THE CRIMINAL CODE

AND THE

LAW OF CRIMINAL EVIDENCE IN CANADA.

BEING AN ANNOTATION OF THE CRIMINAL CODE OF CANADA, AND OF THE CANADA EVIDENCE ACT, 1893, AS AMENDED TO 1902 INCLUSIVE, WITH SPECIAL REFERENCE TO THE LAW OF EVIDENCE AND THE PROCEDURE IN CRIMINAL COURTS, INCLUDING THE PRACTICE BEFORE JUSTICES AND ON CERTIORARI AND HABEAS CORPUS.

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TABLE OF ABBREVIATIONS OF CANADIAN REPORTS.

A.R. / App. R.	Reports of Court of Appeal of Ontario, 1846-1900.
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B.C.R.	British Columbia Reports, 1882-
Bert.	Berton's New Brunswick, (2 N.B.R.) 1835-1839.
C.C.C.	Canadian Criminal Cases, 1893-
C.L.J.	Canada Law Journal, (new series) 1865-
C.L.T.	Canadian Law Times, 1881-
C.P.	Upper Canada Common Pleas, 1850-1882.
Cameron MSS.	Cameron's Reports, Upper Canada, 1840-1844.
Camp. MSS.	Campbell's Reports, Upper Canada, 1823-1827.
Can. Cr. Cas.	Canadian Criminal Cases, 1893-
Can. S.C.R.	Reports of Supreme Court of Canada, 1877-
Cartw.	Cartwright's Constitutional Cases, 1874-
Cham. R.	Reports of Decisions in Common Law, Chambers, (Ont.) 1848-1853.
Ch. Cham.	Chancery Chambers Reports, (Ont.) 1858-1872.
Chip.	Chipman's New Brunswick, (1 N.B.R.) 1825-1828.
Cochrane	Cochrane's Reports, Nova Scotia, 1859.
Dor. Q.B.	Dorion's Queen's Bench, (Quebec) 1880-
Dra.	Draper's King's Bench Reports, Upper Canada, 1829-1831.
Duval R.	Duval's Supreme Court (Canada) Reports, 1876-
E. & A.	Error and Appeal Reports, Upper Canada, 1846-1866.
G. & O.	Geldert & Oxley's Nova Scotia, 1866-1875.
Gr.	Grant's Chancery, (Ontario) 1849-1882.
H. & W.	Haszard & Warburton's Prince Edward Island, 1850-1874.
Han.	Hannay's New Brunswick, (12-13 N.B.R.) 1867-1871.
Hodg. El. Cas.	Hodgins' Election Cases, (Ont.) 1871-1878.
James	James' Reports, Nova Scotia, 1851-1855.
Kerr	Kerr's New Brunswick, (3-5 N.B.R.) 1840-1848.
L.C. Jur.	Lower Canada Jurist, 1856-
L.C.L.J.	Lower Canada Law Journal, 1866-1868.
L.C.R.	Lower Canada (Quebec) Reports, 1850-1867.
L.N.	Legal News, (Montreal) 1878-
Man. R.	Manitoba Law Reports, 1884-
Mathieu R.	Mathieu's Quebec Revised Reports.
Mont. L.R.	Montreal Law Reports, 1884-
N.B. Eq.	New Brunswick Equity Reports, 1876-
N.B.R.	New Brunswick Reports, 1825-
N.S.D.	Nova Scotia Decisions, 1867-1874.
N.S.R.	Nova Scotia Reports, 1834-

N.W.T. Rep. .....North-West Territories Reports (old series).
O.R. .....
Ont. R. ..... } Ontario Reports, 1882-1900.
Old.....Oldright's Reports, Nova Scotia, 1860-1867.
Ont. A.R. .....Reports of Court of Appeal of Ontario, 1846-
Ont. Elec. R.....Ontario Election Reports, 1891-1900.
P. & B. .....Pugsley & Burbidge, New Brunswick, (17-20 N.B.R.) 1877-1881.
P. & T.....Pugsley & Trueman, New Brunswick, (22 N.B.R.) 1882-1883.
Perrault .....Perrault's Lower Canada Reports, 1726-1759.
Pugs. .....Pugsley's New Brunswick, (14-16 N.B.R.) 1872-1876.
Peters.....Peters' Reports, Prince Edward Island, 1850-1872.
P.E.I. .....Prince Edward Island Reports, 1850-
P.R. .....Practice Reports, (Ont.) 1850-1900.
Pyke .....Pyke's Reports, Quebec, 1810-1811.
Que. K.B. .....Quebec Reports, King's Bench, 1901-
Que. L.R. .....Quebec Law Reports, 1874-
Que. P.R. .....Quebec Practice Reports, 1899-
Que. Q.B. .....Quebec Reports, Queen's Bench, 1892-1900.
Que. S.C.....Quebec Reports, Superior Court, 1892-
R. & C.....Russell & Chesley's Nova Scotia, 1875-1879.
R. & G. .....Russell & Geldert's Nova Scotia, 1879-1882.
R.J.Q., Q.B. .....Quebec Judicial Reports, Queen's Bench, 1892-1900.
R.J.Q., S.C. .....Quebec Judicial Reports, Superior Court, 1892-
Ramsay & M.....Ramsay & Morin's Montreal Condensed Reports, 1854.
Rev. Crit.....Revue Critique, (Quebec) 1871-1875.
Rev. de Leg.....Revue de Legislation, (Quebec) 1845-1848.
Rev. Leg. .....Revue Legale, (Que.) 1869-
Russ. & Ch. .....Russell & Chesley, Nova Scotia, 1875-1879.
Terr. L.R. .....Law Reports of the North Western Territories (new series).
Thom. Dec. .....Thomson's Decisions, Nova Scotia, 1834-1851.
Thom. R. .....Thomson's Reports, Nova Scotia, 1856-1859.
U.C.C.P. .....Upper Canada Common Pleas, 1850-1882.
U.C.L.J. .....Upper Canada Law Journal, (old series) 1855-1864.
U.C.O.S. .....Upper Canada, Queen's Bench Reports, (old series) 1831-1844.
U.C.Q.B. .....Upper Canada, Queen's Bench, 1844-1882.

CASES CITED.

CORRIGENDA.

page 512—for "Copy of depositions" (side heading to section 595) read "Recognizance to prosecute"

page 625—Insert "Amendment of 1900" above sec. 702

page 711—In line 1 of sec. 832, for "Court by which any judge" read "Court by which *and* any judge."

page 743—strike out the seventh line from foot of page "Crim. Code one hundred and twenty-three."

page 789—for "R. v. Henell" read "R. v. Herrell"

THE CANADIAN CRIMINAL CODE,

AND THE

LAW OF CRIMINAL EVIDENCE

APPLICABLE THERETO.

THE CRIMINAL CODE, 1892

(Statutes of Canada, 55-56 Vict., Chap. 29) and amending Acts 1893 to 1901, inclusive.

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

[N.B.—Where in the original Act passed in the reign of Her late Majesty, Queen Victoria, reference was made to "Her Majesty," the text is now printed "His Majesty," and the word "King's" substituted for "Queen's," etc.]

TITLE I.

INTRODUCTORY PROVISIONS.

PART I.

PRELIMINARY.

SECT.

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1. Short Title.—This Act may be cited for all purposes as *The Criminal Code*, 1892.

Sub-divisions of Code.]—The arrangement of titles in this Code is as follows:—

TITLE I. Introductory provisions; II. Offences against public order, internal and external; III. Offences affecting the administration of law and

justice; IV. Offences against religion, morals and public convenience; V. Offences against the person and reputation; VI. Offences against the rights of property and rights arising out of contracts, and offences connected with trade; VII. Procedure; VIII. Proceedings after conviction; IX. Actions against persons administering the criminal law; X. Repeal, etc. There are two schedules to the Code, the first containing the Forms, and the second a Table of Acts repealed by the Code (see under sec. 981). The Code Forms are in this treatise set forth under the respective sections to which they refer. There is also an appendix of Acts and parts of Acts which are not affected by the Code. See under sec. 983 (3).

Legislative power.]—Section 91 of the British North America Act, 1867, embodying the Canadian Constitution, provides that it shall be lawful for the Dominion Parliament to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects thereby assigned exclusively to the Legislatures of the provinces; and "for greater certainty, but not so as to restrict the generality of the foregoing terms," it is thereby declared that (notwithstanding anything in that Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within certain classes of subjects enumerated, amongst which is: (27) The Criminal Law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters.

Section 92 of the same statute provides that in each province the Legislature may exclusively make laws in relation to matters coming within certain other classes of subjects therein enumerated, amongst which is included the following: (14) The administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts.

This latter power has been held to include the power of giving jurisdiction to the provincial courts and to impliedly include the power of enlarging, altering, amending and diminishing the jurisdiction of such courts. R. v. Levinger (1892), 22 O.R. 690 (Q.B.D.). But in R. v. Boucher (1879), Cassels S.C. Dig. 181, Henry, J. of the Supreme Court of Canada, held that to merely add to the existing duties or functions of a police magistrate does not interfere with the constitution, maintenance or organization of the court, even if such office can be called a "Court" within the meaning of sec. 92 of the B.N.A. Act, which he doubted. And in R. v. Toland (1892), 22 O.R. 505, it was held that an Ontario Statute (sec. 2 of 53 Viet., ch. 18), which authorized police magistrates to try and convict persons charged with forgery was ultra vires of the Provincial Legislature; per MacMahon, J. Enforcing the law against a person charged with the commission of a crime is by the "trial" of the offender and his punishment for the offence. The trial is not connected with the constitution, maintenance or organization of a court but is a criminal procedure. Ibid.

The whole domain of crime and criminal procedure is the exclusive property of the Dominion Parliament, and to allow the parliament of a province to declare that an Act which, by the general law, is a crime, triable and punishable as a crime with the ordinary safeguards of the constitution affecting procedure as to crime, shall be something other than or less than a crime, and so triable before and punishable by magistrates as if not a crime, would be destructive of the checks provided by the general law for the constitutional liberty of the subject. R. v. Lawrence (1878), 43 U.C.Q.B. 164, 175, per Harrison, C.J.

But there are many acts not being crimes which are triable before and punishable by magistrates, which, although called offences, are not crimes, and which by the proper legislative authority may be made the subject of summary magisterial jurisdiction, either with or without appeal; but these are not to be mistaken for acts in themselves crimes, and the subject of

indictment, and of conviction under indictment, either at the common law or by statute. Such acts as these may by the Provincial Legislature be made the subject of punishment by fine, penalty or imprisonment, when this is done for the purpose of enforcing any law of the province made in relation to any matter coming within any of the classes of subjects exclusively assigned to the Provincial Legislatures. One of the subjects exclusively assigned to the Provincial Legislatures is the right to make laws as to "shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes." Ibid.

The passing of a provincial statute, within the powers of the Legislature, cannot in any wise take away from Parliament the right to legislate respecting the same matters, and to prohibit them and to enforce the prohibition by such punishment by way of fine or imprisonment as may be deemed best; or to draw into the domain of criminal law an act which has hitherto been punishable only under a provincial statute. Per Rose, J., in R. v. Stone (1892), 23 O.R. 46, following R. v. Wason, 17 A.R. 221, and R. Hart, 20 O.R. 611.

A provincial statute relating to criminal law passed before Confederation becomes as to that province a part of the criminal law of Canada, and is subject to repeal or amendment by a Dominion Statute only. R. v. Halifax Electric Tramway Co. (1898), 1 Can. Cr. Cas. 424 (N.S.).

If it appears that provincial legislation deals with public wrongs and imposes penalties in respect thereof for the enforcement of which all citizens should have an equal interest as distinguished from enactments passed for the protection of a particular class or the regulation of the dealings or business of a certain class, as for example between master and servant, such legislation as to public wrongs is within the exclusive jurisdiction of the Dominion Parliament, although similar legislation as applied to various classes only and not to the public generally would be within Provincial jurisdiction as dealing with "civil rights." Ibid.

The Parliament of Canada has not the power to give to a provincial court a jurisdiction which is not within the scope of such court's powers as established by the Provincial Legislature. Ex p. Flanagan (1899), 5 Can. Cr. Cas. 82 (N.B.). Nor can it take away from the provincial courts the powers to try criminal cases given to them by Provincial Legislation. R. v. Wright, 5 Can. Cr. Cas. 85 (N.B.).

2. Commencement of Act.—This Act shall come into force on the first day of July, 1893.

The royal assent was given to this Act on the 9th day of July, 1892.

The several Acts set out in sched. II. (under sec. 981) were from and after the 1st day of July, 1893, when the Code came into operation, repealed to the extent stated in such schedule.

By an amendment of 1893 (56 Vict., ch. 32) it was declared that the provisions of this Act, i. e. the Code, which relate to procedure shall apply to all prosecutions commenced on or after the day upon which this Act comes into force, in relation to any offence whensoever committed. The proceedings in respect of any prosecution commenced before the said date otherwise than under the Summary Convictions Act, shall, up to the time of committal for trial, be continued as if this Act had not been passed, and after committal for trial shall be subject to all the provisions of this Act relating to procedure so far as the same are applicable thereto. The proceedings in respect of any prosecutions commenced before the said day, under the Summary Convictions Act, shall be continued and carried on as if this Act had not been passed. Although the Code was in force at the date of the prosecution and the execution of an impeached agreement, if it was not in force

when the alleged criminal acts were committed it does not apply. Major v. McCraney (1898), 2 Can. Cr. Cas. 547, 558 (S.C. Can.).

Section 754 declares that the practice and procedure in all criminal cases and matters in the High Court of Justice of Ontario, which are not provided for in the Code, shall remain as heretofore.

3. Interpretation.—In this Act the following expressions have the meanings assigned to them in this section unless the context requires otherwise:

(*a.*) The expression "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 included in Canada before it was included therein. R.S.C. c. 174, s. 2 (*a*).

By the Interpretation Act R.S.C. 1886, ch. 1, sec. 2, that Act and every provision thereof is to extend and apply to every Act of the Parliament of Canada "now or hereafter passed" except in so far as the provision is inconsistent with the intent and object of such Act, or the interpretation which such provisions would give to any word, expression or clause is inconsistent with the context, and except in so far as any provision thereof is in any such Act declared not applicable thereto.

The interpretation of all statutes (especially penal ones) should be highly favourable to personal liberty; Henderson v. Sherborne, 2 M. & W. 239; and where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning, which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject, and against the Legislature which has failed to explain itself. Nicholson v. Fields, 31 L.J. Exch. 235; Foley v. Fletcher, 28 L.J. Exch. 106; Scott v. Morley, 57 L.J.Q.B. 45 (C.A.); R. v. Wirth, 1 Can. Cr. Cas. 231 (B.C.).

(*b.*) The expression "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 North-West Territories and the district of Keewatin, the Attorney-General of Canada. R.S.C. c. 150, s. 2 (*a*).

(*c.*) The expression "banker" includes any director of any incorporated bank or banking company. R.S.C. c. 164, s. 2 (*g*).

(*d.*) The expression "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. R.S.C. c. 172, s. 1.

(*Amendments of 1895 and 1900*).

(*e.*) The expression "Court of Appeal" includes the following courts. R.S.C. c. 174, s. 2 (*h*).

(i.) In the province of Ontario, the Court of Appeal for Ontario;

(ii.) In the province of Quebec, the Court of King's Bench, appeal side;

(iii.) In the provinces of Nova Scotia, New Brunswick and British Columbia, and in the North-West Territories, the Supreme Court in banc;

(iv.) In the province of Prince Edward Island, the Supreme Court of Judicature:

(v.) In the province of Manitoba, the Court of King's Bench;

(*f.*) The expression "district, county or place" includes any division of any province of Canada for purposes relative to the administration of justice in criminal cases. R.S.C. c. 174, s. 2 (*f*).

The expression "district" or "county" as used in Part LVIII. relating to summary convictions is by sec. 839 declared to include any territorial or judicial division or place in and for which there is such judge, justice, justice's court, officer or prison as is mentioned in the context.

(*g.*) The expression "document of title to goods" includes any bill of lading, India warrant, dock warrant, warehouse-keeper'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. R.S.C. c. 164, s. 2 (*a*).

(*h.*) The expression "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. R.S.C. c. 164, s. 2 (*b*).

(*i.*) The expression "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; R.S.C. c. 150, s. 2 (*b*).

(*j.*) Finding the indictment includes also exhibiting an information and making a presentment. R.S.C. c. 174, s. 2 (*d*).

(*k.*) 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. R.S.C. c. 164, s. 2 (*l*); c. 165, s. 2; c. 167, s. 2; c. 171, s. 3; 50-51 Vict., c. 45, s. 2 (*e*).

(Amendment of 1893).

If there are two or more persons, any one or more of whom, with the knowledge and consent of the rest, have any thing 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.

(*l.*) The expressions "indictment" and "count," respectively, include information and presentment as well as indictment, and also any plea, replication or other pleading, and any record. R.S.C. c. 174, s. 2 (*c*).

(*m.*) The expression "intoxicating liquor" means and includes any alcoholic, spirituous, vinous, fermented or other intoxicating liquor, or any mixed liquor a part of which is spirituous or vinous, fermented or otherwise intoxicating. R.S.C. c. 151, s. 1 (*d*).

(*n.*) The expression "justice" means a justice of the peace, and includes two or more justices, if two or more justices act or have jurisdiction, and also any person having the power or authority of two or more justices of the peace. R.S.C. c. 174, s. 2 (*b*).

The local Government of the Province of New Brunswick has under 32 Vict., ch. 92, power to appoint Justices of the Peace, that Act having received the assent of the Governor-General on 20th August, 1869, under the 90th sec. of the British North America Act. Ex parte Williamson (1884), 24 N.B.R. 65 (following Ganong v. Bayley, 1 P. & B. 324).

(*o.*) The expression "loaded arms" includes any gun, pistol or other arm loaded with gunpowder, or other explosive substance, and ball, shot, slug or other destructive material, or charged with compressed air and ball, shot, slug or other destructive material.

(*o*-1.) The expression "military law" includes the Militia Act and any orders, rules and regulations made thereunder, the King's Regulations and Orders for the Army; any Act of the United Kingdom or other law applying to His Majesty's troops in Canada, and all other orders, rules and regulations of whatever nature or kind soever to which His Majesty's troops in Canada are subject.

(*p*.) The expression "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. R.S.C. c. 164, s. 2 (*j*).

(*p*-1.) In the sections of this Act relating to defamatory libel the word "newspaper" shall mean any paper, magazine or periodical containing public news, intelligence or occurrences, or any remarks or observations thereon, printed for sale and published periodically, or in parts or numbers, at intervals not exceeding thirty-one days between the publication of any two such papers, parts or numbers, and also any paper, magazine or periodical printed in order to be dispersed and made public, weekly or oftener, or at intervals not exceeding thirty-one days, and containing only or principally advertisements.

(*q*.) The expression "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 the expression "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.

(*r*.) The expression "offensive weapon" includes any gun or other firearm, or air-gun, or any part thereof, or any sword, sword-blade, bayonet, pike, pike-head, spear, spear-head, dirk, dagger, knife, or other instrument intended for cutting or stabbing, or any metal knuckles, or other deadly or dangerous weapon, and any instrument or thing intended to be used as a weapon, and all ammunition which may be used with or for any weapon. R.S.C. c. 151, s. 1 (*c*).

(*s*.) The expression "peace officer" includes a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer, and justice of the peace, and also the warden, keeper or guard 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.

(*t*.) The expressions "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.

A corporation is not subject to indictment upon a charge of any crime the essence of which is either personal criminal intent or such a degree of negligence as amounts to a wilful incurring of the risk of causing injury to others. R. v. Great West Laundry Co. (1900), 3 Can. Cr. Cas. 514 (Man.).

(*u.*) The expression "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.

(*v.*) The expression "property" includes: R.S.C. c. 164, s. 2 (*e*).

(i.) 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;

(ii.) 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;

(iii.) 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; and such postal card or stamp shall be held 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.

The phrase in Code sec. 205 (b) as to lotteries, is "disposing of any property," and the clause of interpretation as to "property" simply states that it includes "every kind of real and personal property." The property need not be "specific property," for it would be an easy evasion if the statute could be got rid of by designating no particular thing, although the winner would be able to exercise his choice among the available prizes offered. Taylor v. Smetten, 11 Q.B.D. at p. 212; R. v. Lorrain (1896), 2 Can. Cr. Cas. 144.

(*w.*) The expression "public officer" includes any inland revenue or customs officer, officer of the army, navy, marine, militia, North-West mounted police, or other officer engaged in enforcing the laws relating to the revenue, customs, trade or navigation of Canada.

The acts of a de facto officer, assuming to exercise the functions of an office to which he has no legal title, are, as regards all persons but the holder of the legal title, legal and binding. O'Neil v. Attorney-General (1896), 1 Can. Cr. Cas. 303 (S.C. Can.).

An officer de facto is "one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." R. v. Bedford Level, 6 East 356, per Lord Ellenborough; Parker v. Kett, 1 Ld. Raym. 658; 12 Mod. 467.

The distinction between an officer de jure and an officer de facto is, that an officer de jure is one who has the lawful right or title without the possession of the office, while an officer de facto has the possession and performs

the duties under the colour of right without being actually qualified in law so to act. 19 Am. & Eng. Encyc. of Law, 394.

The acts of a justice of the peace, duly commissioned, but who has not qualified by taking the prescribed oath, or who has not the property qualification without which he is prohibited by statute from acting and is declared to be incapable of "being a justice," are sustained as valid if done in a judicial character, and sufficient effect is given to the statute by considering it as penal upon the party acting; and therefore persons seizing goods under a warrant of distress, signed by a justice who had not taken the oaths required, are not trespassers because of the defect. Margate Pier v. Hannam (1819), 3 B. & Ald. 266.

It is a general presumption of law that a person acting in a public capacity is duly authorized to do so. R. v. Jones, 2 Camp. 131; Gordon's case (1789), 1 Leach's Crown Cases 581; Berryman v. Wise, 4 T.R. 366; but such presumption only stands till the contrary is proved. R. v. Verelst (1813), 3 Camp. 431.

(*x*.) The expression "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. R.S.C. c. 81, s. 2 (*h*).

(Amendment of 1900.)

(*y*.) The expression "Superior Court of Criminal Jurisdiction means and includes the following courts:

(i.) In the province of Ontario, the High Court of Justice for Ontario;

(ii.) In the province of Quebec, the Court of King's Bench;

(iii.) In the provinces of Nova Scotia, New Brunswick and British Columbia, and in the North-West Territories, the Supreme Court;

(iv.) In the province of Prince Edward Island, the Supreme Court of Judicature;

(v.) In the province of Manitoba, the Court of King's Bench (Crown side).

A Provincial Legislature has no jurisdiction to confer upon a single judge, concurrently or otherwise, the power to determine matters arising under the Criminal Code, as to which the full court was formerly the proper forum. R. v. Beale (1896), 1 Can. Cr. Cas. 235 (Man.).

In Ontario the jurisdiction to quash convictions was at the time of the passing of the Ontario Judicature Act in the Courts of Queen's Bench and Common Pleas respectively, and was exercised and exerciseable by them respectively sitting in term; the courts or divisions of the High Court of Justice mentioned in sub-sec. 3 of sec. 3 of the Judicature Act can respectively exercise all the jurisdiction of the High Court of Justice in the name of the High Court of Justice; the sittings of these respective courts or divisions are analogous to and represent the sittings of the former courts of common law in term. R. v. Beemer (1888), 15 O.R. 266.

(*z*.) The expression "territorial division" includes any county, union of counties, township, city, town, parish or other judicial division or place to which the context applies. R.S.C. c. 174, s. 2 (*g*).

(*aa.*) The expression "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. R.S.C. c. 164, s. 2 (*i*).

(*bb.*) The expression "trustee" means a trustee on some express trust created by some deed, will or instrument in writing, or by parol, 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 and 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 the expression "trust" includes whatever is by that law an "*administration*" or "*fidéicommission.*" R.S.C. c. 164, s. 2 (*c*).

(*cc.*) The expression "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 Britain or Ireland, or 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 as hereinbefore defined 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; and every such valuable security shall, where value is material, be deemed to be of value equal to that of such 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. 53 V., c. 37, s. 20.

It was formerly held that the term "valuable security" meant a valuable security to the person who parted with it on the false pretence, and that the inducing a person to execute a mortgage on his own property was therefore not obtaining a "valuable security." R. v. Brady (1866), 26 U.C.Q.B. 13; R. v. Danger, 3 Jur. N.S. 100; but the present definition expressly includes any deed, bond, etc., which evidences title.

Defendant was indicted for forging an order for the payment of money, the order being in the following words: "John McLean, tailor, please give M. A. S. (defendant) to the amount of $3.50 and by doing you will oblige me, A. McP." It was proved that the signature A. McP. was forged by the prisoner, and prisoner was convicted and sentenced. It was held that this was an order for the payment of money, and not a mere request, and the conviction was affirmed. R. v. Steel (1863), 13 U.C.C.P. 619 (following R. v. Tuke (1858), 17 U.C.Q.B. 296).

The true criterion as to whether a document is an order for payment of money or only a request, is, whether, if the instrument were genuine, and the person to whom it was directed paid it, he could recover the amount from the party by whom the order was given, or charge it to him, for if such be the case it is an order. R. v. Carter, 1 Cox 172; R. v. Ferguson, 1 Cox 241; R. v. Dawson, 3 Cox 220; R. v. Vivian, 1 Den. C.C. 35.

(*dd.*) The expression "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.

(*ee.*) The expression "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.

Interpretation Act.]—By section 7 of the Interpretation Act the following rules of interpretation applicable to the Code are enacted:—

"*Shall.*"]—This word shall be construed as imperative (sub-sec. 4).

"*May.*"]—This expression is to be construed as permissive (sub-sec. 4.)

The word "may" in a statute is, however, sometimes imperative, as where the intent and object of the statute so require (sec. 2).

Where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised. Per Lord Cairns, L.C., Julius v. Bishop of Oxford (1880), 5 App. Cas. 214, 225.

The word "may" is aptly and properly used to confer on the court an authority, and the rule is that when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application. Jervis, C.J., in Macdougall v. Patterson (1851), 11 C.B. 755; Reid v. Gardner, 8 Exch. 651; Jones v. Harrison, 6 Ex. 328, disapproved.

Where a statute directs the doing of a thing for the sake of justice or the public good, the word "may" is the same as the word "shall." Rex v. Barlow, Salk. 609, Skin. 370, Carth. 293. The words "it shall be lawful"

used in a statute merely make that legal and possible which there would otherwise be no right or authority to do, and their natural meaning is permissive and enabling only; so when the Church Discipline Act, 3 and 4 Vict. (Imp.), ch. 86, provided that it shall be lawful for the bishop of the diocese on the application of any party complaining thereof, or if he shall think fit, of his own mere notion to issue a commission for the purpose of making enquiry as to the grounds of such charge or report, and either in the first instance or after the commissioners shall have reported that there is sufficient prima facie ground for instituting proceedings, to send the case by letters of request to the Court of Appeal, etc., it was held that the sections gave the bishop complete discretion to issue or decline to issue such commission. Julius v. Bishop of Oxford (1880), 5 App. Cas. 214.

Enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right, and if by enabling words a court is empowered to pass sentence on one convicted of a crime, it would be the duty of the court to pass that sentence. Per Lord Blackburn, in Julius v. Bishop of Oxford (1880), 5 App. Cas., at page 245.

Where a statute provided that execution "may" be issued by leave of the court upon motion for a rule to shew cause, and that it shall be lawful for such court to make absolute or discharge such rule, or to make such order therein as to such court shall seem fit, it was held by the Court of Common Pleas that the statute left no discretion to the court, which had nothing more to do than to see that the execution creditor had complied with all the conditions which the Legislature had thought fit to impose upon him. Morisse v. Royal British Bank (1856), 1 C.B.N.S. 66; Hill v. London and County Assurance Co., 1 H. and N. 398.

But where a statute was in the terms that upon information and complaint laid, etc., the justices receiving the same *may*, if they shall think fit, issue a summons or warrant, they have a discretion, and if they think the charge frivolous or vexatious they are not bound to grant an application for summonses; what the justices have to consider is whether there was prima facie evidence of a criminal offence which in their judgment calls upon the alleged offender to answer. If they think there is such prima facie evidence, it is their *duty* to issue summonses, and if they refuse, not because they disbelieve the evidence or for any other reasonable ground, but from some ground which they ought not to have taken into account, a mandamus may be ordered to compel them to hear and determine the matter of the application for the summonses. R. v. Adamson (1875), 1 Q.B.D. 201. Ex parte McMahon, 48 J.P. 70.

Code sec. 880 (*e*) enacting that the court "may" order the fine and costs to be paid out of moneys deposited pursuant to sec. 880 (e) on taking an appeal, if the conviction is affirmed, is to be construed as giving the court no discretion to refuse the application of the party to be benefited by the making of the order. Fenson v. New Westminster (1897), 2 Can. Cr. Cas. 52 (B.C.).

"*Province.*"]—This expression includes the North-West Territories and the District of Keewatin (sub-sec. 13).

Names.]—The name commonly applied to any country, place, body, corporation, society, officer, functionary, person, party or thing, means such country, place, body, corporation, society, officer, functionary, person, party or thing, although such name is not the formal and extended designation thereof (sub-sec. 16).

"*County.*"]—The expression "county" includes two or more counties united for purposes to which the enactment relates (sub-sec. 20).

Number and gender.]—Words importing the singular number or the masculine gender only, include more persons, parties or things of the same kind than one, and females as well as males, and the converse (sub-sec. 21).

"*Person.*"]—The expression "person" includes any body corporate and politic, or party, and the heirs, executors, administrators or other legal representatives of such person, to whom the context can apply according to the law of that part of Canada to which such context extends (sub-sec. 22).

"*Writing.*"]—The expression "writing" "written," or any term of like import, includes words printed, painted, engraved, lithographed or otherwise traced or copied. See also sub-sec. (*ee*) supra.

"*Now*" *or* "*Next.*"]—The expression "now" or "next" shall be construed as having reference to the time when the Act was presented for the Royal Assent (sub-sec. 24).

"*Month.*"]—The expression "month" means a calendar month (sub-sec. 25).

"*Holiday.*"]—The expression "holiday" includes Sundays, New Year's Day, the Epiphany, Good Friday, the Ascension, All Saints' Day, Conception Day, Easter Monday, Ash Wednesday, Christmas Day, the birthday or the day fixed by proclamation for the celebration of the birthday of the reigning sovereign, Victoria Day, Dominion Day, Labour Day (first Monday of September), and any day appointed by proclamation for a general fast or thanksgiving (sub-sec. 26 as amended 56 Vict. c. 30, 57-58 Vict. c. 55, and 1 Edw. VII. c. 12, s. 3).

Reckoning of time.]—If the time limited by any Act for any proceeding, or the doing of any thing under its provisions, expires or falls upon a holiday, the time so limited shall be extended to, and such thing may be done on the day next following which is not a holiday.

"*Oath.*"]—The expression "oath" includes a solemn affirmation or declaration, whenever the context applies to any person and case by whom and in which a solemn affirmation or declaration may be made instead of an oath; and in like cases the expression "sworn" includes the expression "affirmed" or "declared" (sub-sec. 28).

"*Sureties.*"]—The expression "sureties" means sufficient sureties, and whenever the word is used one person shall be sufficient therefor unless otherwise expressly required (sub-sec. 30).

"*Magistrate.*"]—The expression "magistrate" means a justice of the peace (sub-sec. 34). But anything directed to be done by or before a magistrate must be done by or before a magistrate whose jurisdiction or powers extend to the place where such thing is to be done (sub-sec. 36). As to the meaning of the term "magistrate" under the Summary Trials Procedure (Part LV. of the Code), see Code sec. 782.

"*Security.*"]—This expression means sufficient security, and, whenever used, one person shall be sufficient therefor unless otherwise expressly required (sub-sec. 30).

"*County Court.*"]—This expression in its application to the Province of Ontario includes "district court" (sub-sec. 31a added by 1 Edw. VII., ch. 11, sec. 1).

"*Two justices.*"]—This expression means two or more justices of the peace assembled or acting together (sub-sec. 35). But anything directed to be done by or before them must be done by or before those whose jurisdiction or powers extend to the place where such thing is to be done (sub-sec. 36).

"*Imprisoned.*"]—If, in any Act, any person is directed to be imprisoned or committed to prison, such imprisonment or committal shall, if no other place is mentioned or provided by law, be in or to the common gaol of the locality in which the order for such imprisonment is made, or if there is no common gaol there, then in or to that common gaol which is nearest to such locality; and the keeper of any such common gaol shall receive such person and safely keep and detain him in such common gaol under his custody until discharged in due course of law, or bailed in cases in which bail may by law be taken (sub-sec. 38).

Majorities rule.]—When any act or thing is required to be done by more than two persons, a majority of them may do it (sub-sec. 42).

Forms.]—Whenever forms are prescribed, slight deviations therefrom, not affecting the substance or calculated to mislead, shall not vitiate them (sub-sec. 44).

Rules.]—Whenever power to make by-laws, regulations, rules or orders is conferred, it shall include the power, from time to time, to alter or revoke the same and make others (sub-sec. 45).

The Crown.]—No provision or enactment in any Act shall affect, in any manner or way whatsoever, the rights of His Majesty, His heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby (sub-sec. 46).

Repeal.]—The repeal of any Act or part of an Act shall not revive any Act or provision of law repealed by such Act or part of an Act, or prevent the effect of any saving clause therein (sub-sec. 48). Whenever any Act is repealed, wholly or in part, and other provisions are substituted, and whenever any regulation is revoked and other provisions substituted, all officers, persons, bodies politic or corporate, acting under the old law or regulation, shall continue to act as if appointed under the new law or regulation until others are appointed in their stead; and all proceedings taken under the old law or regulation shall be taken up and continued under the new law or regulation, when not inconsistent therewith; and all penalties and forfeitures may be recovered and all proceedings had in relation to matters which have happened before the repeal or revocation, in the same manner as if the law or regulation was still in force, pursuing the new provisions as far as they can be adapted to the old law or regulation (sub-sec. 49). Whenever any Act is repealed, wholly or in part, and other provisions are substituted, all by-laws, orders, regulations, rules and ordinances made under the repealed Act shall continue good and valid in so far as they are not inconsistent with the substituted Act, enactment or provision, until they are annulled or others made in their stead (sub-sec 50). Whenever any Act or part of an Act is repealed, and other provisions are substituted by way of amendment, revision or consolidation, any reference in an unrepealed Act, or in any rule, order or regulation made thereunder to such repealed Act or enactment, shall, as regards any subsequent transaction, matter or thing, be held and construed to be a reference to the provisions of the substituted Act or enactment relating to the same subject matter as such repealed Act or enactment: Provided always, that where there is no provision in the substituted Act or enactment relating to the same subject matter, the repealed Act or enactment shall stand good, and be read and construed as unrepealed, in so far, but in so far only, as is necessary to support, maintain or give effect to such unrepealed Act, or such rule, order or regulation made thereunder (sub-sec. 51).

No offence committed and no penalty or forfeiture incurred, and no proceeding pending under any Act at any time repealed, or under any regulation at any time revoked, shall be affected by the repeal or revocation, except that the proceeding shall be conformable, when necessary, to the repealing Act or regulation, and that whenever any penalty, forfeiture or punishment is mitigated by any of the provisions of the repealing Act or regulation, such provisions shall be extended and applied to any judgment to be pronounced after such repeal or revocation (sub-sec. 53).

4. Expressions in other Acts.—The expressions "mail," "mailable matter," "post letter," "post letter bag," and "post office" when used in this Act have the meanings assigned to them in *The Post Office Act,* and 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.

The definitions under the Post Office Act (R.S.C. 1886 ch. 35, and 52 Vict., ch. 20), include the following:—

"*Mail.*"]—This expression includes every conveyance by which post letters are carried whether it is by land or by water (sec. 2 (*f*)).

"*Post letter.*"]—The expression "post letter" means any letter transmitted through the post or delivered through the post, or deposited in any post office, or in any letter box put up anywhere under the authority of the Postmaster General, and a letter shall be deemed a post letter from the time of its being so deposited or delivered, to the time of its being delivered to the person to whom it is addressed; and a delivery to any person authorized to receive letters for the post shall be deemed a delivery at the post office; and a delivery of any letter or other mailable matter at the house or office of the person to whom the letter is addressed, or to him, or to his servant or agent, or other person considered to be authorized to receive the letter or other mailable matter, according to the usual manner of delivering that person's letters, shall be a delivery to the person addressed (sec. 2 (*i*)).

"*Mailable Matter.*"]—The expression "mailable matter" includes any letter, packet, parcel, newspaper, book or other thing which by this Act, or by any regulation made in pursuance of it, may be sent by post (sec. 2 (*j*)).

"*Post letter bag.*"]—The expression "post letter bag" includes a mail bag, basket, or box, or packet or parcel, or other envelope or covering in which mailable matter is conveyed, whether it does or does not actually contain mailable matter (sec. 2 (*k*)).

"*Post Office.*"]—The expression "post office" means any building, room, post office railway car, street letter box, receiving box or other receptacle or place where post letters or other mailable matter are received or delivered, sorted, made up or despatched.

"*Letter.*"]—The expression "letter" includes packets of letters (sec. 2 (*a*)).

Expressions in other statutes.]—The rule to be applied where there is no such statutory provision as the above is that an appeal to earlier law and decisions for the purpose of interpreting the provisions of a statutory code can only be justified on some special ground, such as the doubtful import or previously acquired technical meaning of the language used therein. Robinson v. Canadian Pacific R. W. Co., [1892] A.C. 481.

4A. Carnal knowledge.—Carnal knowledge is complete upon penetration to any, even the slightest degree, and even without the emission of seed. R.S.C. c. 174, s. 226. (Transferred from s. 266, sub-sec. 3 by amendment of 1893).

This section was formerly sub-sec. 3 of sec. 266 defining the crime of rape, and was transferred to Part I. of the Code by the statute 56 Vict. (1893), ch. 32.

5. Offences against Imperial Statutes.—No person shall be proceeded against for any offence against any Act of the Parliament of England, of Great Britain, or of the United Kingdom of Great Britain and Ireland, unless such Act is, by the express terms thereof, or of some other Act of such Parliament, made applicable to Canada or some portion thereof as part of His Majesty's dominions or possessions.

As to offences within the jurisdiction of the English Admiralty, see sec. 542.

By the Imperial Act, 49 Geo. III., ch. 126, certain provisions contained in the statute of 5 & 6 Edw. VI., ch. 16, against buying and selling public offices were made applicable to His Majesty's dominions and were therefore held to be operative in Ontario. R. v. Mercer, 17 U.C.Q.B. 602.

The Imperial Foreign Enlistment Act of 1870 and amendments 46-47 Vict., ch. 39, and 56-57 Vict., ch. 54, extend to all the dominions of His Majesty, including the adjacent territorial waters (33-34 Vict. (Imp. ch. 90, s. 2); and any powers or jurisdiction thereby given to the Secretary of State may be exercised by him throughout His Majesty's dominions, and such powers and jurisdiction may also be exercised in Canada by the Governor-General (33-34 Vict. (Imp.), ch. 90, sec. 26). Jurisdiction thereby given to a Court of Admiralty will be exercised in Canada by the Exchequer Court (Ibid. sec. 30). The latter is also a Prize Court for Canada under Warrant in Admiralty of 17th August, 1899.

6. Punishments.—Everyone who commits an offence against this Act is liable as herein provided to one or more of the following punishments:—

(*a.*) Death;

(*b.*) Imprisonment;

(*c.*) Whipping;

(*d.*) Fine;

(*e.*) Finding sureties for future good behaviour;

(*f.*) If holding office under the Crown to be removed therefrom;

(*g.*) To forfeit any pension or superannuation allowance;

(*h.*) To be disqualified from holding office, from sitting in Parliament and from exercising any franchise;

(*i.*) To pay costs;

(*j.*) To indemnify any person suffering loss of property by commission of his offence.

Locality of Crime.]—All crime is local, and the jurisdiction over the crime belongs to the country where it is committed. Jefferys v. Boosey (1855), 4 H.L.C. 815, 24 L.J. Ex. 81, per Parke, B.; MacLeod v. New South Wales (1891), A.C., 455, 17 Cox C.C. 341.

But if a material part of any crime is committed within the jurisdiction, legislation may properly provide for the punishment there of the whole of it: Bishop on Cr. Law, sec. 116

And offences committed by a subject or citizen within the territorial limits of a foreign state may, by legislation, be made punishable in the courts of the country to which the party owes allegiance, and whose laws he is bound to obey. Wheaton's International Law, sec. 113, re Bigamy Sections, 1 Can. Cr. Cas. 172 (S.C. Can.).

In cases of obtaining goods under false pretences, the crime is complete where the goods are obtained; and, therefore, if the pretences are made within one jurisdiction and the property is obtained in another, the person making the representations must be indicted within the latter jurisdiction. 7 Am. & Eng. Ency. of Law 758; People v. Sully, 5 Parker Cr. Cas. (N.Y.) 142; Skiff v. People, 2 Parker Cr. Cas. N.Y. 139; Connor v. State, 29 Fla. 455, 30 Am. St. Rep. 126.

On an indictment for obtaining money by false pretences by sending a false return of fees to certain public commissioners, it was shewn that the return was received in Westminster with a letter dated Northampton, together with an affidavit swown there, and that the commissioners thereupon issued an order upon the treasury to pay certain moneys to the prisoner. It was held by Coleridge, J., that the jury might infer that the documents were posted in Northamptonshire, where the affidavit was sworn, and from which county the letter purported to have been written, and that the prisoner was properly indicted in Northamptonshire for obtaining money by false pretences, the "forwarding" of the false return, etc., being alleged as the false pretence. R. v. Cooke (1858), 1 Foster & F. 64.

The last-mentioned case was followed and approved by the Court for Crown Cases Reserved in R. v. Holmes (1883), 15 Cox C.C. 343. It was there held that where a false pretence was made by the prisoner in England by letter there posted to a person in France, and received in France by the latter, in consequence of which the latter sent to the prisoner a cheque drawn in France, but payable in England, which the prisoner cashed in England, an offence was established to have taken place in England, and that the prisoner was properly indicted and convicted there. Lord Coleridge, C.J., said: "The pretence was made in the County of Nottingham, for it was held in R. v. Burdett, 4 B. & Ald. 95, and other cases, that the delivery at the post office of a sealed letter, enclosing a libel, is a publication of the libel at the place of posting, and the money, which was the result of the false pretence, was obtained in Nottingham; therefore, the two necessary ingredients of the offence both took place in the country where the prisoner was tried."

PART II.

MATTERS OF JUSTIFICATION OR EXCUSE.

SECT.

7. At common law.—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 common law is not abrogated by the Code and will still be applicable in cases for which no provision has been made in the Code as well to their prosecution as defence. Even in cases provided for by the Code the common law jurisdiction as to crime is still operative except where there is a repugnancy in which event the Code will prevail. R. v. Cole, 12 February, 1902, per Boyd, C. and Ferguson, J., not yet reported.

Generally speaking, if an uninhabited country be discovered and occupied by English subjects, all English laws then in being, which are the birthright of every subject, are immediately there in force. But this must be understood with many and great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony. Broom & Hadley's Com. 119. At the time of its occupation by English subjects the country now known as the North-West Territories would fall within the description of an uninhabited country. R. v. Connor (1885), 2 Man. L.R. 235, 1 Terr. L.R. 4, 13, per Taylor, J.

Intent.]—It is a general principle of the criminal law that there must be as an essential ingredient in a criminal offence some blameworthy condition of mind—something of the mind which is designated by the expression mens rea. It is also a principle of the criminal law that the condition of the mind of the servant is not to be imputed to the master. This principle applies also to statutory offences, with this difference, that it is in the power

of the Legislature, if it so pleases, to enact that a man may be convicted and punished for an offence, although there was no blameworthy condition of mind about him; but it lies on those who assert that the Legislature has so enacted to make it out convincingly by the language of the statute. Per Cave, J., in Chisholm v. Doulton, 22 Q.B.D. 736; cited by Osler, J.A., in R. v. Potter (1893), 20 Ont. App. 516, 523.

Every person at the age of discretion is, unless the contrary be proved, presumed by law to be sane and to be accountable for his actions. R. v. Oxford, 9 C. & P. 525; R. v. Layton, 4 Cox 149; Code sec. 11 (3).

Mistake of fact.]—Ignorance or mistake of fact may constitute a valid excuse for the inadvertent commission of a crime where the accused acted under an honest and reasonable belief in a state of things which, if true, would have justified the act done. R. v. Tolson, 23 Q.B.D. 168.

In that case a woman had been convicted of bigamy, having gone through the ceremony of marriage within seven years after she had been deserted by her husband, and the jury had found that at the time of the second marriage she, in good faith and on reasonable grounds, believed her husband to be dead; it was held, on a case reserved, that such belief constituted a good defence. That doctrine as regards bigamy is now embodied in Code sec. 275 (3).

So if A. make a thrust with a sword at a place in his house where he had good reason to suppose a burglar to be concealed, and killed a person who was not a burglar, A. would be in the same position as if the person killed were in fact a burglar.

But where a statute made it unlawful to take an unmarried girl under the age of sixteen years out of the possession and against the will of her father, it was held to be no defence that the defendant believed on good grounds that the girl was above that age. R. v. Prince, L.R. 2 C.C.R 154; 44 L.J. M.C. 122; it being considered that the Legislature's object being to prevent a scandalous invasion of parental rights, it should be presumed that the Legislature intended that the wrongdoer should act at his peril. The belief in such a case is declared immaterial by sec. 283 (3) of the Criminal Code. The scope of the statute and the object for which it appears to have been passed are to be taken into consideration for the purpose of ascertaining whether a mistaken belief is material to the offence. R. v. Bishop, 5 Q.B.D. 259; Cundy v. Lecocq (1884), 13 Q.B.D. 207.

8. Application of Part II.—The matters provided for in this part are hereby declared and enacted to be justifications or excuses in the case of all charges to which they apply.

9. Children under seven.—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.

This is in accordance with the common law under which a child under the age of seven years is doli incapax and no evidence was admissible to rebut that presumption. Marsh v. Loader, 14 C.B.N.S. 535.

10. Children between seven and fourteen.—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.

Children after attaining the age of fourteen years are presumed by the law to be doli capaces, and capable of discerning good from evil, and are with respect to their criminal actions subject to the same rule of construction as others of more mature age. 1 Hale 25.

Where the offender is between the ages of seven and fourteen, evidence of a mischievous discretion on his part may be given to rebut the presumption of law arising from his tender years, but such evidence must be clear and strong beyond all doubt and contradiction. R. v. Vamplew, 3 F. & F. 520. Two questions are in that case to be left to the jury: (1) Whether he committed the offence; (2) whether at the time he had a guilty knowledge that he was doing wrong. R. v. Owen, 4 C. & P. 236; R. v. Smith, 1 Cox 260.

It is to be conclusively presumed that a party is physically incompetent to commit an unnatural offence under Cr. Code, sec. 174, if under the age of fourteen, such presumption is not affected by the provisions of this section which refers exclusively to mental capacity to distinguish between right and wrong. R. v. Hartlen (1898), 2 Can. Cr. Cas. 12 (N.S.). But although a minor under fourteen cannot be convicted of sodomy, he may, if the act be committed against the will of the other party, be punished for an indecent assault upon another male person under Cr. Code, sec. 260. Ibid.

By Cr. Code, sec. 266, it is enacted that no one under the age of fourteen can commit the offence of rape.

The leading case of R. v. Brimilow (1840), 9 C. & P. 366, 2 Moody C.C. 122, was decided under the statute 1 Vict. (Imp.), ch. 85, sec. 11, which enacted, "that on the trial of any person for any felony where the crime charged shall include *assault*, the jury may acquit of the felony and find the party guilty of an assault, if the evidence shall warrant such finding." Brimilow was charged with rape, and on it being proved that he was under fourteen years of age, it was left to the jury to say whether he was guilty of an assault, and on conviction, and a case reserved, it was held that he could, on an indictment for rape, be legally convicted of an assault under that statute.

A boy under fourteen cannot in point of law be guilty of an assault *with intent* to commit a rape. R. v. Phillips (1839), 8 C. & P. 736, nor of carnally knowing and abusing a girl, although proved that he had arrived at puberty. R. v. Jordan (1839), 9 C. & P. 118, nor of the offence of carnal knowledge of a girl under thirteen. R. v. Waite (1892), 2 Q.B. 600.

11. Insanity.—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 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.

A grand jury should not on the ground of the insanity of the accused return "no bill" to an indictment. R. v. Hodges, 8 C. & P. 195. As to procedure on the trial of an indictment where this defence is raised see Code secs. 736-741.

The rule laid down by the judges in reply to a question put to them by the House of Lords, in McNaghten's Case (1843), 4 St. Tr. N.S. 847, 10 Clark & F. 200, 1 Car. & K. 130, was as follows: "Notwithstanding the party accused did the act complained of, with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we mean, the law of the land." And this rule was followed and applied in R. v. Riel (No. 2) (1885), 1 Terr. L.R. 23.

The burden of proof of insanity is upon the defence. McNaghten's Case, 10 Cl. & F. 200, Regina v. Stokes, 3 C. & K. 185, Regina v. Layton, 4 Cox C.C. 149. Without evidence to go to the jury, the prisoner cannot be acquitted upon the plea of insanity. If there is in such a case to be any appeal after a conviction, it must be on the ground that the evidence is so overwhelming in favour of the insanity of the prisoner that the court will feel that there has been a miscarriage of justice—that a poor, deluded, irresponsible being has been adjudged guilty of that of which he could not be guilty if he were not deprived of the power to reason upon the act complained of, to determine by reason if it was right or wrong. A new trial should not be granted if the evidence were such that the jury could reasonably convict or acquit. Per Killam, J., in R. v. Riel (No. 2) (1895), 1 Terr. L.R. at page 63.

One deaf and dumb from his birth, who has no means of learning to discriminate between right and wrong, or of understanding the penal enactments of the law as applicable to particular offences, is by presumption of law an idiot, but if it can be shewn that he has the use of understanding, which many of that condtion discover by signs, then he may be tried and suffer judgment, although great caution should be observed in such proceedings: 1 Hale 34; R. v. Berry, 1 Q.B.D. 447.

The proper question to be put to the jury as to the prisoner's state of mind where the defence of insanity is raised is, whether the accused had a sufficient degree of reason to know that he was doing an act that was wrong, but this question should be accompanied with such observations and explanations as the circumstances of each particular case may require. McNaghten's Case, 4 St. Tr. N.S. 931. This is preferable to putting the question generally and in the abstract as to whether the accused at the time of doing the act knew the difference between right and wrong. Ibid.

Proof of insanity.]—Insanity may be proved without medical testimony, and may be inferred from the behaviour of the accused and facts proved. R. v. Dart, 14 Cox C.C. 143. If the accused was deranged shortly before committing the offence and there is no reason for believing that he had recovered his senses in the interim, he should be acquitted. R. v. Hadfield, cited in Collinson on Lunacy, p. 480.

Medical evidence.]—A medical man, conversant with the disease of insanity, and who never saw the prisoner previously to the trial but was present during the whole trial and the examination of all the witnesses, cannot, in strictness, be called as a witness to give his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law or whether he was labouring under any and what delusion at the time, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide; and the questions are not mere questions upon a matter of science in which case such evidence is admissible. But where the facts are admitted or not disputed and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right. McNaghten's Case, 4 St. Tr. N.S. 932.

But the witness may be asked whether, assuming certain facts sworn to by other witnesses to be true, such facts in his opinion indicate insanity. R. v. France, 4 Cox C.C. 57; R. v. Wright, R. & R. 456; R. v. Searle, 1 M. & Rob. 75.

It is not permissible for counsel to quote in his address to the jury the opinions of medical writers as expressed in medical books, where such opinions have not been referred to in the testimony of the witnesses. R. v. Taylor, 13 Cox C.C. 77.

Dementia through intoxication.]—Though voluntary drunkenness does not constitute an excuse for the commission of crime, yet where the question is whether an act was premeditated or done only from sudden heat or impulse, the fact that the accused was intoxicated is a circumstance proper to be taken into consideration. R. v. Grindley (1819), 1 Russell on Crimes, 6th ed. 144; R. v. Pearson, 2 Lewin 144; R. v. Thomas, 7 C. & P. 817; R. v. Moore, 3 C. & K. 319; R. v. Doody, 6 Cox C.C. 463; but see contra, R. v. Carroll, 7 C. & P. 145 and R. v. Meakin, 7 C. & P. 297. Where the question is whether words have been uttered with a deliberate purpose or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered; but if there is really a previous determination to resent a slight affront in a barbarous manner, the state of drunkenness in which the prisoner was ought not to be regarded, for it would furnish no excuse. R. v. Thomas, 7 C. & P. 817, per Parke, B. If the very essence of the crime is the intention with which the act was done, it may be left to the jury to say whether the prisoner was so drunk as not to be capable of forming any intention whatever, and, if so, they may acquit him of the intent. R. v. Cruse, 8 C. & P. 541; R. v. Monkhouse, 4 Cox C.C. 55.

Delirium tremens if it produces dementia rendering the person incapable of distinguishing right from wrong while affected by it is such insanity as will constitute a defence. R. v. Davis, 14 Cox C.C. 563; and see R. v. Baines (1886), cited in Wood-Renton on Lunacy, p. 912.

Feigned insanity.]—The various forms of mental disorders which can be feigned are acute mania, dementia or chronic insanity as distinguished from acute mania, monomania and melancholia. With regard to the first of these, mania, although this may be simulated, it is a difficult thing to impose upon those acquainted with the disease. It is a physical impossibility for a person of sound mind to present the continual watchfulness, excitement or resistance seen in the true complaint, or to resist the influence of the remedies. In most cases of true mania there are certain premonitory indications associated with and accompanying it—disorders of the digestive functions, headache, sleeplessness, a peculiar form of raving, all of which are absent with the simulator. One important characteristic in true mania is the absence of all feelings of hunger and thirst, and a want of all sense of decency and cleanliness, which cannot be feigned or assumed for any length of time. The reaction following the violence of feigned lunacy must end in sleep, the individual being unable to keep up the deception during the night, while sheer exhaustion compels him to fall asleep. The real maniac continues his ravings during many days and many nights, and seems possessed of abnormal powers of endurance, the restless nights not causing any material difference in his condition, or diminution in his strength. The chief characteristics of monomania are the presence of a false idea or hallucination. The most marked distinction between real and feigned cases of monomania is the condition of the power of reasoning. A real monomaniac cannot be reasoned out of his false ideas, in maintaining which he will set all the principles of logic at defiance, which the impostor would not, from a fear of discovery, venture to do. In true monomania there is no relation between his delusion and anything surrounding him. His ideas are inconsistent, and he is indifferent as to the fact. In the feigner there will exist a desire to modify his delusions and to associate them with what is going on around him, and he is more coherent in his

ideas. The impostor will endeavour to force his delusion on others, while the real monomaniac rarely alludes to his erroneous views unless when led up to them or questioned thereon, or when the conversation bears upon what is uppermost in his abnormal mind.

12. Compulsion by threats.—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 in paragraphs *a*, *b*, *c*, *d* and *e* of sub-section one of section sixty-five, murder, piracy, offences deemed to be piracy, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm, and arson.

So where several persons, engaged in a rebellion, forced another to join the rebel army and to do duty as a soldier by threats of death continuing during the whole of his service, it was held that the person acting under such compulsion was not guilty. R. v. McGrowther, 18 St. Trials, 394; and see Code sec. 65 (*f*).

Threats of future injury, or the command of any one not the husband of the offender, do not excuse the offence. Stephen's Digest, Art. 31.

13. Compulsion of wife.—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.

The former common law principle that a wife was exempt from liability in certain criminal acts upon the ground of coercion on the part of her husband, did not apply where the wife had committed the offence by her husband's order or procurement, if she committed it in his absence. R. v. Williams (1878), 42 U.C.Q.B. 462. And a plea of compulsion was rebutted by proof that the wife was the more active party, even when the offence was committed in the presence of her husband. Per Gwynne, J., in R. v. Williams (1878), 42 U.C.Q.B. 462.

If, however, there is evidence that the wife acted under the coercion and control of the husband such may still be a defence in certain cases. Brown v. Attorney-General of N.Z., [1898] A.C. 234; R. v. Torpey, 12 Cox 45; R. v. Dykes, 15 Cox 771.

Where both husband and wife were jointly indicted for a robbery with violence and the jury found that the wife who had taken an active part in the offence had acted under the coercion of her husband, who had previously planned the crime, the verdict was held equivalent to one of not guilty as to her. R. v. Torpey, 12 Cox 45.

As to a husband or wife being an accessory after the fact in respect of an offence committed by the other of them, see Code sec. 63.

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

All persons are bound to know and obey the laws. R. v. Mailloux, 3 Pugsley (N.B.) 493; R. v. Moodie, 20 U.C.Q.B. 399.

Although ignorance of the law is not a defence, it constitutes a ground for an application to the Executive for mercy. R. v. Madden, 10 L.C. Jur. 344.

15. Execution of sentence.—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.

16. Execution of process by court officer.—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; and every gaoler who is required under such process to receive and detain any person is justified in receiving and detaining him.

As to irregular process, see sec. 21.

17. Execution of warrants.—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; and every gaoler who is required under such warrant to receive and detain any person is justified in receiving and retaining him.

By sec. 564 every warrant authorized by this Act may be issued and executed on a Sunday or statutory holiday.

Under a warrant of arrest on a charge of an indictable offence, articles found in the possession of the accused and in respect of which or with which the offence is believed to have been committed, may be taken possession of by the constable, and detained as evidence in support of the charge. Dillon v. O'Brien, 16 Cox C.C. 245.

To constitute an arrest the party need not be touched by the officer, it being sufficient if he is commanded to give himself up and does so. 2 Bishop Cr. Law 33.

18. Execution of erroneous sentence or process.—If a sentence is passed or process issued by a court having jurisdiction under any circumstances to pass such a sentence or issue such process, or if a warrant is issued by a court or person having jurisdiction under any circumstances to issue such a warrant, the sentence passed or process or warrant issued shall be sufficient to justify the officer or person 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.

Defective process.]—A search warrant affords absolute justification to the officer executing it if it has been issued by competent authority and is valid on its face, although the warrant may in fact be bad and although it be set aside by reason of a failure to comply with legal requirements. Sleeth v. Hurlbert (1896), 3 Can. Cr. Cas. 197 (S.C. Can.).

A conviction for resisting a sheriff's officer will be supported nothwithstanding the fact that the date of the judgment under which it was issued was erroneously stated therein, such an error being an irregularity only and amendable. R. v. Monkman, 8 Man. R. 509.

And a warrant of commitment which is valid on its face is a justification to the constable who executes it, although the imprisonment it directs is not authorized by law. R. v. King, 18 O.R. 566.

The defendant M. laid an information before the defendant J., a justice of the peace, charging plaintiff with obtaining from him a suit of clothes for one W. under the false pretence that she would pay for the same the following week. The information having been sworn to, J. issued a warrant under which plaintiff was arrested. In an action brought by plaintiff claiming damages for false arrest, the Supreme Court of Nova Scotia was divided in opinion. McDonald, C.J., and Ritchie, J., held that the representation that plaintiff would pay for the clothes the following week was not the representation of a fact, either past or present, within the meaning of the Code; and that as the information did not allege that plaintiff had been guilty of any crime, the arrest was illegal and made without any authority; that even if the magistrate were acting bonâ fide, and believed he had jurisdiction, no circumstances were brought to his notice which if true would give him jurisdiction, and his belief on the subject was without ground on which it could be based, and was unreasonable. But in the opinion of Henry, J., and Graham, E.J., the justice having acted with some colour of reason, and with a bonâ fide belief that he was acting in pursuance of his legal authority, was entitled to protection, although he may have proceeded illegally or in excess of his jurisdiction. Mott v. Mylne (1899), 35 C.L.J. 81 (N.S.).

Where a person has been illegally taken into custody upon a criminal charge under a defective warrant he may be legally arrested or detained upon that criminal charge on the defect being remedied, without being first set free from the illegal custody and placed at liberty. Southwick v. Hare (1893), 24 O.R. 528.

But a person in illegal custody upon a criminal charge, or supposed criminal charge, cannot, before being liberated therefrom, be legally and properly taken into custody upon civil process—such as a ca. sa.—the reason assigned being that if such an arrest or taking into custody were held to be good, this would enable a plaintiff in a civil proceeding to take an advantage of his own wrong. Re Alfred Eggington, 2 E. & B. 717.

Where a person was convicted of an assault and fined by a magistrate in the county of H., and the magistrate issued a warrant for his arrest for the non-payment of the fine, directed to a constable, who went after the plaintiff and found him in an adjoining county, and the constable told him he had a warrant of commitment for him for his arrest, and at his request allowing him to read it, whereupon the plaintiff said he would go with him, which he did, it was held that what took place constituted an arrest. Aldrigh v. Humphrey (1898), 34 C.L.J. 385 (Ont.).

19. Sentence or process without jurisdiction.—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 of the peace 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 such a court under colour of having some appointment or commission lawfully authorizing him to act as such a court, or that the person issuing the warrant acted as a justice of the peace 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.

20. Arresting the wrong person.—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 provision 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.

The right of civil action for the wrongful arrest is not affected by this section.

21. Irregular warrant or process.—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: Provided, that 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 his so believing the warrant or process to be good in law.

This section, as well as secs. 19 and 20, refers only to the criminal responsibility for the unlawful act. Where sec. 18 applies, the process is a justification, and neither civil nor criminal responsibility accrues.

22. Arrest by peace officer.—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.

This section operates, not merely to protect the officer from civil or criminal proceedings, but also to authorize the arrest and make it lawful; and it 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. R. v. Cloutier (1898), 2 Can. Cr. Cas. 43.

If a justice of the peace is not himself personally arresting the offender on view or upon suspicion, or personally acting in effecting the arrest by calling some one to his assistance in making the same, he can legally direct the arrest only by a warrant issued upon a written complaint or information upon oath. A justice of the peace who illegally issues a warrant without having received a sworn information in respect of the charge is liable in trespass for the arrest made thereunder, and he cannot justify the commanding of the constable to make the arrest by shewing that he, the justice, had a reasonable suspicion that an offence had been committed. McGuiness v. Dafoe, 3 Can. Cr. Cas. 139, 23 Ont. App. R. 704.

Neither a magistrate nor a constable is allowed to act officially in his own case, except "flagrante delicto," while there is otherwise danger of escape, or to suppress an actual disturbance and enforce the law while it is in the act of being resisted. P. hearing of a complaint against him from the constable who had the warrant, went voluntarily before the magistrate, who did not examine into the matter and bail him, but allowed him to depart, with a direction to appear at the police office in the morning; and afterwards the magistrate sent the constable to whom the warrant had before been delivered, to take him in custody to the station house, which he did that evening, it being alleged that he had assaulted the magistrate on the previous evening. It was held that this did not warrant the imprisonment, as the magistrate might at the time of the assault have ordered him into custody; but here, the act was over, and time had intervened, so there was no present disturbance. Powell v. Williamson (1843), 7 U.C.Q.B. 154.

A constable in the service of a municipality is not justified in taking a person into custody and depriving him of his liberty, on a criminal charge, without any sworn complaint having been made, and without a warrant issued by competent authority—more especially where there was no reason to suspect that he would attempt to evade arrest. Unsworn statements made to the officer, to the effect that the person had committed a larceny on the previous day, are insufficient. But where the officer has acted in good faith, and on information which excuses him to some extent, these facts should be taken into consideration in the award of damages. Mousseau v. City of Montreal (1898), Q.R. 12 S.C. 61.

23. Persons assisting peace officer.—Every one called upon to assist a peace officer in the arrest of a person suspected of having committed such offence as last aforesaid 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 grounds for the suspicion.

Sections 22 and 23 of the Code are a codification of the common law with respect to the right of a peace officer, whether justice or constable, to personally arrest on view, or on suspicion, or by calling on some one present to assist him. They do not authorize a justice to direct a constable to make an arrest elsewhere without warrant. McGuinness v. Dafoe (1896), 3 Can. Cr. Cas. 139, 23 Ont. App. R. 704, affirming 27 Ont. R. 117.

24. Arrest without warrant of persons found committing offences.—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.

25. Arrest without warrant after commission of offence.—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.

The words "*may be*" in this section refer to those provisions of the Code which authorize arrest without warrant, and include the offence of unlawfully wounding, under sec. 242, that being one of the following sections referred to in sec. 552, which provides for arrest without warrant in certain cases. Jordan v. McDonald (1898), 31 N.S.R. 129.

Defendant, a police officer in and for the town of Windsor, in the County of Hants, arrested plaintiff at Halifax, in the County of Halifax, on a charge of having unlawfully assaulted, beaten, wounded and illtreated P., a police officer, while in the discharge of his duty, occasioning actual bodily harm. Defendant, at the time, held a warrant for plaintiff's arrest, but it had not been indorsed for execution in another county. Apart from the warrant defendant had actual knowledge of the commission of the offence for which the arrest was made. In an action by plaintiff claiming damages for unlawful arrest and imprisonment, it was held that it was competent for defendant to contend that the arrest was made independent of the warrant, and to justify such arrest by shewing that at the time the arrest was made he was aware that plaintiff had committed the offence of unlawfully wounding. Jordan v. McDonald (1898), 31 N.S.R. 129, 34 C.L.J. 425.

Subject to the provisions of sub-sec. (4) of sec. 552, 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 in respect of which a warrant is not required, he must be prepared to prove that such an offence has been committed, for in that respect he acts at his own peril. Mere suspicion that such an offence has been committed by some one will not do, though if he is prepared to shew that it has really been 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. McKenzie v. Gibson (1851), 8 U.C.Q.B. 100.

Where the accused, found committing a criminal offence which may be summarily tried under Part LV., is arrested without warrant by a peace officer, and on being brought before a police magistrate a written charge not under oath is read over to him, and he thereupon consents to be tried summarily, the police magistrate has jurisdiction to try the case although no information has been laid under oath. R. v. McLean (1901), 5 Can. Cr. Cas. 67 (N.S.).

26. Arrest without warrant in offences by night.—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.

By night.]—This expression is defined by sec. 3 (*q*) to mean the interval between 9 p.m. and 6 a.m.

27.—Arrest by peace officer.—Every peace officer is justified in arresting without warrant any person whom he finds committing any offence.

See also sec. 552.

28. Arrest of person found committing offence at night.—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.

By sec. 552 (3) a peace officer may arrest, without warrant, any one whom he finds committing any criminal offence; and any person may arrest, without warrant, any one whom he finds committing any criminal offence by night.

Any peace officer is authorized by sec. 552 (7) to take into custody, without warrant, any person whom he finds lying or loitering in any highway, yard or other place during the night, and whom he has good cause to suspect of having committed or being about to commit any indictable offence. The person arrested under the powers conferred by sub-sec. 7 of sec. 552 may be detained until he can be brought before a justice of the peace to be dealt with according to law, but that must take place before noon of the following day. Sec. 552 (7). R. v. Cloutier (1898), 2 Can. Cr. Cas. 43.

Finds committing.]—A person is "found committing" an offence if he is either caught in the act or is pursued immediately and continuously after he had been seen committing it; but in the latter case there must be such fresh and continuous pursuit of him from the time of his being seen that both events may be said to be part of the one occurrence. R. v. Curran (1828), 3 C. & P. 397. Pursuit begun after the lapse of three hours from the commission of the offence is insufficient to justify the apprehension under this clause. Downing v. Capel, L.R. 2 C.P. 461.

29. Arrest during flight.—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.

Reasonable and probable grounds.]—See secs. 22 and 25.

Flight as evidence.]—The fact of the flight of the accused or his attempts to escape, is a circumstance in the chain of evidence from which guilt may be inferred, unless it appear that the act was for another reason. Lawson's Presumptive Ev., 2nd ed. 619.

So a prisoner's attempt to escape implies guilt and operates against the party like a confession, but the fact that the prisoner had an opportunity or offer of assistance to escape but did not avail himself of it is not relevant. Ibid. 621. The fact that the accused fled because of a fear of violence at the hands of their pursuers overthrows the presumption. Ibid. And if the suspected person had changed his residence but it appeared that he was a peddlar and accustomed to go from place to place, no presumption of guilt would arise. Best Ev., sec. 461. Evidence of the flight of persons charged as co-conspirators with the prisoner is not admissible against him. People v. Sharp, 107 N.Y. 427. And where a prisoner confined in gaol for two distinct offences attempts to escape, it has been held that the attempt is not evidence of guilt as to either charge, as it is impossible to say which offence prompted the attempt. People v. McKean, 19 N.Y. 486.

30. Other statutory powers of arrest.—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.

31. Force used in executing process or arrest.—Every one justified or protected from criminal responsibility in executing any sentence, warrant or process, or in making any arrest, and every one lawfully assisting him, is justified, or 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.

Where an officer of justice is resisted in the legal execution of his duty he may repel force by force, and if in doing so he kills the party resisting him, it is justifiable homicide. Archbold's Cr. Plead. (1900), 778; 1 Hale, 494; R. v. Porter, 12 Cox C.C. 444.

Although a police constable may not be bound in the execution of his duty to assist the occupier of a house in putting out an intruder, yet he may lawfully do so, and if he is assaulted by the intruder while so doing, the latter, though he may not be indictable for assaulting a peace officer in the execution of his duty, will be liable to a conviction for an assault, as he cannot justify resistance to the force lawfully used to eject him. R. v. Roxburgh, 12 Cox C.C. 8.

By sec. 142, every one is guilty of an indictable offence and liable to six months' imprisonment who, having reasonable notice that he is required to assist a peace officer in the execution of his duty in arresting any person or in preserving the peace, without reasonable excuse omits so to do.

32. Duty of persons arresting.—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 fulfil 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.

Manner of arrest.]—Where a constable tells a person given into his charge that he must go with him before a magistrate, and such person, in consequence, goes quietly, and without force being used, it is an arrest. Chinn v. Morris, 2 C. & P. 361; Joyce v. Perrin, 3 U.C.O.S. 300.

And where the constable said to the plaintiff "You must go with me," on which the plaintiff said he was ready to go, and went with the constable towards a police office, without being seized or touched, this was ruled to be an imprisonment. Pocock v. Moore, Ry. & M. 321; Forsyth v. Goden, 32 C.L.J. 499.

If the party is under restraint and the officer manifests an intention to make a captive, it is not necessary that there should be an actual contact. Grainger v. Hill, 4 Bing. N.C. 212, Vaughan, J.; McIntosh v. Demeray, 5 U.C.Q.B. 343; Wilson v. Brecker, 11 U.C.C.P. 268.

Defendant was convicted of a fourth offence under The Canada Temperance Act. A warrant was placed in the hands of a constable, who after keeping it for some time went to defendant to execute it, and told him he would have to come to gaol with him. Defendant, complaining of the great inconvenience he would be put to if placed in custody at that time, induced the constable to hold off for a week or two longer by agreeing to deposit $100 with him. Later on the constable arrested the defendant on the same warrant and lodged him in gaol. It was held on an application for his discharge by habeas corpus on the ground that he had been twice arrested on the same warrant, that even if an arrest had been effected on the first occasion when the constable agreed to hold off, it was called off by defendant's own request and he was therefore estopped, and the application was refused. Ex parte Doherty (1899), 35 C.L.J. 765, 5 Can. Cr. Cas. 54 (N.B.).

Right of search on arrest.]—The right of an officer to search the person of one arrested for felony has always been assumed, as well as the right to keep the goods found on him if necessary for the purposes of the trial. See Tomlin's Law Dictionary, sub-tit. Constable, IV., "A constable must keep goods found on a felon till trial, and then return them according to the directions of the court." In the case of Dillon v. O'Brien, 16 Cox C.C., at page 245, the Irish Exchequer Division extended the rule to cases of misdemeanor. Palles, C.B., says:—"If, then, the right here claimed, does not

exist, even in treason and felony, it would follow upon the arrest of a murderer caught in the act and on the moment lawfully arrested, whilst the weapon with which the crime had been committed was in his hand it would be illegal for the constable to detain that weapon for the purpose of evidence; so also would it be illegal for the officers of the law to take possession of poisons found in the possession of one who had caused death by poison, and even in treason letters from co-traitors evidencing the common treasonable design, found in the possession of a traitor, would be safe from capture upon his arrest, although from the earliest times it has been the settled and unvarying practice to seize such proofs of guilt and give them in evidence at the trial." The case of Leigh v. Cole, 6 Cox C.C. 329 (cited with approbation by the Ontario Court of Appeal in Gordon v. Denison, 22 A.R., p. 326), was a charge to the jury by Mr. Justice Vaughan Williams on the subject of the right of constables to search and handcuff persons in custody for breaches of the peace, and the learned judge made use of the following language: "With respect to searching a prisoner there is no doubt that a man when in custody may so conduct himself, by reason of violence of language or conduct, that a police officer may reasonably think it prudent and right to search him, in order to ascertain whether he has any weapon with which he might do mischief to the person or commit a breach of the peace; but at the same time it is quite wrong to suppose that any general rule can be applied to such a case. Even when a man is confined for being drunk and disorderly it is not correct to say that he must submit to the degradation of being searched, as the searching of such a person must depend on all the circumstances of the case." In the case of persons in custody not accused of an indictable offence no general rule can be applied, and it would always be for a jury to say whether the case is one in which a search should have been made. Ibid.

33. Peace officer preventing escape.—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 necessary to prevent his escape by such flight, unless such escape can be prevented by reasonable means in a less violent manner.

34. Private person preventing escape. — 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: Provided, that such force is neither intended nor likely to cause death or grievous bodily harm.

35. Preventing escape from arrest in other cases.—Every one proceeding lawfully to arrest any person for any cause other than such offence as 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: Provided such force is neither intended nor likely to cause death or grievous bodily harm.

36. Preventing escape or rescue after arrest. — 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.

Where a prisoner escapes, if the escape be negligent merely, the gaoler or officer may retake him at any time without warrant; if voluntary, he cannot afterwards be retaken by virtue of the same warrant under which he was at first arrested, but he may be retaken on a fresh warrant or without warrant in cases where he might have been arrested without warrant originally. Archibald Cr. Plead. (1900), 852.

37. Force used in preventing escape or rescue after arrest.—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: Provided that such force is neither intended nor likely to cause death or grievous bodily harm.

38. Preventing breach of the peace.—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: Provided that 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.

39. Prevention by peace officers of breach of the peace.—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, witnesssed such breach of the peace.

Peace officer.]—The definition of this term is found in sec. 3 (*s*), ante.

Finds committing.]—See note to sec. 28.

Breach of the peace.]—A justice of the peace may apprehend, or cause to be apprehended by a verbal order merely, any person committing a breach of the peace in his presence. 2 Hale 86. A constable may also arrest for a breach of the peace committed in his presence. 1 Hale 587. But a private person is not justified in arresting or giving in charge of a policeman, without a warrant, a party who has been engaged in an affray, unless the affray is still continuing or there is reasonable ground for apprehending that he intends to renew it. Price v. Seeley (1843), 10 Clark & Fin. (H.L.) 28.

A private person cannot of his own authority arrest another for a bare breach of the peace after it is over. 3 Hawkins P.C. 164.

Any one who sees others fighting may lawfully part them and also stay them until the heat be over, and then deliver to the constable who may carry them before a justice of the peace in order to their finding security for the peace. Hawkins P.C., book 1, ch. 63, sec. 11. And while those are assembled together who have committed acts of violence, and the danger of their renewal continues, the affray itself may be said to continue; and during the affray the constable may, not merely on his own view, but on the information and complaint of another, arrest the offenders or either of them. Price v. Seeley, 10 Cl. & F. 28.

Affray.]—An affray is the act of fighting in any public street or highway, or fighting to the alarm of the public in any other place to which the public have access. Sec. 90.

Riot and unlawful assembly.]—See secs. 79 and 80.

40. Suppression of riot by magistrates and officers.—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.

A riot is an unlawful assembly which has begun to disturb the peace tumultuously. Sec. 80. As to the duty of sheriffs, justices and other officers in cases of riot, see secs. 83 and 84.

The neglect of a peace officer to do his duty in suppressing a riot is an indictable offence under sec. 140.

41. Suppression of riot by persons acting under lawful orders.—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 of the peace, 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.

Magistrates must keep the peace when a riot occurs and restrain the rioters, and they may call upon all subjects to render assistance, and the latter may be given firearms for that purpose. R. v. Pinney, 5 C. & P. 261.

A person who after reasonable notice omits without reasonable excuse to assist any sheriff, or peace officer, in suppressing a riot is guilty of an indictable offence. Sec. 141.

42. Suppression of riot by persons without orders.—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.

By the common law, a private individual might lawfully endeavour, of his own authority and without any warrant or sanction from a magistrate, to suppress a riot by every means in his power; he might disperse or assist in dispersing those assembled and stay those engaged in it from executing their purpose, as well as stop and prevent others whom he saw coming up from joining the rest. Phillips v. Eyre, L.R. 6 Q.B. 15. If the occasion demanded immediate action and no opportunity occurred for procuring the advice or sanction of a magistrate, it was the duty of every subject to act for himself and upon his own responsibility in suppressing a riotous and tumultuous assembly, and the law protected him in all that he honestly did in the prosecution of that purpose. Ibid, per Willes, J., approving the charge of Tindal, C.J., to the grand jury of Bristol (1832), 5 C. &. P. 261 (*n*).

43. Suppression of riot by military force.—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.

See secs. 41, 42, 83 and 84.

44. Force in prevention of certain offences.—Every one is justified in using such force as may be reason-

ably necessary in order 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 in order to prevent any act being done which he, on reasonable grounds, believes would, if committed, amount to any of such offences.

The offences for which an arrest without warrant is allowed are set forth in sec. 552.

Where A., to prevent B. from fighting with his brother, laid hold of him and held him down but struck no blow, upon which B. stabbed A., it was held that if A. had done nothing more than was necessary to prevent B. from beating his brother, and had died of the stab, the offence of B. would have been murder; but that if A. did more than was necessary to prevent the beating of his brother, it would have been manslaughter only. R. v. Bourne, 5 C. & P. 120.

And where, under circumstances that might reasonably have induced the belief that a man was cutting his wife's throat, their son shot at and killed his father, it was held that if the son had reasonable grounds for believing and honestly believed that his act was necessary for the defence of his mother, the homicide was excusable. R. v. Rose, 15 Cox 540, Lopes, J.

45. Self-defence against unprovoked assault.—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 grevious bodily harm, and is no more than is necessary for the purpose of self-defence; and every one so assaulted is justified, though he causes death or grevious 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 purpose, and if he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

Self-defence in assault, etc.]—It is a good defence in justification, even of a wounding or mayhem, to prove that the prosecutor assaulted or beat the defendant first, and that the defendant committed the alleged battery merely in his own defence. Archbold's Crim. Plead. (1900), 802. The difficulty arises in drawing the line between mere self-defence and fighting. R. v. Knock, 14 Cox C.C. 1.

If the prosecutor lifted up his cane and offered to strike him, the defendant is justified in striking the prosecutor without waiting for the blow. Buller N.P. 18.

A husband may justify a battery in defence of his wife, a wife in defence of her husband, a parent in defence of his child, a child in defence of his parent, a master in defence of his servant, and a servant in defence of his master. 1 Hawkins P.C., ch. 60, secs. 23, 24; Code sec. 7. If, however, the battery were greater than was necessary for mere defence, or if it were after all danger from the assailment was passed and by way of revenge, the prior assault will not justify. R. v. Driscoll, C. & M. 214; Anon., 2 Lewin C.C. 48.

Ordinarily the person beset is permitted to act only in self-defence; he cannot take the law into his own hands to inflict punishment for the injury. R. v. Milton, 3 C. & P. 31; R. v. Mabel, 9 C. &. P. 474; 2 Bishop Crim. Law 44.

But where there is a manifest intent or endeavour by the assailant to commit *by violence or surprise* an offence formerly a felony, such as murder, robbery, burglary and the like, the party assailed is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is called justifiable self-defence. 1 East P.C. 271.

If in attempting to turn a mere trespasser out of a house, the householder is assaulted by the trespasser, he may kill him if he was not able by any other means to avoid the assault or retain his lawful possession, and in such case a man need not fly as far as he can as in other cases of self-defence for he has a right to the protection of his own house. 2 Burn's Justice, 13th ed., p. 1315. In the New Brunswick case of R. v. Theriault (1894), 2 Can. Cr. Cas. 444, a new trial was ordered where the trial judge had instructed the jury that, to justify or excuse the homicide, the prisoner must be found to have had reasonable grounds for apprehending imminent peril to his life or the lives of his wife and children, and had made no mention of a reasonable apprehension of grievous bodily harm as a ground of justification although the evidence pointed to both.

Not having provoked such assault.]—The provocation may be given by blows, words or gestures. Sec. 46 (2).

46. Self-defence against provoked assault.—Every one 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: Provided, that 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: Provided also, that 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 and the last preceding section, may be given by blows, words or gestures.

Declining further conflict.]—Two or more persons engage in a mutual combat, without any original intent to proceed to extreme measures; or, after an assailant has been met by his adversary, he becomes weary of a conflict which is likely to be more serious than he anticipated or too much for him to withstand; here, if one of the combatants already in the wrong either as a beginner or continuer of the fight wishes to retrace his error, he must retreat. 2 Bishop Cr. Law 565. And though, contrary to his original expectation, he finds himself so hotly pressed as renders the killing of the other necessary to save his own life, he is guilty of a felonious homicide if he kills him unless he first actually puts into exercise this duty of withdrawing from the place. Foster 227; The State v. Hill, 4 Dev. & Bat. 491. If the first assailant, knowing his advantage of strength or skill or weapon,

retreated to the wall merely as a design to protect himself under the shelter of the law, as in his own defence, but really intended the killing of the other man, then it is murder or manslaughter as the circumstance of the case requires. 1 Hale P.C. 479, 480.

Where, upon a quarrel, one of the parties retreated fifty yards desiring to avoid the conflict, but the other pursued him with uplifted arm and a deadly weapon, and being first struck by the retreating one with the fist, the other stabbed and killed him, the case was held to be one of murder, for the law did not require the deceased to wait till the prisoner had executed his threat but justified him in anticipating the premeditated assault. The State v. Howell, 9 Ired. 485.

Provocation.—[See sec. 229.

47. Prevention of insulting assault.—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: Provided, that he uses no more force than is necessary to prevent such assault, or the repetition of it: Provided also, that 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.

48. Defence of movable property against trespasser.—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; and 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 to 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.

In the case of trespass in taking goods the owner may justify beating the trespasser in order to make him desist. 1 Hale 486; R. v. Wild, 2 Lewin C.C. 214.

A battery is justifiable by proving that it was committed to restrain another from unlawfully taking or destroying his goods. 2 Rol. Abr. 549.

49. Defence of movable property with claim of right.—Every one who is in 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.

50. No justification on defence of movable property without claim of right.—Every one who is in peaceable possession of any movable property or thing, but neither claims

right 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.

51. Defence of dwelling house.—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.

It has been held that a guest in a house is justified in defending the house. Curtis v. Hubbard, 4 Hill N.Y. 437; Coopers Case, Cro. Car. 544; also that the neighbours of the occupant may assemble for its defence. Semayne's Case, 5 Co. 91.

Dwelling house.]—Every permanent building in which the renter or owner or his family dwells is a dwelling house. Archbold Cr. Evid. (1900), 593; and see Code sec. 407. And it will be sufficient if any one of the family habitually sleeps in that building. R. v. Westwood, R. & R. 495.

The mere temporary absence of the householder and his family will not prevent its remaining in contemplation of law a dwelling house. R. v. Murray, 2 East P.C. 496. But where the householder moved away from the house, not intending to return to live in it, but retained it as a warehouse in which some of his employees slept for the purpose of taking care of it, it was held not to be his dwelling house. R. v. Flannagan, R. &. R. 187. And where the landlord of a dwelling house after the tenant had quitted it, put a servant into it to sleep there at night until he should re-let it to another tenant, but had no intention to reside in it himself, it could not be deemed the dwelling house of the landlord. R. v. Davis, 2 Leach 876; R. v. Harris, 2 Leach 701. A tenant put his furniture into a house preparatory to moving in with his family, but neither he nor any of his family had as yet slept in it; it was held not to be a "dwelling house" as regards burglary. R. v. Hallard, 2 East P.C. 498; R. v. Lyons, 1 Leach 185.

A temporary booth or tent in a fair or market is not a dwelling house although the owner lodge in it. 1 Hawk., ch. 38, sec. 35. But it is otherwise in respect of a permanent building although used only for the purposes of a fair. R. v. Smith, 1 M. & Rob. 256.

At common law in cases where buildings were attached to a dwelling house and were more or less connected with it, it was frequently a matter of dispute whether they formed a part of the dwelling house so that entering them would be burglary. The different tests proposed were principally three:—(1) Whether the building in question was within the same curtilege; (2) Whether it was under the same roof; (3) Whether it had an internal communication with the principal building. Roscoe Crim. Evid., 11th ed. 348. An outhouse separated from the dwelling house and not within the same curtilege was not within the term from the mere fact that it was occupied with it at the same time. R. v. Garland, 2 East P.C. 493. But a building might constitute a part of the dwelling house although having no internal communication therewith. R. v. Brown, 2 East P.C. 493; R. v. Chalking, Russ. & Ry. 334; R. v. Burrowes, 1 Moody C.C. 274. But as regards the offences of burglary and house-breaking it is now provided by sec. 407 (*a*) that a building occupied with and within the same curtilege 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 communi-

cation either immediate or by means of a covered and inclosed passage leading from the one to the other, but not otherwise.

Breaking and entering.]—The definition of the term "to break" given in sec. 407 (*b*) in terms applies only to Part XXX. but is in accordance with the previous decisions on the subject. The same section provides that an "entrance" into a building is made as soon as any part of the body of the person making the entrance, or any part of any instrument used by him is within the building. It would seem, however, that as to secs. 51 and 52 the common law definition applies and not that of sec. 407, and, at common law, if the instrument were used not for the purpose of committing the contemplated felony but only for the purpose of effecting the entry, its introduction was not such an entry as constituted burglary. R. v. Hughes, 2 East P.C. 491; R. v. Rust, 1 Moody C.C. 183.

52. Defence of dwelling house at night.—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.

The mere threat of parties standing outside of a dwelling house that they will break in, does not justify the householder in shooting at and wounding them, unless the householder has first warned them to desist and depart or that he would fire. Spires v. Barrick, 14 U.C.Q.B. 420.

53. Defence of real property.—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; and 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.

If A., a trespasser, enters B.'s house and refuses to leave, B. has a right to remove A. by force, but not to kick or strike him unless the force used to remove him be necessary. Wild's Case, 2 Lewin C.C. 214. But if the trespasser resists such force the householder may use any degree of force necessary to defend himself and to remove the trespasser from the house. 1 Hale P.C. 486.

In the case of a trespass in law merely, without actual force, the owner must first request the trespasser to depart before he can justify laying his hand on him for the purpose of removing him; and even if he refuse he can only justify so much force as is necessary to remove him. Weaver v. Bush, 8 T.R. 78.

Resists such attempt.]—The words are "if such trespasser resists *such* attempt," the word "such" applies to an attempt by force referred to in the former part of the section, and will not apply to mere words of warning or of request to leave. Packett v. Pool (1896), 11 Man. R. 275, 32 C.L.J. 523. The latter part of the section does not apply until there is an overt act on the part of the person in possession towards prevention or removal, and an overt act of resistance on the part of the trespasser. Ibid.

54. Peaceable entry on claim of right to house or land.—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.

55. Discipline of minors.—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.

Apprentices.]—Formerly a right of chastisement of servants by way of correction was recognized. R. v. Mawgridge, 16 St. Tr. 57; but as to servants who are not apprentices it is in desuetude. Archbold Crim. Evid. (1900) 762.

Child.]—The law as to correction of children has reference only to a child capable of appreciating correction and not to an infant two years and a half old. R. v. Griffin, 11 Cox C.C. 402. If the correction be inflicted with a deadly weapon and the party dies of it it will be murder; if with an instrument not likely to kill, though improper for the purpose of correction, it will be manslaughter. Foster 262; R. v. Hopley (1860), 2 F. & F. 201.

56. Discipline on ships.—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.

This right includes the right of the shipmaster to inflict reasonable corporal punishment at sea on seamen for disobeying orders. The Agincourt, 1 Hagg. 271; Lamb v. Burnett, 1 Cr. & J. 291.

57. Surgical operations.—Every one is protected from 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.

In these cases there is no difference between a licensed physician or surgeon and a person acting as physician or surgeon without license; in either case if a party having a competent degree of skill and knowledge makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter. R. v. Webb, 1 M. & Rob. 405, 2 Lewin 196, per Lord Lyndhurst; R. v. Williamson, 3 C. & P. 635.

It must appear that there was gross ignorance or inattention to human life. R. v. Long, 4 C. & P. 423. If any person, whether he be a regular or licensed medical man or not, professes to deal with the life or health of His Majesty's subjects, he is bound to have competent skill to perform the task that he holds himself out to perform, and he is bound to treat his patients with care, attention and assiduity. R. v. Spiller, 5 C. & P. 333.

It is for the jury to say whether in the execution of the duty which the prisoner had undertaken to perform he is proved to have shewn such a gross want of care, or such a gross and culpable want of skill, as any person undertaking such a charge ought not to be guilty of. R. v. Ferguson, 1 Lewin C.C. 181. See also sec. 212.

58. Excess of force.—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.

59. Consent to homicide.—No one has a right to consent to the infliction of death upon himself; and if such consent is given, it shall have no effect upon the criminal responsibility of any person by whom such death may be caused.

If two persons enter into an agreement to commit suicide together and the means employed to produce death prove fatal to one only, the survivor is guilty of murder. R. v. Jessop, 16 Cox C.C. 204.

It is uncertain to what extent any person has a right to consent to his being put in danger of death or bodily harm by the act of another. Burbidge Cr. Law 201.

60. Obedience to de facto law. — 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.

PART III.

PARTIES TO THE COMMISSION OF OFFENCES.

SECT.

61. Parties to offences.—Every one is a party to and guilty of an offence who—

(*a.*) actually commits it; or

(*b.*) does or omits an act for the purpose of aiding any person to commit the offence; or

(*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.

By this and the following section accessories before the fact and aiders and abettors are declared to be guilty of the offence itself and may be charged as principals in the first degree. As to accessories after the fact see sec. 63. As to aiding and abetting suicide see sec. 237.

Aiding or abetting.]—The words aider, abettor, accessory and accomplice, as applied to crime, are often used as having the same meaning. But they are by no means synonymous. It is unlawful to aid or encourage the commission of crime. It is unlawful under certain circumstances to conceal the commission of crime. One who aids is, in ordinary language, called an aider or abettor. An accessory is one who takes an active but subordinate part. An accomplice, according to the ordinary meaning of the word, would seem to imply one who not only takes an active part, but positively aids in the accomplishment or completion of the crime. R. v. Smith, (1876), 38 U.C.Q.B. 218, 227.

To make a person an "aider and abettor" he must have been present either actually or constructively.

A person is present in construction of law aiding and abetting if with the intention of giving assistance he is near enough to afford it should occasion arise; thus if he was watching at a proper distance to prevent a surprise, or to favour the escape of those who were immediately engaged, then he would be a principal in the second degree. Per MacMahon, J., in R. v. Lloyd (1890), 19 O.R. 352.

If a person sees that a crime is about to be committed in his presence and does not interfere to prevent it, that is not a participation rendering him liable, without evidence that he was there in pursuance of a common

unlawful purpose with the principal offender. R. v. Curtley, 27 U.C.Q.B. 613.

Aid rendered to the principal offenders after the commission of the crime is alone insufficient to justify the conviction of the person so aiding, as a principal under this section. R. v. Graham (1898), 2 Can. Cr. Cas. 388.

Aiders and abettors are principals in the second degree and are sometimes called accomplices; but the latter term will not serve as a definition as it includes all the participes criminis, whether they are considered as principals in the first or second degree or merely as accessories before or after the fact. R. v. Smith (1876), 38 U.C.Q.B. 218, 228.

Form of charge.]—An information and warrant of arrest thereunder, charging the accused as an accessory to the violation of a statute named, without specifying the fact as to which he is alleged to be an accessory is void for uncertainty. R. v. Holley (1893), 4 Can. Crim. Cas. 510 (N.S.).

Such a warrant charges no offence, and neither it, nor a remand thereon is validated by Code sec. 578, which provides that no irregularity or defect in the substance or form of the warrant shall affect the validity of any proceeding at or subsequent to the preliminary enquiry before the justice. Ibid.

It has been held that the owner of a house who leases it to another person knowing and assenting when the lease was made to the purpose of the latter to maintain it as a common bawdy house, thereby does an act for the purpose of aiding the lessee to commit the indictable offence of keeping a disorderly house, and he may be indicted and convicted as a principal under sec. 61 (*b*). R. v. Roy, 3 Can. Cr. Cas. 472 (Que.).

In cases of theft.]—On an indictment for, with three other persons, attempting to steal goods in a store, evidence was given by an accomplice that prisoner went with him to see a store, that prisoner went into the store to buy something to see how the store could be got into and that they and others planned the robbery and fixed the date; prisoner saw them off but did not go with them, the others went out and madet he attempt, which was frustrated. It was held that as those actually engaged were guilty of the attempt to steal the prisoner was properly convicted under 27 and 28 Viet. ch. 19, sec. 9, which enacted that whosoever shall aid, abet, counsel or procure the commission of any misdemeanour shall be liable to be tried, indicted and punished as a principal offender. R. v. Esmonde (1866), 26 U.C.Q.B. 152.

A person who knowingly assists a thief to conceal stolen money which he is in the actual and proximate act of carrying away, by receiving the money for the purpose of concealing it, is guilty of aiding and abetting in the theft, and may under sub-sec. (*c*) be convicted as a principal. R. v. Campbell (1899), 2 Can. Cr. Cas. 357.

Although the theft may be complete by the mere taking and carrying away of stolen property, the subsequent carrying of same to a place of concealment by a person who did not participate in the taking, if done with a guilty knowledge and as a continuation of and proximately at the same time as the theft, is an "aiding and abetting" of the same. Ibid.

An act done which may enter into the offence, although the crime may be complete without it, may be considered as a continuation of the criminal transaction so as to make the participator an aider and abettor, although his participation occurs only after such acts have been done as in themselves would constitute the crime. Ibid.

If the accused were not an aider and abettor or a principal in the second degree in the commission of the theft, the circumstance that he was an accessory before the fact by counselling and procuring the commission of the theft, and therefore liable under sec. 61 to be convicted as a principal, does not prevent his conviction for the substantive offence of afterwards receiving the stolen property knowing it to have been stolen. Such an accessory

before the fact who afterwards becomes a receiver of the stolen property may be legally convicted both of the theft and of "receiving." R. v. Hodge (1898), 2 Can. Cr. Cas. 350.

Under liquor laws.]—If it be contrary to law to sell liquor or any other article in a shop a sale by any clerk or assistant in his shop would prima facie be the act of the shopkeeper. It may be, if he could shew that the act of sale was an isolated act, wholly unauthorized by him, and not in any way in the course of his business, but a thing done wholly by the unwarranted or wilful act of the subordinate, he might escape personal responsibility. Where one H. swore that he got a bottle of brandy and paid for it $1 in K.'s shop, that a woman served him, and no one else was in the store at the time, K. was convicted and the court upheld the conviction. R. v. King (1869), 20 U.C.C.P. 247. (Hagarty, C.J., Gwynne and Galt, JJ.)

A buyer of liquor cannot, in respect of an illegal sale thereof made to him contrary to the Canada Temperance Act, be regarded in point of law as an aider or abettor. R. v. Heath (1887), 13 O.R. 471; Ex parte Armstrong, 30 N.B.R. 425.

In gaming.]—A broker who merely acts as such for two parties, one a buyer and the other a seller, without having any pecuniary interest in the transaction beyond his fixed commission and without any guilty knowledge on his part of the intention of the contracting parties to gamble in stocks or merchandise, is not liable as an accessory. R. v. Dowd (1899), 4 Can. Cr. Cas. 170 (Que.).

Where an hotel keeper was not aware that gaming was being carried on in his hotel, and the only employee who knew it was not in charge of the premises, but was employed in a menial capacity, the hotel keeper was held not to be guilty of "suffering" gaming to be carried on in his premises contrary to a Licensing Act. Somerset v. Hart, 12 Q.B.D. 360.

Joint indictment.]—If the abettor and principal are indicted together as principals, the abettor may be convicted although the principal is acquitted. R. v. Burton, 13 Cox C.C. 71.

62. Offence committed other than the offence intended.—Every one who counsels or procures another to be a party to an offence of which that other 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.

If A. advises B. to murder C. by shooting and B. murders C. by stabbing, A. is nevertheless an accessory to the murder. Foster 369.

And if A. describes C. to B. and instigates B. to murder C., and B. murders D. whom he believes to be C. because D. corresponds with A.'s description of C., A. is an accessory before the fact to the murder of D. Foster 370.

A. instigates B. to rob C., B. does so and C. resists and B. kills C. A. is guilty as an accessory. Foster 370.

But where A. advised B. to murder the latter's wife by giving her a roasted apple containing poison and B. did so but the woman after eating a small part of it gave it to her child and A. made only a faint effort to save

the child whom he did not wish to injure and stood by and saw the child eat the apple and the child died as the result, it was held that A. was not guilty as an accessory to the murder which B. thereby committed. Saunder's Case. Plowd. 475, 1 Hale 431.

63. Accessory after the fact.—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.

At common law the term accessory after the fact only applied to felonies for in misdemeanors all were principals. R. v. Tisdale, 20 U.C.Q.B. 273; R. v. Campbell, 18 U.C.Q.B. 417; R. v. Benjamin, 4 U.C.C.P. 189.

Punishment.]—Accessories after the fact to treason are liable to two years imprisonment under sec. 67. And by sec. 235 "every one is guilty of an indictable offence and liable to imprisonment for life who is an accessory after the fact to murder." Where no express provision is made by the Code for the punishment of an accessory after the fact to an indictable offence, for which the principal would be liable, on a first conviction, to imprisonment for fourteen years or over or to imprisonment for life, such accessory is liable to seven years imprisonment. Sec. 531. And where the principal cannot be sentenced to imprisonment for so long a term as fourteen years, the accessory after the fact to any other indictable offence is liable to one half of the longest term to which a person the principal may be sentenced, except where there is an express provision of law for the punishment of such accessory. Sec. 532.

Who are accessories.]—Any assistance given to the person known to be the offender, in order to hinder his apprehension, trial or punishment is sufficient to make the assisting party an accessory after the fact, as for instance, that he concealed him in his house. Dalt. 530, 531; or shut the door against his pursuers until he should have a chance of escaping. 1 Hale 619; or took money from him to allow him to escape. Year book, 9 H. 4 pl. 1; or supplied him with money, a horse or other necessaries in order to enable him to escape. Hale's Sum. 218. 2 Hawk., ch. 29, sec. 26; or that the principal was in prison, and the alleged accessory after the fact bribed the gaoler to let him escape, or conveyed instruments to him to enable him to break prison and escape. 1 Hale 621.

It is necessary that the accessory have notice, direct or implied, at the time he assists or comforts the offender, that he had committed the offence. 2 Hawk., ch. 29, sec. 32; and the assisting party is an accessory after the fact to whatever offence is complete at the time the assistance is given. So if one wounds another mortally, and after the wound is given but before death ensues, a person assists or receives the delinquent, this does not make him accessory to the homicide, for until death ensues no murder or manslaughter is committed. 2 Hawk., ch. 29, sec. 35, 4 B.C. Com. 38.

Assisting prisoner to escape.]—See secs. 165-8.

Who are not accessories.]—But to merely suffer the principal to escape will not make the party an accessory after the fact, for it amounts at most but to a mere omission. Year book, 9 H. 4, pl. 1, 1 Hale 619. A physician or surgeon may professionally attend a sick or wounded man, although he knew him to be a felon. 1 Hale 332. A person does not become an accessory by advising the principal offender's friends to write to the witnesses not to appear against him at the trial although they do so write. 1 Hale 620. There must be an act to assist the felon personally to constitute an accessory after the fact. R. v. Chapple, 9 C. & R. 355. And it is not sufficient that the person knew of the felony and did not disclose it. 1 Hale 371, 618; or that he agreed for money not to give evidence against the offender. Moor 8.

The receiving of stolen goods did not at common law constitute the receiver an accessory but was a separate and distinct misdemeanor, punishable by fine and imprisonment. Hale 620; and it is treated in the Code as a distinct offence. See sec. 314.

Husband or wife.]—At common law a wife was not punishable as accessory after the fact in receiving and assisting her husband for she was presumed to act under his coercion. R. v. Manning, 2 C. & K. 903 (*n*). But a husband receiving and assisting his wife after the felony became liable as an accessory. 1 Hale 48, 621. This is now changed by sub-sec. 2, supra.

Other relationships.]—No other relationship than that of husband and wife will excuse the wilful receiving or assisting of the offender; a father cannot legally assist his child, a child his parent, a brother his brother, a master his servant, or a servant his master. 1 Hale 48, 621.

Misprision.]—It was a misdemeanor at common law for any person, who knew that another had committed a felony, to "conceal or procure the concealment thereof." 3 Co. Inst. 140, 1 Hawkins P.C. 731, 1 Hale 373. The common law as to crimes is still in force except in so far as the Code has otherwise provided, and it would seem that technically this offence remains in respect of what was formerly a felony. Its definition is extremely vague and there have been few, if any, prosecutions for it in modern times. Burbidge Cr. Law 508.

64. Attempts.—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.

Special provision is made by the Code in respect of "attempt" offences as follows: To break prison, sec. 162; to commit sodomy, sec. 175; to procure girl to have unlawful carnal connection with a third party, sec. 185; to commit murder, sec. 232; to commit suicide, sec. 238; to cause bodily injuries by explosives, sec. 248; to commit rape, sec. 268; to defile children under fourteen, sec. 269; to set fire to crops, sec. 485; to wreck, sec. 494; to injure or poison cattle, sec. 500; to commit other indictable offences punishable by imprisonment, secs. 528 and 529; to commit other statutory offences, sec. 530.

An assault with intent to commit an offence is an attempt to commit such offence, and, on an indictment for rape, a conviction for an assault with intent to commit rape is valid. R. v. John (1888), 15 Can. S.C.R. 384, Code sec. 713.

Criminal intent.]—The general rule is that in order to constitute a crime it is necessary that there should be not only an act, but also a criminal intent. This is embodied in the maxim "actus non facit reum, nisi mens sit rea," 3 Inst. 107; Broom's Legal Maxims 226.

Intent should not be confounded with motive. The terms "intention" and "motive" are often used indiscriminately to denote the same thing, but motive and intention are really two different things, and a distinction ought to be made in the use of the terms. Motive is the moving cause or that which induces an act, while intent is the purpose or design with which it is done. Motive has to do with desire, and intent with will. Burrill's Circ. Evid. 283, 284. Motive generally precedes intent, for a man usually has some inducement or cause for doing a thing before he makes up his mind to do it. There are some cases in which no more need be done to shew the criminal intent than to prove the mere doing of the act; as where the act is such as to shew within itself the guilty intent, so that there can be but one reasonable inference, which of necessity arises from the facts proved. Every sane man is presumed to contemplate the ordinary natural and probable consequences of his acts. Townsend v. Wathen, 9 East 277; R. v. Dixon, 3 M. & S. 15.

The question of fraudulent intent or guilty mind (mens rea) enters into the majority of criminal offences. In the recent case of Bank of N. S. W. v. Piper (1897), 66 L.J.P.C. 76, the law is stated as follows: "It is strongly urged that in order to the constitution of a crime whether common law or statutory, there must be a mens rea on the part of the accused, and he may avoid conviction by shewing that such mens rea did not exist. This is a proposition which their lordships do not desire to dispute; but the questions whether a particular intent is made an element of a statutory crime, and, when that is not the case, whether there is an absence of mens rea in the accused, are questions entirely different, and depend on different considerations. In cases where a statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent. The case of Sherras v. De Rutzen, 64 L.J. M.C. 218; L.R., [1895] 1 Q.B. 918, is an instance of its absence."

If a man knowingly does acts which are unlawful, the presumption of law is that the mens rea exists; and ignorance of the law will not excuse him. R. v. Mailloux, 3 Pugsley (N.B.) 493.

It is a general principle of criminal law that there must be, as an essential ingredient in a criminal offence, some blameworthy condition of mind; sometimes it is negligence, sometimes malice, sometimes guilty knowledge—but as a general rule, there must be something of that kind which is designated by the expression mens rea. Moreover, it is a principle of our criminal law that the condition of mind of the servant is not to be imputed to the master. A master is not criminally responsible for a death caused by his servant's negligence, and still less for an offence depending on his servant's malice; nor can a master be held liable for the guilt of his servant in receiving goods, knowing them to have been stolen. And this principle of the common law applies also to statutory offences, with this difference, that it is in the power of the Legislature, if it so pleases, to enact, and in some cases it has enacted, that a man may be convicted and punished for an offence, although there was no blameworthy condition of mind about him; but inasmuch as to do so is contrary to the general principle of the law, it lies on those who assert that the Legislature has so enacted, to make it out convincingly by the language of the statute, for we ought not lightly to presume that the Legislature intended that A. should be punished for B. Per Cave, J., in Chisholm v. Doulton (1889), 22 Q.B.D. at p. 741; approved in Somerset v. Wade, [1894] 1 Q.B. at p. 576; R. v.

Vachon (1906), 3 Can. Cr. Cas. 558 (B.C.). Vide also Massey v. Morris, [1894] 2 Q.B. 412; Bank of New South Wales v. Piper, [1897] 66 L.J.P.C. at p. 76.

Charging the intent.]—Before the passing of the Code, where the intent with which an act was committed was a necessary ingredient of the offence, such intent must have been alleged in the indictment or charge, and there are some provisions of the Code which lend themselves to the view that it is still necessary to allege it, such as for instance sec. 618, which provides that in an indictment for an offence under sec. 361 it shall not be necessary to allege that the act was done with intent to defraud. The intent to defraud is not necessary to constitute an offence under the latter section, and if it is unnecessary to allege the intent in cases where it is an ingredient, it seems unnecessary to provide that it need not be alleged in certain cases where it forms no part of the offence. Sub-sec. 1 of sec. 611 provides that every count of an indictment "shall contain . . . in substance a statement that the accused has committed some indictable offence therein specified." It might reasonably be contended that, where the law provides that an act shall be a criminal offence only in cases where it is done with a certain intent, an indictment alleging that the accused had done the act without alleging that it was done with that intent would not contain in substance a statement that the accused had committed an offence.

Sub-sec. 4 of sec. 611, however, provides that the statement may be in any words sufficient to give the accused notice of the offence with which he is charged, and Form FF in the schedule which expressly refers to sec. 611 gives examples of the manner of stating offences under it. Form C states an offence under sec. 359 for obtaining goods by false pretences. A reference to that section will shew that the intent to defraud is necessary to constitute that offence and yet Form C contains no allegation of such intent.

It has therefore been held that if in the particular case the defendant could not be said to have any further or better notice of the offence with which he was charged were a specific allegation of intent included than he would have without it, then its omission is not fatal. R. v. Skelton (1898), 4 Can. Cr. Cas. 467 (N.W.T.).

An indictment, charging that the accused unlawfully attempted to steal from the person of an unknown person the property of such unknown person, without giving the name of the person against whom the offence was committed, or the description of the property the accused attempted to steal, is sufficient. R. v. Taylor (1895), 5 Can. Cr. Cas. 89 (Que.).

Possession of instruments for coining.]—See sec. 466.

Evidence.]—Where on an indictment for a principal offence and for an attempt to commit such an offence, the evidence is wholly directed to the proof of the principal offence, the jury's verdict of guilty of the attempt only, will not be set aside, although there were no other witnesses in respect of the attempt than those whose testimony, if wholly believed, shewed the commission of the greater offence. R. v. Hamilton (1897), 4 Can. Cr. Cas. 251 (Ont.).

It is within the province of the jury, to believe, if it sees fit to do so, a part only of a witness's testimony, and to disbelieve the remainder of the same witness's testimony, and it may therefore credit the testimony in respect of a greater offence only in so far as it shews a lesser offence. Ibid.

To shew the animus of an act, evidence of previous and subsequent conduct in the commission of other acts of a like character is admissible, although such other acts are in themselves crimes. R. v. McBerny (1897), 3 Can. Cr. Cas. 339 (N.S.).

Where a prisoner is indicted for an attempt, and the proof establishes that the principal offence was actually committed, the jury may convict of the attempt unless the court discharges the jury and directs that the prisoner be indicted for the complete offence. Sec. 712; R. v. Taylor (1895), R.J.Q., 4 Q.B. 226, 5 Can. Cr. Cas. 89.

TITLE II.

OFFENCES AGAINST PUBLIC ORDER, INTERNAL AND EXTERNAL.

PART IV.

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

SECT.

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65. Treason.—Treason is—

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

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

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

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

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

(Amendment of 1894)

(*f.*) levying war against His Majesty either—

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

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

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

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

(*i.*) assisting any public enemy at war with His Majesty in such war by any means whatsoever; or

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

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

Levying war within Canada.]—See sec. 68.

At common law a British subject was not exempt from the penalties of treason because he held a commission in the enemy's forces. Napper Tandy's Case, 27 St. Tr. 1191; Macdonald's Case, Fost. 59. Alien friends might be convicted. R. v. de la Motte, 21 St. Tr. 687. But not alien enemies unless they had accepted British protection during the war. Fost. 185; Forsyth's Const. Cases, 200.

There is no reason to suppose that it was not intended that the Parliament of Canada should have power to legislate regarding the crime of treason in Canada. It seems to be given when power is given to make laws for the peace, order and good government of Canada. Even jurisdiction to declare what shall be and what shall not be acts of treason, when committed within Canada, against the person of the Sovereign herself, might safely be committed to the Parliament of Canada when the Sovereign is a part of Parliament, and has also power of disallowance of Acts, even after they have been assented to by the Governor-General. R. v. Riel, 1 Terr. L.R. at p. 58, per Killam, J.

The Treason Act of England, 25 Edw. III., st. 5, ch. 2, declared it treason to "compass and imagine the death of the King," but it was necessary that the evidence should be applied to the proof of overt acts for the overt act is the charge upon which the prisoner must apply his defence. Archbold Cr. Plead. 893.

The indictment must state overt acts, and no evidence is admissible of any overt act not stated, unless it is otherwise relevant as tending to prove some overt act stated. See 614.

Words spoken or written and published may constitute an overt act if relating to a treasonable act or design. R. v. Wedderburne, 18 St. Tr. 425; R. v. Charnock, 12 St. Tr. 1377; but not unpublished writings. R. v. Lord Preston, 12 St. Tr. 645; R. v. Layer, 16 St. Tr. 93, 280. And by sec. 551 (2) no person shall be prosecuted under the provisions of this section for any overt act of treason expressed or declared by open and advised speaking unless information of such overt act and of the words by which the same was expressed or declared is given upon oath to a justice within six days after the words are spoken and a warrant for the apprehension of the offender is issued within ten days after such information is given.

Levying war.]—It is not necessary to set out in the indictment the particular acts of the defendant further than to allege generally that he assembled with a multitude armed and arrayed in a warlike manner and levied war. Fost. 220.

A mere rising or tumult is not treasonable unless for a purpose of a public or general nature. R. v. Hardie, 1 St. Tr. (N.S.) 609. It is not necessary that great numbers should assemble or that military arms or array should be displayed to constitute the levying of war. Ibid; R. v. Gallagher, 16 Cox C.C. 291. Enlisting and marching are sufficient without coming to battle. Vaughan's Case, 13 St. Tr. 485, 2 Salk. 634. But there must be an insurrection and it must be for an object of a general nature, and there must be force accompanying insurrection. R. v. Frost, 9 C. & P. 129. If an armed body of men enter a town with the object merely of making a demonstration of their strength to the magistracy in order to procure the liberation of prisoners convicted of some political offence or to have their punishment mitigated, this, although an offence of a serious nature, is not treason. Ibid.

Where the levying of war is direct, i.e., open rebellion for the purpose of deposing the Sovereign, all persons assembled and marching with the rebels are guilty of treason unless compelled to join and continue with them pro timore mortis. R. v. Earl of Essex, 1 St. Tr. 1333; R. v. Slavin, 17 U.C.C.P. 205; Fost. 216. But where it is indirect or constructive only, i.e., when levied for the purpose of effecting innovations of a public and general nature by an armed force or to obtain the redress of a public grievance, real or pretended, those only of the rabble who actually aid and assist in doing those acts of violence which form the constructive treason can be convicted of treason, and the rest are merely rioters. R. v. Messenger, 6 St. Tr. 879; R. v. Gordon, 21 St. Tr. 485.

Notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing some supposed grievances or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law. R. v. Riel (1885), 2 Man. R. 321, 1 Terr. L.R. 23, 10 App. Cas. 675.

Corroboration.]—No person accused of an offence under this section shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused. Sec. 684.

Time for prosecution.]—A prosecution for treason (except treason by killing His Majesty or where the overt act alleged is an attempt to injure the

person of His Majesty) must be commenced within three years from the time of the commission of the offence. Sec. 551.

Bail.]—Sec. 603 re-enacting R.S.C. c. 174, s. 83) provides that—

No judge of a county court or justices shall admit any person to bail accused of treason or an offence punishable with death, or an offence under Part IV. of this Act, nor shall any such person be admitted to bail, except by order of a superior court of criminal jurisdiction for the province in which the accused stands commited, or of one of the judges thereof, or, in the province of Quebec, by order of a judge of the Court of King's Bench or Superior Court.

Special provisions regarding trial.]—See sec. 658.

The ordinary power of amending indictments (sec. 629) does not extend to authorize the court to add to the overt acts charged in an indictment for treason or other offence under Part IV. Sec. 614 (2).

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

Evidence.]—Where a conspiracy is laid as an overt act the acts of any of the conspirators in furtherance of the common design may be given in evidence against all. R. v. Hardy, 1 East P.C. 98; R. v. Stone, 6 T.R. 527; R. v. McCafferty, 10 Cox C.C. 603.

The first thing to be proved is the conspiracy and that the defendant was connected with it, and afterwards, if it is intended to put in evidence the acts of a co-conspirator, it must be shewn that such co-conspirator was a member of the same conspiracy, and that the act done was in furtherance of the common design. R. v. Sidney, 9 St. Tr. 817; R. v. Lovat, 18 St. Tr. 529.

67. Accessories after the fact.—Every one is guilty of an indictable offence and liable to two years' imprisonment who—

(*a.*) becomes an accessory after the fact to treason; or

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

68. Levying war by citizens of a state at peace with His Majesty.—Every subject or citizen of any foreign state or country at peace with His Majesty, who—

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

(*b.*) commits any act of hostility therein; or

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

Every subject of His Majesty within Canada who—

(*d.*) levies war against His Majesty in company with any of the subjects or citizens of any foreign state or country at peace with His Majesty; or

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

(*f.*) with intent to aid and assist, joins himself to any person who has entered Canada with intent to levy war against His Majesty, or to commit any such offence therein—is guilty of an indictable offence and liable to suffer death. R.S.C. c. 146, ss. 6 and 7.

Sections 6 and 7 of the Act respecting treason and other offences against the King's authority, R.S.C. ch. 146, still remain in force (Code sec. 983). They are as follows:—

(6) If any person, being a citizen or subject of any foreign state or country at peace with His Majesty, is or continues in arms against His Majesty, within Canada, or commits any act of hostility therein, or enters Canada with design or intent to levy war against His Majesty, or to commit any felony therein, for which any person would, in Canada, be liable to suffer death, the Governor-General may order the assembling of a militia general court-martial for the trial of such person, under The Militia Act; and upon being found guilty by such court-martial of offending against the provisions of this section, such person shall be sentenced by such court-martial to suffer death, or such other punishment as the court awards.

(7) Every subject of His Majesty, within Canada, who levies war against His Majesty, in company with any of the subjects or citizens of any foreign state or country then at peace with His Majesty, or enters Canada in company with any such subjects or citizens with intent to levy war on His Majesty, or to commit any such act of felony as aforesaid, or who, with the design or intent to aid and assist, joins himself to any person or persons whomsoever, whether subjects or aliens, who have entered Canada with design or intent to levy war on His Majesty, or to commit any such felony within the same, may be tried and punished by a militia court-martial, in the same manner as any citizen or subject of a foreign state or country at peace with His Majesty may be tried and punished under the next preceding section.

This offence is triable either before a superior court of criminal jurisdiction or by a militia general court-martial. The Superior Court has no discretion as to the punishment to be awarded, but a court-martial has. Burbidge Cr. Law Dig. 56.

69. Other treasonable offences.—Every one is guilty of an indictable offence and liable to imprisonment for life who forms any of the intentions hereinafter mentioned, and manifests any such intention by conspiring with any person to carry it into effect, or by any other overt act, or by publishing any printing or writing; that is to say—

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

(*b.*) an intention to levy war against His Majesty within any part of the said United Kingdom, or of Canada, in order by force or constraint to compel him to change his measures or

counsels, or in order to put any force or constraint upon or in order to intimidate or overawe both Houses or either House of Parliament of the United Kingdom or of Canada;

(*c.*) an intention to move or stir any foreigner or stranger with force to invade the said United Kingdom, or Canada, or any other of His Majesty's dominions or countries under the authority of His Majesty. R.S.C. c. 146, s. 3.

A prosecution under this section cannot be commenced after the expiration of three years from the time of the commission of the offence. Sec. 551 (*a*). And no person shall be prosecuted under the provisions of this section for any overt act of treason expressed or declared by open and advised speaking, unless information of such overt act and of the words by which the same was expressed or declared is given upon oath to a justice within six days after the words are spoken and a warrant for the apprehension of the offender is issued within ten days after such information is given. Sec. 551 (2).

70. Conspiracy to intimidate a legislature.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who confederates, combines or conspires with any person to do any act of violence in order to intimidate, or to put any force or constraint upon, any Legislative Council, Legislative Assembly or House of Assembly. R.S.C. c. 146, s. 4.

On demurrer to an indictment for conspiracy to bring about a change in the government of the Province of Ontario by bribing members of the Legislature to vote against the government, it was held that such was an indictable offence as a common law misdemeamor. R. v. Bunting, 7 Ont. R. 524. The fact that the Legislature has power by statute to punish as for a contempt does not oust the jurisdiction of the courts where the offence is of a criminal character; the same act may be in one aspect a contempt of the Legislature and in another aspect an indictable offence. Ibid.

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

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

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

(i.) points, aims or presents at or near His Majesty any firearm, loaded or not, or any other kind of arm;

(ii.) discharges at or near His Majesty any loaded arm;

(iii.) discharges any explosive material near His Majesty;

(iv.) strikes, or strikes at, His Majesty in any manner whatever;

(v.) throws anything at or upon His Majesty; or

(*c.*) attempts to do any of the things specified in paragraph (*b*) of this section.

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

This section is derived from the Imperial Statute 37 Geo. III., ch. 70, the Incitement to Mutiny Act of 1797.

By Code sec. 614 indictments under Part IV. of the Code, in which this section appears, must state overt acts, and no evidence is admissible of any overt act not stated unless it is otherwise relevant as tending to prove some overt act stated. The power of amending indictments (sec. 629) does not authorize any addition to the overt act stated. Sec. 614 (2).

A sailor who has been in the sick hospital for thirty days and who is, therefore, not entitled to pay nor liable to a court-martial, is still "serving" within this section. R. v. Tierney, R. & R. 74.

73. Enticing soldiers or sailors to desert.—Every one is guilty of an indictable offence who, not being an enlisted soldier in His Majesty's service, or a seaman in His Majesty's naval service—

(*a.*) by words or with money, or by any other means whatsoever, directly or indirectly persuades or procures, or goes about or endeavours to persuade, prevail on or procure, any such seaman or soldier to desert from or leave His Majesty's military or naval service; or

(*b.*) conceals, receives or assists any deserter from His Majesty's military or naval service, knowing him to be such deserter.

2. The offender may be prosecuted by indictment, or summarily before two justices of the peace. In the former case he is liable to fine and imprisonment in the discretion of the court, and in the latter to a penalty not exceeding two hundred dollars, and not less than eighty dollars and costs, and in default of payment to imprisonment for any term not exceeding six months. R.S.C. c. 169, secs. 1 and 4.

By R.S.C. ch. 169, sec. 9, it is further provided that one moiety of the amount of any penalty recovered under this provision shall be paid over to the prosecutor or person by whose means the offender has been convicted, and the other moiety shall belong to the Crown.

Every one who is reasonably suspected of being a deserter from His Majesty's service may be apprehended and brought for examination before any justice of the peace, and if it appears that he is a deserter he shall be confined in gaol until claimed by the military or naval authorities, or proceeded against according to law. Sec. 561.

No one shall break open any building to search for a deserter unless he has obtained a warrant for that purpose from a justice of the peace, such warrant to be founded on affidavit that there is reason to believe that the deserter is concealed in such building and that admittance has been demanded and refused; and every one who resists the execution of any such warrant incurs a penalty of eighty dollars, recoverable on summary conviction in like manner as other penalties under the Code. Ibid.

74. Resisting execution of warrant for arrest of deserters.—Every one who resists the execution of any warrant authorizing the breaking open of any building to search for any deserter from His Majesty's military or naval service is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty of eighty dollars. R.S.C. c. 169, s. 7.

See note to sec. 73.

75. Enticing militiamen or members of the N.-W. mounted police to desert.—Every one is guilty of an offence and liable, on summary conviction, to six months' imprisonment with or without hard labour, who—

(*a.*) persuades any man who has been enlisted to serve in any corps of militia, or who is a member of or has engaged to serve in the North-West mounted police force, to desert, or attempts to procure or persuade any such man to desert; or

(*b.*) knowing that any such man is about to desert aids or assists him in deserting; or

(*c.*) knowing any such man is a deserter, conceals such man or aids or assists in his rescue. R.S.C. c. 41, s. 109; 52 V., c. 25, s. 4.

76. Interpretation of secs. 77 and 78.—In the two following sections, unless the context otherwise requires—

(*a.*) Any reference to a place belonging to His Majesty includes a place belonging to any department of the Government of the United Kingdom, or of the Government of Canada, or of any province, whether the place is or is not actually vested in His Majesty;

(*b.*) Expressions referring to communications include any communication, whether in whole or in part, and whether the document, sketch, plan, model or information itself or the substance or effect thereof only be communicated;

(*c.*) The expression "document" includes part of a document;

(*d.*) The expression "model" includes design, pattern and specimen;

(*e.*) The expression "sketch" includes any photograph or other mode of expression of any place or thing;

(*f.*) The expression "office under His Majesty," includes any office or employment in or under any department of the Government of the United Kingdom, or of the Government of Canada or of any province. 53 V., c. 10, s. 5.

77. Unlawfully obtaining and communicating official information.—Every one is guilty of an indictable offence and liable to imprisonment for one year, or to a fine not exceeding one hundred dollars, or to both imprisonment and fine, who—

(*a.*) for the purpose of wrongfully obtaining information—

(i.) enters or is in any part of a place in Canada belonging to His Majesty, being a fortress, arsenal, factory, dockyard, camp, ship, office or other like place, in which part he is not entitled to be; or

(ii.) when lawfully or unlawfully in any such place as aforesaid either obtains any document, sketch, plan, model or knowledge of anything which he is not entitled to obtain, or takes without lawful authority any sketch or plan; or

(iii.) when outside any fortress, arsenal, factory, dockyard or camp in Canada, belonging to His Majesty, takes, or attempts to take, without authority given by or on behalf of His Majesty, any sketch or plan of that fortress, arsenal, factory, dockyard or camp; or

(*b.*) knowingly having possession of or control over any such document, sketch, plan, model, or knowledge as has been obtained or taken by means of any act which constitutes an offence against this and the following section, at any time wilfully and without lawful authority communicates or attempts to communicate the same to any person to whom the same ought not, in the interests of the state, to be communicated at that time; or

(*c.*) after having been intrusted in confidence by some officer under His Majesty with any document, sketch, plan, model or information relating to any such place as aforesaid, or to the naval or military affairs of His Majesty, wilfully, and in breach of such confidence, communicates the same when, in the interests of the state, it ought not to be communicated; or

(*d.*) having possession of any document relating to any fortress, arsenal, factory, dockyard, camp, ship, office or other like place belonging to His Majesty, or to the naval or military affairs of His Majesty, in whatever manner the same has been obtained or taken, at any time wilfully communicates the same

to any person to whom he knows the same ought not, in the interests of the state, to be communicated at the time:

2. Every one who commits any such offence intending to communicate to a foreign state any information, document, sketch, plan, model or knowledge obtained or taken by him, or intrusted to him as aforesaid, or communicates the same to any agent of a foreign state, is guilty of an indictable offence and liable to imprisonment for life. 53 V., c. 10, s. 1.

This, and the following section, are an adaptation of the Imperial statute 52 & 53 Vict., ch. 52, the Official Secrets Act 1889. That Act was by its terms made applicable to British possessions not within the United Kingdom; but it is provided that if by any law made before or after the passing thereof by the legislature of any British possessions provisions are made which appear to His Majesty the King to be of the like effect as those contained in such Act, His Majesty may by order in council suspend the operation within such British possession of such Act or of any part thereof, so long as such law continues in force there and no longer (sec. 5). But the suspension in any British possession is limited by a proviso that it shall not extend to the holder of any office under His Majesty the King who is not appointed to that office by the government of that possession.

Interpretation.]—See sec. 76.

By sec. 543 it is provided that no person shall be prosecuted for the offence of unlawfully obtaining and communicating official information, as defined in this and the following section, without the consent of the Attorney-General or of the Attorney-General of Canada. 53 Vict., ch. 10, sec. 4.

78. Communicating information acquired by holding office.—Every one who, by means of his holding or having held an office under His Majesty, has lawfully or unlawfully, either obtained possession of or control over any document, sketch, plan or model, or acquired any information, and at any time corruptly, or contrary to his official duty, communicates or attempts to communicate such document, sketch, plan, model or information to any person to whom the same ought not, in the interests of the state, or otherwise in the public interest, to be communicated at that time, is guilty of an indictable offence and liable—

(*a.*) if the communication was made, or attempted to be made, to a foreign state, to imprisonment for life; and

(*b.*) in any other case to imprisonment for one year, or to a fine not exceeding one hundred dollars, or to both imprisonment and fine.

2. This section shall apply to a person holding a contract with His Majesty, or with any department of the Government of the United Kingdom, or of the Government of Canada, or of any province, or with the holder of any office under His Majesty as such holder, where such contract involves an

obligation of secrecy, and to any person employed by any person or body of persons holding such a contract who is under a like obligation of secrecy, as if the person holding the contract, and the person so employed, were respectively holders of an office under His Majesty. 53 V., c. 10, s. 2.

See sec. 76 and note to sec. 77.

By sec. 543 the consent of the Attorney-General or of the Attorney-General of Canada is required for the prosecution, as in the case of the preceding section.

An indictment for inciting the commission of an offence under sub-sec. 2, in respect of the offence mentioned in sec. 77 (*d*), was quashed for want of an averment that the person incited had obtained possession or control of the document. R. v. Stuart (1899), Central Cr. Court, Archbold Cr. Plead. 965.

PART V.

UNLAWFUL ASSEMBLIES, RIOTS, BREACHES OF THE PEACE.

SECT.

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79. Definition of unlawful assembly.—An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when assembled as to cause persons in the neighbourhood of such assembly to fear, on reasonable grounds, that the persons so assembled will disturb the peace tumultuously, or will by such assembly needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously.

2. Persons lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in such a manner as would have made their assembling unlawful if they had assembled in that manner for that purpose.

3. An assembly of three or more persons for the purpose of protecting the house of any one in their number against persons threatening to break and enter such house in order to commit any indictable offence therein is not unlawful.

Examples of unlawful assembly.]—The difference between a "riot" and an "unlawful assembly" is that the former is a tumultuous meeting of persons upon some purpose which they actually execute with violence, and the latter is a mere assembly of persons for treasonable or seditious purposes; R. v. Rankin, 7 St. Tr. (N.S.) 711; or upon a purpose which, if executed, would make them rioters, but which they do not execute nor make any motion to execute. R. v. Kelly, 6 U.C.C.P. 372; R. v. Birt, 5 C. & P. 154. The offence formerly known as "rout" was an unlawful assembly in which the parties had made some motion to execute the purpose, which, if executed, would make them rioters. R. v. Vincent, 9 C. & P. 91. But such would now be "riot" under the statutory definitions contained in sec. 80.

The march of a Salvation Army band through the streets of a town in which street music was prohibited, and which resulted in a breach of the peace, was held not to be an unlawful assembly where the bandsmen did not have any reason to believe that their acts would cause a breach of the peace. R. v. Clarkson, 17 Cox C.C. 483.

Persons assembling with intent to carry out a common purpose must not do so in such a manner as to needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously, and if they do so, and persons in the neighborhood are on reasonable grounds afraid that such a result will follow, the assembly will be unlawful under the definition in the section. This extends the common law offence and makes the decision in Beatty v. Gillbanks (1882), 9 Q.B.D. 308, inapplicable.

In that case members of the Salvation Army assembled together in the street for a lawful object, but with a knowledge that their assembly would be opposed and resisted by other persons in such a way as would in all probability tend to the commission of a breach of the peace on the part of the opposing persons. The procession of the Salvation Army was forcibly opposed by a number of persons but no violence was used by the Salvation Army members. It was held by Field and Cave, JJ., that the assembly of the latter was not unlawful, and that a man is not to be convicted for doing a lawful act, although he knows that his doing it may cause another to do an unlawful act.

A meeting lawfully convened may become unlawful if seditious words are spoken of such a nature as to be likely to produce a breach of the peace. R. v. Burns (1886), 16 Cox C.C. 355.

Assemblies to obstruct the officers of the law are unlawful. R. v. McNaughten, 14 Cox C.C. 576; or to witness a prize fight. R. v. Billingham, 2 C. & P. 234; R. v. Perkins, 4 C. & P. 537. See sec. 95 as to the offence of promoting a prize fight.

Suppressing unlawful assembly.]—The magistrates and the police are justified in dispersing an assembling which is unlawful. O'Kelly v. Harvey, 15 Cox C.C. 435. Redford v. Birley, 1 St. Tr. (N.S.) 1071, 1239; R. v. Neale, 3 St. Tr. (N.S.) 1312. After refusal to disperse, force may be used to compel them to do so, and the persons resisting may be punished as rioters. R. v. Jones, 6 St. Tr. (N.S.) 811; R. v. Fursey, St. Tr. (N.S.) 543, 6 C. & P. 81. Nor is it necessary to first read the Riot Act or to proclaim the meeting unlawful before using force to disperse it. Ibid.

Punishment.]—See sec. 81.

80. Definition of riot.—A riot is an unlawful assembly which has begun to disturb the peace tumultuously.

At common law a riot was "a tumultuous disturbance of the peace by three persons or more assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner to the terror of the people, whether the act intended was of itself lawful or unlawful." Hawkins P.C., c. 28, sec. 1, p. 513, and where before the Code a person was indicted for a riot and assault, and the jury found him guilty of a riot, but not of the assault charged; it was held that the conviction for riot could not be sustained, the assault, the object of the riotous assembly, not having been executed; although the defendant might have been guilty of joining in an unlawful assembly. R. v. Kelly (1857), 6 U.C.C.P. 372. The present section makes it unnecessary that the object of the disturbance should have been actually carried out if there has been a tumultuous disturbance of the peace.

A procession having been attacked by rioters, the prisoner, one of the processionists, and in no way connected with the rioters, was proved during the course of the attack to have fired off a pistol on two occasions, first in the air and then at the rioters. So far as appeared from the evidence, the prisoner acted alone and not in connection with any one else. It was held that a conviction for riot could not be sustained. R. v. Corcoran (1876), 26 U.C.C.P. 134.

Punishment and procedure.]—See secs. 82-86 inclusive.

81. Punishment of unlawful assembly. — Every member of an unlawful assembly is guilty of an indictable offence and liable to one year's imprisonment. R.S.C. c. 147, s. 11.

Unlawful assembly defined.]—See sec. 79.

Evidence of other meetings.]—It has been held in New Brunswick that it is not a ground for quashing a conviction for unlawful assembly on a certain day that evidence of an unlawful assembly on another day has been improperly received, if the latter charge was abandoned by the prosecuting counsel at the close of the case, and there was ample evidence to sustain the conviction. R. v. Mailloux, 3 Pugsley (N.B.) 493. And evidence of the conduct of the accused persons on the day previous to their alleged unlawful assembly is not admissible on their behalf to explain or qualify their conduct at the time of the alleged offence. Ibid.

82. Punishment of riot.—Every rioter is guilty of an indictable offence and liable to two years' imprisonment with hard labour. R.S.C. l. 148, s. 13.

Suppression of riot.]—See secs. 40-43 inclusive, 81, 83-86 inclusive, and 140-142 inclusive.

If the magistrate neither reads the Riot Act nor restrains nor apprehends the rioters, nor gives any orders to fire on them, nor makes use of an available military force, such will be prima facie evidence of criminal neglect on his part. R. v. Kennett, 5 C. & P. 282. He is justified in using such force as he on good faith and on reasonable and probable grounds believes necessary, but it must not be out of proportion to the danger to be reasonably apprehended from a continuance of the riot. Sec. 40: Stevenson v. Wilson, 2 L.C.J. 254; R. v. Pinney (1832), 5 C. & P. 254.

Evidence.]—To prove a person to be a rioter, it is not sufficient to merely shew that the riot took place and that the accused was present among them. It must be shewn that he did something by word or act to take part in, help or incite the riotous proceedings. R. v. Atkinson, 11 Cox 330. If, however, his assistance is demanded by officers of the law to aid in suppressing the riot, his failure to aid them is indictable under sec. 141. R. v. Sherlock, 10 Cox C.C. 170; R. v. Brown, C. & Mar. 314.

The acts of the rioters may be proved severally, as in conspiracy, before evidence is given to connect their fellow rioters. R. v. Cooper, 1 Russ. Crimes, 6th ed. 585.

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

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

"GOD SAVE THE KING."

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

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

(*b.*) continue together to the number of twelve for thirty minutes after such proclamation has been made, or if they know that its making was hindered as aforesaid, within thirty minutes after such hindrance. R.S.C. c. 147, ss. 1 and 2.

The Riot Act is not validly proclaimed if the concluding words of the proclamation, "God save the King," are omitted. R. v. Child, 4 C. & P. 442.

A prosecution under the second sub-section for opposing the reading of the Riot Act or for assembling (quære continuing assembled) after proclamation, must be brought within one year from the commission of the offence. Sec. 551 (*c*).

84. Duty of justice if rioters do not disperse.—If the persons so unlawfully, riotously and tumultuously assembled together as mentioned in the next preceding section, 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 of the peace; and if any of the persons so assembled is 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, shall be indemnified against all proceedings of every kind in respect thereof: Provided, that nothing herein 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. R.S.C. c. 147, s. 3.

See secs. 40 to 43 inclusive, and secs. 140 and 141.

85. Riotous destruction of buildings.—All persons are guilty of an indictable offence and liable to imprisonment for life who, being riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force demolish or pull down, or begin to demolish or pull down, any building, or any machinery, whether fixed or movable, or any erection used in farming land, or in carrying on any trade or manufacture, or any erection or structure used in conducting the business of any mine, or any bridge, waggonway or track for conveying minerals from any mine. R.S.C. c. 147, s. 9.

It is not a defence that the offender believed he had a right to act as he did, unless he actually had such a right. Sec. 86 (2). Formerly if the demolition was executed in pursuance of the bona fide belief that the house belonged to one of the rioters, this would be a defence although the belief was erroneous. R. v. Langford, Carr. & M. 602; R. v. Casey (1874), Irish R. 8 C.L. 408.

As to similar offences without riot, see Part XXXVII., secs. 482-511; and as to riotous injury or damage to buildings, see sec. 86.

Begin to demolish.]—This means not simply the demolition of a part, but of a part with intent to demolish the whole. R. v. Ashton, 1 Lewin C.C. 296. In that case the parties first broke the windows and then entered the house and set fire to the furniture, but no part of the house was burned. Park, J., thus instructed the jury:—"If you think the prisoners originally came there without intent to demolish, and that the setting fire to the furniture was an afterthought but with that intent, then you must acquit because no part of the house having been burned there was no beginning to destroy the house. If they came originally without such intent but had

afterwards set fire to the house the offence is arson. If you have doubts whether they originally came with an intent to demolish, you may use the setting fire to the furniture under such circumstances and in such manner as that the necessary consequence, if not for timely interference, would have been the burning of the house, as evidence to shew that they had such intent, although they began to demolish in another manner." Ibid.

If rioters destroy a house by fire the offence is within this section, and they need not be indicted for arson. R. v. Harris, Carr. & M. 661.

If some of the prisoners set fire to the house itself, and others carried furniture out of the house and burned it in a fire made outside, it will be for the jury to say whether the latter were not encouraging and taking part in a general design of destroying both the house and the furniture, and if so the jury ought to convict. Ibid.

Where rioters destroy a house by fire it is not essential to prove that the person accused was present when the house was originally set on fire, if it was shewn that he was one of the rioters present while the fire was burning. R. v. Simpson, Carr. & M. 669.

It is immaterial that the principal intent of the rioters was the capture or personal injury of an individual therein, if it was also their object to demolish the house. R. v. Batt, 6 C. & P. 329.

Where the rioters break the doors and windows and destroy furniture in the house and then go away, although there was nothing to prevent them committing further injury, the offence is not within this section, for their going away under the circumstances shews that they had completed their purpose and had done all the injury they intended to do. R. v. Thomas, 4 C. & P. 237; R. v. Adams, Carr. & M. 299.

86. Riotous damage to buildings.—All persons are guilty of an indictable offence and liable to seven years' imprisonment who, being riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force injure or damage any of the things mentioned in the last preceding section.

2. It shall not be a defence to a charge of an offence against this or the last preceding section that the offender believed he had a right to act as he did, unless he actually had such a right. R.S.C. c. 147, s. 10.

See note to preceding section.

87. Unlawful drilling.—The Governor in Council is authorized from time to time to prohibit assemblies without lawful authority of persons for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms, or for the purpose of practising military exercises, movements or evolutions, and to prohibit persons when assembled for any other purpose so training or drilling themselves or being trained or drilled. Any such prohibition may be general or may apply only to a particular place or district and to assemblies of a particular character, and shall come into operation from the publication in the *Canada Gazette* of a proclamation

embodying the terms of such prohibition, and shall continue in force until the like publication of a proclamation issued by the authority of the Governor in Council revoking such prohibition.

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

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

(*b.*) at any assembly trains or drills any other person to the use of arms or the practice of military exercises or evolutions. R.S.C. c. 147, ss. 4 and 5.

The prosecution must be commenced within six months from the commission of the offence. Sec. 551 (*d*).

88. Being unlawfully drilled.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, without lawful authority, attends, or is present at, any such assembly as in the last preceding section mentioned, for the purpose of being, or who at any such assembly is, without lawful authority and in contravention of such prohibition or proclamation trained or drilled to the use of arms or the practice of military exercises or evolutions. R.S.C. c. 147, s. 6.

The prosecution must be commenced within six months from the time when the offence was committed. Sec. 551 (*d*).

89. Forcible entry and detainer.—Forcible entry is where a person, whether entitled or not, enters in a manner likely to cause a breach of the peace, or reasonable apprehension thereof, on land then in actual and peaceful possession of another.

2. Forcible detainer is where a person in actual possession of land, without colour of right, detains it in a manner likely to cause a breach of the peace, or reasonable apprehension thereof, against a person entitled by law to the possession thereof.

3. What amounts to actual possession or colour of right is a question of law.

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

Forcible entry.]—"Entering" here means not merely going upon land or trespassing upon it; there must accompany the act of going upon the land some intent to take possession of the land itself and deprive the possessor of the land. Such an interference with the possession as trespassing upon it for the purpose of taking away chattels upon the land is not an "entering" within the Code. R. v. Pike (1898), 2 Can. Cr. Cas. 314, 12 Man. L.R. 314.

Lord Tenterden, C.J., expressed himself as follows, in Rex v. Smyth, 5 C. & P. 201: "An indictment for a forcible entry cannot be supported by evidence of a mere trespass; but there must be proof of such force, or at least of such kind of force as is calculated to prevent any resistance."

To enter upon lands with such force as to exceed a bare trespass and so as to cause a public breach of the peace was an indictible offence at common law. R. v. Wilson, 8 T.R. 357; R. v. Bake, 3 Burr. 1731.

Everyone commits the offence of forcible entry, who, in order to take possession thereof, enters upon any lands or tenements in a violent manner, whether such violence consists in actual violence applied to any other person, or in threats, or in breaking open any house, or in collecting together an unusual number of persons for the purpose of making such entry. Stephen's Digest of Crim. Law, p. 51.

Where, therefore, from thirty to forty employees of the G. W. Railway Co. went upon land then in possession of the S. & H. Railway Co., and those resisting had good reason to apprehend violence in the event of further resistance, and yielded possession in the apprehension of such violence, it was held that the entry was a forcible one. R. v. Smith (1878), 43 U.C.Q.B. 369.

The gist of the offence is the forcible depriving of the other's actual and peaceable possession in a manner likely to cause a breach of the peace. R. v. Cokely, 13 U.C.Q.B. 521; R. v. Studd, 14 W.R. 806; Beddall v. Maitland, 17 Ch. D. 174. Even if the defendant had a right of entry, the assertion of that right "with strong hand or with multitude of people" is equally an offence as if he had no right. Taunton v. Costar, 7 T.R. 431.

A landlord may not so eject his tenant although the term of the tenancy has expired. But it has been held that the English statute regarding forcible entry (5 Ric. 2, ch. 7) does not apply to the ejectment of a mere trespasser. Browne v. Dawson, 12 A. & E. 624; Scott v. Browne, 51 L.T. 747.

A person who forcibly enters upon lands of his own which are in the custody of his servant or bailiff, is not guilty of forcible entry. 1 Hawk., ch. 64, sec. 32.

Actual possession does not necessarily imply actual residence, either personally or by a servant or agent. 13 Am. & Eng. Encyc. of Law, 2nd ed., p. 750.

Restitution.]—On a conviction for forcible entry the court is not bound to order a writ of restitution, but may in its discretion grant or refuse the writ. R. v. Jackson, Dra. Rep. (U.C.) 53; R. v. Wightman (1869), 29 U.C.Q.B. 211.

Forcible detainer.]—Everyone commits the offence called forcible detainer, who, having wrongfully entered upon any lands or tenements, detains such lands and tenements in a manner which would render an entry upon them for the purpose of taking possession forcible. Stephen's Digest of Crim. Law, p. 51.

The evidence which supported the allegation of forcible entry in the case of R. v. Smith, supra, was held to support the allegation of forcible detainer. Ib., p. 383. It is within the discretion of the judge who tries the cause either to grant or refuse restitution. R. v. Wightman (1869), 29 U.C.Q.B. 211; R. v. Smith (1878), 43 U.C.Q.B. 369.

90. Affray.—An affray is the act of fighting in any public street or highway, or fighting to the alarm of the public in any other place to which the public have access.

2. Every one who takes part in an affray is guilty of an indictable offence and liable to one year's imprisonment with hard labour. R.S.C. c. 147, s. 14.

If the fighting be in private it is not an affray, but an assault. 4 Bl. Com. 145; R. v. Hunt, 1 Cox C.C. 177. Mere quarrelsome words will not make an affray. 1 Russ. Cr. 5th ed. 390. It differs from a riot in that two persons may be guilty of an affray, but it requires three or more to constitute a riot. Secs. 79 and 80.

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

It was a very high offence at common law to challenge another, either by word or letter, to fight a duel; or to be the messenger of such a challenge or even barely to provoke another to send such a challenge or to fight, e.g., by dispersing letters to that purpose containing reflections and insinuating a desire to fight. Hawk. P.C., b. 1, ch. 63, sec. 3; R. v. Phillips, 6 East 464; R. v. Rice, 3 East 581.

If the defendant's intent does not sufficiently appear from the words proved, the prosecution should give evidence of circumstances from which the jury may infer the intent. R. v. Phillips, 6 East 464; Archbold Cr. Evid. 1060.

Where a letter challenging to fight is put into the post office in one county and delivered to the party in another, the venue may be laid in the former county. R. v. Williams (1810), 2 Camp. 506. The *sending* of the challenge is the offence and the offence is complete if the letter be mailed, although it does not in fact reach the person to whom it is addressed. Ibid.

92. Prize-fighting defined. — In sections ninety-three to ninety-seven inclusive the expression "prize-fight" means an encounter or fight with fists or hands, between two persons who have met for such purpose by previous arrangement made by or for them. R.S.C. c. 153, s. 1.

A sparring match with gloves, fairly conducted, is not unlawful. R. v. Young, 10 Cox C.C. 371. If, however, the parties meet intending to fight till one gives in from exhaustion or injury received, such fighting is unlawful whether the combatants fight with gloves or not. R. v. Orton, 14 Cox C.C. 226.

The defendants advertised a boxing exhibition which was effectively held in a public hall, and was accompanied by all the particulars and circumstances of a prize-fight. Complainant submitted that the accused came within the provision of the statute; and on behalf of the defendants it was contended that the encounter was merely a scientific boxing match, and moreover only a sham fight, not forbidden by law:—Held, that, as the proof adduced established that the encounter in question was accompanied by all the circumstances and elements which constitute a prize-fight, the defendants committed an infraction of the law, for which they must be found guilty. *Steele* v. *Maber*, 19 Que. S.C. 392. Per Mulvena, D.M.

The injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows and because prize-fights are disorderly exhibitions, mischievous on many obvious grounds. R. v. Coney, 8 Q.B.D. 534, 30 W.R. 678, per Stephen, J. The consent of the parties to the blows which they may mutually receive does not prevent those blows from being assaults. Ibid.

The fight must be for a prize or one on the result of which the handing over or transfer of money or property depends, otherwise it is not a prize-fight; sec. 97; but may be punished under the latter section by a fine not exceeding $50.

93. Challenging to fight a prize-fight, etc.—Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding one thousand dollars and not less than one hundred dollars, or to imprisonment for a term not exceeding six months, with or without hard labour or to both, who sends or publishes, or causes to be sent or published or otherwise made known, any challenge to fight a prize-fight, or accepts any such challenge, or causes the same to be accepted, or goes into training preparatory to such fight, or acts as trainer or second to any person who intends to engage in a prize-fight. R.S.C. c. 153, s. 2.

94. Engaging as principal in a prize-fight.—Every one is guilty of an offence and liable, on summary conviction, to imprisonment for a term not exceeding twelve months and not less than three months, with or without hard labour who engages as a principal in a prize-fight. R.S.C. c. 153, s. 3.

Sections 6, 7 and 10 of the Act respecting prize-fighting, R.S.C., ch. 153, still remain in force (Code sec. 983). They are as follows:—

(6) If, at any time, the sheriff of any county, place or district in Canada, any chief of police, any police officer, or any constable, or other peace officer, has reason to believe that any person within his bailiwick or jurisdiction is about to engage as principal in any prize-fight within Canada, he shall forthwith arrest such person and take him before some person having authority to try offences against this Act, and shall forthwith make complaint in that behalf, upon oath, before such person; and thereupon such person shall inquire into the charge, and if he is satisfied that the person so brought before him was, at the time of his arrest, about to engage as a principal in a prize-fight, he shall require the accused to enter into a recognizance, with sufficient sureties, in a sum not exceeding five thousand dollars and not less than one thousand dollars, conditioned that the accused will not engage in any such fight within one year from and after the date of such arrest; and in default of such recognizance, the person before whom the accused has been brought shall commit the accused to the goal of the county, district or city within which such inquiry takes place, or if there is no common goal there, then to the common goal which is nearest to the place where such inquiry is had, there to remain until he gives such recognizance with such sureties.

(7) If any sheriff has reason to believe that a prize-fight is taking place or is about to take place within his jurisdiction as such sheriff, or that any persons are about to come into Canada at a point within his jurisdiction, from any place outside of Canada, with intent to engage in, or to be concerned in, or to attend any prize-fight within Canada, he shall forthwith summon a force of the inhabitants of his district or county sufficient for the purpose of suppressing and preventing such fight,—and he shall, with their aid, suppress and prevent the same, and arrest all persons present thereat, or who come into Canada as aforesaid, and shall take them before some person having authority to try offences against this Act, to be dealt with according to law, and fined or imprisoned, or both, or compelled to enter

into recognizances with sureties, as hereinbefore provided, according to the nature of the case.

(10) Every judge of a superior court or of a county court, judge of the sessions of the peace, stipendiary magistrate, police magistrate, and commissioner of police of Canada, shall within the limits of his jurisdiction as such judge, magistrate or commissioner, have all the powers of a justice of the peace with respect to offences against this Act.

95. Attending or promoting a prize-fight.—Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding five hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding twelve months, with or without hard labour or to both, who is present at a prize-fight as an aid, second, surgeon, umpire, backer, assistant or reporter, or who advises, encourages or promotes such fight. R.S.C. c. 153, s. 5.

96. Leaving Canada to engage in a prize-fight.—Every inhabitant or resident of Canada is guilty of an offence and liable, on summary conviction, to a penalty not exceeding four hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding six months, with or without hard labour or to both, who leaves Canada with intent to engage in a prize-fight without the limits thereof. R.S.C. c. 153, s. 5.

97. When discretionary to discharge or fine.—If, after hearing evidence of the circumstances connected with the origin of the fight or intended fight, the person before whom the complaint is made is satisfied that such fight or intended fight was *bona fide* the consequence or result of a quarrel or dispute between the principals engaged or intended to engage therein, and that the same was not an encounter or fight for a prize, or on the result of which the handing over or transfer of money or property depended, such person may, in his discretion, discharge the accused or impose upon him a penalty not exceeding fifty dollars. R.S.C. c. 153, s. 9.

See note to sec. 92.

98. Inciting Indians to riotous acts.—Every one is guilty of an indictable offence and liable to two years' imprisonment who induces, incites or stirs up any three or more Indians, non-treaty Indians, or half-breeds, apparently acting in concert—

(*a.*) to make any request or demand of any agent or servant of the Government in a riotous, routous, disorderly or threatening manner, or in a manner calculated to cause a breach of the peace; or

(*b.*) to do any act calculated to cause a breach of the peace. R.S.C. c. 43, s. 111.

PART VI.

UNLAWFUL USE AND POSSESSION OF EXPLOSIVE SUBSTANCES AND OFFENSIVE WEAPONS —SALE OF LIQUORS.

SECT.

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99. Causing dangerous explosions.—Every one is guilty of an indictable offence and liable to imprisonment for life who wilfully causes, by any explosive substance, an explosion of a nature likely to endanger life or to cause serious injury to property, whether any injury to person or property is actually caused or not. R.S.C. c. 150, s. 3.

By the common law of England to manufacture or to keep in large quantities in towns or closely inhabited places gunpowder, or other explosive substances, constitutes a nuisance and indictable offence. R. v. Lister, 1 D. & B. 209, citing R. v. Taylor, 2 Strange 1167, and R. v. Williams, 1 Russell on Crimes 298, note *o.*, and the causing of danger is the gist of the offence; but it is not necessary to allege carelessness in the indictment, or that the quantities deposited were so great that care would not produce safety. R. v. Holmes (1884), 17 N.S.R. 499.

Explosive substance.]—This expression is defined by the interpretation clause (sec. 3 (*i*)) as including 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.

Property.]—This term includes 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. Sec. 3 (*v*).

Likely to endanger life.]—It is not necessary to prove actual injury, and it is sufficient if such exposure to risk or chance of injury be shewn as will satisfy the jury that actual danger to life was caused. R. v. McGrath, 14 Cox C.C. 598.

100. Acts with intent to cause dangerous explosions.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who wilfully—

(*a.*) does any act with intent to cause by an explosive substance, or conspires to cause by an explosive substance, an explosion of a nature likely to endanger life, or to cause serious injury to property;

(*b.*) makes or has in his possession or under his control any explosive substance with intent by means thereof to endanger life or to cause serious injury to property, or to enable any other person by means thereof to endanger life or to cause serious injury to property—

whether any explosion takes place or not and whether any injury to person or property is actually caused or not. R.S.C. c. 150, s. 3.

If several persons are connected in a common design to have explosive substances made for an unlawful purpose, each of the confederacy is responsible in respect of such articles as are in the possession of others connected in the carrying out of their common design. R. v. Charles, 17 Cox C.C. 499.

The Imperial Act, 24 & 25 Vict., ch. 97, sec. 10, declared it an offence to "unlawfully and maliciously place or throw in, against or near any building any gunpowder or other explosive substance with intent to destroy or damage any building, etc., whether or not any explosion take place and whether or not any damage be caused." On a prosecution under that statute for throwing gunpowder against a house, the evidence proved that the prisoner had thrown a bottle containing gunpowder against the house, and that there was a fuse in the neck of the bottle. Kelly, C.B., ruled that, unless the fuse was lighted at the time the bottle was thrown against the

house, the offence was not made out, as, "if the fuse was not lighted, it could not cause an explosion and it would be merely throwing a bottle against a house." R. v. Sheppard (1868), 11 Cox C.C. 302.

101. Unlawfully making or possessing explosive substances.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who makes, or knowingly has in his possession or under his control, any explosive substance under such circumstances as to give rise to a reasonable suspicion that he is not making it, or has it not in his possession or under his control, for a lawful object, unless he can shew that he made it or had it in his possession or under his control for a lawful object. R.S.C. c. 150, s. 5.

If any person is charged before a justice of the peace with the offence of making or having explosive substances, as defined in section 100, no further proceeding shall be taken against such person without the consent of the Attorney-General except such as the justice of the peace thinks necessary, by remand or otherwise, to secure the safe custody of such person. Sec. 545.

102. Possession of arms for purposes dangerous to the public peace.—Every one is guilty of an indictable offence and liable to five years' imprisonment who has in his custody or possession, or carries, any offensive weapons for any purpose dangerous to the public peace. R.S.C. c. 149, s. 4.

A prosecution under this section shall not be commenced after the expiration of six months from the commission of the offence. Sec. 551 (*d*).

103. Two or more persons openly carrying dangerous weapons so as to cause alarm.—If two or more persons openly carry offensive weapons in a public place in such a manner and under such circumstances as are calculated to create terror and alarm, each of such persons is liable, on summary conviction before two justices of the peace, to a penalty not exceeding forty dollars and not less than ten dollars, and in default of payment to imprisonment for any term not exceeding thirty days. R.S.C. c. 148, s. 8.

The prosecution must be commenced within one month from the commission of the offence. Sec. 551 (*f*).

104. Smugglers carrying offensive weapons.—Every one is guilty of an indictable offence and liable to imprisonment for ten years who is found with any goods liable to seizure or forfeiture under any law relating to inland revenue, the customs, trade or navigation, and knowing them to be so liable, and carrying offensive weapons. R.S.C. c. 32, s. 213.

105. Carrying a pistol or air-gun without justification.—Every one is guilty of an offence and liable on summary conviction to a penalty not exceeding twenty-five dollars and not less than five dollars, or to imprisonment for one month, who, not being a justice or a public officer, or a soldier, sailor or volunteer in His Majesty's service, on duty, or a constable or other peace officer, and not having a certificate of exemption from the operation of this section as hereinafter provided for, and not having at the time reasonable cause to fear an assault or other injury to his person, family or property, has upon his person a pistol or air-gun elsewhere than in his own dwelling-house, shop, warehouse, or counting-house.

2. If sufficient cause be shewn upon oath to the satisfaction of any justice, he may grant to any applicant therefor not under the age of sixteen years and as to whose discretion and good character he is satisfied by evidence upon oath, a certificate of exemption from the operation of this section, for such period, not exceeding twelve months, as he deems fit.

3. Such certificate, upon the trial of any offence, shall be *primâ facie* evidence of its contents and of the signature and official character of the person by whom it purports to be granted.

4. When any such certificate is granted under the preceding provisions of this section, the justice granting it shall forthwith make a return thereof to the proper officer in the county, district or place in which such certificate has been granted for receiving returns under section nine hundred and two; and in default of making such return within ninety days after a certificate is granted, the justice shall be liable, on summary conviction, to a penalty of not more than ten dollars.

5. Whenever the Governor in Council deems it expedient in the public interest, he may by proclamation suspend the operation of the provisions of the first and second sub-sections of this section respecting certificates of exemption, or exempt from such operation any particular part of Canada, and in either case for such period, and with such exceptions as to the persons hereby affected, as he deems fit.

The limit of time for prosecution is one month. Sec. 551 (*f*).

As to soldiers, peace officers, etc., see the exception contained in sec. 112.

Peace officer.]—See the definition of this term in sec. 3 (*s*).

106. Selling pistol or air-gun to minor.—Every one is guilty of an offence and liable on summary conviction to a penalty not exceeding fifty dollars, who sells or gives any pistol or air-gun, or any ammunition therefor, to a minor under the age of sixteen years, unless he establishes to the satisfaction of the justice before whom he is charged that he used reasonable diligence in endeavouring to ascertain the age of the minor before making such sale or gift, and that he had good reason to believe that such minor was not under the age of sixteen.

2. Every one is guilty of an offence and liable on summary conviction to a penalty not exceeding twenty-five dollars who sells any pistol or air-gun without keeping a record of such sale, the date thereof, and the name of the purchaser and of the maker's name, or other mark by which such arm may be identified.

The limit of time for prosecution is one month. Sec. 551 (*f*).

107. Having weapons on person when arrested.—Every one who, when arrested, either on a warrant issued against him for an offence or while committing an offence, has upon his person a pistol or air-gun is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding fifty dollars and not less than twenty dollars, or to imprisonment for any term not exceeding three months, with or without hard labour. R.S.C., c. 148, s. 2.

The limit of time for prosecution is one month. Sec. 551 (*f*).

As to soldiers, peace officers, etc., see the exception contained in sec. 112.

108. Having weapons on the person with intent.—Every one who has upon his person a pistol or air-gun, with intent therewith unlawfully to do injury to any other person, is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding two hundred dollars and not less than fifty dollars, or to imprisonment for any term not exceeding six months, with or without hard labour. R.S.C., c. 148, s. 3.

The limit of time for prosecution is one month. Sec. 551 (*f*).

A conviction for "procuring" a pistol with intent unlawfully to do injury to another person, is not to be held a sufficient conviction for "having on his person a pistol, etc.," and is bad as not disclosing an offence known to the law. R. v. Mines (1894), 1 Can. Cr. Cas. 217 (Ont.).

109. Pointing firearm at person.—Every one who, without lawful excuse, points at another person any firearm or air-gun, whether loaded or unloaded, is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding one hundred dollars and not less than ten dollars, or to imprisonment for any term not exceeding thirty days, with or without hard labour. R.S.C., c. 148, s. 4.

The limit of time for prosecution is one month. Sec. 551 (*f*).

110. Carrying offensive weapons about the person.—Every one who carries about his person any bowie-knife, dagger, dirk, metal knuckles, skull cracker, slung shot, or other offensive weapon of a like character, or secretly carries about his person any instrument loaded at the end, or sells or exposes for sale, publicly or privately, any such weapon, or being masked or disguised carries or has in his possession any firearm or air-gun, is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding fifty dollars and not less than ten dollars, and in default of payment thereof to imprisonment for any term not exceeding thirty days, with or without hard labour. R.S.C., c. 148, s. 5.

The limit of time for prosecution is one month. Sec. 551 (*f*).

111. Carrying sheath-knives in seaports.—Every one, not being thereto required by his lawful trade or calling, who is found in any town or city carrying about his person any sheath-knife is liable, on summary conviction before two justices of the peace, to a penalty not exceeding forty dollars and not less than ten dollars, and in default of payment thereof to imprisonment for any term not exceeding thirty days, with or without hard labour. R.S.C., c. 148, s. 6.

As to sailors in His Majesty's service and certain others see the exception provided in the following section.

The limit of time for prosecution is one month. Sec. 551 (*f*).

Code sections 107 to 111 inclusive are taken from R.S.C. ch. 148 (secs. 2 to 6 inclusive), an Act respecting the improper use of firearms and other weapons, and sec. 7 of that statute remains unrepealed (Code sec. 983) and is to be read with these sections of the Code. Sec. 7 is as follows:—

(7) The court or justice before whom any person is convicted of any offence against the provisions of the preceding sections, shall impound the weapon for carrying which such person is convicted, and if the weapon is not a pistol, shall cause it to be destroyed; and if the weapon is a pistol, the court or justice shall cause it to be handed over to the corporation of the municipality in which the conviction takes place, for the public uses of such corporation.

(2) If the conviction takes place where there is no municipality, the pistol shall be handed over to the Lieutenant-Governor of the Province in which the conviction takes place, for the public uses thereof in connection with the administration of justice therein.

112. Exception as to soldiers, &c.—It is not an offence for any soldier, public officer, peace officer, sailor or volunteer in His Majesty's service, constable or other policeman, to carry loaded pistols or other usual arms or offensive weapons in the discharge of his duty. R.S.C., c. 148, s. 10.

This section constitutes an exception from the operation of secs. 107, 110 and 111. Sec. 105 by its terms also excepts the same classes from its operation. A justice of the peace is a peace officer; sec. 3 (*s*); and so is a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer, or officer employed for the service or execution of civil process. Ibid.

113. Refusing to deliver offensive weapon to a justice.—Every one attending any public meeting or being on his way to attend the same who, upon demand made by any justice of the peace within whose jurisdiction such public meeting is appointed to be held, declines or refuses to deliver up, peaceably and quietly, to such justice of the peace, any offensive weapon with which he is armed or which he has in his possession, is guilty of an indictable offence.

2. The justice of the peace may record the refusal and adjudge the offender to pay a penalty not exceeding eight dollars, or the offender may be proceeded against by indictment as in other cases of indictable offences. R.S.C., c. 152, s. 1.

The prosecution must be commenced within one year from the commission of the offence. Sec. 551 (*c*).

Sections 1, 2 and 3 of the Act respecting the preservation of peace at public meetings, R.S.C. ch. 152, still remain in force (Code sec. 983). They are as follows:—

(1) Any justice of the peace within whose jurisdiction any public meeting is appointed to be held, may demand, have and take of and from any person attending such meeting, or on his way to attend the same, any offensive weapon, such as firearms, swords, staves, bludgeons, or the like, with which any such person is so armed, or which any such person has in his possession; and every such person who, upon such demand, declines or refuses to deliver up, peaceably and quietly, to such justice of the peace, any such offensive weapon as aforesaid, is guilty of a misdemeanour, and such justice may thereupon record the refusal of such person to deliver up such weapon, and adjudge him to pay a penalty not exceeding eight dollars,—which penalty shall be levied in like manner as penalties are levied under the *Act respecting summary proceedings before justices of the peace*, or such person may be proceeded against by indictment or information, as in other cases of misdemeanour; but such conviction shall not interfere with the power of such justice, or any other justice of the peace, to take such weapon, or cause the same to be taken from such person, without his consent and against his will, by such force as is necessary for that purpose.

(2) Upon reasonable request to any justice of the peace, to whom any such weapon has been peaceably and quietly delivered as aforesaid, made

on the day next after the meeting has finally dispersed, and not before, such weapon shall, if of the value of one dollar or upwards, be returned by such justice of the peace to the person from whom the same was received.

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

114. Coming armed within two miles of public meeting.—Every one, except the sheriff, deputy sheriff and justices of the peace for the district or county, or the mayor, justices of the peace or other peace officer for the city or town respectively, in which any public meeting is held, and the constables and special constables employed by them, or any of them, for the preservation of the public peace at such meeting, is guilty of an indictable offence, and liable to a penalty not exceeding one hundred dollars, or to imprisonment for a term not exceeding three months, or to both, who, during any part of the day upon which such meeting is appointed to be held, comes within one mile of the place appointed for such meeting armed with any offensive weapon. R.S.C., c. 152, s. 5.

The limit of time for prosecution is one year. Sec. 511 (*c*).

115. Lying in wait for persons returning from public meeting.—Every one is guilty of an indictable offence and liable to a penalty not exceeding two hundred dollars, or to imprisonment for a term not exceeding six months, or to both, who lies in wait for any person returning, or expected to return, from any such public meeting, with intent to commit an assault upon such person, or with intent, by abusive language, opprobrious epithets or other offensive demeanour, directed to, at or against such person, to provoke such person, or those who accompany him, to a breach of the peace. R.S.C., c. 152, s. 6.

The limit of time for prosecution is one year. Sec. 551 (*c*).

116. Sale of arms in the N.-W. Territories.—Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty of two hundred dollars or to six months' imprisonment, or to both, who, during any time when and within any place in the North-west Territories where section one hundred and one of *The North-west Territories Act* is in force—

(*a.*) without the permission in writing (the proof of which shall be on him) of the Lieutenant Governor, or of a commissioner appointed by him to give such permission, has in his possession or sells, exchanges, trades, barters or gives to or with any person, any improved arm or ammunition : or

(*b.*) having such permission sells, exchanges, trades, barters or gives any such arm or ammunition to any person not lawfully authorized to possess the same.

2. The expression "improved arm" in this section means and includes all arms except smooth-bore shot-guns; and the expression "ammunition" means fixed ammunition or ball cartridge. R.S.C., c. 50, s. 101.

Sec. 101 of the North-West Territories Act, R.S.C. ch. 50, remains unrepealed (Code sec. 983). It is as follows:—

(101) In this section

(*a.*) The expression "improved arm" means and includes all arms except smooth bore shot guns;

(*b.*) The expression "ammunition" means fixed ammunition or ball cartridge.

Sub-sec. 2. Every person who, in the territories,—

(*a.*) Without the permission in writing (the proof of which shall be on him) of the Lieutenant-Governor, or of a commissioner appointed by him to give such permission, has in his possession or sells, exchanges, trades, barters or gives to, or with any person, any improved arm or ammunition, or—

(*b.*) Having such permission, sells, exchanges, trades, barters or gives any such arm or ammunition to any person not lawfully authorized to possess the same,—

Shall, on summary conviction before a judge of the Supreme Court or two justices of the peace, be liable to a penalty not exceeding two hundred dollars, or to imprisonment for a term not exceeding six months, or to both.

Sub-sec. 3. All arms and ammunition which are in the possession of any person, or which are sold, exchanged, traded, bartered or given to or with any person in violation of this section, shall be forfeited to the Crown, and may be seized by any constable or other peace officer; and any judge of the Supreme Court or justice of the peace may issue a search warrant to search for and seize the same, as in the case of stolen goods.

Sub-sec. 4. The Governor in Council may, from time to time, make regulations respecting:—

(*a.*) The granting of permission to sell, exchange, trade, barter, give or possess arms or ammunition;

(*b.*) The fees to be taken in respect thereof;

(*c.*) The returns to be made respecting permissions granted; and—

(*d.*) The disposition to be made of forfeited arms and ammunition.

Sub-sec. 5. The provisions of this section respecting the possession of arms and ammunition shall not apply to any officer or man of His Majesty's forces, of the Militia force, or of the North-West Mounted Police force.

Sub-sec. 6. The Governor in Council may, from time to time, declare by proclamation that upon and after a day therein named this section shall be in force in the territories, or in any place or places therein in such proclamation designated; and upon and after such day but not before, the provisions of this section shall take effect and be in force accordingly.

Sub-sec. 7. The Governor in Council may, in like manner, from time to time, declare this section to be no longer in force in any such place or places, and may again, from time to time, declare it to be in force therein.

Sub-sec. 8. All courts, judges and justices of the peace shall take judicial notice of any such proclamation.

117. Possessing weapons near public works.—Every one employed upon or about any public work, within any place in which the *Act respecting the Preservation of Peace in the vicinity of Public Works* is then in force, is liable, on summary conviction, to a penalty not exceeding four dollars and not less than two dollars for every such weapon found in his possession who, upon or after the day named in the proclamation by which such Act is brought into force, keeps or has in his possession, or under his care or control, within any such place, any weapon.

2. Every one is liable, on summary conviction, to a penalty not exceeding one hundred dollars and not less than forty dollars who, for the purpose of defeating the said Act, receives or conceals, or aids in receiving or concealing, or procures to be received or concealed within any place in which the said Act is at the time in force, any weapon belonging to or in custody of any person employed on or about any public work. R.S.C., c. 151, ss. 1, 5 and 6.

118. Sale, etc., of liquors near public works.—Upon and after the day named in any proclamation putting in force in any place *An Act respecting the Preservation of Peace in the vicinity of Public Works*, and during such period as such proclamation remains in force, no person shall, at any place within the limits specified in such proclamation, sell, barter, or directly or indirectly, for any matter, thing, profit or reward, exchange, supply or dispose of any intoxicating liquor, nor expose, keep or have in possession any intoxicating liquor intended to be dealt with in any such way.

2. The provisions of this section do not extend to any person selling intoxicating liquor by wholesale and not retailing the same, if such person is a licensed distiller or brewer.

3. Every one is liable, on summary conviction, for a first offence to a penalty of forty dollars and costs, and, in default of payment, to imprisonment for a term not exceeding three months, with or without hard labour,—and on every subsequent conviction to the said penalty and the said imprisonment in default of payment, and also to further imprisonment for a term not exceeding six months, with or without hard labour, who, by himself, his clerk, servant, agent or other person, violates any of the provisions of this or of the preceding section.

4. Every clerk, servant, agent or other person who, being in the employment of, or on the premises of, another person, violates or assists in violating any of the provisions of this or

of the preceding section for the person in whose employment or on whose premises he is, is equally guilty with the principal offender and liable to the same punishment. R.S.C., c. 151, ss. 1, 13, 14 and 15.

Section 2 of the Act respecting the preservation of peace in the vicinity of public works, R.S.C. ch. 151, provides as follows:—

(2) The Governor in Council may, as often as occasion requires, declare, by proclamation, that upon and after a day therein named, this Act, or any section or sections thereof, shall be in force in any place or places in Canada in such proclamation designated, within the limits or in the vicinity whereof any public work is in course of construction, or in such places as are in the vicinity of any public work, within which he deems it necessary that this Act or any section or sections thereof, should be in force, and this Act, or any such section or sections thereof, shall, upon and after the day named in such proclamation, take effect within the places designated therein.

Sub-sec. 2. The Governor in Council may, in like manner, from time to time, declare this Act, or any section or sections thereof, to be no longer in force in any such place or places,—and may again, from time to time, declare this Act, or any section or sections thereof, to be in force therein.

Sub-sec. 3. No such proclamation shall have effect within the limits of any city.

Sub-sec. 4. All courts, magistrates and justices of the peace shall take judicial notice of every such proclamation.

119. Intoxicating liquors on board His Majesty's ships.—Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to a fine not exceeding fifty dollars for each offence, and in default of payment to imprisonment for a term not exceeding one month, with or without hard labour, who, without the previous consent of the officer commanding the ship or vessel—

(*a.*) conveys any intoxicating liquor on board any of His Majesty's ships or vessels; or

(*b.*) approaches or hovers about any of His Majesty's ships or vessels for the purpose of conveying any such liquor on board thereof; or

(*c.*) gives or sells to any man in His Majesty's service, on board any such ship or vessel, any intoxicating liquor. 50-51 V., c. 46, s. 1.

PART VII.

SEDITIOUS OFFENCES.

SECT.

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120. Oaths to commit certain offences.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who—

(*a.*) administers, or is present at and consenting to the administration of, any oath or any engagement purporting to bind the person taking the same to commit any crime punishable by death or imprisonment for more than five years; or

(*b.*) attempts to induce or compel any person to take any such oath or engagement; or

(*c.*) takes any such oath or engagement.

This and the following two sections are taken from the Quebec consolidated statutes of 1860, C.S.L.C. ch. 10, secs. 1, 2, 3 and 4, and those sections are repealed by Code sec. 981 and schedule 2. The other sections, 5 to 9 inclusive, of C.S.L.C. ch. 10, as amended by the statute of the Province of Canada, 29 Vict. (1865, 2nd session), ch. 46, and by 58-59 Vict. (Can.), ch. 44, remain in force in the Province of Quebec. On the revision of the Canada statutes in 1886, the whole of the Quebec statute respecting seditious and unlawful associations and oaths, C.S.L.C. ch. 10, and the amending Act of 1865 were not included in the revision but were classed in Schedule B. to the Revised Statutes of Canada amongst the "Acts and parts of Acts of a public general nature which affect Canada and have relation to matters not within the legislative authority of Parliament, or in respect to which the power of legislation is doubtful or has been doubted and which have in consequence not been consolidated, and also Acts of a public general nature which for other reasons have not been considered proper Acts to be consolidated."

Under the unrepealed sections, certain classes of secret societies operating in Quebec province without incorporation or other sanction of the law are declared illegal and their members are indictable. An exception is made whereby the statute does not apply to the Masonic fraternity, C.S. L.C. ch. 10, sec. 9, 29 Vict. (Can.), ch. 46, 58-59 Vict. (Can.), ch.44. The statute mentioned was modelled upon the English statute of 1799 respecting Unlawful Societies, 39 Geo. III., ch. 79, referred to in R. v. Dixon, 6 C. & P. 601.

Although the oath were read from a paper at the time it was administered, it may be proved by parol evidence without giving the accused notice to produce the paper. R. v. Moors, 6 East 419 (*n*).

121. Other unlawful oaths.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who—

(*a.*) administers or is present at and consenting to the administration of any oath or engagement purporting to bind the person taking the same :

(i.) to engage in any mutinous or seditious purpose ;

(ii.) to disturb the public peace or commit or endeavour to commit any offence ;

(iii.) not to inform and give evidence against any associate, confederate or other person ;

(iv.) not to reveal or discover any unlawful combination or confederacy, or any illegal act done or to be done or any illegal oath or obligation or engagement which may have been administered or tendered to or taken by any person, or the import of any such oath or obligation or engagement ; or

(*b.*) attempts to induce or compel any person to take any such oath or engagement ; or

(*c.*) takes any such oath or engagement. C.S.L.C., c. 10, s. 1.

See note to sec. 120.

A similar enactment is contained in the Imperial Statute, 37 Geo. III., ch. 123, known as the Unlawful Oaths Act of 1797.

Seditious purpose.]—Sedition whether by words spoken or written, or by conduct was a misdemeanour at common law. Stroud's Case, 3 St. Tr. 242. It embraces all those practices whether by word, deed or writing, which fall short of treason (as to which see sec. 65, et seq.), but directly tend or have for their object to excite discontent or dissatisfaction, to excite ill-will between different classs of the King's subjects, to create public disturbance or to lead to civil war, to bring into hatred or contempt the sovereign or the government, the laws or constitution of the realm, and generally all endeavours to promote public disorder, or to incite people to unlawful associations or assemblies, insurrections, breaches of the peace, or forcible obstruction of the execution of the law. Archbold Cr. Ev. (1900) 942; R. v. Pigott, 11 Cox C.C. 44; R. v. Fussell, 3 Cox C.C. 291. But a bona fide intention to point out errors or defects in the government or in the administration of justice or to excite His Majesty's subjects to attempt to procure by lawful means the alteration of any matter in the state, is not seditious; sec. 123 (*b*); nor the like intention to point out, *in order to their removal*, matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects; sec. 123 (*c*); or to shew that His Majesty has been misled or mistaken in his measures; see. 123 (*a*).

A writer may criticise or censure the conduct of the servants of the Crown or the acts of the Government, he can do it freely and liberally, but it must be without malignity and not imputing corrupt or malicious motives; the law only interferes when plainly and deliberately the limits of frank and candid and honest discussion are passed. R. v. Sullivan, 11 Cox C.C. 44; R. v. Burns, 16 Cox C.C. 355; R. v. Lambert, 2 Camp. 398, 11 Revised Reports 748.

122. Compulsion in administering and taking oaths.—Any one who, under such compulsion as would otherwise excuse him, offends against either of the last two preceding sections shall not be excused thereby unless, within the period hereinafter mentioned, he declares the same and what he knows touching the same, and the persons by whom and in whose presence, and when and where, such oath or obligation or engagement was administered or taken, by information on oath before one of His Majesty's justices of the peace for the district or city or county in which such oath or engagement was administered or taken. Such declaration may be made by him within fourteen days after the taking of the oath or, if he is hindered from making it by actual force or sickness, then within eight days of the cessation of such hindrance, or on his trial if it happens before the expiration of either of those periods. C.S.L.C., c. 10, s. 2.

See note to sec. 120.

123. Seditious offences defined.—No one shall be deemed to have a seditious intention only because he intends in good faith—

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

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

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

2. Seditious words are words expressive of a seditious intention.

3. A seditious libel is a libel expressive of a seditious intention.

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

See sec. 124.

124. Punishment of seditious offences.—Every one is guilty of an indictable offence and liable to two years' imprisonment who speaks any seditious words or publishes any seditious libels or is a party to any seditious conspiracy.

Seditious words.]—This expression here means words expressive of a seditious intention, sec. 123 (2). Where the words are spoken at a meeting, those who do anything, as by expressions of approval, to help the speaker to produce upon the hearers the natural effect of the words spoken, are guilty of uttering seditious words just as if they spoke them themselves. R. v. Burns, 16 Cox C.C. 355; but a person merely standing by when they are uttered, and himself saying nothing, does not thereby make himself guilty of the uttering. Ibid.

Seditious libel.]—A seditious libel is defined by the preceding section, 123 (3), as being "a libel expressive of a seditious intention." A seditious libel may be evidenced by a woodcut or engraving. R. v. Sullivan, 11 Cox C.C. 44, 51. Publication must be proved, but if the manuscript of it be proved to be in the handwriting of the accused, and it be also proved to have been printed and published, such is evidence to go to the jury that the publication was *by* the accused, although there is no express evidence that he authorized the printing or publishing. R. v. Beare, 1 Ld. Raym. 414; R. v. Lovett, 9 C. & P. 462.

It is not necessary to prove the falsity of a seditious libel. R. v. Duffy, 2 Cox C.C. 45; Ex parte O'Brien, 15 Cox C.C. 180. Sec. 634 of the Code which allows a plea of the truth of the libel and of its publication in the public interest is limited to defamatory libels, and no such rule applies to seditious libels. But after verdict, the defendant has been allowed to prove in mitigation of sentence that he had published the libel through having himself read it in a newspaper in which it had previously appeared. R. v. Burdett, 4 B. & Ald. 95.

Seditious conspiracy.]—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. Sec. 61 (2).

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

126. Spreading false news damaging to a public interest.—Every one is guilty of an indictable offence and liable to one year's imprisonment who wilfully and knowingly publishes any false news or tale whereby injury or mischief is or is likely to be occasioned to any public interest.

The ancient statute, 3 Ed. 1, ch. 34, enacted as follows:—"Forasmuch as there have been oftentimes found in the country devisers of tales whereby discord, or occasion of discord, hath many times arisen between the King and his people, or great men of the realm, for the damage that

hath and may thereof ensue it is commanded, that, from henceforth, none be so hardy to tell or publish any false news or tales, whereby discord or occasion of discord or slander may grow between the King and his people, or the great men of the realm; and he that doth so shall be taken and kept in prison until he hath brought him into the court which was the first author of the tale."

This statute proceeds on the idea, that, by the common law, as well understood at the time, and enforced by the courts, the author of the tale was punishable by indictment—as undoubtedly was the propagator of it also—and the statute merely provided a means by which he should be effectually discovered and brought to justice. Bishop on Criminal Law, 5th ed. (1872), para. 473.

In 1778 Alexander Scott was indicted at the Old Bailey "for that he on the 23rd of April last, unlawfully, wickedly, and maliciously did publish false news, whereby discord, or occasion of discord, might grow between our lord the King and his people, or the great men of the realm, by publishing a certain printed paper, containing such false news; which said printed paper is of the tenor following:—'In pursuance of His Majesty's order in council to me directed, these are to give public notice, that war with France will be proclaimed on Friday next, etc., etc.'" The defendant was a bill sticker; and it appearing on the trial that he had been imposed upon, and induced to stick up the bills containing the false matter believing it to be true whereas it was a forgery, he was acquitted. There does not seem to have been any doubt that the act with which he was charged was indictable. Scott's Case, 5 New Newgate Calender 284.

PART VIII.

PIRACY.

SECT.

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127. Piracy by the law of nations.—Every one is guilty of an indictable offence who does any act which amounts to piracy by the law of nations, and is liable to the following punishment :—

(*a.*) To death, if in committing or attempting to commit such crime the offender murders, attempts to murder or wounds any person, or does any act by which the life of any person is likely to be endangered ;

(*b.*) To imprisonment for life in all other cases.

Piracy at common law.]—The offence of piracy at common law is nothing more than robbery upon the high seas; but by statutes passed at various times and still in force many artificial offences have been created which are to be deemed to amount to piracy. Roscoe Cr. Evid., 11th ed., 817

Slave trading.]—By the Imperial Statute, 5 Geo. IV., ch. 113, secs. 9 and 10, the carrying away, conveying, or removing of any person upon the high seas for the purpose of his being imported or brought into any place as a slave, or being sold or dealt with as such or the embarking or receiving on board any person for such purpose, is declared to be piracy. The provisions of that statute apply not only to acts done by British subjects in furtherance of the slave trade in England and the British colonies but to acts done by them outside of the British dominions. R. v. Zulueta, 1 C. & K. 215.

Evidence.]—The subject of a friendly foreign power may be punished for piracy committed upon British property. Roscoe Cr. Evid., 11th ed., 820.

Where several seamen on board a ship seized the captain and after putting him ashore carried away the ship and subsequently committed several piracies, it was held that the seizure of the captain and of the ship was an act of piracy. R. v. May, 2 East P.C. 796.

And where certain pilots had in collusion with the master of a vessel cut away a cable for the purpose of defrauding the underwriters for the benefit of the owners, it was held that they were rightly convicted of piratically stealing the cable. R. v. Curling, Russ. & Ry. 123.

But where the master of a vessel with goods on board ran the goods ashore and burned the ship with intent to defraud the owners and insurers, it was held that, as the accused held the goods under a special trust, he could not, before that trust was ended, be guilty of piracy by converting them to his own use. R. v. Mason, 2 East P.C. 796.

128. Piratical acts.—Every one is guilty of an indictable offence and liable to imprisonment for life who, within Canada, does any of the following piratical acts, or who, having done any of the following piratical acts, comes or is brought within Canada without having been tried therefor :—

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

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

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

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

(ii.) yields them up voluntarily to any pirate ;

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

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

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

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

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

or

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

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

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

(iii.) conspires or corresponds with any pirate.

By sec. 542 it is enacted that proceedings for the trial and punishment of a person who is not a subject of His Majesty, and who is charged with any offence committed within the jurisdiction of the Admiralty of England shall not be instituted in any court in Canada except with the leave of the Governor-General and on his certificate that it is expedient that such proceedings should be instituted.

In a recent Nova Scotia case, R. v. Heckman (1902), not yet reported, it was held that a charge against a seaman not a British subject on a British ship for inciting a revolt upon the ship while on the high seas cannot, if taken only under Code sec. 128, be made without the consent of the Governor-General, under sec. 542, obtained prior to the laying of the information. Mr. Justice Ritchie held further that if the proceedings for the offence are taken under the Merchant Shipping Act 1894 (Imp.), s. 686, the consent of the Governor-General is not required and Code sec. 542 would not apply. But a different view was taken by Mr. Justice Weatherbe who held that sec. 542 applies to the procedure in Canadian Courts in respect of offences committed within the Admiralty jurisdiction whether the proceedings are taken under the Criminal Code or the Imperial Merchant Shipping Act or the Admiralty Offence Act, 1849 (Imp.).

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

See note to preceding section.

130. Failure to fight pirates.—Every one is guilty of an indictable offence and liable to six months' imprisonment, and to forfeit to the owner of the ship all wages then due to him, who, being a master, officer or seaman of any merchant ship which carries guns and arms, does not, when attacked by any pirate, fight and endeavour to defend himself and his vessel from being taken by such pirate, or who discourages others from defending the ship, if by reason thereof the ship falls into the hands of such pirate.

TITLE III.

OFFENCES AGAINST THE ADMINISTRATION OF LAW AND JUSTICE.

PART IX.

CORRUPTION AND DISOBEDIENCE.

SECT.

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131. Judicial corruption.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who—

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

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

No one holding any judicial office shall be prosecuted for the offence of judicial corruption, as defined in this section, without the leave of the Attorney-General of Canada. Sec. 544.

132. Corruption of prosecuting officers.—Every one is guilty of an indictible offence and liable to fourteen years' imprisonment who—

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

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

Peace officer.]—The expression "peace officer" includes a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer, and justice of the peace, and also the warden, keeper or guard 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. Sec. 3 (*s*).

Public officer.]—The expression "public officer" includes any inland revenue or customs officer, officer of the army, navy, marine, militia, North-West mounted police, or other officer engaged in enforcing the laws relating to the revenue, customs, trade or navigation of Canada. Sec. 132 (*w*).

(Amendment of 1893).

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

(*a.*) makes any offer, proposal, gift, loan or promise, or who gives or offers any compensation or consideration, directly or indirectly, to any official or person in the employment of the Government, or to any member of his family, or to any person under his control, or for his benefit, with intent to obtain the assistance or influence of such official or person to promote either the procuring of any contract with the Government, for the performance of any work, the doing of any thing, or the furnishing of any goods, effects, food or materials, the execution of any such contract, or the payment of the price, or considera-

tion stipulated therein, or any part thereof, or of any aid or subsidy, payable in respect thereof; or

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

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

(*d.*) in case of so tendering, accepts or receives, directly or indirectly, or permits, or allows to be accepted or received by any member of his family, or by any other person under his control, or for his benefit, any such gift, loan, offer, promise, consideration or compensation, as a consideration or reward for withdrawing or for having withdrawn such tender; or

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

(*f.*) by reason of, or under the pretense of, possessing influence with the Government, or with any Minister or official thereof, demands, exacts or receives from any person, any compensation, fee or reward, for procuring from the Government the payment of any claim, or of any portion thereof, or for procuring or furthering the appointment of himself, or of any other person, to any office, place or employment, or for procuring or furthering the obtaining for himself or any other person, of any

grant, lease or other benefit from the Government; or offers, promises or pays to such person, under the circumstances and for the causes aforesaid, or any of them, any such compensation, fee or reward; or

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

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

(i.) any such commission or reward; or

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

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

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

3. The words " the Government " in this section include the Government of Canada and the Government of any province of Canada, as well as His Majesty in the right of Canada or of any province thereof.

No prosecution for this offence shall be commenced after the expiration of two years from its commission. Sec. 551 (*b*).

Misbehaviour in office is an indictable offence at common law and it is not essential that pecuniary damage should have resulted to the public by reason of such irregular conduct, nor that the defendant should have acted from corrupt motives. R. v. John R. Arnoldi (1893), 23 O.R. 201. A man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehaviour in his office. R. v. Bembridge, 22 St. Tr. 1; 3 Dong. 327. And where there is a breach of trust, fraud or imposition in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject it is indictable. Ibid.

134. Disability on conviction for such offence.—Every person convicted of an offence under the next preceding section shall be incapable of contracting with the Government, or of holding any contract or office with, from, or under it, or of receiving any benefit under any such contract. R.S.C., c. 173, ss. 22 and 23.

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

On the trial of an indictment charging a misdemeanour against the Principal Registrar of Deeds of a County and his deputy jointly for misfeasance in not recording deeds in their due order, it was objected that they could not be indicted together in one indictment, and legally convicted at one and the same time; but it was held by the Full Court on the points reserved, that though the principal might perhaps not be indictable for the wrongful act of his deputy committed in his absence and without his knowledge or consent, it is a different thing when he is present and knowing and consenting to the act; that in such a case both are wrong doers and *particeps criminis*. It was also contended, in the same case, that the deputy registrar could not be legally convicted so long as his principal legally held the office; but it was held that the deputy was liable to be indicted not only while the principal holds office, but even after the deputy himself has been dismissed from his office. R. v. Benjamin (1853), 4 U.C.C.P. 179.

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

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

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

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

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

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

(*f.*) attempts by any such means as in the next preceding paragraph mentioned to influence any member or any officer of a municipal council to aid in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person, or to perform or abstain from performing, or to aid in procuring or preventing the performance of, any official act. 52 V., c. 42, s. 2.

No prosecution for an offence under this section shall be commenced after the expiration of two years from its commission. Sec. 551 (*b*).

137. Selling public office or appointment.—Every one is guilty of an indictable offence, who, directly or indirectly—

(*a.*) sells or agrees to sell any appointment to or resignation of any office, or any consent to any such appointment or resignation, or receives, or agrees to receive, any reward or profit from the sale thereof; or

(*b.*) purchases or gives any reward or profit for the purchase of any such appointment, resignation or consent, or agrees or promises to do so.

Every one who commits any such offence as aforesaid, in addition to any other penalty thereby incurred forfeits any right which he may have in the office and is disabled for life from holding the same.

2. Every one is guilty of an indictable offence who, directly or indirectly—

(*a.*) receives or agrees to receive any reward or profit for any interest, request or negotiation about any office, or under pretense of using any such interest, making any such request or being concerned in any such negotiation; or

(*b.*) gives or procures to be given any profit or reward, or makes or procures to be made any agreement for the giving of any profit or reward, for any such interest, request or negotiation as aforesaid; or

(*c.*) solicits, recommends or negotiates in any manner as to any appointment to or resignation of any office in expectation of any reward or profit; or

(*d.*) keeps any office or place for transacting or negotiating any business relating to vacancies in, or the sale or purchase of, or appointment to or resignation of offices.

The word "office" in this section includes every office in the gift of the Crown or of any officer appointed by the Crown, and all commissions, civil, naval and military, and all places or employments in any public department or office whatever, and all deputations to any such office and every participation in the profits of any office or deputation.

No specific punishment being provided for an offence under this section, it falls within sec. 951, which provides that "every person convicted of an indictable offence for which no imprisonment is specially provided shall be liable to imprisonment for five years."

138. Wilful disobedience to a statute.—Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any Act of the

Parliament of Canada or of any legislature in Canada by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty or other mode of punishment is expressly provided by law.

A wilful disobedience of the statute must be shewn. Re E. J. Parke (1899), 3 Can. Cr. Cas. 122 (Ont.).

139. Disobedience to orders of court.—Every one is guilt of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any lawful order other than for the payment of money made by any court of justice, or by any person or body of persons authorized by any statute to make or give such order, unless some penalty is imposed, or other mode of proceeding is expressly provided, by law.

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

141. Neglect to aid peace officer in suppressing riot.—Every one is guilty of an indictable offence and liable to one year's imprisonment who, having reasonable notice that he is required to assist any sheriff, deputy-sheriff, mayor, or other head officer, justice of the peace, magistrate, or peace officer in suppressing any riot, without reasonable excuse omits so to do.

The procedure governing the calling out of the militia in aid of the civil power is contained in the Militia Act, R.S.C. 1886, ch. 41, secs. 34 to 36 inclusive, which are as follows:—

(34) The Active Militia, or any corps thereof, shall be liable to be called out for active service with their arms and ammunition, in aid of the civil power in any case in which a riot, disturbance of the peace, or other emergency requiring such service occurs, or is, in the opinion of the civil authorities hereinafter mentioned, anticipated as likely to occur, and, in either case, to be beyond the powers of the civil authorities to suppress, or to prevent or deal with,—whether such riot, disturbance or other emergency occurs, or is so anticipated within or without the municipality in which such corps is raised or organized:

2. The senior officer of the Active Militia present at any locality shall call out the same or such portion thereof as he considers necessary for the purpose of preventing or suppressing any such actual or anticipated riot or disturbance, or for the purpose of meeting or dealing with any such emergency as aforesaid, when thereunto required in writing by the chairman or custos of the Quarter Sessions of the Peace, or by any three justices of the peace of whom the warden, mayor, or other head of the municipality

or county in which such riot, disturbance or other emergency occurs or is anticipated as aforesaid, may be one; and he shall obey such instructions as are lawfully given to him by any justice of the peace in regard to the suppression of any such actual riot or disturbance, or in regard to the anticipation of such riot, disturbance or other emergency, or to the suppression of the same, or to the aid to be given to the civil power in case of any such riot, disturbance or other emergency:

3. Every such requisition in writing, as aforesaid, shall express on the face thereof the actual occurrence of a riot, disturbance or emergency or the anticipation thereof, requiring such service of the Active Militia in aid of the civil power for the suppression thereof:

4. Every officer and man of such Active Militia, or any portion thereof, shall, on every such occasion, obey the orders of his commanding officer; and the officers and men, when so called out, shall, without any further or other appointment, and without taking any oath of office, be special constables, and shall be considered to act as such as long as they remain so called out; but they shall act only as a military body, and shall be individually liable to obey the orders of their military commanding officer only:

5. When the Active Militia, or any corps thereof, is so called out in aid of the civil power, the municipality in which their services are required shall pay them, when so employed, the rates authorized to be paid for actual service to officers and men, and one dollar per diem for each horse actually and necessarily used by them, together with an allowance of one dollar to each officer, fifty cents to each man per diem in lieu of subsistence, and fifty cents per diem in lieu of forage for each horse,—and, in addition, shall provide them with proper lodging, and with stabling for their horses; and the said pay and allowances for subsistence and forage, as also the value of lodging and stabling, unless furnished in kind by the municipality, may be recovered from it by the officer commanding the corps, in his own name, and, when so recovered, shall be paid over to the persons entitled thereto:

6. Such pay and allowances of the force called out, together with the reasonable cost of transport may, pending payment by the municipality, be advanced in the first instance out of the Consolidated Revenue Fund of Canada, by authority of the Governor in Council; but such advance shall not interfere with the liability of the municipality, and the commanding officer shall at once, in his own name, proceed against the municipality for the recovery of such pay, allowances and cost of transport, and shall, on receipt thereof, pay over the amount to His Majesty. 46 Vict., ch. 11, sec. 27, part.

(35) Whenever a municipality within the limits of which a railway passes whereon His Majesty's mails are conveyed, has incurred expenses by reason of the Militia being so called out in aid of the civil power, for preventing or repressing a riot or disturbance of the peace beyond the power of the civil authorities to deal with, and not local or provincial in its origin, by which riot or disturbance of the peace the conveyance of such mails might be obstructed, the Governor in Council may pay or reimburse out of any moneys which are provided by Parliament for the purpose, such part as seems just of the proper expenses incurred by any municipality, by reason of any part of the Active Militia being so called out in aid of the civil power:

2. An account of any such expenditure shall be laid before Parliament as soon as possible thereafter. 46 Vict., ch. 11, sec. 27, part.

(36) If it appears to the satisfaction of the Lieutenant-Governor of the Province of Manitoba, that a riot, disturbance of the peace or other emergency, requiring the services of the Active Militia in aid of the civil power, has occurred in the North-West Territories or in the District of Keewatin, or that such riot, disturbance or other emergency is anticipated as likely to occur, and, in either case, to be beyond the powers of the civil authorities

to suppress, or to prevent or deal with, the Lieutenant-Governor may, by a writing, expressing on the face thereof the actual occurrence of such riot, disturbance or emergency, or the anticipation thereof, require the senior officer of the Active Militia present in the Province of Manitoba to call out the same, or such portion thereof as he considers necessary for the purpose of preventing or suppressing any such actual or anticipated riot or disturbance, or for the purpose of meeting and dealing with any such emergency as aforesaid:

2. Such officer shall comply with such requisition and obey such instructions as are lawfully given him by the Lieutenant-Governor, or by such justice of the peace as is designated for the duty by the Lieutenant-Governor, in regard to the suppression of any such actual riot or disturbance or in regard to the anticipation of such riot or disturbance or other emergency, or to the suppression of the same, or to the aid to be given to the civil powers in case of any such riot, disturbance or other emergency:

3. Every officer and man of such Active Militia, or any portion thereof, shall, on every such occasion, obey the orders of his commanding officer:

4. The officers and men, when so called out, shall, without any further or other appointment, and without taking any oath of office, be special constables, and shall be considered to act as such so long as they remain so called out; but they shall act only as a military body, and shall be individually liable to obey the orders of their military commanding officer only; and they shall be paid, when so employed, the rates authorized to be paid for actual service to officers and men, and one dollar per day for each horse actually and necessarily used by them, together with an allowance of one dollar to each officer, and fifty cents to each man per day, in lieu of subsistence, and fifty cents per day in lieu of forage for each horse:

5. Such pay and allowances and the reasonable cost of transport to and from the place where the services of the force are required, may be paid out of the Consolidated Revenue Fund of Canada by authority of the Governor in Council. 46 Vict., ch. 11, sec. 27, part.

It was an indictable misdemeanor at common law to refuse to assist a peace officer in quelling a riot. R. v. Brown, C. & Mar. 314; R. v. Sherlock, L.R. 1 C.C.R. 20, 10 Cox C.C. 170.

142. Neglect to aid peace officer in arresting offenders.—Every one is guilty of an indictable offence and liable to six months' imprisonment who, having reasonable notice that he is required to assist any sheriff, deputy-sheriff, mayor or other head officer, justice of the peace, magistrate, or peace officer, in the execution of his duty in arresting any person, or in preserving the peace, without reasonable excuse omits so to do.

143. Misconduct of officers intrusted with execution of process.—Every one is guilty of an indictable offence and liable to a fine and imprisonment, who, being a sheriff, deputy-sheriff, coroner, elisor, bailiff, constable or other officer intrusted with the execution of any writ, warrant or process, willfully misconducts himself in the execution of the same, or wilfully, and without the consent of the person in whose favour the writ, warrant or process was issued, makes any false return thereto. R.S.C., c. 173, s. 29.

At common law.]—Every malfeasance or culpable non-feasance of an officer of justice with relation to his office was a misdemeanor at common law and punishable with fine or imprisonment, or both. 1 Russ. Cr., 6th ed. 416.

Evidence.]—On a charge against a constable for negligently permitting an escape, the warrant of commitment may be proved either by its production, or, after proving the service upon the accused of a notice to produce it, by parol or other secondary evidence of its contents. It should then be proved that the warrant was delivered to the defendant and that he was one of the peace officers to whom it was addressed, and that the defendant had the person against whom the warrant was issued in actual custody under it. The escape from custody must then be proved, and the law thereupon presumes the defendant's negligence. I Hale 600.

But the presumption is rebuttable, and it is open to the defendant to shew that the escape was not due to his negligence, that the person under arrest rescued himself by force or was forcibly rescued by others and that the defendant made fresh pursuit after him for the purpose of recapturing him. Archbold Crim. Evid. (1900) 983.

Punishment.]—Imprisonment five years (sec. 951), fine in the discretion of the Court (sec. 934).

144. Obstructing public or peace officer in the execution of his duty.—Every one is guilty of an indictable offence and liable to ten years' imprisonment who resists or wilfully obstructs any public officer in the execution of his duty or any person acting in aid of such officer.

2. Every one is guilty of an offence and liable on indictment to two years' imprisonment, and on summary conviction before two justices of the peace to six months' imprisonment with hard labour, or to a fine of one hundred dollars, who resists or wilfully obstructs—

(*a.*) any peace officer in the execution of his duty or any person acting in aid of any such officer;

(*b.*) any person in the lawful execution of any process against any lands or goods or in making any lawful distress or seizure. R.S.C., c. 162, s. 34.

The accused can be tried summarily by a police magistrate under the summary convictions clauses of the Code, or he can be tried before a magistrate as for an indictable offence. R. v. Nelson (1901), 8 B.C.R. 112. (Drake, J.).

The provisions of this section as to summary conviction are not controlled by Code sections 783 and 786 as to "summary trial," and the charge may be summarily adjudicated upon by a magistrate without the consent of the accused. R. v. Nelson (1901), 4 Can. Cr. Cas. 461, per Drake, J. (B.C.), but see contra The Queen v. Crossen (1899), 3 Can. Cr. Cas. 153 (Man.).

In Crossen's case the Appeal Court of Manitoba held that the accused when charged before a "magistrate," as that term is defined by sec. 782, could only be tried under the "Summary Trials" clauses (Part LV.), notwithstanding the provisions of section 144.

Where the process of an inferior court is void by reason of its containing a direction to a peace officer to seize certain goods at a place outside of the territorial jurisdiction of the court, such process is insufficient upon which to base a conviction for resisting the officer in its execution. R. v. Finlay (1901), 4 Can. Cr. Cas. 539 (Man.).

Where a bailiff obtained possession of goods under a writ of replevin, but at the request of the party in whose possession they were seized they were given by the bailiff into the possession of a third party, the latter giving the bailiff an undertaking or agreement to deliver him the goods on demand, it was held that in attempting to retake the goods in the possession of the third party the bailiff was not acting in the execution of any "process," but merely upon the undertaking. R. v. Carley, 18 C.L.T. 26.

PART X.

MISLEADING JUSTICE.

SECT.

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145. Perjury defined.—Perjury is an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding as part of his evidence, upon oath or affirmation, whether such evidence is given in open court, or by affidavit or otherwise, and whether such evidence is material or not, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding. Evidence in this section includes evidence given on the *voir dire* and evidence given before a grand jury.

2. Every person is a witness within the meaning of this section who actually gives his evidence, whether he was competent to be a witness or not, and whether his evidence was admissible or not.

3. Every proceeding is judicial within the meaning of this section which is held in or under the authority of any court of

justice, or before a grand jury, or before either the Senate or House of Commons of Canada, or any committee of either the Senate or House of Commons, or before any Legislative Council, Legislative Assembly or House of Assembly or any committee thereof, empowered by law to administer an oath, or before any justice of the peace, or any arbitrator or umpire, or any person or body of persons authorized by law or by any statute in force for the time being to make an inquiry and take evidence therein upon oath, or before any legal tribunal by which any legal right or liability can be established, or before any person acting as a court, justice or tribunal, having power to hold such judicial proceeding, whether duly constituted or not, and whether the proceeding was duly instituted or not before such court or person so as to authorize it or him to hold the proceeding, and although such proceeding was held in a wrong place or was otherwise invalid.

4. Subornation of perjury is counselling or procuring a person to commit any perjury which is actually committed.

By statute 32-33 Vict. (Can.), ch. 23, sec. 7, all evidence and proof whatsoever, whether given orally or by affidavit, etc., was declared to be material with respect to the liability for wilful and corrupt perjury, and that section was incorporated in the Perjury Act (R.S.C. 1886, ch. 154, sec. 5).

Perjury.]—Under the Code, the giving of false evidence constitutes perjury, whether such evidence is material or not, if the false assertion were known to such witness to be false, and intended by the witness to mislead the court, jury, or person holding the proceeding.

A false statement, made in a statutory declaration administered under the "Canada Evidence Act, 1893," may be the subject of a charge akin to perjury under Code sec. 147, for the object of the Evidence Act (sec. 26), was to provide a means by which certain statements not authorized to be made on oath could be verified.

At common law.]—It has always been an offence at common law for a witness upon oath in a judicial proceeding, before a court of competent jurisdiction, to give evidence material to the issue, which he believes to be false. The common law, however, stopped there and took no notice of false statements, whether made upon oath or not, made under other conditions. The perjury had also to be in a judicial proceeding before a competent tribunal. R. v. Townsend, 10 Cox C.C. 356; R. v. Row (1864), 14 U.C.C.P. 307. And it was therefore formerly the law that false evidence given upon an examination in the absence of the authority competent to hold such examination was not perjury. R. v. Lloyd, L.R. 19 Q.B.D. 213; R. v. Gibson, 7 Revue Legale (Que.) 573.

The witness must also have been a competent one. R. v. Baker, [1895] 1 Q.B. 797; R. v. Clegg, 19 Eng. L.T. 47.

Known to be false.]—The false oath must be taken deliberately and intentionally, for if done from inadvertence or mistake it cannot amount to voluntary and corrupt perjury. 1 Hawk. ch. 69, sec. 2. Where perjury is assigned on an affidavit, the part on which the perjury is assigned may be explained by reference to the remainder of the affidavit. 1 Sid. 419.

The evidence of the false statement must be clear and precise and not ambiguous. R. v. Bird, 17 Cox C.C. 387.

Intended to mislead.]—Although an "intent to mislead" is an essential ingredient of the offence, a charge which does not specifically allege such intent may be sufficient if it gives to the accused notice that he is charged with having "falsely, wilfully and corruptly" sworn to, or solemnly declared a statement to the effect and in the words set forth. R. v. Skelton (1898), 4 Can. Cr. Cas. 467; 2 N.W.T. Rep. 210, 215; R. v. Dewar, 2 N.W.T. Rep. 194; Cr. Code, sec. 611 (3).

Contradictory evidence.]—If the evidence adduced in proof of the crime of perjury consist of two opposing statements of the prisoner and nothing more, he cannot be convicted; for if only one was delivered under oath, it must be presumed, from the solemnity of the sanction, that that declaration was the truth, and the other an error or a falsehood, though the latter being inconsistent with what he has sworn may form important evidence, *with other circumstances*, against him. 1 Greenleaf on Evidence, 259. And if both the contradictory statements were delivered under oath, there is still nothing to shew which of them is false, where no other evidence of the falsity is given.

If a person swears one thing at one time, and another at another, he cannot be convicted where it is not possible to tell which is the true and which is the false. R. v. Jackson, 1 Lewin C.C. 270. Nor is it a necessary consequence that a person has committed perjury when he has sworn on both occasions to conflicting statements, for there are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time. Ibid., per Holroyd, J.

Joint affidavit.]—A joint affidavit made by the defendant and one D. stated: "Each for himself maketh oath and saith that he this deponent is not aware of any adverse claim to or occupation of said lot." The defendant having been convicted of perjury on this latter allegation, it was held that there was neither ambiguity or doubt in what each defendant said, but that each in substance stated that he was not aware of any adverse claim to or occupation of said lot. R. v. Atkinson (1866), 17 U.C.C.P. 295. And it has been held that a statutory declaration made jointly by several persons that they know certain alleged facts is to be construed as a statement by each of them severally that he knows the matters alleged. R. v. Skelton (1898), 4 Can. Cr. Cas. 467 (N.W.T.).

146. Punishment of perjury.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who commits perjury or subornation of perjury.

2. If the crime is committed in order to procure the conviction of a person for any crime punishable by death, or imprisonment for seven years or more, the punishment may be imprisonment for life. R.S.C., c. 154, s. 1.

Form FF.—(*d.*) "A. committed perjury with intent to procure the conviction of B. for an offence punishable with penal servitude, namely robbery, by swearing on the trial of B. for the robbery of C. at the Court of Quarter Sessions for the county of Carleton, held at Ottawa, on

the —— day of ——, 1879; first, that he, A., saw B. at Ottawa on the —— day of ——; secondly, that B. asked A. to lend B. money on a watch belonging to C.; thirdly, etc."

(*e.*) "The said A. committed perjury on the trial of B. at a Court of Quarter Sessions held at Ottawa, on ——, for an assault alleged to have been committed by the said B. on C. at Ottawa, on the —— day of ——, by swearing to the effect that the said B. could not have been at Ottawa, at the time of the alleged assault, inasmuch as the said A. had seen him at that time in Kingston."

Trial by Police Magistrate.]—A police magistrate in Ontario has jurisdiction with the consent of the accused to try the offence of perjury. R. v. Burns (No. 2) (1901), 4 Can. Cr. Cas. 330 (Ont.); and by sub-sec. (2) of sec. 785, added by the amendment of 1900, police magistrates of cities and incorporated towns in every other part of Canada have the like jurisdiction.

Form of indictment.]—An indictment following the statutory form (F.F.) will be sufficient if it charges that the accused "committed perjury" by swearing that (specifying the false oath), without including a specific statement that it was so done knowing the same to be false. R. v. Bain (1877), Ramsay's Cases (Que.) 192; R. v. Bownes, Ramsay's Cases (Que.) 192.

Where a prosecutor has been bound by recognizance to prosecute and give evidence against a person charged with perjury in the evidence given by him on the trial of a certain suit, and the grand jury have found an indictment against the defendant, the court will not quash the indictment because there is a variance in the specific charge of perjury contained in the information and that contained in the indictment, provided the indictment sets forth the substantial charge contained in the information. R. v. Broad (1864), 14 U.C.C.P. 168; and see sec. 611.

A count charging the accused with having committed perjury at an inquest before a coroner is not invalid by reason of the fact that the tribunal was a coroner and a jury. Code sec. 611; R. v. Thompson (1896), 4 Can. Cr. Cas. 265 (N.W.T.).

The Perjury Act.]—Sec. 4 of the Act respecting perjury (R.S.C. ch. 154) still remains in force (Code sec. 983). It is as follows:—(4) Any judge of any court of record, or any commissioner before whom any inquiry or trial is held, and which he is by law required or authorized to hold, may, if it appears to him that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, affirmation, declaration, deposition, examination, answer or other proceeding made or taken before him, direct such person to be prosecuted or such perjury, if there appears to such judge or commissioner a reasonable cause for such prosecution, and may commit such person so directed to be prosecuted until the next term, sittings or session of any court having power to try for perjury, in the jurisdiction within which such perjury was committed, or permit such person to enter into a recognizance, with one or more sufficient sureties, conditioned for the appearance of such person at such next term, sittings or session, and that he will then surrender and take his trial and not depart the court without leave, and may require any person, such judge or commissioner thinks fit,

to enter into a recognizance conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid.

Evidence.]—D. being charged with perjury, in the assignments of perjury and in the negative averments certain facts sworn to by D. in answering to faits et articles on the contestation of a saisie arret or attachment were distinctly negatived, in the terms in which they were made. It was held that under the general terms of the negative averments it was competent for the prosecution to prove special facts to establish the falsity of the answers given by D. in his answers on faits et articles, and the conviction could not be set aside because of the admission of such proof. Downie v. R. (1888), 15 Can. S.C.R. 358.

In a prosecution for perjury where it appears that the false oath was taken before a justice receiving the complaint of an offence committed within his jurisdiction, and acting in the matter within his jurisdiction, it is unnecessary to offer further evidence that he had authority to administer an oath. R. v. Callaghan (1860), 19 U.C.Q.B. 364.

Corroboration.]—As to the corroboration required, see sec. 684.

Proof of judicial proceedings.]—Evidence of any proceeding or record whatsoever of, in, or before any court or before any justice of the peace or any coroner in any province of Canada, may be made by an exemplification or certified copy thereof, purporting to be under the seal of such court, or under the hand or seal of such justice or coroner, as the case may be, without any proof of the authenticity of such seal or of the signature of such justice or coroner, or other proof whatever; and if any such court, justice or coroner, has no seal, or so certifies, then by a copy purporting to be certified under the signature of a judge or presiding magistrate of such court or of such justice or coroner, without any proof of the authenticity of such signature or other proof whatsoever. Can. Evid. Act, sec. 10; subject however to the provision that the party intending to produce the same shall before the trial give to the party against whom it is intended to be produced reasonable notice of such intention. The reasonableness of the notice shall be determined by the court or judge, but the notice shall not in any case be less than ten days. Ibid., sec. 19.

The provisions of the Canada Evidence Act are in addition to and not in derogation of any powers of proving documents given by any existing statute or existing at law. Ibid., sec. 20.

Subject to the provisions made by federal law the laws of evidence in force in the province in which such proceedings are taken, apply. Ibid., sec. 21.

A witness present at the trial when the alleged perjury was committed may be called to state from recollection the evidence given by the accused. It will be sufficient if the witness can state with certainty that what he relates was all the evidence given by the accused on the point regarding which perjury is charged and that the accused said nothing to qualify it, although he is unable to state in effect all the evidence which the accused then gave. R. v. Rowley, 1 Mood. C.C. 111; R. v. Munton, 3 C. & P. 498; R. v. Browne, 3 C. & P. 572.

Where perjury is assigned in respect of evidence given in a criminal proceeding, all evidence which would have been admissible on the trial thereof is admissible on the trial for the perjury. R. v. Harrison, 9 Cox C.C. 503.

Besides proving the whole of what is set out in the indictment as having been falsely sworn to, the prosecution should prove the evidence connected with and necessary for the explanation of the alleged false evidence. R. v. Jones, Peake 51; R. v. Dowlin, Peake 227. But statements made by the judge presiding when the alleged perjury was committed are not admissible. R. v. Britton, 17 Cox C.C. 627.

The judge's notes are not admissible except to refresh the memory of the judge if called as a witness. R. v. Child, 5 Cox C.C. 197; R. v. Morgan, 6 Cox C.C. 107.

The conviction or judgment in the case in which the false evidence was given is not evidence on the perjury trial. R. v. Goodfellow, C. & M. 569.

Perjury in pending civil action.]—The court may properly postpone the trial of an indictment for perjury arising out of a civil action until that action is determined, unless the civil action has been stayed for the purpose of first trying the perjury charge. R. v. Ingham, 14 Q.B. 396; R. v. Ashburn, 8 C. & P. 50; Peddell v. Rutter, 8 C. & P. 340.

Procuring Death by False Evidence.]—By sec. 221 it is enacted that procuring by false evidence the conviction and death of any person by the sentence of the law shall not be deemed to be homicide.

147. False oaths.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being required or authorized by law to make any statement on oath, affirmation or solemn declaration, thereupon makes a statement which would amount to perjury if made in a judicial proceeding.

On a charge under sec. 147, of making a false statutory declaration, it is not necessary to allege in the indictment that the false statement was made with intent to mislead. R. v. Skelton (1898), 4 Can. Cr. Cas. 467 (N.W.T.).

A statutory declaration jointly made by several persons and stating the matter declared in the following form, *i.e.*:—"*We* know that, etc., is to be construed as a statement by each of the declarants severally, that he knows the matters alleged. Ibid.

The permission granted by the Canada Evidence Act to certain officials to "receive" the solemn declarations of persons voluntarily making the same in the statutory form includes an authorization to the declarant to make the same, and constitutes him a person "authorized by law to make a solemn declaration." Ibid.

148. False affidavits, etc.—Every one is guilty of perjury who—

(*a.*) having taken or made any oath, affirmation, solemn declaration or affidavit where by any Act or law in force in Canada, or in any province of Canada, it is required or permitted that facts, matters or things be verified, or otherwise assured or ascertained by or upon the oath, affirmation, declaration or affidavit of any person, wilfully and corruptly, upon such oath, affirmation, declaration or affidavit, deposes, swears to or makes any false statement as to any such fact, matter or thing; or

(*b.*) knowingly, wilfully and corruptly, upon oath, affirmation, or solemn declaration, affirms, declares, or deposes to the truth of any statement for so verifying, assuring or ascertaining any such fact, matter or thing, or purporting so to do, or knowingly, wilfully and corruptly takes, makes, signs or subscribes any such affirmation, declaration or affidavit, as to any such fact, matter or thing, — such statement, affidavit, affirmation or declaration being untrue, in the whole or any part thereof. R.S.C., c. 154, s. 2.

A person applying for a ballot at a Dominion election in the name of another person entitled to vote may be convicted of perjury in taking the oath of identity with that person, although the Elections Act authorizes the administration of the oath of qualification to an "elector" only, and that term must be held to include, for the purposes of administering such oath and prosecuting the personator, the person representing himself at the polls as an elector. R. v. Chamberlain, 10 Man. R. 261; Dominion Elections Act, 1900, 63-64 Vict., ch. 12, sec. 65.

149. Making false affidavit out of Province in which it is used.—Every person who wilfully and corruptly makes any false affidavit, affirmation or solemn declaration, out of the province in which it is to be used but within Canada, before any person authorized to take the same, for the purpose of being used in any province of Canada, is guilty of perjury in like manner as if such false affidavit, affirmation or declaration were made before a competent authority in the province in which it is used or intended to be used. R.S.C., c. 154, s. 3.

150. False declaration to officer, etc.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, upon any occasion on which he is permitted by law to make any statement or declaration before any officer authorized by law to permit it to be made before him, or before any notary public to be certified by him as such notary, makes a statement which would amount to perjury if made on oath in a judicial proceeding.

151. Fabricating evidence.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, with intent to mislead any court of justice or person holding any such judicial proceeding as aforesaid, fabricates evidence by any means other than perjury or subornation of perjury.

The offence is complete if the evidence is fabricated with intent to mislead a judicial tribunal even if the evidence is not used. R. v. Vreones, [1891] 1 Q.B. 360; 17 Cox C.C. 267; 60 L.J.M.C. 62.

Where an act has been proved and the question is whether it was done by a given party, the fabrication or suppression of evidence is one of the circumstances of subsequent conduct, admissible to connect the person procuring the same with the original transaction. Phipson Evid. (1898) 117.

Inciting to give false evidence.]—It is a common law misdemeanor to incite a witness to give particular evidence where the inciter does not know whether it be true or false. Ex parte Overton, 2 Rose 257. This offence differs from subornation in that it is not necessary to prove that the evidence was in fact given, or was false to the knowledge of the witness. Archibold Cr. Evid. (1900), 1019. And by Code sec. 62 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. (Sub-sec. 2).

Dissuading witness from giving evidence.]—See sec. 154.

152. Conspiring to bring false accusations.—Every one is guilty of an indictable offence who conspires to prosecute any person for any alleged offence, knowing such person to be innocent thereof, and shall be liable to the following punishment:

(*a.*) To imprisonment for fourteen years if such person might, upon conviction for the alleged offence, be sentenced to death or imprisonment for life;

(*b.*) To imprisonment for ten years if such person might, upon conviction for the alleged offence, be sentenced to imprisonment for any term less than life.

153. Administering oaths without authority.—Every justice of the peace or other person who administers, or causes or allows to be administered, or receives or causes or allows to be received any oath or affirmation touching any matter or thing whereof such justice or other person has not jurisdiction or cognizance by some law in force at the time being, or authorized or required by any such law, is guilty of an indictable offence and liable to a fine not exceeding fifty dollars, or to imprisonment for any term not exceeding three months.

2. Nothing herein contained shall be construed to extend to any oath or affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial or punishment of any offence, or to any oath or affirmation required or authorized by any law of Canada, or by any law of the province wherein such oath or affirmation is received or administered, or is to be used, or to any oath or affirmation, which is required or authorized by the laws of any foreign country to give validity to an instrument in writing or to evidence designed or intended to be used in such foreign country. R.S.C., c. 141, s. 1.

By the Canada Evidence Act, 1893, sec. 22, every court and judge, and every person having, by law or consent of parties, authority to hear and receive evidence, shall have power to administer an oath to every witness who is legally called to give evidence before that court, judge or person. If a person called or desiring to give evidence, objects on grounds of conscientious scruples, to take an oath or is objected to as incompetent to take an oath, such person may make the following affirmation:—

"I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth."

And upon the person making such solemn affirmation, his evidence shall be taken and have the same effect as if taken under oath. Ibid. Sec. 23. And if a person required or desiring to make an affidavit or deposition in a proceeding or on an occasion whereon or touching a matter respecting

which an oath is required or is lawful, whether on taking office or otherwise, refuses or is unwilling to be sworn, on grounds of conscientious scruples, the court or judge, or other officer or person qualified to take affidavits or depositions, shall permit such person instead of being sworn, to make his solem affirmation in the words following, viz.: "I, A.B., do solemnly affirm," etc.; which solemn affirmation shall be of the same force and effect as if such person had taken an oath in the usual form. Ibid, sec. 24.

The witness whose evidence is admitted or who makes such affirmation is liable to indictment and punishment for perjury in all respects as if he had been sworn. (Sec. 24 (2)).

154. Corrupting juries and witnesses.—Every one is guilty of an indictable offence and liable to two years' imprisonment who—

(*a.*) dissuades or attempts to dissuade any person by threats, bribes or other corrupt means from giving evidence in any cause or matter, civil or criminal; or

(*b.*) influences or attempts to influence, by threats or bribes or other corrupt means, any juryman in his conduct as such, whether such person has been sworn as a juryman or not; or

(*c.*) accepts any such bribe or other corrupt consideration to abstain from giving evidence, or on account of his conduct as a juryman; or

(*d.*) wilfully attempts in any other way to obstruct, prevent or defeat the course of justice. R.S.C., c. 173, s. 30.

Embracery.]—Any attempt to corrupt or influence or instruct a jury or to incline them to be more favourable to one side than the other, by money, promises, letters, threats or persuasions, except only by the strength of the evidence and the arguments of the counsel in open court at the trial of the cause constituted the common law offence of embracery, whether the jurors gave any verdict or not and whether the verdict given were true or false. R. v. Cornellier, 29 L.C.J. 69; Hawk. P.C., b. 1, ch. 85, sec. 1. And the giving of money to a juror after the verdict without any preceding contract is an offence savouring of embracery; but it is otherwise of the payment of a juror's travelling expenses. Ibid, sec. 3.

It is essential that there should be a judicial proceeding pending at the time of the alleged offence. R. v. Leblanc, 8 Montreal Legal News 114.

At one time it seems to have been considered that a mere stranger could not lawfully labour a juror to appear and act according to his conscience; Hawk. P.C., b. 1, ch. 85, sec. 2; but such appears to be no longer the law for an honest exhortation to do justice should never be construed into guilt. Bishop Crim. Law 317.

Tampering with witnesses.]—At common law interference with witnesses in courts of justice by threats or persuasion to induce them not to give evidence was an indictable misdemeanour. R. v. Steventon, 2 East 362; Stone's Justice's Manual, 28th ed., 242. It is also punishable summarily as a contempt of court. Bromilow v. Phillips (1891), W.N. 209; 1 Russ. Crim., 6th ed., 487 (*n*).

Proof of complete offence on charge of attempt.]—When an attempt to commit an offence is charged but the evidence establishes the commission of the full offence, the accused shall not be entitled to be acquitted, but the jury may convict him of the attempt, unless the court before which such trial is

had thinks fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for the complete offence: Provided that after a conviction for such attempt the accused shall not be liable to be tried again for the offence which he was charged with attempting to commit. Sec. 712.

Conspiracy to pervert public justice.]—By sec. 527 every one is guilty of an indictable offence and liable to seven years' imprisonment who conspires with any person to commit an indictable offence in cases not specially provided for in the preceding sections of the Code.

A conspiracy whereby a witness bound over to attend a trial was to absent himself is indictable. R. v. Hamp, 6 Cox C.C. 157. And so is a conspiracy to charge a man falsely with any crime. Poulterer's Case, 9 Co. Rep. 55; R. v. Spragg, 2 Burr. 993, 1027; R. v. Macdaniel, 1 Leach C.C. 45; and see Code sec. 405.

It is immaterial whether the conspiracy proceeds so far as actually indicting the person falsely accused; and if the object of the conspiracy is extortion, the truth or falsity of the charge is immaterial. R. v. Hollingberry, 4 B. & C. 329.

Where a money lender to whom a small sum of money was due conspired with a solicitor by abuse of legal process to enforce payment of a sum known not to be legally due, a conviction for the conspiracy was upheld. R. v. Taylor, 15 Cox C.C. 265.

Temperance Acts.]—It is provided by the Canada Temperance Act, R.S.C. 1886, ch. 106, sec. 121, that every one who on any prosecution under that Act or any Act in force in any province respecting the issue of licenses for the sale of fermented or spirituous liquors, or "The Temperance Act of 1864," tampers with a witness, either before or after he is summoned or appears as such witness on any trial or proceeding under any such Act, or by the offer of money, or by threats, or in any other way, either directly or indirectly, induces or attempts to induce any such witness to absent himself or to swear falsely, shall incur a penalty of fifty dollars for each offence. This special provision is not affected by the Code. R. v. Gibson, 29 N.S.R. 88.

A conviction may be made under this section of the Code for dissuading a person by corrupt means from giving evidence under the Ontario Liquor License Act. R. v. Holland, 14 C.L.T. 294.

If there be a combination of persons for the purpose, the offence is indictable as a conspiracy to pervert the course of justice. R. v. Gill, 2 B. & Ald. 204.

155. Compounding penal actions.—Every one is guilty of an indictable offence and liable to a fine not exceeding the penalty compounded for, who, having brought, or under colour of bringing, an action against any person under any penal statute in order to obtain from him any penalty, compounds the said action without order or consent of the court, whether any offence has in fact been committed or not. R.S.C., c. 173, s. 31.

Compounding penal actions.]—The compounding of an information on penal statutes is a misdemeanour against public justice, by contributing to make the laws odious to the people. Therefore in order to discourage malicious informers, and to provide that when offences are once discovered they shall be duly prosecuted, 18 Eliz., ch. 5 was passed. But that statute did not apply to penalties which are only recoverable by information before justices, and an indictment for making a composition in such a case was held bad in arrest of judgment. R. v. Crisp, 1 B. & Ald. 282, cited by Richards, C.J., in R. v. Mason (1867), 17 U.C.C.P. 534.

The statute 18 Eliz., ch. 5, enacted that if any person informing under pretence of any penal law makes any composition without leave of the court or takes any money or promise from the defendant to excuse him he shall forfeit £10 and be for ever disabled to sue on any penal statute.

And by sec. 31 of R.S.C. (1886), ch. 173, consolidated from 27-28 Vict. (Can.), ch. 43, sec. 2, every private prosecutor in the Province of Quebec who being a plaintiff in a qui tam action discontinues or suspends such action without the permission or direction of the Crown was declared guilty of a misdemeanour.

Compounding criminal prosecution.]—It is not every misdemeanour the compounding of which is an offence. Fallowes v. Taylor, 7 T.R. 475; Keir v. Leeman, 9 Q.B. 371. An indictment will lie if the offence compounded is of such a public nature that its predominating feature is that the public must be protected against it as distinguished from misdemeanours essentially in the nature of private injuries. State v. Carver, 39 Atl. Rep. 973, (N.H.); 1 Bishop Cr. Law sec. 711. And the receipt of money in consideration of the non-prosecution of a charge for the infraction of liquor laws is indictable as compounding a misdemeanour of a public nature. Re Fraser, 1 C.L.J. 326; R. v. Mabey, 37 U.C.Q.B. 248; State v. Carver, supra.

If an offence which was formerly a misdemeanour were compounded under circumstances constituting a conspiracy to obstruct or defeat the course of justice, the accused might be punished for the conspiracy. And a conspiracy with a witness bound over to attend a trial to absent himself from the trial is indictable. R. v. Hamp, 6 Cox 157. And where an assault is coupled with riot a compromise of the charge is illegal and will not bar an action for malicious prosecution, although riot is only a misdemeanour at common law. Keir v. Leeman, 6 Q.B. 308; 9 Q.B. 371.

It has been held that where the prosecutor has the choice between civil and criminal remedies, he may legally compromise as to the criminal remedy, ex gr. for a trade-mark offence. Fisher v. Appolinaris Co., L.R. 10 Ch. App. 297. So also the offence of common assault may be compromised. Keir v. Leeman, 6 Q.B. 308; 9 Q.B. 371.

Where, however, the offence was not under former law a felony, and the compounding is not an indictable conspiracy, there seems to be no precedent for holding that the compounding of an offence which was only a misdemeanour before the Code, is in itself indictable. Archbold Cr. Pleading (1900), 1035.

An agreement after conviction to pay part of the expenses of a prosecution for misdemeanour has been held legal. Beely v. Wingfield, 11 East 46. But such arrangements are seldom approved by the court. Re Parkinson, 76 L.T.N.S. 215.

Compounding a felony is a misdemeanour at common law, punishable by fine and imprisonment. It consists in an agreement for reward not to prosecute an indictment for any felony. Roscoe Crim. Ev., 11th ed., 395. The offence of compounding is complete when the agreement not to prosecute is made whether it be performed or not. R. v. Burgess, 16 Q.B.D. 141.

Where the owner of goods stolen took back the goods or received other amends on condition of not prosecuting, it constituted the offence of theft-bote at common law, and this offence is not usually described as compounding a felony. Archbold Cr. Pleading (1900), 1035; Hawk. P.C., book 1, ch. 59, sec. 7.

A prosecution for a felony is not the property of those that institute it to deal with it as they please; the public have a higher interest in having redress rendered and wrong punished to deter others from offending in like manner. R. v. Hammond, 9 Sol. Jour. 216.

Unless a nolle prosequi is entered by the Attorney-General, it is necessary to obtain the leave of the court to abandon a prosecution after the indict-

ment is found, whether the prosecution desire to effect that purpose by offering no evidence or otherwise. R. v. Nicholson Cent. Cr. Court, 1899, per Darling, J., cited Archbold Cr. Pleading (1900), 1035.

Misprision of felony.]—This offence is now in desuetude. Archbold Cr. Pleading (1900), 1238; Williams v. Bayley, L.R. 2 H.L. 200. It consisted in concealing or procuring the concealment of a felony known to have been committed. 1 Hawk. ch. 59. It differed from the offence of being an accessory in that neither actual assistance to the felon nor privity to the commission of the felony had to be proved. 1 Hale 373.

156. Taking reward for recovering stolen property without prosecution.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who corruptly takes any money or reward, directly or indirectly, under pretense or upon account of helping any person to recover any chattel, money, valuable security or other property which, by any indictable offence has been stolen, taken, obtained, extorted, converted or disposed of, unless he has used all due diligence to cause the offender to be brought to trial for the same. R.S.C., c. 164, s. 89.

This section is in similar terms to the Imperial Statute, 24 & 25 Vict., c. 96, s. 101.

Evidence.]—It is not necessary to shew that the accused had any connection with the commission of the previous offence; it is sufficient if the evidence satisfies the jury that the prisoner had some corrupt and improper design when he received the money, and did not bona fide intend to use such means as he could for the detection and punishment of the offender. R. v. King, 1 Cox C.C. 36.

Unless due diligence is used in prosecuting the thief it has been held to be an offence under the section to take money under pretence of helping a man to recover goods stolen from him, though the defendant had no acquaintance with the felon and did not pretend that he had, and notwithstanding that he had no power to apprehend the felon, that the goods were never restored, and that the defendant had no power to restore them. R. v. Ledbitter, 1 Mood. C.C. 76.

Where A. was charged with corruptly receiving from B. money under pretence of helping B. to recover goods theretofore stolen from B. and with not causing the thieves to be apprehended the following questions were left to the jury:—(1) Did A. mean to screen the guilty parties or to share the money with them? The answer was no. (2) Did A. know the thieves and intend to assist them in getting rid of the property by promising B. to buy it? The answer was no. (3) Did A. know the thieves and assist B. as her agent and at her request in endeavoring to purchase the stolen property from them, not meaning to bring the thieves to justice? The answer was yes. It was held that B. was properly convicted. R. v. Pascoe, 1 Den. 456, 2 C. & K. 927, 18 L.J.M.C. 186.

157. Advertising a reward for return of stolen property without prosecution.—Every one is liable to a penalty of two hundred and fifty dollars for each offence, recoverable with costs by any person who sues for the same in any court of competent jurisdiction, who—

(*a.*) publicly advertises a reward for the return of any property which has been stolen or lost, and in such advertisement uses any words purporting that no questions will be asked; or

(*b.*) makes use of any words in any public advertisement purporting that a reward will be given or paid for any property which has been stolen or lost, without seizing or making any inquiry after the person producing such property; or

(*c.*) promises or offers in any such public advertisement to return to any pawnbroker or other person who advanced money by way of loan on, or has bought, any property stolen or lost, the money so advanced or paid, or any other sum of money for the return of such property; or

(*d.*) prints or publishes any such advertisement. R.S.C., c. 164, s. 90.

A prosecution taken against the proprietor of a "newspaper" for publishing an advertisement offering a reward for the recovery of stolen property under paragraph (*d*) must be commenced within six months from the commission of the offence. Sec. 551 (*d*).

158. Signing false declaration respecting execution of judgment of death.—Every one is guilty of an indictable offence and liable to two years' imprisonment, who knowingly and wilfully signs a false certificate or declaration when a certificate or declaration is required with respect to the execution of judgment of death on any prisoner. R.S.C., c. 181, s. 19.

PART XI.

ESCAPES AND RESCUES.

SECT.

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159. Being at large while under sentence of imprisonment.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, having been sentenced to imprisonment, is afterwards, and before the expiration of the term for which he was sentenced, at large within Canada without some lawful cause, the proof whereof shall lie on him.

The fact of the sentence being in force when the defendant was found at large is sufficiently proved by the certificate of the conviction and sentence, if the judgment remains unreversed, and this although it appears on the face of the certificate that the sentence was one which could not legally have been inflicted on the defendant for the offence of which according to the certificate he had been convicted. R. v. Finney, 2 C. & K. 274.

Escapes.]—See secs. 163 and 164.

Ticket of Leave.]—It may be proved as a defence that the prisoner is at large conditionally under a license or ticket of leave or otherwise and that the conditions have been observed. 62-63 Vict. (Can.), ch. 49. The license issued under the authority of that statute and the amending statute of 1900 (63-64 Vict., ch. 48), known as the Ticket of Leave Acts, may be revoked by the Governor-General either with or without cause assigned. R. v. Johnson, 4 Can. Cr. Cas. 178 (Que.). The revocation by the Crown without cause assigned does not interrupt the running of the sentence, and the latter terminates at the same time as if no license had been granted. Ibid.

Pardon.]—A pardon is a good defence. R. v. Miller, W.Bl. 797, 1 Leach C.C. 74; but the sentence revives if the terms of a conditional pardon are not observed. R. v. Madan, 1 Leach C.C. 223; Aickles' Case, 1 Leach C.C. 390.