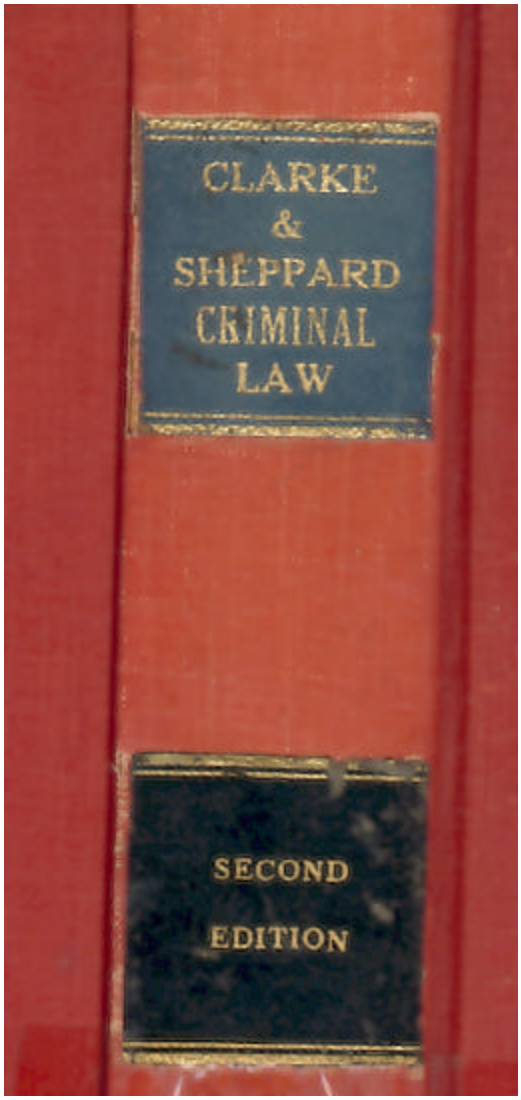
CLARKE
&
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CRIMINAL
LAW
SECOND
EDITION

A

TREATISE

ON THE

CRIMINAL LAW

OF CANADA.

SECOND EDITION

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PREFACE

TO THE

SECOND EDITION.

The favor with which the former edition of the CRIMINAL LAW was received by the profession has induced the authors to venture on a new edition.

They have condensed the work somewhat, and have embodied in it both the decisions of the various provinces of the Dominion and those contained in the English Law Reports down to the end of the year 1881.

A collection of the cases determined in our criminal courts cannot but be useful under a system of government like our own, whose aim is the substitution of one criminal jurisprudence and procedure for the somewhat diverse systems obtaining in the different provinces at the time of confederation. Should this work to any extent aid in this consolidation, the aim of the authors will be accomplished.

S. R. C.
H. P. S.

OSGOODE HALL, TORONTO,
March 1st, 1882.

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THE CRIMINAL LAW

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INTRODUCTORY CHAPTER.

THE ENGLISH CRIMINAL LAWS PREVAILING IN THE DOMINION.

Colonies may be acquired either by occupancy, conquest or cession; the laws prevailing therein depending on the mode of acquisition.

Where the acquisition is by occupancy, all English laws applicable and necessary to the state and condition of the colony are immediately in force, such as the general rules of inheritance, and of protection from personal wrongs; but other provisions, applicable and peculiar to a people in a more advanced state of civilization and artificial refinement, are neither necessary nor convenient in a new and undeveloped country, and therefore are not in force. (*a*)

In conquered colonies, the laws existing at the time of the conquest, except such as are contrary to the laws of God, remain in force until altered by the conquering power; it being competent to the latter to impose on the subjugated people such laws, imperial or otherwise, as may be thought fit. (*b*)

In ceded colonies the same general law prevails as in conquered colonies, except in so far as the power of the Crown may be modified by the treaty of cession.

(*a*) *Uniacke* v. *Dickson*, 1 James, 300, per *Hill*, J., confirmed by *Smyth* v. *McDonald*, 1 Oldright, 274; *Doe dem Anderson* v. *Todd*, 2 U. C. Q. B. 84, per *Robinson*, C. J.

(*b*) *Doe dem Anderson* v. *Todd*, 2 U. C. Q. B. 82.

The Provinces of Ontario, Quebec, Nova Scotia, New Brunswick and Manitoba are all colonies of the British Empire, but it is not perfectly clear under what modes of acquisition they can severally be classed. The country was originally discovered and to some extent settled by the French, who claimed the whole territory, from the Gulf of St. Lawrence to the then unknown western wilds. By the Treaty of Utrecht, signed in 1713, the present Provinces of Nova Scotia and New Brunswick, then called Arcadia, were ceded to Great Britain; and by the Treaty of Paris, concluded in 1763, the entire territories claimed by the French, including the present Provinces of Ontario, Quebec and Manitoba, became the property of the Imperial Crown.

As to the Provinces of Ontario, Quebec and Manitoba, there seems little doubt but that their acquisition may be ascribed to cession founded on conquest; but as to Nova Scotia, it seems to have been considered as a settled colony, in other words, as acquired by occupancy, (*c*) a view which is strongly supported by the fact that the laws of England, both civil and criminal, with certain limitations and restrictions, prevail therein, although never introduced by Imperial statute or proclamation. If this be correct, New Brunswick would fall within the same class, as, until 1784, it and Nova Scotia formed but one Province.

The criminal law in the Provinces of Ontario and Quebec has been introduced by statute. By the Royal Proclamation of 1763, the criminal law of England was made applicable to the Province of Quebec, as there defined; and by the Imperial statute, 14 Geo. III., c. 83, it was extended to the whole of the present Provinces of Ontario and Quebec. This statute, which took effect 1st May, 1775, after reciting the benefits resulting from the use of the criminal law since its introduction by the proclamation above referred to, enacted that the same should continue to be administered and observed as law, "as well in the description and quality of the offence

(*c*) *Uniacke* v. *Dickson*, 1 James, 287.

as in the method of prosecution and trial, and the punishments and forfeitures thereby inflicted." In Ontario, however, the 40 Geo. III., c. 1, was subsequently passed, introducing the criminal law of England, as it stood on the 17th day of September, 1792, "and as the same has since been repealed, altered, varied, modified or affected by any Act of the Imperial Parliament having force of law in Upper Canada, 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 the Consolidated Statutes relating to Upper Canada, exclusively, or to the Province of Canada."

With regard to the Province of Manitoba, prior to Confederation, several Imperial statutes were passed, making provision for the trial of offenders. This legislation was comprised in three enactments, the 43 Geo. III., c. 138, the 1 & 2 Geo. IV., c. 66, and the 22 & 23 Vic., c. 26, the provisions of which it is unnecessary to give, as all necessity for recourse to them is obviated by subsequent colonial legislation.

By an Order in Council following the 33 Vic., c. 3, the Province of Manitoba was formed out of the territories referred to in the above statutes, and by a statute of the Parliament of Canada (34 Vic., c. 14), the entire body of the modern criminal law of England, as existing in the rest of the Dominion, has been extended to that Province. (*d*) Under the latter statute, the Imperial enactments have been superseded as to Manitoba, and the justices in that Province have the same power and jurisdiction over persons charged with indictable offences committed therein, as justices in other parts of the Dominion have over persons committing offences within their several jurisdictions; and the court known as the General Court has power to hear, try and determine, in due course of law, all treasons, felonies and indictable offences committed in any part of the said Province, or in the territory which has now become the said Province. (*e*) The Dominion Statute, 37 Vic.,

(*d*) See charge of Mr. Justice *Johnson* to the Grand Jury, Spring Assizes, 1871.

(*e*) 34 Vic., c. 14, s. 2.

c. 39, moreover, extends to that Province certain Acts relating to the prompt administration of justice in criminal matters, which had been excepted from the operation of the 34 Vic., c. 14.

With regard to British Columbia, the 37 Vic., c. 42, extends to that Province certain of the criminal laws now in force in the other Provinces of the Dominion; and section 5 grants to the Supreme Court of British Columbia power to hear, try and determine all treasons, felonies, and misdemeanors committed in any part of the Province.

By the British North America Act, 1867, the Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, were federally united into one Dominion, under the British Crown (Manitoba, British Columbia, and Prince Edward Island, having been subsequently admitted), with a constitution, to a great extent a written one, and similar in principle to that of England. Power is given to the Queen, by and with the consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, save in so far as jurisdiction over certain matters is expressly given to the local legislatures of the several Provinces. (*f*) The right to legislate as to the criminal law, including the procedure in relation thereto, is vested in the Dominion Parliament, to the exclusion of the local houses. (*g*) Where, under the terms of this Act, the power of legislation is granted to be exercised exclusively by one body, the subject, so exclusively assigned, is as completely taken from the others as if they had been expressly forbidden to act on it, and if they do legislate beyond their powers, or in defiance of the restrictions placed upon them, their enactments are no more binding than rules or regulations promulgated by any other unauthorized body. (*h*) When, however, the local legislatures have power to legislate on any particular subject, their Acts with reference to the

(*f*) *Fredericton* v. *The Queen*, 3 S. C. R. 505.
(*g*) *Reg.* v. *Bradshaw*, 38 U. C. Q. B. 564; in *re Hamilton and N. W. Ry. Co.*, 39 U. C. Q. B. 93.
(*h*) *Reg.* v. *Chandler*, 1 Hannay, 548, per *Ritchie*, C. J.

same are supreme as to the courts and people of the Province, and cannot be objected to as contrary to reason or justice; (*i*) and in such case they may have power to make any violation of their provisions in relation thereto a crime even in the technical sense of the term, and to enforce observance by the imposition of punishment, by way of fine or imprisonment. (*j*) Thus it was held that under section 92 of the British North America Act, Nos. 9 and 16, the Local Legislature not only had the power, but the exclusive right to legislate in relation to shop, tavern, and other licenses, in order to raise a revenue, and that, having such right, they had also power under No. 15 to enact that any person who, having violated any of the provisions of the Act, should compromise the offence, and any person who should be a party to such compromise, should, on conviction, be imprisoned in the common gaol for three months, and that such enactment was not opposed to section 91, No. 27, by which the power to legislate with reference to criminal law is assigned exclusively to the Dominion Parliament. (*k*) But the punishment imposed by the local legislatures cannot be cumulative. It must be either fine, penalty, *or* imprisonment, not both fine and imprisonment. (*l*) And it has been doubted whether they have power to authorize imprisonment at hard labor. (*m*)

The criminal jurisdiction, then, in this country rests entirely with the Dominion Parliament, saving in so far as the power to erect acts or omissions into crimes is given to the local legislatures as incident to their right of legislation in civil matters, and as a means of enforcing their enactments; and saving, also, in so far as the Imperial Parliament may see fit at any time to interfere in colonial affairs, which it is perfectly competent to them to do, (*n*) but which is little

(*i*) *Re Goodhue*, 19 U. C. Chy. 366. See also *Toronto & L. Huron Ry. Co.* v. *Crookshank*, 4 U. C. Q. B. 318.
(*j*) *Reg.* v. *Boardman*, 30 U. C. Q. B. 555-6, per *Richards*, C. J.
(*k*) *Ibid.*
(*l*) *Ex parte Papin*, 8 C. L. J. N. S. 122.
(*m*) *Reg.* v. *Black*, 43 U. C. Q. B. 192.
(*n*) *Smith* v. *McGowan*, 11 U. C. Q. B. 399; *Gabriel* v. *Derbishire*, 1 U. C. C. P. 422.

to be apprehended except with reference to foreign relations. (*o*)

It remains to be considered what Imperial statutes have been held to have been introduced into the various Provinces of the Dominion and the principle of their adoption, premising that the 40 Geo. III., c. 1, did not introduce the English law into the Province of Ontario to any other or greater extent than the 14 Geo. III., c. 83, had into the Province of Quebec; and that as to the extent of introduction, there is no material difference between those colonies of the Dominion in which it is held to be in force on common law principles and those in which it is so by an express statute or proclamation.

There is no precise or defined rule, nor any direct decision as to what Imperial statutes extend to the colonies. This must of necessity be left open for decision in each particular colony and case by the courts, the ultimate forum being the Privy Council. (*p*)

English statutes of general and universal application, regulating the ordinary affairs of life, apply to the colonies, and in some cases where an act is only impliedly made an offence in England. (*q*) And an Imperial Act, though in force generally for the reason just stated, may be held inapplicable in cases of a special nature, where the peculiar condition of the country would render its enforcement inconvenient. (*r*) In applying these rules, however, it is to be borne in mind, that in the early settlement of a colony, when the local legislature has been just called into existence, and has its attention engrossed by the immediate wants of the members of the infant community in their new situation, the courts of judicature would look naturally for guidance, in deciding upon the claims of litigants, to the general laws of the Mother Country, and would exercise greater latitude in the

(*o*) *Reg.* v. *Schram*, 14 U. C. C. P. 322.
(*p*) *Uniacke* v. *Dickson*, 1 James, 299, per *Hill*, J.; *ex parte Rousse*, S. L. C. A. 322, per *Sewell*, C. J.; *Dillingham* v. *Wilson*, 6 U. C. Q. B. O. S. 86, per *Sherwood*, J.
(*q*) *Cronyn* v. *Widder*, 16 U. C. Q. B. 361, per *Robinson*, C. J.
(*r*) *Reg.* v. *McCormack*, 18 U. C. Q. B. 131.

adoption of them than they would be entitled to do as their local legislature, in the gradual development of its powers, assumed its proper position. And increasing lapse of time should render the courts more cautious in recognizing English statutes which have not been previously introduced. (*s*) It is suggested as even worthy of grave consideration whether, after the existence of an independent legislature for nearly a century, the adoption of Imperial enactments is not rather the province of the legislature than of the courts. (*t*)

If, after the grant of a constitution and independent powers of legislation, an English statute is introduced into a colony, though afterwards repealed in England, it will still continue to apply in the colony; because the provisions of the repealing statute, which are substituted for the repealed statute, extend not to the colony. (*u*)

There seems to be a distinction between the common and statute law extending to the colonies. As a code colonists have been disposed to adopt the whole of the former, with the exception of such parts only as are obviously inconsistent with their new situation; whilst far from being inclined to adopt the whole body of the statute law, they hold that such parts only are in force as are obviously applicable and necessary for them. As respects the common law, adoption forms the rule; as regards the statute law, the exception. (*v*)

In conclusion, we will give the more important English criminal statutes which have been held to be in force in this country, stating as far as possible the reasons for their adoption.

Notwithstanding the 19 Vic., c. 49, passed in this Province, the 12 Geo. II., c. 28, as to lotteries, is in force here; first, because it comes within our adoption of the criminal

(*s*) *Uniacke* v. *Dickson*, 1 James, 287, per *Haliburton*, C. J.
(*t*) *Ibid.*
(*u*) *Kerr* v. *Burns*, 4 Allen, 609; following *James* v. *McLean*, 3 Allen, 164.
(*v*) *Uniacke* v. *Dickson*, 1 James, 289, per *Haliburton*, C. J.

law of England as it stood in 1792, and next, because this statute and other statutes of the same nature, and resting on the same footing, have been treated in our courts as being in force. (*w*)

The statute 32 Henry VIII., c. 9, which prohibits the buying of disputed titles, is in force in Ontario, as it constitutes part of the criminal law of England adopted by the 40 Geo. III., c. 1. (*x*) In the case of *Shea* v. *Choat*, (*y*) it was held that the statute 5 Eliz., c. 4, is not in force in Ontario, but the statute 20 Geo. II., c. 19, is, though both statutes are of a date long anterior to the introduction of the English law in this Province. In giving judgment in this case, the learned Chief Justice *Robinson* says in reference to the 5 Eliz., c. 4, that "it cannot possibly admit of doubt that its provisions are inapplicable to any state of things that ever existed here. A clause here and there might be carried into effect in this colony, or anywhere, from the general nature of their provisions, but that is not sufficient to make such a statute part of our law, when the main object and tenor of it is wholly foreign to the nature of our institutions, and is therefore incapable of being carried substantially and as a whole into execution." (*z*)

The 28 Geo. III., c. 49, s. 1, as to perjury, is local in its character, and therefore is not in force here. (*a*)

In *Reg.* v. *Mercer* (*b*) it was held that the 5 & 6 Edw. VI., c. 16, against buying and selling offices, is in force in this country, under the 40 Geo. III., c. 1, as part of the criminal

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(*w*) *Uniacke* v. *Dickson*, 1 James, 356-361 : see also as to lotteries and the 12 Geo. II., c. 28 ; *Corby* v. *McDaniel*, 16 U. C. Q. B. 378; *Marshall* v. *Platt*, 8 U. C. C. P. 189 ; *Lloyd* v. *Clark*, 11 U. C. C. P. 250, per *Draper*, C. J. ; *Mewburn* v. *Street*, 21 U. C. Q. B. 306.

(*x*) *Beasley q. t.* v. *Cahill*, 2 U. C. Q. B. 320 ; see also *Baldwin q. t.* v. *Henderson*, 3 U. C. Q. B. 287 ; *Benns q. t.* v. *Eddie*, 2 U. C. Q B 286 ; *Aubrey, q. t.* v. *Smith*, 7 U. C. Q. B. 213 ; *May, q. t.* v. *Dettrick*, 5 U. C. Q. B. O. S. 77 ; *Ross, q. t.* v. *Meyers*, 9 U. C. Q B. 284 ; *McKenzie* v. *Miller*, 6 U. C. Q. B. O. S. 459 ; *Smith v. Hall*, 25 U. C. Q. B. 554.

(*y*) 2 U. C. Q. B 211.

(*z*) *Ibid.* 221

(*a*) *Reg.* v. *Row*, 14 U. C. C. P. 307.

(*b*) 17 U. C. Q. B. 602.

law of England. The 49 Geo. III., c. 126, applies here, and expressly extends the 5 & 6 Edw. VI., c. 16, to the colonies, or at least such of its provisions as are in their nature applicable. (*c*) Probably the 3 Edw. I., c. 26, is in force here. (*d*)

The 1 W. & M., c. 18, s. 18, is in force here, notwithstanding the Con. Stats. Can., c. 92, s. 18, and a person offending against the former statute may be punished. (*e*)

The 32 Geo. III., c. 1, introducing the law of England as to property and civil rights into the Province of Ontario, included the law generally which related to marriage, that is, the common and statute law of England applicable to the state of things existing in this colony at the time the Act was passed. The stat. 26 Geo. II., c. 33, being in force in England when our stat. 32 Geo. III., c. 1, became law, was adopted, as well as other statutes, so far as it consisted with our civil institutions, being part of the law of England at that time "relating to civil rights." It would seem, however, that the 11th clause of 26 Geo. II., c. 33, is not in force in this country. (*f*)

The 8 Henry VI., c. 9, 6 Henry VIII., c. 9, 8 Henry IV., c. 9, and 21 James I., c. 15, as to forcible entry, are in force here; (*g*) so the 8 & 9 Wm. III., c. 27; (*h*) so the 33 Henry VIII., c. 20; (*i*) so the Mutiny Act, 25 Vic., c. 5, s. 72; (*j*) so by the 14 Geo. III., c. 83, the 9 Geo. I., c. 19, and 6 Geo. II., c. 35, which impose certain penalties on persons selling foreign lottery tickets, have been made to form part of the law of Quebec. (*k*)

(*c*) *Reg.* v. *Mercer*, 17 U. C. Q. B. 602; see also *Reg.* v. *Moodie*, 20 U. C. Q. B. 389; *Foott* v. *Bullock*, 4 U. C. Q. B. 480.
(*d*) *Askin* v. *London District Council*, 1 U. C. Q. B. 292.
(*e*) *Reid* v. *Inglis*, 12 U. C. C. P. 195, per *Draper*, C. J.
(*f*) *Reg.* v. *Roblin*, 21 U. C. Q. B. 352-5; *Hodgins* v. *McNeil*, 9 Grant, 305; 9 U. C. L. J. 125; *Reg.* v. *Secker*, 14 U. C. Q. B. 604; but see *Reg.* v. *Bell*, 15 U. C. Q. B. 287.
(*g*) *Boulton* v. *Fitzgerald*, 1 U. C. Q. B. 343; *Rex.* v. *McKreavy*, 5 U. C. Q. B. O. S. 625.
(*h*) *Wragg* v. *Jarvis*, 4 U. C. Q. B. O. S. 317.
(*i*) *Doe dem Gillespie* v. *Wixon*, 5 U. C. Q. B. 132.
(*j*) *Reg.* v. *Dawes*, 22 U. C. Q. B. 333.
(*k*) *Ex parte Rousse*, S. L. C. A. 321.

The 21 Geo. III., c. 49, prohibiting amusements and entertainments on the Lord's Day has been held to be in force in Ontario, though the propriety of the decision may be questioned. (*l*)

EXTRADITION.

For the purposes of this chapter, it may be said that where, upon a requisition by the Government of Canada or the United States, a person found within the territories of either nation, charged with murder, assault with intent to commit murder, piracy, arson, robbery, the utterance of forged paper, or forgery committed within the jurisdiction of the other, is delivered up to justice, pursuant to the Ashburton Treaty, and the statutes passed to give effect thereto, the surrender under such circumstances is called *extradition.*

Jurists are not unanimous on the question whether in the absence of treaty stipulations there is any obligation recognized between nations to make such surrender. But the better opinion seems to be that, in an international point of view, the extradition of criminals is a matter of comity, and not of right, except in cases specially provided for by treaty. (*m*) The law of England does not recognize it as an inter-

(*l*) *Reg.* v. *Barnes*, 45 U. C. Q B. 276.

See further on the general subject *Hesketh* v. *Ward*, 17 U. C. C. P. 667; *Mercer* v. *Hewston*, 9 U. C. C. P. 349; *Heartly* v. *Hearns*, 6 U. C. Q. B. O. S. 452; *Torrance* v. *Smith*, 3 U. C. C. P. 411; *James* v. *McLean*, 3 Allen, 164; *Marks* v. *Gilmour*, 3 Allen, 170; *ex parte Bustin*, 2 Allen, 211; *Fish* v. *Doyle*, Draper, 328; *Purdy q. t.* v. *Ryder*, Taylor, 236; *Reg.* v. *Street*, 1 Kerr, 373; *Doe dem Allen* v. *Murray*, 2 Kerr, 359; *Milner* v. *Gilbert*, 3 Kerr, 617; *Morrison* v. *McAlpine*, 2 Kerr, 36; *ex parte Ritchie*, 2 Kerr, 75; *Reg.* v. *McCormick*, 18 U. C. Q. B. 131; *Pringle* v. *Allan*, 18 U. C. Q. B. 575; *Warner* v. *Fyson*, 2 L. C. J. 105; *Reg.* v. *Beveridge*, 1 Kerr, 58; *Attorney-General* v. *Warner*, 7 U. C. C. Q. B. 399; *Lyons in re*, 6 U. C. Q. B. O. S. 627; *Hallock* v. *Wilson*, 7 U. C. C. P. 28; *Davidson* v. *Boomer*, 15 U. C. Chy. 1, 218; *Hambly* v. *Fuller*, 22 U. C. C. P. 141; *Maulson* v. *Commercial Bank*, 2 U. C. Q. B. 338; *Stark* v. *Ford*, 11 U. C. Q. B. 363; *Hearle* v. *Ross*, 15 U. C. Q. B. 259; *Reg.* v. *Wells*, 17 U. C. Q. B. 545; *Andrew* v. *White*, 18 U. C. Q. B. 170; *Reg.* v. *Slavin*, 17 U. C. C. P. 205; *Thompson* v. *Bennett*, 22 U. C. C. P. 393; *Gordon* v. *Fuller*, 5 U. C. Q. B. O. S. 174; *Gaston* v. *Wald*, 19 U. C. Q. B. 586; *Stinson* v. *Pennock*, 14 U. C. Chy. 604; *Georgian Bay Transportation Co.* v. *Fisher*, 27 U. C. Chy. 346.

(*m*) *Re Anderson*, 11 U. C. C. P. 61, per *Richards*, J.; *Reg.* v. *Young*; 9 L. C. J. 44, per *Badgley*, J.

national duty in the absence of treaty stipulations, and the *Habeas Corpus* Act, 31 Car. II., c. 2, s. 12, in effect prohibits it in the case of subjects, except fugitives from one part of Her Majesty's dominions to another. (*n*)

As the same views were maintained by the United States, the necessity for a treaty on the subject between that nation and Great Britain was soon felt. Accordingly on the 19th of November, 1794, Jay's Treaty, which, however, extended only to murder and felony, was entered into. It continued in force till the outbreak of the American war in 1812, when its operation ceased, and from the conclusion of the treaty of peace between Great Britain and the United States until the passing of the 3 Wm. IV., c. 6, in 1833, the extradition of criminals between the two countries rested entirely upon state authority and the general law of nations. (*o*)

The first case in which the subject of extradition was discussed in this country was *Re Fisher*, (*p*) decided in 1827. Jay's Treaty not then being in force in Quebec, the decision proceeded on the general principles of international law. The court held that the Executive Government had power to deliver up to a foreign state a fugitive from justice charged with having committed any crime within its jurisdiction. In another case, in 1833, Lord Aylmer, then Governor of Canada, refused to deliver up four prisoners for extradition, saying the executive could not, in the absence of treaty or legislation on the subject, dispense with the *Habeas Corpus* Act; but in the same year this defect was remedied in Ontario by passing the 3 Wm. IV., c. 6, Con. Stat., U. C., c. 96.

The extradition of criminals between the United States and Canada is now regulated by the Ashburton Treaty or Treaty of Washington, and the statutes passed to give effect thereto. The treaty, which was passed for purely national purposes, (*q*) was signed at Washington on the 9th of August,

(*n*) *Reg.* v. *Tubbee*, 1 U. C. P. R. 102-3, per *Macaulay*, C. J.
(*o*) See judgment of *Macaulay*, C. J. *Reg.* v. *Tubbee*, 1 U. C. P. R. 100-1.
(*p*) S. L. C. A. 245.
(*q*) *Reg.* v. *Young, the St. Alban's Raid*, 167, per *Smith*, J.

1842, by Lord Ashburton on behalf of Great Britain, and Daniel Webster on behalf of the United States. The ratifications were exchanged at London on the 30th of October following.

Immediately on its ratification, the necessity of legislation for the purpose of carrying its provisions into complete effect, was felt by each of the high contracting parties. The English legislature, on the 22nd August, 1843, passed the 6 & 7 Vic., c. 76, entitled "An Act for giving effect to a Treaty between Her Majesty and the United States of America, for the apprehension of certain offenders."

The 5th section of that statute gave the Parliament of this country supreme authority to enact laws, and effectually carry out the provisions of the treaty within the limits of our territory. (*r*) But colonial legislative action was allowed only for the purpose of carrying into effect the objects of the Imperial Act within the colonial jurisdiction, according to the local circumstances and position of each colony and dependency.

This delegated power of local legislation was therefore absolute in its nature, but restricted in its purport and extent by the objects of the Imperial Act. These objects once secured by the local law, the procedure, or, in other words, the machinery for obtaining its required purposes, was left to the discretion of the local legislature, to be provided for according to the circumstances and position of each colony; (*s*) and the procedure under the treaty may be changed by our legislature. (*t*)

In pursuance of the powers thus conferred, provision was afterwards made by our legislature for giving effect to the treaty by the enactment of the 12 Vic., c. 19, (*u*) upon the passage of which, the operation of the Imperial Statute 6 & 7 Vic., c. 76, was suspended by Order in Council, dated the

(*r*) *Reg.* v. *Young*, 9 L. C. J. 38, per *Smith*, J.
(*s*) *Ibid.* 45, per *Badgley*, J.
(*t*) *Ibid.*
(*u*) Con. Stat. Can., c. 89.

28th of March, 1850, and the suspension directed to continue so long as our substituted enactment should remain in force. This statute, after reciting certain inconveniences which had arisen from the English Act, in effect enacted sections 2, 3, and 4 of the latter, with this addition, that section 2 of our Act sanctioned a requisition from the United States, or "any of such States."

No further change was made until the passing of the 23 Vic., c. 41, in 1860, which repealed the Con. Stats. U. C., c 96. In 1861, the 24 Vic., c. 6, was passed. This Act did not require the Queen's proclamation, or an order of Her Majesty in Privy Council, to give it effect, but had the force of law here without either. (*v*) The statute was passed in consequence of the legal complications arising in the *Anderson case.* (*w*) In order to avoid, if possible, the blunders of ignorant and incompetent magistrates, the Act deprived ordinary justices of the peace of the power to deal with extradition offences, and vested it only in superior officers of the courts, such as judges of the superior or county courts, recorders, police or stipendiary magistrates. It repealed the 1st, 2nd, and 3rd sections of the Con. Stat. Can., c. 89, and substituted other provisions in lieu thereof. These substituted sections applied only to the technical procedure of the local law, by giving practical, improved, and additional facilities for carrying out the law, and in this respect were simply verbal amendments *in eodem sensu* of the previously existing enactments. (*x*) The Act has omitted the words "any such States," which in the prior Acts were superfluous, and their omission in this Act renders it more perfectly conformable with the terms of the treaty and of the Imperial Act, and with the delegated power of legislation by the colonial legislature; (*y*) for by the terms of the treaty and the Imperial Act, "jurisdiction" and "territories" are synony-

(*v*) *Reg.* v. *Young*, 9 L. C. J. 29.
(*w*) 20 U. C. Q. B. 124.
(*x*) *Reg.* v. *Young*, 9 L. C. J. 48, per *Badgley*, J.
(*y*) *Ibid.* 49, per *Badgley*, J.

mous, and the addition of the words "or of any such States" would be useless, as being, in fact, included in the general aggregate expression "United States of America." (*z*)

These words are not in the Imperial Act, and it seems our legislature exceeded its authority in introducing them into the 12 Vic., c. 19. The mistake probably arose from a desire more fully to explain that the word jurisdiction used in the treaty was to extend over the several States in the same sense in which it was used when applied to the United States. (*a*) In this case it was strongly contended that these words were necessary in the statute—that the jurisdiction of the United States, and that of the several States, are separate and independent of each other, and that the omission of these words necessarily and intentionally restricted the operation of the Ashburton Treaty to offences committed solely within the jurisdiction of the United States, and that when the offence was committed within the limits of any one of the States, it was not covered by the treaty. The court, in holding as already shown, declared that the surrender of persons for imputed crimes can only be made by the supreme executive authority of independent nations, and that in the United States it existed in the supreme federal legislature of the nation, and thus, as the object of the treaty could only be attained by the national power, it did not reside in any one of the United States. (*b*)

The Act also makes two alterations in the rules of procedure. The evidence produced before the magistrate was not to be "sufficient to sustain the charge according to the laws of this Province," but "such as, according to the laws of this Province, would justify the apprehension and committal for trial of the person accused," etc. The language of Robinson, C. J., in the *Anderson case, (c)* shows that, according to the proper construction of the treaty, the former

(*z*) *Reg.* v. *Young*, 9 L. C. J. 51, per *Badgley*, J.
(*a*) *Reg.* v. *Young, the St. Alban's Raid*, 169, per *Smith*, J.
(*b*) *Ibid.* 167-9, per *Smith*, J.
(*c*) *Re Anderson*, 20 U. C. Q. B. 168, per *Robinson*, C. J.

expression has the same meaning as the latter; and as the 12 Vic., c. 19, used the former only, probably it was amended so as not to conflict with the treaty in this respect.

The other alteration is in the second clause, and consisted in omitting the words, "*or under the hand of the officer or person having the legal custody thereof.*" *(d)*

The 31 Vic., c. 94, *(e)* the next statute on the subject, came into operation on the 8th of August, 1868, and was passed to extend the provisions of the 24 Vic., c. 6, to the whole Dominion. *(f)* It is in substance the same as that statute which it superseded and repealed, together with the Con. Stat. Can., c. 89. So much of the first section of this Act as is in the words following, that is to say, "or any Police Magistrate or Stipendiary Magistrate in Canada, or any Judge of the Sessions of the Peace in the Province of Quebec, or any Inspector and Superintendent of Police empowered to act as a justice of the peace in the Province of Quebec," was repealed by the 33 Vic., c. 25.

This was the condition of our statute law at the time of the passing of the Imperial Extradition Act, 1870, an enactment that has given to our procedure a degree of uncertainty which it would have been wise to have avoided. The statute, after providing for the practice to be applicable to extradition in general, in sec. 27, enacts that "The Acts specified in the third schedule to this Act" (including the 6 & 7 Vic., c. 76) "are hereby repealed as to the whole of Her Majesty's dominions; and this Act (with the exception of anything contained in it which is inconsistent with the treaties referred to in the Acts so repealed) shall apply (as regards crimes committed either before or after the passing of this Act) in the case of the foreign States with which those treaties are made, in the same manner as if an Order in Council referring to such treaties had been made in pursuance of this Act, and

(*d*) See 31 Vic., c. 94, s. 2.
(*e*) See Stat. 1869, Reserved Acts.
(*f*) *Reg.* v. *Morton*, 19 U. C. C. P. 21, per *Wilson*, J.

as if such order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this Act." Two cases have arisen for adjudication in this country under the above statute, one in Ontario, (*g*) the other in Quebec, (*h*) in which the section just quoted was held to render the Imperial Act, as modified by our 31 Vic., c. 94, and 33 Vic., c. 25, the governing enactment with regard to extradition of criminals from this country to the United States; and the same statute has also been held to be in force with reference to extradition to France. (*i*) It had been thought that sec. 132 of the B. N. A. Act, delegated to the Dominion Parliament full authority to legislate for Canada with reference to treaties between the Empire and foreign nations, and it was under this impression that our 31 Vic., c. 94, was passed; (*j*) and it might be contended that the Extradition Act, 1870, being general in its terms, and the powers conferred by the B.N.A. Act on our Parliament being special, and an integral part of our constitution, has not the effect of overriding sec. 132 of that enactment, and therefore is not in force in this country. It seems hardly reasonable that the provisions of a statute which affect the constitution of the Empire should be held to be annulled by general words. This point, however, was not taken in either of the cases above cited, and remains undetermined, so that at present the Extradition Act, 1870, must be considered as part of the extradition law of this country. And perhaps the Extradition Act, 1877, (*k*) passed by our Parliament, which by its terms is to come into force provided the operation of the Imperial Extradition Act, 1870, "shall have ceased or been suspended within Canada," might be held to have the effect of obviating the difficulty referred to.

But these cases, though they determine that the Imperial Act is in force in this country, throw but little light upon

(*g*) *Re Williams*, 7 U. C. P. R. 275.
(*h*) *Re Rosenbaum*, 18 L. C. J. 200.
(*i*) *Ex parte Taschmacker*, 6 R. L. 328.
(*j*) See remarks of *Ramsay*, J., in *Re Rosenbaum*, 18 L. C. J. 200.
(*k*) 40 Vic., c. 25, D.

the manner in which it is to be read in connection with our statute. The apparent object of the British Parliament in passing the Act in question was to repeal the different statutes which had, from time to time, been enacted with reference to extradition, and to introduce a uniform procedure under all treaties then made, or which might thereafter be entered into, and at the same time to save all existing treaties in their full integrity and force. (*l*) A further provision is made by the section above quoted for cases where, in any British possession any law or ordinance exists with respect to treaties in force at the time of passing the Act.

But for that section the operation of our 31 Vic., c. 94, and 33 Vic., c. 25, would have ceased, as they depended on the Imperial statute, 6 & 7 Vic., c. 76, which the Extradition Act, 1870, repeals. This action of the British Parliament in saving existing colonial legislation, would seem to indicate an intention not to disturb our local procedure; and if this surmise be correct, the proper construction of the several enactments would be to give precedence to our statute in all cases where Imperial and Canadian legislation conflict.

As the statutes already mentioned are the only legislation on the subject in this country, it follows that the Extradition Act, 1870, in its integrity, is the code of procedure in extradition from Canada to all foreign countries other than the United States; and with reference to that country the same statute is in force, but modified by our colonial legislation existing at the time of its passage.

In 1873 the statute 36 & 37 Vic., c. 60, was passed by the Imperial Parliament, amending the Extradition Act, 1870; but none of its provisions require particular mention in this place.

Having discussed the various enactments relating to the extradition of criminals, let us now consider how the treaty and statutes are to be construed and carried out in order to

(*l*) *Re Bouvier*, 42 L. J. N. S. Q B. 17.

effect the objects they were designed to accomplish. These were the surrender by each country to the other of fugitives from justice, charged with certain specified crimes; (*m*) and thereby to subject parties against whom a charge coming within the treaty and statutes is sustained by evidence of criminality to be put upon trial before the proper tribunal of the country where the offence was committed; (*n*) and thus to prevent the failure of justice which would naturally result from offenders in one country seeking refuge in the other, and there being amenable to no punishment: for by the principles of the common law pervading the jurisprudence of both Great Britain and the United States, crimes are unquestionably considered local, and cognizable exclusively within the country where they are committed. (*o*).

Extradition laws are to be interpreted by the law of nations, in so far as the obligations created by them on the part of one nation to another are concerned; and the then existing public law of both nations forms an essential part of the national compact which is created by the passage of an extradition treaty. Consequently, on the passing of our Extradition Acts, the public law of Great Britain, as well as the public law of the United States, became incorporated into the national compact. (*p*)

The words of this treaty should not be held to too narrow a construction; and if the words used to carry out a design of general utility can properly be construed so as to give effect to and not defeat that design, the larger construction must be adopted. (*q*) The treaty must be construed in a liberal and just spirit; not laboring with legal astuteness to find flaws or doubtful meanings in its words, or in those of the legal forms required for carrying it into effect. Its avowed object is to allow each country to bring to trial all prisoners

(*m*) *Reg.* v. *Morton*, 19 U. C. C. P. 18, per *Hagarty*, C. J.
(*n*) *Reg.* v. *Reno*, 4 U. C. P. R. 299, per *Draper*, C. J.; the *Chesapeake case*, 44. per *Ritchie*, J.
(*o*) *Ibid.* 44, per *Ritchie*, J.
(*p*) *Reg.* v. *Young, the St. Alban's Raid*, 469, per *Smith*, J.
(*q*) *Re Warner*, 1 U. C. L. J. N. S. 18, per *Hagarty*, J.

charged with the expressed offences, and it is based on the assumption that each country should be trusted with the trial of offences committed within its own jurisdiction. We are to regard its avowed object in construing its provisions, (*r*) and should look to it for an indication of what was probably meant by anything that may seem ambiguous in the language of the statutes. (*s*)

The treaty applies to all persons being subjects of both nations, and as well slaves as freemen. (*t*) The words of the 31 Vic., c. 94, and of the Extradition Act, 1870, are large enough to embrace all persons, subjects, denizens, or aliens, who have committed the crimes enumerated in the United States and who are found in Canada; and a British subject committing one of the crimes enumerated in the treaty within the jurisdiction of the United States, and afterwards fleeing to Canada, is subject to the provisions of the treaty, and the statutes which provide for the surrender of "all persons" who, being charged, etc. (*u*) So a person convicted of forgery, or uttering forged paper, in the United States, who escapes to Canada after verdict but before judgment, is liable to be surrendered, although, technically speaking, after judgment or verdict of guilty, a man is incorrectly spoken of as "charged with a crime" in the language of the statute. (*v*) But political offenders have always been held to be excluded from any obligation of the country in which they take refuge to deliver them up, whether such delivery is claimed to be due under friendly relationship or under treaty, unless, in the latter case, the treaty expressly includes them. (*w*)

The treaty, in express terms, includes seven different offences, viz., murder, assault with intent to commit murder,

(*r*) *Re Burley*, 1 U. C. L. J. N. S. 49-50, per *Hagarty*, J.; and see *Reg.* v. *Paxton*, 10 L. C. J. 216, per *Drummond*, J.
(*s*) *Re Anderson*, 20 U. C. Q. B. 160, per *Robinson*, C. J.
(*t*) *Ibid* 124; 11 U. C. C. P. 1.
(*u*) *Re Burley*, 1 U. C. L. J. N. S. 34; *Ibid.* 20.
(*v*) *Re Warner*, 1 U. C. L. J. N. S. 16.
(*w*) *Reg.* v. *Young, the St. Alban's Raid*, 470, per *Smith*, J.

piracy, arson, robbery, forgery, and the utterance of forged paper. These offences are not political but social, though the governments of Great Britain and the United States have made national laws for each respectively, thereby giving them a municipal legal character. (*x*) The stipulations of the treaty, with regard to the definitions of the crimes covered by it, are to be carried out in conformity with the municipal laws of both countries, in so far as they agree. (*y*)

The governments of these two countries, in making the treaty, were dealing with each other upon the footing that each had at that time recognized laws applicable to the offences enumerated, and that these laws would not, in all cases, be the same in both countries. The agreement to surrender to each other criminals of certain classes was based upon the fact of the persons being criminals by the laws of the country from which they came, provided the evidence of criminality, according to the laws of the place where the fugitive so charged should be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed. (*z*) In the case in which this principle was enunciated, it was held that, as slavery was tolerated in the United States, and the apprehension of a fugitive slave was authorized by law, such slave could not lawfully resist apprehension in order to gain his freedom, though our law conferred it upon every man, and consequently, that a slave, so resisting, might be guilty of murder, and not necessarily of manslaughter only. (*a*)

So far as we in Canada are concerned, the treaty and statutes are to be construed according to our laws in regard to the offences comprised within their provisions. In other words, the offence must be one of those enumerated according to our law, and the notions we entertain as to the ingredients necessary to constitute it. (*b*)

(*x*) *Reg.* v. *Young*, 9 L. C. J. 44, per *Badgley*, J.
(*y*) *Ibid.*, *the St. Alban's Raid*, 469, per *Smith*. J.
(*z*) *Re Anderson*, 20 U. C. Q. B. 190, per *Burns*, J.
(*a*) *Ibid.*
(*b*) *Re Smith*, 4 U. C. P. R. 215.

But our law is not absolutely to govern as to the particular offence in all its ingredients, and in relation to whatever circumstances may have influenced the party in committing it. Before this rule could prevail, there should be a similarity between the law of the State from which the person has fled and that of our country, in all the features and attributes of the particular crime. To some extent it might be reasonable to hold that the law of the two countries should be found to correspond. For example, if it were the law of a State that every intentional killing by a slave of his master, however sudden, should be held to be murder, without regard to any circumstances of provocation, or of any necessity of self-defence against mortal or cruel injury, then a fugitive slave who, according to the evidence, could not be found guilty of murder without applying such a principle to the case, could not legally be surrendered by the treaty. It cannot, however, be held that, because a man could not, in the nature of things, be killed in this country while he was pursuing a slave, because there are not, and by law cannot be, any slaves here, therefore a slave who has fled from a slave State into this country, cannot be given up to justice because he murdered a man in that State who was at the time attempting to arrest him under the authority of the law, in order to take him before a magistrate, with a view to his being sent back to his master.

Under such circumstances, reference should be had to the positive law of the slave State, to the conduct of the party pursuing and the party pursued, to the knowledge of the latter that the purpose for which it was desired to arrest him was not contrary to the law of the country, or to the fact (if it should be so) that there was no apparent necessity to inflict death in order to escape. (*c*)

There are several decisions in our own courts as to the particular offences covered by the treaty. Among the earliest and most important of these is the *Anderson case.* (*d*)

(*c*) *Re Anderson*, 20 U. C. Q. B. 170-1, per *Robinson*, C. J.
(*d*) *Ibid.* 124.

In that case, A., being a slave in the State of Missouri, belonging to one M., had left his owner's house with the intention of escaping. Being about thirty miles from his home, he met with D., a planter, working in the field with his negroes, who told A. that as he had not a pass he could not allow him to proceed; but that he must remain until after dinner, when he, D., would go with him to the adjoining plantation, where A. had told him that he was going. As they were walking towards D.'s house, A. ran off, and D. ordered his slaves, four in number, to take him. During the pursuit, D., who had only a small stick in his hand, met A., and was about to take hold of him, when A. stabbed him with a knife, and as D. turned and fell, he stabbed him again. D. soon afterwards died of his wounds. By the law of Missouri, any person may apprehend a negro suspected of being a runaway slave, and take him before a justice of the peace. Any slave found more than twenty miles from his home is declared a runaway, and a reward is given to whomsoever shall apprehend and return him to his master. A., having made his escape to this country, was arrested here upon a charge of murder; and the justice before whom he appeared having committed him, he was brought up in the Court of Queen's Bench upon a *habeas corpus*, and the evidence returned upon a *certiorari*. It was contended that as A. acted only in defence of his liberty, and upon a desire to gain his freedom, there was no evidence upon which to found a charge of murder, if the alleged offence had been committed here, and that he could not be demanded under the treaty; but the court held that the prisoner was liable to be surrendered, for his right to resist apprehension must be governed by the law of the place where the offence was committed.

In *Re Beebe* (*e*) the court held that burglary is not an offence within the meaning of the treaty, or the statutes passed to give effect to the treaty.

(*e*) 3 U. C. P. R. 273.

A prisoner was arrested in Ontario for having committed in the United States the crime of forgery, by forging, coining, counterfeiting, and making spurious silver coin; but the court held that the offence as above charged does not constitute the crime of forgery within the meaning of the treaty or Act, for it was not forgery according to our law. (*f*) In *ex parte E. S. Lamirande*, (*g*) the court held that the making of false entries in the books of a bank does not constitute the crime of forgery according to the law of England or Canada, and the prisoner, therefore, was not liable to be extradited on the requisition of the French authorities under the Imp. statute 6 & 7 Vic., c. 75. But where a prisoner was charged with having forged a resolution of a city council as to the issue of bonds, by altering the amount for which the issue was authorized, and of having forged a bond of the said city, it was held, on an application for his discharge, that the resolution being an essential preliminary to the issue of the bond, and the bond being an instrument which might be the subject of forgery, although not executed in strict accordance with the code of the State in which the bond was issued, there was a *prima facie* case made out against the prisoner, and that he should be remanded. (*h*)

In *Re Lewis*, (*i*) where the prisoner was charged with assault with intent to commit murder, in that he had opened a railway switch with intent to cause a collision, whereby two trains did come into collision, causing a severe injury to a person on one of them, it was held that this was not an assault within the treaty.

It seems piracy, as used in the treaty, was intended to apply to piracy in its municipal acceptation, cognizable only by tribunals having jurisdiction either territorially or over the person of the offender. If, however, it signify piracy in its primary and general sense, as an offence against the law

(*f*) *Re Smith*, 4 U. C. P. R. 215.
(*g*) 10 L. C. J. 280.
(*h*) *Reg.* v. *Hovey*, 8 U. C. P. R. 345.
(*i*) 6 U. C. P. R. 236.

of nations, it can only come within the operation of the treaty when a pirate, having gone into one or other of the countries, and so made himself amenable to its courts, and after having been there legally charged with the offence, has fled or been subsequently found within the territory of the other. (*j*)

When an act assumes an international character, and is sanctioned by the aggregate power of a nation claiming to exercise belligerent rights, all private jurisdiction over it, as regards individual responsibility, ceases, and it is beyond the reach of the treaty or the statutes. In such case, reference can only be had to the arbitrament of the sword. And an offence cannot be divested of its international character, by selecting from an act—referable for its approval or censure only to the law of nations—a portion of, or an incident in, such act, and then attempting to subject such portion or such incident to trial by a municipal tribunal; for the whole of the details and incidents which in the aggregate constitute a national or hostile act, must be taken together. (*k*) In accordance with these principles, it was held that the St. Alban's Raid (the facts of which are given in the report) was a hostile expedition, authorized by a Government entitled to claim belligerent rights, and should be disposed of by international law, founded on the rights of belligerents, and not by a neutral judge. (*ii*)

This principle was also recognized in *Burley's case.* (*jj*) In the latter case, the counsel for the defence contended that the act charged was committed by the prisoner while engaged in an act of hostility duly authorized by the Confederate States against the United States; and no doubt, if this had been established, the court would have discharged the prisoner. But it was held that, under the circumstances of the case as shown, as well on the part of the prosecution as of the defence, the accused, who took the property of a non-

(*j*) The *Chesapeake case*, 44-5.
(*k*) *Reg.* v. *Young, the St. Alban's Raid*, 454, per *Smith*, J.
(*ii*) *Ibid.*
(*jj*) 1 U. C. L. J. N. S. 20 and 34.

combatant citizen, by violence, from his person, was guilty of robbery, and liable to be surrendered under the treaty. The same principle was also very fully recognized in the most important case of the *Chesapeake* in New Brunswick. There evidence was produced to establish an authority from the Government of the Confederate States, as recognized belligerents, for the commission of the acts charged.

An accessory before the fact is liable to extradition, but not an accessory after the fact. (*kk*)

Where the crime comes within the treaty, it is immaterial whether it is, according to the laws of the United States, only a misdemeanor and not a felony; our concern is to deal with these foreign offences in our own country in like manner as if they had been committed here—to enforce the treaty effectually and in good faith, and to leave all questions of municipal law between the foreign authorities and their prisoners to be dealt with and settled by their own system, with which, in that respect, we have nothing whatever to do. (*l*)

Having set out the cases in which the construction of the treaty was involved, the procedure for giving effect thereto will now be considered. This, as before stated, is governed by the Imperial Extradition Act, 1870, as modified by our 31 Vic., c. 94, and 33 Vic., c. 25.

With reference to the warrant of arrest, the 31 Vic., c. 94, sec. 1, as amended by the 33 Vic., c. 25, provides that any Superior or County Court Judge, or any Recorder of a city in Canada, or any Commissioner appointed for the purpose by the Governor under the Great Seal, may issue such warrant. The Extradition Act, 1870, by section 8, gives the same power to "a Police Magistrate or any Justice of the Peace in any part of the United Kingdom," and in section 17 provides that the Act shall "extend to every British possession in the same manner as if throughout this Act the British possessions were substituted for the United Kingdom or England,

(*kk*) *Reg.* v. *Browne*, 6 App. 386.
(*l*) *Re Caldwell*, 6 C. L. J. N. S. 227; 5 U. C. P. R. 217.

as the case may require," but with certain modifications, which in many respects are inapplicable to Canada. The authority to try extradition cases was formerly vested in police magistrates and justices of the peace, but that authority was expressly taken from them by our legislature, as already stated; and a difficulty now raised by the above sections of the Imperial Act, is whether they have the effect of re-clothing magistrates and justices with the powers of which they had been stripped.

It has been held in Quebec, on a construction of these sections, (*m*) that a judge in sessions may take the preliminary *enquête* in matters of extradition, and this apparently on the ground that he is while so acting a justice of the peace. However this may be, the Imperial Act, being permissive in its terms, has not, it is submitted, the effect of ousting the jurisdiction of our superior and county court judges under our 31 Vic., c. 94.

When application is made to a judge or magistrate for a warrant of arrest under the treaty, his first consideration, provided he have jurisdiction in other respects, should be, whether the alleged offence is within its terms. But for the treaty and the statutes, the proceedings by a magistrate, in respect of a crime committed in the United States, by way of arresting or committing the accused to prison, would be *coram non judice*, and upon *habeas corpus* the prisoner would be entitled to his discharge. The whole power to deal with a crime in a foreign country is derived from the treaty and the statutes, and there is no jurisdiction or power to take any proceedings under the treaty, except for one of the offences mentioned therein; (*n*) and if the judge or magistrate does not find by his warrant that one of these offences has been committed, the whole case fails, and no legal power exists to correct or supply the defect. (*o*)

(*m*) *Re Konigs*, 6 *Revue Legale*, 213, Q. B. 1874.
(*n*) *Re Anderson*, 11 U. C. C. P. 52-3, per *Draper*, C. J.
(*o*) *Ibid.* 68, per *Hagarty*, J.

In considering, therefore, the right to arrest and detain, it ought clearly to appear that the prisoner is charged with an offence within the treaty. If doubtful whether it is one of those enumerated or not—if, for instance, it is not clear whether the offence alleged to have been committed amounts to murder or manslaughter—that interpretation should be adopted which is most in favor of the liberty of the accused; and as manslaughter is not mentioned in the treaty, the party should not be arrested and detained. (*p*)

It was held in the *Chesapeake case*, that the magistrate must have jurisdiction, judicially as well as territorially, over the offence, and that if it were of such a character that he would have no jurisdiction over it when committed in this country, neither the treaty nor the statute authorized an inquiry for the purpose of committing the offender, when his offence arose in the United States. This case, however, was under the Imp. Stat. 6 & 7 Vic., c. 76, which only empowered any "justice of the peace or other persons" to act under the treaty. The tendency of recent legislation in Canada has been to vest this power in the superior magistracy of the country; and if it is still held that they must have a judicial as well as territorial jurisdiction over the offence, the jurisdiction is nevertheless very much enlarged; unless, indeed, the Extradition Act, 1870, be held to have the effect of enlarging our statutes in this respect.

The following case, which may still be useful, shows the authority for appointing a magistrate to act under the 31 Vic., c. 94, the powers which the appointment confers, and also that they are not affected by the circumstances that another magistrate has, after hearing evidence, etc., discharged the fugitive:

The prisoners were arrested at Toronto, under a warrant issued by one M., on an information laid by B., charging them with robbery, committed with violence, in one of the

(*p*) *Re Anderson*, 11 U. C. C. P. 62-3, per *Richards*, J.

United States of America, and stating the information to have been laid before "the undersigned police magistrate in and for the county of the city of Toronto, amongst other counties appointed under and by virtue of the Act of the Parliament of Canada, 28 Vic., c. 20, entitled," etc. The warrant of arrest described M. as police magistrate for all these counties, naming them in full, and the warrant of commitment as police magistrate for the county of Essex, amongst other counties appointed under and by virtue of the above Act (but no commission empowering him to act was produced on this application, which was for the prisoners' discharge under a writ of *habeas corpus).* Under this warrant the prisoners were conveyed to S., in the county of Essex, and evidence was given there, before M., of the robbery in question, consisting of certain depositions taken in the United States, before a justice of the peace there, on which an original warrant of arrest was issued by him. These depositions had been taken, and warrant issued, after the arrest at Toronto. On this evidence, the prisoners were committed to custody, to await the warrant of the Governor General for their extradition to the United States. The prisoners, it seemed, had been previously arrested in Toronto on the same charge, and been discharged by the local police magistrate, after a lengthened investigation had before him. It was held that this discharge did not prevent another duly qualified officer from entertaining the charge against them, on the same or on fresh materials, and that the failure of one magistrate, from mistake or otherwise, to commit persons charged for extradition, cannot prevent the action of another. It was held, also, that the 29 & 30 Vic., c. 51, s. 373 (now repealed and re-enacted by (Ont.) 32 Vic., c. 6, s. 11), only applied to any case *arising in any town or city* in Ontario, and did not preclude M. from taking the information of B. and issuing his warrant in Toronto, where there was already a police magistrate; for that the words of the section merely excluded him from jurisdiction there in local

cases, but did not apply to cases arising under the extradition laws.

It was further held, that the appointment of M. might well have been made under 28 Vic., c. 20, for any one or for all the counties of Ontario, including Toronto, and his power made the same as a police magistrate in cities, except as regarded purely municipal matters, and that this Act was continued by (Ont.) 31 Vic., c. 17, s. 4; but that as nothing was suggested in any way impugning the possession by M. of the authority to act, the ordinary rule must prevail, and the warrant be treated as executed by an officer possessing such authority. (*q*)

Under our statute, the 31 Vic., c. 94, a warrant might be issued in the first instance in this country, and the proceedings under the treaty and statutes initiated here, (*r*) it not being necessary that an original warrant should have been granted in the United States; but section 10 of the Extradition Act, 1870, seems to require the foreign warrant to be issued at any rate before the commitment of the prisoner.

It is not a condition precedent to the jurisdiction of the magistrate that a requisition should be first made by the Government of the United States upon the Canadian Government, or that the Governor General of Canada should first issue his warrant requiring magistrates to aid in the arrest of the fugitives. (*s*) If, however, a Secretary of State should order a magistrate to proceed under the statute, his jurisdiction cannot be impeached upon the ground that the terms of the treaty have not been complied with. This might be a reason for the Secretary refusing to make such an order; but having made it, and the magistrate having acted under it, all the court has to do is to look at the statute and see whether he had jurisdiction under it. (*t*)

(*q*) *Reg.* v. *Morton*, 19 U. C. C. P. 9.

(*r*) *Re Anderson*, 11 U. C. C. P. 53, per *Draper*, C. J.; *Reg.* v. *Morton*, 19 U. C. C. P. 19, per *Hagarty*, J.; *Re Caldwell*, 6 C. L. J. N. S. 227; 5 U. C. P. R. 217.

(*s*) *Re Burley*, 1 U. C. L. J. N. S. 34; *Reg.* v. *Young*, 9 L. C. J. 29; Extradition Act, 1870, sec. 8.

(*t*) *Re Counhaye*, L. R. 8, Q. B. 416, per *Blackburn*, J.

The judge or magistrate issuing the warrant for the apprehension of the offender, is the person before whom the evidence in support of the charge must afterwards be heard, and who must determine upon its sufficiency; (*u*) but his decision is not binding on the governor, and the latter may, notwithstanding, order the prisoner's discharge; (*v*) for the magistrate must send or deliver to the governor a copy of all testimony taken before him, that a warrant may issue upon the requisition of the United States for the surrender of the prisoner pursuant to the treaty. (*w*) Nor is the opinion of the committing magistrate conclusive on the prisoner; for, if adverse to the latter, he may still apply to the governor, whose decision may possibly be influenced by considerations which a court could not entertain. (*x*) And it seems doubtful whether it was not the intention of the extradition statutes to transfer to the governor exclusively the consideration of all the evidence, that he might determine whether the prisoner should be delivered up.

It may be observed here, that the surrender of persons for imputed crimes can only be made by the supreme executive authority of independent nations. (*y*) By the British North America Act, 1867, s. 132, the Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada, or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries. No doubt, the Ashburton Treaty is covered by this clause, and that under it the Governor General has power to deal with extradition cases to the exclusion of the Lieutenant-Governors of the several Provinces.

(*u*) The *Chesapeake case*, 46; *Re Anderson*, 20 U. C. Q. B. 165-9, per *Robinson*, C. J.

(*v*) *Ibid.* 189, per *Burns*, J.; *Reg.* v. *Reno and Anderson*, 4 U. C. P. R. 295, per *Draper*, C. J.

(*w*) *Re Burley*, 1 U. C. L. J. N. S. 45, per *Richards*, C. J.; *Re Anderson*, 20 U. C. Q. B. 165-189; see 31 Vic., c. 94, s. 1; also Extradition Act, 1870, s. 8.

(*x*) *Reg.* v. *Reno and Anderson*, 4 U. C. P. R. 295, per *Draper*, C. J.

(*y*) *Reg.* v. *Young, the St. Alban's Raid*, 167, per *Smith*, J.

The surrender, also, must be by the Governor General, as representing the Government. (*z*) But his power is confined within the letter of the local law: and he is powerless to act against fugitives charged with the commission of any other of the formidable list of offences, social and political, not enumerated in the treaty, because these are not contained within the local law. It seems, too, that the courts may, to some extent, control or direct the action of the Executive; for when a party is committed under a magistrate's warrant, he may apply to any of the superior courts or judges for a *habeas corpus*, and that the court in term, or the judges in vacation, may determine whether the case be within the treaty, and, if not, whether a legal power to surrender the prisoner is, nevertheless, reposed in the Executive Government; and if so, then whether a case was made out which entitled the Government to grant such surrender. (*a*) The governor is not authorized to surrender the prisoner until the expiration of fifteen days after his commitment. (*b*) This provision was probably inserted in the statute to give the prisoner an opportunity of having the magistrate's decision reviewed on *habeas corpus* and *certiorari*.

The fact that the person is charged with piracy committed in the foreign country ought not to prevent the governor from surrendering him on the charge made and proved in this country. But if the charge in this country is robbery, and the requisition on behalf of the government of the foreign country be for his extradition for the crime of piracy, he could not be surrendered under a warrant of commitment for robbery. And if his surrender is demanded for any other offence than the one for which he has been committed, it must be refused. (*c*)

Looking at the statute, (*d*) we find that the commitment of the prisoner is to be made upon such evidence as, according

(*z*) *Reg.* v. *Tubbee*, 1 U. C. P. R. 98.
(*a*) *Ibid.*
(*b*) Extradition Act, 1870, s. 11.
(*c*) *Re Burley*, 1 U. C. L. J. N. S. 45-6, per *Richards*, C. J.
(*d*) Extradition Act, 1870, ss. 10 and 17.

to the laws of the Province in which he has been apprehended, would justify his committal for trial, if the crime of which he is accused had been committed therein. This seems to impose on the judge or magistrate the same duties as devolve upon justices of the peace, on charges of indictable offences committed within our own jurisdiction; and when he would commit for trial under a similar state of facts arising in this country, he is bound to commit for trial under the treaty, and our statutes passed to carry it out. (*e*) The authority of the judge or magistrate does not extend beyond the inquiry indicated by the statute; (*f*) but he is bound to see that the commitment for extradition is warranted by the statute, and that the offence is sustained by evidence which in our own courts would *prima facie* establish the crime charged. (*g*) When such *prima facie* case is made out, and the evidence in defence is not clear and conclusive, a jury is the only constitutional tribunal which can determine whether evidence offered to displace the impression which the *prima facie* case is calculated to make, does or does not satisfactorily displace it; and all questions of intent, or of fact or inference, should be submitted to them. (*h*) The judge or magistrate, therefore, should not go beyond a bare inquiry as to the *prima facie* criminality of the accused, and should not inquire into matters of defence which do not affect such criminality; such, for instance, as whether the prosecution of the offender is barred by a statute of limitations in the foreign country, or whether there is a probability of the ultimate conviction of the prisoner therein. (*i*) Conflicting or unsatisfactory evidence in answer to a strong *prima facie* case, though perhaps properly receivable, would not justify the magistrate in discharging the prisoner; (*j*) for it is to be

(*e*) *Re Burley*, 1 U. C. L. J. N. S. 48, per *Richards*, C. J.
(*f*) *Reg.* v. *Reno and Anderson*, 4 U. C. P. R. 281.
(*g*) *Reg.* v. *Morton*, 19 U. C. C. P. 25, per *Wilson*, J.; *ex parte Lamirande* 10 L. C. J. 280.
(*h*) *Reg.* v. *Gould*, 20 U. C. C. P. 159, per *Gwynne*, J.; the *Chesapeak case*, 48.
(*i*) *Ex parte Martin*, 4 C. L. J. N. S. 200, per *Morrison*, J.
(*j*) *Reg.* v. *Reno and Anderson*, 4 U. C. P. R. 281.

observed that he cannot try the case here, nor weigh conflicting evidence, nor assume the functions of a jury by deciding as to the credibility of witnesses. (*k*) In the *Burley case*, the accused, on his examination before the magistrate, admitted the acts charged, which *prima facie* amounted to robbery, and alleged, by way of defence, matter of excuse which was of an equivocal character and bore different interpretations, and the court held that the magistrate could not try the case, nor act on the explanatory evidence by way of defence; but the *prima facie* evidence being sufficient to justify the committal of the prisoner, the facts necessary to rebut the *prima facie* case could only be determined by the courts of the United States.

If there is not sufficient evidence of criminality, the magistrate ought not to commit; if there is, he ought, notwithstanding the evidence is sufficient, if true, to prove an *alibi*. If he discharges because the evidence *pro* and *con*. is equally strong, and he cannot determine which side is telling the truth, he is in error, because, in either of these cases, if he pursued any other course, he would, for many purposes, be assuming the functions of a jury, and, on a preliminary investigation, trying the whole merits of the case, though the inquiry was only instituted to ascertain whether the evidence of criminality would justify the apprehension and committal for trial of the person accused. (*l*)

If the facts proved admit of different interpretations as to the intent with which the prisoner acted, this is no ground for refusing to commit for extradition, because the question of intent is for the jury on the trial. (*m*) Thus, if the charge is of assault with intent to commit murder, it is no objection that the facts proved are as much evidence of other felonious

(*k*) *Reg.* v. *Reno and Anderson*, 4 U. C. P. R. 281; *Re Burley*, 1 U. C. L. J. N. S. 34; *Reg.* v. *Young, the St. Alban's Raid*, 449, per *Smith*, J.; *ex parte Martin*, 4 C. L. J. N. S. 200, per *Morrison*, J.

(*l*) *Reg.* v. *Reno and Anderson*, 4 U. C. P. R. 299, per *Draper*, C. J.; *Re Burley*, 1 U. C. L. J. N. S. 46, per *Richards*, C. J.

(*m*) The *Chesapeake case*, 48.

intents as of the intent to murder. (*n*) And if the evidence presents several views, on any one of which there may be a conviction, if adopted by the jury, the court is not called upon to determine which of the views is best supported, but may commit the prisoner for surrender. (*o*)

The magistrate should remember that the citizens of a foreign country are entitled to precisely the same measure of justice as our own people. (*p*) But he should not hesitate in committing the prisoner for extradition from any fear that he will not be fairly dealt with in the United States; and, even if he is satisfied that the prisoner will not be tried fairly and without prejudice in the foreign country, he cannot refuse to give effect to the statute by acting on such an assumption. (*q*) But he must assume that courts in other countries will be governed by the same general principles of justice which prevail in our own courts, and that the prisoner will have a fair trial after his surrender. (*r*) We are not to overlook or forget for an instant that we are dealing with a highly civilized people, most tenacious of their liberty, whose laws are similar to our own, but administered with more of the common law technicality than we have thought it expedient to retain, by which many avenues are left open for criminals to escape which we have closed; (*s*) so that a prisoner is more likely to be acquitted in the United States than here.

An information stating that the prisoner was apprehended "on suspicion of felony" was held too general, as not containing a charge of any specific offence. (*t*) The information in this case was considered as for an ordinary offence, committed within our own jurisdiction. But it is no objection

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(*n*) *Reg.* v. *Reno and Anderson*, 4 U. C. P. R. 296, per *Draper*, C. J.
(*o*) *Reg. v. Gould*, 20 U. C. C. P. 154.
(*p*) *Re Kermott*, 1 Chr. Reps. 256, per *Sullivan*, J.
(*q*) *Re Anderson*, 20 U. C. Q. B 173, per *Robinson*, C. J.
(*r*) *Reg.* v. *Reno and Anderson*, 4 U. C. P. R. 299, per *Draper*, C. J.; *Re Burley*, 1 U. C. L. J. N. S. 48, per *Richards*, C. J.
(*s*) *Reg.* v. *Morton*, 19 U. C. C. P. 25, per *Wilson*, J.
(*t*) *Reg.* v. *Young, the St. Alban's Raid.*

to the information and complaint on which the magistrate issues his warrant for the arrest of the party, in the first instance, that the complainant was not an eye-witness of the facts to which he deposes, or that they are stated on information and belief; at least, the offender may be lawfully brought before a justice, and detained a reasonable time, until the proper evidence can be produced. (*u*)

In *Re Kermott* (*v*) a question was raised, whether a committing magistrate could detain a prisoner on evidence amounting only to a ground of suspicion, for the purpose of other evidence being imported into the case, so as to bring it within the treaty; but it was held that neither the treaty nor the statutes contemplate the surrender of an accused person upon mere suspicion. (*w*) But where a magistrate was in receipt of telegrams from high persons in France and England, informing the police and the Consul of France of the escape of an individual whom they described, and also of an affidavit of the German Consul, stating that he had reason to believe him guilty, it was held that he was justified in detaining him until the arrival of proof. (*x*) However this may be, there is no doubt of the magistrate's power to detain the prisoner when the evidence is clear and satisfactory as to his guilt, and this even although he has been arrested upon a void warrant. Thus, where a prisoner was committed for extradition, it was held on *habeas corpus* that the material question was, being in custody, whether a sufficient case was made out to justify his commitment for the crime charged; that it was immaterial that the original information, warrant, etc., were irregular and defective, if, on the hearing, sufficient appeared to justify the commitment; that it would be absurd to discharge the prisoner because the warrant might be void when the evidence, on the hearing, would justify re-arresting

(*u*) *Re Anderson*, 20 U. C. Q. B. 151, per *Robinson*, C.J.; *Reg.* v. *Reno and Anderson*, 4 U. C. P. R. 287.
(*v*) 1 Chr. Rep. 253.
(*w*) *Ibid.* 256.
(*x*) *Re Konigs*, 6 R. L. 213, Q. B.

him the next moment, and that the commitment must therefore be upheld. (*y*)

In *Re Anderson*, (*z*) it was held that, when a person is brought before the court upon a writ of *habeas corpus*, and the warrant of commitment upon which he is detained appears on its face to be defective, the court before whom the prisoner is brought has no authority to remand him, and that such power is only possessed by the court in virtue of its inherent jurisdiction at common law, and does not extend to proceedings under the Extradition Treaty and statutes. But it has been held in Quebec that a Judge of Sessions, when a prisoner is brought before him on the original warrant of arrest, has power to remand under the treaty and statutes; and when the remand appointed no day for the further examination of the prisoner, and an application was made for a *habeas corpus* (before the eight days after the remand had expired), (*a*) on this ground, and on the ground that the judge had no power to remand, the writ was refused, the court holding that the power to remand was essential to the performance of the magistrate's duties, and that the irregularity in not fixing the day was unimportant. (*b*)

The provision in the statutes as to the evidence of criminality being sufficient to justify the apprehension and committal for trial, if the offence had been committed here, merely furnishes a test as to the kind of evidence required. (*c*) So far as regards the means of proof, there can be no doubt that it is our law which must govern, according to the provision in the statute. If, for instance, the law of the States, or any of them, should admit a confession extorted from a party by violence or threats, to be used against him on a charge of an offence coming within the provisions of the treaty, such evidence could not be admitted here. (*d*)

(*y*) *Ex parte Martin*, 4 C. L. J. N. S. 198.
(*z*) 11 U. C. C. P. 1.
(*a*) See 32 & 33 Vic., c. 30, s. 41.
(*b*) *Reg.* v. *Young, the St. Alban's Raid*, 15.
(*c*) *Re Warner*, 1 U. C. L. J. N. S. 18, per *Hagarty*, J.
(*d*) *Re Anderson*, 20 U. C. Q. B. 169, per *Robinson*, C. J.

The judge, or other person acting, may proceed upon original *viva voce* testimony, in like manner as "if the crime had been committed in this Province." He may, however, also receive the original depositions, (*e*) or duly authenticated copies thereof, on which the original warrant was issued in the United States, in evidence of the criminality of the accused. (*f*) But as the Extradition Statutes are enabling Acts, there is no obligation on the part of the prosecutor to produce such depositions. (*g*)

Under the third section of our statute, 31 Vic., c. 94, the depositions that may be received as evidence of the criminality of the prisoner must be those upon which the original warrant was granted in the United States, certified under the hand of the person issuing it, and not depositions taken subsequently to the issue of the warrant, or, not in any way connected therewith. (*h*) But under the Imperial Extradition Act, 1870, depositions duly authenticated are receivable in evidence, whether they are taken in the particular charge or not, and whether taken in the presence of the accused or not, it being left to the magistrate to give what weight he thinks proper to depositions so taken. (*i*) And the depositions and statements on oath, and the copies thereof, referred to in the 14th section of the Extradition Act, 1870, are made to include affirmations and copies of such affirmations. (*j*)

As the statute permits depositions taken in a foreign court to be used in lieu of oral testimony, when the case depends wholly upon such depositions, we must be strict in seeing that they are depositions coming clearly within the meaning and provisions of the section, (*k*) and that the forms and technicalities of the statute have been strictly complied

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(*e*) *Reg.* v. *Mathew*, 7 U. C. P. R. 199 ; *Reg.* v. *Browne*, 6 App. R. 386.
(*f*) *Re Caldwell*, 6 C. L. J. N. S. 227 ; 5 U. C. P. R. 217, per *A. Wilson*, J.
(*g*) *Ibid.* 227, per *A. Wilson*, J.
(*h*) *Reg.* v. *Robinson*, 6 C. L. J. N. S. 98 ; 5 U. C. P. R. 189 ; *Reg.* v. *Browne*, 6 App. R. 386.
(*i*) *Re Counhaye*, L. R. 8, Q. B. 410.
(*j*) Extradition Act, 1873, 36 & 37 Vic., c. 60.
(*k*) *Reg.* v. *Robinson*, 6 C. L. J. N. S. 99, per *Morrison*, J.

It may be observed, in conclusion, that the Imp. Stat. 6 & 7 Vic., c. 34, makes provision for the apprehension and surrender to the authorities of the place where the offence has been committed, of persons who have committed offences either in the United Kingdom of Great Britain and Ireland, or in any part of Her Majesty's dominions, whether or not within the said United Kingdom, and who are found in any place in the United Kingdom, or any other part of Her Majesty's dominions, other than where the offence was committed.

The provisions of this statute as between the United Kingdom and the colonies, are very similar to those of our own statutes in aid of the Ashburton Treaty. The enactment only applies to treason, or some felony, such as justices of the peace in General Sessions have not authority to try in England under the provisions of an Act passed in the sixth year of the reign of Her Majesty, intituled "An Act to define the jurisdiction of Justices in General Sessions of the Peace." (*h*)

A person cannot under the 6 & 7 Vic., c. 34, be legally arrested or detained here for an offence committed out of Canada, unless upon a warrant issued where the offence was committed, and endorsed by a judge of a superior court in this country. (*i*) And such warrant must disclose a felony according to the law of this country; and the expression "felony, to wit, larceny," would seem to be insufficient. (*j*)

(*h*) See s. 10.
(*i*) *Reg.* v. *McHolme*, 8 U. C. P. R. 452.
(*j*) *Ibid.*

evidence which may be tendered to show that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character, or is not an extradition crime."

Under this statute it has been held that the judge or magistrate has no authority to hear the prisoner's defence, but that in the exercise of his discretion he might hear any evidence tendered to show that the offence was of a political character or one not comprised in the treaty, or that the accuser was not to be believed upon oath, or that the demand for the prisoner's extradition was the result of a conspiracy. (*s*)

In *Re Caldwell*, (*t*) the court held that the evidence of an accomplice was sufficient to establish the charge for the purpose of extradition, and that magistrates holding preliminary examinations might undoubtedly act on the evidence of an accomplice, as the matter in investigation is merely whether the accused shall be put upon his trial or not; and when all questions as to how far the accomplice is entitled to credit will be duly considered at the proper time. It seems, also, the evidence of a slave may be received. (*u*)

If the prisoner is committed for surrender on insufficient evidence, a judge in chambers will, on writs of *habeas corpus* and *certiorari*, order his discharge. (*v*)

It had been held by the Court of Queen's Bench, in England, in the *Anderson case*, (*w*)after the judges of our courts had refused to discharge the prisoner, that the Imperial courts had jurisdiction to issue a writ of *habeas corpus* into this country to bring up the body of Anderson, and they accordingly granted the writ. This action of the English courts caused much complaint in Canada, as being an unwarranted interference with our judicial prerogatives; and to prevent future proceedings of a like kind, the Imperial Statute 25

(*s*) *Re Rosenbaum*, 20 L. C. J. 165, Q. B.
(*t*) 6 C. L. J. N. S. 227; 5 U. C. P. R. 217.
(*u*) *Re Anderson*, 20 U. C. Q. B. 182, per *McLean*, J.
(*v*) *Re Kermott*, 1 Chr. Rep. 253.
(*w*) *Ex parte Anderson*, 3 L. T. Reps. N. S. 622; 7 Jur. N. S. 122.

Vic., c. 20, was passed, which provides that no *habeas corpus* shall issue out of any court in England to any colony or foreign dominion of the Crown in which any courts exist having power to issue and ensure the due execution of writs.

Some doubt was entertained under our 31 Vic., c. 94, whether it was competent for the Superior Courts to interfere in the case of an offender coming clearly within the treaty, after the judge or magistrate who heard the evidence had determined that, in his opinion, it sustained the charge, and had transmitted to the governor a copy of the testimony and committed the prisoner to gaol under the first section of the Act. No provision is made by that statute for granting a writ of *habeas corpus*, except in the case where the prisoner has not been delivered up within two months after his commitment; and although the necessity for a controlling power in the superior courts was strongly felt, grave doubts were expressed by several judges of high authority as to whether any such power existed. (*x*) But by section 11 of the Extradition Act, 1870, the police magistrate, on committing a prisoner, shall inform him that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus;* so that it would seem that under this section, independently of the general question, our superior courts have authority to exercise the same control in extradition matters as they have over magistrates acting in the administration of the ordinary criminal law.

The following case is important as to the sufficiency of the evidence. The express car of a railway train, on one of the roads in the United States of America, was broken into, and plundered by five or more men, two or three of whom fired at the conductor who was endeavoring to stop them as they were moving off with the engine. The conductor was at the

(*x*) See *Reg.* v. *Reno and Anderson*, 4 U. C. P. R. 281; *Re Anderson*, 20 U. C. Q. B. 124; *Re Warner*, 1 U. C. L. J. N. S. 16; *Kermott's case*, 1 Chr. Rep. 253; *Tubbee's case*, 1 U. C. P. R. 98; *Re Burley*, 1 U. C. L. J. N. S. 46.

time about eight feet from the person who fired the first shot, and the ball passed through his coat. This person was a brother of Reno, one of the prisoners apprehended. The express messenger swore to the identity of the prisoners, and as to the identity of the person who fired the first shot. The prisoners were arrested in Canada, at the instance of the Express Company, and demanded for extradition by the United States authorities. The prisoners offered evidence on their examination to prove an *alibi*. *Draper*, C. J. (in Chambers), held that, under the circumstances of this case, there was sufficient *prima facie* evidence of the criminality of the prisoners to warrant a refusal to discharge them, and that there was evidence to go to a jury to lead to the conclusion that the intent of the prisoners was, at the time of shooting, to commit murder. (*y*)

The court above must be fully satisfied there is no legal ground on which the decision of the magistrate can be supported before it is reversed, (*z*) and it would seem that if in one view of the evidence the court find the decision sustainable, they ought not to interfere and reverse it. (*a*) Where the prisoner was brought before a judge in General Sessions, on the original warrant of arrest, and remanded before final commitment, the court doubted their power to interfere by *habeas corpus* until final commitment. (*b*)

The following case bears on the question of return to the writ of *habeas corpus* :

Where, after the prisoners were committed by a justice for extradition, a writ of *habeas corpus*, directed to a gaoler, was sent to the Clerk of the Crown, with 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. This return having been marked by the clerk, "received and filed, 26th September, 1868," and

(*y*) *Reg.* v. *Reno and Anderson*, 4 U. C. P. R. 281.
(*z*) *Reg.* v. *Gould*, 20 U. C. C. P. 161, per *Hagarty*, J.
(*a*) *Ibid.*
(*b*) *Reg.* v. *Young, the St. Alban's Raid*, 15.

signed by him, a judge in chambers made an order allowing these papers to be withdrawn, for the purpose of having another return made. The prisoners were afterwards produced, with the writ to which the foregoing return was annexed, and another, stating that the prisoners were held under the warrant already spoken of, and a subsequent warrant, by which an alleged defect in the first was intended to be cured. It was held that the first return was, in fact, no return, merely alleging matters of excuse for not making a return, and that, when a writ of *habeas corpus* is returnable before a judge in chambers, the return cannot be filed until it has been read before the judge, and that the second return was the only one in this case, and, it having been openly read, was duly filed. (*c*) The return might have been amended if necessary. (*d*)

The commitment authorized by the Extradition Act is peculiar, and should conform to our 31 Vic., c. 94. (*e*) It is not a commitment for safe custody, in order that the party may be afterwards brought to trial within our jurisdiction, but a commitment for safe custody, there to await the warrant of a Secretary of State for his surrender. (*f*) For it is not the function of the magistrate to determine whether the prisoner should be extradited, but to remand him and report the facts to the proper executive authority. (*g*)

The warrrant of commitment should follow the terms of the statute, and should use the technical term "murder" (or as the case may be) in describing the offence, for although in ordinary cases, where the crime under investigation has been committed in our own country, the technical precision and accuracy necessary in an indictment is not required in a warrant, yet neither this rule, nor the reason for it, apply to extradition cases. In the latter, there is only a special statu-

(*c*) *Reg.* v. *Reno and Anderson*, 4 U. C. P. R. 281.
(*d*) *Ibid.* 291, per *Draper*, C. J.
(*e*) *Ex parte Zink*, 6 Q. L. R. 260.
(*f*) Extradition Act, 1870, s. 10; *ex parte Zink*, *supra*.
(*g*) *Ex parte Zink*, 6 Q. L. R. 260.

tory jurisdiction conferred on the magistrate, and, therefore, the warrant in the execution of the statutory power, thus limited, should adhere to the terms of the statute, in order that it may appear clearly that the offence is one of those to which the treaty and the statutes directly apply. (*h*)

In the *Anderson case*, when before the Court of Common Pleas, it was held that a warrant of commitment which used the words, "did wilfully, maliciously, and feloniously stab and kill," and omitted the word "murder," and "with malice aforethought," and concluded by instructing the gaoler to "there safely keep him (the prisoner) until he shall be thence delivered by due course of law," instead of the words of the Act, directing the prisoner to remain in gaol until his surrender, upon the requisition of the proper authority, or until he should be discharged according to law, did not come within the provisions of the treaty or statute, and was consequently defective. (*i*)

If the warrant has not the proper statutory conclusion, all that appears on its face is, that the prisoner remains in custody for an offence alleged to have been committed by him in a country over which our courts have no jurisdiction, and without any explanation of the authority for such commitment, or of the object of it; and the prisoner would be released on *habeas corpus*. (*j*) In ordinary cases, where the offence is against the Queen's peace, and where the court acts in virtue of its inherent jurisdiction as a court over the offence, if the warrant of commitment appears to be defective, but the depositions show that a felony has been committed, the court will look at the depositions, and remand the prisoner, in order that the defect may be corrected. But in extradition cases, as the authority of the court is derived wholly from the treaty and the statutes, and by the latter the

(*h*) *Re Anderson*, 20 U. C. Q B. 162, per *Robinson*, C. J. ; 11 U. C. C. P. 53-63 ; the *Chesapeake case*, 41.
(*i*) 11 U. C. C. P. 1 ; the *Chesapeake case*, 50.
(*j*) *Re Anderson*, 20 U. C. Q. B. 163, per *Robinson*, C. J. ; *ex parte Zink*, 6 Q. L. R. 260.

duty of deciding on the sufficiency of the evidence is cast on the committing magistrate, (*k*) they cannot look at the depositions, to ascertain whether the detention is warranted; and as they cannot remand the prisoner, (*l*) if the warrant of commitment does not show a sufficient cause for the detention of the latter, he must be discharged. (*m*)

A warrant of commitment, which does not show that the magistrate deemed the evidence sufficient, according to the laws of the Province in which he has been apprehended, to justify the apprehension and committal for trial of the person accused, if the crime of which he is so accused had been committed therein, is bad. (*n*) The warrant must show that the offence was committed within the jurisdiction of the United States. (*o*) But it need not set out the evidence taken before the committing magistrate, nor show any previous charge made in the foreign country, or requisition from the Government of that country, or warrant from the Governor General of Canada, authorizing and requiring the magistrate to act. (*p*) But a warrant of commitment which omitted to state that the accused was brought before the magistrate or that the witnesses against him were examined in his presence was held to be bad on its face, and set aside. (*q*) The adjudication of the committing magistrate, as to the sufficiency of the evidence for committal may, however, be stated, by way of recital, in the warrant. (*r*)

A warrant of commitment, which directed the gaoler to receive the body of W. H., "and him safely keep for examination," was held defective in not mentioning the day, or limiting the time during which the prisoner was to be confined. (*s*) But in this case the warrant was considered as

(*k*) *Ante p.* 30.
(*l*) *Ante p.* 25.
(*m*) *Re Anderson*, 11 U. C. C. P. 1 *et. seq.*
(*n*) The *Chesapeake case*, 51; *Re Anderson*, 11 U. C. C. P. 64, per *Richards*, C. J.; *ex parte Zink*, 6 Q. L. R. 260.
(*o*) The *Chesapeake case*, 4-45.
(*p*) *Re Burley*, 1 U. C. L. J. N. S. 34.
(*q*) *Ex parte Brown*, 2 L. C. L. J. 23, Q. B.
(*r*) *Re Burley*, *supra.*
(*s*) *Reg.* v. *Young, the St. Alban's Raid*, 5.

for an offence committed in Canada. It was held, in one case, that the words in an information and warrant of commitment "did feloniously shoot at with intent, and in so doing, feloniously, wilfully, and of malice aforethought to kill and murder," involved "an assault with intent to commit murder," within the language of the last Act, 31 Vic., c. 94, and, therefore, they were not bad on that ground, though it would have been more prudent to have followed the precise description of the offence given by the statute. (*t*)

It is not indispensable that the authority of the magistrate should be shown on the face of the warrant of commitment; and where the crime has been committed in a foreign country, and the committing magistrate has jurisdiction in every county in Ontario, the warrant is not bad though dated at Toronto, the county mentioned in the margin being York, but directed to the constables, etc. of the county of Essex, and being signed by the police magistrate, as such, for the county of Essex. (*u*)

But where the commital is in pursuance of a special authority, the warrant must be special and must exactly pursue that authority. (*v*)

In *Re Warner* (*w*) the court held that it is in the power of a magistrate, acting under the treaty and statutes, after issue of a writ of *habeas corpus*, but before its return, though after an informal return, to deliver to the gaoler a second or amended warrant, which, if returned in obedience to the writ, must be looked at by the court, or a judge, before whom the prisoner is brought; and *Hagarty*, J., (*x*) thought that although a magistrate, after his first warrant, transmitted copies of the testimony to the Governor, or even after committing the prisoner in the first instance, he is not precluded from issuing a second warrant in proper form against the prisoner.

(*t*) *Reg.* v. *Reno and Anderson*, 4 U. C. P. R. 281.
(*u*) *Ibid.*
(*v*) *Ex parte Zink*, 6 Q. L. R. 260
(*w*) 1 U. C. L. J. N. S. 16.
(*x*) *Ibid.* 17.

Bail may be granted to extradition prisoners in a proper case, as to other offenders. And where a prisoner was committed for extradition to the United States, as the court would not sit at Montreal before the lapse of seven days from the commitment, his counsel applied to the court at Quebec by *habeas corpus* for bail, which was granted. (*y*) If the prisoner is discharged on the hearing of the warrant of arrest, there can be no bail required as a condition of such discharge. (*z*)

A prisoner charged with forgery in Canada was arrested in the United States and surrendered by the Government of that country under the treaty, upon application for bail, on the ground that there was no evidence of the *corpus delicti*. It was held that the depositions taken in Canada expressly charging the prisoner with forgery, followed by an application for the prisoner's surrender and his surrender accordingly taken in connection with the fact that the evidence and proofs on which he was committed for surrender in the States must be held to be such as, under the treaty, to justify it according to the laws there, were sufficient evidence. (*a*)

The warrant of the Governor General, requiring the extradition of a prisoner from the United States for forgery, is no proof that he was charged with or extradited for that crime. (*b*

In *Reg.* v. *Paxton* (*c*) the question was raised, but not decided, whether a party extradited from the United States for forgery was liable here to be tried for any other offence than the one for which he was surrendered.

The point came up again in *Re Rosenbaum*, (*d*) when it was decided that he was so liable, and that section 3 and subsection 2 of the Imperial Extradition Act, 1870, being inconsistent with the subsisting treaty between Great Britain and the United States, was not in force as to any application

(*y*) *Ex parte Foster*, 3 R. C. 46, Q. B.
(*z*) *Reg.* v. *Reno and Anderson*, 4 U. C. P. R. 295, per *Draper*, C. J.
(*a*) *Reg.* v. *Vanaerman*, 4 U. C. C. P. 288.
(*b*) *Reg.* v. *Paxton*, 10 L. C. J. 212.
(*c*) *Ibid.*
(*d*) 18 L. C. J. 200, Q. B.

under such treaty. And it has been held in the United States that whether or not a prisoner had been extradited in good faith is a question for the two governments to determine, and not the courts; and the prisoner being, in fact, within the jurisdiction of the court, he must be tried. (*e*)

The provisions of the treaty for the payment of the expenses of the apprehension and delivery of the fugitive, by the party making the requisition, can be literally carried out by calling on the United States Government to pay such expenses when they make the requisition and receive the fugitive. By making the requisition they assume the responsibility of paying the expenses of apprehending as well as delivering him. (*f*)

Only one case has arisen in this country under the treaty between Great Britain and France, ratified in 1843. In this case it was held that, under the Imp. Stat. 6 & 7 Vic., c. 75, passed to give effect to the treaty, the Consul-General of France had no authority to demand the rendition of a fugitive criminal, such consul not being an accredited diplomatic agent of the French Government. That an informal translation of an *acte de renvoi* is not a judicial document equivalent to the warrant of arrest, of which the party applying for extradition is required to be the bearer, according to the statute. That the evidence of criminality to support the demand for extradition must be sufficient to commit for trial according to the laws of the place where the fugitive is arrested, and not according to the law of the place where the offence is alleged to have been committed. (*g*)

The *Chesapeake case* is the only one under the Imp. Stat. 6 & 7 Vic., c. 76. It was decided in 1864, before the suspension of the statute in New Brunswick. The many important points involved in this case have been given in the foregoing pages.

(*e*) Clarke on Extradition, 2nd Ed. p. 75.
(*f*) *Re Burley*, 1 U. C. L. J. N. S. 45, per *Richards*, C. J.
(*g*) *Ex parte Lamirande*, 10 L. C. J. 280.

It may be observed, in conclusion, that the Imp. Stat. 6 & 7 Vic., c. 34, makes provision for the apprehension and surrender to the authorities of the place where the offence has been committed, of persons who have committed offences either in the United Kingdom of Great Britain and Ireland, or in any part of Her Majesty's dominions, whether or not within the said United Kingdom, and who are found in any place in the United Kingdom, or any other part of Her Majesty's dominions, other than where the offence was committed.

The provisions of this statute as between the United Kingdom and the colonies, are very similar to those of our own statutes in aid of the Ashburton Treaty. The enactment only applies to treason, or some felony, such as justices of the peace in General Sessions have not authority to try in England under the provisions of an Act passed in the sixth year of the reign of Her Majesty, intituled "An Act to define the jurisdiction of Justices in General Sessions of the Peace." (*h*)

A person cannot under the 6 & 7 Vic., c. 34, be legally arrested or detained here for an offence committed out of Canada, unless upon a warrant issued where the offence was committed, and endorsed by a judge of a superior court in this country. (*i*) And such warrant must disclose a felony according to the law of this country; and the expression "felony, to wit, larceny," would seem to be insufficient. (*j*)

(*h*) See s. 10.
(*i*) *Reg.* v. *McHolme*, 8 U. C. P. R. 452.
(*j*) *Ibid.*

CHAPTER I.

CRIMES IN GENERAL.

In the present work it is proposed to treat in the first place of the subject of crimes in general, and the distinctions between a public and a private injury; secondly, of the persons capable of committing crimes, and their several degrees of guilt, as principals or accessories; thirdly, of the several species of crimes recognized by law; after which will follow annotations of the Canadian statutes on criminal law and dissertations on the subjects of evidence, pleading and practice, as developed in our own cases.

A crime is the violation of a right when considered in reference to the evil tendency of such violation as regards the community at large. (*a*)

Where, therefore, an Act declared that every person having a distilling apparatus in his possession, without making a return thereof as therein provided, should forfeit and pay a penalty of $100, and rendered the apparatus liable to seizure and forfeiture to the Crown, it was held that an infringement of this Act was a crime. (*b*)

The violation of a statute containing provisions of a public nature, and more particularly so when that violation is spoken of as an offence, and is punishable by fine, or imprisonment as substitutionary for the fine, is a crime in law. (*c*)

When an offence is made a crime by statute, the proceedings instituted for the punishment thereof are criminal proceedings. (*d*) An information by the Attorney-General for an

(*a*) Ste. Bla. Com., Bk. 6, p. 94.
(*b*) *Re Lucas & McGlashan*, 29 U. C. Q. B. 81; and see *Reg.* v. *Boardman*, 30 U. C. Q. B. 553.
(*c*) *Ibid.* 29 U. C. Q. B. 92, per *Wilson*, J.
(*d*) *Ibid.* 92, per *Wilson*, J.; *Bancroft* v. *Mitchell*, L. R. 2 Q. B. 555, per *Blackburn*, J.

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offence against the revenue laws is a criminal proceeding, (*e*) although offences against the customs and excise laws are not ordinarily treated as criminal but as merely penal in their nature; and the contingent liability to fine and imprisonment does not alter the character of the offence. (*f*) A proceeding to obtain an order of affiliation under the (N.B.) 1 Rev. Stat., c. 57, is not a criminal proceeding, in which the party charged is punishable on indictment or summary conviction, (*g*) bastardy not being a crime punishable in this manner. (*h*)

The doctrine that all crimes concern the public prevails to such an extent, that by the policy of the law if a civil action is instituted, and it appears on the evidence that the facts amount to felony, the judge is bound to stop the proceedings and nonsuit the plaintiff, in order that the public justice may be first vindicated by the prosecution of the offender. (*i*)

The true ground of this rule is to prevent the criminal justice of the country from being defeated, (*j*) and the principle on which it rests is, not that the felony appearing constitutes any defence to the action, but that by the rule of law the civil remedy is suspended until the defendant charged with the felony shall have been acquitted or convicted in due course of law. (*k*) The rule applies, whether the plaintiff be the party upon whose person the alleged felony was committed, or a person who can sustain his cause of action only in virtue of a wrong done to him through another, by an act which, as between the defendant and that other, constitutes felony; (*l*) and it seems the rule equally applies in an action against third persons. (*m*) The civil remedy is only suspended

(*e*) *Re Lucas & McGlashan*, 89, per *Richards*, C. J.
(*f*) *Ex parte Parks*, 3 Allen, 240, per *Carter*, C. J.
(*g*) *Ex parte Cook*, 4 Allen, 506.
(*h*) *Ibid.*
(*i*) *Walsh* v. *Nattross*, 19 U. C. C. P. 453; *Brown* v. *Dalby*, 7 U. C. Q. B. 160; *Livingstone* v. *Massey*, 23 U. C. Q. B. 156; *Williams* v. *Robinson*, 20 U. C. C. P. 255; *Pease* v. *M'Aloon*, 1 Kerr, 111.
(*j*) *Crosby* v. *Leng*, 12 Ea. 414, per *Grose*, J.
(*k*) *Walsh* v. *Nattrass*, 19 U. C. C. P. 454, per *Gwynne*, J.; *Brown* v. *Dalby*, 7 U. C. Q. B. 162, per *Robinson*, C. J.
(*l*) *Walsh* v. *Nattrass*, *supra*, 455, per *Gwynne*, J.
(*m*) *Pease* v. *M'Aloon*, 1 Kerr, 118, per *Parker*, J.

until an acquittal or conviction after a *bona fide* prosecution of the criminal charge. When either event takes place, as the public justice will then be satisfied, the party may proceed with his civil action. (*n*) It has not been decided whether a complaint to a justice of the peace, and statement on oath of the facts, would or would not be sufficient prosecution, if the justice should decline to interfere; but at all events, it would be sufficient to prefer a bill before the grand jury, who would of course ignore it if the prosecutor's evidence negatived the felonious intent, unless there should appear grounds for suspecting connivance or collusion. (*o*) A difference has been suggested between the case of a prior conviction and that of an acquittal, namely, that the latter may have been brought about by the defendant colluding with the prosecutor, and it seems evidence would be admissible to show this; (*p*) and that it would suspend the action. (*q*)

If there be two acts, the one felonious and the other not, and either one be sufficient to support the action, it may proceed, notwithstanding the evidence of the felony; (*r*) for it seems that only an action brought to recover compensation for an injury, resulting from the felonious act, is suspended. (*s*) At all events, in case of seduction, unless the loss of service, which is the gist of the action, directly springs from the very act supposed to be felonious, the civil remedy is not defeated. (*t*)

The question of felony or not cannot be tried by the jury, in the civil action, even though the judge may have a doubt on the evidence as to the facts showing a felony. (*u*) If a *prima facie* case is made out, and the evidence, uncontradicted

(*n*) *Walsh* v. *Nattrass*, 19 U. C. C. P. 456, per *Gwynne*, J.; *Pease* v. *M'Aloon*, 1 Kerr, 117, per *Parker*, J.; *Edwards* v. *Kerr*, 13 U. C. C. P. 25, per *Draper*, C.; *Crosby* v. *Leng*, 12 Ea. 409.
(*o*) *Pease* v. *M'Aloon*, 1 Kerr, 117, per *Parker*, J.
(*p*) *Crosby* v. *Leng*, 12 Ea. 413-4, per *Lord Ellenborough*, C. J.
(*q*) *Ibid.*
(*r*) *Walsh* v. *Nattrass*, 19 U. C. C. P. 457, per *Gwynne*, J.
(*s*) *Hayle* v. *Hayle*, 3 U. C. Q. B. O. S. 295.
(*t*) *Ibid.*
(*u*) *Williams* v. *Robinson*, 20 U. C. C. P. 255; *Walsh* v. *Nattrass*, 19 U. C. C. P. 453; *Pease* v. *M'Aloon*, 1 Kerr, 111.

and unexplained, would warrant a jury in convicting for the felony, the judge should require the party to go before the criminal tribunal, before pursuing his civil remedy. (*v*)

If the judge is not morally satisfied that a felony has been committed, yet if the act were proved by only one witness to have been feloniously done, and there were no circumstances inconsistent with such evidence, nothing that could make the disbelief of it otherwise than purely arbitrary, the judge would not be wrong in nonsuiting the plaintiff. (*w*) It is for the judge to decide whether the case shall go to the jury in the civil action. (*x*) If the judge has reason for doubting whether the act is felonious, but nevertheless allows the case to go to the jury, and a verdict is found for the plaintiff, it will not be set aside, as this will only be done in the interests of public justice. (*y*)

We now proceed to notice the exceptions to the general rule suspending the civil remedy in case of felony. Under the Temperance Act of 1864, 27 & 28 Vic., c. 18, ss. 40 and 41, the legal representatives of the party might have maintained an action for damages against the inn-keeper, although the act giving rise to the right of action was also a felony, and the inn-keeper had neither been acquitted nor convicted. (*z*) So by the Carrier's Act, (*a*) the plaintiff may reply that the carrier's servant feloniously broke the goods in respect of which the action is brought, which will, if shown, entitle him to recover, although the servant has not been prosecuted criminally. (*b*) So under the Con. Stat. Can., c. 78, the civil action

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(*v*) *Pease* v. *M'Aloon*, *supra*.

(*w*) *Williams* v. *Robinson*, 20 U. C. C. P. 256-7, per *Hagarty*, J.; *Brown* v. *Dalby*, 7 U. C. Q. B. 162-3, per *Robinson*, C. J.; see also *Vincent* v. *Sprague*, 3 U. C. Q. B. 283.

(*x*) *Walsh* v. *Nattrass*, 19 U. C. C. P. 456, per *Gwynne*, J.; *Williams* v. *Robinson*, 20 U. C. C. P. 255.

(*y*) *Walsh* v. *Nattrass*, *supra*; *Brown* v. *Dalby*, *supra*; *Williams* v. *Robinson*, *supra*; see also on this subject *Luttrell* v. *Reynell*, 1 Mod. 283; *Stone* v. *Marsh*, 6 B. & C. 551; *Marsh* v. *Keating*, 1 Bing. N. C. 198; *Wellock* v. *Constantine*, 7 L. T. N. S. 751; 32 L. J. Ex. 235; 9 Jur. N. S. 232; *Chowne* v. *Baylis*, 8 Jur. N. S. 1028.

(*z*) *McCurdy* v. *Swift*, 17 U. C. C. P. 126.

(*a*) 11 Geo. IV. and 1 Wm. IV., c. 68, s. 8.

(*b*) *McCurdy* v. *Swift*, *supra*, 136, per *Wilson*, J.

is maintainable, though the act causing the death amounts to felony, and the party has neither been acquitted nor convicted ; (*c*) and, lastly, neither this rule nor the reasons for it apply to the Crown. (*d*) It is to be regretted that the decisions in Quebec are quite adverse to those in the other provinces on the above points. This is the only branch of the criminal law upon which there is any serious conflict in the decisions of the different provinces. It has been held in Quebec that the civil remedy is not suspended when a felony is disclosed in evidence, and this with reference to assault, perjury, arson, rape, and felony in general. (*e*)

It is an established principle of the common law that all crimes are considered local, and cognizable only in the place where they were committed ; (*f*) but this rule has received several modifications by various statutes.

By the term crime, in its stricter sense, is meant such offences only as are punishable by indictment ; those of an inferior character, punishable on summary conviction before a justice of the peace, being usually designated offences. (*g*)

Crimes are divided into two classes, namely, felonies and misdemeanors. (*h*) Felony is defined as an offence which occasions a total forfeiture of either lands or goods, or both, at the common law, and to which capital or other punishment may be superadded, according to the degree of guilt. (*i*) All crimes which are made felonies by the express words of a statute, or to which capital punishment is thereby affixed, become felonies, whether the word "felony" be omitted or mentioned. (*j*) Where a statute declares that the offender shall, under the circumstances, be deemed to have feloniously com-

(*c*) *McCurdy* v. *Swift*, 17 U. C. C. P. 136, per *A. Wilson*, J ; *Clarke* v. *Wilson*, Rob. Dig. 260.
(*d*) *Reg.* v. *Reiffenstein*, 6 U. C. L. J. N. S. 38 ; 5 U. C. P. R. 175.
(*e*) *Dagenay* v. *Hunter*, Rob. Dig. 128 ; *Lamothe* v. *Chevalier*, 4 L. C. R. 160 ; *Fortier* v. *Mercier*, Rob. Dig. 127 ; *Peltier* v. *Miville*, *ibid.* ; *McGuire* v. *Liverpool and London Assurance Company*, 7 L. C. R. 343 ; *Neill* v. *Taylor*, 15 L. C. R. 102.
(*f*) The *Chesapeake case*, 44, per *Ritchie*, J.
(*g*) Ste. Bla. Com Bk. 6, p. 96.
(*h*) *Re Lucas & McGlashan*, 29 U. C. Q. B. 92, per *Wilson*, J.
(*i*) 4 Bla. Com. 95.
(*j*) Russ. Cr. 4th Ed. 78 ; *Reg.* v. *Horne*, 4 Cox, C. C. 263.

mitted the act, it makes the offence a felony, and imposes all the common and ordinary consequences attending a felony. (*k*) So where a statute says that an offence, previously a misdemeanor, "shall be deemed and construed to be a felony," instead of declaring it to be a felony in distinct and positive terms, the offence is thereby made a felony. (*l*) An enactment that an offence shall be a felony, which was felony at common law, does not create a new offence. (*m*) But an offence shall never be made felony by the construction of any doubtful and ambiguous words of a statute; and, therefore, if it be prohibited under "pain of forfeiting all that a man has," or of "forfeiting body and goods," or of "being at the King's will for body, lands and goods," it shall amount to no more than a high misdemeanor; (*n*) and though a statute make the doing of an offence felonious, yet, if a subsequent statute make it penal only, the latter statute is considered as a virtual repeal of the former, so far as relates to the punishment of the offence. (*o*) So if an offence be felony by one statute, and be reduced to a misdemeanor by a later statute, the first statute is repealed. (*p*) When a statute on which the indictment is framed is repealed, after the bill has been found by the grand jury, but before plea, the judgment must be arrested; (*q*) and where a statute creating an offence is repealed, a person cannot afterwards be proceeded against for an offence within it, committed while it was in operation, even though the repealing statute re-enacts the penal clauses of the statute repealed. (*r*) If a later statute expressly alters the quality of an offence, as by making it a misdemeanor instead of a felony, or a felony instead of a misdemeanor, the

(*k*) *Rex* v. *Johnson*, 3 M. & S. 556, per *Bayley*, J.
(*l*) *Rex* v. *Solomons*, M. C. C. R. 292, overruling *Rex.* v. *Cale*, M. C. C. R. 11.
(*m*) *Williams* v. *Reg.*, 7 Q. B. 253, per *Patteson*, J.
(*n*) Russ. Cr. 79.
(*o*) *Ibid.* 79.
(*p*) *Reg.* v. *Sherman*, 17 U. C. C. P. 171, per *A. Wilson*, J.; *Rex* v. *Davis*, 1 Leach, 271.
(*q*) *Reg.* v. *Denton*, 17 Jur. 453; *Reg.* v. *Swan*, 4 Cox C. C. 108.
(*r*) *Reg.* v. *Cummings*, 4 U. C. L. J. 187, per *Macaulay*, C. J.

offence cannot be proceeded for under the earlier statute; (*s*) or if a later statute again describes an offence created by a former statute, and affixes to it a different punishment, varying the procedure, and giving an appeal where there was no appeal before, the prosecutor must proceed for the offence, under the latter statute. (*t*) If, however, in the case of a common law misdemeanor, a new mode of punishment, or new mode of proceeding, merely be directed, without altering the class of the offence, the new punishment, or new mode of proceeding, is cumulative, and the offender may be indicted as before for the common law misdemeanor. (*u*) Where a statute makes a second offence felony, or subject to a heavier punishment than the first, it is always implied that such second offence has been committed after a conviction for the first; (*v*) and where a statute makes an offence felony which was before only a misdemeanor, an indictment will not lie for it as a misdemeanor, (*w*) for the lesser offence merges in the greater. But now, by the 32 & 33 Vic., c. 29, s. 50, although a felony appears on the facts given in evidence, a misdemeanor for which the party may be indicted will not merge therein, and the party may be convicted of such misdemeanor. But the statute has no other effect than to authorize a verdict of guilty on the indictment as it is framed, although the evidence would warrant a conviction for the higher offence. In other words, a party indicted for misdemeanor cannot, under this clause, be convicted of any felony that may be disclosed in evidence, but only of the misdemeanor for which he is indicted, if included in the felony proved; and in accordance with this it has been held that a defendant indicted for a misdemeanor, in obtaining money under false pretences, could not, under the Con. Stat. Can.,

(*s*) *Michell* v. *Brown*, 1 E. & E. 267; 28 L. J. (M C) 53; *Reg.* v. *Sherman*, 17 U. C. C. P. 169, per *A. Wilson*, J.; *Rex* v. *Cross*, 1 Ld. Raym. 711, 3 *Salk.* 193.

(*t*) *Michell* v. *Brown*, *supra*.

(*u*) *Rex* v. *Carlile*, 3 B. & Ald. 161; Arch. Cr. Pldg. 17th Ed. 3; see also *Reg.* v. *Palliser*, 4 L. C. J. 276.

(*v*) Russ. Cr. 79.

(*w*) *Rex* v. *Cross*, 1 Ld. Raym. 711; 3 *Salk.* 193.

c. 99 s. 62, be found guilty of larceny, although the facts would have warranted such finding. (*x*)

The word misdemeanor is usually applied to all those crimes and offences for which the law has not provided a particular name. (*y*) A misdemeanor is in truth any crime less than felony, and the word is generally used in contradistinction to felony, misdemeanors comprehending all indictable offences which do not amount to felony, as perjury, battery, libels, conspiracies, and public nuisances. (*z*) Misprision of felony is concealment of felony, or procuring the concealment thereof, whether it be felony at the common law or by statute. (*a*)

It is clear that all felonies and all kinds of inferior crimes of a public nature, as misprisions, and all other contempts, all disturbances of the peace, oppressions, misbehaviour by public officers, and all other misdemeanors whatsoever of a public evil example against the common law, may be indicted; (*b*) and it seems to be an established principle, that whatever openly outrages decency, and is injurious to public morals, is indictable as a misdemeanor at common law. (*c*) If a statute prohibit a matter of public grievance, or command a matter of public convenience, all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment, if the statute specify no other mode of proceeding. (*d*) But no injuries of a private nature are indictable, unless they in some way concern the king. (*e*)

A general prohibitory clause supports an indictment, though there be afterwards a particular provision and a partial

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(*x*) *Reg.* v. *Ewing*, 21 U. C. Q. B. 523.
(*y*) Russ. Cr. 79.
(*z*) *Ibid.* 79.
(*a*) *Ibid.* 79-80.
(*b*) Russ. Cr. 80.
(*c*) *Ibid.*
(*d*) *Reg.* v. *Toronto Street Ry. Co.*, 24 U. C. Q. B. 457, per *Draper*, C. J.; *Rex* v. *Davis*, Say. 133; and see *Rex* v. *Sainsbury*, 4 T. R. 451; Russ. Cr. 80.
(*e*) *Rex* v. *Richards*, 8 T. R. 634; Russ. Cr. 80.

remedy, (*f*) even though the act prescribes a summary mode of proceeding; (*g*) and it is not in all cases necessary to annex to it words showing that the intention was to make it an indictable offence, if the statute be violated. (*h*) If an Act of Parliament prohibits a thing being done under some specific penalty, then that penalty is all that can be enforced, but if in a different part of the statute certain consequences are entailed upon the prohibited act, then that is cumulative to the prohibition, and the act done contrary to the prohibition may or may not, according to the subject dealt with, be an indictable offence. (*i*) Where a statute forbids the doing of a thing, the doing it wilfully, although without any corrupt motive, is indictable. (*j*) If a statute enjoin an act to be done, without pointing out any mode of punishment, an indictment will lie for disobeying the injunction of the legislature. (*k*) This mode of proceeding in such case is not taken away by a subsequent statute, pointing out a particular mode of punishment for such disobedience. (*l*) Where the same statute which enjoins an act to be done contains also an enactment providing for a particular mode of proceeding, as commitment in case of neglect or refusal, it has been doubted whether an indictment will lie. (*m*) But where a statute only adds a further penalty to an offence prohibited by the common law, there is no doubt that the offender may still be indicted, if the prosecutor think fit, at the common law. (*n*)

An offence is not indictable where an Act of Parliament has pointed out a particular punishment and a specific method of recovering the penalty which it inflicts; and the rule is

(*f*) *Reg.* v. *Mason*, 17 U. C. C. P. 536, per *Richards*, C. J.; *Rex* v. *Boyall*, 2 Burr. 832; *Rex* v. *Wright*, 1 Burr. 543; *Reg.* v. *Buchanan*, 8 Q. B. 883; Arch. Cr. Pldg. 17th Ed. 2.
(*g*) *Pomeroy & Wilson*, 26 U. C. Q. B. 47-8, per *Hagarty*, J.
(*h*) *Reg.* v. *Mercer*, 17 U. C. Q. B. 632, per *Burns*, J.
(*i*) *Ibid.*
(*j*) *Rex* v. *Sainsbury*, 4 T. R. 457; *Reg.* v. *Holroyd*, 2 M. & Rob. 339.
(*k*) *Rex* v. *Davis*, Say. 133; *Reg.* v. *Price*, 11 A. & E. 727; *Reg.* v. *Toronto Street Ry. Co.*, 24 U C. Q. B. 454.
(*l*) *Rex* v. *Boyall*, 2 Burr. 832; Russ. Cr. 87.
(*m*) *Rex* v. *Cummings*, 5 Mod. 179; *Rex* v. *King*, 2 Str. 1268.
(*n*) Russ. Cr. 88.

certain that where a statute creates a new offence by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offence by a particular method of proceeding, that particular method of proceeding must be pursued and no other. (*o*) On this ground it was held that an indictment would not lie on the 3rd sub-section of s. 55 Con. Stats. Can., c. 6, against a deputy returning officer for entering and recording in the poll books the names of several parties as having voted, although they had refused to take the oath required by law, the offence being created by the statute, a particular penalty affixed, and a specific remedy for enforcing it pointed out by the 87th section of the Act. (*p*) Where the penalty is annexed to the offence in the very clause of the Act creating it, no indictment or other proceeding can be taken against the person making default, (*q*) for the express mention of any other mode of proceeding impliedly excludes that of indictment. (*r*)

If a statute specify a mode of proceeding different from that by indictment, then if the matter were already an indictable offence at common law, and the statute introduced merely a different mode of prosecution and punishment, the remedy is cumulative, and the prosecutor has still the option of proceeding by indictment at common law or in the mode pointed out by the statute. (*s*) Therefore, where a Revenue Act (15 Vic., c. 28, s. 68) provided that any penalty or forfeiture inflicted under the Act should be recovered by action of debt or information, and sec. 72 enacted that if any person should assault any revenue officer in the exercise of his office he should, on conviction, pay a fine not exceeding £100 nor less than £50, which fine should be paid to the provincial

(*o*) *Reg.* v. *Bennett*, 21 U. C. C. P. 237, per *Galt*, J. ; *Reg.* v. *Mason*, 17 U. C. C. P. 536, per *Richards*, C. J. ; *Little* v. *Ince*, 3 U. C. C. P. 542-3, per *Macaulay*, C. J. ; see also *Leprophon* v. *Globenski*, Rob. Dig.

(*p*) *Reg.* v. *Bennett*, *supra*.

(*q*) *Ibid.* 238, per *Galt*, J.

(*r*) *Rex* v. *Robinson*, 2 Burr. 805 ; *Rex* v. *Buck*, 1 Str. 679.

(*s*) *Rex* v. *Robinson*, 2 Burr. 800 ; *Rex* v. *Wigg*, 2 Ld. Raym. 1163 ; *Rex* v. *Carlile*, 3 B. & Ald. 161.

treasurer, and in case of non-payment the offender should be imprisoned for a term not exceeding twelve months nor less than three months, at the discretion of the court; the court held that the Act only limited the discretion of the court as to the amount of fine and imprisonment on conviction for an assault under sec. 72, but did not alter the ordinary mode of proceeding therefor by indictment. (*t*)

Where a person filling a public office wilfully neglects or refuses to discharge the duties thereof, and there is no special remedy or punishment pointed out by statute, an indictment will lie, as there would otherwise be no means of punishing the delinquent. (*u*) So an indictment will lie for neglecting or refusing to administer the oath set forth in the Con. Stat. Can., c. 6, s. 55, at the request of the candidate or his agent. (*v*)

An attempt to commit a misdemeanor is a misdemeanor (*w*) whether the offence was created by statute or existed at common law, (*x*) for when an offence is made a misdemeanor by statute it is made so for all purposes. (*y*) So, inciting another to commit a misdemeanor is in itself a misdemeanor. (*z*) Therefore it was held that attempting to bargain with or procure a woman falsely to make the affidavit provided for by the Con. Stats. U. C., c. 77, s. 6, that A. was the father of her illegitimate child, was an indictable offence, on the ground that if the oath were taken and proven to be false, it would have amounted to perjury under the Con. Stats. U. C. c. 2, s. 15, or, at all events, to a misdemeanor, and inciting another to commit perjury is a misdemeanor on the above principle. (*a*) On an indictment for misdemeanor the jury may find the prisoner guilty of any lesser misdemeanor that

(*t*) *Reg.* v. *Walsh*, 3 Allen, 54.
(*u*) *Reg.* v. *Bennett*, 21 U. C. C. P. 238, per *Galt*, J.
(*v*) *Ibid.* 238, per *Galt*, J.
(*w*) *Reg.* v. *Connolly*, 26 U. C. Q. B. 322, per *Hagarty*, J.; *Reg.* v. *Martin*, 9 C. & P. 213; *Reg.* v. *Goff*, 9 U. C. C. P. 438.
(*x*) *Rex* v. *Butler*, 6 C. & P. 368, per *Patterson*, J.; *Rex* v. *Roderick*, 7 C. & P. 795, *Parke*, B.; *Rex* v. *Cartwright*, Russ. & Ry. 107.
(*y*) *Rex* v. *Roderick*, *supra*, 795, per *Parke*, B.
(*z*) *Reg.* v. *Clement*, 26 U. C. Q. B. 297.
(*a*) *Ibid.*

is necessarily included in the offence as charged, (*b*) and on an indictment for felony or misdemeanor the jury may find the party guilty of an attempt to commit it, which is a misdemeanor. (*c*) Under this statute (32 & 33 Vic., c. 29, s. 49) two prisoners may be convicted of misdemeanor, though one is charged with attempting to commit a felony, and the other as aiding and abetting him in the attempt. An indictment charged H. with rape, and U. with aiding and abetting him in the rape, the jury having found H. and U. guilty of a misdemeanor, H. of attempting to commit the rape, and U. of aiding him in the attempt; it was held that they were both properly convicted under the 14 & 15 Vic., c. 100, s. 9. (*d*) But upon this clause the defendant can only be convicted of an attempt to commit the very offence with which he is charged. (*e*) Nor can the jury convict under it of an attempt which is made felony by statute, but only of an attempt which is a misdemeanor. (*f*) But on an indictment for rape the prisoner may be convicted of an attempt to commit the rape, though the attempt is felony by statute, and the indictment is in the ordinary form. (*g*) An attempt to commit a felony is also a misdemeanor, (*h*) and an attempt to obtain money under false pretences is a misdemeanor. (*i*)

The act of attempting to commit a felony must be immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution. (*j*) Where, on an indictment for an attempt to commit burglary, it appeared that the prisoners had agreed to commit the offence on a certain night together with one C.,

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(*b*) *Reg.* v. *Taylor*, L. R. 1 C. C. R. 196, per *Kelly*, C. B.
(*c*) *Reg.* v. *Goff*, 9 U. C. C. P. 438; 32 & 33 Vic., c. 29, s. 49.
(*d*) *Reg.* v. *Happgood*, L. R. 1 C. C. R. 221.
(*e*) *Reg.* v. *McPherson*, Dears. & B. 197, 26 L. J. (M. C.) 134.
(*f*) *Reg.* v. *Connell*, 6 Cox, 178.
(*g*) *Reg.* v. *Webster*, 9 L. C. R. 196.
(*h*) *Reg.* v. *Goff*, 9 U. C. C. P. 438, per *Draper*, C. J.; *Reg.* v. *Esmonde*, 26 U. C. Q. B. 152.
(*i*) *Reg.* v. *Goff*, *supra*.
(*j*) *Reg.* v. *McCann*, 28 U. C. Q. B. 517, per *Morrison*, J.; *Reg.* v. *Taylor*, 1 F. & F. 511.

but C. was kept away by his father, who had discovered their design. The two prisoners were seen about twelve o'clock that night to enter a gate about fifty feet from the house; they came towards the house to a picket fence in front, in which there was a small gate, but they did not come nearer the house than twelve or thirteen feet, nor did they pass the picket gate; they then went, as was supposed, to the rear of the house, and were not seen afterwards. About two o'clock some persons came to the front door and turned the knob, but went off on being alarmed and were not identified. The court held that there was no evidence of an attempt to commit the offence, no overt act directly approximating to its execution, and that a conviction therefor could not be sustained. (*k*) If, however, it had been proved that they attempted to enter the house, and were either interrupted or surprised in doing so, and made their escape, and that but for such surprise or interruption they could have carried out their design of stealing certain money said to be in the house, there would have been evidence to go to the jury. (*l*) Its must appear upon the evidence that the felony might have been completed had there been no interruption. If, therefore, upon an indictment for attempting to commit a felony, by putting the hand into a woman's pocket with intent to steal her property therein, it appears that she had nothing in her pockets, a conviction cannot be sustained. (*m*)

The prisoner was indicted under 32 & 33 Vic., c. 21, s. 56, for breaking and entering a shop, with intent to commit felony. He was seen upon the roof, where a hole was found broken in, but there was no evidence of his having entered the building. The jury were directed that if they thought he broke the roof with intent to enter the shop and steal, they might find him guilty of an attempt. They accordingly convicted, and the court held that the conviction was right. (*n*)

(*k*) *Reg.* v. *McCann*, 28 U. C. Q. B. 514.
(*l*) *Ibid.* 516, per *Morrison, J.*; see also *Reg.* v. *Eagleton*, 1 U. C. L. J. 179; Dears. C. C. 515; *Reg.* v. *Roberts*, *ibid.* 539; *Rex* v. *Martin*, 2 Mood. C. C. 123; 9 C. & P. 213-215; *Dugdale* v. *Reg.* 1 E. & B. 435.
(*m*) *Reg.* v. *Collins*, L. & C. 471; 33 L. J. (M. C.) 177; 10 U. C. L. J. 308.
(*n*) *Reg.* v. *Bain*, 8 U. C. L. J. 279; L. & C. 129; 31 L. J. (M. C.) 88.

But attempting to commit a felony is clearly distinguishable from intending to commit it, for the bare wish or desire of the mind to do an illegal act is not indictable. So long as an act rests in bare intention it is not punishable by our laws, (*o*) but immediately when an act is done the law judges not only of the act itself, but of the intent with which it was done, (*p*) and an act, though otherwise innocent, if accompanied by an unlawful and malicious intent, the intent being criminal, the act becomes criminal and punishable. (*q*)

It has been held under the corresponding English section of the 31 Vic., c. 72, s. 2, that the offence of soliciting and inciting a man to commit a felony is, where no such felony is actually committed, a misdemeanor only, and not a felony under the Act, which only applies to cases where a felony is committed as the result of the counselling and procuring therein mentioned. (*r*)

The motives of a party, though unimportant in civil cases, may be taken into account in criminal proceedings. (*s*) In the latter, however, the maxim, *actus non facit reum nisi mens sit rea*, does not hold universally. When a particular act is positively prohibited by law, it becomes thereupon *ipso facto* illegal to do it wilfully, and in some cases even ignorantly, and a party may be indicted for doing it without any corrupt motive. (*t*) Where a statute, in order to render a party criminally liable, requires the act to be done feloniously, maliciously, fraudulently, corruptly, or with any other expressed motive or intention, such motive or intention is a necessary ingredient in the crime; but where the enactment simply prohibits the doing of an act, motive or intention is immaterial so far as regards the legal liability of the party

(*o*) *Mulcahy* v. *Reg.*, L. R. 3 E. & I. App. 317, per *Willes*, J.
(*p*) *Reg.* v. *McCann*, 28 U. C. Q. B. 516, per *Morrison*, J.; *Reg.* v. *McPherson*, 1 Dears & B. C. C. 197, per *Cockburn*, C. J.; *Rex* v. *Higgins*, 2 Ea. 5, per *Le Blanc*, J.; *Rex* v. *Scofield*, Cald. 403.
(*q*) *Reg.* v. *Bryans*, 12 U. C. C. P. 172, per *Hagarty*, J.
(*r*) *Reg.* v. *Gregory*, L. R. 1 C. C. R. 77.
(*s*) *Phillips* v. *Eyre*, L. R. 6 Q. B. 21, per *Willes*, J.
(*t*) *Rex* v. *Sainsbury*, 4 T. R. 457, per *Ashurst*, J.

committing the forbidden act; (*u*) and it would seem that a party cannot exempt himself from criminal liability on the ground that his object was lawful or even laudable, in committing an act simply prohibited by law; (*v*) for the law infers that every person intends the natural consequences of his own act when that act is wrongful, injurious, and without legal justification. (*w*) The inference equally arises although the party has an honest or laudable object in view, and he will nevertheless be legally liable, unless the object is such as, under the circumstances, to render the act lawful. (*x*)

Misdemeanors differ from felonies in these particulars—the crime is of an inferior degree, and the penal consequences are not so severe; secondly, all persons concerned in the commission of a misdemeanor, if guilty at all, are principals, and the law recognizes no degrees in their guilt.

With regard to the punishment of misdemeanors, it is a general rule that all those offences less than felony which exist at common law, and have not been regulated by any particular statute, are within the discretion of the court to punish, (*y*) and the punishment usually inflicted is fine and imprisonment. (*z*) The punishment of felonies is generally prescribed by statute.

(*u*) 4 C. L. J. N. S. 194.
(*v*) *Reg.* v. *Hicklin*, L. R. 3 Q. B. 360; *Reg.* v. *Recorder of Wolverhampton*, ; 18 L. T. Reps. N. S. 395.
(*w*) *Reg.* v. *Hicklin*, *supra*.
(*x*) *Ibid.* 375, per *Blackburn*, J.; and see *Reg.* v. *Salter*, 3 Allen, 327, per *Carter*, C. J.
(*y*) Russ. Cr. 92.
(*z*) *Ibid.*

CHAPTER II.

THE PERSONS CAPABLE OF COMMITTING CRIMES, AND THEIR SEVERAL DEGREES OF GUILT.

As a *prima facie* criminal liability attaches on every person, it is necessary to consider what defences may, in different cases, be urged by different persons, as grounds of exemption from punishment. The law requires an exercise of understanding and of will to render a person criminally responsible, therefore a want or defect of either may be a good defence. (*a*)

Infants.—The general rule is, that infants under the age of discretion are not punishable by any criminal prosecution whatever, but the age of discretion varies according to the nature of the offence. (*b*) Thus, in some misdemeanors and offences that are not capital, an infant is privileged, by reason of his nonage if under twenty-one; for instance, if the offence charged by the indictment be a mere nonfeasance, unless it be such as he is bound to do by reason of his tenure, or the like as to repair a bridge, (*c*) then, in some cases he shall be privileged, if under twenty-one, because laches shall not be imputed to him. (*d*) But if he be indicted for any notorious breach of the peace, as riot, battery, or for perjury, cheating, or the like, he is equally liable as a person of full age, because upon his trial the court, *ex officio*, ought to consider whether he was *doli capax*, and had discretion to do the act with which he was charged. (*e*) The law as to an infant's liability is more clearly defined with reference to capital crimes, though their criminal responsibility does not so much depend upon

(*a*) Russ Cr. 6.
(*b*) Arch. Cr. Pldg. 16.
(*c*) *Rex* v. *Sutton*, 3 A. & E. 597.
(*d*) Arch. Cr. Pldg. 17.
(*e*) *Ibid.* 17.

their age as upon their judgment and intelligence. (*f*) But within the age of seven years, no infant can be guilty of felony, or be punished for any capital offence, for within that age there is an irrebuttable presumption of law that he has no mischievous discretion. (*g*) On attaining the age of fourteen years, they are presumed to be *doli capaces*, and capable of discerning good from evil, and are, with respect to their criminal actions, subject to the same rule of construction as others of more mature age. (*h*)

Between the age of seven and fourteen years, an infant is deemed *prima facie* to be *doli incapax*, but *malitia supplet ætatem*, and this presumption may be rebutted by strong and pregnant evidence of mischievous discretion, establishing it beyond all doubt and contradiction. (*i*) When a child between the ages 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. (*j*)

An infant under fourteen is presumed by law to be unable to commit a rape, and therefore cannot be found guilty of it, and this on the ground of impotency as well as the want of discretion. This presumption, it seems, is not affected by the 32 & 33 Vic., c. 20, s. 65—making the offence complete on proof of penetration, without evidence of emission. (*k*) Nor is any evidence admissible to show that, in fact, the defendant had arrived at the full state of puberty, and could commit the offence. (*l*) But he may be principal in the second degree if he aid and assist in the commission of the offence, and it appear that he has a mischievous discretion. (*m*)

(*f*) Russ. Cr. 7.
(*g*) *Ibid.*; *Marsh* v. *Loader*, 14 C. B. N. S. 535.
(*h*) Arch. Cr. Pldg. 16.
(*i*) *Ibid.*
(*j*) *Rex* v. *Owen*, 4 C. & P. 236.
(*k*) *Rex* v. *Groombridge*, 7 C. & P. 582.
(*l*) *Rex* v. *Philips*, 8 C. & P. 736; *Rex* v. *Jordan*, 9 C. & P. 118; *Rex* v. *Brimilow*, *ibid.* 366; 2 Mood. C. C. 122.
(*m*) *Rex* v. *Eldershaw*, 3 C. & P. 396; see *Rex* v. *Allen*, 1 Den. C. C. 364; Arch. Cr. Pldg. 17.

It seems a statute creating a new felony does not extend to infants under the age of discretion, (*n*) and that statutes giving corporal punishment do not bind infants, but other and general statutes do, if infants are not excepted. (*o*) And where a fact is made felony, or treason, it extends as well to infants, if above fourteen, as to others. (*p*)

An infant, being unable to trade, cannot be prosecuted criminally for defrauding his creditors, as it cannot be contended that the contracts of an infant for goods supplied in the way of trade or for money lent are valid and result in debts, so as to give rise to the relation of debtor and creditor. (*r*)

Persons non compotes mentis.—Every person, at the age of discretion, is, unless the contrary be proved, presumed by law to be sane, and to be accountable for his actions. But if there be any incapacity, or defect of the understanding, as there can be no consent of the will, so the act cannot be culpable. (*s*) Where the deprivation of the understanding and memory is total, fixed and permanent, it excuses all acts, so, likewise, a man laboring under adventitious insanity is, during the frenzy, entitled to the same indulgence, in the same degree, with one whose disorder is fixed and permanent. (*t*) 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. (*u*) If there be a partial degree of reason; a competent use of it sufficient to restrain those passions which produce the crime; if there be thought and design; a faculty to distinguish the nature of action; to discern the difference between moral good and evil,—then he will be responsible for his actions. (*v*)

(*n*) Russ. Cr. 10.
(*o*) Dwarris, 516.
(*p*) Russ. Cr. 10.
(*r*) *Reg.* v. *Wilson*, L. R. 5, Q. B. D. 28.
(*s*) Arch. Cr. Pldg. 17.
(*t*) *Ibid.* 18; Beverley's Case Co. 125.
(*u*) *Rex* v. *Offord*, 5 C. & P. 168.
(*v*) *Reg.* v. *McNaughten*, 10 Cl. & Fin. 200; 1 C. & K. 130 n.; *Rex* v. *Higginson*, 1 C. & K. 129.

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. (*w*) 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. (*x*) It is said that, as to the criminal liability of a lunatic, the maxim is, *actus non facit reum nisi mens sit rea.* (*y*)

Imbecility, and loss of mental power, whether arising from natural decay, or from paralysis, softening of the brain, or other natural cause, although unaccompanied by frenzy, or delusion of any kind, constitutes unsoundness of mind, amounting to lunacy, within 8 & 9 Vic., c. 100. (*z*)

It is the duty of the Government to assume the care and custody of persons acquitted of criminal charges on the ground of insanity, and this power is vested in the Government, independently of any statute. (*a*) The policy of the law in detaining insane persons in custody is to prevent them from committing the same offences again. (*b*)

The vice of drunkenness, which produces a perfect though temporary frenzy, or insanity, will not excuse the commission of any crime; and an offender under the influence of intoxication can derive 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. (*c*)

(*w*) *Rex* v. *Burton*, 3 F. & F. 772.
(*x*) *Reg.* v. *Frances*, 4 Cox, 57, per *Alderson B. and Cresswell*, J.; *Reg.* v. *Wright*, R. & R. 456; *Reg.* v. *Searle*, 1 M. & Rob. 75; Arch. Cr. Pldg. 19.
(*y*) *Taggard* v. *Innes*, 12 U. C. C. P. 77, per *Draper*, C. J.
(*z*) *Reg.* v. *Shaw*, L. R. 1 C. C. R. 145, 37 L. J. (M. C.) 112.
(*a*) *Reg.* v. *Martin*, 1 James, 322.
(*b*) *Ibid.* 324, per *Bliss*, J.; see as to insane persons 32 & 33 Vic., c. 29, s. 99 *et seq.*
(*c*) Arch. Cr. Pldg. 18.

It has been said that, upon an indictment for murder, the intoxication of the defendant may be taken into consideration as a circumstance to show that the act was not premeditated. (*d*) But if the primary cause of the frenzy be involuntary, or it has become habitual and confirmed, this species of insanity will excuse the offender equally as the other descriptions of this malady. (*e*)

A deaf mute, incapable of understanding the proceedings at his trial, cannot be convicted, but must be detained as non-sane. (*f*)

Persons in subjection to the power of others.—In general, a person committing a crime will not be answerable if he was not a free agent and was subject to actual force at the time the act was done. (*g*) This exemption 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. The private relations which exist between parent and child, and master and servant, will not, however, excuse or extenuate the commission of any crime of whatever denomination; for the command is void in law and can protect neither the commander nor the instrument. (*h*) 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. (*i*) But if she commit an offence in the absence of her husband, even by his order or procurement, her coverture will be no defence; (*j*) even though he appear at the

(*d*) *Reg.* v. *Grindley*, 1 Russ. 8; *Rex.* v. *Thomas* 7 C. & P. 817; *Rex.* v. *Meakin*, *ibid.* 297; but see *Rex.* v. *Carroll*, *ibid.* 145.
(*e*) Arch. Cr. Pldg. 18.
(*f*) *Reg.* v. *Berry*, L. R. 1 Q. B. D. 447.
(*g*) Russ. Cr. 32.
(*h*) Arch. Cr. Pldg. 22.
(*i*) *Ibid* 22; and see *Reg.* v. *Smith*, Dears. & B. C. C. 553.
(*j*) *Ibid.* 22; 2 Reach, C. C. 1102; *Reg.* v. *Morris*, R. & R. 270

very moment after the commission of the offence; and no subsequent act of his, though it may render him accessory to the felony of his wife, can be referred to what was done in his absence. (*k*) This presumption, however, 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. (*l*)

The protection does not extend to crimes which are *mala in se*, and prohibited by the law of nature, nor to 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, or by coercion of, her husband, she is punishable equally as if she were sole. (*m*) So a married woman may be indicted jointly with her husband for keeping a bawdy house, (*n*) or gaming house, (*o*) for these are offences connected with the government of the house in which the wife has a principal share. (*p*) According to the prevailing opinion, it seems the wife may be indicted with her husband in all misdemeanors. (*q*) If a married woman incite her husband to the commission of a felony, she is accessory before the fact. (*r*) But she cannot be treated as an accessory for receiving her husband, knowing that he has committed a felony, nor for concealing a felony jointly with her husband, (*s*) nor for receiving from her husband goods stolen by him. (*t*) And she will not

(*k*) *Reg.* v. *Hughes*, 1 Russ. 21.
(*l*) *Reg.* v. *Cohen*, 11 Cox, 99; *Reg.* v. *Dicks*, 1 Russ. 19; *Reg.* v. *Hammond*, Leach, 447; Arch. Cr. Pldg. 22.
(*m*) *Ibid.* 23; see *Reg.* v. *Cruse*, 8 C. & P. 541; 2 Mood. C. C. 53; *Reg.* v. *Manning*, 2 C. & K. 903 n.
(*n*) *Reg.* v. *Williams*, 10 Mod. 63, 1 Salk. 384.
(*o*) *Reg.* v. *Dixon*, 10 Mod. 335.
(*p*) Arch. Cr. Pldg. 23.
(*q*) *Ibid.* 23; *Reg.* v. *Ingram*, 1 Salk. 384; but see *Reg.* v. *Price*, 8 C. & P. 19.
(*r*) *Reg.* v. *Manning*, 2 C. & K. 903 n.
(*s*) Arch. Cr. Pldg. 23.
(*t*) *Reg.* v. *Brooks*, Dears. C. C. 184; see *Reg.* v. *Archer*, 1 Mood. C. C. 143.

be answerable for her husband's breach of duty, however fatal, though she may be privy to his misconduct, if no duty be cast upon her, and she is merely passive. (*u*)

Ignorance.—The laws can only be administered upon the principle that they are known, because all persons are bound to know and obey them. (*v*) A mistake, or ignorance of law, is no defence for a party charged with a criminal act; (*w*) but it may be ground for an application to the merciful consideration of the Government. (*x*) But ignorance, or mistake of fact, may, in some cases, be a defence; (*y*) as, for instance, if a man intending to kill a thief in his own house, kill one of his own family, he will be guilty of no offence. (*z*) 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. (*a*)

Principals in the first and second degrees.—The general definition of a principal in the first degree is one who is the actor or actual perpetrator of the fact. (*b*) Principals in the second degree are those who are present aiding and abetting at the commission of the fact. (*c*) To prove a person an aider or abettor, it must be shown either that he was actually present aiding and in some way assisting in the commission of the offence, or constructively present for the same purpose —that is, in such a convenient situation as readily to come to the assistance of the others, and with the intention of doing so, should occasion require. (*d*) But there must be

(*u*) *Reg.* v. *Squires*, 1 Russ. 16; Arch. Cr. Pldg. 23.
(*v*) *Reg.* v. *Moodie*, 20 U. C. Q. B. 399, per *Robinson*, C. J.; *Reg.* v. *Maillioux*, 3 Pugsley, 493.
(*w*) *Reg.* v. *Moodie*, *supra*; *Unwin* v. *Clark*, L. R. 1 Q. B. 417; *Reg.* v. *Mayor of Tewkesbury*, L. R. 3 Q. B. 635, per *Blackburn*, J.
(*x*) *Reg.* v. *Madden*, 10 L. C. J. 344, per *Johnson*, J.
(*y*) *Unwin* v. *Clark*, L. R. 1 Q. B. 417, per *Blackburn*, J.
(*z*) *Reg.* v. *Levett*, Cro. Car. 538.
(*a*) Arch. Cr. Pldg. 24.
(*b*) *Ibid.* 7.
(*c*) *Ibid.* 8.
(*d*) *Ashley* v. *Dundas*, 5 U. C. Q. B. O. S. 753, per *Sherwood*, J.; *Reg.* v *Curtley*, 27 U. C. Q. B. 617, per *Morrison*, J.

some participation, for the fact that a person is actually present at the commission of a crime does not necessarily make him an aider or abettor. If one sees a felony is about to be committed, and in no manner interferes to prevent it, he does not thereby participate in the felony committed, so as to render him liable as a principal in the second degree. It should be proved that he did or said something showing his consent to the felonious purpose, and contributing to its execution. (*e*)

If a fact amounting to murder should be committed in prosecution of some unlawful purpose, though it were but a bare trespass, all persons who had gone in order to give assistance, if necessary, for carrying such unlawful purpose into execution, would be guilty of murder. But this applies only to a case where the murder is committed in prosecution of some unlawful purpose—some common design, in which the combining parties were united, and for the effecting whereof they had assembled. (*f*) For when the act of homicide is not done with the concurrence of all those present, there must be evidence of a precedent common purpose to prosecute the unlawful enterprise, even to the extent of extreme and deadly violence. (*g*) Even in case of felony, there must either be a previous or present concurrence in the act by all to render them liable, (*h*) otherwise none but the party actually committing the act will be liable. (*i*)

In the *Curtley case* the prisoner C. was indicted for aiding and abetting one M. in a murder, of which M. was convicted. It appeared that, about six in the evening, the deceased was with R. and his wife on the river bank at Amhertsburg, standing near a pile of wood. R.'s wife testified that she saw M. standing behind the pile, who, on deceased going up to him,

(*e*) *Reg.* v. *Curtley*, 27 U. C. Q. B. 619, per *Morrison*, J.
(*f*) *Ibid.* 617, per *Morrison*, J.
(*g*) *Ibid.* 617, per *Morrison*, J. ; *Rex* v. *Collison*, 4 C. & P. 565 ; *Reg.* v. *Howell*, 9 C. & P. 437.
(*h*) *Ibid.* 617, per *Morrison*, J. ; *Reg.* v. *Franz*, 2 F. & F. 580.
(*i*) *Ibid.* 617, per *Morrison*, J. ; *Reg.* v. *Skeet*, 4 F. & F. 931 ; *Reg.* v. *Price*, 8 Cox, C. C. 96.

struck deceased a blow with a stick, of which he ultimately died. Some time after the stroke, deceased ran, when two other men sprang out, and followed him; but in a few seconds two of them returned, and assaulted witness and R., her husband. She could not identify the prisoner. Two other witnesses saw deceased running from the direction of the wood pile, and across the road, when he fell over a stick of timber. They saw a man, at the same time, come running from the wood pile, and, as deceased got up, he struck him with a stick, knocking him down, and again struck him on the head, and then the man ran off to the north. One of them identified this man as M., but the other did not know him. One witness, B., swore that, about six on that evening, deceased left his office with R. and his wife, and that, about twenty minutes after, he saw the prisoner, with M. and another, go into the vacant lot where the wood pile was, M. having a stick in his hand, and heard M. say to the others, "Let us go for him." It was also proved by others that, before the affray, the three were together near the wood pile in question, and were also in a saloon together about nine o'clock afterwards. The prisoner was convicted on this evidence, and a rule *nisi* was obtained for a new trial on his behalf on the ground that there was no evidence to go to the jury sufficient to justify his conviction. The rule was made absolute, for there was no direct proof that the prisoner was present when the blows were struck, or when the affray began, and no evidence whatever that he and the others were together with any common unlawful purpose, and the expression used by M., "Let us go for him," in the absence of evidence that M. was alluding to the deceased, or that the prisoner and M. were aware that the deceased was at the wood pile, was unimportant *per se*, as indicating the intention of the parties, and was obviously susceptible of different applications. (*j*)

Whenever a joint participation in an act is shown, or there

(*j*) *Reg.* v. *Curtley*, 27 U. C. Q. B. 613.

is a general resolution against all opposers, each person is liable for every act of the others, in furtherance of the common design. (*k*) And if a number of persons are confederated for an unlawful purpose, and in pursuit of their object commit felony, any person present in any character, aiding and abetting, or encouraging the prosecution of the unlawful design, is involved in a share of the common guilt. (*l*)

But this doctrine will apply only to cases where the act intended to be accomplished is unlawful in itself. For if the original purpose is lawful and prosecuted by lawful means, if one of the party commit a felonious act, the others will not be involved in his guilt, unless they actually aided or abetted him in the fact. (*m*) In other words, a felonious act committed by one person in prosecution of a common unlawful purpose is the act of all, but if the purpose is lawful, the person committing the act will alone be liable. By an unlawful purpose is meant such as is either felonious, or if it be to commit a misdemeanor, then there must be evidence to show that the parties engaged intended to carry it out at all hazards. (*n*) The act must also be committed in prosecution of the unlawful purpose, and be the result of the confederacy. (*o*)

A prisoner was convicted of unlawfully attempting to steal the goods of one J. G. It appeared that he had gone with one A. from Toronto to Cooksville, and examined J. G's store, with a view of robbing it; and that afterwards A. and three others having arranged the scheme with the prisoner, started from Toronto, and made the attempt, but were disturbed, after one had gone into the store through a panel taken out by them; the prisoner saw them off from Toronto, but did not go himself. It was held that as those actually engaged were guilty of an attempt to steal, and as the evidence established,

(*k*) *Reg* v. *Slavin*, 17 U. C. C. P. 205; Russ. Cr. 56.
(*l*) *Reg.* v. *Lynch*, 26 U. C. Q. B. 208; see also *Reg.* v. *McMahon*, 26 U. C. Q. B. 195.
(*m*) Russ. Cr 56.
(*n*) *Reg.* v. *Skeet*, 4 F. & F. 931; see also *Reg.* v. *Luck*, 3 F. & F. 483; *Reg.* v. *Craw*, 8 Cox, 335.
(*o*) *Reg.* v. *White*, R. & R. 99; Arch. Cr. Pldg. 950.

the prisoner had counselled and procured the doing of that act, and as such attempt was a misdemeanor, being an attempt to commit a felony, the prisoner, under the 31 Vic., c, 72, s. 9, was properly convicted. (*p*) This statute is clear, that if the prisoner was accessory before the act, he could be indicted as if he were personally present. (*q*)

So where J. and T. were driving a trap along the turnpike road for a lawful purpose, and J. got out of the trap, went into a field and shot a hare, which he gave to T., who had remained in the trap. J. having been convicted of trespass in pursuit of game, an information was laid under the 11 & 12 Vic., c. 43, against T., charging him with being present aiding and abetting. On a case stated by the justices, it was held that there was abundant evidence on which the justices might have come to the conclusion that both were engaged in a common purpose, and that T. was guilty. (*r*)

But where upon an indictment against E., H., and another for stealing and receiving, it was proved that H. was walking by the side of the prosecutrix, and E. was seen just previously following her; that the prosecutrix felt a tug at her pocket and found her purse gone, and, on looking round, saw H. walking with E. in the opposite direction, and saw H. handing something to him, and the jury, in accordance with the direction of the presiding judge, found H. guilty of stealing and E. of receiving, it was objected, that the jury should have been told to find E. guilty of stealing or of no offence, as upon the facts proved he was a principal in the second degree, aiding and abetting, present, and near enough to afford assistance. But the court held the charge and conviction were right, *Williams*, J., being of opinion that the evidence did not show a common purpose and intention; while *Wightman*, J., thought that the jury might very well have inferred concert, but they had not done so, and their finding should not be disturbed. (*s*)

(*p*) *Reg.* v. *Esmonde*, 26 U. C. Q. B. 152.
(*q*) *Ibid.* per *Hagarty*, J.
(*r*) *Stacey* v. *Whitehurst*, 13 W. R. 384.
(*s*) *Reg.* v. *Hilton*, 5 U. C. L. J. 70; Bell, 20; 28 L. J. (M. C.) 28.

Accessories before and after the fact.—An accessory before the fact is he who, being absent at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit a felony. *(t)* An accessory after the fact is one who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon. *(u)* It is only in felonies that there can be accessories, for in misdemeanors all are principals. *(v)* By the 31 Vic., c. 72. s. 9, aiders and abettors in misdemeanors are liable to be indicted, tried, and punished as principal offenders.

There can be no accessories to a felony unless a felony has been committed. *(w)* Ordinarily, there can be no accessories before the fact in manslaughter, for the offence is sudden and unpremeditated. *(x)* Where, however, the prisoner procured and gave a woman poison, in order that she might take it, and so procure abortion, and she did take it in his absence and died of its effects, it was held that he might be convicted as an accessory before the fact to the crime of manslaughter. *(y)* There may, however, be accessories after the fact in manslaughter. *(z)* The offence of an accessory is distinguishable from that of a principal in the second degree: the latter must be actually or constructively present at the commission of the fact. But it is essential to constitute the offence of accessory that the party should be absent at the time the offence is committed. *(a)*. 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. *(b)*

(t) Arch. Cr. Pldg. 11.
(u) *Ibid.* 14.
(v) *Reg.* v. *Tisdale*, 20 U. C. Q. B. 273, per *Robinson*, C. J.; *Reg.* v. *Campbell*, 18 U. C. Q. B. 417, per *Robinson*, C. J.; *Reg.* v. *Benjamin*, 4 U. C. C. P. 189, per *Macaulay*, C. J.
(w) *Reg.* v. *Gregory*, L. R. 1 C. C. R. 77; 36 L. J. (M. C.) 60.
(x) Russ. Cr. 59.
(y) *Reg.* v. *Gaylor*, 1 Dears. & B. C. C. 288; see also *Reg.* v. *Smith*, 2 Cox, 233, per *Parke*, B.
(z) Russ. Cr. 59, n.; see *Rex* v. *Greenacre*, 8 C. & P. 35.
(a) *Rex* v. *Gordon*, 1 Leach, 515; Arch. Cr. Pldg. 11.
(b) *Reg.* v. *Fallon*, L. & C. 217; 32 L. J. (M. C.) 66.

The principle of law, both in civil and criminal cases is that a person is liable for what is done under his presumed authority. (*c*) The owner of a shop is liable for any unlawful act done therein in his absence by a clerk or assistant in the ordinary course of business, for *prima facie* it would be his act; but it would seem that if the act was wholly unauthorized by him, and out of the usual course of business, he might escape personal responsibility. (*d*) But the agent is also liable for an unlawful act, although he may have the express or implied authority of his principal for its commission. (*e*) And a party who maintains a public nuisance as the agent of another, is a principal in the misdemeanor, and cannot justify on the ground of his agency. (*f*) There seems, however, to be a great distinction between the authority or procurement which will render a man liable civilly and that which will render him liable criminally. In the former, the authority must be strictly pursued; but, in the latter, the principal may be criminally liable, though the agent deviate widely from his authority. (*g*) Thus the owner of works carried on for his profit by his agents is liable to be indicted for a public nuisance caused by acts of his workmen in carrying on the works, though done by them without his knowledge, and contrary to his general orders. (*h*)

So, in a prosecution for a penalty in selling liquor without license, proof that the sale was made by a person in the defendant's shop, in his absence, and without showing any general or special employment of such person by the defendant in the sale of liquors, is sufficient *prima facie* evidence against him. (*i*) So, the proprietor of a newspaper was held indictable for a libel published therein, though he took no actual share in the publication, and lived one hundred miles

(*c*) *Reg.* v. *King*, 20 U. C. C. P. 248, per *Hagarty*, C. J.; see also *Atty. Gen.* v. *Siddon*, 1 Tyr. 47.
(*d*) *Ibid.*
(*e*) *Reg.* v. *Brewster*, 8 U. C. C. P. 208.
(*f*) *Ibid.*
(*g*) *Parkes* v. *Prescott*, L. R. 4 Ex. 182, per *Byles*, J.
(*h*) *Reg.* v. *Stephens*, L. R. 1 Q. B. 702, 35 L. J. Q. B. 251.
(*i*) *Ex parte Parks*, 3 Allen, 237.

distant from the place of publication, and was confined to his house by illness when the paper complained of appeared. (*j*) Where the defendant was absent in New York, and his wife, who was intrusted with the ordinary management of the defendant's business in his absence, had a wild duck in her possession, contrary to the Lower Canada Game Act, 22 Vic., c. 103, the court held that the defendant was responsible, on the ground that the wife was acting as the agent of the husband, and should be presumed to have his authority for the illegal act complained of; and a conviction of the husband (the defendant) and imposition of a penalty was consequently sustained. (*k*)

Upon information for unlawfully selling beer, under 4 & 5 Wm. IV, c. 85, s. 17, it was proved that the appellant's wife had actually supplied the beer to three persons who had asked the appellant for beer, and to whom he had said, whilst pointing to his wife, "You must ask her," it was held that upon this evidence the conviction was right. In this case there was an appeal against the decision of the justices. It was argued that if the wife acted as agent for her husband, they both ought to have been summoned and convicted together. However, the court gave judgment for the respondent. (*l*)

It is conceived that the principles involved in the foregoing cases will apply to principals and accessories in felonies. In other words, that the authority or procurement which will in misdemeanors render a man liable as a principal for the act of his agent, will, in felonies, render him liable as an accessory before the fact; for it is a principle of law that he who procures a felony to be done is a felon. (*m*)

The procurement may be personal, or through the intervention of a third person. (*n*) It may also be direct by hire, counsel, command, or conspiracy; or indirect, by evincing an express liking, approbation, or assent to another's felonious

(*j*) *Ex parte Parks*, 3 Allen, 241, per *Carter*, C. J.
(*k*) *Reg.* v. *Donaghue*, 5 L. C. J. 104.
(*l*) *Reg.* v. *Smith*, 5 U. C. L. J. 142.
(*m*) Russ. Cr. 59.
(*n*) *Rex* v. *Cooper*, 5 C. & P. 535; Arch. Cr. Pldg. 11.

design of committing a felony. (*o*) But there must be some sort of active proceeding on the part of the individual to render him an accessory; he must incite, procure or encourage the act; and the mere consent on the part of a prisoner to hold stakes put up by two persons, who, having quarrelled, had agreed to fight with their fists at a future time, was held not to be such a participation as is necessary to constitute him an accessory before the fact to the crime of manslaughter, one of the combatants having died from wounds received in the fight. (*p*) The procurement must also be continuing; for if the procurer of a felony repent, and, before the felony is committed, actually countermand his order, and the principal, notwithstanding, commit the felony, the original contriver will not be an accessory. (*q*) So, if the accessory order or advise one crime, and the principal intentionally commit another, the accessory will not be answerable. (*r*) But it is clear that the accessory is liable for all that ensues upon the execution of the unlawful act commanded; (*s*) and a substantial compliance with his instigation, varying only in circumstances of time or place, or in the manner of execution, will involve him in the guilt, and, even when the principal goes beyond the terms of the solicitation, yet, if in the event the felony committed was a probable consequence of what was ordered or advised, the person giving such orders or advice will be an accessory to that felony. (*t*) A wife is not punishable as accessory for receiving her husband although she knew him to have committed a felony; (*u*) for she is presumed to act under his coercion. But no other relation of persons can excuse the wilful receipt or assistance of felons. (*v*)

(*o*) *Rex* v. *Cooper*, 5 C. & P. 535.
(*p*) *Reg.* v. *Taylor*, L. R. 2 C. C. R. 147.
(*q*) Arch. Cr. Pldg. 11.
(*r*) *Ibid.* 12.
(*s*) *Ibid.*
(*t*) Russ. Cr. 62.
(*u*) *Reg.* v. *Manning*, 2 C. & K. 903 n.; Arch. Cr. Pldg. 14.
(*v*) Arch. Cr. Pldg. 14.
(*w*) *Ibid.* 15.
(*x*) Russ. Cr. 61; Dwarris, 518; and see 31 Vic., c. 72; *Reg.* v. *Smith*, L. R. 1 C. C. R. 266; per *Bovill*, C. J.

To constitute the offence of accessory after the fact, 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; and it is also necessary that the felony be complete at the time the assistance is given. (*w*)

As to felonies created by statute, if an Act of Parliament ordain an offence to be felony, though it mention nothing of accessories before and after the fact, yet, virtually and consequentially, those that counsel or command the offence are accessories before the fact, and those who knowingly receive the offenders are accessories after. (*x*) It is a maxim that *accessorius sequitur naturam sui principalis*, and, therefore, an accessory cannot be guilty of a higher crime than his principal. (*y*)

The 31 Vic., c. 72, makes provision for the trial of accessories before and after the fact. This statute alters the old rule by which an accessory could not be brought to trial until the guilt of his principal had been legally ascertained by conviction. By this act, accessories before the fact are triable in all respects as principal felons; and every principal in the second degree is punishable in the same manner as the principal in the first degree is punishable.

By s. 8, in the case of a felony wholly committed within Canada, the offence of any person who is an accessory either before or after the fact, to such felony, may be dealt with, inquired of, tried, determined, and punished by any court which has jurisdiction to try the principal felony, or any felonies committed in any district, county, or place in which the act by reason whereof such person shall have become such accessory has been committed.

(*y*) Russ. Cr. 61.

CHAPTER III.

OFFENCES PRINCIPALLY AFFECTING THE GOVERNMENT, THE PUBLIC PEACE, OR THE PUBLIC RIGHTS.

Coinage offences.—These offences are now regulated by the 32 & 33 Vic., c. 18. Where a prisoner ordered dies of a maker impressed with the resemblance of the sides of a sovereign, and the maker gave information to the police, who communicated with the authorities of the mint, and the latter, through the police, permitted him to give them to the prisoner, it was held no lawful authority under section 24. (*a*) It is necessary in the indictment to negative lawful authority or excuse, notwithstanding that the burden of proof lies upon the accused; but the word "excuse" includes "authority," and therefore the word "excuse" alone in an indictment under this section is good. (*b*) A prisoner knowingly in possession of dies has sufficient guilty knowledge to constitute felony, whatever his intention as to their use may be, for there is nothing in the act to make the intent any part of the offence. (*c*)

The 32 & 33 Vic., c. 29, s. 26, applies to a trial on an indictment under s. 12 of the Coinage Act for feloniously having in possession counterfeit coin after a previous conviction for uttering counterfeit coin; and, therefore, the previous conviction cannot be proved until the jury find the prisoner guilty of the subsequent offence; (*d*) and a prisoner, indicted under s. 12 of the Coinage Act for the felony of uttering, after a previous conviction for a like offence, cannot be convicted of the misdemeanor of uttering if the jury negative the previous

(*a*) *Reg.* v. *Harvey*, L. R. 1 C. C. R. 284.
(*b*) *Ibid.*
(*c*) *Ibid.*
(*d*) *Reg.* v. *Martin*, L. R. 1 C. C. R. 214; 39 L. J. (M. C.) 31; *Reg.* v. *Goodwin*, 10 Cox, 534, overruled.

conviction; for felony and misdemeanor are different things, and on an indictment for one there can be no conviction for the other, except by express enactment. (*e*) Where coin was counterfeited to resemble smooth worn shillings then in circulation, without any impression whatever upon them, it was held to be a sufficient counterfeiting. (*f*) So a genuine sovereign filed at the edges to such an extent as to reduce its weight by one twenty-fourth part and to remove the milling almost entirely, and a new milling added in order to restore the appearance of the coin, was held to be false and counterfeit. (*g*) By the old law, the counterfeit coin must have appeared to have that degree of resemblance to the real coin that it would likely be received as the coin for which it was intended to pass by persons using the caution customary in taking money; and the coin must have been in a complete and perfect state, ready for circulation. (*h*) Now, however, by the 32 & 33 Vic., c. 18, s. 32, the offence shall be deemed complete although the coin was not in a fit state to be uttered or the counterfeiting thereof was not finished or perfected. By sec. 30 any creditable witness may prove the coin to be false or counterfeit. (*i*) The Imp. Act 16 & 17 Vic., c. 48, is not in force here. (*j*) But the Imp. Stat. 16 & 17 Vic., c. 102, respecting gold, silver, and copper coin, applies to this country. (*k*)

In an indictment under sec. 22 of the Coinage Act, it would seem to be necessary to allege that the coin was not current by law in this province. (*l*)

Foreign enlistment offences.—The Imperial statute 33 & 34 Vic., c. 90, is now the governing enactment on this subject.

(*e*) *Reg.* v. *Thomas*, L. R. 2 C. C. R. 141.
(*f*) *Reg.* v. *Wilson*, 1 Leach, 285; *Reg.* v. *Welsh*, *ibid.* 364; Arch. Cr. Pldg. 745.
(*g*) *Reg.* v. *Hermann*, L. R. 4 Q. B. D. 284.
(*h*) *Reg.* v. *Varley*, 2 W. Bl. 682; *Reg.* v. *Harris*, 1 Leach, 135; Arch. Cr. Pldg 745.
(*i*) See also sec. 31.
(*j*) See 32 & 33 Vic., c. 18, s. 36.
(*k*) *Warner* v. *Fyson*, 2 L. C. J. 105.
(*l*) *Reg.* v. *Tierney*, 29 U. C. Q. B. 181.

It extends to the whole Dominion of Canada, including the adjacent territorial waters. (*m*) This statute is highly penal in its character. (*n*) It, however, strengthens the hands of the Government, and enables it to fulfil more easily than heretofore that particular class of international obligations which may arise out of the conduct of Her Majesty's subjects towards belligerent foreign states with whom Her Majesty is at peace.

It should be so construed as, on the one hand, to give, if possible, due and full execution to its main purpose, and, on the other hand, not to strain its provisions so as to fetter the private commerce of Her Majesty's subjects beyond the express limits which the statute, for the general interests of the public weal, has prescribed. (*o*)

The 59 Geo. III., c. 69, was in force here until the passing of the former statute, the Provincial Act 28 Vic., c. 2, having been passed in aid of it; so that any provisions of the local statute in conflict with the Imperial Act would not prevail against the latter. (*p*) The local enactment will now stand repealed in so far as it is repugnant to the Imp. 33 & 34 Vic., c. 90, but no farther. (*q*)

But little judicial light has been thrown on the latter statute, but several cases have been decided in our courts under the old Act the results of which are given here.

A warrant of commitment, issued under the 59 Geo. III, c. 69, is sufficiently certain if it charges the prisoner with attempting or endeavoring to hire, retain, engage, or prevail on to enlist as a soldier, in the land or sea service, for, or under, or in aid of Abraham Lincoln, President of the United States of America, and in the service of the Federal States of America. The foregoing is also a sufficient description of the foreign power in the warrant; the power being one whose

(*m*) See sec. 2.
(*n*) The *Gauntlet*, L. R. 3 Ad. & Ec. 388, per *Sir R. Phillimore*.
(*o*) The *International*, L. R. 3 Ad. & Ec. 332, per *Sir R. Phillimore*.
(*p*) *Reg.* v. *Sherman*, 17 U. C. C. P. 166; *Reg.* v. *Schram*, 14 U. C. C. P. 318.
(*q*) See sec. 2; see also Imp. Stat. 28 & 29 Vic., c. 63, s. 2.

existence the court is bound to notice judicially, and the words relating to the Federal States being rejected as surplusage. In such a warrant, it is not necessary to allege that the accused is a British subject, the law presuming him to be such until the contrary appears; nor to negative a license from Her Majesty the Queen to do the act or acts concerning which the complaint is laid. (*r*) A direction to the gaoler to keep the prisoner in the common gaol, "until he shall thence be discharged by due course of law, or good and sufficient sureties be received for his appearance," is sufficient—the latter words being looked upon either as surplusage, or as a valid direction, inasmuch as the magistrates having committed the prisoner for want of bail, it would be in the discretion of the magistrates or court ordering bail to fix the amount.

"I," in the text of a warrant, may be read as "I and I," so as to read "given under my and my" hand and seal, etc., it being presumed that both magistrates use one and the same seal. (*s*) A warrant of commitment reciting that Thaddeus K. Clarke "was this day charged (not saying upon oath) before us," and without showing any examination by the magistrates, upon oath or otherwise, into the nature of the offence, and commanding the constables or peace officers of the county of Welland to take the said Thaddeus K. Clarke into custody, was held sufficient. (*t*) A warrant committing the prisoner "until discharged by due course of law," sufficiently complies with the statute, which provides for a committal until delivered by due course of law. A warrant executed by two parties, and concluding "given under our hand and seal," is sufficient. (*u*) A warrant of commitment, reciting that F. M. was charged, on the oath of J. W., "for that he (F. M.) was this day charged with enlisting men for

(*r*) *Re Smith*, 10 U. C. L. J. 247; but see *re Martin*, 3 U. C. P. R. 298.
(*s*) *Re Smith*, 10 U. C. L. J. 247.
(*t*) *Re Clarke*, 10 U. C. L. J. 331.
(*u*) *Ibid.*; see also *re Smith*, 10 U. C. L. J. 247.

the United States army, offering them $350 each as bounty," without charging any offence with certainty, was held bad. (*v*)

The third part of the seventh section of this Act, prohibiting vessels from engaging in foreign service, is in the alternative, and it is not necessary that the vessel should be acting in the service of "any person or persons exercising, or assuming to exercise, any powers of government in or over any foreign state, colony, province, or part of any province or people," if the vessel is "employed in the service of any foreign state, or people, or part of any province or people." (*w*)

It has been doubted whether the jurisdiction conferred by the 28 Vic. c. 2, is a general or a local one. (*x*)

A commitment under that statute, stating the offence as follows: "For that he on, etc., at, etc., did attempt to procure A. B. to serve in a warlike or military operation, in the service of the Government of the United States of America, omitting the words "as an officer, soldier, sailor, etc.," is bad. (*y*)

A judgment for too little is as bad as a judgment for too much, and a condemnation to pay $100 and costs—the statute imposing $200 and costs—is bad. (*z*) So a commitment on a judgment for the penalty and costs, not stating, in the body of the commitment, or a recital in it, the amount of costs, is bad. (*a*) But a warrant of commitment, on a conviction had before the police magistrate for the town of Chatham, in Ontario, under the 28 Vic., c. 2, averring that, on a day named, "at the town of Chatham, in said county, he, the said Andrew Smith, did attempt to procure A. B. to enlist to serve as a soldier in the army of the United States of America, contrary to the statute of Canada in such case made and provided," and then proceeding, "and whereas the said Andrew Smith was duly convicted of the said offence before me, the said

(*v*) *Re Martin*, 3 U. C. P. R. 298.
(*w*) *Reg.* v. *Carlin*, the *Salvador*, L. R. 3 P. C. App. 218.
(*x*) *Re Bright*, 1 U. C. L. J. N. S. 240.
(*y*) *Ibid.*
(*z*) *Ibid.*; *Rex* v. *Salomons*, 1 T. R. 249; *Whitehead* v. *Reg.* 7 Q. B. 582.
(*a*) *Re Bright*, 1 U. C. L. J. N. S. 240; *Rex.* v. *Hall*, Cowp. 60.

police magistrate, and condemned," sufficiently shows jurisdiction. (*b*) A direction to take the prisoner "to the common gaol at Chatham," the warrant being addressed "to the constables, etc., in the county of Kent, and to the keeper of the common gaol at Chatham, in the said county," is sufficient. (*c*) And the adjudication as to the offence may be by way of recital. (*d*) The words "to enlist to serve" do not show a double offence, and sufficiently describe that created by the statute; and such a warrant is not bad as to duration or nature of imprisonment.

The commitment for the further time beyond six months should be at hard labor. (*e*) The statute was intended to allow both fine and imprisonment, or either, and it is not compulsory to award both. So there is power to commit for non-payment of costs. (*f*) The amount of costs was held to be sufficiently fixed in a warrant of commitment, which, in addition to $4.50 for costs, proceeded to give all costs and charges of commitment, and conveying the prisoner to gaol, amounting to the further sum of $1. (*g*) The statute inflicts a penalty, "with costs," and in such case the costs of conveying the defendant to prison may be lawfully added. (*h*)

The intent is the material ingredient in the offence under the Act being considered; and the mere fact that arms are on board for the use of a foreign state against a nation at peace with her Majesty, without showing such intent, is no contravention of the Act. (*i*)

The object of the statute is to prevent warlike enterprises, not commercial adventures. (*j*) And a steam tug which, in pursuance of an agreement made between its master and the officer in command of a vessel captured as prize, lying in

(*b*) *Re Smith*, 1 U. C. L. J. N. S. 241.
(*c*) *Ibid.*
(*d*) *Ibid.*
(*e*) *Ibid.*
(*f*) *Ibid.*
(*g*) *Ibid.*
(*h*) *Ibid.*
(*i*) The *Atalaya*, 7 Q. L. R. 1.
(*j*) *Ibid.*

British waters, and under the direction of such officer, towed the prize out of British waters for the ordinary towage remuneration, which was afterwards paid by the Consul-General of the belligerent state in London, was held not liable to condemnation, though the master, who was one of the owners of the steam tug, had reasonable cause to believe that the prize was a prize of war, as it could not be said to have been employed in the military or naval service of the belligerent state. (*k*) It would seem, however, that a ship employed in the service of a foreign belligerent state to lay down a submarine cable, the main object of which is, and is known to be, the subserving the military operations of the belligerent state, is employed in the military or naval service of that state, within the meaning of the Act. (*l*) When a cause is instituted against a ship in the Admiralty Court, for an offence under this Act, the court may, with the consent of the Crown, order the ship to be released on bail. (*m*)

Seducing soldiers or sailors to desert.—The Con. Stat. U. C., c. 100, has been repealed, and the 32 & 33 Vic., c. 25, is now the governing enactment on this subject. The Imp. Mutiny Act did not override the Con. Stat. U. C., c. 100; but the latter was passed in aid of the former, and was in force, notwithstanding the Imp. Mutiny Act. The two statutes were construed as if they had been both Canadian, or both English Acts. (*n*) The punishment by fine and imprisonment imposed by the Provincial Act, however, stood abolished as long as the Mutiny Act was in force, and the imprisonment could in no case exceed six calendar months.

The power of trial by the Court of Oyer and Terminer, under the Con. Stat. U. C., c. 100, was not taken away by the Mutiny Act. It was, therefore, held no objection that a defendant had been tried by a Court of Oyer and Terminer, and sentenced to six months' imprisonment, and a fine of

(*k*) The *Gauntlet*, L. R. 3 Ad. & Ec. 381.
(*l*) The *International*, L. R. 3 Ad. & Ec. 321.
(*m*) The *Gauntlet*, L. R. 3 Ad. & Ec. 319.
(*n*) *Reg.* v. *Sherman*, 17 U. C. C. P. 168, per *J. Wilson*, J.; 169, per *A. Wilson*, J.

10s. imposed; for this was merely a nominal compliance with the statute, and the court had power to pass the proper judgment, if an improper one had been given. (*o*)

Although the 32 & 33 Vic., c. 25, in terms gives no power of trial to a Court of Oyer and Terminer, yet section 5 of that statute, by making every offence against it a misdemeanor and punishable as such, would seem to continue the jurisdiction over such cases in that tribunal. The offender may also be convicted in a summary manner before any two justices of the peace, on the evidence of one or more credible witness or witnesses, etc. Nothing in the Act shall be construed to prevent any person being prosecuted, convicted, and punished, under any Act of the Imperial Parliament in force in Canada. (*p*)

The defendant was indicted under the Con. Stat. U. C., c. 100, s. 2, and convicted of receiving and concealing a deserter from the Royal Navy. The Naval Discipline (Imp.) Act, 29 & 30 Vic., c. 109, s. 25, authorizes a summary conviction before magistrates for this offence; but the 101st section expressly preserves the power of any court, of ordinary civil or criminal jurisdiction, with respect to any offence mentioned in the Act punishable by common or statute law therefore, a defendant can be indicted and properly convicted under the Provincial Act. (*q*) Where an indictment charged that the defendant did receive, conceal, or assist "one W., a deserter from the navy," the court inclined to think that this was not sufficiently certain or precise; for although acts which would prove concealment must involve receiving, and still more certainly assisting, yet there might be acts of assistance quite apart from either concealment or receiving. (*r*) The Mutiny Act of 1867, 30 Vic., c. 13, has no applicability to the above case. The provisions of that Act

(*o*) *Reg.* v. *Sherman, supra*, 166-172; *Daw* v. *Metro. Board Co.* 12 C. B. N. S. 161; 8 Jur. N. S. 1040.
(*p*) See also 34 Vic., c. 32; 33 Vic., c. 19; and 36 Vic., c. 58.
(*q*) *Reg.* v. *Patterson*, 27 U. C. Q. B. 142.
(*r*) *Ibid.*

relate to soldiers, and to others only in regard to their conduct towards those who are soldiers within the meaning of the Act. (*s*)

A warrant of commitment, in which it was charged that the prisoner, on the 20th June, 1864, "and on divers other days and times," at the city of Kingston, did unlawfully attempt to persuade one James Hewitt, a soldier in Her Majesty's service, to desert, was held bad; for it was impossible to say, upon reading the warrant, how many offences he had committed, or how the punishment was awarded for each specific offence; and if the prisoner were brought up again, he would be unable to say whether he had been tried or not, for he could not tell for which attempt he had already been imprisoned. In this case the court held also that there was no conviction to sustain the warrant of commitment, nor, in fact, any conviction to sustain an imprisonment at all; for if the very words were used in the commitment which were cited in the alleged conviction, the commitment could not be sustained. (*t*)

When a soldier commits felony, by firing, without orders, on a crowd of people, in the streets of a city, such conduct being insubordinate, unsoldier-like, and to the prejudice of good order and military discipline, he must first be held to answer before the constituted tribunals in the colony proceeding under the common law, before a military court, under the Mutiny Act and the Articles of War, can legally take cognizance of the charge. (*u*)

A volunteer is liable, by 29 & 30 Vic., c. 12, to be tried by a court martial for misconduct while present at a parade of his corps, though not actually serving in the ranks at the time. (*v*)

Section 125 of the Imperial Statute 36 Vic., c. 129, does not modify or limit sec. 124 so as to restrict the application

(*s*) *Reg.* v. *Patterson*, U. C. Q. B. 144, per *Draper*, C. J.
(*t*) *Re McGinnes*, 1 U. C. L. J. N. S. 15.
(*u*) *Ex parte McCulloch*, 4 L. C. R. 467.
(*v*) *Ex parte Rickaby*, 17 L. C. R. 270.

of that Act in relation to ships in the merchant service of foreign countries to the offence of desertion only, but the whole provisions of the Act apply to such foreign vessels, so far as is consistent with existing treaties between Great Britain and foreign countries. (*w*)

Piracy.—This offence at common law consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there. (*x*) It was not a felony triable by jury at common law, but was made so by the 28 Hy. VIII., c. 15, and 11 & 12 Wm. III., c. 7. (*y*) These two statutes may, perhaps, be treated as in force here, being part of the law of England at the time of its introduction. In Canada, piracy is, in fact, felony committed within the jurisdiction of any Court of Admiralty; for any felony punishable under the laws of Canada, if committed within the jurisdiction of the Admiralty Courts, may be dealt with, inquired of, tried, and determined in the same manner as any other felony committed within that jurisdiction. (*z*)

The Imp. Stat. 12 & 13 Vic., c. 96, extends to the Dominion, and makes further and better provision for the trial of piracy than is made in and by the two former statutes, and may, perhaps, to some extent, supersede them. Commissions were required for the trial of offences under the earlier statutes, but it is conceived that the latter enactment is in itself a sufficient authority for the trial of these offences, and that commissions are now unnecessary. By that statute jurisdiction is given to the colonial courts to try offences cognizable in the Admiralty Court of England, so that in this country the material inquiry in cases of piracy is as to the jurisdiction of the Admiralty Courts.

The admiralty jurisdiction of England extends over British vessels, not only when they are sailing on the high seas, but

(*w*) *Ex parte Johansen*, 18 L. C. J. 164.
(*x*) Russ. Cr. 144.
(*y*) *Ibid.*
(*z*) 32 & 33 Vic., c. 29, s. 136; see also 12 & 13 Vic., c. 96, s. 1.

also when they are in the rivers of a foreign territory, at a place below bridges where the tide ebbs and flows, and where great ships go, although the municipal authorities of the foreign country may be entitled to concurrent jurisdiction. And all seamen, whatever their nationality, serving on board British vessels, are amenable to the provisions of British law. (*a*)

An American citizen, serving on board a British ship, causing the death of another American citizen, serving on board the same ship, under circumstances amounting to manslaughter, the ship at the time being in the River Garonne, within French territory, at a place below bridges, where the tide ebbed and flowed, and great ships went. It was held that the ship was within the Admiralty jurisdiction, and that the prisoner was rightly tried and convicted at the Central Criminal Court. (*b*)

On a trial for maliciously wounding on the high seas, it was stated by three witnesses that the vessel on board which the offence was alleged to have been committed was a British ship, of Shields, and that she was sailing under the British flag, but no proof was given of the register of the vessel, or of the ownership. It was nevertheless decided that the court had jurisdiction over the offence—first, because the evidence was sufficient to prove that the vessel was a British vessel; secondly, because, even if it had appeared that the vessel was not registered, the court would still have jurisdiction, as there is nothing in the Merchant Shipping Act to take away that jurisdiction, and also by reason of s. 106 of the latter Act, 1854, which provides that, as regards the punishment of offences committed on board such a ship, she shall be dealt with in the same manner as if she were a recognized British ship. (*c*)

The prisoner was indicted for stealing three chests of tea

(*a*) *Reg.* v. *Anderson*, L. R. 1 C. C. R. 161; 38 L. J. (M. C.) 12; and see *Reg.* v. *Lopez*, 1 Dears. & B. 1 C. C. 525; *Reg.* v. *Lesley*, 1 Bell, C. C. 220.

(*b*) *Reg.* v. *Anderson*, *supra*; and see *Reg.* v. *Allen*, 1 Mood. C. C. 494.

(*c*) *Reg.* v. *Seberg*, L. R. 1 C. C. R. 264; 39 L. J. (M. C.) 133.

from a vessel, which sailed from London, on the high seas, when the vessel was lying off Wampa, in China. The vessel lay twenty or thirty miles from the sea. No evidence was given of the flowing of the tide, or otherwise, where the vessel lay. On a case reserved, the court held that the offence was within the Admiralty jurisdiction. (*d*) Where the sea flows in between two points of land in England, a straight imaginary line being drawn from one point to the other, the courts of common law have jurisdiction of all offences committed within that line, though it is said the Admiralty has concurrent jurisdiction within the same. (*e*)

The great inland lakes of Canada are within the Admiralty jurisdiction, and by the Imp. Act 12 & 13 Vic., c. 96, there is authority in our courts and magistrates to take cognizance of an offence committed in the lakes, although in American waters, in the same manner as if committed on the high seas. The power may be exercised by all magistrates in the colony, as if the offence had been committed in the waters within the limits of the colony, and within the limits of the local jurisdiction of the courts of criminal justice in the colony; (*f*) for there is nothing in the statute to give any particular functionary jurisdiction, or to make the offence of a local nature, and, therefore, any magistrate in the province may act. (*g*) If a robbery be committed on lakes, harbors, ports, etc., in foreign countries, the Court of Admiralty indisputably has jurisdiction. (*h*)

A British court has no jurisdiction to punish a foreigner for an offence committed on the high seas in a foreign ship, against a British subject. (*i*) The 32 & 33 Vic., c. 20, s. 9, makes provision for the trial in Canada of offences amounting to murder or manslaughter committed upon the sea. (*j*)

(*d*) *Rex* v. *Allen*, 7 C. & P. 664; *Reg.* v. *Sharp*, 5 U. C. P. R. 138, per *A. Wilson*, J.
(*e*) *Ibid.* 139, per *A. Wilson*, J.; *Rex* v. *Bruce*, R. & R. 243.
(*f*) *Reg.* v. *Sharp*, 5 U. C. P. R. 135.
(*g*) *Ibid.* 140, per *Wilson*, J.
(*h*) *Ibid.* 139, per *Wilson*, J.
(*i*) *Reg.* v. *Kinsman*, 1 James, 62.
(*j*) See also c. 29, s. 9.

Customs and Excise offences.—These offences are now regulated by the 40 Vic. c. 10. (*k*) Although section 81 of that Act provides that persons removing goods from a bonded warehouse shall incur the penalties imposed on persons for smuggling, and by s. 76 of the same Act, smuggling is made a misdemeanor, punishable by a penalty not exceeding $200, or by imprisonment for a term not exceeding one year, or by both, yet an indictment will not lie under s. 81, for the misdemeanor created by s. 76, for the 81st section does not declare that the parties offending, etc., shall be deemed guilty of the misdemeanor created by the 76th, and the clause cannot be extended to the creation of a new crime by implication. (*l*) It is unnecessary to allege, in the indictment for offences against this Act, that the warehouse is a customs warehouse, or one duly appointed and established according to the provisions of the law; for the meaning of the word "warehouse" is clearly defined by the Customs Act, and it would be matter of proof as to whether the building alluded to comes within that definition or not. Nor is it necessary to allege that the goods had been marked and stamped in accordance with the requirements of the Act, for the security of the revenue of Canada, nor that the goods had previously been duly entered for warehousing, in accordance with the provisions of law, nor to allege by whom the goods were kept in the warehouse, for not one of these statements is required by the statute; and, moreover, in official matters, all things are presumed to have been properly done. An allegation that the goods were fraudulently removed implies sufficiently that they were not legally cleared from, etc. (*m*)

On a statute somewhat similar to the 40 Vic., c. 10, s. 91, subsec. 2 (using, however, the words "information on oath shall be given"), it was held that, to justify the breaking open of a building, there should have been, first, a written informa-

(*k*) See as to customs 31 Vic., cs. 5, 6, 7, 43 & 44; also 33 Vic., c. 9; and 34 Vic., cs. 10 and 11.
(*l*) *Reg.* v. *Bathgate*, 13 L. C. J. 299.
(*m*) *Ibid.*

tion on oath ; and, second, the actual presence of the justice at the breaking, so that the parties may understand the demand for admittance comes from the justice, by virtue of his legal authority, and magisterial character. (*n*)

Not opening a door, after a proper demand, is a sufficient denial within the Act. If the breaking open is unlawful, and the officer is concerned therein, he cannot justify the seizure of smuggled goods found within the building; but if a party, not concerned in the unlawful breaking, seized the goods, the case might be different. It seems that an order to enter given to a police officer, present with the revenue officer, would be sufficient, and that he would be presumed to be acting in aid. (*o*) If the door be closed, and admission denied, then the Act clearly intends that the justice should be the person to demand admittance, and to declare the purpose for which the entry is demanded. Possibly he might do this by the mouth of the officer, but it should be done in such a way as to be well understood as coming from the justice, by virtue of his legal authority and magisterial character. (*p*)

An indictment for smuggling, under the (N. B.) Rev. Stat., c. 29, s. 1, charged, in the several counts (1) that the defendant unlawfully landed alcohol, subject to duty, and thereby smuggled the same; (2) that defendant unlawfully landed alcohol, subject to duty, without reporting to the treasurer, and thereby smuggled, etc.; (3) that the defendant landed the alcohol without a permit, and thereby smuggled; and (4) that the defendant landed alcohol without paying the duties. The indictment was held insufficient, as (1) the mere unlawful landing of goods, without alleging any intent to defraud the revenue, did not constitute the offence of smuggling; (2) merely landing goods, without reporting them to the treasurer, or without obtaining a permit, though it may subject the party to a penalty, does not amount to smuggling; (3) and the mere landing of goods, without a previous payment of duty, is not

(*n*) *Reg.* v. *Walsh*, 2 Allen, 387.
(*o*) *Ibid.*
(*p*) *Ibid.* 391, per *Carter*, C. J.

a breach of the revenue laws, as the duty may be secured as pointed out in the Act. The indictment must negative the fact that the duties were secured. (*q*)

The colonial legislature has power to impose additional grounds of forfeiture, for breach of the revenue laws, on goods subject to forfeiture, under an Act of the Imperial Parliament. (*r*)

In the *Atty. General* v. *Warner*, (*s*) the question was raised, but not decided, whether an information would lie under the 66th clause of the Imp. Act 8 & 9 Vic., c. 93, where the party informed against was a person shown not to have transported or harbored the goods of another, but his own goods. smuggled by himself, on his own account.

By this stat. 8 & 9 Vic., c. 93, gunpowder is prohibited from being imported into the British possessions in America, except from the United Kingdom, or some British possession. Gunpowder coming from a foreign country was held not liable to be proceeded against as a non-enumerated dutiable article under the Provincial Revenue Act, 11 Vic., c. 1, for being imported into the Province, at a place not a port of entry, contrary to the Act 11 Vic., c. 2, s. 21; but that it was liable to seizure and forfeiture, under the 17th section of that Act, for being landed without entry at the Treasury. (*t*) Spirits in casks less than 100 gallons were also held liable to forfeiture, under the (N.B.) 11 Vic., c. 67, though the vessel in which they were imported is over 30 tons register. (*u*)

In an information for the condemnation of goods as illegally imported, it is allowable, under a plea that they were not imported *modo et forma*, to show that the goods were landed through stress of weather. (*v*)

In an information, at the suit of the Crown, for goods seized at the Custom House, there must have been a substan-

(*q*) *Reg.* v. *Cassidy*, 4 Allen, 623.
(*r*) *Atty. Genl. and Myers*, 2 Allen, 493.
(*s*) 7 U. C. Q. B. 399.
(*t*) *Ibid.*
(*u*) *Atty. Genl.* v. *Walsh*, 2 Allen, 457.
(*v*) *Atty. Genl.* v. *Spafford, Draper*, 320.

tive allegation that the goods were imported and brought in in violation of the Custom House regulations. (*w*) It has been held that the omission of the words "against the form of the statute" is fatal. (*x*) The omission of these words is probably cured by the 32 & 33 Vic., c. 29, s. 23.

In an information for a penalty under the Customs Act, 3 & 4 Wm. IV., c. 59, for knowingly harboring smuggled goods, it was held that the *scienter* was a proper question for the jury; and that in such information, the particular illegal act, as that the goods were imported without payment of duties, etc., should be specified; and that the information should expressly show that the offence charged to have been committed was contrary to the form of the statute, and that saying merely that the statute gives a right to the penalty was not enough. (*y*)

If a quantity of smuggled goods be purchased at one time, but seizures of them are made at different times, only one penalty for harboring them can be recovered. (*z*)

An entry at the Custom House declared that the packages contained articles not subject to duty, but some of them contained contraband goods. This was held but one entry, and that being false as to some of the packages, the goods were not duly entered, and the whole were forfeited under the (N.B.) 1 Rev. Stat., c. 27, s. 10. (*a*)

A revenue inspector, suing in the Queen's name for penalties under the 14 & 15 Vic., c. 100, was held not liable for costs, because he came within the ordinary common law rule, exempting the Crown from costs. (*b*)

The 34 Vic., c. 11, was passed for the purpose of preventing corrupt practices in relation to the collection of the revenue.

Excise.—The excise is at present regulated by 31 Vic., c. 8, as amended by 40 Vic., c. 12, and by the various statutes in

(*w*) *Solr. Genl.* v. *Darling*, 2 L. C. R. 20.
(*x*) *Ibid.*
(*y*) *Reg* v. *Aumond*, 2 U. C. Q. B. 166.
(*z*) *Ibid.*
(*a*) *Reg.* v. *Southward*, 3 Allen, 387.
(*b*) *Ex parte Hogue*, 3 L. C. R. 287.

force in the several provinces in relation to the sale of liquors.

An indictment under sec. 143 of the first mentioned statute for breaking a lock, etc., after other statements, alleged: In which said warehouse certain goods for and in respect of which a certain duty of excise was then and there by law imposed, were then and there kept and secured, without the knowledge and consent of the collector of inland revenue. It was held that the redundant expression, "were then and there kept and secured," made the words which form the gist of the offence, "without the knowledge and consent of the collector of inland revenue," apply apparently not to the opening of the lock, but to the keeping and securing of certain goods in the warehouse, and was therefore bad. (*c*) The indictment need not show the description of goods, nor that they are subject to excise, nor by whom the goods were kept and secured, nor that the goods were retained in any warehouse, under the supervision of any officer of inland revenue, nor that defendant opened a lock attached to a warehouse in which goods were so retained, nor that the excise duty was then and there unpaid, for all these allegations are mere surplusage. (*d*)

A deputy revenue inspector may validly sign a plaint or information for selling liquor without a license. (*e*) The prosecutor is not bound to prove that the defendant has no license, as he is not called on to prove a negative. (*f*)

It seems the Crown is not obliged, under Acts relating to the excise, to proceed in the manner prescribed therein as a private individual would be, unless expressly included, but may institute proceedings in the superior courts by information. (*g*)

(*c*) *Reg.* v. *Bathgate*, 13 L. C. J. 303.
(*d*) *Ibid.*; see also as to excise 31 Vic., cs. 49 & 50; 33 Vic., c. 9; and 34 Vic., c. 15.
(*e*) *Reynolds and Durnford*, 7 L. C. J. 228.
(*f*) *Ex parte Parks*, 3 Allen, 237; see post Evid; *re Barrett*, 28 U. C. Q. B. 561, per *A. Wilson*, J.
(*g*) *Reg.* v. *Taylor*, 36 U. C. Q. B. 183, per *A. Wilson*, J.

In prosecutions for selling liquor without license, the better opinion seems to be that the information should be under oath, even where the statute does not expressly require it. (*h*)

If a form of conviction is given in the statute under which the prosecution is had, it is sufficient if that form be followed, even though, from a technical point of view, it is defective. (*i*) But, in the absence of such statutory guide, great care is required in the preparation of a conviction. It should show whether the offence is for selling without license, or during prohibited hours, or in illegal quantities; (*j*) if for selling "by retail" it should so state it; (*k*) if for selling during prohibited hours, or not keeping up a proper signboard, should aver that the defendant was properly licensed. (*l*) It seems the time, (*m*) place, (*n*) and to whom sold, (*o*) should also be stated; and if there are any exceptions in the Act, they should be negatived. (*p*) If for a second or third offence, the previous convictions should be recited and proved. (*q*) But it is not necessary to give the statute under which the conviction takes place, (*r*) nor the kind or quantity of liquor sold. (*s*)

The terms "spirituous liquor" and "intoxicating liquors" are convertible; (*t*) and "at" the hotel, is equivalent to "therein

(*h*) *Reg.* v. *McConnell*, 6 U. C. Q. B. O. S. 629; but see *ex parte Cousine*; 7 L. C. J. 112.
(*i*) *Reid* v. *McWhinnie*, 27 U. C. Q. B. 289; *Reg.* v. *Strachan*, 20 U. C. C. P. 182.
(*j*) *Reg.* v. *Hoggard*, 30 U. C. Q. B. 152; *ex parte Woodhouse*, 3 L. C. R. 93.
(*k*) *Ex parte Hebert*, 18 L. C. J. 156.
(*l*) *Reg.* v. *French*, 34 U. C. Q. B. 403; *ex parte Birmingham*, 2 P. & B. 564; *McGilvery* v. *Gault*, 1 P. & B. 641.
(*m*) *Reg.* v. *French*, 2 Kerr, 121; but see *Reg.* v. *Justices of Queen's*, 2 Pugsley, 485.
(*n*) *Ex parte Hebert*, 18 L. C. J. 156.
(*o*) *Reg.* v. *Cavanagh*, 27 U. C. C. P. 537; but see *Reg.* v. *Strachan*, 20 U. C. C. P. 182.
(*p*) *Re Mills*, 9 U. C. L. J. 246; *Reg.* v. *White*, 21 U. C. C. P. 354; *Reg.* v. *Jukes*, 8 T. R. 542; *Reg* v. *White*, 21 U. C. C. P. 354.
(*q*) *Reg.* v. *French*, 34 U. C. Q. B. 403; *Reg.* v. *Justices of Queen's*, 2 Pugsley, 485.
(*r*) *Reg.* v. *Strachan*, *supra*; *Wray* v. *Toke*, 12 Q. B. 492; *Rex.* v. *Woodcock*, 7 East, 146.
(*s*) *Reg.* v. *King*, 20 U. C. C. P. 246.
(*t*) *Reid* v. *McWhinnie*, 27 U. C. Q. B. 289.

or on the premises thereof." (*u*) A conviction which described the defendant as one "G. P. an innkeeper" was held bad, the word "innkeeper" amounting only to a description of the person, and not to an averment of his filling such a character; and the words "in and at his tavern" are held not to supply the deficiency, as those words are consistent with ownership without occupancy. (*v*) A conviction for that one H., on, etc., "did keep his bar-room open, and allow parties to frequent and remain in the same, contrary to law," was held clearly bad as showing no offence. (*w*)

Where the statute limits the time within which proceedings under it are to be taken, it is sufficient if it appear from the statements in the conviction to have been begun in time without any averment of the fact. (*x*) The information is the commencement of proceedings for this purpose. (*y*) Under R. S. Ont., c. 181, it would seem to be unnecessary to show such fact, as the clause of limitation is entirely distinct from those creating the offences and imposing the penalties. (*z*)

A conviction which imposes a fine in excess of that allowed by the statute under which it is made, is bad. (*a*)

An information charging several offences in the disjunctive is bad, and the defect will not be cured by the confession of the defendant. (*b*) The charge in a conviction must be certain, and so stated as to be pleadable in the event of a second prosecution for the same offence. (*c*)

The conviction must be of the offence charged in the information, and not of a different offence, or of several offences in the conjunctive, charged in the disjunctive. (*d*) Therefore,

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(*u*) *Reg.* v. *Cavanagh*, 27 U. C. C. P. 537.
(*v*) *Reg.* v. *Parlee*, 23 U. C. C. P. 359.
(*w*) *Reg.* v. *Hoggard*, 30 U. C. Q. B. 152.
(*x*) *Reid* v. *McWhinnie*, 27 U. C. Q. B. 289.
(*y*) *Reg.* v. *Lennox*, 34 U. C. Q. B. 28.
(*z*) *Reg.* v. *Strachan*, 20 U. C. C. P. 182; *Wray* v. *Toke*, 12 Q. B. 492; *Rex* v. *Woodcock*, 7 East, 146.
(*a*) *Reg* v. *Lennox*, 26 U. C. Q. B. 141; *Reg.* v. *French*, 34 U. C. Q. B. 403.
(*b*) *Ex parte Hogue*, 3 L. C. R. 94.
(*c*) *Reg* v. *Hoggard*, 30 U. C. Q. B. 152.
(*d*) *Ex parte Hogue*, 3 L. C. R. 94.

a conviction adjudging the defendant guilty of the several offences therein enumerated, and condemning him "for his said offences" to but one penalty, is bad; (*e*) and a conviction against two jointly is bad, nor can one penalty be awarded against two jointly, and such a conviction cannot be amended. (*f*) A conviction will lie against a partner alone for selling liquor without license, for all torts are several as well as joint. (*g*)

When a conviction concludes *contra formam statuti*, it should first show something done which is contrary to the statute, and the conclusion should follow properly from the premises, otherwise a criminal charge would contain no certainty at all. (*h*)

A conviction under 40 Geo. III., c. 4, for selling liquor without license, was quashed, because, among other reasons, it directed the defendant to pay the costs of the prosecution, without specifying the amount. (*i*) But it was no objection, under the 29 & 30 Vic., c. 51, s. 254, that the costs of conveying the defendant to gaol, in the event of imprisonment in default of distress, were specified. (*j*)

It is no ground for quashing a conviction that the information stated the offence to be "selling liquor without license" without the word "spirituous" or other word descriptive of the quality of the liquor; (*k*) but it has been doubted whether such a clause would be sufficient in the conviction. (*l*)

It is no objection to state the offence as selling to divers persons unknown to the informant, provided sales to particular persons be proved; (*m*) at any rate, if no objection be taken by the prisoner to the variance; (*n*) and the statute as to variances (*o*) would likely aid such defect.

(*e*) *Ex parte Hogue*, 3 L. C. R. 94.
(*f*) *Reg.* v. *Sutton*, 42 U. C. Q. B
(*g*) *Mullins and Bellamere*, 7 L. C. J. 228.
(*h*) *Wilson* v. *Graybiel*, 5 U. C. Q. B. 229, per *Robinson*, C. J.
(*i*) *Rex* v. *Ferguson*, 3 U. C. Q. B. O. S. 220.
(*j*) *Reid* v. *Mc Whinnie*, 27 U. C. Q. B. 289.
(*k*) *Reg.* v. *Harshman*, 1 Pugsley, 317.
(*l*) *Campbell* v. *Flewelling*, 2 Pugsley, 403.
(*m*) *Reg.* v. *Harshman*, *supra*.
(*n*) *Ibid.*
(*o*) 32 & 33 Vic., c. 31, s. 5.

The exact day of selling need not be stated in the conviction. (*p*)

Costs of commitment or conveying to gaol can only be imposed when expressly authorized by statute; and a conviction granting such costs without authority is bad. (*q*) So a conviction imposing, in default of fine, imprisonment without legislative authority, would be quashed. (*r*)

A conviction for selling, &c., contrary to the Acts of Assembly, and stating the titles of the Acts, is sufficiently certain, one statute rendering the selling illegal and the other imposing the penalty. (*s*)

An order of justices to condemn liquor with packages, &c. is indivisible, and if bad in part, is bad altogether. (*t*) The Ontario Act 44 Vic., c. 27, s. 9, if constitutional, authorizes the destruction of the vessels containing the liquor as well as the liquor itself.

Magistrates cannot, where a formal existing license is produced, go behind it for the purpose of inquiring whether certain preliminary requisites have been complied with before its issue. (*u*) And the quashing of a by-law under which a certificate has been granted, does not, it seems, nullify a license issued under it. (*v*)

Where the licensee to sell "in and upon the premises known as," &c., carried on the business of a tavern keeper in a house at the front of a deep lot, for which house such license was granted, was held properly convicted of selling liquor without license on the lot in rear, which had for many years been used as a fair ground. (*w*)

It is within the competence of the local legislatures to impose penalties for selling liquor without license, though

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(*p*) *Reg.* v. *Justices of Queen's*, 2 Pugsley, 485.
(*q*) *Reg.* v. *Harshman*, *supra*.
(*r*) *Ex parte Slack*, 7 L. C. J. 6.
(*s*) *Reg.* v. *Harshman*, 1 Pugsley, 317.
(*t*) *Ex parte Breeze*, 3 Allen, 390.
(*u*) *Reg.* v. *Stafford*, 22 U. C. C. P. 177.
(*v*) *Ibid.*
(*w*) *Reg.* v. *Palmer*, 46 U. C. Q. B. 262.

they may be restricted as to the modes of enforcing them. (*x*) But where the means provided for the recovery of such penalties are *ultra vires*, the statute is void only to the extent of such excess. (*y*) In the Province of Ontario the sale of liquor is at present regulated by R. S. O., c. 181, as amended by 44 Vic., c. 27. The former statute consolidates and amends the previous enactments on the subject, and makes ample provision for amending and upholding convictions defective in point of form. It also contains clauses regulating the evidence necessary to be adduced in order to procure a conviction; and gives, moreover, civil remedies to persons suffering as a result of the improper supply of liquor to relatives and others.

Several cases have been decided under this statute and those which it embodies, the results of which are given below.

Under s. 52, R.S.O. 181, the previous offence need not be against the same license. That statute only authorizes the alternative of fine or imprisonment for second offence, but gives no power to imprison at hard labor for non-payment of fine; and a conviction bad in this respect cannot be amended under s. 77, as it cannot be said that any other punishment was intended. (*z*)

A brewer, licensed as such by the Government of Canada under 31 Vic., c. 8, requires no license under above statute. (*a*)

It was held that 40 Vic., c. 13, the provisions of which are in the main embodied in the R. S. O., c. 181, must be construed either as providing that a wholesale license must be taken out in municipalities where the Temperance Act of 1864 was in force, for the quantities to be sold therein under that Act; and making a sale thereof without license a contravention of secs. 24 & 25 of 37 Vic., c. 32, as a selling by wholesale without license; or as providing in addition that a sale in such municipalities of the quantities prohibited by the

(*x*) *Reg.* v. *McMillan*, 2 Pugsley, 110.
(*y*) *Ibid.*
(*z*) *Reg.* v. *Black*, 43 U. C. Q. B 180.
(*a*) *Severn* v. *Reg.*, 2 S. C. R. 70; *Reg.* v. *Scott*, 34 U. C. Q. B. 20.

Temperance Act should be a contravention of the said secs. 24 & 25 as a selling by retail without license. (*b*)

A conviction for an offence falling within the Canada Temperance Act of 1864, improperly had under the Ont. 32 Vic., c. 32, was amended under 29 & 30 Vic., c. 50. (*c*) And it has been held that, after a first conviction has been returned to the Sessions, and filed, the justices, if they think it defective, may make out and file a second. (*d*)

Section 51 of R. S. O., c. 181, which imposes the penalties, omits all reference to a third offence (which was provided for in the enactments of which it is a consolidation), though such an offence is referred to in sec. 73, which deals with the procedure, and in the forms of conviction given by the Act. A conviction, therefore, for a third offence was quashed, although the penalty imposed thereby might have been inflicted for a second offence. (*e*) This omission is, however, supplied by 44 Vic., c. 27, s. 5.

The servant of a keeper of an unlicensed tavern may be convicted of selling in his master's absence; (*f*) and a married woman, the lessee of premises where her husband sold liquor, was held liable to conviction though not present when the sale took place. (*g*)

The competency of the local legislature to delegate to the commissioners power to regulate the number of licenses, or otherwise to legislate with regard to the liquor traffic, has been doubted. (*h*)

The purchaser of liquors is a competent witness to prove its sale. (*i*)

A conviction of a registered druggist for selling spirituous

(*b*) *Reg.* v. *Lake*, 43 U. C. Q. B. 515.
(*c*) *Re Watts*, 5 U. C. P. R. 267.
(*d*) *Wilson* v. *Graybiel*, 5 U. C. Q B. 227; *Chancey* v. *Payne*, 1 Q. B. 712.
(*e*) *Reg.* v. *Frawley*, 45 U. C. Q. B. 227.
(*f*) *Reg.* v. *Williams*, 42 U. C. Q. B. 462; *Reg.* v. *Howard*, 45 U. C. Q. B. 346; *Reg.* v. *Campbell*, 8 U. C. P. R. 55.
(*g*) *Reg.* v. *Campbell*, *supra*.
(*h*) *Ibid.*; *Reg.* v. *Hodge*, 46 U. C. Q. B. 141; *Roberts* v. *Climie*, 46 U. C. Q. B. 264.
(*i*) *Ex parte Birmingham*, 2 Pugsley & B. 564.

and intoxicating liquors by retail, to wit, one bottle of brandy to one O. S., at and for the price of $1.25 without having a license so to do as by law required, the said spirituous and intoxicating liquor being so sold for other than strictly medicinal purposes only was held valid, for the defendant was not as a druggist authorized to sell without license, and it was unnecessary for the prosecutor to show that he was not licensed, or to negative any exemption or exceptions. (*j*) But such conviction should aver that the sale was not made on a requisition for medicinal purposes. (*k*)

Sec. 55 of R. S. O., c. 181, is within the competence of the local legislature. (*l*)

An information under sec. 43, for selling liquor on Sunday, is for a crime within R. S. O., c. 62, so as to render the defendant incompetent as a witness. (*m*)

Section 83 applies where the act complained of was done either by the occupant or by some other person. (*n*)

Under the Canada Temperance Act, 1878, it has been held necessary to prove before the magistrate that the second part of the statute is in force, by the production of the gazette containing the proclamation; (*o*) but it may well be doubted whether the court would not be found as a matter of law to take notice whether such proclamation has issued.

Certiorari, on proceedings under this Act, is taken away, (*p*) except in cases of want or excess of jurisdiction. (*q*)

It must be shown that the licenses have expired. (*r*)

Costs may be awarded on conviction. (*s*)

The Quebec License Act, 34 Vic., c. 2, is constitutional. (*t*)

(*j*) *Reg.* v. *Denham*, 35 U. C. Q. B. 503.
(*k*) *Reg.* v. *White*, 21 U. C. C. P. 354.
(*l*) *Reg.* v. *Boardman*, 30 U. C. Q. B. 553; see also *Reg.* v. *Mason* 17 U. C C. P. 534.
(*m*) *Reg.* v. *Roddy*, 41 U. C. Q. B. 291.
(*n*) *Reg.* v. *Breen*, 36 U. C. Q. B. 84.
(*o*) *Ex parte Russell*, 4 Pugsley & B. 536.
(*p*) *Ex parte Orr*, 4 Pugsley & B. 67.
(*q*) *Ex parte Russel*, *supra*.
(*r*) *Ex parte McDonald*, 4 Pugsley, & B. 542; *ex parte White*, 4 Pugsley & B. 552.
(*s*) *Ibid.*, per *Palmer*, J.
(*t*) *Ex parte Duncan*, 4 *Revue Leg.* 228; 16 L. C. J 188.

There was no penalty which could be inflicted on a tavern-keeper for allowing gambling in his house under the above statute; (*u*) this omission, however, is supplied by the 36 Vic., c. 3, s. 18.

In an action for recovery of a fine under sections 245 and 246 of the above Act, it is sufficient to allege and prove the giving of drink by the candidate to an elector, without alleging or proving the existence of any improper motive. (*v*)

On a prosecution for a penalty for selling liquors without license, proof that the sale was made by a person in the defendant's shop in his absence, and without showing any general or special employment of such person by the defendant in the sale of liquors, was held in one case sufficient *prima facie* evidence against him. (*w*)

Under the Quebec License Act, which constitutes a tribunal of two justices, it has been held that a conviction by three is bad; (*x*) and a conviction for selling liquor in the house of another has, in the same province, been held bad. (*y*)

No appeal lies to the Queen's Bench on a conviction by two justices under the Quebec License Act. (*z*)

The quashing of a by-law under which a certificate has been granted, and license issued for the sale of spirituous liquors, does not nullify the license under the R.S.O., c. 181; and a conviction for selling without license cannot, therefore, under these circumstances, be supported. (*a*)

Under this statute, a license to sell spirituous liquors whether by wholesale or retail, is now necessary, either in the case of a tavern or a shop; and in the case of a shop, it must not be consumed on the premises, or sold in quantities less than a quart. Therefore, the sale of a bottle of gin, without license, is contrary to law; and it would seem that even if a

(*u*) *Boivin* v. *Vigneux*, 4 *Revue Leg.* 704.
(*v*) *Philibert* v. *Lacerte*, 3 Que. L. R. 152.
(*w*) *Ex parte Parks*, 3 Allen, 237.
(*x*) *Re Paige*, 18 L. C. J. 119.
(*y*) *Ibid.*
(*z*) *Re Pope*, 16 L. C. J. 169.
(*a*) *Reg.* v. *Stafford*, 22 U. C. C. P. 177.

license be necessary only on a sale by retail, the sale of a bottle valued at sixty cents would be a sale by retail. (*b*)

Under an Imperial statute it was held that the handing of beer, in a mug through an open window of the defendant's premises to a person who, after paying for it, drank it immediately, standing on the highway as close as possible to the window, was not a selling to be consumed on the premises where sold. (*c*)

Where the conviction is for a fine—as a fine is imposed by s. 51 for the first offence—it is not necessary to specify whether the conviction is for the first or second offence, as, from the punishment awarded, the court would imply the first offence; and as the offence is selling liquor without license, it is not necessary to state to whom the liquor was sold. Section 68 of the Act provides that the magistrate shall proceed in a summary manner, according to the provisions, and after the forms, contained in and appended to the Act of the Parliament of Canada, entitled, "An Act respecting the Duties of Justices of the Peace out of Sessions in relation to Summary Convictions and Orders." It was held, therefore, that the magistrate following a similar Act, in awarding imprisonment in default of distress and commitment, and conveying to gaol, was not acting illegally, and that it was also sufficient for the conviction to follow the forms given by same statute. (*d*)

A conviction under this statute, alleging that defendant sold spirituous liquors by retail, without license, stating time and place, is sufficient, without specifying kind and quantity, as this is a particular act, and it is enough to describe it in the words of the legislature. (*e*) Under the statute, the owner of a shop is criminally liable for any unlawful act done therein in his absence by clerk or assistant, as for in-

(*b*) *Reg.* v. *Strachan*, 20 U. C. C. P. 182.
(*c*) *Re Deal*, L. R. 3 Q. B. 8.
(*d*) *Reg.* v. *Strachan*, 20 U. C. C. P. 182; *Re Allison*, 10 Ex. 568, per *Park*, B.; *Moffat* v. *Barnard*, 24 U. C. Q. B. 499; *Egginton* v. *Lichfield*, 5 E. & B. 103.
(*e*) *Re Donelly*, 20 U. C. C. P. 165; *Reg.* v. *King*, 20 U. C. C. P. 246.

stance, in this case, for the sale of liquor, without license, by a female attendant. But it would seem, if the act of sale was an isolated one, wholly unauthorized by him, and out of the ordinary course of his business, he would not be liable. (*f*)

Where the depositions returned to the court by the convicting magistrate, under a *certiorari*, showed that there was no evidence of a license produced before him, while the affidavits filed, on the application to quash, stated that the party had a license in fact, and produced evidence of it before the magistrate, who, moreover, himself swore that he believed a license was produced, but it was either not proved, or given in evidence; it was held that the return to the *certiorari* was conclusive, and that the court could not go behind it. (*g*)

The informer is a competent witness, as he is expressly made so by the statute; (*h*) but the defendant cannot be compelled to give evidence against himself. (*i*)

The penalties imposed by the 3 Vic., c. 47, for selling liquor without license, are recoverable before the mayor of Fredericton, under the Act of Incorporation, 14 Vic., c. 15, s. 67. The mayor, being *ex officio* a justice of the peace, may, in that character, proceed for the penalties which, by the city charter, are made recoverable before the mayor. (*j*)

Under Con. Stats., L. C., c. 6, the convicting magistrate has a discretionary power of giving any one of the three judgments mentioned in sec. 32, sub.-sec. 2, and secs. 38, 39 and 40. (*k*)

An appeal lies to the General Quarter Sessions of the Peace from a conviction rendered by a judge of the Sessions of the Peace in and for the city of Montreal, under s. 50 of this statute. (*l*) Under the same statute, the convicting magistrate has the right to grant costs, either upon conviction or dismissal of the prosecution, and this even to attorneys. (*m*)

(*f*) *Re Donelly*, 20 U. C. C. P. 165.
(*g*) *Reg.* v. *Strachan*, 20 U. C. C. P. 182.
(*h*) *Ibid.*
(*i*) *Reg.* v. *Roddy*, 41 U. C. Q. B. 291.
(*j*) *Reg.* v. *Allen*, 2 Alleulic, 435.
(*k*) *Ex parte Moley*, 7 L. C. J. 1.
(*l*) *Ex parte Thompson*, 7, L. C. J. 10.
(*m*) *Ex parte Moley*, 7 L. C. J. 1.

In an appeal from a conviction for selling liquor contrary to c. 22 of the (N.S.) Rev. Stat., the court allowed the original summons to be amended. (*n*)

Compounding offences.—Compounding felony is where the party injured, knowing the felon, takes his goods again, or other amends, upon agreement not to prosecute. (*o*) It is a misdemeanor at common law, punishable by fine and imprisonment. (*p*)

A prosecution is not the property of those that institute it, to deal with it as they please. The public have a higher interest in having redress rendered, and wrong punished, to deter others from offending in like manner; (*q*) and in general, a prosecution can only be compromised by leave of the court. A prosecution for selling liquor without license cannot be compromised without the leave of the court. (*r*) Leave has been granted to compound a *qui tam* action on the 32 Hy. VIII., c. 9, for buying a pretended title, on paying the King's share into court. (*s*)

It is equally illegal to stipulate for the compromise of a charge amounting to only a misdemeanor, if the offence is one which is injurious to the community generally, and not confined in its consequences to the prosecutor himself, as it is to compromise a charge of felony. (*t*)

The 18 Eliz., c. 5, contains provisions against compounding informations on penal statutes. But this statute does not extend to penalties which are only recoverable by information before justices. (*u*)

(*n*) *Taylor* v. *Marshall*, 2 Thompson, 10,
(*o*) Russ. Cr. 194-5.
(*p*) Arch. Cr. Pldg. 837.
(*q*) *Reg.* v. *Hammond*, 9 Solr. Jour. 216, per *Bramwell*, B.
(*r*) *Re Fraser*, 1 U. C. L. J. N. S. 326, per *A. Wilson*, J.; *Reg.* v. *Mabey*, 37 U. C. Q. B. 248.
(*s*) *May q. t.* v. *Dettrick*, 5 U. C. Q. B. O. S. 77. As to stifling a prosecution for felony, and the distinction between it and compounding felony, see *Williams* v. *Bayley*, L. R.; 1. E. & I. App. 200.
(*t*) *Dwight* v. *Ellsworth*, 9 U. C. Q. B. 540, per *Robinson*, C. J.
(*u*) *Reg.* v. *Mason*, 17 U. C. C. P. 534; *Rex* v. *Crisp*, 1 B. & Ald. 282; *Reg* v. *Mason*, 17 U. C. C. P. 534; see also *Reg.* v. *Stone*, 4 C. & P. 379; *Reg.* v. *Gotley*, R. & R. 84; *Reg.* v. *Best*, 2 Mood. C. C. 125; Arch. Cr. Pldg. 837; *Macfarlane* v. *Dewey*, 15 L. C. J. 85; 32 & 33 Vic. c. 21, s. 115.

Offences by persons in office.—An indictment lies against a person who wilfully neglects or refuses to execute the duties of a public office. (*v*) An indictment may be maintained against a deputy returning officer at an election for refusing, on the requisition of the agent of one of the candidates, to administer the oath to certain parties tendering themselves as voters. (*w*) But the omission of the name of the agent from such indictment will vitiate it. (*x*)

An indictment charging a misdemeanor against a registrar and his deputy jointly, is good, if the facts establish a joint offence. A deputy is liable to be indicted, while the principal legally holds the office, and even after the deputy himself has been dismissed from the office. (*y*)

Extortion signifies the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due to him, or more than is due, or before it is due. (*z*) This offence is of the degree of misdemeanor, and all persons concerned therein, if guilty at all, are principals. (*a*) Two or more persons may be jointly convicted of extortion where they act together and concur in the demand. Where two persons sat together as magistrates, and one of them exacted a sum of money from a person charged before them with a felony, the other not dissenting, it was held that they might be jointly convicted. (*b*) It is not necessary that the indictment should charge the defendants with having acted corruptly. (*c*)

The courts do not quash indictments for extortion, but leave the defendants to demur. (*d*)

The Stat. of West. 3 Edward I., c. 26, would seem to apply here. (*e*)

(*v*) *Reg.* v. *Bennett*, 21 U. C. C. P. 238, per *Galt*, J.
(*w*) *Ibid.*
(*x*) *Ibid.*
(*y*) *Reg.* v. *Benjamin*, 4 U. C. C. P. 179.
(*z*) Russ. Cr. 208.
(*a*) *Reg.* v. *Tisdale*, 20 U. C. Q. B. 273, per *Robinson*, C. J.
(*b*) *Reg.* v. *Tisdale*, 20 U. C. Q. B. 273, per *Robinson*, C. J.
(*c*) *Ibid.*
(*d*) *Ibid.* 272, per *Robinson*, C. J.; and see *Rex* v. *Wadsworth*, 5 Mod. 13.
(*e*) *Askin* v. *London District Council*, 1 U. C. Q. B. 292.

As to the fees which may be legally exacted by public officers in different cases, it is a general rule that when a duty is cast upon any one by Act of Parliament, and no remuneration is provided for doing it, the party is to perform the duty without remuneration. (*f*) A clerk of the peace is an officer serving the Crown, and appointed to discharge public duties, and he cannot charge fees for any service for the remuneration of which no provision is made by statute or otherwise expressly assigned to him by law; (*g*) for it is a maxim of law that no fee can be demanded for services rendered in the administration of justice, except such as can be shown to have a clear legal origin, either as being specifically allowed in some Act of Parliament, or as being sanctioned by some court or officer that has been permitted by ancient usage to award a fee for the service. (*h*)

All new offices erected with new fees, or old offices with new fees, are within the Stat. 34 Edward I., for that is tallage upon the subject, which cannot be done without common assent by Act of Parliament. (*i*) A clerk of the peace is not entitled to any fee from the parties to a cause for striking a special jury. (*j*) The table of fees established and promulgated by the courts, contains all the services for which clerks of the peace are entitled to charge, except that they are entitled to fees in all cases where such fees are authorized by Act of Parliament; but no local tariff or user in particular counties can give any additional right. (*k*)

It would be illegal, as manifestly contrary to duty as well as public policy, in a judge to take from the party in whose favor he purposes to decide, an undertaking to indemnify him against all the consequences of his decision. (*l*)

(*f*) *Askin* v. *London District Council*, 1 U. C. Q. B. 295, per *Robinson*, C. J.; *Graham* v. *Grill*, 2 M. & S. 295.
(*g*) *Askin* v. *London District Council*, 1 U. C Q. B. 292.
(*h*) *Hooker* v. *Gurnett*, 16 U. C. Q. B. 183, per *Robinson*, C. J.; *Price* v. *Perceval*, S. L. C. A. 189; the *London* S. V. A. R. 140.
(*i*) The *London* S. V. A. R. 140.
(*j*) *Hooker* v. *Gurnett*, 16 U. C. Q. B. 180.
(*k*) *Re Dartnell*, 26 U. C. Q. B. 430. See as to auditing accounts of the clerk of the peace, *re Poussett and Corporation of Lambton*, 22 U.C.C.B.80.
(*l*) *Ballard* v. *Pope*, 3 U. C. Q. B. 320, per *Robinson*, C. J.

A bailiff for overcharge is liable to fine and imprisonment; (*m*) but in one case such a conviction was quashed, on the ground that the magistrate permitted an amendment in the information, and because no precise date of the offence was given. (*n*)

The fees of office and taxes payable to the clerk of appeals, Queen's Bench, belong to, and form part of, the revenue of the Crown. (*o*)

Sale of offices.—It would seem that an indictment or information lies at common law for the sale of a public office, on the ground that public policy requires that there should be no money consideration for the appointment to any office in which the public are interested, and that the public will be better served by having persons best qualified to fill offices appointed to them; and if money may be given to those who appoint, or through whom an office may be obtained, it would be a temptation to appoint improper persons. (*p*)

The office of sheriff is an office concerning the administration or execution of public justice, and the sale of it is illegal. The defendant agreed with R., then sheriff of the county of Norfolk, to give him £500, and an annuity of £300 a year, if he would resign. R. accordingly placed his resignation in defendant's hands. The £500 was paid, and certain lands conveyed to secure the annuity; and it was further agreed that in the event of the resignation being returned, and R. continuing to hold the office, the money should be repaid, and the land reconveyed. But R. did not undertake in any way to assist in procuring the appointment for the defendant. The latter having been appointed by the Government in ignorance of the agreement, an information was filed against him, and the court held that this was an illegal transaction, as being, in fact, a purchase of the office, within the 5 & 6 Ed. VI., c. 16, and that an information might be

(*m*) *Deguire* v. *Despins*, 6 *Revue Leg.* 736.
(*n*) *Ex parte Smith*, 6 L. C. R. 468.
(*o*) *Reg* v. *Holt*, 13 L. C. R. 306.
(*p*) *Reg.* v. *Mercer*, 17 U. C. Q. B. 625; per *M'Lean*, J.; and see Russ. Cr. 214; *Rex* v. *Vaughan*, 4 Burr. 2494; *Rex* v. *Pollman*, 2 Camp. 229.

sustained under this Act as for a misdemeanor; but, at all events, if not sustainable under this Act, the British Act 49 Geo. III., c. 126, clearly applied in this Province, and made it a misdemeanor; (*q*) and it may well be doubted whether the agreement would not have been an offence at common law. (*r*) The ignorance of the Government as to the illegal agreement was immaterial. (*s*)

In another case, a sheriff agreed with one O. to give the latter all the fees of his office, except for certain services specified, in consideration of which O. was to pay him £300 a year quarterly in advance, not out of the fees, but absolutely and without reference to their amount. It was held that this was a sale of the deputation of the office, and was clearly prohibited by the 5 & 6 Ed. VI, c. 16, and 49 Geo. III, c. 126, and that the effect of it was to forfeit the office upon conviction under a proceeding by *scire facias*. (*t*) But if the defendant in this case had agreed to pay his deputy a certain sum of money annually for acting as his deputy, either in regard to all his ministerial duties, or a part of them, or had agreed to give him a certain portion of the fees, or to take from him a certain portion of the fees, or a certain fixed sum annually out of the fees, he would not have brought himself within he statute, or done anything illegal. (*u*)

The 49 Geo. III, c. 126, expressly extends the 5 & 6 Ed. VI., c. 16, to the colonies; at least such portions of it as are in their nature applicable. (*v*) The former statute expressly extends the 5 & 6 Ed. VI, c. 16, to the office of sheriff: and any act done in contravention of the latter statute is indictable, though not expressly made so. (*w*)

An agreement whereby, after reciting that A. had carried on the business of a law stationer at G., and had also been

(*q*) *Reg.* v. *Mercer*, 17 U. C. Q. B. 602.
(*r*) *Ibid.*
(*s*) *Ibid.*
(*t*) *Reg.* v. *Moodie*, 20 U. C. Q. B. 389.
(*u*) *Ibid.* 402, per *Robinson*, C. J.; see also *Foott* v. *Bullock*, 4 U. C. Q. B. 480.
(*v*) *Reg.* v. *Mercer*, 17 U. C. Q. B. 602.
(*w*) *Ibid.*

sub-distributor of stamps, collector of assessed taxes, etc., there, and that he had agreed with B. for the sale of the said business, and of all his goodwill and interest therein, to him, for the sum of £300. A., in consideration of the said sum of £300, agreed to sell, and B. agreed to purchase, the said business of a law stationer at G.; and whereby it was further agreed that A. should not, at any time after the first of March then next, carry on the business of a law stationer at G., or within ten miles thereof, or collect any of the assessed taxes, but would use his utmost endeavors to introduce B. to the said business and offices, is illegal and void, as being a contract for the sale of an office within the 5 & 6 Ed. VI., c. 16, and also within the 49 Geo. III., c. 126, which makes the offences prohibited by the former statute misdemeanors. (*x*)

An arrangement by a clerk of the Crown to resign his office in favor of his son, on condition of sharing the revenues and emoluments of the office, is illegal and void. (*y*)

The Quarter Sessions is a competent tribunal to hear and determine a charge, under 1 W. & M., c. 21, s. 6, against a clerk of the peace for having "misdemeaned himself in the execution of his office." And when the Quarter Sessions have determined the charge, the superior court cannot question the propriety of their decision. (*z*)

It seems that the treasurer of a municipality may be indicted for an application of the funds clearly contrary to law, even though sanctioned by a resolution of the council; or for paying a member of the council for his attendance. (*a*)

A court of justice has power to remove its officers, if unfit to be trusted with a professional *status* and character. If an advocate, for example, were found guilty of crime, there is no doubt the court would remove him. (*b*)

(*x*) *Hopkins* v. *Prescott*, 4 C. B. 578; and see *Reg.* v. *Charretie*, 13 Q. B. 447.
(*y*) *Delisle and Delisle*, Dob. Dig. 89.
(*z*) *Wildes* v. *Russell*, L. R. 1, C. P. 722.
(*a*) *East Nissouri* v. *Horseman*, 16 U. C. Q. B. 576; see also *Daniels* v. *Tp. of Burford*, 10 U. C. Q. B. 478.
(*b*) *Re Wallace*, L. R. 1, P. C. App. 295, per Lord *Westbury*.

But an advocate who has advised a client to oppose a writ of execution even by force, believing it to be null, cannot be convicted on a criminal information for such advice. (*c*)

A criminal information will lie against an officer who misconducts himself in the execution of his office. But such an information will never be granted against a judge, unless the court sees plainly that dishonest, oppressive, vindictive or corrupt motives, influenced the mind, and prompted the act complained against. (*d*)

On an application to file a criminal information against a Division Court judge, for his conduct in imposing a fine, for contempt, upon a barrister employed to conduct a case before him, the court held that, even if his conduct were erroneously treated by the judge as contemptuous, and, consequently, the adjudicature of contempt would, on a full and deliberate examination, be found incorrect, this would afford no ground whatever for a criminal information. (*e*) It has been questioned whether a criminal information is proper in the case of a judge of an inferior court of civil jurisdiction in relation to a matter over which he has exclusive jurisdiction. (*f*)

An attachment has been granted against commissioners of a Court of Requests, for trying a cause in which they were interested. (*g*) And where a magistrate acts in his office with a partial, malicious, or corrupt motive, he is guilty of a misdemeanor, and may be proceeded against by indictment or criminal information in the Queen's Bench. (*h*)

It is a well-established maxim of law that no one shall be a judge in his own cause, and the general rule applicable to judicial proceedings is, that the judgment of an interested judge is voidable, and liable to be set aside by prohibition, error, or appeal, as the case may be. (*i*) In cases of necessity

(*c*) *Reg.* v. *Morrison*, 3 *Revue Leg.* 525.
(*d*) *Re Recorder and Judge D. C. Toronto*, 23 U. C. Q. B. 376.
(*e*) *Ibid.*
(*f*) *Ibid.*; see also *Reg.* v. *Ford*, 3 U. C. C. P. 209.
(*g*) *Rex* v. *McIntyre*, Taylor, 22.
(*h*) Burns. Jus., vol. iii. 144-5, ed. 13.
(*i*) *Phillips* v. *Eyre*, L. R. 6 Q. B. 22, per *Willes, J.*

however, where all the judges having exclusive jurisdiction over the subject matter happen to be interested, the objection cannot prevail. And the objection does not apply to a party claiming the protection of an Act of Parliament, though he is a necessary party to its passing, as the governor of a colony, there being no analogy between judicial and legislative proceedings in this respect. (*j*)

A direct pecuniary interest in the matter in dispute disqualifies any person from acting as a judge in such matter. (*k*) The interest, however, which disqualifies at common law must be direct and certain, not remote or contingent. (*l*) Thus, the corporation of B. were the owners of water-works, and were empowered by statute to take the waters of certain streams, without permission of the mill-owners, on obtaining a certificate of justices that a certain reservoir was completed of a given capacity, and filled with water. An application was made to justices accordingly, which was opposed by mill-owners; but, after due inquiry, the justices granted the certificate. Two of the justices were trustees of a hospital and friendly society respectively, each of which had lent money to the corporation bonds, charging the corporate funds. Neither of the justices could, by any possibility, have any pecuniary interest in these bonds; but the security of their *cestui que trusts* would be improved by anything improving the borough fund, and the granting of the certificate would indirectly produce that effect, as increasing the value of the water-works. There was no ground to doubt that the justices had acted *bona fide;* and the court held that the justices were not disqualified from acting in the granting of the certificate, and the court refused a *certiorari* for the purpose of quashing it. (*m*)

The mere possibility of bias in favor of one of the parties does not *ipso facto* avoid the justice's decision; in order to have that effect, the bias must be shown at least to be real.

(*j*) *Phillips* v. *Eyre*, L. R. 6 Q. B. 22, per *Willes*, J.
(*k*) *Reg.* v. *Rand*, L. R. 1 Q. B. 232, per *Blackburn*, J.
(*l*) *Reg.* v. *M. S. & L. Ry. Co.*, L. R. 2 Q. B. 339, per *Mellor*, J.
(*m*) *Reg.* v. *Rand*, L. R. 1 Q. B. 230.

But if a judge is really biassed in favor of one of the parties, it would be very wrong in him to act, and it seems the court would interpose in such case. (*n*)

It seems no objection to a justice that he is remotely connected with one of the parties, so long as there is no consanguinity or affinity. (*o*)

If a person assault a justice, the latter might, at the time of the assault, order him into custody; but when the act is over, and time intervenes, so that there is no present disturbance, it becomes, like any other offence, a matter to be dealt with upon proper complaint, upon oath, to some other justice, who might issue his warrant; for neither a magistrate nor a constable is allowed to act officially in his own case, except *flagrante delictu*, while there is otherwise danger of escape, or to suppress an actual disturbance, and enforce the law while it is in the act of being resisted. (*p*)

Monopoly.—A by-law passed under 31 Vic., c. 30, s. 44, for exempting from taxation any person commencing any new manufacture of the nature contemplated by the section, and employing therein more than $1,000, and paying to operators more than $30 weekly, was held bad, for exempting new manufactures in preference to old-established business, and for exempting only those persons doing a specified amount of business. (*q*) The giving to one person of a trade a benefit which another of the same trade does not get also, is a monopoly of the worst description; (*r*) and a by-law passed for such a purpose would be void.

Rules in restraint of trade are not criminal, though they may be void as against public policy. (*s*) Nor are strikes necessarily illegal, and their legality or illegality must depend on the means by which they are enforced, and upon their

(*n*) *Reg.* v. *Rand*, L. R. 1 Q. B. 233, per *Blackburn*, J.; *Reg.* v. *Meyer*, L. R. 1 Q. B. D. 173.
(*o*) *Reg.* v. *Comrs. Highways, St. Joseph*, 3 Kerr, 583; see also on this subject *Wildes* v. *Russell*, L. R. 1 C. P. 722; *ex parte Leonard*, 1 Allen, 269.
(*p*) *Powell* v. *Williamson*, 1 U. C. Q. B. 156, per *Robinson*, C. J.
(*q*) *Pirie and the Corporation of Dundas*, 29 U. C. Q. B. 401.
(*r*) *Ibid.* 407, per *A. Wilson*, J.
(*s*) *Reg.* v. *Stainer*, L. R. 1 C. C. R. 230, 39 L. J. (M. C.) 54.

objects. They may be criminal, if part of a combination for the purpose of injuring or molesting either masters or men, or they may be simply illegal, as when they are the result of an arrangement depriving those engaged therein of the liberty of action. (*t*)

The Trade Unions Act, 1872, (*u*) (35 Vic., c. 30) declares that the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to a criminal prosecution for conspiracy, or otherwise

By 35 Vic., c. 31., D., every person who uses violence to any person, or any property, or threatens or intimidates any person in such a manner as would justify a justice of the peace, on complaint made to him, to bind over the person so threatening or intimidating to keep the peace, or who "molests" or "obstructs" any person in manner defined by the Act, with a view to coerce such person—being a master, to dismiss or cease to employ any workman; or, being a workman, to quit any employment, or return work before it is finished; being a master, not to offer, or, being a workman, not to accept, any employment or work; being a master or workman, to belong to, or not to belong to, any temporary or permanent association or combination; being a master or workman, to pay any fine or penalty imposed by any temporary or permanent association or combination; being a master, to alter the mode of carrying on his business, or the number or description of any persons employed byhim—shall be guilty of an offence against the Act, and shall beliable to imprisonment, with or without hard labor for a term not exceeding three months.

Any person shall, for the purposes of this Act, be deemed to molest or obstruct another person in any of the following cases: that is to say, (1) if he persistently follows such other

(*t*) *Farrer* v. *Close*, L. R. 4 Q. B. 612, per *Hannen*, J.; *Hilton* v. *Eckersly*, E. & B. 47.
(*u*) 35 Vic., c. 30.

person about from place to place; (2) if he hides any tools, clothes, or other property owned or used by such other person, or deprives him of, or hinders him in the use thereof; (3) if he watches or besets the house or place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place, or if with two or more other persons he follows such other person, in a disorderly manner, in or through any street or road.

By the 32 & 33 Vic., c. 20, s. 42, assaults in pursuance of any unlawful combination or conspiracy to raise the rate of wages, are punishable as misdemeanors.

These statutes, in a great measure, assimilate the law as to trades unions and strikes to that existing in England. Several cases have been decided in England, which may assist in the construction of the Canadian statutes. (*v*)

A by-law of Fredericton, to regulate the public market, required the stalls in the market to be leased annually, and declared that the lessee of a stall should receive from the mayor a license to occupy, and that any person occupying without a license should be liable to a penalty. In a prosecution for the penalty the court held that the only question was, whether the defendant had a license. (*w*)

Champerty and maintenance.—The offence of champerty is defined in the old books to be the unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute, or some profit out of it. (*x*) The object of the law is not so much to prevent the purchase or assign-

(*v*) See *Reg.* v. *Byderdike*, 1 M. & Rob. 179; *Reg.* v. *Rowlands*, 2 Den. 364, 17 Q. B. 671; *Reg.* v. *Duffield*, 5 Cox, 404; *Walsby* v. *Anley*, 30 L. J. (M. C.) 121; *O'Neill* v. *Longman*, 4 B. & S. 376; *O'Neill* v. *Kruger*, 4 B. & S. 389; *Reg.* v. *Druitt*, 10 Cox, 592, 601-2; *Reg.* v. *Shepherd*, 11 Cox, 325; *Reg.* v. *Selsby*, 5 Cox, C. C. 495; *Hilton* v. *Eckersly*, 6 E. & B. 47-53; 24 L. J. Q. B. 353; *Hornby* v. *Close*, L. R. 2 Q. B. 153; *Reg.* v. *Hunt*, 8 C. & P. 642; *Reg.* v. *Hewit*, 5 Cox, C. C. 162.

(*w*) *Ex parte Milligan*, 2 Allen, 583; see as to forestalling, *Wilson* v. *Corporation of St. Catharines*, 21 U. C. C. P. 462.

(*x*) *Carr* v. *Tannahill*, 31 U. C. Q. B. 223, per *Morrison*, J.; *Kerr* v. *Brunton*, 24 U. C. Q. B. 395, per *Hagarty*, J.; *Stanley* v. *Jones*, 7 Bing, 369.

ment *with the object* of maintaining and taking part in the litigation. (*y*) All the cases of champerty and maintenance are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce. (*z*)

The principles of the law of maintenance are recognized and adhered to in the modern cases. (*a*) But the general doctrines of the law are largely modified, and restrained in their operation to cases where there is danger of oppression or abuse ; (*b*) or where a man improperly, and for the purpose of stirring up litigation or strife, or of profiting by it, encourages others to bring actions, or make defences, which they have no right to make. (*c*)

Champerty is punishable at common law. (*d*) It seems the Crown is bound by the law on this subject. In *Smyth* v. *M'Donald*, (*e*) it was held that the Crown must first eject the occupant before selling land of which it is not in possession ; and that neither the 32 Hy. VIII., c. 9, nor the ordinary principles of the common law, allowed the conveyance of such land by the Crown. (*f*)

The plaintiff having recovered judgment against B. & P. agreed with the defendant that, if such judgment, or any portion of it, should be realized from property to be pointed out by him, the defendant should have one-third of the amount so realized. The agreement further provided that " all costs that may be incurred in endeavoring to make the money to be payable by him (the defendant), if unsuccessful, and the amount of such costs to be the first charge on any proceeds, the net balance to be divided." Goods pointed out by the

(*y*) *Carr* v. *Tannahill*, 31 U. C. Q. B. 223, per *Morrison*, J.
(*z*) *Ibid.* 224, per *Morrison*, J. ; *Prosser* v. *Edmonds*, 1 Y. & C. 497.
(*a*) *Carr* v. *Tannahill*, *supra*, 227, per *Morrison*, J.
(*b*) *Allan* v. *M'Heffey*, 1 Oldright, 121, per *Young*, C. J.
(*c*) *Ibid.* 122, per *Young*, C. J.
(*d*) *Scott* v. *Henderson*, 2 Thomson, 116, per *Haliburton*, C. J.
(*e*) 1 Oldright, 274.
(*f*) *Scott* v. *Henderson*, *supra*, 116, per *Haliburton*, C. J.

defendant having been seized, under the plaintiff's execution, were claimed, and, on an interpleader issue, were found to be the claimant's. The plaintiffs thereupon sued defendant upon the agreement for their costs of defence in the interpleader, etc., which they had been compelled to pay. It was held that such agreement, if not champerty, was illegal, as being opposed to public policy and the due administration of justice. (*g*)

Whether or no there must be a suit pending to constitute maintenance does not seem perfectly clear. The argument employed in *Kerr* v. *Brunton*, against the agreement being maintenance, was, that no suit was pending about any property, nor was it binding on the plaintiff to bring any suit. The court did not actually decide that the agreement amounted to maintenance in its strict sense, but held that, at all events, it was a great misdemeanor in the nature of the thing, and equally criminal at common law. (*h*) It would seem, from *Sprye* v. *Porter*, (*i*) that the agreement in *Kerr* v. *Brunton* was maintenance. In the former case, A., in consideration of one-fifth of the property to be recovered, agreed that, in case it should become necessary to institute proceedings at law or in equity, he would furnish such information and evidence as would ensure the recovery of the property; and Lord *Campbell* characterizes this as "maintenance in its worst aspect," although no proceeding was actually commenced or pending.

The plaintiffs having filed a bill for specific performance of a contract by one R. to sell a certain mine to them, it was agreed between the plaintiffs and T., one of the now defendants, while such suit was pending, that certain persons should purchase said mine from the plaintiffs; that they should deposit the money required for security for costs which the plaintiffs had been ordered to give in said suit, and pay all costs incurred, or to be incurred therein

(*g*) *Kerr* v. *Brunton*, 24 U. C. Q. B. 390.
(*h*) *Wood* v. *Downes*, 18 Ves. 125.
(*i*) 7 E. & B. 58.

or any other suit brought or defended by them respecting said mine, and pay all moneys due for the purchase thereof; and, lastly, to allot to each of the plaintiffs a twentieth share therein, if they should succeed in getting a title through the suit, and that they would settle all claims of Messrs. E. & G. against the plaintiffs. The plaintiffs having sued defendants on the last-mentioned covenant, the court held upon demurrer to a plea setting out the transaction, that the agreement was void for champerty and maintenance. (*j*) But the agreement of T. to purchase the mine, though then in litigation, was not necessarily illegal. (*k*) The agreement with respect to the costs, that T. should pay them, and carry on the proceedings, was probably illegal. (*l*) Had T. had any interest in the property at the time of the purchase from the plaintiffs, the purchase or prosecution of the suit would not have been illegal; (*m*) or had he then had a claim which he believed gave him an interest in the property. (*n*)

A sharing in the profits derived from the success of the suit is essential to constitute champerty. (*o*) The plaintiff agreed with a solicitor to give him a portion of the profits arising from the successful prosecution of a suit to establish his right to certain coal mines, upon being indemnified against the costs of the proceedings, and the court held that the contract amounted to champerty and maintenance. (*p*)

After verdict and before judgment, a plaintiff in ejectment assigned the subject-matter of the suit to his attorney, as a security for money advanced by the attorney in carrying on the suit and for other purposes, and for the

(*j*) *Carr* v. *Tannahill*, 31 U. C. Q. B. 217.
(*k*) S. C. 31 U. C. Q. B. 209, per *Wilson*, J.; *Harrington v. Long*, 2 M. & K. 593.
(*l*) *Carr* v. *Tannahill*, 31 U. C. Q. B. 209, per *Wilson*, J.; *Hunter* v. *Daniel*, 4 Hare, 431.
(*m*) *Ibid.* 420-430.
(*n*) *Findon* v. *Parker*, 11 M. & W. 675; *Carr* v. *Tannahill*, *supra*, 210, per *A. Wilson*, J.
(*o*) *Hartley* v. *Russell*, 2 S. & St. 244-252; *Carr* v. *Tannahill*, *supra*, 210, per *Wilson*, J.
(*p*) *Hilton* v. *Woods*, L. R. 4 Eq. 432.

amount due to him for his professional services. It was held, affirming the judgment of the Queen's Bench, that the assignment was not void as against public policy, or by reason of any of the statutes against champerty and maintenance ; (*q*) for the contract was confined to the payment of a debt already due for costs subject to taxation; and, therefore, the attorney got nothing but a security for a just debt.

A conveyance, whether voluntary, or for valuable consideration of property which the grantor has previously conveyed by deed, voidable in equity, is not void on the ground of champerty. (*r*) An agreement by a shareholder in a company which is being compulsorily wound up, that, in consideration of a pecuniary equivalent, he will support the claim of a creditor, comes within the rule of law against maintenance, because it is to uphold a claim to the disturbance of common right. (*s*)

The 32 Hy. VIII., c. 9, as to selling pretended titles, is in force here. (*t*) The intention of this statute, and the ground of the principle of the common law, which is said to be fully in accordance with it, was that a person claiming a right which he knew to be disputed, should not sell a mere lawsuit, but should first reduce the right to possession and then sell. (*u*) A person cannot be convicted on this statute merely upon his own admission that he has taken a deed from a party out of possession. Some evidence *aliunde* must be adduced of the existence of such deed. (*v*)

Buying an equity of redemption in a mortgaged property, of which the person selling has been out of possession for many years, is not buying a disputed title within the statute. (*w*)

(*q*) *Anderson* v. *Radcliffe*, 7 U. C. L. J. 23 (Ex Chr.) E. B. & E. 806-819.
(*r*) *Dickenson* v. *Burrell*, L. R. 1 Eq. 337.
(*s*) *Elliott* v. *Richardson*, L. R. 5 C. P. 748, per *Willes*, J.
(*t*) *Ante* p. 8.
(*u*) *Ross q. t.* v. *Meyers*, 9 U. C. Q. B. 288, per *Robinson*, C. J.
(*v*) *Aubrey q. t.* v. *Smith*, 7 U. C. Q. B. 213.
(*w*) *M'Kenzie* v. *Miller*, 6 U. C. Q. B. O. S. 459.

In the province of Ontario by the R. S. O., c. 98, s. 5, the 32 Hy. VIII., c. 9, is to some extent repealed, and a person selling a right of entry is protected from the penalties imposed by the 32 Hy. VIII., c. 9; for he can no longer be looked upon as selling a pretended right, when the law allows such right to be the subject of legal conveyance. (*x*) But it would seem that the statute is only repealed to the extent of permitting a man to sell and convey a right of entry which is actually subsisting in himself, and that the sale of a pretended right which does not in fact exist is still within the statute. (*y*) Moreover, the R. S. O., c. 98, applies only to rights of entry as on a disseizin. (*z*)

The R. S. O., c. 116, s. 7, renders choses in action assignable at law. This enactment conflicts in principle with the 32 Hy. VIII., c. 9, and it may be questioned whether a conviction would now be had under it.

Bigamy.—It might be contended from the language of the 32 & 33 Vic., c. 20, s. 58, that it only applies to the case of a second marriage, and that the offence of polygamy, in its ordinary acceptation, is not comprehended within its provisions. Assuming that under this statute a person guilty of polygamy cannot relieve himself from the penalties attaching to bigamy, it may be a question, in the event of a plurality of marriages, to which of them proof should be directed; whether any two of them, or the first and second, or all.

The 4 Ed. VI., stat. 3, c. 5, and 1 Jac. I., c. 11, may perhaps apply here, except in so far as they are superseded by the Colonial Act.

On trials for bigamy, the guilt or innocence of the defendant depends upon the legality of the first marriage; and before the jury can convict him they must clearly see that a prior legal marriage has in fact taken place. (*a*) It seems

(*x*) *Baby q. t.* v. *Watson*, 13 U. C. Q. B. 531.
(*y*) *Ibid.*
(*z*) *Hunt* v. *Bishop*, 8 Ex. 675; *Hunt* v. *Remnant*, 9 Ex. 635; *Bennett* v. *Herring*, 3 C. B. N. S. 370.
(*a*) *Breakey* v. *Breakey*, 2 U. C. Q. B. 353, per *Robinson*, C. J.

that if the marriage is voidable merely, it will suffice to constitute bigamy. (*b*) It has been held that though the second marriage would have been void, as for consanguinity or the like, the defendant is guilty of bigamy. (*c*) But the majority of the judges of the Irish Court of Criminal Appeal have held that to constitute the offence of bigamy, the second marriage must be one which, but for the existence of the previous marriage, would have been a valid marriage. (*d*) This doctrine has been very materially modified in a late case. (*e*) It is there laid down that it is the *appearing* to contract a second marriage, and the going through the ceremony, which constitutes the crime of bigamy. (*f*)

Where a person already bound by an existing marriage, goes through a form of marriage known to and recognized by the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, such person is guilty of bigamy, notwithstanding any special circumstances which, independently of the bigamous character of the marriage, may constitute a legal disability in the parties, or make the form of marriage resorted to inapplicable to their particular case. Thus where the prisoner, having a wife living, went through the ceremony of marriage with another woman who was within the prohibited degrees of consanguinity, so that the second marriage, even if not bigamous, would have been void under the 5 & 6 Wm. IV., c. 54, s. 2, it was held that he was guilty of bigamy. (*g*)

The material inquiry, therefore, in cases of bigamy, is as to the validity of the alleged marriages, and the evidence by which such validity may be established.

(*b*) *Reg.* v. *Jacobs*, 2 Mood. C. C. 140; Arch. Cr. Pldg. 886.
(*c*) *Reg.* v. *Brawn*, 1 C. & K. 144.
(*d*) *Reg.* v. *Fanning*, 10 Cox, 411; see also *Reg.* v. *Clarke*, *ibid.* 474; Arch. Cr. Pldg. 887.
(*e*) *Reg.* v. *Allen*, *infra*.
(*f*) See *Reg.* v. *Brawn*, *supra*, 144, per Lord *Denman*; *Reg.* v. *Penson*, 5 C. & P. 412.
(*g*) *Reg.* v. *Allen*, L. R. 1 C. C. R. 367; *Reg.* v. *Fanning*, *supra*, disapproved.

Under the Con. Stat. U. C., c. 32, s. 6, a copy of an extract from the register of the marriage produced from the proper custody, if signed and certified in compliance with this clause, is sufficient evidence of the marriage, provided some proof, either direct or presumptive, be given of the identity of the parties. (*h*)

Evidence of reputation, or the presumption of marriage, arising from long cohabitation, will not suffice on indictments for bigamy, but there must be proof of a marriage in fact, such as the court can judicially hold to be valid. (*i*) The admission of the first marriage by the prisoner, unsupported by other testimony, is sufficient to support a conviction for bigamy. (*j*) The prisoner's admission of a prior marriage is evidence that it was lawfully solemnized. (*k*) The first wife is not admissible as a witness to prove that her marriage with the prisoner was invalid; (*l*) and she cannot be allowed to give evidence either for or against the prisoner. (*m*) But, after proof of the first marriage, the second wife may be a witness; (*n*) for then it appears that she is not the legal wife of the prisoner. (*o*)

On an indictment for bigamy, the witness called to prove the first marriage swore that it was solemnized by a justice of the peace, in the state of New York, who had power to marry; but this witness was not a lawyer or inhabitant of the United States, and did not state how the authority was derived, as by written law or otherwise. Although the court, in their individual capacity, knew that justices of

(*h*) *Re Hall's estate*, 22 L. J. (Ch.) 177; *re Porter's trusts*, 25 L. J. (Ch.) 688; Arch. Cr. Pldg. 884.

(*i*) *Reg.* v. *Smith*, 14 U. C. Q. B. 567-8, per *Robinson*, C. J.; *Breakey* v. *Breakey*, 2 U. C. Q. B. 353, per *Robinson*, C. J.; and see *doe dem. Wheeler* v. *M'Williams*, 3 U. C. Q. B. 165.

(*j*) *Reg.* v. *Creamer*, 10 L. C. R. 404.

(*k*) *Reg.* v. *Newton*, 2 M. & Rob. 503; *Reg.* v. *Simmonsto*, 1 C. & K. 164; Arch. Cr. Pldg. 885.

(*l*) *Reg.* v. *Madden*, 14 U. C. Q. B. 588; 3 U. C. L. J. 106; *Reg.* v. *Tubbee*, 1 U. C. P. R. 103. per Macaulay, C. J.

(*m*) *Reg.* v. *Bienvenu*, 15 L. C. J. 141.

(*n*) *Reg.* v. *Tubbee*, *supra*, 98.

(*o*) *Reg.* v. *Madden*, *supra*, 3 U. C. L. J. 106, per *Robinson*, C. J.

the peace had such power in the state of New York, and that the evidence given was correct, yet they held it insufficient. (*p*)

The production and proof of a deed executed by the prisoner, containing a recital of his having a wife and child in England, and conveying lands in trust for them, is not sufficient evidence to prove a prior marriage, even when coupled with evidence of statements made by him at the time of execution to one of the trustees, to the effect that he had quarrelled with his present wife, and had a lawsuit with her; that the place had been bought with his wife's money, and he wished it to go to her; the trustees never having paid over anything to her, nor written to or heard from her. (*q*)

In one case, where the prisoner relied on the first wife's lengthened absence, and his ignorance of her being alive, it was held that he must show inquiries made, and that he had reason to believe her dead, or, at least, could not ascertain where she was, or that she was living, more especially where as in this case he had deserted her, and this notwithstanding that the first wife has married again. (*r*)

In another case, when it was proved that the prisoner and his first wife had lived apart for the seven years preceding the second marriage, it was held incumbent on the prosecution to show that during that time he was aware of her existence; and that in the absence of such proof, the prisoner was entitled to an acquital. (*s*) From these cases it would seem that the circumstances connected with the separation, affect materially the burden of proof.

On an indictment for bigamy, it is incumbent on the prosecution to prove to the satisfaction of the jury that the husband or wife, as the case may be, was alive at the date

(*p*) *Reg.* v. *Smith*, 14 U. C. Q. B. 565.
(*q*) *Reg.* v. *Duff*, 29 U. C. C. P. 255.
(*r*) *Reg.* v. *Smith*, 14 U. C. Q. B. 565.
(*s*) *Reg.* v. *Curgerwen*, L. R. 1, C. C. R. 1; 35 L. J. (M. C.) 58; *Reg.* v. *Bienvenu*, 15 L. C. J. 341; *Reg.* v. *Fontaine*, 15 L. C. J. 141; see also *Reg.* v. *Heaton*, 3 F. & F. 819.

of the second marriage. This is purely a question of fact for the jury to decide on the particular circumstances of the case, and there is no presumption of law either that the party is alive or dead. (*t*) Therefore, where, on a trial for bigamy, it was proved that the prisoner married A. in 1836, left him in 1843, and married again in 1847. Nothing was heard of A. after the prisoner left him, nor was any evidence given of his age. The court held that there was no presumption of law either in favor of or against the continuance of A.'s life up to 1847, but that it was a question for the jury, as a matter of fact, whether or not A. was alive at the date of the second marriage. (*u*) But when the case is brought within the operation of the proviso in the 32 & 33 Vic., c. 20, s. 58, which exempts from criminal liability "any person marrying a second time, whose husband or wife has been continually absent from such person for the space of seven years, then last past," there is no question for the jury, and the prisoner is exonerated from criminal liability, though the first husband or wife be proved to have been living at the time when the second marriage was contracted. By this proviso, the legislature sanctions a presumption that a person who has not been heard of for seven years is dead; but the proviso affords no ground for the converse proposition,—namely, that when a person has been seen or heard of within seven years, a presumption arises that he is still living. (*v*)

The prisoner having a wife living, was married to another woman in the presence of the registrar, describing himself, not as E. R., his true name, but as B. R. There was no evidence to show that the second wife knew that his Christian name was misdescribed. It was held, nevertheless, that the prisoner was guilty of bigamy, for the presumption in favor of marriage clearly imposed the burden of proving the invalidity of the second marriage upon the prisoner. (*w*)

(*t*) *Reg.* v. *Lumley*, L. R. 1, C. C. R. 196; 38 L. J. (M. C.) 86.
(*u*) *Ibid.*
(*v*) *Reg.* v. *Lumley*, L. R. 1 C. C. R. 198, per *Lush*, J.
(*w*) *Reg.* v. *Rea*, L. R. 1 C. C. R. 365.

Where the prisoner had sucessively married A., B., C. and D., on an indictment for marrying D., C. being then alive, it was held that, whether or not any evidence of the fact were offered, it was for the jury to say whether A. was living at the time of the prisoner's marriage with C. (*x*)

The common and statute law of England in relation to marriage, as existing at the time of the enactment of the 32 Geo. III., c. 1, was introduced by this statute. The canon law, so far as it was part of the law of England at that time, was also introduced, with the 26 Geo. II., c. 33; 25 Hy. VIII., c. 22; 28 Henry VIII., c. 7; 28 Henry VIII., c. 16; and 32 Henry VIII., c. 38; so far as they remained in force in England. (*y*)

Before the 26 Geo. II, c. 33, clandestine marriages, though not void, were illegal, and subjected the parties to ecclesiastical censure: *i. e.*, all marriages were required to be celebrated in *facie ecclesiæ*, and by banns or license, or if a minor, by consent of parents, otherwise they were voidable in the ecclesiastical courts. Such marriages were rendered void by this statute, but the 11th clause thereof, in which the avoiding provision is contained, does not apply here. It is therefore illegal in this country, as it was in England before the 26 Geo. II., c. 33, to marry by license, where both or either of the parties are under twenty-one, without the consent of parents or guardians. But such marriages are not absolutely void. They are, however, irregular. (*z*)

The Imp. Act 5 and 6 Wm. IV, c. 54, is one of convenience and policy, and does not expressly, or by necessary intendment, extend to the colonies. It is, therefore, not in force here. This statute avoids all marriages celebrated between persons within the prohibited degrees of consanguinity; and, under it, a marriage by a man with the sister of his

(*x*) *Rex* v. *Willshire*, L. R. 6 Q. B. D. 366.
(*y*) *Hodgins* v. *McNeil*, 9 U. C. L. J. 126, per *Esten*, V.-C.; 9 Grant, 305; *Reg.* v. *Roblin*, 21 U. C. Q. B. 357; see 9 U. C. L. J. 1, as to the English marriage laws, when the 32 Geo. III., c. 1, was passed.
(*z*) *Hodgins* v. *McNeil*; *Reg.* v. *Roblin*, *supra*.

deceased wife is absolutly void, (*a*) though solemnized abroad between British subjects, in a country by the law of which the marriage would have been valid. (*b*) This doctrine does not apply here; consequently the marriage of a man with the sister of his deceased wife is not void. (*c*)

To render a marriage contracted by banns invalid, it must be contracted with a knowledge by both parties that no true publication of banns has taken place. (*d*)

It seems that if parties are married by banns, it is no objection that they are under age; at all events, such was the law in England prior to the 26 Geo. II., c. 33. (*e*) As the publication of banns in the open manner required gives parents and guardians timely notice of the intended marriage, and an opportunity of forbidding it, so that, if they make no effort to prevent it, their consent may reasonably be assumed, (*f*) it would not seem unreasonable to hold that the marriage by banns of a minor should be valid. Where banns have been published, and no dissent been expressed by parents or guardians at the time of publication, the husband being under age does not make the marriage void, even by the English Marriage Act 26 Geo. II., c. 33. (*g*) It is not necessary that marriages should be solemnized in a church, or within any particular hours. (*h*)

The Imp. stat. 28 and 29 Vic., c. 64, declares that colonial laws establishing the validity of marriages shall have effect throughout Her Majesty's dominions. The 11 Geo. IV., c. 36, cured defects in the form of marriages solemnized by justices of the peace before the passing of the Act. (*i*)

The 18 Vic., c. 129, indicates clearly that the former statute was not intended to operate retrospectively, except

(*a*) *Reg.* v. *Chadwick*, 11 Q. B. 173; 17 L. J. (M. C.) 33.
(*b*) *Brook* v. *Brook*, 3 Smale & G. 481.
(*c*) *Hodgins* v. *McNeil*, 9 Grant, 305; 9 U. C. L. J. 126.
(*d*) *Reg.* v. *Rea*, L. R. 1 C. C. R. 365, per *Kelly*, C. B.; *Rex* v. *Wroxton*, 4 B. & Ad. 640; *Tongue* v. *Tongue*, 1 Moore, P. C. cases, 90.
(*e*) *Rex* v. *Inhab. Hodnetts*, 1 T. R. 99, per Lord *Mansfield*.
(*f*) *Reg.* v. *Roblin*, 21 U. C. Q. B. 454, per *Robinson*, C. J.
(*g*) *Reg.* v. *Secker*, 14 U. C. Q. B. 604.
(*h*) *Reg.* v. *Secker*, *supra*; Con. Stat. U. C. c. 72, s. 3.
(*i*) *Doe dem. Wheeler* v. *McWilliams*, 2 U. C. Q. B. 77.

in the case of marriages solemnized by persons who before that Act had authority to solemnize marriage. The 11 Geo. IV., c. 36, had two distinct objects,—first, to remove difficulties which might arise in consequence of marriages having been irregularly performed by persons who had authority to marry; and, secondly, to confer authority to solemnize marriages upon ministers of certain religious bodies, whose ministers had no such authority before that Act was passed. The Act has retrospective force as to the latter object only. (*j*)

The 23 Vic., c. 11, and 24 Vic., c 46, confirm and legalize certain marriages therein mentioned. Chapters 46 and 47 of the 25 Vic. contain certain provisions as to registering marriages and the offences connected therewith. Marriages contracted in Ireland between members of the Church of England and Presbyterians celebrated by ministers not belonging to the Church of England are legalized by the Imp. stat. 5 & 6 Vic., c. 26, and such marriages celebrated before that Act was passed are legal marriages in this country. (*k*) A written contract is not essential to the validity of a Jewish marriage, which has been solemnized with all the usual forms and ceremonies of the Jewish service and faith. Such marriage is valid, though there exists in relation to it a written contract which is not produced. (*l*) A case has been decided in Quebec as to the marriage of a Lower Canadian by birth with a squaw of the Cree nation. (*m*) In this case it was held (*inter alia*) that a marriage contracted where there are no priests, no magistrates, or civil or religious authority, and no registers, is valid, though not accompanied by any religious or civil ceremony. An Indian marriage between a Christian and a woman of that nation or tribe, is valid, notwithstanding the assumed existence of polygamy and divorce

(*j*) *Pringle* v. *Allan*, 18 U. C. Q. B. 578, per *Robinson*, C. J.
(*k*) *Breakey* v. *Breakey*, 2 U. C. Q. B. 349.
(*l*) *Frank* v. *Carson*, 15 U. C. C. P. 135.
(*m*) *Connolly* v. *Woolrich*, 11 L. C. J. 197.

at will which are no obstacles to the recognition by our courts of a marriage contracted according to the usages and customs of the country; and an Indian marriage, according to the usage of the Cree country, followed by cohabitation and repute, and the bringing up of a numerous family, will be recognized as a valid marriage by our courts. (*n*)

A marriage in a foreign country between persons not being British subjects, if invalid there, must be held invalid in this country, though the parties have done all in their power to make it a valid legal marriage. (*o*) The age of consent to marriage in a woman is twelve, (*p*) and for a man fourteen. If a boy under fourteen, or a girl under twelve contracts matrimony, it is void, unless both husband and wife consent to and confirm the marriage after the minor arrives at the age of consent. (*q*)

In an indictment for bigamy committed in the United States, it is necessary that the indictment should contain allegations that the accused is a British subject; that he is or was resident in the province, and that he left it with intent to commit the offence. (*r*) The words, "or elsewhere," in the 32 & 33 Vic., c. 20, s. 58, extend to bigamy committed in a foreign jurisdiction. (*s*) It is immaterial whether the second marriage takes place in Canada or in a foreign country, provided, if the second marriage take place out of Canada, the accused be a subject of Her Majesty. (*t*) A soldier convicted of bigamy is not thereby discharged from military service. (*u*)

It has been held that, under the 55 Geo. III., c. 3, a writ of *exigi facias* against a person against whom an indictment for bigamy has been found at the assizes, will be awarded by this court upon the application of the prosecutor, without its being applied for by the attorney-general. (*v*)

(*n*) *Connolly* v. *Woolrich*, 11 L. C. J. 197.
(*o*) *Harris* v. *Cooper*, 31 U. C. Q. B. 182.
(*p*) *Reg.* v. *Bell*, 15 U. C. Q. B. 287-9.
(*q*) *Reg.* v. *Gordon*, R. & R. 48; Arch. Cr. Pldg. 886.
(*r*) *Reg.* v. *McQuiggan*, Rob. Dig. 123-4.
(*s*) *Ibid.*
(*t*) See sec. 58.
(*u*) *Reg.* v. *Creamer*, 10 L. C. R. 404.
(*v*) *Rex* v. *Elrod*, Taylor, 120.

Libel.—A libel upon an individual is a malicious defamation of any person made public, either by printing, writing, signs, or pictures, in order to provoke him to wrath, or to expose him to public hatred, contempt, or ridicule. (*w*)

Wherever an action will lie for a libel, without laying special damage, an indictment will also lie. (*x*) An action for libel lies against a corporation aggregate where malice in law may be inferred from the publication of the words. (*y*)

It would seem also that a corporation may be indicted by its corporate name, and fined for the publication of such libel, (*z*) and an action for libel may be brought by one corporation against another. (*a*) A joint action may be maintained against several persons for the joint publication of a libel. (*b*) It seems also that an indictment or information will lie against all persons concerned in the joint publication of a libel. (*c*)

The Imperial statute 32 Geo. III., c. 60, is in force in Canada, and consequently it is for the jury to say whether under the facts proved there is a libel, and whether the defendant published it. (*cc*)

Where the defendant published the following of and concerning the plaintiff,—"Caution: To all persons who may be entering into any arrangements with J. M. C. for his self-action cattle and stock pump, who claims to have patented the same in April last, I wish by this notice to caution the public against having anything to do with Cousins or his pumps, it being an infringement on my patent, which was obtained by me in 1858. I intend to prosecute him immediately. Beware of the fraud and save costs,"—it was held that this publication disclosed a libel on the plaintiff person-

(*w*) Arch. Cr. Pldg. 857.
(*x*) Arch. Cr. Pldg. 857; *Stanton* v. *Andrews*, 5 U. C. Q. B. O. S. 229, per *Macaulay*, J.
(*y*) *Whitfield* v. *S. E. Ry. Co.*, 4 U. C. L. J. 242; E. B. & E. 115.
(*z*) *E. C. Ry. Co.* v. *Broom*, 6 Ex. 314; Arch. Cr. Pldg. 7.
(*a*) *L'Institut Canadien* v. *Le Nouveau Monde*, 17 L. C. J. 296.
(*b*) *Brown* v. *Hirley*, 5 U. C. Q. B. O. S. 734.
(*c*) *Ibid.*; *Rex* v. *Benfield*, Burr. 980; 5 Mod. 167.
(*cc*) *Reg.* v. *Dougall*, 18 L. C. J. 85.

ally, in the caution to all persons about to enter into arrangements with the plaintiff for his pumps, against having anything to do with plaintiff or his pumps, and in the words "beware of the fraud," in relation to the infringement of the patent. (*d*)

Where the plaintiffs were manufacturers of bags, and manufactured a bag which they called the "bag of bags;" and the defendant printed and published concerning the plaintiffs and their business the words following: "As we have not seen the bag of bags, we cannot say that it is useful, or that it is portable, or that it is elegant. All these it may be. But the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar, and which has been forced upon the notice of the public *ad nauseam*." It was held on demurrer (by *Mellor* and *Hannen*, J.J.) that it was a question for the jury whether the words did not convey an imputation on the plaintiffs' conduct in their business, and whether the language went beyond the limits of fair criticism; by *Lush*, J., that the words could not be deemed libellous, either upon the plaintiffs, or upon the mode of conducting their business. (*e*)

The defendant published in a newspaper an article respecting the plaintiff as inspecting field-officer of volunteers and militia, in which, after referring to a recent inspection of a particular battalion, and stating that it was not often that "an example of swearing and drunkenness was set by the officers to their men," it was said it was very little to the plaintiff's credit that "he appears before the volunteers as a transgressor without apology of those laws of discipline and good conduct, the observance of which he so strictly enjoins." In another part, it was said, "we have been for some time aware that the plaintiff was often incapable of attending to his duty here and elsewhere, and now that his evil habits appear to be entirely beyond his control, it is high time for

(*d*) *Cousins* v. *Merrill*, 16 U. C. C. P. 114.
(*e*) *Jenner* v. *A'Beckett*, L. R. 7 Q. B. 11.

the head of the department to deal with the case." Per *Draper*, C. J., the publication complained of, without the aid of any inuendo or explanation, is libellous. (*f*)

To charge a man with ingratitude is libellous, and such charge may also be libellous, notwithstanding that the facts upon which it is founded are stated, and they do not support the charge. (*g*)

A written paper charging the plaintiff with having wrongfully taken the defendant's logs, sawing them up and selling the lumber, is libellous, without any averment or proof that larceny was thereby imputed. (*h*) So a written paper, charging the plaintiff, an attorney, with being governed entirely by a craving after his own gains, without regard to the interests of his clients, and reckless of bringing them to ruin, is libellous. (*i*) But it is not libellous to write of a man that his outward appearance is more like that of an assassin than of an honest man. (*j*)

The publication of any obscene writings is unlawful and indictable. (*k*) The test of an obscene publication is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. (*l*) It is no defence to an indictment for such a publication that the object of the party was laudable; (*m*) for, in case of libel, the law presumes that the party intended what the libel is calculated to effect. (*n*)

It is now well established that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are

(*f*) *Baretto* v. *Pirie*, 26 U. C. Q. B. 469.
(*g*) *Cox* v. *Lee*, L. R. 4 Ex. 284.
(*h*) *Connick* v. *Wilson*, 2 Kerr, 496.
(*i*) *Andrews* v. *Wilson*, 3 Kerr, 86.
(*j*) *Lang* v. *Gilbert*, 4 Allen, 445.
(*k*) *Reg.* v. *Hicklin*, L. R. 3 Q. B. 360; 37 L. J. (M. C.) 89.
(*l*) *Ibid.* 371, per *Cockburn*, C. J.
(*m*) *Ibid.*
(*n*) *Reg.* v. *Atkinson*, 17 U. C. C. P. 304, per *J. Wilson*, J.

neither criminally nor civilly responsible. (*o*) The immunity thus afforded in respect to the publication of the proceedings of courts of justice rests on a twofold ground: First, the occasion is such as repels the presumption of malice, for they are published without any reference to the individuals concerned, and solely to afford information to the public for the benefit of society. The other and broader principle on which this exception to the general law of libel is founded is, that the advantage to the community from publicity being given to the proceedings of courts of justice is so great, that the occasional inconvenience to individuals arising from it must yield to the general good. (*p*)

As to the publication of *ex parte* proceedings of courts of justice, such as before magistrates, and even before the superior courts—as, for instance, applications for criminal informations—if an indictment were preferred for such publication, it would probably be held that the criterion of the privilege is not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the party affected. (*q*)

As to the privilege of reporting legal proceedings, the dignity of the court cannot be regarded, but only the nature of the alleged judicial proceeding which is reported. For this purpose, no distinction can be made between a court *pie poudre* and the House of Lords sitting as a court of justice, But as to magistrates, if, while occupying the bench from which magisterial business is usually administered, they, under pretence of giving advice, publicly hear slanderous complaints, over which they have no jurisdiction although their names may be in the commission of the peace, a report

(*o*) *Wason* v. *Walter*, L. R. 4 Q. B. 87, per *Cockburn*, C. J. 38; L. J. (Q. B.) 34; *Ryalls* v. *Leader*, L. R. 1 Ex. 296; 35 L. J. Ex. 185; but see *Small* v. *McKenzie*, Draper, 188.

(*p*) *Wason* v. *Walter*, L. R. 4 Q. B. 87-8, per *Cockburn*, C. J.

(*q*) *Ibid.* 94, per *Cockburn*, C. J.

of what passes is as little privileged as if they were illiterate mechanics assembled in an alehouse. (*r*)

The privilege accorded to a fair and impartial report of proceedings in a public court of justice extends to preliminary proceedings on a charge of an indictable offence before a magistrate, sitting in an open police court, where the proceedings terminate in the dismissal of the charge, and where, the report keeping pace with the proceedings, which occupy several days, is published in parts, in different numbers of a newspaper, and a portion of it while the proceedings are pending. But the privilege does not extend to comments by the reporter reflecting on any of the parties; as in an account of proceedings out of which an abortive charge of perjury arose, to the statement that the evidence of certain witnesses entirely negatived the story of the defendant, and satisfied the court that he knew that it was false. (*s*)

Proceedings before magistrates, under the 32 & 33 Vic., c. 31, "in relation to summary convictions and orders," in which, after both parties are heard, a final judgment is given, subject to appeal, are strictly of a judicial nature; the place in which such proceedings are held is an open court; (*t*) the defendant, as well as the prosecutor, has a right to the assistance of attorney and counsel, and to call what witnesses he pleases; and both parties having been heard, the trial and the judgment may lawfully be made subject of a printed report, if that report be impartial and correct. (*u*)

A magistrate, upon any preliminary inquiry respecting an indictable offence, may, if he thinks fit, carry on the inquiry in private, and the publication of any such proceedings before him would be unlawful; but while he continues to sit *foribus apertis*, admitting into the room where

(*r*) *Lewis* v. *Levy*, 4 U. C. L. J. 215, per *Campbell*, C. J.; E. B. & E. 554.
(*s*) *Ibid.* 213; E. B. & E. 537.
(*t*) See sec. 29.
(*u*) *Lewis* v. *Levy*, 4 U. C. L. J. 215, per *Campbell*, C. J.

he sits as many of the public as can be conveniently accommodated, thinking that this course is best calculated for the investigation of truth and the satisfactory administration of justice, the court in which he sits is to be considered as a public court of justice. (*v*)

The privilege of publishing judicial proceedings extends to all parties concerned therein. The acts, words, or writings of judges of the superior or county courts, grand or petty jurymen, or witnesses, are absolutely privileged, on the ground that the law gives faith and credence to what they do in the course of a judicial proceeding. (*w*)

An affidavit made in a judicial proceeding is privileged on the established principle that no action will lie for words spoken or written in the course of a judicial proceeding, and this although the affidavit is libellous in its language, and there is evidence of express malice. (*x*)

A letter, or report in writing, by a military officer, in the ordinary course of his duty as such officer, is an absolutely privileged communication, even if written maliciously, and without reasonable and probable cause. (*y*)

A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which, without this privilege, would be slanderous and actionable.

The defendant, with others, having presented a memorial to the Secretary of State for the Home Department, setting out certain acts done by the plaintiff, and complaining of his conduct, and requesting his removal from the office of a justice of the peace; the court held, in an action for libel by the plaintiff against the defendant, the jury having found *bona fides*, that the communication was privileged, since,

(*v*) *Lewis* v. *Levy*, 4 U. C. L. J. 216, per *Campbell*, C. J.
(*w*) *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 103, per *Cockburn*, C. J.
(*x*) *Henderson* v. *Broomhead*, 5 U. C. L. J. 262; 4 Ex. N. S. 569.
(*y*) *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 94, per *Mellor* and *Lush*, J.J., *Cockburn*, C. J., dissenting.

being addressed to the Secretary of State, it was virtually addressed to Her Majesty, for the removal of the plaintiff from his office, and must be taken to be done *bona fide* with a view of obtaining redress, and that the memorial was properly addressed to the Secretary of State, he having a corresponding duty to perform in the matter. (*z*)

An action for libel contained in communications made to the executive Government, with a view of obtaining redress, cannot be sustained, unless it can be proved that the party making them acted maliciously, and without probable cause. (*a*)

A petition to the Lieutenant Governor, complaining of a public grievance in regard to the conduct of commissioners of the Court of Requests, and charging them with partiality, corruption, and connivance at extortion, and highly defamatory in its language, signed by a great number of persons, and praying for redress, is a privileged communication; and no action for libel will lie upon it, though the defendant has circulated it, and been the means of obtaining signatures to it of individuals who knew nothing of the facts stated in such petition, and some of whom supposed it to be a matter of a totally different description. (*b*)

The principle of the law laid down in the Bill of Rights, 1 Wm. & M., stat. 2, namely, that it is the right of the subject to petition the Queen, and that all commitments and prosecutions for such petition are illegal, applies to the case of a petition to the Governor, as representing the Queen. The ground on which the principle rests applies as well to petitions addressed to the head of the executive Government as to either of the other branches of the legislature. But, in any of these cases, evidence of malice, coupled with the knowledge that the statements were false, or the inference of malice arising from the certain consciousness on the part of the defendant that the statements were false, may, perhaps,

(*z*) *Harrison* v. *Bush*, 1 U. C. L. J. 156; 5 E. & B. 344.
(*a*) *Rogers* v. *Spalding*, 1 U. C. Q. B. 258.
(*b*) *Stanton* v. *Andrews*, 5 U. C. Q. B. O. S. 211.

constitute so clear a case of flagrant and intentional abuse of the right of petitioning as to destroy the privilege, and give the injured party a claim to legal redress. (*c*)

Petitions to the Queen, or to any of her ministers, complaining of the conduct of an individual, and containing defamatory statements against him, are or are not privileged communications, according to the motives and intention of the petitioner in making them. If he fairly and honestly makes statements in such petition prejudicial to any person's character, but which he believes to be true, and which are made for the sole purpose of obtaining redress of what he really considers an injury or abuse, his petition is privileged. If he falsely and maliciously prefers a scandalous charge against the individual in such a petition, with the intention of committing an injury, instead of seeking redress, his petition is not privileged. The legal presumption is always in favour of the petitioner that he acts fairly and honestly, unless the circumstances of the case afford some evidence of an evil and malicious intention, in which case the question of privilege is a fact for the jury to determine, under the direction of the court.

The declaration in the Bill of Rights was intended for the protection of petitioners applying to the Crown for the redress of some supposed grievances of a public and general character, and which is thought to be occasioned by some existing law, order in council, proclamation, or other act of the Government, or of any department of Government, but not a petition by one individual against another. The whole scope and spirit of the Bill of Rights points to public and political rights. Private rights were left to the protection, and private injuries to the discretion, of the common law, or to such other laws as might be made by parliament in the ordinary course of legislation. (*d*)

(*c*) *Stanton* v. *Andrews*, 5 U. C. Q. B. O. S. 220, per *Robinson*, C. J.; *Fairman* v. *Ives*, 1 D. & R. 252; 5 B. & Ald. 642.

(*d*) *Stanton* v. *Andrews*, 5 U. C. Q. B. O. S. 221 *et seq.*, per *Sherwood*, J.

In consequence of the decision in *Stockdale* v. *Hansard*, *(e)* the 31 Vic., c. 23, was passed. Section 4 of this Act provides that in any proceeding, civil or criminal, against a person for publishing any report, paper, vote, or proceeding, by or under the authority of the Senate or House of Commons, the court or judge may stay all proceedings, on production of a certificate, under the hand of the speaker or clerk of the Senate or House of Commons, shewing the authority for the publication. *(f)*

Where a presumptive case of publication, by the act of any other person, by his authority, has been established, it will be a good defence for the defendant to show that such publication was made without his authority, consent, or knowledge, and did not arise from want of due care or caution on his part. *(g)*

It would seem that s. 9 of this statute applies to private and personal libels only. *(h)*

Members of parliament are neither civilly nor criminally liable for anything they may say in parliament, in the course of any proceedings therein; and, from motives of the highest policy and convenience, ministers of the Crown cannot be held liable for any advice given to the Sovereign, however prejudicial such advice may be to individuals. *(i)*

But prior to the decision in *Wason* v. *Walter*, *(j)* there was no authority that the publication of a debate in parliament was privileged. In this case, it was held that a faithful report, in a public newspaper, of a debate in either house of parliament, containing matter disparaging to the character of an individual, which had been spoken in the course of the debate, is privileged, on the same principle as

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(e) 9 A. & E. 1; 2 Per. & D. 1.
(f) *Stockdale* v. *Hansard*, 11 A. & E. 297; 3 Per. & D. 346.
(g) Con. Stat. U. C., c. 103, s. 13; and see *Reg.* v. *Holbrook*, L. R. 3 Q. B. D. 60.
(h) *Reg.* v. *Duffy*, 2 Cox, 45.
(i) *Dawkins* v. *Lord Paulet*, L. R. 5, Q. B. 116-7, per *Mellor*, J.; see also *ex parte Wason*, L. R. 4 Q. B. 573.
(j) L. R. 4 Q. B. 73; 38 L. J. (Q. B.) 34.

an accurate report of proceedings in a court of justice is privileged—namely, that the advantage of publicity to the community at large outweighs any private injury resulting from the publication.

The plaintiff presented a petition to the House of Lords, charging a high judicial officer with having, thirty years before, made a statement, false to his own knowledge, in order to deceive a committee of the House of Commons, and praying inquiry, and the removal of the officer, if the charge was found true. A debate ensued on the presentation of the petition, and the charge was utterly refuted. That was held to be a subject of great public concern, on which a writer in a public newspaper had full right to comment, and the occasion was therefore so far privileged that the comments would not be actionable so long as a jury should think them honest, and made in a fair spirit, and such as were justified by the circumstances, as disclosed in an accurate report of the debate. (*k*)

But all the limitations placed on the publication of the proceedings of courts of justice, to prevent injustice to individuals, apply to parliamentary debates. A garbled or partial report, or of detached parts of proceedings, published with intent to injure individuals, will equally be disentitled to protection; and the publication of a single speech in parliament, for the purpose or with the effect of injuring an individual, will be unlawful. (*l*) But such a speech is privileged, if *bona fide* published by a member, for the information of his constituents. (*m*)

Whatever will deprive reports of proceedings in courts of justice of immunity will apply equally to a report of proceedings in parliament.

Independently of the orders of the House, there is nothing

(*k*) *Wason* v. *Walter*, L. R. 4 Q. B. 73; 38 L. J. (Q. B.) 34.
(*l*) *Ibid.* 94, per *Cockburn*, C. J.; *Rex* v. *Lord Abingdon*, 1 Esp. 226; *Rex* v. *Creevey*, 1 M. & S. 273.
(*m*) *Davison* v. *Duncan*, 7 E. & B. 229; 26 L. J. (Q. B.) 104; *Wason* v. *Walter*, *supra*, 95, per *Cockburn*, C. J.

unlawful in publishing reports of parliamentary proceedings. (*n*)

It has been held that ministers of religion in the Province of Quebec are amenable to the courts of civil jurisdiction in the same manner and to the same extent as other persons; and that an action of slander will lie against a Roman Catholic priest for injurious expressions regarding private individuals, uttered by him in his sermon. (*o*)

When a party acts in good faith, and not officially, in a matter of business, in which he has a personal interest, and is also employed by others, a letter written under such circumstances, though it contains a term in its gravest sense libellous, is privileged, on account of his particular and legitimate connection with the subject of which he was writing, rebutting the presumption of malice; and in the absence of evidence of actual malice, he could not be prosecuted for libel. (*p*) The *bona fides* is made out when the privilege is ascertained. The truth of the words is assumed to support the privilege, and the defendant is not called upon to prove it. (*q*)

The privilege which a communication receives must result either from some right on the part of the defendant to say what is complained of, or from a sense of duty, public or private, legal or moral, under which the defendant is acting. (*r*) But where the violence of the language, or the manner of publication, is in excess of what the occasion justifies, the privilege is gone. (*s*)

The proper meaning of a privileged communication is this: that the occasion on which the communication was made

(*n*) *Wason* v. *Walter*, L. R. 4 Q. B. 95, per *Cockburn*, C. J.

(*o*) *Derouin* v. *Archambault*, 19 L. C. J. 157; see also *Brossoit* v. *Turcotte*, 20 L. C. J. 141; *Blanchard* v. *Richer*, 20 L. C. J. 146.

(*p*) *Hanna* v. *De Blaquiere*, 11 U. C. Q. B. 310; *Tench* v. *G. W. Ry. Co.*, 33 U. C. Q. B. 8; *Ronayne* v. *Wood*, 5 *Revue Leg.* 301; *Durette* v. *Cardinal*, 4 *Revue Leg.* 232.

(*q*) *McCullough* v. *McIntee*, 2 E. & A. 390.

(*r*) *Poitevin* v. *Morgan*, 10 L. C. J. 99, per *Badgley*, J.; *Hearne* v. *Stowell*, 12 A. & E. 719-26,

(*s*) *Graham* v. *Crozier*, 44 U. C. Q. B. 378; *Miller* v. *Johnston*, 23 U. C. C. P. 580; *Holliday* v. *Ontario Farmers' M. Ins. Co.*, 1 App. R. 483.

rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact, and that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made. (*t*)

The resolution of an incorporated association censuring one of its members, is privileged. (*u*) And where the general manager of a railway company dismissed the plaintiff, a conductor, for alleged dishonesty, and by his directions placards, describing the offence and stating the plaintiff's dismissal, were posted up in the company's private offices for the information and warning of the company's employees, it was held a reasonable mode of publication, although the notices had been seen by strangers. (*v*)

The proof of express malice appears to consist, in all cases, in showing *mala fides* in the defendant, and this renders him liable, because, by the general rule applicable to such cases, every person is bound for an intentional injury done by him to another. (*w*)

To entitle matter otherwise libellous to the protection which attaches to communications made in the fulfilment of a duty, *bona fides* or honesty of purpose is essential; and to this again two things are necessary: first, that the communication be made not merely in the course of duty but also from a sense of duty; and second, that it be made with a belief of its truth. (*x*)

Where the libel is clearly a privileged communication, the inference of malice cannot be raised on the face of the libel itself; but intrinsic evidence of actual express malice must be given, and it is not to be taken to be malicious although

(*t*) *Poitevin* v. *Morgan*, 10 L. C. J. 98, per *Badgley*, J.; see also *Shaver* v. *Linton*, 22 U. C. Q. B. 183, per *Hagarty*, J.; *Somerville* v. *Hawkins*, 10 C. B. 583.
(*u*) *Cuthbert* v. *The Commercial Trav. Ass.*, 39 U. C. Q. B. 578.
(*v*) *Tench* v. *G. W. Ry. Co.* 35 U. C. Q. B. 8.
(*w*) *Poitevin* v. *Morgan*, 10 L. C. J. 98, per *Badgley*, J.
(*x*) *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 102, per *Cockburn*, C. J.

it may turn out to be unfounded, but the plaintiff must also prove the statement to be false as well as malicious. (*y*)

Malice, in its legal sense, means a wrongful act done intentionally, without just cause or excuse. (*z*) By legal malice is meant no more than the wrongful intention, which the law always presumes as accompanying a wrongful act, without any proof of malice in fact. (*a*)

For the purpose of proving express malice, the plaintiff may show that the libel is really untrue; but this alone will not constitute express malice, but it may, along with other circumstances, raise an inference that express malice exists. (*b*)

Libellous expressions, used in a privileged communication, may be evidence of actual malice for the jury; but if taken in connection with admitted facts, they are such as might have been used honestly and *bona fide* by the defendant, the judge may withdraw the case from the jury, and direct a verdict for the defendant. (*c*)

The defendant, in a privileged communication, described the plaintiff's conduct as "most disgraceful and dishonest." The conduct so described was equivocal, and might honestly have been supposed by the defendant to be as he described it. The court held that the above words were not of themselves evidence of actual malice. (*d*)

The question is not simply whether the act or fact stated is true or untrue, but whether the defendant had reason honestly to believe the act or fact to have been as he represented. (*e*) And the truth of the statement may not always be justification. (*f*)

(*y*) *McIntyre* v. *McBean*, 13 U. C. Q. B. 534. See also *McCullough* v. *McIntee*, 13 U. C. C. P. 438; *Shaver* v. *Linton*, 22 U. C. Q. B. 183.

(*z*) *Poitevin* v. *Morgan*, 10 L. C. J. 97, per *Badgley*, J.; *McIe* v. *ntyr McBean*, 13 U. C. Q. B. 542, per *Robinson*, C. J.

(*a*) *Wason* v. *Walter*, L. R. 4 Q. B. 87, per *Cockburn*, C. J.

(*b*) *McCullough* v. *McIntee*, 13 U. C. C. P. 441, per *A. Wilson*, J.

(*c*) *Spill* v. *Maule*, L. R. 4 Ex. 232.

(*d*) *Ibid.*

(*e*) *McCullough* v. *McIntee*, 13 U. C. C. P. 441, per *A. Wilson*, J.; *Harrison* v. *Bush*, 5 E. & B. 344.

(*f*) *Petrin* v. *Larochelle*, 4 *Revue Leg.* 286; *Reg.* v. *Dougall*, 18 L. C. J. 85; but see as to truth in actions against public officers, *Genest* v. *Normand*, 5 *Revue Leg.* 161.

When express malice is shown, by proving the libel false as well as malicious, the defendant may still make out a good defence, by showing that he had good ground for believing the statement true, and acted honestly under that persuasion. (*g*) And acts of the defendant occurring immediately after the publication may be given in evidence to show that there was no malice. (*h*)

Before it can become material for the jury to inquire whether the defendant acted maliciously or not, the plaintiff must satisfy them that the defendant's statements are not true, and that he had no reasonable ground for believing them to be true. (*i*)

It is matter of law for the judge to determine whether the occasion of writing or speaking criminatory language, which would otherwise be actionable, repels the inference of malice, constituting what is called a privileged communication. (*j*) If, at the close of the plaintiff's case, there is no intrinsic or extrinsic evidence of malice, it is the duty of the judge to direct a nonsuit or verdict for the defendant, without leaving the question of malice to the jury.

But whenever there is evidence of malice, either extrinsic or intrinsic, in answer to the immunity claimed, by reason of the occasion, a question arises which the jury, and the jury alone, ought to determine; (*k*) and the proper course then is for the judge to ask the jury whether the matter was published *bona fide*. If they come to the conclusion that it was, then it is for the judge to say whether, under all the circumstances, it is or is not a privileged communication. (*l*) It is wrong to leave to the jury whether an alleged libel is

(*g*) *McIntyre* v. *McBean*, 13 U. C. Q. B. 534.
(*h*) *Reg.* v. *Dougall*, 18 L. C. J. 85.
(*i*) *McIntyre* v. *McBean*, 13 U. C. Q. B. 534.
(*j*) *McCullough* v. *McIntee*, 2 E. & A. 390.
(*k*) *Shaver* v. *Linton*, 22 U. C. Q. B. 183, per *Hagarty*, J.; *Cooke* v. *Wildes*, 5 E. & B. 340; see also *Poitevin* v. *Morgan*, 10 L. C. J. 99, per *Badgley*, J.; *Lawless* v. *A. E. Cotton Co.*, L. R. 4 Q. B. 262; *McIntee* v. *McCullough*, 10 U. C. L. J. 238 (in E & A.)
(*l*) *Stace* v. *Griffith*, L. R. 2 P. C. App. 428, per *Lord Chelmsford*.

contained in an official document and privileged communication. (*m*)

In some cases the presumption of privilege is altogether conclusive, and the law will not allow any evidence to be adduced to remove or impeach it. The regular and established proceedings in parliament and in courts of justice are of this character, and no action for libel can be supported upon any part of their contents. The reasons given for this absolute privilege are, first, that the safety and welfare of the community requires that all such public proceedings should be perfectly unrestrained and free, and only subject to the authority and discretion of the tribunals in which they take place; second, that such tribunals possess the power of expunging all defamatory matters, if irrelevant from the proceedings, and of obliging the offending party to make satisfaction. (*n*)

When a communication is not absolutely privileged, it is a sufficient answer in point of law to say that it was malicious, and made without reasonable and probable cause. (*o*)

The defendant, hearing that a tradesman had been hoaxed by a letter written in his name, and ordering a certain article, wrote to the tradesman a letter to the effect that, in his opinion, the letter was written by the plaintiff. It turned out that it was not; but the jury found that the defendant sincerely believed that it was; and the court held that, even if the letter was a libel, it was a privileged communication. (*p*)

The defendant having published in his newspaper a report read at a vestry meeting, containing a statement to the effect that certain returns of the plaintiff, a medical man, to the registrar under the statute, were wilfully false, such report not having been published by the vestry, it was held that the publication was not privileged. (*q*)

(*m*) *Stace* v. *Griffith*, L. R. 2 P. C. App. 428, per *Lord Chelmsford*.
(*n*) *Stanton* v. *Andrews*, 5 U. C. Q. B. O. S. 221, *et seq.*, per *Sherwood*, J.
(*o*) *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 101, per *Cockburn*, C. J.
(*p*) *Croft* v. *Stevens*, 8 U. C. L. J. 280; 7 H. & N. 570.
(*q*) *Popham* v. *Pickburn*, 8 U. C. L. J. 335; 7 H. & N. 891; 31 L. J. (Ex.) 133.

A churchwarden having written to the plaintiff, the incumbent, accusing him of having desecrated the church, by allowing books to be sold in it during service, and by turning the vestry room into a cooking apartment, the correspondence was published without the plaintiff's permission, in the defendant's newspaper, with comments on the plaintiff's conduct; it was held that this was a matter of public interest, which might be made the subject of public discussion, and that the publication was therefore not libellous, unless the language used was stronger than, in the opinion of the jury, the occasion justified. (*r*)

A charge against the plaintiff, of wrongfully taking the defendant's logs, sawing them into lumber, and selling it, was contained in a letter written by the defendant to one M., an intimate friend of his, who was a near relative to the plaintiff, but in no way interested or concerned in business with either party, with the avowed object of defendant's availing himself of M.'s influence and good offices in his controversies with the plaintiff, and to warn the plaintiff and his mother against the consequences of lawsuits, and the alleged interested motives of his attorney. M. being absent from the country, the letter was opened by his agents and relatives, and became public; it was held that this was not a privileged communication. (*s*)

It seems the 67th section of 32 & 33 Vic., c. 29, will apply to cases of libel. In *Hughes* v. *Dinorben*, (*t*) to prove that libels declared on were written by the defendant, certain documents, admitted to be in his handwriting, were used as standards of comparison. The plaintiff called several witnesses, and, to support and strengthen such evidence, he produced seven anonymous letters, generally relating to the same matters as the libels declared on. This evidence was admitted to prove malice, and the letters were also used as a

(*r*) *Kelly* v. *Tinling*, L. R. 1 Q. B. 699; 35 L. J. (Q. B.) 231.
(*s*) *Connick* v. *Wilson*, 2 Kerr, 496; *ibid.* 617; and see *Andrews* v. *Wilson*, 3 Kerr, 86.
(*t*) 32 L. T. Rep. 271.

comparison of the handwriting in dispute, and no objection was made by defendant's counsel. It was held that these seven anonymous letters were admissible—that they were relevant to the issue to show malice; but that, if a proper objection had been made at the time of the trial, they could not have been received as evidence of handwriting.

Upon an indictment for libel, published at defendant's instance, in a newspaper, it appeared that the editor, who was not indicted, before inserting the libel, showed it to the prosecutor, who did not express any wish to suppress the publication, but wrote a reply, which was also inserted. This was held not such a defence for the parties indicted as to render a conviction illegal. (*u*)

In Quebec it has been held no defence to an action for libel to say that the defendant, a newspaper proprietor, must give his readers all the information he can on public matters; or that what was said of the plaintiff formed part of a general report of the proceedings at a nomination; or, that scenes of violence took place at such nomination, concerning which the public was desirous of being informed; or that the article had to be written in haste; or that the information obtained was from persons worthy of belief; or that the article was written with the sole object of giving information to the public in the manner usually practised by newspapers generally; or that the plaintiff had not demanded a rectification from the defendant; (*v*) or that a rumor existed to the effect stated in the article complained of as libellous. (*w*)

And it is no answer to an application for a criminal information for libel, to say that the defendants had no personal knowledge of the matter contained in the alleged libels, but received them from persons whom they deemed trustworthy; that a certain newspaper (naming it) was controlled by the applicant, who was an active politician, and had published a

(*u*) *Reg.* v. *McElderry*, 19 U. C. Q. B. 168; see, as to justification, *Stewart* v. *Rowlands*, 14 U. C. C. P. 485; *Hill* v. *Hogg*, 4 Allen, 108.
(*v*) *Devy* v. *Fabre*, 4 Q. L. R. 286.
(*w*) *Reg.* v. *Dougall*, 18 L. C. J. 85.

number of articles violently attacking one S., who was a candidate for a public office, and the libels in question were published with a view of counteracting the effect of these articles, and believing them to be true and without malice. (*x*)

The courts in this country, following the English decisions, confine the granting of criminal informations for libel to the case of persons occupying an official or judicial position, and filling some office which gives the public an interest in the speedy vindication of their character, or to the case of a charge of a very grave or atrocious nature. (*y*) Therefore, leave to the manager of a very large railway company to file a criminal information for libel was refused. (*z*)

There should be no delay in making the application. The complainant should come into court either during the term next after the cause of complaint arose, or so soon in the second term thereafter as to enable the defendant, unless prevented by the accumulation of business in the court, to show cause within that term; and this without reference to the fact whether an assize has intervened or not. (*a*)

The court, on such an application, is placed in the position of a grand jury, and must have the same amount of information as would warrant a grand jury in returning a true bill. A grand jury would not be justified in returning a true bill unless the libel itself were laid before them. Therefore, the application for a criminal information must be rejected, unless the libel is filed with the affidavit on which the application is based. (*b*)

The denial on such an application should be as full, clear, and specific as possible, and all the circumstances must be laid before the court fully and candidly in order that they may deal with the matter. (*c*)

(*x*) *Reg.* v. *Thompson*, 24 U. C. C. P. 252.
(*y*) *Reg.* v. *Wilson*, 43 U. C. Q. B. 583; but see *Reg.* v. *Thompson*, 24 U. C. C. P. 252.
(*z*) *Ibid.*
(*a*) *Reg.* v. *Wilkinson*, 41 U. C. Q. B. 1; *Reg.* v. *Kelly*, 28 U. C. C. P. 35.
(*b*) *Ex parte Gugy*, 8 L. C. R. 353.
(*c*) *Reg.* v. *Wilkinson*, 41 U. C. Q. B. 1.

Under the Con. Stats. U. C., c. 103, a plea to an information for libel must allege the truth of all the matters charged. (*d*)

The use of the inuendo in an indictment for libel is to explain the evil meaning of the defendant when the words are apparently innocent and inoffensive, or ambiguous. The doctrine of taking words in their mildest sense is applied only when the words, in their natural import, are doubtful, and equally to be understood in one sense as in the other. (*e*) It is for the court to say whether the inuendo is capable of bearing the meaning assigned by it, and for the jury to say whether that meaning was intended and proved. (*f*)

Riot.—This offence is defined to be a tumultuous disturbance of the peace, by three persons or more assembling together, of their own authority, with an intent mutually to assist one another against any one who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful. (*g*)

The difference between a riot and an unlawful assembly is this: the former is a tumultuous meeting of persons, upon some purpose which they actually execute with violence, and the latter is a mere assembly of persons, upon a purpose which, if executed, would make them rioters, but which they do not execute, nor make any motion to execute. (*h*)

There is also an offence of a similar character, called a rout. This offence is distinguishable from an unlawful assembly in this, that the parties actually make a motion

(*d*) *Reg.* v. *Moylan*, 19 U. C. Q. B. 521.
(*e*) *Somers* v. *House*, Holt, 39.
(*f*) *Sturt* v. *Blagg*, 10 Q. B. 906; *Anonymous*, 29 U. C. Q. B. 462, per *Wilson*, J.
(*g*) *Reg.* v. *Kelly*, 6 U. C. C. P. 372, per *Draper*, C. J.
(*h*) *Ibid.*; *Rex* v. *Birt*, 5 C. & P. 154.

to execute the purpose which, if executed, would make them rioters. (*i*)

The case of *Reg.* v. *Kelly* (*j*) fully maintains the distinction between a riot and unlawful assembly. In this case, the defendant was indicted for riot and assault, and the jury found him guilty of a riot, but not of the assault charged. The court held that a conviction for riot could not be sustained, for the assault, the object of the riotous assembly, had not been executed, but that the defendant might have been found guilty of forming part of an unlawful assembly. (*k*)

It may be observed generally that all the parts of this definition must be satisfied, in evidence, before the jury can convict of riot. Three persons, or more, must be engaged therein; (*l*) it must relate to some private quarrel, only; for the proceedings of a riotous assembly, on a public and general account, may amount to overt acts of high treason, by levying war against the Queen. (*m*) The offence must also be accompanied with some such circumstances either of actual force or violence, or, at least, of an apparent tendency thereto, as are naturally calculated to inspire people with terror, such as carrying arms, using threatening speeches, turbulent gestures, etc. (*n*)

But it is not necessary that personal violence should have been committed. (*o*) It is sufficient terror and alarm to sustain the indictment if any one of the Queen's subjects be in fact terrified. (*p*)

To some extent it is necessary that there should be a predetermined purpose of acting with violence and tumult; and if parties, met together on a lawful and innocent occasion,

(*i*) See Russ. Cr. 387; *Reg.* v. *Vincent*, 9 C. & P. 91.
(*j*) *Supra.*
(*k*) *Ibid.*
(*l*) *Reg.* v. *Scott*, 3 Burr. 1262; 1 W. Bl. 291; *Reg.* v. *Sudbury*, 1 Lord Raym. 484; Salk. 593; Arch. Cr. Pldg. 841.
(*m*) Russ. Cr. 379.
(*n*) *Reg.* v. *Hughes*, 4 C. & P. 373; Arch. Cr. Pldg. 842.
(*o*) *Clifford* v. *Brandon*, 2 Camp. 369, per *Mansfield*, C. J.; Russ. Cr. 379
(*p*) *Reg.* v. *Phillips*, 2 Mood. C. C. 252; C. & Mar. 602; Arch. Cr. Pldg 842.

become involved in a sudden affray, none are guilty but those who actually engage in it, for the breach of the peace was not part of their original purpose. (*q*) But it seems to be immaterial whether the act intended to be done by the persons assembling be in itself lawful or unlawful. (*r*)

Where a riot is proved to have taken place, the mere presence of a person among the rioters, even although he possessed the power of stopping the riot, and refused to exercise it, does not render him liable as one of the rioters. (*s*) In order to render him so liable, it must be shown that he did something by word or act, to take part in, help, or incite the riotous proceeding. (*t*) It is not necessary to constitute a riot that the Riot Act (*u*) should be read. 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. (*v*)

An assemblage of persons to witness a prize fight is an unlawful assembly, and every one present and countenancing the fight is guilty of an offence. (*w*)

By the common law, every private individual may lawfully endeavor, 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. It is his bounden duty to do this, and even to arm himself, in order to preserve the peace, if the riot be general and dangerous. If the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of a magistrate,

(*q*) Russ. Cr. 381; *Reg.* v. *Corcoran*, 26 U. C. C. P. 134.
(*r*) *Ibid.* 380.
(*s*) *Reg.* v. *Atkinson*, 11 Cox, 330, per *Kelly*, C. B.
(*t*) *Ibid.*
(*u*) 31 Vic., c. 70.
(*v*) *Reg.* v. *Furzey*, 6 C. & P. 81.
(*w*) *Reg.* v. *Bellingham*, 2 C. & P. 234; *Reg.* v. *Perkins*, 4 C. & P. 537; Arch. Cr. Pldg. 842-3.

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. (*x*) This power and duty devolve upon a governor of a colony, as well as others, in case of riot and rebellion. (*y*) By the 31 Vic., c. 70, s. 5, persons suppressing a riot are justified, though the death of a rioter may ensue. This is now the governing enactment as to riots throughout the Dominion.

Forcible entry or detainer.—This offence is committed by violently taking or keeping possession of lands and tenements with menaces, force, and arms, and without the authority of the law. (*z*) It is a misdemeanor at common law, and there is no doubt an indictment will lie at common law for a forcible entry, if accompanied by such circumstances as amount to more than a bare trespass, and constitute a public breach of the peace. (*a*)

The object of prosecutions for forcible entry is to repress high-handed efforts of parties to right themselves; (*b*) and there seems now no doubt that a party may be guilty of a forcible entry by violently and with force entering into that to which he has a legal title. (*c*) And it is not necessary that the force should be actual; but if the occupant of the lands have good reason to believe that sufficient force will be used to compel him to leave, and he leaves accordingly, the party menacing may be convicted of forcible entry. (*d*)

The stats. 8 Hy. IV., c. 9, 8 Hy. VI., c. 9, 6 Hy. VIII., c. 9, and 21 Jac. I., c. 15, as to forcible entries, seem to be in force in this country. (*e*)

(*x*) *Phillips* v. *Eyre*, L. R. 6 Q. B. 15, per *Willes*, J.
(*y*) *Ibid.*
(*z*) Russ. Cr. 421.
(*a*) *Reg.* v. *Wilson*, 8 T. R. 357; *Reg.* v. *Bake*, 3 Burr. 1731; Arch. Cr. Pldg. 851.
(*b*) *Reg.* v. *Connor*, 2 U. C. P. R. 140, per *Robinson*, C. J.
(*c*) *Newton* v. *Harland*, 1 M. & Gr. 644; *Butcher* v. *Butcher*, 7 B. & C. 399; 1 M. & R. 220; *Hillary* v. *Gay*, 6 C. & P. 248; Russ. Cr. 421-2.
(*d*) *Reg.* v. *Smith*, 43 U. C. Q. B. 369.
(*e*) *Ante*, p. 9.

Under these statutes, the party aggrieved by a forcible entry and detainer, or a forcible detainer, may proceed by complaint made to a local justice of the peace, who will summon a jury, and call the defendant before him, and examine witnesses on both sides if offered, and have the matter tried by the jury. (*f*) The party may, however, also proceed by action or by indictment at the General Sessions. (*g*) And if a forcible entry or detainer be made by three persons, or more, it is also a riot, and may be proceeded against as such, if no inquiry has before been made of the force. (*h*)

It has been held that the private prosecutor, on an indictment for forcible entry or detainer, cannot be examined as a witness, if the court may order restitution. (*i*) As this disability, however, rests solely on the ground of interest, it is, no doubt, removed in Ontario, at least, by the Con. Stats. U. C., c. 32. If, since the forcible entry, the prosecutor has been restored to possession, he may be a witness. (*j*)

An inquisition taken before a justice is bad if it appears to the court that the defendant had no notice, or that any of the jury had not lands or tenements to the value of forty shillings, for the 8 Hy. IV., c. 9, expressly requires that persons who are to pass on such an inquisition should have lands of that value. (*k*) The notice is not required by the 8 Hy. VI., c. 9, but the uniform course of criminal proceedings renders it necessary that, before a person shall be found a criminal, he shall be called upon to make defence; and, in addition to this principle, the courts have recognized the propriety of notice in this proceeding, on the ground that it would be wrong to put a person out of possession

(*f*) *Boswell and Loyd*, 13 L. C. R. 10, per *Maguire*, J.
(*g*) Russ. Cr. 428.
(*h*) *Ibid.*
(*i*) *Reg.* v. *Hughson*, Rob. Dig. 124; *Reg.* v. *Beavan*, Ry. & M. 242; *Reg.* v. *Williams*, 4 Man. & R. 471; 9 B. & C. 549.
(*j*) *Reg.* v. *Hughson*, *supra*.
(*k*) *Rex* v. *McKreavy*, 5 U. C. Q. B. O. S. 620.

of his house or land upon a complaint of which he has no knowledge. (*l*)

On an indictment for forcible entry or detainer of land, evidence of title in the defendant is not admissible. (*m*) Where the defendants applied for delay, in order to give evidence of title, but on the prosecutor consenting to waive restitution in the event of conviction, they were compelled to go to trial, and were convicted, a writ of restitution was afterwards refused, though it seems it would in any case have been improper to delay the trial for the reason urged. (*n*)

An inquisition for a forcible entry, taken under 6 Hy. VIII., c. 9, must show what estate the party expelled had in the premises, and if it do not, the inquisition will be quashed, and the court will order restitution. (*o*)

The 8 Hy. VI., c. 9, was construed to authorize restitution only in cases where the person expelled was seized of an estate of inheritance. The 21 Jac. I., c. 15, extends the remedy to a tenant for years; and, in the opinion of Lord Coke, the latter statute will apply to a tenant for a term less than a year. (*p*) When the inquisition finding a forcible entry is quashed, the court, upon the prayer of the party dispossessed under the justice's writ, must award a writ of restitution to place him in possession. (*q*)

It was formerly held that where the prosecutor had been examined as a witness, restitution should not be granted. (*r*) This was because the evidence Act, 16 Vic., c. 19, excluded any claimant or tenant of premises sought to be recovered in ejectment. On an indictment for forcible entry, containing two counts, one at common law and the other under the statutes, the prosecutor alleging that he had a term of years

(*l*) *Rex.* v. *McKreavy*, 5 U. C. Q. B. O. S. 626, per *Robinson*, C. J.
(*m*) *Reg.* v. *Cokely*, 13 U. C. Q. B. 521.
(*n*) *Reg.* v. *Connor*, 2 U. C. P. R. 139.
(*o*) *Mitchell* v. *Thompson*, 5 U. C. Q. B. O. S. 620.
(*p*) *Rex* v. *McKreavy*, *supra*. 625, per *Robinson*, C. J.
(*q*) *Ibid.* 626, per *Robinson*, C. J.
(*r*) *Reg.* v. *Connor*, 2 U. C. P. R. 139.

in the land, there was a general verdict of guilty; a writ of restitution was refused, it appearing that the lease of the land had expired. (*s*) Restitution cannot be awarded to one who never was in possession, or one who never has been dispossessed. (*t*)

The Court of Queen's Bench had at common law no jurisdiction to issue a writ of restitution, except as part of the judgment on an appeal of larceny. (*u*) But, by an equitable construction of the statutes, it has now a discretionary power to grant such writ. (*v*) A defendant, having been convicted at the Quarter Sessions on an indictment for forcible entry, was fined; but that court refused to order a writ of restitution, and the case was removed into the Queen's Bench by *certiorari*, and a rule obtained to show cause why a writ of restitution should not be issued; it was held in the discretion of this court either to grant or refuse the writ; and, under the circumstances, the verdict being against the charge of the learned chairman, and he having declined to grant the writ, and the prosecutor's case not being favored, it was refused. (*w*)

The Court of General Sessions, where the indictment is found, may, before trial, award a writ of restitution; but it is entirely in the discretion of the court to grant or refuse such writ. (*x*)

But a justice out of sessions cannot award restitution on an indictment of forcible entry, or forcible detainer, found before him by the grand jury, at the sessions. He can only do so if seized of the case out of sessions, and after inquiry before a jury, on a regular inquisition. The statement that the justices in court, or out of court, may award a writ of restitution only holds to the extent above-mentioned. (*y*)

(*s*) *Rex* v. *Jackson*, Draper, 53.
(*t*) *Boswell and Lloyd*, 13 L. C. R. 11, per *Maguire*, J.
(*u*) *Reg.* v. *Lord Mayor of London*, L. R. 4 Q. B. 371.
(*v*) *Mitchell* v. *Thompson*, 5 U. C. Q. B. O. S. 628, per *Robinson*, C. J.
(*w*) *Reg.* v. *Wightman*, 29 U. C. Q. B. 211.
(*x*) *Boswell and Loyd*, 13 L. C. R. 6.
(*y*) *Ibid.*

If an indictment is brought at common law for a forcible entry, it is only necessary to state the bare possession of the prosecutor; but in such case no restitution follows the conviction. (*z*)

A mere trespass will not support an indictment for forcible entry. There must be such force, or show of force, as is calculated to prevent resistance. (*a*) But where the defendant, and persons with him, having entered a dwelling-house through an open door, and one of the persons having been seen to push out the windows, the defendant himself taking them off the hinges, it was held that a conviction for forcible entry should not be disturbed. (*b*)

A wife may be guilty of a forcible entry into the dwelling-house of her husband, and other persons also, if they assist her in the force, although her entry, in itself, is lawful. (*c*)

Nuisances.—A nuisance is an injury to land not amounting to a trespass. Nuisances are of two kinds, namely, public or common, and private. (*d*)

To constitute a public nuisance, the thing complained of must be such as, in its nature or its consequences, is a nuisance, and an injury or damage to all persons who come within the sphere of its operation, though it may be in greater or less degree. (*e*)

Throwing noxious matter into navigable waters is a public nuisance, and the person guilty thereof is liable to an indictment for committing a public nuisance, or to a private action, at the suit of any individual distinctly and peculiarly injured. (*f*) So obstructions to navigable rivers are public nuisances. (*g*)

The collection of a crowd of noisy and disorderly people, to the annoyance of the neighborhood, or outside grounds, in which entertainments, with music and fireworks, are given

(*z*) *Rex* v. *McKreavy*, 5 U. C. Q. B. O. S. 629, per *Sherwood*, J.
(*a*) *Rex* v. *Smyth*, 1 M. & Rob. 155; 5 C. & P. 201.
(*b*) *Reg.* v. *Martin*, 10 L. C. R. 435.
(*c*) *Rex* v. *Smyth*, 1 M. & Rob. 155; Arch. Cr. Pldg. 849.
(*d*) *Little* v. *Ince*, 3 U. C. C. P. 545, per *Macaulay*, C. J.
(*e*) *Ibid.*; *Reg.* v. *Meyers*, 3 U. C. C. P. 333, per *Macaulay*, C. J.
(*f*) *Watson* v. *City of Toronto Gas and Water Co.*, 4 U. C. Q. B. 158.
(*g*) *Brown and Gugy*, 14 L. C. R. 213.

for profit, is a nuisance, for which the giver of the entertainment is liable to an injunction, even although he has excluded all improper characters from the grounds, and the amusements within the grounds have been conducted in an orderly way, to the satisfaction of the police. (*h*)

It seems that a person who is annoyed by the noise of horses kicking in a stable contiguous to his dwelling, and by the stench from the manure, etc., cannot maintain an indictment to remove it. (*i*)

All disorderly houses are public nuisances, and their keepers may be indicted. (*j*) And a house to which men and women resort for the purpose of prostitution, even where no indecency or disorderly conduct is perceptible from the exterior, is a disorderly house. (*k*)

In general all open lewdness, grossly scandalous, is indictable at common law, and it appears to be an established principle that whatever openly outrages decency, and is injurious to public morals, is a misdemeanor. (*l*)

The prisoners were convicted of indecently exposing their persons in a urinal, open to the public, which stood on a public footpath in Hyde Park, and the entrance to which was from the footpath: it was held that the jury might well find the urinal to be a public place, and that, therefore, the conviction was good. (*m*)

And an indictment charging the prisoner with keeping a booth for the purpose of showing an indecent exhibition, and in another count with showing for gain an indecent exhibition, and in a third for showing an indecent exhibition in a public place, was held to show sufficiently an indictable offence. (*n*)

By the 10 & 11 Wm. III., c. 17, all lotteries are declared to be public nuisances. (*o*) Where, therefore, one hundred and

(*h*) *Walker* v. *Brewster*, L. R. 5 Eq. 25.
(*i*) *Lawrason* v. *Paul*, 11 U. C. Q. B. 537, per *Robinson*, C. J.
(*j*) Russ. Cr. 442.
(*k*) *Reg.* v. *Rice*, L. R. 1 C. C. R. 21; 35 L. J. (M. C.) 93.
(*l*) Russ. Cr. 449.
(*m*) *Reg.* v. *Harris*, L. R. 1 C. C. R. 282.
(*n*) *Reg.* v. *Saunders*, L. R. 1 Q. B. D. 15.
(*o*) *Cronyn* v. *Widder*, 16 U. C. Q. B. 361, per *Robinson*, C. J.

forty-nine lots of land were sold by lottery, the person getting No. 1 ticket to have the first choice, it was held that this was a lottery, though it did not appear there was any difference in the value of the lots. The lottery consisted in having a choice of the lots, and that choice was to be determined by chance. (*p*) A sale of land by lot, in which there are two prizes, comes within the Imp. stat. 12 Geo. II., c. 28. (*q*)

So the non-repair of a highway, or the obstruction thereof, is a nuisance, indictable at common law. (*r*)

The proper remedy for a public nuisance is by indictment. And where an obstruction of a navigable river is an injury common to all the Queen's subjects who have occasion to use the stream, and is, consequently, a public nuisance, a person sustaining no actual particular damage cannot maintain an action therefor, but the proper remedy is by indictment. (*s*)

An indictment is the proper remedy in all cases, except when a charter, which is assumed to be a contract between the parties obtaining it and the public that the road will be constructed, and has been obtained to construct the road, and the work has never been done, in which latter case the proper remedy is *mandamus*.

The circumstance that the thing complained of furnishes, on the whole, a greater convenience to the public than it takes away, is no answer to an indictment for a nuisance. (*t*) As to highways, the test, irrespective of the balancing of the advantages against the impediments, is, whether the obstruction is prejudicial to the public to a degree amounting to a nuisance in fact, that is, directly, however beneficial collaterally. (*u*) Though a nuisance is erected before any person comes to live on or near the place, this does not prevent them complaining of it, on afterwards coming there. (*v*)

(*p*) *Power* v. *Canniff*, 18 U. C. Q. B. 403.
(*q*) *Marshall* v. *Platt*, 8 U. C. C. P. 189.
(*r*) *Reg*, v. *Corporation of Paris*, 12 U. C. C. P. 450, per *Draper*, C. J.
(*s*) *Small* v. *G. T. R. Co.*, 15 U. C. Q. B. 283.
(*t*) *Reg.* v. *Bruce*, 10 L. C. R. 117; *Reg.* v. *Meyers*, 3 U. C. C. P. 323, per *Macaulay*, C. J.; *Reg.* v. *Ward*, 4 A. & E. 384; 6 Nev. & M. 38.
(*u*) *Reg.* v. *Meyers*, 3 U. C. C. P. 323, per *Macaulay*, C. J.; and see *Rowe* v. *Titus*, 1 Allen, 326.
(*v*) *Reg.* v. *Brewster*, 8 U. C. C. P. 208.

In addition to the remedy by indictment, a nuisance may, in certain cases, be abated by the parties affected thereby, and this whether the nuisance is public or private, and though on the soil of another. (*w*) But a private individual cannot abate a public nuisance, unless by reason of some special inconvenience or prejudice to himself, or an occasion to require and justify it. (*x*) A boom stretched across a floatable stream or river, in a place having relation to public lands, is a public nuisance, and as such, may be abated by any person, notwithstanding Con. Stats. Can., c. 23, s. 13, for the latter only respects booms having reference to public lands. (*y*)

Where the defendant neglects to abate the nuisance, the court will compel its abatement through the sheriff. An indictment had been preferred against the defendant, in a previous term, for a public nuisance, and judgment obtained ordering its abatement, and the court, on an affidavit that the nuisance had not been abated, made a rule absolute for a precept to the sheriff to abate it. (*z*) But an order requiring the sheriff to do more than is necessary to abate, for example, to destroy, and not simply remove gunpowder improperly kept on the defendant's premises, is bad. (*a*)

A party is liable to fresh actions for continuing a nuisance. (*b*) And it may be generally stated that when a person is liable to an action for a nuisance, he may also be indicted. (*c*)

There seems to be no authority for a justice convicting a party summarily of a nuisance, and fining for the offence. (*d*) And a conviction by a magistrate for obstructing a highway,

(*w*) *Little* v. *Ince*, 3 U. C. C. P. 545, per *Macaulay*, C. J.
(*x*) *Ibid.* 545, per *Macaulay*, C. J.; and see *Dimes* v. *Petley*, 15 Q. B. 276; *Reg.* v. *Meyers*, *supra*, 333, per *Macaulay*, C. J.
(*y*) *Reg.* v. *Patton*, 13 L. C. R. 311.
(*z*) *Reg.* v. *Hendry*, 1 James, 105.
(*a*) *Reg.* v. *Dunlop*, 11 L. C. J. 186.
(*b*) *Drew* v. *Baby*, 6 U. C. Q. B. O. S. 240, per *Robinson*, C. J.
(*c*) *Rex* v. *Pedley*, 1 A. & E. 822; *Reg.* v. *Stephens*, L. R. 1 Q. B. 702; 35 L. J. (Q. B.) 251.
(*d*) *Bross* v. *Huber*, 18 U. C. Q. B. 286, per *Robinson*, C. J.

and order to pay a continuing fine until the removal of such obstruction, was held bad, as unwarranted by any Act of Parliament. (*e*)

Twenty years' user will not legitimate a public nuisance. (*f*) The maxim that no length of time will legalize such nuisance generally holds; (*g*) but as applied to a question of dedication, equivocal in itself, after a lapse of thirty years, without any public enjoyment, before or after suit, it forms a proper subject to be taken into consideration. (*h*)

Highways exist both by land and water. In Ontario, those by land have accrued to the public by dedication of the Crown, in what is commonly termed allowances for roads in the original survey of towns and townships; or by dedication of private individuals, or under the provisions of the statute law, or by usurpation and long enjoyment. Upon land, therefore, highways are established only by some positive act, indicating the object and its accomplishment. They are, it may be said, artificially made, or only become such by acts in *pais*. It is otherwise with navigable rivers and watercourses. They are *natural* highways, pre-existing and coeval with the first occupancy of the soil, and formed, practically, the first or original highways, in point of actual use. (*i*)

Where the existence of certain streets as public highways was shown by the work on the ground at the original survey by the Crown, and by the adoption, on the part of the Crown, of that work as exhibited on the plan thereof returned, which adoption was established by the disposition of lands according to that plan and survey: it was held that these streets thereby became public highways; and although, prior to such adoption, the Crown would not have been bound by either plan or survey, after such adoption, it was. (*j*)

(*e*) *Reg.* v. *Huber*, 15 U. C. Q. B. 589.
(*f*) *Reg.* v. *Brewster*, 8 U. C. C. P. 208.
(*g*) *Reg.* v. *Cross*, 3 Camp. 227; 4 Bing. N. C. 183.
(*h*) *Rex* v. *Allan*, 2 U. C. Q. B. O. S. 105, per *Macaulay*, C. J.
(*i*) *Reg.* v. *Meyers*, 3 U. C. C. P. 352, per *Macaulay*, C. J.
(*j*) *Reg.* v. *Hunt*, 17 U. C. C. P. 443, (in E. & A.)

For a period of nearly fifty years, there had been a travelled road, irregular in direction and varied at times in its course, crossing the defendant's land, which road was not laid out by any proper authority, but used by the public at pleasure, owing to the original allowances not having been opened. During two years only statute labor had been performed upon it, and when the regular allowances were opened, defendant obstructed it, other similar roads in the neighborhood having been closed in the same manner. The court held that the road could not be considered a highway, for the evidence showed not a perpetual dedication, but at most a permission to use until the proper allowance was opened, when, if not before, the defendant had a right to close it; nor was it a highway under the 29 & 30 Vic., c. 51, s. 315, now superseded, for it could not be said that statute labor had been "usually performed" upon it; and as it was, in fact, only a substitute for the regular allowance, it might fairly be treated as "altered" within the spirit of that clause when the allowance was open. (*k*)

Where the defendant was convicted on an indictment charging him with having obstructed a "highway" on evidence which, as reported to the court, did not show that the alleged highway had been established by a plan, filed or signed by the owners of the adjoining lots, or by the general user of the public, it having been used by one or two persons only for a short time, or that any clearly defined portion of land had been marked off and used; but there appeared to have been merely an open space, not bounded by posts or fences, over which the owners of the adjoining land had been in the habit of passing in the carriage of goods, wood, etc., to the rear of the premises; it was held that there was not sufficient evidence to support the conviction, and it was therefore quashed. (*l*) It has

(*k*) *Reg.* v. *Plunkett*, 21 U. C. Q. B. 536.
(*l*) *Reg.* v. *Ouellette*, 15 U. C. C. P. 260; see also *Rex* v. *Sanderson*, 3 U. C. Q. B. O. S. 103, as to similar indictment under 50 Geo. III., c. 1.

been held, however, in New Brunswick to be unnecessary for the commissioners of highways in laying out streets under 5 William IV., c. 2, to put up fences or grade the road. It is sufficient if a man can go upon the ground with their return and plan, and discover where the street is, its course, length and breadth. (*m*)

The roads of joint-stock companies were held not public roads or highways, within the meaning of the old 22 Vic., c. 54, s. 336. (*n*)

Under Con. Stats. U. C. c. 54, s. 313, now repealed, the fact of the government surveyor having laid out a road in his plan of the original survey, would have made it a highway, unless there was evidence of his work on the ground clearly inconsistent with such plan. (*o*)

A public road, laid out in the original survey of crown lands, by a duly authorized crown surveyor, is a public highway, though not laid out upon the ground.

After a road has once acquired the legal character of a highway, it is not in the power of the Crown, by grant of the soil, and freehold thereof, to a private person, to defeat the public of their right to use the road. (*p*)

The defendant being indicted for overflowing a highway with water, by means of a mill dam maintained by him, objected that there was no highway, and could be no conviction, because the road overflowed, which was an original allowance, had been in some places enclosed and cultivated. It was used, however, at other points, and those who had enclosed it were anxious that it should be opened and travelled, which, they said, was impossible, owing to the overflow. The overflow was at other parts than those so enclosed. It was held by the court that the conviction was clearly right, and the 335th section of the 29 & 30 Vic., c. 51, now superseded, did not apply, because no other road had been in use in lieu

(*m*) *Reg.* v. *McGowan*, 1 Pugsley & B. 191.
(*n*) *Reg.* v. *Brown and Street*, 13 U. C. C. P. 356.
(*o*) *Carrick* v. *Johnston*, 26 U. C. Q. B. 69; *Reg.* v. *McGowan*, 1 Pugsley & B. 191.
(*p*) *Reg.* v. *Hunt*, 16 U. C. C. P. 145.

of the proper allowance, nor had any road been established by law in lieu thereof. (*q*)

The original public allowances for road made in the first survey of a township continued to be public highways, notwithstanding a new road deviating from any such allowance might have been opened under the provisions of the statute 50 Geo. III., c. 1, or might have been confirmed as a highway by reason of statute labor or public money having been applied upon it. (*r*)

But where, in the original plan of a township, a piece of ground was laid out as a highway, which was subsequently granted by the Crown, in fee, to several individuals, and was occupied by them, and others claiming under them, for upwards of thirty years, and never had been used as a highway, it was held that an indictment for a nuisance for stopping up that piece of ground, claiming it as a highway, could not be sustained. (*s*)

Where the Crown granted a lot of land on the bank of Lake Ontario, and along the bank of the lake, and to Lake Ontario, it was held that the Crown had power to grant the beach up to high-water mark; and in this case the grant being to a private individual, and having conveyed to him the land to the water of the lake, there was no common or public highway along the beach. (*t*) The actual sea shore may be granted by the Crown, and then there is no highway over it: and even when ungranted, unless by dedication, there is no highway against the will of the Crown. It would seem that in grants of land in our waters having a river or lake boundary, the grant extends to the water, and there is no place between the land conceded and the water on which to place the highway. (*u*)

A government survey will prevail in establishing a high-

(*q*) *Reg.* v. *Lees*, 29 U. C. Q. B. 221.
(*r*) *Spalding* v. *Rogers*, 1 U. C. Q. B. 269.
(*s*) *Rex* v. *Allan*, 2 U. C. Q. B. O. S. 90.
(*t*) *Parker* v. *Elliott*, 1 U. C. C. P. 470.
(*u*) *Parker* v. *Elliott supra*, 490, per *Sullivan*, J.

way against the right of a party in possession, to whom a patent afterwards issues. (*v*)

A highway, of which the origin was not clear, had been travelled for forty years across the plaintiff's lot, the patent for which was issued in 1836. The municipality, in 1866, passed a by-law shutting up the road; but no conveyance was ever made to the plaintiff; but the court held that the user for thirty years after the patent would be conclusive evidence of a dedication against the owner, and that such evidence was equivalent to a laying out by him, so that the road, under Con. Stat. U. C., c. 54, s. 336, was vested in the municipality. (*w*)

Under 4 & 5 Vic., c. 10, the district council could not open a new road, except by by-law; and where, therefore, no by-law was shown, it was held that the road was not sufficiently established, and upon the evidence there was nothing to show dedication. (*x*)

Merely opening or widening a street, for the convenience of the person doing it, or leaving land open where it is immediately adjacent to a highway, and permitting the public to use it, will not constitute a dedication. (*y*)

A. being owner of a large tract of land, laid out a plot for a town at the mouth of the river B., upon the map of which town a road was marked off, leading along the edge of the river, to its mouth. The road was made originally at the expense of A., but afterwards repaired and improved by statute labor and public money, and holes filled up in the part upon which the obstruction complained of was erected. After indictment, and verdict of guilty, it was held that there was sufficient evidence of intention to dedicate the street by the plan, by user and the declaration of the owner to estab-

(*v*) *Mountjoy* v. *Reg.* 10 U. C. L. J. 122.
(*w*) *Mytton* v. *Duck*, 26 U. C. Q. B. 61.
(*x*) *Reg.* v. *Rankin*, 16 U. C. Q. B. 304.
(*y*) *Belford* v. *Haynes*, 7 U. C. Q. B. 464; and see *Reg.* v. *Spence*, 11 U. C. Q. B. 31.

lish a dedication, and that the verdict of guilty was in accordance with the evidence. (*z*)

In order to prove that a way was, in fact, public, evidence was given of acts of user extending over nearly seventy years, but during the whole period the land crossed by the way had been in lease. The judge told the jury that they were at liberty, if they thought proper, to presume from these acts a dedication of the way by the defendant, or his ancestors, at a time anterior to the land being leased: and the court held the direction proper. (*a*)

A public highway may be established in this country by dedication and user; but if the question arises between the public and the owner of the land, in a newly settled part of the country, stronger evidence may be required than in a more settled and populous neighborhood. A right reserved to the Crown to enter on land at any time, and erect barracks, batteries, etc., does not prevent a dedication of a part of the land to the public for a highway. (*b*)

There may, in certain cases, be a limited or partial dedication of a road to the public. And a footway may be so dedicated, subject to the condition that the owners of the soil are to plough it up, such a right being considered reasonable, and not inconsistent with dedication. (*c*) So there may be a dedication of a way to the public, subject to a right of the owner of the land through which it passes to have a gate, at certain seasons, run across it. (*d*)

The owner, who dedicates to public use, as a highway, a portion of his land, parts with no other right than a right of passage to the public over the lands so dedicated, and may exercise all other rights of ownership not inconsistent therewith; and the appropriation made to and adopted by the

(*z*) *Reg.* v. *Gordon*, 6 U. C. C. P. 213.
(*a*) *Winterbottom* v. *Lord Derby*, L. R. 2 Ex. 316.
(*b*) *Reg.* v. *Deane*, 2 Allen, 233; *Reg.* v. *Buchanan*, 3 Kerr, 674; see as to dedication by the Crown, *Cole* v. *Maxwell*, 3 Allen, 183.
(*c*) *Arnold* v. *Blaker*, L. R. 6 Q. B. 433 (Ex. Chr.); *Mercer* v. *Woodgate*, L. R. 5 Q. B. 26; 39 L. J. (M. C.) 21, affirmed.
(*d*) *Bartlett* v *Pratt*, 2 Thomson, 11.

public, of a part of the street, to one kind of passage, and another part to another, does not deprive him of any rights, as owner of the land, which are not inconsistent with the right of passage by the public. (*e*)

In order to constitute a valid dedication to the public of a highway, by the owner of the soil, it is clearly settled that there must be an intention to dedicate, an *animus dedicandi*, of which the user by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment. (*f*)

Adoption by the public, and acquiescence, at least, if not user, are most material ingredients to constitute a binding dedication. (*g*)

The intention of the party to dedicate must be clear, and time is considered an essential ingredient. The act or assent of the public must be manifest and complete, and even then a subject cannot, by any spontaneous act of appropriation, impose a highway upon the public. If a highway, the public become bound to repair it, and, consequently, their adoption or assent becomes important. Such adoption and assent, in the case of allowances, are waived by the expenditure of public money in opening or repairing, the performance of statute labor, user, etc.; but, without some evidence of adoption by user, or other manifestation, an allowance for road at common law would continue an allowance only, and not a road in fact. (*h*) A reservation inconsistent with the legal character of a dedication would be void. (*i*)

It seems there may be a public highway without its

(*e*) *St. Mary Newington* v. *Jacobs*, L. R. 7 Q. B. 53, per *Mellor*, J.

(*f*) *Mercer* v. *Woodgate*, L. R. 5 Q. B. 32, per *Hannen*, J.; *Hawkins* v. *Baker*, 1 Oldright, 423, per *Des Barres*, J.; *Leary* v. *Saunders*, 1 Oldright, 17.

(*g*) *Rex* v. *Inhab. St. Benedict*, 4 B. & A., 447; 12 Ea. 192; *Rex* v. *Allan*, 2 U. C. Q. B. O. S. 100, per *Robinson*, C. J.

(*h*) *Ibid.* 103-4, per *Macaulay*, C. J.

(*i*) *Arnold* v. *Blaker*, L. R. 6 Q. B. 437, per *Kelly*, C. B.

being a thoroughfare; at all events, if a highway were stopped at one end so as to cease to be a thoroughfare, it would, in its altered state, continue a highway. The old doctrine that a highway implied a thoroughfare, has been so far modified by more recent decisions that there may be in a square in a great city, lighted and paved at the public expense, which the public, in fact, frequent, passing along its three sides, or to the houses therein situate, a highway in legal contemplation, although it is a *cul de sac.* (*j*)

But where such highway is claimed by dedication, the acts or declarations relied on to support it must be clear and unequivocal, with manifest intention to dedicate. There is a difference between a *cul de sac* in the city and one in the country; much stronger acts being required to establish a public highway by dedication in the latter than in the former. The mere acting so as to lead persons to suppose that a way is dedicated does not amount to a dedication, if there be an agreement which explains the transaction. (*k*) The question of dedication or no dedication is a question of fact for the jury. (*l*)

Whether a certain road constitutes a highway or not is generally a mixed question of law and fact, depending much upon circumstances and the peculiar features of each case. (*m*) The expenditure of public money on a road laid out thirty feet wide can only make it a public highway to that extent, and will not have the effect of extending it to a highway four rods wide. (*n*) Where a road has been used as a public highway, and the usual statute labor of the locality done upon it from year to year, this will, in the absence of explanation, establish the road as a public high-

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(*j*) *Hawkins* v. *Baker*, 1 Oldright, 419-24; *Rex* v. *Marquis of Devonshire*, 4 A. & E. 713, per *Patteson*, J.

(*k*) *Ibid.* 419; see also *Poole* v. *Huskinson*, 11 M. & W. 827; *Bateman* v. *Black*, 18 Q. B. 870; 21 L. J. Q. B. 406.

(*l*) *Belford* v. *Haynes*, 7 U. C. Q. B. 464; *Reg.* v. *Gordon*, 6 U. C. C. P. 213; *Reg.* v. *G. W. R. Co.*, 12 U. C. Q. B. 251, per *Robinson*, C. J.

(*m*) *Rex* v. *Allan*, 2 U. C. Q. B. O. S. 102, per *Macaulay*, J.

(*n*) *Basterach*, v. *Atkinson*, 2 Allen, 439.

way. (*o*) But where it appeared from the evidence that statute labor had been performed on part of the road in question, but only to a limited extent, and not from time to time, so as to show it was a road "whereon the statute labor hath been usually performed," it was held not sufficient to establish the road as a public highway under the 22 Vic., c. 54. (*p*) Where about fifteen years before the finding of the indictment the township council had built a bridge on the road, and expended money thereon, and statute labor had been done thereon, it was considered under the authority of s. 313 Con. Stat. U. C., c. 54, that it must be deemed a public highway. (*q*)

Nuisances to highways are of two classes: positive, as by obstruction; and negative, by want of sufficient repair.

Where a railway company, bound by their charter to restore any highway intersected by their track "to its former state, or in a sufficient manner not to impair its usefulness," constructed their road across a street which was sixty-six feet wide, and connected the street again by a bridge across the track forty feet two inches in width, it was held that the jury might with propriety find this to be a sufficient compliance with the Act, and that the defendants were not necessarily guilty of a nuisance because the bridge was not of equal width with the street crossed. (*r*)

But where a railway company, in passing over a highway, had lowered the highway at the point of intersection so as to make it inconvenient and dangerous, this was held to be an indictable nuisance. (*s*)

Where a street ran into a road allowance, but did not cross it, and the defendants, being incorporated under 16 Vic., c. 190, for gravelling the road, so far lowered the level, in order to get the grade prescribed by the statute, as to make the

(*o*) *Reg.* v. *Hall*, 17 U. C. C. P. 286, per *J. Wilson*, J.
(*p*) *Ibid.* 282, per *J. Wilson*, J.
(*q*) *Prouse* v. *Corporation of Mariposa*, 13 U. C. C. P. 560.
(*r*) *Reg.* v. *G. W. R. Co.*, 12 U. C. Q. B. 250.
(*s*) *Reg.* v. *G. T. R. Co.*, 17 U. C. Q. B. 165.

approach from this street impassable, it was held that they were justified in so doing, and not guilty of a nuisance in obstructing the street, or obliged to restore the approach. (*t*)

A fire lighted by a wheelwright for the purposes of his business, within fifty feet of the centre of the highway, such fire being fed by lifting a lid in the wall on the outside of the premises, is not a public nuisance within the Imp. 5 & 6 Wm. IV., c. 50, s. 72; for to constitute the act an offence within this section, it must be shown that some injury is done to the highway, or some danger or annoyance is occasioned to passengers in using it. (*u*)

When there has been a dedication of a highway to the public, anything afterwards done by the owner interfering with that right of way is a nuisance. (*v*)

The use of a velocipede on the sidewalk, though no one be near it, may be an obstruction within the provisions of a by-law that no person shall, by any vehicle, encumber or obstruct the sidewalk. (*w*)

In *Reg.* v. *Fralick*, (*x*) it was held under the facts stated in that case that the defendant, being the lessee of the ordnance department, had no right to obstruct the road leading to the Niagara Falls Ferry, and that he was guilty of an indictable nuisance in so doing. But where an allowance for a road has never been opened as a public highway, the notice and order required by the 9 Vic., c. 8, not being given, an indictment for a nuisance in obstructing it cannot be maintained. (*y*)

Where a waggon is left standing in the highway, the owner cannot exempt himself from liability by showing that the person injured thereby was drunk at the time of the accident; for it cannot be permitted to a person to place any

(*t*) *Reg.* v. *W. & D. P. & G. R. Co.*, 18 U. C. Q. B. 49.
(*u*) *Stinson* v. *Browning*, L. R. 1 C. P. 321; and see *Hadley* v. *Taylor*, *ibid.* 53.
(*v*) *Mercer* v. *Woodgate*, L. R. 5 Q. B. 31; per *Blackburn*, J.
(*w*) *Reg.* v. *Plummer*, 30 U. C. Q. B. 41.
(*x*) 11 U. C. Q. B. 340.
(*y*) *Reg.* v. *Purdy*, 10 U. C. Q. B. 545; *Reg.* v. *G. W. R. Co.*, 12 U. C. Q. B. 250.

obstruction that he pleases in the highway, and to consider himself responsible for no injury that may happen from it, except to persons who are sober and vigilant in looking out for nuisances that they had no reason to expect to find there. (*z*)

If a road is laid out over land upon which a fence is standing, it is the duty of the commissioners of highways to remove the fence, and the owner of the land omitting to do so is not punishable under the Act 5 Wm. IV., c. 2, s. 16, as for obstructing or encroaching upon a highway. (*a*)

A conviction for obstructing a highway is bad unless it appears on the face of it that the place was a public highway. (*b*)

Where a person has sold lots according to a plan in which a lane is laid out in the rear, he cannot afterwards shut up such lane, and the fact that he had previously conveyed portions of the land comprised in the lane would only affect so much as he had thus precluded himself from giving up to the public, and would not entitle him to close up the whole. (*c*)

C. owned township lot 32, and H. lot 31, adjoining it on the east. In 1856 H. laid out part of 31 with village lots, according to a registered plan, which showed streets called First, Second, Third and Fourth Streets, etc., running from east to west across the block to the east limit of lot 32. In 1858 C. laid out the east part of lot 32 by a plan also registered, by which a street called Augusta Street ran north and south, along the east side of 32, and from it streets ran westerly numbered 1, 2, 3, 4, etc., corresponding to and a continuation of First, Second, Third and Fourth Streets on H.'s block, Augusta Street only intervening. Village lots had been sold on street 4 in C.'s block, but none in Fourth

(*z*) *Ridley* v. *Lamb*, 10 U. C. Q. B. 354.
(*a*) *Ex parte Morrison*, 1 Allen, 203; and see *Cole* v. *Maxwell*, 3 Allen, 183.
(*b*) *Reg.* v. *Brittain*, 2 Kerr, 614.
(*c*) *Reg.* v. *Boulton*, 15 U. C. Q. B. 272.

Street on H.'s land, and the closing of this last named street would not shut out a purchaser of any lot from access to the nearest highway; it was held that under 24 Vic., c. 49, the owner of H.'s block might, by a new survey and plan, close up Fourth Street on his land, for the laying out a street in continuation of it by C. did not make all one street, so as to render the provision in that statute applicable; and the owner of H.'s block having been convicted at the Quarter Sessions of a nuisance for so doing, on application to this court; and that he was therefore entitled to an acquittal. (*d*)

The placing of a gate across a travelled road after the public have been enjoying it for upwards of twenty years can never have the effect of abolishing a highway. It seems that a gate being kept across a public road is not conclusive to show that the road is not a public one, as the road may have originally been granted to the public, reserving the right of keeping a gate across it to prevent cattle straying. (*e*)

Where a road was laid out over land by the owners thereof, and was so used by the public without interruption for thirty or forty years, the court held that it had become a public highway, and could not be stopped up by by-law of the municipal council, particularly at the instance of a purchaser of one of such owners of the land, with knowledge too on his part of the existence of the road. (*f*)

A road had, for more than fifty years, been used as a road between the townships of York and Vaughan, the original road allowance between the townships being to the north of it, and this road being, in fact, wholly within the township of York and part of lot 25. The owner of the lot had been indicted for closing up this road, and convicted in 1870; and the corporation of York then passed a by-law to close it, reciting that there was no further necessity for it, by reason of the road allowance. There

(*d*) *Reg.* v. *Rubidge*, 25 U. C. Q. B. 299.
(*e*) *Johnston* v. *Boyle*, 8 U. C. Q. B. 142.
(*f*) *Moore* v. *Corporation of Esquesing*, 21 U. C. C. P. 277.

being in the facts above stated sufficient evidence of dedication and acceptance of this road as a highway, the court held that it was a road dividing different townships, over which the county council only had jurisdiction, and that the by-law therefore was illegal. Such a road need not consist of an original allowance, but may be acquired or added to by purchase or dedication. (*g*)

To justify shutting up a highway under 1. Rev. Stat. (N. B.), c. 66, the return of the commissioners must show, either expressly or by necessary implication, that the road is not required for the convenience of the inhabitants of the parish. (*h*)

The commissioner of crown lands has no authority to open roads on lands granted by the Crown, and any money expended for such purpose under authority so given, is not public money, within 22 Vic., c. 54, s. 33; and the roads so opened do not, therefore, become public highways under that Act. (*i*)

A municipal corporation had power to open new roads through any person's lands, under the restrictions in the statute 12 Vic., c. 81, s. 31. (*j*) But a by-law of a municipal council for the alteration of an old road has been held bad, in not assigning any width to the new road. (*k*)

At common law, an ancient highway might be changed by writ of *ad quod damnum*. But this writ only avails so far as the rights of the Crown extend, and only in relation to rights which the Crown may grant. (*l*)

To allow a public highway to become ruinous and out of repair, is a nuisance indictable at common law. The party on whom the obligation to repair is imposed, whether by common law or otherwise, is indictable for breach of that

(*g*) *Re McBride*, 31 U. C. Q. B. 355.
(*h*) *Oulton* v. *Carter*, 4 Allen, 169; as to by-law to close and sell road, see *Baker and Corporation of Saltfleet*, 31 U. C. Q. B. 386.
(*i*) *Reg.* v. *Hall*, 17 U. C. C. P. 282.
(*j*) *Dennis* v. *Hughes*, 8 U. C. Q. B. 444.
(*k*) *Re Smith and Council of Euphemia*, 8 U. C. Q. B. 222.
(*l*) *Reg.* v. *Meyers*, 3 U. C. C. P. 321, per *Macaulay*, C. J

obligation, *ad commune damnum*. (*m*) Though a statute provides that the proprietors of a road shall not collect any tolls thereon while out of repair, this does not suspend the common law right of indictment in case of non repair. (*n*) Where a common and public highway is impassable and out of repair, although not from accident, casualty, or emergency, a person using and passing along the highway may go through the adjoining land, going no further from the highway than is necessary, and returning thereto as soon as practicable, and doing no unnecessary damage in that behalf. (*o*) It would seem to make no difference whether the adjoining land be sown with grain or not. (*p*)

Road companies owning public highways, and entitled to tolls for the use thereof, are, upon the principles of the common law, liable to an individual lawfully using the road, and guilty of no fault on his part, for a special injury received in consequence of the company permitting the road to be out of repair; and such want of repair is also a public nuisance as respects the public at large, and the company may be liable to an indictment therefor. (*q*)

Grantees of the Crown of public highways are indictable at the suit of the public for default in repairing such highways, although they are also liable to the Crown for the breach of their covenant to that effect, contained in the patent; and this liability follows and accompanies the transfer of the property, so as to make the purchaser of part, or mortgagee of the residue, also indictable for the same cause, although it has been expressly agreed between grantor and grantee, that the former shall and the latter shall not be bound to repair. To maintain an indictment against the defendant under such circumstances it is not necessary that the government engineer should have first condemned the road by a certificate. (*r*)

(*m*) *Reg.* v. *Corporation of Paris*, 12 U. C. C. P. 450, per *Draper*, C. J.
(*n*) *Ibid.* 445.
(*o*) *Carrick* v. *Johnston*, 26 U. C. Q. B. 65.
(*p*) *Ibid.* 68, per *Hagarty*, J.
(*q*) *MacDonald* v. *Hamilton and P. D. P. L. Co.*, 3 U. C. C. P. 402.
(*r*) *Reg.* v. *Mills*, 17 U. C. C. P. 654.

A company having been formed under the provisions of the Joint-Stock Road Act in several townships, including the defendants, subsequently mortgaged said road to the counties of Lincoln and Welland, which counties, at a later date, took an absolute conveyance, and passed a by-law, by which they assumed it as a county road. They afterwards passed a by-law, requiring the respective townships (the defendant's being one of them) through which the road passed to keep the same in repair. On the trial, the defendants were found guilty. On special case left to this court it was held that the road never vested in or became a county road within the meaning of the statute, but as one acquired by the county, as assignees of the road company, and, as such assignees, they held the same, with all the rights and subject to all the duties and obligations which the law imposed upon the said company, which constructed it, and that the county had no power to divest itself of this obligation, and throw the duty of repairing on the defendants. (*s*)

Where a road ran through the town of Whitby, and was part of a macadamized road, made by the Government, before the 13 & 14 Vic., c. 14, and afterwards transferred to the plaintiffs, it was held that, under this statute, the corporation of the town were clearly bound to keep in repair that portion of it within their limits. (*t*)

Municipal corporations are, under the R. S. O., c. 174, s. 491, bound to keep all highways in the township in repair, and they have all necessary powers given to them for enabling them to perform that duty. (*u*) The Con. Stats. U. C., c. 49, s. 84, provides that, after any road has been completed, and tolls established thereon, the company shall keep it in repair. (*v*)

The Des Jardins Canal Co. having been indicted for not keeping in repair the bridge over their canal, where it

(*s*) *Reg.* v. *The Corporation of Louth*, 13 U. C. C. P. 615.
(*t*) *Port Whitby R. Co.* v. *Corporation Town of Whitby*, 18 U. C. Q. B. 40.
(*u*) *Colbeck* v. *Corporation of Brantford*, 21 U. C. Q. B. 276.
(*v*) *Caswell* v. *The St. M. & P. L. J. R. Co.*, 28 U. C. Q. B. 250, per *A. Wilson*, J.

crosses the highway, built for them by the Great Western Railway Company, it was held that they, and not the railway company, were bound to keep such bridge in repair; and that evidence of the state of the bridge, a few days before the trial, was admissible, not as proof of that fact, but as confirming the other witnesses, who swore to its state at the time laid in the indictment, and as showing such state by inference. (*w*)

The members of a gas company, having parliamentary powers to open streets, for the purpose of public lighting, but having no similar powers for the purpose of conveying gas to private houses, are liable to be convicted for a nuisance, in obstructing the highway, if they open the streets in order to lay down service pipes from the mains, already laid down by them for public lighting, to the houses of the adjacent inhabitants. An inhabitant who directs such service pipes to be laid down to his house is also similarly liable. (*x*)

Where a street, which was a public highway, had been once put in good repair, but at the time of the passing of the special Act was out of repair, it was held that the commissioners had no power, under s. 53, 10 & 11 Vic., c. 34, to do the necessary repairs, and charge the expenses on the adjoining occupiers, as the word "theretofore" in that section is not restricted to the time of the passing of the special Act, but is used in its ordinary sense. (*y*)

Where a highway, fifty feet in width, was set out under the General Inclosure Act, 41 Geo. III., c. 109, but only twenty-five feet were used as actual road, the sides being allowed to grow up with trees, it was held that the right

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(*w*) *Reg.* v. *Des Jardins Canal Co.*, 27 U. C. Q. B. 374; see as to repair of hundred bridges within the English Highway Act, 1835, *Reg.* v. *Inhab. of Claret and Longbridge*, L. R. 1 C. C. R. 237; as to repair of publi buildings, *Hawkeshaw* v. *District Council of Dalhousie*, 7 U. C. Q. B. 590; as to repair of roads in parishes, *Reg.* v. *Folville*, L. R. 1 Q. B. 213; 35 L. J. (M. C.) 154.

(*x*) *Reg.* v. *Knight*, 7 U. C. L. J. 23.

(*y*) *Reg.* v. *Great Western R. Co.*, 5 U. C. L. J. 216.

of the public was to have the whole width of the road, and not merely that part which had been used as the *via trita*, preserved free from obstructions, and that such right had not become extinguished by the fact that the trees had been allowed to grow up within the fifty feet for the period of twenty-five years. (*z*)

A railway company which carried the highway across and over their road by a bridge, were held bound under Con. Stats. U. C., c. 66, s. 9, subs. 5, s. 12, subs. 4, to keep in repair such bridge, and the fence on each side of it. (*a*)

The corporation of the county of Wellington, under 29 & 30 Vic., c. 51, s. 339, had exclusive jurisdiction over a bridge belonging to them "on the line of road and public highway between two townships in the same county," and having jurisdiction, the common law, irrespective of the statute, would impose upon them the duty of repairing it. (*b*)

The word "between," in the 29 & 30 Vic., c. 51, s. 329, must be construed in its popular sense; and where a bridge is constructed over navigable waters, and connects two opposite shores, lying in different counties, such bridge is between such two counties, and they are jointly answerable for its maintenance, even though the counties, as respectively containing the townships between the shores of which the current flows, reach to the middle of the water, and are divided only by the invisible untraceable line called *medium filum aquæ*. (*c*)

It was held not essential in a petition for survey under 12 Vic., c. 35, s. 31, that there should be a statement that the necessary number of resident landholders have applied, if, in fact, a sufficient number have joined. (*d*)

(*z*) *Turner* v. *Ringwood H. Board*, L. R. 9, Eq. 418.
(*a*) *Vanallen* v. *G. T. R. Co.*, 29 U. C. Q. B. 436.
(*b*) *Corporation of Wellington* v. *Wilson*, 14 U. C. C. P. 299.
(*c*) *Harrold* v. *Corporation of Simcoe*, 18 U. C. C. P. 1 (in E. & A.) S. C. 16 U. C. C. P. 43, affirmed.
(*d*) C. S. U. C. c. 93, s. 6; *Cooper* v. *Wellbanks*, 14 U.C.C.P. 364; *Reg.* v. *McGregor*, 19 U. C. C. P. 69.

As to public highways in the navigable rivers of this country, the civil law prevailed in the whole Province of Quebec until the division thereof in 1792. The 32 Geo. III., c. 1, which introduced into the Province of Ontario the law of England as to property and civil rights, included the law as to highways on roads and in streams. After the passing of that Act, the civil law continued applicable to Quebec. Although, in this Province, we have adopted the law of England as to public highways, yet as in other cases of our adoption of English laws, it only prevails here so far as applicable to the state and condition of this country. It is obvious that usage from time immemorial, which, in England, is a material ingredient in determining whether a river is a highway or not, could not be applied to any of the inland waters in Ontario, unless presumed in relation to the wandering tribes who may have roamed through this part of North America, before its discovery by European navigators. (*dd*)

The 32 Geo. III., c. 1, s. 3, superseded the former law of Canada (or the civil law still prevailing in the Province of Quebec), and in introducing the common law of England must be taken *proprio vigore* to have rendered all navigable waters, existing at the time of its introduction, *publici juris*, and more especially if previously entitled to have been so regarded under the abrogated law. (*e*)

This being a newly-discovered country, first occupied within the period of legal memory, and much of it even within living memory, in the application of the common law to it, positive usage immemorially, or from which prior usage immemorially might be inferred, cannot be necessary to render a naturally navigable water-course *publici juris*. When our inland streams are proved to be, in fact and in their natural state, navigable, they are *prima facie* public highways by water. In this light, user or non-user is only

(*dd*) *Reg.* v. *Meyers*, 3 U. C. C. P. 313 *et. seq.*, per *Macaulay*, C. J.
(*e*) *Ibid.* 346, per *Macaulay*, C. J.

material as auxiliary evidence, contributory to the inquiry whether a stream was or was not navigable from the beginning; but it does not therefore follow that it is the only medium, or an indispensable circumstance in the proof. (*f*)

In the application of the common law to Ontario, the fact of the natural capacity of the stream, and not the fact of usage, is most material to be considered. It must, of course, be determined by a court and jury, in each case as it arises, whether a water course ever was, or continued to be, a public highway, or a navigable stream, in the full and comprehensive meaning of the term, and, therefore, a public easement. The question of law for the court being what constitutes a public or navigable river, and whether there was sufficient evidence thereof, or to repel it, the question of fact for the jury being, whether, according to the *data* laid down by the court, and the evidence, it was, in fact, so navigable. (*g*)

As to the Province of Ontario, when our territory was devoted to settlement, the use of all streams practicable for navigation may be justly considered as dedicated to the public use, upon the principles of—first, the civil, and afterwards the common law; so that, although not pre-occupied by public use, they are to be looked upon as open to the public. (*h*)

In this country, streams which are not navigable continuously, but interrupted by occasional rapids, rocks, shoals, or other natural obstructions, causing what are called "portages," are, nevertheless, throughout those portions not thus impeded, undoubtedly highways. (*i*)

Where a portion of water, forming part of Lake Ontario, at extraordinary periods when the water of the lake was pressed up at this particular part of it by strong winds, admitted of scows passing over it, but the water was not

(*f*) *Reg.* v. *Meyers*, 3 U. C. C. P. 347, per *Macaulay*, C. J.
(*g*) *Ibid.* 348, per *Macaulay*, C. J.
(*h*) *Ibid.* 351, per *Macaulay*, C. J.
(*i*) *Ibid.* 352, per *Macaulay*, C. J.

more than four or five feet deep, and at ordinary times it was quite shallow and fordable, it was held that this was not navigable water, and that the Crown had a right to survey and lay out a highway through this portion of water. (*j*)

It is impossible to hold that to be a natural stream or water course, which could be obstructed by the act of ploughing and harrowing land, in the ordinary course of husbandry, and a ditch in a person's land which may be so obstructed, is not a natural stream or highway. (*k*)

It was thought that a creek, whose capacity in its natural state, without improvement, during spring freshets would not permit logs, timber, etc., to float and pass down, would not be subject to public use as a navigable river, (*l*) but in a case now pending in appeal, (*ll*) it was held that streams rendered so navigable by improvement were subject to the public easement.

Navigable rivers are public highways. (*m*) It would seem that the rule of the common law of England, as to the flux and reflux of the tide being necessary to constitute a body of water navigable, does not apply to our waters; and it seems that our large lakes, and navigable rivers, and inland waters are to be viewed as navigable rivers at the common law. (*n*)

All rivers above the flow of the tide, which may be used for the transportation of property, as for floating rafts and driving timber and logs, and not merely such as will bear boats for the accommodation of travellers, are highways by water, and subject to the public use. In determining whether a river is public or private, its mere capacity during the spring freshets, or after heavy rains, to float down single sticks of timber or logs is of itself a very uncertain criterion of the public or private nature of the river, for there is no

(*j*) *Ross* v. *Corporation of Portsmouth*, 17 U. C. C. P. 195.
(*k*) *Murray* v. *Dawson*, 19 U. C. C. P. 317, per *Gwynne*, J.
(*l*) *Whelan* v. *McLachlan*, 16 U. C. C. P. 102.
(*ll*) *McLaren* v. *Caldwell*, 1881.
(*m*) *Gage* v. *Bates*, 7 U. C. C. P. 121, per *Richards*, C. J.; *Olivia* v. *Bissonnault*, S. L. C. A. 524.
(*n*) *Gage* v. *Bates*, 7 U. C. C. P. 121, *et seq.*, per *Richards*, C. J.

stream so small but which may at times suffice and be used for driving down a log or piece of timber, and, therefore, its breadth and its length and depth at ordinary times, and its capacity for floating rafts, etc., are proper to be considered. (*o*)

In *Esson* v. *McMaster* (*p*) it was held that a river which extended about twenty-eight miles into the country, and had been long used for navigation of boats and canoes, and for floating down logs and timber, was a common highway above where the tide flowed. All rivers above the flowing of the tide, and whether the property of the river be in the Crown or in a subject, which afford a common passage, not only for large vessels but for boats or barges, are, by the principles of the common law, public highways. (*q*)

The defendants under their Act of Incorporation, 19 Vic., c. 21, and as assignees of the Canada Company, claimed a right to erect any works for improving the navigation of the navigable river Maitland, and to be owners of the bed of the stream; but it was held that the powers given for that purpose were distinct from those granted for the purposes of their railway, and that, admitting the ownership, it was still subject to the public right, and that any obstruction to the highway or easement of the river for the purposes of navigation, was indictable as a nuisance. (*r*)

An indictment will not lie for merely erecting piers in a navigable river; it must be laid *ad commune nocentum*, and whether it was so or not must be decided by the jury. (*s*)

Where, on an indictment for a nuisance in obstructing the North Sydenham River and Queen's highway, by erecting a dam near lot 16, 13th concession of Sombra, the evidence showed the river in question to be affected by the waters of the St. Clair—to be navigable much higher up than the defendant's dam at some seasons, and at all seasons for some

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(*o*) *Rowe* v. *Titus*, 1 Allen, 326.
(*p*) 1 Kerr, 501.
(*q*) *Ibid.* 506, per *Chipman*, C. J.; see also *Perley* v. *Dibblee*, 1 Kerr, 514.
(*r*) *Reg.* v. *B. & L. H. Ry. Co.*, 23 U. C. Q. B. 208.
(*s*) *Ross* v. *Corporation of Portsmouth*, 17 U.C.C.P. 204, per *A. Wilson*, J.

miles above it; that vessels and boats of a certain size had, before the erection of the dam, passed without obstruction to a point higher up the river than the part where the dam was erected, though it did not appear to have been used to any great extent higher up the river than what was called the Head of Navigation, a point below the dam: the court held that upon such evidence the jury were warranted in finding the stream to be a public navigable water-course. (*t*)

It would seem that the English rule that the land covered by the waters of rivers, above the flux of the tide, belongs to the riparian proprietors does not prevail here. In our waters the grant extends to the water's edge, and the land covered with water and ungranted is the property of the Crown, (*u*) subject to the right of the public to pass over the water in boats, and to fish and bathe therein. (*v*)

In an action for obstructing a river by erecting a mill-dam, it is not a proper question for the jury whether the benefit derived by the public from the mill is sufficient to outweigh the inconvenience occasioned by the dam. (*w*) The provisions of *Magna Charta* and other early statutes which prohibited weirs apply only to navigable rivers. (*x*) Weirs in such rivers are illegal, unless they existed before the time of Ed. I. (*y*)

The 5 & 6 Wm. IV., c. 50, s. 72, which imposes a penalty on any person riding or driving by the side of any road, only applies to footpaths by the side of roads, and not to footpaths in general. (*z*)

Under 27 & 28 Vic., c. 101, s. 25, the owner is liable to a penalty if cattle, sheep, etc., are found straying along any highway, notwithstanding they are under the control of a keeper at the time. (*a*)

(*t*) *Reg.* v. *Meyers*, 3 U. C. C. P. 305.
(*u*) *Parker* v. *Elliott*, 1 U. C. C. P. 489, per *Sullivan*, J.
(*v*) *Attorney General* v. *Perry*, 15 U. C. C. P. 329; see, however, *Fournier and Olivia*, S. L. C. A. 427.
(*w*) *Rowe* v. *Titus*, 1 Allen, 326.
(*x*) *Leconfield* v. *Lonsdale*, L. R. 5 C. P. 657.
(*y*) *Rolle and Whyte*, L. R. 3 Q. B. 64.
(*z*) *Reg.* v. *Pratt*, L. R. 3 Q. B. 64.
(*a*) *Lawrence and King*, L. R. 3 Q. B. 345.

Three magistrates forming a part of the Court of Sessions, by whom the return of a precept issued under c. 62 of the revised statutes (N. B.) for laying out a road is to be decided, are not the three disinterested freeholders contemplated by that Act. (*b*)

The laying out of a public highway by commissioners of highways under the Act 5 Wm. IV., c. 2, does not become invalid by reason of the neglect of the commissioners to deliver a return of such laying out within three months to the clerk of the peace, as directed by the 15th section, this being only a directory provision. (*c*)

A municipality prosecuting an indictment for obstructing a highway is "the party aggrieved" within the 5 & 6 Wm. IV., c. 11, s. 3. (*d*)

On an indictment for nuisance to a highway, if the facts show it to be a proceeding substantially for the trial of a civil right, the defendants may consent that the prosecutor select three or four of them, and proceed only against the latter, the other defendants entering into a rule to plead guilty if those on trial are convicted. This course may be adopted to prevent the charges of putting them all to plead. (*dd*)

The Provincial Attorney-General is the proper person to file an information in respect of a nuisance caused by interference with a railway. (*e*)

A party cannot justify as agent of another for maintaining a public nuisance. (*f*) But an agent merely to let or receive rents of premises is not liable for nuisance upon the same. The case, may, however, be different where the agent is clothed with power to let, repair, and in all respects act as owner. (*g*) If the nuisance existed at the time of letting,

(*b*) *Reg.* v. *Chipman*, 1 Thomson, 292.
(*c*) *Brown* v. *McKeel*, 1 Kerr, 311.
(*d*) *Reg.* v. *Cooper*, 40 U. C. Q. B. 294.
(*dd*) *Whelan* v. *Reg.*, 28 U. C. Q. B. 53, per *A. Wilson*, J.
(*e*) *Attorney General* v. *Niagara Falls Inter. Bridge Co.*, 20 U. C. Chy. 34.
(*f*) *Reg.* v. *Brewster*, 8 U. C. C. P. 208.
(*g*) *Reg.* v. *Osler*, 32 U. C. Q. B. 324.

both tenant and owner are liable; if after the tenancy, only the tenant. (*h*)

An indictment will lie against the corporation of a rural municipality for non-repair of a highway, although it is a front road, of which each proprietor is bound to repair his frontage. But in such case, where the corporation, after conviction, causes the road to be repaired, a merely nominal fine will be imposed, and costs will not be awarded in favor of the prosecutor. (*i*)

Where a corporation is bound by public law to repair a highway, it is sufficient in an indictment for not repairing to allege that the defendants "ought of right" to repair, etc., without setting out the particular ground of liability. (*j*)

An indictment which alleged that "the defendants or some or one of them" had put up, etc., was held bad for uncertainty. (*k*) And an allegation that a nuisance was near a certain lot, when the evidence showed it to be *on* it, was held a fatal variance. (*l*) This could now probably be amended under the 32 & 33 Vic., c. 29, s. 71.

Although a proceeding by indictment for a nuisance is criminal in form, the same evidence that would support a civil action for an injury arising from the nuisance will support the indictment. (*m*)

In *Reg.* v. *Rose* (*n*) it was held that the minutes of the boundary line commissioners produced in the case could not be considered a judgment within the meaning of 3 Vic., c. 11, and that the defendant should therefore have been permitted to give evidence contradicting such minutes. The second section of this Act, which provides that every such judgment shall be filed, is directory only, and the omission to file will not affect the validity of the judgment. In New Brunswick, under the 5 Wm. IV., c. 2, the return of the

(*h*) *Reg.* v. *Osler*, 32 U. C. Q. B. 324.
(*i*) *Reg.* v. *Corporation of St. Saviour*, 3 Q. L. R. 283.
(*j*) *Reg.* v. *Mayor of St. John*, Stev. Dig. 398.
(*k*) *Attorney General* v. *Boulton*, 20 U. C. Chy. 402.
(*l*) *Reg.* v. *Meyers*, 3 U. C. C. P. 305.
(*m*) *Reg.* v. *Stephens*, 2 U. C. L. J. N. S. 223; 14 W. R. 859.
(*n*) 1 U. C. L. J. 145.

commissioners of highways properly made and filed is evidence of the laying out of the street. (*o*)

A conviction for nuisance to a highway is conclusive against the defendant as to the existence of such highway, and he cannot again raise the question on an indictment for obstructing another part of the same highway. (*p*)

It was doubtful whether, after an indictment for nuisance to a highway had been removed by *certiorari*, and tried at the assizes upon a *nisi prius* record, and the defendants found guilty, on a motion afterwards made in term for judgment upon the conviction, the court could, under the 19 Vic., c. 43, s. 316, give judgment out of term. (*q*)

After a verdict of acquittal on an indictment for nuisance in obstructing a highway, tried at a Court of Oyer and Terminer, the court will refuse a *certiorari* to remove the indictment, with a view of applying for a new trial, or to stay the entry of judgment so that a new indictment may be prepared and tried without prejudice, and this though the motion is made on the part of the Crown with the assent of the Attorney General. (*r*) But the court will arrest the judgment on an indictment for nuisance, so that a new indictment may be preferred. (*s*)

After a verdict of acquittal on an indictment for nuisance tried at the assizes, a motion was made with the concurrence of the Attorney General, for a *certiorari* to remove the indictment, with a view to obtain a new trial, but no ground was shown by affidavit, and the new trial was moved for on the same day, being the fourth day of term; it was held that there was nothing to warrant the ordering of a *certiorari*, and that the motion for a new trial could not be entertained until the court were in possession of the record. (*t*) When the

(*o*) *Reg.* v. *McGowan*, 1 Pugsley & B. 191.
(*p*) *Reg.* v. *Jackson*, 40 U. C. Q. B. 290.
(*q*) *Reg.* v. *G. T. R. Co.*, 17 U. C. Q. B. 165, per *Robinson*, C. J.; see also 29 & 30 Vic., c. 40, s. 4, *et seq.*
(*r*) *Reg.* v. *Whittier*, 12 U. C. Q. B. 214.
(*s*) *Reg.* v. *Rose*, 1 U. C. L. J. 145; *Reg.* v. *Spence*, 11 U. C. Q. B. 31.
(*t*) *Reg.* v. *Gzowski*, 14 U. C. Q. B. 591.

case is tried at the assizes, the motion for a new trial need not be made within the first four days of the ensuing term, for the rule of practice requiring a party to move for a new trial within the first four days of a term only applies when the trial has been on record emanating from this court. (*u*)

Obstructing the execution of public justice.—A person who resists, assaults, or otherwise obstructs a constable or other peace officer in the execution of his duty, is liable to an indictment. (*v*) And the fact that the defendant did not know that the person assaulted was a peace officer, or that he was acting in the execution of his duty, furnishes no defence. (*w*) It is sufficient that the constable was actually in the execution of his duty at the time of the assault. (*x*)

Refusing to aid and assist a constable in the execution of his duty, in order to preserve the peace, is an indictable misdemeanor at common law. In order to support such indictment it must be proved that the constable saw a breach of the peace committed; that there was a reasonable necessity for calling on the defendant for his assistance; and that, when duly called on to do so, the defendant, without any physical impossibility or lawful excuse, refused to do so. It is no defence that the single aid of the defendant could have been of no avail. (*y*)

But an indictment for refusing such aid, and to prevent an assault made upon him by persons in his custody, with intent to resist their lawful apprehension, need not show that the apprehension was lawful, nor aver that the refusal was on the same day and year as the assault, or that the assault which the defendant refused to prevent was the same as that which the prisoner made upon the constable; neither is it any objection that the assault is alleged to have been made

(*u*) *Ibid.* 592, per *Robinson*, C. J.
(*v*) *Reg.* v. *McDonald*, 4 Allen, 440.
(*w*) *Reg.* v. *Forbes*, 10 Cox, 362.
(*x*) *Ibid.*
(*y*) *Reg.* v. *Broum*, C. & Mar. 314; Arch. Cr. Pldg. 684-5.

with intent to resist their lawful apprehension by persons already in custody. (*z*)

Before a party can be guilty of the offence of obstructing an officer in the execution of his duty, the latter must be acting under a proper authority. (*a*)

But if the process is regular, and executed by a proper officer, an obstruction, even by a peace officer, will be illegal on the established principle that if one having a sufficient authority issue a lawful command, it is not in the power of any other, having an equal authority in the same respect, to issue a contrary command, as that would legalize confusion and disorder. (*b*)

In an indictment for obstructing an officer of excise, under 27 & 28 Vic., c. 3, the omission in the indictment of the averment that, at the time of the obstruction, the officer was acting in the discharge of his duty, "under the authority of 27 & 28 Vic., c. 3," is not a defect of substance, but a formal defect, which is cured by verdict. (*c*) Where the indictment is under ss. 111 and 112, for obstruction by threats of force and violence, it is not necessary to set out the threats in the indictment, for the gist of the offence is not the meaning of the words, but the effect produced by them—namely, the obstruction. (*d*)

And where a revenue officer, in seizing a distillery, had also seized the outbuildings belonging to the same premises, and the proprietor entered them by force, and in doing so injured one of the employees of the Government; it was held that the proprietor had a right to enter, and that by force if necessary, and that in doing so he had committed no offence against the Government. (*e*)

Disobeying an order made by justices of the peace, at their sessions, in due exercise of the powers of their jurisdiction,

(*z*) *Reg.* v. *Sherlock*, L. R. 1 C. C. R. 20; 35 L. J. (M. C.) 92.
(*a*) Russ. Cr 570; *Rex* v. *Osmer*, 5 Ea. 304.
(*b*) Russ. Cr. 571.
(*c*) *Spelman* v. *Reg.*, 13 L. C. J. 154.
(*d*) *Ibid.* 154, per *Drummond*, J.
(*e*) *Reg.* v. *Spelman*, 2 *Revue Leg.* 709.

is an indictable offence. (*f*) And, on the same principle, if an Act of Parliament give power to the Queen in Council to make a certain order, and annexes no specific punishment to the disobeying it, such disobedience is nevertheless an indictable offence, punishable as a misdemeanor at common law. (*g*) So disobedience to an order of one or more justices is an offence punishable by indictment at common law. (*h*) Every person mentioned in the order, and required to act under it, should, upon its being duly served upon him, lend his aid to carry it into effect. (*i*)

Escapes.—An escape is where one who is arrested gains his liberty, by his own act, or through the permission or negligence of others, before he is delivered by the course of the law. (*j*) If the escape is effected by the party himself, with force, it is usually called prison breach; if effected by others, with force, it is commonly called a rescue. (*k*) If a party in the custody of the law secure his own escape, though without force, he is guilty of a high contempt, and punishable by fine and imprisonment. (*l*) If a prisoner go out through an open door of his gaol, without using any force or violence, he is guilty of a misdemeanor; and it seems any person aiding him in such escape is punishable as for a misdemeanor at common law. (*m*) In order that an officer may be liable for an escape, the party must be actually arrested, and legally imprisoned for some criminal matter. (*n*) The imprisonment must also be continuing at the time of the escape, and its continuance must be grounded on that satisfaction which the public justice demands for the crime committed. (*o*) A voluntary

(*f*) *Reg.* v. *Russell*, 5 U.C.L.J.N.S. 132, per *Cockburn*, C. J.; 17 W. R. 402; Russ. Cr. 573; *Rex* v. *Robinson*, 2 Burr. 799-800.
(*g*) *Rex* v. *Harris*, 4 T. R. 202; 2 Leach, 549.
(*h*) *Rex* v. *Balme*, Cowp. 650; *Rex* v. *Fearnley*, 1 T. R. 316; *Reg.* v. *Gould*, 1 Salk. 381; Russ. Cr. 574.
(*i*) *Ibid.* 575; *Rex* v. *Gash*, 1 Starkie, 41.
(*j*) Russ. Cr. 581.
(*k*) *Ibid.*
(*l*) *Ibid.*
(*m*) *Ibid.*; *Reg.* v. *Allan*, 1 C. & Mar. 295.
(*n*) Russ. Cr. 582.
(*o*) *Ibid.* 583.

escape is where an officer, having the custody of a prisoner, charged with and guilty of a capital offence, knowingly gives him his liberty, with intent to save him either from his trial or execution. By this offence, the officer is involved in the guilt of the same crime of which the prisoner is guilty, and for which he was in custody. A negligent escape is where the party arrested or imprisoned escapes against the will of him that arrests or imprisons him, and is not freshly pursued, and taken again, before he has been lost sight of. (*p*)

In the case of a voluntary escape, the officer has no more right to retake the prisoner than if he had never had him in his custody; but in case of negligent escape, if the party make fresh pursuit he may retake the prisoner at any time afterwards, whether he finds him in the same or a different county.

Where a prisoner, charged with a misdemeanor, after examination of witnesses, was verbally remanded until the following day, in order to procure bail or in default to be committed, and on that day the defendant negligently permitted him to escape, for which he was convicted, it was held that the prisoner was not in the custody of the defendant merely for the purpose of enabling him to procure bail, but under the original warrant, and the matter still pending before the magistrates, until finally disposed of by commitment to custody, or discharged on bail, and that the conviction was proper. (*q*)

It is the duty of the sheriff of the county in which a city is, and not of the high bailiff of such city, to convey to the penitentiary prisoners sentenced at the Recorder's Court. (*r*)

It seems that from the moment a prisoner is arrested, until he has actually expiated his offence by serving the full time of imprisonment, he is in the custody of the law for the purposes of the foregoing offences, and a person in

(*p*) Russ. Cr. 583-4.
(*q*) *Reg.* v. *Shuttleworth*, 22 U. C. Q. B. 372.
(*r*) *Glass* v. *Wigmore*, 21 U. C. Q. B. 37.

any way aiding in his escape, before full atonement made, becomes *particeps criminis.* (*s*)

Prison breach seems now to be an offence of the same degree as that for which the party was confined. (*t*) Imprisonment is no more than a restraint of liberty, and any place, in which a party may be lawfully confined is a prison within the statute, 1 Edward II., stat. 2, for it extends to a prison in law as well as a prison in deed. (*u*) There must be an actual breaking of the prison and not such force and violence only as may be implied by construction of law. (*v*) The breaking need not be intentional; (*w*) but it must not be from the necessity of an inevitable accident happening without the contrivance or fault of the prisoner. (*x*)

The Prison Act, 1865, 28 & 29 Vic., c. 126, s. 37, which prohibits the conveyance into any prison, with intent to facilitate the escape of a prisoner, of certain articles or "any other article or thing," includes a crowbar under the latter words. (*y*)

Parliamentary offences.—Members of either House of Parliament are not criminally liable for any statements made in the House, nor for a conspiracy to make such statements. (*z*) An order for an attachment against a member of parliament is illegal and may be set aside, though no proceedings have been taken upon it, by the issue of the process or otherwise. (*a*) So the writ may be set aside before the defendant is actually arrested upon it. (*b*) A member of parliament was not liable for the penalty imposed by the Con. Stat. Can., c. 3, s. 7, for sitting and voting without having the property qualification required by law. The penalty was only exigible from a person whose incapacity to

(*s*) Russ Cr. 607.
(*t*) 1 Edward II., Stat. 2.
(*u*) Russ. Cr. 592.
(*v*) *Ibid.* 594.
(*w*) *Rex* v. *Haswell*, Russ. & Ry. 458.
(*x*) Russ. Cr. 594.
(*y*) *Reg.* v. *Payne*, L. R. 1 C. C. R. 27; 35 L. J. (M. C.) 170.
(*z*) *Ex parte Wason*, L. R. 4 Q. B. 573.
(*a*) *Reg.* v. *Gamble*, 1 U. C. P. R. 222.
(*b*) *Ibid.*

become a member was decreed by s. 5, and whose election is radically null and void. (*c*) Members of provinicial parliaments are privileged from arrest in civil cases for a period of forty days, after the prorogation or dissolution of parliament and for the same period before the next appointed meeting. (*d*) They have the same privileges in this respect as members of parliament in England. (*e*) But this privilege of exemption from arrest only extends to civil matters. In cases of treason, felony, refusing to give surety of the peace, all indictable offences, forcible entries or detainers, libels, printing and publishing seditious libels, process to enforce *habeas corpus*, contempts for not obeying civil process if that contempt is in its nature or its incidents criminal, and generally in all criminal matters there is no privilege of exemption from arrest. (*f*) A member of a provincial parliament held at Quebec, the place where he is resident, arrested eighteen days after its dissolution for "treasonable practices," and during his confinement elected a member of a new parliament, is not entitled to privilege from such arrest by reason of his election to either parliament. (*g*)

On motion for a writ of *habeas corpus* to produce the body of a person claiming exemption from arrest on the ground of the privilege of parliament, two papers purporting to be two indentures of election are not sufficient evidence of his being such member, to warrant the granting of the writ. (*h*)

After conviction for breach of privilege, in case of libel, the court will not notice any defect in the warrant of commitment. (*i*)

A prisoner committed by the House of Assembly to the

(*c*) *Morasse* v. *Guevremont*, 5 L. C. J. 113.
(*d*) *Wadsworth* v. *Boulton*, 2 Chr. Rep. 76; *Rennie* v. *Rankin*, 1 Allen, 620; *Reg.* v. *Gamble*, 9 U. C. Q. B. 546.
(*e*) *Reg.* v. *Gamble*, *supra*; but see *Culvillier* v. *Munro*, 4 L. C. R. 146.
(*f*) *Reg.* v. *Gamble*, 9 U. C. Q. B. 552, per *Draper*, C. J.; *Lord Wellesley's case*, Russ. and M. 639.
(*g*) *Re Bedard*, S. L. C. A. 1.
(*h*) *Ibid.*
(*i*) *Re Tracy*, S. L. C. A. 478.

common gaol "during pleasure" is discharged by prorogation. (*j*)

Courts of law cannot inquire into the cause of commitment by either House of Parliament, nor bail, nor discharge a person who is in execution by the judgment of any other tribunal; yet if the commitment should not profess to be for a contempt, but is evidently arbitrary, unjust and contrary to every principle of positive law or natural justice, the court is not only competent but bound to discharge the party. (*k*)

The courts have power to issue writs of *habeas corpus* in matters of commitment by either House of Parliament, and the commitment may be examined upon the return to the writ. (*l*)

Conspiracy to intimidate a provincial legislative body is made felony by 31 Vic., c. 71, s. 5.

(*j*) *Ex parte Monk*, S. L. C. A. 120.
(*k*) *Ex parte Lavoie*, 5 L. C. R. 99.
(*l*) *Ibid.*