does not in the judgment of the magistrate, exceed ten dollars."

The above is sec. 777 as the same was amended and added to in 1909. 8-9 Edw. VII. c. 9, s. 2.

In *Ontario* police and stipendiary magistrates in any county, district or provisional county are given jurisdiction under this section.

In *Quebec* district magistrates and Judges of sessions, in addition to police and stipendiary magistrates of cities and incorporated towns having a population of not less than 2,500, and the recorder of any such city or town, have jurisdiction under this section.

In all the other provinces the jurisdiction is limited to police and stipendiary magistrates of cities and incorporated towns having a population of not less than 2,500, and the recorder of any such city or town if he exercises judicial functions.

The Judges of the Territorial Courts and police magistrates in the Yukon Territory have likewise jurisdiction under this section.

The reason a more numerous class of magistrates in Ontario are clothed with this extended jurisdiction than in the other provinces is, that the class of magistrates mentioned had enjoyed this jurisdiction in Ontario long prior to the passing of the Criminal Code.

The first sub-section of sec. 777 is practically sec. 785 of the original Code of 1892, and this section, 785, was a re-enactment of sec. 7 of ch. 176 of the Revised Statutes of Canada (1887).

Section 785 of the original Code was amended in 1900 by enacting sub-sec. 2 of the revised Code, viz., applying this section "to police and stipendiary magistrates of cities and incorporated towns in every other part of Canada and to recorders where they exercise judicial functions."

This was wise and beneficial legislation and much to be commended. As amended in 1909 the provision is narrowed by limiting the class of magistrates to those "in cities and incorporated towns having a population of not less than 2,500." Magistrates in cities and towns of a less population, and who come within sec. 771, nevertheless can exercise their functions on the hearing and determination of the offences mentioned and set out in sec. 773.

One has to confess that the draughtsmanship of sub-sec. 2 of sec. 777, as amended in 1909, is not as perfect as it ought to be. A "period" after Quebec, in the second line, might make it read more clearly. By a reference to the context, and having knowledge of the repealed sub-sec. 2, it can no doubt be implied that the "cities and incorporated towns" mentioned, refer to such cities and towns in all the other provinces as well as in Quebec. It seems doubtful, however, whether the jurisdiction is extended to all magistrates in all cities. As expressed and punctuated, it seems as if it was only meant to cover cities "having a population of not less than 2,500."

If the comma had been placed after the word "cities," instead of after the word "towns," it would be perfectly clear. As at present constructed there is much room for question. Perhaps this section will be amended again at the next session of Parliament, and these defects remedied.

It is hopefully suggested that if this section, 777, is again amended, it will be re-cast and simplified, and be constructed to meet the present conditions of the Dominion. There is surely no reason for any reference to the jurisdiction of "the Court of General Sessions of the Peace." This Court does not exist in any of the provinces outside of Ontario and Quebec. Why not state specifically that certain magistrates, enumerating them, shall, with the consent of the accused, or person charged, have jurisdiction to hear and determine all offences save and except those mentioned and set out in sec. 583?

Where is the necessity of sec. 773, since the amendment of sec. 777 in 1900? Why not mould these two sections into one comprehensive enactment, and if it is still desired to differentiate the class of magistrates to whom this extended jurisdiction shall be given, this can readily be done by exception, or proviso.

Sub-section 3 of sec. 777 provides that secs. 780 and 781 do not extend or apply to cases tried under this section. Section 780 prescribes the punishment on conviction for offences under paragraphs (a) and (b) of sec. 773. And sec. 781 prescribes the punishment on conviction for offences summarily tried under paragraphs (c), (d), (e), (f) and (g) of sec. 773.

The meaning, therefore, of sub-sec. 3 of sec. 777 is, that a magistrate hearing and determining a case under the provisions and jurisdiction conferred by sec. 777, upon conviction, is not restricted to the punishment fixed by secs. 780 and 781, but may award the same and like penalties as if the person convicted had been found guilty upon an indictment. See *R.* v. *Archibald* (1898), 4 C. C. C. 159. And see the well considered and comprehensive judgment of GRAHAM, E.J., in *R.* v. *McLeod* (1906), 12 C. C. C. 73.

ATTORNEY-GENERAL MAY INTERVENE.

The provisions of sub-secs. 4 and 5 are new, being added in 1909.

By the provisions of sub-sec. 4, where an offence charged is punishable with imprisonment exceeding five years, the Attorney-General may require that the charge be tried by a jury, notwithstanding that the person charged has consented to be tried by the magistrate under sec. 777.

When, therefore, the Attorney-General signifies his wishes the jurisdiction of the magistrate is ousted, and he can only proceed as upon a preliminary inquiry.

Absolute Jurisdiction in Cities of 25,000.

By sub-sec. 5 the jurisdiction exercised under sec. 777 in cities of not less than 25,000 population is absolute and does not depend upon the consent of the accused in charges of theft, or obtaining property by false pretences, or receiving stolen property where the value of the property alleged to have been stolen, obtained or received does not, in the judgment of the magistrate, exceed ten dollars.

This sub-section obviates the necessity of putting the accused to his election, and is a saving of both time and expense in dealing with trifling offences. The only comment one wishes to make is, that the value should have been raised far above ten dollars. It is to be noted the value item is "in the judgment of the magistrate."

In accordance with the decision of Boyd, C., in *R.* v. *Coulin* (1897), 1 C. C. C. 41, "theft," as mentioned in sub-sec. 5, is meant to cover "theft from the person." And a person charged with theft may be convicted of an attempt to commit the theft. See *R.* v. *Morgan* (1901), 5 C. C. C. 63.

Jurisdiction of General and Quarter Sessions.

In order that the magistrates mentioned in sec. 777 may properly know what class of crimes are exempted from their jurisdiction, attention is called to the provisions of secs. 582 and 583 of the Code. From a perusal of these sections it will be seen that they have the like power with Courts of General or Quarter Sessions of the Peace to try any indictable offences except those mentioned and set out in sec. 583.

These sections are as follows:

582. 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.

583. No Court mentioned in the last preceding section has power to try any offence under sections,—

(a) seventy-four, treason; seventy-six, accessories after the fact to treason; seventy-seven, seventy-eight, and seventy-nine, treasonable offences; eighty, assaults on the King; eighty-one, inciting to mutiny; eighty-five, unlawfully obtaining and communicating official information; eighty-six, communicating information acquired in office; or,

(b) one hundred and twenty-nine, administering, taking or procuring the taking of oaths to commit certain crimes; one hundred and thirty, administering, taking or procuring the taking of other unlawful oaths; one hundred and thirty-four, seditious offences; one hundred and thirty-five, libels on foreign sovereigns; one hundred and thirty-six, spreading false news; or,

(*c*) one hundred and thirty-seven to one hundred and forty inclusive, piracy; or,

(*d*) One hundred and fifty-six, judicial, etc., corruption; one hundred and fifty-seven, corruption of officers employed in prosecuting offenders; one hundred and fifty-eight, frauds upon the Government; one hundred and sixty, breach of trust by a public officer; one hundred and sixty-one, municipal corruption; one hundred and sixty-two (*a*), selling offices; or,

(*e*) two hundred and sixty-three, murder; two hundred and sixty-four, attempt to murder; two hundred and sixty-five, threat to murder; two hundred and sixty-six, conspiracy to murder; two hundred and sixty-seven, accessory after the fact to murder; two hundred and sixty-eight, manslaughter; or,

(*f*) two hundred and ninety-nine, rape; three hundred, attempt to commit rape; or,

(*g*) three hundred and seventeen to three hundred and thirty-four, defamatory libel; or,

(*h*) four hundred and ninety-eight, combination in restraint of trade; or,

(*i*) conspiring or attempting to commit, or being accessory after the fact to any of the offences in this section before mentioned; or,

(*j*) any indictment for bribery or undue influence, personation or other corrupt practice under the Dominion Elections Act.

In *Re Vancino* (*No. 2*) (1904), 8 C. C. C. 228, 34 S. C. R. 621, it was held by the Supreme Court of Canada that although there are no "Courts of General Sessions" except in Ontario, the 1900 amendment of the Code, secs. 785 (now 777), extending its provisions to cities and towns of other provinces is not therefore imperative, but gives to a magistrate in any other province the jurisdiction given in Ontario by sec. 785 (now 777).

"Where once the Parliament of Canada has given jurisdiction to a provincial court, whether the superior, or inferior, or to a judicial officer, to perform judicial functions in the adjudicating of matters over which the Parliament of Canada has exclusive jurisdiction, no provincial legislation, in our opinion, is necessary in order to enable effect to be given to such parliamentary enactment." *Ibid.* SEDGEWICK, J., at p. 233.

Where a person has consented to be tried summarily by a police magistrate for an offence triable by him under sec. 777, and has been acquitted, the magistrate has no right to bind the prosecutor over to prefer an indictment as provided by sec. 688 of the Code which relates to preliminary inquiry. *R.* v. *Burns* (1901), 4 C. C. C. 330.

Section 777 is wide enough to enable a police magistrate proceeding thereunder to find the accused, who is being summarily tried with his own consent, guilty of whatever offence he might have been convicted of, and amenable to whatever punishment he would have been liable to if he had been tried at the general sessions. *R.* v. *Morgan* (*No. 2*) (1901), 5 C. C. C. 272.

A police magistrate of a city or town has power to impose the same punishment for common assault as could be imposed upon a person convicted on indictment. *R.* v. *Ridehaugh* (1903), 7 C. C. C. 340.

Where a person is accused of inflicting grievous bodily harm, on a summary trial the magistrate may convict him of common assault only, the same as if he had been tried by a jury upon an indictment. And the magistrate may inflict the maximum punishment for common assault prescribed by sec. 291 of the Code, viz., one year's imprisonment or a fine of $100. *R.* v. *Coolen* (1903), 7 C. C. C. 522; and see *R.* v. *Frank Coolen* (1904), 8 C. C. C. 157; *R.* v. *Cameron* (1901), 4 C. C. C. 385, and *R.* v. *Hawes* (1902), 6 C. C. C. 238.

Where the accused consents to summary trial before a city magistrate upon a charge of theft and the value of the goods stolen exceeds ten dollars, and the accused pleads "not guilty," the magistrate is not bound to remand him under sec. 790 (now 783), but has jurisdiction under sec. 785 (now 777) to try and determine the charge and impose the same punishment as might be imposed by a Court of General Sessions in Ontario. *R.* v. *Bowers* (*No. 2*) (1903), 6 C. C. C. 264.

A police magistrate for the county of Westmoreland, N.B., is not a police magistrate having jurisdiction in the City of Moncton, which is situate in that county, and he was held not to be a city magistrate with jurisdiction to try and determine an offence within the meaning of sec. 785 (now 777). *R.* v. *Benner* (1902), 8 C. C. C. 398.

Where in a summary trial by consent before a city magistrate for common assault the accused had been sentenced to three months' imprisonment without hard labour being mentioned in the minute of adjudication, and the conviction included hard labour, as did also the warrant of commitment, the prisoner was discharged on *habeas corpus* on the ground of the variance in the minute of adjudication and the conviction and commitment. *Ex parte Carmichael* (1903), 8 C. C. C. 19.

The Police Court of a city exercising the powers conferred upon it by sec. 785 (now 777) of the Code is not a Court of Record within the meaning of the Ontario *Habeas Corpus Act*. *R.* v. *Gibson* (1898), 2 C. C. C. 302, and see *R.* v. *St. Clair* (1900), 3 C. C. C. 551.

The trial of an offender under sec. 777 must be subject to the same rules of law as a trial at the General Sessions of the Peace. And the same results follow on the conviction of the accused as

"he may be sentenced by the magistrate to the same punishment as he would be liable to if he had been tried before the Court of General Sessions of the Peace." So when tried by a Magistrate "on a charge of being guilty of any such offence," it must mean that the magistrate may find the accused guilty of "any such offence" as is included in the charge. McMAHON, J., p. 388. *R.* v. *Cameron* (1901), 4 C. C. C. 385.

A prisoner's right to *habeas corpus* in Manitoba depends on the *Habeas Corpus* Act, 31 ch. II., c. 2, s. 2, and the writ cannot be taken out on behalf of a prisoner under sentence on a conviction by a police magistrate acting under sec. 777 of the Code, unless an absolute want of jurisdiction is shewn. *R.* v. *Sproule* (1886), 12 S. C. R. 141, followed. *R.* v. *McEwan* (1908), 17 M. L. R. 470, 7 W. L. R. 365, 13 C. C. C. 346. *Per contra*, see *R.* v. *St. Clair*, *supra*; *R.* v. *Pepper* (1909), 15 C. C. C. 314.

Before 1895 two justices of the peace in the North-West Territories had jurisdiction to try offences under paragraphs (a) and (f) of sec. 783 (now 773) of the Code, and there was no appeal from their decision. The extension in 1895 of this jurisdiction to two justices of the peace in any province, subject to appeal where the trial was had before them by virtue of the new enabling clause, did not extend the right of appeal to the North-West Territories. The Alberta Act, since it has continued the law theretofore in force, made no change in this respect. *R.* v. *Pisoni* and *R.* v. *Taylor*, 6 Terr. L. R. 238, 4 W. L. R. 527.

Where a person is charged with perjury alleged to have been committed in a prior trial before the same magistrate, the magistrate should not in the trial for perjury consider his recollection of the demeanour of the accused and other witnesses at the former trial. His duty was to be guided by the evidence before him and by that alone. *R.* v. *Legros* (1908), 14 C. C. C. 162.

Upon a conviction for perjury there is no authority in the Code to impose a fine in lieu of imprisonment. By sec. 174 of the Code the offence of perjury is punishable by imprisonment for a term not exceeding 14 years. *Ibid.* By sub-sec. 2 of sec. 1035 of the Code it is provided that any person convicted of an indictable offence punishable with imprisonment for more than five years may be fined in addition, but not in lieu of any punishment therein ordered.

By the same section on conviction of indictable offences punishable with imprisonment for five years or less, the accused may be fined in addition to, or in lieu of, any punishment therein directed.

A police magistrate or stipendiary magistrate may summarily try a prisoner with his consent by virtue of secs. 771 (a) and 777 of the Code for an offence committed outside his territorial jurisdiction, but in the same province. "I construe secs. 554 (now 653), 557 (now 665-6), and 785 (now 777), taken together to mean that: 'When an offence is committed within the limits of a province and presence, however transitory, of the accused in any part of that province will justify the exercise of as full and complete jurisdiction as if the offence was committed when the offender is apprehended, leaving to the magistrate a discretionary power to send the prisoner for further inquiry, or for trial before the justice having jurisdiction over the locus where the offence was committed.'" FITZPATRICK, C.J., at p. 280. *Re Seeley* (1908), 14 C. C. C. 270, 41 S. C. R. 5; and see *R.* v. *McEwen, supra.*

Where a magistrate holding a summary trial convicted the accused of an offence punishable under a statute which had been repealed, the magistrate not knowing of the repeal, he may afterwards reserve a case for the Court of Appeal under sec. 1014 of the Code, and the conviction will be quashed. *R.* v. *Corrigan* (1909), 15 C. C. C. 310, and see *Mitchell* v. *Brown* (1858), 1 E. & E. 267.

It appears to me that when the representative of the Crown, in the exercise of his judgment and discretion, declines to support a conviction on its face open to such an objection as exists in the present case, this Court ought not to be required to search for reasons to support it. OSLER, J.A., *Ibid,* at p, 311.

The Court will take judicial notice of census returns taken under a statute of Canada and published by the authority of Parliament. Therefore the Court will take judicial notice of such a notorious fact as that the population of the City of Vancouver was at the last Dominion census greater than 2,500. . . . The doctrine of judicial notice extends to all departments of the law, and is not confined to that of evidence. GREGORY, J., p. 194. *R.* v. *Rahmat Ali* (*No. 1*) (1910), 16 C. C. C. 193.

PROCEEDING ON ARRAIGNMENT.

778. Whenever the magistrate, before whom any person is charged as aforesaid, proposes to dispose of the case summarily under the provisions of this Part, such magistrate, after ascertaining the nature and extent of the charge, but before the formal examination of the witnesses for the prosecution, and before calling on the person charged for any statement which he wishes to make, shall state to such person the substance of the charge against him.

2. If the charge is not one that can be tried summarily without the consent of the accused the magistrate shall state to him,—

(*a*) that he is charged with the offence, describing it;

(*b*) that he has the option to be forthwith tried by the magistrate without the intervention of a jury, or to remain in custody or under bail, as the Court decides, to be tried in the ordinary way by the Court having criminal jurisdiction.

3. If the person charged consents to the charge being summarily tried and determined as aforesaid, or if the power of the magistrate to try it does not depend on the consent of the accused, the magistrate shall reduce the charge to writing and read the same to such person, and shall then ask him whether he is guilty or not of such charge.

4. If the person charged confesses the charge the magistrate shall then proceed to pass such sentence upon him as by law may be passed in respect to such offence, subject to the provisions of this Act; but if the person charged says that he is not guilty, the magistrate shall then examine the witnesses for the prosecution, and when the examination has been completed, the magistrate shall inquire of the person charged whether he has any defence to make to such charge, and if he states that he has a defence the magistrate shall hear such defence, and shall then proceed to dispose of the case summarily. 55-56 V., c. 29, s. 786.

It is to be borne in mind that it is only where the magistrate "proposes to dispose of the case summarily under the provisions of this part" that he is required to put the accused to his election. If the magistrate does not propose to dispose of the case summarily then he will proceed with the hearing as upon a preliminary inquiry under Part XIV. of the Code.

The magistrate ascertains the nature and extent of the charge from the reading of the information, or complaint. The magistrate is to state to "such person the substance of the charge against him." This is usually done by reading the information to the accused.

Election of the Accused.

If the charge is not one that can be tried summarily without the consent of the accused, the magistrate should state to him—

(a) That he is charged with the offence, describing it. This can be done by reading the charge from the information.

(b) That he has the option to be forthwith tried by the magistrate without the intervention of a jury, or to remain in custody or under bail as the Court decides, to be tried in the ordinary way by the Court having criminal jurisdiction.

It is only where the charge is *not* one that can be tried summarily without the consent of the accused that the magistrate is required to follow this procedure. If, for instance, the charge is one for keeping a disorderly house under sec. 228 (sec. 773 (f)), it is not necessary for the magistrate to proceed as indicated in this section, since under sec. 774 he has absolute jurisdiction in

respect to this class of offence. And the procedure is not required to be followed in dealing with offences under secs. 775 and 776 where the magistrates named have absolute jurisdiction, as also magistrates having absolute jurisdiction by virtue of sub-sec. 2 of sec. 777, added by the amendment of 1909.

Sub-section 2 was amended in 1909, and it is subject for comment as to whether paragraph (b) is any improvement upon the phraseology of the old sub-section. The wording of paragraph (b) is identical with paragraph (b) of sec. 827 of the Code, on an arraignment before a County Court Judge, or prosecuting officer, under Part XVIII. of the Code relating to "speedy trials" before County Court of District Judges.

Presumably the change was made in consequence of the fact that the question as to whether, or not, magistrates had strictly complied with sub-sec. 2 of sec. 778 as it stood before amendment in 1909, had been frequently the subject of judicial inquiry and decisions on appeal and *habeas corpus* proceedings.

It is very questionable whether any improvement has been made and as to whether magistrates are not more likely to err in a strict compliance with paragraph (b) of sec. 778 than they were before the amendment.

As the question now reads, it is very confusing to the ordinary run of prisoners. They generally understand that they have the right to be tried summarily by the magistrate, or by a jury, but they do not seem to comprehend the meaning of the concluding words "to be tried in the ordinary way by the Court having jurisdiction."

Speaking from experience the writer can say that, in nine cases out of ten, it was found necessary to enter into an explanation of what these latter words mean in order to convey to the accused their true significance.

Since all that is intended is to state to the accused the fact that he can either be tried by the magistrate summarily and have his case disposed of quickly, or he can wait for his trial before a jury, why not convey this intelligence to the prisoner in concise and apt language readily to be understood by the least intelligent?

If it is intended to let the accused know that he will also have the opportunity of having a speedy trial before a County Court, or District Judge, he can be told that also in plain language.

The question, as put by magistrates under the Summary Jurisdiction Act (1879) of England, is simplicity itself, being as fol-

lows: "Do you desire to be tried by a jury, or do you consent to the case being dealt with summarily?"

An accused should be informed of his right to be tried by a jury when the magistrate's jurisdiction to try him summarily is not absolute. The fact that the accused is aware that he has the right to be tried by a jury, and the further fact that the magistrate is aware that the prisoner is going to plead guilty, will not give the magistrate jurisdiction to convict him if he has not been informed of his right. Where a statute requires something to be done in order to give a magistrate jurisdiction, a strict compliance with such direction should be shewn on the face of the proceedings. *R.* v. *Cockshutt,* 19 Cox 3 (1898), 1 Q. B. 582; *R.* v. *Hogarth,* 24 O. R. 60. And see WEATHERBE, J., p. 466. R. v. *Shepherd,* 6 C. C. C. 863.

In *R.* v. *Walsh & Lamont,* 8 C. C. C. 101, the magistrate asked the prisoner, "How do you wish to be tried, before me, or before a jury?" Counsel for the prisoners, instructed by them at the time, answered, "They elect to be tried now before your worship." The magistrate having omitted to inform the accused of the Court at which the charge could probably soonest be tried by a jury, or to give them any information of that nature or to that effect, it was held that there had not been a strict compliance with the requirements of sec. 786 (now 778), and that it is imperative that the magistrate should state to the accused the Court at which the case can probably be soonest tried.

It was also held in this case that upon a summary trial under Part LV. (now XVI.) where the consent of the accused is essential to the jurisdiction, that the charge upon which the accused has so consented to be tried, cannot be enlarged or extended by amendment without giving him the right of re-election upon such amended charge.

If after the charge has been read to the accused and he has consented to be tried summarily it is found necessary to amend the information or charge, the magistrate will have to commence the proceedings *de novo,* that is, he shall state to the accused that he is charged with another or different offence, describing it, and repeat the question, paragraph (b), "that he has the option, &c." If the accused consents to the amended charge being summarily tried the magistrate must read the amended charge to him, and when he has pleaded to the same, the magistrate may proceed, otherwise his jurisdiction is gone. "A magistrate, after he has entered upon the trial of a charge, has no power to enlarge or extend it by amendment without the assent of the accused to the summary trial

of the charge as amended, and then to deprive him of the right to elect to have the amended, or the new additional charge, tried by a jury." OSLER, J.A., p. 106. *R.* v. *Walsh, supra.*

A consent to a summary trial under Part LV. (now XVI.) is invalid unless the accused has been specifically informed by the magistrate of his right to a trial by jury. *R.* v. *Conway* (1902), 7 C. C. C. 129.

The question put to the accused under sub-sec. 2 of sec. 778 may be asked through the magistrate's clerk. *R.* v. *Ridehagh* (1903), 7 C. C. C. 340.

"The magistrate asked him whether 'he consented that the charge should be tried by him, or should be sent for trial by jury at the next ensuing session of the Supreme Court of Criminal Jurisdiction of Halifax.'" This is all that the statute requires. There is nothing in the statute that I can find requiring the date of the sitting to be mentioned. No decision binding on me was cited to the effect that the date must be named, and I am not aware of any such decision. If the date is fixed by law the prisoner in theory knows it as well as the magistrate. If it is not fixed by law I see no good reason why the magistrate should be required to know it." RUSSELL, J., p. 356. *R.* v. *Reid* (1907), 12 C. C. C. 352.

It is imperatively essential that every word of paragraph (b) of sub-sec. 2 of sec. 778 shall be read to the accused before his election. *R.* v. *Howell* (1910), 16 C. C. C. 178, 19 M. L. R. 317.

CHARGE REDUCED TO WRITING.

By sub-sec. 3 of sec. 778 if the person charged consents to being summarily tried and determined, 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 if he is guilty, or not, of such charge.

This is an unnecessary and absurd duplication of work.

In accordance with sub-secs. 1 and 2 of 778 the person charged has already had stated to him the substance of the charge against him, and why should this formality have to be again gone through with?

The information, or complaint, is the foundation of all criminal charges and the basis of all subsequent proceedings. In the information, or complaint, the charge has been reduced to writing;

why then should the magistrate have to go through the same performance over again? See comments on this subject in chapter V., page 109.

In *R.* v. *Shepherd* (1902), 6 C. C. C. 463, TOWNSHEND, J., held that it is not necessary for the magistrate to again "reduce the charge to writing" if that had already been done before the consent was given by the accused. And that "there was no objection to the magistrate reading to the accused what he had already written out, viz., the information."

When the charge is read to the accused in the terms of the written information and his plea taken thereto, any objection to the order in which the proceedings were taken is waived by the accused. *R.* v. *McLeod* (1906), 12 C. C. C. 73.

In his judgment at pages 302-303, ANGLIN, J., in *R.* v. *Gill* (1908), 14 C. C. C. 294, amongst other things, says: "Here the main purpose of the information is not to give the accused knowledge of the charge against him and which he is called upon to meet; it is rather to inform the magistrate in the first instance upon what charge a warrant or summons is asked against the accused." . . .

"The magistrate does not arraign the accused upon the information. He is expressly required, if he decides to proceed upon the election of the defendant, to try him summarily for an indictable offence, to formulate the charge in writing, and to read it when so formulated to the accused, and it is to the charge so formulated and read that the accused must be asked to plead. The charge so formulated with the plea thereto of the accused becomes the record upon which the magistrate proceeds to try him.

"It corresponds to an indictment framed by a jury, or perhaps still more nearly to the record to be drawn up by the Crown prosecutor under sec. 827 of the Code, where an accused person elects for speedy trial without a jury."

His Lordship goes on to say that while in summary conviction proceedings the information and conviction constitute the record, in proceedings under sec. 778 the information is entirely superseded by the formulated charge prepared by the magistrate, and this document, with the plea of the accused and the magistrate's adjudication, together with the consequent conviction, forms the record.

"In my view, therefore, the omissions from the information complained of in the present instance do not affect the validity of the conviction, which follows precisely in its terms the charge as formulated by the magistrate."

In *R.* v. *Grof* (1909), 15 C. C. C. 193, RIDDELL, J., says, at p. 198: "I see no reason why the magistrate may not have the charge prepared in advance in anticipation of the prisoner's expected, or possible choice, and I think the fact that the charge is contained in a document in the form of an information is wholly immaterial."

One can understand the necessity for the magistrate "reducing the charge to writing" where the accused has been committed for trial, or remanded by a justice under sec. 796 of the Code. But where a person is brought before a magistrate upon a charge contained in an information which may have been taken and sworn before him and upon which the warrant was issued for the apprehension of the accused, it does strike one as anomalous that the same magistrate should have to go through the empty form of again reducing the charge to writing.

Why is it necessary to do more than read the information to the accused? That conveys to him "the substance" of the charge, it "describes" the offence with which he is charged, and it is not only reduced to writing, but it has been signed by the informant and sworn to by him before a justice of the peace.

If the accused has been arrested without a warrant, and at the time he appears before the magistrate no information has been laid, that is a different story. But as in the great majority of cases, persons who are charged before city magistrates have been arrested after a warrant has issued, or an information has been laid and warrant issued before the accused appears before the magistrate, this section as it now reads only further convinces me of the necessity of re-casting the whole of this part of the Code, to say nothing of the conflict of opinion expressed in the decisions of the Courts.

The magistrate must either, by the original information, or by the charge which he makes when the party is before him, have the charge in writing, and must read it to the prisoner and ask him whether he is guilty or not. *R.* v. *McKinnon*, 2 U. C. L. J., N. S., 327.

A magistrate is not bound to assume the responsibility of hearing and determining a case summarily under this part; the exercise of his jurisdiction is discretionary with him. See *Ex parte John Cook* (1895), 3 C. C. C. 72.

Even if the person charged before him consents to be tried summarily and the trial proceeds and the evidence for the prosecution has all been put in and heard by the magistrate, he may still decline to proceed further with the matter. Under the pro-

visions of sec. 784, if in any proceeding it appears to the magistrate that the offence is one which, owing to a previous conviction of the person charged, or from any circumstance, ought to be made the subject of prosecution by indictment rather than to be disposed of summarily, the magistrate may before the accused person has made his defence decide not to adjudicate summarily upon the case. In this event, the magistrate will proceed as upon a preliminary inquiry and commit the accused for trial.

The mere fact of an accused person having a previous conviction against him will not of itself prevent the magistrate from trying the offender summarily if he wishes to do so, but it is only an ingredient to be taken into consideration by the magistrate in considering the course he thinks best to pursue.

Trial Procedure under Section 778.

By sub-sec. 4 of sec. 778, if the person charged confesses the charge, or admits his guilt, the magistrate will then proceed to pass such sentence upon him as by law may be passed in respect to such offence.

On the other hand, if the person charged pleads "not guilty," then the magistrate shall proceed to the examination of witnesses for the prosecution, and the defence if any.

The trial shall in every respect be conducted as a trial at *nisi prius,* the only difference being that the magistrate acts as both judge and jury.

There is nothing in the Code providing for the evidence in summary trials before magistrates under this part being taken in shorthand by a stenographer. See *R.* v. *Klein,* 11 W. L. R. 249. Secs. 683 and 684 specifically provide for depositions being taken down in shorthand, but these provisions relate only to procedure upon preliminary inquiry under Part XV.

Nevertheless there can be no doubt but that evidence in summary trials under Part XVI. may be taken in shorthand by a stenographer. The stenographer should be first sworn and secs. 683 and 684 may be taken as a precedent. Sec. 798 specifically provides that the provisions of Part XV. relating to preliminary inquiries shall not apply to any proceedings under Part XVI.; why so one is at a loss to understand.

It is to be inferred that when a magistrate is invested with the authority to hear and determine indictable offences authorized under this part of the Code, that the trials of such cases shall as near as possible be conducted in the same manner as if the

trial was had upon an indictment before a jury, and consequently the same procedure as to taking evidence in Court may be followed.

There is no provision in the Code relating to the examination, or evidence of witnesses, upon trials for indictable offences, either under this part or Part XIX. of the Code, being taken in shorthand by a stenographer, the authority for so doing is assumed as a matter of course.

If the accused elects to be tried by a jury, the procedure will be the same as upon a preliminary inquiry, and the accused may be committed for trial on any indictable offence disclosed by the depositions. See *R.* v. *Brown* (1895), 1 Q. B. 119.

An amendment to the information or charge makes the charge a new one, and all the formalities required by sec. 778 will have to be gone through with anew. See *R.* v. *Bennett,* 3 O. R. 64, and *supra.*

A defendant was arraigned on a charge of having *offered for sale* certain lottery tickets contrary to sec. 236 (b) of the Code. He consented to the charge being tried summarily by the magistrate. On the day set for trial an amended charge was read to the accused charging him with *selling* lottery tickets and *causing them to be sold.* The accused refused to plead to the amended charge, and would only consent to be tried summarily upon the original charge. His objection was upheld. *R.* v. *Woods,* 19 C. L. T. 18.

A warrant of commitment must shew upon its face that the defendant consented to be tried summarily. *R.* v. *Soars,* 17 C. L. T. 124.

Particulars.

There is no doubt but that upon a summary trial under this part, the accused may apply for, and if the magistrate sees fit to grant it, obtain an order for particulars as upon a trial by indictment under sec. 859 of the Code.

The order for particulars is a matter of judicial discretion. *R.* v. *Stevens* (1904), 8 C. C. C. 387, and see *R.* v. *Sinclair* (1906), 12 C. C. C. 20.

"It is only required in criminal matters that the information should give a concise and legal description of the offence charged, and that it should contain the same certainty as an indictment. Of course the description of the charge must include every ingredient required by the statute to constitute the offence. As in

an indictment, the statement of the offence may be in the words of the enactment describing it, or declaring the transaction charged to be an indictable offence."

The absence or the insufficiency of particulars does not vitiate an indictment nor an information, but if it should be made to appear that there is a reasonable necessity for more specific information, the Court or magistrate may on the application of the accused person, order that further particulars be given, but such an order is altogether within the judicial discretion of the Judge or magistrate. See judgment of WURTELE, J., pp. 328-329; *R.* v. *France* (1898), 1 C. C. C. 321. And see *R.* v. *Fulton* (1900), 5 C. C. C. 36.

An indictment should describe the offence charged with such particularity as would enable the accused to know exactly what he has to meet. See *R.* v. *Beckwith* (1903), 7 C. C. C. 450.

ADMISSIONS.

An 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. *Sec. 978 of the Code.*

This does not warrant the admission of improper evidence nor prevent the prisoner from objecting to it, though his counsel may by oversight, or otherwise, have omitted to do so at the proper time. *R.* v. *Brooks* (1906), 11 C. C. C. 188; and see *R.* v. *St. Clair* (1900), 3 C. C. C. 551, 27 A. R. 308.

If a mistake is made by counsel, that does not relieve the Judge in a criminal case from the duty to see that proper evidence only is before the jury. OSLER, J., p. 192, *R.* v. *Brooks, supra,* citing *R.* v. *Gibson* (1887), 18 Q. B. D. 537; *R.* v. *Saunders* (1899), 1 Q. B. 490; *R.* v. *Petrie* (1890), 20 O. R. 317.

The distinction between felony and misdemeanour having been abolished by sec. 14 of the Code, the consent of counsel for the accused, which before the Code would have applied in misdemeanours only, is now effective in all indictable offences.

Evidence given on the trial of another person, including the evidence of the prisoner then called as a witness, may with the consent of the prisoner's counsel be admitted in evidence both for and against the prisoner. *R.* v. *Fox* (1903), 7 C. C. C. 457.

APPEAL BY RESERVED CASE.

By section 1013 of the Code, an appeal from the judgment of any Court having jurisdiction in criminal cases, or of a magis-

trate proceeding under sec. 777 in 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. If the Judges are unanimous in deciding the appeal, their decision shall be final. If any of the Judges dissent from the opinion of the majority, an appeal shall lie to the Supreme Court of Canada.

The cases "hereinafter provided for" are those set out in sec. 1014 of the Code, which is as follows:

1014. No proceeding in error shall be taken in any criminal case.

2. The Court before which any accused person is tried may, either during or after the trial, reverse any question of law arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the Judge, for the opinion of the Court of Appeal in manner hereinafter provided.

3. Either the prosecutor or the accused may during or after the trial, either orally or in writing, apply to the Court to reserve any such question as aforesaid, and the Court, if it refuses so to reserve it, shall nevertheless take a note of such objection.

4. After a question is reserved the trial shall proceed as in other cases.

5. If the result is a conviction, the Court may in its discretion respite the execution of the sentence or postpone sentence till the question reserved has been decided, and shall in its discretion commit the person convicted to prison or admit him to bail with one or two sufficient sureties, in such sums as the Court thinks fit, to surrender at such time as the Court directs.

6. If the question is reserved, a case shall be stated for the opinion of the Court of Appeal.

Sub-section 3 was amended in 1909 by inserting the words 'or after' in the first line thereof, so that an application can now be made to the magistrate, or Court, both during the trial and after it, to reserve a case.

It is to be noted that the only appeal allowed to a person convicted by a magistrate adjudicating under sec. 777 of the Code is that provided for by this and the subsequent section. The appeal is upon questions of law only, and questions of law arising either on the trial, or on any of the proceedings preliminary, subsequent or incidental thereto. And either the prosecutor or the accused may apply to the Court to reserve any such question.

The application can be made either orally or in writing. If he refuses to reserve the question, the magistrate must nevertheless take a note of the objection.

After a question is reserved, the trial proceeds as in other cases. That is, the fact of a question being reserved does not stop, or interrupt the trial. The trial proceeds as if no question had been reserved, or application therefor refused. And the magistrate may convict.

In his discretion the magistrate may either respite the execution of the sentence, or he may postpone the sentence till the question reserved has been decided.

It is also in his discretion as to whether he commits the person convicted to prison to undergo the sentence imposed, or admits the prisoner to bail with one or two sufficient sureties in such sums as the magistrate thinks fit, to surrender at such time as he directs.

If the magistrate reserves a question, or questions, he shall state a case for the opinion of the Court of Appeal.

If the magistrate refuses to reserve the question, the party applying may move the Court of Appeal on notice of motion, to be given either to the accused or the prosecutor, as the case may be. And the Court of Appeal may upon the motion and upon considering such evidence, if any, as it thinks fit to receive, grant or refuse such leave. See *Sec. 1015 of the Code.*

Both the Crown and the accused have equal rights to appeal on questions of law.

But a person convicted can alone apply for a new trial. Such application can only be made upon leave being given by the magistrate or Court before which the trial took place. And such leave may be granted either during the sitting of the Court, or afterwards. The application for a new trial shall be made to the Court of Appeal on the ground that the verdict was against the weight of evidence. See *Sec. 1021 of the Code.*

Upon an application made for leave to appeal after the Court has refused to reserve a case, ample notice from the prisoner's counsel of the application for leave ought to be given to the representative of the Crown, before the application is made to the Court, and the notice of motion so served should set out the grounds relied upon. *R.* v. *Lai Ping* (1904), 8 C. C. C. 467, 11 B. C. R. 102.

On leave to appeal being granted, the Court of Appeal may direct that the Court below shall state a case as if the question had been reserved, on which a reserve case had been refused by the trial Judge. *R.* v. *Sam Chak (No. 1)*, 12 C. C. C. 495.

On being applied to for a reserve case the trial Judge should not grant it upon a question, the determination of which either way would not and did not affect his conclusions. *R.* v. *Walkem* (1908), 14 C. C. C. 122.

On a motion for a new trial under sec. 1021 of the Code, the same rule should be applied as in civil cases, namely, whether the

evidence was such that the jury viewing the whole of the evidence reasonably could not properly find a verdict of guilty. IRVING, J., p. 227, *R.* v. *Jenkins* (1908), 14 C. C. C. 221.

Leave to appeal will not be granted by an appellate Court on the ground of the admission of irrelevant evidence if in the opinion of the Court the reception of such evidence did not occasion any substantial wrong, or miscarriage on the trial. *R.* v. *Callaghan* (1903), 8 C. C. C. 143. See section 1019 of the Code, *supra*.

On an application to the Court of Appeal to direct a stated case and for leave to appeal after refusal of the trial Judge to reserve a case, the Court may, with the consent of counsel both for the Crown and the prisoner, hear the appeal forthwith as if a case had been stated. *R.* v. *Blythe* (1909), 15 C. C. C. 225.

Where a magistrate convicted the accused under a repealed statute, not knowing of the repeal, he may afterwards reserve a case for the Court of Appeal, and the conviction will be quashed. *R.* v. *Corrigan* (1909), 15 C. C. C. 310.

Leave to appeal to the Court of Appeal should only be granted to a private prosecutor under very exceptional circumstances. *R.* v. *Burns* (*No. 1*) (1901), 4 C. C. C. 323; and see *R.* v. *Trepanier* (1901), 4 C. C. C. 259.

If pending the statement of a case upon a question reserved, the Judge or magistrate before whom the trial was held dies, or quits office, or if the Judge or magistrate having reserved a question refuses or neglects to state a case, the party on whose application the question was reserved may, on notice of motion to be given to the accused or prosecutor, as the case may be, apply to the Court of Appeal to state a case, and if a case is thereupon stated, it shall be dealt with as if it had been duly stated by such Judge or magistrate. See *Section 1016 A.*, added in 1909.

By sec. 1017 the evidence may be sent to the Court of Appeal, or any part thereof that is material.

And the Court of Appeal may send back any case to the Court by which it was stated to have the same amended or restated.

By sec. 1018 upon hearing the appeal 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, pass such sentence as ought to have been passed, or set aside any sentence passed by the Court below and remit the case to the Court below with a direction to pass the proper sentence. See *R.* v. *Edwards* (1907), 13 C. C. C. 202.

If the Court substitutes a different sentence the prisoner should be brought into Court to receive sentence. *Ibid.*

(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 effect of an acquittal, or direct a new trial; or (e) make such other order as justice requires.

This section (1018) does not make it obligatory on the Court to direct a new trial in every case which comes before it under the jurisdiction conferred by the Code. The language of the section is permissive, and the Court, in addition to the other powers conferred upon it, is enabled to make such other order as justice requires.

"The matter is left to the Court to exercise its discretion in each case as the circumstances seem to require. It follows that there can be no general rule, and the Court ought not to attempt to lay down, in any one case, the consideration which should govern. The consideration influencing the exercise of discretion in any one class of cases may differ materially from those affecting it in another class. Especially may this be so in cases where the accused has been discharged and the Crown is appealing. There the consideration that would govern where the accused was convicted and was appellant, would not necessarily be applicable." *Rex* v. *Ham* (1903), 5 O. L. R. 704, 6 C. C. C. 479. Moss, C.J.O., pp. 106-107, in *R.* v. *Burr* (1906), 12 C. C. C. 103.

Where there has been an acquittal the preferable practice is for the trial Judge to refuse to reserve a case upon the application of the prosecutor complaining of an erroneous direction, and for the prosecutor to apply to the Court of Appeal under Code sec. 744 (now 1016) for leave to appeal. OSLER, J.A., p. 484. *R.* v. *Karn*, *supra.*

The question of the weight of evidence is one entirely for the jury, and although there is a provision for granting a new trial if the verdict is against the weight of evidence, it cannot be invoked on the part of the Crown. RITCHIE, J., p. 281. *R.* v. *Phinney* (1903), 7 C. C. C. 280.

A single prior act of the like criminal nature as the subject of the charge, but not connected therewith, is not evidence proving the criminal intent of the accused in the act charged. It is discretionary with the trial Judge to admit in reply, with leave to answer the same, evidence of criminal intent which might have been offered in chief. A new trial will be allowed on the ground of

the wrongful admission of evidence of an alleged prior similar offence. *R.* v. *Pollard* (1909), 15 C. C. C. 74.

If no Substantial Wrong the Conviction Stands.

1019. 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.

New Trial by Order of Minister of Justice.

If upon any application for the mercy of the Crown on behalf of anyone convicted of an indictable offence the Minister of Justice entertains a doubt whether such person ought to have been convicted he may, instead of advising His Majesty to remit or commute the sentence, after such inquiry as he thinks proper, by an order in writing direct a new trial at such time and before such Court as he may think proper. Section 1022 of the Code.

By sec. 1023 of the Code it is provided that the sentence of a Court shall not be suspended by reason of an appeal unless the Court expressly so directs, except where the sentence is that the accused suffer death, or whipping. 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.

Part only Proved of the Offence Charged.

A police magistrate of a city or incorporated town, who is also a police magistrate in and for the whole province, may try offences committed anywhere in the province. Such police magistrate at the summary trial of an indictable offence may, under sec. 951 of the Code, convict the accused of any offence included in the offence charged, although the whole offence charged is not proved, without again offering the prisoner election as to the mode of trial. *R.* v. *McEwen* (1908), 17 M. L. R. 477, 13 C. C. C. 346.

Section 951 provides that 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 Court, 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.

Upon an indictment for burglary and stealing, the prisoner may be convicted either of burglary, or entering a dwelling house in the night with intent to commit an indictable offence therein, of housebreaking, of stealing in a dwelling house to the amount of $25 (if the property stolen be laid in the indictment to be of that value), or simply of theft, according to the facts proved. *R.* v. *Compton*, 3 C. & P. 418.

Upon an indictment for assaulting and unlawfully wounding and ill-treating the complainant and thereby occasioning him actual bodily harm, the defendant may be convicted of common assault. *R.* v. *Oliver*, 30 L. J. M. C. 12; *R.* v. *Yeadon*, 31 L. J. M. C. 70.

By sub-sec. 16 of sec. 2 of the Code, "indictment" and "count" respectively include information and presentment as well as indictment, and also any plea, replication, or other pleading, any formal charge under sec. 873a, and any record. And upon a summary trial with consent for a charge of assault occasioning actual bodily harm the magistrate may convict of common assault. And sec. 713 (now 951) of the Code applies to summary trials as well as to trials upon an indictment. *R.* v. *Coolen* (1904), 8 C. C. C. 157.

An indictment for rape includes the lesser charge of assault, and a verdict thereon of common assault is properly followed by a conviction although the information was laid more than six months after the commission of the offence. *R.* v. *Edwards* (1898), 2 C. C. C. 96. See *R.* v. *West* (1898), 1 Q. B. 174; *R.* v. *Clarke* (1907), 12 C. C. C. 300.

Upon the trial of an indictment for wounding with intent to disable a verdict of "guilty without malicious intent," is equivalent to a verdict of acquittal although the jury were instructed that if intent to disable was negatived they might still convict of the simple offence of wounding. *R.* v. *Slaughenwhite* (1905), 9 C. C. C. 173, 35 S. C. R. 607.

Punishment.

By sec. 1027 of the Code it is provided that 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.

A summary conviction for "unlawfully" committing an act does not sufficiently charge that the act was "wilfully" done, to constitute an offence under a statute which makes the latter an essential element of the offence. *Ex parte O'Shaughnessy* (1904), 8 C. C. C. 136.

A summary conviction for indecency under sec. 205 is bad if it omits to state that the offence was committed "wilfully." Upon motion for *habeas corpus* to discharge the prisoner on this ground it appeared that after the notice of motion was served a new conviction for commitment, in which the defect was cured, was substituted for the defective one. The right to substitute a good for a bad conviction, or commitment, after a motion for a *habeas corpus* has long been recognized and acted upon. Application was discharged. *R.* v. *Barre* (1905), 11 C. C. C. 1, and see sec. 1130 of the Code.

Where a person is in custody upon a summary conviction, the appropriate remedy to secure his discharge is by applying for a writ of *habeas corpus*. Where an irregularity appears upon the face of the proceedings an order for discharge will not be made on *certiorari* without *habeas corpus* being applied for. *R.* v. *Goulet* (1907), 12 C. C. C. 365.

A warrant of commitment must shew on its face that the committing magistrate is one having jurisdiction to impose the sentence recited therein. *R.* v. *Hong Lee* (1909), 15 C. C. C. 39.

"There is, moreover, much to be said in favour of the view that there is no inherent right in any foreigner that the proceedings taken in our Courts shall be made wholly intelligible to him, even though he should be charged with crime. . . . In any case the capacity of the interpreter is a question for the magistrate. All matters connected with the interpretation of evidence, etc., are for him, and his finding cannot be attacked in this way, viz., by *habeas corpus*." RIDDELL, J. *R.* v. *Meceklette* (1909), 15 C. C. C. 17.

A clerical error in dating the warrant of commitment as of the day preceding the date of the information is a matter for amendment, and is not a ground for discharge where a conviction, regular in form, has been returned. *R.* v. *Farrell* (1907), 12 C. C. C. 524.

A stipendiary magistrate in Nova Scotia, acting within the local limits of his jurisdiction, may summarily try a prisoner with his consent for an offence committed outside of his territorial jurisdiction, but in the same province, by virtue of the powers conferred by sec. 771 (a) (ii) and sec. 777 of the Code. *Ex parte Seeley* (1908), 13 C. C. C. 259, and see *R.* v. *McEwen* (1908), 17 M. L. R. 477, 13 C. C. C. 346.

Degrees of Punishment.

Whenever it is provided that the offender shall be liable to different degrees or kinds of punishment, the punishment to be inflicted shall, subject to the limitation contained in the enactment, be in the discretion of the Court or tribunal before which the conviction takes place. Section 1028 of the Code.

"Under the provisions of our law, where, as in the present case, a statute prescribes as the punishment for an offence both fine and imprisonment, the Court which convicts has the right in its discretion to impose either a fine alone, or an imprisonment alone, or both, unless the statute declares a contrary intention and expressly over-rides the general rule contained in sec. 932 (now 1028) of the Criminal Code, which the statute in the present case does not do." Wurtele, J., pp. 20, 21. *R.* v. *Robidoux* (1898), 2 C. C. C. 319.

"The word 'penalty,' although generally applied to pecuniary punishment, its primary meaning includes punishment by imprisonment as well as punishment by fine." Henry, J. p. 62. *R.* v. *Gavin* (1897), 1 C. C. C. 59.

A conviction awarding ninety days imprisonment as an alternative punishment in payment of a fine where the statute authorized three months' imprisonment, is bad, as ninety days may possibly be more than three months. *Ibid.*

Imprisonment—Hard Labour.

A conviction is not invalid merely because it omits to state that the accused consented to be tried summarily by the magistrate.

On a summary trial for aggravated assault the magistrate, on conviction, has jurisdiction to award costs against the accused in addition to imposing the fine and imprisonment.

Imprisonment with hard labour may be imposed in default of payment of fine and costs upon a summary trial for an indictable offence. *R.* v. *Burtress* (1900), 3 C. C. C. 536.

By sec. 1057 of the Code, imprisonment in a common gaol, &c., 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 Part XVI. or XVIII., or in the province of Saskatchewan or Alberta before a Judge of a Superior Court, or in the North-West Territories before a stipendiary magistrate, or in the Yukon Territory before a Judge of the Territorial Court.

If the certificate of sentence to imprisonment in a penitentiary is irregular for the omission of the date of sentence, leave may be given on *habeas corpus* to return an amended certificate correcting the omission. *R.* v. *Wright* (1905), 10 C. C. C. 461.

By sec. 1051 of the Code, everyone 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.

And every person convicted of any indictable offence for which no punishment is specially provided shall be liable to imprisonment for three years. And everyone 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. Sec. 1052.

Everyone 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 such latter case the offender shall be liable to the imprisonment directed, and not to any other. Sec. 1053.

Everyone 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. Sec. 1054.

For instance, anyone convicted of stealing a post letter, bag, &c., under sec. 364, is liable to imprisonment for life, or for any term not less than three years. Consequently no one so convicted can be sentenced for any shorter term of imprisonment less than three years.

Cumulative Punishment.

When an offender is convicted of more offences than one, before the same Court or person, at the same sittings, or when any offender, under sentence or undergoing punishment for one offence, is convicted of any other offence, the Court or person passing sentence may, on the last conviction, direct that the sentences passed shall take effect one after another. Sec. 1055.

Imprisonment in the Penitentiary.

Section 42 of the Penitentiary Act, R. S. C. 1906, ch. 147, provides as follows:

"Everyone 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."

Imprisonment for less than two years shall be 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 be lawfully executed. See sec. 1056 of the Code.

If anyone is sentenced to the penitentiary, and at the same sitting, or term of the Court trying him for one or more other offences, to a term of imprisonment less than two years each, he may be sentenced for such shorter term of imprisonment to the same penitentiary, such sentence to take effect from the termination of his other sentence. Sec. 1056 (a).

And if anyone is sentenced for any offence who is at the date of such sentence serving a term of imprisonment in a penitentiary for another offence, he may be sentenced for a shorter term than two years to imprisonment in the same penitentiary, such sentence to take effect from the termination of his existing sentence, or sentences. Sec. 1056 (b).

In Manitoba and British Columbia anyone sentenced to imprisonment for a term less than two years may be sentenced to any one of the common gaols in the province, unless a special prison is prescribed by law. Sec. 1056 (c).

Under sec. 29 of the Prisons and Reformatories Act, any offender whose age at the time of his trial does not, in the opinion of the Court, exceed sixteen years, may be sentenced to imprisonment in any reformatory prison in the province in which the conviction takes place.

Warrant of Commitment.

A warrant of commitment must be certain and definite. And a warrant is bad if it simply directs the gaoler to "imprison" the defendant for the stated time without specifying the place of imprisonment. *Re J. W. King* (1901), 4 C. C. C. 426.

The commitment must be to the common gaol of the county for which the justices shall be acting.

Where a conviction by a police magistrate on a summary trial of the accused under Part XVI. of the Code imposes a longer term

of imprisonment than is authorized by law, the warrant of commitment cannot be amended, as in such cases there is not a valid conviction to sustain the same. *R.* v. *Randolph* (1900), 4 C. C. C. 165.

"The provisions respecting amendments in case of summary convictions do not, I think, apply to this case, which is a case of summary trial." FERGUSON, J., p. 188, *Ibid.*

CONVICTIONS NOT QUASHED FOR WANT OF FORM.

By sec. 1129, no conviction, where the defendant has appeared and pleaded and the merits have been tried, shall 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.

By sec. 1130 of the Code it is specially provided that no conviction, sentence or proceeding under Part XVI. shall be quashed for want of form; and no warrant of commitment upon a conviction under this Part shall be held void by reason of any defect therein, if it is therein alleged that the offender has been convicted and there is a good and valid conviction to sustain the same.

A commitment is defective which recites a conviction that does not disclose any offence within the section of the statute under which the prosecution was had. *R.* v. *Gibson* (1898), 2 C. C. C. 302.

The commitment is not a judicial but simply a ministerial act, carrying out the terms of the conviction, and is not a proceeding that can be brought before the Court on *certiorari*. When the conviction itself is valid the proper course to pursue in attacking the commitment is by way of *habeas corpus*. *Ex parte Bertin* (1904), 10 C. C. C. 65.

The Court on *habeas corpus* will not inquire as to whether the prisoner brought before a justice and remanded by him to gaol for an offence committed in Canada, was arrested in the United States and brought back to Canada without any extradition warrant. *R.* v. *Walton* (1905), 10 C. C. C. 269.

On an application to quash a conviction the Court, as a condition to making an order quashing the same, may provide in the order that no action shall be brought against the justice or stipendiary magistrate by, or before whom such conviction, order or other proceeding was made or had, or against any officer acting thereunder, or under any warrant issued to enforce any such conviction or order. Sec. 1131 of the Code. See *R.* v. *Morningstar*

(1906), 11 C. C. C. 15, 11 O. L. R. 318; *R.* v. *Peter* (1906), 11 C. C. C. 52.

The provisions of sec. 1131 do not extend to an application by way of *habeas corpus* in Ontario to discharge the accused from custody, as the charge has not the effect of quashing the conviction. *R.* v. *Lowry* (1907), 13 C. C. C. 105.

In awarding punishment, whether pecuniary, or corporeal, the magistrate should be careful not to exceed the authority given him by the statute. See *R.* v. *Barton*, 13 Q. B. 389, and *Barton* v. *Bricknell*, 13 Q. B. 393.

Suspended Sentence.

1081. In any case in which a person is convicted before any Court of any offence punishable with not more than two years' imprisonment, and no previous conviction is proved against him, if it appears to the Court before which he is so convicted, that, regard being had to the age, character, and antecedents of the offender, to the trivial nature of the offence, and to any extenuating circumstances under which the offence was committed, it is expedient that the offender be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a recognizance, with or without sureties, and during such period as the Court directs, to appear and receive judgment when called upon, and in the meantime to keep the peace and be of good behaviour.

2. Where the offence is punishable with more than two years' imprisonment the Court shall have the same power as aforesaid with the concurrence of the counsel acting for the Crown in the prosecution of the offender.

3. The Court may, if it thinks fit, direct that the offender shall pay the costs of the prosecution, or some portion of the same, within such period and by such instalments as the Court directs. 63-64 V., c. 46, s. 3.

"4. Where one previous conviction and no more is proved against the person so convicted and such conviction took place more than five years before that for the offence in question, or was for an offence not related in character to the offence in question, the Court shall have the same power as aforesaid with the concurrence of the counsel acting for the Crown in the prosecution of the offender."

It is provided, by sec. 1082, that before directing the release of an offender, under the last preceding section, the Court shall be satisfied that the defendant, 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.

The provisions of sec. 1081 can be applied to "any person, convicted before any Court, of any offence punishable with not more than two years' imprisonment and where no previous conviction is proved against him. By sub-sec. 2, where the offence is punishable with more than two years' imprisonment, the Court has the same power, but only with the concurrence of the counsel acting for the Crown in the prosecution of the offender. In extending the favour the Court shall take into consideration (a) the age, (b) the

character and antecedents of the offender, (c) the trivial nature of the offence, and any extenuating circumstances under which the offence was committed. And the Court must be of the opinion that, taking all these facts into consideration, it is expedient that the offender be released on probation of good conduct.

Then, instead of sentencing the offender at once to any punishment, the Court may 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.

The condition, therefore, of the bond is that for the period named, say two years, the offender will, at any time during that period when called upon, appear and receive judgment, and in the meantime he must keep the peace and be of good behaviour.

And by sub-sec. 3 the Court may also 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. This may be added to the condition of the bond.

It is only upon motion by the Crown that the recognizance of the defendant and his bail is estreated, or that judgment is moved against the offender who has been released on probation under sec. 1081. See *R.* v. *Young* (1901), 4 C. C. C. 580.

Where the accused has been convicted after summary trial and is released on suspended sentence under sec. 1081, and a recognizance has been entered into, the magistrate has no jurisdiction to impose sentence for the original conviction unless information under oath has been laid charging the accused with a breach of the recognizance and a warrant has issued for his apprehension. And such a proceeding must be at the instance of the Crown. *R.* v. *Siteman* (1902), 6 C. C. C. 224.

Upon a summary trial under Part LV. (now XVI.) of the Code the magistrate is a "Court" within the meaning of secs. 971 (now 1081) and 974 (now 1026) of the Code, and he may release the accused upon suspended sentence. *R.* v. *McLellan* (*No. 1*) (1905), 10 C. C. C. 1.

Where the accused is released upon suspended sentence and is directed to pay the costs of the informant, and the conviction does not provide when the costs are to be paid, such costs are payable forthwith. The magistrate is not bound to direct that these costs should be payable by instalments. *Ibid.*

By sec. 1026 of the Code "Court" is declared to mean and include any Superior Court of criminal jurisdiction, any Judge or Court within the meaning of Part XVIII., and any magistrate within the meaning of Part XVI., in the sections of Part XX. relating to suspended sentence, unless the context otherwise requires. These sections are 1081, 1082 and 1083 now under consideration.

The proper time for proving a previous conviction against a prisoner is (under sec. 1081) not upon the trial of the offence, but after the trial. If the Crown does not adduce evidence of a previous conviction the magistrate may, on his own initiative, search the records of his office for the purpose of ascertaining if the accused had been previously convicted by him and of proving the identity of the accused. See *R.* v. *Bonnevie* (1906), 10 C. C. C. 376. And see *R.* v. *Herrell*, 1 C. C. C. 510.

WARRANT WHEN THE RECOGNIZANCE HAS NOT BEEN OBSERVED.

1083. If a Court having power to deal with such offender in respect of his original offence or any justice is satisfied by information on oath that the offender has failed to observe any of the conditions of his recognizance, such Court or justice may issue a warrant for his apprehension.

2. An offender, when apprehended on any such warrant shall, if not brought forthwith before the Court having power to sentence him, be brought before the justice issuing such warrant or before some other justice in and for the same territorial division, and such justice shall either remand him by warrant until the time at which he was required by his recognizance to appear for judgment, or until the sitting of a Court having power to deal with his original offence, or admit him to bail, with a sufficient surety, conditioned on his appearing for judgment.

3. The offender when so remanded may be committed to a prison, either for the county or place in or for which the justice remanding him acts, or for the county or place where he is bound to appear for judgment; and the warrant of remand shall order that he be brought before the Court before which he was bound to appear for judgment, or to answer as to his conduct since his release. 55-56 V., c. 29, s. 973.

An information on oath must be laid charging that the offender has failed to observe some or all of the conditions of his recognizance, and then a warrant may issue. The warrant may be issued by any justice having jurisdiction, or a Court having power to deal with the offender in respect of his original offence. And this warrant may be endorsed or "backed" under sec. 662 of the Code.

When apprehended, the offender should be brought before "the Court having power to sentence him," that is, the Court before which he was originally convicted. If this is not possible, then he may be brought before the justice issuing the warrant, or some other justice in the same territorial division. Any such justice shall either remand him by warrant (a) until the time at which he was

required by his recognizance to appear for judgment, or (b) until the sitting of a Court having power to deal with his original offence, or (c) admit him to bail with a sufficient surety conditioned on his appearing for judgment.

These provisions contemplate, and the inference can be readily drawn, that the offender may be brought before any Court "having power to deal with his original offence." That is if the magistrate, or Court, before whom he was originally convicted, are not available, and the offender cannot be brought before the Court, or magistrate, that dealt with the original offence, then any other magistrate or Court having territorial jurisdiction and power to deal with his original offence, may pass sentence upon the offender as if he had been tried before such Court or magistrate in the first place. This must be so since death may have removed the Judge, or magistrate, who dealt with the original offence and put the offender on suspended sentence.

By sub-sec. 3 the offender, when so remanded, may be committed to prison either for the county, or place, in and for which the justice who remanded him acts, or for the county or place where he is bound to appear for judgment. The warrant of remand shall order that the offender be brought before the Court before which he was bound to appear for judgment, or to answer as to his conduct since his release.

As the recognizance required the offender to appear for sentence or judgment before the Court or magistrate before which he was convicted, naturally it is before this Court, or magistrate, that the offender should be brought if possible; however, any Court or magistrate having jurisdiction may pass the sentence for which the offender was liable, or deal with him as is deemed wise under the circumstances. He may be required to enter into another recognizance for good behaviour, with or without sureties, and his case dealt with as if he was before the Court or magistrate for sentence immediately after his conviction.

It was a condition precedent to the Court exercising the power of suspended sentence, under sec. 1081, that no previous conviction is proved against the offender. By the amendment of 1909—sub-sec. 4—this condition has been relaxed to the extent that where one previous conviction and no more is proved against the person, and (a) such conviction took place more than five years before his present conviction, (b) or was for an offence not related in character to the offence in question, (c) the Court may, with the concurrence of the counsel acting for the Crown in the prosecution of the offender, exercise the power of suspending sentence.

So that if a person is convicted for an offence in 1910, and one previous conviction made in 1904 is proved against him, that will not bar the right of the Court, with the consent of the Crown, to put him on suspended sentence. Or if a person is convicted in 1910 for theft, and a previous conviction against him for assault in 1909 is proved against him, the Court may also suspend sentence. If, however, a person is convicted in December, 1910, of theft, and a previous conviction in December, 1906, for the same offence, or for housebreaking and theft (an offence related in character) is proved against him, the Court will not be able to exercise the powers granted by sec. 1081.

Fines and Forfeitures.

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. Sec. 1029 of the Code.

A conviction must adjudge a forfeiture of the amount of the fine as well as payment thereof. A prisoner is entitled to be discharged under *habeas corpus* if the conviction merely adjudge that he "forthwith pay $100, and in default of payment to be imprisoned for six months." *R.* v. *Crowell* (1897), 2 C. C. C. 34.

The conviction should read, "and I adjudge the said A. B. for his said offence *to forfeit* and pay the sum of," &c. See *Form 32.*

Fines in Lieu of, or in Addition to, other Punishment.

1035. Any person convicted by any magistrate under Part XVI. or by any Court of an indictable offence punishable with imprisonment for five years or less may be fined in addition to, or in lieu of any punishment otherwise authorized, in which case the sentence may direct that in default of payment of his fine the person so convicted shall be imprisoned until such fine is paid, or for a period not exceeding five years, to commence at the end of the term of imprisonment awarded by the sentence, or forthwith as the case may require.

2. Any person convicted of an indictable offence punishable with imprisonment for more than five years may be fined, in addition to, but not in lieu of, any punishment otherwise ordered, and in such case, also, the sentence may in like manner direct imprisonment in default of payment of any fine imposed.

3. Any corporation convicted of an indictable or other offence, punishable with imprisonment, may, in lieu of the prescribed punishment, be fined in the discretion of the Court before which it is convicted.

Sub-section 3 was added in 1909.

Reference should be had to sec. 720 A, as to the procedure against corporations under Part XV. And to secs. 916-920 as to procedure by indictment against corporations.

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, the same may be recovered by civil action or proceeding at the suit of His Majesty, or any private party suing as well for His Majesty as for himself. *Sec. 1038 of the Code.*

Costs and Expenses of Prosecution.

1044. Any Court by which, and any Judge under Part XVIII., or magistrate under Part XVI., by whom judgment is pronounced or recorded, upon conviction of any person for treason or any indictable offence, in addition to such sentence as may otherwise by law be passed, may condemn such person to the payment of the whole or any part of the costs or expenses incurred in and about the prosecution and conviction for the offence of which he is convicted, if to such Court or Judge it seems fit so to do.

2. Such Court or Judge may include in the amount to be paid such moderate allowance for loss of time as the Court or Judge, by affidavits or other inquiry and examination, ascertains to be reasonable.

3. The payment of such costs and expenses, or any part thereof, may be ordered by the Court or Judge to be made out of any moneys taken from such person on his apprehension, if such moneys are his own, or may be enforced at the instance of any person liable to pay or who has paid the same in such and the same manner, subject to the provisions of this Act, as the payment of any costs ordered to be paid by the judgment or order of any Court of competent jurisdiction in any civil action or proceeding may for the time being be enforced.

4. In the meantime, until the recovery of such costs and expenses from the person so convicted as aforesaid, or from his estate, the same shall be paid and provided for in the same manner as if this section had not been passed; and any money which is recovered in respect thereof from the person so convicted, or from his estate, shall be applicable to the reimbursements of any person or fund by whom or out of which such costs and expenses have been paid or defrayed. 63-64 V., c. 46, s. 3.

In the absence of any regulations, some difficulty may arise as to what "costs and expenses in and about the prosecution and conviction" should be properly allowed.

It is to be recollected that the provisions of this section relate solely to the prosecution of indictable offences, and have no reference to offences punishable on summary conviction, so that a magistrate will not be bound, in convictions under Part XVI., as to the amount of costs by the provisions of sec. 770. The table of fees set out in that section have relation only "to the fees to be taken before justices under Part XV." presumably as to the costs of the information, warrant, summons for witness, &c., and all process issued by the magistrate; the fees set out in sec. 770 would be the proper fees to charge, under Part XVI., since all such process is issued by virtue of the magistrate being ex-officio a justice of the

peace, and it is in such capacity and under his authority as a justice of the peace that he exercises this jurisdiction.

The authority for issuing process leading to trial of indictable offences is that contained in Part XIII., secs. 653, *et seq.* And in the absence of any specific provisions in Part XIII. or XIV. as to what fees justices shall be entitled to charge for informations, warrants, summons for witness, &c., issued under Part XVI., the provisions of sec. 770 may well act as a guide.

By sec. 576 of the Code authority is given to the "Superior Courts of criminal jurisdiction" to make rules regulating the sittings of the Courts and for regulating in criminal matters the pleading, practice, and procedure in the Courts, including *mandamus, certiorari, habeas corpus,* prohibition *quo warranto, bail* and *costs.*

From the context, one would read this to mean that the costs referred to are those relating to the several processes mentioned, and not costs generally. No doubt, under sub-sec (c), which is very general in its language, the Courts have power to make a tariff of fees relating to all criminal procedure.

And by sec. 1047 of the Code any costs ordered to be paid by a Court pursuant to the provisions of secs. 1045 and 1046 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. And 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.

As in a majority of the provinces magistrates do not adjudicate upon civil matters except by way of summary conviction, the fees allowed in civil suits in the Superior Courts of the different provinces according to the lowest scale will govern. The taxing officer can either be the magistrate or his clerk.

In England these costs are now regulated by the "Costs in Criminal Cases Act, 1908," 8 Edw. VII. c. 15. The allowances to be made under this Act are fixed by the regulations of the Secretary of State.

For bills of costs, see *R.* v. *St. Louis* (1897), 1 C. C. C. 141, and *R.* v. *Gouillioud* (1903), 7 C. C. C. 432.

By sub-sec. 2 of sec. 1044 the Court may include in the amount of the costs or expenses a moderate allowance for loss of time. This must be ascertained by affidavits, or other inquiry and examination, and the amount must be such as is thus ascertained to be reasonable. This means an allowance for wages or salary for

each day's work lost by the complainant from his work, through any injury sustained, or time lost by attending the trial. It is very doubtful if the word "expenses" will also include any medical, or hospital expenses, incurred by the person injured. The "costs or expenses" are those incurred in and about the prosecution and conviction for the offence, &c.

If the person convicted had any money on him when arrested, and such money is his own, the costs and expenses may be paid out of the same. Or payment may be enforced by process of the Court itself, or recovered in a civil action.

Imprisonment in Default of Payment of Costs on Conviction for Assault.

1046. If a person convicted on an indictment for assault, whether with or without battery and wounding, is ordered to pay costs as aforesaid, he shall be liable, unless the said costs are sooner paid, to three months' imprisonment, in addition to the term of imprisonment, if any, to which he is sentenced for the offence, and the Court may, by warrant in writing, order the amount of such costs to be levied by distress and sale of the goods and chattels of the offender, and paid to the prosecutor, and the surplus, if any, arising from such sale, to the owner.

2. If such sum is so levied, the offender shall be released from such imprisonment. 55-56 V., c. 29, s. 834.

1047. Any costs ordered to be paid by a Court pursuant to the foregoing provisions shall, in case there is no tariff of fees provided with respect to criminal proceedings, be taxed by the proper officer of the Court according to the lowest scale of fees allowed in such Court in a civil suit.

2. If such Court has no civil jurisdiction, the fees shall be those allowed in civil suits in a superior Court of the province according to the lowest scale. 55-56 V., c. 29, s. 835.

Compensation for Loss of Property.

1048. 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 for which such person is so convicted.

2. The amount awarded for such satisfaction or compensation shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and the order for payment of such amount may be enforced in such and the same manner as in the case of any costs aforesaid ordered by the Court to be paid. 55-56 V., c. 29, s. 836.

The application is to be made by "any person aggrieved." This includes anyone who has suffered loss to his "*property*" through, or by means of the offence of which the person is convicted.

The expression "party aggrieved" is not a technical expression, but one to be construed according to the ordinary meaning of the

word. *Robinson* v. *Currey*, L. R. 7 Q. B. 465. See *supra* notes to sec. 749.

The application must be made immediately after the conviction, and the sum of money awarded cannot exceed $1,000. The amount so awarded for satisfaction and compensation shall be deemed a judgment debt due to the person entitled to receive the same, that is, "the person aggrieved," who has made the application and to whom the sum of money is awarded by the order of the Court. The order of the Court may be enforced in the same manner as provided by sec. 1044 as to costs.

As the sum awarded under this section (1048) is by way of satisfaction or compensation for any "loss of property" suffered by the applicant, it would seem to apply only to losses suffered for instance by arson, or burglary, or housebreaking and theft, or mischief under sec. 510 of the Code, or some offence by the commission of which the person convicted has occasioned loss of property to the applicant. It cannot apply to any injury to the person of the party aggrieved; the loss must be to his property, so that if a person suffers bodily injury by reason of an assault he cannot be awarded compensation under this section. Such a person can be granted an allowance for his loss of time under sec. 1044 (2).

Compensation to Bona Fide Purchasers of Stolen Property.

1049. When any prisoner has been convicted, either summarily or otherwise, of any theft or other offence, including stealing or unlawfully obtaining any property, and it appears to the Court, by the evidence, that the prisoner sold such property or part of it to any person who had no knowledge that it was stolen or unlawfully obtained, and that money has been taken from the prisoner on his apprehension, the Court may, on application of such purchaser and on restitution of the property to its owner, order that out of the money so taken from the prisoner, if it is his, a sum not exceeding the amount of the proceeds of the sale be delivered to such purchaser. 55-56 V., c. 29, s. 837.

The prisoner may be convicted either summarily or otherwise, i.e., on indictment, for any kind of theft, or other offence, including the stealing of, or unlawfully obtaining any property.

If it is shewn that he has sold such property, or part of it, to any person who had no knowledge that it was stolen or unlawfully obtained, then, if the prisoner on his apprehension has money on him, the Court, on the application of the purchaser, may order that out of the money so found on and taken from the prisoner, if the money is really his, a sum not exceeding the proceeds of the sale shall be paid and delivered to the purchaser. The stolen property in the meantime is restored to its owner.

To entitle a person aggrieved to an order for the restitution to him of money found upon a prisoner convicted of theft from the person, proof must be adduced identifying the money so found as being the money that was stolen. *R.* v. *Haverstock* (1901), 5 C. C. C. 113.

A Superior Court of criminal jurisdiction may order the restoration to an accused person committed for trial of articles found in his possession and taken by the police, which are not connected with the offence charged, and are not required for the purposes of evidence. *Ex parte McNichol* (1904), 7 C. C. C. 549.

As to what the "property" includes, see paragraph (32) of sec. 2 of the Code.

Restitution of Stolen Property.

1050. 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.

3. The Court or tribunal may also, if it sees fit, award restitution of the property taken from the prosecutor, or any witness for the prosecution, by such offence, although the person indicted is not convicted thereof, if the jury declares, as it may do, or if, in case the offender is tried without a jury, it is proved to the satisfaction of the Court or tribunal by whom he is tried, that such property belongs to such prosecutor or witness, and that he was unlawfully deprived of it by such offence.

4. If it appears before any award or order is made, that any valuable security has been *bona fide* paid or discharged by any person liable to the payment thereof, or being a negotiable instrument, has been *bona fide* taken or received by transfer or delivery, by any person, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had, by an indictable offence, been stolen, or if it appears that the property stolen has been transferred to an innocent purchaser for value who has acquired a lawful title thereto, the Court or tribunal shall not award or order the restitution of such security or property.

5. Nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker or other agent entrusted with the possession of goods or documents of title to goods, for any indictable offence under sections three hundred and fifty-eight or three hundred and ninety of this Act. 55-56 V., c. 29, s. 838; 56 V., c. 32, s. 1.

Magistrates by whom any one is convicted under this Part of the Code (XVI.) are given specific power to order restitution by sec. 795 of the Code, as follows:

795. The magistrate by whom any person has been convicted under the provisions of this Part may order restitution of the property stolen, or taken or obtained by false pretences, in any case in which the Court,

before whom the person convicted would have been tried but for the provisions of this Part, might by law order restitution. 55-56 V., c. 29, s. 803.

When a person is convicted of stealing, or receiving stolen property, the property so stolen, or received, shall be restored to the owner or his representative. And for that purpose the Court has power from time to time to award writs of restitution, or to order the restitution thereof in a summary manner. There must be a conviction before the order can be made.

Although there is no conviction if it is proved to the satisfaction of the Court that the goods in question belong to the prosecutor, or a witness, and that he was unlawfully deprived of them, the Court, if it sees fit, may award restitution of the property.

If before any order or award is made it appears to the Court that (a) any valuable security has been *bona fide* paid, or discharged, by any person liable to the payment thereof, or, (b) being a negotiable instrument has been *bona fide* taken or received by transfer or delivery for a just and valuable consideration without notice or any reasonable cause for suspicion that it had been stolen, or, (c) 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 *shall not* award, or order, restitution of such security or property.

The ownership of stolen property is only changed by sale in *market overt: White* v. *Spettigue,* 13 M. & W. 603; but if sold in *market overt* the property will still, on the conviction of the thief, revest in the true owner and entitle him to recover in an action of trover. *Scattergood* v. *Sylvester,* 19 L. J. Q. B. 447.

Stolen animals purchased *bona fide* in *market overt* are the property of the purchaser until the conviction of the thief, when the property reverts to the original owner. And the purchaser cannot set up against the owner a claim for the keep of the beast during such period. *Walker* v. *Mathews,* 8 Q. B. D. 109, 46 L. J. 915.

The finder of lost goods has a good title to them against all the world except the true owner, although the same were found in another person's shop. *Bridges* v. *Hawksworth,* 18 L. T. (O.S.) 154. See *Farquharson* v. *King* (1902), A. C. 325; *Lindsay* v. *Cready,* H. L. 3 A. C. 459.

Where goods had been purchased with stolen money and were found in the house of the prosecutor and the prisoner was acquitted on technical grounds and brought an action to recover the goods, judgment was given for the defendant in the County

Court, and this judgment was upheld on appeal. *Cattley* v. *Lowndes*, 34 W. R. 139.

Where there has been a conviction for obtaining money by false pretences, the Court has power to order restitution of the proceeds of the goods as well as of the goods themselves. The application will only be granted if the proceeds are in the hands of the prisoner or of an agent of his holding them for him. *R.* v. *J. J. Central Crim. Court* (*Foisard's Case*), 17 Q. B. D. 593, and 18 Q. B. D. 314.

On an indictment for stealing goods the prisoner was acquitted, the defence being that the goods were his own. Held, that it was virtually a finding by the jury that the goods were not the property of the prosecutor, and, therefore, that the Judge had no right to order them to be restored to him. *R.* v. *Evelette*, 5 Allen N. B. R. 201.

If property stolen has been sold before the conviction, an application may be made to the Court before which the prisoner is convicted for the restitution of the proceeds, which, if they are in the hands of the prisoner, or of an agent who holds them for him, an order should be granted. If the person holding the goods does not hold them for the prisoner the application should not be granted. *R.* v. *J. J. Central C. C.*, *supra*.

Where after the trial and conviction of a prisoner for theft the Judge who presided at the trial made an order, directing that the property found in his possession when he was apprehended should be disposed of in a particular manner, such property not being part of that which had been stolen, nor connected therewith, it was held that the order was bad as the Judge had no jurisdiction to make it. *R.* v. *City of London*, E. B. & E. 509, 27 L. J. M. C. 231.

Where the property stolen is considerable, it is advisable to try the prisoner upon all the indictments in order that the Court may make restitution, for unless after judgment on the indictments, upon which he has been found guilty, the prisoner pleads guilty to the others, the Court cannot award restitution.

In a case where a prisoner was convicted of stealing a bill of exchange and a considerable amount of money in specie, and the evidence tended to shew that he must have purchased a horse with part of the proceeds of the bill, the Court ordered the horse to be delivered to the prosecutor. *R.* v. *Powell*, 7 C. & P. 640.

The Court will not, in general, award restitution where the owner has been guilty of gross neglect in bringing the offender to justice. 2 *Hawk*, c. 23, 556.

The owner shall have no more goods than those mentioned in the indictment, though other goods were stolen at the same time; and the reason is because by such admission the offender might have escaped. 1 *Hale*, 545.

The Court has no jurisdiction to direct the disposal of property found in the felon's possession not forming part of that stolen. *R.* v. *Pearce*, 27 L. J. M. C. 231.

Where a prisoner pleaded guilty to stealing several articles, the pawnbroker into whose hands the goods had come objected to any order of restitution, saying that the pledging of the goods might not have amounted to felony, and that as against their title to the goods the prisoner's confession ought not to prevail. The Judges said they were satisfied from the depositions that the prisoner was not an agent, but was guilty of felony, and an order of restitution was granted. *R.* v. *Macklin*, 5 Cox 216, and see *R.* v. *Walley*, 8 Cox 337.

The provisions of sec. 1050 do not apply to the cases of prosecution of any trustee, &c., for an indictable offence under secs. 358 or 390.

Bonds to Keep the Peace.

1058. Every magistrate under Part XVI. and every Court of criminal jurisdiction before whom any person is convicted of an offence and is not sentenced to death, shall have power in addition to any sentence imposed upon such person, to require him forthwith to enter into his own recognizances, or to give security to keep the peace, and be of good 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.

2. Any such recognizance may be in Form 49.

1059. Whenever any person who has been required to enter into a recognizance with sureties, to keep the peace and be of good behaviour, or not to engage in any prize-fight has, on account of his default therein, remained imprisoned for two weeks, the sheriff, gaoler or warden shall give notice, in writing, of the facts, to a Judge of a superior Court, or to a Judge of the County Court of the county or district in which such gaol or prison is situate, or, in the cities of Montreal and Quebec, to a Judge of the sessions of the peace for the district, or, in the Northwest Territories, to a stipendiary magistrate.

2. Such Judge or magistrate may order the discharge of such person, thereupon or at a subsequent time, upon notice to the complainant or otherwise, or may make such other order as he sees fit, respecting the number of sureties, the sum in which they are to be bound and the length of time for which such person may be bound.

The person must first be convicted of an offence, that is any offence, indictable or otherwise. The recognizance is in addition to any sentence imposed upon the person. He is required to forthwith enter either into his own recognizance, or to give security to

keep the peace and be of good behaviour for any term not exceeding two years.

In default the person (a) shall be imprisoned for not more than one year after the expiry of his imprisonment under his sentence, or (b) until such recognizances are sooner entered into, or security sooner given.

It is only in cases where the person convicted is ordered to find sureties and makes default that imprisonment is awarded, since he can himself be bound over in open Court forthwith after sentence. A recognizance does not require to be signed by either the person convicted or his sureties. The recognizance may be in Form 49.

Further reference can be had to sec. 748 in the last chapter, and comments thereon and cases cited.

Section 1059 applies only where a person has been ordered to enter into a recognizance with sureties and has made default, and no order has been made in the warrant of commitment for his imprisonment for a term mentioned therein unless he finds sufficient sureties.

It is usual in the warrant of commitment (Form 50) to specify the time of imprisonment. But after he has been imprisoned for two weeks the sheriff, gaoler or warden shall give notice in writing, &c. This is an imperative duty cast upon these officials. Power is given to the Judge or magistrate to practically review the order of the committing magistrate, since he may order the person's discharge forthwith or at a subsequent time, and this with, or without, notice to the complainant.

And he may make such 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 each person may be bound. It is virtually a trial *de novo* by way of appeal from the decision of the committing magistrate.

Punishment for Convictions under Section 773 (a) or (b).

780. In the case of an offence charged under paragraph (*a*) or (*b*) of section seven hundred and seventy-three, the magistrate, after hearing the whole case for the prosecution and for the defence, shall, if he finds the charge proved, convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labour, for any term not exceeding six months. 55-56 V., c. 29, s. 787.

These offences are, (a) theft, or obtaining money or property by false pretences, or unlawfully receiving stolen property where

the value does not, in the judgment of the magistrate, exceed ten dollars, or (b) with attempt to commit theft.

Sub-sec. 3 of sec. 777 expressly declares that secs. 780 and 781 do not extend, or apply to cases tried under that section. This means that any person tried and convicted of these offences before any magistrate exercising and having jurisdiction under sec. 777, where the value does not exceed $10, may have imposed on them the full penalties enacted for these offences by the section of the Code governing these offences, and the punishment need not be limited to six months. For instance, by sec. 386 of the Code, everyone is guilty of an indictable offence and liable to seven years' imprisonment who steals anything, for the stealing of which no punishment is otherwise proveded, &c. See *R.* v. *Hayward* (1902), 6 C. C. C. 399, and *Ex parte McDonald* (1904), 9 C. C. C. 368.

PUNISHMENT FOR UNLAWFUL WOUNDING.

Assaulting Peace Officer, Disorderly House, Etc.

781. In any case summarily tried under paragraphs (*c*), (*d*), (*e*), (*f*) or (*g*), of section seven hundred and seventy-three, if the magistrate finds the charge proved, he may convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard 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.

2. Such fine may be levied by warrant of distress under the hand and seal of the magistrate, or the person convicted may be condemned, in addition to any other imprisonment on the same conviction, to be committed to the common gaol or other place of confinement for a further term not exceeding six months, unless such fine is sooner paid. 55-56 V., c. 29, s. 788.

Paragraph (c) of sec. 773, relates to unlawful wounding or inflicting grievous bodily harm, either with or without a weapon or instrument, (d) indecent assault upon males and females, (e) assaulting or obstructing any public, or peace officer, engaged in officer, (f) with keeping a disorderly house under sec. 228, or the execution of his duty, or any person acting in aid of such (g) with any offence under sec. 235, betting or pool selling.

Upon conviction, the magistrate in any of these cases summarily tried by him under sec. 773, can only impose imprisonment, with or without hard labour, for any term not exceeding six months, or condemn him to pay a fine not exceeding with the costs in the case $100, or to both fine and imprisonment.

A magistrate having jurisdiction under sec. 777, has power to impose the full sentences fixed by the sections of the Code governing these several offences.

(c) A person convicted for unlawful wounding or inflicting grievous bodily harm, whether with or without a weapon, under sec. 274, is liable to three years imprisonment.

Consequently anyone convicted before a magistrate acting under sec. 777, is liable to the same punishment as if tried by indictment, and the provision of sec. 781 does not apply. See *R.* v. *Archibald* (1898), 4 C. C. C. 159.

(d) The offences punishable under secs. 293 and 292 with ten years, and two years respectively, and a magistrate acting under sec. 777, can inflict the punishment.

(e) Likewise a magistrate acting and having jurisdiction under sec. 777, may impose the full penalty prescribed by sec. 296, viz., two years imprisonment.

(f) And upon conviction for keeping a disorderly house under 228, the punishment prescribed by that section is one year's imprisonment. A fine may be inflicted in lieu of imprisonment, or, in addition thereto, as provided for by sec. 1035.

(g) The penalty prescribed by sec. 235 for offences punishable under that section is one year's imprisonment, or a fine not exceeding $1,000. And this punishment may be inflicted by a magistrate acting under sec. 777.

All this emphasises the fact that the punishments prescribed by secs. 780 and 781, are the maximum sentences that can be imposed by magistrates having jurisdiction under secs. 771 and 773, and the provisions of secs. 780 and 781 in no wise restrict or limit the powers of magistrates who are qualified to act and do act under sec. 777.

It is to be carefully noted that the fine which can be imposed under sec. 781, must not exceed $100, with costs in the case. So that if a man was fined $100 and costs the conviction would be bad. The best way to avoid difficulty if costs are to be imposed is to make the fine the difference between $100 and the costs. For instance, if the costs amount to $2.35, then make the fine $97.65. If the full fine of $100 is imposed then the conviction should shew on the face of it that there are no costs. See *R.* v. *Perry* (1899), 35 C. L. J. 174; *R.* v. *Cyr*, 12 P. R. 34.

Where the law authorizing the conviction does not specify any term of imprisonment unless the penalty is sooner paid, a magistrate can only award three months' imprisonment in default. Sec. 781 only authorizes six months' imprisonment as a substantive penalty to be imposed in the first instance. If a fine is imposed, then the only imprisonment that can be given in

default is three months, as provided by sec. 739 of the Code. And where a person was convicted for keeping a disorderly house and fined $50, and in default six months' imprisonment, the conviction was held bad and the prisoner discharged. See *R.* v. *Horton* (1898), 34 C. L. J. 42; *R.* v. *Bougie* (1899), 3 C. C. C. 487; *R.* v. *Howes* (1902), 6 C. C. C. 238.

Where there is nothing upon the face of a conviction for keeping a house of ill-fame, to shew that the convicting magistrate was acting under this Part XVI., or under summary conviction Part XV., and the information being defective in form, can be amended under Part XV., the Court will treat it as a summary conviction, and correct the same under sec. 1124 by reducing the term of imprisonment where the sentence is in excess of that authorized by law. *R.* v. *Spooner* (1900), 4 C. C. C. 209. And see *R.* v. *Roberts* (1901), 4 C. C. C. 253; *R.* v. *Carter* (1902), 5 C. C. C. 401.

Sec. 169 of the Code provides that every one who resists or wilfully obstructs any peace officer in the execution of his duty, etc., is guilty of an offence punishable on indictment, or on summary conviction, and liable if convicted on indictment to two years, and on summary conviction before two justices to six months' imprisonment with hard labour, or a fine of $100. This section 169 is not controlled by secs. 773 and 774 of the Code.

The consent of the accused is not necessary to the justices having jurisdiction, to try the offence under sec. 169. *R.* v. *Jack* (1902), 5 C. C. C. 304.

Theft, False Pretences over $10.

782. When any person is charged before a magistrate with theft or with having obtained property by false pretences, or with having unlawfully received stolen property, and the value of the property stolen, obtained or received exceeds ten dollars, and the evidence in support of the prosecution is, in the opinion of the magistrate, sufficient to put the person on his trial for the offence charged, such magistrate, if the case appears to him to be one which may properly be disposed of in a summary way, shall reduce the charge to writing, and shall read it to the said person, and, unless such person is one who, under section seven hundred and seventy-five, can be tried summarily without his consent, shall then put to him the question mentioned in section seven hundred and seventy-eight, and shall explain to him that he is not obliged to plead or answer before such magistrate, and that if he does not plead or answer before him, he will be committed for trial in the usual course.

783. If the person charged as mentioned in the last preceding section consents to be tried by the magistrate, the magistrate shall then ask him whether he is guilty or not guilty of the charge, and if such person says that he is guilty, the magistrate shall then cause a plea of guilty to be entered upon the proceedings, and sentence him to the same punishment as

he would have been liable to if he had been convicted upon indictment in the ordinary way; and if he says that he is not guilty, he shall be remanded to gaol to await his trial in the usual course.

The limited jurisdiction conferred by these sections is confined to the class of magistrates mentioned in sec. 771, and having jurisdiction under sec. 773. It does not limit the jurisdiction of magistrates in cities and towns acting under sec. 777. A magistrate having authority and acting under sec. 777 has, with the consent of the accused, full authority to try and determine the offences mentioned in sec. 782, and to impose the maximum penalties.

If a person is charged before a city stipendiary with theft, and the value of the goods stolen exceeds $10, such magistrate is not bound to remand him under sec. 783 upon his pleading "not guilty," his jurisdiction being under sec. 777, and he may try the charge and impose the same punishment as might be imposed by a Court of General Sessions. *R.* v. *Bowers* (*No. 2*) (1903), 6 C. C. C. 264.

The class of magistrates upon whom extra jurisdiction is imposed by these sections, 782 and 783, have authority under sec. 773 with the consent of the accused to summarily dispose of the charges of theft, false pretences and receiving stolen property where in the opinion of the magistrate the value of the property in question does not exceed ten dollars in value. The jurisdiction conferred by sec. 782 is to enable these magistrates to deal summarily with these offences where the value of the property exceeds ten dollars. The procedure laid down must be followed strictly. The proceedings up to the close of the case for the prosecution are to be conducted in every respect as upon a preliminary inquiry under Part XIV. And if in the opinion of the magistrate the evidence in support of the prosecution is sufficient to put the person on his trial for the offence charged, and it appears to him to be a case that should be disposed of summarily, he may then reduce the charge to writing and read it to the accused. This feature of the proceedings is imperative since the language is that the magistrate shall reduce the charge to writing and shall read it to said person. It matters not that the charge that he has been investigating has already been reduced to writing in the sworn information upon which his inquiry has been based. He must go through the formality of writing out the charge himself, and then reading it to the accused. And unless the accused is a seafaring person over whom the magistrate has absolute jurisdiction under sec. 775, then the magistrate shall put to him the question men-

tioned in sec. 778, 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, he will be committed for trial in the usual course. That is, the magistrate in this event will proceed as under sec. 684 on a preliminary inquiry. If however the person charged consents to be tried by the magistrate, he shall then be asked "whether he is guilty or not guilty of the charge." If he says he is guilty, then such a plea shall be entered on the proceedings, and the magistrate may proceed to sentence him to the same punishment as if he had been convicted upon indictment. If however the accused person says he is "not guilty," he shall be remanded to gaol in the usual course.

That the proceedings, as on a preliminary inquiry, must be strictly complied with, see *R.* v. *Williams* (1905), 10 C. C. C. 330.

Magistrates of cities and towns having jurisdiction under sec. 777, are not controlled in any way by secs. 782 and 783 as respects the trial and disposition of the offences of theft, false pretences and receiving when the value of the property exceeds $10, but may proceed to the trial of such offences with the consent of the accused, without any preliminary inquiry. *R.* v. *McLeod* (1906), 12 C. C. C. 73.

Where there is a valid conviction under sec. 777, the warrant of commitment need not recite that the charge was read over to the accused as required by sec. 778, before he was asked to plead, for the omission if otherwise material is cured by sec. 1130. *Ibid.*

A county stipendiary magistrate has no jurisdiction to hold a summary trial of an indictable offence where the jurisdiction depends on sec. 777 (2) of the Code.

Such a magistrate may have jurisdiction as such within a city inside of his county, yet he is not a stipendiary magistrate of the city. *R.* v. *Nar Singh* (1909), 14 C. C. C. 454. See *R.* v. *Lee Guey* (1907), 13 C. C. C. 80; *R.* v. *Benner*, 8 C. C. C. 398, and *R.* v. *Giovonetti*, 5 C. C. C. 157.

Where, before sentence on a plea of guilty, it appears that the accused disputed that he had so pleaded, and claimed a justification or excuse for the act charged against him, the magistrate should have allowed the accused to change his plea to not guilty and tried the case on the evidence. *R.* v. *Lamothe* (1908), 15 C. C. C. 61.

MAGISTRATE MAY DECIDE NOT TO PROCEED.

784. 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.

785. If, when his consent is necessary, the person charged elects to be tried before a jury, the magistrate shall proceed to hold a preliminary inquiry as provided in Parts XIII. and XIV., and if the person charged is committed for trial, shall state in the warrant of committal the fact of such election having been made.

Where the accused has consented to summary trial, and has made his defence and the magistrate has acquitted him, the magistrate has no further jurisdiction, and cannot accept the recognizance of the prosecutor to prefer an indictment. *R.* v. *Burns* (*No. 2*), (1901), 4 C. C. C. 330.

Full Defence Must be Allowed.

786. 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.

Where the magistrate expressed his opinion that in view of the evidence adduced by the prosecution, a denial by the defendant on oath of the charge would not alter his opinion as to her guilt, and after that expression of opinion the counsel who appeared for the defendant did not further press for her examination as a witness on her own behalf. Held that there was no denial of the right of the defendant "to make her full answer and defence to the charge." *R.* v. *McGregor* (1895), 2 C. C. C. 410.

Where the defendant appeared before the magistrate and pleaded not guilty to a charge of selling liquor without a license and asked for an adjournment which was refused, the Court held that the conviction should be quashed on the ground that when the defendant denied that he was guilty and gave evidence on his behalf denying his guilt, but required reasonable time to procure other witnesses who could probably be speedily procured, reasonable time should be allowed him. A defendant should be duly summoned and fully heard. *R.* v. *Lorenzo* (1909), 14 O. W. R. 1038, and see *R.* v. *Luigi* (1909), 14 O. W. R. 1041.

Proceedings in Open Court.

It is provided by sec. 787 that every Court held by a magistrate for the purposes of this part shall be an open public Court.

Section 645 provides for the exclusion of the public at the trial of any person charged with an offence under the sections of the Code therein set out, as follows: secs. 202 to 206, 211 to 220, 228, 238, 292 and 293, 299 to 306 and 313 and 314.

The Court or Judge or justice may order that the public be excluded from the room or place in which the Court is held during the trial. And such order may be made in any case other than those enumerated above, where the Court or Judge, or justice, may be of opinion that the same will be in the interest of public morals. And nothing in the section shall be construed by implication or otherwise as limiting any power heretofore possessed at common law by the presiding Judge, or other presiding officer of any Court, of excluding the general public from the court-room in any case where such Judge or officer deems such exclusion necessary or expedient.

Procuring Attendance of Witnesses.

788. The magistrate before whom any person is charged under the provisions of this Part may, by summons or, by writing under his hand, require the attendance of any person as a witness upon the hearing of the case, at a time and place to be named in such summons, and such magistrate may bind, by recognizance, all persons whom he considers necessary to be examined, touching the matter of such charge, to attend at the time and place appointed by him and then and there to give evidence upon the hearing of such charge.

2. If any person so summoned, or required or bound as aforesaid, neglects or refuses to attend in pursuance of such summons or recognizance, and if proof is made of such person having been duly summoned as hereinafter mentioned, or bound by recognizance as aforesaid, the magistrate before whom such person should have attended may issue a warrant to compel his appearance as a witness.

789. Every summons issued under the provisions of this Part may be served by delivering a copy of the summons to the person summoned, or by delivering a copy of the summons to some inmate of such person's usual place of abode apparently over sixteen years of age.

2. Every person required by any writing under the hand of the magistrate to attend and give evidence as aforesaid shall be deemed to have been duly summoned.

Presumably the summons may be in Form 11, or to the like effect, as prescribed by sec. 671.

By sec. 672, every summons for a witness issued under sec. 671 must be served by a constable, or other peace officer, upon the person to whom it is directed, either personally, of if such person cannot be conveniently met with, by leaving it for him at his last or most usual place of abode, with some inmate thereof apparently not under 16 years of age. There is nothing in sec. 789 about a summons issued under 788 being served by a peace officer, but it is advised that service should be so effected.

It is only in cases where a person is "charged under the provisions of this part," that is, has consented to be tried summarily by a magistrate, that the provisions of secs. 788 and 789 apply. If the person elects to be tried by a jury, the magistrate shall proceed under Parts XIII. and XIV. (sec. 785), and consequently the provisions of secs. 671 to 677, inclusive, will be used for procuring the attendance of witnesses.

The warrant which a magistrate may issue in default of a witness attending may be in form 12, the same as provided for under sec. 673.

See the comments upon and cases cited under secs. 671, *et seq.*, *supra*.

Dismissal of the Charge; Effect of Conviction.

790. Whenever the magistrate finds the offence not proved, he shall dismiss the charge, and make out and deliver to the person charged a certificate under his hand stating the fact of such dismissal. 55-56 V., c. 29, s. 797.

791. Every conviction under this Part shall have the same effect as a conviction upon indictment for the same offence. 55-56 V., c. 29, s. 798.

792. Every person who obtains a certificate of dismissal or is convicted under the provisions of this Part, shall be released from all further or other criminal proceedings for the same cause. 55-56 V., c. 29, s. 799.

794. A copy of such conviction, or of such certificate of dismissal, certified by the proper officer of the Court, or proved to be a true copy, shall be sufficient evidence to prove a conviction or dismissal for the offence mentioned therein in any legal proceedings. 55-56 V., c. 29, s. 802.

The forms of conviction and certificate of dismissal under this part are prescribed by sec. 799, as follows:—

799. A conviction or certificate of dismissal under this Part may be in the Form 55, 56, or 57 applicable to the case or to the like effect; and whenever the nature of the case required it, such Forms may be altered by omitting the words stating the consent of the person to be tried before the magistrate, and by adding the requisite words, stating the fine imposed, if any, and the imprisonment, if any, to which the person convicted is to be subjected, if the fine is not sooner paid. 55-56 V., c. 29, s. 807.

The warrant of commitment must shew on its face that the prisoner consented to a summary trial. *R.* v. *Soars*, 17 C. L. T. 124.

Where a conviction omitted to set out the consent to the charge being summarily tried, held that the defect was cured by sec. 1130, being a matter of form only. See *R.* v. *Buttress*, *supra*.

The words used in form 55 are "(and consenting to my trying the charge summarily)."

The effect of the provisions of secs. 790, 791 and 792 is to place a person who has been tried under this part and been either

acquitted or convicted, upon the same par as to his legal rights, as if he had been tried upon an indictment and the jury had returned a verdict of guilty or not guilty. Since by sec. 792, a person who obtains a certificate of dismissal thereby obtains a release from all further or other criminal proceedings for the same cause, and as by sec. 791, a conviction under this part shall have the same effect as a conviction upon an indictment for the same offence, such conviction will operate as a release from all further or other criminal proceedings for the same cause.

Release from Further Proceedings.

And by sec. 1079 of the Code, it is provided that when any person convicted of any offence has paid the sums adjudged to be paid, together with costs, if any, under such conviction, or has received a remission thereof from the Crown, or has suffered the imprisonment awarded for non-payment thereof, or the imprisonment awarded in the first instance, or has been discharged from his conviction by the justice in any case in which such justice may discharge such person, he shall be released from all further or other criminal proceedings for the same cause.

As to pleading *autrefois acquit* or *autrefois convict*, see secs. 905, 906, 907 and 908 of the Code.

Where the name of the accused, the place of the offence and the character of the offence are the same in the certificate of conviction produced in proof of a plea of *autrefois acquit* and in the charge then being tried, it will be presumed that the accused is the party named in such certificate without parol evidence of identity. *R.* v. *Clark* (1904), 9 C. C. C. 125.

We must bear in mind the well established principle of our criminal law that a series of charges shall not be preferred, and whether a person accused of a minor offence is acquitted, or convicted, he shall not be charged again on the same facts in a more aggravated form. *4 Bl. Com. 336; 2 Hale, 251.* And see *R.* v. *Bombardier* (1905), 11 C. C. C. 216; *Ex parte Flanagan* (1899), 5 C. C. C. 82; *R.* v. *Quinn* (1905), 10 C. C. C. 412.

Sec. 793 provides for magistrates transmitting convictions or duplicate certificates of dismissals with the written charge and the depositions of witnesses for the prosecution and defence and the statement of accused, to the clerk of the peace or other proper officer for the district, city, county or place wherein the offence was committed, there to be kept by the proper officer among the records of the general or quarter Sessions of the Peace, or of any

Court discharging the functions of a Court of General Quarter Sessions of the Peace.

Remand by Justice to Magistrate.

796. Whenever any person is charged before any justice or justices, with any offence mentioned in section seven hundred and seventy-three, and in the opinion of such justice or justices the case is proper to be disposed of summarily by a magistrate, as in this Part provided, the justice or justices before whom such person is so charged may, if he or they see fit, remand such person for trial before the nearest magistrate in like manner in all respects as a justice or justices are authorized to commit an accused person for trial at any Court: Provided that no justice or justices, in any province, shall so remand any person for trial before any magistrate in any other province.

2. Any person so remanded for trial before a magistrate in any city, may be examined and dealt with by the said magistrate or any other magistrate in the same city.

The provisions of this section are only applicable in respect to the offences mentioned in sec. 773, namely, (a) theft, or obtaining money by false pretences and receiving stolen property where the value of the property in the judgment of the magistrate does not exceed $10, (b) with attempt to commit theft, or (c) unlawful wounding or inflicting grievous bodily harm with or without a weapon, or, (d) indecent assaults, or (e) assaulting or obstructing any public or peace officer engaged in the execution of his duty, or any person acting in aid of such officer, or (f) keeping a disorderly house under sec. 228, or (g) with any offence under sec. 235, betting and pool selling.

The object of investing justices with the powers here granted is to facilitate the trial of these offences and allow them to be disposed of quickly.

A justice of the peace has alternative courses to pursue, either to remand the accused before a magistrate, or commit him for trial in the usual way. A justice of the peace may make a remand in such cases before a magistrate in the same city in which he himself resides and has jurisdiction.

Appeals from Convictions Under Sec. 773.

797. When any of the offences mentioned in paragraphs (*a*) or (*f*) of section seven hundred and seventy-three is tried in any of the provinces under this Part an appeal shall lie from a conviction for the offence in the same manner as from summary convictions under Part XV., and all provisions of that Part relating to appeals shall apply to every such appeal: Provided that in the province of Saskatchewan or Alberta there shall be no appeal if the conviction is made by a Judge of a superior Court.

The appeals provided by sec. 797 are from convictions made by the class of magistrates mentioned in sec. 771, and who exer-

cise jurisdiction under sec. 773. An appeal will not lie under this section from a conviction for any of the offences mentioned in sec. 773, by any city or town magistrate having power to exercise jurisdiction under sec. 777.

As we have already seen, the only appeal that can be taken from the conviction of a magistrate exercising jurisdiction under sec. 777 is by way of reserved case upon questions of law, as provided by secs. 1013-1021. Reference can be had to the discussion on appeal in the previous part of this chapter.

PROVISIONS OF PART XV.

798. Except as specially provided for in the two last preceding sections, neither the provisions of this Act relating to preliminary inquiries before justices, nor of Part XV., shall apply to any proceedings under this Part.

A magistrate in dealing with a case under Part XVI. is not by virtue of sec. 711 of the Code to take depositions in the manner prescribed by sec. 682 of the Code. He is relieved from the duty of reading over the depositions to the witnesses before the prisoner enters on his defence by reason of the provisions of sec. 798 of the Code. *R.* v. *Klein*, 11 W. L. R. 249.

JUVENILE OFFENDERS.

779. Whenever the person charged appears to be of, or about, or under the age of sixteen years, and is not represented by counsel present at the time, the magistrate shall not proceed under the last preceding section without first asking the person charged what his age is.

2. If such person then states his age as being sixteen years or less, the magistrate shall defer any further action, and shall at once cause notice to be given to the parent or parents of such person, living in the province, if any, or if he has no such parents, or if his parents are unknown, then to the guardian or householder, if any, with whom he ordinarily resides, of such person having been so charged, and of the time and place when such person will be called on to make his election as to whether he will be tried by the said magistrate.

3. Such notice shall allow reasonable time for the said parents, guardian or householder to be present and advise the said person charged before he is called on to so elect.

4. At the time fixed by such notice, or if it appears to the satisfaction of the magistrate that there is no person for whom notice is provided as aforesaid, or that all reasonable means to give such notice have been taken without success, then, at the earliest convenient time, the magistrate shall proceed as in the last preceding section provided.

5. If any person notified as aforesaid is present at the time so fixed, the magistrate shall afford him an opportunity to advise the person charged before he is called upon to elect.

6. The notice provided for by the section may be given by registered letter, if the person to be notified does not reside in the city, town or municipality where the proceedings are had.

This is the only section in Part XVI. that has not been considered. Although left to the last, its provisions are none the less important. Since the manner of dealing with juvenile delinquents has been almost entirely revolutionized through the passing in recent years of advanced legislation, one seems to feel that this enactment is out of place and has no business where it is. One has no quarrel with the procedure laid down as to notice to parents, etc., but it disputes one's ideas as to how juvenile offenders should be dealt with, and it is to be regretted that such antiquated legislation should be left upon the statute book.

The latest legislation on the subject is the "Juvenile Delinquents' Act, 1908" (7-8 Edw. VII. c. 40), and it is to be hoped that little time will be lost in incorporating this Act into the Criminal Code and making its provisions the general law of Canada. As the law now stands this Act can only be put in force in cities, towns and other portions of the provinces by proclamation, after the governor in council is satisfied that proper facilities for the carrying out of the provisions of the Act have been provided for such cities and towns, by the municipal councils or otherwise.

The modern idea of dealing with juvenile delinquents is not to treat them as ordinary criminals, but as mischievous children, and by keeping them from associating with criminals and placing them under such restraint and observation as will tend to bring out their better instincts and make them realize their duties to others. The outstanding features of this new Act are the appointment and use of probation officers who look after children in their homes, and to whom the children report from time to time. The visitations of these officers to the homes of the children never fail to have a beneficial effect all around, since the parents are made to realize their true responsibilities. Next the establishment of detention homes, where children are sent who are apprehended for offences; no gaol, lock-up or police cells. The juvenile Court is held away from the neighbourhood of the Police Court, and if possible in the detention home, and the proceedings of the Court are as informal as circumstances will permit, having a due regard for the proper administration of justice. Parents are notified to attend the Court and their duties are fully impressed upon them. And last, but by no means least, are the provisions of sec. 29 of the Act which prescribes punishment for what is known as 'contributory' delinquency. Any person who knowingly, or wilfully, encourages, aids, abets or connives at the commission by a child of a delinquency, or who knowingly or wilfully does any act producing, promoting or contributing to a child's being or becoming a juvenile delinquent,

whether or not such person is the parent or guardian of the child, or who being the parent or guardian of the child, and being able to do so, wilfully neglects to do that which would directly tend to prevent a child's being or becoming a juvenile delinquent, is liable upon summary conviction before a Juvenile Court, or justice, to a fine not exceeding $500, or to imprisonment for a period not exceeding one year, or to both fine and imprisonment.

A 'delinquency' is defined by the Act to mean and include any offence under the Criminal Code, or of any Dominion, or Provincial, statute, or of any by-law, or ordinance of any municipality, for the violation of which punishment by fine or imprisonment may be awarded.

A careful perusal of this section will indicate how far reaching are its provisions, and what a salutary influence can be exercised over both men and women who are responsible for children going wrong.

The Trial of Juvenile Offenders for Indictable Offences.

Part XVII. of the Code deals exclusively with the mode and manner of dealing with juvenile offenders. As it is hoped the day is not far distant when this obsolete legislation will be repealed and will have substituted for it the enlightened and progressive provisions contained in "The Juvenile Delinquents' Act of 1908," further reference to this part of the Code is not thought necessary.

Speedy Trials of Indictable Offences.

Part XVIII. of the Code sets out the procedure in trials before County and District Judges of indictable offences where the prisoner charged elects to take a speedy trial, after commitment for trial by a magistrate or justice of the peace.

A Judge sitting in these Courts, with the consent of the accused, has jurisdiction to try all the offences mentioned in sec. 582 of the Code as being within the jurisdiction of the General or Quarter Sessions of the Peace.

As this work purports to deal only with summary trials before magistrates and justices of the peace, further reference to Part XVIII. is not thought necessary or convenient.

CHAPTER X.

Habeas Corpus and Certiorari.

All that is attempted to be given in this chapter is a summary of the law and general principles relating to these important matters of criminal procedure. The space at our command will not admit of more detail, and the reader must look elsewhere for further enlightenment.

Blackstone says, at p. 129, Vol. III.: "The writ of *habeas corpus*, the most celebrated writ in the English law," and "The oppression of an obscure individual gave birth to the famous Habeas Corpus Act, 31 Car. II. c. 2 (1679), which is frequently considered as another *Magna Charta* of the Kingdom, and by consequence and analogy has also in subsequent times reduced the general method of proceeding on these writs (though not within the reach of that statute, but issuing merely at the common law) to the true standard of law and liberty."

Various kinds of these writs were made use of at Westminster. The writs that are of modern use are: (1) the writ of *habeas corpus ad testificandum*, a process issued for the purpose of removing a prisoner from a prison or gaol to prosecute or testify in Court as a witness. This writ is superseded in criminal matters by the provisions of s. 977 of the Code. This section provides that where the attendance of any person confined in any prison in Canada is required in any Court of criminal jurisdiction in any case cognizable therein by indictment, the Court before whom any such person is required to attend, or any Judge of such Court or of any superior Court, or County Court, or chairman of General Sessions, may before or during any such term or sittings at which 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 either deliver the prisoner to the person named in the order or for himself to convey such prisoner to such place.

Habeas Corpus ad Subjiciendum.

The writ with which we are concerned is described by Blackstone as "the great and efficacious writ in all matters of illegal confinement, that of *habeas corpus ad subjiciendum*, directed to

the person detaining another and commanding him to produce the body of the prisoner with the day and cause of his caption and detention to do, submit to, and receive whatsoever the Judge or Court awarding such writ shall consider in that behalf. This is a high prerogative writ, and therefore by the common law issuing out of the Court of King's Bench not only in term time, but also during the vacation by a *fiat* from the Chief Justice or any other of the Judges, and running into all parts of the King's Dominions, for the King is entitled at all times to have an account why the liberty of any of his subjects is restrained wherever that restraint may be inflicted."

The Habeas Corpus Act, 31 Car. II. c. 2, applies only to persons who are detained, or imprisoned for criminal or supposed criminal offences. By proclamation in 1763 the criminal law of England was introduced into Canada, and by the Quebec Act of 1774 the criminal law of England was to obtain to the exclusion of every other criminal code which might have prevailed in Canada before 1763.

Thus was introduced into Canada the Habeas Corpus Act, 31 Car. II. In the case of Anderson, the fugitive slave, it was held that this writ could be applied for in England by a person confined in Canada or any other of the colonies. The Judges of the Queen's Bench held that the prerogative power had always been inherent in the English Court in favour of British subjects wherever imprisoned, except in a foreign country, and had never been taken away by express statute. By statute (25 Vict.) passed by the Houses of Parliament in England, the English Courts were deprived of their extended jurisdiction over the colonies, whenever local Courts exist by which such a jurisdiction can be exercised. The Habeas Corpus Act, 29 Car. II. c. 2, is in force all over the British Dominions.

As the Habeas Corpus Act, 31 Car. II., extended only to cases where persons are imprisoned on criminal or supposed criminal charges, the other cases were left to the operations of the common law. This being found defective, by the Statute 56 Geo. III. c. 100, the writ was extended to all other cases in England. Under this Act any person confined or restrained of his liberty (otherwise than for criminal charges and except persons imprisoned under a judgment or decree for debt) may apply to any Judge of the Common Law Courts for a *habeas corpus* on shewing by affidavit that there is a reasonable and probable ground for complaint.

The provisions of this latter Act, 56 Geo. III. c. 100 (1816), has been extended by special statutes in several of the Provinces

of Canada. In Ontario by chapter 51 of the statutes of 1909, the Ontario Habeas Corpus Act, repealing R. S. O. c. 83. In Nova Scotia by R. S. N. S. (1900), c. 181, "Securing the liberty of the subject." In New Brunswick by R. S. N. B. (1903), c. 133.

In Manitoba and in the North-West and Yukon Territories and the Provinces of Saskatchewan and Alberta the laws of England as they existed on the 15th day of July, 1870, in so far as the same are applicable, relating to civil and criminal rights, are in force, except where the same have been altered or repealed by the legislatures of these Provinces or of the Territories. Consequently the Act, 56 Geo. III. c. 100, is in force in these Provinces, and special legislation is not necessary for its promulgation. This law is also in force in British Columbia, since the laws of England, both civil and criminal, as they existed on the 19th day of November, 1858, in so far as they have not been repealed by any Act or Ordinance passed in that Province, or by the Parliament of Canada relating to criminal matters, are the laws of British Columbia.

The Act, c. 45, 29 & 30 Vic., of the old Province of Canada, which then included Ontario and Quebec, extended the Statute of Geo. III. into these two Provinces, thus providing a remedy by *habeas corpus* in matters other than criminal matters arising under Provincial laws. The Act, 29 & 30 Vic. c. 45, is embodied in Quebec law in the Revised Statutes of Lower Canada (1861), c. 95, and in Ontario in the Habeas Corpus Act of 1909, c. 51. The Habeas Corpus Act of Canada (1866), 45 Vic. c. 45, which applies only to Upper Canada, is still in force in Ontario in all criminal matters. And the Statutes of Canada, 1870, c. 1, and 1876, c. 26.

Supreme Court of Canada.

By s. 62 of the Supreme Court Act every Judge of the Court shall, except in matters arising out of any claim for extradition under any treaty, have concurrent jurisdiction with the Courts or Judges of the several Provinces to issue the writ of *habeas corpus ad subjiciendum* for the purpose of an inquiry into the case of commitment in any criminal case under any Act of the Parliament of Canada. If the Judge refuses the writ or remands the prisoner, an appeal shall lie to the Court. See *In re Trepanier*, 12 S. C. R. 111, and *In re Boucher*, Cassells' Digest, 182. The right to issue a writ of *habeas corpus* being limited by sec. 51 of

the Supreme and Exchequer Court Act to "an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada," such writ cannot be issued in a case of murder, which is a case of common law." *In re Sproule,* 12 S. C. R. 140.

Where a Judge in a Province has the right to issue a writ of *habeas corpus* returnable in term, as well as in vacation, a Judge of the Supreme Court might make the writ he authorizes returnable in said Court in term as well as immediately. *In re Sproule,* 12 S. C. R. 140; see *Re Placide Richard, infra.*

At common law the Judges of the Superior Courts can order writs of *habeas corpus ad subjiciendum* in vacation returnable either in term or vacation. *Re Hawkins,* 3 P. R. 239.

The section of the Supreme Court Act conferring jurisdiction in *habeas corpus* does not constitute the individual Judge of the Supreme Court separate and independent Courts, nor confer on the Judges jurisdiction outside of and independent of the Court and obedience to a writ issued under the said section cannot be enforced by the Judge, but the Court, which alone can issue an attachment for contempt in not obeying its process. *In re Sproule, supra.*

This section of the Supreme Court gives to a Judge of the Supreme Court of Canada the power which the common and statute law gives to Judges of the superior Courts in matters of *habeas corpus,* but it does not constitute such Judge a Court of Appeal with jurisdiction to void or review judgments of provincial Courts. *R.* v. *White* (1901), 4 C. C. C. 430; 31 S. C. R. 383.

The jurisdiction of a Judge of the Supreme Court in matters of *habeas corpus* in any criminal case is limited to an inquiry into the case of commitment, that is, as disclosed by the warrant of commitment under any Act of Parliament. GIROUARD, J., p. 14; *Ex parte MacDonald* (1896), 3 C. C. C. 10; 27 S. C. R. 683.

An application to the Supreme Court of Canada to fix a day for hearing a motion to quash an appeal from an order refusing a *habeas corpus* in an extradition matter was refused, the matter being *coram non judice,* since the Supreme and Exchequer Court Act provides that "no appeal shall be allowed in any case of proceedings for or upon a writ of *habeas corpus* arising out of any claim for extradition made under any treaty." *Ibid.,* and see *In re Lazier,* 29 S. C. R. 630.

On application to a Judge of the Supreme Court of Canada for a writ of *habeas corpus*, he may refer the matter to the full Court which has jurisdiction to hear and dispose of it. *Re Placide Richard* (1907), 12 C. C. C. 204.

Practice and Procedure.

By s. 576 of the Code every Superior Court of criminal jurisdiction may make rules of Court for regulating in criminal matters the pleading, practice and procedure in the Courts in certain subjects, including *certiorari* and *habeas corpus*. The Courts of the majority of the Provinces have not made rules respecting procedure in *certiorari* and *habeas corpus*, and where there are no such rules, it is usual to follow the English Crown Office Rules (1906); Ontario, Nova Scotia and British Columbia have rules of their own respecting *certiorari*. And the North-West Territory Rules of 1903 are in use in Saskatchewan and Alberta.

Affidavit Required on Application.

The writ of *habeas corpus*, whether at common law, or under 31 Car., does not issue as a matter of course in the final instance upon application, but must be moved for on affidavit, and the issue of the writ is entirely in the discretion of the Court.

In *The Canadian Prisoners' Case* (1839), 5 M. & W., *Re Parker et al.*, the Court said: "Before granting a *habeas corpus* to remove a person in custody we must ascertain that an affidavit is not reasonably to be expected from him. An affidavit is absolutely necessary either from the party who claims the writ, or from some other person, so as to satisfy the Court that he is so coerced as to be unable to make it." See also *R.* v. *Black* (1899), 8 C. C. C. 465.

It is discretionary with the Judge to whom the application is made to receive an affidavit of a different kind, or one not sworn to by the prisoner. *Re Ross*, 3 P. R. 301; 10 U. C. L. J. 133, and see *Re A. B.* (1905), 9 C. C. C. 390, *infra*.

Where the affidavit was not made by the prisoner and it was shewn that he was a foreigner unable to speak or understand English, the affidavit made by his solicitors was held sufficient, as would also an affidavit made by any one on his behalf. *R.* v. *Rudland, Ex parte Kalker* (1908), 14 C. C. C. 22, and see *R.* v. *McIvor* (1903), 7 C. C. C. 183.

The affidavit of the prisoner alleging an intrinsic fact confessing and avoiding the return, but not directly contradicting it, may be read on a motion for *habeas corpus*. *R.* v. *Cavelier* (1896), 11 M. L. R. 333; 1 C. C. C. 134.

Although upon the *habeas corpus* and the return thereof the Court can judge of the sufficiency or insufficiency of the return and commitment, as the case appears on the return, yet they cannot upon the bare return of the *habeas corpus* give any judgment without the record itself be removed by *certiorari*. *Bacon's Abr. Habeas Corpus*, B. 3.

Application, How Made.

Under the Crown Office Rules, the application may be to the Court or a Judge. If to the Court, it must be by motion for an order, which if the Court so direct may be made absolute *ex parte* or the Court may grant an order *nisi*. If made to a Judge he may order the writ to issue *ex parte* in the first instance, or may direct a summons for the writ to issue.

No order for the issuing of a writ is to be granted where the validity of any warrant, commitment, order, conviction, injunction or record shall be questioned unless at the time of moving a copy thereof, verified by affidavit, be produced and handed to the officer of the Court before the motion is made or the absence thereof accounted for to the satisfaction of the Court. See B. C. and N. S. Rules.

In all criminal cases the notice of application for *habeas corpus* must be served upon the convicting justice or magistrate, and upon the Crown Attorney, or other functionary representing the Attorney-General. It is essential that the notice should be both addressed to and served upon the Attorney-General. The service may be made upon the duly authorized representative of the Attorney-General.

Under the old practice the application was made by way of petition addressed to the Court to be appealed to or to any one of the Judges thereof. The modern practice is to apply to the Court or Judge by notice of motion in the first instance, or by rule *nisi*. The practice is not uniform throughout the Provinces. With the notice of motion must be served copies of the affidavits filed and the exhibits therein referred to.

The motion is to shew cause why a writ of *habeas corpus* should not issue to the keeper of the gaol directing him to bring

before the Judge or Court the body of the prisoner detained in his custody, or the order may dispense with the personal attendance of the prisoner, and that the Court may cause to be done therefore what of right and according to law the Court shall see fit to be done (and for a writ of *certiorari* in aid thereof). No security is required from a prisoner applying for *habeas corpus* or a writ of *certiorari* in aid thereof. Security is required on an application for *certiorari* alone.

The affidavit by the prisoner must disclose grounds upon which the Court can exercise its discretion, unless it is shewn that he is so coerced as to be unable to make an affidavit; in this event the affidavit may be made by the husband or wife of the prisoner, or by his agent or friend.

A mere stranger, however, who does not exhibit any right or authority to act or represent the prisoner, cannot apply.

If it sufficiently appears that the prisoner is suffering involuntary and wrongful restraint, no express authority from him need be shewn.

With the affidavit should be exhibited a copy of the warrant of detention, or the affidavit may set out that a copy has been demanded in writing and refused; this demand must be signed either by the prisoner or some one acting in his behalf.

The demand for the copy of the writ should be served personally upon the gaoler if he is in the prison, otherwise a service upon his deputy or a turnkey might be held ineffective.

The affidavit should be entitled in the Court applied to, and should set out clearly and concisely in paragraphs all the facts which the applicant considers necessary to establish his right to be released.

If there is a defect apparent upon the face of the commitment it will be sufficient to confine the affidavit to verifying the copy of the warrant of commitment and denying the guilt of the prisoner set out in the warrant. The affidavit must not be sworn before the solicitor for the applicant or the prosecutor.

On the original of an order *nisi* for a writ of *habeas corpus*, the Court may in its discretion direct an order to be drawn up for the prisoner's discharge instead of waiting for the return of the writ. When a prisoner is brought up on *habeas corpus* his counsel shall be first heard, then the counsel for the Crown and then a counsel for the prisoner in reply. If the writ is disobeyed application may be made to the Court on an affidavit of service

for an attachment, or an application may be made to the Judge in Chambers for a warrant for the apprehension of the person in contempt to be brought before him or some other Judge, to be bound over to appear in Court to answer for his contempt or to be committed to prison for want of bail.

Direction and Service of the Writ.

The writ should be directed to the person in whose custody the applicant is actually detained, whether he is an officer concerned in the public administration of justice, or a private individual who, under any pretence (such as that the person detained is a lunatic) detains another against his will.

A writ of *habeas corpus* directed disjunctively to the sheriff, or gaoler, was held to be bad. If a person is taken by a warrant of the sheriff then the writ must be directed to him, for in contemplation of the law the prisoner is in his custody and the writ must be returned with the body. If on the other hand the prisoner has been immediately committed to the custody of the gaoler, as in all criminal cases, it must be directed to him.

By the provisions of the Statute of Car. II. s. 2, the person to whom the writ is directed is bound to return the body of the prisoner within the space of three days if within twenty miles, in ten days if within one hundred miles, and within twenty days for any greater distance. If the person refuses to deliver the body he is liable for the first offence to a penalty of £100, and for the second offence to £200.

The person to whom a *habeas corpus* is directed is not bound to bring up one in his custody who is charged with treason or felony plainly expressed in the warrant of commitment, or in prison for any civil cause of action, or in execution upon process after judgment from any Court of competent jurisdiction.

The writ must be subscribed by the Judge awarding it: *R.* v. *Roddam,* Cowp. 672, and marked in the margin "*Per Statutum trisecimo primo Carli Secundi Regis.*" The Judge should sign in the margin. It should also be signed by the officer issuing it. *R.* v. *St. Clair,* 3 C. C. C. 551; *Arscott* v. *Lilly,* 11 O. R. 153; and it must be sealed by the seal of the Court. Objections cannot be raised after the return. *U. S.* v. *Browne, infra.* In Quebec all writs of *habeas corpus* should be marked "By virtue of chapter 95 Consolidated Statutes of Lower Canada," and should be signed by the person who awards the same.

The original writ must be served by delivering it to the person to whom it is directed and who has custody of the prisoner. The service must be personal if at all possible. If the writ be directed to the gaoler and he is not present in the gaol, then his deputy, or some one in authority, may be served. If directed to some other public official, and personal service is impossible, then the original may be left with a servant or agent of this official, at the place where the prisoner is confined or restrained.

If the writ is directed to more than one person the original shall be delivered to or left with the gaoler, or other principal person, and copies served or left on each of the other persons in the same manner as the writ. The service should be made in such a way that the person to whom the writ is delivered should understand its nature. And when the gaoler is in the gaol pains should be taken to effect personal service upon him.

It is essential that the gaoler should have the original writ since he is bound to produce the same with his return.

The attendance of the prisoner at the argument may be dispensed with. The consent of his solicitor to such non-attendance is required to be endorsed on the writ and signed by him.

Objections to the writ must be taken by way of substantive motion to set it aside, and not upon the motion for the discharge of the prisoner upon the return. If the writ has been obtained on fraudulent misrepresentation the Court will quash it on motion.

Return of a Writ of Habeas Corpus.

The return should be clear and unambiguous, and it will be held bad and evasive if doubtful points of the return are not cleared up by affidavit. *R.* v. *Roberts,* 2 F. & F. 272.

Upon a return to a writ of *habeas corpus* affidvaits are not admissible to shew that the offence was not committed within the justice's jurisdiction. *Ex parte Smith,* 27 L. J. M. C. 186.

The return must shew by whom and for what cause the prisoner was committed. And it will not be held invalid by mere want of form, if it discloses a good cause of detainer. It should always shew a good cause of detainer and in some cases the proof. *R.* v. *Nash,* 4 B. & A. 295.

When the body is returned by the officer to whom the writ is directed he is to certify the day and cause of the caption and detainer, as in case of an excuse for not bringing the individual. Bac. Ab. Hab. Corp. (B. 9).

Where the party is in custody under the sentence of a Court of competent jurisdiction to try his offence, it is sufficient to return that fact without stating the particulars of the original charge against him (1 East. 306); nor if the commitment were made out by order of a Court of record is it necessary to set it forth in its precise language, as must be done when it is merely under the hand of an individual magistrate.

Where a gaoler made a return stating that he held the prisoners under a warrant of committal annexed, but was unable to produce them for want of means to pay their conveyance, the Clerk of the Court endorsed the return "returned and filed." The Judge allowed these papers to be withdrawn so another return could be made—afterwards the prisoner and the writ were produced with the above return annexed. Held, (1) that the first return was in fact no return, merely alleging matters of excuse for not making a return; (2) that a return cannot be filed until it has been read before the Judge, and that the second return was authorized. *R.* v. *Reno*, 4 P. R. 281.

Where a prisoner was committed to prison upon a warrant not properly sealed, it was held to be a good return to a writ of *habeas corpus*, that a second warrant duly sealed had been lodged for his detention. *Re Phipps*, 11 W. R. 730, Q. B.

Where a prisoner was lodged in gaol under a bad warrant of commitment in the nature of a conviction, a good warrant of commitment subsequently delivered to the gaoler, but before the rule for a *habeas corpus* has been obtained, is a good answer to such rule. *Ex parte Cross*, 26 L. J. M. C. 201, and see *Ex parte Smith*, 27 L. J. M. C. 186; and see *R.* v. *Morgan* (1901), 5 C. C. C. 63.

An attachment may be granted for making an insufficient return to the first writ of *habeas corpus* without issuing an *alias* and a *pluris* writ. *R.* v. *Winton*, 5 T. R. 89.

The truth of a return in criminal cases, it has been said, cannot be controverted. 2 Hawk. P. C. 113.

On *habeas corpus*, bringing up a party committed by justices for not finding sureties of the peace, the Court will not hear affidavits controverting the facts alleged in the articles of the peace. *R.* v. *Dunn*, 12 A. & E. 599. And the Statute, 56 Geo. III., c. 100, s. 3, does not affect the practice in this respect. *Ibid.*

On a *habeas corpus*, the Warden of the Fleet set out in his return an order of the Master of the Rolls which stated that the prisoner being brought to the bar of that Court, was committed

for contempt. It was held that the prisoner could not be allowed to contradict by affidavit the statement that he was brought to the bar of the Court. *In re Clarke,* 6 Jur. 757.

At all events the return *prima facie* imparts verity, and until it is impeached need not be supported by affidavits or otherwise. *R.* v. *Batcheldor,* 9 A. & E. 731.

A return may be impeached and its truth inquired into, and it may be controverted by affidavits. If the return be false by an action at the suit of the prisoner, or by indictment. *Anon.* Salk. 349. But an attachment will not be granted unless perhaps the return be wilfully false.

Upon the return the prisoner's counsel may move to file it and to have the prisoner called into Court and the return read, and after which the counsel may argue for the prisoner's discharge.

By sec. 3, 31 Car. II., c. 2, the Judge before whom the prisoner is brought is within two days to discharge the prisoner, taking his recognizance with one or more sureties in any sum according to his discretion for his appearance, if the cause be bailable, and if it be not then he is to remand him. See sec. 1120 of the Code, *infra.*

The King's Bench may remand the prisoner to the same gaol from whence he came and order him to be brought up from time to time until they have determined to discharge or detain him: Bac. Ab. Hab. Corp. 13; or may during a reasonable time bail the prisoner *de die in diem* until they have come to a decision. *Ibid* and *R.* v. *Bethel,* 5 Mod. 19.

If a *corpus delecti* appear on the depositions (which the Court always look to) the Court will remand the prisoner though the warrant of commitment be informal. *R.* v. *Homer,* 1 Leach C. C. 273; *R.* v. *Marks,* 3 East 162; *Ex parte Kranom,* 1 B. & C. 262.

Recognizance on Remand.

If the Court or a Judge determine that the party shall be released from custody, he must thereupon enter into a recognizance to appear on his trial, and the writ, the return and the recognizance must be certified into the Court where the trial is to take place. 31 Car. II., c. 2, s. 3.

The rule is that where the offence is *prima facie* great to require good and ample bail. Moderation nevertheless is to be observed, and such bail only is to be required as the party is able

to procure, for otherwise the allowance of bail would be a mere colour for imprisoning the party on the charge. *R.* v. *Wilks*, 2 Wils. 159. The Court will not increase the amount of the bail after they have once taken. *R.* v. *Salter*, 2 Chits. Rep. 109.

In delivering the judgment of the Privy Council in *United States* v. *Gaynor* (1905), 9 C. C. C. 205, the Lord Chancellor, at p. 231, says: "Their Lordships do not mean to suggest that the writ of *habeas corpus* is not applicable when there is a preliminary proceeding. Each case must depend upon its own merits. But where a prisoner is brought before a competent tribunal and is charged with an extradictable offence and remanded for the express purpose of affording the prosecution the opportunity of bringing forward the evidence by which that accusation is to be supported, if, in such a case, upon a writ of *habeas corpus* a learned Judge treats the remand as a nullity and proceeds to adjudicate upon the case as though the whole evidence were before him, it would paralyze the administration of justice and render it impossible for the proceedings in extradition to be effective."

It is not essential in Quebec that a writ of *habeas corpus* under s. 16 of the Extradition Act should be returnable in Court, and it is sufficient that the writ is returnable before a Judge sitting in Chambers, if the latter practice is authorized under the general law in force in the Province. *Re Gaynor and Green* (No. 8), 9 C. C. C. 496.

If the return to a writ of *habeas corpus* shews a proper warrant, or other legal cause for detention, although dated subsequent to the writ to which the return is made, the prisoner must be remanded to custody. *R.* v. *Walton* (1905), 10 C. C. C. 269.

The proper practice in the return of a writ of *habeas corpus* appears to be to bring it into Court and read the return, whereupon, and not before, it is to be filed by the proper officer. *Re Reno and Anderson*, 4 P. R. 281, at 291; *Re Murphy* (1894), 2 C. C. C. 562.

The person to whom a writ of *habeas corpus* is directed must return the original writ and not a copy. In *Re Carmichael*, 10 U. C. L. J. 325. This is contrary to the decision in *Re Ross*, 3 P. R. 301.

On the return of a writ of *habeas corpus* in an extradition proceeding the Judge has no power to review the decision of the extradition commission on the ground that it is against the weight of evidence. *Ex parte Leitz* (No. 1) (1899), 3 C. C. C. 54.

Amending Return.

The Court has power to permit the return of the writ to be amended and to allow it to be taken off the files in order that the amendment may be made. *Leonard Watson Case,* 9 A. & E. 731; *R.* v. *Reno and Anderson,* 4 P. R. 281; MEREDITH, C.J., p. 567, in *Re Murphy, supra.* See *Re Canadian Prisoners,* 9 A. & E. 731. This amendment may be made without the consent of the prisoner. *Re Clarke,* 6 Jur. 75; and see *R.* v. *Royston* (1909), 15 C. C. C. 96.

Where it appears on the return of a *certiorari* that the convicted person is in close custody the Court may order a *habeas corpus,* and hear together the motion to quash the conviction, and the motion for the prisoner's discharge. *R.* v. *Spooner* (1900), 4 C. C. C. 209.

Where the magistrate is directed by an order to return the proceedings relating to the imprisonment, and returns on such order the information, depositions and conviction, such conviction is not by reason thereof brought under the jurisdiction of the Superior Court for the purpose of quashing the same. *R.* v. *MacDonald* (No. 2) (1902), 5 C. C. C. 279.

Until the conviction is brought into the Court by a return to a writ of *certiorari* under the hand and seal of the judicial officer to whom it is directed requiring it to be certified, the Court has no power to quash it. It is the return in due form which gives the necessary jurisdiction to revise the conviction. MEAGHER, J., p. 299, *ibid.*

The decision of a County Court on appeal from a summary conviction is final and conclusive, and a superior Court has no jurisdiction to interfere by *habeas corpus.* *R.* v. *Beamish* (1901), 5 C. C. C. 388.

On *habeas corpus* proceedings all the facts can be brought before the Judge that may become necessary or important for him to know so as to enable him to come to a determination as to the legality of the imprisonment. HANNINGTON, J., p. 194; *Ex parte Fitzpatrick* (1893), 5 C. C. C. 191.

Where the conviction only was lodged with the gaoler, and no warrant of commitment, upon *habeas corpus* the Judge may properly allow the further detention of the prisoner for a limited time until a warrant in due form can be obtained from the committing magistrate. *R.* v. *Morgan* (1901), 5 C. C. C. 63; affirmed on appeal, 5 C. C. C. 272.

Where a return to an order in the nature of a writ of *habeas corpus* specifies two warrants of commitment for the same offence and there is nothing in either the second warrant, nor in the return, shewing that the second warrant was issued in substitution of the first, or that the justice intended to amend the first warrant, the return was held to be bad and the prisoner discharged. *R.* v. *Venot* (1903), 6 C. C. C. 209.

"I think more care should be taken in making a return to an order in the nature of a *habeas corpus,* and in a case like this, it should have been carefully prepared by a solicitor." RITCHIE, J., p. 212, *ibid.*

A return by the sheriff disclosed two warrants setting out the conviction and sentence, and the affirmation thereof by the Court of error is a good and sufficient return. If actually written by him or under his direction the return need not be signed by the sheriff. *In re Sproule,* 12 S. C. R. 140.

Extradition, Inquiry as to Evidence.

On motion for *habeas corpus,* or for the discharge of the prisoner held for extradition, the Court applied to cannot receive or consider any evidence except that upon which the prisoner stands convicted.

Neither can the Court inquire into the weight of evidence or its sufficiency to sustain the charge. *Re Cohen* (1904), 8 C. C. C. 251; and see *In re Parker* (1890), 19 O. R. 612; *Re Gates* (1904), 8 C. C. C. 249; *R.* v. *Governor Halloway Prison* (1902), 71 L. J. K. B. 935; *Ex parte Huguet* (1893), L. T. 41; *Re Arton* (1896), 1 Q. B. 509.

Where a person has been arrested illegally he cannot, while still under such illegal arrest, be legally held on a valid warrant. Before a prisoner can be legally arrested on a new charge, the first arrest being illegal, he must first be liberated.

While *habeas corpus* proceedings are pending a warrant of arrest cannot be served upon a prisoner, such prisoner being deemed to be under the protection of the Court charged with the *habeas corpus* proceedings. *Ex parte Cohen* (1902), 8 C. C. C. 312.

An arrest in Canada for extradition cannot legally be made upon a mere telegraphic or other request, from the authorities of a foreign country, without a warrant issued in Canada. *Re Dickey* No. 1 (1904), 8 C. C. C. 318.

An information leading to the issue of a warrant of arrest in extradition is insufficient if made upon information and belief only, without disclosing the facts upon which the informant's belief is founded. *Re Dickey* (No. 2) (1904), 8 C. C. C. 321.

Married Women and Minors.

A minor, or a married woman under coverture, is amenable to the criminal law, and if convicted, or committed before conviction, is entitled to have the validity of the procedure tested under the provisions of a writ of *habeas corpus*. HALL, J., p. 391. *Re A. B.* (1905), 9 C. C. C. 390.

The person making the affidavit for the writ stands towards the Court only in the relation of a witness, and if the information which he supplies has the character of credibility, the Court is bound to act upon it, just as it would accept the testimony of the same person in an ordinary civil action or criminal trial. *Ibid.* p. 392.

In Nova Scotia, it was held that an affidavit of the gaoler verifying a copy of the warrant claimed as the cause of detention may be accepted as a return of an order for *habeas corpus*. *R.* v. *Skinner* (1905), 9 C. C. C. 558.

Unless evidence taken before the extradition commissioner of an alleged confession by the accused is clearly inadmissible, a Judge hearing a motion for *habeas corpus* should not discharge the prisoner upon the ground of the inadmissibility of such evidence. *Re Lewis* (1904), 9 C. C. C. 233.

A prisoner is not entitled to a *habeas corpus* under the Statute of Charles, unless there be "a request made in writing by him or anyone on his behalf, attested by two witnesses who are present at the delivery of the same." In *Re Carmichael*, 1 C. L. J. 243.

A rule to quash a conviction may in the first instance be to shew cause why a writ of *habeas corpus* should not issue "and why, in the event of the rule being made absolute, the prisoner should not be discharged out of custody without the issuing of the said writ and without his being brought before the Court." The rule may at the same time ask for a writ of *certiorari* as well as of *habeas corpus*. *R.* v. *Collins*, 5 M. L. R. 136. The Statute 29 and 30 Vict. c. 45 (Canada) had in view and recognized the right of every man committed on a criminal charge, to have the opinion of a Judge of a Superior Court upon the cause of his commitment by any inferior jurisdiction. *R.* v. *Mosier*, 4 P. R. 64.

Habeas Corpus is not an Appeal.

The Judge acting under a writ of *habeas corpus* examines whether the committing magistrate has jurisdiction, whether the committal is legal and whether any crime known to the law is alleged to have been committed, but he is not called upon to determine whether the committing magistrate's decision is in accordance with the evidence, or is proper or improper on the merits of the case. The proceeding is not an appeal against the magistrate's decision, but is an investigation to act, whether the commitment is legal and whether any offence known to the law is charged, and if the magistrate had the necessary power, or jurisdiction, its exercise will not be inquired into. WURTELE, J., p. 561; *R.* v. *Gillespie* (1898), 1 C. C. C. 551.

Decisions of County Judges' Criminal Court.

The County Judges' Criminal Court is not an inferior Court and its decisions and proceedings are not subject to review on *habeas corpus*. *R.* v. *Burke* (1898), 1 C. C. C. 539, and see *R.* v. *Kavanagh* (1902), 5 C. C. C. 507.

"If any proposition is conclusively established by authorities having the support of the soundest reasons, it is, that after a conviction for felony by a Court having general jurisdiction of the offence charged, a *habeas corpus* is an inappropriate remedy; the proper course to be adopted in such a case being, viz., a writ of error." STRONG, J., p. 204, *Re Sproule*, 12 S. C. R. 180.

In *R.* v. *Murray* (1897), 1 C. C. C. 452, the Ontario Court of Appeal held that the County Judge's Criminal Court was a Court of Record, and after a conviction by such a Court having general jurisdiction over the offence charged, the proceedings are reviewed only under a writ or error and cannot be the subject of investigation under a writ of *habeas corpus*. And see *R.* v. *St. Denis* (1875), 18 P. R. 16; *R.* v. *Goodman* (1883), 2 O. R. 468.

A Court of one province has no jurisdiction to direct an inquiry before a justice or a Judge of another province. *R.* v. *Defries* (1894), 1 C. C. C. 207; 25 O. R. 645.

Where the warrant of arrest exhibited in the return to a *habeas corpus* shews on its face the magistrate's jurisdiction, affidavits are not admissible to controvert this fact if the offence charged was a criminal one. *Ibid.*

Habeas Corpus on Magistrate's Decision.

A police magistrate trying a prisoner with his own consent under sec. 777 of the Code is not a "Court of Record," and *habeas corpus* will lie to quash a commitment made by such a magistrate. *R.* v. *Gibson* (1898), 2 C. C. C. 302, and see *R.* v. *St. Clair* (1900), 3 C. C. C. 551, 27 A. R. 308. But see *R.* v. *McEwen* (1908), 13 C. C. C. 346.

Prisoner's Discharge on Habeas Corpus.

The Court as a condition precedent to a prisoner's discharge on *habeas corpus* proceedings imposed the terms that he should undertake that no action shall be brought by law against any person in respect of the proceedings taken against him which resulted in the conviction and his imprisonment thereunder. *R.* v. *Horton* (1897), 3 C. C. C. 84, and see *Ex parte Hill*, 3 C. & P. 225.

Where a prisoner is discharged upon *habeas corpus* merely by reason of a defect in the commitment, or for lack of jurisdiction in the committing magistrate, such discharge is not a bar to the prisoner's re-arrest and trial before a competent jurisdiction in respect of the same charge.

After citing *Attorney-General for Hong Kong* v. *Kwok*, A. Sing. L. R. 5 P. C. App. 201, WURTELE, J., in *Re* v. *Horton*, *supra*, at page 131, proceeds: "The rule, therefore, is that when a prisoner has been discharged upon the merits of the charges laid against him, when the conviction or order of detention founded on the charge is set aside as unfounded in law, the prisoner then discharged cannot be lawfully arrested and imprisoned again for the same offence upon the same state of facts, but that when the prisoner is discharged merely by reason of a defect in the commitment, or in consequence of the want or excess of jurisdiction in the committing Court, or in the committing magistrate, he can be again arrested and tried for the same cause before a competent Court, or a competent magistrate." *Ex parte Seitz* (*No. 2*), (1899), 3 C. C. C. 127.

The Court cannot on a writ of *habeas corpus* revise on its merits the decision of the Judge who has made the conviction, nor adjudge on the culpability of the petitioner. *R.* v. *Bougie* (1899), 3 C. C. C. 487.

Where there has been a commitment under an extradition warrant the Court on *habeas corpus* proceedings, is not justified in

referring to the depositions returned and inferring therefrom facts material to the offence if the warrant of commitment is in itself defective in omitting to recite a finding of such fact. *Re Murphy, supra.*

A person who is charged under a wrong name and who pleads without objecting to the same is not entitled after conviction to be released upon *habeas corpus* on the ground that she is not the person designated in the commitment. *Ex parte Corrigan* (1899), 2 C. C. C. 591. Held, in this case that the discharge of the prisoner from custody on *habeas corpus* was not a quashing of the conviction. *Hunter* v. *Gilkison*, 7 O. R. 735.

Order Protecting Gaoler and not Magistrate.

In discharging a prisoner under *habeas corpus* proceedings under ch. 181 R. S. Nova Scotia, an order for protection in respect of a civil action by the prisoner can be made only in favour of the gaoler and not in favour of the magistrate and prosecutor. *R.* v. *Keeping* (1901), 4 C. C. C. 494.

An order of a Judge made under Con. Stat. cap. 45 N. B., discharging a prisoner from custody, cannot be set aside or revised by the Court. *Ex parte Byrne*, 22 N. B. R. 427.

The decision of a magistrate as to whether a defaulting witness was bound to attend his Court without prepayment of witness fees and the liability of the witness to arrest is not open to review upon *habeas corpus*. *R.* v. *Clements* (1901), 4 C. C. C. 553.

Where a person has been committed for extradition the Court on *habeas corpus* proceedings may revise the commissioner's decision on the question of whether or not there was legal and competent evidence tending to prove the commissioner of the crime, but it will not review the commissioner's decision as to the sufficiency of the evidence to justify the committal. *Ex parte Feinberg* (1901), 4 C. C. C. 270.

An unreasonable delay in issuing a warrant of commitment may be a ground for discharge on *habeas corpus* if the delay works an injustice to the defendant. *Ex parte Doherty* (1899), 5 C. C. C. 94.

Applications to Successive Judges.

Where an application is made for the discharge of a prisoner on *habeas corpus* and is refused, another application may be made

for the same purpose to another Judge in Chambers, and this latter Judge may discharge the prisoner notwithstanding the refusal of the first Judge applied to. *R.* v. *Carter et al.* (1902), 5 C. C. C. 401, and see *R.* v. *Heckman* (1902), 5 C. C. C. 242, and *Re Paget*, 21 C. L. T. 536, *Cox* v. *Haker*, 15 A. C. 514; *Re Bowack* (1892), 2 B. C. R. 222. This is the practice that prevails still in England and in all the provinces of Canada except in Ontario and Quebec, where provisions are made for appeals from judgments refusing to discharge the applicant from *habeas corpus*. But there is no appeal from an order discharging a prisoner under *habeas corpus*. *Vide Cox & Haker, supra.*

In Ontario a person is limited to the writ of *habeas corpus* to be granted by any Judge of the High Court returnable before himself, or another Judge in Chambers, or before a Divisional Court with a right of appeal. See *Taylor* v. *Scott, supra.* And see cases under the Court of Appeal, *supra.*

An appeal in Ontario lies direct to the Court of Appeal and not to a Divisional Court, from the order of a single Judge remanding a person to custody upon a return to a *habeas corpus* issued under R. S. O. c. 83. *Re Harper*, 23 O. R. 63.

In Quebec when the issue of a writ of *habeas corpus* has been refused, the application cannot be renewed before the Judge who refused it or before any other Judge, unless new facts are stated; but application may be made anew to the Court of King's Bench on its appeal side, at Montreal or Quebec, according to the district where the appellant is confined, is situated, in the division for which the Court sits in one or other of those cities. The Court of King's Bench on its appeal side has original jurisdiction in matters of *habeas corpus* with respect to any person confined in a district included in the one or the other of its two districts. *Ex parte Tremblay* (1902), 6 C. C. C. 147.

When a person had been arrested on a warrant of commitment and requested the officer to allow him to spend Easter Sunday at home and the officer complied with his request, trusting to the prisoner surrendering himself under the warrant, and the prisoner was re-arrested later on by the constable on the same warrant; on a motion for *habeas corpus* it was held that the facts disclosed upon affidavit shewed that the escape at most was negligence on the part of the officer, and that he did not contemplate a voluntary abandonment of his prisoner, but negligently trusted to his promise to surrender and the re-arrest was upheld and the applica-

tion for the prisoner's discharge was dismissed. *R.* v. *O'Hearon* (1901), 5 C. C. C. 531.

Fugitive Offenders.

Extradition from Canada to another British possession will not be confirmed on *habeas corpus* unless a *prima facie* case of guilt is made out to the satisfaction of the Superior Court to which the accused makes application for his discharge, irrespective of the decision of the committing magistrate. The power under sec. 10 of the Fugitive Offenders' Act is practically unlimited, and the Court on *habeas corpus* may, in the exercise of its discretion, order a discharge for any reason which appears to it to be satisfactory. The Court has power to review the evidence upon which the commitment for intercolonial extradition is founded. *R.* v. *Delisle* (1896), 5 C. C. C. 210.

Bail in Extradition Proceedings.

Under ordinary circumstances bail should not be granted to a person committed for extradition. Where bail was granted pending an application for *habeas corpus* and afterwards the application for *habeas corpus* was refused, the accused must surrender himself into close custody before an application on his behalf for an order to admit him to bail pending an appeal will be entertained. *Re Watts* (1902), 5 C. C. C. 538, and see *Re Stern* (1903), 7 C. C. C. 191; *United States* v. *Weiss* (1904), 8 C. C. C. 62.

No Costs by Stranger to Proceedings.

A person who has been made a respondent on an application for *habeas corpus* in a criminal matter, and who does not appear on the record as being the prosecutor, and who did not appear on the application, was held in Nova Scotia as not liable for the costs of the application on the discharge of the prisoner, although the conviction appealed against was for stealing his property. *R.* v. *Bowers* (1900), 6 C. C. C. 100.

Jurisdiction in Quebec.

The Court of King's Bench sitting in Appeal either at Montreal or Quebec has jurisdiction to grant a writ of *habeas corpus*

on the application of a prisoner confined in any district within the division for which the appeal sittings are being held. A Superior Court Judge sitting outside the limits of the judicial district in which a prisoner is confined has no jurisdiction in *habeas corpus* proceedings when there is a Judge duly authorized within such district. *Ex parte Tremblay* (1902), 6 C. C. C. 147.

Jurisdiction Generally.

Where a magistrate not having jurisdiction tried and convicted the accused and committed him to gaol, on *habeas corpus* proceedings for the release of the prisoner, an application on behalf of the Crown for an order detaining the prisoner under sec. 1120 of the Code for appearance on a preliminary inquiry, was refused. *R.* v. *Blucher* (1903), 7 C. C. C. 278.

A commitment by a tribunal of inferior jurisdiction may be severable where imprisonment is ordered for a term and a further term in default of payment of a fine and costs; the prisoner is not entitled to his release on *habeas corpus* during the first term because of the costs not being ascertained in the commitment, but leave will be reserved to him to re-apply at the expiration of the first term. *R.* v. *Carlisle* (1903), 7 C. C. C. 470.

On a writ of *habeas corpus* issued before the committal of the accused for extradition and before the conclusion of the inquiry before the Commissioner, the powers of the Judge are limited to determine whether the Commissioner has jurisdiction to make the inquiry. *Ex parte Green & Gaynor* (*No. 1*) (1902), 7 C. C. C. 375.

The legality of the arrest in extradition proceedings may be inquired into upon *habeas corpus* without awaiting the conclusion of the investigation before the Commissioner. A second writ of *habeas corpus* may issue notwithstanding that a writ had been previously issued and been quashed by another Judge. The matter is not *res judicata* if other grounds are taken in the petition on which the second writ was issued, and if the petitioner had formally abandoned his writ before the order quashing it had been made. A *certiorari* may issue addressed to the Extradition Commissioner requiring him to return the whole record before him. *Ex parte Greene & Gaynor* (*No. 2*) (1902), 7 C. C. C. 389. Reversed on appeal to the Privy Council. *United States* v. *Gaynor* (1905), 9 C. C. C. 205.

Where concurrent proceedings are taken by *certiorari* and *habeas corpus* in Quebec, and the writ of *habeas corpus* is main-

tained upon an objection appearing on the face of the commitment, the order for costs against the prosecutor should not include the costs incurred upon the *certiorari*. *R.* v. *Coté* (1903), 8 C. C. C. 393.

The right to *habeas corpus* in criminal matters does not depend upon the legality or illegality of the original caption, but upon the legality or illegality of the present detention. *R.* v. *Whiteside* (1904), 8 C. C. C. 478.

Where a prisoner was arrested in the county of Ontario on a warrant issued in and directed to the peace officers of the county of Durham (Ont.) and the warrant had not been backed or endorsed by a J. P. in the county of Ontario, this irregular arrest is not a ground for the prisoner being released on *habeas corpus*. *Ibid.*

The petition for a writ of *habeas corpus* may be refused if the Court is satisfied that the writ would, if issued, be quashed upon the petitioner's own shewing. *United States* v. *Weiss* (1904), 8 C. C. C. 62, and see 15 Am. & Eng. Encyc., p. 140.

Extradition.

When a prisoner is brought before an extradition Judge in pursuance of a warrant of arrest and charged with an extraditable offence he may be remanded for the purpose of affording the prosecution an opportunity of adducing evidence. *U. S.* v. *Gaynor* (1905), 9 C. C. C. 205.

In extradition on a writ of *habeas corpus* the Judge must see in the first place whether the offence charged is or is not of a political character, or whether the proceedings are regular and justify the prisoner's committal for surrender. *Re Levi* (1897), 1 C. C. C. 74.

In the case of a fugitive who has been convicted, the Judge does not examine the evidence given at his trial and must not revise the verdict of the jury; his duty is to see if the offence is an extradition crime, if the conviction after a regular trial has been duly proved, and if the prisoner has been identified. *Ibid.*

It is only necessary that actual identity between the person held and the person named in the warrant be established. *Re Garbutt* (1891), 21 A. R. 468, 472.

If a warrant of commitment returned, on an application for *habeas corpus*, as the cause of detention, is bad on its face in not

alleging a conviction, the conviction cannot be received or referred to in order to support the warrant. "Had the warrant alleged that there had been a conviction it may be that the conviction could have been referred to in order to support it, even though the offence were insufficiently stated in the warrant; but as it contains no such allegation, I must hold in the absence of any authority to the contrary that the conviction cannot be referred to." SCOTT, J., *R.* v. *Lalonde* (1895), 9 C. C. C. 501.

By sec. 1121 of the Code it is provided that "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."

Bail in Extradition Matters.

A Judge of a Superior Court in Quebec may grant bail after commitment by an Extradition Commissioner, but this power should not be exercised except under exceptional circumstances such as the life of the fugitive being endangered by his close confinement. *R.* v. *Gaynor & Greene* (*No. 9*) (1905), 9 C. C. C. 542.

Appeal from Orders Relating to Habeas Corpus.

Where a person has been discharged from custody by an order of the High Court under a *habeas corpus*, the Court of Appeal has no jurisdiction to entertain an appeal. *Cox* v. *Hakes* (1890), 15 A. C. 506. This appeal was held by the House of Lords not to be an appeal "in a criminal cause or matter" within sec. 47 of the Judicature Act of 1893; but that no appeal lay to the Court of Appeal under sec. 19 from an order discharging a prisoner under a *habeas corpus*. So that it makes no difference whether the *habeas corpus* had been issued respecting a criminal matter under the Statute of Charles II. or under 56 Geo. III., c. 100.

Lord Herschell says, at p. 534: "I am driven then to the conclusion that where a person has been discharged by the High Court under a writ of *habeas corpus*, the Court of Appeal has no power effectually to interfere with the action of the Court below. The judgment of the higher Court cannot in any wise affect the discharge, or restore to custody the person liberated. It is incompetent to give effect to its judgment and cannot undo that which it holds to have been wrongly done by the order appealed from."

And at page 522 the Lord Chancellor (Halsbury) concludes his judgment by saying: "It is the right of personal freedom in this country which is in debate, and I for one should be very slow to believe except it was done by express legislation, that the policy of centuries has been suddenly reversed, and that the right of personal freedom is no longer to be determined summarily and finally, but is to be subject to the delay and uncertainty of ordinary litigation, so that the final determination upon that question may only be arrived at by the last Court of Appeal."

Where the subject matter of the proceedings in respect of which the application for *habeas corpus* was made *is not criminal*, the Court of Appeal has jurisdiction to entertain an appeal from an order refusing to grant a *habeas corpus*. *Ex parte Woohull*, 20 Q. B. D. 832.

In *Cox* v. *Hakes, supra*, at page 535, Lord Herschell said: "It will be seen that the reasoning which has led me to the conclusion that an appeal will not lie from an order discharging a person from custody under a writ of *habeas corpus* has no application to an appeal from an order refusing to discharge applicant. I intend to express no opinion whether there is an appeal in such a case."

See *Green* v. *Lord Penzance*, 6 A. C. 657; *Enraght's case*, 6 Q. B. D. 376.

As to appeals in Quebec see *Ex parte Tremblay, supra*.

There is no appeal in Manitoba from the decision of a single Judge of the Court of King's Bench refusing a *habeas corpus*, but successive applications for the writ may be made to each Judge. *R.* v. *Barre* (1905), 11 C. C. C. 1.

Whether a Judge can in Chambers rescind his own order for a writ of *habeas corpus* or quash the writ itself on the ground that it issued improvidently. See *Re Ross*, 3 P. R. 301.

In Ontario the Master in Chambers, Local Judges and Local Masters have no jurisdiction to entertain applications for *habeas corpus*.

In Manitoba the Referee in Chambers and Local Judges are also deprived of such jurisdiction. In New Brunswick County Court Judges have concurrent jurisdiction in *habeas corpus* matters. See sec. 4, cap. 133 N. B. C. S. (1903).

Where the discharge from custody of an applicant under *habeas corpus* has been ordered by a tribunal of competent jurisdiction in Nova Scotia, that order is not revocable by way of appeal or otherwise. *Re E. G. Blair*, 23 N. S. R. 225.

And in *Re A. L. McKenzie*, 2 R. & G. N. S. R. 481. As to costs in Nova Scotia see *In re Murphy*, 28 N. S. R. 196.

One Writ in Ontario.

In Ontario a person confined or restrained of his liberty is now limited to only one writ of *habeas corpus* to be granted by a Judge of the High Court returnable before himself, or before a Divisional Court or before a Judge in Chambers with a right of appeal to the Court of Appeal, whose judgment is final; and where no such appeal is taken the judgment which might have been appealed against becomes final and conclusive, and may be pleaded as *res judicata*. *Taylor* v. *Scott*, 30 O. R. 475, and see *R.* v. *St. Clair* (1900), 3 C. C. C. 551, and *R.* v. *Miller (No. 2)* (1909), 15 C. C. C. 156; *R.* v. *Teasdale* (1910), 16 C. C. C. 53. As to costs in Ontario see *Re Weatherall*, 1 O. L. R. 542.

A Court of one province has no power on *habeas corpus*, or in any other proceedings, to enquire into the validity or regularity of any of the proceedings connected with the trial of an accused person by the Court of another province. *R.* v. *Wright* (1905), 10 C. C. C. 461.

If the certificate of sentence to the penitentiary is irregular for omitting the date of sentence, leave may be given on *habeas corpus* to return an amended certificate correcting the omission. *Ibid.*

In Quebec the Judges of the Superior Court of the district or division where a person is imprisoned, have jurisdiction in *habeas corpus* proceedings, and can entertain a petition for the same. *Ex parte Goldsberg* (1905), 10 C. C. C. 392, and see *Ex parte Tremblay, supra.*

A commitment is not a judicial, but simply a ministerial act carrying out the term of the conviction, and is not a proceeding that can be brought up here on *certiorari*. The proper procedure for reviewing the validity of a warrant of commitment under which the accused is in custody is by way of *habeas corpus*. *Ex parte Bertin* (1904), 10 C. C. C. 65.

Detention of Person after Application for Habeas Corpus.

1120. Whenever any person in custody charged with an indictable offence has taken proceedings before a Judge or Criminal Court having jurisdiction in the premises by way of *certiorari*, *habeas corpus* or otherwise, to have the legality of his imprisonment inquired into, such Judge or Court

may, with or without determining the question, make an order for the further detention of the person accused, and direct the Judge or justice, under whose warrant he is in custody, or any other Judge or justice, to take any proceedings, hear such evidence, or do such further act as in the opinion of the Court or Judge may best further the ends of justice.

This section was amended in 1908, 6-7 Edw. VII. c. 18, s. 14, by inserting the words "or any other Judge or justice" after the word "custody" in the 8th line thereof.

If the return shews a commitment bad on the face of it, the Court will not on the suggestion that the conviction is good, adjourn the case for the purpose of having the conviction brought up and amending the commitment by it. Nor will the Court look at the conviction unless it is before them, having been brought up by a *certiorari*. *Ex parte Timson*, L. R. 5 Ex. 257, 39 L. J. M. C. 129.

A Judge who quashes a writ of *habeas corpus* on the ground that the petitioner is in custody under a sentence legally pronounced by a competent tribunal, has no power to direct such tribunal to execute a part of the sentence (say whipping) which had been suspended in connection with the issue of the writ. *R.* v. *Godsberry* (1905), 11 C. C. C. 159.

An objection to the validity of a writ of *habeas corpus* on the ground that it had not been signed by the Judge who ordered its issue and is not marked "By virtue of c. 95 of the Consolidated Statutes for Lower Canada," as provided by s. 3 of the Habeas Corpus Act, cannot be raised after the return of the writ and production of the prisoner. *United States* v. *Browne* (*No. 2*) (1906), 11 C. C. C. 167.

The Ontario Habeas Corpus Act, R. S. O. 1897, c. 83, s. 5, makes it necessary where a *certiarari* in aid has been granted, to consider the depositions and proceedings returned in order to ascertain whether there is any evidence to sustain the conviction even where the conviction is in regular form. *R.* v. *Farrell* (1907), 12 C. C. C. 574.

Upon the return of the writ pending the hearing the prisoner is detained under the writ and not under the authority of the original warrant. *R.* v. *Bethel* (1696), 5 Mod. 19.

After a return to a writ of *habeas corpus* and an order refusing discharge thereunder a second writ of *habeas corpus* may afterwards be granted if the circumstances have altered, *ex gr.* on the expiry of a term of imprisonment, which was current on the first application. On the second motion to discharge no objection

should be considered which might have been taken upon the first application. *R.* v. *Riddell* (1907), 12 C. C. C. 447.

If a prisoner who obtains a writ of *habeas corpus* for his release escapes before judgment on the application the motion will be dismissed. When the prisoner has been recaptured and sentenced for the escape he may, upon being returned into custody on the original charges, be granted a second *habeas corpus*. *Re Bartels* (1907), 13 C. C. C. 59.

When the depositions returned with a *certiorari* in aid of a *habeas corpus* disclosed no evidence whatever as to a material fact essential to the offence, the case will not be remitted to the justice to take evidence on the point omitted. *R.* v. *Brisbois* (1907), 13 C. C. C. 96, and see *R.* v. *Simmons* (1908), 14 C. C. C. 5.

Under the Ontario Habeas Corpus Act the Court is bound on the return of a writ of *habeas corpus* to examine the proceedings anterior to the warrant and to discharge the prisoner if the proceedings do not authorize the detention. *Ibid.* And see *R.* v. *Mosier* (1867), 4 P. R. 64, 70, and *R.* v. *St. Clair* (1900), 27 A. R. 308, 410, 3 C. C. C. 551.

Order Protecting Magistrates.

The provisions as to protecting magistrates found in the Criminal Code and in the Ontario Statute do not apply to *habeas corpus* where everything is left as it stands when the prisoner is discharged. *R.* v. *Lowery* (1907), 13 C. C. C. 105, 107.

The provisions in the Criminal Code protecting magistrates when a conviction is quashed are contained in sec. 1131 of the Code as follows:

1131. If an application is made to quash a conviction, order or other proceeding made or had by or before a justice or stipendiary magistrate, on the ground that such justice or stipendiary has exceeded his jurisdiction, the Court or Judge to which or whom the application is made, may, as a condition of quashing the conviction, order or other proceeding, if the Court or Judge thinks fit so to do, provide that no action shall be brought against the justice or stipendiary by or before whom such conviction, order or other proceeding was made or had, or against any officer acting thereunder or under any warrant issued to enforce any such conviction or order. 55-56 V., c. 29, s. 891.

As decided in *R.* v. *Lowery, supra*, these provisions do not apply when the prisoner has been discharged on *habeas corpus*.

When a party is entitled to relief *ex debito justitiæ* against illegal proceedings, the Court has no power to impose upon him

the terms that he shall not bring any action against the party from whose illegal act he has suffered as a condition of relief, but they often refuse the costs of the application unless he consents to such terms. *Downey's Case*, 7 Q. B. D. 283; *Re Blues*, 5 E. & B. 291, 24 L. J. M. C. 138.

The condition imposed as a term of quashing a justice's order under sec. 1131 is one which the applicant may accept or reject on the delivery of the judgment, and, if it be rejected the Court may dismiss the application with costs, although it finds that the justice exceeds his jurisdiction. *R.* v. *Morningstar* (1906), 11 C. C. C. 15, and see *R.* v. *Kehr*, 11 C. C. C. 52, where protection was given on an order quashing a search warrant.

Convictions on Summary Trials.

On a summary trial under sec. 777 by a city police magistrate, if objections are raised to his decision on the ground of jurisdiction, such objection must be taken by way of reserved case or appeal and cannot be raised by *habeas corpus*. *R.* v. *McEwen* (1908), 13 C. C. C. 346.

An order discharging a prisoner on *habeas corpus* on the ground that the conviction is invalid does not determine the validity of the conviction for any purposes other than the *habeas corpus* motion, and the conviction itself stands until quashed on *certiorari* or otherwise formally reversed or vacated. RUSSELL and DRYSDALE, JJ., in *Johnston* v. *Robertson* (1908), 13 C. C. C. 452.

A warrant of commitment under the Ontario Liquor License Act may under the special powers conferred by sec. 105 of that statute, be amended on the return of a *habeas corpus* by striking out the direction to hold the prisoner for the costs of conveying him to gaol, if such costs are not properly ascertained in the warrant. *R.* v. *Degan* (1908), 14 C. C. C. 148.

Arrest on Telegram.

Where the accused was arrested for an offence alleged to have been committed in Montreal and a warrant of arrest had been issued in Montreal, and the police at Halifax, where the arrest took place, were notified by telegram of the issue of the warrant, the accused is not entitled to be discharged on *habeas corpus* if the original warrant in due form and duly endorsed is returned in answer to the writ. *R.* v. *Lee Chu* (1909), 14 C. C. C. 322.

Where a *habeas corpus* has been granted without a *certiorari* in aid, the Crown should be granted an adjournment of the motion to discharge, pending a return to a *certiorari* granted to the Attorney-General. *R.* v. *Nelson* (1908), 15 C. C. C. 10, and see *R.* v. *MacDonald* (1910), 16 C. C. C. 121.

Where the warrant of commitment in execution returned to a writ of *habeas corpus* states only a charge of the offence and not a conviction thereof, the prisoner should be discharged. *Ibid.*

Amending Warrant of Commitment.

In Ontario on the return of a *habeas corpus*, leave may be given the Crown to file an amended warrant of commitment in place of the alleged defective commitment, and the prisoner may be remanded under the substituted commitment, if in due form, without determining the objections taken to the first warrant. *R.* v. *MacDonald* (1910), 16 C. C. C. 121.

If excessive costs have been included in a warrant of commitment for default in payment of a fine upon summary conviction, the Court may on return of a *habeas corpus* amend the conviction and commitment by reducing such costs to the proper amount and may remand the prisoner. *R.* v. *Morris* (1910), 16 C. C. C. 1.

Acting Magistrate.

A prisoner held on a summary conviction purporting to be made by a deputy stipendiary acting at the request of the stipendiary, but when in fact there was no incapacity to prevent the stipendiary from acting, must be discharged on *habeas corpus*. *Ibid.*

Where a summary conviction is made by justices within their jurisdiction to make only if acting at the request of the police magistrate, or in case of his absence or illness, the conviction should shew upon its face the fact that the justices were so acting. *R.* v. *Ackers* (No. 3) (1910), 16 C. C. C. 222.

Costs of Proceedings.

Where the officer or other person to whom a writ of *habeas corpus* is directed has obeyed it by bringing up the body and making his return, the Judge or Court may make an order for payment by the applicant of the expenses of such officer or person. *Dodd's Case*, 2 De G. & J. 510, followed.

The costs of proceedings by *habeas corpus* were governed in Ontario by s. 119 of the Judicature Act, R. S. (1897), c. 51, and are therefore in the discretion of the Court or Judge. *R.* v. *Jones* (1894), 2 Q. B. 382, followed; *Re Weatherell*, 21 Occ. N. 256, 1 O. L. R. 542.

Irregularity.

On a motion for *habeas corpus* the preliminary objections were taken that the affidavit proposed to be read in support of the prisoner's discharge had not been served upon the interested party, that the affidavits filed were not endorsed with a memorandum stating on whose behalf they were filed, and that the affidavits had been interlined and corrections had been made therein which had not been initialed and rewritten in the margin by the Commissioner. See Crown Rules 15, 163, 17, 352, 348 and 463. Held, that these Rules governed and the irregularities should not be condoned.

The applicant must pay the costs of this application but should have leave to renew his motion. *In re Hayes*, 21 Occ. N. 87

Jurisdiction in New Brunswick.

In New Brunswick a Judge of a County Court has no jurisdiction to grant an order under the Habeas Corpus Act (Con. Stat. c. 41), unless the person applying is confined within the Judge's county. *R.* v. *Wilson, Ex parte Irving*, 35 N. B. R. 461.

The Judges of the Supreme Court of New Brunswick have the exclusive right to issue writs of *habeas corpus* to inquire into the legality of the imprisonment of a person confined in the Dominion penitentiary at Dorchester, N.B., though he was committed there by the Court of another province. *Ex parte Strathon*, 25 N. B. R. 374.

Jurisdiction in Nova Scotia.

In Nova Scotia the County Court has no jurisdiction to issue a writ of *habeas corpus*. It has concurrent jurisdiction with the Supreme Court under the liberty of the Subject Act. *Re Edwin G. Harris*, N. S. R. 508.

It is within a Judge's discretion to award costs against the prosecutor on the discharge of an applicant for *habeas corpus*, but

the power should be exercised only in extreme cases, if at all. In *Re Murphy*, 28 N. S. R. 196.

Alberta and Saskatchewan.

Where the defendant has been arrested in Alberta upon a warrant issued in Saskatchewan and endorsed by a magistrate in Alberta, on *habeas corpus* proceedings it was held that the Court has a right to inquire if the magistrate had a right to issue the process and if the proceedings before the magistrate were an abuse of the process of the magistrate's Court, and if such a state of facts is found then the Judge may discharge the prisoner. *R.* v. *Galloway* (1909), 15 C. C. C. 317; 11 W. L. R. 673.

"A Judge of Superior Court of any province of the Dominion has jurisdiction to prevent the removal of an accused person from that province to another upon an information laid by a private individual before a justice of the peace in the latter province, if it is made to appear that the proceedings before the justice are frivolous, or vexatious, or *mala fide*, or otherwise are an abuse of the process of the justices' Court." BECK, J., at p. 320, *Ibid.*

Certiorari.

The *certiorari* is a writ issuing out of the Crown office in the name of the King or Queen regnant and tested by the Chief Justice, which the Court of King's Bench by virtue of its superintending authority over all Courts of inferior criminal jurisdiction in the Kingdom, directs to the Judges or officers of those Courts, or to justices at sessions or out of sessions, commanding them to certify or return the records or proceedings in a judicial matter depending before them to the end that the party may have the more sure and speedy justice before the King or such justice as he shall assign to determine the same. 1 Bac. Ab. Certiorari, Com. Dig. Certiorari.

It is an undoubted prerogative of the Crown to see that all inferior jurisdictions are kept within their proper bounds and on that principle the whole doctrine of *certiorari* proceeds. *R.* v. *Berkley*, 1 Ken. 81, 103. The writ lies in all judicial proceedings. Therefore the Court of King's Bench has by the common law in general a right to bring before it all records in order to rectify wrong ones if rectifiable, and if not to quash them. *Ibid.*

It is agreed that the Court of King's Bench having a general superintendency over all Courts of inferior jurisdiction, may

award a *certiorari* to remove the proceedings from any of them except some particular statute or charter invest them with absolute jurisdiction. *R.* v. *Gillyard,* 12 Q. B. 527.

The general principles governing the issue and use of the writ of *certiorari* may be shortly stated as follows:—

It is an original writ issued out of a superior Court directed to the Judges of an inferior Court commanding the return to the superior Court of all the records, papers and documents relating to or concerning the judgment, order or conviction, so that the proceedings had and taken in the inferior Court respecting the same may be fully inquired into and an ascertainment had as to whether justice has been done in accordance with the law governing the judicial disposition of the case. It is judicial acts that will be investigated and not those of a ministerial nature. The writ always lies unless it is taken away by express statutory enactment, and even in this event it will be issued where it is shewn upon affidavits that there has been an excess or want of jurisdiction or a wrongful exercise of judicial power. It is frequently enacted that where an appeal may be taken under the provisions of the governing statute, *certiorari* will not lie, but then express provisions are overridden where a question of jurisdiction is involved. The granting or refusing of the writ is entirely in the discretion of the Court or Judge applied to. The writ is issued as a matter of right upon the application of the Crown. Notice of the application must be given to the magistrate and a verified copy of the conviction or order appealed against produced on the motion, and the applicant must enter into a recognizance.

The use of a *certiorari* is for the superior Court the better to consider and determine the validity of convictions, orders, appeals, proceedings or indictments, presentments and other judicial proceedings, and to prevent an unfair or insufficient trial or judgment or the execution of a wrongful judgment which it is thought would take place in the original jurisdiction. 2 Hale 210.

The proceeding by *certiorari* differs from a right of appeal in this that it always lies, unless it is taken away by express words. While an appeal never lies unless it is expressly given by statute. *R.* v. *Gillyard,* 12 Q. B. 527; *R.* v. *Hanson,* 4 B. & A. 521.

A *certiorari* being a beneficial writ for the subject cannot be taken away without express words. If therefore a statute authorizing a summary conviction before a magistrate gives an appeal to the sessions who are directed to hear and finally deter-

mine the matter, it does not take away the *certiorari* even after such appeal is made and determined. *R.* v. *Jukes*, 8 T. R. 542.

Certiorari may be taken away by statute although no appeal is given to the sessions. *R.* v. *J. J. St. Albans*, 5 D. & R. 528; 3 B. & C. 698. Or although an appeal is given to the sessions and they make an order subject to a case. *R.* v. *Middlesex*, 8 D. & R. 117.

And generally when thus taken away the Court will not directly or indirectly in any manner enable a defendant to remove proceedings before it. *R.* v. *Eaton*, 2 T. R. 472; *R.* v. *J. J. Yorkshire*, 1 A. & E. 563.

General words in an Act taking away the *certiorari* will not bind the Crown, unless such an intention is to be gathered from the other parts of the Act. *R.* v. *Allan*, 15 East 333, 342; *R.* v. *Hubie*, 5 T. R. 542; *R.* v. *Davies*, 5 T. R. 626.

And in all cases the Attorney-General may have a *certiorari* on behalf of the defendants. 1 East. 303.

It is of general benefit that the privilege enjoyed by the Attorney-General should exist, as he can and has assisted defendants in several instances where a doubtful judgment has been given below to have their cases reconsidered by applying for *certiorari* on the part of the Crown. 15 East 337.

An enactment taking away the writ of *certiorari* in respect of orders and convictions made under it, does not extend to an order or conviction made entirely without jurisdiction, though pretended to be made under the Act. *R.* v. *Bolton*, 1 Q. B. 66; *R.* v. *J. J. St. Albans*, 22 L. J. M. C. 142; *R.* v. *Wood*, 5 E. & B. 49; *R.* v. *Hoggard* (1870), 30 U. C. R. 152; *Hespler* v. *Shaw* (1858), 16 U. C. R. 104.

Where by a clause in a statute it is provided that no summary conviction under it shall be removed by *certiorari* and upon the face of a conviction it may be that the justices have no jurisdiction, or that having jurisdiction they have omitted to set it forth, the defendant cannot obtain a *certiorari* to remove such conviction unless he shewed by affidavit that there was no jurisdiction. *R.* v. *Long*, 1 M. & R. 139.

And though an order or conviction shew jurisdiction on the face of it, the Court will receive affidavits to shew whether in fact there was jurisdiction or not, and grant or refuse a *certiorari* thereupon. *R.* v. *Bolton*, 1 Q. B. 66.

Excess of Jurisdiction.

Even where express words take away *certiorari* they are not applicable where there is an excess of jurisdiction; this may be shewn by affidavit although the conviction may be good *ex facie*, or where the Court has been illegally constituted or the conviction has been obtained through fraud. *Ex parte Bradlaugh*, 3 Q. B. D. 509; *R.* v. *Bolton*, 1 Q. B. 66; *R.* v. *Cheltenham Commrs.*, 1 Q. B. 467; *Tarry* v. *Newman*, 15 M. & W. 653; *R.* v. *Alleyne*, 4 E. & B. 186; *Sheddon* v. *Patrick*, 1 Macqueen, H. of L. C. 535.

On the question of defective jurisdiction objection may be made as to the character and constitution of the inferior Court, the nature of the subject-matter of the inquiry, or the absence of some preliminary proceeding which was necessary to give jurisdiction to the inferior Court. *Colonial Bank of Australia* v. *Willan*, L. R. 5 P. C. 417.

Facts such as are stated above may be brought before the superior Court by affidavit.

Although affidavits will be received to shew that the justices had no authority to enter upon the inquiry, as for instance, that the question brought before them by the complaints was not one to which their jurisdiction extended, yet the Court will not hear affidavits impeaching their decision or conclusion of facts, or the facts or renewing their judgment on the evidence. See *R.* v. *Bolton*, 1 Q. B. 66; *Thompson* v. *Ingham*, 14 Q. B. 710, 718; *Barber* v. *Nott. Ry. Co.*, 14 Q. B. 710, 718.

"It is clear that the decision of a tribunal lawfully constituted, upon a question properly brought before it respecting a matter within its jurisdiction, is not open to review on *certiorari*, but the decision of persons assuming to be a tribunal, that they are lawfully constituted, is open to review. Thus a decision either by a justice that he was in the commission, or by any arbitrator under a statute that he was duly appointed, or by a sheriff that a valid writ of trial had issued to him, might be shewn by affidavit to be untrue." LORD DENMAN, C.J., in *R.* v. *Grant*, 19 L. J. U. C. 59, and see *R.* v. *Nunneley*, E. B. & E. 852; *R.* v. *Dayman*, 7 E. & B. 672.

Where a conviction was bad on the face of it, the writ was allowed to issue notwithstanding there were express words taking it away, the magistrate having convicted of an assault although the complainant only asked sureties to keep the peace. *R.* v. *Denny et al.*, 20 L. J. M. C. 189 S. C.

Where by the words of a statute the *certiorari* is taken away but by its general tenor that is only done to give the option of appeal to the sessions the right of proceeding by *certiorari* is only barred by the party adopting the method of appeal. *R.* v. *Eaton*, 2 T. R. 89.

"A *certiorari* does not go to try the merits of the question, but to see whether the limited jurisdiction has exceeded its bounds. The jurisdiction of the Queen's Bench is not taken away unless there be express words to take it away. This is a settled point." *R.* v. *Morley et al.*, 2 Burr. 1041.

Privilege of the Crown.

The privilege existing on the part of the Crown extends to any private prosecutor, though he may at a subsequent stage of the proceedings have become nominal defendant, as if the conviction had been quashed at the sessions with costs to be paid by the prosecutor, and he afterwards seeks to quash the order of the sessions. On application at the suit of the Crown either by the Attorney-General *ex officio*, or by the private prosecutor, the writ issues as a matter of course and without any ground for its issue being assigned. 2 Hawk P. C. c. 27; *R.* v. *Boulthee*, 4 A. & E. 498 S. C.

Notice, recognizance, etc., are not required on applications by the Crown or prosecutor. 1 East 298, 303; *R.* v. *Farwell*, 2 Str. 1209.

The distinction between an application for the writ by the Attorney-General *ex officio*, and by a private prosecutor, is that in the former case the writ is of absolute right, but in the case of an individual private prosecutor, though the writ issues as of course, yet upon cause shewn, it may be suspended. 2 Hawk P. C. c. 27, s. 27.

Notwithstanding that *certiorari* is expressly taken away by a statute from a defendant and he cannot procure it except upon shewing special reason by affidavit, the Crown if it take up the defence may have a *certiorari* in the name of the defendant without giving any special reasons and without reference to any restrictions imposed in ordinary cases as to the time of applying for it. *R.* v. *Thomas*, 4 M. & S. 442; *R.* v. *Jacobs*, 1 East 303. The Attorney-General's authority in writing authorizing defendant's solicitor to apply for the order is required. No recognizance is necessary upon these writs.

The Attorney-General is entitled to a *certiorari* of absolute right and absolutely in all cases.

The Attorney-General on the motion for the discharge of the prisoner appeared and asked for a *certiorari* to bring up the matters and an order was granted accordingly, and the case adjourned for the purpose of having the material before the Court. The learned Judge (RIDDELL, J.), says p. 12: "If it had been the case of the Attorney-General not having previously moved such writ, attending and arguing the matter, and then saying that it was probable the conviction was a good one and on that ground asking for a *certiorari*, the authority of *In re Timson* (1870), L. R. 5 Ex. 257, would be conclusive in favour of the defendant. See also *R.* v. *Chaney* (1838), 6 Dowl. 281. But that is not what happened; the Attorney-General did not attempt to support the warrant as it stood; but asked that the matter might stand over that all material might be brought before the Court." *R.* v. *Nelson* (1908), 15 C. C. C. 10.

Conviction or Order Affirmed on Appeal.

By sec. 1121 of the Code, no conviction or order made on summary conviction which has been affirmed, or affirmed and amended in appeal, shall be quashed for want of form or be removed by *certiorari* into any superior Court, and no warrant or commitment shall be held void by reason of any defect therein, provided it is therein alleged that the defendant has been convicted and there is a good and valid conviction to sustain the same.

Appeals from summary convictions are made under the provisions of sec. 750 of the Code, and the following successive sections up to and including sec. 760.

And by sec. 754 it is provided that the appeal shall be heard and determined upon the merits notwithstanding any defect in the conviction or order appealed from.

And by sec. 752—where an appeal against a summary conviction or order has been lodged in due form—the Court appealed to shall try and shall be the absolute judge as well of the facts as of the law, in respect of such conviction. In other words the judgment shall be final.

And now to complete the finality of this appeal: Sec. 1121 says that if any conviction or order made on summary conviction has been either affirmed, or affirmed and amended on appeal, such conviction shall not be quashed for want of form nor shall it be removed by *certiorari* into a superior Court.

No Certiorari where Appeal Lies.

Then follows sec. 1122, which says that no writ of *certiorari* shall be allowed to remove any conviction or order had or made before any justice if the defendant has appealed from such conviction or order to any Court to which an appeal from such conviction or order is authorized by law, or shall be allowed to remove any conviction or order made upon such appeal.

The provisions of these two sections 1121 and 1122 mean that where a defendant has seen fit to appeal to a Judge of a County or District Court under 750 of the Code, and accepted that forum to investigate his rights, he must abide by the decision of that Court, and such decision in appeal shall be final and conclusive, and bar the appellant's right to further appeal by way of *certiorari*, unless in certain exceptional cases which will now be noticed.

For instance, if an appeal has been taken from a summary conviction and the appeal has lapsed because the magistrate has failed to return the conviction, a superior Court may nevertheless issue a *certiorari*, and quash the conviction on the ground that the magistrate by his conduct had deprived the defendants of a reasonable opportunity of making their defence and had acted in collusion with the prosecutor. *Ex parte Conan* (1904), 9 C. C. C. 454, and see *R.* v. *Alford* (1902), 10 O. C. C. C. 61.

"As the appellant appealed against his conviction and it was affirmed he can succeed upon this application only by shewing an absence of any jurisdiction in the convicting magistrate, and that is shewn only if the enactment upon which the conviction is based is *ultra vires*." MEREDITH, J., p. 273; *R.* v. *Horning* (1904), 8 C. C. C. 268.

The appeal in the above case was from a summary conviction under the Ontario Summary Conviction Act, and it was held that under that Act a *certiorari* can only be granted in respect of the want of jurisdiction or excess of jurisdiction of the convicting magistrate, and the conviction was affirmed.

Where there is a right of appeal from a summary conviction, the discretion of the Court as to granting a *certiorari* should be exercised by refusing the latter unless special circumstances are shewn. *R.* v. *Herrell* (1899), 3 C. C. C. 15, 12 M. L. R. 522, and see *Ex parte Ross* (1895), 1 C. C. C. 153 (N.B.). This latter case was not approved of in *Re Traves* (1899), 10 C. C. C. 63 (B.C.).

The liquor license law of New Brunswick by providing that a summary conviction for selling liquor without a license shall be final and conclusive, takes away the right of *certiorari*, except as regards the jurisdiction of the magistrate. *Ex parte Hebert* (1898), 4 C. C. C. 153.

Although the Indian Act declares that no convictions thereunder shall be removed by *certiorari* into a superior Court, it nevertheless lies where there has been improper conduct of the magistrate, or the fundamental privilege of entitling the party to a fair trial has been overlooked. In this case the magistrate had taken a view of the premises in the absence of the parties. *Re Sing Kee* (1901), 5 C. C. C. 86, and see *Ex parte Hill* (1891), 31 N. B. R. 84.

As to the same provisions in the Canada Temperance Act taking away *certiorari*: see *R.* v. *Eli* (1896), 10 O. R. 727, and *R.* v. *Wallace* (1883), 4 O. R. 140, and in *Ontario Public Health Act, Re Holland* (1895), 37 U. C. R. 214.

These cases all establish that where a magistrate has been guilty of a clear dereliction of duty or improper conduct, or has acted contrary to natural justice, *certiorari* will lie notwithstanding that it is taken away by statute.

"It is very old and often reiterated, that although there is a provision in a statute taking away the writ of *certiorari*, it does not deprive the superior Court of its power to issue the writ to quash a proceeding on the ground of want of jurisdiction. And it would be a novelty that a provision granting an appeal should restrict the power to correct a proceeding by *certiorari* more than a provision taking away the writ altogether. The fact is that for want of jurisdiction in an inferior Court the writ of *certiorari* is the appropriate remedy and an appeal is not." GRAHAM, E.J., p. 174, in his very able and exhaustive judgment in *Re Ruggles* (1902), 5 C. C. C. 163.

The pendency of an appeal to the County Judge does not interfere with *certiorari* unless at all events the question of jurisdiction is not raised upon the appeal. *R.* v. *Starkey*, 6 M. L. R. 588; *R.* v. *Galbraith*, 6 M. L. R. 14.

Where the defendant had appealed within the meaning of sec. 84 of the Summary Convictions Act, Manitoba, the right to *certiorari* was taken away except as to objection going to the jurisdiction of the justice. The bringing of the prosecution was the laying of the information and it ought to have been laid before two justices, and the matter of the prosecution was not therefore

properly before the two justices on the hearing of the case and they had no jurisdiction to hear or determine it, and the conviction was quashed. *R.* v. *Starkey* (1890), 7 M. L. R. 143.

The Attorney-General, although not a party to the proceedings in the above matter, intervened, and moved before the full Court against the decision of TAYLOR, C.J., *supra*. Held, that the Attorney-General was entitled to intervene and the decision was affirmed. *R.* v. *Starkey* (1891), 7 M. L. R. 489.

The Ontario Statute, 2 Ed. VII. (1902), c. 12, s. 14, which declares that no conviction under the Ontario Summary Convictions Act shall be removed by *certiorari*, except upon the ground that an appeal could not afford an adequate remedy, does not prevent the granting of the writ where the magistrate had no jurisdiction over the matter adjudicated. *R.* v. *St. Pierre* (1902), 5 C. C. C. 365. See R. S. O. vol. 3, c. 324, s. 37.

Jurisdiction in Quebec.

The superior Court in the province of Quebec has power over a conviction made by a justice of the peace in a criminal matter on *certiorari* proceedings. *R.* v. *Mercier* (1901), 6 C. C. C. 44.

The provisions of the Code of Civil Procedure will be applicable in the case of *certiorari* as regards the decisions of inferior tribunals in so far and so long as the Statute 12 Vict. c. 38, s. 7, is not repealed by the Federal Parliament. But as respects conviction having by law the value of convictions pronounced by the Court of King's Bench, that is to say, in a matter of pure criminal law, under the provisions of the Criminal Code, the provisions of the Code of Civil Procedure have no application. It is to the Court of King's Bench and to the Judges of that Court that it appertains to deal with proceedings by *certiorari* in matters purely criminal and before such competent Provincial Court as may be suggested. (Sec. 576 Crim. Code). DE LORIMER, J., p. 349; *R.* v. *Marquis* (1903), 8 C. C. C. 346.

The taking out of a writ of *certiorari* is a waiver of the right of appeal. *Denault* v. *Robida* (1894), 8 C. C. C. 501.

The superior Court and every Judge thereof have jurisdiction to review every decision rendered by justices of the peace even in criminal matters by virtue of the laws of Canada as well as by virtue of the Revised Statutes of Quebec, LAVERGNE, J. *Leonard* v. *Pelletier* (1903), 9 C. C. C. 19.

A writ of *certiorari* will not be granted to review the judgment of the Recorder's Court in the province of Quebec where the law permits an appeal from such judgments. *O'Shaugnessy* v. *Montreal* (1904), 9 C. C. C. 44.

The above decision was based upon the fact that the defendant could have appealed under s. 879 (now 749) of the Code to the Court of King's Bench, Crown side.

And that under the provisions of Article 1292 of the Code of Civil Procedure *certiorari* will not lie where there is an appeal from the decision of the inferior Court.

Under Article 1293 C. P. Q., the remedy will lie: 1. Where there is want or excess of jurisdiction. 2. Where the regulations upon which a complaint is brought or the judgment rendered are null, or of no effect. 3. Where the proceedings contain gross irregularities and there is reason to believe that justice has not been or will not be done.

A deposit of $50 in conformity with Article 217 of the license law of Quebec is a deposit as security for costs and cannot be converted into payment of fine and costs. The application for *certiorari* could not take away from the defendant his option to serve out the term of imprisonment fixed by the sentence, instead of paying the fine and costs. The *certiorari* suspended the sentence (of which defendant had served 10 days) and after it was annulled the defendant was rendered liable to serve out the remainder of his term if he so persisted, and exercising such option he was entitled to the return of the deposit. *Wing* v. *Sicotte* (1904), 10 C. C. C. 171.

No general rule requiring a petitioner on a writ of *certiorari* to give security for the costs and other charges of the case is in existence in the province of Quebec. *Tierney* v. *Choquet*, 9 Q. P. R. 229.

Cases where Certiorari Will or Will Not Lie.

A *certiorari* will not be refused in British Columbia to quash a conviction under a municipal by-law because the applicant might have appealed. *Ex parte Ross* (1895), 1 C. C. C. 153, not approved. MARTIN, J., *Re Traves* (1899), 10 C. C. C. 63.

The fact that the commitment itself was bad would not affect the conviction . . . The commitment is not a judicial but simply a ministerial act, carrying out the terms of the conviction, and is not a proceeding that can be brought up here on *certiorari*. MCLEOD, J., p. 67, 68; *Ex parte Bertin* (1904), 10 C. C. C. 67.

Where the same Court has jurisdiction both in appeal and upon *certiorari* and a summary conviction has been transmitted by the magistrate and filed in such Court as required by sec. 757 of the Code, the writ of *certiorari* cannot be dispensed with for the purposes of a motion to quash. *R.* v. *Gehrke* (1906), 11 C. C. C. 109, and see *R.* v. *Monaghan* (1897), 2 C. C. C. 488, where the Court was divided upon the same question. And *R.* v. *Ames* (1903), 10 C. C. C. 52, where SCOTT, J., of the same Court, held to the contrary, and likewise in *R.* v. *Rondeau* (1903), 9 C. C. C. 523.

A magistrate's jurisdiction to make a summary conviction must appear on the face of the proceedings, as he will be presumed to have acted without jurisdiction. *Certiorari* will lie notwithstanding notice of appeal, and sec. 1122 of the Code, upon any ground which impeaches the jurisdiction of the magistrate. *Johnston* v. *O'Reilley* (1906), 12 C. C. C. 218.

An order for discharge of the prisoner will not be made in *certiorari* proceedings without a writ of *habeas corpus*. *R.* v. *Goulet* (1907), 12 C. C. C. 365.

The leave of the Attorney-General is a condition precedent to the commencement of a prosecution under the Lord's Day Act, and a magistrate has not jurisdiction to take the information unless leave has already been granted. Evidence of such leave must appear in the proceedings before the magistrate, and in its absence the prosecutor will not be permitted upon a *certiorari* application to prove that leave had been granted before the information was laid. *R.* v. *Can. Pac. Ry. Co.* (1907), 12 C. C. C. 549.

A search warrant issued under sec. 629 of the Code is a judicial proceeding and may be removed by *certiorari*. *R.* v. *Kehr* (1906), 11 C. C. C. 52.

A coroner's warrant to apprehend a witness who had disobeyed a summons is a ministerial and not a judicial act, and *certiorari* will not be granted on an application to quash the warrant. *Re Anderson and Kinrade* (1909), 14 C. C. C. 448.

After the order absolute for a *certiorari* and order *nisi* to quash was obtained, the applicant served notice of his grounds of appeal to the County Court, so that his latest step in the proceedings was in the appeal. Under these circumstances the Court declined to interfere by *certiorari* as the appeal proceedings were pending. *Ex parte McCorquindale* (1908), 15 C. C. C. 187, and see *In re Kelly*, 27 N. B. R. 553.

The right to take the new procedure in Ontario, under 8 Edw. VII. c. 34, which is substituted for *certiorari*, must be confined to cases in which prior to this legislation the defendant would have been entitled to a writ of *certiorari*. *R.* v. *Cook* (1908), 14 C. C. C. 495, 18 O. L. R. 415; followed in *R.* v. *Renaud* (1909), 15 C. C. C. 246.

When no suggestion is made as to the sufficiency of the information, or that the magistrate had no jurisdiction over the offence charged as well as over the person charged with the offence, and the right of *certiorari* had been expressly taken away, any supposed miscarriage of the inquiry from the insufficiency of the evidence or as to its irregularity cannot be inquired into by the Court. Following *Ex parte Daley*, 27 N. B. R. 129; *Ex parte Morison* (1909), 16 C. C. C. 28, 39 N. B. R. 298.

Where a case has been decided upon its merits and the accused was acquitted by the magistrate a *certiorari* will not be granted to quash the order of acquittal, the object being to re-open the whole case, the only ground urged being that the magistrate refused to compel a witness to answer a material question. *R.* v. *Reddin* (1910), 16 C. C. C. 163, see *R. G. Causeway & Tramway Co. J. J. Antin*, Ir. R. (1895), 2 Q. B. D. 603.

An application by the accused for a *certiorari* to remove a summary conviction may be made without making the informant a party thereto or serving him with notice of the application, if an immediate order to quash without the issue of the writ is not asked and if the Court has not specially directed service on the informant. *Ex parte Harris* (1906), 14 C. C. C. 109, 4 W. L. R. 530.

There is no appeal in British Columbia to the full Court from the decision of a single Judge quashing a summary conviction on *certiorari*. *R.* v. *Carroll* (1908), 14 C. C. C. 338.

Provincial statutes in force at the time of Confederation in 1867, regarding *certiorari* in criminal matters, remain in force except in so far as they have been repealed by or are inconsistent with Dominion legislation. The Court of King's Bench in Quebec has exclusive jurisdiction to review the decision of magistrates upon summary trials for indictable offences. *R.* v. *Maquis* (1903), 8 C. C. C. 346.

The Supreme Court of British Columbia sitting *en banc* as the full Court will not hear a motion for a rule *nisi* to quash a conviction as the motion can be made to a single Judge under B. C. S. C. Act Rules, s. 5. *R.* v. *Tanghe* (1904), 8 C. C. C. 160.

Juvenile Offenders' Part of the Code.

1123. No conviction under Part XVII. shall be quashed for want of form or be removed by *certiorari* or otherwise into any Court of Record; and no warrant of commitment under the said Part shall be held void by reason of any defect therein, if it is therein alleged that the person has been convicted and there is a good and valid conviction to sustain the same. 55-56 V., c. 29, s. 820.

Convictions or Warrants not Void for Irregularities.

1124. No conviction or order made by any justice, and no warrant for enforcing the same, shall, on being removed by *certiorari*, be held invalid for any irregularity, informality or insufficiency therein, if the Court or Judge before which or whom the question is raised, upon perusal of the depositions, is satisfied that an offence of the nature described in the conviction, order or warrant, has been committed, over which such justice has jurisdiction, and that the punishment imposed is not in excess of that which might have been lawfully imposed for the said offence: Provided that the Court or Judge, where so satisfied, shall, even if the punishment imposed or the order made is in excess of that which might lawfully have been imposed or made, have the like powers in all respects to deal with the case as seems just as are by section seven hundred and fifty-four conferred upon the Court to which an appeal is taken under the provisions of section seven hundred and forty-nine.

2. Any statement which, under this Act or otherwise, would be sufficient if contained in a conviction, shall also be sufficient if contained in an information, summons, order or warrant. 55-56 V., c. 29, s. 889.

1125. The following matters amongst others shall be held to be within the provisions of the last preceding section:—

(*a*) The statement of the adjudication, or of any other matter or thing, in the past tense instead of in the present;

(*b*) The punishment imposed being less than the punishment by law assigned to the offence stated in the conviction or order, or to the offence which appears by the depositions to have been committed;

(*c*) The omission to negative circumstances, the existence of which would make the act complained of lawful, whether such circumstances are stated by way of exception or otherwise in the section under which the offence is laid, or are stated in another section.

2. Nothing in this section contained shall be construed to restrict the generality of the wording of the last preceding section. 55-56 V., c. 29, s. 890.

No matter what irregularity, informality or insufficiency exists in the conviction, or order, or the warrant enforcing it, the same shall not by reason of any of these things be held invalid if the Court or Judge after perusing the depositions is satisfied that—

(*a*) An offence of the nature described in the conviction order or warrant has been committed; (*b*) that the justice had jurisdiction, and (*c*) that the punishment awarded is not in excess of that imposed by the law governing the offence. And if the Court or Judge are satisfied as to the offence being committed and that

the justice had jurisdiction, but find the punishment is in excess of that which could be lawfully imposed, they can deal with the case as seems just, and exercise all the powers conferred upon a County Court Judge in appeal under sec. 754. That is, in this event, the Court or Judge may hear and determine the charge or complaint on which the conviction or order has been had or made upon the merits, and may confirm, reverse or modify the decision of the justice or make such other conviction or order in the matter as the Court thinks just. And the Court may by such order, exercise any power which the justice whose decision is appealed from might have exercised, and may make such order as to costs to be paid by either party as the Court thinks fit. And such conviction or order so made by the Court shall have the same effect and may be enforced in the same manner as if it had been made by such justice. And any conviction or order so made by the Court may also be enforced by process of the Court itself.

See further the comments upon sec. 754 in Chapter VIII, page 324 *supra*.

"Now it is one thing to decline to quash a conviction where there is evidence upon which a magistrate might convict and another thing to interfere actively and amend a conviction. To do that it seems to me that the Court or a Judge must from the depositions be satisfied that if trying the defendant in the first instance the Court or Judge would upon that evidence have convicted. Had the defendant been tried before me, I could never have convicted him upon the evidence as it stands. The conviction should be quashed." TAYLOR, C.J., p. 516; *R.* v. *Herrell* (1898), 1 C. C. C. 510, 12 M. L. R. 198, and see KILLAM, J., at p. 513, and BAIN, J., p. 527, *Ibid.* And see *R.* v. *Coulson* (1893), 1 C. C. C. 114, 24 O. R. 246; *R.* v. *Hughes*, 2 C. C. C. 5.

Conviction under the New Brunswick Liquor License Act, 1887. The magistrate imposed a fine of $50, or in default two months with hard labour. The Court amended the conviction by striking out the words "with hard labour," so as to correspond with the minute of conviction which was all right. *Ex parte Nugent* (1895), 1 C. C. C. 126.

As to amending convictions on *certiorari*, see *R.* v. *Menary* (1890), 19 O. R. 691; *R.* v. *Brady*, 12 O. R. 363; *R.* v. *McAnn* (1896), 3 C. C. C. 110, and *R.* v. *Law Bow* (1903), 7 C. C. C. 468; *R.* v. *Hartley*, 20 O. R. 481.

The Judges of the Court of Common Pleas in contradistinction to the judgment of the King's Bench Division in *R.* v. *Coul-*

son, supra, expressed the opinion that the evidence should be looked at when the proceedings are removed by *certiorari* in order to see if there was any evidence whatever to sustain the magistrate's finding, even if no defect appeared on the face of the conviction and if there was any evidence of that character the Court should not review all the evidence or find as to the propriety of the magistrate's dismissal. *R.* v. *Coulson* (1896), 27 O. R. 59.

The Court will not on *certiorari* quash an adjudication upon the ground that the fact however essential has been erroneously found. An adjudication by a tribunal having jurisdiction over the subject matter is, if no defects appear, on the face of it, to be taken as conclusive of the facts therein stated. *R.* v. *The "Troop,"* 29 S. C. R. 673.

Imposing Less Punishment than Law Prescribes.

Amongst the matters held by sec. 1125 *supra,* to be within the scope of sec. 1124, *supra,* is that (*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."

If, for instance, a Statute or Ordinance prescribed a penalty of $25 for a first offence and a conviction is had, and only a penalty of $5 is imposed, this would be the imposition of a less punishment than is by law assigned, and but for the saving provision of paragraph (*b*) of sec. 1125, quoted above, the conviction would be bad and quashed accordingly.

See *R.* v. *Hostyn* (1905), 9 C. C. C. 138.

Hearing on the Merits Under Sec. 1124.

The proviso to section 1124, which declares that the Court or a Judge acting under its provisions shall "have the like powers in all respects to deal with the case as seems just; as, and by sec. 754 conferred upon the Court to which an appeal is taken under the provisions of sec. 749," calls for some consideration. And this, in view of the extended powers which are given to a County Court Judge in appeal under sec. 754. Since he shall hear and determine the charge or complaint "upon the merits," notwithstanding any defect in the conviction or order, or that the punishment is in excess of what might be lawfully imposed.

Query, whether in *certiorari* under sec. 1124 any duty is cast upon the Court of "hearing and determining the charge or complaint upon the merits otherwise than by perusing the depositions."

It would hardly seem so, since by sec. 754 the County Court Judge is not empowered to arrive at his decision "upon perusal of the depositions." The duty is cast upon him of "hearing and determining the charge or complaint on which such conviction or order has been had or made upon the merits." He cannot so hear and determine the matter without taking the testimony of witnesses and ascertaining therefrom what the merits of the case are. The hearing in appeal under section 754 is a trial *de novo* of the original charge or complaint made before the justice who made the conviction.

On the hearing of the appeal any of the parties thereto may call witnesses and adduce evidence, and whether such witnesses were called or evidence adduced at the hearing before the justice or not, and the depositions of witnesses taken on the hearing below before the justice can only be read on such appeal when the same have been certified by the justice, and when the Court appealed to is satisfied by affidavit, or otherwise, that the personal presence of the witness cannot be obtained by any reasonable efforts. (See sec. 752).

Now, under sec. 1124 the proceedings to be taken by the Court of Appeal so far as the consideration of evidence is concerned, is limited to the Court perusing the depositions. And from this perusal the Court acquires knowledge of the merits and must so peruse these depositions in order that the Court can be satisfied. (1) That an offence of the nature described in the conviction, order or warrant has been committed; (2) that the justice had jurisdiction, and (3) that the punishment imposed is not in excess of that which lawfully might be imposed.

And then comes the proviso that when the Courts are so satisfied, that is satisfied by the reading of the depositions, even if the punishment imposed or order made is in excess of that which might lawfully have been imposed, they shall, if they want to exercise it, have all the powers in all respects to deal with the case as seems just under sec. 754. And amongst these powers is the right "to confirm, reverse or modify the decision of such justice, or to make such other convictions or orders in the matter as the Court deems just, etc."

It is submitted that it is neither required nor contemplated by sec. 1124 that the Court or Judge should do more than "peruse

the depositions" for the purpose of hearing and determining the merits, in order to confirm, reverse or modify the decision of the justice, or to make such other order or conviction in the matter as the Court thinks fit.

The Court, or a Judge, must read the depositions in order to ascertain the merits of the case, and it is after a perusal of the depositions, and not till then, that the Court or a Judge can invoke the powers conferred by sec. 757 for the purpose of confirming, reversing, modifying or amending the conviction. But under sec. 754 the County Court Judge hearing the appeal is required to do more in order to exercise these powers, he must hear and determine the charge or complaint upon the merits, and for this purpose try the case *de novo*. The decision of the Court or of a Judge on *certiorari* under sec. 1124, is arrived at after hearing and determining the merits as disclosed in the depositions, or upon evidence already taken, the County Court Judge so determines after hearing evidence taken before him, *viva voce*.

In his judgment in *R.* v. *Murdoch*, at page 90, MR. JUSTICE OSLER says: "The effect of these two sections of the Code, however, now is that, if satisfied upon a perusal of depositions that an offence of the nature described in the conviction has been committed, the Court may hear and determine the charge upon the merits as described by the depositions returned in the *certiorari* and may vary, confirm, reverse or modify the decision of the justice or make such other order as they think just, and may by such order exercise any power which the justice might have exercised." *R.* v. *Murdoch* (1900), 4 C. C. C. 82.

Amending the Conviction.

And see *R.* v. *Spooner* (1900), 4 C. C. C. 209, where the Court treated the conviction as having been made under the Summary Conviction Clauses of the Code, and reduced the sentence from 12 months to 10 months and amended the conviction accordingly. And at page 215, STREET, J., says: "Upon being brought before the magistrate and charged with appearing the keeper of a house of ill-fame, the prisoner pleaded guilty. This was a trial upon the merits, and the plea was an admission by the prisoner that she appeared to be the keeper of such a house." And see *R.* v. *Meikelham* (1905), 10 C. C. C. 382.

Where a County Court Judge on an appeal from a summary conviction quashed the conviction as being invalid on the face without hearing any evidence or trying the case *de novo*. *Manda-*

mus to compel the Judge to re-open the appeal for the purpose of hearing evidence was refused, the Court holding on the authority of *R.* v. *J. J. Middlesex,* 2 Q B. D. 516, that it had no power to interfere by *mandamus,* there having been a decision by the County Court Judge on the legal merits. *Strang* v. *Gallatley* (1904). 8 C. C. C. 17. (B.C.).

In *R.* v. *McKenzie* (Nova Scotia), a motion to set aside a conviction for an infraction of the Customs Act of Canada, the defendant's counsel contended that the Court must be satisfied upon a perusal of the depositions that the offence charged was committed and must also re-try the case by having the witnesses orally examined before it, before amending the conviction. The Chief Justice delivered a dissenting judgment, but the majority of the Court held that the conviction should be amended.

"As the application to quash the conviction brought up upon a writ of *certiorari,* usually takes place before a Court of Appeal (as in Nova Scotia), when the facts are brought forward and disposed of upon evidence always taken, there would be a strong presumption that the powers conferred are to be exercised according to the practice of the Court. There is nothing in the expression 'hear and determine' which limits the investigation to oral testimony. The words 'hear' and 'hearing' were expressions most commonly used to express the act of the Court in disposing of cases upon evidence already taken. The expressions 'heard and determined' on appeal from justices is satisfied without a trial by witnesses. *The King* v. *Cawston,* 4 Dowl. & Ry. 445. If the case has to be tried by witnesses, *de novo,* why make it a condition that the Court should be satisfied (that the offence has been committed) only upon a perusal? The defendant's rights would be amply guarded if the provision was that it should be satisfied upon affidavit, a very usual way of applying for amendment if afterwards a conviction could only take place upon a trial *de novo.*" GRAHAM, E.J., p. 443.

"But when the procedure of sec. 883 (now 754), is adapted to the case of a conviction brought up under section 889 (now 1124), I do not think it calls for a second hearing on the merits, if there has been one already, as I think there should be, at the time when the question is raised as to the validity of the conviction if there are any merits to be urged. This hearing, I think, must take place on the depositions before the Court." RUSSELL, J., p. 447; *R.* v. *McKenzie* (1907), 12 C. C. C. 435.

Where after a perusal of the depositions the Court is satisfied that the commission of the offence has been established, but the

conviction is defective in awarding six months' imprisonment where only three months could be inflicted, the Court has power to amend the conviction by reducing the term to that allowed by the statute. *Ibid.*

The provisions of sec. 1124 as to reducing the excessive punishment adjudged by a justice of the peace applies to convictions made by way of summary conviction under Part XV., but does not relate to convictions on "summary trials" made by a police magistrate under Part XVI. of the Code. *R.* v. *Randolph* (1900), 4 C. C. C. 165.

The Court should not amend a conviction if in so doing it has to exercise the discretion of the magistrate. Also that where the only penalty authorized has been imposed, but with an unauthorized addition the latter may be struck out on amendment after it's return under *certiorari*. *R.* v. *Whiffen* (1900), 4 C. C. C. 141.

The powers of amendment under sec. 1124 do not apply where there is an inherent defect in the procedure which has deprived the defendant of a fair trial. *Re Sing Kee* (1901), 5 C. C. C. 86.

An omission to state or allege the knowledge of the accused will not invalidate a conviction if the Court on perusal of the depositions is satisfied that an offence of the nature described in the conviction has been committed. *R.* v. *Crandall*, 27 O. R. 63.

An information which has been amended in the presence of the informant and the accused was notified that he would be tried on the amended information, the fact that the information was not re-sworn after amendment will not invalidate the proceedings if the defendant did not take any objection. Being satisfied from a perusal of the depositions that an offence of the nature described in the conviction has been committed by the defendant and that the magistrate had jurisdiction over it, and that the punishment imposed is not in excess of that by law provided, the Court should not hold the conviction invalid by reason of the fact that the date and place of the offence not being stated in it, for these clearly appear from the depositions, and we have power under section 883 (now 754) and 889 (now 1124) of the Criminal Code to amend the conviction by stating the offence to have been committed at B. on 29th July, 1902. *R.* v. *Lewis* (1903), 6 C. C. C. 499.

On a motion to quash a conviction for selling during prohibited hours, where the existence of a license is not proved, the Court will not amend the conviction so as to make it one for selling without a license. *R.* v. *Williams* (1892), 8 M. L. R. 342.

Court will not Consider the Weight of Evidence.

If there is any evidence upon which a conviction can be based the Court will not consider the weight of evidence. *R.* v. *McArthur* (1906), 14 C. C. C. 342; see *R.* v. *Green*, 12 P. R. 373, 375; *In re Trepanier*, 12 S. C. R. 111, *R.* v. *Weller* (1906), 11 C. C. C. 226, *R.* v. *Bowman*, 2 C. C. C. 410, *R.* v. *Daun* (1908), 11 C. C. C. 244.

The omission of the word "knowingly" from both information and the conviction is a matter of substance and not a mere matter of form, and the defect is not curable upon *certiorari* as an "irregularity, informality or insufficiency" under sec. 889 (now 1124) of the Code. *R.* v. *Haynes* (1903), 6 C. C. C. 357.

When a summary conviction is not on its face defective and the justice had general jurisdiction over the subject matter the adjudication involved in the merits of the case on the facts as distinguished from collateral facts upon which the justice's jurisdiction depends is not reviewable on *certiorari*. *R.* v. *Beagan* (No. 1), 6 C. C. C. 54, and see *R.* v. *The Troop* (1899), 29 S. C. R. 673.

Costs against Prosecutor.

The High Court in Ontario has no jurisdiction on *certiorari* proceedings respecting a criminal charge to award costs against the prosecutor or magistrate on the conviction being quashed. There is jurisdiction to award costs against an unsuccessful applicant in *certiorari* proceedings respecting a purely criminal charge either because of the recognizance which he has entered into to pay costs, or of the inherent power which the Court possesses to give costs on a punishment for erroneously putting the jurisdiction of the Court in motion. *R.* v. *Bennett* (1902), 5 C. C. C. 456, and see *R.* v. *Parlby* (1889), 6 T. L. R. 37.

Where a magistrate returns an amended conviction in *certiorari* proceedings and the conviction is restrained only by reason of the amendment, costs of the proceedings should not be awarded against the applicant. *R.* v. *Whiffen* (1900), 4 C. C. C. 141.

When the only record of conviction produced before the institution of *certiorari* proceedings to quash the same is bad, and a valid amended conviction is produced to the Court, the costs of opposing the motion should not be awarded against the applicant. *R.* v. *McAnn* (1896), 3 C. C. C. 110.

In Nova Scotia, if the magistrate and the informant appear upon and unsuccessfully oppose an application for *certiorari* to remove a conviction they may be ordered to pay the costs of the motion in the event of the conviction being quashed. *R.* v. *Sarah Smith* (1899), 2 C. C. C. 485.

On motion to quash a conviction being unopposed no costs were allowed and terms were imposed that no action should be brought by the defendant. *R.* v. *McLeod* (1897), 1 C. C. C. 10.

Costs of *certiorari* proceedings are not usually given where the conviction is amended and affirmed as amended. *R.* v. *Higham*, 7 E. & B. 557.

Costs were refused to the justice as against the defendant where an amended conviction had been returned on the ground that the application was justifiable at the time it was launched. *Re Plunkett* (1895), 1 C. C. C. 365.

SECURITY BY RECOGNIZANCE OR DEPOSIT.

1126. The Court having authority to quash any conviction, order or other proceeding by or before a justice, may prescribe by general order that no motion to quash any conviction, order or other proceeding by or before a justice, brought before such Court by *certiorari*, shall be entertained unless the defendant is shewn to have entered into a recognizance with one or more sufficient sureties, before a justice or justices of the county or place within which such conviction or order has been made, or before a Judge or other officer, as may be prescribed by such general order, or to have made a deposit to be prescribed in like manner, with a condition to prosecute such writ of *certiorari* at his own costs and charges, with effect, without any wilful or effected 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. 55-56 V., c. 29, s. 892.

It is the Court having authority to quash any conviction, etc., that is to prescribe the order as to security for costs either by way of recognizance with one or more sufficient sureties or by deposit.

The Courts referred to are "superior Courts of Criminal jurisdiction" in each of the provinces and territories (sec. 576). In Quebec the Court of King's Bench; in Ontario the Supreme Court of Judicature (sec. 576 (2)); in British Columbia, Nova Scotia, New Brunswick, Alberta and Saskatchewan the Supreme Court of those provinces; in Manitoba the Court of Appeal, or the Court of King's Bench (Crown side); in Prince Edward Island the Supreme Court of Judicature; in the Yukon Territory the Territorial Court.

Crown Rules in Ontario.

In Ontario the High Court passed a general order on the 17th November, 1886, relating to security on *certiorari*, and this rule prevailed until the Crown Rules governing the practice in *certiorari* were promulgated by the Supreme Court of Judicature for Ontario on the 27th March, 1908, when the rule of the 17th November, 1886, was repealed. See chap. 34, 8 Edw. VII. (Ont.), 1908, where the rules are set out and the Judicature Act amended accordingly. These rules number 1279 to 1288 and are set out at length at the end of this chapter. See also Canada Gazette, vol. 41, p. 3160. The rule relating to recognizance is rule 1285, and is summarized as follows: "The motion shall not be entertained unless the returned day thereof be within six months after the conviction, order, warrant or inquisition, or unless the applicant is shewn to have entered into a recognizance with one or more sufficient sureties in the sum of $100 before a justice or justices of the county within which the conviction or order or inquisition was made or the warrant issued, etc., and the recognizance with an affidavit of the due execution thereof shall be filed with the registrar of the Court in which such motion is made or is pending. The applicant may make a deposit of $100 with the Registrar of the Court.

Nova Scotia Crown Rules.

The Nova Scotia Crown Rules 27 to 37 govern the practice as to *certiorari*, and are set out at the end of this chapter. Under these rules a recognizance with two sureties in the sum of $200 must be filed and additional security may be ordered.

Affidavits of justification are imperative, and leave to file such affidavits pending the motion to quash cannot be granted. *McIsaac* v. *McNeil*, 28 N. S. R. 424.

British Columbia Rules.

Under the British Columbia Rules, "Crown Rules 1896," which will be found at the end of this chapter.

Rule 5 provides for recognizance in *certiorari* proceedings.

There is a further condition in the recognizance here than that of Ontario, since it is provided that the consignor will "pay the party in whose favour or for whose benefit such judgment, order

or conviction shall have been given or made *within one month* after the said judgment, etc., shall be confirmed his full costs, etc. The Ontario rule does not specify any particular time within which the costs shall be paid.

By Rule 6, every recognizance with affidavit of justification and due execution shall be filed with the Registrar of the Court before the issue of any writ of *certiorari*. This rule must be strictly complied with. *R.* v. *Ah Gin* (1892), 2 B. C. R. 207, *R.* v. *Geiser* (*No. 2*), 7 C. C. C. 172 (B.C.).

The British Columbia Rules also differ from the Ontario Rule since there is no provision in the former for a deposit of money in lieu of a recognizance.

In Ontario the surety must justify in the sum of $100 over and above any amount for which he may be surety, as well as over and above his debts. *R.* v. *Robinet* (1894), 2 C. C. C. 382.

If there is no affidavit of justification the Court cannot entertain the motion. *R.* v. *Richardson, R.* v. *Addison* (1889), 17 O. R. 729.

The recognizance must be entered into before a justice of the county in which the conviction was made, if before a justice of another county it will be invalid. *R.* v. *Johnson* (1904), 8 C. C. C. 123.

Ontario Crown Rule 1285, as to recognizance under Code 1126, does not apply to applications made by a prosecutor whether acting directly on behalf of the Crown, or as a private prosecutor. *Re Martin & Garlow* (1910), 15 C. C. C. 446.

As we have already seen, unless there are express words in the Act, or an intention manifestly appearing in the same prohibiting the Crown as well as the subject, from removing proceedings by *certiorari*, nothing will restrain the prerogative right of the Crown in this respect. In none of the rules is there anything to be found limiting the time within which the Crown may move for *certiorari* or requiring the Crown to give security. In the British Columbia rules, the Attorney-General, acting on behalf of the Crown, is specifically exempted from having to give security. The principle is so well understood and so ingrafted upon our law that we presume that is the reason no specific mention is made as to the Crown in the Ontario, or Nova Scotia Rules.

In Nova Scotia it is not necessary that a recognizance in *certiorari* proceedings should set out that the bail has resided for

a month at the place of residence. *R.* v. *Burke* (No. 1) (1903), 8 C. C. C. 538.

Where proceedings pending before an inferior Court were removed by *certiorari* into a Superior Court after a conviction, and before the date fixed for sentence, a warrant of commitment having issued enforcing the conviction, the same was held to be invalid as being unauthorized after the proceedings had been removed by *certiorari*. *R.* v. *Foster* (1903), 7 C. C. C. 46.

English Crown Office Rule No. 24.

Under the English Crown Office Rules (1906), Rule No. 24, the party obtaining the writ whether for removal of an indictment or conviction (except the Attorney-General and the prosecutor of an indictment against a body corporate) is required to enter into a recognizance with sureties for the due prosecution of the proceedings, and to pay the costs in the event of being unsuccessful. The recognizance on a writ to remove a conviction, etc., is to be in the sum of £50 and to be entered into before a justice where the conviction, &c., was made, or a Judge of the High Court.

Deposit in Cash.

Where a deposit in cash is made in lieu of recognizance in *certiorari* it is not necessary that the applicant should fill at the same time a written document setting forth the condition upon which the deposit was made. *R.* v. *Davidson* (1900), 6 C. C. C. 117.

The recognizance or deposit is only necessary in case of a motion to quash a conviction by *certiorari*. If the conviction or proceeding sought to be quashed is already before the Court, *e.g.*, in a previous motion for *habeas corpus*, no *certiorari* is necessary in aid of the motion to quash, and in such a case no recognizance or deposit is required. *R.* v. *Whelan*, 45 U. C. R. 396.

Enforcing Recognizance on Certiorari.

It is provided by sec. 1096 of the Code that like proceedings may be had for enforcing the condition of a recognizance taken under sec. 1126 as might be had for enforcing the condition of a recognizance taken under the Act of the Parliament of the United

Kingdom passed in the fifth year of the reign of His Majesty King George the second, chapter 19.

Sec. 3, 5 George II., ch. 19, provides that the party entitled to the costs within ten days after demand made of the person or persons who ought to pay the costs, upon oath made of the making such demand and refusal of payment thereof, should have an attachment granted against him, or them, for the contempt; and the recognizance given upon the allowing the *certiorari* shall not be discharged until the costs shall be paid and the order be complied with and obeyed.

Upon the Master's allocatur therefor and affidavit of the service thereof, and of demand and non-payment as above, an attachment issues, on motion for that purpose. No attachment can issue for the costs except where there has been a recognizance.

The above is taken from Paley on Convictions (1827), 2nd ed., p. 315. In Paley, 8th ed. (1904), at p. 477, note (z), it is stated that since the Debtors Act, 1869, the Court has always refused attachment for non-payment of costs on a Master's allocatur.

The practice in England is if the taxed costs be not paid after a proper demand, a motion may be made to estreat the recognizance upon an affidavit of service of the order to tax and the Master's allocation thereon and of demand on the defendant and his bail.

Sec. 1096 is the only section of the Code which provides for the remedy by way of attachment on breach of recognizance, in all other cases the remedy is by estreating the recognizance.

Why in this enlightened age should we be relegated to a procedure so antiquated that it is no longer even followed in England? With due deference we think that the whole trouble seems to be occasioned by the default and dilatoriness of our Judges in not complying with the requirements of the section 576 of the Code, making rules governing these proceedings. Nova Scotia is content to get along with rules that date as far back as 1891, before the passing of the Criminal Code Act of 1892. The Ontario Bench had a great awakening in 1908, but overlooked the enforcement of recognizance. So far the example of Ontario has not been followed in any of the other provinces.

British Columbia set a good example as far back as 1896, and under Rule 43 no recognizance shall henceforth be forfeited or estreated without the order of a Judge. Section 1096 of the Code is permissive only, and points the way in lieu of any rule having been adopted providing for contrary proceedings. It is respectfully suggested that there should be uniform rules adopted

throughout Canada, by the Courts of the several provinces, governing procedure in criminal matters as provided for by sec. 576.

No doubt a change will be made in Nova Scotia in the near future if the caustic remarks of RUSSELL, J., in *R.* v. *Townsend,* bear fruit.

The Nova Scotia Rules were the subject of much consideration in *R.* v. *Townsend* (No. 5) (1907), 13 C. C. C. 209. It was decided in that case that Rule No. 28 operates as a general order of the Court as to security for costs on *certiorari* under sec. 1126 of the Code, and a recognizance entered into under its provisions may be enforced by attachment under sec. 1096 of the Code.

Also that section 1126 applies as well to a recognizance required to be given on the application for the writ of *certiorari* as to a recognizance given after the writ, if upon the former the Court may order that the conviction be quashed on return of the writ without further order.

In Quebec it has been held that security for costs cannot be ordered against the petitioner for a writ of *certiorari* in a criminal case, owing to the fact that no general rule of Court exists or has been made under the provisions of sec. 1126 of the Code in that province. *Tierney* v. *Choquet* (1908), 13 C. C. C. 238.

The recognizance or deposit may be delivered to the justice and sent to the Court with his return to the *certiorari*. *R.* v. *Cluff,* 46 U. C. R. 565; *R.* v. *Robinet,* 16 P. R. 49.

PRACTICE RELATING TO CERTIORARI.

The governing statute relating to the procedure necessary to procure *certiorari* is the Imperial Act 13 George II., ch. 19, sec. 5 (1739-40). This Act is in force in Ontario, Manitoba, Saskatchewan, Alberta, British Columbia, the Yukon and North-West Territories.

It is not in force in Nova Scotia and New Brunswick. British Columbia by the Certiorari Procedure Act, ch. 42 R. S. B. C. (1897), adopts this section of the statute of Geo. II. and also incorporates the provisions of 12 & 13 Vict. (Imp.) ch. 45, sec. 7.

Statute of George II., Ch. 18.

By the provisions of sec. 5 of the Act no writ of *certiorari* shall be given (1) unless the same be moved or applied for within *six*

calendar months "next after such conviction, judgment, order or other proceeding shall be so had or made." (2) and unless it has been *duly proved upon oath* that the said party or parties suing for the same hath or have given *six days' notice* thereof in writing to the justice or justices, or to two of them (if so many there be) by and before whom such conviction, judgment, order or other proceedings shall be so had or made, to the end that such justice or justices may shew cause if he or they shall so think fit, against the issuing or granting such *certiorari*.

The six calendar months are to be computed from the date of the conviction if there has been no appeal. But if an appeal has been heard then it is sufficient if the *certiorari* is moved for within six calendar months after the order of sessions confirming the conviction. *R.* v. *Boughey*, 4 T. R. 281, *R.* v. *Bloxam*, 1 A. & E., *R.* v. *J. J. Middlesex*, 5 A. & E., *R.* v. *Ray*, 1 D. & R. 436.

The application for the writ should be made with reasonable promptitude, although the Court will not necessarily require it to be made within the term following the sessions. *R.* v. *J. J. Brecknock*, 43 L. J. M. C. 135.

The application may be made on the last day of the six months and where the applicant had left the affidavits with the Judge's clerk on the last day but one of the six months, and had done all he could for the purpose of making the application on the next day, but on account of the Judge not attending Chambers, the application was not heard until after the six months had expired, the writ was allowed to issue. *R.* v. *Allen et al.*, 4 B. & S. 32 L. J. M. C. 98. Paley, 8th ed., pp. 457-458.

Notice of Application for Certiorari.

The six days' notice is imperative and a condition precedent to the issuing of the writ. The justices can set up the defect in answer to the rule *nisi* without making a substantive motion to quash. *R.* v. *McAllan* (1880), 45 U. C. R. 402, 406.

The objection may be waived by delay and should be taken at the first opportunity offered. *R.* v. *Basingstock* (1849), 19 L. J. M. C. 28, and see *R.* v. *Whitaker* (1894), 24 O. R. 437.

The six days' notice must be given six days previous to the application for the rule to shew cause and the six days are to be reckoned one day inclusively and the other exclusively. *R.* v. *Goodenough*, 2 A. & E. 463.

The service of the rule to shew cause though more than six days be given upon it, is not a sufficient compliance with the Act. *R.* v. *J. J. Glamorgan*, 5 T. R. 279.

The notice may be of intention to move for a *certiorari* "in six days from the giving of this notice or as soon as counsel can be heard." *R.* v. *Ross et al.*, 3 D. & L. 359, and see *In re Flounders*, 4 B. & A. 865.

By the Crown Office Rules (1906), Rules 19 and 20 on *ex parte* motion for an order *nisi* may be made which on *prima facie* case being made out, is granted. The applicant must prove by affidavit that he has served the order *nisi* six days before the return day on the justices, in order that they may shew cause. Rule 21.

This notice must precede the motion for a rule *nisi* and not merely the motion for the rule absolute. *Ex parte Roberts*, 50 J. P. 567.

The absence of the affidavit of service is no ground for discharging the rule *nisi* though the writ will not be drawn up unless an affidavit of service has been supplied. *R.* v. *Northumberland, J. J.*, 71 J. P. 331.

Where a rule *nisi* has been served upon the convicting justices more than six days before the date of its return, but six days' notice of intention to apply for *certiorari* had not been served upon them as required by 13 Geo. II., ch. 8, sec. 5, it was held not to be a sufficient compliance with the statute. *R.* v. *Plunkett* (1895), 1 C. C. C. 365. MR. JUSTICE DUBUC said, "as far as this objection goes, a fresh application might be made by the prisoner."

It is not sufficient to state in the affidavit of service that the notice was served on two of the justices present at the session, but it should be alleged that it was served on two of the justices present at the hearing by and before whom the conviction was made, and it seems that no presumption arises on this head from their names appearing in the caption of the order which it is sought to remove. *R.* v. *Cartworth*, 5 Q. B. 201, and *R.* v. *J. J. Suffolk*, 21 L. J. M. C., *R.* v. *Calchester*, 20 L. J. M. C. 203.

A defect in this respect is ground for quashing the writ, and if the application fails from defective affidavits, it cannot in general be removed. *R.* v. *Cartworth, supra*, *R.* v. *Manchester Ry. Co.*, 8 A. & E. 413.

The want of, or any defect in, such previous notice is therefore a good cause to be shewn against making the rule absolute, or

even if the rule had been absolute, and the writ issued, the Court would supersede it, on the ground that no notice was given previous to the moving for the rule *nisi*. *R.* v. *Nichols*, 5 T. R. 281, *R.* v. *Rottislow*, 5 Dowl. C. P. 539.

The notice should be given by the party suing out the writ and that circumstance should appear upon the face of the motion itself for the object of it, stated by the statute, is to enable the justices to shew cause against granting *certiorari* and they may shew for cause, that the party suing out the writ was a stranger to the country, and not interested in the order. The justices, therefore, ought to have their attention called to the name of the party by the notice itself. *R.* v. *J. J. Lancashire*, 4 B. & A. 289.

The *certiorari* can only be issued at the instance of the party giving notice to the justices. The notice must, therefore, state the name of the party intending to apply for the writ and should state who that party is, and on motion for the writ the Court must be satisfied on the affidavits that the party so named is the one by whom or on whose behalf the notice was given and the application is made; the justices must also be identified with those who are served. And if there are more than one party applying for it the notice must be given by all, and, therefore, when a notice was signed by only one churchwarden, although it was stated to be "on behalf of the churchwardens and overseers of E" it was held not to be sufficient notice by the "party or parties suing forth" the writ within the statute 13 Geo. II., ch. 18, sec. 5. *R.* v. *J. J. Cambridgeshire*, 3 B. & A., *R.* v. *J. J. Kent*, 40 L. J. M. C. 26, *Paley*, 8th ed., p. 460.

None of these restrictions attach upon application on behalf of the prosecution nor upon those made by the Attorney-General officially on account of a defendant.

Where from special circumstances the Court or a Judge may be of opinion that the writ should issue forthwith the order may be made absolute, or an order be made in the first instance either *ex parte* or otherwise as the Court or Judge may direct. Crown Office Rules.

Ontario Rules.

By Rule 1279, the proceedings shall be by a notice of motion in the first instance instead of by *certiorari* or by rule or order *nisi*.

Rule 1280. The notice shall be served at least six days before the return day upon the magistrate, etc., making the conviction

or order, and also upon the prosecutor or informant (if any) and upon the clerk of the peace if the proceedings have been returned to his office, and it shall specify the objections to be raised. On these notices shall be endorsed a copy of Rule 1279 and the further notice prescribed by Rule 1281.

In Nova Scotia. A four days' notice of the application must be given to the opposite party, and also to the magistrate.

Affidavits Verifying Proceedings.

The Crown Office Rules and the British Columbia Rules each provide that "no order for the issuing of a writ of *certiorari* to remove any order, conviction, or inquisition, or record or writ of *habeas corpus subjiciendum*, is to be granted where the validity of any warrant, commitment, order, conviction or record shall be questioned unless at the time of moving, a copy of any such warrant, commitment, order, conviction, inquisition or record verified by affidavit be produced and handed to the officer of the Court before the motion be made, or the absence thereof accounted for to the satisfaction of the Court.

According to the Nova Scotia Rules a copy of the conviction to be attached must be produced verified by affidavit.

In New Brunswick this is also required: see *Ex parte Emmerson* (1895), 1 C. C. C. 156, 33 N. B. R. 425.

The application for the *certiorari* must be supported by affidavits shewing the ground on which it is sought.

The affidavit should be entitled in the Court to which the application is made and not in the Court below.

The want of this affidavit has been held to be fatal. *R.* v. *Stevens*, 31 N. S. R. 125, *R.* v. *Bigelow*, 31 N. S. R. 436.

Copies of the information, evidence taken, justice's minute of adjudication, formal record of the conviction, the exhibits and all other papers connected with the proceedings, should be made exhibits to the affidavit of the applicant and verified as being true copies of the originals.

If it is impossible to secure a copy of the proceedings or any part thereof, the affidavit should state this fact and disclose what steps were taken to secure the same, and the reasons why any were not obtained.

The writ is of no effect unless delivered before the time of its return has expired. From the time of its delivery the writ super-

sedes the authority of the magistrate below, and all subsequent proceedings by them taken are void. The magistrate is also liable for contempt, and liable to attachment and fine. The magistrate upon receiving *certiorari* should yield obedience to it by entering all proceedings comprehended in its mandate whether taken before or after the date of the writ.

Return of the Writ or Order.

In Ontario, as we have seen by Rule 1281, on the notice of motion is to be endorsed a notice in accordance with the form given in the Rule (1281). This notice requires the justice "to make the return in the manner therein specified." Rule 1282 provides for the certificate of return to be endorsed on the notice served upon the justice or other officer and the form of the return is set out. It is also declared in Rule 1283 that the certificate shall have the same effect as a return to a writ of *certiorari*.

Under the Crown Rules and the old practice, the justice endorsed the following on the back of the writ:—

"The execution of the writ appears by the schedule hereunto annexed. The answer of A. B., Esquire, one of the keepers of the peace and justice within mentioned."

This is signed by the justice or person making the return. The record and documents are set out in a schedule annexed to the writ.

The return must certify the record itself, that is all original documents; it will be bad if a copy of the record is only mentioned or the tenor thereof.

The return should be under the seal of the justice, and he should add his description, otherwise it will be sent back to him for amendment.

If the justice has transmitted the conviction to the clerk of the peace he must, nevertheless, make a return certifying this fact, and the regular return of the conviction will be made by the latter.

The writ and certificate and all papers and documents included in the return should be sent or delivered to the proper officer of the Court designated to receive them.

If a conviction has not already been made up the justice may draw up a formal conviction and return it with the writ.

If the record returned is for any reason not well removed by reason of a variance between the return and the writ or the return

is otherwise imperfect, then nothing is before the Court upon which it can proceed. In that case, therefore, the Court will quash the return and award a new writ.

Proceedings on Refusal to Quash Conviction.

1127. If a motion or rule to quash a conviction, order or other proceeding is refused or discharged, it shall not be necessary to issue a writ of *procedendo*, but the order of the Court refusing or discharging the application shall be a sufficient authority for the registrar or other officer of the Court forthwith to return the conviction, order or proceeding to the Court or justice from which or whom they were removed, and for proceedings to be taken thereon for the enforcement thereof, as if a *procedendo* had issued, which shall forthwith be done.

1128. No order, conviction or other proceeding made by any justice or stipendiary magistrate shall be quashed or set aside, and no defendant shall be discharged, by reason of any objection that evidence has not been given of a proclamation or order of the Governor in Council, or of any rules, regulations, or by-laws made by the Governor in Council in pursuance of a statute of Canada, or of the publication of such proclamation, order, rules, regulations or by-laws in the *Canada Gazette*.

2. Such proclamation, order, rules, regulations and by-laws and the publication thereof shall be judicially noticed.

By sec. 1127 the order of the Court refusing or discharging the application for *certiorari* is a sufficient authority in itself without other process, for the registrar or other officer of the Court forthwith to return the conviction, order or proceeding which has been removed into the Superior Court, to the Court or Justice from which or whom they were removed so that proceedings may be taken for the enforcement thereof, which shall be forthwith done. Two things are emphasized here, first that the officer of the superior Court shall make the return forthwith, and secondly, that the proceedings for the enforcement by the justice of the conviction or order shall be done forthwith.

This section only applies where a conviction or order has been affirmed and not where it has been quashed. When a conviction has been quashed the record must remain in the superior Court and cannot be sent back to the inferior Court.. *R.* v. *Neville*, 2 B. & A. 299, *Valence* v. *Forsythe*, 4 B. & C. 401, *Fazachanly* v. *Balda*, 1 Salk. 352, 6 Mod. 177, *R.* v. *Inhabitants of Clare*, 4 Burr. 2456.

Where a conviction has been removed by *certiorari*, together with the information and proceedings therein, and the conviction was quashed, the information by a mistaken order of the Court was taken off the files and returned to the justice who, thereupon, issued a fresh summons. Held, that the information when removed into the superior Court became part of the records of that Court and cannot be returned to the justice when the conviction

has been quashed and prohibition was granted to prevent the justice proceeding under the second summons. An order for the return of any proceedings to the convicting justice can only be made under the authority of sec. 895 (now 1127) and then only in cases where formerly a *procedendo* would have issued upon the conviction being affirmed and not where the conviction is quashed. *R.* v. *Zickrick* (1897), 5 C. C. C. 380, 11 M. L. R. 452. And see *R.* v. *Harrison* (1907), 15 O. L. R. 231.

Conviction not to be Set Aside for Defect in Form.

1129. Whenever it appears by any conviction made by a justice or stipendiary magistrate that the defendant has appeared and pleaded, and the merits have been tried, and the defendant has not appealed against the conviction, where an appeal is allowed, or if appealed against, the conviction has been affirmed, such conviction shall not afterwards be set aside or vacated in consequence of any defect of form whatever, but the construction shall be such a fair and liberal construction as will be agreeable to the justice of the case.

See *R.* v. *Hostyn* (1905), 9 C. C. C. 138.

Where the depositions of the witnesses had not been taken down in writing it was held, on *certiorari* proceedings quashing the conviction, that the omission to comply with the provisions of the Code in this respect is not a defect of form mentioned in sec. 896 (now 1129) of the Code. *R.* v. *Lacroix* (1907), 12 C. C. C. 297, and see *R.* v. *McGregor* (1905), 10 C. C. C. 313, *supra*, and *Denault* v. *Robida* (1894), 8 C. C. C. 501, *supra*.

1130. No conviction, sentence or proceeding under Part XVI. shall be quashed for want of form; and no warrant of commitment upon a conviction under the said Part shall be held void by reason of any defect therein, if it is therein alleged that the offender has been convicted and there is a good and valid conviction to sustain the same.

See *R.* v. *Gibson* (1898), 2 C. C. C. 302; *R.* v. *Buttress* (1900), 3 C. C. C. 536; *R.* v. *Randolph* (1900), 4 C. C. C. 165, and *R.* v. *Venot* (1903), 6 C. C. C. 209. This section of the Code was discussed in the last chapter, and reference can be had to the comment there made, and the above cases which are all previously noted, *supra*.

Crown Rules in Different Provinces Where They Have Adopted Rules.

Crown Rules in Ontario Governing Certiorari Practice.

At a meeting of the Supreme Court of Judicature for Ontario, held on 27th March, 1908, it was ordered that the following rules be adopted, viz.: —

1279.—In all cases in which it is desired to move to quash a conviction, order, warrant or inquisition, the proceedings shall be by a notice of motion in the first instance, instead of by *certiorari*, or by rule or order *nisi*.

1280.—The notice shall be served at least six days before the return day thereof, upon the magistrate, justice or justices making the conviction or order, or issuing the warrant, or the coroner making the inquisition, and also upon the prosecutor or informant (if any), and upon the clerk of the peace, if the proceedings have been returned to his office, and it shall specify the objections intended to be raised.

1281.—Upon the notice of motion shall be indorsed a copy of rule number 1279, together with a notice in the following form, addressed to the magistrate, justice or justices, coroner or clerk of the peace, as the case may be:—

"You are hereby required forthwith, after service hereof, to return to the central office at Osgoode Hall, Toronto, the conviction (or as the case may be) herein referred to, together with the information and evidence, if any, and all things touching the matter as fully and entirely as they remain in your custody, together with this notice."

"Dates

"To A. B.

"Magistrate at

"C. D.,

"Solicitor for the applicant.

"(or as the case may be.)"

1282.—Upon receiving the notice so indorsed, the magistrate, justice or justices, coroner or clerk of the peace, shall return forthwith to the central office at Osgoode Hall, Toronto, the conviction, order, warrant or inquisition, together with the information and evidence, if any, and all things touching the matter, and the notice served upon him with the certificate endorsed thereupon in the following form:—

"Pursuant to the accompanying notice I herewith return to this Honourable Court the following papers and documents, that is to say:—

"(1) The conviction (or as the case may be);

"(2) The information and the warrant issued thereon;

"(3) The evidence taken at the hearing;

"(4) (Any other papers or documents touching the matter).

"And I hereby certify to this Honourable Court that I have above truly set forth all the papers and documents in my custody or power relating to the matter set forth in the said notice of motion."

A copy of this rule shall be annexed to the notice of motion served upon the magistrate, justice or justices, coroner, or clerk of the peace, from whom the return is required.

1283. The certificate shall have the same effect as a return to a writ of *certiorari*, or to an order under consolidated rule 1101 of the Supreme Court of Judicature for Ontario.

1284. The notice shall be returnable before a Judge of the high Court sitting in Chambers.

1285. The motion shall not be entertained unless the return day thereof be within six months after the conviction, order, warrant or inquisition, or unless the applicant is shewn to have entered into a recognizance with one or more sufficient sureties in the sum of $100 before a justice or justices of the county within which the conviction or order or inquisition was made, or the warrant issued, or before a Judge of the County Court of the said county, or before a Judge of the superior Court, and which recognizance with an affidavit of the due execution thereof shall be filed with the Registrar of the Court in which such motion is made or is pending, or unless the applicant is shewn to have made a deposit of a like sum of $100 with the Registrar of the Court in which such motion is made, with or upon the condition that he will prosecute such application at his own costs and charges, without any wilful or affected delay, and that he will pay the person in whose favour the conviction, order, or other proceedings is affirmed his full costs and charges to be taxed according to the course of the Court, in case the conviction, order or other proceeding is affirmed.

1286. The Judge shall have all the powers of the Court in the like matters, and may order the production of papers and documents as he may deem necessary.

1287. An appeal shall lie from the order of the Judge to a Divisional Court if leave be granted by a Judge of the High Court.

1288. The rule passed by the High Court of Justice on November 17th, 1886, under the authority of 49 Vict. c. 49, s. 6 (D.), and all rules and parts of rules inconsistent with the next preceding nine rules are hereby repealed.

The above rules are all set out in 8 Ed. VII. c. 34 (Ont.) 1898.

Nova Scotia Crown Rules.

The Nova Scotia Crown Rules 27 to 37 relate to the practice to be observed in respect to the writ *certiorari*.

(1) A four days' notice of the application must be given to the opposite party, and also to the magistrate in order that either may shew cause.

(2) A recognizance with two sureties in the sum of $200 must first be filed to respond the judgment, and additional security may be ordered.

(3) Such writ shall be applied for within six months after a conviction.

(4) No order for a *certiorari* shall be made unless a copy of the conviction to be attacked is produced, verified by affidavit.

(5) No objection on account of any mistake or omission in a judgment or order brought up by writ shall be allowed unless the omission or mistake was specified in the notice of motion for the writ.

In Nova Scotia it was held that the requirements of the rule as to filing affidavits of justification are imperative, and that leave to file such affidavits pending the motion to quash cannot be granted. *McIsaac* v. *McNeil*, 28 N. S. R. 424.

British Columbia Rules.

The Crown Rules of British Columbia, 1896, relating to *certiorari* are as follows:—

(2) Every applicant for a writ of *certiorari* at the instance of any person, other than the Attorney-General on behalf of the Crown, shall be made to a Judge of the Supreme Court by summons to shew cause; unless, in the opinion of the Judge, the writ should issue forthwith, in which case the order may be made absolute; or an order be made in the first instance either *ex parte*, or otherwise, as the Judge may direct.

(3) No writ of *certiorari* shall be granted, issued, or allowed, or remove any judgment, conviction, order, or other proceedings had or made before any justice or justices of the peace, unless such writ be applied for within six calendar months, after such judgment, conviction, order, or other proceeding shall be so had

or made, and unless it be proved by affidavit that the party suing forth the same has given six days' notice thereof in writing to the justice or justices, or to two of them if more than one, by and before whom such judgment, order, conviction, or other proceedings shall be so had or made, in order that such justice or justices, or the parties therein concerned, may shew cause, if he or they shall so think fit, against the party issuing or allowing such writ of *certiorari*. The writ shall be in the Form No. 9, Appendix J, of the "Supreme Court Rules, 1890."

(4) No order for the issuing of a writ of *certiorari* to remove any order, conviction or inquisition, or record, or writ of *habeas corpus ad subjiciendum*, shall be granted where the validity of any warrant, commitment, order, conviction, inquisition, or record, shall be questioned, unless at the time of moving, a copy of any such warrant, commitment, order, conviction, inquisition or record verified by affidavit, be produced and handed to the officer of the Court before the motion be made, or the absence thereof accounted for to the satisfaction of the Court.

(5) No writ of *certiorari* shall be allowed to remove any judgment, order, or conviction given or made by justices, unless the party (other than the Attorney-General acting on behalf of the Crown) prosecuting such *certiorari* before the allowance thereof, shall enter into a recognizance with one or more sufficient sureties before one or more justices, or before any Judge of the Supreme Court or County Court, in the sum of $100, with condition to prosecute the same, at his own costs and charges, with effect without any wilful or affected delay, and to pay the party in whose favour or for whose benefit such judgment, order, or conviction shall have been given or made within one month after the said judgment order or conviction shall be conferred; his full costs and charges to be taxed according to the practice of the Court; and in case the party prosecuting such *certiorari* shall not enter into such recognizance, or shall not perform the conditions aforesaid, it shall be lawful for the said justices to proceed and make such further order for the benefit of the party for whom such judgment shall be given, in such manner as if no *certiorari* had been granted.

(6) Every such recognizance with affidavit of justification, and of due execution, shall be filed with the registrar of the Court before the issue of any writ of *certiorari*.

(7) When cause is shewn against an order *nisi* for a *certiorari* to remove any judgment, order or conviction upon which no spe-

cial case has been stated, given, or made by justices of the peace for the purpose of quashing such judgment, order or conviction, the Court, or a Judge thereof, if it shall think fit, may make it part of the order absolute for the *certiorari* that the judgment, order, or conviction shall be quashed on return without further order, and in such case, no such recognizance as is required by the last preceding rule, shall be necessary, and a memorandum to that effect shall be indorsed by the proper officer upon the issuing of the writ of *certiorari*.

(8) No objection on account of any omission or mistake in any judgment or order of any justice of the peace or Court of summary jurisdiction brought up upon a return of a writ of *certiorari*, and filed in the Supreme Court, shall be allowed, unless such omission or mistake shall have been specified in the order for issuing the *certiorari*.

SASKATCHEWAN AND ALBERTA RULES.

Custody of Papers.

1. The Deputy Clerk of the Supreme Court in each Deputy Clerk's District shall have the care and custody of the records and other proceedings in matters arising in his district and the clerk of the judicial district in all matters arising in the remaining portion of the judicial district.

Certiorari.

2. Subject to the provisions of this Rule being dispensed with as hereinafter provided, no motion to quash any conviction, order or other proceeding by or before a justice or justices of the peace and brought before the Supreme Court of the North-West Territories or any Judge thereof, by *certiorari*, shall be entertained by such Court or Judge, unless the defendant is shewn to have entered into recognizance in $200, with one or more sufficient sureties, before a justice of the peace, and deposited the same with the registrar or the clerk of the Court, as the case may be, or to have made a deposit with the said registrar or clerk of $100 in either case, with a condition to prosecute such motion and writ of *certiorari* at his own costs and charges with effect and without any wilful or affected delay, and if ordered to do so, to pay to 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 this Court, where such conviction, order, or proceeding is affirmed. R. S. C. N. W. T. 23.

3. The summons or notice of motion for a writ of *certiorari* shall be served upon the justice or one of the justices who made the conviction or order and upon the person who put the proceedings attacked in motion, unless the Judge or Court shall upon such application otherwise direct.

4. The summons or notice of motion may also ask that the proceedings attacked be quashed without the actual issue of the writ, but in this case the person who put the proceedings attacked in motion shall be one of the persons to be served, and a Judge may in such case dispense with the giving of security required by Rule 23.

5. No such application shall be made or allowed after the expiration of six months from the date of the judgment, conviction or order attacked and no notice to the justices or the person who put the proceedings attacked in motion prior to such application shall be necessary.

Quo Warranto.

6. On an application for a *certiorari* to remove a judgment, conviction or order the Court or Judge may order such judgment, conviction or order to be quashed without the actual issue of the writ of *certiorari*, and if such person is in custody under any warrant or other process issued on such judgment, conviction or order, the Court or a Judge may in granting such order for a writ of *certiorari* or to quash such judgment, conviction or order at any time after said order is granted, order him to be discharged from custody absolutely or on his giving such security as the Court or Judge shall direct, that if the said judgment, conviction or order is confirmed or the application for the writ of *certiorari* is dismissed or the writ of *certiorari* is quashed, he will comply with the provisions thereof and pay the fine or penalty imposed, and in case of imprisonment without fine that he will forthwith surrender himself into the same custody and undergo the remainder of his imprisonment notwithstanding the term limited for his imprisonment shall have expired. If the recognizance shall be forfeited a warrant for the apprehension of the defendant may be granted by a Judge, which shall authorize his arrest and imprisonment for the unexpired term. N.S. 37.

7. No information in the nature of a *quo warranto* except an *ex-officio* information shall be granted with leave of a Court or

Judge unless at the time of application for such leave an affidavit be produced by which some person shall depose on oath that such application is made at his instance as relator; and such person shall be deemed to be the relator in case order shall be made, and shall be named as such relator in such information in case the same shall be filed unless the Court or Judge shall otherwise order. N.S. 48.

8. Every objection intended to be made to the title of a defendant on an information in the nature of a *quo warranto* shall be specified in the summons or notice of motion, and no objection not so specified shall be raised by the relator on the pleadings without the special leave of the Court or Judge. N.S. 49.

9. The Court or Judge may refuse the application for an information in the nature of a *quo warranto* with or without costs, and in its discretion may, upon such notice as may be just, direct the costs to be paid by the solicitor or other parties joining in the affidavits in support of the application although he is not the proposed relator. N.S. 50.

10. A new relator may by leave of the Court or Judge be substituted for the one who first entered into the recognizance on special circumstances being shewn. N. S. 51.

11. Where several applications for informations in the nature of a *quo warranto* have been given against several persons for the usurpation of the same offence and all upon the same or like grounds of objection the Court or Judge may order such applications to be consolidated, and only one information to be filed in respect of all of them, or may order all proceedings to be stayed upon all but one, until judgment be given in that one, provided always that no order be made to consolidate or stay any proceedings against any defendant unless he give an undertaking to disclaim if judgment be given for the Crown upon the information which proceeds. N.S. 52.

12. If the defendant in an information in the nature of a *quo warranto* does not intend to defend, he may, to prevent judgment by default, file a disclaimer in the office of the clerk or deputy clerk of the Court, as the case may be, and deliver a copy to the relator or his solicitor. Upon the disclaimer being filed judgment of ouster may be entered and the costs taxed as in judgment by default. N.S. 53.

Mandamus.

13. The summons or notice in the case of an application for a prerogative writ of *mandamus* shall be served upon every person

who shall appear to be interested or likely to be affected by the proceedings. The Court or Judge may direct notice to be given to any other person or persons and adjourn the hearing for that purpose. N.S. 55.

14. Any person whether he has been so served or not who can make it appear to the Court or Judge that he is affected by the proceeding for a writ of *mandamus* may shew cause against the application, and shall be liable to costs in the discretion of the Court or Judge if the order should be made or the prosecutor obtain judgment. N.S. 56.

15. The order for a *mandamus* need not be served but the cost of service of the order may be allowed in the discretion of the taxing officer, where the writ is not issued. N.S. 57.

16. The Court or Judge may if deemed proper order that any writ of *mandamus* shall be peremptory in the first instance. N.S. 60.

17. Every writ of *mandamus* shall bear date on the day when it is issued. The writ may be made returnable forthwith or time may be allowed to return it, either with or without terms, as to the Court or Judge shall think fit. N.S. 61.

18. Any person by law compellable to make return to a writ of *mandamus* shall make his return to the first writ. N.S. 62.

19. Where a point of law is raised in answer to a return or any other pleading in *mandamus*, and there is no issue of fact to be decided, the Court or Judge shall, on the argument of the point of law, give judgment for the successful party, without any motion for judgment being made or required. N.S. 63.

20. Where the applicant obtains judgment he shall be entitled forthwith to a peremptory writ of *mandamus* to enforce the command contained in the original writ, and the judgment shall direct that a peremptory writ do issue. N.S. 64.

21. No action or proceeding shall be commenced or prosecuted against any person in respect of anything done in obedience to a writ of *mandamus* issued by the Court or any Judge thereof. N.S. 65.

22. When it appears to the Court or Judge that the respondent claims no right or interest in the subject-matter of the application or that his functions are merely ministerial, the return to the writ and all subsequent proceedings down to judgment shall still be made and proceed in the name of the person to whom the writ is directed, and if the Court or Judge thinks fit

so to order may be expressed to be made on behalf of the persons really interested therein. In that case the persons interested shall be permitted to frame the return and conduct the subsequent proceedings at their own expense; and if judgment is given for or against the applicant it shall likewise be given against or for the persons on whose behalf the return is expressed to be made; and if judgment is given for them they shall have the same remedies for enforcing it as the person to whom the writ is directed would have in other cases. N.S. 66.

23. Where under the last preceding rule the return to a writ of *mandamus* is expressed to be made on behalf of some person other than the person to whom the writ is directed the proceedings on the writ shall not abate by reason of the death, resignation or removal from office of that person, but they may be continued and carried on in his name; and if a peremptory writ is awarded it shall be directed to the successor in office or right of that person. N.S. 67.

24. No order for the issuing of any writ of *mandamus* shall be granted unless at the time of application an affidavit be produced by which some person shall depose upon oath that such application is made at his instance as prosecutor, and if the writ be granted the name of such person shall be endorsed on the writ as the person at whose instance it is granted. N.S. 69.

Pleadings in Quo Warranto.

25. When any information in the nature of a *quo warranto* has been filed, the defendant may plead to such information within such time and in like manner as if the information were a statement of claim delivered in an action, and where the judgment is for the relator judgment of ouster may be entered for him in all cases. N.S. 94.

26. The prosecutor in answer to a plea that the defendant has held and executed the office or franchise for six years before the exhibiting the information, may reply any forfeiture, surrender, or avoidance by the defendant within the said six years. N.S. 95.

Pleadings in Mandamus.

27. When any return is made to the first writ of *mandamus* the applicant may plead to the return within such time and in like manner as if the return were a statement of defence delivered in an action.

Pleadings in Prohibition.

28. Where pleadings in prohibition are ordered the pleadings and subsequent proceedings, including judgment and assessment of damages if any, shall be, as nearly as may be, the same as in an ordinary action for damages. N.S. 97.

Judgment by Default.

29. In case no statement of defence or other pleading shall be entered within the time limited the opposite party may file a note of such default in the proper office on the next following morning after the expiration of the time limited upon filing an affidavit shewing such default, unless an order of a Court or a Judge extending such time shall have been obtained and served, in which case such note shall not be filed until the day after the expiration of the time granted by such order, and after the filing of such note the party in default shall not without leave of the Court or Judge file any further pleading; but the party entering such note may make an application *ex parte* to the Court or Judge for such judgment as he may deem himself entitled to.

Habeas Corpus.

30. If a writ of *habeas corpus* be disobeyed by the person to whom it is directed, application may be made to the Court or a Judge on an affidavit of service and disobedience for an attachment for contempt.

31. The return of the writ of *habeas corpus* shall contain a copy of all the causes of the prisoner's detainer indorsed on the writ, or on a separate schedule annexed to it.

32. The return may be amended or another substituted for it by leave of the Court or Judge.

33. When a return to the writ of *habeas corpus* is made the return shall first be made and motion then made for discharging or remanding the prisoner, or amending or quashing the return.

34. On the argument of a motion or summons for a writ of *habeas corpus* the Court or Judge may in his or their discretion direct an order to be drawn up for the prisoner's discharge, instead of waiting for the return of the writ, which order shall be a sufficient warrant for any gaoler or constable, or other person, for his discharge.

General.

35. Application for a prerogative writ of *mandamus,* for a writ of *certiorari,* or order to quash proceedings without the actual issue of the writ, for a writ of *habeas corpus,* for prohibition or for an information in the nature of a *quo warranto,* may be made either to a Judge in Chambers or in Court, or to the Court *en banc,* provided that the Court or a Judge may, if it be deemed proper, grant *ex parte* an order for the immediate issue of a writ of *habeas corpus.*

36. Any writ may be served according to the rules relating to the service of writs of summons under the rules of the Supreme Court.

37. It shall not be necessary to serve the original of any writ, judgment, order or other proceeding, but the party served with a copy thereof shall be entitled to inspect the original at the time of service if he so demand.

38. All proceedings under these rules shall be intituled in the Court and shall be styled in the matter to which they relate so as to shew the name of the applicant as informant relator, plaintiff, private prosecutor, or otherwise, according to the nature of the case and the name of the defendant, respondent or party against whom the application is made.

39. In all proceedings under these rules the costs shall be in the discretion of the Court or Judge who shall have full power to order either the applicant or the party against whom the application is made, or any other party to the proceedings, to pay such costs or any part thereof according to the result.

40. The proceedings for attachment for contempt, for disobedience of any writ, judgment, order issued or made under these rules, shall conform as nearly as may be to proceedings for contempt, for disobedience of any writ, judgment or order in a civil action.

Application of Certiorari, Orders and Rules of the Supreme Court of the North-West Territories.

41. The following rules and orders for the Supreme Court enacted by the Judicature Ordinance and any amendments thereto, shall as far as applicable apply to all proceedings in relation to said matters.

(*a*) Order V. (Service of other proceedings.)
(*b*) Rule 59. (Constitutional questions.)
(*c*) Order XI. (Pleading generally.)
(*d*) Order XIII. (Matters arising pending the action.)
(*e*) Order XIV. (Raising points of law, &c.)
(*f*) Order XV. (Reply and close of pleadings.)
(*g*) Rule 169. (Setting down for trial.)
(*h*) Rule 173. (Notice of trial.)
(*i*) Rule 188. (Mistakes in judgment, &c.)
(*j*) Order XIX. (Amendment.)
(*k*) Order XX. (Discovery of document.)
(*l*) Order XXI. (Examination for discovery.)
(*m*) Order XXII. (Admissions.)
(*n*) Order XXIV. (Special case.)
(*o*) Order XXV. (Trial.)
(*p*) Order XXVI. (Evidence, &c.)
(*q*) Order XXVII. (Affidavits and depositions.)
(*r*) Order XXIX. (Judgments and entry of judgment.)
(*s*) Order XXX. (Execution.)
(*t*) Order XXXI. (Discovery in aid of execution.)
(*u*) Order XXXVII. (Interpleader.)
(*v*) Order XXXIX. (Motions and applications.)
(*w*) Order XL. (Applications in chambers generally.)
(*x*) Order XLI. (Court *en banc*.)
(*y*) Order XLII. (III Taxation and tariff of costs.)
(*z*) Order XLIII. (III *Ex parte* proceedings, non-compliance and irregularity.—Time for service.)

Where no other provision is made by these rules the procedure and practice shall as far as may be, be regulated by the Crown Office Rules for the time being in force in England.

Forms.

42. The forms for the time being in use in England under the said Crown Office Rules where applicable, and where not applicable, forms of the like character as near as may be shall be used in all proceedings except where otherwise ordered by these rules.

43. These rules may be cited as "The Crown Office Rules, 1903" and shall come into force on the first day of January, 1903.

Dated the 9th day of July, 1903.

(Signed) ARTHUR L. SIFTON, C.J.
" E. L. WETMORE, J.
" D. L. SCOTT, J.
" JAMES E. P. PRENDERGAST, J.

CHAPTER XI.

1. *Evidence;* 2. *Limitation of Actions;* 3. *Arrest without Warrant;* 4. *Forms.*

This work would be incomplete if reference was not made to the "Canada Evidence Act."

For the purpose of ready reference the first eighteen sections of the Act are set out in full with notes of some Canadian cases, and other references.

By sec. 1 the Act may be cited as the "Canada Evidence Act." And by sec. 2 it is provided that Part I. of the Act shall apply to all criminal proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf.

Part II of the Act applies to the taking of evidence in Canada relating to proceedings in Courts out of Canada.

WITNESSES.

3. A person shall not be incompetent to give evidence by reason of interest or crime. 56 V., c. 31, s. 3.

It was not until the year 1833 in England that the old rule was abolished, whereby every person having an interest, no matter how small, in the result of legal proceedings was absolutely barred from being a witness.

A rule grew up in England that a conviction for treason, felony or misdemeanours of forgery, perjury and conspiracy rendered a witness incompetent.

It was not until 6 & 7 Vic. c. 85, s. 1, was passed that disqualification for crime was abolished.

A prisoner under sentence of death is a competent witness on a criminal trial since the abolition of attainder by sec. 1033 of the Code. *R.* v. *Hatch* (1909), 16 C. C. C. 196. And see *contra* *R.* v. *Webb*, 11 Cox 133.

Husband and Wife Competent Witnesses.

4. Every person charged with an offence, and, except as in this section otherwise provided, the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

2. The wife or husband of a person charged with an offence against any of the sections two hundred and two to two hundred and six inclusive, two hundred and eleven to two hundred and nineteen inclusive, two hundred and thirty-eight, two hundred and thirty-nine, two hundred and forty-four, two hundred and forty-five, two hundred and ninety-eight, to three hundred and two inclusive, three hundred and seven to three hundred and eleven inclusive, three hundred and thirteen to three hundred and sixteen inclusive of the Criminal Code, shall be a competent and compellable witness for the prosecution without the consent of the person charged.

3. No husband shall be compellable to disclose any communication made to him by his wife during their marriage, and no wife shall be compellable to disclose any communication made to her by her husband during their marriage.

4. Nothing in this section shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

5. The failure of the person charged, or of the wife, or husband of such person, to testify, shall not be made the subject of comment by the Judge, or by counsel for the prosecution.

By the first section every person charged with an offence shall be a competent witness on his own behalf or for the defence on behalf of another, with whom he is charged jointly. And the wife shall be a competent witness for the defence on behalf of her husband if he be charged with an offence, and a husband may be a witness on behalf of his wife if she is so charged.

The Judge or magistrate should always inform the accused of his right to give evidence in his own behalf, where he is unrepresented by counsel. The failure of the accused to give evidence shall not be the subject of comment. (Sub-section 5.)

It is to be noted that the competency of husband and wife to testify is limited to their giving evidence on behalf of the defence. It is only the wives or husbands of person charged with offences enumerated in sub-sec. 2 that are compelled to testify on behalf of the prosecution, and the consent of the accused is not necessary. Their testimony in relation to other offences is not admissible for the prosecution without the consent of the accused.

The accused cannot be called as a witness except on his own application.

A co-defendant in a criminal case in which the defendants are being tried jointly cannot be compelled to testify, but he may volunteer to give evidence if he sees fit to do so.

Although the accused may not be called as a witness except on his own application, yet if he has made a statement before the justice on the preliminary inquiry under sec. 684 of the Code, it is provided by sec. 1001 of the Code that the statement made by the accused person before the justice may if necessary, upon the trial of such persons, be given in evidence against them with-

out further proof thereof, unless it is proved that the justice purporting to have signed the same did not in fact sign the same. See the comments under sec. 684 in chapter 7, page 198.

Husband and Wife Jointly Accused.

Any voluntary statement made by the accused person tending to connect himself, either directly or indirectly, with the commission of the crime charged is admissible in evidence against the accused whether such statement is or is not a "confession."

Where two prisoners (husband and wife) are being jointly tried for murder, a voluntary admission made by the wife is evidence against her only, and if it implicate a fellow-prisoner the trial Judge should warn the jury that the statement is evidence only against the person making it, and should not be considered in weighing the evidence against the fellow-prisoner. *Semble,* persons jointly charged would have good ground for applying for separate trial. *R.* v. *Martin* (1905), 9 C. C. C. 371.

"The old and universally recognized rule of the English criminal law—that no one can be compelled to criminate himself—still prevails, and therefore in criminal cases no person accused of an offence whether indicted and tried alone or jointly with others can be required to give evidence, although he may do so of his own accord."

"When a person on trial claims the right to give evidence on his own behalf, he comes under the ordinary rule as to cross-examination in criminal cases. He may be asked all questions pertinent to the issue, and cannot refuse to answer those which may implicate him. Under the new law, which protects him from the effect of his own evidence in proceedings subsequently brought, but does not do so in the case in which the evidence is given, he may be convicted out of his own mouth. He cannot be compelled to testify but when he offers and gives his evidence he has to take the consequences." WURTELE, J., p. 72, *R.* v. *Connors, et al.* (1893), 5 C. C. C. 70.

One co-defendant cannot be called by another co-defendant, and compelled to give evidence, but he may tender his evidence if he sees fit. *Ibid.*

"The right, and if such it can be called, the privilege, of the accused now is to tender himself as a witness. When he does so he puts himself forward as a creditable person, and except in so far as he may be shielded by some statutory protection, he is

in the same situation as any other witness as regards liability to and extent of cross-examination." OSLER, J., p. 411.

"It is therefore clear that evidence of these convictions by the accused's own admissions was proper, and that it was open to the learned Judge to draw therefrom any inferences favourable or unfavourable to the accused, of which it was justly susceptible." OSLER, J., p. 413. *R.* v. *D'Aoust* (1902), 5 C. C. C. 407.

An accused person examined as a witness on his own behalf may be cross-examined as to previous convictions against him; the question is relevant to the issue as affecting the credibility of the accused as a witness. *Ibid.*

Where one of two prisoners tried together gives evidence on his own behalf and this incriminates his co-defendant, counsel for the latter is entitled to cross-examine as well as counsel for the prosecution. *R.* v. *Hadwen* (1902), 1 Q. B. 882.

The depositions of a witness taken at a coroner's inquest without objection by him that his answers may tend to criminate him and who is subsequently charged with an offence, are receivable in evidence against him at the trial. *R.* v. *Williams*, 28 O. R. 583, overruling *R.* v. *Hendershott*, 26 O. R. 678.

In prosecutions of certain crimes such as passing counterfeit bills or coins, or uttering forged paper, or knowingly receiving stolen goods, criminal motive may be shewn by proof of other crimes of the same nature. In prosecutions for obtaining goods, or money, on false pretences, it has generally been held that evidence of other false pretences, made under similar circumstances and at about the same time, is relevant. Generally in criminal prosecutions evidence of a motive for the commissions of the alleged crime is relevant against the accused, and is admissible. *R.* v. *Ellis*, 6 B. & C. 145; *R.* v. *Winkworth*, 4 C. & P. 444; *R.* v. *Lang*, 6 C. & P. 179; *R.* v. *Geering*, 18 L. J. M. C. 215; *R.* v. *Clewes*, 4 C. & P. 221, and see *R.* v. *Law* (1909), 15 C. C. C. 382.

So the want of any apparent motive is a relevant fact and in favour of the accused and is admissible. Chamberlayne's Best on Ev., s. 453.

When evidence of motive is relevant the accused may testify what his motive was in doing the alleged criminal act. See Phipson, 4th ed., pp. 49-120-122.

Facts tending to shew preparation on the part of the accused to commit a criminal act are relevant and admissible to prove the commission of the crime. Cham., Best on Evidence, s. 454.

So facts shewing capacity or opportunity to commit the alleged crime are admissible as tending to render guilt probable. Cham., Best on Evidence, s. 453.

Disclosure of Communication During Marriage.

Neither husband nor wife is bound to disclose a communication received from the other during marriage. Sub-section 3 s. 4, *supra.*

A letter written by the accused to his wife and intrusted to, but opened by a constable, was held inadmissible. *R.* v. *Pamenter* (1872), 12 Cox 177. And see Scott Com., 42 Am. 8, Rep. 371, and Taylor, 10th ed., s. 5881.

But conversations at which a third person was present or which he overheard may be proved by him. *R.* v. *Smithie,* 5 C. & P. 332; *R.* v. *Simmons,* 6 C. & P. 540; *R.* v. *Bartlett,* 7 C. & P. 832.

And no protection exists with regard to communications made between the parties before marriage, or to facts coming to their knowledge during marriage, but from extraneous sources, and the protected evidence will, if voluntarily given, be admissible. *O'Connor* v. *Marjoribanks,* 4 M. & G. 435.

A widow cannot be asked to disclose conversations between her and her late husband. *Beveridge* v. *Minter,* 1 C. & P. 364.

A statement made by a wife in the presence of her husband is receivable against him in evidence. *R.* v. *Mallory,* 13 Q. B. D. 33.

Though a woman lives with a man, uses his name, and passes as his wife, she is a competent witness for or against him, such circumstances going only to her credit and not to her competency. *Bathews* v. *Balindo,* 1 M. & Payne 565. *Wells* v. *Fletcher,* 5 C. & P. 12.

On the trial of a man for the murder of his wife, her dying declarations are evidence against him. *John's Case,* 1 East B. C. 357; *Woodcocks Case,* Leach C. 500.

By s. 5 of the Canada Evidence Act it is provided as follows:

INCRIMINATING QUESTIONS.

5. No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

2. If with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence.

If when called upon to testify, the witness does not object to do so, on the ground that his answers may tend to criminate him, his answers are receivable against him (except in the case the section provides for) in any criminal trial or other criminal proceeding against him thereafter. If on the other hand he does object he is protected. OSLER, J., p. 241. *R.* v. *Clark* (1901), 5 C. C. C. 235.

Relevant statements made by the accused without objection on his examination for discovery in a civil action prior to the criminal proceedings are admissible on the criminal trial.

The deposition of a judgment debtor upon his examination as to means may be proved in evidence against him on a criminal charge of disposing of his property in fraud of his creditors, unless at the time of his examination he objected on the ground that his answer might tend to criminate him. *R.* v. *Van Meter* (1906), 11 C. C. C. 207.

The communication between the prisoner's wife and the prisoner's counsel was not a privileged communication in the sense of being a communication from her husband. No evidence was given that he knew of or authorized it. The only point reserved as I understand the case is with respect to what the solicitor told her. This statement was certainly not within his duty, and being calculated to further or conceal a criminal act, does not come within the solicitor's privilege. DAVIES, J., p. 152. *Gosselin* v. *The King* (1903), 7 C. C. C. 139, 31 S. C. R. 255.

The privilege between solicitor and client cannot be invoked to protect communications which are in themselves parts of a criminal or unlawful proceeding. *Bullivant* v. *The Atty.-Genl. for Victoria* (1901), A. C. 201; *R.* v. *Cox*, 14 Q. B. D. 153.

DEAF MUTES.

The following provision in the Canada Evidence Act relates to the evidence of mutes.

6. A witness who is unable to speak, may give his evidence in any other manner in which he can make it intelligible. 56 V., c. 31, s. 6.

The evidence of a deaf mute may be taken either through an interpreter who is conversant with the sign language of the deaf and dumb, or by writing the questions out and getting the witness to write the answers in reply. The oath can be administered in the same way.

Foreign Witness.

When it is sought to examine a witness through an interpreter in a foreign tongue the opposing counsel may be given leave first to question the witness in English for the purpose of testing the witness' competency to speak English.

Where a foreign witness examined in chief through an interpreter has some knowledge of English the counsel entitled to cross-examine may do so in English without the intervention of the interpreter, and may also if he chooses, put questions through the interpreter. *R.* v. *Wong On* (No. 2) (1904), 8 C. C. C. 343.

The trial Judge has no power to direct that an official interpreter appointed by the Government shall not act because he is objected to by counsel for the accused on the ground that he had been actively engaged in assisting the prosecution at the Police Court.

"I do not think you can find fault with the officers appointed by the Crown for their business." Irving, J. *R.* v. *Wong On* (1904) (No. 1), 8 C. C. C. 342.

A conviction and commitment are not open to attack on *habeas corpus* on ground of incompetency of the interpreter. The capacity of the interpreter is a question for the magistrate. *R.* v. *Mecekletti* (1909), 15 C. C. C. 17.

Expert Witnesses.

7. Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called upon either side without the leave of the Court or Judge or person presiding.

2. Such leave shall be applied for before the examination of any of the experts who may be examined without such leave.

8. 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.

The opinions of skilled witnesses are admissible whenever the subject is one upon which competency to form an opinion can only be acquired by a course of special study or experience. Phipson, 4th ed. 355.

When the subject is one upon which the jury is as capable of forming an opinion as the witness the reason for the admission of such evidence fails and it will be rejected. *Ibid.*

An expert may give his opinion upon *facts* proved either by himself or by other witnesses in his hearing at the trial, or upon hypotheses based upon the evidence. An expert may refer to text-books to refresh his memory, or to correct or confirm his opinion, *e.g.*, a doctor to medical treatises; a valuer to price lists; a foreign lawyer to codes; text-writers and reports. Phipson, 4th ed., 361-2.

As to comparison of handwriting, see Phipson, p. 91.

After all the evidence was in and the Judge had addressed the jury, he allowed the jury to compare the admitted writing with that which was disputed in order to draw their own conclusions from a comparison of the two. On motion to set aside the conviction the Supreme Court of Nova Scotia held that the learned trial Judge was quite justified in the course he adopted. *R.* v. *Dixon* (No. 2) (1897), 3 C. C. C. 220.

A prisoner cannot be compelled to provide a specimen of his handwriting merely because he goes into the witness-box. It is true he renders himself liable to cross-examination and prosecution for perjury, if need be, but he is none the less an accused person, and therefore ought not to be compelled to criminate himself to any further extent than that which may strictly arise out of the cross-examination. HUNTER, C.J. *R.* v. *Grinder* (1905), 10 C. C. C. 333.

Adverse Witness.

A witness is considered adverse when in the opinion of the Judge (whose decision is final) he bears a hostile *animus* to the party calling him and not merely when his testimony contradicts his proof. *Greenough* v. *Eccles*, 5 C. B. N. S. 786; *Reid* v. *The King*, 30 L. J. 290; and other cases cited by Phipson, 4th ed., page 457.

If a witness by his conduct shews that he is hostile to the party calling him, the latter may in the discretion of the Judge (which is not open to appeal) lead, or rather cross-examine him, but the

matter is wholly for the Court, and a party though called by his opponent cannot as of right be treated as hostile. *Rice* v. *Howard*, 10 Q. B. D. 681; *Coles* v. *Coles*, L. R. 1 P. D. 70; *Price* v. *Manning*, 42 Chy. Div. 372 C. A.

And the following is the provision of the Canada Evidence Act respecting adverse witnesses, and the right to contradict them.

9. 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.

In spite of these statutes a party may, as of right, without obtaining such opinion or leave, contradict his own witness whether adverse in the above or not, by other evidence relevant to the issue, and thus indirectly discredit him, *e.g.*, where an attesting witness denies his own signature. Phipson, 4th ed. 458.

"If, therefore, a witness makes a statement which the party who has called him knows to be directly opposite to the truth, unless the Court is of the opinion that the witness is hostile, that he has shewn by his demeanour, or by the way in which he has given his evidence, that he has some ill-will or bad feeling against the party who has called him, although he cannot do so directly, he may contradict him indirectly; that is to say, the party who has produced him is not debarred in the interest of truth and justice from producing other witnesses not for the express purpose of contradicting his witness, but to establish the truth by other distinct and independent evidence." WURTELE, J., p. 138. *R.* v. *Laurin* (1902), 6 C. C. C. 135.

CROSS-EXAMINATION AS TO PREVIOUS STATEMENTS.

10. Upon any trial a witness may be cross-examined as to previous statements made by him in writing, or reduced to writing, relative to the subject-matter of the case, without such writing being shewn to him: Provided that, 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 that the Judge, at any time during the trial, may require the production of the writing for his inspection, and thereupon make such use of it for the purposes of the trial as he thinks fit.

2. A deposition of the witness, purporting to have been taken before a justice on the investigation of a criminal charge and to be signed by the witness and the justice, returned to and produced from the custody of the proper officer, shall be presumed *prima facie* to have been signed by the witness.

A witness having been cross-examined as to a previous statement relative to the subject matter of the case, and having denied that she made it, proof can be given that she did indeed make it, the particular occasion having been designated, and there is nothing to prevent such evidence being given by witnesses who were present and heard the statement made. The depositions before the magistrate were admittedly lost, and it was held that a person who was present at the examination could be called and testify as to what the witness did say at the preliminary hearing. *R.* v. *Troop* (1898), 2 C. C. C. 22.

As to the reading of depositions taken on a preliminary in the event of death, sickness or absence of the deponent, see sec. 999 of the Code. These depositions may be used against the person on his prosecution for another charge. Section 1000. And the statement of the accused before the justice on a preliminary hearing may be given in evidence against him on his trial. Sec. 1001.

CROSS-EXAMINATION AS TO PREVIOUS ORAL STATEMENTS.

11. 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. 55-56 V., c. 29, s. 701.

12. A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction.

2. The conviction may be proved by producing,—

(*a*) a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction, if for an offence punishable upon summary conviction, purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court in which the conviction, if upon indictment, was had, or to which the conviction, if summary, was returned; and,

(*b*) proof of identity.

On a charge of forcible entry, evidence relating to the title of land is not admissible and a statement in the cross-examination of the accused denying that he had previously stated that he had sold the land to the complainant is not "a statement relative to the subject matter of the case," but only as to a collateral matter, and evidence to contradict the denial of the accused was improperly received. *R.* v. *Walker* (1906), 12 C. C. C. 197.

As to accused who gives evidence on his own behalf being cross-examined as to previous convictions: see *R.* v. *D'Aoust* (1902), 5 C. C. C. 407, *supra.*

Previous convictions as a rule may not be proved against the accused until after verdict. This rule does not apply when (1) they form an essential ingredient of the offence, (2) or are tendered to shew guilty knowledge, or (3) to rebut good character, or (4) to contradict the defendant's denial of the conviction, or (5) to prove public rights, or (6) to prove a plea of *res judicata* or (7) in summary cases.

Oaths and Affirmations.

13. Every Court or Judge, and every person having, by law or consent of parties, authority to hear and receive evidence, shall have power to administer an oath to every witness who is legally called to give evidence before that Court, Judge or person.

See chapter VII., page 189.

Affirmation Instead of Oath.

14. If a person called or desiring to give evidence, objects on grounds of conscientious scruples, to take an oath, or is objected to as incompetent to take an oath, such person may make the following affirmation: "I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth."

2. Upon the person making such solemn affirmation his evidence shall be taken and have the same effect as if taken under oath.

Affirmation by Deponent.

15. If a person required or desiring to make an affidavit or deposition in a proceeding or on an occasion whereon or touching a matter respecting which an oath is required or is lawful, whether on the taking of office or otherwise, refuses or is unwilling to be sworn, on grounds of conscientious scruples, the Court or Judge, or other officer or person qualified to take affidavits or depositions, shall permit such person, instead of being sworn, to make his solemn affirmation in the words following, viz.: "I, A. B., do solemnly affirm, etc."; which solemn affirmation shall be of the same force and effect as if such person had taken an oath in the usual form.

2. Any witness whose evidence is admitted or who makes an affirmation under this or the last preceding section shall be liable to indictment and punishment for perjury in all respects as if he had been sworn.

Evidence of a Child.

16. In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the Judge, justice or other presiding officer, understand the nature of an oath, the evidence of

such child may be received, though not given upon oath, if, in the opinion of the Judge, justice or other presiding officer, as the case may be, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

2. No case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence.

JUDICIAL NOTICE.

17. Judicial notice shall be taken of all Acts of the Imperial Parliament, of all ordinances made by the Governor in Council, or the Lieutenant Governor in Council of any province or colony which, or some portion of which, now forms or hereafter may form part of Canada, and of all the acts of the legislature of any such province of colony, whether enacted before or after the passing of the British North America Act, 1867.

18. Judicial notice shall be taken of all public Acts of the Parliament of Canada without such Acts being specially pleaded.

LIMITATION OF ACTIONS.

Part XXIV. of the Code.

These sections of the Code, 1140 to 1157, are added for reference and without any notes or comments.

Prosecutions for Crimes.

1140. No prosecution for an offence against this Act, or action for penalties or forfeiture, shall be commenced.—

(*a*) after the expiration of three years from the time of its commission if such offence be

(i) treason, except treason by killing His Majesty, or where the overt act alleged is an attempt to injure the person of His Majesty —section seventy-four,

(ii) treasonable offences—section seventy-eight,

(iii) any offence against Part VII. relating to the fraudulent marking of merchandise · or,

(*b*) after the expiration of two years from its commission if such offence be

(i) a fraud upon the Government—section one hundred and fifty-eight,

(ii) a corrupt practice in municipal affairs—section one hundred and sixty-one,

(iii) unlawfully solemnizing marriage—section three hundred and eleven; or,

(*c*) after the expiration of one year from its commission if such offence be,

(i) opposing reading of Riot Act and continuing together after proclamation—section ninety-two,

(ii) refusing to deliver weapon to justice—section one hundred and twenty-six,

(iii) coming armed near public meeting—section one hundred and twenty-seven,

(iv) lying in wait near public meeting—section one hundred and twenty-eight,

(v) seduction of girl under sixteen — section two hundred and eleven,

(vi) seduction under promise of marriage—section two hundred and twelve,

(vii) seduction of a ward or employee—section two hundred and thirteen,

(viii) parent or guardian procuring defilment of girl—section two hundred and fifteen,

(ix) unlawfully defiling women, procuring, etc.—section two hundred and sixteen,

(x) householders permitting defilement of girls on their premises—section two hundred and seventeen; or,

(*d*) after the expiration of six months from its commission if the offence be

(i) unlawfully drilling—section ninety-eight,

(ii) being unlawfully drilled—section ninety-nine,

(iii) having possession of offensive weapons for purposes dangerous to the public peace—section one hundred and fifteen,

(iv) proprietor of newspaper publishing advertisement offering reward for recovery of stolen property—section one hundred and eighty-three, paragraph (*d*); or,

(*e*) after the expiration of three months from its commission if the offence be

(i) cruelty to animals—sections five hundred and forty-two and five hundred and forty-three,

(ii) railways and vessels violating provisions relating to conveyance of cattle—section five hundred and forty-four,

(iii) refusing peace officer or constable admission—section five hundred and forty-five; or,

(*f*) after the expiration of one month from its commission if the offence be improper use of offensive weapons under sections one hundred and sixteen and one hundred and eighteen to one hundred and twenty-four inclusive.

2. No person shall be prosecuted, under the provisions of section seventy-four or seventy-eight of this Act, for any overt act of treason expressed or declared by open and advised speaking unless information of such overt act, and of the words by which the same was expressed or declared, is given upon oath to a justice within six days after the words are spoken and a warrant for the apprehension of the offender is issued within ten days after such information is given.

1141. No action, suit or information shall be brought or laid for any penalty or forfeiture under any Act, except within two years after the cause of action arises or after the offence for which such penalty or forfeiture is imposed is committed, unless the time is otherwise limited by any Act or by law.

1142. In the case of any offence punishable on summary conviction, if no time is specially limited for making any complaint, or laying any information, in the Act or law relating to the particular case, the complaint shall be made, or the information shall be laid, within six months from the time when the matter of complaint or information arose, except in the provinces of Saskatchewan and Alberta, the Northwest Territories and the Yukon Territory, where the time within which such complaint may be made, or such information laid, is extended to twelve months from the time when the matter or the complaint or information arose.

Actions against Persons Administering the Criminal Law.

1143. 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.

1144. 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.

1145. 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.

1146. 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.

1147. If such action is commenced after the time limited as aforesaid for bringing the same, or is brought or the venue laid in any other place than as aforesaid, a verdict shall be found or judgment shall be given for the defendant; and thereupon, or if the plaintiff becomes 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.

2. Although a verdict or judgment is given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the Judge before whom the trial is had certifies his approval of the action.

1148. Nothing herein shall prevent the effect of any Act in force in any province of Canada, for the protection of justices or other officers from vexatious actions for things purporting to be done in the performance of their duty.

1149. Every action brought against any commissioner under Part III. of this Act or any justice, constable, peace officer or other person, for anything done in pursuance of the said Part, shall be commenced within six months next after the alleged cause of action arises; and the venue shall be laid or the action instituted in the district or county or place where the cause of action arose; and the defendant may plead the general issue and give this Act and the special matter in evidence.

2. If such action is brought after the time limited, or the venue is laid or the action brought in any other district, county or place than in this section prescribed, the judgment or verdict shall be given for the defendant; and in such case, or if the judgment or verdict is given for the defendant on the merits, or if the plaintiff becomes non-suited or discontinues after appearance is entered, or has judgment rendered against him on demurrer, the defendants shall be entitled to recover double costs.

1150. All actions for penalties arising under the provisions of section eleven hundred and thirty-four shall be commenced within six months next after the cause of action accrues, and the same shall be tried in the district, county or place wherein such penalties have been incurred; and if a verdict or judgment passes for the defendant, or the plaintiff becomes non-suit, or discontinues the action after issue joined, or if, upon demurrer or otherwise, judgment is given against the plaintiff, the defendant shall, in the discretion of the Court, recover his costs of suit, as between solicitor and client, and shall have the like remedy for the same as any defendant has by law in other cases.

1151. No action or proceeding shall be commenced or had against a justice for enforcing a conviction, order or determination affirmed, amended or made by the Court under section seven hundred and sixty-five.

ARRESTS WITHOUT WARRANT.

Part XIII. of the Code.

There is also here added for reference secs. 646 to 652, being the provisions of the Code relating to arrests without warrant. And also are added secs. 30 to 47 inclusive, all relating to arrest by peace officers and others with and without warrant.

Arrests without Warrant.

646. Any person may arrest without warrant any one who is found committing any of the offences mentioned in sections,—

(*a*) seventy-four, treason; seventy-six, accessories after the fact to treason; seventy-seven, seventy-eight and seventy-nine, treasonable offences; eighty, assaults on the King; eighty-one, inciting to mutiny;

(*b*) ninety-two, offences respecting the reading of the Riot Act; ninety-six, riotous destruction of property; ninety-seven, riotous damage to property;

(*c*) one hundred and twenty-nine, administering, taking or procuring the taking of oaths to commit certain crimes; one hundred and thirty, administering, taking or procuring the taking of other unlawful oaths;

(*d*) one hundred and thirty-seven, piracy; one hundred and thirty-eight, piratical acts; one hundred and thirty-nine, piracy with violence.

(*e*) one hundred and eighty-five, being at large while under sentence of imprisonment; one hundred and eighty-seven, breaking prison; one hundred and eighty-nine, escape from custody or from prison; one hundred and ninety, escape from lawful custody;

(*f*) two hundred and two, unnatural offence;

(*g*) two hundred and sixty-three, murder; two hundred and sixty-four, attempt to murder; two hundred and sixty-seven, being accessory after the fact to murder; two hundred and sixty-eight, manslaughter; two hundred and seventy, attempt to commit suicide;

(*h*) two hundred and seventy-three, wounding with intent to do bodily harm; two hundred and seventy-four, wounding; two hundred and seventy-six, stupefying in order to commit an indictable offence; two hundred and seventy-nine and two hundred and eighty, injuring or attempting to injure by explosive substances; two hundred and eighty-two, intentionally endangering persons on railways; two hundred and eighty-three wantonly endangering persons on railways; two hundred and eighty-six, preventing escape from wreck;

(*i*) two hundred and ninety-nine, rape; three hundred, attempt to commit rape; three hundred and one, defiling children under fourteen;

(*j*) three hundred and thirteen, abduction of a woman;

(*k*) three hundred and fifty-eight, theft by agents and others; three hundred and fifty-nine, theft by clerks, servants and others; three hundred and sixty, theft by tenant and lodgers; three hundred and sixty-one, theft of testamentary instruments; three hundred and sixty-two, theft of documents of title; three hundred and sixty-three, theft of judicial or official documents; three hundred and sixty-four, three hundred and sixty-five and three hundred and sixty-six, theft of postal matter; three hundred and sixty-seven, theft of election documents; three hundred and sixty-eight, theft of railway tickets;

three hundred and sixty-nine, theft of cattle; three hundred and seventy-one, theft of oysters; three hundred and seventy-two, theft of things fixed to buildings or land; three hundred and seventy-nine, stealing from the person; three hundred and eighty, stealing in dwelling-houses; three hundred and eighty-one, stealing by picklocks, etc; three hundred and eighty-two, stealing from ships, docks, wharfs or quays; three hundred and eighty-three, stealing wreck; three hundred and eighty-four, stealing on railways; three hundred and eighty-six, stealing things not otherwise provided for; three hundred and eighty-seven, stealing where value over two hundred dollars; three hundred and eighty-three, stealing in manufactories; three hundred and ninety, criminal breach of trust; three hundred and ninety-one, public servant refusing to deliver up chattels, money, valuables, security, books, papers, accounts or documents; three hundred and ninety-six, destroying, cancelling, concealing or obliterating any documents of title; three hundred and ninety-eight, bringing stolen property into Canada;

(*l*) three hundred and ninety-nine, receiving property obtained by crime;

(*m*) four hundred and ten, personation of certain persons;

(*n*) four hundred and forty-six, aggravated robbery; four hundred and forty-seven, robbery; four hundred and forty-eight, assault with intent to rob; four hundred and forty-nine, stopping the mail; four hundred and fifty, compelling execution of documents by force; four hundred and fifty-one, sending letter demanding with menaces; four hundred and fifty-two, demanding with intent to steal; four hundred and fifty-three, extortion by certain threats;

(*o*) four hundred and fifty-five, breaking place of worship and committing an indictable offence; four hundred and fifty-six, breaking place of worship with intent to commit an indictable offence; four hundred and fifty-seven, burglary; four hundred and fifty-eight, housebreaking and committing an indictable offence; four hundred and fifty-nine, housebreaking with intent to commit an indictable offence; four hundred and sixty, breaking shop and committing an indictable offence; four hundred and sixty-one, breaking shop with intent to commit an indictable offence; four hundred and sixty-two, being found in a dwelling-house by night; four hundred and sixty-three, being armed, with intent to break a dwelling-house; four hundred and sixty-four, being disguised or in possession of housebreaking instruments;

(*p*) four hundred and sixty-eight, four hundred and sixty-nine and four hundred and seventy, forgery; four hundred and sixty-seven, uttering forged documents; four hundred and seventy-two, counterfeiting seals; four hundred and seventy-eight, using probate obtained by forgery or perjury; five hundred and fifty, possessing forged bank notes;

(*q*) four hundred and seventy-one, making, having or using instrument for forgery or having or uttering forged bond or undertaking; four hundred and seventy-nine, counterfeiting stamps; four hundred and eighty, injuring or falsifying registers,

(*r*) one hundred and twelve, attempt to damage by explosives; five hundred and ten, mischief; five hundred and eleven, arson; five hundred and twelve, attempt to commit arson; five hundred and thirteen, setting fire to crops; five hundred and fourteen, attempting to set fire to crops; five hundred and seventeen, mischief on railways; five hundred and twenty, mischief to mines; five hundred and twenty-one, injuries to electric telegraphs, magnetic telegraphs, electric lights, telephones and fire alarms; five hundred and twenty-two, wrecking; five hundred and twenty-three, attempting to wreck; five hundred and twenty-six, interfering with marine signals;

(*s*) five hundred and fifty-two, counterfeiting gold and silver coin; five hundred and fifty-six, making instruments for coining; five hundred and fifty-eight, clipping current coin; five hundred and sixty, possessing clippings of current coin; five hundred and sixty-two, counterfeiting copper coin; five hundred and sixty-three, counterfeiting foreign gold and silver coin; five hundred and sixty-seven, uttering copper coin not current.

647. A peace officer may arrest, without warrant, any one who has committed any of the offences mentioned in the sections in the last preceding section mentioned or in sections,—

(*a*) four hundred and five, obtaining by false pretence.

648. A peace officer may arrest, without warrant, any one whom he finds committing any criminal offence.

2. Any person may arrest, without warrant, any one whom he finds committing any criminal offence by night.

649. Any one may arrest without warrant a person whom he, on reasonable and probable grounds, believes to have committed a criminal offence and to be escaping from, and to be freshly pursued by, those whom the person arresting, on reasonable and probable grounds, believes to have lawful authority to arrest such person.

650. The owner of any property on or with respect to which any person is found committing any criminal offence, or any person authorized by such owner, may arrest, without warrant, the person so found, who shall forthwith be taken before a justice to be dealt with according to law.

651. Any officer in His Majesty's service, any warrant or petty officer in the navy, and any non-commissioned officer of marines may arrest without warrant any person found committing any of the offences mentioned in section one hundred and forty-one.

652. 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.

Arrests Generally, secs. 30 to 47.

30. 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.

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

32. 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.

33. 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.

34. 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.

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

36. 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.

37. 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.

38. 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.

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

40. 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.

41. 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.

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

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

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

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

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

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

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

FORMS PRESCRIBED BY PART XXV. OF THE CODE.

1152. The several forms in this Part, varied to suit the case, or forms to the like effect, shall be deemed good, valid and sufficient in cases thereby respectively provided for; and may, when made for one class of officials, be varied so as to apply to any other class having the same jurisdiction.

FORM 1.

(Section 629.)

Information to obtain a Search Warrant.

Canada,
Province of ,
County of .

The information of A. B., of in the said county (*yeoman*), taken this day of in the year before me, J. S., Esquire, a justice of the peace, in and for the district (*or* county, *etc.*), of , who says that (*describe things to be searched for and offence in respect of which search is made*), and that he has just and reasonable cause to suspect, and suspects, that the said goods and chattels, or some part of them, are concealed in the (*dwelling-house, etc.*) of C. D., of in the said district (*or* county, *etc.*), (*here add the causes of suspicion, whatever they may be*): Wherefore (*he*) prays that a search warrant may be granted to him to search the (*dwelling-house, etc.,*) of the said C. D., as aforesaid, for the said goods and chattels so stolen, taken and carried away as aforesaid (*or as the case may be*).

Sworn (*or* affirmed) before me the day and year first above mentioned, at in the said county of

J. S.,
J. P., (name of district or county, etc.).

FORM 2.

(Section 630.)

Warrant to Search.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of .

Whereas it appears on the oath of A. B., of , that there is reason to suspect that (*describe things to be searched for and offence in respect of which search is made*) are concealed in at

This is, therefore, to authorise and require you to enter between the hours of (*as the justice shall direct*) into the said premises, and to search for the said things, and to bring the same before me or some other justice.

Dated at , in the said county of this day of ,in the year .

J. S.,
J. P., (name of county).

To of .

FORM 3.

(Section 654.)

Information and Complaint for an Indictable Offence.

Canada,
Province of ,
County of .

The information and complaint of C. D., of (*yeoman*), taken this day of , in the year , before the undersigned (*one*) of His Majesty's justices of the peace in and for the said county of , who saith that (*etc., stating the offence*).

Sworn before (*me*), the day and year first above mentioned, at

J. S.,
J. P., (name of county).

FORM 4.

(Section 656).

Warrant to Apprehend a Person Charged with an Indictable Offence Committed on the High Seas or Abroad.

For offences committed on the high seas the warrant may be the same as in ordinary cases, but describing the offence to have been committed 'on the high seas, out of the body of any district or county of Canada and within the jurisdiction of the Admiralty of England.'

For offences committed abroad for which the parties may be indicted in Canada, the warrant also may be the same as in ordinary cases, but describing the offence to have been committed 'on land out of Canada, to wit: at in the Kingdom of , *or*, at , in the Island of , in the West Indies, *or* at , in the East Indies,' *or as the case may be.*

FORM 5.

(Section 658.)

Summons to a Person Charged with an Indictable Offence.

Canada,
Province of
County of

T. A. B., of , (*labourer*):

Whereas you have this day been charged before the undersigned , a justice of the peace in and for the said county of , for that you on , at , (*stating shortly the offence*): These are therefore to command you, in His Majesty's name, to be and appear before (*me*) on , at o'clock in the (fore) noon, at , or before such other justice or justices of the peace for the same county of , as shall then be there, to answer to the said charge, and to be further dealt with according to law. Herein fail not.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (name of county).

FORM 6.

(Section 659.)

Warrant in the first instance to apprehend a Person charged with an Indictable Offence.

Canada,
Province of
County of

To all or any of the constables and other peace officers in the said county of .

Whereas A. B., of , (*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 His Majesty's name, forthwith to apprehend the said A. B., and to bring him before (*me*) or some other justice of the peace in and for the said county of , to answer unto the said charge, and to be further dealt with according to law.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (name of county).

FORM 7.

(Section 660.)

Warrant when the Summons is disobeyed.

Canada,
Province of
County of

To all or any of the constables and other peace officers in the said county of .

Whereas on the day of . (instant *or* last past) A. B., of , was charged before (*me* or *us*), the undersigned (*or name the justice or justices, or as the case may be*), (*a*) justice of the peace in and for the said county of , for that (*etc., as in the summons*); and whereas I (*or* he *the said justice of the peace, or* we *or* they *the said justices of the peace*) did then issue (*my, our, his* or *their*) summons to the said A. B., commanding him, in His Majesty's name, to be and appear before (*me*) on , at o'clock in the (fore) noon, at , or before such other justice or justices of the peace as should then be there, to answer to the said charge and to be further dealt with according to law; and whereas the said A. B. has neglected to be or appear at the time and place appointed in and by the said summons, although it has now been proved to (*me*) upon oath that the said summons was duly served upon the said A. B.: These are therefore to command you in His Majesty's name, forthwith to apprehend the said A. B., and to bring him before (*me*) or some other justice of the peace in and for the said county of , to answer the said charge, and to be further dealt with according to law.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (name of county).

FORM 8.

(Section 662.)

Endorsement in Backing a Warrant.

Canada,
Province of
County of

Whereas proof upon oath has this day been made before me , a justice of the peace in and for the said county of , that the name of J. S. to the within warrant subscribed, is of the handwriting of the justice of the peace within mentioned: I do therefore hereby authorize W. T. who brings to me this warrant and all other persons to whom this warrant was originally directed, or by whom it may be lawfully executed, and also all peace officers of the said county of , to execute the same within the said last mentioned county.

Given under my hand, this day of , in the year at . in the county aforesaid.

J. L.,
J. P., (name of county).

55-56 V., c. 29, sch. 1, form H.

FORM 9.

(Section 665.)

Warrant to convey before a Justice of another County.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of ,

Whereas information upon oath was this day made before the undersigned that A. B., of , on the day of , in the year , at , in the county (*state the charge*).

And whereas I have taken the deposition of X. Y. as to the said offence.

And whereas the charge is of an offence committed in the county of ,

This is to command you to convey the said (*name of accused*), of , before some justice of the last-mentioned county, near the above place, and to deliver to him this warrant and the said deposition.

Dated at , in the said county of , this day of , in the year .

J. S.,
J. P., (name of county).

To of .

FORM 10.

(Section 666.)

Receipt to be given to the Constable by the Justice for the County in which the Offence was committed.

Canada,
Province of ,
County of .

I, J. L., a justice of the peace in and for the county of , hereby certify that W. T., peace officer of the county of , has, on this day of , in the year , by virtue of and in obedience to a warrant of J. S., Esquire, a justice of the peace in and for the county of , produced before me one A. B., charged before the said J. S. with having (*etc., stating shortly the offence*) and delivered him into the custody of , by my direction to answer to the said charge, and further to be dealt with according to law, and has also delivered unto me the said warrant, together with the information (*if any*) in that behalf, and the deposition (*s*) of C. D. (*and of*), in the said warrant mentioned, and that he has also proved to me, upon oath, the handwriting of the said J. S., subscribed to the same.

Dated the day and year first above mentioned, at , in the said county of .

J. L.,
J. P., (name of county).

FORM 11.

(Section 671.)

Summons to a Witness.

Canada,
Province of , }
County of . }

To E. F., of , (*labourer*):

Whereas information has been laid before the undersigned a justice of the peace in and for the said county of , that A. B., (*etc., as in the summons or warrant against the accused*), and it has been made to appear to me that you are likely to give material evidence for (*the prosecution or for the accused*): These are therefore to require you to be and to appear before me, on next, at o'clock in the (fore) noon, at , or before such other justice or justices of the peace of the said county of , as shall then be there, to testify what you know concerning the said charge so made against the said A. B. as aforesaid. Herein fail not.

Given under my hand and seal, this day of in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (name of county).

FORM 12.

(Section 673.)

Warrant when a Witness has not obeyed the Summons.

Canada,
Province of , }
County of . }

To all or any of the constables and other peace officers in the said county of .

Whereas information having been laid before , a justice of the peace, in and for the said county of , that A. B. (*etc., as in the summons*); and it having been made to appear to (*me*) upon oath that E. F., of , (*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 said county, as should then be there, to testify what he knows respecting the said charge so made against the said A. B., as aforesaid; and whereas proof has this day been made upon oath before (*me*) of such summons having been duly served upon the said E. F.; and whereas the said E. F. has neglected to appear at the time and place appointed by the said summons, and no just excuse has been offered for such neglect: These are therefore to command you to bring and have the said E. F. before (*me*) on at o'clock in the (fore) noon, at , or before such other justice of justices for the said county, as shall then be there, to testify what he knows concerning the said charges so made against the said A. B. as aforesaid.

Given under (*my*) hand and seal, this day of in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (name of county).

FORM 13.

(Sections 674 and 842.)

Conviction for Contempt.

Canada,
Province of
County of

Be it remembered that on the day of , in the year , in the county of , E. F. is convicted before me, for that he the said E. F. did not attend before me to give evidence on the trial of a certain charge against one A. B. of theft (*or as the case may be*), although duly subpœnaed (*or* bound by recognizance to appear and give evidence in that behalf, *as the case may be*) but made default thereia and has not shewn before me any sufficient excuse for such default, and I adjudge the said E. F., for this said offence, to be imprisoned in the common jail of the county of , at , for the space of , there to be kept with (*or* without) hard labour (*as may be authorized and determined, and in case a fine is also intended to be imposed, then proceed*) and I also adjudge that the said E. F. do forthwith pay to and for the use of His Majesty a fine of dollars, and in default of payment, that the said fine, with the costs 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.

FORM 14.

(Section 675.)

Warrant for a Witness in the First Instance.

Canada,
Province of
County of

To all or any of the constables and other peace officers in the said county of .

Whereas information has been laid before the undersigned , a justice of the peace, in and for the said county of , that (*etc., as in the summons*); and it having been made to appear to (*me*) upon oath, that E. F. of (*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).

FORM 15.

(Section 677.)

Warrant when a Witness has not obeyed the Subpœna.

Canada,
Province of }
County of }

To all or any of the constables and other peace officers in the said county of .

Whereas information having been laid before , a justice of the peace, in and for the said county, that A. B. (*etc., as in the summons*); and there being 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 said county as shall then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (name of county).

FORM 16.

(Section 678.)

Warrant of Commitment of a Witness for Refusing to be Sworn or to Give Evidence.

Canada,
Province of }
County of }

To all or any of the constables and other peace officers in the county of , and to the keeper of the common gaol at , in the said county of .

Whereas A. B. was lately charged before , a justice of the peace in and for the said county of , for that (*etc., as in the summons*); and it having been made to appear to (*me*) upon oath that E. F., of , was likely to give material evidence for the prosecution, (*I*) duly issued (*my*) summons to the said E. F., requiring him to be and appear before me on , at , or before such other justice or justices of the peace for the said county as should then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid; and the said E. F. now appearing before (*me*) (*or* being brought before (*me*) by virtue of a warrant in that behalf), to testify as aforesaid, and being required to make oath or affirmation as a witness in that behalf, now refuses so to do (*or* being duly sworn as a witness now refuses to answer certain questions concerning the premises which are now here put to him, and more particularly the following

) without offering any just excuse for such refusal: These are therefore to command you, the said constables or peace officers, or any one of you, to take the said E. F. and him safely to convey to the common gaol at , in the county aforesaid, and there to deliver him to the keeper thereof, together with 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 the said contempt, unless in the meantime he consents to be examined, and to answer concerning the premises; and for your so doing, this shall be your sufficient warrant.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (name of county).

FORM 17.

(Section 679.)

Warrant Remanding a Prisoner.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of , and to the keeper of the common gaol at in the said county.

Whereas A. B. was this day charged before the undersigned , a justice of the peace in and for the said county of , for that (*etc., as in the warrant to apprehend*), and it appears to (*me*) to be necessary to remand the said A. B.: These are therefore to command you, the said constables and peace officers, or any of you, in His Majesty's name, forthwith to convey the said A. B. to the common gaol at , in the said county, and there to deliver him to the keeper thereof, together with 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).

FORM 18.

(Section 681.)

Recognizance of Bail instead of Remand on an Adjournment of Examination.

Canada,
County of ,
Province of .

Be it remembered that on the day of , in the year , A. B., of , (*labourer*), L. M., of , (*grocer*), and N. O., of , (*butcher*), personally came before me, , a justice of the peace for the said county, and severally acknowledged themselves to owe to our Sovereign Lord the King, his heirs and successors, the several sums following, that is to say: The said A. B. the sum of , and the said L. M., and N. O., the sum

each, of good and lawful current money of Canada, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Lord the King, his heirs and successors, if he, the said A. B., fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned, at before me.

J. S.,
J. P., (name of county).

Condition.

The condition of the within (*or* above written recognizance) is such that whereas the within bounden A. B. was this day (*or* on last past) charged before me for that (*etc., as in the warrant*); and whereas the examination of the witnesses for the prosecution in this behalf is adjourned until the day of (*instant*): If therefore, the said A. B. appears before me on the said day of (*instant*), at o'clock in the (fore) noon, or before such other justice or justices of the peace for the said county as shall then be there, to answer (*further*) to the said charge, and to be further dealt with according to law, the said recognizance to be void, otherwise to stand in full force and virtue.

FORM 19.

(Section 682.)

Deposition of a Witness.

Canada,
County of ,
Province of ,

The deposition of X. Y., of , taken before the undersigned, a justice of the peace for the said county of , this day of , in the year , at (*or* after notice to C. D. who stands committed for) in the presence and hearing of C. D., who stands charged that (*state the charge*). The said deponent saith on his (*oath or affirmation*) as follows: (*Insert deposition as nearly as possible in words of witness*).

(*If depositions of several witnesses are taken at the same time, they may be taken and signed as follows*):

The depositions of X. of , Y. of , Z. of , etc., taken in the presence and hearing of C. D., who stands charged that

The deponent X. (*on his oath or affirmation*) says as follows:

The deponent Y. (*on his oath or affirmation*) says as follows:

The deponent Z. (*on his oath, etc., etc.*)

(*The signature of the justice may be appended as follows*):

The depositions of X., Y., Z., etc., written on the several sheets of paper, to the last of which my signature is annexed, were taken in the presence and hearing of C. D., and signed by the said X., Y., Z., etc., respectively in his presence. In witness whereof I have in the presence of the said C. D. signed my name.

J. S.,
J. P., (name of county).

FORM 20.

(Section 684.)

Statement of the Accused.

Canada,
County of ,
Province of ,

A. B. stands charged before the undersigned , a justice of the peace in and for the county aforesaid, this day of , in the year , for that the said A. B., on , at

(*etc., as in the captions of the depositions*); and the said charge being read to the said A. B., and the witnesses for the prosecution, C. D. and E. F., being severally examined in his presence, the said A. B. is now addressed by me as follows:

'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you at your trial. You must clearly understand that you have nothing to hope from any promise of 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).

FORM 21.

(Section 688.)

Form of Recognizance where the Prosecutor requires the Justice to bind him over to prosecute after the charge is dismissed.

Canada,
Province of .
County of .

Whereas C. D. was charged before me upon the information of E. F., that C. D. (*state the charge*), and upon the hearing of the said charge I discharged the said C. D., and the said E. F. desires to prefer an indictment against the said C. D. respecting the said charge, and has required me to bind him over to prefer such an indictment at (*here describe the next practicable sitting of the Court by which the person discharged would be tried if committed*).

The undersigned E. F. hereby binds himself to perform the following obligation, that is to say, that he will prefer and prosecute an indictment respecting the said charge against the said C. D. at (*as above*). And the said E. F. acknowledges himself bound to forfeit to the Crown the sum of $ in case he fails to perform the said obligation.

E. F.

Taken before me.

J. S.,
J. P., (name of county).

FORM 22.

(Section 690.)

Warrant of Commitment.

Canada,
Province of .
County of .

To all or any of the constables and other peace officers of , and to the keeper of the (*common gaol*) at , in the said county of .

Whereas A. B. was this day charged before me, J. S., one of His Majesty's justices of the peace in and for the said county of , on the oath of C. D. of , (*farmer*), and others, for that (*etc.*,

stating shortly the offence): These are therefore to command you the said constable to take the said A. B., and him safely to convey to the (*common gaol*) at aforesaid, and there to deliver him to the keeper thereof, together with this precept: And I do hereby command you the said keeper of the said (*common gaol*) to receive the said A. B. into your custody in the said (*common gaol*), and there safely keep him until he shall be thence delivered by due course of law.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (*name of county*).

FORM 23.

(Section 692.)

Recognizance to Prosecute.

Canada,
Province of ,
County of .

Be it remembered that on the day of , in the year , C. D., of , in the of in the said county of , (*farmer*), personally came before me , a justice of the peace in and for the said county of , and acknowledged himself to owe to our Sovereign Lord the King, his heirs and successors, the sum of , of good and lawful current money of Canada, to be made and levied of his goods and chattels, lands and tenements, to the use of our said Sovereign Lord the King, his heirs and successors, if the said C. D. fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned, at , before me.

J. S.,
J. P., (*name of county*).

Condition to Prosecute.

The condition of the within (or above) written recognizance is such that whereas one A. B. was this day charged before me, J. S., a justice of the peace within mentioned, for that (*etc., as in the caption of the depositions*); if, therefore, he the said C. D. appears at the Court by which the said A. B. is or shall be tried* and there duly prosecutes such charge then the said recognizance to be void, otherwise to stand in full force and virtue.

FORM 24.

(Section 692.)

Recognizance to Prosecute and give Evidence.

(*Same as 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.

FORM 25.

(Section 692.)

Recognizance to give Evidence.

(*Same as form 23 to the asterisk,* and then thus*):—And there gives such evidence as he knows upon the charge to be then and there preferred against the said A. B. for the offence aforesaid, then the said recognizance to be void, otherwise to remain in full force and virtue.

FORM 26.

(Section 694.)

Commitment of a Witness for Refusing to Enter into the Recognizance.

Canada,
Province of
County of

To all or any of the peace officers in the said county of , and to the keeper of the common gaol of the said county of , at , in the said county of .

Whereas A. B. was lately charged before the undersigned (*name of the justice of the peace*), a justice of the peace in and for the said county of , for that (*etc., as in the summons to the witness*), and it having been made to appear to (*me*) upon oath that E. F., of , was likely to give material evidence for the prosecution, (*I*) duly issued (*my*) summons to the said E. F., requiring him to be and appear before (*me*) on , at or before such other justice or justices of the peace as should then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid; and the said E. F. now appearing before (*me*) (*or* being brought before (*me*) by virtue of a warrant in that behalf to testify as aforesaid), has been now examined before (*me*) touching the premises, but being by (*me*) required to enter into a recognizance conditioned to give evidence against the said A. B., now refuses so to do: These are therefore to command you the said peace officers, or any one of you, to take the said E. F. and him safely convey to the common gaol at , in the county aforesaid, and there deliver him to the said keeper thereof, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said E. F. into your custody in the said common gaol, there to imprison and safely keep him until after the trial of the said A. B. for the offence aforesaid, unless in the meantime the said E. F. duly enters into such recognizance as aforesaid, in the sum of before some one justice of the peace for the said county, conditioned in the usual form to appear at the Court by which the said A. B. is or shall be tried, and there to give evidence upon the charge which shall then and there be preferred against the said A. B. for the offence aforesaid.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (name of county).

FORM 27.

(Section 694.)

Order Discharging Witness, when Accused Discharged.

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.)

FORM 28.

(Section 696.)

Recognizance of Bail.

Canada,
Province of ,
County of .

Be it remembered that on the day of , in the year , A. B. of , (*labourer*), L. M. of , (*grocer*), and N. O. of , (*butcher*), personally came before (*us*) the undersigned, (*two*) justices of the peace for the county of , and severally acknowledged themselves to owe to our Sovereign Lord the King, his heirs and successors, the several sums following, that is to say: the said A. B., the sums of , and the said L. M. and N. O. the sum of , each, of good and lawful current money of Canada, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Sovereign Lord the King, his heirs and successors, if he, the said A. B., fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned, at , before us,

J. S.,
J. N.,
J. P., (name of county.)

The condition of the within (*or* above) written recognizance is such that whereas the said A. B. was this day charged before (*us*), the justices within mentioned for that (*etc., as in the warrant*); if, therefore, the said A. B. appears at the next Superior Court of Criminal Jurisdiction (*or* Court of General or Quarter Sessions of the Peace) to be holden in and for the county 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.

FORM 29.

(Section 698.)

Warrant of Deliverance on Bail being given for a Prisoner already Committed.

Canada,
Province of ,
County of .

To the keeper of the common gaol of the county of , at , in the said county.

Whereas A. B. late of , (*labourer*), has before (*us*) (*two*) justices of the peace in and for the said county of , entered into his own recognizance, and found sufficient sureties for his appearance at the next Superior Court of Criminal Jurisdiction (*or* Court of General or Quarter Sessions of the Peace), to be holden in and for the county of , to answer our Sovereign Lord the King, for that (*etc., as in the commitment*), for which he was taken and committed to your said common gaol: These are therefore to command you, in His Majesty's name, that if the said A. B. remains in your custody in the said common gaol for the said cause, and for no other, you shall forthwith suffer him to go at large.

Given under our hands and seals, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. N., [SEAL.]
J. P., (name of county.)

FORM 30.

(Section 704.)

Gaoler's Receipt to the Constable for the Prisoner.

I hereby certify that I have received from W. T., constable, of the county of , the body of A. B., together with a warrant under the hand and seal of J. S., Esquire, justice of the peace for the said county of , and that the said A. B. was sober, (*or as the case may be*), at the time he was delivered into my custody.

P. K.,
Keeper of the common gaol of the said county.

FORM 31.

(Section 727.)

Conviction for a Penalty to be Levied by Distress and in Default of Sufficient Distress, by Imprisonment.

Canada,
Province of ,
County of .

Be it remembered that on the day of , in the year , at , in the said county, A. B. is convicted before the undersigned, , a justice of the peace for the said county, for that the said A. B. (*etc., stating the offence, and the time and place when and where committed*), and I adjudge the said A. B. for his said offence to forfeit and pay the sum of $ (*stating the penalty, and also the compensation, if any*), to be paid and applied according to law, and also to pay to the said C. D. the sum of , for his costs in this behalf; and if the said several sums are not paid forthwith, (*or* on or before the

of next), * I order that the same be levied by distress and sale of the goods and chattels of the said A. B., and in default of sufficient distress. * I adjudge the said A. B. to be imprisoned in the common gaol of the said county, at , in the said county of , (there to be kept at hard labour, *if the Act or law authorizes this, and it is so adjudged*) for the term of , unless the said several sums and all costs and charges of the said distress and of the commitment and of the conveying of the said A. B. to the said gaol are sooner paid.

Given under my hand and seal, the day and year first above mentioned, at , in the county aforesaid.

J. S., [SEAL.]
J. P., (name of county.)

* *Or when the issuing of a distress warrant would be ruinous to the defendant and his family, or it appears he has no goods whereon to levy a distress, then instead of the words between the asterisks say,* 'inasmuch as it is now made to appear to me that the issuing of a warrant of distress in this behalf would be ruinous to the said A. B. and his family,' (*or,* 'that the said A. B. has no goods or chattels whereon to levy the said sums by distress').

FORM 32.

(Section 727.)

Conviction for a Penalty, and in Default of Payment, Imprisonment.

Canada,
Province of }
County of }

Be it remembered that on the day of , in the year , at , in the said county, A. B. is convicted before the undersigned, , a justice of the peace for the said county, for that he the said A. B. (*etc., stating the offence, and the time and place when and where it was committed*), and I adjudge the said A. B. for his said offence to forfeit and pay the sum of (*stating the penalty and 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, *if the Act or law authorizes this, and it is so adjudged*) for the term of , unless the said sums and the costs and charges of the commitment and of the conveying of the said A. B. to the said common gaol are sooner paid.

Given under my hand and seal, the day and year first above mentioned at , in the county aforesaid.

J. S., [SEAL.]
J. P., (name of county.)

FORM 33.

(Section 727.)

Conviction when the Punishment is by Imprisonment, etc.

Canada,
Province of }
County of }

Be it remembered that on the day of , in the year , at , in the said county, A. B. is convicted before the undersigned, , a justice of the peace in and for the

said county, for that he the said A. B. (*etc., stating the offence, and the time and place when and where it was committed*); and I adjudge the said A. B. for his said offence to be imprisoned in the common gaol of the said county, at , in the county of , (and there to be kept at hard labour, *if the Act or law authorizes this, and it is so adjudged*) for the term of ; and I also adjudge the said A. B. to pay to the said C. D. the sum of , for his costs in this behalf, and if the said sum for costs is not paid forthwith (*or* on or before next), then* I order that the said sum be levied by distress and sale of the goods and chattels of the said A. B.; and in default of sufficient distress in that behalf,* I adjudge the said A. B. to be imprisoned in the said common gaol (and kept there at hard labour, *if the Act or law authorizes this, and it is so adjudged*) for the term of , to commence at and from the expiration of the term of his imprisonment aforesaid, unless the said sum for costs and the costs and charges of the commitment and of the conveying of the said A. B. to gaol are sooner paid.

Given under my hand and seal, the day and year first above mentioned at , in the county aforesaid.

J. S., [SEAL.]
J. P., (name of county.)

**Or when the issuing of a distress warrant would be ruinous to the defendant and his family, or it appears that he has no goods whereon to levy a distress, then, instead of the words between the asterisks * * say,* 'inasmuch as it is now made to appear to me that the issuing of a warrant of distress in this behalf would be ruinous to the said A. B. and his family,' (*or* 'that the said A. B. has no goods or chattels whereon to levy the said sum for costs by distress').

FORM 34.

(Section 727.)

Order for Payment of Money to be Levied by Distress, and in Default of Distress, Imprisonment.

Canada,
Province of ,
County of .

Be it remembered that on , a complaint was made before the undersigned, , a justice of the peace in and for the said county of , for that (*stating the facts entitling the complainant to the order, with the time and place when and where they occurred*), and now at this day, to wit, on , at , the parties aforesaid appear before me the said justice (*or* the said C. D. appears before me the said justice, but the said A. B., although duly called, does not appear by himself, his counsel or attorney, and it is now satisfactorily proved to me on oath that the said A. B. was duly served with the summons in this behalf, which required him to be and appear here on this day before me or such justice or justices of the peace for the county, as should now be here, to answer the said complaint, and to be further dealt with according to law); and now having heard the matter of the said complaint, I do adjudge the said A. B. to pay to the said C. D. the sum of forthwith (*or* on or before next, *or as the Act or law requires*), and also to pay to the said C. D. the sum of for his costs in this behalf; and if the said several sums are not paid forthwith (*or* on or before next), then,* I hereby order that the same be levied by distress and sale of the goods and chattels of the said A. B. and in default of sufficient distress in that behalf* I adjudge the said A. B. to be imprisoned in the common gaol of the said county, at , in the said county of , (and there kept at hard labour, *if the Act or law authorizes this, and it is so adjudged*) for the term of , unless the said several sums and all costs and charges of the said distress and of the commitment and of the conveying of the said A. B. to the said common gaol are sooner paid.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (name of county.)

**Or when the issuing of a distress warrant would be ruinous to the defendant and his family, or it appears that he has no goods whereon to levy a distress, then, instead of the words between the asterisks * * say,* 'inasmuch as it is now made to appear to me that the issuing of a warrant of distress in this behalf would be ruinous to the said A. B. and his family,' *(or* 'that the said A. B. has no goods or chattels whereon to levy the said sums by distress').

FORM 35.

(Section 727.)

Order for Payment of Money, and in Default of Payment, Imprisonment.

Canada,
Province of ,
County of .

Be it remembered that on , complaint was made before the undersigned, , a justice of the peace in and for the said county of , for that (*stating the facts entitling the complainant to the order, with the time and place when and where they occurred*), and now on this day, to wit, on , at , the parties aforesaid appear before me the said justice (*or* the said C. D. appears before me the said justice, but the said A. B., although duly called, does not appear by himself, his counsel or attorney, and it is now satisfactorily proved to me upon oath that the said A. B. was duly served with the summons in this behalf, which required him to be and appear here this day before me, or such justice or justices of the peace for the said county, as should now be here, to answer to the said complaint, and to be further dealt with according to law), and now having heard the matter of the said complaint, I do adjudge the said A. B. to pay to the said C. D. the sum of forthwith (*or* on or before next, *or as the Act or law requires*), and also to pay to the said C. D. the sum of for his costs in this behalf; and if the said several sums are not paid forthwith (*or* on or before next), then I adjudge the said A. B. to be imprisoned in the common gaol of the said county at , in the said county of , (there to be kept at hard labour, *if the Act or law authorizes this, and it is so adjudged*) for the term of , unless the said several sums and the costs and charges of the commitment and of the conveying of the said A. B. to the said common gaol are sooner paid.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (name of county.)

FORM 36

(Section 727.)

Order for any other Matter where the Disobeying of it is Punishable with Imprisonment.

Canada,
Province of ,
County of .

Be it remembered that on , complaint was made before the undersigned, , a justice of the peace in and for the said county of , for that (*stating the facts entitling the complainant to the order, with the time and place where and when they occurred*); and now on this day, to wit, on , at , the parties aforesaid appear before me the said justice (*or* the said C. D. appears before me the said

justice, but the said A. B., although duly called, does not appear by himself, his counsel or attorney, and it is now satisfactorily proved to me, upon oath, that the said A. B. was duly served with the summons in this behalf, which required him to be and appear here this day before me, or such justice or justices of the peace for the said county, as should now be here, to answer to the said complaint and to be further dealt with according to law); and now having heard the matter of the said complaint, I do adjudge the said A. B. to (*here state the matter required to be done*), and if, upon a copy of the minute of this order being served upon the said A. B., either personally or by leaving the same for him at his last or most usual place of abode, he neglects or refuses to obey the same, in that case I adjudge the said A. B., for such his disobedience, to be imprisoned in the common gaol of the said county, at , in the said county of , (there to be kept at hard labour, *if the Act or law authorizes this, and it is so adjudged*) for the term of , unless the said order is sooner obeyed, and I do also adjudge the said A. B. to pay to the said C. D. the sum of for his costs in this behalf, and if the said sum for costs is not paid forthwith (*or* on or before next), I order the same to be levied by distress and sale of the goods and chattels of the said A. B., and in default of sufficient distress in that behalf I adjudge the said A. B. to be imprisoned in the said common gaol (there to be kept at hard labour, *if the Act or law authorizes this, and it is so adjudged*) for the space of , to commence at and from the termination of his imprisonment aforesaid, unless the said sum for costs is sooner paid.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (name of county.)

FORM 37.

(Section 730.)

Form of Order of Dismissal of an Information or Complaint.

Canada,
Province of
County of

Be it remembered that on , information was laid (*or* complaint was made) before the undersigned, , a justice of the peace in and for the said county of , for that (*etc., as in the summons of the defendant*) and now at this day, to wit, on , at , (*if at any adjournment insert here:* 'to which day the hearing of this case was duly adjourned, of which the said C. D. had due notice,') both the said parties appear before me in order that I should hear and determine the said information (*or* complaint) (*or* the said A. B. appears before me, but the said C. D., although duly called, does not appear); [whereupon the matter of the said information (*or* complaint) being by me duly considered, it manifestly appears to me that the said information (*or* complaint) is not proved, and] (*if the informant or complainant does not appear, these words may be omitted*), I do therefore dismiss the same, and do adjudge that the said C. D. do pay to the said A. B. the sum of , for his costs incurred by him in defence in his behalf; and if the said sum for costs is not paid forthwith (*or* on or before), I order that the same be levied by distress and sale of the goods and chattels of the said C. D., and in default of sufficient distress in that behalf, I adjudge the said C. D. to be imprisoned in the common gaol of the said county of , at , in the said county of (and there kept at hard labour, *if the Act or law authorizes this, and it is so adjudged*) for the term of , unless the said sum for costs, and all costs and charges of the said distress and of the commitment and of the conveying of the said C. D. to the said common gaol are sooner paid.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (name of county.)

FORM 38.

(Section 730.)

Form of Certificate of Dismissal.

Canada,
Province of ,
County of .

I hereby certify that an information (*or* complaint) preferred by C. D. against A. B. for that (*etc., as in the summons*) was this day considered by me, a justice of the peace in and for the said county of , and was by me dismissed (with costs).

Dated at , this day of , in the year

J. S.,
J. P., (name of county.)

55-56 V., c. 29, sch. 1, form CCC.

FORM 39.

(Section 741.)

Warrant of Distress upon a Conviction for a Penalty.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of .

Whereas A. B., late of , (*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 (*etc., as in the conviction*), and should also pay to the said C. D. the sum of , for his costs in that behalf; and it was thereby ordered that if the said several sums were not paid (forthwith) the same should be levied by distress and sale of the goods and chattels of the said A. B., and it was thereby also adjudged that the said A. B., in default of sufficient distress, should be imprisoned in the common gaol of the said county at , in the said county of (and there kept at hard labour *if the conviction so adjudges*) for the space of , unless the said several sums and all costs and charges of the said distress, and of the commitment and conveying of the said A. B. to the said common gaol were sooner paid; *And whereas the said A. B., being so convicted as aforesaid, and being (now) required to pay the said sums of and has not paid the same or any part thereof, but therein has made default: These are, therefore, to command you in His Majesty's name forthwith to make distress of the goods and chattels of the said A. B.; and if within days next after the making of such distress, the said sums, together with the reasonable charges of taking and keeping the distress, are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale unto me, the convicting justice (*or* one of the convicting justices), that I may pay and apply the same as by law directed, and may render the overplus, if any, on demand, to the said A. B.; and if no such distress is found, then to certify the same unto me, that such further proceedings may be had thereon as to law appertain.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (name of county.)

FORM 40.

(Section 741.)

Warrant of Distress upon an Order for the Payment of Money.

Canada,
Province of ,
County of ,

To all or any of the constables and other peace officers in the said county of .

Whereas on , last past, a complaint was made before , a justice of the peace in and for the said county, for that (*etc., as in the order*), and afterwards, to wit, on , at , the said parties appeared before (*as in the order*), and thereupon the matter of the said complaint having been considered, the said A. B. was adjudged to pay to the said C. D. the sum of , on or before then next, and also to pay to the said C. D. the sum of , for his costs in that behalf; and it was ordered that if the said several sums were not paid on or before the said then next, the same should be levied by distress and sale of the goods and chattels of the said A. B.; and it was adjudged that in default of sufficient distress in that behalf, the said A. B. should be imprisoned in the common gaol of the said county, at , in the said county of (and there kept at hard labour *if the order so directs*) for the term of , unless the said several sums and all costs and charges of the distress (and of the commitment and conveying of the said A. B. to the said common goal) were sooner paid; *And whereas the time in and by the said order appointed for the payment of the said several sums of , and has elapsed, but the said A. B. has not paid the same, or any part thereof, but therein has made default: These are, therefore, to command you, in His Majesty's name, forthwith to make distress of the goods and chattels of the said A. B.; and if within the space of days after the making of such distress, the said last mentioned sums, together with the reasonable charges of taking and keeping the said distress, are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale unto me (*or some other of the convicting justices, as the case may be*), that I (*or* he) may pay or apply the same as by law directed, and may render the overplus, if any, on demand to the said A. B.; and if no such distress can be found, then to certify the same unto me, to the end that such proceedings may be had therein, as to law appertain.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S. [SEAL.]
J. P. (*name of county.*)

FORM 41.

(Section 741.)

Warrant of Commitment upon a Conviction for a Penalty in the first instance.

Canada,
Province of ,
County of ,

To all or any of the constables and other peace officers in the said county of , and to the keeper of the common gaol of the said county of , at , in the said county of .

Whereas A. B., late of , (*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 *if the conviction so adjudges*) for the term of , unless the said several sums and the costs and charges of the commitment and of the conveying of the said A. B. to the said common gaol were sooner paid; and whereas the time in and by the said conviction appointed for the payment of the said several sums has elapsed, but the said A. B. has not paid the same, or any part thereof, but therein has made default: These are, therefore, to command you, the said peace officers, or any one of you, to take the said A. B., and him safely to convey to the common gaol at aforesaid, and there 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 *if the conviction so adjudges*) for the term of , unless the said several sums and the costs and charges of the commitment and of the conveying of the said A. B. to the said common gaol are sooner paid unto you, the said keeper; and for your so doing, this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S. [SEAL.]
J. P. (name of county.)

FORM 42.

(Section 741.)

Warrant of Commitment on an Order in the first instance.

Canada,
Province of ,
County of ,

To all or any of the constables and other peace officers in the said county of , and to the keeper of the common gaol of the county of , at , in the said county of .

Whereas, on last past, complaint was made before the undersigned , a justice of the peace in and for the said county of , for that (*etc., as in the order*), and afterwards, to wit, on the day of , at A. B. and C. D. appeared before me, the said justice (*or as it is in the order*), and thereupon having considered the matter of the complaint, I adjudged the said A. B. to pay the said C. D. the sum of , on or before the day of then next, and also to pay to the said C. D. the sum of for his costs in that behalf; and I also thereby adjudged that if the said several sums were not paid on or before the day of then next, the said A. B. should be imprisoned in the common gaol of the county of , at , in the said county of (and there be kept at hard labour *if the order so directs*) for the term of , unless the said several sums and the costs and charges of the commitment and of the conveying of the said A. B. to the said common gaol, were sooner paid: And whereas the time in and by the said order appointed for the payment of the said several sums of money has elapsed, but the said A. B. has not paid the same, or any part thereof, but therein has made default: These are, therefore, to command you, the said peace officers, or any of you, to take the said A. B. and him safely to convey to the said common gaol, at aforesaid, and there to deliver him to the keeper thereof, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said A. B. into your custody in the said common gaol, there to imprison him (and keep him at hard

labour *if the order so directs*) for the term of unless the said several sums and the costs and charges of the commitment and of conveying him to the said common gaol are sooner paid unto you the said keeper; and for your so doing, this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S. [SEAL.]
J. P., (name of county.)

FORM 43.

Section 741.)

Constable's Return to a Warrant of Distress.

I, W. T., constable, of , in the county of , hereby certify to J. S., Esquire, a justice of the peace in and for the county of , that by virtue of this warrant I have made diligent search for the goods and chattels of the within mentioned A. B., and that I can find no sufficient goods or chattels of the said A. B. whereon to levy the sums within mentioned.

Witness my hand, this day of , one thousand nine hundred and .

FORM 44.

(Section 741.)

Warrant for Commitment for Want of Distress.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the county of , and to the keeper of the common gaol of the said county of , at , in the said county.

Whereas (*etc., as in either of the foregoing distress warrants* 39 or 40, *to the asterisk,* * *and then thus*): And whereas, afterwards on the day of , in the year aforesaid, I, the said justice, issued a warrant to all or any of the peace officers of the county of , commanding them, or any of them, to levy the said sums of and by distress and sale of the goods and chattels of the said A. B.: And whereas it appears to me, as well by the return of the said warrant of distress by the peace officer who had the execution of the same, as otherwise, that the said peace officer has made diligent search for the goods and chattels of the said A. B., but that no sufficient distress whereon to levy the sums above mentioned could be found: These are, therefore, to command you, the said peace officers, or any one of you, to take the said A. B., and him safely to convey to the common gaol at aforesaid, and there deliver him to the said keeper, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said A. B. into your custody, in the said common gaol, there to imprison him (and keep him at hard labour *if the order so directs*) for the term of , unless the said several sums, and all the costs and charges of the said distress and of the commitment and of the conveying of the said A. B. to the said common gaol are sooner paid unto you, the said keeper; and for so doing this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S. [SEAL.]
J. P. (name of county.)

FORM 45.

(Section 742.)

Warrant of Distress for Costs upon an Order for Dismissal of an Information or Complaint.

To all or any of the constables and other peace officers in the said county of .

Canada,
Province of ,
County of ,

Whereas on last past, information was laid (*or* complaint was made) before , a justice of the peace in and for the said county of , for that (*etc., as in the order of dismissal*) and afterwards, to wit, on , at , both parties appearing before (*me*) , in order that (*I*) should hear and determine the same, and the several proofs adduced to (*me*) in that behalf, being by (*me*) duly heard and considered, and it manifestly appearing to (*me*) that the said information (*or* complaint) was not proved, (*I*) therefore dismissed the same and adjudged that the said C. D. should pay to the said A. B. the sum of , for his costs incurred by him in his defence in that behalf; and (*I*) ordered that if the said sum for costs was not paid (forthwith), the same should be levied on the goods and chattels of the said C. D., and (*I*) adjudged that in default of sufficient distress in that behalf the said C. D. should be imprisoned in the common gaol of the said county of , at , in the said county of (and there kept at hard labour, *if the order so directed*) for the space of unless the said sum for costs, and all costs and charges of the said distress and of the commitment and of the conveying of the said A. B. to the said common gaol, were sooner paid; * And whereas the said C. D. being now required to pay to the said A. B. the said sum for costs, has not paid the same, or any part thereof, but therein has made default: These are, therefore, to command you, in His Majesty's name, forthwith to make distress of the goods and chattels of the said C. D., and if within the term of days next after the making of such distress, the said last mentioned sum, together with the reasonable charges of taking and keeping the said distress, shall not be paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale to (*me*) that (*I*) may pay and apply the same as by law directed, and may render the overplus (if any) on demand to the said C. D., and if no distress can be found, then to certify the same unto (*me*) (*or* to any other justice of the peace for the said county), that such proceedings may be had therein as to law appertain.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S. [SEAL.]
J. P. (name of county.)

FORM 46.

(Section 742.)

Warrant of Commitment for Want of Distress.

Canada,
Province of ,
County of ,

To all or any of the constables and other peace officers in the said county of , and to the keeper of the common gaol of the said county of , at , in the said county of .

Whereas (*etc., as in form 45 to the asterisk, * and then thus*): And whereas afterwards, on the day of , in the year aforesaid, I, the said justice, issued a warrant to all or any of the peace officers of the said county, commanding them, or any of them, to levy the said sum

of , for costs, by distress and sale of the goods and chattels of the said C. D.: And whereas it appears to me, as well by the return to the said warrant of distress of the peace officer charged with the execution of the same, as otherwise, that the said peace officer has made diligent search for the goods and chattels of the said C. D., but that no sufficient distress whereon to levy the sum above mentioned could be found: These are, therefore, to command you, the said peace officers, or any one of you, to take the said C. D., and him safely convey to the common gaol of the said county, at aforesaid and there deliver him to the keeper thereof, together with this precept: And I hereby command you, the said keeper of the said common gaol, to receive the said C. D. into your custody in the said common gaol, there to imprison him and keep him at hard labour (*if the order so directed*) for the term of , unless the said sum, and all the costs and charges of the said distress and of the committment and of the conveying of the said C. D. to the said common gaol are sooner paid unto you the said keeper; and for your so doing, this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year , at in the county aforesaid.

J. S. [SEAL.]
J. P. (name of county.)

FORM 47.

(Section 743.)

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

O. K.,
J. P. (name of county.)

FORM 48.

(Section 748.)

Complaint by the Party Threatened, for Sureties for the Peace.

Canada,
Province of ,
County of ,

The information (*or* complaint) of C. D., of , in the said county of , (*labourer*), (*if preferred by an attorney or agent, say*—by D. E., his duly authorized agent (*or* attorney), in this behalf), taken upon oath, before me, the undersigned, a justice of the peace, in and for the said county of , at , in the said county of , this day of , in the year , who says that A. B., of , in the said county did, on the day of (instant or last past), threaten the said C. D. in the words or to the effect following, that is to say: (*set them out, with the circumstances under which they were used*); and that from the above and other threats used by the said A. B. towards the said C. D., he, the said C. D., is afraid that the said A. B. will do him some bodily injury, and therefore prays that the said A. B. may be required to find sufficient sureties to keep the peace and be of good behaviour towards him, the said C. D.; and the said C. D. also says that he does not make this complaint against nor require such sureties from the said A. B. from any malice or ill-will, but merely for the preservation of his person from injury.

FORM 49.

(Sections 748 and 1058.)

Form of Recognizance to Keep the Peace.

Canada,
Province of ,
County of ,

Be it remembered that on the day of , in the year , A. B. of , (*labourer*), L. M. of , (*grocer*), and N. O. of , (*butcher*), personally came before (*us*) the undersigned, (*two*) justices of the peace for the county of , and severally acknowledged themselves to owe to our Lord the King the several sums following, that is to say: the said A. B. the sum of , and the said L. M. and N. O. the sum of , each, of good and lawful money of Canada, to be made and levied of their goods and chattels, lands and tenements respectively, to the use of our said Lord the King, his heirs and successors, if he, the said A. B., fail in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned at before us.

J. S.,
J. T.,
J. P. (name of county.)

The condition of the within (*or above*) written recognizance is such that if the within bound A. B. (of, etc.), keeps the peace and is of good behaviour towards his Majesty and his liege people, and specially towards C. D. (of, etc.) for the term of now next ensuing, then the said recognizance to be void, otherwise to stand in full force and virtue.

FORM 50.

(Section 748.)

Form of Commitment in Default of Sureties.

Canada,
Province of ,
County of ,

To all or any of the constables and other peace officers in the county of , and to the keeper of the common gaol of the said county, at , in the said county.

Whereas on the day of (*instant*), complaint on oath was made before the undersigned (*or* J. L., Esquire), a justice of the peace in and for the said county of , by C. D., of , in the said county, (*labourer*), that A. B., of (etc.), on the day of , at aforesaid, did threaten (*etc., follow to the end of complaint, as in form above, in the past tense, then*): And whereas the said A. B. was this day brought and appeared before me, the said justice (*or* J. L., Esquire, a justice of the peace in and for the said county of), to answer unto the said complaint; and having been required by me to enter into his own recognizance in the sum of , with two sufficient sureties in the sum of each, to keep the peace and be of good behaviour towards His Majesty and his liege people, and especially towards the said C. D., has refused and neglected, and still refuses and neglects, to find such sureties: These are, therefore, to command you, and each of you, to take the said A. B. and him safely to convey to the common gaol at aforesaid, and there to deliver him to the keeper thereof, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said A. B. into your custody in the said common gaol, there to imprison

him for the space of , or until he shall otherwise be discharged in due course of law, unless he, in the meantime, finds sufficient sureties to keep the peace as aforesaid.

Given under my hand and seal, this day of , in the year , at in the county aforesaid.

J. S., [SEAL.]
J. P. (name of county.)

FORM 51.

(Section 750.)

Form of Recognizance to try the Appeal.

Canada,)
County of ,)
Province of ,)

Be it remembered that on , A. B., of (*labourer*), and L. M., of , (*grocer*), and N. O., of , (*yeoman*), personally came before the undersigned , a justice of the peace in and for the said county of , and severally acknowledged themselves to owe to our Sovereign Lord the King, the several sums following, that is to say, the said A. B. the sum of , and the said L. M. and N. O. the sum of , each, of good and lawful money of Canada, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Lord the King, his heirs and successors, if he the said A. B. fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned at , before me.

J. S.,
J. P. (name of county.)

The condition of the within (*or* the above) written recognizance is such that if the said A. B. personally appears at the (next) General Sessions of the Peace (*or other Court discharging the functions of the Court of General Sessions, as the case may be*), to be holden at , on the day of , next, in and for the said county of , and tries an appeal against a certain conviction, bearing date the day of , (*instant*), and made by (*me*) the said justice, whereby he, the said A. B., was convicted, for that he, the said A. B., did, on the day of , at , in the said county of , (*here set out the offence as stated in the conviction*); and also abides by the judgment of the court upon such appeal and pays such costs as are by the court awarded, then the said recognizance to be void, otherwise to remain in full force and virtue.

Form of Notice of such Recognizance to be given to the Appellant and his Sureties.

Take notice, that you, A. B., are bound in the sum of , and you, L. M. and N. O., in the sum of , each, that you the said A. B. will personally appear at the next General Sessions of the Peace to be holden at , in and for the said county of , and try an appeal against a conviction (*or* order) dated the day of , (*instant*), whereby you A. B. were convicted of (*or* ordered, *etc.*), (*stating offence or the subject of the order shortly*), and abide by the judgment of the court upon such appeal and pay such costs as are by the court awarded, and unless you the said A. B. personally appear and try such appeal and abide by such judgment and pay such costs accordingly, the recognizance entered into by you will forthwith be levied on you, and each of you.

Dated at , this day of , one thousand nine hundred and .

FORM 52.

(Section 759.)

Certificate of Clerk of the Peace that the Costs of an Appeal are not paid.

Office of the clerk of the peace for the county of .

Title of the Appeal.

I hereby certify that at a Court of General Sessions of the Peace, (*or other court discharging the functions of the Court of General Sessions, as the case may be*), holden at , in and for the said county, on last past, an appeal by A. B. against a conviction (*or* order) of J. S., Esquire, a justice of the peace in and for the said county, came on to be tried, and was there heard and determined, and the said Court of General Sessions (*or other court, as the case may be*) thereupon ordered that the said conviction (*or* order) should be confirmed (*or* quashed), and that the said (appellant) should pay to the said (respondent) the sum of , for his costs incurred by him in the said appeal, and which sum was thereby ordered to be paid to the clerk of the peace for the said county, on or before the day of (*instant*), to be by him handed over to the said (respondent), and I further certify that the said sum for costs has not, nor has any part thereof, been paid in obedience to the said order.

Dated at , this day of , one thousand nine hundred and .

G. H.,
Clerk of the Peace.

FORM 53.

(Section 759.)

Warrant of Distress for Costs of an Appeal against a Conviction or Order.

To all or any of the constables and other peace officers in the said county of .

Canada,
Province of ,
County of .

Whereas (*etc., as in the warrants of distress, forms 39 or 40, and to the end of the statement of the conviction or order, and then thus*): And whereas the said A. B. appealed to the Court of General Sessions of the Peace (*or other Court discharging the functions of the Court of General Sessions, as the case may be*), for the said county, against the said conviction or order, in which appeal the said A. B. was the appellant, and the said C. D. (*or* J. S., Esquire, the justice of the peace who made the said conviction (*or* order) was the respondent, and which said appeal came on to be tried and was heard and determined at the last General Sessions of the Peace (*or other court, as the case may be*) for the said county, holden at , on ; and the said court thereupon ordered that the said conviction (*or* order) should be confirmed (*or* quashed) and that the said (appellant) should pay to the said (respondent) the sum of for his costs incurred by him in the said appeal, which said sum was to be paid to the clerk for the said county, on or before the day of , one thousand nine hundred and , to be by him handed over to the said C. D.; and whereas the clerk of the peace of the said county has, on the day of (*instant*), duly certified that the said sum for costs had not been paid: * These are, therefore, to command you, in His Majesty's name, forthwith to make distress of the goods and chattels of the said A. B., and if, within the term of days next after the making of such distress, the said last mentioned sum, together with the reasonable charges of taking and keeping the said distress, are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale to the clerk

of the peace for the said county of , that he may pay and apply the same as by law directed; and if no such distress can be found, then to certify the same unto me or any other justice of the peace for the said county, that such proceedings may be had therein as to law appertain.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

O. K., [SEAL.]
J. P. (name of county.)

FORM 54.

(Section 759.)

Warrant of Commitment for want of Distress in the last case.

Canada,
County of ,
Province of ,

To all or any of the constables and other peace officers in the said county of , and to the keeper of the common gaol of the said county at , in the said county.

Whereas (*etc., as in form 53, to the asterisk * and then thus*): And whereas, afterwards, on the day of , in the year aforesaid, I, the undersigned, issued a warrant to all or any of the peace officers in the said county of , commanding them, or any of them, to levy the said sum of , for costs, by distress and sale of the goods and chattels of the said A. B.: And whereas it appears to me, as well by the return to the said warrant of distress of the peace officer who was charged with the execution of the same, as otherwise, that the said peace officer has made diligent search for the goods and chattels of the said A. B., but that no sufficient distress whereon to levy the said sum above mentioned could be found: These are, therefore, to command you, the said peace officers, or any of you, to take the said A. B., and him safely to convey to the common gaol of the said county of , at aforesaid, and there deliver him to the said keeper thereof, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said A. B. into your custody in the said common gaol, there to imprison him for the term of , unless the said sum and all costs and charges of the said distress and of the commitment and of the conveying of the said A. B. to the said common gaol, are sooner paid unto you, the said keeper; and for so doing this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

O. K., [SEAL.]
J. P. (name of county.)

FORM 55.

(Section 799.)

Conviction.

Canada,
Province of ,
County of ,

Be it remembered that on the day of , in the year , at , A. B., being charged before me, the undersigned, , of the said (*city*) (and consenting to my trying the charge summarily), is convicted before me, for that he, the said A. B.,

(*etc., stating the offence, and the time and place when and where committed*), and I adjudge the said A. B., for his said offence, to be imprisoned in the (and there kept at hard labour, *if it is so adjudged*) for the term of .

Given under my hand and seal, the day and year first above mentioned, at aforesaid.

G. F., [SEAL.]
Police magistrate
for .
(*or as the case may be*).

FORM 56.

(Section 799.)

Conviction upon a Plea of Guilty.

Canada,
Province of ,
County of .

Be it remembered that on the day of , in the year , at , A. B., being charged before me, the 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 at hard labour, *if it is so adjudged*) for the term of .

Given under my hand and seal, the day and year first above mentioned, at aforesaid.

G. F., [SEAL.]
Police magistrate
for .
(*or as the case may be*).

FORM 57.

(Section 799.)

Certificate of Dismissal.

Canada,
Province of ,
County of .

I, the undersigned, , of the city (*or as the case may be*) of , certify that on the day of in the year , at aforesaid, A. B. being charged before me (and consenting to my trying the charge summarily), for that he, the said A. B., (*etc., stating the offence charged, and the time and place when and where alleged to have been committed*), I did after having summarily tried the said charge, dismiss the same.

Given under my hand and seal, this day of , in the year , at aforesaid.

G. F., [SEAL.]
Police magistrate
for .
(*or as the case may be*).

FORM 58.

(Section 813.)

Certificate of Dismissal.

Canada,
Province of ,
County of .

, justices of the peace for the of , (*or if a recorder, etc.*, I a , of the of , *as the case may be*), do hereby certify that on the day of , in the year , at , in the said of , A. B. was brought before us, the said justices (*or* me, the said), charged with the following offence, that is to say (*here state briefly the particulars of the charge*), and that we, the said justices, (*or* I, the said) thereupon dismissed the said charge.

Given under our hands and seals (*or* my hand and seal), this day of , in the year , at aforesaid.

J. P. [SEAL.]
J. R. [SEAL.]
or S. J. [SEAL.]

FORM 59.

(Section 814.)

Conviction.

Canada,
Province of ,
County of .

Be it remembered that on the day of , in the year , at , in the county of , A. B. is convicted before us, J. P. and J. R., justices of the peace for the said county (*or* me, S. J., recorder, of the , of , *or as the case may be*) for that he, the said A. B., did (*specify the offence and the time and place when and where the same was committed, as the case may be, but without setting forth the evidence*), and we, the said J. P. and J. R. (*or* I, the said S. J.), adjudge the said A. B., for his said offence, to be imprisoned in the with (*or* without) hard labour (*in the discretion of the justice*) for the space of , (*or* we) (*or* I) adjudge the said A. B., for his said offence, to forfeit and pay (*here state the penalty actually imposed*), and in default of immediate payment of the said sum, to be imprisoned in the with (*or* without) hard labour (*in the discretion of the justice*) for the term of , unless the said sum is sooner paid.

Given under our hands and seals (*or* my hand and seal), the day and year first above mentioned.

J. P. [SEAL.]
J. R. [SEAL.]
or S. J. [SEAL.]

FORM 60.

(Section 827.)

Form of Record when the Prisoner Pleads Guilty.

Canada,
Province of ,
County of .

Be it remembered that A. B., being a prisoner in the gaol of the said county, on a charge of having on the day of , in the

year , stolen, etc., (*one cow, the property of* C. D., *or as the case may be, stating briefly the offence*), and being brought before me (*describe the judge*) on the day of in the year , and asked by me if he consented to be tried before me without the 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.

FORM 61.

(Section 833.)

Form of Record when the Prisoner Pleads Not Guilty.

Canada,
Province of ,
County of .

Be it remembered that A. B. being a prisoner in the gaol of the said county, committed for trial on a charge of having on day of , in the year , stolen, etc., (*one cow, the property of* C. D., *or as the case may be, stating briefly the offence*) and having been brought before me (*describe the judge*) on the day of , in the year , and asked by me if he consented to be tried before me without the intervention of a jury, consented to be so tried; and that upon the day of , in the year , the said A. B., being again brought before me for trial, and declaring himself ready, was arraigned upon the said charge and pleaded not guilty; and after hearing the evidence adduced, as well in support of the said charge as for the prisoner's defence (*or as the case may be*), I find him to be guilty of the offence with which he is charged as aforesaid, and I accordingly sentence him to (*here insert such sentence as the law allows and the judge thinks right*), (*or* I find him not guilty of the offence with which he is charged, and discharge him accordingly).

Witness my hand at , in the county of , this day of , in the year .

O. K.,
Judge.

FORM 62.

(Section 842.)

Warrant to Apprehend Witness.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of .

Whereas it having been made to appear before me, that E. F. of , in the said county of , is likely to give material evidence on behalf of the prosecution (*or* defence, *as the case may be*) on the trial of a certain charge of (*as theft, or as the case may be*), against A. B., and that the said E. F. was duly subpœnaed (*or* bound under recognizance) to appear on the day of , in the year , at , in the said county at o'clock (forenoon *or* afternoon, *as the case may be*), before me, to testify what he knows concerning the said charge against the said A. B.

And whereas proof has this day been made before me, upon oath of such subpœna having been duly served upon the said E. F., (*or* of the said E. F. having been duly bound under recognizance to appear before me, *as the case may be*); and whereas the said E. F. has neglected to appear at the trial and place appointed, and no just excuse has been offered for such neglect: These are, therefore, to command you to take the said E. F., and to bring him and have him forthwith before me, to testify what he knows concerning the said charge against the said A. B., and also to answer his contempt for such neglect.

Given under my hand this day of , in the year .

O. K.,
Judge.

FORM 63.

(Sections 845 and 856.)

Headings of Indictment.

In the (*name of the court in which the indictment is found*).
The jurors for our Lord the King present that
(*Where there are more counts than one, add the beginning of each count*):
The said jurors further present that .

FORM 64.

(Section 852.)

Examples of the manner of stating offences.

(*a*) A. murdered B. at , on .

(*b*) A. stole a sack of flour from a ship called the , at , on .

(*c*) A. obtained by false pretences from B., a horse, a cart and the harness of a horse at , on .

(*d*) A. committed perjury with intent to procure the conviction of B. for an offence punishable with penal servitude, namely, robbery, by swearing on the trial of B. for the robbery of C. at the Court of Quarter Sessions for the county of Carleton, held at Ottawa, on the day of , 19 ; first, that he, A., saw B. at Ottawa, on the day of ; secondly, that B. asked A. to lend B. money on a watch belonging to C.; thirdly, etc.

or

(*e*) The said A. committed perjury on the trial of B. at a Court of Quarter Sessions held at Ottawa, on for an assault alleged to have been committed by the said B. on C. at Ottawa, on the day of by swearing to the effect that the said B. could not have been at Ottawa, at the time of the alleged assault, inasmuch as the said A. had seen him at that time in Kingston.

(*f*) A., with intent to maim, disfigure, disable or do grievous bodily harm to B. or with intent to resist the lawful apprehension or detainer of A. (*or* C.), did actual bodily harm to B. (*or* D.).

(*g*) A., with intent to injure or endanger the safety of persons on the Canadian Pacific Railway, did an act calculated to interfere with an engine, a tender, and certain carriages on the said railway on at by (*describe with so much detail as is sufficient to give the accused reasonable information as to the acts or omissions relied on against him, and to identify the transaction*).

(*h*) A. published a defamatory libel on B. in a certain newspaper, called the , on the day of 19 , 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*).

FORM 65.

(Section 879.)

Certificate of Indictment being Found.

Canada,
Province of ,
County of .

I hereby certify that at a Court of (Oyer and Terminer, *or* General Gaol Delivery, *or* General Sessions of the Peace) holden in and for the county of , at , in the said (county), on a bill of indictment was found by the grand jury against A. B., therein described as A. B., late of , (*labourer*), for that he (*etc., stating shortly the offence*), and that the said A. B. has not appeared or pleaded to the said indictment.

Dated this day of , in the year

Z. X.
(*Title of officer.*)

FORM 66.

(Section 880.)

Warrant to Apprehend a Person Indicted.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of .

Whereas it has been duly certified by J. D., clerk of the (*name the court*) (*or* E. G., deputy clerk of the Crown *or* clerk of the peace, *or as the case may be*), in and for the county , that (*etc., stating the certificate*): These are, therefore, to command you in His Majesty's name forthwith to apprehend the said A. B., and to bring him before (*me*) or some other justice or justices of the peace in and for the said county, to be dealt with according to law.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (name of county.)

FORM 67.

(Section 881.)

Warrant of Commitment of a Person Indicted.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of , and the keeper of the common gaol at in the said county of .

Whereas by a warrant under the hand and seal of , (*a*) justice of the peace in and for the said county of , dated after reciting that it had been certified by J. D. (*etc., as in the certificate*), the said justice of the peace commanded all or any of the constables or peace officers of the said county, in His Majesty's name, forthwith to apprehend the said A. B., and to bring him before (*him*) the said justice of the peace

or before some other justice or justices in and for the said county, to be dealt with according to law; and whereas the said A. B. has been apprehended under and by virtue of the said warrant, and being now brought before (*me*) it is hereupon duly proved to (*me*) upon oath that the said A. B. is the same person who is named and charged as aforesaid in the said indictment: These are therefore to command you, the said constables and peace officers, or any of you, in His Majesty's name, forthwith to take and convey the said A. B. to the said common gaol at , in the said county of , and there to deliver him to the keeper thereof, together with this precept: And (*I*) hereby command you the said keeper to receive the said A. B. into your custody in the said gaol, and him there safely to keep until he shall thence be delivered by due course of law.

Given under (*my*) hand and seal, this day of in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (name of county.)

FORM 68.

(Section 882.)

Warrant to detain a Person indicted who is already in Custody for another Offence.

Canada,
Province of ,
County of .

To the keeper of the common gaol at , in the said county of .

Whereas it has been duly certified by J. D., clerk of the (*name the court*) (*or* deputy clerk of the Crown *or* clerk of the peace of and for the county of , (*or as the case may be*), that (*etc., stating the certificate*); And whereas (*I am*) informed that the said A. B. is in your custody in the said common gaol at aforesaid, charged with some offence, or other matter; and it being now duly proved upon oath before (*me*) that the said A. B., so indicted as aforesaid, and the said A. B., in your custody, as aforesaid, are one and the same person: These are therefore to command you, in His Majesty's name, to detain the said A. B. in your custody in the common gaol aforesaid, until by a writ of *habeas corpus* he shall be removed therefrom, for the purpose of being tried upon the said indictment, or until he shall otherwise be removed or discharged out of your custody by due course of law.

Given under (*my*) hand and seal, this day of in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (name of county.)

FORM 69.

(Section 925.)

Challenge to Array.

Canada,
County of
Province of

The King v. C. D. } The said A. B., who prosecutes for our Lord the King (*or* the said C. D., *as the case may be*) challenges the array of the panel on the ground that it was returned by X. Y., sheriff of the county of (*or* E. F., deputy of X. Y., sheriff of the county of (*as the case may be*), and that the said X. Y. (*or* E. F., *as the case may be*), was guilty of partiality (*or* fraud, *or* wilful misconduct) on returning said panel.

FORM 70.

(Section 936.)

Challenge to Poll.

Canada,
Province of
County of

The King
v.
C. D.

The said A. B., who prosecutes, *etc.* (or the said C. D., *as the case may be*) challenges G. H., on the ground that his name does not appear in the panel, [*or* that he is not indifferent between the King and the said C. D., *or* that he was convicted and sentenced to death, *or* penal servitude, *or* imprisonment with hard labour, *or* exceeding twelve months, *or* that he is disqualified as an alien.]

FORM 71.

(Section 1068.)

Certificate of Execution of Judgment of Death.

I, A. B., surgeon (*or as the case may be*) of the (*describe the prison*), hereby certify that I, this day, examined the body of C. D. on whom judgment of death was this day executed in the said prison and that on such examination I found that the said C. D. was dead.

(Signed), A. B.

Dated this day of , in the year .

FORM 72.

(Section 1068.)

Declaration of Sheriff and Others.

We, the undersigned, hereby declare that judgment of death was this day executed on C. D., in the (*describe the prison*) in our presence.

Dated this day of , in the year .

E. F., Sheriff of———
L. M., Justice of the Peace for———
G. H., Gaoler of———
etc., etc.

FORM 73.

(Section 1097.)

Certificate of Non-appearance to be endorsed on the Defendant's Recognizance.

I hereby certify that the said A. B. has not appeared at the time and place in the said condition mentioned, but therein has made default, by reason whereof the within written recognizance is forfeited.

Dated at .

J. S., [SEAL.]
J. P., (*name of county.*)

FORM 74.

(Section 1105.)

Writ of Fieri Facias.

Edward VII., by the Grace of God, etc.

To the sheriff of , greeting:

You are hereby commanded to levy of the goods and chattels, lands and tenements, of each of the persons mentioned in the roll or extract to this writ annexed, all and singular the debts and sums of money upon them severally imposed and charged, as therein is specified; and if any of the said several debts cannot be levied, by reason that no goods or chattels, lands or tenements can be found belonging to the said persons, respectively, then, and in all such cases, that you take the bodies of such persons, and keep them safely in the gaol of your county, there to abide the judgment of our court (*as the case may be*) upon any matter to be shown by them, respectively, or otherwise to remain in your custody as aforesaid, until such debt is satisfied unless any of such persons respectively gives sufficient security for his appearance at the said Court, on the return day hereof, for which you will be held answerable; and what you do in the premises make appear before us in our court (*as the case may be*), on the day of term next, and have then and there this writ. Witness, etc., G. H., clerk (*as the case may be*).

FORM 75.

(Section 1133.)

Justices' Return.

RETURN of convictions made by me (*or* us, *as the case may be*), during the quarter ending , 19 .

Name of the Prosecutor.	Name of the Defendant.	Nature of the Charge.	Date of Conviction.	Name of Convicting Justice.	Amount of Penalty. Fine or Damage.	Time when paid or to be paid to the said Justice.	To whom paid over by the said Justice.	If not paid, why not, and general observations if any.

J. S., Convicting Justice.

or

J. S. and O. K., Convicting Justices (*as the case may be*).

APPENDIX A.

GENERAL FORMS.

FORMS IN CERTIORARI PROCEEDINGS.

NOTICE OF APPLICATION FOR CERTIORARI.

In the (*Name of Court to be applied to*).
The King v. A. B.

To
J. S., Esquire,
One of His Majesty's Justices of the Peace (*or* Police Magistrate) for the of

TAKE NOTICE that, inasmuch as A. B., of was on the day of 19 , at the of in the of , convicted by you of having (*Here state the offence, as in the conviction*), a motion will on the day of instant at ten o'clock in the forenoon, or so soon thereafter as counsel can be heard, be made on behalf of the said A. B. before a Judge of this Honourable Court sitting at for an order for a writ of *certiorari* to issue out of this Court, directed to you and to the Clerk of the Peace for the of , for the removal of the said conviction into this Court for the purpose of having the same quashed and the said A. B. discharged therefrom, upon the ground that the said conviction is invalid, (*or*, that the penalty imposed is illegal and beyond or in excess of your jurisdiction, *or* as the case may be), for the following reasons: (*Here set out the reasons relied upon*).

Dated at this day of 19 .

C. D.,
Solicitor for the said A. B.

AFFIDAVIT OF SERVICE OF NOTICE.

In the (*Name of Court to be applied to*).

The King v. A. B.

I, of , being duly sworn, make oath and say:—

1. That on the day of 19 , at I did serve J. S., the Justice of the Peace (or Police Magistrate), named in the notice hereunto annexed and marked exhibit A, with a true copy of the said notice, by then and there delivering to and leaving with him the said true copy of this notice.

2. That I was present at the trial and conviction of the said A. B., of the offence mentioned in the said notice; and I personally know the person so served by me as aforesaid to be the said J. S., the Justice (*or* Police Magistrate) by whom the said conviction was made, (*or* otherwise, as the case may be, showing the means of identification of the Justice or Magistrate).

SWORN, etc.

MOTION FOR CERTIORARI.

In the (*Name of Court applied to*).

The King v. A. B.

MOTION, on the part of the defendant, that,

1. In view of the affidavit herewith filed of in verification of exhibits B, C, D, and E as true copies of the proceedings therein mentioned (or,—if copies of the proceedings cannot be obtained,—" *explaining the purport of the proceedings therein mentioned and setting forth the*

efforts made to obtain and the reasons for not being able to obtain copies thereof").

2. And, in view of the hereunto subjoined affidavit of the defendant and of the facts therein alleged and the grounds thereby appearing.

A writ of *certiorari* be ordered to issue for the removal into this Honourable Court of the said conviction and warrant of commitment, for the purpose of having the same quashed and the defendant discharged therefrom.

AFFIDAVIT AS TO PROCEEDINGS.

In the (*Name of Court applied to*).

The King v. A. B.

I, of , being duly sworn, made oath and say:—

1. That the several paper writings hereunto annexed, marked respectively B, C, D and E, to this my affidavit, are true copies of the original documents of which they severally purport to be copies and were copied by me from the originals now in the hands of J. S. Esquire, a Justice of the Peace (*or* Police Magistrate) for the , of , (*or* now on file in the office of the clerk of the peace for the of).

2. That I have examined and carefully compared the warrant of commitment now in the hands of the keeper of the common gaol for the county of , (*or* as the case may be), upon which the said A. B. is now held in custody in the said gaol, (*or* is committed under the said conviction, *or* as the case may be); and that the paper writing hereunto annexed marked exhibit , to this, my affidavit, is a true copy of the said warrant of commitment.

SWORN, etc.

AFFIDAVIT OF DEFENDANT.

In the (*Name of Court applied to*).

The King v. A. B.

I, A. B., of , in the of , being duly sworn, make oath and say:—

1. I am the defendant above named.

2. (*Set forth the facts showing the conviction and warrant of commitment to be bad, and the grounds upon which the application for certiorari and for quashing the conviction are based.*)

SWORN, etc.

ORDER FOR CERTIORARI.

In the (*Name of Court*),

Tuesday, the day of

Present (*Name of Judge.*)

The King v. A. B.

UPON the application of the said A. B., upon reading the notice served herein and the affidavit of service thereof upon J. S. Esquire, the justice of the peace (*or* police magistrate) therein named and upon reading the affidavit of filed, and the exhibits therein referred to, and the affidavit of the said A. B. and the other papers filed on his behalf upon this motion, and upon hearing what was said by the respective solicitors (*or* counsel) for the said A. B., and for the prosecutor E. F., and also for the convicting or committing magistrate (*or*, as the case may be).

IT IS ORDERED that a writ of *certiorari* do issue out of this Court directed to J. S. Esquire, one of His Majesty's justices of the peace (*or* police magistrate) for the of , (*as the case may be*), to remove

and return into this Court all and singular the conviction and all other proceedings, and all things touching the same, had and taken against the said A. B. before the said justice of the peace (*or* police magistrate) upon the information of for that the said A. B., etc., (*Here set out the charge.*)

WRIT OF CERTIORARI TO A JUSTICE OF THE PEACE TO RETURN A CONVICTION.

Canada, Province of , County of , } GEORGE THE FIFTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the seas, KING, Defender of the Faith.

To , one of our justices, assigned to keep our peace, in and for the county (*or* district) of and also to hear and determine divers offences in the said (*county*) committed.

GREETING:

WE, being willing for certain reasons that all and singular records of conviction of whatsoever trespasses and contempts against the Criminal Code of Canada (*or* against the form of a certain statute, *etc.*), whereof A. B. is before you convicted (as it is said) be sent by you before us, DO COMMAND YOU that you send your hand and seal before the Honourable in days from (*or* immediately on the receipt of this writ) all and singular the said records of conviction with all things touching the same, as fully and perfectly as they have been made by you and now remain in your custody or power, together with this our writ, that we may further cause to be done therein what of right and according to law we shall see fit.

IN WITNESS WHEREOF, WE have caused the seal of our Court of to be hereunto affixed at our (*city*) of this day of in the year of our reign .

Clerk of the Crown.

CERTIORARI—RECOGNIZANCE.

BE IT REMEMBERED, that, on the day of in the year of the reign of Our Sovereign Lord, GEORGE THE FIFTH, (*etc.*), G. H. of (*merchant*), and M. W. of (*gentleman*) came before me, J. S. Esquire, one of the keepers of the peace and justices of Our Lord, the King, in and for the (*county*) of and acknowledged to owe to Our Sovereign Lord the King the sum of to be levied upon their goods and chattels, lands and tenements to His Majesty's use, upon condition that if A. B. shall prosecute with effect, without any wilful or affected delay, at his own proper costs and charges, a writ of CERTIORARI issued out of the Court of our said Lord the King, at to remove into the said Court all and singular the records of conviction of whatsoever trespasses and contempts against the Criminal Code of Canada (*or* against the form of a certain statute, *etc.*), whereof the said A. B. is convicted before me, the said J. S., and shall pay to the prosecutors within next after the said record of conviction (*or* order) shall be confirmed in the said Court, all their said full costs and charges to be taxed according to the course of the said Court, then this recognizance to be void, or else to remain in full force.

Taken and acknowledged the day and year aforesaid, at before me,

J. S.

G. H.
M. W.

NOTE.—A blank recognizance is usually transmitted with the writ of certiorari from the office of the Court issuing it and when taken and acknowledged the recognizance is returned with the writ.

If the conviction be quashed, the recognizance is cancelled by being struck through, and is marked in the margin "discharged, because the conviction is quashed."

FORM OF AFFIDAVIT OF JUSTIFICATION BY SURETY.

In the

The King v. A. B.

I, E. F., of the of in the county of (*occupation*) make oath and say:

1. That I am the surety (*or* one of the sureties, as the case may be) proposed and named for the above named A. B. in the recognizance in this matter hereunto annexed.

2. That I am a freeholder (*or* householder) residing at No. St. in of in the said county of

3. That I am worth property to the amount of one hundred dollars over and above what will pay all my debts and liabilities and every other sum for which I am now liable, or for which I am bail, or surety in any other matter.

4. That I am not bail or surety for any person except in this matter and except (*stating in what matter and for how much, if any*).

5. That my said property to the amount of the said sum of $100 consists of household furniture (*or* farm stock, implements, money deposited in bank or bank stock or land, (*describing it, or whatever it consists of*), to the value of about dollars.

Sworn before me at the of in the County of on the day of A. D. 19 . E. F.

Signed: O. P.,
A Commissioner, etc.

FORM OF AFFIDAVIT OF EXECUTION.

In the

The King v. A. B.

I, M. N., of the of in the county of (*occupation*) make oath and say:

1. That I was personally present and did see the hereunto annexed recognizance duly signed, sealed and executed by A. B., and E. F. and G. H., the parties thereto, and by R. S., the justice of the peace for the said county of , before whom the same was taken and acknowledged.

2. That the said recognizance was so executed, taken and acknowledged at the of in the said county of .

3. That I know the said parties and the said justice.

4. That I am a subscribing witness to the said recognizance.

Sworn before me at
in the county of
this day of , A.D. 19 .
A Commissioner.

RETURN TO A WRIT OF CERTIORARI.

(*To be Endorsed on the Certiorari.*)

The answer of the justice of the peace or police magistrate within mentioned.

The execution of this writ appears in the schedule hereunto annexed.

Justice of the peace,
(*or* police magistrate.)

SCHEDULE.

(*To be written as a separate document.*)

I, one of the justices of the peace of Our Sovereign Lord the King, assigned to keep the peace within the said (*county*) of

and to hear and determine divers offences committed in the said (*county*), by virtue of this writ of *certiorari* to me delivered, DO, under my seal, CERTIFY unto His Majesty, in His Court of , the record of conviction and all proceedings taken before me, of which mention is made in the said writ.

In witness whereof, I have hereunto set my hand and seal at the of this day of A.D. 19 .

All the proceedings should be attached to the *certiorari* and returned as required by the writ.

If the conviction has been already filed with the clerk of the peace, the return will be made by the latter; and the justice of the peace will, in the schedule to his own return, explain the fact, as follows:—

SUBSTITUTED SCHEDULE.

I, , one of the justices of the peace for Our Sovereign Lord, the King, assigned to keep the peace within the said of , do certify that, before the receipt of the writ of *certiorari*, the record of conviction and all proceedings taken before me of which mention is made in the said writ were sent and delivered by me to the clerk of the peace of the said , of , according to law and at the time of the receipt of the said writ by me I had not nor have I now any of the said proceedings remaining in my custody, control or keeping.

In witness whereof I have hereunto set my hand and seal at the of this day of A.D. 19 .

FORM OF NOTICE OF OBJECTION TO BE TAKEN TO CERTIORARI.

In the (*Name of Court*).

The King v. A. B.

TAKE NOTICE that upon the motion to quash the conviction of you, the said A. B., objection will be taken on behalf of C. D., the prosecutor, (*or* of G. H., the convicting magistrate *or* convicting justice), that the writ of *certiorari* herein and the return thereto are invalid, on the ground that six clear days' previous notice was not given to the said convicting magistrate (*or* convicting justice), of the application for the said *certiorari*, (*or* that the recognizance filed is insufficient, for the following reasons, [stating them], *or* that there has been delay [*mentioning the circumstances*] in prosecuting the said writ of *certiorari*, *etc.*, *etc.*, *or* as the case may be).

Dated at , this day of , A.D. 19 .

E. F.,
Solicitor for the said C. D., prosecutor, (*or* G. H., the magistrate *or* justice above named).

To the said A. B.

NOTICE OF MOTION TO SUEPRSEDE CERTIORARI.

In the (*Name of Court*).

The King v. A. B.

TAKE NOTICE that on the day of instant at ten o'clock in the forenoon or so soon thereafter as counsel can be heard, a motion on behalf of C. D., the prosecutor, (*or* of G. H., the convicting magistrate *or* convicting justice), will be made before a Judge of this honourable Court, sitting at , for an order superseding and quashing the writ of *certiorari* issued herein and for the return of the conviction and other proceedings and papers, to the said convicting magistrate (*or* convicting justice *or* to the clerk of the Crown and peace for the county [*or* district] of), on the ground that no notice was given to the said magistrate (*or* justice), six clear days before the application for the said

writ as required by the statute in that behalf, (*or* that the notice was insufficient [*giving reasons*], *or* that no recognizance was filed as required by law, *or* that the recognizance filed is insufficient [*giving reasons*], or was not duly entered into and executed [*giving reasons*], *or* that there has been delay [*giving the circumstances*] in prosecuting the said writ of *certiorari*, *etc.*, *etc.*, (*or* as the case may be), and for an order directing you, the said defendant, A. B., to pay to the said prosecutor, (*or* the convicting magistrate *or* justice), his costs of and incidental to the application for the said writ of *certiorari* and this motion, and for such further order as may seem meet.

AND TAKE NOTICE that upon this motion will be read the affidavit of the exhibits therein referred to, and the proceedings and papers herein.

Dated at , this day of , A.D. 19

E. F.,
Solicitor for the said C. D., prosecutor (*or* G. H., the magistrate, *or* justice above named).

To the said A. B.,
and to
his Solicitor.

AFFIDAVIT IN SUPPORT OF MOTION TO SUPERSEDE CERTIORARI.

In the (*Name of Court*).

THE KING v. A. B.

I, , of the of in the county (*or* district) of , make oath and say:

1. That I am the prosecutor (*or* the magistrate *or* justice) named in the writ of *certiorari* issued herein, a true copy of which is now shown to me marked Exhibit A.

2. That the notice of motion for the said writ of *certiorari* was served on the magistrate (*or* justice, *or me*) less than six clear days, *etc.*, (*Here state the facts clearly*) [*or*, if no notice at all was served on the magistrate *or* justice, state the fact, *or* if the objection is as to the insufficiency of the sureties, state it fully, *or* if the ground of the motion is delay in prosecuting the writ and in moving to quash, or whatever else is or are the grounds of the motion, set out the facts relied on.]

SWORN, *etc.*

MOTION PAPER ON APPLICATION TO QUASH.

In the
Before the Court the day of
A.D. 19 .

The King against A. B.

Motion on behalf of the above named A. B. upon reading the writ of *certiorari* granted herein on the day of , A.D. 19 , and the papers filed in Chambers on the application therefor, the return to the said writ and the papers thereto attached, and the recognizance also filed for an order calling upon C. D., Esquire, Justice of the Peace (*or* Police Magistrate), for the of , and E. F. (*the informant*), upon notice to them of such order to be given to them respectively, to shew cause why the conviction of the said A. B., upon the information of the said E. F. for that he did (*set out the charge as in the conviction*), should not be quashed with costs upon the following, among other grounds: (*State the grounds*).

Of Counsel for the said A. B.

RULE NISI TO QUASH A CONVICTION.

The King v. A. B.

In the
day, the day of
A.D. 19 .

Upon the application of the said A. B. upon reading the writ of *certiorari* issued on the day of , A.D. 19 , and the papers filed in Chambers on the application therefor, the return of C.D., Esquire, justice of the peace (*or* police magistrate), for the of , or the clerk of the peace for the county of (*as the case may be*), to the said writ and the papers thereto attached, and also the recognizance entered into by the said A.B., with a surety (*or* sureties) also filed, and upon hearing counsel for the said A. B.

It is ordered that C.D., Esquire, justice of the peace (*or* police magistrate), for the of and E.F., the prosecutor, upon notice to them of this order, to be given to them respectively, shall, on the day of , A.D. 19 , at o'clock, in the forenoon, or so soon thereafter as counsel can be heard before this Court at , shew cause why a certain conviction made by the said C.D., justice of the peace (*or* police magistrate), on the information of the said E.F., whereby the said A.B. was convicted for that (*set out the charge as in the conviction*), and which said conviction has been removed into this Court under *certiorari*, should not be quashed with costs, on the following grounds, amongst others: (*Set out the grounds*).

On motion of Mr. , of counsel for the said A.B.

By the Court.

Registrar.

RULE ABSOLUTE QUASHING CONVICTION.

In the the day of
A.D., 19 .

The King against A. B.

1. Upon the application of A. B. upon reading the rule nisi issued on the day of , A.D. 19 , and the affidavit of service thereof, the writ of *certiorari*, dated the day of , A.D. 19 , the return of the said writ and the papers thereto attached, and the recognizance filed, and upon hearing counsel for the prosecutor, E.F., and for the appellant, A. B., and for C. D., Esquire, justice of the peace (*or* police magistrate) (*or* no one appearing for the said E. F. or C. D., although duly notified),

2. It is ordered that the conviction of the said A. B. by C. D., Esquire, justice of the peace (*or* police magistrate) for the of on information of the said E. F. for that (*set out the charge*) be and the same is hereby quashed (*and if costs are ordered*) with costs to be paid by the said to the said A. B.

3. And it is further ordered that the said A. B. be, and he is hereby discharged from custody under the warrant of commitment issued upon the said conviction.

4. And it is further ordered that no such action as is provided for by section 1131 of the Criminal Code of Canada, and by the Revised Statutes of , chapter , section , shall be brought against the said C. D. and E. F., or either of them, or any person whomsoever.

On motion of Mr. , of counsel for said A. B.
By the Court.

Registrar.

FORMS IN HABEAS CORPUS PROCEEDINGS.

NOTICE OF APPLICATION FOR HABEAS CORPUS.

In the (*Name of Court to be applied to*).

The King (on information of A. B.) v. C. D.

TAKE NOTICE that a petition, on behalf of he said C. D., will on the day of A.D. 19 , at o'clock in the forenoon or so soon thereafter as counsel can be heard, be made to a Judge of the honourable Court, in Chambers at , for the issue of a writ of *habeas corpus* to the keeper of the common gaol (*or* penitentiary) of the county (*or* district) of directing him to have before a Judge of (*Name of Court*), the body of the said C. D., a prisoner detained in his custody, so that there may be caused to be done thereupon what of right and according to law, the Court shall see fit to be done, for the following among other reasons. (*State them.*)

AND TAKE NOTICE that in support of the said petition there will be read the affidavit of , herein filed therewith, and the exhibits therein mentioned.

Dated at this day of 19 .

Solicitor for the said C.D.

To the said A. B.

To
the convicting justice (*or* magistrate).

And to
the Crown Attorney, (*or* Crown prosecutor),
or, as the case may be.

PETITION FOR HABEAS CORPUS.

In the (*Name of Court*),

The King v. C. D.

To the honourable (*Name of Court*), or to any one of the honourable Judges thereof.

The petition of C. D., respectfully represents:

1. That, (*State the facts from the laying of the information and the issuing of the summons or warrant of arrest to the trial and conviction and the issuing of the warrant of commitment thereon*).

2. That, (*State the grounds upon which it is contended that the warrant of commitment, or the conviction upon which it is issued, or both, is or are illegal*).

3. That your petitioner is unlawfully detained in the said common gaol (*or* penitentiary) of the county (*or* district) of , and is entitled to be discharged therefrom and to be released and set at liberty.

Wherefore your petitioner prays that an order be made for the issue herein of a writ of *habeas corpus* under which your petitioner may be brought before one of the Honourable Judges of this Honourable Court, that it be, thereupon, declared that, the said warrant of commitment, (*or* the said conviction, or both), is (or are) illegal, null and void, that your petitioner is unlawfully detained and imprisoned, and is entitled to be discharged from the said common gaol (*or* penitentiary) and to be released and set at liberty, and that he be accordingly ordered to be forthwith discharged from the said common gaol, (*or* penitentiary), and to be released and set at liberty.

Dated at this day of 19 .

Solicitor for the petitioner.

AFFIDAVIT IN SUPPORT OF PETITION.

I, C. D., the above named petitioner, being duly sworn, do depose and say:—

1. That the allegations of the foregoing petition are true.

2. That a copy of the said warrant of commitment is hereunto annexed and marked exhibit "A."

And further the deponent saith not.

Sworn, etc.

ORDER FOR HABEAS CORPUS.

In the (*Name of Court*).

Before the Honourable Mr. Justice
In Chambers.

The day of , A.D. 19 .

The King v. C. D.

Upon the application of the said C. D., upon reading the petition and affidavit of the said C. D., herein filed, and a copy of the warrant of commitment marked exhibit "A," annexed thereto, and upon hearing counsel for the said C. D.

It is ordered that a writ of *habeas corpus* do issue out of this Court, directed to the keeper of the common gaol, (*or* penitentiary), for the county (*or* district), of , (*or*, as the case may be), directing him to have, before me (*or* a Judge of this Court), in Chambers, at forthwith on receipt of the said writ, the body of C. D., a prisoner detained in his custody, and that there be caused to be done thereupon what of right and according to law shall be deemed fit to be done.

Registrar, (*or* clerk).

(N.B.—The attendance of the prisoner at the argument upon a writ of *habeas corpus* may be dispensed with by consent of his solicitor endorsed upon the writ).

WRIT OF HABEAS CORPUS AD SUBJICIENDUM.

Canada,
County (*or* district) of
Province of

GEORGE THE FIFTH, by the grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas, KING, Defender of the Faith.

To the keeper of our common gaol (*or* penitentiary) for our county (*or* district) of , or his deputy or deputies, and to each of them.

GREETINGS:

WE COMMAND YOU that you have before the Honourable for at the Judge's Chambers in the Court House in our (*city*) of , immediately after the receipt of this writ, the body of , being committed and detained in our prison (*or* penitentiary), under your custody (*as it is said*), together with the day and cause of the taking and detaining of the said by whatsoever name the said be called in the same, to undergo and receive all and singular such things as our said shall then and there consider of him in that behalf, and that you have then and there this writ.

IN WITNESS WHEREOF we have caused the seal of our Court of for (*as the case may be*), to be hereunto affixed, at our (*city*) of , this day of in the year of our reign.

.*Clerk of the Crown.*

RETURN OF WRIT OF HABEAS CORPUS.

By virtue of the within order, I, the keeper of the common gaol (*or penitentiary*) at (*etc.*), do hereby return to the Honourable Mr. Justice , (*or* as the writ directs), that C. D. is a prisoner in the aforesaid, under a warrant of commitment hereunto annexed, and that the said C. D. was committed to the said common gaol (*or* penitentiary) under and by virtue of the said warrant of commitment on ; and the said C. D. is now detained in the said common gaol (*or* penitentiary) by virtue of the said warrant and for no other cause or reason whatsoever, (*or*, as the case may be, with regard to other warrants of detention, if any).

[Add,—if the prisoner's attendance has not been dispensed with,—a clause stating that the body of the prisoner is produced.]

Dated at this day of A.D., 19 .

Keeper of (*etc.*).

NOTICE OF MOTION FOR DISCHARGE.

In the (*Name of Court*),

The King v. C. D.

To , the convicting justice (*or* magistrate).
To , the prosecutor,
And to , the Crown Attorney (*or* Crown prosecutor, *or*, as the case may be).

Take notice that a motion will be made before a Judge of this Honourable Court sitting in Chambers at , on , at o'clock in the forenoon, or so soon thereafter as counsel can be heard for the discharge of the said C. D. from the common gaol (*or* penitentiary) of (*etc.*), upon the return of the writ of *habeas corpus* herein issued, directing the keeper of (*etc.*), to have before a Judge of this Honourable Court the body of the said C. D., now in custody under a warrant of commitment issued in pursuance of a conviction made by , Esquire, a justice of the peace (*or* police magistrate), for (*etc.*) for that (*Insert the charge as in the conviction or warrant of commitment.*)

And take notice that in support of the said motion there will be read the petition and affidavit of C. D., and the exhibits therein mentioned, as well as the return of the said writ of *habeas corpus*, and,—[*if such be the case*].—the writ of *certiorari* issued in aid thereof.

Dated at this day of A.D., 19 .

Solicitor for the said C. D.

ORDER OF DISCHARGE ON HABEAS CORPUS.

In the (*Name of Court*),

Before the Honourable Mr. Justice , in Chambers (*or*, if in Court).

Before the Honourable (*Give the names of the Judges present*).

Tuesday, the day of , A.D. 19 .

The King v. C. D.

Upon the application of the said C. D., upon reading the writ of *habeas corpus* herein issued on the , and the return made thereto by , the keeper, [*etc.*], the writ of *certiorari* issued in aid of the said writ of *habeas corpus*, upon reading the information, convic-

tion and proceedings returned by , a justice of the peace (*or* police magistrate) for (*etc.*), in compliance with the said writ of *certiorari*, upon reading the petition and affidavit of the said C. D., and the exhibits therein mentioned, and upon hearing counsel for the Crown, and for the private prosecution, and for the said C. D., IT IS ORDERED that the said C. D. be, and he is hereby discharged from the custody of the said , the keeper of (*etc.*), as to the commitment made by the said , Esquire, a justice of the peace (*or* the police magistrate), for (*etc.*), aforesaid, on the information of , for that (*Set out the charge, as in the warrant of commitment*), in so far as the said C. D. is held under the said warrant of commitment, and that this order be sufficient authority for the said keeper (*etc.*), for the discharge of the said C. D.

Registrar (*or clerk*).

[Seal of Court.]

ORDER FOR CERTIORARI IN AID OF HABEAS CORPUS.

In the (*Name of Court*).

The King v. C. D.

Upon the application of the said C. D., upon reading the affidavit herein filed of the said C. D., and the exhibits therein mentioned; and a writ of *habeas corpus* having been issued to bring the body of the said C. D. before a Judge of this Court,

IT IS ORDERED that a writ of *certiorari* in aid of the said writ of *habeas corpus* do issue out of this Court. (*Proceed as in form of order for certiorari, at p. , ante.*

Where the practice is to apply by notice of motion instead of by petition, the following form may be used:—

NOTICE OF MOTION FOR WRIT OF HABEAS CORPUS.

In the

The King, on the information of E. F. against A. B.

Take notice that a motion will be made on behalf of the above-named A. B. before the presiding Judge in Chambers at , on the day of , A.D. 19 , at ten o'clock in the forenoon, or so soon thereafter as the motion can be heard, whereon you are to show cause why a writ of *habeas corpus* should not issue to the keeper of the common gaol of the county of (*or as the case may be*), directing him to have before a Judge of the , the body of the said A. B., a prisoner detained in his custody, that the Court may cause to be done thereupon what of right and according to law the Court shall see fit to be done, and for a writ of *certiorari* in aid thereof, for the following among other reasons:

1—(*State the reasons and grounds of application*). And take notice that in support of such application will be read the affidavits of filed, and the exhibits therein referred to.

Dated at this day of A.D., 19 .

To the Attorney-General for the Province of and to the prosecutor, and to the convicting magistrate (*or* justice).

Solicitors for the said A. B.

And the following form of affidavit may be used in support of the notice of motion:—

In the

The King against A. B.

I, A. B., of the of in the county of (*occupation*), make oath and say:—

1. I am the above named defendant.

2. That the paper writing shewn to me marked exhibit "A" to this my affidavit is a true copy of the warrant of commitment produced to me by the gaoler of the common gaol of the county of , as that under which I am now held in close custody in said gaol.

3. That I am not held as a prisoner in the said gaol under any other warrant.

Sworn, etc.

TAKING EVIDENCE UNDER COMMISSION. SECS. 995-997 OF THE CODE.

AFFIDAVIT FOR COMMISSION TO EXAMINE WITNESS WHO IS DANGEROUSLY ILL. SEC. 995 OF THE CODE.

In the Court of (*Style of cause*).

In the matter of an information laid by against before , Esquire, a justice of the peace in and for the county of , for an indictable offence, to wit: for that (*state the charge*).

I, , of the of in the county of , (*occupation*), make oath and say:

1. I am the informant above-named.

2. On the day of , A.D. 19 . I duly laid an information **against the above-named** , for the indictable offence above mentioned, and the proceedings thereon are now pending before the said justice.

3. That , of the of , in the county of , is a material and necessary witness, and is able to give material information relating to the said offence, and he, the said , is, as he has informed me in an interview which I had with him on the day of instant, willing to give such information, which **is** (*here state in a general way the evidence which the witness is able to give so as to shew its materiality*).

4. That the said , according to the opinion of , of , a duly licensed medical practitioner, which is now shewn to me marked exhibit "A.," to this my affidavit, and which was given to me by the said on the day of its date, is dangerously ill and not likely to recover from such illness, and the attendance of the said to give evidence cannot by reason thereof be procured.

5. That , a justice of the peace residing at , is a fit and proper person to take the evidence of the said witness.

6. The said is now in actual custody in the common gaol of the county of , and has been served with the notice now shewn to me marked "B." (*See Code*).

Sworn, etc.,

ORDER APPOINTING A COMMISSIONER TO EXAMINE A WITNESS DANGEROUSLY ILL. SEC. 995 OF THE CODE.

In the High Court of Justice.
The Honourable
Mr. Justice
In Chambers.

Tuesday, the day of A.D. 19 .

In the matter of, etc. (*as in the above affidavit*).

Upon the application of the above-named , upon reading the affidavits of , and filed, and it appearing to my satisfaction that one , a person who is dangerously ill, and who, in the opinion of a duly licensed medical practitioner, is not likely to recover from such illness, is able and willing to give material evidence relating to the indictable offence above mentioned.

1. It is ordered that , of , a justice of the peace in and for the county of , *or, as the case may be*), be and he is hereby appointed a commissioner to take in writing the statement on oath or affirmation of the said , pursuant to section of the Criminal Code of Canada, the examination of the said witness to be *viva voce*.

2. And it is further ordered and directed that the keeper of the common gaol for the county of , in whose custody the above-named now is, do convey the said to the , in the of , on the day of , A.D. 19 , at o'clock in the noon, being the place mentioned in the notice served on the said C. D. of an intention to take the said statement, for the purpose of being present at the taking of the said statement.

FORM OF DEPOSITIONS TAKEN ON COMMISSION. SEC. 995.

(*To be attached and returned with the commission*).

Canada
Province of
County of

The deposition of , of the of in the county of (*occupation*),

Taken on oath (*or affirmation*) before the undersigned , the commissioner named in the commission hereto annexed, at the of , in the county of , on this day of , A.D. 19 , under the said commission, in the presence and hearing of , named in the said commission (*or* after notice to the said), and of (*the prosecutor*), also named therein (*or* after notice to him).

The said deponent, , upon his oath (*or* affirmation), says as follows:—

(*Here insert the witness's statement in the words used by him as nearly as possible, and at its conclusion have the same signed at the foot by the witness and also by the commissioner*).

The depositions of the above named , written on the several sheets of paper, to the last of which my signature is subscribed, were taken in the presence and hearing of the above-named and and signed by the said in their presence, and I further certify that the solicitor or counsel for the said (*or* , *naming the prosecutor or defendant as the case may be against whom the evidence is to be used*) had (*or* might or would have had if he had chosen to be present, *as the case may be*) full opportunity of cross-examining (*and did cross-examine if it be one case*) the said witness, , upon his said examination before me under the said commission.

Dated at this day of A.D., 19 .

Commissioner.

Note.—A notice should be served upon the opposite party, giving the time and place where the examination is to take place.

NOTICE OF MOTION FOR COMMISSION TO TAKE EVIDENCE OUT OF CANADA. SEC. 997 OF THE CODE.

In the Court of .
(*Style of cause*).

Take notice that an application on behalf of the above-named (*or as the case may be*) will be made to the Honourable the presiding Judge in Chambers, of the Court of at ,the Court House, in the of , on , the day of , A.D. 19 , at ten o'clock in the forenoon, or so soon thereafter as the application can be made, for an order appointing a commissioner to take the evidence *viva voce*, upon oath or affirmation, of , a witness who resides out of Canada, and is able to give material information relating to the charge of an indictable offence, for which a prosecution is now pending upon the information of the above-named , against the above-named , for that (*state the charge*). And take notice that the name and address of the commissioner proposed to be so appointed is , of the of , in the State of , one of the United States of America (*or as the case may be, adding the person's occupation*). And further take notice that upon such application will be read the affidavit of the said , this day filed, and the exhibits therein referred to.

Dated at this day of A.D., 19 .

To
The above named (*or*), and to his Solicitor. } Solicitor for the said

AFFIDAVIT FOR COMMISSION TO TAKE EVIDENCE OUT OF CANADA. SEC. 997.

(*Style of cause*).

I, , make oath and say:

1. I am the above-named informant in this matter.

2. On or about the day of , A.D. 19 , I duly laid an information against the above-named , before , Esquire, a justice of the peace in and for the county of , for an indictable offence, namely, that (*set out the charge*).

3. The prosecution of the said , for the said offence is now pending before the said justice of the peace.

4. That , a person who resides at , out of Canada, and is not now in Canada, is, as I am informed and verily believe, able to give material information relating to the said offence, such information being that (*state in a general way the evidence the witness will give, so as to satisfy the Court that it is material.*

5. That , of (*residence and occupation*), is, as I am informed and believe, a fit and proper person to be appointed a commissioner to take the evidence of the said .

SWORN, etc.

ORDER APPOINTING COMMISSIONER TO TAKE EVIDENCE OUT OF CANADA.

(Section 997.)

(*Style of cause.*)

Upon the application of the above named , and upon reading the affidavit of filed, and upon hearing both parties by their solicitors or counsel, and it appearing that , who resides out of Canada, is able to give material information relating to an indictable offence for which a prosecution is now pending in this matter:

1. It is ordered that of (*residence and occupation*) be and he is hereby appointed a commissioner to take the evidence *viva voce* upon oath

or affirmation of the said , at aforesaid, and that a commission do issue for that purpose under the seal of this Court directed to the said commissioner.

2. That days' previous notice of the mail or other conveyance, by which the said commission is to be sent out, shall be given by the said to the said , or to his solicitor.

STATING A CASE UNDER SECTIONS 761-764 OF THE CODE.

FORM OF CERTIFICATE OF REFUSAL TO STATE A CASE UNDER SECTION 763.

I, , a justice of the peace in and for the county of , do certify at the request of , who was on the day of , A.D. 19 , summarily convicted before me on the information of for (*state the charge*) that after the said conviction was made, namely, on the day of , A.D. 19 , the said desiring to question the said conviction on the ground that it is erroneous in point of law in that (*state the ground of objection*), or that the same is in excess of my jurisdiction as such justice (*or as the case may be*), applied to me as such justice to state and sign a case setting forth the facts of the case and the grounds on which the said conviction is questioned. And I further certify that the said application being in my opinion merely frivolous (*or if the question raised is one of fact and not upon a point of law or jurisdiction so state.*) I did thereupon refuse to state a case thereon; and this certificate thereof is signed and delivered by me to the said at his request pursuant to section 763 of the Criminal Code of Canada.

Given under my hand at the of in the county of this day of , A.D. 19 .

Justice of the peace.

AFFIDAVIT UPON APPLICATION FOR RULE TO COMPEL A JUSTICE TO STATE A CASE UNDER SECTION 764.

In the (*title of court.*)

In the matter of The King on the information of against .

I, of the of , in the county of , make oath and say:

1. That I am the above named defendant .

2. That on the day of , A.D. 19 , I was served with a summons (or arrested on a warrant) herein, a true copy of which is now shewn to me, marked exhibit A, and issued upon an information, a true copy of which is now shewn to me marked exhibit .

3. On the day of , A.D. 19 , I appeared before , Esquire, the justice of the peace named in the said proceedings, to answer to the charge therein mentioned, and the said justice thereupon proceeded to hear and determine the said charge in presence of the said informant A. and myself, and upon hearing the evidence the justice convicted me of the said charge.

4. That the paper writing now shewn to me marked exhibit is a true copy of the evidence upon the said hearing as taken down by the said justice.

5. That upon the said hearing I took the objection before the said justice that the said conviction was erroneous in point of law (or was in excess of his jurisdiction) upon the grounds following (*here state the questions of law or jurisdiction raised.*)

6. That I thereupon applied to the said justice to state a case for the opinion of this court upon the said questions so raised, but he refused to do so upon the ground that the same were merely frivolous, and a certificate of such refusal was then granted by the said justice, which certificate is now shewn to me marked exhibit .

7. (*State any further facts which the circumstances require.*)

RULE NISI TO COMPEL A JUSTICE TO STATE A CASE UNDER SECTION 764.

In the Court of

The Honourable Mr. Justice { day the day of A.D. 19 .

In the matter of the King upon the information of against .

Upon the application of the said , upon reading the certificate of , one of His Majesty's justices of the peace in and for the county of , of his refusal to state a case for the opinion of this court, at the request of the said , touching the question of the validity of a certain conviction made on the day of , A.D. 19 , by the said justice for that (*set out the charge*) upon the ground that the same is erroneous in point of law (*or* in excess of the said justice's jurisdiction), upon reading the affidavit of the said , and upon hearing counsel for the said :

It is ordered that the said and the said , upon notice of them of this order to be given to them respectively, shall on the day of , A.D. 19 , at o'clock in the forenoon, or so soon thereafter as counsel can be heard before this Court, at , shew cause why the said , as such justice, should not be ordered to state and sign a case for the opinion of this court upon the following questions:

1. (*Set out the points of law on which the conviction is claimed to be erroneous, or the question as to the justice's jurisdiction.*)

On motion of Mr. of counsel for the said .

By the court,

RULE ABSOLUTE TO STATE A CASE UNDER SECTION 764.

In the Court of

The Honourable Mr. Justice { day the day of A.D. 19 .

In the matter of, etc., (*as in the above form of rule nisi*).

Upon the application of the above named upon reading the rule *nisi* issued on the day of , A.D. 19 , the therein mentioned certificate of , a justice of the peace for the county of of his refusal to state a case (*as in the above form of rule nisi*) upon reading the affidavits of and filed, and upon hearing counsel for the said , and , the convicting justice, respectively (*or* no one appearing for the said although duly notified).

1. It is ordered that the said do forthwith state and sign and transmit to this court, a case for the opinion of this court upon the following questions:

(1) (*Set out the questions to be submitted*).

2. And it is further ordered that the costs of and incidental to this application be paid by the said to the said forthwith after taxation thereof.

On motion of Mr. counsel for the said .

By the court.

FORM OF CASE STATED.

In the Court of

In the matter of the King upon the information of (*Respondent*) and (*Appellant*).

Case stated by , one of His Majesty's Justices of the Peace in and for the county of under the provisions of section 900 of the Criminal Code of Canada.

1. On the day of A.D. 19 , an information was laid, under oath, before me by the above named , for that the said on at (*state the offence*).

2. On the day of , A.D. 19 , the said charge was duly heard before me in the presence of both parties, and, after hearing the evidence adduced and the statements of the said and and their solicitors (*or* counsel) I found the said guilty of the said offence and convicted him thereof, but at the request of the solicitor (*or* counsel) for the said I state the following case for the opinion of this Honourable Court:—

It was shewn before me that (*here set out the findings of fact under which the point of law arises*).

The solicitor (*or* counsel) for the said desires to question the validity of the said conviction on the ground that it is erroneous in point of law (*or* is in excess of jurisdiction) the questions submitted for the judgment of this Honourable Court being: (*here state the questions submitted, as for instance*).

1. Whether (*here state points of law in question for the opinion of the Court*).

FORM OF RECOGNIZANCE ON CASE STATED UNDER.

Canada,
Province of
County of

Be it remembered that on the day of , A.D. 19 , of the of in the county of (*occupation*), of the same place (*occupation*) and of the same place (*occupation*) personally came before me, the undersigned, one of His Majesty's Justices of the Peace, in and for the said county of and severally acknowledge themselves to owe to our Sovereign Lord the King the several sums following, that is to say; The said the sum of dollars, and the said and the sum of dollars each of lawful money of Canada to be made and levied of their goods and chattels, lands and tenements respectively, to the use of our said Lord the King, his heirs and successors, if he, the said , fails in the condition hereunder written.

Taken and acknowledged the day and year first above mentioned at the of in the county of before me,

[SEAL.]
Justice of the Peace, in and for the County of .

Whereas the above bounden was on the day of A.D. 19 , convicted before , a justice of the peace in and for the said county of for that the said (*state the charge*) and afterwards on the day of , A.D. 19 , the said desiring to question the said conviction on the ground that it is erroneous in point of law (*or* is in excess of jurisdiction) applied to the said as such justice to state and sign a case for the opinion of (*name the court*).

The condition of the above written bond or obligation is such that if the said shall prosecute his appeal without delay and submit to the judgment of the said Court of and pay such costs as shall be awarded by the same; and further, if the said shall appear before the said the same justice by whom he was convicted as aforesaid or such other justice as is then sitting, within ten days after the judgment of the said court has been given, to abide such judgment, unless the judgment appealed against is reversed, then the recognizance to be void, otherwise to stand in full force and virtue.

Taken and acknowledged before me J.P.

FORM OF ORDER.

In the Court of .

Before the Hon. Mr. Justice) The King, upon information of
In Chambers.) appellant hereunder.

Upon the application of the above named , upon reading the Case Stated by , Esquire, a Justice of the Peace for the county of in this matter touching the question of the validity of a certain conviction of the said made by the said Justice of the Peace on the day of , A.D. 19 , for that (*set out the charge*) upon the grounds that the same is erroneous in point of law (*or* in excess of jurisdiction *or as the case may be*) and submitting the following questions for the opinion of this Court thereon, namely:

1. (*Set out the questions submitted.*)

and respectively (*or* no one appearing for the said although duly notified).

It is ordered that the said conviction be and the same is hereby affirmed (*or* quashed, *as the case may be*).

2. And it is further ordered that the costs of and incidental to this application be paid by the said to the said forthwith after taxation thereof.

APPLICATION FOR APPREHENSION OF PERSON BAILED AND ABOUT TO ABSCOND UNDER SECTION 703 OF THE CODE.

Form of Information.

Canada,)
Province of ,)
County of .)

The information of of the of in the county of (*occupation*), taken this day of , A.D. 19 , before the undersigned , one of His Majesty's Justices of the Peace in and for the county of who saith that they, the said and , were on the day of now past, severally and respectively bound by recognizance before , Esquire, one of His Majesty's justices of the peace for the said (*county*) of , in the sum of each, upon condition that one , of, etc., should appear at the next term of the Court of , for the district of , (or Court of Oyer and Terminer and general gaol delivery, *or* Court of General Sessions of the Peace), to be holden in and for the (*county*) of , and there surrender himself into the custody of the keeper of the (*common gaol*) there, and plead to such indictment as might be found against him by the grand jury for or in respect to the charge of (stating the charge shortly), and take his trial upon the same and not depart the said Court without leave; and that these complainants have reason to suspect and believe and do verily suspect and believe, that the said is about to depart from this part of the country (*here state reasons for belief*), and therefore they pray of me the said justice that I would issue my warrant of apprehension of the said , in order that he may be surrendered to prison in discharge of them his said bail.

Taken before me, , Justice of the Peace.

WARRANT TO APPREHEND THE PERSON CHARGED UNDER SECTION 703 OF THE CODE.

To all or any of the constables and other peace officers in the said district (*or* county, united counties, *or as the case may be*), of , and to and , severally and respectively.

Canada,)
Province of ,)
To wit:)

Whereas you the said and , have this day made complaint to me, the undersigned, one of His Majesty's justices of the peace in and for the said (*county*) of , that you the said and , were, etc., (*as in the complaint, to the end*): These are therefore to authorize you the said and , and also to command you the said (*constable or other peace officer*), in His Majesty's name forthwith to apprehend the said , and to bring him before me or some justice or justices of the peace in and for the said (*county*), to the intent that he may be committed to the (*common gaol*) in and for the said (*county*), until the next Court of Over and Terminer and general gaol delivery (*or* Court of General Quarter Sessions of the Peace), to be holden in and for the said (*county*) of *or, etc., as the case may be*), unless he find new and sufficient sureties to become bound for him in such recognizance as aforesaid.

Given under my hand and seal, this day of , in the year of our Lord , at , in the (*county*) aforesaid.

[SEAL.]

COMMITMENT OF THE PERSON CHARGED ON SURRENDER OF HIS BAIL AFTER APPREHENSION UNDER A WARRANT. SECTIONS 703-704.

To all or any of the constables, or other peace officers in the district (*or* county, united counties, *or as the case may be*) of , and to the keeper of the common gaol of the district (*or* county, united counties, *or, as the case may be*) at , in the said district (*or* county, etc.), of :

Canada,)
Province of ,)
To wit:)

Whereas on the day of instant, complaint was made to me the undersigned , one of His Majesty's justices of the peace, in and for the said (*county*) of , by and , of, etc., that (*as in the complaint, to the end*), I (*or* the said justice) thereupon issued my warrant authorizing the said and , and also commanding the said constables of , and all other peace officers in the said (*county*) of , in His Majesty's name forthwith to apprehend the said .

And whereas the said has been apprehended under the said warrant, and is now brought before me, the undersigned, one of His Majesty's justices of the peace in and for the said county of , and it thereupon appearing to my satisfaction, upon hearing the evidence then adduced in the presence of the said , that the ends of justice would otherwise be defeated;

These are therefore to command you, the said constables or peace officers in His Majesty's name, forthwith to take and safely convey the said to the said common gaol at , in the said county of , and there deliver him to the keeper thereof; and I hereby command you, the said keeper, to receive the said into your custody in the said common gaol, and him, there safely to keep until his trial, or until he produces another sufficient surety or sureties in this behalf.

Given under my hand and seal, this day of A.D., 19 .

APPLICATION FOR SUBPOENA FOR WITNESS IN CANADA, BUT OUT OF THE PROVINCE. UNDER SECTION 676 OF THE CODE.

Affidavit for Subpœna to Witness out of the Province. Section 676 of the Code.

In the Court of

In the matter of an information laid by against before , Esquire, a justice of the peace in and for the county of , for that (*state offence as charged*).

I, , of, etc., make oath and say:

1. I am the above named informant,

2. That on the day of , A.D. 19 , I duly laid an information before the above named justice of the peace, a true copy of which information is now shewn to me, marked exhibit "A."

3. That the said justice of the peace thereupon issued his warrant for the apprehension of the said , who has been arrested and is now in custody (*or* on bail, *or as the case may be*) upon the said charge, and the said justice has appointed the day of , A.D. 19 , for the holding of the preliminary inquiry upon the same, and the prosecution of the said upon the said charge is now pending before the said justice.

4. That one, , is, as I am informed and believe, likely to give material evidence for the prosecution respecting the said charge, the nature of such evidence being, as I am informed and believe, that (*state in general terms the nature of the evidence so as to satisfy the judge or court that the proposed witness is likely to give material evidence*).

5. I am informed and believe that the said has in his possession or control certain documents relating to the matter in question, namely, (*state what documents are desired to be produced*).

6. That the said resides at , in the Province of , within the Dominion of Canada, and is out of the Province of , and I desire that a subpœna should issue requiring the said to appear before the said justice, at the said time and place, to give evidence respecting the said charge, and to bring with him any documents in his possession or control relating thereto, and particularly the documents above mentioned.

Sworn, etc.

ORDER FOR SUBPŒNA TO WITNESS OUT OF THE PROVINCE. SECTION 676 OF THE CODE.

In the Court of
The Honourable
Mr. Justice
In Chambers.
day the
day of
A.D. 19 .

In the matter of, etc.

Upon the application of , the informant above named, and it appearing that one, , residing at the of , in the Province of , out of this Province, and not being in this Province, is likely to give material evidence for the prosecution in the above matter now pending before the said justice, and that he is alleged to have in his possession or control certain documents relating to the said charge, and particularly the following (*here state document of which production is required*).

It is ordered that a writ of subpœna do issue out of this court, under its seal, requiring the said to appear before , Esquire, justice of the peace, at in the of in the county of and province of on the day of , A.D. 19 , to give evidence respecting the said charge, and to bring with him and produce at the said time and place, any and all documents in his possession, custody or control, relating to the said charge, and particularly the document above specially mentioned.

AFFIDAVIT OF SERVICE OF SUBPŒNA OUT OF THE PROVINCE. SECTION 676 OF THE CODE.

In the Court of

In the matter of, etc.

I, , of the of in the county of , in the province of , make oath and say, as follows:

1. That I did on the day of , A.D. 19 , personally serve with the subpœna hereto annexed marked "A." by

delivering to and having with him the said , a true copy thereof at the of , aforesaid.

2. That at the time of such service as aforesaid, I produced and exhibited to the said , the original subpœna hereto annexed, and that the said is personally known to me and is the person named in the said original subpœna.

3. That in order to effect such service I necessarily travelled miles.

4. That at the time of such service I paid to the said the witness fees following, that is to say:

Sworn before me at the of in the Province of this day of , A.D. 19 . } A Justice of the Peace in and for the county of , in the Province of .

NOTE.—The warrant for defaulting witness who has been served with subpœna may be in form 15 of the Code. See section 677.

PROCEEDINGS UNDER WARRANT OF DISTRESS. SECTION 741 OF THE CODE.

For Forms of Warrant of Distress, see Forms 39 or 40 of the Code.

BAILIFF OR CONSTABLE'S INVENTORY OF GOODS SEIZED UNDER WARRANT OF DISTRESS.

An inventory of goods and chattels by me this day seized and distrained in the of in the county of by virtue of a distress warrant issued by , Esquire, a justice of the peace in and for the county of , dated the day of , A.D. 19 , under a conviction (*or* order) made by the said as such justice on the day of , A.D. 19 . That is to say: (*specify the articles seized*).

Dated this day of , A.D. 19 .

Constable or Bailiff.

APPRAISEMENT.

We, and , having at the request of , a constable of the county of , examined the goods and chattels mentioned in the annexed inventory, do appraise the same at the sum of $.

Witness our hands this day of , A.D. 19 .

NOTICE OF SALE OF GOODS DISTRAINED.

By virtue of a distress warrant issued by , Esquire, a justice of the peace in and for the county of , under a conviction (*or* order) made by the said justice against , I have distrained of the goods and chattels of the said , to wit: (*describe property*). All of which goods and chattels will be sold by public auction at on the day of , A.D. 19 , at the hour of o'clock in the noon.

Dated the day of , A.D. 19 .

Bailiff or Constable.

NOTE.—Warrants of distress are directed to constables or peace officers. Under section 2 of the Code paragraph (26), a "peace officer" includes a "bailiff." So a warrant of distress may be directed to a bailiff as well as to a constable.

CORONER'S WARRANT ISSUED UNDER SECTION 667 OF THE CODE.

Canada,
Province of ,
County of .
To wit.

To all or any of the constables and other peace officers in the said county of .

Whereas of the of in the county (*occupation*), has this day, upon an inquisition taken before the undersigned, a coroner in and for the said county of been charged with the manslaughter (*or* murder) of (*or* a man *or* a woman, *or* a male *or* female child unknown) of the of in the county of . And whereas the said has not already been charged with the said offence before a magistrate or justice. These are therefore to command you in His Majesty's name forthwith to take the said into custody and convey him (*or* her) with all convenient speed before a magistrate or justice in and for the said 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 , A.D. 19 , at the of in the county aforesaid.

[SEAL.]

Coroner, County of .

APPENDIX B.

STATEMENT OF OFFENCES IN NUMERICAL ORDER WITH THE SECTIONS OF THE CODE—PART II. OF THE CODE.

STATEMENTS OF OFFENCES AGAINST PUBLIC ORDER (2).

TREASON.

(Section 78.)

On at within His Majesty's Dominions, A., with divers other false traitors to the jurors unknown, and armed, arrayed and assembled together in warlike manner, did levy and make war against our Lord the King, with intent thereby to depose His Majesty from the style, honour and royal name of the Imperial Crown of the United Kingdom of Great Britain and Ireland and of his other Dominions.

ASSAULT ON THE KING.

(Section 80.)

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

INCITING TO MUTINY.

(Section 81.)

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

RIOT.

(Sections 87 and 88.)

On at A., B., and C., with divers other persons to the jurors aforesaid unknown, unlawfully, riotously and in a manner causing reasonable fear of a tumultuous disturbance of the peace did assemble together, and being so assembled together did then and there make a great noise, and thereby began and continued for some time to disturb the peace tumultuously.

NEGLECT TO SUPPRESS RIOT.

(Section 94.)

On at the city of within the jurisdiction of A., then the mayor of and present in the city of there was a riot, and the said A., then having notice thereof, without any reasonable excuse, did omit to do his duty as such mayor in suppressing the said riot.

OMITTING TO AID PEACE OFFICER TO SUPPRESS RIOT.

(Section 95.)

On at , there was a riot, and that A., B. and C., then and there present, being called upon and required by D., a peace officer in the exercise of his duty in that behalf, to assist in suppressing the said riot, did without any reasonable excuse omit to do so.

RIOTOUS DESTRUCTION OF BUILDINGS.

(Section 96.)

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

RIOTOUS DAMAGE TO BUILDINGS.

(Section 97.)

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

AFFRAY.

(Section 100.)

A., B., and C.D., on did commit the act of fighting on the public street (or highway) in the said of (*or*, did commit the act of fighting to the alarm of the public in the bar-room of the hotel known as the Hotel in the said of , being a place to which the public then had access (*or* state any other public place) and did thereby then and there take part in an affray.

FORCIBLE ENTRY.

(Sections 102-103.)

A., B., C. and D., on at did, in a manner likely to cause a breach of the peace, (*or* "in a manner likely to cause reasonable apprehension of a breach of the peace"), enter on land (*or* "into a certain dwelling-house"), situate and being at and then in the actual and peaceable possession of E.

CAUSING DANGEROUS EXPLOSIONS.

(Section 111.)

On at , A., by a certain explosive substance, to wit, wilfully did cause an explosion of a nature likely to endanger life, (*or* "of a nature likely to cause injury to property").

ATTEMPT TO DESTROY PROPERTY WITH EXPLOSIVES.

(Section 112.)

On at , A., did wilfully place and throw, into (or near) a certain building, (*or* ship), to wit, [*Describe same*], an explosive substance, to wit, [*Describe it*], with intent to destroy (*or* damage) the same (*or* any machinery, etc.).

MAKING, OR POSSESSING EXPLOSIVES.

(Section 114.)

On at , A., wilfully did make (*or* "have in his possession" or "under his control") a certain explosive substance, to wit, with intent, by means thereof, to endanger life (*or* "to cause serious injury to property" *or* "to enable C., by means thereof, to endanger life," *or* "cause serious injury to property.")

OR,

(Section 114.)

On at , A., did make (*or* "knowingly have in his possession" or "under his control") a certain explosive substance, to

wit, , under such circumstances as to give rise to a reasonable suspicion that his making [(*or* "having possession" *or* "control of") it was not for a lawful object, the said circumstances being as follows: (*Relate them.*)]

OFFENSIVE WEAPONS.

(Section 115.)

On at , A. did carry (*or* "have in his possession," *or* "custody") a certain offensive weapon, to wit, a sword (*or* "an air-gun," *or* "a dagger," *or* "a pistol," *or* "metal knuckles"), for a purpose dangerous to the public peace.

WEAPONS.

(Section 116.)

Carrying, two or more persons:

A. B. and C. D., at , on , being together, did both of them then and there openly carry offensive weapons, to wit, (*state what*), in a public place, to wit (*state where*), in such a manner and under such circumstances as were calculated to create terror and alarm (*state the manner and circumstances*).

(Two justices required).

SMUGGLERS CARRYING OFFENSIVE WEAPONS.

(Section 117.)

On at A., did have possession of certain goods, to wit, (*describe them*) liable to seizure (*or* "forfeiture") under (*mention the Act or law*) relating to inland revenue, (*or* "the customs," *or* "trade," *or* "navigation") knowing them to be so liable, and that he did then and there and at the same time carry a certain offensive weapon, to wit, (*describe it.*)

CARRYING PISTOL OR AIR-GUN.

(Section 118.)

A. B., on , at , did unlawfully have upon his person a pistol (*or air-gun*) elsewhere than in his own dwelling-house, shop, warehouse or counting-house, to wit, (*state where*), the said A. B. not then being a justice, or a public officer, or a soldier, sailor or volunteer in His Majesty's service, then and there on duty, or a constable or other peace officer; and the said A. B. not then and there having a certificate of exemption as required by the statute in that behalf issued by a justice of the peace and not having at the said time reasonable cause to fear an assault or other injury to his person, family or property.

SELLING A PISTOL, ETC., TO A MINOR.

(Section 119.)

A. B., on , at , did unlawfully sell (*or give*) a pistol (*or* "air-gun," *or* "certain ammunition for a pistol or air-gun") to a minor under the age of 16 years, to wit, to (*name the minor*).

SELLING A PISTOL OR AIR-GUN WITHOUT KEEPING A RECORD.

(Section 119 (2).)

A. B., on , at , did unlawfully sell a pistol (*or* "an air-gun") to C. D. without keeping a record of such sale, and the date thereof, and the name of the said purchaser thereof, and of the name of the maker of the said pistol (*or* "air-gun") *or* of some other mark by which the said pistol (*or* "air-gun") might be identified.

HAVING WEAPON ON THE PERSON WHEN ARRESTED.

(Section 120.)

A. B., on , at , having been then and there arrested on a warrant issued against him by C. D., Esquire, a justice of the peace in and for the of , for an offence, to wit (*state the offence*); [*or*, having been then and there duly arrested while committing an offence, to wit (*state the offence*),] did then and there unlawfully have upon his person when so arrested, a pistol (*or* "an air-gun").

POINTING FIREARM (LOADED OR NOT) AT ANY PERSON.

(Section 122.)

A. B., at , on , did without lafwul excuse, unlawfully point at C. D. a firearm (*or* "an air-gun").

CARRYING, OR HAVING, OR SELLING SHEATH KNIFE, ETC.

(Section 123.)

A. B., at , on , did unlawfully carry about his person a bowie-knife (*or* "dagger," *or* "dirk," *or* "metal knuckles," *or* "skull cracker," *or* "slung shot," *or* "other offensive weapon of the character," stating what); or (did unlawfully and secretly carry about his person an instrument loaded at the end; or did sell, or expose for sale, a bowie-knife, or any of the weapons above enumerated (naming it); or that A. B., on , at , being then and there masked (or disguised), did unlawfully, and while so masked (or disguised) carry (or have in his possession) a fire-arm (*or* "air-gun").

CARRYING SHEATH KNIFE.

(Section 124.)

A. B., at , on , was found in the town (or city) of carrying about his person a sheath knife, he, the said A. B. not being thereto required by his lawful trade or calling.

REFUSE TO DELIVER WEAPON TO JUSTICE.

(Section 126.)

A. B., at , on , being then and there attending (or "on his way to attend") a certain public meeting at (*Describe it*) did unlawfully decline and refuse to deliver up peaceably and quietly to C. D., a justice of the peace for the said of , within whose jurisdiction the said public meeting was then appointed to be held, upon demand then and there duly and lawfully made by the said justice of the peace, a certain offensive weapon, to wit, a pistol (*or* describe the weapon), with which he, the said A. B., was then armed (*or* which he, the said A. B., then had in his possession).

UNLAWFUL OATH.—ADMINISTERING OR TAKING.

(Section 129.)

A., on , at , did take, (*or* "administer and cause to be administered to B."), a certain oath and engagement purporting to bind the said A., (*or* "B.") not to inform or give evidence against any associate, confederate or other person of or belonging to a certain unlawful association or confederacy, to wit, (*Describe the unlawful association or confederacy*). (*Add,—in case of a charge for taking the oath,*—"he the said A. not being then compelled to take the said oath and engagement," *or,—in case of a charge for administering,*—"and which said oath and engagement was then and there taken by the said B.")

PIRACY.

(Section 137.)

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

POSSESSING WEAPONS NEAR PUBLIC WORKS.

(Sections 142, 145, 146.)

A. B., who was at the time hereinafter mentioned, employed upon or about a certain public work within the of , being a place where the statute called an Act respecting the Preservation of the Peace in the Vicinity of Public Works was then lawfully in force by proclamation, did upon (*or* "after") the day named in the proclamation by which the said Act was brought into force at the said of unlawfully keep or have in his possession (*or* "under his care or control") within the said of , a certain weapon, to wit, a dirk (*or* "describe the weapon").

CONCEALING ARMS NEAR PUBLIC WORKS.

(Section 147.)

A. B., within the , of , being a place where the statute known as an Act respecting the Preservation of the Peace in the Vicinity of Public Works was then lawfully in force did unlawfully and for the purpose of defeating the lawful enforcement of Part III. of the Criminal Code of Canada, receive (*or* "counsel," *or* "aid in receiving," *or* "procure to be received or concealed") within the said place a certain weapon, to wit, a dirk (*or* "describe the weapon") then belonging to (*or* "in the custody of") C. D., a person then and there employed on or about a certain public work (*describing it*), then being prosecuted at the said of .

PART IV. OF THE CODE.

STATEMENTS OF OFFENCES AGAINST THE ADMINISTRATION OF LAW AND JUSTICE.

JUDICIAL CORRUPTION.

(Section 156.)

On , at , A., being a judicial officer, to wit, a Judge of (*name of Court*), did corruptly accept (*or* "obtain," *or* "agree to accept" *or* "attempt to obtain") for himself (*or* for) from B., the sum of dollars [*or* a certain office, place or employment, to wit, (*Describe it*)] on account of [*Give particulars of the thing done or omitted to be done or omitted by A. in his judicial capacity of a Judge of* .]

CORRUPTION OF A MEMBER OF PARLIAMENT.

(Section 156.)

On , at , A., being a member of Parliament of Canada (*or* "of the legislative assembly" *or* "council" of) did corruptly accept (*or* "obtain" *or* "agree to accept" *or* "attempt to obtain") for himself (*or* "for ") from B., the sum of dollars [*or* "a certain office, place or employment," to wit, (*Describe it*)] on account of [*Give particulars of the thing done or omitted, or to be done or omitted by A., in his capacity of such member of the Parliament of Canada, or of the legislative assembly or council of* .]

OFFICER TAKING BRIBE.

(Section 157.)

On , at , A., being a justice of the peace, (*or* "a peace officer"), employed in the capacity of , for the prosecution (*or* "detection" *or* "punishment") of offenders, did corruptly accept (*or* "obtain," *or* "agree to accept" *or* "attempt to obtain") for himself (*or* "for ") from B., the sum of dollars [*or* a "certain office, place or employment, to wit, (*Describe it*)] with intent to interfere corruptly with the due administration of justice," (*or* "to procure or facilitate the commission, by C., of a crime, to wit, the criminal offence of ," *or* "to protect from detection or punishment one C., who had committed, *or* was intending to commit a crime, to wit, the criminal offence of ").

FRAUDS UPON THE GOVERNMENT.

(Section 158.)

On at , A. did give (*or* "offer") to B., a person in the employment of the Government of Canada (*or* "to C., a member of the family of B., a person in the employment of the Government of Canada," *or* "to D., a person under the control of B., a person in the employment of the Government of Canada") the sum of dollars (*or* whatever the particular compensation or consideration may be) with intent to obtain the assistance or influence of the said B. to promote the procuring of a certain contract, to wit, (*Describe it*) with the Government of Canada for the performance of the following work, namely, (*or* as the case may be).

OR,

(Section 158.)

On , at , A. did give (*or* "offer") to B., a person in the employment of the Government of Canada (*or* "C., a member of the family of B., a person in the employment of the Government of Canada, *or* D., a person under the control of B., a person in the employment of the Government of Canada") the sum of dollars (*or whatever the particular compensation or consideration may be*) with the intent to obtain the assistance and influence of the said B. to promote the procuring of the payment of the price or consideration stipulated in a certain contract, to wit, (*Describe it*), with the Government of Canada for the performance of the following work, namely (*or, as the case may be*), [*or* to promote the payment of any aid or subsidy payable in respect of a certain contract, (*etc.*)]

MUNICIPAL CORRUPTION.

(Section 161.)

On , at , A. did make an offer (*or* "promise" *or* "agreement") to pay (*or* "give") the sum of dollars (*or whatever the material compensation or consideration may be*) to B., a member of the municipal council of for the purpose of inducing him, the said B., to vote (*or* "to abstain from voting") at a meeting, to wit, a meeting of the day of of the said municipal council of (*or* at a meeting, to wit, a meeting of the , day of , of the committee of the said municipal council of) in favour of (*or* "against") a certain measure (*or* "motion" *or* "resolution" *or* "question") submitted to such council (*or* "committee").

PERJURY.

(Sections 170-172.)

A. committed perjury with intent to procure the conviction of B. for an offence punishable with imprisonment for more than seven years, namely, robbery, by swearing on the trial of B. for the robbery of C. at the Court of Quarter Sessions for the county of , on the day of , 18 ; first, that he, A., saw B. at on the day of ; secondly, that B. asked A. to lend B. money on a watch belonging to C.; thirdly, etc.

PERJURY.

(Sections 170-172.)

A. committed perjury on the trial of B. at a Court of Quarter Sessions, held at on for an assault alleged to have been committed by the said B. on C., at Toronto, on the day of by swearing to the effect that the said B. could not have been at Toronto at the time of the alleged assault, inasmuch as the said A. had seen him at that time in Port Arthur.

SUBORNATION OF PERJURY.

(Section 174.)

Same as last form to the end, and then proceed:—

And the jurors aforesaid further present, that before the committing of the said perjury by the said A., to wit, on the day of , at , C., unlawfully, did counsel and procure the said A. to do and commit the said perjury.

TAKING REWARD FOR HELPING TO RECOVER STOLEN PROPERTY.

On , at , A. did unlawfully and corruptly take and receive dollars as a reward for and under pretence and on account of helping to recover a certain piano, (*or* twenty dollars in money *or* a promissory note, *or* a horse), belonging to and theretofore stolen from the said B., (*or as the case may be*), the said A. not having used all due diligence to bring to trial for such theft the person who committed it.

BREAKING PRISON.

(Section 187.)

On the day of , at , A. being then a prisoner confined in the common gaol or prison in and for the county of , on a criminal charge, did unlawfully, by force and violence, break the said gaol or prison, by then and there cutting and sawing two iron bars of the said gaol or prison and by also then and there breaking, cutting and removing a quantity of stone, parcel of the wall of the gaol or prison aforesaid, with intent thereby, then and there, to set himself, the said A., at liberty.

PART V. OF THE CODE.

STATEMENTS OF OFFENCES AGAINST RELIGION, MORALS AND PUBLIC CONVENIENCE.

BLASPHEMOUS LIBEL.

(Section 198.)

On , at , A. did publish a certain blasphemous indecent and profane libel of and concerning the Holy Scriptures and the Christian religion, in one part of which said libel there were and are contained amongst other things certain blasphemous, indecent and profane matters and things, of and concerning the Holy Scriptures and the Christian religion, of the tenor following, that is to say [*here set out the libellous passage, and if there be another such passage in another part of the publication introduce it thus*: "and in another part whereof there were and are contained, amongst other things, certain other blasphemous, indecent and profane matters and things, of and concerning the Holy Scriptures and of the Christian religion, of the tenor following, that is to say," etc., etc., *and conclude the count thus*]: to the high displeasure of Almighty God, and to the great scandal and reproach of the Christian religion.

OBSTRUCTING OFFICIATING CLERGYMAN.

(Section 199.)

A., on , at , unlawfully did by force (*threats of force*), obstruct and prevent B., a clergyman, from celebrating divine service in the parish church of the parish of C., [*or* "in the performance of his duty in the lawful burial of the dead in the church yard of the parish church of the parish of C.,,]

STRIKING OR ARRESTING OFFICIATING CLERGYMAN.

(Section 200.)

A., on , at , did arrest B., a clergyman, upon a certain civil process [*or* "did strike" *or* "did offer violence to B., a clergyman,"] whilst he the said B., as such clergyman, was going to perform divine service, he the said A., then well knowing that the said B. was a clergyman and was going to perform divine service.

DISTURBING A RELIGIOUS MEETING.

(Section 201.)

A., on , at , did wilfully disturb (*or* "interrupt" *or* "disquiet"), an assemblage of persons, met for religious worship, (*or* for a "moral" *or* "social" *or* "benevolent" "purpose"), by profane discourse (*or* "rude or indecent behaviour" *or* "making a noise"), within the place of such meeting, (*or* "so near to the place of such meeting as to disturb the order or solemnity of it").

SODOMY.

(Section 202.)

A., on , at , did assault, and then and there, unlawfully, wickedly, and against the order of nature have a venereal affair with and carnally know B., and then and there wickedly and against the order of nature with the said B., did commit and perpetrate that detestable and abominable crime of buggery.

BESTIALITY.

(Section 202.)

A., on , at , with a certain mare, ("*any other living creature*"), wickedly, and against the order of nature, did have a venereal affair, and, then and there, unlawfully, wickedly, and against the order of nature, with the said mare, did commit and perpetrate that detestable and abominable crime of buggery.

ATTEMPT TO COMMIT SODOMY.

(Section 203.)

A., on , at , did assault B., and then and there did attempt to wickedly, and against the order of nature, have a venereal affair with and to carnally know and commit and perpetrate with the said B. that detestable and abominable crime of buggery.

INCEST.

(Section 204.)

On , at , A. and B., then and there being and knowing themselves to be brother and sister did commit incest (*or* "did cohabit" *or* "have sexual intercourse") with each other.

ACT OF GROSS INDECENCY.

(Section 205.)

On , at , A., a male person, in public (*or* "in private") did commit an act of gross indecency with B., another male person.

OR,

(Section 206.)

On , at , A., a male person, was a party to the commission of (*or* "did procure the commission of" *or* "did attempt to procure the commission of") an act of gross indecency, in public, (*or* "in private") by B., also a male person, with C., another male person.

SELLING OR PUBLICLY EXPOSING AN OBSCENE PICTURE, ETC.

(Section 207.)

A., on , at , knowingly and without lawful justification or excuse did manufacture (*or* "sell" *or* "expose for sale," *or* "expose to public view," *or* "distribute" *or* "circulate") a certain obscene book, (*or* "picture," *or* "photograph" *or* "model"), representing a naked man or woman in a lewd, indecent and obscene posture (*or as the case may be*), and having a tendency to corrupt morals.

SEDUCTION OF GIRL BETWEEN FOURTEEN AND SIXTEEN.

(Section 211.)

On at , A., did seduce (*or* "did have illicit connection with") B., a girl, of previously chaste character, then being of (*or* "above") the age of fourteen years and under the age of sixteen years.

SEDUCTION UNDER PROMISE OF MARRIAGE.

(Section 212.)

On at , A., being then above the age of twenty-one years did, then and there, under promise of marriage, seduce and have illicit connection with B., then being an unmarried female of previously chaste character, and under twenty-one years of age.

SEDUCTION BY GUARDIAN OF WARD.

(Section 213 (*a*).)

On at , A., then being the guardian of B., then and there did seduce (or "did have illicit connection with") the said B., his ward.

SEDUCTION OF FEMALE EMPLOYEE.

(Section 213 (*b*).)

On at A., did seduce (*or* "did have illicit connection with") B., a woman of previously chaste character, and then being under the age of twenty-one years, to wit, of the age of years, and then also being in the employment of the said A. in the said A.'s factory (*or* "mill," *or* "workshop," *or* "shop," *or* "store").

PROCURING DEFILEMENT OF A WOMAN UNDER AGE.

(Section 216.)

On at A., did procure (*or* "did attempt to procure") B., a girl, (*or* "woman") then under the age of twenty-one years, to wit, of the age of years, and not being a prostitute nor of known immoral character, to have unlawful carnal connection with another person (*or* "other persons").

ENTICING A WOMAN UNDER AGE TO PROSTITUTION.

(Section 216 (*b*).)

On at A., did inveigle, (*or* "entice"), B., a girl, (*or* "woman"), then under the age of twenty-one years, to wit, of the age of years, and not being a prostitute nor of known immoral character, to a house of ill-fame, (*or* "assignation"), for the purpose of illicit intercourse (*or* "prostitution").

PROCURING A WOMAN TO BECOME A PROSTITUTE.

(Section 216 (*c*).)

On at A., did procure (*or* "attempt to procure"), B., a woman (*or* "girl"), to become, within Canada, (*or* "out of Canada"), a common prostitute.

PROCURING A WOMAN TO LEAVE CANADA FOR PROSTITUTION ELSEWHERE.

(Section 216 (*d*).)

On at A., did procure (*or* "attempt to procure"), B., a woman (*or* "girl"), to leave Canada with intent that she should become an inmate of a brothel elsewhere.

PROCURING A WOMAN TO COME TO CANADA FOR PROSTITUTION.

(Section 216 (*e*).)

On at A., did procure (*or* "attempt to procure"), B., a woman (*or* "girl"), to come to Canada from abroad with intent that she should become an inmate of a brothel in Canada.

PROCURING A WOMAN'S DEFILEMENT BY THREATS.

(Section 216 (*g*).)

On at A., by threats (*or* "intimidation") did procure (*or* "attempt to procure") B., a woman (*or* "girl") to have unlawful carnal connection within Canada (*or* "out of Canada").

PROCURING A WOMAN'S DEFILEMENT BY FALSE PRETENCES.

On at A., by false pretences (*or* "false representations"), did procure B., a woman, (*or* "girl"), not being a prostitute nor of known immoral character, to have unlawful carnal connection within Canada (*or* "out of Canada").

DEFILING BY MEANS OF DRUGS.

(Section 216 (*i*).)

On at A., did apply (*or* "administer") to and cause to be taken by B., a woman, (*or* "girl"), a certain drug to wit, (*or* "some intoxicating liquor," *or* some other matter or thing, *as the case may be*), with intent to stupefy (*or* "overpower") her the said B., so as thereby to enable the said A. (*or* "a certain man, to wit, C.,") to have unlawful carnal connection with her the said B.

CONSPIRACY TO INDUCE A WOMAN TO COMMIT ADULTERY OR FORNICATION.

(Section 218.)

On at A. and B., did conspire, combine, confederate and agree together, by false pretences, to induce C., a woman, to commit adultery (*or* "fornication") with D.

A COMMON NUISANCE ENDANGERING LIFE, Etc.

(Section 221.)

At on , and on and at divers other days and times, before and since that date, A., unlawfully and injuriously did and he does yet continue to (*set out the particular act or omission complained of*) and thereby did commit and does continue to commit a common nuisance endangering the lives (*or* "safety" *or* "health") of the public.

A COMMON NUISANCE OCCASIONING PERSONAL INJURY.

(Section 222.)

At on , and on and at divers other days and times, before and since that date, A., unlawfully and injuriously did and he does yet continue to (*set out the particular act or omission complained of*) and thereby did commit and does continue to commit a common nuisance by which the public were and are obstructed in the exercise or enjoyment of a right common to all His Majesty's subjects, to wit, (*set out the common right obstructed*) and which common nuisance did at aforesaid on the day of occasion actual injury to the person of B.

OR,

(Section 222.)

At on , and on and at divers other days and times, before and since that date, A., unlawfully and injuriously did and he does yet continue to (*set out the particular act or omission complained of*) and thereby did commit and does continue to commit a common nuisance, endangering the property (*or* "comfort") of the public and which common nuisance did at aforesaid on the day of occasion actual injury to the person of B.

SELLING THINGS UNFIT FOR FOOD.

(Section 224.)

B. C., on at did unlawfully, knowingly and wilfully expose for sale (or have in his possession with intent to sell) for human food, a certain article to wit (*name the article*), which he, the said B. C., then knew to be unfit for human food by reason of the same being (*state nature of unfitness*).

KEEPING A BAWDY-HOUSE.

(Sections 225-228.)

At on , and on and at divers other days and times since that date, A., and B., the wife of the said A., did keep and maintain a disorderly house, to wit, a common bawdy-house, by keeping and maintaining a certain house (*or* "room," *or* "set of rooms," etc.), situate and being , for purposes of prostitution.

KEEPING A COMMON GAMING-HOUSE.

(Sections 226-228.)

At on , and on and at divers other days and times since that date, A. (*or* "A., B. and C."), did keep and maintain a disorderly house, to wit, a common gaming-house by keeping and maintaining for gain a certain house (*or* "room," etc.) situate and being to which persons did and do resort for the purpose of playing at games of chance, to wit, (or mixed games of chance and skill, to wit.)

OR,

(Section 228.)

(*Commence as above*) did keep and maintain a disorderly house, to wit, a common gaming-house, by keeping (*or* "using") for gain, a certain house (*or* "room," etc.), situate and being for playing therein at games of chance and mixed games of chance and skill, and in which a bank was and is kept by one or more of the players exclusively of the others, (*or in which, in the games played therein, the chances are not alike favourable to all the players*).

VAGRANCY.

(Sections 238-239.)

(*a*) A. B., at , on , not having any visible means of subsistence, was found unlawfully wandering abroad (*or* was found lodging in a barn, *or* out-house, *or* in a deserted *or* unoccupied building, or in a cart or waggon or as otherwise stated in section 238 (*a*), or not having any visible means of maintaining himself, lives without employment, and is thereby a loose, idle and disorderly person and a vagrant.

OR,

(*b*) Being able to work and thereby (*or* by other means, *stating them*), to maintain himself and family, wilfully and unlawfully refused or neglected to do so, and is thereby, etc.

OR,

(*c*) Unlawfully did openly expose, or exhibit in street (*or* road, *or* highway, *or* public place, to wit, *state the place*), an indecent exhibition (see *post*, "Indecent Exhibitions," *stating its nature in general terms*), and is thereby, etc.

OR,

(*d*) Was unlawfully wandering about and begging (*or* did unlawfully go from door to door, *or* place himself in a street, *or* highway, *or* passage, *or* public place, to wit, *name it*, to beg or receive alms), without a certificate signed within six months, by a priest, *or* clergyman, *or* minister of the gospel, *or* two justices of the peace, as by law required, and is thereby, etc.

OR,

(*e*) Did unlawfully loiter on a public street (*or* road, *or* highway, *or* public place, to wit, *describe where*), and obstruct passengers by standing across the footpath (*or* by using insulting language, to wit, *state the language used, or state any other way by which any passenger, on the way, was obstructed*), and is thereby, etc.

OR,

(*f*) Did unlawfully cause a disturbance in (*or* near a street, *or* road, *or* highway, *or* public place, *describing it*), by screaming, *or* swearing, *or* singing, *or* by being drunk, *or* by impeding or incommoding peaceful passengers), and is thereby, etc.

OR,

(*g*) By discharging fire-arms (*or* by riotous or disorderly conduct, to wit, by, *describe it*), in a street, *or* highway, in the said of , wantonly and unlawfully disturbed the peace and quiet of the inmates of the dwelling-house of C. D., situate near the said street or highway, and is thereby, etc.

OR,

(*h*) Did unlawfully tear down or deface a sign (*or* break a window, *or* a door, *or* a door-plate, *or* the wall of a house, *or* of a road, *or* of a garden, *or* destroying a fence, *describing the same*), and is thereby, etc.

OR,

(*i*) Being a common prostitute (*or* night-walker), wandered in the fields adjacent to the of (*or* in the public streets, *or* highways, *or* lanes, *or* places of public meetings, *or* gathering of people, *stating where*), and upon demand being thereupon made of her by C. D., a peace officer of the said of , she unlawfully did not give a satisfactory account of herself, and is thereby, etc.

OR,

(*j*) Was unlawfully a keeper (*or* inmate) of a disorderly house, to wit, a common bawdy house (*or* house of ill-fame, *or* house for the resort of prostitutes, see "Disorderly House"), and is thereby, etc.

OR,

(*k*) Was unlawfully in the habit of frequenting disorderly houses, *or* bawdy houses (*or* houses of ill-fame, *or* houses for the resort of prostitutes), and upon being required by C. D., a peace officer, did not give a satisfactory account of herself, and is thereby, etc.

OR,

(*l*) Having no peaceable profession or calling to maintain himself by, for the most part supports himself by gaming (*or* by crime, *or* by the avails of prostitution), and is thereby, etc.

PART VI. OF THE CODE.

OFFENCES AGAINST THE PERSON AND REPUTATION.

OMISSION OF FATHER TO PROVIDE NECESSARIES FOR CHILD UNDER SIXTEEN.

(Section 242.)

At on , and on and at divers other days and times, before and since that date, A., being then and there the father of B., a child under sixteen years of age, who was then and there a member of the said A.'s household, and the said A., being, as such father, under a legal duty and bound by law to provide sufficient food, clothing and lodging and all other necessaries for the said B., his said child, did, in disregard of his duty in that behalf, then and there, refuse, neglect and omit, without lawful excuse, to provide necessaries for the said B., his said child, by means whereof the life of the said B. has been and is endangered; (*or* "the health of the said B., is now and is likely to be permanently injured").

OMISSION OF HUSBAND TO PROVIDE NECESSARIES FOR WIFE.

(Section 242.)

(*Commence as above*) A., the husband of B., being then and there, as such husband, under a legal duty and bound by law to provide sufficient food, clothing and lodging and all other necessaries for B., his said wife, did, in disregard of his duty in that behalf, then and there, refuse, neglect and omit, without lawful excuse, to provide necessaries for her the said B. by means whereof the life of the said B. has been and is endangered, (*or*, "the health of the said B., is now and is likely to be permanently injured").

OMISSION OF MASTER TO PROVIDE NECESSARIES FOR SERVANT OR APPRENTICE.

(Section 243.)

(*Commence as above*) A., being then and there the master of B., a servant, (*or* "an apprentice"), under the age of sixteen years, and being then and there under contract and legally bound to provide necessary food, clothing and lodging for the said B., as his said servant, (*or* "apprentice"), did in disregard of such contract and of the legal duty imposed upon him by law, in that behalf, then and there refuse, neglect and omit, without lawful excuse, to provide necessary food, clothing and lodging for the said B., by means whereof the life of the said B. has been and is endangered; (*or* "the health of the said B. has been and is likely to be permanently injured").

ABANDONING CHILD UNDER TWO YEARS OF AGE.

(Section 245.)

On at A. unlawfully did abandon and expose B., a child then under the age of two years, whereby the life of the said B. was and is endangered; (*or* "the health of the said B. has been and is permanently injured").

CAUSING BODILY HARM TO SERVANT OR APPRENTICE.

(Section 249.)

On , at , A. being then and there the master of B., a servant, (*or* "an apprentice"), and being legally liable to provide for the said B., as his servant (*or* "apprentice"), then and there unlawfully did do and cause to be done bodily harm to the said B., whereby the life of the said B. was and is endangered; (*or* "the health of the said B. has been and is likely to be permanently injured").

MURDER.

(Section 249.)

A. murdered B. at on .

OR,

At on A. did commit murder.

ATTEMPT TO COMMIT MURDER BY POISONING.

(Section 264 (a)).

At , on , A. did administer (*or* "cause to be administered") to B. certain poison (*or* "a certain destructive thing" (to wit, with intent, thereby, then and there, to murder the said B. (*or* "with intent thereby then and there to commit murder").

ATTEMPT TO MURDER BY WOUNDING, Etc.

(Section 264 (b)).

At , on , A. did wound (*or* "cause grievous bodily harm") to B. with intent, thereby, then and there, to murder the said B. (*or* "with intent, thereby, then and there, to commit murder").

ATTEMPT TO MURDER BY SHOOTING.

(Section 264 (*c*).)

At , on , A. did, with a certain loaded gun (*or* "pistol," *or* "revolver") shoot (*or* "attempt to discharge a loaded arm") at B., with intent, thereby, there and then, to murder the said B. (*or* "with intent, thereby, then and there, to commit murder").

ATTEMPT TO MURDER BY DROWNING, Etc.

(Section 264 (*d*).)

At , on , A. did attempt to drown (*or* suffocate," *or* "strangle") B., with intent, thereby, then and there, to murder the said B., (*or* "with intent, thereby, then and there, to commit murder").

ATTEMPT TO MURDER, BY EXPLOSION.

(Section 264 (*e*).)

At on , A., did by the explosion of a certain explosive substance, to wit, [*describe the explosive*], destroy (*or* "damage") a certain building situate and being in street, inn aforesaid, with intent, thereby, then and there, to murder B. (*or* "with intent, thereby, then and there, to commit murder").

ATTEMPT TO MURDER, BY ANY MEANS.

(Section 264 (*h*).)

At on , A., by then and there, cutting the rope of a certain hoist (*or* "breaking the chain of a certain elevator") in a certain building situate and being in street in aforesaid (*or, otherwise describe the actual deed*) did attempt to murder B. (*or* "to commit murder").

THREATENING, BY LETTER, TO KILL OR MURDER.

(Section 265.)

At on , A., did send (*or* "deliver"), to (*or* "cause to be received by") B., a certain letter (*or* "writing") threatening to kill (*or* "murder") the said B., he the said A., then knowing the contents of the said letter (*or* "writing").

OR,

(Section 265.)

At on , A., did utter a certain writing, (*or* "letter"), threatening to kill (*or* "murder") B., he the said A., then knowing the contents of the said writing (*or* "letter").

CONSPIRACY TO MURDER.

(Section 266.)

At on , A., B. and C. did conspire and agree together to murder D., (*or* "*to* cause D. to be murdered").

COUNSELLING MURDER.

(Section 266.)

At on , A., did unlawfully counsel (*or* "attempt to procure") B., to murder C.

MANSLAUGHTER.

(Section 262.)

A. unlawfully did kill and slay B., at on .

OR,

(Section 262.)

At on , B. did slay and kill, and did thereby commit manslaughter.

AIDING AND ABETTING SUICIDE.

(Section 269.)

At on , and on divers other days before that date, A., did counsel and procure B. to commit suicide, in consequence of which counselling and procuring by the said A., the said B., then and there, actually did commit suicide.

ATTEMPT TO COMMIT SUICIDE.

(Section 270.)

A., at on , did attempt to commit suicide by then and there endeavoring to kill himself.

NEGLECT TO OBTAIN ASSISTANCE IN CHILD-BIRTH.

(Section 271.)

At on , A., being then and there with child and about to be delivered of such child, did, then and there, with intent that her said child should not live, neglect to provide reasonable assistance in her delivery, whereby and in consequence of which neglect her said child was and is permanently injured (*or* "died during or shortly after birth").

CONCEALMENT OF BIRTH.

(Section 272.)

On at , A., was delivered of a child, and that subsequently on at aforesaid, the said child being dead, the said A. (*or* "B.") did dispose of the dead body of the said child, by secretly burying it (*or state the actual means used*), with intent to conceal the fact that the said A. had been delivered of such child.

WOUNDING WITH INTENT TO MAIM, ETC.

(Section 273.)

On at , A., with intent to maim (*or* "disfigure," *or* "disable" *or* "do grievous bodily harm to") B., did wound (*or* "cause grievous bodily harm to") the said B.

OR,

(Section 273.)

On at , A., with intent to resist the lawful apprehension (*or* "detainer") of him the said A. (*or* "*of* B.") did wound (*or* "cause grievous bodily harm to") C.

OR,

(Section 273.)

On at , A., with intent to resist the lawful apprehension (*or* "detainer") of him the said A. (*or* "of B.") did, with a certain loaded gun (*or* "pistol" *or* "revolver") shoot (*or* "attempt to discharge a loaded arm") at C.

WOUNDING, BODILY HARM.

(Section 274.)

On at , A., unlawfully did wound (*or* "inflict grievous bodily harm upon") B.

WOUNDING A PUBLIC OFFICER.

(Section 275.)

At on , A. wilfully did maim (*or* "wound") B., a public officer engaged in the execution of his duty, (*or* "a person acting in aid of C., a public officer engaged in the execution of his duty").

CHOKING OR DISABLING WITH INTENT TO COMMIT AN INDICTABLE OFFENCE.

(Section 276.)

At on , A., with intent thereby to enable him the said A. (*or* "one B.") to rob C., did attempt to choke (*or* "suffocate," *or* "strangle") the said C.

OR,

(Section 276 (*a*).)

At on , A., with intent thereby to enable him the said A., (*or* "one B.") to rob (*or* "to commit a rape upon") C., did attempt to render the said C. insensible (*or* "unconscious," *or* "incapable of resistance") by gagging *or* "garotting," *or* "sandbagging") *or* [mention *the actual means used*], the said C., in a manner calculated to choke, or "suffocate," *or* "strangle") the said C.

DRUGGING WITH INTENT TO COMMIT AN INDICTABLE OFFENCE.

(Section 276 (*b*).)

At on , A., with intent thereby to enable him the said A. (*or* "one B.") to rob (*or* "to commit a rape upon") C., did apply and administer (*or* "attempt to apply and administer *or* "cause to be administered") to (*or* "cause to be taken by") C., certain chloroform (*or* "laudanum") (*or mention the stupefying or over-powering drug, matter or thing used.*)

ADMINISTERING POISON AND THEREBY ENDANGERING LIFE.

(Section 277.)

On at , A. unlawfully did administer (*or* "cause to be administered") to (*or* "cause to be taken by") B., certain poison (*or* "a certain destructive and noxious thing"), to wit, , and did thereby endanger the life of (*or* "inflict grievous bodily harm upon") the said B.

ADMINISTERING POISON WITH INTENT TO INJURE.

(Section 278.)

On at , A., with intent thereby to injure (*or* "aggrieve," *or* "annoy") B., unlawfully did administer (*or* "cause to be administered") to (*or* "cause to be taken by") the said B., certain poison (*or* "a certain destructive and noxious thing"), to wit, [*describe the drug or other noxious thing, and mention the quantity used.*]

CAUSING BODILY INJURY, BY EXPLOSION.

(Section 279.)

On at , A., by the explosion of a certain explosive substance, to wit, , unlawfully did burn *or* "maim," *or* "disfigure," *or* "disable," *or* "do grievous bodily harm") to B.

CAUSING EXPLOSION, WITH INTENT TO INJURE.

(Section 280 (i).)

At , on , A., with intent thereby to burn (*or* "maim," *or* "disfigure," *or* "disable," *or* "do grievous bodily harm to") B. (*or* "any person") unlawfully did cause a certain explosive substance, to wit, , to explode.

SENDING AN EXPLOSIVE SUBSTANCE WITH INTENT TO INJURE.

(Section 280 (ii).)

At on A., with intent thereby to burn (*or* "maim," *or* "disfigure," *or* "disable," *or* "do grievous bodily harm to") B., unlawfully did send (*or* "deliver") to (*or* "cause to be taken into the possession of" *or* "to be received by") the said B., a certain explosive substance to wit, .

PLACING DESTRUCTIVE FLUIDS, ETC., WITH INTENT TO INJURE.

(Section 280 (iii).)

At on , A., with intent thereby to burn (*or* "maim," *or* "disfigure," *or* "disable," *or* "do grievous bodily harm to") B., unlawfully did put and lay, in a certain place, to wit, [*describe the place*] a certain fluid (*or* "destructive" *or* "explosive substance," to wit [*describe the fluid or substance*].

THROWING DESTRUCTIVE FLUIDS, ETC., WITH INTENT TO INJURE.

(Section 280 (*b*).)

At on , A., with intent thereby to burn (*or* "maim," *or* "disfigure," *or* "disable," *or* "do grievous bodily harm to") B., unlawfully did cast and throw at and upon the said B., a certain corrosive fluid (*or* "destructive" *or* "explosive substance") to wit [*describe the fluid or substance used*].

SETTING SPRING-GUNS, ETC.

(Section 281.)

On at , A., did set and place (*or* "cause to be set and placed") in a certain [*describe where set*] a certain spring-gun (*or*

"man-trap"), calculated to destroy human life (*or* "inflict grievous bodily harm"), with intent that the same (*or* "whereby the same") might destroy (*or* "inflict grievous bodily harm upon") any trespasser, or other person coming in contact therewith.

INTENTIONALLY ENDANGERING RAILWAY PASSENGERS.

(Section 282 (*a*).)

On at , A., with intent to injure or endanger the safety of persons on the Canadian Pacific Railway, did an act calculated to interfere with an engine, a tender, and certain carriages on the railway on at by (*describe with so much detail as is sufficient to give the accused reasonable information as to the acts or omissions relied on against him, and to identify the transaction.*)

OR,

(Section 282 (i).)

On at , A., upon and across a certain railway there called , a certain piece of wood (*or* "stone," etc.) did put (*or* "throw"), with intent thereby to injure or endanger the safety of persons travelling, (*or* "being") upon the said railway.

OR,

(Section 282 (ii).)

On at , A., from a certain railway, there called , certain rail (*or* "railway switch," etc.), there being upon and belonging to such railway, did take up (*or* "remove," *or* "displace"), with intent thereby to injure or endanger the safety of persons travelling (*or* "being") upon the said railway.

OR,

(Section 282 (iii).)

On at , A., a certain point (*or other machinery*) then being upon and belonging to a certain railway called , did turn (*or* "move," *or* "divert"), with intent thereby to injure or endanger the safety of persons travelling (*or* "being") upon the said railway.

OR,

(Section 282 (iv).

On at , A., did make (*or* "show," *or* "hide," *or* "remove"), a certain signal (*or* "light") upon (*or* "near to") a certain railway called , with intent, thereby, to injure or endanger the safety of persons travelling (*or* "being") upon the said railway.

OR,

(Section 282 (v).)

On at , A., a certain piece of wood (*or* "stone,' etc.), did throw (*or* "cause to fall" *or* "strike") at (*or* "against," *or* "into,"*or* "upon") a certain engine, (*or* "tender," *or* "carriage," *or* "truck"), then being used and in motion upon a certain railway there called , with intent, thereby, to injure or enanger the safety of B., then and there being upon the said engine (*or* "tender" *or* "carriage," *or* "truck" *or* "engine," etc., of the train of which the said first mentioned engine, etc., then formed part").

NEGLIGENTLY ENDANGERING THE SAFETY OF RAILWAY PASSENGERS.

(Section 283.)

On at , A., by wilfully omitting and neglecting to do his duty, that is to say, by wilfully omitting and neglecting to (*set out the particular act omitted to be done*) which it was then the duty of him the said A. to do, did endanger (*or* "cause to be endangered") the safety of persons then conveyed (*or* "being") in and upon a certain railway there called.

DOING INJURY BY FURIOUS DRIVING.

(Section 285.)

On at , A., being in charge of a certain vehicle, to wit, a motor vehicle, did then and there by his wanton and furious driving, of (*or* "racing") with the said vehicle do (*or* "cause to be done") bodily harm to B.

PREVENTING THE SAVING OF A SHIPWRECKED PERSON.

(Section 286.)

On at , A. did prevent and impede (*or* "endeavour to prevent and impede") B., a shipwrecked person, in his endeavour to save his life.

COMMON ASSAULT.

(Section 291.)

On at , A., assaulted (*or* assaulted and beat) B.

INDECENT ASSAULT ON A FEMALE.

(Section 292.)

On at , A., indecently did assault B., a female.

INDECENT ASSAULT ON A MALE.

(Section 293.)

On at , A., a male person indecently did assault B., another male person.

ASSAULT CAUSING ACTUAL BODILY HARM.

(Section 295.)

On at A., did make an assault upon and beat and occasion actual bodily harm to B.

AGGRAVATED ASSAULT.

(Section 296 (*a*).)

On at A., in and upon B. did make an assault with intent then and there to commit an indictable offence, namely, [*describe the indictable offence intended.*]

OR,

(Section 296 (*b*).)

On at , A., did assault B., a public officer (*or* "a peace officer") then and there engaged in the execution of his duty.

OR,

(Section 296 (*c*).)

On at , A. did assault B., with intent then and there to resist (*or* "prevent") the lawful apprehension (*or* "detainer") of him the said A., (*or* "one C.") for a certain offence, to wit, [*state the offence.*]

OR,

(Section 296 (*d*).)

On at , A., did assault B., who was then and there, in his quality of a duly appointed bailiff of , engaged in the lawful execution of a certain process against (*or* "in the making of a lawful seizure of") lands (*or* "goods").

OR,

(Section 296 (*e*).)

At on , day whereon a poll for the election of municipal councillors, for the municipality of was being proceeded with, A., being then and there, within two miles from the place where such poll was being held, did unlawfully make an assault upon and beat B.

KIDNAPPING.

(Section 297.)

On at , A., without lawful authority, did kidnap B., with intent to cause the said B. to be secretly confined or imprisoned in *Canada*, (*or* "to be unlawfully sent out of Canada," *or* "to be sold or captured as a slave, or in any way held to service"), against his will.

UNLAWFUL IMPRISONMENT.

(Section 297.)

On , at , A., without lawful authority, forcibly seized (*or* "confined" *or* "imprisoned") B., within Canada.

RAPE.

(Section 298.)

On at A., did assault B., a woman, who was not his wife, and did then and there have carnal knowledge of her without her consent.

ATTEMPT TO COMMIT RAPE.

(Section 300.)

On at A., did assault B., a woman, who was not his wife, with intent then and there to have carnal knowledge of her the said B., without her consent.

CARNALLY KNOWING A GIRL UNDER FOURTEEN.

(Section 301.)

On at A., did have carnal knowledge of B., a girl under the age of fourteen years, not being his wife.

ATTEMPT TO CARNALLY KNOW A GIRL UNDER FOURTEEN.

(Section 302.)

On at A. did attempt to have carnal knowledge of B., a girl under the age of fourteen years, not being his wife.

ABORTION.

(Section 303.)

On at , A., with intent thereby to procure the miscarriage of a certain woman to wit, one B., did unlawfully administer to (*or* "cause to be taken by") her the said B., a certain drug (*or* "a certain noxious thing") to wit [*describe the drug or noxious thing used, and mention the quantity.*]

OR,

On at , A, with intent thereby to procure the miscarriage of a certain woman, to wit, one B., did unlawfully use upon the person of the said B., a certain instrument, to wit [*describe the instrument used.*]

OR,

(Section 304.)

On at , A., a woman, did, with intent thereby to procure her own miscarriage, unlawfully administer (*or* "permit to be administered") to herself a certain drug (*or* "a certain noxious thing") to wit [*describe the drug or noxious thing, and mention the quantity used*].

OR,

(Section 305.)

On at , A., unlawfully did supply (*or* "procure") a certain drug (*or* "a certain noxious thing") to wit, [*describe and mention the quantity of it*] he the said A., then knowing that the same was intended to be unlawfully used or employed with intent to procure the miscarriage of a certain woman, to wit, one B.

OR,

(Section 305.)

On at , A., unlawfully did supply (*or* "procure") a certain instrument, to wit, [*describe the instrument*], he the said A., then knowing that the same was intended to be unlawfully used or employed with intent to procure the miscarriage of a certain woman, to wit, one B.

OFFENCES AGAINST CONJUGAL RIGHTS.

BIGAMY.

(Section 307.)

On at , A., being already theretofore, married to one B., did marry and go through a form of marriage with another woman (*or* "man"), to wit, C., and, to her (*or* "him") the said C. was then and there married, the said B., his the said A.'s, said first wife (*or* her, the said A.'s, said first husband") being still alive.

PROCURING A FEIGNED MARRIAGE.

At on , A., did procure a feigned and pretended marriage between himself, the said A., and a certain woman, to wit, B.

OR,

At on A., did knowingly aid and assist B., in procuring a feigned and pretended marriage between him, the said B., and a certain woman, to wit, C.

POLYGAMY.

(Section 310.)

At on , and on and at divers other days and times before and since that date, A., a male person, and B., C. and B., three females, did practice (*or* "agree and consent to practice") polygamy together.

OR,

At on , A., male person, and B., C. and D., three females, did enter into a conjugal union (*or* "spiritual or plural marriage," etc.) together, by means of a contract (*or* "the rites" *or* "rules," etc.) "of a certain denomination," (*or* "sect" *or* "society" called Mormons), (*or* "called," etc.).

SOLEMNIZING MARRIAGE, WITHOUT AUTHORITY.

(Section 311.)

On at , A., without lawful authority, did solemnize (*or* "pretend to solemnize") a marriage between B. and C.

OR,

On at , A., then knowing that B. was not lawfully authorized to solemnize a marriage between C. and D., did procure the said B. to solemnize a marriage between the said C. and D.

SOLEMNIZING A MARRIAGE CONTRARY TO LAW.

(Section 312.)

At on , A., a clergyman of , having lawful authority to solemnize marriages, did, then and there, knowingly and wilfully solemnize a marriage between B. and C., in violation of the laws of the province of , in which the said marriage was so solemnized, to wit, by solemnizing the same without any previous publication of banns, and without any license in that behalf, *or*, [*set out the particular violation complained of.*]

ABDUCTION.

(Section 313.)

On at , A., did take away (*or* "detain") against her will, a certain woman, to wit, B., with intent to marry (*or* "carnally know") the said B.,

OR,

On at , A., did take away (*or* "detain") against her will, a certain woman, to wit, B., with intent to cause her, the said B., to be married to (*or* "carnally known by") C.

ABDUCTION OF AN HEIRESS OF ANY AGE.

(Section 314.)

On at , A., from motives of lucre, did take away (*or* "detain," *or* "take away and detain") against her will, a certain woman, to wit, B., such woman having a certain legal (*or* "equitable") present absolute, (*or* "future absolute" *or* "future conditional" *or* contingent" interest in certain real (*or* "personal") estate, to wit, (*describe the estate or property*), [*or* such woman being a presumptive heiress or co-heiress or presumptive next of kin to C., who has a legal, (*or*, etc.), interest in (*etc.*)], with intent to marry (*or* "carnally know") the said B., (*or* with intent to cause her, the said B., to be married to), (*or* "carnally known by") D.

ALLUREMENT OR ABDUCTION OF AN HEIRESS UNDER TWENTY-ONE.

(Section 314.)

On at , A., with intent to marry (*or* "carnally know") a certain woman, to wit, B., then being under the age of twenty-one years, and having a certain legal (*or* etc.), interest in (etc.), [*follow the above form as to the woman's quality of heiress*], did fraudulently allure (*or* "take away" *or* "detain") the said B., out of the possession and against the will of C., her father, (*or* "mother," etc.).

ABDUCTION OF A GIRL UNDER SIXTEEN.

(Section 315.)

On at , A., unlawfully did take (*or* "cause to be taken") a certain unmarried girl, to wit, B., then under the age of sixteen years, out of the possession and against the will of C., her father, (*or* "mother" *or* "a person having the lawful care and charge of her the said B.").

STEALING CHILDREN UNDER FOURTEEN.

(Section 316.)

On at , A., unlawfully did take (*or* "entice") away (*or* "detain,") one B., a child under the age of fourteen years, to wit, of the age of years, with intent, thereby, then and there, to deprive C., the father (*or* "mother," *or* "guardian," etc.), of the said B., of the possession of the said B., (*or* "with intent, thereby, then and there, to steal a certain article (*or* "certain articles), to wit, (*mention the article or articles*) then being on or about the person of the said B."

OR,

(Section 316.)

On at , A., unlawfully did receive (*or* "harbour") one B., a child under the age of fourteen years, to wit, of the age of years, then and there knowing the said B. to have been then and there, and theretofore, taken (*or* "enticed") away, with intent to deprive C., the father (*or* "mother" *or* "guardian," etc.) of the said B., of the possession of the said B.

EXTORTION BY DEFAMATORY LIBEL.

(Section 332.)

On at , A., did publish (*or* "threaten to publish," *or* "offer to abstain from or prevent the publishing of") a defamatory libel of and concerning B., with intent thereby,

then and there, to induce the said B., (*or* "one C"), to confer upon, (*or* "procure for") the said A., (*or* "one D.") a certain appointment (*or* "office") of profit (*or* "trust"), to wit, [*mention the appointment or office in question*].

OR,

(Section 332.)

On at , A., did publish (*or* "threaten to publish") a defamatory libel of and concerning B., in consequence of the said A. having been refused money theretofore demanded by him the said A. of and from the said B. (*or* "in consequence of the said A. having been refused a certain appointment, etc., theretofore sought by him the said A., of or from or at the hands or by the influence of the said B.").

PUBLISHING A LIBEL KNOWING IT TO BE FALSE.

(Section 333.)

On at , A., did publish in a certain newspaper called the a defamatory libel, on, of and concerning B., he the said A. well knowing the same to be false, which libel was contained in the said newspaper in an article therein headed (*or* "commencing with") the following words, to wit, [*set out the heading, or the commencing, and, if necessary, the concluding words of the libel, or otherwise give so much detail as is sufficient to furnish the accused with reasonable information as to the part of the publication to be relied on against him*], and which libel was written in the sense of imputing that the said B. was [*as the case may be*], and which libel was published without legal justification or excuse, and was likely to injure and did injure the reputation of the said B., by exposing him to hatred, (*or* "contempt," *or* "ridicule").

PUBLISHING A LIBEL.

(Section 334.)

On at , A., did publish on, and of and concerning B., a defamatory libel in a certain letter directed to C., which libel was in the words following that is to say, [*set out the part of the letter complained of as libellous*], and which libel was written in the sense of imputing that the said B. was [*as the case may be*], and was designed to insult the said B.

Special Pleadings in Libel Cases.

SPECIAL PLEA.

And, without waiver of his plea of not guilty, the said A., for a further plea in this behalf, says that Our Lord the King ought not further to prosecute the said indictment against him because he says it is true that [*and so on, stating facts showing the truth of every matter charged in the alleged libel*]; and so the said A. says that the said alleged libel is true in substance and in fact. And the said A., further says that the said alleged libel was and is matter of public interest and concern and that before and at the time of publishing the said alleged libel, it was for the public benefit that the matters contained therein should be published, to the extent that the same were published by him the said A., because [*set out the facts showing that the publication was for the public benefit*]. And this he the said A. is ready to verify, etc.

REPLICATION.

And as to the second plea of the said A., the said J. N. (*the clerk of the Crown*) who prosecutes for Our said Lord the King in this behalf, says that Our said Lord the King ought not, by reason of anything in the said second plea alleged, to be barred or precluded from prosecuting the said indictment against the said A., because the said J. N. says that he denies the

said several matters in the said second plea alleged, and says that the same are not, nor are, nor is any or either of them, true, etc. And this he the said J. N. prays may be enquired of by the country, etc.

PART VII. OF THE CODE.

STATEMENTS OF OFFENCES AGAINST RIGHTS OF PROPERTY, OFFENCES CONNECTED WITH TRADE, ETC.

KILLING AN ANIMAL WITH INTENT TO STEAL THE CARCASE, Etc.

(Section 350.)

At on , A., did kill one sheep, belonging to B., with intent to steal the carcase (*or* "a part of the carcase, to wit, the inward fat") of the said sheep.

FRAUDULENT CONVERSION BY A PERSON ENTRUSTED WITH MONEY.

(Section 355).

At on , A.,—having theretofore received from B., the sum of one hundred dollars, on terms requiring him, the said A., to pay over the same to C.,—did fraudulently convert to his own use and thereby steal the said sum of money.

THEFT BY HOLDER OF A POWER OF ATTORNEY.

(Section 356.)

At on , A., having been theretofore entrusted, by B., with a power of attorney for the sale of a certain lot of land and the buildings thereon, to wit, (*describe the property*), did sell the same fraudulently, to wit, for a sum of money which was $500 less than the value thereof under a fraudulent arrangement for the division of the said surplus value of $500 between the said A. and one C.

OR,

(Section 356.)

At on , A., having been theretofore entrusted, by B., with a power of attorney for the sale of a certain lot of land and the buildings thereon, to wit, (*describe the property*), and having theretofore sold the said land and buildings, did, then and there, fraudulently convert the proceeds of the said sale, to wit, the sum of two thousand dollars, to a purpose other than that for which he was entrusted with the said power of attorney, by then and there applying and converting the said money to his own use.

THEFT BY MISAPPROPRIATING MONEY HELD UNDER DIRECTION.

(Section 357.)

At on , A., having theretofore received from B., the sum of one hundred dollars, with a direction from him the said B., to the said A., that the said money should be paid to C., did, then and there, in violation of good faith and contrary to the terms of the said direction, fraudulently convert to his own use and thereby steal the said sum of money.

THEFT BY A PARTNER.

(Section 352.)

At on , A. stole one car load of coals of the value of the property of a co-partnership composed of the said A. and one B.

THEFT BY A CLERK OR SERVANT.

(Section 359.)

At on , A., being then and there, a clerk, (*or* "employed for the purpose and in the capacity of a clerk") to B., his master, (*or* "employer"), did steal certain money, to the amount of one hundred dollars, certain goods, to wit, one gold watch and one gold chain, and a certain valuable security, to wit, one promissory note for the payment of twenty dollars, of and belonging to (*or* "in the possession of") the said B., his master, (*or* "employer").

THEFT BY A BANK OFFICIAL.

(Section 359 (*b*).)

At on , A., being then and there a cashier (*or* "assistant cashier," *or* "manager" *or* "clerk," etc.), of the bank, (*or* "savings bank"), did steal certain money to the amount of five thousand dollars, (*or* "bonds," *or* "obligations," etc.), [*describe them*], of and belonging to, (*or* "lodged," *or* "deposited") in the said bank, *or* "savings bank").

THEFT BY GOVERNMENT EMPLOYEE.

(Section 359 (*c*).)

At on , A., being then and there employed in the service of His Majesty (*or* "the Government of Canada," *or* "the Government of the Province of Ontario," *or* "Quebec," *or* "the municipality of "), and being, then and there, by virtue of his said employment, in possession of certain moneys to the amount of ten thousand dollars, (*or* "certain valuable securities, to wit"), [*describe them*], did unlawfully steal the said moneys, (*or* "the said valuable securities").

GOVERNMENT EMPLOYEES REFUSING TO DELIVER UP BOOKS, Etc.

At on , A., being then and there employed in the service of His Majesty (*or* "the Government of Canada," *or* "the Government of the Province of Ontario," *or* "Quebec," *or* "the municipality of "), and being, then and there, entrusted, by virtue of his employment, with the keeping (*or* "receipt," *or* "custody," *or* "management," *or* "control") of certain monies, to the amount of ten thousand dollars, (*or* "certain chattels, to wit," [*describe them*], *or* "certain valuable securities, to wit," [*describe them*], *or* "certain books, papers, accounts and documents, to wit"), [*describe them*], did refuse (*or* "fail") to deliver up the same, to B., who was, then and there, duly authorized to demand them.

THEFT BY TENANT.

(Section 360.)

At on , A., being then and there a tenant, (*or* "lodger") of or in a certain house (*or* "lodging"), to wit, [*describe the premises*], did steal a certain chattel, (*or* "fixture"), to wit, [*describe the chattel or fixture*], belonging to B., and let to be used by him the said A., in or with the said house, (*or* "lodging").

THEFT OF A WILL.

(Section 361.)

At on , A., did steal a certain testamentary instrument, to wit, the last will and testament (*or* "a codicil to the last will and testament") of B.

THEFT OF A DOCUMENT OF TITLE.

(Section 362.)

At on , A., did steal a certain document of title to goods, to wit, one bill of lading, [*describe the document and the goods to which it relates*], *or* "one dock warrant," *or* "warehouse keeper's receipt," etc.), the property of B.

OR,

(Section 362.)

At on , A., did steal a certain document of title to lands, to wit, one deed, (*or* "map," *or* "paper," etc.), containing evidence of the title, (*or* "a part of the title") of B., to certain real property, to wit, [*describe the property*], belonging to the said B. (*or* "in which the said B. has an interest").

THEFT OF JUDICIAL DOCUMENTS, Etc.

(Section 363.)

At on , A., did steal a certain record of and belonging to the Superior Court of Lower Canada for the district of Montreal in a certain cause, [*describe the cause, matter or proceeding*] then (*or* "theretofore"), depending in the said Court.

OR,

(Section 363.)

At on , A., did steal a certain writ, (*or* "petition," etc.), forming part of a certain record of and belonging to the Superior Court of Lower Canada, for the district of Montreal, in a certain cause [*describe the cause, matter or proceeding*], then (*or* "theretofore") depending in the said Court.

STEALING A POST-LETTER BAG.

(Section 364 (*a*).)

At on , A., did steal, one post-letter bag, the property of the Post-Master General.

STEALING A POST-LETTER FROM A POST-LETTER BAG, Etc.

(Section 364 (*b*).)

At on , A., did steal, one post-letter, the property of the Post-Master General, from a post-letter bag, (*or* "from a post-office" *or* "from an officer employed in the post-office of Canada").

STEALING A POST-LETTER WITH MONEY IN IT.

(Section 364(*c*).)

At on , A., did steal, one post-letter, the property of the Post-Master General, which post-letter contained a certain chattel, to wit, [*describe it*], (*or* "certain money to the amount of ," *or* "a certain valuable security, to wit"), [*describe it*].

STEALING MONEY, Etc., OUT OF A POST-LETTER.

(Section 364 (*d*).)

At on , A., did steal a certain chattel, to wit, [*describe it*], (*or* "certain money to the amount of ," *or* "a certain valuable security, to wit"), [*describe it*], from and out of a post-letter, the property of the Post-Master General.

STEALING A POST-LETTER, Etc.

(Section 365 (*a*)).

At on , A., did steal, one post-letter, the property of the Post-Master General.

STEALING CATTLE.

(Section 369.)

At on , A., did steal, one horse, the property of B.

STEALING OYSTERS.

(Section 371.)

At on A., did steal from a certain oyster-bed, called , the property of B., one hundred oysters.

DREDGING FOR OYSTERS.

(Section 371.)

At on , A., within the limits of a certain oyster-bed, called , the property of B., and sufficiently marked out and known as the property of the said B., unlawfully and wilfully did use a certain dredge (*or* "net," *or* "instrument," *or* "engine"), for the purpose of then and there taking oysters, (*or* "oyster-brood").

DRAGGING ON THE GROUND OF AN OYSTER FISHERY.

(Section 371.)

At on , A., unlawfully and wilfully did drag, with a certain net, (*or* "instrument" *or* "engine"), upon the ground of a certain oyster fishery called , the property of B., and sufficiently marked out and known as the property of the said B.

STEALING THINGS FIXED TO BUILDINGS.

(Section 372.)

At on , A., did steal sixty pounds weight of lead, the property of B., then being fixed in a certain dwelling-house belonging to the said B., and situated in aforesaid.

STEALING TREES WORTH MORE THAN $25.

(Section 373.)

At on , A., did steal one ash tree of the value of twenty-six dollars, the property of B., then growing in a certain field belonging to the said B., and situated in aforesaid.

STEALING A TREE (WORTH $5), IN A PARK, Etc.

(Section 373).

At on , A., did steal one apple tree, of the value of six dollars, the property of B., growing in a certain orchard of the said B, situated at aforesaid.

STEALING TREES AFTER TWO PREVIOUS CONVICTIONS.

(Section 374.)

At on , A., did steal one shrub of the value of fifty cents, the property of B., then growing in a certain plot of land situate and being in aforesaid; and the said jurors say, that heretofore, to wit, at on , (before the committing of the hereinbefore mentioned offence), the said A. was duly convicted, before C., one of His Majesty's justices of the peace for the district of of having at on , [*set out the offence forming the basis of the first conviction*], and was adjudged, for his said offence, to pay, [etc.], and, in default of payment, [etc.], to be imprisoned, [etc.]. And the said jurors further say that heretofore, to wit, at on , (before the committing of the firstly hereinbefore mentioned offence, but after the next hereinbefore mentioned conviction), the said A. was again duly convicted before D., one of His Majesty's justices of the peace for the district of of having at on , [*set out the second conviction*]. And so the jurors aforesaid say that, on the day and year first aforesaid the said A., did steal the said shrub of the value of fifty cents, after having been twice convicted of the offence of stealing a shrub, (*or* "tree," [etc.], of the value of at least twenty-five cents.

STEALING FRUIT, Etc., GROWING IN A GARDEN, Etc., AFTER A PREVIOUS CONVICTION.

(Section 375.)

At on , A., did steal, forty pounds weight of pears, the property of B., then growing in a certain orchard of the said B., situated in aforesaid: And the said jurors say that, heretofore, to wit, at on (before the committing of the hereinbefore mentioned offence), the said A. was duly convicted before C., one of His Majesty's justices of the peace for the district of of having at on , [*set out the offence forming the basis of the first conviction*], and was adjudged, for his said offence, to pay, [etc.], and in default of payment, [etc.], to be imprisoned, [etc.]. And so the jurors aforesaid say that, on the day and year first aforesaid, A. did steal the said forty pounds weight of pears, after having been previously convicted of the offence of stealing fruit in an orchard (*or* "garden"), [etc.].

STEALING FROM A SHIP.

(Section 386.)

A. stole a sack of flour from a ship called the , at on .

STEALING METAL ORE, Etc., FROM A MINE.

(Section 378.)

At on , A., did steal, five tons weight of iron ore, (*or* "coal"), the property of B., from a certain iron (*or* "coal") mine of the said B., situated in aforesaid.

STEALING FROM THE PERSON.

(Section 379.)

At on , A., did steal, one gold watch, and one silver watch chain from the person of B.

STEALING IN A DWELLING HOUSE.

(Section 380 (*a*).)

At on , A., did steal, twelve silver spoons, of the total value of twenty-five dollars, of the goods and chattels of B., in the dwelling house of the said B., situated in aforesaid.

OR,

(Section 380 (*b*).)

At on , A., did steal, twelve silver forks of the goods and chattels of B., in a dwelling house of the said B. situated in , aforesaid; there being, then and there, in the said dwelling house, one C., who was then and there put in bodily fear by the menaces and threats of the said A.

STEALING BY PICKLOCKS.

(Section 381.)

At on , A., by means of a pick-lock, (*or* "false key," etc.), did steal the sum of twenty-five dollars, the property of B., from a locked and secured receptacle for property.

STEALING IN A SHIP ON A NAVIGABLE RIVER.

(Section 382 (*a*).)

At on , A., did steal, from a certain ship called "*Nepigon*" twelve bars of iron of the goods and merchandise of B., then being in the said ship, upon the navigable river St. Lawrence, (*or* "in a certain port of discharge, to wit, the port of Montreal").

STEALING FROM A DOCK.

(Section 382 (*b*).)

At on , A., did steal, from a certain dock, (*or* "wharf"), adjacent to the navigable river St. Lawrence, one sack of flour of the goods and merchandise of B., then being upon the said dock.

STEALING WRECK.

(Section 383.)

At on , A., did steal, one coil of rope, and one compass, being portions of the tackle of a certain ship called the "*Hawk*," the property of B., and other persons to the jurors unknown, which ship was then and there lying stranded and wrecked.

OR,

(Section 383.)

At on , A., did steal, a gold watch, the property of B., a shipwrecked person belonging to a certain ship, called the "*Highflyer*," which then and there lay stranded and wrecked.

STEALING IN OR FROM RAILWAY STATIONS, Etc.

(Section 384.)

At on , A., did steal, one umbrella and one rug of the goods and chattels of B., in (*or* "from"), a certain railway station, to wit, a station belonging to the Grand Trunk Railway Company (*or* "the Canadian Pacific Railway Company"), and situated at , aforesaid.

STEALING GOODS IN PROCESS OF MANUFACTURE.

(Section 388.)

At on , A., did steal, forty yards of calico worth five dollars, belonging to B., in a certain weaving shed of the said B., situated in aforesaid, whilst the same were there exposed upon the looms of the said B., during a certain stage, process or progress of the manufacture thereof.

FRAUDULENTLY DISPOSING OF GOODS ENTRUSTED FOR MANUFACTURE.

(Section 389.)

At on , A., did fraudulently dispose of one hundred yards of tweed cloth, the property of B., which the said A. had been heretofore entrusted with to manufacture.

CRIMINAL BREACH OF TRUST.

(Section 390.)

At on , A., then being,—under and by virtue of the will of B.,—a trustee of certain property, to wit, [*describe it*], for the use and benefit of C., D., E. and F., did with intent to defraud, and in violation of his trust, convert the same to a use not authorized by the said trust.

FRAUD BY OFFICIAL.

(Section 391.)

At on , A., then being a director (*or* "manager"), [etc.], of a certain body corporate called did destroy (*or* "alter," *or* "mutilate," *or* "falsify"), a certain book (*or* "paper," *or* "writing," *or* "valuable security"), to wit, [*describe the book*, etc.], belonging to the said body corporate, with intent to defraud.

OR,

(Section 391.)

At on , A., then being a director [etc.], of a certain body corporate called did with intent to defraud, make (*or* "concur in making") in a certain book of account to wit, [*describe it*], of the said body corporate, a certain false entry, by then and there falsely entering in such book, [*describe the false entry*].

DESTROYING DOCUMENT OF TITLE TO GOODS.

(Section 396.)

At on , A., for a fraudulent purpose, did destroy (*or* "cancel," *or* "conceal," *or* "obliterate"), a certain document of title to goods, to wit, one bill of lading, [*describe it*].

FRAUDULENT CONCEALMENT, Etc.

(Section 397.)

At on , A., for a fraudulent purpose, did take (*or* "obtain," *or* "remove," *or* "conceal"), one horse and one express wagon, the property of B., of the value of one hundred dollars.

BRINGING STOLEN PROPERTY INTO CANADA.

(Section 398.)

On at , A., did bring into Canada, to wit, into the city of Montreal in the province of Quebec, twelve gold watches and five diamond rings, of the total value of two thousand dollars, theretofore stolen by him the said A., outside of Canada, to wit, in the city of New York in the State of New York, one of the United States of America.

RECEIVING PROPERTY STOLEN, OR OBTAINED BY ANY INDICTABLE OFFENCE.

(Section 399.)

At on , did receive and have one piano, belonging to B., and theretofore stolen (*or* "obtained by an indictable offence, to wit, by false pretences"), *or* [*describe the offence by which the piano was obtained*], he the said A., then well knowing the said piano to have been so stolen (*or* "obtained by the said indictable offence.")

OR,

(Section 400.)

At on , A., stole one piano belonging to B. . *And the jurors aforesaid do further present*, that, afterwards, at on , C., the said piano so stolen as aforesaid, did receive and have, he, the said C., then well knowing the said piano to have been stolen.

OBTAINING BY FALSE PRETENCES.

(Section 404.)

At on A., by false pretences, did obtain from B., five barrels of flour of the value of with intent to defraud.

OR,

(Section 404.)

A. obtained by false pretences from B., a horse, a cart and the harness of a horse at on .

OBTAINING EXECUTION OF VALUABLE SECURITY BY FALSE PRETENCES.

(Section 406.)

At on A., by false pretences, did cause and induce B. to execute (*or* "make," *or* "accept," *or* "endorse," *or* "destroy"), a certain valuable security, to wit, a promissory note for one hundred dollars, with intent thereby then and there to defraud and injure the said B.

PERSONATION.

(Section 408.)

At on , A., did personate B., (*or* "the administrator," *or* "widow," *or* "next of kin of the late C.," *or* "the wife of D.") with intent then and there and thereby fraudulently to obtain, [*describe the money or property intended to be obtained*].

PERSONATION AT AN EXAMINATION.

(Section 409.)

At on , A., falsely and with intent to gain an advantage for himself, (*or* "one B."), did personate C., a candidate at a competitive (*or* "qualifying") examination held under authority of law, (*or* "in connection with the McGill College University, of Montreal").

PERSONATING AN OWNER OF STOCK.

(Section 410.)

At on , A., falsely and deceitfully did personate B., the owner of a certain share and interest in certain stock, [*annuity or public fund*], to wit, [*give the amount and description of the said stock, etc.*], then transferable at the bank, and did, thereby, and by means of such personation, then and there transfer (*or* "endeavour to transfer"), the said share and interest of the said B., in the said stock, [etc.], as if he the said A. were the lawful owner thereof.

ACKNOWLEDGING AN INSTRUMENT IN A FALSE NAME.

(Section 411.)

At on , A., did, before the Court of King's Bench for the province of Quebec, sitting in and for the district of Montreal, (*or* "the Honourable Mr. Justice ——"), [etc.], without lawful authority or excuse, acknowledge in the name of B., a certain recognizance of bail, (*or* "*cognovit actionem*"), [etc.], to wit, [*describe the instrument and the cause, action, or proceeding to which it relates*].

OBTAINING PASSAGE BY FALSE TICKET.

(Section 412.)

At on , A., fraudulently, unlawfully, and by means of a false ticket, (*or* "order"), did obtain (*or* "attempt to obtain") a passage on a carriage or car of the Montreal Street Railway Company.

FALSE STATEMENT BY A PROMOTER, DIRECTOR, PUBLIC OFFICER OR MANAGER OF A PUBLIC COMPANY.

(Section 413 (*a*).)

At on , A., being then a promoter (*or* "director," *or* "public officer," *or* "manager"), of a certain body corporate (*or* "public company") then intended to be formed and to be called , (*or* "then actually existing and called "), did make, circulate, and publish (*or* "concur in making, circulating, and publishing) a certain prospectus (*or* "account" *or* "statement"), well knowing the same to be false in certain material particulars, to wit, [*state them*], with intent to induce certain persons, to the jurors aforesaid unknown, to become shareholders or partners (*or* "with intent to deceive and defraud the members, shareholders and creditors"), of the said body corporate (*or* "public company").

FALSE ACCOUNTING BY CLERK.

(Section 415.)

At on , A., then being a clerk in the employ of B., did, with intent to defraud, destroy (*or* "alter," *or* "mutilate," *or* "falsify") a certain book (*or* "paper," *or* "writing," *or* "valuable security"), to wit, [*describe the book*, etc.], belonging to (*or* "in the possession of," *or* "received by the said A., for and on behalf of") the said B.

FRAUDULENT ASSIGNMENT BY A DEBTOR.

(Section 417.)

At on , A., with intent to defraud his creditors, did make (*or* "cause to be made") a gift, (*or* "conveyance," *or* "assignment," *or* "sale," *or* "transfer," *or* "delivery"), of his property, to B.

OR,

(Section 417 (ii).)

At on , A., did remove (*or* "conceal," *or* "dispose of") his property, with intent to defraud his creditors.

FRAUDULENTLY RECEIVING A DEBTOR'S PROPERTY.

(Section 417 (b).)

At on , A., with intent that B. should defraud his creditors, did receive the property of the said B., then and there given, *or* "conveyed," *or* "assigned," *or* "sold," *or* "transferred," *or* "delivered," *or* "removed," *or* "concealed," *or* "disposed of") by the said B., with intent to defraud his creditors.

GIVING A FALSE WAREHOUSE RECEIPT.

(Section 425.)

At on , A., then being the keeper of a warehouse, [etc.], for storing timber, [etc.] knowingly, wilfully and with intent to mislead (*or* "injure," *or* "defraud") did give to B. a certain writing purporting to be a receipt for, (*or* "acknowledgment of"), certain goods, to wit, [*describe them*], as having been received into his the said A.'s warehouse, [etc.], before the said goods had been received by him the said A., as aforesaid

FALSE RECEIPT FOR GRAIN, Etc.

(Section 427.)

At on , A., in a certain receipt (*or* "certificate," *or* "acknowledgment") for grain (*or* "timber," etc.), to be used for one of the purposes of the Bank Act, to wit, for the purpose, [*mention the purpose*], wilfully did make a false statement, to wit, [*set out the statement and show in what respect it was false.*]

UNLAWFULLY APPLYING MARKS TO PUBLIC STORES.

(Section 432.)

At on , A., without lawful authority, did apply, in and on certain stores, to wit, fifty yards of canvas, and fifty yards of fearnought, a certain mark, to wit, a blue line in a serpentine form.

OR,

(Section 432.)

At on , A., without lawful authority, did apply in and on certain stores, to wit, fifty yards of bunting, a certain mark, to wit, a double tape in the warp of the said bunting.

UNLAWFUL POSSESSION, Etc., OF PUBLIC STORES.

(Section 435.)

At on , A., without lawful authority, did receive (*or* "possess," *or* "keep," *or* "sell," *or* "deliver"), certain public stores, to wit, twenty-five pounds of candles, bearing a certain mark, to wit, blue threads in each wick, to denote His Majesty's property therein.

RECEIVING REGIMENTAL NECESSARIES.

(Section 439.)

At on , A., did buy from a certain soldier, to wit, B., certain arms (*or* "clothing") to wit [*describe them*], belonging to His Majesty.

CHEATING AT PLAY, Etc.

At on , A., with intent to defraud B., did cheat in playing at a game with cards (*or* "dice.").

CONSPIRACY TO DEFRAUD.

(Section 444.)

At on , A., B. and C., did conspire together to defraud the public (*or* "D."), by deceit, (*or* "falsehood," *or* "by the fraudulent means following), to wit, [*set out the fraudulent means agreed upon*].

ROBBERY, WITH WOUNDING, Etc.

(Section 446 (*a*).)

At on , A., with and by means of violence (*or* "threats of violence") then and there used by him to and against the person (*or* "property") of B., to prevent (*or* "overcome") resistance, did violently steal from the person (*or* "in the presence") of the said B. and against the said B.'s will, one gold watch, of the goods and chattels of the said B.; and that at the time (*or* "immediately before," *or* "immediately after") he so robbed the said B., as aforesaid, he the said A. did wound (*or* "beat," *or* "strike," *or* "use personal violence to") the said B.

ROBBERY BY A PERSON ACCOMPANIED BY OTHERS.

(Section 446 (*b*).)

At on , A., then being together with other persons to the jurors aforesaid unknown, did with and by means of violence, (*or* "threats of violence") then and there used by him to and against the person (*or* "property") of B., to prevent (*or* "overcome") resistance, violently steal from the person (*or* "in the presence") of the said B., and against the said B.'s will, moneys of the said B., to the amount of one hundred dollars.

ROBBERY BY A PERSON ARMED WITH AN OFFENSIVE WEAPON.

(Section 446 (*c*).)

At on , A., then being armed with a certain offensive weapon, to wit, a brass knuckle-duster (*or* "lead-loaded cane," *or* "sand-bag," *or* "pistol," *or* "knife"), did, with and by means of violence, (*or* "threats of violence"), then and there used by him to and against the person (*or* "property") of B., to prevent (*or* "overcome") resistance, violently steal from the person (*or* "in the presence") of the said B., and against the said B.'s will, one diamond ring of the goods and chattels of the said B.

ASSAULT BY AN ARMED PERSON, WITH INTENT TO ROB.

(Section 446 (*c*).)

At on , A., then being armed with a certain offensive weapon, to wit, a heavy bludgeon, did, in and upon B., make an assault, with intent the moneys, goods and chattels of the said B., then and there violently steal from the person and against the will of the said B.

ROBBERY.

(Section 447.)

At on , A., with and by means of violence (*or* "threats of violence") then and there used by him to and against the person (*or* "property") of B., to prevent (*or* "overcome") resistance, did violently steal from the person (*or* "in the presence"), of the said B., and against the said B.'s will, moneys of him the said B., amounting to fifty dollars.

ASSAULT WITH INTENT TO ROB.

(Section 448.

At on , A. assaulted B. with intent the moneys, goods and chattels of the said B., then and there violently to steal from the person and against the will of the said B.

STOPPING THE MAIL.

(Section 449.)

At on , A. did stop a certain mail, to wit, the mail for the conveyance of letters between and with intent to rob (*or* "search") the same.

COMPELLING EXECUTION OF A DOCUMENT BY FORCE.

(Section 450.)

At on , A., by means of unlawful violence to (*or* "restraint of") the person of B., did unlawfully compel the said B. to execute (*or* "sign" *or* "destroy") a certain deed, to wit, [*describe it*], with intent to defraud, (*or* "injure").

OR,

(Section 450.)

At on , A., by means of a threat that he would employ unlawful violence to (*or* "restraint of") the person of B., did unlawfully compel the said B. to sign (*or* "accept," *or* "endorse," *or* "destroy," *or* "alter") a certain promissory note (*or* "bill of exchange") to wit, [*describe it*], with intent to defraud (*or* "injure").

SENDING THREATENING LETTER.

(Section 451.)

At on , A. did send to (*or* "cause to be received by") B., a certain letter (*or* "writing") demanding of the said B., with menaces, a certain sum of money, to wit, one thousand dollars, the said demand being without reasonable or probable cause, and he the said A. then well knowing the contents of the said letter (*or* "writing"), which is as follows: [*set out the letter.*]

DEMANDING WITH INTENT TO STEAL.

(Section 452.)

At on , A., with menaces, did demand of B. a certain sum of money, to wit, one hundred dollars, with intent then and there to steal the same from the said B.

EXTORTION BY THREATS TO ACCUSE OF CERTAIN SERIOUS CRIMES.

(Section 453 (*a*).)

At on , A., did accuse (*or* "threaten to accuse") B., of having committed an offence punishable by law with death (*or* "imprisonment for seven years or more") to wit, murder (*or* "forgery," *or* "burglary," *or* "bigamy"), [etc.], with intent thereby then and there to extort and gain money from the said B.

OR,

(Section 453 (i).)

At on , did accuse (*or* "threaten to accuse") B., of having committed an assault with intent to commit a rape, (*or* "attempted or endeavoured to commit a rape"), with intent thereby then and there to extort and gain money from the said B.

OR,

(Section 453 (iv).)

At on , A., did accuse (*or* "threaten to accuse") B., of having committed an infamous offence, to wit, the abominable crime of buggery, with intent thereby then and there to extort and gain money from the said B.

OR,

(Section 453 (iv).)

At on , A., with intent to extort and gain money from B., did cause the said B., to receive a certain document accusing (*or* "threatening to accuse") the said B., of having counselled and procured one C., to commit an infamous offence, to wit, the abominable crime of buggery, he the said A. then well knowing the contents of the said document, which is as follows: [*set out the document*].

EXTORTION BY THREATS TO ACCUSE OF OTHER CRIMES.

(Section 453 (*c*).)

At on , A., did accuse (*or* "threaten to accuse") B., of having committed the offence of polygamy (*or* "libel" *or* "aggravated assault," *or* "gaming in stocks," *or* "frequenting bucket shops," *or* "corrupting jurors," *or* "obtaining money by false pretences," *or* "defrauding creditors"), [etc.], with intent, thereby, then and there to extort and gain money from the said B.

BREAKING A PLACE OF PUBLIC WORSHIP.

(Section 455.)

At on , A., did break and enter a certain place of public worship, to wit, [*describe the church, chapel, or other place of public worship*], and there, in the said church, (*or* "chapel") [etc.], did steal, one silver candlestick of the goods and chattels of .

BURGLARY.

(Section 457 (*a*).)

At on , about the hour of twelve at night, A., burglariously did break and enter the dwelling-house of B., there situated, with intent burglariously to steal the goods and chattels of the said B., then and there being found in the said dwelling-house, (*or* "with intent to commit, in the said dwelling-house, an indictable offence, to wit"), [*describe the offence*].

OR,

(Section 457 (*a*).)

At on , about the hour of twelve at night, A. burglariously did break and enter the dwelling-house of B., there situated, with intent burglariously to steal the goods and chattels of the said B., then and there being found in the said dwelling-house; and he the said A., having so broken and entered and then being in the said dwelling-house did burglariously steal twelve silver forks and twelve silver spoons of the value of forty dollars, of the goods and chattels of the said B., in the said dwelling-house then being found.

OR,

(Section 457 (*b*)).

At on , A., then being in the dwelling-house of B., did steal twelve silver forks and twelve silver spoons of the value of forty dollars of the goods and chattels of the said B. in the said dwelling-house, and the said A., being so as aforesaid in the said dwelling-house and having committed the theft aforesaid, did afterwards, to wit, on the day and year aforesaid, about the hour of twelve at night, burglariously break out of the said dwelling-house.

HOUSE BREAKING.

(Section 458 (*a*).)

At on , A. did break and enter by day the dwelling-house of B., there situated, and, twelve silver forks of the value of twenty dollars, the property of the said B., then and there being found therein, did then and there steal.

OR,

(Section 458.)

At on , A. did break and enter by day the dwelling-house of B., there situated, with intent to commit an indictable offence therein, to wit, to steal the goods then and there being in the said dwelling-house.

BREAKING SHOP, ETC.

(Section 460.)

At on , A., did break and enter the shop of B., there situated, and five boxes of cigars of the value of twenty dollars, the property of the said B., then and there being found therein, did, then and there, steal.

OR,

(Section 460.)

At on , A., did break and enter a certain building, there situated, and being within the curtilage of and occupied with the dwelling-house of B., but not connected with or forming part of the said dwelling-house either immediately or by means of any covered or enclosed passage, and one horse of the value of seventy-five dollars, the property of the said B., then and there being found in the said building, did then and there steal.

OR,

(Section 461.)

At on , A., did break and enter the shop of B., there situated, with intent to commit an indictable offence therein, to wit, to steal the goods and chattels of the said B., then and there being in the said shop.

OR,

(Section 460.)

At on , A., did break and enter a certain building there situated and being within the curtilage of and occupied with the dwelling-house of B., but not connected with or forming part of the said dwelling-house either immediately or by means of any covered or enclosed passage, with intent then and there the goods and chattels of the said B., then being in the said building, to steal.

BEING FOUND IN A DWELLING-HOUSE BY NIGHT.

(Section 462.)

At on , about the hour of twelve at night, A. unlawfully did enter (*or* "was in") the dwelling-house of B., there situated, with intent the goods and chattels of the said B., to steal.

BEING FOUND ARMED WITH INTENT TO BREAK AND ENTER.

(Section 463 (*a*).)

At on , A., was found, by day, armed with a certain dangerous and offensive weapon (*or* "instrument"), to wit, [*describe it*], with intent to break and enter the dwelling-house of B., there situated, and to commit therein an indictable offence, to wit, to steal the goods and chattels of the said B. then being in the said dwelling-house,

OR,

(Section 463 (*b*).)

At on , A., was found, by night, armed with a certain dangerous and offensive weapon (*or* "instrument") to wit, [*describe it*], with intent to break and enter a certain building of B. there situated, and to commit therein an indictable offence, to wit, to steal the goods and chattels of the said B. then being in the said building.

HAVING POSSESSION, BY NIGHT, OF HOUSE-BREAKING INSTRUMENTS.

(Section 464 (*a*).)

At on , A., was found, about the hour of twelve at night, without lawful excuse, in possession of certain house-breaking instruments, to wit, [*describe them*].

BEING FOUND DISGUISED BY NIGHT.

(Section 464 (*c*).)

At on , A., was found, by night, without lawful excuse, with his face masked (*or* "blackened").

BEING FOUND DISGUISED, BY DAY, WITH INTENT.

(Section 464 (*b*).)

At on , A., was found, by day, without lawful excuse, in a certain disguise, to wit [*describe the disguise*], with intent then and there to commit an indictable offence, to wit, [*mention the offence*].

FORGERY.

(Section 466.)

At on , A., knowingly did forge a certain document, to wit, [*describe the document by its usual name, or set forth a copy of it*].

UTTERING A FORGERY.

(Section 467.)

At on , A., knowing a certain document, to wit, [*describe it*], to be forged, did utter (*or* "use," *or* "deal with," *or* "act upon," *or* "attempt to use," etc., , the said forged document, as if it were genuine.

COUNTERFEITING SEALS.

(Section 468 (*a*).)

At on , A., did make and counterfeit a certain public seal, to wit, the public seal of the Dominion of Canada.

UTTERING COUNTERFEIT SEALS.

(Section 467.)

At on , A., knowing a certain seal, to wit, a seal purporting to be the public seal of the Dominion of Canada, to be counterfeited, did use the said counterfeited seal.

UNLAWFULLY PRINTING PROCLAMATION.

(Section 474.)

At on , A., did print a certain proclamation, to wit [*describe it*], and did then and there unlawfully cause the same to falsely purport to have been printed by the King's Printer for Canada.

SENDING A FALSE TELEGRAM.

(Section 476.)

At on , A., with intent to defraud, did cause and procure a certain telegram in the words and figures following, [*set out the telegram*], to be sent, (*or* "delivered"), to B., as being sent by the authority of C., knowing that it was not sent by such authority, with intent that the said telegram should be acted on as being sent by the said C.

SENDING FALSE TELEGRAMS, OR LETTERS, WITH INTENT TO INJURE OR ALARM.

(Section 476.)

At on , A., with intent to injure (*or* "alarm") B., did send (*or* "cause" *or* "procure to be sent"), to the said B., a certain telegram (*or* "letter") containing matter which he the said A., knew to be false, to wit, a telegram (*or* "letter,") in the words and figures following, [*set out the telegram or letter.*]

COUNTERFEITING REVENUE STAMPS.

(Section 479.)

At on , A., fraudulently did counterfeit a certain revenue stamp, to wit, [*describe it*].

SELLING COUNTERFEITED REVENUE STAMPS.

(Section 479 (*b*).)

At on , A., knowingly, did sell (*or* "expose for sale," *or* "utter," *or* "use,") a certain counterfeited revenue stamp, to wit, [*describe it*].

FALSIFYING REGISTERS.

(Section 480.)

At on , A., did destroy (*or* "deface," *or* "injure,") a certain register then and there lawfully kept as the register (*of* "baptisms," *or* "marriages," *or* "deaths," *or* "burials,") of the parish of .

OR,

(Section 480 (*b*).)

At on , A., did insert in a certain register then and there lawfully kept as the register of births, [etc.], of the parish of , a certain entry, known by him, the said A., to be false, and relating to the birth (*or* "marriage"), [etc.], of .

FALSELY CERTIFYING EXTRACTS FROM REGISTERS.

(Section 481.)

At on , A., being a person authorized and required by law to give certified copies of entries in a certain register, then and there lawfully kept as the registry of births (*or* "marriages") etc., of the parish of did certify a certain writing to be a true copy of (*or* "extract from") a certain entry in the said register to wit, an entry of the birth (*or* "marriage"), etc.], of .

FALSE ENTRIES IN BOOKS RELATING TO PUBLIC FUNDS.

(Section 484.)

At on , A., in a certain book of account kept by the Bank, in which said book were then kept and entered the accounts of the owners of certain transferable stock, [*annuity or other public fund*], wilfully, with intent to defraud, did make a certain false entry, to wit, [*describe the false entry*].

FRAUDULENT TRANSFER OF STOCK.

(Section 484 (*b*).)

At on , A., a transfer of a certain share and interest of and in certain stock [*annuity or other public fund*], transferable at the Bank, to wit, the share and interest of B., of and in [*mention the amount and description of the stock, etc.*], did with intent to defraud, make, in the name of C., he the said C. not being then the true and lawful owner of the said stock, [etc.], or any part thereof.

MAKING FALSE DIVIDEND WARRANTS.

(Section 485).

At on , A., being a clerk in the employ of the Bank, with intent to defraud, did make out and deliver to one B., a certain dividend warrant for five hundred dollars, being a greater amount than the said B. was then entitled to, the amount to which the said B. was then entitled being only three hundred dollars.

FORGERY OF A TRADE MARK.

(Section 486.)

At on , A., did forge (*or* cause to be forged"), a certain trade-mark, to wit, [*describe it*].

FALSELY APPLYING A TRADE MARK.

(Section 487.)

At on , A., did falsely apply (*or* "cause to be applied") to certain goods, to wit, [*describe them*], a certain trade-mark, to wit, [*describe it*], (*or* "a mark so nearly resembling a certain trade-mark, to wit, [*describe it*], "as to be calculated to deceive").

COMBINATION IN RESTRAINT OF TRADE.

(Section 496.)

At on , A., conspired, combined, agreed and arranged with B., C. and D., and with the Company, to unduly limit the facilities for transporting (*or* "producing" *or* "supplying," *or* "storing," *or* "dealing in," *or* "manufacturing"), cotton goods, [etc.], a subject of trade and commerce.

OR,

(Section 496.)

At on , A. conspired, combined, agreed, and arranged with B., C. and D., and with the Company, to unduly prevent and lessen competition in the production (*or* "manufacture," *or* "purchase," *or* "barter," *or* "sale," *or* "transportation," *or* "supply"), of woollen goods, [etc], a subject of trade and commerce.

CRIMINAL BREACH OF CONTRACT.

(Section 499.)

At on , A., wilfully did break a certain contract, to wit, [*describe it*], theretofore made by him, well knowing (*or* "having reasonable cause to believe") that the probable consequences of his so doing would be to endanger human life (*or* "cause serious bodily injury," or "expose valuable property to destruction," or "serious injury.")

INTIMIDATION.

(Section 501.)

At on , A. and B., wrongfully and without lawful authority, did use violence to (*or* "injure the property of") C., by [*describe the personal violence or the injury to property, (as the case may be)*], with a view to compel the said C. to employ D., E. and F., whom he the said C., had a lawful right to refuse to employ (*or* "to compel the said C. to discharge from and refuse to keep in his employ G., and H., whom he the said C. had a lawful right to retain in his employ").

OR,

(Section 501 (*a*).)

At on , A., B. and C., being workmen in the employ of D., wrongfully and without lawful authority, did, by means of threats of using violence to (*or* "of injuring the property of") the said D., then and there intimidate the said D., with a view to compel the said D. to raise and advance the wages of them the said A., B. and C.

OR,

(Section 501 (*e*).)

At on , A. and B., wrongfully, and without lawful authority, did persistently follow C., from place to place, with a view to compel the said C. to cease working for D., he the said C., having a lawful right to continue to work for the said D.

INTIMIDATION BY PICKETING.

(Section 501 (*f*).)

At on , and on divers other days before and since that date, A. and B., wrongfully, and without lawful authority, did beset and watch the building, workshop, and premises of C., where D. was then working in the employ of the said C., with a view to compel the said D. from working in the employ of the said C., he the said D. having a lawful right to continue to work in the employ of the said C., (*or* "with a view to compel the said C. to discharge and to discontinue employing the said D., he the said C. having a lawful right to continue the said D. in his employ").

INTIMIDATION, BY ASSAULTS OR THREATS, IN PURSUANCE OF AN UNLAWFUL COMBINATION.

(Section 502.)

At on , A., B. and C., having, before then, conspired, combined, confederated and agreed together to raise the rate of wages then usually payable to workmen, in a certain trade, business and manufacture, to wit, the trade, business and manufacture of brass founding (*or* "calico printing," *or* "silk weaving," *or* "engine making," *or* "cigar making,"), [etc.], did, then and there, in pursuance of the said conspiracy, assault (*or* "use violence," *or* "threats of violence to") B., with a view to hinder him from working (*or* "being employed") at such trade, business, and manufacture.

TRADING STAMPS.

(Section 505.)

On at , A. issued (*or* "gave," *or* "sold," *or* "offered to issue," etc.), to B., a merchant (*or* "dealer in goods") certain trading stamps, [*describe them and give the quantity*], for use in his business.

PART VIII.

WILFUL AND FORBIDDEN ACTS RESPECTING PROPERTY.

WILFULLY DESTROYING A HOUSE, Etc., AND ENDANGERING LIFE.

(Section 510 (*a*).)

At on , A., wilfully, without legal justification or excuse, and without colour of right, did by means of an explosion destroy (*or* "damage") a certain dwelling-house (*or* "ship," *or* "boat"), to wit, [*describe it*], the property of B., there being certain persons, to wit, C. and D., then in the said dwelling-house, [etc.], and the said destruction (*or* "damage") did, then and there, cause actual danger to life.

WILFULLY DESTROYING A RIVER BANK, Etc., AND CAUSING DANGER OF INUNDATION.

(Section 510 (*b*).)

At on , A., wilfully, without legal justification or excuse, and without colour of right, did destroy (*or* "damage") the bank (*or* "dyke") of a certain river called the river St. Lawrence, whereby and by means whereof there was actual danger of inundation.

WILFULLY DESTROYING BRIDGES.

(Section 510 (*c*).)

At on , A., wilfully, without legal justification or excuse, and without colour of right, did destroy (*or* "damage") a certain bridge (*or* "viaduct," *or* "aqueduct") situated in aforesaid, and over (*or* "under") which a certain highway (*or* "railway," *or* "canal"), to wit, [*describe it*], passes, and the said destruction (*or* "damage"), was so done by the said A., with intent and so as to render the said bridge (*or* "viaduct," *or* "aqueduct," *or* "highway," *or* "railway," *or* "canal") dangerous and impassable.

WILFULLY DESTROYING OR DAMAGING A RAILWAY.

(Section 510 (*d*).)

At on , A., wilfully, without legal justification or excuse, and without colour of right, did destroy (*or* "damage") a certain railway, to wit, [*describe it*], with intent to render and so as to render the same dangerous and impassable.

WILFULLY DESTROYING CATTLE, Etc.

(Section 510 B. (*b*).)

At on , A., wilfully, without legal justification or excuse, and without colour of right, did destroy (*or* "damage") one cow, the property of B., by then and there killing (*or* "maiming," *or* "poisoning," *or* "wounding") the said cow.

WILFULLY DAMAGING A SHIP WITH INTENT TO DESTROY OR RENDER IT USELESS.

(Section 510 C. (*a*).)

At on , A., wilfully, without legal justification or excuse, and without colour of right, did damage a certain ship, to wit, [*describe it*], with intent to destroy (*or* "render useless") the said ship.

WILFULLY DAMAGING A CANAL, Etc.

(Section 510 C. (*d*).)

At on , A., wilfully, without legal justification or excuse, and without colour of right, did damage a certain canal (*or* "navigable river"), to wit, [*describe it*], by then and there interfering with and breaking down the flood-gates (*or* "sluices") thereof, with intent and so as thereby, then and there, to obstruct the navigation thereof.

WILFULLY DAMAGING THE SLUICE OF A PRIVATE WATER.

(Section 510 C. (*e*).)

At on , A., wilfully, without legal justification or excuse, and without colour of right, did damage (*or* "destroy") the flood-gate (*or* "sluice") of a certain private water, to wit, the fish pond of B., situated in aforesaid, with intent to take (*or* "destroy"), (*or* "so as to cause the loss or destruction of") the fish therein.

DAMAGING A PRIVATE FISHERY.

(Section 510 C. (*e*).)

At on , A., wilfully, without legal justification or excuse, and without colour of right, did damage a certain private fishery (*or* "salmon river"), by putting into it large quantities of lime, with intent, thereby, then and there to destroy the fish then and there being therein.

WILFULLY DESTROYING GOODS IN PROCESS OF MANUFACTURE.

(Section 510 (*h*).)

At on , A., wilfully, without legal justification or excuse, and without colour of right, did destroy (*or* "damage") certain goods, to wit, [*describe them*], the property of B., and then being in process of manufacture, with intent, thereby, then and there to render the same useless.

WILFULLY DAMAGING MANUFACTURING MACHINES.

(Section 510 (*i*).)

At on , A., wilfully, without legal justification or excuse, and without colour of right, did damage (*or* "destroy" certain agricultural (*or* "manufacturing") machines, to wit, [*describe them*], the property of B., with intent, thereby, then and there to render the same useless.

WILFULLY DAMAGING OR DESTROYING TREES IN A PARK, Etc.

(Section 510 D. (*a*).)

At on , A., wilfully, without legal justification, and without colour of right, did damage, (*or* "destroy") two fir trees the property of B., then growing in a certain park, (*or* "pleasure ground," *or* "garden," *or* "land adjoining and belonging to the dwelling-house") of the said B., thereby, then and there, injuring the said trees to an extent exceeding in value the sum of five dollars.

WILFULLY DAMAGING A POST-LETTER BAG, Etc.

(Section 510 D. (*b*).)

At on , A., wilfully, without legal justification or excuse, and without colour of right, did damage (*or* "destroy") a certain post-letter bag (*or* "post-letter") the property of the Postmaster-General.

WILFULLY DAMAGING BY NIGHT, PROPERTY TO THE AMOUNT OF TWENTY DOLLARS.

(Section 510 D. (*c*).)

At on , A., wilfully without legal justification or excuse, and without colour of right, did damage (*or* "destroy"), by night, seven birch trees, the property of B., then growing in a plot of land belonging to the said B., thereby, then and there, injuring the said trees to the amount of twenty dollars.

OR,

(Section 510 D. (*c*).)

At on , A., wilfully without legal justification or excuse, and without colour of right, did damage (*or* "destroy"), by night, thirty-five patterns for the making of waterproof coats, the property of B., thereby, then and there, injuring the said patterns to the amount of twenty dollars.

WILFULLY DESTROYING, BY DAY, PROPERTY TO THE AMOUNT OF TWENTY DOLLARS.

(Section 510 E.)

At on , A., wilfully without legal justification or excuse, and without colour of right, did damage (*or* "destroy"), by day, one crate of crockery and glassware, the property of B., thereby, then and there, injuring the said crockery and glassware to the amount of twenty dollars.

ARSON.

(Section 511.)

At on , A., wilfully, without legal justification or excuse, and without colour of right, did set fire to a certain building, to wit, a dwelling-house belonging to B., and situated in aforesaid.

OR,

(Section 511.)

At on , A., wilfully, without legal justification or excuse, without colour of right, and with intent to defraud, did set fire to a certain building, to wit, a store situated in aforesaid and belonging to him the said A.

OR,

(Section 511.)

At on , A., wilfully, without legal justification or excuse, and without colour of right, did set fire to a certain stack of vegetable produce (*or* "of mineral," *or* "vegetable fuel"), to wit, [*describe the stack*], belonging to B.

ATTEMPT TO COMMIT ARSON.

(Section 512.)

At on , A., wilfully, without legal justification or excuse, and without colour of right, did attempt to set fire to a certain building, to wit, a dwelling-house belonging to B., and situated in aforesaid.

WILFULLY SETTING FIRE TO CROPS, Etc.

(Section 513 (*a*).)

At on , A., wilfully, without legal justification or excuse, and without colour of right, did set fire to a certain crop (*or* "wood," *or* "forest," *or* "coppice," *or* "plantation," *or* "health," *or* "gorse," *or* "furze," *or* "fern"), to wit, (*describe the crop*), [etc.], the property of B.

NEGLIGENTLY SETTING FIRE TO FOREST, Etc.

(Section 515.)

At on , A., negligently, recklessly, and with wanton disregard of consequences, (*or* "in violation of a certain provincial law, to wit, "), did unlawfully set fire to a certain forest (*or* "tree," *or* "manufactured lumber," etc.), situated (*or* "being") on the Crown domain (*or* "land leased or lawfully held for the purpose of cutting timber," etc.), so that the said forest, [etc.], was injured (*or* "destroyed").

PLACING OR THROWING EXPLOSIVES WITH INTENT TO DESTROY A BUILDING, Etc.

At on , A., wilfully, without legal justification or excuse, and without colour of right, did place near (*or* "throw into") a certain building (*or* "ship") to wit, [*describe the building or ship*], a certain explosive substance, to wit, five pounds of gunpowder, with intent, thereby, then and there to destroy (*or* "damage") the said building (*or* "ship").

MISCHIEF ON RAILWAYS.

(Section 517.)

At on , A., in a manner likely to cause danger to valuable property, to wit, to a certain engine and certain cars of the Canadian Pacific Railway, on their railway at aforesaid, did displace a rail (*or* "sleeper," etc.), on and belonging to the said railway.

OR,

(Section 517 (*b*).)

At on , A., did make a false signal on (*or* "near") the railway of the Grand Trunk Railway Company at aforesaid, in a manner likely to cause danger to valuable property, to wit, to a certain engine and certain cars of the said Grand Trunk Railway Company, on their said railway.

MISCHIEF ON RAILWAYS WITH INTENT.

(Section 517 (*a*).)

At on , A., did break and injure a rail (*or* "sleeper") on and belonging to the railway of the Grand Trunk Railway Company, at aforesaid, with intent, thereby, then and there, to cause danger to a certain engine and certain cars of the said Grand Trunk Railway Company, on their said railway.

MISCHIEF TO MINES.

(Section 520.)

At on , A., did cause a quantity of water (*or* "earth," *or* "rubbish,") to be conveyed into a certain mine (*or* "well of oil"), to wit [*describe it*], the property of B., with intent, thereby, then and there, to injure (*or* "obstruct the working of") the said mine (*or* "well of oil").

WILFULLY REMOVING MARINE SIGNALS.

(Section 526.)

At on , A., wilfully, without legal justification or excuse and without colour of right, did alter, (*or* "remove," *or* "conceal"), a certain signal (*or* "buoy") used upon the river St. Lawrence, for the purpose of navigation.

WILFUL INJURIES TO POLL-BOOK, Etc.

(Section 528.)

At on , A., wilfully, without legal justification or excuse, and without colour of right, did destroy, (*or* "injure," *or* "obliterate") a certain writ of election, (*or* "return to a writ of election," *or* "pool-book," *or* "voters' list," *or* "ballot"), [etc.], to wit, [*describe the election writ, etc.*], prepared and drawn out according to a certain law in regard to Dominion (*or* "provincial," *or* "municipal," *or* "civic"), elections, to wit, the Act [*cite the Act applying to the case in hand*].

INJURIES TO BUILDINGS BY TENANTS.

(Section 529.)

At on , A., being then possessed of a certain dwelling-house situated in aforesaid, and then held by him the said A., as tenant thereof for an unexpired term of three years, did wilfully, without legal justification or excuse, without colour of right, and to the prejudice of B., the owner thereof, pull down and demolish the said dwelling-house.

WILFULLY DESTROYING TREES AFTER TWO PREVIOUS CONVICTIONS.

(Section 533.)

At on A., wilfully, without legal justification or excuse and without colour of right, did damage (*or* "destroy") one shrub, so that the injury done by such damage (*or* "destruction") amounted to the value of fifty cents, the said shrub being

the property of B., and then growing in a certain plot of land situated and being in aforesaid: And the said jurors say, that, heretofore, to wit, at on (before the committing of the hereinbefore mentioned offence) the said A. was duly convicted, before C., one of His Majesty's justices of the peace for the district of of having at on [*set out the offence forming the basis of the first conviction*], and was adjudged, for his said offence, to pay, [etc.], and, in default of payment, [etc.], to be imprisoned, [etc.]: And the said jurors further say, that heretofore, to wit, at on , (before the committing of the firstly hereinbefore mentioned offence, but after the next hereinbefore mentioned conviction), the said A. was again duly convicted before D., one of His Majesty's justices of the peace for the district of of having at on ,[*set out the second conviction*]: And so the jurors aforesaid say, that, on the day and year first aforesaid the said A., wilfully, without legal justification or excuse and without colour of right, did damage (*or* "destroy") the said shrub, and did thereby do injury amounting to the value of fifty cents, after having been twice convicted of the like offence of wilfully damaging (*or* destroying") a shrub, (*or* "tree"), [etc.], and doing injury amounting to the value of at least twenty-five cents.

WILFULLY DAMAGING OR DESTROYING VEGETABLE PRODUCTIONS GROWING IN A GARDEN, Etc.

(Section 534.)

At on A., wilfully, without legal justification or excuse, and without colour of right, did damage (*or* "destroy") fifty cauliflowers, the property of B., then growing in a certain garden of the said B., situated in aforesaid: And the said jurors say, that, heretofore, to wit, at on (before the committing of the hereinbefore mentioned offence), the said A. was duly convicted before C., one of His Majesty's justices of the peace, for the district of of having at on , [*set out the offence forming the basis of the first conviction*], and was adjudged, for his said offence, to pay, [etc.], and in default of payment, [etc.], to be imprisoned, [etc.]: And so the jurors aforesaid say, that on the day and year first aforesaid, A., did, wilfully, without legal justification or excuse, and without colour of right, damage (*or* "destroy"), the said fifty cauliflowers after having been previously convicted of the like offence of wilfully damaging (*or* "destroying") vegetable productions in a garden, [etc.].

PART IX.

OFFENCES RELATING TO BANK NOTES, COIN AND COUNTERFEIT MONEY.

PURCHASING, RECEIVING OR POSSESSING A FORGED BANK NOTE.

(Section 550.)

On at , A., without lawful authority or excuse, purchased (*or* "received") from B. (*or* "had in his possession") a forged bank note, to wit, (*describe it*), knowing it to be forged.

COUNTERFEITING CURRENT SILVER COIN.

(Section 552 (*a*).)

At on , A., did unlawfully make (*or* "begin to make") and counterfeit twenty pieces of false and counterfeit coin resembling (*or* "apparently intended to resemble and pass for") current silver dollars (*or* "half dollars," *or* "ten cent pieces").

BUYING, SELLING, OR DEALING IN COUNTERFEIT COIN.

(Section 553.)

At on , A., did unlawfully and without lawful authority or excuse, buy (*or* "sell," *or* "receive," *or* "pay," *or* "put off") twenty pieces of false and counterfeit coin, resembling (*or* "apparently intended to resemble and pass for") current silver dollars, at and for a lower rate and value than the same imported (*or* were apparently intended to import).

IMPORTING COUNTERFEIT COIN.

(Section 554.)

At on , A., did unlawfully and without lawful authority or excuse, import and receive into Canada twelve pieces of false and counterfeit coin resembling (*or* "apparently intended to resemble and pass for") current silver dollars, he the said A. then and there well knowing the same to be counterfeit.

EXPORTING COUNTERFEIT COIN.

(Section 555.)

At on , A., did unlawfully and without lawful authority or excuse, export from Canada, twelve pieces of false and counterfeit coin resembling (*or* "apparently intended to resemble and pass for") current silver dollars, he the said A. then and there well knowing the same to be counterfeit.

BRINGING COINING INSTRUMENTS INTO CANADA.

(Section 556.)

At on , A., unlawfully, knowingly and without lawful authority or excuse, did convey out of His Majesty's Mints into Canada, one puncheon (*or* "counter-puncheon," *or* "matrix"), [etc.], used or employed in or about the coining of coin.

CLIPPING CURRENT COIN.

At on , A., did unlawfully impair (*or* "diminish," *or* "lighten"), twelve pieces of current silver coin called dollars, with intent that each of the said twelve pieces so impaired, (*or* "diminished," *or* "lightened"), might pass for a current silver dollar.

DEFACING AND TENDERING CURRENT COIN, SO DEFACED.

(Section 559.)

At on , A., did deface one piece of current silver coin, called a dollar, by then and there stamping thereon certain names (*or* "words"), to wit, , and did afterwards unlawfully tender the said current silver coin, so defaced as aforesaid.

POSSESSING COUNTERFEIT COIN, WITH INTENT.

(Section 560.)

At on , A., had in his custody and possession twelve pieces of counterfeit coin resembling (*or* "apparently intended to resemble, and pass for") current silver dollars, with intent to utter the same, he the said A. then well knowing the same to be counterfeit.

COUNTERFEITING FOREIGN COIN.

(Section 563.)

At on , A., did make (*or* "begin to make") a counterfeit coin resembling (*or* "apparently intended to resemble and pass for") the silver coin of a foreign country, to wit, the silver coin of the United States of America, called a dollar.

UTTERING COUNTERFEIT COIN.

(Section 564.)

At on , A., did utter to B., one piece of counterfeit coin resembling (*or* "apparently intended to resemble and pass for"), the current silver coin called a dollar, he the said A. then well knowing the same to be counterfeit.

UTTERING LIGHT COIN.

(Section 565.)

At on , A., did utter as being current a certain silver coin, to wit, a silver dollar of less than its lawful weight, he the said A. then well knowing the said coin to have been impaired, (*or* "diminished," *or* "lightened"), otherwise than by lawful wear.

ATTEMPT TO COMMIT AN INDICTABLE OFFENCE.

(Section 572.)

At on , A., did attempt to commit the indictable offence of theft of one gold watch of the value of sixty-five dollars of the goods and chattels of B.

OR,

(Section 572.)

At on , A., did solicit and advise B. to steal one piano of the goods and chattels of C., whereby he the said A., did attempt to commit the indictable offence of theft.

OR,

(Section 572.)

At on , A., did attempt to commit the indictable offence of bigamy (*or* "burglary"), [etc.], by then and there, [*set out the means used in making the attempt*].

CONSPIRACY TO COMMIT AN INDICTABLE OFFENCE.

(Section 373.)

At on , A. B. and C., did conspire, combine, confederate and agree together to commit a certain indictable offence, to wit, the crime of arson (*or* "burglary," *or* "rape," *or* "forgery"), [etc.], by then and there conspiring, combining, confederating, and agreeing together to set fire to (*or* "break and enter") *or* [etc.], [*describe the crime agreed upon and mention the property or person, or both, (as the case may be), to be affected thereby*]. (A count may be added setting out the overt acts of the conspiracy.)

CONSPIRACY TO BRING FALSE ACCUSATION OF CRIME.

(Section 573.)

At on , A. B., and M. B., (his wife), C. D. and E. F., did conspire, combine, confederate and agree together to prosecute G. H., for an alleged offence, to wit, upon a false charge of accusation falsely charging and accusing that he, the said G. H., had, then, lately before, assaulted, ravished and carnally known the said M. B., without her consent, they the said A. B., M. B., C. D., and E. F., then well knowing the said G. H., to be innocent of the said alleged offence.

And the said jurors further present that, afterwards, at aforesaid, on the day and year aforesaid, the said A. B., and M. B., his wife, C. D., and E. F., in pursuance of their said conspiracy, did attend together before J. N., Esquire, one of His Majesty's justices of the peace for the district of to whom they, the said A. B., and M. B., his wife, C. D., and E. F., did, then and there, make the said false charge and accusation, falsely charging and accusing the said G. H., with and of the rape aforesaid; and,

then and there, before the said J. N., she, the said M. B., in the presence of and in company with the said A. B., C. D., and E. F., and in further pursuance of the said conspiracy, did make her written and sworn information and complaint, falsely charging and accusing that the said G. H., had, then, lately before, assaulted, ravished, and carnally known her, the said M. B., without her consent.

And the said jurors further present, that, afterwards, to wit, in the Court of King's Bench [*or* (name the Court), *as the case may be*] of the province of, holden at in and for the district (*or* "county") of on , in the year aforesaid, they the said A. B., and M. B. his wife, C. D., and E. F., in further pursuance of their said conspiracy, did cause and procure to be falsely laid and exhibited, before the Grand Jury then and there sworn before the said Court, a bill of indictment falsely charging and accusing the said G. H., with and of the rape aforesaid; which said bill of indictment was by the said Grand Jury, then and there, returned into the said Court, thus endorsed:—"No Bill."

ACCESSORY AFTER THE FACT INDICTED WITH THE PRINCIPAL OFFENDER.

(Section 574.)

(*After charging A., as the principal offender, with the principal offence, proceed thus*):—

And the said jurors further present, that C., well knowing the said A. to have done and committed the said offence, as aforesaid, did, after the same was so done and committed as aforesaid, to wit, on the day and year aforesaid, receive, comfort and assist him, the said A., in order to enable him to escape.

ACCESSORY AFTER THE FACT INDICTED ALONE, THE PRINCIPAL OFFENDER HAVING BEEN CONVICTED.

(Section 575.)

(*After stating the principal offence and the principal offender's conviction, proceed thus*):—

And the said jurors further present, that C., well knowing the said A. to have done and committed the said offence, as aforesaid, did, after the same was so done and committed as aforesaid, to wit, on the day and year aforesaid, receive, comfort and assist him, the said A., in order to enable him to escape.

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