STATUTES OF CANADA 1953-54

2-3 ELIZABETH II

Chapter 51

An Act respecting the Criminal Law

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

SHORT TITLE.

1. This Act may be cited as the *Criminal Code*.

INTERPRETATION.

DEFINITIONS. — "Act." — "Attorney General." — "Bank-note." — "Canadian Forces." — "Cattle." — "Clerk of the court." — "Counsel." — "Count." — "Court of appeal." — "Court of criminal jurisdiction." — "Day." — "Document of title to goods." — "Document of title to lands." — "Dwelling house." — "Every one." — "Person." — "Owner." — "Explosive substance." — "Feeble-minded person." — "Highway." — "Her Majesty's Forces." — "Indictment." — "Justice." — "Magistrate." — "Military." — "Military law." — "Motor vehicle." — "Municipality." — "Newly-born child." — "Night." — "Offensive weapon." — "Weapon." — "Peace officer." — "Prison." — "Property." — "Prosecutor." — "Public department." — "Public officer." — "Public stores." — "Steal." — "Superior court of criminal jurisdiction." — "Territorial division." — "Testamentary instrument." — "Trustee." — "Valuable security." — "Wreck." — "Writing."

2. In this Act,

(1) "Act" includes

(*a*) an Act of the Parliament of Canada,

(*b*) an Act of the legislature of the late province of Canada,

(*c*) an Act of the legislature of a province, and

(*d*) an Act or ordinance of the legislature of a province, territory or place in force at the time that province, territory or place became a province of Canada;

(2) "Attorney General" means the Attorney General or Solicitor General of a province in which proceedings to which this Act applies are taken and, with respect to the Northwest Territories and the Yukon Territory, means the Attorney General of Canada;

(3) "bank-note" includes any negotiable instrument

(*a*) issued by or on behalf of a person carrying on the business of banking in or out of Canada,

(*b*) issued under the authority of the Parliament of Canada or under lawful authority of the government of a state other than Canada,

intended to be used as money or as the equivalent of money, immediately upon issue or at some time subsequent thereto, and includes bank bills and bank post bills;

OLD CODE:

2. in this Act, unless the context otherwise requires,

(1) "any Act," or "any other Act," includes any Act passed or to be passed by the parliament of Canada, or any Act passed by the legislature of the late province of Canada, or passed or to be passed by the legislature of any province of Canada, or passed by the legislature of any province now a part of Canada before it was included therein;

(2) "Attorney General" means the Attorney General or Solicitor General of any province in Canada in which any proceedings are taken under this Act, and, with respect to the Northwest Territories and the Yukon Territory, the Attorney General of Canada;

(4) "bank-note" includes all negotiable instruments issued by or on behalf of any person, body corporate, or company carrying on the business of banking in any part of the world, or issued by the authority of the Parliament of Canada, or any Governor or other authority lawully authorized thereto in any of His Majesty's dominions, or by the authority of any foreign prince, or state or government and intended to be used as equivalent to money, either immediately upon their issue or at some time subsequent thereto, and all bank bills and bank post bills;

(5) "cattle" includes any horse, mule, ass, swine, sheep or goat, as well as any neat cattle or animal of the bovine species, and by whatever technical or familiar name known, and shall apply to one animal as well as to many;

(17) "indictment" and "count" respectively include information and presentment as well as indictment, and also any plea, replication or other pleading, any formal charge under section eight hundred and seventy-three, and any record;

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(4) "Canadian Forces" means the naval, army and air forces of Her Majesty raised by Canada and consist of three services, namely, the Royal Canadian Navy, the Canadian Army and the Royal Canadian Air Force;

(5) "cattle" means neat cattle or an animal of the bovine species by whatever technical or familiar name it is known, and includes a horse, mule, ass, pig, sheep or goat;

(6) "clerk of the court" includes a person, by whatever name or title he may be designated, who from time to time performs the duties of a clerk of the court;

(7) "counsel" means a barrister or solicitor, in respect of the matters or things that barristers and solicitors, respectively, are authorized by the law of the province to do or perform in relation to legal proceedings;

(8) "count" means a charge in an information or indictment;

(9) "court of appeal" means

(*a*) in the province of Ontario, the Court of Appeal,

(*b*) in the province of Quebec, the Court of Queen's Bench, appeal side,

(*c*) in the province of Nova Scotia, the Supreme Court *in banco*,

Section 2(9)—*continued*

(*d*) in the province of New Brunswick, the Court of Appeal, otherwise known as the Appeal Division of the Supreme Court,

(*e*) in the province of British Columbia, the Court of Appeal,

(*f*) in the province of Prince Edward Island, the Supreme Court,

(*g*) in the province of Manitoba, the Court of Appeal,

(*h*) in the province of Saskatchewan, the Court of Appeal,

(*i*) in the province of Alberta, the Appellate Division of the Supreme Court,

(*j*) in the province of Newfoundland, the Supreme Court, constituted by two or more of the judges thereof,

(*k*) in the Yukon Territory, the Court of Appeal for the province of British Columbia, and

(*l*) in the Northwest Territories

(i) for those parts of the Territories west of the one hundred and second meridian of west longitude, the court of appeal for the province of Alberta, and

(ii) for those parts of the Territories east of the one hundred and second meridian of west longitude, the court of appeal for the province of Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island or Newfoundland;

(10) "court of criminal jurisdiction" means

(*a*) a court of general or quarter sessions of the peace, when presided over by a superior court judge or a county or district court judge, or in the cities of Montreal and Quebec, by a municipal judge of the city, as the case may be, or a judge of the sessions of the peace,

(*b*) a magistrate or judge acting under Part XVI, and

(*c*) in the province of New Brunswick, the county court;

(11) "day" means the period between six o'clock in the forenoon and nine o'clock in the afternoon of the same day;

(12) "document of title to goods" includes a bought and sold note, bill of lading, warrant, certificate or order for the delivery or transfer of goods or any other valuable thing, and any other document used in the ordinary course of business as evidence of the possession or control of goods, authorizing or purporting to authorize, by endorsement or by delivery, the person in possession of the document to transfer or receive any goods thereby represented or therein mentioned or referred to;

(13) "document of title to lands" includes any writing that is or contains evidence of the title, or any part of the title to real property, or to any interest in real property, and any notarial or registrar's copy thereof, and any duplicate instrument, memorial, certificate or document authorized or required by any law in force in any part of Canada with respect to registration of titles, that relates to title to real property or to an interest in real property;

OLD CODE:

(7) "court of appeal" includes,

. . . . . .

(k) in the Northwest Territories for those parts of the said Territories west of the eighty-ninth meridian of west longitude, the court of appeal as in this paragraph defined for the provinces of Manitoba, Saskatchewan, Alberta and British Columbia, and for those parts of the said Territories east of the eighty-ninth meridian of west longitude, the court of appeal as in this paragraph defined for the provinces of Ontario, Quebec, Nova Scotia, New Brunswick, and Prince Edward Island;

(24) "night" or "night time" means the interval between nine o'clock in the afternoon and six o'clock in the forenoon of the following day, and "day" or "day time" includes the interval between six o'clock in the forenoon and nine o'clock in the afternoon of the same day;

(11) "document of title to goods" includes any bill of lading, India warrant, dock warrant, warehousekeeper's certificate warrant or order for the delivery or transfer of any goods or valuable thing, bought and sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to;

(12) "document of title to lands" includes any deed, map, paper or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title to any real property, or to any interest in any real property or any notarial or registrar's copy thereof or any duplicate instrument, memorial, certificate or document authorized or required by any law in force in any part of Canada respecting registration of titles, and relating to such title;

335. (g) "dwelling-house" means the whole or any part of any building kept or occupied as a permanent or temporary residence;

339. A building occupied with, and within the same curtilage with, any dwelling-house shall be deemed to be part of the said dwelling-house if there is between such building and dwelling-house a communication, either immediate or by means of a covered and inclosed passage, leading from the one to the other, but not otherwise.

2. par. (13) "every one," "person," "owner," and other expressions of the same kind include His Majesty and all public bodies, bodies corporate, societies, companies, and inhabitants of counties, parishes, municipalities or other districts in relation to such acts and things as they are capable of doing and owning respectively;

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(14) "dwelling house" means the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence and includes a building within the curtilage of a dwelling house that is connected to it by a doorway or by a covered and enclosed passageway;

(15) "every one," "person," "owner," and similar expressions include Her Majesty and public bodies, bodies corporate, societies,

Section 2(15)—*continued*

companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively;

(16) "explosive substance" includes

(*a*) anything intended to be used to make an explosive substance, and

(*b*) anything, or any part thereof, used or intended to be used, or adapted to cause, or to aid in causing an explosion in or with an explosive substance;

(17) "feeble-minded person" means a person in whom there exists and has existed from birth or from an early age, mental defectiveness not amounting to imbecility, but so pronounced that he requires care, supervision and control for his protection or for the protection of others;

(18) "highway" means a road to which the public has the right of access, and includes bridges over which or tunnels through which a road passes;

(19) "Her Majesty's Forces" means the naval, army and air forces of Her Majesty wheresoever raised, and includes the Canadian Forces;

(20) "indictment" includes

(*a*) information, presentment and a count therein,

(*b*) a plea, replication or other pleading, and

(*c*) any record;

(21) "justice" means a justice of the peace or a magistrate, and includes two or more justices where two or more justices are, by law, required to act or, by law, act or have jurisdiction;

(22) "magistrate" means a police magistrate, a stipendiary magistrate, a district magistrate, a provincial magistrate, a judge of the sessions of the peace, a recorder, or any person having the power and authority of two or more justices of the peace, and includes the lawful deputy of each of them;

(23) "military" shall be construed as relating to all or any of the Canadian Forces;

(24) "military law" includes all laws, regulations or orders relating to the Canadian Forces;

(25) "motor vehicle" means a vehicle that is drawn, propelled or driven by any means other than by muscular power, but does not include a vehicle of a railway that operates on rails;

(26) "municipality" includes the corporation of a city, town, village, county, township, parish or other territorial or local division of a province, the inhabitants of which are incorporated or are entitled to hold property collectively for a public purpose;

(27) "newly-born child" means a person under the age of one year;

(28) "night" means the period between nine o'clock in the afternoon and six o'clock in the forenoon of the following day;

OLD CODE:

(14) "explosive substance" includes any materials for making an explosive substance; also any apparatus, machine, implement or materials, used or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; and also any part of any such apparatus, machine or implement;

(15) "feeble-minded person" means a person in whose case there exists from birth or from an early age, mental defectiveness not amounting to imbecility yet so pronounced that he requires care, supervision and control for his own protection or for the protection of others;

285. (9) For the purposes of this section "highway" shall include any road to which the public has the right of access, including bridges over which, or tunnels through which, a road passes.

2. par. (17) "indictment" and "count" respectively include information and presentment as well as indictment, and also any plea, replication or other pleading, any formal charge under section eight hundred and seventy-three, and any record;

(19) "justice" means a justice of the peace, and includes two or more justices, if two or more justices act or have jurisdiction, and also a police magistrate, a stipendiary magistrate and any person having the power or authority of two or more justices of the peace;

(28) "police magistrate" includes a deputy police magistrate, a magistrate and a deputy magistrate having the powers of a police magistrate under the laws of the province;

(21) "military law" includes all laws, regulations or orders governing or in respect of the Army, the Navy or the Air Force;

(22) "municipality" includes the corporation of any city, town, village, county, township, parish or other territorial or local division of any province of Canada, the inhabitants whereof are incorporated or have the right of holding property for any purpose;

(24) "night" or "night time" means the interval between nine o'clock in the afternoon and six o'clock in the forenoon of the following day, and "day" or "day time" includes the interval between six o'clock in the forenoon and nine o'clock in the afternoon of the same day;

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(29) "offensive weapon" or "weapon" means

(*a*) anything that is designed to be used as a weapon, and

(*b*) anything that a person uses or intends to use as a weapon, whether or not it is designed to be used as a weapon,

and, without restricting the generality of the foregoing, includes a firearm, air-gun or air-pistol and ammunition for a firearm, air-gun or air-pistol;

(30) "peace officer" includes

(*a*) a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer and justice of the peace,

Section 2(30)—*continued*

(b) a warden, deputy warden, instructor, keeper, gaoler, guard and any other officer or permanent employee of a prison,

(*c*) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process, and

(*d*) an officer or person having the powers of a customs or excise officer when performing any duty in the administration of the *Customs Act* or the *Excise Act*;

(31) "prison" includes a penitentiary, common gaol, public or reformatory prison, lock-up, guard-room or other place in which persons who are charged with or convicted of offences are usually kept in custody;

(32) "property" includes

(*a*) real and personal property of every description and deeds and instruments relating to or evidencing the title or right to property, or giving a right to recover or receive money or goods,

(b) property originally in the possession or under the control of any person, and any property into or for which it has been converted or exchanged and anything acquired at any time by such conversion or exchange, and

(*c*) any postal card, postage stamp or other stamp issued or prepared for issue under the authority of the Parliament of Canada or of the legislature of a province for the payment to the Crown or a corporate body of any fee, rate or duty, whether or not it is in the possession of the Crown or of any person;

(33) "prosecutor" means the Attorney General or, where the Attorney General does not intervene, means the person who institutes proceedings to which this Act applies, and includes counsel acting on behalf of either of them;

(34) "public department" means a department of the Government of Canada or a branch thereof or a board, commission, corporation or other body that is an agent of Her Majesty in right of Canada;

(35) "public officer" includes

(*a*) an officer of customs or excise,

(*b*) an officer of the Canadian Forces,

(*c*) an officer of the Royal Canadian Mounted Police, and

(*d*) any officer while he is engaged in enforcing the laws of Canada relating to revenue, customs, excise, trade or navigation;

(36) "public stores" includes any movable property that is under the care, supervision, administration or control of a public department or of any person in the service of a public department;

(37) "steal" means to commit theft;

(38) "superior court of criminal jurisdiction" means

(*a*) in the province of Ontario, the Supreme Court,

OLD CODE:

(27) "peace officer" includes a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer, any justice of the peace, and also the warden, deputy warden, instructor, keeper, guard or any other officer or permanent employee of a penitentiary and the gaoler or keeper of any prison and any police officer, police constable, bailiff, constable or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process, and shall also include any officer or person having the powers of a Customs or Excise officer when performing any duty in the administration of the Customs Act or the Excise Act;

(29) "prison" includes any penitentiary, common gaol, public or reformatory prison, lock-up, guard room or other place in which persons charged with the commission of offences are usually kept or detained in custody;

(31) "property" includes,
(a) every kind of real and personal property, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods,
(b) not only such property as was originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged and anything acquired by such conversion or exchange, whether immediately or otherwise,
(c) any postal card, postage stamp or other stamp issued or prepared for issue by the authority of the Parliament of Canada, or of the legislature of any province of Canada, for the payment to the Crown or any corporate body of any fee, rate or duty, and whether still in the possession of the Crown or of any person or corporation;

(32) "public department" means a department of the Government of Canada or a branch thereof and a board, commission, corporation or other body that is an agent of His Majesty in right of Canada;

(33) "public officer" includes
(a) an officer of customs or excise;
(b) an officer of the Canadian Forces;
(c) an officer of the Royal Canadian Mounted Police; and
(d) any officer while he is lawfully engaged in enforcing the laws of Canada relating to revenue, customs, trade or navigation;

(34) "public stores" includes all stores under the care, superintendence or control of any public department as herein defined, or of any person in the service of such department;

(38) "superior court of criminal jurisdiction" means and includes, the Courts following or such Courts as may be substituted therefor:
(a) in the province of Ontario, the Supreme Court of Ontario,
(b) in the province of Quebec, the Court of King's Bench,
(c) in the provinces of Nova Scotia, New Brunswick, Alberta and Newfoundland, the Supreme Courts of the said provinces respectively,
(d) in the province of British Columbia, the Supreme Court and the Court of Appeal of that province,
(e) in the province of Prince Edward Island, the Supreme Court of Judicature,
(f) in the provinces of Manitoba and Saskatchewan, the Court of Appeal or the Court of King's Bench,
(g) in the Yukon Territory, the Territorial Court;

Section 2(38)—*continued*

(*b*) in the province of Quebec, the Court of Queen's Bench,
(*c*) in the provinces of Nova Scotia, New Brunswick, Alberta and Newfoundland respectively, the Supreme Court,
(*d*) in the province of British Columbia, the Supreme Court or the Court of Appeal,
(*e*) in the province of Prince Edward Island, the Supreme Court of Judicature,
(*f*) in the provinces of Manitoba and Saskatchewan respectively, the Court of Appeal or the Court of Queen's Bench,
(*g*) in the Yukon Territory, the Territorial Court, and
(*h*) in the Northwest Territories, the Territorial Court;

(39) "territorial division" includes any province, county, union of counties, township, city, town, parish or other judicial division or place to which the context applies;

(40) "testamentary instrument" includes any will, codicil or other testamentary writing or appointment, as well during the life of the testator whose testamentary disposition it purports to be as after his death, whether it relates to real or personal property, or to both;

(41) "trustee" means a person who is declared by any Act to be a trustee or is, by the law of the province, a trustee, and without restricting the generality of the foregoing, includes a trustee on an express trust created by deed, will or instrument in writing, or by parol;

(42) "valuable security" includes
(*a*) an order, exchequer acquittance or other security that entitles or evidences the title of any person,
(i) to a share or interest in a public stock or fund or in any fund of a body corporate, company or society, or
(ii) to a deposit in a savings bank or other bank,
(*b*) a debenture, deed, bond, bill, note, warrant, order or other security for money or for the payment of money,
(*c*) a document of title to lands or goods wheresoever situate,
(*d*) a stamp or writing that secures or evidences title to or an interest in a chattel personal, or that evidences delivery of a chattel personal, and
(*e*) a release, receipt, discharge or other instrument evidencing payment of money;

(43) "wreck" includes the cargo, stores and tackle of a vessel and all parts of a vessel separated from the vessel, and the property of persons who belong to, are on board or have quitted a vessel that is wrecked, stranded or in distress at any place in Canada; and

(44) "writing" includes a document of any kind and any mode in which, and any material on which, words or figures, whether at length or abridged, are written, printed or otherwise expressed, or a map or plan is inscribed.

OLD CODE:

(39) "territorial division" includes any county, union of counties, township, city, town, parish or other judicial division or place to which the context applies;

(40) "testamentary instrument" includes any will, codicil, or other testamentary writing or appointment, as well during the life of the testator whose testamentary disposition it purports to be as after his death, whether the same relates to real or personal property, or both;

(42) "trustee" means a trustee on some express trust created by some deed, will or instrument in writing, or by parole, or by any Act, or otherwise, and includes the heir or personal representative of any such trustee, and every other person upon or to whom the duty of such trust has devolved or come, whether by appointment of a court or otherwise, and also an executor or administrator, and an official manager, assignee, liquidator, or other like officer acting under any Act relating to joint stock companies, bankruptcy or insolvency, and any person who is, by the law of the province of Quebec, an administrateur or fidéicommissaire; and "trust" includes whatever is by that law an administration or fidéicommis;

(43) "valuable security" includes any order, exchequer acquittance or other security entitling or evidencing the title of any person to any share or interest in any public stock or fund, whether of Canada or of any province thereof, or of the United Kingdom, or of Great Britian or Ireland, or of any British colony or possession, or of any foreign state, or in any fund of any body corporate, company or society, whether within Canada or the United Kingdom, or any British colony or possession, or in any foreign state or country, or to any deposit in any savings bank or other bank, and also includes any debenture, deed, bond, bill, note, warrant, order or other security for money or for payment of money, whether of Canada or of any province thereof, or of the United Kingdom, or of any British colony or possession, or of any foreign state, and any document of title to lands or goods wheresoever such lands or goods are situate, and any stamp or writing which secures or evidences title to or interest in any chattel personal, or any release, receipt, discharge or other instrument, evidencing payment of money, or the delivery of any chattel personal;

(36) "shipwrecked person" includes any person belonging to, on board of, or having quitted any vessel wrecked, stranded or in distress at any place in Canada;

(44) "wreck" includes the cargo, stores and tackle of any vessel and all parts of a vessel separated therefrom, and also the property of shipwrecked persons;

(45) "writing" includes any mode in which, and any material on which, words or figures, whether at length or abridged, are written, printed or otherwise expressed, or any map or plan is inscribed;

NOTES TO SECTION 2.

A reference to the concordance will show that several of the definitions which formerly appeared in the interpretation section have been dropped.

Section 2—*continued*

(1) The words "or to be passed" have been dropped as unnecessary. S.10 of the *Interpretation Act* provides that "the law shall be considered as always speaking."

(2) No change in effect but see also s.31(1)(l) of the *Interpretation Act* (Ministers and Deputies). In *R. v. MORRIS,* [1950]O.W.N.377 this was held in effect to empower a Deputy Minister to do administrative acts on the part of the Minister. The exercise of Ministerial discretion is personal to the Minister.

(3) No change in effect. Formerly par. (4) of s.2 (1).

(4) No change. Formerly par. (4a) of s.2 (1). See 1951, c.47, s.1.

(5) No change in effect.

(6) New. It is to provide a uniform expression.

(7) New.

(8) This comes from the former par. (17) of s.2 and is redrawn to conform to the provision (s.696, *post*) that more than one offence may be included in an information. This is new in the *Criminal Code* but has been included in other penal Acts and Regulations, e.g., the Wartime Prices and Trade Board Regulations, the Defence of Canada Regulations and provincial Liquor Acts.

(9) This alters the former par. (7) of s.2 by substituting the 102nd Meridian for the 89th, in conformity with the provision of the *Northwest Territories Act,* R.S.C. 1952, c.331, in respect of civil cases, and also by including the Court of Appeal for Newfoundland as one of the Courts of Appeal for parts of the Northwest Territories east of the 102nd Meridian.

(10) This is new and obviates a need for repetition by adopting a comprehensive term for the courts defined. It conforms to a Quebec statute of 1953 substituting "municipal court" for "recorder's court."

(11) From the former par. (24) of s.2. No change in effect.

(12) The former par. (11) of s.2. No change in effect.

(13) The former par. (12) of s.2. No change in effect.

(14) This is derived from the former ss.335(1)(g) and 339. No change in effect.

(15) The former par. (13) of s.2. No change in effect.

(16) The former par. (14) of s.2. No change in effect.

(17) The former par. (15) of s.2. No change in effect.

(18) The former s.285 (9). It came into the Code as the result of an accident in the Windsor tunnel.

(19) The former par. (16a) of s.2. No change. See 1951, c.47, s.1.

(20) From the former par. 17 of s.2. No change in effect.

(21) The former par. (19) of s.2. No change in effect.

(22) This is new and saves repetition. However, it does not apply to Part XVI as the word is specially defined for that Part (s.466, *post*).

(23) The former par. (20a) of s.2. No change. See 1951, c.47, s.1.

(24) The former par. (21) of s.2. No change in effect. See 1947-48, c.39, s.2.

(25) New. It was held in *R. v. OWENS*(1950), 98 C.C.C.279, and *R. v. URBSHOTT*(1951), 99 C.C.C.320, that a farm tractor is not a motor vehicle, but *R. v. GAJEWSKI*(1952), 102 C.C.C.115 is to the contrary.

(26) The former par. (22) of s.2. No change in effect.

(27) New. This comes from the *Infanticide Act*, 1939 (U.K.).

(28) From the former par. (24) of s.2. No change in effect.

(29) The former par. (25) of s.2. No change. See 1951, c.47, s.1.

(30) The former par. (27) of s.2. No change in effect.

(31) The former par. (29) of s.2 with the addition of the words "or convicted".

(32) The former par. (31) of s.2. No change in effect. "Property" was defined in the *Larceny Act*, 1861 (Imp.) by a definition taken from 20 & 21 Vict., c.54, s.17, but made wider. Greaves' Cons. Acts, p.71 notes that the words "anything acquired by such conversion or exchange, whether immediately or otherwise" were substituted for the words "the proceeds thereof respectively, and anything acquired by such proceeds", so that "however many exchanges may have been made in the property, any fraudulent disposal of the proceeds ultimately obtained may be included within this clause."

See also s.3(2). For the purposes of Part IX, "property" is defined in s.370, *post*.

(33) New. This provides a uniform expression to replace "crown", "prosecutor", "Attorney General", etc., as formerly used to refer to the person conducting a prosecution.

(34) The former par. (32) of s.2. No change in effect.

(35) The former par. (33) of s.2. No change in effect. See 1951, c.47, s.1.

(36) The former par. (34) of s.2. No change in effect.

(37) New. This avoids the expression "theft or stealing" in the former s.347. See also s.446.

(38) No change in effect.

(39) This has been widened by inserting the word "province". It will be applicable where a person is authorized to act or to exercise jurisdiction throughout a province.

(40) No change in effect.

(41) This is the former par. (42) of s.2 simplified without change in effect.

(42) The former par. (43) of s.2. No change in effect. Chattels personal are mere moveables, generally such things as furniture, jewels, animals. See also s.3(3).

(43) This combines the former pars. (36) and (44) of s.2.

(44) The former par. (45) of s.2. The words "a document of any kind" have been added to obtain uniformity of expression.

PART I.

GENERAL.

DETERMINATION OF AGE.—Postcard a chattel, value.—Value of valuable security.—Possession.—Meaning of expressions taken from other Acts.—Sexual intercourse.

3. (1) For the purposes of this Act a person shall be deemed to have been of a given age when the anniversary of his birthday, the number of which corresponds to that age, is fully completed, and until then to have been under that age.

(2) For the purposes of this Act a postal card or stamp referred to in subparagraph (*c*) of paragraph (32) of section 2 shall be deemed to be a chattel, and to be equal in value to the amount of the postage, rate or duty expressed on its face.

(3) For the purposes of this Act, the following rules apply for the purpose of determining the value of a valuable security where value is material, namely,

(*a*) where the valuable security is one mentioned in subparagraph *(a)* or *(b)* of paragraph (42) of section 2, the value is the value of the share, interest, deposit or unpaid money, as the case may be, that is secured by the valuable security;

(*b*) where the valuable security is one mentioned in subparagraph (*c*) or (*d*) of paragraph (42) of section 2, the value is the value of the lands, goods, chattel personal or interest in the chattel personal, as the case may be; and

(*c*) where the valuable security is one mentioned in subparagraph (*e*) of paragraph (42) of section 2, the value is the amount of money that has been paid.

(4) For the purposes of this Act,

(*a*) a person has anything in possession when he has it in his personal possession or knowingly

(i) has it in the actual possession or custody of another person, or

(ii) has it in any place, whether or not that place belongs to or is occupied by him, or the use or benefit of himself or of another person; and

(*b*) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

(5) Where an offence that is dealt with in this Act relates to a subject that is dealt with in another Act, the words and expressions used in this Act with respect to that offence have, subject to this Act, the meaning assigned to them in that other Act.

(6) For the purposes of this Act, sexual intercourse is complete upon penetration to even the slightest degree, notwithstanding that seed is not emitted.

Subsec. (1) is the former subsec. (2) of s.2. It is important not only with reference to the capacity of children but also to those sections, e.g., ss.143 and 144, in which age is a condition of the offence.

OLD CODE:

2. (2) For the purposes of this Act a person shall be deemed to have been of a given age when the anniversary of his birthday, the number of which corresponds to that age, shall have been fully completed, and until then to have been under that age.

3. For the purpose of this Act a postal card or any stamp referred to in the last preceding section shall be deemed to be a chattel, and to be equal in value to the amount of the postage, rate or duty expressed on its face in words or figures or both.

4. Valuable security shall, where value is material, be deemed to be of value equal to that of the unsatisfied money, chattel personal, share, interest or deposit, for the securing or payment of which, or delivery or transfer or sale of which, or for the entitling or evidencing title to which, such valuable security is applicable or to that of such money or chattel personal, the payment or delivery of which is evidenced by such valuable security.

5. In this Act, unless the context otherwise requires,

(a) finding the indictment includes also exhibiting an information and making a presentment;

(b) having in one's possession includes not only having in one's own personal possession, but also knowingly,

(i) having in the actual possession or custody of any other person, and

(ii) having in any place, whether belonging to or occupied by one's self or not, for the use or benefit of one's self or of any other person.

(2) If there are two or more persons, and any one or more of them, with the knowledge and consent of the rest, has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.

6. In every case in which the offence dealt with in this Act relates to the subject treated of in any other Act the words and expressions used herein in respect to such offence shall have the meaning assigned to them in such other Act.

7. Carnal knowledge is complete upon penetration to any, even the slightest degree, and even without the emission of seed.

In *R. v. FALLOWS*, [1954] 1 All E.R.623, in which it was necessary to consider the words "person who is not less than thirty years of age", it was held that the appellant's age at the time of trial and sentence was the governing factor.

Subsec. (2) is the former s.3. No change in effect.

Subsec. (3) is the former s.4. No change in effect. It requires to be read with the definition in s.2 (42) of which in fact it formed part when it was first enacted by 1890, c.37, s.20 *An Act respecting Threats, Intimidation and other Offences*. It came into the Code of 1892 in the same form, as part of par. (cc) of s.3.

Subsec. (4) combines the former subsecs. (1) (b) and (2) of s.5 which as they stood required to be read together to complete the definition. The words "knowingly having it in the actual custody or possession of any other person", sometimes called constructive possession,

Section 3—*continued*

first appeared in the *Coinage Offences Act,* 1861 (Imp.) and were introduced to remove doubts which had arisen upon the cases of *R. v. ROGERS* (1839), 2 Mood. C.C.85; *R. v. GERRISH* (1839), 2 Mood. & R. 219; and *R. v. WILLIAMS* (1842), Car. & M. 259, whether a person could be said to be in possession of a coin within the meaning of 2 Wm. IV, c.34, s.1, which was with his knowledge in the personal possession of another in his company.

Instances of its application appear as follows:

In *R. v. PARKER*(1941), 77 C.C.C.9, it was held that accused was not guilty of retaining stolen property in his possession under the former s.399 because the actual thief had retained exclusive control of it.

Similarly in *VAILLANCOURT v. R.*(1951), 100 C.C.C.87, a case under the *Customs Act,* it was held that the accused was in possession of the goods in question because he had a right of control over them. The following appears at p.93:

> "It seems to me that when two penal laws use the same word to designate the same thing, the definition of the word in one of the laws applies to the other, especially when the definition conforms to the general principles of law and logic. The common control of D. and V. over the refrigerators . . . . . is a joint possession within the meaning of the definition contained in s.5 of the Criminal Code."

It has been held also to "express closely what is involved" in the meaning of "possession" in the *Ontario Game and Fisheries Act* (*R. v. CAMPBELL,* [1938]4 D.L.R.773; *R. v. TUTTLE*(1951), 101 C.C.C.249) and the Ontario Fishery Regulations (*R. ex. rel. BATTRICK v. LAVER* (1953), 105 C.C.C.324).

There has been a difference of opinion concerning its application to the *Opium and Narcotic Drug Act.* See *R. v. COLVIN and GLADUE* (1942), 78 C.C.C.282; *R. v. MARTIN*(1948), 92 C.C.C.257; *LAMY v. R.* (1950), 101 C.C.C.94.

Although not cited, it appears too that it would not apply to the *Combines Investigation Act,* since it was held in *R. v. McGAVIN BAKERIES* (*No. 5*) (1951), 100 C.C.C.215 at pp.222,224 that bare possession of documents at some relevant time, akin to bare custody, was sufficient and that knowledge was not an essential. "I find it implicit in this new legislation that the possession required by it is possession of a different kind and quality than that which may be required under other statutes".

Subsec. (5) is the former s.6. This appears as the concluding part of s.4 of the (Can.) Cr. Law Bill of 1891 where it is said to be new. The first part of the section says that "mail", "mailable matter", "post letter", "post letter bag" and "post office" shall have the meanings assigned to them in the *Post Office Act.*

In *R. v. RYAN*(1904), 9 C.C.C.347, a prosecution against a letter carrier, it was held that a decoy letter upon which postage has been paid, written by a post office inspector, and delivered by him to the proper sorting office for distribution is a "post letter" within the meaning of the Code and of the *Post Office Act.*

R. v. SHANDRO(1923), 38 C.C.C.337, prosecution against a postmaster for theft of a post letter, is a case which turned upon a question of misdirection but so far as it applied to s.6 is in accord with *R. v. RYAN*. Here also a decoy letter was used.

See also note to *VAILLANCOURT v. R., supra.*

Subsec. (6) is the former s.7 altered to provide a uniform expression instead of the various terms used in the repealed Code in ss.204,213, 216,298, and 301.

CANADIAN FORCES NOT AFFECTED.

4. Nothing in this Act affects any law relating to the government of the Canadian Forces.

This section was s.983 (2) of the 1892 Code and s.8 of the 1927 Code. It appears in the *Offences Against the Person Act* 1861 (Imp.), s.68, and in the *Forgery Act* 1861 (Imp.), s.50, in each case in a context to the effect that indictable offences committed within Admiralty jurisdiction may be tried and disposed of in any country or place in England or Ireland where the offender is apprehended or is in custody.

In Canada it appears as s.~~279 of~~ the *Criminal Procedure Act* 1869. It was re-enacted 1947-1948, c.31, s.3, and may be read with s.62 (1) of the *National Defence Act* 1950, c.43: "Nothing in the Code of Service Discipline affects the jurisdiction of any civil court to try a person for an offence triable by that court." "Canadian Forces" is defined in s.2 (4).

There does not appear to be any reported case upon this section, but the following may afford a clue to its application:

> *R. v. KIRKUP*(1950), 34 Cr.App.Rep.150: "It has been said by this Court and also at assizes, that, where an offence has been committed by a serving soldier in relation to Government property at the barracks or camp or other place where he is stationed, the proper person to deal with the matter is his commanding officer so that the offence may be dealt with under military law, and that it is unnecessary for the civilian police to interfere. . . . . The Court hopes that this state of affairs will not occur again."

At the time the offence respecting Government property was discovered, the civil police "were making inquiries into some other case with which the appellant was suspected of being concerned, and *which it would be proper for them to deal with as it did not relate to Army property.*"

The language of *R. v. KIRKUP* was adopted in *R. v. RUSSELL*(1951), 99 C.C.C.316, and it was remarked that, with reference to the trials of two other soldiers to whose offences Russell was alleged to have been accessory, "we expressed surprise that their offences were dealt with in a civilian Magistrate's Court instead of by the Army authorities."

PUNISHMENT ONLY AFTER CONVICTION.—Punishment only as prescribed. —Offences outside of Canada.

5. (1) Where an enactment creates an offence and authorizes a punishment to be imposed in respect thereof,

> **(*a*) a person shall be deemed not to be guilty of that offence until he is convicted thereof; and**

Section 5(1)—*continued*

(*b*) a person who is convicted of that offence is not liable to any punishment in respect thereof other than the punishment prescribed by this Act or by the enactment that creates the offence.

(2) Subject to this Act or any other Act of the Parliament of Canada, no person shall be convicted in Canada for an offence committed outside of Canada.

Subsec. (1) combines the former ss.1027 and 1051 which were ss.931 and 950 in the Code of 1892 and came from R.S.C. 1886, c.181, ss.1 and 23, an *Act respecting Punishment, Pardons and the Commutation of Sentences.*

The subsection sets out fundamental principles, to which it may be added that *Magna Charta* provides: "nor may be charged or condemned, except by the lawful judgment of his peers, or by the law of the land."

Subsec. (2) is new. See s.420, *post,* and notes thereto and, with reference to offences committed outside of Canada, see also ss.46,58,75,76 and 240.

APPLICATION TO TERRITORIES.

6. The provisions of this Act apply throughout Canada except

(*a*) in the Northwest Territories, in so far as they are inconsistent with the *Northwest Territories Act*, and

(*b*) in the Yukon Territory, in so far as they are inconsistent with the *Yukon Act*.

This is the former s.9.

It will be observed that this Code contains special provisions applicable to the territories. Further provision concerning the administration of criminal law is contained in the *Northwest Territories Act,* R.S.C. 1952, c.331 and the *Yukon Act,* 1952-53, c.53. The coming into force of these Acts has awaited the enactment of this Code, but will no doubt coincide with the coming into force of the Code on April 1, 1955.

Before 1946 the section contained also a reference to Alberta, but c.20 of that year struck out that reference and inserted in the Code several sections specially applicable to that province. See s.417, *post,* and notes thereto, and the notes to the next section.

APPLICATION OF CRIMINAL LAW OF ENGLAND.—Common law principles continued.

7. (1) The criminal law of England that was in force in a province immediately before the coming into force of this Act continues in force in the province except as altered, varied, modified or affected by this Act or any other Act of the Parliament of Canada.

(2) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada.

OLD CODE:

1027. Whenever a person doing a certain act is declared to be guilty of any offence, and to be liable to punishment therefor, it shall be understood that such person shall only be deemed guilty of such offence and liable to such punishment after being duly convicted of such act.

1051. Every one who is convicted of any offence not punishable with death, shall be punished in the manner, if any, prescribed by the statute especially relating to such offence.

1032. There shall be no forfeiture of any chattels, which have moved to or caused the death of any human being, in respect of such death.

1033. No confession, verdict, inquest, conviction or judgment of or for any treason or indictable offence, or felo de se shall cause any attainder or corruption of blood, or any forfeiture or escheat: Provided that nothing in this section shall affect any penalty or fine imposed on any person by virtue of his sentence, or any forfeiture in relation to which special provision is made by any Act of the Parliament of Canada.

9. The provisions of this Act shall extend to and be in force throughout Canada, except
(a) in the Northwest Territories in so far as they are inconsistent with the Northwest Territories Act;
(b) in the Yukon Territory in so far as they are inconsistent with the Yukon Act.

10. The criminal law of England, as it existed on the seventeenth day of September, one thousand seven hundred and ninety-two, in so far as it has not been repealed by any Act of the Parliament of the United Kingdom having force of law in the province of Ontario, or by any Act of Parliament of the late province of Upper Canada, or of the province of Canada, still having force of law, or by this Act or any other Act of the Parliament of Canada, and as altered, varied, modified or affected by any such Act, shall be the criminal law of the province of Ontario.

11. The criminal law of England as it existed on the nineteenth day of November, one thousand eight hundred and fifty-eight, in so far as it has not been repealed by any ordinance or Act, still having the force of law, of the colony of British Columbia, or the colony of Vancouver Island, passed before the union of the said colonies, or of the colony of British Columbia passed since such union, or by this Act or any other Act of the Parliament of Canada, and as altered, varied, modified or affected by any such ordinance or Act, shall be the criminal law of the province of British Columbia.

12. The criminal law of England as it existed on the fifteenth day of July, one thousand eight hundred and seventy, in as far as it is applicable to the province of Manitoba, and in so far as it has not been repealed as to the Province, by any Act of the Parliament of the United Kingdom, or by this Act or any other Act of the Parliament of Canada, and as altered, varied, modified or affected, as to the Province, by any such Act, shall be the criminal law of the province of Manitoba.

CRIMINAL OFFENCES TO BE UNDER LAW OF CANADA.

8. Notwithstanding anything in this Act or any other Act no person shall be convicted

(a) **of an offence at common law,**

(b) **of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or**

(c) **of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada.**

but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or magistrate had, immediately before the coming into force of this Act, to impose punishment for contempt of court.

Sections 7 and 8 replace ss.10,11,12 and 16 of the previous Code.

The criminal law of England is still in force in Canada except in so far as it has been repealed expressly or by implication: *UNION COLLIERY CO. v. R.*(1900), 31 S.C.R.81; *BROUSSEAU v. R.* (1917), 29 C.C.C.207. Under s.7 each part of Canada will continue to apply the law of England as it did previously. The dates of reception vary:

Quebec: Royal Proclamation October 1763: 14 Geo. III, c.83.

Ontario: In 1800, by 40 Geo. III, c.1 (U.C.), the criminal law of England as it stood on September 17, 1792, was declared to be the law of the province.

British Columbia: 19 November, 1859 (B.C. Legislature 1871, No. 70 of 34 Vict.).

Manitoba: 15 July 1870 (15 Vict., c.35 (Can.)).

Alberta, Saskatchewan, Northwest Territories: 15 July, 1870, R.S.C. 1886, c.50, s.11; 49 Vict., c.25(Can.): *Alberta Act,* 1905, *Saskatchewan Act,* 1905, *Northwest Territories Act,* 1952, c.46, R.S.C. 1952, c.331, s.17.

Yukon: By the *Yukon Act, R.S.C.* 1952, c.298, s.33, the law of England is introduced as it stood in the Northwest Territories on June 13, 1898, that is to say, as it stood on July 15, 1870. (See now 1952-53, c.53, s.22.)

Nova Scotia, New Brunswick, Prince Edward Island: There is no statutory declaration such as the foregoing, concerning the introduction of English law into these provinces. "These provinces were, according to Forsyth (Cases and Opinions on Constitutional Law, p.26) acquired in 1497 by settlement . . . . . The first general assembly of Nova Scotia, which then included New Brunswick and Prince Edward Island, met at Halifax in 1758 and perhaps the most that can be said with certainty is, that no English statute passed after that date could apply to either of those provinces unless there were express words therein making its provisions applicable to such Province, or to H.M. Dominions in general, or unless the same were otherwise, by competent authority brought into force there (Forsyth, p. 19)." Burb. Dig. p.9.

OLD CODE:

16. All rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this Act except in so far as they are hereby altered or are inconsistent herewith.

The underlying principle is as stated by Blackstone, Vol.1, p.107: "It hath been held that if an uninhabited country be discovered and planted by British subjects, on it English laws then in being (which are the birthright of every subject), are immediately there in force. But this must be understood with very many and very great restrictions; they carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony."

Newfoundland: The same considerations apply here as in the other Atlantic provinces, but on November 18, 1837, the legislature of the colony continued in force the criminal laws and statutes of England in force there on June 20, 1837, "so far as the same can be applied" and enacted that all such statutes passed or to be passed in Great Britain after that date should come into force in the colony after twelve months "so far as the same can be applied." This, of course, is replaced by the Code which came into effect on the Island on August 1st, 1950.

For leading cases on questions of the applicability of English statutes see *UNIACKE v. DICKSON*(1848), 1 James (2N.S.R.) 287, and *Doe d. ANDERSON v. TODD*(1845), 2 U.C.Q.B.82.

It is an interesting fact that s.5 of the E.D.C. proposed to abolish all common law offences not provided for by the code. It was said (Parl. Papers, 1878-79, vol.59, p.140) that "The effect of this will be to do away with the following offences:—oppression at common law, extortion at common law, champerty, maintenance, being a common barrator, refusing to serve an office, being a common scold, refusing to receive a guest at an inn, and all conspiracies except those specifically mentioned in the Bill, or some other statute." On the same subject the Attorney General said that "It is thus secured that every crime shall be distinctly and clearly described and not be the subject of doctrines which ingenuity may render sufficiently flexible to suit the occasion" (Parl. Debates, 3 Series, Vol.245, Col.318.).

In the preparation of this Code it was decided to recommend that no one should be accused of a crime unless the Code stated it to be one, but that recourse should still be had to English law where it was necessary to preserve matters of defence or to fill gaps in procedure or rules of evidence not provided for by Canadian legislation. This is the purpose of s.7 and pars.(a) and (b) of s.8. The common law offences which it was thought advisable to perpetuate have been codified. The Report of the Commission indicates these as being common law conspiracy (408(2)), public mischief (120), indemnification of bail (119(2)(d)), and compounding a felony (121).

It would be difficult if not impossible, to say in full detail the extent to which these paragraphs effect a repeal. Dr. Maurice Ollivier has appended to his book *"Problems of Canadian Sovereignty"*, a list of Acts of the British Parliament which are in force in Canada. He remarks that "It is impossible to mention here all the Acts applicable to the different

Section 8—*continued*

Dominions", and describes his list as tentative. It can readily be seen to be so. In *CRONYN v. WIDDER*(1858), 16 U.C.Q.B.356, at p.361, it was said that "(But) when acts have been prohibited under a penalty from their tendency to lead to vice and immorality, as in the instance of Sabbath breaking and gambling, the English statutes respecting them which were in force in 1792 have been treated as being in force here." Similarly, in *Ex p. ROUSSE*(1828), 1 Stu. K.B.321, the Chief Justice remarked of the criminal law of England that "A great portion of that law is of universal application and that portion is in force in this province; but other portions are merely municipal and of local importance only, and these are not in force."

Much more recently, it was held in *WYER v. WYER*, [1947]3D.L.R. 579, that the *Imperial Evidence Act*, 14-15 Vict. c.99, is in force in Canada; in *R. v. INNES*(1933), 59 C.C.C.339, at 345, it was held that the statute 1854, c.80 (Imp.), an Act to provide for the better registration of births, marriages and deaths in Scotland, is in force in Canada as to proof of records; and in *R. v. POLLOCK*(1920), 47 O.L.R.616, it was held that the *Witchcraft Act.*, 9 Geo.II.c.5 (Imp.), is in force here. Instances could be multiplied with reference to Lord's Day observance.

The British Parliament in 1950 undertook a vigorous house-cleaning of its statute books, and the *Statute Law Revision Act* of that year contains a schedule of about 140 pages, of Acts as far back as the reign of Henry III, which it specifically repeals, wholly or in part. But by s.3(1) it is provided that "From any revised edition of the statutes published by authority there may be omitted enactments or words in respect of matters exclusively relating to territory within the jurisdiction of any one or more of the following, that is to say, *Canada*, Australia," etc. It would appear that Parliament was taking care, in accord with the *Statute of Westminster*, to leave it to the Commonwealth countries to repeal Imperial statutes by which they are affected. On the other hand, it was held in *BANK OF UPPER CANADA v. BETHUNE* as long ago as 1835 (4 U.C.Q.B.(O.S.)165) that "when the parliament of the mother country repealed the original or principal Act of 6 Geo. I.,—*they did*, in my opinion, *undo all that they had done by that statute*, and they neither meant to leave it in force nor did leave it in force, in any one part of the British Dominions more than in any other." (italics added)

Par.(c) will operate to repeal the following:

Consolidated Statutes of Lower Canada, 1861, c.10. By this Act it is a felony punishable with twenty-one years' imprisonment to administer unlawful oaths and a felony punishable with seven years' imprisonment to take such an oath. Substantively, the Act covers ground similar to that covered by sections 130-132 of the previous Code, but is more comprehensive in describing what are unlawful confederacies.

Revised Statutes, Nova Scotia, 1864, c.160, s.2. This provides that incest is a misdemeanour punishable with two years' imprisonment.

Prince Edward Island, 24 Vict., c.27, s.3. Under this provision incest is a misdemeanour punishable by imprisonment for a term not exceeding twenty-one years with or without hard labour.

Revised Statutes, New Brunswick, 1854, c.145, ss.2&3. Under these provisions incest is a misdemeanour punishable with fourteen years' imprisonment and adultery is a misdemeanour punishable by a fine of one hundred pounds or two years. See *R. v. STRONG*(1915), 24 C.C.C. at p. 435; *R. v. FOSTER*(1935), 62 C.C.C. at p.264.

New Brunswick, 19 Vict., c.41, s.2. This contains certain provisions regarding evidence in criminal proceedings so far as applicable to prosecutions for adultery.

The New Brunswick statute, 11 & 12 Vict., c.12, s.7, under which a constable is empowered to take into custody without warrant "all loose, idle or disorderly persons whom he shall find disturbing the public peace, or whom he shall have just cause to suspect of having committed or being about to commit any felony, misdemeanour, or breach of the peace," was held in *HOPPER v. CLARK*(1911), 40 N.B.R. 568, to be still in force. It too is probably repealed, but in any event would appear to be covered by the provisions of the Code relating to disorderly conduct and to powers of arrest.

APPEAL.—Part XVIII applies.

9. (1) Where a court, judge, justice or magistrate summarily convicts a person for a contempt of court committed in the face of the court and imposes punishment in respect thereof, that person may appeal against the punishment imposed.

(2) Where a court or judge summarily convicts a person for a contempt of court not committed in the face of the court and punishment is imposed in respect thereof, that person may appeal

***(a)* from the conviction, or**

***(b)* against the punishment imposed.**

(3) An appeal under this section lies to the court of appeal of the province in which the proceedings take place, and, for the purposes of this section, the provisions of Part XVIII apply, *mutatis mutandis*.

This section is new.

"All courts of record possessed an inherent jurisdiction to discipline at once and without formality any contempt committed in the face of the court, and superior courts had also the power to deal with contempt committed outside the court. This jurisdiction did not rest upon statutory authority. *CARUS WILSON'S Case*(1845), 7 Q.B.984; *Re GERSON; Re NIGHTINGALE*, [1946]S.C.R.538 at 544, affirmed [1946] S.C.R. at p. 547, ... The common law also recognized contempt of court . . . . . as a misdemeanour that could be punished either by summary proceedings or by indictment."

Ex p. LUNAN, [1951]O.W.N.251.

In Oswald on Contempt, 3rd ed., p.230 it is said that:

"It is difficult to draw the line between contempt which is a civil wrong only and a contempt which is a criminal wrong; but it is submitted that contempt is merely a civil wrong where there has been disobedience of an order made for the benefit of a particular party, and that person sets the Court in motion to punish the disobedience; and that contempt is a criminal wrong where either the Court itself takes cognizance of the offence without being set in motion, or, being set in motion, has to deal with an alleged offence which is a public wrong as being an interference with the course of justice before or during the trial or hearing."

Section 9—*continued*

In an article on Criminal Contempt of Court Procedure by the Hon. J. C. McRuer(1942), 30 C.B.Rev. p.226, the following appears:

"Criminal contempt of court may be defined as any act done or any thing published tending to obstruct, impair or interfere with the fair administration of justice or to bring the court or judge into contempt or lower his authority; or any act done or writing published tending to obstruct or interfere with the due course of justice or lawful process of the courts."

In *CANADIAN TRANSPORT CO. v. ALBURY,* [1952]7 W.W.R. (N.S.) p.49, Smith, J. A., expressed himself as follows:

"I am not at all satisfied that every contempt is not, technically at least, a criminal matter. There can be no doubt whatever that breach of an injunction is a contempt of court of some kind; and it seems to me there is a contradiction in saying that it is nothing but a civil wrong, though it is that too. In *WELLESLEY v. BEAUFORT (Duke)* (1831), 2 Russ. & M. 639, at p.667, Lord Brougham, L.C., while stating *obiter* that disobedience to a civil order was 'substantially' a civil matter, elsewhere modified that; and he also admitted that it was 'technically speaking and in form, an offence', obviously meaning a criminal offence . . . . . Though the point is undoubtedly obscure, I think there is sufficient to indicate that even a contempt substantially civil could and would be treated as taking on a criminal character when there were circumstances of aggravation; or perhaps I should say that then its inherently criminal quality acquired greater proportions . . . . . And at p.667 he added: 'If the contempt savour of criminality, and is penal, that according to the books appears to be enough.' "

Reference should also be made to the case of *POJE v. ATTORNEY GENERAL OF BRITISH COLUMBIA,* decided by the Supreme Court of Canada(1953), 105 C.C.C.311. See notes to s.107, *post.*

While there is no right of appeal from a conviction for criminal contempt in England, there is a series of cases including two from Canada, in which, during a period of about a century, the Privy Council considered such appeals from colonial courts. In the latest of these, *AMBARD v. ATTORNEY GENERAL FOR TRINIDAD AND TOBAGO,* [1936]A.C.322, it was held finally that it is competent for His Majesty in Council to give leave to appeal, and to entertain appeals, against orders of the courts overseas imposing penalties for contempt of court. This, of course, does not now apply to Canada.

Here it is settled by the judgment *In re CAMPBELL and COWPER* (1934), 63 C.C.C.36, that appeal does not lie. That was a case arising out of published reports of a trial. Apart from that case, there is ample authority for the proposition that the power to punish summarily for contempt exists for the protection of parties litigant: *O'SHEA v. O'SHEA and PARNELL, Ex p. TUOHY*(1890), 15 P.D.59(C.A.); *R. v. PARKE,* [1903]2 K.B.432; *R. v. DAVIES,* [1906]1 K.B.32; *R. v. DAVIES, Ex p. DELBERT-EVANS,* [1945]1 K.B.435. The question of the right of appeal came into prominence in Canada as the result of four similar cases: *R. v. SULLIVAN, in re OTTAWA JOURNAL PUBLISHING CO.,* February 13th, 1951 not reported; *R. v. MEEK, in re DELL PUBLISHING CO., INC.,* March 11th,

OLD CODE:

13. No civil remedy for any act or omission shall be suspended or affected by reason that such act or omission amounts to a criminal offence.

1952, not reported; *R. v. THOMAS, in re GLOBE PRINTING CO.*(1951), 102 C.C.C.257; *In re WINDSOR STAR and HARRISON,* May 16th, 1952, not reported. In the case last mentioned, notice of appeal was served, but notice of abandonment was served on October 21st, 1952, and the appeal was formally dismissed on October 27th, 1952. The underlying principle appears in the following quotation from the judgment in the Globe's case:

> "This rule has been made not for the protection of Judges but for the protection of those accused of crimes, to ensure that they are treated fairly in their trials."

Recent cases similar to the four mentioned are *R. v. BRYAN*(1954), 108 C.C.C.209, and *R. v. WESTERN PRINTING and PUBLISHING LTD.* (Nfld. June 18, 1954) not yet reported. The contempt involved in another recent case, *R. v. VANCOUVER PROVINCE, in re GASH*(1954), 12 W.W.R.(N.S.)349, was of a different sort. It consisted in the publication after verdict and sentence of matter calculated to lower the dignity of the Court and to destroy public confidence in the administration of justice.

Contempt by accused or witnesses is dealt with in the new Code (ss.457, 610,612). It may be noted too that disobedience to an order of the court is an offence under s.108 of the Code (formerly s.165).

CIVIL REMEDY NOT SUSPENDED.

10. No civil remedy for an act or omission is suspended or affected by reason that the act or omission is a criminal offence.

This was formerly s.13. It was s.430 in the English Draft Code where the Commissioners citing, *WELLS v. ABRAHAMS*(1872), L.R.7 Q.B.554, and *OSBORN v. GILLETT*(1873), L.R.8 Exch. 88, state that "This seems to be the existing law." It was s.534 in the Code of 1892. Even then there was question of the power of the Parliament of Canada to pass it, and because of the doubts expressed then and later, it is advisable to deal with it at some length.

In Hansard, 1892, Vol. II, 3645, it was said that the section was necessary and that the latest practice was to suspend the civil remedy until the criminal case was heard. There was objection that "The rule is perfectly intelligible in England where the one legislature deals with civil and criminal matters. Here, however, where the local Legislature may deal with civil matters and the Federal Parliament with criminal matters, I think we cannot insert such a clause, except it refers to civil rights arising out of Dominion legislation, such as bills of exchange." The reply was that "it may require legislation by both the Federal and Provincial Legislatures. At any rate we had better pass it and let the local Legislatures supplement it. It will be giving our assent to such legislation."

The original rule appears in Hale's "Pleas of the Crown", 546, as follows:

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"It was held that if a man feloniously steals goods, and before prosecution by indictment the party robbed brings trover, it lies not, for so felonies should be healed."

In an article which appeared in 1925, 159 L.T.Jo.10, Sir Frederick Pollock is quoted in these words:

"It has been correctly said, sometimes laid down, and once or twice acted on as established law, that when the facts affording an action of law in tort are such as to amount to a felony, there is no civil remedy against the felon for the wrong, at all events before the crime has been prosecuted to conviction. And as before 1870 (33 & 34 Vict., c.23) a convicted felon's property was forfeited, there would, at common law, be no effectual remedy afterwards, so that the compendious form in which the rule was often stated, that 'the trespass was merged in the felony,' was substantially if not technically correct. But so much doubt has been thrown on the supposed rule in several recent cases that it seems, if not altogether exploded, to be only awaiting a decisive abrogation. The result of the cases on the question is that, although it is difficult to deny that some such rule exists, the precise extent of the rule and the reasons of policy on which it is founded are uncertain, and it is not known what is the proper method of applying it."

However, Prof. Kenny is quoted also as being of the opinion that "the defence does certainly exist."

The concluding words quoted from Sir Frederick Pollock refer undoubtedly to the leading case of *WELLS v. ABRAHAMS*(1872), L.R.7 Q.B. 554, in which Blackburn, J., said (at p.559):

"No doubt that there are many dicta of high authority to the effect that when there has been a private injury to a civil right, which may also be the subject of criminal prosecution for felony, it is the duty of the person injured to prosecute for the criminal offence, before he can pursue for remedy by action for the private injury. But although there are many dicta to that effect, I cannot find any case where that rule of law has been acted on before the cases of *WHITE v. SPETTIGUE* ((1845), 13 M. & W.603) and *GIMSON v. WOODFULL*((1825), 2 C. & P.41). While the law throws the prosecution of criminal cases on private individuals, it may be, in some cases, that the civil remedy is suspended until there has been a prosecution for the felony. I am not prepared to say that, if an action were brought against a defendant and it was stated by the Attorney General on behalf of the Crown that criminal proceedings were pending, and the action was brought with an intention of compromising the felony, the Court might not, in such a case, in the exercise of its summary jurisdiction, stay proceedings in the action until the indictment for felony had been tried; or if an action were brought contemporaneously with an indictment for felony, and was an attempt to extort money, then again it might be that the Court would stay proceedings. I am not aware that such cases have arisen, and I am not to be understood to say a proper case might not arise in which the Court might interfere."

In *OSBORN v. GILLET*(1873), L.R.8 Exch. 88, it was argued that *WELLS v. ABRAHAMS* had shaken the rule as previously understood,

and it was held that a plea that the acts complained of amounted to a felony for which the person committing them had not been prosecuted, was held to be bad, on the ground that "it only affords a defence, *if at all*, when the action is brought against the supposed criminal and before prosecution."

In *S. v. S.*(1889), 16 Cox, C.C.566, where a civil action claiming damages for acts which, on the face of the pleadings, amounted to a felony, was instituted, it was held that the court should not of its own motion, stay the action on the ground of the felony not having been prosecuted, when no application was made by the defendant and no prosecution was pending.

A case which marks a further step in the development of the modern rule is *SMITH v. SELWYN*, [1914]3 K.B.98. It was held that an action for damages based on a felonious act on the part of the defendant committed against the plaintiff, is not maintainable so long as the defendant has not been prosecuted or a reasonable excuse shown for his not having been prosecuted (e.g. that he is absent from the country); and the proper course for the Court to adopt in such a case is to stay further proceedings in the action until the defendant has been prosecuted. *Per* Kennedy, L.J.: "It is in the power of the Court to grant a stay, and it is the duty of the Court to consider in each case whether in the circumstances it will grant a stay, if it sees that the claim for damages is based upon a felony committed by the defendant." *WELLS v. ABRAHAMS* was discussed as authority for the proposition laid down in *SMITH v. SELWYN*, a distinction being drawn between a stay before a trial, and the right to stop a trial after it had been commenced. In *WELLS v. ABRAHAMS* the opinion had been expressed that the court had a right to grant a stay, but that the Judge of Assize had to hear issues brought before him.

The following is quoted from *CARLISLE v. ORR* (No. 2), [1918]2 I.R.442, at p.445:

> "The trial presents for the first time since *WELLS v. ABRAHAMS*, the question, under what conditions a trial may be allowed to proceed in respect of a cause of action founded on felony notwithstanding that there has been no prosecution. . . . . The Court of Appeal only decided that suspension or not was most proper for the discretion and decision of the Judge at the trial. Where a prosecution is impossible by reason of death or absence from the jurisdiction, the civil remedy would not be affected. Law does not compel impossibilities. The topics here which might be relied on as influencing discretion, if the rule in its present form, which is suspensory only, permits discretion, appear to be infancy, delay—accounted for by ignorance of legal rights and forms—the acceptance of £50 by the father and the probability, if not certainty, that a prosecution would fail. . . . . Young people selling matches like the plaintiff to earn a livelihood have no next friend willing to act."

The entry of judgment was not stayed.

The old rule would appear to have received the "decisive abrogation" spoken of by Sir Frederick Pollock in the words of Lord Wright in *ROSE v. FORD*, [1937] A.C. 826, at p.846:

"Whatever the old law may have been, the modern law is quite clear

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that if the act complained of constitutes a felony, the civil remedy is not drowned but merely suspended. But, however limited, the rule that the plaintiff must first prosecute in a case of felony is an anachronism now that the police prosecute or are assumed to prosecute in every case of probable felony."

The Rule in Canada

In view of the modern rule it is unnecessary to review at length the cases in which the old rule was applied in Canada. However, *SCHOHL v. KAY*(1862), 5 Allen 244 (N.B.), and *LIVINGSTONE v. MASSEY*(1863), 23 U.C.Q.B.,156, may be mentioned as cases in which plaintiff was nonsuited under it.

In *TAYLOR v. McCULLOUGH*(1885), 8 O.R.309, Rose, J., following *WELLS v. ABRAHAMS*, said in part:

"But it is argued that the defendant cannot be allowed to set up his own criminality as a defence. This would appear reasonably clear from the authorities, and if to this action the defendant had pleaded, not a pending prosecution, on a charge of felony, at the instance of the plaintiff, but that the assault had been committed under such circumstances as amounted to felony, and hence the action was not maintainable, such a plea could not be allowed; but here what he alleges and what the plaintiff admits, is not that the defendant has been guilty of felony, but that prior to this action the plaintiff set on foot a prosecution for felony."

In *TREMBLAY v. BERNIER*(1892), 21 S.C.R.409, it was held that when a charge derogatory to the honour of his profession is made against a notary under the *Notarial Code*, R.S.Q. 1888, Art. 3871, which amounts to a crime or felony (in this case forgery), the Board of Notaries has jurisdiction to investigate the act without waiting for the sentence of a court of criminal jurisdiction.

The modern position is summed up in *CZERNEWICZ v. WINNIPEG WHOLESALE GROCERY & CONFECTIONERY LTD.*(1939), 72 C.C.C.243:

"The old English rule that where felonies are charged, civil proceedings respecting the same acts should be stayed until the criminal prosecution is disposed of, has little or no application in this country. (*Criminal Code*, s.13 quoted). Section 734 of the *Code* is framed on similar lines.

This s.13 has been challenged in times past as being *ultra vires* of the Dominion Parliament but generally has been upheld as ancillary to the criminal jurisdiction of the Dominion. The Dominion has no legislative authority to interfere with "property or civil rights" of a Province. Section 13 however does not invade civil rights. If anything it enlarges them by removing the limitations imposed on civil actions pending criminal prosecutions. The old English rule was based upon public policy that the administration of justice should proceed untrammelled by the handicap or embarrassment of civil actions. Section 13 declares that the administration of justice in Canada does not require protection. Whereas the civil remedy under the English rule was

forced to defer to public policy it was to the public policy prevailing at the time of that rule. Section 13 has now changed public policy for Canada. The civil action may now proceed without conflicting with the new public policy.

This view of the effect of s.13 has been expressed in our Court of Appeal in the case of *KOZLOWSKI v. WORKERS' BENEVOLENT SOCIETY OF CANADA*, [1934]1 D.L.R.237, 41 Man. R.488. In *MACKENZIE v. PALMER*(1921), 63 D.L.R.362, 62 S.C.R.517 at p.520, Duff, C.J.C. (then J.) after referring to the English rule as laid down in *SMITH v. SELWYN*, [1914]3 K.B.98, goes on to say that the rule when sought as a defence to the action, should at most be raised by way of an application to stay proceedings, and continues,—

'Section 13 of the Criminal Code of Canada professes to abolish this rule. It may be questioned whether this is a subject within the competence of the Parliament of Canada as appertaining to the domain of criminal law or as a proper subject for the exercise of ancillary jurisdiction in the enactment of the Criminal Code. But at least there is a declaration in the most deliberate and solemn form by the legislative authority having jurisdiction over the criminal law, that the rule is no longer necessary in the interests of public justice. As the rule has its foundation in the supposed interests of public justice, it is at least, I think, exceedingly doubtful whether in this country any action ought to be stayed on such a ground.'

In *CANADA STARCH CO. v. ST. LAWRENCE STARCH CO.*, [1936]2 D.L.R.142, O.R.261, 65 C.C.C.270, Riddell, J.A. says at pp.148-9 (D.L.R.), pp.277-8(Can. C.C.): 'If the paragraph is charged as improper on the old principle that in the case of a tort which is also a crime, the tort cannot be sued for unless and until the crime has been proceeded for; the answer is that the modern doctrine is that such a defence is now subject to the exercise of judicial discretion. It seems to me that it would be absurd to compel the plaintiff company, complaining of a business wrong, to prosecute for a crime before it could recover for the civil wrong done it. The matter is fairly discussed in 10 C.E.D., pp.506,507; and whatever may be the effect of the Dominion legislation referred to, I am of opinion that, except under extraordinary circumstances, the old rule should not be applied.' . . . . . "

The Constitutional Question

The expressions of doubt which appear in the judgment of the Supreme Court of Canada in *MACKENZIE v. PALMER*, have already been quoted, but the further statement should be added, "That is a question which does not strictly arise here because no application was made for a stay of the action, and the rule, if not entirely obsolete, *ought at least to operate only within the straitest limits allowed by precedent.*"

Again in *ATTORNEY-GENERAL v. KELLY*(1915), 25 Man. R. 696, doubt was expressed. In that case the defendant was out of Canada and was resisting extradition on the criminal charge. A stay of the civil action was refused. *Per* Howell, C.J.M.:

"If section 13 of the Criminal Code is *intra vires*, the old law on this subject is entirely changed; but without considering this . . . . it seems

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to me the motion should be refused. I think a reasonable excuse has been shown for not prosecuting the defendant."

Per Richards, J.A.:

"The first point seems to turn, not on any right of the defendant, but on the rule of law that it is a matter of public policy that the criminal proceedings should first be dealt with and disposed of. I take that to be the reason, although in a number of the cases the grounds given are confusing."

In *STANDARD BANK v. SHUEN WAH,* [1919]1 W.W.R.586, it was said that:

"As to the contention that a civil action cannot be taken when crime is involved, until there is a criminal prosecution, sec. 13 of the Criminal Code R.S.C. 1906, c.146, would be an answer if not *ultra vires.* I do not deem it necessary to decide whether it is or not, for a criminal prosecution has actually been carried through in this matter, and the decision is under advisement. Further, what is disclosed here is not a felony at common law—9 Halsbury 631. Finally, there seems much doubt that the principle invoked is really law at the present time as evidenced by the opinion of the Royal Commissioners who drafted the English Draft Code. See notes to sec. 13, Crankshaw's Criminal Code. 4th ed. p.21"

In *PORTER v. SOLLOWAY MILLS & COMPANY LTD.*(1930), 54 C.C.C. 181, it was said:

"The Criminal Code having abolished the distinction between felonies and misdemeanours, the rule based on that distinction, that a civil action for an injury which is also a felonious wrong, may be stayed pending prosecution of the defendant for the felony, is no longer applicable in Canadian courts, ... (Headnote)

Having adopted this view of the law, it seems unnecessary to consider the effect of sec.13 of the Code. Doubts have been expressed as to the validity of this section. Duff, J., in *MACKENZIE v. PALMER* (1921), 62 S.C.R.517 at p.520, ... "

Stay of action refused.

In *ILLINGWORTH v. COYLE,* [1933]3 W.W.R.607, a stay of the civil action was granted. As to s.13, the following appears:

"It appears never to have been decided whether this section is *intra vires* though the question has often been discussed. Even assuming that it be *intra vires,* it can surely mean only what it says; and it does not purport to take away the right of any civil Court to control its own proceedings. It is a mere statement that the fact of the act constituting a crime does not of itself operate as a stay.

It does seem fairly clear that the present trend of the decisions is to the effect that a stay should be granted in a case such as this where the identical facts and the identical persons are involved in both proceedings and where the defendant has done nothing to delay or frustrate the criminal proceedings. See *BRYANT v. CITY DAIRY* (1921), 37 C.C.C.405; *MOOREHOUSE v. CONNELL*(1920), 17 O.W.N. 351; *ATTORNEY-GENERAL v. KELLY*(1915), 25 Man. R. 696."

It is submitted however, that the statement in *PORTER v. SOLLOWAY MILLS* that the rule is no longer applicable in Canadian Courts is stated more broadly than the other cases justify.

S.13 came into consideration under unusual circumstances in *MITCHELL v. TIMES PRINTING COMPANY*(1943), 80 C.C.C.318, where again doubts were expressed. The plaintiff while in custody awaiting trial on a charge of murder, brought a civil action in respect of a newspaper article commenting on his arrest. The defendant newspaper applied for an extension of time for delivery of its defence, which in the words of Sloan, J. A., would be "tantamount to a stay of the action." The application was granted, the same Judge saying:

> "We were not referred by counsel to any direct authority upon the point but it seems to me that it offends the judicial sense of propriety and is not consonant with public justice to have this civil action for libel in which justification might well be pleaded, proceeding parallel with and involving an investigation into the same facts as a criminal proceeding in the Assize Court in which the life of the plaintiff is at stake."

In the same case Robertson, J. A., dissenting in part, quoted s.13 and said:

> "In my opinion this would be a complete answer to the appellant's contention were it not for the fact that there is a grave question as to its constitutionality. The section, obviously was intended to do away with the common law rule applied in *SMITH v. SELWYN*, [1914]3 K.B.98, viz., where injuries are inflicted upon an individual under circumstances which constitute a felony, that felony cannot be made the foundation of a civil action at the suit of the person injured against the person who inflicted the injuries until the latter had been prosecuted or a reasonable excuse shown for his non-prosecution. Even assuming the section to be *ultra vires* I respectfully agree, if I may say so, with what the Chief Justice of Canada (then Duff, J.) said in *MACKENZIE v. PALMER*(1921), 62 S.C.R.517 at p.520, with reference to this section."

Positive expressions of opinions are few and contradictory. In *PAQUET v. LAVOIE*(1898), 6 C.C.C.314, an application was made for leave to appeal from an order staying proceedings in the civil action until defendant should have undergone a criminal trial on a charge of theft then pending. Blanchet, J. held, that s.534 (i.e. s.13) was *ultra vires.*

> "The object does not appear to have been for the benefit of the Crown, much less was it for the protection of the accused. It cannot be considered as a necessary incident or consequence of the right to legislate upon criminal matters of which it is completely independent, and I have not found any ground which can be seriously considered as supporting the claim of *intra vires.* The most eminent jurists of the Federal Parliament seem to have been of the same opinion."

He then refers to the discussion in Hansard, and proceeds:

> "Our legislature having neither assented to nor adopted this rule, we have to fall back upon the law prior to the Criminal Code",

and concludes that the old rule that the felony must be prosecuted first, must be taken to have been introduced into Quebec as part of the English criminal law, by the *Quebec Act,* 1774. Leave to appeal was

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granted but not acted on. A similar course was followed in *PAPINEAU v. NESBITT*(1899), 3 Q.P.R.88. This case was followed in *BOUCHARD v. MORISSETTE*(1920), 36 Q.P.R.302, on the ground of possible prejudice to defendant.

Again in *KOZLOWSKI v. WORKERS' BENEVOLENT SOCIETY OF CANADA*, [1933]3 W.W.R.566, the section was held to be unconstitutional. Trueman, J.A., said of s.13:

> "Of course the constitutionality of this piece of legislation has always been questioned. Whether the civil remedy shall be suspended or not is for the province to declare, the matter being one that concerns not only property and civil rights but the administration of justice, both civil and criminal, by the province. The utmost that can be said for the section is summed up by Duff, J., as he then was, in *MACKENZIE v. PALMER*." (Quoted *supra*).

On the other hand in *MOYLE v. McLAUCHLAN*, [1922]1 W.W.R. 782, it was held that the objection that a counter-claim prayed for relief against a criminal offence without disclosing that a criminal charge had been laid in respect thereto, was met by Code s.13. And in *MENARD v. R.*(1933), 60 C.C.C.334 (Que. K.B.), on a charge of criminal libel, Walsh, J., referring to Code ss.333-4 said:

> "They enunciate that a defamatory libel shall be punished. This, they do, though civil rights may be affected by the same libel. And the Federal legislator recognized (by s.13) that there may exist civil rights which shall not be affected by the indictment."

In considering the question of the validity of the section, reference may be made to the judgment of the Privy Council in *TORONTO RAILWAY v. R.*(1917), 29 C.C.C.29. At p.34 (referring to nuisances declared non-criminal by Code s.223) it was said that:

> "Their Lordships think that it was competent for the Parliament of Canada, under section 91(27) of the *B.N.A. Act*, 1867, which enables it exclusively to legislate as to criminal law, including procedure in criminal matters, to declare that what might previously have constituted a criminal offence should no longer do so, although a procedure in form criminal was kept alive."

And reference may also be made to what was said by Lord Watson in *ATTORNEY-GENERAL OF ONTARIO v. ATTORNEY-GENERAL OF CANADA* as reported in Lefroy's "Legislative Power in Canada", p.358. After remarking that the decisions of the Privy Council did not suggest that the area of the legislative power is defined and capable of definition and absolutely exclusive in all cases, His Lordship said:

> "The decisions of this Board rather point to this,—that there is a certain extent of that legislation which might be reserved to the province, but there are many ancillary regulations which might be made in carrying out their primary object, and the power given to them," (sc., the Dominion Parliament), "in which they can override the provincial authorities. But the provincial authority is there."

Application of the Rule in Canada

It is only in *PAQUET v. LAVOIE, supra*, that there has been any definition of the terms used in the section. In that case it was held that the

section establishes a general and absolute rule and that the literal meaning of the words "shall be suspended or affected", is applicable to the word "remedy". "The former indicates that it is operative where the civil action has already been started, and the latter to civil proceedings not yet begun."

It may be said, however, that, in the cases where the rule has been applied, the question whether criminal proceedings are or are not pending has been a factor. In *BRYANT v. CITY DAIRY CO.*(1921), 50 O.L.R. 40, Hodgins, J. A., delivering the judgment of the Appellate Division, quoted *SMITH v. SELWYN* and *CARLISLE v. ORR* and said of the latter:

> "In this is laid down what I conceive to be the true principle and it is the same as is involved in the English case, as I read it. And the principle is, that the judicial discretion is and must be exercised by the Court by which the case is to be determined, and that facts and circumstances arising in and about the case itself, and in the criminal proceedings, will be considered by that Court in arriving at its conclusion.
>
> In the case at bar, I think the right of the Division Court Judge to determine whether or not a stay should be directed was absolute, and that it cannot be controlled by a Judge of the Supreme Court on a motion for prohibition. The Division Court Judge had the power on the day fixed for the trial to adjourn the trial or to proceed partly with it or to stay it, and his action then would naturally depend upon the position of the criminal proceedings at that time."

There is no case in which a stay has been granted when criminal proceedings were not pending.

In the case of *CZERNEWICZ v. WINNIPEG WHOLESALE GROCERY and CONFECTIONERY LTD.*(1939), 72 C.C.C.243, a stay was refused. "No charges have been laid in criminal Courts in respect of the matters involved in this action, and there is neither threat of such charges nor even any inquiry respecting them. The Crown seems to be unaware of the alleged crimes, and the company shows no disposition to prosecute the matters criminally."

On the other hand there are cases in which the judicial discretion has been exercised when criminal proceedings were pending, both for and against the staying of civil proceedings. *MITCHELL v. TIMES PRINTING COMPANY* has already been quoted as an unusual case and *GOLDBERG v. STEINBERG*(1931), 40 O.W.N.59, while not uncommon in principle, is surely unique in its particulars. This was a civil action for damages brought by the wife of a man who had been killed. The defendant had been tried and was under sentence of death for murdering him, and judgment in an appeal against conviction was pending at the time of the instant application. It was held that s.13 of the Code "provides that no civil remedy for any act or omission shall be suspended or affected by reason that such act or omission amounts to a criminal offence, but this does not at all affect the right or duty of the Court, in a proper case, to exercise its descretion and say in effect that, not withstanding that the civil remedy is not suspended or affected, nevertheless it shall not be exercised

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pending the criminal proceedings." This case followed *SMITH v. SELWYN*, [1914]3 K.B.98, and *BRYANT v. CITY DAIRY*(1921), 37 C.C.C.405.

In *MOOREHOUSE v. CONNELL*(1920), 17 O.W.N.351 it was sought to postpone the examination for discovery of the defendants pending the trial of criminal charges. Lennox, J., did not order a stay but thought that the criminal proceedings should be expedited and if possible the criminal charge disposed of before trial of the civil action.

However, in *JOHNSON v. SHEILLS*, [1935]2 D.L.R.806, a stay of the defendant's examination for discovery was granted on the ground that the disclosure which it would entail might prejudice the defendant in his defence on the criminal charge.

In *MACKEE v. SOLLOWAY MILLS*(1931), 57 C.C.C.103, a stay was refused without reference to s.13, on the ground that the criminal proceedings were against individuals while the civil action was against a corporation in which they were concerned.

There is a converse to the rule under discussion. It appears in *R. v. COHON*(1903), 6 C.C.C.386, a case in which accused was convicted of perjury alleged to have been committed in an affidavit used in a civil action. The following is quoted from the judgment of Townshend, J., at p.393:

> "This charge should not have been brought during the pendency of the civil action in the Supreme Court, although I know of no legal rule to prevent the prosecution making the charge. I think further if it comes to the knowledge of the Court that a suit is pending involving the very question on which the perjury is alleged, it has the discretion which would be wisely exercised to defer the trial on the criminal charge until the suit is determined."

Conclusions

1. It appears from the cases that, apart altogether from s.10, the Courts have a discretion to grant a stay of civil proceedings in a proper case.

2. With deference to contrary opinion, it is submitted that for two reasons the section is valid: (a) It does not deal with civil rights or procedure, but rather removes an obstacle which formerly the criminal law placed in the way of the exercise of civil rights. (b) It has been adopted by the Provinces to some extent although it has not been re-enacted by them in its broadest sense. E.g. the *Fatal Accidents Act* in Ontario gives a right of action "although the death was caused under circumstances amounting in law to culpable homicide," and the *Families Compensation Act* of British Columbia gives it "although the death shall have been caused under such circumstances as amount in law to an indictable offence."

Here it must be noticed that the new Code does not continue the former s.734 under which a conviction for common assault barred a civil action for the same cause. The history of this section goes back to 9 Geo. IV c.31 (Imp.) and its purpose, as stated in *WITHERS v. BULMER*(1921), 36 C.C.C.178 was "that this civil remedy should be taken away only in cases where the assault complained of is a mere common assault not resulting in any serious injury or accompanied by any other aggravating circumstances, and which might properly be dealt with by a single Justice

OLD CODE:

15. Where an act or omission constitutes an offence, punishable on summary conviction or on indictment, under two or more Acts, or both under an Act and at common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of such Acts, or at common law, but shall not be liable to be punished twice for the same offence.

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of the Peace, and where in the public interest the matter should be dealt with once and for all, the party aggrieved being allowed the option of proceeding either civilly or under the Crim. Code". See also *TUNNICLIFFE v. TEDD*(1848), 5 C.B.553, 136 E.R.995. However, the outstanding fact in relation to this section is that its constitutionality has been the subject of a widespread controversy. General discussion is to be found in articles by Bora Laskin(1941), 19 C.B.Rev.379, and G.V.V. Nicholls(1948), 26 C.B.Rev.1006, and the position with reference to the cases may be summed up as follows.

In favour of the Dominion Power:

New Brunswick, WILSON v.CODYRE(1886), 26 N.B.R.516;
Ontario, FLICK v. BRISBIN(1896), 26 O.R.423;
Quebec, in *KUCZER v. MASSE,* [1948]Que. S.C.187, the section was applied in bar of an action. It does not appear that the constitutional question was argued. The question was noticed, but not decided in *HEBERT v. HEBERT*(1909), 16 C.C.C.199, at p.200.
Alberta, TRINEA v. DULEBA, [1924]2 W.W.R.1177; *DOWSETT v. EDMUNDS,* [1926]4 D.L.R.796.
Saskatchewan, NYKIFORUK v. KOHUT(1949), 94 C.C.C.128.

The contrary view was expressed in:

Nova Scotia, RICE v. MESSENGER(1929), 51 C.C.C.147;
Prince Edward Island, DAWSON v. MUTTART(1941), 75 C.C.C.340.

In several of the cases attention was called to the existence of similar provisions in previous legislation, either English or colonial. For example, it was held in the Saskatchewan case that, even if s.734 were *ultra vires,* the action would still be barred by s.45 of the *Offences against the Person Act,* 1861 (Imp.), introduced into the Northwest Territories and subsequently into the province as part of the law of England. However, in view of the repeal of s.734 by the new Code, it is submitted that the question of the revival or survival of previous legislation would require to be considered in the light of s.19 of the *Interpretation Act* (Can.), with the probable result that s.10 will apply to these actions in the same way as to others.

OFFENCE PUNISHABLE UNDER MORE THAN ONE ACT.

11. Where an act or omission is an offence under more than one Act of the Parliament of Canada, whether punishable by indictment or on summary conviction, a person who does the act or makes the omission is, unless a contrary intention appears, subject to proceedings under any of those Acts, but is not liable to be punished more than once for the same offence.

This is a revision of the former s.15, which appeared in the same form as s.15 of the Code of 1906. It was s.933 in the Code of 1892, but without the reference to the common law. In view of the provisions of s.8, *ante,*

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that reference has been omitted from the new section. In principle, it rests upon the maxim *Nemo debit bis vexari pro una et eadem causa.* In statutory form it appears in terms essentially similar to s.15 in 1889, c.63, s.33 (Imp.), as follows:

> "33. Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, whether any such Act was passed before or after the commencement of this Act, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same *offence.*"

It will be observed that this provision is essentially the same as former Code s.15.

In *R. v. MILES*(1890), 17 Cox,C.C.9 it was held that the assault of which the Defendant had been convicted before magistrates was the sole foundation on which a subsequent conviction on indictment rested, and that a person who has been convicted before a court of summary jurisdiction of an assault which in the opinion of such court was of so trifling a nature as to render it inexpedient to inflict any punishment or other than a nominal punishment, and who has been discharged upon giving security to be of good behaviour, cannot afterwards be convicted upon an indictment, the charges in which are based upon the same assault. *Per* Hawkins, J. at p.18:

> "With regard to the common law defence relied on as an answer to this indictment, it is not strictly a plea of *autrefois acquit,* because the Defendant had never previously been convicted of either of the offences in the form in which they are charged in the first three counts; but it was a defence grounded, as Blackburn, J., said in *WEMYSS v. HOPKINS*((1875), L.R.10 Q.B.378), on the well-established rule at common law that where a person has been convicted and punished for an offence by a court of competent jurisdiction, *transit in rem judicatam,* that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter; otherwise there might be two different punishments for the same offence. This rule of law so stated has never been doubted or qualified in any one of the numerous authorities which are to be found in the books upon the subject, though it has not always been found easy to apply the rule to the facts of the particular cases under discussion . . . . . The difficulties which have arisen in the application of the rule have most frequently occurred in cases where a conviction or acquittal for a simple offence has been set up as a bar to a subsequent charge against the same person in a more aggravated form, and the law, as deducible from the numerous cases to be found on the subject, seems to be this — that where a charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence, whether with or without circumstances of aggravation, and whether such circumstances of aggravation consist of the offence having been committed with wicked or malicious

intent, or by reason that the committal of the offence was followed by serious consequences. In this respect the criminal law is in unison with that which prevails in civil proceedings."

In R. v. KING, [1897]1 Q.B.214, at p.218, the same Judge said:
"The man had clearly been convicted of a misdemeanour in respect of obtaining credit for the same goods which were the subject of the charge of larceny; and it is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts; the offences are practically the same, though not their legal operation."

Commenting upon this statement, Lord Reading, C. J., said in the case of *R. v. BARRON*(1914), 10 Cr. App.R.81 at p.88.
"It is quite plain that the learned judge did not intend to lay down, and did not lay down, as a general principle of law that a man cannot be placed twice in jeopardy upon the same facts if the offences are different. The statement obviously refers to a case where the offences are the same, 'practically the same' the words are, and as the two offences in the present case are not either exactly or practically the same it does not help the appellant . . . . . (p.89)

The substantial identity of the offence was recognized in *R. v. KING* as an essential condition to the validity of the plea of *autrefois convict* or *autrefois acquit*, and that case made no change in the general and well settled principle of law applicable to these pleas. The test is not, in our opinion, whether the facts relied upon are the same in the two trials. The question is whether the appellant has been acquitted of an offence which is the same offence as 'gross indecency', i.e., whether the acquittal on the charge of sodomy necessarily involves an acquittal on the charge of gross indecency. It is quite clear that the jury could not have convicted the appellant of gross indecency at the first trial."

In the same case the Lord Chief Justice said (p.87):
"The principle on which this plea depends has often been stated. It is this, that the law does not permit a man to be twice in peril of being convicted of the same offence. (2 Hawkins P.C., c.35(ed.1824)). If, therefore, he has been acquitted, i.e., found to be not guilty of the offence, by a Court competent to try him, such acquittal is a bar to a second indictment for the same offence. This rule applies not only to the offence actually charged in the first indictment, but to any offence of which he could have been properly convicted on the trial of the first indictment. Thus an acquittal on a charge of murder is a bar to a subsequent indictment for manslaughter, as the jury could have convicted of manslaughter (2 Hale, P.C. p.246)."

The statement in Hawkins' Pleas of the Crown referred to above is: "The plea of *autrefois acquit* is grounded on this maxim, that a man shall not be brought into danger of his life for one and the same offence, more than once."

In the case of *R. v. TONKS*, [1916]1 K.B.443, accused appealed from a conviction of manslaughter, alleging that she had on September 27, 1915, been found guilty of neglect of her children of whom deceased, who died on October 1, was one. Appeal dismissed. Lord Reading, C.J., said in part (p.450):
"We desire to call attention to a passage in Archbold's Criminal Plead-

Section 11—*continued*

> ings, 24th ed., p.177, which is in the following terms: 'The true test by which the question, whether such a plea is a sufficient bar in any particular case, may be tried is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first'. The authority cited in support of that proposition is *R. v. CLARK*((1820), 1 Brod. & Bing.473). But on examination it will be found that that case is not an authority in support of the principle enunciated in the text-book. That book, which is usually entirely accurate, and is evidence of so much painstaking skill and industry, is wrong in citing *R. v. CLARK* as establishing the principle there stated."

The foregoing cases were reviewed in *R. v. BAYN*, [1933]1 D.L.R.497, in which it was held that a plea of *autrefois acquit* or *res judicata* was not available to a defendant charged with having given perjured testimony upon his trial for forgery. Sir Frederick Haultain, C.J.S., speaking for the Court, quoted also *R. v. KENDRICK and SMITH*(1931), 23 Cr. App. R.1, as follows:

> "It is quite clear that to enable an accused person to rely on that plea (*autrefois convict*) the offence with which he is charged—must be the same offence, or practically the same offence, as that with which he was charged on the first occasion. It is not enough to say that the evidence tendered on the second charge was the same evidence as that offered to prove the first charge. It is not the evidence which is material to the charge that grounds the plea, but the offence which is charged. That becomes perfectly clear when one considers the judgment of this Court given by Lord Reading, C.J., in *R. v. BARRON*."

The Court also quoted with approval from a dissenting judgment in the case of *R. v. QUINN*(1905), 10 C.C.C. at p.420:

> "I am unable in either of these cases, or the reasons contained in the judgments, or in any other reported English or Canadian case, to find any justification for a defence at common law which is not based upon the principle involved in the defence of *autrefois acquit*, which defence proceeds upon the fundamental common law maxim, *Nemo debit bis vexari pro una et eadem causa*. In other words, except in two American cases, I find no authority for any special plea to an indictment setting up a former acquittal or conviction which does not involve the question of second peril for the same or substantially the same offence."

Archbold's Criminal Pleadings, 28th ed. p.161, contains the statement in reference to s.33 of the Act of 1889, that "Perhaps this enactment would have been clearer if for the word 'offence' at the end had been substituted the words 'act or omission'." If the authorities, especially *R. v. BARRON* and *R. v. TONKS*, had not already shown this opinion to be without support, the case of *R. v. THOMAS*, [1949]2 All E.R.662, has conclusively done so. There, at p.666, Humphreys, J., after some words of criticism of text-book writers in general, adds that "It is clear that the word in the Act is 'offence' and I deprecate the suggestion that the Act, to have made things clear, should have enacted something different. The answer is that it does not."

Again, *R. v. THOMAS* points to a limitation upon the application

of this section and its underlying principle. In that case the accused, who was charged with murdering his wife, pleaded *autrefois convict,* he having been previously found guilty of assaulting her with intent to murder. This plea was rejected. It was held that although it was necessary to hear evidence of the assault, the prisoner was not in peril of conviction twice for the same offence because the charge of murder arose only on the intervention of the new fact of the wife's death.

The distinction between identity of facts and identity of offences is important, and the cases of *R. v. BARRON* and *R. v. TONKS* have been applied in Canadian cases where that distinction had been drawn. Thus, in *R. v. BLANCHET*(1919), 36 C.C.C.10, it was held that a previous conviction for making a false statement in writing was a bar to charges of obtaining money and credit by false pretences in the same transaction. *LOHSE v. TAYLOR*(1922), 37 C.C.C.123; *R. v. GEIGER* (1923), 41 C.C.C.185; *R. v. RUNIONS*(1931), 40 O.W.N.249, and *R. v. BOYKO,* [1929]1 W.W.R.929, were all cases where defendants were convicted under the *Inland Revenue Act* or the *Excise Act* as well as under provincial liquor laws, it being held that there were distinct offences. On this point reference might be made also to *R. v. KENDRICK and SMITH*(1931), *supra,* and *R. v. KUPFERBERG*(1918), 13 Cr. App. R.166. These cases, as well as *R. v. BARRON,* were applied in *R. v. BROWN,* [1945]O.R. 869.

It should be noted too that the *Combines Investigation Act,* R.S.C. 1952, c.314, s.32(2) provides that a person shall not be charged with an offence relating to the formation or operation of a combine under that Act in an information or indictment charging an offence under Code s.498. (See s.750(1) *post*). This was applied in *R. v. IMPERIAL TOBACCO COMPANY*(1942), 77 C.C.C.146, at p.153 where, in considering Code s.498 and s.28 of the *Combines Investigation Act,* which, as it then read, included the words "upon the same evidence" it was said that:

> "Where the state of facts is such as to come within the purview of both, it seems to me that s.28 may well be looked upon as a legislative adoption of the principle stated by Cockburn, C.J. in *R. v. ELRINGTON* (1861), 31 L.J.(M.C.) 14 at p.16, where he said: 'it is a fundamental principle that out of the same state of facts a series of prosecutions is not to be allowed.'"

However, in view of the foregoing, the provision of the *Combines Investigation Act* must be regarded as referring to a special situation. *R. v. ELRINGTON* turned upon the application of ss.27 to 29 of the Act, 9 Geo. IV, c.31, which correspond to the former Code ss.732 to 734 relating to assault, and Cockburn, C.J. said also:

> "We must bear in mind the well-established principle of our criminal law that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same *facts* in a more aggravated form."

As to this statement of principle see s.519(1) *post.*

CHILD UNDER SEVEN.

12. No person shall be convicted of an offence in respect of an act or omission on his part while he was under the age of seven years.

PERSON BETWEEN SEVEN AND FOURTEEN.

13. No person shall be convicted of an offence in respect of an act or omission on his part while he was seven years of age or more, but under the age of fourteen years, unless he was competent to know the nature and consequences of his conduct and to appreciate that it was wrong.

Ss. 12 and 13 reproduce the former ss.17 and 18. They were ss.20 and 21 in the E.D.C., where they were said to set forth the existing law, and ss. 9 and 10 in the Code of 1892. See s.139, *post,* which raises a supplementary presumption regarding certain sexual offences, and the *Juvenile Delinquents Act,* R.S.C. 1952, c.160, s.9, under which the trial of a juvenile may be ordered to be held in the ordinary courts. This was applied upon a charge of arson (*R. v. H.,* [1931]2 W.W.R.917) and of murder (*R. v. L.Y.*(1944), 82 C.C.C.105; *R. v. D.P.P.*(1948), 92 C.C.C:282, [1949] 1 W.W.R.48).

Under s.12 evidence of the capacity of the child is not admissible.

Part XVII, which formerly applied to the trial for theft and kindred offences of a person whose age in the opinion of the justice did not exceed sixteen years, was repealed by 1948, c.39, s.36, for the reason that the cases to which it referred were being dealt with under the *Juvenile Delinquents Act,* with the result that it was used very little (Senate Debates, 1948, p.583). However, there are some parts of Canada in which that Act has not been proclaimed in force. Where it has been proclaimed it does not apply uniformly, the age limit in some places being sixteen years, and in others eighteen years.

CONSENT TO DEATH.

14. No person is entitled to consent to have death inflicted upon him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted upon the person by whom consent is given.

This was the former s.67. It was s.69 in the E.D.C. and s.59 in the Code of 1892.

OBEDIENCE TO *DE FACTO* LAW.

15. No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs.

This is the former s.68. It was s.60 in the Code of 1892 and clause 70 in the English Draft Code, where a marginal note refers to 11 Henry VII, c.1, *SIR H. VANE'S* case(1662), Kel. 15, and Foster's Crown Law, 4th Discourse, p.402. In Vane's case:

> "It was resolved that the King Charles the 2d was *de facto* kept out of the exercise of the kingly office by traitors and rebels; yet he was King both *de facto* and *de jure* and all acts done to the keeping him out were high-treason".

Sir H. Vane was convicted of treason for sitting in council "for the ordering of the forces of the nation against the King that now is".

OLD CODE:

17. No person shall be convicted of an offence by reason of any act or omission of such person when under the age of seven years.

18. No person shall be convicted of an offence by reason of an act or omission of such person when of the age of seven, but under the age of fourteen years, unless he was competent to know the nature and consequences of his conduct, and to appreciate that it was wrong.

67. No one has a right to consent to the infliction of death upon himself.
(2) If such consent is given, it shall have no effect upon the criminal responsibility of any person by whom such death may be caused.

68. Every one is protected from criminal responsibility for any act done in obedience to the laws for the time being, made and enforced by those in possession de facto of the sovereign power in and over the place where the act is done.

Byrnes' Law Dictionary states at p.287:

"The statute 11 Henry VII, c.1, enacts that no person serving the King for the time being in his wars shall be convicted or attaint of high treason for so doing. The intention was to protect persons serving the King *de facto* against punishment or forfeitures imposed by the King *de jure* on the latter recovering the kingdom."

The following appears in Holdsworth's History of English Law, Vol. III, p.468:

"In the same reign (viz., that of Henry VII) a statute was enacted to make it clear that faithful service to a reigning King was no treason to a successful claimant to the Throne (11 Henry VII, c.1); and Stephen is probably warranted in saying that this statute is 'the earliest recognition to be found in English law of a possible difference between the person and the office of the King'."

Stephen (Hist. Vol.II, p.254) comments that:

"The words of the Act are very remarkable, and if the history of the Wars of the Roses were unknown would be wholly unintelligible."

A Canadian text, Constantineau on De Facto Doctrine, says:

"Obedience to such (*de facto*) government naturally involves obedience also to public functionaries holding office thereunder who, though in possession of offices tainted with the same illegality as the government itself, yet discharge duties identical with, and of equal importance to the citizens at large, as those performed by like officers under a lawful government ... The Government of Cromwell in England is a memorable instance of a *de facto* government."

Instances within the principle could be multiplied by reference, for example, to the German military occupations during the two Great Wars.

INSANITY.—When insane.—Delusions.—Presumption of sanity.

16. (1) No person shall be convicted of an offence in respect of an act or omission on his part while he was insane.

(2) For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and qual-

Section 16(2)—*continued*

ity of an act or omission or of knowing that an act or omission is wrong.

(3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of a state of things that, if it existed, would have justified or excused his act or omission.

(4) Every one shall, until the contrary is proved, be presumed to be and to have been sane.

This is the former s.19 changed in subsec.(2) to read "*or* of knowing" instead of "*and* of knowing." It was s.11 in the Code of 1892 and s.22 in the E.D.C., and is founded on the M'Naghten Rules.

As this subject is now under study by a Royal Commission, no attempt at a full discussion will be attempted here. It may be pointed out, however, that the change referred to is justified by the cases.

The leading case on the interpretation of s.19(2) is *R. v. CRACKNELL* (1931), 56 C.C.C.190. Mulock, C.J.O. said at p.192:

"This section is in the very words of s.11(1) of the Cr. Code (1892) and the question is whether the word 'and' before the words, 'of knowing,' is to be interpreted literally or as meaning 'or'. This section is in the exact words of one of the rules in *M'NAGHTEN'S CASE*(1843), 10 Cl. & Fin. 200, 8 E.R.718, except that it substitutes the word 'and' for 'or'. That this change was a mistake on the part of the draughtsman appears to me obvious. It is a fundamental principle that *mens rea* is an essential element in crime. If absent there is no crime. Here, if the accused did not know that in killing his wife he was doing what was wrong he had no guilty intention, and therefore was not guilty of murder even though he might have appreciated the physical, not the moral nature and quality of his act: *R. v. HADFIELD*(1800), 27 St.Tr.1281. Thus, in order to establish his defence it was not necessary to prove both incapacity to appreciate the nature and quality of his act and the absence of guilty intent. In my opinion in the present case the word 'and' should not be construed literally."

Per Magee, J.A. at p.194:

"In the present case the jury were directed that defect in both respects was necessary. In so directing them the learned Judge had in mind s.19 of the Cr. Code, which enacts that no person shall be convicted if defect in both respects existed.

But this did not say that unless defect in both existed he should be convicted. In so serious a matter it cannot be implied that the common law has been changed without clear enactment, and it must be taken that law as declared by the Judge is still the law in Canada. In England in *R. v. FLAVELL*(1926), 19 Cr.App.R.141, it was declared that the rules in *M'NAGHTEN'S Case* still stand. The direction to the jury in the present case was made without reference to the established and unrepealed rule and was not in accordance with it."

Per Hodgins, J.A. at p.194:

"As to s.19 of the Cr. Code, I think it does not, in this case, require both elements mentioned to be found. If the nature and quality of the act is not known to the accused so that his mind does not grasp its

OLD CODE:

19. No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such an act or omission was wrong.

(2) A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, under the provisions hereinafter contained, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission.

(3) Every one shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved.

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physical character, it is idle to inquire if he knew the act to be wrong."

In *R. v. JEANOTTE,* [1932]2 W.W.R,283 (Sask. C.A.) (murder), the Court followed *R. v. CRACKNELL.* The following is quoted:

"The Ontario Court was of opinion that the above substitution (i.e. 'and' for 'or' as it appears in the Judges' answers to the second and third questions in M'Naghten's case), had not changed the law and that, in order to establish such a defence, it was not necessary to prove in the accused both incapacity to appreciate the nature and quality of the act and want of knowledge that it was wrong, but only that he was lacking in one or other of such respects.

Expressions from which the same conclusion may be inferred are to be found in a later decision of the same Court in *R. v. BROCKENSHIRE*(1931), 56 C.C.C.340 at 345-6, and in the judgment of Mr. Justice (now Chief Justice) Anglin, in *CLARK v. R.*(1921), 35 C.C.C.261, at 274.

With such conclusion we would respectfully state that we are in accord, although it does not seem to have met with universal judicial acceptance even in Ontario: See Proceedings of the Canadian Bar Association, Vol. 16, 1931, at p. 60. . . . .

It is also worthy of note that s.19 above is the same as s.22 of the *Draft Code* of 1879, submitted by the Imperial Commissioners, appointed for the purpose, in their report to the Imperial House of Commons, in the form of a bill in 1880. In such report the Commissioners specifically state that said section 'which relates to insanity expresses the existing law'. . . . . "

New trial ordered.

Note: The above reference appears to be inexact. It is true that in the Bill of 1880 the word "and" is used in s.23 (insanity), but the statement "Section 22, which relates to insanity expresses the existing law" (Report p.17) refers to s.22 of the *Draft Code* (p.67). This uses the word "or" and a marginal note refers back to p.17 of the Report.

At all events, *R. v. CRACKNELL* and *R. v. JEANOTTE* were followed by the Manitoba C.A. in *R. v. HARROP*(1940), 74 C.C.C.228, where s.19 was interpreted as providing alternate defences. Prendergast, C.J.M., added:

"This construction of the section, however, only restates the fundamental principle that *mens rea* is an essential element in crime, a prin-

Section 16—*continued*

ciple which, if it were not stressed in the Code, we would still hold to under the common law of all times, and it was the appellant's right that the jury be fully apprized of it."

New trial ordered.

In *R. v. BROCKENSHIRE*(1931), 56 C.C.C.340, (Ont. C.A.) at p. 345: "the issue is not whether B. had the disease known as *dementia praecox*, but whether he had a disease of the mind to such an extent as to render him incapable of appreciating the nature and quality of his act in shooting M. *or* knowing that such act was wrong."

CLARK v. R.(1921), 35 C.C.C.261 (S.C.C.) turned rather on the presumption raised by s.19(3) but the following appears in the judgment of Anglin, J. (at p.274):

"Here I find nothing to warrant requiring evidence of greater weight than would ordinarily satisfy a jury in a civil case that a burden of proof has been discharged, that, balancing the probabilities upon the whole case, there was such a preponderance of evidence as would warrant them as reasonable men in concluding that it had been established that the accused when he committed the act was mentally incapable of knowing its nature and quality, *or* if he did know it, did not know that he was doing what was wrong. That I believe to be the law of Canada, as it appears to be that of most of the States of the American Union."

In a recent case upon another phase of the subject, *R. v. REECE*(1954), 109 C.C.C.26, it was held that a defence of drunkenness, to be effective, must show that the accused was incapable by reason of drunkenness of forming an intent to commit the offence.

The case of *WHITELAW v. WILSON*(1934), 62 C.C.C.172, has a strong bearing on the operation of subsec.(3). That case was a civil action to prevent a husband from taking any benefit under a will made by his wife, and was decided by reference to the *Criminal Code*. The circumstances appear in the following quotation, at p.176:

"The fact that he believed that he was hopelessly ill and would not recover, and honestly believed that to be so, is no justification for him entering into a suicide pact with his wife and counselling her, or aiding and abetting her to commit the act of self-destruction, and still less for failing to render her the necessary medical help and assistance under the section of the Code above referred to."

This reference is to Code section 242 (now s.186). And the judge continues:

"On all the evidence I am satisfied that at the time that his wife took the arsenical poison the defendant George Wilson was capable of appreciating the nature and quality of the act which he and his wife were attempting to commit and his inexcusable omission to render her assistance and also that he knew such an act and omission was wrong. Both Dr. Robertson and Dr. Kerr say in express words that in their opinion the defendant George Wilson would appreciate the nature and quality of the act and that they are of the opinion that he did know the act was wrong and against the law of the land. The neighbours speak of his conduct up to the time of the tragedy, and there is

OLD CODE:

20. Except as hereinafter provided, compulsion by threats of immediate death or grievous bodily harm from a person actually present at the commission of the offence shall be an excuse for the commission, by a person subject to such threats and who believes such threats will be executed, and who is not a party to any association or conspiracy, the being a party to which rendered him subject to compulsion, of any offence other than treason as defined by this Act, murder, piracy, offences deemed to be piracy, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm, and arson.

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nothing to indicate that other than the delusion from which he was clearly suffering he was in any way incapable of appreciating and knowing what he was doing and conscious of the moral and legal consequences flowing from his unlawful acts and omissions. *His business affairs were looked after by himself, and his own conduct when taken to the hospital at Fergus and his remarks there of what had taken place, referring to the tragedy, only confirm my view that he knew and appreciated that he had done a wrongful act and that he was subject to criminal liability therefor.*" (Italics added: Ed.)

COMPULSION BY THREATS.

17. A person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is excused for committing the offence if he believes that the threats will be carried out and if he is not a party to a conspiracy or association whereby he is subject to compulsion, but this section does not apply where the offence that is committed is treason, murder, piracy, attempted murder, assisting in rape, forcible abduction, robbery, causing bodily harm or arson.

This is the former s.20, omitting the words "offences deemed to be piracy," and "causing grievous bodily harm," as the Code does not use these terms. The section was s.12 in the Code of 1892 and, with the next section, made up s.22 in the E.D.C. where the Commissioners (Report, Note A) quote 'the stern rule' laid down by Lord Hale:

"If a man be desperately assaulted and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he *ought rather to die himself than kill an innocent.*"

It was held in *DUNBAR v. R.*(1936), 67 C.C.C.20, that if a person is compelled by threats to choose between endangering his own life and assisting in a robbery (in this case by acting as chauffeur for his associates), his choice of the latter alternative makes him a party to the unlawful common intention, and if murder is committed in carrying it out, the compulsion will not excuse him since murder was expressly excluded from the operation of s.20.

See also s.15, and discussion of the principle involved in this section in *R. v. BOURNE*(1952), 36 Cr.App.R.125, and in 69 L.Q.R.226.

Section 17—*continued*

The compulsion contemplated by the section is the threat of actual force, to use the words of Lord Hale, and not the compulsion of necessity. As to this, Coleridge, C.J. said in *R. v. DUDLEY and STEPHENS*(1884), 14 Q.B.D.273, the well-known case in which two shipwrecked sailors resorted to cannibalism:

"It is not correct to say that there is an absolute or unqualified necessity to preserve one's life, and, if Lord Bacon, in saying that if one of two shipwrecked persons holding on to a plank push the other off to save his own life, meant, to lay down the broad proposition that a man may save his own life by killing, if necessary, an innocent and unoffending neighbor, it is certainly not law at the present day."

COMPULSION OF WIFE.

18. No presumption arises that a married woman who commits an offence does so under compulsion by reason only that she commits it in the presence of her husband.

This is the former s.21. It was s.13 in the Code of 1892 and formed part of s.23 of the E.D.C. along with the substance of s.17 above, with which it must still be read. It did away with a rule to the contrary which existed at common law *prima facie* in relation to all offences except treason and murder.

A distinction has sometimes been drawn between exemption from punishment and exemption from criminal liability but this is not of practical importance since s.17 exempts from criminal liability. In *R. v. BOURNE*(1952), 36 Cr.App.R.125 Goddard, L.C.J. said:

"Assuming that (the wife) could have set up duress, what does that mean? It means that she admits that she has committed the crime but prays to be excused from punishment for the consequences of the crime by reason of the duress, and no doubt in those circumstances the law would allow a verdict of Not Guilty to be entered."

See also *R. v. WISHART*(1954), 13 W.W.R. (NS.) 477.

See also s.23(2) and (3).

IGNORANCE OF THE LAW.

19. Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.

This is the former s.22. It was s.24 in the E.D.C. and s.14 in the Code of 1892, and states in other words the principle that everyone is presumed to know the law, that being the only basis on which the law can be enforced. It does not include mistake of fact, as to which see, for example, ss.269(1) and 371(2) *post*, under which colour of right relieves from criminal responsibility. On the other hand, s.235(2)(b) *post* (abduction of female under sixteen), is an instance where mistake of fact is not an excuse.

Those sections, *e.g.*, s.25(2) (execution of defective process) and s.32 (suppression of riots) which might appear to create exceptions to this rule, do so only apparently. Their primary purpose is the protection of those

OLD CODE:

21. No presumption shall be made that a married woman committing an offence does so under compulsion because she commits it in the presence of her husband.

22. The fact that an offender is ignorant of the law is not an excuse for any offence committed by him.

661. (3) Every warrant authorized by this Act may be issued and executed on a Sunday or statutory holiday.

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by whom the law is to be enforced, and the principles that apply were stated by the Imperial Commissioners (E.D.C. s.26(n)) as follows:

> "The result of the authorities justifies us in saying that wherever a ministerial officer, who is bound to obey the orders of a court or magistrate (as, for instance, in executing a sentence or effecting an arrest under warrant), and is punishable by indictment for disobedience, merely obeys the order which he has received, he is justified, if that order was within the jurisdiction of the person giving it.
>
> And we think that the authorities show that a ministerial officer obeying an order of the court, or the warrant of a magistrate, is justified, if the warrant or order was one which the court or magistrate could, under any circumstances, lawfully issue, though the order or warrant was in fact obtained improperly; or, though there was a defect of jurisdiction in the particular case, which might make the magistrate issuing the warrant civilly responsible: on the plain principle that a ministerial officer is not bound to enquire what were the grounds on which the order or warrant was issued, and is not to blame for acting on the supposition that the court or magistrate had jurisdiction."

R. v. MONKMAN(1892), 8 Man.R.509, is a concrete example. There it was decided that where a writ of *fi. fa.* is delivered to a sheriff in proper form, and on its face regular, he is bound to execute it. *Per* Taylor, C. J.:

> "Apart from the error in the date of the judgments, the writs are regular in form, so that they were a sufficient authority and protection to the sheriff, who was bound to act under them. . . . . There seems good reason for this. When a sheriff has handed to him a writ in proper form, and on its face regular, he is bound to execute it. To hold otherwise would require the sheriff in every case before executing process to search as to the regularity of previous proceedings and to act at the risk of being held responsible, should there be irregularity in these. The object of the statute would be wholly defeated if the contention of the defendant should prevail."

EXECUTION OF WARRANT OR SUMMONS ON SUNDAY OR HOLIDAY.

20. A warrant or summons that is authorized by this Act may be issued or executed on a Sunday or statutory holiday.

This is the former s.661(3), and s.564(3) in the Code of 1892, with the addition of the words "or summons" which were inserted in Committee of the House of Commons on the representation that it might be necessary sometimes for a magistrate to issue a summons on Sunday or a statutory holiday, but it is suggested that the change does not mean that this should be ordinary procedure.

Section 20—*continued*

29 Car.II,c.7, prohibited the performance of judicial acts (which would include the issue of a summons) on Sunday, prohibited arrest also on that day except for treason, felony or breach of the peace. S.4 of 11 & 12 Vict.c.42 authorized the issue on Sunday of search warrants or warrants to apprehend, and this section appeared in Canada as 1869, c.30, s.8. The words "or other statutory holiday" are in the section as it appears in the *Criminal Procedure Act,* R.S.C.1886, c.174,s.37. The E.D.C. s.443 says that "Every such warrant may be issued *and executed* on a Sunday" but does not mention search warrants. It has been the law for centuries that ministerial acts, as distinguished from judicial acts, may be done on Sunday, but it was held in *R. v. ETTINGER*(1899), 3 C.C.C.387, that the issue of a summons, upon consideration of the information, is a judicial act.

As to search warrants, see also s.430.

The word "holiday" is defined in the *Interpretation Act,* R.S.C.1952, c.158,s.35(12). There is special legislation, R.S.C.1952, c.88, declaring Dominion Day, July 1st, to be a public holiday, and in R.S.C.1952, c.237, there is a similar declaration concerning Remembrance Day, November 11th.

It was held that the incorporation of Parts XIII and XIV of the *Criminal Code,* so far as applicable, into a provincial liquor act, authorized arrest on Sunday on a warrant issued under that Act; *R. v. SMITH*(1927), 47 C.C.C.345. It seems doubtful that the present section would apply in such a case unless the provincial Act incorporated it by specific reference.

On this subject generally, see s.561, *post,* and notes thereto.

PARTIES TO OFFENCES.

PARTIES TO OFFENCE.—Common intention.

21. (1) Every one is a party to an offence who

(a) **actually commits it,**

(b) **does or omits to do anything for the purpose of aiding any person to commit it, or**

(c) **abets any person in committing it.**

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

This reproduces the former s.69 with a change in form. It was s.61 in the Code of 1892 and s.71 in the E.D.C., where the Commissioners noted that:

> "This section is so framed as to put an end to the nice distinctions between accessories before the fact and principals in the second degree, already practically superseded by 24 and 25Vict.c.94",

a statute which was adopted into Canadian law: see R.S.C.1886, c.145 (*An Act respecting Accessories*) and statutes of 1868 and 1869 there cited.

OLD CODE:

69. Every one is a party to and guilty of an offence who
(a) actually commits it;
(b) does or omits an act for the purpose of aiding any person to commit the offence;
(c) abets any person in commission of the offence; or
(d) counsels or procures any person to commit the offence.

(2) If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose.

Although the *Criminal Code* and English criminal law do not specify degrees of criminal responsibility, the expressions "principal in the first degree" and "principal in the second degree" sometimes appear, *e.g.*, in *R. v. BOURNE*(1952), 36 Cr.App.R.125 and where they do, the former, according to Byrne's Law Dictionary means "one who commits a felony either himself or through an innocent person", and the latter "one who is either actually or constructively present and aids and abets the principal in the first degree".

Foster's Crown Law, 3rd Discourse, p.350, gives the following illustration of constructive presence:

> "Several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned him; some to commit the fact, others to watch at proper distances and stations to prevent a surprize, or to favour, if need be, the escape of those who are more immediately concerned. They are all, provided the fact be committed, in the eye of the law present at it; for it was made a common cause with them . . . . . and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to insure the success of their efforts."

Offences by accessories after the fact generally are dealt with by s.406. For special provisions concerning parties see s.211(murder), s.212(suicide), s.50(1) (treason). Points of procedure are covered by ss.502 and 503.

The change in form of s.21 makes it a definition only. The repealed section not only declared who were parties to an offence but also by the words "is guilty of an offence" created substantive offences. In *BROUSSEAU v. R.*(1917), 29 C.C.C. 207, at p.210, Anglin J., said:

> "The purport and intent of clause (d) of section 69 of the Criminal Code, in my opinion, is to make it an offence to counsel any person to commit an offence whether the actual commission of the latter offence does or does not ensue."

Fitzpatrick, C.J.(p.208) put it this way:

> "If the offence is committed then the accused is a party to it; or, if the offence is not committed, then he who counsels is guilty of a substantive offence".

A point not argued in *BROUSSEAU v. R.* was argued in *R. v. HALMO* (1941), 76 C.C.C.116. It was based on s.28 of the *Interpretation*

Section 21—*continued*

Act (Can.) which, in part, reads as follows:

"Every Act shall be read and construed as if any offence for which the offender may be:

(a) prosecuted by indictment, ... were described or referred to as an indictable offence;

(b) punishable on summary conviction, were described or referred to as an offence; and

all provisions of the Criminal Code relating to indictable offences, or offences, as the case may be, shall apply to every such offence."

The submission was that the substantive offence created by s.69 was one triable on summary conviction, but it was held that an indictable offence of reckless driving had been committed to which the accused was a party. The point is mentioned here because by reason of s.569(1), it would now be immaterial, at least in cases where a summary conviction offence can be regarded as included in an offence punishable on indictment.

It will be seen, however, that the omission of the words "is guilty of an offence" from s.21 does not of itself change the law.

Another aspect of the same matter appears in *SIMCOVITCH v. R.* (1935), 63 C.C.C.70 (S.C. Can.), in which the appellant, an employee of a bankrupt, had been convicted for aiding and abetting the commission of certain offences under the *Bankruptcy Act*. It was contended that under the wording of s.191 of that Act no person other than the bankrupt could be indicted. Duff, C.J.C., at p.72, quoted s.28 of the *Interpretation Act* and said:

"The language of this enactment is quite plain and unqualified.

I have no doubt that it applies to offences created by s.191 . . . . True it is, s.28 lays down a rule of interpretation, and necessarily, therefore, the provisions of the Criminal Code must give way to the enactments of the statute to be interpreted, to the extent to which, by express words, or by necessary or reasonable implication, such statute evinces an intention to exclude those provisions. But, subject to this qualification, s.191 must be read and construed on the footing that the provisions of the Criminal Code apply to all the offences created by it, and, in particular, that the provisions of s.69 are to be construed as if such offences were specifically nominated in that section.

Now the effect of s.69 in this view, is simply this: persons aiding or abetting the bankrupt or other person, whose acts are embraced within the enactment, are guilty of the offences created by the enactment.... On this construction of s.69 we have a substantive enactment, co-ordinate with s.191 by which persons aiding, abetting, counselling or procuring, are put upon the same plane as the bankrupt, and become indictable and punishable for the offence in relation to which they have so acted."

Cannon, J., at p.78 said:

"The evident intention of Parliament was that these three statutes (i.e. the *Bankruptcy Act*, the *Intepretation Act* and the *Criminal Code*) should complete and aid one another in order to bring to justice those who aided or abetted a bankrupt to commit offences to defraud his creditors." (Words in brackets added: Ed.)

OLD CODE:

70. Every one who counsels or procures another person to be a party to an offence of which that person is afterwards guilty, is a party to that offence, although it may be committed in a way different from that which was counselled or suggested.

(2) Every one who counsels or procures another to be a party to an offence is a party to every offence which that other commits in consequence of such counselling or procuring, and which the person counselling or procuring knew, or ought to have known, to be likely to be committed in consequence of such counselling or procuring.

PERSON COUNSELLING OFFENCE.

22. (1) Where a person counsels or procures another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled or procured is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled or procured.

(2) Every one who counsels or procures another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling or procuring that the person who counselled or procured knew or ought to have known was likely to be committed in consequence of the counselling or procuring.

This is the former s.70. It was s.62 in the Code of 1892 and s.72 in the E.D.C. where it appears with a note that "This is believed to express the existing law."

In *R. v. STEWART*, [1934] 1 W.W.R. 423, the accused was convicted of counselling others to commit an offence, but the conviction was quashed on the ground that there was no evidence that any person at any time addressed by the accused was a member of the unlawful assembly on December 20. The Court went further and held that a person cannot in fact be a member of an unlawful assembly at which he is not present, so that the Crown was forced to fall back upon that section of the *Criminal Code* which defines who are parties to offences. McGillivray, J. A., said at p.428:

> "I have no doubt that the accused could have been charged with counselling others to constitute an unlawful assembly, contrary to s.69 of the Code, and have been found guilty of the crime of counselling under that section, regardless of whether or not the persons counselled committed the offence which they were counselled to commit (*R. v. BROUSSEAU*(1917), 56 S.C.R. 22) but the Crown did not see fit to charge the appellant and Irvine with the substantive offence of counselling, on the contrary they were specifically charged with being 'members of an unlawful assembly' (s.89).
>
> "Now it is evident that a person cannot in fact be a member of an unlawful assembly at which he is not present and so on the facts of this case the Crown was driven to rely upon this s.69 of the Code which not only makes counselling a crime a substantive offence but also provides that every one is a party to and guilty of an offence who counsels or procures any person to commit that offence. *Now there is a distinct*

Section 22—*continued*

difference between the charge of counselling others to commit an offence, and the charge of being party to an offence by virtue of having counselled someone to commit that offence. In the first case it is immaterial whether the offence is committed or not; in the second case the offence must be committed and it must be committed by the persons counselled ere the accused can be said to be a party to the offence committed. If this be so, as it unquestionably is, then the Crown must prove that the persons who were addressed by the appellant, and counselled to become members of an unlawful assembly, in fact did become members of such an assembly before it can be held to be established that the appellant, who was not in fact present, was none the less a member of the assembly as charged."

ACCESSORY AFTER THE FACT.—Husband or wife, when not accessory.—When wife not accessory.

23. (1) An accessory after the fact to an offence is one who, knowing that a person has been a party to the offence, receives, comforts or assists him for the purpose of enabling him to escape.

(2) No married person whose spouse has been a party to an offence is an accessory after the fact to that offence by receiving, comforting or assisting the spouse for the purpose of enabling the spouse to escape.

(3) No married woman whose husband has been a party to an offence is an accessory after the fact to that offence by receiving, comforting or assisting in his presence and by his authority any other person who has been a party to that offence for the purpose of enabling her husband or that other person to escape.

This is the former s.71. It was s.63 in the Code of 1892 and s.73 in the E.D.C.

Accessories after the fact are specially dealt with in ss.50 (treason), 211 (murder) and 212 (suicide). The general penal provision is in s.406, *q.v.*, with the notes thereto. As to jurisdiction in certain cases, see s.413 (2)(b), and as to indictment, see s.502.

Subsecs.(2) and (3) appear to qualify s.18.

ATTEMPTS.—Question of law.

24. (1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

(2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

This is the former s.72. It was s.64 in the Code of 1892 and may be compared with s.74 of the E.D.C. where the principles embodied in subsec.(1) are expressed in different language as follows:

"An attempt to commit an offence, is an act done or omitted with intent to commit that offence, forming part of a series of acts or omissions which would have constituted the offence if such series of acts or

OLD CODE:

71. An accessory after the fact to an offence is one who receives, comforts or assists any one who has been a party to such offence in order to enable him to escape, knowing him to have been a party thereto.

(2) No married person whose husband or wife has been a party to an offence shall become an accessory after the fact thereto by receiving, comforting or assisting the other of them, and no married woman whose husband has been a party to an offence shall become an accessory after the fact thereto, by receiving, comforting or assisting in his presence and by his authority any other person who has been a party to such offence in order to enable her husband or such other person to escape.

72. Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such offence or not.

(2) The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.

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omissions had not been interrupted, either by the voluntary determination of the offender not to complete the offence or by some other cause.

Every one who, believing that a certain state of facts exists, does or omits an act the doing or omitting of which would if the state of facts existed be an attempt to commit an offence, attempts to commit that offence, although its commission in the manner proposed was by reason of the non-existence of that state of facts at the time of the act or omission impossible."

The second paragraph was drawn to offset the case of *R. v. COLLINS* (1864), Le. & Ca. 471, where it was held that putting a hand into another person's empty pocket was not an attempt to steal because it was not possible to steal anything. However, even without any statutory provision, that case was overruled by *R. v. BROWN*(1889), 16 Cox, C.C.715, and *R. v. RING*(1892), 17 Cox, C.C.491. The principle is contained in the concluding words of subsec.(1).

Except with regard to treason (s.46(1)(a)), rape (s.137), and murder (s.210), attempts are dealt with as substantive offences in s.406, and ss.567 and 568 state the procedure where the full offence is charged but the evidence proves an attempt, and vice versa.

In so far as subsec. (2) draws a distinction between preparation and attempt it is essentially part of the definition. In *KELLEY v. HART* (1934), 61 C.C.C.364, at p.370 the following appears:

"The obvious difficulty in the application of the section is in distinguishing between acts done with intent to commit the offence which are merely preparatory in character and those done with intent to commit the offence which are so connected with the offence to be committed as to constitute an attempt to commit that offence.

It is quite impossible to lay down any hard and fast rule for the drawing of the line between preparation and attempt. It is in each case a question of the remoteness or proximity of the acts done to the ac-

Section 24—*continued*

complishment of the offence. In *PEOPLE v. MURRAY*(1859), 14 Cal. 159, Field, C.J., said:—'Preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission after the preparations are made.'"

(See also annotation in 24 C.C.C.110).

The classic case is *R. v. TAYLOR*(1859), 1 F.&F.511, to the effect that where the prisoner knelt by a stack and lit a match intending to set it on fire, he was guilty of an attempt despite the fact that the match was blown out by the wind, or that he blew it out himself when he saw that he was watched. But the fact that he had bought matches with the same intention would not constitute an attempt because of its remoteness from the completed offence. To say, as does subsec.(2), that the question of remoteness is a question of law to determine what is no more than preparation, is another way of saying that this question is to be decided by the judge and not by the jury.

An attempt has been defined as "an abortive or frustrated effort" (*HOLLOWAY v. R.*(1851), 17 Q.B.317) but even this requires some further definition of terms. The key word in the section is "intent" and in intention may be said to lie the essence of the criminal law when once the intention is carried into action. It is more than a political maxim to say that "a man may think the thing he will." "The standards of the law," said the late Mr. Justice Holmes, "are external standards, and however much it may take moral considerations into account, it does so only for the purpose of drawing a line beween such bodily motions and rests as it permits, and such as it does not." And again, "There is no law against a man's intending to commit a murder the day after tomorrow. The law only deals with conduct."

It is true that intent is not punishable without action; it is also true, as a general rule, that action is not punishable without intent. However, the latter statement is subject to qualification, and it has been said that there are three kinds of subject matter which exclude *mens rea*, or the guilty mind:

(a) Things not really criminal but prohibited under penalty in the public interest (e.g., offences against the revenue laws);

(b) Public nuisances;

(c) Cases where the proceeding is criminal in form but really civil in its nature (e.g., cases under acts providing summary procedure for dealing with disputes between masters and servants). Such cases are often said to be 'quasi-criminal'.

The judgment in *R. v. PIGGLY WIGGLY CANADIAN LTD.*(1933), 60 C.C.C.104, contains the following explanation:

"The statute (the Weights and Measures Act) is for the protection of the public, and in respect to such enactments, as well as those relating to the revenue, the sale of intoxicating liquor, and most if not all of those containing prohibitions not falling within the proper domain of criminal law, the general rule is contrary to the common law, that *mens rea* is not a necessary ingredient of the offence. As stated in *HOTCHIN v. HINDMARSH*, [1891]2 Q.B.181, the mere doing of

the prohibited thing or 'the physical act' in itself constitutes the offence; the reason as given by Brett, J., in *R. v. PRINCE*(1875), L.R. 2 C.C.R.154, at p.163, being that such enactments 'do not constitute the prohibited acts into crime . . . . . but only prohibit them for the purpose of protecting the individual interest of individual persons or of the revenue'."

It has been held, however, that while *mens rea* may be dispensed with by statute, "the terms which should induce us to infer that it is dispensed with must be very strong."

Intent, in the sense in which it is used in criminal law, has been said to be "the voluntary direction of the mind to an unlawful or wrongful act or conduct," but it is a rule of law that a man is presumed to intend the probable consequences of what he does, and often his intent will be inferred from what he does. The rule goes even further and holds that when a man engages in a criminal act, he is criminally responsible for its indirect, as well as its direct consequences. This does not mean that the law does not expressly include the element of intent. On the contrary, many sections of the Code contain words which make necessary the proof of specific intent. Such expressions as 'fraudulently', 'with intent to deceive', 'knowingly', 'maliciously', 'unlawfully' and, most common of all, 'wilfully' not only import an element to be proved by the prosecution, but each, in its own context, is an essential part of the charge and must be included in it. The following references and comments bear upon the interpretation of these expressions:

"Unlawfully". It appears (*R. v. PRINCE*(1875), 13 Cox, C.C. 138, at pp.148 and 151) that in the drafting of English statutes "unlawfully" was used to indicate a misdemeanour as distinguished from a felony, which was indicated by the word "feloniously". There is no occasion for any such distinction in Canada. Each, however, to some extent denoted a specific intent and "unlawfully" has been taken to mean "without lawful excuse" (*R. v. PRINCE, supra,* at p.157), and "not sanctioned or permitted by law" (*R. v. KARN*(1909), 20 O.L.R.91; *R. v. ROBINSON* (1948), 92 C.C.C. 223). It has been said also to mean generally "the converse of 'lawful'; prohibited by the law" (66 C.J. 33). Still, it must be said that it seems redundant to use the words "unlawful" and "unlawfully" in describing conduct that is declared to be criminal, and the Code does not use them extensively.

"Maliciously". The word "malice" and its derivatives were expressly excluded from the E.D.C. for the reason that the legal and popular senses of malice are irreconcilably different. It is said in U.K. Parl. Debates, 1878, 3 Series, Vol. 239, Col. 1945 that:

"This word 'malice' is largely used in our existing criminal law; but it is a word which is full of danger, and the source of infinite confusion and difficulty. It has been deemed right to avoid its use altogether in the Code, and, where necessary, to substitute for it words which convey the full legal explanation which the Court would have put upon the word malice, had it been employed."

The word "maliciously" appears once in the new Code (s.273), where it may be taken in its ordinary sense as indicating spite or active ill-will.

"Knowingly". *In R. v. PRINCE, supra,* it was said that:

Section 24—*continued*

"the word 'knowingly' is used where the noxious character of the prohibited acts depends upon a knowledge in the prisoner of their noxious effect, other than a mere knowledge that he is doing the acts; the presence of the word calls for more evidence on the part of the prosecution."

Similarly in *R. v. BEAVER*(1904), 9 C.C.C.415 it was held that the insertion of the word "knowingly" made it incumbent on the prosecution to give some evidence of knowledge. And so in *R. v. BRITNELL*(1912), 20 C.C.C.85, where a bookseller was charged with selling obscene books, it was held that the word "knowingly" must appear in the information as in the statute, and that "there must be shewn knowledge of the sale or exposure for sale and also knowledge of the character of the book." It has been held, however, that such words as "using", "permitting" and "suffering" involve knowledge: *R. ex rel. HAMMOND v. CAPPAN*(1920), 32 C.C.C.267 and cases there cited.

"Wilfully". Lopes, L.J. *In re LONDON (MAYOR) AND TUBBS' CONTRACT*, [1894]2 Ch.524 said:

"It is difficult to lay down any general definition of 'wilful'. The word is relative, and each case must depend on its own particular circumstances."

For the purposes of Part IX it is defined in s.371(1). It is submitted, however, that this definition gives it no specialized meaning, but rather that it codifies those principles of criminal responsibility to which reference has already been made. It may be noted generally that in the case of *ANDERSON & EDDY v. C.N.R.*(1917), 35 D.L.R. 480, Brown, J., referred to the judgment of Bowen, L.J., *In re YOUNG AND HARSTON'S CONTRACT*(1885), 31 Ch.D.168 at p.174, from which the following is quoted:

"The other word which it is sought to define is 'wilful'. That is a word of familiar use in every branch of law, and although in some branches of the law it may have a special meaning, it generally, as used in courts of law, implies nothing blameable, but merely that the person of whose act or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing and intends to do what he is doing, and is a free agent."

He went on to add, quoting from 40 Cyc. 944;

"But generally in penal statutes the word wilful or wilfully means something more than a voluntary or intentional act; it includes the idea of an act intentionally done with a particular motive or purpose, or as it is otherwise expressed, with an evil intent."

In Ex parte O'SHAUGHNESSY(1904), 8 C.C.C.136, at p.139, the following discussion of the words appears:

"Wilfully means not merely to commit an act voluntarily but to commit it purposely with an evil intention, or in other words it means to do so deliberately, intentionally and corruptly and without any justifiable excuse. In conjunction with an offence such as that mentioned in s.177 of the Criminal Code, the qualification of 'wilfully' indicates that the act committed must have been done wantonly, which is to wander from moral rectitude and to do an act licentiously and dissolutely, unrestrained by law and morality, intentionally and without

excuse. The word 'wilful' is not the synonym of the word 'unlawful'. An act may be unlawful and yet not wilful and many acts are unlawful in a civil sense which are not penal and for which a criminal penalty cannot therefore be incurred. A thing may be unlawful in two senses; first, as unenforceable by law, and secondly, as morally wrong, but not punishable by criminal law; for instance, an agreement for sexual immorality would furnish no right of action between the parties but is not punishable in criminal law. It will thus be seen that there is a great distinction between an unlawful act and a wilful one, and that to describe an offence in an information as an unlawful one where the enactment requires the act to be a wilful one, is a defective statement which discloses no offence in criminal law and which therefore renders all the proceedings on the defective information null and void. I will give one citation on this point; it is from the Judicial Dictionary, by F. Stroud, 2nd ed., Vol. 3, p.2248:—'Where a statutory offence is for something "wilfully" done, that word should always be employed in the indictment; thus, if the offence be for wilfully and maliciously doing anything, the indictment will be bad if it charges that the act was "unlawfully and maliciously" done, for a thing may be unlawfully done without wilfulness. (R. v. DAVIS(1792), 1 Leach, 4th ed., p.493)'."

The reasoning in *ANDERSON & EDDY v. C.N.R.* and *Ex parte O'SHAUGHNESSY* was adopted in the case of *R. v. MILLER*(1944), 81 C.C.C. at p.112, and *R. v. GENERAL NEWS BUREAU INC.*(1933), 60 C.C.C.66. The latter was charged under section 235(i) relating to betting, and the County Court Judge who decided the case said the inclusion of the words "wilfully and maliciously" in s.235(i) express the intention of Parliament that the prosecution shall establish the *mens rea* of the accused either directly or by inference from facts from which only one conclusion can be drawn.

Similar in effect is *R. v. BALL*, [1937]1 W.W.R.482 at p.485, in which it was held that the failure to include the word "wilfully" was fatal to the conviction.

In *R. v. GRIFFIN*(1935), 63 C.C.C.286(N.B.C.A.), the following appears at p.290:

"In *LEWIS v. GREAT WESTERN RAILWAY CO.*(1877), 47 L.J.Q.B. 131, at p.139 . . . . I find it was held by Brett and Cotton, L.JJ., that to be wilful—'There must be a doing of something which the person doing it knows will cause risk or injury, or the doing of an unusual thing with reference to the matter in hand, either in spite of warning or without care, regardless of whether or not it will cause injury.'"

R. v. GOODMAN, [1951]2 W.W.R.127 (B.C.C.A.) was a case of obstruction under s.168. Robertson, J.A., with whom Smith, J.A. agreed, after citing the words of Lopes, L.J., quoted above, proceeds to refer to offences under Part VIII (but without reference to s.509 where he says "wilfully" is used with the meaning as ordinarily used in civil courts), and after quoting *R. v. GRIFFIN*, comes to the conclusion that "wilfully" in s.168 applies to a state of circumstances where the person charged knows what he is doing and intends to do what he is doing and is a free agent.

To quote again from *R. v. GRIFFIN, supra:*

". . . . . it has been held both in England and American Courts that the

Section 24—*continued*

word 'wilful' imports design, intention and purpose and that when applied to the intent with which an act is done implies a purpose or willingness to commit the act. This also applies when it is used in criminal or penal statutes or criminal law in respect to a violation of which it has been said that the word 'wilfully' has an understood and accepted, unrestricted or well defined meaning and is to be given some force, implying as it does a deliberate purpose to accomplish something forbidden, a determination to execute one's own will in spite of and in defiance of law."

Protection of Persons Administering and Enforcing the Law.

PROTECTION OF PERSONS ACTING UNDER AUTHORITY.—When not protected.

25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

***(a)* as a private person,**

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

***(c)* in aid of a peace officer or public officer, or**

***(d)* by virtue of his office,**

is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

(2) Where a person is required or authorized by law to execute a process or to carry out a sentence, he or any person who assists him is, if he acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

(3) Subject to subsection (4), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless he believes on reasonable and probable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm.

(4) A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner.

This section embodies the former ss.23-27, 29-39, and 41-45.

It has been observed that the criminal law could be enforced on no other basis than a presumption that it is known to everyone. It is equally true that it could not be enforced on any other basis than that the state owes protection to those to whom it entrusts the duty of enforcing it. It is an old maxim of law that *"Quando aliquid mandatur, mandatur et omne*

OLD CODE:

23. Every ministerial officer of any court authorized to execute a lawful sentence, and every gaoler, and every person lawfully assisting such ministerial officer or gaoler, is justified in executing such sentence.

24. Every ministerial officer of any court duly authorized to execute any lawful process of such court, whether of a civil or criminal nature, and every person lawfully assisting him, is justified in executing the same.
(2) Every gaoler who is required under such process to receive and detain any person is justified in receiving and detaining him.

25. Every one duly authorized to execute a lawful warrant issued by any court or justice of the peace or other person having jurisdiction to issue such warrant, and every person lawfully assisting him, is justified in executing such warrant.
(2) Every gaoler who is required under such warrant to receive and detain any person is justified in receiving and detaining him.

26. If a sentence is passed or process issued by a court having jurisdiction under any circumstances to pass the sentence or issue such process, or if a warrant is issued by a court, justice or person having jurisdiction under any circumstances to issue the warrant, the sentence passed or process or warrant issued shall be sufficient to justify the officer or person thereby authorized, to execute the same, and every gaoler and person lawfully assisting in executing or carrying out such sentence, process or warrant, although the court passing the sentence or issuing the process had not in the particular case authority to pass the sentence or to issue the process, or although the court, justice or other person in the particular case had no jurisdiction to issue, or exceeded its or his jurisdiction in issuing, the warrant, or was, at the time when such sentence was passed or process or warrant issued, out of the district in or for which such court, justice or person was entitled to act.

27. Every officer, gaoler or person executing any sentence, process or warrant, and every person lawfully assisting such officer, gaoler or person, shall be protected from criminal responsibility if he acts in good faith under the belief that the sentence or process was that of a court having jurisdiction, or that the warrant was that of a court, justice or other person having authority to issue warrants, and if it be proved that the person passing the sentence or issuing the process acted as a court under colour of having some appointment or commission lawfully authorizing him to so act, or that the person issuing the warrant acted as a court, justice or other person having such authority, although in fact such appointment or commission did not exist or had expired, or although in fact the court or the person passing the sentence or issuing the process was not the court or the person authorized by the commission to act, or the person issuing the warrant was not duly authorized so to act.

29. Every one acting under a warrant or process which is bad in law on account of some defect in substance or in form apparent on the face of it, if he in good faith and without culpable ignorance and negligence believes that the warrant or process is good in law, shall be protected from criminal responsibility to the same extent and subject to the same provisions as if the warrant or process were good in law, and ignorance of the law shall in such case be an excuse.
(2) It shall be a question of law whether the facts of which there is evidence may or may not constitute culpable ignorance or negligence in the belief of such person that the warrant or process is good in law.

Section 25—*continued*

per quod pervenitur ad illud". When anything is commanded, everything by which it can be accomplished is also commanded, or in other words, what the law requires it justifies.

At the same time, it is necessary under our system and under the system from which we inherited it, that there be a proper balance between the liberty of the subject on the one hand, and the protection of society on the other. That is recognized in s.5 *ante*, and it is recognized too in the words of Lord Simonds, [1947] A.C., at p.591:

"Is citizen A. bound to submit unresistingly to arrest by citizen B. in ignorance of the charge made against him? I think, my Lords, that cannot be the law of England. Blind, unquestioning obedience is the law of tyrants and of slaves: it does not yet flourish on English soil."

And the balance is held in the words of Scott, L.J., in *DUMBELL v. ROBERTS*(1944), 60 T.L.R. 231, as follows:

"The power possessed by constables to arrest without warrant, whether at common law for suspicion of felony, or under statutes for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion, is a valuable protection to the community; but the power may easily be abused and become a danger to the community instead of a protection. The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not required before acting to have got anything like a *prima facie* case for conviction. But the duty of making such inquiry as the circumstances of the case ought to indicate to a sensible man is without difficulty, presently practicable, does rest on them; for to shut your eyes to the obvious is not to act reasonably, ... The British principle of personal freedom, that every man should be presumed innocent until he is proved guilty, applies also to the police function of arrest—in a very modified degree, it is true, but at least to the extent of requiring them to be observant, receptive and open-minded, and to notice any relevant circumstance which points either way, either to innocence or to guilt . . . . . I am not suggesting a duty on the police to try to prove innocence; that is not their function; but they should act on the assumption that their *prima facie* suspicion may be ill-founded."

In this connection it is unnecessary to make any lengthy reference to the judges because the rule is ancient that they have complete immunity for what they say and do in the execution of their offices. It may be said, however, that in the case of *O'CONNOR v. WALDRON*(1935), 152 L.T.R.289(P.C.), in which the defendant was a Commissioner appointed under the Canadian *Combines Investigation Act* and was sued for slander as a result of certain remarks made by him in the course of his investigation, Lord Atkin said:

"The law as to judicial privilege has in process of time developed. Orginally it was intended for the protection of judges sitting in recognized courts of justice established as such. The object no doubt was that judges might exercise their functions free from any danger that they might be called to account for any words spoken as judges. The doc-

OLD CODE:

30. Every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who, on reasonable and probable grounds, believes that any person has committed that offence, is justified in arresting such person without warrant, whether such person is guilty or not.

31. Every one called upon to assist a peace officer in the arrest of a person suspected of having committed the offence mentioned in the last preceding section, is justified in assisting, if he knows that the person calling on him for assistance is a peace officer, and does not know that there is no reasonable ground for the suspicion.

32. Every one is justified in arresting without warrant any person whom he finds committing any offence for which the offender may be arrested without warrant, or may be arrested when found committing.

33. If any offence for which the offender may be arrested without warrant has been committed, any one who, on reasonable and probable grounds, believes that any person is guilty of that offence is justified in arresting him without warrant, whether such person is guilty or not.

34. Every one is protected from criminal responsibility for arresting without warrant any person whom he, on reasonable and probable grounds, believes he finds committing by night any offence for which the offender may be arrested without warrant.

35. Every peace officer is justified in arresting without warrant any person whom he finds committing any offence.

36. Every one is justified in arresting without warrant any person whom he finds by night committing any offence.

(2) Every peace officer is justified in arresting without warrant any person whom he finds lying or loitering in any highway, yard or other place by night, and whom he has good cause to suspect of having committed or being about to commit any offence for which an offender may be arrested without warrant.

37. Every one is protected from criminal responsibility for arresting without warrant any person whom he, on reasonable and probable grounds, believes to have committed an offence and to be escaping from and to be freshly pursued by those whom he, on reasonable and probable grounds, believes to have lawful authority to arrest that person for such offence.

38. Nothing in this Act shall take away or diminish any authority given by any Act in force for the time being to arrest, detain or put any restraint on any person.

39. Every one executing any sentence, warrant or process, or in making any arrest, and every one lawfully assisting him, is justified, and protected from criminal responsibility, as the case may be, in using such force as may be necessary to overcome any force used in resisting such execution or arrest, unless the sentence, process or warrant can be executed or the arrest effected by reasonable means in a less violent manner.

41. Every peace officer proceeding lawfully to arrest, with or without warrant, any person for any offence for which the offender may be arrested without warrant, and every one lawfully assisting in such arrest, is justified, if the person to be arrested takes to flight to avoid arrest, in using such force as may be neces-

Section 25—*continued*

trine has been extended to tribunals exercising functions equivalent to those of an established court of justice."

He held that a Commissioner appointed under the Act had not the attributes of a Court of Justice, and said:

"The defendant in this case will be protected if he establishes that he spoke the words complained of on a privileged occasion, and the plaintiff fails to prove express malice. This is the measure of protection given to other administrative officers exercising similar duties, and their Lordships know of no legal principle which affords any further or better protection."

In *GARNETT v. FERRAND*(1827), 6 B.&C.611, it was held that no action will lie against the judge of a court of record for anything done by him in his judicial capacity, and therefore trespass cannot be maintained against a coroner (whose court is a court of record) for turning a person out of a room where he is about to take an inquisition.

The repealed Code dealt with this subject in ss.23 to 52, a series by which protection was granted to the police, the sheriff and other peace officers, to persons subject to military law, and, in some instances, to private persons in the exercise of their duties or rights in the administration of the criminal law. They correspond to ss.25 *et seq.* in the E.D.C. which were largely declaratory of the common law, although with exceptions in that respect as will appear.

With reference to the common law, the following appears in Hale, P.C. Vol.2,85-86:

"There are certain officers and ministers of public justice, that *virtute officio* are empowered by law to arrest felons, or those that are suspected of felony, and that before conviction, and also before indictment.

And these are under a greater protection of the law in execution of this part of their office upon these two accounts. 1. Because they are persons more eminently trusted by the law, as in many other acts incident to their office, so in this. 2. *Because they are by law punishable, if they neglect their duty in it.*

And therefore it is all the reason that can be, that they should have the greatest protection and encouragements in the due execution of their office, since *their actings herein are not* arbitrary but necessary duties (not permissions) and under severe punishments in their neglect thereof."

The common law powers of arrest were discussed exhaustively in *WALTERS v. SMITH*, [1914]1 K.B.595, from the historical point of view and otherwise. The whole judgment is important and has been followed in Canada, but only a short extract will be quoted here. After citing with approval a statement in Bullen and Leake's Precedents of Pleading, 3rd.ed.(1868) p.797, that "A private individual is justified in himself arresting a person or ordering him to be arrested where a felony has been committed and he has reasonable ground of suspicion that the person accused is guilty of it,"—the judgment proceeds at p.606:

"It is by reference to the earlier works on the common law, which has never been altered, that one must ascertain what is the law of the land. I cannot find that any doubt has ever been expressed upon the accu-

OLD CODE:

Section 41—continued

sary to prevent his escape by such flight, unless such escape can be prevented by reasonable means in a less violent manner.

42. Every private person proceeding lawfully to arrest without warrant any person for any offence for which the offender may be arrested without warrant is justified, if the person to be arrested takes to flight to avoid arrest, in using such force as may be necessary to prevent his escape by flight, unless such escape can be prevented by reasonable means in a less violent manner, if such force is neither intended nor likely to cause death or grievous bodily harm.

43. Every one proceeding lawfully to arrest any person for any cause other than an offence in the last section mentioned is justified, if the person to be arrested takes to flight to avoid arrest, in using such force as may be necessary to prevent his escape by flight, unless such escape can be prevented by reasonable means in a less violent manner, if such force is neither intended nor likely to cause death or grievous bodily harm.

44. Every one who has lawfully arrested any person for any offence for which the offender may be arrested without warrant is protected from criminal responsibility in using such force in order to prevent the rescue or escape of the person arrested as he believes, on reasonable grounds, to be necessary for that purpose.

45. Every one who has lawfully arrested any person for any cause other than an offence for which the offender may be arrested without warrant is protected from criminal responsibility in using such force in order to prevent his escape or rescue as he believes, on reasonable grounds, to be necessary for that purpose, if such force is neither intended nor likely to cause death or grievous bodily harm.

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racy of the proposition of law which I have stated in the simplest language from the note in Bullen and Leake's Precedents of Pleading. I am bound to follow the law thus laid down, and, moreover, I am convinced on consideration that it is based on sound principle."

At p.607:

"When a person, instead of having recourse to legal proceedings by applying for a judicial warrant for arrest or laying an information or issuing other process well known to the law, gives another into custody, he takes a risk upon himself by which he must abide, and if in the result it turns out that the person arrested was innocent, and that therefore the arrest was wrongful, he cannot plead any lawful excuse unless he can bring himself within the proposition of law which I have enunciated in this judgment."

The same question was recently discussed in the House of Lords in *CHRISTIE v. LEACHINSKY*, [1947]A.C.573. In that case Lord Simon summed up his review of the authorities in the following propositions:

"(1). If a policeman arrests without warrant upon reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words a citizen is entitled to know on what charge or on suspicion of what crime he is seized. (2) If the citizen is not so informed but is nevertheless

Section 25—*continued*

seized, the policeman, apart from certain exceptions, is liable for false imprisonment. (3) The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained. (4) The requirement that he should be so informed does not mean that technical or precise language need be used."

Lord du Parcq (p.596) quoted Bullen and Leake, *op cit.*, p.795, that "a constable is justified in arresting a person without a warrant, upon a reasonable suspicion of a felony having been committed, and of the person being guilty of it, although no felony has in fact been committed", and concluded a tracing of the development of the rule as follows:

"In 1827, however, Lord Tenterden, C.J., giving the judgment of the Court of King's Bench in *BECKWITH v. PHILBY*(1827), 6 B. & C. 635, distinguished the case of the constable from that of the private individual, and said that 'a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities.' This would seem to conclude the matter. But the old rule died hard, and even in 1869, in the thirtieth edition of Dr. Burn's Justice of the Peace (vol. 1, p.295), a doubt is expressed whether the constable who acts on his own initiative is in any different position from the private citizen, save in some exceptional cases. No such doubt can be justified today. The judges of England have long regarded the law on this point as settled—see, for instance, the judgment of Blackburn, J. in *HADLEY v. PERKS*(1866), L.R. 1 Q. B. 444, and that of Isaacs, C.J., in *WALTERS v. W. H. SMITH & SON, LTD.*, [1914] 1 K. B. 595 and juries have long been directed as a matter of course in accordance with the rule stated in the passage which I have quoted from Bullen & Leake."

His Lordship said also (p.600):

"Arrest and imprisonment, without a warrant, on a charge which does not justify arrest, are unlawful and, therefore, constitute false imprisonment, whether the person making the arrest is a policeman or a private individual."

It may be observed that this case has special reference to the principles laid down in former Code s.40, but it was applied in Canada in *R. v. HASTINGS*, [1947]4 D.L.R.748, in the Appeal Division of the New Brunswick Supreme Court, to ss.646 to 652 inclusive, which authorize arrest without warrant, and to ss.30 to 37, which afford relief from liability. A conviction for inflicting grievous bodily harm was affirmed against a policeman, it being found that he had not been justified either under the sections mentioned or at common law for what he had done.

The Report of the Imperial Commissioners with reference to the sections in the E.D.C. contained the following:

"There is a difference in the language used in the sections in this part which probably requires explanation. Sometimes it is said that the person doing an act is 'justified' in so doing under particular circumstances. The effect of an enactment using that word would be not only to relieve him from punishment, but also to afford him a statutable

defence against a civil action for what he had done. Sometimes it is said that a person doing an act is 'protected from criminal responsibility' under particular circumstances. The effect of an enactment using this language is to relieve him from punishment, but to leave his liability to an action for damages to be determined on other grounds, the enactment neither giving a defence to such an action where it does not exist, nor taking it away where it does. This difference is rendered necessary by the proposed abolition of the distinction between felony and misdemeanour.

We think that in all cases where it is the duty of a peace officer to arrest, (as it is in cases of felony) it is proper that he should be protected as he now is, from civil as well as from criminal reponsibility. And as it is proposed to abolish the distinction between felony and misdemeanour, on which most of the existing law as to arresting without a warrant depends, we think it is necessary to give a new protection from all liability (both civil and criminal) for arrest, in those cases which by the schemes of the Draft Code are (so far as the power of arrest is concerned) substituted for felonies. In those cases therefore which are provided for in sections 32, 33, 34, 37, 38 (22, 23, 24, 27, 28 of the Code of 1892) the word 'justified' is used. A private person is, by the existing law, protected from civil responsibility for arresting without warrant a person who is on reasonable grounds believed to have committed a felony, provided a felony has actually been committed, but not otherwise. In section 35, (25 of the Code of 1892) providing an equivalent for this law, the word used is 'justified'.

On the other hand, where we suggest an enactment which extends the existing law for the purpose of protecting the person from criminal proceedings, we have not thought it right that it should deprive the person injured of his right to damages.

And in cases in which it is doubtful whether the enactment extends the existing law or not, we have thought it better not to prejudice the decision of the civil courts by the language used. In cases therefore such as those dealt with by sections 29, 30, 31, 36, 39, 46, 47, (19, 20, 21, 26, 29, 36, 37 of the Code of 1892) we have used the words 'protected from criminal responsibility.' "

It appears, too, that the Imperial Commissioners used the word "justified" where their suggestions involved no change in the law, and otherwise that they used the words "protected from criminal responsibility".

It may be said in favour of the retention of these sections that, since they largely embody the common law, they are useful in formulating the rules of law applicable to particular cases and so serve the purpose of a code. However, in Canada, it was necessary to read them in the light of s.646 *et seq.*, which had no counterpart in the E.D.C. Partly for that reason, partly because the cases almost invariably return to the common law, and partly in keeping with the general scheme of the revision as already mentioned, there has been a good deal of consolidation. In the result, and in accord with the principles stated at the beginning of this note s.25 covers the former ss.23 to 27, 29, 30 to 37, 39, and 41 to 45. The following is a review of the cases upon them:

Section 23 (Execution of sentence).

There are no cases on this section, which is common law based upon

Section 25—*continued*

the principle that what the law requires it justifies. In *POND'S* case, an American case reported in Horrigan's Cases on Self Defence, p.814, it is remarked that "Those only were justifiable homicides where the slayer was regarded as promoting justice, and performing a public duty."

Section 24 (Execution of process).

This should be read with ss.26 and 27 (Execution of erroneous sentence or process, and Execution of sentence or process without jurisdiction).

It may be doubted whether these sections were ever necessary. S.165 made it an offence to disobey "any lawful order made by any court of justice".

Section 25 (Execution of warrants).

R. v. DAVIES(1861), 8 Cox,C.C.486. Upon an indictment for an assault upon a County Court bailiff in the execution of his duty, the production of a warrant of the County Court Judge for the apprehension of the prisoner, is a sufficient justification of the bailiff in apprehending the prisoner, without proof of the previous proceedings authorizing the warrant, even though the judgment be obtained in one county and the warrant sent for execution in a different county.

SYMONDS v. KURTZ(1889), 16 Cox,C.C.726. Field, J., at p.728: "It is a general principle of law that every person whose house is entered, and whose property seized, is entitled to know the authority under which it is done, and to be able to see whether that authority has been followed. Here the warrant under the statute was given to Sim who had no authority to hand it over to another person for execution. It would be a shocking thing to say that an authorized man can give the warrant to any person he pleases and allow that person to commit a trespass."

HICKS v. McCUNE(1921), 36 C.C.C.141. In this case it was held that the defendant, by failing to set out the causes of his suspicion, rendered the magistrate incompetent, for want of jurisdiction, to issue the (search) warrant either at common law or under the *Criminal Code*. That being so, he, the defendant, was liable for the consequences which followed from his act. These consequences were, the warrant being void, that the trespass and search made under it were unlawful, and the defendant, having taken part in them, is liable in damages and is not protected by s.25 of the *Criminal Code*. Riddell, J., dissenting in part, considered that the warrant was irregular and not void, that the defendant was entitled to the protection of s.26 as "lawfully assisting" in the execution of the warrant, and that if liable at all he was liable *qua* prosecutor for putting the law in motion.

Ex p. McMANUS(1894), 32 N.B.R.481 at p.483:

"In *BLATCH v. ARCHER*(1774), 1 Cowp. 63, it was held that an arrest must be by the authority of the bailiff; but he need not be the hand that arrests, nor in the presence, nor actually in sight, nor within any precise distance of the person arrested; yet he must be so near as to be near at hand and be acting in the arrest. This is a decision of Lord Mansfield, and I think governs this case. Long was acting in the

arrest, and had the warrant. Weyman, who, it is alleged, made the arrest, was near enough to see the constable. Long and Weyman were acting together . . . . " Arrest held good.

Sections 26 and 27. (Execution of erroneous sentence or process and sentence or process without jurisdiction).

The report of the English Commissioners states that the law is perhaps extended by the words in s.26:

"or although the court, justice or other person in the particular case had no jurisdiction to issue, or exceeded its or his jurisdiction in issuing, the warrant, or was, at the time when such sentence was passed or process or warrant issued, out of the district in or for which such court, justice or person was entitled to act."

Marginal notes to this section are as follows:

"The result of the authorities justifies us in saying that wherever a ministerial officer, who is bound to obey the orders of a court or magistrate (as, for instance, in executing a sentence or effecting an arrest under warrant), and is punishable by indictment for disobedience, merely obeys the order which he has received, he is justified, if that order was within the jurisdiction of the person giving it.

"And we think that the authorities show that a ministerial officer obeying an order of the court, or the warrant of a magistrate, is justified, if the warrant or order was one which the court or magistrate could, under any circumstances, lawfully issue, though the order or warrant was in fact obtained improperly; or, though there was a defect of jurisdiction in the particular case, which might make the magistrate issuing the warrant civilly responsible: on the plain principle that a ministerial officer is not bound to enquire, what were the grounds on which the order or warrant was issued, and is not to blame for acting on the supposition, that the court or magistrate had jurisdiction."

A marginal note to s.27 reads:

"Though cases of this sort have rarely arisen in practice, we think we are justified by the opinion of Lord Hale (1 Hale P.C., 498) in saying that the order of a court, having a colour of jurisdiction, though acting erroneously, is enough to justify the ministerial officer."

There are the following cases under these sections:

WEST v. SMALLWOOD(1838), 3 M.&W.418. Where a party lays a complaint before a magistrate on a subject-matter over which he has a general jurisdiction, and the magistrate grants a warrant upon which the party charged is arrested, the party laying the complaint is not liable as a trespasser, although the particular case be one in which the magistrate had no authority to act.

R. v. KING(1889), 18 O.R.566. Held that as the justices had jurisdiction over the offence, and the warrant was valid on its face, it afforded a complete protection to the constable executing it, and that defendant was properly convicted of assaulting him while attempting to execute it, notwithstanding that the awarding of the punishment may have been erroneous, in directing imprisonment for non-payment of the fine and costs, including costs of conveying to gaol, as not authorized by the said Act.

Section 25—*continued*

2 Hawk. P.C. c.13, s.11:

"It is the better opinion at this day, that any constable or even private person, to whom a warrant shall be directed, from a justice of (the) peace to arrest a particular person for felony, or any other misdemeanor *within his jurisdiction* may lawfully execute it, whether the person mentioned in it be in truth guilty or innocent, and whether he were before indicted of the same offence or not, and whether any felony were in truth committed or not. For however the justice himself may be punishable for granting such a warrant without sufficient grounds, it is reasonable that he alone should be answerable for it, and not the officer, who is not to examine or dispute the reasonableness of his proceeding; and therefore it seems that the old books . . . . . which say generally, that no one can justify an arrest upon a suspicion of felony, unless he himself suspect the party, and unless the felony were in truth committed, ought to be intended only of arrests made by a person of his own head, or in obedience to the command of a constable or other such like ministerial officer, and not of such as are made in pursuance of the warrant of a justice of peace."

In *R. v. MONKMAN*(1892), 8 Man.R.509, prior to the coming into force of the *Criminal Code*, it was decided that where a writ of *fi. fa.* is delivered to a sheriff in proper form, and on its face regular, he is bound to execute it. *Per* Taylor, C.J.:

"Apart from the error in the date of the judgments, the writs are regular in form, so they were a sufficient authority and protection to the sheriff, who was bound to act under them. . . . . .

There seems good reason for this. When a sheriff has handed to him a writ in proper form, and on its face regular he is bound to execute it. To hold otherwise, would require the sheriff in every case before executing process to search as to the regularity of previous proceedings and to act at the risk of being held responsible, should there be irregularity in these. The object of the statute would be wholly defeated, if the contention of the defendant should prevail."

In *SLEETH v. HURLBERT*(1895), 25 S.C.R.620 (S.C. Can.), it was held that a search warrant issued under the Canada Temperance Act is good if it follows the prescribed form, and if it has been issued by competent authority and is valid on its face notwithstanding that it may be bad in fact and may have been quashed or set aside. Sedgwick, J., who delivered the majority judgment, quoted the report of the Imperial Commissioners (*ante*) and adds that this view of the law was adopted by the Canadian Parliament in s.18(26) of the *Criminal Code* of 1892.

O'NEIL v. A.-G. CAN.(1896), 1 C.C.C.303(S.C. Can.) at p.311:

"The rule of law is that the acts of a person assuming to exercise the functions of an office to which he has no legal title are, as regards third persons, that is to say, with reference to all persons but the holder of the legal title to the office, legal and binding. Especially is this so in the case of officers holding over and continuing to perform official duties after their term has expired. Further, this rule has been held to apply to a delegate of a delegate whose appointment would be manifestly without legal authority. Further, it has been held to apply even to judicial officers and *a fortiori* to those appointed for the performance

of mere ministerial duties such as head constable. And particularly it has been held to apply to officers who have failed to qualify themselves by taking an oath of office prescribed by law."

It may be noted in passing that this appears to be the only case in which question was raised concerning the constitutional validity of this series of sections. The action was one to recover money seized in a common gaming house under a search warrant and ordered to be forfeited. The Supreme Court held that the provision authorizing the magistrate to order the forfeiture was not *ultra vires* as an interference with property and civil rights. The Chief Justice said that:

"The constitutional question as to the validity of the legislation applicable to the case is so destitute of any real foundation that it calls for no observations".

O'NEIL v. A.-G. CANADA, was followed in *R. v. CYR*(1917), 29 C.C.C.77, 2 W.W.R.1185 at p.1187, where the Supreme Court of Canada was held to have adopted the principle laid down in *MARGATE PIER CO. v. HANNAN*(1819), 3 B. & Ald.266; 106 E.R.661, where it was said that:

"It is obvious that, if the act of the justice, in issuing a warrant, be invalid on the ground of such an objection as the present, all persons who act in the execution of the warrant will act without any authority; a constable who arrests, and a gaoler who receives a felon, will each be a trespasser; resistance to them will be lawful; everything done by either of them will be unlawful; and a constable, or person aiding him, may, in some possible instance, become amenable even to a charge of murder, for acting under an authority, which they reasonably considered they were bound to obey, and of the invalidity whereof they were wholly ignorant . . . . . The interest of the public at large requires that the acts done should be sustained; sufficient effect is given to the statutes by considering them as penal upon the party acting."

It is said in *R. v. CYR* that:

"By s.29 *et seq.* of the Criminal Code, officers executing process by a person acting as justice of the peace may now be relieved from the liabilities referred to by Abbott, J. (*supra*), but, nothwithstanding that these provisions appeared in the Code in 1902, the Supreme Court of Canada in 1906 adopted the principle laid down in that case," *i.e.* in *O'NEIL v. A.-G. CAN. supra.*

MOTT v. MILNE(1898), 31 N.S.R.372(C.A.), was an action for damages for false arrest which was dismissed at trial. An appeal was dismissed on an equal division of the court, it being held that as the justice had acted with some colour of reason and with a *bona fide* belief that he was acting in pursuance of his legal authority, he was entitled to protection, even though he may have proceeded illegally or in excess of his jurisdiction.

MURFINA v. SAUVE et al.(1901), 19 Que.S.C.51: A justice of the peace who issues a warrant to arrest without enquiring as to the informant's grounds of suspicion, renders himself liable if there was no reasonable or probable cause for the charge.

In *COTE v. COTE*(1926), 32 R.L.N.S.344, an action for damages for false arrest, ss.25,26, and 29 were referred to but it was held on the facts that there was reasonable and probable cause.

Section 25—*continued*

Section 29 (Irregular warrant or process).

BEATTY v. RUMBLE(1891), 21 O.R.184.

"The plaintiff knowing that the crops were in the custody of the sheriff and locked up for safe-keeping, proceeded to break open the doors of the granary in order to carry off and dispose of this property. . . . . Special legislation is found in Canada whereby every one who secretly or openly takes or carries away, without lawful authority, any property under lawful seizure and detention, is guilty of larceny: R.S.C. c.164, s.50. And any one found committing any such offence may be immediately apprehended by any person without a warrant and forthwith taken before a magistrate: R.S.C. c.174, s.25. Generally it is laid down that it is the duty of all persons to arrest without warrant any person attempting to commit a felony. . . . . The jury have found that he (deft.) acted as sheriff's bailiff, and not as a constable, but the finding is not material, as it was incumbent on any by-stander to act as (deft.) did."

R. v. SABEANS(1903), 7 C.C.C.498. In this case a policeman arrested accused whom he suspected of being one of the parties who had committed a robbery. He had a warrant in which accused was named as Elderkin and afterwards altered the warrant to the name Sabeans, apparently the accused's proper name.

It was held on a case reserved that as the constable would be justified by s.22(28) in arresting without a warrant, the justification would extend to an arrest in respect of which he held a warrant which was insufficient by reason of the misnomer.

The remarks of Tindal, C. J. in *HOYE v. BUSH*(1840), 1 Man. & G. 775, were cited where he said:

"Where indeed it can be shewn that a felony has been actually committed the constable may throw the warrant aside. It will be sufficient in such a case for the constable to shew that he has taken the person really charged with the offence however he may have been misdescribed in the warrant."

GAUL v. ELLICE(1902), 3 O.L.R.438. In this case the warrant was bad as the conviction awarded one fine against three defendants. It was held, however, that the constable, in arresting under the warrant, had acted as such in executing it and was entitled to protection, and was protected from civil action by R.S.O.1897, c.88, and by Code ss.975,976 and 980. *Ex p. McCLEAVE*(1900), 35 N.B.R.100, was referred to but distinguished, and "even if well decided, ought not to be read as applicable to the ordinary course of criminal procedure."

Section 30 (Arrest by peace officer).

This section is commonly applied along with section 41 (Peace officer preventing escape). Some special considerations arise upon it in the matter of jurisdiction, in the matter of arrest on telegram, and also upon the question whether it merely justifies or whether it authorizes arrest.

First, however, upon the section generally there may be quoted the case of *ANDERSON v. JOHNSON*(1918), 30 C.C.C.268, as follows:

"This section is simply declaratory of the common law. By the com-

mon law, any person (whether a peace officer or not) may arrest any one on probable suspicion of felony, and a peace officer under such circumstances is protected, even if it should turn out that no such felony had been committed by any one, provided he can shew that he had reasonable ground for suspecting the party arrested."

In *R. v. ROACH*(1922), 38 C.C.C.295, at p.297, the following appears *per* Stuart, J.A.:

"Parliament has specified the cases in which people may be arrested without warrant. Obviously it was not thought right to leave it open to police officers to arrest any person whenever they please."

Per Beck, J.A. at p.301:

"As to a peace officer arresting without a warrant, sections 30 to 37 are provisions 'justifying' or 'protecting from criminal responsibility' police officers and others, where an arrest is made without a warrant. These sections do not *authorize* arrest without a warrant. See notes under section 35 in Tremeear's 1919 ed. of the Cr. Code.

Section 646 authorizes arrest by *any person* without a warrant of any one 'found committing' any one of a large number of enumerated offences; sec.647 authorizes the arrest by a peace officer without warrant of any one who *has committed* any one of the offences enumerated in the next preceding section or any one of a number of other offences enumerated. The keeping of a disorderly house is not one of the enumerated cases. Section 648 authorizes a *peace officer* to arrest without warrant anyone whom he *finds committing any criminal offence.*

It is quite clear that there are some criminal offences which a person cannot be 'found committing', because they depend upon circumstances which are not all apparent at any particular time. (Hals. p. 305 note (j).)

. . . . . It is most important to keep such extreme powers as that of arrest without warrant within restrictive limits, for they are easily capable of great abuse, which in all probability would in most cases be without remedy."

And Stuart, J.A. at p.296 said:

"It is helpful, I think, to observe that sec. 648 (2) says that *any person* (not merely a peace officer) may arrest without a warrant any person whom he finds committing any offence 'by night'. This, I think, confirms the view expressed in the cases referred to by my brother Beck that the phrase 'finds committing an offence' is intended to apply to offences which consist in specific individual acts, not to those which consist in a general course of conduct."

The following is a quotation from *R. v. BELYEA*(1915), 24 C.C.C.395, at p.402:

"Unquestionably at common law, as well as now by statute, not only a peace officer but any person is empowered to arrest upon the spot, or upon fresh pursuit, any person found committing certain crimes, even though the offence was committed against the person so arresting. And, as pointed out in Bacon Abr., title "Constable, (c)," in case of an affray, a peace officer may arrest persons actually engaged in an 'affray whether the violence was done or offered to another or *even to himself.*'

But the reasons which render this advisable, even when the offence is being committed against the person making the arrest, fail when the offence has been already committed and the offender is not

Section 25—*continued*

being freshly pursued. The powers given to peace officers, as well as the more restricted right possessed by private persons, to arrest for past offences such as at common law were formerly felony, but include now all crimes specified in the Code as those for which arrest may be made without warrant, were, and are, no doubt granted by reason of the paramount importance of preserving the King's peace; and because, without such power to arrest, criminals must often escape justice. But it can very rarely, if ever, happen that any public interest would suffer by restricting, in the case of past offences, the powers so conferred, to such peace officers, or persons, as, not being themselves directly sufferers from the offence, are in a position to act without bias or prejudice. On the other hand, to allow persons so injured, and who would therefore be very liable to act with undue harshness and from motives of revenge, or in furtherance of their own personal aims instead of exclusively in the public interest, would, I think, be a direct violation of that sound principle of law which requires that, so far as may be, public officers in the performance of the duties imposed upon them, shall stand indifferent, and act without bias or prejudice."

Concerning arrest on telegram, the following may be noted:

In *R. v. CLOUTIER*(1898), 12 Man.R.183 (arrest in Winnipeg on telegram from Montreal) Killam, J. said:

"By section 22 (30) of the Code 'Every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not,' etc. It is argued that this clause merely enables the officer to plead or raise such matter in defence if proceeded against for the arrest. In my opinion the section operates to protect officers, not merely from civil or criminal proceedings, but also to authorize the arrest and make it lawful. It appears to me, too, that the clause applies, not only when the arrest could be made by any person without a warrant, but also to cases in which a peace officer only may so arrest. In the latter class of cases, as well as in the former, it can properly be said that the offence is one for which the offender may be arrested (by some person) without a warrant."

It is here that the conflict arises as to the effect of the sections. It will be observed that this case states that the effect is not merely to afford a defence, but also to authorize the arrest. *R. v. DOYLE, infra; PLESTED v. McLEOD*(1910), 15 W.L.R.533, and *R. v. SUCHAKI*(1923), 41 C.C.C. 166, all hold that "this section is for the purpose of authorizing the arrest", but in the latter two, although they are dealing with s.35, there is a clear contradiction in principle.

R. v. SHYFFER(1910), 15 W.L.R.323. Accused arrested on telegram in Vancouver for crime committed in Quebec. The police of one province can arrest without warrant a person charged with having committed a crime in another province only where the crime is one for which the accused could have been arrested without warrant in the province where the offence was committed, or where the accused is escaping fresh pursuit. Ordinary theft is not such an offence, nor was the coming of an officer from Montreal in September fresh pursuit when the offence was committed on August 1.

It is submitted with deference that this case was wrongly decided. S.347 is the *definition* of theft, and ordinary theft as referred to in the judgment falls under s.386, which is one of those enumerated in s.646.

R. v. WARD(1923), 53 O.L.R.568. Arrest in Toronto on telegram from Calgary for alleged offence under s.405, not justified. This is not an offence mentioned in s.646.

R. v. PANASES(1920), 36 C.C.C.309. Held that telegram was the basis of belief on reasonable and probable grounds in a case upon which arrest could be made without warrant.

Upon the question of jurisdiction there has been some conflict of opinion, but the weight of authority tends towards following *R. v. HUGHES*(1879), 4 Q.B.D.614, in which it was held that where the magistrate has jurisdiction over the person of the accused, and over the offence, it is immaterial how the accused was brought before the court. (See for example *R. v. BOURGEOIS*(1948), 92 C.C.C.229).

In the Hughes case, Lopes, J. said at p.622:

"I think the warrant in this case was mere process for the purpose of bringing the party complained of before the justices and had nothing whatever to do with the jurisdiction of the justices. I am of opinion that whether Stanley was summoned, brought by warrant, came voluntarily, was brought by force or under an illegal warrant, is immaterial; being before the justices, however brought there, if they had jurisdiction in respect of time and place over the offence, [they] were competent to entertain the charge."

This conflict is noted in an annotation to *ALTMAN v. MAJURY* (1916), 27 C.C.C.398, and in *WHITWORTH v. DUNLOP*(1934), 62 C.C.C.41. Crankshaw (1935 ed.) in notes to s.652 observes that Alberta and Manitoba have decided that there is no jurisdiction, while Ontario, British Columbia, New Brunswick and Nova Scotia, take the other view. Quebec may be added to the latter group in view of the decision in *BROWN v. R.*(1937), 63 Que.K.B.515.

APPLETON v. LEPPER(1869), 20 U.C.C.P.138. Defendant, a justice of the peace, issued his warrant against Plaintiff on an alleged charge of stealing a lease, without any information being laid. Held, that defendant was liable in trespass, as without an information on oath he had no jurisdiction over the person of the plaintiff, also that although the warrant was good on its face, he was not protected by C.S.U.C. c.126 (An Act for the protection of justices and others), unless the warrant was issued on a proper information.

Cf. this case with *MURFINA v. SAUVE*(1901), 19 Que.S.C.51 where a similar conclusion was reached under the Code.

MOUSSEAU v. CITY OF MONTREAL(1896), 12 Que.S.C.61. Held that a constable was not justified in arresting solely upon the unsworn statement of the informant that an offence had been committed the previous day. The court in assessing damages took into account that the information given the constable "while it did not justify their said action, rendered it to some extent excusable".

In *McGUINESS v. DAFOE*(1896), 23 O.A.R.704, the justice had issued his warrant without the information, which had been laid before him, having been actually sworn. At p.706:

Section 25—*continued*

"Section 23 (31) of the Code being read with section 22 (30), it seems plain that what both point out is the personal or individual act of the peace officer. Section 22 justifies the officer—justice or constable—in personally arresting a suspected person under certain circumstances without warrant; that is to say, just as if he had a warrant in his possession authorizing him to do it; and section 23 justifies everyone who is called upon to assist the peace officer in making the arrest, if he knows that he is a peace officer, and does not know that there are no reasonable grounds for the suspicion which justified the latter in acting."

At p.709:

"If, therefore, the justice is not himself personally arresting the offender on view or upon suspicion, or calling in some one to assist him in doing so, he can only act by issuing a warrant to apprehend the offender in the manner authorized by law. It is the former case to which sections 22 and 23 are applicable, the actual personal interference of the justice and those whom he calls to his assistance in making the arrest. There is no authority for saying that as peace officer he has any authority to send B. as a constable to arrest anywhere in his county a person whom he suspects of having committed an offence for which he may be arrested without warrant. B. may as constable or private person be in a position to justify the arrest by reason of his own suspicion. He cannot in such a case justify under A.'s (the justice's) command, and if he cannot justify by reason of his own suspicion, both A. and B. are wrongdoers, for A. cannot justify under section 22. If the constable can justify the arrest as upon his own suspicion it may perhaps be said that it was his arrest alone and not that of A. the defendant upon his command."

These sections are merely a codification of the common law.

R. v. SMITH(1907), 13 C.C.C.326. The primary importance of this case, in which a policeman was charged with manslaughter, lies in the application of s.41, *q.v.* In regard to s.30 the question that arose was whether or not the suspected offence was one for which the offender could be arrested without warrant.

R. v. DOYLE(1920), 35 C.C.C.6, at p.8:

"But section 30 *does not give authority to arrest.* It only provides that if an arrest is made under those conditions the arrest will be held to be justified, that is, the peace officer will escape from any of the civil or criminal consequences of doing an act which is not authorized by the law.....

It is not necessary to consider the question whether the word "offence" in sec. 30 of the Criminal Code includes an offence under the provincial Act. If it does, the only effect of the section is to justify an arrest made under the conditions set out, and to relieve the peace officer making the arrest from civil and criminal responsibility." (Italics added: Ed.)

R. v. GRAMAM(1921), 36 C.C.C.263, in which it was objected that accused was illegally before the court, having been arrested without warrant on a charge of keeping a bawdy house. Held that in the particular case the arrest was authorized under either s.30 or s.648. But in *R. v.*

BOTTLEY(1929), 51 C.C.C.385, accused similarly charged, was discharged on the ground that the warrant issued was in effect a blank warrant, and arrest without warrant could not be justified under these sections in the particular circumstances. See also *R. v. ROACH*(1923), 38 C.C.C.294.

GELFAND v. C.P.R.(1925), 44 C.C.C.325, at p.327:

"Under s. 30 of the Cr. Code the following conditions must appear to justify an arrest without a warrant:- (1) The peace officer must on reasonable and probable grounds have believed that an offence for which arrest without warrant could be made had been committed. (2) He must have believed on reasonable or probable grounds that the plaintiff had committed that offence."

VIGNITCH v. BOND(1928), 50 C.C.C.273 at 281:

"I have found there was no 'flight to avoid arrest' and even if there was, I find that escape of the plaintiff could have been prevented by reasonable means and in a less violent manner than by shooting him through the body."

Also constable should have informed him of cause of arrest. (s.40(2) and (3)).

R. v. HARLTON(1929), 51 C.C.C.329. The Appeal Division in Ontario considered s.30 in connection with s.260 under which killing in resisting arrest or escaping is murder, if grievous bodily harm is intended. A new trial was ordered with a direction that it should be made plain to the jury that s.260 has no application unless there was an actual and lawful arrest or attempt to arrest, and that the constable could not lawfully arrest unless that which is made necessary by s.30 is proved—*i.e.*, that upon reasonable and probable grounds the constable believed that an offence for which the offender might be arrested without a warrant had been committed, and also believed on reasonable and probable grounds that the accused had committed the offence.

MERIN v. ROSS(1932), 60 C.C.C.18:

"As I find that the defendant as a peace officer, was proceeding lawfully in the course of his duty to arrest without warrant the three men, including the deceased, as aforesaid, for an offence for which they might be arrested without warrant and that the deceased, as well as the others, took to flight to avoid arrest, the question seems to narrow itself down to whether or not the defendant was justified in shooting as he did, to prevent the escape of the men by flight. . . . . I cannot see that it is reasonable to believe that the escape would have been prevented . . . . . by any other reasonable means in a less violent manner."

In *WARNOCK v. FOSTER*, [1936]3 W.W.R.625, it was held that a police officer was not justified under s.30 in arresting a person without a warrant where he does not believe that person has committed an offence, even though he suspects that the arrested person has knowledge which will enable him to identify those guilty of an offence which has actually been committed.

ALBERT v. ST. VINCENT(1936), 74 Que.S.C.123. Accused arrested under Quebec liquor law. Re-captured after attempt to escape. Arrest held justified, ss.30, 32, 35, 40 and 41. In attempting to escape accused committed an offence under Code s.190.

Two recent cases may also be mentioned:

Section 25—*continued*

R. v. BREZACK, [1949]O.W.N.776. In this case the police were arresting the accused under the *Opium and Narcotic Drug Act,* and one of them put his finger into the mouth of the accused, having reasonable ground to believe that the drug was concealed there. It was held that the policeman was justified in doing so.

In *FREY v. FEDORUK*(1949), 95 C.C.C.206, it was held by the British Columbia Court of Appeal that a "peeping Tom" was guilty of an offence at common law for which arrest without warrant was justified under Code ss.32, 33 and 36(1), and that justification under s.30 implies the co-existence of authority to arrest without warrant where it has not first been expressly conferred by the Code. This judgment, however, was reversed by the Supreme Court of Canada in 1950 upon the ground that no offence at common law had been committed.

Section 31 (Persons assisting peace officers).

In *LEMAY v. MEGANTIC*(1921), 68 D.L.R.496, it was held that a town municipality which confirms the action of its town constable who has arrested a citizen maliciously and without proper cause, is liable in damages for such illegal arrest, but a person assisting the constable at his request, without malice and without knowing that there is no reasonable and proper cause for the arrest, is not liable.

Section 32 (Arrest of persons found committing offence).

Taschereau, p.17, notes of this section that:

"It is not clear that it was necessary to enact in these sections (namely 22, 23 and 24, later 30, 31 and 32) that a person who, being by law duly authorized to do so, arrests any one without warrant is justified in so doing."

In *McCATHERIN v. JAMER*(1912), 21 C.C.C.116, it was held that a magistrate who unlawfully issues a warrant of arrest without the sworn information required by law acts without jurisdiction and is liable in damages for false arrest. The fact that the constable might have arrested without warrant under a provincial statute did not protect the magistrate as it was found that the constable acted under the warrant.

In *R. v. STACKHOUSE*(1917), 29 C.C.C.151, the accused was charged with escaping from custody. It was alleged that accused was under arrest for assault but as the officer had no warrant and did not see the assault complained of, it was held that the arrest was illegal.

With reference to the words "finds committing", the following may be quoted: *DESJARDINS v. CITY OF MONTREAL*(1907), 14 Rev. de Jur. 70. The court held an arrest justified under ss.32 and 35 adopting the words of Tindal, C.J., in *HANWAY v. BOULTBEE*(1830), 4 C.&P.350:

"Still the words of the present statute must not be taken so strictly as to defeat its reasonable operation. Suppose a party seen in the act of committing the crime were to run away, and immediate and fresh pursuit to be made: I think that would be sufficient. So in this case, the party is actually seen in the commission of the act complained of; as soon as possible an officer is sent for, and he is taken as soon as possible. No greater diligence could be required; and that being the case I think it must be treated as an 'immediate apprehension' for

an offence which the Plaintiff, supposing under the circumstances that it was an offence at all, was 'found committing'."

R. v. HILLS(1924), 44 C.C.C.329. (This was a case of arrest under a Provincial statute).

"A magistrate or judge finds a man guilty of committing an offence by perceiving his guilt from having evidence of persons having knowledge of the facts. A peace officer finds him committing the offence by seeing the act committed."

Here may be mentioned also two actions for damages against department stores arising out of the detention of persons suspected of shoplifting. In *PERRY v. WOODWARDS LTD.*, [1929]4 D.L.R.751, a lengthy judgment makes no reference whatever to the Criminal Code, while the judgment in *COCHRANE v. EATON*(1936), 65 C.C.C.329, follows *R. v. SMITH*(1907), 13 C.C.C.326 (quoted *supra*) and refers to the Code only to say at the end that "Sections 32, 33, 41, 42 and 44 of the Code also have a bearing on the case herein".

See also *R. v. BELYEA* (quoted *supra* under s.30).

In a discussion of false imprisonment, Winfield on Torts, 5th Ed., p.222, cites as setting out a basic principle of this cause of action, some expressions of Lord Campbell, C. J., in *BROUGHTON v. JACKSON* (1852), 18 Q.B.378:

"The defendant . . . . . must show reasonable grounds of suspicion for the satisfaction of the Court; it is not enough to state that he himself reasonably suspected. But he is not bound to set forth all the evidence; it is enough if he shows facts which would create a reasonable suspicion in the mind of a reasonable man."

And see also *WING LEE v. JONES et al.*(1953), 106 C.C.C.385 in which the defence of reasonable and probable cause was applied to result in the dismissal of an action for damages for false imprisonment arising out of the suspected theft of a diamond ring.

It is appropriate to notice here that the statutes of Canada contain no Act for the protection of public authorities, although ss.1143 to 1148 of the repealed Code contained provisions relating to actions against persons administering the law, and there are similar provisions in the *Customs Act* and the *Excise Act*. Mr. Justice Taschereau in his edition of the Code of 1892 questioned the right of Parliament to pass those sections and there has been other comment as to their constitutional validity. In *MACK SING v. SMITH*(1908), 9 W.L.R.28, it was said that the question had been raised several times, but, although not always without reservation, generally decided affirmatively, and the subject was mentioned inconclusively in *CALDWELL v. REILLY* and *BELL*(1932), 58 C.C.C.241.

That difficulty at least has been solved by omitting the sections in question from the new Code and leaving such actions to the operation of the relevant provincial legislation, which already has been applied in some instances to protect persons from action under federal authority. Thus, in *TOUSIGNANT v. BOUCHARD*(1914), 15 Que.P.R.327, it was held that an inspector of butter named by the federal government was a public officer under the C.C.P., s.88, and in *CAN. CREDIT MEN'S TRUST ASS'N. v. JOHNSTON et al.*(1931), 58 C.C.C.1, an action for trespass against certain officials of the Department of Marine and Fisher-

Section 25—*continued*

ies, the Supreme Court of Canada applied the *Magistrate's Act,* R.S.B.C. 1924 (R.S.B.C. 1948, c.195), in these terms:

"We can perceive no ground for holding that a public officer, not belonging to any of the specific classes of officers enumerated, is not, when performing executive duties, within the descriptive words of the section, and subject to the conditions prescribed, entitled to the benefit of it."

For other applications of provincial legislation, see *GRAFF v. LABERGE et al.*(1927), 66 Que.S.C.93 (special constable acting under returning officer at an election), and *GOLDBERG v. CRUICKSHANK* (1919), 17 O.W.N.164 (constable executing search warrant).

Since the statutory provisions in Canada are drawn largely from the *Public Authorities Protection Act,* 1893 (U.K.), it may be useful to refer to the following general principles laid down in *SCAMMELL v. HURLEY,* [1929]1 K.B.419, at 427:

"To require the application of the Public Authorities Protection Act, the acts must be acts not authorized by any statute or legal justification, but acts intended to be done in pursuance or execution of some statute or legal power. It would appear, therefore, if illegal acts are really done from some motive other than a desire to execute the statutory or other legal duty and an honest belief that they are justified by statutory or other legal authority; if they are done from a desire to injure a person or to assist some person or cause without any honest belief that they are covered by statutory authority, or are necessary in the execution of statutory authority, the Public Authorities Protection Act is no defence, for the acts complained of are not done in intended execution of a statute but only in pretended execution thereof."

Section 33 (Arrest after commission of certain offences).

Of this section Meagher, J. said in *JORDAN v. McDONALD*(1898), 31 N.S.R.129, at p.134:

"I am satisfied that the words 'may be' in s. 25 (33), refer to the provisions of the code which authorize an arrest without warrant." And again (p.135): "Section 25 is general in terms, and was, no doubt, intended to supplement the provisions of s. 552, and so as to authorize an arrest in the one case, where the offence had actually been committed, and in the other where the party was found committing it. The one does not, for this purpose, include the other."

McKENZIE v. GIBSON(1851), 8 U.C.Q.B.100, at p.101:

"We take the law respecting the right of a private person to make an arrest in such cases, to be at this day, as it is clearly stated to be in Hale's Pleas of the Crown, 2nd Vol., p.76—namely, that when a private person, that is, a person not by office a keeper of the peace, or a justice, or a constable—takes upon himself to arrest another without a warrant for a supposed offence, he must be prepared to prove, and therefore must in his plea affirm, that a felony has been committed for in that respect he acts at his own peril.

That point in his defence must be clear; mere suspicion that there has been a felony committed by some one, will not do; though if he

is prepared to shew that there really has been a felony committed by some one, then he may justify arresting a particular person, upon reasonable grounds of suspicion that he was the offender; and mistake on that point, when he acts sincerely upon strong grounds of suspicion, will not be fatal to his defence.

There is some semblance of authority in one or two cases for supporting the position that a private person will be justified in arresting upon strong suspicion merely that a felony has been committed, but the current of authority up to the present day is quite the other way; and we must hold that it is a fatal defect in this plea, that it does not unequivocally and clearly allege that a felony has been committed.

I find no precedent of a plea which does not lay that foundation for the defence, in direct and positive terms, though the plea need not contain all the technical language of an indictment in charging the offence."

WILLIAMS v. LAING(1935), 55 O.L.R.26, followed *WALTERS v. SMITH*, [1914]1 K.B.595, and *McKENZIE v. GIBSON, supra*. Here again, a question as to the legality of the arrest may arise as in *R. v. STACKHOUSE*(1917), 29 C.C.C.151, and here also the cases apply which deal with arrest on telegram, the legality of the arrest depending on whether or not the offence is one for which arrest may be made without warrant.

Section 34 (Arrest during night).

This section has a correlative provision in subsec.2 of s.648. In the former, every one is protected from criminal responsibility for arresting without warrant any person whom he on reasonable and probable grounds *believes he finds committing* by night any offence for which the offender may be arrested without warrant. S.648(2) says that any person may arrest without warrant any one whom he *finds committing any criminal offence by night*. It would appear that the latter is wider than the former inasmuch as the words "any criminal offence" would include offences punishable on summary conviction. It was so interpreted in *PLESTED v. McLEOD*(1910), 15 W.L.R.533.

The cases which might be quoted under this section are: *R. v. JOHNSON*(1924), 42 C.C.C.279; *R. v. TEY SHING*(1920), 32 C.C.C.315, and *R. v. SCHMIDEL*(1920), 33 C.C.C.110. They have either been quoted already or turned upon the legality of the particular arrest and disclose no new principles.

But see now s.435 *post*, from which the reference to night has been omitted.

Section 35

It was held in *R. v. JOHNSON, supra*, that:

"While s.35 for instance, provides that every peace officer is justified in arresting without warrant any person whom he finds committing any offence, express authority to make the arrest is conferred by s. 648. S. 30 is unsupported by a similar complementary provision."

In *PLESTED v. McLEOD, supra*, the following appears:

Per Newlands, J.: "The powers of a constable to make arrests without warrant depend either on the common law or on statute. At common law, speaking generally, a constable may arrest a person whom he finds committing a felony, misdemeanour, or breach of the peace,

Section 25—*continued*

or whom on reasonable grounds he suspects of having committed a felony . . . . . And by the Criminal Code he may arrest any person whom he finds committing a criminal offence: Criminal Code, sec. 648 . . . . . Section 648 of the Code uses the words "criminal offence", shewing clearly that the right of arrest given there is in the case of the committing of an offence under that Act, which would include offences punishable on summary conviction, as well as indictable offences. Section 35 of the Code says that every peace officer is justified in arresting without warrant any person whom he finds committing any offence. *This section is not for the purpose of authorizing the arrest,* but is for the protection of the officers making the same from the consequences of his (*sic*) act either in a criminal or civil proceeding. It would only protect him in cases in which he was authorized to make the arrest, *i.e.,* in the case of a person found committing a criminal offence. *This section is merely a codification of the common law.*" (Report of Eng. Comm'rs. quoted).

This was followed in *R. v. SUCHAKI*(1923), 41 C.C.C.166, from which the following is quoted:

"This section (35) protects the peace officer making the arrest. But the offences under this section for which an offender may be arrested without warrant are limited to those within the legislative competence of the Parliament of Canada. The regulation of the procedure for enforcing penalties provided for the infraction of provincial statutes or by-laws passed in pursuance of them, including the right of arrest without a warrant, falls within the legislative jurisdiction of the Province. . . . . Section 648 authorizes a peace officer to arrest, without warrant, any one whom he finds committing any criminal offence. The authority of this section like that of secs. 30 and 35, is confined to criminal offences."

In *R. v. POLLARD*(1917), 29 C.C.C.35, at p.37, it was said that the word "offence" in s.35, and the words "criminal offence" in s.608 do not include a violation of a provincial statute for which a penalty is provided by that statute, and therefore, that Code s.164, which makes it an indictable offence to disobey a statute, would not apply. This was followed in *LA COMMISSION DES LIQUEURS DE QUEBEC v. BROUILLETTE*(1928), 35 Rev. de Jur. 4. *R. v. BELYEA* and *DESJARDINS v. CITY OF MONTREAL* have already been quoted.

In *GREEN v. PIKE and BAGLEY*, [1953]8 W.W.R.369, it was held that a peace officer is entitled to the protection given him by s.35 so as to justify the arrest for any of the offences committed in his presence.

The following cases are sometimes mentioned in connection with this section, but have no bearing upon it except perhaps to emphasize the recourse to the common law:

KELLY v. BARTON(1895), 26 O.R.608. This was an action for damages for wrongful arrest and was decided without reference to the Code. It was held that a breach of a City by-law for driving an omnibus without the required license, did not justify the summary arrest of the offender, although the officer may have acted in good faith in the belief that he was acting legally.

McNAYER v. PROSSER(1928), 49 C.C.C.98. In this case a constable

was held liable in damages. Although the charge against the Plaintiff which had been dismissed was laid under the Code it is to be observed that the constable did not claim protection under the Code.

Section 36 (Arrest by night).

Subsec.2 of this section provided that a peace officer is justified in arresting without warrant "any person whom he finds lying or loitering . . . . by night, and whom he has good cause to suspect of having committed or being about to commit any offence *for which an offender may be arrested without warrant.*" Taschereau, p.18, points out that the words in italics are a clear error, as reference to subsec.7, s.552, will show. This subsec. is s.652 of the former Code and empowered the peace officer to arrest under such circumstances any person whom he has good cause to suspect of having committed or being about to commit *any indictable offence.* Obviously this is wider than s.36.

In the case of *CHENG FUN v. CAMPBELL*(1909), 16 C.C.C.508, the judgment applied the case of *WEST v. SMALLWOOD*(1838), 3 M.&W. 418. It was held, however, that the peace officer may be liable in damages for false imprisonment if he holds the prisoner unreasonably long before taking him before the magistrate. Upon the same ground peace officers were held liable in damages in *FREY v. FEDORUK*, [1950]3 D.L.R.513 (S.C.Can.).

Other cases which might be quoted under this section—*R. v. JOHNSON*, and *BEATTY v. RUMBLE*, have already been noted.

Section 37 (Arrest during flight).

The Commissioners on the English Draft Code remarked of this section: "This is believed to extend the common law, which applies only to the arrest of persons actually guilty. It does not affect the question of civil rights."

It is pertinent here to note some comments upon the arrangement of this and foregoing sections made by O'Halloran, J.A., in *FREY v. FEDORUK*(1949), 95 C.C.C.206, at p.226:

> "If ss. 30-7, had followed after ss. 646-52, that arrangement of the context might have given support to the submission that the justification in ss. 30-7 was dependent upon the powers of arrest appearing first in sections similar to 646-52. But that is not the case, ss. 30-7 are found almost at the beginning of the Criminal Code, far removed from and completely unrelated to ss. 646-52. The present contextual setting fortifies the view that Parliament did not intend 'justify' to apply only if express authority to arrest without warrant had been given previously in the Code. Nor can it be interpreted to relate only to cases where the common law power exists, because then there would be no provision in the Code up to that point, for justification in cases where the power to arrest without warrant is subsequently given by the Code."

R. v. SHYFFER, has already been quoted on the words "freshly pursued".

Section 38 (Statutory power of arrest).

No cases nor comment appear on this section. It seems to have been a provision *ex abundanti cautela*, and, in any event, to be unnecessary in view of the provisions of ss.25 and 434 *et seq.* of the new Code.

Section 25—*continued*

Section 39 (Force in executing warrant).

The following cases may be noted under this section: *LAUNOCK v. BROWN*(1819), 2 B.&Ald.592, 106 E.R.482. In the execution of criminal process against any man in the case of misdemeanour, it is necesesary to demand admittance, before the breaking of the outer door of the house can be justified. In *HODDER v. WILLIAMS*(1895), 2 Q.B.663, it was held that the sheriff may for the purpose of executing a writ of *fieri facias* break open the outer door of a workshop or other building of the judgment debtor, not being his dwelling house or connected therewith, *PENTON v. BROWNE*(1664), 1 Keb.698, decided in the time of Charles II, followed. It was held that the doctrine in SEMAYNE'S *CASE*(1604), 5 Co. Rep. 91a that "a man's house is his castle" only extends to his dwelling house. These cases were followed in Canada in *WAH KIE v. CUDDY*(1914), 23 C.C.C.383, where it was held that an officer executing a search warrant is protected only insolar as he uses no more force than is reasonably necessary under the circumstances.

In *DILLON v. O'BRIEN*(1887), 16 Cox,C.C.245, it was held that when a person is arrested for committing a felony or misdemeanour, any property in his possession believed to have been used by him for the purpose of committing the offence, may be seized and retained as evidence in support of the charge, and if necessary such property may be taken from him by force provided no unnecessary violence is used. It will be observed that provisions correlative to this section are found in ss.167 and 168 (now s.110) in which the resistance referred to is made an indictable offence.

In *R. v. PORTER*(1873), 12 Cox,C.C.444, it was held that if a prisoner, having been lawfully apprehended by a police constable on a criminal charge, uses violence to the constable or to any one lawfully assisting him, which causes death, and does so with intent to inflict grievous bodily injury, he is guilty of murder, and so also if he does it with intent to escape. But if in the course of the struggle he accidentally causes an injury it would be manslaughter.

The converse of this case is found in the recent case of *PROCUREUR-GENERAL DU CANADA v. HULL*, [1948]Que.S.C.335, where it was held that a peace officer is authorized by s.39 to use necessary force to execute an arrest, but he can use a baton loaded with lead only in a case of extreme necessity. In this case he should have exercised prudence and moderation.

Section 41 (Peace officer preventing escape). Now s. 25(2).

Cases applicable to this section have already appeared under *Section 30* above. The following additional cases should be noticed:

MARATZEAR v. C.P.R.(1920), 37 C.C.C.297, at p.298:

"The evidence shews very clearly that . . . . . if the police officer had not shot him, he would have escaped. The constable acted as the law requires in the circumstances."

R. v. BEVIS(1925), 43 C.C.C.229. In this case the accused was charged with the murder of a police constable. It was argued on his behalf that

the trial judge should have charged the jury upon s.41. This contention was rejected and the Court held that:

"If the policeman had shot and killed the prisoner while he was trying to escape and was being tried for murder then the provisions of s. 41 would have applied and the question as to whether the means taken to prevent the prisoner's escape by flight were necessary, or whether his escape could have been prevented by other means in a less violent manner, would have been for the jury."

In *R. v. MITCHELL*(1937), 69 C.C.C.406, O'Connell, C.C.J., said (at p.411):

"A police officer in the discharge of his duties is vested with considerable powers such as using firearms, if necessary, to prevent an escape if the escape cannot be prevented in a less violent manner, but it is a principle of common law that all powers, the exercise of which may do harm to others, must be exercised in a reasonable manner."

This point is made also in the report of the Imperial Commissioners.

R. v. PURVIS(1929), 51 C.C.C.273. In this case the accused, a policeman, was acquitted of criminal negligence in shooting a person who was running away. It was held that he was justified under s.41. The following is quoted from the judgment at p.288:

"The right to resort to force under s.41 of the Criminal Code is not a new provision but has been recognized law for more than a century, that section being apparently a codification of the common law of England as it existed at the time the section was enacted. . . . .

It is said in 1 Foster's Crown Law, pp.271-2, s.4:- 'But where a felony is committed, and the felon fleeth from justice, or a dangerous wound is given, it is the duty of every man to use his best endeavours for preventing an escape; and if in the pursuit the party fleeing is killed, *where he cannot otherwise be overtaken,* this will be deemed justifiable homicide; for the pursuit was not barely warrantable, it is what the law requireth and will punish the *wilful* neglect of. I may add, that it is the duty of every man in these cases quietly to yield himself up to the justice of his country.'

In 4 Bl. Com., p.179, it is stated:- 'Again: in some cases homicide is justifiable, rather by the *permission*, than by the absolute *command*, of the law: either for the *advancement* of public justice, which without such indemnification would never be carried on with proper vigour; or, in such instances where it is committed for the *prevention* of some atrocious *crime*, which cannot otherwise be avoided.' "

See also annotation to this case 51 C.C.C. p.293.

The following quotation is from *R. v. SMITH*(1907), 13 C.C.C.326:

"If you have answered the first question in the affirmative and find that Smith had a right to arrest Gans without a warrant, then Gans was fleeing to evade a lawful arrest, and Smith was justified in using reasonable force in order to apprehend him and prevent his escape . . . . If you find that he could have apprehended him by any other means then Smith was not justified in shooting him. *Shooting is the very last resort. Only in the last extremity should a peace officer resort to such a dangerous weapon as a revolver in order to prevent the escape of an*

Section 25—*continued*

accused person who is attempting to escape by flight." (Italics added: Ed.)

"A man who is fleeing from lawful arrest may be tripped up, thrown down, struck with a cudgel and knocked over if it is necessary to do so in order to prevent his escape, and if he strikes his head on a stone and is killed, the police officer is absolved because the man was fleeing to escape lawful arrest and the means taken were not dangerous and not likely in themselves to cause his death. But firing at a man with a revolver may result in the death of the man, as it did in this case, although the intention was only to wound and so prevent his escape. . . . . It is the duty of every citizen to assist in the pursuit and capture of a criminal who is fleeing from arrest, when such citizen is called upon by a peace officer. . . . You will have to consider whether Smith, if he had not had that revolver or had kept it in his pocket, might not have called to his assistance persons on the street who would have joined him in the pursuit.". . . .

It is to be observed that there is no suggestion that the peace officer had no right to shoot to prevent escape; the question was whether his right was reasonably exercised in the particular case. He was acquitted.

A similar question was before the Supreme Court of Canada in *SAVARD and LIZOTTE v. R.*, [1946]S.C.R.20. There it was held that a police officer is entitled to fire shots in the air or on the ground to induce a person who is fleeing from arrest to submit thereto, when that person refuses to obey a command to stop.

It should be noted here that in 1948 a new subsec.1 of s.129 was passed by c.39, s.4, under which peace officers and others are permitted to carry firearms. See now s.97(3).

This section has been applied most recently in the case of *ROBERTSON v. JOYCE*(1948), 92 C.C.C.382. After quoting ss.30 and 41, the judgment proceeds:

"A peace officer is not empowered to employ whatever means in whatever manner he pleases to prevent the escape of an offender who takes to flight to avoid arrest. He is not free to use force of whatever kind or extent he may think fitting to the circumstances. A statutory defence against liability of a peace officer for what he has done is not available to him under s.41 if he has used an excess of force to prevent the escape by flight of a person to be arrested by him or if such escape could have been prevented by reasonable means in a less violent manner. The question whether he used an excess of force and the question whether the escape could have been prevented by reasonable means in a less violent manner are questions of fact for determination upon the evidence and in the circumstances of each particular case under review."

At p.390:

"The right of a peace officer under s.41 of the *Code* to use force to prevent the escape of a person who takes to flight to avoid arrest ought to be made plain to the jury, apart altogether from the question whether there was any negligence on his part. The jury ought to have been instructed that a peace officer is not empowered to use force at

any time and in all circumstances to prevent the escape of a person who takes to flight to avoid arrest; that the right given to a peace officer under s.41 of the *Code* to use force for that purpose is a limited one; that the right may be exercised only if the escape could not be prevented by reasonable means in a less violent manner; that a peace officer cannot in any circumstances justify the use of excess force, that he may only use the force necessary in the circumstances for the purpose of preventing the escape by flight. The jury should have been instructed, also, that where the right of a peace officer to use force exists, it must be exercised in a reasonable manner; and that if it be exercised in a negligent manner, a peace officer is liable for all loss or damage caused by his negligence. The omission to instruct the jury sufficiently, as well as the omission to submit to them the necessary questions as previously discussed, makes it necessary, in my opinion, that a new trial be had between the parties."

Section 42 (Private person preventing escape).

This is s.44 in the English Draft Code and the Commissioners referring to the words "provided that such force is neither intended or likely to cause death or grievous bodily harm", remarked that there is some obscurity as to the existing law on this point. The following quotations from 2 Hale P.C. 82 and 83 are relevant:

"If there be a felony committed by B. and A. is present and sees it, and pursues the felon, and he cannot be otherwise taken, and A. kills him in the pursuit, though he has not arrested him, the law justifies him. . . . . (83) If an innocent person be actually arrested upon suspicion by a private person, all circumstances being duly observed, and he breaks away from the arrest, yet I do not think the person arresting can kill him, though he cannot otherwise be taken, for the person arrested is not bound to take notice of that authority that the law gives to a private person in this case."

The only reported case in which the section is mentioned is that of *ALBERT v. ST. VINCENT*(1936), 74 Que.S.C.123, at p.129, where the concluding words are quoted along with s.41 and with the comment that:

"This indicates that the peace officer in the circumstances mentioned in sec. 42 may use force of a nature to cause death or grievous bodily harm, although a private person (*un particulier*) has not the right to do so."

Section 43 (Preventing escape in other cases).

The note to s.42 is applicable to this section also. The section appears to have been mentioned in only one reported case, *SAVARD & LIZOTTE v. R., supra.* In that case, members of the R.C.M.P. were appealing from conviction of manslaughter in shooting to prevent escape. The Supreme Court of Canada quashed the conviction. *Per* Kellock J., p.278:

"The question of fact as to the existence or non-existence of a common wrongful intention was completely taken away from the jury by the charge. They were told that the guilt of appellants was dependent merely upon a finding that the appellants had gone beyond that which was authorized by section 43. This, of course, is completely erroneous."

Section 25—*continued*

Section 44 (Preventing escape and rescue).

It may be noted that escapes and rescues were dealt with as substantive offences in ss.185 and 196, and here again 2 Hale 83 was cited by the Imperial Commissioners with the remark that the section seems to extend the law so far as regards private persons. The only reported case in which this section is mentioned is *VIGNITCH v. BOND*(1928), 50 C.C.C.273:

"The question to be decided first is whether or not the plaintiff had been arrested. If he had not been arrested, the matter is to be considered under the principle laid down in s.41 of the Cr. Code, and if he had been arrested and was attempting to escape, it will be considered under the principle set forth in s.44 of the Cr. Code."

Section 45.

This section also deals with escape or rescue and the note to s.44 applies to it.

R. v. O'HEARON(No.2)(1901), 5 C.C.C.531, is cited with reference to this section. In that case it was held upon the authority of Archbold's Cr.Pl., 22nd. ed. p.852, and Paley on Convictions, 7th ed. 28, that when the officer executing a warrant of commitment released the prisoner at his request for a temporary period on his promise to surrender himself, the officer's doing so was not a voluntary abandonment of the arrest, and re-arrest on the same warrant was justified.

EXCESSIVE FORCE.

26. Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.

This is the former s.66. It was s.58 in the Code of 1892 and s.68 in the E.D.C. The Imperial Commissioners said in their report (p.11) that "It is also a principle of the common law that all powers, the exercise of which may do harm to others, must be exercised in a reasonable manner, and that, if there is excess, the person guilty of such excess is liable for it according to the nature and quality of his act".

See notes to s.25 *supra*, especially those relating to the former s.41, and *YAKIMISHYN v. BILESKI*(1946), 86 C.C.C.179.

USE OF FORCE TO PREVENT COMMISSION OF OFFENCE.

27. Every one is justified in using as much force as is reasonably necessary

***(a)* to prevent the commission of an offence**

(i) for which, if it were committed, the person who committed it might be arrested without warrant, and

(ii) that would be likely to cause immediate and serious injury to the person or property of anyone; or

***(b)* to prevent anything being done that, on reasonable and probable grounds he believes would, if it were done, be an offence mentioned in paragraph *(a)*.**

This is the former s.52 and comes from s.44 of the Code of 1892 and s.54 of the E.D.C. On p.11 of their Report the Imperial Commissioners said:

"We take one great principle of the common law to be, that though

OLD CODE:

66. Every one authorized by law to use force is criminally responsible for any excess, according to the nature and quality of the act which constitutes the excess.

52. Every one is justified in using such force as may be reasonably necessary in order

(a) to prevent the commission of any offence for which, if committed, the offender might be arrested without warrant, and the commission of which would be likely to cause immediate and serious injury to the person or property of any one; or

(b) to prevent any act being done which he, on reasonable grounds, believes would, if committed, amount to any such offence.

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it sanctions the defence of a man's person, liberty and property against illegal violence and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from, the force used is not disproportioned to the injury or mischief which it is intended to prevent. This last principle will explain and qualify many of our suggestions. It does not seem to have been universally admitted, and we have therefore thought it advisable to give our reasons for thinking that it not only ought to be recognized as the law in future, but that it is the law at present."

and in an explanatory note at p.45, they said:

"In *HANDCOCK v. BAKER*(1800), 2 Bos. & P. 260, a plea justifying the breaking of the plaintiff's dwelling-house, assaulting him therein, beating him, and imprisoning him on the ground that plaintiff was about to kill his wife, and that all that was done was for the purpose of and necessary to prevent his doing so, was held good after verdict. And we take it to be clear that even killing the intruding criminal, if necessary, to prevent a crime of this magnitude, would be justifiable; but not if it were to prevent a common assault."

In *R. v. MOKE,* [1917]3 W.W.R.575, in which the accused was charged with murder, the following appears (p.585):

"It seems to me to be carrying the principle of justification to a dangerous length to hold that because one man has abused and threatened another, even to the length of making him properly apprehensive that on some future occasion he may kill or do some grievous bodily harm to him, that that other may take advantage of an opportunity to kill him which presents itself when he is well armed and the aggressor is helpless and thus render his threats incapable of fulfilment."

ARREST OF WRONG PERSON.—Person assisting.

28. (1) Where a person who is authorized to execute a warrant to arrest believes, in good faith and on reasonable and probable grounds, that the person whom he arrests is the person named in the warrant, he is protected from criminal responsibility in respect thereof to the same extent as if that person were the person named in the warrant.

Section 28—*continued*

(2) Where a person is authorized to execute a warrant to arrest,

(a) **every one who, being called upon to assist him, believes that the person in whose arrest he is called upon to assist is the person named in the warrant, and**

(b) **every keeper of a prison who is required to receive and detain a person who he believes has been arrested under the warrant,**

is protected from criminal responsibility in respect thereof to the same extent as if that person were the person named in the warrant.

The former s.28, this was s.20 in the Code of 1892 and s.30 in the English Draft Code. The Imperial Commissioners said of it:

"This is new. As an officer arresting for felony without warrant is by the common law justified even if he by mistake arrests the wrong person, we think that the man who arrests any person with a warrant for any offence shall at least be protected from criminal responsibility. The right of action is not affected by it."

In *R. v. SABEANS*(1903), 7 C.C.C.498 (Nova Scotia) a policeman arrested accused whom he suspected of being one of the parties who had committed a robbery. He had a warrant in which accused was named as Elderkin and afterwards altered it to the name of Sabeans, apparently the proper name of the accused.

Held, on a case reserved, that as the constable would be justified by s.22 (present s.25) in arresting without a warrant for that offence, the justification would extend to an arrest in respect of which he had a warrant which was insufficient by reason of the misnomer.

The remarks of Tindal, C. J., in *HOYE v. BUSH*(1840), 1 Man.& G. 775, were cited where he said:

"Where indeed it can be shewn that a felony has been actually committed the constable may throw the warrant aside. It will be sufficient in such a case for the constable to shew that he has taken the person really charged with the offence however he may have been misdescribed in the warrant."

In *ANDERSON v. JOHNSTON*, [1918]3 W.W.R.621, (Sask.C.A.) it was held that, where the chief of police in one city notifies the police in another city that a warrant had been issued for an offence for which plaintiff might have been arrested without warrant, and the latter police arrested the plaintiff relying on the description and photograph sent by the former, in the honest and responsible belief that he was the one wanted, the police making the arrest were protected by s.30 of the Code from liability in civil or criminal proceedings even though the man arrested was not in fact the one for whom the warrant had been issued.

Stephen's Commentaries, 13th ed., Vol.IV, at p.310:

"Upon a reasonable charge of treason or of any felony . . . or upon his own reasonable suspicion that any of such offences have been committed, the constable may, without warrant, arrest the party so charged or suspected; and he will (in case of felony, though not, unless protected by statute, in cases of misdemeanour) be justified in doing so, though it should afterwards turn out that the party is in-

OLD CODE:

28. Every one duly authorized to execute a warrant to arrest, who thereupon arrests a person, believing in good faith and on reasonable and probable grounds that he is the person named in the warrant, shall be protected from criminal responsibility to the same extent and subject to the same provisions as if the person arrested had been the person named in the warrant.

(2) Every one called on to assist the person making such arrest, and believing that the person in whose arrest he is called on to assist is the person for whose arrest the warrant is issued, and every gaoler who is required to receive and detain such person, shall be protected to the same extent and subject to the same provisions as if the arrested person had been the person named in the warrant.

40. It is the duty of every one executing any process or warrant to have it with him, and to produce it if required.

(2) It is the duty of every one arresting another, whether with or without warrant, to give notice, where practicable, of the process or warrant under which he acts, or of the cause of the arrest.

(3) A failure to fulfill either of the two duties last mentioned shall not of itself deprive the person executing the process or warrant, or his assistants, or the person arresting, of protection from criminal responsibility, but shall be relevant to the inquiry whether the process or warrant might not have been executed, or the arrest effected, by reasonable means in a less violent manner.

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nocent, or even that no such offence as was supposed has been in fact committed."

2 Hale P.C. 78:

"The third case is, there is a felony committed, but whether committed by B. or not, *non constat*, and therefore we will suppose, that in truth it were not committed by B. but by some person else, yet A. hath probable causes to suspect B. to be the felon, and accordingly doth arrest him; this arrest is lawful and justifiable, and the reason is, because if a person should be punished by an action of trespass, or false imprisonment for an arrest of a man for a felony under these circumstances, malefactors would escape to the common detriment of the people."

DUTY OF PERSON ARRESTING.—Notice.—Failure to comply.

29. (1) It is the duty of every one who executes a process or warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so.

(2) It is the duty of every one who arrests a person, whether with or without warrant, to give notice to that person, where it is feasible to do so, of

***(a)* the process or warrant under which he makes the arrest, or**

***(b)* the reason for the arrest.**

(3) Failure to comply with subsection (1) or (2) does not of itself deprive a person who executes a process or warrant, or a person who makes an arrest, or those who assist them, of protection from criminal responsibility.

This is the former s.40.

In *GEORGE v. R.*(1936),67 C.C.C.33, the Supreme Court of Canada

Section 29—*continued*

held that whether or not it is practicable to give the notice required by subsec.(2) in any given case depends upon the circumstances surrounding the arrest, such as the menacing attitude of the person to be arrested.

This section was considered comprehensively in the judgment appealed from in *R. v. GEORGE*(1934), 63 C.C.C.225. Martin, J.A., after a lengthy history of this section and s.16, proceeded as follows:

"The test of the question is to be found in this: that if this case were being tried today in England, where there is no criminal code or section similar to our said s-s.2, the constable could 'justify' his authority and act of arrest by the common law 'principle' that since the accused already had 'notice' of the cause of his arrest it was not rendered unlawful simply because the constable did not again notify him of what he already knew, and in my opinion that same justification is preserved to him in Canada by said s.16, as interpreted by the Supreme Court, and it would, e.g., furnish a complete defence to a charge of assault or action for false arrest and imprisonment . . *cf., WHITWORTH v. DUNLOP,* [1934]3 D.L.R. 727, 62 C.C.C. 41, 48 B.C.R. 161. It would be strange, indeed, if by a useless technical requirement an arrest otherwise lawful could be invalidated, and it is not strange that no case was cited to us, nor have I been able after a most diligent search to find one which, when clearly understood on its different facts, (*cf., e.g., REX v. HARLTON,* [1929] 3 D.L.R. 688, 51 C.C.C. 329) supports such a submission, and that the law in Canada at the time of the enactment of our Code in 1892 was the same as it is now in England appears clear from this passage from that very sound work of our Criminal Law by Mr. Justice Burbidge, ... (relied on by Sir John Thompson, *ante,* as one 'foundation' for his Code) at p.217, viz:- 'Notice may be given, either by words, by the production of a warrant, or other legal authority, by the known official character of the person killed, or by the circumstances of the case.' "

In Orfield's Criminal Procedure from Arrest to Appeal, pp.13-14, the opinion is expressed that the requirement that the arresting officer must have the warrant with him, is not adapted to modern conditions because many peace officers may be seeking a suspect. Note in this regard the words "where it is feasible to do so" in the new s.29(1).

PREVENTING BREACH OF PEACE.

30. Every one who witnesses a breach of the peace is justified in interfering to prevent the continuance or renewal thereof and may detain any person who commits or is about to join in or to renew the breach of the peace, for the purpose of giving him into the custody of a peace officer, if he uses no more force than is reasonably necessary to prevent the continuance or renewal of the breach of the peace or than is reasonably proportioned to the danger to be apprehended from the continuance or renewal of the breach of the peace.

The following cases may be quoted under this section which is the former s.46. In *TIMOTHY v. SIMPSON*(1835), 1 Cr.M. & R.757, 149 E.R. 1285 at p.1288, Parke, B. said:

OLD CODE:

46. Every one who witnesses a breach of the peace is justified in interfering to prevent its continuance or renewal and may detain any person committing or about to join in or renew such breach of the peace, in order to give him into the custody of a peace officer, if the person interfering uses no more force than is reasonably necessary for preventing the continuance or renewal of such breach of the peace, or than is reasonably proportioned to the danger to be apprehended from the continuance or renewal of such breach of the peace.

"Any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled, and his desire to break the peace has ceased, and then deliver him to a peace officer. And, if that be so, what reason can there be why he may not arrest an affrayer after the actual violence is over, but whilst he still shows a disposition to renew it, by persisting in remaining on the spot where he has committed it? Both cases fall within the same principle, which is that, for the sake of the preservation of the peace, any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shews that the public peace is likely to be endangered by his acts."

TREBECK v. CROUDACE, [1918]1 K.B.158, *per* Swinfen-Eady, L.J. at p.164:

"At common law a private person may arrest where a breach of the peace is being actually committed or is apprehended, although 'no private person can of his own authority arrest another for a bare breach or the peace after it is over'. Hawk. P. C. bk. ii, c.12, s.20; see also Hale's P. C. vol. 2, p.78 . . . . In cases of misdemeanour, other than those which amount to a breach of the peace, in the absence of statutory authority there is no power to arrest without a warrant."

In Canada, it was held in *R. v. MANSON*(1925), 43 C.C.C.30, that a person attempting to prevent a breach of the peace is justified in using such force as may be necessary to do so, and if in fact the force used is not sufficient to prevent such breach, such person cannot be convicted of assault or causing grievous bodily harm for using such force as he did. Here again, there is recourse to the common law, as the judgment is based upon *R. v. DEANA*(1909), 2 Cr.App.R.75, in which it was held that in self-defence a person assaulted may do more than ward off a blow; that person may strike back.

ARREST FOR BREACH OF PEACE.—Giving person in charge.

31. (1) Every peace officer who witnesses a breach of the peace and every one who lawfully assists him is justified in arresting any person whom he finds committing the breach of the peace or who, on reasonable and probable grounds, he believes is about to join in or renew the breach of the peace.

(2) Every peace officer is justified in receiving into custody any person who is given into his charge as having been a party to a breach of the peace by one who has, or who on reasonable and probable grounds he believes has, witnessed the breach of the peace.

Section 31—*continued*

This is the former s.47. It was s.39 in the Code of 1892 and s.48 in the E.D.C.

See notes to preceding section and to s.34.

SUPPRESSION OF RIOTS.

USE OF FORCE TO SUPPRESS RIOT.—Person bound by military law.—Obeying order of peace officer.—Apprehension of serious mischief.—Question of law.

32. (1) Every peace officer is justified in using or in ordering the use of as much force as he believes, in good faith and on reasonable and probable grounds,

(a) **is necessary to suppress a riot, and**

(b) **is not excessive, having regard to the danger to be apprehended from the continuance of the riot.**

(2) Every one who is bound by military law to obey the command of his superior officer is justified in obeying any command given by his superior officer for the suppression of a riot unless the order is manifestly unlawful.

(3) Every one is justified in obeying an order of a peace officer to use force to suppress a riot if

(a) **he acts in good faith, and**

(b) **the order is not manifestly unlawful.**

(4) Every one who, in good faith and on reasonable and probable grounds, believes that serious mischief will result from a riot before it is possible to secure the attendance of a peace officer is justified in using as much force as he believes in good faith and on reasonable grounds,

(a) **is necessary to suppress the riot, and**

(b) **is not excessive, having regard to the danger to be apprehended from the continuance of the riot.**

(5) For the purposes of this section the question whether an order is manifestly unlawful or not is a question of law.

Subsec.(1) comes from the former s.48. It was s.40 in the Code of 1892 and ss.49 and 50 in the E.D.C. The substitution of the words "peace officer" for the enumeration in s.48 widens it so as to include a policeman, who is, in any case, bound to prevent a breach of the peace. In *R. v. BROWN*(1841), Car. & M.314, it was said that "The constable therefore saw parties breaking the law; and if a breach of the peace is in the act of being committed in the presence of a constable, that constable is not only justified but bound to prevent it, or put a stop to it if it has begun, and he is bound to do so without a warrant."

In *DUNCAN v. JONES*(1935), 52 T.L.R.,26, at p.28, the following appears:

"It does not require authority to emphasize the statement that it is the duty of a police officer to prevent apprehended breaches of the peace. Here it is found as a fact that the respondent reasonably apprehended a breach of the peace. It then . . . . . became his duty to prevent anything which in his view would cause that breach of the peace."

OLD CODE:

47. Every peace officer who witnesses a breach of the peace, and every person lawfully assisting him, is justified in arresting any one whom he finds committing such breach of the peace, or whom he, on reasonable and probable grounds, believes to be about to join in or renew such breach of the peace.
(2) Every peace officer is justified in receiving into custody any person given into his charge as having been a party to a breach of the peace by one who has, or whom such peace officer, upon reasonable and probable grounds, believes to have, witnessed such breach of the peace.

48. Every sheriff, deputy sheriff, mayor or other head officer or acting head officer of any county, city, town or district, and every magistrate and justice of the peace, is justified in using, and ordering to be used, and every peace officer is justified in using, such force as he, in good faith, and on reasonable and probable grounds, believes to be necessary to suppress a riot, and as is not disproportioned to the danger which he, on reasonable and probable grounds, believes to be apprehended from the continuance of the riot.

49. Every one, whether subject to military law or not, acting in good faith in obedience to orders given by any sheriff, deputy sheriff, mayor or other head officer or acting head officer of any county, city, town or district, or by any magistrate or justice, for the suppression of a riot, is justified in obeying the orders so given unless such orders are manifestly unlawful, and is protected from criminal responsibility in using such force as he, on reasonable and probable grounds, believes to be necessary for carrying into effect such orders.
(2) It shall be a question of law whether any particular order is manifestly unlawful or not.

50. Every one, whether subject to military law or not, who in good faith and on reasonable and probable grounds believes that serious mischief will arise from a riot before there is time to procure the intervention of any of the authorities aforesaid, is justified in using such force as he, in good faith and on reasonable and probable grounds, believes to be necessary for the suppression of such riot, and as is not disproportioned to the danger which he, on reasonable grounds, believes to be apprehended from the continuance of the riot.

51. Every one who is bound by military law to obey the lawful command of his superior officer is justified in obeying any command given him by his superior officer for the suppression of a riot, unless such order is manifestly unlawful.
(2) It shall be a question of law whether any particular order is manifestly unlawful or not.

Subsec.(2) comes from the former s.51. It was s.43 in the Code of 1892 and s.53 in the E.D.C.

In *KEIGHLEY v. BELL*(1866), 4 F. & F.763 at 805, 176 E.R.781 at 800, Willes, J., said:

> "If it were necessary to state any principle on which it would be competent to me to decide in such a case, it would be that a soldier, acting honestly in the discharge of his duty—that is, acting in obedience to the orders of his commanding officers—is not liable for what he does, unless it be shown that the orders were such as were obviously illegal. He must justify any direct violation of the personal rights of another

Section 32—*continued*

person, by showing not only that he had orders, but that the orders were such as he was bound to obey."

Provision for use of the Canadian Forces in aid of the civil power to suppress a riot is contained in the *National Defence Act*, R.S.C. 1952, c.184, ss.218-228.

Subsec.(3) comes from the former s.49. It was s.41 in the Code of 1892, and s.51 in the E.D.C. There is a change similar to that in subsec.(1).

Subsec.(4) comes from the former s.50. It was s.42 in the Code of 1892, and s.52 in the E.D.C.

Subsec.(5) appeared in both the former ss.49 and 51 and is of similar origin.

Concerning what are now subsecs.(2) to (5) the Imperial Commissioners said that the protection given by them to persons obeying the orders of magistrates and military officers was perhaps carried to an extent not yet expressly decided, but based the provisions on *KEIGHLEY v. BELL*, *supra*, and *R. v. PINNEY*(1832), 5 C. & P.254,172 E.R.962. In their Report (p.18) they said:

"We would direct special attention to the sections relating to the suppression of riots, particularly to their suppression by the use of military force. We do not think that these sections differ from what would probably be held to be the law if cases should ever occur to raise the questions which they determine, but we cannot say that every proposition has been expressly held to be the law. We must observe, in regard to all these provisions, that the law upon the different matters to which they relate has never before, so far as we know, been reduced to an explicit or systematic form."

DUTY OF OFFICERS IF RIOTERS DO NOT DISPERSE.—Protection of officers.—Section not restrictive.

33. (1) Where the proclamation referred to in section 68 has been made or an offence against paragraph (*a*) or (*b*) of section 69 has been committed, it is the duty of a peace officer and of a person who is lawfully required by him to assist, to disperse or to arrest persons who do not comply with the proclamation.

(2) No civil or criminal proceedings lie against a peace officer or a person who is lawfully required by a peace officer to assist him in respect of any death or injury that by reason of resistance is caused as a result of the performance by the peace officer or that person of a duty that is imposed by subsection (1).

(3) Nothing in this section limits or affects any powers, duties or functions that are conferred or imposed by this Act with respect to the suppression of riots.

This comes from the former s.93(2) and (3). They formed part of s.84 of the Code of 1892 and of s.89 in the E.D.C. They come originally from the *Riot Act*, 1 Geo.1, ch.2, s.5. The words "by reason of resistance" in subsec.(2) are new and will no doubt emphasize the facts that the rights and exemptions that are declared are correlative to duties, for ss.32 and 33 must be read with ss.69,70 and 110(b) (*q.v.*), and that those duties are

OLD CODE:

93. If the persons so unlawfully, riotously and tumultuously assembled together, or twelve or more of them, continue together, and do not disperse themselves, for the space of thirty minutes after the proclamation is made or after such hindrance as aforesaid, it is the duty of every such sheriff, justice and other officer, and of all persons required by them to assist, to cause such persons to be apprehended and carried before a justice.

(2) If any of the persons so assembled are killed or hurt in the apprehension of such persons or in the endeavour to apprehend or disperse them, by reason of their resistance, every person ordering them to be apprehended or dispersed, and every person executing such orders, are indemnified against all proceedings of every kind in respect thereof.

(3) Nothing in this section contained shall, in any way, limit or affect any duties or powers imposed or given by this Act as to the suppression of riots before or after the making of the said proclamation.

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not confined to magistrates, soldiers and police. These considerations were cogently expressed in *R. v. PINNEY*(1832), 5 C. & P.254.

That case arose during a period of agitation over the Reform Bill of 1831. There were riots in the city of Bristol in which many lives were lost and much property destroyed. The mayor was brought to trial upon a charge of neglect of duty, and the trial Judge addressed the jury in part as follows:

"Now a person, whether a magistrate or peace officer, who has the duty of suppressing a riot, is placed in a very difficult situation, for if by his acts he causes death, he is liable to be indicted for murder or manslaughter, and if he does not act, he is liable to an indictment on an information for neglect: he is therefore, bound to hit the precise line of his duty; and how difficult it is to hit that precise line will be a matter for your consideration, but that, difficult as it may be, he is bound to do. Whether a man has sought a public situation, as is often the case with mayors or magistrates, or whether as a peace-officer, he has been compelled to take the office that he holds, the same rule applies: and if persons were not compelled to act according to law, there would be an end of society: but still you ought to be satisfied that the defendant has been clearly guilty of neglect before you return a verdict against him; and here I ought to remark, that mere good feeling, or upright intentions are not sufficient to discharge a man if he has not done his duty."

The following quotation is taken from the head-note:

"The general rules of law require of magistrates at the time of a riot, that they should keep the peace and restrain the rioters, and pursue and take them, and to enable them to do this, they may call upon all the king's subjects to assist them; and all the king's subjects are bound to do so upon reasonable warning. In point of law, a magistrate would be justified in giving fire-arms to those who thus come to assist him, but it would be imprudent in him to do so. It is no part of the duty of a magistrate to go out and head the constables, neither is it any part of his duty to marshal and arrange them (these duties, it was said, fall

Section 33—*continued*

upon the chief constable); neither is it any part of his duty to hire men to assist him in putting down a riot; nor to keep a body of men as a reserve, to act as occasion may require. Neither is he bound to call out the Chelsea pensioners any more than the rest of the king's subjects; nor is it any part of his duty to give any orders respecting the fire-arms in the gunsmiths' shops. Nor is a magistrate bound to ride with the military; if he gives the military officer orders to act, that is all that is required of him. . . . . Nor will the fact of his having acted on the advice of others be any defence for him. The question is, whether he did all that he knew was in his power, and which could be expected from a man of ordinary prudence, firmness and activity."

The assertion that the magistrate is under no duty to ride with the military may be qualified by the opinion expressed by a British Parliamentary Committee in 1894 that "one salutary practice is that a magistrate should accompany the troops. The presence of a magistrate on such occasions, *although not a legal obligation,* is a matter of the highest importance" because, it was said, of his presumable knowledge of local conditions.

In 1911, Sir Rufus Isaacs and Sir John Simon gave the following opinion as law officers of the Crown:

"A soldier differs from the ordinary citizen in being armed and subject to discipline; but his rights and duties in dealing with crime are probably the same as those of the ordinary citizens. If the aid of the military has been invoked by the police, and the soldiers find that a situation exists in which prompt action is required, although neither magistrate nor police are present or available for consultation, they must act on their own responsibility. They are bound to use such force as is reasonably necessary to protect premises over which they are watching, and to prevent serious crime or riot. But they must not use lethal weapons to prevent or suppress minor disorders or offences of a less serious character, and in no case should they do so if less extreme measures will suffice. Should it be necessary for them to use extreme measures they should, whenever possible, give sufficient warning of their intention."

In Canada, the Supreme Court held in *HEBERT v. MARTIN*(1930), 54 C.C.C.257 that a constable is not civilly liable for killing a man in the course of a riotous assembly when he had good reason to fear danger to his own life. Cannon, J., adopted the following language from the Report of the British Parliamentary committee:

" . . . . 'The taking of life can only be justified by the necessity for protecting persons or property against various forms of violent crime, or by the necessity of dispersing a riotous crowd which is dangerous unless dispersed . . . . '

In the case at bar, we also have a crowd which threatened serious injury, amounting to felony, to property and persons, and it became the duty of all peaceable subjects to assist in preventing this. The necessary prevention of such outrage on persons and property justifies the guardians of the peace in the employment against a riotous crowd of even deadly weapons.

OLD CODE:

53. Every one unlawfully assaulted, not having provoked such assault, is justified in repelling force by force, if the force he uses is not meant to cause death or grievous bodily harm, and is no more than is necessary for the purpose of self-defence.

(2) Every one so assaulted is justified, though he causes death or grievous bodily harm, if he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes, and if he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

(3) Provocation, within the meaning of this section may be given by blows, words or gestures.

'A guilty ringleader who under such circumstances is shot dead dies by justifiable homicide . . . . The reason is that the soldier who fired had done nothing except what was his strict legal duty.' "

DEFENCE OF PERSON

SELF DEFENCE AGAINST UNPROVOKED ASSAULT.—Extent of justification.

34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

***(a)* he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes, and**

***(b)* he believes, on reasonable and probable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.**

This is the former s.53(1) and (2). It was s.45 in the Code of 1892 and s.55 in the E.D.C. The Imperial Commissioners in their Report (Note A) say that "There can be no doubt that a man is entitled to preserve his own life and limb; and on this ground he may justify much that would otherwise be punishable."

In *R. v. PRESTON*(1953), 9 W.W.R.(NS)57, it was held that the question whether accused used excessive force must be determined pursuant to s.53(2) of the *Criminal Code*, with regard to the state of mind of the accused at the time force was applied by him.

Concerning the defence of others from assault, the following appears in 1 Hawk. P.C. c.28, par.23: "Also there are some actual assaults on the person which do not amount to a forfeiture of such a recognizance (*viz.*, of surety of the peace) . . . if a man beat, or as some say, wound or maim one who makes an assault upon his person, or that of his wife, parent, child or master, especially if it appear that he did all he could

Section 34—*continued*

to avoid fighting before he gave the wound."

For definition of 'provocation' see s.36.

SELF DEFENCE IN CASE OF AGGRESSION.

35. Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault upon himself by another, may justify the use of force subsequent to the assault if

***(a)* he uses the force**

(i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and

(ii) in the belief, on reasonable and probable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;

***(b)* he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and**

***(c)* he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.**

This is the former s.54 and comes from s.46 of the Code of 1892 and s.56 of the E.D.C.

4 Bl. Com. p.184 states:

"It is frequently difficult to distinguish this species of homicide (upon chance-medley in self-defence) from that of manslaughter, in the proper legal sense of the word. But the true intention between them seems to be this: When both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer has not begun the fight, or (having begun) endeavours to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence. For which reason the law requires that the person who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that not factiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood."

It is to be noted that under the section a person may *justify* the use of force in self-defence notwithstanding that he has given provocation.

For definition of 'provocation' see s.36.

PROVOCATION.

36. Provocation includes, for the purposes of sections 34 and 35, provocation by blows, words or gestures.

This combines the former ss.53(3) and 54(2). See notes to next section and to s.203, *post*.

The following appears in *R. v. LESBINI*(1914), 11 Cr.App.R.7 at p.9:

"We see no reason to dissent from the judgment delivered by Darling,

OLD CODE:

53. (3) Provocation, within the meaning of this section may be given by blows, words or gestures.

54. Everyone who has without justification assaulted another, or has provoked an assault from that other, may nevertheless justify force subsequent to such assault, if he uses such force under reasonable apprehension of death or grievous bodily harm from the violence of the person first assaulted or provoked, and in the belief, on reasonable grounds, that it is necessary for his own preservation from death or grievous bodily harm, if he did not commence the assault with intent to kill or do grievous bodily harm, and did not endeavour, at any time before the necessity for preserving himself arose, to kill or do grievous bodily harm, and if before such necessity arose, he declined further conflict, and quitted or retreated from it as far as was practicable.

(2) Provocation, within the meaning of this section may be given by blows, words or gestures.

J., in *R. v. ALEXANDER*(1913), 9 Cr. App. R. 139, in which case a substantially similar argument was put forward that the Court ought to take into account the mental ability of the prisoners who came before it, and that if the mental ability of one of them is less than that of the other, it ought to avail as a defence for him although it would not be open to the other. We agree with the view stated by Darling, J., and with the principles stated in *R. v. WELSH*((1869), 11 Cox, C.C. 336): 'There must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion.' The Court is not minded in any degree to weaken the state of the law which makes a man who is not insane responsible for the ordinary consequences of his action."

TAYLOR v. R., [1947]S.C.R.462, is to the same effect: "sufficient to deprive an ordinary person of the power of self-control, without taking drunkenness into account."

In *EVANS v. BRADBURN*(1915), 9 W.W.R.281, it was said that:

"The instinct of human nature is to resent insult. . . . . in many cases by physical force; and, according to the circumstances this is more or less generally approved, or even applauded, but the law, probably wisely, does not recognize any provocation, short of an assault or threats creating a case for self-defense, as a justification for assault, but only takes it into account as a circumstance which may reduce culpable homicide from murder to manslaughter and in all criminal cases involving an assault as a circumstance given in mitigation of punishment and in civil cases in mitigation of damages."

PREVENTING ASSAULT.—Extent of justification.

37. (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

(2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

Section 37—*continued*

This is the former s.55 from which the words "accompanied with insult" have been omitted. It was s.47 in the Code of 1892 and s.57 in the E.D.C. where it appears with the comment that "This perhaps extends the law, but it appears reasonable." The section as it formerly read appears to be grounded in the distinction between assault and battery, and to be a mitigation of the rule that "in the absence of statute . . . no words, however opprobrious, disgraceful, annoying or vexatious, will justify a battery, though they may mitigate the punishment:" Tremeear, 1919 ed., p.60.

The revision without the words "accompanied with insult" will overcome the impression that in a case of assault the one who strikes the first blow is the guilty party. In *R. v. DEANA*(1909), 2 Cr.App.R.75, Darling, J., said:

> "He told the jury that no more than warding off a blow must be attempted by anyone attacked. That is not the law. The direction that ought to have been given was that if appellant was assailed by the prosecutor, and the jury believed that the prosecutor struck a blow at the appellant, the appellant was not limited to warding off a blow, but may be justified in striking one—a battery, in fact, in return for an assault which missed being a battery."

These remarks were cited with approval in *R. v. MANSON*(1925), 43 C.C.C.30 (Alta.C.A.).

Under the revision a person will be justified in defending against any assault on himself or on a person entitled to his protection so long as he does not use unreasonable violence. The Imperial Commissioners in their report (p.44) observed that "the proposition that the force used in defence of person, liberty, or property must be proportioned to the injury or mischief which it is intended to prevent is in our opinion one of great importance" and it was one which they emphasized in their Draft.

Examples of the application of this proposition are to be found in *R. v. MORSE*(1910), 4 Cr.App.R.50 (use of razor in defence against unarmed assailant) and *R. v. MANCINI*, [1942]A.C.1, 28 Cr.App.R.65 (use of dagger resulting in death). In *R. v. BURKETT*(1946), 1 C.R.339, a conviction for assault occasioning bodily harm was upheld against an accused on the ground that he had used excessive force in defending himself from attack.

Defence of Property.

DEFENCE OF MOVABLE PROPERTY.—Assault by trespasser.

38. (1) Every one who is in peaceable possession of movable property, and every one lawfully assisting him, is justified

(a) **in preventing a trespasser from taking it, or**

(b) **in taking it from a trespasser who has taken it,**

if he does not strike or cause bodily harm to the trespasser.

(2) Where a person who is in peaceable possession of movable property lays hands upon it, a trespasser who persists in attempting to keep it or take it from him or from any one lawfully assisting him shall be deemed to commit an assault without justification or provocation.

OLD CODE:

55. Every one is justified in using force in defence of his own person, or that of any one under his protection, from an assault accompanied with insult, if he uses no more force than is necessary to prevent such assault, or the repetition of it.

(2) This section shall not justify the wilful infliction of any hurt or mischief disproportionate to the insult which the force used was intended to prevent.

56. Every one who is in peaceable possession of any movable property or thing, and every one lawfully assisting him, is justified in resisting the taking of such thing by any trespasser, or in retaking it from such trespasser, if in either case he does not strike or do bodily harm to such trespasser.

(2) If, after any one, being in peaceable possession as aforesaid, has laid hands upon any such thing, such trespasser persists in attempting to keep it or take it from the possessor, or from any one lawfully assisting him, the trespasser shall be deemed to commit an assault without justification or provocation.

57. Every one who is peaceable possession of any movable property or thing under a claim of right, and every one acting under his authority, is protected from criminal responsibility for defending such possession, even against a person entitled by law to the possession of such property or thing, if he uses no more force than is necessary.

58. Every one who is in peaceable possession of any movable property or thing but neither claims rights thereto nor acts under the authority of a person claiming right thereto, is neither justified nor protected from criminal responsibility for defending his possession against a person entitled by law to the possession of such property or thing.

This is the former s.56. It was s.48 in the Code of 1892 and s.58 in the E.D.C. where it appears with the comment that "This would put the possessor in the position of a person acting in self-defense as contemplated by section 55." (*i.e.*, s.34, *supra*).

Concerning the defence of possession generally, the Imperial Commissioners said (Note B., p.45):

> "But the defence of possession either of goods or land against a mere trespass, not a crime, does not, strictly speaking, justify even a breach of the peace. The party in lawful possession may justify gently laying his hands on the trespasser and requesting him to depart. If the trespasser resists, and in so doing assaults the party in possession, that party may repel the assault and for that purpose may use any force which he would be justified in using in defence of his person. As is accurately stated in 1 Rolle's Abt. Trespass G.8, 'a justification of a battery in defence of possession, though it arose in the defence of the possession, yet in the end it is the defence of the person.' "

DEFENCE WITH CLAIM OF RIGHT.—Defence without claim of right.

39. (1) Every one who is in peaceable possession of movable property under a claim of right, and every one acting under his authority is protected from criminal responsibility for defending that possession, even against a person entitled by law to possession of it, if he uses no more force than is necessary.

Section 39—*continued*

(2) Every one who is in peaceable possession of movable property, but does not claim it as of right or does not act under the authority of a person who claims it as of right, is not justified or protected from criminal responsibility for defending his possession against a person who is entitled by law to possession of it.

This combines the former ss.57 and 58. They were ss.49 and 50 in the Code of 1892 and ss.59 and 60 in the E.D.C., but s.59 contained the qualifying clause "if he does not strike or do bodily harm to such person."

As to protection from criminal responsibility, see notes to s.25, and, with reference also to ss.40-42, see notes on self-defence following s.34.

DEFENCE OF DWELLING.

40. Every one who is in peaceable possession of a dwelling house, and every one lawfully assisting him or acting under his authority, is justified in using as much force as is necessary to prevent any person from forcibly breaking into or forcibly entering the dwelling house without lawful authority.

This is a combination of the former ss.59 and 60 modified as noted below. These were ss.51 and 52 in the Code of 1892, and ss.61 and 62 in the E.D.C.

The words "either by night or day" in s.59, and "by night" in s.60 do not appear, and the reference to the trespasser's intent is also omitted. The effect of the new section is that the householder is justified in using necessary force to prevent anyone from breaking or forcibly entering his house without lawful authority.

Upon the words "without lawful authority" see *HANDCOCK v. BAKER*(1800), 2 Bos. & P. 260, in which a constable and a private person were held to be justified in breaking into a house to prevent the committing of murder.

DEFENCE OF HOUSE OR REAL PROPERTY.—Assault by trespasser.

41. (1) Every one who is in peaceable possession of a dwelling house or real property and every one lawfully assisting him or acting under his authority is justified in using force to prevent any person from trespassing on the dwelling house or real property, or to remove a trespasser therefrom, if he uses no more force than is necessary.

(2) A trespasser who resists an attempt by a person who is in peaceable possession of a dwelling house or real property or a person lawfully assisting him or acting under his authority to prevent his entry or to remove him, shall be deemed to commit an assault without justification or provocation.

This is the former s.61. It was s.53 in the Code of 1892, and s.63 in the E.D.C. where it appeared with the qualifying clause noted under s.39, *ante*.

OLD CODE:

59. Every one who is in peaceable possession of a dwelling house, and every one lawfully assisting him or acting by his authority, is justified in using such force as is necessary to prevent the forcible breaking and entering of such dwelling house, either by night or day, by any person with the intent to commit any indictable offence therein.

60. Every one who is in peaceable possession of a dwelling house, and every one lawfully assisting him or acting by his authority, is justified in using such force as is necessary to prevent the forcible breaking and entering of such dwelling house by night by any person, if he believes, on reasonable and probable grounds, that such breaking and entering is attempted with the intent to commit any indictable offence therein.

61. Every one who is in peaceable possession of any house or land, or other real property, and every one lawfully assisting him or acting by his authority, is justified in using force to prevent any person from trespassing on such property, or to remove him therefrom, if he uses no more force than is necessary.
(2) If such trespasser resists such attempt to prevent his entry or to remove him such trespasser shall be deemed to commit an assault without justification or provocation.

62. Every one is justified in peaceably entering in the daytime to take possession of any house or land to the possession of which he, or some person under whose authority he acts, is lawfully entitled.
(2) If any person, not having or acting under the authority of one having peaceable possession of any such house or land with a claim of right, assaults any one peaceably entering as aforesaid, for the purpose of making him desist from such entry, such assault shall be deemed to be without justification or provocation.
(3) If any person having peaceable possession of such house or land with a claim of right, or any person acting by his authority, assaults any one entering as aforesaid, for the purpose of making him desist from such entry, such assault shall be deemed to be provoked by the person entering.

ASSERTATION OF RIGHT TO HOUSE OR REAL PROPERTY.—Assault in case of lawful entry.—Trespasser provoking assault.

42. (1) Every one is justified in peaceably entering a dwelling house or real property by day to take possession of it if he, or some person under whose authority he acts, is lawfully entitled to possession of it.

(2) Where a person

(*a*) not having peaceable possession of a dwelling house or real property under a claim of right, or

(*b*) not acting under the authority of a person who has peaceable possession of a dwelling house or real property under a claim of right,

assaults a person who is lawfully entitled to possession of it and who is entering it peaceably by day to take possession of it, for the purpose of preventing him from entering, the assault shall be deemed to be without justification or provocation.

Section 42—*continued*

(3) Where a person

(a) **having peaceable possession of a dwelling house or real property under a claim of right, or**

(b) **acting under the authority of a person who has peaceable possession of a dwelling house or real property under a claim of right,**

assaults any person who is lawfully entitled to possession of it and who is entering it peaceably by day to take possession of it, for the purpose of preventing him from entering, the assault shall be deemed to be provoked by the person who is entering.

This is the former s.62 with the term "real property" substituted for "land". It was s.54 in the Code of 1892, and s.64 in the E.D.C. *Cf.* the words of the former s.61: "house or land, or other real property".

This section should be read with s.73, *post*.

PROTECTION OF PERSONS IN AUTHORITY.

CORRECTION OF CHILD BY FORCE.

43. Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction towards a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

This is the former s.63, omitting the reference to master and apprentice. It was s.55 in the Code of 1892 and s.66 in the E.D.C. The relationship of master and apprentice in the sense in which it formerly existed is much less common nowadays. However, it is still recognized by the *Canada Shipping Act*, and in that regard would probably be covered by the next section. S.190, *post*, preserves the reference to it.

In *R. v. GRIFFIN*(1869), 11 Cox, C.C.402, accused was convicted of manslaughter when his child died as the result of being beaten with a strap. In a recent unreported case in Canada a man was convicted and sentenced to imprisonment for beating a child with a metal-studded belt.

Charges of assault against school-teachers alleging excessive punishment have been not uncommon. In an English case, *R. v. HOPLEY*(1860), 2 F. & F. 202, a schoolmaster was convicted of manslaughter when a beating administered by him resulted in the death of a pupil. In a recent Canadian case, *CAMPEAU v. R.*(1952), 14 C.R.202, a conviction against a teacher was upheld on appeal. See also *R. v. GAUL*(1904), 8 C.C.C. 178, *R. v. ZINCK*(1910), 18 C.C.C.456, and especially the lengthy judgment acquitting the accused in *R. v. METCALFE*(1927), 49 C.C.C.260.

MASTER OF SHIP MAINTAINING DISCIPLINE.

44. The master or officer in command of a vessel on a voyage is justified in using as much force as he believes, on reasonable and probable grounds, is necessary for the purpose of maintaining good order and discipline on the vessel.

This is the former s.64. It was s.56 in the Code of 1892, and s.66 in the E.D.C.

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;**