OLD CODE:

575G. (2) & (3) For wording of these subsections see p. 1001.

1054A. (6) For wording of this subsection see p.997.

575H. The Minister of Justice shall, once at least in every three years during which a person is detained in custody under a sentence of preventive detention, review the condition, history and circumstances of that person with a view to determining whether he should be placed out on licence, and if so, on what conditions.

1054A. (7) For wording of this subsection see p.997.

575E. A person convicted and sentenced to preventive detention, may appeal against his conviction and sentence, and the provisions of this Act relating to an appeal from a conviction for an indictable offence shall be applicable thereto.

PART XXII.

EFFECT AND ENFORCEMENT OF RECOGNIZANCES.

APPLICATIONS FOR FORFEITURE OF RECOGNIZANCES.—"Clerk of the Court."—"Schedule."

668. (1) Applications for the forfeiture of recognizances shall be made to the courts, designated in Column II of the Schedule, of the respective provinces designated in Column I of the Schedule.

(2) In this Part,

***(a)* "clerk of the court" means the officer designated in Column III of the Schedule in respect of the court designated in Column II of the Schedule, and**

***(b)* "Schedule" means the schedule to this Part.**

This Part replaces the former Part XXI, which was Part LIX (ss.910 *et seq.*) in the Code of 1892, and came largely from R.S.C. 1886, c.179. It was pointed out in *R. v. WAH LUNG,* [1928]3 W.W.R.232, that the provisions of the Criminal Code relating to bail were patterned after the statute 3 and 4 Wm. IV, c.99, and subsequent legislation in England, and that the procedure is further indicated by the Crown Office Rules. In the particular case, however, it was held that it had to be decided upon the provisions of the Code in circumstances to which the local Crown Practice Rules did not refer.

In this Part a complete new procedure is provided, more nearly uniform than was formerly the case, and, so far as it replaces the former sections especially relating to Quebec, not differing materially from an Act of that province R.S.Q. 1941, c.26.

The schedule (p.1135) was prepared after consultation with the provinces. The Part is drawn upon the basis that the proceedings on forfeiture are intended to collect a debt due to the Crown and are by nature civil rather than criminal. Where there is no express provision in the Code, the action is governed by provincial laws: *Re TALBOT'S BAIL*(1892), 23 O.R.65.

RECOGNIZANCE BINDING.

669. Where a person is bound by recognizance to appear before a court, justice or magistrate for any purpose and the session or sittings of that court or the proceedings are adjourned or an order is made changing the place of trial, that person and his sureties continue to be bound by the recognizance in like manner as if it had been entered into with relation to the resumed proceedings or the trial at the time and place at which the proceedings are ordered to be resumed or the trial is ordered to be held.

This is derived from the former s.698(3) which was enacted by 1938, c.44, s.37; and s.886(2), which came from s.651(4) in the Code of 1892, and R.S.C. 1886, c.174, s.102.

See also s.418 *ante* and notes thereto.

RESPONSIBILITY OF SURETIES.—Committal or new sureties.—Effect of committal.—Endorsement on recognizance.

670. (1) Where an accused is bound by recognizance to appear for trial, his arraignment or conviction does not discharge the recognizance, but it continues to bind him and his sureties, if any, for his appearance until he is discharged or sentenced, as the case may be.

(2) Notwithstanding subsection (1), the court, justice or magistrate may commit an accused to prison or may require him to furnish new or additional sureties for his appearance until he is discharged or sentenced, as the case may be.

(3) The sureties of an accused who is bound by recognizance to appear for trial are discharged if he is committed to prison pursuant to subsection (2).

(4) The provisions of section 669 and subsections (1), (2) and (3) of this section shall be endorsed on any recognizance entered into pursuant to this Act.

Subsecs.(1), (2) and (3) are the former s.1092, which was s.914 in the Code of 1892. It came from R.S.C. 1886, c.179, s.6, and 1 R.S.N.B., c.157, s.6.

Subsec.(4) was added by the Senate Committee, the purpose being to give the sureties notice of their responsibilities: Proceedings, Dec. 15-16, 1952, p.98. See Form 28.

In *R. v. CONNOLLY*(1923), 61 Que. S.C.513, it was held that a surety was entitled to be discharged on civil process when the appeal of the accused was dismissed in default of appearance at an adjourned sitting of which neither accused nor surety had notice. Accused had appeared at the sitting at which the recognizance required appearance.

EFFECT OF SUBSEQUENT ARREST.

671. Where an accused is bound by recognizance to appear for trial, his arrest upon another charge does not vacate the recognizance, but it continues to bind him and his sureties, if any, for his appearance until he is discharged or sentenced, as the case may be, in respect of the offence to which the recognizance relates.

OLD CODE:

698. (3) The recognizance entered into by the accused shall, notwithstanding any election made under Part XVIII, continue to bind the accused and his sureties for his appearance at the appropriate court for his trial and for his then surrendering and taking his trial and not departing the court without leave, in like manner as if the recognizance had been originally entered into with respect to such appearance, and it shall not be necessary unless otherwise ordered by the judge under the said Part, for the accused or his sureties to enter into a new recognizance upon such an election: Provided that at the time of entering into the recognizance the justices specifically advise the sureties that they will continue to be bound under the recognizance notwithstanding such an election in like manner as if same had been entered into with reference to such appearance and that they will not be entitled to receive from the Crown further notice of such an election or trial.

1092. The arraignment or conviction of any person charged and bound as aforesaid, shall not discharge the recognizance, but the same shall be effectual for his appearance for trial or sentence, as the case may be.
(2) The court may nevertheless commit such person to gaol upon his arraignment or trial, or may require new or additional sureties for his appearance for trial or sentence, as the case may be, notwithstanding such recognizance.
(3) Such commitment shall be a discharge of the sureties.

This is new and specifically overrides the decisions in *R. v. GETLIN* (1930), 54 C.C.C.225, and *R. v. McTAVISH*(1926), 47 C.C.C.251. In *R. v. GETLIN,* accused under bail had absconded and the immigration authorities refused to re-admit them when they had been found and re-arrested in the United States at the instance of the surety. Denton, Co.C.J.:

"The act of the Dominion of Canada in refusing to allow the accused persons to re-enter Canada is, I think, an act of the state which makes it impossible for the surety to carry out the terms of his recognizance, and I therefore discharge the whole of the forfeited recognizance."

In *R. v. McTAVISH*(1926), at p.254, *per* Mathers, C.J.K.B. (Man.):

"When McTavish was admitted to bail on July 2, he was placed in the custody of his sureties. The reason is that they may control his movements and produce him when required in discharge of their obligation. Any interference by the Crown with that custody discharges the sureties from their obligation under the recognizance. When, therefore, the Crown procured the arrest of McTavish it took him out of the custody of his sureties and thereby rendered it impossible for them to fulfil their obligation to produce him if called upon to do so. That such is the effect of subsequently arresting the cognizor upon the same charge upon which he was bailed is laid down in 6 Corp. Jur. 1027, s.282, and also in *R. v. EDWARDS*(1914), 19 D.L.R.207, 23 C.C.C.296."

In *H.M. POSTMASTER-GENERAL v. WHITEHOUSE*(1951), 35 Cr.App.R.8, the following appears at p.11:

"As we have pointed out in cases in the Court of Criminal Appeal, bail ought to be sparingly granted where prisoners have long records of convictions, since it very often results, when such a person obtains

Section 671—*continued*

bail, he commits offences while on bail, sometimes telling the Court afterwards that he did it so as to get money to enable him to be represented at Quarter Sessions, in other cases saying that he had to make some provision for his wife and children while he was in prison."

It was anomalous that the sureties should be relieved through the wrongdoing of the person who was in their custody.

RENDER OF ACCUSED BY SURETIES.—Arrest.—Certificate and entry of render.—Discharge of sureties.

672. (1) A surety for a person who is bound by recognizance to appear may, by an application in writing to a court, justice or magistrate apply to be relieved of his obligation under the recognizance, and the court, justice or magistrate shall thereupon issue an order in writing for committal of that person to the prison nearest to the place where he was, under the recognizance, bound to appear.

(2) An order under subsection (1) shall be given to the surety and upon receipt thereof he or any peace officer may arrest the person named in the order and deliver him with the order to the keeper of the prison named therein, and the keeper shall receive and imprison him until he is discharged according to law.

(3) Where a judge, justice or magistrate who issues an order under subsection (1) receives from the sheriff a certificate that the person named in the order has been committed to prison pursuant to subsection (2), he shall order an entry of the committal to be endorsed on the recognizance.

(4) An endorsement under subsection (3) vacates the recognizance and discharges the sureties.

Subsecs.(1) & (2) come from the former s.1088, which was s.910 in the Code of 1892, and came from R.S.C. 1886, c.179, ss.1 and 2, and 1 R.S.N.B. c.157, ss.1 and 2. Subsecs.(3) & (4) come from the former s.1090, which was s.912 in the Code of 1892, and came from R.S.C. 1886, c.179, s.4, and 1 R.S.N.B., c.157, s.4. Under the former ss.703 and 704 too, the surety could obtain a warrant where accused was about to abscond.

This affords an alternative to the common law right of the surety to render the principal, and makes possible the issue of process if he fears that he will be unable to do so. See s.674; as to the offence of skipping bail, s.125(c) *ante;* and as to the offence of indemnifying bail, s.119(d) & (e).

The accused, if committed, will be sent to the gaol nearest the place where his offence is to be tried.

RENDER OF ACCUSED IN COURT BY SURETIES.

673. A surety for a person who is bound by recognizance to appear may bring that person into the court at which he is required to appear at any time during the sittings thereof and before his trial and the surety may discharge his obligation under the recognizance by giving that person into the custody of the court, and the court shall thereupon commit that person to prison until he is discharged according to law.

OLD CODE:

1088. Any surety for any person charged with any indictable offence may, upon affidavit showing the grounds therefor, with a certified copy of the recognizance, obtain from a judge of a superior court or from a judge of a county court having criminal jurisdiction, or in the province of Quebec from a district magistrate, an order in writing under his hand, to render such person to the common gaol of the county where the offence is to be tried.
(2) The sureties, under such order, may arrest such person and deliver him, with the order, to the gaoler named therein, who shall receive and imprison him in the said gaol, and shall be charged with the keeping of such person until he is discharged by due course of law.

1091. The sureties may bring the person charged as aforesaid into the court at which he is bound to appear, during the sitting thereof, and then, by leave of the court, render him in discharge of such recognizance at any time before trial, and such person shall be committed to gaol, there to remain until discharged by due course of law; but such court may admit such person to bail for his appearance at any time it deems meet.

1093. Nothing in the foregoing provisions shall limit or restrict any right which a surety has of taking and rendering to custody any person charged with any such offence, and for whom he is such surety.

1089. The person rendered may apply to a judge of a superior court, or in cases in which a judge of a county court may admit to bail, to a judge of a county court, to be again admitted to bail, who may on examination allow or refuse the same, and make such order as to the number of the sureties and the amount of recognizance as he deems meet.

This comes from the former s.1091, which was s.913 in the Code of 1892, and came from R.S.C. 1886, c.179, s.5, and R.S.N.B., c.157, s.5.

S.675 provides for a further application for bail.

At common law the sureties took personal custody of the accused and were responsible for his appearance in court. Under this section they have power to render him there. It must be remembered, of course, that sometimes, as in ss.637 and 638, the sureties assume an obligation beyond that of ensuring the appearance of the accused.

RIGHTS OF SURETY PRESERVED.

674. Nothing in this Part limits or restricts any right that a surety has of taking and giving into custody any person for whom, under a recognizance, he is a surety.

This is the former s.1093, which was s.915 in the Code of 1892, and came from R.S.C. 1886, c.179, s.7. It preserves a common law right inherent in the transaction between the surety and his principal. See notes to ss.672 and 673, and see further an annotation by Eric Armour K.C., afterwards Mr. Justice Armour, in 47 C.C.C. at p.8.

APPLICATION FOR BAIL AFTER RENDER.

675. Where a surety for a person has rendered him into custody and that person has been committed to prison, he may apply to the court, justice or magistrate before whom he was required to appear

Section 675—*continued*

to be admitted again to bail, and the court, justice or magistrate may

(a) **refuse the application, or**

(b) **allow the application and make any order with respect to the number of sureties and the amount of the bail that is considered proper in the circumstances.**

This comes from the former s.1089 which was s.911 in the Code of 1892, and came from R.S.C. 1886, c.179, s.3, and R.S.N.B., c.157, s.3.

The former section did not refer to a justice or magistrate. In that connection, this section should be read with the provisions for review contained in s.463(1) (b) and s.465, *ante*.

DEFAULT TO BE ENDORSED.—Transmission to clerk of court.—*Prima facie* evidence.—Transmission of deposit.

676. (1) Where, in proceedings to which this Act applies, a person who is bound by recognizance does not comply with a condition of the recognizance, a court, justice or magistrate having knowledge of the facts shall endorse or cause to be endorsed on the back of the recognizance a certificate in Form 29 setting out

(a) **the nature of the default,**

(b) **the reason for the default, if it is known,**

(c) **whether the ends of justice have been defeated or delayed by reason of the default, and**

(d) **the names and addresses of the principal and sureties.**

(2) A recognizance that has been endorsed pursuant to subsection (1) shall be sent to the clerk of the court and shall be kept by him with the records of the court.

(3) A certificate that has been endorsed on a recognizance pursuant to subsection (1) is *prima facie* evidence of the default to which it relates.

(4) Where, in proceedings to which this section applies, the principal or surety has deposited money as security for the performance of a condition of a recognizance, that money shall be sent to the clerk of the court with the defaulted recognizance, to be dealt with in accordance with this Part.

Subsec.(1) comes from the former s.1094, which was s.917 in the Code of 1892, and came from R.S.C. 1886, c.179, ss.8, 9 & 15. Earlier relevant legislation was contained in C.S.U.C., c.117, ss.1-5 and s.10, and in 49 Vict., c.25, s.14, and in England in 3 Geo.IV, c.46, s.5 and the *Criminal Law Act*, 1826, 7 Geo.IV, c.64, s.3.

Subsecs.(2), (3) and (4) replace the former ss.1098 and 1099, and are redrawn to fit in with the general scheme of the Part, *viz.*, that the application for forfeiture is to be made to the court specified in the schedule rather than upon a roll presented to a later sitting of the assize court. Subsec.(4) became necessary because, under this Code, cash bail may be taken.

It will be observed that this Code does not use the word "estreat". This had come by loose usage to mean forfeiture. It meant, however, the "extracting" or withdrawing of the recognizance from the record in

OLD CODE:

Section 1089—continued

(2) Such order shall be dealt with in the same manner as the first order for bail, and so on as often as the case requires.

1094. If any person bound by recognizance for his appearance to prosecute or give evidence on the trial of any indictable offence, or to answer for any common assault, or to articles of the peace, or for whose appearance any other person has become so bound, makes default, the officer of the court by whom estreats are made out, shall prepare a list in writing, specifying the name of every person so making default, and the nature of the offence in respect of which such person, or his surety, was so bound, together with the residence, trade, profession or calling of every such person and surety.

(2) Such officer shall, in such list, distinguish the principals from the sureties, and shall state the cause, if known, why each such person did not appear, and whether, by reason of the non-appearance of such person, the ends of justice have been defeated or delayed.

1098. The proper officer to whom the recognizance and certificate of default are to be transmitted in the province of Ontario, shall be the clerk of the peace of the county for which such justice is acting.

(2) The court of general sessions of the peace for such county shall, at its then next sitting, order all such recognizances to be forfeited and estreated, and the same shall be enforced and collected in the same manner and subject to the same conditions as any fines, forfeitures or amercements imposed by or forfeited before such court.

1099. In the province of British Columbia, such proper officer shall be the clerk of the county court having jurisdiction at the place where such recognizance is taken, and such recognizance shall be enforced and collected in the same manner and subject to the same conditions as any fines, forfeitures or amercements imposed by or forfeited before such county court.

(2) In the other provinces of Canada such proper officer shall be the officer to whom like recognizances have been heretofore accustomed to be transmitted under the law heretofore in force: and such recognizances shall be enforced and collected in the same manner as like recognizances have heretofore been enforced and collected.

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case of default. The order for forfeiture was another step.

See also s.685(2) *post*.

PROCEEDINGS IN CASE OF DEFAULT.—Judge to fix time for hearing.—Notice of hearing.—Order of judge.—*Fieri facias* to issue.—Transfer of deposit.

677. (1) **Where a recognizance has been endorsed with a certificate pursuant to section 676 and has been received by the clerk of the court pursuant to that section,**

(a) **a judge of the court shall, upon the request of the clerk of the court or the Attorney General or counsel acting on his behalf, fix a time and place for the hearing of an application for the forfeiture of the recognizance, and**

(b) **the clerk of the court shall, not less than ten days before the time fixed under paragraph *(a)* for the hearing, send by registered mail to each principal and surety named in the**

Section 677—*continued*

recognizance, directed to him at the address set out in the certificate, a notice requiring him to appear at the time and place fixed by the judge to show cause why the recognizance should not be forfeited.

(2) Where subsection (1) has been complied with, the judge may, after giving the parties an opportunity to be heard, in his discretion grant or refuse the application and make any order with respect to the forfeiture of the recognizance that he considers proper.

(3) Where, pursuant to subsection (2), the judge orders forfeiture of the recognizance, the principal and his sureties become judgment debtors of the Crown, each in the amount that he has pledged himself to pay, and the clerk of the court or, in the province of Quebec, the prothonotary, shall issue a writ of *fieri facias* in Form 30 and deliver it to the sheriff of the territorial division in which the order was made.

(4) Where a deposit has been made by a person against whom an order for forfeiture of a recognizance has been made, no writ of *fieri facias* shall issue, but the amount of the deposit shall be transferred by the person who has custody of it to the person who is entitled by law to receive it.

This section, by provision for an application by appointment, provides a more expeditious procedure and gives the sureties as well a right to notice and to be heard upon the application. Support for such procedure is to be found in *R. v. McTAVISH,* noted *ante,* s.671.

There has been a difference of opinion as to whether notice to the sureties was necessary. See, *e.g., R. v. CREELMAN*(1893), 25 N.S.R.404, holding that it was, and *R. v. ZARKAS*(1918), 29 C.C.C.183, holding that it was not, this after review of the previous authorities including *R. v. CREELMAN,* but with particular reference to Crown Practice Rules in force in the province.

LEVY UNDER WRIT.—Costs.

678. (1) Where a writ of *fieri facias* is issued pursuant to section 677, the sheriff to whom it is delivered shall execute the writ and deal with the proceeds thereof in the same manner in which he is authorized to execute and deal with the proceeds of writs of *fieri facias* issued out of superior courts in the province in civil proceedings.

(2) Where this section applies the Crown is entitled to the costs of execution and of proceedings incidental thereto that are fixed, in the province of Quebec, by any tariff applicable in the Superior Court in civil proceedings, and in any other province, by any tariff applicable in the superior court of the province in civil proceedings, as the judge may direct.

Subsec.(1) is an adaptation of the former s.1107, which was s.920 in the Code of 1892, and came from R.S.C. 1886, c.179, s.14, and C.S.U.C., c.117, s.8. Subsec.(2) is an adaptation of the former s.1116, which was s.926(2)(c) in the Code of 1892, and came from R.S.C. 1886, c.179, s.22 (4), and C.S.L.C., c.106, s.2.

OLD CODE:

1107. If upon any writ issued under section eleven hundred and five, the sheriff takes lands or tenements in execution, he shall advertise the same in like manner as he is required to do before the sale of lands in execution in other cases; and no sale shall take place in less than twelve months from the time the writ comes to the hands of the sheriff.

1116. Such execution shall issue upon fiat or praecipe of the Attorney General or of any person thereunto authorized in writing by him; and the Crown shall be entitled to the costs of execution and to costs on all proceedings in the case subsequent to execution, and to such costs, in the discretion of the court, for the entry of the judgment, as are fixed by any tariff.
(2) The cognizor shall be liable to coercive imprisonment for the payment of the judgment and costs.

1105. The other of such rolls aforesaid shall, as soon as the same is prepared, be sent by the clerk of the court making the same, or in case of his death or absence, by such judge as aforesaid, with a writ of fieri facias and capias, according to Form 74, to the sheriff of the county in which such court was holden.

1115. The date of the receipt of such recognizance or minute and certificate by the prothonotary of the said court shall be endorsed thereon by him, and he shall enter judgment in favour of the Crown against the cognizor for the penal sum mentioned in such recognizance, and execution may issue therefor after the same delay as in other cases, which shall be reckoned from the time the judgment is entered by the prothonotary of the said court.

The provision for levy by execution is not new: see the former s.1105, which was s.916(4) in the Code of 1892, and came from R.S.C. 1886, c.179, s.9, and C.S.U.C., c.117, s.2, also 3 Geo.IV, c.46, s.2 (Imp.). As to Quebec, see the former ss.1115 *et seq*. S.1115 was s.926(2)(b) in the Code of 1892. It came from R.S.C. 1886, c.179, s.22(3), and C.S.L.C., c.106, s.2.

This section separates the writ of *capias, i.e.,* for the attachment of the person, from the writ of *fieri facias* for the levying of the amount (Form 30). See next section as to committal where the amount is not realized.

COMMITTAL WHEN WRIT NOT SATISFIED.—Notice.—Hearing.—Warrant of committal.—"Attorney General."

679. (1) Where a writ of *fieri facias* has been issued under this Part and it appears from a certificate in a return made by the sheriff that sufficient goods and chattels, lands and tenements cannot be found to satisfy the writ, or that the proceeds of the execution of the writ are not sufficient to satisfy it, a judge of the court may, upon the application of the Attorney General or counsel acting on his behalf, fix a time and place for the sureties to show cause why a warrant of committal should not be issued in respect of them.

(2) Seven clear days' notice of the time and place fixed for the hearing pursuant to subsection (1) shall be given to the sureties.

(3) The judge shall, at the hearing referred to in subsection (1), inquire into the circumstances of the case and may in his discretion

***(a)* order the discharge of the amount for which the surety is liable, or**

Section 679—*continued*

(b) make any order with respect to the surety and to his imprisonment that he considers proper in the circumstances and issue a warrant of committal in Form 24.

(4) A warrant of committal issued pursuant to this section authorizes the sheriff to take into custody the person in respect of whom the warrant was issued and to confine him in a prison in the territorial division in which the writ was issued or in the prison nearest to the court, until satisfaction is made or until the period of imprisonment fixed by the judge has expired.

(5) In this section and in section 677, "Attorney General" means, where subsection (2) of section 626 applies, the Attorney General of Canada.

This is an adaptation of the former s.1106 and, as to Quebec, of s.1117. S.1106 was part of s.916(4) in the Code of 1892, and came from R.S.C. 1886, c.179, s.9 pt.; C.S.U.C., c.117, and 3 Geo.IV, c.46, s.2 (Imp.). S.1117 was based upon s.926 in the Code of 1892, which came from 57 & 58 Vict., c.57, s.1.

This section was redrafted in the Senate (Committee proceedings, Dec. 15-16, 1952, pp.78 and 98), to provide that where the amount cannot be realized by execution, an application for committal shall be by appointment, with notice to the surety to give him an opportunity to be heard. Form 24 *post* was amended to provide for committal for a definite period.

The mention of the Minister of Finance in the former ss.1101 and 1112 has been eliminated. It is the Attorney General who carries on the proceedings for forfeiture.

See also s.626 *ante*, as to disposition of the proceeds of a forfeited recognizance where there is no special provision, and s.627 as to the recovery of forfeitures by civil action at the suit of the Crown.

The Schedule to this Part appears at page 1135.

PART XXIII.

EXTRAORDINARY REMEDIES.

APPLICATION OF PART.

680. This Part applies to proceedings in criminal matters by way of *certiorari*, *habeas corpus*, *mandamus* and prohibition.

This is new. Although by s.424 *ante*, the superior courts are given the power to make rules governing the practice in these matters, it is pointed out there that this power does not include the right to make *substantive* law. This Part deals further with the procedure relative thereto, but it is still necessary to go to the English law to find out when these remedies are available.

The writs of mandamus and prohibition are the converse of each other. The former issues out of the superior court to compel an inferior court to act in a matter within its jurisdiction when it has declined jurisdiction, although, of course, not to tell it what to do: *R. v. BISHOP OF LITCHFIELD*(1734), 7 Mod.217. The writ of prohibition issues to

OLD CODE:

1106. Such writ shall be authority to the sheriff for proceeding to the immediate levying and recovering of such fines, issues, amercements and forfeited recognizances, on the goods and chattels, lands and tenements of the several persons named therein, or for taking into custody the bodies of such persons respectively, in case sufficient goods and chattels, lands or tenements cannot be found, whereof the sums required can be made.

(2) Every person so taken shall be lodged in the common gaol of the county, until satisfaction is made, or until the court into which such writ is returnable, upon cause shown by the party, as hereinafter mentioned, makes an order in the case and until such order has been fully complied with.

1117. When sufficient goods and chattels, lands or tenements cannot be found to satisfy the judgment against a cognizor and the same is certified in the return to the writ of execution or appears by the report of distribution, a warrant of commitment addressed to the sheriff of the district may issue upon the fiat or praecipe of the Attorney General, or of any person thereunto authorized in writing by him, and such warrant shall be authority to the sheriff to take into custody the body of the cognizer so in default and to lodge him in the common gaol of the district until satisfaction is made, or until the court which issued such warrant, upon cause shown as hereinafter mentioned, makes an order in the case and such order has been fully complied with.

(2) Such warrant shall be returned by the sheriff on the day on which it is made returnable and the sheriff shall state in his return what has been done in execution thereof.

(3) On petition of the cognizor, of which notice shall be given to the clerk of the Crown of the district, the court may inquire into the circumstances of the case and may in its discretion order the discharge of the amount for which he is liable or make such order with respect thereto and to his imprisonment as may appear just, and such order shall be carried out by the sheriff.

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restrain an inferior court from acting where it has no jurisdiction, or where there is bias or interest.

In *R. v. CAMBORNE JUSTICES; ex parte PEARCE,* [1954] 2 All E.R.850 at p.855 it was held that:

> "to disqualify a person from acting in a judicial or quasi-judicial capacity on the ground of interest (other than pecuniary or proprietary) in the subject-matter of the proceedings, a real likelihood of bias must be shown", and further that "a real likelihood of bias must be made to appear, not only from the materials in fact ascertained by the party complaining, but also from such further facts as he might readily have ascertained and easily verified in the course of his inquiries."

As to *habeas corpus* and *certiorari*, see notes to ss.681 and 682. See also notes to s.424.

DETENTION OF PRISONER ON INQUIRY AS TO LEGALITY OF IMPRISONMENT.

681. Where a person, being in custody by reason that he is charged with or has been convicted of an indictable offence, has instituted proceedings to which this Part applies, before a judge or

Section 681—*continued*

court having jurisdiction, to have the legality of his imprisonment determined, the judge or court may, without determining the question, make an order for the further detention of that person and direct the judge, justice or magistrate under whose warrant he is in custody, or any other judge, justice or magistrate to take any proceedings, hear such evidence or do any other thing that, in the opinion of the judge or court, will best further the ends of justice.

This comes from the former s.1120 which appeared as s.752 in the Code of 1892 with no source indicated. It was not in the Criminal Code Bill of 1891, but was in the Bill of 1892 with amendments proposed by the joint committee of the Senate and House of Commons, at the beginning of Part LXIV. Taschereau's edition remarked that it seemed out of place there.

In Hansard 1892, Vol. II, col.4448, it appears that the section was intended to provide that a court in cases of extradition, might take such evidence as might appear best to further the ends of justice. Mr. Mulock said it was the result of the case of one Garbett, who was charged with an indictable offence committed in Texas. The Judge held that all he had to do was to be satisfied that there was a *prima facie* case, and he made the order "although there were a number of people in court who were ready to prove that the prisoner was in the town of Wingham at the time when he was said to have committed the offence in Texas." However, it is hardly necessary to add that the application of the section has not been confined to extradition cases, although it has been applied in such cases: *Ex p. O'DELL and GRIFFEN*(1953), 105 C.C.C.256.

In that case it was said at p.260 that it does not follow from provisions of the *Extradition Act* relating to the conduct of the hearing that "the technicalities of our criminal procedure have been introduced into the proceedings to be conducted before the tribunal designated by s.9 of the *Extradition Act*," and *Re COLLINS (No.3)*(1905), 10 C.C.C.80 at p.83 was quoted that "the technicalities of the criminal practice should not be allowed to encumber or smother the administration of the procedure prescribed by these modern statutes for the purpose of carrying out the obligations we have assumed under a vastly salutary international arrangement."

In the general statutory revision of 1906, Part XXII of the repealed Code was set up and this section included in it.

The new section resolves a conflict by reason of the insertion of the words "or has been convicted". The words "charged with an indictable offence" in the former section had given rise to a difference of judicial opinion, "it being held on the one hand that it applied only to cases where accused is being held pending an indictment, and on the other, that it includes cases where accused is in custody after a summary conviction." *R. v. GEE DEW*(1924), 42 C.C.C.210.

R. v. MORRIS(1910), 16 C.C.C.1(N.S.S.C.), says simply that s.1120 is confined to indictable offences. *R. v. JOHNSON*(1912), 20 C.C.C.8 (Man.K.B.): "It has been the constant practice of this Court to deal with such matters as this one (summary conviction under the vagrancy

OLD CODE:

1120. Whenever any person in custody charged with an indictable offence has taken proceedings before a judge or criminal court having jurisdiction in the premises by way of certiorari, habeas corpus or otherwise, to have the legality of his imprisonment inquired into, such judge or court may, with or without determining the question, make an order for the further detention of the person accused, and direct the judge or justice, under whose warrant he is in custody, or any other judge or justice, to take any proceedings, hear such evidence, or do such further act as in the opinion of the court or judge may best further the ends of justice.

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sec.) on application for *habeas corpus.*" This was done apparently by analogy with the original jurisdiction of the Court of King's Bench in England to enquire into summary convictions.

In *R. v. FREJD*(1910), 18 C.C.C.110, it was said by Meredith, J.A.:

"But the inapplicability of sec.1120 is not conclusive of the case . . . . . It is, in no sense, the purpose of any writ of *habeas corpus* to thwart the due administration of justice, and so, in many cases, even under the common law, one who is unduly restrained of his liberty, in one respect, and entitled to his discharge from such detention, may nevertheless be further detained, and dealt with, so that justice may be done regarding him."

In *R. v. L'HEUREUX*(1932), 59 C.C.C.69, where earlier authorities are reviewed, it was said that:

"The appellant's contention rests mainly on the use in the section of the words 'charged' and 'accused' instead of 'convicted', and it does not seem to be satisfactorily answered by saying that one who is convicted is or has been also charged and accused. This Part XXII of the Code taken as a whole, seems to show an intention to make a neat distribution of the matter of *habeas corpus* and *certiorari* by providing on the other hand, in s.1121 and the following (as they expressly do) for cases where there has been a conviction, and, on the other hand, in said s.1120 for cases where a conviction has not yet been reached. No particular significance can, however, attach one way or the other to the words *'certiorari, habeas corpus* or otherwise', for *certiorari,* as *habeas corpus,* may go in cases where there has been as well as where there has not been a conviction."

In *R. v. TELLIER*(1946), 85 C.C.C.401, it was held that although s.1120 did not apply to a conviction made by a summary conviction court, the court had inherent power to control its proceedings quite apart from s.1120, and might, on an application for *habeas corpus,* order the detention of the prisoner where the conviction was valid.

In *R. v. MISHKO*(1945), 85 C.C.C.410, where on a preliminary hearing the magistrate committed accused for trial after refusing to hear witnesses for the defence, it was held that the magistrate should have heard the witnesses, and an order for detention was made under s.1120 for the purpose of preliminary inquiry.

The usual method of questioning the legality of confinement is by application for writ of *habeas corpus ad subjiciendum,* sometimes with *certiorari* in aid where the court wishes to have before it not only the

Section 681—*continued*

warrant of committal but also the conviction on which it is based. As a general matter it is relevant to quote *Ex p. CORKE,* [1954]2 All E.R.440, where the applicant, serving a sentence imposed by a magistrate under the *Vagrancy Act,* applied for a writ of *habeas corpus* on an affidavit alleging that he was convicted wrongly or on perjured evidence:

> "It is as well that persons serving sentences passed on them by a competent court of summary jurisdiction should understand that *habeas corpus* is not a means of appeal. If they complain that they are wrongly convicted, they should appeal to quarter sessions . . . . . before a writ can issue or leave can be given to apply for a writ, an affidavit must be before the court showing some ground on which the court can say that the applicant is unlawfully detained. In this case it is perfectly clear that, unless the conviction was set aside by a court of appeal (and the time for appeal has long gone by), he is lawfully in custody, serving a lawful sentence."

The writ of *habeas corpus* is of great antiquity and was in use before Magna Charta. Bacon's Abridgment describes six forms of it. Although it may be observed that the writ of *habeas corpus ad testificandum* to bring up a witness who is detained in prison, is covered by s.446, *ante,* it is to the writ *ad subjiciendum,* described by Blackstone as "The great and efficacious writ in all manner of illegal confinement", that the criminal law commonly refers, and it is to it that the statute 31 Car.II, c.2 (1679), *The Habeas Corpus Act,* refers. The preamble sets out certain abuses which had grown up and adds "for the prevention whereof, and the more speedy relief of all persons imprisoned for any such criminal or supposed criminal matter". The substance of the statute is stated (Blackstone, Bk. 3, p.136) in part as follows:

> "The Statute itself enacts,
>
> 1. That on complaint and request in writing by or on behalf of any person committed and charged with any crime (unless committed for treason or felony expressed in the warrant; or as accessory, or on suspicion of being accessory, before the fact, to any petit-treason or felony; or upon suspicion of such petit-treason or felony, plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process,) the lord chancellor or any of the twelve judges, in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a *habeas corpus* for such prisoner, returnable immediately before himself or any other of the judges; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature.
>
> 2. That such a writ shall be endorsed as granted in pursuance of this act, and signed by the person awarding them.
>
> 3. That the writ shall be returned and the prisoner brought up, within a limited time, according to the distance, not exceeding in any case twenty days."

In 1816 a *Habeas Corpus Act* was passed for securing the liberty of the subject in cases *not* covered by the Statute of Car.II. Notwithstand-

ing that its subject-matter would in Canada be within the scope of provincial legislation, it is mentioned here because both of these Imperial Acts came into force in Canada, either through settlement or by specific adoption of English law, by virtue of s.129 of the *British North America Act*.

The *Supreme Court Act* confers an original jurisdiction in *habeas corpus* upon the judges of that Court.

See also notes to ss.690 and 691 *post*, especially *Re FRED STORGOFF*.

Other Canadian cases, with English authorities on which they are based, are as follows:

Re RICHARD(1907), 38 S.C.R.394, was an application for a writ of *habeas corpus* after a conviction under the *Canada Temperance Act*. Application made to Mr. Justice Duff and referred by him to the Court. The application was granted.

In *Re SPROULE*(1886), 12 S.C.R.140: Motion to quash a writ of *habeas corpus*. Held, that the right to issue a writ of *habeas corpus* being limited by section 51 of the *Supreme and Exchequer Court Act* to "an enquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada," such writ cannot be issued in a case of murder, which is a case at common law (Fournier and Henry, JJ., dissenting).

Re DEAN(1913), 48 S.C.R.235: Application for writ of *habeas corpus* after conviction for breaking and entering. Refused:

> "The jurisdiction (*i.e.* of a judge of the Supreme Court of Canada) extends only, I think, to those cases in which the 'commitment' has followed upon a charge of a criminal offence, which is a criminal offence by virtue of some statutory enactment of the Parliament of Canada; it does not in my opinion, extend to cases in which the 'commitment' is for an offence which was an offence at common law or under a statute which was passed prior to Confederation and is still in force."

Re R. v. McADAM(1925), 44 C.C.C.155(B.C.): Held, an appeal from a refusal of a writ of *habeas corpus* arising out of a criminal matter is a criminal appeal, and falls within the heading, criminal law, assigned to the Dominion by s.91 of the *British North America Act*. Therefore there is no right of appeal in such a case as none is granted by the *Criminal Code*.

Re ROBERTS(1923), 39 C.C.C.99(S.C.C.):

> "The applicant, Roberts, as appears by his petition, is held in custody at Quebec for an alleged offence against the privileges, honour, and dignity of the Provincial Legislature of Quebec and under the authority of special legislation enacted by it 1922 (Que.), c.18. The cause of his commitment is that Act of the Legislature. There is, in my opinion, no ground whatever for suggesting that it is 'in a criminal case under any Act of the Parliament of Canada.' On that simple ground I am satisfied that I am without jurisdiction to entertain the present application for the issue of a writ of *habeas corpus ad subjiciendum*."

Section 681—*continued*

Re GRAY(1918), 42 D.L.R.1(S.C.C.): Application by way of *habeas corpus* for the discharge of a soldier in military custody awaiting sentence of a courtmartial for disobeying orders in violation of the *Militia Act*, R.S.C. 1906, c.41, on the ground that certain orders cancelling exemptions granted under the *Military Service Act* were invalid. Orders held valid and application refused. Anglin, J., expressed the opinion that the "commitment" of the applicant was "in a criminal case" under an Act of Parliament within s.62 of the *Supreme Court Act*.

Re WONG SHEE(1922), 37 C.C.C.37: The B.C.C.A. held that it had jurisdiction to hear an appeal by the Crown from an order of *habeas corpus* releasing a person, ordered by a Board of Inquiry to be deported under the *Immigration Act*, 1910 (Can.) c.27. Order set aside.

Ex p. MARTIN(1927), 48 C.C.C.23(Ont.): Application for *habeas corpus* after conviction for false and fraudulent statements under s. 407A of the *Criminal Code*. Refused. Held, that where an illegal sentence is passed upon an accused in a County Court Judge's Criminal Court, no writ of *habeas corpus* lies, the common law writ because the Court sentencing him is one of criminal jurisdiction, the statutory writ because the Court is a Court of Record. The judgment refers to statutes 1640 Car. I, c.10 (abolishing the Star-Chamber), 31 Car. II, c.2 (1679), 56 Geo.III, c. 100 (the Act of 1816), the *Liberty of the Subject Act*, 1866 (Can.) c.45, which follows the English precedent of 1816 and became the Ontario *Habeas Corpus Act*, R.S.O. 1914, c.84.

SMITH v. R.(1931), 56 C.C.C.51: Appeal by accused from the refusal of a Judge of the Supreme Court of Canada to issue a writ of *habeas corpus*. Held that no appeal lay, as theft and attempts to steal were criminal offences at common law and not offences "made criminal by an Act of the Parliament of Canada" within the meaning of s.57 of the *Supreme Court Act*.

Re WOODHALL(1888), 57 L.J.M.C.70, was a motion by way of appeal for a rule *nisi* for *habeas corpus*. Accused committed to prison with a view to surrender as a fugitive under the *Extradition Act*, 1870. Held no appeal lay:

> "The object is to have the alleged criminal released from a prosecution for a criminal offence. If it is not a criminal case I do not know what it is. In cases of *habeas corpus* for the custody of infants and the like, there is jurisdiction, but in cases like this it is perfectly plain that there is none."

COX v. HAKES(1890), 15 App.Cas.506: It was held in the House of Lords that where a person had been discharged from custody by an order of the High Court under a *habeas corpus*, the Court of Appeal has no jurisdiction to hear an appeal. Held also, that the appeal to the Court of Appeal was not "in a criminal cause or matter" (the original proceedings having been in an Ecclesiastical Court).

Ex p. SAVARKAR, [1910] 2 K.B.1056: In this case an order *nisi* for a writ of *habeas corpus* was obtained by the applicant who had been committed to prison under the *Fugitive Offenders Act*, 1881, for deportation to India to be tried there in respect of alleged offences under

OLD CODE:

1121. No conviction or order made on summary conviction which has been affirmed, or affirmed and amended, in appeal, shall be quashed for want of form, or be removed by certiorari into any superior court, and no warrant or commitment shall be held void by reason of any defect therein, provided it is therein alleged that the defendant has been convicted, and there is a good and valid conviction to sustain the same.

1122. No writ of certiorari shall be allowed to remove any conviction or order had or made before any justice if the defendant has appealed from such conviction or order to any court to which an appeal from such conviction or order is authorized by law, or shall be allowed to remove any conviction or order made upon such appeal.

1129. Whenever it appears by any conviction made by a justice or stipendiary magistrate that the defendant has appeared and pleaded, and the merits have been tried, and the defendant has not appealed against the conviction, where an appeal is allowed, or if appealed against, the conviction has been affirmed, such conviction shall not afterwards be set aside or vacated in consequence of any defect of form whatever, but the construction shall be such a fair and liberal construction as will be agreeable to the justice of the case.

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the Indian Penal Code. It was held that this was a criminal cause or matter and that no appeal lay from a refusal to issue the writ.

AMAND v. HOME SECRETARY, [1943] A.C.147: A Netherlands subject, who had resided in England for fourteen years, was arrested as an absentee without leave from the Netherlands Army in Great Britain, in which he was an ordinary conscript, and taken before a magistrate with a view to his being handed over to the Netherlands military authorities. The Divisional Court refused his application for a writ of *habeas corpus*. Held, that it was a criminal cause or matter and that there was no appeal. *Per* Viscount Simon, L.C. at p.156:

> "It has been consistently held that there is no right of appeal from the refusal of the writ in extradition proceedings (Ex p. Woodhall) or in proceedings under the Fugitive Offenders Act, 1881 (Ex p. Savarkar).
>
> He has been apprehended by the police on suspicion of being a deserter or absentee without leave from the Dutch Forces, and is being brought before a court of summary jurisdiction on these charges by a procedure analogous to that of the Army Act, so that the Court, if 'satisfied', may deal with him as provided in subsec.4 of that section."

WHERE CONVICTION OR ORDER NOT REVIEWABLE.

682. No conviction or order shall be removed by *certiorari*

***(a)* where an appeal was taken, whether or not the appeal has been carried to a conclusion, or**

***(b)* where the defendant appeared and pleaded and the merits were tried, and an appeal might have been taken, but the defendant did not appeal.**

This section comes from the former ss.1121, 1122 and 1129, which were ss.886, 887 and 896 in the Code of 1892, and R.S.C. 1886, c.178, ss.83, 84 and 94.

Section 682—*continued*

The writ of *certiorari* is a procedure whereby the superior court which in Canada inherits the jurisdiction of the Court of King's Bench in England, calls before it the proceedings of an inferior court to examine them for legal defects, such as want of jurisdiction, or where it is alleged that a conviction has been obtained by fraud. (As to inherent jurisdiction, see *R. v. TELLIER, supra*, s.681.)

Blackstone's Commentaries, Bk. IV, p.316, explains it as follows:

"Such writ of certiorari, when issued and delivered to the inferior court for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior court, and makes all subsequent proceedings therein entirely erroneous and illegal; unless the court of King's Bench remands the record to the court below, to be there tried and determined. A certiorari may be granted at the instance of either the prosecutor or the defendant; the former as a matter of right, the latter as a matter of discretion; and therefore it is seldom granted to remove indictments from the justices of gaol delivery, or after issue joined or confession of the fact in any of the courts below."

At p.315 he states the four usual purposes:

"1. To consider and determine the validity of appeals or indictments and the proceedings thereon; and to quash or confirm them as there is cause: or

2. Where it is surmised that a partial or insufficient trial will probably be had in the court below, the indictment is removed, in order to have the prisoner or defendant tried at the bar of the King's bench, or before the justices of nisi prius:

3. It is so removed, in order to plead the King's pardon there:

4. To issue process of outlawry against the offender, in those counties or places where the process of the inferior judges will not reach him."

Stephen's Comm., 9th ed., Vol. III, p.386 is to the same effect, but referring to the Queen's Bench Division of the High Court, says:

"For this is the sovereign's ordinary court of justice in causes criminal; and has consequently the power of issuing such writ to any court of rank subordinate to its own in causes of this description, unless the certiorari be taken away by the express words of some Act of Parliament."

On the last point, the Encyc. of the Laws of England, 3rd ed., vol. 2, p.722 says:

"It may at any time be claimed by the Crown as a matter of absolute right, and it issues as of course when applied for by the Attorney General representing the Crown (*R. v. AMENDT*, [1915]2 K.B.276 (C.A.)). This is the case even where the right to certiorari is expressly taken away by statute, for unless named, the Crown is not bound. (*R. v.* —— (1815), 2 Chit.136; *R. v. DAVIES*(1794), 5 Term R.626, and see Archbold, 30th ed., 100)."

In *Re ONTARIO LABOUR RELATIONS BOARD*(1951), 100 C.C.C.301(Ont.), it is said at p.332, quoting *R. v. MAHONY*, [1910] 2 Ir.R.695 at p.730:

"Looking at the history of legislation, I find it hard to suppose that

no-certiorari clauses were devised or introduced to validate intrinsically void adjudications, and to confer jurisdiction which, but for them would not exist."

At p.337: "The foregoing authorities point to the irresistible conclusion that inferior Courts are not sheltered by no-certiorari provisions where there has been an abuse of jurisdiction in the form of a denial of substantial justice."

The leading Canadian case is that of *R. v. NAT BELL LIQUORS LTD.*(1922), 37 C.C.C.129, a decision of the Privy Council, which laid it down that the court is not entitled to look at the depositions if the court below had jurisdiction and the conviction is good on its face, but the extent of this case has been the subject of much controversy. *E.g.* it was held in *ODELL v. TREPANIER*(1949), 95 C.C.C.241, at p.244, that the Superior Court on *certiorari* proceedings, is entitled to examine all the evidence, and if it finds that there is *no evidence* on which the trial judge could have legally reached the conclusion he did reach, to render the judgment which should have been rendered. And in *R. v. SARBER* (1951), 101 C.C.C.222 (B.C.S.C.), where the judge was amending on *certiorari* a sentence which was clearly in excess of jurisdiction, he pointed out that in a few cases convictions had been amended where, upon a perusal of the depositions, it appeared that the sentence was more than ought reasonably to have been imposed.

In *R. v. DUNBAR*(1953), 106 C.C.C.395 (B.C.S.C.), applying *R. v. THOMPSON*(1950), 99 C.C.C.89 at pp. 90-91, it was held that the court on *certiorari* has the right to look at the depositions for the purpose of determining the territorial jurisdiction of the magistrate.

Proceedings by way of *certiorari* are not an appeal on the merits. The following appears in *R. v. LANE*(1950), 25 M.P.R.263 at page 268:

"As the defendant had the right to appeal against the said conviction, he should have availed himself of that right if he was dissatisfied with the findings of the Court. Without a satisfactory explanation, certiorari will not be granted when a right of appeal exists unless there are exceptional circumstances." *R. v. PALMER, Ex p. McCOY*(1929), 3 M.P.R.344 and other cases cited there.

Tremeear's Code, 5th ed., p.1521, has a summary of what appear to be regarded as exceptional circumstances.

CONVICTION OR ORDER REMEDIABLE, WHEN.—Correcting punishment.—In case of fine.—In case of imprisonment.—Where both are imposed.—Remitting matter to justice.—Amendment.—Sufficiency of statement.

683. (1) No conviction, order or warrant for enforcing a conviction or order shall, on being removed by *certiorari*, be held to be invalid by reason of any irregularity, informality or insufficiency therein, where the court before which or the judge before whom the question is raised, upon perusal of the evidence, is satisfied

***(a)* that an offence of the nature described in the conviction, order or warrant, as the case may be, was committed,**

***(b)* that there was jurisdiction to make the conviction or order or issue the warrant, as the case may be, and**

***(c)* that the punishment imposed, if any, was not in excess of the punishment that might lawfully have been imposed,**

Section 683—*continued*

but the court or judge has the same powers to deal with the proceedings in the manner that he considers proper that are conferred upon a court to which an appeal might have been taken.

(2) Where, in proceedings to which subsection (1) applies, the court or judge is satisfied that a person was properly convicted of an offence but the punishment that was imposed is greater than the punishment that might lawfully have been imposed, the court or judge

***(a)* shall correct the sentence,**

(i) where the punishment is a fine, by imposing a fine that does not exceed the maximum fine that might lawfully have been imposed,

(ii) where the punishment is imprisonment, and the person has not served a term of imprisonment under the sentence that is equal to or greater than the term of imprisonment that might lawfully have been imposed, by imposing a term of imprisonment that does not exceed the maximum term of imprisonment that might lawfully have been imposed, or

(iii) where the punishment is a fine and imprisonment, by imposing a punishment in accordance with subparagraph (i) or (ii), as the case requires, or

***(b)* shall remit the matter to the judge, justice or magistrate and direct him to impose a punishment that is not greater than the punishment that may be lawfully imposed.**

(3) Where an adjudication is varied pursuant to subsection (1) or (2), the conviction and warrant of committal, if any, shall be amended to conform with the adjudication as varied.

(4) Any statement that appears in a conviction and is sufficient for the purpose of the conviction is sufficient for the purposes of an information, summons, order or warrant in which it appears in the proceedings.

This comes from the former s.1124. It was brought into the Summary Convictions part of the Code of 1892 from R.S.C.1886, c.178, s.87, becoming s.889 of the Code. In the general revision of 1906 it was transferred to the part dealing with extraordinary remedies, but still referring to "a conviction or order made by a justice".

In this Code the application is not limited to summary conviction matters, but this change is not a matter of substance, in view of the inherent power of the superior court to review the proceedings of inferior courts and correct defects therein. On this point, see *R. v. MISHKO,* noted *ante* s.681.

There is power to amend on an application for *certiorari.* The court applied to may itself make the amendment, as is illustrated by the following cases:

In *Re R. v. DROLET*(1925), 43 C.C.C.310, a conviction was amended as to penalty; in *Re EASTICK*(1949), 96 C.C.C.160, it was amended to fix a definite term of suspension of a driver's license on conviction for driving while intoxicated.

OLD CODE:

1124. No conviction or order made by any justice and no warrant for enforcing the same, shall, on being removed by certiorari, be held invalid for any irregularity, informality or insufficiency therein, if the court or judge before which or whom the question is raised, upon perusal of the depositions, is satisfied that an offence of the nature described in the conviction, order or warrant, has been committed, over which such justice has jurisdiction, and that the punishment imposed is not in excess of that which might have been lawfully imposed for the said offence: Provided that the court or judge, where so satisfied, shall, even if the punishment imposed or the order made is in excess of that which might lawfully have been imposed or made, have the like powers in all respects to deal with the case as seems just as are by section seven hundred and fifty-four conferred upon the court to which an appeal is taken under the provisions of section seven hundred and forty-nine.

(2) Any statement which, under this Act or otherwise, would be sufficient if contained in a conviction, shall also be sufficient if contained in an information, summons, order or warrant.

1125. The following matter amongst others shall be held to be within the provisions of the last preceding section:—

(a) The statement of the adjudication, or of any other matter or thing, in the past tense instead of in the present;

In *R. v. DEGAN*(1908), 17 O.L.R.366, and similarly in *R. v. SILVERMAN*(1920), 19 O.W.N.138, a warrant of commitment was amended to conform to the adjudication by striking out a reference to costs of conveyance of the prisoner.

The following are instances in which the magistrate was permitted to file amended process:

In *Re PLUNKETT*(1895), 1 C.C.C.365, where the original warrant of commitment was bad as not following the conviction nor disclosing an offence.

In *R. v. BARRE*(1905), 11 C.C.C.1, it was said that:

"The right to substitute a good for a bad conviction or commitment after a motion for habeas corpus has long been recognized and acted upon: Clarke's Magistrates' Manual, 235; Paley on Convictions, 320. In no place have I found it stated that that right is confined to cases where the defect is one of form only."

In *Re MUSCHIK*(1915), 25 C.C.C.170 a new warrant and commitment were filed amending the original documents by omitting hard labour, which the justice had improperly imposed. In this case there is a review of authorities.

IRREGULARITIES WITHIN SECTION 683.

684. Without restricting the generality of section 683, that section shall be deemed to apply where

***(a)* the statement of the adjudication or of any other matter or thing is in the past tense instead of in the present tense,**

***(b)* the punishment imposed is less than the punishment that might by law have been imposed for the offence that appears by the evidence to have been committed, or**

Section 684—*continued*

(c) there has been an omission to negative circumstances, the existence of which would make the act complained of lawful, whether those circumstances are stated by way of exception or otherwise in the provision under which the offence is charged, or are stated in another provision.

This is the former s.1125, which was s.890 in the Code of 1892, and came from R.S.C.1886, c.178, s.88.

See notes to ss.371 and 683 *ante*, and s.702 *post*.

GENERAL ORDER FOR SECURITY BY RECOGNIZANCE.—Provisions for forfeiture of recognizance apply.

685. (1) A court that has authority to quash a conviction, order or other proceeding on *certiorari* may prescribe by general order that no motion to quash any such conviction, order or other proceeding removed to the court by *certiorari*, shall be heard unless the defendant has entered into a recognizance with one or more sufficient sureties, before one or more justices of the territorial division in which the conviction or order was made, or before a judge or other officer, or has made a deposit to be prescribed with a condition that the defendant will prosecute the writ of *certiorari* at his own expense, without wilful delay, and, if ordered, will pay to the person in whose favour the conviction, order or other proceeding is affirmed, his full costs and charges to be taxed according to the practice of the court where the conviction, order or proceeding is affirmed.

(2) The provisions of Part XXII relating to forfeiture of recognizances apply to a recognizance entered into under this section.

Subsec.(1) comes from the former s.1126, which was s.892 in the Code of 1892, and R.S.C.1886, c.178, s.90. It is widened to cover all proceedings on *certiorari*.

Subsec.(2) is new. Formerly it was not clear that the provisions relating to forfeiture applied to a recognizance under s.1126.

In *R. v. CUNNINGHAM*(1953), 105 C.C.C.377, it was held in reference to the former ss.576 and 1126, that the Supreme Court of British Columbia has power to make rules as to costs in applications for *certiorari* in criminal matters and to award costs.

EFFECT OF ORDER DISMISSING APPLICATION TO QUASH.

686. Where a motion to quash a conviction, order or other proceeding is refused, the order of the court refusing the application is sufficient authority for the clerk of the court forthwith to return the conviction, order or proceeding to the court from which or the person from whom it was removed, and for proceedings to be taken with respect thereto for the enforcement thereof.

This comes from the former s.1127 which was s.895 in the Code of 1892, and came from R.S.C.1886, c.178, s.93.

The reference to the writ of *procedendo* has been dropped as unnecessary since it was abolished by s.1127. That was a prerogative writ

OLD CODE:

Section 1125—continued

(b) The punishment imposed being less than the punishment by law assigned to the offence—stated in the conviction or order or to the offence—which appears by the depositions to have been committed;

(c) The omission to negative circumstances, the existence of which would make the Act complained of lawful, whether such circumstances are stated by way of exception or otherwise in the section under which the offence is laid, or are stated in another section.

(2) Nothing in this section contained shall be construed to restrict the generality of the wording of the last preceding section.

1126. The court having authority to quash any conviction, order or other proceeding by or before a justice may prescribe by general order that no motion to quash any conviction, order or other proceeding by or before a justice, brought before such court or certiorari, shall be entertained unless the defendant is shown to have entered into a recognizance with one or more sufficient sureties, before a justice or justices of the county or place within which such conviction or order has been made, or before a judge or other officer, as may be prescribed by such general order, or to have made a deposit to be prescribed in like manner, with a condition to prosecute such writ or certiorari at his own costs and charges, with effect, without any wilful or affected delay, and if ordered so to do, to pay the person in whose favour the conviction, order or other proceeding is affirmed, his full costs and charges to be taxed according to the course of the court where such conviction, order or proceeding is affirmed.

1127. If a motion or rule to quash a conviction, order or other proceeding is refused or discharged, it shall not be necessary to issue a writ of procedendo, but the order of the court refusing or discharging the application shall be a sufficient authority for the registrar or other officer of the court forthwith to return the conviction, order or proceeding to the court or justice from which or whom they were removed, and for proceedings to be taken thereon for the enforcement thereof, as if a procedendo had issued, which shall forthwith be done.

1128. No order, conviction or other proceeding made by any justice or stipendiary magistrate shall be quashed or set aside, and no defendant shall be discharged, by reason of any objection that evidence has not been given of a proclamation or order of the Governor in Council, or of any rules, regulations, or by-laws made by the Governor in Council in pursuance of a statute of Canada, or of the publication of such proclamation, order, rules, regulations or by-laws in the Canada Gazette.

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by which the superior court remitted back to the inferior court a cause that had been removed from it improperly or on insufficient grounds.

CONVICTION, ETC., NOT SET ASIDE FOR WANT OF PROOF OF COUNCIL. —Judical notice.

687. (1) No order, conviction or other proceeding shall be quashed or set aside, and no defendant shall be discharged, by reason only that evidence has not been given

***(a)* of a proclamation or order of the Governor in Council or the Lieutenant-Governor in Council;**

***(b)* of rules, regulations or by-laws, made by the Governor**

Section 687—*continued*

in Council under an Act of the Parliament of Canada or by the Lieutenant-Governor in Council under an Act of the Legislature of the province; or

(c) **of the publication of a proclamation, order, rule, regulation or by-law in the *Canada Gazette* or in the official gazette for the province.**

(2) Proclamations, orders, rules, regulations and by-laws mentioned in subsection (1) and the publication thereof shall be judicially noticed.

This comes from the former s.1128, which came from s.894 in the Code of 1892, and 51 Vict., c.45, s.10. The former provisions are altered in two respects: (a) by widening the section to apply to all proceedings, and not only to those relating to convictions or orders made by justices, and (b) by provision for judicial notice of proclamations, etc., of the Lieutenant-Governor in Council.

WARRANT OF COMMITMENT NOT VOID FOR DEFECT IN FORM.

688. No warrant of committal shall, on *certiorari* or *habeas corpus*, be held to be void by reason only of any defect therein, where

(a) **it is alleged in the warrant that the defendant was convicted, and**

(b) **there is a valid conviction to sustain the warrant.**

This is the former s.1130 widened similarly to the preceding section. S.1130 came from s.800 in the Code of 1892, and R.S.C.1886, c.176, s.24.

To illustrate its application, see *R. v. JAMES*, noted *ante* s.635.

NO ACTION AGAINST OFFICIAL WHEN CONVICTION, ETC., QUASHED.

689. Where an application is made to quash a conviction, order or other proceeding made or held by a magistrate acting under Part XVI or a justice on the ground that he exceeded his jurisdiction, the court to which or the judge to whom the application is made may in quashing the conviction, order or other proceeding, order that no civil proceedings shall be taken against the justice or magistrate or against any officer who acted under the conviction, order or other proceeding or under any warrant issued to enforce it.

This comes from the former s.1131, which was s.891 in the Code of 1892 and R.S.C.1886, c.178, s.89.

The Senate Committee made the section read as it now appears by substituting the words "may in quashing the conviction, order or other proceeding, order" for the words "may make it a condition of quashing the conviction, order or other proceeding".

Generally, as to protection of persons enforcing the criminal law, see s.25 *ante*, and notes thereto.

APPLICATIONS FOR *HABEAS CORPUS* NOT TO BE MADE.—Saving.

690. Nothing in this Act limits or affects any provision of the *Supreme Court Act* that relates to writs of *habeas corpus* arising out of criminal matters.

OLD CODE:

Section 1128—continued

(2) Such proclamation, order, rules, regulations and by-laws and the publication thereof shall be judicially noticed.

1130. No conviction, sentence or proceeding under Part XVI shall be quashed for want of form; and no warrant of commitment upon a conviction under the said Part shall be held void by reason of any defect therein, if it is therein alleged that the offender has been convicted and there is a good and valid conviction to sustain the same.

1131. If an application is made to quash a conviction, order or other proceeding made or had by or before a justice or stipendiary magistrate on the ground that such justice or stipendiary has exceeded his jurisdiction, the court or judge to which or whom the application is made, may, as a condition of quashing the conviction, order or other proceeding, if the court or judge thinks fit so to do, provide that no action shall be brought against the justice or stipendiary by or before whom such conviction, order or other proceeding was made or had, or against any officer acting thereunder or under any warrant issued to enforce any such conviction or order.

This is new. See notes to s.680 *ante*. As presented in the Draft Bill it was subsec.(2). Subsec.(1) proposed to abolish the practice, not everywhere uniform, of going from judge to judge with an application for *habeas corpus,* and s.691 substituted a right of appeal. This provision was altered by the Committee of the House of Commons to provide that after a judge had refused the application *on the merits* there could be no application to another judge. When the Code went to the Senate after being passed by the House of Commons, subsec.(1) was struck out, and the original practice restored.

In *SECRETARY OF STATE FOR HOME AFFAIRS v. O'BRIEN,* [1923]A.C.603, the following, referring to *COX v. HAKES*(1890), 15 App.Cas.506, appears at p.621:

> "It was pointed out by Lord Halsbury that in the older practice under habeas corpus it was allowable for a person seeking his liberty to apply to successive courts of competent jurisdiction undeterred by previous refusals; but that if he once succeeded in obtaining a judgment in favour of liberty that judgment could no longer be called in question. . . . . Lord Herschell, in the course of his opinion, said: 'A person detained in custody might thus proceed from court to court until he obtained his liberty. And if he could succeed in convincing any one of the tribunals competent to issue the writ that he was entitled to be discharged, his right to his liberty could not afterwards be called in question.' The expression, be it observed, is 'entitled to be discharged,' not, 'actually discharged'."

And at p.643:

> "I think the law of England to be long settled to the following effect, *i.e.*, that when once a legally constituted court has determined that a subject of the Crown, who is an applicant for the issue of a writ of habeas corpus, is entitled to his liberty, such a judgment cannot be overruled either by any other court or by any court of review or appeal."

Section 690—*continued*

The right to go from judge to judge was expressly affirmed by the Judicial Committee in *ESHUGBAYI ELEKO v. GOVERNMENT OF NIGERIA,* [1928]A.C.459.

In Canada the practice has varied. In some cases, *e.g., Re LOO LEN*(No.2)(1924), 41 C.C.C.388, it was held that there was no right to go from judge to judge. In other cases, *e.g., R. v. LAURA CARTER et al.*(1902), 5 C.C.C.401, the right was held to exist, and so in *R. v. JACKSON*(1914), 22 C.C.C.215 in Alberta, but in that province it was said by Harvey, C.J.A., in *Re DAVIES*(1915), 32 W.L.R.716 at p.718, that:

> "The disadvantage of one judge being required to sit practically in appeal from a brother judge, and the consequent loss of dignity and respect to judicial decisions in case of a difference of opinion caused our practice to be changed, and now by R.20 of the C.P. rules the decision of a judge on an application for habeas corpus is final, subject only to an appeal to the Appellate Division."

(But as to appeal, see *In re FRED STORGOFF, infra,* s.691).

Other cases expressing varying views are collected in 21 Can.Abr.539, and this right of an accused has been criticised in an article by D. M. Gordon, Q.C. in 23 C.B.Rev.595, and in an article by R. F. V. Heuston in 66 L.Q.R.78.

See also s.681 and notes thereto.

***HABEAS CORPUS*, ETC.—Part XVIII applies.—When appeal to be heard.**

691. (1) An appeal lies to the court of appeal from a decision granting or refusing the relief sought in proceedings by way of *mandamus, certiorari* or prohibition.

(2) The provisions of Part XVIII apply, *mutatis mutandis,* to appeals under this section.

This is new. A proposed right of appeal in *habeas corpus* was struck out of this section in its course through Parliament.

As to *certiorari,* it was held in *R. v. ASHTON*(1948), 92 C.C.C.137 (Ont.), and *R. v. CRAIG*(1949), 94 C.C.C.382(N.B.) that there was no right of appeal from an order made on *certiorari.*

In *BURROWS v. GILDING*(1954), 11 W.W.R.(N.S.)89 (Sask.), the Court of Appeal declined to hear an application for *certiorari* which had been refused by a single Judge, on the grounds that the Court of Appeal and the judges of the Court of Queen's Bench have concurrent jurisdiction in such matters, and that to hear the application would, in effect, be sitting in appeal from the judge's refusal.

In *Re WHITE; WHITE v. R.*(1954), 12 W.W.R.(N.S.)315 (B.C.C.A.), on appeal from an order refusing a writ of *certiorari,* the following appears at page 316:

> "Counsel for the respondent took a preliminary objection to our jurisdiction to entertain this appeal upon the ground that the matters in question were of a criminal nature, but we found against this contention: In orally delivering the judgment of the court on this objection I said:

'I regard sections 29, 30 and 31 of the Royal Canadian Mounted Police Act as legislation not in relation to criminal matters as such, but as providing the definitions of and punishments for breaches of discipline. These so-called offences are not tried in a criminal court but in an internal domestic tribunal exercising a special statutory jurisdiction. It follows in my opinion that the certiorari proceedings herein do not arise from a criminal cause or matter. In consequence the preliminary objection to our jurisdiction must, in my opinion, be overruled'."

With regard to *habeas corpus,* there had been two conflicting views before 1945, one that *habeas corpus* is always a civil matter based upon the liberty of the subject as a civil right, and the other that the writ is procedural and that proceedings under it might or might not be criminal, the test being whether the matter out of which the proceedings arise is or is not criminal. The controversy was settled in favour of the latter view by the judgment of the Supreme Court of Canada, *In re FRED STORGOFF,* [1945] S.C.R.526.

The Supreme Court held that provincial legislation in British Columbia granting an appeal to the Court of Appeal in *habeas corpus* was inoperative in a case under the *Criminal Code,* and that the Dominion Parliament has exclusive jurisdiction to grant such a right of appeal. The following are extracts from the judgment. Taschereau, J., at p.574, said:

"In view of this recent decision (*i.e. AMAND v. SECRETARY OF STATE*, [1943] A.C. 147), and of the unequivocal language used by their Lordships, I believe it is settled law that *Habeas Corpus* is a procedural writ, and that it is not a new suit different from the one which has been dealt with at the trial. It is not as contended, always a civil writ, the purpose of which is to enforce a civil right. In certain cases it is of a criminal nature, being a step in a criminal proceeding, and in other cases, when it is a step in a 'civil cause or matter', it will have a civil character."

Rand, J., at p.583, said:

"The exclusive power, then, to legislate in relation to . . . . . the criminal law . . . . . including the procedure in criminal matters, subject to section 92(15), must, I think, extend to a procedural step 'in a criminal cause or matter' of the nature of *habeas.* It follows that legislation in relation to the law of *habeas* in respect of criminal matters over which the Dominion has jurisdiction, must be deemed to be within the language of section 91(27) and excluded from section 92(13)."

Estey, J., at p.591 referred also to the right to go from judge to judge and said:

"The authorities establish that the writ of *habeas corpus* is available to any subject detained or imprisoned, not to hear and determine the case upon the evidence, but to immediately and in a summary way test the validity of his detention or imprisonment. It matters not whether the basis for the detention or imprisonment be criminal or civil law: That the applicant may go from judge to judge renewing his application, and once he finds a judge who grants his application, at common law that concludes the matter as no appeal is provided.

Section 691—*continued*

Appeals in matters of *habeas corpus* have been and are statutory."

PART XXIV.

SUMMARY CONVICTIONS.

In 1869, by c.31, an Act was passed respecting the duties of Justices of the Peace in relation to summary convictions and orders.

The preamble recites that it is "expedient to assimilate, amend, and consolidate the statute law of the several Provinces of Quebec, Ontario, Nova Scotia and New Brunswick, respecting the duties of Justices of the Peace out of Sessions in relation to convictions and orders, and to extend the same as so amended to all Canada."

This Act, which appears to be based largely upon the English *Summary Jurisdiction Act*, 1848, 11 and 12 Vict., c.43, was embodied in R.S.C.1886, c.178 as the *Summary Convictions Act*, and it is from the Act as so revised that this procedure came into the *Criminal Code*. It was Part XV of the repealed Code.

INTERPRETATION.

"INFORMANT."—"Information."—"Order."—"Proceedings."—"Prosecutor."—"Sentence."—"Summary conviction court."—"Trial."

692. In this Part,

(a) **"informant" means a person who lays an information;**

(b) **"information" includes**

(i) a count in an information, and

(ii) a complaint in respect of which a justice is authorized by an Act of the Parliament of Canada or an enactment made thereunder to make an order;

(c) **"order" means any order, including an order for the payment of money;**

(d) **"proceedings" means**

(i) proceedings in respect of offences that are declared by an Act of the Parliament of Canada or an enactment made thereunder to be punishable on summary conviction, and

(ii) proceedings where a justice is authorized by an Act of the Parliament of Canada or an enactment made thereunder to make an order;

(e) **"prosecutor" means an informant or the Attorney-General or their respective counsel or agents;**

(f) **"sentence" includes a direction made under section 638;**

(g) **"summary conviction court" means a person who has jurisdiction in the territorial division where the subject matter of the proceedings is alleged to have arisen and who**

(i) is given jurisdiction over the proceedings by the enactment under which the proceedings are taken,

(ii) is a justice or magistrate, where the enactment under which the proceedings are taken does not expressly give jurisdiction to any person or class of persons, or

OLD CODE:

705. In this Part, unless the context otherwise requires,
(a) "clerk of the peace" includes the proper officer of the court having jurisdiction in appeal under this Part;
(b) "common gaol" or "prison" for the purpose of this Part means any place other than a penitentiary in which persons charged with offences are usually kept and detained in custody;
(c) "district" or "county" includes any territorial or judicial division, or place in and for which there is such judge, justice, justice's court, officer or prison as is mentioned in the context;
(d) "territorial division" means, district, county, union of counties, township, city, town, parish or other judicial division or place;
(e) "the court" in the sections of this Part relating to justices stating or signing cases means and includes any superior court of criminal jurisdiction for the province in which the proceedings in respect of which the case is sought to be stated are carried on.

706. Subject to any special provision otherwise enacted with respect to such offence, act or matter, this Part shall apply to
(a) every case in which any person commits, or is suspected of having committed, any offence or act over which the Parliament of Canada has legislative authority, and for which such person is liable, on summary conviction, to imprisonment, fine, penalty or other punishment;
(b) every case in which a complaint is made to any justice in relation to any matter over which the Parliament of Canada has legislative authority, and with respect to which such justice has authority by law to make any order for the payment of money or otherwise.

707. Every complaint and information shall be heard, tried, determined and adjudged by one justice or two or more justices as directed by the Act or law upon which the complaint or information is framed or by any other Act or law in that behalf.
(2) If there is no such direction in any Act or law then the complaint or information may be heard, tried, determined and adjudged by any one justice for the territorial division where the matter of the complaint or information arose: Provided that every one who aids, abets, counsels or procures the commission of any offence punishable on summary conviction, may be proceeded against and convicted either in the territorial division or place where the principal offender may be convicted, or in that in which the offence of aiding, abetting, counselling or procuring was committed.
708. (5) If it is required by an Act or law that an information or complaint shall be heard and determined by two or more justices, or that a conviction or order shall be made by two or more justices, such information or complaint may be heard and determined and such conviction or order may be made by a police magistrate, stipendiary magistrate or any person having the power or authority of two or more justices of the peace.

(iii) is a magistrate, where the enactment under which the proceedings are taken gives jurisdiction in respect thereof to two or more justices; and

***(h)* "trial" includes the hearing of a complaint.**

Section 692—*continued*

Pars.(a) and (b)(i) are new and are consequent upon the new provisions whereby the term "complaint" is not formally continued, and whereby more than one offence may be included in an information. In relation to the first point, the following appears in *Re DILLON*(1859), 11 I.C.L.R.232 at p.238:

"The term 'information' is of well-defined meaning; and, whether it be in writing or *ore tenus*, is understood to be the initiatory step in proceedings of a criminal nature, which are to be disposed of summarily, while I apprehend the term 'complaint' designates the initiatory step in summary proceedings of a civil nature; but equally in both cases there is contemplated the existence of a matter in controversy between two parties."

However, in ordinary usage the terms were used interchangeably, and even in the *Income Tax Act* the expression "information or complaint in respect of an offence" was used.

On the latter point, it may be observed that similar provision was made in the Defence of Canada Regulations and the Wartime Prices and Trade Board Regulations, as well as in some provincial Acts, without consequent difficulty. See also s.2(8).

Par.(b)(ii) is derived from the former s.706(b) which was s.840 in the Code of 1892 and s.3 in R.S.C.1886, c.178.

Par.(c) also is derived from the former s.706(b). In *R. v. HARTFEIL* (1920), 35 C.C.C.110, the following appears at p.125:

"In Part XV of the Criminal Code, Parliament clearly contemplated a dual jurisdiction of the magistrate, one purely penal and the other quasi-civil . . . . . for the purpose of collecting penalties. Section 706(a) and (b) makes the distinction. . . . . Under this Part of the Code I think a clear distinction is to be made between a 'summary conviction' under 706(a) and an 'order' under 706(b) and other sections of the Code in this Part bear me out. Sec.731 clearly refers to a magistrate's order for the payment of money and is to be distinguished from a summary conviction by him for an offence. . . . . Section 721 clearly contemplates the distinction."

The former s.731 is not continued in this Code, but s.721 is now s.708. It preserves the distinction, as also do Forms 31 and 32 *post*.

In *R. v. KEEN*(1922), 38 C.C.C.168 at p.173 it was said that:

"It may be well to note, in view of the words 'by a summary conviction under Part XV of the Criminal Code' . . . . . that sec.706 of the Criminal Code makes that part applicable to cases in which the justice has authority by law to *make any order* 'for the payment of money *or otherwise*', which, I think, can quite readily be interpreted to cover an order for condemnation of goods forfeited."

In other words, the section is wide enough to cover an order *in rem* as well as an order *in personam*.

Par.(d) is derived from the former s.706. Note that it refers to federal acts generally but that the summary conviction procedure has been incorporated into many provincial Acts. See s.28 of the *Interpretation Act*.

"Part XV, sec.706 applies to all offences against such Federal Acts as

OLD CODE:

706. For wording of this section see p. 1031.

1142. In the case of any offence punishable on summary conviction, if no time is specially limited for making any complaint, or laying any information, in the Act or law relating to the particular case, the complaint shall be made, or the information laid, within six months from the time when the matter of the complaint or information arose, except in the Northwest Territories and the Yukon Territory, in all which Territories the time within which such complaint may be made or such information laid shall be twelve months from the time when the matter of the complaint or information arose.

1052. (2) Every one who is summarily convicted of any offence for which no punishment is specially provided, shall be liable to a penalty not exceeding fifty dollars, or to imprisonment, with or without hard labour, for a term not exceeding six months, or to both.

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the *Inland Revenue Act*": *R. v. SAWCHUK,* [1923]2 W.W.R. 824 at p.826.

Par.(e) is new.

Par.(f) is new and, along with s.720, gives a right of appeal where sentence is suspended. It conforms to s.581(d) *ante,* in this respect.

Par.(g) is derived from the former ss.707 and 708 which were subsecs. (1),(2) and (7) of s.842 in the Code of 1892, and ss. 4 *et seq.* of R.S.C. 1886, c.178. See notes to par.(c) *supra.*

Par.(h) is new.

APPLICATION OF PART.—Limitation.

693. (1) Except where otherwise provided by law, this Part applies to proceedings as defined in this Part.

(2) No proceedings shall be instituted more than six months after the time when the subject matter of the proceedings arose.

Subsec.(1) is taken from the former s.706 and supplements the definitions in s.692(d) and (e).

Subsec.(2) is taken from the former s.1142 but is made uniform. Formerly the period of limitation was twelve months in the Northwest Territories and the Yukon Territory.

Note that the section applies "except where otherwise provided by law". It has been held that s.1142 was not applicable where, *e.g.,* as in the *Customs Act,* the statute contained its own provisions.

PUNISHMENT.

GENERAL PENALTY.—Imprisonment in default where not otherwise specified. —Time for payment.

694. (1) Except where otherwise expressly provided by law, every one who is convicted of an offence punishable on summary conviction is liable to a fine of not more than five hundred dollars or to imprisonment for six months or to both.

(2) Where the imposition of a fine or the making of an order

Section 694—*continued*

for the payment of money is authorized by law, but the law does not provide that imprisonment may be imposed in default of payment of the fine or compliance with the order, the court may order that in default of payment of the fine or compliance with the order, as the case may be, the defendant shall be imprisoned for a period of not more than six months.

(3) A summary conviction court may direct that any fine, pecuniary penalty or sum of money adjudged to be paid shall be paid forthwith or, if the accused is unable to pay forthwith, at such time and on such terms as the summary conviction court may fix.

Subsec.(1) replaces the former s.1052(2) which provided for cases in which an offender was convicted on summary conviction for an offence for which no penalty was specially provided. It set a general penalty of fifty dollars fine or six months' imprisonment or both. It was s.951(2) in the Code of 1892, as amended in 1893, and R.S.C. 1886, c.181, s.24.

Subsecs.(2) and (3) replace the former s.739. These provisions were R.S.C. 1886, c.178, s.62, and s.872(1) in the Code of 1892, am. by 1894, c.57, s.1; 1900, c.46, s.3, and 1909, c.9, s.2.

This section was the subject of extended debate (Hansard, 1954, pp.2901 *et seq.*, and pp.3015 *et seq.*), chiefly upon the payment of fines by instalments, and upon the increase in the amount of the maximum fine.

The payment of fines by instalments has been the subject of discussion and controversy for many years. The Archambault Commission 1938 in its report (p.359) recommended "the embodiment of the principles of the English statutes in regard to allowing time for the payment of fines and imprisonment for the non-payment of fines" and commented upon the matter (report pp.167 and 168) in part as follows:

"Imprisonment for non-payment, when the convicted person has not the means or ability to pay, is, in fact, imprisonment for poverty. The injustice of such a law is patent. The poverty-stricken man is punished more severely for the commission of the same offence than the man with means. Your Commissioners are of the opinion that many recidivist criminals often receive their first education in crime upon being committed to prison for non-payment of fines."

The position under the repealed Code was as follows:

(a) time for payment of the fine might be allowed (s.739);
(b) there might be part payment of a fine and thereupon a proportionate reduction of the imprisonment in default (s.1035(A));
(c) without reference to fines, the payment of costs or compensation (where applicable) by instalments might be made a condition of suspended sentence.

The effect of the new section was stated by the Minister (Hansard 1954, pp.3016 and 3017) as follows:

"With regard to the use of the word 'time' in the singular, perhaps I should say that by the Interpretation Act a reference like that in the singular includes a reference in the plural. Therefore, it would be at such time or times and on such terms as the summary conviction court may fix . . . . . the mere fact of our conveying it is no assurance that the magistrate is going to exercise this power . . . . . We have to leave it

OLD CODE:

739. Whenever a conviction adjudges a pecuniary penalty or compensation to be paid, or an order requires the payment of a sum of money, whether the Act or law authorizing such conviction or order does or does not provide a mode of raising or levying the penalty, compensation or sum of money, or of enforcing the payment thereof, the justice by his conviction, or order after adjudging payment of such penalty, compensation or sum of money, with or without costs, may order and adjudge

(a) that in default of payment thereof forthwith, or within a limited time, such penalty, compensation or sum of money and costs, if the conviction or order is made with costs, shall be levied by distress and sale of the goods and chattels of the defendant, and, if sufficient distress cannot be found, that the defendant be imprisoned in the manner and for the time directed by the Act or law authorizing such conviction or order or by this Act, or for any period not exceeding three months, if the Act or law authorizing the conviction or order does not specify imprisonment, or does not specify any term of imprisonment, unless such penalty, compensation or sum of money and costs, if the conviction or order is made with costs, and the costs and charges of the distress and of the commitment and of the conveying of the defendant to gaol are sooner paid; or

(b) that in default of payment of the said penalty, compensation or sum of money, and costs, if any, forthwith or within a limited time, the defendant be imprisoned in the manner and for the time mentioned in the said Act or law, or for any period not exceeding three months, if the Act or law authorizing the conviction or order does not specify imprisonment, or does not specify any term of imprisonment, unless the same and the costs and charges of the commitment and of the conveying of the defendant to jail are sooner paid.

(2) Whenever under such Act or law, imprisonment with hard labour may be ordered or adjudged in the first instance as part of the punishment for the offence of the defendant, the imprisonment in default of distress or of payment may be with hard labour.

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to the judge or magistrate to decide on the facts of the case whether to give time or not. If the magistrate or judge is satisfied that an accused cannot pay forthwith, he may give time, but he has the right to decide in every one of these cases."

In addition to this, the reader is reminded that s.625 contains provisions for part payment of penalties, and that the provisions for distress which appeared in the former ss.739 *et seq.*, are not continued in this Code. It is submitted too, with respect, that the effect of the new section is to remove some disproportionate penalties which formerly appeared. For example, a year in gaol seems hardly a fitting alternative to a fine of one hundred dollars as provided in s.409, and the same may be said of s.229(8) which provided for a fine not exceeding two hundred dollars or imprisonment not exceeding twelve months or both.

INFORMATION.

COMMENCEMENT OF PROCEEDINGS.—One justice may act before the trial.

695. (1) Proceedings under this Part shall be commenced by laying an information in Form 2.

Section 695—*continued*

(2) Notwithstanding any other law that requires an information to be laid before or to be tried by two or more justices, one justice may

***(a)* receive the information,**

***(b)* issue a summons or warrant with respect to the information, and**

***(c)* do all other things preliminary to the trial.**

See notes to s.696.

FORMALITIES OF INFORMATION.—No reference to previous conviction.

696. (1) In proceedings to which this Part applies, the information

***(a)* shall be in writing and under oath, and**

***(b)* may charge more than one offence or relate to more than one matter of complaint, but where more than one offence is charged or the information relates to more than one matter of complaint, each offence or matter of complaint, as the case may be, shall be set out in a separate count.**

(2) No information in respect of an offence for which, by reason of previous convictions, a greater punishment may be imposed shall contain any reference to previous convictions.

Ss. 695 and 696 are derived from the former ss.708(1) and 710, but make considerable change. S.708(1) was s.842(3) in the Code of 1892 and s.6 in R.S.C. 1886, c.178. Subsecs.(1) to (4) of s.710 were s.845 in the Code of 1892, and ss.23, 24 and 26 of R.S.C. 1886, c.178. S.710(5) was enacted by 1943-44, c.23, s.14.

The proceedings before the justice will be commenced by information, whether the end sought is conviction and punishment, or is the justice's order. The information is to be in writing and under oath (s.696).

If the name of the person to be charged is not known, he may be described as a person whose name is unknown to the justice, and may be identified by some fact: Paley on Summary Convictions, 9th ed., p.469. Thus, in a case in England which appears to have been the occasion of much trouble for the authorities through the refusal of the accused to give his name, the Judges at length suggested that he be indicted as "a person whose name was unknown, but who was personally brought before the jurors by the keeper of the prison." This was done and the prisoner was convicted: *R. v.* ———(1825), 168 E.R.912.

In form, the information—and these observations apply also to the conviction or other process—must set out all of the ingredients necessary to constitute the offence. For example, where the accused was charged that he did "contrary to law" expose for sale and sell certain indecent and obscene books, the information was held to be defective because it did not include the word "knowingly", since knowledge on the part of the accused is a necessary element of this offence: *R. v. BRITNELL* (1912), 20 C.C.C.85. See also *R. v. BROOKS*(1951), 100 C.C.C.164.

The new provision that more than one offence may be included in

OLD CODE:

708. Any one justice may receive the information or complaint, and grant a summons or warrant thereon, and issue his summons or warrant to compel the attendance of any witnesses for either party, and do all other acts and matters neccessary preliminary to the hearing, notwithstanding anything contained herein or even if in any statute in that behalf it is provided that the information or complaint shall be brought or laid before or heard and determined by two or more justices.

. . . . . .

710. It shall not be necessary that any complaint upon which a justice may make an order for the payment of money or otherwise shall be in writing, unless it is so required by the particular Act or law upon which such complaint is founded.

(2) Every complaint upon which a justice is authorized by law to make an order, and every information for any offence or act punishable on summary conviction, may, unless it is by this Part or by some particular Act or law otherwise provided, be made or had without any oath or affirmation as to the truth thereof.

(3) Every complaint shall be for one matter of complaint only, and not for two or more matters of complaint, and every information shall be for one offence only, and not for two or more offences.

(4) Every complaint or information may be laid or made by the complainant or informant in person, or by his counsel or attorney or other person authorized in that behalf.

(5) No informaton for an offence for which a greater punishment may be inflicted by reason of a previous conviction or convictions shall contain any reference to such previous conviction or convictions.

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an information (s.696(1)(b)) makes it necessary to refer to two matters, first, duplicity, and second, the intermixing of trials.

The new provision does not mean that a *count* in an information may contain more than one offence. If it does so it may be void for duplicity. Speaking generally, it is sufficient if it follows the wording of the section creating the offence, and it is not to be held to charge two offences nor to be uncertain because it states the offence to have been committed in different modes, *e.g.*, "buying, exchanging, taking in pawn, detaining or receiving from a soldier his war medal" (*R. v. BRINE*(1904), 8 C.C.C.54), or in respect of different articles: ss.701-3. The test is to determine whether or not the section creating the offence intended to create more than one offence. For example, in *R. v. KITCHENER NEWS CO.* (1954), 108 C.C.C.304, a conviction was quashed for duplicity where the charge was that the accused did "unlawfully distribute, sell or have in their possession for any such purpose, crime comics". The Court said "We do not find in the language of this section of the statute any intention of Parliament to create a single offence. On the contrary, it does appear that the section is intended to create more than one offence". An example of the opposite sort is to be found in *EDDY MATCH CO. LTD. et al. v. R.*(1953), 109 C.C.C.1, upon a section of the *Combines Investigation Act*. It was held that what Parliament seeks to prevent is detriment to the public and that it is a matter of indifference whether that detriment results from the formation or operation of a combine.

Section 696—*continued*

A case decided in Alberta, *Re EFFIE BRADY*(1913), 21 C.C.C.123, contains some pungent remarks upon this point. On that occasion it was urged that a conviction was bad for duplicity because it described the accused, in the words of the statute, as "a common prostitute or night-walker". The Court expressed itself as follows:

"The summary convictions sections of the Code are administered by a body of men, the great majority of whom are without legal training or experience of any kind. It is probably for this reason that sec.723(3) of the Code was enacted so that a justice of the peace might not worry over the phraseology to be used by him in describing an offence, but might use the ready-made description of it contained in the section creating it. That being so, I think that he should be allowed to do so. Not being a Judge or a lawyer, he is not used to picking hidden meanings out of the plain language of statutes nor should he be asked to do so. It surely must be mystifying to a justice of the peace after being told by the Code that he will be all right if he describes an offence in the language of the section enacting it to be told by a Judge that he was all wrong in so describing it and that his conviction, which follows implicitly the directions of the statute in its description of the offence, is no good because he did not put into that description some words which do not appear in the statute. Of course, as Lord Alverstone says, in *SMITH v. MOODY*, 'fair information and reasonable particularity as to the nature of the offence must be given in indictments and convictions.' This, I take it, means that such particulars as to the time, place and subject-matter of the charge must be given as with the statutory description of the offence will show upon the face of the conviction exactly what it is for."

As to the intermixing of trials, there are principles that apply either when there are a number of charges against the same person, or when there are charges against two or more persons. Inasmuch as they apply not only to trials upon summary conviction but to trials on indictment as well, some of the illustrations which follow were cases tried under the latter procedure, but these rules are perhaps more likely to call for application in summary conviction matters. It is necessary, however, to warn the reader that the rules are not without qualifications which will be stated later.

When there are two or more charges against the same person, the principle is this:

"Justices are not to mix up two or more criminal charges and convict or acquit in one of them with any reference to the facts appearing in the other." (2 C.E.D.(Western)587.)

The leading authority in this connection is a case, heard in England, *R. v. FRY*(1898), 67 L.J.Q.B.712, in which the accused was tried on three informations, one for permitting drunkenness on his premises on February 7th, the second for selling liquor during prohibited hours on February 8th, and the third for keeping his premises open during prohibited hours on the latter date. After hearing the evidence relating to the first charge, the justices postponed their decision and proceeded to hear the other informations. One of these they dismissed, and the other was withdrawn.

One of the Judges made the following general remarks:

"Such a course (*i.e.*, the intermixing of trials,) would be contrary to law; and undoubtedly, as a general rule it will be prudent and right for justices to avoid any course which reasonably bears the aspect of such a mistake. If a *prima facie* case is made out that such an error has been, or may have been committed, it will in general be upon the justices to show very clearly that it has not been committed. On the other hand, we should be equally sorry to throw any doubt upon the right of the justices in any case, for reasons of justice arising out of the case itself, and for its better determination, to adjourn or to postpone their decision; and if their discretion in this respect be honestly exercised and not directly or indirectly, with a view of throwing in facts or evidence which have no legitimate bearing on their decision, it must not be interfered with."

In Canada there are several reported cases in which this rule has been discussed in courts of appeal, and while all agree that the practice of intermixing trials is a very undesirable one, sometimes the Judges of the same court have been divided in opinion regarding the application of the rule to the particular case before them: *R. v. IMAN DIN*(1910), 18 C.C.C.82; *R. v. STEEVES*(1914), 24 C.C.C.183. In Nova Scotia and Alberta it has been applied directly to quash convictions: *R. v. McBERNY* (1897), 3 C.C.C.339; *R. v. BURKE*(1904), 8 C.C.C.14; *R. v. McMANUS* (1918), 30 C.C.C.122. However, in the former province, in a case, *R. v. REID*(1907), 12 C.C.C.352, in which the magistrate heard the evidence upon a charge of assault, reserved his decision upon it, and then, after hearing a charge of pointing a fire-arm which had been laid against the same defendant, dismissed the second charge and convicted upon the first, the Supreme Court declined to alter the decision. The Judge expressed the opinion that "the magistrate could not have done otherwise under the circumstances than find the defendant guilty", and later went on to say:

"I think that, under the English decisions, I am justified in holding that, where the offence was clearly proved and no evidence was offered in explanation, I am not bound to hold the conviction bad on account of the irregularity in trying both cases together simply because of the shadowy possibility that the judgment of the magistrate may have been influenced against the prisoner by his examination in his own defence on the second charge and his cross-examination by the counsel for the prosecution."

Similarly, the Court of Appeal in Ontario refused to interfere in a case, *R. v. BULLOCK and STEVENS*(1903), 8 C.C.C.8, in which a County Court Judge adjourned the giving of his verdict upon one charge until after he had heard the evidence upon others. In that case, it may be said, that the Judge, in effect, adopted what was said by the justices in the case of *R. v. FRY, ante,* as to their having made up their minds upon the first charge before proceeding to hear the others.

On the other hand, in a case tried in 1905 under the *Dental Profession Act* of the Northwest Territories, *R. v. AUSTIN*(1905), 10 C.C.C. 34, the hearing proceeded despite objection that the information contained three charges against the defendant. At the close of the case for the

Section 696—*continued*

prosecution, counsel abandoned all but one charge and a conviction was entered upon it. That conviction was quashed on appeal, the Court holding that:

"In my opinion it was the duty of the justice, when the objection was taken, to have amended the information by striking out all but one of the charges and to have heard the evidence upon that charge only."

The application of the principle appears most clearly in an Ontario case, *R. v. CASSIDY*(1927), 49 C.C.C.93, in which the accused was indicted on two bills, one for indecent assault, the other for larceny; and in which, as the trial Judge said, "the accused consented that the evidence concerning both charges be received at the same time, to save time and not to break the story of evidence given by the different parties."

On appeal the Court held that, although this was not made a ground of appeal, the Court should of its own motion, express its disapprobation of the practice of trying two indictments at the same time. "There is no authority for such a practice," it said, "and almost always it must have disadvantages. It is peculiarly objectionable in the present case, because evidence which may be admissible on one charge is inadmissible on the other".

It is now time to notice the qualifications, already mentioned, to the rule against the intermixing of the trials of two or more charges against the same defendant. The first point to be observed is that the rule does not come into operation unless it appears that the course which was followed resulted, or may have resulted in prejudice to the accused. True, the earliest of the Canadian decisions, *R. v. McBERNY, ante,* quashed the convictions then in question, notwithstanding that all of the evidence was held to have been properly received under the rule which permits evidence of similar acts to show a course of conduct, motive, or intent, and also in spite of the doubt expressed by the Court whether "the prisoner was at all prejudiced by this course". Yet it is equally certain that no other case has gone as far as this and, in view of the later decisions, it may be considered doubtful whether it would be adjudged in the same way were it to be tried now.

Again, it must be made clear that what is deprecated is the postponing of the *verdict* upon one charge until other charges have been heard. There can be no objection, if the judge or magistrate announces his decision upon each charge as it is heard, to his postponing the imposition of any penalty until all the charges have been heard: *R. v. BIGELOW*(1904), 8 C.C.C.132.

However, two cases may be mentioned which indicate that the rule under discussion does not apply if, *by statute,* it is provided that the information may contain more than one charge. The first, *R. v. WHIFFIN*(1900), 4 C.C.C.141, fell under a statute dealing with liquor licenses which provided, as some provincial liquor laws still do, that several charges might be included in one and the same information or complaint, and further, that convictions for several offences might be made although the offences were committed on the same day.

The other case was a prosecution, *Re A. E. CROSS*(1900), 4 C.C.C. 173, under a provincial Election Act which provided that several charges of corrupt practices might be stated in the summons requiring the defendant to appear. The defendant appealed from a conviction recorded against him, but in the judgment of the High Court of Justice in Ontario it was said that:

"there is plainly no violation of any principle in giving to the provisions of sec.188 of R.S.O. ch.9 the meaning which seems plain upon their face, *viz.*, that any number of corrupt practices charged as having been committed by the defendant at the same election are intended to be tried together and included in the same judgment".

Finally—and this is indicated by the foregoing quotation—the rule, in its application to indictments, strikes at the trying together of *separate indictments,* not at the trying together of two or more counts in the same indictment. The Code provides (s.501), that any number of counts for any offences may be joined in one indictment except in a case of murder—that count must stand alone (s.499). S.500(2) provides that the Court may order one or more counts to be tried separately from others if the interests of justice seem to require it. *R. v. NORMAN*(1914), 84 L.J.K.B.449, was a case in which the Court of Criminal Appeal in England was of opinion that counts should have been severed because "evidence which is admissible on the charge of obtaining credit by false pretences, may not be admissible on the charge of obtaining chattels by false pretences".

The intermixing of the trials of two or more persons charged with distinct—not necessarily different—offences is governed by considerations in many respects similar to those just now discussed. The leading case, again to be found in the English reports, *CRANE v. R.*(1921), 90 L.J.K.B.1160, was decided on appeal from a trial on indictment, but the principle applies generally. Two men, Morton and Crane were indicted, the former for stealing and receiving, and the latter for receiving certain goods. They were indicted separately but, through some inadvertence, they were tried jointly before the same jury. They contested the verdicts which were returned against them, and the Judicial Committee of the House of Lords held that the trial was a nullity. The following quotation from the judgment of Lord Atkinson may be taken as the rule:

"When an accused person has pleaded 'not guilty' to the offence charged against him in an indictment, and another accused person has pleaded 'not guilty' to the offence or offences charged against him in another and separate and independent indictment, it is, I have always understood elementary in criminal law, that the issues raised by those two pleas cannot be tried together."

This case was followed later upon the review of a case in which one person had been charged with using a house as a betting house, and another, on a separate indictment, with keeping a betting house. The two were tried together, as counsel, both for the prosecution and for the defence, were agreed that this would be the most convenient procedure. Both accused were convicted. The Court of Criminal Appeal said:

"The question in issue here is not a question of regularity or irregularity; it is one of jurisdiction, since no criminal Court has jurisdic-

Section 696—*continued*

tion to try two separate indictments against two prisoners at the same time." *R. v. DENNIS; R. v. PARKER*(1924), 93 L.J.K.B.388.

The Canadian cases upon this point are all of comparatively recent date. In the second of them, *R. v. McDONALD*(1928), 50 C.C.C.65, the accused was charged with keeping liquor for sale. The Parkdale Hotel and also one Downey were similarly charged, and it was alleged, that all the offences were committed at the same time and place. The three defendants were tried together upon the agreement of counsel that the evidence taken in one case should be used in all. The trial was held to be a nullity.

In a later case in which one defendant was charged with being the keeper of a bawdy house, and another with being an inmate of a bawdy house, a similar result followed, the Court remarking:

"It seems clear that the Magistrate had no jurisdiction to proceed as he did even without objection and the cases are no further advanced than they were when the pleas of not guilty were entered." *R. v. THEIRLYOCK et al.*(1928), 50 C.C.C.296.

See also *R. v. HART and KOZARUK*(1929), 51 C.C.C.145.

The concluding clause indicates that, the trial being a nullity, the proceedings may be begun again, and this conclusion is borne out by *CRANE v. R., ante.*

In this connection it will be noted again that what is considered to be objectionable is the trying together of *separate* indictments. The Code provides that persons may be charged jointly, but also that the Court may order them to be tried separately if the interests of justice require it, as, for example, if one accused person has made a statement implicating another (s.501). For cases in which separate trials have been ordered, see *R. v. MARTIN*(1905), 9 C.C.C.371, and *R. v. WISER and McCREIGHT*(1930), 54 C.C.C.117.

In the first Canadian case in which the reported judgment dealt with the matter now under discussion, *R. v. TALLY, ante,* two defendants had been tried together on charges of common assault. That fact was made the ground of a motion to quash the convictions, but the Judge held that:

"The depositions shew that had the cases been tried separately the evidence would have been identical in each case; that, in other words, the assaults, charged separately against each defendant, both took place as part of one and the same occurrence. Under these circumstances no possible injustice could be done to either defendant, and the reasoning in the cases of *R. v. FRY*(1898), 19 Cox.C.C.135, 62 J.P. 457, and *R. v. LAPOINTE*(1912), 20 Can.Cr. Cas.98, 4 D.L.R.210, leads to what I think is the proper conclusion that the convictions should stand as against this objection—at all events, as it does not appear that any exception was taken at the hearing to this course being taken."

However, in the later cases appeal courts have been unanimous in declaring that such a circumstance renders the trial of no effect, and further, that even though it is not made a ground of appeal, they will, of their own motion, take cognisance of it. These decisions, therefore,

OLD CODE:

708 (2) After a case has been heard and determined one justice may issue all warrants of distress or commitment thereon.

(3) It shall not be necessary for the justice who acts before or after the hearing to be the justice or one of the justices by whom the case is to be or has been heard and determined.

(4) If it is required by any Act or law that an information or complaint shall be heard and determined by two or more justices, or that a conviction or order shall be made by two or more justices, such justices shall be present and acting together during the whole of the hearing and determination of the case.

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must be taken as over-ruling the earlier one, and as establishing that in such a case the Court, on appeal, will nullify the proceedings without inquiring whether or not the accused was prejudiced by the procedure followed in the court of first instance.

On this subject see also article in the Journal of Criminal Law, cited under s.501 *ante*.

As to s.696(2) see ss.222, 223 and 571 to 574 *ante*.

ANY JUSTICE MAY ACT BEFORE AND AFTER TRIAL.—Two or more justices.—Adjournment.—Waiving jurisdiction.

697. (1) Nothing in this Act or any other law shall be deemed to require a justice before whom proceedings are commenced or who issues process before or after the trial, to be the justice or one of the justices before whom the trial is held.

(2) Where two or more justices have jurisdiction with respect to proceedings they shall be present and act together at the trial, but one justice may thereafter do anything that is required or is authorized to be done in connection with the proceedings.

(3) Subject to section 698, in proceedings under this Part no summary conviction court other than the summary conviction court by which the plea of an accused is taken has jurisdiction for the purposes of the hearing and adjudication, but any justice may

***(a)* adjourn the proceedings at any time before the plea of the accused is taken, or**

***(b)* adjourn the proceedings at any time after the plea of the accused is taken for the purpose of enabling the proceedings to be continued before the summary conviction court by which the plea was taken.**

(4) A summary conviction court before which proceedings under this Part are commenced may, at any time before the trial, waive jurisdiction over the proceedings in favour of another summary conviction court that has jurisdiction to try the accused under this Part.

(5) A summary conviction court that waives jurisdiction in accordance with subsection (4) shall name the summary conviction court in favour of which jurisdiction is waived, except where, in the province of Quebec, the summary conviction court that waives jurisdiction is a judge of the sessions of the peace.

Subsecs.(1) and (2) are taken from subsecs.(2), (3) and (4) of the former s.708, the history of which is given under the preceding section.

Section 697—*continued*

Subsec.(3) sets out matter that formerly was not explicit in the Code. However, it was held in *R. ex rel. MURRAY v. STREATCH*(1950), 99 C.C.C.60, at page 71, in a case which had been adjourned first by Magistrate A and then by Magistrate B and finally heard and determined by A, that the conviction was valid as the accused was voluntarily before him on a legal information and there was thereafter no break in the proceedings nor any step that was contrary to the provisions of the Code.

Subsecs.(4) and (5) are new and set out a procedure on which there had previously been some variance. Under these provisions the Justice or Magistrate who is first seized of the case by taking the information and issuing process, is not bound to see it through to the end. He may waive his jurisdiction, but his request that another act in his stead must, with the exception specified as to Quebec, be to a Magistrate or Justice by name.

It had been held in *BABIUK v. ANDERSON*(1929), 52 C.C.C.23, that a justice, who had received an information, might ask another to hear it in his stead, and that such a request or waiver of jurisdiction might be inferred from the circumstances: *R. v. JIM SING*, [1935]1 W.W.R. 136; *R. v. CRUICKSHANKS*(1914), 23 C.C.C.23. However, it was held in *R. v. GREENWOOD*, [1948]1 W.W.R.322, that a general waiver of jurisdiction, rather than a waiver to a named justice, was improper for Alberta, whatever practice might be authorized by legislation in the other provinces.

This section provides a uniform procedure.

INABILITY OF JUSTICE TO CONTINUE.—Continuing trial.

698. (1) Where a trial under this Part is commenced before a summary conviction court and a justice who is or is a member of that summary conviction court dies or is, for any reason, unable to continue the trial, another justice who is authorized to be, or to be a member of, a summary conviction court for the same territorial division may act in the place of the justice before whom the trial was commenced.

(2) A justice who, pursuant to subsection (1), acts in the place of a justice before whom a trial was commenced

***(a)* shall, if an adjudication has been made by the summary conviction court, impose the punishment or make the order that, in the circumstances, is authorized by law, or**

***(b)* shall, if an adjudication has not been made by the summary conviction court, commence the trial again as a trial *de novo*.**

This is new and adapts to summary convictions the law applicable to indictable offences. See s.481 *ante* and notes thereto, also *R. v. NOLET* (1951), 101 C.C.C.396, at p.399.

Note that under subsec.(2) (b) the justice or magistrate who resumes a trial part heard on a former occasion, must hear the evidence in full; he cannot go on from where the earlier hearing left off.

OLD CODE:

709. No justice shall hear and determine any case of assault or battery, in which any question arises as to the title to any lands, tenements, hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice.

732. Whenever any person is charged with common assault any justice may summarily hear and determine the charge.

(2) If the justice finds the assault complained of to have been accompanied by an attempt to commit some other indictable offence, or is of opinion that the same is, from any other circumstance, a fit subject for prosecution by indictment, he shall abstain from any adjudication thereupon, and shall deal with the case in all respect in the same manner as if he had no authority finally to hear and determine the same.

DUTY OF COURT WHERE COMMON ASSAULT IS CHARGED.

699. Where a defendant is charged with common assault and, before the defendant enters upon his defence, the summary conviction court is, from the evidence, of the opinion

(a) that the assault complained of was accompanied by an attempt to commit an indictable offence other than common assault or was committed in the course of the commission of an indictable offence other than comon assault, or

***(b)* that the defendant should, for any reason, be prosecuted by indictment,**

the summary conviction court shall not adjudicate thereon, but the proceedings shall be continued as for an indictable offence and the defendant shall be informed accordingly.

This replaces the former ss.709 and 732. S.709 was s.842(d) in the Code of 1892, and R.S.C.1886, c.178, s.73(3). S.732 was part of s.864 in the Code of 1892, amended by 1900, c.46, s.3. It came from R.S.C. 1886, c.178, s.73(1) (2) am.

It is perhaps more accurate to say that the effect of this section is to drop s.709 under which the jurisdiction of the inferior court was ousted in a case of common assault where a question arose as to the title to land or as to any bankruptcy or insolvency or of execution under the process of a court. This is an old rule and Coleridge, J., is quoted in *R. v. CRIDLAND*(1857), 119 E.R.1463, as saying that "as a general rule the jurisdiction of justices to convict summarily, ceases as soon as a claim of title is *bona fide* made. If not, magistrates might, against the will of a defendant, determine upon his title to a large property".

Crompton, J., in the same case quotes Paley on Summary Conviction and adds: "The editor mentions this rule as not arising from a legislative enactment, but as the old legal maxim applicable to summary trials in general".

It is however, expressed in some statutes, *eg., The Offences against the Person Act*, 1861. On the other hand, the *Criminal Justice Administration Act*, 1914, excepts it from the *Malicious Damage Act*, 1861, and gives a justice power to adjudicate where the alleged offender acted under a fair and reasonable supposition that he had a right to do the act complained of: Paley, 9th ed., p.144, and p.350.

Section 699—*continued*

In our Code it created two anomalies, first, that under the Part dealing with mischief (s.539) the justice had to decide questions of colour of right (s.541), and second, that a magistrate hearing a charge of assault occasioning bodily harm by virtue of his absolute jurisdiction under s.773, could adjudicate where such a charge arose but could not where the charge was one of common assault.

Under the provisions of this section, he can send the case to a higher court but, even if he does not, there is a sufficient remedy by way of appeal. There are very few reported cases in which a *bona fide* question of title to land arose.

As to what constitutes a *bona fide* question of title, see *HUDSON v. McRAE*(1863), 33 L.J.M.C.65, at p.67, *per* Blackburn, J:

> "And when the question is one of fact between the prosecutor and the defendant whether such a right as may exist in law does exist in point of fact, then title to property comes in question; and the justices on being convinced that the claim is bona fide should hold their hands. But when the question before the justices is not whether such a right in point of fact exists, but the defendant sets up a right which cannot possibly exist in law, then title to property cannot be said to come in question."

Under the new Code, the question of assault or no assault, which is essentially what the summary conviction court has to determine, will be decided by the application of s.230, which defines assault, and ss.38 *et seq.*, which deal with the defence of property. If the decision is wrong it can be corrected on appeal. In any event, the additional rule, under the former s.734, that the adjudication upon a charge of common assault, whether by conviction or dismissal, was a bar to further or other proceedings *civil* or criminal, upon which there was a conflict of judicial opinion on constitutional grounds, is not continued in the new Code, the civil remedy being left to the operation of s.10, *ante*.

It may be observed otherwise that this section clarifies procedure which was not clear before. It is the only instance in which a trial on summary conviction can be transformed into a preliminary hearing. On this point, reference may be made to *R. v. GOJDOS*(1943), 79 C.C.C. 382, in which an indictment was quashed after a magistrate had committed the accused for trial in a case where the Crown had elected to proceed summarily. It was held that the magistrate should have dismissed the charge as being outlawed by s.1142, a period of six months having elapsed.

SUMMONS AND WARRANT.

COMPELLING APPEARANCE.—Copy of warrant to be served.

700. (1) The provisions of Parts XIV and XV with respect to compelling the appearance of an accused before a justice apply, *mutatis mutandis*, to proceedings under this Part.

(2) Where a warrant is issued in the first instance for the arrest of a defendant, a copy thereof shall be served on the person who is arrested thereunder.

OLD CODE:

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

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

This is the former s.711 insofar as it related to the accused. S.711 was part of s.843(1) in the Code of 1892. *Cf.* R.S.C.1886, c.178, ss.17 and 18.

The steps necessary to procure the attendance of the defendant and of the witnesses are, in general, the same as upon a preliminary hearing (s.700). This is true also of the backing of warrants (ss.447, 604, 608), but it must be observed that the process issued by a justice or magistrate under this Part does not run beyond the border of the province in which it is issued. With this qualification, the justice may issue a subpoena to a witness who resides out of his jurisdiction, but within the province (s.604).

If a material witness resides out of Canada, a Judge of any Superior or County Court may appoint a commissioner or commissioners to take his evidence on oath. The appointment is made in a manner similar to that provided for a trial on indictment (s.613).

If the justice issues a warrant to apprehend instead of a summons, he is required under Part XV to see that a copy of it is served upon the accused when the arrest is made (s.700(2)). But whether he issues the one rather than the other is wholly in his own discretion. In *R. v. HOBBS*(1935), 65 C.C.C.67, it was said that:

> "The Magistrate takes the ground that his discretion as to whether to proceed by the issue of a summons or by the issue of a warrant should not be interfered with by this Court. That contention should, I think, prevail. It is a matter for the magistrate to decide. The direction of this Court is that he should dispose of and determine the charge, and as I understand the order, it is left to him to determine the better way to bring the defendant before him. There is no refusal on the Magistrate's part to proceed; if there were, the case would be different.
>
> He is to act according to the procedure of his own Court, and he has a discretion, which should not be interfered with, to take such regular steps as in the circumstances commend themselves to his judgment."

PROCEEDINGS NOT OBJECTIONABLE ON CERTAIN GROUNDS.—Particulars.

701. (1) Sections 492 and 493 apply, *mutatis mutandis*, to informations in respect of proceedings as defined in this Part.

(2) The summary conviction court may, if it is satisfied that it is necessary for a fair trial, order that a particular, further describing any matter relevant to the proceedings, be furnished to the defendant.

This replaces the former s.723. It was s.846 in the Code of 1892 where it was new. The effect of the section is to make the procedure uniform with that for cases tried on indictment. Particulars are dealt with in s.497 *ante*.

PROSECUTOR NEED NOT NEGATIVE EXCEPTION, ETC.,—Burden of proving exception, etc., on defendant.

702. (1) No exception, exemption, proviso, excuse or qualification prescribed by law is required to be set out or negatived, as the case may be, in an information.

(2) The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, proviso, excuse or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

This comes from the former s.717 which was s.852 in the Code of 1892 as amended by 1909, c.9 s.2. It came from R.S.C. 1886, c.178, s.47.

The words "except by way of rebuttal" are new and were added "because in the first instance the accused person might offer enough evidence to meet the presumption, and then we did not want to shut out the prosecutor; the prosecutor would be free then to adduce evidence by rebuttal": Senate Committee, December 15-16, 1952, p.79.

See also s.704(3)(b)(ii) as to amendment, and ss.683 and 684, to the effect that a conviction, etc., shall not, on *certiorari*, be held to be invalid because of an omission to negative circumstances the existence of which would make the act complained of lawful.

The following are examples of the application of the section:

In *BELGO CANADIAN PULP AND PAPER CO. v. COURT OF SESSIONS*(1919), 33 C.C.C.310, a prosecution under the Lord's Day Act, it was said that:

> " . . . . . the complaint should contain all that is required . . . . . to constitute a breach. Now, in our case, the complaint contains all that section 5 requires in order to constitute the breach therein mentioned. This is all that the complainant had to do; it is all that he had to prove. It remained to the accused or to the prisoner to plead all the reasons for exemption or exceptions which are in his favour."

In *R. v. WENER*(1940), 74 C.C.C.265, in which a person was prosecuted under a Provincial Game Act for being in possession of an un-

OLD CODE:

723. No information, complaint, warrant, conviction or other proceeding under this Part shall be deemed objectionable or insufficient on the ground
(a) that it does not contain the name of the person injured, or intended or attempted to be injured; or
(b) that it does not state who is the owner of any property therein mentioned; or
(c) that it does not specify the means by which the offence was committed; or
(d) that it does not name or describe with precision any person or thing.
(2) The justice may, if satisfied that it is necessary for a fair trial, order that a particular, further describing such means, person, place or thing, be furnished by the prosecutor.
(3) The description of any offence in the words of the Act or any order, by-law, regulation or other document creating the offence, or any similar words, shall be sufficient in law.

717. Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, by-law, regulation or other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and whether it is or is not so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant.

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stamped beaver pelt, it was held that by virtue of this section there was no burden on the Crown to prove that the person charged was not the holder of a licensed trap.

In *R. v. STAVISS*(1943), 79 C.C.C.105, it was held that the words "without a permit" were not a part of the description of the offence of selling or offering for sale used tires at prices higher than those established under the Wartime Prices and Trade Board Regulations, but that they were an exception which need not be mentioned in the information or proved by the prosecution.

In *R. v. MAKARENKO*(1945), 83 C.C.C.328, it was held that under a Provincial Liquor Act the possession of liquor was not an offence unless it was shown to have been obtained otherwise than as permitted, and that an information disclosed no offence which charged the possession of liquor not purchased through the Liquor Control Board but omitted to add that it had not been lawfully purchased from a druggist authorized to sell it, since the latter also was a lawful way in which it might have been acquired. See, however, s.492 as to describing the offence.

There is further discussion of this section in the notes to s.371 *ante*, *q.v.*

PROCESS NOT OBJECTIONABLE ON CERTAIN OTHER GROUNDS.

703. No information, summons, conviction, order or process shall be deemed to charge two offences or to be uncertain by reason only that it states that the alleged offence was committed

(*a*) in different modes, or

(*b*) in respect of one or other of several articles, either conjunctively or disjunctively.

Section 703—*continued*

This is the former s.725 as it appeared in 1948, c.39, s.24, but without the illustration which was set out there. It was s.907 in the Code of 1892 and came from R.S.C. 1886, c.178, s.107. There is no similar statutory provision in English law.

This is one of a number of saving clauses designed to obviate objections based on want of form. Thus, an information need not negative exceptions, *e.g.*, a charge under the *Excise Act* for the distilling of illicit liquor need not allege that the accused had no license to do so. So too the information will not be invalid because it does not "name or describe with precision any person or thing," *e.g.*, the name of the person injured, or the means by which the offence was committed. Moreover, it is not affected by variances between the allegations which it contains and the evidence adduced at the hearing, but the justice may adjourn the hearing if he thinks that this variance has misled the accused, and he may order particulars in any case if he thinks that they are necessary to ensure a fair trial (ss.701(2) and 704(6)).

It was said in *R. v. ARCHER*, [1954]O.W.N.216 that "s.725 was in reality a proviso to s.710(3) and that the provisions of s.723(3) must also be kept in mind." See now ss.696 and 701 and notes thereto.

AMENDING DEFECTIVE INFORMATION.—Amendment where variance.—Information under wrong Act.—Defective statement.—Exception not negatived. —Defect in substance.—Defect in form.—Variance not material.—As to time. —As to place.—What to be considered.—Adjournment if defendant prejudiced.

704. (1) An objection to an information for a defect apparent on its face shall be taken by motion to quash the information before the defendant has pleaded, and thereafter only by leave of the summary conviction court before which the trial takes place.

(2) A summary conviction court may, upon the trial of an information, amend the information or a particular that is furnished under section 701, to make the information or particular conform to the evidence if there appears to be a variance between the evidence and

***(a)* the charge in the information, or**

***(b)* the charge in the information**

(i) as amended, or

(ii) as it would have been if amended in conformity with any particular that has been furnished pursuant to section 701.

(3) A summary conviction court may, at any stage of the trial, amend the information as may be necessary if it appears

***(a)* that the information has been laid**

(i) under another Act of the Parliament of Canada instead of this Act, or

(ii) under this Act instead of another Act of the Parliament of Canada; or

***(b)* that the information**

(i) fails to state or states defectively anything that is requisite to constitute the offence,

OLD CODE:

725. No information, summons, conviction, order or other proceeding shall be held to charge two offences, or shall be held to be uncertain on account of its stating the offence to have been committed in different modes, or in respect of one or other of several articles, either conjunctively or disjunctively.

724. No objection shall be allowed to any information, complaint, summons or warrant for any alleged defect therein, in substance or in form, or for any variance between such information, complaint, summons or warrant and the evidence adduced on the part of the informant or complainant at the hearing of such information or complaint.

(2) Any variance between the information for any offence or act punishable on summary conviction and the evidence adduced in support thereof as to the time at which such offence or act is alleged to have been committed, shall not be deemed material if it is proved that such information was, in fact, laid within the time limited by law for laying the same.

(3) Any variance between the information and the evidence adduced in support thereof, as to the place in which the offence or act is alleged to have been committed, shall not be deemed material if the offence or act is proved to have been committed within the jurisdiction of the justice by whom the information is heard and determined.

(4) If any such variance, or any other variance between the information, complaint, summons or warrant, and the evidence adduced in support thereof, appears to the justice present and acting at the hearing to be such that the defendant has been thereby deceived or misled, the justice may, upon such terms as he thinks fit, adjourn the hearing of the case to some future day.

(ii) does not negative an exception that should be negatived, or

(iii) is in any way defective in substance,

and the matters to be alleged in the proposed amendment are disclosed by the evidence taken on the trial; or

***(c)* that the information is in any way defective in form.**

(4) A variance between the information and the evidence taken on the trial is not material with respect to

***(a)* the time when the offence is alleged to have been committed, if it is proved that the information was laid within the prescribed period of limitation, or**

***(b)* the place where the subject matter of the proceedings is alleged to have arisen, if it is proved that it arose within the territorial jurisdiction of the summary conviction court that holds the trial.**

(5) The summary conviction court shall, in considering whether or not an amendment should be made, consider

***(a)* the evidence taken on the trial, if any,**

***(b)* the circumstances of the case,**

***(c)* whether the defendant has been misled or prejudiced in his defence by a variance, error or omission mentioned in subsection (2) or (3), and**

***(d)* whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.**

Section 704—*continued*

(6) Where in the opinion of the summary conviction court the defendant has been misled or prejudiced in his defence by an error or omission in the information, the summary conviction court may adjourn the trial and may make such an order with respect to the payment of costs resulting from the necessity of amendment as it considers desirable.

This replaces the former s.724. The purpose of the whole section is to clarify the law relating to the amendment of informations and to make comprehensive provision therefor as far as possible uniform with the procedure on indictment. The provisions of s.724 which are peculiarly applicable to summary convictions are retained in subsec.(4). Subsec.(6) was common to both ss.724 and s.889(4). For the rest, provisions are adopted from s.510 *ante* that are logically applicable to both procedures.

S.724 was s.847 in the Code of 1892, and R.S.C. 1886, c.178, s.28.

See notes to s.510 *ante*.

TRIAL.

JURISDICTION.

705. Every summary conviction court has jurisdiction to try, determine and adjudge proceedings to which this Part applies in the territorial division over which the person who constitutes that court has jurisdiction.

This comes from the former s.707(1). It was s.842(1) in the Code of 1892 and was taken from R.S.C. 1886, c.178, s.4.

S.707(2) is, in part, incorporated in s.692(g). The proviso is covered by ss.21, 22 and 419(b) *ante*. There is, however, a change effected by s.407(b) *ante*. Under that section it is a substantive offence to counsel, procure or incite another person to commit an offence punishable on summary conviction although the offence is not committed as a result. In such a case the offence is committed where the counselling, etc., is done and would be tried there.

There should be evidence to show territorial jurisdiction. The cases are not uniform as to the power of the court to take judicial notice of locality.

Some magistrates and justices are appointed for a province and may, accordingly, sit anywhere within the province. However, if a trial takes place unreasonably far from the place where the accused and his witnesses reside, it may amount to a denial of his right to present his full answer and defence: *R. v. TALLY*(1915), 23 C.C.C.449. See section 709.

NON-APPEARANCE OF PROSECUTOR.

706. Where, in proceedings to which this Part applies, the defendant appears for the trial and the prosecutor, having had due notice, does not appear, the summary conviction court may dismiss the information or may adjourn the trial to some other time upon such terms as it considers proper.

OLD CODE:

707. Every complaint and information shall be heard, tried, determined and adjudged by one justice or two or more justices as directed by the Act or law upon which the complaint or information is framed or by any other Act or law in that behalf.

(2) If there is no such direction in any Act or law then the complaint or information may be heard, tried, determined and adjudged by any one justice for the territorial division where the matter of the complaint or information arose; Provided that every one who aids, abets, counsels or procures the commission of any offence punishable on summary conviction, may be proceeded against and convicted either in the territorial division or place where the principal offender may be convicted, or in that in which the offence of aiding, abetting, counselling or procuring was committed.

719. If, upon the day and at the place so appointed the defendant appears voluntarily in obedience to the summons in that behalf served upon him, or is brought before the justice by virtue of a warrant, then, if the complainant or informant, having had due notice, does not appear by himself, his counsel, solicitor or agent, the justice shall dismiss the complaint or information unless he thinks proper to adjourn the hearing of the same until some other day upon such terms as he thinks fit.

This is the former s.719 which was s.854 in the Code of 1892 and was taken from R.S.C.1886, c.178, s.41.

If the prosecutor fails to appear upon the return of the summons, the justice may adjourn the hearing, or he may dismiss the charge, with or without costs (ss.706 and 710(4)). However, dismissal under such circumstances will not preclude the laying of another information, as appears from the following quotation:

"There had been no trial upon the merits and I take it an order for dismissal made in this way would not have supported a plea of autrefois acquit. The result therefore would be that it would have been open for the prosecution to lay a new charge and proceed to prosecute the accused before a justice in the usual way." (*R. v. ROWAT*, [1923]2 W.W.R.659.)

This case, indeed, goes somewhat farther and makes it clear that, if the matter is to be followed up, the proper course is to lay another information, not to appeal from the action of the justice in dismissing the first one:

"The intention of the Act in my opinion is after there has been a hearing before the justices, to allow an appeal as a hearing *de novo* in the King's Bench; and in this case there cannot be a rehearing or a hearing *de novo* because there has not yet been any hearing at all. . . . . If I were to hold that it is the law that an appeal would lie in such a case as this, it would be possible for the prosecution practically to ignore the justice's Court and by refraining from prosecution in that Court come directly to the King's Bench, a state of affairs not at all contemplated by the Act; and I add further that the accused has a right, which is a very valuable one, to have the matter gone into upon the merits before it is reheard in the King's Bench."

Section 706—*continued*

See also *GHITTERMAN v. RALPH*(1928), 50 C.C.C.282, and cases there cited.

It is convenient here to notice that there are cases in which the informant may wish to withdraw the information. The practice in that regard does not rest on statutory authority.

"It should never be lost sight of in dealing with criminal or quasi-criminal cases," says an English decision, "for it is a most important element in them . . . . . that a summons can only be withdrawn with the consent of the magistrate before whom it comes on for hearing. A complainant can only put an end to a criminal or quasi-criminal proceeding with the consent of the Court, which is given when leave is obtained to withdraw the summons, and the summons is withdrawn in consequence of such leave." (*PICKAVANCE v. PICKAVANCE* (1901), 70 L.J.P.14.)

There is, as has been pointed out, an "obvious distinction between a "withdrawal" conditional or unconditional, by leave of the court, and the situation created by the breakdown of the charge when the prosecutor abandons it by "withdrawing" at any stage from its further prosecution." (*R. v. SOMERS*(1929), 51 C.C.C.356).

In any case, if the informant wished to withdraw the charge, it would be most unusual for the justice to force the issue, unless some general public interest was involved, or unless he had some reason to believe that there had been some compromise between the parties. But again, should the justice refuse permission, and the prosecutor present no evidence to support his charge, the justice's course would be to dismiss it for want of prosecution. Paley on Summary Convictions, 9th ed., p.141, says that in the absence of special circumstances, it is customary to allow the withdrawal.

There is, too, a distinction to be drawn between a withdrawal because of some defect in the statement of the charge, and a withdrawal for some reason arising out of the evidence. In the first event the matter is not necessarily ended; a new charge may be laid. In the latter case, the matter is ended because there has been a hearing on the merits.

Regarding one case in which, incidentally, the withdrawal came about because the case was "settled out of court" by an arrangement between the parties, it was stated in an action for malicious prosecution which followed, that:

"It is conceded by the defendants that the abandonment of a prosecution by the complainant or the entry of a *nolle prosequi* by the representative of the Crown—if not the result of a compromise or arrangement with the accused—is a termination of the criminal proceeding in favour of the accused." (*BAXTER v. GORDON IRONSIDES & FARES CO. LTD.*(1907), 13 O.L.R.598).

A later case sums up the preceding ones as follows:

"The main principle to be gathered from all the many cases, not always consistent or exact, and based on varying circumstances, is that unless it can be said, in the facts of the particular case that there has been an adjudication and acquittal on the merits, the permission of the Court to withdraw a charge is not equivalent to a dismissal

OLD CODE:

720. If both parties appear, either personally or by their respective counsel, solicitors or agents, before the justice who is to hear and determine the compliant or information, such justice shall proceed to hear and determine the same, provided however, that if the accused does not appear personally, the justice may require the personal appearance of the accused and may adjourn the hearing and may issue his warrant for the apprehension of the accused.

(2) When the defendant is a corporation the summons may be served on the mayor or chief officer of such corporation or branch thereof, or upon the clerk or secretary or the like officer thereof, and may be in the same form as if the defendant were a natural person.

(3) The corporation in such case shall appear by attorney, and if it does not appear the justice may proceed as in other cases.

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which can be pleaded in bar of subsequent proceedings." (*R. v. SOMERS, supra*, overruling *R. v. CHEW DEB*(1913), 21 C.C.C.20. See also *BLANCHARD v. JENKINS*(1930), 55 C.C.C.77.)

WHEN BOTH PARTIES APPEAR.—Counsel or agent.—Appearance by corporation.

707. (1) Where the prosecutor and defendant appear, the summary conviction court shall proceed to hold the trial.

(2) A defendant may appear personally or by counsel or agent, but the summary conviction court may require the defendant to appear personally and may, if it thinks fit, issue a warrant in Form 7 for the arrest of the defendant, and adjourn the trial to await his appearance pursuant thereto.

(3) Where the defendant is a corporation it shall appear by counsel or agent, and if it does not appear, the summary conviction court may, upon proof of service of the summons, proceed *ex parte* to hold the trial.

This comes from the former s.720 which may be compared with s.855 in the Code of 1892 and R.S.C.1886, c.178, s.42. S.720(2) was amended by 1938, c.30, s.16. Service on a corporation is covered in this Code by s.441, which, by virtue of s.700, is applicable to this Part. The power to compel personal appearance was added to s.720 by 1947-48, c.39, s.21. Sometimes it is necessary to establish identity.

As to withdrawal of information see notes to s.706, *supra*. See also s.709 and notes thereto.

ARRAIGNMENT.—Conviction or order if charge admitted.—Procedure if charge not admitted.—Separating trial of courts.—Admission by defendant.

708. (1) Where the defendant appears the substance of the information shall be stated to him, and he shall be asked,

(a) whether he pleads guilty or not guilty to the information, where the proceedings are in respect of an offence that is punishable on summary conviction, or

(b) whether he has cause to show why an order should not be made against him, in proceedings where a justice is authorized by law to make an order.

Section 708—*continued*

(2) Where the defendant pleads guilty or does not show sufficient cause why an order should not be made against him, as the case may be, the summary conviction court shall convict him or make an order against him accordingly.

(3) Where the defendant pleads not guilty or states that he has cause to show why an order should not be made against him, as the case may be, the summary conviction court shall proceed with the trial, and shall take the evidence of witnesses for the prosecutor and the defendant in accordance with the provisions of Part XV relating to preliminary inquiries.

(4) The summary conviction court may, before or during the trial, where it is satisfied that the ends of justice require it, direct that the defendant be tried separately upon one or more of the counts in the information.

(5) A defendant may admit any fact alleged against him for the purpose of dispensing with proof thereof.

Subsecs.(1),(2) and (3) come from the former s.721(1),(2),(3) and (5), which were contained in s.856 in the Code of 1892 and in R.S.C. 1886, c.178, ss.43-46. S.721(4) is not continued; see s.12 of the *Canada Evidence Act*. S.708(1)(a) embodies a change in requiring a plea of guilty or not guilty. Subsec.(3) also embodies a change in requiring that the witnesses sign their depositions; under s.721(5) that was not necessary. "We think it is wholesome that they should be required to sign them": Senate Committee, Dec. 15-16, 1952, p.79.

Subsec.(4) is new in this Part. It is an adaptation of s.501(3) *ante* in view of the provision in s.696(1)(b) that more than one offence may be included in an information. Subsec.(5) also is new in this Part and adapts the provision contained in s.562 *ante*.

It is important that the plea of guilty be unequivocal, and if it be not so, the justice should enter a plea of not guilty and hear the evidence. It was held that a justice had erred in failing to do so under the following circumstances.

The accused was charged with the unlawful possession of liquor and pleaded guilty. The informant drew the attention of the justice to the minimum penalty provided for the offence, whereupon the accused said: "I am not guilty. I want that stuff analysed. It is not over two per cent, as I kept it on ice and it is sweet." The informant replied: "It is too late now," and the justice proceeded to impose the penalty. The conviction was quashed and the case remitted to the justice for re-hearing (*R. v. RAPP*(1923), 41 C.C.C.51. And see *R. v. OLNEY*(1926), 46 C.C.C.196). The same result followed in *R. v. MLAKER*(1923), 40 C.C.C.287, in which the accused, charged with the possession of part of a still, said to the interpreter that he had been making raisin wine, which statement the interpreter transmitted to the Court as a plea of guilty.

In the most notable case dealing with this subject (*R. v. RICHMOND* (1917), 29 C.C.C.89) it appeared—although there was some dispute as to what actually had taken place before the magistrate—that either the accused himself, or his counsel on his behalf, had pleaded guilty to a

OLD CODE:

721. If the defendant is personally present at the hearing the substance of the information or complaint shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted, or why an order should not be made against him, as the case may be.

(2) If the defendant thereupon admits the truth of the information or complaint, and shows no sufficient cause why he should not be convicted, or why an order should not be made against him, as the case may be, the justice present at the hearing shall convict him or make an order against him accordingly.

(3) If the defendant does not admit the truth of the information or complaint, the justice shall proceed to inquire into the charge and for the purposes of such inquiry shall take the evidence of witnesses both for the complainant and accused in the manner provided by Part XIV in the case of a preliminary inquiry.

(4) The prosecutor or complainant is not entitled to give evidence in reply if the defendant has not adduced any evidence other than as to his general character.

(5) In a hearing under this Part the witnesses need not sign their depositions.

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charge of unlawful possession of opium. It was clear, however, that, before the imposition of any penalty, the accused had said to the magistrate that he did not know what was in the parcel when he received it from the express office. The following extract from one of the judgments delivered in the appeal court, lays down a salutary principle:

> "Even though a prisoner has pleaded guilty, yet if while the case is still in course of being dealt with and the proceedings are not closed it plainly appears that the accused never intended to admit the truth of a fact which is an essential ingredient in his guilt and therefore pleaded guilty under a misapprehension of what constituted guilt, it is, I think, clearly the duty of any presiding Judge or Magistrate to offer to allow him to withdraw his plea if he so desires and to enter a plea of 'not guilty'. I think it is quite obvious from a comparison of all the affidavits that very little time elapsed in dealing with the matter. If a conviction had been entered, sentence reserved and other prisoners proceeded with before the defendant suggested his possible defence the case might very well be different."

If the charge is disputed, the evidence is taken in a manner similar to that in which it is taken upon a preliminary hearing. It has been held, moreover, that some of the statutory requirements are merely directory and may be waived in summary conviction matters. This is true of the following items of procedure:

1. Taking the depositions in writing (*R. v. JANNEAU*(1907), 12 C.C.C. 360; *BEDARD v. R.*(1916), 26 C.C.C.99). But see now s.708(3).
2. Reading the deposition to the witness (*R. v. NORWODSKY*(1920), 33 C.C.C.284.)
3. Signing the deposition by the justice (*Ex parte BUDD*(1910), 17 C.C.C.235.)

These cases refer to a waiver which is either express or which may be inferred from the circumstances, and refer to matters of procedure only. Sometimes, however, dispute arises as to what irregularities are mere matters of procedure, and what go to the jurisdiction of the Court. In a case in which a conviction was appealed because an adjournment had

Section 708—*continued*

been made for more than the statutory eight days, the following was laid down:

"If jurisdiction was not lost, then the applicant's contention is without basis. If the Magistrate did lose jurisdiction for the time being, and I will assume for the sake of argument that he did, it was still competent for him to try the charge *de novo*. And it seems to me that this was done; for when a person charged with some offence comes before a Magistrate and pleads to the charge, it is immaterial whether he has come of his own accord or in pursuance of an intimation or command contained in a summons served upon him, or comes by any other invitation or upon any other business, if he pleads to the charge he thereby waives the irregularity or absence of the usual steps necessary to his appearance following the laying of the information." (*HALL v. TAYLOR*(1926), 46 C.C.C.50.)

RIGHT TO MAKE FULL ANSWER AND DEFENCE.—Examination of witnesses.—On oath.

709. (1) The prosecutor is entitled personally to conduct his case, and the defendant is entitled to make his full answer and defence.

(2) The prosecutor or defendant, as the case may be, may examine and cross-examine witnesses personally or by counsel or agent.

(3) Every witness at a trial in proceedings to which this Part applies shall be examined under oath.

This combines the former ss.715 and 716(1) which came from ss.850 and 851 of the Code of 1892, and R.S.C. 1886, c.178, ss.34-36. As to evidence on commission (former s.716(2)) see ss.613 *et seq., ante*.

In *R. v. SVEINSSON*(1950), 102 C.C.C.366, at p.372, it was said that "It is a fundamental rule that no evidence can be given in the absence of an oath—*R. v. ANTROBUS*(1946), 87 C.C.C.118, at p.119. To this rule there are statutory exceptions, one of which is s.14 (*i.e.*, of the *Canada Evidence Act*)."

S.850 of the Code of 1892 reads "counsel or attorney" in both subsections. Hansard 1892, vol.II, does not show discussion upon it. The change to "counsel, solicitor or agent" in subsec.(1), appears in the Code of 1906. S.850 of the 1892 Code is shown as its origin, but the Tables in Vol. IV, R.S.C. 1906, show s.850 consolidated as s.715 without reference to any change (pp.2892, 3049).

The annual statutes from 1892 to 1906 do not show any amendment, and it would appear therefore, that the change was made in the general revision of 1906. The cases in which the section is referred to are concerned principally with the right to full answer and defence, but the following may be mentioned with reference to right of audience:

In *GARNEAU v. GAUTHIER*(1912), 18 Rev. de Jur. (Que.K.B.) 172, at p.176, it is said that:

"It is the party charged, who is 'admitted' to bring in his counsel. It is important that courts of criminal jurisdiction should not be regarded

OLD CODE:

715. The person against whom the complaint is made or information laid shall be admitted to make his full answer and defence thereto, and to have the witnesses examined and cross-examined by counsel, solicitor or agent on his behalf. (2) Every complainant or informant in any such case shall be at liberty to conduct the complaint or information, and to have the witnesses examined and cross-examined, by counsel or attorney on his behalf.

716. Every witness at any hearing shall be examined upon oath or affirmation, by the justice before whom such witness appears for the purpose of being examined.

718. In case the accused does not appear at the time and place appointed by any summons issued by a justice on information before him of the commission of an offence punishable on summary conviction then, if it appears to the satisfaction of the justice that the summons was duly served a reasonable time before the time appointed for appearance, such justice may proceed ex parte to hear and determine the case in the absence of the defendant, as fully and effectually, to all intents and purposes, as if the defendant had personally appeared in obedience to such summons and had pleaded "not guilty", or the justice may, if he thinks fit, issue his warrant as provided by sections six hundred and fifty-nine and six hundred and sixty and adjourn the hearing of the complaint or information until the defendant is apprehended.

722. (1) Before or during the hearing of any information or complaint the justice may, in his discretion, adjourn the hearing of the same to a certain time or place to be then appointed and stated in the presence and hearing of the party or parties, or of their respective counsel, solicitors or agents then present, but no such adjournment shall, except with the consent of both parties, be for more than eight days.

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as revenue producing instrumentalities for law agents. I therefore consider that in summary conviction cases costs are not intended to include attorney fees."

As to the right to full answer and defence, it is relevant to refer again to *R. v. ROACH*(1914), 23 C.C.C.28, quoted under s.557, *ante*.

ADJOURNMENT.—Security for appearance of defendant.—Non-appearance of defendant.—Proceeding *ex parte*.—Warrant.—Non-appearance of prosecutor.

710. (1) The summary conviction court may, in its discretion, before or during the trial, adjourn the trial to a time and place to be appointed and stated in the presence of the parties or their respective counsel or agents, but no such adjournment shall, except with the consent of both parties, be for more than eight days.

(2) Where the summary conviction court adjourns a trial it may

(*a*) permit the defendant to be at large,

(*b*) commit him by warrant in Form 14 to a prison within the territorial division for which the summary conviction court has jurisdiction or to such other safe custody as the summary conviction court thinks fit, or

(*c*) discharge the defendant upon his recognizance in Form 28,

(i) with or without sureties, or

Section 710—*continued*

(ii) upon depositing such sum of money as the court directs, conditioned for his appearance at the time and place fixed for resumption of the trial.

(3) Where the defendant does not appear at the time and place appointed for the trial, and service of the summons within a reasonable period before the appearance was required is proved, or does not appear for the resumption of a trial that has been adjourned in accordance with subsection (1), the summary conviction court

(a) **may proceed *ex parte* to hear and determine the proceedings in the absence of the defendant as fully and effectually as if the defendant had appeared, or**

(b) **may, if it thinks fit, issue a warrant in Form 8 or 9, as the case may be, for the arrest of the defendant, and adjourn the trial to await his appearance pursuant thereto.**

(4) Where the prosecutor does not appear at the time and place appointed for the resumption of an adjourned trial, the summary conviction court may dismiss the information with or without costs.

Subsec.(1) is the former s.722(1); subsec.(2) is the former s.722(4) with the addition of provision for cash bail, as to which see also s.451(a) *ante*. Subsec.(3) combines the former ss.718 and 722(5); subsec.(4) is the former s.722(3), as to which see also s.706 *ante*. The former s.722(2) is not continued in terms—a complete procedure is provided without it.

S.718 came from s.853 in the Code of 1892, and R.S.C. 1886, c.178, s.39. It originated in 7 and 8 Geo. IV, c.29, s.65 (Imp.) whence it was taken into the *Larceny Act*, 1861, s.105 (Imp.). S.722 came from s.857 in the Code of 1892, and R.S.C. 1886, c.178, ss.48-51.

As to adjournment, see *R. v. ROACH*, cited under s.557 *ante*. The Code in s.710(1) lays down certain rules, but obviously it would be impossible for it to lay down rules for, or even to specify all of the circumstances under which an adjournment may be asked. A material witness may not be available, the prosecution may amend the information in a material part, the accused may wish to consult counsel—these situations are common enough. In such circumstances the justice must exercise his discretion, and it should be unnecessary to add that it is his duty to be fair to the prosecution as well as to the accused. But, bearing that in mind, it may be said that, within limits and as a general rule, he will exercise a wise discretion if he grants the adjournment, more especially if the summons is before him for the first time. It has been observed with regard to a preliminary hearing that a superior court will not interfere with the exercise of a justice's discretion upon an application for adjournment, but this is not true of summary convictions, and not uncommonly, convictions have been set aside because adjournment was refused.

For example in *R. v. FARRELL*(1907), 12 C.C.C.524, a summons was served upon the defendant on the 8th day of October, requiring his appearance on the next day. He answered the summons, but pressed for an adjournment on account of the absence of his solicitor. This request was refused, and he was convicted. It is unnecessary to state the surrounding circumstances in detail, beyond saying that they drew from

OLD CODE:

Section 722 —continued

(2) If, at the time and place to which the hearing or further hearing is adjourned, either or both of the parties do not appear, personally or by his or their counsel, solicitors or agents respectively, before the justice or such other justices as shall then be there, the justice who is then there may proceed to the hearing or further hearing as if the party or parties were present.

(3) If the prosecutor or complainant does not appear the justice may dismiss the information, with or without costs as to him seems fit.

(4) Whenever any justice adjourns the hearing of any case he may suffer the defendant to go at large or may commit him to the common gaol or other prison within the territorial division for which such justice is then acting, or to such other safe custody as such justice thinks fit, or may discharge the defendant upon his recognizance with or without sureties at the discretion of such justice, conditioned for his appearance at the time and place to which such hearing or further hearing is adjourned.

(5) Whenever any defendant who is discharged upon recognizance, or allowed to go at large, does not appear at the time mentioned in the recognizance or to which the hearing or further hearing is adjourned the justice may issue his warrant for his apprehension.

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a superior court Judge this scathing comment:

> "I have rarely heard of magisterial authority being more arbitrarily and unfairly exercised than it appears to have been by the police magistrate in this case. His course was entirely contrary to the spirit which happily pervades the administration of justice in this country."

That case was followed later (*R. v. LORENZO*(1909), 16 C.C.C.19) in a situation which appears in the following excerpts from the reported judgment:

> "The police magistrate says that, in his opinion, the application by the defendant was made for the purpose of delay. It certainly was, but for such delay . . . . . reasonable, reduced to a minimum . . . . . as would enable the defendant to get the evidence of one or more of three named persons believed to be then within a short distance of the place where the trial was proceeding, and, as it turns out, upon the evidence of the prosecutor, one of these named persons was present in court, although not to the knowledge of the defendant or magistrate."

The judgment proceeds:

> "It is, subject to the question of depriving a defendant of a fair trial, for the magistrate to say what is reasonable time after service for a defendant to appear and stand trial, and further what is reasonable service. Here the defendant did appear; and, under all the circumstances of the case, should he be held to depend simply upon his own denial, or should, upon terms that would prevent any possible miscarriage, an adjournment have been granted? No harm, as it seems to me, could have resulted from such adjournment. Upon his arrest in the morning he had given bail to the satisfaction of the magistrate himself, for his appearance at 5 o'clock. He then appeared. Had an adjournment been granted until a later hour that evening, or until some convenient time a little later, the defendant would have been obliged to renew his bail or remain in custody. At such cost, can it be

Section 710—*continued*

said that for the purpose of fair trial the defendant was not entitled to an adjournment? It is reasonable, if a person plead not guilty before a magistrate and requires time for his defence and to produce his evidence, that he should get it."

A strong case to the same effect was *R. v. HALLCHUK (ELCHUK)*, [1928] 1 W.W.R.646, in which the accused was a foreigner with an imperfect knowledge of the English language. He was arrested and, when taken before the magistrate on the same day, he asked for an adjournment in order that counsel whom he had retained might be present. Counsel also sent a telegram to the magistrate making the same request, which, however, was not granted. The accused was released upon application for a writ of *habeas corpus*.

"To refuse an accused under such circumstances, a reasonable remand in order that he might have the benefit of counsel's advice and conduct of his defence is simply to disregard one of the strongest safeguards which our law has provided for persons accused of crime . . . . . .

I think the whole proceedings before the magistrate were an instance of undue haste in railroading the prisoner (if I may use the expression) into Court on the afternoon of the day on which he was arrested, and notwithstanding the protest of the accused and the telegram received from his counsel, proceeding with the case and sending this man off to jail."

Still, as has been observed, there are limits beyond which the justice need not go to exercise his discretion in favour of the accused, and the two cases now to be cited are instances in which refusal to grant an adjournment was held, upon review, to have been justified. In the first, *R. v. IRWING*(1908), 14 C.C.C.489, the Court said that "inasmuch as she (the accused) gave evidence on her own behalf, and in plain terms shewed that the charge was well founded, it does not appear that any injustice was occasioned by the refusal of the adjournment." In the second, *R. v. PFISTER*(1911), 19 C.C.C.92, the Court merely observed upon this point, that: "The prisoner did not ask . . . . . for an adjournment at any stage of the case, nor did he ask for the assistance of counsel until after the evidence was in, and the magistrate had intimated that he would find him guilty."

Both these decisions were based upon an English case which, in the former, was cited in the following terms:

"In *R. v. BIGGINS*(1862), 5 L.T.N.S.605, it was held upon a similar enactment, the origin of that found in our Code (*i.e.*, that the defendant shall be admitted to make his full answer and defence), that it did not touch the discretionary power of the magistrate in the conduct of the trial, and that he was not bound to adjourn to enable the accused to procure counsel, and that, although the accused had the absolute right to the assistance of counsel, if he could obtain it, he was not entitled as of right to an adjournment for the purpose of enabling him to do so. Cockburn, C.J., said: 'The intention of the statute was that it should not be in the power of the justices to refuse a party legal assistance upon a summary hearing, when he desired it, but where the matter resolves itself into the question of an adjournment, though it would be proper in the justices to adjourn under the circumstances,

OLD CODE:

726. The justice, having heard what each party has to say, and the witnesses and evidence adduced, shall consider the whole matter, and, unless otherwise provided, determine the same and convict or make an order against the defendant, or dismiss the information or complaint, as the case may be.

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yet the statute does not touch his discretionary power on that subject.'

'The magistrate,' said the Chief Justice, 'must have a discretion as to adjourning. The Act does not put the right in such case higher than that of a person tried for felony. Suppose a person in the dock says that he wants counsel or attorney. It may be very proper to postpone his trial, but you cannot say that if the Judge chooses to try him at once he has no jurisdiction.' "

Lest the reader feel that these two groups of cases are in conflict, it should be noted that there is no real inconsistency. The gist of the remarks of Cockburn, C.J., is in the words "it would be proper in the justices to adjourn under the circumstances". If they refuse to do so, but proceed with the hearing, the resultant conviction may be set aside if there is any reason to believe that the accused has not had a chance to present his full answer and defence; and if the conviction is quashed, it will not be because the justices lacked jurisdiction, but because their denial of that inherent right of the accused was "contrary to the spirit" —and here the letter is but the expression of the spirit—"which happily pervades the administration of justice in this country."

ADJUDICATION.

CONVICTION, ORDER OR DISMISSAL.

711. When the summary conviction court has heard the prosecutor, defendant and witnesses it shall, after considering the matter, convict the defendant or make an order against him or dismiss the information, as the case may be.

This is the former s.726. It was s.858 in the Code of 1892, and R.S.C. 1886, c.178, s.52. Convicted means "found guilty": *R. v. BLABY*, [1894]2 Q.B.170. As to withdrawal of information, see notes to s.706 *ante*.

It is the duty of the justice not only to hear but to determine the matter before him. Sometimes he may wish to take time to consider his decision. He is quite at liberty to adjourn for that purpose, but must announce a time and place at which judgment will be given. The limit of eight days does not apply to such an adjournment, but if he adjourns *sine die* his jurisdiction is lost.

Sometimes too, if there be two or more justices, they fail to agree. If there are more than two, the majority may decide the matter, but, if they are equally divided, there is no adjudication. "Where the justices are equally divided the case should be adjourned and reheard by a reconstituted court" (19 Hals., 1st ed., 601). The rehearing, it appears, may take place without the laying of a new information before the same

Section 711—*continued*

justices along with others called in to assist them, or before other justices upon a new information (*LANE v. KRENKEWICH*(1932), 60 C.C.C.61). The first of these alternatives would be proper if it were likely that the statutory period of limitation might expire before a new information could be laid; if there were no such possibility, the second seems preferable.

PREVIOUS CONVICTION.—Procedure where previous conviction charged.—Where hearing *ex parte*.—Proof of previous conviction.

712. (1) Where a defendant is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed upon him by reason thereof unless the prosecutor satisfies the summary conviction court that the defendant, before making his plea, was notified that a greater punishment would be sought by reason thereof.

(2) Where a defendant is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, the summary conviction court shall, upon application by the prosecutor, and upon being satisfied that the defendant was notified in accordance with subsection (1), ask the defendant whether he was previously convicted, and if he does not admit that he was previously convicted, evidence of previous convictions may be adduced.

(3) A summary conviction court that holds a trial pursuant to subsection (3) of section 710 may, if it convicts the defendant, make inquiries with respect to previous convictions, whether or not the defendant was notified that a greater punishment would be sought by reason thereof.

(4) For the purposes of this section, a previous conviction may be proved in the manner prescribed by section 574.

This covers matters dealt with in the former s.721A and s.757(3), and (as to subsec.(4)) comes from the former s.982 (now s.574). However, it is largely new.

S.721A came into the Code as 1943, c.23, s.15, and was amended by 1948, c.39, s.22. It settled a difference of judicial opinion whether the former s.851 (now in s.572) applied to summary conviction offences. The section was one of a number of amendments of similar tenor and in connection with them the following appears in the Senate Debates, 1943, p.348:

"These relate to procedure in cases where the offence with which a person is charged is of a type for which greater punishment may be inflicted upon the accused if it is proved that he was previously convicted. The procedure outlined in these sections differs from, and, in my opinion, is fairer than, that now followed. For instance, at the present time where a person is being proceeded against summarily, under the summary convictions part of the Criminal Code, and the Crown alleges the offence to be a second offence, some reference to this may be made in the information. That certainly is embarrassing to the accused person and makes it more difficult for him to defend himself. At least, the atmosphere in court is more unfavourable to him.

OLD CODE:

721A. Upon the trial of any person for an offence for which a greater punishment may be inflicted by reason of a previous conviction, if the accused is found guilty, the justice shall then, and not before, if requested by the prosecutor, ask the accused whether he was previously convicted, and if he does not admit that he was so previously convicted evidence may be adduced to prove such previous conviction.

(2) If upon the hearing of any information for any such offence the justice proceeds ex parte to hear and determine the case in the absence of the accused as provided in section seven hundred and eighteen the justice may inquire concerning any previous conviction.

757. (3) Upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence.

. . . . . .

982. A certificate containing the substance and effect only, omitting the formal part, of any previous indictment and conviction for any indictable offence, or a copy of any summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court before which the offender was first convicted, or to which such summary conviction was returned, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of such conviction without proof of the signature or official character of the person appearing to have signed the same.

The amendments that I have referred to deal with summary convictions, summary trials of indictable offences and speedy trials of indictable offences, and they all provide that the information shall not make any reference to a previous conviction. Only after the accused person has been convicted of the offence for which he is then being tried may the judge, at the request of the Crown prosecutor, inquire of the accused whether it is his first offence. If he says it is, the Crown may then put in evidence to prove that he is not telling the truth."

The principle of the early legislation on this subject (6 & 7 Wm. IV, c.111 (Imp.)) was that the jury should not before conviction be made aware that the accused had been convicted previously.

Former s.851 stated how previous convictions should be mentioned in indictments for offences where a heavier penalty followed a subsequent conviction. There was no corresponding provision in Part XV.

The cases show two conflicting views of the principle involved. The first is that the previous conviction should be set out in the information so that the accused may know that he is charged with something carrying more serious consequences than a first offence, *e.g.*, *R. v. DALBERGH*(1930), 55 C.C.C.177.

The other view is that the previous conviction should not be set out in the information because of the danger of prejudice to the accused in having it brought to the attention of the magistrate. This is discussed in *PRUD'HOMME v. PETITJEAN*(1942), 77 C.C.C.327 (Que. S.C.).

Section 712—*continued*

The revision resolves the conflict of views by providing that a previous conviction shall not be mentioned in the information, and that where a subsequent offence carries a heavier penalty by reason of a previous conviction, that heavier penalty shall not be asked for unless the prosecutor has notified the accused that he intends to ask for it.

This provision for notice is comparable to that contained in s.23 of the English *Criminal Justice Act* 1948, which provides that (for the purpose of determining whether an offender is liable to be sentenced to corrective training or preventive detention):

> "no account shall be taken of any previous conviction or sentence unless notice has been given to the offender and to the proper officer of the court at least three days before the trial that it is intended to prove the previous conviction or sentence; and unless any such previous conviction or sentence is admitted by the offender the question shall be determined by the verdict of a jury."

In *MAXWELL v. D.P.P.*(1934), 24 Cr. App. R.152 at p.173 it was said that:

> "And in general no question as to whether a prisoner has been convicted or charged or acquitted should be asked or, if asked, allowed by the Judge, who has a discretion under proviso (f) (i.e. to s.1 of the *Criminal Evidence Act* (1898)), unless it helps to elucidate the particular issue which the jury is investigating, or goes to credibility, that is, tends to show that he is not to be believed on his oath; indeed the question whether a man has been convicted, charged or acquitted, even if it goes to credibility, ought not to be admitted, if there is any risk of the jury being misled into thinking that it goes not to credibility but to the probability of his having committed the offence with which he is charged."

The difference between Canadian and English law in this respect has been noted under s.572, but it may be observed also that in *KOUFIS v. R.*(1941), 76 C.C.C.161, it was held by the Supreme Court that a question to the accused with reference to a previous offence was merely prejudicial, and in effect, that, although s.12 of the *Canada Evidence Act* permits an accused to be questioned as to previous convictions, he is not otherwise to be cross-examined as to alleged offences unless the evidence falls within the rule relating to evidence of similar acts.

MEMO OF CONVICTION OR ORDER.—Forms.—Warrant of committal.

713. (1) Where a defendant is convicted or where an order is made against him, a minute or memorandum of the conviction or order may be made, without fee, but whether or not a minute or memorandum is made, the conviction or order shall be drawn up by the summary conviction court in Form 31 or 32, as the case may be.

(2) Where a defendant is convicted or an order is made against him, the summary conviction court shall issue a warrant of committal in Form 18 or 19, and section 447 applies in respect of a warrant of committal issued under this subsection.

This comes from the former ss.712 and 727. S.712 was s.844 in the Code of 1892, and R.S.C. 1886, c.178, s.22, am. by 52 Vict., c.45, s.4. S.727 was s.859 in the Code of 1892, and R.S.C. 1886, c.178, s.53.

OLD CODE:

712. The provisions of section six hundred and sixty-two relating to the endorsement of warrants shall apply to the case of any warrant issued under the provisions of this Part against the accused, whether before or after conviction, and whether for the apprehension or imprisonment of any such person.

727. If the justice convicts or makes an order against the defendant, a minute or memorandum thereof may then be made, for which no fee shall be paid, and the conviction or order, in such case, shall afterwards be drawn up by the justice on parchment or on paper, under his hand, in such one of the forms of conviction or of orders from 31 to 36 inclusive as is applicable to the case, or to the like effect.

728. When several persons join in the commission of the same offence, and upon conviction thereof each is adjudged to pay a penalty which includes the value of the property or the amount of the injury done, no further sum shall be paid to the person aggrieved than such amount or value and costs, if any, and the residue of the penalties imposed shall be applied in the same manner as other penalties imposed by a justice are directed to be applied.

It has been held that a variance between the minute and the conviction is ground for quashing the conviction: *Ex p. CARMICHAEL* (1903), 8 C.C.C.19.

The arrest of accused under a warrant of committal issued in one county and executed in another, without backing, was held in *R. v. WHITESIDE*(1904), 8 C.C.C.478, not to justify the release of the accused on *habeas corpus.*

DISPOSAL OF PENALTIES WHEN JOINT OFFENDERS.

714. Where several persons join in committing the same offence and upon conviction each is adjudged to pay an amount to a person aggrieved, no more shall be paid to that person than an amount equal to the value of the property destroyed or injured or the amount of the injury done, together with costs, if any, and the residue of the amount adjudged to be paid shall be applied in the manner in which other penalties imposed by law are directed to be applied.

This is the former s.728, which was s.860 in the Code of 1892 and R.S.C. 1886, c.178, s.54. Under this Code it can apply only to s.373.

A partnership as such cannot be charged. The individual partners should be charged either jointly or separately, and if convicted, penalized separately: *R. v. HARRISON AND COMPANY*(1800), 101 E.R.1516; *Re ROSKE & MESSENGER,* [1919]1 W.W.R.341.

The words in s.728 were "no further sum shall be paid to the person aggrieved than such amount or value." The provision appears to have been taken into the *Larceny Act* 1861 (Imp.) s.106 from Jervis' Act, 11 & 12 Vict., c.43, s.31, and in a note to the former in Greaves' Cons. Acts, p.148, it is said that:

Section 714—*continued*

"The words 'such value and amount' are substituted for 'that which shall be forfeited by one of the offenders'; for it may well be that no offender may pay the whole value or amount of injury done, though the sums paid by all may exceed that value or amount."

ORDER OF DISMISSAL.—Forms.—Effect of certificate.

715. (1) Where the summary conviction court dismisses an information it may, if requested by the defendant, draw up an order of dismissal, and shall give to the defendant a certified copy of the order of dismissal.

(2) A copy of an order of dismissal, certified in accordance with subsection (1) is, without further proof, a bar to any subsequent proceedings against the defendant in respect of the same cause.

This is the former s.730, which was s.862 in the Code of 1892 and came from R.S.C. 1886, c.178, s.56. Under this section the copy of the order need only be furnished on request. As to laying a new information where there has been no hearing on the merits, see notes to s.706 *ante*.

COSTS.—To informant.—To defendant.—To be set out.—Costs are part of fine.—Where no fine imposed.—Definition.

716. (1) The summary conviction court may in its discretion award and order such costs as it considers reasonable and not inconsistent with the fees established by section 744, to be paid

***(a)* to the informant by the defendant, where the summary conviction court convicts or makes an order against the defendant, or**

***(b)* to the defendant by the informant, where the summary conviction court dismisses an information.**

(2) An order under subsection (1) shall be set out in the conviction, order or order of dismissal, as the case may be.

(3) Where a fine or sum of money or both are adjudged to be paid by a defendant, and a term of imprisonment in default of payment is imposed, the defendant is, in default of payment, liable to serve the term of imprisonment imposed, and for the purposes of this subsection, any costs that are awarded against the defendant shall be deemed to be part of the fine or sum of money adjudged to be paid.

(4) Where no fine or sum of money is adjudged to be paid by a defendant, but costs are awarded against the defendant or informant, the person who is liable to pay them is, in default of payment, liable to imprisonment for one month.

(5) In this section, "costs" includes the costs and charges, after they have been ascertained, of committing and conveying to prison the person against whom costs have been awarded.

Subsec.(1) comes from the former ss.735 and 736, which were ss.867 and 868 in the Code of 1892, and ss.58 and 59 in R.S.C. 1886, c.178. It

OLD CODE:

730. If the justice dismisses the information or complaint, he may, when required so to do, make an order of dismissal in form 37, and he shall give the defendant a certificate in form 38, which, upon being afterwards produced, shall without further proof, be a bar to any subsequent information or complaint for the same matter, against the same defendant.

735. In every case of a summary conviction, or of an order made by a justice, such justice may, in his discretion, award and order in and by the conviction or order that the defendant shall pay to the prosecutor or complainant such costs as to the said justice seem reasonable in that behalf, and not inconsistent with the fees established by law to be taken on proceedings had by and before justices.

736. Whenever the justice, instead of convicting or making an order, dismisses the information or complaint, he may, in his discretion, in and by his order of dismissal, award and order that the prosecutor or complainant shall pay to the defendant such costs as to the said justice seem reasonable and consistent with law.

737. The sums so allowed for costs shall, in all cases, be specified in the conviction or order, or order of dismissal, and the same shall be recoverable in the same manner and under the same warrants as any penalty, adjudged to be paid by the conviction or order, is to be recovered.

738. Whenever there is no such penalty to be recovered such costs shall be recoverable by distress and sale of the goods and chattels of the party, and in default of distress, by imprisonment, with or without hard labour, for any term not exceeding one month.

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will be noted that s.735 used the words "such costs as to the said justice seem reasonable in that behalf and not inconsistent with the fees established by law to be taken on proceedings had by and before justices", while s.736, in dealing with costs, used the words "such costs as to the said justice seem reasonable and consistent with law". The Supreme Court has held that the costs which may be awarded to a complainant or defendant are the fees fixed by the tariff. See *A. G. QUEBEC v. A. G. CANADA*, [1945] S.C.R.600, *per* Kerwin, J. (now C.J.), at 607:

> "I think it plain that, in dealing with summary conviction matters, Parliament intended, by this amendment (the provisions of s.770 (now s.744) setting up a tariff of fees), to insure not only that *the fees mentioned in the tariff and no other could be directed to be paid by a complainant or accused but also that no other fees for the itemized services could be taken or accepted by the parties mentioned*, and that in summary conviction proceedings the tariffs of fees or costs which up to that time Parliament had been willing should be fixed by the provinces should thereafter be uniform." (Italics added)

At p.608:

> "My opinion is that s.770, Criminal Code, is not confined to providing for the maximum amount that may be imposed upon a person convicted of an offence, or upon the complainant in the event of the dismissal of the charge, but is an imperative direction to all concerned that, for the services to be rendered by the officials named, and for

Section 716—*continued*

witnesses, no other fees shall be demanded or accepted."

Held that the section should not be restricted to the case when the unsuccessful party has to pay costs to the other.

Subsecs.(2) and (3) are the former s.737 which was s.869 in the Code of 1892, and R.S.C. 1886, c.178, s.60. Subsec.(4) comes from the former s.738, which was s.870 in the Code of 1892, and R.S.C. 1886, c.178, s.61. The reference to distress has been omitted as that procedure has been dropped throughout.

Subsec.(5) embodies what was in the warrants of committal and the authority to issue them.

SURETIES TO KEEP THE PEACE.

WHERE INJURY OR DAMAGE FEARED.—Duty of justice.—Adjudication.—Recognizance.—Committal in default.—Forms.—Procedure.

717. (1) Any person who fears that another person will cause personal injury to him or his wife or child or will damage his property may lay an information before a justice.

(2) A justice who recieves an information under subsection (1) shall cause the parties to appear before him or before a summary conviction court having jurisdiction in the same territorial division.

(3) The justice or the summary conviction court before which the parties appear may, if satisfied by the evidence adduced that the informant has reasonable grounds for his fears,

***(a)* order that the defendant enter into a recognizance, with or without sureties, to keep the peace and be of good behaviour for any period that does not exceed twelve months, or**

***(b)* commit the defendant to prison for a term not exceeding twelve months if he fails or refuses to enter into the recognizance.**

(4) A recognizance and committal to prison in default or recognizance under subsection (3) may be in Forms 28 and 20, respectively.

(5) The provisions of this Part apply, *mutatis mutandis*, to proceedings under this section.

This comes from the former s.748(2) to (5). This procedure appeared in the Code of 1892 in s.959 as amended in 1893. A new subsec.(2), changing "burn or set fire to" to "damage" was enacted by 1948, c.39, s.29. The only change effected by this section is to require that an information be laid.

A Justice of the Peace may take money to lie *in deposito* for the security of the peace: *MOYSER v. GRAY*(1636), Cro.Car.446.

See notes to s.718.

BREACH OF RECOGNIZANCE.

718. A person bound by recognizance under section 717 who commits a breach of the recognizance is guilty of an offence punishable on summary conviction.

OLD CODE:

748. (2) Upon complaint by or on bahalf of any person that on account of threats made by some other person or on any other account, he, the complainant, is afraid that such other person will do him, his wife or child some personal injury, or will damage his property, the justice before whom such complaint is made, may, if he is satisfied that the complainant has reasonable grounds for his fears, require such other person to enter into his own recognizance, or to give security, to keep the peace, and to be of good behaviour, for a term not exceeding twelve months.

(3) The provisions of this Part shall apply, so far as the same are applicable, to proceedings under this section, and the complainant and defendant and witnesses may be called and examined, and cross-examined, and the complainant and defendant shall be subject to costs as in the case of any other complaint.

(4) If any person so required to enter into his own recognizance or give security as aforesaid, refuses or neglects so to do, the same or any other justice may order him to be imprisoned for any term not exceeding twelve months.

(5) The forms 48, 48A, 49 and 50, with such variations and additions as the circumstances may require, may be used in proceedings under this section.

This is new. Formerly, the only remedy upon breach of the recognizance (not itself involving an offence, such as assault) was to apply the appropriate remedy for breach of the recognizance.

Here must be mentioned the procedure in preventive justice, which is in the nature of a special remedy, and which, it is now settled by the judgment of the Supreme Court of Canada in *MacKENZIE v. MARTIN* (1954), 108 C.C.C.305, is in force in Canada and has not been interfered with by the *Criminal Code*. It is regarded as depending upon a statute of 1360, 34 Ed. III, c.1, under which justices were authorized "to take of all them that be not of good fame sufficient surety and mainprize of their good behaviour towards the King and his people," although there has been some opinion that it existed even earlier.

Blackstone, at the beginning of Book V, says of it:

> "This preventive justice consists in pledging those persons, whom there is a probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour."

In Volume 1, page 356, he says the general duty of all constables, both high and petty, as well as of the other officers, is to keep the King's peace in their several districts.

In *R. v. SANDBACH*, [1935] 2 K.B.192, the following appears:

> "I cannot think that the expression against the peace or apprehension of a breach of the peace is confined to a breach or apprehension of a breach of that part of the law which provides that persons shall not commit assaults."

The following is quoted from the judgment of Mr. Justice (now Chief Justice) Kerwin in *MacKENZIE v. MARTIN*, at page 313:

> "In *R. v. COUNTY OF LONDON QUARTER SESSIONS*, [1948] 1 All E.R.72 at p.74, Lord Goddard, C.J., pointed out that *LANS-*

Section 718—*continued*

BURY v. RILEY was clear authority that Justices can bind over whether the person is, or is not, of good fame. Later he stated: 'In the case of the present statute there is a consensus of opinion to be found in the books extending back for some 400 years that this Act, which was described by both Coke and Blackstone as an Act for preventive justice, does enable justices at their discretion to bind over a man, not because he has committed an offence, but because they think from his behaviour he may himself commit or cause others to commit offences against the King's peace. It is abundantly clear that for several centuries justices have bound by recognizances persons whose conduct they consider mischievous or suspicious, but which could not, by any stretch of imagination, amount to a criminal offence for which they could have been indicted.'

Lord Goddard expressed the view that the catalogue of the large number of instances which would justify sureties for good behaviour being taken, given in Dalton's Country Justice was not intended to be exhaustive. In my view the common law preventive justice was in force in Ontario: ss.(2) of s.748 or any other provision of the Code to which our attention was directed, does not interfere with the use of that jurisdiction; and the respondent was intending to exercise it. He, therefore, had jurisdiction over the subject-matter of the complaint, and did not exceed it."

The jurisdiction in preventive justice had previously been exercised in Canada. In *R. v. FAUSTMAN,* reported in the Royal Canadian Mounted Police Gazette under date of October 16, 1940, the accused was bound over to keep the peace for one year in a "Peeping Tom" case which, however, will now be covered by s.162 of this Code. It was similarly exercised in *R. v. POFFENROTH*(1942), 78 C.C.C.181, in which accused was charged at common law with conduct likely to cause a breach of the peace by following after and annoying a woman on a city street. Some doubt as to the existence of the jurisdiction had been created by earlier litigation in which the plaintiff in *MacKENZIE v. MARTIN* had been involved.

The following principles may be drawn from the cases:

(1) Justices have the right at the instance of a private applicant to bind over a person to keep the peace or to commit him in default of recognizance.

(2) Justices have the right in the public interest to require a person to provide sureties for his good behaviour or to commit him in default.

(3) Peace officers have a duty inherent in their office to prevent a breach of the peace that is apprehended on reasonable grounds. As to their protection and that of others in doing so, see ss.30 and 31, *ante*.

APPEAL.

P. E. ISLAND, NEWFOUNDLAND.—Nova Scotia, New Brunswick, Manitoba.—Quebec.—Ontario.—Saskatchewan, Alberta.—British Columbia.—Territories.

719. For the purposes of sections 720 to 732, "appeal court" means

OLD CODE:

749. Unless it is otherwise provided in any Act under which a conviction takes place or an order is made by a justice for the payment of money or dismissing an information or complaint, any person who thinks himself aggrieved by any such conviction or order or dismissal, the prosecutor or complainant, as well as the defendant, may appeal,

(a) in the province of Ontario, to the county court of the district or county or group of counties where the cause of the information or complaint arose;

(b) in the province of Quebec, to the Superior Court;

(c) in the provinces of Nova Scotia, New Brunswick and Manitoba, to the county court of the district or county where the cause of the information or complaint arose;

(d) in the province of British Columbia, to the county court, at the sitting thereof which shall be held nearest to the place where the cause of the information or complaint arose;

(e) in the province of Prince Edward Island, to the Supreme Court;

(f) in the province of Saskatchewan, to the District Court of the district in which the cause of the information or complaint arose, at the judicial centre of the district or sub-judicial district or at the sittings thereof which shall be held nearest to the place where the cause of the information or complaint arose: Provided that the district Court Judge of such judicial district shall have power to appoint the place for the hearing of such appeal on the application of any party to it;

(ff) in the province of Alberta to the District Court having jurisdiction in the judicial district in which the cause of the information or complaint arose, at the judicial centre of the judicial district or sub-judicial district or at the sittings thereof which shall be held nearest to the place where the cause of the information or complaint arose: Provided that a Judge of such district Court shall have power to appoint the place for the hearing of such appeal on the application of any party to it;

(g) in the Northwest Territories, to a stipendiary magistrate; and

(h) in the Yukon Territory, to a judge of the Territorial Court.

(i) in the province of Newfoundland, to the Supreme Court.

(2) In the case of the provinces of Saskatchewan and Alberta, and of the Northwest Territories and the Yukon Territory, the judge or stipendiary magistrate hearing any such appeal shall sit without a jury; and such sitting in the Northwest Territories and the Yukon Territory shall be held at the place where the cause of the information or complaint arose, or at the nearest place thereto where a court is appointed to be held.

(*a*) in the Provinces of Prince Edward Island and Newfoundland, the Supreme Court,

(*b*) in the Provinces of Nova Scotia, New Brunswick and Manitoba, the county court of the district or county where the cause of the proceedings arose,

(*c*) in the Province of Quebec, the Superior Court,

(*d*) in the Province of Ontario, the county court of the district or county or group of counties where the cause of the proceedings arose,

(*e*) in the Provinces of Saskatchewan and Alberta, the district court of the judicial district or sub-judicial district in which the

Section 719—*continued*

cause of the proceedings arose,

(f) **in the Province of British Columbia, the county court of the county in which the cause of the proceedings arose, and**

(g) **in the Yukon Territory and Northwest Territories, a judge of the Territorial Court.**

This comes from the former s.749(1). It involves no change except in relation to the Northwest Territories, as to which see note to s.6.

APPEAL.—By defendant.—By informant or Attorney General.

720. Except where otherwise provided by law,

(a) **the defendant in proceedings under this Part may appeal to the appeal court**

(i) from a conviction or order made against him, or

(ii) against a sentence passed upon him; and

(b) **the informant or the Attorney General in proceedings under this Part may appeal to the appeal court**

(i) from an order dismissing an information, or

(ii) against a sentence passed upon a defendant,

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

This also comes from the former s.749(1) but makes two changes. The first is to give a right of appeal against sentence only. In this connection, see notes to s.727, especially as to the right to a re-hearing on the merits after a plea of guilty in the summary conviction court.

The second change is to give to the Attorney General of Canada a right of appeal correlative to that of the Attorney General of a province. The former s.763 (now s.737) contemplated him as having such a right in relation to a stated case. See also s.742.

BRITISH COLUMBIA.—Alberta, Saskatchewan.—Yukon, N.W. Territories.

721. (1) In the province of British Columbia, an appeal under section 720 shall be heard at the sittings of the appeal court that is held nearest to the place where the cause of the proceedings arose.

(2) In the provinces of Alberta and Saskatchewan an appeal under section 720 shall be heard at the sittings of the appeal court that is held nearest to the place where the cause of the proceedings arose, but the judge of the appeal court may, on the application of one of the parties, appoint a place for the hearing of the appeal.

(3) In the Yukon Territory and the Northwest Territories, an appeal under section 720 shall be heard at the place where the cause of the proceedings arose or at the place nearest thereto where a court is appointed to be held.

This comes from the former s.749. It deals with the place of hearing. As to time, see s.723.

OLD CODE:

749. For wording of this section see p. 1073.

750. Unless it is otherwise provided in the special Act,
(a) If the service upon the respondent which is referred to in paragraph (b) is made ten or more days before a sitting of the court to which an appeal is given, such appeal shall be made to that sittings; but if such service is made less than ten days before a sittings, the appeal shall be made to the second sittings next after such service: Provided that in the province of Nova Scotia the appeal shall be to a sittings of the court in the county where the cause of the information or complaint arose, in the one case to the sittings next after and in the other to the second sittings after such service;
Provided further that, in the province of Prince Edward Island on application of any party to the appeal, the court to which an appeal is given may set down the appeal for hearing at a special sittings of the court to be held at a date earlier than the sittings to which the appeal has been made; and
Provided further that in the province of Quebec in the judicial districts where terms are not fixed by proclamation of the Lieutenant Governor the sittings of the Superior Court shall, for the purposes of this section, be deemed to commence, save during legal vacation periods, on the first day of each week;
(b) the applicant shall give notice of his intention to appeal by filing in the office of the clerk, or in the province of Alberta in the office, in the judicial or sub-judicial district in which the cause of the information or complaint arose, of the clerk or deputy clerk, of the court appealed to a notice in writing setting forth with reasonable certainty the conviction or order appealed against and the notice shall be served upon the respondent and the justice who tried the case, or, in the alternative, upon such person or persons as a judge of the court appealed to shall direct, and such service and filing shall be within thirty days of the making of the conviction or order complained of, or in the Northwest Territories within such further time not exceeding an additional thirty days, as a judge of the court appealed to may see fit to fix either before or after the expiration of the said thirty days.

NOTICE OF APPEAL.—Contents.—Service.—Filing.—Time for service and filing.—Alternative service.

722. (1) Where an appeal is taken under section 720, the appellant shall

(a) prepare a notice of appeal in writing setting forth
(i) with reasonable certainty the conviction or order appealed from or the sentence appealed against, and
(ii) the grounds of appeal;
(b) cause the notice of appeal to be served upon
(i) the summary conviction court that made the conviction or order or imposed the sentence, and
(ii) the respondent,
within thirty days after the conviction or order was made or the sentence was imposed; and
(c) file in the office of the clerk of the appeal court
(i) the notice of appeal referred to in paragraph (a), and
(ii) an affidavit of service of the notice of appeal,
not later than seven days after the last day of service of the

Section 722—*continued*

notice of appeal upon the respondent and the summary conviction court.

(2) In the Northwest Territories, the appeal court may fix, before or after the expiration of the periods fixed by paragraphs *(b)* and *(c)* of subsection (1), a further period not exceeding thirty days within which service and filing may be effected.

(3) Where the respondent is a person engaged in enforcement of the law under which the conviction or order was made or the sentence was imposed, the appeal court may direct that a copy of the notice of appeal referred to in subsection (1) be served upon a person other than the respondent, and where the appeal court so directs, that service shall, for the purposes of this section and section 723, be deemed to be service upon the respondent.

This comes from the former s.750(b) but makes the following changes:
1. The notice of appeal is to set out the grounds of appeal;
2. The notice is to be filed within seven days after service is completed;
3. The court appealed to may permit alternative service, *e.g.*, in a case where a policeman who laid the original information has been transferred to another post during the time limited for appeal and service of notice.

SETTING DOWN APPEAL.—Exception.

723. (1) Where an appellant has complied with section 722, the appeal court shall set down the appeal for hearing at a regular or special sittings thereof and the clerk of the appeal court shall post, in a conspicuous place in his office, a notice of every appeal that has been set down for hearing and notice of the time when it will be heard.

(2) No appeal shall be set down for hearing at a time that is less than ten days after the time when service was effected upon the respondent of the notice referred to in paragraph *(b)* of subsection (1) of section 722, unless the parties or their counsel or agents otherwise agree in writing.

This is new. Under the procedure prescribed by the former s.750 it was necessary that the notice of appeal specify the sittings of the court; under this procedure the time of hearing will be set by the judge after the notice has been served and filed and the security furnished. The section recognizes that in the larger centres it is common practice to appoint a special time for the hearing of an appeal.

This procedure may be compared with that under s.474(1) *ante*, and with the English practice. Subsec.(1) of s.31 of the *Summary Jurisdiction Act*, 1879, cited Paley, 9th ed., p.695, requires that the appeal be to "the prescribed court of general or quarter sessions, or, if no court is prescribed, to the next practicable court of general or quarter sessions having jurisdiction in the county, borough or place for which the said court of summary jurisdiction acted, and holden not less than fifteen days after the day on which the decision was given upon which the conviction or order was founded," and it appears (*ibid.*, p.701) that "It will

OLD CODE:

Section 750—continued

(c) the appellant, if the appeal is from a conviction or order adjudging imprisonment, or suspending sentence, shall either remain in custody until the holding of the court to which the appeal is given, or shall within the time limited for filing a notice of intention to appeal, enter into a recognizance in form 51 with two sufficient sureties before a county judge, clerk of the peace or justice for the county in which such conviction or order has been made, conditioned personally to appear at the said court and try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as are awarded by the court or enter into a recognizance so conditioned and make such cash deposit in lieu of sureties as the justice may determine; or if the appeal is from a conviction or order whereby a penalty or sum of money is adjudged to be paid, the appellant shall within the time limited for filing the notice of intention to appeal, in cases in which imprisonment upon default of payment is directed either remain in custody until the holding of the court to which the appeal is given, or enter into a recognizance in form 51 with two sufficient sureties as hereinbefore set out, or deposit with the justice making the conviction or order an amount sufficient to cover the sum so adjudged to be paid, together with such further amount as such justice deems sufficient to cover the costs of the appeal; and, in cases in which imprisonment in default of payment is not directed, deposit with such justice an amount sufficient to cover the sum so adjudged to be paid, together with such further amount as such justice deems sufficient to cover the costs of the appeal; and upon such recognizance being entered into or deposit made the justice before whom such recognizance is entered into or deposit made shall liberate such person if in custody;

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be the duty of the clerk of the peace to call on the appeal in its proper order, ascertained according to the date and time of entry."

SECURITY BY APPELLANT.

WHERE APPEAL FROM CONVICTION IMPOSING IMPRISONMENT.—Where appeal from conviction adjudging imprisonment in default.—Where appeal from conviction adjudging fine but not imprisonment.—Where appeal from dismissal of complaint.—Formalities or recognizance.—Conditions.—New recognizance.—Release of appellant.

724. (1) **The following provisions apply in respect of appeals to the appeal court, namely,**

(*a*) where an appeal is from a conviction imposing imprisonment without alternative punishment the appellant shall

(i) remain in custody until the appeal is heard, or

(ii) enter into a recognizance;

(*b*) where an appeal is from a conviction or order adjudging that a fine or sum of money be paid and imposing a term of imprisonment in default of payment, the appellant shall

(i) remain in custody until the appeal is heard,

(ii) enter into a recognizance, or

(iii) deposit with the summary conviction court the amount of the fine or the sum of money to be paid and an additional amount that, in the opinion of the summary con-

Section 724—*continued*

viction court, is sufficient to cover the costs of the appeal;

(c) **where an appeal is from a conviction or order adjudging that a fine or sum of money be paid but not imposing a term of imprisonment in default of payment, the appellant shall comply with subparagraph (ii) or (iii) of paragraph *(b)*; and**

(d) **where an appeal is from an order other than an order for the payment of money or is from an order dismissing an information, the appellant shall, unless he is the Attorney General of Canada or of a province, enter into a recognizance in an amount, or deposit with the summary conviction court an amount that, in the opinion of that court, is sufficient to cover the costs of the appeal.**

(2) A recognizance under this section

(a) **shall be in Form 28,**

(b) **shall be entered into before a judge of the county or district court, or a justice having jurisdiction in the territorial division in which the conviction or order was made in such amount as the judge or justice directs,**

(c) **may be required to be entered into with one or more sureties, and**

(d) **may, where it is not entered into by one or more sureties, be required to be accompanied by a deposit of such sum of money as the summary conviction court that made the conviction or order has directed.**

(3) The condition of a recognizance under this section shall be that

(a) **the appellant, if he was the defendant in the proceedings before the summary conviction court, will appear personally at the sittings of the appeal court at which the appeal is to be heard,**

(b) **the appellant, if he was the prosecutor in the proceedings before the summary conviction court, will appear personally or by counsel at the sittings of the appeal court at which the appeal is to be heard,**

(c) **the appellant will abide the judgment of the appeal court on the appeal, and**

(d) **the appellant will pay any costs that are awarded against him.**

(4) An appeal court has, with respect to a recognizance that appears to it to be insufficient, defective or invalid, the same powers that a superior court has under subsection (5) of section 735.

(5) Where an appellant is in custody an order for discharge in Form 35 shall, when a recognizance is entered into under this section, be issued by the person who takes the recognizance.

This comes from the former s.750(c) which derived from s.880(c). The provision from which this section immediately comes was re-enacted by 1948, c.39, s.30. It is re-written here and embodies change in that the informant who appeals (other than the Attorney General) must give

OLD CODE:

Section 750—continued

(d) in case of an appeal from the order of a justice pursuant to section six hundred and thirty-seven for the restoration of gold or gold-bearing quartz, or silver or silver ore, the appellant shall give security by recognizance to the value of the said property to prosecute his appeal at the proper sittings of the court, and to pay such costs as are awarded against him;

(e) where any recognizance shall have been entered into, within the prescribed time, and shall appear to the court before which the appeal or stated case in respect of which the recognizance is given is brought, to have been insufficiently entered into or to be otherwise defective or invalid, it shall be lawful for such court if it shall so think fit to permit the substitution of a new and sufficient recognizance to be entered into before such court in place of such insufficient, defective or invalid recognizance, and for that purpose to allow such time and make such examination and impose such terms as to payment of costs as to such court shall appear just and reasonable; and such substituted recognizance shall be as valid and effectual to all intents and purposes as if the same had been duly entered into within the prescribed time;

(f) the service of any notice under this section may be proven by the affidavit of the officer or person serving the same;

(g) no person shall be deemed to waive the right of appeal provided by the next preceding section merely by paying the fine imposed on his conviction without in any way indicating an intention to appeal or reserving the right to appeal; and the right to appeal so provided shall, notwithstanding such payment and failure to indicate such intention or reservation, be deemed to continue up to the expiration of the time, or any extension thereof, for filing the notice hereinbefore required.

757. Every justice before whom any person is summarily tried, shall transmit the conviction or order and all other material in his possession in connection with the case to the court to which the appeal is by this Part given, in and for the district, county or place wherein the offence is alleged to have been committed, before the time when an appeal from such conviction or order may be heard, there to be kept by the proper officer among the records of the court.

(2) The conviction or order shall be presumed not to have been appealed against, until the contrary is shown.

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security. In cl.(2)(b) the words "in such amount as the judge or justice directs" are new. "This is the security to be given by an appellant in appealing a summary conviction, and . . . . . we add 'in such amount as the judge or justice directs,' so as to make it clear that the judge can settle the amount": Senate Comm. Dec. 15-16, 1952, p.79.

PAYMENT OF FINE NOT A WAIVER OF APPEAL.—Presumption.

725. (1) A person does not waive his right of appeal under section 720 by reason only that he pays the fine imposed upon conviction, without in any way indicating an intention to appeal or reserving the right to appeal.

(2) A conviction, order or sentence shall be deemed not to have been appealed against until the contrary is shown.

Subsec.(1) is the former s.750(g) which was brought into the Code by

Section 725—*continued*

1934, c.47, s.14. It is unnecessary that payment be indicated as being made "under protest" or "without prejudice".

Subsec.(2) is the former s.757(2) which formed part of s.888(1) in the Code of 1892. *Cf.* the English procedure as outlined in Paley on Summary Convictions and noted under s.727.

PROCEDURE ON APPEAL.

TRANSMISSION OF CONVICTION, ETC.,—Saving.—Appellant to furnish transcript of evidence.

726. (1) Where a summary conviction court is served with a copy of the notice referred to in paragraph *(b)* of subsection (1) of section 722, that court shall transmit the conviction, order or order of dismissal and all other material in its possession in connection with the proceedings to the appeal court before the time when the appeal is to be heard, or within such further time as the appeal court may direct, and the material shall be kept by the clerk of the court with the records of the appeal court.

(2) An appeal shall not be dismissed by the appeal court by reason only that some person other than the appellant failed to comply with the provisions of this Part relating to appeals.

(3) Where the evidence upon a trial before a summary conviction court has been taken by a stenographer duly sworn, the appellant shall, unless the appeal court otherwise orders, cause a transcript thereof, certified by the stenographer, to be furnished to the appeal court for use upon the appeal.

Subsec.(1) comes from the former s.757(1) which formed part of s.888(1) in the Code of 1892, but changes it to provide that the justice need forward the material only if there is an appeal. The former provision required transmission in all cases, and s.982, which authorized the clerk of the court "to which such conviction was returned" to issue a certificate of conviction, contemplated that this would be done. However, it appeared that there was a variance in the practice of the provinces in this respect.

Subsec.(2) is new. It clarifies a matter upon which there were formerly two points of view, one, that the appellant was bound to see that, when the appeal was called, the court had the material upon which to proceed, the other that, when the appellant gave notice and furnished security for costs, he had done all that was required of him. Under this provision, the appellant will not lose his right of appeal because of the justice's default. It may be compared to art. 1219 of the *Quebec Code of Civil Procedure* which provides that default in transmitting the record may lead to dismissal of the appeal *unless the appellant proves diligence.*

Subsec.(3) is new. *Cf.* s.588(2).

APPEAL.—Former evidence.—Appeal against sentence.—General provisions re appeals.

727. (1) Where an appeal has been lodged in accordance with this Part from a conviction or order made against a defendant, or

OLD CODE:

Section 757—continued

(3) Upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence.

(4) In any case when a conviction or order is required by this Part after appeal to be enforced by any justice the clerk of the court to which the appeal was had or other proper officer shall remit such conviction or order and all papers therewith sent to the court of appeal excepting any notice of intention to appeal and recognizance to such justice to be by him proceeded upon as in such case directed by this Part.

751. The court to which such appeal is made shall thereupon hear and determine the matter of appeal and make such order therein, with or without costs to either party, including costs of the court below, as seems meet to the court, and, in case of the dismissal of an appeal by the defendant and the affirmance of the conviction or order, shall order and adjudge the appellant to be punished according to the conviction or to pay the amount adjudged by the order, and to pay such costs as are awarded, and shall, if necessary, issue process for enforcing the judgment of the court.

. . . . . .

(4) Whenever any conviction or order is quashed on appeal, the clerk of the peace or other proper officer shall forthwith endorse on the conviction or order a memorandum that the same has been quashed.

(5) Whenever any copy or certificate of such conviction or order is made, a copy of such memorandum shall be added thereto, and shall, when certified under the hand of the clerk of the peace, or of the proper officer having the custody of the same, be sufficient evidence, in all courts and for all purposes, that the conviction or order has been quashed.

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from an order dismissing an information, the appeal court shall hear and determine the appeal by holding a trial *de novo*, and for this purpose the provisions of sections 701 to 716, insofar as they are not inconsistent with sections 720 to 732, apply, *mutatis mutandis*.

(2) The appeal court may, for the purpose of hearing and determining an appeal, permit the evidence of any witness taken before the summary conviction court to be read if that evidence has been authenticated in accordance with section 453, and if

(*a*) the appellant and respondent consent,

(*b*) the appeal court is satisfied that the attendance of the witness cannot reasonably be obtained, or

(*c*) by reason of the formal nature of the evidence or otherwise the court is satisfied that the opposite party will not be prejudiced,

and any evidence that is read under the authority of this subsection has the same force and effect as if the witness had given the evidence before the appeal court.

(3) Where an appeal is taken against sentence, the appeal court shall, unless the sentence is one fixed by law, consider the fitness

Section 727—*continued*

of the sentence appealed against, and may upon such evidence, if any, as it thinks fit to require or receive, by order,

(a) **dismiss the appeal, or**

(b) **vary the sentence within the limits prescribed by law for the offence of which the defendant was convicted.**

(4) The following provisions apply in respect of appeals, namely,

(a) **where an appeal is based on an objection to an information or any process, judgment shall not be given in favour of the appellant**

(i) for any alleged defect therein in substance or in form, or

(ii) for any variance between the information or process and the evidence adduced at the trial,

unless it is shown

(iii) that the objection was taken at the trial, and

(iv) that an adjournment of the trial was refused notwithstanding that the variance referred to in subparagraph (ii) had deceived or misled the appellant; and

(b) **where an appeal is based on a defect in a conviction or order, judgment shall not be given in favour of the appellant, but the court shall make an order curing the defect.**

This section covers matters formerly dealt with in ss.751(1), 752, 753 and 754. Provisions for appeals in summary conviction matters were contained in ss.879 *et seq.* of the Code of 1892, but these have been the subject of many amendments.

Subsec.(2) reproduces the former s.752(3) as it was amended by 1950, c.11, s.12 to permit a more liberal use of the depositions taken in the court below. In a recent case in which cl.(b) was applied, a conviction was quashed on the ground that the efforts to locate the witness had not been sufficiently diligent to show that his attendance could not reasonably be obtained.

It will be observed that the hearing of the appeal is a trial *de novo*. The abolition of this procedure has been much discussed and there is great difference of opinion on the subject. It was debated in the Senate Committee, Dec. 15-16, 1952 (pp.24 *et seq.*). It is unnecessary to review the reasons for and against, inasmuch as the view prevailed that a case could be more thoroughly examined on the appeal. In the result (*ibid.*, p.80) "we have preserved the right to the trial *de novo*, and we have maintained the provision in the present law under which, with the consent of the parties, the appeal may be heard on the record, but at the same time we preserve the right to an appellant, the Crown as well as the accused, to have the trial proceed afresh."

In England the practice of trial *de novo* is very old but is not governed by statute. It is summed up in Paley on Summary Convictions, 9th ed., p.709, as follows:

"The appeal is in the nature of a re-hearing and the party supporting the conviction or order is the one to open the case, as soon as any preliminary matters have been disposed of. In this way, in the rare

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752. When an appeal against any summary conviction or order has been lodged in due form, and in compliance with the requirements of this Part, the court appealed to shall try, and shall be the absolute judge of the facts, in respect to such conviction or order.

(2) Any of the parties to the appeal may call witnesses and adduce evidence whether such witnesses were called or evidence adduced at the hearing before the justice or not, either as to the credibility of any witness, or as to any other fact material to the inquiry.

(3) any evidence taken before the justice at the hearing below, certified by the justice or a duly sworn court stenographer who took it, may be read on the appeal

(a) by consent of the parties; or

(b) if the court is satisfied that the attendance of the witness cannot reasonably be obtained; or

(c) if by reason of the formal nature of the evidence or otherwise the court is satisfied that the opposite party will not be prejudiced;

and such evidence shall thereupon have the like force and effect as if the witness was there examined.

753. No judgment shall be given in favour of the appellant if the appeal is based on an objection to any information, complaint or summons, or to any warrant to apprehend a defendant issued upon any such information, complaint or summons, for any alleged defect therein in substance or in form, or for any variance between such information, complaint, summons or warrant and the evidence adduced in support thereof at the hearing of such information or complaint, unless it is proved before the court hearing the appeal that such objection was made before the justice before whom the case was tried, and by whom such conviction, judgment or decision was given, nor unless it is proved that notwithstanding it was shown to such justice that by such variance the person summoned and appearing or apprehended had been deceived or misled, such justice refused to adjourn the hearing of the case to some further day, as in this Part provided.

754. In every case of appeal from any summary conviction or order had or made before any justice, the court to which such appeal is made shall, notwithstanding any defect in such conviction or order, and notwithstanding that the punishment imposed or the order made may be in excess of that which might lawfully have been imposed or made, hear and determine the charge or complaint on which such conviction or order has been had or made, upon the merits, and may confirm, reverse or modify the decision of such justice, or may make such other conviction or order in the matter as the court thinks just, and may by such order exercise any power which the justice whose decision is appealed from might have exercised, and may make such order as to costs to be paid by either party as it thinks fit.

(2) Such conviction or order shall have the same effect and may be enforced in the same manner as if it had been made by such justice.

(3) Any conviction or order made by the court on appeal may also be enforced by process of the court itself.

Section 727—*continued*

instances in which an informant has a right of appeal against a dismissal, he will open the case, while where the appeal is against a conviction the respondent will proceed first. It is an admitted rule that in every case of appeal to sessions both parties are at liberty to call such evidence as they may desire, irrespective of whether or not it has been adduced before the court of summary jurisdiction (*R. v. PILGRIM* (1870), 40 L.J.M.C.3: *R. v. GAMBLE*(1847), 16 M.&W.384: *R. v. ABERGAVENNY UNION*(1880), 50 L.J.M.C.1). If the further evidence adduced upon appeal is such as to take the other party by surprise, it may be necessary to consider whether an adjournment is not necessary to enable the opposite party to meet the fresh evidence thus brought forward against him, particularly if the evidence might have been brought forward in the court below, and it appears that there has been a deliberate abstention from advancing it. Moreover, a distinction is to be observed between bringing forward upon appeal fresh evidence in support of the case advanced in the court below, and an attempt upon appeal to advance an entirely fresh case."

In *R. v. PILGRIM, supra,* it was said that "if the quarter sessions are to review the decision of the justices below, they ought to be at liberty to go into the whole matter, and therefore, to hear any evidence which the appellant can produce." Expressions in *R. v. FARRELL* (1910), 16 C.C.C.419, are similar, namely, that "the findings of the court below are wholly irrelevant, and it is for the County Court Judge to determine the complaint himself upon the evidence brought before him." See also *R. v. HILL*(1951), 101 C.C.C.343, at p.347.

Although, by s.720, there may now be an appeal against sentence only, the question remains open whether an accused who has pleaded guilty is entitled to have the merits tried *de novo*. This is a matter upon which there has been a conflict of judicial opinion, as appears from the following cases:

R. v. URIDGE, [1937] 3 W.W.R.321 (D.C. Alta.):

"Sec.751 requires the Court to hear and determine the matter of appeal. Sec.752 requires the Court to try and be the absolute judge as well of the facts as of the law, and any of the parties may call witnesses and adduce evidence. And sec.754 provides that the Court shall hear and determine the charge or complaint, 'upon the merits'. The duties of the Court are much the same as those of the justice trying the case in the first instance except where varied by the Code . . . . . In coming to the conclusion that I have I quite realize that I am possibly going contrary to the views expressed in other decisions . . . . . but it is my humble opinion that substantial injustice may be done if I refuse the right to a rehearing as fully as I believe the Code requires."

R. v. MORIN, [1941]1 W.W.R.63, (D.C. Sask.): In this case appellant had pleaded guilty before the justice but on the appeal leave was given "to have the matter reopened and the appellant permitted to enter a plea of not guilty."

R. v. BLONDEAU, [1944] 1 W.W.R.196 (D.C. Sask.), at p.200:

"It seems to have always been unquestioned in England that an accused person had the right of appeal against a conviction or order made against him.

In *MITTELMAN v. DENMAN*, [1920] 1 K.B.519 . . . . . .

It may be contended, however, that although the accused may have the absolute right to appeal by sec.749 of the *Code*, which is identical in terminology with sec.879 of the *Code* of 1892, the estoppel created by his plea of guilty would still operate against him and prevent him from questioning the facts upon which the conviction is founded. There is some authority for this contention. Thus Mellish, J., in *R. v. STONE* (1932), 4 M.P.R.455, 58 C.C.C.262, at 266, says: 'It is said that the accused was estopped by her plea of guilty from appealing against her conviction. This would ordinarily be so (Everest and Strode on Estoppel, p.35).'

This same difficulty seems to have occurred to Cayley, C.C.J., in *R. v. LEE TAN & LEE HIM*(1920), 35 C.C.C.377.

The obvious answer to this contention is that, once it is conceded that a defendant who has been convicted has always the right of appeal, the course of the appeal is governed by the provisions of the Code respecting the appeal and, since by these provisions there is actually a trial *de novo* the effect of a plea of guilty is entirely done away with."

R. ex. rel. WILSON v. PERTEET(1944), 82 C.C.C.333 (D.C. Sask.), followed *R. v. BLONDEAU*, but added (p.337):

"As the accused had the right to appeal, and as under the provisions of the Code this is a trial *de novo*, and as the accused at the summary trial where he pleaded guilty, had not the advice of counsel and had no means of knowing that the charge to which he pleaded guilty did not contain all the essentials of a charge . . . . . I find that under such circumstances a plea of guilty should not have been entered, and following the English practice, order that the plea of guilty be struck out."

R. v. CLARK, [1947] 1 W.W.R.96, follows *R. v. BLONDEAU*.

The cases contra are as follows:

R. v. BROOK(1902), 7 C.C.C.216 (N.W.T. *en banc*): Held that a person convicted on summary conviction upon his plea of guilty may enter an appeal notwithstanding such plea.

The plea of guilty convicts the accused only as to the fact that he did what is charged in the information, and he may still appeal upon the ground that the conviction is bad in law or upon an objection to the information or summons taken before the magistrate and overruled by him.

"The appellant is not, under the circumstances of this case, entitled to call upon the respondent to produce evidence to establish that he is guilty of the offence of which he is charged. His plea of guilty before the justices estops him from taking that ground. So far as the facts relating to his guilt or innocence are concerned, he is not a person aggrieved within the meaning of sec.879: *HARRUP v. BAYLEY*(1856), 25 L.J.M.C.107."

In *R. v. STONE*(1932), 58 C.C.C.262, (N.S.S.C.), the court (3 to 2) permitted an appeal from conviction under the special circumstance that it was alleged that the defendant had been induced to plead guilty through some sort of bargain with Crown officers, but all were agreed that ordinarily there would be no right of appeal after a plea of guilty.

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DUNN v. R.(1944), 82 C.C.C.184 (P.E.I.,S.C.):

"The case of *R. v. STONE*(1932), 58 C.C.C.262, discloses a complete agreement of the full bench of the Supreme Court of Nova Scotia on the general principle, though the judges differed as to its application to the particular facts of the case. The clearest statement of the basis of the principle is to be found in the judgment of Paton, J., at p.268: 'A plea of guilty is an admission that the matters alleged in the information are true. The accused cannot complain or be an aggrieved person because the court accepted his admission. It seems to be recognized that there may be exceptional circumstances when the admission ostensibly made by the plea of guilty does not express the real intention of the accused and the plea consequently loses its force as an admission. But where an accused appeals after a plea of guilty he, *prima facie*, is not an aggrieved person, and consequently is not a person having the right to appeal and cannot have his appeal heard as a trial *de novo* unless he establishes the exceptional circumstances which destroy the usual effect of the plea of guilty.'

To this very lucid exposition, I may add the practical remark that the contrary view would expose the prosecution to the danger of having to contest appeals (in cases of death or absence of witnesses) without the advantage of evidence which would have been perpetuated upon a plea of not guilty."

R. v. COUPAL(1946), 86 C.C.C.82 (D.C. Sask.), at p.87, follows *R. v. BROOK, supra,* rather than *R. v. URIDGE,* and points out that the Alberta Appellate Division acted similarly in *R. v. FODOR*(1938), 70 C.C.C.108 (*Per* Harvey, C.J.A., at p.115).

R. v. TAYLOR, [1948]2 W.W.R.321 (Co.Ct.B.C.), follows Dunn, Fodor and Brook in preference to contrary decisions and holds that where an accused has pleaded guilty under Part XV and fails to show that there were exceptional circumstances, *e.g.*, the entry of the plea through an error or misunderstanding, improper inducement or threat, he is not entitled on his appeal to require the Crown to prove its case on the merits.

In *SWAN v. R.*(1952), 104 C.C.C.153 (Sask. C.A.), it was held that an appeal lies to the district court judge after a plea of guilty before the magistrate.

In *R. v. SANDERS*(1953), 8 W.W.R.(N.S.)676, the B.C.C.A. disagreed with *SWAN v. R. supra,* and held that an accused who has pleaded guilty has no right to a trial on the merits unless he shows special circumstances affecting that plea.

In *R. v. RAPIEN*(1954), 11 W.W.R.(N.S.)529, it was said that in Alberta the court follows the authorities which deny a trial on the merits after a plea of guilty.

To sum up, it can be said that, except in *SWAN v. R.*, the superior courts have held that there cannot be a re-hearing on the merits as of course after a plea of guilty.

If, however, accused can show special circumstances, for example, that he pleaded guilty without understanding the effect of that plea, he may, as shown by *R. v. MORIN,* and *R. v. SANDERS, supra,* be permitted to withdraw it and have the merits examined.

OLD CODE:

751. (3) The court to which such appeal is made shall have power, if necessary, from time to time, by order endorsed on the conviction or order, to adjourn the hearing of the appeal from one sittings to another, or others, of the said court.

760. An appellant may abandon his appeal by giving to the opposite party notice in writing of his intention six clear days before the sitting of the court appealed to, and thereupon the costs of the appeal shall be added to the sum, if any, adjudged against the appellant by the conviction or order, and the justice shall proceed on the conviction or order as if there had been no appeal.

755. The court to which an appeal is made, upon proof of notice of the appeal to such court having been given to the person entitled to receive the same, whether such notice has been properly given or not, and though such appeal has not been afterwards prosecuted or entered, may, if such appeal has not been abandoned according to law, at the same sittings for which such notice was given, order to the party or parties receiving the same such costs and charges as are thought reasonable and just by the court, to be paid by the party or parties giving such notice.

See s.743 as to further appeal on point of law with leave.

ADJOURNMENT.

728. The appeal court may adjourn the hearing of the appeal from time to time as may be necessary.

This is the former s.751(3) without change in effect.

It has been held that the appeal is to a continuing court and that there is consequently an inherent right to adjourn: *R. v. VERGE*(1923), 41 C.C.C.146; *R. v. GREGG*(1913), 22 C.C.C. 51; *MENZIES v. MARCOTTE et al.*, [1935]1 W.W.R.69; also that jurisdiction is not lost by an adjournment *sine die*: *R. v. PETIT*(1931), 57 C.C.C.216; *R. v. RHODENHIZER* (No. 2)(1936), 67 C.C.C.262; or because the adjournment was made without proof of the conditions essential to appeal having first been made: *R. v. HOLAYCHUK*(1929), 51 C.C.C.98, but *R. v. TRONSON*(1931), 57 C.C.C.383 at p.386, quotes Paley on Summary Convictions as differing on this point.

DISMISSAL FOR WANT OF PROSECUTION.

729. The appeal court may, upon proof that notice of an appeal has been given and that the appeal has not been proceeded with or has been abandoned, order that the appeal be dismissed.

This comes from the former s.760 but effects changes, first by omitting the provision for six clear days' notice of abandonment and second, by providing that the appeal may be dismissed for want of prosecution.

R. v. MacNAMARA(1951), 100 C.C.C.274 and (1952), 103 C.C.C.284, is authority for the propositions that there was no jurisdiction to dismiss an appeal for want of prosecution, and that, although s.755 authorized an order for costs where it was not prosecuted, an appeal, once properly entered, could be disposed of only by being abandoned or heard.

COSTS.

730. Where an appeal is heard and determined or is abandoned or is dismissed for want of prosecution, the appeal court may make any order with respect to costs that it considers just and reasonable.

This combines the former ss.755 and 760 in so far as they dealt with costs.

TO WHOM COSTS PAYABLE, AND WHEN.—Application of deposit.—Certificate of non-payment of costs.—Committal.

731. (1) Where the appeal court orders the appellant or respondent to pay costs, the order shall direct that the costs be paid to the clerk of the court, to be paid by him to the person entitled to them, and shall fix the period within which the costs shall be paid.

(2) Where costs are awarded against an appellant who has made a deposit to cover costs, the amount of the deposit shall be applied towards payment of costs.

(3) Where costs are not paid in full within the period fixed for payment and the person who has been ordered to pay them has not been bound by a recognizance to pay them, the clerk of the court shall, upon application by the person entitled to the costs, or by any person on his behalf, and upon payment of any fee to which the clerk of the court is entitled, issue a certificate in Form 38 certifying that the costs or a part thereof, as the case may be, have not been paid.

(4) A justice having jurisdiction in the territorial division in which a certificate has been issued under subsection (3) may, upon production of the certificate, by warrant in Form 23, commit the defaulter to imprisonment for a term not exceeding one month, unless the amount of the costs and, where the justice thinks fit so to order, the costs of the committal and of conveying the defaulter to prison are sooner paid.

Subsec.(1) is the former s.758. Subsec.(2) is the former s.751(2).

Subsec.(3) is the former s.759(1). Subsec.(4) is the former s.759(2) and (3), omitting the reference to distress.

ENFORCEMENT OF CONVICTION OR ORDER BY COURT OF APPEAL.—Enforcement by justice.—Duty of clerk of court.

732. (1) A conviction or order made by the appeal court may be enforced

***(a)* in the same manner as if it had been made by the summary conviction court, or**

***(b)* by process of the appeal court.**

(2) Where an appeal taken against a conviction or order adjudging payment of a sum of money is dismissed, the summary conviction court that made the conviction or order or a justice for the same territorial division may issue a warrant of committal as if no appeal had been taken.

(3) Where a conviction or order that has been made by an appeal court is to be enforced by a justice, the clerk of the appeal court shall send to the justice the conviction or order and all writings

OLD CODE:

Section 755—continued

(2) Such costs shall be recoverable in the manner provided by this Act for the recovery of costs upon an appeal against an order or conviction.

760. For wording of this section see p.1087.

758. If upon any appeal the court trying the appeal orders either party to pay costs, the order shall direct the costs to be paid to the clerk of the peace or other proper officer of the court, to be paid over by him to the person entitled to the same, and shall state within what time the costs shall be paid.

751. (2) In any case where a deposit has been made as provided in paragraph (c) of section seven hundred and fifty if the conviction or order is affirmed, the court may order that the sum thereby adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal, shall be paid out of the money deposited, and that the residue, if any, shall be paid to the appellant; and if the conviction or order is quashed the court shall order the money to be repaid to the appellant.

759. If such costs are not paid within the time so limited, and the person ordered to pay the same has not been bound by any recognizance conditioned to pay such costs, the clerk of the peace or his deputy, on application of the person entitled to the costs, or of any person on his behalf, and on payment of any fee to which he is entitled, shall grant to the person so applying, a certificate that the costs have not been paid.
(2) Upon production of the certificate to any justice in and for the same territorial division, such justice may enforce the payment of the costs by warrant of distress, and in default of distress may by warrant commit the person against whom the warrant of distress has issued, for any term not exceeding one month, unless the amount of the costs and all costs and charges of the distress and also the costs of the commitment and of the conveying of the party to prison, if the justice thinks fit so to order, are sooner paid.
(3) The said certificate shall be in form 52 and the warrants of distress and commitment in forms 53 and 54 respectively.

754. (2) Such conviction or order shall have the same effect and may be enforced in the same manner as if it had been made by such justice.
(3) Any conviction or order made by the court on appeal may also be enforced by process of the court itself.

756. If an appeal against a conviction or order is decided in favour of the respondents, the justice who made the conviction or order, or any other justice for the same territorial division, may issue the warrant of distress or commitment for execution of the same, as if no appeal had been brought.
757. (4) In any case when a conviction or order is required by this Part after appeal to be enforced by any justice the clerk of the court to which the appeal was had or other proper officer shall remit such conviction or order and all papers therewith sent to the court of appeal excepting any notice of intention to appeal and recognizance to such justice to be by him proceeded upon as in such case directed by this Part.

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relating thereto, except the notice of intention to appeal and any recognizance.

Section 732—*continued*

Subsec.(1) is the former s.754(2) and (3). Subsec.(2) is the former s.756, without the reference to distress. Subsec.(3) is the former s.757(4).

Where an appeal from conviction is dismissed and accused is on bail, a new warrant of committal is necessary. It was held too in *R. v. IRON* (1948), 94 C.C.C.322, that a certificate, signed by the Deputy Clerk of the Court, that an appeal has been dismissed, does not alone justify the detention of the accused and that there should be a new warrant.

STATED CASE.

"COURT."

733. For the purposes of sections 734 to 742, "superior court" means the superior court of criminal jurisdiction for the province in which the proceedings in respect of which a case is sought to be stated are carried on.

This is the former s.705(e) which was s.900(1) in the Code of 1892. See also s.424(2)(c), formerly 576(1)(b), as to rules of court relating to stated cases. In Quebec, a case is stated to the Court of Queen's Bench, Crown Side (*MINISTER OF INLAND REVENUE v. JASSBY*(1919), 33 C.C.C.304). In Ontario it is to a Judge in Chambers, in Saskatchewan to the Court of Appeal, in Alberta to a Judge in Chambers or to the Appellate Division (and there the application must state which alternative is desired). Where there are no rules the English practice will apply.

See notes to next section.

APPLICATION FOR STATED CASE.—Grounds.—Rules of court, if any, to apply.—Time and manner of application.—When case to be stated.—Delivery of stated case.—Right of Attorney General of Canada to appeal.

734. (1) A party to proceedings to which this Part applies or the Attorney General may appeal against a conviction, order, determination or other proceeding of a summary conviction court on the ground that

***(a)* it is erroneous in point of law, or**

***(b)* it is in excess of jurisdiction,**

by applying to the summary conviction court to state a case setting forth the facts as found by that court and the grounds on which the proceedings are questioned.

(2) An application to state a case shall be made and the case shall be stated within the period and in the manner directed by rules of court, if any, and where there are no rules of court otherwise providing, the following rules apply, namely,

***(a)* the application**

(i) shall be in writing and be directed to the summary conviction court,

(ii) shall be served upon the summary conviction court by leaving with that court a copy thereof within seven clear days after the time when the adjudication that is questioned was made;

OLD CODE:

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

. . . . . .

(e) "the court" in the sections of this Part relating to justices stating or signing cases means and includes any superior court of criminal jurisdiction for the province in which the proceedings in respect of which the case is sought to be stated are carried on.

761. Any person aggrieved, the prosecutor or complainant as well as the defendant, who desires to question a conviction, order, determination or other proceeding of a justice under this Part, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to such justice to state and sign a case setting forth the facts of the case and the grounds on which the proceeding is questioned, and if the justice declines to state the case, may apply to the court for an order requiring the case to be stated.

(2) The application shall be made and the case stated within such time and in such manner as is from time to time directed by rules or orders made under section five hundred and seventy-six of this Act.

(3) If there be no rule or order otherwise providing,

(a) the application shall be made in writing to the justice and a copy thereof left with him, and may be made at any time within seven clear days from the date of the proceeding to be questioned;

(b) the case shall be stated within three calendar months after the date of the application, and after the recognizance hereinafter referred to has been entered into; and

(c) the applicant shall within three days after receiving the case transmit it to the court, first giving notice in writing of such appeal, with a copy of the case as signed and stated, to the other party to the proceeding which is questioned.

(b) the case shall be stated and signed by the summary conviction court

(i) within one month after the time when the application was made, and

(ii) after the recognizance referred to in section 735 has been entered into; and

(c) the appellant shall, within seven clear days after receiving the stated case,

(i) give to the respondent a notice in writing of the appeal with a copy of the stated case, and

(ii) transmit the stated case to the superior court.

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

Subsecs.(1) and (2) come from the former s.761 which derives from s.900 of the Code of 1892. The procedure in Canada, subject to rules of court passed under the authority of the former s.576 (now s.424), is based upon that which, in England under the *Summary Jurisdiction Acts* of 1857 and 1879, governs stated cases.

There are several differences between this section and the former

Section 734—*continued*

provisions. The reference to the justice's refusal is omitted from subsec. (1) as that matter is dealt with in s.738. The time for stating the case has been reduced from three months to one month and the time for transmitting and filing the stated case is increased from three days to seven clear days. Subsec.(3) makes explicit what was implied by the provision in former s.763, that the justice could not refuse to state a case where the application for it was made by or under the direction of the Attorney General of Canada.

A complete statement of the practice in relation to stated cases is to be found in *R. v. MOROZ*(1945), 83 C.C.C.239, *R. v. PALING*(1946), 85 C.C.C.289, and *R. v. ARTHUR*(1946), 85 C.C.C.369. It is sufficient here to note that, as a rule, the case is prepared by the applicant's solicitor and submitted to the solicitor for the other party. If there is any point on which they do not agree, the justice settles it. The case should not be headed in the court whose opinion is sought—it is stated *to*, not *in* that court. With that exception, the forms set out in Daly's Criminal Procedure, 3rd Ed., p.249, seem to meet with approval.

The case should set out, not the evidence, but the facts as found by the justice and should state, as questions of law, the points upon which the opinion of the court is desired. In other words, to paraphrase what was said in *R. v. MOROZ, supra*, the justice should not throw at the court the case generally and ask "Was I right?"

RECOGNIZANCE BY APPELLANT.—Justice's fees.—Exception.—Discharge of appellant from custody.—New recognizance.

735. (1) The appellant shall, at the time he makes the application and before a case is stated, enter into a recognizance in Form 28 before the summary conviction court or a justice having the same jurisdiction, with or without sureties and in an amount that the summary conviction court or the justice considers proper, conditioned to prosecute his appeal without delay and to submit to the judgment of the superior court and to pay any costs that are awarded against him, or in lieu of furnishing sureties, make a cash deposit as the summary conviction court or the justice may direct.

(2) The appellant shall, before the stated case is delivered to him, pay to the summary conviction court or the justice the fees to which they are entitled.

(3) Subsections (1) and (2) do not apply where the application is made by the Attorney General of Canada or the Attorney General of a province or by counsel acting on behalf of either of them.

(4) Where an appellant is in custody the summary conviction court or the justice shall order that he be released if his recognizance contains a further condition that he will appear before that court or another summary conviction court within ten days after the judgment of the superior court has been given, to abide the judgment, unless the judgment from which the appeal is taken is reversed.

(5) Where the recognizance appears to the superior court to be insufficient, defective or invalid, the superior court may permit

OLD CODE:

762. (1) The appellant at the time of making such application, and before a case is stated and delivered to him by the justice, shall, in every instance, enter into a recognizance before such justice or some other justice exercising the same jurisdiction, with or without surety or sureties, and in such sum as to the justice seems meet, conditioned to prosecute his appeal without delay, and to submit to the judgment of the court and pay such costs as are awarded by the same, or in lieu of furnishing sureties make such cash deposit as the justice may determine; and the appellant shall, at the same time, and before he shall be entitled to have the case delivered to him, pay to the justice such fees as he is entitled to.

(2) The appellant, if then in custody, shall be liberated upon the recognizance being further conditioned for his appearance before the same justice, or such other justice as is then sitting, within ten days after the judgment of the court has been given, to abide such judgment, unless the judgment appealed against is reversed.

(3) Where any recognizance shall have been entered into within the prescribed time, and shall appear to the court before which the appeal or stated case in respect of which the recognizance is given is brought, to have been insufficiently entered into or to be otherwise defective or invalid, it shall be lawful for such court if it shall so think fit to permit the substitution of a new and sufficient recognizance to be entered into before such court in place of such insufficient, defective or invalid recognizance, and for that purpose to allow such time and make such examination and impose such terms as to payments of costs as to such court shall appear just and reasonable; and such substituted recognizance shall be as valid and effectual to all intents and purposes as if the same had been duly entered into within the prescribed time.

(4) Where, pending an application for a stated case, the justice dies or quits office the applicant may, on notice to the other party or parties, apply to the court to state a case itself, and if a case is thereupon stated it may be dealt with as if it had been duly stated by the said justice.

(5) Before any such case is stated by the court the applicant shall enter into recognizances as herein provided.

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the substitution of a new and sufficient recognizance, to be entered into before it and for that purpose may allow such time and make such examination and impose such terms with respect to the payment of costs as it considers just and reasonable, and the substituted recognizance, shall, for all purposes, be as valid and effectual as if it had been entered into at the time the appellant made the application and before the case was stated.

Subsec.(1) comes from the former s.762(1), which formed part of s.900(4) in the Code of 1892, as amended by 1947, c.55, s.26. The provision for a cash deposit is new. Subsec.(2) also was part of s.900(4) in the Code of 1892. Subsec.(3) is new. Subsec.(4) comes from the former s.762(2). It was part of s.900(4) in the Code of 1892. Subsec.(5) comes from the former s.762(4) as enacted by 1909, c.9, s.2, and amended by 1925, c.38, s.20. S.900 as a whole came from 53 Vict., c.37, s.28.

The effect of this section and of changes made in s.724 *ante*, is to make the requirement of security uniform in the two procedures.

Section 735—*continued*

It has been held that the furnishing of the security under s.762 was a condition precedent to the hearing of the stated case, and that it went to the jurisdiction: *R. v. GEISER*(1901), 5 C.C.C.154. See also ss.736 and 738.

PROCEDURE WHEN JUSTICE DIES OR QUITS OFFICE.—Recognizance.

736. (1) Where, pending an application for a stated case, a justice who was, or was a member of, the summary conviction court dies, quits office or is unable to act, the appellant may, upon giving notice to the respondent, apply to the superior court to state a case, and if a case is thereupon stated it shall be dealt with as if it had been stated by the summary conviction court.

(2) The appellant shall, before a case is stated by the superior court under this section, enter into a recognizance as provided in section 735.

This comes from the former s.762(4) & (5) which were enacted by 1909, c.9, s.2 and amended by 1925, c.38, s.20. The words "or is unable to act" are new.

REFUSAL TO STATE A CASE.

737. Where a summary conviction court, to which an application to state a case is made, considers that the application is frivolous, it may refuse to state a case and shall, at the request of the appellant, issue to him a certificate of the refusal, but the summary conviction court shall not refuse to state a case where the application is made by or at the direction of the Attorney General of Canada or the Attorney General of a province or counsel acting on behalf of either of them.

This is the former s.763, which was s.900(5) in the Code of 1892.

COMPELLING STATEMENT OF CASE.—Order.—Case to be stated.

738. (1) Where a summary conviction court refuses to state a case, the appellant may apply to the superior court, upon an affidavit setting out the facts, for an order directing the summary conviction court and the respondent to show cause why a case should not be stated.

(2) Where an application is made under subsection (1), the superior court may make the order or dismiss the application, with or without payment of costs by the appellant or the summary conviction court, as it considers appropriate in the circumstances.

(3) Where an order is made under this section, the summary conviction court shall, upon being served with a copy thereof and upon the appellant entering into a recognizance pursuant to subsection (1) of section 735, state a case accordingly.

This is the former s.764, which was s.900(6) in the Code of 1892. See notes to s.734.

OLD CODE:

762. (4) & (5) For wording of these subsections see p.1093.

763. If the justice is of opinion that the application is merely frivolous, but not otherwise, he may refuse to state a case, and shall on the request of the applicant sign and deliver to him a certificate of such refusal: Provided that the justice shall not refuse to state a case where the application for that purpose is made to him by or under the direction of the Attorney General of Canada, or of any province.

764. Where the justice refuses to state a case, it shall be lawful for the applicant to apply to the court, upon an affidavit of the facts, for a rule calling upon the justice, and also upon the respondent, to show cause why such case should not be stated; and such court shall make such rule absolute, or discharge the application, with or without payment of costs, as to the court seems meet.
(2) The justice upon being served with such rule absolute shall state a case accordingly, upon the appellant entering into such recognizance as hereinbefore provided.

768. No writ of certiorari or other writ shall be required for the removal of any conviction, order or other determination in relation to which a case is stated as aforesaid for obtaining the judgment or determination of a superior court on such case.

765. The court to which a case is transmitted shall hear and determine the question or questions of law arising thereon, and shall thereupon affirm, reverse or modify the conviction, order or determination in respect of which the case has been stated, or remit the matter to the justice with the opinion of the court thereon, and may make such other order in relation to the matter, and such orders as to costs, as to the court seems fit.
(2) No justice who states and delivers a case shall be liable to any costs in respect or by reason of such appeal against his determination.

NO *CERTIORARI* REQUIRED.

739. No writ of *certiorari* or other writ is required to remove any conviction, order or other determination in relation to which a case is stated for the purpose of obtaining the judgment, determination or opinion of the superior court.

This is the former s.768, which was s.900(12) in the Code of 1892.

POWERS OF COURT HEARING APPEAL.—Costs.—Authority of judge.

740. (1) Where a case is stated under this Part, the superior court shall hear and determine the grounds of appeal and may

(*a*) affirm, reverse or modify the conviction, order or determination,

(*b*) cause the case to be sent back to the summary conviction court for amendment and deliver judgment after it has been amended, or

(*c*) remit the matter to the summary conviction court with the opinion of the superior court,

and may make

(*d*) any other order in relation to the matter that it considers proper, and

Section 740—*continued*

(e) any order, with respect to costs, that it considers proper, but except as provided in subsection (2) of section 738, no order for the payment of costs shall be made against a summary conviction court that states a case.

(2) The authority and jurisdiction of the superior court to which a case is stated may, where that authority and jurisdiction may be exercised by a judge of that court, subject to any rules of court in relation thereto, be exercised by a judge of the court sitting in chambers as well in vacation as in term time.

This combines the former ss.765 and 766, which were s.900(7), (8) & (9) in the Code of 1892. S.424 *ante* makes provision for rules of court. As to the superior courts that exercise this jurisdiction, see notes to s.733 *supra*. As to subsec.(1) (e) it may be noted that the former s.1148 which dealt with the protection of the justice, is left to the operation of s.25 of this Code.

In *R. ex rel. COOK v. ARMSTRONG*(1943), 80 C.C.C. 262, a point of law was raised that was not covered by the stated case and it was said, on the authority of *R. v. NUGENT*(1904), 9 C.C.C.1, that it could not be argued. However, the stated case was referred back to the magistrate to be amended in that regard.

ENFORCEMENT OF ADJUDICATION.

741. (1) Where the superior court has rendered its decision on a stated case, the summary conviction court in relation to whose adjudication the case has been stated or a justice exercising the same jurisdiction has the same authority to enforce a conviction, order or determination that has been affirmed, amended or made by the superior court as the summary conviction court would have had if a case had not been stated.

(2) An order of the superior court may be enforced by its own process.

This is the former s.767, which was s.900(10) in the Code of 1892. See *R. v. IRON*, noted under s.732.

STATEMENT OF CASE PRECLUDES APPEAL.—No case to be stated when no appeal.

742. (1) Every person for whom a case is stated in respect of an adjudication of a summary conviction court from which he is entitled to an appeal under section 720 shall be taken to have abandoned all his rights of appeal under that section.

(2) Where it is provided by law that no appeal lies from a conviction or order, no appeal by way of a stated case lies from such a conviction or order.

This is the former s.769, which was s.900(14) & (15) in the Code of 1892.

R. v. MACDONALD(1922), 37 C.C.C.298, illustrates this section. It was held that there was no jurisdiction to hear a case stated from a

OLD CODE:

766. The court for the opinion of which a case is stated shall have power, if it thinks fit, to cause the case to be sent back for amendment; and thereupon the same shall be amended accordingly, and judgment shall be delivered after it has been amended.

(2) The authority and jurisdiction of the court for the opinion of which a case is stated may, subject to any rules and orders of court in relation thereto, be exercised by a judge of such court sitting in chambers, and as well in vacation as in term time.

767. After the decision of the court in relation to any case stated for their opinion, the justice in relation to whose determination the case has been stated, or any other justice exercising the same jurisdiction, shall have the same authority to enforce any conviction, order or determination which has been affirmed, amended or made by such court as the justice who originally decided the case would have had to enforce his determination if a case had not been stated.

(2) If the court deems it necessary or expedient any order of the court may be enforced by its own process.

769. Every person for whom a case is stated as aforesaid in respect of any determination of a justice from which he is entitled to an appeal under section seven hundred and forty-nine, shall be taken to have abandoned his said right of appeal finally and conclusively and to all intents and purposes.

(2) Where, by any special Act, it is provided that there shall be no appeal from any conviction or order, no proceedings shall be taken to have a case stated or signed as aforesaid in any case to which such provision as to appeal in such special Act applies.

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conviction under a provincial Liquor Act which provided that the conviction made by the magistrate on the charge in question should be final and conclusive and that there should be no appeal from it.

Appeals to Court of Appeal.

ON QUESTION OF LAW.—Sections applicable.—Costs.—Enforcement of decision.—Right of Attorney General of Canada to appeal.

743. (1) An appeal to the court of appeal, as defined in section 581 may, with leave of that court, be taken on any ground that involves a question of law alone, against

(a) **a decision of a court in respect of an appeal under section 727, or**

(b) **a decision of a superior court in respect of a stated case under section 740, except where the superior court to which the case was stated is the court of appeal.**

(2) Sections 581 to 589 apply, *mutatis mutandis*, to an appeal under this section.

(3) Notwithstanding subsection (2), the court of appeal may make any order with respect to costs that it considers proper in relation to an appeal under this section.

(4) The decision of the court of appeal may be enforced in the same manner as if it had been made by the summary conviction court before which the proceedings were originally heard and determined.

Section 743—*continued*

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

This comes from the former s.769A which was added to the Code by 1948, c.39, s.34. The exception in subsec.(1) (b) is in recognition of the fact that in some of the provinces a stated case goes to the Court of Appeal.

Subsec.(3) has been added inasmuch as costs are provided for in all other proceedings relating to summary conviction.

As to subsec.(4), see s.732 and note thereto.

Subsec.(5) is new.

It was held in *R. ex rel. SPENCE v. GALL*, [1954] O.W.N.297, in respect of this procedure, that the court is not to weigh evidence or give decisions on questions of fact.

In *R. ex rel. FLETCHER v. JOY OIL CO.*, [1950] O.W.N.745, it was held that this section gives a right of appeal on a question of law alone from a conviction under the *Summary Convictions Act* of Ontario. *R. ex rel. STANLEY v. DE LUXE CAB CO.*, [1951] O.W.N.122, 563, is to similar effect, holding that s.769A and the Ontario Act were not in conflict. However, insofar as these two cases held that the former s.769A gave to a prosecutor other than the Attorney General a right of appeal from an acquittal of an accused person after a trial *de novo* on appeal in a summary conviction matter, they must be taken to be overruled by the decisions of the Ontario Court of Appeal in *R. ex rel. MORRISON v. CANADIAN ACME SCREW & GEAR LTD.* (1955), (reversing 20 C.R. 231), and *R. ex rel. IRWIN v. DUESLING*. Both of these judgments were delivered on April 22, 1955, and are as yet unreported.

A question whether there is an appeal to the Supreme Court of Canada under this section appears to be answered affirmatively by the amendments to the *Supreme Court Act*, 1949, 2nd sess., c.37, provided the judgment appealed from is that of the final court having jurisdiction in the matter in the province. S.41(3) says that "No appeal to the Supreme Court of Canada lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence, or *except in respect of a question of law or jurisdiction,* of an offence other than an indictable offence."

In *INTERNATIONAL METAL INDUSTRY v. TORONTO*, [1939] S.C.R.271, an appeal was dismissed on the ground that the County Court was not the highest court of final resort having jurisdiction in the province.

Fees and Allowances.

FEES AND ALLOWANCES.

744. The fees and allowances mentioned in the Schedule to this Part and no others are the fees and allowances that may be taken or allowed in proceedings before summary conviction courts and justices under this Part.

OLD CODE:

769A. An appeal to the Court of Appeal, as defined in section one thousand and twelve, against any decision of the court under provisions of section seven hundred and fifty-two or section seven hundred and sixty-five with leave of the Court of Appeal or a judge thereof may be taken on any ground which involves a question of law alone.

(2) The provisions of sections one thousand and twelve to one thousand and twenty-one, inclusive, shall mutatis mutandis in so far as the same are applicable, apply to an appeal under this section.

(3) The decision of the Court of Appeal shall have the same effect and may be enforced in the same manner as if it had been made by a justice at the hearing.

This comes from the former s.770 which was s.871 in the Code of 1892. As long ago as 1895 there were complaints that the allowances under s.871 were inadequate, but although changes were made by 1894, c.57, s.1; 1921, c.25, s.15; and 1947, c.55, s.27, there has been no drastic revision of the amounts allowed. Nor is there in this section although there are some changes in detail, the principal ones being from $3.00 to $4.00 in item 25, and from $5.00 to $10.00 in item 28.

There was discussion of the Schedule in the House of Commons (Hansard, 1954, page 2912) and the opinion was expressed that the amounts should be increased. It was pointed out, however, that in very many cases it will be quite poor people who will have to pay these fees on top of any fine which may be levied, and that although the items represent disadvantages in some respects, it was better upon balance to leave them as they are.

See *ATTORNEY-GENERAL, QUEBEC v. ATTORNEY-GENERAL OF CANADA*, [1945] S.C.R.600, noted under s.716 *ante*.

SCHEDULE.

Fees and Allowances that may be Charged by Summary Conviction Courts and Justices.

1. Information	**$1.00**
2. Summons or warrant	**0.50**
3. Warrant where summons issued in first instance	**0.30**
4. Each necessary copy of summons or warrant	**0.30**
5. Each subpoena or warrant to or for witnesses	**0.30**
(A subpoena may contain any number of names. Only one subpoena may be issued on behalf of a party in any proceeding, unless the summary conviction court or the justice considers it necessary or desirable that more than one subpoena be issued).	
6. Information for warrant for witness and warrant for witness	**1.00**
7. Each necessary copy of subpoena to or warrant for witness	**0.20**
8. Each recognizance	**1.00**

Section 744—*continued*

FEES AND ALLOWANCES THAT MAY BE ALLOWED TO PEACE OFFICERS.

9. Hearing and determining proceeding	**1.00**
10. Where hearing lasts more than two hours	**2.00**
11. Where two or more justices hear and determine a proceeding, each is entitled to the fee authorized by item 9.	
12. Each warrant of committal	**0.50**
13. Making up record of conviction or order upon request of a party to the proceedings	**1.00**
14. Copy of a writing other than a conviction or order, upon request of a party to the proceedings; for each folio of one hundred words	**0.10**
15. Bill of costs, when made out in detail upon request of a party to the proceedings	**0.20**
(Items 14 and 15 may be charged only where there has been an adjudication.)	
16. Attending to remand prisoner	**1.00**
17. Attending to take recognizance of bail	**1.00**
18. Arresting a person upon a warrant or without a warrant	**1.50**
19. Serving summons or subpoena	**0.50**
20. Mileage to serve summons or subpoena or to make an arrest, both ways, for each mile	**0.10**
(Where a public conveyance is not used, reasonable costs of transportation may be allowed.)	
21. Mileage where service cannot be affected, upon proof of a diligent attempt to effect service, each way, for each mile	**$0.10**
22. Returning with prisoner after arrest to take him before a summary conviction court or justice at a place different from the place where the peace officer received the warrant to arrest, if the journey is of necessity over a route different from that taken by the peace officer to make the arrest, each way, for each mile	**0.10**
23. Taking a prisoner to prison on remand or committal, each way, for each mile	**0.10**
(Where a public conveyance is not used, reasonable costs of transportation may be allowed. No charge may be made under this item in respect of a service for which a charge is made under item 22.)	
24. Attending summary conviction court or justice on summary conviction proceedings, for each day necessarily employed	**2.00**
(No more than $2.00 may be charged under this item in respect of any day notwithstanding the number of proceedings that the peace officer attended on that day before that summary conviction court or justice.)	

FEES AND ALLOWANCES THAT MAY BE ALLOWED TO WITNESSES.

25. Each day attending trial	**4.00**
26. Mileage travelled to attend trial, each way, for each mile	**0.10**

FEES AND ALLOWANCES THAT MAY BE ALLOWED TO INTERPRETERS.

27. Each half day attending trial	**2.50**
28. Actual living expense when away from ordinary place of residence, not to exceed per day	**10.00**
29. Mileage travelled to attend trial, each way, for each mile	**0.10**

PART XXV.
TRANSITIONAL AND CONSEQUENTIAL.

REPEAL.

745. The *Criminal Code*, chapter 36 of the Revised Statutes of Canada, 1927, is repealed.

See notes to s.746.

TRANSITIONAL.

746. (1) Where proceedings for an offence against the criminal law were commenced before the coming into force of this Act, the offence shall, after the coming into force of this Act, be dealt with, inquired into, tried and determined in accordance with this Act, and any penalty, forfeiture or punishment in respect of that offence shall be imposed as if this Act had not come into force, but where, under this Act, the penalty, forfeiture or punishment in respect of the offence is reduced or mitigated in relation to the penalty, forfeiture or punishment that would have been applicable if this Act had not come into force, the provisions of this Act relating to penalty, forfeiture and punishment shall apply.

(2) Where proceedings for an offence against the criminal law are commenced after the coming into force of this Act the following provisions apply, namely,

***(a)* the offence, whenever committed, shall be dealt with, inquired into, tried and determined in accordance with this Act;**

***(b)* if the offence was committed before the coming into force of this Act, the penalty, forfeiture or punishment to be imposed upon conviction for that offence shall be the penalty, forfeiture or punishment authorized or required to be imposed by this Act or by the law that would have applied if this Act had not come into force, whichever penalty, forfeiture or punishment is the less severe; and**

Section 746—*continued*

***(c)* if the offence is committed after the coming into force of this Act, the penalty, forfeiture or punishment to be imposed upon conviction for that offence shall be the penalty, forfeiture, or punishment authorized or required to be imposed by this Act.**

This is a section drafted especially for the purposes of this Code but it may be compared with s.14 and s.19(1)(d) and (2) of the *Interpretation Act*. Although its effect will probably be exhausted within a comparatively short period, it will have an important application after this Code comes into force.

It is submitted that it is in accord with general principles already laid down. In this connection the following is quoted from *R. v. RIVET* (1944), 81 C.C.C.377:

"It is well settled that legislation which merely affects procedure may be given a retrospective effect but that in the absence of an apparent intention that it should have a retrospective effect legislation affecting substantial rights shall not be given such effect.

For this proposition it is sufficient to refer to the decision of the House of Lords in *GARDNER v. LUCAS*(1878), 3 App.Cas.582.

It is equally well established that legislation creating or abolishing a right of appeal does not relate merely to procedure. The decisions of the Privy Council and the Supreme Court of Canada in *GOLONIAL SUGAR REFINING CO. v. IRVING*, [1905] A.C.369 and *UPPER CANADA COLLEGE v. SMITH*(1920), 57 D.L.R.648, 61 S.C.R.413, illustrate this principle."

In *R. v. CHANDRA DHARMA*, [1905]2 K.B.335, a prosecution was commenced on December 27, more than three but less than six months after the commission of the offence. On October 1 a new Act came into operation by which the time for prosecution was extended from three to six months. Held, this related to procedure only and was therefore retrospective, and that the conviction must be upheld.

However, Channell, B., pointed out that defendants were liable to prosecution at the time the new Act came into force, but "if the time under the old Act had expired before the new Act came into operation the question would have been entirely different, and in my view would not have enabled a prosecution to be maintained even within six months from the offence."

In *Re HUNT AND LINDENSMITH*(1921), 67 D.L.R.240 (Ont.):

"The effect of the repeal of a statute and the enactment in its place of a new statute covering the same ground is provided for by the *Interpretation Act*, R.S.O. 1914, c.1, ss.14 *et seq*. Under these sections, the repeal of any statute does not completely destroy it, but it remains in force for the purpose of continuing any existing right and its enforcement thereunder. The substituted provisions of the new Act do not create a new right or provide a new penalty with respect to matters then past. If the effect of the new Act is to substitute a less onerous penalty or punishment, the more lenient provision is to prevail, but there is no provision which justifies the imposition of a greater liability, or the enforcement, by reason of a more drastic penal provision,

of any right which existed before the new Act comes into operation."

The principle as to the mitigation of penalty is recognized in the section now under discussion.

In *R. v. ROBINSON et al.*(1951), 100 C.C.C.1 at p.15 (S.C.Can.), Cartwright, J., said:

"In my opinion if the words of an enactment which is relied upon as creating a new offence are ambiguous, the ambiguity must be resolved in favour of the liberty of the subject, but whether or not such ambiguity exists is to be determined after calling in aid the rules of construction."

In *R. v. SUTHERLAND,* [1950] O.W.N. 516 (Ont.C.A.) accused was convicted of an offence under s.444 committed in 1947 and 1948. The conviction took place on October 27th, 1949. The amended s.444 came into effect November 1, 1948.

"The indictment charges the commission of the offence within the years 1947 and 1948. If there had been no repeal of the section, the Crown would not have been limited to the proof that the offence had been committed on any particular dates within those years, and the effect of s.19 *(i.e.* of the *Interpretation Act,* R.S.C.) 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 in the year 1947 and to that portion of 1948 expiring on the date of the repeal."

R. v. SMITH(1947), 89 C.C.C.397 (Alta.), was a magistrate's decision under the *Special War Revenue Act,* amended 1947, c.60. The penalty was imposed under the amended section although the offence arose before the amendment.

In *Re GRIMSHAW ESTATE,* [1950] O.W.N.616 (Ont.C.A.):

"An Act governing procedure only 'has effect from the time when it comes into force, with respect to any order made thereafter, and whether or not the proceedings were commenced before or after the enactment came into force': *per* Grant, J.A., in *Re WICKS and ARMSTRONG*(1928), 61 O.L.R.667 at 669."

See also *R. v. AUSTIN,* [1913] 1 K.B.551; *R. v. O'CONNOR,* [1913] 1 K.B.557; *R. v. STRONG*(1915), 24 C.C.C.430 at p.435; *R. v. CIESLENSKI*(1923), 41 C.C.C.195; *R. v. TAYLOR and YOUNG*(1924), 41 C.C.C. 212.

INTERPRETATION ACT.

747. Section 29 of the *Interpretation Act*, chapter 158 of the Revised Statutes of Canada, 1952, is repealed.

This is for conformity with the new Code which does not use the expressions "summary trial" and "speedy trial".

***OPIUM AND NARCOTIC DRUG ACT.*—Except in cases tried before two justices no appeals in cases taken under section 4(1) or (2).**

748. Section 25 of the *Opium and Narcotic Drug Act*, chapter 201 of the Revised Statutes of Canada, 1952, is repealed and the following substituted therefor:

Section 748—*continued*

"25. Except in cases tried before two justices of the peace sections 719 to 732, inclusive, and subsection (2) of section 742 of the *Criminal Code* do not apply to any conviction, order or proceedings in respect of any offence under subsection (1) or (2) of section 4 of this Act."

This is for conformity with the new Code.

***CANADA EVIDENCE ACT.*—Wife or husband competent and compellable witness for prosecution.**

749. Subsection (2) of section 4 of the *Canada Evidence Act*, chapter 307 of the Revised Statutes of Canada, 1952, is repealed and the following substituted therefor:

"(2) The wife or husband of a person charged with an offence against section 33 or 34 of the *Juvenile Delinquents Act* or with an offence against any of the sections 135 to 138, 140, 142 to 147, 149, 155, 156, 157, 158, 164, 184, 186; 189, 234 to 236, 241 to 244, 275, paragraph *(c)* of section 408 or an attempt to commit an offence under section 138 or 147 of the *Criminal Code*, is a competent and compellable witness for the prosecution without the consent of the person charged."

This is for conformity with the new Code in view of the changes in numbering.

***COMBINES INVESTIGATION ACT.*—Director may submit statement of evidence.—Procedure for enforcing penalties.—Jurisdiction of courts.**

750. (1) Wherever, in the *Combines Investigation Act*, chapter 314 of the Revised Statutes of Canada, 1952, the expression "section 498 or 498A of the *Criminal Code*" or "section 498 or 498A of the *Criminal Code*, chapter 36 of the Revised Statutes of Canada, 1927," appears, the expression "section 411 or 412 of the *Criminal Code*" shall be substituted therefor, and wherever in the said Act the expression "section 498 of the *Criminal Code*" appears there shall be substituted therefor the expression "section 411 of the *Criminal Code*."

(2) Subsection (1) of section 18 of the said Act is repealed and the following substituted therefor:

"18. (1) At any stage of an inquiry,

***(a)* the Director may, if he is of the opinion that the evidence obtained discloses a situation contrary to section 32 or 34 of this Act, or section 411 or 412 of the *Criminal Code*, and**

***(b)* the Director shall, if so required by the Minister, prepare a statement of the evidence obtained in the inquiry which shall be submitted to the Commission and to each person against whom an allegation is made therein."**

(3) Subsections (1) and (2) of section 40 of the said Act are repealed and the following substituted therefor:

OLD CODE:

1152. The several forms in this Part varied to suit the case, or forms to the like effect, shall be deemed good, valid and sufficient in the cases thereby respectively provided for; and may, when made for one class of officials, be varied so as to apply to any other class having the same jurisdiction.

(2) It shall not be necessary for any justice to attach or affix any seal to any proceedings or process the forms for which are contained in this Part.

"40. (1) Where an indictment is found against an accused, other than a corporation, for any offence against this Act, the accused may elect to be tried without a jury and where he so elects he shall be tried by the judge presiding at the court at which the indictment is found, or the judge presiding at any subsequent sittings of that court, or at any court where the indictment comes on for trial; and in the event of such election being made the proceedings subsequent to the election shall be regulated in so far as may be applicable by the provisions of the *Criminal Code* relating to the trial of indictable offences by a judge without a jury.

(2) No court other than a superior court of criminal jurisdiction, as defined in the *Criminal Code*, has power to try any offence against section 32 of this Act."

This is partly for conformity, but also to provide uniform procedure in so far as offences under the *Combines Investigation Act* coincide with those under ss.411 and 412.

EXTRADITION ACT.

751. A reference in item 24 of the First Schedule to the *Extradition Act*, chapter 322 of the Revised Statutes of Canada, 1952, to an offence under a Part of the *Criminal Code*, chapter 36 of the Revised Statutes of Canada, 1927, shall be construed as a reference to the same or corresponding offence under this Act.

This is for conformity with the new Code.

COMING INTO FORCE.

752. This Act shall come into force on the 1st day of April 1955.

This is 3-4 Eliz.II, c.2, which received Royal Assent on 24th March 1955. It replaces s.752 as it appeared in the new Code as passed originally, and obviates the need to produce the proclamation published earlier in the Canada Gazette.

PART XXVI.

FORMS.

FORMS.—Seal not required.

753. (1) The forms set out in this Part varied to suit the case or forms to the like effect shall be deemed to be good, valid and sufficient in the circumstances for which, respectively, they are provided.

Section 753—*continued*

(2) No justice is required to attach or affix a seal to any writing or process that he is authorized to issue and in respect of which a form is provided by this Part.

This comes from the former s.1152. Note provision for endorsement on Form 28.

FORM 1.

(Section 429.)

Information to obtain a search warrant.

Canada,
Province of ,
(territorial division) .

This is the information of A. B., of in the said *(territorial division)*, *(occupation)*, hereinafter called the informant, taken before me.

The informant says that *(describe things to be searched for and offence in respect of which search is to be made)*, and that he has reasonable grounds for believing that the said things, or some part of them are in the *dwelling house, etc.)*, of C. D., of in the said *(territorial division)* *(here add the grounds of belief, whatever they may be)*.

Wherefore the informant prays that a search warrant may be granted to search the said *(dwelling house, etc.)* for the said things.

Sworn before me this day of A.D. ,
at

.....
Signature of Informant.

.....
A Justice of the Peace in and for .

FORM 2.

(Sections 439 and 695.)

Information.

Canada,
Province of ,
(territorial division) .

This is the information of C. D., of *(occupation)*, hereinafter called the informant

The informant says that ***(if the informant has not personal knowledge state that he has reasonable and probable grounds to believe and does believe and state the offence.)***

Sworn before me this day of A.D. ,
at

.....
Signature of Informant.

.....
A Justice of the Peace in and for .

FORM 3.

(Sections 491 and 501.)

Heading of Indictment.

Canada,
Province of
(territorial division) **,**

In the ***(set out name of the court)***

Her Majesty the Queen

against

(name of accused)

1. The jurors for Her Majesty the Queen present that

2. The said jurors further present that

FORM 4.

(Sections 478 and 491.)

Heading of indictment.

Canada,
Province of
(territorial division) **,**

In the ***(set out name of the court)***

Her Majesty the Queen

against

(name of accused)

Form 4—*continued*

(Name of accused) **stands charged**

1. That he ***(state offence)***.

2. That he ***(state offence)***.

Dated this day of A.D.

at

.....

(Signature of signing officer, Agent of Attorney General, etc., as the case may be).

FORM 5.

(Section 429.)

Warrant to search.

Canada,
Province of ,
(territorial division) .

To the peace officers in the said *(territorial division)*:

Whereas it appears on the oath of A.B., of that there are reasonable grounds for believing that *(describe things to be searched for and offence in respect of which search is to be made)* are in at ,

hereinafter called the premises;

This is, therefore, to authorize and require you between the hours of *(as the justice may direct)* to enter into the said premises and to search for the said things and to bring them before me or some other justice.

Dated this day of A.D.

at .

.....

A Justice of the Peace in and for .

FORM 6.

(Sections 441 and 700.)

Summons to a person charged with an offence.

Canada,
Province of ,
(territorial division) .

To A. B., of *(occupation)*: .

Whereas you have this day been charged before me that *(state offence as in the information)*:

This is therefore to command you, in Her Majesty's name, to appear before on the day of A.D. , at o'clock in the noon, at or before any justice for the said *(territorial division)* who is there, to answer to the said charge and to be dealt with according to law.

Dated this day of A.D. at .

.....
A Justice of the Peace in and for .

FORM 7.

(Sections 442, 444 and 707.)

Warrant to arrest a person charged with an offence.

Canada,
Province of ,
***(territorial division)* .**

To the peace officers in the said *(territorial division)*:

Whereas A. B., of , *(occupation)*, hereinafter called the accused, has been charged that *(state the offence as in the information)*:

This is, therefore, to command you in Her Majesty's name forthwith to arrest the accused and to bring him before or any justice for the said *(territorial division)*, to answer to the said charge and to be dealt with according to law.

Dated this day of A.D. at .

.....
A Justice of the Peace in and for .

FORM 8.

(Sections 444, 451 and 710).

Warrant where summons is disobeyed or cannot be served.

Canada,
Province of
(territorial division)

To the peace officers in the said *(territorial division)*:

Whereas on the day of , A.D. , A. B., of , hereinafter called the accused, was charged that *(state the offence as in the information)*;

And Whereas a summons to the accused was issued commanding him, in Her Majesty's name, to appear on the day of A.D., at o'clock in the noon, at , before me or any justice who should then be there, to answer to the said charge and to be dealt with according to law;

And Whereas it appears (* *or***);

This is therefore to command you, in Her Majesty's name, forthwith to arrest the said accused and to bring him before me or any justice in and for the said *(territorial division)*, to answer to the said charge and to be dealt with according to law.

Dated this day of

A.D. at

.....
A Justice of the Peace in and for

---

* that the accused has failed to appear at the time and place appointed by the said summons and it has been proved that the summons was duly served upon him.

** that the said summons cannot be served upon the accused.

FORM 9.

(Sections 451 and 710).

Warrant where accused fails to appear after adjournment.

Canada,
Province of ,
(territorial division) .

To the peace officers in the *(territorial division)*:

Whereas A. B., of , hereinafter called the accused, appeared before me on the day of A.D., , on a charge that *(state the offence as in the information)*;

And Whereas the trial (*or* inquiry, *etc.*) was adjourned to the day of A.D. at ;

And Whereas the accused has failed to appear at the time and place to which the trial (*or* inquiry, *etc.*) was adjourned:

This is therefore to command you, in Her Majesty's name, forthwith to arrest the said accused and to bring him before me or any justice in and for the said *(territorial division)*, to answer to the said charge and to be dealt with according to law.

Dated this day of A.D. at

.....
A Justice of the Peace in and for

FORM 10.

(Section 456.)

Warrant to convey accused before justice of another territorial division.

Canada,
Province of ,
(territorial division) .

To the peace officers in the said *(territorial division)*:

Whereas A. B., of hereinafter called the accused, has been charged that *(state place of offence and charge)*;

Form 10—*continued*

And Whereas I have taken the position of X. Y. in respect of the said charge;

And Whereas the charge is for an offence committed in the *(territorial division)*;

This is to command you, in Her Majesty's name, to convey the said A. B., before a justice of the *(last-mentioned territorial division)* and to deliver to him the information, the said deposition and this warrant.

Dated this day of A.D.

at .

A Justice of the Peace in and for .

FORM 11.

(Section 604).

Subpœna to a witness.

Canada,
Province of
(territorial division)

To E. F., of , *(occupation)*:

Whereas A. B. has been charged that *(state offence as in the information)*, and it has been made to appear that you are likely to give material evidence for (the prosecution *or* the defence);

This is therefore to command you to attend before *(set out court or justice)*, on the day of A.D. , at o'clock in the noon at to give evidence concerning the said charge.*

Dated this day of A.D.

at .

A Justice *or* clerk of the court.

(Seal if required).

---

* ***Where a witness is required to produce documents add the following:***
and to bring with you any writings in your possession or under your control that relate to the said charge, and more particularly the following: *(specify any writings required)*.

FORM 12.

(Sections 603 and 610.)

Warrant for witness.

Canada,
Province of
(territorial division) }

To the peace officers in the *(territorial division)*:

Whereas A. B. of , has been charged that *(state offence as in the information)*:

And Whereas it has been made to appear that E. F. of , hereinafter called the witness, is likely to give material evidence for (the prosecution *or* the defence) and that*

This is therefore to command you, in Her Majesty's name, to bring the witness before *(set out court or justice)* on the day of , A.D. , at o'clock in the noon, at to give evidence concerning the said charge.

Dated this day of A.D. at .

.....
A Justice *or* clerk of the court.

(Seal if required).

---

* *Insert whichever of the following is appropriate:*
(a) the said E. F. will not attend unless compelled to do so;
(b) the said E.F. is evading service of a subpœna;
(c) the said E. F. was duly served with a subpœna and has neglected (to attend at the time and place appointed therein *or* to remain in attendance).
(d) the said E. F. was bound by a recognizance to attend and give evidence and has neglected (to attend *or* to remain in attendance).

FORM 13.

(Section 609.)

Warrant to arrest an absconding witness.

Canada,
Province of
(territorial division) }

Form 13—*continued*

To the peace officers in the *(territorial division)*:

Whereas A. B. of , has been charged that *(state offence as in the information)*;

And Whereas I am satisfied by information in writing and under oath that C. D. of , hereinafter called the witness, is bound by recognizance to give evidence upon the trial of the accused upon the said charge, and that the witness (has absconded *or* is about to abscond):

This is therefore to command you, in Her Majesty's name, to arrest the witness and bring him before *(the court, judge, justice or magistrate before whom the witness is bound to appear)* to be dealt with according to law.

Dated this day of A.D.

at .

.....
A Justice of the Peace in and for .

FORM 14.

(Sections 451 and 710.)

Warrant remanding a prisoner.

Canada,
Province of ,
***(territorial division)* .**

To the peace officers in the *(territorial division)*:

You are hereby commanded forthwith to convey to the *(prison)* at the persons named in the following schedule each of whom has been remanded to the time mentioned in the schedule:

Person charged.	Offence.	Remanded to.

And I hereby command you, the keeper of the said prison, to receive each of the said persons into your custody in the prison and keep him safely until the day when his remand expires and then to have him before me or any other justice at at o'clock in the noon of the said day, there to answer to the charge and to be dealt with according to law, unless you are otherwise ordered before that time.

Dated this day of A.D.

at .

.....
A Justice of the Peace in and for .

FORM 12.

(Sections 603 and 610.)

Warrant for witness.

Canada,
Province of
(territorial division) }

To the peace officers in the *(territorial division)*:

Whereas A. B. of , has been charged that *(state offence as in the information)*:

And Whereas it has been made to appear that E. F. of , hereinafter called the witness, is likely to give material evidence for (the prosecution *or* the defence) and that*

This is therefore to command you, in Her Majesty's name, to bring the witness before *(set out court or justice)* on the day of , A.D. , at o'clock in the noon, at to give evidence concerning the said charge.

Dated this day of A.D. at .

.....
A Justice *or* clerk of the court.

(Seal if required).

---

* *Insert whichever of the following is appropriate:*
(a) the said E. F. will not attend unless compelled to do so;
(b) the said E.F. is evading service of a subpœna;
(c) the said E. F. was duly served with a subpœna and has neglected (to attend at the time and place appointed therein *or* to remain in attendance).
(d) the said E. F. was bound by a recognizance to attend and give evidence and has neglected (to attend *or* to remain in attendance).

FORM 13.

(Section 609.)

Warrant to arrest an absconding witness.

Canada,
Province of
(territorial division) }

Form 13—*continued*

To the peace officers in the *(territorial division)*:

Whereas A. B. of , has been charged that *(state offence as in the information)*;

And Whereas I am satisfied by information in writing and under oath that C. D. of , hereinafter called the witness, is bound by recognizance to give evidence upon the trial of the accused upon the said charge, and that the witness (has absconded *or* is about to abscond):

This is therefore to command you, in Her Majesty's name, to arrest the witness and bring him before *(the court, judge, justice or magistrate before whom the witness is bound to appear)* to be dealt with according to law.

Dated this day of A.D.

at .

.....
A Justice of the Peace in and for .

FORM 14.

(Sections 451 and 710.)

Warrant remanding a prisoner.

Canada,
Province of ,
***(territorial division)* .**

To the peace officers in the *(territorial division)*:

You are hereby commanded forthwith to convey to the *(prison)* at the persons named in the following schedule each of whom has been remanded to the time mentioned in the schedule:

Person charged.	Offence.	Remanded to.

And I hereby command you, the keeper of the said prison, to receive each of the said persons into your custody in the prison and keep him safely until the day when his remand expires and then to have him before me or any other justice at at o'clock in the noon of the said day, there to answer to the charge and to be dealt with according to law, unless you are otherwise ordered before that time.

Dated this day of A.D.

at .

.....
A Justice of the Peace in and for .

FORM 15.

(Section 507.)

Warrant for arrest of person against whom indictment has been found.

Canada,
Province of
(territorial division) ;}

To the peace officers in *(territorial division)*:

Whereas an indictment has been found against A. B., hereinafter called the accused, and the accused has not (appeared *or* remained in attendance) to take his trial on the said indictment before *(set out court)*:

You are hereby commanded, in Her Majesty's name, forthwith to arrest the accused and to bring him before the said court to be dealt with according to law.

Dated this day of A.D.
at .

.....
Clerk of the Court.

(Seal).

FORM 16.

(Section 457.)

Warrant of committal of witness for refusing to be sworn or to give evidence.

Canada,
Province of
(territorial division) ;}

To the peace officers in the *(territorial division)*:

Whereas A. B. of , hereinafter called the accused, has been charged that *(set out offence as in the information)*;

And Whereas E. F. of , hereinafter called the witness, attending before me to give evidence for (the prosecution *or* the defence) concerning the charge against the accused (refused to be sworn *or* being duly sworn as a witness refused to answer certain questions concerning the charge that were put to him *or* refused or neglected to produce the following writings, namely *or* refused to sign his deposition) having been ordered to do so, without offering any just excuse for such refusal or neglect:

This is therefore to command you, in Her Majesty's name, to take the witness and convey him safely to the prison at and there deliver him to the keeper thereof, together with the following precept:

Form 16—*continued*

I do hereby command you, the said keeper, to receive the said witness into your custody in the said prison and safely keep him there for the term of days, unless he sooner consents to do what was required of him, and for so doing this is a sufficient warrant.

Dated this day of A.D.

at

.....
A Justice of the Peace in and for

FORM 17.

(Section 460.)

Warrant of committal for trial.

Canada,
Province of ,
(territorial division) .

To the peace officers in the *(territorial division)* and to the keeper of the *(prison)* at :

Whereas A. B., hereinafter called the accused, stands charged that *(state offence as in the information)*;

And whereas on a preliminary inquiry into that charge the accused (having elected to be tried by a judge without a jury *or* by a court composed of a judge and jury, *or* not having elected, *as the case may be*) was this day committed for trial;

This is therefore to command you, in Her Majesty's name, to take the accused and convey him safely to the *(prison)* at and there deliver him to the keeper thereof, with the following precept:

I do hereby command you the said keeper to receive the accused into your custody in the said prison and keep him safely there until he is delivered by due course of law.

Dated this day of A.D.

at

.....
A Justice of the Peace in and for

FORM 18.

(Sections 482 and 713.)

Warrant of committal upon conviction.

Canada,
Province of
(territorial division)

To the peace officers in the *(territorial division)* and to the keeper of the *(prison)* at

Whereas A. B., hereinafter called the accused, was this day convicted upon a charge that *(state offence as in the information)*, and it was adjudged that the accused for his offence*

You are hereby commanded, in Her Majesty's name, to take the accused and convey him safely to the *(prison)* at

and deliver him to the keeper thereof, together with the following precept:

You, the said keeper, are hereby commanded to receive the accused into custody in the said prison and imprison him there**

and for so doing this is a sufficient warrant.

Dated this day of A.D.

at

.....
Clerk of the Court, Justice *or* Magistrate.

(Seal, if required).

**Use whichever of the following forms of sentence is applicable:*

(a) be imprisoned in the *(prison)* at

for the term of ;

(b) forfeit and pay the sum of dollars to be applied according to law and also pay to *the sum of* dollars in respect of costs and in default of payment of the said sums (forthwith *or within a time fixed, if any)* be imprisoned in the *(prison)* at for the term of unless the said sums and costs and charges of the committal and of conveying the accused to the said prison are sooner paid;

(c) be imprisoned in *(prison)* at for the term of , and in addition *(as in (b) above)*.

***(The official print has no footnote. The form will of course be completed in accordance with the adjudication.)*

FORM 19.

(Section 713.)

Warrant of committal upon an order for the payment of money.

Canada,
Province of ,
(territorial division) .

To the peace officers in the *(territorial division)* and to the keeper of the *(prison)* at :

Whereas A. B., hereinafter called the defendant, was tried upon an information alleging that *(set out matter of complaint)*, and it was ordered that *(set out the order made)*, and in default that the defendant be imprisoned in the *(prison)* at for a term of ;

I hereby command you, in Her Majesty's name, to take the defendant and convey him safely to the *(prison)* at , and deliver him to the keeper thereof together with the following precept:

I hereby command you the keeper of the said prison to receive the defendant into your custody in the said prison and imprison him there for the term of , unless the said amounts and the costs and charges of the committal and of conveying the defendant to the said prison are sooner paid, and for so doing this is a sufficient warrant.

Dated this day of , A.D.

at .

.....
A Justice of the Peace in and for .

FORM 20.

(Sections 637 and 717.)

Warrant of committal for failure to furnish recognizance to keep the peace.

Canada,
Province of ,
(territorial division) .

To the peace officers in the *(territorial division)* and to the keeper of the *(prison)* at :

Whereas A. B., hereinafter called the accused, has been ordered to enter into a recognizance to keep the peace and be of good behaviour, and has (refused *or* failed) to enter into a recognizance accordingly;

You are hereby commanded, in Her Majesty's name, to take the accused and convey him safely to the *(prison)* at and deliver him to the keeper thereof together with the following precept:

You, the said keeper, are hereby commanded to receive the accused into your custody in the said prison and imprison him there until he enters into a recognizance as aforesaid or until he is discharged in due course of law.

Dated this day of A.D.

at .

.....

Clerk of the Court, Justice *or* Magistrate.

(Seal, if required).

FORM 21.

(Section 461.)

Warrant of committal of witness for failure to enter into recognizance.

Canada,
Province of
(territorial division)

To the peace officers in the *(territorial division)* and to the keeper of the *(prison)* at :

Whereas A. B., hereinafter called the accused, was committed for trial on a charge that *(state offence as in the information)*;

And Whereas E. F., hereinafter called the witness, having appeared as a witness on the preliminary inquiry into the said charge, and being required to enter into a recognizance to appear as a witness on the trial of the accused on the said charge, has (failed *or* refused) to do so;

Form 21—*continued*

This is therefore to command you, in Her Majesty's name, to take and safely convey the said witness to the *(prison)* at and there deliver him to the keeper thereof, together with the following precept:

I do hereby command you, the said keeper, to receive the witness into your custody in the said prison and keep him there safely until the trial of the accused upon the said charge, unless before that time the witness enters into the said recognizance.

Dated this day of A.D.

at .

.....
A Justice of the Peace in and for .

FORM 22.

(Section 612.)

Warrant of committal for contempt.

Canada,
Province of
(territorial division) **:**

To the peace officers in the said *(territorial division)* and to the keeper of the *(prison)* at :

Whereas E. F., of , hereinafter called the defaulter, was on the day of *A.D.* , at , convicted before for contempt in that he did not attend before to give evidence on the trial of a charge that *(state offence as in the information)* against A. B. of , although (duly subpoenaed *or* bound by recognizance to appear and give evidence in that behalf, *as the case may be*) and did not show any sufficient excuse for his default;

And Whereas in and by the said conviction it was adjudged that the defaulter *(set out punishment adjudged)*;

And Whereas the defaulter has not paid the amount adjudged to be paid; *(delete if not applicable)*

This is therefore to command you, in Her Majesty's name, to take the defaulter and convey him safely to the prison at and there deliver him to the keeper thereof, together with the following precept:

I do hereby command you, the said keeper, to receive the defaulter into your custody in the said prison and imprison him there* and for so doing this is a sufficient warrant.

Dated this day of A.D.

at .

.....

A Justice *or* clerk of the court.

(Seal, if required).

**Insert whichever of the following is applicable:*

(a) for the term of ,

(b) for the term of unless the said sums and the costs and charges of the committal and of conveying the defaulter to the said prison are sooner paid, *or*

(c) for the term of and for the term of *(if consecutive so state)* unless the said sums and costs and charges of the committal and of conveying the defaulter to the said prison are sooner paid.

FORM 23.

(Section 731.)

Warrant of committal in default of payment of costs of an appeal

Canada,
Province of ,
(territorial division) .

To the peace officers of *(territorial division)* and to the keeper of the *(prison)* at

Whereas it appears that upon the hearing of an appeal before the *(set out court)*, it was adjudged that A. B., of , hereinafter called the defaulter, should pay to the Clerk of the Court the sum of dollars in respect of costs;

And Whereas the Clerk of the Court has certified that the defaulter has not paid the sum within the time limited therefor;

I do hereby command you the said peace officers, in Her Majesty's name, to take the defaulter and safely convey him to the *(prison)* at and deliver him to the keeper thereof, together with the following precept:

Form 23—*continued*

I do hereby command you, the said keeper, to receive the defaulter into your custody in the said prison and imprison him for the term of , unless the said sum and the costs of the committal and of conveying the defaulter to prison are sooner paid, and for so doing this is a sufficient warrant.

Dated this day of A.D.

at .

.....
A Justice of the Peace in and for .

FORM 24.

(Section 679.)

Warrant of committal on forfeiture of a recognizance.

Canada,
Province of ,
(territorial division) .

To the sheriff of *(territorial division)* and to the keeper of the *(prison)* at .

You are hereby commanded to take (A. B. and C. D. *as the case may be*) hereinafter called the defaulters, and to convey them safely to the *(prison)* at and deliver them to the keeper thereof, together with the following precept:

You, the said keeper, are hereby commanded to receive the defaulters into your custody in the said prison and imprison them for a period of or until satisfaction is made of a judgment debt of dollars due to Her Majesty the Queen in respect of the forfeiture of a recognizance entered into by on the day of A.D. .

Dated this day of A.D.

.....
Clerk of the .

(Seal).

FORM 25.

(Sections 429 (2), 447 and 713.)

Endorsement of warrant.

Canada,
Province of
(territorial division) }

Pursuant to application this day made to me, I hereby authorize the execution of this warrant within the said *(territorial division)*.

Dated this day of A.D.

at .

.....
A Justice of the Peace in and for .

FORM 26.

(Section 451.)

Order for accused to be brought before justice prior to expiration of period of remand.

Canada,
Province of
(territorial division) }

To the keeper of the *(prison)* at :

Whereas by warrant dated the day of A.D. , I committed A. B., hereinafter called the accused, to your custody and required you safely to keep him until the day of A.D. , and then to have him before me or any other justice at at o'clock in the noon to answer to the charge against him and to be dealt with according to law unless you should be ordered otherwise before that time:

Now, therefore, I order and direct you to have the accused before ..... at at o'clock in the noon to answer to the charge against him and to be dealt with according to law.

Dated this day of A.D.

at .

.....
A Justice of the Peace in and for .

FORM 27.

(Section 453.)

Deposition of a witness.

Canada,
Province of
(territorial division)

These are the depositions of X. Y., of , taken before me, this day of A.D. , at , in the presence and hearing of A. B., hereinafter called the accused, who stands charged *(state offence as in the information)*.

X. Y., having been duly sworn, deposes as follows: *(insert deposition as nearly as possible in words of witness.)*

M. N., having been duly sworn, deposes as follows:

I certify that the depositions of X. Y., and M. N., written on the several sheets of paper hereto annexed to which my signature is affixed, were taken in the presence and hearing of the accused (and signed by them respectively, in his presence, *where they are required to be signed by witness)*. In witness whereof I have hereto signed my name.

.....
A Justice of the Peace in and for .

FORM 28.

(Sections 451, 461, 463, 611, 637, 638, 669, 670, 710, 717, 724 and 735.)

(N.B. The provisions of sections 669 and 670 (1), (2) and (3) must be endorsed on a recognizance. See section 670 (4)).

Recognizance.

Canada,
Province of
(territorial division)

Be it remembered that on this day the persons named in the following schedule personally came before me and severally acknowledged themselves to owe to Her Majesty the Queen the several amounts set opposite their respective names, namely,

Name	Address	Occupation	Amount
A. B.			
C. D.			
E. F.			

to be made and levied of their several goods and chattels, lands and tenements, respectively, to the use of Her Majesty the Queen, if the said A. B. fails in the condition hereunder written.

Taken and acknowledged before me on the day of A.D. at .

.....
A Justice of the Peace in and for .

---

* *Use whichever of the following conditions is appropriate:*

(a) Whereas the said A. B. has been charged *(state offence as in the information)*;

Now, therefore, the condition of the above written recognizance is that if the said A. B. appears before the *(state court, judge or justice)* on the day of A.D. , at o'clock in the noon, at *(place)* to answer to the charge and to be dealt with according to law, the said recognizance is void, otherwise it stands in full force and virtue.

(b) Whereas the said A. B., hereinafter called the accused, was committed to stand his trial before a judge acting under Part XVI, on a charge that: *(set out charge)*

Now, therefore, the condition of the above written recognizance is that if the accused appears before the presiding judge at the time and place fixed for his trial and there surrenders himself and takes his trial on the indictment that is found against him and does not depart the said court without leave, the said recognizance is void, otherwise it stands in full force and virtue.

(c) Whereas the said A. B., hereinafter called the accused, was committed for trial before *(set out court)*;

Now, therefore, the condition of the above written recognizance is that (if the accused appears at that court, *or* if, having re-elected under Part XVI, he appears before the presiding judge at the time and place fixed for his trial) and takes his trial on the indictment that is found against him and does not depart the said court without leave, the said recognizance is void, otherwise it stands in full force and virtue.

(d) Whereas C. D., hereinafter called the accused, was committed for trial on a charge that *(set out charge)*;

And Whereas A. B. appeared as a witness on the preliminary inquiry into the said charge;

Now, therefore, the condition of the above written recognizance is that if the said A. B. appears at the time and place fixed for the trial of the accused to give evidence upon the indictment that is found against the accused, the said recognizance is void, otherwise it stands in full force and virtue.

(e) The condition of the above written recognizance is that if A. B. keeps the peace and is of good behaviour for the term of commencing on , the said recognizance is void, otherwise it stands in full force and virtue.

Form 28—*continued*

(f) The condition of the above written recognizance is that if A. B. appears and receives judgment when called upon during the term of commencing on , and during that term keeps the peace and is of good behaviour *(add special conditions as authorized by section 638, where applicable)*, the said recognizance is void, otherwise it stands in full force and virtue.

(g) Whereas A. B., hereinafter called the appellant, has appealed (against his conviction *or* against an order *or* by way of stated case) in respect of the following matter *(set out offence, subject matter of order or question of law)*;

Now, therefore, the condition of the above written recognizance is that if the appellant personally appears at the sittings of the court at which the (appeal *or* stated case) is to be heard and abides the judgment of the said court and pays any costs that are awarded against him, the said recognizance is void, otherwise it stands in full force and virtue.

FORM 29.

(Section 676.)

Certificate of default to be endorsed on recognizance.

I hereby certify that A. B. has not appeared as required by this recognizance and that by reason thereof the ends of justice have been (defeated *or* delayed, *as the case may be*).

The reason for the default is *(state reason if known)*.

The names and addresses of the principal and sureties are as follows:

Dated this day of A.D.

at

.....

Clerk of the Court, Judge,
Justice *or* Magistrate.

(Seal, if required).

FORM 30.

(Section 677.)

Writ of fieri facias.

Elizabeth II by the Grace of God, etc.

To the sheriff of *(territorial division)*, GREETING,

You are hereby commanded to levy of the goods and chattels, lands and tenements of each of the following persons the amount set opposite the name of each:

Name	Address	Occupation	Amount

And you are further commanded to make a return of what you have done in execution of this writ.

Dated this day of A.D.

at .

(Seal). ..... **Clerk of the .**

FORM 31.

(Sections 482 and 713.)

Conviction.

Canada,
Province of
(territorial division)

Be it remembered that on the day of at , A.B., hereinafter called the accused, was tried under Part (XVI *or* XXIV) of the Criminal Code upon the charge that *(state fully the offence of which accused was convicted)*, was convicted of the said offence and the following punishment was imposed upon him, namely,*

Dated this day of A.D.

at .

..... **Clerk of the Court, Justice *or* Magistrate.**

(Seal, if required).

---

* ***Use whichever of the following forms of sentence is applicable:***

(a) **That the said accused be imprisoned in the *(prison)* at for the term of .**

(b) **That the said accused forfeit and pay the sum of dollars to be applied according to law and also pay to the sum of dollars in respect of costs and in default of payment of the said sums (forthwith *or within a time fixed, if any)* to be imprisoned in the *(prison)* at for the term of unless the said sums and costs and charges of the committal and of conveying the accused to the said prison are sooner paid.**

Form 31—*continued*

(c) That the said accused be imprisoned in the *(prison)* at for the term of and in addition forfeit and pay the sum of dollars to be applied according to law and also pay to the sum of dollars in respect of costs and in default of payment of the said sums (forthwith *or within a time fixed, if any)* to be imprisoned in the *(prison)* at for the term of *(if sentence to be consecutive, state accordingly)* unless the said sums and costs and charges of the committal and of conveying the accused to the said prison are sooner paid.

FORM 32.

(Section 713.)

Order against a defendant.

Canada,
Province of ,
(territorial division) .

Be it remembered that on the day of A.D. , at , A. B., of , was tried upon an information alleging that *(set out matter of complaint)*, and it was ordered and adjudged that *(set out the order made)*.

Dated this day of A.D.

at .

.....
A Justice of the Peace in and for .

FORM 33.

(Section 482.)

Order acquitting accused.

Canada,
Province of ,
(territorial division) .

Be it remembered that on the day of A.D. , at A. B., of , *(occupation)*, was tried upon the charge that *(state fully the offence of which accused was acquitted)* and was found not guilty of the said offence.

Dated this day of A.D.

at .

(Seal, if required).

.....
Magistrate *or* Clerk of the Court.

FORM 34.

(Section 612.)

Conviction for contempt.

Canada,
Province of ,
(territorial division) .

Be it remembered that on the day of A.D. , at in the *(territorial division)*, E. F. of , hereinafter called the defaulter, is convicted by me for contempt in that he did not attend before (set out court *or* justice) to give evidence on the trial of a charge that *(state fully offence with which accused was charged)*, although (duly subpœnaed *or* bound by recognizance to attend to give evidence, *as the case may be)* and has not shown before me any sufficient excuse for his default;

Wherefore I adjudge the defaulter for his said default, *(set out punishment as authorized and determined in accordance with section 612).*

Dated this day of A.D.

at .

. . . . . .
A Justice *or* Clerk of the court *as the case may be*.

(Seal, if required).

FORM 35.

(Sections 461, 463 and 724).

Order for discharge of a person in custody.

Canada,
Province of ,
(territorial division) .

To the keeper of the *(prison)* at :

I hereby direct you to release E. F., detained by you under a (warrant of committal *or* order) dated the day of A.D. , if the said E. F., is detained by you for no other cause.

. . . . . .
A Judge, Justice *or* Clerk of the Court.

(Seal , if required).

FORM 36.

(Section 538).

Challenge to array.

Canada,	}	**The Queen**
Province of	,	**v.**
(territorial division)	}	**C. D.**

The (prosecutor *or* accused) challenges the array of the panel on the ground that X. Y., (sheriff *or* deputy sheriff), who returned the panel, was guilty of (partiality *or* fraud *or* wilful misconduct) on returning it.

Dated this day of A.D.

at .

.....

Counsel for (prosecutor *or* accused.)

FORM 37.

(Section 548).

Challenge for cause.

Canada,	}	**The Queen**
Province of	,	**v.**
(territorial division)	}	**C. D.**

The (prosecutor *or* accused) challenges G. H. on the ground that *(set out ground of challenge in accordance with section 547(1)).*

.....

Counsel for (prosecutor *or* accused.)

FORM 38.

(Section 731). .....

Certificate of non-payment of costs of appeal.

In the Court of

(Style of Cause)

I hereby certify that A. B. (the appellant *or* respondent, *as the case may be)* in this appeal, having been ordered to pay costs in the sum of dollars, has failed to pay the said costs within the time limited for the payment hereof.

Dated this day of A.D.

at .

.....

Clerk of the Court of .

(Seal).

FORM 39.

(Section 636).

Gaoler's receipt to peace officer for prisoner.

I hereby certify that I have received from X. Y., a peace officer for *(territorial division)* one A. B., together with a (warrant *or* order) issued by *(set out court or justice, as the case may be).

Dated this day of A.D.

at .

.....

Keeper of *(prison)*.

* *(Add a statement of the condition of the prisoner.)*

FORM 40.

(Section 646).

Certificate of execution of sentence of death.

I, A. B., prison doctor of the *(prison)*, at hereby certify that I examined the body of C. D. on whom sentence of death was this day executed in the said prison and that I found that the said C. D. was dead.

Dated this day of A.D.

at

.....

Prison doctor.

FORM 41.

(Section 646).

Declaration of sheriff and others.

We, the undersigned, hereby declare that sentence of death was this day executed on C. D., in our presence in the *(prison)* at .

Dated this day of A.D.

at

Sheriff of .....

Goaler of .....

..... } *Others.*

..... }

..... }

FORM 42.

FIREARM PERMIT

This permit authorizes ..... **of**

..... *(Address)* **to have a** ..... *(Insert type of firearm)*

..... **elsewhere than in his dwelling house or place of**

business for the purpose of ..... *(insert purpose for which permit is required)*

This permit is valid during the period .....

..... *(Date of issue).* ..... *(Signature of person authorized to issue permits in Form 42.)*

FORM 43.

PERMIT TO BUY AND SELL FIREARMS AT RETAIL.

This permit authorizes ..... *(Insert name of holder of permit)*

of .....

to buy and sell firearms at retail.

..... *(Date of issue).* ..... *(Signature of person authorized to issue permits).*

..... *(Address).*

FORM 44.

PERMIT TO CONVEY FIREARM.

This permit authorizes ..... **to convey the firearm described herein from** .....
(Place of delivery or place of residence or business)

..... **to** .....
(Local registrar of firearms)

and thence to .....
(Place of residence or business)

This permit is valid only during the period .....

....
(Date of issue) *(Local Registrar of Firearms)*

.....
(Address)

APPLICATION TO REGISTER FIREARM.

Place .....**Date** .....

Re .....**Certificate No.** .....
(Name of Applicant) *(If available)*
(Please show full Christian names)

.....
Description of Firearm

Make of Firearm	R or A	Cal.	Model	Ser. No.	No. Shots	Bbl. Lgth.
	( )					

(Note: (R) Revolver (A) Automatic)

Obtained by: **Purchase** ☐ **Exchange** ☐ **Gift** ☐ **Found** ☐

Obtained from .....

Certificate No. .....**Address** .....

Occupation of Applicant .....

Purpose for which firearm required .....

.....
(Signature of Applicant)

Address: .....

Registered under the authority of section 93 of the Criminal Code of Canada

.....
(Local Registrar of Firearms)

....
(Date of issue) *(Address)*

TRANSFER COMPLETED

Date ..... **Initialed by** ..... **Police Department** .....

FORM 45.

PERMIT FOR A MINOR TO ACQUIRE FIREARMS.

This permit authorizes .....

of .....

aged ..... **years, to acquire and have in his possession the firearm, air-gun, air-pistol or ammunition therefor, described as follows:**

.....

.....

This permit is valid during the period .....

.....
(Date of issue).

.....
(Signature of person authorized to issue permits).

.....
(Address).

SCHEDULE—Part XXII—Section 668

Column I.	Column II.	Column III.
Ontario.....	The Supreme Court, in respect of a recognizance for the appearance of a person before that court.	The Registrar or Local Registrar of the Supreme Court.
	A judge of the Court of Appeal in respect of a recognizance for the appearance of a person before that court.	The Registrar of the Supreme Court
	A Court of the General Sessions of the Peace in respect of a recognizance for the appearance of a person before that court, a judge acting under Part XVI, a justice or a magistrate.	Clerk of the Peace.

Schedule—*continued*

Column I.	Column II.	Column III.
Quebec	The Superior Court, exercising civil jurisdiction.	The Clerk of the Peace.
Nova Scotia	A judge of the Supreme Court in respect of a recognizance for the apparance of a person before the Supreme Court *in banco*.	The Prothonotary at Halifax.
	A judge of the County Court in respect of a recognizance for the appearance of a person before a judge of the Supreme Court, a judge of the County Court, a judge acting under Part XVI, a justice or a magistrate.	The Clerk of the County Court.
New Brunswick	The Supreme Court	The Registrar of the Supreme Court.
Manitoba	The Court of Queen's Bench	The Clerk or Deputy Clerk of the Crown and Pleas.
British Columia	The Supreme Court in respect of a recognizance for the appearance of a person before that court or the Court of Appeal.	The District Registrar of the Supreme Court.
	A County Court in respect of a recognizance for the appearance of a person before that court, a judge acting under Part XVI, a justice or a magistrate.	The Clerk of the County Court.
Prince Edward Island	The Supreme Court of Judicature	The Prothonotary.
Saskatchewan	The Court of Queen's Bench in respect of a recognizance for the appearance of a person before that Court or the Court of Appeal.	The Local Registrar of the Court of Queen's Bench.
	A District Court in respect of a recognizance for the appearance of a person before that Court, a judge acting under Part XVI, a justice or a magistrate.	The Clerk of the District Court.
Alberta	The Supreme Court in respect of a recognizance for the appearance of a person before that Court or the Court of Appeal.	The Clerk of the Supreme Court.
	A district Court in respect of recognizance for the appearance of a person before that Court, a judge acting under Part XVI, a justice or a magistrate.	The Clerk of the District Court.
Newfoundland	The Supreme Court	The Registrar of the Supreme Court.
Yukon Territory	The Territorial Court	The Clerk of the Court.
Northwest Territories	The Territorial Court	The Clerk of the Court.