

PART VII.
OFFENCES AGAINST RIGHTS OF PROPERTY.

INTERPRETATION.

“BREAK.” — “Document.” — “Exchequer bill.” — “Exchequer bill paper.” — “False document.” — “Revenue paper.”

268. In this Part,

- (a) “break” means
- (i) to break any part, internal or external, or
 - (ii) to open any thing that is used or intended to be used to close or to cover an internal or external opening;
- (b) “document” means any paper, parchment or other material used for writing or printing, marked with matter capable of being read, but does not include trade-marks on articles of commerce or inscriptions on stone or metal or other like material;
- (c) “exchequer bill” means a bank note, bond, note, debenture or security that is issued or guaranteed by Her Majesty under the authority of the Parliament of Canada or the legislature of a province;
- (d) “exchequer bill paper” means paper that is used to manufacture exchequer bills;
- (e) “false document” means a document
- (i) the whole or some material part of which purports to be made by or on behalf of a person
 - (A) who did not make it or authorize it to be made, or
 - (B) who did not in fact exist;
 - (ii) that is made by or on behalf of the person who purports to make it but is false in some material particular;
 - (iii) that is made in the name of an existing person, by him or under his authority, with a fraudulent intention that it should pass as being made by some person, real or fictitious, other than the person who makes it or under whose authority it is made; and
- (f) “revenue paper” means paper that is used to make stamps, licences or permits or for any purpose connected with the public revenue.

Par.(a) comes from the former s.335(d). It was part of s.407(b) in the Code of 1892, and part of s.297 in the E.D.C. For the effect of this definition see note to s.294, *post*.

Par.(b) is the former s.335(h). It was s.419 in the Code of 1892 and s.313 in the E.D.C. *Cf.* the definition added to the *Combines Investigation Act* by 1949, 2nd sess., c.12, s.13, discussed with reference to unsigned minutes, etc., in *R. v. McGAVIN'S BAKERIES*, (No. 5)(1951), 100 C.C.C. 215, at p.220.

Pars.(c) and (d) are re-drafts of the former s.335(j) and (k) which appeared in ss.420 and 433 of the Code of 1892. “Exchequer bill” was defined in s.314 of the E.D.C. in different terms.

Par.(e) is the former s.335(l). It was s.421(1) in the Code of 1892 and formed part of s.315 in the E.D.C.

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issue as in other criminal cases; and the jury may, on such issue, find a special verdict if they think fit so to do.

(2) The defendant, if found guilty, may move in arrest of judgment on such ground and in such manner as heretofore.

335. In this Part, unless the context otherwise requires,

(d) "break" means to break any part, internal or external, of a building, or to open by any means whatever, including lifting, in the case of things kept in their places by their own weight, any door, window, shutter, cellar-flap or other thing intended to cover openings to a building, or to give passage from one part of it to another;

(h) "document" means any paper, parchment or other material used for writing or printing, marked with matter capable of being read, but does not include trademarks on articles of commerce, or inscriptions on stone or metal or other like material;

(j) "exchequer bill" includes exchequer bonds, notes, debentures and other securities issued under the authority of the Parliament of Canada, or under the authority of the legislature of any province forming part of Canada, whether before or after such province so became a part of Canada;

(k) "exchequer bill paper" means any paper provided by the proper authority for the purpose of being used as exchequer bills, exchequer bonds, notes, debentures or other securities issued under the authority of the Parliament of Canada, or under the authority of the legislature of any province forming part of Canada, whether before or after such province became a part of Canada;

(l) "false document" means

(i) a document, the whole or some material part of which purports to be made by or on behalf of any person who did not make or authorize the making thereof, or which, though made by, or by the authority of the person who purports to make it, is falsely dated as to time or place of making, where either is material, or

(ii) a document, the whole or some material part of which purports to be made by or on behalf of some person who did not in fact exist, or

(iii) a document which is made in the name of an existing person, either by that person or by his authority, with the fraudulent intention that the document should pass as being made by some person, real or fictitious, other than the person who makes or authorizes it;

(s) "revenue paper" means any paper provided by the proper authority for the purpose of being used for stamps, licences or permits, or for any other purpose connected with the public revenue;

.....

Par.(l) is the former s.335(s). It was s.433(b) in the Code of 1892, and (in different terms) formed part of s.342 in the E.D.C.

With reference to par.(a), a recent English case, *R. v. BOYLE* (1954), 218 L.T.Jo.70, is in point. The accused, falsely representing that he was employed by the British Broadcasting Corporation to locate disturbances

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on the radio, gained entrance to a house and stole a hand-bag. It was held that the trick was a constructive breaking, and, since it appeared that he went to the house with intent to commit a felony, that he was properly convicted of housebreaking.

This case is discussed in 218 L.T.Jo., p.147, and the following cases cited:

1 Hawk. c.38, s.5, where persons intending to rob, pretended to have business with the owner of a house and were admitted by a servant. They were found guilty of burglary.

R. v. CHANDLER, [1913]1 K.B.125: A servant pretended to enter into a conspiracy to rob a house, but informed his mistress of the plan. When the accused later entered with a duplicate key, he was held guilty of breaking and entering.

THEFT.

"THEFT."—Time when theft completed.—Secrecy.—Purpose of taking.—Living creature wild by nature.

269. (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything whether animate or inanimate, with intent,

- (a) to deprive, temporarily or absolutely, the owner of it or a person who has a special property or interest in it, of the thing or of his property or interest in it,
- (b) to pledge it or deposit it as security,
- (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform, or
- (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.

(2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.

(3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.

(4) For the purposes of this Act the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.

(5) For the purposes of this section a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it while it is in captivity and after it has escaped from captivity.

This is the former ss.345 and 347 omitting the words "capable of being stolen". These sections were ss.304 and 305 in the Code of 1892, and ss.245 and 246 in the E.D.C. See s.2(37).

OLD CODE:

344. *Every inanimate thing whatever which is the property of any person, and which either is or may be made movable, is capable of being stolen as soon as it becomes movable, although it is made movable in order to steal it: Provided that nothing growing out of the earth of a value not exceeding twenty-five cents shall, except in cases hereinafter provided, be deemed capable of being stolen.*

345. *All tame living creatures, whether tame by nature or wild by nature and tamed, shall be capable of being stolen: Provided that tame pigeons shall be capable of being stolen so long only as they are in a dovecot or on their owner's land.*
 (2) *All living creatures wild by nature, such as are not commonly found in a condition of natural liberty in Canada, shall, if kept in a state of confinement, be capable of being stolen, not only while they are so confined but after they have escaped from confinement.*

(3) *All other living creatures wild by nature shall, if kept in a state of confinement, be capable of being stolen so long as they remain in confinement or are being actually pursued after escaping therefrom, but no longer.*

(4) *A wild living creature shall be deemed to be in a state of confinement so long as it is in a den, cage or small inclosure, sty or tank, or is otherwise so situated that it cannot escape and that its owner can take possession of it at pleasure.*

(5) *Wild creatures in the enjoyment of their natural liberty shall not be capable of being stolen, nor shall the taking of their dead bodies by, or by the orders of, the person who killed them before they are reduced into actual possession by the owner of the land on which they died, be deemed to be theft.*

(6) *Everything produced by or forming part of any living creature capable of being stolen, shall be capable of being stolen.*

347. *Theft or stealing is the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person, anything capable of being stolen, with intent,*

(a) *to deprive the owner, or any person having any special property or interest therein, temporarily or absolutely of such thing or of such property or interest;*
 or

(b) *to pledge the same or deposit it as security; or*

(c) *to part with it under a condition as to its return which the person parting with it may be unable to perform; or*

(d) *to deal with it in such a manner that it cannot be restored in the condition in which it was at the time of such taking and conversion.*

(2) *Theft is committed when the offender moves the thing or causes it to move or to be moved, or begins to cause it to become movable, with intent to steal it.*

(3) *The taking or conversion may be fraudulent, although effected without secrecy or attempt at concealment.*

(4) *It is immaterial whether the thing converted was taken for the purpose of conversion, or whether it was, at the time of the conversion, in the lawful possession of the person converting.*

Jeremy Bentham said (*Morals and Legislation*, Vol. II, p. 269):

“Take for instance the law, *Thou shalt not steal*: Such a command, were it to rest there, could never sufficiently answer the purpose of a law. A word of so vague and unexplicit a meaning can no otherwise perform this office, than by giving a general intimation of a variety of propositions, each requiring, to convey it to the apprehension, a more particular and ample assemblage of terms. Stealing, for example (ac-

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ording to a definition not accurate enough for use, but sufficiently so for the present purpose), *is the taking of a thing which is another's by one who has no title to do so, and is conscious of his having none.*

Even after this exposition, supposing it a correct one, can the law be regarded as completely expressed? Certainly not,"

and he proceeds to point out the need for further definition of terms.

The words "capable of being stolen" had reference to common law distinctions concerning documents of title, things growing out of the ground, and animals that could not be used for food. It was held in *R. v. GOLDSTAUB*(1895), 5 C.C.C.357, that they were descriptive of the things to which the section referred and that they did not indicate that they must be the property of someone other than the accused.

The Commissioners on the E.D.C. said in their report that:

"The definition properly expounded and qualified will, we think, be found to embrace every act which in common language would be regarded as theft and it will avoid all the technicalities referred to as arising out of the common law rules, as well as the intricate and somewhat arbitrary legislation on the subject."

Larceny was not defined.

The Attorney General said in the same connection (Parl. Debates, 1878, 3 Series, Vol. 239, Col. 1949):

"This branch of the law is at present in a state of most bewildering confusion. It abounds in distinctions without real differences, and in refinements and subtleties which I consider a reproach even to a system of judicature established in a barbarous age, and which lead to nothing but uncertainty and embarrassment, and the frustration of justice.

By the common law, many things were not the subject of larceny—namely, a great number of animals, all choses in action, and therefore a variety of documents, land, and things growing out of the land or appertaining to it.

I think I have said enough to show that owing to the causes I have mentioned, the law of larceny has been brought into a state of deplorable entanglement, which is certainly anything but creditable to the judicial system of a civilized country. The whole subject is dealt with in a thoroughly effectual manner in a few sections of the 6th chapter of the Code. The irrational common law rules have been swept aside—every species of determinate property, subject to certain necessary conditions, is declared to be the subject of larceny; all exceptions and fictions have been got rid of, and it is, in substance, declared that the man shall be guilty of theft who either takes with intent to steal property which is in the possession of another, or with the like intent appropriates to his own use property of another in his own possession, or with the like intent obtains property belonging to another by means of false pretences."

In the case of *KELLY v. R.*(1917), 54 S.C.R.220, Mr. Justice Idington said (p.238):

"Anything capable of being stolen might not cover money in the bank to the credit of any person, but surely it does include a cheque to draw that money. I think a cheque being an order for money is a valuable security within the words of the indictment."

The distinction between grand and petty larceny, which is also implicit in the words, by which the dividing line was placed at the valuation of twelve pence, has long since been abolished, but it would appear that a vestige of it remained in the proviso to s.344 that nothing growing out of the earth of a value not over twenty-five cents, should be capable of being stolen except in certain cases, although this is based more definitely on the maxim "*De minimis non curat lex*".

Formerly it appears to have been held that this value must be intrinsic and must not arise from the relation which the chattel bore to some other thing, as in the case of deeds, covenants, and other securities, but there are reported cases in which the articles stolen were pieces of paper of no value in themselves.

In the case of *R. v. HAMMON*(1812), 2 Leach 1083, Mr. Justice Grose, delivering the opinion of all the judges in a case reserved said:

"Now the true meaning of larceny is '*the felonious taking the property of another without his consent and against his will, with intent to convert it to the use of the taker*'. The facts of the case answer every part of this definition. The taking of the property is clear, and that it was taken against the will of the owner, and with a felonious intent is equally clear from the circumstance of the prisoner's having fraudulently made these false entries (i.e. in a customer's bank account) with a view to conceal the means he had artfully made use of to obtain it."

Accused, a bank clerk, was held guilty of stealing the money from the banker. This case may be compared with the quotation from *KELLY v. R., supra*.

R. v. BINGLEY & LAW(1833), 5 C. & P.602: "Prisoners indicted for robbing J. A. of one piece of writing paper of the value of one penny, one other piece of paper of the value of one penny and one written memorandum of the value of one penny." It appeared that J. A. had nothing in his pockets except a slip of paper which contained a memo of a sum a person owed him. Accused held guilty of robbery.

"In cases of robbery, the value is immaterial, and the prosecutor, by carrying this memorandum in his pocket showed that he considered that it was of some value to himself."

In *R. v. CLARK*(1810), 2 Leach 1036, the paper and stamps of the notes of a country bank which have been paid by the correspondent banker in London and which the country banker may legally re-issue are the valuable property of the country banker while *in transitu* for the purpose of being re-issued.

"They were indeed, only of value to those owners; but it is enough that they were of value to them: their value as to the rest of the world is immaterial."

R. v. MORRIS(1840), 9 C. & P.349. Accused charged with receiving nine pieces of paper, value 2s. knowing them to be stolen. These were certificates torn by someone out of a certificate book kept by a coalmaster to be filled out as coals were delivered from barges. Parke, B.:

"It has cost more than a farthing. . . . But I must be understood for one as not considering that it was necessary to show that the article must be of the value of some known coin. It must be of some value,

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no doubt. There is clearly evidence to go to the jury that it is of the value of more than a farthing to the owners. It has cost them that."

This case finds its counterpart in cases in Western Canada in which blank cash grain tickets have been torn from books supplied to country elevators.

Kenny's Outlines of Criminal Law, 15th ed., p.205, says:

"The principle is now distinctly laid down that although, to be the subject of stealing, a thing must be of value to its owner, if not to other people, yet this need not amount to the value of the smallest coin known to the law, or of even 'the hundredth part of a farthing.'" Hals., 2nd ed., Vol 9, p.507, is to similar effect.

This bears upon the maxim "*De minimis non curat lex*" referred to above. It has been held that it applies in criminal as well as civil matters: *R. v. PELESHATEY*, [1950] 1 W.W.R.108 (10 drops of liquor), and *R. v. LING*(1954), 12 W.W.R. (N.S.), 581 (minute quantity of narcotic). On the other hand, s.397 *post*, and *R. v. BYTHELL*(1915), 24 C.C.C.276 (fraudulent use of street car transfer), as well as *R. v. MORRIS* and *R. v. BINGLEY and LAW*, *supra*, serve well to show that things of little moment in themselves, can become the instruments of harm or prejudice.

It is submitted that the definition of theft, without the words "capable of being stolen" is in accord with *R. v. HAMMON*, *supra*, and with the principle quoted from Kenny's Outlines.

The Commissioners on the E.D.C. (report p.27) pointed out also that the "fraudulently and without colour of right converting" had the effect of doing away with the distinction between larceny and embezzlement.

As to colour of right, see notes to s.371.

OYSTERS.—Oyster bed.

270. (1) Where oysters and oyster brood are in oyster beds, layings or fisheries that are the property of any person and are sufficiently marked out or known as the property of that person, he shall be deemed to have a special property or interest in them.

(2) An indictment is sufficient if it describes an oyster bed, laying or fishery by name or in some other way, without stating that it is situated in a particular territorial division.

Subsec.(1) is the former s.346. It was s.304(5) in the Code of 1892 and formed part of s.245 in the E.D.C. where its origin is given as 24 and 25 Vict., c.96, s.26 (Imp.).

Subsec.(2) is the former s.864(e). It was s.619(c) in the Code of 1892 and s.123 in the *Criminal Procedure Act*, R.S.C. 1886, c.174, where its origin also is given as 24 and 25 Vict., c.96, s.26 (Imp.).

THEFT BY BAILEE OF THINGS UNDER SEIZURE.

271. Every one who is a bailee of anything that is under lawful seizure by a peace officer or public officer in the execution of the duties of his office, and who is obliged by law or agreement to produce and deliver it to that officer or to another person entitled thereto at a certain time and place, or upon demand, steals it if he does not produce and deliver it in accordance with his obligation, but he

OLD CODE:

346. *Oysters and oyster brood shall be capable of being stolen when in oyster beds, layings, or fisheries which are the property of any person, and sufficiently marked out or known as such property.*

864. *An indictment shall be deemed sufficient in the cases following:—*

(e) *If for an offence under section three hundred and seventy-one the oyster bed, laying or fishery is described by name or otherwise, without stating the same to be in any particular county or place.*

348. *Every one who, being a bailee of anything capable of being stolen which is under lawful seizure by a peace officer or public officer in the execution of the duties of his office, and being obliged by law or agreement to produce and deliver the thing bailed to such officer or other person entitled thereto at a certain time and place, or upon demand, commits theft and steals the thing bailed if he does not so produce and deliver it; provided that a person accused under this section shall not be convicted if it be proved that the non-production and non-delivery of the thing bailed is not due to any wilful act or omission on the part of the person accused.*

does not steal it if his failure to produce and deliver it is not the result of a wilful act or omission by him.

This section was passed by 1925, c.38, s.6 as s.347A. It became s.348 in the general revision of 1927.

There is no corresponding section in the English Draft Code, but there is in s.252 a section concerning theft by co-owner as it appeared in s.352 of our former Code (now s.274).

S.347A was the subject of a good deal of debate (Hansard 1925, Vol. IV, p.3998, Vol. V, p.4209). The Minister of Justice explained that it was drawn upon the suggestion of members of the Alberta Bar. He said (p.3998):

"It appears that there has been a doubt as to the possession of men, especially farmers, who have been appointed bailees of their own grain when under seizure by the sheriff, and who fail to produce the grain at the proper time. The difficulty is that they are in lawful possession of the grain because they have been appointed by the Sheriff to take care of it, but if they have disposed of the grain it is very hard to prosecute them under the law as it stands."

He said also (p.4209) that he thought it:

"A commendable provision, making it a criminal offence for any one who has been appointed by the Sheriff as bailee of anything capable of being stolen, to appropriate the article to his own use personally, or selling or disposing of it, or not returning it at the appointed time when ordered by the court."

Again he said:

"If he is the legal custodian of a certain number of bushels of grain, and if he disposes of any of it, it is a matter of theft."

The principal objection to the section was to its putting the burden of proof on the accused, but Mr. Lapointe answered that he thought it "identical with the case of receiving stolen goods, in which the accused has to show that there has been no wilful act on his part which makes him liable".

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R. v. HRYCZUIK(1915), 24 C.C.C.283, had decided that a sheriff who has seized under a writ of execution a number of hogs in possession of the execution debtor and who at the latter's request has taken a bond from him and his surety, has a special property or interest sufficient to make the selling of the hogs a theft thereof under ss.347 and 386. It may be noted in passing that under this decision it would appear that s.352 was unnecessary.

In the *HRYZUIK* case, Lamont and McKay, JJ. would have granted a new trial on the ground that the sheriff could only have a special property or interest if (1) the goods were the property of the execution debtor (*R. v. KNIGHT*(1898), 1 Cr.App.R.186), and (2) if the seizure had not been abandoned, and that these were questions of fact on which the jury should pass.

R. v. HRYCZUIK was reviewed in *R. v. MUDRY*(1935), 64 C.C.C. 177. In this case the sheriff seized certain grain on land leased by Harry Mudry from his father on a crop sharing lease. The seizure was made on an execution against the father, the writ of execution being defective in a number of respects, chiefly that it was issued after more than six years without a judge's order. Accused removed the grain under cover of night and was convicted of theft and also of obstruction. It was held that as the writ was defective the sheriff acquired no special property or interest upon which to found a charge of theft. That conviction was set aside but the conviction for obstruction was upheld. The court held that the sheriff was protected by the writ, that he could not go behind it, and *a fortiori* the accused could not, and that therefore, the seizure was inviolate until the writ was set aside in interpleader or otherwise. On this latter point the court followed *R. v. MONKMAN*(1892), 8 Man.R. 509. Robson, J.A. who dissented, makes some comments on s.348:

"This section was introduced in 1925, c.38, s.6. It seems to me that s.348 was passed expressly to meet cases where the sheriff had taken a bond or undertaking, but where the existence of a special property, necessary to sustain a charge of theft under s.347 was in doubt. Section 348 removed the likelihood of such difficulties as arose in *R. v. HRYCZUIK*. . . . In the *HRYZUIK* case a bond had been given by the defendant which might possibly have made a difference then and evidently would now in a case under s.348."

In *R. v. LUCIUK*, [1926]3 W.W.R.453, it was held that the debtor who gave the sheriff a bond was a bailee under the new section. In this case, however, it appeared that the sheriff, notwithstanding the bond, had afterwards agreed that the debtor might sell the grain seized and account for the proceeds, and it was held that this took the case out of the section.

In *R. v. JACOBSON*(1943), 81 C.C.C.104, it was held that, to a charge against an execution debtor under s.386 of converting to his own use grain which had been seized by a sheriff under execution, reasonable grounds for believing that the grain was exempt from seizure under provincial legislation, is a defence; McLaurin, J.:

"I am accordingly of the opinion that *had it not been for the question of exemptions, it would have been necessary for me to have convicted*

OLD CODE:

349. No factor or agent shall be guilty of theft by pledging or giving a lien on any goods or document of title to goods entrusted to him for the purpose of sale or otherwise, for any sum of money not greater than the amount due to him from his principal at the time of pledging or giving a lien on the same, together with the amount of any bill of exchange accepted by him for or on account of his principal.

351. Every one commits theft who maliciously or fraudulently abstracts, causes to be wasted or diverted, consumes or uses any electricity, or uses a telephone or telegraph line or obtains telephone or telegraph service.

the accused. . . . However, in a criminal matter, I think the strong probability of valid exemptions provided him with a sufficient answer."

It was held in *R. v. LIPMAN*(1935), 63 C.C.C.148, that this section does not apply to a bailiff making a distress for rent under the *Landlord and Tenant Act*, R.S.O. 1927, c.190, as he is not a public or peace officer.

AGENT PLEDGING GOODS, WHEN NOT THEFT.

272. A factor or agent does not commit theft by pledging or giving a lien on goods or documents of title to goods that are entrusted to him for the purpose of sale or for any other purpose, if the pledge or lien is for an amount that does not exceed the sum of

- (a) the amount due to him from his principal at the time the goods or documents are pledged or the lien is given, and
- (b) the amount of any bill of exchange that he has accepted for or on account of his principal.

This is the former s.349(1). It was s.305(5) in the Code of 1892 and was a proviso to s.246 in the E.D.C. with a marginal note that "This proviso is perhaps unnecessary; but it is found in the existing statute, and is therefore preserved." The existing statute was the *Larceny Act* 1861, s.78, which was drawn from 7 & 8 Geo. IV, c.29, s.51, and 5 & 6 Vict., c.39, s.6. The reason appears to have been that by trade usage the agents mentioned had power to pass the property.

Subsec.349(2) is not continued. At common law a servant who fed his master's animals contrary to instructions was deemed to have stolen the food given to them: *R. v. MORFIT*(1816), Russ. & Ry. 307; *R. v. HANDLEY*(1841), Car. & M. 547; *R. v. PRIVETT*(1846), 1 Den., C.C.193. By a statute passed in 1863 this was declared not to be an offence.

THEFT OF SERVICES.

- 273. Every one commits theft who fraudulently or maliciously**
- (a) abstracts, consumes or uses electricity or gas or causes it to be wasted or diverted, or
 - (b) uses a telephone or telegraph line or obtains telephone or telegraph service.

This is the former s.351 with the addition of "gas". It was s.10 of 57 & 58 Vict., c.39, and was amended by 1934, c.47, s.10 by adding the references to telephone and telegraph. The section originated in 45 & 46

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Vict., c.56, s.23 (Imp.). As to the word "maliciously" see notes to s.24, *ante*.

A conviction for abstracting electricity was held to be irregular in directing part of the fine to be paid to the electric company: *R. v. SPERDAKES*(1911), 24 C.C.C.210.

THEFT BY OR FROM PERSON HAVING SPECIAL PROPERTY OR INTEREST.

274. A person may be convicted of theft notwithstanding that anything that is alleged to have been stolen was stolen

- (a) by the owner of it from a person who has a special property or interest in it,
- (b) by a person who has a special property or interest in it from the owner of it,
- (c) by a lessee of it from his reversioner,
- (d) by one of several joint owners, tenants in common or partners of or in it from the other persons who have an interest in it, or
- (e) by the directors, officers or members of a company, body corporate, unincorporated body or of a society associated together for a lawful purpose from the company, body corporate, unincorporated body or society, as the case may be.

This is the former s.352.

At common law a co-owner could not steal property from his other co-owners: 1 Hale P.C.513.

It may be noted, although it is not now relevant, that there seems to have been some conflict of authority upon this proposition. Taschercau (Cr. Code 1892 at p.345) notes that a partner at common law may be guilty of larceny of the partnership's property and that a man may be guilty of larceny of his own goods.

In *R. v. BURGESS*(1863), Le. & Ca. 299, it was held that a part owner of property may be convicted of stealing it from the person in whose custody it is and who is accountable for it. *R. v. WEBSTER*(1861), Le. & Ca.77, is to the same effect.

At all events, it was altered by s.1 of 31 & 32 Vict., c.116, commonly called Mr. Russell Gurney's Act, which enacted as follows:

"If any Person, being a Member of any Copartnership, or being One of Two or More beneficial Owners of any Money, Goods or Effects, Bills, Notes, Securities or other Property, shall steal or embezzle any such Money, Goods, or Effects, Bills, Notes, Securities, or other Property of or belonging to any such Copartnership or to such joint beneficial Owners, every such Person shall be liable to be Dealt with, tried, convicted and punished for the same as if such Person had not been or was not a Member of such Copartnership or One of such beneficial Owners."

This was enacted into the *Larceny Act*, 32-33 Vict., c.21 (Can.), as follows:

"(38) Whosoever, being a member of any copartnership owning any money or other property, or being one of two or more beneficial owners of any money or other property, steals, embezzles or unlawfully

OLD CODE:

352. *Theft may be committed by the owner of anything capable of being stolen against a person having a special property or interest therein, or by a person having a special property or interest therein against the owner thereof, or by a lessee against his reversioner, or by one of several joint owners, tenants in common, or partners of or in any such thing against the other persons interested therein, or by the directors, officers or members of a company, or body corporate, or of an unincorporated body or society associated together for any lawful purpose, against such company or body corporate or unincorporated body or society.*

converts the same or any part thereof to his own use, or that of any person other than the owner, shall be liable to be dealt with, tried, convicted and punished as if he had not been or were not a member of such copartnership, or one of such beneficial owners."

This was not re-enacted in the Criminal Code of 1892, which, however, contained the following:

"(311) Theft may be committed by the owner of anything capable of being stolen against a person having a special property or interest therein, or by a person having a special property or interest therein against the owner thereof, or by a lessee against his reversioner, or by one of several joint owners, tenants in common or partners of or in any such thing against the other persons interested therein, or by the directors, public officers, or members of a public company or body corporate, *or of an unincorporated body or society associated together for any lawful purpose, against such public company or body corporate or unincorporated body or society.*"

S.311, which became s.352 of the Code, was amended in 1930 by striking out the word "public".

Section 311 was a copy of s.252 of the English Draft Code with the addition of the words in italics. Evidently with reference to these words, Trueman, J.A., in *R. v. MARTIN*(1932), 59 C.C.C.8, at p.29, said:

"I have been unable to trace the derivation of these words. In their context they appear to be original and to have been inserted *ex abundanti cautela.*"

The effect of the legislation is shown by *R. v. RUDGE*(1874), 13 Cox, C.C.17, in which the following appears:

"By the 30 & 31 Vict., c.116, we may look at the case as if the prisoner had never been a member of the copartnership; and then if so, by 24 & 25 Vict., c.96, s.72, a conviction on the indictment may be sustained, if the prisoner was guilty either of larceny or embezzlement. There was ample evidence that he was guilty of embezzlement."

In *R. v. TANKARD*, [1894]1 Q.B.548, the accused was charged with embezzling money in his hands as treasurer of a voluntary association called the Bowling Feast Club. It was objected that the association was illegal under the *Companies Act* and therefore incapable of holding property. The objection was overruled and it was held that the prisoner was properly convicted.

Again, in *R. v. McDONALD*(1885), 15 Q.B.D.323, an infant over 14

Section 274—*continued*

years of age fraudulently converted to his own use goods which had been delivered to him by the owner under an agreement for the hire of the same. Held, that he was rightly convicted of larceny as a bailee. *Per* Cave, J.:

"That there may be a bailment without a contract seems to me to be shown conclusively, if it be the case that delivery upon condition creates in the infant a special property which comes to an end when the condition is fulfilled, the entire property then reverting to the bailor. The delivery of goods on a condition to an infant must, as it appears to me, create in him a special property which is so far recognized and protected by the law that he could bring an action, whilst the special property lasted, against any person depriving him of the goods."

It will be noted that the case of *GUILLET v. R.* (1904), 12 C.C.C.186, is in accord with *R. v. McDONALD*. In that case it was held that a minor entrusted by his tutor or judicial guardian with chattel property of which he is part owner, who fraudulently converts it to his own use with intent to deprive his tutor of it, is guilty of theft.

In *McINTOSH v. R.* (1894), 5 C.C.C.254, it was held in the Supreme Court of Canada that a conviction for theft may be made against a co-owner fraudulently misappropriating funds (Code ss.305 & 311 now 269), although the facts also prove the offence of criminal breach of trust (Code s.363, now 282).

In *LEVY v. R.* (1924), 36 Que. K.B.490, it was held that the lessee who removes from the premises which he occupies, furniture of which he is the owner and of which he has possession, cannot be convicted of theft of the furniture upon the information of the lessor, the lien of the latter upon these movable effects constituting neither a right of property nor a special interest within the meaning of s.352.

The section, however, has had its principal application to cases arising from the practice, common in the Prairie Provinces, and governed by provincial statutes, of leasing land upon share-crop rentals.

In Saskatchewan it was held in *R. v. CURTIS* (1920), 33 C.C.C.106, that the *Crop Payments Act* did not alter the legal ownership of the crop which still remained the property of the purchaser, subject to his contractual obligation to deliver part of it to the vendor, and that the failure to deliver the vendor's share was not theft. The case was followed in *R. v. HANDSBEE* (1923), 41 C.C.C.177.

In a case in Manitoba, *R. v. HASSALL* (1916), 27 C.C.C.322, the judgment is that of a County Court Judge and the following is a quotation from it:

"It is argued by counsel for the Crown that while these cases are authority for the proposition that the landlord is not the *owner* of the share of the wheat, he should be held to have a *special property or interest* in it. I cannot find any case or text-book in which any attempt is made to explain comprehensively the meaning of this expression, but from the cases in which instances are given of certain rights that fall within it, I think it probably was intended to cover nothing that was not covered by such expressions as 'special ownership' and 'spe-

cial property' as used in larceny cases in England. If this is so, I take it *possession* is a necessary element of such special property or interest. All the instances of special property that I find in the English authorities were cases of bailees, pawnees, carriers, agisters and such like, where the persons said to have such special property in a chattel were in possession of it. In Russell on Crimes, 7th ed. at p.1288, it is said that to sustain an indictment for larceny 'it must appear in evidence that the party in whom the goods are laid had either the property or the possession of them'."

The Saskatchewan Act was amended in 1924 specifically to create a special property or interest in the vendor, lessor or mortgagee, and two cases have been decided under it as follows:

In *R. v. MARKOFF*(1940), 74 C.C.C.65, it was said:

"There can be no doubt that the Great West Life Ass'cc Co. had a special property or interest in the wheat and oats threshed by the accused in the fall of 1939, for s.5 of the Crop Payments Act vested in the company an undivided one-third share of the grain until such share was delivered to or received by the company. Sections 347 and 352 of the Cr. Code are clearly intended to protect the interest of any person whether such interest amounts to ownership or not, against fraudulent transactions."

Upon the point that the lessee held the lessor's share as a trustee under the provincial Act, the judgment proceeds:

"It is sufficient to say that the provincial legislation in question cannot affect the right to lay a charge of theft under ss.347 and 352 of the Cr. Code, which are applicable to the special property or interest created by the Crop Payments Act."

The first of the two points decided in *R. v. MARKOFF*, is in accord with *R. v. CASSILS*(1932), 57 C.C.C.366, an Alberta case which arose under similar circumstances. The second point is expressed in different terms in *R. v. HASSALL*, *supra*, as follows:

"I think a Provincial Legislature *can* pass legislation that will affect the applicability of provisions of the Criminal Code. . . . The Criminal Code in the section dealing with theft provides that certain acts interfering with the rights of owners of property shall be punishable as crimes, but it is the Provincial Legislatures that have to do with fixing the relationship between individuals that constitutes ownership."

R. v. HLADYCH(1942), 77 C.C.C.322, is to the same effect as *R. v. MARKOFF*, and holds that a lease of land is valid and binding between the parties notwithstanding that it is not accompanied by the affidavit required of the lessor by the *Homestead Act*(Sask.).

See also *R. v. HRYCZUIK*, cited under s.271, *ante*.

In *R. v. MALLISON*(1902), 20 Cox,C.C.204, the accused was convicted of theft by conversion. He was employed as master of a fishing smack owned by the prosecutors, under an agreement whereby he received at the end of every third voyage, a proportion of the proceeds of the fish delivered to them at Grimsby. On one voyage he took his vessel into another harbour and sold the fish without accounting for the proceeds of the sale to his employers. On appeal it was held that the fish were reduced into possession of the owner of the smack, and that accused was properly convicted.

Section 274—continued

In a somewhat similar case, *MORIN and GARDINER v. R.*, the facts were that the accused had entered into an agreement with B to fish with equipment supplied by him. B was to transport the fish to Hay River and, after deducting a certain sum for doing so, was to pay to the accused seventy per cent of the proceeds of sale. The accused concealed some of their catch and, without making any disclosure to B, sold the fish to a buyer M. They were charged with theft under the former s.386, the general section, and convicted. The Supreme Court of Canada, May 6th, 1954, in an unreported decision, unanimously affirmed the conviction.

HUSBAND OR WIFE.—Theft by spouse while living apart.—Theft by person assisting spouse.—Receiving property of spouse.

275. (1) Subject to subsection (2), no husband or wife, during cohabitation, commits theft of anything that is by law the property of the other.

(2) A husband or wife commits theft who, intending to desert or on deserting the other or while living apart from the other, fraudulently takes or converts anything that is by law the property of the other in a manner that, if it were done by another person, would be theft.

(3) Every one commits theft who, during cohabitation of a husband and wife, knowingly,

(a) assists either of them in dealing with anything that is by law the property of the other in a manner that would be theft if they were not married, or

(b) receives from either of them anything that is by law the property of the other and has been obtained from the other by dealing with it in a manner that would be theft if they were not married.

This is the former s.351. It was s.313 in the Code of 1892, and s.253 in the E.D.C., where the Commissioners in their report said:

"By the present law a husband or wife cannot steal from his wife or her husband, even if they are living apart, although by recent statutes (*scil.*, the Married Women's Property Act, 1870, and amendments) the wife is capable of possessing separate property. So long as cohabitation continues this seems reasonable; but when married persons are separated, and have separate property, it seems to us to follow that the wrongful taking of it should be theft. This section is also framed so as to put an end to an unmeaning distinction by which it is a criminal offence in an adulterer to receive from his paramour the goods of her husband, but no offence in anyone else to receive such goods from his wife."

As to subsec.(2) it was held in *R. v. KING(No.1)* (1914), 24 Cox,C.C. 146, that if a man steals his wife's property, intending to leave or desert her when the theft is discovered, he is "about to leave or desert" notwithstanding that a considerable time (in this case, six weeks) may have elapsed between the theft and the actual desertion.

THEFT BY PERSON REQUIRED TO ACCOUNT.—Effect of entry in account.

276. (1) Every one commits theft who, having received anything from any person on terms that require him to account for or

OLD CODE:

354. *During cohabitation no husband or wife shall be convicted of stealing the property of the other, but a husband or wife shall be guilty of theft who, intending to desert or on deserting the other or while living apart from the other, fraudulently takes or converts anything which is by law the property of the other in a manner which in any other person would amount to theft.*

(2) *Every one commits theft who, while a husband and wife are living together, knowingly*

(a) *assists either of them in dealing with anything which is the property of the other in a manner which would amount to theft if they were not married; or*

(b) *receives from either of them anything, the property of the other, obtained from that other by such dealing as aforesaid.*

355. *Every one commits theft who, having received any money or valuable security or other thing whatsoever, on terms requiring him to account for or pay the same, or the proceeds thereof, or any part of such proceeds, to any other person, though not requiring him to deliver over in specie the identical money, valuable security or other thing received, fraudulently omits to account for or pay the same or any part thereof, or to account for or pay such proceeds or any part thereof, which he was required to account for or pay as aforesaid.*

(2) *If it be part of the said terms that the money or other thing received, or the proceeds thereof, shall form an item in a debtor and creditor account between the person receiving the same and the person to whom he is to account for or pay the same, and that such last mentioned person shall rely only on the personal liability of the other as his debtor in respect thereof, the proper entry of such money or proceeds or any part thereof, in such account, shall be a sufficient accounting for the money or proceeds, or part thereof, so entered.*

(3) *In such case no fraudulent conversion of the amount accounted for shall be deemed to have taken place.*

pay it or the proceeds of it or a part of the proceeds to that person or another person, fraudulently fails to account for or pay it or the proceeds of it or the part of the proceeds of it accordingly.

(2) Where subsection (1) otherwise applies, but one of the terms is that the thing received or the proceeds or part of the proceeds of it shall be an item in a debtor and creditor account between the person who receives the thing and the person to whom he is to account for or to pay it, and that the latter shall rely only on the liability of the other as his debtor in respect thereof, a proper entry in that account of the thing received or the proceeds or part of the proceeds of it, as the case may be, is a sufficient accounting therefor, and no fraudulent conversion of the thing or the proceeds or part of the proceeds of it thereby accounted for shall be deemed to have taken place.

This is the former s.355. It was s.308 in the Code of 1892 and s.249 in the E.D.C. where, with reference to this and the next two sections, the Commissioners said (report, p.28):

“The crime of embezzlement, wherever the subject of it is a chattel or other thing which is to be handed over *in specie*, will come within the definition of theft; but where the subject matter is not to be handed over *in specie*, but may be accounted for by handing over an

Section 276—continued

equivalent, it requires special provisions, which will be found in sections 249, 250 and 251".

The following historical reference is quoted from *R. v. KIMBROUGH*(1918), 30 C.C.C.56:

"The section appears in much the same words in the original Criminal Code in 1892, where it appears as s.308. There is an absence of reference to any former statutory provision indicating that, at least in its present form, it is a new enactment. The section relating to theft generally, s.305, however, is shown to be taken from an earlier enactment. A reference to some of the earlier decisions shows that the converting of a chattel which a person had received in terms requiring him to deliver it to some person other than himself was theft (see *R. v. DAVIES*(1866), 10 Cox.C.C.239) while the converting by the person charged of money received but which was not to be delivered in specie was not theft (see *R. v. HOARE*(1859), 1 F. & F. 647 and *R. v. GARRETT*(1860), 2 F. & F. 14). In the last case Willes, J., said, 'It seems to me that the bailment referred to in the statute is one in which the same property is to be returned, not one in which different property is to be returned.' The statute referred to in these two cases was in the same terms as s.4 of R.S.C. 1886, c.164. This section did not appear when the law was codified in 1892, but the definition of theft as given in s.305 was made wide enough to include it, and s.308 was enacted apparently for the first time. We find then that it was not necessary to include in s.308 the case of a person converting something which he had received on terms requiring him to deliver the identical thing for that was already theft."

In *R. v. MARTIN*(1932), 59 C.C.C.8, one of a number of prosecutions against brokers after the crash of 1929, Dennistoun, J. A., quoted s.81 of the *Larceny Act*, 1861 (Imp.) concerning the punishment of directors, &c, of bodies corporate, and said at p.27:

"The section is one of several provisions for the punishment of frauds by trustees, agents and other persons entrusted with property, which were first enacted in Sir Richard Bethel's Act, 1857 (Imp.) c.54. The provision and related provisions of the English Act were adopted in Canada in 1869 by Act c.21, s.82 being the above s.81 with the addition of 'manager' after the word 'member'. The section was continued in s.66 of c.164, R.S.C. 1886, but was dropped, for the reason presently to be noticed, in the Criminal Code, 1892 (Can.), c.29, and has not since been re-enacted.

Bethel's Act was passed to remedy defects in the common law, which treated a fraudulent breach of a common law trust by conversion as merely a civil injury, since not accompanied by a felonious or fraudulent taking. Stephen in his *History of the Criminal Law*, vol. III, p. 163, referring to the legislation, points out that the situation could have been simply and much better met by an enactment defining theft as 'the act of fraudulently and without colour of right taking or fraudulently and without colour of right converting to the use of any person anything capable of being stolen, with intent to deprive the owner permanently thereof, or to deprive any person having any special property or interest therein permanently of such property or

OLD CODE:

356. *Every one commits theft who, being entrusted, either solely or jointly with any other person, with any power of attorney for the sale, mortgage, pledge or other disposition of any property, real or personal, whether capable of being stolen or not, fraudulently sells, mortgages, pledges or otherwise disposes of the same or any part thereof, or fraudulently converts the proceeds of any sale, mortgage, pledge or other disposition of such property, or any part of such proceeds, to some purpose other than that for which he was entrusted with such power of attorney.*

357. *Every one commits theft who, having received, either solely or jointly with any other person, any money or valuable security or any power of attorney for the sale of any property, real or personal, with a direction that such money, or any part thereof, or the proceeds, or any part of the proceeds of such security, or such property, shall be applied to any purpose or paid to any person specified in such direction, in violation of good faith and contrary to such direction, fraudulently applies to any other purpose or pays to any other person such money or proceeds, or any part thereof.*

interest,' a definition drawn up by the Criminal Code Commissioners of 1879. . . . Theft by agent, theft by person holding power of attorney, and theft by misappropriating proceeds held under direction, provided for by the English Commissioners in their draft code, and referred to by Stephen in his history at pp. 165-6, are respectively ss. 308, 309 and §10 of the Code of 1892."

In *R. v. TOMLIN*, [1954]2 All E.R. 272, it is pointed out that it is undesirable to charge a general deficiency if individual items can be traced, but that such a course may be followed if it is not possible to trace individual items.

Note that by s.630(5) *post*, an order for restitution cannot be made upon charges under this and the next two sections.

THEFT BY PERSON HOLDING POWER OF ATTORNEY.

277. *Every one commits theft who, being entrusted, whether solely or jointly with another person, with a power of attorney for the sale, mortgage, pledge or other disposition of real or personal property, fraudulently sells, mortgages, pledges or otherwise disposes of the property or any part of it, or fraudulently converts the proceeds of a sale, mortgage, pledge or other disposition of the property, or any part of the proceeds, to some purpose other than that for which he was entrusted by the power of attorney.*

This is the former s.356. It was s.309 in the Code of 1892 and s.250 in the E.D.C. where its origin is given as 24 & 25 Vict., c.96, s.77. See notes to ss.276 and 278.

MISAPPROPRIATION OF MONEY HELD UNDER DIRECTION.—Effect of entry in account.

278. (1) *Every one commits theft who, having received, either solely or jointly with another person, money or valuable security or a power of attorney for the sale of real or personal property, with a direction that the money or a part of it, or the proceeds or a part of the proceeds of the security or the property shall be applied to a*

Section 278—*continued*

purpose or paid to a person specified in the direction, fraudulently and contrary to the direction applies to any other purpose or pays to any other person the money or proceeds or any part of it.

(2) This section does not apply where a person who receives anything mentioned in subsection (1) and the person from whom he receives it deal with each other on such terms that all money paid to the former would, in the absence of any such direction, be properly treated as an item in a debtor and creditor account between them, unless the direction is in writing.

This is the former s.357. It was s.310 in the Code of 1892 and came from s.251 of the E.D.C. where, however, the words are "the sale of any stock or shares whatever" instead of "the sale of any property, real or personal", as in s.357. A marginal note in the E.D.C. gives the source as 24 and 25 Vict., c.96, s.75, and referring to what is now subsec.(2) says: "The proviso diminishes the number of cases in which the direction to dispose of the money, etc. must be in writing. See also *R. v. COOPER* (1874), L.R. 2 C.C.R.123; also *R. v. TATLOCK* (1876), L.R. 2 Q.B.D. 157". It would appear, however, that if the section in the E.D.C. had such effect, that effect was nullified when the reference to stocks or shares was changed to property in the Bill of 1880.

This section deals with a kind of theft different from those covered by ss.276 and 277. Its origin appears to be in 52 Geo. III, c.63, *An Act for more effectually preventing the embezzling of securities for money and other effects left or deposited for safe custody, or other special purpose, in the hands of Bankers, Merchants, Brokers, Attornies or other agents.*

Section 2 of this Act reads in part as follows:

"And whereas it is usual for persons having dealings with Bankers, Merchants, Brokers, Attornies and other agents, to deposit or place in the hands of such Bankers, Merchants, Brokers, Attornies and other agents, sums of money, bills, notes, drafts, cheques or orders for the payment of money, with directions or orders to invest the moneys so paid, or to which such bills, etc., relate, or part thereof, in the purchase of stocks or funds, or in or upon Government or other securities for money, or to apply and dispose thereof in other ways or for other purposes, and it is expedient to prevent embezzlement and malversation in such cases, also; be it therefore enacted by the authority aforesaid that if any such Banker, etc., in whose hands any sum or sums of money, bills, note, etc., shall be placed *with any order or orders in writing, and signed by the party or parties who shall so deposit or place the same* to invest the same or for any other purpose specified in such order or orders,"

and makes it a misdemeanour for such a person to use or dispose of the property deposited for his own use.

Stephen's History of Criminal Law, Vol.III, beginning at p.151, traces the history of the legislation, which may be given in outline as follows:

"The doctrine of the common law was that fraudulent breach of trust is not a crime, or if the same thing is more technically stated, that a felonious taking is an essential part of the definition of theft. I have

OLD CODE:*Section 357—continued*

(2) *When the person receiving such money, security or power of attorney, and the person from whom he receives it, deal with each other on such terms that all money paid to the former would, in the absence of any such direction, be properly treated as an item in a debtor and creditor account between them, this section shall not apply, unless such direction is in writing.*

given the early history of this state of the law. It may have been based on the sentiment that against open violence people ought to be protected by law, but that they could protect themselves against breaches of trust by not trusting people,—a much easier matter in simple times, when commerce was in its infancy, than in the present day.

The first general enactment, however, which altered the old common law rule extensively was 39 Geo. 3, c.85, which was passed in consequence of the decision of *BAZELEY'S CASE*. Bazeley was a clerk in Esdaile's Bank. He received as such a note for £100, which it was his duty to put to the credit of a customer who paid it in. Instead of doing so, he applied it to his own purposes. The case, strange as it appears, seems to have been considered as a new one. There is a most elaborate report of the argument, but hardly any cases or authorities upon it were referred to, and the judges decided that it was not within either the common law or any of the statutes then in force.

The case was the occasion of 39 Geo. 3, c.85, which was repealed by 7 & 8 Geo. 4, c.27, and re-enacted by 7 & 8 Geo. 4, c.29, s.47. These statutes enacted that if any clerk or servant, or person employed in the capacity of a clerk or servant, should, *by virtue of his employment*, receive or take into his possession any chattel, money, or valuable security for, or in the name of, or on account of, his master, and should fraudulently embezzle the same, he should be deemed to have feloniously stolen the same from his master. This provision is re-enacted with the omission of the words italicised by 24 and 25 Vict., c.96, s.66.

Twelve years after *BAZELEY'S CASE* occurred the case of *R. v. WALSH*. Walsh was a stockbroker, who acted for Sir T. Plumer. Sir T. Plumer gave Walsh a cheque for £22,200, to be invested in Exchequer Bills. Walsh paid the cheque into the bank on which it was drawn, and drew out the proceeds in bank notes, a large part of which he applied to his own purposes. He was indicted for stealing the bank notes and certain other securities representing other parts of Sir T. Plumer's cheque. It could not be suggested that this was embezzlement, because Walsh was neither a clerk nor a servant, and because he had received the money to be invested for Sir T. Plumer, not to be paid to him, and the question whether it was larceny was argued with extreme elaboration. No judgment was given, but the prisoner was released.

This case led to the passing of the Act 52 Geo. 3, c.63 (introduced by Mr. Drummond), which applied specifically to bankers, merchants, brokers, attornies, and 'agents of any description, whatever'.

These provisions were re-enacted, with a little condensation in language, but substantially in the same words, by 7 & 8 Geo. 4, c.29, s.49, which, however, for some reason inverts this order; section 2 of the Act of George III, forming the first part, and s.1 the second part, of s.49 of the Act of George IV. A section was added to this Act (s.51),

Section 278—*continued*

which contained provisions relating to the fraudulent pledging by factors and agents, intrusted for the purposes of sale with goods or documents of title to goods.

It is important to observe that these enactments did not deal with the principles of the common law. They only put fraudulent breaches of trust by agents, and in particular by merchants, bankers, brokers, attorneys, and factors, on the same footing as embezzlement by servants. The old common law principle still protected all other fraudulent breaches of trust, as, for instance, larceny by a bailee. If a carrier stole a parcel of jewellery intrusted to him to carry, he committed no crime under these acts unless he broke bulk.

This state of the law was to some extent remedied by the enactment, in the year 1857, of 20 & 21 Vict. c. 54. This act was occasioned by a variety of frauds committed by trustees properly so called, some of which had come to light in connection with the trial of the directors of the British Bank.

Four years afterwards this act was repealed and its provisions were re-enacted in 24 & 25 Vict., c.96, the act under consideration."

R. v. CHRISTIAN(1873), 12 Cox, C.C.502:

"Section 75 of the *Larceny Act*, 1861, 24 and 25 Vict. c.96 (Imp.) (Note: This appears as section 60 of the *Larceny Act*, R.S.C. 1886, c.164), begins: 'Whosoever having been entrusted, either solely, or jointly with any other person, as a Banker, Merchant, Broker, Attorney or other agent, with any money or security for the payment of money with any direction in writing to apply, pay or deliver such money or security or any part thereof respectively, or the proceeds or any part of the proceeds for any purpose, or to any person specified in such direction, shall, in violation of good faith.'"

In this case it was held on appeal that a letter to a broker acknowledging receipt of a letter stating that he had bought certain bonds for the writer, and enclosing a cheque in payment was a sufficient direction in writing within this section.

The following explanation of s.75 of the Act of 1861 appears in *R. v. TATLOCK*(1876), 46 L.J.M.C.7, at p.13:

"Now, looking at both branches of the section, which we ought to do, for the purpose of arriving at the true meaning of either, it appears to me that the second branch only deals with the case of chattels and securities sold or converted into money without authority, and does not embrace in its provisions policies like these, which were entrusted to the defendant for collection.

For we must observe that the section only relates to certain classes of agents whom the Legislature has not thought fit to make amenable to the ordinary law of embezzlement, and it is only, therefore, under defined conditions and safeguards that such agents can be proceeded against criminally for misappropriating moneys or securities entrusted to them.

The general scheme appears to be this—If moneys or securities which they are authorized to convert into money are entrusted to agents of this character, they are only answerable criminally for a fraudulent

OLD CODE:

378. Every one is guilty of an indictable offence and liable to two years' imprisonment who steals the ore of any metal, or any quartz, lapis, calaminaris, manganese or mundic, or any piece of gold, silver or other metal, or any wad, black cawk, or black lead, or any coal, or cannel coal, or any marble, stone or other mineral, from any mine, bed or vein thereof respectively.

misappropriation, if a direction in writing as to the disposal of such moneys was given. That is provided for by the first branch of the section, which embraces the case we are considering, for I cannot doubt having regard to the interpretation clause, that the policies were securities for the payment of money within the meaning of the section.

My judgment is based, not upon subtleties of language, but upon the broad ground that, according to the true construction of the section, cases which, if there had been a written direction, would have fallen within the first branch, do not, in the absence of such written direction, fall within the second branch of the section. In fact, I think that the cardinal principle of the section is, that such an agent is only (in the absence of a written direction) to be criminally responsible for moneys which may come into his hands by some unauthorized act of his own.

But the prisoner was not a mere clerk of the prosecutor; he was an insurance broker carrying on an independent business, and it must be assumed that he had many other principals for whom he acted besides the prosecutor, and it does not appear what had been the previous course of dealing between the prosecutor and the prisoner as to the payment or accounting by the latter for money received by him on the settlement of losses. These are matters having an essential bearing upon the guilt or innocence of the prisoner, and yet they do not appear to have been explained by the evidence, or brought to the attention of the jury."

In *R. v. CAMPBELL* (1926), 45 C.C.C. 159, C. received from M. at various times sums of money to be invested in mortgages for her benefit. He was convicted under s.357. It was held that the dealings were not shown to be such that the parties dealt with each other as debtor and creditor and that the case was not within subsec.(2) so as to require a written direction.

The crux of the matter appears to lie in a remark of Pigott, B., in *R. v. COOPER* (1874), 43 L.J.M.C.89: "The foundation of the offence is that he must have transferred without authority." To put it another way, the effect of the section appears to be that disobedience to an oral direction would give rise to civil but not to *criminal* liability.

For definitions see s.2(32), property; s.2(42) and s.3(3), valuable security. See also notes to s.276 and s.630(5).

TAKING ORE FOR SCIENTIFIC PURPOSE.

279. No person commits theft by reason only that he takes, for the purpose of exploration or scientific investigation, a specimen of ore or mineral from land that is not enclosed and is not occupied or worked as a mine, quarry or digging.

Section 279—continued

This is the former s.378(2). It was s.310(2) in the Code of 1892 and s.25(2) in R.S.C. 1886, c.164.

Subsec.(1) of s.378 which dealt with theft of ores and minerals is left to the operation of s.280 of this Code. See also ss.274, *ante*, and 287, *post*.

PUNISHMENT FOR THEFT.

280. Except where otherwise prescribed by law, every one who commits theft is guilty of an indictable offence and is liable

(a) to imprisonment for ten years, where the property stolen is a testamentary instrument or where the value of what is stolen exceeds fifty dollars, or

(b) to imprisonment for two years, where the value of what is stolen does not exceed fifty dollars.

This is new and replaces the penalties for various thefts set out in the former ss.358-387. The general penalty was contained in s.386, but in some instances the penalties were as high as fourteen years' imprisonment, and all were subject to an additional two years if the value of the thing stolen exceeded two hundred dollars. Par.(b) replaces also the limitation of six months, which by the former s.778, applied to cases of theft tried summarily under s.773(a) where the value did not exceed twenty-five dollars.

Greaves' Cons. Acts, p.xliii said: "I am very strongly in favour of general clauses when they can be used without any others. They are not only clear and simple; but, if I be not very much mistaken, would reduce the length of our statutes to a greater extent than any other plan that could be devised," and the same authority p.xli said also: "A clause may be framed in such general terms as to include all cases of the same kind within it. This is the simplest, and, perhaps, the best course; and it leaves the judgment of the Court entirely unfettered as to the punishment in every case."

In 68 L.Q.R.(1952), Lieck's "Bow Street World" is quoted as follows at p.505:

"The Larceny Act is a mockery from the point of view of simplification. It retains all the special forms of larceny with special punishments, which are survivals of the old days when death was thought to be the panacea of all crime. . . ."

In these days when no one wants to hang another for stealing or even to inflict the lengthy imprisonment fixed as a merciful substitute by men who were ardent reformers in their time, there could be one offence of larceny and one only, with one maximum punishment. Make the maximum high if you like. The merciful mood of the public will inevitably be reflected in the sentences of the judges. It is this indeed which checks reform, for though the maximum sentences vary, the actual sentences have little if any relation to them."

The change now made is in accord with the amendment in 1950 of the former s.468 to provide a general penalty for forgery.

Note that the minimum penalty for theft of an automobile contained in the former s.377 has been omitted in accordance with the general recommendation of the Commissioners that such penalties should be abolished.

OLD CODE:*Section 378—continued*

(2) It is not an offence to take, for the purposes of exploration or scientific investigation, any specimen or specimens of any ore or mineral from any piece of ground uninclosed and not occupied or worked as a mine, quarry or digging.

386. Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals anything for the stealing of which no punishment is otherwise provided or commits in respect thereof any offence for which he is liable to the same punishment as if he had stolen the same.

(2) The offender is liable to ten years' imprisonment if he has been previously convicted of theft.

387. If the value of anything stolen, or in respect of which any offence is committed for which the offender is liable to the same punishment as if he had stolen it, exceeds the sum of two hundred dollars the offender is liable to two years' imprisonment, in addition to any punishment to which he is otherwise liable for such offence.

285. (3) Every one who takes or causes to be taken from a garage, stable, stand, or other building or street, road, highway or other place, any motor vehicle with intent to operate or drive or use or cause to permit the same to be operated or driven or used without the consent of the owner is liable, on summary conviction, to a fine not exceeding five hundred dollars and costs or to imprisonment for any term not exceeding twelve months or to both fine and imprisonment.

OFFENCES RESEMBLING THEFT.

TAKING MOTOR VEHICLE WITHOUT CONSENT.

281. Every one who, without the consent of the owner, takes a motor vehicle with intent to drive or use it or cause it to be driven or used is guilty of an offence punishable on summary conviction.

This is the former s.285(3) as re-enacted by 1948, c.39, s.9.

In *R. v. SCHMIDT and EDLUNG*(1930), 54 C.C.C.168, it was held that an offender may be convicted under this provision without being liable for theft, but that:

"Obviously, however, when the circumstances are such that a theft of such articles has been committed within the meaning of s.347 (now s.269) it is the duty of the officers of the Crown to lay and prosecute a charge of that higher description, and for the magistrate to convict if the evidence supports it,"

This was followed in *R. v. BERNIER et al.* (1940), 74 C.C.C.384, where Hansard 1910, Vol. 1, Dec. 13, is quoted as to the object of the provision:

"The object of this amendment is to make it a specified offence of a chauffeur or anyone else other than the owner of any automobile, to use said automobile without the consent or permission of the owner."

This provision finds its usual application in cases of "joy-riding" so called.

CRIMINAL BREACH OF TRUST.

282. Every one who, being a trustee of anything for the use or benefit, whether in whole or in part, of another person, or for a public or charitable purpose, converts, with intent to defraud and in violation of his trust, that thing or any part of it to a use that is not authorized by the trust is guilty of an indictable offence and is liable to imprisonment for fourteen years.

This is the former s.390. It was s.363 in the Code of 1892, and s.274 in the E.D.C. where it appeared with a definition of "trustee" taken from 24 and 25 Vict., c.96, s.80. In this Code "trustee" is defined in s.2(41). As the element of breach of trust is a circumstance in aggravation, the penalty is greater than that for ordinary theft. There can be no order for restitution: s.630(5) *post*.

The requirement that a prosecution must have the consent of the Attorney General, formerly appearing in s.596, is not continued as there seemed no greater reason for it in a case under s.390 than for any other case of conversion.

In *R. v. BROUNSTEIN*(1923), 39 C.C.C.250, the following appears at p.252:

"The section provides for the case of a trustee who is the full legal owner of the subject matter of the trust for the use or benefit of another person. Fraudulent breach of trust on the part of a trustee having the full legal ownership of property was up to 1857 only a civil wrong, and was first made a criminal offence in England in that year."

and at p.255:

"There is no doubt that it is the privilege of the Crown to lay as many charges against the accused as the evidence in the case may appear to support;"

and at p.256:

"Was he, at the time of the alleged misappropriation, a 'trustee' within the definition of the Code? If so, the offence amounts to one of criminal breach of trust and is punishable under s.390. If not, the case is one of ordinary theft and is covered by sec.347. I have no doubt at all that the charges in question were properly laid; they are not inconsistent, but very plainly alternative."

In *R. v. KRATKY*(1931), 55 C.C.C.150, the informant had given money to the accused to keep for him to save and accused used the money for his own purposes. It was argued that the charge should have been laid under s.390, but it was held that accused was not a trustee and that the charge was properly laid as theft by conversion within s.347.

See also *R. v. MARKOFF*, noted under s.274, *ante*.

PUBLIC SERVANT REFUSING TO DELIVER PROPERTY.

283. Every one who, being or having been employed in the service of Her Majesty in right of Canada or in right of a province, or in the service of a municipality, and entrusted by virtue of that employment with the receipt, custody, management or control of anything, refuses or fails to deliver it to a person who is authorized to demand it and does demand it, is guilty of an indictable offence and is liable to imprisonment for fourteen years.

OLD CODE:

390. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being a trustee of any property for the use or benefit, either in whole or in part, or some other person, or for any public or charitable purpose, with intent to defraud, and in violation of his trust, converts anything of which he is trustee to any use not authorized by the trust.

391. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, being employed in the service of His Majesty or of the Government of Canada or the Government of any province of Canada, or of any municipality, and entrusted by virtue of such employment with the keeping, receipt, custody, management or control of any chattel, money, valuable security, book, paper, account or document, refuses or fails to deliver up the same to any one authorized to demand it.

392. Every one is guilty of an indictable offence and liable to three years' imprisonment who,

(a) without the consent of the owner thereof fraudulently takes, holds, keeps in his possession, conceals, receives, appropriates, purchases or sells, or fraudulently causes or procures, or assists in the taking possession, concealing, appropriating, purchasing or selling of any cattle which are found astray; or

(b) fraudulently refuses to deliver up any such cattle to the proper owner thereof, or to the person in charge thereof on behalf of such owner, or authorized by such owner to receive such cattle; or

This is the former s.391 in general terms and with the addition of the words "or having been employed". The section was s.321 in the Code of 1892 and came from the *Larceny Act*, R.S.C. 1886, c.164, s.55. It was not in the E.D.C.

The words added are to cover a case where anything is held by virtue of the employment and delivery is refused after the employment has ended.

FRAUDULENTLY TAKING CATTLE.—Defacing brand on cattle.—Evidence of property in cattle.—Presumption from possession.

284. (1) Every one who, without the consent of the owner,

(a) fraudulently takes, holds, keeps in his possession, conceals, receives, appropriates, purchases or sells, cattle that are found astray; or

(b) fraudulently, in whole or in part,

(i) obliterates, alters or defaces, a brand or mark on cattle,

or

(ii) makes a false or counterfeit brand or mark on cattle,

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

(2) In any proceedings under this Act, evidence that cattle are marked with a brand or mark that is recorded or registered in accordance with any Act is *prima facie* evidence that the cattle are owned by the registered owner of that brand or mark.

(3) Where an accused is charged with theft of cattle or with an offence under subsection (1), the burden of proving that the cattle came lawfully into the possession of the accused or his employee or

Section 284—*continued*

into the possession of another person on behalf of the accused is on the accused, if the accused is not the registered owner of the brand or mark with which the cattle are marked, unless it appears that possession of the cattle by an employee of the accused or by another person on behalf of the accused was without the knowledge and authority, sanction or approval of the accused.

Subsec.(1) comes from the former s.392 which came into the Code by 1900, c.46, s.3, as s.331A. It was amended by 1901, c.42, s.2, especially to require that a refusal to deliver should be fraudulent instead of "without lawful excuse", presumably because there might be lawful excuse, e.g. in taking the animals to pound, as to which see *R. v. LORETTE* (1918), 30 C.C.C.238.

That clause is not continued in terms as the refusal to deliver would be a keeping in possession under subsec.(1)(a). Par.(d) of s.392 is not included. So far as it involved fraud, it would probably be covered by s.304 (false pretences) or s.323 (fraud) in this Code. Otherwise it was felt to be a matter proper to be dealt with in legislation regarding diseases of animals.

It was said in *R. v. DUBOIS*(1909), 15 C.C.C.485, at p.487, that this section was evidently intended to meet the circumstances of a ranching country where cattle are supposed to run at large and that "I think it may be taken as an axiom that no honest stockman will brand a 3-year old steer, without careful examination, unless he has lately purchased it from a known and reputable person, and even then it would be much wiser if he did exercise care and see that so-called accidents do not occur".

In *HAZLETT v. VAN ROSS*(1934), 62 C.C.C.192, it was held that a person charged under the former s.369 (theft of cattle) might be convicted of the lesser offence set out in s.392(a). S.369 is covered by the general section in this Code, but in any case, if there were doubt, theft could be charged in an alternative count. See *R. v. BROUNSTEIN*, quoted under s.282, *supra*.

Subsecs.(2) and (3) are the former s.989.

TAKING POSSESSION ETC., OF DRIFT TIMBER. — Dealer in second hand goods.—Search for timber unlawfully detained.—Evidence of property in timber.—Presumption from possession.—"Coastal waters."—"Lumber."—"Lumbering equipment."

285. (1) Every one is guilty of an indictable offence and is liable to imprisonment for five years who, without the consent of the owner,

(a) fraudulently takes, holds, keeps in his possession, conceals, receives, appropriates, purchases or sells,

(b) removes, alters, obliterates or defaces a mark or number on, or

(c) refuses to deliver up to the owner or to the person in charge thereof on behalf of the owner or to a person authorized by the owner to receive it,

any lumber or lumbering equipment that is found adrift, cast ashore or lying upon or embedded in the bed or bottom, or on the bank or beach of a river, stream or lake in Canada, or in the harbours or any of the coastal waters of Canada.

*OLD CODE:**Section 392—continued*

(c) *without the consent of the owner, fraudulently, wholly or partially obliterates, or alters or defaces, or causes or procures to be obliterated, altered or defaced, any brand or mark on any cattle, or makes or causes or procures to be made any false or counterfeit brand or mark on any cattle; or*

(d) *sells or offers for sale, or causes to be sold or offered for sale, any cattle, knowing that within the period of sixty days immediately preceding such sale or offer for sale any animal so sold or offered for sale had been injected with tuberculin by any person not being a duly qualified veterinarian, or in case the said injection had been made by a duly qualified veterinarian, does any of the acts mentioned in this paragraph without producing the tuberculin test chart to the purchaser prior to the completion of any such sale.*

989. *In any criminal prosecution, proceeding or trial, the presence upon any cattle of a brand or mark, which is duly recorded or registered under the provisions of any Act, ordinance or law, shall be prima facie evidence that such cattle are the property of the registered owner of such brand or mark.*

(2) *When a person is charged with theft of cattle, or with an offence under paragraph (a) or paragraph (b) of section three hundred and ninety-two respecting cattle, possession by such person or by others in his employ or on his behalf of such cattle bearing such a brand or mark of which the person charged is not the registered owner, shall throw upon the accused the burden of proving that such cattle came lawfully into his possession or into the possession of such others in his employ or on his behalf, unless it appears that such possession by others in his employ or on his behalf was without his knowledge and without his authority, sanction or approval.*

394. *Every one is guilty of an indictable offence and liable to three years' imprisonment who,*

(a) *without the consent of the owner thereof,*

(i) *fraudulently takes, holds, keeps in his possession, collects, conceals, receives, appropriates, purchases, sells or causes or procures or assists to be taken possession of, collected, concealed, received, appropriated, purchased or sold, any timber, mast, spar, saw-logs, shingle bolt or other description of lumber boom chains, chains, lines or shackles, which is found adrift in, or cast ashore, or lying upon or imbedded in the bed, bottom, or on the bank or beach of any river, stream, or lake, in Canada, or in the harbours or any of the coast waters, including the whole of Queen Charlotte Sound, the whole of the Strait of Georgia or the Canadian waters of the Strait of Juan de Fuca, of British Columbia, or*

(ii) *wholly or partially defaces or adds or causes or procures to be defaced or added, any mark or number on any such timber, mast, spar, saw-log, shingle bolt, or other description of lumber, boom chains, chains, lines or shackles, or makes or causes or procures to be made, any false or counterfeit mark on any such timber, mast, spar, saw-log, shingle bolt, or other description of lumber, boom chains, chains, lines or shackles; or*

(b) *refuses to deliver up to the proper owner thereof, or to the person in charge thereof, on behalf of such owner, or authorized by such owner to receive the same, any such timber, mast, spar, saw-log, shingle bolt, or other description of lumber, boom chains, chains, lines or shackles.*

Section 285—*continued*

(2) Every one who, being a dealer in second-hand goods of any kind, trades or traffics in or has in his possession for sale or traffic any lumbering equipment that is marked with the mark, brand, registered timber mark, name or initials of a person, without the written consent of that person, is guilty of an offence punishable on summary conviction.

(3) A peace officer who suspects, on reasonable grounds, that any lumber owned by any person and bearing the registered timber mark of that person is kept or detained in or on any place without the knowledge or consent of that person, may enter into or upon that place to ascertain whether or not it is detained there without the knowledge or consent of that person.

(4) Where any lumber or lumbering equipment is marked with a timber mark or a boom chain brand registered under any Act, the mark or brand is *prima facie* evidence, in proceedings under subsection (1), that it is the property of the registered owner of the mark or brand.

(5) Where an accused or his servants or agents are in possession of lumber or lumbering equipment marked with the mark, brand, registered timber mark, name or initials of another person, the burden of proving that it came lawfully into his possession or into possession of his servants or agents is, in proceedings under subsection (1), on the accused.

(6) In this section,

- (a) "coastal waters of Canada" includes all of Queen Charlotte Sound, all the Strait of Georgia and the Canadian waters of the Strait of Juan de Fuca,
- (b) "lumber" means timber, mast, spar, shingle bolt, sawlog or lumber of any description, and
- (c) "lumbering equipment" includes a boom chain, chain, line and shackle.

Subsecs.(1) and (6) come from the former s.394; subsec.(2) from the former s.431(4); subsec.(3) from the former s.638 with the words "timber mark" replacing the words "trade mark". Subsecs.(4) and (5) come from the former s.990.

The subject was dealt with originally in s.111 of the *Larceny Act*, 1869 (Can.) which was amended by 38 Vict., c.40, s.1, to introduce new material similar in effect to what now appears as subsecs.(3), (4) and (5). The substantive provisions appeared in s.338 of the Code of 1892, altered in form and with the word "fraudulently" inserted at the beginning of par.(a)(i).

The former s.638 was s.572 in the Code of 1892, and the former s.990 was s.708 there.

The following appears in Hansard, 1892, Vol. II, col. 3470:

"Formerly there were a number of small mills along the Ottawa river whose owners made it a business to pick up a sufficient number of logs to supply their mills, and, if they were found in their booms, they set up the pretence that they had floated in there and had come

OLD CODE:

431. (4) *Every one who, being a dealer in second-hand goods of any kind, trades or traffics in or has in his possession for sale any boom or other chains, lines or shackles for the use of rafting, storing, fastening or towing lumber or logs, and who purchases, trades or traffics in any boom or other chain, line or shackle which has upon it the mark, brand, trade mark duly registered, name or initials of any person, without the written consent of such person, or who, without such consent, has in his possession any such boom chains or other description of chains, lines or shackles for the purpose of sale or traffic, is guilty of an offence, and shall be liable on summary conviction to a penalty of twenty-five dollars or imprisonment for any term not exceeding thirty days for a first offence, and of fifty dollars or imprisonment for sixty days for any subsequent offence.*

638. *If any constable or other peace officer has reasonable cause to suspect that any timber, mast, spar, saw-log or other description of lumber, belonging to any lumberman or owner of lumber, and bearing the registered trade mark of such lumberman or owner of lumber, is kept or detained in any saw-mill, mill-yard, boom or raft, without the knowledge or consent of the owner, such constable or other peace officer may enter into or upon such saw-mill, mill-yard, boom or raft, and search or examine for the purpose of ascertaining whether such timber, mast, spar, saw-log or other description of lumber is detained therein without such knowledge or consent.*

990. (1) *In any prosecution, proceeding or trial for any offence under section three-hundred and ninety-four, if any timber, mast, spar, saw-log, shingle bolt or other description of lumber, boom chain, chain or shackle is marked with a timber mark or a boom chain brand duly registered under the provisions of the Timber Marking Act, or under the provisions of the Forest Act or the Boom Chain Brands Act of the statutes of British Columbia, every such mark shall be prima facie evidence that such timber, mast, spar, saw-log, shingle bolt or other description of lumber, boom chain, chain or shackle is the property of the registered owner of such timber mark or boom chain brand.*

(2) *Possession by the accused, or by others in his employ or on his behalf, of any such timber, mast, spar, saw-log, shingle bolt or other description of lumber, boom chain, chain or shackle so marked shall, in all cases, throw upon him the burden of proving that such timber, mast, spar, saw-log, shingle bolt or other description of lumber, boom chain, chain or shackle came lawfully into his possession, or into the possession of such others in his employ or on his behalf.*

to their possession innocently. This had become such a nuisance and prevailed to such an extent that there seemed to be no way of remedying the evil other than to make the possession of these logs punishable in this way, and, in 1875, the possession of these logs in the booms was made a criminal offence, the onus of proof being thrown upon the party in whose possession they were instead of lying upon the party who owned the logs as it did previously, as to the unlawful manner in which they had come into the possession of the party with whom they were found. While, perhaps, the penalty is a little too severe, I think there should be some penalty."

In 1919, there were strong representations that a considerable traffic in stolen chains had grown up in British Columbia and was causing heavy losses to lumbermen. As a result by 1919, c.46, s.10, the words

Section 285—continued

“boom chains, lines, or shackles,” were inserted after “description of lumber”, in s.394, and by s.11, subsec.(4) was added to s.431.

By 1932-33, c.53, s.4, an amendment was made “to make a theft of the removal of logs lying in the bottom of streams and belonging to certain owners”.

It was held in *ROBITAILLE v. MASON*(1903), 9 B.C.R.499 that fraud is an element of the offence under s.394(b). That case was an action for malicious prosecution and false imprisonment. It was held that there had been no reasonable cause for the prosecution as the accused had only refused to deliver up the float in question without compensation for salvage.

- Similarly in *WATTS & GAUNT v. R.*(1953), 105 C.C.C.193, it was held by the Supreme Court that the word “fraudulently” applies to s.394 (b) as well as to (a) and that *mens rea* is an ingredient of the offence under that paragraph (now s.285(1)(c)). This was applied in *R. v. SHYMKO-WICH*(1954), 12 W.W.R.(N.S.)49, to hold that *mens rea* is an essential element of the offence under s.394(a)(i), now s.285 (1)(a).

DESTROYING DOCUMENTS OF TITLE.

286. Every one who, for a fraudulent purpose, destroys, cancels, conceals or obliterates

- (a) a document of title to goods or lands,
- (b) a valuable security or testamentary instrument, or
- (c) a judicial or official document,

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

This is the former s.396. It was s.353 in the Code of 1892 and came from the *Larceny Act*, 1861 (Imp.) ss.27, 28, 29, and R.S.C. 1886, c.164, ss.12, 13 and 14. S.265 of the E.D.C. is the same in effect although in more general terms. For definitions of terms see s.2(12), (13), (40) and (42). With regard to testamentary instruments see also ss.280, 293, 304(2) and 467(a).

FRAUDULENT CONCEALMENT.

287. Every one who, for a fraudulent purpose, takes, obtains, removes or conceals anything is guilty of an indictable offence and is liable to imprisonment for two years.

This is the former s.397 omitting the words “capable of being stolen”, as to which see notes to s.269, *ante*. The section was s.354 in the Code of 1892, where Taschereau describes it as new. A somewhat similar section in the *Larceny Act*, R.S.C. 1886, c.164, s.26, referred only to minerals.

In *R. v. HERMAN*(1936), 66 C.C.C.129, in which a conviction under s.424, now s.337, for unlawful possession of gold suspected to have been stolen, was set aside because of technical defects in the information, the judgment remarked that it seemed that the prosecution would have been more appropriate under s.397 than under s.424.

OLD CODE:

396. *Every one who destroys, cancels, conceals or obliterates any document of title to goods or lands, or any valuable security, testamentary instrument, or judicial, official or other document, for any fraudulent purpose, is guilty of an indictable offence and liable to the same punishment as if he had stolen such document, security or instrument.*

397. *Every one is guilty of an indictable offence and liable to two years' imprisonment who, for any fraudulent purpose, takes, obtains, removes or conceals anything capable of being stolen.*

445. *Robbery is theft accompanied with violence or threats of violence to any person or property used to extort the property stolen, or to prevent or overcome resistance to its being stolen.*

446. *Every one is guilty of an indictable offence and liable to imprisonment for life and to be whipped who*

(a) robs any person and at the time of, or immediately before or immediately after, such robbery, wounds, beats, strikes, or uses any personal violence to, such person; or

(b) being together with any other person or persons robs, or assaults with intent to rob, any person; or

(c) being armed with an offensive weapon or instrument or imitation thereof robs, or assaults with intent to rob, any person.

448. *Every one who assaults any person with intent to rob him is guilty of an indictable offence and liable to three years' imprisonment and to be whipped.*

ROBBERY AND EXTORTION.

"ROBBERY."

288. Every one commits robbery who

(a) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property,

(b) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person,

(c) assaults any person with intent to steal from him, or

(d) steals from any person while armed with an offensive weapon or imitation thereof.

This is a combination of the former ss.445, 446 and 448, designed for greater clarity and to do away with the overlapping of ss.446(b) and 448. They were ss.397, 398 and 400 in the Code of 1892 and ss.288, 289 and 293 in the E.D.C., where the origin of the latter two is given as the *Larceny Act, 1861* (Imp.) ss.42 and 43. See also notes following s.231.

Robbery is a felony at common law and also by statute and consists in the felonious taking of money or goods of some value from the person of another, or in his presence, if the property is under his immediate and personal care and protection, against his will and either by force or by putting him in fear; 9 Halsbury, 2nd ed., p.532.

Section 288—continued

At common law robbery is the felonious taking of goods or money from the person or place of another by force or intimidation; 54 Corpus Juris 1007.

Broadly speaking, to rob is to steal or thieve; 54 Corpus Juris 1009.

The history of s.446 is traced in *R. v. MASKIEW*(1945), 85 C.C.C. 138, in which it was held that the offence of carrying a firearm (see now s.90, *ante*) was not an included offence under s.446. The following is quoted at p.139:

"Section 446 of the present Code appeared first in the *Larceny Act*, 1869 (Can.) c.21, s.42. It was continued in force in the *Larceny Act*, R.S.C. 1886, c.164, s.34(quoted). It was continued in the same form in R.S.C. 1906, c.146, s.446; and further continued without amendment in R.S.C. 1927, c.36, s.446. No amendment thereto has been made since the latter statute came into force."

and at p.141:

"From the above resumé it will be noted that s.446 of the *Criminal Code*, as it now stands, has not been varied to any extent, except in form, since 1886, and that the section deals with the crime of robbery and the punishment for same. On the other hand, s.122 is in respect of the possession of firearms, and the changes made therein have reference entirely to the offence of carrying concealed weapons and the punishment for same." See also *R. v. QUON*(1948), 92 C.C.C.1.

PUNISHMENT FOR ROBBERY.

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

This is the former s.447 with an increase in penalty. It was s.399 in the Code of 1892 and s.292 in the E.D.C.

STOPPING MAIL WITH INTENT.

290. Every one who stops a mail conveyance with intent to rob or search it is guilty of an indictable offence and is liable to imprisonment for life.

This is the former s.449 omitting the minimum penalty. It was s.401 in the Code of 1892 and s.290 in the E.D.C. where it was adapted from 7 Wm. IV and 1 Vict., c.36. The minimum penalty was omitted in accordance with the general policy adopted by the Commissioners on this Code, but also because there was no minimum penalty prescribed for the actual robbery.

EXTORTION.—Saving.

291. (1) Every one who, without reasonable justification or excuse and with intent to extort or gain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or to cause anything to be done, is guilty of an indictable offence and is liable to imprisonment for fourteen years.

(2) A threat to institute civil proceedings is not a threat for the purposes of this section.

OLD CODE:

447. *Every one who commits robbery is guilty of an indictable offence and liable to fourteen years' imprisonment and to be whipped.*

449. *Every one is guilty of an indictable offence and liable to imprisonment for life, or for any term not less than five years, who stops a mail with intent to rob or search the same.*

450. *Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to defraud or injure, by unlawful violence to, or restraint of the person of another, or by the threat that either the offender or any other person will employ such violence or restraint, unlawfully compels any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal upon any paper or parchment, in order that it may be afterwards made or converted into or used or dealt with as a valuable security.*

451. *Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property, chattel, money, valuable security or other valuable thing.*

452. *Every one is guilty of an indictable offence and liable to two years' imprisonment who, with menaces, demands from any person, either for himself or for any other person, anything capable of being stolen with intent to steal it.*

453. *Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, with intent to extort or gain anything from any person,*

(a) accuses or threatens to accuse either that person or any other person, whether the person accused or threatened with accusation is guilty or not, of

(i) any offence punishable by law with death or imprisonment for seven years or more,

(ii) any assault with intent to commit a rape, or any attempt or endeavour to commit a rape, or any indecent assault.

(iii) carnally knowing or attempting to know any child so as to be punishable under this Act,

(iv) any infamous offence, that is to say, buggery, an attempt or assault with intent to commit buggery, or any unnatural practice, or incest,

(v) counselling or procuring any person to commit any such infamous offence;
or

(b) threatens that any person shall be so accused by any other person; or

(c) causes any person to receive a document containing such accusation or threat, knowing the contents thereof;

or who by any of the means aforesaid compels or attempts to compel any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal upon or to any paper or parchment, in order that it may be afterwards made or converted into or used or dealt with as a valuable security.

454. *Every one is guilty of an indictable offence and liable to imprisonment for seven years who,*

(a) with intent to extort or gain anything from any person, accuses or threatens to accuse either that person or any other person of any offence other than those

This combines the former ss.450 to 454.

The provisions of these sections appear in the *Larceny Act*, 1861 (Imp.) and in the *Larceny Act*, 1869 (Can.). In the Revised Statutes, 1886, they appear as ss.1-6 inclusive, of Chap. 173, *An Act respecting Threats, Intimidation and other Offences*. They are contained in ss.402 to 406, inclusive, of the Code of 1892, except that s.404 did not include the words "or by force" after "menaces". These words were dropped in the English Draft Code. Of these sections the Commissioners reported (p.29):

"The provisions in Part XXVII as to Robbery and Extortion re-enact the existing law, with the exception of s.296 (s.454 in the Canadian Code) which is new. At present a policeman or game-keeper who levies blackmail under threat of accusing of larceny or poaching, if criminally responsible at all, is only punishable with imprisonment and fine." And Taschereau notes (p.455) that: "This section now extends the provisions of the preceding section to threats of every accusation whatever."

In *R. v. RICHARDS*(1868), 11 Cox, C.C.43, it was held that whether the crime of which the prisoner accused the prosecutor was or was not committed is not material in this, that the prisoner is equally guilty if he intended by such accusation to extort money. But it is material in considering the question whether, under the circumstances of the case, the intention of the prisoner was to extort money or merely to compound a felony.

See also s.252, *ante* (extortion by libel), and s.316 *post* (threats). In *R. v. McDONALD*(1892), 8 Man. L.R.491, it was held that a letter sent by the prisoners to a tavern keeper demanding a sum of money, and threatening in default of payment to bring a prosecution under the *Liquor License Act*, was not a menace within the meaning of R.S.C., c.173, s.1. It was held, following *R. v. SOUTHERTON*(1805), 6 East, 126, that the test was whether the menace was such as a firm and prudent man might and ought to have resisted.

R. v. GIBBONS(1898), 1 C.C.C.340: Held, that a demand of money from a hotel keeper under threat of prosecution under a Liquor License Act may constitute the offence under Criminal Code s.404, of demanding money with menaces with intent to steal the same. Such a threat made to a licensee, who to the knowledge of the prisoner had been previously convicted under the Liquor License laws, and who was therefore liable to a cancellation of his license as well as to heavy penalties, is such a threat as is calculated to do him harm and as would be likely to affect any man in a sound and healthy state of mind, and any such threat is an illegal menace.

This case may be compared with *R. v. McDONALD*, *supra*,—also a Manitoba case—as to which Bain, J. observed that "when a case arises again under section 403, it may be desirable to reconsider the decision in *R. v. McDONALD*."

S.406 (later s.454) was interpreted in *R. v. DIXON*(1895), 2 C.C.C. 589, in which accused had written a letter threatening to accuse the informant of an offence against a Liquor License Act. Held that the word "offence" as used in the section applies to offences against local as well

*OLD CODE:**Section 454—continued**specified in the last preceding section, whether the person accused or threatened with accusation is guilty or not of that offence; or**(b) with such intent as aforesaid threatens that any person shall be so accused by any person; or**(c) causes any person to receive a document containing such accusation or threat knowing the contents thereof;**or who by any of the means aforesaid compels or attempts to compel any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal upon or to any paper or parchment, in order that it may be afterwards made or converted into, or used or dealt with as a valuable security.*

as Dominion Acts and is not confined to offences against the Code.

In *R. v. TISDALE and SHAVER*(1860), 20 U.C.Q.B.272, where two defendants sat together as magistrates, and one exacted a sum of money from a person charged before them with a felony, the other not dissenting, it was held that they might be jointly convicted. "Two or more persons may be jointly convicted of extortion when they act together and concur in the demand. It is a misdemeanour and all are principals."

In *R. v. ROBINSON*(1837), 2 Mood. & R. 14, 174 E.R.198, it was held that threatening to accuse need not be a threat to accuse before a judicial tribunal, a threat to charge before any third person is enough. Patteson, J.: "By the former law it was felony to extort money by threatening to accuse the prosecutor to any third party; it was not necessary that the threat should be that of accusing by course of law; and the statute (7 & 8 Geo. IV, c.29, s.7) being declaratory of the former law, could hardly be construed as less extensive in its operations."

In *R. v. TOMLINSON*, [1895]1 Q.B.706, the accused had written the prosecutor a letter threatening to tell the latter's wife of certain alleged indecent conduct on his part, unless certain money was paid by a certain time.

Wills, J. (at p.710) said: "I do not think that the word 'accusation' is confined to cases coming within s.46 (*viz.*, of the *Larceny Act*, 1861) which deals with offences of a peculiarly bad character, nor can I think it applies only to accusations of criminal offences; it must have the meaning given it in ordinary language."

The cases were referred to in *R. v. KEMPEL*(1900), 3 C.C.C.481, where it was held that laying an information for rape before a J.P. for the sole purpose of extorting money was to "accuse".

Upon another subject Wills, J. said: "With regard to the doctrine that the threat must be of a nature to operate on a man of reasonably sound or ordinarily firm mind, I only desire to say that it ought, in my judgment, to receive a liberal construction in practice; otherwise great injustice may be done, for persons who are thus practised upon are not as a rule of average firmness; but I quite appreciate the fact that the threat must not be one that ought to influence nobody."

Section 291—*continued*

Lord Reading, C.J., in *R. v. BOYLE & MERCHANT*, [1914]3 K.B. 339 at p.344, a prosecution under the *Larceny Act*, 1861, s.45, remarked upon this, that:

"Some of the expressions used by Wills, J. in that case may have gone too far, but we agree with him that the doctrine that the threat must be of a nature to operate on a man of reasonably sound or ordinarily firm mind must receive a liberal construction in practice"

and he concludes that:

"In our judgment, when a man with intent to steal, threatens either to do violence to the person of another, or to commit acts calculated to injure the property or character of another, it is a menace within the meaning of this section."

He says also (p.348) that:

"Whatever may have been the view in earlier days under the older statutes and decisions, a wider view has been given to the word (menaces) by later decisions beginning with *R. v. WALTON & OGDEN* (1863), 9 Cox, C.C.268."

These expressions were adopted in *R. v. PACHOLKO*(1941), 75 C.C.C.172, where it was said that the rule relating to the offence of delivering a letter demanding property "with menaces and without any reasonable and probable cause" viz., that the threat must be such as may overcome the will of an ordinarily firm man, has reference to the general nature of the evil threatened rather than to the powers of resistance of the particular person addressed, and that a threat of injury to character (in this case, a threat to accuse a police constable of an indecent assault on accused's wife) is itself sufficient evidence of a menace to go to the jury. The accused's belief that he has reasonable and probable cause for making the demand is no defence. The words "without reasonable and probable cause" have long been held to apply to the money demanded and not to the accusation constituting the threat.

R. v. JOHNSON(1857), 14 U.C.Q.B.569: Demanding with menaces money actually due is not a demand with intent to steal. Prisoner who owned a house, deserted his wife and she, in his absence, rented the house. The prisoner returned and with menaces demanded the rent from the tenant who meanwhile had paid it to the wife. The conviction was quashed. If accused thought he had the law on his side, he was not guilty. It would not have been theft if the tenant had offered the money in response to the threat, and therefore the accused could not be said to have had an intent to steal.

In *R. v. WALTON*(1863), 9 Cox, C.C.268, Wilde, B., said (at p.272): "The degree of such alarm may vary in different cases. The essential matter is that it be of a nature and extent to unsettle the mind of the person in whom it operates, and take away from his acts that element of free, voluntary action which alone constitutes consent. Now to apply this principle to the present case. A threat or menace to execute a distress warrant is not necessarily of a character to excite fear or alarm. On the other hand, the menace may be made with such gesture and demeanour or with such unnecessarily violent acts, or under such circumstances of intimidation as to have that effect and this should be decided by the jury."

R. v. HAMILTON(1843), 1 Cox, C.C.212, 174 E.R.779: "The words 'without any reasonable and probable cause' in 7 & 8 Geo. IV c.29, s.8, concerning threatening letters, etc., apply to the money demands and not to the accusation threatened to be made."

This was considered in *R. v. DYMOND*, [1920]2 K.B.260, in which Earl Reading, C.J. said (at p.265):

"In order to constitute the offence it must be proved that the accused: (1) uttered the writing; (2) demanded property or a valuable thing with menaces; (3) knew the contents of the writing; and (4) had no reasonable or probable cause for making the demand. It is for the jury to decide whether there was reasonable or probable cause for making the demand and it is not for them to decide whether the accused believed that she had reasonable or probable cause for making it."

Followed in *R. v. PACHOLKO*, *supra*.

R. v. CHALMERS(1867), 10 Cox, C.C.450, is to the same effect as *R. v. HAMILTON* and so also is *R. v. MASON*(1874), 24 U.C.C.P.58.

In *R. v. ARSINO*(1920), 19 O.W.N.136, there were motions to quash warrants of commitment on preliminary hearing of charges under s.452. It appeared that A. had held a knife over T's head and demanded \$500 from him. Held, that there was evidence to go to a jury.

R. v. LYON(1898), 2 C.C.C.242: Appeal from conviction under Code s.404. Conviction quashed. The procuring of possession of goods by a creditor by means of a threat of the debtor's arrest does not constitute "theft" or "stealing" under Criminal Code s.305(347) if done only for the purpose of holding the goods as security for an overdue debt, as in such case the taking is with "colour of right". See *R. v. HATCH*(1911), 18 C.C.C.125 and annotation.

R. v. LAPHAM(1913), 21 C.C.C.79, at p.80:

"It may be that a constable, armed with a warrant, who extorts money from any person by the mere threat to arrest upon a warrant in his possession, for an offence of which the informant accuses that person, is not within the statute. If so, the statute should be amended so as to make it plain that no peace officer can use his office and his duty to arrest under process, as a means of extortion."

BREAKING AND ENTERING.

BREAKING AND ENTERING WITH INTENT.—Breaking and entering and committing.—Breaking out.—Punishment.—Presumptions.—Committing offence when armed.—"Place."

292. (1) Every one who

- (a) breaks and enters a place with intent to commit an indictable offence therein;**
- (b) breaks and enters a place and commits an indictable offence therein; or**
- (c) breaks out of a place after**
 - (i) committing an indictable offence therein, or**
 - (ii) entering the place with intent to commit an indictable offence therein,**

Section 292—*continued*

is guilty of an indictable offence and is liable

(d) to imprisonment for life, if the offence is committed in relation to a dwelling house, or

(e) to imprisonment for fourteen years, if the offence is committed in relation to a place other than a dwelling house.

(2) For the purposes of proceedings under this section, evidence that an accused

(a) broke and entered a place is *prima facie* evidence that he broke and entered with intent to commit an indictable offence therein; or

(b) broke out of a place is *prima facie* evidence that he broke out after

(i) committing an indictable offence therein, or

(ii) entering with intent to commit an indictable offence therein.

(3) Every one who is convicted of an offence under this section who had upon his person, at the time he committed the offence or was arrested therefor, an offensive weapon or imitation thereof, is liable to be whipped in addition to any other punishment that may be imposed in respect of the offence for which he is convicted.

(4) For the purposes of this section, "place" means

(a) a dwelling house,

(b) a building or structure or any part thereof, other than a dwelling house,

(c) a railway vehicle, vessel, aircraft or trailer, or

(d) a pen or enclosure in which fur-bearing animals are kept in captivity for breeding or commercial purposes.

This replaces the former ss.455, 456, 457, 460 and 461. By 1950, c.11, s.5, the former ss.457, 458, and 459 were combined in a new s.457 for the purpose set out in the following explanatory note:

"The purpose of this amendment is to remove the distinction between burglarizing dwelling houses by day and by night. In many cases, it is not known whether the offence was committed before or after nine p.m., which by virtue of paragraph (24) of section two is the dividing hour. Such a difficulty arose recently in the Ontario case of *R. v. HAGGERTY* (1948), 91 C.C.C. 257 and led to the acquittal of the accused, although the breaking and entering with intent to commit an indictable offence had been proved."

The former ss.455-459 were ss.408-412 in the Code of 1892. Ss.460 and 461 were based on ss.413 and 414. The corresponding sections in the E.D.C. were ss.297-304.

The *Larceny Act*, 1861 (Imp.) contained provisions similar to ss.459 and 461 of the repealed Code but with no reference to time. Greaves' Cons. Acts, p.110, says of it (*i.e.* on s.57 of that Act):

"This clause is new, and contains a very important improvement in the law. Formerly the offence here provided for was only a misdemeanour at common law. Now, it very often happened that such an offence was very inadequately punished as a misdemeanour; especially as the night was made to commence at nine in the evening; for at

OLD CODE:

455. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who breaks and enters any place of public worship and commits any indictable offence therein, or who, having committed any indictable offence therein, breaks out of such place.

456. Every one is guilty of an indictable offence and liable to seven years' imprisonment who breaks and enters any place of public worship, with intent to commit any indictable offence therein.

457. (1) Every one is guilty of an indictable offence and liable to imprisonment for life who

(a) breaks and enters a dwelling-house with intent to commit any indictable offence therein; or

(b) breaks and enters any dwelling-house and commits any indictable offence therein; or

(c) breaks out of any dwelling-house either after committing any indictable offence therein, or after having entered such dwelling-house with intent to commit an indictable offence therein.

(2) Every one convicted of an offence under this section who when arrested, or when he committed such offence, had upon his person any offensive weapon, shall, in addition to the imprisonment above prescribed, be liable to be whipped.

(3) The breaking and entering of a dwelling-house or the breaking out of a dwelling-house after having entered such dwelling-house shall be *prima facie* evidence of an intent to commit an indictable offence therein.

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

(a) breaks and enters any dwelling-house by day and commits any indictable offence therein; or

(b) breaks out of any dwelling-house by day after having committed any indictable offence therein.

459. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, by day, breaks and enters any dwelling-house with intent to commit any indictable offence therein.

(2) The breaking and entering by day of a dwelling-house shall be *prima facie* evidence of an intent to commit an indictable offence therein.

460. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, either by day or night, breaks and enters and commits any indictable offence in a hospital, nursing home or charitable institution, school-house, shop, warehouse, counting-house, office, office building, theatre, store, store-house, garage, pavilion, factory, work-shop, railway station or other railway building or shed, freight car, passenger coach or other railway car, or any building belonging to His Majesty, or to any Government department or to any municipal or other public authority, or any building within the curtilage of a dwelling-house, but not so connected therewith as to form part of it under the provisions hereinbefore contained, or in any pen, cage, den or enclosure in which fur-bearing animals wild by nature are kept in captivity for breeding or commercial purposes.

461. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, either by day or night, breaks and enters any of the buildings,

Section 292—continued

that time in the winter in rural districts the poor were often in bed. Nor could anything be much more unreasonable than that the same acts done just after nine o'clock at night should be liable to penal servitude for life, but if done just before nine, they should only be punishable as a misdemeanour."

Concerning the new s.457 the following appears in *R. v. READ & READ*(1954), 12 W.W.R. (N.S.) 25:

"The purpose of the consolidation was to enlarge the scope of section 457 and there is no reason to believe that Parliament intended to exclude an offence under section 462 which was formerly included. The offence of breaking and entering contrary to section 457 is since the consolidation an offence whether committed by night or day and a person accused of such an offence may be convicted of this and any included offence."

Subsec.(1), by the definition of the word "place" in subsec.(4) widens the old s.457(1) so as to include the provisions of former ss.460 and 461. That definition widens the former provisions also by the words "vessel, aircraft or trailer".

Subsec.(2) is s.457(3) as passed in 1950. It may be noted that Code sections as to breaking out changed the common law. See *R. v. BURNS* (1903), 7 C.C.C.95 at p.101, where 5 Am. and Eng. Ency. of Law, p.19 is quoted that "According to the better doctrines it is not burglary at common law to break out of a house provided the entry was effected without breaking in."

Subsec.(3) is s.457(2) as passed in 1950. "Offensive weapon" is defined in s.2(29).

Subsec.(4)(d) from the former s.460 came into the *Criminal Code* in 1913 as a result of the development of the fox farming industry, and was designed to give to enclosures where fur-bearing animals were kept, the same protection as the Code afforded to shops and warehouses.

As to breaking, see s.268(a) *ante* and notes thereto, and for definition of "enters" see s.294.

BEING UNLAWFULLY IN DWELLING HOUSE.—Presumption.

293. (1) Every one who without lawful excuse, the proof of which lies upon him, enters or is in a dwelling house with intent to commit an indictable offence therein is guilty of an indictable offence and is liable to imprisonment for ten years.

(2) For the purposes of proceedings under this section, evidence that an accused, without lawful excuse, entered or was in a dwelling house is *prima facie* evidence that he entered or was in the dwelling house with intent to commit an indictable offence therein.

This is the former s.462 omitting the words "by night". Subsec.(1), was s.415 in the Code of 1892, and s.305 in the E.D.C. Subsec.(2) was added by 1938, c.44, s.26. See notes to ss.292 and 294, especially *R. v. MILLER*, where it was held that this offence was included in a charge under the former s.457(1)(a).

The original purpose of the section is explained in a note to s.54 of the *Larceny Act*, 1861 (Imp.) in Greaves' Cons. Acts, p.107, as follows:

OLD CODE:*Section 461—continued*

or any car, coach, pen, cage, den or enclosure mentioned in the last preceding section with intent to commit any indictable offence therein.

462. Every one is guilty of an indictable offence and liable to seven years' imprisonment who unlawfully enters, or is in, any dwelling-house by night with intent to commit any indictable offence therein.

(2) The unlawful entering or being in any dwelling-house by night shall be *prima facie* evidence of an intent to commit an indictable offence therein.

340. An entrance into a building is made as soon as any part of the body of the person making the entrance, or any part of any instrument used by him, is within the building.

(2) Every one who obtains entrance into any building by any threat or artifice used for that purpose, or by collusion with any person in the building, or who enters any chimney or other aperture of the building permanently left open for any necessary purpose, shall be deemed to have broken and entered that building.

"It frequently happened on the trial of an indictment for burglary where no property had been stolen that the prisoner escaped altogether for want of sufficient proof of the house having been broken into, though there was no moral doubt that it had been so. This clause will meet all such cases."

See also s.294 for definition of "enters".

"ENTRANCE."

294. For the purposes of sections 292 and 293,

(a) a person enters as soon as any part of his body or any part of an instrument that he uses is within any thing that is being entered; and

(b) a person shall be deemed to have broken and entered if

(i) he obtained entrance by a threat or artifice or by collusion with a person within, or

(ii) he entered without lawful justification or excuse, the proof of which lies upon him, by a permanent or temporary opening.

This comes from the former s.340, altered by addition of the words "or temporary" in clause (b). The purpose of the addition is to meet decisions that the raising of a window that was partly open did not constitute a breaking; *R. v. BURNS*(1903), 7 C.C.C.95; *R. v. MILLER* (1948), 91 C.C.C.270; *R. v. DOLBEC*(1950), 98 C.C.C.62.

The former section was part of the definition of "break" in s.407 of the Code of 1892 and s.297 of the E.D.C. It is complementary to s.268(a) *ante*.

POSSESSION OF HOUSE-BREAKING INSTRUMENTS.—Disguise with intent.

295. (1) Every one who without lawful excuse, the proof of which lies upon him, has in his possession any instrument for house-breaking, vault-breaking or safe-breaking is guilty of an indictable offence and is liable to imprisonment for fourteen years.

(2) Every one who, with intent to commit an indictable offence, has his face masked or coloured or is otherwise disguised is guilty of an indictable offence and is liable to imprisonment for ten years.

Section 295—continued

This is the former s.464 altered by omitting the references to night and day, and also by being divided into two separate subsections. There is a considerable increase in maximum penalties. The former section was s.417 in the Code of 1892, amended by 1936, c.29, s.10, and s.307 in the E.D.C. where the Commissioners remarked that "These are extensions of the existing law. It is thought that being disguised by night affords sufficient *prima facie* evidence of a criminal intent." Under the old law it was said in *R. v. THOMPSON*(1869), 11 Cox,C.C.362, that where several persons are found out together by night for the common purpose of housebreaking "the possession of one (*i.e.* of housebreaking implements) is the possession of all. Under the Game Laws it has been held that where several persons go out poaching in the night time, and one is armed with a gun, all are armed: See *R. v. GOODFELLOW*(1845), 1 Den.81."

However, this may now be compared with *R. v. KUBE* (1945), 62 B.C.R.181; *R. v. SULLIVAN and GODBOLT*(1946), *ib.*, p.278, and *R. v. McDERMOTT*(1952), 102 C.C.C.379, noted under s.82 *ante*, pp.158 and 159, to the effect that possession of a revolver is not of itself enough to prove "a purpose dangerous to the public peace".

These considerations emphasize the fact that a criminal charge must be based upon reasonable and probable cause, which in turn may rest upon inference from the surrounding circumstances. These, too, are important because an obvious difficulty arises under subsec.(1) in connection with things that are capable of lawful use, *e.g.* screw-drivers or pinch-bars.

In *R. v. OLDDHAM*(1852), 5 Cox,C.C.351, it was held that:
 "Whether an implement is to be considered an implement of house-breaking, within stat. 14 and 15 Vict., c.19, s.1, must depend upon the purpose for which the person charged has possession of it.
 Any implement that may be used for the purpose of housebreaking, if the jury find it to have been in the possession of the person charged for that purpose, at the time and place alleged, is an implement of housebreaking within that section, although it may also be an implement which is used in the ordinary affairs of life for a lawful purpose."
 (Accused was found by night with a number of house-door keys and a pair of pincers all of an ordinary description, but not in possession of any of the particular implements of house-breaking enumerated in the section.)

In *R. v. WARD*(1915), 85 L.J.K.B.483 at pp.484-5, it was said that:
 "The jury should have been told that *prima facie* a sufficient excuse had been given by the appellant for his possession of the tools, and that therefore the burden lay upon the prosecution of satisfying them, from the other circumstances in the case, that the appellant had no lawful excuse for being in possession of these tools at that particular time and place."

The expressions in *R. v. WARD* were adopted in *R. v. HOY*(1950), 98 C.C.C.132. See also *R. v. KIEM and ROOKE*(1952), 102 C.C.C.357, where it was held further that "since this was a joint venture, both ac-

OLD CODE:

464. *Every one is guilty of an indictable offence and liable to five years' imprisonment who is found*

(a) *having in his possession by night, without lawful excuse, the proof of which shall lie upon him, any instrument of housebreaking, vaultbreaking or safebreaking; or*

(b) *having in his possession by day any such instrument with intent to commit any indictable offence; or*

(c) *having his face masked or blackened, or being otherwise disguised, by night, without lawful excuse, the proof whereof shall lie on him; or*

(d) *having his face masked or blackened, or being otherwise disguised by day, with intent to commit any indictable offence.*

399. *Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who receives or retains in his possession anything obtained by any offence punishable on indictment, or by any acts wheresoever committed, which, if committed in Canada would have constituted an offence punishable upon indictment, knowing such thing to have been so obtained.*

cused had possession of the flashlight even though it was on the person of Klem".

HAVING IN POSSESSION.**HAVING IN POSSESSION PROPERTY OBTAINED BY CRIME.**

296. Every one commits an offence who has anything in his possession knowing that it was obtained

(a) by the commission in Canada of an offence punishable by indictment, or

(b) by an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.

This and the following section replace the former s.399 which was s.314 in the Code of 1892. The words "or retains in his possession" in that section were new and were added during the course of the Criminal Code Bill through Parliament. Without them, the section formed part of s.309 in the E.D.C. where a marginal note says that "This section extends the existing law by putting the receiving of things obtained by any indictable offence on the same footing as receiving stolen property".

There were difficulties in connection with prosecutions under the former section. For example, it was said in *R. v. SEARLE*(1929), 51 C.C.C.128: "It seems clear that the section deals with two separate offences". In *ECREMENT v. R.*(1945), 84 C.C.C.349, receiving and retaining stolen goods was treated as one transaction, and not as two separate offences.

Again in *R. v. RAMSAY & CURTIN*, [1948]2 W.W.R.1117, in which accused were charged with retaining stolen property, the accused, Curtin, set up the defence that he himself had stolen the goods, and relied on the case of *R. v. BROWN*(1936), 65 C.C.C.244, in which it was held that

Section 296—continued

a thief cannot be a receiver of goods he has stolen, and hence that a participant in theft with others, who had retained the stolen goods, is guilty of theft and cannot be held on a charge of receiving stolen property. It appears that this defence was successful and it was suggested that the Code be amended so as to prevent the setting up of such a defence.

It may be noted, however, that it is stated in *R. v. BROWN*, that: "there is no difficulty in practice in overcoming this technical principle, because the two distinct offences should be averred in separate counts to meet the circumstances that the evidence may disclose, and thus the requirement that 'the accused should be indicted for the offence which he really committed' will be satisfied."

In *CLAY v. R.*, [1952]1 S.C.R.170, after the case had been twice argued before the Court, it was held by five judges, with four dissenting, that the doctrine of recent possession applied to retaining as well as to receiving. This was applied in *R. v. SHEPHERD*(1954), 11 W.W.R. (N.S.) 336.

The clause "who has in his possession" is an important departure from the repealed section. The effect of the change, which originated in a suggestion made by a Committee of the Bar of British Columbia, will necessarily await judicial interpretation, in relation both to after-acquired knowledge and to recent possession, although it would appear to present no difficulty in the latter respect, at least.

However, it is submitted that, reading "theft" for "larceny" and "obtaining" for "receiving", the considerations which appeared in *R. v. SEYMOUR*, [1954]1 All.E.R.1006, will still apply. There it was held that where there is no positive evidence that a prisoner has stolen property, but he is found in possession of it shortly after it has been stolen, and the evidence is as consistent with larceny as with receiving, the indictment should contain a count for larceny and a count for receiving. The jury should then be directed that it is for them to determine whether the prisoner was the thief or the receiver, and they should be reminded that a man cannot receive from himself.

"Where it is proved that property has been stolen, and that very soon after the larceny, the prisoner was found in possession of the property, it is open to the jury to find him guilty of larceny, and they should be so directed."

See also s.297 (punishment), s.299 (property obtained outside Canada by crime), s.300 (when possession complete), s.301 (evidence), s.302 (evidence of previous conviction) and s.503 (joint trial).

PUNISHMENT.

297. Every one who commits an offence under section 296 is guilty of an indictable offence and is liable

- (a) to imprisonment for ten years, where the property that comes into his possession is a testamentary instrument or where the value of what comes into his possession exceeds fifty dollars, or
- (b) to imprisonment for two years, where the value of what comes into his possession does not exceed fifty dollars.

OLD CODE:

364. *Every one is guilty of an indictable offence and liable to imprisonment for life, or for any term not less than six months, who steals,*

- (a) *a post letter bag; or*
- (b) *a post letter from a post bag or from any post office, or from any officer or person employed in any business of the post office of Canada, or from a mail; or*
- (c) *a post letter containing any chattel, money or valuable security; or*
- (d) *any chattel, money or valuable security from or out of a post letter.*

365. *Every one is guilty of an indictable offence and liable to imprisonment for any term not exceeding seven years, and not less than six months, who steals,*

- (a) *any post letter, other than post letters referred to in the last preceding section;*
- (b) *any parcel sent by parcel post, or any article contained in any such parcel; or*
- (c) *any key suited to any lock adopted for use by the Post Office Department, and in use on any Canada mail or mail bag.*

365A. *Section one thousand and eighty-one does not apply where a person is convicted of an offence under section three hundred and sixty-four or three hundred and sixty-five.*

400. *Every one is guilty of an indictable offence and liable to five years' imprisonment who receives or retains in his possession, any post letter or post letter bag, or any chattel, money or valuable security, parcel or other thing, the stealing whereof is hereby declared to be an indictable offence, knowing the same to have been stolen.*

869. *When an offence is committed in respect of a post letter bag, or a post letter, or other mailable matter, chattel, money or valuable security sent by post, the property of such post letter bag, post letter, or other mailable matter, chattel, money or valuable security may, in the indictment preferred against the offender, be laid in the Postmaster General; and it shall not be necessary to allege in the indictment, or to prove upon the trial or otherwise, that the post letter bag, post letter or other mailable matter, chattel or valuable security was of any value.*

(2) *The property of any chattel or thing used or employed in the service of the post office, or of moneys arising from duties of postage, shall, except in the cases aforesaid, be laid in His Majesty, if the same is the property of His Majesty, or if the loss thereof would be borne by His Majesty, and not by any person in his private capacity.*

This replaces the penalty prescribed by the former s.399 and is in conformity with s.280.

As to jurisdiction see s.467(a)(iii), *post*.

THEFT FROM MAIL.—Allegation of value not necessary.

298. (1) Every one who

(a) steals

- (i) anything sent by post, after it is deposited at a post office and before it is delivered,**
- (ii) a bag, sack or other container or covering in which mail is conveyed, whether it does or does not contain mail, or**
- (iii) a key suited to a lock adopted for use by the Canada Post Office, or**

(b) has in his possession anything in respect of which he

Section 298—*continued*

knows that an offence has been committed under paragraph (a), is guilty of an indictable offence and is liable to imprisonment for ten years and, where the offence is committed under paragraph (a), to imprisonment for not less than six months.

(2) In proceedings for an offence under this section it is not necessary to allege in the indictment or to prove on the trial that anything in respect of which the offence was committed had any value.

This comes from the former ss.364, 365, 400 and 869. These were ss.326, 327, 315, and 624(1) and (2) in the Code of 1892. The offence of stealing post letters was dealt with in s.256 of the E.D.C., which was taken from 7 Wm. IV and I Vict., c.36, ss.27 and 29.

Subsec.(1)(a) re-enacts the former ss.364 and 365 as passed by 1951, c.47, s.16, with a change in penalty.

Subsec.(1)(b) is adapted from the former s.400 to conform to s.296 above.

Subsec.(2) is the former s.869(1) in part. The remaining provisions of s.869 as to the laying of property are not continued: See s.493, *post*, concerning the sufficiency of indictments and, with reference to mailable matter, s.39 of the *Post Office Act*, R.S.C. 1952, c.212, which says that "Subject to the provisions of this Act and the regulations respecting undeliverable mail, mailable matter becomes the property of the person to whom it is addressed when it is deposited in a post office."

As to jurisdiction see s.419, *post*, especially par.(e).

In *R. v. RYAN*(1905), 9 C.C.C.347, a conviction was made in respect of a decoy letter placed in a post office to test the honesty of an employee. See also *R. v. SHANDRO*(1923), 38 C.C.C.337; *R. v. TREPANIER*(1901), 4 C.C.C. 259; *R. v. RELF*(1927), 47 C.C.C.38, and *ROY v. R.*(1938), 69 C.C.C.177.

See also s.300 (when possession complete), s.301 (evidence), s.302 (evidence of previous conviction) and s.503 (joint trials).

BRINGING INTO CANADA PROPERTY OBTAINED BY CRIME.

299. Every one who brings into or has in Canada anything that he has obtained outside of Canada by an act that, if it had been committed in Canada, would have been the offence of theft or an offence under section 296, is guilty of an indictable offence and is liable to imprisonment for ten years.

This is the former s.398, altered to bring it into conformity with the new s.296. The former section was s.355 in the Code of 1892 and was taken from R.S.C. 1886, c.164, s.88. There was no counterpart in the E.D.C.

In *R. v. JEWELL*(1890), 6 Man.L.R.460 at p.464, the following appears:

"As the Legislature was dealing with Canadian law, and making the bringing of certain property into Canada an offence against that law, it might well provide that before a person can be convicted of such an offence, it must be proved that he took, converted or obtained the

OLD CODE:

398. *Every one is guilty of an indictable offence and liable to seven years' imprisonment who, having obtained elsewhere than in Canada any property by any act which if done in Canada would have amounted to theft, brings such property into or has the same in Canada.*

402. *The act of receiving anything unlawfully obtained is complete as soon as the offender has, either exclusively or jointly with the thief or any other person, possession of or control over such thing, or aids in concealing or disposing of it.*

property under such circumstances, that he would by the laws of Canada have been guilty of felony or misdemeanor, and not that he took, converted or obtained it under circumstances which, though unlawful in the other country, would, in Canada, be quite consistent with innocence."

In *R. v. DUFF*(No. 1) (1909), 15 C.C.C.351, recent possession by the accused in Canada of horses stolen in North Dakota was held to be a circumstance justifying a conviction.

HAVING IN POSSESSION WHEN COMPLETE.

300. For the purposes of section 296 and paragraph (b) of subsection (1) of section 298, the offence of having in possession is complete when a person has, alone or jointly with another person, possession of or control over anything mentioned in those sections or when he aids in concealing or disposing of it, as the case may be.

This is the former s.402 altered to conform to the new s.296. The former section was s.317 in the Code of 1892 and s.310 in the E.D.C.

In *R. v. PARKER*(1941), 77 C.C.C.9, the accused assisted in disposing of a stolen sewing machine. He was discharged on the ground that he could not be guilty of retaining possession because the machine had at all times been under the control of the thief and had never been in the possession of the accused.

EVIDENCE.—Notice to accused.

301. (1) Where an accused is charged with an offence under section 296 or paragraph (b) of subsection (1) of section 298, evidence is admissible at any stage of the proceedings to show that property other than the property that is the subject matter of the proceedings

- (a) was found in the possession of the accused, and
- (b) was stolen within twelve months before the proceedings were commenced,

and that evidence may be considered for the purpose of proving that the accused knew that the property forming the subject-matter of the proceedings was stolen property.

(2) Subsection (1) does not apply unless

- (a) at least three days' notice in writing is given to the accused that in the proceedings it is intended to prove that property other than the property that is the subject-matter of the proceedings was found in his possession, and

Section 301—*continued*

(b) the notice sets out the nature or description of the property and describes the person from whom it is alleged to have been stolen.

See notes to s.302.

EVIDENCE OF PREVIOUS CONVICTION.—Notice to accused.

302. (1) Where an accused is charged with an offence under section 296 or paragraph (b) of subsection (1) of section 298 and evidence is adduced that the subject matter of the proceedings was found in his possession, evidence that the accused was, within five years before the proceedings were commenced, convicted of an offence involving theft or an offence under section 296 is admissible at any stage of the proceedings and may be taken into consideration for the purpose of proving that the accused knew that the property that forms the subject matter of the proceedings was unlawfully obtained.

(2) Subsection (1) does not apply unless at least three days' notice in writing is given to the accused that in the proceedings it is intended to prove the previous conviction.

Ss.301 and 302 are the former ss.993 and 994. They were ss.203 and 204 in R.S.C. 1886, c.174, ss.716 and 717 in the Code of 1892, and formed part of s.309 in the E.D.C.

These provisions were taken from the *Prevention of Crime Act*, 34 & 35 Vict., c.112, s.19 (Imp.) (since repealed). It was passed in consequence of *R. v. ODDY*(1851), 2 Den.264, 169 E.R. 499, in which it was held that on the trial of an indictment containing counts of stealing and for receiving the property of A knowing it to be stolen, evidence of possession, by the prisoner, of other property stolen from other persons at other times was not admissible to prove either the stealing or the receiving.

On the first paragraph of 301(1)(a), it was held in *R. v. DRAGE*(1878), 14 Cox,C.C.85, that it was not sufficient to show that other property stolen within the preceding period of 12 months had at some previous time been dealt with by the prisoner. It must be proved that the other property was in his possession at the time of the finding of the property on which the charge was laid.

This ruling was followed in *R. v. CARTER*(1884), 12 Q.B.D.522. In England it was replaced by 6 & 7 Geo. V, c.50, s.43 (the *Larceny Act*, 1916) in which subsec.1(a) reads "the fact that other property stolen within the period of twelve months preceding the date of the offence charged was found or had been in his possession." S. 993 continued the original wording.

A change proposed in the Draft Bill was commented upon in the proceedings of the Senate's Committee on Banking and Commerce, June 11, 1952, p.27, as follows:

"Clause 301. Under the present Code, it is permissible for the Crown, when charging receiving or retaining stolen goods, to rebut the presumption or evidence of lack of knowledge that the goods were stolen by evidence that the accused was on a previous occasion guilty of having stolen property in his possession. This is of course extraordinary

OLD CODE:

993. *When proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given, at any stage of the proceedings, that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property which forms the subject of the proceedings taken against him to be stolen, if not less than three days' notice in writing has been given to the person accused that proof is intended to be given of such other property, stolen within the preceding period of twelve months, having been found in his possession.*

(2) *Such notice shall specify the nature or description of such other property, and the person from whom the same was stolen.*

994. *When proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has, within five years immediately preceding, been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen, if not less than three days' notice in writing has been given to the person accused that proof is intended to be given of such previous conviction.*

(2) *It shall not be necessary, for the purposes of this section, to charge in the indictment the previous conviction of the person so accused.*

proceeding, for it puts the accused on trial for previous offences, while the policy of English criminal law is to exclude the record of the accused, and try him on the offence charged.

In carrying this provision to the Bill, this privilege of the Crown is widened so that evidence may be given of the possession of property obtained by 'an offence punishable by indictment'. Property may be obtained by offences punishable by indictment totally different in character from the theft of goods, such as forgery, false pretences, a rubber cheque and numerous other such acts. The clause as drawn may put the accused on trial for his entire record.

The sub-committee ordered the clause to stand to be redrafted and to be limited to evidence of receiving or obtaining, that is, the possession of stolen goods only."

In the end the section was restored to its original effect.

Concerning the provisions of the Act of 1871 that appeared in s.993 of our Code, Lord Reading, C.J., said in *R. v. BALLARD*(1916), 12 Cr.App.R.1:

"According to the common law at the time the Act was passed, on a charge of receiving evidence could not be given of finding in the prisoner's possession other goods in respect of which he was not then charged. But Parliament in 1871 thought right that in these cases of receiving stolen goods, evidence should be admitted which would not otherwise have been admissible. No doubt that was because in many cases there was not sufficient evidence of guilty knowledge. In those

Section 302—*continued*

days a prisoner could not give evidence. Parliament said, 'Where you find a man in possession of stolen property he may be unfortunate, and not guilty, but if you find other stolen property in his possession it may not be easy to believe that it is merely a coincidence.' The section has to be carefully administered, no doubt, and ought not to be used where there are counts for both stealing and receiving for the purpose of getting a verdict on the count for stealing, where the court cannot exclude the evidence as there is a count for receiving; it might induce the jury to convict of stealing on very slight evidence. So if the charge is substantially one of stealing, and not receiving, the evidence ought not to be given."

It may be noted that in *R. v. KIEWITZ*(1941), 76 C.C.C.369, it was held that on a charge of receiving goods knowing them to have been stolen, evidence of other goods found in the possession of the accused is not admissible under s.993 unless it is proved that such goods were also stolen, and further, that all the conditions precedent to the admission of such evidence laid down by that section must be strictly complied with. The revision sacrifices nothing in respect of this strictness of proof.

How far these provisions are affected by the rule with regard to evidence of similar acts is another question, but it seems probable that it would still apply where such evidence was relevant to prove intent or a course of conduct, or to negative a defence of accident or mistake. It was held in *R. v. POWELL*(1909), 3 Cr.App.R.1, that on a trial for receiving, evidence by the thief to prove that he had sold stolen property to the receiver at any previous time is admissible against the receiver, and is not excluded by the time limitation in the statute.

In *R. v. ROWLAND*(1909), 3 Cr.App.R.277, the following appears: "The Lord Chief Justice: There was no evidence that the prisoner stole the goods, but it was found that he had dealt with some of them very shortly after the breaking in, and he would therefore in the absence of a satisfactory explanation, be rightly convicted of receiving them. He did not think that the words 'the stolen property has been found in his possession' in the second paragraph of sec. 19 of the Prevention of Crimes Act, 1871, meant that the goods must have been actually found in his possession at the time of his arrest. For example, the property might have been pawned and the pawn tickets found in his possession. It is sufficient if the property had been in his possession."

It is relevant, too, to note that *R. v. BALLARD*, *supra*, was cited with approval in *R. v. DAVIES*, [1953] 1 All E.R.341. The following appears at p.343:

"In our opinion, that case shows the true rule. If the case is substantially one of receiving and is presented to the jury on that footing, so that they are not being asked to find a verdict on some other count, evidence of a previous conviction may be admitted, but it cannot be admitted where there is another charge on which a verdict is sought, and we think that the only right rule to lay down is that, if the prosecution feel that they cannot confine their case to one of receiving, but must rely on some other count, be it of stealing or of being an ac-

OLD CODE:

404. *A false pretense is a representation, either by words or otherwise, of a matter of fact either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation.*

(2) *Exaggerated commendation or depreciation of the quality of any thing is not a false pretense, unless it is carried to such an extent as to amount to a fraudulent misrepresentation of fact.*

(3) *It is a question of fact whether such commendation or depreciation does or does not amount to a fraudulent misrepresentation of fact.*

cessory after the fact to stealing, then, if they include in the indictment a count for either of those offences they must refrain from giving evidence of any previous conviction. Evidence of bad character or of previous convictions is evidence of a most prejudicial kind and is only allowed in receiving cases because the legislature, no doubt, recognized the difficulty which often arises of proving guilty knowledge in such cases. It must be restricted to those cases."

It may be observed here that the former s.403 (receiving goods after restoration to owner) is omitted from this Code. It was taken from the E.D.C. (s.311) in which it was inserted apparently to codify the ruling in *R. v. VILLENKY*, [1892]2 Q.B.597, in which it was held that, as the person in whom the property was laid had resumed possession before the goods were received by the prisoners, the goods had then ceased to be stolen property. It would appear that as this section preserved a common law defence, and as common law defences generally are preserved, the section is unnecessary. If there were a subsequent taking it would be theft.

FALSE PRETENCES.

"FALSE PRETENCE."—Exaggeration.—Question of fact.

303. (1) A false pretence is a representation of a matter of fact either present or past, made by words or otherwise, that is known by the person who makes it to be false and that is made with a fraudulent intent to induce the person to whom it is made to act upon it.

(2) Exaggerated commendation or depreciation of the quality of anything is not a false pretence unless it is carried to such an extent that it amounts to a fraudulent misrepresentation of fact.

(3) For the purposes of subsection (2) it is a question of fact whether commendation or depreciation amounts to a fraudulent misrepresentation of fact.

This is the former s.404. It was s.358 in the Code of 1892, and s.270 in the E.D.C. The Imperial Commissioners remarked (report, p.28) that: "The crimes of obtaining goods, money, or credit by false pretences, and of criminal breach of trust are in point of mischief and moral guilt much the same as theft, but from their nature they require separate clauses to define them."

In *R. v. KASZAS*(1954), 12 W.W.R. (N.S.)479, at p.485, the elements of the offence of false pretences are set out as follows:

1. A representation known to the accused to be false.

Section 303—*continued*

2. It must be made with a fraudulent intent to induce the other person to act on it.
3. The false pretence must have procured the money to be paid.
4. The accused must have procured the money to be paid with intent to defraud.

To these elements there should be added a fifth, that the false representation must concern a matter of past or existing fact, rather than a promise or representation as to something to happen in the future.

In *R. v. SMITH* (1954), 12 W.W.R. (N.S.)364, it was held that a conditional sale agreement of an automobile, not registered as required by provincial statute, was not an encumbrance, and a conviction for obtaining by false pretences was quashed. It may be questioned, however, whether this result would have followed had the charge been laid under s.444 (now s.323) with which s.404 may be compared.

Mannheim (Criminal Justice and Social Reconstruction, p.121) cites a case in which "when A got money from B by pretending that C had sent him for it, Chief Justice Holt grimly asked, 'Shall we indict one man for making a fool of another?' and bade the prosecutor to have recourse to a civil action." Yet, whatever the attitude may have been in the eighteenth century, the ground of fraud is now pretty thoroughly covered, especially by this section and s.323.

OBTAINING BY FALSE PRETENCE. — Obtaining credit by false pretence. — False statement in writing.—Punishment.—Presumption from cheque issued without funds.

304. (1) Every one commits an offence who

- (a) by a false pretence, whether directly or through the medium of a contract obtained by a false pretence, obtains anything in respect of which the offence of theft may be committed or causes it to be delivered to another person;
- (b) obtains credit by a false pretence or by fraud;
- (c) knowingly makes or causes to be made, directly or indirectly, a false statement in writing with intent that it should be relied upon, with respect to the financial condition or means or ability to pay of himself or any person, firm or corporation that he is interested in or that he acts for, for the purpose of procuring, in any form whatsoever, whether for his benefit or the benefit of that person, firm or corporation,
 - (i) the delivery of personal property,
 - (ii) the payment of money,
 - (iii) the making of a loan,
 - (iv) the extension of credit,
 - (v) the discount of an account receivable, or
 - (vi) the making, accepting, discounting or endorsing of a bill of exchange, cheque, draft, or promissory note; or
- (d) knowing that a false statement in writing has been made with respect to the financial condition or means or ability to pay of himself or another person, firm or corporation that he is interested in or that he acts for, procures upon the faith of that statement, whether for his benefit or for the benefit of

OLD CODE:

405. *Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud, by any false pretense, either directly or through the medium of any contract obtained by such false pretense, obtains anything capable of being stolen, or procures anything capable of being stolen to be delivered to any other person than himself.*

(2) *Every one is guilty of an indictable offence and liable to one year's imprisonment who, in incurring any debt or liability, obtains credit under false pretenses, or by means of any fraud.*

(3) *In any prosecution under this section, if it be shewn that any thing capable of being stolen was obtained by the accused by means of a cheque which, when presented for payment within a reasonable time, was dishonoured on the ground that there were no funds or not sufficient funds on deposit in the bank to the credit of the accused, it shall be presumed that such thing was obtained with fraudulent intent by a false pretense, unless it be established to the satisfaction of the Court that when the accused issued such cheque he had reasonable grounds for believing that it would be honoured if presented for payment within a reasonable time after it was issued.*

407. (2) *Every one is guilty of an indictable offence and liable to one year's imprisonment and to a fine of two thousand dollars who*

(a) *knowingly makes or causes to be made, either directly or indirectly, or through any agency whatsoever, any false statement in writing with intent, that it shall be relied upon, respecting the financial condition or means or ability to pay, of himself, or any other person, firm or corporation in whom he is interested, or for whom he is acting, for the purpose of procuring, in any form whatsoever, either the delivery of personal property, the payment of cash, the making of a loan or credit, the extension of a credit, the discount of an account receivable or the making, acceptance, discount or endorsement of a bill of exchange, cheque, draft, or promissory note, either for the benefit of himself or such person, firm or corporation; or*

(b) *knowing that a false statement in writing has been made respecting the financial condition or means or ability to pay, of himself, or such person, firm or corporation in which he is interested, or for whom he is acting, procures upon the faith thereof, either for the benefit of himself or such person, firm or corporation, any of the benefits mentioned in paragraph (a) of this section.*

that person, firm or corporation, anything mentioned in subparagraphs (i) to (vi) of paragraph (c).

(2) Every one who commits an offence under paragraph (a) of subsection (1) is guilty of an indictable offence and is liable

(a) to imprisonment for ten years, where the property obtained is a testamentary instrument or where the value of what is obtained exceeds fifty dollars; or

(b) to imprisonment for two years, where the value of what is obtained does not exceed fifty dollars.

(3) Every one who commits an offence under paragraph (b), (c) or (d) of subsection (1) is guilty of an indictable offence and is liable to imprisonment for ten years.

(4) Where, in proceedings under paragraph (a) of subsection (1), it is shown that anything was obtained by the accused by means of a cheque that, when presented for payment within a reasonable

Section 304—*continued*

time, was dishonoured on the ground that no funds or insufficient funds were on deposit to the credit of the accused in the bank on which the cheque was drawn, it shall be presumed to have been obtained by a false pretence, unless the court is satisfied by evidence that when the accused issued the cheque he had reasonable grounds to believe that it would be honoured if presented for payment within a reasonable time after it was issued.

Subsec.1(a) and (b) are the former s.405(1) and (2), which were respectively s.359 in the Code of 1892, and s.6 of 1908, c.18. S.359 came from s.271 of the E.D.C. and the *Larceny Act* 1861 (Imp.), s.88. S.405(2) may be compared with s.273 of the E.D.C. which came from the *Debtors Act*, 1869 (Imp.) s.13, although the English provision more closely resembles s.323(1), *post*.

Subsec.1(c) and (d) are the former s.407(2) which came into the Code by 1913, c.13, s.16.

Subsec.(3) is the former s.405(3) which was added by 1932, c.7, s.1.

As to s.304(1)(a), reference may be had to *R. v. HALL*(1930), 53 C.C.C. 312. In that case the accused, by falsely representing that he represented a society which was in a flourishing condition and that a number of prominent men were associated with it, induced an hotel to furnish a banquet for one thousand people at which only about one hundred and eighty appeared. It was held that he had procured by false pretences a contract with the hotel whereby he obtained for himself and others the food and other refreshments supplied. He was convicted under the former s.405(1).

See also *R. v. JONES*, cited under s.307, *post*, as to subsec.1)(b) above, where the following appears at page 125:

"There was a debt, and there was credit, and we think there was ample evidence to justify the jury in arriving at the conclusion that the defendant was guilty of fraud He intended to cheat, and so the jury found."

At p.123 it is said also:

"We do not desire to say anything which can weaken the authority of the decisions which say that there can be a false pretence by conduct; for example, the case of *R. v. BARNARD*(1837), 7 C. and P. 784, where a cap and gown were used by a man who had no right to wear them, in order to convey the notion that he was a member of the university. Nor do we in any way dispute the authority of another class of cases; that is, where a man gives a cheque on a bank where he either has no account or has not sufficient means to meet the cheque, and must have known that he had not sufficient means."

A verdict of "guilty of obtaining money by false pretences without intent to defraud" is in effect a verdict of "not guilty" since intent to defraud is an essential element of the offence: *R. v. WEBER*(1921), 36 C.C.C.33; *R. v. McKEE*(1951), 99 C.C.C.382, the latter case involving the issue of certain cheques. As to preparation of the charge, see s.493, *post*.

OLD CODE:

406. *Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud or injure any person by any false pretence, causes or induces any person to execute, make, accept, endorse or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal on any paper or parchment in order that it may afterwards be made or converted into or used or dealt with as a valuable security.*

OBTAINING EXECUTION OF VALUABLE SECURITY BY FRAUD.

305. Every one who, with intent to defraud or injure another person, by a false pretence causes or induces any person

(a) to execute, make, accept, endorse or destroy the whole or any part of a valuable security, or

(b) to write, impress or affix a name or seal on any paper or parchment in order that it may afterwards be made or converted into or used or dealt with as a valuable security,

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

This is the former s.406(1). It comes from s.360 in the Code of 1892, s.272 in the E.D.C. and the *Larceny Act*, 1861 (Imp.) s.90. See s.2(42) and s.3(3) *ante*, with reference to valuable security.

The following appears in *R. v. LEROUX*(1928), 50 C.C.C.52, at p.56: "What he did in substance was to procure the signature of the complainant to a form of promissory note, giving his own note in exchange therefor. The printed form of note was not the property of the complainant. Merely inducing the complainant to sign his name could not properly be said to be 'obtaining anything capable of being stolen'. It is clearly manifest that s.406 of the Cr.C. was passed for the express purpose of providing for such cases as the present." The complainant's note, of course, became a valuable security in the hands of the accused and was so used.

PUBLICATION OF FALSE ADVERTISEMENTS.—Publication of statement without proper test.—Saving.—What is proper test.

306. (1) Every one who publishes or causes to be published an advertisement containing a statement that purports to be a statement of fact but that is untrue, deceptive or misleading or is intentionally so worded or arranged that it is deceptive or misleading, is guilty of an indictable offence and is liable to imprisonment for five years, if the advertisement is published

(a) to promote, directly or indirectly, the sale or disposal of property or any interest therein, or

(b) to promote a business or commercial interest.

(2) Every one who publishes or causes to be published in an advertisement a statement or guarantee of the performance, efficacy or length of life of anything that is not based upon an adequate and proper test of that thing, the proof of which lies upon the accused, is, if the advertisement is published to promote, directly or indirectly, the sale or disposal of that thing, guilty of an offence punishable on summary conviction.

Section 306—*continued*

(3) Subsections (1) and (2) do not apply to a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business.

(4) For the purposes of subsection (2), a test that is made by the National Research Council of Canada or by any other public department is an adequate and proper test, but no reference shall be made in an advertisement to indicate that a test has been made by the National Research Council or other public department unless the advertisement has, before publication, been approved and permission to publish it has been given in writing by the president of the National Research Council or by the deputy head of the public department, as the case may be.

(5) Nothing in subsection (4) shall be deemed to exclude, for the purposes of this section, any other adequate or proper test.

This is the former s.406(2) and (3) altered, in subsec.(1), to make a breach of it indictable. The words "National Research Council of Canada" in subsec.(4) replace the words "Honorary Advisory Council for Scientific and Industrial Research".

The *Criminal Code* was amended in 1914 by c.24, s.1, which provided that:

"Every person who knowingly publishes or causes to be published any advertisement for either directly or indirectly promoting the sale or disposal of any real or personal, movable or immovable property, or any interest therein, containing any false statement or false representation which is of a character likely to or is intended to enhance the price or value of such property or any interest therein, or to promote the sale or disposal thereof shall be liable upon summary conviction," etc.

This was passed as a result of the boom in real estate in Western Canada.

In 1931, it was amended by c.28, s.5, by striking out the word "knowingly", by adding two provisoes to exempt newspapers and individuals who acted in good faith, and by altering the wording to read:

"Every person who publishes, or causes to be published, any advertisement for either directly or indirectly promoting the sale or disposal of any real or personal movable or immovable property, or any interest therein, which contains any statement purporting to be one of fact which is untrue, deceptive or misleading,"

It was said (Hansard, 1931, p.4137) that the result of the word "knowingly" in the section had been that prosecutions had failed because the Crown was not able to establish the fact that a man had inserted a false advertisement knowing it to be false, also that many business organizations had asked that the section be amended.

In 1935, by c.56, s.6, the two provisoes were combined into the form in which they appeared in the former Code. Subsec.3 was added also, in effect forbidding the advertising of a statement purporting to guarantee the efficacy of any product without adequate test. A test made by an authorized public authority was declared to be sufficient, but no reference

OLD CODE:*Section 406—continued*

(2) Every person who publishes, or causes to be published, any advertisement for promoting either directly or indirectly the sale or disposal of any real or personal, movable or immovable property, or any interest therein, or promoting any business or commercial interests, which contains any statement purporting to be one of fact which is untrue, deceptive or misleading, or which advertisement is intentionally so worded or arranged as to be deceptive or misleading, shall be liable upon summary conviction to a fine not exceeding two hundred dollars or to six months' imprisonment, or to both fine and imprisonment; Provided that any person publishing any such advertisement accepted in good faith in the ordinary course of his business shall not be subject to the provisions of this subsection.

(3) (a) Every person who publishes, or causes to be published, any advertisement containing any statement or guarantee of the performance, efficacy or length of life of any product for the purpose of either directly or indirectly promoting the sale or disposal of such product and which statement or guarantee is not based upon an adequate and proper test, shall be guilty of an offence and liable upon summary conviction to a fine not exceeding two hundred dollars or to six months imprisonment, or to both fine and imprisonment; Provided that any person publishing any such advertisement accepted in good faith in the ordinary course of his business shall not be subject to the provisions of this subsection;

(b) Without excluding any other adequate and proper test, a test by The Honorary Advisory Council for Scientific and Industrial Research or any other public department shall be considered an adequate and proper test for the purposes of this subsection, but no reference shall be made in any such advertisement to the fact that a test has been made by such Council or other public department, unless and until the details and form of the proposed advertisement have been approved and permission has been given, in writing, by the Council or department which made the test.

(c) On any prosecution under this subsection, the burden of proof that an adequate and proper test has been made shall lie on the defendant.

to it was to be made in advertising. In 1938, by c.44, s.21, the section was modified to the extent of providing for the granting of permission to refer to the test after the proposed advertisement had been submitted to the Advisory Council or public authority.

By 1943-44, c.23, s.11, the section was amended by inserting the words "or promoting any business or commercial interests" and by adding the words "intentionally so worded or arranged". It was stated in the House of Commons that the change was made at the request of the Better Business Bureau, and there was reference to signs which had been displayed with the word "no" in small letters and "fire sale here" in larger type.

The only reported case in which these provisions as to false advertising have come under consideration, is that of *CANADIAN STARCH CO. v. ST. LAWRENCE STARCH CO.*(1936), 65 C.C.C.270, a civil action resulting from the advertisement of the use of corn syrup in the feeding of the Dionne quintuplets. The judgment is of little assistance in the interpretation of the section as it turns upon points of pleading.

Section 306—continued

In *R. v. THERMO-SEAL INSULATION LTD.* (1951), 15 C.P.R.42, (Ont.) what now appears as subsec.(4) was treated as creating an offence.

See also notes to s.107.

FRAUDULENTLY OBTAINING FOOD AND LODGING.—Presumption.

307. (1) Every one who fraudulently obtains food, lodging or other accommodation at an hotel or inn or at a lodging, boarding or eating house is guilty of an offence punishable on summary conviction.

(2) In proceedings under this section, evidence that an accused obtained food, lodging or other accommodation at an hotel or inn or at a lodging, boarding or eating house, and did not pay for it and

(a) made a false or fictitious show or pretence of having baggage,

(b) had any false or pretended baggage,

(c) surreptitiously removed or attempted to remove his baggage or any material part of it,

(d) absconded or surreptitiously left the premises,

(e) knowingly made a false statement to obtain credit or time for payment, or

(f) offered a worthless cheque, draft or security in payment for his food, lodging or other accommodation,

is prima facie evidence of fraud.

This is the former s.407(3) which was brought into the Code by 1913, c.13, s.16. The following comment appears in *R. v. HALL* (1930), 53 C.C.C.312, at p.314:

"It would appear from the illustrations given in s.407(3), which are no doubt not exhaustive, that the Legislature intended to provide for the case of an ordinary guest who, presenting himself at an hotel, lodging, boarding or eating house, and by means of false or fictitious show or pretence of having baggage, obtains credit and leaves without paying the debt incurred, or such like transaction."

This may be contrasted with the case of *R. v. JONES*, [1898] 1 Q.B. 119. In that case a man went into a restaurant and ordered a meal, and after having eaten it, said he could not pay for it. It was held that he could be convicted of obtaining credit by fraud, but not of obtaining goods by false pretences. This case is cited in Chalmers on Sale of Goods, 12th Ed., p.98, with the comment that "It seems, therefore, that under such circumstances there is an implied agreement for credit until the dinner is finished."

PRETENDING TO PRACTISE WITCHCRAFT, ETC.

308. Every one who fraudulently

(a) pretends to exercise or to use any kind of witchcraft, sorcery, enchantment or conjuration,

(b) undertakes, for a consideration, to tell fortunes, or

(c) pretends from his skill in or knowledge of an occult or crafty science to discover where or in what manner anything that is supposed to have been stolen or lost may be found,

is guilty of an offence punishable on summary conviction.

OLD CODE:

407. (3) Every one is guilty of an offence and liable upon summary conviction to a fine of one hundred dollars and costs or three months' imprisonment who fraudulently obtains food, lodging or other accommodation at any hotel or inn or at any lodging, boarding or eating house; and proof that a person obtained food, lodging or other accommodation at any hotel or inn, or any lodging, boarding or eating house, and did not pay therefor, and made any false or fictitious show or pretense of having baggage, or had any false or pretended baggage, or surreptitiously removed or attempted to remove his baggage or any material part thereof, or absconded or surreptitiously left the premises, or knowingly made any false statement to obtain credit or time for payment, or offered any worthless cheque, draft or security in payment for such food, lodging or other accommodation, shall be prima facie evidence of fraud.

443. Every one is guilty of an indictable offence and liable to one year's imprisonment who pretends to exercise or use any kind of witchcraft, sorcery, enchantment or conjuration, or undertakes to tell fortunes, or pretends from his skill or knowledge in any occult or crafty science, to discover where or in what manner any goods or chattels supposed to have been stolen or lost may be found.

This is the former s.443, altered by adding the word "fraudulently", and by making the offences under it punishable on summary conviction. S.443 was s.268 in the E.D.C.

The following appears in *R. v. POLLOCK*(1920), 33 C.C.C.155, at 157: "The history of s.443 of the Criminal Code, so far as Canada is concerned, is very simple. Prior to 1892, when the criminal laws of Canada were codified, there was no Canadian legislation on the subject, but it was held in *R. v. MILFORD*(1890), 20 O.R.306, that the *Witchcraft Act*, 9 Geo. II, ch.5, was imported into Canada by the *Act of Upper Canada*, 40 Geo. III, ch.1, and that a charge of undertaking to tell fortunes could be laid in Canada under the English Act. Whether it was in consequence of this decision or not, the Criminal Code of 1892, by s.396 re-enacted *verbatim* the effective portions of s.4 of the English Act. Section 396 is now s.443 of the present Code. No attempt is made in the Code to define any of the unusual terms used in the section, and we are driven to an examination of the *Witchcraft Act* of 1736 for their meaning."

In Canada it was held in *R. v. MARCOTT*(1901), 2 O.L.R.105, *per* Armour, C.J.O.:

"The word 'undertakes' as used in this section of the Code, implies an assertion of the power to perform, and a person undertaking to tell fortunes impliedly asserts his power to tell fortunes and in doing so is asserting the possession of a power which he does not possess and is thereby practising deception, and when this assertion of power is used by him with the intent of deluding and defrauding others the offence aimed at by the enactment is complete."

It was said by Osler, J.A., in the same case:

"To 'undertake' to tell fortunes, according to one of the common meanings of the word, is to assert or profess a power or ability to do so, which, as Denman, J., says in delivering the judgment of the Court in *PENNY v. HANSON*(1887), 18 Q.B.D.478, is something which no sane man can believe in these times, and where such profession, as-

Section 308—continued

sertion, or undertaking is made for reward or, as in the case just cited, with intent to defraud, the offence is complete, since the person so pretending must know that he has no such power."

This case was discussed and applied in the case of *R. v. MONSELL* (1916), 35 O.L.R.336, in which it was held that to warrant a conviction for undertaking to tell fortunes contrary to s.443, an intent to delude and defraud on the part of the person charged must be shown, but it is not necessary to show that the accused has succeeded in deceiving or defrauding.

The most recent case, *R. v. STANLEY* (1952), 104 C.C.C.31, was tried in the Supreme Court of Alberta in September 1952. It was held that the indictable offence of undertaking to tell fortunes does not turn upon the technique (*e.g.*, cards, tea-leaves, lines in the hand). The sole question for the Court is, did the accused, by whatever means, undertake to tell a fortune? It is not necessary that the person whose fortune is told should believe what he is told or be actually deceived by it.

It was held that a provincial, municipal, or other authority cannot license any one to do what is an act punishable under the *Criminal Code*.

Prior to 1951 a person in England who professed to tell fortunes "to deceive and impose upon any of His Majesty's subjects" was punishable under the *Vagrancy Act* of 1824, s.4. In a case under the section, *DAVIS v. CURRY*, [1918]1 K.B.109, it was held that an intention to deceive was necessary. There was dissent on this point and the case may be compared with *R. v. ENTWISTLE*, [1899]1 Q.B.846. However, these cases are now of academic interest, since the *Fraudulent Mediums Act*, 1951, replaced the Act of 9 Geo. II and s.4 of the *Vagrancy Act*, 1824. The new Act applies to any person who, for reward,

"(a) with intent to deceive purports to act as a spiritualistic medium or to exercise any powers of telepathy, clairvoyance or other similar powers, or (b) in purporting to act as a spiritualistic medium or to exercise such powers as aforesaid, uses any fraudulent device."

Anything done solely for the purpose of entertainment, is exempted by subsec.(5) of s.1.

The English Act, passed obviously for the protection of persons engaged *bona fide* in psychic research, is cited for the purpose of comparison with s.308. In *R. v. POLLOCK*, *supra*, it was said at p.165 that:

"There is no law to prevent the accused from communing with departed spirits, but the Criminal Code says that she shall not profess with their aid to be able to discover lost or stolen property."

FORGERY AND OFFENCES RESEMBLING FORGERY.

"FORGERY."—Making false document.—When forgery complete.—Forgery complete though document incomplete.

309. (1) Every one commits forgery who makes a false document, knowing it to be false, with intent

(a) that it should in any way be used or acted upon as genuine, to the prejudice of any one whether within Canada or not, or

OLD CODE:

466. *Forgery is the making of a false document, knowing it to be false, with the intention that it shall in any way be used or acted upon as genuine, to the prejudice of any one whether within Canada or not, or that some person should be induced by the belief that it is genuine to do or refrain from doing anything, whether within Canada or not.*

(2) *Making a false document includes altering a genuine document in any material part, or making any material addition to it or adding to it any false date, attestation, seal or other thing which is material, or making any material alteration in it, either by erasure, obliteration, removal or otherwise.*

(3) *Forgery is complete as soon as the document is made with such knowledge and intent as aforesaid, though the offender may not have intended that any particular person should use or act upon it as genuine, or be induced, by the belief that it is genuine, to do or refrain from doing anything.*

(4) *Forgery is complete although the false document may be incomplete, or may not purport to be such a document as would be binding in law, if it be so made and is such as to indicate that it was intended to be acted on as genuine.*

(b) that some person should be induced, by the belief that it is genuine, to do or to refrain from doing anything, whether within Canada or not.

(2) Making a false document includes

(a) altering a genuine document in any material part,

(b) making a material addition to a genuine document or adding to it a false date, attestation, seal or other thing that is material, or

(c) making a material alteration in a genuine document by erasure, obliteration, removal or in any other way.

(3) Forgery is complete as soon as a document is made with the knowledge and intent referred to in subsection (1), notwithstanding that the person who makes it does not intend that any particular person should use or act upon it as genuine or be induced, by the belief that it is genuine, to do or refrain from doing anything.

(4) Forgery is complete notwithstanding that the false document is incomplete or does not purport to be a document that is binding in law, if it is such as to indicate that it was intended to be acted upon as genuine.

This is the former s.466. It was s.422 in the Code of 1892 and s.316 in the E.D.C. "Document" is defined in s.2(12), (13) and (14), and s.268(b), "false document" in s.268(e) *ante*.

The Imperial Commissioners in their report (p.29) said:

"It is not possible to say precisely what are the documents the false making of which is forgery at common law. But by a great many different enactments passed at different times a great many forgeries have been made felonies, and as such punishable with great severity. The statute law was for the most part consolidated by the 24 and 25 Vict. c.98. Like the other Consolidation Acts, the *Forgery Act* assumes that the common law definition of forgery is known. This definition, however, is a somewhat intricate matter involving various questions as to the extent of falsification implied in forgery, the character of the

Section 309—continued

intent to defraud essential to it, and the circumstances essential to the completion of the crime. These matters are dealt with in sections 313 to 317 both inclusive."

The sections mentioned contain matter included in ss.268(b),(c) and (e) and 309 of this Code.

In *R. v. RITSON*, [1869] L.R. 1 C.C.R.200, the following appears at p.203:

"The definition of forgery is not that every instrument containing false statements fraudulently made is a forgery; but that every instrument which fraudulently purports to be that which it is not is a forgery, whether the falseness of the instrument consists in the fact that it is made in a false name, or that the pretended date, when that is a material portion of the deed, is not the date at which the deed was in fact executed."

Per Blackburn, J.:

"The definition in Comyns (Dig., tit. Forgery, A-I) is 'forgery is where a man fraudulently writes or publishes a false deed or writing to the prejudice of the right of another'—not making an instrument containing that which is false, which, I agree would not be forgery, but making an instrument which purports to be that which it is not."

On this point see also *R. v. X*, [1919] 2 W.W.R.998, at p.1000.

Filling in a blank cheque without authority is forgery: *R. v. WILSON* (1847), 2 Cox, C.C.426.

Although by definition it may be forgery to sign the name of a fictitious person, the case of *R. v. CARLOW* (1949), 94 C.C.C.95 should be noticed, where it was said that "The definition of false document in Code s.335(1) is so wide, it gives rise to legitimate doubt that it is incorporated in s.466 in its widest possible sense".

The accused, who was charged with forgery, assumed a name which was not his own but which was in fact the name of a non-existing person. The court acquitted him, following *R. v. INHABITANTS OF BURTON-UPON-TRENT* (1815), 105 E.R.712, where it was said that "If a party sign an instrument in a name assumed by him for other purposes a considerable time before (in that case sixteen weeks), such signature will not amount to a forgery; but otherwise if he assume a name by which he had never been known before for the purpose of fraud".

From subsecs.(3) and (4) it follows that, as stated in 9 Halsbury, 1st ed., 764, it is only necessary to prove a general intent to defraud; it is not necessary to prove an intent to defraud any particular person or that any particular person was defrauded. In this connection see s.493(c).

PUNISHMENT FOR FORGERY.—Corroboration.

310. (1) Every one who commits forgery is guilty of an indictable offence and is liable to imprisonment for fourteen years.

(2) No person shall be convicted of an offence under this section upon the evidence of only one witness unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.

OLD CODE:

468. *Every one who commits forgery is guilty of an indictable offence and liable to fourteen years' imprisonment.*

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

· · · · ·
 (e) *Forgery, Part VII, sections four hundred and sixty-eight to four hundred and seventy inclusive.*

Subsec.(1) is the former s.468 as enacted by 1950, c.11, s.6. This prescribed one penalty for forgery, and replaced the long enumeration previously set out in ss.468, 469 and 470. On this matter of substituting general terms for particulars, see notes to s.280 *ante*.

Subsec.(2) is the former s.1002(e), s.684(c) in the Code of 1892. It modified s.218 of R.S.C. 1886, c.174, which applied to "the evidence of any person interested or supposed to be interested". The provision in the Code seems to be a survival from a time when an interested party could not give evidence at all, *vide CAPT. SMITH'S CASE*(1768), 2 East P.C.1001:

"In such prosecutions (*i.e.*, by the party whose hand was forged) there was certainly no necessity that the person whose hand-writing was forged should himself appear to prove the forgery; but the fact might be proved by others who were acquainted with his hand. That the reason was, because in such prosecutions the party himself, whose hand-writing was forged, would be no competent witness, being interested in the question.

In the 18th and early 19th centuries this exclusion was based upon the probability that persons interested were likely to commit perjury. 'It is founded', said Starkie in 1824, 'on the known infirmities of human nature, which is too weak to be generally restrained by religion or moral obligations, when tempted in a contrary direction by temporal interests the law must prescribe general rules; and experience proves that more mischief would be done by the general reception of interested witnesses than is occasioned by this general exclusion.'

Holdsworth's History, Vol. IX, p.196, traces the development of the rule from civil to criminal cases and points out that this disqualification was got rid of when it was recognized that interest is a valid objection, not to competence but to credibility.

As to corroboration generally, see notes to s.131 *ante*.

UTTERING FORGED DOCUMENT.—Wherever forged.

311.(1) Every one who, knowing that a document is forged,

(a) uses, deals with, or acts upon it, or

(b) causes or attempts to cause any person to use, deal with, or act upon it,

as if the document were genuine, is guilty of an indictable offence and is liable to imprisonment for fourteen years.

(2) For the purposes of proceedings under this section, the place where a document was forged is not material.

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This is the former s.467. It was s.424 in the Code of 1892, and s.338 in the E.D.C. It deals with cases in which the intent specified in s.309(1) is carried a step further. As to what constitutes the offence a reference may be made to *R. v. ION*(1852), 2 Den.475, which held that the offence consisted in parting with or tendering the instrument, or offering or using it in some way to get money or credit by means of it.

For example, in *R. v. X*, [1919]2 W.W.R.998, it was held that it was an offence against this section to present a forged prescription to a druggist in order to procure liquor. The judgment points out that the druggist was prejudiced by the fact that his acting upon it might lay him open to a prosecution for an illegal sale.

The wording of this section may be compared with "uttering" as dealt with in ss.391(e) and 395, *post*, and the reader may be reminded that by this Code, the counterfeiting of paper money is covered by s.391 (b) and ss.392 *et seq.*

EXCHEQUER BILL PAPER. — Making, etc. — Instruments. — Counterfeiting public seals.

312. Every one who, without lawful authority or excuse, the proof of which lies upon him,

(a) makes, uses or knowingly has in his possession

(i) any exchequer bill paper, revenue paper, or paper that is used to make bank notes, or

(ii) any paper that is intended to resemble paper mentioned in subparagraph (i);

(b) makes, offers or disposes of or knowingly has in his possession any plate, die, machinery, instrument or other writing or material that is adapted and intended to be used to commit forgery; or

(c) makes, reproduces or uses a public seal of Canada or of a province, or the seal of a public body or authority in Canada, or of a court of law,

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

This combines the former ss.471, 472 and 473. S.471 was s.434 in the Code of 1892, and came from ss.9 and 19 of the *Forgery Act*, 1861 (Imp.). See definitions in s.3(4) and s.268(c), (d) and (f). Provisions of the Act of 1861 were adopted in ss.343 *et seq.* of the E.D.C. but do not correspond to our Code.

S.472 was s.425 in the Code of 1892 and came from s.1 of the Act of 1861. *Cf.* s.318 of the E.D.C.

S.473, reproduced in more general terms in s.312(c) was s.426 in the Code of 1892. It adapted provisions in ss.28, 31 and 36 of the Act of 1861.

Note that the offences under this section are committed if the acts are done without lawful authority or excuse and that intent to defraud is not specified. It was held in *WEICH v. R.*, [1951]S.C.R.537, that the having in one's possession without lawful excuse of instruments enabling one to fashion or change a piece of white paper to resemble Bank of America bill paper, is an offence within the meaning of s.471(a).

OLD CODE:

467. *Every one is guilty of an indictable offence who, knowing a document to be forged, uses, deals with, or acts upon it, or attempts to use, deal with, or act upon it, or causes, or attempts to cause any person to use, deal with, or act upon it, as if it were genuine, and is liable to the same punishment as if he had forged the document.*

(2) *It is immaterial where the document was forged.*

471. *Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, without lawful authority or excuse, the proof whereof shall lie on him,*

(a) *makes, begins to make, uses or knowingly has in his possession, any machinery or instrument or material for making exchequer bill paper, revenue paper or paper intended to resemble the bill paper of any firm or body corporate, or person carrying on the business of banking; or*

(b) *engraves or makes upon any plate or material anything purporting to be, or apparently intended to resemble, the whole or any part of any exchequer bill or bank note; or*

(c) *uses any such plate or material for printing any part of any such exchequer bill or bank note; or*

(d) *knowingly has in his possession any such plate or material as aforesaid; or*

(e) *makes, uses or knowingly has in his possession any exchequer bill paper, revenue paper, or any paper intended to resemble any bill paper of any firm, body corporate, company or person, carrying on the business of banking, or any paper upon which is written or printed the whole or any part of any exchequer bill, or any bank note; or*

(f) *engraves or makes upon any plate or material anything intended to resemble the whole or any distinguishing part of any bond or undertaking for the payment of money used by any dominion, colony or possession of His Majesty or by any foreign prince or state, or by any body corporate, or other body of the like nature, whether within His Majesty's dominions or without; or*

(g) *uses any such plate or other material for printing the whole or any part of such bond or undertaking; or*

(h) *knowingly offers, disposes of or has in his possession any paper upon which such bond or undertaking, or any part thereof, has been printed.*

472. *Every one is guilty of an indictable offence and liable to imprisonment for life who unlawfully makes or who counterfeits any public seal of the United Kingdom or any part thereof, or of Canada or any part thereof, or of any dominion, possession or colony of His Majesty, or the impression of any such seal, or uses any such seal or impression, knowing the same to be so unlawfully made or counterfeited.*

473. *Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who unlawfully makes or who counterfeits any seal of a court of justice, or any seal of or belonging to any registry office or burial board, or the impression of any such seal, or uses any such seal or impression knowing the same to be so unlawfully made or counterfeited.*

PRINTING COUNTERFEIT PROCLAMATION.—Tendering in evidence.**313. Every one who knowingly**

(a) prints a proclamation, order, regulation or appointment, or notice thereof, and causes it falsely to purport to have been printed by the Queen's Printer for Canada, or the Queen's Printer for a province, or

(b) tenders in evidence a copy of a proclamation, order, regulation or appointment that falsely purports to have been printed by the Queen's Printer for Canada or the Queen's Printer for a province,

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

This is the former s.474. It was s.427 in the Code of 1892 and came from R.S.C. 1886, c.165, s.37. See s.117 *ante*, s.687 *post*, and ss.21 and 22 of the *Canada Evidence Act*.

TELEGRAM, ETC., IN FALSE NAME.

314. Every one who, with intent to defraud, causes or procures a telegram, cablegram or radio message to be sent or delivered as being sent by the authority of another person, knowing that it is not sent by his authority and with intent that the message should be acted on as being sent by his authority, is guilty of an indictable offence and is liable to imprisonment for five years.

This is the former s.475 with the addition of "cablegram or radio message". It was s.428 in the Code of 1892 and s.325 in the E.D.C.

In *R. v. STEWART*(1875), 25 U.C.C.P.440, the prisoner had written out what purported to be a telegram to one McK. It was delivered to McK. without having been transmitted by wire at all, and on the faith of its contents McK. endorsed a draft on which the prisoner received the proceeds. It was held that he was properly convicted of forgery.

In *R. v. GALLOWAY*(1909), 15 C.C.C.317, the accused was discharged on *habeas corpus*. The accused had sent a telegram purporting to be signed by one M. without M's authority. The purpose was to have the addressee meet the accused at Banff instead of Regina. It was held that intent to defraud is an essential element of the offence, and that as it did not appear, the accused was not guilty.

FALSE MESSAGES.

315. Every one who, with intent to injure or alarm any person sends or causes or procures to be sent by telegram, letter, radio, cable or otherwise a message that contains matter that he knows is false is guilty of an indictable offence and is liable to imprisonment for two years.

This is the former s.476 widened similarly to s.314. It was s.429 in the Code of 1892. It was not in the E.D.C. but was added to the Canadian Bill of 1892 as a subsection of s.428. Taschereau's edition of the Code of 1892, p.523, comments that it seems to cover a letter or message intended to injure or alarm not only the person to whom it is sent, but others as well.

OLD CODE:

474. Every one is guilty of an indictable offence and liable to seven years' imprisonment who prints any proclamation, order, regulation or appointment, or notice thereof, and causes the same falsely to purport to have been printed by the King's Printer for Canada, or the Government printer for any province of Canada, as the case may be, or tenders in evidence any copy of any proclamation, order, regulation or appointment which falsely purports to have been printed as aforesaid, knowing that the same was not so printed.

475. Every one is guilty of an indictable offence who, with intent to defraud, causes or procures any telegram to be sent or delivered as being sent by the authority of any person knowing that it is not sent by such authority, with intent that such telegram should be acted on as being sent by that person's authority, and is liable, upon conviction thereof, to the same punishment as if he had forged a document to the same effect as that of the telegram.

476. Every one is guilty of an indictable offence and liable to two years' imprisonment who, with intent to injure or alarm any person, sends, causes, or procures to be sent any telegram or letter or other message containing matter which he knows to be false.

265. Every one is guilty of an indictable offence and liable to ten years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person.

516. Every one is guilty of an indictable offence and liable to three years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to burn or destroy any building, or any rick or stack of grain, hay or straw or other agricultural produce, or any grain, hay or straw or other agricultural produce in or under any building in or under any building, or any ship or vessel.

537. (1) Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding five hundred dollars over and above the amount of injury done, or to one year's imprisonment with or without hard labour, who

• • • • •
 (c) who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to kill, maim, wound, poison, or injure any dog, bird, beast, or other animal, not being cattle, but being the subject of larceny at common law, or being ordinarily kept in a state of confinement, or kept for any lawful purpose.
 • • • • •

THREATENING LETTERS.—Punishment.

316. (1) Every one commits an offence who sends, delivers, utters or directly or indirectly causes any person to receive

(a) a letter or writing that he knows contains a threat to cause death or injury to any person; or

(b) a letter or writing that he knows contains a threat
(i) to burn, destroy or damage real or personal property, or
(ii) to kill, maim, wound, poison or injure an animal or bird that is the property of any person.

Section 316—*continued*

(2) Every one who commits an offence under paragraph (a) of subsection (1) is guilty of an indictable offence and is liable to imprisonment for ten years.

(3) Every one who commits an offence under paragraph (b) of subsection (1) is guilty of

- (a) an indictable offence and is liable to imprisonment for two years, or
- (b) an offence punishable on summary conviction.

This gathers together a number of provisions relating to threats that formerly appeared in different places. Par.(a) is the former s.265 changed to read "to cause death or injury" instead of "to kill or murder". S.265 was s.233 in the Code of 1892, and s.415 in the E.D.C., being adapted from 24 and 25 Vict., c.100, s.16, and 1 and 2 Wm. IV, c.44, s.3 (Ireland).

Par.(b)(i) puts in general terms the provisions of s.516 as re-enacted by 1938 c.44, s.33. S.516 was s.487 in the Code of 1892 and was part of s.416 of the E.D.C. into which it was adapted from 24 and 25 Vict., c.97, s.50 and 1 and 2 Wm. IV., c.44 (Ireland). The Imperial Commissioners (p.13) mention it as being taken from what were usually called the "Whiteboy Acts", applicable to Ireland.

Par.(b)(ii) comes from the former s.537(1)(c) which was added to the Code by 1930, c.11, s.10, and s.538 which was s.502 in the Code of 1892, and was also part of s.416 in the E.D.C. Provisions similar to par.(b) appeared in R.S.C. 1886, c.173, s.8, *An Act respecting Threats, Intimidation and other Offences*.

This section refers to written threats. As to binding over in case of threats generally, see s.717, *post*. As to threat to murder see s.413.

DRAWING DOCUMENT WITHOUT AUTHORITY.—Uttering.**317. Every one who**

(a) with intent to defraud and without lawful authority makes, executes, draws, signs, accepts or endorses a document in the name or on the account of another person by procuration or otherwise, or

(b) makes use of or utters a document knowing that it has been made, executed, signed, accepted or endorsed with intent to defraud and without lawful authority, in the name or on the account of another person, by procuration or otherwise,

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

This is the former s.477. It was s.431 in the Code of 1892, and s.340 in the E.D.C. It comes originally from s.24 of the *Forgery Act*, 1861 (Imp.), and appears to have resulted from the following cases:

R. v. ARSCOTT(1834), 6 C. & P.408: In this case accused wrote on the back of a bill of exchange "Received for R. Aickman, G. Arscott". He was indicted for forgery and uttering and it was held that he could not be convicted. *Per Littledale, J.*:

"I take it, that to forge a receipt for money, is writing the name of the person for whom it is received. But, in this case, the acts done by the prisoner were, receiving for another person, and signing his own

OLD CODE:

538. *Every one is guilty of an indictable offence and liable to two years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to kill, maim, wound, poison or injure any cattle.*

477. *Every one is guilty of an indictable offence who, with intent to defraud and without lawful authority or excuse, makes or executes, draws, signs, accepts or endorses, in the name or on the account of another person, by procuration or otherwise, any document, or makes use of or utters any such document knowing it to be so made, executed, signed, accepted or endorsed, and is liable to the same punishment as if he had forged such document.*

name. Under these circumstances the prisoner must be acquitted upon this indictment."

R. v. WHITE(1847), 1 Den.208: Prisoner, falsely averring that he had authority to endorse a bill of exchange for T. Tomlinson, wrote on the back "per procuration, Thomas Tomlinson, Emanuel White." The bill was discounted and the prisoner made off with the money. Held, no forgery.

It was urged that the prisoner had counterfeited nothing, that the writing was not made as the writing of another, but avowedly that of the prisoner himself: and though he may have committed fraud in saying that he was authorised to make the endorsement, this was not a forgery, but a mere false pretence. There are no reasons for judgment but the court seems to have upheld this view.

Taschereau, p.524, notes that this case cannot now be followed.

R. v. CLIFFORD(1845), 2 Car. and Kir.202: B. had signed a post office order with the name of W.S. on the strength of a letter written by the prisoner and purporting to come from W.S. giving him permission to do so. B. wrote without imitating any person's signature. Held that the prisoner was guilty of forgery, but that B. was an innocent agent.

In Canada it was held in *R. v. WEIR*(1899), 3 C.C.C.155 and 499, that s.431(477) creates two distinct offences, one, the making and signing, etc., and the other, the uttering, and that the indictment must set out the essentials of each. Held also that a charge may be laid although the name signed is that of a testamentary succession or of an estate in liquidation (e.g., "Estate John Doe").

BOISSEAU v. R.(1923), 41 C.C.C.33, although on this section, turned entirely on a question of the material to be furnished on a stated case.

OBTAINING, ETC., BY INSTRUMENT BASED ON FORGED DOCUMENT.

318. Every one who demands, receives, or obtains anything, or causes or procures anything to be delivered or paid to any person under, upon, or by virtue of any instrument issued under the authority of law, knowing that it is based on a forged document, is guilty of an indictable offence and is liable to imprisonment for fourteen years.

This is part of the former s.478(a). The first part of that paragraph, which made it an offence to demand, receive or obtain anything by means of a forged instrument, has been dropped as being covered by

Section 318—continued

s.311, *ante*. The former par.(b), dealing with attempts, has also been dropped as being covered by s.406, *post*. The portion reproduced here is widened to cover all instruments issued under lawful authority. S.478 appeared as s.432 in the Code of 1892 and as s.341 in the E.D.C. It was taken from the *Forgery Act* 1861 (Imp.) and, although new in the form in which it appeared there, it was framed in part upon 38 Geo. III, c.52, s.2 (I), and II Geo. IV, c.20, s.85. A note by the draftsman says that it is intended to embrace every case of demanding, etc., any property whatsoever upon forged instruments; and it is intended to include bringing an action on any forged bill of exchange, note, or any security for money. The words "procure to be delivered or paid to any person" were inserted to include cases where one person by means of a forged instrument causes money to be paid to another person.

It has been held that "instrument" includes a business document: *R. v. RILEY*, [1896] 1 Q.B.309; *R. v. CADE*, [1914] 2 K.B.209.

COUNTERFEITING STAMP.—Using.—Possessing.—Instruments for counterfeiting stamps.—Counterfeiting mark.—Selling.—Affixing false mark.—Affixing counterfeit mark.—"Mark."—"Stamp."

319. (1) Every one who

- (a) fraudulently uses, mutilates, affixes, removes or counterfeits a stamp or part thereof;
- (b) knowingly and without lawful excuse, the proof of which lies upon him, has in his possession
 - (i) a counterfeit stamp or a stamp that has been fraudulently mutilated, or
 - (ii) anything bearing a stamp of which a part has been fraudulently erased, removed or concealed; or
- (c) without lawful excuse, the proof of which lies upon him, makes or knowingly has in his possession a die or instrument that is capable of making the impression of a stamp or part thereof,

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

(2) Every one who, without lawful authority,

- (a) makes a mark,
- (b) sells, or exposes for sale, or has in his possession a counterfeit mark, or
- (c) affixes a mark to anything that is required by law to be marked, branded, sealed or wrapped other than the thing to which the mark was originally affixed or was intended to be affixed, or
- (d) affixes a counterfeit mark to anything that is required by law to be marked, branded, sealed or wrapped,

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

(3) In this section,

- (a) "mark" means a mark, brand, seal, wrapper or design used by or on behalf of
 - (i) the Government of Canada or of a province,
 - (ii) the government of a state other than Canada, or

OLD CODE:

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

(a) demands, receives, or obtains anything, or causes or procures anything to be delivered or paid to any person, under, upon, or by virtue of any forged instrument knowing the same to be forged, or under, upon, or by virtue of any probate or letters of administration, knowing the will, codicil or testamentary writing on which such probate or letters of administration were obtained to be forged, or knowing the probate or letters of administration to have been obtained by any false oath, affirmation, or affidavit; or

(b) attempts to do any such thing as aforesaid.

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

(a) fraudulently counterfeits any stamp, whether impressed or adhesive, used for the purposes of revenue by the Government of the United Kingdom or of Canada, or by the Government of any province of Canada, or of any possession or colony of His Majesty, or by any foreign prince or state; or

(b) knowingly has in his possession, sells or exposes for sale, or utters or uses any such counterfeit stamp; or

(c) without lawful excuse, the proof whereof shall lie on him, makes, or has knowingly in his possession, any die or instrument capable of making the impression of any such stamp as aforesaid, or any part thereof; or

(d) fraudulently cuts, tears or in any way removes from any material any such stamp, with intent that any use should be made of such stamp or of any part thereof; or

(e) fraudulently mutilates any such stamp with intent that any use should be made of any part of such stamp; or

(f) fraudulently fixes or places upon any material, or upon any stamp aforesaid, any stamp or part of a stamp which whether fraudulently or not, has been cut, torn, or in any other way removed from any other material or out of or from any other stamp; or

(g) fraudulently erases, or otherwise, either really or apparently, removes, from any stamped material, any name, sum, date, or other matter or thing thereon written, with the intent that any use should be made of the stamp upon such material; or

(h) knowingly and without lawful excuse the proof whereof shall lie upon him has in his possession any stamp or part of a stamp which has been fraudulently cut, torn, or otherwise removed from any material, or any stamp which has been fraudulently mutilated, or any stamped material out of which any name, sum, date or other matter or thing has been fraudulently erased or otherwise, either really or apparently, removed; or

(i) without lawful authority makes or counterfeits any mark, brand, official liquor seal, liquor seal, wrapper or design used by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of Canada, or the Government of any province of Canada, or by any Department or officer of any Board of Commission established by such Government for any purpose in connection with the service or business of such Government, or the impression of any such mark, brand, official liquor seal, liquor seal, wrapper or design, or sells, or exposes for sale, or has in his possession any such counterfeit mark, brand, official liquor seal, liquor seal, wrapper or design, or any goods, having thereon a counterfeit of any such mark, brand, official liquor seal, liquor seal,

Section 319—*continued*

- (iii) a department, board, commission or agent established by a government mentioned in subparagraph (i) or (ii) in connection with the service or business of that government; and
- (b) "stamp" means an impressed or adhesive stamp used for the purpose of revenue by the Government of Canada or of a province or by the government of a state other than Canada.

This is the former s.479. In subsec.(3)(a) the definition of "mark" is widened to include Government marks on goods other than liquor, as to which see also s.359, *post*. The former s.479(i), which was re-enacted by 1931, c.28, s.6, referred only to Government marks on liquor.

As to subsec.(1)(a) see also s.60 of the *Post Office Act*, R.S.C. 1952, c.212, under which it is an indictable offence fraudulently to remove a stamp from mail or to remove a mark or cancellation from a stamp.

S.479 was s.435 in the Code of 1892 and (as to pars.(a) to (h)), s.347 in the E.D.C., being based upon 33 and 34 Vict., c.98, s.18. Par. (h) of s.435 extended the earlier legislation by the reference to possession. See also s.2(32) and s.3(2), *ante*.

R. v. LOWDEN(1913), 9 Cr.App.R.195, was a case in which accused was convicted for selling what purported to be cancelled £1 stamps for collections, both the stamps and the obliterations being forgeries.

In *R. v. MILLER*(1931), 56 C.C.C.97, a conviction under s.479(i) was affirmed, it being found on circumstantial evidence that the accused knew that the liquor seals in his possession were forged.

INJURING DOCUMENTS.—"Election document."

320. (1) Every one who unlawfully

- (a) destroys, defaces or injures a register, or any part of a register of births, baptisms, marriages, deaths or burials that is required or authorized by law to be kept in Canada, or a copy or any part of a copy of such a register that is required by law to be transmitted to a registrar or other officer,
- (b) inserts or causes to be inserted in a register or copy referred to in paragraph (a) an entry, that he knows is false, of any matter relating to a birth, baptism, marriage, death or burial, or erases any material part from such a register or copy,
- (c) destroys, damages or obliterates an election document or causes an election document to be destroyed, damaged or obliterated, or
- (d) makes or causes to be made an erasure, alteration or interlineation in or upon an election document,

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

(2) In this section, "election document" means any document or writing issued under the authority of an Act of the Parliament of Canada or of a legislature with respect to an election held pursuant to the authority of any such Act.

See notes following s.321.

OLD CODE:*Section 479—continued*

wrapper or design, or affixes any such mark, brand, official liquor seal, liquor seal, wrapper or design to any goods required by law to be marked, branded, sealed or wrapped other than those to which such mark, brand, official liquor seal, liquor seal, wrapper or design was originally affixed or intended to be affixed.

480. *Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who*

(a) unlawfully destroys, defaces or injures any register of births, baptisms, marriages, deaths or burials required or authorized by law to be kept in Canada, or any part thereof, or any copy of such register, or any part thereof required by law to be transmitted to any registrar or other officer, or

(b) unlawfully inserts in any such register, or any such copy thereof, any entry, known by him to be false, of any matter relating to any birth, baptism, marriage, death or burial, or erases from any such register or document any material part thereof.

481. *Every one is guilty of an indictable offence and liable to ten years' imprisonment who,*

(a) being a person authorized or required by law to give any certified copy of any entry in any register in the last preceding section mentioned, certifies any writing to be a true copy or extract, knowing it to be false, or knowingly utters any such certificate; or

(b) unlawfully and for any fraudulent purpose takes any such register or certified copy from its place of deposit or conceals it; or

(c) being a person having the custody of any such register or certified copy, permits it to be so taken or concealed.

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

(a) being by law required to certify that any entry has been made in any such register makes such certificate knowing that such entry has not been made; or

(b) being by law required to make a certificate or declaration concerning any particular required for the purpose of making entries in such register, knowingly makes such certificate or declaration containing a falsehood; or

(c) being an officer having custody of the records of any court, or being the deputy of any such officer, wilfully utters a false copy or certificate of any record; or

(d) not being such officer or deputy fraudulently signs or certifies any copy of certificate of any record, or any copy of any certificate, as if he were such officer or deputy.

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

(a) being an officer required or authorized by law to make or issue any certified copy of any document or of any extract from any document, wilfully certifies, as a true copy of any document or of any extract from any such document, any writing which he knows to be untrue in any material particular; or

(b) not being such officer as aforesaid fraudulently signs or certifies any copy of any document, or of any extract from any document, as if he were such officer.

528. *Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully*

FALSE COPY FROM REGISTER.—Fraudulent copy by person not authorized.
—Giving false particulars.

321. Every one who

(a) being authorized or required by law to make or issue a certified copy of, extract from or certificate in respect of a register, record or document, knowingly makes or issues a false certified copy, extract or certificate,

(b) not being authorized or required by law to make or issue a certified copy of, extract from or certificate in respect of a register, record or document, fraudulently makes or issues a copy, extract or certificate that purports to be certified as authorized or required by law, or

(c) being authorized or required by law to make a certificate or declaration concerning any particular required for the purpose of making entries in a register, record or document, knowingly and falsely makes the certificate or declaration,

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

Ss.320 and 321 combine the former ss.480 to 483 and s.528. Ss.480 to 483 were ss.436 to 439 in the Code of 1892, and ss.348 to 352 in the E.D.C., being based upon 24 and 25 Vict., c.98, ss.36, 37, 28 and 29 (Imp.), the *Forgery Act*, 1861.

A note (Greaves' Cons. Acts p.246), refers to s.37 of the *Forgery Act*, 1861 (Imp.), and is to the effect that new provisions were added because of *BOWEN'S CASE*(1844), 1 Den.22. In that case the prisoner had obtained access to certain registries and had taken away copies of registers upon which he obliterated certain entries and substituted others which would have proved part of the pedigree of the claimant to an estate.

Concerning the former s.528 which appears in (1)(c) and (d) and (2) above, it may be pointed out that it appeared first in the *Dominion Elections Act*, R.S.C. 1886, c.8 and that it came into the Criminal Code of 1892 as s.503 with the addition of the word "ballot". The provincial Elections Acts to some extent cover the same ground.

In *R. v. DUGGAN*(1906), 12 C.C.C.147, the accused, a returning officer, was charged with altering a voter's list in a Dominion election. Phippen, J. A., said at p.165:

"There is no doubt that section 503 of the Code was framed to avoid alterations or erasures in lists which might prevent those legally entitled from exercising their franchise, or allow unqualified persons a voice in the election of a member."

PART VIII.

FRAUDULENT TRANSACTIONS RELATING TO CONTRACTS AND TRADE.

INTERPRETATION.

"GOODS."—"Trading stamps."

322. In this Part,

(a) "goods" means anything that is the subject of trade or commerce; and

OLD CODE:*Section 528—continued**(a) destroys, injures or obliterates, or causes to be destroyed, injured or obliterated; or**(b) makes or causes to be made an erasure, addition of names, or interlineation of names in or upon;**any writ of election, or any return to a writ of election, or any indenture, poll-book, voters' list, certificate, affidavit or report, or any document, ballot or paper made, prepared or drawn out according to any law in regard to Dominion, provincial, municipal or civic elections.**335. In this Part, unless the context otherwise requires,**(o) "goods," for the purpose of the sections relating to forgery of trade-marks and fraudulent marking of merchandise, means anything which is merchandise or the subject of trade or manufacture;**(x) "trading stamps" includes, besides trading stamps commonly so-called, any form of cash receipt, receipt, coupon, premium ticket or other device, designed or intended to be given to the purchaser of goods by the vendor thereof or his employee or agent, and to represent a discount on the price of such goods or a premium to the purchaser thereof, which is redeemable either**(i) by any person other than the vendor, or the person from whom he purchased the goods, or the manufacturer of the goods, or**(ii) by the vendor, or the person from whom he purchased the goods, or the manufacturer of the goods, in cash or goods not his property, or not his exclusive property, or**(iii) by the vendor elsewhere than in the premises where such goods are purchased;**or which does not show upon its face the place of its delivery and the merchantable value thereof, or is not redeemable at any time;**(2) An offer, printed or marked by the manufacturer upon any wrapper, box or receptacle, in which goods are sold, of a premium or reward for the return of such wrapper, box or receptacle, to the manufacturer, is not a trading stamp within the meaning of this Part.*

(b) "trading stamps" includes any form of cash receipt, receipt, coupon, premium ticket or other device, designed or intended to be given to the purchaser of goods by the vendor thereof or on his behalf, and to represent a discount on the price of the goods or a premium to the purchaser thereof**(i) that may be redeemed****(A) by any person other than the vendor, the person from whom the vendor purchased the goods, or the manufacturer of the goods,****(B) by the vendor, the person from whom the vendor purchased the goods, or the manufacturer of the goods in cash or in goods that are not his property in whole or in part, or****(C) by the vendor elsewhere than in the premises where the goods are purchased; or****(ii) that does not show upon its face the place where it is delivered and the merchantable value thereof; or****(iii) that may not be redeemed upon demand at any time,**

Section 322—continued

but an offer, endorsed by the manufacturer upon a wrapper or container in which goods are sold, of a premium or reward for the return of that wrapper or container to the manufacturer is not a trading stamp.

Par.(a) is the former s.335(1)(o). It came from s.443(d) in the Code of 1892, and from 1888, c.41, s.2(d).

Par.(b) is the former s.335(1)(x) and (2). See notes to s.369, *post*.

FRAUD.**FRAUD.—Affecting public market.**

323. (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security, is guilty of an indictable offence and is liable to imprisonment for ten years.

(2) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public, is guilty of an indictable offence and is liable to imprisonment for ten years.

This comes from the former s.444. By that section, as it stood before 1948, it was an offence to conspire with any other person "by deceit or falsehood or other fraudulent means, to defraud the public or any person, ascertained or unascertained, or to affect the public market price of stocks, shares, merchandise, or anything else publicly sold, whether such deceit or falsehood or other fraudulent means would or would not amount to a false pretence". It was altered by 1948, c.39, s.13, by striking out the words "conspires with any other person". As it stood originally, s.444 was s.394 in the Code of 1892 and s.284 in the E.D.C.

It was explained (Hansard 1948, Vol. V, page 5189) that the conspiracy sections elsewhere in the Code would take effect if there were conspiracy, and also that it was assumed that fraudulent statements could be made for the purpose of affecting the market price of shares which would not amount to the offence of obtaining goods by false pretences. With reference to the amendment it was said also in *R. v. SUTHERLAND* (1950), 97 C.C.C.118 that:

" the effect of s.19 of (the *Interpretation Act*) is to leave the Crown in the same position on a prosecution after the repeal as it would have been before the repeal, subject only to this, namely, that the Crown was limited in proving the commission of the offence to the year 1947 and to that portion of 1948 expiring on the date of the repeal."

Although the section appears to have been designed to protect the public against fraudulent stock exchange transactions it undoubtedly goes much further. In *R. v. BOICEV* (1951), 102 C.C.C.239, a conviction under the amended section was affirmed on appeal in a case in which the complainant had been induced to buy what he was led to believe was

OLD CODE:

444. Every one is guilty of an indictable offence and liable to five years' imprisonment who, by deceit or falsehood or other fraudulent means, defrauds the public or any person, ascertained or unascertained, or affects the public market, price of stocks, shares, merchandise, or anything else publicly sold, whether such deceit or falsehood or other fraudulent means would or would not amount to a false pretense as hereinbefore defined.

gold but which turned out to be brass. The court rejected an argument that the section covered stock market frauds only and that the facts of the case could only be dealt with under s.405 (false pretences).

A difficulty which arises was noticed in *R. v. LIKE* (1953), 107 C.C.C. 97, also an appeal from conviction under this section. The following appears at page 99:

"It is plain that the offence of larceny or theft by a trick in some cases so nearly resembles that of obtaining by fraudulent means, deceit or falsehood as to create real difficulty in distinguishing one from the other. However, one intelligent distinction is: In theft the owner of the thing stolen has no intention to part with his property therein to the person taking it, while in the case of deceit, falsehood or other fraudulent means the owner does intend to part with his property in the money or chattel, but it is obtained from him by an act of deliberate deception, practised with the object of gaining something of recognized value from the owner to his prejudice: *HEAP v. MOTORISTS' ADVISORY AGENCY*, [1923] 1 K.B.577; *WHITEHORN BROS. v. DAVISON*, [1911] 1 K.B. 463 at p.479, *per* Buckley, L.J."

It is submitted that the section, by its reference to the public, covers what was known as an indictable cheat at common law and extends it by reference to "any person whether ascertained or not". It is said in Halsbury, 2nd ed., Vol. 9, p.563, that to obtain the property of another by fraud does not amount to a cheat at common law unless it is effected by a deceitful and illegal practice, not amounting to felony, *which directly affects the public*, and that a mere private cheat or imposition, even if accompanied by a false affirmation, is not indictable as a cheat at common law, if no false token is used.

To illustrate the distinction, it has been held that where sixteen gallons of liquor were deceitfully sold as eighteen gallons, there was only an imposition on the particular purchaser by which he could not have suffered except for his own carelessness in not measuring it, but that to sell by the use of false weights or measures was an indictable cheat.

The principle of the section cannot be better illustrated than by the case of *R. v. DE BERENGER et al.* (1814), 3 M. & S.67, 105 E.R.536. The defendants were shown to have circulated rumours that Napoleon Bonaparte had been killed and that peace would soon be made with France, their purpose being to raise the price of Government securities. The following is quoted:

"The purpose itself is mischievous, it strikes at the price of a vendible commodity in the market, and if it gives a fictitious price, by means of false rumours it is a fraud levelled against the public, for it is against all such as may possibly have anything to do with the funds on that particular day."

Section 323—continued

It was said, too, to be unnecessary to set out the names of persons who would be affected "for the defendants could not, except by a spirit of prophecy, divine who would be the purchasers on a subsequent day". On this last point see s.493, *post*.

See also notes to ss.303 and 304, *ante*, *R. v. SIMPSON and SIMMONS*(1913), 79 C.C.C.344, and *R. v. MELNYK*(1947), 90 C.C.C.257, noted under s.408, *post*.

It has been said that to deceive is by falsehood to induce a state of mind, and to defraud is by deceit to influence conduct.

USING MAILS TO DEFRAUD.

324. Every one who makes use of the mails for the purpose of transmitting or delivering letters or circulars concerning schemes devised or intended to deceive or defraud the public, or for the purpose of obtaining money under false pretences, is guilty of an indictable offence and is liable to imprisonment for two years.

This is the former s.209(c). It came from R.S.C. 1886, c.35, s.103 and 47 & 48 Vict., c.76, s.4 (Imp.). See also s.153, *ante*.

FRAUDULENT MANIPULATION OF STOCK EXCHANGE TRANSACTIONS.

325. Every one who, through the facility of a stock exchange, curb market or other market, with intent to create a false or misleading appearance of active public trading in a security or with intent to create a false or misleading appearance with respect to the market price of a security,

(a) effects a transaction in the security that involves no change in the beneficial ownership thereof,

(b) enters an order for the purchase of the security, knowing that an order of substantially the same size at substantially the same time and at substantially the same price for the sale of the security has been or will be entered by or for the same or different persons, or

(c) enters an order for the sale of the security, knowing that an order of substantially the same size at substantially the same time and at substantially the same price for the purchase of the security has been or will be entered by or for the same or different persons,

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

This is the former s.414A which was enacted into the Code by 1918, c.39, s.14. It was explained (Hansard 1918, Vol. V., page 5190) as follows: "It deals with fraudulent manipulations of the stock exchange. It is designed to prevent fraudulent manipulations of transactions on the stock exchange and will make quite a number of 'wash' sales criminal."

Wash sale may be taken as a colloquial reference to the simulated transactions which the section described.

GAMING IN STOCKS OR MERCHANDISE.—Making contract without intention to acquire or sell.—Contract without delivery or intention to receive.—Saving.—Onus.

326. (1) Every one is guilty of an indictable offence and is liable to imprisonment for five years who, with intent to make gain or

OLD CODE:

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

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

444A. Every one is guilty of an indictable offence and liable to five years' imprisonment who, through the facility of any stock exchange or curb market, or other market, with the intent of creating a false or misleading appearance of active public trading in any security, or with the intent of creating a false or misleading appearance with respect to the market price of any security:—

(a) effects any transaction in such security which involves no change in the beneficial ownership thereof; or

(b) enters an order for the purchase of such security with the knowledge that an order of substantially the same size at substantially the same time and at substantially the same price for the sale of any such security has been or will be entered by or for the same or different persons; or

(c) enters an order for the sale of any such security with the knowledge that an order of substantially the same size at substantially the same time and at substantially the same price for the purchase of any such security has been or will be entered by or for the same or different persons.

231. Every one is guilty of an indictable offence and liable to five years' imprisonment, and to a fine of five hundred dollars, who, with the intent to make gain or profit by the rise or fall in price of any stock of any incorporated or unincorporated company or undertaking, either in Canada or elsewhere, or of any goods, wares or merchandise,

(a) without the bona fide intention of acquiring any such shares, goods, wares or merchandise, or of selling the same, as the case may be, makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any shares of stock, goods, wares or merchandise; or

(b) makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any such shares of stock, goods, wares or merchandise in respect of which no delivery of the thing sold or purchased is made or received, and without the bona fide intention to make or receive such delivery.

profit by the rise or fall in price of the stock of an incorporated or unincorporated company or undertaking, whether in or out of Canada, or of any goods, wares, or merchandise,

(a) makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the purchase or sale of shares of stock or goods, wares or merchandise, without the bona fide intention of acquiring the shares, goods, wares or merchandise or of selling them, as the case may be; or

(b) makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of shares of stock or goods, wares or merchandise in respect of which no delivery of the thing sold or

Section 326—*continued*

purchased is made or received, and without the *bona fide* intention of making or receiving delivery thereof, as the case may be,

but this section does not apply where a broker, on behalf of a purchaser, receives delivery, notwithstanding that the broker retains or pledges what is delivered as security for the advance of the purchase money or any part thereof.

(2) Where, in proceedings under this section, it is established that the accused made or signed a contract or agreement for the sale or purchase of shares of stock or goods, wares or merchandise, or acted, aided or abetted in the making or signing thereof, the burden of proof of a *bona fide* intention to acquire or to sell the shares, goods, wares or merchandise or to deliver or to receive delivery thereof, as the case may be, lies upon the accused.

Subsec.(1) is the former s.231. It was s.201 in the Code of 1892.

Subsec.(2) is the former s.987. It was s.704 in the Code of 1892 amended by 1908, c.18, s.13 to read "to acquire or to sell such *shares, goods*" etc.

These provisions originated in 51 Vict., c.42 (Can.) ss.1-3. They are designed to strike at what are called bucket shops. In *PEARSON v. CARPENTER AND SON*(1904), 35 S.C.R.380, it was said (*per* Nesbitt, J.) that "(they) were carrying on what is popularly known as a bucket shop, pure and simple, that is to say, there was an absolute unreality as to any transactions. They never placed or intended to place any order which was telegraphed to them but simply entered same upon the sheets and bet against it."

Referring to this case, it was said in *BEAMISH v. JAMES RICHARDSON AND SONS LTD.*(1914), 23 C.C.C.394, that:

"A 'bucket shop' has been held to be a place where bets are made as to the rise or fall of commodities under the guise of fictitious sales and purchases."

BROKER REDUCING STOCK BY SELLING FOR HIS OWN ACCOUNT.

327. Every one is guilty of an indictable offence and is liable to imprisonment for five years who, being an individual, or a member or employee of a partnership, or a director, officer or employee of a corporation, where he or the partnership, or corporation is employed as a broker by any customer to buy and carry upon margin any shares of an incorporated or unincorporated company or undertaking, whether in or out of Canada, thereafter sells or causes to be sold shares of the company or undertaking for any account in which

(a) he or his firm or a partner thereof, or

(b) the corporation or a director thereof,

has a direct or indirect interest, if the effect of the sale is, otherwise than unintentionally, to reduce the amount of such shares in the hands of the broker or under his control in the ordinary course of business below the amount of such shares that the broker should be carrying for all customers.

This is the former s.231A which came into the Code by 1930, c.11, s.5. It was explained (Hansard 1930, p.2742) that it was being introduced

OLD CODE:*Section 231—continued*

(2) *It is not an offence under this section if the broker of the purchaser receives delivery, on his behalf, of the articles sold, notwithstanding that such broker retains or pledges the same as security for the advance of the purchase money or any part thereof.*

987. *Whenever, on the trial of a person charged with making an agreement for the sale or purchases of shares, goods, wares or merchandise in the manner set forth in section two hundred and thirty-one, it is established that the person so charged has made or signed any such contract or agreement of sale or purchase, or has acted, aided or abetted in the making or signing thereof, the burden of proof of the bona fide intention to acquire or to sell such shares, goods, wares or merchandise, or to deliver or to receive delivery thereof, as the case may be, shall rest upon the person so charged.*

231A. *Every person is guilty of an indictable offence and liable to seven years' imprisonment, who, being an individual, or a member or employee of a partnership, or a director, officer or employee of a corporation, where he or the partnership, or corporation is employed as a broker by any customer to buy and carry upon margin any shares of any incorporated or unincorporated company or undertaking, either in Canada or elsewhere, thereafter sells or causes to be sold shares of such company or undertaking for any account in which*

(a) *he, or*

(b) *his firm or a partner thereof, or*

(c) *the corporation or a director thereof*

has a direct or indirect interest, if the effect of such sale shall otherwise than unintentionally be to reduce the amount of such shares in the hands of the broker or under his control in the ordinary course of business below the amount of such shares which the broker should be carrying for all customers.

232. *Every office or place of business wherein is carried on the business of making or signing, or procuring to be made or signed, or negotiating or bargaining for the making or signing of contracts of sale or purchase prohibited by the last preceding section is a common gaming-house, and every one who as principal or agent occupies, uses, manages or maintains the same is the keeper of a common gaming-house.*

as the result of a conference of the attorneys general. Its purpose is to protect the purchasers of shares of stock on margin.

FRAUDULENT CONCEALMENT.—Of document of title.—Falsifying pedigree.—Consent required.

328. (1) Every one who, being a vendor or mortgagor of property or of a chose in action or being a solicitor for or agent of a vendor or mortgagor of property or a chose in action, is served with a written demand for an abstract of title by or on behalf of the purchaser or mortgagee before the completion of the purchase or mortgage, and who

(a) with intent to defraud and for the purpose of inducing the purchaser or mortgagee to accept the title offered or produced to him, conceals from him any settlement, deed, will or other instrument material to the title, or any encumbrance on the title, or

Section 328—*continued*

(b) falsifies any pedigree upon which the title depends, is guilty of an indictable offence and is liable to imprisonment for two years.

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

Subsec.(1) is the former s.419.

Subsec.(2) is the former s.597 without the requirement of previous notice to the person intended to be prosecuted. The provision for consent of the Attorney General should be a sufficient safeguard against frivolous prosecutions.

The former sections were combined in s.287 of the E.D.C.

The origin of these sections is found in s.24 of 22 & 23 Vict., c.35 (Imp.), *An Act to further amend the Law of Property, and to relieve Trustees*, which reads in part as follows:

"Any seller or mortgagor of land, or of any chattels, real or personal, or chases in action conveyed or assigned to a purchaser, or the solicitor or agent of any such seller or mortgagor, who shall after the passing of this Act conceal any settlement, deed, will or other instrument material to the title or any encumbrance from the purchaser, or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any such cases to defraud, shall be guilty of a misdemeanour, and being found guilty shall be liable at the discretion of the Court, to suffer such punishment, by fine or imprisonment for any time not exceeding two years, with or without hard labour, or by both, as the Court shall award, (and shall also be liable to an action for damages. . . .) but no prosecution for any offence included in this section against any seller or mortgagor, or any solicitor or agent, shall be commenced without the sanction of Her Majesty's Attorney General, or in case that office be vacant of Her Majesty's Solicitor General; and no such sanction shall be given without such previous notice of the application for leave to prosecute to the person intended to be prosecuted as the Attorney General or the Solicitor General (as the case may be) shall direct."

These provisions were re-enacted in terms (except for the peculiar wording "or being found guilty") in the Statutes of Canada, 29 Vict., 1865, c.28, s.20, *An Act to amend the law of Property and Trusts in Upper Canada*, concluding with the words:

"and no prosecution for concealment shall be sustained unless a written demand of an abstract of title was served by or on behalf of the purchaser or mortgagee before the completion of the purchase or mortgage."

These provisions do not appear in the *Larceny Act* of 1869 (Can.), but s.91 of the *Larceny Act*, R.S.C. 1886, c.164, contained similar provisions, giving 25 Vict., c.28, s.20, part, as the source, but reading:

"Every one who, being a seller or mortgagor of land, or of any chattel, real or personal or chose in action, or the solicitor or agent of any such seller or mortgagor, and having been served with a written demand of an abstract of title by or on behalf of the purchaser or

OLD CODE:

419. Every one is guilty of an indictable offence and liable to a fine, or to two years' imprisonment, or to both, who, being a seller or mortgagor of land, or of any chattel, real or personal, or chose in action, or the solicitor or agent of any such seller or mortgagor, and having been served with a written demand of an abstract of title by or on behalf of the purchaser or mortgagee before the completion of the purchase or mortgage, conceals any settlement, deed, will or other instrument material to the title, or any encumbrance, from such purchaser or mortgagee, or falsifies any pedigree upon which the title depends, with intent to defraud and in order to induce such purchaser or mortgagee to accept the title offered or produced to him.

597. No prosecution for concealing any settlement, deed, will or other instrument material to any title, or any encumbrance, or falsifying any pedigree upon which any title depends, shall be commenced without the consent of the Attorney General, given after previous notice to the person intended to be prosecuted of the application to the Attorney General for leave to prosecute.

mortgagee before the completion of the purchase or mortgage, conceals, &c."

Subsec.(2) provided for the consent of the Attorney General of the province after notice to the person intended to be prosecuted.

Subsec.(3) said that "Nothing in this section, and no proceeding, conviction or judgment had or taken thereon, shall prevent, lessen or impeach any remedy which any person aggrieved by any such offence would otherwise have had."

In the Criminal Code Bill of 1892, subsec.(1) becomes s.370 with the words "and having been served" to "completion of purchase and mortgage" in brackets and so it appears in the Code as passed. Subsec.(2) becomes s.549. Subsec.(3) does not appear, probably because it was regarded as being covered by s.13, by virtue of which civil remedies are not suspended or affected.

There is only one case in which s.597 has been referred to: *R. v. DAVENPORT*(1928), 50 C.C.C.40, in which accused was charged under s.17 of the *Live Stock Pedigree Act*, 1912, c.31. The section makes it an offence to make a false or fraudulent statement in an application for registration of an animal under that Act. It was argued that the consent of the Attorney General was required under s.597 but the court held otherwise. *Per* Harvey, C.J.A.:

"It seems quite evident that the offences contemplated by s.597 are those created by s.419, and that the pedigree under consideration is one which is of importance in determining the title to property and not such a pedigree as is in question."

FRAUDULENT REGISTRATION OF TITLE.

329. Every one who, as principal or agent, in a proceeding to register title to real property, or in a transaction relating to real property that is or is proposed to be registered, knowingly and with intent to deceive,

- (a) makes a material false statement or representation,
- (b) suppresses or conceals from a judge or registrar or any per-

Section 329—*continued*

son employed by or assisting the registrar, any material document, fact, matter or information, or
 (c) is privy to anything mentioned in paragraph (a) or (b),
 is guilty of an indictable offence and is liable to imprisonment for five years.

FRAUDULENT SALE OF REAL PROPERTY.

330. Every one who, knowing of an unregistered prior sale or of an existing unregistered grant, mortgage, hypothec, privilege or encumbrance of or upon real property, fraudulently sells the property or any part thereof is guilty of an indictable offence and is liable to imprisonment for two years.

Ss.329 and 330 are the former ss.420 and 421. They were taken from C.S.L.C. 1860, c.13, ss.113 and 114 and appear in the *Larceny Act*, R.S.C. 1886, c.164, as ss.93 and 94, applying only to Quebec. They came into the Code of 1892 as ss.372 and 373, with general application.

The fine provided by s.421 is not specified but will still be possible under s.622(1), *post*.

S.421 was considered in *LAWRENCE v. R.*(1949), 9 C.R.5. It was held that the facts disclosed a sale, interpreting that word to mean a contract for the transfer of property from one person to another for valuable consideration. The following is quoted from the judgment of Barclay, J. (p.12):

"It is argued that s.421 of the Criminal Code is restricted to deeds susceptible of registration, and that since ex. P-1 is not susceptible of registration, the section does not apply to the present case. I do not accept that argument. There was a sale and that sale was not registered. But it could be registered by the signing of the deed which the accused undertook to sign. He cannot be heard to say that his refusal to sign is a bar to any prosecution under s.421.

Having come to this conclusion, the sole remaining question is whether the second sale made by the accused was made fraudulently. That was a question for the jury to decide and their verdict should not be interfered with by an appellate court unless manifestly erroneous."

RECEIPT INTENDED TO MISLEAD.—Using receipt.

331. Every one who wilfully

(a) with intent to mislead, injure or defraud any person, whether or not that person is known to him, gives to a person anything in writing that purports to be a receipt for or an acknowledgment of property that has been delivered to or received by him, before the property referred to in the purported receipt or acknowledgment has been delivered to or received by him, or

(b) accepts, transmits or uses a purported receipt or acknowledgment to which paragraph (a) applies,
 is guilty of an indictable offence and is liable to imprisonment for two years.

This is the former s.425 put in more general terms. It was s.376 in the Code of 1892. See notes following s.332.

OLD CODE:

420. Every one is guilty of an indictable offence and liable to three years' imprisonment who, acting either as principal or agent, in any proceeding to obtain the registration of any title to land or otherwise or in any transaction relating to land which is or is proposed to be, put on the register, knowingly and with intent to deceive makes or assists or joins in, or is privy to the making of, any material false statement or representation, or suppresses, conceals, assists or joins in, or is privy to the suppression, withholding or concealing from, any judge or registrar, or any person employed by or assisting the registrar, any material document, fact or matter or information.

421. Every one is guilty of an indictable offence and liable to one year's imprisonment and to a fine not exceeding two thousand dollars who, knowing the existence of any unregistered prior sale, grant, mortgage, hypothec, privilege or encumbrance of or upon any real property, fraudulently makes any subsequent sale of the same or of any part thereof.

425. Every one is guilty of an indictable offence and liable to three years' imprisonment, who,

(a) being the keeper of any warehouse, or a forwarder, miller, master of a vessel, wharfinger, keeper of a cove, yard, harbour or other place for storing timber, deals, staves, boards, or lumber, curer or packer of pork, or dealer in wool, carrier, factor, agent or other person, or a clerk or other person in his employ, knowingly and wilfully gives to any person a writing purporting to be a receipt for, or an acknowledgment of, any goods or other property as having been received into his warehouse, vessel, cove, wharf, or other place, or in any such place about which he is employed, or in any other manner received by him, or by the person in or about whose business he is employed, before the goods or other property named in such receipt, acknowledgment or writing have been actually delivered to or received by him as aforesaid, with intent to mislead, deceive, injure or defraud any person, although such person is then unknown to him; or
(b) knowingly and wilfully accepts, transmits or uses any such false receipt or acknowledgment or writing.

FRAUDULENT DISPOSAL OF GOODS ON WHICH MONEY ADVANCED.—
Aiding such disposal.—Saving.

332. (1) Every one who

(a) having shipped or delivered to the keeper of a warehouse or to a factor, agent or carrier, anything upon which the consignee thereof has advanced money or has given valuable security, thereafter, with intent to deceive, defraud or injure the consignee, disposes of it in a manner that is different from and inconsistent with any agreement that has been made in that behalf between him and the consignee, or

(b) knowingly and wilfully aids or assists any person to make a disposition of anything to which paragraph (a) applies for the purpose of deceiving, defrauding or injuring the consignee,

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

(2) No person is guilty of an offence under this section where, before disposing of anything in a manner that is different from and inconsistent with any agreement that has been made in that behalf between him and the consignee, he pays or tenders to the consignee

Section 332—*continued*

the full amount of money or valuable security that the consignee has advanced.

This is the former s.426. It was s.377 in the Code of 1892.

S.425 came from s.88 of the *Larceny Act* 1869 (Can.) and s.64 of the *Bank Act*, 1871. It became s.73 of the *Larceny Act*, R.S.C. 1886, c.164. S.426 came from s.88 of the *Larceny Act*, 1869. They are not in Imperial legislation, but, with particular reference to s.332, some analogy may be drawn from 5 & 6 Vict., c.39.

This was an Act to amend the law relating to advances *bona fide* made to agents entrusted with goods, *i.e.*, 6 Geo. IV, c.94, *An Act to alter and amend an act for the better protection of the property of merchants and others, who may hereafter enter into any contracts or agreements in relation to goods, wares or merchandise entrusted to factors or agents*. By this Act it was provided that factors or agents having goods in their possession should be deemed owners so as to give validity to contracts with persons dealing *bona fide* upon the faith of such property without notice on the part of the consignee that his consignor was only an agent. Another section provided that persons might contract with known agents *in the ordinary course of business* or out of that course if within the agent's authority, provided that such person did not have notice that the agent did not have authority to sell the goods or to receive the purchase money.

The preamble to 5 & 6 Vict., c.39 recites these provisions but says that:

"under the said Act and the present state of the law advances cannot safely be made upon goods or documents to persons known to have possession thereof as agents only," and that "whereas much litigation has arisen upon the construction of the said recited Act, and so much uncertainty exists in respect thereof that it is expedient to alter and amend the same and to put the law on a clear and certain basis."

S.4 went on to provide definitions and s.6 made it a misdemeanour for an agent to make consignments contrary to the instructions of his principal or to receive advances for his own use and benefit above any amount due from the principal to the agent, or for any clerk or other person to assist in so doing.

6 Geo. IV., c.94 and 5 & 6 Vict., c.39 were both repealed by the *Factors Act*, 1889, c.45.

See s.334 where a corporation is involved.

FRAUDULENT RECEIPTS UNDER BANK ACT.

333. Every one is guilty of an indictable offence and is liable to imprisonment for two years who

(a) wilfully makes a false statement in a receipt, certificate or acknowledgment for anything that may be used for a purpose mentioned in the *Bank Act*; or

(b) wilfully,

(i) after giving to another person,

(ii) after a person employed by him has, to his knowledge, given to another person, or

OLD CODE:

426. *Every one is guilty of an indictable offence and liable to three years' imprisonment, who,*

(a) *having, in his name, shipped or delivered to the keeper of any warehouse, or to any other factor, agent, or carrier, to be shipped or carried, any merchandise upon which the consignee has advanced any money or given any valuable security, afterwards, with intent to deceive, defraud or injure such consignee, in violation of good faith, and without the consent of such consignee, makes any disposition of such merchandise different from and inconsistent with the agreement made in that behalf between him and such consignee at the time when or before such money was so advanced or such security given; or*

(b) *knowingly and wilfully aids and assists in making such disposition for the purpose of deceiving, defrauding or injuring such consignee.*

(2) *No person commits an offence under this section who, before making such disposition of such merchandise, pays or tenders to the consignee the full amount of any advance made thereon.*

427. *Every one is guilty of an indictable offence and liable to three years' imprisonment, who*

(a) *wilfully makes any false statement in any receipt, certificate or acknowledgment for grain, timber or other goods or property which can be used for any purposes mentioned in the Bank Act; or*

(b) *having given, or after any clerk or person in his employ has, to his knowledge, given, as having been received by him in any mill, warehouse, vessel, cove or other place, any such receipt, certificate or acknowledgment for any such grain, timber or other goods or property, or having obtained any such receipt, certificate or acknowledgment, and after having endorsed or assigned it to any bank or person, afterwards, and without the consent of the holder or endorsee in writing, or the production and delivery of the receipt, certificate or acknowledgment, wilfully alienates or parts with, or does not deliver to such holder or owner of such receipt, certificate or acknowledgment, the grain, timber, goods or other property therein mentioned.*

(iii) after obtaining and endorsing or assigning to another person,

a receipt, certificate or acknowledgment for anything that may be used for a purpose mentioned in the *Bank Act*, without the consent in writing of the holder or endorsee or the production and delivery of the receipt, certificate or acknowledgment, alienates or parts with, or does not deliver to the holder or owner the property mentioned in the receipt, certificate or acknowledgment.

This is the former s.427. It was s.378 in the Code of 1892.

Par.(a) came from s.65 of the *Bank Act*, 1871. Par.(b) came from the *Bank Act*, 1868 and s.90 of the *Larceny Act*, 1869 (Can.).

The purposes of the *Bank Act*, especially the use of documents of title as security, are set out in ss.86-88 of the *Bank Act*, 1954. See s.2(1) (ac) of that Act for definition of "warehouse receipt" and ss.146-150 for offences in respect of warehouse receipts and bills of lading.

See s.334 where a corporation is involved.

SAVING.

334. Where an offence is committed under section 331, 332 or 333 by a person who acts in the name of a corporation, firm or partnership, no person other than the person who does the act by means of which the offence is committed or who is secretly privy to the doing of that act is guilty of the offence.

This is the former s.428. It was s.379 in the Code of 1892. It came from s.91 of the *Larceny Act*, 1869 (Can.), and s.66 of the *Bank Act*, 1871.

See notes to s.278, *ante*, and s.631(5), *post*, for further provisions and comment regarding the special sorts of agency dealt with in this group of sections.

DISPOSAL OF PROPERTY TO DEFRAUD CREDITORS.—Receiving.

335. Every one who,
 (a) with intent to defraud his creditors,
 (i) makes or causes to be made a gift, conveyance, assignment, sale, transfer or delivery of his property, or
 (ii) removes, conceals or disposes of any of his property; or
 (b) with intent that any one should defraud his creditors, receives any property by means of or in relation to which an offence has been committed under paragraph (a),
 is guilty of an indictable offence and is liable to imprisonment for two years.

This is the former s.417(a) and (b). They were s.368 in the Code of 1892, and R.S.C. 1886 c.173, s.28, a re-enactment of C.S.U.C. c.26, s.20.

In *R. v. BELL*(1929), 51 C.C.C.388, a conviction under this section was set aside on appeal for want of sufficient evidence that the creditors were accused's own, rather than those of a joint stock company of which he was an officer and manager. See also s.345 *post*.

FRAUD IN RELATION TO FARES, ETC.—Fraudulently obtain transportation.

336. (1) Every one whose duty it is to collect a fare, toll, ticket or admission who wilfully

- (a) fails to collect it,
- (b) collects less than the proper amount payable in respect thereof, or
- (c) accepts any valuable consideration for failing to collect it or for collecting less than the proper amount payable in respect thereof,

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

(2) Every one who gives or offers to a person whose duty it is to collect a fare, toll, ticket or admission fee, any valuable consideration

- (a) for failing to collect it, or
- (b) for collecting an amount less than the amount payable in respect thereof,

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

(3) Every one who, by any false pretence or fraud, unlawfully obtains transportation by land, water or air is guilty of an offence punishable on summary conviction.

OLD CODE:

428. *If any offence mentioned in any of three sections last preceding is committed by the doing of anything in the name of any firm, company or co-partnership of persons, the person by whom such thing is actually done, or who connives at the doing thereof, is alone guilty of the offence.*

417. *Every one is guilty of an indictable offence and liable to a fine of eight hundred dollars and to one year's imprisonment who,*

- (a) *with intent to defraud his creditors, or any of them,*
 - (i) *makes, or causes to be made any gift, conveyance, assignment, sale, transfer or delivery of his property, or*
 - (ii) *removes, conceals or disposes of any of his property; or*
- (b) *with the intent that any one shall so defraud his creditors, or any one of them, receives any such property; or*

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412. *Every one who, by means of any false ticket, badge or order, or of any other ticket, badge or order, fraudulently and unlawfully obtains or attempts to obtain any passage on any carriage, tramway or railway, or in any steam or other vessel, is guilty of an indictable offence and liable to six months' imprisonment.*

- (2) *Every one who,*
 - (a) *being an officer or employee whose duty it is to collect fares or tolls, wilfully neglects to collect any fare or tolls, or wilfully collects less than the proper amount, or accepts any valuable consideration for omitting to collect such fare or toll;*
 - (b) *gives or offers to give any such officer or employee any valuable consideration for not collecting such fare or toll or for collecting a less amount than is properly due;*

is guilty of an indictable offence and liable to two years' imprisonment or to a fine not exceeding two thousand five hundred dollars or to both imprisonment and fine.

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This is the former s.412(2) altered by the addition of subsec.(3), which is new, and by the reference to charges for admission.

It came into the Code as s.412A by 1920, c.43, s.9.

It was explained (Senate, 1920, p.714) that prosecutions of railway employees collecting fares and misappropriating the proceeds, had been taking place under the *Secret Commissions Act*, 1909 (see now s.368, *post*), under which the accused had no right to elect to be tried otherwise than summarily, and that the purpose of the amendment was to change that situation. S.773 was amended accordingly (See now s.467(c)(ix) *post*).

As to jurisdiction in such cases see ss.419 & 467, *post*.

Cases of the sort previously referred to which were decided prior to the amendment may be considered obsolete, but it may be noted that in one such case, *R. v. MARTIN*(1912), 19 C.C.C.376, an appeal from conviction for theft under s.355 (now s.276) was dismissed.

FRAUD BY HOLDER OF MINING LEASE.—Unlawful sale of substance containing precious metals.—Unlawful possession.—Seizure and forfeiture.

337. (1) Every one is guilty of an indictable offence and is liable to imprisonment for five years who

- (a) **being the holder of a lease or license issued**

Section 337—*continued*

- (i) under an Act relating to the mining of precious metals,
or
- (ii) by the owner of land that is supposed to contain precious metals,

by a fraudulent device or contrivance defrauds or attempts to defraud any person of any precious metals or money payable or reserved by the lease or licence, or fraudulently conceals or makes a false statement with respect to the amount of precious metals procured by him;

- (b) sells or purchases any rock, mineral, or other substance that contains precious metals or unsmelted, untreated, unmanufactured, or partly smelted, partly treated or partly manufactured precious metals, unless he establishes that he is the owner or agent of the owner or is acting under lawful authority; or

- (c) has in his possession or knowingly has upon his premises
 - (i) any rock or mineral of a value of twenty-five cents per pound or more,
 - (ii) any mica of a value of seven cents per pound or more, or
 - (iii) any precious metals,

that there is reasonable ground to believe have been stolen or have been dealt with contrary to this section, unless he establishes that he is lawfully in possession thereof.

(2) Where a person is convicted of an offence under this section, the court may order anything by means of or in relation to which the offence was committed, upon such conviction, to be forfeited to Her Majesty in right of the province in which the proceedings take place.

This is the former s.424(1) and (6). It was s.375 in the Code of 1892, being adapted there from R.S.C. 1886, c.164, ss.27, 28 and 29. In view of the great development of the mining industry the provisions relating to proclamation have been dropped, and the section will now apply throughout Canada.

See notes following s.339.

SEARCH FOR PRECIOUS METALS.—Power to seize.—Appeal.

338. (1) Where an information in writing is laid under oath before a justice by any person having an interest in a mining claim, that any precious metals or rock, mineral or other substance containing precious metals is unlawfully deposited in any place or held by any person contrary to law, the justice may issue a warrant to search any of the places or persons mentioned in the information.

(2) Where, upon search, anything mentioned in subsection (1) is found, it shall be seized and carried before the justice who shall order

- (a) that it be detained for the purposes of an inquiry or trial,
or
- (b) if it is not detained for the purposes of an inquiry or trial,
 - (i) that it be restored to the owner, or
 - (ii) that it be forfeited to Her Majesty in right of the province in which the proceedings take place if the owner cannot be ascertained.

OLD CODE:

424. (1) Every one is guilty of an indictable offence and liable to five years' imprisonment, who

(a) being the holder of any lease or license issued under the provisions of any Act relating to the mining of gold, silver, platinum or other precious metals, or by any persons owning land supposed to contain any gold, silver, platinum or other precious metals by fraudulent device or contrivance defrauds or attempts to defraud His Majesty, or any person, of any gold, silver, platinum or other precious metals, or money payable or reserved by such lease, or, with such intent as aforesaid conceals or makes a false statement as to the amount of gold, silver, platinum or other precious metals procured by him; or

(b) sells or purchases any rock, ore, mineral, stone, quartz or other substance containing gold, silver, platinum or other precious metals or any unsmelted or untreated or unmanufactured or partly smelted, partly treated or partly manufactured gold, silver, platinum or other precious metals, unless such purchaser or seller is one to which this section does not apply by virtue of the provisions of subsection three of this section; or

(c) having in his possession or upon his premises with his knowledge any rock, ore, mineral, stone or quartz of a value of not less than twenty-five cents per pound, or in the case of mica of a value of not less than seven cents per pound, or any gold, silver, platinum or other precious metals, bullion or any partly smelted or partly treated or partly manufactured gold, silver, platinum or other precious metals, which there is reasonable ground to suspect has been stolen or has been dealt with contrary to the provisions of this section, is unable or refuses to account satisfactorily for or prove his lawful right to the possession of the same.

(6) Upon the conviction of any person for a violation of any of the provisions of this section the court or justice may order all such rock, ore, mineral, stone, quartz, gold, silver, platinum or other precious metals, the subject matter of the prosecution, to be seized and forfeited to His Majesty the King in right of the province in which such prosecution takes place.

637. On complaint in writing made to any justice of the county, district or place, by any person interested in any mining claim, that mined gold or gold-bearing quartz, or mined or unmanufactured silver or silver ore, is unlawfully deposited in any place, or held by any person contrary to law, a general search warrant may be issued by such justice, as in the case of stolen goods, including any number of places or persons named in such complaint.

(2) If, upon search, any such gold or gold-bearing quartz or silver ore is found to be unlawfully deposited or held, the justice shall make such order for the restoration thereof to the lawful owner as he considers right.

(3) The decision of the justice in such case is subject to appeal as in ordinary cases coming within the provisions of Part XV.

(3) An appeal lies from an order made under paragraph (b) of subsection (2) in the manner in which an appeal lies in summary conviction proceedings under Part XXIV and the provisions of that Part relating to appeals apply to appeals under this subsection.

This is the former s.637, altered in wording to conform to s.337, and also by the requirement of a sworn information in writing. It was s.571

Section 338—*continued*

in the Code of 1892, being adapted there from the *Criminal Procedure Act*, R.S.C. 1886, c.174, s.53.

See notes following s.339.

SALTING MINE.—Salting sample.—Presumption.**339. (1) Every one who**

(a) adds anything to or removes anything from an existing or prospective mine, mining claim or oil well with a fraudulent intent to affect the result of an assay, test or valuation that has been made or is to be made with respect to the mine, mining claim or oil well, or

(b) adds anything to, removes anything from or tampers with a sample or material that has been taken or is being or is about to be taken from an existing or prospective mine, mining claim or oil well for the purpose of being assayed, tested or otherwise valued, with a fraudulent intent to affect the result of the assay, test or valuation,

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

(2) For the purposes of proceedings under subsection (1), evidence that

(a) something has been added to or removed from anything to which subsection (1) applies, or

(b) anything to which subsection (1) applies has been tampered with,

is *prima facie* evidence of a fraudulent intent to affect the result of an assay, test or valuation.

This is the former s.424A with the addition of "oil well", and with a considerable increase in the maximum penalty.

Ss.424, 424A and 637 may conveniently be dealt with together. They were designed to cope the better with the practices known as "high-grading" and "salting" which appear to have been the cause of great losses to the operators of mines.

S.424A was passed as 1938, c.44, s.23, as the result of requests made by the Deputy Attorney General of Quebec and the Ont. Securities Comm'n, the former request as a result of a prosecution in which the Rubec mine was concerned, in which recourse was had to the provisions of s.414(false prospectus). The latter request was made in consequence of the decision of a magistrate (*R. v. BARBER* (1910), 17 C.C.C.236), that certain provisions in the *Ontario Securities Act* dealing with frauds were *ultra vires* of the provincial legislature.

S.424 was amended by 1909, c.9, s.2, and by 1910, c.12, s.1, in effect principally to strike at the *receivers* of stolen ore. It was again amended in 1938 as the result of requests made by the Department of the Attorney General of Ontario, and others. The amendments in effect were as follows:

The penalty was raised from two years to five years.

The words "platinum or other precious metals" were inserted to cover materials in the platinum group.

OLD CODE:

424A. (1) Every one is guilty of an indictable offence and liable to two years' imprisonment who

(a) adds any ore, mineral or other substance to or removes any ore, mineral or other substance from any mine or mining claim or prospective mine or mining claim with the fraudulent intent to affect the result of any assay, test or valuation made or to be made respecting such mine or claim or prospective mine or claim;

(b) adds any ore, mineral or other substance to or removes any ore, mineral or other substance from or tampers with, any sample or material taken or being or about to be taken from any mine or mining claim or prospective mine or mining claim for the purpose of being assayed, tested or otherwise valued, with the fraudulent intent to affect the result of such assay, test or valuation.

(2) Proof of any such adding, removing or tampering shall be *prima facie* evidence of the fraudulent intent to affect the result of any such assay, test or valuation.

The onus of proof was put on the accused. This was declaratory and was in accord with the judgment in *R. v. FRESCO*(1933), 59 C.C.C.391.

The former provision that an information under s.424 must be laid by certain specified persons was repealed so that the information might be laid as in any other case. In *R. v. HERMAN*(1936), 66 C.C.C.129, a conviction had been quashed because the informant was not one of the persons enumerated.

Power was given to the court or justice to order that the subject matter of the prosecution be forfeited to His Majesty in the right of the province.

With regard to subsec.(5) of s.424, it may be noted that the section was proclaimed in force as follows:

In Ontario and Quebec by PC 976 dated 17th May, 1910.

In British Columbia by PC 2207 dated Sept.-Oct., 1932.

In Nova Scotia by PC 182 dated 26th January, 1938.

In Manitoba by PC 7517 dated September, 1944.

In the Yukon Territory by PC 9239 dated 12th September, 1944.

In connection with s.424 it is relevant to note that in allowing the appeal in *R. v. HERMAN*(1936), *supra*, Middleton, J.A. said:

"I would draw the attention of the Crown to section 397 of the Criminal Code which provides 'every one is guilty of an indictable offence and liable to two years' imprisonment, who for any fraudulent purpose, takes, obtains, removes or conceals anything capable of being stolen'. It seems to me that this section rather than 424 is the express section under which the prosecution should be had." (S.397 is now s.287.)

A charge under s.287 might still be justified.

FALSIFICATION OF BOOKS AND DOCUMENTS.

BY DESTRUCTION ETC.—To defraud creditors.

340. (1) Every one who, with intent to defraud,

(a) destroys, mutilates, alters, falsifies, or makes a false entry in, or

(b) omits a material particular from, or alters a material particular in,

Section 340—*continued*

a book, paper, writing, valuable security or document is guilty of an indictable offence and is liable to imprisonment for five years.

(2) Every one who, with intent to defraud his creditors, is privy to the commission of an offence under subsection (1) is guilty of an indictable offence and is liable to imprisonment for five years.

This is a combination of the former ss.413, 415, 418, 484 and 485, expressing in general terms the offences of destroying or falsifying records with intent to defraud.

S.413 was s.364 in the Code of 1892 and s.280 in the E.D.C. It came from R.S.C. 1886, c.164, s.8 (*Larceny Act*) and 24-25 Vict., c.96, s.83 (Imp.).

S.415 was s.366 in the Code of 1892 where it was described as new, and s.282 in the E.D.C. Its origin is given as 38-39 Vict., c.24.

S.418 was s.369 in the Code of 1892. It came from R.S.C. 1886, c.173, s.27 and C.S.U.C., c.26, s.19.

S.484 was s.440 in the Code of 1892, and s.353 in the E.D.C. It came from R.S.C. 1886, c.165, s.11, which was an adaptation of 24-25 Vict., c.98, s.5 (Imp.).

In *R. v. BLACKSTONE*(1887), 4 Man.L.R.296, an application to extradite a bank clerk on charges of forgery alleged to have been committed in Maine, this section was not referred to, but the facts indicated that if committed in Canada, they might have been covered by this section. It was held that where he had made false entries in books under his control to enable him to obtain money of the bank improperly, he was not guilty of forgery. "A simple lie, reduced to writing, is not necessarily forgery."

S.485 was s.441 in the Code of 1892, and s.354 in the E.D.C. It came from R.S.C. 1886, c.165, s.12, and 24-25 Vict., c.98, s.6 (Imp.).

In *CLARK v. MacWORTH*(1931), 55 C.C.C.268, ss.413 and 415 were considered. A conviction made upon a plea of guilty was set aside on the ground that in the absence of an allegation of fraud, a criminal offence cannot be held to have been committed.

See also *BERTHIAUME v. DU TREMBLAY*, [1945]R.L.N.S.486, as to duty of magistrate to discharge accused on preliminary hearing in the absence of evidence of intent to defraud.

In *REINBLATT v. R.*(1933), 61 C.C.C.1, the Supreme Court of Canada, dismissed an appeal from conviction under s.415(a), holding that the evidence, although circumstantial, was such that an inference of guilt might and could legally and properly be drawn from it.

In *R. v. YOUNG*, [1933]O.W.N.777, accused pleaded guilty, *inter alia*, to a charge under s.415(a) of mutilating the books of a municipality. His sentence was increased on appeal by the Crown, the Court remarking that "the law regards dishonesty, amounting as here to disloyalty, as a grave crime and it must be so treated."

In *R. v. CHAMANDY*, [1934]O.R.208, charges had been laid under s.413(b) and s.415(b). On appeal by the accused a new trial was ordered but the judgment turns upon procedure rather than upon an interpretation of the sections.

OLD CODE:

413. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being a director, manager, officer or member of any body corporate or company with intent to defraud,

(a) destroys, alters, mutilates or falsifies any book, paper, writing or valuable security belonging to the body corporate or company; or

(b) makes, or concurs in making, any false entry, or omits or concurs in omitting to enter any material particular, in any book of account or other document.

415. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being or acting in the capacity of an officer, clerk, or servant, with intent to defraud,

(a) destroys, alters, mutilates or falsifies any book, paper, writing, valuable security or document which belongs to or is in the possession of his employer, or has been received by him for on behalf of his employer, or concurs in the same being done; or

(b) makes, or concurs in making, any false entry in, or omits or alters, or concurs in omitting or altering, any material particular from or in, any such book, paper, writing, valuable security or document.

418. Every one is guilty of an indictable offence and liable to ten years' imprisonment who, with intent to defraud his creditors or any of them, destroys, alters, mutilates or falsifies any of his books, papers, writings or securities, or makes, or is privy to the making of, any false or fraudulent entry in any book of account or other document.

484. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, with intent to defraud,

(a) makes any untrue entry or any alteration in any book of account kept by the Government of Canada, or of any province of Canada, or by any bank for any such Government, in which books are kept the accounts of the owners of any stock, annuity or other public fund transferable for the time being in any such books, or who, in any manner, willfully falsifies any of the said books; or

(b) makes any transfer of any share or interest of or in any stock, annuity or public fund, transferable for the time being at any of the said banks, in the name of any person other than the owner of such share or interest.

485. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being in the employment of the Government of Canada, or of any province of Canada, or of any bank in which any books of account mentioned in the last preceding section are kept, with intent to defraud, makes out or delivers any dividend warrant, or any warrant for the payment of any annuity, interest or money payable at any of the said banks, for an amount greater or less than that to which the person on whose account such warrant is made out is entitled.

FALSE EMPLOYMENT RECORD.—Time clock.

341. Every one who, with intent to deceive, falsifies an employment record by any means, including the punching of a time clock, is guilty of an offence punishable on summary conviction.

This continues the former s.415A in part. That section was added to the Code by 1935, c.56, s.7 and was designed to aid the operation of the *Minimum Wages Act* passed in the same year. This is made clear by *R.*

Section 341—*continued*

v. LUPOVITCH(1938), 70 C.C.C.12. The *Minimum Wages Act* was declared invalid in *A.-G. CANADA v. A.-G. ONTARIO*, [1937]A.C.326, as being an encroachment upon the provincial field of legislation. However, it would seem proper to deal with this form of *deceit* as a matter of criminal law.

FALSE RETURN BY PUBLIC OFFICER.

342. Every one who, being entrusted with the receipt, custody or management of any part of the public revenues, knowingly furnishes a false statement or return of

(a) any sum of money collected by him or entrusted to his care, or

(b) any balance of money in his hands or under his control, is guilty of an indictable offence and is liable to imprisonment for five years.

This is the former s.416. It was s.367 in the Code of 1892. It was s.283 in the E.D.C., its origin being given as 50 Geo. III, c.59, s.2. There are no reported cases upon it.

See also ss.282 and 283, *ante*.

FALSE PROSPECTUS, ETC.—“Company.”

343. (1) Every one who makes, circulates or publishes a prospectus, statement or account, whether written or oral, that he knows is false in a material particular, with intent

(a) to induce persons, whether ascertained or not, to become shareholders or partners in a company,

(b) to deceive or defraud the members, shareholders or creditors, whether ascertained or not, of a company,

(c) to induce any person to entrust or advance anything to a company, or

(d) to enter into any security for the benefit of a company, is guilty of an indictable offence and is liable to imprisonment for ten years.

(2) In this section, “company” means a syndicate, body corporate or company, whether existing or proposed to be created.

This is the former s.414 as enacted by 1925, c.38, s.9, and amended by 1948, c.39, s.12. It comes from s.365 in the Code of 1892, and was adapted from the *Larceny Acts*, 24-25 Vict., c.96, s.84 (Imp.), 32-33 Vict., c.21, s.85 (Can.) and R.S.C. 1886, c.164, s.69.

The amendment of 1948 added the words “whether written or oral” and was said (Hansard, p.5189) to have been consequent upon the case of *R. v. MORGAN, DEMPSEY and DEMPSEY*, [1947]O.R.805, in which it was held that if the statements were made orally they did not constitute an offence. On this point see also *R. v. ANDERSON*(1924), 55 O.L.R.586.

The English *Prevention of Frauds (Investments) Act*, 1939, c.16, s.12 makes it an offence for any person:

“by any statement, promise or forecast, which he knows to be misleading, false or deceptive, or by any dishonest concealment of material facts, or by the reckless making of any statement, promise or forecast,

OLD CODE:

415A. Every one is guilty of an indictable offence and liable to two years imprisonment or to a fine not exceeding five thousand dollars, or to both such imprisonment and such fine who, knowingly:—

(b) falsifies any employment record with intent to deceive;

(c) punches any time clock with intent to deceive;

416. Every one is guilty of an indictable offence and liable to five years' imprisonment and to a fine not exceeding five hundred dollars, who, being an officer, collector or receiver, entrusted with the receipt, custody or management of any part of the public revenues, knowingly furnishes any false statement or return of any sum of money collected by him or entrusted to his care, or of any balance of money in his hands or under his control.

414. Every one is guilty of an indictable offence and liable to five years' imprisonment who, being a promoter, director, officer or manager of any body corporate or company, either existing or intended to be formed, makes, circulates, or publishes, or concurs in making, circulating or publishing any prospectus, statement or account, whether written or oral, which he knows to be false in any material particular, with intent to induce persons whether ascertained or not to become shareholders or partners, or with intent to deceive or defraud the members, shareholders or creditors, or any of them, whether ascertained or not, of such body corporate or company, or with intent to induce any person to entrust or advance any property to such body corporate or company, or to enter into any security for the benefit thereof.

which is misleading, false or deceptive, induces or attempts to induce another person to enter into or offer to enter into:

- (1) Any agreement for, or with a view to acquiring, disposing of, subscribing for or underwriting securities, or lending or depositing money to or with any industrial provident society or building society, etc.,
- (2) Any agreement the purpose or pretended purpose of which is to secure a profit to any of the parties from the yield of securities, or by reference to fluctuations in the value of securities."

A conspicuous English case is that of *R. v. LORD KYLSANT*, [1932] 1 K.B.442, in which accused was convicted on a charge of "making, circulating or publishing, or concurring in making, circulating or publishing a written statement—namely, a prospectus which he knew to be false in a material particular." Each statement in the prospectus, taken by itself, was quite true, but "the falsehood in this case consisted in putting before intending investors, as material on which they could exercise their judgment as to the position of the company, figures which apparently disclosed the existing position, but in fact hid it." It may be noted that the charge was laid under the *Larceny Act* of 1861, s.84, which reads as follows:

"Whosoever, being a director, manager or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating or publishing any written statement or account which he knows to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of

Section 343—continued

such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security thereof, shall be guilty of a misdemeanour."

The English legislation may be compared with this section with particular reference to the words "promise or forecast". However, in Canada, provincial legislation dealing with securities touches this subject. See *e.g.* the *Securities Act*, R.S.O. 1950, c.351, s.68.

The following Canadian cases are reported under s.414:

R. v. HARCOURT(1929), 52 C.C.C.342: This was an appeal from the conviction of a director of a mining company charged with unlawfully circulating false prospectuses, statements, etc., based on documents purporting to show the work done upon the ground and upon inferences therefrom. The accused was acquitted.

This case was followed in *R. v. BOWEN*(1930), 43 B.C.R.507, in which the prosecution was based principally upon the statement that the company which accused was promoting had acquired an old railway charter. The conviction was quashed on appeal.

R. v. JOHNSTON et al.(1931), 57 C.C.C.132: In this case it was held that the words "no bonds, no mortgages" in the prospectus of a building company, could be taken as meaning that its property was then free of bonds and mortgages, and that the accused were properly convicted.

R. v. McLEOD, [1941] S.C.R.288: Held, reversing the British Columbia Court of Appeal, that to show as an asset a balance which consisted largely of a loan was to make a statement "false in a material particular", within the meaning of s.414.

MARCHAND v. R.(1944), 82 C.C.C.138: This case turned upon false statements that the company had acquired machinery worth several thousand dollars, that a site had been acquired and that a plant was in course of construction, and resulted in a conviction under s.414.

See also ss.306 and 323-325 *ante*.

OBTAINING CARRIAGE BY FALSE BILLING.—Forfeiture.

344. (1) Every one who, by means of a false or misleading representation, knowingly obtains or attempts to obtain the carriage of anything by any person into a country, province, district or other place, whether or not within Canada, where the importation or transportation of it is, in the circumstances of the case, unlawful is guilty of an offence punishable on summary conviction.

(2) Where a person is convicted of an offence under subsection (1), anything by means of or in relation to which the offence was committed, upon such conviction, in addition to any punishment that is imposed, is forfeited to Her Majesty and shall be disposed of as the court may direct.

This is the former s.412(3) altered to apply to contraband generally and not to liquor only, as did the former provision.

It was added to the Code by 1925, c.38, s.7. It was at first proposed as an amendment to the *Railway Act* (Hansard, p.3541) to avoid interference with legitimate international trade, but was placed in the Code

OLD CODE:

412. (3) *Every one who by himself, his servant, agent or employee,*
 (a) *by means of false or misleading billing, classification or labelling, or any other false or misleading representation or statement of the contents of any car, vessel, package or consignment, or by concealment, or failure to proper bill or disclose the entire contents of any such car, vessel, package or consignment, or by giving, furnishing or using any false address or by any other means or device, whether with or without the consent or connivance of any servant, agent or employee of any railway, steamship or other transportation company, including any railway or steamship line owned or controlled directly or indirectly by the Crown, knowingly obtains or attempts to obtain the carriage or transportation by such company of any intoxicating liquor into any country, province, district or other place, whether within or without Canada, where the importation or transportation of such liquor is in the circumstances of the case contrary to law;*
 (b) *knowingly aids or assists in any manner whatsoever in the doing of any of the acts, matters or things mentioned in paragraph (a) of this subsection;*
is guilty of an offence and shall be liable on summary conviction to imprisonment without the option of fine for a term not less than thirty days nor exceeding twelve months, with or without hard labour; and all intoxicating liquor with respect to which any conviction has been had under this section and all cases, kegs, barrels, bottles, packages, or receptacles of any kind in which the same is or was contained shall upon conviction be forfeited and shall be disposed of for medical purposes or in such other manner as the Court may from time to time order.

(Hansard, p.4215) so that it would apply to the railways generally and not only to those within the purview of the *Railway Act*.

It appears in *Re LOW*, [1932]4 D.L.R.542, that the applicant had been prosecuted under this provision but mention of that prosecution occurred only incidentally in extradition proceedings.

TRADER FAILING TO KEEP ACCOUNTS.—Saving.

345. (1) Every one who, being a trader or in business,
 (a) **is indebted in an amount exceeding one thousand dollars,**
 (b) **is unable to pay his creditors in full, and**
 (c) **has not kept books of account that, in the ordinary course of the trade or business in which he is engaged, are necessary to exhibit or explain his transactions,**
is guilty of an indictable offence and is liable to imprisonment for two years.
 (2) **No person shall be convicted of an offence under this section**
 (a) **where, to the satisfaction of the court or judge, he**
 (i) **accounts for his losses, and**
 (ii) **shows that his failure to keep books was not intended to defraud his creditors; or**
 (b) **where his failure to keep books occurred at a time more than five years prior to the day on which he was unable to pay his creditors in full.**

This is the former s.417(c). It came into the Code by 1904, c.7, s.1, without the saving now expressed in subsec.(2). This was added by 1917, c.14, s.4, and was explained as follows (Hansard, 1917, p.4465):

Section 345—continued

"Mr. Doherty: The present section contains a provision just as it is here, save as regards the proviso that a man is not to be convicted if the period for which he failed to keep his books is more than five years anterior to the charge. The present section has been interpreted as providing that if at any time within the last five years he kept any books, he could not be convicted. What was in view under the old section, though it was unfortunately expressed, was that if he had at any time during the last five years failed to keep such books of account, he might be convicted. In view of the wording, it was interpreted to mean that only if, as a matter of fact, for the whole period of five years he kept no books he might be convicted. The proviso here carries out the intention that he is not to be convicted if his offence of not keeping books is more than five years old."

There are similar provisions in the *Bankruptcy Act* which was first enacted in 1919, but in order that there be a prosecution under that Act there must be a bankruptcy.

In *LIEBLING v. R.* (1932), 57 C.C.C.113, application was made to a Judge of the Supreme Court of Canada for leave to appeal on the ground that s.417(c) was in conflict with s.193 of the *Bankruptcy Act*. Leave to appeal was refused.

See also notes to s.335, *ante*, and *SIMCOVITCH v. R.* (1934), 63 C.C.C.70.

PERSONATION.**PERSONATION WITH INTENT.**

346. Every one who fraudulently personates any person, living or dead,

(a) with intent to gain advantage for himself or another person,

(b) with intent to obtain any property or an interest in any property, or

(c) with intent to cause disadvantage to the person whom he personates or another person,

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

This combines, in more general terms, the former ss.408 and 410. They were ss.456 and 458 in the Code of 1892. The corresponding sections in the E.D.C. were ss.359 and 360, which in turn were based upon 37, 38 Vict., c.36, s.1 (Imp.) and 24 & 25 Vict., c.98, s.3 (Imp.). Personation for the purpose of fraud was a misdemeanour at common law. See notes following s.348.

PERSONATION AT EXAMINATION.

347. Every one who falsely, with intent to gain advantage for himself or some other person, personates a candidate at a competitive or qualifying examination held under the authority of law or in connection with a university, college or school or who knowingly avails himself of the results of such personation is guilty of an offence punishable on summary conviction.

OLD CODE:

417. Every one is guilty of an indictable offence and liable to a fine of eight hundred dollars and to one year's imprisonment who,

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 (c) being a trader and indebted to an amount exceeding one thousand dollars, is unable to pay his creditors in full and has not kept books of account as, according to the usual course of trade or business in which he may have been engaged, are necessary to exhibit or explain his transactions, unless he be able to account for his losses to the satisfaction of the court or judge and to show that the absence of such books was not intended to defraud his creditors, but no person shall be prosecuted under the provisions of this paragraph by reason only of his having failed to keep such books of account at a period of more than five years before the date of such inability to pay his creditors.

408. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who, with intent fraudulently to obtain any property, personates any person, living or dead, or the administrator, wife, widow, next of kin or relation of any person.

410. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who falsely and deceitfully personates

(a) any owner of any share or interest of or in any stock, annuity or other public fund transferable in any book of account kept by the Government of Canada or of any province thereof, or by any bank for any such Government; or .

(b) any owner of any share or interest of or in the debt of any public body, or of or in the debt or capital stock of any body corporate, company or society; or

(c) any owner of any dividend, coupon, certificate or money payable in respect of any such share or interest as aforesaid; or

(d) any owner of any share or interest in any claim for a grant of land from the Crown, or for any scrip or other payment or allowance in lieu of such grant of land; or

(e) any person duly authorized by any power of attorney to transfer any such share or interest, or to receive any dividend, coupon, certificate or money on behalf of the person entitled thereto;

and thereby transfers or endeavours to transfer any share or interest belonging to such owner, or thereby obtains or endeavours to obtain, as if he were the true and lawful owner or were the person so authorized by such power of attorney, any money due to any such owner or payable to the person so authorized, or any certificate, coupon or share warrant, grant of land, or scrip, or allowance in lieu thereof, or other document which, by any law in force, or any usage existing at the time, is deliverable to the owner of any such stock or fund, or to the person authorized by any such power of attorney.

409. Every one is guilty of an indictable offence and liable on indictment or summary conviction, to one year's imprisonment, or to a fine of one hundred dollars, who falsely, with intent to gain some advantage for himself or some other person, personates a candidate at any competitive or qualifying examination, held under the authority of any law or statute, or in connection with any university or college, or who procures himself or any other person to be personated at any such examination, or who knowingly avails himself of the results of such personation.

Section 347—continued

This is the former s.409 altered to make the offence punishable on summary conviction only. It was s.457 in the Code of 1892, where it was new. See notes to next section.

ACKNOWLEDGING INSTRUMENT IN FALSE NAME.

348. Every one who, without lawful authority or excuse, the proof of which lies upon him, acknowledges in the name of another person before a court or a judge or other person authorized to receive the acknowledgment, a recognizance of bail, a confession of judgment, a consent to judgment or a judgment, deed or other instrument, is guilty of an indictable offence and is liable to imprisonment for five years.

This is the former s.411. It was s.459 in the Code of 1892 and s.361 in the E.D.C. It came from s.34 of the *Forgery Act*, 1861 (Imp.).

For other instances in which impersonation is made punishable by statute, see the *Canada Elections Act*, R.S.C., 1952, c.23, ss.48 and 68, the *Civil Service Act*, R.S.C., 1952, c.48, s.35, and the *Pension Act*, R.S.C., 1952, c.207, s.46.

In *R. v. LARTIE*(1916), 25 C.C.C.300, in which accused was charged with fraudulently obtaining another to impersonate him at a Civil Service examination, it was held that knowingly to benefit by such false representation was a continuing offence. It was held also that the accused might be prosecuted either under Code s.409 or under the *Civil Service Act*.

See also s.111, *ante*.

FORGERY OF TRADE MARKS AND TRADE DESCRIPTIONS.**SIMULATING TRADE MARK.—Falsifying trade mark.**

349. For the purposes of this Part, every one forges a trade mark who

- (a) without the consent of the proprietor of the trade mark, makes or reproduces in any manner that trade mark or a mark so nearly resembling it as to be calculated to deceive, or**
- (b) falsifies, in any manner, a genuine trade mark.**

This is the former s.486(1). It was s.445(1) in the Code of 1892, amended by 1931, c.28, s.7 by the insertion of the words "or reproduces in any manner".

By the operation of s.3(5) *ante*, the definition of "trade mark" in the *Trade Marks Act*, 1952-53, c.49, s.2(t) would apply. That Act was proclaimed in force on July 1st, 1954, and the definition is as follows:

- "(t) 'trade mark' means
 - (i) a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others,
 - (ii) a certification mark,
 - (iii) a distinguishing guise, or
 - (iv) a proposed trade mark;"

See notes following s.351.

OLD CODE:

411. *Every one is guilty of an indictable offence and liable to seven years' imprisonment who, without lawful authority or excuse, the proof of which shall lie on him, acknowledges, in the name of any other person, before any court, judge or other person lawfully authorized in that behalf, any recognizance of bail, or any cognovit actionem, or consent for judgment, or judgment or any deed or other instrument.*

486. (1) *Every one is deemed to forge a trade mark who either*
 (a) *without the assent of the proprietor of the trade mark makes or reproduces in any manner that trade mark or a mark so nearly resembling it as to be calculated to deceive; or*
 (b) *falsifies any genuine trade mark, whether by alteration, addition, effacement or otherwise.*
 (2) *Any trade mark or mark so made, or reproduced, or falsified is, in this Part, referred to as a forged trade mark.*

488. (1) *Every one is guilty of an indictable offence who, with intent to defraud,—*
 (a) *forges any trade mark; or*

487. *Every one is deemed to apply a trade mark, or mark, or trade description to goods who*
 (a) *applies it to the goods themselves; or*
 (b) *applies it to any covering, label, reel, or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade or manufacture; or*
 (c) *places, incloses or annexes any goods which are sold or exposed or had in possession for any purpose of sale, trade or manufacture in, with or to any covering, label, reel, or other thing to which a trade mark or mark or trade description has been applied; or*

FORGING TRADE MARK.

350. Every one commits an offence who, with intent to deceive or defraud the public or any person, whether ascertained or not, forges a trade mark.

This is the former s.488(1)(a). It was s.447(1)(a) in the Code of 1892. The earlier legislation did not contain the words "to deceive or".

See notes following s.351.

PASSING OFF.

351. Every one commits an offence who, with intent to deceive or defraud the public or any person, whether ascertained or not,

- (a) **passes off other wares or services as and for those ordered or required, or**
- (b) **makes use, in association with wares or services, of any description that is false in a material respect as to**
 - (i) **the kind, quality, quantity or composition,**
 - (ii) **the geographical origin, or**
 - (ii) **the mode of the manufacture, production or performance of such wares or services.**

Section 351—*continued*

This is new and replaces the former ss.487 and 488 (in part).

The provisions in s.486 and following sections of the former Code were passed originally as parts of the *Fraudulent Marks on Merchandise Act*, 1888, which in their turn were taken from the *Fraudulent Marks Act*, 1887 (Imp.). They were the result of international conventions held in 1883 and 1886.

There has been some opinion that legislation in this sense should not be in the *Criminal Code* at all and that civil remedies by way of injunction and damages are more effective ways of dealing with the trade practices at which it is aimed. It is true that those who have trade marks and similar industrial property to protect often resort to civil action. In this connection it may be pointed out that the opening words of Kerly on Trade Marks, 7th ed., 1951, are as follows:

"The foundation upon which the law relating to trade marks and trade names developed is that the deception of the public by the offer for sale of goods as possessing some connection with a particular trader which they do not in fact possess, is a wrong in respect of which the trader has a cause of action against any person who is the author of it, or is responsible for, the deception."

For this purpose, however, intent to defraud is not an essential; it is enough if there is similarity likely to create confusion.

The new section adopts the view that the public generally is as much entitled to be protected against such fraudulent trade practices as against any other form of fraud, but that only the use of methods intended to deceive or defraud should be criminal. It is adapted from s.7 of the *Trade Marks Act* which reads as follows:

- "7. No person shall
- (a) make a false or misleading statement tending to discredit the business, wares or services of a competitor;
 - (b) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another;
 - (c) pass off other wares or services as and for those ordered or requested;
 - (d) make use, in association with wares or services, of any description that is false in a material respect and likely to mislead the public as to
 - (i) the character, quality, quantity or composition,
 - (ii) the geographical origin, or
 - (iii) the mode of the manufacture, production or performance of such wares or services; or
 - (e) do any other act or adopt any other business practice contrary to honest industrial or commercial usage in Canada."

The Act does not provide a penalty for a breach of this section, but it is highly probable that s.107 of the *Criminal Code* would apply so as to make it punishable as a criminal act in the absence of some such provision as is contained in s.351. In this connection it is useful to refer to

OLD CODE:*Section 487—continued*

(d) uses a trade mark or mark or trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade mark or mark or trade description.

(2) A trade mark or mark or trade description is deemed to be applied whether it is woven, impressed or otherwise worked into, or annexed or affixed to, the goods, or to any covering, label, reel, or other thing.

(3) Every one is deemed to falsely apply to goods a trade mark or mark who, without the assent of the proprietor of the trade mark, applies such trade mark, or a mark so nearly resembling it as to be calculated to deceive.

488. (1) (b) knowingly and without the assent of the proprietor of the trade mark applies to any goods any trade mark, or any mark so nearly resembling a trade mark as to be calculated to deceive; or

(c) makes any die, block, machine or other instrument, for the purpose of forging, or being used for forging, a trade mark; or

(d) applies any false trade description to goods; or,

(e) disposes of, or has in his possession any forged trade mark, or any die, block, machine, or other instrument, for the purpose of forging a trade mark; or

(f) causes or is knowingly a party to any such things.

(2) On any prosecution under this section, the burden of proof of the assent of the proprietor shall lie on the defendant.

the following quotation from *PEGGY SAGE v. SIEGEL KAHN CO.*, [1935]S.C.R.539 at p.549:

"But even if the respondent did not intend to deceive, and if actual deception has not been proven, the registration should be expunged, if, in the opinion of the court, it is calculated to deceive, which does not mean 'capable of being used to deceive', but that, by its resemblance to the appellants', it is likely to deceive the public in the course of its legitimate use in the trade." [italics added].

In this connection see also editorial note to *R. v. THERMO-SEAL INSULATION LTD.*(1951), 102 C.C.C.68.

It is submitted that from the point of view of criminal law, the essence of the offence lies in the preparation of goods in such a way as deliberately to deceive an intending purchaser into believing that the goods he is getting are other than what they really are. The methods used may be infinite and the particular method is not material. From this point of view, the existence of a registered trade mark is merely incidental, if not indeed quite irrelevant.

In *DAVIS v. KENNEDY*(1867), 13 Gr.523 at p.537, the following appears:

"I have not thought it necessary to go through the cases on the law of trade marks, which is now well understood: the application of it to particular cases is the difficulty. I will refer only to the language of Lord Cranworth in *FARINA v. SILVERLOCK*(1855), 6 DeG. M. & G. 214, it is peculiarly apposite to the case before me, 'Judges may occasionally have erred in the application of the law to particular facts, but I apprehend that the law is perfectly clear, that any one who has adopted a particular mode of designating his particular manufacture, has a right to say, not that other persons shall not sell exactly the

Section 351—continued

same article, better or worse, or an article looking exactly like it, but that they shall not sell it in such a way as to steal (so to call it) his trade mark, and make purchasers believe that it is the manufacture to which that trade mark was originally applied.'

The practice of appropriating the trade marks of others has been reprobated by various Judges, and I have no doubt that Lord Cranworth used the word 'steal' to mark his sense of its gross impropriety."

See also s.355 (punishment and forfeiture).

INSTRUMENTS FOR FORGING TRADE MARK.—Saving.

352. (1) Every one commits an offence who makes, has in his possession or disposes of a die, block, machine or other instrument, designed or intended to be used in forging a trade mark.

(2) No person shall be convicted of an offence under this section where he proves that he acted in good faith in the ordinary course of his business or employment.

Subsec.(1) comes from the former s.488(1)(e). Subsec.(2) preserves in general terms the defence provided by the former s.494. See notes to s.349 and s.355 (punishment and forfeiture).

DEFACING TRADE MARK.—Using bottles bearing trade mark of another.

353. Every one commits an offence who, with intent to deceive or defraud,

(a) defaces, conceals or removes a trade mark or the name of another person from anything without the consent of that other person, or

(b) being a manufacturer, dealer, trader or bottler fills any bottle or siphon that bears the trade mark or name of another person, without the consent of that other person, with a beverage, milk, by-product of milk or other liquid commodity for the purpose of sale or traffic.

Par.(a) is the former s.490(1)(a) re-drawn. S.449 in the Code of 1892, which was based upon 1888, c.41, s.7 referred to the sale or traffic in bottles marked with a trade mark. It was replaced by 63-64 Vict., c.46.

Par.(b) comes from the former s.490(1)(b) as enacted by 1938, c.44, s.28, by which milk and by-products of milk were added to the earlier provision. This amendment resulted from *R. v. ROUSE*(1936), 66 C.C.C. 225, in which it was held that milk is not a beverage.

Under the former section, it was held in *R. v. COULOMBE*(1912), 20 C.C.C.31, that criminal intent was not necessary to constitute an offence under what is now s.353(b). This, however, is changed by the new section, which requires an intent to defraud.

See also s.355 (punishment and forfeiture).

USED GOODS SOLD WITHOUT DISCLOSURE.

354. Every one commits an offence who sells, exposes or has in his possession for sale, or advertises for sale, goods that have been used, reconditioned or remade and that bear the trade mark or the trade name of another person, without making full disclosure that

OLD CODE:

494. Any one who is charged with making any die, block, machine or other instrument for the purpose of forging, or being for forging, a trade mark, or with falsely applying to goods any trade mark, or any mark, so nearly resembling a trade mark as to be calculated to deceive, or with applying to goods any false trade description, or causing any of the things in this section mentioned to be done, and proves

(a) that in the ordinary course of his business he is employed, on behalf of other persons, to make dies, blocks, machines or other instruments for making or being used in making trade marks, or, as the case may be, to apply marks or descriptions to goods, and that in the case which is the subject of the charge he was so employed by some person resident in Canada, and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and

(b) that he took reasonable precaution against committing the offence charged; and

(c) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark or trade description; and

(d) that he gave to the prosecutor all the information in his power with respect to the person by or on whose behalf the trade mark, mark or description was applied;

shall be discharged from the prosecution but is liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence.

490. Every one is guilty of an indictable offence who

(a) wilfully defaces, conceals or removes the trade mark duly registered, or name of another person upon any cask, keg, bottle, siphon, vessel, can, case or other package, unless such cask, keg, bottle, siphon, vessel, can, case or other package has been purchased from such other person, if the same shall have been so defaced, concealed or removed without the consent of, and with intention to defraud such other person;

(b) being a manufacturer, dealer or trader, or bottler, trades or traffics in any bottle or siphon which has upon it the trade mark duly registered or name of another person, without the written consent of such other person or without such consent fills such bottle or siphon with any beverage, milk, by-products of milk or other liquid commodities, for the purpose of sale or traffic.

(2) The using by any manufacturer, dealer or trader or bottler, other than such other person, of any bottle or siphon for the sale therein of any beverage, milk, by-products of milk or other liquid commodities, or the having by any such manufacturer, dealer, trader or bottler upon any bottle or siphon such trade mark or name of such other person, or the buying, selling or trafficking in any such bottle or siphon without such written consent of such other person, or the fact that any junk dealer has in his possession any bottle or siphon having upon it such trade mark or name without such written consent, shall be prima facie evidence of trading or trafficking within the meaning of paragraph (b) of this section.

the goods have been reconditioned, rebuilt or remade for sale and that they are not then in the condition in which they were originally made or produced.

Section 354—continued

This is the former s.490A. It was brought into the Code by 1934, c.47, s.11.

See also s.355 (punishment and forfeiture).

PUNISHMENT.—Forfeiture.

355. (1) Every one who commits an offence under section 350, 351, 352, 353 or 354 is guilty of

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

(b) an offence punishable on summary conviction.

(2) Anything by means of or in relation to which a person commits an offence under section 350, 351, 352, 353 or 354 is, unless the court otherwise orders, forfeited upon the conviction of that person for that offence.

Subsec.(1) is the former s.491(1) with some consequential change in the penalty on summary conviction, and without reference to subsequent offences.

Subsec.(2) combines provisions appearing in the former ss.491(2), 635(1) and 1039. The first two mentioned were ss.450 and 569 in the Code of 1892, and all were based upon 1888, c.41. In this subsection the words "unless the court otherwise orders" are new. There might be a case in which it would be unfair to forfeit goods, *e.g.*, where they had been purchased by an innocent customer who was not aware that an offence was being committed and who was not dissatisfied with his purchase. As to compensation, see s.628(1), *post*.

Note that a limitation of three years for the prosecution of these trade mark offences, formerly appearing in s.1140(1)(a)(iii), is not continued.

FALSELY CLAIMING ROYAL WARRANT.

356. Every one who falsely represents that goods are made by a person holding a royal warrant, or for the service of Her Majesty, a member of the Royal Family or a public department is guilty of an offence punishable on summary conviction.

This is the former s.492 without the reference to the United Kingdom. It was s.451 in the Code of 1892 and s.21 in the Canadian Act 1881, c.41.

PRESUMPTION FROM PORT OF SHIPMENT.

357. Where, in proceedings under this Part, the alleged offence relates to imported goods, evidence that the goods were shipped to Canada from a place outside of Canada is *prima facie* evidence that the goods were made or produced in the country from which they were shipped.

This is the former s.992. It was s.710(1) in the Code of 1892, and s.13 in 1881, c.41.

It might be thought that provisions of this sort would be more appropriately placed in the *Evidence Act*, but it may be remembered that the *Criminal Code* anticipated the *Canada Evidence Act* which was not

OLD CODE:

490A. Every one is guilty of an indictable offence who sells, exposes or has in his possession for sale, or who advertises for sale any goods or things which have been used, reconditioned, rebuilt or remade, and which bear the duly registered trade mark or the trade name of any other person who owns or is entitled to use such trade mark or trade name, unless full disclosure is made that such goods or things have been so used, reconditioned, rebuilt or remade for sale, and that they are not then in the condition in which they were originally made or produced.

491. Every one guilty of an offence defined in this Part in respect to trade marks or names, or in respect to trade descriptions or false trade descriptions for which no penalty is in this Part otherwise provided, is liable,

(a) on conviction on indictment, to two years' imprisonment, with or without hard labour, or to a fine, or to both imprisonment and fine; and

(b) on summary conviction, to four months' imprisonment, with or without hard labour, or to a fine not exceeding one hundred dollars; and, in case of a second or subsequent conviction, to six months' imprisonment, with or without hard labour, or to a fine not exceeding two hundred and fifty dollars.

(2) In any case, every chattel, article, instrument or thing, by means of, or in relation to which, the offence has been committed shall be forfeited.

635. If goods or things by means of which it is suspected that an offence has been committed against any provision of Part VII, relating to forgery of trade marks and fraudulent marking of merchandise, are seized under a search warrant, and brought before a justice, such justice and one or more other justice or justices shall determine summarily whether the same are or are not forfeited under the said Part.

(2) If the owner of any goods or things which, if the owner thereof had been convicted, would be forfeited under this Act, is unknown or cannot be found, an information of complaint may be laid for the purpose only of enforcing such forfeiture, and the said justice may cause notice to be advertised stating that unless cause is shown to the contrary at the time and place named in the notice, such goods or things will be declared forfeited.

(3) At such time and place the justice, unless the owner, or some person on his behalf, or other person interested in the goods or things, shows cause to the contrary may declare such goods or things, or any of them, forfeited.

1039. Any goods or things forfeited under any provision of Part VII relating to forgery of trade marks and fraudulent marking of merchandise, may be destroyed or otherwise disposed of in such manner as the court, by which the same are declared forfeited, directs; and the court may, out of any proceeds realized by the disposition of such goods, after all trade marks and trade descriptions are obliterated, award to any innocent party any loss he may have innocently sustained in dealing with such goods.

492. Every one is guilty of an offence and liable on summary conviction, to a penalty not exceeding one hundred dollars, who falsely represents that any goods are made by a person holding a royal warrant, or for the service of His Majesty or any of the royal family, or any government department of the United Kingdom or of Canada.

992. In any prosecution, proceeding or trial for any offence under Part VII relating to fraudulent marks on merchandise, if the offence relates to imported goods,

Section 357—continued

passed until 1893. At all events, this provision, designed to facilitate proof of a limited class of offences, is most conveniently placed with the sections that deal with those offences.

WRECK.

SECRETING WRECK.—Receiving wreck.—Offering wreck for sale.—Keeping wreck.—Boarding wrecked vessel.

358. Every one who

- (a) secretes wreck, or defaces or obliterates the marks on wreck, or uses any means to disguise or conceal the fact that anything is wreck, or in any manner conceals the character of wreck, from a person who is entitled to inquire into the wreck,
- (b) receives wreck, knowing that it is wreck, from a person other than the owner thereof or a receiver of wreck, and does not within forty-eight hours thereafter inform the receiver of wreck thereof,
- (c) offers wreck for sale or otherwise deals with it, knowing that it is wreck, and not having a lawful authority to sell or deal with it,
- (d) keeps wreck in his possession knowing that it is wreck, without lawful authority to keep it, for any time longer than the time reasonably necessary to deliver it to the receiver of wreck, or
- (e) boards, against the will of the master, a vessel that is wrecked, stranded or in distress unless he is a receiver of wreck or a person acting under orders of a receiver of wreck,

is guilty of

- (f) an indictable offence and is liable to imprisonment for two years, or
- (g) an offence punishable on summary conviction.

This is the former s.130. It was s.381 in the Code of 1892 and came from R.S.C. 1886, c.81, s.37. "Wreck" is defined in s.2(43) *ante*.

The appointment of receivers of wrecks is provided for by s.497 of the *Canada Shipping Act*, R.S.C. 1952, c.29.

PUBLIC STORES.

DISTINGUISHING MARK ON PUBLIC STORES.

359. The Governor-in-Council may, by notice to be published in the *Canada Gazette*, prescribe distinguishing marks that are appropriated for use on public stores to denote the property of Her Majesty therein, whether the stores belong to Her Majesty in right of Canada or to Her Majesty in any other right.

This is the former s.432 as enacted by 1951, c.47, s.17. By that section and s.23 of the same Act, new sections replaced ss.432 to 440 and s.991 of the Code. The earlier sections specified the broad arrow and other distinguishing marks for use on public stores. The new provisions in general were consequential upon the passing of the *National Defence Act*.

*OLD CODE:**Section 992—continued*

evidence of the port of shipment shall be prima facie evidence of the place or country in which the goods were made or produced.

430. Every one who

(a) secretes any wreck, or defaces or obliterates the marks thereon, or uses means to disguise the fact that it is wreck, or in any manner conceals the character thereof, or the fact that the same is wreck, from any person entitled to inquire into the same; or

(b) receives any wreck, knowing the same to be wreck, from any person other than the owner thereof or the receiver of wrecks, and does not within forty-eight hours inform the receiver thereof; or

(c) offers for sale or otherwise deals with any wreck, knowing it to be wreck, not having a lawful title to sell or deal with the same; or

(d) keeps in his possession any wreck knowing it to be wreck, without a lawful title so to keep the same, for any time longer than the time reasonably necessary for the delivery of the same to the receiver; or

(e) boards any vessel which is wrecked, stranded or in distress against the will of the master, unless the person so boarding is, or acts by command of the receiver; is guilty of an offence punishable on indictment with two years' imprisonment, and on summary conviction before two justices with a penalty of four hundred dollars or six months' imprisonment with or without hard labour.

432. The Governor in Council may, by notice to be published in the Canada Gazette, prescribe distinguishing marks that are appropriate for use on public stores to denote the property of His Majesty therein, whether the stores belong to His Majesty in right of Canada or to His Majesty in any other right.

The earlier legislation was contained in ss.384 to 392 and 709 of the Code of 1892, and came from the *Public Stores Act*, 38 & 39 Vict., c.25 (Imp.).

See also s.360 (applying or removing marks).

APPLYING OR REMOVING MARKS WITHOUT AUTHORITY. — Unlawful transactions in public stores.—“Distinguishing mark.”

360. (1) Every one who,

(a) without lawful authority, the proof of which lies upon him, applies a distinguishing mark to anything, or

(b) with intent to conceal the property of Her Majesty in public stores, removes, destroys or obliterates, in whole or in part, a distinguishing mark,

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

(2) Every one who, without lawful authority, the proof of which lies upon him, receives, possesses, keeps, sells or delivers public stores that he knows bear a distinguishing mark is guilty of

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

(b) an offence punishable on summary conviction.

(3) For the purposes of this section, “distinguishing mark” means a distinguishing mark that is appropriated for use on public stores pursuant to section 359.

Section 360—continued

This is the former s.433 as enacted by 1951, c.47, s.17. See notes to ss.359 and 361, and also s.364 (evidence of enlistment).

SELLING DEFECTIVE STORES TO HER MAJESTY.—Offences by officers and employees of corporations.

361. (1) Every one who knowingly sells or delivers defective stores to Her Majesty or commits fraud in connection with the sale, lease or delivery of stores to Her Majesty or the manufacture of stores for Her Majesty is guilty of an indictable offence and is liable to imprisonment for fourteen years.

(2) Every one who, being a director, officer, agent or employee of a corporation that commits, by fraud, an offence under subsection (1),

(a) knowingly takes part in the fraud, or

(b) knows or has reason to suspect that the fraud is being committed or has been or is about to be committed and does not inform the responsible government, or a department thereof, of Her Majesty,

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

This is the former s.434(1) and (2) as enacted by 1951, c.47, s.17. Subsec.(3) which declared certain disabilities consequent upon conviction, has been placed in s.654(4), *post*.

In *R. v. ROLLINGS*(1918), 31 C.C.C.31, it was held that the dishonest application of a government inspector's mark to military stores being manufactured for the government, to indicate that they had passed inspection, whereas they had not in fact been passed, was an indictable offence under the former s.406 (false pretences). Such a case would appear to be covered now by s.360(1)(a).

It was held, too, that two classes of offences were created, the first dealing with the sale and delivery of defective military stores, the second with acts of dishonesty, fraud, or deception in connection with their manufacture, sale, lease, or purchase. These rulings would be equally applicable to s.361.

See also s.364 (evidence of enlistment).

UNLAWFUL USE OF MILITARY UNIFORMS OR CERTIFICATES.

362. Every one who without lawful authority, the proof of which lies upon him,

(a) wears a uniform of the Canadian Forces or any other naval, army or air force or a uniform that is so similar to the uniform of any of those forces that it is likely to be mistaken therefor,

(b) wears a distinctive mark relating to wounds received or service performed in war, or a military medal, ribbon, badge, chevron or any decoration or order that is awarded for war services, or any imitation thereof, or any mark or device or thing that is likely to be mistaken for any such mark, medal, ribbon, badge, chevron, decoration or order,

OLD CODE:

433. (1) Every one is guilty of an indictable offence and liable to imprisonment for two years who,

(a) without lawful authority, the proof of which lies upon him, applies a distinguishing mark to anything; or

(b) with intent to conceal the property of His Majesty in public stores, removes, destroys or obliterates, in whole or in part, a distinguishing mark.

(2) Every one who, without lawful authority, the proof of which lies upon him, receives, possesses, keeps, sells or delivers public stores that he knows bear a distinguishing mark is guilty of an offence and liable

(a) upon conviction under indictment, to imprisonment for one year; or

(b) on summary conviction, to a fine not exceeding five hundred dollars or to imprisonment for six months or to both fine and imprisonment.

(3) For the purposes of this section, "distinguishing mark" means a distinguishing mark that is appropriated for use on public stores pursuant to section four hundred and thirty-two.

434. (1) Every one who knowingly sells or delivers defective stores to His Majesty or commits fraud in connection with the sale, lease or delivery of stores to His Majesty or the manufacture of stores for His Majesty is guilty of an indictable offence and liable to a fine not exceeding fifty thousand dollars or to imprisonment for fourteen years or to both fine and imprisonment.

(2) A director, officer, agent or employee of a corporation that commits, by fraud, an offence under subsection one is guilty of an indictable offence and is liable, upon conviction, to the punishment authorized by subsection one, if the director, officer, agent or employee

(a) knowingly takes part in the fraud; or

(b) knows or has reason to suspect that the fraud is being committed or has been or is about to be committed

without informing the responsible government, or a department thereof of His Majesty.

(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.

435. Every one who without lawful authority, the proof of which lies upon him, (a) wears a uniform of the Canadian Forces or any other naval, army or air force or a uniform that is so similar to the uniform of any of those forces that it is likely to be mistaken therefor;

(b) wears a distinctive mark relating to wounds received or service performed in war, or a military medal, ribbon, badge, chevron or any decoration or order that is awarded for war services, or any imitation thereof, or any mark or device or thing that is likely to be mistaken for any such mark, medal ribbon, badge, chevron, decoration or order;

(c) has in his possession a certificate of discharge or statement of service from the Canadian Forces or any other naval, army or air force that has not been issued to and does not belong to him; or

(d) has in his possession a commission or warrant or a certificate of discharge or statement of service issued to an officer or person in or who has been in the Canadian Forces or any other naval, army or air force, that contains any alteration that is not verified by the initials of the officer who issued it, or by the initials of some officer thereto lawfully authorized,

Section 362—*continued*

(c) has in his possession a certificate of discharge, certificate of release, statement of service or identity card from the Canadian Forces or any other naval, army or air force that has not been issued to and does not belong to him, or

(d) has in his possession a commission or warrant or a certificate of discharge, certificate of release, statement of service or identity card issued to an officer or person in or who has been in the Canadian Forces or any other naval, army or air force, that contains any alteration that is not verified by the initials of the officer who issued it, or by the initials of some officer thereto lawfully authorized,

is guilty of an offence punishable on summary conviction.

This is the former s.435 as enacted by 1951, c.47, s.17, with the addition of the words "certificate of release", and "identity card" in clauses (c) and (d).

See also s.364 (evidence of enlistment).

MILITARY STORES.—Exception.

363. (1) Every one who buys, receives or detains from a member of the Canadian Forces or a deserter or absentee without leave from those forces any military stores that are owned by Her Majesty or for which the member, deserter or absentee without leave is accountable to Her Majesty is guilty of

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

(b) an offence punishable on summary conviction.

(2) No person shall be convicted of an offence under this section where he establishes that he did not know and had no reason to suspect that the military stores in respect of which the offence was committed were owned by Her Majesty or were military stores for which the member, deserter or absentee without leave was accountable to Her Majesty.

Subsec.(1) is the former s.436 as enacted by 1951, c.47, s.17.

Subsec.(2) is new.

Under s.439 as it stood before 1951 it was held in *R. v. JOBIDON* (1942), 78 C.C.C.147, that to purchase provisions from a soldier who had no authority to sell them was an offence irrespective of the existence of criminal intent.

The new subsec.(2) creates a defence in recognition of the fact that surplus materials are sometimes disposed of and may come into a purchaser's hands legitimately. See, however, the presumption in s.364(2).

See also s.364 (evidence of enlistment).

EVIDENCE OF ENLISTMENT.—Presumption when accused a dealer in stores.

364. (1) In proceedings under sections 360 to 363, evidence that a person was at any time performing duties in the Canadian Forces is *prima facie* evidence that his enrolment in the Canadian Forces prior to that time was regular.

*OLD CODE:**Section 435—continued*

is guilty of an offence and liable on summary conviction to a fine not exceeding five hundred dollars or to imprisonment for six months or to both fine and imprisonment.

438. Every person shall be liable on summary conviction to a penalty not exceeding three hundred dollars or to imprisonment for any term not exceeding twelve months or to both fine and imprisonment who without lawful authority

(a) wears any uniform of any of His Majesty's naval, land or air forces, or any uniform which is so similar to the uniform of any of the said forces as to be likely to be mistaken therefor;

(b) wears any distinctive mark relating to wounds received or service performed in war, or any military medal, ribbon, badge, chevron or any decoration or order that is awarded for war services, or any imitation thereof, or any mark or device or thing likely to be mistaken for any such mark, medal, ribbon, badge, chevron, decoration or order;

(c) has in his possession any certificate of discharge or statement of service from any of His Majesty's naval, land or air forces not issued to and belonging to such person; or

(d) has in his possession any commission or warrant or any certificate of discharge or statement of service issued to any officer or person in, or who has been in, any of His Majesty's naval, land or air forces, which contains any alteration that is not verified by the initials of the officer issuing the same, or by the initials of some officer thereto lawfully authorized.

(2) In any prosecution under this section in which it is proved that the accused has worn a uniform, mark, medal, ribbon, badge, chevron, decoration or order aforesaid, or without lawful excuse has in his possession any certificate or statement aforesaid, he shall be deemed to have worn or had the same in his possession without lawful authority, unless he proves that he had such authority.

436. Every one who buys, receives or detains from a member of the Canadian Forces or a deserter or absentee without leave from those forces any military stores that are owned by His Majesty or for which the member, deserter or absentee without leave is accountable to His Majesty is guilty of an offence and liable

(a) upon conviction under indictment, to imprisonment for five years; or

(b) on summary conviction, to a fine not exceeding five hundred dollars or to imprisonment for six months or to both fine and imprisonment.

439. (1) Every one who

(a) buys, exchanges or detains, or otherwise receives from any soldier, airman, militiaman or deserter any arms, clothing or furniture belonging to His Majesty, or any such articles belonging to any soldier, airman, militiaman or deserter as are generally deemed regimental or unit necessaries according to the custom of the army or air force; or

(b) causes the colour of such clothing or articles to be changed; or

(c) exchanges, buys or receives from any soldier, airman or militiaman, any provisions, without leave in writing from the officer commanding the unit or detachment to which such soldier or airman belongs;

is guilty of an offence punishable on indictment or on summary conviction, and liable on conviction on indictment to five years' imprisonment, and on summary conviction before two justices to a penalty not exceeding forty dollars, and not

Section 364—*continued*

(2) An accused who is charged with an offence under subsection (2) of section 360 shall be presumed to have known that the stores in respect of which the offence is alleged to have been committed bore a distinguishing mark within the meaning of that subsection at the time the offence is alleged to have been committed if he was, at that time, in the service or employment of Her Majesty or was a dealer in marine stores or in old metals.

This is the former s.991 as enacted by 1951, c.47, s.23.

BREACH OF CONTRACT, INTIMIDATION AND DISCRIMINATION
AGAINST TRADE UNIONISTS.

CRIMINAL BREACH OF CONTRACT.—Where life endangered.—Causing bodily injury.—Endangering property.—Depriving of services.—Preventing running of trains.—Saving.—Consent required.

365. (1) Every one who wilfully breaks a contract, knowing or having reasonable cause to believe that the probable consequences of doing so, whether alone or in combination with others, will be

- (a) to endanger human life,
- (b) to cause serious bodily injury,
- (c) to expose valuable property, real or personal, to destruction or serious injury,
- (d) to deprive the inhabitants of a city or place, or part thereof, wholly or to a great extent, of their supply of light, power, gas or water, or
- (e) to delay or prevent the running of a locomotive engine, tender, freight or passenger train or car, on a railway that is a common carrier,

is guilty of

- (f) an indictable offence and is liable to imprisonment for five years, or
- (g) an offence punishable on summary conviction.

(2) No person wilfully breaks a contract within the meaning of subsection (1) by reason only that

- (a) being the employee of an employer, he stops work as a result of the failure of his employer and himself to agree upon any matter relating to his employment, or,
- (b) being a member of an organization of employees formed for the purpose of regulating relations between employers and employees, he stops work as a result of the failure of the employer and a bargaining agent acting on behalf of the organization to agree upon any matter relating to the employment of members of the organization,

if, before the stoppage of work occurs, all steps provided by law with respect to the settlement of industrial disputes are taken and any provision for the final settlement of differences, without stoppage of work, contained in or by law deemed to be contained in a collective agreement is complied with and effect given thereto.

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

OLD CODE:*Section 439—continued*

less than twenty dollars and costs, and, in default of payment, to six months' imprisonment with or without hard labour.

(2) Every one who buys, exchanges, or detains, or otherwise receives from any seaman or mariné, upon any account whatsoever, or has in his possession any arms or clothing, or any articles, belonging to any seaman, marine or deserter, as are generally deemed necessaries according to the custom of the navy, is guilty of an offence punishable on indictment or on summary conviction and liable on conviction on indictment to five years' imprisonment, and on summary conviction before two justices to a penalty not exceeding one hundred and twenty dollars, and not less than twenty dollars and costs, and in default of payment to six months' imprisonment.

991. (1) In proceedings under section four hundred and thirty-three to four hundred and thirty-six evidence that a person was at any time performing duties in the Canadian Forces is prima facie evidence that his enrolment in the Canadian Forces prior to that time was regular.

(2) An accused who is charged with an offence under subsection two of section four hundred and thirty-three shall be presumed to have known that the stores in respect of which the offence is alleged to have been committed bore a distinguishing mark within the meaning of that subsection at the time the offence is alleged to have been committed, if he was, at that time, in the service or employment of His Majesty or a dealer in marine stores or a dealer in old metals.

499. Every one is guilty of an offence punishable on indictment or on summary conviction before two justices and liable on conviction to a penalty not exceeding one hundred dollars or to three months' imprisonment, with or without hard labour, who

(a) wilfully breaks any contract made by him knowing, or having reasonable cause to believe, that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or to cause serious bodily injury, or to expose valuable property, whether real or personal, to destruction or serious injury; or

(b) being bound, agreeing or assuming, under any contract made by him with any municipal corporation or authority, or with any company, to supply any city or any other place, or any part thereof, with electric light or power, gas or water, wilfully breaks such contract knowing, or having reasonable cause to believe, that the probable consequences of his so doing, either alone or in combination with others will be to deprive the inhabitants of that city or place, or part thereof, wholly or to a great extent, of their supply of power, light, gas or water; or

(c) being bound, agreeing or assuming, under any contract made by him with a railway company, or with His Majesty, or any one on behalf of His Majesty, in connection with a government railway on which His Majesty's mails, or passengers or freight are carried, to carry His Majesty's mails, or to carry passengers or freight, wilfully breaks such contract knowing, or having reason to believe that the probable consequences of his so doing, either alone or in combination with others, will be to delay or prevent the running of any locomotive engine, or tender, or freight or passenger train or car, on the railway.

(2) Every municipal corporation or authority or company, bound, agreeing or assuming to supply any city, or any other place, or any part thereof, with electric light or power, gas or water, which wilfully breaks any contract made by such

Section 365—*continued*

Subsec.(1) comes from the former s.499. It was s.521 in the Code of 1892. The words "that is a common carrier" in cl.(1)(e) are new, as are also subsecs.(2) and (3). Note that the saving in subsec.(2) differs from that added to ss.52 and 372 in that under this section the terms of a collective agreement must be complied with.

It is submitted that subsec.(1) restores the meaning of the section as it appeared originally.

The law as it stood in 1867 at the time of the appointment of the first of the Royal Commissions which dealt with the question of trade unions, had given rise to dissatisfaction to workmen because they felt that their rights to combine to raise wages had been impaired, and to the public, because the trade unions had fallen into disrepute by reason of murders and other crimes committed by trade unionists in Sheffield. (Stephen's History, Vol. III, p.222). As the result of the report of a Royal Commission, an Act was passed in 1871 amending the criminal law with regard to coercion for trade purposes, and the *Trade Unions Act* was passed in 1872.

In that year there was a strike of gas-stokers under contract to a company in protest against the dismissal of one of their workmen. As a result of the strike, a large part of London was thrown into darkness for some time. Several of the strikers were indicted for conspiracy and were convicted: *R. v. BUNN*(1872), 12 Cox,C.C.316. Stephen says,

"The case substantially decided as far as its authority went, that, although a strike could no longer be punished as a conspiracy in restraint of trade, it might, under circumstances, be of such a nature as to amount to conspiracy at common law to molest, injure, or impoverish an individual, or to prevent him from carrying on his business."

This case aroused further dissatisfaction and resulted in the passing of the *Conspiracy and Protection of Property Act 1875*, of which ss.4 and 5 contain the following provisions:

"(4). Where a person employed by a municipal authority or by any company or contractor upon whom is imposed by Act of Parliament the duty, or who have otherwise assumed the duty of supplying any city, borough, town, or place, or any part thereof, with gas or water, wilfully and maliciously breaks a contract of service with that authority or company or contractor, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to deprive the inhabitants of that city, borough, town, place or part, wholly or to a great extent of their supply of gas or water, he shall on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds or be imprisoned for a term not exceeding three months with or without hard labour.

(Next paragraphs provide for posting up this section and penalty for failure to do so.)

(5). Where any person wilfully and maliciously breaks a contract of service or of hiring, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in

*OLD CODE:**Section 499—continued*

municipal corporation, authority, or company, knowing or having reason to believe that the probable consequences of its so doing will be to deprive the inhabitants of that city or place or part thereof wholly, or to a great extent, of their supply of electric light or power, gas or water, is liable to a penalty not exceeding one thousand dollars.

(3) Every railway company, bound, agreeing or assuming to carry His Majesty's mails, or to carry passengers or freight, which wilfully breaks any contract made by such railway company, knowing or having reason to believe that the probable consequences of so doing will be to delay or prevent the running of any locomotive engine or tender, or freight or passenger train or car on the railway, is liable to a penalty not exceeding one hundred dollars.

(4) It is not material whether any offence defined in this section is committed from malice conceived against the person, corporation, authority or company with which the contract is made or otherwise.

combination with others, will be to endanger human life, or cause serious bodily injury, or to expose valuable property whether real or personal to destruction or serious injury, he shall on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned, be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour."

The legislation was explained in the House of Lords as follows (Debates, July 26, 1875, 3rd Series, Vol. 276, p.32):

"The Lord Chancellor said he would explain the purpose of this bill and also that of the Employers and Workmen Bill. The latter was confined to civil remedies for breach of contract between employers and workmen while the other, while it provided that no combination can be deemed criminal if the act proposed to be done would not be criminal if done by one person, declared certain breaches of contract, though 'done by one person to be criminally punishable, and others involving injury to persons and property to be also punishable'."

He referred to the Statute of Labourers, 23 Edw. III (1350), and to the fact that there had been almost incessant legislation until 1867. Legislation passed in that year led to dissatisfaction and to the appointment of a commission.

"The Government decided to draw a broad line of demarcation between civil and criminal breaches of contract and to leave that line to be determined, not by the tribunal, but on the face of the Act of Parliament itself.

The Employers and Workmen Bill dealt with civil breaches of contract alone, laying down the general rule—apart from certain exceptions which came under the other Bill—that breach of contract which resulted in damages should be treated as giving rise to a civil remedy, and not as constituting a crime."

Certain procedure was set up where the damages were under or over £10.

"The breaches of contract which were to be made criminal in future were included in the Conspiracy and Protection to Property Bill. That bill dealt first with questions affecting the supply of gas and

Section 365—*continued*

water. It provided that where a person employed by a municipal authority or a company wilfully and maliciously broke a contract of service, knowing or having reasonable cause to believe that the probable consequences of his doing so would be to deprive the public of gas or water, he should be liable They held that a person so acting not only committed a breach of contract incurring civil damages, but a criminal offence for which he ought to be criminally responsible.

Then the next clause (5) proceeded exactly on the same principle as clause 4, the only difference being that it contemplated a breach of contract, whether by a person serving or by a person hiring, which involved serious injury to life, personal injury, or which exposed valuable property to destruction or serious injury. There, again, a breach of contract having those consequences was treated differently from a mere civil contract."

In 1877 the Parliament of Canada passed the *Breaches of Contract Act* (c.35) which in s.2, subsecs.1 and 2 embodied provisions similar to s.4, par.1 and s.5 of the English Act. S.4, pars.2 and 3 regarding posting up a copy of the section, were also embodied in the Canadian Act. It is to be observed however that the Canadian Act went beyond the English Act in a number of respects:

1. Subsec.(1) of s.2 of the Canadian Act applied to "any person who wilfully and maliciously breaks any contract made by him", whereas the English Act said "Where any person wilfully and maliciously breaks a contract of service or of hiring, knowing, &c."

2. Subsec.(1) of the Canadian Act read "Any person who, being under any contract made by him with any municipal corporation or authority or with any company, bound, agreeing or assuming to supply &c." while in the English Act s.4 begins "Where a person employed by a municipal authority or by any company or contractor upon whom is imposed by Act of Parliament the duty, or who have otherwise assumed the duty of supplying, etc."

3. The Canadian Act by s.3 created an offence on the part of the municipal corporation or authority or company to break its contract to supply gas or water.

4. The references to railway companies in the Canadian Act do not appear in the English Act.

In the Debates on the Canadian Bill, Hansard 1877, p.856, Mr. Blake gave the following explanation:

"In these modern times, the enormous inconvenience of stopping the whole system of communication between one part of the country and the other was very apparent, and he was justified in holding that any man who produced that result by wilfully breaking his contract was guilty of a crime. The principle of that portion of the Bill was similar to the English Act. But he wanted to avoid class legislation and therefore he had made the law applicable to others as well as to workmen engaged on railways."

Shortly before the introduction of the Canadian Act, there had been a strike of engineers on the Grand Trunk Railway. In spite of Mr. Blake's assurance that the Bill was not intended to deal with strikes, this one,

some incidents of which had apparently aroused a good deal of feeling, was reviewed at length. Mr. Blake said (p.872):

"The Bill did not profess to deal even with a strike, or to interfere with the freedom of the employee to leave the service of his employer at any time when his contract had expired. It professed in general terms to say that, save under special circumstances, breach of service was not a crime. It professed to define certain breaches of contract, or in the event of certain breaches of service, when they involved consequences of such moment and were connected with such results as might in the opinion of the Government, fairly be called crimes, to define and punish them as such. To deal with such a measure was an entirely different question from such as how to avoid a breach of contract, or how to treat a riot, how persons obstructing railway engines were to be treated, how persons who made murderous assaults, as alleged, were to be treated, or how the militia of this country was to be called out in aid of the civil powers."

There are no reported Canadian cases under this section, but it was referred to in *JOHNSTON et al. v. MACKEY et al.*(1937), 67 C.C.C. 196, where it was held to be an indictable offence under s.499(a), wilfully to break a contract with knowledge that the probable consequences will be to expose valuable property to destruction or serious injury, and that the threat to withdraw maintenance men from the mines in violation of contract was a threat to do an illegal act.

The English case of *SCAMMELL v. HURLEY*, [1928] 1 K.B.419, although a civil action, appears to be one to which the provisions of the Canadian Code might apply. The defendants were members of a Committee of a Borough Council and when the general strike of 1926 was pending, agreed with the Electrical Trades Union that if the Union would continue to supply light, the Committee would abandon the supply of power.

A comparison of pars.(b) and (c) of subsec.(1) of the text as it appears in s.521, with the present paragraphs shows a change which appears to have been made, not by formal amendment but in the general revision of 1906.

Par.(b) in s.521 begins "Being, under any contract made by him with any municipal corporation or authority or with any company bound, agreeing or assuming to supply" Par.(c) begins "Being under any contract made by him with a railway company bound, agreeing or assuming to carry"

The effect of the change is that the words "bound, agreeing or assuming" in the old text modify in par.(b) the words "municipal corporation or authority or company", and in par.(c) they modify "railway company". In s.499 they modify the pronoun "who" in the introductory clause. The only formal amendment was made in 1908 by c.18 to amend an obvious error. The text read: "On indictment on summary conviction" and the amendment simply inserted the word "or" after indictment.

The English Act also contained provisions similar to those in s.501 of the repealed Code (now s.366). The Lord Chancellor said in the speech already quoted:

Section 365—continued

"The only other question in the Bill requiring notice was one of great importance—the question of violence or molestation. The 6th Geo. IV, the Act of 1826, abolished the Combination Laws and made violence to person or property, or threats, or intimidation, or molestation or obstruction with a view to interfere with masters or servants, a criminal offence. The first impression was that these forbidden acts were physical and mechanical acts; but by construction they were held to include the act of persuading in a peaceable manner. Accordingly, in order to meet this objection, the 22nd Vict. was passed, which provided that an endeavour to persuade in a peaceable manner should not be deemed molestation or obstruction. Still, doubts arose upon the construction of the Act, and then came the Criminal Law Amendment Act of 1871, which repealed both the previous enactments and substituted other acts as criminal offences. Great dissatisfaction, however, was felt with the working of the Act of 1871 because the decisions upon it were not altogether uniform. The Recorder's charge in what was known as the Cabinet Maker's Case embodied the law upon the subject. In the course of his charge the learned Recorder said—

'The question you will have to ask yourselves is whether the evidence shows that the defendants were guilty of obstructing and rendering difficult of access the prosecutor's place of business, or whether anything which they did was calculated to deter or intimidate those who were passing to and fro, or whether there was an exhibition of force calculated to produce fear in the minds of ordinary men, or whether the defendants or any of them combined for that purpose. If you think that, it seems to me, then, it will be your duty to find a true bill; but if you think their conduct may be accounted for by a desire to ascertain who were the persons working there, or peaceably to persuade them or any others who were proposing to work there, to join their fellow-workmen, who were contending, whether rightly or wrongly, for the interests of the general body, it seems to me that there is no evidence sufficient to establish the charge that is here made',

The House of Commons thought that it was not desirable to leave the question in any doubt whatever, and words were accordingly introduced into the present Bill in order that future rulings in similar cases should be placed upon the same footing as in the case tried by the Recorder."

These provisions appear to have been the result of consultations by the Home Secretary with various bodies of employers and workmen and to have been acceptable to labour. (Debates 1875, 3rd Series, Vol. 275, Col.1579).

INTIMIDATION.—By violence.—By threats.—By following.—By hiding property.—By disorderly conduct.—By watching or besetting.—By obstructing highway.—Exception.

366. (1) Every one who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he has a lawful right to do, or to do anything that he has a lawful right to abstain from doing,

(a) uses violence or threats of violence to that person or to his wife or children, or injures his property,

OLD CODE:

501. *Every one is guilty of an offence punishable on indictment or on summary conviction before two justices and liable on conviction to a fine not exceeding one hundred dollars, or to three months' imprisonment with or without hard labour, who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain:*

- (a) uses violence to such other person, or his wife or children, or injures his property; or*
- (b) intimidates or attempts to intimidate such other person or the wife, child, parent or other relation of such other person by threats that, in Canada or elsewhere, violence or other injury will be done to, or punishment inflicted upon him, her, or any of them or that the property of any of them will be damaged.*
- (c) persistently follows such other person about from place to place; or*
- (d) hides any tools, clothes or other property owned or used by such other person, or deprives him of, or hinders him in, the use thereof; or*
- (e) with one or more other persons, follows such other person, in a disorderly manner, in or through any street or road; or*
- (f) besets or watches the house or other place where such other person resides or works, or carries on business or happens to be; or*
- (g) attending at or near or approaching to such house or other place as aforesaid, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.*

502. *Every one is guilty of an indictable offence and liable to two years' imprisonment who, in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or of any unlawful combination or conspiracy respecting any trade, business or manufacture, or respecting any person concerned or employed therein, unlawfully assaults any person, or, in pursuance of any such combination or conspiracy, uses any violence or threat of violence to any person, with intent to hinder him from working or being employed at such trade, business or manufacture.*

(2) Every one is guilty of an offence punishable on indictment, or on summary conviction before two justices, and liable on conviction to a fine not exceeding one hundred dollars, or to three months' imprisonment with or without hard labour, who

- (a) beats or uses any violence or threat of violence to any person with intent to deter or hinder him from buying, selling or otherwise disposing of any wheat or other grain, flour, meal, malt or potatoes, or other produce or goods, in any market or other place; or*
- (b) beats or uses any such violence or threat to any person having the charge or care of any wheat or other grain, flour, meal, malt or potatoes, while on the way to or from any city, market, town or other place with intent to stop the conveyance of the same; or*
- (c) by force of threats of violence, or by any form of intimidation whatsoever, hinders or prevents, or attempts to hinder or prevent any seaman, stevedore, ship carpenter, ship labourer or other person employed to work at or on board any ship or vessel, or to do any work connected with the loading or unloading thereof, from working at or exercising any lawful trade, business, calling or occupation in or for which he is so employed; or with intent so to hinder or prevent, besets or watches such ship, vessel or employee; or*
- (d) beats or uses any violence to, or makes any threat of violence against, any*

Section 366—*continued*

- (b) intimidates or attempts to intimidate that person or a relative of that person by threats that, in Canada or elsewhere, violence or other injury will be done to or punishment inflicted upon him or a relative of his, or that the property of any of them will be damaged,
 - (c) persistently follows that person about from place to place,
 - (d) hides any tools, clothes or other property owned or used by that person, or deprives him of them or hinders him in the use of them,
 - (e) with one or more other persons follows that person, in a disorderly manner, on a highway,
 - (f) besets or watches the dwelling house or place where that person resides, works, carries on business, or happens to be, or
 - (g) blocks or obstructs a highway,
- is guilty of an offence punishable on summary conviction.

(2) A person who attends at or near or approaches a dwelling house or place, for the purpose only of obtaining or communicating information, does not watch or beset within the meaning of this section.

This replaces the former ss.501 and 502. These with some modification of earlier legislation, were ss.523,524, and 525 of the Code of 1892. It is considered that, with the insertion of cl.(1)(g), all matters are covered that formerly appeared in s.502.

S.501 had its beginning in 1871, c.32 (Imp.), *An Act to amend the Criminal Law relating to Violence, Threats and Molestation*. In Canada the provisions of the 1871 Act were re-enacted into the Act 1872, c.31, s.2, under the same heading.

In 1875 its provisions were strongly attacked in the Canadian Parliament (Hansard, p.898), on the grounds that they had worked injustice in England, that Parliament had taken away with one hand what, in the English *Trades Union Act* of 1871, it had offered with the other, and that Magistrates were prone to favour the employer against the employee. A Bill was introduced with a view to its repeal, but the Government undertook to bring in new legislation and the Bill was dropped.

In England new legislation was passed, substantially as it appeared in s.501 (except as to par.(b)), and in the *Conspiracy and Protection of Property Act* 1875, and was re-enacted in Canada in the Act 1876, c.37, s.2 (*An Act to amend the Criminal Law relating to Violence, Threats and Molestation*).

Although the section is general in its terms, it has been applied most often in labour disputes. On this subject there is a great and growing literature, but the following from W. Milne-Baily on "Trades Unions and the State" may be quoted as the effect of the legislation. It is said to have "freed strikes and other combinations from criminality provided that they were in combination or furtherance of a trade dispute between employers and workmen, that they were for the commission of some act which would not be a crime apart from the combination, that they did not involve a conspiracy punishable by statute, and that they were not breaches of the law relating to riot, unlawful assembly, breach of the peace, sedition, or any offence against the State or the Sovereign".

*OLD CODE:**Section 502—continued*

such person with intent to hinder or prevent him from working at or exercising such trade, business, calling or occupation or on account of his having worked at or exercised the same.

With the section are to be read s.409, which provides that the purposes of a Trade Union are not unlawful by reason merely that they are in restraint of trade, and s.410, which provides in part that no prosecution shall be maintainable against any person for doing any act or causing any act to be done for the purpose of a trade combination unless such act is an offence punishable by law. Certain saving clauses are contained too in ss.52, 365, 372 and 411.

By 1934, c.47, s.12, par.(g) was added to s.501, excepting from the operation of the section "attending at or near or approaching the office, house or other place as aforesaid in order merely to obtain or communicate information". When this amendment was introduced in the House of Commons, the Minister of Justice made the following statement (Hansard 1934, Vol.4, p.4550):

"Mr. GUTHRIE: For many years the Trades and Labour Congress have requested that a clause, which was formerly in the Criminal Code, in regard to picketing, should be restored or that the English clause in regard to the same matter should be incorporated in our law. In the Statute of 1886 this clause appeared under section 501 of our Criminal Code, in regard to picketing (quoted). This was the law until the Statutes were revised in 1896 when it was dropped without any repeal by this House. Of course, the effect of the passage of the Revised Statutes would operate as a repeal". (It is probable that the Minister meant 1892 instead of 1896—this provision did not appear in the Code of 1892.)

In 1948 par.(b) was amended by c.39, s.15, to read:
 "(b) intimidates or attempts to intimidate such other person or the wife, child, parent or other relation of such other person, by threats that, in Canada or elsewhere, violence or other injury will be done to, or punishment inflicted upon him, her, or any of them or that the property of any of them will be damaged."

The scope of the amendment is indicated by the following (and only) comments (Hansard 1948, Vol. 5, p.5191):

"Mr. DIEFENBAKER: Persons in this country are sometimes subjected to the threat that, unless they give support to communist works, or to communist funds, or in any other way assist in the spread of communism, harm will be done to their relatives. This section will cover such a situation. I am glad also to say that the addition of the words 'or attempts to intimidate' placing it in the same position as though the full and complete offence of intimidation were perpetrated, will be of great assistance and uphold the arm of the law in a great many cases throughout this country."

Reference may be had to the following English cases:

In *COLLARD v. MARSHALL*, [1892] 1 Ch.571, it was held that the Court has power to restrain by injunction on interlocutory motion the publication of placards and circulars containing statements injurious to

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trade where the Court is satisfied upon the facts and the evidence before it, that such statements are false. In this case placards and circulars had been issued accusing the Plaintiff of operating a "sweat shop".

LYONS & SONS v. WILKINS (1896), 74 L.T.R. 358: Appeal from order granting an interlocutory injunction. The following is quoted from the judgment of Lindley, L.J., at p. 364:

"Now they are not there merely to obtain or communicate information; that is not their function. They are there to put pressure upon Messrs. Lyons by persuading people not to enter into their employment, and that is 'watching or besetting' within subsec. 4, and is not 'attending in order merely to obtain or communicate information'. Under these circumstances I think that the defendants have gone too far, and have gone beyond what the Act of Parliament authorizes; and I do not hesitate to say that this is a case in which from the necessity of the thing a quick remedy is actually and absolutely required. That leads me to the second point, which is that we ought to leave the Plaintiffs to have recourse to the summary jurisdiction of a magistrate. I do not think so. This is obviously a case in which a man's property, his trade, his livelihood, and the good will of his business will be absolutely ruined if what is complained of is not peremptorily stopped."

In the *LYONS* case the union had called out the workmen of one Schoenthal, who made goods for the plaintiffs. There was no dispute with Schoenthal, and this action was taken as a means of hitting at Lyons. In this respect the facts resemble the case of *QUINN v. LEATHEN*, [1901] A.C. 495, in which the union threatened to call out the workmen of one Munce, if he continued to accept meat supplied by Leathen. Although this case is more properly to be dealt with under the head of conspiracy, the following quotation from the judgment of Lord Lindley is in point here:

"It is all very well to talk about peaceable persuasion. It may be that in *ALLEN v. FLOOD* there was nothing more; but here there was very much more. What may begin as peaceable persuasion may easily become, and in trade union disputes generally does become, peremptory order, with threats open or covert of very unpleasant consequences to those who are not persuaded. Calling workmen out involves very serious consequences to such of them as do not obey. Black lists are real instruments of coercion, as every man whose name is on one discovers to his cost. A combination not to work is one thing, and is lawful. A combination to prevent others from working by annoying them if they do, is a very different thing, and is *prima facie* unlawful. Again, not to work oneself is lawful so long as one keeps off the poor-rates, but to order men not to work when they are willing to work is another thing. A threat to call men out given by a trade union official to an employer of men belonging to the union and willing to work with him, is a form of coercion, intimidation, molestation, or annoyance to them and to him very difficult to resist, and, to say the least, requiring justification. None was offered in this case."

In *WARD, LOCK & CO. LTD. v. OPERATIVE PRINTERS' ASSISTANTS SOCIETY* (1906), 22 L.T.R. 327, there was no evidence that pickets invited plaintiff's employees to break their contracts, nor was

there evidence of violence, obstruction, or otherwise of a common law nuisance. Judgment was given for the defendants. *Per Moulton, L.J.*: "Giving to that section (i.e., sec.7 of the Conspiracy and Protection of Property Act (1875)) the most careful consideration in my power, I cannot see that this section affects, or is intended to affect civil rights or civil remedies. It legalizes nothing, and it renders nothing wrongful that was not so before. The object is solely to visit certain selected classes of acts which were previously wrongful, i.e., were at least civil torts, with penal consequences capable of being summarily inflicted.—What, then, is the effect of the exception which is made by the last paragraph? In my opinion, that part of the section does exactly what its language expresses and no more. It expressly excepts a sub-class of acts (which otherwise might be held to be within the class mentioned in subsec.4) from the operation of the section, i.e., it does not attach the additional penal consequences to acts which come within that sub-class. It leaves them exactly where they were before. If they were civil torts, they remain so. If they were previously criminal in their nature, their criminality and its punishment are unaffected by the section."

It is a noteworthy fact that so far as the reported cases are concerned, s.501 was invoked in civil cases oftener than in criminal cases. The leading criminal case under the section is *RENERS v. R.*(1926), 46 C.C.C.14, a decision of the Supreme Court of Canada, to the effect that watching or besetting, if carried on in a manner to create a nuisance or otherwise unlawfully, constituted a breach of s.501.

The judgment noted the absence from s.501 of the exemption which later appeared as par.(g), but apparently its presence would not have affected the result, as it was said (p.30) that "the numbers of men who assembled, their distribution about the premises, including the company's property, their attendance there by day and by night, the fires, the shouting, their reception of the police, their threats and conduct when the police approached, afford cogent evidence not only of a nuisance, but also of unlawful assembly."

ROBINSON v. ADAMS(1924), 56 O.L.R.217, was an action in which an injunction was sought to restrain defendants from picketing a theatre. Injunction refused. At p.224:

"The equitable jurisdiction of a civil court cannot properly be invoked to suppress crime. Unlawful acts which are an offence against the public, and fall within the criminal law, may also be the foundation of an action based upon the civil wrong done to an individual, but when Parliament has, in the public interest, forbidden certain acts and made them an offence against the law of the land, then, unless a right to property is affected, the civil courts should not attempt to interfere and forbid by their injunction that which has already been forbidden by Parliament itself."

And at p.225:

"It is safe to say that the Court of Chancery never granted an injunction in aid of the criminal law, or as supplementing the criminal law, if it was found to be inefficient."

These statements were quoted and followed in a similar case—*STEWART v. BALDASSARI*(1930), 38 O.W.N.131, and again in *D.H.*

Section 366—continued

LAS v. FELEK, [1934]O.W.N.247, where it was said (at p.250) that "if there is a real case of 'besetting and watching' within the meaning of s.501(f) of the *Criminal Code*, R.S.C.1927, c.36, the plaintiff's remedy lies in a criminal prosecution." Injunction granted to restrain defamatory statements injurious to plaintiff's trade.

In *GOLDMAN v. R.*(1928), 45 Que. K.B.287:

"Est du ressort du jury l'appréciation du fait d'épier ou surveiller injustement (wrongfully) au cours d'une grève, un établissement industriel." (It is for the jury to appreciate the fact of wrongfully spying or watching an industrial establishment during the course of a strike.)

In the case of *R. v. RICHARDS*(1933), 61 C.C.C. p.321, the British Columbia Court of Appeal, upon an equal division, affirmed a conviction under s.501 where the accused, without molesting anyone or obstructing entry of patrons, had walked to and fro in front of the theatre, wearing slickers on which was printed "The Edison Theatre does not employ Union Picture Projectionists, affiliated with the New Westminster and Vancouver Trades and Labour Council"—this with the view to compel the owner to abstain from reducing wages or employing non-union picture operators, which he had a lawful right to do.

In *ALLIED AMUSEMENTS LTD. v. REANEY; KERSHAW THEATRES LTD. v. REANEY*(1937), 69 C.C.C.31 (Man. C.A.), it was held that to picket premises in a manner calculated to injure the owners in their business, is an unlawful "besetting and watching" prohibited by s.501 of the *Criminal Code*, and that such acts are not justifiable as a besetting and watching to obtain information permitted by par.(g) of that section.

In a dissenting judgment, Trueman, J.A., expressed the following opinions on s.501, at p.38:

"The sense of this clause (g) is that in a criminal enactment recognition is given to the common law right of picketing, something strictly within the ambit of provincial jurisdiction. One's mind runs to the view that there is something more than an anomaly in having civil actions in tort, in which the remedies sought are injunctions and damages, tried on the section. To do so is to admit that the relevant law is now in stereotyped form, with a dead hand laid on all the flexibility inherent in the living law of torts."

and at p.42:

"I take it to be clear that picketing, or 'watching and besetting', which is the legislative equivalent, conducted peaceably, that is, without violence or intimidation or other wrongful or illegal means, though for the purpose of compelling or inducing employers to employ none but union labour, is legal at common law, and that nothing in s.501 of the Code qualifies or overrides it. Clause (g) of s.501 is a proviso inserted *abundanti cautela* in qualification of the general enactment. So far as it goes it states the common law, the full statement of which is in s.2 of the *Trade Disputes Act*."

The foregoing statement was cited in *WASSERMAN v. SOPMAN* (1941), 77 C.C.C.334, at p.341, and also in *CANADA DAIRIES v. SEG-*

GIE(1940), 74 C.C.C.210, at p.215. In the latter case, the following opinion was expressed at p.217:

"The relationship between s.501 of our *Criminal Code* which is the counterpart of s.7 of the *Conspiracy and Protection of Property Act* (1875) of Great Britain and the common law concept of nuisance is indicated in the judgment of Lord Justice Fletcher Moulton (*i.e.*, in *WARD LOCK & CO. v. OPERATIVE PRINTERS' ASSISTANTS SOCIETY*) when, referring to s.7, the reasons state: 'I cannot see that this section affects or is intended to affect civil rights or civil remedies. It legalizes nothing, and it renders nothing wrongful that was not so before. Its object is solely to visit certain classes of acts which were previously wrongful, *i.e.*, were at least civil torts, with penal consequences capable of being summarily inflicted'."

In *BESLER v. MATTHEWS*(1939), 71 C.C.C.183 (Man. C.A.), it was held that picketing and besetting a theatre in order to coerce an employer to discharge an employee and hire a member of defendant's union instead, did not come within the privilege of attending to obtain or communicate information. *HURTIG v. REISS*(1937), 68 C.C.C.334 (Man.) is to the same effect.

RUBENSTEIN v. KUMER(1940), 73 C.C.C.303 (Ont.) at p.308:

"The fact that the Union in this case happens to be a union of merchants instead of the conventional labour union makes no difference. *SORRELL v. SMITH*, [1925]A.C. 700, was a case of a banding together of news dealers for the enhancement of their own several businesses. Merchants have the same right under English common law to unite for their mutual benefit and protection as have labourers and craftsmen. I mention this only because of the suggestion during the argument that the defendants and these others who are members of the 'Union', being merchants or tradesmen their common law right to act in unison is more limited in its scope than is the right and privilege of the members of the ordinary trade union. True, the *Criminal Code*,—s.497 and s.498 (2), contains limitations or exceptions in favour of trade unions, but that is another matter.

Section 501(f) of the *Criminal Code* creates the criminal offence of besetting and watching. If the acts of the defendants bring them within the scope of this section they may be convicted of it."

Injunction continued but varied.

In *SHANE v. LUPOVITCH*(1942), 78 C.C.C.272 (Que. K.B. Appeal Side) the following appears at p.281:

"But under our law as it at present stands, including the amendment to the *Criminal Code*, employees have the right to strike, which constitutes *per se* an interference with the respondents' business; they have the right peaceably to counsel and urge other workers to go on strike or to join a union; they may watch and beset for the purpose of obtaining information; peaceful picketing is not prohibited so long as it does not constitute a common law nuisance; and organizing on the part of workmen to accomplish legal ends, so far from being prohibited, is encouraged by our most recent provincial law."

Injunction continued but varied.

In *R. v. CARRUTHERS*(1946), 86 C.C.C.247 (Ont. Co. Court), at p.249, it was said:

Section 366—continued

"I can see nothing wrong with a member of a picket line using peaceful persuasion on an employee about to enter his employer's premises to work, but, if force is used, or if any threat or threatening gesture is made, or if access to the premises is blocked by a member, such act is wrongful and without lawful authority and a 'besetting or watching' within the meaning and intent of section 501(f) of the Criminal Code. That section, of long standing, was not enacted to restrict the rights of labour but to protect the rights of the subject."

R. v. DOHERTY & STEWART(1946), *infra*, and *R. v. ELFORD* (1947), 87 C.C.C.372, are to the same effect. In each of these three cases it was held that what was done went beyond the exemption.

Later cases are to be noted as follows:

R. v. LENTON(1947), 88 C.C.C.1 (Ont. C.A.): In this case union men seized and forcibly held an employee of a steamship company. Conviction under s.501 for using violence and threatening violence, upheld on appeal.

R. v. BONHOMME(1946), 88 C.C.C.100: Accused said to D. "It is better that you do not work tomorrow; you know Mr. B. . . . , he was warned and he did not return to work this morning." D. knew that Mr. B. had been attacked when he went to work that morning and, being frightened, she stayed away from work for three days. Accused was convicted under Code s.501(b).

INTERNATIONAL LADIES' GARMENT WORKERS UNION v. ROTHER(1922), 41 C.C.C.70, cited to the effect that the right to strike conceded by law does not confer the right to prevent others from working who desire to do so; also *R. v. DOHERTY & STEWART*(1946), 86 C.C.C.286, at p.292 where it was said that:

"I know of no other property or civil right existing between a company and its employees, recognized by law, the breach of which would make it unlawful for an employee, in the event of a strike, to continue in his employment, or for the company to employ such employee, or any employees."

In *WILLIAMS v. ARISTOCRATIC RESTAURANTS*(1953), 101 C.C.C.273, pickets paraded two at a time with placards stating truthfully that the employer had no agreements with the Union. There was no trespass or obstruction of passersby, although at one place prospective patrons were told by the picketers, "You are not supposed to go in there. This is a picket line." The employer brought action for damages and for an injunction against the picketing. The trial judge dismissed the action except that he granted an injunction against the establishment of a picket line, and against statements to prospective patrons that there was a picket line. This judgment was reversed by the Court of Appeal in British Columbia, but was restored by the Supreme Court of Canada, which held that the form of picketing employed was lawful from a criminal standpoint under Criminal Code s.501(g). See also *MOSTRENKO v. GROVES*(1953), 106 C.C.C.277; *COMSTOCK MID-WESTERN LTD. v. SCOTT et al.*, [1953] 4 D.L.R.316.

The following quotations are taken from *GENERAL DRY BATTERIES v. BRIGENSHAW*(1951), 101 C.C.C.323, at p.327:

"The Courts are always here to protect personal and property rights; on the one hand, the right of the employer to exercise his common law rights over his own property without unlawful interference by anyone, and, on the other hand, the right of every individual, be he a member of a Labour Union or not, to exercise those personal rights that are given to him by the common law."

Injunction granted to restrain acts on a picket line which go beyond peaceful picketing and which injure the employer's business. And at p.328:

"It may be very true that the employees have improperly broken their agreement and it may be that it is unlawful for them to break their agreement, but I think they nevertheless have a common law right to inform others that they are on strike, be the strike lawful or unlawful, and if they choose to exercise this right by picketing in a manner that is not otherwise unlawful their actions cannot be restrained by, and particularly by, an interlocutory injunction."

And at p.330:

"It is one thing to exercise all the lawful rights to strike and the lawful rights to picket; that is a freedom that should be preserved and its preservation has advanced the interests of the labouring man and the community as a whole to an untold degree over the last half-century. But it is another thing to recognize a conspiracy to injure so that benefits to any particular person or class may be realized."

This case has been quoted at some length because it has been referred to in several more recent cases: *PEERLESS LAUNDRY AND CLEANERS LTD. v. LAUNDRY AND DRY CLEANING WORKERS UNION*(1952), 6 W.W.R. (N.S.) 443; *HALLNOR MINES LTD. v. BEHIE*, [1953]O.W.N. 868; *SMITH v. JONES et al.*, [1954]O.R. 166; and see especially *NORANDA MINES LTD. v. UNITED STEEL WORKERS OF AMERICA et al.*(1954), 109 C.C.C.270 and 289.

For a case in which picketing in breach of an injunction was punished as contempt of court, see *POJE v. ATTORNEY-GENERAL OF BRITISH COLUMBIA*(1953), 105 C.C.C.311.

EMPLOYER REFUSING TO EMPLOY MEMBER OF TRADE UNION.—Employer intimidating workman.—Employers conspiring.

367. Every one who, being an employer or the agent of an employer, wrongfully and without lawful authority

- (a) refuses to employ or dismisses from his employment any person for the reason only that the person is a member of a lawful trade union or of a lawful association or combination of workmen or employees formed for the purpose of advancing, in a lawful manner, their interests and organized for their protection in the regulation of wages and conditions of work,
- (b) seeks by intimidation, threat of loss of position or employment, or by causing actual loss of position or employment, or by threatening or imposing any pecuniary penalty, to compel workmen or employees to abstain from belonging to a trade union, association or combination to which they have a lawful right to belong, or

Section 367—*continued*

(c) conspires, combines, agrees or arranges with any other employer or his agent to do anything mentioned in paragraph (a) or (b),
is guilty of any offence punishable on summary conviction.

This is the former s.502A which came into the Code as 1939, c.30, s.11, altered by making the offences punishable on summary conviction only.

The following explanation appears in *SOCIETY BRAND CLOTHES LIMITED v. R.*(1942), 78 C.C.C. 351, at p.358:

"This law evidently had in view the maintenance of labour relations in the country on a legal basis by preventing certain unjust practices by employers toward employees. The latter having obtained the right to combine, to form unions, to better working conditions, Parliament was called upon to assure the fullest exercise of this right. For that reason it considered any interference on the part of an employer with the exercise of the workers' rights as a disloyal and criminal act. When the employer may impose his will by preventing, directly or indirectly, affiliation with a labour organization, such act becomes an offence."

In the same case the following appears at p.354:

"If the proof establishes that the real reason for the dismissal of an employee, or the refusal to employ him, is the fact that he belongs to a union, then such action is wrongful and without lawful authority, although an attempt be made to show that there also existed several other possible reasons. If the fact that an employee belonged to a union is the real reason for his dismissal, it is not one of several reasons but the only real reason for the dismissal."

Appeal from conviction dismissed.

In *CANADAIR LIMITED v. R.*(1948), 5 C.R.67, an appeal from conviction was allowed. In that case the company had dismissed a number of men who had broken away from their union and set up a separate group with the result that there was disturbance and unrest in the company's plant. The following appears at p.86:

"One question only must be answered and that is whether the Crown established that those mentioned in the indictment were dismissed for the sole reasons that they were members of such union or association, or were dismissed for the purpose of compelling others to abstain from joining or from remaining as members of such union or association. This question I must answer negatively."

and at p.87:

"I see a distinction between dismissing a man because he is a member of the union and dismissing him because by his activities, union or otherwise, he contributes to disturbance and unrest. The former is clearly covered by section 502A, but the latter is not."

In *COUTURE v. LAUZON SCHOOL*(1950), 97 C.C.C.218, it was held that Code section 502A is not in conflict with s.21 of the *Quebec Labour Relations Act*, and that these provisions cover the same ground in different aspects.

OLD CODE:

502A. Any employer or his agent, whether a person, company or corporation, who wrongfully and without lawful authority

(a) refuses to employ or dismisses from his employment any person for the sole reason that such person is a member of a lawful trade union or of a lawful association or combination of workmen or employees formed for the purpose of advancing in a lawful manner their interests and organized for their protection in the regulation of wages and conditions of work;

(b) seeks by intimidation, threat of loss of position or employment, or by causing actual loss of position or employment, or by threatening or imposing any pecuniary penalty, to compel workmen or employees to abstain from belonging to such a trade union or to such an association or combination to which they have a lawful right to belong; or

(c) conspires, combines, agrees or arranges with any other employer or his agent to do any of the things mentioned in the preceding paragraphs;

is guilty of an offence punishable on indictment or on summary conviction before two justices, and liable on conviction, if an individual, to a fine not exceeding one hundred dollars or to three months' imprisonment, with or without hard labour, and, if a company or corporation, to a fine not exceeding one thousand dollars.

504. In this section, unless the context otherwise requires,

(a) "agent" means any person employed by or acting for another, and includes a person serving under the Crown or under any municipal or other corporation;

(b) "consideration" includes valuable consideration of any kind;

(c) "principal" includes an employer.

SECRET COMMISSIONS.

BRIBERY OF AGENT.—Agent accepting bribe.—False account to deceive principal.—Privity to offence.—Punishment.—“Agent.”—“Principal.”

368. (1) Every one commits an offence who

(a) corruptly

(i) gives, offers or agrees to give or offer to an agent, or

(ii) being an agent, demands, accepts or offers or agrees to accept from any person,

a reward, advantage or benefit of any kind as consideration for doing or forbearing to do, or for having done or forbore to do, any act relating to the affairs or business of his principal or for showing or forbearing to show favour or disfavour to any person with relation to the affairs or business of his principal; or

(b) with intent to deceive a principal gives to an agent of that principal, or, being an agent, uses with intent to deceive his principal, a receipt, account, or other writing

(i) in which the principal has an interest,

(ii) that contains any statement that is false or erroneous or defective in any material particular, and

(iii) that is intended to mislead the principal.

(2) Every one commits an offence who is knowingly privy to the commission of an offence under subsection (1).

Section 368—*continued*

(3) A person who commits an offence under this section is guilty of an indictable offence and is liable to imprisonment for two years.

(4) In this section,

(a) "agent" includes an employee, and

(b) "principal" includes an employer.

This is the former s.501(1), (2) and (3) altered to make the offences punishable on indictment only. It comes from 1909, c.33 (*Secret Commissions Act*) and 1920, c.13, s.9. It is largely similar to s.1 of the *Prevention of Corruption Act, 1906* (Imp.). Subsec.(4) which made the section inapplicable to persons liable under s.412(2), now s.336 *ante*, is not continued. See notes to s.336.

In *R. v. GROSS*(1945), 86 C.C.C.68 at p.74, it was said that the section is aimed not only at an inducement to do or forbear to do some specific act, but also at an inducement for showing favour or disfavour, not necessarily in relation to a specific instance or occasion, but favour or disfavour generally with relation to the principal's affairs or business.

An English case, *R. v. DICKINSON, R. v. DE RABIE*(1948), 33 Cr. App.R.5, tried under the *Prevention of Corruption Act, 1906*, is similar in effect. The Court of Criminal Appeal approved a charge to the jury that:

"If Dickinson was using his position as an important person in the Ministry of Aircraft Production to get commission corruptly, I do not think it would matter whether the work in relation to which he was to get commission was work which his duties brought him into direct contact with or not."

It will be noted that the word "corruptly" appears in subsec.(1)(a) but not in subsec.(1)(b). A similar distinction was pointed out in a prosecution also under the *Prevention of Corruption Act, SAGE v. EICHOIZ*, [1919] 2 K.B.171. In that case the respondent gave to an officer of the Metropolitan Water Board a form falsely claiming premises to have been vacant during certain periods, for the purpose of getting an allowance against his water rates. It was charged that he knowingly gave the form with intent to mislead the Board. It was held that neither the corruption or attempted corruption of the agent who received it nor his knowledge of the falsity of the statement was a necessary ingredient in the charge.

TRADING STAMPS.

ISSUING TRADING STAMPS.—Giving to purchaser of goods.

369. (1) Every one who, by himself or his employee or agent, directly or indirectly issues, gives, sells or otherwise disposes of, or offers to issue, give, sell or otherwise dispose of trading stamps to a merchant or dealer in goods for use in his business is guilty of an offence punishable on summary conviction.

(2) Every one who, being a merchant or dealer in goods, by himself or his employee or agent, directly or indirectly gives or in any way disposes of, or offers to give or in any way dispose of, trading stamps to a person who purchases goods from him is guilty of an offence punishable on summary conviction.

OLD CODE:*Section 504—continued*

(2) Every one is guilty of an offence and liable, upon conviction on indictment, to two years' imprisonment, or to a fine not exceeding two thousand five hundred dollars, or to both, and, upon summary conviction, to imprisonment for six months, with or without hard labour, or to a fine not exceeding one hundred dollars, or to both, who

(a) being an agent, corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act relating to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person with relation to his principal's affairs or business; or

(b) corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward or consideration to such agent for doing or forbearing to do, or for having done or forborne to do, any act relating to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person with relation to his principal's affairs or business; or

(c) knowingly gives to any agent, or, being an agent, knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which, to his knowledge, is intended to mislead the principal.

(3) Every person who is a party or knowingly privy to any offence under this section shall be guilty of such offence and shall be liable upon conviction to the punishment hereinbefore provided for by this section.

(4) This section shall not apply to any person liable to punishment under section four hundred and twelve, subsection two of this Act.

505. Every one is guilty of an indictable offence and liable to one year's imprisonment, and to a fine not exceeding five hundred dollars, who by himself or his employee or agent, directly or indirectly, issues, gives, sells or otherwise disposes of, or offers to issue, give, sell or otherwise dispose of trading stamps to a merchant or dealer in goods for use in his business.

(2) Every one is guilty of an indictable offence and liable to six months' imprisonment, and to a fine not exceeding two hundred dollars, who, being a merchant or dealer in goods, by himself or his employee or agent, directly or indirectly, gives or in any way disposes of, or offers to give or in any way dispose of, trading stamps to a purchaser from him of any such goods.

(3) Any executive officer of a corporation or company guilty of an offence under subsection one and two of this section who in any way aids or abets in or counsels or procures the commission of such offence, is guilty of an indictable offence and liable on conviction to the punishment provided by the said subsection respectively.

(4) Every one is guilty of an offence and liable, on summary conviction, to a fine not exceeding twenty dollars, who, being a purchaser of goods from a merchant or dealer in goods, directly or indirectly receives or takes trading stamps from the vendor of such goods or his employee or agent.

Section 369—continued

This is the former s.505. For definitions of "trading stamps" see s.322 (b), *ante*.

These provisions appear in the *Criminal Code Amendment Act 1905, c.9*. The Bill was introduced at the insistence of many Boards of Trade and Retail Merchants' Associations throughout Canada.

The trading stamp scheme originated in the United States about 1895 and was imported into Canada about 1900. The operation of the scheme as it affected the customer was described in the House of Commons as follows (Hansard 1905, Vol. 5, column 9432):

"MR. KEMP: Certainly some remedy should be applied to this abuse. These trading stamp companies, small and insignificant as they are, are permitted to do what no other kind of financial corporation can do. They are permitted to circulate money. This trading stamp resembles a postage stamp. They are sold at five dollars for a hundred dollars face value. The merchant hands them out to his customer and they get into circulation that way. When a customer gets a hundred dollars' worth he can go and exchange it for some article valued at from twenty-five cents to a dollar. He never gets anything worth five dollars. A greater evil is this, that a great amount of these stamps are never redeemed. Very few people can get a hundred dollars together. The people who have been deceived into taking these stamps are generally poor people, and it takes them a long time to collect a hundred dollars. Where the tremendous profit of the trade stamp companies comes in is due to the fact that the stamps are never redeemed. Then—when people present the stamps at the store, they will be told that the store is out of goods but some are expected in a few days, and in the end the trading stamp agents get away without paying anything."

In 1901 and 1903 the Legislature of Ontario amended its statutes so as to enable municipalities to pass a by-law prohibiting the use of trading stamps and in 1903 the Legislature of Quebec passed legislation to the same effect. In subsequent litigation there arose a conflict of decisions, the Court of Appeal in Quebec holding that the provincial legislation on the subject was *ultra vires*, on the ground that it dealt with trade and commerce. On the other hand, it was decided by the Court of Appeal in Ontario that the legislation was constitutional. This conflict of decisions was referred to the Supreme Court of Canada and appears not to have been decided when the Criminal Code Amendment was brought before Parliament. The Bill provoked lengthy debates both in the House of Commons and in the Senate, those supporting the Bill arguing that the use of trading stamps was an instrument of fraud and thus more than unfair competition. The Bill was opposed on the ground that the advertising company which promoted the scheme was incorporated under Dominion Charter and also on the ground that no distinction could be drawn between stamps issued by the vendor of goods himself, redeemable on his own premises by himself, to which there seemed to be no objection, and trading stamps issued to be redeemable by a third party. (Par.(b) of s.322, excluding certain offers from the definition of trading stamps marks this distinction.)

During the discussion in the House of Commons the following took place (at column 9433):

"MR. R. L. BORDEN: I would recognize legislation against the principle of lottery as very wise, but it does not seem that this legislation proceeds on that basis. It is not framed from the standpoint of the purchaser, but from the standpoint of the vendor, and its object is to prevent the trading stamp proprietor from receiving a portion of the vendor's profits. I am not objecting to that. The evil may be so great as to require legislation, but let us understand the principle on which we are acting. If it is intended to prohibit lotteries we should go further.

SIR WILFRID LAURIER: I do not now dispute anything stated by my hon. friend (Mr. R. L. Borden). But we are dealing with an evil that exists. It may be that if we dealt with all covered by this principle, we should go further than we are now going. But we are now dealing with a lottery which has invaded every city and town in Canada, in the form of these trading stamps. The object of this legislation is to reach this form of lottery; and we think we have done it and will stamp it out. If any other evil

MR. R. L. BORDEN: In what way does the right hon. gentleman (Sir Wilfrid Laurier) say the principle of lottery is involved.

SIR WILFRID LAURIER: It induces people to pay money with the prospect of a chance to draw a prize."

The following cases are reported under the section:

(B.C.) *R. v. SMITH*, [1932]1 W.W.R.131: Conviction affirmed on appeal. Fine reduced. The particular form of the scheme is not stated.

(Alta.) *R. v. WESTERN AUTOMOBILE CLUB, LTD.*, [1934]2 W.W.R.431: The club supplied coupons to garages under a contract, and the garagemen, as agents of the club, distributed the coupons to members who purchased gasoline. The coupon read "Expires Feb. 1st, 1935. Good for Two Cents on any cash purchase except gasoline, at all Garages and Service Stations of the Western Automobile Club, Limited." Conviction affirmed on appeal. The Court said:

"Regarding the objection that the provision of the Criminal Code is *ultra vires* as being beyond the jurisdiction of the Dominion Parliament, I find that it has been in the statute for many years and its validity has never been questioned by any Court so far as I am aware.

It appears to me to come within the domain of criminal law allotted to the Dominion Parliament by the British North America Act 1867."

(Sask.) *R. v. McMANUS*(1938), 71 C.C.C.47, at p.52:

"It is sufficient to state that, on the whole of the evidence covering the transactions in question here, it is plain that the accused gave these premium slips to those who purchased his goods knowing that they would be redeemed, and intending that they should be redeemed, not by himself as the manufacturer of the goods, but by the Elite Studio. Premium slips disposed of in this manner are 'trading stamps' within the prohibition of ss.335(x) and 505(2)."

Appeal dismissed.