Section 129—*continued*

punishment of the offender shall be real and such as shall be a deterrent."

As to being at large without authority see *R. v. POKITRUSKI* and comparable cases cited under s.640, *post*.

PART IV.

SEXUAL OFFENCES, PUBLIC MORALS AND DISORDERLY CONDUCT.

Interpretation.

"GUARDIAN."—"Public place."—"Theatre."

130. In this Part,

***(a)* "guardian" includes any person who has in law or in fact the custody or control of another person;**

***(b)* "public place" includes any place to which the public have access as of right or by invitation, express or implied; and**

***(c)* "theatre" includes any place that is open to the public where entertainments are given, whether or not any charge is made for admission.**

Cl.(a) is the former s.197(a); cl.(b) is a modification of the former 197(b) and cl.(c) is the former 197(c) expressed in general terms. For the origin of these definitions see 57-58 Vict., c.57, s.1; 63-64 Vict., c.46, s.3, and 3 Edw.VII, c.13, s.2.

The new definition of 'public place' is designed to overcome questions which have arisen in the cases as to whether restaurants, stores, and other places to which the public are invited, are public places. In *R. v. KEARNEY and DENNING*(1907), 12 C.C.C.349, it was held that a licensed saloon and billiard hall was a public place within s.197(b); in *R. v. COUPAL*(1946), 86 C.C.C.82, it was held that a restaurant was not. In *R. v. CLIFFORD*(1916), 26 C.C.C.5, it was held in a case under s.205 (now s.158), that the magistrate was justified in finding that this massage parlour, to which apparently all comers were admitted, was a place to which the public 'are permitted to have access' within the statute.

Special Provisions.

CORROBORATION.—Marriage a defence.—Burden of proof.—Previous sexual intercourse with accused.

131. (1) No accused shall be convicted of an offence under section 140, 142, 143, 144, 145, 146, or 155 upon the evidence of only one witness unless the evidence of the witness is corroborated in a material particular by evidence that implicates the accused.

(2) No accused shall be convicted of an offence under section 144, paragraph *(b)* of section 145 or section 146 where he proves that, subsequent to the time of the alleged offence, he married the person in respect of whom he is alleged, to have committed the offence.

OLD CODE:

197. In this Part, unless the context otherwise requires,
(a) "guardian" includes any person who has in law or in fact the custody or control of any girl or child referred to;
(b) "public place" includes any open place to which the public have or are permitted to have access and any place of public resort;
(c) "theatre" includes any place open to the public, gratuitously or otherwise, where dramatic, musical, acrobatic or other entertainments or representations are presented or given.

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

. . . . . .

(c) Offences under Part V, sections two hundred and eleven to two hundred and twenty inclusive, except subsections two to five inclusive of section two hundred and fifteen;

214. (2) The subsequent intermarriage of the seducer and the seduced is, if pleaded, a good defence to any indictment for any offence against this or either of the two last preceding sections, except in the case of a guardian seducing his ward.

210. The burden of proof of previous unchastity on the part of the girl or woman under the three next succeeding sections shall be upon the accused.

211. (2) Proof that a girl has on previous occasions had illicit connection with the accused shall not be deemed to be evidence that she was not of previously chaste character.

213. (2) On the trial of any offence against paragraph (b) of this section, the trial judge may instruct the jury that if in their view the evidence does not show that the accused is wholly or chiefly to blame for the commission of said offence, they may find a verdict of acquittal.

301. (4) Proof that a girl has on previous occasions had illicit connection with the accused shall not be deemed to be evidence that she was not of previously chaste character.

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(3) In proceedings for an offence under subsection (2) of section 138 or section 143, 144 or paragraph *(b)* of section 145 the burden of proving that the female person in respect of whom the offence is alleged to have been committed was not of previously chaste character is upon the accused.

(4) In proceedings for an offence under subsection (2) of section 138 or under section 143 or paragraph *(b)* of section 145, evidence that the accused had, prior to the time of the alleged offence, sexual intercourse with the female person in respect of whom the offence is alleged to have been committed shall be deemed not to be evidence that she was not of previously chaste character.

In the leading case on the subject of corroboration, *R. v. BASKERVILLE*(1916), 25 Cox, C.C.524, it was held that corroborative evidence must be such as to confirm the fact that the crime charged has been committed and that it was committed by the accused. It follows that to

Section 131—*continued*

support a conviction, the evidence is such as is consistent only with the guilt of the accused: *PETERSON v. R.*(1917), 28 C.C.C.332.

Under the former Code s.1002 such evidence was required in respect of the following offences:

Treason (s.74, now s.46);
Perjury (s.174, now s.112);
Seduction of girl between 16 and 18 (s.211, now s.143);
Seduction under promise of marriage (s.212, now s.144);
Seduction of foster child, step-child, ward or female employee (s.213, now s.145);
Seduction of female passenger on vessel (s.214, now s.146);
Parent or guardian procuring defilement (s.215(1), now s.155);
Procuring (s.216, now s.184);
Householder permitting defilement (s.217, now s.156);
Conspiracy to defile (s.218, now s.408(c));
Carnal knowledge of idiots or deaf mutes (s.219, now s.140);
Prostitution of Indian women (s.220, dropped from new Code);
Carnal knowledge of girl under 14 or between 14 and 16(s.301, now s.138);
Communicating venereal disease (s.307, now s.239);
Procuring feigned marriage (s.309(2), now s.242); and
Forgery (s.468, now s.310(1)). (Note that the former ss.469 and 470, also relating to forgery, were repealed by 1950, c.11, s.6).

In cases of carnal knowledge of girls under 14, and of indecent assault under s.292 where the unsworn evidence of children of tender years was received, corroboration was required by s.1003(2). S.16 of the *Canada Evidence Act* requires it in all cases where there is such evidence. The former appeared in the Criminal Code, 1892, and the latter in the *Canada Evidence Act*, which was passed in 1893, and both are shown as coming from the same source, namely, 53 Vict., c.37, s.13. They were probably intended to be co-extensive (on this point see *R. v. SILVERSTONE* (1934), 61 C.C.C.258, and *R. v. GEMMILL*(1924), 43 C.C.C.360). In the new Code, s.1003(2) does not appear, but s.566 will require corroboration of the unsworn evidence of children in all cases.

Under this Code corroboration will continue to be required in respect of all of the offences enumerated above, except:

Living on the avails of prostitution (s.184(1)(j)). To require corroboration does not seem consistent with the presumption raised by subsec.(2);

Householder permitting defilement. Corroboration is not required in bawdy-house cases, and it has been held (*R. v. SAM SING*(1910), 17 C.C.C.361) that the section was aimed at houses of assignation and places of that sort;

Conspiracy to defile. It does not appear that there is any greater need for corroboration for this conspiracy than for any other. At all events, the victim would not be likely to know of any such agreement;

Prostitution of Indian women. Provisions for the protection of Indian women were included in the *Indian Act*, 43 Vict. c.28, ss.95 and 96; R.S.C. 1886, c.43, ss106 and 107; 50-51 Vict. 33, s.11. This and other provisions relating to Indians, *e.g.*, ss.109 and 110 (inciting In-

OLD CODE:

294. It is no defence to a charge or indictment for any indecent assault on a young person under the age of fourteen years to prove that he or she consented to the act of indecency.

215. (7) No prosecution for an offence under this section shall be commenced after the expiration of one year from the time of its commission.

1140. (1) No prosecution for an offence against this Act, or action for penalties or forfeiture, shall be commenced

. . . . . .

dians), which were passed in an earlier stage of Canada's development, are not now thought to be necessary. In so far as the former s.220 is concerned, s.184 will apply;

Carnal knowledge of deaf mutes. See note to s.140.

Under the new Code, incest (s.142) has been added to the offences in proof of which corroboration is necessary. There was reference in Parliament to a case in which a girl had been compelled to give evidence against her father (Hansard 1954, pp.2037,3560). It was pointed out in *BERGERON v. R.*(1930), 56 C.C.C.62, that corroboration was unnecessary in cases of incest.

See also s.115, the effect of which is to require corroboration in cases of false swearing in extra-judicial proceedings, where formerly it was not necessary.

In respect of the offences under s.138 (the former s.301) the requirement is modified by s.134, *q.v.*

Subsec.(2) is the former s.214(2).

Subsec.(3) is the former s.210 extended to include the offence under s.138(2).

Subsec.(4) is a combination of the former ss.211(2), 213(1)(b) in part, and s.301(4).

See further the notes following s.146.

CONSENT OF CHILD UNDER FOURTEEN NO DEFENCE.

132. Where an accused is charged with an offence under section 138, 141 or 148 in respect of a person under the age of fourteen years, the fact that the person consented to the commission of the offence is not a defence to the charge.

This is the former s.294. It was s.261 in the Code of 1892 and comes from 43-44 Vict., c.45, s.2 (Imp.), where the age specified is thirteen years. In Archbold's Cr.Pl. 24th ed., p.1018, it is said that this enactment got rid of the decisions in *R. v. READ*(1845), 1 Den.377; *R. v. JOHNSON*(1865), 34 L.J.M.C.192; *R. v. WOLLASTON*(1872), 12 Cox, C.C.180.

As to proof or inference of age, see s.565, *post*.

LIMITATION.

133. No proceedings for an offence under section 143, 144, paragraph *(b)* of section 145, or under section 155, 156 or 157 shall be commenced more than one year after the time when the offence is alleged to have been committed.

Section 133—*continued*

This covers the former ss.215(7) (but appears to duplicate part of s.157), and 1140(1)(c), except that it removes the former limitation in respect of s.213(1)(a), now s.145(1)(a). See 1892 Code, s.551(1)(v) to (x).

INSTRUCTION TO JURY.

134. Notwithstanding anything in this Act or any other Act of the Parliament of Canada, where an accused is charged with an offence under section 136, 137, subsection (1) or (2) of section 138 or subsection (1) of section 141, the judge shall, if the only evidence that implicates the accused is the evidence, given under oath, of the female person in respect of whom the offence is alleged to have been committed and that evidence is not corroborated in a material particular by evidence that implicates the accused, instruct the jury that it is not safe to find the accused guilty in the absence of such corroboration, but that they are entitled to find the accused guilty if they are satisfied beyond a reasonable doubt that her evidence is true.

This is new and codifies a rule of practice. It was discussed at some length (Hansard, 1953, pp.2038 and 3559) and stated to apply to all sexual offences in which corroboration was not specifically required. However, while the rule in Canada was quite clear concerning rape (as to which see *R. v. ELLERTON*(1927), 49 C.C.C.94; *R. v. GALSKY*(1930), 54 C.C.C.199; *R. v. LOVERING*(1948), 92 C.C.C.65; *R. v. THOMAS* (1951), 100 C.C.C.112), it was less clear in relation to other offences than it is in England. There, in *R. v. JONES*(1925), 19 Cr.App.R.40, it was said that "The correct direction on a charge of indecent assault is that it is not safe to convict on the uncorroborated evidence of the prosecutrix, but that the jury, if they are satisfied of the truth of her evidence, may, after paying attention to that warning, nevertheless convict." This case was referred to with approval in *R. v. JONES*(1934), 63 C.C.C.341, at 346, but the latter also was a case of rape.

In *R. v. DRUZ*(1928), 34 O.W.N.119, it was observed that corroboration is not required *by statute* in cases of indecent assault. In *CULLEN v. R.*(1949), 94 C.C.C.337 (S.C. Can.), in which a new trial was ordered after acquittal, the accused was charged under s.276(a) (garrotting), and s.292(a) (indecent assault). It was said (p.339) that "there was in law no necessity for corroboration."

However, there are two cases which indicate a tendency to apply the rule of practice extensively. In *R. v. YATES*(1946), 85 C.C.C. 334, a case of indecent assault involving a child of tender years, the following appears at p.336:

> "The learned Judge did tell the jury the general rule that a jury may convict without corroboration of the sworn evidence of a child of tender years if they believe it, yet it is unsafe to do so. He told them in particular that they were not prevented from acting on the little girl's evidence without corroboration. In my judgment the latter instruction, *while true as a general rule,* was inadequate where baldly stated as it was, without the explanations and limitations which the peculiar circumstances of this case required to be carefully placed before the jury, if they were to be fully apprised of the strength of the case for the defence."

OLD CODE:

Section 1140—continued

(c) after the expiration of one year from its commission if such offence be

. . . . . .

(v) seduction of a girl above sixteen and under eighteen—section two hundred and eleven.

(vi) seduction under promise of marriage—section two hundred and twelve,

(vii) seduction of a ward or employee—section two hundred and thirteen,

(viii) parent or guardian procuring defilement of girl—section two hundred and fifteen, subsection one,

(ix) unlawfully defiling women, procuring, etc.—section two hundred and sixteen,

(x) householders permitting defilement of girls on their premises—section two hundred and seventeen; or

298. Rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent, or with consent which has been extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by false and fraudulent representations as to the nature and quality of the act.

The conviction was quashed, chiefly because of the weakness of the evidence of identification.

In *R. v. McBEAN*(1953), 107 C.C.C.28, where the charge was one of contributing to juvenile delinquency, it was said that:

> "the rule as to the danger of convicting on the uncorroborated evidence of the complainant should be applied not only to charges laid under the Cr. Code but also to all judicial inquiries involving sexual offences."

It is submitted that s.134 states a salutary rule and that the inclusion of offences under s.138 (formerly s.301) which by s.1002 required corroboration, is justified. It may be of assistance in the detection of criminal sexual psychopaths, not to mention cases in which young girls have been sexually assaulted in circumstances which made corroboration difficult, if not impossible, to obtain.

Sexual Offences.

RAPE.

135. A male person commits rape when he has sexual intercourse with a female person who is not his wife,

***(a)* without her consent, or**

***(b)* with her consent if the consent**

(i) is extorted by threats or fear of bodily harm,

(ii) is obtained by personating her husband, or

(iii) is obtained by false and fraudulent representations as to the nature and quality of the act.

This is the former s.298(1). It was s.266(1) in the Code of 1892 and formed part of s.207 in the E.D.C. Other sections relevant to this crime are 3(6), 133, 134, 218 and 661.

Section 135—*continued*

Cl.(b)(ii) was new in the E.D.C. and in connection with it there is reference to *R. v. FLATTERY*(1877), 2 Q.B.D.410, and *HEGARTY v. SHINE*(1878), 14 Cox, C.C.145. It became law in 48 & 49 Vict. c.69, s.4, of which Archbold remarks that it got rid of the decision in *R. v. BARROW*(1868), 38 L.J.M.C.20. It departs also from the earlier definitions which contemplated the use of force, but accords with a definition given by Russell, which explains 'consent' as meaning 'free and conscious permission'. On this point, see *R. v. MAYERS*(1872), 12 Cox, C.C. 311, and *R. v. YOUNG*(1878), 14 Cox, C.C.114, which concern the ravishing of a woman who is asleep.

Cl.(b)(iii) codifies rulings made in *R. v. FLATTERY, supra*, and *R. v. CASE*(1850), 4 Cox,C.C.220, both of which were applied in *R. v. HARMS*(1944), 81 C.C.C.4, where it was held that a yielding brought about by such a misrepresentation as to the nature and quality of the act was not such a consent as to absolve the accused from a charge of rape.

It has been pointed out many times that a charge of this kind is easy to lay and difficult to disprove. For that reason, the character of the prosecutrix is in issue to some extent, notwithstanding that previous chastity is not an element of the crime. Thus, she may be questioned concerning her relations with men other than the accused, but they cannot be called to contradict her if she denies that there has been connection with them.

The vital question is that of consent or no consent, and collateral to that is the question whether or not the conduct of the prosecutrix was consistent with absence of consent. It is in this connection that the rule has grown up that a complaint made by her at the first reasonable opportunity after the offence is admissable evidence. The conditions surrounding this rule are stated clearly and concisely in the following extracts from the judgment in the leading case upon this subject *R. v. OSBORNE*(1905), 74 L.J.K.B.311:

> "To support a charge of rape, or an offence of similar class, but only in such cases, a statement in the nature of a complaint made by the prosecutrix to a third person, not in the presence of the accused, may be given in evidence, whether proof of non-consent is or is not a material element of the charge under investigation, provided such statement is shown to have been made at the first opportunity which reasonably presented itself after the commission of the offence, and has not been elicited by questions of a leading and inducing or incriminating character.
>
> In all ordinary cases, indeed, the principle must be observed which rejects statements made by anyone in the prisoner's absence. Charges of this kind form an exceptional class, and in them such statements ought, under the proper safeguards, to be admitted. Their consistency with the story told is, from the very nature of such cases, of special importance. Did the woman or girl make a complaint at once? If so, that is consistent with her story. Did she not do so? That is inconsistent. And in either case the matter is important for the jury."

It is obvious that the application of this rule in practice must depend upon the circumstances of each case—upon the age of the girl,

OLD CODE:

299. Every one who commits rape is guilty of an indictable offence and liable to suffer death or to imprisonment for life, and to be whipped.

perhaps, upon the nature of the questions put to her, or upon the time when her complaint was made. In one case, which may be taken as representative of this class, the Court received evidence of a complaint made by a young girl to her mother about two hours after the event. In another, statements made to a policeman the day after the alleged offence were rejected as not having been made at the first opportunity.

There is authority for saying that there was a tendency, prior to the *OSBORNE* case, to extend this rule to cases other than those of sexual crime. That case, however, makes clear the limitation within which it is, in that respect, to be applied. (See *R. v. CUTT*(1936), 67 C.C.C.240 and annotation thereto.)

A clear application of the rule appears in *R. v. JONES*(1945), 84 C.C.C.299. The prosecutrix had made no outcry at the time of the offence although other persons were close by, and a complaint made later by her was rejected as evidence, in the absence of proof that she had not had a reasonable opportunity to complain at that time.

PUNISHMENT FOR RAPE.

136. Every one who commits rape is guilty of an indictable offence and is liable to imprisonment for life and to be whipped.

This is the former s.299 omitting the death penalty. It was s.267 in the Code of 1892, without the penalty of whipping.

See also s.134 (warning), s.139 (age), s.413 (trial) and s.661 (Criminal Sexual Psychopath).

The sentence of death was imposed under this provision of the Code in one case only, *R. v. McCATHERN*(1927), 48 C.C.C.54, and in that instance was commuted to twenty years' imprisonment with lashes.

The penalty of whipping was added by 1921, c.25, s.4. Under the law as it stood previously, the offender might be whipped for an attempt, but not for the completed offence.

In *R. v. DeYOUNG*(1927), 47 C.C.C.207, it was said:

"Until 1921, when s.799 was amended by 1921 (Can.) c.25, s.4, the lash was not a punishment that could be added to imprisonment. By that enactment the Parliament of Canada considered that, as the sentence of death was not in practice imposed on a person found guilty of the crime, the words 'and to be whipped' should be added to 'imprisonment for life.' This must be taken to mean that even a life sentence was not to be regarded as adequate punishment in certain cases and that conditions existed or might arise in which whipping might properly be imposed as an additional penalty. Canada is but sparsely settled in many places where women are often alone or insufficiently protected from men of the tendencies of the respondents, and a severer deterrent than previously existed was obviously thought to be necessary."

See also discussion along similar lines in *R. v. BAKSHISH SINGH*, [1943]2 W.W.R.478 in which appeal from sentence of ten years was dismissed where the crime had been committed with deliberation and brutality.

ATTEMPT TO COMMIT RAPE.

137. Every one who attempts to commit rape is guilty of an indictable offence and is liable to imprisonment for ten years and to be whipped.

This is the former s.300. It was s.268 in the Code of 1892 and s.209 in the E.D.C., in both cases without the penalty of whipping, which was added by 1920, c.43, s.7. As to corporal punishment generally, see Introduction.

See also s.134 (warning) and s.139 (age).

SEXUAL INTERCOURSE WITH FEMALE UNDER FOURTEEN.—Sexual intercourse with female between fourteen and sixteen.—Acquittal where accused not chiefly to blame.

138. (1) Every male person who has sexual intercourse with a female person who

(a) **is not his wife, and**

(b) **is under the age of fourteen years,**

whether or not he believes that she is fourteen years of age or more, is guilty of an indictable offence and is liable to imprisonment for life and to be whipped.

(2) Every male person who has sexual intercourse with a female person who

(a) **is not his wife,**

(b) **is of previously chaste character, and**

(c) **is fourteen years of age or more and is under the age of sixteen years,**

whether or not he believes that she is sixteen years of age or more, is guilty of an indictable offence and is liable to imprisonment for five years.

(3) Where an accused is charged with an offence under subsection (2), the court may find the accused not guilty if it is of opinion that the evidence does not show that, as between the accused and the female person, the accused is wholly or chiefly to blame.

This replaces the former s.301(1),(2) and (3). S.301(1) was s.269 in the Code of 1892 and s.211 in the E.D.C. (with age thirteen). Subsecs.(2) and (3) of s.301 were added by 1920, c.43, ss.8 and 17, and subsec.(4) which is now covered by s.131(4) was added by 1934, c.47, s.9. As to burden of proof under subsec.(2), see s.131(3); as to corroboration, in respect of which there is modification, see s.134 and note thereto, and s.566; as to proof of age, see s.565 and see also ss.3(6) and 132, 139 and 661.

AGE.

139. No male person shall be deemed to commit an offence under section 136, 137, 138 or 142 while he is under the age of fourteen years.

This is the former s.298(2) extended to include the offences under ss.137,138 and 142 to which similar reasoning is applicable. S.298(2) was s.266(2) in the Code of 1892, and s.207 of the E.D.C. included a conclusive presumption in the same sense.

The following quotation from *R. v. LOGAN, ex. p. McALLISTER* (1947), 90 C.C.C.177, at p.184, is in point:

"At common law a boy of fourteen could not be guilty of rape. Our

OLD CODE:

300. Every one is guilty of an indictable offence, and liable to seven years' imprisonment and to be whipped, who attempts to commit rape.

301. Every one is guilty of an indictable offence and liable to imprisonment for life, and to be whipped, who carnally knows any girl under the age of fourteen years, not being his wife, whether he believes her to be of or above that age or not.

(2) Every one is guilty of an indictable offence and liable to imprisonment for five years who carnally knows any girl of previous chaste character under the age of sixteen and above the age of fourteen years, not being his wife, and whether he believes her to be above the age of sixteen years or not; but no person accused of any offence under this subsection shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused.

(3) On the trial of any offence against subsection two of this section, the trial judge may instruct the jury that if in their view the evidence does not show that the accused is wholly or chiefly to blame for the commission of said offence, they may find a verdict of acquittal.

(4) Proof that a girl has on previous occasions had illicit connection with the accused shall not be deemed to be evidence that she was not of previously chaste character.

298. (2) No one under the age of fourteen years can commit this offence.

Criminal Code contains a similar provision. This was also true in other cases involving having carnal knowledge. This rule of the common law is based on an irrebuttable presumption that a boy under fourteen is physically incapable of committing the crime. The law was so fixed in supporting the presumption that it would not permit evidence to be offered to show that he was in fact capable. Russell on Crimes, 8th ed. vol.1, p.60 . . . . . .

But all rules of the common law may be changed by a valid statute. If the presumption of the common law extended beyond its application to criminal law and was equally in force in civil proceedings then the provincial legislature had power to change the rule in so far as civil proceedings were concerned, and the legislature of New Brunswick has changed it in so far as it is applicable (*sc.* to the Illegitimate Children's Act, s.47.). That section provides that infancy shall be no defence. That provision is broad enough to remove the common law rule. It does not limit the defence to infants over fourteen. It is as broad as language can make it."

SEXUAL INTERCOURSE WITH FEEBLE-MINDED, etc.

140. Every male person who, under circumstances that do not amount to rape, has sexual intercourse with a female person

***(a)* who is not his wife, and**

***(b)* who is and who he knows or has good reason to believe is feeble-minded, insane, or is an idiot or imbecile,**

is guilty of an indictable offence and is liable to imprisonment for five years.

This is the former s.219 from which the reference to deaf mutes has been omitted in view of the judgment in *R. v. PROBE, infra.* It was s.189 in the Code of 1892.

Section 140—*continued*

The history of this section is given in notes following s.143. See also s.131.

In *R. v. WALEBEK*(1913), 21 C.C.C.130, the charge involved a woman of unsound mind. The majority judgment contained the following expressions (p.133):

> "I am of opinion that the effect of these authorities (i.e. *R. v. R. FLETCHER*, 8 Cox C.C. 131; *R. v. CHARLES FLETCHER*, 10 Cox C.C. 248 and *R. v. BARRATT*, 12 Cox C.C. 498, all tried at dates earlier than the legislation), is that if the evidence establishes that the girl was in such a condition of imbecility that the Jury might reasonably find that she was incapable of giving her consent, then it is a case to go to the Jury, and a verdict of 'guilty' on their part will not be disturbed."

In this case the count under s.219 was withdrawn from the Jury and the accused was convicted of the rape with which he was also charged. In the last of the three cases cited, *R. v. BARRATT*, Blackburn, J., said:

> "In all these cases the question is whether the prosecutrix is an imbecile to such an extent as to render her incapable of giving consent or exercising any judgment upon the matter, or, in other words, is there sufficient evidence of such an extent of idiocy or want of capacity."

The question was answered against the prisoner.

In *R. v. REEVES*(1941), 77 C.C.C.89, distinguishing the case of *R. v. WALEBEK*, it was said:

> "The accused was not charged under section 219 and in my opinion, the offence of carnally knowing a feeble-minded person contrary to s.219, is not a lesser and cognate offence included within the charge of rape. The essential ingredients of the two offences are dissimilar."

A charge under s.219 involving a deaf and dumb woman was before the Court in *R. v. PROBE*(1943), 79 C.C.C.289. It was held that one who has carnal knowledge of a woman known by him to be afflicted with one of the infirmities specified in the *Criminal Code* s.219, is not guilty of an offence under that section unless the woman by reason of such infirmity, is mentally and morally incapable of resisting his solicitation. A woman who is deaf and dumb may, notwithstanding such infirmity, be mentally competent to consent to sexual intercourse, and her mental competence is a question for the Jury. (At p.294):

> "Such an offence is especially distinguished from that of rape by one of its terms which renders it imperative that the act be committed 'under circumstances which do not amount to rape'. This imports the conclusion that it is not necessarily a defence to such a charge to show that a defective woman or girl has yielded to the intercourse in such a way as to amount to consent sufficient in law to constitute a good defence to a charge of rape."

It has been mentioned already that nothing in the Parliamentary records shows the reason for the inclusion of deaf and dumb women in s.219. A suggestion that it was because such a woman is unable to make an outcry is negatived by the words "under circumstances which do not amount to rape". There is a suggestion that it is based upon the case of *R. v. BERRY*(1876), 1 Q.B.D.447, in which it was held that a person

OLD CODE:

219. Every one is guilty of an indictable offence and liable to four years' imprisonment who unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of, any female idiot or imbecile, insane or deaf and dumb or feeble-minded woman or girl, under circumstances which do not amount to rape but where the offender knew or had good reason to believe, at the time of the offence, that the woman or girl was an idiot, or imbecile, or insane or deaf and dumb or feeble-minded.

292. Every one is guilty of an indictable offence and liable to two years' imprisonment, and to be whipped, who
(a) indecently assaults any female; or
(b) does anything to any female by her consent which but for such consent would be an indecent assault, if such consent is obtained by false and fraudulent representations as to the nature and quality of the act; or

. . . . . .

"mute by the visitation of God" with whom it was impossible to communicate, was of "non-sane" mind.

INDECENT ASSAULT ON FEMALE.—Consent by false representations.

141. (1) Every one who indecently assaults a female person is guilty of an indictable offence and is liable to imprisonment for five years and to be whipped.

(2) An accused who is charged with an offence under subsection (1) may be convicted if the evidence establishes that the accused did anything to the female person with her consent that, but for her consent, would have been an indecent assault, if her consent was obtained by false and fraudulent representations as to the nature and quality of the act.

This is the former s.292(a) and (b), with a considerable increase in penalty. Cl.292(c) is covered in this Code by s.231. The provisions of this section were s.259 in the Code of 1892, and were taken into the E.D.C. (s.204) from 24-25 Vict., c.100, s.52.

As to subsec.(2) see notes to s.135. As to cases involving young children, see ss.132,566, and s.16 of the *Canada Evidence Act*. As to corroboration, see s.134, to which this section was added by amendment in the House of Commons (Hansard, 1954, p.3559).

In *R. v. ALLEN*(1954), 108 C.C.C.102, statements made by the accused on inquiry following statements made to her mother by the victim of the assault, a child of three years, were held to have been properly admitted in evidence.

See also s.661(1)(a) (Criminal Sexual Psychopaths).

INCEST.—Punishment.—Compulsion of female.—"Brother."—"Sister."

142. (1) Every one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.

(2) Every one who commits incest is guilty of an indictable offence and is liable to imprisonment for fourteen years, and in the case of a male person is liable, in addition, to be whipped.

Section 142—*continued*

(3) Where a female person is convicted of an offence under this section and the court is satisfied that she committed the offence by reason only that she was under restraint, duress or fear of the person with whom she had the sexual intercourse, the court is not required to impose any punishment upon her.

(4) In this section, "brother" and "sister", respectively, include half-brother and half-sister.

This is the former s.204, subsec.(1) of which was s.176 in the Code of 1892. Subsec.(2) of s.204, (subsec.4 of this section) was added by 1934, c.47, s.6. As to pre-Confederation statutes dealing with this offence, see note to s.8. Incest was not a crime at common law and did not become a statutory offence in England until the passing of the *Punishment of Incest Act*, 1908, 8 Edw. VII, c.45.

Note that, by amendment in the House of Commons (Hansard, 1954, pp.2037,3560), this offence is included in s.131(1) as requiring corroboration, because of the danger of vexatious charges being laid.

As to the meaning of "step-child", see *R. v. GROENING*, noted under s.145. It may be noted too, that the word "cohabit" is omitted from this section. There had previously been a difference of opinion as to its meaning.

It was held in *R. v. FOURNIER*(1934), 62 C.C.C.397, that the word "cohabit" implies sexual intercourse. So too, in *DESELLIER v. R.*(1925), 45 C.C.C.246, Greenshields, J., speaking for the Court said: "I am forced to the opinion that the two expressions mean the same thing. To cohabit is the same as the other." However, in *R. v. GUILBAULT*(1939), 72 C.C.C.254, Roy, J., whose judgment was upheld by the Quebec Court of King's Bench, disagreed with both cases. Referring to the judgment of Greenshields, J., he said:

> "He endeavoured also to show that the words 'cohabit or sexual intercourse' mean the same thing. This point does not concern us, but it would require a very strong argument to bring me to concur in it .....
>
> Then there is the decision of Belleau, J., in *R. v. FOURNIER*(1934), 62 C.C.C.397. The learned Judge studies the sense of these words (i.e. carnal knowledge as defined in Code sec.7), and links them with the procreation of children. That is not the most important part of his judgment, but it is the only part which interests us, and with respect I am not of the same opinion." (Words in brackets added: Ed.)

See also s.139 (age).

SEDUCTION OF FEMALE BETWEEN SIXTEEN AND EIGHTEEN.

143. Every male person who, being eighteen years of age or more, seduces a female person of previously chaste character who is sixteen years or more but less than eighteen years of age is guilty of an indictable offence and is liable to imprisonment for two years.

This is the former s.211(1). It was in s.181 in the Code of 1892.

See also s.131 (corroboration and burden of proof) and s.133 (limitation).

Section 211 appeared in its original form as subsec.(a) of s.3, R.S.C. 1886, c.157:

OLD CODE:

204. (1) Every parent and child, every brother and sister, and every grandparent and grandchild, who cohabit or have sexual intercourse with each other, shall each of them, if aware of their consanguinity, be deemed to have committed incest, and be guilty of an indictable offence and liable to fourteen years' imprisonment, and the male person shall also be liable to be whipped: Provided that, if the court or judge is of opinion that the female accused is a party to such intercourse only by reason of the restraint, fear or duress of the other party, the court or judge shall not be bound to impose any punishment on such person under this section.

(2) In this section the expressions "brother" and "sister" respectively include half-brother and half-sister.

211. Every one over the age of eighteen years is guilty of an indictable offence and liable to two years' imprisonment who seduces any girl of previously chaste character of or above the age of sixteen years and under the age of eighteen years.

. . . . . .

(3) On the trial of any offence under this section, the trial judge may instruct the jury that if in their view the evidence does not show that the accused is wholly or chiefly to blame for the commission of said offence, they may find a verdict of acquittal.

"Every one who (a) seduces and has illicit connection with any girl of previously chaste character, or who attempts to have illicit connection with any girl of previously chaste character, being in either case of or above the age of twelve years and under the age of sixteen years . . . . . is guilty of misdemeanour . . . . . ."

It was amended in 1890 by c.37 by changing twelve to fourteen, the effect being "to give us a more stringent rule than is found in our present statutes", and to adopt the English rule (Hansard, 1890, col.316).

In 1893 by c.32, the section was amended by substituting "or" for "and" in line two. It was explained that "As the section stands, however, while illicit connection with a child of these tender years, between fourteen and sixteen, would not be an offence, there must be the element of seduction", and that "the object of the amendment is to make that element unnecessary. In future, the element of seduction is not necessary to constitute the offence" (Hansard 1893, col.2802).

A number of important amendments to this section were passed in 1920 by c.43.

1. The words "or has illicit connection with" were struck out. It was said (Senate 1920, p.700) "You seduce a virtuous girl; you can have illicit intercourse with a prostitute."
2. Ages 16 to 18 were substituted for ages 14 to 16.
3. Proof of previous intercourse between the parties should not be evidence that the girl was not of previously chaste character.
4. (By s.17). It was provided that the judge might instruct the jury that if in their view the accused was not wholly or chiefly to blame, they might acquit.

This last provision was not continued in the revision of s.211. It is not consistent with the meaning of the word "seduces" as set out in *R. v. GASSELIE*(1934), 62 C.C.C.295, *infra* p.241.

Section 143—*continued*

In *R. v. MACDONALD*(1952), 102 C.C.C.337, a conviction under this section was quashed because the indictment contained no averment as to the age of the accused. It was held that this was an essential part of the charge and that its omission was not curable by amendment.

Seduction was not punishable as a crime in England unless it was preceded by a conspiracy. It was a crime in many of the United States, and in *R. v. COMEAU*(1912), 19 C.C.C.350, in which the accused was charged with seduction under promise of marriage under the former s.212 of the *Criminal Code*, Graham E. J. (at p.357), cited a number of American cases as "authorities of the country from which this statutory provision was taken".

In 1885 the English Parliament passed c.69 of 48-49 Vict., *An Act to make further provision for the protection of Women and Girls, the suppression of brothels and other purposes*, and provided punishment for procuration, for procuring defilement of a woman by means of fraud, threats or drugs, and for various offences concerning the defilement of girls.

In Canada, Bills upon the subject had been introduced in Parliament without success, and it was not until 1885 that a Bill was passed, based in part upon the new English Act and in part upon the American legislation. This was 49 Vict., c.52, *An Act to punish seduction and like offences and to make further provision for the protection of Women and Girls.* This Act made it an offence to seduce and have illicit connection with any girl of previously chaste character above the age of twelve years and under the age of sixteen years, this limitation being adopted "because our statutes make the carnal knowledge of a girl under twelve years of age a felony". It was made an offence unlawfully and carnally to know or attempt to have carnal knowledge of "any female idiot or imbecile woman or girl under circumstances which do not amount to rape, but which prove that the offender knew at the time of the offence that the woman or girl was an idiot or imbecile".

By s.2 it became an offence for any one above the age of twenty-one years, under promise of marriage, to seduce and have illicit connection with any unmarried female of previously chaste character and under eighteen years of age. The English Act did not create a similar crime. This section became s.3 of R.S.C. 1886, c.157, *An Act respecting Public Morals and Public Convenience*. It was amended in 1887 by raising the age of the woman to twenty-one years, the reason for the amendment being given that:

> "The general sentiment of the country which calls for legislation of this kind, considers the character of the Bill in this respect, as it now stands on the Statute Book, not a commendable one, and that sentiment calls for the protection of a female of any age under the circumstances of seduction under promise of marriage. I felt it was impossible to secure the passage of a clause protecting females of any age, but I thought it would be a reasonable compromise to adopt the age mentioned in the Bill". (Hansard 1887, p.278).

The same Bill added the words "or insane" after "imbecile" in s.1. In the *Criminal Code* of 1892, this s.1 appears as s.189 with the addition of the words "or deaf and dumb". There is no record of an amendment

in the intervening years, so that apparently these words were added in Committee. They do not appear in a corresponding section in the English Act.

The section referring to seduction under promise of marriage appears in the Code of 1892 as s.182.

The terms used in the sections have received judicial interpretation in a number of instances. In *R. v. KARN*(1909), 15 C.C.C.301, it was said that ss.211, 212, 213, 214, 216, 217 and 219 deal with and penalize in the specified instances, certain acts heretofore only unlawful in the sense that they were breaches of the moral law:

"In these sections the words '*unlawful*' and '*illicit*' appear to me to be synonymous, and to be used, in describing the act penalized, in the sense of not sanctioned or permitted by law."

The case of *R. v. KARN* was applied in *R. v. ROBINSON*(1948), 92 C.C.C.223, a charge of procuring under s.216(1)(a). It was held that the word "unlawful" means simply not authorized by law, and that it is immaterial that the carnal connection could not itself be the subject of criminal proceedings. The following are extracts from the judgment:

" 'Lawful' means authorized by law. The prefix 'un' may mean simply 'not', and 'unlawful' may be properly used to mean 'not authorized by law'. It is in that sense that the word is used in s. 216(1)(a) of the Code, and to give to it a different and more restricted meaning in that section, as urged by counsel for the appellant would defeat the plain intention and purpose of the enactment .....

The essence of the offence created by the section under consideration is the wrongful act of any person who procures or attempts to procure or solicits any girl or woman to have carnal connection with any other person or persons not authorized by law. The conduct of that person is the criterion by which his or her guilt is to be determined and not the criminality of the result brought about or attempted to be brought about by it .....

Thus in the present case while the act of carnal connection was not shown to be an act contrary to the criminal law and it does not appear that criminal proceedings would lie in respect of it, nevertheless it was not an act authorized by law and in that sense was 'unlawful' within the meaning of that word as used in s. 216(1)(a). I conclude, therefore, that upon a proper construction of the language therein it is applicable to the facts of the case presently under consideration."

And at p.229:

"Because s. 216 is of the same group of sections of the Code as s. 217, all dealing with acts of a similar character, and in view of the opinion expressed by the Judges in the Karn case, the meaning to be placed upon the word 'unlawful' in the expression 'unlawful carnal connection' as it appears s. 216(1)(a) of the Code, must, in my opinion, be that given to the word 'unlawfully' in s. 217, namely, that the word 'unlawful' in s. 216(1)(a) comprises acts which are known and defined as crimes, but embraces, as well, acts which are not contrary to the law in a criminal sense."

The following is an extract from the judgment in *R. v. GASSELLE* (1934), 62 C.C.C.295 at p.297:

"..... illicit connection and seduction do not mean the same thing. Legislative recognition of the existence of this distinction is strongly

Section 143—*continued*

indicated by a review of s.211 under which the charge is laid. As originally enacted by Parliament it read as follows (see 1892 (Can.), c.29, s.181, as amended by 1893 (Can.), c.32):

'181. Every one is guilty of an indictable offence and liable to two years' imprisonment who seduces or has illicit connection with any girl of previously chaste character, of or above the age of fourteen years and under the age of sixteen years.'

In such form the above section passed into the Revised Statutes of Canada, 1906, c.146, where it became s.211, and in its wording remained unchanged until 1920 when it was repealed and the following substituted therefor (see 1920 (Can.), c.43, s.4):—

'211. Every one over the age of eighteen years is guilty of an indictable offence and liable to two years' imprisonment who seduces any girl of previously chaste character of or above the age of sixteen years and under the age of eighteen years. Proof that a girl has on previous occasions had illicit connection with the accused shall not be deemed to be evidence that she was not of previously chaste character.'

So the section stood at the time of the commencement of the prosecution in this case. By the elimination of the words 'or has illicit connection with' from the section as originally enacted it is clear that Parliament intended to make the commission of an offence thereunder dependent upon nothing less than seduction. The word 'seduces' imports not only illicit connection but also the surrender by a woman of her chastity to a man as the result of his persuasion, solicitation, promises, bribes or other means without the employment of force: 57 Corp.Jur. p.9; *R. v. SCHEMMER,* [1927] 3 W.W.R. 417; *R. v. DAUN* (1906), 11 Can.C.C.244, at p.253, 12 O.L.R.227; *R. v. MOON,* [1910] 1 K.B.818; Crankshaw's Criminal Code, 1924, 5th ed., p.216; Tremeear's Criminal Code, 1929, 4th ed., p.235.

The authorities moreover would indicate that in order to sustain the present charge the prosecution should have shown that after her original seduction by the prisoner and following the subsequent occasions when she engaged in illicit connection with him she had rehabilitated herself and that he had then seduced her again on or about the date charged: *R. v. LOUGHEED* (1903), 8 Can.C.C. 184, *R. v. HAUBERG* (1915), 24 Can.C.C. 297, 8 S.L.R. 239; *R. v. COMEAU* (1912), 19 Can. C.C. 350, 5 D.L.R. 250, 46 N.S.R. 450; *R. v. MAGDALL* (1920), 33 Can.C.C. 387, 15 Alta. L.R. 313, affd. 61 S.C.R. 88."

In *R. v. LOUGHEED*(1903), 8 C.C.C.184, it was held that *"previously chaste character"* does not mean "previously chaste reputation", but points to those acts and that disposition of mind which constitute an unmarried woman's virtue or morals. (At p.187):

"I do not mean to infer that there cannot under particular circumstances be a second seduction of the same woman by the same, and possibly even, another man. I would rather incline towards the affirmative, and it has, in fact, been held by the American courts . . . . . that a woman may have been guilty of unchaste conduct, and subsequently become chaste in legal contemplation, and be the subject of seduction. And it does seem reasonable to hold that an unfortunate woman who has once surrendered herself, should not on that account alone irrevocably be deprived of the protection of the Statute.

But there must be, at all events, between the two acts of seduction, such conduct and behaviour as to imply reform and self-rehabilitation in chastity ....."

In *R. v. RIOUX*(1914), 22 C.C.C.323, it was held that where the girl was physically chaste, a conviction for her seduction when under age of sixteen, may be supported under the *Criminal Code* (1906) c.211, although the circumstances indicate the fixed intention on her part, by arrangement with an intermediary, to surrender herself to the man for a stipulated price. In *R. v. FIOLA*(1918), 29 C.C.C.125, following *R. v. LOUGHEED, supra,* and *R. v. COMEAU infra,* the Court discharged the accused, holding that the girl was not of previously chaste character:

" 'Previous chaste character' of a girl as it concerns the offence of seduction, is not limited in its meaning to the physical condition of virginity, and notwithstanding that condition, at the time of the offence it may be shown in defence of the charge by her admissions or otherwise, that the girl had previously committed acts of gross immorality with a man and had exhibited a disposition for lewdness."

In *R. v. COMEAU*(1912), 19 C.C.C.350, Drysdale, J., said:

"I agree with the New York Court of Appeals in the case of *KENYON v. THE PEOPLE,* 26 N.Y. 203, 207, 84 Am. Dec. 180, where it is said that in a statute similar to this, 'character' as here used means actual personal virtue, not reputation."

Graham, E.J. said:

"By a person of chaste character if Parliament had meant in the case of a girl *virgo intacta,* it was easy to have said so". And again, "The moment the notion that the provision is in the case of a girl only for the protection of *virgo intacta,* is departed from, as I think the New York case admits that it must be departed from, and that character may be amended, I see no reason for holding that a previous act of illicit intercourse should disqualify a girl from the protection of the provision."

R. v. JOHNSTON, [1948]5 C.R.320, was a case in which the accused was charged under s.301 (Carnal knowledge of a girl between fourteen and sixteen years). In interpreting the words "previously chaste character", the Court adopted the interpretation set out in *R. v. LOUGHEED, supra,* and held that it was misdirection by the trial judge to instruct the Jury that the question was one of "virginity or no virginity". The following is an extract from the judgment at p.235:

"The word 'character' is intended in my opinion to mean the sum of all mental and moral qualities possessed by the girl. If the aggregate of those qualities distinguish her as one who can properly be described as decent and clean in thought and conduct, she comes within the meaning and intention of the words 'chaste character' as used in this particular section of the Code."

R. v. STINSON(1934), 61 C.C.C.227, also a case under s.301, is to the same effect, following *MAGDALL v. R.,* and so also is *R. v. FARRELL* (1916), 26 C.C.C.273, a case under s.211.

It will be observed that by s.210 the burden of proving previous unchastity on the part of the girl or woman in cases under these sections

Section 143—*continued*

was on the accused. In this connection it was said in the case of *R. v. WAKELYN*(1913), 21 C.C.C.111, at p.115:

> "Inasmuch as it is the judge's duty at the trial to direct the jury hypothetically that if they find such and such facts to have existed, then unchastity is shown, or if they find such and such facts only to have existed, then unchastity is not shown, it is for the accused to complain of the nature of his charge, and to say either that he has not directed them at all upon the point or has misdirected them, and to ask for a reserved case thereupon."

In *R. v. PIECO*(1916), 27 C.C.C.435, it was held that inasmuch as the burden of proving previous unchastity is on the accused, evidence tendered to prove that the girl had previously had illicit intercourse with another man was wrongly rejected since such evidence was the most direct way in which previous unchastity could be proved.

It may be mentioned, however, that the judgment in *R. v. JOHNSTON, supra,* points out that under s.301(2) it is for the Crown to establish that the girl was of previously chaste character and that the burden was not on the accused as it is by virtue of s.210 to prove that she was not.

R. v. PIECO, however, like a number of other cases, turned upon the question of the corroboration which is required under s.1002, and the conviction was quashed since corroboration was lacking.

In *R. v. WYSE*(1895), 1 C.C.C.6, a statement made by the accused before any charge was laid against him that he had been advised that if he could get the girl to marry him he would escape punishment, was held to be corroboration. In *R. v. VAHEY*(1899), 2 C.C.C.258, it was held that evidence of the girl's pregnancy, that she had been in domestic service at the accused's home and that there was a strong probability that no other man could have had an opportunity to become responsible for her condition, did not constitute the corroboration required.

R. v. DAUN(1906), 11 C.C.C.244, was a charge of seduction under promise of marriage. It was held that there was corroboration in statements made by the accused to the girl's family: "That he thought enough of her to make her his wife", that "he always intended to marry her", that he did not deny intercourse but said there were others, that a date was fixed for the wedding and that the accused and the girl had had their photograph taken together.

In *R. v. BURR*(1906), 12 C.C.C.103, the Chairman of the General Sessions had withdrawn from the Jury a charge of seduction of a girl between fourteen and sixteen years of age on the ground that there was no corroboration. It was held that this ruling was wrong in view of statements made by the accused, including some from which it might be inferred that he had taken advantage of the absence from home of the girl's parents.

In *R. v. AUGER*(1930), 54 C.C.C.209, it was held that the corroboration required under s.1002 must be independent evidence proving or tending to prove the commission of the offence charged, also independent evidence identifying or tending to identify the accused with or implicating him in the commission of the offence. The facts are not stated but it was held that there was such evidence.

OLD CODE:

212. Every one, above the age of twenty-one years, is guilty of an indictable offence and liable to two years' imprisonment who, under promise of marriage, seduces and has illicit connection with any unmarried female of previously chaste character and under twenty-one years of age.

SEDUCTION UNDER PROMISE OF MARRIAGE.

144. Every male person, being twenty-one years of age or more, who, under promise of marriage, seduces an unmarried female person of previously chaste character who is less than twenty-one years of age is guilty of an indictable offence and is liable to imprisonment for two years.

This is the former s.212. It was s.182 in the Code of 1892. See also s.131 (corroboration), s.133 (limitation) and notes following s.143.

In the case of *R. v. ROMANS*(1908), 13 C.C.C.68, the parties had become engaged to be married in 1906. There was no illicit intercourse between them then, but there was on various occasions later, the engagement being referred to each time and the promise of marriage repeated. It was held that the seduction is under promise of marriage whether it follows immediately after the promise of marriage or afterwards during the engagement, as it can be inferred that the subsistence of the promise induces the girl's consent. It may be observed that there is a difference of judicial opinion between this case and that of *R. v. WALKER*(1893), 5 C.C.C.465, in which it was held that to constitute the offence it must be shown that the seduction was accomplished by means of the promise. However, later cases follow *R. v. ROMANS*.

In *R. v. COMEAU*(1912), 19 C.C.C.350, the girl's evidence was that "He said that if anything came of it he would marry me". It was held that the promise of marriage must be absolute and not a conditional promise of marriage only to be performed in the event of pregnancy happening. It was held also that *R. v. ROMANS, supra,* was not in conflict with this view, there having been an absolute promise in that case.

In *R. v. SPRAY*(1915), 24 C.C.C.152, it was held on appeal that the words of the accused "Do you love me enough to live with me? I have money enough for two", were not a promise of marriage and that a conviction under s.212 would not stand.

In *R. v. SPERA*(1915), 25 C.C.C.180, a conviction under this section was affirmed. The case turned upon proof of age and it was held that the girl's own evidence that she was nineteen, coupled with similar evidence given by a woman under whose care she had been when a small child, was sufficient.

In *R. v. HAUBERG*(1915), 24 C.C.C.297, the accused was charged under s.212. It was shown that seduction had taken place in Norway and that after the parties came to Canada, intercourse was resumed when circumstances permitted. The conviction was quashed, it being held that there was no evidence that between the two acts of seduction there was such conduct and behaviour on the part of the girl as to imply reform and rehabilitation in chastity, thus applying the doctrine laid down in the case of *R. v. LOUGHEED, supra* s.143.

SECTION 144—*continued*

The same doctrine was adopted by the Supreme Court of Canada, in *MAGDALL v. R.*(1920), 35 C.C.C.244. In this case it was held that there is no statutory limit of time which must elapse in order that a woman seduced under promise of marriage may rehabilitate herself as a person of "chaste character" within the meaning of s.212, and if the facts and circumstances justify a jury in coming to the conclusion that she is a person of previously chaste character at the time of the second seduction, an Appellate Court will not disturb their finding. In this case, more than a year had elapsed between the first seduction and the laying of the charge, so that the prosecution (Code 1140(1)(c)) had to be based upon the second occasion. The promise of marriage subsisted at both times.

In *R. v. SEYMOUR*(1931), 57 C.C.C.95, it was held that the essence of seduction under promise of marriage is that the female is led to surrender her chastity in reliance on the promise; a promise to marry only in the event of her getting into trouble, will not support a conviction. This case was followed in *R. v. McISAAC*(1933), 60 C.C.C.70, in which there was a similar promise, and it is in accord with *R. v. COMEAU* and *R. v. ROMANS*.

SEXUAL INTERCOURSE WITH STEP-DAUGHTER, etc.—Sexual intercourse with female employee.—Acquittal where accused not chiefly to blame.

145. (1) Every male person who

***(a)* has illicit sexual intercourse with his step-daughter, foster daughter or female ward; or**

***(b)* has illicit sexual intercourse with a female person of previously chaste character and under the age of twenty-one years who**

(i) is in his employment,

(ii) is in a common, but not necessarily similar, employment with him and is, in respect of her employment or work, under or in any way subject to his control or direction, or

(iii) receives her wages or salary directly or indirectly from him,

is guilty of an indictable offence and is liable to imprisonment for two years.

(2) Where an accused is charged with an offence under paragraph *(b)* of subsection (1), the court may find the accused not guilty if it is of opinion that the evidence does not show that, as between the accused and the female person, the accused is wholly or chiefly to blame.

This is the former s.213. It was s.183 in the Code of 1892.

See also s.131 (corroboration), s.133 (limitation) and notes following s.143.

Section 213(a) formerly read "Who, being a guardian, seduces and has illicit connection with his ward." It was amended by 1917, c.14, s.2, to read: "Who, being a step-parent or foster parent or guardian, seduces or has illicit connection with his step-child or foster child or ward;".

Cases under this provision have been few. However, in *R. v. STEW-*

OLD CODE:

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

(a) who, being a step-parent or foster parent or guardian, seduces or has illicit connection with his step-child or foster child or ward; or

(b) who seduces or has illicit connection with any girl previously chaste and under the age of twenty-one years who is in his employment, or who, being in a common, but not necessarily similar, employment with him is, in respect of her employment or work, under or in any way subject to his control or direction, or receives her wages or salary directly or indirectly from him; and proof that a girl has on previous occasions had illicit connection with the accused shall not be deemed to be evidence that she was not previously chaste.

ART(1919), 45 D.L.R.480, it was held that s.1140(c)(vii), (1 year limitation), did not apply to this offence.

It will be observed that this subsection did not include the words "of previously chaste character" and that by subsec.2 of s.214 this offence was expressly excluded from the defence afforded by a subsequent marriage.

It was held in *R. v. GROENING*(1953), 107 C.C.C.234, on a charge under cl.(1)(a) that the illegitimate daughter of a wife was not her husband's step-child. See note on this case following s.185.

Section 213(b) appears first in 53 Vict., c.37, as part of s.4, as follows: "Every one who seduces or has illicit connection with any woman or girl of previously chaste character and under the age of twenty-one years who is in his employment in a factory, mill or workshop, or who, being in a common employment with him, in such factory, mill or workshop is, in respect of her employment or work in such factory, mill or workshop, under, or in any way subject to, his control or direction, is guilty of a misdemeanour and liable to two years' imprisonment."

In the House of Commons (Hansard 1890, Vol. 2, col. 3170), the age was raised to thirty years, it having been said that there had been cases of hardship involving women over the age of twenty-one years. However, the provision was restored to its original form in the Senate. It appears in the same form as s.183 of the Code of 1892.

By c.46 of the Statutes of 1900, it was amended to read "in a common, *but not necessarily similar*, employment", and by adding after "control or direction" the words *"or receives her wages or salary directly or indirectly from him"*.

It was amended again in 1920 (c.43, ss.5 & 17), by striking out the word "woman" and the words "in a factory, mill or workshop", the effect being in the later instance to widen the application of the subsection to all kinds of employment. There were long debates on this amendment, the ground being taken on one side that the provision was invidious as applying only to women working in a factory, mill or workshop, and on the other side that, in view of the altered relation of employer and employee under modern conditions, the subsection should be dropped as providing too ready a means of blackmail and coercion against employers. The discussion indicated also an opinion that married women did not need the protection of legislation of this kind.

Section 145—*continued*

(Senate Debates 1920, 701, Hansard 1920, Vol.V, p.4414). The changes were accepted, however, along with provisions that proof of previous intercourse with the accused, should not be proof of previous unchastity, and that the judge might instruct the jury that they might acquit if they found that the accused was not wholly or chiefly to blame. This is the present reading of the subsection.

In *R. v. JONES*(1934), 63 C.C.C.341, in which the charge related to a married woman employed as a housekeeper, it was held that since the word "woman" had been deleted in 1920 leaving only the word "girl" the subsection applied only to an unmarried woman. But note that in the revision the expression is "female person".

In *R. v. BLANCHARD*(1941), 75 C.C.C.279, the accused appealed from a conviction for seduction of a housemaid. A new trial was ordered on the ground that the trial judge did not instruct the jury what elements the Crown should establish in order that the accused might be found guilty of seduction, the girl having sworn that she did not consent.

SEDUCTION OF FEMALE PASSENGERS ON VESSELS.

146. Every male person who, being the owner or master of, or employed on board a vessel, engaged in the carriage of passengers for hire, seduces, or by threats or by the exercise of his authority, has illicit sexual intercourse on board the vessel with a female passenger is guilty of an indictable offence and is liable to imprisonment for two years.

This is the former s.214(1). It was s.184 in the Code of 1892. The words "on board the vessel" are new. See also s.131.

The provision made by s.214(1) (Seducing female passengers on vessels) was for the protection of women coming to Canada as immigrants. There are no reported cases under it.

BUGGERY OR BESTIALITY.

147. Every one who commits buggery or bestiality is guilty of and indictable offence and is liable to imprisonment for fourteen years.

This is the former s.202. It was s.174 in the Code of 1892 and s.144 in the E.D.C., whence it was taken from the *Offences against the Person Act*, 1861. Under the former section the maximum penalty was imprisonment for life, but this has been changed and the offence added to those specified in s.661, *post*, as possibly indicating criminal sexual psychopathy. See also s.3(6), and for meaning of the terms used, *R. v. JACOBS*(1817), Russ. & Ry. 331.

While this offence is not one included in s.131 as requiring corroborative evidence, the rule requiring corroboration of the evidence of an accomplice will apply: *R .v. TATE*, [1908]2 K.B.680; *R. v. BROWN*(1928), 49 C.C.C.334; *R. v. CUTT*(1936), 67 C.C.C.240.

As to the admissibility of evidence of a complaint in a case under this section, see *R. v. ELLIOTT*(1928), 49 C.C.C.302, and notes to s. 135, *ante*.

The former s.203 (attempt) is not continued in terms, but is covered by s.406.

See also s.661 (Criminal Sexual Psychopath).

OLD CODE:

214. Every one is guilty of an indictable offence and liable to a fine of four hundred dollars or to one year's imprisonment, who, being the master or other officer or a seaman or other person employed on board of any vessel, while such vessel is in any water within the jurisdiction of the Parliament of Canada, under promise of marriage, or by threats, or by the exercise of his authority, or by solicitation, or the making of gifts or presents, seduces and has illicit connection with any female passenger.

(2) The subsequent intermarriage of the seducer and the seduced is, if pleaded, a good defence to any indictment for any offence against this or either of the two last preceding sections, except in the case of a guardian seducing his ward.

202. Every one is guilty of an indictable offence and liable to imprisonment for life who commits buggery, either with a human being or with any other living creature.

293. Every one is guilty of an indictable offence and liable to ten years' imprisonment, and to be whipped, who assaults any person with intent to commit sodomy or who, being a male, indecently assaults any other male person.

206. Every male person is guilty of an indictable offence and liable to five years' imprisonment and to be whipped who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any acts of gross indecency with another male person.

INDECENT ASSAULT ON MALE.

148. Every male person who assaults another person with intent to commit buggery or who indecently assaults another male person is guilty of an indictable offence and is liable to imprisonment for ten years and to be whipped.

This is the former s.293. It was s.260 in the Code of 1892, and formed part of s.145 in the E.D.C. See s.132 as to consent of children under fourteen, and s.566 as to corroboration. In the latter connection, s.16(2) of the *Canada Evidence Act* was applied in *R. v. SILVERSTONE*(1934), 61 C.C.C.258.

See also s.661 (Criminal Sexual Psychopath) and s.662 (preventive detention).

ACTS OF GROSS INDECENCY.

149. Every one who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for five years.

This is the former s.206 widened to apply to acts of gross indecency committed by persons of either sex. It was s.178 in the Code of 1892, and came from 48-49 Vict., c.69, s.11(Imp.). It was intended to cover the facts of such earlier cases as *R. v. JACOBS*(1817), Russ. & Ry.331; *R. v. WOLLASTON*(1872), 12 Cox,C.C.180, and *R. v. ROWED*(1842), 3 Q.B.180.

That part of the former section dealing with attempts has been left to the operation of s.406. As to acts constituting attempts, see *R. v. MISKELL*, [1954]1 All E.R.137.

In a Canadian case, *R. v. LANDLOW*(1922), 38 C.C.C.54, it was held that the offence under this section is distinct from the offences under

Section 149—*continued*

ss.202 and 293 (now 147 and 148) and that the section must be taken to refer to acts not included there. The following cases are relevant to this section: *R. v. HORNBY*(1946), 32 Cr.App.R.1. *Per* Lynskey, J. at p.3:

> "We have had an argument whether actual physical touching is essential to constitute the offence of gross indecency by one male person with another. . . . . If I had to decide it, I personally would take the view that, if two male persons are acting in concert to behave in an indecent manner, there may be gross indecency the one with the other, even though there is no actual physical contact . . . . . (The jury) ought to have been told that the act of gross indecency must be by one person with the other and that the two men must have been acting in concert."

In *R. v. PEARCE*(1951), 35 Cr.App.R.17, the accused was convicted of attempting to commit an act of gross indecency with another man who was not charged, and Humphreys, J., quoting *R. v. HORNBY* with approval, said:

> "Obviously it is an offence which, if two persons are to be convicted of it, must be proved to have been committed with the consent of both of them, acting in concert together, otherwise those two persons cannot be convicted. There is nothing to support the proposition that where two persons are jointly indicted for such an offence, one cannot be convicted and the other acquitted."

R. v. HUNT et al. (1950), 34 Cr.App.R.135:

> "In order to constitute the offence of gross indecency between male persons, actual physical contact is not essential, and it is sufficient if the persons charged have placed themselves in such a position that a grossly indecent exhibition is going on between them: . . . . . "

The matter of the admissibility of evidence of similar acts in cases where persons are charged with unnatural practices has arisen several times. In *R. v THOMPSON*(1918), 26 Cox,C.C.189 (H.L.), it was admitted as being relevant to the issue of identity, in *R. v. SIMS,* [1946]1 K.B.531, to show the nature of the act done by the accused, and in *R. v. HARTLEY*(1940), 57 T.L.R.98, to prove the existence of a guilty passion. *R. v. THOMPSON* and *R. v. SIMS* were discussed at length by the Privy Council in *NOOR MOHAMED v. R.,* [1949]1 All E.R.365, in which the question arose in a case of murder, and that case, which was applied in the Supreme Court of Canada in *LIZOTTE v. R.*(1951), 99 C.C.C.113 at p.125, lays down as a general principle that evidence of similar acts should not be admitted unless it is relevant to an issue before the court, and unless its probative value outweighs its prejudicial effect *quoad* the accused. See also *R. v. THOMPSON,* [1954] O.W.N.156.

It appears from the cases, however, that if such evidence is admissible, it may be given either in the case in chief or in rebuttal, and that it may concern acts either previous to or subsequent to the offence charged.

As to Criminal Sexual Psychopaths see s.661.

OLD CODE:

207. (1) Every one is guilty of an indictable offence and liable to two years' imprisonment who

(a) makes, prints, publishes, distributes, circulates, or has in possession for any such purpose any obscene written matter, picture, model or other thing whatsoever; or

(b) makes, prints, publishes, distributes, sells or has in possession for any such purpose, any crime comic.

(2) Every one is guilty of an indictable offence and liable to two years' imprisonment who knowingly, without lawful justification or excuse

(a) sells, exposes to public view or has in possession for any such purpose any obscene written matter, picture, model or other thing whatsoever;

(b) publicly exhibits any disgusting object or any indecent show; or

(c) offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or represented as a means of preventing conception or causing abortion or miscarriage or advertises or publishes an advertisement of any means, instructions, medicine, drug or article for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

OFFENCES TENDING TO CORRUPT MORALS.

OBSCENE MATTER.—Crime comic.—Selling obscene matter.—Indecent show.—Offering to sell contraceptives.—Offering to sell other drugs.—Defence of public good.—Question of law and question of fact.—Motives irrelevant.—Ignorance of nature no defence.—"Crime comic."

150. (1) Every one commits an offence who

(*a*) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever, or

(*b*) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation, a crime comic.

(2) Every one commits an offence who knowingly, without lawful justification or excuse,

(*a*) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatsoever,

(*b*) publicly exhibits a disgusting object or an indecent show,

(*c*) offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or represented as a method of preventing conception or causing abortion or miscarriage, or

(*d*) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

(3) No person shall be convicted of an offence under this section if he establishes that the public good was served by the acts that are alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good.

Section 150—*continued*

(4) For the purposes of this section it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

(5) For the purposes of this section the motives of an accused are irrelevant.

(6) Where an accused is charged with an offence under subsection (1) the fact that the accused was ignorant of the nature or presence of the matter, picture, model, phonograph record, crime comic or other thing by means of or in relation to which the offence was committed is not a defence to the charge.

(7) In this section, "crime comic" means a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially

***(a)* the commission of crimes, real or fictitious, or**

***(b)* events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.**

This is the former s.207 as enacted 1949 (2nd sess.), c.13. It has been changed by adding a reference to phonograph records, and subsec.7 contains an amendment of the definition of 'crime comics', that was passed in 1949. See also s.154 (punishment).

There has been criticism of this section on the ground that it contains no definition of obscenity. However, the test applied is that laid down in *R. v. HICKLIN*(1868), 3 Q.B.D.360 at p.371:

"I think the test of obscenity is this, 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."

It was held in *R. v. REITER et al.,* [1954]1 All E.R.741 that this test is to be applied to-day, and that, in determining whether or not a book is obscene, regard is to be had to that book alone. The Court of Appeal in Ontario applied the same test in a prosecution involving several novels and magazines, *R. v. NATIONAL NEWS CO. LTD.,* [1953] O.R.533, adding that it must, no doubt, be related to the time when the test is applied. The Chief Justice also pointed out two differences between subsecs.(1) and (2), namely, (a) that subsec.(7) (now subsec.(6)) which provides that ignorance of the nature of the publication is no defence, refers to subsec.(1) and not to subsec.(2), and (b) that the words "knowingly, without lawful justification to excuse" appear in subsec.(2) and not in subsec.(1). On that point he said:

"I think that under subsec.(1) Parliament was putting the distributor in the same position as the publisher, and putting the person who sells or exposes to public view or has in his possession for that purpose, obscene written matter, in a different position, the different position being that the person who sells or exposes to public view or has in his possession for that purpose, must act *knowingly and without lawful justification or excuse*. . . . . .

OLD CODE:
Section 207—continued
(3) "Crime comic" means in this section any magazine, periodical or book which exclusively or substantially comprises matter depicting pictorially the commission of crimes, real or fictitious..
(4) No one shall be convicted of any offence in this section mentioned if he proves that the public good was served by the acts alleged to have been done, and that there was no excess in the acts alleged beyond what the public good required.
(5) It shall be a question for the judge whether such acts are such as might be for the public good, and whether there is evidence of excess beyond what the public good required; but it shall be a question for the jury whether there is or is not such excess.
(6) The motives of the accused shall in all cases be irrelevant.
(7) It shall be no defence to a charge under subsection one that the accused was ignorant of the nature or presence of the matter, picture, model, crime comic or other thing.

The differences which I have mentioned are the result of the repeal in 1949 of s.207 as it then stood and the substitution therefor of a new section. By this change the words 'knowingly without lawful justification or excuse' were removed in relation to distributing obscene matter or having such obscene matter in one's possession for distribution. Subsec.(7) above referred to was added at the same time."

In *R. v. MARTIN SECKER & WARBURG LTD.*, [1954]1 W.L.R. 1138, a prosecution in respect of a recent novel "The Philanderers", it was said that in deciding whether a recently published novel is an obscene libel, it is necessary to take into account the changed approach to the question of sex since *R. v. HICKLIN* was decided. The jury acquitted the accused.

As to subsec.(2), the cases which held under the section as it stood before 1949, that it is necessary for the Crown to prove knowledge on the part of the accused, and that the word 'knowingly' is essential to the charge, will still apply: *R. v. BEAVER*(1904), 9 C.C.C.415; *R. v. McDOUGALL*(1909), 15 C.C.C.466; *R. v. BRITNELL*(1912), 20 C.C.C.85; *R. v. DESCOTES*(1924), 63 Que.S.C.52; *R. v. AMERICAN NEWS CO.* (1941), 76 C.C.C.151.

The question of publications for the public good arose in the case of *R. v. ST. CLAIR*(1913), 21 C.C.C.350, involving a bulletin issued by the accused, a clergyman, describing an obscene theatrical performance. His defence was that he had intended to arouse the public conscience, but it was held that he had gone beyond what was justifiable. On the other hand, this defence was successful in *R. v. PALMER*(1937), 68 C.C.C.20, in which accused was charged under s.207(1)(c), now s.150(2)(c) in respect of her actions in distributing articles and information relating to birth control.

Historical. The publication of indecent matter tending to the destruction of morals was in early times punished in the ecclesiastical courts, and Halsbury 2nd ed., Vol. IX, p.395, notes that *R. v. CURL*(1727), 2 Stra.788, seems to have been the first successful prosecution in a temporal court. In that case it was held that the publication of an obscene book was punishable as a libel and that it was a temporal offence.

Section 150—*continued*

In 1841 (*R. v. MOXON*, 4 StateTr.N.S.693) Edward Moxon was indicted for publishing an obscene libel consisting of Shelley's poem "Queen Mab". The report at column 722 says that "the Jury, after deliberating for a quarter of an hour found the defendant guilty. The defendant was never called up for judgment". Commenting on this, in the case of *R. v. HICKLIN, supra*, Blackburn, J., said (p.374):

> "In Moxon's case, the publication of Shelley's 'Queen Mab' was found by the Jury to be an indictable offence; I hope I may not be understood to agree with what the Jury found, that the publication of 'Queen Mab' was sufficient to make it an indictable offence. I believe, as everybody knows, that it was a prosecution instituted merely for the purpose of vexation and annoyance".

In 1868, *R. v. HICKLIN*, *supra*, besides laying down the modern rule as already quoted, held also that the publication of the pamphlet in question was not justified by the appellant's innocent motives or object, and that he must be taken to have intended the natural consequences of his act.

In 1878, the novelist Annie Besant and Charles Bradlaugh were indicted for publishing an obscene libel consisting of Mrs. Besant's book "The Fruits of Philosophy," and convicted. On appeal (14 Cox, C.C.68) the conviction was reversed because the indictment did not set out the words of the libel. It was stated in the Court below, that to set out the objectionable material might involve setting out the whole of a long book, but in the Court of Appeal it was said (Bramwell L. J., at p.76):

> "It seems that equal inconvenience might arise from making such an exception to the general rule of law, for when is a libel considered too long to set out? Is one of ten volumes too long? Where is the line to be drawn? And it has not been suggested that a defamatory libel need not be set out and yet it may be of any length. . . . . The law says, convenient or inconvenient, he may take the objection at any time, before or after the verdict".

It may be noticed in passing that on that point the case would not be followed in Canada, as it was held in *R. v. DAVIDSON*(1931), 55 C.C.C. 203, that in view of the provisions of s.852 of the *Criminal Code*, an indictment for obscenity need not set out the words alleged to constitute the offence. (See ss.492 and 493, *post*).

The English Draft Code adopted the law as laid down in *R. v. HICKLIN*, *supra*, the Commissioners remarking (p.22): "We believe that section 147, as to obscene publications, expresses the existing law, but it puts it into a much more definite form than at present."

S.179 of the *Criminal Code of Canada*, 1892, was based on s.147 of the English Draft Code, but the English section did not include subsec.(2) of the Canadian section. There was the further difference that par.(c) of subsec.(1) does not appear in the English section which had instead the clause "publishes any obscene libel". In *R. v. PALMER*(1937), 68 C.C.C.20, at p.22, it is pointed out that "The English common law deals only with obscene libels and literature." . . . . "Any English cases to be found deal with the question of 'publishing an obscene libel' ".

S.179 of the Code of 1892 was amended by 1900, c.46, s.3, to cover the manufacture of obscene material and also to include typewritten

matter. The 1900 amendment included the words "so as to afford a justification or excuse therefor", after the word "made" in subsec.(3), but these words were not in s.207 as it appeared in R.S.C. 1906, and subsequently.

In 1909 (c.9, s.2) subsec.(1)(a) was amended to include "any plate for the reproduction of any such picture or photograph", and in 1913 par.(c) was amended to refer to advertisements of drugs or articles as cures for venereal disease, etc.

In *R. v. DeMARNY*(1906), 21 Cox,C.C.371 it was held that a publisher was liable in respect of advertisements of obscene material inserted by persons resident abroad. It was said (p.374) "*R. v. OLIPHANT*, [1905] 2 K.B.67; *R. v. BURDETT* (1 St.Tr.N.S.1) and *R. v. COOPER* (5 C. & P.535) are authorities that persons who aid and abet persons abroad in the commission of offences in this country, are liable as principals here".

Notes on Canadian Cases.

In *R. v. BEAVER*(1904), 9 C.C.C.415, mentioned above, it was found that when the accused was arrested she had been asked what she was doing and replied "that she was fighting the devil". It was held that this statement showed that she was aware of the contents of the document in question and that she had published it "knowingly".

In *R. v. McDOUGALL*, *supra*, it was held on appeal that the onus is on the Crown to show that the accused as editor and proprietor of a paper had "knowingly" published the obscene matter, but that knowledge may be inferred, in the absence of evidence to the contrary, from proof that he had full control as to what should be published or not published and that he published the paper under an assumed name.

In *R. v. McCUTCHEON*(1909), 15 C.C.C.362, it was held that a person who knowingly purchases an obscene picture for another and has possession of the same for the purpose of delivering it to such other person, is guilty of having in his possession for circulation a picture tending to corrupt morals although he did not exhibit it to any one.

The matter of obscene literature came before the Courts in another way in the case of *PASICKNIAK v. DOJACEK*, [1928]2 D.L.R.545. In that case the plaintiff brought the action to restrain the defendant from infringing his copyright and it was found that the defendants had "pirated the whole book, word for word". The defendants sought (unsuccessfully upon the facts) to have the action dismissed on the ground that the book was obscene within the meaning of s.207(1)(a) of the Code.

The Manitoba Court of Appeal rejected this contention on the authority of *STOCKDALE v. ONWHYN*(1826), 5 B. & C.173. That case concerned a book which professed to be a history of certain illicit amours and which contained libels upon individuals. Abbott, C.J., said:

> "The question then is, whether the first publisher can claim a compensation in damages for a loss sustained by an injury done to the sale of such a work. In order to establish such a claim he must in the first place, show a right to sell; for if he has not that right, he cannot sustain any loss by an injury to the sale. Now I am certain that no lawyer can say that the sale of each copy of this work is not an offence against the law."

In the Manitoba case, Fullerton, J.A., said:

"It is clear from the above authority that unless there is something in

Section 150—*continued*

the plaintiff's book which makes the sale of it an offence against the law, the plaintiff has the right to sell it and consequently the right to restrain the defendant from infringing his copyright."

See also *A.-G. ONTARIO v. KOYNOK*(1940), 75 C.C.C.100, where the Attorney-General applied under s.16 of the *Ontario Judicature Act*, R.S.O. 1937, c.100, for an injunction to restrain the publication of certain magazines or periodicals alleged to be obscene. The question arose whether s.16 was *ultra vires* as prohibiting an act already prohibited by s.207 of the *Criminal Code*. The action was subsequently withdrawn on the defendants' agreeing to cease publication of the matter in question (75 C.C.C.405).

In a prosecution relating to crime comics, *R. v. KITCHENER NEWS Co.*(1954), 108 C.C.C.304, it was said that:

"It does appear that the section is intended to create more than one offence, and inasmuch as the charge contained in the indictment contains more than one of the offences created, we think that . . . . . the conviction is void and should be quashed on the ground of duplicity."

As the offences under the section may now be tried on summary conviction as well as on indictment, see s.696(1)(b) as to separate *counts* and s.708(4) as to separate trial of counts.

Of this subject generally, it may be trite to remark that there can be no absolute standard of taste in artistic expression and that in the name of realism, much has been written that it is difficult to justify. Stephen in his Digest of Criminal Law, set out some useful criteria:

"I have found no authority for the proposition that the publication of a work immoral in the wider sense of the word is an offence. A man might with perfect decency of expression, and in complete good faith, maintain doctrines as to marriage, the relation of the sexes, the obligation of truthfulness, the nature and limits of the rights of property, etc., which would be regarded as highly immoral by most people, and yet (I think) commit no crime. Obscenity and immorality in this wide sense are entirely distinct from each other. The language used in reference to some of the cases might throw doubt on this, but I do not think any instance can be given of the punishment of a decent and bona fide expression of opinions commonly regarded as immoral."

And he adds a list of authors, to which he might have added Shakespeare, whose books contain, he says:

"More or less obscenity for which it is impossible to offer any excuse whatever. I know not how the publication of them could be justified except by the consideration that upon the whole it is for the public good that the works of remarkable men should be published as they are, so that we may be able to form as complete an estimate as possible of their characters and of the times in which they lived. On the other hand, a collection of indecencies might be formed from any one of the authors I have mentioned, the separate publication of which would deserve severe punishment."

RESTRICTION ON PUBLICATION OF REPORTS OF JUDICIAL PROCEEDINGS.—Saving.—Consent of Attorney General.—Exceptions.

151. (1) A proprietor, editor, master printer or publisher com-

OLD CODE:

207A. (1) Every person being a proprietor, editor, master printer or publisher is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding four months or to a fine not exceeding two thousand dollars, or to both such imprisonment and fine, who prints or publishes or causes or procures to be printed or published:—

(a) in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details being matter or details the publication of which would be calculated to injure public morals;

(b) in relation to any judicial proceedings for dissolution of marriage, for nullity of marriage, or for judicial separation, or for restitution of conjugal rights, any particulars other than the following, that is to say:—

(i) the names, addresses and occupations of the parties and witnesses;

(ii) a concise statement of the charges, defences and countercharges in support of which evidence has been given;

(iii) submissions on any point of law arising in the course of the proceedings, and the decision of the court thereon;

(iv) the summing up of the judge and the finding of the jury (if any) and the judgment of the court and observations made by the judge in giving judgment;

Provided that nothing in this part of this subsection shall be held to permit the publication of anything contrary to the provisions of paragraph (a) of this subsection.

(2) No prosecution for an offence under this section shall be commenced without the leave of the Attorney General for the province in which the offence is alleged to have been committed.

(3) Nothing in this section shall apply to the printing of any pleading, transcript of evidence or other document for use in connection with any judicial proceedings or the communication thereof to persons concerned in the proceedings, or to the printing or publishing of any notice or report in pursuance of the directions of the court; or to the printing or publishing of any matter in any separate volume or part of any bona fide series of law reports which does not form part of any other publication and consists solely of reports of proceedings in courts of law, or in any publication of a technical character bona fide intended for circulation among members of the legal or medical professions.

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mits an offence who prints or publishes

(a) **in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details, being matter or details that, if published, are calculated to injure public morals;**

(b) **in relation to any judicial proceedings for dissolution of marriage, nullity of marriage, judicial separation or restitution of conjugal rights, any particulars other than**

(i) the names, addresses and occupations of the parties and witnesses,

(ii) a concise statement of the charges, defences and countercharges in support of which evidence has been given,

(iii) submissions on a point of law arising in the course of the proceedings, and the decision of the court in connection therewith, and

(iv) the summing up of the judge, the finding of the jury and the judgment of the court and the observations that

Section 151—*continued*

are made by the judge in giving judgment.

(2) Nothing in paragraph *(b)* of subsection (1) affects the operation of paragraph *(a)* of that subsection.

(3) No proceedings for an offence under this section shall be commenced without the consent of the Attorney General.

(4) This section does not apply to a person who

***(a)* prints or publishes any matter for use in connection with any judicial proceedings or communicates it to persons who are concerned in the proceedings;**

***(b)* prints or publishes a notice or report pursuant to directions of a court; or**

***(c)* prints or publishes any matter**

(i) in a volume or part of a *bona fide* series of law reports that does not form part of any other publication and consists solely of reports of proceedings in courts of law, or

(ii) in a publication of a technical character that is *bona fide* intended for circulation among members of the legal or medical professions.

This is the former s.207A which was added to the Code by 1938, c.44, s.11. It was described by the Minister of Justice (Hansard, p.4315) as "a reproduction of the English law with regard to the publication of details and reports of judicial proceedings which may be calculated to injure public morals," and was agreed to without discussion.

As to the exceptions set out in subsec.(4) see also s.153. Concerning clause (4)(a), it is interesting to note that in *R. v. BRADLAUGH and BESANT, supra* s.150, American cases were cited to the effect appearing in the following quotation, and were not approved:

"They lay down a rule that, where it is an allegation that the libel is too bad to put on record, it may be omitted, and it is enough to say that there is no such allegation here. But do the English Courts recognize that rule? They do not. Our Courts do not allow libels to be perpetuated and disseminated under a pretense of judicial necessity, but that is as far as they go. Where it is relevant and necessary, there is no rule which allows matter to be omitted merely because it is impure or libellous. A Court ought not to consider its records defiled by any matter which a defendant has a substantial interest in demanding to be placed on them. If it is desirable that there should be an exception to any such case, the Legislature must make it as it has made exceptions in other cases."

See also s.154 (punishment).

IMMORAL THEATRICAL PERFORMANCE.—Person taking part.

152. (1) Every one commits an offence who, being the lessee, manager, agent or person in charge of a theatre, presents or gives or allows to be presented or given therein an immoral, indecent or obscene performance, entertainment or representation.

(2) Every one commits an offence who takes part or appears as an actor, performer, or assistant in any capacity, in an immoral, indecent or obscene performance, entertainment or representation in a theatre.

OLD CODE:

208. Every person who, being the lessee, agent or person in charge or manager of a theatre, presents or gives or allows to be presented or given therein any immoral, indecent or obscene play, opera, concert, acrobatic, variety, or vaudeville performance, or other entertainment or representation, is guilty of an offence punishable on indictment or on summary conviction, and liable, if convicted upon indictment, to one year's imprisonment with or without hard labour, or to a fine of five hundred dollars, or to both, and, on summary conviction, to six months' imprisonment, or to a fine of fifty dollars, or to both.

(2) Every person who takes part or appears as an actor, performer, or assistant in any capacity, in any such immoral, indecent or obscene play, opera, concert, performance, or other entertainment or representation, is guilty of an offence and liable, on summary conviction, to three months' imprisonment or to a fine not exceeding twenty dollars, or to both.

(3) Every person who so takes part or appears in an indecent costume is guilty of an offence and liable, on summary conviction, to six months' imprisonment, or to a fine of fifty dollars or to both.

209. Every one is guilty of an indictable offence and is liable to two years' imprisonment who makes use of the mails for the purpose of transmitting or delivering

(a) any obscene or immoral book, pamphlet, newspaper, picture, print, engraving, lithograph, photograph or any publication, matter or thing of an indecent, immoral, or scurrilous character;

(b) any letter upon the outside or envelope of which, or any post-card or post band or wrapper upon which, there are words, devices, matters or things of the character aforesaid; or

(c) any letter or circular concerning schemes devised or intended to deceive and defraud the public, or for the purpose of obtaining money under false pretences.

This reproduces the former s.208(1) and (2) which came into the Code in 1903, by 3 Edw.VII, c.13, s.2. A conviction under that section was upheld in *R. v. HELLIER*(1953), 106 C.C.C.143, in which, on appeal, the Court applied the definition of obscenity laid down in *R. v. HICKLIN*, noted under s.150. See also *R. v. CONWAY*(1944), 81 C.C.C.189, in which it was found that it was not the intent to suggest obscenity but rather to present an artistic scene. See also s.154 (punishment).

MAILING OBSCENE MATTER.

153. Every one commits an offence who makes use of the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral or scurrilous, but this section does not apply to a person who makes use of the mails for the purpose of transmitting or delivering anything mentioned in subsection (4) of section 151.

This comes from the former s.209(a) and (b), which came into the Code as 63-64 Vict., c.46, s.3. The saving clause is new. S.209(c) has been placed in s.324, *post*. See also s.154 (punishment).

See the *Post Office Act*, R.S.C. 1952, c.212, s.6(2) under which the Postmaster General may make regulations to say what is mailable matter, and *R. v. GOYER*(1916), 27 C.C.C.10, in which it was held that these

Section 153—*continued*

provisions did not apply to a private letter sent with the consent of the person to whom it was addressed.

PUNISHMENT.

154. Every one who commits an offence under section 150, 151, 152 or 153 is guilty of

***(a)* an indictable offence and is liable to imprisonment for two years, or**

***(b)* an offence punishable on summary conviction.**

The provision that the offences mentioned are triable either on indictment or on summary conviction embodies change in procedure from the former ss.207, 207A, 208 and 209.

PARENT OR GUARDIAN PROCURING DEFILEMENT.

155. Every one who, being the parent or guardian of a female person,

***(a)* procures her to have illicit sexual intercourse with a person other than the procurer, or**

***(b)* orders, is party to, permits or knowingly receives the avails of, the defilement, seduction or prostitution of the female person,**

is guilty of an indictable offence and is liable to

***(c)* imprisonment for fourteen years, if the female person is under the age of fourteen years, or**

***(d)* imprisonment for five years, if the female person is fourteen years of age or more.**

This is the former s.215(1). It was enacted as 1890, c.37, s.9(1) and became s.186 in the Code of 1892.

See also s.131 and notes thereto and s.133 (limitation).

HOUSEHOLDER PERMITTING DEFILEMENT.

156. Every one who

***(a)* being the owner, occupier or manager of premises, or**

***(b)* having control of premises or assisting in the management or control of premises,**

knowingly permits a female person under the age of eighteen years to resort to or to be in or upon the premises for the purpose of having illicit sexual intercourse with a particular male person or with male persons generally is guilty of an indictable offence and is liable to imprisonment for five years.

This is the former s.217. It was s.187 in the Code of 1892.

This section is taken from s.6 of the *Imperial Act* 48-49 Vict., c.69. Its history is given in *R. v. SAM SING*(1910), 17 C.C.C.361 at p.367 as follows:

"If we look into the history of the section it will be more clear. It was originally section 4 of 49 Vict., c.52, and was limited to an offence in respect of girls under sixteen years, it being declared a felony and the punishment being ten years' imprisonment, if the age of the girl was under twelve years, and being declared a misdemeanour and the imprisonment two years if she were of or above the age of twelve

OLD CODE:

215. (1) Every one who, being the parent or guardian of any girl or woman,
(a) procures such girl or woman to have carnal connection with any man other than the procurer; or
(b) orders, is party to, permits or knowingly receives the avails of, the defilement, seduction or prostitution of such girl or woman;
is guilty of an indictable offence, and liable to fourteen years' imprisonment, if such girl or woman is under the age of fourteen years, and if such girl or woman is of or above the age of fourteen years, to five years' imprisonment.

. . . . . .

217. Every one who, being the owner or occupier of any premises, or having, or acting or assisting in, the management or control thereof, induces or knowingly suffers any girl under the age of eighteen years to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally, is guilty of an indictable offence, and is liable,
(a) to ten years' imprisonment if such girl is under the age of fourteen years;
(b) to two years' imprisonment if such girl is of or above the age of fourteen years.

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years and under fourteen years, and it was provided that it would be a defence if the accused had reasonable cause to believe the age to be sixteen or over.

By the same Act seduction and attempt at seduction of chaste girls under the age of sixteen years was made an offence. In 1890, by 53 Vict., c.37, s.3, the age of fourteen was substituted for that of twelve years. In 1892 the provision so amended was adopted in the Criminal Code (as section 187) but without the provision excusing the accused on account of his belief as to the age.

Then in 1900, by 63 & 64 Vict., c.46, the age of eighteen years was substituted for that of sixteen years. By section 12 of the Act of 1890 referred to, unlawful and carnal knowledge and abuse of a girl under fourteen years of age was made a felony. Previously, the ages had been ten and twelve years. In 1892 and 1906 this was embodied in the Criminal Code."

In *R. v. WEBSTER*(1885), 15 Cox,C.C.775, a mother was convicted of knowingly suffering her daughter, aged fourteen, to be in or upon premises for the purpose therein specified, notwithstanding that such premises were those in which the mother and daughter lived, having no other home. This case was followed in Ontario in *R. v. KARN*(1909), 15 C.C.C.301, in which the owner of business premises brought two girls to his shop for the immoral purposes of himself and another man. The presence of the other man was the reason for a distinction drawn in the case of *R. v. SAM SING, supra,* in which the same Court held that to prove a charge under s.217, the prosecution must show that accused induced or suffered the girl to be on the premises for the purpose of being carnally known by some man other than himself. "It would be somewhat extraordinary" said Meredith, J.A., "if any one were made guilty of a very grave crime in carnally knowing a girl upon his own premises, and yet remained not guilty of any offence if the same thing were done anywhere else; this section of the Code is surely not aimed against the carnal intercourse directly, but it is aimed against houses of assignation and things of that character."

Section 156—*continued*

Upon similar facts the Court of Appeal of British Columbia in *R. v. SAM JON*(1914), 24 C.C.C.334, quashed a conviction, following *R. v. SAM SING*: "While what has happened is certainly most deplorable immorality, it is not crime—either at common law or by statute."

See also s.133 (limitation).

CORRUPTING CHILDREN.—Limitation.—"Child."—Who may institute prosecutions.

157. (1) Every one who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of an indictable offence and is liable to imprisonment for two years.

(2) No proceedings for an offence under this section shall be commenced more than one year after the time when the offence was committed.

(3) For the purposes of this section, "child" means a person who is or appears to be under the age of eighteen years.

(4) No proceedings shall be commenced under subsection (1) without the consent of the Attorney General, unless they are instituted by or at the instance of a recognized society for the protection of children or by an officer of a juvenile court.

This comes from the former s.215(2) to (7). It is to be noted that the age of the child has been increased from sixteen to eighteen years to bring it into conformity with the age under the *Juvenile Delinquents Act*, and that the irrebuttable presumption in section 215(3) has been dropped.

The following sets out the history of the present provisions and the cases upon them.

By c.16 of 1918, provisions were added regarding the corruption of children including the subject matter of the former subsecs.4, 5, 6 and 7. Another subsection read as follows:

"Any person who, in the home of a child, by indulgence in sexual immorality, in habitual drunkenness or any other form of vice, causes such child to be in danger of being or becoming immoral, dissolute or criminal, or the morals of such child to be injuriously affected, or renders the home of such child an unsafe place for such child to be in, shall be liable on summary conviction, etc."

This new subsection, which was incorporated into s.215 in the Revision of 1927, was explained (Hansard 1918, p.1191) as being a section which had been enacted in the *Juvenile Delinquency Act* of Ontario, and had been found useful there.

"The Courts however, have recently held that it was in substance legislation of the nature of criminal law, and the enactment as contained in the provincial legislation was, therefore, not effective. We have been asked to give effect to it by making it a section of the Criminal Code. . . . . It introduces bodily the provisions of the Ontario

OLD CODE:

215. (2) Every person who, in the home of a child, participates in adultery, or in sexual immorality, or indulges in habitual drunkenness or any other form of vice, thereby endangering the morals of such child or rendering the home of such child an unfit place for such child to be in shall be guilty of an offence and liable, upon summary conviction, to a fine not exceeding five hundred dollars, or to imprisonment for a period not exceeding one year, or to both fine and imprisonment.

(3) It shall be an irrebuttable presumption in any prosecution under subsection two of this section, that the child was in danger of being or becoming immoral, its morals injuriously affected and its home rendered an unfit place for it to be in, upon proof that the person accused did in fact, in the home of such child, participate in adultery, in sexual immorality, in habitual drunkenness, or in any other form of vice: Provided that this subsection shall not apply in the case of two persons who are not married to each other but are living together as man and wife and reputed to be man and wife, and where the child so affected is the child of the two persons so living together.

(4) It shall not be a valid defence to a prosecution under subsection two of this section that the child is of too tender years to understand or appreciate the nature of the conditions prevailing in the home or the nature of the act complained of or to be immediately affected thereby.

(5) For the purposes of this section "child" shall mean a boy or girl apparently or actually under the age of sixteen years.

(6) No prosecution shall be instituted under subsection two of this section unless it be at the instance of some recognized society for the protection of children or an officer of a juvenile court, without the authorization of the Attorney General of the province in which the offence is alleged to have been committed.

(7) No prosecution for an offence under this section shall be commenced after the expiration of one year from the time of its commission.

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law into the Criminal Code. There are definitions of what shall be a child for the purpose of the section. . . . . There is a further provision that it shall not be a defence that the child is of too tender years to understand or appreciate the nature of the act complained of, or (to be) immediately affected thereby."

In 1933, subsec.(2) was amended so as to make it begin "Every one who, in the home of a child, participates in adultery", and a new subsec.(3) was added to raise an irrebuttable presumption upon proof of the described conditions as matters of fact.

It was stated by the Hon. Mr. Bennett (Hansard 1933, Vol.V, p.5489) that the amendment was sought by the Social Service Council "in consequence of a decision of the Court of Appeal of Ontario that the Statute was to be so construed as to make it almost impossible to secure a conviction." The case was *R. v. VAHEY*(1931), 57 C.C.C.378, in which it was held that,

"mere living in adultery is not sufficient to justify a conviction of the father and mother of an illegitimate child for contributing to the child's delinquency; there must be some evidence of actual sexual immorality so indulged in as to endanger the child's morals, or some evidence that the child's morals are in fact (not in theory) endangered by the mere adultery itself."

Section 157—*continued*

The ground was covered again in 1935 with reference to the same case (Senate 1935, p.368) when by 1935, c.36, the following proviso was added to subsec.(3):

"Provided that this subsection shall not apply in the case of two persons who are not married to each other but are living together as man and wife and reputed to be man and wife, and where the child so affected is the child of the two persons so living together."

By the same Act subsec.(7) was added imposing a limitation of one year upon prosecutions under the section. The amendment made by 1936, c.29, s.5, struck out the previous limitation of six months.

Harris, C.J., in *McNAYER v. PROSSER*, [1928]1 D.L.R.861 at p.868, said:

"It will be seen that under s.220A(4) a recognized society for the protection of children is singled out and given authority—the only authority—to prosecute under the section without the authorization of the Attorney-General.

One cannot read these various Acts and the history of the movement which led to their being passed without being convinced that a prosecution under s.220A of the Criminal Code is one of the duties of these Children's Aid Societies . . . . . "

R. v. POKITRUSKI(1931), 55 C.C.C.152, was a charge under this section, but turned on a question of sentence.

In *R. v. OKRAINETZ*(1929), 53 C.C.C.340, it was held that the section contemplates a relationship which is immoral for the sake of sexual gratification or indulgence, rather than a desire which cannot be legally gratified to live together as man and wife. *R. v. VAHEY, supra*, was later decided in the same sense.

In *R. v. EASTMAN*(1932), 58 C.C.C.218 at p. 228, Sedgewick, J., said:

"I am quite satisfied that the judgment in *R. v. VAHEY*(1932), 57 C.C.C.378, sets forth correctly the general intention of the section. . . . The evidence discloses a course of living which the general public sense regards as immoral—but that course of living has not been legislated against directly. The section, as I read it, requires more. It requires proof of giving free course to viciousness in a way which would be apparent to a child capable of understanding."

In *R. v. HAMLIN*(1939), 72 C.C.C.142, Manson, J., said: "In my view, Parliament intended to make it clear that conduct likely to undermine the morals of a child should constitute an offence," and expressed some doubt concerning the case of *R. v. MACDONALD*(1936), 66 C.C.C.230. Both these cases however, involved charges of contributing to juvenile delinquency, the latter holding that immoral relationship of a man with the mother of a 17-month old child in the presence of the child, would not warrant a conviction for that offence.

See also notes to s.243.

DISORDERLY CONDUCT.

INDECENT ACTS.

158. Every one who wilfully does an indecent act

***(a)* in a public place in the presence of one or more persons, or**

OLD CODE:

205. Every one is guilty of an offence and liable, on summary conviction before two justices, to a fine of fifty dollars or to six months' imprisonment with or without hard labour, or to both fine and imprisonment, who wilfully
(a) in the presence of one or more persons does any indecent act in any place to which the public have or are permitted to have access; or
(b) does any indecent act in any place intending thereby to insult or offend any person.

(b) in any place, with intent thereby to insult or offend any person,
is guilty of an offence punishable on summary conviction.

This is the former s.205. It was s.177 in the Code of 1892 and s.146 in the E.D.C. where clause (b) was described as new.

In *R. v. CLIFFORD* (*supra* s.130) the following appears:

"It is of the essence of the offence that it should be committed 'in the presence of one or more persons' . . . . . It is enough that one person should be shewn to be present, but it must be a person other than those engaged in the offence.

Section 205 may well be interpreted so as to include any place to which the public have access as of right or by the invitation or permission of the owner; and the magistrate was justified in finding that this massage parlour, to which apparently all comers were admitted, was a place to which the public 'are permitted to have access' within the statute."

In *R. v. KEIR*(1919), 34 C.C.C.164, it was said, *per* Harris, C.J. at p.166:

"One finds that the point raised in this case has been taken before and on every consideration of it the Courts have reached the conclusion that the publicity contemplated has reference to the persons who may witness the act rather than to locality, and that a place has always been held to be public if it is so situated that it can be seen by the public or any considerable number."

NUDITY.—"Nude."—Consent of Attorney General.

159. (1) Every one who, without lawful excuse,
(a) is nude in a public place, or
(b) is nude and exposed to public view while on private property, whether or not the property is his own,
is guilty of an offence punishable on summary conviction.

(2) For the purposes of this section a person is nude who is so clad as to offend against public decency or order.

(3) No proceedings shall be commenced under this section without the consent of the Attorney General.

This is the former s.205A, which came into the Code as 1931, c.28, s.2. Its terms are general, but the discussions in Parliament (Hansard, 1931, pp.3688,4131; Senate Committee June 11, 1952, p.19), show that it had regard chiefly to the nude parades of members of the Doukhobor sect.

Although there have been several cases in which Doukhobors have been prosecuted under this section, the cases have not reached the re-

Section 159—*continued*

ports. However, one that is reported, *R. v. STORGOFF*(1945), 84 C.C.C.1, turned wholly upon the right of appeal in *habeas corpus* proceedings. Again, the section came into consideration in *LEIGHTON v. LINES* (1941), 77 C.C.C.264. This was a civil action for damages for false arrest and was dismissed.

In this case, the defendant, a police officer, received a complaint which, coupled with his own observation when he went to the premises referred to, led him to believe that the plaintiff, a girl of eighteen, had committed an offence under s.205A. He ordered her and two other girls to accompany him to the police station where he questioned them and detained them until he obtained statements from certain witnesses. "In these statements the boys apparently did not stand by the complaint in every particular, and the defendant, being then in doubt, as he says, told the girls they could go and later got a car and drove the plaintiff home. . . . . I also find that the defendant throughout acted without malice and with reasonable and probable cause." It was held that the defendant was protected by Code s.648, by which a peace officer may arrest without warrant any person whom he finds committing any criminal offence, and s.30, which justifies arrest by a peace officer on reasonable and probable grounds under certain circumstances.

The judgment reviews English authorities as to arrest, and in particular quotes Hallett, J. in *STEVENSON v. AUBROOK,* [1941]2 All E.R.476, as follows:

" . . . . . if I were asked whether the nature of the suspected offence here required prompt action, I should answer that question without a moment's hesitation in the affirmative. Here the suspected offence is a man riding round on a bicycle indecently exposing his person, and the matter certainly did, in my opinion, require prompt attention. I repeat what I said during the argument—namely, that, looking at this offence as a layman, I should not only say that the police were justified in taking the action they took in view of the information which they had received, but I would go further and say that, in the view of the ordinary man in the street, the police would have been lamentably failing in their duty if they had done anything else."

Adapting this language to the case before him, Fisher, J. said (p.273): "I have in the first place to say, as Hallett, J. said in the Stevenson case, that if I were asked whether the nature of the suspected offence here required prompt action, I should answer that question in the affirmative, and, looking at this offence as a layman, I would go on to say that the defendant was justified in taking the action he took in view of the information he had received. I have next to say that, looking at the matter, as I must, as one obliged to interpret s. 648 as it stands in the light of the very recent cases hereinbefore referred to, I reach the same conclusion. . . . . Doing my best to interpret the section with the assistance of the cases referred to I decide that said s. 648 authorized and justified the arrest and detention of the plaintiff by the defendant under the circumstances as I have hereinbefore found them in a case where the nature of the suspected offence was such that in the interests of public safety prompt action was called for."

OLD CODE:

205A. (1) Every one is guilty of an offence and liable upon summary conviction to three years' imprisonment who, while nude,
(a) is found in any public place whether alone or in company with one or more other persons who are parading or have assembled with intent to parade or have paraded in such public place while nude, or
(b) is found in any public place whether alone or in company with one or more other persons, or
(c) is found without lawful excuse for being nude upon any private property not his own, so as to be exposed to the public view, whether alone or in company with other persons, or
(d) appears upon his own property so as to be exposed to the public view, whether alone or in company with other persons.
For the purposes of this subsection any one shall be deemed to be nude who is so scantily clad as to offend against public decency or order.
(2) No action or prosecution for a violation of this section shall be commenced without the leave of the Attorney General for the province in which the offence is alleged to have been committed.

100. An affray is the act of fighting in any public street or highway, or fighting to the alarm of the public in any other place to which the public have access.
(2) Every one who takes part in an affray is guilty of an indictable offence and liable to one year's imprisonment with hard labour.

222B. Every one not being in a dwelling house, who causes a disturbance in or near any street, road, highway, restaurant, railway station, public library, tavern, billiard hall, theatre, shop or other place to which members of the public are admitted, whether as a matter of right or otherwise, by screaming, shouting, swearing or singing or by being drunk or by impeding or incommoding other persons is guilty of an offence and is liable on summary conviction to a fine not exceeding one hundred dollars or to imprisonment for a term not exceeding three months or to both fine and imprisonment.

238. Every one is a loose, idle or disorderly person or vagrant who,
(a) not having any visible means of subsistance, is found wandering abroad or

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CAUSING DISTURBANCE.—Indecent exhibition.—Loitering in public place.—Disturbing occupants of dwelling.

160. Every one who

(a) **not being in a dwelling house causes a disturbance in or near a public place,**

(i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language,

(ii) by being drunk, or

(iii) by impeding or molesting other persons;

(b) **openly exposes or exhibits an indecent exhibition in a public place;**

(c) **loiters in a public place and in any way obstructs persons who are there; or**

(d) **disturbs the peace and quiet of the occupants of a dwelling house by discharging firearms or by other disorderly conduct in a public place,**

is guilty of an offence punishable on summary conviction.

Section 160—*continued*

This comes from the former s.238(c)(e) and (g) and s.222B which was brought into the Code by 1947, c.55, s.3, replacing s.238(f). The addition of the word "fighting" in cl.(a)(i) has made it possible to drop the former s.100(affray). For definition of "public place" see s.130(b).

The section takes from the former vagrancy section those parts of it which are more aptly described as disorderly conduct. See notes to s.164.

Par.(a) (formerly s.222B).

In *R. v. OISEBERG*(1931), 56 C.C.C.385, it was said that:

> " . . . . s-s (f) does not seem to fit in well as part of s.238. The Courts, as appears from the cases, have repeatedly felt a repugnance in convicting one as a disorderly person under this subsection. There is nothing corresponding to it in the Vagrancy Act 1824 . . . . It seems it could appropriately be replaced by an independent section without reference to vagrancy, etc., and in the usual form:- 'Every one is liable . . . . who causes a disturbance . . . . ' which might find place in the division of Nuisances, ss.221 to 224."

This was done in 1947 when this paragraph was repealed and s.222B enacted. Concerning it, the Minister of Justice said (Hansard 1947, Vol. V., p.5039): "Causing a disturbance is not a badge of vagrancy. It is a nuisance, and the offence should be moved out of the vagrancy section into the nuisance section."

It has been held that a man was not guilty of an offence under this section for causing a disturbance in a corridor of an apartment block outside the door of his apartment. The building consisted of business establishments on the ground floor and apartments on the second and third floors. It was held that the accused was in a dwelling house. This decision followed *HOLLYHOMES v. HIND*, [1944]2 All E.R.8. Accused was found by police in the inner part of the entrance hall of a building comprising ground and first floor maisonette, a second and third floor flat and a basement flat. The entrance hall was used in common by all the occupants. He was charged under the *English Vagrancy Act* 1824 with being found in a dwelling house for an unlawful purpose. Held, that the entire building was a dwelling house within the meaning of s.4 of the Act. "The whole building, No. 8 Marlborough Buildings is quite clearly a dwelling house. It may be said to be three dwelling houses: but that does not prevent it being a dwelling house. It is used as a dwelling house; it is occupied as a dwelling house."

Par.(c) (formerly s.238(e)).

It was held in *PRESSEAU v. PAQUETTE*(1951), 101 C.C.C.256, at p.259, that this applies to those who are ordinarily vagabonds.

Par.(d) (formerly s.238(g)).

See also s.163.

OBSTRUCTING OFFICIATING CLERGYMAN.—Violence to or arrest of officiating clergyman.—Disturbing religious worship or certain meetings.

161. (1) Every one who

***(a)* by threats or force, unlawfully obstructs or prevents or endeavours to obstruct or prevent a clergyman or minister from celebrating divine service or performing any other function in connection with his calling;**

OLD CODE:
Section 238—continued
lodging in any barn or outhouse, or in any deserted or unoccupied building, or in any cart or wagon, or in any railway carriage or freight car, or in any railway building, and not giving a good account of himself, or who, not having any visible means of maintaining himself, lives without employment;
(b) being able to work and thereby or by other means to maintain himself or family, wilfully refuses or neglects to do so;
(c) openly exposes or exhibits in any street, road, highway or public place, any indecent exhibition;
(d) without a certificate signed, within six months, by a priest, clergyman or minister of the Gospel, or two justices, residing in the municipality where the alms are being asked, that he or she is a deserving object of charity, wanders about and begs, or goes about from door to door, or places himself or herself in any street, highway, passage or public place to beg or receive alms;
(e) loiters on any street, road, highway or public place, and obstructs passengers by standing across the foothpath, or by using insulting language, or in any other way;
(f) (Paragraph repealed. 1947, c. 55, s. 5.)
(g) by discharging firearms, or by riotous or disorderly conduct in any street or highway, wantonly disturbs the peace and quiet of the inmates of any dwelling-house near such street or highway;
(h) tears down or defaces signs, breaks windows, or doors or door plates, or the walls of houses, roads or gardens, or destroys fences;
(i) being a common prostitute or night walker, wanders in the fields, public streets or highways, lanes or places of public meeting or gathering of people, and does not give a satisfactory account of herself;
(j) having no peaceable profession or calling to maintain himself by, for the most part supports himself by gaming or crime, or by the avails of prostitution.
(k) having at any time been convicted of an offence under paragraph (a) of section two hundred and ninety-two, section two hundred and ninety-three, subsection one or two of section three hundred and one, or section three hundred and two, is found loitering or wandering in or near a school ground or playground or public park or public bathing area.

(*b*) knowing that a clergyman or minister is about to perform, is on his way to perform, or is returning from the performance of any of the duties or functions mentioned in paragraph *(a)*

(i) assaults or offers any violence to him, or

(ii) arrests him upon a civil process, or under the pretence of executing a civil process,

is guilty of an indictable offence and is liable to imprisonment for two years.

(2) Every one who wilfully disturbs or interrupts an assemblage of persons met for religious worship or for a moral, social or benevolent purpose is guilty of an offence punishable on summary conviction.

(3) Every one who, at or near a meeting referred to in subsection (2), wilfully does anything that disturbs the order or solemnity of the meeting is guilty of an offence punishable on summary conviction.

Section 161—*continued*

This is a combination of the former ss.199,200 and 201. They were ss.171,172 and 173 in the Code of 1892. The corresponding provisions of the E.D.C. were ss.141 and 142.

By the *Toleration Act* of 1688, 1 W. & M., c.18, s.18, it was enacted that any person who should "willingly and of purpose maliciously or contemptuously come into any cathederall or parish church chapel or other congregation permitted by this Act and disquiet or disturbe the same or misuse any preacher or teacher" should be fined and required to find sureties. This was declared to be a public Act by the *Nonconformists Relief Act,* 19 Geo.III, c.44.

It appears from *R. v. HUBE and OTHERS*(1794), 5 Term Rep.542, that to disturb such meetings was not an offence before the passing of the *Toleration Act.*

Other relevant Imperial statutes are 52 Geo.III, c.155, s.12; 15-16 Vict., c.36; 23-24 Vict., c.32. In Canada, reference may be made to C.S.L.C. 1860, c.22, s.3; C.S. Can. 1859, c.92, s.18, and R.S.C. 1886, c.156.

The following appears in *R. v. WASYL KAPIJ*(1905), 9 C.C.C.186 at p.192:

> "The Imperial statute from which s.171 of our Criminal Code is taken is 24 and 25 Vict., c.100, s.36. The provision in the Imperial statute does not contain the word "unlawfully", which is found in our sec.171. It appears to me that it was present to the minds of the framers of our Code that there might be a lawful obstruction of a clergyman while officiating in a church, and the provisions of the section were, therefore, aimed at and confined to such persons as should unlawfully obstruct. What then is to be considered an unlawful obstruction within the meaning of the section? It appears to me that the word "unlawfully", in this section, means without legal authority or justification.
> "The word 'unlawfully' in this sense should probably be read into the clause in the Imperial Statute, as, no doubt, the provision is only intended to apply to unlawful acts of obstruction, etc. In any event, the use of the word in our statute shows that it is not every obstruction of a clergyman while celebrating divine service that is prohibited, but only such obstruction as is unlawful, that is to say, only such as is caused without legal authority or justification.
> "It appears to me that to support a prosecution under that section the clergyman or minister obstructed must be shewn to have been, at the time of the offence, either the lawful incumbent of the church, or to have been holding service with the permission of the lawful authorities of the church. A clergyman who is a mere trespasser or intruder in a church, the congregation of which does not accept his religious doctrines or tenets, may be treated as an ordinary trespasser."

It was held in *R. v. LAVOIE*(1902), 6 C.C.C.39, that s.173 (later 201) did not apply to a meeting called by one of the candidates in a municipal election.

In *R. v. GAUTHIER*(1905), 11 C.C.C.263, where accused went into a hall leased by the Salvation Army during one of its meetings and said "I am a French Roman Catholic. This is no place for us Roman Catholics. Leave," it was held (on appeal from dismissal) that he was guilty

OLD CODE:

199. Every one is guilty of an indictable offence and liable to two years' imprisonment who, by threats or force, unlawfully obstructs or prevents, or endeavours to obstruct or prevent, any clergyman or other minister in or from celebrating divine service, or otherwise officiating in any church, chapel, meeting-house, school-house or other place for divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place.

200. Every one is guilty of an indictable offence and liable to two years' imprisonment who strikes or offers any violence to, or arrests upon any civil process or under the pretense of executing any civil process, any clergyman or other minister who is engaged in or, to the knowledge of the offender, is about to engage in, any of the rites or duties in the last preceding section mentioned, or who, to the knowledge of the offender, is going to perform the same, or returning from the performance thereof.

201. Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding fifty dollars and costs, and in default of payment to one month's imprisonment, who wilfully disturbs, interrupts or disquiets any assemblage of persons met for religious worship, or for any moral, social or benevolent purpose, by profane discourse, by rude or indecent behaviour, or by making a noise, either within the place of such meeting or so near it as to disturb the order or solemnity of the meeting.

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of the offence of disturbing a religious meeting under *Criminal Code* s.173.

R. v. FRASER, [1928]1 D.L.R.803 was an appeal from a conviction under s.201 but, as it turned upon the procedure relating to ss.749-50, it does not assist the interpretation of the section.

The same is true of *LANDRY v. CAISSY*(1937), 44 R.L.N.S. 100 which was an appeal from conviction under the Quebec *Loi de la liberté des cultes et du bon ordre dans les églises.*

TRESPASSING AT NIGHT.

162. Every one who, without lawful excuse, the proof of which lies upon him, loiters or prowls at night upon the property of another person near a dwelling house situated on that property is guilty of an offence punishable on summary conviction.

This new section strikes at the person known colloquially as a "Peeping Tom". It was held by the Supreme Court of Canada in *FREY v. FEDORUK*, [1950]3 D.L.R.513, that such a person did not commit an offence at common law. The following is quoted from the judgment of Cartwright, J., at p.554:

"I think it safer to hold that no one shall be convicted of a crime unless the offence with which he is charged is recognized as such in the provisions of the *Criminal Code*, or can be established by the authority of some reported case as an offence known to the law. I think that if any course of conduct is now to be declared criminal, which has not up to the present time been so regarded, such declaration should be made by Parliament and not by the Courts."

OFFENSIVE VOLATILE SUBSTANCE.

163. Every one other than a peace officer engaged in the discharge of his duty who has in his possession in a public place or who deposits, throws or injects or causes to be deposited, thrown or injected in, into or near any place,

(a) **an offensive volatile substance that is likely to alarm, inconvenience, discommode or cause discomfort to any person or to cause damage to property, or**

(b) **a stink or stench bomb or device from which any substance mentioned in paragraph *(a)* is or is capable of being liberated,**

is guilty of an offence punishable on summary conviction.

This section comes from the former s.510A which was enacted as 1932-33, c.53, s.5. "Public place" is defined in s.130(b). The word "alarm" is new, as is the exception in favour of peace officers. It is a well-known fact that the police sometimes use tear-gas for the purpose of putting an end to a disturbance or to overcome resistance to arrest. Under the former section the offence was indictable and carried a minimum penalty.

NO APPARENT MEANS OF SUPPORT.—Begging.—Prostitute or night walker.—Living by gaming or crime.—Sexual offenders loitering near schools, etc.—Punishment.—Aged or infirm persons.

164. (1) Every one commits vagrancy who

(a) **not having any apparent means of support is found wandering abroad or trespassing and does not, when required, justify his presence in the place where he is found;**

(b) **begs from door to door or in a public place;**

(c) **being a common prostitute or night walker is found in a public place and does not, when required, give a good account of herself;**

(d) **supports himself in whole or in part by gaming or crime and has no lawful profession or calling by which to maintain himself; or**

(e) **having at any time been convicted of an offence under a provision mentioned in paragraph *(a)* or *(b)* of subsection (1) of section 661, is found loitering or wandering in or near a school ground, playground, public park or bathing area.**

(2) Every one who commits vagrancy is guilty of an offence punishable on summary conviction.

(3) No person who is aged or infirm shall be convicted of an offence under paragraph *(a)* of subsection (1).

Subsecs.(1) and (2) come from the former s.238(a),(d),(i),(j) and (k). Clause (k) was added as 1951, c.47, s.13. Subsec.(3) is the former s.239. Before examining the history of this offence, it should be observed that the new section effects considerable changes. The omission of the words "loose, idle or disorderly person" results in a statement of the offence as *doing* certain things rather than in *being* a certain sort of person. The provision in s.238(a) as to living without employment was struck out for the reason that it might bear unjustly on a man who was unemployed but not because of his own fault: (Hansard, 1954, p.3004). S.238(b) is omitted as being covered by s.186 (duty to provide necessaries), and that part of 238(j) which referred to a person living on the avails of prostitu-

OLD CODE:

510A. Every one is guilty of the indictable offence of mischief and liable to a term of imprisonment of not less than two years and not more than five years who shall have in his possession or deposit, throw or inject or cause to be deposited, thrown or injected in, near or into any theatre, church, public hall or other place of usual resort any offensive volatile substance likely to inconvenience, discommode or cause discomfort to any person or damage to any property, or any stink or stench bomb or device from which any such substance may or can be liberated.

238. (For wording of this section see pp. 267 and 269)

239. Every loose, idle or disorderly person or vagrant is liable, on summary conviction, to a fine not exceeding fifty dollars or to imprisonment, with or without hard labour, for any term not exceeding six months, or to both: Provided that no aged or infirm person shall be convicted for any reason within paragraph (a) of the last preceding section, as a loose, idle or disorderly person or vagrant in the county of which he has for the two years immediately preceding been a resident.

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tion, is left to the operation of s.184. The qualification in s.238(d) with reference to a certificate signed by a clergyman etc., is omitted in view of the consideration that modern social agencies make begging unnecessary.

The history of this legislation is dealt with fully in the English case *LEDWITH v. ROBERTS*, [1937]1 K.B.232. At page 270 Scott, L.J., referring to the expressions "loitering" and "idle and disorderly persons" said:

> "In my view those two expressions both refer to members of a class once prevalent in England to an extent which made it for four or five centuries a major political problem, a problem which taxed the forces of law and order to the uttermost and produced a long succession of repressive statutes. These laws were framed exclusively in relation to that particular class of the community and had three purposes. The class consisted of the hordes of unemployed persons, many of them addicted to crime, then wandering over the face of the country; and the purposes were: (a) settlement of the able-bodied in their own parish and provisions of work for them there; (b) relief of the aged and infirm, that is, those who could not work; (c) punishment of those of the able-bodied who would not work. The early Vagrancy Acts came into being under peculiar conditions utterly different to those of the present time. From the time of the Black Death in the middle of the 14th century till the middle of the 17th century, and indeed, although in diminishing degree, right down to the reform of the Poor Law in the first half of the 19th century, the roads of England were crowded with masterless men and their families, who had lost their former employment through a variety of causes, had no means of livelihood and had taken to a vagrant life. The main causes were the gradual decay of the feudal system under which the labouring classes had been anchored to the soil, the economic slackening of the legal compulsion to work for fixed wages, the break up of the monasteries in the reign of Henry VIII, and the consequent disappearance of the religious orders which had previously administered a kind of 'public assistance' in the form

Section 164—*continued*

of lodging, food and alms; and, lastly, the economic changes brought about by the Enclosure Acts. Some of these people were honest labourers who had fallen upon evil days, others were the 'wild rogues' who had been born to a life of idleness and had no intention of following any other. It was they and their confederates who formed themselves into the notorious 'brotherhood of beggars' which were a definite and serious menace to the community and it was chiefly against them and their kind that the harsher provisions of the vagrancy laws of the period were directed."

He then traces the statutory history of Parliamentary attempts to deal with this class beginning with the *Statute of Labourers* in 1349, down to the *Vagrancy Act* of 1824, which, in part, is still in force. Concerning that Act he said at page 275:

"The Vagrancy Act of 1824 differs little from the long string of earlier Acts in the Legislature's attitude to the class of idle and disorderly persons except that it is simply a punishment Act, and not, as the earlier Acts were, partly a punishment Act and partly an Act for the relief of the poor.

There runs all through this chain of statutes the recognition of a well known and notorious class of unemployed poor persons dealt with as such by Parliament according to their ability or inability to work. The phrases 'idle and disorderly' and 'those who use loitering' are recurrent and both apply to the class. When those phrases appear again in statutes of the 19th century passed not long after the Act of 1824, which was the last of the series, they should not, in my view, be interpreted in a sense foreign to that in which they had previously been used."

And concludes at p.276:

" . . . . but it is beyond dispute that there was in our earlier history an unemployed class which was only too well known and always regarded as a public menace, and that it was this class which was intended by all the expressions 'idle and disorderly persons,' 'persons using loitering,' 'rogues and vagabonds' and 'sturdy beggars'. That the class was treated as semi-criminal is also beyond argument: they were referred to by such phrases as 'outrageous enemies to the common weal': (see 14 Eliz., c.5, s.2)."

He makes further comment as follows:

"It seems to me wrong that these old phrases should still be made the occasion of arrest and prosecution, when in their historical meaning they are so utterly out of keeping with modern life in England. The class against which the legislation was directed has ceased to exist. The poor law legislation and the increased industrial and commercial employment of the 19th century together reduced it to much narrower proportions. The legislation of the 20th century, unemployment insurance, national health insurance, public assistance and all the other social reforms of recent years, have abolished it altogether. The old phrases have today lost their meaning, but they remain on the Statute Book as vague and indefinite words of reproach. Is it not time that our relevant statutes should be revised and that punishment and arrest should no longer depend on words which today have an uncertain sense and which nobody can truly apply to modern conditions?

To retain such laws seems to me inconsistent with our national sense of personal liberty or our respect for the rule of law. Clear and definite language is essential in penal laws."

The Canadian sections are traced by Boyd, C., in *R. v. MUNROE* (1911), 19 C.C.C.86, as follows:

"The vagrancy clauses of the Canadian Criminal Code are derived from the English general Vagrancy Act (still in force, 5 Geo.IV, c.83, secs. 3 & 4) and in small part from the later Act, 1 & 2 Vict., c.38, s.2: see marginal note to Dominion Statute 49 Vict., c.157, s.8; . . . Many of the phrases reappear *verbatim* in the Code. Thus in the Act of 1824, sec.3, we find that any person wilfully refusing to maintain himself 'by work or by other means . . . every person wandering abroad . . . in any public place . . . to beg or gather alms . . . shall be deemed an idle and disorderly person'. And in sec.4, 'every person pretending . . . to tell fortunes, or use any subtle craft . . . to . . . impose on any of His Majesty's subjects; every person wandering abroad and lodging in any . . . outhouse . . . not having any visible means of subsistence, and not giving a good account of himself . . . every person wandering abroad and endeavouring by the exposure of wounds and deformities to obtain or gather alms . . . shall be deemed a rogue and a vagabond.'

It is inherently evident from this legislation that the man who makes a living by begging or by gambling or by trickery, is not regarded as a person who maintains himself by honest work or other lawful means."

The marginal note referred to, which appears with R.S.C. 1886, c.157, s.8, *An Act respecting Offences against Public Morals and Public Convenience* is, "What persons shall be deemed loose, idle or disorderly, or vagrants." The section, except for paragraphs relating to keepers or inmates of disorderly houses, bawdy houses, or houses of ill-fame, is largely similar to s. 238 as it stood before the repeal of par.(f) in 1947, as noted above (s.160). In 1915 these paragraphs were repealed by c.12, s.7, and keepers and inmates of bawdy houses were dealt with in other sections, one object of the change being to provide for longer terms of imprisonment. It was felt that the six months which could be imposed under the vagrancy section were not long enough to allow reformative influences to be effective.

1 & 2 Vict., c.38, s.2, referred to by Boyd, C., deals with persons exposing to public view "any obscene print, picture or other indecent exhibition."

These sections appear as ss.207 and 208 in the Code of 1892.

Sec.238 was interpreted in various ways:

1. Some cases have held that the offence lay in being a loose, idle or disorderly person or vagrant, and not in doing one or another of the things which brought the person within that characterization: Rose, J., in *R. v. JACKSON*(1917), 29 C.C.C.352 at p.369; *R. v. LAW*(1924), 42 C.C.C.124; *R. v. FLEURY*(1933), 60 C.C.C.32. In *R. v. BASSETT*(1884), 10 P.R. 386, it was said that "It is the general trend of his life that is to be looked at and the sort of character he is exhibiting."

Although the offence under s.164 consists now in conduct, in so far as it consists in a *course of conduct*, considerations of this sort may still be

Section 164—*continued*

relevant. In *R. v. OISEBERG*(1931), 56 C.C.C.385, Prendergast, C.J.M., said that the vagrancy section:

" . . . . is, I think, the only one of its kind in the Code, in as much as the offence it provides for consists in the accused being of a certain character, and in not doing or omitting to do a certain thing.

The terms, 'loose, idle or disorderly person or vagrant' convey, in their ordinary meaning, if not necessarily a uniform method of living or a constant habit, at least a condition or manner of behaviour of some duration, and something more at all events than a single act, or even occasional acts spread over a somewhat considerable space of time.

It is in this sense, their natural sense, that these terms are dealt with in s.238, and s-ss.(a)(b)(c)(d)(e)(g)(h)(i) and (j) . . . all implying either repeated acts or some single act, omission or manner of life, of a certain duration or continuity, which makes a person loose, idle, disorderly or a vagrant. . . . . .

I fully agree, following *R. v. KNEELAND*(1902), 6 C.C.C.81, that sec. 239 is applicable only to loose, idle and disorderly persons, but would consider it necessary to add: as they are described or defined in the various sections of sec. 238."

In *R. v. KNEELAND*(1902), 6 C.C.C.81, it had been said that:

"One finds everywhere and in different forms, that the construction of statutes known under the name of Acts, concerning vagrancy, calls for the exclusion of persons following a lawful occupation or having legitimate means of maintaining themselves, and enjoying a generally good reputation as well."

In *R. v. KEEPING*(1901), 4 C.C.C.494, it was said:

"207(j) . . . creates no offence, but only indicates one of the many ways how a person may be a loose, idle or disorderly person, or a vagrant, and that is the proper way to charge an offence under that section."

R. v. HARKNESS(1906), 12 C.C.C.54, was decided in terms identical with those used in *R. v. KEEPING*, but a note states that "the above decision is submitted with disapproval", and in *R. v. YOUNG* (1906), 12 C.C.C.109, the court declined to follow it, saying:

"I think that the contention is at variance with the case of *R. v. McCORMACK*(1903), 7 C.C.C.135, in which it was held by Hunter, C.J., 'that a summary conviction for being a loose, idle person or a vagrant without specifying in what the vagrancy consisted under Code sec. 207, is void for uncertainty.' Hunter, C.J., there said: 'The conviction is clearly bad. You might just as well charge a man generally with being a thief. The accused was entitled to know under what subsection of sec. 207 he was charged, that is, what the facts were on which the prosecution relied'."

Again in *R. v. LeCONTE*(1906), 11 C.C.C.41, at p.43, Meredith, C.J., following *R. v. McCORMACK* rather than *R. v. KEEPING*, said:

"It is idle to argue that the statute is confined to vagrants in the ordinary, primary sense of the term. The headings do not control the provisions of the enactment and it is, besides, plain from the provisions of the section itself that the term "vagrant" is not comprehensive

enough to cover the classes of persons who are brought within the reach of the criminal law under sec. 207."

This case was followed in *R. v. DEMETRIO*(1911), 20 C.C.C.316, and *R. v. KEEPING* disapproved. It was followed also in *R. v. MARIOTT* (1924), 41 C.C.C.333.

2. The case of *R. v. CODE*(1908), 13 C.C.C.372, marks clearly a difference in interpretation. There it was held that a summary conviction for vagrancy is multifarious, if it charges both obstructing passengers on the street and causing a disturbance on the street, such being separate offences under clauses (a) and (l) of Code s.238 as they then stood.

In *R. v. JACKSON, supra,* Meredith, C.J.C.P., differing in this respect from Rose, J., said (p.364):

" . . . . how can there be any kind of certainty in a charge of being a loose, idle *or* disorderly person *or* vagrant, and when such a description, if it do not cover quite a multitude of sins, does cover 10 now, 12 formerly, of these widely different characters: no visible means of support; not maintaining family; indecent exhibitions; begging; loitering on highway; disorderly conduct; wanton disturbances; destroying property; night walker; keeping house of ill-fame; frequenting the same; and supported by prostitution.

It may be that each one of these offences may make the person committing it a loose or an idle or a disorderly person or a vagrant, but it is quite certain that some of them could not make the person committing it all four. The appellant may have been a loose person, but she could not fairly be described as an idle or disorderly person or a vagrant, and the section does not so describe her or provide that she shall be so called. The clause (*i*) describes her offence; and, as a loose person, sec. 239 provides for her punishment.

Under the conviction in question, for aught that appears in it, the appellant was guilty of all the 10 formerly 12, offences covered by sec. 238; for instance: indecent exhibition; begging; disorderly conduct; wanton disturbance; or destroying property: and under a plea of autrefois acquit or autrefois convict would escape after the trial of one charge, though guilty upon another or others."

This was followed in *R. v. WASHINGTON*(1935), 65 C.C.C.106.

R. v. SHEEHAN(1908), 14 C.C.C.119, supports *R. v. CODE*. In that case a man was charged under paragraph (a). He had $27.50 in his possession when arrested and the evidence was that he associated with gamblers and followed the race track for a living. The conviction was quashed. It was held that the fact that the money he had was obtained by gambling was immaterial to a charge under s.238(a) although he might have been convicted under another subsection of the same section.

R. v. CODE was followed in Quebec in *R. v. ST. ARMAND*(1915), 25 C.C.C.103, and it was followed also, although not without criticism, in *R. v. ROSENFELD*(1928), 50 C.C.C. 305 (Man.). In the latter case, Galt, J., said:

"It seems curious that such an offence as vagrancy should require nine separate provisions occupying nearly two pages of the Criminal Code in order to define it. But so it is, and it would appear from the decision in *R. v. CODE, supra,* that each one of these provisions constitutes a separate offence and therefore no two of them may be united

Section 164—*continued*

in one charge. This case has been followed in several later cases, and so far as I know has not been dissented from. . . . . .

"But for the decision in *R. v. CODE*, I should have thought that the various provisions of sec. 238 merely constituted different modes in which the offence of vagrancy might be committed."

He went on to hold that a subsection was not to be subdivided within itself so as to read, paragraph (f) for example, as creating six different offences, and said:

"No such conclusion can be gathered from *R. v. CODE*. I think the meaning of the clause is that a man who is guilty of all or any of the acts mentioned is guilty of the single offence of vagrancy."

R. v. McKENZIE(1885), 2 Man. L.R.168, and *R. v. IRWING*(1908), 14 C.C.C.489, although on a paragraph of s.238 that was repealed by 5 Geo. V, c.12, s.7, may also be referred to in this connection.

It is submitted here that a charge under s.164 should not set out merely a charge of vagrancy, but should state clearly in what respect the offence is alleged to have been committed.

3. A third interpretation, differing from both that of Rose, J., in *R. v. JACKSON* and that expressed in *R. v. CODE*, has been advanced in the notes to s.238 in Tremeear's Code (1919 ed.). It is as follows:

"The opinion is hazarded that there is but one offence at any one trial under secs. 238 and 239, and that the offence is that the accused at the date of the information or charge, was either a loose person, an idle person, a disorderly person or a vagrant, using the appropriate term in its statutory significance."

Concerning s.238 as a whole, it is not too much to say that, probably because these offences have been dealt with under the heading of vagrancy for at least a century and a quarter, the words "loose, idle or disorderly person or vagrant" appear to have become a sort of formula and occasionally (e.g., in *R. v. ANDERSON*, *supra*), we find the expression "loose, idle *and* disorderly person *and* vagrant" as if they formed one general description.

The relation of these sections to provincial legislation.

Something should be said concerning the relationship of ss.238 and 239 to provincial legislation and municipal by-laws made under the authority of provincial Acts.

In *A.-G. FOR ONTARIO v. KOYNOK*(1940), 75 C.C.C.100, Kelly, J., said:

"Any act which is prohibited with penal consequences is a criminal act, and the law by which such act is prohibited and penalty imposed is criminal law: *PROPRIETARY ARTICLES TRADE ASS'N v. A.G. CANADA*(1931), 55 C.C.C.241. Criminal law in its widest sense is reserved for the exclusive legislative jurisdiction of Parliament: *A.G. ONT. v. HAMILTON STREET R. CO.*(1903), 7 C.C.C.326. A provincial Legislature may, however, impose punishment by fine, penalty or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in s.92 of the *B.N.A. Act* 1867; but the matter of 'public morals' is not within the classes of subjects so enumerated. It has been said that Parliament alone can define crime and enumerate the acts which

are to be prohibited and punished in the interests of public morality; *Re RACE-TRACKS AND BETTING*(1921), 36 C.C.C.357, *per* Middleton, J.; *R. v. HAYDUK*(1938), 71 C.C.C.134."

There is no doubt that there is to some extent concurrent jurisdiction between the provinces and the Dominion as far as the offences in s.238 are concerned, the provinces having the power to deal "generally with all matters of a merely local or private nature in the Province."

In *Ex p. ASHLEY*(1898), 8 C.C.C.328, it was held that a provincial legislature has jurisdiction to legislate concerning matters of police regulation of public morals, but in so far as the same subject is dealt with by the Dominion Parliament, the Dominion Legislation will prevail. This case upheld a by-law of the City of Montreal passed in 1879 under the authority of the *Charter of Montreal,* 1874, 37 Vict., c.51 (Que.) referring to indecent performances in theatres. It was held that there are certain points upon which the two Parliaments, federal and local, have a concurrent jurisdiction. This case was followed in *Ex p. PELCHAT* (1915), 26 C.C.C.75. The latter case goes back through the Revised Statutes of Quebec, 1888, to c.202 of the old Revised Statutes of that province entitled *Acts concerning the police in Quebec and Montreal, as well as certain police regulations in other towns and villages,* and notes that:

> "In 1869, Parliament reproduced this latter disposition under the title 'Act Respecting Vagrancy', and sec. 238 of the Criminal Code at the present day reproduces for a great part, at least, these same dispositions. . . . . .
>
> In the present case it cannot be said that there is a conflict. And, the provincial statute subsisting, it is proper that I should take it into account in coming to a decision."

This case was one in which the accused was making a petition for a writ of *certiorari* following a conviction for vagrancy. *LEONARD v. PELLETIER*(1903), 9 C.C.C.19, was a similar case.

Again, a note to *R. v. HARKNESS*(1906), 12 C.C.C.54, says that "The offence of being drunk on a public street is a municipal one, regulated in many provinces by their municipal Acts and municipal by-laws passed thereunder". So also in *R. v. MUNROE*(1911), 19 C.C.C.86, it was held that a conviction under s.238(a) may be made concurrently with a conviction for begging in contravention of a municipal by-law.

Subsec.(1)(a) formerly s.238-Par.(a).

In the Code of 1892 this paragraph read "Not having any visible means of maintaining himself, lives without employment". It was replaced by 1900, c.46, which enacted the para. in the code now repealed. However, the requirement that the suspect give a satisfactory account appeared in par.(i) of the section enacted in 1892. In 1915 s.239 also was amended by the proviso exempting aged or infirm persons from the operation of par.(a). The cases of *R. v. BASSETT, R. v. SHEEHAN, R. v. MUNROE,* decided under this paragraph have already been referred to.

In 1914, a commitment was quashed in *R. v. KOLENCZUK*(1914), 23 C.C.C.265, because it did not allege that the accused had no visible means of subsistence. "As persons are not forbidden to wander abroad unless they have no visible means of subsistence, the commitment is bad as not describing any offence known to the law."

In 1917 the paragraph was interpreted in *R. v. CYR*(1917), 29 C.C.C.

Section 164—*continued*

77, at p.88, as follows:

"The words 'visible means of maintenance' refer in my opinion to a source of livelihood which is not only lawful, in the sense of not being forbidden by law, but also honest and reputable, that is, such as is generally recognized as not subject to condemnation by the ordinary moral standards of the community. It may be true that a woman is not infringing the Criminal Code merely by being a prostitute as distinct from keeping a house of prostitution, but it is impossible to suppose that the Legislature intended to cover, by the expression used, so immoral a method of securing a maintenance."

This case was followed in *R. v. DAVIS*(1930), 39 O.W.N.98, in which a girl who was living with a man as his mistress was convicted under s.238(a).

In the case of *R. v. ROYAL*(1925), 44 C.C.C.317, many circumstances indicated that the accused was "leading the kind of life that is within the mischief aimed at by the section under which he is charged", although he had ample means in his possession. An appeal from conviction was dismissed. The Court stated that it was quite in line with the decided cases and added:

"While it is, of course, important to preserve the liberty of the subject, it is, I think, equally important that the Courts should, perhaps more carefully in these days than at any time in the past, have in mind the protection of the public and should (of course within the law) assist the police in ridding the country of people possessed of a character such as that of the accused, and should not be too astute in seeking some technical ground upon which the accused may escape."

In *R. v. MANDZUK*(1945), 83 C.C.C.347 (B.C.), the accused was found at 2 a.m. in the corridor of a private rooming-house. It was held that a person is not found "wandering abroad" within s.238(a) when he is in a private place from which he might be ejected by the occupant, unless the place is one specifically mentioned in the provision.

Subsec.(1)(c) (formerly s.238(i)).

There has been some conflict of judicial opinion upon this paragraph, as was pointed out by Falconbridge, C.J.K.B., in *R. v. JACKSON* (1917), 29 C.C.C. at p.354. He cites *R. v. HARRIS*(1908), 13 C.C.C.393 and *R. v. PEPPER*(1909), 15 C.C.C.314, as "favouring the prisoner", but he adds, "I would prefer the opinion of Mr. Justice Walsh in *Re BRADY* (1913), 21 C.C.C.123."

R. v. HARRIS(1908), 13 C.C.C.393 at 397:

" . . . . . I am satisfied it is an essential ingredient of the offence that a request for an explanation should have first been made, and the onus is on the prosecution to prove both the request and the failure to give a satisfactory explanation."

And at page 397:

" . . . .I am satisfied that natural justice warrants the finding by the Court in *R. v. LEVECQUE*. It is impossible to think that these women are called upon by the statute to address every policeman they pass and to explain their business in the street. Common sense would indicate that a policeman suspecting them must charge them with being improperly in the street and call for an explanation."

R. v. PEPPER(1909), 15 C.C.C.314 at p.315:

"Subsection (i) of sec. 238 of the Code, R.S.C. 1906, does not mean that being a prostitute or a night walker makes such a person liable to punishment as such, but only those prostitutes who when found wandering about and when requested to give an account of themselves are unable to give a satisfactory account of themselves."

Re BRADY(1913), 21 C.C.C.123 at p.125:

"Without attempting a definition of the word night walker, I do not hesitate to say that the evidence given in this charge, which is before me, brands the applicant as one. She was wandering around the streets of the city after dark in the company of a woman who had been convicted of being an inmate of a house of ill-fame, and both she and her companion accosted and spoke to nine or ten different men in a period of twenty minutes during which they were under observation by policemen. Whatever else may be involved in this expression I am satisfied that it is broad enough to cover a woman who thus conducts herself."

Walsh, J. expressly disagreed with *R. v. HARRIS, R. v. PEPPER* and *R. v. LEVECQUE*(1870), 30 U.C.Q.B., 509, on the point that it was fatal to the conviction that it did not set out that accused had been asked to give an account of herself. He held that the conviction was sufficient under s.723(3) if it was in the words of the statute.

In *R. v. LEROY*(1940), 73 C.C.C.288, it was held that an information charging accused with "being a common prostitute or night walker, unlawfully did wander in the public streets and fail to give a satisfactory account of herself" discloses no offence. It is not clear whether it was because she was not asked to give an account of herself, or because it omitted the words "loose, idle or disorderly person or vagrant."

In *R. v. THOMAS*(1949), 96 C.C.C.129, it was said that:

"It seems to me that in present day circumstances a common prostitute found on the street (whether she is what we might call aimlessly moving around, or simply on the street) can be stopped and questioned to give a satisfactory account of herself. The giving of a satisfactory account has to do with the woman's doings at that present minute; not what she lives on, where she comes from, whether she has any money, or anything else."

See also *R. v. MANDZUK*, cited under par.(a), and *SIMARD v. R.* (1954), 18 C.R.263.

Subsec.(1)(d) (formerly s.238(j)).

There are the following decisions in relation to this paragraph. In *R. v. ORGAN*(1886), 11 P.R.497, it was said that:

"A person who for fourteen or fifteen years has never been known by one who knows him, to do any honest work, and who does not do any work that another says he knows of, although he says he knows the defendant, and who also says he sees the defendant going about the streets doing nothing in company with thieves and reputed thieves, and has been twice in the Central Prison as a convict is shown sufficiently to be "an idle person not having visible means of maintaining himself without employment" under the first part of that section of the Act, but that is not the part of the section under which the defendant has been convicted."

Section 164—*continued*

It was held that the facts in evidence did not support an inference that he "for the most part supports himself by crime", any more than by any of the other means prohibited by the subsection.

Similarly in *R. v. COLLETTE*(1905), 10 C.C.C.286, a prisoner was discharged when it was shown that he had some $40.00 in his possession, and that he had within two months previously been regularly employed in another city, although it was also shown that he had been an associate of pickpockets in that city and was "known to the police authorities there as a professional pickpocket."

In *R. v. ELLIS*(1909), 15 C.C.C.379 (Ont. C.A.) it was held that gaming and betting on horse races are different things, and that a man who made his living principally from taking in the streets personal bets on horse races, was not properly convicted under this subsection.

In *R. v. KOLOTYLA*(1911), 19 C.C.C.25, it was held that accused was properly convicted under this subsection when it was shown that 6 months previously he had left off working at his trade and that his only means of livelihood since had been the running of a gambling resort, although he had not failed to support himself or his family. *R. v. DAVIDSON*(1892), 8 Man.R.325 followed.

In *R. v. ANDERSON*(1920), 32 C.C.C.177, it was held that two ingredients must be proved to justify a conviction, (a) not having a peaceable calling or profession to maintain himself, and (b) supporting himself by illegal means specified. The first element was found upon the facts but the conviction was quashed "since there is no direct evidence that he supports himself for the most part by gaming or on the avails of prostitution."

Subsec.(1)(e) (formerly s.238(k)).

This will be somewhat widened by the addition to s.661 of offences not originally included there.

NUISANCES.

COMMON NUISANCE.—Definition.

165. (1) Every one who commits a common nuisance and thereby

***(a)* endangers the lives, safety or health of the public, or**

***(b)* causes physical injury to any person,**

is guilty of an indictable offence and is liable to imprisonment for two years.

(2) For the purposes of this section, every one commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby

***(a)* endangers the lives, safety, health, property or comfort of the public, or**

***(b)* obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada.**

This section, which is derived from the former ss.221 and 222 and drops s.223, was the subject of lengthy debate in the House of Com-

OLD CODE:

221. A common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all His Majesty's subjects.

222. Every one is guilty of an indictable offence and liable to one year's imprisonment or a fine who commits any common nuisance which endangers the lives, safety or health of the public, or which occasions injury to the person of any individual.

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mons, debate which, however, turned principally upon a specific instance of pollution of the North Saskatchewan River (Hansard, 1954, pp.3627 *et seq.*, and 3651 *et seq.*), although with close consideration of the definition in subsec.(2).

History of Legislation

Article 176 of Stephen's Digest defines common nuisance as follows:

"A common nuisance is an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects. It is immaterial whether the act complained of is convenient to a larger number of the public than it inconveniences, but the fact that the act complained of facilitates the lawful exercise of their rights by part of the public may show that it is not a nuisance to any part of the public."

Article 177 declares that any one who commits any common nuisance is guilty of a misdemeanour.

These appear verbatim as Articles 229 and 230 in Burbidge's Digest of the Criminal Law of Canada.

The English Draft Code modified the above statement of the law in clauses 150, 151 and 152, as follows:

"150. A common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all Her Majesty's subjects.

151. What common nuisances are offences. Every one shall be guilty of an indictable offence, and shall be liable upon conviction thereof to one year's imprisonment, who commits any common nuisance which endangers the lives, safety or health of the public, or which injures the person of any individual.

152. When a common nuisance is not to be deemed criminal. Any one convicted upon any indictment or information for any common nuisance other than those mentioned in the preceding section shall not be deemed to have committed a criminal offence; but all such proceedings or judgments may be taken and had as heretofore to abate or remedy the mischief done by such nuisance to the public right."

The following comments appear in the report of the Imperial Commissioners (p.22):

"With regard to nuisances, which form the subject of Part XIV, we have in section 151 and section 152 drawn a line between such nuisances as are and such as are not to be regarded as criminal offences.

Section 165—*continued*

It seems to us anomalous and objectionable upon all grounds that the law should in any way countenance the proposition that it is a criminal offence not to repair a highway when the liability to do so is disputed in perfect good faith. Nuisances which endanger the life, safety, or health of the public stand on a different footing.

By the present law, when a civil right such as a right of way is claimed by one private person and denied by another, the mode to try the question is by an action. But when the right is claimed by the public, who are not competent to bring an action, the only mode of trying the question is by an indictment or information, which is in form the same as an indictment or information for a crime. But it was very early determined that, though it was in form a prosecution for a crime, yet that as it involved a remedy for a civil right, the Crown's pardon could not be pleaded in bar. See 3 Inst. 237 (Note: This is a statement that the King cannot pardon a common nuisance). And the legislature as recently as in the statute 40 & 41 Vict., c.14 (allowing the defendant to be a witness) again recognized the distinction. *The existing remedy in such cases is not convenient,* but it is not within our province to suggest any amendment."

As these came into the Code of 1892, s.191 is clause 150, word for word, and ss.192 and 193 are clauses 151 and 152 with slight changes in wording but identical in effect. The Debates show that they occasioned some difficulty in Parliament on these points:

1. Constitutionality;
2. The words "property or comfort";
3. The reference to personal injury.

This appears in the Parliamentary Debates (Hansard, 1892, Vol. II, 3100 *et seq.*; 4526), from which the following extracts are quoted:

"Sir John Thompson: This is a definition for criminal purposes only. It must be an unlawful act, and it may be one which endangers health and property, and it is intended that in that case it shall be an indictable offence, or it may be an act which affects the comfort of the neighbours, and then the proceeding must be by indictment. The English report points this out very clearly, and the object is to preserve for the criminal law that class of cases the remedy for which is by indictment, but which partake, in all other respects, of a civil proceeding, and to provide that it shall be within the purview of the criminal procedure for carrying out the abatement of the mischief done to the public right. There are cases which are to be punished criminally, there are those which can be met by a civil action between private individuals, and there are those where the offence is against the public and which require to be proceeded with by way of indictment, which is a criminal procedure, though the remedy itself would more partake of a civil character.

Mr. Davies (P.E.I.): I do not understand why the words 'property or comfort' are used in section 191, which is the defining clause, and not in section 192, which provides for the punishment of the offence.

Sir John Thompson: That is to reach the class referred to in section 193 where the comfort of the public is affected, and which can only be reached through the criminal law procedure, and we do not want a

man sent to prison for that.

Mr. Laurier: A penal action.

Mr. Masson: That might be. It is only a question of remedies, and how to enforce it. I think you would strike a great blow at the public remedy if you took out the word 'comfort'."

These sections were allowed to stand but subsequently in column 4526 the following appears:

"Sir John Thompson: These sections were left at the request of the committee, but I think they are all right after we leave out the words 'property or comfort' in section 191.

Mr. Mills (Bothwell): These were the sections that were left to be dealt with as matters of civil right.

Sir John Thompson: I think it is all right to pass them. It gives a right to abate a nuisance without being liable criminally. It has that effect under our jurisdiction.

Mr. Mulock: Take the enforcement of municipal by-laws. It is a man's legal duty to comply with a by-law. Supposing he neglects to comply with it.

Sir John Thompson: That does not touch a by-law unless the nuisance affects health, safety, life or property.

Sir John Thompson: The only change in recent times has been in the procedure; although they are offences against the criminal law, the procedure is that of a civil case. We should retain control of all matters connected with the life, safety and health of the people."

Again, in 1936, when s.223 was being amended to correct a reference to "the preceding section", the following appears (Hansard, 1936, Vol. IV, 3932):

Mr. Burnett: How can you say that an offence under the criminal code is not a criminal offence?

Mr. Lapointe: I see the point raised by my right hon. friend. Of course, I am not responsible for this, as the section is already in the statute. *Possibly this defect can be remedied in some other way.*"

In Taschereau's edition of the Code of 1892, he describes ss.192 and 193 as new. But it is particularly to be noted that in s.193, he reproduces the words "or which occasions injury to the person of an individual" in italics and comments, "The words in italics are new law. They are in contradiction with the definition given in the preceding section." In his open letter to the Minister of Justice, dated Jan. 20th, 1893, he had been similarly critical.

Of the Nature of Nuisance

The word "nuisance" comes from a French word *"nuire"*, to do hurt or to annoy.

Blackstone (4 Bl. Com. 167) gives the following definition:

"Common nuisances are such inconvenient or troublesome offences, as annoy the whole community in general, and not merely some particular person; and therefore are indictable only, and not actionable; as it would be unreasonable to multiply suits, by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow-subjects."

In 46 C.J., at p.646, there is a classification of nuisances which may be summarized as follows:

Section 165—*continued*

a. Common or public, where it affects the rights of all. It is indictable but not actionable;
b. Private, where it affects one person in a determinate number, but not all. It is actionable but not indictable;
c. Mixed, where it affects all, but inflicts special injury upon an individual. It is this class that is covered by s.165(1)(b).

The most authoritative pronouncement on ss.221, 222 and 223 is that contained in the judgment of the Privy Council in *TORONTO RAILWAY v. R.*, [1917]A.C.630. The company had been convicted by a jury on a count alleging that the company in breach of a legal duty, "unlawfully neglected to take reasonable precautions or care to prevent undue, dangerous and illegal overcrowding of passengers in their cars, in consequence whereof the property and comfort of the public passengers in the said cars were endangered." At p. 639:

"The point (as to whether or not it was a 'criminal case') turns upon the construction of section 223, and their Lordships think that, although the section preserves indictment and information as modes of procedure in the cases with which alone it deals, those relating to the property or comfort of the public and to obstruction of rights common to the King's subjects other than those dealt with in s.222, it divests the breach of duty so tried of any criminal character. . . . The wrong done is therefore in their Lordships' opinion, only a civil wrong. That indictment should be recognized in a statute as a method of trying a civil right is nothing new."

By way of exposition of the Code sections Viscount Haldane, who delivered the judgment, said (at p.636):

"The indictment was brought under the Criminal Code enacted by the Dominion Parliament, which forms c.146 of the Revised Statutes of Canada, 1906. The Code enacts (s.10) that the criminal law of England, existing at a certain date, is to be the criminal law of the Province of Ontario, except so far as modified by the Code itself or other statutes. It subsequently (s.221) defines a common nuisance to be an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all His Majesty's subjects. Having thus defined a common nuisance the Code goes on to divide such nuisance into two categories with different consequences attached. By s.222 every one is to be guilty of an indictable offence and liable to one year's imprisonment or a fine who commits any common nuisance which endangers the lives, safety or health of the public, *or which occasions injury to the person of any individual.* By s.223, on the other hand, any one convicted upon any indictment or information for any common nuisance *other than those mentioned in the last section* 'shall not be deemed to have committed a criminal offence; but all such proceedings or judgments may be taken and held as heretofore to abate or remedy the mischief done by such nuisance to the public right'. The effect of this section is, in their Lordships' opinion, *to leave indictment as a method of procedure* for trying the general question whether a common nuisance to the detriment of the prop-

erty or comfort of the public, or by obstruction of any right, *other than one affecting life, safety or health,* which is common to all His Majesty's subjects, has been committed. But it does deprive a conviction or indictment in these cases, of its criminal character. The method of indictment is at times used in English law as a convenient one for trying a civil right, and the section of the Canadian statute appears to give recognition to the use of this method and to deprive it of any result in criminal consequences." (Italics added: Ed.)

The nature of nuisance with reference to Code s.221 is illustrated by the case of *R. v. GILBERTSON*(1930), 53 C.C.C.286. There the accused had been convicted in a case in which he was in charge of a truck which was proceeding along the highway with a quantity of tent flooring which projected a considerable distance on each side. He ran into a man, who received such injuries that he died the next day. The trial judge instructed the jury that by so driving, the accused was creating a common nuisance, which was an illegal act, and that, therefore, if death resulted, it was manslaughter. The court of appeal ordered a new trial and, after quoting 4 Bl. Com. 1565-6, Russell on Crime, 8th ed., 1691, and Stephen's Digest, art. 189 (nuisances to highways), Haultain, C.J.S., said:

"Applying the definition in section 221 of the Code, we have to look for 'an unlawful act' or 'an omission to discharge a legal duty'.

What, therefore, was the unlawful act or omission in the present case? Merely to drive a car with materials projecting beyond the body of the car is not an unlawful act in itself, . .

It was the legal duty of the accused, of course, under s.247 of the Code, in driving the truck to take reasonable care not to endanger life, and the fact that there were projections and no lamps upon them would undoubtedly necessitate a larger degree of care than usual on their part; but every omission to discharge such a duty upon a public highway does not constitute a common nuisance. *It seems to depend largely upon the frequency and duration of its occurrence, and the number of persons affected thereby.*" (Italics Added: Ed.)

Notes of the Cases

Archbold's Cr. Pl. 24th ed., 1306, says that:

"Public nuisances which are indictable may be thus classified:

(1) Interference with comfort, enjoyment or health;
(2) Acts dangerous to public safety;
(3) Acts injurious to public morals or decency;
(4) Unlawful treatment of dead bodies;
(5) Interference with public rights of passage by land or water."

It will be convenient to use the above classification as a basis for notes of the cases, but introductory remarks are necessary in these respects:

(a) The purpose here is to deal with nuisance in relation to criminal law. The Encyclopaedia of the Laws of England, 2nd ed. Vol. X, p.85 says:

"The tendency of modern legislation has discouraged the granting of special powers by local Acts, and has rather taken the direction of enabling local authorities to adopt clauses which are of general application, or to legislate for their own requirements by means of by-

Section 165—*continued*

laws. Nuisances affecting particular localities can now be, and often are, dealt with summarily in this way. Thus obstructions to highways may be summarily dealt with under the Highway Acts, *e.g.*, 5 & 6 Will. IV, c.50, Act of 1835, ss.26, 56, 72, 77, 78 etc."

This sort of over-lapping is illustrated not only by the Parliamentary Debates, as quoted *ante*, but also by two Canadian cases, one previous to the *Code* and one very recent.

In *PILLOW v. RECORDER'S COURT*(1885), 30 L.C.Jur.1, it was held that legislation of the Province of Quebec authorizing the city council of Montreal to make by-laws for the prevention and suppression of nuisances is not *ultra vires* of the said legislature:

". . . considering that the said legislation is not of the nature or character of Criminal Law nor for the suppression or punishment of crime in the sense and intent of subsection 27 of section 91 (of the B.N.A. Act), but merely to protect the citizens of Montreal from the *res noxiat*, hurt and annoyance of offences not criminal in their nature and not within the purview and intent of said No. 27, section 91."

In *R. v. CAPILANO TIMBER CO.*(1919), 96 C.C.C.141 the defendant was convicted in a Magistrate's court under a city by-law for allowing solid matter to escape from fuel-burning equipment "which was a nuisance to persons not being therein engaged". The following appears in the judgment:

"At first I thought the charge here might be for an act indictable under the Criminal Code and beyond the purview of the by-law, but I do not now so believe. By this, I refer to criminal and non-criminal common nuisances set out in Code ss.221, 222 and 223 [Am. 1939, c.29, s.6].

A reference to 8 C.E.D. (Ont.) shows that there is a local standard applicable to each district, . .

I have considered this case from the point of view of a civil case to determine whether or not a nuisance has been caused within the meaning of the by-law because the by-law uses the term nuisance."

(b) It should be pointed out that a number of offences set out in the former Code were indictable nuisances at common law: the use of explosives in dangerous places, keeping disorderly houses, selling food unfit for human consumption, indignity to the dead, indecent acts or exhibitions. It is probable too that the offence of spreading false news is within the same category. Wood's Law of Nuisances, p.72, mentions the case of *COMMONWEALTH v. CASSIDY*(1865), 6 Phila. (Penn.) 82, in which it was held to be a public nuisance to circulate a hand-bill stating falsely that a child-stealer was in the city and warning the public to look out for her.

To put the same matter conversely, items 3 and 4 of Archbold's classification are dealt with as specific offences in the Canadian Code, so that, with reference to ss.221, 222 and 223, it is necessary only to notice his items 1, 2 and 5.

(c) Archbold's classification does not, as does the Code, include by reference the element of personal injury. That is involved in what Corpus Juris has called mixed nuisances.

1. *Acts Affecting Comfort, Enjoyment or Health.*

R. v. WHITE and *WARD*(1757), 1 Burr.333, *per* Lord Mansfield: "The very existence of the nuisance depends upon the number of houses and concourse of people; and this is a matter of fact, to be judged of by the jury."

and *per* Denison, J.:

"Upon a former trial, the indictment then before the court charged the air to be corrupted. This present indictment is better expressed. The word 'noxious' includes the complex idea both of insalubrity and and offensiveness. And there was no need to specify particular instances of the effects of it."

R. v. VANTANDILLO(1815), 4 M. & S.73. Accused was convicted of a common nuisance in carrying her child which was infected with smallpox, along a public highway. It was alleged that two pupils in a school kept there had caught the disorder and died. On a motion in arrest of judgment there was mentioned:

" . . . the circumstances of a bill having been introduced into Parliament during the last sessions, for the purpose of subjecting this offence to a punishment, and that it had been rejected upon the ground (then suggested by the law officers) that it would restrain the common law proceeding; upon which occasion it was taken for granted, that to carry infected persons about the streets of London was an indictable offence. And Lord Hale expressly mentions the smallpox as one of those contagious diseases, which if a man be infected therewith, and goes abroad, whereby another be infected and dies, it is a great misdemeanour in him."

In *R. v. BURNETT*(1815), 4 M. & S.272, it was held to be an indictable offence in an apothecary unlawfully and injuriously to inoculate children with smallpox, and while they are sick of it, to cause them to be carried along a public street. Le Blanc, J., said that the introduction of vaccination did not render the practice of inoculation for the smallpox unlawful, but that in all times it was unlawful and an indictable offence to expose persons infected with contagious disorders.

In *R. v. HENSON*(1852), Dears C.C.,24, accused was convicted for a nuisance in bringing into a public place to the danger of infecting the Queen's subjects, a mare infected with glanders. Held, that it was not necessary to aver that he knew that the disease was communicable to man.

In a Canadian case, *R. v. BREWSTER and COOK*(1859), 8 U.C.C.P. 208, accused were indicted for a nuisance in maintaining a dam which affected the health of people living in the neighbourhood. *Per* Draper, C.J., at p.212:

"It would be a strange proposition if a man could for his own profit overflow some fifteen thousand acres of land with nearly stagnant water, so as to render the land surrounding and adjoining uninhabitable, except at the imminent risk of health, and to say that, having done this before they were inhabitants, they cannot complain that he is guilty of a nuisance, for they need not have come to it. . . . The settlement of a valuable tract of land cannot be lawfully impeded or obstructed by a nuisance prejudicial to public health, any more than

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a public highway can be obstructed so as to prevent intercourse through the same portion of country."

In *R. v. BRUCE*(1860), 10 L.C.R.117, it was held that the rule, *sic utere tuo ut alienum non laedas,* which directs us to enjoy our own property in such a manner as not to injure that of another person, is a familiar maxim of the Common Law of England, as well as a maxim of the Civil Law, and that in the case submitted:

". . . evidence to prove the advantage accruing, and likely to accrue, to the public at large from a certain manufactured article, could not be admitted, inasmuch as it is settled that the circumstance that the thing complained of furnishes upon the whole a greater convenience to the public than it takes away, is no answer to an indictment for a nuisance."

R. v. BRICE(1889), 15 Q.L.R.147, was a case in which a captain of the Salvation Army was convicted of a common nuisance, despite the fact that the trial judge charged the jury that the evidence was not sufficient for a conviction and that they should acquit. A new trial was ordered. *Per* Cross, J., at p.158:

"It is, however, contended that the Salvationists are responsible for the whole crowd, even those who pelted them with stones. If this were an open question, common sense as well as plain law would protest against it, but it has been decided over and over again, that they are not so responsible. In the case of *BEATTY v. GILBANKS*(1882), 15 Cox, C.C. 138, it was held that the procession of the Salvationists was lawful, that their meeting was not made unlawful simply by ruffians trying to break it up; that a breach of the peace which renders a meeting unlawful, must be a breach caused by members of the meeting, and not by wrongdoers who wish to prevent its being held. There is a series of cases to the same purport: *JOHNSON v. THE MAYOR OF CROYDON*(1886), 16 Q.B.D. 708; Stone's Justice's Manual, pp.171, 786; *R. v. NUNN*(1884), 10 P.R. (Ont.) 395; *R. v. MARTIN* (1886), 12 O.R. 800; Taschereau's Can. Crim. Acts, p.39."

To cases under this heading may be added *R. v. CAPILANO TIMBER Co., supra.*

2. *Acts Dangerous to Public Safety.*

In *R. v. LISTER*(1857), Dears. & B.209, accused was convicted of a public nuisance in keeping large quantities of wood naphtha in a warehouse in a populous district. The case was twice argued on appeal and the conviction was affirmed. *Per* Lord Campbell, C.J., at p.227:

"We conceive that to deposit and keep such a substance in such quantities in a warehouse so situate, to the danger of the lives and property of the Queen's subjects, is an indictable offence. The law of the country would surely be very defective if life and property could be so exposed to danger by the act of another with impunity."

In *R. v. HENRY MUTTERS*(1864), Le. & Ca.491, the accused had been engaged in blasting a stone quarry, and by using an excessive charge of powder, caused a great quantity of stones to fall upon a public highway and houses nearby. Held, that he was rightly convicted upon an indictment which charged him with a nuisance to the highway. For

Canadian reference this case would properly be placed with s.78 (causing dangerous explosions).

R. v. DUNLOP(1867), 11 L.C.Jur.186. Accused was convicted of a nuisance in storing in his building an excessive quantity (51 tons) of gunpowder.

R. v. BURT(1870), 11 Cox, C.C.399. Accused was convicted for a nuisance in respect of certain steps placed in a footpath in carrying out improvements authorized by statute:

"Skilled artisans, surveyors of pavements, and others acquainted with the subject, were called in to give their opinion that such steps were dangerous, and these steps in particular. *And evidence was given of a number of accidents which had occurred at these steps, one of which had terminated fatally,* and others had led to serious injuries."

per Hannan, J.:

"It is a question of degree, and therefore for the jury to consider whether what was done was done reasonably."

Later there was a motion on the ground that what had been done was justified by the statute, temporarily at least, and that there was no evidence that the steps had been kept up an unreasonable time. But the court held that the lapse of time and the nature of the obstruction were circumstances from which the jury might infer the unreasonableness of the time.

Two prosecutions against the Toronto Railway Co. come under this heading. In the first, *R. v. TORONTO RAILWAY CO.*(1900), 4 C.C.C.4, it was held that their omission in operating their cars upon a highway, to use reasonable precautions to avoid endangering the lives of the public using the highway in common with them, is a breach of a legal duty constituting a common nuisance for which an indictment will lie under Code ss.191 and 213 (See now ss.165 and 191).

In the second, *R. v. TORONTO RAILWAY*(1905), 10 C.C.C.106, it was held that the company committed a nuisance by systematically moving electric cars reversely on a public street without fenders or gongs or other signalling appliances at the rear of the cars while being so operated, and thereby endangering the lives and safety of the public. At p.114:

"The causing of the death of Elizabeth Ward is stated merely as an illustration of the way in which the nuisance alleged affected the individual named as one of the public, the consequence, in short, of the offence . . . . . The duty alleged is that which exists as well at common law as under section 213 of the Code." (Italics added: Ed.)

It was held too that a nuisance indictable under ss.191,192 and 213 (now ss.165 and 191) may consist in the mode of using or controlling anything, and it is not essential that there should be anything dangerous in the thing itself. See annotation to this case, 10 C.C.C.118.

See also *R. v. MICHIGAN CENTRAL RAILWAY CO.*, noted under s.80, *ante.*

3. *Interference with Public Right of Passage.*

WILLIAMS' CASE(1593), 3 Co.Rep.145, at p.147:

"A man shall not have an action on the case for a nuisance done in the highway, for it is a common nuisance, and then it is not reasonable that a particular person should have the action; for by the same reason that one person might have an action for it, by the same reason every

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one might have an action, and then he could be punished 100 times for one and the same cause. But if any particular person afterwards by the nuisance done has more particular damage than any other, there for that particular injury, he shall have a particular action on the case; and for common nuisances, which are equal to all the King's liege people, the common law has appointed other courts for the correction and reforming of them, *scil., tourns, leets,* etc."

R. v. GREAT NORTH OF ENGLAND RAILWAY(1846), 2 Cox, C.C.70. Held, that an indictment will lie against a corporation as well for misfeasance as for non-feasance. "They may be guilty, as a body corporate, of commanding acts to be done to the nuisance of the community at large." This case was for nuisance in the erection of a railway bridge which crossed a highway.

Similarly, in Canada in *R. v. GRAND TRUNK RAILWAY*(1858), 17 U.C.Q.B.165, the accused company was convicted of nuisance for obstructing a highway by improper construction of their road across it. On a motion for judgment:

"The proper sentence seems to be that they should pay a fine, and that the nuisance complained of be abated . . . . . in England, or here, another course was open than by indictment, namely, by moving for a mandamus to the company to carry the statute into effect, by restoring the highway to its former state as nearly as circumstances will permit; but the course which has been taken is a legal course, though perhaps not the most convenient, and we must give effect to the conviction."

This case, in point of procedure, may be compared with others noted under that heading (*infra*), decided since the Code was enacted.

In *R. v. U.K. TELEGRAPH CO.*(1862), 3 F. & F.73, a case involving the erection of telegraph poles on a highway, it was held:

"That the public are *prima facie* entitled to the use of every portion of an ordinary highway lying between the fences enclosing it, is a matter of law; though what is a permanent obstruction placed on the highway, rendering the way less commodious than before, and so amounting to a public nuisance, is a question of fact for the jury."

It is irrelevant, but interesting to note that this case was, if not the first, certainly one of the earliest, in which photographs were used in a criminal trial to show the nature of the *locus in quo*.

In another aspect of the criminal law relating to this subject, it was held in *R. v. PATTON*(1863), 13 L.C.R.311, that a boom stretched across a floatable stream or river is a public nuisance, and as such may be abated by any person. The accused, who had broken the boom because it prevented the passage of his saw-logs, was acquitted.

That case has some points of resemblance with *R. v. STEPHENS* (1866), 10 Cox,C.C.340, where accused was convicted of a common nuisance by reason of his workmen placing rubbish so that it obstructed a navigable river, although this had been done against his orders and without his personal knowledge. A rule *nisi* for a new trial was discharged. *Per* Blackburn, J.:

"All that it is necessary to say is this: that where a person maintains works by his capital and his servants, and conducts them so that they are in point of fact a nuisance; if the circumstances under which he

maintains those works are such that for a private nuisance a civil action by an individual might be supported; if the nuisance inflicts an injury upon a public right, so that a private action would not lie, but the remedy would be by indictment, the same proof that would prove the nuisance so as to enable a person to bring an action would prove the nuisance so as to enable the public to indict."

ATTORNEY GENERAL v. BRIGHTON & HOVE CO-OPERATIVE SUPPLY ASS'N.(1900), 69 L.J. Ch.204, is a typical case under the present heading but is noteworthy also in point of procedure, it being an action by the Attorney General for an injunction to restrain a nuisance in the unreasonable use of a street for loading and unloading goods. *Per* Lindley, M.R., at p.206:

"Now, I take the law to be that which was laid down long ago, and I believe with perfect correctness, in *R. v. RUSSELL* (6 East, 427) . . . . . what I am going to read appears to me to express . . . . . what the law is, and it has the great advantage of having stood the test of the best part of a hundred years of criticism. What the Court said was: 'That it should be fully understood that the defendant could not legally carry on any part of his business in the public street to the annoyance of the public. That the primary object of the street was for the free passage of the public, and anything which impeded that free passage, without necessity, was a nuisance. That if the nature of the defendant's business were such as to require the loading and unloading of so many more of his wagons than could conveniently be contained within his own private premises, he must either enlarge his premises, or remove his business to some more convenient spot.' I take that to be the law."

R. v. REYNOLDS(1906), 11 C.C.C.312, a prosecution under the Code, involved a nuisance by obstruction of a highway, but was decided on a motion to quash the indictment for various defects. The following appears in the judgment:

"He does not state that there has been an injury to the person of anyone. That allegation of actual injury must therefore be regarded as surplusage. If it had alleged injury to the person, it would have made the count bad on the ground of charging two offences, one a criminal offence under the Code, and one otherwise.

After the Parliament of Canada has divided nuisance into those which constitute *criminal offences* and those which do not, *one cannot probably look in the Statutes of Canada for further provisions on the subject of those nuisances which are not criminal offences. We have to look* to the proceedings which, before the existence of the Criminal Code, might be taken to abate or remedy the mischief, that is, *to the common law.*" (Italics added: Ed.)

CLARK v. CHAMBERS(1878), 3 Q.B.D.327, although a civil case in England, affords an excellent example of the sort of mixed nuisance which s.165 of our Code would cover by its reference to personal injury. In that case the defendant put a barrier across a private way on which his premises abutted, to prevent people from overlooking athletic sports which were carried on in his grounds. In the middle of the barrier was a gap which was usually open, but which, when sports were going on, was closed by means of a pole let down across it. The defendant had no

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right to erect the barrier. Some persons, without his authority removed a part of the barrier armed with spikes called a *chevaux de frise*, from the way where the defendant had placed it, and put it in an upright position across the way. The plaintiff, lawfully passing along the road on a dark night, made his way through the opening in the barrier and onto the footpath, and injured his eye by coming into contact with one of the spikes. Held, that the defendant, having unlawfully placed a dangerous instrument in the road, was liable for the injuries occasioned by it to the plaintiff, who was lawfully using the road, notwithstanding the fact that the immediate cause of the accident was the intervening act of a third party.

Procedure.

R. v. COOPER(1876), 40 U.C.Q.B.294. Defendant convicted of a nuisance by obstructing a highway. These proceedings were on *certiorari* and turned on a question of costs.

R. v. HART(1880), 45 U.C.Q.B.1. *Certiorari* by prosecutor after acquittal of defendant on a similar charge.

Re JAMIESON and COUNTY OF LANARK(1876), 38 U.C.Q.B. 647. Where a county council is liable to repair a bridge, the proper remedy is indictment, not *mandamus*. *Per* Harrison, C.J.:

"Indictment will lie: it is an adequate remedy, and that being so, I do not see why I should take it upon myself to grant an extra-ordinary remedy."

R. v. CITY OF LONDON(1900), 32 O.R.326. Proceedings against the corporation of a city on a charge of neglecting to repair and keep in repair one of its public streets, thereby committing a common nuisance, should be by indictment. Prohibition was granted to restrain a preliminary investigation of such a charge before a police magistrate and an order *nisi* to set aside the order granting prohibition was refused by a Divisional Court.

In *R. v. PORTAGE LA PRAIRIE*(1905), 10 C.C.C.125, a rural municipality was found guilty on indictment for allowing a highway to remain out of repair and the trial judge ordered that the nuisance be abated by a certain date. This was not done and no sufficient reason for delay was shown. At the autumn assizes a motion was made for an order directing the sheriff to make the repairs, but as this could not be done until after the then approaching winter, judgment on the motion was allowed to stand. When it came on again, the municipality had meanwhile made the repairs. Richards, J., said:

"I am of the opinion that the motion was properly made, and that, but for the subsequent action of the municipality, the order should be made as asked for and a writ *de nocumento amovendo* issued to the sheriff."

R. v. CITY OF VICTORIA(1920), 33 C.C.C.108. An appeal does not lie under Criminal Code ss.1014-1020 to a criminal Court of Appeal in respect of proceedings by indictment for a non-criminal common nuisance as defined by s.223. In this case a Judge had quashed the indictment and refused to reserve a case in respect of his order. The Court of Appeal refused leave to appeal.

R. v. LAMBTON(1926), 46 C.C.C.13. The proper procedure against a municipality for the offence of nuisance by allowing a highway to fall into a dangerous condition of disrepair, is indictment and not *mandamus,* and prohibition will not lie to prevent a magistrate holding a preliminary inquiry on an information therefor:

> "The facts deposed to . . . . . show a shocking neglect of the River Road in that vehicles become mired requiring chains and horses to extricate them, and on account of its crumbling and slipping into the river it has become a source of peril."

The Attorney General's Right of Action.

ATTORNEY-GENERAL v. NIAGARA FALLS INTERNATIONAL BRIDGE CO.(1873), 20 Grant 34. Headnote: "The Attorney General of the Province is the officer of the Crown who is considered as present in the Courts of the Province, to assert the rights of the Crown, and of those who are under its protection. The Provincial Attorney General *and not the Attorney General of the Dominion,* is the proper party to file an information, when the complaint is not of an injury to property vested in the Crown in representing the government of the Dominion, but of a violation of the rights of the public of Ontario. The Provincial Attorney General is the proper person to file an information in respect of a nuisance, caused by interference with a railway." *Per* Strong, V.C., at p.38:

> "I can discover nothing incongruous or inconvenient in the *Attorney General* for the province being admitted to sue on behalf of the public, even in respect of the violation of rights created by an Act of the Parliament of the Dominion. So far from that being so, the whole system of the administration of criminal justice furnishes an analogy to the contrary. The power of making laws is in the Legislature of the Dominion; but it has never been doubted that the *Attorney General* of the Province is the proper officer to enforce those laws by prosecution in the Queen's Courts of justice in the Province.
>
> For the purpose of obtaining redress for any injury to, or for restraining undue interference with public property vested in the Crown, for the purposes of the Government of the Dominion, I can conceive that it might be argued with much force that the *Attorney General* for the Dominion should be admitted to sue by information. That, however, is a totally different case from the present. In the case of a public nuisance caused by the illegal obstruction of a railway, as I have said, the Provincial *Attorney General* would be the proper officer to prosecute in a Court of Law. *A court of Equity, however, would also lend its aid on an information being filed by the proper officer to restrain such a nuisance."* (Italics added: Ed.)

Some deviation from this case, in so far as it deals with the position of the Attorney General of Canada, is shown by later cases.

In *ATTORNEY-GENERAL OF CANADA v. EWEN*(1895), 3 B.C.R. 468, it was held that the Crown, in the right of the Dominion, has the right to take proceedings *to restrain by injunction* the pollution of tidal rivers, which co-exists with the right of the Provincial Attorney General to restrain any public nuisance, caused by the improper conduct in question.

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In *ATTORNEY-GENERAL OF CANADA v. BRISTER*, [1943]3 D.L.R.50, it was held *per* Chisholm, C.J., and Hall, J., that the Attorney General of Canada may maintain an action for damages in respect of an obstacle to navigation which constitutes a public nuisance. At p.63:

"The learned Judge has made a finding that the hulks were a public nuisance, and counsel for the defendant submits that only the Attorney General of the Province can maintain an action to abate such a nuisance, citing in support of his contention the case of *ATTORNEY-GENERAL v. NIAGARA INTERNATIONAL BRIDGE CO.*(1873), 20 Gr.34, in which Strong, V.C., held that the Attorney-General of the province was a proper officer of the Crown to maintain that action for the injury to the public. The Vice-Chancellor did not suggest that the Attorney General of Canada could not maintain the action. Our attention was not drawn during the argument to *ATTORNEY-GENERAL OF CANADA v. EWEN* . . . . . It was held by Drake, J., that the Crown in the right of the Dominion could maintain the action, the right of action being in the particular case coextensive with that of the Attorney General of the Province. The decision of Drake, J., was sustained on appeal. I am of opinion that each Attorney General has the right to maintain an action to abate a nuisance such as those obstructions in a public harbour."

Conclusion.

It is submitted that s.165 as it now appears:

1. Specifies, as in the case of negligence, what is to be regarded as criminal;

2. Confines the provisions of the criminal law to criminal common nuisance. This avoids questions that arose in the Debates on the former sections and in particular, is consistent with the principle stated by Sir John Thompson that "We must retain control of all matters connected with the life, safety and health of the people";

3. Provides that common nuisance, where declared to be criminal, shall be prosecuted like any other offence. This involves the following considerations:

(a) *R. v. CITY OF LONDON* and *R. v. LAMBTON* (*supra*), are not in accord as to the holding of a preliminary inquiry under the former procedure.

(b) The procedure by way of criminal information is not continued in the new Code. As to this, see notes to s.488(2).

(c) The cases of *ATTORNEY-GENERAL v. NIAGARA FALLS BRIDGE CO.*, *ATTORNEY-GENERAL OF CANADA v. EWEN*, and *ATTORNEY-GENERAL OF CANADA v. BRISTER* (*supra*), which deal with the right of action of the Attorney General whether of Canada or of a province, show that nothing is lost by the elimination of s.223.

SPREADING FALSE NEWS.

166. Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and is liable to imprisonment for two years.

OLD CODE:

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

This is the former s.136 with the addition of the words "statement or."

No apology is offered for dealing with this section at length, because it has been drawn into a movement that has emerged (not only in Canada, as will be seen) to bring about legislation in relation to what is called 'group libel.'

The section has developed from the statute *De Scandalis Magnatum*, 3 Edward I, c.34, by which none should be "so hardy to tell or publish any false news or tales whereby discord or occasion of discord or slander may grow between the King and his people, and the great men of the realm". It was "open to a limited aristocracy, official or otherwise, and administered by the King's Council". "Great men of the realm" were particularized in 2 Richard II, c.5. A subsequent statute, 12 Richard II, c.11, recited the Act of Edward I against "devisers of false news and of horrible and false lies, of prelates, dukes, earls, barons and other great men of the realm" and provided that when the deviser is "imprisoned and cannot find him by whom the speech is moved", he should be punished by the advice of the Council. The last action under these statutes was in 1710, but they were not formally repealed until 1888.

In *R. v. HARRIS*(1680), 7 State Tr.926, at p.930, Scroggs, L.C.J., is quoted as follows:

> "It is not long since, that all the judges met, by the King's command; as they did some time before too: and they both times declared unanimously that all persons that do write, or print, or sell any pamphlet, that is either scandalous to public or private persons; such books may be seized, and the person punished by law; that all books, which are scandalous to the government may be seized; and all persons so exposing them, may be punished. *And further, that all writers of news, though not scandalous, seditious, nor reflective upon the government or the state; yet if they are writers (as there are few others) of false news, they are indictable and punishable upon that account.*"

– Starkie on Libel, 1st ed. (1813), p.546, apparently with the foregoing in mind says:

> "It is said to have been resolved by all the judges that all writers of *false news* (his italics) are indictable and punishable; and probably at this day the publication of news likely to produce any public detriment would be considered as criminal."

The statute 3 Edward I, c.34, is cited by Stephen in connection with Art. 65 in his Digest of Criminal Law, 4th ed., 1887:

> "Every one commits a misdemeanour who cites or publishes any false news or tales whereby discord or occasion of discord or slander may grow between the Queen and her people or the great men of the realm (or which may produce other mischiefs)",

and in a footnote to the words in brackets, he says: "The definition is very vague and the doctrine exceedingly doubtful."

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This provision was not carried into the English Draft Code and does not appear to have been continued by Stephen after the repeal of the Act of Edward I. However, it does appear verbatim as Art. 125 in Burbidge's Digest of the Criminal Law of Canada, which article is given in the Canadian Criminal Law Bills of 1891 and 1892 as the source of what became s.136 of the former Code. As an indication of the intention of the section, it is important to notice the changes that it underwent during its course through Parliament. As cl.125 in the Bill of 1891 it reads:

"Every one is guilty of an indictable offence and liable to one year's imprisonment who cites or publishes any false news or tales whereby discord or occasion of discord or slander may grow between the Queen and Her people (or which may produce other public or private injury)."

As clause 125 of the Bill of 1892 with amendments proposed by the joint Committee of the Senate and House of Commons, it reads:

". . . . . who *wilfully* publishes any false news or tale whereby injury or mischief is *likely to be* occasioned to any public or private interest," the words italicized above being hand-written. As passed by the House of Commons with amendments made in the Senate, it reads:

". . . . . who wilfully *and knowingly* publishes any false news or tale whereby injury or mischief is *or is* likely to be occasioned to any public or private interest."

It appears thus as s.126 in the Code of 1892 where Taschereau's edition describes it as new.

The history of the section indicates that it is the intention to make it clear that *mens rea* is an element of the offence and that it is intended that the Crown must prove that the publisher knew that the news was false. It is in this sense that s.166 of the present Code is drawn. It is submitted that this is not inconsistent with *R. v. HOAGLIN*(1907), 12 C.C.C.226 (the only reported case under the section) where it is implied at least that the accused knew or should have known that what he was stating was false. In that case, the accused had published notices to the effect that he was closing out his business and leaving Canada because Americans were not wanted in this country.

Other instances involving the principle of this section are as follows:

Chitty's Criminal Law, Vol. 2, p.527, has a form of indictment for spreading false rumours in order to enhance the price of hops.

In 1778, one Scott, a bill poster, was indicted for posting up a paper purporting to direct the publication of an Order in Council giving notice that war with France "will be proclaimed on Friday next". This was untrue and was regarded as being indictable in itself, but the defendant was acquitted since he had been induced to post up the bills believing the matter stated to be true (cited 12 C.C.C. p.229).

In *R. v. DeBERENGER*(1814), 3 M. & S.67, the accused was indicted for conspiracy to defraud by publishing a false report that peace was about to be declared, his object being to raise the price of the public funds.

Woods Law of Nuisances, 1883, p.72, contains the following:

"Circulation of false reports, etc., a public nuisance.—Anything that

creates unnecessary alarm or anxiety in the public mind, such as the publication of false reports of an intended invasion or of the reported presence in a community of a child-stealer, which is calculated to disturb the public mind and create false terror and anxiety, is a public nuisance, and was so held in *COMMONWEALTH v. CASSIDY* (6 Phila. (Penn.) 82). In that case a false handbill was circulated, cautioning the public to look out for a child-stealer, who was represented to be a black woman, and then in the city, and fully described her. The statement was wholly false, but naturally created great alarm in the city. The person circulating the bills was indicted therefor as for a public nuisance, and the court held that the indictment would lie, that mental anxiety, induced from any cause, is a fruitful source of bodily disease, as well as of death itself, and any false publication calculated unnecessarily to excite it, is a public nuisance."

Group Libel.

It has been observed that some people feel that the problem raised by the defamation of minorities cannot be solved by legislation. There are recent important deliverances which support that view. They may be mentioned at the outset before a discussion in detail is undertaken.

(1) In March, 1952, a standing committee of the British House of Commons considered a proposal designed to make it an offence punishable with imprisonment up to two years for any person to libel any body of persons within the United Kingdom, distinguishable as such by race, creed, or colour, thereby bringing them into hatred, ridicule or contempt, and also a proposal, similar in intent, that in group libel actions the court should not award damages but should be empowered to restrain the defendant by injunction from repeating or further publishing the defamatory statement. Both proposals were rejected. The Attorney General said that the Home Office was not prepared to recommend them. "The present law for seditious libel", he said, "was adequate to deal with this kind of case, and it has been clear since 1732 that the criminal law was adequate in this respect. In that year, proceedings were taken against a man called Osborne for publishing a paper entitled 'A true and surprising relation of the cruelties and murders committed by the Jews'. Objection was raised that the charge was so general that it was insupportable, but the court would not accept this, and said that the basis of the charge was a breach of the peace." (The Times, London, March 26, 1952).

There are two reports of *R. v. OSBORNE* and they do not agree. In *ANONYMOUS*(1732), 2 Barn. (K.B.), pp.138 and 166, it is said,

"Mr. Fazakerly moved for an information against one Osborn, for printing a libel reflecting on the Portuguese Jews, that lately came over, in charging them with being guilty of burning a bastard child begotten by a Christian on the body of a Jewish woman. He said too, that several Jews had been insulted by the mob on this occasion. Lord Raymond said, that he believed the Court could do nothing in the matter, by reason that no particular Jew could be able to shew to the Court, that they were pointed at more than any others; and thought that Lord Chief Justice Holt was of this opinion in the case of Orm and Nut."

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and at p.166:

"The Court said, that in the present case it is related in the paper, that the fact there told is a fact which the Jews have frequently done; and therefore the whole community of the Jews are struck at. And wherever that is the case, they thought this Court ought to interpose. Accordingly they made the rule absolute."

But in Kel. W. 230, the Court is reported as having granted a criminal information and as having said:

"This is not by way of Information for a Libel that is the Foundation of the Complaint, but for a breach of the Peace, and in inciting a Mob to the Destruction of a whole Set of People; and though it is too general to make it fall within the description of a Libel, yet it will be pernicious to suffer such scandalous Reflections to go unpunished. We don't give any present Judgment in this affair but think this is a Fact, proper to be tried."

In 1936, when it was proposed to lay a charge of defamatory libel against the Imperial Fascist League or members thereof for defamatory statements concerning the Jewish community in London, the Director of Public Prosecutions obtained the opinion of counsel, who considered *R. v. OSBORNE*. His conclusion was:

"I have no doubt that this (the Kelynges') report accurately represents what the judges said, and that they were in effect saying that although these facts do not disclose evidence which would justify proceedings for defamatory libel, since no individual is directly or by implication libeled, yet proceedings will be for what is in effect a public mischief."

In the case of *R. v. LEESE and WHITEHEAD*(1936), which involved the printing in a Fascist paper of attacks on the London Jews, there were four counts of seditious libel, one of conspiracy to effect a public mischief and one of effecting a public mischief. The case went to the jury on the public mischief counts only. There was no count charging defamatory libel. (This case is not in the reports but is referred to in "The Modern Approach to Criminal Law," p.76, in a note that it "greatly and, it is submitted, unjustifiably, extends the field covered by *R. v. MANLEY*.")

(2) On April 28th, 1952 in *BEAUHARNOIS v. PEOPLE*, 96 U.S.627 the Supreme Court of the United States upheld the constitutionality of group libel legislation of the State of Illinois. However, the majority judgment, written by Mr. Justice Frankfurter contains the statement:

"But it bears repeating—although it should not—that our finding that the law is not constitutionally objectionable carries no implication of approval of the wisdom of the legislation or of its efficacy. These questions may raise doubts in our minds as well as in others."

These words are no doubt sufficiently general to apply to any legislation which is questioned on constitutional grounds, but it is probable that they were written with an eye to the dissenting opinions of Mr. Justice Jackson and Mr. Justice Black. The former said:

"While I doubt that any laws or prosecutions will much alleviate racial or sectarian hatreds and may even invest scoundrels with a specious martyrdom, I should be loath to foreclose the States from a

considerable latitude of experimentation in this field. Such efforts, if properly applied, do not justify frenetic forebodings of crushed liberty. But these acts present most difficult policy and technical problems, as thoughtful writers who have canvassed the problem more comprehensively than is appropriate in a judicial opinion, have well pointed out."

Mr. Justice Black said at p.649:

"One need only glance through the Parliamentary discussion of Fox's Libel Law passed in England in 1792 to sense the bad odor of criminal libel in that country even when confined to charges against individuals only."

And, at p.651:

"I think the First Amendment, with the Fourteenth, 'absolutely' forbids such laws without any 'ifs' or 'buts' or 'whereases'. Whatever the danger, if any, in such public discussions, it is a danger the Founders deemed outweighed by the danger incident to the stifling of thought and speech."

(3) Upon a related subject, a compulsory Fair Employment Practices Code, Mr. Eisenhower is reported as saying that he will be in the fight for non-discrimination, "but I am unwilling to believe that a punitive Federal law itself . . . . . is the very best way. I am afraid very much that it will intensify rather than ameliorate the problem." (Manchester Guardian Weekly, June 12, 1952.)

An idea of the difficulties referred to by Mr. Justice Jackson is to be obtained from an article "Statutory Prohibition of Group Defamation", 47 Columbia Law Review, 595 (1947), and another entitled "Group Libel Laws: Abortive Efforts to combat Hate Propaganda", Yale, L.J., February 1952. *For a Canadian reader it is important to remember that the crime of seditious libel does not exist in the United States.*

In addition to the principle that a person who causes a breach of the peace by defamatory statements is liable to punishment, another rule of law may be drawn from *R. v. OSBORNE, viz.*, that a person may render himself liable to punishment by publishing a libel of a group which is so small and so readily ascertainable that an individual member of it is defamed. Starkie (Law of Slander, 665) on that authority and on the authority of *R. v. ORME, infra,* and *R. v. GATHERCOLE, infra,* puts it this way:

"An information will be granted when the libel reflects on a body of men, though no individuals in particular be pointed out. As if the libel tend to raise tumults and disorder among the people, by exciting their hatred against a whole class of men."

And on the authority of *R. v. JENOUR, infra,* he adds:

"A libel upon one of a body of persons without naming him, is a libel upon the whole, and may be so described."

Odgers on Libel and Slander, 6th ed., p.123, contains the following: "If the words used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory. 'An innuendo cannot make the person certain which was incertain before' (*JAMES v. RUTLECH*, 4 Co. Rep. 17b). So if the words reflect impartially on either A or B, or on some one of a certain number or class, and there is nothing to show which one was meant, no one can

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sue. Where the words reflect on each and every member of a certain number or class, each or all can sue. 'Every member of the class who could satisfy the jury that he was a person aimed at and defamed could recover' (*per* Farwell, L.J., in *JONES v. HULTON & CO.*, [1909]2 K.B.444 at p.481)."

Again, Odgers says at p.456:

"It is also a misdemeanour to libel any sect, company, or class of men, without mentioning any person in particular; provided that it be alleged and proved that such libel tends to excite the hatred of the people against all belonging to such sect or class, and conduces a breach of the peace (*R. v. GATHERCOLE*(1838), 2 Lew. C.C.237).

Such intention may sufficiently appear from the words of the libel itself, or it may be proved by the consequences, if any, of its publication."

In *R. v. ORME*(1699), 1 Ld. Raym.486, the alleged libel consisted of an invective against mankind in general and the report says that the jurors "could not properly say that the matter was false and scandalous when they did not know the persons of whom it was spoken."

In *R. v. GATHERCOLE*(1838), 2 Lew. C.C.237, the accused, who was a Protestant clergyman, published an attack upon the Roman Catholic church in general, and made aspersions upon a certain nunnery in particular. He was charged with criminal libel in respect of the individuals in that nunnery and was convicted. Alderson, B., said:

"A person may, without being liable to prosecution for it, attack Judaism, or Mohammedanism, or even any sect of the Christian Religion (save the established religion of the country); and the only reason why that is in a different situation from the others is, because it is in the form established by law, and is therefore part of the constitution of the country. In like manner, and for the same reason, any general attack on Christianity is the subject of criminal prosecution, because Christianity is the established religion of the country. The defendant here has a right to entertain his opinions, to express them, and to discuss the subject of the Roman Catholic Religion and its institutions; but he has no right to say of a particular body of persons (*e.g.*, the inhabitants of Scorton Nunnery) that the place they inhabit is a 'brothel of prostitution'; for in so doing he is attacking the individual characters of the body of whom Scorton Nunnery consists."

Commenting upon the above reference to a "general attack on Christianity", Lord Sumner said in *BOWMAN v. SECULAR SOCIETY*, [1917]A.C.406, at p.460:

"After all, to insult a Jew's religion is not less likely to provoke a fight than to insult an Episcopalian's; and, on the other hand, the publication of a dull volume of blasphemies may well provoke nothing worse than throwing it into the fire."

In *R. v. JENOUR*(1741), 7 Mod. Rep.400, a statement had been published making certain imputations against a "director of the East India Company". A motion was made and granted for a criminal information against the defendant for a libel against the directors of the East India Company, and the defendant was convicted. Lee, C.J., said:

". . . . . the advertisement seems equally applicable to every one of the

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Directors. Where a paper is printed, equally reflecting upon a certain number of people, it reflects upon all; and readers according to their different opinions may apply it so. It has been the rule of this Court always to endeavour to prevent libels upon societies of men. Where the persons reflected upon are quite unknown, the Court will not grant an information. In the Jews' case (*i.e. R. v. OSBORNE*) it appeared by affidavit that the persons upon whom the reflection was made were moved (sic); but the Court held, that for the printing such an account of the Jews as would tend to make people believe them so barbarous as to burn a woman and her child, because it was begot by a Christian, the information ought to go. Now as this is equally applicable to all the directors, the reader may equally apply it to any one, which is the inconveniency this Court always endeavours to prevent."

The principles upon which *R. v. OSBORNE* is based underlie decisions in other jurisdictions. David Reisman, in an article in 42 Col. L.R. 727, at p.754, notes a case in Berne, Switzerland, in which the defendant was fined for distributing the Protocols of the Elders of Zion, on the ground that the Protocols were "scandalous literature of the worst sort" and that the publication was liable to disturb the peace.

Again, in *PEOPLE v. EDMONDSON*(1938), 4 N.Y. S.2nd.257, the accused was indicted for three libels, one of them on "all persons of the Jewish Religion". The Court made a careful review of the English authorities amongst others and came to the conclusion "that such an indictment cannot be sustained under the laws of this state, and that no such indictment as one based upon defamatory matter directed against a group or community so large as 'all persons of the Jewish Religion' has ever been sustained in this or any other jurisdiction."

There are two civil actions which it is useful to mention. In *SUMNER v. BUEL*(1815), 12 Johns.(N.Y.)475, an officer of a regiment brought action for damages for a libel against the whole regiment. The action was unsuccessful because no special damage was shown, but the Court indicated its belief that an indictment for criminal libel would lie. This affords an interesting parallel with the case of *R. v. SHEPPARD* referred to by Mr. John King in a pamphlet on the Amended Law of Criminal Libel and not otherwise reported. In that case the publisher of the Toronto News was called to Montreal to defend a charge of criminal libel laid by an officer of volunteers in respect of certain comments upon his regiment as a whole. The defendant was convicted.

The Scottish case of *BROWNE v. THOMSON & CO.*, [1912] S.C. 359, is another illustration of the application of the same principle. The defendants had published in the Dundee "Courier" an article which stated that in Queenstown instructions were issued by the Roman Catholic religious authorities that all Protestant shop assistants should be discharged, and that a shopkeeper who had refused so to act had had his shop proclaimed and had been forced to close it. The Roman Catholic bishop at Queenstown and six of his clergy sued as individuals alleging that they were the religious authorities referred to, and were successful. The Lord President said:

"I think it is quite evident that if a certain set of people are accused of having done something, and if such accusation is libellous, it is

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possible for the individuals in that set of people to show that they have been damnified, and it is right that they should have an opportunity of recovering damages as individuals."

Other Canadian Cases.

In *ORTENBERG v. PLAMONDON*(1914), 24 Que.K.B.69 and 385, the plaintiff recovered damages for libel in a publication containing a severe attack on the Jews. *Per* Cross, J., at p.387:

"I cannot agree that the respondent's utterances amount to a non-actionable denunciation or controversion of a race, or religion at large. They were that and, as regards the appellant, they were more. They were an invitation and incitement to a boycott of the handful of Jewish traders in the City of Quebec. The invitation to boycott was accepted and acted upon."

The judgment states that these Jews were seventy-five families in a population of eighty thousand. It must be noted that this case has been referred to as "the often-cited but never-followed case of *ORTENBERG v. PLAMONDON*" (1942, 42 Col. I..R. at p.766).

In *GERMAIN v. RYAN*(1918), 53 Que. S.C.543, it was held that no action lies by an individual for defamatory words (*injures*) addressed to a collectivity, when the members of that collectivity, as in the case of a race (in this instance the French-Canadians) are so numerous that the defamation cannot attach to anyone in particular, nor cause particular damage (*un prejudice personnel*) to anyone.

In *EX PARTE GENEST v. R.*(1933), 71 Que. S.C.385, in which the accused was discharged on habeas corpus, it was said that the jurisprudence shows that, under the common law, there can be a defamatory libel of a class or category of persons; but it is doubtful that the word "person" in s.317 (now 248) of the *Criminal Code*, as it is defined in s.2(13) (now 2(15)) includes a collectivity not having a corporate existence. This case appears to have arisen from an attack on the Roman Catholic clergy.

In *R. v. RAHARD*, [1936]3 D.L.R.230, an Anglican clergyman was prosecuted under Code s.198 for blasphemous libel involved in an attack on Roman Catholic priests. "The expression in writing of an opinion upon a religious question in bad faith and in language offensive and injurious to the religious convictions of those who do not share those convictions and of such a nature that it may lead to a disturbance of the public peace, constitutes blasphemous libel." This case does not refer to defamatory libel but contains a review of the authorities dealing with blasphemy as a crime at common law.

In *R. v. CARRIER*(1951), 104 C.C.C.75, where it was sought to indict accused under s.136, after his acquittal on a charge of sedition, it was held that s.136 must be interpreted as involving sedition as defined in *BOUCHER v. R.*, noted under s.60(62), *ante*.

While it is intended here to deal with the problem as a question of criminal law, and its civil aspect has been touched upon only for the parallels which it affords, a reference to The Manitoba Statute, 1946, c.11, s.19, will render this discussion more nearly complete. That section provides that "the publication of a libel against a race or creed likely to expose persons belonging to the race or professing the creed to hatred, contempt or ridicule, and tending to raise unrest or disorder among the

OLD CODE:

237. Every one is guilty of an indictable offence and liable to five years' imprisonment who,

(a) without lawful excuse, neglects to perform any duty either imposed upon him by law or undertaken by him with reference to the burial of any dead human body or human remains; or

(b) improperly or indecently interferes with or offers any indignity to any dead human body or human remains, whether buried or not.

2. par. (9a) 'disorderly house' means a common bawdy-house, a common gaming-house or a common betting-house;

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people, shall entitle a person belonging to the race or professing the creed to sue for an injunction to prevent the continuation and circulation of the libel", and the Court of King's Bench is empowered to entertain the action.

"Publication" is defined, and the section provides that the action may be taken against the person responsible for the authorship, publication or circulation of the libel. The fact that these provisions have not been used may afford an argument either that they are a useful preventive or that they are unnecessary.

When the problem is regarded with reference to the criminal law, it appears that the weight of authority and the weight of experience indicate that it is not advisable to attempt to combat prejudice by legislation. As the law stands, a remedy is afforded the individual, and the public interest, which is not affected until its peace is threatened, is protected also.

NOT BURYING DEAD.—Indignity to dead body.

167. Every one who

***(a)* neglects, without lawful excuse, to perform any duty that is imposed upon him by law or that he undertakes with reference to the burial of a dead human body or human remains, or**

***(b)* improperly or indecently interferes with or offers any indignity to a dead human body or human remains, whether buried or not,**

is guilty of an indictable offence and is liable to imprisonment for five years.

This is the former s.237. It was s.206 in the Code of 1892, and s.158 in the E.D.C. where it appears with a marginal note that "We have not thought it expedient to make any reference here to any mode other than burial of disposing of dead bodies which may hereafter be sanctioned." This is interesting since Leslie Stephen in his Life of Sir James Fitzjames Stephen, p.450, mentions the case of *R. v. PRICE*(1884), 12 Q.B.D.247, in which accused, who called himself a Druid, had burned the body of his child and was charged with misdemeanour. Stephen, J. concluded that there was no positive law against burning bodies, unless the mode of burning produced nuisance, and that therefore the principle applied that nothing should be a crime which was not distinctly forbidden by law. The biographer adds that "The prisoner was acquitted and the decision has sanctioned the present practice of cremation." But it was

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held to be an offence to burn a body for the purpose of preventing an inquest: *R. v. STEPHENSON*(1884), 13 Q.B.D.331. And in *R. v. CLARK* (1883), 15 Cox,C.C.171, cited under s.165, the exposure of a dead body near a highway was held to constitute a nuisance.

Stephen, in his History of Criminal Law, Vol. III, p.127, says: "The dead body of a human being is almost the only movable object known to me which by our law is no one's property, and cannot, so long at all events, as it exists as such, become the property of any one. I suppose, however, that anatomical specimens and the like are personal property."

This statement was cited in *PHILLIPS v. MONTREAL GENERAL HOSPITAL*(1908), 4 E.L.R.477, but regarded as being subject to qualification, since the husband or wife or relatives of a deceased person are entitled to *possession* of the body for the purpose of burial. In that case and also in *EDMONDS v. ARMSTRONG FUNERAL HOME, LTD.*, [1931]1 D.L.R.676, it was held that the performance of an unauthorized autopsy was a ground for civil action.

Earlier cases relating to the sale of dead bodies for dissection are *R. v. LYNN*(1788), 1 Leach 497, *R. v. FEIST*(1858), Dears. & B.590, and *R. v. SHARPE*(1857), Dears. & B. 160.

PART V.

DISORDERLY HOUSES, GAMING AND BETTING.

INTERPRETATION.

"BET."—"Common bawdy-house."—"Common betting house."—"Common gaming house."—"Disorderly house."—"Game."—"Gaming equipment."—"Keeper."—"Place."—Exception.—Charitable organizations.—Onus.—Effect when game partly played on premises.

168. (1) In this Part,

(a) **"bet" means a bet that is placed on any contingency or event that is to take place in or out of Canada, and without restricting the generality of the foregoing, includes a bet that is placed on any contingency relating to a horse-race, fight, match or sporting event that is to take place in or out of Canada;**

(b) **"common bawdy-house" means a place that is**

(i) kept or occupied, or

(ii) resorted to by one or more persons

for the purpose of prostitution or the practice of acts of indecency;

(c) **"common betting house" means a place that is opened, kept or used for the purpose of**

(i) enabling, encouraging or assisting persons who resort thereto to bet between themselves or with the keeper, or

(ii) enabling any person to receive, record, register, transmit or pay bets or to announce the results of betting;

(d) **"common gaming house" means a place that is**

(i) kept for gain to which persons resort for the purpose

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