OLD CODE:

63. It is lawful for every parent, or person in the place of a parent, schoolmaster or master, to use force by way of correction towards any child, pupil or apprentice under his care, provided that such force is reasonable under the circumstances.

64. It is lawful for the master or officer in command of a ship on a voyage to use force for the purpose of maintaining good order and discipline on board of his ship, provided that he believes, on reasonable grounds, that such force is necessary, and provided also that the force used is reasonable in degree.

65. Every one is protected from the criminal responsibility for performing with reasonable care and skill any surgical operation upon any person for his benefit, provided that performing the operation was reasonable, having regard to the patient's state at the time, and to all the circumstances of the case.

SURGICAL OPERATIONS.

45. Every one is protected from criminal responsibility for performing a surgical operation upon any person for the benefit of that person if

***(a)* the operation is performed with reasonable care and skill, and**

***(b)* it is reasonable to perform the operation, having regard to the state of health of the person at the time the operation is performed and to all the circumstances of the case.**

This is the former s.65. It was s.57 in the Code of 1892, and s.67 in the E.D.C. Obviously, it operates to protect physicians and surgeons, but in any case it will, under the new Code, be complementary to the definition of criminal negligence. See ss.187,188 and 191, especially the reference to *R. v. BATEMAN*(1925), 19 Cr.App.R.8.

PART II.
OFFENCES AGAINST PUBLIC ORDER.

TREASON AND OTHER OFFENCES AGAINST THE QUEEN'S AUTHORITY AND PERSON.

TREASON.—Canadian citizen or person owing allegiance.—Overt act.

46. (1) Every one commits treason who, in Canada,

***(a)* kills or attempts to kill Her Majesty, or does her any bodily harm tending to death or destruction, maims or wounds her, or imprisons or restrains her;**

***(b)* levies war against Canada or does any act preparatory thereto;**

***(c)* assists an enemy at war with Canada, or any armed forces against whom Canadian forces are engaged in hostilities whether or not a state of war exists between Canada and the country whose forces they are;**

Section 46—*continued*

(d) **uses force or violence for the purpose of overthrowing the government of Canada or a province;**

(e) **without lawful authority, communicates or makes available to an agent of a state other than Canada, military or scientific information or any sketch, plan, model, article, note or document of a military or scientific character that he knows or ought to know may be used by that state for a purpose prejudicial to the safety or defence of Canada;**

(f) **conspires with any person to do anything mentioned in paragraphs *(a)* to *(d)*;**

(g) **forms an intention to do anything mentioned in pargraphs *(a)* to *(d)* and manifests that intention by an overt act; or**

(h) **conspires with any person to do anything mentioned in paragraph *(e)* or forms an intention to do anything mentioned in paragraph *(e)* and manifests that intention by an overt act.**

(2) Notwithstanding subsection (1), a Canadian citizen or a person who owes allegiance to Her Majesty in right of Canada commits treason if, while in or out of Canada, he does anything mentioned in subsection (1).

(3) Where it is treason to conspire with any person, the act of conspiring is an overt act of treason.

This section replaces the former ss.74,75,77 and 78 with new matter contained in clauses (1)(e) to (h). They were ss.65,66,68 and 69 in the Code of 1892. The corresponding sections in the E.D.C. are ss.75-79.

See also s.47 (punishment), s.48 (limitation), s.464 (bail) and s.510(9) (amending indictment).

The word 'treason' has been a rather elastic one at times in English history when the Sovereign was regarded more as a person than as part of the constitutional organization of the state. However, the present law of treason, as is noted in Stephen's Commentaries, 21st. ed.(1950), Vol.IV, p.127, still has as its base the *Treason Act* of Edward III, 1351, with the 'constructive treason' which judicial interpretation has declared to be within its terms. In his History of Criminal Law, Vol. II, p.281, he set out the three primary essentials of the crime embodied in that Act as follows:

A. Treason by imagining the King's death (extended by judicial interpretation and later by the 57 Geo. III, c.6, and 11 & 12 Vict. c.12, to include imagining bodily harm or restraint to the King).

B. Treason by levying war, in the natural sense of that expression which is defined to be levying war with intent to depose the King, or to compel legislation by force and terror.

C. Treason by adhering to the King's enemies.

The use of violence to intimidate Parliament or a legislature is a separate offence under the Code (s.51) but it will be noticed that otherwise, these three essentials are within the terms of s.46.

On the matter of adhering to the King's enemies, Holdsworth's History of English Law, Vol. VIII, pp.307, 308, says that the only difficulty which

OLD CODE:

74. Treason is

(a) the act of killing His Majesty, or doing him any bodily harm tending to death or destruction, maim or wounding, and the act of imprisoning or restraining him; or

(b) the forming and manifesting by any overt act an intention to kill His Majesty, or to do him any bodily harm tending to death or destruction, maim or wounding, or to imprison or to restrain him; or

(c) the act of killing the eldest son and heir apparent of His Majesty, or the Queen consort of any King of the United Kingdom of Great Britain and Ireland; or

(d) the forming and manifesting, by an overt act, an intention to kill the eldest son and heir apparent of His Majesty, or the Queen consort of any King of the United Kingdom of Great Britain and Ireland; or

(e) conspiring with any person to kill His Majesty, or to do him any bodily harm tending to death or destruction, maim or wounding, or conspiring with any person to imprison or restrain him; or

(f) levying war against His Majesty either

(i) with intent to depose His Majesty from the style, honour and royal name of the Imperial Crown of the United Kingdom of Great Britain and Ireland or of any other of His Majesty's dominions or countries; or

(ii) in order, by force or constraint, to compel His Majesty to change his measures or counsels, or in order to intimidate or overawe both Houses or either House of Parliament of the United Kingdom or of Canada; or

(g) conspiring to levy war against His Majesty with any such intent or for any such purpose as aforesaid; or

(h) instigating any foreigner with force to invade the said United Kingdom or Canada or any other of the dominions of His Majesty; or

(i) assisting, while in or out of Canada, any enemy at war with Canada, or any armed forces against whom Canadian forces are engaged in hostilities whether or not a state of war exists between Canada and the country whose forces they are, or

(j) violating, whether with her consent or not, a Queen consort, or the wife of the eldest son and heir apparent, for the time being, of the King or Queen regnant.

(2) Every one who commits treason is guilty of an indictable offence and liable to suffer death.

75. In every case in which it is treason to conspire with any person for any purpose, the act of so conspiring, and every overt act of any such conspiracy, is an overt act of treason.

77. Every subject or citizen of any foreign state or country at peace with His Majesty, who

(a) is or continues in arms against His Majesty within Canada; or

(b) commits any act of hostility therein; or

(c) enters Canada with intent to levy war against His Majesty, or to commit any indictable offence therein for which any person would, in Canada, be liable to suffer death; and

every subject of His Majesty who

Section 46—*continued*

has arisen in this connection has been the difficulty of deciding whether adherence to the King's enemies out of the realm is included in it, and concludes that "Coke, Hale, and Hawkins were well warranted in holding that adhering to the King's enemies outside the Kingdom was an offence which came within the scope of Edward III's statute." Later cases have all laid down the law the same way; and after an elaborate review of the authorities, this interpretation was finally established as correct in 1916 in the case of *R. v. CASEMENT,* [1917] 1 K.B.98 at p.128, and in Stephen's Commentaries, 21st ed., Vol. IV, p.131, it is noted that it was on a charge of treason under this head that the case of *JOYCE v. DIRECTOR OF PUBLIC PROSECUTIONS,* [1946] A.C. 347, was decided.

In *R. v. CASEMENT,* [1917] 1 K.B.98 at p.136, Darling, J., in explaining the meaning of the provision of the Act of 23 Edward III, makes the following statement:

> "We agree that if a person being within this country gives aid and comfort to the King's enemies in this country, he is adherent to the King's enemies; we agree . . . . . that if he is in this country and he gives aid and comfort to the King's enemies outside this country, he is adherent to the King's enemies. But we think there is another offence, and that these words must mean something more than that. We think that the meaning of these words is this: *'giving aid and comfort to the King's enemies' are words in apposition; they are words to explain what is meant by being adherent to,* and we think that if a man be adherent to the King's enemies in his realm by giving to them aid or comfort in his realm, or if he be adherent to the King's enemies elsewhere, he is equally adherent to the King's enemies, and if he is adherent to the King's enemies, then he commits the treason which the statute of Edward III defines." (Italics added: Ed.)

The case of Joyce, the notorious 'Lord Haw-haw', cited above, in which it was held that the acceptance of the protection of a British passport imposed a duty of allegiance, may also be cited on the question of intent. The following instruction was given to the jury, (quoted at p.379):

> "I think that is the whole of the very short material upon which you have to come to the conclusion as to whether or not it has been proved to your satisfaction, beyond all reasonable doubt, that during the period in question this man adhered to the King's enemies, comforted and aided them *with intent to assist them, and that he did so voluntarily.*" (Italics added: Ed.)

In *R. v. AHLERS,* [1915] 1 K.B.616, the accused was charged with adhering to the King's enemies by aiding and comforting them. He was a naturalized British subject who acted as a consul for the German government. In August, 1914, when a state of war existed between Great Britain and Germany, he assisted German subjects to return to Germany. His defence was that he believed that under international law the nationals of belligerent countries were allowed a certain time to return to their own country if they wished, and that he had had no evil intent in assisting Germans to do so. It was held that the jury should have been told that they must consider whether the appellant's acts were

OLD CODE:

Section 77—continued

(a) within Canada levies war against His Majesty in company with any of the subjects or citizens of any foreign state or country at peace with His Majesty; or

(b) enters Canada in company with any such subjects or citizens with intent to levy war against His Majesty, or to commit any such offence therein; or

(c) with intent to aid and assist, joins himself to any person who has entered Canada with intent to levy war against His Majesty, or to commit any such offence in Canada;

is guilty of an indictable offence and liable to suffer death.

78. Every one is guilty of an indictable offence and liable to imprisonment for life who forms,

(a) an intention to depose His Majesty from the style, honour and royal name of the Imperial Crown of the United Kingdom of Great Britain and Ireland, or of any other of His Majesty's dominions or countries; or

(b) an intention to levy war against His Majesty within any part of the said United Kingdom, or of Canada, in order by force or constraint to compel him to change his measures or counsels, or in order to put any force or constraint upon or in order to intimidate or overawe both Houses or either House of Parliament of the United Kingdom or of Canada; or

(c) an intention to move or stir any foreigner or stranger with force to invade the said United Kingdom, or Canada, or any other of His Majesty's dominions or countries under the authority of His Majesty;

and manifests any such intention by conspiring with any person to carry it into effect, or by any other overt act, or by publishing any printing or writing.

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done *with the intention of assisting the King's enemies,* or whether he acted without evil intention.

The following Canadian cases bear upon the same point:

R. v. SCHAEFER(1918), 31 C.C.C.22 (Que. C.A.). This decision related to the sufficiency of the charge. However, there are passages in the judgment which support the proposition that an intent to assist the enemy must be established. Lavergne, J., at p.23:

> "The charge of overt acts not having been related or connected with any hostile intention or action the charge must fail."

Cross, J., at p.27:

> "Quite apart from what is above set forth, it may be added that, inasmuch as the Code declares that treason is (amongst other things) 'assisting any public enemy at war with His Majesty in such war by any means whatever', it cannot be successfully pretended that 'any means whatever' must mean means, the recital of which would set forth all the ingredients of treason. It appears to me that the overt act might, as suggested at the hearing, consist in some quite colorless act such as sending food stuffs to Spain, provided, of course, *that it be charged as having been done in furtherance of the treasonable project.*" (Italics added: Ed.)

Section 46—*continued*

Carroll, J., at p.28:

"We are told that an intention of aiding the enemy must be proved against the accused and that this intention is not clearly shown from the established facts.

Intention is deduced from acts, and the whole question being submitted to the jury, it was within their competence to decide whether the facts proved constitute an act of treason.

When the matter came before us the first time, we decided that it was not one of those cases where the Crown had adduced no evidence in support of the charge. It was a question of facts uncontradicted by the accused, and creating a presumption against him. Schaefer had only to have the witnesses for the defence heard, or to be heard himself, to repel the presumption against him."

R. v. BLEILER(1917), 28 C.C.C.9.

This was a case in which the accused endeavoured to get an inventor to sell an invention to Germany in order that it could be used in the war between Germany and Britain. The indictment alleged intent. Harvey, C.J.A., at p.13:

"The accused is charged not merely with counselling and assisting Hedenstrom, but he is charged with informing the German Emperor of the device and counselling him and his agents to acquire it. That was not merely attempting to assist the enemy but was assisting the enemy with advice and information which might have been of value and which the jury on the evidence could conclude *that he intended to be of value.*" (Italics added: Ed.)

R. v. SNYDER(1915), 24 C.C.C.101 (Ont. C.A.), was a case in which a trap was laid for the accused by inducing him to agree to ferry enemy aliens across the Niagara River to the United States whence they might proceed to join the enemy forces. The enemy aliens had no knowledge of the plan but were merely being used for the purposes of the trap. Meredith, C.J.O., at p.110:

"Surely to assist another involves the idea of a desire, or at least a willingness to be assisted on the part of the person who is said to have been assisted; and there was neither, according to the uncontradicted testimony, and that, too, elicited from the witnesses called on the part of the prosecution."

Although the accused in the case of *R. v. MAZERALL*(1946), 86 C.C.C.321, one of the cases that followed the Report of the Royal Commission on Espionage in that year, was not charged with treason, the following, which appears at p.334 is relevant to clauses (1)(c) and (f) of s.46:

"It is objected by counsel for the appellant that there is no evidence to support a finding that the appellant was a party to a conspiracy for the purposes charged in the indictment, that is, for purposes prejudicial to the safety or interests of the State. There was first the evidence of one Gouzenko . . . describing in considerable detail certain activities . . . which had for their purpose the obtaining and communicating . . . of information in respect to military, naval and air force arrangements in Canada, inventions, munitions of war, developments in radio and radar, and other matters. It is true that the appellant did not

OLD CODE:

74. (2) Every one who commits treason is guilty of an indictable offence and liable to suffer death.

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

(a) Treason, Part II, section seventy-four;

. . . . . .

take an active part in all these matters, and probably did not know the full extent of the conspirators' activities. There is, however, ample evidence that he knew of the purpose in the carrying out of which he was asked to take a part, ... The secret and undercover methods adopted, the care to avoid discovery of what was going on, and of who were actively participating, support an inference that a jury could reasonably draw that the appellant well knew of the existence of a conspiracy that went beyond his own part in it, and that it was of an unlawful character, as charged: . . ."

PUNISHMENT.—Corroboration.

47. (1) Every one who commits treason is guilty of an indictable offence and is liable

(*a*) to be sentenced to death if he is guilty of an offence under paragraph (*a*), (*b*) or (*c*) of subsection (1) of section 46;

(*b*) to be sentenced to death or to imprisonment for life if he is guilty of an offence under paragraph (*d*), (*f*) or (*g*) of subsection (1) of section 46;

(*c*) to be sentenced to death or to imprisonment for life if he is guilty of an offence under paragraph (*e*) or (*h*) of subsection (1) of section 46, committed while a state of war exists between Canada and another country; or

(*d*) to be sentenced to imprisonment for fourteen years if he is guilty of an offence under paragraph (*e*) or (*h*) of subsection (1) of section 46, committed while no state of war exists between Canada and another country.

(2) No person shall be convicted of treason upon the evidence of only one witness, unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.

Subsec.(1) is a modification of the former s.74(2). With reference to the distinction in penalties between treason in time of war and treason when no war exists, it may be remarked that some European countries notably opposed to capital punishment have re-introduced it for 'quisling' crimes and collaboration. This is notably true of the Netherlands (1944), Norway(1945), and Denmark as lately as 1952. The others have it for treason in some form or other, especially in time of war, and although what is included in treason may vary from one country to another, the references to collaboration are clear enough.

Subsec.(2) is from the former s.1002.

Section 47—*continued*

See also s.48 (limitation), s.55 (overt acts), s.413 (jurisdiction), s.464 (bail)and s.492(4) (indictment).

LIMITATION.—Information for treasonable words.

48. (1) No proceedings for an offence of treason as defined by paragraph *(d)* of subsection (1) of section 46 shall be commenced more than three years after the time when the offence is alleged to have been committed.

(2) No proceedings shall be commenced under section 47 in respect of an overt act of treason expressed or declared by open and considered speech unless

***(a)* an information setting out the overt act and the words by which it was expressed or declared is laid under oath before a justice within six days after the time when the words are alleged to have been spoken, and**

***(b)* a warrant for the arrest of the accused is issued within ten days after the time when the information is laid.**

Subsec.(1) comes from the former s.1140(1)(a), s.551(1)(a) in the Code of 1892, but with the modification that under the new section the limitation applies only to s.46(1)(d). The justification for retaining it in that respect lies in the fact, that apart from the consideration that it is desirable for offences to be prosecuted promptly if they are to be prosecuted at all, political ideas change so that a man who, at one stage of his career may be rebellious or at least seditious, may afterwards come to be regarded as a patriotic statesman. An illustration in principle may be drawn from the Winnipeg general strike of 1919. Some of the men engaged in it later occupied important public positions. See *R. v. RUSSELL*(1920), 33 C.C.C.1.

Subsec.(2) is the former s.1140(2); s.551(2) in the Code of 1892.

By 'overt act' is meant any act manifesting the criminal intention or tending to accomplish the criminal object in respect whereof the indictment is framed: Archbold, Cr.Pl., 24 ed. p.1041, citing *R. v. THISTLEWOOD*(1820), 33 State Tr.682.

Prohibited Acts.

ACTS INTENDED TO ALARM HER MAJESTY OR BREAK PUBLIC PEACE.

49. Every one who wilfully, in the presence of Her Majesty,

***(a)* does an act with intent to alarm Her Majesty or to break the public peace, or**

***(b)* does an act that is intended or is likely to cause bodily harm to Her Majesty,**

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

This is the former s.80 expressed in general terms. The maximum penalty has been increased from seven to fourteen years and the penalty of whipping omitted. It was s.71 in the Code of 1892 and s.80 in the

OLD CODE:

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

(a) after the expiration of three years from the time of its commission if such offence be

(i) treason, except treason by killing His Majesty, or where the overt act alleged is an attempt to injure the person of His Majesty—section seventy-four,

(ii) treasonable offences—section seventy-eight,

. . . . . .

(2) No person shall be prosecuted, under the provisions of section seventy-four or seventy-eight of this Act, for any overt act of treason expressed or declared by open and advised speaking unless information of such overt act, and of the words by which the same was expressed or declared, is given upon oath to a justice within six days after the words are spoken and a warrant for the apprehension of the offender is issued within ten days after such information is given.

80. Every one is guilty of an indictable offence and liable to seven years' imprisonment, and to be whipped once, twice or thrice as the court directs, who

(a) wilfully produces, or has, near His Majesty, any arm or destructive or dangerous thing with intent to use the same to injure the person of, or to alarm His Majesty; or

(b) wilfully and with intent to alarm or to injure His Majesty or to break the public peace,

(i) points, aims or presents, or attempts to point, aim or present, at or near His Majesty, any firearm, loaded or not, or any other kind of arm,

(ii) discharges or attempts to discharge at or near His Majesty any loaded arm,

(iii) discharges or attempts to discharge any explosive material near His Majesty,

(iv) strikes, or strikes at, or attempts to strike, or strike at, His Majesty in any manner whatever,

(v) throws, or attempts to throw, anything at or upon His Majesty.

E.D.C. Its origin appears in the following quotation from Stephen's History, Vol. II, p.290:

> "The only offence against the King personally, other than high treason, known to the common law, was that of contempt, either of his person or of his authority. I have no doubt that if any such offence had taken place in early times, in a form gross enough to attract special attention, it would have been punished with cruel severity. Probably a blow given to the king's person would have been interpreted to be high treason.
>
> It is remarkable that it did not become necessary to make specific statutory provision for personal insults to the sovereign till the reign of the most popular monarch who ever sat on the throne of this country had lasted for several years. In the early part of Her Majesty's reign, two foolish boys, Oxford and Francis, fired pistols at the Queen, loaded or not.

Section 49—*continued*

One was, with cruel mercy, acquitted of high treason on the ground of insanity, and though unquestionably sane was confined in criminal lunatic asylums for upwards of thirty years. The other was convicted and sentenced to death, but his sentence was commuted to transportation for life. Soon afterwards (in July 1842) the Act 5 and 6 Vict., c.51, was passed, which provides for such offences a maximum punishment of seven years' penal servitude and whipping. There have been several prosecutions under it."

ASSISTING ALIEN ENEMY TO LEAVE CANADA.—Omitting to prevent treason.—Punishment.

50. (1) Every one commits an offence who

(a) **incites or wilfully assists a subject of**

(i) a state that is at war with Canada, or

(ii) a state against whose forces Canadian forces are engaged in hostilities, whether or not a state of war exists between Canada and the state whose forces they are,

to leave Canada without the consent of the Crown, unless the accused establishes that assistance to the state referred to in subparagraph (i) or the forces of the state referred to in subparagraph (ii), as the case may be, was not intended thereby, or

(b) **knowing that a person is about to commit treason does not, with all reasonable dispatch, inform a justice of the peace or other peace officer thereof or make other reasonable efforts to prevent that person from committing treason.**

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

This comes from the former s.76 of which cl.(b) is omitted as being covered by s.406. S.76(b) and (c) were s.67 in the Code of 1892 and s.78 in the E.D.C. S.76(c) was added in 1915.

Par. (1)(a)(ii) is new and adapts to this section the provision in s.46(1)(c).

See note to s.121 as to misprision. S.50(1)(b) and s.361(2)(b) are the only instances in which it is an offence under the Code.

In *R.* v. *OMA*(1915), 25 C.C.C.73 the following appears with reference to s.50(1)(a):

"I instructed the jury that where the subject of a foreign state at war with His Majesty intended to leave Canada and started for the boundary line to carry out such intention, he was in the act of leaving Canada on every part of the journey for that purpose, and that if the accused, knowing a subject had such intention, did any act furthering to that intention, he was assisting such subject to leave Canada."

Conviction affirmed. See also *R. v. AHLERS*, [1915]1 K.B.616, cited under s.46.

See also s.55 (overt acts), ss.463,464 (bail), s.492(4) (indictment) and s.510(9) (amending indictment).

OLD CODE:

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

(a) incites or assists any subject of any foreign state or country at war with His Majesty to leave Canada without the consent of the Crown, unless the person accused can prove that assistance to the enemy was not intended, and provided that such inciting or assisting do not amount to treason;

(b) becomes an accessory, after the fact, to treason; or

(c) knowing that any person is about to commit treason does not, with all reasonable despatch, give information thereof to a justice of the peace, or use other reasonable endeavours to prevent the commission of the same.

79. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who confederates, combines or conspires with any person to do any act of violence in order to intimidate, or to put any force or constraint upon, any legislative council, legislative assembly or house of assembly.

509A. (1) Every one who does a prohibited act for a purpose prejudicial to

(a) the safety or interests of Canada; or

(b) the safety or security of the naval, army or air forces of any State other than Canada that are lawfully present in Canada

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

(2) In this section "prohibited act" means any act or omission that

(a) impairs the efficiency or impedes the working of any vessel, vehicle, aircraft, machinery, apparatus or other thing; or

(b) causes property, by whomsoever it may be owned, to be lost, damaged, or destroyed.

INTIMIDATING PARLIAMENT OR LEGISLATURE.

51. Every one who does an act of violence in order to intimidate the Parliament of Canada or the legislature of a province is guilty of an indictable offence and is liable to imprisonment for fourteen years.

This comes from the former s.79 which was s.70 in the Code of 1892; s.4 of the *Treason Act*, R.S.C.1886, c.146, and s.5 of 31 Vict. c.71. The element of conspiracy is not continued as conspiracy to commit an indictable offence is covered by s.408(d).

As to other pertinent sections see note to s.50 and s.413 (jurisdiction).

SABOTAGE.—"Prohibited act."—Saving.

52. (1) Every one who does a prohibited act for a purpose prejudicial to

(*a*) the safety, security or defence of Canada, or

(*b*) the safety or security of the naval, army or air forces of any state other than Canada that are lawfully present in Canada,

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

Section 52—*continued*

(2) In this section, "prohibited act" means an act or omission that

(a) **impairs the efficiency or impedes the working of any vessel, vehicle, aircraft, machinery, apparatus or other thing, or**

(b) **causes property, by whomsoever it may be owned, to be lost, damaged or destroyed.**

(3) No person does a prohibited act within the meaning of this section by reason only that

(a) **he stops work as a result of the failure of his employer and himself to agree upon any matter relating to his employment,**

(b) **he stops work as a result of the failure of his employer and a bargaining agent acting on his behalf to agree upon any matter relating to his employment, or**

(c) **he stops work as a result of his taking part in a combination of workmen or employees for their own reasonable protection as workmen or employees.**

(4) No person does a prohibited act within the meaning of this section by reason only that he attends at or near or approaches a dwelling house or place for the purpose only of obtaining or communicating information.

This is the former s.509A that was enacted in 1951, c.47, s.18, with some important changes. Subsecs.(3) and (4) are new, the former referring to a lawful strike, and the latter to lawful picketing, as to which see also s.366(2).

The words "safety or interests of Canada" which appeared in cl.(1)(a) were objected to in Parliament as being vague and too wide, and the words "safety or defence of Canada" were substituted for them. It is submitted, however, that the quotations which follow are relevant to the clause as it now appears. The Report of the Royal Commission on Espionage, 1946, p.618, says of a category which it describes as economic information:

"Regarding the evaluation of this material, we will say only that this information appears to have been such as would be designed to facilitate detailed estimates of Canada's post-war economic and military potential. Parts of this information could also be useful in connection with possible sabotage operations. . . .

Again, Canadian citizenship documents . . . were sought for illegal purposes and in some cases obtained. . . . Such planted agents could in time be used not only for espionage but for sabotage, leadership of subversive political groups, and other purposes."

And in *ROSE v. R.*(1946), 88 C.C.C.114, at p.144, there is reference to

"the strict, rigid and necessary rule that the state, first and foremost, owes to its own citizens, independently of its foreign duties, to assure its own security and to repress crimes which its own nationals might commit against the King and against the security of the country."

As to other pertinent sections see note to s.50 and s.202.

OLD CODE:

81. Every one is guilty of an indictable offence and liable to imprisonment for life, who for any traitorous or mutinous purpose, endeavours to seduce any person serving in His Majesty's forces by sea, land or air from his duty and allegiance to His Majesty, or to incite or stir up any such person to commit any traitorous or mutinous practice.

82. Every one who aids, assists, harbours or conceals a person who he knows is a deserter or an absentee without leave from the Canadian Forces is guilty of an offence and liable on summary conviction to a fine not exceeding five hundred dollars but no proceedings shall be instituted under this section without the consent of the Attorney-General of Canada.

847. Every indictment for treason, or for an offence against any of the sections, seventy-six to eighty-six inclusive, shall state overt acts, and no evidence shall be admitted of any overt act not stated unless it is otherwise relevant as

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INCITING TO MUTINY.

53. Every one who

***(a)* attempts, for a traitorous or mutinous purpose, to seduce a member of the Canadian Forces from his duty and allegiance to Her Majesty, or**

***(b)* attempts to incite or to induce a member of the Canadian Forces to commit a traitorous or mutinous act,**

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

ASSISTING DESERTER.

54. Every one who aids, assists, harbours or conceals a person who he knows is a deserter or absentee without leave from the Canadian Forces is guilty of an offence punishable on summary conviction, but no proceedings shall be instituted under this section without the consent of the Attorney General of Canada.

Ss.53 and 54 are designed to cover the former ss.81 and 82, retaining so much of them as are not covered by the *National Defence Act*. They were ss.72 and 73 in the Code of 1892. S.81 was s.82 in the E.D.C. These penal provisions come originally from 37 Geo.III, c.70 (Imp.), of which the preamble reads:

"Whereas divers wicked and evil-disposed persons, by the publication of written or printed papers, and by malicious and advised speaking, have of late industriously endeavoured to seduce persons serving in his Majesty's forces by sea and land from their duty and allegiance to his Majesty, and to incite them to mutiny and disobedience," etc.

The death penalty for these offences was abolished in 1837, by 7 Wm. IV and 1 Vict., c.91. In *R. v. FULLER*(1797), 1 Bos. & P.180, it was held that accused's knowledge of B's being a soldier was implied in the words "endeavouring to seduce." In *R. v. TIERNEY*(1804), Russ. & Ry. 74, a sailor in sick hospital and not entitled to pay was held to be in His Majesty's service.

As to other pertinent sections see note to s.50.

EVIDENCE OF OVERT ACTS.

55. In proceedings for an offence against any provision in section

Section 55—*continued*

47 or sections 49 to 53, no evidence is admissible of an overt act unless that overt act is set out in the indictment or unless the evidence is otherwise relevant as tending to prove an overt act that is set out therein.

This is the former s.847(1). It was s.614(1) in the Code of 1892. See notes to s.46, especially reference to *R. v. SCHAEFER*(1918), 31 C.C.C. 22.

RESISTING EXECUTION OF SEARCH WARRANT.

56. Every one who resists the execution of a warrant that authorizes a building to be broken open for the purpose of searching for a deserter or an absentee without leave from the Canadian Forces is guilty of an offence punishable on summary conviction.

This is the former s.83 as re-enacted 1951, c.47, s.5, and comes from s.74 of the Code of 1892 and R.S.C.1886, c.169, s.7.

This section was complementary to the former s.657 which was repealed by 1951, c.47, s.21. It may be noted, however, that s.202 of the *National Defence Act* authorizes the issue of a justice's warrant to apprehend deserters or absentees without leave. Hals. (1st ed.) vol. 9, p.309, citing Foster's Crown Cases, pp.136,320, and *BURDETT v. ABBOTT* (1811), 14 East 1, at pp.158,162, says that: "A constable having a warrant to arrest a person may after demanding and being refused admittance break open doors to effect an arrest."

OFFENCES IN RELATION TO R.C.M. POLICE.

57. Every one who wilfully

***(a)* procures, persuades or counsels a member of the Royal Canadian Mounted Police to desert or absent himself without leave,**

***(b)* aids, assists, harbours or conceals a member of the Royal Canadian Mounted Police who he knows is a deserter or absentee without leave, or**

***(c)* aids or assists a member of the Royal Canadian Mounted Police to desert or absent himself without leave, knowing that the member is about to desert or absent himself without leave,**

is guilty of an offence punishable on summary conviction.

This is the former s.84. It was s.75 in the Code of 1892. Its provisions first came into legislation in 52 Vict., c.25, s.4, as an amendment to the *Mounted Police Act*. It was stated (Hansard 1889, vol. II, p.1709) that it was "merely for the improvement of the discipline of the force" but it was removed to the Code presumably because it dealt with the public and not with members of the force as such.

PASSPORTS.

FALSE STATEMENT TO PROCURE PASSPORT.—"Passport."

58. (1) Every one who, while in or out of Canada, for the purpose of procuring a passport or a visa thereof or an endorsement thereon for himself or any other person, makes a written or verbal statement that he knows is false or misleading is guilty of an indictable offence and is liable to imprisonment for two years.

OLD CODE:

Section 847—continued

tending to prove some overt act stated.

(2) The power of amending indictments in this Part contained shall not extend to authorize the court to add to the overt acts stated in the indictment.

83. Every one who resists the execution of a warrant that authorizes a building to be broken open for the purpose of searching for a deserter or an absentee without leave from the Canadian Forces is guilty of an offence and liable on summary conviction to a fine not exceeding two hundred dollars.

84. Every one who

(a) procures, persuades or counsels a member of the Royal Canadian Mounted Police to desert or absent himself without leave;

(b) aids, assists, harbours or conceals a member of the Royal Canadian Mounted Police whom he knows to be a deserter or absent without leave; or

(c) aids or assists a member of the Royal Canadian Mounted Police to desert or absent himself without leave, knowing that the member is about to desert or absent himself without leave,

is guilty of an offence and liable on summary conviction to a fine not exceeding five hundred dollars or to imprisonment for six months or to both fine and imprisonment.

405A. Every one is guilty of an indictable offence and liable to two years' imprisonment or to a fine of five hundred dollars, or both such imprisonment and fine, who makes a statement, whether in writing or verbally, which is to his knowledge untrue or misleading, for the purpose of procuring a passport or a visa thereof or an endorsement thereon, whether for himself or any other person.

405C. (1) Every one who, for the purpose of procuring a Canadian passport or a visa thereof or endorsement thereon, whether for himself or any other person, while outside of Canada makes a statement in writing or verbally to any person authorized to issue Canadian passports outside of Canada which is to his knowledge untrue or misleading is guilty of an indictable offence and liable to a fine of five hundred dollars or imprisonment for a term of two years or both fine and imprisonment.

(2) In this section and in section four hundred and five A, "passport" includes any document issued by or under the authority of the Department of External Affairs for the purpose of identifying the holder thereof and also an emergency certificate issued in lieu of a passport by a person duly authorized to issue Canadian passports outside of Canada.

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(2) In this section, "passport" includes

(a) a document issued by or under the authority of the Secretary of State for External Affairs for the purpose of identifying the holder thereof, and

(b) an emergency certificate authorized by the Secretary of State for External Affairs to be issued in lieu of a passport by a person duly authorized to issue passports outside of Canada.

FRAUDULENT USE OF CERTIFICATE OF CITIZENSHIP.—"Certificate of citizenship."—"Certificate of naturalization."

59. (1) Every one who

(a) uses a certificate of citizenship or a certificate of natural-

Section 59—*continued*

ization for a fraudulent purpose, or

(b) **being a person to whom a certificate of citizenship or a certificate of naturalization has been granted, knowingly parts with the possession of that certificate with intent that it should be used for a fraudulent purpose,**

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

(2) In this section, "certificate of citizenship" and "certificate of naturalization", respectively, mean a certificate of citizenship and a certificate of naturalization as defined by the *Canadian Citizenship Act*.

S.58 combines the former ss.405A and 405C which came into the Code as 1935, c.56, s.5 and 1947, c.55, s.14 respectively. S.59 reproduces the former s.405B, which came into the Code as 1938, c.44, s.20, with such changes as are made necessary by the enactment of the *Canadian Citizenship Act* and the repeal of the *Naturalization Act*.

Although the application of these sections is not limited, their primary importance is in relation to the "cold war," as to which see the quotation from the Report of the Royal Commission on Espionage, under s.52 *ante*, and in that view the offences are properly regarded as offences against the State.

See also *R. v. BRAILSFORD*(1905), 75 L.J.K.B.64, noted under s.120, *post*.

SEDITION.

"SEDITIOUS WORDS."—"Seditious libel."—"Seditious conspiracy."—"Seditious intention."

60. (1) Seditious words are words that express a seditious intention.

(2) A seditious libel is a libel that expresses a seditious intention.

(3) A seditious conspiracy is an agreement between two or more persons to carry out a seditious intention.

(4) Without limiting the generality of the meaning of the expression "seditious intention", every one shall be presumed to have a seditious intention who

(a) **teaches or advocates, or**

(b) **publishes or circulates any writing that advocates, the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada.**

EXCEPTION.

61. Notwithstanding subsection (4) of section 60, no person shall be deemed to have a seditious intention by reason only that he intends, in good faith,

(a) **to show that Her Majesty has been misled or mistaken in her measures,**

OLD CODE:

405B. Every one is guilty of an indictable offence and liable to two years' imprisonment or to a fine of five hundred dollars, or both such imprisonment and fine, who

(a) by any false pretence uses or attempts to use a certificate of naturalization, as defined in the Naturalization Act, for any fraudulent purpose;

(b) being the person to whom a certificate of naturalization has been granted, knowingly parts with the possession of that certificate with the intent that it be used for any fraudulent purpose.

133. Seditious words are words expressive of seditious intention.

(2) A seditious libel is a libel expressive of a seditious intention.

(3) A seditious conspiracy is an agreement between two or more persons to carry into execution a seditious intention.

(4) Without limiting the generality of the meaning of the expression "seditious intention" everyone shall be presumed to have a seditious intention who publishes, or circulates any writing, printing or document in which it is advocated, or who teaches or advocates, the use, without the authority of law, of force, as a means of accomplishing any governmental change within Canada.

133A. No one shall be deemed to have a seditious intention only because he intends in good faith,—

(a) to show that His Majesty has been misled or mistaken in his measures; or

(b) to point out errors or defects in the government or constitution of the United Kingdom, or of any part of it, or of Canada or any province thereof, or in either House of Parliament of the United Kingdom or of Canada, or in any legislature, or in the administration of justice; or to excite His Majesty's subjects to attempt to procure, by lawful means, the alteration of any matter in the state; or,

(c) to point out, in order to their removal, matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects.

134. Every one is guilty of an indictable offence and liable to imprisonment for a term of not more than seven years, who speaks any seditious words or publishes any seditious libel or is a party to any seditious conspiracy.

135. Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful justification, publishes any libel tending to degrade, revile or expose to hatred and contempt in the estimation of the people of any foreign state, any prince or person exercising sovereign authority over such state.

(b) **to point out errors or defects in**

(i) the government or constitution of Canada or a province,

(ii) the Parliament of Canada or the legislature of a province, or

(iii) the administration of justice in Canada,

(c) **to procure, by lawful means, the alteration of any matter of government in Canada, or**

(d) **to point out, for the purpose of removal, matters that produce or tend to produce feelings of hostility and ill-will between different classes of persons in Canada.**

PUNISHMENT OF SEDITIOUS OFFENCES.

62. Every one who

(a) **speaks seditious words,**

(b) **publishes a seditious libel, or**

(c) **is a party to a seditious conspiracy,**

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

Ss.60,61, and 62 come from ss.133,133A,134 and 135; ss.123 and 124 in the Code of 1892, and ss.102 and 103 in the E.D.C.

Comparison will show that in general effect ss.60,61 and 62 do not differ from former sections133,133A and 134 except as to penalty, which in 1951 was raised to seven years and which in the new Code is raised to fourteen years.

The Criminal Code Bill of 1891 contained in cl.122 a definition as follows:

"A seditious intention is an intention —

To bring into hatred or contempt, or to excite disaffection against, the person of Her Majesty, or the Government and Constitution of the United Kingdom or any part of it, or of Canada or any Province thereof, or either House of Parliament of the United Kingdom, or of Canada or any Legislature, or the administration of justice; or

To excite Her Majesty's subjects to attempt to procure, otherwise than by lawful means, the alteration of any matter in the State; or

To raise discontent or disaffection amongst Her Majesty's subjects; or

To promote feelings of ill-will and hostility between different classes of such subjects."

There was debate on this clause (Hansard, 1892, vol. 2, Columns 2829 to 2837), the concluding words of which are as follows:

"MR. MULOCK: I altogether oppose this kind of legislation, and I think the Minister will be consulting public opinion if he drops the subsections interfering with freedom of speech except so far as they are necessary to the maintenance of our institutions.

MR. DAVIES (P.E.I.): The common law provides for that.

MR. MULOCK: I do not know enough as to what the common law provides to be able to state, but I will oppose anything which will prevent a man from expressing his views in regard to any matter against the state or in the state."

The section was postponed and later (*ibid.*, Column 4344) Sir John Thompson said:

"I think the amendment I propose will meet all views about that. I propose to strike out all the words of the section down to line twenty-two including the words 'Provided that' in clause 2 of subsection (d); so that we shall make no definition of seditious intention, but will simply go on to say what shall not be seditious, leaving the definition of sedition to common law. The section will begin with: 'No one shall be' on the twenty-second line."

The effect of this was to strike out the definition.

The clause as it appeared in the Criminal Code Bill was taken from clause 102 of the English Draft Code of 1878. The exemption contained in Code section 133A, (now sec.61), was repealed in 1919 by chapter 46,

s.4, but was restored in 1930. This was related to the controversial s.98. Ss.133 and 134 were referred to at length by the Hon. Ernest Lapointe, then Minister of Justice, in a debate on the repeal of s.98 (Hansard 1936, Vol.4, p.3897). At p.3899, he said that the common law relating to sedition is already in our *Criminal Code* and always has been. After quoting ss.133 and 134 he went on as follows:

"This crime of sedition has been discussed in Great Britain on many, many occasions. The commissioners who wrote the English draft code inserted a definition of some kind as to what constitutes sedition and what constitutes seditious words or seditious intentions. But after prolonged debate in the British parliament it was decided that it would be better to keep the word 'sedition' not defined expressly but rather left there to meet all occasions and to apply to all cases where order is disturbed or where there may be danger in the land. When our own criminal code was enacted the same debate took place. There were some who wanted to define the offence of sedition more specifically but the parliament of Canada of that time, in its judgment, thought it better to follow the English practice and to remain with the common law operation in that regard.

May I read what constitutes sedition in the English and Empire Digest, 15th volume, at page 633:

'An intention to excite ill-will between different classes of Her Majesty's subjects may be seditious intention; whether or not it is so in any particular case must be decided upon by the jury after taking into consideration all the circumstances of the case. Sedition embraces everything, whether by word, deed, or writing, which is calculated to disturb the tranquillity of the state, and lead ignorant persons to subvert the government and laws of the empire.

Where in a prosecution for uttering seditious words with intent to incite to riot, it is proved that previously to the happening of a riot, seditious words were spoken, it is a question for the jury whether or not such rioting was directly or indirectly attributable to the seditious words proved to have been spoken.

A meeting lawfully convened may become an unlawful meeting if during its course seditious words are spoken of such a nature as to produce a breach of the peace, and those who do anything to assist the speakers in producing upon the audience the natural effect of their words will be guilty of uttering seditious words as well as those who spoke the words.'

Then at page 634:

'Held: guilty of sedition and unlawful assembly; a speech urging the people to form themselves into unlawful associations, and inciting the insurrection, unlawful assemblies, breaches of the peace, and the forcible obstruction of the execution of the law is seditious, the circumstances of the time being such that the public peace is likely to be thereby endangered. A meeting convened to hear such a speech is an unlawful assembly so far as those are concerned who are parties to calling it or attending it for that purpose.'

MR. BENNETT: What court was that?

MR. LAPOINTE (Quebec East): This is the *KING v. JONES*(1848), 6 St.TR., N.S., 783. But it is the same thing throughout the history of

Section 62—*continued*

criminal law in England. There is a multiplicity of decisions to the same effect.

May I say here and now why I propose to add a few words to section 133. I do not think they are necessary, but it is merely to make it clearer that nobody can by words or writing preach the use of force to bring about governmental changes. I do it because in some of the judgments the courts seem to have required that it must be proved that the words or the teachings were strong enough to lead to disturbance of order and trouble. This is merely to make it absolutely clear that nobody should be allowed to teach the use of force to bring about change of government in Canada."

The concluding paragraph of this quotation refers to subsec.(4) of s.133 added by 1936, c.29, s.4 (now s.60(4)).

In the absence of a statutory definition of sedition it is necessary to return to the cases. In Canada, the leading case is *BOUCHER v. R.*, [1951]S.C.R.265, in which the principal question was whether or not the words "seditious intention" included an intention in all cases to incite to acts of violence or public disorder. It was held by Kerwin, Rand, Kellock and Estey, JJ., that public disorder is an element in all cases; by Taschereau, Cartwright, Fauteux, JJ., and (although doubtfully) by Locke, J., that it was an element in all cases except those relating to the administration of justice. Rinfret, C.J., was of opinion that public disorder was not an element in cases relating to the administration of justice or to the causing of disaffection. Extracts from the judgments are as follows. Rinfret, C.J., at p.275:

. . . "the advocating of force is not the only instance in which an accused could be found guilty of a 'seditious intention.' "

Kerwin, J., at p.283:

"The intention on the part of the accused which is necessary to constitute seditious libel must be to incite the people to violence against constituted authority or to create a public disturbance or disorder against such authority. . . . . An intention to bring the administration of justice into hatred or contempt or exert disaffection against it is not seditious unless there is also the intention to incite people to violence against it."

Taschereau, J., at p.283:

"Upon application a new hearing was granted and heard by the full court, and in view of the opinions now expressed by the majority, it is settled, I think, that generally speaking, the writings complained of must, in addition to being calculated to promote feelings of ill-will and hostility between different classes of subjects, be intended to produce disturbance or resistance to the lawful constituted authority.

But as pointed out by my brother Cartwright, there is another definition of seditious intention which I think must be accepted. I agree with him that an intention to bring the administration of justice into hatred or contempt or to excite disaffection against it, is a seditious intention."

Rand, J., at p.286:

"The test is not either the truth of the language or the innocence of the motive with which he publishes it. The test is this: was the

language used calculated, or was it not, to promote public disorder or physical force."

These words are taken from the judgment of Coleridge, J., in *R. v. ALDRED*(1909), 22 Cox, C.C.1.

Kellock, J., at p.286:

"It is noteworthy that the draft Code of the Royal Commissioners was not accepted by Parliament, and in my opinion, incitement to violence toward constituted authority, i.e. government in the broad sense, or resistance having the same object, is, upon the authorities, a necessary ingredient of the intention."

and at p.301:

"In my opinion, to render the intention seditious, there must be an intention to incite to violence or resistance or defiance for the purpose of disturbing constituted authority. I do not think there is any basis in the authorities for defining the crime on any lower plane."

and at p.303:

"At the present time, therefore, in England, matter of the character here in question, if made the subject of criminal process at all, appears to be treated as contempt of court, rather than as seditious libel. Such matters may, of course, be regarded from the standpoint of seditious libel if intention of the necessary character be established."

Estey, J., at p.315:

"I would clarify my previous reasons by adding that a seditious intention must be founded upon evidence of incitement to violence, public disorder or unlawful conduct, directed against His Majesty or the institutions of the Government . . . . . with great respect, I am of opinion that in all cases the intention to incite violence or public disorder or unlawful conduct against His Majesty or an institution of the State is essential."

Locke, J., at p.331:

"The question remains whether it is accurate to say that 'a seditious intention is an intention to excite disaffection against the administration of justice' as stated by Stephen . . . . Only if disaffection be construed as meaning resistance to or disobedience of the law or the authority of the State is it accurate, in my opinion.

I concur in the opinion of my brother Kellock that that portion of Stephen's definition which declares that 'to intend to promote feelings of ill-will and hostility between different classes of such subjects' is a seditious intention without more, is inadequate as a statement of the common law and I agree with his conclusion upon this aspect of the matter."

Cartwright, J., at p.333:

"The reasons of my brother Kellock bring me to the conclusion that the definition quoted above ought not to be accepted without qualification, and that before a writing can be held to disclose a seditious intention by reason of being calculated to promote feelings of ill-will and hostility between different classes of His Majesty's subjects it must further appear that the intended, or natural and probable, consequences of such promotion of ill-will and hostility is to produce disturbance or resistance to the authority of lawfully constituted government."

Section 62—*continued*

and at p.342:

"In my opinion at Common Law an intention to bring into hatred or contempt or to create disaffection against the administration of justice is a seditious intention and I do not find anything in the provisions of the Criminal Code to negative this view."

Fauteux, J.,—agrees with Cartwright, J.

BOUCHER v. R. was interpreted in *R. v. CARRIER*(1951), 104 C.C.C.75 at p.79, in the sense that there must be "either incitement of the people to violence against the constituted authority or creation of a public disorder against the said authority".

R. v. RUSSELL(1920), 33 C.C.C.1, has special reference to s.60(4). In that case, which arose out of the Winnipeg general strike of 1919, it was found that there was a seditious conspiracy which had as its ultimate object as disclosed in the public speeches of the accused, the overthrow of the existing government by revolution.

There has been recently a newspaper report (Toronto Globe and Mail, Dec. 5, 1953) of a case in which accused was convicted of sedition in Belfast. He was charged with saying, *inter alia*: "I believe in the use of force, the more the better, the sooner the better. That may be treason or sedition, call it whatever the hell you like."

The crime of seditious libel does not exist in the United States of America, but there is legislation aimed at those who advocate the overthrow of the government by force. The reader may be interested in referring to "the clear and present danger test" as applied there, especially in *DENNIS v. U.S.*(1951), 341 U.S.494, where the earlier cases are reviewed. It may not be out of place to compare with *R. v. RUSSELL*, *supra*, the following expressions of Chief Justice Vinson (at p.509):

"Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required."

See s.413 for jurisdiction to try charges under s.62.

OFFENCES IN RELATION TO MILITARY FORCES.—"Member of a force."

63. (1) Every one who wilfully

(*a*) interferes with, impairs or influences the loyalty or discipline of a member of a force,

(*b*) publishes, edits, issues, circulates or distributes a writing that advises, counsels or urges insubordination, disloyalty, mutiny or refusal of duty by a member of a force, or

(*c*) advises, counsels, urges or in any manner causes insubordination, disloyalty, mutiny or refusal of duty by a member of a force,

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

(2) In this section, "member of a force" means a member of

(*a*) the Canadian Forces, or

OLD CODE:

132. Every one is guilty of an indictable offence and liable to imprisonment for five years who wilfully
(a) interferes with, impairs or influences the loyalty or discipline of;
(b) publishes, edits, issues, circulates or distributes any writing that advises, counsels or urges insubordination, disloyalty, mutiny or refusal of duty by; or
(c) advises, counsels, urges or in any manner causes insubordination, disloyalty, mutiny or refusal of duty by
a member of the Royal Canadian Mounted Police, the Canadian Forces or the naval, army or air forces of a State other than Canada that are lawfully present in Canada.

87. An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when assembled as to cause persons in the neighbourhood of such assembly to fear, on reasonable grounds, that the persons so assembled will disturb the peace tumultuously, or will by such assembly needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously.
(2) Persons lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in such a manner as would have made their assembling unlawful if they had assembled in that manner for that purpose.
(3) An assembly of three or more persons for the purpose of protecting the house of any one of their number against persons threatening to break and enter such house in order to commit any indictable offence therein is not unlawful.

(*b*) the naval, army or air forces of a state other than Canada that are lawfully present in Canada.

This is the former s.132A as enacted by 1951, c.47, s.8, without the reference to the Royal Canadian Mounted Police. The reason for that deletion appears in the Proceedings of the Senate's Standing Committee on Banking and Commerce, Dec. 15-16, 1952, p.56: "We should, I think, very carefully distinguish between military forces and the Royal Canadian Mounted Police, which is not a military force, and should be kept a civilian force."

See s.57, *ante* (R.C.M.P.).

UNLAWFUL ASSEMBLIES AND RIOTS.

"UNLAWFUL ASSEMBLY."—Lawful assembly becoming unlawful.—Exception.

64. (1) An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when they are assembled as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that they

(*a*) will disturb the peace tumultuously, or

(*b*) will by that assembly needlessly and without reasonable cause provoke other persons to disturb the peace tumultuously.

Section 64—*continued*

(2) Persons who are lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in a manner that would have made the assembly unlawful if they had in that manner for that purpose.

(3) Persons are not unlawfully assembled by reason only that they are assembled to protect the dwelling house of any one of them against persons who are threatening to break and enter it for the purpose of committing an indictable offence therein.

This reproduces the former s.87. It was s.79 in the Code of 1892 and s.84 of the E.D.C. The Imperial Commissioners said of it (Report, p.20):

"The definition of an unlawful assembly in Part VI depends entirely on the common law.

The earliest definition of an unlawful assembly is in the Year Book 21 H.7,39. It would seem from it that the law was first adopted at a time when it was the practice for the gentry, who were on bad terms with each other, to go to market at the head of bands of armed retainers. It is obvious that no civilised government could permit this practice, the consequence of which was at the time that the assembled bands would probably fight, and certainly make peaceable people fear that they would fight. It was whilst the state of society was such as to render this a prevailing mischief that the earlier cases were decided; and consequently the duty of not provoking a breach of the peace has sometimes been so strongly laid down as almost to make it seem as if it was unlawful to take means to resist those who came to commit crimes. We have endeavoured in section 84 to enunciate the principles of the common law, although in declaring that an assembly may be unlawful if it causes persons in the neighbourhood to fear that it will needlessly and without reasonable occasion provoke others to disturb the peace tumultuously, we are declaring that which has not as yet been specifically decided in any particular case. The clause as to the defence of a man's house has been inserted because of a doubt expressed on the subject."

"RIOT."

65. A riot is an unlawful assembly that has begun to disturb the peace tumultuously.

This is the former s.88. It was s.80 in the Code of 1892 and s.85 of the E.D.C.

PUNISHMENT OF RIOTER.

66. Every one who takes part in a riot is guilty of an indictable offence and is liable to imprisonment for two years.

This is the former s.90. It was s.82 in the Code of 1892 and s.87 of the E.D.C.

Mere presence without some word or act to help or incite riotous conduct will not of itself make a person liable: *R. v. ATKINSON*(1869), 11 Cox, C.C.330.

It has been held in England that where speeches inciting to violence were made at a meeting and a riot followed as a consequence, the speak-

OLD CODE:

88. A riot is an unlawful assembly which has begun to disturb the peace tumultuously.

90. Every rioter is guilty of an indictable offence and liable to two years' imprisonment with hard labour.

89. Every member of an unlawful assembly is guilty of an indictable offence and liable to one year's imprisonment.

91. It is the duty of every sheriff, deputy sheriff, mayor or other head officer, and justice, of any county, city or town, who has notice that there are within his jurisdiction persons to the number of twelve or more unlawfully, riotously and tumultuously assembled together to the disturbance of the public peace, to resort to the place where such unlawful, riotous and tumultuous assembly is, and among the rioters, or as near to them as he can safely come, with a loud voice to command or cause to be commanded silence, and after that openly and with loud voice to make or cause to be made a proclamation in these words or to the like effect:—

"Our Sovereign Lord the King charges and commands all persons being assembled immediately to disperse and peaceably to depart to their habitations or to their lawful business, upon the pain of being guilty of an offence on conviction of which they may be sentenced to imprisonment for life.

*"*GOD SAVE THE KING."

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ers may be convicted as rioters although absent when the riot took place. *R. v. SHARPE*(1848), 3 Cox,C.C.288. But compare this with *R. v. STEWART*, quoted under s.22, *ante*.

PUNISHMENT OF MEMBER OF UNLAWFUL ASSEMBLY.

67. Every one who is a member of an unlawful assembly is guilty of an offence punishable on summary conviction.

This is the former s.89 altered to make the offence punishable on summary conviction. It was s.81 in the Code of 1892 and s.86 of the E.D.C.

READING PROCLAMATION.

68. A justice, mayor or sheriff or the lawful deputy of a mayor or sheriff who receives notice that, at any place within his jurisdiction, twelve or more persons are unlawfully and riotously assembled together, shall go to that place and, after approaching as near as safely he may do, if he is satisfied that a riot is in progress, shall command silence and thereupon make or cause to be made in a loud voice a proclamation in the following words or to the like effect:

Her Majesty the Queen charges and commands all persons being assembled immediately to disperse and peaceably to depart to their habitations or to their lawful business upon the pain of being guilty of an offence for which, upon conviction, they may be sentenced to imprisonment for life.

GOD SAVE THE QUEEN.

This comes from the former s.91. It was s.83(1) in the Code of 1892 and formed part of s.88 of the E.D.C. Note that the words "if he is satisfied that a riot is in progress" are new and that they emphasize the

Section 68—*continued*

fact that "reading the Riot Act" does not constitute the assembly a riot. There must be a riot before the proclamation can be read. This and the following section also had their statutory origin in 1 Geo. I, st.2, c.5.

See also s.32 (use of force) and s.33 (duty of peace officers).

PREVENTING PROCLAMATION.—Failure to disperse and depart.—Failure to depart.

69. Every one is guilty of an indictable offence and is liable to imprisonment for life who

(a) **opposes, hinders or assaults, wilfully and with force, a person who begins to make or is about to begin to make or is making the proclamation referred to in section 68 so that it is not made,**

(b) **does not peaceably disperse and depart from a place where the proclamation referred to in section 68 is made within thirty minutes after it is made, or**

(c) **does not depart from a place within thirty minutes when he has reasonable ground to believe that the proclamation referred to in section 68 would have been made in that place if some person had not opposed, hindered or assaulted, wilfully and with force, a person who would have made it.**

This comes from the former s.92. It was s.83(2) in the Code of 1892 and part of s.88 of the E.D.C. with the difference that the last mentioned reads "one hour" instead of "thirty minutes". The words "to the number of twelve" are not continued—three persons may constitute an unlawful assembly.

See also s.32 (use of force) and s.33 (duty of peace officers).

NEGLECT BY PEACE OFFICER.

70. A peace officer who receives notice that there is a riot within his jurisdiction and, without reasonable excuse, fails to take all reasonable steps to suppress the riot is guilty of an indictable offence and is liable to imprisonment for two years.

This is the former s.94. It was s.140 in the Code of 1892 and s.116 in the E.D.C. The words "peace officer" replace the former enumeration. As to such neglect or refusal by others, see s.110(b).

The nature of the offences of unlawful assembly and riot is described in the judgment in *R. v. JONES and SHEININ*(1931), 57 C.C.C. 81 in which convictions for the former offence were upheld on appeal. The following is quoted from the judgment:

> "It will be seen that to constitute the offence, (i.e. of unlawful assembly), there need be no intention on the part of any member of the assembly to commit any offence but it is the manner in which the assembly conducts itself that brings it within the purview of the section.
>
> "Suppose a party of three or more friends assemble to view a football match, quite innocently, and being dissatisfied with the conduct of a player or the referee but with the common purpose of showing their disapproval they conduct themselves in such a manner as to cause

OLD CODE:

92. All persons are guilty of an indictable offence and liable to imprisonment for life who,

(a) with force and arms wilfully oppose, hinder or hurt any person who begins or is about to make the said proclamation, whereby such proclamation is not made; or

(b) continue together to the number of twelve for thirty minutes after such proclamation has been made, or if they know that its making was hindered as aforesaid, within thirty minutes after such hindrance.

94. Every sheriff, deputy sheriff, mayor or other head officer, justice or other magistrate, or other peace officer, of any county, city, town, or district, who has notice that there is a riot within his jurisdiction, who, without reasonable excuse omits to do his duty in suppressing such riot, is guilty of an indictable offence and liable to two years' imprisonment.

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others in their vicinity reasonably to fear that they intend to assault somebody or otherwise 'disturb the peace tumultuously,' to use the words of the section, then they have committed a breach of the section and are liable to the penalty prescribed. But since in such a simple way an innocent assembly may become an unlawful one it is not, in itself, treated as a major offence, the penalty prescribed being only one year's imprisonment.

"It is quite a different thing from an unlawful association whose purpose is to bring about a change of government or other change by force . . . . . .

"The seriousness of the offence of which they were convicted lies rather in the probable or even possible consequences, in other words, what it may lead to.

"If an unlawful assembly goes a step further and proceeds to do what the persons in the neigborhood fear it may do, *viz*: 'disturb the peace tumultuously' it has become a riot (s.88) and the punishment for a rioter is 2 years but that is not all that is involved in it. In the case of a riot by twelve or more persons any sheriff, mayor, or justice who has notice of it is legally bound to do what is spoken of as 'read the riot act', in other words he has to call on them to disperse (s.91) and if they fail to disperse within 30 minutes they are guilty of an offence for which they may be imprisoned for life (s.92), but that is not the worst, for equally if they do not disperse the officer mentioned is legally bound to cause their arrest for which purpose he is entitled to call to his assistance whom he will, and if in the endeavour to arrest or disperse them any of the rioters are killed, such killing is excused (s.93), and moreover if the sheriff or other officer fails in his duty he is liable to be imprisoned for 2 years (s.94), and if anyone called in to assist fails to render such assistance he also is guilty of a crime and may be punished by one year's imprisonment (s.95)."

Concerning the delay and the duty of citizens generally, the following is quoted from *R. v. GORDON*(1781), 21 State Tr.485, at p.493, the trial of Lord George Gordon consequent upon the serious disturbances of which he was the instigator:

"It has been imagined, because the law allows an hour for the disper-

Section 70—*continued*

sion of a mob to whom the Riot Act has been read by the Magistrate, the better to support the civil authority, that during that period of time the civil power and the magistrate are disarmed, and are to remain quiet and passive. No such meaning was within view of the Legislature, nor does the operation of the Act warrant any such effect. The civil magistrates are left in possession of those powers which the law had given them before; if the mob collectively, or part of it, or any individual, within or before the expiration of that hour, attempts or begins to perpetrate an outrage amounting to felony, to pull down a house, or by any other act to violate the laws, it is the duty of all present, of whatever description they may be, to endeavour to stop the mischief and to apprehend the offender."

And on the last point it was held in *ST. PIERRE v. BOISSEAU*, [1952] Que. Q.B.292 that the defendants, as individuals, not only had a right to endeavour to suppress a riot, but that it was their duty to do so since all private citizens are in effect the agents of the Crown for that purpose.

There have been cases which fell directly within the sections dealing with riot and unlawful assembly, and there have been other cases in which these sections have been discussed incidentally. One of the latter sort arose during a strike in Alberta in which men were convicted upon charges of picketing laid under s.501 of the Code (*RENERS v. THE KING*(1926), 46 C.C.C.14). This case was carried to the Supreme Court of Canada and one of the Judges of that Court made the following comments:

"While it is explained, with remarkable agreement on the part of the striking miners, that the purpose of their assembly at and about the mine was peacefully to endeavour to persuade the miners who continued to work to quit the service of the company and join the new union, in order, as it is said, to maintain the standard of living, the character and purpose of this assembly is, I think, better evidenced by its acts and course of conduct than by the statements of its members as to what their intention was; and the numbers of men who assembled, their distribution about the premises, including the company's property, their attendance there by day and night, the fires, the shouting, their reception of the police, their threats and conduct when the police approached afford cogent evidence, not only of a nuisance but also of an unlawful assembly."

A case directly within the section dealing with unlawful assembly arose in 1930 when the accused led a parade of unemployed through the streets of Hamilton, Ontario (*R. v. PATTERSON*(1931), 55 C.C.C.218). The circumstances appear in the following extracts from the judgment on appeal affirming a conviction, at p.226:

"No physical violence doing bodily harm resulted, apparently because the police realised the wisdom of yielding to a crowd of men who were unarmed and apparently harmless. They did not themselves resist by force or violence. Had they done so the result might have been far otherwise. . . . . .

"Here no one suggests that these unemployed men intended any misconduct or uproar. They desired to impress the public with their need and to excite public sympathy, and so to obtain some relief in

their distress. Yet, when it was plain that they would not be allowed to march through the restricted area of the city by reason of the action of the police, they went too far when, as an assertion of their right to proceed with the parade, they undertook to force their way despite police opposition. That the accused knew that he was defying police authority and undertaking to assert his views as to his rights by force is very plain. He had announced at the meeting in the Hay Market his willingness to lead the throng, and stated there that, if there was any opposition leading to arrest, as he thought probable, he desired to be the one arrested.

"No matter how worthy the cause, or how clear the right to be asserted may be, our law requires the worthy cause to be advocated and the right to be asserted in a peaceable way, and not by riot and tumult. The provision of the Code prohibiting unlawful assemblies is for the purpose of drawing the line between a lawful meeting and an assembly, either unlawful in its inception or which is deemed to have become unlawful either by reason of the action of those assembled, or by reason of the improper action of others having no sympathy with the objects of the meeting."

The concluding words refer to a time in the early history of the Salvation Army when gangs calling themselves the 'Skeleton Army' set up a misguided opposition to its then novel methods (*BEATTY v. GILLBANKS*(1882), 9 Q.B.D.308).

In the case of *R. v. BEATTIE*(1931), 55 C.C.C.381, the accused was tried upon an indictment charging riot and unlawful assembly. He was acquitted upon the former, convicted upon the latter count, and appealed. The learned Chief Justice of Manitoba, delivering the judgment of the Court, said:

"I would say that there was here an unlawful assembly from the moment that two or three hundred unemployed, appealed to as 'red-blooded men' to go and enter the city hall which they knew would be opposed by the peace officers, began making their way across King St. in the manner described." . . . . . .

His Lordship added:

"Indeed with the rush of such a number of men 'kicking up an awful row,' yelling, swearing and one of them at least inciting to violence on the police, I cannot see that there was not decidedly at that moment and before the collision at the curb, a tumultuous disturbance of the peace under s. 88 and consequently a riot, ..."

It is in a special sense that the sections under discussion are directed towards the end that the peace be kept. That this is so was indicated in the Judge's charge to the jury in *R. v. GRAHAM*(1888), 16 Cox, C.C.420 in these words:

"Now mark what follows and ask yourselves whether it is not admirable good sense: For the law will not suffer persons to seek redress of their wrongs by a dangerous disturbance of the peace. Gentlemen, I tell you that is the law of England, and I ask you does it not commend itself to your common sense? It is not a royal right, it is not an actual right which you are entitled to enforce by violence. The cases are few indeed of that description, and I need not here allude to them . . . cases, that is, in which by the strong hand you may assert your right.

Section 70—*continued*

You have no business to redress private grievances by a dangerous disturbance of the public peace."

UNLAWFUL DRILLING.

ORDERS BY GOVERNOR IN COUNCIL.—General or special order.—Punishment.

71. (1) The Governor in Council may from time to time by proclamation make orders

***(a)* to prohibit assemblies, without lawful authority, of persons for the purpose**

(i) of training or drilling themselves,

(ii) of being trained or drilled to the use of arms, or

(iii) of practicing military exercises; or

***(b)* to prohibit persons when assembled for any purpose from training or drilling themselves or from being trained or drilled.**

(2) An order that is made under subsection (1) may be general or may be made applicable to particular places, districts or assemblies to be specified in the order.

(3) Every one who contravenes an order made under this section is guilty of an indictable offence and is liable to imprisonment for five years.

This is the former s.99, omitting the provision for publication, as to which see now the *Regulations Act*, R.S.C.1952, c.235. S.99 was ss.87 and 88 in the Code of 1892, and ss.92 and 93 in the E.D.C., and came from 60 George III & 1 Geo. IV, c.4, s.1.

In this connection it may be noted that the former ss.130, 131 and 132 which dealt with unlawful oaths, are not continued. Such oaths have a purpose beyond the mere taking or administering of them, and the sections added nothing to the crime of conspiracy, seditious or otherwise.

These provisions come from the *Unlawful Oaths Act*, 1797, 37 Geo. III, c.123 (Imp.). Like the provisions respecting unlawful drilling, that Act was one of a number passed for the repression of disturbances in the reign of that monarch. The preamble is set out in Archbold's Cr.Pl., 24th ed., p.1107:

"Whereas divers wicked and evil-disposed persons have of late attempted to seduce persons serving in His Majesty's forces by sea and land, and others of his Majesty's subjects, from their duty and allegiance to his Majesty, and to incite them to acts of mutiny and sedition (see 37 G.3, c.70, . . .), and have endeavoured to give effect to their wicked and traitorous proceedings, by imposing upon the persons whom they have attempted to seduce the pretended obligation of oaths unlawfully administered."

The *Seditious Associations Act*, C.S.L.C. 1860, c.10, as amended by 58-59 Vict., c.44 (Can.) which dealt with the same subject, is effectively repealed by the operation of s.8, *ante*.

OLD CODE:

99. The Governor in Council is authorized from time to time to prohibit assemblies, without lawful authority, of persons for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms, or for the purpose of practising military exercises, movements or evolutions, and to prohibit persons when assembled for any other purpose from so training or drilling themselves or being trained or drilled.

(2) any such prohibition may be general or may apply only to a particular place or district or to assemblies of a particular character, and shall come into operation from the publication in the Canada Gazette of a proclamation embodying the terms of such prohibition, and shall continue in force until the like publication of a proclamation issued by the authority of the Governor in Council revoking such prohibition.

(3) Every person is guilty of an indictable offence and liable to two years' imprisonment who, without lawful authority and in contravention of such prohibition or proclamation.

(a) is present at or attends any such assembly for the purpose of training or drilling any other person to the use of arms or the practice of military exercises or evolutions; or

(b) at any assembly trains or drills any other person to the use of arms or the practice of military exercises or evolutions.

(4) Every one is guilty of an indictable offence and liable to two years' imprisonment who, without lawful authority, attends, or is present at, any such assembly as in this section mentioned, for the purpose of being, or who at any such assembly is, without lawful authority and in contravention of such prohibition or proclamation, trained or drilled to the use of arms or the practice of military exercises or evolutions.

101. Every one is guilty of an indictable offence and liable to three years' imprisonment who challenges or endeavours by any means to provoke any person to fight a duel, or endeavours to provoke any person to challenge any other person so to do.

DUELS.

DUELLING.

72. Every one who

***(a)* challenges or attempts by any means to provoke another person to fight a duel.**

***(b)* attempts to provoke a person to challenge another person to fight a duel, or**

***(c)* accepts a challenge to fight a duel,**

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

This is the former s.101, with the addition of cl.(c) which is new. It was s.91 in the Code of 1892, and s.97 in the E.D.C.

Blackstone, Bk.IV, p.199, discussing 'express malice', speaks of it as taking in the case of deliberate duelling, where both parties meet avowedly with an intent to murder: "thinking it their duty as gentlemen, and claiming it as their right, to wanton with their own lives and those of their fellow-creatures; . . . and therefore the law has justly fixed the

Section 72—*continued*

crime and punishment of murder on them, and on their seconds also."

In *R. v. PHILLIPS*(1805), 6 East 464, it was held that an endeavour to provoke another to commit the misdemeanour of sending a challenge to fight is itself a misdemeanour indictable.

FORCIBLE ENTRY AND DETAINER.

"FORCIBLE ENTRY."—"Forcible detainer."—Questions of law.

73. (1) A person commits forcible entry when he enters real property that is in actual and peaceable possession of another in a manner that is likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, whether or not he is entitled to enter.

(2) A person commits forcible detainer when, being in actual possession of real property without colour of right, he detains it in a manner that is likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against a person who is entitled by law to possession of it.

(3) The questions whether a person is in actual and peaceable possession or is in actual possession without colour of right are questions of law.

PUNISHMENT.

74. Every one who commits forcible entry or forcible detainer is guilty of an indictable offence and is liable to imprisonment for two years.

Ss.73 and 74 are the former ss.102 and 103. They were s.89 in the Code of 1892, and s.95 in the E.D.C. where the Commissioners said that "Forcible entry and detainer are offences at common law; and section 95 we believe correctly states the existing law." S.95 was reproduced in ss.102 and 103 without material alteration although it read "whether *legally* entitled or not."

A forcible entry is where a man enters into lands or tenements, *manu forti*: Com. Dig., Forcible Entry (A.2). A forcible detainer is where a man who has entered peaceably, maintains his possession by force: Com. Dig., Justice (B.1).

The essence of these offences is still what was expressed in the statute 5 Ric.II, st.1, C.7:

> "And also the King defendeth, that none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner."

PIRACY.

PIRACY BY LAW OF NATIONS.—Punishment.

75. (1) Every one commits piracy who does any act that, by the law of nations, is piracy.

OLD CODE:

102. Forcible entry is where a person, whether entitled or not, enters in a manner likely to cause a breach of the peace, or reasonable apprehension thereof, on land then in actual and peaceable possession of another.
(2) Forcible detainer is where a person in actual possession of land, without colour of right, detains it in a manner likely to cause a breach of the peace, or reasonable apprehension thereof, against a person entitled by law to the possession thereof.
(3) What amounts to actual possession or colour of right is a question of law.

103. Every one who forcibly enters or forcibly detains land is guilty of an indictable offence and liable to one year's imprisonment.

137. Every one is guilty of an indictable offence who does any act which amounts to piracy by the law of nations, and is liable
(a) to the penalty of death, if in committing or attempting to commit such crime the offender murders, attempts to murder or wounds any person, or does any act by which the life of any person is likely to be endangered;
(b) to imprisonment for life in all other cases.

139. Every one is guilty of an indictable offence and liable to suffer death who, in committing or attempting to commit any piratical act, assaults with intent to murder, or wounds, any person, or does any act likely to endanger the life of any person.

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(2) Every one who commits piracy while in or out of Canada is guilty of an indictable offence and is liable to imprisonment for life, but if while committing or attempting to commit piracy he murders or attempts to murder another person or does any act that is likely to endanger the life of another person he shall be sentenced to death.

This combines the former ss.137 and 139. They were ss.127 and 129 in the Code of 1892 and came from ss.105 and 106 in the E.D.C. The Imperial Commissioners in their Report (p.20) said:

> "The Bill contained a definition of "Piracy by the law of nations". We have thought it better to leave this offence undefined . . . , as no definition of it would be satisfactory which is not recognized as such by other nations; and after careful consideration of the subject we have not been able to discover a definition fulfilling such a condition. We may observe as to this that the subject has been much discussed in the Courts of the United States, and the result appears to justify the course which we have adopted. We do not think it will lead to practical inconvenience."

Sir W. Scott in *LE LOUIS*(1817), 165 E.R.1464 at p.1475 says:

> "With professed pirates there is no state of peace. They are the enemies of every country, and at all times; and therefore are universally subject to the extreme rights of war."

There is historical precedent in the action taken by the United States in 1805 to wipe out the pirates who infested the Barbary Coast. In Archbold's Cr.Pl., 24th ed., p.622 we read:

"If the subjects of the same state commit robbery upon each other,

Section 75—*continued*

upon the high sea, it is piracy. If the subjects of different states commit robbery upon each other, upon the high sea, if their respective states are in amity, it is piracy; if at enmity, it is not; for it is a general rule, that enemies can never commit piracy on each other, their depredations being deemed mere acts of hostility."

The Act 11 Wm.III, c.7, s.7, however, made it an offence to engage in piratical acts under colour of a foreign commission.

See also s.413 (trial) and s.464 (bail).

PIRATICAL ACTS.

76. Every one who, while in or out of Canada,

(a) **steals a Canadian ship,**

(b) **steals or without lawful authority throws overboard, damages or destroys anything that is part of the cargo, supplies or fittings in a Canadian ship,**

(c) **does or attempts to do a mutinous act on a Canadian ship, or**

(d) **counsels or procures a person to do anything mentioned in paragraph *(a)*, *(b)* or *(c)*,**

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

This replaces the former s.138. It was s.128 in the Code of 1892, and ss.107 and 108 in the E.D.C., the latter being derived from a series of English statutes: 11 and 12 Wm.III, c.7, ss.7 and 8; 18 Geo.II, c.30, s.1; 8 Geo.I, c.24, s.1. Other statutes dealing with the same subject are 28 Hen.VIII, c.15; 7 Wm.IV and 1 Vict. c.88; and 37 & 38 Vict. c.35.

The new section is drawn to cover piratical offences in respect of Canadian ships, bearing in mind the legislative power of Parliament as declared by the *Statute of Westminster*, 1931. This is discussed in the introduction. The application of English law is dealt with in s.7, *ante*.

Should the offence be committed by a foreigner, s.420 would apply if it were in territorial waters; otherwise s.692 of the *Canada Shipping Act* would apply. In the former case, but not in the latter, a prosecution would be subject to the consent of the Attorney General of Canada: see *R. v. HECKMAN* (1901), 5 C.C.C.242.

It may be noted that the former s.140 under which it was an offence for an officer or seaman of an armed merchantman not to resist a pirate, is not continued. A person acting in collusion with a pirate would himself be a party to the crime. Again, merchant ships are not armed except in time of war, on which point see notes to s.75.

See also s.413 (trial).

Dangerous Substances.

DUTY OF CARE RE EXPLOSIVE.

77. Every one who has an explosive substance in his possession or under his care or control is under a legal duty to use reasonable care to prevent bodily harm or death to persons or damage to property by that explosive substance.

OLD CODE:

138. Every one is guilty of an indictable offence and liable to imprisonment for life who, within Canada, does any of the piratical acts specified in this section, or who, having done any of such piratical acts, comes or is brought within Canada without having been tried therefor, that is to say:—

(a) Being a British subject, on the sea, or in any place within the jurisdiction of the Admiralty of England, under colour of any commission from any foreign prince or state, whether such prince or state is at war with His Majesty or not, or under pretense of authority from any person whomsoever commits any act of hostility or robbery against other British subjects, or during any war is in any way adherent to or gives aid to His Majesty's enemies;

(b) Whether British subject or not, on the sea or in any place within the jurisdiction of the Admiralty of England, enters into any British ship, and throws overboard, or destroys any part of the goods belonging to such ship, or laden on board the same;

(c) Being on board any British ship on the sea or in any place within the jurisdiction of the Admiralty of England,

(i) turns enemy or rebel, and piratically runs away with the ship, or any boat, ordnance, ammunition or goods,

(ii) yields up voluntarily any ship, boat, ordnance, ammunition or goods to any pirate,

(iii) brings any seducing message from any pirate, enemy or rebel,

(iv) counsels or procures any persons to yield up or run away with any ship, goods or merchandise, or to turn pirate or to go over to pirates,

(v) lays violent hands on the commander of any such ship, in order to prevent him from fighting in defence of his ship and goods,

(vi) confines the master or commander of any such ship,

(vii) makes or endeavours to make a revolt in the ship; or

(d) Being a British subject in any part of the world, or whether a British subject or not, being in any part of His Majesty's dominions or on board a British ship, knowingly

(i) furnishes any pirate with any ammunition or stores of any kind,

(ii) fits out any ship or vessel with a design to trade with or supply or correspond with any pirate,

(iii) conspires or corresponds with any pirate.

111. Every one is guilty of an indictable offence and liable to imprisonment for life who wilfully causes, by any explosive substance, an explosion of a nature likely to endanger life or to cause serious injury to property, whether any injury to person or property is actually caused or not.

BREACH OF DUTY.

78. Every one who, being under a legal duty within the meaning of section 77, fails without lawful excuse to perform that duty, is guilty of an indictable offence and if as a result an explosion of an explosive substance occurs that

(*a*) causes death or is likely to cause death to any person, is liable to imprisonment for life, or

(*b*) causes bodily harm or damage to property or is likely to cause bodily harm or damage to property, is liable to imprisonment for fourteen years.

CAUSING INJURY WITH INTENT.—Punishment.

79. (1) Every one commits an offence who

(a) **does anything with intent to cause an explosion of an explosive substance that is likely to cause serious bodily harm or death to persons or is likely to cause serious damage to property,**

(b) **with intent to do bodily harm to any person**

(i) causes an explosive substance to explode,

(ii) sends or delivers to a person or causes a person to take or receive an explosive substance or any other dangerous substance or thing

(iii) places or throws anywhere or at or upon a person a corrosive fluid, explosive substance or any other dangerous substance or thing,

(c) **with intent to destroy or damage property without lawful excuse, places or throws an explosive substance anywhere, or**

(d) **makes or has in his possession or has under his care or control any explosive substance with intent thereby**

(i) to endanger life or to cause serious damage to property, or

(ii) to enable another person to endanger life or to cause serious damage to property.

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

(a) **for an offence under paragraph *(a)* or *(b)*, to imprisonment for life, or**

(b) **for an offence under paragraph *(c)* or *(d)*, to imprisonment for fourteen years.**

POSSESSING EXPLOSIVE WITHOUT LAWFUL EXCUSE.

80. Every one who without lawful excuse, the proof of which lies upon him,

(a) **makes or has in his possession or under his care or control an explosive substance that he does not make or does not have in his possession or under his care or control for a lawful purpose, or**

(b) **has in his possession a bomb, grenade or other explosive weapon,**

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

S.77 is new, although not new law.

Ss.78 and 79 contain the offences formerly set out in ss.111,112,113, 114,279 and 280. These were ss.21,22 and 23 of the Offences against the Person Act, R.S.C.1886, c.162, as adapted with some modification from the corresponding Act, 24-25 Vict. c.100 (Imp.), and s.49 of the *Malicious Injuries to Property Act*, R.S.C.1886, c.168, which came from 24-25 Vict. c.97, s.45, and from the *Explosive Substances Act*, 1883, (Imp.). Note that s.594 (Consent of Attorney General) which applied to s.113 is not continued.

OLD CODE:

112. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who wilfully places or throws any explosive substance into or near any building or ship with intent to destroy or damage the same or any machinery, working tools, or chattels whatever whether or not an explosion takes place.

113. Every one who wilfully,
(a) does any act with intent to cause by an explosive substance, or conspires to cause by an explosive substance, an explosion of a nature likely to endanger life, or to cause serious injury to property; or
(b) makes or has in his possession or under his control any explosive substance with intent by means thereof to endanger life or to cause serious injury to property, or to enable any other person by means thereof to endanger life or to cause serious injury to property;
is guilty of an indictable offence and liable to fourteen years' imprisonment, whether an explosion takes place or not, and whether an injury to person or property is actually caused or not.

594. If any person is charged under section one hundred and thirteen, before a justice with the offence of making or having explosive substances, no further proceeding shall be taken against such person without the consent of the Attorney General except such as the justice thinks necessary, by remand or otherwise, to secure the safe custody of such person.

279. Every one is guilty of an indictable offence and liable to imprisonment for life who unlawfully and by the explosion of an explosive substance burns, maims, disfigures, disables or does any grievous bodily harm to any person.

280. Every one who unlawfully,
(a) with intent to burn, maim, disfigure or disable any person, or do some grievous bodily harm to any person, whether any bodily harm is effected or not,
(i) causes any explosive substance to explode,
(ii) sends or delivers to, or causes to be taken or received by, any person any explosive substance, or any other dangerous or noxious thing,
(iii) puts or lays at any place, or casts or throws at or upon, or otherwise applies to, any person, any corrosive fluid, or any destructive or explosive substance; or
(b) places or throws in, into, upon, against or near any building, ship or vessel an explosive substance, with intent to do any bodily injury to any person, whether or not any explosion takes place and whether or not any bodily injury is effected;
is guilty of an indictable offence and liable, in cases within paragraph (a) of this section, to imprisonment for life, and in cases within paragraph (b) of this section to fourteen years' imprisonment.

114. Every one is guilty of an indictable offence and liable to seven years' imprisonment who makes, or knowingly has in his possession or under his control, any explosive substance under such circumstances as to give rise to a reasonable suspicion that he is not making it, or has it not in his possession or under his control, for a lawful object, unless he can show that he made it or had it in his possession or under his control for a lawful object.
(2) Every one is guilty of an indictable offence and liable to seven years'

Sections 77-80—*continued*

"Explosive substance" is defined in s.2(16), and s.433 contains provisions for seizure and forfeiture.

S.77 applies to those who, although using explosives for legitimate operations, use them without proper care. The Code sections are not designed to interfere with such operations, yet the public has a right to require a high standard of care where the work requires the use of dangerous explosives. The repealed Code met this by s.247, which declared a duty existing at common law, but which was dropped in the revision in view of the definition of criminal negligence.

To indicate the nature of the duty the following cases are relevant:

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

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

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

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

A conspicuous Canadian case and one which would be chargeable as criminal negligence under the Code, is *R. v. MICHIGAN CENTRAL R.R. CO.*(1907), 17 C.C.C.483. The company was convicted on an indictment under ss.221 and 247 for a nuisance and for carrying dangerous explosives without proper precautions. *There had been an explosion by which two men were killed and forty injured.* The company pleaded guilty and was fined $25,000.

> "At the common law it is clear that no carrier could be compelled to carry such goods as these, dangerous in their natures: . . . Cyc. Vol. 6, p.378 B.; 3 Wood's Railway Law, s.426."

See also *R. v. MILLER CONSTRUCTION CO. INC.*, [1944]1 W.W.R.83.

As to the word "places" in s.79, it may be observed that, in a note to s.29 of 24-25 Vict., c.100, Greaves' Cons. Acts, p.37, says that under earlier legislation, if any person had placed an infernal machine in any place where he believed another would tread on it and cause it to explode, he would not have been guilty of an offence, and that the words "put or lay in any place" were introduced to meet all such cases.

S.80 alters the former s.114 by replacing the word "knowingly" with the words "without lawful excuse" and by omitting the reference to circumstances that give use to a reasonable suspicion. The element of

OLD CODE:

Section 114—continued

imprisonment who without lawful excuse has in his possession any bomb, grenade or other device or contrivance made or intended for a similar use or purpose, and such possession shall be prima facie evidence of such unlawful possession.

suspicion is, however, retained in s.433. It is submitted that the gravamen of the offence is substantially what it was under s.114 and s.4(1) of the *Explosives Act*, 1883, the latter of which was explained in *R. v. DACEY* (1939), 27 Cr.App. R.86, as follows:

"The Court thinks that it is desirable to state what the law is on this subject. In our view the law is that in a prosecution under section 4 of the Explosives Substances Act, 1883, the prosecution has to prove that the accused person was knowingly in possession of something which is an explosive substance as defined in section 9 of the Act, and further that the possession was in circumstances giving rise to a reasonable suspicion that it was not for a lawful object. When so much is proved, the onus is on the accused person to prove, if he can, that he had possession for a lawful object. It is not necessary for the prosecution to prove knowledge by the accused person of the explosive nature of the substance. No doubt evidence that the accused person did or did not know or suspect the use to which the substance might be or was intended to be put would be material on the question of the reasonableness or otherwise of the suspicion that possession by the accused person was not for a lawful object, but that is very different from saying that the prosecution must fail unless it can prove some degree of chemical knowledge on the part of the accused person.

The gist of the offence under section 4 is the *wilful, intentional* possession by an unauthorized person of that which is in fact an explosive substance in circumstances which will enable a jury to say that he had in his possession that explosive substance for an unlawful object."

In a recent Canadian case, *R. v. HOBSON, HOBSON and WITZKE* (1951), 100 C.C.C.172 (B.C.C.A.), a quantity of nitro-glycerine was found in the glove compartment of a car belonging to C.H. at a time when E.H. and W. were riding in the car in the absence of C.H. He testified that neither of the others knew of the presence of the nitro-glycerine.

On appeal from conviction on a charge under s.114 it was held that the burden is on the Crown to prove beyond a reasonable doubt that the accused was "knowingly" in possession. Where possession or control is thus proved, s.114 of the Code casts upon the accused the onus of showing that his possession was for a lawful purpose.

Prize Fights.

ENGAGING IN PRIZE FIGHT.—"Prize fight."

81. (1) Every one who

(*a*) engages as a principal in a prize fight,

(*b*) advises, encourages or promotes a prize fight, or

(*c*) is present at a prize fight as an aid, second, surgeon, um-

Section 81 —*continued*

pire, backer or reporter,
is guilty of an offence punishable on summary conviction.

(2) In this section, "prize fight" means an encounter or fight with fists or hands between two persons who have met for that purpose by previous arrangement made by or for them, but a boxing contest between amateur sportsmen, where the contestants wear boxing gloves of not less than five ounces each in weight, or any boxing contest held with the permission or under the authority of an athletic board or commission or similar body established by or under the authority of the legislature of a province for the control of sport within the province, shall be deemed not to be a prize fight.

Subsec.(1) is taken from the former ss.105 and 106 which were ss.93 and 94 in the Code of 1892. Subsec.(2) comes from the former s.2(30), altered to provide for the fact that in some instances regulatory bodies are set up under the authority of a legislature but not directly by it.

In view of the existence of such bodies, and since nowadays boxing matches are usually under their control, the former ss.104,107,108,627 and 628, which came into the Code from "*An Act respecting Prize Fighting*", 41 Vict., c.30 (Can.), R.S.C. 1886, c.153, have been dropped. Thus the Code retains only the offences of engaging in or abetting a prize fight that is within the first part of the definition.

Offensive Weapons.

POSSESSION OF WEAPON.

82. Every one who carries or has in his custody or possession an offensive weapon for a purpose dangerous to the public peace or for the purpose of committing an offence is guilty of an indictable offence and is liable to imprisonment for five years.

A complete revision of the former ss.115-129 was effected by 1951, c.47, s.7. Ss.82-98 of the new Code are based upon that revision but include changes as noted. For definition of 'offensive weapons' see s.2(29), and for definition of 'firearm' see s.98(b).

See also s.96(1) (search) s.96(3) (forfeiture) and s.97 (exceptions).

In s.82 the addition of the words "for the purpose of committing an offence" to the former s.115 made it possible to drop the former s.463, and restored as well the effect of s.122(1) as it stood before 1951.

It covers also a point upon which some doubt had been expressed. In *R. v. KUBE*(1945), 62 B.C.R.181 at p.183 after examination of ss.114, 118 and 121A, the Court concluded:

> "Examination of these sections of the Criminal Code I think makes it apparent that the mere keeping in possession, without more, of an unloaded revolver cannot be said to constitute possession 'for any purpose dangerous to the public peace.' The concluding phrase of section 115 is not to be interpreted as meaning 'for any purpose suspected to be dangerous to the public peace.'"

Conviction substituted for possession of unregistered revolver under 121A.

OLD CODE:

105. Every one is guilty of an offence and liable, on summary conviction, to imprisonment for a term not exceeding twelve months and not less than three months, with or without hard labour, who engages as a principal in a prize fight.

106. Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding five hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding twelve months, with or without hard labour, or to both, who is present at a prize fight as an aid, second, surgeon, umpire, backer, assistant or reporter, or who advises, encourages or promotes such fight.

2. par. (30) "Prize fight" means an encounter or fight with fists or hands between two persons who have met for such purpose by previous arrangement made by or for them, provided, however, that any boxing contest, where both the contestants wear boxing gloves of not less than five ounces each in weight, between amateur sportsmen, or held with the permission or under the authority of any athletic board or commission or like body set up by the legislature of any province, for the control of sport within such province shall not be deemed to be a prize fight;

115. Every one who carries or has in his custody or possession an offensive weapon for a purpose dangerous to the public peace is guilty of an indictable offence and liable to imprisonment for five years.

463. Every one is guilty of an indictable offence and liable to seven years' imprisonment who is found
(a) armed with any dangerous or offensive weapon or instrument by day, with intent to break or enter into any dwelling-house, and to commit any indictable offence therein; or
(b) armed as aforesaid by night, with intent to break into any building and to commit any indictable offence therein.

In *R. v. SULLIVAN & GODBOLT*(1946), 62 B.C.R.278, at p.291, the Court adverted to *R. v. KUBE* and added:

> "Here possession of a revolver is not enough, unless the Code is amended to make it so subject to an explanation by the possessor. Nor is it enough that the possessor of the revolver is suspected of planning to commit some crime, or is suspected of allowing it to be used in aid of the commission of some crime. If that were Parliament's intention the word 'suspected' would have been inserted in section 115 –as for example in Code section 114 which relates to the suppression of explosives."

R. v. McDERMOTT(1952), 102 C.C.C.379. On a charge under this section as re-enacted by 1951, c.47, it is not necessary to show that accused's purpose was to do some specific act. A purpose dangerous to the public peace may be proved by inferences from the circumstances.

See also s.288(d), *post*, formerly s.446(c), and compare *R. v. MASKIEW* (1945), 85 C.C.C.138 with *R. v. OUON*(1948), 92 C.C.C.1, in the latter of which it was held by the Supreme Court of Canada that an offence under s.122(1) was not an 'included' offence in a charge under s.446(c), or, in other words, that a person convicted of robbery while armed under the latter provision, could not be convicted under s.122 in respect of the same pistol.

Section 82—*continued*

R. v. JURA, [1954]1 All E.R.696, may usefully be noticed here. In that case the appellant, while in a public shooting gallery in company with a woman, had been given an air rifle to fire at a target, and in a moment of anger turned and fired at the woman, wounding her slightly.

Held that appellant could not be said to have had the rifle without "reasonable excuse" within the *Prevention of Crime Act* 1953, which was meant to deal with a person who goes out with an offensive weapon —a "cosh" or a knife, or something else—without excuse. However, as he had used it for an unlawful purpose he was guilty of an offence under the *Offences against the Person Act*, 1861 (common assault).

CARRYING WEAPON WHILE IN POSSESSION OF ANYTHING LIABLE TO SEIZURE.

83. Every one who, while carrying an offensive weapon, has custody or possession of anything that he knows is liable to seizure under any law relating to customs, excise, trade or navigation is guilty of an indictable offence and is liable to imprisonment for ten years.

This is the former s.117. As to pistols and revolvers, see s.90. See also historical note to s.82 and reference there to other pertinent sections.

See historical note to s.82 and reference there to other pertinent sections.

CARRYING CONCEALED WEAPON.

84. Every one who carries concealed an offensive weapon other than a pistol or revolver is guilty of an offence punishable on summary conviction.

This is the former s.117. As to pistols and revolvers, see s.90. See also historical note to s.82 and reference there to other pertinent sections.

SHORT-BARREL SHOT-GUN OR RIFLE.—Silencers.

85. (1) Every one who carries or has in his custody or possession a sawed-off shot-gun or sawed-off rifle, with a barrel less than twenty inches in length, is guilty of an indictable offence and is liable to imprisonment for five years.

(2) Every one who, without lawful excuse, the proof of which lies upon him, has in his possession any device or contrivance designed or intended to muffle or stop the sound or report of a firearm is guilty of an offence punishable on summary conviction.

Subsec.(1) is s.118 as enacted in 1951, changed to refer to firearms which have been "sawed-off", that expression being taken from s.118 as it stood before 1951. It appears that firearms with barrels less than twenty inches long are manufactured for use in hunting.

Subsec.(2) did not appear in the 1951 revision, nor did the provision empowering the Governor in Council to forbid by proclamation the use

OLD CODE:

117. Every one who carries concealed an offensive weapon other than a pistol or revolver is guilty of an offence and liable on summary conviction to a fine not exceeding one hundred dollars or to imprisonment for three months or to both fine and imprisonment.

118. Every one who carries or has in his custody or possession a shotgun or rifle with a barrel less than twenty inches in length is guilty of an indictable offence and liable to imprisonment for five years.

119. Every one who, without lawful excuse, points at another person a firearm, air-gun or air-pistol, whether loaded or unloaded, is guilty of an offence and liable on summary conviction to a fine not exceeding one hundred dollars and not less than ten dollars or to imprisonment for thirty days.

619. Any justice within whose jurisdiction any public meeting is appointed to be held may demand, have and take of and from any person attending such meeting, or on his way to attend the same, without his consent and against his will, by such force as is necessary for that purpose, any offensive weapon, such as firearms, swords, staves, bludgeons, or the like, with which any such person is so armed, or which any such person has in his possession.

620. Upon reasonable request to any justice to whom any such weapon has been peaceably and quietly delivered and aforesaid, made on the day next after the meeting has finally dispersed, and not before, such weapon shall, if of the value of one dollar or upwards, be returned by such justice to the person from whom the same was received.

621. No such justice shall be held liable to return any such weapon, or make good the value thereof, if the same, by unavoidable accident, has been actually destroyed or lost out of the possession of such justice without his wilful default.

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of a device to muffle the report of a firearm. That power had been conferred by s.121(b) as passed in 1932-33, c.25, s.1, and had been exercised.

See historical note to s.82 and reference there to other pertinent sections.

POINTING FIREARM.

86. Every one who, without lawful excuse, points at another person a firearm, air-gun or air-pistol, whether loaded or unloaded, is guilty of an offence punishable on summary conviction.

This is the former s.119. See historical note to s.82 and reference there to other pertinent sections.

An offence against this provision constitutes an assault: *KWAKU MENSAH v. R.*, [1946] A.C.83.

WHILE ATTENDING PUBLIC MEETING.

87. Notwithstanding anything in this Act, every one who has an offensive weapon in his possession while he is attending or is on his way to attend a public meeting is guilty of an offence punishable on summary conviction.

Section 87—*continued*

This replaces the former ss.619,620 and 621. Its effect is that: (a) notwithstanding that a person may have a permit to carry a pistol or revolver, he commits an offence if he carries it to a public meeting; (b) by virtue of s.96, the weapon is subject to seizure, and to forfeiture upon conviction. Under the former provisions, a justice had power to seize offensive weapons from persons attending public meetings, but might restore them upon reasonable request made the next day.

The former sections appeared originally in 1843, c.7, "*An Act respecting the calling and orderly holding of public meetings,*" of which the preamble read in part as follows:

> "And whereas, in consequence of troubles and disorders which unhappily have taken place at several of these assemblies, it is expedient to provide by legislative enactment for the convoking and holding of them in a peaceable manner, and for the preserving of the public peace" . . . . .

They came into R.S.C.1886, c.152 under a similar title. They did not appear in the Code of 1892, but were not repealed, and came into the Code in the revision of 1906.

Cf. the *Public Order Act*, 1936 (U.K.), passed at the time of the activity of Sir Oswald Moseley and his fascists.

See historical note to s.82 and reference there to other pertinent sections.

DELIVERING FIREARMS TO MINORS.—Seizure.—Spring-knives.

88. (1) Every one who sells, barters, gives, lends, transfers or delivers a firearm, air-gun or air-pistol or ammunition therefor to a person under the age of fourteen years who does not have a valid permit in Form 45 is guilty of an offence punishable on summary conviction.

(2) Notwithstanding section 96, a peace officer who finds a person under the age of fourteen years in possession of a firearm, air-gun, air-pistol or ammunition therefor without a valid permit in Form 45 relating to that firearm, air-gun, air-pistol or ammunition may seize it, and upon seizure it is forfeited to Her Majesty and may be disposed of as the Attorney General may direct.

(3) Everyone who without lawful excuse, the proof of which lies upon him, has in his possession or sells, barters, gives, lends, transfers or delivers a spring-knife or switch-knife is guilty of an offence punishable on summary conviction.

Subsecs.(1) and (2) are the former s.120.

Subsec.(3) is new. As showing what led to its passage, the following is quoted from Hansard, 1954, p.1260:

> "I know there have been incidents in Vancouver where at a school dance, school reception or during the recess period some young boy did not like the attitude of somebody else and whipped out one of these definitely dangerous and offensive weapons.
> From my own personal knowledge I know that young boys have been severely slashed and required a great many stitches and other medical

OLD CODE:

120. (1) Every one who sells, barters, gives, lends, transfers or delivers a firearm, air-gun or air-pistol or ammunition therefor, to a person under the age of fourteen years who does not have a valid permit in Form 76C is guilty of an offence and liable on summary conviction to a fine not exceeding one hundred dollars and not less than twenty dollars.

(2) Notwithstanding section one hundred and twenty-seven a peace officer who finds a person under the age of fourteen years in possession of a firearm, air-gun, air-pistol or ammunition therefor without a valid permit in Form 76C relating to that firearm, air-gun, air-pistol or ammunition may seize it, and upon seizure it is forfeited to His Majesty and may be disposed of as the Attorney-General may direct.

121. Every one who, not being a local registrar of firearms or a person authorized to issue permits, purports to issue a firearms registration certificate or permit, as the case may be, is guilty of an offence and liable on summary conviction to a fine of five hundred dollars or to imprisonment for six months or to both fine and imprisonment.

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attention to close their wounds. I understand that at the moment there is no provision whereby the authorities can deal with such situations and stop these young people from having these dangerous weapons in their possession."

See historical note to s.82 and also s.92 (onus) s.96(1) (search) s.96(3) (forfeiture) and s.97(3) (exceptions).

UNAUTHORIZED ISSUE OF CERTIFICATES OR PERMITS.

89. Every one who, not being a local registrar of firearms or a person authorized to issue permits, purports to issue a firearms registration certificate or permit, as the case may be, is guilty of an offence punishable on summary conviction.

This is the former s.121. See historical note to s.82 and also s.96(1) (search) s.96(3) (forfeiture) and s.97(3) (exceptions) and s.98 (definitions).

UNREGISTERED FIREARM IN DWELLING HOUSE.—Firearm elsewhere than in dwelling house without permit.—Firearm in motor vehicle.—Buying and selling firearms.—Transfer of firearm.—Accepting firearm.—Finding firearm. —Tampering with serial number, certificate or permit.—Punishment.

90. (1) Every one commits an offence who has an unregistered firearm in his dwelling house or place of business.

(2) Every one commits an offence who has a firearm elsewhere than in his dwelling house or place of business, unless he has a valid permit in Form 42 or Form 44 relating to that firearm.

(3) Every one who is an occupant of a motor vehicle in which he knows there is a firearm commits an offence unless some occupant of the motor vehicle has a valid permit in Form 42 or Form 44 relating to that firearm, but no person shall be convicted of an offence under this subsection where he establishes that he did not

Section 90—*continued*

know that no occupant of the motor vehicle had a valid permit relating to that firearm and that he took reasonable steps to discover whether any occupant of the motor vehicle had such a permit.

(4) Every one commits an offence who conducts, operates, or engages in the business of buying or selling firearms at retail unless he has a permit in Form 43.

(5) Every one who sells, barters or makes a gift of a firearm commits an offence if he delivers it before

***(a)* it is registered in the name of the purchaser or the person to whom it is bartered or given, or**

***(b)* the purchaser or the person to whom it is bartered or given has a valid permit, as contained in Form 44, relating to that firearm.**

(6) Every one who buys or accepts in barter or as a gift a firearm commits an offence if he receives delivery of it before

***(a)* it is registered in his name, or**

***(b)* he has a valid permit, as contained in Form 44, relating to that firearm.**

(7) Every one commits an offence who, upon finding a firearm that he has reasonable grounds to believe has been lost or abandoned, does not forthwith

***(a)* deliver it to a peace officer, or**

***(b)* report to a peace officer that he has found it.**

(8) Every one commits an offence who, without lawful authority, the proof of which lies upon him,

***(a)* alters, defaces or removes a serial number on a firearm, or**

***(b)* alters, defaces or falsifies a firearms registration certificate or permit.**

(9) Every one who commits an offence under this section is guilty of

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

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

This is the former s.122 without change except that the saving clause in subsec.(3) is new.

See historical note to s.82 and also s.92 (onus) s.96(1) (search) s.96(3) (forfeiture) s.97(3) (exceptions) and s.98 (definitions).

Where an accused was charged under s.115 and convicted, the Court of Appeal held that the evidence was insufficient to prove that he had the revolver for a purpose dangerous to the public peace, but that it showed him to be in possession of an unregistered firearm contrary to s.121A. A conviction for that offence was substituted: *R. v. MILINA* (1946), 86 C.C.C.371.

Subsec.(3) was the subject of considerable discussion in the Standing Committee on Banking and Commerce of the Senate (Proceedings June 11, 1952, pp.12 14). While it was recognized that "the purpose of the legislation was to help the police in the case of those bandits who are picked up and firearms are found in their motor-car, but nobody admits

OLD CODE:

122. (1) Every one is guilty of an offence who has an unregistered firearm in his dwelling house or place of business.
(2) Every one is guilty of an offence who has a firearm elsewhere than in his dwelling house or place of business, unless he has a valid permit in Form 76 or Form 76B relating to that firearm.
(3) Every one who is an occupant of a motor vehicle in which he knows there is a firearm is guilty of an offence unless some occupant of the motor vehicle has a valid permit in Form 76 or Form 76B relating to that firearm.
(4) Every one is guilty of an offence who conducts, operates, or engages in the business of buying or selling firearms at retail unless he has a permit in Form 76A.
(5) Every one who sells, barters or makes a gift of a firearm is guilty of an offence if he delivers it before
(a) it is registered in the name of the purchaser or the person to whom it is bartered or given; or
(b) the purchaser or the person to whom it is bartered or given has obtained a valid permit, as contained in Form 76B, relating to that firearm.
(6) Every one who buys or accepts in barter or as a gift a firearm is guilty of an offence if he receives delivery of it before
(a) it is registered in his name; or
(b) he has obtained a valid permit as contained in Form 76B relating to that firearm.
(7) Every one is guilty of an offence who, upon finding a firearm that he has reasonable grounds to believe has been lost or abandoned, does not forthwith
(a) deliver it to a peace officer; or
(b) report to a peace officer that he has found it.

. . . . . .

(9) A person who is guilty of an offence under this section is liable
(a) upon conviction under indictment, to imprisonment for two years; or
(b) on summary conviction, to a fine not exceeding five hundred dollars or to imprisonment for six months or to both fine and imprisonment.

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ownership," it was felt that the subsection, without a saving clause such as now appears, was too sweeping. However, it had been held in *R. v. HOBSON*, [1951]2 W.W.R.490, that a person who rides in an automobile as a passenger and then borrows it for a short period cannot, on those facts alone, be held in criminal law to know all that the owner of the car had in it.

RETAIL TRANSACTIONS IN FIREARMS.—Punishment.

91. (1) Every one who conducts, operates or engages in the business of buying and selling firearms at retail

(*a*) shall keep a record of every transaction that he enters into with respect to firearms, and

(*b*) shall produce that record for inspection at the request of a peace officer.

(2) Every one who fails to comply with subsection (1) is guilty of an offence punishable on summary conviction.

Section 91—*continued*

This is the former s.123. See historical note to s.82 and also s.96(1) (search) s.96(3) (forfeiture) and s.98 (definitions).

ONUS OF PROOF.—Evidence.

92. (1) Where, in proceedings under section 88 or 90, any question arises with respect to permits or registration certificates, the onus lies upon the accused to prove that he has the permit or registration certificate.

(2) A permit or registration certificate is *prima facie* evidence of its contents and of the signature and official character of the person by whom it purports to be signed.

This restores s.120(4) as it stood before 1951. It was not in the 1951 revision. It is in accord with s.702(2), *post*, under which the burden of proving excuse or exemption in summary conviction matters, is on the accused. If the accused has a permit, its existence is a matter clearly within his own knowledge.

For definitions see, s.98.

REGISTRY.—Application for registration.—Duties of local registrar.—Duty of Commissioner.—Form of certificate.—Refusal of application.—Exception.—Evidence of registration.

93. (1) The Commissioner shall cause a registry to be maintained in which shall be kept a record of every firearms registration certificate that is issued under the authority of this Act.

(2) An application for registration of a firearm shall be made on Form 44 to a local registrar of firearms.

(3) A local registrar of firearms who receives an application for registration of a firearm shall, after signing the application,

***(a)* send one copy thereof to the Commissioner,**

***(b)* deliver one copy thereof to the applicant, and**

***(c)* retain one copy thereof.**

(4) The Commissioner shall, upon receipt of an application for registration of a firearm signed by the applicant and a local registrar of firearms, cause a firearms registration certificate to be issued in the name of the applicant in respect of the firearm described in the application.

(5) Firearms registration certificates shall be in a form to be prescribed by the Commissioner.

(6) A local registrar of firearms shall refuse to accept an application for registration of a firearm that does not bear a serial number sufficient, in his opinion, to distinguish it from other firearms.

(7) Subsection (6) does not apply to firearms that, in the opinion of a local registrar of firearms, are useful or valuable only as antiques.

(8) A firearms registration certificate is *prima facie* evidence that the firearm to which it relates is registered.

OLD CODE:

123. (1) A person who conducts, operates or engages in the business of buying and selling firearms at retail
(a) shall keep a record of every transaction that he enters into with respect to firearms; and
(b) shall produce that record for inspection at the request of a peace officer.
(2) A person who fails to comply with subsection one is guilty of an offence and liable on summary conviction to a fine not exceeding five hundred dollars or to imprisonment for six months, or to both fine and imprisonment.

WHO MAY ISSUE PERMITS IN FORM 42.—In Form 43.—In Form 44.—Permit in Form 42—when issued.—Validity of permit in Form 42 or 45.—Validity of permit in Form 43.—Validity of permit in Form 44.—Permits supplied by Commissioner.

94. (1) A permit in Form 42 may be issued by

(*a*) the Commissioner or a person authorized in writing by him, or

(*b*) the Attorney General of a province or a person authorized in writing by him.

(2) A permit in Form 43 may be issued by a local registrar of firearms.

(3) A permit to convey, as contained in Form 44, may be issued by a local registrar of firearms to authorize a person who buys, accepts in barter, accepts as a gift or finds a firearm that is not registered in his name, to convey the firearm from the place where he takes delivery of it or from his place of residence or business to the office of the local registrar of firearms and thence to his place of residence or business.

(4) A permit in Form 42 shall be issued only where the person who issued it is satisfied that the applicant for the permit requires the firearm to which it relates

(*a*) to protect his life or property,

(*b*) for use in connection with his profession or occupation, or

(*c*) for use in target practice in connection with a shooting club approved by the Attorney General of the province in which the shooting club is situated.

(5) A permit in Form 42 or Form 45 is valid until

(*a*) the expiration of the period for which it is expressed to be issued,

(*b*) it is revoked, or

(*c*) the expiration of the calendar year in which it is issued, whichever is the earliest.

(6) A permit in Form 43 is valid until it is revoked.

(7) A permit as contained in Form 44 is valid only during the period for which it is expressed to be valid.

(8) Permits shall be supplied in blank by the Commissioner to persons who are authorized to issue them.

REVOCATION.

95. Permits may be revoked by any person who is authorized to issue them.

Section 95—*continued*

Ss.93,94 and 95 are respectively ss.124,125 and 126 as enacted in 1951. For definitions see s.98.

It will be observed that there is a difference between the issue of a certificate of registration and the issue of a permit. S.94 is mandatory except where the firearm does not bear a serial number or is of value only as an antique. Under s.94, the issue of a permit is discretionary and depends upon the applicant's fulfilment of the conditions set out in subsec.(4). The right to revoke a permit is explicit in s.95.

SEARCH AND SEIZURE.—Detention.—Forfeiture.

96. (1) Whenever a peace officer believes on reasonable grounds that an offence is being committed or has been committed against any of the provisions of sections 82 to 91 he may search, without warrant, a person or vehicle, or premises other than a dwelling house, and may seize anything by means of or in relation to which he reasonably believes the offence is being committed or has been committed.

(2) Anything seized pursuant to subsection (1) may be detained for a period of two months following the time of seizure unless during that period proceedings are instituted, in which case it may be further detained until the proceedings are concluded.

(3) Where a person is convicted of an offence against any of the provisions of sections 82 to 91, anything by means of or in relation to which the offence was committed, upon such conviction, in addition to any punishment imposed, is forfeited to Her Majesty and may be disposed of as the Attorney General may direct.

This is the former s.127. In view of this provision the former s.634 (s.569(9) in the Code of 1892) has been dropped.

See also s.88 (seizure) and s.98 (definitions).

PERSONS WHO DO NOT COMMIT OFFENCES.—Wholesalers.—Exception. Repairers.—Retailers.—Members of Forces.—Peace officers, public officers.—Other officers.

97. (1) A person does not commit an offence under subsection (1) or (5) of section 90 by doing anything mentioned in those subsections in the ordinary course of conducting, operating or engaging in the business of buying and selling firearms at wholesale.

(2) A person does not commit an offence under subsection (1) of section 90 by doing anything mentioned in that subsection in the ordinary course of conducting, operating or engaging in

***(a)* the business of repairing firearms, or**

***(b)* the business of buying and selling firearms or revolvers at retail, if he has a permit in Form 43.**

(3) Notwithstanding anything in sections 82 to 90,

***(a)* a member of the Canadian Forces or of the naval, army or air forces of a state other than Canada that are lawfully present in Canada,**

***(b)* a peace officer or public officer, or**

OLD CODE:

127. (1) Whenever a peace officer believes on reasonable grounds that an offence is being committed or has been committed against any of the provisions of sections one hundred and fifteen to one hundred and twenty-three, he may search, without warrant, a person or vehicle, or premises other than a dwelling-house, and may seize anything by means of or in relation to which he reasonably believes the offence is being committed or has been committed.

(2) Anything seized pursuant to subsection one may be detained for a period of two months following the day of seizure unless during that period proceedings for violation of any of the sections mentioned in subsection one are undertaken, in which case it may be further detained until the proceedings are finally concluded.

(3) Where a person is convicted of an offence against any of the provisions of sections one hundred and fifteen to one hundred and twenty-three, anything by means of or in relation to which the offence was committed, upon such conviction, in addition to any penalty imposed, is forfeited to His Majesty and may be disposed of as the Attorney-General may direct.

634. If offensive weapons believed to be dangerous to the public peace are seized under a search warrant the same shall be kept in safe custody in such place as the justice directs, unless the owner thereof proves, to the satisfaction of such justice, that such offensive weapons were not kept for any purpose dangerous to the public peace.

(2) Any person from whom any such offensive weapons are so taken may, if the justice upon whose warrant the same are taken, upon application made for that purpose refuses to restore the same, apply to a judge of a superior or county court for the restitution of such offensive weapons, upon giving ten days' previous notice of such application to such justice; and such judge shall make such order for the restitution or safe custody of such offensive weapons as upon such application appears to him to be proper.

(c) an officer under the *Immigration Act*, the *Customs Act* or the *Excise Act*,

is not guilty of an offence under any of the provisions of those sections by reason only that he has in his possession an offensive weapon for the purpose of his duties or employment.

DEFINITIONS. — "Commissioner." — "Firearm." — "Local registrar of firearms."

98. For the purposes of sections 89 to 97,

(a) "Commissioner" means the Commissioner of the Royal Canadian Mounted Police,

(b) "firearm" means a pistol, revolver, or a firearm that is capable of firing bullets in rapid succession during one pressure of the trigger; and

(c) "local registrar of firearms" means

(i) the Commissioner or a person appointed in writing by him, or

(ii) the Attorney General of a province or a person appointed in writing by him.

Ss.97 and 98 are respectively ss.128 and 129 as enacted in 1951.

Section 82—*continued*

R. v. JURA, [1954]1 All E.R.696, may usefully be noticed here. In that case the appellant, while in a public shooting gallery in company with a woman, had been given an air rifle to fire at a target, and in a moment of anger turned and fired at the woman, wounding her slightly.

Held that appellant could not be said to have had the rifle without "reasonable excuse" within the *Prevention of Crime Act* 1953, which was meant to deal with a person who goes out with an offensive weapon —a "cosh" or a knife, or something else—without excuse. However, as he had used it for an unlawful purpose he was guilty of an offence under the *Offences against the Person Act*, 1861 (common assault).

CARRYING WEAPON WHILE IN POSSESSION OF ANYTHING LIABLE TO SEIZURE.

83. Every one who, while carrying an offensive weapon, has custody or possession of anything that he knows is liable to seizure under any law relating to customs, excise, trade or navigation is guilty of an indictable offence and is liable to imprisonment for ten years.

This is the former s.117. As to pistols and revolvers, see s.90. See also historical note to s.82 and reference there to other pertinent sections.

See historical note to s.82 and reference there to other pertinent sections.

CARRYING CONCEALED WEAPON.

84. Every one who carries concealed an offensive weapon other than a pistol or revolver is guilty of an offence punishable on summary conviction.

This is the former s.117. As to pistols and revolvers, see s.90. See also historical note to s.82 and reference there to other pertinent sections.

SHORT-BARREL SHOT-GUN OR RIFLE.—Silencers.

85. (1) Every one who carries or has in his custody or possession a sawed-off shot-gun or sawed-off rifle, with a barrel less than twenty inches in length, is guilty of an indictable offence and is liable to imprisonment for five years.

(2) Every one who, without lawful excuse, the proof of which lies upon him, has in his possession any device or contrivance designed or intended to muffle or stop the sound or report of a firearm is guilty of an offence punishable on summary conviction.

Subsec.(1) is s.118 as enacted in 1951, changed to refer to firearms which have been "sawed-off", that expression being taken from s.118 as it stood before 1951. It appears that firearms with barrels less than twenty inches long are manufactured for use in hunting.

Subsec.(2) did not appear in the 1951 revision, nor did the provision empowering the Governor in Council to forbid by proclamation the use

OLD CODE:

155. In this Part, unless the context otherwise requires,
(a) "the government" includes the government of Canada, and the government of any province of Canada, as well as His Majesty in the right of Canada or of any province thereof, and the Commissioners of the Transcontinental Railway;
(b) "office" includes every office in the gift of the Crown or of any officer appointed by the Crown, and all commissions, civil and military, and all places or employments in any public department of office whatever, and all deputations to any such office and every participation in the profits of any office or deputation; and
(c) "official or person in the employment of the government" and "official or employee of the government," extend to and include the Commissioners of the Transcontinental Railway and the persons holding office as such commissioners, and the engineers, officials, officers, employees and servants of the said commissioners.

170. Perjury is an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding as part of his evidence, upon oath or affirmation, whether such evidence is given in open court, or by affidavit or otherwise, and whether such evidence is material or not, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury or person holding the proceeding.
(2) Subornation of perjury is counselling or procuring a person to commit any perjury which is actually committed.
(3) Evidence in this section includes evidence given on the voir dire and evidence given before a grand jury.

171. Every person is a witness within the meaning of the last preceding section who actually gives his evidence, whether he was competent to be a witness or not, and whether his evidence was admissible or not.
(2) Every proceeding is judicial within the meaning of the last preceding section which is held in or under the authority of any court of justice, or before a grand jury, or before either the Senate or House of Commons of Canada, or any committee of either the Senate or House of Commons, or before any legislative council, legislative assembly or house of assembly or any committee thereof, empowered by law to administer an oath, or before any justice, or any arbitrator or umpire, or any person or body of persons authorized by law or by any statute in force for the time being to make an inquiry and take evidence therein upon oath, or before any legal tribunal by which any legal right or liability can be established, or before any person acting as a court, justice or tribunal, having power to hold such judicial proceeding, whether duly constituted or not, and whether the proceeding was duly instituted or not before such court or person so as to authorize it or him to hold the proceeding, and although such proceeding was held in a wrong place or was otherwise invalid.

1003. (3) Any witness whose evidence is admitted under this section is liable to indictment and punishment for perjury in all respects as if he or she had been sworn.

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corporation with the right to make its own contracts. The reference is obsolete but its inclusion made the Commissioners and their employees subject to the provisions of the Code as to corruption in the awarding of contracts.

Section 99—*continued*

Par.(d). This is the former s.155(b). 'Public department' is defined in s.2(34).

Par.(e). This replaces the former s.155(*c*) and is in accord with the cases.

In *R. v. WHITAKER*, [1914]3 K.B.1283 (C.C.A.), it was said that, "A public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges, he is a public officer. The addition of the words "and ministerial" does not affect the matter."

In *HENLY v. LYME REGIS*(1829), 5 Bing.91, at p.107, the following definition appears, Best, C.J.:

"Then what constitutes a public officer? In my opinion, every one who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the crown or otherwise, is constituted a public officer."

The foregoing expressions were adopted in Canada in *R. v. McMORRAN*(1948), 91 C.C.C.19, where it was argued that accused, who was a technical adviser to the Wool Administration under the W.P. & T.B., was not a "public officer" within Code s.160. It was held that the definition in s.2(33) was extensive of the common law meaning of a peace officer which is one who discharges a public duty and is paid out of money provided for the public service, citing the two English cases above.

HENLEY v. LYME REGIS was similarly applied in *R. v. JOLLIMORE*(1950), 98 C.C.C.388, a case of obstruction of members of the R.C.M.P., enforcing the *Excise Act*.

They were applied too in *KOWNATZKI v. BEAR LAKE*, [1931]1 W.W.R.757, an action involving consideration of the *Public Authorities Protection Act* of Alberta. There was reference also to an Act of Upper Canada passed in 1850 for the protection of justices of the peace "or other officer or person fulfilling any public duty".

See also s.116 (contradictory evidence).

CORRUPTION AND DISOBEDIENCE.

BRIBERY OF JUDICIAL OFFICERS, ETC.—Consent of Attorney General.

100. (1) Every one who

***(a)* being the holder of a judicial office, or being a member of the Parliament of Canada or of a legislature, corruptly**

(i) accepts or obtains,

(ii) agrees to accept, or

(iii) attempts to obtain,

any money, valuable consideration, office, place or employment for himself or another person in respect of anything done or omitted or to be done or omitted by him in his official capacity; or

***(b)* gives or offers corruptly to a person who holds a judicial office, or is a member of the Parliament of Canada or of a**

OLD CODE:

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

(a) holding any judicial office or being a member of Parliament or of a legislature, corruptly accepts or obtains, or agrees to accept, or attempts to obtain for himself or any other person, any money or valuable consideration, office, place, or employment on account of anything already done or omitted, or to be afterwards done or omitted, by him in his judicial capacity, or in his capacity as such member; or

(b) corruptly gives or offers to any such person or to any other person, any such bribe as aforesaid on account of any such act or omission.

593. No one holding any judicial office shall be prosecuted for the offence of judicial corruption, without the leave of the Attorney General of Canada.

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legislature, any money, valuable consideration, office, place or employment in respect of anything done or omitted or to be done or omitted by him in his official capacity for himself or another person,

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

(2) No proceedings against a person who holds a judicial office shall be instituted under this section without the consent in writing of the Attorney General of Canada.

This combines the former ss.156 and 593. They were ss.131 and 544 in the Code of 1892. They come from s.111 of the E.D.C., as to which the following appears in the report of the Commissioners:

"In a general Code of the criminal law we have thought it right to include the offence of judicial corruption, and to subject it to severe and infamous punishment. As no case of the kind has occurred (if we except the prosecutions of Lord Bacon and Lord Macclesfield), it is not surprising that the law on the subject should be somewhat vague. We have thought it right, in order to protect persons holding judicial positions from malicious prosecutions, to provide that no prosecution for this offence shall be instituted except by the Attorney General, or in the case of judges of the Superior Courts (who since the Revolution have not been removable at the will of the Crown, without the resolution of one of the Houses of Parliament)."

Semble, the consent would be required for the prosecution of persons *e.g.*, recorders, appointed to judicial positions by provincial governments: Hansard, 1892, Vol.II, col.3800.

It was said in *R. v. BUNTING*(1885), 7 O.R.524, at p.537 that "conspiracy to bribe is undoubtedly a common law offence, and the offence of bribery of, or the attempt to bribe a member of Parliament is a common law offence."

As to method of trial see s.413(2)(*c*).

BRIBERY OF OFFICERS.

101. Every one who

***(a)* being a justice, police commissioner, peace officer, public officer, or officer of a juvenile court, or being employed in the**

Section 101—*continued*

administration of criminal law, corruptly

(i) accepts or obtains,

(ii) agrees to accept, or

(iii) attempts to obtain,

for himself or any other person any money, valuable consideration, office, place or employment with intent

(iv) to interfere with the administration of justice,

(v) to procure or faciliate the commission of an offence, or

(vi) to protect from detection or punishment a person who has committed or who intends to commit an offence; or

***(b)* gives or offers, corruptly, to a person mentioned in paragraph *(a)* any money, valuable consideration, office, place or employment with intent that the person should do anything mentioned in subparagraph (iv), (v) or (vi) of paragraph *(a)*, is guilty of an indictable offence and is liable to imprisonment for fourteen years.**

This is the former s.157. It was s.132 in the Code of 1892 and came from s.112 of the E.D.C. It was a common law misdemeanour but the Commissioners remarked of it that it was codified because recent experience had shown that the punishment at common law was not severe enough.

'Peace officer' is defined in s.2(30), and 'public officer' in s.2(35). 'Officer of a juvenile court' was added in 1919 as the result of a case (unreported) in which there was an attempt to bribe such an officer.

As to method of trial see s.413(2)(a).

FRAUDS UPON THE GOVERNMENT.—Offer or gift to influence official.—Giving reward or commission to official without consent.—Acceptance of the commission or gift without consent.—Compensation for procuring settlement of claim, etc.—Offer of reward for appointment.—Reward for withdrawal of tender.—Contractor subscribing to election fund.—Punishment.

102. (1) Every one commits an offence who

***(a)* directly or indirectly**

(i) gives, offers, or agrees to give or offer to an official or to any member of his family, or to any one for the benefit of an official, or

(ii) being an official, demands, accepts or offers or agrees to accept from any person for himself or another person, a loan, reward, advantage or benefit of any kind as consideration for co-operation, assistance, exercise of influence or an act or omission in connection with

(iii) the transaction of business with or any matter of business relating to the government, or

(iv) a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow,

whether or not, in fact, the official is able to co-operate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be;

***(b)* having dealings of any kind with the government, pays a**

OLD CODE:

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

(a) being a police commissioner or being a justice, peace officer, or public officer, employed in any capacity for the prosecution or detection or punishment of offenders, or being an officer of a Juvenile Court, corruptly accepts or obtains, or agrees to accept or attempts to obtain for himself, or for any other person, any money or valuable consideration, office, place or employment, with the intent to interfere corruptly with the due administration of justice, or to procure or facilitate the commission of any crime, or to protect from detection or punishment any person having committed or intending to commit any crime;

(b) corruptly gives or offers to any officer aforesaid any such bribe as aforesaid with any such intent.

158. Every one is guilty of an indictable offence and liable to a fine of not less than one hundred dollars, and not exceeding one thousand dollars, and to imprisonment for a term not exceeding one year and not less than one month, and in default of payment of such fine to imprisonment for a further time not exceeding six months who,

(a) makes any offer, proposal, gift, loan or promise, or gives or offers any compensation or consideration, directly or indirectly, to any official or person in the employment of the government, or to any member of his family, or to any person under his control or for his benefit, with intent to obtain the assistance or influence of such official or person to promote either the procuring of any contract with the government for the performance of any work, the doing of any thing, or the furnishing of any goods, effects, food or materials, the execution of any such contract, or the payment of the price or consideration stipulated therein, or any part thereof, or of any aid or subsidy payable in respect thereof; or

(b) being an official or person in the employment of the government, directly or indirectly, accepts or agrees to accept, or allows to be accepted by any person under his control or for his benefit, any such offer, proposal, gift, loan, promise, compensation or consideration; or

(c) in the case of tenders being called for by or on behalf of the government for the performance of any work, the doing of any thing, or the furnishing of any goods, effects, food or materials, directly or indirectly, by himself, or by the agency of any other person on his behalf, with intent to obtain the contract therefor, either for himself or for any other person, offers to make, or makes, any gift, loan, offer or promise, or offers or gives any consideration or compensation whatsoever to any person tendering for such work or other service, or to any member of his family or other person for his benefit, to induce such person to withdraw his tender for such work or other service, or to compensate or reward him for having withdrawn such tender; or

(d) in case of tendering for the performance of any work, the doing of any thing, or the furnishing of any goods, effects, food or materials, for the government when tenders are called for by or on behalf of the government, accepts or receives, directly or indirectly, or permits, or allows to be accepted or received by any member of his family, or by any other person under his control, or for his benefit, any such gift, loan, offer, promise, consideration or compensation, as a consideration or reward for withdrawing or for having withdrawn such tender; or

Section 102—*continued*

commission or reward to or confers an advantage or benefit of any kind upon an employee or official of the government with which he deals, or to any member of his family, or to any one for the benefit of the employee or official, with respect to those dealings, unless he has the consent in writing of the head of the branch of government with which he deals, the proof of which lies upon him;

(c) being an official or employee of the government, demands, accepts or offers or agrees to accept from a person who has dealings with the government a commission, reward, advantage or benefit of any kind directly or indirectly, by himself or through a member of his family or through any one for his benefit, unless he has the consent in writing of the head of the branch of government that employs him or of which he is an official, the proof of which lies upon him;

(d) having or pretending to have influence with the government or with a minister of the government or an official, demands, accepts or offers or agrees to accept for himself or another person a reward, advantage or benefit of any kind as consideration for co-operation, assistance, exercise of influence or an act or omission in connection with

(i) anything mentioned in subparagraph (iii) or (iv) of paragraph *(a)*, or

(ii) the appointment of any person, including himself, to an office;

(e) offers, gives or agrees to offer or give to a minister of the government or an official a reward, advantage or benefit of any kind as consideration for co-operation, assistance, exercise of influence or an act or omission in connection with

(i) anything mentioned in subparagraph (iii) or (iv) of paragraph *(a)*, or

(ii) the appointment of any person, including himself, to an office; or

(f) having made a tender to obtain a contract with the government

(i) gives, offers or agrees to give to another person who has made a tender, or to a member of his family, or to another person for the benefit of that person, a reward, advantage or benefit of any kind as consideration for the withdrawal of the tender of that person, or

(ii) demands, accepts or agrees to accept from another person who has made a tender a reward, advantage or benefit of any kind as consideration for the withdrawal of his tender.

(2) Every one commits an offence who, in order to obtain or retain a contract with the government, or as a term of any such contract, whether express or implied, directly or indirectly subscribes, gives, or agrees to subscribe or give, to any person any valuable consideration

OLD CODE:

Section 158—continued

(e) being an official or employee of the government, receives, directly or indirectly, whether personally or by or through any member of his family or person under his control or for his benefit, any gift, loan, promise, compensation or consideration whatsoever, either in money or otherwise, from any person whomsoever, for assisting or favouring any individual in the transaction of any business whatsoever with the government, or who gives or offers any such gift, loan, promise, compensation or consideration; or

(f) by reason of, or under the pretence of, possessing influence with the government, or with any minister or official thereof, demands, exacts or receives from any person any compensation, fee or reward, for procuring from the government the payment of any claim, or of any portion thereof, or for procuring or furthering the appointment of himself or of any other person, to any office, place or employment, or for procuring or furthering the obtaining for himself or any person, of any grant, lease or other benefit from the government; or offers, promises or pays to such person, under the circumstances and for the causes aforesaid, or any of them, any such compensation, fee or reward; or

(g) having dealings of any kind with the government through any department thereof, pays to any employee or official of the government, or to any member of the family of such employee or official, or to any person under his control or for his benefit, any commission or reward; or within one year before or after such dealings, without the express permission in writing of the head of the department with which such dealings have been had, the proof of which permission shall lie upon him, makes any gift, loan, or promise of any money, matter or thing, to any such employee or other person aforesaid; or

(h) being an employee or official of the government, demands, exacts or receives from such person, directly or indirectly, by himself, or by or through any other person for his benefit, or permits or allows any member of his family, or any person under his control, to accept or receive

(i) any such commission or reward, or

(ii) within the said period of one year, without the express permission in writing of the head of the department with which such dealings have been had, the proof of which permission shall lie upon him, accepts or receives any such gift, loan or promise; or

(i) having any contract with the government for the performance of any work, the doing of any thing, or the furnishing of any goods, effects, food or materials, and having or expecting to have any claim or demand against the government by reason of such contract, directly or indirectly, by himself or by any person on his behalf, subscribes, furnishes or gives, or promises to subscribe, furnish or give, any money or other valuable consideration for the purpose of promoting the election of any candidate, or of any number, class or party of candidates, to a legislature or to Parliament, or with the intent in any way of influencing or affecting the result of a provincial or Dominion election.

2. If the value of the amount or thing paid, offered, given, loaned, promised, received or subscribed, as the case may be, exceeds one thousand dollars, the offender under this section is liable to any fine not exceeding such value.

Section 102—*continued*

(a) for the purpose of promoting the election of a candidate or a class or party of candidates to the Parliament of Canada or a legislature, or

(b) with intent to influence or affect in any way the result of an election conducted for the purpose of electing persons to serve in the Parliament of Canada or a legislature.

(3) Every one who commits an offence under this section is guilty of an indictable offence and is liable to imprisonment for five years.

This is the former s.158 re-drawn with a view to greater clarity. It was s.133 in the Code of 1892. There is no corresponding section in the E.D.C., but it may be compared with s.113 of the latter, and with the *Public Bodies Corrupt Practices Act*, 1889 (U.K.).

Cl.1(a) covers the matters dealt with in former s.158(1)(a), (b) and (c);

Cl.1(b) covers the matters mentioned in former s.158(1)(g);

Cl.1(c) covers matters mentioned in former s.158(1)(h);

Cls.1(d) and 1(e) cover matters mentioned in former s.158(1)(f);

Cl.1(f) cover matters mentioned in former s.158(1)(c) and (d).

Subsec.(2) replaces the former s.158(1)(i). It was adopted after debate which appears in Hansard, 1954, pp.2990-2995, the gist of which may be summed up in the following quotation:

". . . the probable intent of this original clause was to make it a crime to try to bribe anybody in the government in order to get some benefit out of it. Certainly there is nothing in the common-sense intention of the law of this country to stop any individual or any organization from making legitimate political contributions."

The disability following conviction, formerly set out in s.159, appears in s.654, *post*.

BREACH OF TRUST BY PUBLIC OFFICER.

103. Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and is liable to imprisonment for five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person.

This is the former s.160 without the words "affecting the public". These are unnecessary in view of the definition of "official" in s.99, and of the words "in connection with the duties of his office".

The section was s.135 in the Code of 1892. It was not in the E.D.C., but comes from art.121 of Stephen's Digest. He illustrates it by a case in which:

"A., a commissary-general of stores in the West Indies, makes contracts with B. to supply stores on condition that B. should divide the profits with A. A. commits a misdemeanour."

See also *R. v. McMORRAN*, cited under s.99, and s.368, *post*.

MUNICIPAL CORRUPTION. — Influencing municipal official. — "Municipal official."

104. (1) Every one who

OLD CODE:

160. Every public officer is guilty of an indictable offence and liable to five years' imprisonment who, in the discharges of the duties of his office, commits any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person.

161. Every one is guilty of an indictable offence and liable to a fine not exceeding one thousand dollars and not less than one hundred dollars, and to imprisonment for a term not exceeding two years and not less than one month, and in default of payment of such fine to imprisonment for a further term not exceeding six months, who directly or indirectly

(a) makes any offer, proposal, gift, loan, promise or agreement to pay or give any money or other material compensation or consideration to any member of a municipal council, whether the same is to enure to his own advantage or to the advantage of any other person, for the purpose of inducing such member either to vote or to abstain from voting at any meeting of the council of which he is a member or at any meeting of a committee of such council, in favour of or against any measure, motion, resolution or question submitted to such council or committee; or

(b) makes any offer, proposal, gift, loan, promise or agreement to pay or give any money or other material compensation or consideration to any member or to any officer of a municipal council for the purpose of inducing him to aid in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person; or

(c) makes any offer, proposal, gift, loan, promise or agreement to pay or give any money or other material compensation or consideration to any officer of a municipal council for the purpose of inducing him to perform or abstain from performing, or to aid in procuring or preventing the performance of, any official act; or

(d) being a member or officer of a municipal council, accepts or consents to accept any such offer, proposal, gift, loan, promise, agreement, compensation or consideration in this section mentioned; or in consideration thereof votes or abstains from voting in favour of or against any measure, motion, resolution or question, or performs or abstains from performing any official act; or

(e) attempts by any threat, deceit, suppression of the truth or other unlawful means to influence any member of a municipal council in giving or withholding his vote in favour of or against any measure, motion, resolution or question, or in not attending any meeting of the municipal council of which he is a member or of any committee thereof; or

(f) attempts by any such means as in the last preceding paragraph mentioned to influence any member or any officer of a municipal council to aid in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person, or to perform or abstain from performing, or to aid in procuring or preventing the performance of, any official act.

(a) gives, offers or agrees to give or offer to a municipal official, or

(b) being a municipal official, demands, accepts or offers or agrees to accept from any person,

a loan, reward, advantage or benefit of any kind as consideration for the official

Section 104—*continued*

(c) to abstain from voting at a meeting of the municipal council or a committee thereof,

(d) to vote in favour of or against a measure, motion or resolution,

(e) to aid in procuring or preventing the adoption of a measure, motion or resolution, or

(f) to perform or fail to perform an official act,

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

(2) Every one who

(a) by suppression of the truth, in the case of a person who is under a duty to disclose the truth,

(b) by threats or deceit, or

(c) by any unlawful means,

influences or attempts to influence a municipal official to do anything mentioned in paragraphs *(c)* to *(f)* of subsection (1) is guilty of an indictable offence and is liable to imprisonment for two years.

(3) In this section "municipal official" means a member of a municipal council or a person who holds an office under a municipal government.

This comes from the former s.161. The words "in the case of a person who is under a duty to disclose the truth" are new, and the definition in subsec.(3) is wide enough to include boards and commissions set up under municipal authority.

The section was s.136 in the Code of 1892 and came from 52 Vict. c.42, s.2.

See notes to s.102, s.368 *post*, and *BROUSSEAU v. R.*, cited under s.21, *ante*.

SELLING OFFICE.—Purchasing office.

105. Every one who

(a) purports to sell or agrees to sell an appointment to or resignation from an office, or a consent to any such appointment or resignation, or receives, or agrees to receive a reward or profit from the purported sale thereof, or

(b) purports to purchase or gives a reward or profit for the purported purchase of any such appointment, resignation or consent, or agrees or promises to do so,

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

This is the former s.162 with the addition of the words "purports to" which are thought to be a more accurate statement. It was part of s.137 in the Code of 1892 which is described as new in Taschereau's edition. These offences were common law misdemeanours.

"Office" is defined in s.99(d).

For disability following conviction see s.654.

OLD CODE:

162. Every one is guilty of an indictable offence who, directly or indirectly,
(a) sells or agrees to sell any appointment to or resignation of any office, or any consent to any such appointment or resignation, or receives, or agrees to receive, any reward or profit from the sale thereof; or
(b) purchases or gives any reward or profit for the purchase of any such appointment, resignation or consent, or agrees or promises to do so;
and in addition to any other penalty incurred, forfeits any right which he may have in the office and is disabled for life from holding the same.

163. Every one is guilty of an indictable offence who, directly or indirectly,
(a) receives or agrees to receive any reward or profit for any interest, request or negotiation about any office, or under pretense of using any such interest, making any such request or being concerned in any such negotiation; or
(b) gives or procures to be given any profit or reward, or makes or procures to be made any agreement for the giving of any profit or reward, for any such interest, request or negotiation as aforesaid; or
(c) solicits, recommends or negotiates in any manner as to any appointment to or resignation of any office in expectation of any reward or profit; or
(d) keeps any office or place for transacting or negotiating any business relating to vacancies in, or the sale or purchase of, or appointment to or resignation of offices.

REWARD FOR INFLUENCING APPOINTMENT.—Reward for negotiating appointment.—Establishment for dealing in offices.

106. Every one who

(a) receives, agrees to receive, gives or procures to be given, directly or indirectly, a reward, advantage or benefit of any kind as consideration for co-operation, assistance or exercise of influence to secure the appointment of any person to an office;

(b) solicits, recommends or negotiates in any manner with respect to an appointment to or resignation from an office, in expectation of a direct or indirect reward, advantage or benefit; or

(c) keeps without lawful authority, the proof of which lies upon him, a place for transacting or negotiating any business relating to

(i) the filling of vacancies in offices,

(ii) the sale or purchase of offices, or

(iii) appointments to or resignations from offices,

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

This is the former s.163. See notes to s.105.

DISOBEYING A STATUTE.

107. Every one who, without lawful excuse, contravenes an Act of the Parliament of Canada by wilfully doing anything that it forbids or by wilfully omitting to do anything that it requires to be done is, unless some penalty or punishment is expressly provided by law, guilty of an indictable offence and is liable to imprisonment for two years.

Section 107—*continued*

This is the former s.164, omitting the reference to provincial statutes. It was s.138 in the Code of 1892 and came from s.114 of E.D.C.

The effect of the omission is to leave it to the provinces to penalize such breaches of their statutes as they wish to punish. As the section stood, it was possible that it might operate to punish an act or omission which the legislature did not intend to penalize. In this connection the following may be quoted from *R. v. STANLEY*(1935), 64 C.C.C.385 at p.391:

> "While it is true that Parliament has declared it to be a crime to disobey a provincial statute for which no penalty is provided (i.e. by sec.164), it is equally true that the Dominion may not under the cloak of legislating as to criminal law, invade the legislative field exclusively assigned to the Provinces, *Re Reciprocal Ins. Legislation* (1924), 41 C.C.C. 336."

And at p.392:

> "It seems to me that where we have a Provincial Act in respect of provincial matters, the Dominion cannot merely by providing an omitted penalty for disregard of its prohibitions, convert an Act which otherwise would unquestionably be valid provincial legislation, into a criminal law enactment."

This provision has appeared since Confederation, in the *Interpretation Act*, 1867-68, c.1, pars.20 and 21, in s.3 of c.71 of the same year, *An Act respecting Forgery, Perjury and Intimidation, in connection with the Provincial Legislatures and their Acts*, and in R.S.C. 1886, c.173, s.25, *An Act respecting Threats, Intimidation and other Offences.*

There is a common law basis for the section. Stephen's Digest of Criminal Law, 7th Ed., Art. 166, is as follows:

> "Every one commits a misdemeanour who wilfully disobeys any statute of the realm by doing any act which it forbids, or by omitting to do any act which it requires to be done, and which concerns the public or any part of the public, unless it appears from the statute that it was the intention of the Legislature to provide some other penalty for such disobedience."

This article was incorporated in the English Draft Code with the concluding words:

> "Unless some penalty or other proceeding is expressly provided by law, and is intended to be exclusive of all other punishment for such disobedience."

In *R. v. ROBINSON*(1759), 2 Burr.799, at p.805, Lord Mansfield laid down the rule as follows:

> "The true rule of distinction seems to be, that where the offence intended to be guarded against by a statute, was punishable before the making of such statute prescribing a particular method of punishing it, there such particular remedy is cumulative, and does not take away the former remedy; but where the statute only enacts 'that the doing of any particular act not punishable before, shall for the future be punishable in such and such a particular manner,' there it is necessary that such particular method, by such Act prescribed, must be specifically pursued; and not the common law remedy of an indictment."

OLD CODE:

164. Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any Act of the Parliament of Canada or of any legislature in Canada by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty or other mode of punishment is expressly provided by law.

The case of *R. v. BUCHANAN*(1846), 8 Q.B.883, concerned a statute which, in general terms, prohibited persons acting as attorneys in any Court without having been previously admitted and enrolled. In a later part of the same statute it had been enacted that any person who did act without being admitted and enrolled, should be unable to recover fees and should be guilty of contempt of Court and punishable accordingly. It was held that an unqualified person might be indicted under the substantive prohibitory clause. The following is quoted from the judgment of Lord Denman:

"I am of opinion that, wherever a person does an act which a statute on public grounds has prohibited generally, he is liable to an indictment. I quite agree that where, in the clause containing the prohibition a particular mode of enforcing the prohibition is prescribed and the offence is new, that mode only can be pursued; the case is then as if the statute had simply declared that the party doing the act was liable to the particular punishment. But where there is a distinct, absolute prohibition, the act is indictable."

The following cases dealing with the section are reported in Canada.

In *Re E. J. PARKE*(1899), 3 C.C.C.122, an application was made for a writ of mandamus to compel a police magistrate to receive an information charging a disobedience of the *Ontario Municipal Act* for which no penalty was provided. The application was refused by Meredith, J., who said:

"Assuming that section 138 of the Code is applicable to a case of this kind, and assuming that there are no other difficulties in the way, this motion must be refused because no wilful disobedience of any statute has been shown, and that it ought to be shown, not only after but also before, any criminal prosecution for such an offence is permitted."

An appeal from this decision was dismissed.

Similar to the foregoing was the case of *R. v. MEEHAN*(No.2)(1902), 5 C.C.C.312, in which it was held that where the doing of a particular act is prohibited by a statute on public grounds, and the statute does not declare a mode of enforcing the prohibition, the offence is indictable. This was also an application for a writ of *mandamus* to compel a magistrate to receive an information on a charge of illegal voting. In this case the application was granted, and the case of *R. v. BUCHANAN*(*supra*) was followed. The following is quoted from the judgment:

"Every contempt of a statute is indictable where no other punishment is limited: 2 Hawk. P.C., ch. 25, sec. 4; 5 Burn's Justice, p. 730; and when a new offence is created by one clause of an Act, and a penalty annexed by a separate and substantive clause, a prosecutor may indict on the clause creating the offence, and is not obliged to sue for the penalty: *R. v. HARRIS*, 4 T.R. at p. 205; see also *R. v.*

Section 107—*continued*

WRIGHT (1758), 1 Burr. 543; 2 Hawk. P.C., ch. 25, sec. 4; 1 Russell on Crimes, 6th ed., p. 199 *et seq*. These cases all refer to new offences or to offences which Parliament had the power to create. Here there is no penalty or other mode of punishment, and therefore the case comes within sec. 138 of the Code."

In *R. v. McMURRER*: *McMURRER v. JENKINS*(1907), 18 C.C.C. 385(P.E.I.) it was argued that a provision disallowing an appeal from conviction was a matter of criminal procedure. *Per* Sullivan, C.J.:

"Section 138 of the Criminal Code provides a means of punishment for the wilful violation of a federal or of a provincial statute, where no penalty or other mode of punishment is expressly provided by law; but it has no application to a case like the present one, under an Act which expressly provides a penalty and mode of punishment. In my opinion subsec. 2 of sec. 16 of the Prohibition Act, 1900, which prohibits 'an appeal to any Court whatever' is operative."

R. v. HAYS(1907), 12 C.C.C.423. The manager of a corporation is not criminally liable as for wilful disobedience of a statute under Code section 164 in respect of the corporation's neglect, not due to any active participation on his part, to perform a statutory duty imposed upon it. *Per* Osler, J.A.: Section 164 does not apply in this instance because section 294 of the *Railway Act* provided a penalty for violations of it not specially provided for.

R. v. DUROCHER(1913), 21 C.C.C.61, was a motion to prohibit a police magistrate from proceeding on an information charging a breach of the then *Ontario Municipal Act*. S.193, subsec.1(b) provided that "no person shall . . . . . fraudulently put into any ballot box any paper other than the ballot paper which he is authorized by law to put in." Subsec.3 provided a punishment of not more than six months' imprisonment with or without hard labour. The motion was refused. (*R. v. BUCHANAN, supra*, followed.) An appeal (21 C.C.C.382) was dismissed. The following are quotations from the judgment:

"The law upon the subject is thus stated in Hawkin's Pleas of the Crown, bk. 2, ch. 25, sec. 4: 'Wherever a statute prohibits a matter of public grievance to the liberties and security of a subject or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable not only at the suit of the party aggrieved but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it' . . . . .

Maxwell on Statutes, 5th ed., p. 651, lays down the rule as follows: 'If a statute prohibits a matter of public grievance or commands a matter of public convenience, all acts and omissions contrary to its injunctions are misdemeanours; and if it omits to provide any procedure or punishment for such act or default, the common law method of redress is impliedly given; that is, the procedure by indictment, and punishment by fine or imprisonment without hard labour or both.' . . . . . The punishment for violation of the statute is prescribed in clause (3) of sec. 193. That, however, is not now in question, as the whole question on this appeal is, whether the Police Magistrate should be prohibited from taking the preliminary examination upon the in-

formation laid.

As I have said, neither sec. 193 nor any other part of the Municipal Act provides what *procedure is to be adopted for enforcing the punishment* prescribed for a violation of the provision of the Act now in question. There is, consequently, nothing to prevent the adoption of the procedure laid down by the authorities above cited, that is, by indictment, as 'such method of proceeding does not manifestly appear to be excluded by it,' to use the language of Hawkins; or, to use the language of Maxwell, 'it omits to provide any procedure' . . . . . .

An examination of the various cases shows that the difficulties have arisen with those statutes which have prescribed either a particular procedure or punishment or both. In such cases a question often arises whether the particular procedure or punishment prescribed in the statute supersedes the common law procedure and punishment, or whether the prosecutor can proceed under one or the other at his option; or, in other words, whether that statutory remedy is in lieu of or in addition to the common law remedy.

In the present case no such conflict arises as to the remedy. The statute itself provides none, so that the common law remedy of indictment remains intact. If the appellant should be found guilty, the question of the punishment will be a proper one for consideration."

It will be remembered, of course, that as a result of s.8, *ante*, the indictment at common law will not now be available.

R. v. D'ANGELO(1927), 48 C.C.C.127(Ont.). This was an appeal from conviction on a charge of manslaughter in which the conviction was quashed and a new trial ordered. The following are extracts from the judgment *per* Mulock, C.J.O.:

"In my opinion, neither under the Criminal Code nor at common law is it unlawful to sell potable alcohol. While such selling may be an infraction of provincial legislation, s. 164 of the Cr. Code not here applying, it is not unlawful in the sense of that unlawfulness which is a necessary element in determining whether an act amounts to manslaughter."

Per Hodgins, J.A. (dissenting):

"Section 164 of the Cr. Code uses the word 'wilfully' in dealing with disobedience to a Dominion or Provincial statute, in order to constitute it an unlawful act.

"It is to be observed that whatever disobedience of a Provincial statute may be, when considered in reference to a definition of "crime" it is by this section, if wilful, made an indictable offence and punishable as such, unless some other penalty or mode of punishment is expressly provided by law. It includes *mens rea* by reason of the use of the word 'wilfully', but that expression in this connection only means intent to disobey the statute. I cannot follow the argument that there is any difference in its legal consequences between the unlawfulness of an act *malum in se* and one *malum prohibitum* when this section is being dealt with. An unlawful act is created by wilfully disobeying a Provincial statute. Whether that statute prohibits an act which is not essentially criminal in its nature or one which has in it elements of crime as generally understood, an indictable offence under s.164 is committed when it is disobeyed. Its unlawfulness in no sense depends

Section 107—*continued*

upon the difference between *malum in se* and *malum prohibitum*, but merely upon infraction of the terms of the statute."

In *R. v. THERMO-SEAL INSULATION LTD.*(1951), 15 C.P.R.42, accused was charged with a breach of s.406(3)(b), now s.306(4), as a substantive offence, and resort was had to s.164 to supply a penalty.

A question has arisen on the interpretation of s.164 with reference to its application to regulations made under statutory authority. In this connection two Canadian cases should be noted. In *HAMILTON v. MASSIE*(1889), 18 O.R.585, the facts were that a workman in the Central Prison at Toronto, in the employ of a contractor doing work in the "prison" was detected in the act of conveying tobacco to a convict. This was a breach of a rule made by the Inspector of Prisons under statutory authority, and he was arrested. It was pointed out that insofar as such rules had the force of a statute, any infraction of them was a misdemeanour under s.25, R.S.C. 1886, c.173. It was held that the workman was subject to an indictment and punishable accordingly. This judgment was affirmed on appeal.

In *R. v. SINGER*(1940), 74 C.C.C.290, on appeal from a judgment of the Court of Sessions dismissing an information for violation of a regulation made under s.3 of the *War Measures Act*, it was held by three judges with two others dissenting, that disobedience to the regulations was not disobedience to an Act of Parliament.

"Since s.3(2) of the War Measures Act, R.S.C. 1927, c.206, merely enacts that orders and regulations made by the Governor in Council under s.3 shall have the force of law, without adding that such orders and regulations shall be deemed to be part of the Act, the violation of a regulation made under s.3 which prescribes no sanction for its enforcement is not punishable under s.164, Cr. Code, which relates only to violations of Acts of Parliament or of provincial Legislatures."

Bond, J., pointed out that the *Bankruptcy Act* provides that rules "shall be judicially noticed, and shall have effect as if enacted by this Act," that the *Explosives Act* provides that regulations upon being published "shall have the same force as if they formed part of this Act," and that the *Meat and Canned Foods Act* provides that orders and regulations under it "shall have the same force and effect as if embodied in this Act." And he added that "if Parliament intends to provide that regulations shall have the same effect as if enacted by the Act, then Parliament must surely say so, as in the illustrations that I have given in the earlier parts of these notes."

No similar question has arisen in Canada with reference to orders in council, but it appears that disobedience to an order in council authorized by statute was an offence at common law: *R. v. HARRIS*(1791), 4 Term Rep. 202; *R. v. WALKER*(1875), 13 Cox,C.C.94; *R. v. HALL* (1891), 17 Cox,C.C.278.

DISOBEYING ORDER OF COURT.

108. Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order

OLD CODE:

165. Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any lawful order, other than for the payment of money, made by any court of justice, or by any person or body of persons authorized by any statute to make or give such order, unless some penalty is imposed, or other mode of proceeding is expressly provided, by law.

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for the payment of money is, unless some penalty or punishment or other mode of proceeding is expressly provided by law, guilty of an indictable offence and is liable to imprisonment for two years.

This is the former s.165. It was s.139 in the Code of 1892 and came from s.115 of the E.D.C. where, however, the "other mode of proceeding" has not only to be "provided by law" but also to be "intended to be exclusive of all other punishment for such disobedience."

It was held in *Re GERSON; Re NIGHTINGALE*(1946), 87 C.C.C. 143, that the right to punish for contempt of court is not affected by this section. See also *POJE v. A.-G. of BRITISH COLUMBIA*(1953), 105 C.C.C.311, cited under s.9, *ante*.

This section has been referred to in the following cases:
R. v. G.T.R. & C.P.R.(1908), 17 O.L.R.601 at p.608;
MACKELL v. OTTAWA(1917), 40 O.L.R.272 at p.284;
R. v. SHARPE, ex p. SHARPE(1922), 36 C.C.C.1, at p.4;
Re KEAN v. KEAN, ex p. BIRD(1927), 48 C.C.C.363, at pp.386,394.
The first two turned on the point that the section only applies where no provision is otherwise made by law.

R. v. SHARPE was a proceeding for contempt in disobedience of an order for the custody of children under provincial law. It was argued that the proceeding did not lie because the offender was liable to prosecution under s.165, but it was held that he was liable for contempt and the objection was overruled.

Re KEAN v. KEAN was an application to commit a solicitor for contempt for breach of an alleged undertaking to pay money, in proceedings under the *Deserted Wives' Maintenance Act* of British Columbia. "It is not to be forgotten that the failure to obey any lawful order of a Court of justice to pay money is not a criminal offence under s.165 of the Cr. Code" (quoted). It was held that the order for commitment for contempt was not validly made as there was no *personal* undertaking.

MISCONDUCT OF OFFICERS EXECUTING PROCESS.

109. Every peace officer or coroner who, being entrusted with the execution of a process, wilfully

***(a)* misconducts himself in the execution of the process, or**

***(b)* makes a false return to the process,**

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

This is the former s.166 altered by specifying the penalty which under the former section, fell under s.1052. It was s.143 in the Code of 1892.

Section 109—*continued*

S.166 came from 27 & 28 Vict., c.85, s.31 (Can.), which read as follows: "31. If any bailiff or constable entrusted with the execution of any writ, warrant or process, mesne or final, shall wilfully misconduct himself in the execution of same, or wilfully make any false return to such writ, warrant or process, unless by the consent of the party in whose favor the process may have issued, he shall be guilty of a misdemeanour and upon conviction thereof before any court of competent jurisdiction, shall be liable to fine and imprisonment in the discretion of the Court, *and shall answer in damages to any party aggrieved by such misconduct or false return.*"

This Act had to do with the office of Sheriff in Upper Canada and repealed Cons. Stat. of U.C., c.38, which however contained no provision similar to the above.

The revision omits the words "without the consent of the person in whose favour the writ, warrant or process was issued,". The reason why they were in s.166 is obscure, but it is probable that they referred to the existence of a civil remedy by action indicated by the words in italics above, which reference does not appear in the Code. There is no similar statutory provision in England but at common law "any public officer is indictable for misbehaviour in his office . . . . . (*Anon.* (1704), 6 Mod. Rep. 96) . . . . . even though the same conduct in a private transaction would, if between individuals have only given rise to an action." Roscoe's Cr. Ev., 16th ed., p.813:

"Where an officer neglects a duty incumbent on him, either by common law or statute, he is for his default indictable: *R. v. WYAT*(1705), 1 Salk. 380."

The common law cases have to do with the mishandling of money. There are no reported Canadian cases.

OBSTRUCTING PUBLIC OR PEACE OFFICER.—Neglect to aid public or peace officer.—Resisting execution of process.

110. Every one who

***(a)* resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer,**

***(b)* omits, without reasonable excuse, to assist a public officer or peace officer in the execution of his duty in arresting a person or in preserving the peace, after having reasonable notice that he is required to do so, or**

***(c)* resists or wilfully obstructs any person in the lawful execution of a process against lands or goods or in making a lawful distress or seizure,**

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

This combines matter appearing in the former ss.95,167 and 168. These were ss.141, 142 and 144 in the Code of 1892. Ss.141 and 142, which Taschereau describes as new, were ss.117 and 118 in the E.D.C. S.144 came from R.S.C. 1886, c.162, s.34, and from 24-25 Vict. c.100, s.38 (Imp.).

OLD CODE:

166. Every one is guilty of an indictable offence and liable to a fine and imprisonment who, being a sheriff, deputy-sheriff, coroner, elisor, bailiff, constable or other officer entrusted with the execution of any writ, warrant or process, wilfully misconducts himself in the execution of the same, or wilfully, and without the consent of the person in whose favour the writ, warrant or process was issued, makes any false return thereto.

95. Every one is guilty of an indictable offence and liable to one year's imprisonment who, having reasonable notice that he is required to assist any sheriff, deputy sheriff, mayor, or other head officer, justice, magistrate, or peace officer in suppressing any riot, without reasonable excuse omits to do so.

167. Every one is guilty of an indictable offence and liable to ten years' imprisonment who resists or wilfully obstructs any public officer in the execution of his duty or any person acting in aid of such officer.
(2) Every one is guilty of an indictable offence and liable to six months' imprisonment who, having reasonable notice that he is required to assist any sheriff, deputy-sheriff, mayor or other head officer, justice, magistrate, or peace officer, in the execution of his duty in arresting any person, or in preserving the peace, without reasonable excuse omits to do so.

168. Every one who resists or wilfully obstructs
(a) any peace officer in the execution of his duty or any person acting in aid of such officer;
(b) any person in the lawful execution of any process against any lands or goods or in making any lawful distress or seizure;
is guilty of an offence punishable on indictment or on summary conviction and liable if convicted on indictment to two years' imprisonment, and, on summary conviction before two justices to six months' imprisonment with hard labour, or to a fine of one hundred dollars.

As to protection of persons arresting or assisting in arrests, or preventing a breach of the peace, see ss.25 *et seq., ante.* The powers of private persons to make an arrest are set out in ss.434 and 436-438, *post.* Other provisions relating to obstruction are contained in ss.56,169,175 and 390.

The word "wilfully" in this context was interpreted in *R. v. GOODMAN*(1951), 99 C.C.C.366, noted under s.24, *ante.*

The officer must be in the execution of his duty: *R. v. DIAMOND* (1923), 42 C.C.C.90; *R. v. JOHANSON and LEWIS*(1922), 38 C.C.C.60; but if he is so, the obstruction need not take the form of physical force. "I do not wish to be understood to say that, in order that there should be an offence under this section there must be some physical obstruction of the constable:" Darling, J., in *BASTABLE v. LITTLE*, [1907]1 K.B.59.

In *R. v. L.*(1922), 38 C.C.C.242, the obstruction took the form of advising people found in a house during a search not to give their right names when asked by the police. In *R. v. GOTH*(1951), 100 C.C.C.269, (following *R. v. GRIFFIN*(1935), 63 C.C.C.286), it consisted in refusal to stop a car when ordered by the police to do so. It could consist in conduct before a justice of the peace that would be punishable as contempt if it occurred in a court of record.

Section 110—*continued*

As to par.(c), see *R. v. LORETTE*(1918), 30 C.C.C.238, in which the obstruction consisted in the rescue of animals being taken to pound.

Note too, that this Code does not contain the provisions for distress that appeared in the repealed Code.

As to absolute jurisdiction of magistrate see s.467(c).

PERSONATING PEACE OFICER.

111. Every one who

***(a)* falsely represents himself to be a peace officer or a public officer, or**

***(b)* not being a peace officer or public officer uses a badge or article of uniform or equipment in a manner that is likely to cause persons to believe that he is a peace officer or a public officer, as the case may be,**

is guilty of an offence punishable on summary conviction.

This is the former s.169 which was brought into the code as s.169A by 1913, c.13, s.7. It is widened to include a public officer. See definitions in s.2(30) and (35) *ante*.

Section 37 of the *R.C.M.P. Act*, R.S.C. 1952, c.241, makes it an offence unlawfully to put on or assume the dress, name, designation or description of any member of the Force.

In *R. v. BILLETT*(1952), 105 C.C.C.169, a conviction under s.169 was quashed on appeal for lack of sufficient evidence. The following appears at p.172:

> "I do not think that the proof of the falsity of the representation that accused was a policeman is sufficiently made without at least showing that he was not a policeman with authority in the area where the representation was made. Some evidence should be presented to shift the onus to the accused."

MISLEADING JUSTICE.

PERJURY.

112. Every one commits perjury who, being a witness in a judicial proceeding, with intent to mislead gives false evidence, knowing that the evidence is false.

This section, with the definitions in s.99(a),(c) and (f) covers matters dealt with in the former ss.170 and 171.

The history of the sections of the repealed Code which dealt with perjury and similar offences appears in *R. v. ORFORD*(1943), 79 C.C.C. 151 at p.160:

> "At common law, in order to amount to perjury, the offence had to be committed in a judicial proceeding. False swearing was a different offence. In Canada, after Confederation, an Act respecting perjury was introduced in Parliament in 1869 (c.23, 32-33 Vict.) and it is found in a modified form in the Revised Statutes of 1886, c.154. The reading of this Act will show that it was the clear intention of Parliament to do away with the existing law, for the word 'perjury' in the new Act did not apply only to a witness giving evidence under oath in a judicial proceeding, but to any one, who having taken any oath, affirmation,

OLD CODE:

169. Every one who falsely represents himself to be a constable or other peace officer, or who, not being a constable or other peace officer, makes use of any badge or article of uniform or equipment in such manner as is likely to make persons believe that he is a constable or other peace officer, is liable upon summary conviction to a fine not exceeding one hundred dollars and costs, or to imprisonment for a term not exceeding three months, or to both such fine and such imprisonment.

170. Perjury is an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding as part of his evidence, upon oath or affirmation, whether such evidence is given in open court, or by affidavit or otherwise, and whether such evidence is material or not, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury or person holding the proceeding.

(2) Subornation of perjury is counselling or procuring a person to commit any perjury which is actually committed.

(3) Evidence in this section includes evidence given on the voir dire and evidence given before a grand jury.

171. Every person is a witness within the meaning of the last preceding section who actually gives his evidence, whether he was competent to be a witness or not, and whether his evidence was admissible or not.

(2) Every proceeding is judicial within the meaning of the last preceding section which is held in or under the authority of any court of justice, or before a grand jury, or before either the Senate or House of Commons of Canada, or any committee of either the Senate or House of Commons, or before any legislative council, legislative assembly or house of assembly or any committee thereof, empowered by law to administer an oath, or before any justice, or any arbitrator or umpire, or any person or body of persons authorized by law or by any statute in force for the time being to make an inquiry and take evidence therein upon oath, or before any legal tribunal by which any legal right or liability can be established, or before acting as a court, justice or tribunal, having power to hold such judicial proceeding, whether duly constituted or not, and whether the proceeding was duly instituted or not before such court or person so as to authorize it or him to hold the proceeding, and although such proceeding was held in a wrong place or was otherwise invalid.

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declaration or affidavit, in any case in which by any Act or law in force in Canada, or in any Province in Canada, it is required or authorized that facts, matters or things be verified or otherwise assured or ascertained. The wide extension given to the word perjury was a complete departure from the law of England, where the Star Chamber in 1613, declared that perjury by a *witness* only, was punishable at common law.

Kenny in his Outlines of Criminal Law, 4th ed., says at p.295: 'The common law offence of perjury, thus created, consists in the fact that a witness, to whom an oath has been duly administered in a judicial proceeding, gives, upon some point material to that proceeding, testimony which he does not believe to be true. It will thus be seen that false oaths do not always involve a perjury.'

The Act of 1869 remained the law of the land until 1893, when our *Criminal Code* based on the *English Draft Code* was enacted. . . . . It is for all practical purposes a copy of the *English Draft Code*, except that in Canada, it is not necessary that the evidence given be

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material. But the main feature of this section is that perjury may be committed, only by a witness in a judicial proceeding, whether the witness give his evidence orally, or by affidavit or otherwise. This is obviously a return to the former notions of perjury and a limitation of its definition to a much narrower field.

Our s.171, which is also found in the Draft Code, defines what is a judicial proceeding and it states that every proceeding is judicial which is held not only under the authority of a Court of Justice, but also before a grand jury, or before the Senate or House of Commons or a committee of either House, or similar bodies.

The *Code* deals also with false oaths which would amount to perjury if made in judicial proceedings. S.175, different from 122 of the *Draft Code* only in its phraseology, reads as follows: 'Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being required or authorized by law to make any statement on oath, affirmation or solemn declaration, thereupon makes a statement which would amount to perjury if made in a judicial proceeding.'

This section covers the case of a false oath given in a non-judicial proceeding. It is not called perjury, but is merely described as being an indictable offence.

Then comes s.176 drafted as follows: 'Every one is guilty of an indictable offence and liable to two years' imprisonment who, upon any occasion on which he is permitted by law to make any statement or declaration before any officer authorized by law to permit it to be made before him, or before any notary public to be certified by him as such notary, makes a statement which would amount to perjury if made on oath in a judicial proceeding.'

It is significant that as in the *Draft Code* the legislator uses the words 'any statement or declaration'. We do not find as in s.175 'statement on *oath* or *solemn* declaration'. It was not sure if the giving of a false statement or declaration not on oath to a person authorized by law to permit it to be made before him, was a common law misdemeanour, but in their report the English Commissioners said: 'False statements not an oath to which faith is given are not perjury etc.' But they felt that it should be made indictable and proposed the enactment of s.123 which we have adopted and embodied in our *Code*. It is now s.176. It cannot be said that any untrue statement or false declaration is an offence under this section. But when the false statement is given to a person authorized by law to require it, it is an offence as it would be for instance in the case of an authorized custom or excise officer to whom a false statement is given."

To this may be added the historical summary given by Mr. Justice Hall in *DREW v. R.*(1902), 6 C.C.C.241, at p.244:

"All who had experience in former years in prosecutions before our criminal Courts are aware of the serious technical difficulties which made convictions of perjury almost impossible. The common law of England, which was in force here in criminal matters, exacted that the alleged false evidence must have been *material* to the issue in the case in which it was taken, and, secondly, that the tribunal before which the sworn statement was made must have been regularly constituted and have possessed competent jurisdiction to hear and adjudi-

cate upon the case. So that if a false statement were made by a witness, he could not be punished for it unless it related to the exact issue which was under consideration, and, equally, if having thus sworn falsely, he could, upon his trial for perjury establish that the Magistrate had not taken the oath of allegiance, or lacked the proper qualification, or did not possess the technical jurisdiction, territorial or otherwise, to try the case, the witness guilty of an attempt to mislead justice by false evidence escaped conviction and punishment. This was admitted to be a cause of a serious miscarriage of justice, and a persistent effort was made to correct both abuses. The first suggestion made was to abolish *materiality* as an essential condition of a conviction for perjury. Our Parliament at once accepted the modification and, by 32-33 Vict. (1869), c.23, s.7, declared that any false statement made by a witness in a judicial proceeding should be held to be *material* to the issue then pending. This removed a part of the difficulty, but the other remained, and still exists and hampers the administration of criminal justice in Great Britain. So many similar abuses existed there that in 1880 an Imperial Commission was appointed, headed by Sir James Stephen, the eminent expert in criminal law, to examine the whole body of English criminal law and report upon the changes that seemed to them necessary and desirable. Their report was voluminous and exhaustive. In regard to the offence of perjury they recommended that materiality should not be insisted upon as an essential condition for conviction. In regard to the existing conditions as to the technical constitution of the Courts and the qualifications of the Magistrate, they recommended very radical changes, nothing less in fact, than the abolition of all the class of objections which made the convictions so difficult. They reported that in their opinion: 'The guilt and danger of perjury consist in attempting by falsehood to mislead a tribunal *de facto* exercising judicial functions. It seems to us not desirable that a person who has done this should escape from punishment if he can shew some defect in the constitution of the tribunal which he sought to mislead or some error in the proceedings themselves.' "

The judgment quoted from *R. v. ORFORD, supra,* continues at p.162 as follows:

"It can now be seen that the law deals with three different offences: The crime of perjury, always committed by a witness in a judicial proceeding; the indictable offence of giving a false oath in a non-judicial matter; and the last indictable offence of giving a false statement, not under oath, to a person authorized by law to receive it . . . . .

But the *Code* contains another section, which is s.172 and which is not in the *English Draft Code.* (Quoted) . . . . . .

'Every one is guilty of *perjury* who' etc. says s.172. It must necessarily be perjury as defined in s.170, and therefore in a judicial proceeding, otherwise, we would have to reach the illogical conclusion that 172 and 175 both cover extra-judicial oaths although the punishment for violating s.172 is 14 years, and 7 years for s.175.

The crimes described in ss.175 and 176 are not qualified as 'perjury', but it is said in both sections that they would amount to perjury 'if made in a judicial proceeding', and those last words are omitted from s.172, obviously because they are unnecessary. The intention of the

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legislator in enacting s.172, was not to repeat what was already enacted in s.175 concerning extra-judicial oaths, but to declare that it would be a crime amounting to perjury, for any person other than a witness (whose case is covered by s.170), to give a false statement under oath, in a judicial proceeding. And it is very frequent that affidavits have to be given in judicial proceedings by persons who are not witnesses, as for instance affidavits by plaintiffs in civil actions, before the writ of summons may be issued.

This is, to my mind, the case which the legislator had in mind when he enacted s.172, and which otherwise would not amount to a crime under the *Criminal Code*. Indeed, it would not be an offence under s.170 because the false oath would not have been given by a witness, and it cannot be said that it would be a violation of s.175 because the oath would be given in a judicial proceeding.

In the present case, the respondent did not give a false statement under oath while called as a witness in a judicial proceeding, nor did he give a false oath in a judicial proceeding in the manner contemplated by s.172, and therefore, he cannot be charged of having committed the crime of perjury."

The judgment of Taschereau, J., expressed the opinion of the majority, but Kerwin and Hudson, JJ., dissented to the extent of holding that perjury as defined by s.172 is not limited to false statements made in judicial proceedings. In view of the majority opinion it would appear that the previous jurisprudence is obsolete so far as it holds that ss.172 and 175 "overlap" and "probably mean the same thing".

It is submitted that s.176, as so explained, is not covered by s.112 or s.114 of this Code, but falls rather within the sections relating to fraud or false pretences.

"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): *R. v. SVEINSSON*(1950), 102 C.C.C.366, at p.372. See also *R. v. TILLITSON*(1947), 89 C.C.C.389.

In 218 L.T. at p.96 there is comment upon the case of *NASH v. ALI KHAN*(1892), 8 Times L.R.444, in which a witness could not swear, because there was no form of oath by which he was bound, and could not affirm, because he had a religious belief. Although he said that he would speak "the truth, the whole truth about this matter, and no humbug," it was held on appeal that his evidence had been rightly rejected.

In *R. v. LEE TUCK*(1912), 19 C.C.C.471, in which the "paper oath" was administered to a Chinese witness, although he had said he wished to be sworn on the Bible, it was held that he was not properly sworn. (At p.481): "By the common law of England every witness must be sworn according to some religious ceremony or other. There is, however, at common law no prescribed form of oath: it is that which the witness declares to be binding on his conscience, and he is always allowed to adopt the ceremonies of his own religion." But where the "paper oath" was administered at the witness' own suggestion, he was held to be bound: *R. v. LAI PING*(1904), 8 C.C.C.467.

Forms of Chinese oaths are given in *R. v. AH WOOEY*(1902), 8 C.C.C.25.

In *SHAJOO RAM v. R.*(1915), 25 C.C.C.69, a Hindoo witness was held to be bound by a form of oath administered through an interpreter and assented to by him as appropriate to his belief and as binding upon him.

In *CURRY v. R.* (No.2)(1913), 22 C.C.C.191, the "Scotch" form of swearing with uplifted hand, was held to be binding. It was said that the *Criminal Code* amended earlier legislation "so as to render it yet more comprehensive and plain" and that the former legislation was so framed, "as to end, if possible, every frivolous attempt of the perjurer, to escape, by way of technicalities and needless subtleties from the consequences of his misconduct."

In *R. v. KLINE*(1937), 68 C.C.C.66 it was held that a witness who had taken the usual oath by kissing the Bible although it was not administered with the formality that his faith required, had taken a binding oath.

What is a Judicial Proceeding?

R. v. ROW(1864), 14 U.C.C.P.307.

In this case it appeared that the perjury, if committed, was committed in the City of London, on the hearing of a charge of an offence committed in the County of Middlesex. It was objected that the justices had no right to swear accused as they were appointed for the County and had no jurisdiction in the city. This contention was upheld and the conviction reversed.

Held that s.4 of 28 Geo.III, c.49 (Imp.) *An Act to enable Justices of the Peace to act as such, in certain cases, out of the Limits of the Counties in which they actually are,* was local in character and was not in force in the province.

R. v. THOMPSON(1896), 4 C.C.C.265.

A count charging accused with perjury committed at an inquest before a coroner is not invalid by reason of the fact that the tribunal was a coroner and jury. "The circumstances that the evidence was given before a coroner and jury, instead of before the coroner alone, does not alter the fact that false swearing before the coroner or before the coroner and jury, would have been a perjury." It was held too the charge was sufficient under s.611 (now 492(3)) "to give the accused notice of the offence with which he was charged".

DREW v. R.(1903), 33 S.C.R.228.

It was held by the Supreme Court of Canada, approving the judgment of the Court of King's Bench, appeal side, in Quebec, that the hearing of a charge by a magistrate, assuming to act as a Justice of the Peace having authority to hear it, is a judicial proceeding within the meaning of s.145 of the *Criminal Code* (later s.171) and a person swearing falsely upon such hearing may be properly convicted of perjury notwithstanding that the magistrate had no jurisdiction over the subject matter of the complaint, he not residing in the county where the offence was charged to have been committed.

The judgment was not unanimous but Armour, J., who delivered the judgment of the majority said in part at p.251:

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"The recorder was a justice, but in hearing the said charge he was not a justice having power to hold such judicial proceeding, but he was acting as a justice having power to hold such judicial proceeding and his hearing the said "charge was therefore a judicial proceeding within the meaning of that phrase as used in s.145 of the Criminal Code, and the defendant was rightly convicted."

R. v. THICKENS(1906), 11 C.C.C.274.

Held by a Judge of a County Court in British Columbia, that perjury may be assigned in respect of an examination for discovery in a civil action, although the presiding officer has no power of adjudication.

Held also that an examination for discovery is a "judicial proceeding" as defined by Code s.145(3). (*Quaere* this decision in view of later decisions *contra*).

R. v. YALDON(1908), 13 C.C.C.489.

An indictment for perjury is not bad because it does not allege intent to defraud or mislead. In this case there was no written information and the fact of the hearing was proved by the evidence of the Magistrate and clerk who produced their notes. No objection was taken at the time.

Held, the evidence was given in a judicial proceeding, and that this was sufficiently proved. *R. v. HUGHES*(1879), 4 Q.B.D.614 held to be in accord with Canadian legislation.

R. v. MITCHELL: *R. v. WEST*(1913), 21 C.C.C.193 (Ont.)

Held, following *DREW v. R.*, that where a person acted *de facto* as a registrar under the *Manhood Suffrage Act*, 7 Edw.VII (Ont.) c.5, without objection and under colour of right as having been appointed by the only statutory member of the Board of Registrars, his administration of the qualification oath to a person applying to be registered as a voter, took place in a *judicial proceeding* within the meaning of Code s.171 so as to found a charge of perjury in respect of wilfully false and misleading statements sworn to by the applicant.

R. v. IRVIN(1919), 27 B.C.R.226.

Conviction upheld by a divided court, two judges holding that the magistrate might take judicial notice of the fact that Princeton was in the County of Yale, that if a fact is sufficiently notorious the judge may take judicial notice of it. Two judges *contra*, that it was not proved that the evidence was given in a judicial proceeding.

R. v. GURDITTA(1926), 47 C.C.C.103.

In this case it was alleged that accused had commited perjury in a civil action and an appeal was taken on the ground that there was no formal proof of a *judicial proceeding*. It was argued that the writ of summons or exemplification of the record should have been put in. The appeal was dismissed. *Per* McPhillips, J.A.:

"The evidence is most complete in form, there was placed in evidence a certified copy of the pleadings in the action in which the testimony was given . . . as required by O.36, r. 30 of the Supreme Court, and in the form required for use of the Judge at the trial with the official Supreme Court stamp thereon. The trial took place in due course. . . . I am of opinion that the objection taken is one wholly devoid of merit."

Leave to appeal to the S.C.C. was twice refused by Anglin, C.J.C.(1927), 47 C.C.C.154. It was argued that this case was in conflict with *R. v.*

DRUMMOND(1905), 10 C.C.C.340, but the Chief Justice said that there was no conflict inasmuch as in the *DRUMMOND* case no record whatever was produced.

BOIVIN v. R.(1929), 54 C.C.C.290.

Perjury cannot be assigned in respect of false statements sworn to in an investigation conducted by the C.N.R., although one member of the investigating board was a justice and swore the accused. At p.296:

"It may be that he (accused) was guilty of having made a false oath in an extra-judicial proceeding, as defined in s.175 of the Code, but that is essentially different from perjury."

KALFAKIS v. R.(1933), 55 Que. K.B.411.

Where a surety in appeal has been convicted of perjury committed in a deposition regarding his solvency and presented to the Court of Appeals as part of the record in a motion to dismiss such appeal (according to practice under the C.C.P.), the conviction will not be set aside on the ground that the cross examination was conducted by respondent's attorney instead of the deputy-prothonotary and was held elsewhere than before the latter. Such deposition is a judicial proceeding under Code s.171. *R. v. HOWLEY*(1912), 22 C.C.C.108, followed and distinction from *R. v. RULOFSON*(1908), 14 C.C.C.253, noted as pointed out by Mathers, C.J., in *R. v. ALLEN*(1924), 43 C.C.C.118. It would appear that a distinction is to be drawn between Quebec and the common law provinces.

Administration of Oath.

R. v. COLEMAN(1898), 2 C.C.C.523.

In this case the oath was administered to the accused by a person acting in the stead of the clerk of the peace at his request. Held, that perjury may be assigned in respect of statements made in open court although the oath was administered to the witness by a person temporarily acting in the place of the proper officer at such officer's request. *Per* Rose, J., at pp.534-5:

"I feel no doubt that when the words of the oath are stated to the witness by anyone, in the presence and with the sanction of the court, and the witness takes upon himself the obligation by kissing the book or going through such other form as is permitted by law, the oath is duly administered by the court."

R. v. LANDRY(1922), 40 C.C.C.16 (Que.).

Held on appeal that neither the recital in the caption of the evidence of a witness in a civil trial nor the shorthand reporter's certificate on the deposition that the witness had been duly sworn, is admissible on a charge of perjury to prove that the witness had, in fact, been sworn. The testimony of witnesses that they heard the accused swear to certain statements does not prove that he had been duly sworn.

Examination for Discovery.

R v. HOWLEY(1911), 20 C.C.C.36; affirmed 22 C.C.C.108 (Que. K.B.).

The fact that the witness although sworn by the prothonotary was actually examined in the robing room and not in the presence of the prothonotary or judge is immaterial when neither party raised any objection to the mode of examination at the time.

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R. v. ALLEN(1924), 43 C.C.C.118.

A person cannot be convicted of perjury for false answers given on an examination for discovery if the officer before whom the examination was being taken was not present at the time the answers were given.

R. v. HOWLEY, supra, was distinguished because under Quebec procedure an examination becomes part of the record; under British Columbia procedure it may or may not be used at the trial at all.

R. v. RULOFSON(1908), 14 C.C.C.253, is to the same effect.

R. v. KOHEL(1926), 46 C.C.C.279 (Sask.) followed *R. v. ALLEN, supra.*

R. v. DUPUIS(1940), 74 C.C.C.82.

A judgment debtor was examined by the complaining party's solicitor without the presence of the judge or prothonotary. He was then taken before the prothonotary and swore to the truth of the answers he had given. It was held that he was not guilty of perjury because the examination was not held "before the judge or prothonotary" as required by art. 590 C.C.P. *R. v. HOWLEY, supra,* distinguished on the ground that there was nothing to show that the examination of Dupuis was to be used "in a judicial proceeding".

Falsity.

R. v. CHAMBERLAIN(1894), 10 Man.R.261.

Tribunals of limited jurisdiction have implied authority to receive proof of the facts on which their right to exercise their jurisdiction depends.

In this case accused had taken an oath that he was a certain person named in the list of electors. He was not an elector, nor was he entitled to vote. On his trial for perjury it was argued that the D.R.O. was authorized to administer the oath only to an elector and as accused was not an elector there was no authority to administer the oath to him. The C.A. rejected this argument and held that it was intended to confer upon the officer authority to administer the oath to any person presenting himself to vote and pretending to be an elector.

Killam, J. at p.268: "He can administer it only if the oath is authorized or required by the Act." However, he was of the opinion that in this case the Act did so require.

R. v. COOTE(1903), 8 C.C.C.199.

A person charged with perjury committed in a civil action is entitled to have put in evidence those parts of his testimony which may explain or qualify the statements alleged to be false, and refusal to admit such testimony is a "substantial wrong".

R. v. MORAES(1907), 12 C.C.C.145.

It was held that accused was not guilty of perjury in making a solemn declaration that there was no lawful hindrance to his marriage to a girl under 21 whose father had not given his consent. The want of his consent would not invalidate the marriage and was not therefore a lawful hindrance. (This can be taken as meaning that there was a sense in which the words of the accused were true.)

R. v. DOYLE(1906), 12 C.C.C.69.

In this case (proceedings under s.748(2) for sureties to keep the peace)

accused was charged with perjury for denying that he had written two letters. It was held that oral testimony was admissible to prove his denial although the magistrate had not recorded it in his minutes of evidence. However, as the denial was made after the magistrate had stopped inquiry about the letters as not having anything to do with the inquiry before him, it was held that the denial was not made to mislead him and the accused was acquitted.

R. v. TREMBLAY(1916), 28 C.C.C.21.

Accused was charged with perjury in respect of an alleged false statement in a certificate made under his oath of office. A certified copy of the record was produced and was held insufficient in the absence of the original. (*Quaere* this in view of the provisions of the *Canada Evidence Act* as to certified copies).

Held also that "there cannot be perjury in the matter of an oath of office."

R. v. MOYNES(1919), 33 C.C.C.303.

Accused, after pleading guilty to a charge under the Manitoba Liquor Act, was examined on oath by the magistrate as to where he had got the liquor. On a charge of perjury it was held that the magistrate was not "authorized or required" by the Act to administer an oath for that purpose.

A charge of perjury is not sustainable in respect of a false answer given under oath when the magistrate is neither authorized nor required to receive the answer under oath. *R. v. CHAMBERLAIN*(1894), 10 Man.L.R.261 applied.

R. v. SEGAL(1920), 33 C.C.C.297.

Where the alleged perjury is set out in the indictment as falsely asserting upon oath that the statement made by another in his evidence at the former trial that a certain conversation took place was untrue, a conviction cannot be sustained without proof that such statements were in fact made at the former trial by the person named. It is not enough, on a charge so framed by the Crown, to prove that the conversation referred to did take place.

R. v. HAYFORD(1921), 35 C.C.C.293.

In this case accused had sworn on the trial of a charge of assault that he had not made a certain agreement. On his trial for perjury it was found that he had made the agreement but the trial judge found that it was invalid as having been made on Sunday. Accused was convicted and appealed. The conviction was quashed.

> "The onus was on the Crown to establish not only that the assertion was false, but that the accused knew it was false. Where the assertion made is true in one sense and false in another, the Crown, in my opinion, must prove that it was false in the sense in which the accused used it."

R. v. CIESLENSKI(1923), 41 C.C.C.195.

In this case accused asked for an adjournment to get witnesses and in discussing the need therefor the magistrate asked accused certain questions concerning the merits. It was held on appeal from conviction that as the accused had not presented himself as a witness, the magistrate had no right to ask these questions and that the C.A. may take "prejudicial irregularities" into consideration.

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It was held also that proof of a mere untrue statement in giving testimony is not sufficient to establish perjury: the making of the untrue statement must be wilful and corrupt.

R. v. KRUCHKOVSKI(1925), 43 C.C.C.299.

Accused had testified on a trial under the protection of s.5 of the *Canada Evidence Act* that certain statements made by him at an inquest and preliminary hearing were not true. It was held that as evidence given under such protection is not usable against deponent except in a prosecution for perjury in the giving of *that evidence*, it was not receivable against him on a charge of perjury in respect of his testimony at the inquest and preliminary. But see now s.116.

Form of Charge.

There has been conflict in the cases regarding the way in which the crime of perjury should be charged. In the case of *R. v. COHON*(1903), 6 C.C.C.386, the Supreme Court of Nova Scotia held that a charge of perjury is defective as not disclosing a crime if it does not allege that the statement was sworn to knowing the same to be false, or if such is not the necessary inference from what is alleged, apart from the declaration in the charge that the accused "thereby committed wilful and corrupt perjury."

This was contrary to what had been held in two Quebec cases, *R. v. BAIN* and *R. v. BOWNES*(1877), Ramsay's App. Cas. 191, where it was said "As regards the word 'knowingly' the indictment follows the statutory form and it is therefore declared by law to be sufficient."

R. v. COHON was discussed and distinguished in *R. v. LEE CHU* (1909), 14 C.C.C.322 at p.326, and was reviewed at length by the S.C.N.S. in the case of *R. v. MORRISON*(1916), 28 D.L.R.113. There it was held that a charge was sufficient in alleging that accused "did unlawfully commit perjury" in that with intent to vote again he swore that he had not already voted that day when in fact he had. It was held that there was an implication that he had taken the false oath "wilfully and corruptly" or "knowingly" and that the charge complied with Code s.852 in setting out in popular language a statement in substance that accused had committed an indictable offence therein specified.

Sufficiency of Charge.

R. v. LEGROS(1908), 14 C.C.C.161. Held, it is not essential that an information for perjury should set out the exact words of the false statement in testimony taken *viva voce*; the charge may be properly stated by summarizing what was in effect the false evidence, specifying the tribunal and the time and place at which the same was given and charging that accused thereby "unlawfully committed perjury."

Proof of Record.

Where perjury is charged as having been committed on a summary trial for an indictable offence under the Code, the formal record of such summary trial must be proved in the perjury case, although the latter is tried by the same magistrate. In this case the record was not produced and that fact was held fatal to the conviction.

R. v. YEE MOCK(1913), 21 C.C.C.400.

A conviction for perjury that follows the precedent of form 64(e) of the Schedule to the Cr. Code need not allege that defendant had knowledge of the falsity of the testimony on which the charge is founded. And at p.402:

> "It appears that a count in an indictment for perjury is not open to objection because it charges that accused made more than one false statement in the same affidavit, or in the course of his evidence upon a certain trial (see *R. v. SOLOMON*, Ryan & Moody, 252, and Bishop's Cr. Procedure, 2nd ed., sec.916 *et seq.*), and I see no reason why the charge in the present case and the conviction thereon should not be construed and treated as being for one offence only."

R. v. PICARD(1937), 68 C.C.C.82(Que.D.M.).

Proof of the swearing of the witness, is sufficiently made by production of the minutes of the proceedings in which accused is alleged to have perjured himself duly certified by the Clerk of the Court and indicating that accused had been sworn by the presiding magistrate.

LEFEBVRE v. R.(1946), 88 C.C.C.383.

Held, following *R. v. MORRISON*(1916), 26 C.C.C.26, *U.S. v. SNYDER*(1924), 43 C.C.C.92, *R. v. YEE MOCK, supra.*, that a charge of perjury was not insufficient for failure to include the words "wilfully and knowingly", since the implication was that the false oath was made wilfully, corruptly or knowingly.

R. v. CALLAGHAN(1860), 19 U.C.Q.B.364.

Where it appears on the face of an indictment for perjury that the statement complained of was made before a justice of the peace in preferring a charge of larceny committed within his jurisdiction, it is unnecessary to allege expressly that he had authority to administer the oath. (4 & 5 Vict., c.24, and 18 Vict., c.92 referred to). See now s.495.

R. v. MASON(1869), 29 U.C.Q.B.431.

Charge of perjury—Information proved but no summons. Held, unnecessary, and that as long as accused was present, the manner of his getting there was immaterial.

R. v. SCOTT(1877), 13 Cox, C.C.594.

To prove that the action was pending, the copy of the writ of summons filed under the rules of the Judicature Act, and a copy of the pleadings in the action, and the original one dismissing the action, were produced. Held, sufficient without producing the original writ of summons.

R. v. JOHN ROSS(1884), 1 Montreal L.R.227.

Charge of perjury committed in a civil action. The non-production by the prosecution of the plea in the civil action is not material where the assignment of perjury has no reference to the pleadings; but defendant may, if he wishes, prove its contents by secondary evidence.

R. v. DRUMMOND(1905), 10 C.C.C.340(Ont.).

On a charge of perjury committed at the trial of an indictment, such trial and the indictment, verdict and judgment therein must be proved as matters of record.

In this case the clerk of assize testified that accused was called as a

witness in the trial for murder of one Kennedy, that he had sworn accused and entered the name of the accused in his "record" book. He identified accused as a witness sworn by him. Neither the indictment on which Kennedy had been tried, nor any copy or sworn copy of it was produced. Held, insufficient.

R. v. FARRELL(1909), 15 C.C.C.283(Ont.) followed *R. v. DRUMMOND supra.*

In this case the perjury was alleged to have been committed on a preliminary hearing before a magistrate. He testified that the information had been laid before him and that in the enquiry accused had been sworn and had testified. Held, insufficient—that the information was the best evidence and should have been produced in the absence of circumstances justifying the admission of secondary evidence. Without it there was not sufficient proof of a "judicial proceeding". (Meredith, J. A. dissenting).

R. v. PRASILOSKI (No. 2)(1910), 16 C.C.C.139.

Where a deposition had been regularly taken down in writing by a magistrate at a preliminary hearing, and such deposition is available, that deposition is the best evidence of what the witness stated on that occasion, but where the deposition is produced and put in evidence, then parol evidence is admissible to prove statements made by the witness on that occasion, and not appearing therein.

R. v. MICHAEL JUDGE(1915), 24 C.C.C.354.

In this case the deputy prothonotary appeared in court saying that he had no objection to exhibit the originals of documents in question so that the Court might look at them but that he would not part with them. The magistrate refused such production. Held, that when the witness was asked to produce the proceedings from the Superior Court records, he was being asked to exhibit original papers, and the evidence was the best evidence and was being lawfully tendered and adduced. The trial was a final trial on indictment and it was of no particular consequence whether the witness was unwilling to part with the papers or not or whether copies were left with the Judge holding the speedy trial.

SPIRES v. R.(1915), 25 C.C.C.172.

A deposition containing the false statement charged as perjury was part of the record of a case before the Superior Court. It was certified by the official stenographer as being the deposition of the accused and was produced at his trial. Held sufficient proof.

R. v. KOBOLD(1927), 48 C.C.C.290.

Accused was charged with committing perjury in a civil action. The proceedings in the civil action were proved by exemplification under s.23 of the *Canada Evidence Act.* It was objected that under that act (s.28) notice was necessary but it was held on appeal that this applies to certified copies and not to exemplifications.

"Exemplification" is defined as "a certified transcript under the great seal or under the seal of a particular Court": Wharton's Law Lexicon.

R. v. CHERER(1930), 54 C.C.C.297.

"Upon a charge of perjury, the fact that the impeached evidence

was given in a judicial proceeding must be proved, and where the alleged judicial proceeding is a preliminary enquiry before a magistrate, the best evidence of its being a judicial proceeding is the information, and that must be produced in the absence of evidence excusing production of the best evidence". (Headnote) *R. v. FARRELL*(1909), 15 C.C.C.283 followed; *R. v. DRUMMOND, supra,* referred to; *R. v. GURDITTA, supra,* distinguished.

R. v. CHASTAKOFF(1936), 67 C.C.C.129.

"Parol evidence of alleged false statements made by one accused of perjury at his trial on a charge of vagrancy is not admissible where there was no reason for non-production of the depositions taken down in writing as required by s.721(3) of the Criminal Code." (Headnote)

R. v. RHODENIZER(1948), 90 C.C.C.314.

Accused was convicted on trial before judge and jury on a charge of perjury committed before a magistrate on a preliminary hearing. Neither the original record of the inquiry nor a certified copy was produced. A duplicate was produced and the magistrate testified as to his conduct of the inquiry. The conviction was affirmed on equal division, two judges holding that there was sufficient evidence that the magistrate had in fact acted in the proceedings and that the trial judge could then take judicial notice that he was authorized to hold the inquiry and to hear evidence.

As to the need to produce the record, see also *R. v. LEGROS*, cited *supra,* on the form of charge. It was followed in *R. v. GRAVES*(1910), 16 C.C.C.318, at p.336.

See also s.113 (punishment) and s.116 (contradictory evidence).

PUNISHMENT FOR PERJURY.—Proof of former trial upon trial of indictment for perjury.

113. (1) Every one who commits perjury is guilty of an indictable offence and is liable to imprisonment for fourteen years, but if he commits perjury to procure the conviction of a person for an offence punishable by death, he is liable to imprisonment for life.

(2) Where a person is charged with an offence under section 112 or 116, a certificate specifying with reasonable particularity the proceeding in which that person is alleged to have given the evidence in respect of which the offence is charged, is *prima facie* evidence that it was given in a judicial proceeding, without proof of the signature or official character of the person by whom the certificate purports to be signed if it purports to be signed by the clerk of the court or other official having the custody of the record of that proceeding or by his lawful deputy.

Subsec.(1) comes from the former ss.172 and 174. For the reference in the concluding words, see s.194(6).

Subsec.(2) is the former s.979.

See notes to s.112 and also s.115 (corroboration).

FALSE STATEMENTS IN EXTRA-JUDICIAL PROCEEDINGS.

114. Every one who, not being a witness in a judicial proceeding but being permitted, authorised or required by law to make a statement by affidavit, by solemn declaration or orally under oath, makes in such a statement, before a person who is authorised by law to permit it to be made before him, an assertion with respect to a matter of fact, opinion, belief or knowledge, knowing that the assertion is false, is guilty of an indictable offence and is liable to imprisonment for fourteen years.

This covers matters dealt with in the former ss.173,175 and 176 but is confined to statements made under an oath or its equivalent. Under the *Interpretation Act* "oath" is defined to include a solemn affirmation or declaration, and statutory declarations are provided by s.36 of the *Canada Evidence Act*.

See notes to s.112 and also s.115 (corroboration).

R. v. ATKINSON(1866), 17 U.C.C.P.295.

In this case the affidavit on which the charge of perjury was based did not say where it was sworn. Held upon objection that the place should have been shown, that the perjury is committed when the defendant takes the oath, and the jurat so far as this is concerned is not material. "The jurat is no part of the affidavit, *per* Maule, J., in *HUGHES v. BROWN* (6 M. & G. 752); ....."

R. v. SKELTON(1898), 4 C.C.C.467.

It was held that the permission granted by s.26, (now s.36) of the *Canada Evidence Act* to certain officials to receive the solemn declarations of persons voluntarily making the same, in the statutory form, includes an authorization to the declarant to make the same, and constitutes him a person "authorized to make a solemn declaration".

R. v. PHILLIPS(1908), 14 C.C.C.239.

It was held that a person is "authorized by law" to make a statutory declaration if the declaration is such as can legally be made under the *Canada Evidence Act*. Accused discharged as form in Evidence Act was not followed.

R. v. NIER(1915), 9 W.W.R.838.

Stewart, J., was of the opinion that s.36 (now s.37) of the *Canada Evidence Act* "at least authorizes the taking and making of a statutory declaration as to the truth of any fact or facts". Beck, J. disagreed, saying that s.176 of the *Criminal Code* distinctly differentiates between authority to receive and authority to make.

Ex p. LINDSAY(1918), 30 C.C.C.387.

Accused had been convicted of perjury in a declaration purporting to be made under the *Intoxicating Liquor Act*, 1916 (N.B.). Held, that the Act did not authorize the declaration within the meaning of Code s.172(a) and accused was discharged.

R. v. WHITE, [1929]3 W.W.R.729.

Accused, an Indian, had procured a permit to buy liquor by signing a statement (not under oath nor statutory declaration) that he was a person entitled to receive it. Held that s.176 did not apply.

OLD CODE:

172. Every one is guilty of perjury who,

(a) having taken or made any oath, affirmation, solemn declaration or affidavit where, by any Act or law in force in Canada, or in any province of Canada, it is required or permitted that facts, matters or things be verified, or otherwise assured or ascertained by or upon the oath, affirmation, declaration or affidavit of any person, wilfully and corruptly, upon such oath, affirmation, declaration or affidavit, deposes, swears to or makes any false statement as to any such fact, matter or thing; or

(b) knowingly, wilfully and corruptly, upon oath, affirmation or solemn declaration, affirms, declares or deposes to the truth of any statement for so verifying, assuring or ascertaining any such fact, matter or thing, or purporting so to do, or knowingly, wilfully and corruptly takes, makes, signs or subscribes any such affirmation, declaration or affidavit as to any such fact, matter or thing, if such statement, affidavit, affirmation or declaration is untrue in whole or in part.

174. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who commits perjury or subornation of perjury.
2. If the crime is committed in order to procure the conviction of a person for any crime punishable by death, or imprisonment for seven years or more, the punishment may be imprisonment for life.

979. A certificate containing the substance and effect only, omitting the formal part, of the indictment and trial for any offence, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court, whereat the indictment was tried, or among which such indictment has been filed, or by the deputy of such clerk or other officer, shall, upon the trial of an indictment for perjury or subornation of perjury, be sufficient evidence of the trial of such indictment without proof of the signature or official character of the person appearing to have signed the same.

173. Every person who wilfully and corruptly makes any false affidavit, affirmation or solemn declaration, out of the province in which it is to be used but within Canada, before any person authorized to take the same, for the purpose of being used in any province of Canada, is guilty of perjury in like manner as if such false affidavit, affirmation or declaration were made before a competent authority in the province in which it is used or intended to be used.

175. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being required or authorized by law to make any statement on oath, affirmation or solemn declaration, thereupon makes a statement which would amount to perjury if made in a judicial proceeding.

176. Every one is guilty of an indictable offence and liable to two years' imprisonment who, upon any occasion on which he is permitted by law to make any statement or declaration before any officer authorized by law to permit it to be made before him, or before any notary public to be certified by him as such notary, makes a statement which would amount to perjury if made on oath in a judicial proceeding.

Section 114—*continued*

Thompson, C.C.J.: "Sec. 176 applies to a statement or declaration of a similar character to those mentioned in 175 which a person is permitted by law to make, and which does not fall within the provisions of s. 176."

R. v. DAVIDSON, [1933]2 W.W.R.285 (C.C.J.-B.C.).

Before a debtor can be held guilty under s.175 with respect to answers to questions put under Bankruptcy Rule 109 it must be shown that the official receiver either personally or by delegation ordered said questions to be asked the debtor.

R. v. THOEM, [1933]3 W.W.R.637.

Accused had pleaded guilty to a charge under s.175 of making a false solemn declaration in order to obtain relief but applied for release on *habeas corpus* on the ground that the sentence was illegal in ordering him to pay costs. Held, that even if the Court exceeded its jurisdiction under s.1044, appeal and not *habeas corpus* was the proper remedy.

R. v. SHIFF(1939), 72 C.C.C.44.

It was held that s.176 applies only to statements not under oath and simple declarations also made in virtue of a special law. It is noted that this interpretation is contrary to that in *R. v. WHITE,* [1929]3 W.W.R. 729, where it was held that the "statement or declaration" means a statement under oath or solemn declaration.

Cf. R. v. RUTHERFORD(1923), 41 C.C.C.240 with *R. v. ORFORD,* cited under s.112.

CORROBORATION.

115. No person shall be convicted of an offence under section 113 or 114 upon the evidence of only one witness unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.

This is an extension of the former s.1002(b) which referred only to perjury in a judicial proceeding (s.174). This provision requires corroboration also in cases under s.114.

See also notes to s.131.

In *R. v. BREWER*(1921), 34 C.C.C.341, it was held that s.1002 did not apply where the accused, charged with perjury in relation to two contradictory sworn statements, admits that the one charged as false in the indictment is the false one. See now s.116, *post.*

In *R. v. BERRY*(1922), 39 C.C.C.127, it was held that the corroboration might be found in the deposition of a witness made at a preliminary hearing and admitted under s.999, it being shown that the witness was absent from Canada.

As to corroboration of accomplice, see *R. v. GALLAGHER,* [1924] 3 W.W.R.357.

In *R. v. McBETH*(1926), 45 C.C.C.357, it was held that under s.1002 corroboration was not required upon a charge of subornation of perjury. But see *contra, R. v. PICARD*(1937), 68 C.C.C.82. Under this Code, subornation of perjury, which is counselling or procuring perjury that is actually committed, is covered by s.406 and s.21. To counsel or procure where the offence is not committed, is covered by s.407.

OLD CODE:

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

. . . . . .

(b) Perjury, Part IV, section one hundred and seventy-four;

In *R. v. ROBERTSON*(1936), 66 C.C.C.45, where the purchaser of liquor testified that he had found it in a ditch and later said in an affidavit that he had bought it from the accused, it was held that the affidavit was not sufficient corroboration under s.1002.

WITNESS GIVING CONTRADICTORY EVIDENCE.—"Evidence."—Consent required.

116. (1) Every one who, being a witness in a judicial proceeding, gives evidence with respect to any matter of fact or knowledge and who subsequently, in a judicial proceeding, gives evidence that is contrary to his previous evidence is guilty of an indictable offence and is liable to imprisonment for fourteen years, whether or not the prior or the later evidence or either of them is true, but no person shall be convicted under this section unless the court, judge or magistrate, as the case may be, is satisfied beyond a reasonable doubt that the accused, in giving evidence in either of the judicial proceedings, intended to mislead.

(2) Notwithstanding paragraph *(a)* of section 99, "evidence", for the purposes of this section, does not include evidence that is not material.

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

This is new and is aimed at such a situation as appears in the following quotation from the charge to the jury in *R. v. DEACON*(1948), 91 C.C.C.1 at p.7:

"At the coroner's inquest she gave the evidence contained in the statement, but at the preliminary she changed her evidence. Then she has told us that at the first trial she gave the same evidence that she gave in the witness-box up to the time that she was declared adverse. At this trial she departed from the statement she had given and the evidence she gave at the inquest.

May I draw your attention to the fact that either at the coroner's inquest, or the preliminary, or in this Court, she has committed perjury.

Now I have warned you, and I warn you again, her evidence must be weighed carefully."

The section was the subject of controversy in its course through Parliament, the principal objection being that it created an intolerable situation for the witness who is honest but mistaken. The arguments pro and con appear in an article by E. L. Haines, Q.C. in C.B.Rev., Feb. 1953, and in Chitty's Law Journal, Vol.3, May, 1953.

Subsecs.(2) and (3) and the saving clause in subsec.(1) are designed to meet the objections and to confine the operation of the section to cases where there is flagrant perjury.

Section 116—*continued*

Provisions in the sense of this section are in the law of South Africa, but with the difference that it has been held on appeal that it is not necessary for the Crown to allege, or to prove at the trial, that the conflicting statements were made in the course of judicial proceedings: Sir William Pittman, "Criminal Law in South Africa", p.178.

The gravamen of this section is the law in the State of New York (*Penal Code* s.1627), and s.118(a) of the *Penal Code of California* contains provisions somewhat similar in respect of affidavits that are contradicted by the affiant's subsequent testimony.

FABRICATING EVIDENCE.

117. Every one who, with intent to mislead, fabricates anything with intent that it shall be used as evidence in a judicial proceeding, existing or proposed, by any means other than perjury or incitement to perjury is guilty of an indictable offence and is liable to imprisonment for fourteen years.

This is the former s.177 in which the words "existing or proposed" have been inserted to resolve a conflict in the cases, although in reference to future proceedings, the fabrication of evidence might perhaps constitute an attempt.

This provision comes from clause 125 of the English Draft Code, where it was new, the wording being "fabricates or contrives evidence". The Report of the Commission (p.21) says of it:

> "Fabricating evidence is an offence which is not so common as perjury, but which does occur and is sometimes detected. An instance occurred a few years ago on a trial for shooting at a man with intent to murder him, when the defence was that though the accused did fire off a pistol, it was not loaded with ball, and the only intent was to frighten. Evidence was given that a pistol ball was found lodged in the trunk of a tree nearly in the line from where the accused fired to where the prosecutor stood. It was afterwards discovered that the ball had been placed in the tree by those concerned in the prosecution, in order to supply the missing link in the evidence. Such an offence is as wicked and as dangerous an offence as perjury but the punishment as a common law offence (if, irrespective of conspiracy, it be an offence), is only fine and imprisonment."

In *R. v. VREONES*(1891), 17 Cox,C.C.267, accused was convicted of a misdemeanour for preparing false samples from a cargo of wheat to be used as evidence in arbitration proceedings provided for by contract in case of dispute. No arbitrators were in fact appointed. It was held that it was an offence to attempt by the manufacture of false evidence to mislead a judicial tribunal, which might or might not be called into existence.

In *R. v. SEVICK*(1930), 54 C.C.C.92, it was held that it is no defence to a charge of fabrication of evidence under s.177 that there was in fact no charge or prosecution pending before any court at the time of the doing of the acts charged. However, in *FONTAINE v. R.*(1932), 52 Que. K.B.199, the contrary was held, *i.e.*, that the accused was not guilty of an offence under s.177, no charge having been laid. It is to be noted that *R. v. SEVICK* does not appear to have been cited to the court.

OLD CODE:

177. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, with intent to mislead any court of justice or person holding any such judicial proceeding, fabricates evidence by any means other than perjury or subornation of perjury.

In *R. v. BOYKO*(1945), 83 C.C.C.295, it was held that an accused cannot be convicted under this section by reason of her having signed notes alleging that she had been kidnapped by a certain individual since the notes would not be admissible in evidence at the trial of the person alleged to have committed the offence.

In an Australian case, *WHITE v. R.*(1906), 4 C.L.R.152, *R. v. VREONES* was referred to. It was contended that before an indictment for an attempt to prevent the course of law and justice can be held to be good it must appear that whether by law or by agreement of the parties, *e.g.* in an arbitration, there is in existence or is to be constituted a tribunal competent to deal with the matter in respect of which the defendant is alleged to have made the attempt. This contention was rejected on the ground that s.475 of the *Crimes Act*, 1900, "clearly points to a judicial inquiry."

SIGNING PRETENDED AFFIDAVIT.—Using pretended affidavit.—Writing purporting to be affidavit.

118. Every one who

(*a*) signs a writing that purports to be an affidavit or statutory declaration and to have been sworn or declared before him when the writing was not so sworn or declared or when he knows that he has no authority to administer the oath or declaration,

(*b*) uses or offers for use any writing purporting to be an affidavit or statutory declaration that he knows was not sworn or declared, as the case may be, by the affiant or declarant or before a person authorized in that behalf, or

(c) signs as affiant or declarant a writing that purports to be an affidavit or statutory declaration and to have been sworn or declared by him, as the case may be, when the writing was not so sworn or declared,

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

This is the former s.179(2). It came into the Code as 1920, c.43, s.3, the offences being punishable on summary conviction, but was amended by 1932-33, c.53, s.2 to make them indictable. The purpose of the change was to avoid the limitation of six months prescribed by s.1142, since it might happen that such an affidavit, *e.g.*, on a mortgage, might not come to light until much later.

In *FULTON v. WAWANESA MUTUAL INSURANCE CO.*, [1933] 1 D.L.R.131, it was said that:

> "Section 179 of the Criminal Code makes it a criminal offence for any person to sign any document purporting to be a statutory declaration as having been declared before him when it was not so declared and also for any person to use such a document which he knows was not declared to."

Section 118—*continued*

For the purpose of comparison, reference may be made to *R. v. SCHULTZ*(1922), 37 C.C.C.301, in which a form of declaration was filled in by accused and left by him on the desk of the commissioner for oaths, who was not present at the time. He met the latter outside, told him he had left a paper on his desk, and asked him to complete it. The commissioner signed it as requested but it was neither subscribed nor declared before him. Held on case reserved, that accused was not guilty under s.172 of making a false statutory declaration. *Per* Haultain, C.J.S.:

"The essential requirement of the Act is not the signature of the declarant but his solemn declaration made before the commissioner."

As to statutory declarations, see *Canada Evidence Act*, ss.36 and 37.

The former s.179(1) has been dropped in view of these provisions. It was complementary to s.176 and its purpose appears in the preamble to 5 & 6 Wm. IV, c.62 (Imp.) where it appears originally:

"Whereas a practice has prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial enquiry nor in any wise required or authorized by any law; and whereas doubts have arisen whether or not such proceeding is illegal; for the suppression of such practice and removing such doubts, Her Majesty by and with the advice and consent", &c.

In this connection the following appears in Hansard 1892, col.2965: "Every time a man was injured or thought he was or had any complaint, he rushed off and made an affidavit; and although the act does not prevent by any means all extra-judicial oaths, it has suppressed a vast number of them."

It is interesting to note that in the Senate Debates in 1882 (p.702) there was mention of a case in which several prisoners were brought to Kingston and tried for treason. A magistrate made each of them admit his guilt and swear to it. The affidavits were held to be inadmissible at the trial. "The consequence was the parties were all acquitted, although they had sworn to their own guilt."

OBSTRUCTING JUSTICE.—Corrupting witness.—Corrupting juror.—Accepting bribe.—Indemnifying bondsman.—Bondsman accepting indemnity.

119. (1) Every one who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and is liable to imprisonment for two years.

(2) Without restricting the generality of subsection (1), every one shall be deemed wilfully to attempt to obstruct, pervert or defeat the course of justice who in a judicial proceeding, existing or proposed,

***(a)* dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence,**

***(b)* influences or attempts to influence by threats, bribes or other corrupt means, a person in his conduct as a juror,**

***(c)* accepts a bribe or other corrupt consideration to abstain from giving evidence, or to do or to refrain from doing anything as a juror,**

***(d)* before or after being released from custody under recognizance, indemnifies or agrees to indemnify in any way, in**

OLD CODE:

179. Every justice or other person is guilty of an indictable offence and liable to a fine not exceeding fifty dollars, or to imprisonment for any term not exceeding three months, who administers or causes or allows to be administered, or receives, or causes or allows to be received, any oath or affirmation touching any matter or thing whereof such justice or other person has not jurisdiction or cognizance by some law in force at the time being, or not authorized or required by any such law; but nothing in this section contained shall be construed to extend to any oath or affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial or punishment of any offence, or to any oath or affirmation required or authorized by any law of Canada or by any law of the province wherein such oath or affirmation is received or administered, or is to be used, or to any oath or affirmation, which is required or authorized by the laws of any foreign country to give validity to an instrument in writing or to evidence designed or intended to be used in such foreign country.
(2) Every one is guilty of an indictable offence and liable to a penalty not exceeding five hundred dollars, or to imprisonment for any term not exceeding six months, or to both fine and imprisonment who
(a) signs any document purporting to be an affidavit or statutory declaration as having been sworn or declared before him when such document was not so sworn or declared, or when he knows that he had no authority to administer such oath or declaration; or
(b) signs, uses or offers for use any document purporting to be an affidavit or statutory declaration which he knows is not or was not sworn or declared to; or was not sworn or declared to before a proper officer in that behalf.

180. Every one is guilty of an indictable offence and liable to two years' imprisonment who
(a) dissuades or attempts to dissuade any person by threats, bribes, or other corrupt means from giving evidence in any cause or matter, civil or criminal; or
(b) influences or attempts to influence, by threats or bribes or other corrupt means, any juryman in his conduct as such, whether such person has been sworn as a juryman or not; or
(c) accepts any bribe or other corrupt consideration to abstain from giving evidence, or on account of his conduct as a juryman; or
(d) wilfully attempts in any other way to obstruct, pervert or defeat the course of justice.

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whole or in part, his bondsman, or

***(e)* being a bondsman, accepts or agrees to accept indemnity, in whole or in part, from a person who is released or is to be released from custody under a recognizance.**

This section comes from the former s.180 which was s.154 in the Code of 1892 and was adapted from ss.128 and 129 of the E.D.C.

The expression 'course of justice' is not defined, but it is significant that s.128 uses the words "defeat the course of justice or the administration of the law." Obstructing the administration of the law is dealt with in Code ss.69, 175 and 232. It is said in 20 C.J.S., p.1303, although not on Canadian or English authority, that 'course' refers to progressive action in a suit or proceedings not yet determined. The words "existing or proposed" in subsec.(2) are new and are in that sense, it having been held in

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R. v. ST. JEAN(1937), 69 C.C.C.240, that a person could not be convicted under s.180(a) for attempting by threats to dissuade persons from testifying against persons who sold liquor illegally, at a time when no proceedings had been begun.

The offence under s.180(a)(now 119(2)(a)) was an offence at common law: *R. v. SILVERMAN*(1908), 14 C.C.C.79. *R. v. LAWLEY*(1731), 2 Stra.904, was a case in which accused was convicted for attempting to persuade witnesses to keep out of the way. The offence was punishable also as contempt of court: 1 Hawk. P.C. ch.21, s.15. In this connection it should be noted that it was held in *Re Gerson, Re Nightingale*(1946), 87 C.C.C.143(S.C. Can.), that s.180(d) has not abrogated the inherent right of the Court to punish contempt of court.

In *R. v. R.*(1927), 46 C.C.C., at p.371, it was said that the gist of the offence under *all* the subsections of s.180 is wilfully attempting to obstruct, pervert or defeat the course of justice. This was followed in *R. v. MURDOCK*(1936), 67 C.C.C.142, where the offence consisted in counselling a person to abstain from prosecuting a charge of theft.

In *R. v. PICARD*(1937), 68 C.C.C.82 at p.92, in which a witness said that accused had said to him "if you convict me, I am not afraid to disable a man", it was held that this was not counselling but threatening, and so depended rather on s.180 than on s.174 (subornation). In *R. v. SOLOMON*(1932), 5 M.P.R.67, it was held that the jury were properly instructed that they might convict both on a count under s.180(a) and on a count for attempted subornation of perjury.

In *R. v. KADIN*(1937), 68 C.C.C.318, accused was charged with obstructing justice by taking his wife out of Canada to evade her trial on a charge under the *Female Minimum Wage Act*, 1934 (B.C.). It was held that his attempt was not established with sufficient certainty.

In *R. v. BANTA SINGH*, [1942]4 D.L.R.795, accused was charged under s.180 but the case turned upon a question of evidence consequent upon an amendment.

Cl.(2)(b) is not new but codified the common law offence known as embracery, against which statutes had been passed in the reigns of Edward III and Henry VIII.

Cls.2(d) and (e) are new in statutory form and codify the common law offence of indemnifying bail. This offence is regarded as being against public policy. It sets a premium on escapes and is a fraud on the court. It has been said that "Bail that is indemnified is no bail."

In *WILSON v. STRUGNELL*(1881), 7 Q.B.D.548 Stephen, J. said at p.551:

> ". . . I am of opinion that the contract to indemnify the bail against his liability was contrary to public policy, and therefore illegal and void. I should have been prepared to hold thus upon the obvious principle that the effect of the contract is to deprive the public of the security of the bail, but I think that the opinion of the Court in *JONES v. ORCHARD*, 16 C.B.614, is a direct authority in favour of the view which I take, ... "

HERMAN v. JEUCHNER(1885), 15 Q.B.D.561 is to the same effect.

See also *R. v. PORTER*, [1910]1 K.B. 369. In that case the accused

were indicted for conspiracy to effect a public mischief but the object of the conspiracy was to indemnify bail.

PUBLIC MISCHIEF.

120. Every one who, with intent to mislead, causes a peace officer to enter upon an investigation by

(a) **making a false statement that accuses some other person of having committed an offence,**

(b) **doing anything that is intended to cause some other person to be suspected of having committed an offence that he has not committed, or to divert suspicion from himself, or**

(c) **reporting that an offence has been committed when it has not been committed,**

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

This is new in statutory form. Although the common law offence of public mischief rests upon the judgment in *R. v. HIGGINS*(1801), 2 East 5, consideration of the modern conception of it may properly begin with the case of *R. v. MANLEY*, [1933]1 K.B.529. The latter case is regarded as marking a new departure in criminal law in holding that the act of a single person can constitute the offence "where there is no trace of conspiracy whatsoever." In *R. v. HIGGINS, supra*, it was held that to solicit a servant to steal his master's goods is a misdemeanour, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting and inciting.

Per Lawrence, J.:

" . . . all offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable. Then the question is whether an attempt to incite another to steal is not prejudicial to the community ? of which there can be no doubt. The whole argument for the defendant turns upon a fallacy in assuming that no act is charged to have been done by him; his solicitation is an act."

Per Lord Kenyon, C.J.:

"The case of *R. v. VAUGHAN* (4 Burr. 2494) was not passed over slightly. It was there attempted to be maintained, that an attempt to bribe the Duke of Grafton, then a Cabinet Minister and a member of Privy Council, to give the defendant a place in Jamaica, was not indictable. Lord Mansfield rejected the attempt with indignation. It was a solicitation to the Duke to commit a great offence against his duty to the King and the public. So it is here; and it would be a slander upon the law to suppose that an offence of such magnitude is not indictable."

In an earlier case, *R. v. DANIEL*(1705), 3 Salk, 191, 91 E.R.770; "Holt, C.J., held, that the seducing of an apprentice to absent was not indictable, because it doth not affect the public. But per Powell, Justice, It doth affect the public as much as the persuading a woman to absent from her husband, because it tends to destroy the first foundation of society. But, *per totam Curiam*, This indictment is naught, for not averring that the apprentice *did absent*; . . . "

In the case of *R. v. MANLEY, supra*, the defendant was an employee charged with the collection of certain moneys. In order to cover de-

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falcations of her own she reported to the police on two occasions that she had been assaulted and robbed by men whom she described. When it appeared that her allegations were false, she was indicted and convicted for unlawfully effecting a public mischief. On appeal Lord Hewart, C.J., at p.534 said:

> "We think that the law remains as it was stated to be by Lawrence, J. in *R. v. HIGGINS*: . . . . . .
> The second question is whether the appellant did acts which constituted a public mischief. . . . . the indictment aptly describes two ingredients of public mischief or prejudice to the community, one of these being that officers of the Metropolitan police were led to devote their time and services to the investigation of an idle charge, and the other being that members of the public, or at any rate those of them who answered a certain description, were put in peril of suspicion and arrest."

The Court in this case referred to *R. v. BRAILSFORD,* [1905]2 K.B.730, which arose from the fact that the accused had conspired with others by false pretence to procure a Russian passport for the use of some one else. It was held that the accused was properly convicted of an act tending to public mischief. Although conspiracy was of the essence of the charge, Lord Alverstone C.J., citing *R. v. HIGGINS,* said:

> "It cannot, of course, be maintained that every fraud and cheat constitutes an offence against the criminal law, but the distinction between acts which are merely improper or immoral and those which tend to produce a public mischief has long been recognized."

Later in the same case he said:

> "It is for the Court to direct the jury whether such an act may tend to the public mischief, and that it is not in such a case an issue of fact upon which evidence can be given."

He repeated and applied these principles in *R. v. PORTER,* [1910]1 K.B.369, in which the accused were indicted for conspiracy to indemnify bail.

The decision in *R. v. MANLEY* provoked a good deal of critical comment. The principal grounds taken were that it left the field of criminal liability vague and that it was capable of being extended to anything that incurred the displeasure of the Bench. See 5 Camb. L.J.263, an article in 49 L.Q.R. 184, and an annotation on "Acts Tending to Public Mischief" by Eric Armour, K.C., 59 C.C.C.113.

Before examining the cases in which the decision in *R. v. MANLEY* has been applied in the interval, it may be well to observe here that despite the criticism the principle has not only been maintained but extended. A recent English case reported on the subject is that of *R. v. YOUNG*(1944), 30 Cr.App.R.57. There the appellant was indicted with another person on a count (*inter alia*) of conspiring to effect a public mischief in that they "conspired together and with other persons unknown to effect a public mischief by building . . . . . air-raid shelters in a manner so deficient in structure as to fall far short of the standard of protection afforded by the specifications provided and so as to cost the (borough) council" a large sum of money for re-building. Appellant

was convicted and his appeal was dismissed. The Lord Chief Justice said:

"Now it is said that this is the first time in which a case of neglect of duty or of negligence has been charged as causing or effecting a public mischief. It seems to us to be too late to say, and indeed it is not attempted to say, that the charge of public mischief is not known to the law."

A note on *R. v. YOUNG*(1946), 10 J.C.L.44, says:

"The most common class of act constituting this unusual common law misdemeanour is that of making to the police false statements of imaginary crimes . . . . . ."

(Note: this is true also in Canada; the cases do not always reach the Law Reports).

"It is important to distinguish the public mischief cases in which a conspiracy is charged, from the cases of public mischief in which conspiracy is not charged. It is the undue extension of the latter type of case which may possibly in the future be a danger to the certainty and the clarity of the criminal law."

The principle in *R. v. MANLEY* has been applied in England many times since. It was applied (although conspiracy was charged) in the case of *R. v. ROSE*(1937), 1 J.C.L. 171, based upon false statements made to mislead the police in their investigation of an alleged motoring offence. Essentially the same situation, although a more serious one, arose in the case of *R. v. ROBINSON and another*(1938), 2 J.C.L.62, when survivors of a motor accident falsely stated to the police that a man killed thereby had been driving when it occurred.

In *R. v. DAVIES*(1937), 1 J.C.L.541, a man was convicted because, in a misguided effort to gain sympathy, he confessed to a crime which he had not committed. It required two hundred and seventeen and one-half hours of police investigation to establish that he could not have done the act. Similarly in Canada, it has happened recently that a man, from whatever motive, confessed in Vancouver to having killed a man in Quebec. Investigation established that he could not have committed the crime. He was convicted of public mischief.

In 1939, resort was had to the indictment for public mischief in a number of cases of widely varying circumstances. In the first, a woman endeavoured to cover the theft of money from her employer by a pretended robbery (*R. v. HENDERSON*(1939), 3 J.C.L.35). In another, the accused, described by the learned trial Judge as a "typical exhibitionist", had attempted to attract notice by a simulated robbery, even going to the length of scratching his face and tearing his clothing (*R. v. ATKINSON*, 3 J.C.L.368). In still another, the accused, during the Munich crisis of 1938, had sent in code a false warning of the approach of enemy aircraft, which message was the cause of a great deal of trouble to the police, the fire brigade, and the officials of the Post Office (*R. v. WOOD*, 3 J.C.L.36). Similar to this was the foolish practical joke, which proved to be a boomerang, of the man who reported the "finding" of a Mills bomb which he himself had filled with soap and coal dust (*R. v. BENNETT*(1939), 3 J.C.L.368).

In 1938, *R. v. SORRELL; R. v. McCALL; R. v. LODGE; R. v. NICHOLL* and *R. v. CANNON*, known as the "Halifax slasher" cases,

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form a remarkable group. In those cases (3 J.C.L.197), a series of unrelated complaints were made to the police and the whole community terrorized for a considerable period. There was a great waste of time and service in investigation and patrols, and there were instances in which innocent persons were suspected and set upon. In the end "it was revealed that the slasher was a mythical person and there was no doubt that in all the cases except one the wounds were self-inflicted and that in the one case if such an assault did occur it was done by a person known to the accused."

It will be observed that in some of the cases cited the accused might have been (and in fact were also) charged with attempting to pervert the course of justice, or that in Canada, under s.177 of the *Criminal Code*, they might have been charged with fabricating evidence. (It is to be noted, as pointed out by Mr. Armour in the Annotation referred to, that s.177 of the *Criminal Code of Canada* was taken from the English Draft Code, but was not copied in English legislation).

The former was the course adopted in a case in which it was found that the accused had tampered with samples taken from a cargo of wheat so that they might be available in the event of an arbitration which might or might not take place (*R. v. VREONES*(1891), 60 L.J.M.C. 62). This case is notable for the reason that, on appeal, it was held that:

> "an attempt to mislead a judicial tribunal, which might be called into existence, by the manufacture of false evidence is a misdemeanour, although such tribunal was never called into existence and consequently the manufactured evidence never used."

It was applied and followed in a Canadian case (*R. v. SEVICK*(1930), 54 C.C.C.92) in which the accused was charged under s.177. The facts briefly, were that he wrote a letter to the police in which he said that he suspected that a certain person had murdered his brother. He also smeared with human blood a cap and shirt belonging to his brother and hid them in a place where the police later found them. Fortunately, the police doubted his story and obtained from him an admission of what he had done, before trouble was caused to an innocent person.

In the Canadian case of *R. v. BOYKO*(1945), 83 C.C.C.295, a woman who was leaving her husband had written notes to be found by him, implying that she had been kidnapped by a certain individual. She was charged with fabricating evidence, but it was held that she could not be convicted since the notes would not be admissible at the trial of the suggested kidnapper. On appeal by the Crown the Court said, p.299:

> "But in my opinion to change the charge from one of fabricating evidence to one of public mischief could not properly be called an amendment at all. On the charge as read the accused was entitled to her acquittal. On the proposed new charge the accused would necessarily be arraigned, in other words, there would be a new trial.
>
> The Court was invited to say whether the proposed evidence would disclose the offence of public mischief, but it is not the function of a Court of law to advise parties on hypothetical sets of facts."

There is, however, a remarkable and atrocious Canadian case where the consequence of trouble to an innocent person was not averted (*R. v. LEFFLER*(1937), 67 C.C.C.330). In 1934 one Earl Leffler was acquitted

of a charge of murdering his grandfather. In 1936 he went to the police and made a long statement in which he accused his grandmother of the crime. After her arrest he appeared at the preliminary hearing and testified to the same effect, and as a result his grandmother was committed for trial. About two months later and before the trial, he went to the Crown Attorney and made another statement retracting the first and confessing that he himself had committed the murder of which he had been found not guilty. He was charged with effecting a public mischief, and after pleading guilty, was sentenced to five years in the penitentiary.

In *R. v. KOZLUK*(1943), 82 C.C.C.253, accused, a railway sectionman, complained to the police that while he was engaged in replacing spikes which some unknown person had removed from a railway track, he was shot at and hit by some person or persons unknown. After investigation it was alleged that his statements were false, and he was convicted on a charge of public mischief, on the authority of *R. v. MANLEY, R. v. HIGGINS, R. v. LEFFLER* and *KERR v. HILL,* [1936]S.C.(J.)71. (In the last named case, there was a false statement to the police that a motor accident had occurred, the object being to cause an investigation to be made. This was held to be a crime, even though the statement did not include a charge against an individual.)

What has been done in s.120 has received rather striking confirmation in a recent English case, *R. v. NEWLAND,* [1953]2 All E.R.1067 at p.1073, where in a discussion of *R. v. MANLEY, supra,* the Lord Chief Justice expressed the opinion of the Court that "it would be a useful reform if such conduct as was there disclosed was made a summary offence by the legislature."

COMPOUNDING INDICTABLE OFFENCE.

121. Every one who asks or obtains or agrees to receive or obtain any valuable consideration for himself or any other person by agreeing to compound or conceal an indictable offence is guilty of an indictable offence and is liable to imprisonment for two years.

This is new and codifies the common law offence of compounding a felony. It replaces the former s.181 which was said in *COUTURE v. BILODEAU*(1938), 76 Que. S.C.340, to forbid "in the public interest the reduction by compromise, without the consent of the court, of the amount which may be recovered by a penal action." (As to penal actions, see s.627, *post.*)

The following Canadian cases are relevant to the section as it now reads:

R. v. LEROUX(1928), 50 C.C.C.52, at p.56:

"(The complainant) admitted quite frankly that . . . . . he told the accused that if he did not get it settled he would swear out a warrant for his arrest. In effect, the complainant, by threatening prosecution, endeavoured to obtain payment of a debt. What was done in this case amounted to an abuse of the process of the Court and should not be tolerated. Assuming that the accused was guilty of a criminal offence, if he made some settlement with the complainant in consequence of which no charge had been laid, the complainant would have been guilty of compounding a felony. The criminal law was not enacted for the assistance of persons seeking to collect civil debts."

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HAWKES v. WAUGH(1948), 21 M.P.R.417, at p.425:

"This Court, on appeal, is entitled to draw its own inferences from the facts found by the learned trial judge, and these facts satisfy me that the endorsement of the promissory note sued on was given in consideration of the withdrawal by the plaintiff of a criminal prosecution instituted by him."

Judgment for defendant following *WILLIAMS v. BAYLEY*(1866), L.R. 1 H.L.200 (noted *infra*).

GIASSON v. THIBAULT(1935), 73 Que.S.C.174 is similar in effect.

In an English case, *R. v. BURGESS*(1885), 16 Q.B.D.141, it was held that the offence of compounding a larceny may be committed by a person other than the owner of the stolen goods or a material witness for the prosecution.

Note that the section requires more than mere concealment. "To know of a felony and not to inform the King's officers is misprision of felony": *HARDE & LANE LTD. v. CHILTON*, [1928]2 K.B.306. It is a misdemeanour at common law, and, in the sense stated, it appears in ss.50(1)(b) and 361(2)(b) of this Code.

However, the concept of the common law offence seems to be changing in such a way as to make it distinguishable from compounding only by the existence of an agreement. In *WILLIAMS v. BAYLEY*(1866), L.R. 1 H.L.220, Lord Westbury expressed himself as follows:

"I apprehend the law to be this, and unquestionably it is a law dictated by the soundest considerations of policy and morality, that you shall not make a trade of a felony. If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself. But that is the position in which these bankers stood. They knew well, for they had before them the confessing criminal, that forgeries had been committed by the son, and they converted that fact into a source of benefit to themselves by getting the security of the father. Now, that is the principle of the law and the policy of the law, and it is dictated by the highest considerations. If men were permitted to trade upon the knowledge of a crime, and to convert their privity to that crime into an occasion of advantage, no doubt a great legal and great moral offence would be committed. And that is what I apprehend, the old rule intended to convey when it embodied the principle under the words which have now somewhat passed into desuetude, namely, "misprision of felony". That was a case when a man, instead of performing his public duty, and giving information to the public authorities of a crime that he was aware of, concealed his knowledge, and, further, converted it into a source of emolument to himself."

In *R. v. ABERG*, [1948]1 All E.R.601, the accused, a nurse, was convicted on a count charging misprision of felony which consisted in her concealing a man who had been imprisoned for housebreaking and had escaped. Lord Goddard, C.J. said:

"The third count was a count for misprision of felony. The jury found the applicant guilty on that count as well as on the other two counts. Misprision of felony is an offence which is still described in the textbooks, but it is generally regarded nowadays as having become ob-

OLD CODE:

182. Every one is guilty of an indictable offence and liable to seven years' imprisonment who corruptly takes any money or reward, directly or indirectly, under pretence or upon account of helping any person to recover any chattel, money, valuable security or other property which, by any indictable offence, has been stolen, taken, obtained, extorted, converted or disposed of, unless he has used all due diligence to cause the offender to be brought to trial for the same.

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solete or as having fallen into desuetude, although included in indictments. If in any future case it is thought necessary or desirable to include in an indictment a count for misprision of felony, great care should be taken to see what—at any rate according to more modern authorities—are the constituents of the offence. I call particular attention to the speech of Lord Westbury in *WILLIAMS v. BAYLEY* (1866), L.R. 1 H.L.220. *It may be that the court will have carefully to consider whether it is necessary to show a concealment for the benefit of the person charged.* However, no point of that sort is taken in the present case . . . . . "

CORRUPTLY TAKING REWARD FOR RECOVERY OF GOODS.

122. Every one who corruptly accepts any valuable consideration, directly or indirectly, under pretence or upon account of helping any person to recover any thing obtained by the commission of an indictable offence is guilty of an indictable offence and is liable to imprisonment for five years.

This is the former s.182 altered as noted below. It comes from s.156 in the Code of 1892 and s.312 of the E.D.C. without the words "or bargains for" which appeared there.

The provision originated in 7 & 8 Geo. IV, c.29, s.58 and 9 Geo. IV, c.55, s.51. It contained the words "unless he caused the offender to be apprehended and brought to trial for the same". As this might be impossible these words were altered in the *Larceny Act*, 1861 (Imp.) to read "unless he has used all due diligence to cause the offender to be brought to trial for the same." Greaves' Cons. Acts, p.144.

This qualification has been dropped from the revision because the gist of the offence is in the word "corruptly". If the accused has attempted to bring the offender to justice, that fact may be considered in mitigation, but if he has acted corruptly, he should not be immune.

In *R. v. PASCOE*(1849), 3 Cox,C.C.462, the accused received a sum of money from the prosecutrix for the purpose of buying back some goods that had been stolen from her. A conviction against him was affirmed. The Court said:

"We are of the opinion . . . . . that the receipt of the money by the prisoner was a corrupt receiving of such money within the meaning of the statute, the facts found being that the prisoner knew the thieves, and assisted the prosecutrix in endeavouring to purchase the stolen property from them, not meaning to bring them to justice."

In *R. v. KING*(1844), 1 Cox,C.C.36, it was held sufficient to show that the accused had some corrupt and improper design.

ADVERTISING REWARD AND IMMUNITY.—Advertising return of money advanced on stolen property.—Printing advertisement.

123. Every one who

(*a*) publicly advertises a reward for the return of anything that has been stolen or lost, and in the advertisement uses words to indicate that no questions will be asked if it is returned,

(*b*) uses words in a public advertisement to indicate that a reward will be given or paid for anything that has been stolen or lost, without interference with or inquiry about the person who produces it,

(*c*) promises or offers in a public advertisement to return to a person who has advanced money by way of loan on, or has bought, anything that has been stolen or lost, the money so advanced or paid, or any other sum of money for the return of that thing, or

(*d*) prints or publishes any advertisement referred to in paragraph (*a*), (*b*) or (*c*),

is guilty of an offence punishable on summary conviction.

This is the former s.183 altered to make the offences punishable on summary conviction. It was s.157 in the Code of 1892, and came from s.102 of the *Larceny Act*, 1861 (Imp.). The former section gave a common informer a right of action to recover a penalty. Under the revision (s.627) a penal action can be brought only by the Crown. Other provisions as to common informers in the former ss.1041 *et seq.* were repealed in 1948.

See notes to ss.121 and 122.

Escapes and Rescues.

PRISON-BREACH.

124. Every one who

(*a*) by force or violence breaks a prison with intent to set at liberty himself or any person confined therein, or

(*b*) with intent to escape forcibly breaks out of, or makes any breach in, a cell or other place within a prison in which he is confined,

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

See notes following s.129.

ESCAPE.—Being unlawfully at large.—Skipping bail.

125. Every one who

(*a*) escapes from lawful custody,

(*b*) is, before the expiration of a term of imprisonment to which he was sentenced, at large within Canada without lawful excuse, the proof of which lies upon him, or

(*c*) having been charged with a criminal offence and being at large on recognizance fails, without lawful excuse, the proof of which lies upon him, to appear in accordance with the recognizance at the proper time and place for his preliminary inquiry, to stand his trial, to receive sentence or for the hearing of an appeal, as the case may be,

OLD CODE:

183. Every one is liable to a penalty of two hundred and fifty dollars for each offence, recoverable with costs by any person who sues for the same in any court of competent jurisdiction, who

(a) publicly advertises a reward for the return of any property which has been stolen or lost, and in such advertisement uses any words purporting that no questions will be asked; or

(b) makes use of any words in any public advertisement purporting that a reward will be given or paid for any property which has been stolen or lost without seizing or making any inquiry after the person producing such property; or

(c) promises or offers in any such public advertisement to return to any pawnbroker or other person who advanced money by way of loan on, or has bought, any property stolen or lost, the money so advanced or paid, or any other sum of money for the return of such property; or

(d) prints or publishes any such advertisement.

187. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, by force or violence, breaks any prison with intent to set at liberty himself or any person confined therein on any criminal charge.

188. Every one is guilty of an indictable offence and liable to two years' imprisonment who attempts to break prison, or who forcibly breaks out of his cell or makes any breach therein with intent to escape therefrom.

185. Every one is guilty of an indictable offence and liable to two years' imprisonment who, having been sentenced to imprisonment, is afterwards, and before the expiration of the term for which he was sentenced, at large within Canada without some lawful cause, the proof whereof shall lie on him.

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

(a) having been convicted of an offence, escapes from any lawful custody in which he may be under such conviction; or

(b) whether convicted or not, escapes from any prison in which he is lawfully confined on any criminal charge; or

(c) having been charged with a criminal offence and being on bail does not, without lawful excuse, the proof whereof shall lie upon him, present himself at the proper time and place for his preliminary inquiry or to stand his trial or to receive his sentence or for the hearing of an appeal, as the case may be.

190. Every one is guilty of an indictable offence and liable to two years' imprisonment who, being in lawful custody other than as aforesaid on any criminal charge, escapes from such custody.

193. Every one is guilty of an indictable offence and liable to one years' imprisonment, who, by failing to perform any legal duty, permits a person in his lawful custody on a criminal charge to escape therefrom.

194. Every one is guilty of an indictable offence and liable to two years' imprisonment who with intent to facilitate the escape of any prisoner lawfully imprisoned conveys, or causes to be conveyed, any thing into any prison.

195. Every one is guilty of an indictable offence and liable to two years' imprisonment who knowingly and unlawfully, under colour of any pretended authority, directs or procures the discharge of any prisoner not entitled to be so discharged, and the person so discharged shall be held to have escaped.

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

See notes following s.129.

PERMITTING ESCAPE.—Conveying things into prison.—Discharge under pretended authority.

126. Every one who

(a) **permits a person whom he has in lawful custody to escape, by failing to perform a legal duty,**

(b) **conveys or causes to be conveyed into a prison, anything, with intent to facilitate the escape of a person imprisoned therein, or**

(c) **directs or procures, under colour of pretended authority, the discharge of a prisoner who is not entitled to be discharged,**

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

See notes following s.129.

RESCUE.—Peace officer permitting escape.—Prison officer permitting escape.

127. Every one who

(a) **rescues any person from lawful custody or assists any person in escaping or attempting to escape from lawful custody,**

(b) **being a peace officer, wilfully permits a person in his lawful custody to escape, or**

(c) **being an officer of or an employee in a prison, wilfully permits a person to escape from lawful custody therein,**

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

See notes following s.129.

ASSISTING PRISONER OF WAR TO ESCAPE.

128. Every one who knowingly and wilfully

(a) **assists a prisoner of war in Canada to escape from a place where he is detained, or**

(b) **assists a prisoner of war, who is permitted to be at large on parole in Canada, to escape from the place where he is at large on parole,**

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

See notes following s.129.

FULL TERM TO BE SERVED WHEN RETAKEN.—Service of *Remanet*.—Imprisonment for escape.—"Escape."

129. (1) A person who escapes while undergoing imprisonment is, after undergoing any punishment to which he is sentenced for that escape, required to serve the portion of his term that he had not served at the time of his escape.

(2) For the purposes of subsection (1), the portion of a person's term that he had not served at the time of his escape shall be served

(a) **in the prison from which the escape was made, if imprisonment for the escape is not awarded, or**

OLD CODE:

191 Every one is guilty of an indictable offence and liable to seven years' imprisonment who,

(a) rescues any person or assists any person in escaping, or attempting to escape, from lawful custody, whether in prison or not, under sentence of death or imprisonment for life, or after conviction of, and before sentence for, or while in such custody upon a charge of any crime punishable with death or imprisonment for life; or

(b) being a peace officer and having any such person in his lawful custody, or being an officer of any prison in which any such person is lawfully confined, voluntarily and intentionally permits him to escape therefrom.

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

(a) rescues any person, or assists any person in escaping, or attempting to escape, from lawful custody, whether in prison or not, under a sentence of imprisonment for any term less than life, or after conviction of, and before sentence for, or while in such custody upon a charge of any crime punishable with imprisonment for a term less than life; or

(b) being a peace officer having any such person in his lawful custody, or being an officer of any prison in which such person is lawfully confined, voluntarily and intentionally permits him to escape therefrom.

186. Every one is guilty of an indictable offence and liable to five years' imprisonment who knowingly and wilfully,

(a) assists any alien enemy of His Majesty, being a prisoner of war in Canada, to escape from any place in which he may be detained; or

(b) assists any such prisoner as aforesaid, suffered to be at large on his parole in Canada or in any part thereof, to escape from the place where he is at large on his parole.

196. (1) Every one who escapes from custody and is retaken shall, after undergoing the punishment, if any, to which he may be sentenced for such escape, undergo imprisonment equivalent to the remainder of his term unexpired at the time of his escape.

(2) Such imprisonment shall, if no imprisonment for such escape is awarded, be served in the prison to which he was sentenced otherwise it shall be served in the same prison to which he is sentenced for such escape.

(3) Imprisonment for such escape may be to the penitentiary or other prison from which the escape was made whether the term of such imprisonment is less than two years or two or more years.

(b) in the prison to which he is sentenced for the escape, if imprisonment for the escape is awarded.

(3) Where a person is sentenced to imprisonment for an escape he may, for the purposes of this section, be sentenced to imprisonment in a penitentiary or in the prison from which the escape was made, whether the imprisonment is for less than two years or for two years or more.

(4) For the purposes of this section, "escape" means breaking prison, escaping from lawful custody or, without lawful excuse, being at large within Canada before the expiration of a term of imprisonment to which a person has been sentenced.

Section 129—*continued*

Ss.124 to 129 reproduce the former ss.185-196 without material change. The reference to attempt (s.188) has been omitted as being covered by s.406, *post*, and "escape" has been defined to make it clear that it includes prison-breach. The sections are based upon ss.130 *et seq.* of the E.D.C., concerning which the Imperial Commissioners said in their Report (p.21):

"In reference to the somewhat intricate subject of escape and rescue . . . . . we have made distinctions, which are, we think, insufficiently recognized by the existing law, between the commission of such offences by peace officers and gaolers, and by other persons."

In Russell on Crimes, 10th ed., 339 the distinctions are set out as follows:

"The term 'escape' is usually applied where the liberation of the prisoner is effected either by himself or others, without force. Where it is effected by the prisoner himself with force, it is called *prison-breaking;* and where it is effected by others, with force, it is commonly called a *rescue.* (It is distinct from flight from justice before arrest.)

Escapes fall into three classes—escape by the prisoner, escape suffered by an officer of the law, and escape suffered by a private person who has the prisoner in custody. But these distinctions, while recognized as to common law offences, cannot be applied with exactness to the statutes regulating offences of these classes.

As all persons are bound to submit themselves to the judgment of the law, those who, when lawfully arrested on criminal process, free themselves from custody before they are put in a prison or other legal place of detention, are guilty of a misdemeanor . . . . . It is also criminal in a prisoner to escape from lawful confinement on a criminal charge though no force or artifice be used on his part to effect such purpose."

At p.353:

"The breach of the prison within the meaning of the statute (i.e. 23 Edw. I *De frangentibus prisonam*, 1295) must be actual, and not merely a constructive breaking. Therefore, if the party go out of a prison without obstruction, the prison doors being open through the consent or negligence of the gaoler, or if he otherwise escape, without using any kind of force or violence, he seems to be guilty of a misdemeanor only. But the breaking need not be intentional." *R. v. HASWELL, infra,* cited.

Escapes were further classified as voluntary or negligent, according to whether or not they were the result of a deliberate act on the part of a public officer.

Stephen's Digest, p.104 says "There is a good deal of learning on the subject founded on 1 Edw.2, st. 2 *'De frangentibus prisonam'*, but it is mostly practically obsolete. This statute is not mentioned in the Revised Statutes."

Hals. 2nd ed., Vol.9, p.361, classifies escape in the same way as Russell (above) and adds:

"In all these cases it is immaterial whether the escape is before or after conviction, or whether the prisoner was guilty or not, or whether he was at the time of the escape actually in prison or on his way there

or detained for the purpose of being sent there.

If a prisoner escapes from any lawful custody, without force but by artifice or similar means, he commits a common law misdemeanour."

If force is used to effect the escape it is the common law offence of breach of prison (p.359), and is felony or misdemeanour according to the offence for which he is detained.

In *R. v. HASWELL*(1821), Russ. & Ry.458, the prisoner escaped by scaling a wall, but in doing so threw down some bricks placed loosely at the top so as to give way when taken hold of. The trial judge "doubted whether there was such force used as to constitute the crime of prison breaking, or whether it amounted only to an escape" and reserved the matter for consideration of the judges.

"The judges were unanimously of the opinion that this was a prison breach, and punishable as a common law felony, by imprisonment not exceeding a year, *to begin from the passing of the sentence*, and, if thought right, the prisoner might be whipped three times in addition to the imprisonment. *Had this been an escape only*, Richardson, J. thought it would not have been felony."

S.196 had its genesis in the *Criminal Procedure Act* 1869(Can.), c.29, s.87, and appears as s.11 of c.155 of the Revised Statutes 1886, an *Act Respecting Escapes and Rescues*. It became s.169 of the Code of 1892, as follows:

"Every one who escapes from *custody* shall, on being retaken, *serve in the prison to which he was sentenced,* the remainder of his term at the time of his escape, in addition to the punishment which is awarded for such escape; and any imprisonment awarded for such offence may be to the penitentiary or prison from which the escape was made."

The section was enacted in its later form in 1938. There was no comment on it other than the statement "This is only a clarification." (Hansard, 1938, vol. IV, p.4315).

In *R. v. BALDWIN*(1945), 84 C.C.C.159, at p.161 (Ont.C.A.), the following appears:

"Section 196 (am. 1938, c.44, s.10) of the Criminal Code provides in the case of one who escapes custody that on being retaken he shall serve a term equivalent to the remainder of his term unexpired at the time of his escape in addition to the punishment awarded for his escape. I observe that in England the Home Office in establishing a rule as to when sentences should be made concurrent made an exception in the case of attacks upon wardens which were required to be made consecutive . . . . . see *R. v. PHILLIPS*(1921), 15 Cr. App. R. 161. In some discussions that have occurred regarding the abolition of flogging as a punishment exception has been suggested in the case of breaches of prison discipline.

"There is solid reason for these distinctions. The guards are performing a public duty that involves personal risk. Their duties are performed surrounded by persons of the criminal class, in prison for crime committed. It is but poor protection given to the guard if for attacks upon him a concurrent sentence is to be the penalty. The due carrying out of criminal justice requires that for violence to a guard

Section 129—*continued*

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

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

PART IV.

SEXUAL OFFENCES, PUBLIC MORALS AND DISORDERLY CONDUCT.

Interpretation.

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

130. In this Part,

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

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

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

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

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

Special Provisions.

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

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

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