Section 580—*continued*

witness shall in the opinion of the Judge prove adverse,' because the Judge's discretion must be principally, if not wholly, guided by the witness' behaviour and language in the witness box.

(3) The granting of a view under s.958 of the Criminal Code (now s.559).

(4) The discharging of the jury after disagreement and postponing the trial 'on such terms as justice may require' under s.960. . . . . , (now s.560) which discretion, by subsec.2 it is declared that 'it shall not be lawful for any court to review,' differing in this respect from the right to discharge for disobedience and postpone under the preceding s.959, subsec.(3) (now s.556(4)).

(5) The discharging of the jury without giving a verdict because of the illness or drunkenness of one of them, or otherwise.

(6) The keeping of the jury together under s.945(3), (see now s.556(1)) and

(7) I should think, the admission of the unsworn evidence of children under s.1003 Criminal Code and s.16 of the *Canada Evidence Act* (see now s.566), whereby the matter rests 'in the opinion of the Court' or justices, etc., which is the same expression as was held to confer an absolute discretion in my second illustration."

PART XVIII.

APPEALS—INDICTABLE OFFENCES.

"COURT OF APPEAL."—"Indictment."—"Registrar."—"Sentence".—"Trial court."

581. In this Part,

***(a)* "court of appeal" means the court of appeal, as defined by paragraph (9) of section 2, for the province or territory in which the trial of a person by indictment is held;**

***(b)* "indictment" includes an information or charge in respect of which a person has been tried for an indictable offence under Part XVI;**

***(c)* "registrar" means the registrar or clerk of the court of appeal;**

***(d)* "sentence" includes an order made under section 628, 629 or 630 and a direction made under section 638; and**

***(e)* "trial court" means the court by which an accused was tried and includes a judge or a magistrate acting under Part XVI.**

Provisions for appeal were contained in ss.742 *et seq.* in the Code of 1892 and embodied provisions set out in ss.538 *et seq.* of the E.D.C. The provisions in the Code were repealed in 1923 and replaced by ss.1012 to 1022. These were largely a re-enactment of provisions contained in the *Criminal Appeal Act* 1907 (Imp.), but with the notable exception of the power to grant a new trial.

S.581 comes from the former s.1012. The definition of appellant has been dropped as unnecessary. The definition of "sentence" has been changed and is designed to allow an appeal against the suspension of

OLD CODE:

1012. In this section and in the following sections of this Part, unless the context otherwise requires,
(a) "appellant" includes a person who has been convicted on indictment and desires to appeal under the next following section of this Act;
(b) "court of appeal" means the court designated by paragraph (7) of section two of this Act as the court of appeal for the province in which the conviction on indictment was had;
(c) "indictment" includes any information, complaint or charge whereon a person has been tried under the provisions of Part XVI or Part XVIII of this Act and convicted of an indictable offence;
(d) "registrar" means the registrar, clerk or other chief officer of the court of appeal;
(e) "sentence" includes any order of the trial court made on conviction with reference to the person convicted or his wife or children; and the power of the court of appeal to pass a sentence includes a power to make any such order of the court of appeal;
(f) "trial court" means the court before which the appellant was tried and convicted, and includes a "magistrate" acting under Part XVI and a "judge" acting under Part XVIII.

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sentence. It was held in *R. v. WILSON*, [1950]O.W.N. 640, that under the former provisions, no appeal lay in such a case, as "sentence" did not include the suspension of passing sentence. On the same point, see also *R. v. CRUICKSHANKS*(1946), 86 C.C.C.257, which resulted in s.1081(1) being amended by 1947, c.55, s.34 to include the Court of Appeal.

With reference to the former definition, it was said in *R. v. JONES*, [1929]1 K.B.211 that:

> "In the opinion of the Court the words 'with reference to' are sufficiently wide to include an order for the payment of money by a person as satisfaction or compensation on a conviction of felony, such money being deemed to be a judgment debt due from the person so convicted. The order in our opinion, is made 'with reference to' him as well as his property."

This language was adopted in *R. v. GRAVES & ROSE*, [1950]O.W.N. 238.

In *R. v. S.*(1946), 87 C.C.C.154, it was held that an order for costs made by a juvenile court judge was within the definition of sentence so as to permit an appeal, and in *R. v. HALL*(1955), 14 W.W.R.(N.S.)241, an order for the forfeiture of slot machines under the former s.641 was held to be within the definition. On this point see also *R. v. GREEN*, [1935] 1 W.W.R.526, which is similar in effect, and s.431(7) *ante*.

PROCEDURE ABOLISHED.

582. No proceedings other than those authorized by this Part and Part XXIII shall be taken by way of appeal in proceedings in respect of indictable offences.

This replaces the former s.1013(3). Part XXIII deals with extraordinary remedies which, according to Byrne's L.D., provide forms of appeal as that term is used in its widest sense.

See s.743 as to appeals from summary conviction.

RIGHT OF APPEAL OF PERSON CONVICTED.

583. A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal

(a) **against his conviction**

(i) on any ground of appeal that involves a question of law alone,

(ii) on any ground of appeal that involves a question of fact alone or a question of mixed law and fact, with leave of the court of appeal or upon the certificate of the trial judge that the case is a proper case for appeal, or

(iii) on any ground of appeal not mentioned in subparagraph (i) or (ii) that appears to the court of appeal to be a sufficient ground of appeal, with leave of the court of appeal; or

(b) **against the sentence passed by the trial court, with leave of the court of appeal or a judge thereof unless that sentence is one fixed by law.**

This comes from the former s.1013(1) and (2) and sets out in a separate section the right of appeal appertaining to the accused. Sentence is defined in s.581.

See s.598 as to further appeals by the Attorney General and s.743 as to appeals from summary conviction.

RIGHT OF ATTORNEY GENERAL TO APPEAL.—Acquittal.

584. (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

(a) **against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone, or**

(b) **with leave of the court of appeal or a judge thereof, against the sentence passed by a trial court in proceedings by indictment, unless that sentence is one fixed by law.**

(2) For the purposes of this section a judgment or verdict of acquittal includes an acquittal in respect of a principal offence where the accused had been convicted of an offence included in the principal offence.

This comes from the former s.1013(2), (4) and (5) and sets out in a separate section the right of appeal appertaining to the Crown. As to the Attorney General for Canada, see s.601 *post*, and notes thereto. See also ss.598 & 743.

The right of the Attorney General to appeal against acquittal was conferred by 1930, c.11, s.28.

Subsec.(2) gives a wider right of appeal in this respect than was formerly available. In *R. v. WILMOT*(1941), 75 C.C.C.161 the accused, charged with manslaughter, was convicted of the lesser offence of reckless driving by virtue of s.951(3). Appeal by the Crown was quashed by the Supreme Court on the ground that what had occurred was not an acquittal. *Per* Rinfret, J.:

OLD CODE:

1013. A person convicted on indictment may appeal to the court of appeal against his conviction

(a) on any ground of appeal which involves a question of law alone;

(b) with leave of the court of appeal, or upon the certificate of the trial court that it is a fit case for appeal, on any ground of appeal which involves a question of fact alone or a question of mixed law and fact; and

(c) with leave of the court of appeal, on any other ground which appears to the court of appeal to be a sufficient ground of appeal.

(2) A person convicted on indictment, or the Attorney General, or the counsel for the Crown in the trial, may with leave of the court of appeal or a judge thereof, appeal to that court against the sentence passed by the trial court, unless that sentence is one fixed by law.

(3) No proceeding in error shall be taken in any criminal case, and the powers and practice now existing in the court of criminal appeal for any province, in respect of motions for or the granting of new trials of persons convicted on indictment are hereby abolished.

(4) Notwithstanding anything in this Act contained, the Attorney General shall have the right to appeal to the court of appeal against any judgment or verdict of acquittal of a trial court in respect of an indictable offence on any ground of appeal which involves a question of law alone.

(5) The procedure upon such an appeal and the powers of the court of appeal, including the power to grant a new trial, shall mutatis mutandis and so far as the same are applicable to appeals upon a question of law alone, be similar to the procedure prescribed and the powers given by sections one thousand and twelve to one thousand and twenty-one of this Act, inclusive, and the Rules of Court passed pursuant thereto, and to section five hundred and seventy-six of this Act.

"The respondent has, therefore, been convicted upon the charge as laid; and I cannot look upon the judgment now submitted to our court as being an acquittal in the sense that it may give the Attorney-General a right of appeal to this Court under the provisions of subsec. (2) of s.1023."

Per Taschereau, J.:

"To my mind, the law requires a complete acquittal in respect of all the offences charged directly or otherwise in the same count, in order to allow the Attorney-General to appeal to this Court."

The new provision will give the Crown the right to appeal against acquittal of the principal offence.

The application of the former provision is illustrated by *R. v. BLAHUT and HANNICK*(1954), 19 C.R.104 where, on a charge of theft of an automobile, the magistrate thought the offence was really that of taking without the owner's permission. The Crown would not concur in laying a new charge, but the magistrate accepted pleas of guilty of the latter offence. The Crown appealed and a verdict of guilty of theft was substituted:

"We think we should treat the present appeal as being an appeal from an acquittal on the indictment that was before the magistrate, and from that acquittal the Crown has a right of appeal to this Court."

Section 584—*continued*

Again, as the provision in subsec.(2) is, or may be, linked to the power of the Court of Appeal to grant a new trial, *e.g.*, in a case where accused appeals against conviction and the Crown cross-appeals against acquittal of the principal offence, the following may be quoted as relevant.

In *WELCH v. R.*, [1950]S.C.R.412, at p.426, Fauteux, J. in the majority judgment said:

"Legal and sufficient it would have been to direct a new trial on the offence of manslaughter exclusively and to further order that the original indictment of murder be, to that end, amended. Thus, on the new trial, the accused could only be found guilty or not guilty of manslaughter. The language of the Statute is broad enough to embrace the authority to make such 'other order', if the justice of the case suggests no other. And I know of no principles of law which could have been violated by such order."

Taschereau, J., although dissenting, said on this point (at p.416):

"I entertain no doubt that the Court of Appeal had power by virtue of section 1014(3) of the Criminal Code, after having quashed the conviction, to direct a new trial limited exclusively to the charge of manslaughter."

In *GUDMONDSON v. R.*(1933), 60 C.C.C.332, accused had been charged with manslaughter and convicted of criminal negligence. On appeal to the Supreme Court of Canada, that Court ordered a new trial, saying, in part:

"The trial will proceed as the trial of a charge under s.284 of the Criminal Code."

SPECIFYING GROUNDS OF DISSENT.

585. Where an appeal is dismissed by the court of appeal and a judge of that court expresses an opinion dissenting from the judgment of the court, the formal judgment of the court shall specify any grounds in law upon which the dissent, in whole or in part, is based.

This is the former s.1013(6), which was added to the Code by 1931, c.28, s.14. When this amendment was presented to Parliament, it concluded with a provision that it should not be competent to the appellant to raise any question of law not specified in the grounds of dissent, but that clause was struck out: Hansard 1931, p.4140.

In *REINBLATT v. R.*, [1933]S.C.R.694 the following appears with reference to s.1013(6):

"The new enactment does not forbid a dissent from being expressed without leave of the Court; and the circumstance that the grounds of dissent are not specified in the formal judgment of the court does not avoid the fact of there having been a dissent, ... which remains the sole condition for the foundation of our jurisdiction, provided the dissent was in respect of a question of law",

this by virtue of s.1023(1), now s.598(1)(a).

OLD CODE:

Section 1013—continued

(6) Whenever an appeal under this section is dismissed by the Court of Appeal, and any judge of such Court expresses an opinion dissenting from the judgment of the Court, the formal judgment of the Court shall specify any ground or grounds in law on which such dissent is based either in whole or in part.

1018. Where a person convicted on indictment desires to appeal to the court of appeal, or to obtain the leave of that court to appeal, he shall give notice of appeal, or notice of his application for leave to appeal, in such manner and within such time after the date of his conviction, as may be directed by rules of court; and such rules shall enable any convicted person to present his case and his argument in writing instead of by oral argument if he so desires, and any case or argument so presented shall be considered by the court.

(2) Except in the case of a conviction involving sentence of death, the time, within which notice of appeal or notice of an application for leave to appeal may be given, may be extended at any time by the court of appeal or by any judge of that court.

(3) In the case of a conviction involving sentence of death or whipping

(a) the sentence shall not in any case be executed until after the expiration of the time within which notice of appeal or of an application for leave to appeal may be given under this section; and

(b) if notice is so given, the appeal or application shall be heard and determined with as much expedition as practicable, and the sentence shall not be executed until after the determination of the appeal, or, in cases where an application for leave to appeal is finally refused, of the application.

PROCEDURE ON APPEALS.

NOTICE OF APPEAL.—Extension of time.—Delay in execution of sentence of death or whipping.—Effect of certificate.

586. (1) An appellant who proposes to appeal to the court of appeal or to obtain the leave of that court to appeal shall give notice of appeal or notice of his application for leave to appeal, in the manner and within the period after the time of the acquittal, conviction or sentence, as the case may be, as may be directed by rules of court.

(2) The court of appeal or a judge thereof may at any time extend the time within which notice of appeal or notice of an application for leave to appeal may be given, but this subsection does not apply where a sentence of death has been imposed pursuant to a conviction.

(3) Where, pursuant to a conviction, a sentence of death or whipping has been imposed,

***(a)* the sentence shall not be executed until after the expiration of the time within which notice of appeal or of an application for leave to appeal may be given under this section; and**

***(b)* an appeal or application for leave to appeal from the conviction or sentence shall be heard and determined as soon as practicable, and the sentence shall not be executed until after**

(i) the determination of the application, where an appli-

Section 586—*continued*

cation for leave to appeal is finally refused, or

(ii) the determination of the appeal.

(4) The production of a certificate

***(a)* from the registrar that notice of appeal or notice of application for leave to appeal has been given, or**

***(b)* from the Minister of Justice that he has exercised any of the powers conferred upon him by section 596,**

is sufficient authority to suspend the execution of a sentence of death or whipping, as the case may be, and where, pursuant to such suspension, a new time is required to be fixed for execution of the sentence, it may be fixed by the judge who imposed the sentence or any judge who might have held or sat in the same court.

This is the former s.1018(1)-(4) which came from s.7 of the *Criminal Appeal Act* 1907, s.7 (Imp.). Subsec.(5) has been dropped in view of s.624 *post*. By s.49(3) of the *Penitentiary Act*, R.S.C. 1952, c.206, a convict may give notice in writing waiving appeal. In *COLANGELO v. R.*(1941), 76 C.C.C. 334, a prisoner was permitted, in the special circumstances of his case, to withdraw the waiver signed by him.

In *LANGLAIS v. R.*(1934), 56 Que. K.B. 384, it was held that the power to extend the time might be exercised before or after the time limit had expired, but that it should be exercised only for grave reasons. In *R. v. TRACEY*(1944), 81 C.C.C. 246, the time was extended some months after conviction, when it appeared that the trial judge had mistakenly excluded certain evidence for the defence.

In *R. v. HAMILTON*(1947), 88 C.C.C.241, extension of time was refused under s.1018(2) in the case of a man who had been sentenced to death. *R. v. TWYNHAM*(1920), 26 Cox,C.C.678 was cited, where the reasons for that provision (subsec. (2) above) are set out as follows:

> "There is a reason why the Legislature should make a provision of this kind, because the mere giving of a notice of appeal or a notice of application for leave to appeal against a conviction for murder or high treason has the effect of postponing the date of the execution. When once notice has been given, the execution cannot take place until a certain time has elapsed after the hearing. If the time could be extended, a murderer, having failed on one appeal, could give notice asking for an extension of time within which to bring some other matter before this court, or he could abstain from giving notice until the last moment, so as to provide for a further extension of time. It is for these reasons that the Legislature has said that an appeal from a conviction involving a sentence of death must be made within a certain time."

See also s.743 (appeals from summary conviction).

BAIL.

587. The chief justice or the acting chief justice of the court of appeal or a judge of that court to be designated by the chief justice or acting chief justice may admit an appellant to bail pending the determination of his appeal.

This is the former s.1019 as it stood at the time of repeal, s.1019(2) which dealt with the commencement of sentences, having been repealed

OLD CODE:

Section 1018—continued

(4) The production of a certificate from the registrar that notice of appeal or of application for leave to appeal has been duly given, or the production of a certificate from the Minister of Justice that he has directed a new trial shall be a sufficient warrant to suspend the execution of any sentence of death or whipping.

(5) In the case of a conviction not involving sentence of death or whipping the sentence of the trial court shall not be suspended by reason of any notice of appeal or of application for leave to appeal, whether against conviction or against sentence, unless the court of appeal or a judge of the court of appeal expressly so directs.

1019. The chief justice or the acting chief justice of the court of appeal or a judge of that court to be designated by him, may if it seems fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal.

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by 1950, c.11, s.17, in consequence of enactment of s.1054B, now s.624 *post*.

It was held in *STEELE v. R.*, [1924]S.C.R.1, that the jurisdiction to grant bail remained in the Chief Justice or acting Chief Justice of the provincial Court of Appeal, or upon a judge of that court designated by him, where the appeal was to the Supreme Court, and that the Supreme Court had no jurisdiction to do so.

In *R. v. GUINNESS*(1939), 73 C.C.C.98 it was said that until leave to appeal to the Supreme Court was granted by a judge of that Court, there is no appeal pending, and, consequently, no jurisdiction to grant bail under this section. On this point see also *R. v. GOVERLUK* (1945), 83 C.C.C.377 and *R. v. LAROCQUE*(1951), 101 C.C.C.125.

Upon the principles involved, it has been held that bail pending appeal will not be granted unless there are special circumstances. The following is quoted from *R. v. HENRY*(1940), 73 C.C.C.347:

> "It is accepted law that until a man is found guilty by a competent tribunal he is presumed to be innocent; after conviction, however, it is otherwise and he has to be regarded as guilty while the conviction remains in force . . . . . Circumstances which have been considered in several cases are: the nature and seriousness of the crime; the quality of the evidence supporting the conviction; and the previous character and standing of the prisoner. A Judge has to consider whether the offence is serious or trivial, whether the evidence in the case is properly admissible and substantial, whether the appeal is not a frivolous one and there is a fair chance of success in the appeal, and whether the prisoner has been a man of good standing and has borne a good character and has family ties and obligations. If it appears that there is not sufficient evidence to support a verdict of guilty, that the verdict is perverse, it would then be an injustice to keep an innocent man in custody pending the determination of his appeal."

R. v. HENRY was applied adversely to the prisoner in *R. v. CAVASIN*(1944), 82 C.C.C.171.

Section 587—*continued*

In *R. v. TILLEY*(1951), 101 C.C.C.223, bail was refused pending appeal when an issue remained to be decided by the trial judge whether or not the accused was a criminal sexual psychopath.

REPORT BY JUDGE.—Transcript of evidence.—Notes of proceedings.—Copies for interested parties.—Copy for Minister of Justice.

588. (1) Where, under this Part, an appeal is taken or an application for leave to appeal is made, the judge or magistrate who presided at the trial shall furnish to the court of appeal, in accordance with rules of court, a report giving his opinion upon the case or upon any matter relating thereto.

(2) A copy or transcript of

***(a)* the evidence taken at the trial,**

***(b)* the charge to the jury, if any, and**

***(c)* the reasons for judgment, if any,**

shall be furnished to the court of appeal, except in so far as it is dispensed with by order of a judge of that court.

(3) A copy of the charge to the jury, if any, and any objections that were made to it shall, before the copy or transcript is transmitted to the court of appeal pursuant to subsection (2), be submitted to the judge who presided at the trial, and if the judge refuses to certify that the charge and objections are accurately set out, he shall immediately certify to the court of appeal

***(a)* the reasons for his refusal, and**

***(b)* the charge that was given to the jury, if any, and any objections that were made to it.**

(4) A party to the appeal is entitled to receive, upon payment of any charges that are fixed by rules of court, a copy or transcript of any material that is prepared under subsections (2) and (3).

(5) The Minister of Justice is entitled, upon request, to receive a copy or transcript of any material that is prepared under subsections (2) and (3).

This comes from the former s.1020(1) to (4). As presented in the draft Bill, subsec.(2) read "furnished by the appellant" but the words "by the appellant" were struck out in Parliament.

In *R. v. CUTHBERT*(1952), 5 W.W.R.(N.S.) 382, it was said that:

"It is the duty of the appellant to bring before this court all the evidence and the judge's charge if he wishes to make any point in respect thereof. This is clearly the rule in civil cases . . . . . see *SYD SMITH LTD. v. PENNICUICK*(Nos. 1 and 2)(1951-52), 4 W.W.R. (N.S.) 700; and I think the same rule must apply to appeals in criminal matters."

The change referred to will vary the rule as there laid down.

S.1020(2) by an amendment passed in 1930 provided that in case of variance between the stenographic notes and the judge's certificate, the latter should prevail. The latter provision is not continued. It appears to have been passed after the Supreme Court had ordered a new trial in *BARON v. R.*(1930), 53 C.C.C.154, in which the judge's statement was prepared some months after the trial. With reference to s.1020, the following appears:

OLD CODE:

1020. The judge or magistrate before whom a person has been tried on indictment shall, in the case of appeal under this Part against the conviction or against the sentence, or in the case of an application for leave to appeal under this Part, furnish to the court of appeal, in accordance with rules of court, his notes of the trial; and shall also furnish to the court of appeal in accordance with rules of court, a report giving his opinion upon the case or upon any point arising in the case.

(2) In all cases where notes of the evidence or any part thereof, and of the charge of the presiding judge, have been made at the trial, a copy, or in the case of shorthand notes a transcript thereof, shall be made and furnished to the court of appeal, unless such transcript is dispensed with in whole or in part by order of a judge thereof. Before transmitting such transcript to the court of appeal a copy of the charge and objections, if any, thereto shall be submitted to the judge presiding at the trial for his approval. Should the trial judge refuse to approve of the same or any part thereof, he shall immediately certify to the court of appeal his reasons for so refusing and shall also certify to what was his actual charge upon the point or points in question; and in that event his certificate shall prevail.

(3) A copy or transcript, as the case may be, of such notes shall be furnished to any party interested upon payment of such charges, if any, as may be fixed by rules of court.

(4) The Minister of Justice may, if he thinks fit in any case, direct that a copy of the judge's or magistrate's notes, or a copy or transcript of the notes of the evidence, shall be furnished to him.

. . . . . .

"It was never intended by this section to enable the trial Judge, after an appeal had been argued, to put before the Court of Appeal by way of certificate or otherwise, whether *proprio motu* or by direction of the Court of Appeal, his answer to the various points taken upon the appeal . . . . . We cannot regard such a certificate as having been properly given, nor as a report within s.1021. That being so, we are left with nothing authentic and regularly before the Court to establish that the charge was not what the stenographic transcription shows; and upon that, ... the misdirection is so plain and so fatal in its consequences that a new trial is inevitable."

Under somewhat different circumstances a new trial was ordered in *R. v. LUMLEY*(1951), 101 C.C.C.410, where the trial Judge refused to approve the transcript of his charge. He said that it was inaccurate in some respects and that "it would be quite improper for me to attempt to revise it".

COURT MAY ORDER.—Production of documents.—Attendance of witnesses.—Admission of evidence.—Reception of evidence.—Reference to commissioner.—Acceptance of report.—Parties entitled to adduce evidence and be heard.—Other powers.—Execution of process.

589. (1) For the purposes of an appeal under this Part the court of appeal may, where it considers it in the interests of justice,

***(a)* order the production of any writing, exhibit, or other thing connected with the proceedings;**

***(b)* order any witness who would have been a compellable**

Section 589—*continued*

witness at the trial, whether or not he was called at the trial,

(i) to attend and be examined before the court of appeal, or

(ii) to be examined in the manner provided by rules of court before a judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose;

***(c)* admit, as evidence, an examination that is taken under subparagraph (ii) of paragraph *(b)*;**

***(d)* receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;**

***(e)* order that any question arising on the appeal that**

(i) involves prolonged examination of writings or accounts, or scientific or local investigation, and

(ii) cannot in the opinion of the court of appeal conveniently be inquired into before the court of appeal,

be referred for inquiry and report, in the manner provided by rules of court, to a special commissioner appointed by the court of appeal; and

***(f)* act upon the report of a commissioner who is appointed under paragraph *(e)* in so far as the court of appeal thinks fit to do so.**

(2) In proceedings under this section the parties or their counsel are entitled to examine or cross-examine witnesses and, in an inquiry under paragraph *(e)* of subsection (1), are entitled to be present during the inquiry and to adduce evidence and to be heard.

(3) A court of appeal may exercise in relation to proceedings in the court any powers not mentioned in subsection (1) that may be exercised by the court on appeals in civil matters, and may issue any process that is necessary to enforce the orders or sentences of the court but no costs shall be allowed to the appellant or respondent on the hearing and determination of an appeal or on any proceedings preliminary or incidental thereto.

(4) Any process that is issued by the court of appeal under this section may be executed anywhere in Canada.

This is the former s.1021(1) and (8), corresponding to s.9 and s.13(1) of the *Criminal Appeal Act,* 1907 (U.K.) but with some substantial changes.

S.1021(1)(e) has been omitted. The effect of this is that a person called to assist in determining a matter will give evidence and be subject to cross-examination.

Par.(1)(d), taken from s.1021(1)(c), omits the reference to husband or wife. Phipson on Evidence, 8th ed., p.450 says that the consort is always a competent witness for the defence on the accused's application.

Subsec.(2) is new. The Proceedings of the Senate Committee on Banking and Commerce, Dec. 15-16, 1952, p.75, explains it as follows:

"We thought the procedure and the rights of the parties, particularly of the accused person or the convicted person, as the case may be, should be absolutely clear. If any witnesses are being called he should

OLD CODE:

1021. For the purposes of an appeal under this Part, the court of appeal may if it thinks it necessary or expedient in the interest of justice

(a) order the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case; and

(b) if it thinks fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the court of appeal, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any judge of the court of appeal, or before any officer of the court of appeal or justice of the peace, or other person appointed by the court of appeal for the purpose, and allow the admission of any deposition so taken as evidence before the court of appeal; and

(c) if it thinks fit, receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such an application; and

(d) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in the opinion of the court of appeal conveniently be conducted before the court of appeal, order the reference of the question, in manner provided by rules of court, for inquiry and report to a special commissioner appointed by the court of appeal, and act upon the report of any such commissioner so far as the court of appeal thinks fit to adopt it; and

(e) appoint any person with special expert knowledge to act as assessor to the court of appeal in any case where it appears to the court of appeal that such special knowledge is required for the proper determination of the case;

and exercise in relation to the proceedings of the court of appeal any other powers which may for the time being be exercised by the court of appeal on appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentences of the court of appeal.

. . . . . .

(8) On the hearing and determination of an appeal, or any proceedings preliminary or incidental thereto, under this Part, no costs shall be allowed on either side.

. . . . . .

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have the right of either examination or cross-examination. And where an inquiry is directed by the court of appeal because the matter is too technical or too involved for them to spend the necessary time upon it, and they appoint a commission, we thought that all the rights of the litigants should be made perfectly clear, namely, that they have the right to examine and cross-examine. That is what we have done here."

Concerning the right to hear evidence, it was said in *R. v. MASON* (1923), 17 Cr. App.R.160:

"This Court exercises with very great caution the power given it to hear fresh evidence because to do so is opposed to the old established, trusted and cherished institution of trial by jury. This Court has to be convinced of very exceptional circumstances before it will re-consider the verdict of a jury in the light of fresh evidence which has not been

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laid before the jury, and which, in some cases, might have been put before the jury at the trial."

These expressions were applied in *R. v. CUMYOW*(1925), 45 C.C.C. 172, MacDonald, C.J.A., adding (at p.175):

"If evidence is discovered after the trial two things are necessary: (1) It is necessary to show that all due diligence was taken to have that evidence at the trial, and (2) the new evidence must be such as to be practically decisive of the case."

In *R. v. DAVIDOFF*(1951), 101 C.C.C.238 (B.C.C.A.), it was said (at p.241):

"The principle adopted in this Court in criminal cases illustrated by *R. v. MARTIN*(1945), 82 C.C.C.311 . . . . . is not to allow fresh evidence on appeal, unless appellant at his trial was unaware of its existence, or if he did know of it, that he was then unable to adduce it. A reason for this, of course, is to prevent accused persons trying out one set of defence tactics in the trial Court, and if unsuccessful, to try another set of tactics in the Court of Appeal."

LEGAL ASSISTANCE FOR APPELLANT.

590. A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal aid and where it appears that the accused has not sufficient means to obtain that aid.

This is the former s.1021(4) and also includes s.1021(5).

SUMMARY DETERMINATION OF FRIVOLOUS APPEALS.

591. Where it appears to the registrar that a notice of an appeal against a conviction, which purports to be on a ground of appeal that involves a question of law alone, does not show a substantial ground of appeal, the registrar may refer the appeal to the court of appeal for summary determination, and, where an appeal is referred under this section, the court of appeal may, if it considers that the appeal is frivolous or vexatious and can be determined without being adjourned for a full hearing, dismiss the appeal summarily, without calling on any person to attend the hearing or to appear for the respondent on the hearing.

This is the former s.1021(10) and also includes s.1021(9).

Powers of the Court of Appeal.

ALLOWANCE OF APPEAL AGAINST CONVICTION.—Dismissal.—Wrong conclusion on special verdict.—Insanity.—Order to be made.—Substituting verdict. —Appeal from acquittal.—Dismissal.—Allowance.—New trial under Part XVI. —Additional powers.

592. (1) On the hearing of an appeal against a conviction, the court of appeal

***(a)* may allow the appeal where it is of the opinion that**

OLD CODE:

1021. (4) The court of appeal, or any judge of that court, may at any time assign to an appellant a solicitor and counsel, or counsel only, in any appeal or proceeding preliminary or incidental to any appeal in which, in the opinion of that court or judge, it appears desirable in the interests of justice that the appellant should have legal aid, and that he has not sufficient means to enable him to obtain that aid.

(5) The registrar shall report to the court of appeal or some judge thereof any case in which it appears to him that, although no application has been made for the purpose, a solicitor and counsel, or counsel only, ought to be assigned to an appellant under the powers given to the court of appeal by this Act.

. . . . . .

(9) The registrar shall take all necessary steps for obtaining a hearing of any appeal or application, notice of which is given to him under section one thousand and eighteen of this Act, and shall obtain and lay before the court of appeal in proper form all documents, exhibits, and other things relating to the proceedings in the trial court which appear necessary for the proper determination of an appeal or application.

(10) If it appears to the registrar that any notice of an appeal against a conviction, purporting to be on a ground of appeal which involves a question of law alone, does not show any substantial ground of appeal, the registrar may refer the appeal to the court of appeal for summary determination, and, where the case is so referred, the court of appeal may, if it considers that the appeal is frivolous or vexatious, and can be determined without adjourning the same for a full hearing, dismiss the appeal summarily, without calling on any persons to attend the hearing or to appear for the Crown thereon.

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

***(b)* may dismiss the appeal where**

(i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment.

(ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph *(a)*, or

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (ii) of paragraph *(a)* the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred;

***(c)* may refuse to allow the appeal where it is of the opinion that the trial court arrived at a wrong conclusion as to the effect of a special verdict, and may order the conclusion to be recorded that appears to the court to be required by the verdict, and may pass a sentence that is warranted in law in substitution for the sentence passed by the trial court; or**

Section 592—*continued*

(d) may quash a sentence and order the appellant to be kept in safe custody to await the pleasure of the Lieutenant-Governor where it is of the opinion that, although the appellant committed the act or made the omission charged against him, he was insane at the time the act was committed or the omission was made, so that he was not criminally responsible for his conduct.

(2) Where a court of appeal allows an appeal under paragraph *(a)* of subsection (1), it shall quash the conviction and

(a) direct a judgment or verdict of acquittal to be entered, or

(b) order a new trial.

(3) Where a court of appeal dismisses an appeal under subparagraph (1) of paragraph *(b)* of subsection (1), it may substitute the verdict that in its opinion should have been found and affirm the sentence passed by the trial court or impose a sentence that is warranted in law.

(4) Where an appeal is from an acquittal the court of appeal may

(a) dismiss the appeal; or

(b) allow the appeal, set aside the verdict and

(i) enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or

(ii) order a new trial.

(5) Where an appeal is taken in respect of proceedings under Part XVI and the court of appeal orders a new trial under this Part, the following provisions apply, namely,

(a) if the accused, in his notice of appeal or notice of application for leave to appeal, requested that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall be held accordingly;

(b) if the accused, in his notice of appeal or notice of application for leave to appeal, did not request that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall, without further election by the accused, be held before a judge or magistrate, as the case may be, acting under Part XVI, other than a judge or magistrate who tried the accused in the first instance, unless the court of appeal directs that the new trial be held before the judge or magistrate who tried the accused in the first instance; and

(c) if the court of appeal orders that the new trial shall be held before a court composed of a judge and jury it is not necessary, in any province of Canada, to prefer a bill of indictment before a grand jury in respect of the charge upon which the new trial was ordered, but it is sufficient if the new trial is commenced by an indictment in writing setting forth the offence with which the accused is charged and in respect of which the new trial was ordered.

OLD CODE:

1013. (5) The procedure upon such an appeal and the powers of the court of appeal, including the power to grant a new trial, shall mutatis mutandis and so far as the same are applicable to appeals upon a question of law alone, be similar to the procedure prescribed and the powers given by sections one thousand and twelve to one thousand and twenty-one of this Act, inclusive, and the Rules of Court passed pursuant thereto, and to section five hundred and seventy-six of this Act.

. . . . . .

1014. On the hearing of any such appeal against conviction the court of appeal shall allow the appeal if it is of opinion

(a) that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or

(b) that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law; or

(c) that on any ground there was a miscarriage of justice; and

(d) in any other case shall dismiss the appeal.

(2) The court may also dismiss the appeal if, notwithstanding that it is of opinion that on any of the grounds above mentioned the appeal might be decided in favour of the appellant, it is also of opinion that no substantial wrong or miscarriage of justice has actually occurred.

(3) Subject to the special provisions contained in the following sections of this Part, when the court of appeal allows an appeal against conviction it may

(a) quash the conviction and direct a judgment and verdict of acquittal to be entered; or

(b) direct a new trial;

and in either case may make such other order as justice requires.

(4) When the court of appeal directs a new trial in the case of an appellant convicted, under the provisions of Part XVI or Part XVIII of this Act, of an indictable offence, if his consent or election was necessary to give jurisdiction to the magistrate or judge before whom he was tried, the new trial shall be before a jury if the appellant so requests in his notice of appeal or notice of application for leave to appeal, but otherwise shall, in the discretion of the court of appeal, be either before the proper magistrate or judge or before a jury.

1016. If it appears to the court of appeal that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the court may either affirm the sentence passed on the appellant by the trial court or pass such sentence in substitution therefor as the court thinks proper, and as may be warranted in law by the verdict on the count or part of the indictment on which the court considers that the appellant has been properly convicted.

(2) Where an appellant has been convicted of an offence and the jury or, as the case may be, the judge or magistrate, could on the indictment have found him guilty of some other offence, and on the actual finding it appears to the court of appeal that the jury, judge or magistrate must have been satisfied of facts which proved him guilty of that other offence, the court of appeal may, instead of allowing or dismissing the appeal, substitute for the verdict found a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed by the trial court as may be warranted in law for that other offence, not being a sentence of greater severity.

Section 592—*continued*

(6) Where a court of appeal exercises any of the powers conferred by subsection (2) or (4) it may make any order, in addition, that justice requires.

This section combines several provisions of the former Code and is new in some respects. Subsec.(1)(b) requires extended notice and will be mentioned last.

Subsec.(1)(a) is the former s.1014(1)(a),(b) and (c). In *R. v. HARRISON* (No. 3)(1951), 100 C.C.C.143, the conviction was set aside on the ground that it was not supported by the evidence in view of the weakness of the evidence of identity.

Subsec.(1)(b)(i) is the former s.1016(1).

Subsec.(1)(b)(ii) and (iii) contains a modification of the former s.1014 (2).

Subsec.(1)(c) is the former s.1016(3).

Subsec.(1)(d) is the former s.1016(4).

Subsec.(2) is the former s.1014(3) redrawn to accord with the judgment of the Supreme Court in *WELCH v. R.*(1950), 97 C.C.C.177, in which Fauteux, J., delivering the judgment of the majority, pointed out (at page 188) that in adapting the corresponding provision of the English *Criminal Appeal Act*, 1907, it was necessary to provide for an order for a new trial, which the Court of Criminal Appeal in England is not empowered to make and he added "that in the process of thus amending our law, the indented letter (a) has been misplaced before the words 'quash the conviction and', rather than being properly placed after them, cannot alter the true meaning and the only possible construction of the section". It was held further that "may" was to be interpreted as "shall" or in other words, that it was mandatory for the Court of Appeal to adopt one of the alternative courses provided.

Subsec.(3) is the former s.1016(2) in part. This received recent interpretation by the Supreme Court of Canada in *ROZON v. R.*(1951), 99 C.C.C.167. It was held that the application of s.1016(2) by which an Appellate Court is empowered to substitute a conviction for an offence other than that found at the trial depends on three conditions:

(1) that the accused must have been convicted of an offence, not necessarily an offence included in the indictment,

(2) that it must have been open to the jury on the indictment to find the appellant guilty of the offence proposed in substitution, and

(3) that, on the actual finding, it must appear to the Appellate Court that the jury must have been satisfied of facts which proved the appellant guilty of that other offence.

See also *R. v. SMITH* (1953), 11 W.W.R. (N.S.) 702.

Subsec.(4) is the former s.1013(5) and sets out what is there incorporated by reference. It will provide for such a situation as arose in the case of *ex parte STOKES*, [1951]O.W.N.547, in which the Court of Appeal substituted for a conviction for theft a conviction for an attempt to commit the offence, but did not pass a sentence in substitution for that passed by the trial court.

OLD CODE:
Section 1016—continued

(3) Where on the conviction of the appellant the jury have found a special verdict, and the court of appeal considers that a wrong conclusion has been arrived at by the trial court as to the effect of that verdict, the court of appeal may, instead of allowing the appeal, order such conclusion to be recorded as appears to the court to be in law required by the verdict, and pass such sentence in substitution for the sentence passed by the trial court as may be warranted in law.

(4) If on any appeal it appears to the court of appeal that, although the appellant was guilty of the act or omission charged against him, he was insane at the time the act was done or omission made so as not to be responsible according to law for his actions, the court may quash the sentence passed by the trial court and order the appellant to be kept in strict custody, in such place and such manner as to the court of appeal seems fit, until the pleasure of the lieutenant governor of the province is known.

In *White v. R.*(1947), 3 C.R.232, it was held that the onus is on the Crown in an appeal from acquittal to satisfy the Court that the verdict would not necessarily have been the same if the Magistrate had properly directed himself.

Subsec.(5) replaces the former s.1014(4). As originally presented it varied the former provision by adding the words "without further election by the accused". The subsection as it now appears with the words quoted appearing in par.(b), was substituted by the Committee of the House of Commons, embodying changes to the effect that:

(a) the new trial shall not be before the same judge or magistrate unless the court otherwise orders, and

(b) that where a new trial is ordered it is unnecessary that the matter go again before a grand jury.

The provision of subsec. (6) comes from ss.1014(2) and 1013(5). Semble, it would include a right of the Supreme Court to direct upon what charge the new trial is to be held. In *GUDMONDSON v. R.*(1933), 60 C.C.C.332, in which the accused had been charged with manslaughter and convicted of criminal negligence, the Supreme Court directed a new trial and said "The trial will proceed as the trial of a charge under s.284 of the Code".

Turning now to subsec.(1)(b)(ii) and (iii), the change can best be explained by referring to the proceedings of the Senate Committee on Banking and Commerce where the following appears (Proceedings, December 16, 1952, page 76):

"The Chairman: One of these grounds of appeal is that the verdict is unreasonable and cannot be supported in evidence. Another ground is that there was some wrong decision on a point of law by the Court of first instance; and the third ground is that there has been a miscarriage of justice. Now this bill went on to provide that notwithstanding these grounds of appeal, if on consideration of all the facts in evidence the court concluded that there was no substantial miscarriage of justice it might still dismiss the appeal. That did not appear to be logical. In the first place, if a verdict is unreasonable and cannot be supported in evidence, the appeal should be allowed. Other-

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wise you are saying in the same breath that the verdict is unreasonable and cannot be supported in evidence, but there has been no substantial wrong or miscarriage of justice. And how can you say that? And if you say there has been a miscarriage of justice, how can a court find that there has been no substantial wrong and that therefore the appeal should be dismissed? So we think the authority to dismiss an appeal on the ground that there has been no substantial wrong or miscarriage of justice should be limited to where it is found that the court of first instance has made a mistake on a question of law. We think that the effect of a mistake on a question of law can be weighed by the court of appeal. It may be felt that the decision on the question of law did not affect the way the evidence went in or the jury's determination of the case and in these circumstances the court of appeal can decide that there was no substantial wrong."

The provisions of s.1014(2) are taken from the proviso to s.4(1) of the *Criminal Appeal Act*, 1907 (Imp.) What has been referred to as the classic case upon it is *R. v. COHEN and BATEMAN*(1909), 2 Cr.App.R.197, where the following appears (at page 207):

"There is such a miscarriage of justice not only where the court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the judge may reasonably be considered to have brought about that verdict, and when, on the whole facts and with a correct direction, the jury might reasonably have found the appellant not guilty. There then has been not only a miscarriage of justice but a substantial one, because the appellant has lost the chance which was fairly open to him, of being acquitted and therefore, *as there is no power of this court to grant a new trial*, the conviction has to be quashed. If, however, the court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the provision."

The sentence in the judgment of Viscount Sankey in refusing to apply the proviso in *WOOLMINGTON v. DIRECTOR OF PUBLIC PROSECUTIONS*, [1935]A.C.462, was the occasion of comment later and was considered eventually in the House of Lords. The statement reads:

"I cannot say that if the jury had been properly directed they would inevitably have come to the same conclusion."

With reference to it the following appears in *R. v. HADDY*, [1944] K.B.442:

"That statement of the law (*i.e.*, the statement in *R. v. COHEN* as quoted *supra*) has stood for thirty-five years and, so far as we are aware, has never been the subject of adverse comment, though judges in giving the decisions of the Court of Criminal Appeal have used varying language and many different expressions, including the word 'inevitably' which does not occur for the first time in the opinion of Viscount Sankey in Woolmington's case. We are convinced that it was not the intention of the Lord Chancellor in that case, or of the other members

of their Lordships' House who concurred in his opinion, to lay down any different interpretation of the expression 'miscarriage of justice'."

In *STIRLAND v. DIRECTOR OF PUBLIC PROSECUTIONS*, [1944]A.C.315(H.L.), the appellant, on trial for forgery, having put his character in issue and asserted in examination in-chief that he had never been "charged" with any offence, was asked in cross-examination questions suggesting that on a previous occasion he had been "questioned about a suggested forgery" by his former employers: Held, that the appellant should have been understood to be asserting that he had never been accused before a criminal court (which is the meaning which the word "charged" bears in s.1(f) of the *Criminal Evidence Act*, 1898), and the questions should have been disallowed as irrelevant and unfair, but that since, on the rest of the evidence, no reasonable jury could have failed to convict him, the conviction should stand. *Per* Viscount Simon, L.C., at p.321:

". . . . . When the transcript is examined it is evident that no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice, and this is the proper test to determine whether the proviso to s.4, sub-s.1, of the *Criminal Appeal Act*, 1907, should be applied. The passage in *WOOLMINGTON v. DIRECTOR OF PUBLIC PROSECUTIONS*, where Viscount Sankey L.C. observed that in that case, if the jury had been properly directed it could not be affirmed that they would have 'inevitably' come to the same conclusion should be understood as applying this test. A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence, but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict. That assumption, as the Court of Criminal Appeal intimated, may be safely made in the present case. The Court of Criminal Appeal has recently in *R. v. HADDY* . . . . . correctly interpreted s.4, sub-s.1 of the *Criminal Appeal Act* and the observation above quoted from *WOOLMINGTON'S* case is in exactly this sense."

The previous decisions were examined and discussed at some length in *R. v. WHYBROW*(1951), 35 Cr.App.R.141. There the Court found that there had been misdirection on the intent necessary to constitute attempted murder, but held that the proviso should be applied. The Lord Chief Justice, who delivered the judgment of the Court, expressed himself as follows:

"In considering whether the proviso is to be applied in any particular case this Court must consider the whole of the circumstances of the case. We do not for an instant wish to put ourselves into the position of the jury. We take the verdict of the jury, which is one of Guilty and which means that the jury are satisfied that the prisoner did do a criminal act. We then have to see how far the case is affected by the wrong direction given by the presiding Judge, and we must take the

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whole of the facts into account and regard the whole of the circumstances. As I have already said, there was at the outset of the summing-up a mistake made by the learned Judge, who was thinking, if I may put it compendiously, in terms of murder and not in terms of attempted murder. There was next the direction given by the learned Judge at a much later stage of the summing-up, when he said to the jury: 'You may think this becomes a direct issue: Was this inserted at all and was the shock an accident?' That put the matter fairly and squarely before them. Could any reasonable jury, once it was established, as it was established, that this deadly contrivance had been used with cold-blooded deliberation, because it had been prepared some time before and left there, when the only explanation given was one which no person could possibly accept, have come to the conclusion that in attempting to put the voltage of electricity to be found in the ordinary domestic supply through that woman while she was in her bath the appellant had any intent other than to murder her?"

See also *R. v. HARRISON-OWEN*(1951), 35 Cr.App.R.108, *R. v. MITCHELL*(1952), 36 Cr.App.R.79, and *HARRIS v. DIRECTOR OF PUBLIC PROSECUTIONS*, [1952]1 All E.R.1044, at page 1051.

Turning to the Canadian cases, it should be observed first that the provision is held to apply not only where the accused is the appellant, but also where the Attorney General appeals against an acquittal. For example, in *R. v. CONSTABLE*(1936), 66 C.C.C.206, the Crown appealed from a verdict of acquittal of the defendant on a charge of manslaughter. *Per* McGillivray, J.A., at p.218:

"If the learned trial Judge could not have found on the evidence adduced by the Crown with the certainty required in a criminal case, that the accused was intoxicated at the time of the accident, it follows that neither his failure to formally state that he did not find that it was proven that the accused was intoxicated nor his failure to fully appreciate the law of this Province as to intoxicated persons in charge of motor vehicles, can possibly be said to have occasioned a miscarriage of justice."

The appeal was dismissed.

In *R. v. BOURGEOIS*(1937), 69 C.C.C.120 also, an appeal by the Attorney General was dismissed. At page 139:

"Having regard to the relative historical positions of the Crown and of the accused towards each other in criminal proceedings there seems to me to be nothing incongruous or objectionable in the fact that the terms 'substantial wrong or miscarriage of justice' when applied to an appeal by an accused person should be interpreted in one way but that when applied to an appeal by the Attorney General they should be interpreted in another."

Generally, the following cases, out of many, may be specially noted:

In *GOUIN v. R.*, [1926]S.C.R.539, where the evidence was the uncorroborated evidence of an accomplice, it was held that it was wrong for the judge to tell the jury that, if they are quite certain that the accomplice is telling the truth, they have not only the right to convict the prisoner but that it is their duty to do so. Conviction quashed and new trial ordered.

In *BROOKS v. R.*, [1927]S.C.R.633, a case of abortion, it was held that there was non-direction in the failure of the trial judge to direct the attention of the jury to the possible significance of certain evidence and also to the motives, consistent with innocence, which might have actuated the girl. The following appears in the judgment:

"There was non-direction by the learned trial judge in a vital matter, tantamount in the circumstances of this case to misdirection, and constituting a miscarriage of justice within subs.(1)(c) of s.1014 of the Criminal Code. Upon the whole case, and taking into consideration the entire charge, the majority of the Court, with respect, finds itself unable to accept the view expressed by the learned judge who delivered the majority judgment in the Appellate Division that 'no substantial wrong or miscarriage of justice can have occurred' at the trial. (Criminal Code s.1014(2))."

The provision also applied in the case of *BOULIANNE v. R.*, [1931] S.C.R.621, a case of conversion. Though finding misdirection in a material matter (corroboration) the majority of the Court held that it did not result in a miscarriage of justice.

"While the majority of us are of the opinion that there was misdirection in a material matter . . . . . we are also satisfied that the jury, properly directed, must have reached the same conclusion as that actually reached in this case (*BROOKS v. THE KING*, [1927](Can.) S.C.R.633).

Moreover, we are all satisfied that the jury could not, on the evidence in the case, have failed to convict the accused. The case, therefore, is one for the application of s.1014(2) of the Criminal Code."

In *CHAPDELAINE v. R.*, [1935]S.C.R.53, a case of murder, the Supreme Court refused to apply the provision and ordered a new trial. It was found that there were certain matters, particularly with reference to statements made by the deceased, which ought not to have been submitted to the jury for consideration in arriving at their verdict, and that it was not possible to say to what extent there was material prejudice to the accused.

In *SCHMIDT v. THE KING*, [1945]S.C.R.438, 83 C.C.C.207, the Supreme Court applied the provision and dismissed an appeal notwithstanding a defect in the judge's charge in that "he did not apply the law to the evidence as fully as he might have done". The following is quoted as at p.210:

"The meaning of these words has been considered in this Court in several cases, one of which is *GOUIN v. THE KING*, [1926]3 D.L.R.649, S.C.R.539, 46 C.C.C.1, from all of which it is clear that the onus rests on the Crown to satisfy the Court that the verdict would necessarily have been the same if the charge had been correct or if no evidence had been improperly admitted. The principles therein set forth do not differ from the rules set forth in a recent decision of the House of Lords in *STIRLAND v. DIRECTOR OF PUBLIC PROSECUTIONS*, [1944]A.C.315, *i.e.*, that the proviso that the Court of Appeal may dismiss the appeal 'if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused' assumes a situation where a reasonable jury, after being properly di-

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rected, would, on the evidence properly admissible, without doubt convict."

In *LIZOTTE v. R.*, [1951]S.C.R.115, it was found that the instructions to the jury were defective:

"If, for example, the jury were of the opinion that, consistently with the evidence, the death of Beaumont may have been caused by the blows on the head with bottles said to have been struck by Legare and Vallières and were not satisfied beyond a reasonable doubt that his death was caused by blows struck by the accused or that the accused took part in throwing him into the river while still alive they could not find him guilty of murder; I cannot find that they were properly instructed in this regard."

At p.137:

"I have no difficulty in reaching the conclusion that this is not a case in which it can be said that no substantial wrong or miscarriage of justice has occurred by reason of the errors in law made at the trial which have been pointed out above. The test to be applied is found in the words of Kerwin, J., giving the judgment of the court in *SCHMIDT v. THE KING*" (quoted as above).

It may be observed that in this case as well as in *BROOKS v. R.*, the Provincial Court of Appeal had been of opinion that there was no substantial wrong or miscarriage of justice.

In *THE QUEEN v. NIXON*, [1952]O.W.N.782, the Court of Appeal in Ontario refused to apply the provision in question. The trial judge had said:

"And while it is true that the burden of proof never shifts, if the Crown produces evidence which, if unanswered and believed, is sufficient to raise a *prima facie* case, the Crown has discharged its burden and the accused may be convicted unless he counteracts the effect of that evidence."

The Court of Appeal held that this was serious misdirection and that: "the jury may well have been led to believe that the Crown had discharged its burden of proving the guilt of the accused beyond reasonable doubt. We do not question the correctness of the above-quoted statement of law in considering whether a *prima facie* case has been made out to go to the jury, but we think it has no place in a judge's charge to the jury.

We do not think that we can, under s.1014(2) of The Criminal Code, R.S.C.1927, c.36, say that no substantial wrong or miscarriage of justice has actually occurred."

New trial ordered.

It is submitted that the crux of any question concerning the application of this provision is in the words "the appellant has lost his chance of being acquitted" as used in the case of *COHEN and BATEMAN* and that this will continue to be true under the new Code. The basic principle of its application appears to be well settled by *STIRLAND v. DIRECTOR OF PUBLIC PROSECUTIONS*, and that it applies in Canada as well as in England is made clear by the judgments in *SCHMIDT v. R.*, and *LIZOTTE v. R.* It operates in England where the Court of Criminal Appeal cannot grant a new trial, to mean that the

OLD CODE:

1015. On an appeal against sentence, unless the sentence is one fixed by law, the court of appeal shall consider the fitness of the sentence appealed against, and may upon such evidence, if any, as it thinks fit to require or to receive,
(a) refuse to alter that sentence; or
(b) diminish or increase the punishment imposed by that sentence, but always so that the diminution or increase be within the limits of the punishment prescribed by law for the offence of which the offender has been convicted; or
(c) otherwise, but within such limits, modify the punishment imposed by that sentence; and
(d) in any other case shall dismiss the appeal.
(2) A judgment whereby the court of appeal so diminishes, increases or modifies the punishment of an offender shall have the same force and effect as if it were a sentence passed by the trial court.

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accused is not necessarily to be discharged where, although there has been some error in law, his guilt is shewn beyond a reasonable doubt. In Canada, in similar circumstances it operates to mean that there need not be another trial which would be futile since the accused has no chance of acquittal.

It is true that the Court of Appeal may allow the appeal where it is of opinion that "on any ground there was a miscarriage of justice" (s.592(1)(a)(iii)). Nevertheless, under the provision now being considered, it may still *dismiss* the appeal "if it is of the opinion that no substantial wrong or miscarriage of justice has occurred," which must be taken to refer to cases where the accused has not been deprived of a chance of acquittal.

POWERS OF COURT ON APPEAL AGAINST SENTENCE. — Effect of judgment.

593. (1) Where an appeal is taken against sentence the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may upon such evidence, if any, as it thinks fit to require or to receive,

***(a)* vary the sentence within the limits prescribed by law for the offence of which the accused was convicted, or**

***(b)* dismiss the appeal.**

(2) A judgment of a court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court.

This is a re-draft of the former s.1015 without change in effect.

While this section is referable to s.4(3) of the English Act, the *Criminal Appeal Act*, 1907, the following comparative comment appears in *R. v. CRUICKSHANKS*(1946), 86 C.C.C.257; *per* Bird J.A., at p.282:

"It is noteworthy that power to quash and pass another sentence in substitution therefor is not given under Criminal Code, s.1015 and the power given by the Criminal Code to diminish, increase or modify is related to the 'punishment' imposed by the sentence from which the appeal is taken, which is a punishment prescribed by the statute relating to the offence . . . . . Moreover, marked differences of language in the corresponding sections of the two Acts (*i.e.* the Crimi-

Section 593—*continued*

nal Code and the *Criminal Appeal Act* 1907 (Eng.)), giving jurisdiction on appeals from sentence considered in the light of the fact that many other sections of the *Criminal Appeal Act* 1907 have been transplanted in Part XIX of the Criminal Code, lead one to the conclusion that Parliament did not intend to confer upon Courts of Appeal the wide powers to quash and substitute sentences which are given to the Court of Criminal Appeal."

In *R. v. ADAMS*(1921), 36 C.C.C.180 these provisions were considered at length, they having been carried into the Code as s.1055A(1) by 1921, c.25, s.22 "obviously an adoption of the English Statute which, in the year 1907 (Imp.), c.23, conferred similar powers upon the English Court of Criminal Appeal." The judgment quotes at length a statement of policy adopted in England regarding the revision of sentences. The following is an extract:

"The Court has on several occasions stated the general principle on which it interferes with sentences. It will not interfere 'unless it was apparent that the Judge at the trial had proceeded upon wrong principles or given undue weight to some of the facts'; Sidlow (1 Cr. App. Rep. 29); Ross (3 Cr. App. Rep. 198); Stanley (5 Cr. App. Rep. 16). 'It is undesirable to alter the sentence unless the Judge at the trial has clearly gone wrong'; Williams (2 Cr. App. Rep. 156); Stutter (5 Cr. App. Rep. 64). 'If the principle on which the Court of trial passes sentence is right, the Court will not enquire whether the sentence is one which they themselves would have thought well to pass.' Maurice (1 Cr. App. Rep. 176). 'It is not the policy of this Court to interfere if its members are of opinion that they would have given a less sentence, but only if the sentence appealed from is manifestly wrong.' Wolff (10 Cr. App. Rep. 107). 'Whilst we much dislike interfering with sentences there are some cases in which we feel bound to do so, and this is one of them. We think the sentences are so clearly excessive that we must reduce them.' Wilde and Jukes (11 Cr. App. Rep. 34)."

The judgment points out (p.184) that the English precedents are from a jurisdiction where the conditions of society are to some extent different from those in Canada, and that the decision in many cases seems to have been affected by the character of the various penal institutions to which the convict might be sent. It comes to the conclusion that "we shall probably have to work out a course of action of our own based upon our local conditions".

The language of *R. v. ADAMS* was adopted in *R. v. ZIMMERMAN* (1925), 46 C.C.C.78, and it was said that:

"if it is possible to extract any general principle from the many conflicting cases that are to be found in the English reports of the decisions of that Court of Criminal Appeal . . . . . it would be that an Appellate Court is reluctant to interfere with the sentence unless it is clearly of the opinion that it should do so having regard to all the circumstances of the particular case and bearing mind the advantage possessed by the Judge below of personal observation of the convict and his conduct and condition at the time. This substantially and practically is the course that has been adopted by the other Appellate Courts in Canada (after considering the said authorities), such as the

OLD CODE:

1018. Where a person convicted on indictment desires to appeal to the court of appeal, or to obtain the leave of that court to appeal, he shall give notice of appeal, or notice of his application for leave to appeal, in such manner and within such time after the date of his conviction, as may be directed by rules of court; and such rules shall enable any convicted person to present his case and his argument in writing instead of by oral argument if he so desires, and any case or argument so presented shall be considered by the court.

. . . . . .

1021. (6) An appellant, notwithstanding that he is in custody, shall be entitled to be present, if he desires it, on the hearing of his appeal, except where the appeal is on some ground involving a question of law alone, but, in that case and on an application for leave to appeal and on any proceedings preliminary or incidental to an appeal, shall not be entitled to be present, except where rules of court provide that he shall have the right to be present, or where the court of appeal or a judge of that court gives him leave to be present.

(7) The power of the court of appeal to pass any sentence under section one thousand and fifteen of this Act may be exercised notwithstanding that the appellant is for any reason not present.

Court of Appeal for Alberta in *R. v. ADAMS*(1921), 36 C.C.C.180; [of Saskatchewan] in *R. v. FINLAY*(1924), 43 C.C.C.62, ... and of Manitoba in *R. v. PETCH*(1925), 45 C.C.C.49."

The Court of Appeal may increase a sentence that it considers inadequate: see *e.g., R. v. TEED*(1940), 73 C.C.C.245.

In *Re JOHNSON*(1954), 13 W.W.R.(N.S.)45, it was said that s.1015 (2) does not mean that the procedure applicable to proceedings in the trial court must be followed:

"I do not think that a requirement that the Court of Appeal shall issue a new warrant of commitment or even an endorsement on the existing warrant is to be read into the subsection.

In the Supreme Court there is no such thing as a warrant of commitment."

See also cases noted under s.641 *post*.

RIGHT OF APPELLANT TO ATTEND.—Appellant represented by counsel.—Argument may be oral or in writing.—Sentence in absence of appellant.

594. (1) Subject to subsection (2), an appellant who is in custody is entitled, if he desires, to be present at the hearing of the appeal.

(2) An appellant who is in custody and who is represented by counsel is not entitled to be present

(*a*) at the hearing of the appeal, where the appeal is on a ground involving a question of law alone,

(*b*) on an application for leave to appeal, or

(*c*) on any proceedings that are preliminary or incidental to an appeal,

unless rules of court provide that he is entitled to be present or the court of appeal or a judge thereof gives him leave to be present.

Section 594—*continued*

(3) A convicted person who is an appellant may present his case on appeal and his argument in writing instead of orally, and the court of appeal shall consider any case or argument so presented.

(4) The power of a court of appeal to impose sentence may be exercised notwithstanding that the appellant is not present.

Subsecs.(1) and (2) come from the former s.1021(6); subsec.(3) comes from s.1018(1), and subsec.(4) from s.1021(7). Corresponding provisions in the English Act of 1907 are ss.7 and 11.

RESTITUTION OF PROPERTY.—Annulling or varying order.

595. (1) Where an order for compensation or for the restitution of property is made by the trial court under section 628, 629 or 630, the operation of the order is suspended

***(a)* until the expiration of the period prescribed by rules of court for the giving of notice of appeal or of notice of application for leave to appeal, unless the accused waives an appeal, and**

***(b)* until the appeal or application for leave to appeal has been determined, where an appeal is taken or application for leave to appeal is made.**

(2) The court of appeal may by order annul or vary an order made by the trial court with respect to compensation or the restitution of property within the limits prescribed by the provision under which the order was made by the trial court, whether or not the conviction is quashed.

This is the former s.1017, corresponding to s.6 in the English Act of 1907.

In *MALLET v. R.*(1951), 101 C.C.C.352, at p.357, Marchand, J., said:

> "I see clearly in this provision the desire of the law to submit the verdict of civil responsibility to the same appeal as the judgment of guilty itself which is the warrant for this responsibility,"

but this was a dissenting judgment, and the opinion of the majority was that the question involved an appeal against sentence.

See s.424 as to power of judges to make rules.

Powers of Minister of Justice.

POWERS OF MINISTER OF JUSTICE.

596. The Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment,

***(a)* direct, by order in writing, a new trial before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial should be directed;**

***(b)* refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person; or**

OLD CODE:

1017. The operation of any order for the restitution of any property to any person made on a conviction on indictment, and the operation in case of any such conviction, of the provisions of sections seven hundred and ninety-five, one thousand and forty-eight, one thousand and forty-nine, and one thousand and fifty of this Act, shall, unless the trial court has directed to the contrary in any case in which, in its opinion, the title to the property is not in dispute, be suspended

(a) in any case until the expiration of such time after the date of the conviction as may be directed by rules of court for giving notice of appeal or of application for leave to appeal; and

(b) in cases where such notice has been given within the time so directed, until the determination of the appeal; and in cases where the operation of any such order, or the operation of the said provisions, is suspended until the determination of the appeal, the order or provisions, as the case may be, shall not take effect as to the property in question if the conviction is quashed on appeal; and provision may be made by rules of court for securing the safe custody of any property, pending the suspension of the operation of any such order or of the said provisions.

(2) The court of appeal may by order annul or vary any order made by the trial court for the restitution of any property to any person, although the conviction is not quashed; and the order, if annulled, shall not take effect, and, if varied, shall take effect as so varied.

1022. Nothing in the ten last preceding sections of this Act shall in any manner limit or affect His Majesty's royal prerogative of mercy.

(2) Upon any application for the mercy of the Crown on behalf of any person convicted on indictment, the Minister of Justice,

(a) if he entertains a doubt whether such persons ought to have been convicted, may, after such inquiry as he thinks proper, instead of advising His Majesty to remit or to commute the sentence, direct by an order in writing a new trial at such time and before such court as the Minister of Justice thinks proper; or

(b) may, at any time, refer the whole case to the court of appeal, and the case shall then be heard and determined by that court as in the case of an appeal by a person convicted; and

(c) at any time, if the Minister of Justice desires the assistance of the court of appeal on any point arising in the case with a view to the determination of the petition, he may refer that point to the court of appeal for its opinion thereon, and that court shall consider the point so referred and furnish the Minister of Justice its opinion thereon accordingly.

***(c)* refer to the court of appeal at any time, for its opinion, any question upon which he desires the assistance of that court, and the court shall furnish its opinion accordingly.**

This is the former s.1022(2) re-written without change in substance. It corresponds to s.19(a) and (b) of the English Act of 1907, but see notes *infra*. S.1022(1) dealing with the royal prerogative is covered by s.658 *post*.

Provisions in this sense were brought forward as s.545 in the E.D.C. The following is quoted from the report of the Imperial Commisioners in relation to it:

Section 596—*continued*

"Cases in which, under some peculiar state of facts, a miscarriage of justice takes place, may sometimes though rarely occur; but when they occur it is under circumstances for which fixed rules of procedure cannot provide. Experience has shown that the Secretary of State is a better judge of the existence of such circumstances than a court of justice can be. He has every facility for inquiring into the special circumstances; he can and does, if necessary, avail himself of the assistance of the judge who tried the case, and of the law officers. The position which he occupies is a guarantee of his own fitness to form an opinion. He is fettered by no rule, and his decision does not form a precedent for subsequent cases. We do not see how a better means could be provided for inquiry into the circumstances of the exceptional cases in question. The powers of the Secretary of State, however, as to disposing of the cases which come before him are not as satisfactory as his power of inquiring into their circumstances. He can advise Her Majesty to remit or commute a sentence; but, to say nothing of the inconsistency of pardoning a man for an offence on the ground that he did not commit it, such a course may be unsatisfactory. The result of the inquiries of the Secretary of State may be to show, not that the convict is clearly innocent, but that the propriety of the conviction is doubtful; that matters were left out of account which ought to have been considered; or that too little importance was attached to a view of the case the bearing of which was not sufficiently apprehended at the trial; in short, the inquiry may show that the case is one on which the opinion of a second jury ought to be taken. If this is the view of the Secretary of State, he ought, we think, to have the right of directing a new trial on his own undivided responsibility. Such a power we accordingly propose to give him by section 545."

The provision empowering the Minister to order a new trial became s.748 in the Code of 1892. Taschereau's edition of that Code, p.873, comments that it virtually gave an appeal from the courts to the Minister of Justice, but from the report as quoted above, it would appear rather that it was intended to meet rare contingencies and not to give a prisoner an alternative to an appeal or application to the court for a new trial. At all events s.1022(2) (b) and (c) were adapted from the *Criminal Appeal Act* 1907 (Imp.), when the appeal provisions of the Code were re-cast in 1923.

The position in the United Kingdom is that:

"where a person has been convicted on indictment the Secretary of State has the power, on consideration of any petition for the exercise of His Majesty's mercy, or of any representation made on behalf of such a person, to refer the whole case to the Court of Criminal Appeal to be dealt with as an appeal, or to refer any point arising in such a case to the Court. The Secretary of State has no power to order a new trial for any convicted person."

In *R. v. REID*, [1933] O.W.N.106, the Court of Appeal, on a reference by the Minister under s.1022, substituted a verdict of manslaughter for one of murder.

OLD CODE:

1023. Any person convicted of any indictable offence whose conviction has been affirmed on an appeal taken under section ten hundred and thirteen may appeal to the Supreme Court of Canada against the affirmance of such conviction on any question of law on which there has been dissent in the Court of Appeal.

(2) Any person whose acquittal has been set aside may appeal to the Supreme Court of Canada against the setting aside of such acquittal on any ground of appeal which involves a question of law alone; and any person who was tried jointly with such acquitted person, and whose conviction was sustained by the Court of Appeal, may appeal to the Supreme Court of Canada against the sustaining of such conviction on like grounds.

1025. Either the Attorney General or any person convicted of an indictable offence may appeal to the Supreme Court of Canada from the judgment of any court of appeal setting aside or affirming a conviction or dismissing an appeal against a judgment or verdict of acquittal in respect of an indictable offence, on any question of law, if leave to appeal is granted by a judge of the Supreme Court of Canada within twenty-one days after the judgment appealed from is pronounced, or within such extended time thereafter as the judge to whom the application is made may for special reasons allow; in an appeal by the Attorney General the judge may impose such terms, if any, as he may see fit.

In *R. v. CRACKNELL*(1931), 56 C.C.C.190, upon a similar reference, the Court of Appeal found that there had been misdirection by the trial Judge and ordered a new trial.

In *R. v. JARVIS*(1936), 66 C.C.C.20, upon a reference eleven years after the conviction, the Court granted a re-hearing, but later (1937, 68 C.C.C.188) declined to interfere. It held, however, that to grant a new trial upon the reference would be a further step in the original prosecution, and therefore not precluded by the former ss.1078 and 1079, the accused having undergone the penalty imposed.

Appeals to the Supreme Court of Canada.

APPEAL FROM CONVICTION.—In case of dissent.—On question of law with leave.—Appeal where acquittal set aside.—Where joint trial.

597. (1) A person who is convicted of an indictable offence whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada

***(a)* on any question of law on which a judge of the court of appeal dissents, or**

***(b)* on any question of law, if leave to appeal is granted by a judge of the Supreme Court of Canada within twenty-one days after the judgment appealed from is pronounced or within such extended time as the judge may, for special reasons, allow.**

(2) A person

***(a)* who is acquitted of an indictable offence and whose acquittal is set aside by the court of appeal, or**

***(b)* who is tried jointly with a person referred to in para-**

Section 597—*continued*

graph *(a)* and is convicted and whose conviction is sustained by the court of appeal,

may appeal to the Supreme Court of Canada on a question of law.

This combines the former s.1023(1) and subsec.(2) as enacted by 1947, c.55, s.30, and s.1025(1) as amended by 1948, c.39, s.42. It sets out in one section the rights of the accused to appeal to the Supreme Court of Canada. As to dissent, see also s.585, *ante*, and as to acquittal, s.584(2) *ante*.

In *R. v. ROZON*(1951), 99 C.C.C.167, the question turned upon a difference of opinion as to the meaning of a verdict returned by the jury. The Supreme Court held that this was not a question of law within the meaning of s.1023(1). Fauteux, J., who delivered the judgment of the majority, quoted from *MANCHUK v. R.*, [1938]S.C.R.341 at p.346, the statement that:

"The appeal is by law necessarily limited to the grounds upon which the learned Judges dissented",

and from *R. v. DECARY*(1942), 77 C.C.C.191, at p.194, the statement that:

"It is well settled by the decisions of this Court that such ground must raise a question of law in the strict sense and that it is not a competent ground of appeal if it raises only a mixed question of fact and law."

He emphasized the fact that the section did not read "any question of law in the dissent," as in the earlier provision, but "any question of law *on which* there has been dissent in the Court of Appeal".

In the case of *LATOUR v. R., infra*, before the Supreme Court of Canada, October 13, 1950, the Chief Justice was quoted as referring to the new section as "most extraordinary" in that it did not state that the appeal to the Supreme Court had to be limited to points of law raised in the lower courts.

In a previous case, *BOYER v. R.*(1949), 7 C.R.257 at p.268 it seems to be assumed that the appeal should be on points raised below. The following is quoted from the judgment:

"The new 1025 . . . . . has done away with the need of showing a conflict between two courts of appeal and a new right of appeal is created on any question of law. It does not even require that there should be a dissent in the Court of Appeal, nor that any of the judges who took part in the judgment of that Court should have entertained the question of law upon which the convicted person may ask for leave to appeal. It is now sufficient that the person may have raised a question of law in the Court of Appeal and, although every one of the judges in that Court refused to accept that proposition of law as being sound, the mere fact that the said question of law was raised by the convicted person in the Court appealed from, is sufficient to give him a ground upon which he may ask a judge of the Supreme Court of Canada to grant leave to appeal on that question to this Court." (Held not retroactive.)

The written reasons of the Supreme Court in *R. v. LATOUR*, [1951] S.C.R.19 at p.29, make only passing reference to this point where, refer-

ring to the "last ground of appeal", it is said that "It was formulated orally in the course of the argument, leave to do so being then granted upon the consent of the Crown, and in view of the importance of the case."

The following reference from *KWAKU MENSAH v. R.*, [1946]A.C. 83, at p.94, is relevant in this connection. The quotation is from the judgment of Lord Goddard, C.J.:

"The principles on which this Board acts in criminal cases are well known and need no repetition, but when there has been an omission to place before the jury for their consideration a matter of such grave importance that they were never led to consider whether in this respect the prosecution had discharged the onus which lay on them of proving murder as distinct from manslaughter, their Lordships think that they can properly entertain the appeal. They would add that it must be seldom that they consider a matter which was not only not mentioned in the courts below, but was not included in the reasons given by the appellant in his case. It was not, indeed, raised till his junior counsel addressed the Board, but in view of the opinion of the House of Lords in *MANCINI'S CASE* as to the duty of the court in such circumstances as they find existed here, they have thought it right to consider the matter, although not raised in the printed case. It is impossible to say which verdict would have been returned had the case been left to the jury with a proper direction."

Subsec.(2) in its original form appeared in 1931, c.28, s.15, and was amended by 1935, c.56, s.16. With reference to par.(2)(b), the following statement by the Minister of Justice appears in Hansard, 1931, p.4142:

"It has been brought to my attention, since this bill was printed, that there is an anomaly in one of the appeal sections, section 1025, ss.3 which reads (quoted).

The case which has arisen or will arise is this: Certain people are indicted on a charge of conspiracy. One of them is convicted; three others are acquitted, and in the case of those three the Crown appeals to the provincial court of appeal. The provincial court of appeal convicts them. From that conviction, under the section which I have read, they have an appeal to the Supreme Court of Canada, but the other man who was convicted in the first instance, has no appeal. The result may be a favourable judgment in the Supreme Court in respect of the three, while the unfortunate man who was convicted in the first instance, has no appeal and stands convicted, although they have been tried together for the same offence. The suggestion has been made that that sentence should be clarified by adding the words: 'And any person who was tried jointly with such acquitted person and whose conviction was sustained by the court of appeal may appeal to the Supreme Court of Canada against the sustaining of such conviction'."

APPEAL BY ATTORNEY GENERAL.—In case of dissent.—On question of law with leave.—Terms.

598. (1) Where a judgment of a court of appeal sets aside a conviction pursuant to an appeal taken under paragraph *(a)* of sec-

Section 598—*continued*

tion 583 or dismisses an appeal taken pursuant to paragraph *(a)* of section 584, the Attorney General may appeal to the Supreme Court of Canada

***(a)* on any question of law on which a judge of the court of appeal dissents, or**

***(b)* on any question of law, if leave to appeal is granted by a judge of the Supreme Court of Canada within twenty-one days after the judgment appealed from is pronounced or within such extended time as the judge may, for special reasons, allow.**

(2) Where leave to appeal is granted under paragraph *(b)* of subsection (1), the judge may impose such terms as he sees fit.

This section comes from the former s.1023(3) and s.1025(1) as re-enacted by 1948, c.39, s.42. It is correlative to the preceding section and sets out in one section the rights of the Attorney General. See also s.584 *ante*, and notes thereto.

In *CULLEN v. R.*(1949), 8 C.R.141 (S.C. Can.), at p. 148 it was said that:

"The right of appeal given to the Attorney General by the amendment of 1930 introduced a new principle into the administration of criminal justice, that is, that a man might under certain circumstances be tried again upon a criminal charge after having been acquitted."

NOTICE OF APPEAL.

599. No appeal lies to the Supreme Court of Canada unless notice of appeal in writing is served by the appellant upon the respondent within fifteen days

***(a)* after the judgment of the court of appeal is pronounced where the appeal may be taken without leave, or**

***(b)* after leave to appeal is granted, where leave is required, unless before or after the expiration of that period further time is allowed by the Supreme Court of Canada or a judge thereof.**

This comes from the former s.1023(4) and s.1025(2). S.1023(4) was enacted by 1935, c.56, s.16 as subsec.(3) and re-numbered as subsec.(4) by 1947, c.55, s.30. It was put into the form in which it appeared in the repealed Code by 1951, c.47, s.24, the purpose of the amendment then made being:

"to remove any doubt that notice of appeal must be given by the appellant within fifteen days after the judgment appealed from is pronounced or within such further time as may be allowed, in all cases where an appeal is taken to the Supreme Court of Canada under section 1023."

S.1025(2) came into the Code in 1920, c.43, s.16, as part of s.1024A. The words "before or after the expiration of that period" are new. They were added in Parliament (Hansard 1954, p.2869).

OLD CODE:

1023. (3) The Attorney General of the province may appeal to the Supreme Court of Canada from the judgment of any court of appeal setting aside a conviction or dismissing an appeal against a judgment or verdict of acquittal in respect of an indictable offence on an appeal taken under section ten hundred and thirteen on any question of law on which there has been dissent in the Court of Appeal.

1025. (1) For wording of this subsection see page 913.

1023. (4) No appeal lies to the Supreme Court of Canada under this section unless notice of appeal is served in writing by the appellant upon the other party to the proceedings within fifteen days after the judgment of the Court of Appeal is pronounced or within such further time as may be allowed by the Supreme Court of Canada or a judge thereof.

1025. (2) Notice of appeal in writing shall be served upon the person convicted or his solicitor, or upon the Attorney General, as the case may be, within fifteen days after the granting of such leave, and subsequent proceedings shall be had in the same manner and with the same effect as provided in the last preceding section.

1024. The Supreme Court of Canada shall make such rule or order thereon, either in affirmance of the conviction or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect.

(2) Unless such appeal is brought on for hearing by the appellant at the session of the Supreme Court of Canada during which such affirmance setting aside or dismissal takes place, or the session next thereafter if the said court is not then in session, the appeal shall be held to have been abandoned, unless otherwise ordered by the Supreme Court of Canada or a judge thereof.

(3) The judgment of the Supreme Court of Canada shall, in all cases, be final and conclusive.

(4) Notwithstanding any royal prerogative, or anything contained in the Interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard.

ORDER OF SUPREME COURT OF CANADA.—Hearing of appeal.—Abandonment.

600. (1) The Supreme Court of Canada may, on an appeal under this part, make any order that the court of appeal might have made and may make any rule or order that is necessary to give effect to its judgment.

(2) An appeal to the Supreme Court of Canada that is not brought on for hearing by the appellant at the session of that court during which the judgment appealed from is pronounced by the court of appeal, or during the next session thereof, shall be deemed to be abandoned, unless otherwise ordered by the Supreme Court of Canada or a judge thereof.

This comes from the former s.1024(1),(2) and (3) which formed part of s.750 in the Code of 1892. S.1024(4) is not continued: see s.54(2) and (3)

Section 600—*continued*

of the *Supreme Court Act*, R.S.C. 1952, c.259, which declares that no appeal lies to any "court of appeal, tribunal or authority" in the United Kingdom.

It may be noted here that the former s.1025A has been omitted. That section was passed in 1939, apparently to meet a situation which arose in the case of *R. v. COMBA* (Hansard 1938, p.4321, Senate Debates, 583). It does not appear from the report of the case ((1938), 70 C.C.C.205) whether or not the accused had been at large between his trials. The section had been strongly criticized. In *R. v. MUNROE*, [1940]2 W.W.R.1, Martin, C.J.B.C., said at p.22:

> "It is to be remembered that if the Crown can get one new trial because of its own failures it can also get two or more of them if it continues to err, with the shocking result that the subject would be crushed with a successive burden of costs, delay and anxiety and often languish long in jail in default of bail in general and in particular under the novel provisions of s.1025A."

In *R. v. HESS (No. 2)*, [1949] 1 W.W.R.586, O'Halloran, J.A., characterized the re-arrest of the accused after the Court of Appeal had directed a verdict of acquittal, as "a flouting of this Court's authority and jurisdiction," and came to the conclusion that s.1025A was unconstitutional.

Appeals by Attorney General of Canada.

RIGHT OF ATTORNEY GENERAL OF CANADA TO APPEAL.

601. The Attorney General of Canada has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that government as the Attorney General of a province has under this Part.

This is new. The Attorney General of Canada is, by definition, s.2(2) *ante*, the Attorney General of the Northwest Territories and the Yukon and as such would have a right of appeal. This section gives him otherwise a clear status.

In *R. v. ST. LOUIS*(1897), 1 C.C.C.141, at p.146, the following appears:

> "As the conduct or supervision of criminal prosecutions before the criminal courts devolve upon the provincial law officers, the Attorney-General of Canada has no ministerial duties or official legal functions to perform in that connection, and consequently when he, with the consent of a judge or under an order of the court, prefers a bill of indictment and conducts a prosecution before the petit jury in which the Government of the Dominion is interested, he occupies a position which is analogous to that of a private prosecutor."

These expressions were adopted in *R. v. HARRY GALLANT and FRANK GALLANT (No. 2)*(1944), 83 C.C.C.55, in which an appeal was undertaken upon the instructions of the Department of Justice with the

consent of the provincial Attorney General. It was said at p.58 that the Code conferred the right of appeal directly on the Attorney General of the province and made no provision for appeals with his consent or by his agreement:

"The appeal must be substantially and actually, not merely nominally, that of the Attorney-General."

By s.31 of the *Combines Investigation Act*, R.S.C. 1952, c.314, the Attorney General of Canada is empowered to prosecute under that Act, or ss.498 and 498A, now ss.411 and 412, of the Code.

In that connection it was held in *R. v. McGAVIN BAKERIES*(1950), 98 C.C.C.1, that the fact that the Attorney General of Canada is expressly authorized by s.31(2) as again re-enacted in 1949, to institute and conduct prosecutions under the Act and under s.498 of the *Criminal Code* does not oust the similar existing powers and rights of the Attorney General of a province. The legislature merely adds the Attorney General of Canada as one more person who may institute the proceedings. At p.9:

"No higher duty devolves upon an Attorney-General of any Province than the administration of criminal law and . . . . . it is not only the right but the duty of the Attorney-General and of agents of the Attorney-General to prefer formal charges in writing wherever there is any reasonable ground for believing that there has been such a violation."

It should be noted however that the right of the Attorney General of Canada to bring an action for the abatement of a nuisance was held to exist in *ATTORNEY-GENERAL OF CANADA v. EWEN*(1895), 3 B.C.R.468, and *ATTORNEY-GENERAL OF CANADA v. BRISTER* (1943), 17 M.P.R.93, [1943]3 D.L.R.50. In *ATTORNEY-GENERAL OF ONTARIO v. NIAGARA FALLS INTERNATIONAL BRIDGE CO.* (1873), 20 Grant Ch.34, it was held that the Attorney General of the province was the proper party to file an information where the complaint was in respect of violation of the rights of the public of Ontario, and not of injury to property vested in the Crown as representing the government of the Dominion.

PART XIX.

PROCURING ATTENDANCE OF WITNESSES.

Application.

APPLICATION.

602. Except where section 446 applies, this Part applies where a person is required to attend to give evidence in a proceeding to which this Act applies.

Section 602—*continued*

The gathering together in a separate Part of the provisions relating to the attendance of witnesses obviates the need for repetition in the Parts dealing with modes of trial. The exception is for the reason that s.446 deals with cases where prisoners are required as witnesses. In such a case an order must be obtained.

PROCESS.

SUBPOENA.—Warrant in Form 12.—Subpoena to be issued in first instance.

603. (1) Where a person is likely to give material evidence in a proceeding to which this Act applies, a subpoena may be issued in accordance with this Part requiring that person to attend to give evidence.

(2) Where it is made to appear that a person who is likely to give material evidence

***(a)* will not attend in response to a subpoena if a subpoena is issued, or**

***(b)* is evading service of a subpoena,**

a court, justice or magistrate having power to issue a subpoena to require the attendance of that person to give evidence may issue a warrant in Form 12 to cause that person to be arrested and to be brought to give evidence.

(3) Except where paragraph *(a)* of subsection (2) applies, a warrant in Form 12 shall not be issued unless a subpoena has first been issued.

This comes from the former ss.673(1) & (2), 675(1) and 973. S.673(1) & (2) came from s.582 in the Code of 1892, amending R.S.C. 1886, c.174, s.61. Similar provisions were in s.449 of the E.D.C., citing 11 & 12 Vict., c.42, s.16, and 14 & 15 Vict., c.93 (both Imp.), with a marginal note that: "There is no provision in the existing law for tendering a witness his expenses" on which point see notes to s.605.

S.973 was brought into the Code by 63 & 64 Vict., c.46, s.3.

In the courts of record a subpoena was issued and in courts presided over by justices and magistrates a summons was issued. Each was an order to the witness to attend and he was liable to be penalized for disobedience. Under this Code there is one form of subpoena, but if it is issued out of a court of record, it will be under the seal of the court.

Subsec.(3) will prevent the arbitrary issue of a warrant for a witness in the first instance. It was held in *Ex p. COYLE*(1927), 49 C.C.C.91, that there is no authority to arrest a witness unless the accused is "before the justice" within the meaning of s.668 (now s.449).

See also s.611 (order where witness arrested under warrant).

HOW SUBPOENA ISSUED.—Who may issue.—Order of judge.—Seal.—Signature.—Form.

604. (1) Where a person is required to attend to give evidence before a superior court of criminal jurisdiction, a court of appeal

OLD CODE:

673. If any one to whom such last-mentioned summons is directed does not appear at the time and place appointed thereby, and no just excuse is offered for such non-appearance, then after proof upon oath that such summons has been served as aforesaid, or that the person to whom the summons is directed is keeping out of the way to avoid service, the justice before whom such person ought to have appeared, if satisfied by proof on oath that such person is likely to give material evidence, may issue a warrant under his hand to bring such person at a time and place to be therein mentioned before him or any other justice in order to testify as aforesaid.

(2) The warrant may be in form 12, or to the like effect.

675. If the justice is satisfied by evidence on oath that any person within the province, likely to give material evidence either for the prosecution or for the accused, will not attend to give evidence without being compelled so to do, then instead of issuing a summons, he may issue a warrant in the first instance.

973. Either before or during the sittings of any court of criminal jurisdiction, the court, or any judge thereof, or any judge of any superior or county court, if satisfied by evidence upon oath that any person within the province likely to give material evidence, either for the prosecution or for the accused, will not attend to give evidence at such sittings without being compelled so to do, may, by his warrant, cause such witness to be apprehended and forthwith brought before such court or judge and such witness may be detained on such warrant before such court or judge or in the common gaol, with a view to secure his presence as a witness, or, in the discretion of the court or judge, may be released on a recognizance, with or without sureties, conditioned for his appearance to give evidence.

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or a court of criminal jurisdiction other than a magistrate acting under Part XVI, the subpoena directed to that person shall be issued out of the court before which the attendance of that person is required.

(2) Where a person is required to attend to give evidence before a magistrate acting under Part XVI, or a summary conviction court under Part XXIV or in proceedings over which a justice has jurisdiction, a subpoena directed to that person shall be issued

***(a)* by a justice or magistrate, as the case may be, where the person whose attendance is required is within the province in which the proceedings were instituted, or**

***(b)* out of a superior court of criminal jurisdiction or a county or district court of the province in which the proceedings were instituted, where the person whose attendance is required is not within the province.**

(3) A subpoena shall not be issued pursuant to paragraph *(b)* of subsection (2), except pursuant to an order of a judge of the court made upon application by a party to the proceedings.

(4) A subpoena or warrant that is issued by a court under this Part shall be under the seal of the court and shall be signed by a judge of the court or by the clerk of the court.

(5) A subpoena or warrant that is issued by a justice or magistrate under this Part shall be signed by the justice or magistrate.

(6) A subpoena issued under this Part may be in Form 11.

Section 604—*continued*

The general power to compel the attendance of witnesses was contained in the former ss.604A, 671, 971 and 711. Ss. 676 and 974 made provision for the attendance of witnesses who were outside the province. S.713 made provision for the service of a summons to a witness outside the jurisdiction of the justice but presumably (by reason of the fact that s.711 made the provisions of Part XIV applicable to summary conviction matters) within the province.

S.604A came into the Code as 1930, c.11, s.16. The origin of s.671 is given under s.605, *infra*. S.676 was s.548(1) & (2) in the Code of 1892. No source is indicated, but it is comparable with s.447 in the E.D.C. S.971 was s.677 in the Code of 1892, and R.S.C. 1886, c.174, s.210. S.974 was part of s.679 in the Code of 1892 and came from R.S.C. 1886, c.174, s.212. Taschereau's Criminal Acts, p.895, says that it empowered any court of criminal jurisdiction to summon a witness from any other part of Canada, and points to 46 Geo. III, c.92, as making similar provision in England. In the Part relating to summary convictions, the former s.711 relating to the attendance of witnesses appeared in s.843 of the Code of 1892, and came from R.S.C. 1886, c.178, s.13. The former s.713 was s.848 in the Code of 1892 and came from 51 Vict., c.45, ss.1 and 3.

Under this section a subpoena to a witness out of the province will be issued, under subsec.(2), out of a court of record to require the witness to attend before the justice or magistrate before whom his attendance is required.

As to service see s.606.

CONTENTS OF SUBPOENA.—Witness to appear and remain.

605. (1) A subpoena shall require the person to whom it is directed to attend, at a time and place to be stated in the subpoena, to give evidence and, if required, to bring with him any writings that he has in his possession or under his control relating to the subject matter of the proceedings.

(2) A person who is served with a subpoena issued under this Part shall attend and shall remain in attendance throughout the proceedings unless he is excused by the presiding judge, justice or magistrate.

Subsec.(1) is derived from the former s.671 which came from s.580 in the Code of 1892, with which R.S.C. 1886, c.174, s.60 is cited. S.447 in the E.D.C. is to like effect, and was derived from 11 & 12 Vict., c.49, s.16; and 14 & 15 Vict., c.93, s.13.

Subsec.(2) comes from the former s.971, which was s.677 in the Code of 1892 and R.S.C. 1886, c.174, s.210.

The following appears in 2 Hawkins, P.C., c.46, s.168:

"It seems, that in civil proceedings a witness is not obliged to attend, unless his expenses are tendered to him pursuant to 5 Eliz. c.9, and if after such tender he neglects to appear, he may be fined according to the directions of that statute, or punished by attachment for a contempt of the court, as the circumstances of the case shall appear to be. But in criminal proceedings the demands of public justice supersede every consideration of private inconvenience; and witnesses are bound, un-

OLD CODE:

604A Every Clerk of the Crown and every Clerk of the Peace in the province of Quebec shall have power to issue a summons under his hand requiring any person being or residing within the province whom he believes capable of giving material evidence, either for the prosecution or for the accused, in any matter pending before the court of which he is the clerk, to appear before such court at the time and place mentioned in the summons to give evidence respecting such matter and to bring with him any documents or things in his possession relating thereto.

671. It it appears to the justice that any person being or residing within the province is likely to give material evidence either for the prosecuton or for the accused on such inquiry he may issue a summons under his hand requiring such person to appear before him at a time and place mentioned therein to give evidence respecting the charge, and to bring with him any documents in his possession or under his control relating thereto.

(2) Such summons may be in form 11, or to the like effect.

711. The provisions of Parts XIII and XIV relating to compelling the appearance of the accused before the justice receiving an information for an indictable offence and the provisions respecting the attendance of witnesses on a preliminary inquiry and the taking of evidence thereon, shall, so far as the same are applicable, except as varied by the sections immediately following, apply to any hearing under the provisions of this Part: Provided that whenever a warrant is issued in the first instance against a person charged with an offence punishable under the provisions of this Part, the justice issuing it shall furnish a copy or copies thereof, and cause a copy to be served on the person arrested at the time of such arrest.

(2) Nothing herein contained shall oblige any justice to issue any summons to procure the attendance of a person charged with an offence by information laid before such justice whenever the application for any order may, by law, be made ex parte.

971. Every witness duly subpœnaed to attend and give evidence at any criminal trial before any court of criminal jurisdiction shall be bound to attend and remain in attendance throughout the trial.

676. If there is reason to believe than any person residing anywhere in Canada out of the province who is not within the province is likely to give material evidence either for the prosecution or for the accused, any judge of a superior court or a county court, on application therefor by the informant or complainant, or the Attorney General, or by the accused person or his solicitor or some person authorized by the accused, may cause a writ of subpœna to be issued under the seal of the court of which he is a judge, requiring such person to appear before the justice before whom the inquiry is being held or is intended to be held at a time and place mentioned therein to give evdence respecting the charge and to bring with him any documents in his possession or under his control relating thereto.

(2) Such subpœna shall be served personally upon the person to whom it is directed, and an affidavit of such service by a person effecting the same purporting to be made before a justice, shall be sufficient proof thereof.

974. If any witness in any criminal case, cognizable by indictment in any court of criminal jurisdiction at any term, sessions or sittings of any court in any part of Canada, resides in any part of Canada, not within the ordinary jurisdiction

Section 605—*continued*

conditionally to attend the trial upon which they may be summoned, and be bound over to give their evidence. To persons of opulence and public spirit this obligation cannot be either hard or injurious; but indigent witnesses grew weary of expensive attendance, and frequently bore their own charges to their great hinderance and loss; and Sir Matthew Hale complains of the want of power in judges to allow witnesses their charges, as a great defect in this part of judicial administration."

In Archbold's Criminal Pleadings, 28th Ed., (1931), p.504, it is stated that:

"At common law, a witness in criminal cases is not entitled to his expenses; 2 Hawk., c.46, s.173; at least, if he attend on the part of the prosecution. (Note: This citation should be s.168, not 173). A witness subpoenaed for the defence cannot refuse to give evidence until his expenses are paid. *R. v. COOKE*(1824), 1 C. & P.321."

Starkie on Evidence, 2nd ed., p.83, says that:

"It is the common practice in criminal cases, for the Court to direct the witness to give his evidence, notwithstanding his demurrer on the ground that his expenses have not been paid."

In *R. v. HUBLEY*(1924), 43 C.C.C.208, it was held that an expert witness cannot decline to give evidence on the ground that his fees have not been paid.

See also s.612 and notes thereto.

EXECUTION OR SERVICE OF PROCESS.

SERVICE.—Personal service.—Proof of service.

606. (1) Subject to subsection (2), a subpoena shall be served in accordance with subsection (3) of section 441.

(2) A subpoena that is issued pursuant to paragraph *(b)* of subsection (2) of section 604 shall be served personally upon the person to whom it is directed.

(3) Service of a subpoena may be proved by the affidavit of the person who effected service.

Subsec.(1) is derived from the former s.672 which was s.581 in the Code of 1892, and modified provisions in R.S.C. 1886, c.174, s.61. The Code section was taken from s.448 of the E.D.C. with which are cited 11 & 12 Vict., c.42, s.16, and 30 & 31 Vict., c.35, s.3.

Subsecs.(2) & (3) are derived from the former s.676(2) which came from s.584(2) in the Code of 1892. Provisions somewhat similar were contained in s.448 of the E.D.C., as to service in England and Ireland.

See s.441 *ante*, and s.700 *post*, and notes thereto.

SUBPOENA EFFECTIVE THROUGHOUT CANADA.—Subpoena effective throughout province.

607. (1) A subpoena that is issued out of a superior court of criminal jurisdiction, a court of appeal or a court of criminal juris-

OLD CODE:

Section 974—continued

of the court before which such criminal case is cognizable, such court may issue a writ of subpoena, directed to such witness, in like manner as if such witness was resident within the jurisdiction of the court.

713. A summons may be issued to procure the attendance, on the hearing of any charge under the provisions of this Part of a witness who resides out of the jurisdiction of the justice before whom such charge is to be heard.
(2) Every such summons and every warrant issued to procure the attendance of a witness, whether in consequence of refusal by such witness to appear in obedience to a summons or otherwise, may be respectively served and executed by the constable or other peace officer to whom the same is delivered or by any other person, as well beyond as within the territorial division of the justice who issued the same.

672. Every such summons shall be served by a constable or other peace officer upon the person to whom it is directed either personally, or, if such person cannot conveniently be met with, by leaving it for him at his last or most usual place of abode with some inmate thereof apparently not under sixteen years of age.
676. (2) For wording of this subsection see p. 923.

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diction other than a magistrate acting under Part XVI has effect anywhere in Canada according to its terms.

(2) A subpoena that is issued by a justice or magistrate has effect anywhere in the province in which it is issued.

Subsec.(1) is derived from the former s.974, which formed part of s.679 in the Code of 1892, and of R.S.C. 1886, c.174, s.212.

As to subsec.(2) and generally, see notes to ss.604 and 612.

WARRANT EFFECTIVE THROUGHOUT CANADA. — Warrant effective throughout province.

608. (1) A warrant that is issued out of a superior court of criminal jurisdiction, a court of appeal or a court of criminal jurisdiction other than a magistrate acting under Part XVI may be executed anywhere in Canada.

(2) Subject to subsection (3) of section 610, a warrant that is issued by a justice or magistrate may be executed anywhere in the province in which it is issued.

This relates to warrants the provisions of s.607 in relation to subpoenas, with the exception that by s.610(3) a bench warrant issued by a justice or magistrate after default may be executed anywhere in Canada. Otherwise a warrant issued by a justice or magistrate will require endorsement under s.447. This involves a change from the former s.713.

This section may be compared with the former s.974, the origin of which is given under s.604, *ante*.

DEFAULTING OR ABSCONDING WITNESS.

WARRANT FOR ABSCONDING WITNESS.—Endorsement of warrant.—Copy of information.

609. (1) Where a person is bound by recognizance to give evidence in any proceedings, a justice who is satisfied upon information being made before him in writing and under oath that the person is about to abscond or has absconded, may issue his warrant in Form 13 directing a peace officer to arrest that person and to bring him before the court, judge, justice or magistrate before whom he is bound to appear.

(2) Section 447 applies, *mutatis mutandis*, to a warrant issued under this section.

(3) A person who is arrested under this section is entitled, upon request, to receive a copy of the information upon which the warrant for his arrest was issued.

This comes from the former s.693, which was s.598(6) in the Code of 1892, and came from 48 & 49 Vict., c.7, s.9. Provision for binding over or detaining a witness is contained in s.461 *ante*, and in s.611 *post*. It will be observed that a person arrested under this section is entitled to receive a copy of the information on which the warrant was issued, also that the provisions of s.447, as to endorsement, apply.

WARRANT WHEN WITNESS DOES NOT ATTEND.—Warrant where witness bound by recognizance.—Warrant effective throughout Canada.

610. (1) Where a person who has been served with a subpoena to give evidence in a proceeding does not attend or remain in attendance, the court, judge, justice or magistrate before whom that person was required to attend may, if it is established

***(a)* that the subpoena has been served in accordance with this Part, and**

***(b)* that the person is likely to give material evidence,**

issue or cause to be issued a warrant in Form 12 for the arrest of that person.

(2) Where a person who has been bound by a recognizance to attend to give evidence in any proceeding does not attend or does not remain in attendance, the court, judge, justice or magistrate before whom that person was bound to attend may issue or cause to be issued a warrant in Form 12 for the arrest of that person.

(3) A warrant that is issued by a justice or magistrate pursuant to subsection (1) or (2) may be executed anywhere in Canada.

This section comes from the former ss.673(1), 842(1), 972(1) and 975. S.673(1) was s.582(1) in the Code of 1892, amending R.S.C. 1886, c.174, s.61. S.842(1) formed part of s.781(1) in the Code of 1892, which came from 52 Vict., c.47, s.19. S.972(1) was part of s.678 in the Code of 1892, and R.S.C. 1886, c.174, s.211. S.975 was s.679 in the Code of 1892, and came from R.S.C. 1886, c.174, s.212. See also s.608 *ante*, and as to binding over witnesses, s.461 *ante* and s.611 *post*.

OLD CODE:

693. Whenever any person is bound by recognizance to give evidence before a justice, or any criminal court, in respect of any offence under this Act, any justice, if he sees fit, upon information being made in writing and on oath, that such person is about to abscond, or has absconded, may issue his warrant for the arrest of such person.

(2) If such person is arrested, any justice, upon being satisfied that the ends of justice would otherwise be defeated, may commit such person to prison until the time at which he is bound by such recognizance to give evidence, unless in the meantime he produces sufficient sureties.

(3) Any person so arrested shall be entitled on demand to receive a copy of the information upon which the warrant for his arrest was issued.

673. (1) For wording of this subsection see p. 921.

842. Upon proof to the satisfaction of the judge the service of a subpoena upon any witness who fails to attend before him as required by such subpoena, and upon such judge being satisfied that the presence of such witness before him is indispensable to the ends of justice, he may, by his warrant, cause the said witness to be apprehended and forthwith brought before him to give evidence as required by such subpoena, and to answer for his disregard of the same.

972. Upon proof to the satisfaction of the judge of the service of the subpoena upon any witness who fails to attend or remain in attendance, or upon its appearing that any witness at the preliminary examination has entered into a recognizance to appear at the trial, and has failed so to appear, and that the presence of such witness is material to the ends of justice, the judge may, by his warrant, cause such witness to be apprehended and forthwith brought before him to give evidence and to answer for his disregard of the subpoena.

975. If such witness does not obey such writ of subpoena the court issuing the same may proceed against such witness for contempt or otherwise, or bind over such witness to appear at such days and times as are necessary, and upon default being made in such appearance may cause the recognizances of such witness to be estreated, and the amount thereof to be sued for and recovered by process of law, in like manner as if such witness was resident within the jurisdiction of the court.

674. If a person summoned as a witness under the provisions of this Part is brought before a justice on a warrant issued in consequence of refusal to obey the summons, such person may be detained on such warrant before the justice

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Subsec.(2) carries to the sitting of the court, provisions in s.609(1) relating to the time when the trial is pending.

Subsec.(3) is new. See notes to ss.604 and 608 *ante*.

ORDER WHERE WITNESS ARRESTED UNDER WARRANT.

611. Where a person is brought before a court, judge, justice or magistrate under a warrant issued pursuant to subsection (2) of section 603, or pursuant to section 609 or 610, the court, judge, justice or magistrate may order that the person

(a) **be detained in custody, or**

(b) **be released on recognizance in Form 28, with or without sureties,**

to appear and give evidence when required.

Section 611—*continued*

This covers matter that appeared in the former ss.674, 842(2) and 972(2). The origin of these sections is noted under ss.604 and 610 *supra*.

CONTEMPT.—Punishment.—Form.

612. (1) A person who, being required by law to attend or remain in attendance for the purpose of giving evidence fails, without lawful excuse, to attend or remain in attendance accordingly is guilty of contempt of court.

(2) A court, judge, justice or magistrate may deal summarily with a person who is guilty of contempt of court under this section and that person is liable to a fine of one hundred dollars or to imprisonment for ninety days or to both, and may be ordered to pay the costs that are incident to the service of any process under this Part and to his detention, if any.

(3) A conviction under this section may be in Form 34 and a warrant of committal in respect of a conviction under this section may be in Form 22.

This is derived from the former ss.674(2), 841(2), 842(3) and 972(3). The penalty comes from the two last mentioned. S.674(2) formed part of s.582(3) in the Code of 1892, and 51 Vict., c.45, s.1. S.841(2) came from s.780 in the Code of 1892, and 52 Vict., c.47, s.18. S.842(3) formed part of s.781 in the Code of 1892, and 52 Vict., c.47, s.19. It was held under that provision in *Re HELIK*(1939), 72 C.C.C.76, that the County Court Judge's Criminal Court was restricted to the penalty set out there. S.972(3) came from s.678 in the Code of 1892 and R.S.C. 1886, c.174, s.211.

See notes to s.605 *supra*.

"Without lawful excuse." There is no settled practice in the matter but sometimes advances have been made to witnesses who stated that they were without means to attend, and this lack of means might be considered a sufficient excuse.

As to appeal from conviction for contempt, see the new s.9 *ante*. It may be noticed here that the former s.976 is not included in terms. That section, by 1900, c.46, s.3 was inserted after s.973 of the repealed Code and was explained (Hansard, 1900, Vol. II, col. 5270) to be intended to cover the case of witnesses knowledge of whom came to the Crown or the accused after the preliminary and did not come to the knowledge of the committing magistrate. It does not appear that the power of a court to enforce a "judgment, decree or order" made for contempt by a witness by a court in another province, has been invoked, and probably, upon a reading together of ss.610, 611 and 612, does not exist under this Code. However, the principle involved in the first words of s.976 that: "The Courts of the several provinces and the Judges of the said Courts respectively shall be auxiliary to one another for the purposes of this Act", has been observed in relation to search warrants and without reference to that section, in *R. v. SOLLOWAY & MILLS*(1930), 53 C.C.C.271, 335, and 403, and 54 C.C.C.214, to the effect that, for purposes of criminal law, Canada is a unit.

OLD CODE:

Section 674—continued

who issued the summons, or before any other justice in and for the same territorial division who shall then be there, or in the common gaol, or any other place of confinement, or in the custody of the person having him in charge, with a view to secure his presence as a witness on the day fixed for the trial, or, in the discretion of the justice, released on recognizance, with or without sureties, conditioned for his appearance to give evidence as therein mentioned, and to answer as for contempt for his default in not attending upon the said summons.

(2) The justice may, in a summary manner, examine into and dispose of the charge of contempt against such person, who, if found guilty, shall be liable to a fine not exceeding twenty dollars, or to imprisonment in the common gaol, without hard labour, for a term, not exceeding one month, or to both such fine and imprisonment, and may also be ordered to pay the costs incident to the service and execution of the said summons and warrant and of his detention in custody.

(3) The conviction under this section may be in form 13.

842. (2) Such witness may be detained on such warrant before the said judge, or in the common gaol, with a view to secure his presence as a witness; or, in the discretion of the judge, such witness may be released on recognizance with or without sureties, conditioned for his appearance to give evidence as therein mentioned, and to answer for his default in not attending upon the said subpoena, as for a contempt.

. . . . . .

972. (2) Such witness may be detained on such warrant before the judge or in the common gaol, with a view to secure his presence as a witness, or, in the discretion of the judge, he may be released on a recognizance, with or without sureties, conditioned for his appearance to give evidence and to answer for his default in not attending or not remaining in attendance.

. . . . . .

841. (2) If he fails to attend he shall be held guilty of contempt of court, and may be proceeded against therefor accordingly.

842. (3) The judge may, in a summary manner, examine into and dispose of the charge of contempt against any such witness who, if found guilty thereof, may be fined or imprisoned, or both, such fine not to exceed one hundred dollars, and such imprisonment to be in the common gaol, with or without hard labour, and not to exceed the term of ninety days, and he may also be ordered to pay the costs incident to the execution of such warrant and of his detention in custody.

972. (3) The judge may, in a summary manner, examine into and dispose of the charge against such witness, who, if he is found guilty thereof, shall be liable to a fine not exceeding one hundred dollars, or to imprisonment, with or without hard labour, for a term not exceeding ninety days, or both.

716. (2). Whenever it is made to appear to the satisfaction of a judge of any Superior or County Court that any person who resides out of Canada is able to give material information relating to an offence for which a prosecution is pending under this Part, or relating to any person accused of such offence, such

EVIDENCE ON COMMISSION.

ORDER FOR, WHEN WITNESS ILL OR OUT OF CANADA.—Application for order when witness ill.

613. A party to a proceeding to which this Act applies may apply for an order appointing a commissioner to take the evidence of a witness who

(a) **is, by reason of**

(i) physical disability arising out of illness, or

(ii) some other good and sufficient cause,

not likely to be able to attend at the time the trial is held, or

(b) **is out of Canada.**

This is derived from the former ss.716(2), 995(1) and 997(1). S.716(2) came into the Code in 1905 by 6 Edw.VII, c.5, s.1. It was repealed and subsecs.(2), (3) & (4) enacted by 1948, c.39, s.19. The re-enacted subsecs.(3) & (4) are covered by ss.616 and 617 *post*. The former provisions, as they related to summary conviction matters, applied only to a witness residing out of Canada. Generally too, this section extends the law by providing that evidence on commission may be taken where the witness is unlikely to be able to attend for "some other good and sufficient cause." See comment on the word "health" in *R. v. COVENTRY*, noted *ante* s.190.

The former s.995 came from s.681(1) in the Code of 1892, and R.S.C. 1886, c.174, s.220. It originated in 30 and 31 Vict., c.35, s.6 (Imp.), and was enacted in Canada in 43 Vict., c.35, ss.1 and 3. The former s.997(1) was s.683(1) in the Code of 1892, and came from 53 Vict., c.37, s.23.

In *R. v. VERRAL*(1895), 6 C.C.C.325, the following propositions appear:

1. S.683 of the Code was merely an extension of s.681;
2. The statement provided for in s.681 might be used at any stage of the inquiry;
3. The time at which an order might be applied for under s.683 did not differ from the time at which application for an order might be made under s.681;
4. The kind of evidence to be given in each case was substantially the same; it must relate to an indictable offence, or to any person accused of such offence.
5. The return should be made to the court that ordered the commission, not to the magistrate where the evidence was required upon a preliminary inquiry.

See also s.614 (application for order where witness ill), s.615 (reading evidence taken under s.614) and s.616 (application for order, witness out of Canada).

APPLICATION WHERE WITNESS IS ILL.—Evidence of medical practitioner.

614. (1) An application under paragraph *(a)* of section 613 shall be made

(a) **to a judge of a superior court of the province, or**

(b) **to a judge of a county or district court in the territorial division where the proceedings are taken.**

OLD CODE:

Section 716—continued

judge may by order under his hand, appoint a commissioner or commissioners to take the evidence, upon oath of such person.

995. (1) Whenever it is made to appear at the instance of the Crown, or of the prisoner or defendant, to the satisfaction of a judge of a superior court, or a judge of a county court having criminal jurisdiction, that any person who is dangerously ill, and who, in the opinion of some licensed medical practitioner, is not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, such judge may, by order under his hand, appoint a commissioner to take in writing the statement on oath or affirmation of such person.

. . . . . .

997. (1) Whenever it is made to appear, at the instance of the Crown, or of the prisoner or defendant, to the satisfaction of the judge of any superior court, or the judge of a county court having criminal jurisdiction, or of any magistrate acting under Part XVI or of any judge acting under Part XVIII, that any person who resides out of Canada is able to give material information relating to any indictable offence for which a prosecution is pending, or relating to any person accused of such offence, such judge may, by order under his hand, appoint a commissioner or commissioners to take the evidence, upon oath, of such person.

. . . . . .

998. If the statement of a sick person has been taken by a commissioner as provided in section nine hundred and ninety-five, and upon the trial of any offender for any offence to which the same relates, the person who made the statement is proved to be dead, or if it is proved that there is no reasonable probability that such person will ever be able to attend at the trial to give evidence, such statement may, upon the production of the judge's order appointing the commissioner, be read in evidence, either for or against the accused, without further proof thereof, if the same purports to be signed by the commissioner by or before whom it purports to have been taken, and it is proved to the satisfaction of the court that reasonable notice of the intention to take such statement was served upon the person, whether prosecutor or accused, against whom it is proposed to be read in evidence, and that such person or his counsel or solicitor had, or might have had, if he had chosen to be present, full opportunity of cross-examining the person who made the same.

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(2) An application under subparagraph (i) of paragraph *(a)* of section 613 may be granted on the evidence of a registered medical practitioner.

This comes from the former s.995(1). See notes *supra*, s.613.

READING EVIDENCE OF WITNESS WHO IS ILL.

615. Where the evidence of a witness mentioned in subparagraph (i) of paragraph *(a)* of section 613 is taken by a commissioner appointed under section 614, it may be read in evidence in the proceedings if

***(a)* it is proved by oral evidence or by affidavit that the witness is, by reason of death or physical disability arising out of illness,**

Section 615—*continued*

unable to attend,

(b) **the transcript of the evidence is signed by the commissioner by or before whom it purports to have been taken, and**

(c) **it is proved to the satisfaction of the court that reasonable notice of the time for taking the evidence was given to the other party, and that the accused or his counsel, or the prosecutor or his counsel, as the case may be, had or might have had full opportunity to cross-examine the witness.**

This is a re-draft of the former s.998, which was s.686 in the Code of 1892, and came from R.S.C. 1886, c.174, s.220, and 30 & 31 Vict., c.35, s.6, (Imp.).

In *BRUNET v. R.*, [1928]S.C.R.161, Mignault, J., in a judgment granting leave to appeal, noted that in *R. v. SHURMER*(1886), 16 Cox, C.C.94, the Court applied strictly the corresponding English statute requiring notice in writing to the accused. *R. v. SHURMER* was followed in *R. v. HARRIS*(1918), 26 Cox, C.C.143.

As to full opportunity to cross-examine, see *ROSE v. R.*, noted *infra*, s.619.

Note that this section refers to the evidence of a witness taken as part of the trial. It does not refer to dying declarations.

Sometimes a peace officer is called upon to take a dying declaration from the victim of a criminal offence. The rule in this connection is that in trials for murder or manslaughter the dying declarations of the deceased, made under the sense of approaching death are admissible to prove the circumstances of the crime.

However, in order that such a declaration may be received as evidence, three conditions must be present:

1. The proceedings in which it is tendered must relate to the death of the declarant.
2. There must have been a sense of impending death, or, in other words, it must have been made in "the settled and hopeless expectation of death." If the declarant signifies hope of recovery, it is not a dying declaration even when death actually follows. It is interesting to note that a dying declaration made at a time when a physician thought that the declarant might recover, is admissible, the test, of course, being the state of mind of the patient.
3. The declarations must be statements of fact *relating to the death*—statements regarding other matters, and expressions of opinion are not admissible: *SCHWARTZENHAUER v. R.*, [1935]S.C.R.367.

If these conditions are fulfilled, the declaration need not be in writing, *R. v. MAGYAR*(1906), 7 Terr.L.R.491, at p.495, and the method of taking it is not material. Still, if a peace officer has occasion to take such a declaration, it is advisable for him to call in a Justice of the Peace and also to have the doctor present, if possible. Of course it may happen that he will be acting in an emergency and will not have time to do these things. But in any event, it is important that what the declarant says be taken down exactly as he says it; if questions are asked, that both question and answer be shown; above all, it should appear that the declaration was made in the expectation of death.

OLD CODE:

997. (1) For wording of this subsection see p. 931

. . . . . .

(3) The depositions taken by such commissioners may be used as evidence at the trial.

(4) Subject to such rules of court or to the practice or procedure aforesaid, such depositions may, by the direction of the presiding judge, be read in evidence before the grand jury.

It may be useful to quote some observations made upon this subject in a Canadian case: *R. v. CHRISTENSON*(1923), 39 C.C.C.203, at p.205:

"I think it can safely be laid down that everything that occurred at the time of the making of a dying declaration ought to be fully and completely related to the Court. I think it is clear that a dying declaration may be partly in writing and partly oral. Once it appears to the Judge that the declarant was in the necessary condition of mind with regard to approaching death, I think that everything he says, whether oral or in writing or partly one and partly the other, may be admitted in evidence."

With reference to the section itself, note the three conditions which must be complied with before the evidence can be read.

APPLICATION FOR ORDER WHEN WITNESS OUT OF CANADA.—Reading evidence of witness out of Canada.—Reading evidence to grand jury.

616. (1) An application that is made under paragraph *(b)* of section 613 shall be made

***(a)* to a judge of a superior court of criminal jurisdiction or of a court of criminal jurisdiction before which the accused is to be tried, or**

***(b)* to a magistrate acting under Part XVI, where the accused is to be tried by a magistrate acting under that Part.**

(2) Where the evidence of a witness is taken by a commissioner appointed under this section, it may be read in evidence in the proceedings.

(3) Subject to section 618, evidence that is taken by a commissioner appointed under this section may, where the presiding judge directs, be read in evidence before a grand jury.

This is derived from the former s.997(1), (3) & (4). S.997(1) came from s.683(1) in the Code of 1892, and 53 Vict., c.37, s.23. It was amended by 1925, c.38, s.25. Subsecs.(3) & (4) of s.997 were added by 58 & 59 Vict., c.40, s.1, and 63 & 64 Vict., c.46, s.3.

In *R. v. LEFEBVRE*(1940), 75 C.C.C.196, it was held that the Crown was not bound to use the evidence taken on commission but might use instead the evidence that the witness gave at the preliminary hearing.

PROVIDING FOR PRESENCE OF ACCUSED COUNSEL.—Return of evidence.

617. (1) A judge or magistrate who appoints a commissioner may make provision in the order to enable an accused to be present or represented by counsel when the evidence is taken, but failure of the accused to be present or to be represented by counsel in ac-

Section 617—*continued*

cordance with the order does not prevent the reading of the evidence in the proceedings if the evidence has otherwise been taken in accordance with the order and with this Part.

(2) An order for the taking of evidence by commission shall indicate the officer of the court to whom the evidence that is taken under the order shall be returned.

This is derived from the former s.996 which was s.682 in the Code of 1892, and came from R.S.C. 1886, c.174, s.221, and 30 & 31 Vict., c.35, s.7. (as to person out of Canada, from 1890, c. 37, s.23).

The provision for payment of the expenses of the accused is not continued. He has in any event the right to be represented by counsel.

Under the statute of 1890, it was said in *R. v. CHETWYND*(1891), 23 N.S.R.332 at p.336, that it was to be assumed:

"that parliament did not contemplate that, either under the present practice in civil cases, or under rules to be made by the court in pursuance of the statute under consideration, the prisoner should be taken beyond the boundaries of Canada to be personally present . . . . . The intention of parliament, therefore, must have been that it would suffice to have the prisoner represented by counsel, with authority to cross-examine witnesses and otherwise represent him. It would, therefore, appear to be incumbent on the Crown to take care that counsel, having the authority of the accused to represent him, attended at the examination on his behalf."

In *R. v. GUILMETTE*(1919), 30 C.C.C.276, it was said that:

"It is manifest that the law does not contemplate that the accused should be taken beyond the boundaries of Canada to be personally present at the examination of witnesses under a commission. On the other hand, it would be manifestly unfair to the accused if opportunity is not afforded him to be represented by counsel with authority to cross-examine witnesses."

As to subsec.(2) see *R. v. VERRAL, supra,* s.615.

RULES AND PRACTICE SAME AS IN CIVIL CASES.

618. Except where otherwise provided by this Part or by rules of court, the practice and procedure in connection with the appointment of commissioners under this Part, the taking of evidence by commissioners, the certifying and return thereof, and the use of the evidence in the proceedings shall, as far as possible, be the same as those that govern like matters in civil proceedings in the superior court of the province in which the proceedings are taken.

This is derived from the former s.997(2), which was s.683(2) in the Code of 1892, and came from 53 Vict., c.37, s.23 (Imp.).

See *R. v. CHETWYND, supra,* s.617.

OLD CODE:

996. Whenever a prisoner in actual custody is served with or receives notice of an intention to take the statement mentioned in the last preceding section the judge who has appointed the commissioner may, by an order in writing, direct the officer or other person having the custody of the prisoner to convey him to the place mentioned in the said notice for the purpose of being present at the taking of the statements; and such officer or other person shall convey the prisoner accordingly, and the expenses of such conveyance shall be paid out of the funds applicable to the other expenses of the prison from which the prisoner has been conveyed.

997. (2) Until otherwise provided by rules of court, the practice and procedure in connection with the appointment of commissioners, under this section, the taking of depositions by such commissioners, and the certifying and return thereof, and the use of such depositions as evidence, shall be as nearly as practicable the same as those which prevail in the respective courts in connection with like matters in civil causes.

. . . . . .

999. If upon the trial of an accused person such facts are proved upon oath or affirmation that it can be reasonably inferred therefrom that any person, whose evidence was given at any former trial upon the same charge, or whose deposition has been theretofore taken in the investigation of the charge against such accused person, has since become and is insane, or is dead, or so ill as not to be able to travel, or is absent from Canada, or if such person refuses to be sworn or to give evidence, and if it is proved that such evidence was given or such deposition was taken in the presence of the person accused, and that he or his counsel or solicitor if present had a full opportunity of cross-examining the witness, then if the evidence or deposition purports to be signed by the judge or justice before whom the same purports to have been taken, it shall be read as evidence in the prosecution, without further proof thereof, unless it is proved that such evidence or deposition was not in fact signed by the judge or justice purporting to have signed the same.

EVIDENCE PREVIOUSLY TAKEN.

EVIDENCE ON PRELIMINARY INQUIRY MAY BE READ ON TRIAL IN CERTAIN CASES.

619. (1) Where, at the trial of an accused, a person whose evidence was given at a previous trial upon the same charge, or whose evidence was taken in the investigation of the charge against the accused or upon the preliminary inquiry into the charge, refuses to be sworn or to give evidence, or if facts are proved upon oath from which it can be inferred reasonably that the person

(*a*) is dead,

(*b*) has since become and is insane,

(*c*) is so ill that he is unable to travel, or

(*d*) is absent from Canada,

and where it is proved that his evidence was taken in the presence of the accused, it may be read as evidence in the proceedings without further proof, if the evidence purports to be signed by the judge or justice before whom it purports to have been taken, unless the ac-

Section 619—*continued*

cused proves that it was not in fact signed by that judge or justice or that he did not have full opportunity to cross-examine the witness.

(2) Evidence that has been taken on the preliminary inquiry or other investigation of a charge against an accused may be read as evidence in the prosecution of the accused for any other offence upon the same proof and in the same manner in all respects, as it might, according to law, be read in the prosecution of the offence with which the accused was charged when the evidence was taken.

This combines the former ss.999 and 1000. S.1000 was s.688 in the Code of 1892, and R.S.C. 1886, c.174, s.224. S.999 came from s.687 in the Code of 1892, and R.S.C. 1886, c.174, s.222. Corresponding provisions were contained in s.473 of the E.D.C., which was adapted from 11 & 12 Vict., c.43, s.17 (Imp.).

S.687 which read "and that *he*, his counsel or solicitor," was amended by 1900, c.46, s.3 and 1913, c.13, s.30. The amendment of 1900 simply struck out the word "he".

The amendment of 1913 added the provision in respect of a witness refusing to be sworn or to testify. It was the result of a case in which a man was charged with incest with his daughter. She testified at the preliminary hearing but refused to do so at the trial.

As to the amendment of 1900, the striking out of the word "he" was explained (Senate Debates 1899, p.554) as follows:

> "It sometimes happens that an ill-informed man is without counsel before a magistrate, and evidence is taken and he is incapable of cross-examining the party. He is unrepresented by counsel. The witness who appeared before him may have left the country before the trial and may not be present at the trial. The evidence is frequently not well taken, and it may be very different from what it would have been if the witness had been cross-examined. It is, nevertheless, used against him without any opportunity of bringing out those facts which might have completely altered the complexion of the evidence had he been subjected to cross-examination; so where there is no cross-examination I think it is better that the evidence should not be produced."

In view of that amendment, a conviction was quashed in *R. v. SNELGROVE*(1906), 12 C.C.C.189, where the deposition upon a preliminary hearing (where accused was not represented by counsel) of a witness who had died before the trial, had been admitted. *Per* Russell, J.:

> "I am of opinion that section 687 of the Code provides exhaustively for the cases in which and the conditions under which the depositions taken on the preliminary examination can be used on the trial in the event of the deponent's decease, and that the common law procedure has been superseded . . . . . the comparison of the original with the present form makes it very obvious that the intention of Parliament was the same as that expressed by the Minister of Justice in his explanation of the amendment."

However, the word "he" appears to have been inserted again in the general revision of 1906.

In *R. v. BELL*(1929), 53 C.C.C.44, the court under s.999 admitted the deposition of a witness who had left the jurisdiction.

OLD CODE:

1000. Deposition taken in the preliminary or other investigation of any charge against any person may be read as evidence in the prosecution of such person for any other offence, upon the like proof and in the same manner, in all respects, as they may, according to law, be read in the prosecution of the offence with which such person was charged when such depositions were taken.

1028. Whenever it is provided that the offender shall be liable to different degrees or kinds of punishment, the punishment to be inflicted shall, subject to the limitations contained in the enactment be in the discretion of the court or tribunal before which the conviction takes place.

In *ROSE v. R.*(1946), 88 C.C.C.114, at p.124 the following appears: "By a 'full opportunity to cross-examine' is meant that the defence is given every opportunity which the Court and the law gives him to examine a witness. The refusal of the witness to answer does not affect the opportunity to cross-examine. It is the opportunity to cross-examine and not the actual cross-examination, which the law envisages."

and also "the fact that he *(i.e.,* defence counsel) had the opportunity is decisive."

In *R. v. BANTA SINGH*(1942), 78 C.C.C.266, it was held that the reference to cross-examination applies to the opportunity, and not to the cross-examination that actually took place, bearing in mind that a justice holding a preliminary inquiry is not bound by the information but may send the accused for trial on any charge that appears on the depositions.

PART XX.

PUNISHMENTS, FINES, FORFEITURES, COSTS AND RESTITUTION OF PROPERTY

Punishment Generally.

"COURT."

620. In this Part, except as provided in section 640, "court" means a court, judge, justice or magistrate and includes a person who is authorized to exercise the powers of a court, judge, justice or magistrate to impose punishment.

There was no counterpart of this section in the repealed Code. It has been inserted for clarity and to avoid the need for repetition in the sections that follow.

DEGREES OF PUNISHMENT.—Discretion as to punishment.—Imprisonment in default where term not specified.—Cumulative punishments.

621. (1) Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence.

(2) Where an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, subject to the limita-

Section 621—*continued*

tions prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence, but no punishment is a minimum punishment unless it is declared to be a minimum punishment.

(3) Where an accused is convicted of an offence punishable with both fine and imprisonment and a term of imprisonment in default of payment of the fine is not specified in the enactment that prescribed the punishment to be imposed, the imprisonment that may be imposed in default of payment shall not exceed the term of imprisonment that is prescribed in respect of the offence.

(4) Where an accused

***(a)* is convicted while under sentence for an offence, and a term of imprisonment, whether in default of payment of a fine or otherwise, is imposed;**

***(b)* is convicted of an offence punishable with both fine and imprisonment, and both are imposed with a direction that, in default of payment of the fine, the accused shall be imprisoned for a term certain; or**

***(c)* is convicted of more offences than one before the same court at the same sittings, and**

(i) more than one fine is imposed with a direction in respect of each of them that, in default of payment thereof, the accused shall be imprisoned for a term certain,

(ii) terms of imprisonment for the respective offences are imposed, or

(iii) a term of imprisonment is imposed in respect of one offence and a fine is imposed in respect of another offence with a direction that, in default of payment, the accused shall be imprisoned for a term certain,

the court that convicts the accused may direct that the terms of imprisonment shall be served one after the other.

Subsec.(1) is the former s.1028. It was s.932 in the Code of 1892 and came from 32-33 Vict., c.29, s.1.

Subsec.(2) is derived from the former ss.1029 and 1054. These were respectively ss.934 and 953 in the Code of 1892, and came from 32-33 Vict., c.29, ss.89 and 90. The subsection has been re-drawn to make it clear that the court has a discretion as to penalty unless a penalty is expressly stated to be a minimum. There was previously a conflict of judicial opinion as to the existence of such discretion where, *e.g.*, an offender was "liable to a fine of $25.00." It was held in *R. v. THOMPSON*(1920), 47 O.L.R.103; *R. v. SMITH*(1923), 38 C.C.C.327; *R. v. HARRISON and O'KELLY*(1924), 42 C.C.C.259; and *ASSOC. PHARMACEUTIQUE de QUEBEC v. DEMERS*(1928), (unreported), that in such a case the penalty was fixed and that the court had no discretion to impose a lesser one. The contrary was held in a dissenting judgment in *R. v. SMITH, supra; R. v. BELL*(1924), 42 C.C.C.253; and *R. v. FRASER* (1944), 81 C.C.C.114. Mr. (now Mr. Justice) Fernand Choquette also, in an article in 8 Rev. du Droit 136, came to the conclusion that there was a discretion.

OLD CODE:

1029. Whenever a fine may be awarded or a penalty imposed for any offence, the amount of such fine or penalty shall, within such limits, if any, as are prescribed in that behalf, be in the discretion of the court or person passing sentence or convicting, as the case may be.

1054. Every one who is liable to imprisonment for life, or for any term of years, or other term, may be sentenced to imprisonment for any shorter term: Provided that no one shall be sentenced to any shorter term of imprisonment than the minimum term, if any, prescribed for the offence of which he is convicted.

746. (1) Whenever a justice, upon any information or complaint, adjudges the defendant to be imprisoned, and the defendant is then in prison undergoing imprisonment upon conviction for any other offence, the warrant of commitment in respect of the subsequent conviction shall be forthwith delivered to the gaoler or other officer to whom it is directed.

(2) The justice who issued the same, if he thinks fit, may award and order therein that the term of imprisonment in respect of the subsequent conviction shall commence at the expiration of the term of imprisonment to which the defendant was previously sentenced.

1055. When an offender is convicted of more offences than one, before the same court or person at the same sittings, or when any offender, under sentence or undergoing punishment for one offence, is convicted of any other offence, the court or person passing sentence may, on the last conviction, direct that the sentences passed upon the offender for the several offences shall take effect one after another.

740. Where, by virtue of an Act or law so authorizing, the justice by his conviction adjudges against the defendant payment of a penalty or compensation, and also imprisonment, as punishment for an offence, he may, if he thinks fit, order that the imprisonment in default of distress or of payment, shall commence at the expiration of the imprisonment awarded as a punishment for the offence.

(2) The like proceeding may be had upon any conviction or order made in accordance with this or the last preceding section as if the Act, or law authorizing the conviction or order had expressly provided for a conviction or order in the terms permitted by this or the last preceding section.

1035. (4) When an offender is convicted of more offences than one before the same court or person at the same sittings and more than one fine is imposed with the provision that in default of payment of the same the offender shall be imprisoned for a definite term, the court or person may direct that such terms of imprisonment shall take effect one after the other.

A statutory provision for a minimum penalty was considered in *Ex p. HENDERSON, Ex. p. STEWART et al.*(1929), 52 C.C.C.95. In Stewart's case the accused was convicted under the *Excise Act* and sentenced to be imprisoned for 6 months and to pay a fine of $100 or in default to be imprisoned for a further term of two months. The *Excise Act* provided a fine of not less than $200 and imprisonment for not more than 12 months and not less than 1 month, and in default of payment, a further term of imprisonment not exceeding 12 months and not less than 6 months.

Section 621—*continued*

A Judge of the Supreme Court dismissed an application for a writ of *habeas corpus*. He said:

"There seems to be no doubt however, that the magistrate had no power to impose less than the minimum fine or to order imprisonment, in default of payment of fine and costs, for a term shorter than prescribed by statute",

and that such an adjudication was bad and illegal.

Subsec.(3) is new and is inserted for clarity.

Subsec.(4)(a) combines the powers to impose consecutive sentences which were contained in the former ss.746 and 1055. These were respectively ss.877 and 954 in the Code of 1892, the former coming from R.S.C. 1886, c.178, s.69, and the latter from 32-33 Vict., c.29, s.92.

At common law, apart from statutory provisions, consecutive sentences might be imposed for felonies but not for misdemeanours.

It has been held (*Ex p. BISHOP*(1895), 1 C.C.C.118), that where two terms of imprisonment are imposed at the same time and no direction given, there is no presumption that they are to run concurrently, but later authorities do not accord with this view. The following appears in *Re HICKS*(1948), 92 C.C.C.154:

"By implication, in the absence of special direction that the sentences should run consecutively, the sentences run concurrently. A decision of the Quebec Court of King's Bench in its appeal division supports this view: *R. v. BOISSEAU*(1923), 36 Que. K.B.213. The Courts in England have adopted the same view." *(R. v. PHILLIPS*(1921), 15 Cr. App. R.161; *R. v. BELL*(1922), 16 Cr. App. R.105, cited.)

There is a suggestion in *R. v. ROMANCHUK* (1924), 42 C.C.C.231, at p. 245, that s.746 did not apply to prosecutions under provincial statutes, but this should be compared with *R. v. FIALKA*(1942), 77 C.C.C. 210. In that case accused was sentenced for two offences against a provincial Act, to terms of imprisonment to be served consecutively. On the same day he was sentenced on conviction under the Cr. Code for obstructing a peace officer to a term of 6 months to commence after the expiration of the other two terms. Robertson, C.J.O., at p.212:

"It is argued that s.1055 of the *Criminal Code* does not apply because the offences referred to in it must be deemed to be offences under the *Criminal Code*. I do not know that this is so, and no authority was submitted for the proposition.

It is, I think, sufficient to refer to s.3 of the *Prisons and Reformatories Act*, R.S.C. 1927, c.163, which is as follows: 'The term of imprisonment in pursuance of any sentence shall, unless otherwise directed in the sentence, commence on and from the day of passing such sentence, but no time during which the convict is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced'. This section plainly recognizes, even if it does not grant, power to direct the postponement of the day when a term of imprisonment shall commence, when there is proper reason for such a postponement . . . . . We know of no law that made it illegal or improper for

the Magistrate to postpone the commencement of this sentence as he did." (See now s.624.)

Par.(4)(b) is new and fills what seems to have been a gap in the repealed Code. In *GORMLEY v. R.*(1946), 87 C.C.C.95 (P.E.I.), the following appears, *per* Campbell, C.J.:

"The only reference to the question of cumulative punishments in the Criminal Code is s.1055 which officially implies that in the absence of a direction to the contrary, two sentences which are passed at the same sittings of a Court or Magistrate must be regarded as running concurrently. There is a little more difficulty in the application of this assumption to imprisonment awarded in default of payment of fine, but substantially the principle appears to be the same."

Par.(4) (c) is derived from the former ss.740 and 1035(4) which appeared in s.872(3) and (4) in the Code of 1892, and 1938, c.44, s.50 respectively.

It should be observed that, if it is intended that sentences shall run consecutively, the direction must appear in the warrants of committal. A memorandum, as by numbering the warrants, is not sufficient: *R. v. PAINTING*(1943), 79 C.C.C.274.

Upon the subject of cumulative punishments generally, reference may be made to *R. v. WOOLLEY*(1909), 3 Cr. App. R.57, in which a prisoner was sentenced to 6 months' imprisonment for breach of prison rules and misconduct while serving another sentence of 18 months. In the first warrant of committal made out for the second term the sentence was erroneously stated to be concurrent, but an amended warrant was made out changing "concurrent" to "consecutive". The prisoner's appeal was dismissed.

"In the case of an independent subsequent offence like this we are doubtful of the legality of a concurrent sentence. If a judge did not desire to inflict any further punishment, the proper course would be to pass a nominal sentence, not one to run concurrently."

However, *R. v. FIELDER*(1926), 135 L.T.R.64 (C.C.A.), is cited in Hals. 2nd ed., vol. 6, p.229(n), as authority for the proposition "despite doubts expressed in *R. v. WOOLLEY*," that a court has power to order a sentence for an offence tried subsequently to run concurrently with a sentence which is being served.

In *R. v. BALDWIN and O'SULLIVAN*(1945), 84 C.C.C.159, Robertson, C.J.O., considered that an exception should be made in the case of attacks on prison guards, citing *R. v. PHILLIPS*(1921), 15 Cr. App. R. 161. See note to s.129, *ante*.

See also s.446 (person in prison) and s.623 (corporations).

FINE IN LIEU OF OTHER PUNISHMENT.—Fine in addition to other punishment.—Imprisonment in default of payment.

622. (1) An accused who is convicted of an indictable offence punishable with imprisonment for five years or less may be fined in addition to or in lieu of any other punishment that is authorized, but an accused shall not be fined in lieu of imprisonment where the offence of which he is convicted is punishable by a minimum term of imprisonment.

Section 622—*continued*

(2) An accused who is convicted of an indictable offence punishable with imprisonment for more than five years may be fined in addition to, but not in lieu of, any other punishment that is authorized.

(3) Where a fine is imposed under this section, a term of imprisonment may be imposed in default of payment of the fine, but no such term shall exceed

***(a)* two years, where the term of imprisonment that may be imposed for the offence is less than five years, or**

***(b)* five years, where the term of imprisonment that may be imposed for the offence is five years or more.**

This is derived from the former s.1035(1) & (2) which was part of s.958 in the Code of 1892 as amended in 1893. It was based upon R.S.C. 1886, c.181, s.31.

This section effects a change by adding provision that in the cases where a minimum punishment is prescribed, as for example in section 222, there cannot be a fine in lieu of imprisonment. In other words, it is clear that where a minimum term of imprisonment is provided, it must be imposed. Previously, *e.g.*, in ss.377(1) and 229(2), it had been necessary to declare that s.1035 did not apply, where that was the intention.

FINES ON CORPORATIONS.—Enforcement.

623. (1) Notwithstanding subsection (2) of section 621, a corporation that is convicted of an offence is liable, in lieu of any imprisonment that is prescribed as punishment for that offence,

***(a)* to be fined in an amount that is in the discretion of the court, where the offence is an indictable offence, or**

***(b)* to be fined in an amount not exceeding one thousand dollars, where the offence is a summary conviction offence.**

(2) Where a fine that is imposed under subsection (1) is not paid forthwith the prosecutor may, by filing the conviction, enter as a judgment the amount of the fine and costs, if any, in the superior court of the province in which the trial was held, and that judgment is enforceable against the accused in the same manner as if it were a judgment rendered against the accused in that court in civil proceedings.

Par.(1)(a) is the former s.1035(3) which came into the Code in 1909, c.9, s.3. The rest is new and makes provisions for the recovery of fines, as distinct from penalties or forfeitures. Under this provision the fine may be entered as a judgment debt. See also s.627 *post*.

This section replaces also the former s.739 which provided for distress.

COMMENCEMENT OF SENTENCE.—Time pending appeal.—When time begins to run.—Where fine imposed.—Application for leave to appeal.

624. (1) A sentence commences when it is imposed, except where a relevant enactment otherwise provides or the court otherwise orders.

(2) The time during which a convicted person

***(a)* is at large on bail, or**

OLD CODE:

1035. Any person convicted by any magistrate under Part XVI or by any court of an indictable offence punishable with imprisonment for five years or less may be fined in addition to, or in lieu of any punishment otherwise authorized, in which case the sentence may direct that in default of payment of his fine the person so convicted shall be imprisoned until such fine is paid, or for a period not exceeding five years, to commence at the end of the term of imprisonment awarded by the sentence, or forthwith as the case may require.
(2). Any person convicted of an indictable offence punishable with imprisonment for more than five years may be fined, in addition to, but not in lieu of, any punishment, otherwise ordered, and in such case, also, the sentence may in like manner direct imprisonment in default of payment of any fine imposed.
(3) Any corporation, convicted of an indictable or other offence punishable with imprisonment, may in lieu of the prescribed punishment be fined in the discretion of the court before which it is convicted.

. . . . . .

739. For wording of this section see p. 1035.

1054B. (1) Subject to any provision made by statute or to any order made by the court, all sentences shall commence from the date of sentence.
(2) The time during which a person convicted is admitted to bail pending the determination of any appeal and, subject to any directions which the court appealed to may give to the contrary on any appeal, the time during which such person is detained in gaol or other place of confinement pending the determination of an appeal by him shall not count as part of any term of imprisonment under his sentence; and any imprisonment under the sentence of the appellant, whether it is the sentence passed by the trial court or the sentence passed by the court appealed to, shall, subject to any directions which may be given by the court appealed to, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is

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(b) is confined in a prison or other place of confinement, pending the determination of an appeal by that person,
does not count as part of any term of imprisonment imposed pursuant to his conviction, but paragraph (b) is subject to any directions that the court appealed to may give.

(3) Notwithstanding subsection (1), a term of imprisonment, whether imposed by a trial court or by the court appealed to, commences or shall be deemed to be resumed, as the case requires,

(a) on the day on which the appeal is determined, where the convicted person is then in custody, and

(b) on the day on which the convicted person is arrested and taken into custody under the sentence, where he is not in custody,

but paragraph (a) is subject to any directions that the court appealed to may give.

(4) Nowithstanding subsection (1), where the sentence that is imposed is a fine with a term of imprisonment in default of payment, no time prior to the day of execution of the warrant of committal counts as part of the term of imprisonment.

(5) An application for leave to appeal is an appeal for the purposes of this section.

Section 624—*continued*

This section is derived from the former s.1054B. It was passed as 1950, c.11, s.20 in order to clarify the provisions relating to the commencement of sentences and to remove doubts in regard thereto that had arisen under Code s.1019(2), s.3 of the *Prisons and Reformatories Act*, and ss.47 (2) and 49(4) of the *Penitentiary Act*, 1939, all of which were repealed by the Act of 1950. Subsec.(4) of s.1054B made a distinction between persons sentenced to serve imprisonment in a penitentiary and those sentenced to other imprisonment, but that distinction has been removed in the revision.

In *R. v. PATTERSON*(1946), 87 C.C.C.86, the Ontario Court of Appeal altered a sentence passed on Aug. 28th, 1946, to date from Apr. 6th, 1946, so as to make it run from the day on which it was pronounced. The following appears:

"No doubt, a Magistrate, in determining what sentence of imprisonment should be imposed, may take into consideration the time, if any, that the prisoner has been in custody between the date of conviction and the date of imposing the sentence, or even the time that the prisoner has been under arrest under the charge on which he is convicted. The proper course in such a case would, however, appear to be to give effect to any such consideration, in a proper case, by abbreviating the term of imprisonment to be imposed. Time elapsed before the sentence is imposed cannot strictly be regarded as part of the term of imprisonment imposed by the sentence.

What the Magistrate has done in the present case, however, is to direct that the term of imprisonment imposed for the offence in question, shall run from a date months before the offence was committed, and the only ground for so directing is that, for that period, the prisoner was under sentence for some other offence. The time so served in prison can have no relation whatever to this charge, and to treat it as time so served can no more be justified than could a similar direction be justified if the prisoner had been a free man in that period."

This case was followed in *R. v. SLOAN*(1947), 87 C.C.C.198, in which accused was sentenced on November 1st, 1946, to a term of imprisonment to date from June 27, 1946, the date of his arrest. The following appears:

"This court has had occasion recently to point out in *R. v. PATTERSON, (supra)*, that there is no authority for the 'dating back of any sentence.' The sentence can only bear the date on which it is imposed and any term of imprisonment contained therein cannot begin to run earlier than the date of the sentence itself."

The principle of these two cases was reaffirmed in *R. v. DESCHAMPS* (1951), 100 C.C.C.191, in which also sentence had been imposed to run from the date of arrest. It was held that the law in this respect was not altered when s.1054B was passed:

"In my opinion the reasoning which led to the Court's conclusion in the *PATTERSON* case applies with equal force to the provisions of s-s.(1) of s.1054B of the Code . . . . . I cannot glean from the new provision any intention to alter the law as it previously stood; in fact to me the former provisions are quite interchangeable in meaning with the present one, ..."

OLD CODE:

Section 1054B—continued

determined, and, if he is not in custody, as from the day on which he is received into prison under the sentence.

(3) Where the sentence is a fine with a term of imprisonment in default of payment, no time prior to the execution of the warrant of commitment shall count as part of the term of imprisonment.

(4) Where a person is sentenced to imprisonment in a penitentiary, no time spent in gaol or other place of confinement prior to the expiration of the time limited for appeal, shall count as part of any term of imprisonment under his sentence, but if he gives to the committing magistrate or other proper officer a written notice of his election not to appeal, any time spent in custody thereafter shall count as part of the term of imprisonment under his sentence.

(5) An application for leave to appeal is an appeal for the purposes of this section.

1035A. (1) Where a term of imprisonment is imposed by any court in respect of the non-payment of any sum of money, that term shall, upon payment of a part of such sum, be reduced by a number of days bearing as nearly as possible the same proportion to the total number of days in the term as the sum paid bears to the sum in respect of non-payment of which the imprisonment is imposed: Provided that, in reckoning the number of days by which any term of imprisonment would be reduced under this section, the first day of imprisonment shall not be taken into account.

(2) Payment may be made to the person having lawful custody of the prisoner, or to such other person as the Attorney General of the province where the prisoner was convicted may direct.

The new section will necessarily await interpretation in the light of *R. v. DESCHAMPS.*

See also s.621 as to cumulative punishments.

REDUCTION OF IMPRISONMENT ON PART PAYMENT.—Minimum which can be accepted.—To whom payment made.—Application of money paid.—"Penalty."

625. (1) Where a term of imprisonment is imposed in default of payment of a penalty, the term shall, upon payment of a part of the penalty, be reduced by the number of days that bears the same proportion to the number of days in the term as the part paid bears to the total penalty.

(2) No amount offered in part payment of a penalty shall be accepted unless it is sufficient to secure reduction of sentence of one day, or some multiple thereof, and where a warrant of committal has been issued, no part payment shall be accepted until any fee that is payable in respect of the warrant or its execution has been paid.

(3) Payment may be made under this section to the person who has lawful custody of the prisoner or to such other person as the Attorney General directs.

(4) A payment under this section shall, unless the order imposing the penalty otherwise provides, be applied to the payment in full of costs and charges, and thereafter to payment in full of compensation or damages that are included in the penalty, and finally to

Section 625—*continued*

payment in full of any part of the penalty that remains unpaid.

(5) In this section, "penalty" means all the sums of money, including fines, in default of payment of which a term of imprisonment is imposed and includes the costs and charges of committing the defaulter and of conveying him to prison.

This is the former s.1035A which was enacted by 1947, c.55, s.32. Subsecs.(4) & (5), which appeared to involve matters of accounting administration, are not reproduced. The section contemplates part payment both before and after the issue of a warrant of committal. See also s.694(3) *post*.

FINES AND PENALTIES GO TO PROVINCIAL TREASURER.—Exception.—Direction for payment to municipality.—By Lieutenant-Governor.—By Governor in Council.—Province of Ontario.

626. (1) Where a fine, penalty or forfeiture is imposed or a recognizance is forfeited and no provision, other than this section, is made by law for the application of the proceeds thereof, the proceeds belong to Her Majesty in right of the province in which the fine, penalty or forfeiture was imposed or the recognizance was forfeited, and shall be paid by the person who receives them to the treasurer of that province.

(2) Where

***(a)* a fine, penalty or forfeiture is imposed**

(i) in respect of a violation of a revenue law of Canada,

(ii) in respect of a breach of duty or malfeasance in office by an officer or employee of the Government of Canada, or

(iii) in respect of any proceedings instituted at the instance of the Government of Canada in which that government bears the costs of prosecution; or

***(b)* a recognizance in connection with proceedings mentioned in paragraph *(a)* is forfeited,**

the proceeds of the fine, penalty, forfeiture or recognizance belong to Her Majesty in right of Canada and shall be paid by the person who receives them to the Receiver General of Canada.

(3) Where a provincial, municipal or local authority bears, in whole or in part, the expense of administering the law under which a fine, penalty or forfeiture is imposed or under which proceedings are taken in which a recognizance is forfeited,

***(a)* the Lieutenant-Governor in Council may, from time to time, direct that the proceeds of a fine, penalty, forfeiture or recognizance that belongs to Her Majesty in right of the province shall be paid to that authority, and**

***(b)* the Governor in Council may, from time to time, direct that the proceeds of a fine, penalty, forfeiture or recognizance that belongs to Her Majesty in right of Canada shall be paid to that authority.**

(4) Where the proceeds of a fine, penalty, forfeiture or recognizance belong, by virtue of this section, to Her Majesty in right of the Province of Ontario, but a municipal or local authority in that province bears, in whole or in part, the expense of administering

OLD CODE:

Section 1035A—continued

(3) No amount tendered in part payment of the said sum shall be accepted unless it is the amount required to secure one day's reduction of sentence, or some multiple thereof; and when a warrant of distress or commitment has been issued, no part payment shall be accepted until the fee, if any, payable for such warrant has been discharged.

(4) The person to whom payment is made shall pay the money so received forthwith to the registrar of the Superior Court or clerk of the court of the county in which the conviction was made or to such other person as the Attorney General of the province in which the prisoner was convicted may direct.

(5) The person to whom payment is made shall upon receipt thereof immediately determine the number of days by which the term of imprisonment is reduced, and forthwith, in case a warrant of distress or commitment has been issued, notify the appropriate police officer or warden or governor of the prison, as the case may require, of such payment of reduction.

(6) Unless the order adjudging the payment of the whole sum otherwise directs, the amount received shall be applied, firstly, towards the payment in full or in part of any costs which may have been ordered to be paid by the prisoner; secondly, towards the payment in full or in part of any damages or compensation which may have been ordered to be paid by the prisoner; and, thirdly, towards payment of any fine.

1036. Whenever no other provision is made by any law of Canada for the application of any fine, penalty or forfeiture imposed for the violation of any law or of the proceeds of an estreated recognizance, the same shall be paid over by the magistrate or officer receiving the same to the treasurer of the province in which the same is imposed or recovered, except that

(a) all fines, penalties and forfeitures imposed in respect of the breach of any of the revenue laws of Canada, or imposed upon any officer or employee of the Government of Canada in respect of any breach of duty or malfeasance in his office or employment, and the proceeds of all recognizances estreated in connection with proceedings for the prosecution of persons charged with such breaches or malfeasance; and

(b) all fines, penalties and forfeitures imposed for whatever cause in any proceeding instituted at the instance of the Government of Canada or of any department thereof in which that Government bears the cost of prosecution, and the proceeds of all recognizances estreated in connection with such proceedings, shall belong to His Majesty for the public uses of Canada, and shall be paid by the magistrate or officer receiving the same to the Minister of Finance and form part of the Consolidated Revenue Fund in Canada:

provided, however, that with respect to the province of Ontario the fines, penalties and forfeitures and proceeds of estreated recognizances first mentioned in this section shall be paid over to the municipal or local authority where the municipal or local authority wholly or in part bears the expense of administering the law under which the same was imposed or recovered.

(2) Nothing in this section contained shall affect any right of a private person suing as well for His Majesty as for himself, to the moiety of any fine, penalty or forfeiture recovered in his suit.

(3) The Lieutenant Governor in Council may from time to time direct that any fine, penalty or forfeiture, or any portion thereof paid over to the treasurer of

Section 626—*continued*

the law under which the fine, penalty or forfeiture was imposed or the recognizance was forfeited, the proceeds shall, notwithstanding anything in this section, be paid to that authority.

This combines the former ss.1036 and 1037, omitting s.1036(2). This has been dropped because the former ss.1041, 1042 and 1043, which dealt with the payment of moieties, were repealed in 1950.

Provisions in this connection adapted from 31 Vict., c.1 and 49 Vict., c.48, appeared in *An Act respecting Fines and Forfeitures,* R.S.C. 1886, c.180, and came into the Code as ss.927 and 928. The latter was re-numbered later as s.1038. The former later became s.1036, the original section being amended by 1900, c.46, s.3 to make fines, not otherwise provided for, payable to the province. The power of the Lieutenant Governor now set out in s.626(3)(a) was added by 1909, c.9, s.2. The provision relating to Ontario, where the local authorities bear the cost of administration, was added by 1922, c.16, s.8. In that connection reference may be made to *TORONTO v. R.*(1931), 56 C.C.C.273, a contest between the city and the province in which the latter argued unsuccessfully that the special provision was *ultra vires.* In *TORONTO v. ATTORNEY GENERAL OF CANADA*(1945), 85 C.C.C.1, it was held by the Privy Council that the special provision referred only to fines that otherwise would go to the provincial treasurer, and not to those especially appropriated to the Dominion Minister of Finance. See also *WINDSOR v. ATTORNEY GENERAL OF ONTARIO*(1933), 60 C.C.C.401.

As to proceeds of sale of explosives seized, see s.433 *ante.*

RECOVERY OF PENALTIES.—Limitation.

627 (1) Where a fine, pecuniary penalty or forfeiture is imposed by law and no other mode is prescribed for the recovery thereof, the fine, pecuniary penalty or forfeiture is recoverable or enforceable in civil proceedings by Her Majesty, but by no other person.

(2) No proceedings under subsection (1) shall be instituted more than two years after the time when the cause of action arose or the offence was committed in respect of which the fine, pecuniary penalty or forfeiture was imposed.

Subsec.(1) is the former s.1038, omitting the provision for actions by private informers. Subsec.(2) is the former s.1141.

For the origin of these sections it is necessary to go back to the Acts 18 Eliz. c.5, *An Act to redress Disorders in common Informers,* and 31 Eliz. c.5, s.5, (1589) *An Act concerning Informers.* The latter, in which the limitation of time appears, reads in part as follows:

"For that divers of the Queen's Majesty's Subjects be daily unjustly vexed and disquieted by divers common Informers upon Penal Statutes, notwithstanding any former statute that hath been heretofore made against their disorders; for remedy whereof. Be it enacted . . . . . .

V. And be it further enacted by the authority aforesaid, that all actions, suits, Bills, Indictments, or Informations, which after twenty days next after the end of this Session of Parliament shall be had, brought, sued or exhibited, for any forfeiture upon any penal statute made or to be made, whereby the forfeiture is or shall be limited to

OLD CODE:

Section 1036—continued

the province under this section be paid to the municipal or local authority if any, which wholly or in part bears the expenses of administering the law under which the same was imposed or recovered, or to be applied in any other manner deemed best adapted to attain the objects of such law and secure its due administration.

1037. The Governor in Council may, from time to time, direct that any fine, penalty or forfeiture, or any portion thereof, which would otherwise belong to the Crown for the public uses of Canada, be paid to any provincial, municipal or local authority, which wholly or in part bears the expenses of administering the law under which such fine, penalty or forfeiture is imposed, or that the same be applied in any other manner deemed best adapted to attain the objects of such law and to secure its due administration.

1038. Whenever any pecuniary penalty or any forfeiture is imposed for any violation of any Act and no other mode is prescribed for the recovery thereof, such penalty or forfeiture shall be recoverable or enforceable, with costs, in the discretion of the court, by civil action of proceeding at the suit of His Majesty only, or of any person or corporation suing as well for His Majesty as for such person or corporation in any form of action allowed in such case by the law of the province in which it is brought, and before any court having jurisdiction to the amount of the penalty in cases of simple contract.

(2) If no other provision is made for the appropriation of any penalty or forfeiture so recovered or enforced, one moiety shall belong to His Majesty and the other moiety shall belong to the person or corporation suing for the same, if any, and if there is none, the whole shall belong to His Majesty.

1141. No action, suit or information shall be brought or laid for any penalty or forfeiture under any Act, except within two years after the cause of action arises or after the offence for which such penalty or forfeiture is imposed is committed, unless the time is otherwise limited by any Act or by-law.

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the Queen, her Heirs, or Successors only, shall be brought, sued or exhibited within two years next after the offence committed or to be committed against such Act Penal, and not after two years."

The above is referred to in Halsbury, 2nd Ed., Vol.20, p.766, as being still applicable.

The Code of 1892, in which these sections appear together as ss.929 and 930, refers to them as coming from R.S.C. 1886, c.180. This was *An Act respecting Fines and Forfeitures,* consisting of five sections, of which s.1 includes provisions contained in ss.1038(1) and 1039 (2) (moieties). S.5 covers what is now s.1141. R.S.C.1886, c.180, gives the origin of s.1038 as 31 Vict., c.1, s.7 part. That Act is an *Interpretation Act* and par.22 of s.7 contains the provisions of s.1038, except that it does not refer to corporations, and that it does have after "simple contract" the words "upon the evidence of any one credible witness other than the plaintiff or party interested".

The origin of s.1141 is given as C.S.L.C. c.108, s.1, part and s.2; 1 R.S.N.B., c.140, s.2; 29 Vict.(N.S.), c.12, s.15 part; C.S.U.C. c.78, s.7 part.

The provisions of the statute of Lower Canada originate in 52 Geo.3, 1812, c.7, ss. 1 and 2, the preamble to which reads:

Section 627—continued

"Whereas the want of a law limiting the time during which penal actions may be brought in this province may cause the most serious inconveniences and daily occasion grievous suits against His Majesty's subjects in this province and abuses which it is essentially necessary to prevent".

The following cases are relevant: *LAMONTAGNE v. THE GROSVENOR APARTMENTS LTD.*(1910), 20 Que. K.B.221 was a penal action to recover $5,340 (penalties at the rate of $20. per day) against the defendant for maintaining an office and place of business without putting the word "limited" after its name outside its place of business.

The action was based on s.1038. Held:

"Penal actions, partaking of the nature of criminal suits, should follow strictly the forms prescribed by law. Therefore, an action to recover penalties imposed by a federal law, taken in the form *qui tam,* is irregular, the recourse existing only in favour of the Crown, or of the private party 'in his own name'."

The words *"qui tam"* are a short reference to the Latin *"qui tam pro domino rege quam pro se ipso in hac parte sequitur"* that is to say, "who sues on behalf of our Lord the King as well as for himself".

LAMONTAGNE v. GALBRAITH(1912), 13 Que. P.R.397: This was an action to recover a penalty for failing to register a marriage within 60 days as required by a provincial statute. It was held that the action was an action *qui tam* which could be brought by the plaintiff as well in his own name as in that of His Majesty—this by virtue of the coming into force of R.S.Q.1909, and that as that action was not outlawed against the Crown, it was not outlawed against the Plaintiff.

BOIVIN v. GREGOIRE(1934), 72 Que. S.C.529, at p.534:

"Criminal offences are defined in the Criminal Code and a person cannot be condemned under the Code unless he has committed an offence declared in it. Sections 1140, 1141 and 1142 cannot, then, apply to matters other than those mentioned in the Criminal Code."

R. v. MEEHAN, [1924]2 W.W.R.1231, (C.C.J.): This was an appeal by the Crown from the decision of a police magistrate dismissing an information under the *Income War Tax Act* on the ground that the information was not laid within 6 months of the default.

It was held that as the *Inland Revenue Act,* s.13(c) applies to all internal taxations, and as the limitation under that Act (s.135) was 2 years, the information in the instant case was not out of time, in view of the fact that s.1142 applied *"if no time is specially limited* for making any complaint, or laying any information, in the Act or law relating to the particular case."

In *R. v. CONTAINER MATERIALS LTD.*(1939), 72 C.C.C.383, a judgment dismissing a motion to quash an indictment for conspiracy, it was said, at p.387:

"Sec.1038 disposes of the objection that there is no means of enforcing a fine on a corporation outside the provinces."

The elimination of moieties by the repeal of ss.1041, 1042 and 1043 by 1950, c.11, s.18 would appear to do away to some extent with the need

OLD CODE:

1048. A court on the trial of any person on an indictment may, if it thinks fit, upon the application of any person aggrieved and immediately after the conviction of the offender, award any sum of money, not exceeding one thousand dollars, by way of satisfaction or compensation for any loss of property suffered by the applicant through or by means of the offence of which such person is so convicted.

(2) The amount awarded for such satisfaction or compensation shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and the order for payment of such amount may be enforced in such and the same manner as in the case of any costs aforesaid ordered by the court to be paid.

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for these provisions, but on the other hand, the preambles which have been quoted show that they were regarded as affording the subject a proper safeguard. The elimination of the action *qui tam* has been described, with reference to similar legislation introduced in the United Kingdom in 1951, ending "a centuries-old custom that enabled Britons to make money by spying on each other."

COMPENSATION FOR LOSS OF PROPERTY.—Enforcement.—Moneys found on the accused.

628. (1) A court that convicts an accused of an indictable offence may, upon the application of a person aggrieved, at the time sentence is imposed, order the accused to pay to that person an amount by way of satisfaction or compensation for loss of or damage to property suffered by the applicant as a result of the commission of the offence of which the accused is convicted.

(2) Where an amount that is ordered to be paid under subsection (1) is not paid forthwith the applicant may, by filing the order, enter as a judgment, in the superior court of the province in which the trial was held, the amount ordered to be paid, and that judgment is enforceable against the accused in the same manner as if it were a judgment rendered against the accused in that court in civil proceedings.

(3) All or any part of an amount that is ordered to be paid under subsection (1) may be taken out of moneys found in the possession of the accused at the time of his arrest, except where there is a dispute as to ownership of or right of possession to those moneys by claimants other than the accused.

This comes from the former s.1048, which was s.836 in the Code of 1892 and came from 33 & 34 Vict., c.23, s.4(Imp.).

In this section it is to be observed that the limitation of one thousand dollars under the old section has been removed because, as the Commission stated in its report, the amount found in the possession of the convicted person sometimes exceeds that amount and such a limitation might work injustice. This would be true, *e.g.*, in the case of bank robberies.

The Committee of the House of Commons altered the clause from its form in the draft Bill, the differences being that the order may be entered as a judgment and enforced accordingly, and that the order may be made against moneys found in the possession of the accused at the time of his

Section 628—*continued*

arrest except where there is dispute as to ownership or right of possession on the part of claimants other than the accused.

Another point to be observed in connection with this section is that by virtue of the definition of "court" in s.620, the order may be made by a magistrate acting under Part XVI. Doubt in this regard had previously been expressed in *Re MATHEWS*(1947), 88 C.C.C.344.

In *R. v. RAMSEY*(1946), 87 C.C.C.64, it was said that the right to be reimbursed for loss sustained through theft is a civil right and that Parliament has attempted to deal with it only in a limited way in the *Criminal Code*. It was held too that where a conviction for theft was made under the former s.379, the magistrate had no power to order reimbursement when the money was not found on accused at time of arrest and was not in court, and when there had not been an application under s.1048.

R. v. GRAVES, [1950]O.W.N.238, was an appeal from an order awarding $1,000 under s.1048 on conviction of accused on a charge of breaking and entering. It was held that the order was part of the "sentence" and that therefore there was an appeal, but that the appeal failed on the ground that a Court of Appeal should not and will not interfere with a discretionary order "except in well-defined and well-understood classes of cases" in which the present did not fall.

With reference to subsec.(3), the following appears in *R. v. LEBANSKY*(1938), 70 C.C.C.260, at p.263 interpreting the former s.1044, which is not continued in this Code, and s.1048:

> "The two sections, as I would construe them, do not appear to be inequitable if we consider (which seems to have been the reason why Parliament enacted as I think it did) that it is only in very rare cases indeed that money found on an accused on his arrest for such offences as we have here, are not in some way, either by exchange or otherwise, the produce of the crime charged, although this cannot always be shown with certainty. It is quite in order for a solicitor to take an assignment of such monies, but it must be with the realization that if his client is convicted and a compensation award follows, the latter will take priority."

It was held that money found on the accused at time of arrest was "his own" and subject to an order for compensation regardless of his assignment of it.

See s.581 *ante*, for definition of "sentence" and s.595 *ante*, as to suspension of order pending appeal.

Upon similar legislation in England, it was held in *R. v. LOVETT* (1870), 11 Cox, C.C.602, that it was not intended to afford a means of compromising a criminal offence, but rather to give redress to the aggrieved party, and that the order was in addition to the punishment for the offence.

COMPENSATION TO *BONA FIDE* PURCHASERS.—Enforcement.—Moneys found on accused.

629. (1) Where an accused is convicted of an indictable offence and any property obtained as a result of the commission of the offence has been sold to an innocent purchaser, the court may, upon

OLD CODE:

1049. When any prisoner has been convicted, either summarily or otherwise, of any theft or other offence, including the stealing or unlawfully obtaining any property, and it appears to the court, by the evidence, that the prisoner sold such property or part of it to any person who had no knowledge that it was stolen or unlawfully obtained, and that money has been taken from the prisoner on his apprehension, the court may, on application of such purchaser and on restitution of the property to its owner, order that out of the money so taken from the prisoner, if it is his, a sum not exceeding the amount of the proceeds of the sale be delivered to such purchaser.

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the application of the purchaser after restitution of the property to its owner, order accused to pay to the purchaser an amount not exceeding the amount paid by the purchaser for the property.

(2) Where an amount that is ordered to be paid under subsection (1) is not paid forthwith the applicant may, by filing the order, enter as a judgment, in the superior court of the province in which the trial was held, the amount ordered to be paid, and that judgment is enforceable against the accused in the same manner as if it were a judgment rendered against the accused in that court in civil proceedings.

(3) All or any part of an amount that is ordered to be paid under subsection (1) may be taken out of moneys found in the possession of the accused at the time of his arrest, except where there is a dispute as to ownership of or right of possesion to those moneys by claimants other than the accused.

This comes from the former s.1049, and is widened to include property obtained by offences other than theft.

The section comes from 30 & 31 Vict., c.35, s.9, and appeared as section 837 in the Code of 1892, with the addition of the words "if it is his". There are no reported Canadian cases in which it was applied directly, but indirectly it comes into consideration with s.630 upon the general principle of restitution. However, certain authorities are pertinent to it.

The section is designed to correct the inequitable situation referred to in the report of the Imperial Commissioners (quoted *infra* s.630) which was emphasized by the House of Lords in *BENTLEY v. VILMONT* (1887), 12 App. Cas.471, where Lord Watson said, at p.477:

> "I do not think that, apart from statute law, a bona fide purchaser from one who has acquired the property of the goods by a contract of sale tainted with fraud stands in precisely the same relation to the original owner as a purchaser of stolen goods, without notice of the theft, in market overt. In the latter case the original owner and the purchaser in open market are to this extent in *pari casu*, that neither has done aught to mislead the other; whilst in the former case the original owner has intentionally given his fraudulent vendor an *ex facie* absolute and valid title to the goods, upon which purchasers without notice of the fraud are entitled to rely. *I have great difficulty in supposing that the legislature, as an incentive to the prosecution of crime, deliberately intended in the case where the property has been passed by the act of the original owner to deprive the honest purchaser both of his goods*

Section 629—*continued*

and of his money; but I have been unable to put a reasonable construction upon the language of sect.100 which will avoid that inequitable result." (Italics added).

See s.581 as to definition of "sentence" and s.595 as to suspension of order pending appeal.

ORDER FOR RESTITUTION OF PROPERTY.—Where no conviction.—When order not to be made.—By whom order executed.—Saving.

630. (1) Where an accused is convicted of an indictable offence the court shall order that any property obtained by the commission of the offence shall be restored to the person entitled to it, if at the trial the property is before the court or has been detained so that it can be immediately restored to that person under the order.

(2) Where an accused is tried for an indictable offence but is not convicted, and the court finds that an indictable offence has been committed, the court may order that any property obtained by the commission of the offence shall be restored to the person entitled to it, if at the time of the trial the property is before the court or has been detained, so that it can be immediately restored to that person under the order.

(3) An order shall not be made under this section in respect of

(a) **property to which an innocent purchaser for value has acquired lawful title,**

(b) **a valuable security that has been paid or discharged in good faith by a person who was liable to pay or discharge it,**

(c) **a negotiable instrument that has, in good faith, been taken or received by transfer or delivery for valuable consideration by a person who had no notice and no reasonable cause to suspect that an indictable offence had been committed, or**

(d) **property in respect of which there is a dispute as to ownership or right of possession by claimants other than the accused.**

(4) An order made under this section shall be executed by the peace officers by whom the process of the court is ordinarily executed.

(5) This section does not apply to proceedings against a trustee, banker, merchant, attorney, factor, broker or other agent entrusted with the possession of goods or documents of title to goods, for an offence under section 276, 277, 278 or 282.

This comes from the former s.1050, which was s.838 in the Code of 1892 as amended in 1893. The section is widened similarly to s.629. "If at the trial the property is before the court": see *R. v. SMITH, infra.*

Par.(3)(d) was added by the Senate Committee.

Reference to writs of restitution is not continued. In Short and Mellor's Crown Office Rules, 2nd ed., p.402, it is said that under modern English practice, these writs apply only to real property forcibly entered or detained.

Subsec.(5) comes from a proviso to s.100 of the *Larceny Act*, 1861 (Imp.), the bulk of the section coming from 7 & 8 Geo.IV, c.29, s.7, and 9

OLD CODE:

1050. If any person who is guilty of any indictable offence in stealing, or knowingly receiving, any property, is indicted for such offence, by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, or is tried before a judge or justice for such offence under any of the foregoing provisions and convicted thereof, the property shall be restored to the owner or his representative.

(2) In every such case the court or tribunal before which such person is tried for any such offence, shall have power to award, from time to time, writs of restitution for the said property or to order the restitution thereof in a summary manner.

(3) The court or tribunal may also, if it sees fit, award restitution of the property taken from the prosecutor, or any witness for the prosecution, by such offence, although the person indicted is not convicted thereof, if the jury declares, as it may do, or if, in case the offender is tried without a jury, it is proved to the satisfaction of the court or tribunal by whom he is tried, that such property belongs to such prosecutor or witness, and that he was unlawfully deprived of it by such offence.

(4) If it appears before any award or order is made, that any valuable security has been bona fide paid or discharged by any person liable to the payment thereof, or being a negotiable instrument, has been bona fide taken or received by transfer or delivery, by any person, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had, by any indictable offence, been stolen, or if it appears that the property stolen has been transferred to an innocent purchaser for value who has acquired a lawful title thereto, the court or tribunal shall not award or order the restitution of such security or property.

(5) Nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker or other agent entrusted with the possession of goods or documents of title to goods, for any indictable offence under sections three hundred and fifty-eight or three hundred and ninety of this Act.

795. The magistrate by whom any person has been convicted under the provisions of this Part may order restitution of the property stolen, or taken or unlawfully received, in any case in which the court, before whom the person convicted would have been tried but for the provisions of this Part, might by law order restitution.

Geo.IV, c.55, s.50(Imp.). Greaves' Cons. Acts, p.143, says "The last proviso introduced especially to protect persons who receive goods from factors &c. under such circumstances that their title to them is valid." See also 6 Geo.IV, c.94, and 5 & 6 Vict., c.39.

S.1050 was taken almost verbatim from the English *Larceny Act* of 1861, s.100, except for subsec.(3) referring to restitution in cases where there is no conviction. This provision is not in the English Act. It was in the Bill as passed in the House of Lords, but was struck out by the Select Committee of the Commons. It may be observed in passing, that the *Crimes Act* of New South Wales includes this provision.

In this connection also it is useful to note the report of the English

Section 630—*continued*

Commissioners, as follows:

"Finally, section 551 makes an alteration in principle on the existing law, to which we call attention. Where property has been stolen, no change in the property is produced by the theft, but a bona fide purchaser in market overt acquires under the common law a property superior to that of the true owner. By the general law merchant a bona fide purchaser of a negotiable instrument, though it may be from a thief, acquires a property superior to that of the true owner. By the common law, where property has been parted with under a contract obtained by fraud, the property passes, though it may be reclaimed and the contract rescinded; but the right of a bona fide purchaser for value before rescission is superior to that of the former owner. And by the Factors' Acts purchasers from agents entrusted with goods or the title of goods acquire a title superior to that of the true owner. The existing statute law, 24 and 25 Vict. c.96, s.100, however, rewards one who prosecutes with success by depriving the innocent purchaser in market overt, and the innocent purchaser of property obtained by a contract not yet rescinded, of the property which they have innocently acquired; yet at the same time the enactment excepts the cases of negotiable instruments and property pledged or sold by agents within the Factors' Acts. If there is any ground for these exceptions other than the fact that the mercantile classes who would suffer without them are vigilant and powerful, we cannot perceive it. We think that it is just and politic to protect the interest acquired by bona fide purchasers in all cases, and that it is a vicious principle to reward a prosecution at the expense of a third person. But at all events the rule should be uniform; and we suggest, as will be seen by sec.551, that the order of restitution should be effectual to put the person in possession who appears to the Court to be justly entitled to the property, but not to deprive the other claimant of his right to bring an action to recover it."

The following decisions of the English Courts may be noted:

In *R. v. GOLDSMITH*(1873), 12 Cox, C.C.594, it was held that the order was strictly limited to property identified at the trial as being the subject of the charge. It therefore did not extend to property in the possession of innocent third persons which was not produced and identified at the trial as being the subject of the indictment.

In *R. v. SMITH*(1873), 12 Cox, C.C.597, it was held that an order of restitution of properties stolen will extend only to such property as is produced and identified in the course of trial, and not to all the articles named in the indictment, unless so produced and identified and in the possession of the Court. It was held also in *R. v. JONES*(1881), 14 Cox, C.C.528, that restitution could be ordered to the owner only.

Upon the section generally, the case of *R. v. BEGUIN*(1922), 31 B.C.R.429, is to be noted. In that case the accused was charged with murder. A shotgun and rifle belonging to him were seized. He was acquitted and later made application for the return of the firearms. Hunter, C.J.B.C., said:

"To speak plainly, the only verdict open on the evidence was that of murder, and if the jury saw fit they could have added a recommendation to mercy, which no doubt would have been carried out. The result

is that a self-confessed murderer was allowed to go scot-free by a jury of his peers . . . . . I am now asked to add further discredit to the administration of justice by returning the weapons to the assassin. I reject the application."

In *BELL TELEPHONE CO. v. R. & ROZON*(1937), 75 Que. S.C.250, a petition for the return of telephone equipment seized under a search warrant was rejected. It was held that there is no general provision in the criminal law, permitting a third person whose interests may be prejudiced, to intervene in the trial of a person charged with an indictable offence, except in ss.635 (suspected goods seized) and 1050 which are special, and that the general recourse to an aggrieved party in such cases is provided by ss.1081 and 1085 (application to the Governor in Council). This situation, however, is unlikely to arise since the amendment of 1950 to s.641 exempting telephones from seizure. See now s.171(6), *ante*.

In *U.S. v. TOUNDER*(1914), 23 C.C.C.76, an order was made for the return to a prisoner held upon extradition proceedings, of money found on him at the time of his arrest, there being no proof of its identity with the money stolen. It was held that s.1050 did not apply.

As to subsec.(3) (now subsec.(2)), in *R. v. McINTYRE*(1877), 2 P.E.I. 154, an order was made to return to a defendant acquitted of the theft of money, certain money which had been found in his possession. The statute provided that when a person was not convicted the court might order the restitution of the property where it "clearly appears" to have been stolen. The Court said, at p.160:

"The taking away property from an accused person found not guilty and giving it to the prosecutor is a power which should be exercised with great caution, and I think was intended to apply only to cases where the accused evidently can lay no claim to the property, and not to cases like the present, where money which cannot be identified may or may not be part of the property stolen."

Under the Code, it was held in *R. v. HAVERSTOCK*(1901), 5 C.C.C. 113, that an order should be made restoring certain money to the prisoner on the ground that there was no proof that it belonged to the prosecutors and that the Code c.838(1050) authorized the restitution of property only on such proof. But *quaere*, whether the order could not have been made under s.1048 by way of compensation. An application under s.1050 was refused in *Re MATHEWS, supra*, (following *R. v. HAVERSTOCK*) in which it was held also, as noted above, that a Magistrate has not power to make an order under s.1048.

In *Ex p. SELIG*(1910), 17 C.C.C.70, a quantity of stolen metal was sold for $66 and this money and the metal were brought into court. After conviction the Judge ordered both the metal and the money to be delivered to the victim of the theft. On *certiorari* the order, insofar as it referred to the money, was quashed.

In *HOWE v. SCHROEDER*(1905), 1 W.L.R.174, an accused had been convicted of theft of an animal which he exchanged for another animal. It was held in an interpleader that the second animal was the proceeds of the theft and should be restored to the original owner. The Court followed *R. v. CENTRAL CRIMINAL COURT JUSTICES*

Section 630—*continued*

(1886), 16 Cox, C.C.174, 196, where Lord Esher, M.R., said, at p. 201:

> "All the cases show that the Court has power to order the restitution not only of the things themselves but also of the proceeds of their sale in the hands of the prisoner. If the proceeds are in the hands of an agent, who holds them for the prisoner, that is enough. Further than that I do not go."

In this connection however, it may be recalled that s.629 covers the case of the innocent purchaser.

In *R. v. MARCENIUK*, [1923]3 W.W.R.758, the accused had been convicted of theft and after conviction the trial Judge ordered restitution of property to the prosecutor. On appeal the conviction was quashed on the ground that inadmissible evidence had been received, but the order for restitution was left undisturbed. It was held that the Court of Appeal might do so under s.1050(3).

On subsec.(4), now subsec.(3), the only reported Canadian case appears to be *FERGUSON v. KEMP*(1919), 45 D.L.R.360. In that case it was held that where an unendorsed promissory note was stolen from the office of a solicitor with whom it had been left for collection, the maker was relieved from liability when, in good faith and without notice or cause to suspect the theft, he paid it to the person presenting it.

It may be noted that the power to order restitution conferred by the preceding section was given to a magistrate under former Part XVI by s.795.

By amendment 1943-44, c.23, s.24, the words "unlawfully received" were substituted for "obtained by false pretenses". It has been held in *R. v. WESTERLAND*(1929), 52 C.C.C.127, in which the accused was tried on summary conviction under the former s.376 for theft of a fence, that the provisions of ss.795 and 1050 were not applicable to an offence tried on summary conviction.

See s.581 as to definition of "sentence" and s.595 as to suspension of order pending appeal.

COSTS TO SUCCESSFUL PARTY IN CASE OF LIBEL.

631. The person in whose favour judgment is given in proceedings by indictment for defamatory libel is entitled to recover from the opposite party costs in a reasonable amount to be fixed by order of the court.

HOW RECOVERED.

632. Where costs that are fixed under section 631 are not paid forthwith the party in whose favour judgment is given may enter judgment for the amount of the costs by filing the order in the superior court of the province in which the trial was held, and that judgment is enforceable against the opposite party in the same manner as if it were a judgment rendered against him in that court in civil proceedings.

Ss.631 and 632 replace the former ss.1045 and 1047 with reference to costs in cases of criminal libel. There is a change in that the costs are to be fixed by the court instead of being taxed as in civil actions.

1045. In the case of an indictment or information by a private prosecutor for the publication of a defamatory libel, if judgment is given for the defendant, he shall be entitled to recover from the prosecutor, the costs incurred by him by reason of such indictment or information, either by warrant of distress issued out of the said court, or by action or suit as for an ordinary debt.
1047. Any costs ordered to be paid by a court pursuant to the foregoing provisions shall, in case there is no tariff of fees provided with respect to criminal proceedings, be taxed by the proper officer of the court according to the lowest scale of fees allowed in such court in a civil suit.
(2) If such court has no civil jurisdiction, the fees shall be those allowed in civil suits in a superior court of the province according to the lowest scale.

S.1045 was s.833 in the Code of 1892 and originated in 6-7 Vict., c.96, s.8 (Imp.). Under the former Code the costs of the successful prosecutor were recoverable under s.1044, but in view of its omission, s.631 applies to both parties.

S.1047 was s.835 in the Code of 1892, where Taschereau's edition describes it as new.

The omission of s.1044 calls for comment. It came into the Code of 1892 as s.832, having been adopted from 33-34 Vict., c.23, s.3, and introduced a new principle: Taschereau, p.899. There was no corresponding provision in the E.D.C., but it dealt with costs in ss.547-550, in some respects similarly to the 1892 Code. The Imperial Commissioners at p.30 of their report observed that:

"We propose that costs should be allowed in all cases of prosecutions for offences included in the Draft Code, and that the accused shall be liable to be ordered to pay the costs in all cases if he is convicted. He is now subject to this liability upon a conviction for felony."

S.832 of the Canadian Code was amended by 1900, c.46, s.3, by adding the clause which, after the revision of 1906, appeared as s.1044(2) to permit the inclusion in the amount to be paid, of a moderate allowance for loss of time. The section was again amended by 1935, c.56, s.18, to make the tariff set out in s.770 (now s.744), applicable to summary trials before magistrates.

There were three considerations which led to s.1044 being dropped. The Minister of Justice explained them (Hansard, 1954, pp.2873-4) as follows:

"Mr. GARSON: In dropping the section the commission considered first the difficulty in arriving at a proper amount without turning a criminal prosecution into a trial of an issue of damages, second the existence of a civil remedy, and third the duty of citizens to assist in the prosecution of offenders. As the result of such changes, costs in criminal cases will not be awarded, except on summary conviction matters and to a successful defendant in a prosecution for libel."

However, as will be noticed, s.631 was subsequently altered to apply to the successful party, whether prosecutor or defendant, in a prosecution for libel.

It is only the third of the considerations above mentioned that

Sections 631 & 632—*continued*

applies to costs, and the change is actually a return to the general principle noted 3 Bl. Com.400; Chitty's Prerogatives of the Crown, p.310 and in *R. v. JENKINSON*(1785), 1 Term Rep.85, that the King shall neither pay nor receive costs. The acceptance of that principle is emphasized by the fact that in the course of the new Code through Parliament, there were struck out of s.588(2) a provision that a transcript of evidence shall be furnished *by the appellant* to the court of appeal, and out of s.638(2), a provision that the payment of costs might be made a condition of suspended sentence.

Otherwise, there had been difficulty in applying s.1044. In *R. v. MERE SINGH*(1923), 39 C.C.C.391, on a conviction for assault the sum of $400 was allowed to the complainants for loss of time "with regard solely to the fact that the complainants had been in hospital and incapacitated for eight weeks as a result of the assault." This was disallowed on appeal on the ground that the section could not be intended to cover compensation by way of damages which might be the subject of a civil action.

In *MOLLET v. R.*(1951), 14 C.R.238 at p.252, the following appears: "The sum of $200 awarded for loss of time is obviously meant to compensate the victim for loss of earnings during the period following the commission of the offence. In making such an award the learned trial judge, in my opinion, misapplied the provisions of s.1044 which envisage an award to compensate for time lost in and about the prosecution and conviction. In this respect also the sentence is faulty."

In *R. v. HOBBS GLASS LTD.*, [1951]O.W.N.772, Trelcaven, J., on an application to clarify an order for "costs or expenses" under s.1044, struck out the words "or expenses". The gist of the judgment is that he did not know what "expenses" in s.1044 was intended to cover.

IMPRISONMENT.

IMPRISONMENT WHEN NO OTHER PROVISION.

633. Every one who is convicted of an indictable offence for which no punishment is especially provided is liable to imprisonment for five years.

This is the former s.1052(1), which was s.951(1) in the Code of 1892, as amended in 1893, and came from R.S.C.1886, c.181, s.24. S.1052(2) is covered by s.694 *post*.

In *R. v. HUM KING*(1928), 49 C.C.C.174, the accused was convicted on indictment. The jury found him guilty of stealing "a sum of money we are not prepared to say how much". It was argued that the former s.780 applied, under which the punishment was limited to six months, but this argument was rejected. The following appears at p.178:

". . . . . it is I think clear from the wording of the section that it does not apply to the case where a person is indicted for stealing. It is expressly restricted to the case where the charge is under s.773 and is tried summarily by a Magistrate. It has no application to cases of indictment and it is I think clear that a person can be indicted for

OLD CODE:

1052. (1) Every person convicted of any indictable offence for which no punishment is specially provided, shall be liable to imprisonment for five years.

1006. When any sentence is passed upon any person after a trial had under an order for changing the place of trial, the court may in its discretion, either direct the sentence to be carried out at the place where the trial was had or order the person sentenced to be removed to the place where his trial would have been had but for such order, so that the sentence may be there carried out.

1056. Every one who is sentenced to imprisonment for a term less than two years shall, if no other place is expressly mentioned, be sentenced to imprisonment in the common gaol of the district, county or place in which the sentence is pronounced, or if there is no common gaol there, then in that common gaol which is nearest to such locality, or in some lawful prison or place of confinement, other than a penitentiary, in which the sentence of imprisonment may be lawfully executed: Provided that,

(a) when any one is sentenced to imprisonment in a penitentiary, and at the same sittings or term of the court trying him is sentenced for one or more other offences to a term or terms of imprisonment less than two years each, he may be sentenced for such shorter terms to imprisonment in the same penitentiary;

(b) when any one is sentenced for an offence who is, at the date of such sentence, serving a term of imprisonment in a penitentiary for another offence, he may be sentenced for a term shorter than two years to imprisonment in the same penitentiary;

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stealing a sum of money under $10 or goods valued at less than $10 and if found guilty his punishment is not regulated by s.780, but would be determined under some other section of the Cr. Code (see ss.386 and 1052)."

See also s.107 *ante*.

IMPRISONMENT FOR LIFE OR MORE THAN TWO YEARS.—Imprisonment for term less than two years.—Term less than two years.—Sentence to penitentiary of person serving sentence elsewhere.—Exception.

634. (1) Except where otherwise provided, a person who is sentenced to imprisonment for life or for a term of two years or more shall be sentenced to the penitentiary designated by or under the *Penitentiary Act* as the penitentiary for the province, territory or district in which he is convicted.

(2) A person who is sentenced to imprisonment

(*a*) for a term of less than two years, or

(*b*) for two or more terms of less than two years each, to be served one after the other,

shall, unless a special prison is prescribed by law, be sentenced to imprisonment in a prison or place of confinement within the province in which he is convicted, other than a penitentiary, in which the sentence of imprisonment may be lawfully executed.

(3) Where a person who is sentenced to imprisonment in a penitentiary is, before the expiration of that sentence, sentenced to imprisonment for a term of less than two years, he may be sentenced to serve that term in the same penitentiary, and if he is sentenced accordingly, he shall serve that term in that penitentiary, but if the

Section 634—*continued*

previous sentence of imprisonment in the penitentiary is set aside, he shall serve that term in accordance with subsection (2).

(4) Where a person is sentenced to imprisonment in a penitentiary while he is lawfully imprisoned in a place other than a penitentiary he shall, except where otherwise provided, be sent immediately to the penitentiary and shall serve in the penitentiary the unexpired portion of the term of imprisonment that he was serving when he was sentenced to the penitentiary as well as the term of imprisonment for which he was sentenced to the penitentiary.

(5) For the purposes of subsection (2) "penitentiary" does not, until a day to be fixed by proclamation of the Governor in Council, include the penitentiary mentioned in section 82 of the *Penitentiary Act*, chapter 206 of the Revised Statutes of Canada, 1952.

This replaces the former ss.1006 and 1056. Subsec.(1) comes from s.46 of the *Penitentiary Act*. Subsec.(2) comes from the opening words of s.1056. Subsec.(3) combines pars.(a) & (b), adding a provision that if the penitentiary term is set aside, the lesser sentences will be served in a common gaol. Subsec.(4) comes from s.1056(c). Subsec.(5) was added by 1949, c.2, s.7. The penitentiary at St. John's, Newfoundland, is a provincial institution, but by agreement, prisoners sentenced to two years or more are received there. A short statute in the session 1952-53 altered s.1056(e) (now subsec.(5)) by reference to "a day to be fixed by proclamation".

S.1006 was s.733(4) in the Code of 1892, and similar provisions formed part of s.529 in the E.D.C. S.1056 came from s.955 in the Code of 1892, from R.S.C. 1886, c.181, s.28, and 53 Vict., c.37, s.31. By amendment in 1947, c.55, s.33, the words "such sentences to take effect from the termination of his other sentence" were struck out, and from par.(b) the words "such sentence to take effect from the termination of his existing sentence or sentences" were struck out. These changes were made on the recommendation of the Commissioners on Uniformity. Par.(c) (new) was added at the same time. Par.(d) appears first in 1901, c.42, with reference to Manitoba. Reference to British Columbia was added by 1909, c.9. In *R. v. TARCHUK*, [1928]3 W.W.R.577 (B.C.), it was held that s.33 of the *Police and Prisons Regulation Act*, R.S.B.C. 1924, c.91, which provided that "The Attorney-General may from time to time direct that prisoners confined in one gaol be removed to some other gaol," cannot be invoked to support the Attorney-General's removal from one gaol to another of a prisoner who has been committed for an offence under the *Criminal Code*. This is the effect of s.1056, the trial judge having specified the gaol. Prisoner released on *habeas corpus*.

In *R. v. ALLARD*(1946), 88 C.C.C.97, it was said that in view of the concluding words of s.32 of the *Prisons and Reformatories Act*:

> ". . . . . there are only two persons lawfully authorized to require such delivery, *viz*: (1) the Crown, acting through the Attorney-General or other qualified officer and (2) the accused himself.
>
> In this case the Crown has not required such offender's delivery and the prisoner has not only not required such delivery but on the contrary has requested that he be not delivered."

OLD CODE:

Section 1056—continued

(c) when any one is sentenced to imprisonment in a penitentiary who is, at the date of such sentence, serving a term of imprisonment in a common gaol or in some lawful prison or place of confinement other than a penitentiary, unless it is otherwise directed by statute, he shall, instead of being returned to the common gaol or other prison or place of confinement, be forthwith sent to the penitentiary, there to serve the remainder of the unexpired portion of the term he was serving at the date of such sentence; and

(d) in the province of Manitoba and the province of British Columbia any one sentenced to imprisonment for a term of less than two years may be sentenced to any one of the common gaols in the province, unless a special prison is prescribed by law.

(e) until a day to be fixed by proclamation of the Governor in Council, the word "penitentiary" as first used in this section does not include the penitentiary mentioned in section 37 of The Statute Law Amendment (Newfoundland) Act, chapter of the statutes of 1949, or in section 82 of the Penitentiary Act, chapter 206 of the Revised Statutes of Canada, 1952.

1057. Imprisonment in a common gaol, or a public prison, other than a penitentiary or the Central Prison for the province of Ontario, the Andrew Mercer Ontario Reformatory for females or any reformatory prison for females in the province of Quebec, shall be with or without hard labour, in the discretion of the court or person passing sentence, if the offender is convicted on indictment, or under the provisions of Parts XVI or XVIII, or, in the province of Saskatchewan or Alberta, before a judge of a superior court, or in the Northwest Territories, before a stipendiary magistrate or in the Yukon Territory, before a judge of the Territorial Court or a stipendiary magistrate.

(2) In other cases such imprisonment may be with hard labour, if hard labour is part of the punishment for the offence of which such offender is convicted, and if such imprisonment is to be with hard labour, the sentence shall so direct.

It appeared that there was a common practice that where prisoners committed to Oakalla requested that they be kept in the city gaol at Vancouver, they were so kept and were not sent to Oakalla.

SENTENCE SERVED ACCORDING TO REGULATIONS.—Hard labour improperly ordered.

635. (1) A sentence of imprisonment shall be served in accordance with the enactments and rules that govern the institution to which the prisoner is sentenced, and a reference to hard labour in a conviction or sentence shall be deemed to be a reference to the employment of prisoners that is provided for in the enactments or rules.

(2) A conviction or sentence that imposes hard labour shall not be quashed or set aside on the ground only that the enactment that creates the offence does not authorize the imposition of hard labour, but shall be amended accordingly.

This is new. By reason of subsec.(1) the former s.1057 has been dropped. It came from s.955(5) and (6) in the Code of 1892 which was

Section 635—*continued*

adapted from R.S.C. 1886, c.181, s.28, and 53 Vict., c.37, s.31. It was re-enacted by 1943-44, c.23, s.34.

It may be observed that s.28(7) of R.S.C. 1886, c.181 provided that "Every one who is sentenced to imprisonment in any penitentiary, gaol, or other public or reformatory prison, shall be subject to the provisions of the statute relating to such penitentiary, gaol, or prison, and to all rules and regulations lawfully made with respect thereto," and that under the *Penitentiary Act* a sentence was to be served with hard labour.

In England, the *Criminal Justice Act* 1948, abolished hard labour, and by s.52(1) empowered the Secretary of State to make rules for the regulation and management of prisons, as well as for the classification, treatment, employment, discipline and control of persons required to be detained therein.

Subsec.(2) is designed to overcome a conflict in decisions concerning the right to amend. The following cases illustrate the procedure under the former provisions:

R. v. BOARDMAN(1914), 23 C.C.C.191: Sentence included whipping and fixed the time when whippings were to take place. Held bad since this in discretion of prison surgeon, but amended under s.1124.

R. v. WRIGHT(1905), 10 C.C.C.461: Conviction amended on *habeas corpus* to correct the date.

R. v. HENGARTNER(1919), 34 C.C.C.46: The court permitted a second warrant of commitment, omitting "with hard labour," to be returned.

Ex p. HENDERSON(1929), 52 C.C.C.82: Macdonald, C.J.B.C., permitted a valid conviction imposing fine and imprisonment, the fine being unauthorized, to be severed, and refused release on *habeas corpus* since the imprisonment was good.

R. v. LOW QUONG(1924), 42 C.C.C.300: Court did not permit conviction with hard labour (the hard labour being unauthorized), to be amended after part of the sentence had been served, even though hard labour had not been imposed.

R. v. HALE(1926), 49 C.C.C.253: Man. C.A. released a prisoner on *habeas corpus* on the ground that a warrant of commitment illegally imposing hard labour cannot be amended after part of sentence has been served.

COTÉ v. MORIN(1917), 30 C.C.C.59: Lemieux, C.J. (Que.), on motion for discharge on *habeas corpus* held that a warrant of commitment improperly fixing costs could be amended, and adjourned the application to permit the amendment.

In *R. v. JAMES*(1915), 25 C.C.C.23, s.1130, now s.688, was applied to dismiss an application based on defects in the warrant. "The thing all essential is a valid conviction, and this is made a condition of disregarding defects in the warrant of commitment." See also *Re MUSCHIK*, noted s.683 *post*.

In *R. v. McDONALD*(1948), 93 C.C.C.154, it was held that the

OLD CODE:

704. The constable or any of the constables, or other person to whom any warrant or commitment authorized by this or any other Act or law is directed, shall convey the accused person therein named or described to the gaol or other prison mentioned in such warrant, and there deliver him, together with the warrant, to the keeper of such gaol or prison, who shall thereupon give the constable or other person delivering the prisoner into his custody, a receipt for the prisoner, setting forth the state and condition of the prisoner when delivered into his custody.

(2) Such receipt shall be in form 30.

Opium and Narcotic Drug Act, as amended 1925, c.20, s.3(3) authorized the imposition of hard labour when accused was convicted on indictment.

In *Re SCHEWAGA*(1954), 12 W.W.R.(N.S.)561, on a warrant of committal after conviction under the *Excise Act,* the magistrate omitted hard labour, which under that Act is required to be imposed. The magistrate was ordered to issue a new warrant.

Delivery of Accused to Keeper of Prison.

EXECUTION OF WARRANT OF COMMITTAL.

636. A peace officer or other person to whom a warrant of committal authorized by this Act or any other Act of the Parliament of Canada is directed shall convey the person named or described therein to the prison mentioned in the warrant and deliver him, together with the warrant, to the keeper of the prison who shall thereupon give to the peace officer or other person who delivers the prisoner a receipt in Form 39 setting out the state and condition of the prisoner when delivered into his custody.

This is the former s.704 which came from s.607 in the Code of 1892, and R.S.C.1886, c.174, s.85.

Recognizances to Keep the Peace.

BINDING OVER PERSON CONVICTED.—Form.—Proceedings when in prison two weeks.—Procedure when brought before court.—"Judge."

637. (1) Where a person is convicted of an offence, the court may

(*a*) in addition to any sentence that is imposed upon him, in the case of an indictable offence, or

(*b*) in addition to or in lieu of sentence, in the case of an offence punishable on summary conviction,

order that the person shall, at a time to be fixed by the court, enter into a recognizance, with or without sureties, to keep the peace and be of good behaviour for a term that does not exceed two years, and in default may, by warrant in Form 20, commit him to prison until the recognizance is entered into or the security is given.

(2) A recognizance under this section may be in Form 28.

Section 637—*continued*

(3) Where a person who has been ordered to enter into a recognizance under subsection (1) has remained in prison for two weeks because of his default, he may apply to a judge for review of the order of committal.

(4) A judge who receives an application under subsection (3) may order the discharge of the person referred to, forthwith or at a subsequent time, upon notice to such persons as he considers proper, or may make any other order that he considers proper in the circumstances with respect to the number of sureties to be required, the amounts in which they are to be bound and the period during which the person and the sureties are to be bound.

(5) In this section, "judge" means a judge of a superior court of criminal jurisdiction or of a court of criminal jurisdiction for the territorial division in which the prison where the person is confined is situated.

This comes from the former ss.748(1), 1058 and 1059.

S.748(1) was new in s.959(1) of the Code of 1892, as amended in 1893. It covered cases in which the accused was convicted on summary conviction. In default of recognizance, the accused was liable to imprisonment for twelve months.

S.1058 was s.958 in the Code of 1892, as amended in 1893, and came from R.S.C.1886, c.181, s.31. It provided for binding over where the offence was indictable and for imprisonment for one year in default of recognizance.

S.1059 was s.960 in the Code of 1892, and came from R.S.C.1886, c.181, s.32. It provided for a review of the order after two weeks' imprisonment.

The new section omits the power to imprison for a year, but preserves the provision for review.

Similar provisions for binding over were included in the *Offences against the Person Act* 1861 (Imp.), and other consolidating Acts of that year. The following appears in Greaves' Cons. Acts at p.7:

"In all cases of misdemeanor the Court might by the Common Law add to the sentence of imprisonment, by ordering the defendant to find security for his good behaviour and for keeping the peace, and might order him to be imprisoned until such security was found. *R. v. DUNN*(1847), 12 Q.B.1026; but as this power was not generally known, it was thought better to insert it in this clause. As it sometimes happens in cases of felony, that it may be expedient to require sureties for keeping the peace after the expiration of any imprisonment awarded, this clause empowers the Court to require such sureties. It is easy to see that it may frequently be highly advisable to pass a very short sentence of imprisonment on a youth, and to direct him to be delivered to his friends on their entering into the proper recognizances. And it may be well worth making the experiment whether requiring adults to find such sureties may not prove beneficial. The great dif-

OLD CODE:

748. (1) Whenever any person is charged before a justice with any offence triable under this Part which, in the opinion of such justice, is directly against the peace, and the justice after hearing the case is satisfied of the guilt of the accused, and that the office was committed under circumstances which render it probable that the person convicted will be again guilty of the same or some other offence against the peace unless he is bound over to good behaviour, such justice may, in addition to, or in lieu of, any other sentence which may be imposed upon the accused, require him forthwith to enter into his own recognizance, or to give security to keep the peace and be of good behaviour for any term not exceeding twelve months.

1058. Every magistrate under Part XVI and every court of criminal jurisdiction before whom any person is convicted of an offence and is not sentenced to death, shall have power in addition to any sentence imposed upon such person, to require him forthwith to enter into his own recognizances, or to give security to keep the peace, and be of good behaviour for any term not exceeding two years, and that such person in default shall be imprisoned for not more than one year after the expiry of his imprisonment under his sentence, or until such recognizances are sooner entered into or such security sooner given.
(2) any such recognizance may be in form 49.

1059. Whenever any person who has been required to enter into a recognizance with sureties, to keep the peace and be of good behaviour, or not to engage in any prizefight has, on account of his default therein, remained imprisoned for two weeks, the sheriff, gaoler or warden shall give notice, in writing, of the facts to a judge of a superior court, or to a judge of the county court of the county or district in which said gaol or prison is situate, or, in the cities of Montreal and Quebec, to a judge of the sessions of the peace for the district, or in the Northwest Territories, to a stipendiary magistrate.
(2) Such judge or magistrate may order the discharge of such person, thereupon or at a subsequent time, upon notice to the complainant or otherwise, or may make such other order as he sees fit, respecting the number of sureties, the sum in which they are to be bound and the length of time for which such person may be bound.

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ficulty, with which convicts have to contend immediately after their discharge, is the want of some check that may tend to prevent them from relapsing into their former habits; and the knowledge that their sureties would be liable to forfeit their recognizances might, and probably would, in some cases at least, operate as a check upon their conduct. In cases of assault and other breaches of the peace, it has been found highly beneficial to require the parties to find sureties for their future good behaviour; and this leads to the hope that even in cases of felony a similar result may follow from requiring sureties for keeping the peace, especially where the felony has been accompanied by any personal violence."

See also the notes to s.717 *post*, concerning the procedure in preventive justice, which, it is now settled, applies in Canada.

SUSPENDED SENTENCE AND PROBATION.

SUSPENSION OF SENTENCE.—Conditions.—Requiring person to report.—Report by designated person.—Suspending sentence of person previously convicted.

638 (1) Where an accused is convicted of an offence and no previous conviction is proved against him, and it appears to the court that convicts him or that hears an appeal that, having regard to his age, character and antecedents, to the nature of the offence and to any extenuating circumstances surrounding the commission of the offence, it is expedient that the accused be released on probation, the court may, except where a minimum punishment is prescribed by law, instead of sentencing him to punishment, suspend the passing of sentence and direct that he be released upon entering into a recognizance in Form 28, with or without sureties,

(a) **to keep the peace and be of good behaviour during any period that is fixed by the court, and**

(b) **to appear and to receive sentence when called upon to do so during the period fixed under paragraph *(a)*, upon breach of his recognizance.**

(2) A court that suspends the passing of sentence may prescribe as conditions of the recognizance that

(a) **the accused shall make restitution and reparation to any person aggrieved or injured for the actual loss or damage caused by the commission of the offence, and**

(b) **the accused shall provide for the support of his wife and any other dependents whom he is liable to support,**

and the court may impose such further conditions as it considers desirable in the circumstances and may from time to time change the conditions and increase or decrease the period of the recognizance, but no such recognizance shall be kept in force for more than two years.

(3) A court that suspends the passing of sentence may require as a condition of the recognizance that the accused shall report from time to time, as it may prescribe, to a person designated by the court, and the accused shall be under the supervision of that person during the prescribed period.

(4) The person designated by the court under subsection (3) shall report to the court if the accused does not carry out the terms on which the passing of sentence was suspended, and the court may order that the accused be brought before it to be sentenced.

(5) Where one previous conviction and no more is proved against an accused who is convicted, but the previous conviction took place more than five years before the time of the commission of the offence of which he is convicted, or was for an offence that is not related in character to the offence of which he is convicted, the court may, notwithstanding subsection (1), suspend the passing of sentence and make the direction mentioned in subsection (1).

SUMMONS OR WARRANT WHEN RECOGNIZANCE NOT OBSERVED.—Return.—Remand for judgment.—Sentence.—Magistrate unable to act.

639. (1) A court that has suspended the passing of sentence or

OLD CODE:

1081. (1) In any case in which a person is convicted before any court of any offence punishable with not more than two years' imprisonment, and no previous conviction is proved against him, if it appears to the court before which he is so convicted or the Court of Appeal, that, regard being had to the age, character, and antecedents of the offender, to the trivial nature of the offence, and to any extenuating circumstances under which the offence was committed, it is expedient that the offender be released on probation of good conduct, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a recognizance, with or without sureties, and during such period as the court directs, to appear and receive judgment when called upon, and in the meantime to keep the peace and be of good behaviour.

(2) Where the offence is punishable with more than two years' imprisonment the court shall have the same power as aforesaid with the concurrence of the counsel acting for the Crown in the prosecution of the offender.

(3) The court may, if it thinks fit, direct that the offender shall pay the costs of the prosecution, or some portion of the same, within such period and by such instalments as the court directs.

(4) Where one previous conviction and no more is proved against the person so convicted and such conviction took place more than five years before that for the offence in question, or was for an offence not related in character to the offence in question, the court shall have the same power as aforesaid with the concurrence of the counsel acting for the Crown in the prosecution of the offender.

(5) The court in suspending sentence may direct that the offender shall be placed on probation for such period and under such conditions as the court may prescribe, and may from time to time increase or decrease such period and change such conditions, and that during such period the offender shall report from time to time as the court may prescribe to any officer that the court may designate, and the offender shall be under the supervision of such officer during the said period, and the officer shall report to the court if the offender is not carrying out the terms on which the sentence is suspended, and thereupon the offender shall be brought again before the court for sentence.

(6) The offender may also be ordered to make restitution and reparation to a person or persons aggrieved or injured by the offence for which he was convicted for the actual damage or loss thereby caused, and the offender may while on probation be ordered as one of said conditions to provide for the support of his wife and any other dependent or dependents for which he is liable.

1082. The court, before directing the release of an offender under the last preceding section, shall be satisfied that the offender or his surety has a fixed place of abode or regular occupation in the county or place for which the court acts, or in which the offender is likely to live during the period named for the observance of the conditions.

1083. If a court having power to deal with such offender in respect of his original offence or any justice is satisfied by information on oath that the offender has failed to observe any of the conditions of his recognizance, such court or justice may issue a warrant for his apprehension.

(2) An offender, when apprehended on any such warrant, shall, if not brought forthwith before the court having power to sentence him, be brought before the justice issuing such warrant or before some other justice in and for the same

Sections 638-640—*continued*

a justice having jurisdiction in the territorial division in which a recognizance was taken under section 638 may, upon being satisfied by information on oath that the accused has failed to observe a condition of the recognizance, issue a summons to compel his appearance or a warrant for his arrest.

(2) A summons under subsection (1) is returnable before the court and an accused who is arrested under a warrant issued under subsection (1) shall be brought before the court or a justice.

(3) A justice before whom a warrant under subsection (1) is returned may remand the accused to appear before the court or admit him to bail upon recognizance, with or without sureties, conditioned upon such appearance.

(4) The court may, upon the appearance of the accused pursuant to this section or subsection (4) of section 638 and upon being satisfied that the accused has failed to observe a condition of his recognizance, sentence him for the offence of which he was convicted.

(5) Where the passing of sentence is suspended by a magistrate acting under Part XVI or Part XXIV or by a judge, and thereafter he dies or is for any reason unable to act, his powers under this section may be exercised by any other magistrate or judge, as the case may be, who has equivalent jurisdiction in the same territorial division.

"COURT."

640. For the purposes of sections 638 and 639, "court" means
***(a)* a superior court of criminal jurisdiction,**
***(b)* a court of criminal jurisdiction,**
***(c)* a magistrate acting as a summary conviction court under Part XXIV, or**
***(d)* a court that hears an appeal.**

Ss.638, 639 and 640 replace the former ss.1081-1083 & 1026.

S.638(1) comes from the former s.1081(1); subsecs.(2), (3) and (4) from s.1081(5) and (6); and subsec.(5) from s.1081(4).

S.639(1) to (4) comes from the former s.1083. Subsec.(5) is new.

S.640 comes from the former s.1026.

The provision for suspended sentence originated in 1889, c.44, *An Act to permit the Conditional Release of first offenders in certain cases*, and came into the Code of 1892 in ss.971-973. In its original form it was evidently intended to apply to minor offences, but subsequent amendment widened its scope.

The power to suspend sentence is not vested in all courts that have jurisdiction in criminal cases. In 1934, by c.47, s.20, it was extended to "any magistrate within the meaning of Part XV". When this reference to the Summary Conviction procedure was added, there arose an impression, based upon the definition of "magistrate" in the *Interpretation Act*, that the right to suspend sentence had been granted to a single justice of the peace, but that was set at rest by 1936, c.29, s.22, which amended s.1026 to read "any magistrate within the meaning of Part XVI

OLD CODE:

Section 1083—continued

territorial division, and such justice shall either remand him by warrant until the time at which he was required by his recognizance to appear for judgment, or until the sitting of a court having power to deal with his original offence, or admit him to bail, with a sufficient surety, conditioned on his appearing for judgment.

(3) The offender when so remanded may be committed to a prison, either for the county or place in or for which the justice remanding him acts, or for the county or place where he is bound to appear for judgment; and the warrant of remand shall order that he be brought before the court before which he was bound to appear for judgment, or to answer as to his conduct since his release.

1026. In the sections of this Part relating to suspended sentence, unless the context otherwise requires, "court" means and includes any superior court of criminal jurisdiction, any court of general or quarter sessions of the peace, any judge or court within the meaning of Part XVIII and any magistrate within the meaning of Part XVI acting under that Part or Part XV.

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acting under that Part or Part XV".

S.1081(1) was amended by 1947, c.55, s.34 to include the Court of Appeal, it having been held in *R. v. CRUICKSHANKS*(1946), 86 C.C.C. 257, that the Court of Appeal had not the power to grant suspended sentence.

See ss.581 & 692 as to inclusion of orders under s.638 in the definition of "sentence" in Parts XVIII and XXIV.

The revision effects some important changes:

(1) The provision that in certain cases suspended sentence could be granted only with the consent of Crown counsel, is not continued. The discretion will rest with the trial judge or magistrate.

(2) The provision as to costs (s.1081(2)) has been dropped.

"We thought that if a person merited suspended sentence, he should not be required to pay something for the privilege of getting his sentence suspended." (Senate Committee, Dec. 16, 1952, p.77).

(3) There is clear provision that a recognizance cannot be kept in force for more than two years. There is similar provision in s.637.

(4) The former s.1082 has been dropped as setting out circumstances that the court would consider in any case.

(5) S.639(2) provides that a summons rather than a warrant may issue to bring the offender before the court to answer for breach of recognizance.

(6) S.639(5) is new.

For the purpose of comparison, reference may be had to the *Criminal Justice Act*, 1948 (U.K.) and to the *Probation of Offenders Act*, 1907, which it superseded.

The suspension of sentence is a very useful and, in the majority of cases in which it is applied, effective method of mitigating the penal provisions of the *Criminal Code*. Yet in magistrates' courts there has been a wide divergence of practice with regard to it, ranging from the mere statement of the magistrate to the accused that, "You are released

Sections 638-640—*continued*

on suspended sentence," through the taking of an oral acknowledgment in open court, to the taking of such an acknowledgment along with the signing of a written recognisance. However, it seems clear that a written recognisance is required.

In the case of *LAPLANTE v. COURT OF SESSIONS OF THE PEACE*(1937), 69 C.C.C.291, an accused person had pleaded guilty on December 12, 1936. The court did not pronounce any sentence, but suspended it until June 15, 1937, and released the accused without taking a written recognisance. Later on his behalf an application was made for a writ of prohibition to prevent the court recalling him for sentence. The following are portions of the judgment delivered on that application:

"What is the intent of this section (*i.e.*, sec.1081 of the Code)? It is to release any one who has committed a minor criminal offence so that he may avoid going to prison and the dishonour and to give him a salutary lesson and to reform him. It is a section of sound morality and renders great service.

However, in order to release any one and have him under control, the Judge must have him sign a recognisance with or without sureties for the period of time of the suspension in order to be able to call him before him according to s.1083 of the Cr. Code, if, later, he is informed that the delinquent has not fulfilled any of the conditions of his recognisance. It is reasonable, logical, and the only means of controlling an accused thus released.

But if as in the present case no recognisance has been signed, what is the position of the accused?

One of two things, either the Crown appeals from the decision of the trial Judge under ss.1012 *et seq.* of the Cr. Code or it does not appeal. If it appeals, it may have the decision of the Magistrate quashed and that is the meaning of the case of *R. v. SILVERSTONE* (1925), 44 Can.C.C.335. In that case the Court of Appeal decided that a Judge has no jurisdiction to suspend sentence without requiring a written recognizance."

The judgment proceeds:

"If the Crown is not going to appeal or has not done so and if the recognisance was not given, the accused in my opinion is released. He is no longer under the jurisdiction of the Court. He has promised nothing, he has bound himself to nothing. As a result, in order to bring him before the Court, he must have committed a new offence necessitating a new complaint, a new order etc. The fact of his having been allowed to go without recognisance is equivalent to an acquittal. The Crown has only one remedy: to have the decision of the Court quashed."

Yet in view of the variance in practice, it is not surprising that the method is not understood by the public as well as it deserves to be. Concerning the result of the trial of a criminal case, an interested inquirer is told sometimes that, "so-and-so got off on suspended sentence", which is precisely what did not happen. The offender may have been

released, but he did not "get off". Moreover, the method is not intended for the old offender nor for the transient, but chiefly, although not exclusively for the first offender who has "a local habitation and a name", and, while it is meant to put him under a kind of restraint for a time, it is intended also to give him a chance to redeem himself.

The power to grant suspended sentence does not exist in every prosecution. It has been held that it is not applicable to so-called "provincial crimes", although in view of the 1936 amendment just cited, it may now be arguable that it does apply to such offences against provincial statutes as are punishable with imprisonment and without the option of a fine (*QUEBEC LIQUOR COM'N v. THIBAUDEAU*(1927), 50 C.C.C.434; *R. v. WARNER*(1924), 43 C.C.C.78, at p.80). By some Dominion statutes, notably the *Excise Act*, (*R. ex rel. BRETHERTON v. CAMPBELL et al.*, [1932]3 W.W.R.272), the *Customs Act*, and the *Opium and Narcotic Drug Act*, the exercise of such a power is expressly excluded. The Code itself was amended by 1935 c.56, s.4, amending s.285(4), to provide that sentence shall not be suspended when a person is convicted of driving or having control of a motor vehicle while intoxicated or under the influence of a narcotic. Under the revision (s.638 (1)) sentence cannot be suspended where a minimum punishment is prescribed by law, as it is for this offence.

A point which should be made quite clear is that suspended sentence "does not mean suspending the operation of a sentence after passing the same, but suspending the passing of the sentence". In the case quoted, sentence of fine and imprisonment had been passed and then "suspended" (*R. v. SWITZKI*(1930), 54 C.C.C.332).

R. v. HIRSCH(1924), 42 C.C.C.153, may be noted in this connection. There the Crown appealed from a sentence which adjudged that:

> "With the consent of the Agent of the Attorney General accused is allowed to go on suspended sentence to two years' imprisonment in Prince Albert Penitentiary and to fifteen lashes 6 months after the date he is received in the Penitentiary and fifteen lashes 6 months before the termination of term of imprisonment."

While remarking that "The sentence actually pronounced in the case does not suggest very strong grounds for suspended sentence," the Court of Appeal explained:

> "That (s.1081) means that no sentence will be passed unless and until the offender is called upon to appear and receive judgment. The expression 'suspended sentence', standing by itself, is somewhat misleading, but the plain words of the section show that it cannot mean passing sentence and then suspending the operation of the sentence."

In deciding whether it is proper to apply this method in a particular case, the Court must have regard "to the age, character, and antecedents of the offender, to the trivial nature of the offence, and to any extenuating circumstances under which the offence was committed". In a case in Nova Scotia (*R. v. PETTIPAS (No.2)*(1911), 18 C.C.C.74) in which the accused had been convicted of shooting with intent, the Crown appealed upon the ground that "all of these elements" must be present before sentence may be suspended, and that "the nontriviality of the offence is absent here". One of the Judges observed:

Sections 638-640—*continued*

"It is called to our attention here that this offence is not ordinarily a trivial offence. I think the second sub-section is meant to provide for such a case and if it is not trivial, under the first subsection, still the Attorney General having the power to deal with cases where the term of imprisonment is over two years, can deal with it and give his assent to the suspension of the sentence."

Another member of the Court adopted this reasoning in these terms:

"I adopt the suggestion . . . . . that it does not matter whether all these things are present; that they must all be taken and considered together and weighed in the scale and in that way the Judge with the Crown prosecutor's concurrence reaches a conclusion."

When suspended sentence is granted the accused enters into a recognisance, with or without sureties as the court decides, which binds him:

1. To keep the peace and be of good behaviour during a limited period. This period may be increased or decreased by the court from time to time, but does not exceed two years.
2. To appear and receive judgment when called upon during the stated period; and
3. To observe such other conditions as the court may impose.

Under the section one of such conditions may be that the offender shall report at intervals to any officer whom the court may designate, but the recognisance frequently includes other conditions. For example, it may require the offender to make reparation to the person injured by the offence, or—if it is thought that by such means the probable occasion of further offences may be avoided—to abstain from the use of liquor or to keep away from specified premises.

It was held, however, that the magistrate had imposed an improper condition when he adjudged that the defendant undergo:

"1 yr. in Central Prison with hard labour, to take effect in 30 days unless you dispose of your property and move out of the community, also undertake to deliver the children to John Dodge for care."

To this the words "Sentence suspended" were afterwards added. The minute of adjudication was dated 9th October, 1914, and warrant of commitment was issued and executed in September, 1916. In *habeas corpus* proceedings which followed, the Judge said:

"The magistrate had no power to enter into such an arrangement or stipulation with the defendant as was disclosed in the minute of adjudication, and the disposition thus made of the case could not be an effective conviction" (*R. v. KNIGHT*(1922), 37 C.C.C.223).

If the offender breaks the conditions of the recognisance, it appears that in the superior courts there is available procedure similar to that provided in England, whereby the offender may be called before the court for judgment upon notice to him and his sureties (*R. v. YOUNG* (1901), 4 C.C.C.580). However, it is immaterial whether or not this be so inasmuch as the Code provides that an information may be laid

charging the breach of the recognisance, and that a warrant may then issue to apprehend him and bring him before the court for sentence (s.639). In any case, it is abundantly clear that there must be a substantive proceeding based on the breach of the condition; the suspended sentence is not revoked by the fact that another charge is laid while the recognisance is in effect.

A case is reported in which the defendant was convicted by a magistrate and released on suspended sentence upon giving a recognisance. About three months later she was tried upon a similar charge and acquitted, but the magistrate sentenced her upon the first conviction. An application for her release was granted, the Court remarking:

"She was not before him under any information that she had failed to comply with or observe any of the conditions of her recognisance, and, if she had been, the result of the trial showed that she had not broken her recognisance. To justify the imposition of sentence for her original conviction, an information under oath must be laid charging her with a second breach and a warrant issued for her apprehension, and there seems to be authority in the case of *R. v. YOUNG*(1901), 4 C.C.C.580, for saying that such proceeding should be at the instance of the Crown (*R. v. SITEMAN*(1902), 6 C.C.C.224. See also *R. v. WEEDMARK*(1928), 50 C.C.C.443, and *R. v. GLASGOW*(1936), 67 C.C.C.392)."

Occasionally a practice appears which is sometimes confused with the suspension of sentence — that is, the passing of sentence and the withholding of the warrant of commitment. This cannot be suspended sentence since it is, in reality, the suspension of the operation of the sentence. We have already noticed a case (*R. v. KNIGHT*(1922), 37 C.C.C.223) in which this was done, although there the court purported, ineffectively as it was afterwards held, also to suspend sentence. Very like it and with a similar result, was the case of *R. v. POKITRUSKI* (1931), 55 C.C.C. 152. (It does not appear that *R. v. MONDSCHEIN*, [1927] 1 W.W.R.101 was cited in this case, but it is to the same effect.) In it one Tonasko Pokitruski was "sentenced to six months' imprisonment with H.L. and warrant of commitment withheld for 14 days to give male defendant opportunity to leave the district." It does not appear that he complied with that condition, but about two months later a warrant of commitment was issued, and about nine months later it was executed. He applied to be released from gaol, but his application was refused for the following reason:

"The offence in this case is one punishable on summary conviction, but it is an offence under a federal statute, and in such case I fail to find any sufficient authority for holding that s.3 of the Prisons and Reformatories Act, R.S.C. 1927, c.163, does not apply. This defendant's sentence then began on the date when adjudged and he was in custody when it was pronounced.

He escaped from that custody by reason of the unlawful act of the Magistrate. The Magistrate in effect tried to banish him, and in effect connived at the escape. But he had no power to do so, he was *functus officio*."

It should be noted that this case and those which follow are cited only

Sections 638-640—*continued*

with reference to the magistrate's exercise of his authority. They must be read in the light of the fact that s.3 of the *Prisons and Reformatories Act* was repealed by 1950, c.11, s.20, and replaced by a new section, 1054B, of the *Criminal Code*. As to commencement of sentence, see now s.624, *ante*.

Except on the basis that the condition that the defendant move on was made at his own request, it is difficult to reconcile the foregoing cases with those which follow and in which this practice more typically appears. A person was charged with vagrancy on October 26, 1921, and pleaded guilty. The magistrate sentenced him to six months' imprisonment, but directed that the warrant of commitment be "held for 24 hours", apparently with the understanding that the defendant would leave the city. He did so, but returned about two months later only to leave again when the police informed him that he would be arrested if he remained. Early in February, 1922, he came back again, was arrested, and taken to the common gaol. An application for his release was refused upon the ground that his term of imprisonment had not commenced at the time of his arrest (*R. v. LITMAN*(1922), 37 C.C.C.26). In the course of his opinion, the Judge stated:

"The practice of permitting prisoners who have been convicted of minor offences to leave town and stay away, has for a long time prevailed in Canadian Police Courts. It is always done with the consent and at the request of the prisoner. It seldom happens that it is to the interests of anyone to complain of this practice, so much so that there are very few reported cases dealing with it. One case, however, came before me a few years ago."

The case to which the learned Judge made reference was one which illustrates that, however convenient the practice may be, it may lead to complications. A woman was convicted of being an inmate of a disorderly house and sentenced to imprisonment for three months, but was given forty-eight hours to leave the city. She left, but returned later, whereupon she was arrested and taken to gaol. She applied for release, but her application was refused in the following terms:

"The main objection urged for the prisoner is directed against the practice which has now become common with magistrates, whereby the accused in a certain class of cases, after being convicted and sentenced to imprisonment is, as it is commonly expressed, given time to leave the city or country. I find, however, that this is effected by, and involves, no other judicial act by the magistrate than a direction that the execution of the warrant of commitment be withheld for a short space of time specified, the understanding being that the accused will not be interfered with if he chooses to leave within that time.

The practice seems to me to be in the interests of the community, as it affords an inexpensive means of ridding it of undesirables. On the other hand, it would appear that convicted parties also consider it to be in their own interest. In fact, it is generally adopted only when the accused signifies his readiness to avail himself of it. In any event, I cannot see that the accused is prejudiced. He is free to take advantage or not of the few days of delay to leave, and if he does not

his position is no worse, as he just stands where he stood before . . . . .

I am free to admit that the practice can easily be made an occasion for abuse, inasmuch as the re-arrest is not dependent on any further action by the magistrate as in a case of suspended sentence. But nothing of that nature happened in this case."

The defendant shortly afterwards renewed her application upon new facts and to another Judge. The report does not state the nature of the new facts, but it may be surmised that it was her desire to bring it to the attention of the court that she had not returned within three months from the date of sentence. In any event, the application succeeded upon the following ground:

"It appears to me that at the expiration of the three months the effect of the conviction was spent, and no power existed to re-arrest the applicant on a warrant based on the old conviction. .

It may very well be that the authorities considered that the arrangement made would ensure the absence of this applicant from Winnipeg indefinitely. I enquired of counsel for the crown whether he had any authority to show that the police court, or any other court in Manitoba, had power to banish an individual for life, and he frankly admitted that no such authority was known to him. In my opinion no such power exists. For these reasons I think the order must be granted, and the prisoner discharged from custody." (*R. v. FITZPATRICK* (1915), 25 C.C.C.42.)

While it appears that the practice now under discussion is not confined to Canada (*Re LEO HINSON*(1911), 156 North Carolina Rep.250, cited in *R. v. LITMAN, supra,* it seems that in this country there is no very definite authority either for or against it. By contrast with what has been quoted with regard to its efficacy in ridding the community of undesirables, one Canadian Judge, speaking with obvious hesitation, has said:

"I express no opinion upon it, but it seems to me a grave question whether magistrates possess the power they claim of allowing time to elapse before issuing the commitment unless they have provided for such delay in the conviction. It is the duty of the magistrate when he gives judgment to follow up that judgment with a commitment, and it is to me very doubtful whether he possesses the power to suspend the execution of his sentence until for some reason or for no reason at all he pleases to execute it." (*Re THOMAS LYNCH*(1906), 12 C.C.C.141.)

WHIPPING.

EXECUTION OF SENTENCE BY WHIPPING.—Number of strokes to be specified.—Supervision.—Instrument to be used.—When to be used.—Female not to be whipped.

641. (1) Where a person is liable to be sentenced to be whipped, the court may sentence him to be whipped on one, two or three occasions within the limits of the prison in which he is confined.

(2) A sentence of whipping shall specify the number of strokes to be administered on each occasion.

(3) A sentence of whipping shall be executed under the supervision of the prison doctor or, if he is unable to be present, it shall

Section 641—*continued*

be executed under the supervision of a duly qualified medical practitioner to be named by the Attorney General of Canada, where the sentence is executed in a prison administered by the Government of Canada, or, where the sentence is executed in a prison administered by the government of a province, to be named by the Attorney General of that province.

(4) The instrument to be used in the execution of a sentence of whipping shall be a cat-o'-nine tails, unless some other instrument is specified in the sentence.

(5) A sentence of whipping shall be executed at a time to be fixed by the keeper of the prison in which it is to be executed, but, whenever practicable, a sentence of whipping shall be executed not less than ten days before the expiration of any term of imprisonment to which the convicted person has been sentenced.

(6) No female person shall be whipped.

This is the former s.1060. Provisions relating to a judicial sentence of whipping came into the Code of 1892 from R.S.C. 1886, c.181, s.30, as s.957. The section was amended by 1900, c.46, s.3, and 1938, c.44, s.52.

The repealed Code provided for punishment by whipping under sentence of the Court for the following offences:

1 —	Sec. 80	—	Assault on Sovereign
2 —	" 204	—	Male party to incest
3 —	" 206	—	Gross indecency
4 —	" 276	—	Choking, drugging, etc., to overcome resistance
5 —	" 292(a)	—	Indecent assault on female
6 —	" 292(c)	—	Assault occasioning actual bodily harm to wife or other female
7 —	" 293	—	Indecent assault on male
8 —	" 299	—	Rape
9 —	" 300	—	Attempted rape
10 —	" 301	—	Carnal knowledge of girl under 14 years
11 —	" 302	—	Attempt
12 —	" 447	—	Robbery
13 —	" 457(2)	—	Armed burglary

For the offence of assault causing actual bodily harm to wife or other female (292(c)), whipping was added by amendment in 1909. The same Bill proposed that it should be made a penalty for carrying concealed weapons, but this proposal was withdrawn. It proposed also that there should be whipping in cases of robbery or assault with intent to rob, but it was not until 1921 (c.25, s.8) that this change was made (Secs.447 and 448).

For the offence of rape as well, whipping was added in 1921, to do away with the anomaly that a man could be whipped for the attempt but not for the completed offence.

Prior to 1938 subsec.(3) of s.1060 read as follows:

"(3) Whenever practicable, every whipping shall take place not less than ten days before the expiration of any term of imprisonment to which the offender is sentenced for the offence."

OLD CODE:

1060. Whenever whipping may be awarded for any offence, the court may sentence the offender to be once, twice or thrice whipped, within the limits of the prison, under the supervision of the medical officer of the prison, or if there be no such officer, or if the medical officer be for any reason unable to be present, then, under the supervision of a surgeon or physician to be named by the Minister of Justice, in the case of prisons under the control of the Dominion, and in the case of other prisons by the Attorney General of the province in which such prison is situated.

(2) The number of strokes shall be specified in the sentence; and the instrument to be used for whipping shall be a cat-o'-nine tails unless some other instrument is specified in the sentence.

(3) Every whipping shall take place, under the supervision as aforesaid, at such time as may be determined by the officer in charge of the prison: Provided that whenever practicable, every whipping shall take place not less than ten days before the expiration of any term of imprisonment to which the offender is sentenced for the offence.

(4) Whipping shall not be inflicted on any female.

The reason given for the amendment made in that year was (Hansard 1938, p.4321):

> "The explanatory note gives essentially the purpose of the change: The object of this amendment is to insure that the whipping to which the prisoner is sentenced shall be inflicted. In the past some sentences have contained specific times at which the whipping is to take place and it has been found that through illness, the shortening of the term by good behaviour and other causes, it has been impracticable to carry out the sentence in this respect, with the result that the prisoner has escaped this part of his punishment."

It was said that it would apply only to a whipping prescribed in the sentence and not to whipping inflicted in the course of service of the sentence in the penitentiary.

There was further provision in s.1018(3), (now s.586(3)), that a sentence of whipping shall not be executed within the time limited for appeal or until an appeal or application for leave to appeal has been determined.

The matter of corporal punishment is a highly controversial subject and the question of its abolition is being studied by a joint committee of the Senate and House of Commons. Meanwhile the new Code continues it as under the former Code except for:

1. Assaults on the sovereign. Such an offence is not likely to happen in Canada.

3. Gross indecency. Such a case may be evidence of a psychopathic state. The Code accordingly places it within the operation of s.661, which provides for preventive detention.

6. Assault on wife or other female. As for the offence of wife beating, to give the offending husband "a taste of his own medicine" may seem a fitting retribution, but the relationship is a continuing one—there is not always a separation—and there is danger that the last state of the wife may be worse than the first.

Section 641—*continued*

The draft bill as presented proposed to leave it to the Governor-in-Council to pass regulations governing the method of carrying out the sentence, but the committee of the House of Commons restored the details in subsecs.(3), (4) and (5).

The cases of *R. v. WHEPDALE*(1927), 49 C.C.C.62 (Sask. C.A.); *R. v. MAH CHEE*, [1939]1 D.L.R.111 (B.C.C.A.); *R. v. CHILDS*, [1939] 1 D.L.R.188 (Ont.C.A.), the last named, quoting at length from the report of the Departmental Committee on corporal punishment in England (March 1938), may be referred to as showing a tendency against whipping. On the other hand in *R. v. LEMIRE & GOSSELIN*(1948), 92 C.C.C.201, it was said that "The criminal law so provides, and until it has, in the wisdom of the law-maker, been changed or abrogated, it is idle to speculate as to the merits or demerits of such form of punishment."

CAPITAL PUNISHMENT.

FORM OF SENTENCE.

642. The sentence to be pronounced against a person who is sentenced to death shall be that he shall be hanged by the neck until he is dead.

This is the former s.1062. It came from R.S.C. 1886, c.181, s.5, *An Act respecting Punishments, Pardons, and the Commutation of Sentences,* and 54 Geo.III, c.46, s.1 (Imp.). The Imperial Act on capital executions is 31 Vict., c.24.

The form of sentence is quoted in 9 Hals., 2nd ed., p.225 (note h.).

Although not with reference to capital punishment, it was said in *Re RICE* (1881), 14 N.S.R.77, that:

> "No English case is to be found but we have referred to two American cases where it was held that a mere accidental error in pronouncing sentence was not a sufficient ground for discharging a prisoner."

The question of the abolition of capital punishment is under study by a joint committee of the Senate and House of Commons.

SENTENCE OF DEATH TO BE REPORTED TO THE MINISTER OF JUSTICE. —When judge may grant reprieve.—Sentence of death in N.W.T. and Yukon.

643. (1) A judge who sentences a person to death shall appoint a day for the execution of the sentence, and in appointing that day shall allow a period of time that, in his opinion is sufficient to enable the Governor General to signify his pleasure before that day, and shall forthwith make a report of the case to the Minister of Justice for the information of the Governor General.

(2) Where a judge who sentences a person to death considers

(*a*) that the person should be recommended for the royal mercy, or

(*b*) that, for any reason, it is necessary to delay the execution of the sentence,

the judge or any judge who might have held or sat in the same court may, at any time, reprieve the person for any period that is necessary for the purpose.

OLD CODE:

1061. Every one who is indicted as principal or accessory for any offence made capital by any statute, shall be liable to the same punishment, whether he is convicted by verdict or on confession, and this as well in the case of accessories as of principals.

1062. In all cases where an offender is sentenced to death, the sentence or judgment to be pronounced against him shall be that he be hanged by the neck until he is dead.

1063. In the case of any prisoner sentenced to the punishment of death, the judge before whom such prisoner has been convicted shall forthwith make a report of the case to the Secretary of State, for the information of the Governor General; and the day to be appointed for carrying the sentence into execution shall be such as, in the opinion of the judge, will allow sufficient time for the signification of the Governor's pleasure before such day.
(2) If the judge thinks such prisoner ought to be recommended for the exercise of the royal mercy, or if, from the non-decision of any point of law reserved in the case, or from any other cause, it becomes necessary to delay the execution, he, or any other judge of the same court, or any judge who might have held or sat in such court, may, from time to time, either in term or in vacation, reprieve such offender for such period or periods beyond the time fixed for the execution of the sentence as are necessary for any of the purposes aforesaid.
(3) In the Northwest Territories and in the Yukon Territory, when any person is convicted of a capital offence and is sentenced to death the judge or stipendiary magistrate who tried the case shall forthwith forward to the Secretary of State of Canada full notes of the evidence with his report upon the case, and the execution shall be stayed until such report is received and the pleasure of the Governor General therein is communicated to the Commissioner of the Northwest Territories or of the Yukon Territory, as the case may be.

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(3) A judge who sentences a person to death in the Northwest Territories or in the Yukon Territory shall, after appointing a day for the execution of the sentence, in accordance with subsection (1), forthwith forward to the Minister of Justice full notes of the evidence taken at the trial and his report upon the case, and the execution of the sentence shall be suspended until the report is received and the pleasure of the Governor General is signified, and where, pursuant to such suspension, a new time is required to be fixed for execution of the sentence, it may be fixed by the judge who imposed the sentence or any judge having equivalent jurisdiction.

This comes from the former s.1063 which was s.937 in the Code of 1892 amended by 1913, c.13, s.31 by the addition of subsec.(3). It came from R.S.C.1886, c.181, s.8.

In this section the Minister of Justice has been substituted for the Secretary of State. The last four lines of subsec.(3) are new to make provision for cases in which it becomes necessary to appoint a new time for an execution. Reference to stipendiary magistrate is not continued; see s.6 and notes *ante*. See also ss.651 & 652.

Taschereau's Code p.960 quotes 2 Hale, 412, that a reprieve may be

Section 643—*continued*

granted or taken off by a judge, although the session may be adjourned or finished, and this by reason of common usage.

PRISONER TO BE CONFINED APART.—Who to have access.

644. (1) A person who is sentenced to death shall be confined in a safe place within a prison apart from all other prisoners.

(2) No person other than the keeper of the prison and his servants, the prison doctor and a clergyman or minister shall have access to a person who is sentenced to death unless permission is given in writing by a judge of the court by which the sentence was imposed or by the sheriff.

This is the former s.1064 re-drawn with minor changes. It was s.938 in the Code of 1892 and came from R.S.C. 1886, c.181, s.9.

In *COOK v. WESTGATE*(1944), 82 C.C.C.190, it was held that an order under this section granting or refusing access is not appealable, first, in the absence of express provision for appeal, and second, because it is discretionary. The court refused to permit service of a writ of summons in an action for damages on the defendant who was under sentence of death for murder.

See also ss.651 and 652, *post*.

PLACE OF EXECUTION.—Who shall attend.—Who may attend.

645. (1) A sentence of death shall be executed within the walls of a prison.

(2) The sheriff, the keeper of the prison, the prison doctor and any other persons required by the sheriff shall be present at the execution of a sentence of death.

(3) A clergyman or minister who desires to attend and any other person whom the sheriff considers it proper to admit may attend the execution of a sentence of death.

This combines the former ss.1065, 1066 and 1067. These were ss.939, 940 and 941 in the Code of 1892. They were ss.10, 11 and 12 in R.S.C. 1886, c.181 and were taken from the *Capital Punishment Amendment Act*, 1868 (Imp.).

A Résumé of Instructions in relation to capital punishment, issued (1941) by the Department of the Secretary of State and patterned in part on rules made under the Imperial Act (as to which see Churchill's Law of the Sheriff, p.152), points out that the preparations for carrying out a sentence of execution are under provincial control. Subsec.(1) of this section alters the wording of the former s.1065 to enable the province to establish a central place of execution. This was recommended in the report of the Archambault Commission, 1938, p.171. See also Hansard, 1937, p.350.

Subsec.(3) is altered from the former s.1067. Having regard to present-day conditions and the changed position of a justice, there seems to be no reason to continue the provision whereby any justice may attend as of right. Since the sheriff may admit any person he deems proper, including a relative, there is no necessity to mention the latter specifically.

See also ss.647, 651 and 652, *post*.

OLD CODE:

1064. Every one who is sentenced to suffer death shall, after judgment, be confined in some safe place within the prison, apart from all other prisoners; and no person except the gaoler and his servants, the medical officer or surgeon of the prison and a chaplain or a minister of religion, shall have access to any such convict, without permission, in writing, of the court or judge before whom such convict has been tried, or of the sheriff.

1065. Judgment of death to be executed on any prisoner shall be carried into effect within the walls of the prison in which the offender is confined at the time of execution.

1066. The sheriff charged with the execution, and the gaoler and medical officer or surgeon of the prison, and such other officers of the prison and such persons as the sheriff requires, shall be present at the execution.

1067. Any justice for the district, county or place to which the prison belongs, and such relatives of the prisoner or other persons as it seems to the sheriff proper to admit within the prison for the purpose, and any minister of religion who desires to attend, may also be present at the execution.

1068. As soon as may be after judgment of death has been executed on the offender, the medical officer or surgeon of the prison shall examine the body of the offender, and shall ascertain the fact of death, and shall sign a certificate thereof, in form 71, and deliver the same to the sheriff.

(2) The sheriff and the gaoler of the prison, and such justices and other persons present, if any, as the sheriff requires or allows, shall also sign a declaration in form 72 to the effect that judgment of death has been executed upon the offender.

1069. The duties imposed upon the sheriff, gaoler, medical officer or surgeon by the three sections last preceding may be, and, in his absence, shall be performed by his lawful deputy or assistant, or other officer or person ordinarily acting for him, or conjointly with him, or discharging the duties of any such officer.

CERTIFICATE OF DEATH.—Form.—Declaration by sheriff and keeper.—Form.

646. (1) The prison doctor shall, as soon as possible after a sentence of death has been executed, examine the body of the executed person, ascertain the fact of death, and sign and deliver to the sheriff a certificate in Form 40.

(2) The sheriff, the keeper of the prison and any other persons who are present at the execution of a sentence of death shall, if required by the sheriff, sign a declaration in Form 41.

This is the former s.1068. It was s.942 in the Code of 1892, and ss.13 and 14 of R.S.C. 1886, c.181.

See also ss.649, 651 and 652, *post*.

DEPUTIES MAY ACT.

647. Any duty that is imposed upon a sheriff, keeper of the prison or prison doctor by section 645 may, and in his absence shall, be performed by his lawful deputy or assistant, or by the officer or person who ordinarily acts for him or with him.

Section 647—*continued*

This is the former s.1069. It was s.943 in the Code of 1892, amended by 63 & 64 Vict., c.46, s.3, to include the three instead of the two preceding sections. It came from R.S.C. 1886, c.181, s.15.

See also ss.651 and 652, *post*.

CORONER'S INQUEST.—Identity and death.—Inquisition in duplicate.—Jurors.—Where no coroner in Newfoundland.

648. (1) A coroner of a district, county or place where a sentence of death is executed shall, within twenty-four hours after the execution of the sentence, hold an inquest on the body of the executed person.

(2) The jury shall, at the inquest referred to in subsection (1), inquire into and ascertain the identity of the body of the executed person, and whether sentence of death was duly executed.

(3) The coroner shall prepare the inquisition in duplicate and shall deliver one to the sheriff.

(4) No officer of a prison in which a sentence of death is executed and no prisoner confined therein shall be a juror on an inquest referred to in subsection (1).

(5) Where a sentence of death is executed in a district county or place in the province of Newfoundland in which there is no coroner, an inquiry shall, for the purposes of this section, be conducted without the intervention of a jury by a magistrate having jurisdiction in the district, county or place, and for the purposes of this subsection the provisions of section 649 and subsections (1), (2) and (3) of this section apply, *mutatis mutandis*.

Subsecs.(1) to (4) are the former s.1070. These provisions were s.944 in the Code of 1892, and R.S.C. 1886, c.181, ss.16 and 17. Subsec.(5) is new; the office of coroner was abolished in Newfoundland in 1875.

The purpose of the section is to provide that the proper execution of a sentence of death shall be recorded in the finding of a court.

See also ss.649, 651 and 652, *post*.

DOCUMENTS TO BE SENT TO THE MINISTER OF JUSTICE.

649. Where a sentence of death is executed, the sheriff shall, as soon as possible, send the certificates mentioned in section 646 and the inquisition referred to in subsection (3) of section 648 to the Minister of Justice or to the person who, from time to time, is appointed by the Governor in Council to receive them.

This comes from the former s.1072(1) which was part of s.946 in the Code of 1892, and of R.S.C. 1886, c.181, s.20. In this section the Minister of Justice is substituted for the Secretary of State.

That part of the former section which required the posting up of the certificate of death, etc., is not continued.

See also ss.651 and 652, *post*.

PLACE OF BURIAL.

650. The body of a person who is executed pursuant to a sentence of death shall be buried within the prison in which the sen-

OLD CODE:

1070. A coroner of a district, county or place to which the prison belongs wherein judgment of death is executed on any offender shall, within twenty-four hours after the execution, hold an inquest on the body of the offender.
(2) The jury at the inquest shall inquire into and ascertain the identity of the body, and whether judgment of death was duly executed on the offender.
(3) The inquisition shall be in duplicate, and one of the originals shall be delivered to the sheriff.
(4) No officer of the prison and no prisoner confined therein shall, in any case, be a juror on the inquest.

1071. The body of every offender executed shall be buried within the walls of the prison within which judgment of death is executed on him, unless the Lieutenant Governor in Council orders otherwise.

1072. Every certificate and declaration, and a duplicate of the inquest required by this Part shall in every case be sent with all convenient speed by the sheriff to the Secretary of State, or to such other officer as is, from time to time, appointed for the purpose by the Governor in Council.
(2) Printed copies of such several instruments shall as soon as possible, be exhibited and shall, for twenty-four hours at least, be kept exhibited on or near the principal entrance of the prison within which judgment of death has been executed.

1073. The omission to comply with any provision of the preceding sections of this Part shall not make the execution of judgment of death illegal in any case in which such execution would otherwise have been legal.

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tence was executed, unless the Lieutenant-Governor in Council, the Commissioner of the Yukon Territory or the Commissioner of the Northwest Territories, as the case may be, otherwise orders.

This is the former s.1071 extended to apply to the Yukon and the Northwest Territories. S.1071 was s.945 in the Code of 1892, and came from R.S.C. 1886, c.181, s.18, where, however, the wording was "unless the Lieutenant Governor in Council, being satisfied that there is not, within the walls of any prison, sufficient space for the convenient burial of offenders executed therein, permits some other place to be used for the purpose".

See also s.652, *post*.

SAVING.

651. Failure to comply with sections 643 to 649 does not make the execution of a sentence of death illegal where the execution would otherwise have been legal.

This is the former s.1073. It was s.947 in the Code of 1892 and R.S.C. 1886, c.181, s.21.

PROCEDURE UNDER OTHER ACTS NOT AFFECTED.

652. Sections 643 to 650 do not apply in so far as they are inconsistent with any other Act of the Parliament of Canada that provides for the imposition and execution of a sentence of death.

Section 652—*continued*

This replaces the former s.1074, which was s.948 in the Code of 1892, and R.S.C. 1886, c.181, s.22. It was s.16 of the *Capital Punishment Amendment Act* 1868(Imp.) which applied only to murder. There might be sentence of death by shooting under the *Treachery Act*, 1940, c.43, a measure not in force since the cessation of war.

REGULATIONS.

653. The Governor in Council may make regulations not inconsistent with this Act with respect to the execution of sentences of death.

This comes from the former s.1075(1) which was s.949(1) in the Code of 1892, and R.S.C. 1886, c.181, s.44. S.1075(2) which required the tabling of regulations, is not continued.

DISABILITIES.

CONVICTION OF PERSON HOLDING PUBLIC OFFICE VACATES OFFICE.—When disability ceases.—Disability to contract.—Removal of disability.

654. (1) Where a person is convicted of treason or of an indictable offence for which he is sentenced to death or to imprisonment for a term exceeding five years and holds, at the time he is convicted, an office under the Crown or other public employment, the office or employment forthwith becomes vacant.

(2) A person to whom subsection (1) applies is, until he undergoes the punishment imposed upon him or the punishment substituted therefor by competent authority or receives a free pardon from Her Majesty, incapable of holding any office under the Crown or other public employment, or of being elected or sitting or voting as a member of the Parliament of Canada or of a legislature or of exercising any right of suffrage.

(3) No person who is convicted of an offence under section 102, 105 or 361 has, after that conviction, capacity to contract with Her Majesty or to receive any benefit under a contract between Her Majesty and any other person or to hold office under Her Majesty.

(4) Where a conviction is set aside by competent authority any disability imposed by this section is removed.

This enactment comes from the former s.1034 which came into the Code of 1892 as a new provision in s.961 and was based upon 33-34 Vict., c.23, s.2 (U.K.). The present section combines in subsec.(3) the provisions as to disabilities following conviction that appeared in the former ss.159, 162 and 434(3). In subsec.(1) the provisions relating to the cessation of payments from a pension or superannuation fund have been dropped; in most cases nowadays such funds are under contributory schemes.

S.434(3), now covered by s.654(3) was re-enacted by 1951, c.47, s.17.

OLD CODE:

1074. Except in so far as is hereby otherwise provided, judgment of death shall be carried into effect in the same manner as if the above provisions had not been passed.

1075. The Governor in Council may, from time to time, make such rules and regulations to be observed on the execution of judgment of death in every prison, as he, from time to time, deems expedient for the purpose, as well of guarding against any abuse in such execution, as of giving greater solemnity to the same, and of making known without the prison walls the fact that such execution is taking place.

(2) All such rules and regulations shall be laid upon the tables of both Houses of Parliament within six weeks after the making thereof, or, if Parliament is not then sitting, within fourteen days after the commencement of the next sitting thereof.

159. Every person convicted of an offence under the last preceding section shall be incapable of contracting with the government, or of holding any contract or office with, from, or under it, or of receiving any benefit under any such contract.

162. Every one is guilty of an indictable offence who, directly or indirectly,
(a) sells or agrees to sell any appointment to or resignation of any office, or any consent to any such appointment or resignation, or receives, or agrees to receive, any reward or profit from the sale thereof; or
(b) purchases or gives any reward or profit for the purchase of any such appointment, resignation or consent, or agrees or promises to do so;
and in addition to any other penalty incurred, forfeits any right which he may have in the office and is disabled for life from holding the same.

434. (3) No person who is convicted of an offence under this section has, after that conviction, capacity to contract with His Majesty or to receive any benefit under a contract between His Majesty and any other person, or to be employed by or hold office under His Majesty.

1034. If any person hereafter convicted of treason or any indictable offence for which he is sentenced to death, or imprisonment for a term exceeding five years, holds at the time of such conviction any office under the Crown or other public employment, or is entitled to any pension or superannuation allowance payable by the public, or out of any public fund, such office or employment shall forthwith become vacant, and such pension or superannuation allowance or emolument shall forthwith determine and cease to be payable, unless such person receives a free pardon from His Majesty, within two months after such conviction, or before the filling up of such office or employment, if given at a later period.

(2) Every such person sentenced to imprisonment as aforesaid or on whom sentence of death has been passed which has been commuted to imprisonment, shall become, and, until he undergoes the imprisonment aforesaid or suffers such other punishment as by competent authority is substituted for the same, or receives a free pardon from His Majesty, shall continue incapable of holding any office under the Crown, or other public employment, or of being elected, or sitting, or voting, as a member of either House of Parliament, or of exercising any right of suffrage or other parliamentary or municipal franchise.

(3) The setting aside of a conviction by competent authority shall remove the disability by this section imposed.

PARDON.

TO WHOM PARDON MAY BE GRANTED.—Free or conditional pardon.—Effect of free pardon.—Punishment for subsequent offence not affected.

655. (1) Her Majesty may extend the royal mercy to a person who is sentenced to imprisonment under the authority of an Act of the Parliament of Canada, even if the person is imprisoned for failure to pay money to another person.

(2) The Governor in Council may grant a free pardon or a conditional pardon to any person who has been convicted of an offence.

(3) Where the Governor in Council grants a free pardon to a person, that person shall be deemed thereafter never to have committed the offence in respect of which the pardon is granted.

(4) No free pardon or conditional pardon prevents or mitigates the punishment to which the person might otherwise be lawfully sentenced on a subsequent conviction for an offence other than that for which the pardon was granted.

This is the former s.1076 with "the Governor in Council" substituted for "the Crown". S.1076 was s.966 in the Code of 1892 and was adapted from R.S.C. 1886, c.181, ss.38 and 39.

HAY v. TOWER DIVISION JUSTICES(1890), 24 Q.B.D.561 was decided in the terms of subsec.(3), *i.e.*, that a free pardon restores the person to the same status as before he was convicted.

"The King's pardon, if general in its purport and sufficient in other respects, obliterates every stain which the law attached to the offender. Generally speaking, it puts him in the same situation as that in which he stood before he committed the pardoned offence; and frees him from the penalties and forfeitures to which the law subjected his person and property." Chitty, Prerogative of the Crown, p.102.

"The effect of such pardon by the King, is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not so much to restore his former, as to give him new credit and capacity." 4 Bl. Com. 402.

"The pardon of Treason or Felony, even after an Attainder, so far clears the Party from the Infamy, and all other Consequences thereof; that he may be a good Witness, and may have an Action against any who shall afterwards call him Traitor or Felon, for the Pardon makes him as it were a new Man."

2 Hawkins, Crown Law 318 and 2 Hawkins, P.C.547 are to similar effect.

It would appear, however, that the right of pardon does not exist without qualification where private rights would be affected. In 2 Hawkins., P.C., c.37, s.33, the following appears:

"I take it to be a settled rule, that the King may pardon any offence whatever whether against the common or statute law, so far as the public is concerned in it, after it is over, and consequently may prevent any popular action on a penal statute by a pardon of the offence before any suit commenced by an informer. But while a public nuisance continues unreformed, it seems agreed, that the King cannot

OLD CODE:

1076. The Crown may extend the royal mercy to any person sentenced to imprisonment by virtue of any statute, although such person is imprisoned for non-payment of money to some other person than the Crown.

(2) Whenever the Crown is pleased to extend the royal mercy to any offender convicted of an indictable offence punishable with death or otherwise, and grants to such offender either a free or conditional pardon, by warrant under the royal sign manual, countersigned by one of the principal Secretaries of State, or by warrant under the hand and seal-at-arms of the Governor General, the discharge of such offender out of custody, in case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall, as to the offence of which he has been convicted, have the same effect as a pardon of such offender under the great seal.

(3) No free pardon, nor any discharge in consequence thereof, nor any conditional pardon, nor the performance of the condition thereof, in any of the cases aforesaid, shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any offence other than that for which the pardon was granted.

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wholly pardon it, because such pardon would take away the only means of redress of it."

The following extract from the judgment of Boyd, C., in *ATTORNEY-GENERAL OF CANADA v. ATTORNEY-GENERAL OF ONTARIO*(1890), 20 O.R.222, at p.251, is in accord with this pronouncement:

"The Royal prerogative of pardon is a relic of that power of dispensing with the laws which was restrained within narrow compass by the Bill of Rights in 1688. In its origin the pardoning power arose when crimes began to be regarded as offences against the State, and not as mere injuries to individuals, and when pecuniary satisfaction to the injured became displaced by deterrent remedies affecting the person of the offender. The King being the impersonation or representative of the State, all crimes and misdemeanours affecting the life and security of the subject or the peace of the public were accounted injuries to him. In his name all prosecutions were conducted, all punishments were awarded, and by him all dispensations of grace were granted. This last act of sovereignty proceeded upon the theory that he, the injured person in the eye of the law, could forgive a transgression which was reckoned against himself: 1 Bl. pp.268 and 269. But concurrently with this royal exercise of mercy, the pardoning power was in use in other quarters when the same reason applied as in the case of the Crown. Thus Earls Palatine and others in virtue of their possession of Royal franchises had a right of pardon within the limits of their local jurisdiction. So the right of pardon was practically held by the prosecutor in the now obsolete proceedings in trials by appeal respecting crimes. He might grant a release which barred all proceedings, and this because one may renounce the benefit of a law which he has invoked in his own favour. The punishment awarded in such appeals the King had no right to remit, inasmuch as it was the party actually injured who had demanded satisfaction: 1 Bl. p.269; iv. *ib.* pp.12, 311, 391.

Section 655—*continued*

These reasons still hold good for the new state of affairs presented by the development of self-governing dependencies, ..."

Following representations made to the Imperial authorities by the Minister of Justice of Canada, the royal instructions to Governors General of Canada under letters patent of 1878 as quoted in Todd's "Parliamentary Government in the British Colonies", p.365, contained the following provisions:

"We do further authorise and empower our said governor-general, as he shall see occasion, in our name and on our behalf, when any crime has been committed (for which the offender may be tried within our said dominion), to grant a pardon to any accomplice, not being the actual perpetrator of such crime, who shall give such information as shall lead to the conviction of the principal offender; and, further, to grant to any offender convicted of any crime in any court, or before any judge, justice, or magistrate, within our said dominion, a pardon either free or subject to lawful conditions, or any respite of the execution of the sentence of any such offender, for such period as to our said governor-general may seem fit, and to remit any fines, penalties, or forfeitures which may become due and payable to us. Provided always, that our said governor-general shall not in any case, except where the offence has been of a political nature, make it a condition of any pardon or remission of sentence that the offender shall be banished from, or shall absent himself from, our said dominion. And we do hereby direct and enjoin that our said governor-general shall not pardon or reprieve any such offender without first receiving, in capital cases, the advice of the privy council for our said dominion, and in other cases the advice of one at least of his ministers, and in any case in which such pardon or reprieve might directly affect the interests of the empire, or of any country or place beyond the jurisdiction of the government of our said dominion, our said governor-general shall, before deciding as to either pardon or reprieve, take those interests specially into his own personal consideration, in conjunction with such advice as aforesaid."

Those instructions were renewed in 1931, omitting the proviso as to banishment (see prefix to 1931 Statutes). They were renewed again in 1947 omitting the words which follow "at least one of his ministers". (81 Can. Gazette, Part I, p.3015.)

See also s.658, and, as to pleading pardon, s.516 *ante*.

It may be observed here that, in view of the clarification in s.655(3), the former s.1078 is not continued. That section was taken originally from 9 Geo. IV, c.2, s.3 (Imp.), the *Civil Rights of Convicts Act*, 1828, passed, as was held in *LEYMAN v. LATIMER*(1878), 14 Cox, C.C.51, not solely to affect the law of evidence in certain cases but to affect also the persons who had been convicted and to restore them if they had suffered the punishment awarded, to their full civil rights and status.

On the other hand, it was pointed out in *HAY v. LONDON JUSTICES, supra*, that there seemed to be some literal conflict between the corresponding English provisions and those found in other Acts attaching disabilities to convictions. And s.1078, as it read, seemed to be not

OLD CODE:

1077. The Crown may commute the sentence of death passed upon any person convicted of a capital offence to imprisonment in the penitentiary for life, or for any term of years not less than two years, or to imprisonment in any gaol or other place of confinement for any period less than two years, with or without hard labour.

(2) An instrument under the hand and seal-at-arms of the Governor General, declaring such commutation of sentence, or a letter or other instrument under the hand of the Secretary of State of Canada or of the Under Secretary of State, shall be sufficient authority to any judge or justice, having jurisdiction in such case, or to any sheriff or officer to whom such letter or instrument is addressed, to give effect to such commutation and to do all such things and to make such orders, and to give such directions, as are requisite for the change of custody of such convict, and of his conduct to and delivery at such gaol or place of confinement or penitentiary, and his detention therein, according to the terms on which his sentence has been commuted.

1084. The Governor in Council may at any time remit, in whole or in part, any pecuniary penalty, fine or forfeiture imposed by any Act of the Parliament of Canada, whether such penalty, fine or forfeiture is payable to His Majesty or to some other person, or in part to His Majesty and in part to some other person, and whether it is recoverable on indictment, information or summary conviction, or by action or otherwise.

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quite accurate, since the conviction remains of record after the punishment has been endured; it is not expunged as it would be by a full pardon.

COMMUTATION OF SENTENCE.—Notice to authorities.

656. (1) The Governor in Council may commute a sentence of death to imprisonment in the penitentiary for life, or for any term of years not less than two years, or to imprisonment in a prison other than a penitentiary for a period of less than two years.

(2) A copy of an instrument duly certified by the Clerk of the Privy Council or a writing under the hand of the Minister of Justice or Deputy Minister of Justice declaring that a sentence of death is commuted is sufficient notice to and authority for all persons having control over the prisoner to do all things necessary to give effect to the commutation.

This is the former s.1077, re-drawn to simplify the provisions as to notice of commutation, and to substitute the Minister of Justice or Deputy Minister of Justice for the Secretary of State or Under Secretary of State.

S.1077 was s.967 in the Code of 1892, and R.S.C. 1886, c.181, s.40.

REMISSION BY GOVERNOR IN COUNCIL.—Terms of remission.

657. (1) The Governor in Council may order the remission, in whole or in part, of a pecuniary penalty, fine or forfeiture imposed under an Act of the Parliament of Canada, whoever the person may be to whom it is payable or however it may be recoverable.

Section 657—*continued*

(2) An order for remission under subsection (1) may include the remission of costs incurred in the proceedings, but no costs to which a private prosecutor is entitled shall be remitted.

This combines the former ss.1084 and 1085, which were enacted by 1902, c.26, ss.1 and 2. The remission of penalties imposed under provincial statutes is dealt with by the Lieutenant-Governor in Council.

ROYAL PREROGATIVE.

658. Nothing in this Act in any manner limits or affects Her Majesty's royal prerogative of mercy.

This is the former s.1080 which was s.970 in the Code of 1892, and R.S.C. 1886, c.181, s.42. It covers also a similar provision in the former s.1022(1). See notes to ss.655 and 656, *supra*.

In Parliament, in reply to the question (Hansard, 1954, p.2893) "Where, on Her Majesty's birthday or on the coronation, she announced remission of sentences for those in jail, is that carried through as a prerogative of the crown or do we in Canada then take the necessary steps to promulgate her announcement?" the answer was that "We pass an order in council which gives effect to Her Majesty's amnesty in Canada."

PART XXI.

PREVENTIVE DETENTION.

This Part reproduces with changes as noted, the provisions for preventive detention that appeared in former Part X(A)(ss.575A to 575H), which was passed as 1947, c.55, s.18, and was largely adapted from the English *Prevention of Crime Act*, 8 Edw. VII, c.59, and s.1054A, which was enacted as 1948, c.39, s.43.

INTERPRETATION.

"COURT."—"Criminal sexual psychopath."—"Preventive detention."

659. In this Part,

***(a)* "court" means**

(i) a superior court of criminal jurisdiction, or

(ii) a court of criminal jurisdiction;

***(b)* "criminal sexual psychopath" means a person who, by a course of misconduct in sexual matters, has shown a lack of power to control his sexual impulses and who as a result is likely to attack or otherwise inflict injury, pain or other evil on any person, and**

***(c)* "preventive detention" means detention in a penitentiary for an indeterminate period.**

Par.(a) modifies the former s.575A. "Court of criminal jurisdiction" is defined in s.2(10), *ante*. In effect, the definition extends to magistrates acting under Part XVI the power to deal with habitual criminals. They already had that power in respect of criminal sexual psychopaths: *R. v. TILLEY*(1952), 104 C.C.C.315, at page 316 (affirmed 106 C.C.C.12).

OLD CODE:

1085. Such remission may, in the discretion of the Governor in Council, be on terms as to the payment of costs or otherwise: Provided that where proceedings have been instituted by private persons costs already incurred shall not be remitted.

1080. Nothing in this Part shall in any manner limit or affect His Majesty's royal prerogative of mercy.

575A. In this Part unless the context otherwise requires, "judge" means a judge acting under Part XVIII of this Act and any judge having criminal jurisdiction in the province.

1054A. (8) In this section "criminal sexual psychopath" means a person who by a course of misconduct in sexual matters has evidenced a lack of power to control his sexual impulses and who as a result is likely to attack or otherwise inflict injury, loss, pain or other evil on any person.

575B. Where a person is convicted of an indictable offence committed after the commencement of this Part and subsequently the offender admits that he is or is found by a jury or a judge to be a habitual criminal, and the court passes a sentence upon the said offender, the court, if it is of the opinion that, by reason of his criminal habits and mode of life, it is expedient for the protection of the public, may pass a further sentence ordering that he be detained in a prison for an indeterminate period and such detention is hereinafter referred to as preventive detention and the person on whom such a sentence is passed shall be deemed for the purpose of this Part to be a habitual criminal.

Par.(b) is the former s.1054A(8). In *R. v. TILLEY*(1953), 106 C.C.C.42, at page 48, it was said that "there may be a course of misconduct within the meaning of that section in a space of time much less than was consumed in this case."(*i.e.*, 2 days).

In *R. v. HOYT*(1953), 107 C.C.C.59, at page 65, the following appears:

> "I am persuaded that in view of the past and in view of the prisoner's treatment of this girl there is every likelihood of further similar attacks in the future if he is at liberty. The prisoner here is the type of man against whom society ought to be protected, and in respect of whom this section was passed. If I were to disregard the evidence I have here, and failed to act upon this section, I would not be doing my duty to the state."

In this case an appeal was dismissed.

HABITUAL CRIMINALS.

APPLICATION FOR PREVENTIVE DETENTION.—Who is habitual criminal?

660. (1) Where an accused is convicted of an indictable offence the court may, upon application, impose a sentence of preventive detention in addition to any sentence that is imposed for the offence of which he is convicted if

***(a)* the accused is found to be an habitual criminal, and**

***(b)* the court is of the opinion that because the accused is an**

Section 660—*continued*

habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention.

(2) For the purposes of subsection (1), an accused is an habitual criminal if

(a) **he has previously, since attaining the age of eighteen years, on at least three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading persistently a criminal life, or**

(b) **he has been previously sentenced to preventive detention.**

This replaces the former ss.575B and 575C(1). It effects changes as follows:

1. The indictment upon which the accused is before the court will not allege that he is an habitual criminal. Compare this with ss.571 and 572, *ante*.

2. If preventive detention is sought, there must be an application under the procedure set out in s.662.

3. The words "on at least three separate and independent occasions" in subsec.(2) are substituted for the words "at least three times previously." It had been held in *R. v. CINDLER*, [1950]2 W.W.R.1088, applying the New Zealand case of *R. v. TIER*(1912), 32 N.Z.L.R.428, that the subsection meant "on three previous separate and independent occasions." *R. v. CINDLER* decided also that "convicted of an indictable offence" was intended to mean nothing less than a conviction on indictment.

4. The words "imprisonment for five years or more" in subsec.(2) replace the words "at least five years' imprisonment". This follows the decision of the Supreme Court in *R. v. ROBINSON* (or Robertson), [1951] S.C.R.522, that the latter expression did not refer to a minimum, but meant rather "exposed or subject to five years or more". Thus, although a magistrate acting under Part XVI may impose preventive detention, conviction in a case within his absolute jurisdiction will not as a rule render the accused liable to preventive detention since none of the offences specified in s.467, except perhaps attempted theft, carries a penalty greater than two years: *cf. R. v. LUFT*(1948), 91 C.C.C.294, and *R. v. CINDLER, supra*.

As to age, it was stated in *R. v. TURNER*, [1910]1 K.B.346, which contains a detailed examination of the English Act, that when the prisoner is of an age which makes it doubtful whether he may or may not have been under the statutory age at the date of the first conviction which is alleged against him, some evidence must be given, as it must be in all cases where the prisoner's appearance is not sufficient to satisfy the court.

It must be shown that the offender is leading persistently a criminal life. It was said in *R. v. POWELL*(1953), 37 Cr. App. R.185, at p.187, that "preventive detention ought to be kept for prisoners who have shown by their conduct and previous history that they cannot be trusted to abstain from crime, though they may do spells of honest work between

OLD CODE:

575c. (1) A person shall not be found to be a habitual criminal unless the judge or jury as the case may be, finds on evidence,
(a) that since attaining the age of eighteen years he has at least three times previously to the conviction of the crime charged in the indictment, been convicted of an indictable offence for which he was liable to at least five years' imprisonment, whether any such previous conviction was before or after the commencement of this Part, and that he is leading persistently a criminal life; or
(b) that he has on a previous conviction been found to be a habitual criminal and sentenced to preventive detention.

. . . . . .

1054a. (1) When any person is convicted of an offence under sections two hundred and ninety-two, two hundred and ninety-three, two hundred and ninety-nine, three hundred, three hundred and one or three hundred and two, the court, before passing sentence, may hear evidence as to whether the offender is a criminal sexual psychopath.
(2) Such evidence shall be given by at least two psychiatrists who, in the opinion of the court, are duly qualified as such and one of whom has been nominated by the Attorney General.
(3) The court may hear such other evidence as it may deem necessary.

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convictions." The mere fact that an offender has been at work since his last release from prison is not a sufficient defence, especially if, as was found in *R. v. HAYDEN*(1911), 6 Cr. App. R.213, his work was "only a cloak." On the other hand, an attempt to lead an honest life after discharge should be put clearly before the court: *R. v. WILKINS*(1922), 16 Cr. App. R.96. It was said in *R. v. TURNER, supra,* that:

> "whether evidence of the prisoner's persistently dishonest or criminal life previous to his last conviction is admissible in evidence in order to prove that he is at present leading a persistently dishonest or criminal life depends on the facts of the case. The evidence may be admissible as a step in proving that he is at present leading a persistently dishonest or criminal life."

CRIMINAL SEXUAL PSYCHOPATHS.

EVIDENCE.—Rape.—Carnal knowledge.—Indecent assault on female.—Buggery or bestiality.—Indecent assault on male.—Gross indecency.—Evidence of psychiatrists.—Sentence of preventive detention.

661. (1) Where an accused is convicted of
(a) an offence under
(i) section 136,
(ii) section 138,
(iii) section 141,
(iv) section 147,
(v) section 148, or
(vi) section 149; or
(b) an attempt to commit an offence under a provision mentioned in paragraph (a),
the court may, upon application, before passing sentence hear evi-

Section 661—*continued*

dence as to whether the accused is a criminal sexual psychopath.

(2) On the hearing of an application under subsection (1) the court may hear any evidence that it considers necessary, but shall hear the evidence of at least two psychiatrists, one of whom shall be nominated by the Attorney General.

(3) Where the court finds that the accused is a criminal sexual psychopath it shall, notwithstanding anything in this Act or any other Act of the Parliament of Canada, sentence the accused to a term of imprisonment of not less than two years in respect of the offence of which he was convicted and, in addition, impose a sentence of preventive detention.

This embodies the former s.1054A(1),(2),(3) and (5), adding thereto the offences (and attempts) under ss.147 and 149. The words "Attorney General," which are defined in s.2(2), replace the words "Minister of Justice" in subsec.(2).

It was said in *R. v. CAREY*(1951), 102 C.C.C.25, at p.29, in reference to the former section, that:

> "That section empowers the Court before passing sentence to hear evidence as to whether the offender is a criminal sexual psychopath. The power so given to the Court is a discretionary one. It may be exercised by the Court on its own motion without application by counsel for the prosecution or for the prisoner, and the exercise of the power does not depend in any way upon the consent of counsel."

Under the new section, the Court has a discretion as to the hearing of evidence and as to the imposition of preventive detention, but it may be questioned whether or not it can, of its own motion, raise an issue under this section. The British Royal Commission 1949-53 found the analogous question in relation to insanity, to be one of considerable difficulty.

This is one of the few sections in the Code that prescribes a mandatory minimum penalty. As to the discretion to impose the additional penalty, see note to next section.

GENERAL.

NOTICE OF APPLICATION.—Hearing of application.—When proof unnecessary.

662. (1) The following provisions apply with respect to applications under this Part, namely,

***(a)* an application under subsection (1) of section 660 shall not be heard unless**

(i) the Attorney General of the province in which the accused is to be tried consents,

(ii) seven clear days' notice has been given to the accused by the prosecutor specifying the previous convictions and the other circumstances, if any, upon which it is intended to found the application, and

(iii) a copy of the notice has been filed with the clerk of the court or the magistrate, as the case may be; and

OLD CODE:

Section 1054A—continued

(4) Evidence as to whether the offender is a criminal sexual psychopath shall not be submitted unless seven days' notice has been given by the proper officer of the court to the offender that such evidence will be submitted.

(5) The court may find that the convicted person is a criminal sexual psychopath and in such case shall sentence him for the offence for which he has been convicted to a term of imprisonment in a penitentiary of not less than two years and for an indeterminate period thereafter.

(6) Any person found to be a criminal sexual psychopath and sentenced accordingly shall be subject to such disciplinary and reformative treatment as may be prescribed by penitentiary regulations.

(7) The Minister of Justice shall once at least in every three years during which a person is detained in custody for an indeterminate period review the condition, history and circumstances of that person with a view to determining whether he should be placed out on licence and, if so, on what condition.

. . . . . .

575C. (2) In any indictment under this section it shall be sufficient, after charging the crime, to state that the offender is a habitual criminal.

(3) In the proceedings on the indictment the offender shall in the first instance be arraigned only on so much of the indictment as charges the crime, and if on arraignment he pleads guilty or is found guilty by the judge or jury, as the case may be, unless he thereafter pleads guilty to being a habitual criminal, the judge or jury shall be charged to enquire whether or not he is a habitual criminal and in that case it shall not be necessary to swear the jury again.

(4) A person shall not be tried on a charge of being a habitual criminal unless

(a) the Attorney General of the province in which the accused is to be tried consents thereto; and

(b) not less than seven days' notice has been given by the proper officer of the court by which the offender is to be tried and the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge.

(5) Where an offender pleads guilty to the offence charged in the indictment for which, if he had pleaded not guilty, he would have been tried by jury, and pleads not guilty to being an habitual criminal, a jury shall, for the purpose of determining whether he is an habitual criminal, be selected in the same manner and the accused and the Crown shall be entitled to the same challenges as if the accused had pleaded not guilty to the crime charged in the indictment.

(*b*) an application under subsection (1) of section 661 shall not be heard unless seven clear days' notice thereof has been given to the accused by the prosecutor and a copy of the notice has been filed with the clerk of the court or with the magistrate, where the magistrate is acting under Part XVI.

(2) An application under this Part shall be heard and determined before sentence is passed for the offence of which the accused is convicted and shall be heard by the court without a jury.

(3) For the purposes of section 660, where the accused admits the allegations contained in the notice referred to in paragraph *(b)* of subsection (1), no proof of those allegations is required.

Section 662—*continued*

This section, in its reference to habitual criminals, comes from the former s.575C(3) & (4). In its reference to criminal sexual psychopaths, it comes from the former s.1054A(4). The following points of procedure, differing in some respects from the former provisions are to be noted:

Before the Application is heard.

(a) The application must be with the consent of the Attorney General. It was held in *R. v. TONER*(1950), 97 C.C.C.171, that a consent signed by the Acting Attorney General complies with this requirement.

The following quotations from English cases are relevant, *mutatis mutandis*. In *R. v. TURNER, supra*, it was said that:

"In our view it is sufficient if he proves that he has been in correspondence with the office of the Director of Public Prosecutions and he has received the document containing the consent in the regular and ordinary course of post and says that to the best of his belief it is a genuine document."

In *R. v. WALLER*(1909), 3 Cr. App. R.213, the opinion was expressed that this consent, apart from objection, is not one of the matters which the prosecution is called upon to prove as part of the case before the petit jury, an opinion which coincides with Canadian cases upon the former ss.590 *et seq*. The report says, at p.222:

"If objection is taken, and, of course, objection may be taken by the prisoner, that there was no consent in fact, then the question will arise in each particular case as to the evidence which the Court will require in order to satisfy itself whether there is any ground for the objection, and then the principle which this Court laid down as to the way in which the thing may be proved, if necessary, as stated in the judgment of the Court in Turner's case, will apply."

(b) The prosecutor must give the accused notice of the application and file a copy of it with the magistrate or the clerk of the court. There had been difficulty under the former procedure, as pointed out in *R. v. LUFT, supra*, and in *R. v. GREER*(1950), 97 C.C.C.66. However, in the former it was held that, in the provinces where there is a grand jury, the officer who receives the bill of indictment preferred, and, in the provinces where there is no grand jury, the officer who has custody of the charge preferred, was the "proper officer of the court" to give the notice to the accused. In *R. v. GREER, supra*, it was held that the Deputy Registrar, or Crown counsel was a proper officer for the purpose. In *R. v. HOYT, supra*, it was held that notice by an assistant Crown Attorney, given orally in court, was sufficient.

(c) There must be seven clear days' notice. It had been held in *R. v. LUFT, supra*, that this was intended, and so also in *R. v. TURNER, supra*, following *CHAMBERS v. SMITH*(1843), 12 M. & W.2.

(d) The notice should give particulars not only of the previous convictions, but also of the facts (but not the evidence) relied on as "other circumstances": *R. v. WILKINS, supra*. It would be sufficient to state, *e.g.*, that the prisoner is a habitual associate of thieves, or that he is doing no work and has no visible means by which he is earning an honest livelihood, but it is not sufficient merely to state in the words of

the statute that the prosecution intends to prove that which the statute says must be proved: *R. v. TURNER, supra.* No evidence may be given of "other grounds" than those specified in the notice: *R. v. MORAN* (1910), 5 Cr. App. R.219. And leave to appeal will be granted if the prosecution gives evidence of other grounds than the three statutory convictions, but had not included those grounds in the notice: *R. v. FAWCETT*(1910), 5 Cr. App. R.91. In that case the notice said "You were given various opportunities to earn an honest living; nevertheless you returned to your dishonest and criminal life."

During the Hearing.

(a) The indictment on which the accused is before the court will not refer to the application. See ss.571 and 572, *ante.* This is a change.

(b) The application is made after conviction of the primary offence but before sentence.

> "The facts which are to be proved on the charge of being a habitual criminal are the same as those with reference to which the Court at a trial always desires information before passing sentence, and it is therefore impossible that the Legislature could have intended that sentence must be passed before those facts are inquired into." (*R. v. TURNER, supra.*)

See also *R. v. WALKER*(1910), 5 Cr. App. R.231.

(c) Proof is unnecessary if the accused admits the allegations contained in the notice.

(d) The three statutory convictions must be strictly proved but the record of other convictions may be put in as "evidence of character and repute . . . . . on the question whether the accused is or is not leading a dishonest or criminal life," and these need not be as strictly proved: *R. v. FRANKLIN*(1909), 3 Cr. App. R.48; *R. v. CHATWAY & HOWARD* (1910), 5 Cr. App. R.151.

The Crown may rely on the three convictions. "It seems to us quite plain that in a particular case the three convictions and the proof . . . . . of the particular charge on which he is being tried may be quite sufficient": *R. v. WALLER, supra.* "The three previous convictions . . . . . may be sufficient . . . . . when the offences committed show deliberate and systematic preparation and are repeated at an early opportunity after release from prison": *R. v. EVERITT*(1911), 6 Cr. App. R.267.

In *R. v. BLACKSTOCK*(1950), 97 C.C.C.201, which followed *R. v. TURNER* on the merits, it was held that any method by which the three statutory convictions may be proved strictly, is open to the prosecution. In this case they were proved under s.982 (now s.574).

In *R. v. TONER, supra,* the procedure followed as to one conviction was to produce the memorandum of sentence signed by two justices of the peace and to call one of them, and, as to the other two convictions, to produce certified copies of the convictions made by police magistrates before whom the accused had consented to be tried, the certificates being signed by the clerk or other officer who had the custody of the convictions. This was held to be sufficient.

This, however, is all subject to the requirement, already noticed, that the prosecutor must confine himself to the proof of matters set

Section 662—*continued*

out in the notice. Under the English practice, the Court will quash a conviction as a habitual criminal if the judge puts to the jury a conviction that was not proved: *R. v. CULLIFORD*(1911), 6 Cr. App. R.142. And see *R. v. FAWCETT*, cited *supra* in reference to the notice.

After the Application is made.

(a) The application is to be determined by the judge alone in cases where the trial for the primary offence is before judge and jury. This makes no change as to criminal sexual psychopaths: *R. v. TILLEY*(1952), 104 C.C.C.315, but does make a change otherwise. The contrary seems to have been the intention as to habitual criminals because, by 1951, c.47, s.19, an amendment was passed to provide a method of selecting a jury on that question. This, of course, is nullified by the new section. The reason for the change is that the application for preventive detention is a matter of penalty.

It was held in *R. v. ROBINSON or ROBERTSON* (No. 2) (1952), 102 C.C.C.332, that the habitual criminal inquiry was in effect to determine whether a further sentence should be imposed. *R. v. HUNTER*, [1921]1 K.B.555, at 559, was quoted where it was said that "there is nothing in the Act which would justify us in saying that the charge of being an habitual criminal is a charge of a crime or offence."

R. v. McKENNA(1952), 102 C.C.C.335, is to the same effect. The point was settled by *BRUSCH v. R.*(1952), 105 C.C.C.340, in which it was held by the Supreme Court of Canada that the habitual criminal provisions do not create a new offence, but merely establish a status or condition in which a person may, after conviction, be dealt with under those provisions.

(b) Preventive detention cannot be imposed by itself. It is "in addition". Unless the Court passes a sentence for the primary offence, it has no jurisdiction to pass a sentence of preventive detention. It is, however, under no obligation to pass a sentence of preventive detention. *R. v. WILKINS, supra.*

EVIDENCE OF CHARACTER AND REPUTE.

663. Without prejudice to the right of the accused to tender evidence as to his character and repute, evidence of character and repute may, where the court thinks fit, be admitted on the question whether the accused is or is not persistently leading a criminal life or is or is not a criminal sexual psychopath, as the case may be.

This combines the former ss.575D and 1054A(3).

COMMENCEMENT OF SENTENCE.—Commutation.

664. A sentence of preventive detention shall commence immediately upon the determination of the sentence imposed upon the accused for the offence of which he was convicted, but the Governor in Council may, at any time, commute that sentence to a sentence of preventive detention.

This is a combination of the former ss.575F, 575G(1) and 1054A(4). Its operation will be to merge the sentence of imprisonment in the

OLD CODE:

575D. Without prejudice to the right of the accused to tender evidence as to his character and repute, evidence of character and repute may, if the court thinks fit, be admitted on the question whether the accused is or is not leading persistently a criminal life.

1054A. (3) The court may hear such other evidence as it may deem necessary.

. . . . . .

575F. Where a person has been sentenced, whether before or after the commencement of this Part, to imprisonment of five years or upwards, and has been sentenced to preventive detention under this Part, the Crown may, at any time commute the whole or any part of the residue of the sentence to a sentence of preventive detention under this Part.

575G. The sentence of preventive detention shall take effect immediately on the conviction of a person on a charge that he is a habitual criminal.
(2) Persons undergoing preventive detention may be confined in a prison or part of a prison set apart for that purpose.
(3) Persons undergoing preventive detention shall be subjected to such disciplinary and reformative treatment as may be prescribed by the prison regulations.

1054A. (4) For wording of this subsection see p. 997.

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sentence of preventive detention. The new section is designed to meet criticism which appeared in *R. v. BLACKSTOCK*(1950), 97 C.C.C.201, at p.208, as follows:

"Furthermore, and here again occurs a substantial change from the English legislation, s.575G(1) provides that the sentence of preventive detention 'shall take effect immediately on the conviction of a person on a charge that he is a habitual criminal'. In view of this provision, it might not be out of place to enquire what happens to the sentence imposed upon conviction for the primary offence, which conviction must necessarily take place under s.575B. In the English legislation the situation is clear; the sentence of preventive detention 'shall take effect immediately on the determination of the sentence of penal servitude [that is, the sentence on conviction for the primary offence]'."

A difference between the Canadian procedure under ss.661 and 662 and the English procedure appears in the following quotation from *R. v. CANNELL*(1953), 37 Cr. App.R.188:

"There is no difficulty in sentencing a person who is serving a sentence of imprisonment either to corrective training or preventive detention. Such a sentence can be made to begin only at the conclusion of the sentence which he is already serving, *but if this court thinks that a sentence of corrective training or preventive detention to date from the original conviction is proper, they can impose it and that will at once take the place of the sentence of imprisonment. In other words, the shorter sentence will be merged in the longer.*"

WHERE TO BE SERVED.—Prison set apart.

665. (1) Notwithstanding anything in this Act or any other Act of the Parliament of Canada an accused who is sentenced to pre-

Section 665—*continued*

ventive detention shall serve in a penitentiary the sentence for the offence of which he was convicted as well as the sentence of preventive detention.

(2) An accused who is sentenced to preventive detention may be confined in a penitentiary or part of a penitentiary set apart for that purpose and shall be subject to such disciplinary and reformative treatment as may be prescribed by law.

Subsec.(1) is new. In view of s.666, the Part contemplates that the prisoner will be in custody for a period of not less than three years.

Subsec.(2) combines the former ss.575G(2) and (3) and 1054A(6).

REVIEW BY MINISTER OF JUSTICE.

666. Where a person is in custody under a sentence of preventive detention, the Minister of Justice shall, at least once in every three years, review the condition, history and circumstances of that person for the purpose of determining whether he should be permitted to be at large on licence, and if so, on what conditions.

This combines the former ss.575H and 1054A(7).

In *R. v. MUNAVISH*(1954), 11 W.W.R.(N.S.)47, it appeared that review by the Minister was due in February, 1951, but was not made until May, 1951. An application for release of the prisoner on *habeas corpus* was refused on the ground that to hold otherwise would mean that "the sentence of a court of competent jurisdiction to preventive detention can be defeated and made nugatory by the failure of an officer of the Crown whether by accident or design to carry out a duty imposed on him by statute even if the delay is for one day only."

APPEAL.—Appeal by Attorney General.—Part XVIII applies *re* appeals.

667. (1) A person who is sentenced to preventive detention under this Part may appeal to the court of appeal against that sentence.

(2) The Attorney General may appeal to the court of appeal against the dismissal of an application for an order under this Part.

(3) The provisions of Part XVIII with respect to procedure on appeals apply, *mutatis mutandis*, to appeals under this section.

This gives to a person, whether an habitual criminal or a criminal sexual psychopath, against whom a sentence of preventive detention has been passed, a right of appeal under the procedure provided for appeals against conviction on indictment. It is new so far as criminal sexual psychopaths are concerned, and so far as the Attorney General is concerned. As to habitual criminals, see the former s.575E.

In *R. v. GALLOW*, [1954]O.W.N.290, it was held that the limitation of time for appeal applies as in the case of conviction.

OLD CODE:

575G. (2) & (3) For wording of these subsections see p. 1001.

1054A. (6) For wording of this subsection see p.997.

575H. The Minister of Justice shall, once at least in every three years during which a person is detained in custody under a sentence of preventive detention, review the condition, history and circumstances of that person with a view to determining whether he should be placed out on licence, and if so, on what conditions.

1054A. (7) For wording of this subsection see p.997.

575E. A person convicted and sentenced to preventive detention, may appeal against his conviction and sentence, and the provisions of this Act relating to an appeal from a conviction for an indictable offence shall be applicable thereto.

PART XXII.

EFFECT AND ENFORCEMENT OF RECOGNIZANCES.

APPLICATIONS FOR FORFEITURE OF RECOGNIZANCES.—"Clerk of the Court."—"Schedule."

668. (1) Applications for the forfeiture of recognizances shall be made to the courts, designated in Column II of the Schedule, of the respective provinces designated in Column I of the Schedule.

(2) In this Part,

***(a)* "clerk of the court" means the officer designated in Column III of the Schedule in respect of the court designated in Column II of the Schedule, and**

***(b)* "Schedule" means the schedule to this Part.**

This Part replaces the former Part XXI, which was Part LIX (ss.910 *et seq.*) in the Code of 1892, and came largely from R.S.C. 1886, c.179. It was pointed out in *R. v. WAH LUNG,* [1928]3 W.W.R.232, that the provisions of the Criminal Code relating to bail were patterned after the statute 3 and 4 Wm. IV, c.99, and subsequent legislation in England, and that the procedure is further indicated by the Crown Office Rules. In the particular case, however, it was held that it had to be decided upon the provisions of the Code in circumstances to which the local Crown Practice Rules did not refer.

In this Part a complete new procedure is provided, more nearly uniform than was formerly the case, and, so far as it replaces the former sections especially relating to Quebec, not differing materially from an Act of that province R.S.Q. 1941, c.26.

The schedule (p.1135) was prepared after consultation with the provinces. The Part is drawn upon the basis that the proceedings on forfeiture are intended to collect a debt due to the Crown and are by nature civil rather than criminal. Where there is no express provision in the Code, the action is governed by provincial laws: *Re TALBOT'S BAIL*(1892), 23 O.R.65.