PART XXVIII.

FRAUD.

SECT.

364.—False accounting by official.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being a director, manager, public officer, or member of any body corporate or public company, with intent to defraud—

(*a*) destroys, alters, mutilates, or falsifies any book, paper, writing or valuable security belonging to the body corporate or public company; or

(*b*) makes, or concurs in making, any false entry, or omits or concurs in omitting to enter any material particular in any book of account or other document. R.S.C., c. 164, s. 68.

An indictment charging bank officials with having made a monthly report, etc., "a wilful, false and deceptive statement" of and concerning the affairs of the bank, with intent to deceive, sufficiently charges the offence, under sec. 99 of The Bank Act, of having made, "a wilfully false or deceptive statement *in* any return or report" with such intent. R. v. Weir (No. 1) (1899), 3 Can. Cr. Cas. 102, R.J.Q. 8 Q.B. 521.

365. False statement by official.—Every one is guilty of an indictable offence and liable to five years' imprisonment who, being a promoter, director, public officer or manager of any body corporate or public company, either existing or intended to be formed, makes, circulates or publishes, or concurs in making, circulating or publishing, any prospectus, statement or account which he knows to be false in any material particular, with intent to induce persons (whether ascertained or not) to become shareholders or partners, or with intent to deceive or defraud the members, shareholders or creditors, or any of them (whether ascertained or not), of such body corporate or public company, or with intent to induce any person to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof. R.S.C., c. 164, s. 69.

Where the offence charged was the making, circulation and publication of false statements of the financial position of a company, and it appeared that the statements were mailed from a place in Ontario to the parties

intended to be deceived in Montreal, the offence, although commenced in Ontario, is completed in the Province of Quebec by the delivery of the letters to the parties to whom they were addressed. R. v. Gillespie (No. 2) (1898), 2 Can. Cr. Cas. 309.

In such case, the courts of the Province of Quebec have jurisdiction to try the accused, if he has been duly committed for trial by a magistrate of the district. Ibid.

If a director or manager of a public company publishes a false statement of account knowing that it is false, with the intent that it shall be acted upon by those whom it reaches, he is guilty in law of publishing such statement with intent to defraud. R. v. Birt (1899), 63 J.P. 328 (Central Cr. Court).

Judicial notice will be taken of the statutory law of a province, other than the one in which the charge is laid, whereby the "president" of a company must necessarily be one of the "directors," and on proof of the manner of incorporation a description of the accused as the "president" of the company seems to be sufficient. R. v. Gillespie (1898), 1 Can. Cr. Cas. 551 (Que.).

366.—False accounting by clerk.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being or acting in the capacity of an officer, clerk, or servant, with intent to defraud—

(*a*) destroys, alters, mutilates or falsifies any book, paper writing, valuable security or document which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or concurs in so doing; or

(*b*) makes, or concurs in making, any false entry in, or omits or alters, or concurs in omitting or altering, any material particular from any such book, paper writing, valuable security or document.

An entry in an official cash book as "balance in hand" of an amount which correctly represented the amount which the defendant should have had in his possession but did not then have, is not a "false entry" if the cash book is not one kept to shew the state of account between the defendant and his employer, but between his employer and the employer's superior as to whom the entry correctly represents the amount he is entitled to receive. R. v. Williams (1900), 63 J.P. 103, 19 Cox C.C. 239.

Blackstone's definition of forgery is "the fraudulent making or alteration of a writing to the prejudice of another's right." The possibility of prejudice to another is sufficient. R. v. Ward (1727), 2 Str. 747; 2 Ld. Ray 1461. A clerk, representing his superior, makes a correct entry in official books, and afterwards without authority and malo animo changes the entry for his own gain; yet so as to make it appear to be still the official record; such an act constitutes forgery. Re Hall (1883), 3 O.R. 331.

367.—False statement by public officer.—Every one is guilty of an indictable offence and liable to five years' imprisonment, and to a fine not exceeding five hundred dollars, who, being an officer, collector or receiver, intrusted with the

receipt, custody or management of any part of the public revenues, knowingly furnishes any false statement or return of any sum of money collected by him or intrusted to his care, or of any balance of money in his hands or under his control.

The wilful intent to make a false return may be inferred by the jury from all the circumstances of the case proved to their satisfaction. R. v. Hincks (1879), 24 L.C. Jur. 116.

368.—Assigning property with intent to defraud creditors.—Every one is guilty of an indictable offence and liable to a fine of eight hundred dollars and to one year's imprisonment who—

(*a*) with intent to defraud his creditors, or any of them,

(i.) makes, or causes to be made, any gift, conveyance, assignment, sale, transfer or delivery of his property;

(ii.) removes, conceals, or disposes of any of his property; or

(*b*) with the intent that any one shall so defraud his creditors, or any one of them, receives any such property. R.S.C., c. 173, s. 28.

This section is a re-enactment of sec. 21 of 22 Viet. (Can.), c. 96.

Under section 5 of the Canada Evidence Act, 1893, as amended in 1901, 1 Edw. VII., c. 36, the answer of a witness to any question which pursuant to an enactment of the legislature of a province such witness is compelled to answer after having objected so to do upon any ground mentioned in subsec. 1 of sec. 5, and which, but for that enactment, he would upon such ground have been excused from answering, shall not be used or be receivable in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place other than a prosecution for perjury in giving such evidence. This abrogates the former law as laid down in R. v. Douglas (1896), 1 Can. Cr. Cas. 221 (Man.).

It is not essential that the debt of the creditor should at the time of assignment be actually due. R. v. Henry (1891), 21 O.R. 113, following Macdonald v. McCall, 12 A.R. 393.

It is properly left to the jury to say whether the defendant put the property out of his hands, transferred or disposed of it for the purpose of defrauding his creditors, although in the course of that transaction he satisfied a debt due to the creditor to whom the property was assigned. R. v. Potter (1860), 10 U.C.C.P. 39 (Draper, C.J., and Hagarty, J.).

In a case where the nature of the proceedings and the evidence clearly shewed that criminal process issued against S. was used only for the purpose of getting S. to Montreal to enable his creditors there to put pressure on him, in order to get their claims paid or secured, a transfer made by S.'s father of all his property for the benefit of the Montreal creditors was set aside as founded on an abuse of the criminal process of the court. Shorey v. Jones (1888), 15 Can. S.C.R. 398, affirming the decision of the Supreme Court of Nova Scotia, 20 N.S. Rep. 378.

In Nova Scotia it is held that the disposition of the property under this section must be such as would, if not interfered with, deprive the creditors of any benefit whatever therefrom. R. v. Shaw (1895), 31 N.S.R. 534.

369. Destroying or falsifying books with intent to defraud creditors.—Every one is guilty of an indictable offence and liable to ten years' imprisonment who, with intent to defraud his creditors, or any of them, destroys, alters, mutilates, or falsifies any of his books, papers, writings, or securities, or makes, or is privy to the making of, any false or fraudulent entry in any book of account or other document. R.S.C. c. 173, s. 27.

370. Concealing deeds or encumbrances or falsifying pedigrees.—Every one is guilty of an indictable offence and liable to a fine, or to two years' imprisonment, or to both, who, being a seller or mortgagor of land, or of any chattel, real or personal, or chose in action, or the solicitor, or agent of any such seller or mortgagor (and having been served with a written demand of an abstract of title by or on behalf of the purchaser or mortgagee before the completion of the purchase or mortgage) conceals any settlement, deed, will or other instrument material to the title, or any encumbrance, from such purchaser or mortgagee, or falsifies any pedigree upon which the title depends, with intent to defraud and in order to induce such purchaser or mortgagee to accept the title offered or produced to him. R.S.C., c. 164, s. 91.

No prosecution for concealing deeds and encumbrances as defined by this section shall be commenced without the consent of the Attorney-General, given after previous notice to the person intended to be prosecuted of the application to the Attorney-General for leave to prosecute. Sec. 548.

371. Frauds in respect to the registration of titles to land.—Every one is guilty of an indictable offence and liable to three years' imprisonment who, acting either as principal or agent, in any proceeding to obtain the registration of any title to land or otherwise, or in any transaction relating to land which is, or is proposed to be, put on the register, knowingly and with intent to deceive makes or assists or joins in, or is privy to the making of, any material false statement or representation, or suppresses, conceals, assists or joins in, or is privy to the suppression, withholding or concealing from, any judge or registrar, or any person employed by or assisting the registrar, any material document, fact or matter of information. R.S.C., c. 164, ss. 96 and 97.

372. Fraudulent sales of property.—Every one is guilty of an indictable offence and liable to one year's imprisonment, and to a fine not exceeding two thousand dollars, who, knowing the existence of an unregistered prior sale, grant, mortgage, hypothec, privilege or encumbrance of or upon any real property, fraudulently makes any subsequent sale of the same, or of any part thereof. R.S.C., c. 164, ss. 92 and 93.

373. Fraudulent hypothecation of real property.—Every one who pretends to hypothecate, mortgage, or otherwise charge any real property to which he knows he has no legal or equitable title is guilty of an indictable offence, and liable to one year's imprisonment, and to a fine not exceeding one hundred dollars.

2. The proof of the ownership of the real estate rests with the person so pretending to deal with the same. R.S.C., c. 164, ss. 92 and 94.

374. Fraudulent seizures of land.—Every one is guilty of an indictable offence and liable to one year's imprisonment who, in the Province of Quebec, wilfully causes or procures to be seized and taken in execution any lands and tenements, or other real property, not being, at the time of such seizure, to the knowledge of the person causing the same to be taken into execution, the *bona fide* property of the person or persons against whom, or whose estate, the execution is issued. R.S.C. c. 164, ss. 92 and 95.

375. Unlawful dealings with gold and silver.—Every one is guilty of an indictable offence and liable to two years' imprisonment, who—

(*a*) being the holder of any lease or license issued under the provisions of any Act relating to gold or silver mining, or by any persons owning land supposed to contain any gold or silver, by fraudulent device or contrivance defrauds or attempts to defraud His Majesty,or any person of any gold, silver or money payable or reserved by such lease, or, with such intent as aforesaid, conceals or makes a false statement as to the amount of gold or silver procured by him; or

(*b*) not being the owner or agent of the owners of mining claims then being worked, and not being thereunto authorized in writing by the proper officer in that behalf

named in any Act relating to mines in force in any Province of Canada, sells or purchases (except to or from such owner or authorized person) any quartz containing gold, or any smelted gold or silver, at or within three miles of any gold district or mining district, or gold mining division; or

(*c*) purchases any gold in quartz, or any unsmelted or smelted gold or silver, or otherwise unmanufactured gold or silver, of the value of one dollar or upwards (except from such owner or authorized person), and does not, at the same time, execute in triplicate an instrument in writing, stating the place and time of purchase, and the quantity, quality and value of gold or silver so purchased, and the name or names of the person or persons from whom the same was purchased, and file the same with such proper officer within twenty days next after the date of such purchase. R.S.C., c. 164, ss. 27, 28, and 29.

Search warrant.]—On complaint in writing made to any justice of the county, district or place, by any person interested in any mining claim, that mined gold or gold-bearing quartz, or mined or unmanufactured silver or silver ore, is unlawfully deposited in any place, or held by any person contrary to law, a general search warrant may be issued by such justice, as in the case of stolen goods, including any number of places or persons named in such complaint; and if, upon such search, any such gold or gold-bearing quartz, or silver or silver ore is found to be unlawfully deposited or held, the justice shall make such order for the restoration thereof to the lawful owner as he considers right. Sec. 571.

The decision of the justice in such case is subject to appeal as in ordinary cases coming within the provisions of Part LVIII. Sec. 571 (2).

376. Warehousemen, etc., giving false receipts - knowingly using the same.—Every one is guilty of an indictable offence and liable to three years' imprisonment, who—

(*a*) being the keeper of any warehouse, or a forwarder, miller, master of a vessel, wharfinger, keeper of a cove, yard, harbour or other place for storing timber, deals, staves, boards or lumber, curer or packer of pork, or dealer in wool, carrier, factor, agent or other person, or a clerk or other person in his employ, knowingly and wilfully gives to any person a writing purporting to be a receipt for, or an acknowledgement of, any goods or other property as having been received into his warehouse, vessel, cove, wharf, or other place, or in any such place about which he is employed, or in any other manner received by him, or by the person in or about whose business he is employed, before the goods or other property named in such receipt, acknowledgment or writing have been actually delivered to or received by him as aforesaid, with intent to mislead, deceive, injure

or defraud any person, although such person is then unknown to him; or

(*b*) knowingly and wilfully accepts, transmits or uses any such false receipt or acknowledgment or writing. R.S.C., c. 164, s. 73.

377. Consignments on which advances made.—Every one is guilty of an indictable offence and liable to three years' imprisonment, who —

(*a*) having, in his name, shipped or delivered to the keeper of any warehouse, or to any other factor, agent or carrier, to be shipped or carried, any merchandise upon which the consignee has advanced any money or given any valuable security afterwards, with intent to deceive, defraud or injure such consignee, in violation of good faith, and without the consent of such consignee, makes any disposition of such merchandise different from and inconsistent with the agreement made in that behalf between him and such consignee at the time of or before such money was so advanced or such negotiable security so given; or

(*b*) knowingly and wilfully aids and assists in making such disposition for the purpose of deceiving, defrauding or injuring such consignee.

2. No person commits an offence under this section who, before making such disposition of such merchandise, pays or tenders to the consignee the full amount of any advance made thereon. R.S.C., c. 164, s. 74.

378. Making false statements in receipts for property under "The Bank Act."—Every person is guilty of an indictable offence and liable to three years' imprisonment who—

(*a*) wilfully makes any false statement in any receipt, certificate or acknowledgment for grain, timber or other goods or property which can be used for any of the purposes mentioned in *The Bank Act;* or

(*b*) having given, or after any clerk or person in his employ has, to his knowledge, given, as having been received by him in any mill, warehouse, vessel, cove or other place, any such receipt, certificate or acknowledgment for any such grain, timber or other goods or property,—or having obtained any such receipt, certificate, or acknowledgment, and after having endorsed or assigned it to any bank or person, afterwards, and without the consent of the holder or

endorsee in writing, or the production and delivery of the receipt, certificate or acknowledgment, wilfully alienates or parts with, or does not deliver to such holder or owner of such receipt, certificate or acknowledgment, the grain, timber, goods or other property therein mentioned. R.S.C., c. 164, s. 75.

Receipts given by any person in charge of logs or timber in transit from timber limits or other lands to their place of destination are covered by the term "warehouse receipt" used in the Bank Act. Stat. Can. 1890, ch. 31, sec. 2 (*d*); Stat. Can. 1900, ch. 26, sec. 3.

379. Innocent partners.—If any offence mentioned in any of the three sections next preceding is committed by the doing of anything in the name of any firm, company, or co-partnership of persons, the person by whom such thing is actually done, or who connives at the doing thereof, is guilty of the offence, and not any other person. R.S.C., c. 164, s. 76.

380. Selling vessel or wreck not having title thereto.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, not having lawful title thereto, sells any vessel or wreck found within the limits of Canada. R.S.C., c. 81, s. 36 (*d*).

Wreck.]—The term "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.

381. Other offences respecting wrecks.—Every one is guilty of an indictable offence and liable, on conviction on indictment, to two years' imprisonment, and on summary conviction before two justices of the peace, to a penalty of four hundred dollars or six months' imprisonment, with or without hard labour, who—

(*a*) secretes any wreck, or defaces or obliterates the marks thereon, or uses means to disguise the fact that it is wreck, or in any manner conceals the character thereof, or the fact that the same is such wreck, from any person entitled to inquire into the same; or,

(*b*) receives any wreck, knowing the same to be wreck, from any person, other than the owner thereof or the receiver of wrecks, and does not within forty-eight hours inform the receiver thereof;

(*c*) offers for sale or otherwise deals with any wreck, knowing it to be wreck, not having a lawful title to sell or deal with the same; or

(*d*) keeps in his possession any wreck, knowing it to be wreck, without a lawful title so to keep the same, for any time longer than the time reasonably necessary for the delivery of the same to the receiver; or

(*e*) boards any vessel which is wrecked, stranded or in distress, against the will of the master, unless the person so boarding is, or acts by command of, the receiver. R.S.C., c. 81, s. 37.

382. Offences respecting old marine stores.—Every person who deals in the purchase of old marine stores of any description, including anchors, cables, sails, junk, iron, copper, brass, lead and other marine stores, and who, by himself or his agent, purchases any old marine stores from any person under the age of sixteen years, is guilty of an offence and liable, on summary conviction, to a penalty of four dollars for the first offence and of six dollars for every subsequent offence.

2. Every such person who, by himself or his agent, purchases or receives any old marine stores into his shop, premises or places of deposit, except in the daytime between sunrise and sunset, is guilty of an offence and liable, on summary conviction, to a penalty of five dollars for the first offence and of seven dollars for every subsequent offence.

3. Every person, purporting to be a dealer in old marine stores, on whose premises any such stores which were stolen are found secreted is guilty of an indictable offence and liable to five years' imprisonment. R.S.C. c. 81, s. 35.

383. Definitions.—In the next six sections, the following expressions have the meaning assigned to them herein:

(*a*) The expression "public department" includes the Admiralty and the War Department, and also any public department or office of the Government of Canada, or of the public or civil service thereof, or any branch of such department or office;

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

(*c*) The expression "stores" includes all goods and chattels, and any single store or article. 50-51 V., c. 45, s. 2.

384. Marks to be used on public stores.—The following marks may be applied in or on any public stores to denote His Majesty's property in such stores, and it shall be lawful for any public department, and the contractors, officers and workmen of such department, to apply such marks, or any of them, in or on any such stores:—

Marks appropriated for His Majesty's use in or on Naval, Military, Ordnance, Barrack, Hospital and Victualling Stores.

STORES.	MARKS.
Hempen cordage and wire rope.	White, black, or coloured threads laid up with the yarns and the wire, respectively.
Canvas, fearnought, hammocks and seamen's bags.	A blue line in a serpentine form.
Bunting.	A double tape in the warp.
Candles.	Blue or red cotton threads in each wick, or wicks of red cotton.
Timber, metal and other stores not before enumerated.	The broad arrow, with or without the letters W.D.

Marks appropriated for use on stores, the property of His Majesty in the right of his Government of Canada.

STORES.	MARKS.
Public stores.	The name of any public department, or the word "Canada," either alone or in combination with a Crown or the Royal Arms.

385 Unlawfully applying marks to public stores.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, without lawful authority the proof of which shall lie on him, applies any of the said marks in or on any public stores. 50-51 V., c. 45, s. 4.

386. Taking marks from public stores.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, with intent to conceal His Majesty's property in any public stores, takes out, destroys or obliterates, wholly or in part, any of the said marks. 50-51 V., c. 45, s. 5.

387. Unlawful possession, sale, etc., of public stores.—Every one who, without lawful authority the proof of which lies on him, receives, possesses, keeps, sells or delivers any public stores bearing any such mark as aforesaid, knowing them to bear such mark, is guilty of an indictable offence and liable on conviction on indictment to one year's imprisonment

and, if the value thereof does not exceed twenty-five dollars, on summary conviction, before two justices of the peace, to a fine of one hundred dollars or to six months' imprisonment with or without hard labour. 50-51 V., c. 45, ss. 6 and 8.

Right of search.]—Any constable or other peace officer, if deputed by any public department, may, within the limits for which he is such constable or peace officer, stop, detain and seach any person reasonably suspected of having or conveying in any manner any public stores defined in sec. 383, stolen or unlawfully obtained, or any vessel, boat or vehicle in or on which there is reason to suspect that any public stores stolen or unlawfully obtained may be found. Sec 570.

A constable or other peace officer shall be deemed to be deputed within the meaning of sec. 570 if he is deputed by any writing signed by the person who is the head of such department, or who is authorized to sign documents on behalf of such department. Sec. 570 (2).

As to searching for stores near His Majesty's ships see sec. 389.

Evidence.]—In any prosecution, proceeding or trial under sections 385 to 389 inclusive for offences relating to public stores, proof that any soldier, seaman or marine was actually doing duty in His Majesty's service shall be prima facie evidence that his enlistment, entry or enrolment has been regular. Sec. 709. If the person charged with the offence relating to public stores mentioned in article 387 was at the time at which the offence is charged to have been committed in His Majesty's service or employment, or a dealer in marine stores, or a dealer in old metals, knowledge on his part that the stores to which the charge relates bore the marks described in section 384 shall be presumed until the contrary is shewn. Sec. 709 (2).

388. Not satisfying justices that possession of public stores is lawful.—Every one, not being in His Majesty's service, or a dealer in marine stores or a dealer in old metals, in whose possession any public stores bearing any such mark are found who, when taken or summoned before two justices of the peace, does not satisfy such justices that he came lawfully by such stores so found, is guilty of an offence and liable, on summary conviction, to a fine of twenty-five dollars; and

2. If any such person satisfies such justices that he came lawfully by the stores so found, the justices, in their discretion, as the evidence given or the circumstances of the case require, may summon before them every person through whose hands such stores appear to have passed; and

3. Every one who has had possession thereof, who does not satisfy such justices that he came lawfully by the same, is liable, on summary conviction of having had possession thereof, to a fine of twenty-five dollars, and in default of payment to three months' imprisonment with or without hard labour. 50-51 V., c. 45, s. 9.

See note to sec. 387.

389. Searching for stores near His Majesty's vessels.—Every one who without permission in writing from the Admiralty, or from some person authorized by the Admiralty in that behalf, creeps, sweeps, dredges, or otherwise searches for stores in the sea, or any tidal or inland water, within one hundred yards from any vessel belonging to His Majesty, or in His Majesty's service, or from any mooring place or anchoring place appropriated to such vessels, or from any mooring belonging to His Majesty, or from any of His Majesty's wharfs or docks, victualling or steam factory yards, is guilty of an offence and liable, on summary conviction before two justices of the peace, to a fine of twenty-five dollars, or to three months' imprisonment, with or without hard labour. 50-51 V., c. 45, ss. 11 and 12.

See note to sec. 387.

390. Receiving regimental necessaries, etc., from soldiers or deserters.—Every one is guilty of an indictable offence and liable on conviction on indictment to five years' imprisonment and on summary conviction before two justices of the peace to a penalty not exceeding forty dollars, and not less than twenty dollars and costs, and, in default of payment, to six months' imprisonment with or without hard labour who—

(*a*) buys, exchanges or detains, or otherwise receives from any soldier, militiaman or deserter any arms, clothing or furniture belonging to His Majesty, or any such articles belonging to any soldier, militiaman or deserter as are generally deemed regimental necessaries according to the custom of the army; or

(*b*) causes the colour of such clothing or articles to be changed; or

(*c*) exchanges, buys or receives from any soldier or militiaman any provisions without leave in writing from the officer commanding the regiment or detachment to which such soldier belongs. R.S.C. c. 169, ss. 2 and 4.

391. Receiving, etc., necessaries from mariners or deserters.—Every one is guilty of an indictable offence, and liable, on conviction on indictment to five years' imprisonment, and on summary conviction before two justices of the peace to a penalty not exceeding one hundred and twenty dollars, and not less than twenty dollars and costs, and in default of payment to six months' imprisonment, who buys, exchanges or detains, or otherwise receives, from any seaman or marine, upon any

account whatsoever, or has in his possession, any arms or clothing, or any such articles, belonging to any seaman, marine or deserter, as are generally deemed necessaries according to the custom of the navy. R.S.C. c. 169, ss. 3 and 4.

392 Receiving, etc., a seaman's property.—Every one is guilty of an indictable offence who detains, buys, exchanges, takes on pawn or receives, from any seaman or any person acting for a seaman, any seaman's property, or solicits or entices any seaman, or is employed by any seaman to sell, exchange or pawn any seaman's property, unless he acts in ignorance of the same being seaman's property, or of the person with whom he deals being or acting for a seaman, or unless the same was sold by the order of the Admiralty or Commander-in-Chief.

2. The offender is liable, on conviction on indictment to five years' imprisonment, and on summary conviction to a penalty not exceeding one hundred dollars; and for a second offence, to the same penalty, or, in the discretion of the justice, to six months' imprisonment, with or without hard labour.

3. The expression "seaman" means every person, not being a commissioned, warrant or subordinate officer, who is in or belongs to His Majesty's Navy, and is borne on the books of any one of His Majesty's ships in commission, and every person, not being an officer as aforesaid, who, being borne on the books of any hired vessel in His Majesty's service, is, by virtue of any Act of Parliament of the United Kingdom for the time being in force for the discipline of the Navy, subject to the provisions of such Act.

4. The expression "seaman's property" means any clothes, slops, medals, necessaries or articles usually deemed to be necessaries for sailors on board ship, which belong to any seaman.

5. The expression "Admiralty," means the Lord High Admiral of the United Kingdom, or the Commissioners for executing the office of Lord High Admiral. R.S.C. c. 171, ss. 1 and 2.

393. Not satisfying justice that possession of seaman's property is lawful.—Every one in whose possession any seaman's property is found who does not satisfy the justice of the peace before whom he is taken or summoned that he came by such property lawfully is liable, on summary conviction, to a fine of twenty-five dollars. R.S.C. c. 171, s. 3.

394. Conspiracy to defraud.—Every one is guilty an indictable offence and liable to seven years' imprisonment who conspires with any other person, by deceit or falsehood or other fraudulent means, to defraud the public or any person, ascertained or unascertained, or to affect the public market price of stocks, shares, merchandise or anything else publicly sold, whether such deceit or falsehood or other fraudulent means would or would not amount to a false pretense as hereinbefore defined.

Conspiracy.]—A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in *intention only*, it is not indictable. But where two agree to carry it into effect, the very plot is an act in itself and is the act of each of the parties, promise against promise, actus contra actum, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means. Mulcahy v. R. (1868), L.R. 3 H.L., Eng. & Ir. App. 306, 317, Archbold's Crim. Evid., 21st ed. 1104.

The conspiracy itself is the offence, and whether anything has been done in pursuance of it or not is immaterial. R. v. Gill (1818), 2 B. & Ald. 204; R. v. Seward (1834), 1 A. & E. 706; R. v. Richardson (1834), 1 M. & Rob. 402; R. v. Kenrick (1843), 5 Q.B. 49.

The date mentioned in the indictment as the day when the conspiracy took place is not material, but in form some day before the indictment preferred, must be laid; evidence is not thereby precluded in respect of an earlier date. R. v. Charnock (1698), 12 Howard's State Trials, 1397.

Evidence.]—It is not necessary to prove that the defendants actually met together and concerted the proceeding; it is sufficient if the jury are satisfied from the defendants' conduct either together or severally, that they were acting in concert. R. v. Fellowes (1859), 19 U.C.R. 48, 58.

The jury may group the detached acts of the parties severally, and view them as indicating a concerted purpose on the part of all as proof of the alleged conspiracy. R. v. Connolly (1894), 1 Can. Cr. Cas. 468 (Ont.).

When the existence of the common design on the part of the defendants has been proved, evidence is then properly receivable as against both of what was said or done by either in furtherance of the common design. Ibid.

Evidence is admissible of what was said or done in furtherance of the common design by a conspirator not charged, as against those who are charged, after proof of the existence of the common design on the part of the defendants with such conspirator. Ibid.

A conspiracy to defraud is indictable, although the conspirators have been unsuccessful in carrying out the fraud. R. v. Frawley (1894), 1 Can. Cr. Cas. 253 (Ont.).

Conspiracy to defraud is indictable although the object was to commit a civil wrong, and although if carried out the act agreed upon would not constitute a crime. R. v. Defries (1894), 1 Can. Cr. Cas. 207 (Ont.).

Any overt act of conspiracy is to be viewed as a renewal or continuation of the original agreement made by all of the conspirators, and, if done in another jurisdiction than that in which the original concerted purpose was formed, jurisdiction will then attach to authorize the trial of the charge in such other jurisdiction. R. v. Connolly (1894), 1 Can. Cr. Cas. 468.

The bare consulting of those who merely deliberate in regard to the proposed conspiracy, although they may not agree on a plan of action, is of itself an overt act. Ibid.

One person alone cannot be guilty of a conspiracy, and if all the alleged conspirators are prosecuted for such a conspiracy and all are acquitted but one, the acquittal of the others is the acquittal of that one also. 1 Hawkins P.C. 448. But one person alone may be tried for a conspiracy, provided that the indictment charged him with conspiring with others who have not appeared. Rex v. Kinnersley, 1 Str. 193, or who are since dead. Rex v. Nicholls, 2 Str. 1227, 13 East, p. 412 (*n*).

And it has recently been held in Ontario, in a case under the Code, that one conspirator may be indicted and convicted without joining the others, although they are living and within the jurisdiction. R. v. Frawley (1894), 1 Can. Cr. Cas. 253 (Ont.).

A person was charged with conspiring with two others to obtain goods by false pretences from various tradesmen. During the trial a deputy chief constable was called and asked with reference to a shop opened by one of the persons charged who had pleaded guilty, "Did you make inquiries as to whether any trade had been done?" The answewer was, "I did." He was then asked, "Did you as a result of such enquiries find that any trade had been done?" and he answered, "I did not." It was held that the evidence was merely hearsay and inadmissible and the conviction was quashed. R. v. Saunders (1899), 63 J.P. 150.

Particulars of charge.]—Sec. 616 (sub-sec. 2), provides that "No count which charges any false pretences or any fraud or any attempt or *conspiracy by fraudulent means*, shall be deemed insufficient because it does not set out in detail in what the false pretences or the fraud or fraudulent means consisted: Provided that the court may if satisfied as aforesaid, order that the prosecutor shall furnish a particular of the above matters or any of them.

A copy of the particulars is to be given without charge to the accused or his solicitor and shall be entered in the record and the trial shall proceed in all respects as if the indictment had been amended in conformity with same. Cr. Code 617. The court may have regard to the depositions, in determining whether a particular is required or not. Cr. Code 617 (2).

An indictment charging that two parties named did conspire by false pretences and subtle means and devices to obtain from F. divers large sums of money of the moneys of F., and to cheat and defraud him thereof was held good although the means of the alleged conspiracy were not stated in detail. R. v. Kenrick (1843), 5 Q.B. 49. Lord Denman, C.J., in that case said: "There have not been wanting occasions when learned judges have expressed regret that a charge so little calculated to inform a defendant of the facts intended to be proved upon him should be considered by the law as well laid. All who have watched the proceedings of courts are aware that there is danger of injustice from calling for a defence against so vague an accusation, and judges of high authority have been desirous of restraining its generality within some reasonable bounds. The ancient form, however, has kept its place and the expedient now employed in practice of furnishing defendants with a particular of the acts charged upon them is probably effectual for preventing surprise and unfair advantages.

Venue.]—The venue may be laid either where the agreement was entered into or where any overt act was done in pursuance of the common design. R. v. Connolly (1894), 1 Can. Cr. Cas. 468 (Ont.).

395. Cheating at play.—Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud any person, cheats in playing at any game, or in holding the stakes, or in betting on any event. R.S.C. c. 164, s. 80.

Cheating.]—To constitute the offence of cheating at common law it is necessary to shew, (1) that the act has been completed, (2) that there has been injury to the individual. R. v. Vreones, [1891] 1 Q.B. 360.

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

Deception is an essential element of the offence of "undertaking to tell fortunes" under sec. 396, and to uphold a conviction for that offence there must be evidence upon which it may be reasonably found that the accused was asserting or representing, with the intention that the assertion or representation should be believed, that he had the power to tell fortunes, with the intent in so asserting or representing of deluding and defrauding others. R. v. Marcott (1901), 4 Can. Cr. Cas. 437 (C.A. Ont.).

The word "undertakes," as used in this section of the Code, implies an assertion of the power to perform, and a person undertaking to tell fortunes impliedly asserts his power to tell fortunes and in doing so is asserting the possession of a power which he does not possess and is thereby practising deception, and when this assertion of power is used by him with the intent of deluding and defrauding others the offence aimed at by the enactment is complete. Per Armour, C.J.O., in R. v. Marcott (1901), 4 Can. Cr. Cas. 437; Penny v. Hanson (1887), 18 Q.B.D. 478; R. v. Entwistle, [1899] 1 Q.B. 846; Monck v. Hilton, 2 Ex. D. 268.

The word "pretend" in itself implies that there was an intention to deceive and impose upon others. R. v. Entwistle, ex parte Jones (1899), 63 J.P. 423.

The mere undertaking to tell fortunes is an offence. A conviction obtained upon the evidence of a person who was a decoy, but not a dupe or a victim, was affirmed. R. v. Milford (1890), 20 Ont. R. 306.

PART XXIX.

ROBBERY AND EXTORTION.

SECT.

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

Robbery at common law.]—"Robbery is larceny committed by violence, from the person of one put in fear."—Bishop.

The following are some of the definitions of this offence:—

Lord Coke. "Robbery is a felony by the common law, committed by a violent assault upon the person of another, by putting him in fear, and taking from his person his money or other goods of any value whatsoever." 3 Inst. 68.

Lord Hale. "Robbery is the felonious and violent taking of any money or goods from the person of another, putting him in fear, be the value thereof above or under one shilling." 1 Hale P.C. 532.

Hawkins. "Robbery is a felonious and violent taking away from the person of another, goods or money to any value, putting him in fear." 1 Hawk. P.C. Curw. Ed. p. 212.

East. "A felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear." 2 East P.C. 707.

Blackstone. "The felonious and forcible taking, from the person of another, of goods or money to any value, by violence or putting him in fear." 4 Bl. Com. 242.

Lord Mansfield. "A felonious taking of property from the person of another by force." Rex v. Donolly, 2 East P.C. 715, 725.

The act of violence.]—To constitute robbery, there must be either some act of direct violence, or some demonstration from which physical injury to the person robbed may be reasonably apprehended. 2 Bishop's Cr. Law 967.

The fear of physical ill must come before the relinquishment of the property to the thief, and not after; else the offence is not robbery. Rex v.

Harman, 2 East P.C. 736. The general doctrine is, that physical force, actual or apprehended, in taking property, is essential to constitute a crime of this kind. 1 Bishop 430. And the injury may be, as just mentioned, either actual or apprehended.

No sudden taking of a thing unawares from the person, as by snatching any thing from the hand or head, is sufficient to constitute a robbery, unless some injury be done to the person, or unless there be some previous struggle for the possession of the property. 2 East P.C. 708. But in the later editions of Hawkins, it is said to be robbery "to snatch a basket of linen suddenly from the head of another." 1 Hawk. P.C. Curw. Ed. 214, sec. 9. The true doctrine is, that such a snatching will constitute robbery, provided the article is so attached to the person or clothes as to create resistance, however slight; not otherwise. 2 Bishop 968. And where a watch was fastened to a steel chain passing round the neck of its owner, one who snatched it away, breaking the chain, was held to be guilty of this offence. "For the prisoner could not obtain the watch at once, but had to overcome the resistance the steel chain made, and actual force was used for the purpose." Rex v. Mason, Russ. & Ry. 419. To snatch a pin from a lady's headdress, so violently as to remove with it a part of the hair from the place where it was fixed (Rex v. Moore, 1 Leach, 4th ed. 335), or to force an ear-ring from her ear (Rex v. Lapier, 1 Leach, 4th ed. 320, 2 East P.C. 557, 708), is robbery; but not, to snatch property merely from another's hand. Rex v. Baker, 1 Leach, 4th ed. 290, 2 East P.C. 702; Rex v. Macauley, 1 Leach, 4th ed. 287; Rex v. Robins, 1 Leach, 4th ed. 290, note.

If the robber has, in any way, disabled his victim, a simple taking then from the person is sufficient. And where a bailiff handcuffs his prisoner, under pretence of conducting him the more safely to prison, but really for the purpose of robbing him; then, if, having so disabled him, he takes money from the prisoner's pocket, the offence is robbery. Rex v. Gascoigne, 1 Leach, 4th ed. 280, 2 East P.C. 709. So also, if one seizes another by the cravat, then forces him against the wall, then abstracts his watch from his pocket even without his knowledge, this graver form of larceny is committed. Commonwealth v. Snelling, 4 Binn. 379.

Apprehended violence.]—There is no need of actual force to be employed by the robber. If he assaults one (1 Hale P.C. 533; 1 Hawk. P.C. Curw. Ed. p. 214, sec. 7), or threatens him in such a manner as to create in his mind a reasonable apprehension of bodily harm in case of resistence, the taking is robbery. So that, where money was given to a person connected with a mob in a time of riot, on his coming to the house and begging in a manner which implied menace if it were not given him, the getting of this money was held to be robbery. Rex v. Taplin, 2 East P.C. 712. And where the threat was to tear down corn and the house, the giving under fear of this threat was deemed sufficient to constitute the taker a robber. Rex v. Simons, 2 East P.C. 731. See Rex v. Gnosil, 1 Car. & P. 504. Even where the danger was not immediate, but a threat was to bring a mob from a neighbouring town, in a state of riot, and burn down the prosecutor's house, and the prosecutor parted with the goods through fear of this consequence, which he believed would follow refusal, but not otherwise from apprehension of personal danger, the crime was held to be committed. Rex v. Astley, 2 East P.C. 729; Rex v. Brown, 2 East P.C. 731. The offer of money, less than the value of the goods, will not make the act of taking less criminal. Rex v. Simons, 2 East P.C. 712; Rex v. Spencer, 2 East P.C. 712.

To constitute robbery, under such circumstances mentioned in the last section, the menace must be of a kind to excite reasonable apprehension of danger; nothing short will do. 2 East P.C. 713; 1 Hawk. P.C. Curw. Ed. p. 214, sec. 8. Moreover, though the danger need not be immediate and the money need not be parted with instantly, yet the money must be delivered and taken while the fear is on the mind, and not after time has elapsed,

especially in the absence of the robber, for the fear to be removed. Long v. The State, 12 Ga. 293; Rex v. Jackson, 1 East P.C. Add. XXI., 1 Leach, 4th ed. 193, note, 2 Ib. 618, note; 1 Hawk. P.C. Curw. Ed. p. 213, sec. 1. Lord Hale says: "If thieves come to rob A., and, finding little about him, enforce him by menace of death to swear upon a book to fetch them a greater sum, which he doth accordingly, this is a taking by robbery, yet he was not in conscience bound by such compelled oath; for the fear continued, though the oath bound him not." 1 Hale P.C. 532.

Obtaining money from a woman by threat to accuse her husband of an indecent assault, is not robbery. Rex v. Edwards, 5 Car. & P. 518, 1 Moody & R. 257.

The taking.]—If the person assaulted merely drops the property, and the assailant is apprehended before he takes it up, his offence is not robbery. Rex v. Farrell, 1 Leach, 4th ed. 322, note, 2 East P.C. 557; ante, sec. 701. And, Lord Hale says, "if A. have his purse tied to his girdle, and B. assaults him to rob him, and in struggling the girdle breaks, and the purse falls to the ground, this is no robbery; because no taking. But if B. take up the purse; or, if B. had the purse in his hand, and then the girdle break, and striving lets the purse fall to the ground, and never takes it up again; this is a taking and robbery." 1 Hale P.C. 533, referring to 3 Inst. 69; Dalt. Just., ch. 100; Cromp. 35. After the taking has been effected, the crime is not purged by giving back the thing taken. 1 Hale P.C. 533; Rex v. Peat, 1 Leach, 4th ed. 228, 2 East P.C. 557.

It is no objection, that the person assaulted delivered with his own hand the property to the assailant, if the necessary other circumstances concurred. 1 Hale P.C. 533.

Since robbery is an offence as well against the person as the property, the taking must be, in the language of the law, from the person. 2 Bishop 975. But the person may be deemed to protect all things belonging to the individual, within a distance, not easily defined, over which the influence of the presence extends. "If a thief," says Lord Hale, "come into the presence of A.; and, with violence and putting A. in fear, drives away his horse, cattle, or sheep"; he commits robbery. 1 Hale P.C. 533. The better expression is, that a taking in the presence of an individual (of course, there being a putting in fear) is to be deemed a taking from his person. Rex v. Frances, Comyns 478, 2 Stra. 1015, Cas. temp. Hardw. 113, Foster 128. In robbery, it is sufficient if the property be taken in the presence of the owner; it need not be taken immediately from his person, so that there be violence to his person or putting him in fear. As where one, having first assaulted another, takes away his horse standing by him; or having put him in fear, drives his cattle out of his pasture in his presence, or takes up his purse which the other in his fright had thrown into a bush, or his hat which had fallen from his head. 2 East P.C. 707. "Or," adds Hawkins, "robs my servant of my money before my face." 1 Hawk. P.C., Curw. Ed., p. 214, sec. 5; Rex v. Fallows, 5 Car. & P. 508.

The fear.]—Where there is no actual force, there must be actual fear; but, where there is actual force, the fear is conclusively inferred by the law. Rex v. Reane, 2 Leach, 4th ed., 616. And, within this distinction, assaults, where there is no actual battery, are probably to be deemed actual force. 1 Bishop 317. Where neither this force is employed, nor any fear is excited, there is no robbery, though there be reasonable grounds for fear. Rex v. Reane, 2 East P.C. 734, 2 Leach, 4th ed., 616. And see 2 East P.C. 665, 666.

Accomplices.]—Hawkins observes: "In some cases a man may be said to rob me, where in truth he never actually had any of my goods in his possession; as where I am robbed by several of one gang, and one of them only takes my money; in which case, in judgment of law, every one of the company shall be said to take it, in respect of that encouragement which they give to another, through the hopes of mutual assistance in their enter-

prise; nay, though they miss of the first intended prize, and one of them afterwards ride from the rest, and rob a third person in the same highway without their knowledge, out of their view, and then return to them—all are guilty of robbery, for they came together with an intent to rob, and to assist one another in so doing." 1 Hawk. P.C., Curw. Ed., p. 213, sec. 4. And see Code secs. 61-63.

398. Punishment of aggravated robbery.—Every one is guilty of an indictable offence and liable to imprisonment for life and to be whipped who—

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

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

(*c*) being armed with an offensive weapon or instrument robs, or assaults with intent to rob, any person. R.S.C. c. 164, s. 34.

399 Punishment of robbery.—Every one who commits robbery is guilty of an indictable offence and liable to fourteen years' imprisonment. R.S.C. c. 164, s. 32.

400. Assault with intent to rob.—Every one who assaults any person with intent to rob him is guilty of an indictable offence and liable to three years' imprisonment. R.S.C. c. 164, s. 33.

Indictment.]—When the complete offence of robbery is charged but not proved and the evidence establishes an attempt to commit the offence, the accused may be convicted of such attempt and punished accordingly. Sec. 711. An assault with intent to rob is a form of attempt to rob. Sec. 64. On a count for robbery the accused may be convicted of any offence the commission of which would be included in the commission of robbery and which is proved; or he may be convicted of an attempt to commit any offence so included. Sec. 713. An attempt to assault with intent to rob is in itself an indictable offence. Sec. 529.

When an attempt to commit an offence is charged but the evidence establishes the commission of the full offence, the accused is not entitled to be acquitted, but the jury may convict him of the attempt, unless the court where the trial takes place, 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. Sec. 712. After a conviction for the attempt the accused is not liable to be tried again for the offence which he was charged with attempting to commit. Sec. 712 (2). If a count for assault with intent to rob is joined with a count for robbery the prosecutor cannot proceed with both and is put to his election. R. v. Gough (1831), 1 M. & Rob. 71.

It was formerly held that a prisoner could not be convicted of a common assault on an indictment for an assault with intent to rob; R. v. Woodhall (1872), 12 Cox C.C. 240; R. v. Sandys (1844), 1 Cox C.C. 8; but sec. 713 abrogates that rule.

Form of indictment.]—The indictment may be in the following form:—

"County of —— to wit: The jurors for our Lord the King upon their oath present that A.B. on the —— day of —— in the year of our Lord 190—, in and upon one J. N. did make an assault with intent the moneys, goods and chattels of the said J. N. from the person and against the will of him the said J. N. then unlawfully and violently to steal, take and carry away; against the form of the Criminal Code (sec. 400) and against the peace of our Lord the King, his Crown and dignity."

With intent to rob him.]—The English Larceny Act, 1861, 24-25 Vict., ch. 96, sec. 40, which deals with this offence, omits the word "him," and may possibly include the case of an assault upon A. with intent to rob B., but such would not be the case under the Code.

Under a former English Act, 7 Geo. III., ch. 21, now repealed, which made it felony for any person with an offensive weapon to assault any other person "with intent to rob such person," a charge of assault with intent to rob the occupant of a carriage was held not sustainable on evidence that the assault was made upon the driver of the carriage only, without threats or violence to the occupant. R. v. Thomas (1784), 1 Leach C.C. 330, 1 East P.C. 417.

Evidence.]—As to what constitutes an assault, see sec. 258. An attempt or threat, by any act or gesture to apply force to the person of another without the latter's consent is an assault, if the person making the threat has, or causes the other to believe upon reasonable grounds that he has, present ability to effect his purpose. See. 258.

Where the defendant decoyed the prosecutor into a house and chained him down to a seat, and there compelled him to write orders for payment of money and for the delivery of deeds, and the papers on which he wrote remained in his hands for half an hour, but he was chained all the time, this was held not to be an assault with intent to rob. R. v. Edwards (1834), 6 C. & P. 515, 521; R. v. Phipoe (1795), 2 Leach 673. Such cases are now provided for by sec. 402, following sec. 48 of the English statute 24-25 Vict., ch. 96, which was framed to meet such cases.

The evidence on the charge usually proves all the elements of a robbery with the exception of the taking and carrying away.

Assaulting and threatening to charge an infamous crime with intent thereby to extort money, is an assault with intent to rob. R. v. Stringer (1842), 2 Mood. C.C. 261, 1 C. & K. 188.

No actual demand of money is required to make out the offence. R. v. Trusty (1783), 1 East P.C. 418; R. v. Sharwin (1785), 1 East P.C. 421.

401. Stopping the mail.—Every one is guilty of an indictable offence and liable to imprisonment for life, or for any term not less than five years, who stops a mail with intent to rob or search the same. R.S.C. c. 35, s. 81.

The expression "mail" is to be interpreted by the Post Office Act, R.S.O. 1886, ch. 36. Code sec. 4. That Act (sec. 2) declares that "mail" includes every conveyance by which post letters are carried, whether it is by land or by water.

402. Compelling execution of documents by force.—Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to defraud, or injure, by unlawful violence to, or restraint of the person of another,

or by the threat that either the offender or any other person will employ such violence or restraint, unlawfully compels any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal upon any paper or parchment, in order that it may be afterwards made or converted into or used or dealt with as a valuable security. R.S.C. c. 173, s. 5.

As to the origin of this section see note to sec. 400.

Valuable security.]—See definition of this term in sec. 3 (*cc*). A document as follows:—"I hereby agree to pay you 100*l* sterling on the 27th inst. to prevent any action against me" has been held to be a "valuable security." R. v. John (1875), 13 Cox C.C. 100.

403. Sending letter demanding property with menaces.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property, chattel, money, valuable security or other valuable thing. R.S.C. c. 173, s. 1.

Form of indictment.]—The following form of indictment may be used:—

"County of ——, to wit:—The jurors for our Lord the King upon their oath present that J. S. on the —— day of —— in the year of our Lord —— at the —— in the County of ——, unlawfully did send (*or* delivered or uttered and caused to be received) to one J. N. a certain letter (*or* writing) directed to the said J. N. by the name and description of Mr. J. N., demanding money (*or* a certain valuable security to wit, etc.) from the said J. N. with menaces and without any reasonable or probable cause, he the said J. S. then well knowing the contents of the said letter; and which said letter is as follows, that is to say (*here* set out the letter verbatim), against the form of the Criminal Code (sec. 403) and against the peace of our Lord the King his Crown and dignity."

Inspection.]—In R. v. Harrie (1833), 6 C. & P. 105, an order was made that the letter be deposited in the hands of the Clerk of the Peace in order that the defendant's witnesses might inspect it before the trial.

Sends, delivers, etc.]—Proof that the letter is in the defendant's handwriting and that it came to the prosecutor by post is sufficient evidence that the defendant sent it. R. v. Heming (1799), 2 East P.C. 1116; R. v. Jepson (1798), 2 East P.C. 1115. Sending a letter to A. in order that he may deliver it to B. is a sending to B. if the letter is delivered by A. to B. R. v. Paddle (1822), R. & R. 484 and the leaving a letter directed to A. so that it may not only reach A. but B. also and with the intent that it should reach them both is a sending to B. if it reaches him; and it is for the jury to decide as to whom it was intended to reach. R. v. Carruthers (1844), 1 Cox C.C. 138; R. v. Grimwade (1844), 1 Den. C.C. 30, 1 Cox 85.

Knowing the contents thereof.]—The knowledge by the accused of the contents of the letter or writing is an essential ingredient of the offence in all cases under this section. R. v. Girdwood (1776), 1 Leach 142.

The demand.]—A letter signifying an intention to impute a crime to the party from whom it is attempted to obtain the property, in case he does not choose to comply with the sender's suggestion by delivering the property, is a sufficient demand. R. v. Michael Robinson (1796), 2 Leach C.C. 869; 2 East's P.C. 1,110. But a mere request without imposing any conditions would not suffice. Ibid. And see secs. 405 and 406.

With menaces.]—The word "menace" means "a threat or threatening; the declaration or indication of a disposition or determination to inflict an evil; the indication of a probable evil or catastrophe to come." The word as here used in the Code (similar to Imp. Larceny Act, 1861, 24 and 25 Vict., c. 96, s. 44,) is to be given its natural meaning, and will include menaces, or threats of a danger, by an accusation of misconduct, though of misconduct not amounting to a crime, and is not confined to a threat of injury to the person or property of the person threatened. Lord Russell in R. v. Tomlinson, [1895] 1 Q.B. 706, 708.

If the threat be to accuse of a crime, it is no less an offence because the person threatened was really guilty, for, if he was guilty, the accused ought to have prosecuted him for it, and not have extorted money from him. R. v. Gardner (1824), 1 C. & P. 479.

The threat must be of such a nature as is calculated to overcome a firm and prudent man, and to induce him from fear to part with his money or property. R. v. Southerton, 6 East 126, per Lord Ellenborough; but this must be taken to refer to the nature of the demand itself, and not to the state of mind of the party on whom it is made, and if the threatening demand be of such a nature as is calculated to affect a man of a reasonably sound state of mind, the court will not enquire into the degree of nerve possessed by the individual. R. v. Smith (1850), 19 L.J. N.S. M.C. 80, 82.

In the more recent case of R. v. Tomlinson, [1895] 1 Q.B. 706, 710, Mr. Justice Wills said that the threat must not be one that ought to influence nobody, and as persons who are thus practised upon are not, as a rule, of average firmness, there should be given in practice a liberal construction to the doctrine that the threat must be of a nature to operate on a man of reasonably sound or ordinarily firm mind.

A threat or menace to execute a distress warrant which he had no authority to do is not of a character to excite either fear or alarm, but may be made with such gesture and demeanour, or with such other unnecessarily violent acts, or under such circumstances of intimidation, as to have that effect, and this should be decided by the jury. R. v. Walton (1863), 1 Leigh & Cave's Crown Cases, 288, 298.

It is not for the judge to say, as a matter of law, that the conduct of the accused constituted a menace within the statute, and the jury should be told that the question was whether the threats or words used were such as would naturally and reasonably operate on the mind of a reasonable man; in other words, whether they would have such an effect on such a person as to deprive him of his free volition and put a compulsion on him to act as he would not act otherwise. R. v. Tomlinson, [1895] 1 Q.B. 706, 709.

In Reg. v. McDonald, 8 Man. R. 493, a case that was decided on the provision of the criminal law that is now found in this section, it was held, following Reg. v. Southerton (1805), 6 East, 126, that sending a letter threatening a prosecution for a breach of The Liquor License Act unless a sum of money was paid, was not an offence within this section, because the threat was not one that would be likely to overcome a man of an ordinarily firm and prudent mind. But in the recent case of Reg. v. Tomlinson, [1895] 1 Q.B. 706, 18 Cox C.C. 75, the Court, took a less restricted view of the meaning to be given to the word "menaces" in this section than had been taken in previous cases. For this reason it was intimated in R. v. Gibbons (1898), 1 Can. Cr. Cas. at page 345, that when a case arises again under section 403, it may be desirable to reconsider the decision in Reg. v. McDonald.

Under this section what is made criminal is the sending a letter demanding money with menaces; and in these cases it must always be a question of law, whether the menaces in the letters sent are such as are contemplated by the statute. R. v. Gibbons (1898), 1 Can. Cr. Cas. at p. 345, per Bain J. Under section 404, however, the offence is demanding money or property with menaces with intent to steal it. An essential element of that offence is the intent to steal; and any menace or threat that comes within the sense of the word menace in its ordinary meaning, proved to have been made with the intent of stealing the thing demanded, would bring the case within the section. For that reason it cannot be determined as a question of law, and without reference to the circumstances of the particular case whether a demand for money with menaces is within section 404 or not. Ibid.

Without reasonable or probable cause.]—The words "without reasonable or probable cause" apply to the demand for the money and not to the accusation threatened to be made (following R. v. Hamilton (1843), 1 C. & K. 212, a prosecution under 7 and 8 Geo. IV., ch. 29, sec. 8, the wording of which section is identical with the words of Code sec. 403). R. v. Mason (1874), 24 U.C.C.P. 58.

On a charge of delivering a letter demanding property with menaces and without reasonable or probable cause, the question as to whether the demand was made without reasonable or probable cause is one of fact, and the onus of proof is upon the prosecution to prove the want of reasonable or probable cause. R. v. Collins (1895), 1 Can. Cr. Cas. 48 (N.B.).

The words "without reasonable or probable cause" have reference to the state of the prisoner's mind when making the demand. R. v. Miard (1844), 1 Cox C.C. 22; R. v. Chalmers (1867), 10 Cox C.C. 450.

If the money were actually due, the demand of same with menaces would not come within the section. R. v. Johnson, 14 U.C.Q.B. 569; but see sec. 523. A person who threatens to make an accusation with intent to extort money is equally guilty whether the accusation threatened was or was not true. R. v. Richards (1868), 11 Cox C.C. 43.

Property.]—As to meaning of this term see sec. 3 (*v*).

Valuable security.]—See sec. 3 (*cc*).

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

Demurrer.]—The courts do not quash indictments for extortion but leave the defendant to demur. R. v. Wadsworth (1694), 5 Mod. 13; R. v. Tisdale and another (1860), 20 U.C.Q.B. 272.

Evidence.]—A demand of money from a hotel keeper under threat of prosecution for selling intoxicating liquor in prohibited hours contrary to a Liquor License statute if the demand be not complied with, may constitute the offence of demanding money with menaces, "with intent to steal the same." R. v. Gibbons (1898), 1 Can. Cr. Cas. 340 (Man.).

Such a threat of prosecution made to a licensee, who to the knowledge of the prisoner had been previously convicted of an offence under the Liquor License laws and who was therefore liable to cancellation of his license, as well as to heavy penalties, is such a threat as is calculated to do him harm and as would be likely to affect any man in a sound and healthy state of mind, and any such threat is an illegal menace. Ibid.

Demanding with menaces money actually due is not a demand with intent to steal. Where prisoner who owned a house deserted his wife, who in his absence rented the house to P., and on returning demanded the rent with menaces from P., who had in the meantime paid it over to the wife, it was held that if he had succeeded in inducing P. thus to pay him the rent he claimed he never could be held to have stolen that money from him, and that his demanding it with threats under such circumstances could not be held to have been a demand with intent to steal. R. v. Johnson (1857), 14 U.C.Q.B. 569. See, however, sec. 523, as to the offence of intimidation.

Two or more persons may be jointly convicted of extortion when they act together and concur in the demand. Two defendants sat together as magistrates and one illegally exacted a sum of money for justice's fees for his discharge from a person charged before them with a felony, against whom they found no evidence. The other justice made no objection. It was held they might be jointly convicted. R. v. Tisdale (1860), 20 U.C. Q.B. 272.

For the purpose of proving the "intent to steal" it is sufficient if an inference of such intent is deducible from the acts and conduct of the prisoner as shewn by the evidence. The question of "intent to steal" is one entirely for the jury, and cannot be determined as a question of law by the judge. R. v. Gibbons (1898), 1 Can. Cr. Cas. 340 (Man.).

To demand and obtain possession of goods from a debtor for the purpose of holding them as security for a debt actually owing, is not a demand with menaces made with "intent to steal," although such possession is obtained by means of an unjustified threat of the debtor's arrest made by the creditor's agent without any honest belief that the debtor was liable to arrest. R. v. Lyon (1898), 2 Can. Cr. Cas. 242 (Ont.).

405. Extortion by certain threats.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, with intent to extort or gain anything from any person—

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

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

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

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

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

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

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

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

(*d*) by any of the means aforesaid compels or attempts to compel any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal upon or to any paper or parchment, in order that it may be afterwards made or converted into or used or dealt with as a valuable security. R.S.C. c. 173, ss. 3, 4, 1 and 5.

The accusation need not be one made or to be made before a judicial tribunal; a threat to charge before any third person is sufficient. R. v. Robinson (1837), 2 M. & Rob. 14.

It is immaterial whether the prosecutor be innocent or guilty of the offence imputed to him if the accused intended to extort money. R. v. Richards (1868), 11 Cox C.C. 43; R. v. Gardner (1824), 1 C. & P. 479.

Although the prosecutor may be cross-examined as to his guilt of the offence imputed to him with a view to shake his credit, yet no evidence will be allowed to be given by another witness even in cross-examination to prove that the prosecutor was guilty of that offence. R. v. Cracknell (1866), 10 Cox C.C. 408.

Where an information for rape or other offence under sec. 405 is laid with the sole intent to extort money or property from the person against whom the charge is made, the informant thereby "accuses" such person with intent to extort or gain something from him under sec. 405; and commits an indictable offence thereunder. R. v. Kempel (1900), 3 Can. Cr. Cas. 481 (Ont.).

A crime punishable by law with imprisonment for seven years or more means a crime the minimum punishment for which is seven years; and the section does not apply where no minimum term of imprisonment is prescribed. R. v. Popplewell (1890), 20 Ont. R. 303.

If a person has been indicted for an offence or is in custody therefor it is not an offence under this section to threaten to procure witnesses to prove the charge. Archbold Cr. Pl. (1900), 505.

Valuable security.]—For the statutory definition of this term see sec. 3 (C.C.).

406. Extortion by other threats.—Every one is guilty of an indictable offence, and liable to imprisonment for seven years, who —

(*a*) with intent to extort or gain anything from any person accuses or threatens to accuse either that person or any other person of any offence other than those specified in the last section, whether the person accused or threatened with accusation is guilty or not of that offence; or

(*b*) with such intent as aforesaid, threatens that any person shall be so accused by any person; or

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

or

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

The "offence" to accuse, or threaten to accuse, a person of which with intent to extort or gain anything from him is here made an indictable offence, need not be an offence under the Code or other Dominion law, but may be an offence under a provincial law, *ex. gr.* an offence under a Liquor License Act. R. v. Dixon (1895), 2 Can. Cr. Cas. 589 (N.S.).

Where, in a charge of sending a threatening letter to a person with intent to extort money, it is proved that the accused had stated that he had written a letter to such person, and that he had stated its purport in language to the like effect as the threatening letter, it is not error for the court to admit the threatening letter in evidence without further proof of the handwriting, and to submit to the jury for comparison with an exhibit, already in evidence, admittedly written by the accused. A jury may properly make a comparison of doubtful or disputed handwriting, and draw their own conclusion as to its authenticity, if the admittedly genuine handwriting and the disputed handwriting are both in evidence for some purpose in the case, although no witness was called to prove the handwriting to be the same in both. R. v. Dixon (No. 2) (1897), 3 Can. Cr. Cas. 220. (N.S.).

PART XXX.

BURGLARY AND HOUSEBREAKING.

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407. Definition of dwelling-house, etc.—In this part the following words are used in the following senses:

(*a*) "Dwelling-house" means a permanent building the whole or any part of which is kept by the owner or occupier for the residence therein of himself, his family, or servants, or any of them, although it may at intervals be unoccupied;

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

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

(i.) 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;

(ii.) every one who obtains entrance into any building by any threat or artifice used for that purpose, or by collusion with any person in the building, or who enters any chimney or other aperture of the building permanently left open for any necessary purpose, shall be deemed to have broken and entered that building. R.S.C. c. 164, s. 2.

408. Breaking place of worship and commiting offence.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who breaks and enters any place of public worship and commits an indictable offence therein, or who, having committed any indictable offence therein, breaks out of such place. R.S.C. c. 164, s. 35.

409. Breaking place of worship with intent to commit offence.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who breaks and enters any place of public worship, with intent to commit any indictable offence therein. R.S.C. c. 164, s. 42.

(Amendment of 1900.)

410. Burglary defined.—Every one is guilty of the indictable offence called burglary, and liable to imprisonment for life, who—

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

(*b*) breaks out of any dwelling-house by night, either after committing an indictable offence therein, or after having entered such dwelling-house, either by day or by night, with intent to commit an indictable offence therein. R.S.C. c. 164, s. 37.

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

Breaks and enters a dwelling house.]—Some violence is necessary to constitute the actual breaking of a house, though very slight violence is necessary.

If one unlatches a door, opens a window when fastened, or raises it when shut, but being without any fastening, puts back a lock or a bolt, or picks a lock with a false key, takes a pane of glass out of the window, either by taking out the nails or other fastening, or by drawing or bending them back, or by unloosing any other fastening, either to doors or windows, which the owner has provided, all these are burglarious breakings. But where a pane of glass had been cut or cracked for a month, but there was no opening or hole whatever, as every portion of the glass remained exactly in its place, and the prisoner was both seen and heard to put his hand through the glass; this was held a sufficient breaking. 1 Russell, by Greaves, 787; Rex v. Bird, 9 Carrington & Payne 44; per Bosanquet, J. So where a window, opening upon hinges, is fastened by a wedge, so that pushing against it will open it, if such window be forced open by pushing against it, there will be a sufficient breaking. 1 Russell, by Greaves, 787.

Entrance by threat, artifice or collusion.]—If there be no *actual* breaking there must be a breaking by *construction of law*, as where any one by fraud, conspiracy, or threats, procure the door of a dwelling house to be opened to him.

"Thieves come with a pretended hue and cry, and require the constable to go along with them to search for felons, and whilst he goes with them into a man's house, they bind the constable and dweller, and rob him, this is burglary." Coke, 3 Inst. 64; 1 Hale P.C. 552. "This," says Hale, "happened in Blackfriars, 1664, where thieves, pretending that A. harboured traitors, called the constable to go with him to apprehend them, and the constable entering, they bound the constable and robbed A., and were executed for burglary, and yet the owner opened the door of his own accord to the constable." 1 Hale 553; Crompton 22a.

Where divers persons came to a house with intent to rob it, and knocked at the door, pretending to have business with the owner, and being by that means let in, rifled the house, they were found guilty of burglary. 1 Hawkins P.C., ch. 38, sec. 5.

Le Mott's case was thus: "Thieves came with intent to rob him, and finding the door locked up, pretended they came to speak with him, and, thereupon, a maid servant opened the door, and they came in and robbed him, and this being in the night time, this was adjudged burglary, and the persons hanged; for their intention being to rob, and getting the door open by false pretence, this was in fraudem legis, and so they were guilty of burglary, though they did not actually break the house; for this was in law an actual breaking, being obtained by fraud to have the door opened; as if men pretend a warrant to a constable, and bring him along with them, and under that pretence rob the house, if it be in the night, this is burglary." Le Mott's case, Kelyng 42.

"Nor were those less guilty," says Hawkins, "who, having a design to rob a house, took lodging in it, and then fell on the landlord and robbed him; for the law will not endure to have its justice defrauded by such evasions." 1 Hawkins P.C., ch. 38, sec. 5.

"At the jail delivery in the Old Bailey, 10th of October, 1666, Thomas Cassy and John Cotter were indicted for robbing William Pinkney, a goldsmith, by the Temple Bar, in his house near the Highway, in the nighttime, and stealing several parcels of plate and other things from him. And they were also indicted for the same offence for burglary, for breaking his house in the night, and stealing his plate, and on both these indictments they were arraigned and tried; and upon the evidence the case appeared to be, that Cotter was a lodger in the house of the said Pinkney, and knowing that he had plate and money to a good value, he combined with the afore-

said Cassy, and one John Barrington, and Gerrard Cleashard, and they three contrived, that one of these three should come as servant to the other to hire lodgings there for his master and another gentleman; and Cotter told them that Pinkney was one who constantly kept prayers every night, and they could not have so good an opportunity to surprise him as to desire to form in prayer with him, and at that time to fall on him and his maid, there being no other company in the house; and accordingly one of them came on Saturday in the afternoon and hired lodgings there, pretending it to be for his master and another gentleman of good quality, and about eight o'clock at night they all came thither, two of them being in very good habit, and when they were in their chamber they sent for ale, and desired Pinkney to drink with them, which he did; and whilst they were drinking, Cotter came into his lodging, and they, hearing one go up stairs, asked who it was, and Pinkney told them it was an honest gentleman, one Mr. Cotter, who lodged in the house, and they desired to be acquainted with him, and that he might be desired to come to them; and, thereupon, Pinkney sent his maid to let him know the gentlemen desired to be acquainted with him, to which Cotter sent word it was late, the next day was the Sabbath, and he desired to be private, and thereupon these persons told Pinkney they had heard he was a religious man, and used to perform family duties, in which they desired to join with him; at which Pinkney was very well pleased that he had got such religious persons, and so called to prayers, and while he sat at his devotion they rose up and bound him and his servant, and then Cotter came to them and shewed them where his money and plate lay, and they ransacked the house, and broke open the several doors and cupboards fixed to the house; and upon this evidence it was held that the entrance into the house being gained by fraud, with an intent to rob, and they making use of this entrance, thus fraudulently obtained, as in the night-time, to break open doors, etc., this was burglary. Cassy and Cotter's case, Kelyng 62.

Ann Hawkins was indicted for burglary, and, upon evidence, it appeared that she was acquainted with the house, and knew the family were in the country. That meeting with the boy who kept the key, she desired him to go with her to the house, and, to induce him, promised him a pot of ale. The boy accordingly went with her, opened the door, and let her in. She then sent the boy for the pot of ale, robbed the house, and went off. This being in the night-time, Holt, C.J., Tracy and Bury, adjudged it to be clearly burglary in the woman, for she prevailed with the boy, by fraud, to open the door with intent that she might rob the house. Hawkins' case, 2 East P.C. 485.

In The State v. Henry, 9 Iredell 463, it was held that there cannot be a constructive breaking by enticing the owner out of his house by fraud and circumvention, and thus inducing him to open his door, unless the entry be immediate, or in so short a time that there is no opportunity for the owner or his family to refasten the door. In that case, the owner was decoyed to a distance from his house, leaving his door unfastened, and it was not fastened by his family after his departure. At the expiration of ten or fifteen minutes, the prisoner entered the house, by opening the unfastened door, with intent to commit a felony. Held, that this was not burglary.

So to persuade an innocent agent, either under colour of right or on any other excuse, or to incite a child under years of discretion, to open the door of another man's dwelling-house in the night-time, and thence bring out goods, would be burglary in him that should thus persuade, although he take no part himself in the transaction; but the agent or the child, by reason of its tender years, would stand excused. "If A.," says Lord Hale, "being a man of full age, takes a child of seven or eight years old, well instructed by him in this villanous art, as some such there be, and the child goes in at the window, takes goods out, and delivers them to A., who car-

ries them away, this is burglary in A., though the child that made the entry be not guilty, by reason of his infancy." 1 Hale P.C. 555.

"So if the wife, in the presence of her husband, by his threats or coercion, breaks and enters in the house of B. in the night, this is burglary in the husband, though the wife, that is the immediate actor, is excused by the coercion of her husband." 1 Hale P.C. 556; 3 Greenleaf, Ev. sec. 7, note.

Hawkins compares the case of a servant letting in a thief at night with that where many act in concert, and although some of the party keep watch at a distance, they are, by construction of law, equally guilty of breaking and entering the dwelling-house as those who actually break and enter. "It is certain that in some cases one may be guilty of burglary who never made an actual entry at all, as where divers come to commit a burglary together, and some stand to watch in adjacent places, and others enter and rob, etc., for in all such cases the act of one is, in judgment of law, the act of all. And upon the like ground, it seems difficult to find a reason why a servant, who confederating with a rogue, lets him in to rob a house, etc., should not be guilty of burglary as much as he, for it is clear that if the servant were out of the house, the entry of the other would be adjudged to be his also, and what difference is there when he is in the house." Hawkins P.C., ch. 38, secs. 8, 9.

East, 2 P.C. 446, and Blackstone have adopted the reasoning of Hawkins. "If a servant," says the latter (4 Com. 227), "conspires with a robber, and lets him into the house by night, this is burglary in both, for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt."

This, too, was the ground upon which the judges based their decision in Cornwall's case, although the point raised at the trial, and which caused the doubt in the minds of the judges who tried the case, was the fact that the servant did not go out with the prisoner after letting him out of the house. The case is reported in Strange. "Joshua Cornwall was indicted, with another person, for burglary, and upon the evidence it appeared that he was a servant in the house where the robbery was committed, and in the night-time opened the street door and let in the other prisoner, and shewed him the sideboard from whence the other prisoner took the plate; then the defendant opened the door and let him out, but the defendant did not go out with him, but went to bed. Upon the trial before Lord C.J. Raymond, Raymond, J., Dennison, J., and Baron Comyns, at the Old Bailey, it was doubted whether this was burglary in the servant, *he not going out* with the other; and it being laid down in Hale, P.C. 81, Dalton 317, that it is not burglary in the servant, the judges ordered it to be found specially. And afterwards, at a meeting of all the judges at Sergeant's Inn, they were all of opinion that it was burglary in both, and not to be distinguished from a case which had often been ruled, and allowed in the same page in Hale, that if one watches at the street end while the other goes in, it is burglary in all; and upon report of this opinion the next sessions, the prisoner was executed." Cornwall's case, 2 Strange 881.

It was formerly considered doubtful how far it might be considered as a breaking, if a servant, acting in confidence, and with the assent of his master, let robbers in by agreement with them to steal, but in truth with a view to their apprehension. 2 East P.C. 486, 494; but the question was settled in Regina v. Johnson, Carrington & Marshman 218, where it was held that if a servant pretending to agree with a robber, open the door and let him in, for the purpose of detecting and apprehending him, this was no burglary, for the door was lawfully open. Roscoe Crim. Ev. 345.

There may also be a breaking in law where, in consequence of violence commenced or threatened, in order to obtain an entrance, the owner, either from apprehension of the force, or with a view more effectually to repel it,

opens the door, through which the robber enters. 2 East P.C. 486; Hawkins, ch. 38, sec. 4. Although the door was literally opened by one of the family, yet if such opening proceeded from the intimidations of those who were without, and from the force which had been used, knocking at and breaking the windows, calling out and insisting upon the door being opened, and firing of guns; if under these circumstances the persons within were induced to open the door, it was as much a breaking by those who made use of such intimidations, to prevail upon them so to open it, as if they had actually burst the door open. Rex v. Swallow (1813), 1 Russell 792.

But if upon a bare assault upon a house, the owner fling out his money, it is no burglary. 1 Hawkins 38, sec. 3; though, if the money were taken up in the owner's presence, it would be robbery. 2 East P.C. 486; 1 Russell 793.

(*b*) *Breaking out of dwelling-house after committing indictable offence therein.*]—In their Fifth Report the English Commissioners on Criminal Law made the following remarks on burglary, by breaking out of a dwelling-house: "By the statute 12 of Queen Anne, statute 1, ch. 7 (now repealed by 7 and 8 of Geo. IV., ch. 27, and re-enacted by ch. 29 of the same statute), the crime of burglary was extended to the case of an offender, who, having committed a felony in a dwelling-house, or having entered therein with intent to commit a felony, afterwards broke out of such dwelling-house in the night-time. This extension does not, we think, rest upon any just principle. After a felony has been committed within the dwelling-house, the offence is not in reality aggravated by lifting the latch of the door, or the sash of a window, in the night-time, in order to enable the offender to escape. A breaking out, indeed, may be an innocent act, as it may be committed by one desirous of retiring from the further prosecution of a crime; and the extension of the law of burglary to such a case is not warranted by the principles upon which the law is founded, inasmuch as a circumstance not essential to the guilt of the offender, or the mischief of the act, is made deeply essential to the crime. It is ineffectual, even with a view to the object proposed; the pretext for the conviction fails in the absence of a breaking out, which is a casual and uncertain circumstance."

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

(2)—*Having offensive weapon.*]—See definition of the expression "offensive weapon" in sec. 3 (*r*).

411. Housebreaking and committing an indictable offence.—Every one is guilty of the indictable offence called housebreaking, and liable to fourteen years' imprisonment, who—

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

(*b*) breaks out of any dwelling-house by day after having committed any indictable offence therein. R.S.C. c. 164, s. 40.

Housebreaking.]—The principal distinction between this offence, as declared in this and the following section, and the offence of burglary, is that housebreaking is usually applied to the offence committed by day and burglary to that committed by night. But if it be proved on an indictment for housebreaking that the offence was committed by night, *i.e.*, between 9 p.m. and 6 a.m. (sec. 3 (*q*)) and that it is therefore burglary the defendant

may notwithstanding be convicted of housebreaking. R. v. Robinson (1817), R. & R. 321.

412. Housebreaking with intent to commit an indictable offence.—Every one is guilty of an indictable and liable to seven years' imprisonment, who, by day, breaks and enters any dwelling-house with intent to commit any indictable offence therein. R.S.C. c. 164, s. 42.

413. Breaking shop and committing an indictable offence.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, either by day or night, breaks and enters and commits an indictable offence in a school-house, shop, warehouse or counting-house, or any building within the curtilage of a dwelling-house, but not so connected therewith as to form part of it under the provisions hereinbefore contained. R.S.C. c. 164, s. 41.

414. Breaking shop with intent to commit an indictable offence.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, either by day or night, breaks and enters any of the buildings mentioned in the last preceding section with intent to commit any indictable offence therein. R.S.C. c. 164, s. 42.

It is not necessary that an indictment which sufficiently describes that which is by statute an indictable offence should conclude with the words "against the form of the statute in such case made and provided, and against the peace of Our Lord the King, his Crown and dignity." R. v. Doyle (1894), 2 Can. Cr. Cas. 335 (N.S.).

415. Being found unlawfully in dwelling house by night.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who unlawfully enters, or is in, any dwelling-house by night with intent to commit any indictable offence therein. R.S.C. c. 164, s. 39.

416. Being found armed with intent to break a dwelling-house.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who is found—

(*a*) armed with any dangerous or offensive weapon or instrument by day, with intent to break or enter into any dwelling-house, and to commit any indictable offence therein; or

(*b*) armed as aforesaid by night, with intent to break into any building and to commit any indictable offence therein. R.S.C. c. 164, s. 43.

Offensive weapon.]—See sec. 3 (*r*).

By day.]—See sec. 3 (*q*).

Dwelling house.]—See sec. 407 (*a*).

By night.]—See sec. 3 (*q*).

417. Being disguised or in possession of housebreaking instruments.—Every one is guilty of an indictable offence and liable to five years' imprisonment who is found—

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

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

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

(*d*) having his face masked or blackened, or being otherwise disguised, by day, with intent to commit any indictable offence. R.S.C. c. 164, s. 43.

Having in his possession.]—Knowingly having in any place, whether belonging to or occupied by the offender or not, is included, and whether for the use or benefit of the offender or of another person. Sec. 3 (*k*).

Instrument of housebreaking.]—Any instrument capable of being used as an implement of housebreaking and intended to be so used will be included. R. v. Oldham (1852), 2 Den. 472, 3 C. & K. 250, 21 L.J. (Eng.) 134. The possession of a crowbar or other implement of housebreaking by one of two persons acting in concert will be the possession of both. R. v. Thompson (1869), 11 Cox 362, 33 J.P. 791.

418. Punishment after previous conviction.—Every one who, after a previous conviction for any indictable offence, is convicted of an indictable offence specified in this part for which the punishment on a first conviction is less than fourteen years' imprisonment, is liable to fourteen years' imprisonment. R.S.C. c. 164, s. 44.

Indictment.]—In any indictment for any indictable offence, committed after a previous conviction or convictions for any indictable offence or offences or for any offence or offences (and for which a greater punishment may be inflicted on that account), it shall be sufficient, after charging the subsequent offence, to state that the offender was at a certain time and place, or at certain times and places, convicted of an indictable offence, or of an offence or offences, as the case may be, and to state the substance and effect only, omitting the formal part of the indictment and conviction, or of the summary conviction, as the case may be, for the previous offence, without otherwise describing the previous offence or offences. Sec. 628.

Procedure.]—The following is the procedure upon an indictment for committing any offence after a previous conviction or convictions:—The offender shall, in the first instance, be arraigned upon so much only of the indict-

ment as charges the subsequent offence, and if he pleads not guilty, or if the court orders a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if the jury finds him guilty, or if, on arraignment he pleads guilty, he shall then, and not before, be asked whether he was so previously convicted, as alleged in the indictment; and if he answers that he was so previously convicted, the court may proceed to sentence him accordingly, but if he denies that he was so previously convicted, or stands mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall, for all purposes, be deemed to extend to such last mentioned inquiry: Provided, that if upon the trial of any person for any subsequent offence, such person gives evidence of his good character, the prosecutor may, in answer thereto, give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty is returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence. Sec. 676.

PART XXXI.

FORGERY.

SECT.

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419. Document defined.—A document means in this part any paper, parchment, or other material used for writing or printing, marked with matter capable of being read, but does not include trade marks on articles of commerce, or inscriptions on stone or metal or other like material.

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

(*a*) "Exchequer bill" includes exchequer bonds, notes, debentures and other securities issued under the authority of the Parliament of Canada, or under the authority of any Legislature of any Province forming part of Canada, whether before or after such Province so became a part of Canada.

The punishment for forgery of a bank note or exchequer bill may be imprisonment for life. Sec. 423, sub-secs. A (*q*) and A (*r*).

Two prisoners were tried and convicted on an indictment charging them with feloniously offering, etc., a certain forged note, commonly called a Provincial note; the evidence shewed that the prisoners had, with the knowledge that the figure 5 had been pasted over the figure 1, and the word "five" over the word "one" upon a note purporting to be a note issued by the government of the late Province of Canada, passed off and uttered the same as a five dollar note of that denomination, but no evidence was given that the note so altered was a note issued by the Government of Canada, beyond the production of the note. It was objected, but not before the jury were prepared to deliver their verdict, that no proof had been given of the note being a Provincial note. The evidence further shewed that when the attention of the prisoners was called to the paper, they both said, "give it back if it is not good and we will give good money for it," but upon its being placed upon the counter one of the prisoners took it up and refused to return it, or substitute good money for it. The prisoners were found guilty and sentenced. On a case reserved by the judge at the trial it was held that looking at the particular character of the forgery—that is to say an alteration—and the conduct of the prisoners with regard to it, that the onus was on them to dispute the validity of the writing, if its invalidity would be a defence. R. v. Portis (1876), 40 U.C.Q.B. 214.

A forged paper purporting on the face of it to be a bank note is within the definition, although there be no such bank as named. R. v. McDonald, 12 U.C.Q.B 543.

The alteration of a Dominion note for $2 to one for $20, such alteration consisting in the addition of a cipher after the figure two wherever that figure occurred in the margin of the note, was held to be forgery. R. v. Bail (1884), 7 O.R. 228.

On an indictment charging prisoner with uttering a certain writing—to wit, a certain bank note "with intent to defraud," on which he was convicted, it was insisted by prisoner's counsel that there should have been evidence that the bank whose note it purported to be was a corporation legally authorized to issue notes such as that described in the indictment. Carter, C.J., delivering the judgment of the Supreme Court of New Brunswick, said: "The writing in question carries on its face the semblance of a bank note issued by a company in the State of Maine, and there is nothing in its frame which shews that it is illegal, even if there were no charter or Act of incorporation authorizing the issue of such note. The evidence proved that there are genuine instruments of which this is an imitation, which are of value in the State of Maine, and if the illegality of such instruments would afford a defence to the prisoner, and such illegality could be shewn by the Act of incorporation or any other evidence, such proof would lie on him, rather than the negative proof on the Crown." Assuming that illegality of the note would be a defence the court held that the onus of proving illegality lay upon the prisoner. R. v. Brown, 3 Allen (N.B.) 13.

421. False document defined.—The expression "false document" means—

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

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

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

2. It is not necessary that the fraudulent intention should appear on the face of the document, but it may be proved by external evidence.

False document.]—The definition of a false document given in the Code makes no change in the law but merely defines in statutory form what had by judicial construction in the courts been held to constitute a false document, the making of which with the knowledge and intent mentioned in the statute is declared to be forgery, and the uttering of which with like knowledge by one who uses, deals with, or acts upon it as if it were genuine, is made an indictable offence punishable in like manner as forgery. Per Burton, J.A., in Re Murphy (1895), 2 Can. Cr. Cas. 578, 583.

Where a fraudulent conspiracy was entered into between two persons in pursuance of which one of them opened an account in a bank in a fictitious name and gave to the other a cheque, for which the latter knew there were no funds, drawn in the fictitious name, and the same was negotiated by the payee in furtherance of such conspiracy by obtaining another bank to cash the same on the faith of its being a genuine cheque, the cheque is a "false document" both by the Criminal Code (sec. 421) and at common law. Re Murphy (1894), 2 Can. Cr. Cas. 562; S.C. in appeal (1895), 2 Can. Cr. Cas. 578.

An instrument may be the subject of forgery although in fact it should appear impossible for such an instrument as the instrument forged to exist, provided the instrument purports on the face of it to be good and valid as to the purposes for which it was intended to be made. R. v. Sterling (1773), 1 Leach 996; R. v. Portis (1876), 40 U.C.Q.B. 214.

Altering genuine document.]—Making a false document includes altering a genuine document in any material part, and making any material addition to it or adding to it any false date, attestation, seal or other thing which is material, or by making any material alteration in it, either by erasure, obliteration, removal or otherwise. Sec. 422 (2).

Where the forgery consists of the alteration of the time of maturity of an endorsed note, the intent to prejudice someone (see sec. 422) or to defraud may be inferred if the facts warrant the conclusion that either the maker or the endorser might be defrauded, although it appears that the prisoner fully intended to retire the note. R. v. Craig (1858), 7 U.C.C.P. 241. R. v. Hodgson, 2 Jurist N.S. 453.

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

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

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

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

Filling in check signed in blank.]—If a check is given to a person with a certain authority, the agent is confined strictly within the limits of that authority, and if he choose to alter it, the crime of forgery is committed. If a blank check be delivered to him with a limited authority to complete it, and he fill it up with an amount different from the one he was directed to insert, and if, after the authority was at end, he fill it up with any amount whatever, that too would be clearly forgery. R. v. Bateman (1845), 1 Cox C.C. 186; R. v. Hart (1836), 7 C. & P. 652, 1 Moody C.C. 486; R. v. Wilson (1847), 1 Den. C.C. 284.

Filling in the body of a blank check to which a signature is attached, without any authority, is a forgery. The prisoners were indicted for uttering a forged check, and it appeared that one Townsend was in the habit of signing blank checks and leaving them with his clerk when business called him away from home; one of these checks fell into the hands of the prisoners, who filled up the blank with the words "one hundred pounds," and dated it; it was objected that the signature being genuine, it could not be said that the prisoner had uttered a forged instrument: but Bailey, J., held that it was a forgery of the check. By filling in the body and dating it, it was made a perfect instrument, which it previously was not, and although it was not in point of fact made entirely by the prisoners, yet it had been held that the doing that which is necessary to make an imperfect instrument a perfect one, is a forgery of the whole. The learned judge was also of opinion that if the bankers had paid the check they might have recovered the amount from the prosecutor, as he was in the habit of leaving blank checks out, with his name written at the bottom. Wright's case, 1 Lewin, C.C. 135.

Forgery generally.]—To forge is, in its general sense, to counterfeit, to falsify; though to convict the person who made the false instrument of a crime the intent to defraud must be made to appear. R. v. Dunlop (1857), 15 U.C.Q.B. 118.

Mr. Justice Stephen, in his third edition of his Digest of the Criminal Law, p. 285, defines forgery as the "making of a false document with intent to defraud." The making of a false document includes the alteration of it, for the alteration of a genuine instrument makes it a false instrument. R. v. Bail (1884), 7 Ont. R. 228.

To constitute the crime of forgery it is not necessary that the writing charged to be forged should be such as would be effectual if it were a true and genuine writing. R. v. Portis (1876), 40 U.C.Q.B. 214.

The counterfeiting of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery at common law. 2 Russ. Cr. (4th ed.) 768; Ex parte Cadby (1886), 26 N.B.R. 452, 492; R. v. Stewart (1875), 25 U.C.C.P. 440; R. v. Ward (1727), 2 Ld. Raym. 1461.

The prisoner, with intent to defraud, wrote out a telegraph message purporting to be sent by one C. to D., authorizing the latter to furnish the prisoner with funds. This was left by a boy, as from the telegraph office, being written on paper having the heading and appearance of a telegraphic despatch. Afterwards on the same day prisoner called on D., who told him he had received a telegram from C.; prisoner said, "I thought so." Upon the faith of the document D. went with prisoner to the bank and endorsed a draft drawn by the prisoner on C. for $85, the proceeds of which were handed over to the prisoner. It was held that the counterfeiting of what purported to be only a copy of C.'s signature was a forgery. R. v. Stewart (1875), U.C.C.P. 440.

It is a forgery to fraudulently make a deed which purports to be something quite different from that which it really is, ex. gr. by antedating it for a fraudulent purpose, even though it is executed by the parties between whom it is expressed to be made. R. v. Ritson (1869), L.R. 1 C.C.R. 200. The execution of a deed by prisoner in the name of and representing himself to be another may be a forgery if done with intent to defraud, even though he had a power of attorney from such person, but fraudulently concealing the fact of his being only such attorney, and assuming to be the principal. R. v. A. I. Gould (1869), 20 U.C.C.P. 154.

Fictitious name.]—The result of the cases is, that where a fictitious name is assumed for the purposes of a fraud, the offence of forgery may be proved, but not where the credit is given solely to the person without any regard to the name, as in R. v. Martin (1880), 5 Q.B.D. 34, per Hagarty, C.J.O. in Re Murphy (1895), 2 Can. Cr. Cas. 578, 582; R. v. Whyte (1851), 5 Cox C.C. 290; R. v. Wardell (1862), 3 F. & F. 82.

Where a person passing under an assumed name falsely represents that he is in the employment of a certain firm, and that he is authorized to make a draft upon such firm, his signature in such assumed name to a draft upon the firm, and his fraudulent negotiation of it, constitute forgery, if the credit obtained in negotiating the bill was not personal to himself alone, without relation to his supposed employers, and if the false name, although that of a non-existent person, was assumed for the very purpose of perpetrating the fraud. Re M. B. Lazier (1899), 3 Can. Cr. Cas. 167 (Ont. C.A.).

In R. v. Dunn (1765), 1 Leach C.C. 68, the accused had represented herself to be the widow of John Wallace, a deceased seaman, and in that character applied to a prize agent for prize money due to him by the Government. She exhibited what purported to be the probated will of the deceased, and thereby induced the agent to advance money to her on a promissory note, signed by her in the name of the supposed widow, for which advances the agent was to reimburse himself out of the prize money, when obtained. A conviction on a charge of forgery was confirmed on a case reserved. Nine of the ten judges in that case agreed to the following (Leach C.C. 68), as the rules governing the case:

(1) In all forgeries, the instrument supposed to be forged must be a false instrument in itself;

(2) If a person gives a note *entirely as his own*, his subscribing it by a fictitious name will not make it forgery, the credit being there wholly given to *himself*, without any regard to the name, or without any relation to a third person;

(3) An instrument which is uttered as the act and instrument of another, and in that light obtains a superior credit, when in truth it is not the act of

the person represented, is strictly and properly a false instrument, for in that case the party deceived does not advance his money or accept the instrument upon the personal credit of the party producing it, but upon the name and character of the third person, whose situation and circumstances import a superior security for the debt; and therefore, if in truth it is not the instrument of that third person, whose name and situation induced the credit, it is certainly a false instrument, and the intention fraudulent to the party imposed upon by it, for he believed, when he accepted the security, that he had a remedy upon it against the third person in whose name it was given and on whom he relied when he advanced the money, but, this being false, he has no such remedy, and therefore is materially deceived;

(4) If an instrument be false in itself, and by its purporting to be the act of another a credit is obtained which would not otherwise have been given, it is forgery, though the name it is given in be really a non-entity;

(5) The case is very different if the person borrowing money upon his own note and assuming a fictitious name does so without any relation to a different person. In that case the whole credit is given to the party himself; the lender accepts the security as the security of that person only; he has no other remedy in view, but merely against the man he is dealing with, and the security is really and truly the instrument of the party whose act it purports to be, however subscribed by a fictitious name; he has, therefore, a remedy upon it against the person on whose credit he took it, and consequently is not substantially defrauded.

In R. v. Whyte (1851), 5 Cox C.C. 290, the prisoner had purchased goods of a warehouseman and represented that he was in business with one Whiffen, under the firm name of Whiffen & Co. Several bills for goods so purchased were met, but finally Whyte desired the warehouseman to draw on the firm for a certain bill of goods. This was done, and the bill was accepted by him in the name of the pretended firm. Talfourd, J., there said: "I think it will scarcely be sufficient to shew that the name of Whiffen was assumed for the purpose of fraud generally; it must have been taken for the specific object of passing off this bill; the carrying on business in the false name might be for the purpose of creating a false impression with a view to obtain credit. That might support a charge of obtaining money or goods by false pretences, but not a charge of forgery."

To sustain a conviction, it should appear either that the prisoner had not gone by the fictitious name before the signing, or that he had assumed the name for the purpose of committing the fraud. R. v. Bontien (1813), Rus. & Ry. 260; R. v. Peacock (1814), ibid. 278; R. v. Lockett (1772), 1 Leach C.C. 94; R. v. Sheppard (1781), 1 Leach C.C. 226; R. v. Francis (1811), Russ. & Ry. 209.

In a recent Georgia case a person who, in an assumed name, made a draft on another whom he falsely claimed to be his father, was held guilty of forgery. Lascelles v. The State, 90 Ga. 347.

Forgery at common law.]—At common law the offence of forgery was punishable as a misdemeanor. It is defined by Sir W. Blackstone as "the fraudulent making or altering of a writing to the prejudice of another man's right." 4 Com. 247. And by Mr. East, as "a false making, a making malo animo, of any written instrument for the purpose of fraud and deceit." 2 East P. C. 852. Forgery consists not in making a deed which has a false statement in it, but in making an instrument appear to be what it is not. Per Blackburn, J., in R. v. Ritson, L.R. 1 C.C.R. 200, 39 L.J.M.C. 10; Ex parte Windsor, 34 L.J.M.C. 163.

Though doubts were formerly entertained on the subject, it is now clear that forging any document, with a fraudulent intent, and whereby another person may be prejudiced, is within the rule. Thus, after much debate, it was held that forging an order for the delivery of goods was a misdemeanor

at common law. R. v. Ward, Str. 747, 2 Ld. Raym. 1461. And the same was held by a majority of the judges, with regard to a document purporting to be a discharge from a creditor to a gaoler, directing him to discharge a prisoner in his custody. R. v. Fawcett, 2 East P.C. 862. R. v. Ward is considered by Mr. East to have settled the rule, that the counterfeiting of *any writing*, with a fraudulent intent, whereby another may be prejudiced, is forgery at common law. 2 East P.C. 861.

Forgery at common law must be of some document or writing. Therefore where the prisoner was indicted for forging the name of J. Linnell, and the evidence was that he painted it in the corner of a picture, with intent to pass off the picture as a work of that artist, this was held not to be a forgery. But that, if money had been obtained by the fraud, the defendant was indictable for a cheat at common law. R. v. Closs, Dears. & B.C.C. 460, 27 L.J.M.C. 54. So where the prisoner caused wrappers to be printed similar to those of another tradesman, and sold in them a composition called "Borwick's Baking Powder," but caused the signature and the notification that without such signature no powder was genuine, which appeared on the genuine wrappers, to be omitted, it was held that this was no forgery, though the jury found that the wrappers were procured by the prisoner with intent to defraud. R. v. Smith, Dears. & B.C.C. 566, 27 L.J.M.C. 225.

It is not necessary to the sustaining an indictment for forgery at common law that any prejudice should in fact have happened by reason of the fraud. R. v. Ward, Str. 747, 2 Ld. Raym. 1461. Nor is it necessary that there should be any publication of the forged instrument. 2 East P.C. 855, 951; Russ. on Cri. 618, 5th ed.

It is not forgery fraudently to procure a party's signature to a document, the contents of which have been altered without his knowledge. R. v. Chadwicke, 2 Moo. & R. 545. Or fraudulently to induce a person to execute an instrument on a misrepresentation of its contents. Per Rolfe, B.; R. v. Collins, M.S. 2 Moo. & B. 461.

No ratification.]—Though fraud or breach of trust may be ratified, forgery cannot be. La Banque Jacques Cartier v. La Banque d'Epargne, 13 App. Cas. 118; Burton v. L. & N. W. Ry. Co., 6 L.T. Rep. 70; Merchants Bank of Canada v. Lucas (1890), 18 Can. S.C.R. 704, affirming 15 Ont. App. 572, which reversed that of the Divisional Court, 13 O.R. 520.

423. Punishment of forgery.—Every one who commits forgery of the documents hereinafter mentioned is guilty of an indictable offence and liable to the following punishment:

(*A*) To imprisonment for life if the document forged purports to be, or was intended by the offender to be understood to be or to be used as—

(*a*) any document having impressed thereon or affixed thereto any public seal of the United Kingdom or any part thereof, or of Canada or any part thereof, or of any dominion, possession or colony of His Majesty; R.S.C. c. 165, s. 4; or

(*b*) any document bearing the signature of the Governor-General, or of any administrator, or of any deputy of the Governor, or of any

Lieutenant-Governor or any one at any time administering the government of any Province of Canada; R.S.C. c. 165, s. 5; or

(*c*) any document containing evidence of, or forming the title or any part of the title to, any land or hereditatment, or to any interest in or to any charge upon any land or hereditatment, or evidence of the creation, transfer or extinction of any such interest or charge; or

(*d*) any entry in any register or book, or any memorial or other document made, issued, kept or lodged under any Act for or relating to the registering of deeds or other instruments respecting or concerning the title to or any claim upon any land or the recording or declaring of titles to land; R.S.C. c. 165, s. 38; or

(*e*) any document required for the purpose of procuring the registering of any such deed or instrument or the recording or declaring of any such title; R.S.C. c. 165, s. 38; or

(*f*) any document which is made, under any Act, evidence of the registering or recording or declaring of any such deed, instrument or title; R.S.C. c. 165, s. 38; or

(*g*) any document which is made by any Act evidence affecting the title to land; or

(*h*) any notarial act or document or authenticated copy, or any *proces-verbal* of a surveyor or authenticated copy thereof; R.S.C. c. 165, s. 38; or

(*i*) any register of births, baptisms, marriages, deaths or burials authorized or required by law to be kept, or any certified copy of any entry in or extract from any such register; R.S.C. c. 165, s. 43; or

(*j*) any copy of such register required by law to be transmitted by or to any registrar or other officer; R.S.C. c. 165, s. 44; or

(*k*) any will, codicil or other testamentary document, either of a dead or living person, or any probate or letters of administration, whether with or without the will annexed; R.S.C. c. 165, s. 27; or

(*l*) any transfer or assignment of any share or interest in any stock, annuity or public fund of the United Kingdom or any part thereof, or of Canada or any part thereof, or of any dominion, possession or colony of His Majesty, or of any foreign state or country, or receipt or certificate for interest accruing thereon; R.S.C. c. 165, ss. 8 and 25; or

(*m*) any transfer or assignment of any share or interest in the debt of any public body, company, or society, British, Canadian, or foreign, or of any share or interest in the capital stock of any such company or society, or receipt or certificate for interest accruing thereon; R.S.C. c. 165, s. 8; or

(*n*) any transfer or assignment of any share or interest in any claim to a grant of land from the Crown, or to any scrip or other payment or allowance in lieu of any such grant of land R.S.C. c. 165, s. 8; or

(*o*) any power of attorney or other authority to transfer any interest or share hereinbefore mentioned, or to receive any dividend or money payable in respect of any such share or interest; R.S.C. c. 165, s. 8; or

(*p*) any entry in any book or register, or any certificate, coupon, share, warrant or other document which by any law or any recognized practice is evidence of the title of any person to such stock, interest or share, or to any dividend or interest payable in respect thereof; R.S.C. c. 165, s. 11; or

(*q*) any exchequer bill or endorsement thereof, or receipt or certificate for interest accruing thereon; R.S.C. c. 165, s. 13; or

(*r*) any bank note or bill of exchange, promissory note or cheque, or any acceptance, endorsement or assignment thereof; R.S.C. c. 165, ss. 18, 25 and 28; or

(*s*) any scrip in lieu of land; R.S.C. c. 165, s. 13; or

(*t*) any document which is evidence of title to any portion of the debt of any dominion, col-

ony or possession of His Majesty, or of any foreign state, or any transfer or assignment thereof; or

(*u*) any deed, bond, debenture, or writing, obligatory, or any warrant, order, or other security for money or payment of money, whether negotiable or not, or endorsement or assignment thereof; R.S.C. c. 165, ss. 26 and 32; or

(*v*) any accountable receipt or acknowledgment of the deposit, receipt or delivery of money or goods, or endorsement or assignment thereof; R.S.C. c. 165, s. 29; or

(*w*) any bill of lading, charter-party, policy of insurance, or any shipping document accompanying a bill of lading, or any endorsement or assignment thereof; or

(*x*) any warehouse receipt, dock warrant, dock-keeper's certificate, delivery order, or warrant for the delivery of goods, or of any valuable thing, or any endorsement or assignment thereof; or

(*y*) any other document used in the ordinary course of business as proof of the possession or control of goods, or as authorizing, either on endorsement or delivery, the possessor of such document to transfer or receive any goods.

(*B*) To fourteen years' imprisonment if the document forged purports to be, or was intended by the offender to be understood to be, or to be used as—

(*a*) any entry or document made, issued, kept or lodged under any Act for or relating to the registry of any instrument respecting or concerning the title to, or any claim upon, any personal property; R.S.C. c. 165, s. 38;

(*b*) any public register or book not hereinbefore mentioned appointed by law to be made or kept, or any entry therein; R.S.C. c. 165, s. 7.

(*C*) To seven years' imprisonment if the document forged purports to be, or was intended by the offender to be understood to be, or to be used as—

(*a*) any record of any Court of Justice, or any document whatever belonging to or issuing from any Court of Justice, or being or forming part of any proceeding therein; or

(*b*) any certificate, office copy, or certified copy or other document which, by any statute in force for the time beng, is admissible in evidence; or

(*c*) any document made or issued by any judge, officer or clerk of any Court of Justice, or any document upon which, by the law or usage at the time then in force, any Court of Justice or any officer might act; or

(*d*) any document which any magistrate is authorized or required by law to make or issue; or

(*e*) any entry in any register or book kept, under the provisions of any law, in or under the authority of any Court of Justice or magistrate acting as such; or

(*f*) any copy of any letters patent, or of the enrolment or enregistration of letters patent, or of any certificates thereof; R.S.C. c. 165, s. 6; or

(*g*) any license or certificate for or of marriage; R.S.C. c. 165, s. 42; or

(*h*) any contract or document which, either by itself or with others, amounts to a contract, or is evidence of a contract; or

(*i*) any power or letter of attorney or mandate; or

(*j*) any authority or request for the payment of money, or for the delivery of goods, or of any note, bill, or valuable security; R.S.C. c. 165, s. 29; or

(*k*) any acquittance or discharge, or any voucher of having received any goods, money, note, bill or valuable security, or any instrument which is evidence of any such receipt; R.S.C. c. 165, s. 29; or

(*l*) any document to be given in evidence as a genuine document in any judicial proceeding; or

(*m*) any ticket or order for a free or paid passage on any carriage, tramway or railway, or on any steam or other vessel; R.S.C. c. 165, s. 33; or

(*n*) any document other than those above mentioned. R.S.C. c. 165, s. 76.

Jurisdiction.]—In Ontario a provincial statute, 53 Vict., ch. 18, was passed, by which it was declared that Courts of General Sessions should have jurisdiction to try any person for any offence under certain sections of the Forgery Act, R.S.C., ch. 165. It was held that the provincial legislature had power to so enact, and that such a provision was one relating to the constitution of a court rather than to criminal procedure. R. v. Levinger, 22 O.R. 690. But a provision in the same statute authorizing police magistrates to try and to convict persons charged with forgery was declared ultra vires. R. v. Toland, 22 O.R. 505.

Indictment.]—Where in an indictment for forgery the forged document is set out verbatim it is not necessary to give a description of its legal character. R. v. Carson (1864), 14 U.C.C.P. 309.

Order for payment of money.]—A writing not addressed to any one may be an order for the payment of money if it be shewn by evidence for whom it was intended. In this case the order was for $15 in favour of "bearer or R.R. and purported to be signed by one B." The prisoner in person presented it to M., representing himself to be the payee and a creditor of B. It was held that it might fairly be inferred to have been intended for M., and a conviction for forgery was sustained. R. v. Parker (1864), 15 U.C.C.P. 15.

Evidence.]—The fact of his flight from a charge of forgery militates against the accused. R. v. Judd (1788), 2 T.R. 255; R. v. Van Aerman (1854), 4 U.C.C.P. 288.

Corroboration.]—A conviction cannot be made for forgery upon the evidence of one witness unless such witness is corroborated in some material particular by evidence implicating the accused. Cr. Code, sec. 684. And see note to that section.

A witness who testified that the forged signatures were written by the accused is not corroborated in a "material particular by evidence implicating the accused" by proof that certain other signatures were in the same handwriting, when the only evidence shewing that the latter signatures were written by the accused was the testimony of the *same* witness who had testified to the handwriting of the signatures first mentioned. R. v. McBride (1895), 2 Can. Cr. Cas. 544 (Ont.).

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

2. It is immaterial where the document was forged.

Uttering forged paper.]—Where a defendant had forged the name of the payee of a cheque, payable to his order, on the back of a cheque it was held that he was rightly convicted of uttering a forged "order for the payment of money," but that he could not be convicted of uttering a forged cheque. R. v. Cunningham (1885), 6 N.S.R. 31.

Prisoner drew a promissory note payable *two* months after date to the order of T.S., who endorsed it; after the endorsement by T.S. prisoner altered the note by making it payable at *three* months after date. The indictment contained six counts, the fourth of which was "offering and putting off a forged promissory note," and the prisoner was convicted on the fourth count of the indictment. On motion for a new trial it was held that the moment the note was altered in a material point it ceased to be that

which T.S. had endorsed; and that being uttered in the altered state as a note endorsed by him, when it was not the note endorsed by him, such uttering was the uttering of a *note altered* so as to constitute forgery—a forgery of a note at three months, endorsed by T.S.—and not a forgery of T.S.'s endorsement on a genuine note at three months. R. v. Craig (1858), 7 U.C.C.P. 241. The transfer of the note to a third party who had sued the endorser and failed to recover because of the alteration is evidence of the intent to defraud which is a question for the jury. Ibid.

The shewing of a forged receipt to a person with whom the defendant is claiming credit on account of that receipt is an uttering, although the defendant never voluntarily parts with the possession of it. R. v. Radford (1844), 1 Den. C.C. 59, 1 Cox C.C. 168.

Invoices certified in blank.]—The customs tariff, 1897, 60-61 Vict., ch. 16, makes the following additional provision regarding blank invoices with certificate of correctness:—"Any person who, without lawful excuse, the proof of which shall be on the person accused, sends or brings into Canada, or who being in Canada, has in his possession, any bill-heading or other paper appearing to be a heading or blank capable of being filled up and used as an invoice, and bearing any certificate purporting to shew, or which may be used to shew, that the invoice which may be made from such bill-heading or blank is correct or authentic, is guilty of an indictable offence and liable to a penalty of five hundred dollars, and to imprisonment for a term not exceeding twelve months, in the discretion of the court, and the goods entered under any invoice made from any such bill-heading or blank shall be forfeited."

425. Counterfeiting seals.—Every one is guilty of an indictable offence and liable to imprisonment for life who unlawfully makes or counterfeits any public seal of the United Kingdom or any part thereof, or of Canada or any part thereof, or of any dominion, possession or colony of His Majesty, or the impression of any such seal, or uses any such seal or impression, knowing the same to be so counterfeited. R.S.C. c. 165, s. 4.

426. Counterfeiting seals of courts, registry offices, etc.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who unlawfully makes or counterfeits any seal of a Court of Justice, or any seal of or belonging to any registry office or burial board, or the impression of any such seal, or uses any such seal or impression knowing the same to be counterfeited. R.S.C. c. 165, ss. 35, 38 and 43.

427. Unlawfully printing proclamation, etc.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who prints any proclamation, order, regulation or appointment, or notice thereof, and causes the same falsely to purport to have been printed by the King's Printer for Canada, or the Government Printer for any Province of Canada, as the case may be, or tenders in evidence any copy of any

proclamation, order, regulation or appointment which falsely purports to have been printed as aforesaid, knowing that the same was not so printed. R.S.C. c. 165, s. 37.

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

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

430. Possessing forged bank notes.—Every one is of an indictable offence and liable to fourteen years' imprisonment who, without lawful authority or excuse (the proof whereof shall lie on him), purchases or receives from any person, or has in his custody or possession, any forged bank note, or forged blank bank note, whether complete or not, knowing it to be forged. R.S.C. c. 165, s. 19.

Has in his custody or possession.]—See the interpretation clause, Code sec. 3 (*k*).

431. Drawing document without authority.—Every one is guilty of an indictable offence who, with intent to defraud, and without lawful authority or excuse, makes or executes, draws, signs, accepts or endorses, in the name or on the account of another person, by procuration or otherwise, any document, or makes use of or utters any such document, knowing it to be so made, executed, signed, accepted or endorsed, and is liable to the same punishment as if he had forged such document. R.S.C. c. 165, s. 30.

Any document.]—A "document" here means any paper, parchment, or other material used for writing or printing, marked with matter capable of being read, but does not include trade marks on articles of commerce, or inscriptions on stone or metal or other like material. Sec. 419.

An indictment may be laid for unlawfully and with intent to defraud signing a promissory note by procuration, although the name signed is

the name of a testamentary succession or of an estate in liquidation (e.g. "Estate John Doe"), but if the indictment does not disclose the particulars, an order will be made against the Crown to furnish particulars of the names and capacities of the persons representing such estate at the time when the offence is alleged to have been committed, and directing that the defendants be not arraigned until after the particulars have been delivered. R. v. Weir (No. 2) (1899), 3 Can. Cr. Cas. 155.

A count of an indictment charging the defendant with having, with intent to defraud, unlawfully made use of and uttered a promissory note, alleged to have been made and signed by one of the defendants by procuration without lawful authority or excuse and with intent to defraud, is defective if it does not also allege that the defendants knew it to have been so made and signed. Such a defect is one of substance and cannot be amended under Code sec. 629. R. v. Weir (No. 5) (1900), 3 Can. Cr. Cas. 431 (Que.).

432. Using probate obtained by forgery or perjury. —Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who—

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

(*b*) attempts to do any such thing as aforesaid. R.S.C. c. 165, s. 45.

PART XXXII.

PREPARATION FOR FORGERY AND OFFENCES RESEMBLING FORGERY.

SECT.

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433. Interpretation of terms.—In this part the following expressions are used in the following senses:

(*a*) " Exchequer bill paper " means any paper provided by the proper authority for the purpose of being used as exchequer bills, exchequer bonds, notes, debentures, or other securities mentioned in section four hundred and twenty;

(*b*) " Revenue paper " means any paper provided by the proper authority for the purpose of being used for stamps, licenses, or permits, or for any other purpose connected with the public revenue.

434. Instruments of forgery.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, without lawful authority or excuse (the proof whereof shall lie on him)—

(*a*) makes, begins to make, uses or knowingly has in his possession any machinery or instrument or material for making exchequer bill paper, revenue paper or paper intended to resemble the bill paper of any firm or body corporate, or person carrying on the business of banking. R.S.C. c. 165, ss. 14, 16, 20 and 24; or

(*b*) engraves or makes upon any plate or material anything purporting to be, or apparently intended to resemble,

the whole or any part of any exchequer bill or bank note; R.S.C. c. 165, ss. 20, 22 and 24; or

(*c*) uses any such plate or material for printing any part of such exchequer bill or bank note; R.S.C. c. 165, ss. 22 and 23; or

(*d*) knowingly has in his possession any such plate or material as aforesaid; R.S.C. c. 165, ss. 22 and 23; or

(*e*) makes, uses or knowingly has in his possession any exchequer bill paper, revenue paper, or any paper intended to resemble any bill paper of any firm, body corporate, company or person, carrying on the business of banking, or any paper upon which is written or printed the whole or any part of any exchequer bill, or of any bank note; R.S.C. c. 165, ss. 15, 16, 20 and 24;

(*f*) engraves or makes upon any plate or material anything intended to resemble the whole or any distinguishing part of any bond or undertaking for the payment of money used by any dominion, colony, or possession of His Majesty, or by any foreign prince or state, or by any body corporate, or other body of the like nature, whether within His Majesty's dominions or without; R.S.C. c. 165, s. 25; or

(*g*) uses any such plate or other material for printing the whole or any part of such bond or undertaking; R.S.C. c. 165, s. 25; or

(*h*) knowingly offers, disposes of or has in his possession any paper upon which such bond or undertaking, or any part thereof, has been printed; R.S.C. c. 165, s. 25.

435. Counterfeiting stamps.—Every one is guilty of an indictable offence, and liable to fourteen years' imprisonment who—

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

(*b*) knowingly sells or exposes for sale, or utters or uses any such counterfeit stamp; or

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

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

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

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

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

(*h*) knowingly and without lawful excuse (the proof whereof shall lie upon him) has in his possession any stamp or part of a stamp which has been fraudulently cut, torn, or otherwise removed from any material, or any stamp which has been fraudulently mutilated, or any stamped material out of which any name, sum, date, or other matter or thing has been fraudulently erased or otherwise, either really or apparently removed; R.S.C. c. 165, s. 17; or

(*i*) without lawful authority makes or counterfeits any mark or brand used by the Government of the United Kingdom of Great Britain and Ireland, the Government of Canada, or the Government of any Province of Canada, or by any department or officer of any such Government for any purpose in connection with the service or business of such Government, or the impression of any such mark or brand, or sells or exposes for sale, or has in his possession any goods having thereon a counterfeit of any such mark or brand, knowing the same to be a counterfeit, or affixes any such mark or brand to any goods required by law to be marked or branded, other than those to which such mark or brand was originally affixed.

On a prosecution under the Post Office Protection Act (Imp.), 1884, sec. 7 (*c.*) for having in possession "without lawful excuse" a die for making a fictitious stamp, it appeared by the evidence that the defendant was the proprietor of a newspaper circulating among stamp collectors, and had caused a die to be made for him abroad, from which imitatations of a current colonial postage stamp could be made. The only purpose for which he had actually used it was for making on an illustrated catalogue illustrations in black and white, and not in colors of the stamp in question. This catalogue was sold as part of his newspaper. On a case stated by a magis-

trate as to whether this evidence shewed "a lawful excuse," Grantham and Collins, JJ., were unanimous that it did not, and that the defendant was liable under the Act. Dickins v. Gill, [1896] 2 Q.B. 310, 18 Cox 384.

436. Falsifying registers.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who—

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

(*b*) unlawfully inserts in any such register, or any such copy thereof, any entry, known by him to be false, of any matter relating to any birth, baptism, marriage, death or burial, or erases from any such register or document any material part thereof. R.S.C. c. 165, ss. 43 and 44.

Evidence.]—A register is none the less defaced or injured because when produced in court the torn part has been pasted in and is as legible as before the offence. R. v. Bowen (1844), 1 Cox C.C. 88; 1 Den. 22.

A person who knowing his name to be A. signs another name as a witness to a marriage in an authorized register, is guilty of the offence of inserting a false entry in the register although he so signs as a third witness and two only were required by law. R. v. Asplin (1873), 12 Cox C.C. 391.

Where the false entry is actually made on the information of and at the instance of the accused, he is guilty of the offence of inserting the entry in the register and not merely of making a false statement for that purpose. R. v. Mason (1848), 2 C. & K. 622; R. v. Dewitt (1849), 2 C. & K. 905.

The offence of making false statements as to births, marriages and deaths in regard to particulars for registration is controlled by provincial law. See R.S.O. 1897, ch. 44, sec. 28.

437. Falsifying extracts from registers.—Every one is guilty of an indictable offence and liable to ten years' imprisonment, who—

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

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

(*c*) being a person having the custody of such register or certified copy, permits it to be so taken or concealed as aforesaid. R.S.C. c. 165, s. 44.

438. Uttering false certificates.—Every one is guilty of an indictable offence and liable to seven years' imprisonment, who—

(*a*) being by law required to certify that any entry has been made in any such register as in the two last preceding sections mentioned makes such certificate, knowing that such entry has not been made; or

(*b*) being by law required to make a certificate or declaration concerning any particular required for the purpose of making entries in such register, knowingly makes such certificate or declaration containing a falsehood; or

(*c*) being an officer having custody of the records of any Court, or being the deputy of any such officer, wilfully utters a false certificate of any record; or

(*d*) not being such officer or deputy fraudulently signs or certifies any copy or certificate of any record or any copy of any certificate, as if he were such officer or deputy. R.S.C. c. 165, ss. 35 and 43.

439. Forging certificates.—Every one is guilty of an indictable offence and liable to two years' imprisonment, who—

(*a*) being an officer required or authorized by law to make or issue any certified copy of any document, or of any extract from any document, wilfully certifies, as a true copy of any document, or of any extract from any such document, any writing which he knows to be untrue in any material particular; or

(*b*) not being such officer as aforesaid fraudulently signs or certifies any copy of any document, or of any extract from any document, as if he were such officer.

440. Making false entries in books relating to public funds.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, with intent to defraud—

(*a*) makes any untrue entry or any alteration in any book of account kept by the Government of Canada, or of any Province of Canada, or by any bank for any such Government, in which books are kept the accounts of the owners of any stock, annuity or other public fund transferable for the time being in any such books, or who, in any manner, wilfully falsifies any of the said books; or

(*b*) makes any transfer of any share or interest of or in any stock, annuity or public fund, transferable for the time being at any of the said banks, in the name of any person other than the owner of such share or interest. R.S.C. c. 165, s. 11.

441. Clerks issuing false dividend warrants.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being in the employment of the Government of Canada, or of any Province of Canada, or of any bank in which any books of account mentioned in the last preceding section are kept, with intent to defraud, makes out or delivers any dividend warrant, or any warrant for the payment of any annuity, interest or money payable at any of the said banks, for an amount greater or less than that to which the person on whose account such warrant is made out is entitled. R.S.C. c. 165, s. 12.

442. Printing circulars, etc., in likeness of notes.—Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to a fine of one hundred dollars or three months' imprisonment, or both, who designs, engraves, prints, or in any manner makes, executes, utters, issues, distributes, circulates, or uses any business or professional card, notice, placard, circular, hand-bill or advertisement in the likeness or similitude of any bank note, or any obligation or security of any Government or any bank. 50-51 V., c. 47, s. 2; 53 V., c. 31, s. 3.

PART XXXIII.

FORGERY OF TRADE MARKS—FRAUDULENT MARKING OF MERCHANDISE.

SECT.

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443. Definitions.—In this part—

(*a*) the expression "trade mark" means a trade mark or industrial design registered in accordance with *The Trade Mark and Design Act* and the registration whereof is in force under the provisions of the said Act, and includes any trade mark which, either with or without registration, is protected by law in any British possession or foreign state to which the provisions of section one hundred and three of the Act of the United Kingdom, known as *The Patents, Designs and Trade Marks Act,* 1883, are, in accordance with the provisions of the said Act, for the time being applicable;

(*b*) the expression "trade description" means any description, statement, or other indication, direct or indirect—

(i.) as to the number, quantity, measure, gauge or weight of any goods;

(ii.) as to the place or country in which any goods are made or produced;

(iii.) as to the mode of manufacturing or producing any goods;

(iv.) as to the material of which any goods are composed;

(v.) as to any goods being the subject of an existing patent, privilege or copyright;

And the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, is a trade description within the meanng of this part;

(*c*) the expression "false trade description" means a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect; and the fact that a trade description is a trade mark, or part of a trade mark, shall not prevent such trade description being a false trade description within the meaning of this part;

(*d*) the expression "goods" means anything which is merchandise or the subject of trade or manufacture;

(*e*) the expression "covering" includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame or wrapper; and the expression "label" includes any band or ticket;

(*f*) the expressions "person, manufacturer, dealer or trader," and "proprietor" include any body of persons corporate or unincorporate;

(*g*) the expression "name" includes any abbreviation of a name.

2. The provisions of this part respecting the application of a false trade description to goods extend to the application to goods of any such figures, words, or marks, or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are.

3. The provisions of this part respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and the expression "false name or initials" means, as applied to any goods, any name or initials of a person which—

(*a*) are not a trade mark, or part of a trade mark;

(*b*) are identical with, or a colourable imitation of, the name or initials of a person carrying on business in connection with goods of the same description, and not having authorized the use of such name or initials;

(*c*) are either those of a fictitious person, or of some person not *bona fide* carrying on business in connection with such goods. 51 V., c. 41, s. 2.

(1*a*) *Trade mark.*]—A trade mark cannot exist in gross, Cotton v. Millard, 44 L.J. Ch. 90; nor can there be an exclusive right to a mere adjective description, ex. gr., "nourishing stout." Raggett v. Findlater, L.R. 17 Ex. 29.

(1*b*) *Place in which goods made.*]—In any prosecution, proceeding or trial for any offence against this Part, if the offence relates to imported goods evidence of the port of shipment is prima facie evidence of the place or country in which the goods were made or produced. Sec. 710.

(1*c*) *False trade description.*]—See note to sec. 446.

(*3c.*)—*Person not bona fide carrying on business.*]—It seems that all three conditions contained in sub-sec. 3 must exist concurrently in order to constitute the offence of applying a false trade description by means of a false name or initials.

444. Words or marks on watch cases.—Where a watch case has thereon any words or marks which constitute, or are by common repute considered as constituting, a description of the country in which the watch was made, and the watch bears no such description, those words or marks shall *prima facie* be deemed to be a description of that country within the meaning of this part, and the provision of this part with respect to goods to which a false description has been applied, and with respect to selling or exposing or having in possession, for sale, or any purpose of trade or manufacture, goods with a false trade description, shall apply accordingly; and for the purposes of this section the expression "watch" means all that portion of a watch which is not the watch case. 51 V., c. 41, s. 11.

445. Definition of forgery of a trade mark.—Every one is deemed to forge a trade mark who either—

(*a*) without the assent of the proprietor of the trade mark, makes that trade mark or a mark so nearly resembling it as to be calculated to deceive; or

(*b*) falsifies any genuine trade mark, whether by alteration, addition, effacement or otherwise.

2. And any trade mark or mark so made or falsified is, in this part, referred to as a forged trade mark. 51 V., c. 41, s. 3.

446. Applying trade marks to goods.—Every one is deemed to apply a trade mark, or mark or trade description to goods who—

(*a*) applies it to the goods themselves; or

(*b*) applies it to any covering, label, reel, or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade or manufacture; or

(*c*) places, incloses or annexes any goods which are sold or exposed, or had in possession for any purpose of sale, trade or manufacture in, with or to any covering, label, reel or other thing to which a trade mark or trade description has been applied; or

(*d*) uses a trade mark or mark or trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade mark, or mark or trade description.

2. A trade mark or mark or trade description is deemed to be applied whether it is woven, impressed or otherwise worked into, or annexed or affixed to the goods, or to any covering, label, reel or other thing.

3. Every one is deemed to falsely apply to goods a trade mark or mark who, without the assent of the proprietor of the trade mark, applies such trade mark, or a mark so nearly resembling it as to be calculated to deceive. 51 V., c. 41, s. 4.

False trade description.]—The use of the words "quadruple plate" in an advertisement of sale of silverplated ware may constitute a false trade description, the application of which is an offence under this section. R. v. T. Eaton Co. (1899), 3 Can. Cr. Cas. 421.

It is not necessary that the false trade description should be physically connected with the goods or that it should accompany the same, and oral evidence is admissible to connect the description of the goods in the advertisement with the goods afterwards sold. Ibid.

The description in an invoice of the goods is sufficient, but an oral statement made on the sale is not within this section. Coppen v. Moore, [1898] 2 Q.B. 300, 306; Langley v. Bombay Tea Co., [1900] 2 Q.B. 460.

Gunpowder manufacturers contracted to supply gunpowder under the trade mark of "R.L.G., No. 4." Owing to an explosion they were unable to manufacture the powder, but they obtained gunpowder equal in quality from a German manufacturer, and packed it in barrels supplied by the Government, and inserted their own trade name on the labels as contractors. They sustained a loss by having to import the gunpowder, and no complaint was made by the Government, but no communication was made on delivery that the gunpowder was of German manufacture. The Q.B. Division held justices were wrong in refusing to convict, as the description attached implied they were delivering gunpowder of their own manufacture, when, in fact, it was not such. Starey, Secretary of Trade Mark Owners' Protection Society v. Chilworth Gunpowder Co., 24 Q.B.D. 90; 59 L.J.M.C. 13. Selling machine-made cigarettes with a label describing them as hand-made is a false trade description. Kirshenboim v. Salmon and Gluckstein, Limited, [1898] 2 Q.B. 19. A. bought six barrels of beer from L., a brewer, and received with the casks an invoice describing the casks as barrels. One was six gallons short:—Held, that the delivery of the invoice might be an application of a false trade description, although such invoice was not physically attached to the goods, and that evidence of L. having in previous transactions sent casks of short measure was admissible evidence of L. having authorized a false trade description to be used. Budd v. Lucas, [1891] 1 Q.B. 408.

The foundation of a margarine mixture made in France and imported as "Oleo margarine" was mixed at Southampton with a small precentage of imported Danish butter and English milk. The finished product was called "Le Dansk" and sold in England in card boxes under the description of "Le Dansk French Factory, Le Dansk, Paris." The conviction was affirmed on the ground that the words were a false trade description and the article was obviously represented as being of foreign make when it was not. Bischop v. Toler, 44 W.R. 189; 65 L.J.M.C. 1. At his establishment in Ireland, Lipton sold under the descriptions—(1) "Lipton's prime, mild cured," and (2) "First quality smoked ham, own cure at Lipton's market," hams which had been manufactured and cured by him in America. The Queen's Bench (Ireland) held that neither of the descriptions was a false trade description within this section. R. v. Lipton, Q.B.D. (Ir.); 32 L.R. (Ir.) 115. Appellant asked at respondent's shop for two half-pounds of tea, and was supplied with two packets, on each of which was stamped on the outside in ink a notice that the weight, including the wrapper, was half a pound. The weight of the tea in each case was slightly less than half a pound, but the weight of the tea and wrapper was more than half a pound. The Q.B. Division upheld the refusal of the magistrates to convict, and held there had been no false trade description applied within the meaning of the Act. Langley v. Bombay Tea Co., [1900] 2 Q.B. 460; 69 L.J.Q.B. 752; 19 Cox C.C. 551.

An article was sold in packets as "S.'s patent refined isinglass," preceded by the words "By Her Majesty's Royal Letters Patent," and the Royal coat-of-arms. On analysis the contents were found to be gelatine. An information for unlawfully applying to gelatine a false description, and thereby stating it to be isinglass, also with representing it to be the subject of an existing patent, was rightly dismissed on the ground that isinglass was often used for gelatinous matters, and that the words "patent refined isinglass" were not an untrue description. Gridley v. Swinborne, 52 J.P. 791; 5 T.L.R. 71. B., a mineral water manufacturer, made use of bottles moulded with the name and address of W., another manufacturer, but caused a paper label, bearing his own name and address, to be put upon the bottles. The delivery was accompanied by an invoice, which left no doubt that B. was the vendor. The magistrates dismissed the summons on the ground that B. had acted

"innocently" (sec. 448 (*c*)). The Q.B. Division held that an intent to defraud the purchaser was not an ingredient in the offence, and B. was guilty of using a false trade description. Wood v. Burgess, 24 Q.B.D. 162; 59 L.J.M.C. 11.

A piece of china was sold at Christie's, marked in the catalogue "Dresden," but on the lot being reached the auctioneer said to the assembled buyers, "Our attention has been drawn to this lot, and we sell it for what it is worth," and put his pen through the word "Dresden." No attempt was made to shew the article was Dresden china. The Q.B. Division set aside a conviction of the auctioneers, and held that defendant might shew in his defence he acted innocently, although at the time of sale he had reason to suspect the genuineness of the trade mark or trade description, and so be exonerated under this sub-section. Christie, Manson and Woods v. Cooper, [1900] 2 Q.B. 522.

W. was convicted for applying to a watch a false trade description as an "English lever," the facts being that several of its parts were of foreign manufacture, though they were finished and all put together and adjusted at appellant's factory at Coventry. It was contended that the proper description of the watch was an "Anglo-Swiss" watch. The Q.B. Division eventually sent the case back to the magistrate to be re-stated on one point. Williamson v. Tierney, 83 L.T. 592; 65 J.P. 70. In the re-stated case, the magistrate held that he found, as a fact, upon the evidence before him that the watch would not be regarded as an "English" watch in the trade by reason of certain material parts being of foreign manufacture. The Q.B. Division held that the question was one of fact, and that no appeal lay. Id. 17 T.L.R. 424.

"*Calculated to deceive.*"]—The question as to what resemblance to an already registered trade mark will be a bar to registration under The Trade Marks and Industrial Designs Act (Can.), 54-55 Vict., ch. 35, is not the same as that which arises in an action for the infringement of a trade mark; and it does not follow that, because the person objecting to the registration of a trade mark could not get an injunction against the applicant, the latter is entitled to put his trade mark on the register. Re Melchers and De Kuyper (1898), 6 Can. Exch. Ct. Rep. 82, 100; Re Speer, 55 L.T. 880; Re Australian Wine Importers, 41 Ch. Div. 278.

The Minister of Agriculture may refuse to register a trade mark . . . (*b*) if the trade mark proposed for registration is *identical with* or *resembles* a trade mark already registered; (*c*) if it appears that the trade mark is *calculated to deceive* or *mislead* the public, 54-55 Vict. (Can.), ch. 35, sec. 11.

Under that statue it has been held that "if the trade mark proposed to be registered so resembles one already on the register that the owner of the latter is liable to be injured by the former being passed off as his, then a case is presented in which the proposed trade mark is *calculated to deceive* or *mislead* the public. Whenever the resemblance between two trade marks is such that one person's goods are sold as those of another the result is that the latter is injured and some one of the public is misled." Re Melchers and DeKuyper (1898), 6 Can. Exch. Rep. 82, 95.

The prosecutor must make out beyond all question that the goods are so got up as to be calculated to deceive. Payton v. Snelling, 70 L.J. Ch. 644.

Imported goods.—In any prosecution hereunder for applying a false trade description in that the place or country in which any goods are made or produced is misrepresented (sec. 443 (*b*)), evidence of the port of shipment is prima facie evidence of the place or country in which such goods were made or produced. Sec. 710.

Time.]—No prosecution for this offence shall be commenced after the expiration of three years from its commission. Sec. 551 (*a*).

447. Forgery of trade marks, etc.—Every one is guilty of an indictable offence who, with intent to defraud—

(*a*) forges any trade mark; or

(*b*) falsely applies to any goods any trade mark, or any mark so nearly resembling a trade mark as to be calculated to deceive; or

(*c*) makes any die, block, machine or other instrument, for the purpose of forging, or being used for forging, a trade mark; or

(*d*) applies any false trade description to goods; or

(*e*) disposes of, or has in his possession, any die, block, machine or other instrument, for the purpose of forging a trade mark; or

(*f*) causes any of such things to be done. 51 V., c. 41, s. 6.

At common law.]—The appropriation of the trade mark of another, apart from any signature therein included, is not forgery at common law. R. v. Smith (1858), 1 Dears & B. 566; 27 L.J.M.C. 225. Nor is it forgery if the signature copied be not upon a document or paper, and therefore an imitation of an artist's signature upon a spurious picture was held not to be an offence at common law. R. v. Closs (1858), Dears & B. 460; 7 Cox C.C. 494.

Time.]—The prosecution must be commenced within three years from the time the offence was committed. Code sec. 551 (*a*).

If the offence charged be under sub-section (*b*) of sec. 447 of the Code, for falsely *applying* to any goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, it would seem to be necessary for the prosecution to negative the assent of the proprietor.

By the corresponding English Act, the Merchandise Marks Act, 1887, 50 & 51 Vict., ch. 28, in separate provisoes, the one in repect of forging, and the other as to falsely applying, the onus is placed in both cases upon the defendant (sections 4 and 5).

"*Calculated to deceive.*"]—See note to preceding section.

Evidence.]—On a charge of falsely applying a trade mark the onus of proving that the assent of the proprietor of the trade mark has not been given is upon the prosecution, for sec. 710 applies only to cases of "forgery" of a trade mark and not to cases of "falsely applying," to shift the onus to the defendant of proving such assent. R. v. Howarth (1898), 1 Can. Cr. Cas. 243 (Ont.).

Punishment.]—See sec. 450.

448. Selling goods falsely marked.—Defence.—Every one is guilty of an indictable offence who sells or exposes, or has in his possession, for sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark, or mark so nearly resembling a trade mark as to be calculated to deceive, is falsely applied, as the case may be, unless he proves—

(*a*) that, having taken all reasonable precaution against committing such an offence, he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark or trade description; and

(*b*) that on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; and

(*c*) that otherwise he had acted innocently. 51 V., c. 41, s. 6.

The Canadian law respecting trade-marks being derived from English legislation, reference for its interpretation should be had to English decisions, more especially as the law extends throughout the Dominion, and it is desirable that the jurisprudence should be uniform. Per Wurtele, J. in R. v. Authier (1897), 1 Can. Cr. Cas. 68 (Que.).

The offences specified in secs. 451 and 452, of falsely representing goods as having been manufactured for the Government, and of unlawfully importing goods liable to forfeiture under the trade-mark law would appear to be examples of Code offences for which a corporation *must* be proceeded against under the Summary Convictions clauses. But for the offence declared by sec. 448 of selling goods to which a false trade description has been applied, provision is made by sec. 450 for punishment: (*a*) upon indictment, by imprisonment or fine, or both; (*b*) upon summary conviction, by imprisonment or fine; and it was held that under that section a justice has no summary jurisdiction against a corporation, and that the intention to be inferred from such an alternative provision is that where the accused is a corporation, the only authorized procedure is that of indictment. The Queen v. Eaton (1898), 2 Can. Cr. Cas. 252.

Evidence.]—Where a trade-mark is complained of as being forged and as infringing the rights of a proprietor of a duly registered trade-mark, any resemblance of a nature to mislead an incautious or unwary purchaser, or calculated to lead persons to believe that the goods marked are the manufacture of some person other than the actual manufacturer, is sufficient to bring the person using such trade-mark under the purview of this section.

In such cases it is not necessary that the resemblance should be such as to deceive persons who might see the two marks placed side by side, or who might examine them critically. R. v. Authier (1897), 1 Can. Cr. Cas. 68 (Que.). The trial judge may examine the label for himself and form a conclusion as to the resemblance without expert evidence as to its tendency to deceive. In re Marks & Tellefsen's Application, 63 L.T. 234; R. v. Authier (1897), 1 Can. Cr. Cas. 69.

Reasonable precaution.]—In Coppen v. Moore, [1898] 2 Q.B. 300 and 306, decided under the English Merchandise Act, 1887 (50 and 51 Vict., Imp., c. 38), the prosecution was for selling goods to which a false description was applied, and in the case stated by the justices it appeared that the prosecutor asked a salesman in the accused's shop for an English ham; the salesman pointed to some American hams, and said: "These are Scotch hams." The prosecutor chose one, and asked for an invoice containing a description of the ham bought, and was given one, stating the purchase of a "Scotch" ham. It was held by Wright and Darling, JJ., that the oral statement that the ham was Scotch did not amount to a breach of the Act,

but the statement in the invoice was an application of a false description to the goods sold, within the meaning of the statute; but they reserved the question of whether the employer was liable for the act of his servant, for the consideration of the Court for Crown Cases Reserved. On this point it appeared that the employer was not present at the time of the sale; that he had issued a printed circular to his employees, forbidding the sale of the hams under any specific name or place of origin, but there was evidence that the American hams were dressed so as to deceive the public; on the strength of which it was found that the employer had not taken all reasonable precautions against committing an offence against the Act, and the Court (Lord Russell, C.J., Jeune, P.P.D., Chitty, L.J., Wright, Darling and Channell, JJ.,) therefore held that under the circumstances the employer was criminally responsible for the act of his servant, as he had not discharged the onus of shewing that he had acted innocently. On this point Lord Russell says, "We conceive the effect of the Act to be to make the master a principal liable criminally (as he is already, by law, civilly) for the acts of his agents and servants, in all cases within the section with which we are dealing, when the conduct constituting the offence was pursued by such servants and agents within the scope or in the course of their employment, subject to this: that the master or principal may be relieved from criminal responsibility when he can prove that he had acted in good faith, and done all that it was reasonably possible to do to prevent the commission by his agents and servants of offences against the Act."

Time.]—Prosecutions must be commenced not later than three years from the time of the offence. Sec. 551 (*a*).

Punishment.]—See sec. 450.

(Amendment of 1900).

449. Trade mark offences.—Every one is guilty of an indictable offence who—

(a) without the consent of such other person wilfully defaces, conceals or removes the duly registered trade mark or name of another person upon any cask, keg, bottle, siphon, vessel, can, case, or other package, with intent to defraud such other person, or unless such package has been purchased from such other person;

(*b*) being a manufacturer, dealer or trader, or a bottler, without the written consent of such other person, trades or traffics in any bottle or siphon which has upon it the duly registered trade mark or name of another person, or fills such bottle or siphon with any beverage for the purpose of sale or traffic.

2. The using by any manufacturer, dealer or trader other than such other person of any bottle or siphon for the sale therein of any beverage, or the having upon it such trade mark or the name of another person, buying, selling or trafficking in any such bottle or siphon without such written permission of such other person, or the fact that any junk dealer has in his possession any such bottle or siphon having upon it such a

trade mark or name without such written permission, shall be prima facie evidence that such use, buying, selling, or trafficking or possession is unlawful within the meaning of this section.

The former section which this replaces applied to bottles only and the trade mark had to be one which was "blown or stamped or otherwise permanently affixed thereon." This substituted section is designed to protect manufacturers and bottlers whose business is now injured by the action of unscrupulous persons, who procure bottles from second-hand dealers, junk stores, etc., and fill them with inferior soda water, ginger ale, etc., and by merely covering up the manufacturer's name on the bottle, and covering up his trade mark, sell the inferior ginger ale, etc.; and although it is impossible to shew that there is any fraudulent representation or deception practiced on the public in the first instance (as the name and trade mark are covered up), still the use of the bottles in this way eventually injures the manufacturer, as the new cover sometimes slips off and his reputation becomes injured in some cases thereby. Commons Sessional Debates, 1900, page 5290.

On the consideration of the amendment in the Senate the Hon. Mr. Power said:—"The necessity for this provision has arisen from the practice of persons who make up certain kinds of mineral and other waters using the siphons and bottles bearing the trade mark of the person who has manufactured that which was in the bottle first, and it is really a sort of forgery. If one wishes to use a bottle which has contained———'s ale, he can wipe the label off, but this is intended to meet the cases of bottles and siphons which have the original maker's name stamped on the bottle or siphon, and one can readily understand how fraud is perpetrated by selling an inferior article with one of these trade marks on it." Senate Debates, 1900, page 710.

It will be observed that under this enactment the trade mark is protected only when it has been "duly registered," i.e. registered in Canada under the Canadian Trade Mark Act. The words "or unless such package has been purchased from such other person," which appear at the end of sub-paragraph (*a*), are probably intended to except from its operation all cases in which the trade mark proprietor has parted with his right of property in the "cask, keg, bottle, etc., or other package."

Sub-paragraph (*b*) and sub-section (2) are limited to bottles and siphons and do not include casks, kegs and cases, and packages of that class, as does sub-paragraph (*a*). The offences under sub-paragraph (*b*) consist either in

(1) trading or trafficking in the bottles and siphons, or

(2) filling the bottles and siphons for the purpose of sale or traffic.

The mere "having in possession" is not made an indictable offence and it therefore seems doubtful whether that part of the second sub-section which enacts that the fact that a junk dealer "has in his possession any such bottle or siphon" shall be prima facie evidence that "such *possession* is unlawful within the meaning of this section" can have any operative force.

Time.]—The prosecution must be commenced within three years from the time of the commission of the offence. Sec. 551 (*a*).

Punishment.]—See sec. 450.

450. Punishment of offences defined in this part.—Every one guilty of any offence defined in this part is liable—

(*a*) on conviction on indictment to two years' imprisonment, with or without hard labour, or to fine, or to both imprisonment and fine; and

(*b*) on summary conviction, to four months' imprisonment, with or without hard labour, or to a fine not exceeding one hundred dollars; and in case of a second or subsequent conviction to six months' imprisonment, with or without hard labour, or to a fine not exceeding two hundred and fifty dollars.

2. In any case every chattel, article, instrument or thing, by means of, or in relation to which the offence has been committed, shall be forfeited.. 51 V., c. 41, s. 8.

Time for prosecution.]—Sec. 551 (*a*) provides that no prosecution for any offence against Part XXXIII. relating to the fraudulent marking of merchandise and no action for penalties or forfeiture thereunder shall be commenced after the expiration of three years from the time of the commission of the offence.

451. Falsely representing that goods are manufactured for His Majesty.—Every one is guilty of an indictable offence and liable, on summary conviction, to a penalty not exceeding one hundred dollars who falsely represents that any goods are made by a person holding a Royal warrant, or for the service of His Majesty or any of the Royal Family, or any Government department of the United Kingdom or of Canada. 51 V., c. 41, s. 21.

Time.]—The prosecution must be commenced within three years from the date of the offence. Sec. 551 (*a*).

452. Unlawful importation of goods liable to forfeiture under this Part.—Every is guilty of an offence and liable, on summary conviction, to a penalty of not more than five hundred dollars nor less than two hundred dollars who imports or attempts to import any goods which, if sold, would be forfeited under the provisions of this part, or any goods manufactured in any foreign state or country which bear any name or trade mark which is or purports to be the name or trade mark of any manufacturer, dealer or trader in the United Kingdom or in Canada, unless such name or trade mark is accompanied by a definite indication of the foreign state or country in which the goods were made or produced; and such goods shall be forfeited. 51 V., c. 41, s. 22.

Time.]—The prosecution must be commenced within three years from the date of the offence. Sec. 551 (*a*).

The offence here specified if laid against a corporation *must* be prosecuted under the Summary Convictions clauses.

The offence specified in this section would appear to be an example of an offence for which a corporation can be proceeded against, only under the Summary Convictions clauses.

453. Defence where person charged innocently in the ordinary course of business makes instruments for forging trade marks.—Any one who is charged with making any die, block, machine or other instrument for the purpose of forging, or being used for forging, a trade mark, or with falsely applying to goods any trade mark, or any mark so nearly resembling a trade mark as to be calculated to deceive, or with applying to goods any false trade description, or causing any of the things in this section mentioned to be done, and proves—

(*a*) that in the ordinary course of his business he is employed, on behalf of other persons, to make dies, blocks, machines or other instruments for making or being used in making trade marks, or, as the case may be, to apply marks or descriptions to goods, and that in the case which is the subject of the charge he was so employed by some person resident in Canada, and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and

(*b*) that he took reasonable precaution against committing the offence charged; and

(*c*) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark or trade description; and

(*d*) that he gave to the prosecutor all the information in his power with respect to the person by or on whose behalf the trade mark, mark or description was applied;—

shall be discharged from the prosecution but is liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence. 51 V., c. 41, s. 5.

454. Defence where offender is a servant.—No servant of a master, resident in Canada, who *bona fide* acts in obedience to the instructions of such master, and, on demand made by or on behalf of the prosecutor, gives full information as to his master, is liable to any prosecution or punishment for any offence defined in this part. 51 V., c. 41, s. 20.

455. Exception respecting trade description, lawfully applied to goods on 22nd May, 1888, etc.—The provisions of this part with respect to false trade descriptions do not apply to any trade description which, on the 22nd day of May, 1888, was lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods: Provided, that where such trade description includes the name of a place or country, and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, and the goods are not actually made or produced in that place or country, such provisions shall apply unless there is added to the trade description, immediately before or after the name of that place or country, in an equally conspicuous manner with that name, the name of the place or country in which the goods were actually made or produced, with a statement that they were made or produced there. 51 V., c. 41, s. 19.

This and the preceding sections of Part XXXIII. are taken from the statute 51 Vict. (Can.) ch. 41. The following additional sections of that statute remain unrepealed (Code sec. 983), and should be read with Part XXXIII. of the Code:—

(15.) Any goods or things forfeited under any provision of this Act, may be destroyed or otherwise disposed of in such a manner as the court, by which the same are declared forfeited, directs; and the court may, out of any proceeds realized by the disposition of such goods (all trade marks and trade descriptions being first obliterated), award to any innocent party any loss he may have innocently sustained in dealing with such goods.

(16.) On any prosecution under this Act the court may order costs to be paid to the defendant by the prosecutor, or to the prosecutor by the defendant, having regard to the information given by and the conduct of the defendant and prosecutor respectively.

(18.) On the sale or in the contract for the sale of any goods to which a trade mark or mark or trade description has been applied, the vendor shall be deemed to warrant that the mark is a genuine trade mark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee.

(22.) The importation of any goods which, if sold, would be forfeited under the foregoing provisions of this Act, and of goods manufactured in any foreign state or country which bear any name or trade mark which is or purports to be the name or trade mark of any manufacturer, dealer or trader in the United Kingdom or in Canada is hereby prohibited, unless such name or trade mark is accompanied by a definite indication of the foreign state or country in which the goods were made or produced; and any person who imports or attempts to import any such goods shall be liable to a penalty of not more than five hundred dollars, nor less than two hundred dollars, recoverable on summary conviction, and the goods so imported or attempted to be imported shall be forfeited and may be seized by any officer of the

Customs and dealt with in like manner as any goods or things forfeited under this Act.

2. Whenever there is on any goods a name which is identical with or a colourable imitation of the name of a place in the United Kingdom or in Canada, such name, unless it is accompanied by the name of the state or country in which it is situate, shall, unless the Minister of Customs decides that the attaching of such name is not calculated to deceive (of which matter the said Minister shall be the sole judge) be treated, for the purposes of this section, as if it was the name of a place in the United Kingdom or in Canada.

3. The Governor in Council may, whenever he deems it expedient in the public interest, declare that the provisions of the two sub-sections next preceding shall apply to any city or place in any foreign state or country; and after the publication in the *Canada Gazette* of the Order in Council made in that behalf, such provisions shall apply to such city or place in like manner as they apply to any place in the United Kingdom or in Canada, and may be enforced accordingly.

4. The Governor in Council may, from time to time, make regulations, either general or special, respecting the detention and seizure of goods, the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and seizure, and may, by such regulations, determine the information, notices and security to be given, and the evidence necessary for any of the purposes of this section, and the mode of verification of such evidence.

5. The regulations may provide for the reimbursing by the informant to the Minister of Customs of all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent upon such detention.

6. Such regulations may apply to all goods the importation of which is prohibited by this section, or different regulations may be made respecting different classes of such goods or of offences in relation to such goods.

7. All such regulations shall be published in the *Canada Gazette* and shall have force and effect from the date of such publication.

(23.) This Act shall be substituted for chapter one hundred and sixty-six of the Revised Statutes, respecting the fraudulent marking of merchandise, which is hereby repealed.

PART XXXIV.

PERSONATION.

SECT.

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456. Personation.—Every one is guilty of an indictable offence, and liable to fourteen years' imprisonment, who with intent fraudulently to obtain any property, personates any person, living or dead, or administrator, wife, widow, next of kin or relation of any person.

Evidence.]—Although the fund to obtain which the personation takes place has in fact been previously paid to the party entitled there may be a conviction of the personator endeavouring to obtain payment. R. v. Cramp (1817), R. & R. 324. See also the definition of "property" in sec. 3 (*v*). But it would appear doubtful whether a conviction could be supported for personation in respect of a supposed property or fund which had never existed. Cf. R. v. Pringle (1840), 2 Mood. C.C. 127, 9 C. & P. 408. The intent must be "fraudulently to obtain" the property, and it would seem doubtful whether a personation at the instance of the personated party would be included. Under the English Army Prize-money Act, 2 & 3 Wm. IV., ch. 53, sec. 49, it was declared an offence to knowingly and willingly personate or falsely assume the name or character of a soldier in order to receive prize-money, and it was held that it was no defence that the prisoner was authorized by the soldier to personate him or that the prisoner had bought from the soldier personated the prize-money to which the latter was entitled. R. v. Lake (1869), 11 Cox C.C. 333.

457. Personation at examinations.—Every one is guilty of an indictable offence, and liable on indictment or summary conviction to one year's imprisonment, or to a fine of one hundred dollars, who falsely, with intent to gain some advantage for himself or some other person, personates a candidate at any competitive or qualifying examination, held under the authority of any law or statute or in connection with any university or college, or who procures himself or any other person to be personated at any such examination, or who knowingly avails himself of the results of such personation.

458. Personation of certain persons.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who falsely and deceitfully personates—

(*a*) any owner of any share or interest of or in any stock, annuity, or other public fund transferable in any book of account kept by the Government of Canada or of any province thereof, or by any bank for any such Government; or

(*b*) any owner of any share or interest of or in the debt of any public body, or of or in the debt or capital stock of any body corporate, company, or society; or

(*c*) any owner of any dividend, coupon, certificate or money payable in respect of any such share or interest as aforesaid; or

(*d*) any owner of any share or interest in any claim for a grant of land from the Crown, or for any scrip or other payment or allowance in lieu of such grant of land; or

(*e*) any person duly authorized by any power of attorney to transfer any such share, or interest, or to receive any dividend, coupon, certificate or money, on behalf of the person entitled thereto—

and thereby transfers or endeavours to transfer any share or interest belonging to such owner, or thereby obtains or endeavours to obtain, as if he were the true and lawful owner or were the person so authorized by such power of attorney, any money due to any such owner or payable to the person so authorized, or any certificate, coupon, or share warrant, grant of land, or scrip, or allowance in lieu thereof, or other document which, by any law in force, or any usage existing at the time, is deliverable to the owner of any such stock or fund, or to the person authorized by any such power of attorney. R.S.C. c. 165, s. 9.

The corresponding English statute is the Forgery Act, 1861, 24-25 Vict., ch. 98, secs. 3, 4, 14 and 35.

Form of indictment.]—The jurors, etc., present that J.S. on the ——— day of ——— in the year of our Lord ——— at the ——— of ——— did falsely and deceitfully personate one J.N., the said J.N. being the owner of a certain share and interest in certain stock and annuities which were then transferable at the Bank of ———, to wit (*here* state the amount and nature of the stock), and that the said J.S. thereby did then transfer (*or* endeavour to transfer) the said share and interest of the said J.N. in the said stock and annuities as if he, the said J.S., were then the true and lawful owner thereof, against the form of the statute in such case made and provided.

459. Acknowledging instrument in false name.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, without lawful authority or excuse (the proof of which shall lie on him) acknowledges, in the name of any other person, before any Court, judge or other person lawfully authorized in that behalf, any recognizance of bail, or any *cognovit actionem,* or consent for judgment, or judgment, or any deed or other instrument. R.S.C. c. 165, s. 41.

PART XXXV.

OFFENCES RELATING TO THE COIN.

SECT.

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460. Interpretation of terms.—In this part unless the context otherwise requires, the following words and expressions are used in the following senses:—

(*a*) "Current gold or silver coin," includes any gold or silver coin coined in any of His Majesty's mints, or gold or silver coin of any foreign prince or state or country, or other coin lawfully current, by virtue of any proclamation or otherwise, in any part of His Majesty's dominions.

(*b*) "Current copper coin," includes copper coin coined in any of His Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of His Majesty's dominions.

(*c*) "Copper coin," includes any coin of bronze or mixed metal and every other kind of coin other than gold or silver.

(*d*) "Counterfeit" means false, not genuine.

(i.) Any genuine coin prepared or altered so as to resemble or pass for any current coin of a higher denomination is a counterfeit coin.

(ii.) A coin fraudulently filed or cut at the edges so as to remove the milling, and on which a new milling has been added to restore the appearance of the coin, is a counterfeit coin.

(*e*) "Gild" and "silver," as applied to coin, include casing with gold or silver respectively, and washing and colouring by any means whatsoever with any wash or materials capable of producing the appearance of gold or silver respectively.

(*f*) "Utter" includes "tender" and "put off." R.S.C. c. 167, s. 1.

Counterfeit.]—When upon the trial of any person it becomes necessary to prove that any coin produced in evidence against such person is false or counterfeit it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer or other officer of His Majesty's mint, or other person employed in producing the lawful coin in His Majesty's dominions or elsewhere, whether the coin counterfeited is current coin, or the coin of any foreign prince, state or country, not current in Canada, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness. Sec. 692.

A coin made by splitting two genuine coins and joining the heads together so as to make a double-headed coin has been held in Australia to be a counterfeit. R. v. McMahon (1894), 15 N.S.W. Law Rep. 131.

A genuine sovereign which had been fraudulently filed at the edges to such an extent as to reduce the weight by one twenty-fourth part, and to remove the milling entirely or almost entirely, and to which a new milling has been added in order to restore the appearance of the coin, was held to be a false and counterfeit coin. R. v. Hermann (1879), L.R. 4 Q.B.D. 284.

It is sufficient to prove such general resemblance to the lawful coin as will shew an intention that the counterfeit shall pass for it. Sec. 718.

Variance from true coin.]—Upon the trial of any person accused of any offence respecting the currency or coin or against the provisions of this Part (XXXV), no difference in the date or year, or in any legend marked upon the lawful coin described in the indictment, and the date or year or legend marked upon the false coin counterfeited to resemble or pass for such lawful coin, or upon any die, plate, press, tool or instrument used, constructed, devised, adapted or designed for the purpose of counterfeiting or imitating any such lawful coin shall be considered a just or lawful cause or reason for acquitting any such person of such offence. Sec. 718.

461. When offence completed.—Every offence of making any counterfeit coin, or of buying, selling, receiving, paying, tendering, uttering, or putting off, or of offering to buy, sell, receive, pay, utter or put off, any counterfeit coin is deemed to be complete, although the coin so made or counterfeited, or bought, sold, received, paid, tendered, uttered or put off, or

offered to be bought, sold, received, paid, tendered, uttered or put off, was not in a fit state to be uttered, or the counterfeiting thereof was not finished or perfected. R.S.C. c. 167, s. 27.

462. Counterfeiting coins, etc.—Every one is guilty of an indictable offence and liable to punishment for life who—

(*a*) makes or begins to make any counterfeit coin resembling, or apparently intended to resemble or pass for, any current gold or silver coin; or

(*b*) gilds or silvers any coin resembling or apparently intended to resemble or pass for, any current gold or silver coin; or

(*c*) gilds or silvers any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into counterfeit coin resembling, or apparently intended to resemble or pass for, any current gold or silver coin; or

(*d*) gilds any current silver coin, or files or in any manner alters such coin, with intent to make the same resemble or pass for any current gold coin; or

(*e*) gilds or silvers any current copper coin, or files or in any manner alters such coin, with intent to make the same resemble or pass for any current gold or silver coin. R.S.C. c. 167, ss. 3 and 4.

"*Gilds*" *or* "*silvers.*"]—These words as applied to coin include casing with gold or silver respectively, and washing and colouring *by any means whatsoever* with any wash or materials *capable of producing* the appearance of gold or silver respectively. Sec. 460 (*e*). The words above italicized were intended to remove the doubts which existed under previous statutes. See R. v. Lavey (1776), 1 Leach C.C. 153, as to whether the word "colouring" was confined to superficial application. Archbold Cr. Pl. (1900), 917.

An indictment charging the use of such a wash or material will be supported by proof of a colouring with real gold or silver, as the case may be. R. v. Turner (1838), 2 Mood. C.C. 42.

Evidence.]—See sec. 460 and note to same.

463. Dealing and importing counterfeit coin.—Every one is guilty of an indictable offence and liable to imprisonment for life who, without lawful authority or excuse, the proof whereof shall lie on him—

(*a*) buys, sells, receives, pays or puts off, or offers to buy, sell, receive, pay or put off, at or for a lower rate or value than the same imports, or was apparently intended to import, any counterfeit coin resembling or apparently intended to resemble or pass for any current gold or silver coin; or

(*b*) imports or receives into Canada any counterfeit coin resembling or apparently intended to resemble or pass for, any current gold or silver coin knowing the same to be counterfeit. R.S.C. c. 167, ss. 7 and 8.

464. Manufacture of copper coin and importation of uncurrent copper coin.—Every one who manufactures in Canada any copper coin, or imports into Canada any copper coin, other than current copper coin, with the intention of putting the same into circulation as current copper coin, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars for every pound Troy of the weight thereof; and all such copper coin so manufactured or imported shall be forfeited to His Majesty. R.S.C. c. 167, s. 28.

The following portions of the Revised Statutes as to "offences relating to the coin" (R.S.C. 1886, ch. 167), remain unrepealed and relate to the manufacture and importation of uncurrent copper coin:—

If any coin is tendered as current gold or silver coin to any person who suspects the same to be diminished otherwise than by reasonable wearing, or to be counterfeit, such person may cut, break, bend or deface such coin, and if any coin so cut, broken, bent or defaced appears to be diminished otherwise than by reasonable wearing, or to be counterfeit, the person tendering the same shall bear the loss thereof; but if the same is of due weight, and appears to be lawful coin, the person cutting, breaking, bending or defacing the same, shall be bound to receive the same at the rate for which it was coined. Sec. 26.

If any dispute arises whether the coin so cut, broken, bent or defaced, is diminished in manner aforesaid, or counterfeit, it shall be heard and finally determined in a summary manner by any justice of the peace, who may examine, upon oath, the parties as well as any other person, for the purpose of deciding such dispute, and if he entertains any doubt in that behalf, he may summon three persons, the decision of a majority of whom shall be final. Sec. 26 (2).

Every officer employed in the collection of the revenue in Canada shall cut, break or deface, or cause to be cut, broken or defaced, every piece of counterfeit or unlawfully diminished gold or silver coin which is tendered to him in payment of any part of such revenue in Canada. Sec. 26 (3). Sec. 26 appears to have been inadvertently omitted from the unrepealed statutes printed as an appendix to the official edition of the Code.

Any two or more justices of the peace, on the oath of a credible person, that any copper or brass coin has been unlawfully manufactured or imported, shall cause the same to be seized and detained, and shall summon the person in whose possession the same is found, to appear before them; and if it appears to their satisfaction, on the oath of a credible witness, other than the informer, that such copper or brass coin has been manufactured or imported in violation of this Act, such justice shall declare the same forfeited, and shall place the same in safe keeping to await the disposal of the Governor General, for the public uses of Canada. Sec. 29.

If it appears, to the satisfaction of such justices, that the person in whose possession such copper or brass coin was found, knew the same to have been so unlawfully manufactured or imported, they may condemn him to

pay the penalty aforesaid with costs, and may cause him to be imprisoned for a term not exceeding two months, if such penalty and costs are not forthwith paid. Sec. 30.

If it appears, to the satisfaction of such justices, that the person in whose possession such copper or brass coin was found was not aware of it having been so unlawfully manufactured or imported, the penalty may, on the oath of any one credible witness, other than the plaintiff, be recovered, from the owner thereof, by any person who sues for the same in any court of competent jurisdiction. Sec. 31.

Any officer of His Majesty's customs may seize any copper or brass coin imported or attempted to be imported into Canada in violation of this Act, and may detain the same as forfeited, to await the disposal of the Governor General, for the public uses of Canada. Sec. 32.

Every one who utters, tenders or offers in payment any copper or brass coin, other than current copper coin, shall forfeit double the nominal value thereof:

2. Such penalty may be recovered, with costs, in a summary manner on the oath of one credible witness, other than the informer, before any justice of the peace, who, if such penalty and costs are not forthwith paid, may cause the offender to be imprisoned for a term not exceeding eight days. Sec. 33.

A moiety of any of the penalties imposed by any of the five sections next preceding, but not the copper or brass coins forfeited under the provisions thereof, shall belong to the informer or person who sues for the same, and the other moiety shall belong to His Majesty, for the public uses of Canada. Sec. 34.

"*Copper coin.*"]--See sec. 460 (*c*), as to the interpretation of this term.

465. Exportation of counterfeit coin.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, without lawful authority or excuse the proof whereof shall lie on him, exports or puts on board any ship, vessel or boat, or on any railway or carriage or vehicle of any description whatsoever, for the purpose of being exported from Canada, any counterfeit coin resembling or apparently intended to resemble or pass for any current coin or for any foreign coin of any prince, country or state, knowing the same to be counterfeit. R.S.C. c. 167, s. 9.

466. Making instruments for coining.—Every one is guilty of an indictable offence and liable to imprisonment for life who, without lawful authority or excuse the proof whereof shall lie on him, makes or mends, or begins or proceeds to make or mend, or buys or sells, or has in his custody or possession—

(*a*) any puncheon, counter puncheon, matrix, stamp, die, pattern or mould, in or upon which there is made or impressed, or which will make or impress, or which is adapted and intended to make or impress, the figure, stamp

or apparent resemblance of both or either of the sides of any current gold or silver coin, or of any coin of any foreign prince, state or country, or any part or parts of both or either of such sides; or

(*b*) any edger, edging or other tool, collar, instrument or engine adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures apparently resembling those on the edges of any such coin, knowing the same to be so adapted and intended; or

(*c*) any press for coinage, or any cutting engine for cutting, by force of a screw or of any other contrivance, round blanks out of gold, silver or other metal or mixture of metals, or any other machine, knowing such press to be a press for coinage, or knowing such engine or machine to have been used or to be intended to be used for or in order to the false making or counterfeiting of any such coin. R.S.C. c. 167, s. 24.

Where the defendant employed a die-sinker to make, for a pretended innocent purpose, a die calculated to make shillings, and the die-sinker suspecting fraud, informed the authorities and under their direction made the die for the purpose of detecting the prisoner, it was held that the defendant was rightly convicted as a principal although the die-sinker was an innocent agent in the transaction. R. v. Bannon (1844), 2 Mood. C.C. 309, 1 C. & K. 295.

Search warrant.]—See sec. 569.

467. Bringing instruments for coining from mints into Canada.—Every one is guilty of an indictable offence and liable to imprisonment for life who, without lawful authority or excuse the proof whereof shall lie on him, knowingly conveys out of any of His Majesty's mints into Canada, any puncheon, counter puncheon, matrix, stamp, die, pattern, mould, edger, edging or other tool, collar, instrument, press or engine, used or employed in or about the coining of coin, or any useful part of any of the several articles aforesaid, or any coin, bullion, metal or mixture of metals. R.S.C. c. 167, s. 25.

468. Clipping current gold or silver coin.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who impairs, diminishes or lightens any current gold or silver coin, with intent that the coin so impaired, diminished, or lightened may pass for current gold or silver coin. R.S.C. c. 167, s. 5.

469. Defacing current coins.—Every one is guilty of an indictable offence and liable to one year's imprisonment who defaces any current gold, silver or copper coin by stamping thereon any names or words, whether such coin is or is not thereby diminished or lightened, and afterwards tenders the same. R.S.C. c. 167, s. 17.

470. Possessing clippings of current coin.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who unlawfully has in his custody or possession any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution or otherwise, which have been produced or obtained by impairing, diminishing or lightening any current gold or silver coin, knowing the same to have been so produced or obtained. R.S.C. c. 167, s. 6.

471. Possessing counterfeit coins.—Every one is guilty of an indictable offence and liable to three years' imprisonment who has in his custody or possession, knowing the same to be counterfeit, and with intent to utter the same or any of them—

(*a*) any counterfeit coin resembling, or apparently intended to resemble or pass for, any current gold or silver coin; or

(*b*) three or more pieces of counterfeit coin resembling, or apparently intended to resemble or pass for, any current copper coin. R.S.C. c. 167, ss. 12 and 16.

Indictment.] — Where an indictment for having possession of counterfeit coin was, on demurrer, held bad for not alleging that the counterfeit coin "resembled some gold or silver coin then actually current," the order made was that the indictment be quashed, so that another indictment might be preferred, not that the defendants be discharged, R. v. Tierney (1869), 29 U.C.Q.B. 181.

472. Offences respecting copper coin.—Every one is guilty of an indictable offence and liable to three years' imprisonment who—

(*a*) makes, or begins to make, any counterfeit coin resembling, or apparently intended to resemble or pass for, any current copper coin; or

(*b*) without lawful authority or excuse, the proof of which shall lie on him, knowingly

(i) makes or mends, or begins or proceeds to make or mend, or buys or sells, or has in his

custody or possession, any instrument, tool or engine adapted and intended for counterfeiting any current copper coin;

(ii) buys, sells, receives, pays or puts off, or offers to buy, sell, receive, pay or put off, any counterfeit coin resembling, or apparently intended to resemble or pass for any current copper coin, at or for a lower rate of value than the same imports or was apparently intended to import. R.S.C. c. 167, s. 15.

See note to sec. 464.

473. Offences respecting foreign coins.—Every one is guilty of an indictable offence and liable to three years' imprisonment who—

(*a*) makes, or begins to make, any counterfeit coin or silver coin resembling, or apparently intended to resemble or pass for, any gold or silver coin of any foreign prince, state or country, not being current coin;

(*b*) without lawful authority or excuse, the proof of which shall lie on him—

(i) brings into or receives in Canada any such counterfeit coin, knowing the same to be counterfeit;

(ii) has in his custody or possession any such counterfeit coin knowing the same to be counterfeit, and with intent to put off the same; or

(*c*) utters any such counterfeit coin; or

(*d*) makes any counterfeit coin resembling, or apparently intended to resemble or pass for, any copper coin of any foreign prince, state or country, not being current coin. R.S.C. c. 167, ss. 19, 20, 21, 22 and 23.

On a charge of having counterfeit coins in possession, proof that the accused also had in his possession 'trade dollars,' which, although genuine, were not worth their stamped value, and that he had attempted to put them off as worth their stamped value, is not admissible as shewing intent to put off the counterfeit coin. R. v. Benham (1899), 4 Can. Cr. Cas. 63 (Que.).

474. Uttering counterfeit gold or silver coins.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who utters any counterfeit coin resembling, or apparently intended to resemble or pass for, any current gold or silver coin, knowing the same to be counterfeit. R.S.C. c. 167, s. 10.

Uttering.]—To "utter" includes to tender or to put off. Sec. 460 (*f*).

Evidence.]—The word "apparently" in this section would seem to confine the proof of intended resemblance to the counterfeit coin itself, and if the so-called coin was not in itself apparently intended to resemble or pass for a current coin it would not aid the prosecution to shew that the prisoner had represented that, although not a genuine coin, it could be easily passed as such.

In the case of persons who have passed counterfeit money or bills, when it is necessary to establish a guilty knowledge on the part of the prisoner, the prosecutor is allowed to give evidence of the prisoner having passed other counterfeit money or bills at about the same time, or that he had many such in his possession, which circumstances tend strongly to shew that he was not acting innocently and had not taken the money casually, but that he was employed in fraudulently putting it off. R. v. Brown (1861), 21 U.C.Q.B. 330, per Robinson, C.J.

If it be proved that the accused uttered either on the same day or at other times, whether before or after the uttering charged, base money either of the same or a different denomination to the same or to a different person, or had other pieces of base money about him when he uttered the counterfeit money in question, such will be evidence from which a guilty knowledge may be presumed. R. v. Whiley (1804), 2 Leach C.C. 983; R. v. Forster, Dears. 456.

Time.]—Sec. 552 declares that any one found committing the offence mentioned in "sec. 477, uttering counterfeit current coin," may be arrested without warrant by any one. This is an error in the Code, as this section relates merely to uncurrent copper coin and not counterfeit coin, and the offence is a comparatively trivial one. It is submitted that the language of sec. 552 does not have the effect of applying its provisions to either this section (477), or to the sections which relate to counterfeit coin (474 and 475.

475. Uttering light coins, medals, counterfeit copper coins, etc.—Every one is guilty of an indictable offence and liable to three years' imprisonment who—

(*a*) utters, as being current, any gold or silver coin of less than its lawful weight, knowing such coin to have been impaired, diminished or lightened, otherwise than by lawful wear; or

(*b*) with intent to defraud utters, as or for any current gold or silver coin, any coin not being such current gold or silver coin, or any medal, or piece of metal or mixed metals, resembling in size, figure, and colour, the current coin as or for which the same is so uttered, such coin, medal or piece of metal or mixed metals so uttered being of less value than the current coin as or for which the same is so uttered; or

(*c*) utters any counterfeit coin resembling or apparently intended to resemble or pass for any current copper coin, knowing the same to be counterfeit. R.S.C. c. 167, ss. 11, 14 and 16.

476. Uttering defaced coin.—Every one who utters any coin defaced by having stamped thereon any names or words, is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding ten dollars. R.S.C. c. 167, s. 18.

477. Uttering uncurrent copper coins.—Every one who utters, or offers in payment, any copper coin, other than current copper coin, is guilty of an offence and liable, on summary conviction, to a penalty of double the nominal value thereof, and in default of payment of such penalty, to eight days' imprisonment. R.S.C. c. 167, s. 33.

478. Punishment after previous conviction.—Every one who, after a previous conviction of any offence relating to the coin under this or any other Act, is convicted of an offence specified in this part, is liable to the following punishment:

(*a*) to imprisonment for life if otherwise fourteen years would have been the longest term of imprisonment to which he would have been liable;

(*b*) to fourteen years' imprisonment, if otherwise seven years would have been the longest term of imprisonment to which he would have been liable;

(*c*) to seven years' imprisonment, if otherwise he would not have been liable to seven years' imprisonment. R.S.C. c. 167, s. 13.

Previous conviction.]—It is not necessary that any judgment should have been pronounced against the prisoner on the first conviction. R. v. Blaby, [1894] 2 Q.B. 170.

Secs. 628 and 676 as to the procedure where a previous conviction is charged seem to imply that the second offence must have been committed subsequently to the first conviction.

PART XXXVI.

ADVERTISING COUNTERFEIT MONEY.

SECT.

(Amendment of 1900).

479. Counterfeit token.—In this Part the expression "counterfeit token of value" means any spurious or counterfeit coin, paper money, inland revenue stamp, postage stamp, or other evidence of value, by whatever technical, trivial or deceptive designation the same may be described, and includes also any coin or paper money, which, although genuine, has no value as money, but in the case of such last mentioned coin or paper money it is necessary in order to constitute an offence under this Part that there should be knowledge on the part of the person charged that such coin or paper money was of no value as money, and a fraudulent intent on his part in his dealings with, or with respect to the same.

The section formerly ended at the words "deceptive designation the same may be described." The amendment consists in the addition of the words which follow them, and is particularly directed against frauds in passing bills of defunct banks and notes of the "Confederate States" of America.

Counterfeit token.]—A paper which is a spurious imitation of a government treasury note is a counterfeit, or what purports to be a counterfeit token of value under this section, although there is no original of its description. R. v. Corey (1895), 1 Can. Cr. Cas. 161 (N.B.).

Before the Code it had been held that a person indicted for offering to purchase counterfeit tokens of value could not be convicted on evidence shewing that the notes which he offered to purchase were not counterfeit, but genuine bank notes unsigned, though he believed them to be counterfeit, and offered to purchase them under such belief. R. v. Attwood (1891), 20 Ont. R. 574. The present definition includes such paper where there is knowledge by the accused that it was of no value and a fraudulent intent in dealing with it.

480. Advertising counterfeit money and other offences connected therewith.—Every one is guilty of an indictable offence and liable to five years' imprisonment, who—

(*a*) prints, writes, utters, publishes, sells, lends, gives away, circulates or distributes any letter, writing, circular, paper, pamphlet, handbill, or any written or printed matter advertising, or offering or purporting to advertise or offer for sale, loan, exchange, gift or distribution, or to furnish, procure or distribute, any counterfeit token of value, or what purports to be a counterfeit token of value, or giving or purporting to give, either directly or indirectly, information where, how, of whom, or by what means any counterfeit token of value, or what purports to be a counterfeit token of value, may be procured or had; or

(*b*) purchases, exchanges, accepts, takes possession of or in any way uses, or offers to purchase, exchange, accept, take possession of or in any way use, or negotiates or offers to negotiate with a view of purchasing or obtaining or using any such counterfeit token of value, or what purports so to be; or

(*c*) in executing, operating, promoting or carrying on any scheme or device to defraud, by the use or by means of any papers, writings, letters, circulars or written or printed matters concerning the offering for sale, loan, gift, distribution or exchange of counterfeit tokens of value, uses any fictitious, false or assumed name or address, or any name or address other than his own right, proper and lawful name; or

(*d*) in the execution, operating, promoting or carrying on, of any scheme or device offering for sale, loan, gift, or distribution, or purporting to offer for sale, loan, gift or distribution, or giving or purporting to give information, directly or indirectly, where, how, of whom, or by what means any counterfeit token of value may be obtained or had, knowingly receives or takes from the mails, or from the post office, any letter or package addressed to such fictitious, false or assumed name or address, or name other than his own right, proper or lawful name. 51 V. c. 40, ss. 2 and 3.

Evidence.]—In Jones' case (1779), 1 Doug. 300, a prisoner was indicted for having in his custody a certain forged and counterfeited paper-writing *purporting* to be a bank note, and a special verdict was returned therein that the paper-writing was forged, and that the prisoner well knowing it not to be a bank note averred it to be a good bank note, and disposed of it as such with intent to defraud.

It appeared that the document was made in the form and appearance of a bank note, but was not signed. Lord Mansfield, in directing the prisoner's discharge, said:—

"The representations of the prisoner after the note was made could not alter the purport, which is what appears on the face of the instrument itself. Such representations might make the party guilty of a fraud or cheat."

Section 480 of the Code covers not only the case of counterfeit money, i.e., false tokens purporting to be bank notes, etc., but false tokens purporting to be *counterfeit* tokens.

The words "what purports to be" in sec. 480 (formerly 51 Vict. (Can.), ch. 40) import what appears on the face of the instrument; and therefore what was said to the prisoner, or what he thought or believed, would not be of any moment. Per Rose, J., R. v. Attwood (1891), 20 Ont. R. 574, 578.

When a person exhibits to another bank notes representing them as counterfeit, when in fact they are not so, the offer to purchase such notes cannot be an offence under the Act, as the prisoner was offering to purchase that which the party had to sell, which were not counterfeit tokens of value. Per MacMahon, J., R. v. Attwood (1891), 20 Ont. R. 574, 581.

In the last named case, the defendant was prosecuted for offering to purchase bank notes which were shewn to him as counterfeit, but were in fact genuine bank notes unsigned.

Doubt was also expressed in the Attwood case as to whether the section applies to counterfeit tokens not in esse, MacMahon, J., saying that it may be that the clause of the statute would require to be amended in order to reach a person offering to purchase such.

A paper which is a spurious imitation of a government treasury note is a counterfeit, or what purports to be a counterfeit, token of value, although there is no original of its description. R. v. Corey (1895), 1 Can. Cr. Cas. 161 (N.B.).

As to evidence of admissions made by the accused, see note to sec. 592.

Fraudulent scheme.]—On the trial of any person charged with the offences above mentioned, any letter, circular, writing or paper offering or purporting to offer for sale, loan, gift or distribution, or giving or purporting to give information, directly or indirectly, where, how, of whom, or by what means, any counterfeit token of value may be obtained or had, or concerning any similar scheme or device to defraud the public, shall be prima facie evidence of the fraudulent character of such scheme or device. Sec. 693.

PART XXXVII.

MISCHIEF.

SECT.

481. Preliminary.—Every one who causes any event by an act which he knew would probably cause it, being reckless whether such event happens or not, is deemed to have caused it wilfully for the purposes of this part.

2. Nothing shall be an offence under any provision contained in this part unless it is done without legal justification or excuse, and without colour of right.

3. Where the offence consists of an injury to anything in which the offender has an interest, the existence of such interest, if partial, shall not prevent his act being an offence, and if total, shall not prevent his act being an offence, if done with intent to defraud. R.S.C. c. 168, ss. 60 and 61.

(3)—*With intent to defraud.*]—D. was charged with having set fire to a building, the property of J. H., "with intent to defraud." The case opened by the Crown was that prisoner intended to defraud several insurance companies, but legal proof of the policies was wanting, and an amendment was allowed by striking out the words "with intent to defraud." The evidence shewed that several persons were interested in the premises as mortgagees, and J. H. as owner of the equity of redemption. The jury found prisoner intended to injure those interested. It was held that the amendment was authorized and proper, and the conviction warranted by the evidence. An indictment for arson is good without alleging any intent. R. v. Cronin (1875), 36 U.C.Q.B. 342.

It is necessary where the setting fire is to a man's own house, to prove an intent to injure and defraud. R. v. Bryans (1862), 12 U.C.C.P. 161.

482. Arson.—Every one is guilty of the indictable offence of arson and liable to imprisonment for life, who wilfully sets fire to any building or structure whether such building, erection or structure is completed or not, or to any stack of vegetable produce or of mineral or vegetable fuel, or to any mine or any well of oil or other combustible substance, or to any ship or vessel, whether completed or not, or to any timber or materials placed in any shipyard for building or repairing or fitting out any ship, or to any of His Majesty's stores or munitions of war. R.S.C. c. 168, ss. 2 to 5, 7, 8, 19, 28, 46 and 47.

As to necessity of proving an intent to defraud if the building belonged to the accused, see sec. 481 (3).

At common law if the house were the prisoner's it was necessary to shew that his attempt to set fire to it was unlawful and malicious. R. v. Greenwood (1864), 23 U.C.Q.B. 250.

And this was supplied by proof that the act might or would be an injury to or a fraud upon any person, and that the accused acted with intent to do such injury. R. v. Bryans (1862), 12 U.C.C.P. 166.

In R. v. Gray (1866), 4 F. & F. 1102, the accused was charged with setting fire to his house with intent to defraud an insurance company, and evidence was offered to shew that the prisoner had previously occupied two other houses in succession which had been insured, that fires had broken out in both, and that the prisoner had made claims on the insurance com-

panies, for the losses occasioned. There was no other evidence offered to shew that the fires in the two houses had been set by the prisoner, yet the evidence was received as tending to prove that the fire set as charged in the indictment was the result of design, not of accident.

Arson at common law.]—Arson at common law was the malicious burning of another's house. 1 Bishop Cr. Law 414. It was an offence against the security of the habitation rather than of the property. 2 Bishop 24. A man was not guilty of arson by the common law if he burned a house of which he was in possession as owner or as tenant from year to year; R. v. Pedley, 1 Leach 242; or which he held under an agreement for a lease; R. v. Breeme, 1 Leach 220; or as mortgagor in possession. R. v. Spalding, 1 Leach 218, 2 East P.C. 1025.

Sets fire.]—It is sufficient if the wood has been at a red heat. R. v. Parker, 9 C. & P. 45. But the mere scorching the wood black is not enough. R. v. Russell, Car. & M. 541. It is not necessary that there should have been a flame. R. v. Stallion, 1 Moo. 398.

Any stack.]—Straw packed on a lorry ready for market has been held not to be a "stack." R. v. Satchwell, 28 Eng. L.T. 569; R. v. Avis, 9 C. & P. 348.

Evidence.]—A burning done by mischance or negligence is not arson. 3 Inst. 67. And the same is true where the burning results accidentally from the intentional commission of a mere civil trespass. 2 East P.C. 1019.

But if a person intending to burn the house of a particular person accidentally burns another's he commits the offence. 3 Inst 67; 2 Bishop Cr. Law 27.

The offence must have been committed without legal justification or excuse and without colour of right. Sec. 481 (2).

A man is presumed to intend the natural and probable consequences of his own voluntary act. Therefore, if one kindles a fire in a stack situated so that it is likely to communicate and does communicate in fact to an adjoining building, he is chargeable with burning the building. R. v. Cooper, 5 C. & P. 535.

But where a sailor entered a part of a vessel to steal rum there stored, and while he was tapping a cask a lighted match, which he held, came in contact with the rum and a fire resulted which destroyed the vessel, it was held that it was not arson. R. v. Faulkner, 13 Cox C.C. 550.

Damaging property.]—See sec. 499 as to the indictable offence of mischief by wilfully destroying or damaging property; and see sec. 511 as to summary conviction for malicious injury to property where the damage is less than $20.

483. Attempt to commit arson.—Every one is guilty of an indictable offence, and liable to fourteen years' imprisonment who wilfully attempts to set fire to anything mentioned in the last preceding section, or who wilfully sets fire to any substance so situated that he knows that anything mentioned in the last preceding section is likely to catch fire therefrom. R.S.C. c. 168, ss. 9, 10, 20, 29 and 48.

Attempts to set fire.]—If B., under A.'s direction, arranges a blanket saturated with oil so that if it is set on fire the flame will be communicated to a building and then lights a match and holds it until it is burning well and then puts it down to within an inch or two of the blanket, when the match goes out; A. is guilty of an attempt to set fire to the building. R. v. Goodman, 22 U.C.C.P. 338.

484. Setting fire to crops.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who wilfully sets fire to—

(*a*) any crop, whether standing or cut down, or any wood, forest, coppice or plantation, or any heath, gorse, furze or fern; or

(*b*) any tree, lumber, timber, logs, or floats, boom, dam or slide, and thereby injures or destroys the same. R.S.C. c. 168, ss. 18 and 12.

In R. v. Dossett (1846), 2 C. & K. 306, the accused was indicted for setting fire to a rick of straw. The rick was set on fire by the prisoner having fired a gun very near to it, and evidence was offered to shew that the rick had been on fire the day previous, and that the prisoner was then close to it with a gun in his hand. There was no other evidence offered to shew that the prisoner had on the day previous fired the gun or set fire to the rick. The evidence, however, was received as tending to shew that the rick was fired at the time charged wilfully.

Colour of right.]—See sec. 481 (2).

485. Attempt to set fire to crops.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully attempts to set fire to anything mentioned in the last preceding section, or who wilfully sets fire to any substance so situated that he knows that anything mentioned in the last preceding section is likely to catch fire therefrom. R.S.C. c. 168, s. 20.

486. Recklessly setting fire to forest, etc.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, by such negligence as shows him to be reckless or wantonly regardless of consequences, or in violation of a Provincial or municipal law of the locality, sets fire to any forest, tree, manufactured lumber, square timber, logs, or floats, boom, dam or slide on the Crown domain, or land leased or lawfully held for the purpose of cutting timber, or on private property, on any creek or river, or rollway, beach or wharf, so that the same is injured or destroyed.

2. The magistrate investigating any such charge may, in his discretion, if the consequences have not been serious, dispose of the matter summarily, without sending the offender for trial, by imposing a fine not exceeding fifty dollars, and in default of payment by the committal of the offender to prison for any term not exceeding six months, with or without hard labour. R.S.C. c. 168, s. 11.

487. Threats to burn, etc.—Every one is guilty of an indictable offence and liable to ten years' imprisonment who sends, delivers, or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to burn or destroy any building, or any rick or stack of grain, hay or straw, or other agricultural produce, or any grain, hay or straw, or other agricultural produce in or under any building, or any ship or vessel. R.S.C. c. 173, s. 8.

Threats verbally made to burn the complainant's buildings are not indictable under the Criminal Code, and give rise only to proceedings to force the offender to give security to keep the peace. Ex parte Welsh (1898), 2 Can. Cr. Cas. 35 (Que.).

Binding over to keep the peace.]—Upon complaint by or on behalf of any person that on account of threats made by some other person or on any other account, he the complainant is afraid that such other person will burn or set fire to his property, the justice before whom such complaint is made may, if he is satisfied that the complainant has reasonable grounds for his fears, require such other person to enter into his own recognizances or to give security to keep the peace, and to be of good behaviour for a term not exceeding twelve months. Sec. 959 (2).

488. Attempt to damage by gunpowder.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who wilfully places or throws any explosive substance into or near any building or ship with intent to destroy or damage the same, or any machinery, working tools, or chattels whatever, whether or not any explosion takes place. R.S.C. c. 168, ss. 14 and 49.

Explosive substance.]—This expression 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. Sec. 3 (*i*).

489. Mischief on railways.—Every one is guilty of an indictable offence and liable to five years' imprisonment who, in manner likely to cause danger to valuable property, without endangering life or person—

(*a*) places any obstruction upon any railway, or takes up, removes, displaces, breaks or injures any rail, sleeper, or other matter or thing belonging to any railway; or

(*b*) shoots or throws anything at an engine or other railway vehicle; or

(*c*) interferes without authority with the points, signals or other appliances upon any railway; or

(*d*) makes any false signal on or near any railway; or

(*e*) wilfully omits to do any act which it is his duty to do; or

(*f*) does any other unlawful act.

2. Every one who does any of the acts above mentioned, with intent to cause such danger, is liable to imprisonment for life. R.S.C. c. 168, ss. 37 and 38.

See also secs. 250 and 251 and note to sec. 511.

Where an indictment charges substantially the same offence as that charged in the indictment on which the accused was given in charge on a former trial but adds a statement of intention or circumstances of aggravation tending if proved to increase the punishment, the previous acquittal or conviction is a bar to such subsequent indictment. Sec. 633 (1).

Evidence.]—The act must have been done without legal justification or excuse and without colour of right, Sec. 481 (2). It will be observed that the term "wilfully" does not appear except in sub-paragraph (f) in the first part of the section.

490. Obstructing railways.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, by any act or wilful omission obstructs or interrupts, or causes to be obstructed or interrupted, the construction, maintenance or free use of any railway or any part thereof, or any matter or thing appertaining thereto or connected therewith. R.S.C. c. 168, ss. 38 and 39.

To constitute an offence the act must be done without legal justification or excuse and without colour of right. Sec. 48, (2).

A drunken man got upon the railway and altered the signals and thereby caused a luggage train to pull up and proceed at a very slow pace. It was held upon a case reserved, that this was the causing of an engine and carriage using a railway to be obstructed. R. v. Hadfield, 11 Cox C.C. 574. A person improperly went upon a line of railway and purposely attempted to stop a train approaching, by placing himself on the space between two lines of rails, and holding up his arms in the mode adopted by inspectors of the line when desirous of stopping a train; it was held also to be the offence of unlawfully obstructing an engine or carriage using a railway. R. v. Hardy, 11 Cox C.C. 656.

491. Injuries to packages in the custody of railways.—Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the value of the goods or liquors so destroyed or damaged, or to one month's imprisonment, with or without hard labour, or to both, who—

(*a*) wilfully destroys or damages anything containing any goods or liquors in or about any railway station, or building or any vehicle of any kind on any railway, or in any warehouse, ship or vessel, with intent to steal or otherwise unlawfully to obtain or to injure the contents, or any part thereof; or

(*b*) unlawfully drinks or wilfully spills or allows to run to waste any such liquors, or any part thereof. R.S.C. c. 38, s. 62; 51 V. c. 29, s. 297.

492. Injuries to electric telegraphs, etc.—Every one is guilty of an indictable offence and liable to two years' imprisonment who wilfully—

(*a*) destroys, removes or damages anything which forms part of, or is used or employed in or about any electric or magnetic telegraph, electric light, telephone, or fire-alarm, or in the working thereof, or for the transmission of electricity for other lawful purposes; or

(*b*) prevents or obstructs the sending, conveyance or delivery of any communication by any such telegraph, telephone or fire-alarm, or the transmission of electricity for any such electric light or for any such purpose as aforesaid.

2. Every one who wilfully, by any overt act, attempts to commit any such offence, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding fifty dollars, or to three months' imprisonment, with or without hard labour. R.S.C. c. 168, ss. 40 and 41.

To constitute an offence the act must be done without legal justification or excuse and without colour of right. Sec. 48, (2.)

493. Wrecking.—Every one is guilty of an indictable offence and liable to imprisonment for life who wilfully—

(*a*) casts away or destroys any ship, whether complete or unfinished; or

(*b*) does any act tending to the immediate loss or destruction of any ship in distress; or

(*c*) interferes with any marine signal, or exhibits any false signal, with intent to bring a ship or boat into danger. R.S.C. c. 168, ss. 46 and 51.

494. Attempting to wreck.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who attempts to cast away or destroy any ship, whether complete or unfinished. R.S.C. c. 168, s. 48.

495. Interfering with marine signals.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully alters, removes, or conceals, or attempts to alter, remove or conceal, any signal, buoy or other sea mark used for the purposes of navigation.

2. Every one who makes fast any vessel or boat to any such signal, buoy, or sea mark, is liable, on summary conviction, to a penalty not exceeding ten dollars, and in default of payment to one month's imprisonment. R.S.C. c. 168, ss. 52 and 53.

496. Preventing the saving of wrecked vessels or wreck. —Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully prevents or impedes, or endeavours to prevent or impede—

(*a*) the saving of any vessel that is wrecked, stranded, abandoned or in distress; or

(*b*) any person in his endeavour to save such vessel.

2. Every one who wilfully prevents or impedes, or endeavours to prevent or impede, the saving of any wreck, is guilty of an indictable offence and liable, on conviction on indictment, to two years' imprisonment, and on summary conviction before two justices of the peace, to a fine of four hundred dollars or six months' imprisonment, with or without hard labour. R.S.C. c. 81, ss. 36 (*b*) and 37 (*c*).

Wreck.]—This term includes the cargo, stores and tackle of any vessel and all parts of a vessel separated therefrom, and also the property of shipwrecked persons. Sec. 3 (*dd*).

497. Injuries to rafts of timber and works used for the transmission thereof.—Every one is guilty of an indictable offence, and liable to two years' imprisonment who wilfully—

(*a*) breaks, injures, cuts, loosens, removes or destroys, in whole or in part, any dam, pier, slide, boom or other such work, or any chain or other fastening attached thereto, or any raft, crib of timber, or saw-logs; or

(*b*) impedes or blocks up any channel or passage intended for the transmission of timber. R.S.C. c. 168, s. 54.

498. Mischief to mines.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, with intent to injure a mine or oil well, or obstruct the working thereof—

(*a*) causes any water, earth, rubbish or other substance to be conveyed into the mine or oil well or any subterranean channel communicating with such mine or well; or

(*b*) damages any shaft or any passage of the mine or well; or

(*c*) damages, with intent to render useless, any apparatus, building, erection, bridge or road belonging to the mine, or well, whether the object damaged be complete or not; or

(*d*) hinders the working of any such apparatus; or

(*e*) damages or unfastens, with intent to render useless, any rope, chain or tackle used in any mine or well, or upon any way or work connected therewith. R.S.C. c. 168, ss. 30 and 31.

Colour of right.]—If the act be done with a colour of right it is no offence. Sec. 481 (2); R. v. Matthews, 14 Cox C.C. 5.

Apparatus, building or erection.]—A trunk of wood used to convey water to wash the earth from the ore is an "erection" belonging to the mine within this section. Barwell v. Winterstoke, 14 Q.B. 704; and so is a scaffold erected at some distance above the bottom of a mine for the purpose of working a vein of coal on a level with the scaffold. R. v. Whittingham, 9 C. & P. 234.

The legislation in the several provinces for the protection of persons employed in mines is as follows:—

Nova Scotia.—Revised Statutes of Nova Scotia, fifth series, 1884, Title 3, Chapter 8, 'Of the Regulation of Mines'; as amended by Chapter 6 of the Acts of 1885; by Chapter 9 of Acts of 1891; Chapter 4 of Acts of 1892; Chapter 10 of Acts of 1893; Chapter 54 of the Acts of 1899 (62 Vict. ch. 54).

New Brunswick.– Certain provisions in the General Mining Act, R.S.N.B., 1877, Chapter 18; 54 Vict., Chapter 16; and the amending Acts, 55 Vict., Chapter 10, 59 Vict., Chapter 27, and 62 Vict., Chapter 26; 56 Vict., Chapter 11.

Quebec.—The Act of 1892, 'An Act to Amend and Consolidate the Mining Laws,' 55-56 Vict., Chapter 20, as amended by the Act of 1900, 63 Vict., Chapter 17; and 63 Vict., Chapter 33.

Ontario.—R.S.O., 1897, Chapter 36; as amended in 1899 by 62 Vict., Chapter 10; and in 1900 by 63 Vict., Chapter 13.

Manitoba.—'The Mines Act, 1897,' 60 Vict., Chapter 17.

British Columbia.—R.S.B.C., 1897, Chapter 134, 'An Act for securing the Safety and Good Health of Workmen engaged in or about the Metalliferous Mines in the Province of British Columbia,' as amended by 62 Vict., Chapter 49; and R.S.B.C., 1897, Chapter 138, 'An Act to make Regulations with respect to Coal Mines,' as amended in 1899 by 62 Vict., Chapter 47.

Another amendment of 1899 to the latter Act, 62 Vict., Chapter 46, was disallowed on April 24, 1900. Can. Gazette, May 12, 1900, p. 2366.

499. Mischief. — Every one is guilty of the indictable offence of mischief who wilfully destroys or damages any of the property hereinafter mentioned, and is liable to the punishments hereinafter specified:

(*A*) To imprisonment for life if the object damaged be—

(*a*) a dwelling-house, ship or boat, and the damage be caused by an explosion, and any person be in such dwelling-house, ship or boat; and the damage causes actual danger to life; or

(*b*) a bank, dyke or wall of the sea, or of any inland water, natural or artificial, or any work in or belonging to any port, harbour, dock or inland water, natural or artificial, and the damage causes actual danger of inundation; or

(*c*) any bridge (whether over any stream of water or not) or any viaduct, or aqueduct, over or under which bridge, viaduct or aqueduct any highway, railway or canal passes, and the damage is done with intent and so as to render such bridge, viaduct or aqueduct, or the highway, railway or canal passing over or under the same, or any part thereof, dangerous or impassable; or

(*d*) a railway damaged with the intent of rendering and so as to render such railway dangerous or impassable. R.S.C. c. 168, ss. 13, 32 and 49; c. 32, s. 213.

(*B*) To fourteen years' imprisonment if the object damaged be—

(*a*) a ship in distress or wrecked, or any goods, merchandise or articles belonging thereto; or

(*b*) any cattle or the young thereof, and the damage be caused by the killing, maiming, poisoning or wounding.

(*C*) To seven years' imprisonment if the object damaged be—

(*a*) a ship damaged with intent to destroy or render useless such ship; or

(*b*) a signal or mark used for purposes of navigation; or

(*c*) a bank, dyke or wall of the sea, or of any inland water or canal, or any materials fixed in the ground for securing the same, or any work belonging to any port, harbour, dock or inland water or canal; or

(*d*) a navigable river or canal damaged by interference with the flood-gates or sluices

thereof or otherwise, with intent, and so as to obstruct the navigation thereof; or

(*e*) the flood-gate or sluice of any private water with intent to take or destroy, or so as to cause the loss or destruction of, the fish therein; or

(*f*) a private fishery or salmon river damaged by lime or other noxious material put into the water with intent to destroy fish then being or to be put therein; or

(*g*) the flood-gate of any mill-pond, reservoir or pool cut through or destroyed; or

(*h*) goods in process of manufacture damaged with intent to render them useless; or

(*i*) agricultural or manufacturing machines, or manufacturing implements, damaged with intent to render them useless; or

(*j*) a hop bind growing in a plantation of hops, or a grape vine growing in a vineyard. R.S.C. c. 168, ss. 16, 17, 21, 33, 34, 50 and 52.

(*D*) To five years' imprisonment if the object damaged be—

(*a*) a tree, shrub or underwood growing in a park, pleasure ground or garden, or in any land adjoining and belonging to a dwelling-house, injured to an extent exceeding in value five dollars; or

(*b*) a post letter bag or post letter; or

(*c*) any street letter box, pillar box or other receptacle established by authority of the Postmaster-General for the deposit of letters or other mailable matter; or

(*d*) any parcel sent by parcel post, any packet or package of paterns or samples of merchandise, or goods, or of seeds, cuttings, bulbs, roots, scions or grafts, or any printed vote or proceeding, newspaper, printed paper or book or other mailable matter, not being a post letter, sent by mail; or

(*e*) any property, real or personal, corporeal or incorporeal, for damage to which no special punishment is by law prescribed, damaged by night to the value of twenty dollars. R.S.C.

c. 168, ss. 22, 23, 38 and 58; c. 35, ss. 79, 91, 96 and 107; 53 V. c. 37, s. 17.

(*E*) To two years' imprisonment if the object damaged be—

(*a*) any property, real or personal, corporeal or incorporeal, for damage to which no special punishment is by law prescribed, damaged to the value of twenty dollars. R.S.C. c. 168, ss. 36, 42 and 58; 53 V. c. 37, s. 17.

See note to sec. 511.

500. Attempting to injure or poison cattle.—Every one is guilty of an indictable offence and liable to two years' imprisonment who wilfully—

(*a*) attempts to kill, maim, wound, poison or injure any cattle, or the young thereof; or

(*b*) places poison in such a position as to be easily partaken of by any such animal. R.S.C. c. 168, s. 44.

501. Injuries to other animals.—Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding one hundred dollars over and above the amount of injury done, or to three months' imprisonment with or without hard labour, who wilfully kills, maims, wounds, poisons or injures any dog, bird, beast or other animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or kept for any lawful purpose.

2. Every one who, having been convicted of any such offence, afterwards commits any offence under this section, is guilty of an indictable offence, and liable to a fine or imprisonment, or both, in the discretion of the Court. R.S.C. c. 168, s. 45; 53 V. c. 37, s. 16.

As to injuries to cattle see sec. 499 (B) (*b*), and the statutory definition of the word cattle in sec. 3, sub-sec. (*d*).

Punishment on indictment.]—See sec. 951 as to offences under the second sub-section.

Punishment on summary conviction.]—See sec. 872.

502. Threats to injure cattle.—Every one is guilty of an indictable offence, and liable to two years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to kill, maim, wound, poison, or injure any cattle. R.S.C. c. 173, s. 8.

Under sec. 499 it is an indictable offence to wilfully destroy or damage any cattle, *or the young thereof*, by killing, maiming, poisoning or wounding, and by sec. 3 (*d*) the term "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. This definition seems wide enough of itself to include the young of any of the animals of the classes mentioned. It will be observed that threats to kill a dog or other animals not being cattle (see sec. 501) are not within this section.

503 Injuries to poll books, etc.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully—

(*a*) destroys, injures or obliterates, or causes to be destroyed, injured or obliterated; or

(*b*) makes or causes to be made any erasure, addition of names, or interlineation of names in or upon—

any writ of election, or any return to a writ of election, or any indenture, poll-book, voters' list, certificate, affidavit or report, or any document, ballot or paper made, prepared or drawn out according to any law in regard to Dominion, Provincial, municipal or civic elections. R.S.C. c. 168, s. 55.

504. Injuries to buildings by tenants.—Every one is guilty of an indictable offence and liable to five years' imprisonment who, being possesed of any dwelling-house or other building, or part of any dwelling-house or other building which is built on lands subject to a mortgage, or which is held for any term of years or other less term, or at will, or held over after the termination of any tenancy, wilfully and to the prejudice of the mortgagee or owner—

(*a*) pulls down or demolishes, or begins to pull down or demolish the same or any part thereof, or removes or begins to remove the same or any part thereof from the premises on which it is erected; or

(*b*) pulls down or severs from the freehold any fixture fixed in or to such dwelling-house or building, or part of such dwelling-house or building.

See also sec. 322.

505. Injuries to land marks indicating muncipal divisions.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully pulls down, defaces, alters or removes any mound, land-mark, post or monument lawfully erected, planted or placed to mark or determine the boundaries of any province, county, city, town, township, parish or other municipal division. R.S.C. c. 168, s. 56.

506. Injuries to other land marks.—Every one is guilty of an indictable offence and liable to five years' imprisonment who wilfully defaces, alters or removes any mound, landmark, post or monument lawfully placed by any land surveyor to mark any limit, boundary or angle of any concession, range, lot or parcel of land.

2. It is not an offence for any land surveyor in his operations to take up such posts or other boundary marks when necessary, if he carefully replaces them as they were before. R.S.C. c. 168, s. 57.

507. Injuries to fences, etc.—Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the amount of the injury done, who wilfully destroys or damages any fence, or any wall, stile or gate, or any part thereof respectively, or any post or stake planted or set up on any land, marsh, swamp or land covered by water, on or as the boundary or part of the boundary line thereof, or in lieu of a fence thereto.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence, is liable, on summary conviction, to three months' imprisonment with hard labour. R.S.C. c. 168, s. 27; 53 V., c. 38, s. 15.

(Amendment of 1893).

507A. Natural bar to harbour.—Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding fifty dollars, who wilfully and without the permission of the Minister of Marine and Fisheries (the burden of proving which permission shall lie on the accused) removes any stone, wood, earth or other material forming a natural bar necessary to the existence of a public harbour, or forming a natural protection to such bar.

508. Injuries to trees, etc., wheresoever growing.—Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty-five dollars over and above the amount of the injury done, or to two months' imprisonment, with or without hard labour, who wilfully destroys or damages the whole or any part of any tree, sapling or shrub, or any underwood, wheresoever the same is growing, the injury done being to the amount of twenty-five cents, at the least.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence, is liable, on summary conviction, to a penalty not exceeding fifty dollars over and above the amount of the injury done, or to four months' imprisonment with hard labour.

3. Every one who, having been twice convicted of any such offence, afterwards commits any such offence, is guilty of an indictable offence, and liable to two years' imprisonment. R.S.C. c. 168, s. 24.

By sec. 907 it is provided that no information, summons, conviction, order or other proceeding shall be held to charge two offences, or shall be held to be uncertain on account of its stating the offence to have been committed in different modes, or in respect of one or other of several articles, either conjunctively or disjunctively, for example, in charging an offence under this section it may be alleged that "the defendant unlawfully did cut, break, root up and otherwise destroy or damage a tree, sapling or shrub"; and it is not necessary to define more particularly the nature of the act done, or to state whether such act was done in respect of a tree, or a sapling or a shrub. Sec. 907.

Where the expression "over and above the amount of injury done," is used, it does not mean that the penalty "over and above, etc.," is to go to the Crown and the sum assessed as "the amount of injury done" is to go to the party aggrieved. It is not intended that there shall be two penalties, but that the amount of the whole penalty shall be arrived at by ascertaining the damages and then adding thereto such sum, not exceeding $50, as the justice may deem proper. By sec. 511 provision is made whereby the justice may award a sum not exceeding $20 in the cases there mentioned, as "compensation" to be paid in the case of private property to the person aggrieved. If it had been intended that the "amount of injury done" mentioned in sec. 508 should be ascertained and paid as compensation to the aggrieved person, it is fair to expect it would have so stated. Why the justice should fix the penalty by first ascertaining the amount of damage done is explained by reference to sec. 861, which authorizes the justice for a first offence to discharge the offender from his conviction upon his paying the aggrieved person the damages and costs, or either, as ascertained by the justice. R. v. Tebo (1889), 1 Terr. L.R. 196.

509. Injuries to vegetable productions growing in gardens, etc.—Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the amount of the injury done, or to three months' imprisonment, with or without hard labour, who wilfully destroys, or damages with intent to destroy, any vegetable production growing in any garden, orchard, nursery ground, house, hot-house, green-house, or conservatory.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence, is guilty of an indictable offence, and liable to two years' imprisonment. R.S.C. c. 168, s. 25.

See note to sec. 508.

510. Injuries to cultivated roots and plants growing elsewhere.—Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding five dollars over and above the amount of the injury done, or to one month's imprisonment, with or without hard labour, who wilfully destroys, or damages with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture and growing in any land, open or inclosed, not being a garden, orchard, or nursery ground.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence, is liable, on summary conviction, to three months' imprisonment, with hard labour. R.S.C. c. 168, s. 26.

See note to sec. 508.

511. Injuries not otherwise provided for.—Every one who wilfully commits any damage, injury or spoil to or upon any real or personal property, either corporeal or incorporeal, and either of a public or private nature, for which no punishment is hereinbefore provided, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars, and such further sum, not exceeding twenty dollars, as appears to the justice to be a reasonable compensation for the damage, injury or spoil so committed—which last mentioned sum of money shall, in the case of private property, be paid to the person aggrieved; and if such sums of money, together with the costs, if ordered, are not paid, either immediately after the conviction, or within such period as the justice, at the time of the conviction appoints, the justice may cause the offender to be imprisoned for any term not exceeding two months, with or without hard labour.

2. Nothing herein extends to—

(*a*) any case where the person acted under a fair and reasonable supposition that he had a right to do the act complained of; or

(*b*) any trespass, not being wilful and malicious, committed in hunting, or fishing, or in the pursuit of game. R.S.C. c. 168, s. 59; 53 V., c. 37, s. 18.

Colour of right.]—To constitute an offence under this Part of the Code the act must have been done without legal justification or excuse and without colour of right. Sec. 481 (2).

Assertion of right; excess.]—In R. v. Clemens, [1898] 1 Q.B. 556, the Court for Crown cases reserved (Russell, C.J., and Grantham, Wright, Bigham and Darling, JJ.), laid down that the proper direction to be given to a jury on an indictment for malicious injury to property where it is claimed by the defendant that the act was done in the assertion of a right, is: Did the defendants do what they did in exercise of a supposed right? And if they did, but on the facts before them the jury are of opinion that the defendants did more damage than they could reasonably suppose to be necessary for the assertion or protection of the alleged right, then that the jury ought to find them guilty of malicious damage. In this case two wooden structures were erected on a piece of meadow land on the sea shore, over which the defendants claimed to have certain rights of user for recreation and for mending and drying nets, etc., and the defendants in the assertion of these rights pulled down the buildings and threw them into the sea. The court held that this was an excess of damage for which they might properly be convicted.

On a prosecution for malicious damage to property, the accused cannot claim that they were acting under a fair and reasonable supposition that they had a right to do the act complained of, if it appears that the supposed right was one which, under the circumstances, could not exist in law although the accused had a bona fide belief that these acts were legal. White v. Feast, 36 J.P. 36; Brooks v. Hamlyn (1899), 63 J.P. 215.

Under this section the magistrate's jurisdiction in respect of a charge of wilful injury to property is not ousted unless the act was done under a fair and reasonable supposition of right, and the magistrate has jurisdiction to summarily try the charge notwithstanding the mere belief of the accused that he had a right to do the act complained of. R. v. Davy (1900), 4 Can. Cr. Cas. 28 (Ont. C.A.).

Uncertainty in conviction.]—A conviction which alleged that the defendant unlawfully and maliciously committed damage, injury and spoil to and upon the real and personal property of the prosecutor, but did not allege the particular act done and the nature and quality of the property damaged, was held bad for uncertainty. Re Donelly, 20 U.C.C.P. 165; R. v. Spain (1889), 18 Ont. R. 385.

A conviction under this section should clearly shew whether the damage, injury or spoil complained of, is done to real or personal property, stating what property, and what is the amount which the justice has ascertained to be reasonable compensation. R. v. Caswell (1870), 20 U.C.C.P. 275.

Evidence.]—In Gayford v. Chouler, [1898] 1 Q.B. 316, the defendant walked across the respondent's field after notice to desist, and injured the high grass to the extent of 6d., and it was held by Day and Lawrance, JJ., that this constituted a malicious injury to property, for which the appellant could properly be convicted.

In Roper v. Knott, [1898] 1 Q.B. 686, the defendant was a milk carrier in the employment of the prosecutor, and the alleged offence consisted in adding water to the milk delivered to him for carriage to the prosecutor's customers. The magistrate found that the addition was made for the purpose of enabling the defendant to make a profit for himself by selling the surplus milk and not accounting for it, but that there was no intention to injure the prosecutor. The Court for Crown Cases reserved held that an intention to injure the owner of the property was not essential to the offence and that the defendant should be convicted.

Railway property.]—Sub-section 2 of sec. 273 of The Railway Act, Statutes of Canada, 1888, ch. 29, as amended (1899, ch. 37, sec. 4) provides as follows:—Every person who wilfully breaks down, injures, weakens or destroys any gate, fence, erection, building or structure of a company, or removes, obliterates, defaces or destroys any printed or written notice,

direction, order, by-law or regulation of a company, or any section of or extract from this Act or any other Act of Parliament, which a company or any of its officers or agents have caused to be posted, attached or affixed to or upon any fence, post, gate, building or erection of the company, or any car upon any railway, shall be liable on summary conviction to a penalty not exceeding fifty dollars, or, in default of payment, to imprisonment for a term not exceeding two months. Sec. 273 (2).

PART XXXVIII.

CRUELTY TO ANIMALS.

SECT.

(Amendment of 1895.)

512. Cruelty to animals.—Every one is guilty of an offence, and liable, on summary conviction before two justices of the peace, to a penalty not exceeding fifty dollars, or to three months' imprisonment, with or without hard labour, or to both, who—

(*a*) wantonly, cruelly or unnecessarily beats, binds, ill-treats, abuses, overdrives or tortures any cattle, poultry, dog, domestic animal or bird, or any wild animal or bird in captivity; or

(*b*) while driving any cattle or other animal is, by negligence or ill-usage in the driving thereof, the means whereby any mischief, damage or injury is done by any such cattle or other animal; or

(*c*) in any manner encourages, aids or assists at the fighting or baiting of any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature. R.S.C. c. 172, s. 2.

Unnecessarily beats, etc.]—"Unnecessarily" here means "without good reason." Ford v. Riley, 23 Q.B.D. 203; Murphy v. Manning, 2 Ex. D. 307; R. v. McDonagh, 28 L.R. Ir. 204.

The use of an overdraw check rein on a horse is ordinarily not an offence under this section although it causes discomfort to the animal. Society v. Lowry (1894), 17 Montreal Legal News 118.

The cutting of the combs of cocks to fit them for fighting or winning prizes at exhibitions has been held to be cruelty. Murphy v. Manning, L.R. 2 Ex. D. 307; but as to dishorning cattle the better opinion appears to be that it is not an offence; Callaghan v. Society, 11 Cox C.C. 101; although it was held to be in Ford v. Wiley, L.R. 23, Q.B.D. 203.

The spaying of sows is not cruelty. Lewis v. Fermor, L.R. 18 Q.B.D. 532.

Appeal.]—Where an information is laid in the name of an individual describing himself as the agent of a society named, the society does not thereby become a party to the proceedings and it has no locus standi to appeal from the justices' order dismissing the charge; the notice of appeal must in such case be taken in the name of the agent personally, otherwise it may be quashed. Canadian Society, etc. v. Lauzon (1899), 4 Can. Cr. Cas. 354 (Que.).

Penalty.]—This and sec. 513 of the Code are taken from the Act respecting Cruelty to Animals, R.S.C., ch. 172, and sec. 7 of that statute remains unrepealed (Code sec. 983) and must be read in conjunction with Code secs. 512 and 513. It is as follows:—

"Every pecuniary penalty recovered with respect to any such offence shall be applied in the following manner, that is to say: one moiety thereof to the corporation of the city, town, village, township, parish, or place in which the offence was committed, and the other moiety, with full costs, to the person who informed and prosecuted for the same, or to such other person as to the justices of the peace seems proper."

Time.]—The prosecution must take place within three months from the commission of the offence. Sec. 551 (*e*).

513. Keeping cockpit.—Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding fifty dollars, or to three months' imprisonment, with or without hard labour, or to both, who builds, makes, maintains or keeps a cock-pit on premises belonging to or occupied by him, or allows a cock-pit to be built, made, maintained or kept on premises belonging to or occupied by him.

2. All cocks found in any such cock-pit, or on the premises wherein such cock-pit is, shall be confiscated and sold for the benefit of the municipality in which said cock-pit is situated. R.S.C. c. 172, s. 3.

Time.]—The prosecution must be commenced within three months from the commission of the offence. Sec. 551 (*e*).

514. The conveyance of cattle.—No railway company within Canada, whose railway forms any part of a line of road over which cattle are conveyed from one Province to another Province, or from the United States to or through any Province, or from any part of a Province to another part of the same and no owner or master of any vessel carrying or transporting cattle from one Province to another Province, or within any Province, or from the United States through or to any Province, shall confine the same in any car, or vessel of any description, for a longer period than twenty-eight hours without unlading the same for rest, water and feeding for a period of at least five consecutive hours, unless prevented from so unlading and furnishing water and food by storm or other unavoidable cause, or by necessary delay or detention in the crossing of trains.

2. In reckoning the period of confinement, the time during which the cattle have been confined without such rest, and without the furnishing of food and water, on any connecting railway or vessels from which they are received, whether in the United States or in Canada, shall be included.

3. The foregoing provisions as to cattle being unladen shall not apply when cattle are carried in any car or vessel in which they have proper space and opportunity for rest, and proper food and water.

4. Cattle so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof, or in case of his default in so doing, by the railway company, or owner or master of the vessel transporting the same, at the expense of the owner or person in custody thereof; and such company, owner or master shall in such case have a lien upon such cattle for food, care and custody furnished, and shall not be liable for any detention of such cattle.

5. Where cattle are unladen from cars for the purpose of receiving food, water and rest, the railway company then having charge of the cars in which they have been transported shall, except during a period of frost, clear the floors of such cars, and litter the same properly with clean sawdust or sand, before reloading them with live stock.

6. Every railway company, or owner or master of a vessel having cattle in transit, or the owner or person having the custody of such cattle as aforesaid, who knowingly and wilfully fails to comply with the foregoing provisions of this section, is liable for every such failure, on summary conviction, to a penalty not exceeding one hundred dollars. R.S.C. c. 172, ss. 8, 9, 10 and 11.

Time.]—By sec. 551 (*e*) it is provided that no prosecution for this offence, or action for penalties or forfeiture shall be commenced after the expiration of three months from the commission of the offence.

515. Search of premises.—Any peace officer or constable may, at all times, enter any premises where he has reasonable grounds for supposing that any car, truck or vehicle, in respect whereof any company or person has failed to comply with the provisions of the next preceding section, is to be found, or enter on board any vessel in respect whereof he has reasonable grounds for supposing that any company or person has, on any occasion, so failed.

2. Every one who refuses admission to such peace officer or constable is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars, and not less than five dollars, and costs, and in default of payment, to thirty days' imprisonment. R.S.C. c. 171, s. 12.

Time.]—A prosecution against a railway company for refusing to admit the peace officer to the car must be commenced within three months from the commission of the offence. Sec 551 (*e*).

PART XXXIX.

OFFENCES CONNECTED WITH TRADE AND BREACHES OF CONTRACT.

SECT.

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516. Conspiracies in restraint of trade.—A conspiracy in restraint of trade is an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade.

517. What acts done in restraint of trade are not unlawful.—The purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful within the meaning of the next preceding section. R.S.C. c. 131, s. 22.

Trade union.]—As sec. 517 is taken from the Trade Unions Act, R.S.C. 1886, ch. 131, the definition of the term contained in that Act will apply. The expression "trade union" is there declared to mean (unless the context otherwise requires) such combination whether temporary or permanent for regulating the relations between workmen and masters or for imposing restrictive conditions on the conduct of any trade or business as would, but for that statute, have been deemed to be an unlawful combination by reason of some one or more of its purposes being in restraint of trade. R.S.C. ch. 131, sec. 2.

518. Prosecution for conspiracy.—No prosecution shall be maintainable against any person for conspiracy in refusing to work with or for any employer or workman, or for doing any act or causing any act to be done for the purpose of a trade combination unless such act is an offence punishable by Statute. 53 V. c. 37, s. 19.

Doing an act, etc.]—The expression "act" here includes a default, breach or omission. Sec. 519.

It being proved that a member of a trades union had conspired to injure a non-union workman by depriving him of his employment, this was held not to be excepted as an "act for the purpose of trade combination," and a conviction for a conspiracy was sustained. R. v. Gibson (1889), 16 O.R. 704.

519. "Trade combination;" "act;" interpretation.—The expression "trade combination" means any combination between masters or workmen or other persons, for regulating or altering the relations between any persons being masters or workmen, or the conduct of any master or workman in or in respect of his business or employment, or contract of employment or service; and the expression "act" includes a default, breach or omission. R.S.C. c. 173, s. 13.

(Amendments of 1899 and 1900).

520. Trade combines.—Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars, and not less than two hundred dollars, or to two years' imprisonment, or, if a corporation, is liable to a penalty not exceeding ten thousand dollars, who conspires, combines, agrees, or arranges with any other person, or with any railway, steamship, steamboat, or transportation company—

(*a*) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or

(*b*) to restrain or injure trade or commerce in relation to any such article or commodity; or

(*c*) to unduly prevent, limit or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or

(*d*) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property.

2. Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees.

Section 520 originally contained the word "unlawfully" before the subsections (*a*) to (*d*) inclusive and the word "unduly" appeared in paragraphs (*a*), (*c*) and (*d*) as it does in this amendment, and the word "unreasonably" before the word "enhance" in paragraph (*c*). The section was amended in 1899 (Canada Statutes, 1899, ch. 46, sec. 1) by striking out the words "unduly" and "unreasonably," but the word "unlawfully" which applied to all of the paragraphs was retained. 2 Can. Cr. Cas. 605 (Appendix). The present amendment re-inserts the words "unduly" and "unreasonably" in their former position, but strikes out the word "unlawfully."

Sub-sec. 2 is new. It applies not only to regularly organized trade unions as that term is defined by the Trade Union Act, R.S.C. ch. 131, but to any voluntary organization of labourers. Senate Debates, 1900, page 1044. As to trade unions there is a provision in that statute as follows: (Sec. 22). "The purposes of any trade union shall not by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise, or so as to render void or voidable any agreement or trust."

It is not an unlawful combination for a manufacturer to agree with a number of dealers to sell to them exclusively. R. v. American Tobacco Co. (1897), 3 Revue de Jurisprudence 453.

Secs. 4 and 5 of the Act for the Prevention and Suppression of Combinations formed in restraint of Trade, 52 Vict., ch. 41, still remain in force (Code sec. 983). They are as follows:

(4) Where an indictment is found against any person for offences provided against in this Act, the defendant or person accused shall have the option to be tried before the judge presiding at the court at which such indictment is found, or the judge presiding at any subsequent sitting of such court, or at any court where the indictment comes on for trial, without the intervention of a jury; and in the event of such option being exercised the proceedings subsequent thereto shall be regulated, in so far as may be applicable, by The Speedy Trials Act.

(5) An appeal shall lie from any conviction under this Act by the judge without the intervention of a jury to the highest court of appeal in criminal matters in the province where such conviction shall have been made, upon all issues of law and fact; and the evidence taken in the trial shall form part of the record in appeal, and for that purpose the court before which the case is tried shall take note of the evidence and of all legal objections thereto.

521. Criminal breaches of contract.—Every one is guilty of an indictable offence and liable, on indictment, or on summary conviction before two justices of the peace, to a penalty not exceeding one hundred dollars or to three months' imprisonment, with or without hard labour, who—

(*a*) wilfully breaks any contract made by him knowing or having reasonable cause to believe, that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or to cause serious bodily injury, or to expose valuable property,

whether real or personal, to destruction or serious injury; or

(*b*) being under any contract made by him with any municipal corporation or authority, or with any company, bound, agreeing or assuming to supply any city or any other place, or part thereof, with electric light or power, gas or water, wilfully breaks such contract, knowing, or having reasonable cause to believe, that the probable consequences of his so doing, either alone or in combination with others, will be to deprive the inhabitants of that city or place, or part thereof, wholly or to a great extent, of their supply of power, light, gas or water; or

(*c*) being under any contract made by him with a railway company, bound, agreeing, or assuming to carry His Majesty's mails, or to carry passengers or freight, or with His Majesty, or any one on behalf of His Majesty, in connection with a Government railway on which His Majesty's mails or passengers or freight are carried, wilfully breaks such contract, knowing, or having reason to believe that the probable consequences of his so doing, either alone or in combination with others, will be to delay or prevent the running of any locomotive engine, or tender, or freight or passenger train or car, on the railway.

2. Every municipal corporation or authority or company which, being bound, agreeing or assuming to supply any city, or any other place, or any part thereof, with electric light or power, gas or water, wilfully breaks any contract made by such municipal corporation, authority or company, knowing or having reason to believe that the probable consequences of his so doing will be to deprive the inhabitants of that city or place or part thereof wholly, or to a great extent, of their supply of electric light or power, gas or water, is liable to a penalty not exceeding one thousand dollars.

3. Every railway company which, being bound, agreeing or assuming to carry His Majesty's mails, or to carry passengers or freight, wilfully breaks any contract made by such railway company, knowing or having reason to believe that the probable consequences of its so doing will be to delay or prevent the running of any locomotive, engine, or tender, or freight or passenger train or car on the railway, is liable to a penalty not exceeding one hundred dollars.

4. It is not material whether any offence defined in this section is committed from malice conceived against the person,

corporation, authority or company with which the contract is made or otherwise. R.S.C. c. 173, ss. 15 and 17.

Malice.]—"A term which is truly a legal enigma": Harris Cr. Law, p. 13.

The terms "malice" and "malicious" are practically eliminated from the code owing to the confusion of ideas connected with them. "Malice" only appears in two places; here and in sec. 676 where the expression "mute of malice" is retained. Mr. Hoyles' article on The Criminal Law, 38 C.L.J. 231.

522. Posting up copies of provisions respecting criminal breaches of contract.—Every such municipal corporation, authority, or company, shall cause to be posted up at the electrical works, gas works, or water works, or railway stations, as the case may be, belonging to such corporation, authority or company, a printed copy of this and the preceding section in some conspicuous place, where the same may be conveniently read by the public; and as often as such copy becomes defaced, obliterated or destroyed, shall cause it to be renewed with all rasonable despatch.

2. Every such municipal corporation, authority or company which makes default in complying with such duty is liable to a penalty not exceeding twenty dollars for every day during which such default continues.

3. Every person unlawfully injuring, defacing, or covering up any such copy so posted up is liable, on summary conviction, to a penalty not exceeding ten dollars. R.S.C. c. 173, s. 19.

523. Intimidation.—Every one is guilty of an indictable offence and liable, on indictment, or on summary conviction before two justices of the peace, to a fine not exceeding one hundred dollars, or to three months' imprisonment, with or without hard labour, who wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain—

(*a*) uses violence to such other person or his wife or children, or injures his property; or

(*b*) intimidates such other person, or his wife or children, by threats of using violence to him, her or any of them, or injuring his property; or

(*c*) persistently follows such other person about from place to place; or

(*d*) hides any tools, clothes or other property owned or used by such other person, or deprives him of, or hinders him in the use thereof; or

(*e*) with one or more other persons, follows such other person in a disorderly manner, in or through any street or road; or

(*f*) besets or watches the house or other place where such other person resides or works, or carries on business or happens to be. R.S.C. c. 173, s. 12.

Intimidates.]—A threat made by workmen to their employer that they will strike if he employs a non-union man is not intimidation. Connor v. Kent, [1891] 2 Q.B. 545.

Besetting house or other place.]—Sub-section (*f*) is adapted from sec. 7 of the Conspiracy and Protection of Property Act (Imp.), 38-39 Vict., ch. 86. Under that statute it has been held that the words "or other place" include a pier or landing stage. Charnock v. Court, [1899] 2 Ch. 35.

In Lyons v. Wilkins, [1899] 1 Ch. 255, the plaintiffs sought by a civil action to restrain the defendants, members of a trades union, from watching and besetting the works of the plaintiffs, and also the works of a third person who worked for the plaintiffs, for the purpose of persuading workpeople, and such third person, to abstain from working for the plaintiffs; and a perpetual injunction was granted restraining the defendants from watching and besetting the plaintiff's premises for the purpose of persuading, or otherwise preventing, persons working for them, or for any purpose except merely to obtain or communicate information; and also from watching or besetting the premises of the third person for the purpose of persuading or preventing him from working for the plaintiffs, or for any purpose except merely to obtain or communicate information. This judgment was affirmed by the Court of Appeal (Lindley, M.R., and Chitty and Williams, L.JJ.).

524. Intimidation of any person to prevent him from working at any trade. — Every one is guilty of an indictable offence and liable to two years' imprisonment who, in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or of any unlawful combination or conspiracy respecting any trade, business, or manufacture, or respecting any person concerned or employed therein, unlawfully assaults any person, or, in pursuance of any such combination or conspiracy, uses any violence or threat of violence to any person, with a view to hinder him from working or being employed at such trade, business or manufacture. R.S.C. c. 173, s. 9.

525. Intimidation of any person to prevent him dealing in wheat, etc.; unlawfully preventing seamen from working.—Every one is guilty of an indictable offence and liable, on indictment, or on summary conviction before two justices of the peace, to a fine not exceeding one hundred

dollars, or to three months' imprisonment, with or without hard labour, who—

(*a*) beats or uses any violence or threat of violence to any person with intent to deter or hinder him from buying, selling or otherwise disposing of any wheat or other grain, flour, meal, malt or potatoes or other produce or goods, in any market or other place; or

(*b*) beats or uses any such violence or threat to any person having the charge or care of any wheat or other grain, flour, meal, malt or potatoes, while on the way to or from any city, market, town or other place, with intent to stop the conveyance of the same; or

(*c*) by force or threats of violence, or by any form of intimidation whatsoever, hinders or prevents or attempts to hinder or prevent any seaman, stevedore, ship carpenter, ship labourer or other person employed to work at or on board any ship or vessel, or to do any work connected with the loading or unloading thereof, from working at or exercising any lawful trade, business, calling or occupation in or for which he is so employed; or with intent so to hinder or prevent, besets or watches such ship, vessel or employee; or

(*d*) beats or uses any violence to, or makes any threat of violence against, any such person with intent to hinder or prevent him from working at or exercising the same, or on account of his having worked at or exercised the same. R.S.C. c. 173, s. 10; 50-51 V., c. 49.

526. Intimidation of any person to prevent him bidding for public lands.—Every person is guilty of an indictable offence and liable to a fine not exceeding four hundred dollars, or to two years' imprisonment, or to both, who, before or at the time of the public sale of any Indian lands, or public lands of Canada, or of any Province of Canada, by intimidation, or illegal combination, hinders or prevents, or attempts to hinder or prevent, any person from bidding upon or purchasing any lands so offered for sale. R.S.C. c. 173, s. 14.

PART XL.

ATTEMPTS—CONSPIRACIES—ACCESSORIES.

SECT.

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527. Conspiring to commit an indictable offence. —Every one is guilty of an indictable offence and liable to seven years' imprisonment who, in any case not hereinbefore provided for, conspires with any person to commit any indictable offence.

What is conspiracy?]—An agreement between two or more persons for any of the purposes following will constitute criminal conspiracy:

1. Falsely to charge another with a crime punishable by law, either from a malicious or vindictive motive or feeling toward the party, or for the purpose of extorting money from him.

2. Wrongfully to injure or prejudice a third person or any body of men, in any other manner.

3. To commit any offence punishable by law.

4. To do any act with intent to pervert the course of justice. Archbold's Crim. Plead. (1893), 21st Ed., 1100.

The existence of a bad motive in the case of an act which is not in itself illegal will not convert that act into a civil wrong for which reparation is due. A wrongful act done knowingly and with a view to its injurious consequences may in the sense of law be malicious; but such malice derives its essential character from the circumstance that the act done constitutes a violation of the law. Allen v. Flood (1898), A.C. 1, per Lord Watson at p. 92. In order to constitute legal malice the act done must, apart from bad motive, amount to a violation of law. Ibid.

Intention and agreement.] — A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in *intention only*, it is not indictable. But where two agree to carry it into effect, the very plot is an act in itself and is the act of each of the parties, promise against promise, actus contra actum, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means. Mulcahy v. R., L.R. 3 H.L., Eng. and Ir. App. 306, 317; Archbold's Crim. Evid., 21st Ed., 1104.

The conspiracy itself is the offence, and whether anything has been done in pursuance of it or not is immaterial. R. v. Gill (1818), 2 B. & Ald. 204; R. v. Seward (1834), 1 A. & E. 706; R. v. Richardson (1834), 1 M. & Rob. 402; R. v. Kenrick (1843), 5 Q.B. 49.

Indictment.]—An indictment for a conspiracy may be tried in any county in which an overt act has been committed in pursuance of the original illegal combination and design. R. v. Connolly (1894), 25 Ont. R. 151, 169.

The date mentioned in the indictment as the day when the conspiracy took place is not material, but in form some day before the indictment preferred, must be laid; evidence is not thereby precluded in respect of an earlier date. R. v. Charnock (1698), 12 Howard's State Trials, 1397.

Evidence.] It is not necessary to prove that the defendants actually met together and concerted the proceeding; it is sufficient if the jury are satisfied from the defendants' conduct either together or severally, that they were acting in concert. R. v. Fellowes (1859), 19 U.C.R., 48, 58.

It must be left to the jury to estimate the weight of the evidence of an accomplice according to their opinion of the motives, character and credibility of the witness, and of the probable nature of his statement. And if it has had the effect of convincing them without doubt of the guilt of the accused they are at liberty to act upon their conviction. Per Robinson, C.J. R. v. Fellowes and others (1859), 19 U.C.Q.B. 48.

Conspiracy is not chargeable against a husband and wife alone, for they are in law one person and are presumed to have but one will. 1 Hawk., ch. 72, sec. 8.

If A. and B. conspire together, each is guilty of an offence, and each may be indicted separately, tried alone and convicted, although both be living and within the country and county at the time of the indictment, trial and conviction. R. v. Frawley (1894), 1 Can. Cr. Cas. 253 (Ont.).

In a charge of conspiracy when the existence of the common design on the part of the defendants has been proved, evidence is then properly receivable as against both of what was said or done by either in furtherance of the common design. R. v. Connolly (1894), 1 Can. Cr. Cas. 468 (Ont.).

And evidence is admissible of what was said or done in furtherance of the common design by a conspirator not charged, as against those who are charged, after proof of the existence of the common design on the part of the defendants with such conspirator. Ibid.

The charge of Coleridge, J., in R. v. Murphy (1837), 8 C. & P., at p. 310, conveniently summarizes the usual method of proving a charge of conspiracy: "Although the common design is the root of the charge, it is not necessary to prove that the parties came together and actually agreed in terms to have this common design, and to pursue it by common means, and so carry it into execution. This is not necessary, because in many cases of the most clearly established conspiracies there are no means of proving any such thing, and neither law nor common sense requires that it should be proved. If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act so as to complete it with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is, 'Had they this common design, and did they pursue it by these common means—the design being unlawful?'" R. v. Connolly (1894), 1 Can. Cr. Cas. 468 (Ont.); R. v. Fellowes, 19 U.C.Q.B. 48.

At the hearing of a charge of conspiracy in relation to corrupt practices at an election, before a county judge sitting as police magistrate, evidence given before a special committee of the House of Commons, and taken down by stenographers, was tendered before the magistrate, and refused by him; it was held that the court had no jurisdiction to grant a mandamus to the magistrate directing him to receive such evidence. R. v. Connolly (1891), 22 Ont. R. 220.

Treason.]—As to treasonable conspiracy see sec. 66.

528. Attempting to commit certain indictable offences.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who attempts, in any case not hereinbefore provided for, to commit any indictable offence for which the punishment is imprisonment for life, or for fourteen years, or for any term longer than fourteen years.

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.

529. Attempting to commit other indictable offences.—Every one who attempts to commit any indictable offence for committing which the longest term to which the offender can be sentenced is less than fourteen years, and no express provision is made by law for the punishment of such attempt, is guilty of an indictable offence and liable to imprisonment for a term equal to one-half of the longest term to which a person committing the indictable offence attempted to be committed may be sentenced.

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. And where a prisoner is indicted for an attempt to steal, and the proof establishes that the offence of larceny 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 (Code sec. 712). R. v. Taylor (1895), 5 Can. Cr. Cas. 89 (Que.).

530. Attempting to commit statutory offences.—Every one is guilty of an indictable offence and liable to one year's imprisonment who attempts to commit any offence under any statute for the time being in force and not inconsistent with this Act, or incites or attempts to incite any person to commit any such offence, and for the punishment of which no express provision is made by such statute.

A defendant charged with offering money to a person to swear that A., B. or C. gave him a certain sum of money to vote for a candidate at an election, was admitted to bail and the recognizance taken by one justice of the peace. It was held that the offence was not an attempt to commit the crime of subornation of perjury, but something less, being an incitement to

give false evidence or particular evidence regardless of its truth or falsehood, and was a misdemeanor at common law, and that the recognizance was properly taken by one justice, who had power to admit the accused to bail at common law, and that sec. 601 of the Code did not apply. R. v. Cole (1902), 38 C.L.J., 266 (Ont.).

The common law jurisdiction as to crime is still operative, notwithstanding the Code, and even in cases provided for by the Code, unless there is such repugnancy as to give prevalence to the later law. Ibid.

531. Accessories after the fact to certain indictable offences.—Every is guilty of an indictable offence and liable to seven years' imprisonment who, in any case where no express provision is made by this Act for the punishment of an accessory, is accessory after the fact to any indictable offence for which the punishment is, on a first conviction, imprisonment for life, or for fourteen years, or for any term longer than fourteen years.

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. Sec. 63. But 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. Sec. 63 (2).

At common law the term accessory after the fact only applied to felonies for in misdemeanours 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.

Where the power of a court of General or Quarter sessions is excluded, as to which see sec. 540, such court has no jurisdiction to try a charge of being accessory after the fact to such offence. Sec. 540.

An accessory after the fact may be indicted whether the principal offender has or has not been indicted or convicted, or is or is not amenable to justice; and such accessory may be indicted either alone as for a substantive offence or jointly with such principal. Sec. 627 (1).

Where an indictment contains two counts, one charging the accused as a principal offender and the other charging him with being an accessory after the fact to the same offence, the prosecution will be compelled to elect upon which count they will proceed. R. v. Brannon (1880), 14 Cox C.C. 394.

Where several persons are tried upon one indictment, some as principals in murder others as accessory after the fact to the murder, and the principals are convicted of manslaughter only, the prisoners charged as accessories after the fact may be convicted on the same indictment as such accessories to the manslaughter. R. v. Richards (1877), 2 Q.B.D. 311, 13 Cox C.C. 611.

But on an indictment charging a man with the principal offence only, he cannot be convicted thereunder of being an accessory after the fact. R. v. Fallon (1862), L. & C. 217, 32 L.J.M.C. 66; Richards v. R. (1897), 61 J.P. 389.

Evidence.]—See note to sec. 63.

532. Accessories after the fact to other indictable offences.—Every one who is accessory after the fact to any indictable offence for committing which the longest term to which the offender can be sentenced is less than fourteen years, and no express provision is made for the punishment of such accessory, is guilty of an indictable offence and liable to imprisonment for a term equal to one-half of the longest term to which a person committing the indictable offence to which he is accessory may be sentenced.

See notes to secs. 63 and 531.

TITLE VII.

PROCEDURE.

PART XLI.

GENERAL PROVISIONS.

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533. Power to make rules.—Every Superior Court of criminal jurisdiction may at any time, with the concurrence of a majority of the judges thereof present at any meeting held for the purpose, make rules of court, not inconsistent with any statute of Canada, which shall apply to all proceedings relating to any prosecution, proceeding or action instituted in relation to any matter of a criminal nature, or resulting from or incidental to any such matter, and in particular for all or any of the purposes following:—

(*a*) For regulating the sittings of the court or of any division thereof, or of any judge of the court sitting in chambers, except in so far as the same are already regulated by law.

(*b*) For regulating in criminal matters the pleading, practice and procedure in the court, including the subjects of mandamus, certiorari, habeas corpus, prohibition, quo warranto, bail and costs, and the proceedings under section nine hundred of this Act.

(*c*) Generally for regulating the duties of the officers of the court and every other matter deemed expedient for better attaining the ends of justice and carrying the provisions of the law into effect.

2. Copies of all rules made under the authority of this section shall be laid before both Houses of Parliament at the session next after the making thereof, and shall also be published in the Canada Gazette. 52 V., c. 40.

(Amendment of 1900).

3. In the Province of Ontario the authority for the making of such rules of court applicable to superior courts of criminal jurisdiction in the Province is vested in the Supreme Court of Judicature, and such rules may be made by the said Court at any time with the concurrence of a majority of the judges thereof present at a meeting held for the purpose.

British Columbia Rules of Court.]—In the Province of British Columbia rules and orders of court have been passed under this section, known as the "Supreme Court Rules, 1896 (Crown side), and the same appear in The Canada Gazette (1900), Vol. 33, p. 2110. They are adapted principally from the English Crown Office Rules of 1886. Where no other provision is made in the Rules the former procedure and practice remains in force, and as to matters not provided for, the practice shall, as far as may be, be regulated by analogy to such Rules. B.C. Crown Rules (1896) No. 65.

534. Civil remedy not suspended though act is a criminal offence.—After the commencement of this Act no civil remedy for any act or omission shall be suspended or affected by reason that such act or omission amounts to a criminal offence.

The operation of this section is left in doubt by reason of the constitutional questions involved. Can the Dominion Parliament declare that a civil remedy shall not be suspended? Paquet v. Lavoie (1898), R.J. Que., 7 Q.B. 277. Have not the provincial legislatures by reason of their exclusive jurisdiction as to civil rights the right to control the suspension of the civil remedy pending the criminal prosecution?

To an action, before the Code, for assault and battery defendant pleaded that before action brought the plaintiff laid an information before a magistrate charging defendant with feloniously, etc., wounding the plaintiff with intent to do him grievous bodily harm, thereby charging defendant with felony; that defendant was brought before the magistrate and committed for trial which had not yet taken place; that the subject of both the civil and criminal prosecutions was the same, and that plaintiff's civil right of action was suspended until the criminal charge was disposed of. Held, on demurrer, that the plea was good; and an order was made staying the civil action in the meantime. Taylor v. McCulloch (1885), 8 Ont. R. 309.

The former rule, excepting in the Province of Quebec, was that on grounds of public policy if it appeared on the trial of a civil action that the facts amounted to felony, the judge was bound to stop the civil proceedings and non-suit the plaintiff in order that public justice might first be vindicated by a criminal prosecution. Walsh v. Nattress, 19 U.C.C.P. 453; Livingstone v. Massey, 23 U.C.Q.B. 156; Williams v. Robinson, 20 U.C.C.P. 255; Pease v. McAloon, 1 Kerr (N.B.) 111. The civil remedy was held to be suspended until the defendant charged with the felony should be either acquitted or convicted thereof. Brown v. Dalby, 7 U.C.Q.B. 162.

535. Abolition of distinction between felony and misdemeanor.—After the commencement of this Act the distinction between felony and misdemeanour shall be abolished, and proceedings in respect of all indictable offences (except so far as they are herein varied) shall be conducted in the same manner.

A provincial statute prior to Confederation, providing for the discharge from imprisonment in default of indictment of an accused person committed for a "felony" will apply equally to cases which were misdemeanors before the abolition by the Criminal Code of Canada of the distinction between felony and misdemeanor. R. v. Cameron (1897), 1 Can. Cr. Cas. 169 (Que.).

A person admitted to bail is technically in custody, so as to entitle him to the benefit of such a statute. Ibid.

Enactments regulating the procedure in courts are usually deemed imperative, and not merely directory. Maxwell on Statutes, 456; Taylor v. Taylor, 1 Ch. D. 426, 3 Ch. D. 145; R. v. Riel (No. 2) (1885), 1 Terr. L.R. 23, 44.

536. Construction of Acts.—Every Act shall be hereafter read and construed as if any offence for which the offender may be prosecuted by indictment (howsoever such offence may be therein described or referred to), were described or referred to as an "indictable offence;" and as if any offence punishable on summary conviction were described or referred to as an "offence;" and all provisions of this Act relating to "indictable offences" or "offences" (as the case may be) shall apply to every such offence.

2. Every commission, proclamation, warrant or other document relating to criminal procedure, in which offences which are indictable offences or offences (as the case may be) as defined by this Act are described or referred to by any names whatsoever, shall be hereafter read and construed as if such offences were therein described and referred to as indictable offences or offences (as the case may be).

537. Construction of reference to certain Acts.—In any Act in which reference is made to The Speedy Trials Act the same shall be construed, unless the context requires otherwise, as if such reference were to Part LIV. of this Act; any Act referring to The Summary Trials Act shall be construed, unless the context forbids it, as if such reference were to Part LV. of this Act; and every Act referring to The Summary Convictions Act shall be construed, unless the context forbids it, as if such reference were to Part LVIII. of this Act.

PART XLII.

JURISDICTION.

SECT.

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538. Superior Court.—Every Superior Court of criminal jurisdiction and every Judge of such Court sitting as a Court for the trial of criminal causes, and every Court of Oyer and Terminer and General Gaol Delivery has power to try any indictable offence.

New Brunswick.]—County Courts in New Brunswick are not courts of oyer and terminer and general gaol delivery, as the circuits of the Supreme Court are. Criminal jurisdiction is given to the County Courts by statute, but nothing is said to the effect that they are courts of general gaol delivery. R. v. Wright, 2 Can. Cr. Cas. 88 (N.B.).

(Amendment of 1893).

539. Other courts.—Every Court of General or Quarter Sessions of the Peace, when presided over by a Superior Court judge, or a County or District Court judge, or in the cities of Montreal and Quebec by a recorder or judge of the Sessions of the Peace; and in the Province of New Brunswick every County Court judge has power to try any indictable offence except as hereinafter provided.

The courts here mentioned have their power limited by sec. 540.

The judgments of the Courts of General Sessions in Ontario are public records, and the clerk of the peace holds them as their statutory custodian in the interests of the public generally and not as a deputy officer of the Crown. Any person interested in the indictments and records of the Court of General Sessions is entitled of right to inspect them. R. v. Scully (1901), 5 Can. Cr. Cas. 1 (Ont.).

An accused person tried and acquitted in such court is entitled to a copy of the record of such acquittal and of the indictment without the fiat of or intervention by the Attorney-General of the province, and a mandamus will lie to the clerk of the peace to compel the delivery to him of certified copies. Ibid.

540. Jurisdiction in certain cases.—No such court as mentioned in the next preceding section has power to try any offence under the following sections, that is to say:

Part IV.—Sections 65, treason; 67, accessories after the fact to treason; 68, 69 and 70, treasonable offences; 71, assault on the King; 72, inciting to mutiny; 77, unlawfully obtaining and communicating official information; 78, communicating information acquired by holding office.

Part VII.—Sections 120, administering, taking, or procuring the taking of oaths to commit certain crimes; 121, administering, taking or procuring the taking of other unlawful oaths; 124, seditious offences; 125, libels on foreign sovereigns; 126, spreading false news.

Part VIII.—Piracy; any of the sections in this part.

Part IX.—Sections 131, judicial corruption; 132, corruption of officers employed in prosecuting offenders; 133, frauds upon the Government; 135, breach of trust by a public officer; 136, corrupt practices in municipal affairs; 137 (*a*), selling and purchasing offices.

(Amendment of 1894.)

Part XVIII.—Sections 231, murder; 232, attempts to murder; 233, threats to murder; 234, conspiracy to murder; 235, accessory after the fact to murder.

Part XXI.—Sections 267, rape; 268, attempt to commit rape.

Part XXIII.—Defamatory libel; any of the sections in this part.

Part XXXIX.—Section 520, combinations in restraint of trade.

Part XL.—Conspiring or attempting to commit, or being accessory after the fact to any of the foregoing offences.

(Amendment of 1900.)

Or any indictment for bribery or undue influence, personation or other corrupt practice under The Dominion Elections Act.

541. Exercising powers of two justices.—The judge of the Sessions of the Peace for the city of Quebec, the judge of the Sessions of the Peace for the city of Montreal, and every recorder, police magistrate, district magistrate, or stipendiary

magistrate appointed for any territorial division, and every magistrate authorized by the law of the Province in which he acts to perform acts usually required to be done by two or more justices of the peace, may do alone whatever is authorized by this Act to be done by any two or more justices of the peace, and the several forms in this Act contained may be varied so far as necessary to render them applicable to such case. R.S.C. c. 174, s. 7.

Where a statute declares that the jurisdiction of a county stipendiary magistrate shall extend throughout the "whole of the county," it is to be construed as including jurisdiction in any incorporated town within the county limits notwithstanding the fact that there is a stipendary magistrate for such town alone, unless the latter's jurisdiction is made exclusive. R. v. Giovanetti (1901), 5 Can. Cr. Cas. 157.

PART XLIII.

PROCEDURE IN PARTICULAR CASES.

SECT.

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542. Offences within the jurisdiction of the Admiralty of England.—Proceedings for 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.

The laying of the information is the institution of the proceedings. Thorpe v. Priestnell, [1897] 1 Q.B. 159.

In a recent case in the Supreme Court of Nova Scotia, the accused, an articled seaman of foreign nationality, was committed for trial at Halifax on a charge that he "did on the 9th day of December, A.D. 1901, on the high seas on board a British foreign sea going ship on a voyage from St. Kitts, British West Indies, to Halifax via Bermuda (he then being an articled seaman on board said ship), unlawfully endeavour to make a revolt in said ship, for which he has not been tried before being brought to Canada, where he now is, in the port of Halifax."

The information charging the said offence and the depositions, consisting only of the evidence of the captain and the first officer, taken thereon by the committing magistrate being on the files of the court, having been transmitted there under the authority of sec. 600 of the Criminal Code were by the permission of the learned judges read by the prisoner on his said applications. The evidence disclosed that the prisoner when on the high

seas on board said ship, between 3½ and 9 miles after leaving the Island of St. Kitts, British West Indies, being intoxicated, struck the first officer who came into the forecastle to search for stowaways. It was not clear whether the blow was inflicted unprovokingly by the prisoner or in self-defence, as it was given during an altercation between him and the mate. Shortly afterwards in another altercation between another drunken seaman and the said officer, the prisoner was said to have encouraged by words the other seaman to defend himself, and on that seaman's request to have passed him something that looked like a knife. There was no evidence that the prisoner had done any act in furtherance of any design to interfere with the supreme command and management of the ship.

Ritchie, J., held that ch. 73 of 41 and 42 Vict. (Imp.) was not applicable, as it refers solely to offences committed within a marine league of the coasts of His Majesty's Dominions, and that if the Crown were obliged to proceed under sec. 128 of the Code alone, it could not be done until the consent of the Governor-General had been obtained in accordance with sec. 542. But he held further that full provision is made for the trial and punishment of such offences under sec. 686 of The Merchant Shipping Act, 1894 (Imperial), and that no restriction or conditions are imposed with reference to the procedure or trial as in the Criminal Code.

That statute confers power on a British colonial court of criminal jurisdiction *to try* a foreigner or a British subject found within its jurisdiction for any offence committed by him on board of a British ship on the high seas, provided such colonial court could have tried such a person if the offence had been committed within the limits of its ordinary jurisdiction. But Weatherbe, J., held that such an offender when he comes within the jurisdiction of the colonial court is subject to the general law of the place regulating the procedure for trying such offences; that the Admiralty Offences Act of 1849, 12 & 13 Vict. (Imperial), ch. 96, must receive a like construction; and that if such a person were to be tried in Canada, proceedings with that end in view would still require the consent spoken of in sec. 542 of the Code. The latter judge accordingly made an order for the prisoner's discharge on habeas corpus. R. v. Heckman (1902), not yet reported.

Indictment.]—No count shall be deemed objectionable or insufficient in cases where the consent of any person, official or authority is required before a prosecution can be instituted, that it does not state that such consent has been obtained. Sec. 613 (*h*).

543. Disclosing official secrets.—No person shall be prosecuted for the offence of unlawfully obtaining and communicating official information, as defined in sections 77 and 78, without the consent of the Attorney-General or of the Attorney-General of Canada. 53 V., c. 10, s. 4.

Attorney-General.] — The expression "Attorney-General" means the Attorney-General or Solicitor-General of any Province in Canada in which any proceedings are taken under the Code; and, with respect to the North-West Territories and the district of Keewatin, the Attorney-General of Canada. Sec. 3 (*b*).

The indictment need not allege the consent here mentioned. [Sec. 613 (*h*).

544. Judicial corruption.—No one holding any judicial office shall be prosecuted for the offence of judicial corruption, as defined in section 131, without the leave of the Attorney-General of Canada.

Leave of Attorney-General of Canada.]—Sections 543 and 545 use the term "consent" while here the word is "leave"; but they are probably interchangeable terms and sec. 613 (*h*) would apply as well to this offence as to those referred to in secs. 543 and 545.

British Columbia.]—With the exception of ex-officio informations filed by the Attorney-General on behalf of the Crown, no criminal information or information in the nature of a quo warranto shall be exhibited or received in the Supreme Court without an express order of a Judge of the Supreme Court, nor shall any process be issued upon any information until the person procuring such information to be exhibited, shall have filed in the registry of the Supreme Court a recognizance in the penalty of $100, effectually to prosecute such information, and to abide by and observe such orders as the court shall direct; such recognizance to be entered into before some Justice of the Peace or Registrar of the Supreme Court. (Rule 9.)

No application shall be made for a criminal information against a Justice of the Peace for misconduct in his magisterial capacity unless a notice containing a distinct statement of the grievances or acts of misconduct complained of be served personally on him or left at his residence with some member of his household six days before the time named in it for making the application. (Rule 10.)

The application for a criminal information shall be made to the court by a motion for an order nisi within a reasonable time after the offence complained of, and if the application be made against a Justice of the Peace for misconduct in his magisterial capacity, the applicant must depose on affidavit to his belief that the defendant was actuated by corrupt motives, and further, if for an unjust conviction, that the defendant is innocent of the charge. (Rule 11.)

545. Making explosive substances.—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 proceedings 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. R.S.C. c. 150, s. 5.

See note to sec. 543.

(Amendment of 1893.)

546. Sending unseaworthy ships to sea.—No person shall be prosecuted for any offence under sections 256, or 257, without the consent of the Minister of Marine and Fisheries.

547. Trustee fraudulently disposing of money.—No proceeding or prosecution against a trustee for a criminal breach of trust, as defined in section 363, shall be commenced without the sanction of the Attorney-General. R.S.C. c. 164, s. 65.

548. Fraudulent acts of vendor or mortgagor.—No prosecution for concealing deeds and encumbrances, as defined in section 370, shall be commenced without the consent of the Attorney-General, given after previous notice to the person intended to be prosecuted of the application to the Attorney-General for leave to prosecute. R.S.C. c. 164, s. 91.

549. Uttering defaced coin.—No proceeding or prosecution for the offence of uttering defaced coin, as defined in section 476, shall be taken without the consent of the Attorney-General.

(Amendment of 1894).

550. Trial of minors.—The trials of all young persons apparently under the age of sixteen years, shall take place without publicity and separately and apart from the trials of other accused persons, and at suitable times to be designated and appointed for that purpose.

The amendment made in 1894 of the above section was made by statute of Canada, 57-58 Vict., ch. 58, entitled an Act respecting Arrest, Trial and Imprisonment of Youthful Offenders, which begins with a recital that "It is desirable to make provision for the separation of youthful offenders from contact with older offenders and habitual criminals during their arrest and trial, and to make better provision than now exists for their commitment to places where they may be reformed and trained to useful lives, instead of their being imprisoned."

It also makes the following provisions:—

Young persons apparently under the age of sixteen years who are:—

(*a*) arrested upon any warrant; or

(*b*) committed to custody at any stage of a preliminary enquiry into a charge for an indictable offence; or

(*c*) committed to custody at any stage of a trial, either for an indictable offence or for an offence punishable on summary conviction; or

(*d*) committed to custody after such trial, but before imprisonment under sentence,—

shall be kept in custody separate from older persons charged with criminal offences and separate from all persons undergoing sentences of imprisonment, and shall not be confined in the lock-ups or police stations with older persons charged with criminal offences or with ordinary criminals. 57-58 Vict., ch. 58, sec. 2.

If any child, appearing to the court or justice before whom the child is tried to be under the age of fourteen years, is convicted in the Province of Ontario of any offence against the law of Canada, whether indictable or punishable on summary conviction, such court or justice, instead of sentencing the child to any imprisonment provided by law in such case, may order that the child shall be committed to the charge of any home for destitute and neglected children, or to the charge of any children's aid society duly organized and approved by the Lieutenant-Governor of Ontario in Council, or to any certified industrial school. Ibid. sec. 3.

Whenever in the Province of Ontario, an information or complaint is laid or made against any boy under the age of twelve years, or girl under the age of thirteen years, for the commission of any offence against the law of Canada, whether indictable or punishable on summary conviction, the court or justice seized thereof shall give notice thereof in writing to the executive officer of the children's aid society, if there be one in the county, and shall allow him opportunity to investigate the charges made, and may also notify the parents of the child, or either of them, or other person apparently interested in the welfare of the child.

2. The court or justice may advise and counsel with the said officer and with the parents or such other person, and may consider any report made by the said officer upon the charges.

3. If, after such consultation and advice, and upon consideration of any report so made, and after hearing the matter of information or complaint, the court or justice is of opinion that the public interest and the welfare of the child will be best served thereby, then, instead of committing the child for trial, or sentencing the child, as the case may be, the court or justice may, by order:—

(*a*) authorize the said officer to take the child and, under the provisions of the law of Ontario, bind the child out to some suitable person until the child has attained the age of 21 years, or any less age; or

(*b*) place the child out in some approved foster home; or

(*c*) impose a fine not exceeding ten dollars; or

(*d*) suspend sentence for a definite period or for an indefinite period; or

(*e*) if the child has been found guilty of the offence charged or is shewn to be wilfully wayward and unmanageable, commit the child to a certified industrial school, or to the provincial reformatory for boys, or to the refuge for girls, as the case may be, and in such cases, the report of the said officer shall be attached to the warrant of commitment. Ibid. s. 4.

Wherever an order has been made under either of the two sections next preceding, the child may thereafter be dealt with under the law of the province of Ontario, in the same manner, in all respects, as if such order had been lawfully made in respect of a proceeding instituted under authority of a statute of the Province of Ontario. Ibid. s. 5.

No Protestant child dealt with under this Act, shall be committed to the care of any Roman Catholic children's aid society, or be placed in any Roman Catholic family as its fosterhome; nor shall any Roman Catholic child dealt with under this Act, be committed to the care of any Protestant children's aid society, or be placed in any Protestant family as its fosterhome. But this section shall not apply to the care of children in a temporary home or shelter, established under the Act of Ontario, 56 Vict., ch. 45, intituled *An Act for the Prevention of Cruelty to, and better Protection of, Children*, in a municipality in which there is but one children's aid society. Ibid. sec. 6.

Commencement of prosecution.]—Laying the information is the commencement of a prosecution. Thorpe v. Priestnell, [1897] 1 Q.B. 159; Vaughton v. Bradshaw, 9 C.B.N.S. 103, following Tunnicliffe v. Tedd, 5 C.B. 553. Where, therefore, a statute provided that all prosecutions thereunder should be commenced within twenty days after the commission of the offence, and an information was taken on 30th December laying the offence on 16th December, but no summons was issued on the information till 15th January, it was held that the prosecution was commenced in time. R. v. Lennox (1878), 34 U.C.Q.B. 28.

(Amendment of 1900).

550A. Excluding public from court room.—At the trial of any person charged with an offence under any of the following sections, that is to say, 174, 175, 176, 177, 178, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 195, 198, 208 in so far as it relates to paragraphs (*i*), (*j*) and (*k*) of 207, 259, 260, 267, 268, 269, 270, 271, 272, 273, 274, 281, and 282, or with conspiracy or attempt to commit, or being an accessory after the fact to any such offence, the Court or Judge may order that the public be excluded from the room or place in which the Court is held during such trial; and such order may be made in any other case also in which the Court or Judge or justice may be of opinion that the same will be in the interests of public morals.

2. Nothing in this section shall be construed by implication or otherwise as limiting any power heretofore possessed at common law by the presiding Judge or other presiding officer of any Court of excluding the general public from the court-room in any case when such Judge or officer deems such exclusion necessary or expedient.

The following are the subjects dealt with by the sections above referred to:—Sec. 174, Unnatural offence; 185, Attempt to commit sodomy; 176, Incest; 177, Indecent acts; 178, Acts of gross indecency; 181, Seduction of girls under 16; 182, Seduction under promise of marriage; 183, Seduction of ward, servant, etc.; 184, seduction of passengers on vessels; 185, Procuring; 186, Parent or guardian procuring; 187, Householders permitting defilement on premises; 188, Conspiracy to defile; 189, Carnally knowing idiots, etc.; 190, Prostitution of Indian women; 195 to 198, Keeping disorderly house; 207 (*i*), (*j*) and (*k*), Being common prostitute; keeping house of ill-fame; frequenting such house; 259, Indecent assault on females; 260, indecent assault on males; 267, Rape; 268, Attempt to commit rape; 269, Defiling children under 14; 270, Attempting to defile child; 271, Killing unborn child; 272, Procuring abortion; 273, Woman procuring her own miscarriage; 274, Supplying noxious drugs, etc.; 281, Abduction of woman; 282, Abduction of heiress.

The Solicitor General (Hon. Mr. Fitzpatrick), made the following statement with regard to the object of this section, when it came up for discussion in the Commons:—"Under the general law, the courts are open to the general public, but by sec. 550 the trials of all persons under the age of sixteen years shall, as far as practicable, take place without publicity. Our intention is to extend substantially the provisions of sec. 550 to the cases provided for in 550a. In the trial of charges for indecent offences and things of that kind, we leave it discretionary with the judge to declare that for the purpose of such trials the court shall not be a public court, and that he shall have power to determine who shall have access." Commons Sessional Debates 1900, page 5266.

551. Time within which proceedings shall be commenced in certain cases.—No prosecution for an offence against this Act, or action for penalties or forfeiture, shall be commenced—

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

(i.) treason, except treason by killing His Majesty or where the overt act alleged is an attempt to injure the person of His Majesty (Part IV., section 65);

(ii.) treasonable offences (Part IV., section 69);

(iii.) any offence against Part XXXIII., relating to the fraudulent marking of merchandise; nor

(*b*) after the expiration of two years from its commission, if such offence be—

(i.) a fraud upon the Government (Part IX., section 133);

(ii.) a corrupt practice in municipal affeairs (Part IX., section 136);

(iii.) unlawfully solemnizing marriage (Part XXII., section 279); nor

(*c*) after the expiration of one year from its commission, if such offence be—

(i.) opposing reading of Riot Act and assembling after proclamation (Part V., section 83);

(ii.) refusing to deliver weapon to justice (Part VI., section 113);

(iii.) coming armed near public meeting (section 114);

(iv.) lying in wait near public meeting (section 115);

(v.) seduction of girl under sixteen (Part XIII., section 181);

(vi.) seduction under promise of marriage (section 182);

(vii.) seduction of a ward, etc., (section 183);

(viii.) unlawfully defiling women (section 185);

(ix.) parent or guardian procuring defilement of girl (section 186);

(x.) householders permitting defilement of girls on their premises (section 187); nor

(*d*) after the expiration of six months from its commission, if the offence be—

(i.) unlawful drilling (Part V., section 87);

(ii.) being unlawfully drilled (section 88);

(iii.) having possession of arms for purposes dangerous to the public peace (Part VI., section 102);

(iv.) proprietor of newspaper publishing advertisement offering reward for recovery of stolen property (Part X., section 157, paragraph (*d*); nor

(*e*) after the expiration of three months from its commission, if the offence be cruelty to animals under sections 512 and 513 (Part XXXVIII); nor

(ii.) railways violating provisions relating to conveyance of cattle (Part XXXIX., section 514);

(iii.) refusing peace officer admission to car, etc. (section 515);

(*f*) after the expiration of one month from its commission, if the offence be

(i.) improper use of offensive weapons (Part VI., sections 103, and 105 to 111 inclusive).

2. No person shall be prosecuted, under the provisions of s. 65 or s. 69 of this Act, for any overt act of treason expressed or declared by open and advised speaking unless information of such overt act, and of the words by which the same was expressed or declared, is given upon oath to a justice within six days after the words are spoken and a warrant for the apprehension of the offender is issued within ten days after such information is given.

In a New Brunswick case under The Canada Temperance Act, there was a conviction for a sale on Nov. 20th, 1896. The information was laid on Feb. 19th, 1897, but the summons was not issued until March 22nd, 1897, more than three months after the alleged offence. It was held that the laying of the information was the commencement of the prosecution within the meaning of sec. 106 of The Canada Temperance Act. Ex parte George Wallace (1897), 33 Can. Law Jour. 506.

552. Arrest without warrant.—Any one found committing any of the offences mentioned in the following sections, may be arrested without warrant by any one, that is to say:

Part IV.—Sections 65, treason; 67, accessories after the fact to treason; 68, 69 and 70, treasonable offences; 71, assaults on the King; 72, inciting to mutiny.

Part V.—Sections 83, offences respecting the reading of the Riot Act; 85, riotous destruction of buildings; 86, riotous damage to buildings.

Part VII.—Sections 120, administering, taking or procuring the taking of oaths to commit certain crimes; 121, administering, taking or procuring the taking of other unlawful oaths.

Part VIII.—Sections 127, piracy; 128, piratical acts; 129, piracy with violence.

Part XI.—Sections 159, being at large while under sentence of imprisonment; 161, breaking prison; 163, escape from custody or from prison; 164, escape from lawful custody.

Part XIII.—Section 174, unnatural offence.

Part XVIII.—Sections 231, murder; 232, attempt to murder; 235, being accessory after the fact to murder; 236, manslaughter; 238, attempt to commit suicide.

Part XIX.—Sections 241, wounding with intent to do bodily harm; 242, wounding; 244, stupefying in order to commit an indictable offence; 247 and 248, injuring or attempting to injure by explosive substances; 250, intentionally endangering persons on railways; 251, wantonly endangering persons on railways; 254, preventing escape from wreck.

Part XXI.—Sections 267, rape; 268, attempt to commit rape; 269, defiling children under 14.

Part XXII.—Section 281, abduction of a woman.

Part XXV.—Section 314, receiving property dishonestly obtained.

(Amendment of 1895).

Part XXVI.—Sections 319, theft by clerks and servants, etc.; 320, theft by agents, etc.; 321, public servant refusing to deliver up chattels, etc.; 322, theft by tenants and lodgers; 323, theft of testamentary instruments; 324, theft of documents of title; 325, theft of judicial or official documents; 326, theft of postal matter; 327, theft of postal matter; 328, theft of postal matter; 329, theft of election documents; 330, theft of railway tickets; 331, theft of cattle; 334, theft of oysters; 335, theft of things fixed to buildings or land; 344, stealing from the person; 345, stealing in dwelling-houses; 346, stealing by picklocks, etc.; 347, stealing in manufactories; 349, stealing from ships, etc.; 350, stealing from wreck; 351, stealing on railways; 355, bringing stolen property into Canada.

Part XXIX.—Sections 398, aggravated robbery; 399, robbery; 400, assault with intent to rob; 401, stopping the mail; 402, compelling execution of documents by force; 403, sending letter demanding with menaces; 404, demanding with intent to steal; 405, extortion by certain threats.

Part XXX.—Sections 408, breaking place of worship and committing an indictable offence; 409, breaking place of worship with intent to commit an indictable offence; 410, burglary; 411, housebreaking and committing an indictable offence; 412, housebreaking with intent to commit an indictable offence; 413, breaking shop and committing an indictable offence; 414, breaking shop with intent to commit an indictable offence; 415, being found in a dwelling-house by night; 416, being armed, with intent to break a dwelling-house; 417, being disguised or in possession of housebreaking instruments.

Part XXXI.—Sections 423, forgery; 424, uttering forged documents; 425, counterfeiting seals; 430, possessing forged bank notes; 432, using probate obtained by forgery or perjury.

Part XXXII.—Sections 434, making, having or using instrument for forgery or uttering forged bond or undertaking; 435, counterfeiting stamps; 436, falsifying registers.

Part XXXIV.—Section 458, personation of certain persons.

Part XXXV.—Sections 462, counterfeiting gold and silver coin; 466, making instruments for coining; 468, clipping current coin; 470, possessing clipping of current coin; 472, counterfeiting copper coin; 473, counterfeiting foreign gold and silver coin; 477, uttering counterfeit current coin.

Part XXXVII.—Sections 482, arson; 483, attempt to commit arson; 484, setting fire to crops; 485, attempting to set fire to crops; 488, attempt to damage by explosives; 489, mischief on railways; 492, injuries to electric telegraphs, etc.; 493, wrecking; 494, attempting to wreck; 495, interfering with marine signals; 498, mischief to mines; 499, mischief.

(Amendment of 1895).

2. A peace officer may arrest without warrant any one who has committed or who is found committing any of the offences mentioned in the said sections or in the following sections, that is to say:

Part XXVII.—Sections 359, obtaining by false pretense; 360, obtaining execution of valuable securities by false pretense.

Part XXXV.—Sections 465, exporting counterfeit coin; 471, possessing counterfeit current coin; 473, paragraph (*b*), possessing counterfeit foreign gold or silver coin; 473, paragraph (*d*), counterfeiting foreign copper coin.

Part XXXVII.—Sections 497, cutting booms, or breaking loose rafts or cribs of timber or saw-logs; 500, attempting to injure or poison cattle.

Part XXXVIII.—Sections 512, cruelty to animals; 513, keeping cock-pit.

(Amendment of 1895).

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.

4. Any one may arrest without warrant a 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 the person arresting, on reasonable and probable grounds, believes to have lawful authority to arrest such person.

(Amendment of 1895).

5. The owner of any property on or in respect to which any person is found committing any offence, or any person authorized by such owner, may arrest without warrant the person so found, who shall forthwith be taken before a justice of the peace to be dealt with according to law.

6. Any officer in His Majesty's service, any warrant or petty officer in the navy, and any non-commissioned officer of marines may arrest without warrant any person found committing any of the offences mentioned in s. 119 of this Act.

7. Any peace officer may, without a warrant, take into custody 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, and may detain such person until he can be brought before a justice of the peace, to be dealt with according to law;

(*a*) No person who has been so apprehended shall be detained after noon of the following day without being brought before a justice of the peace.

At common law.]—The law is stated in Hale's Pleas of the Crown, Vol. 2, 76, that "when a private person, that is, a person not by office a keeper of the peace, or a justice, or a constable, takes upon himself to arrest another, without a warrant for a supposed offence, he must be prepared to prove that a felony has been committed, for in that respect he acts on his own peril." Mere suspicion that there has been a felony committed by some one will not do; though if he is prepared to shew that there really has been a felony committed by some one, then he may justify arresting a particular person, upon reasonable grounds of suspicion that he was the offender; and mistake on that point, when he acts sincerely upon strong grounds of suspicion, will not be fatal to his defence to an action for trespass and false imprisonment. McKenzie v. Gibson (1851), 7 U.C.Q.B. 100. Sub-sec. 4 of the above sec. 552 extends the common law rule.

Loitering at night.]—Sub-sec. 1 (*7a*) applies only to cases coming within sub-sec. 7, and it is not necessary in other cases to bring the person arrested before a justice of the peace before noon of the day following the arrest. R. v. Cloutier (1898), 2 Can. Cr. Cas. 43 (Man.).

Unsworn statements made to the officer, to the effect that the person had committed a larceny on the previous day, are insufficient to justify a constable in the service of a municipality 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. Musseau v. City of Montreal, Q.R. 12 S.C. 61.

PART XLIV.

COMPELLING APPEARANCE OF ACCUSED BEFORE JUSTICE.

SECT.

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553. Magisterial jurisdiction.—For the purposes of this Act, the following provisions shall have effect with respect to the jurisdiction of justices:

(Amendment of 1900).

(*a*) Where the offence is committed in or upon any water, tidal or other, or upon any bridge between two or

more magisterial jurisdictions, such offence may be considered as having been committed in either of such jurisdictions;

(*b*) Where the offence is committed on the boundary of two or more magisterial jurisdictions, or within the distance of five hundred yards from any such boundary, or is begun within one magisterial jurisdiction and completed within another, such offence may be considered as having been committed in any one of such jurisdictions;

(*c*) Where the offence is committed on or in respect to a mail, or a person conveying a post letter bag, post letter or anything sent by post, or on any person, or in respect of any property, in or upon any vehicle employed in a journey, or on board any vessel employed on any navigable river, canal or other inland navigation, the person accused shall be considered as having committed such offence in any magisterial jurisdiction through which such vehicle or vessel passed in the course of the journey or voyage during which the offence was committed: and where the centre or other part of the road, or any navigable river, canal or other inland navigation along which the vehicle or vessel passed in the course of such journey or voyage, is the boundary of two or more magisterial jurisdictions, the person accused of having committed the offence may be considered as having committed it in any one of such jurisdictions.

Magistrate's jurisdiction.]—The general rule is that the magistrate or justice of the peace has jurisdiction either by reason of the residence or presence of the accused in his district, or by reason of the commission of the offence within its limits. There is, however, an enlargement of this general rule in sec. 553, whereby, when an offence is begun within one magisterial jurisdiction and completed within another, such offence may be considered as having been committed in either of them. R. v. Hogle (1896), 5 Can. Cr. Cas. 53, R.J.Q. 5 Q.B. 59.

This section is derived from the Imperial Act, 7 Geo. IV., ch. 64, sec. 12.

In Rex v. Girdwood (1776), 2 East P.C. 1120, 1 Leach's Crown Cases 169, it was held on a case reserved, that a person writing a threatening letter in one county and delivering it to another person in that county, by whom it was posted at the writer's request to an address in another county, was properly tried and convicted in the latter country.

In R. v. Esser (1767), 2 East P.C. 1125, Lord Mansfield held that the sending of a letter by post directed to a person in another county was sending also in the latter county, and that the whole was to be considered as the act of the defendant to the time of the delivery in that county. 3 Russell on Crimes, 6th ed., 722 (*p*).

If the accused person, "wherever he may be," (i.e., within Canada), is charged with having committed an indictable offence within the limits over which a justice of the peace has jurisdiction, the justice is empowered to issue a warrant or summons to compel the attendance of the accused person

before him for the purpose of preliminary enquiry; Cr. Code, sec. 554 (*b*); and the accused may be arrested upon such warrant in any part of Canada upon the warrant being "endorsed" by a justice within whose jurisdiction the accused may be found; Cr. Code 565 and Code form H. The "endorsement" is to be made only upon proof, by oath or affirmation, of the handwriting of the justice who issued the same, and when made is sufficient authority to the person bringing such warrant, to carry the person against whom the warrant is issued, when apprehended, before the justice who issued the warrant or before other justices at the place from which the warrant came. Cr. Code 565.

The courts will take judicial notice of the local divisions, such as counties, municipalities and polling sections, into which their country is divided for purposes of political government. Ex parte Macdonald (1896), 3 Can. Cr. Cas. 10 (S.C. Can.).

Where the offence charged was the making, circulation and publication of false statements of the financial position of a company, and it appeared that the statements were mailed from a place in Ontario to the parties intended to be deceived in Montreal, the offence, although commenced in Ontario, is completed in the Province of Quebec by the delivery of the letters to the parties to whom they were addressed. R. v. Gillespie (No. 2) (1898), 2 Can. Cr. Cas. 309 (Que.).

In such case, the courts of the Province of Quebec have jurisdiction to try the accused, if he has been duly committed for trial by a magistrate of the district. Ibid.

The offence of fraudulent conversion of the proceeds of a valuable security may consist in a continuity of acts—the reception of the valuable security, the collection of the proceeds, the conversion of the proceeds, and lastly the failure to account for them; and where the beginning of the operation is in one district and the continuation and completion are in another district, the accused may be proceeded against in either district. R. v. Hogle (1896), R.J.Q. 5 Q.B. 59; 5 Can. Cr. Cas. 53.

Magistrates cannot give themselves jurisdiction or retain jurisdiction by finding a particular fact one way, if the evidence is clearly the other way. White v. Feast (1872), L.R. 7, Q.B. 353; R. v. Davy (1900), 4 Can. Cr. Cas. 28, 33 (Ont. C.A.).

A prohibition may issue to a court exercising criminal jurisdiction as well as to a civil court. Per Cockburn, C.J., in R. v. Herford, 3 El. & El. p. 136. And there is no doubt that prohibition can issue to a Justice of the Peace to prohibit him from exercising a jurisdiction which he has not. Chapman v. Corporation of London (1890), 19 Ont. R. 33.

Keepers of the peace.]—In 1327, 1 Edward 3, ch. 16, it was enacted that "For the better keeping and maintenance of the peace, the King will that in every county good men and lawful, which be no maintainers of evil or barrators in the country, shall be assigned to keep the peace." By 4 Edw. 3, ch. 2, they were to send their indictments to be tried by the justices of assize, but later it was further provided that two or three of the best reputation in the counties should be assigned keepers of the peace by the King's Commission. (18 Edw. 3, stat. 2, ch. 3.) The statute 34 Edw. 3, ch. 1, giving them further powers, first designated them as "justices."

554. When justice may compel appearance.—Every justice may issue a warrant or summons as hereinafter mentioned to compel the attendance of an accused person before him, for the purpose of preliminary inquiry in any of the following cases:—

(*a*) If such person is accused of having committed in any place whatever an indictable offence triable in the Province in which such justice resides, and is, or is suspected to be, within the limits over which such justice has jurisdiction, or resides or is suspected to reside within such limits;

(*b*) If such person, wherever he may be, is accused of having committed an indictable offence within such limits;

(*c*) If such person is alleged to have anywhere unlawfully received property which was unlawfully obtained within such limits;

(*d*) If such person has in his possession, within such limits, any stolen property.

Preliminary enquiry.]—A party applying to a magistrate for a warrant to arrest another for an alleged offence is deemed only to appeal to the magistrate to exercise his jurisdiction, and is not liable in trespass for an arrest under the warrant, but if he goes beyond this and interferes in the exercise of the ministerial powers under the warrant he will be liable. Kingston v. Wallace (1886), 25 N.B.R. 573.

If there was a complaint proved and the person informed against was present, the magistrate might rightly proceed, though such person did not appear on summons, or did not require compulsion to make him appear. His actual presence is all that is required; the manner of his getting there is of no consequence to the investigation. R. v. Mason (1869), 29 U.C.Q.B. 431.

The power conferred on a magistrate under sec. 557 of ordering the accused person brought before him, charged with an offence committed out of his territorial jurisdiction, to be taken before some justice having jurisdiction in the place where the offence was committed, is permissive only. A magistrate may hold a preliminary enquiry in respect of an indictable offence committed in the same province outside of his territorial jurisdiction, if the accused is, or is suspected to be, within the limits over which such magistrate has jurisdiction, or resides or is suspected to reside within such limits. Re the Queen v. Burke (1900), 5 Can. Cr. Cas. 29 (Ont.).

See also notes to sec. 553 and 609.

Service of summons.]—Where the door of the defendant's house was fastened, and the constable spoke to him through a closed window, explaining the nature of the process and then placed a copy of it under the door, informing the defendant thereof, after which he returned to the window and shewed the original summons to the defendant, who said, "That will do," it was held a sufficient service of the summons. Ex parte Campbell (1887), 26 N.B.R. 590. But it would seem that but for what the defendant then said, it would have been set aside. Ibid.

555. Offences committed in certain parts of Ontario.—All offences committed in any of the unorganized tracts of country in the Province of Ontario, including lakes, rivers and other waters therein, not embraced within the limits of any organized county, or within any provisional judicial district, may be laid and charged to have been committed and may

be inquired of, tried and punished within any county of such Province; and such offences shall be within the jurisdiction of any Court having jurisdiction over offences of the like nature committed within the limits of such county, before which Court such offences may be prosecuted; and such Court shall proceed therein to trial, judgment and execution or other punishment for such offence, in the same manner as if such offence had been committed within the county where such trial is had.

2. When any provisional judicial district or new county is formed and established in any of such unorganized tracts, all offences committed within the limits of such provisional judicial district or new county, shall be inquired of, tried and punished within the same, in like manner as such offences would have been inquired of, tried and punished if this section had not been passed.

3. Any person accused or convicted of any offence in any such provisional district may be committed to any common gaol in the Province of Ontario; and the constable or other officer having charge of such person and intrusted with his conveyance to any such common gaol, may pass through any county in such Province with such person in his custody; and the keeper of the common gaol of any county in such Province in which it is found necessary to lodge for safe keeping any such person so being conveyed through such county in custody, shall receive such person and safely keep and detain him in such common gaol for such period as is reasonable or necessary; and the keeper of any common gaol in such Province, to which any such person is committed as aforesaid, 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. R.S.C. c. 174, s. 14.

556. Offences committed in the district of Gaspe. —Whenever any offence is committed in the district of Gaspe, the offender, if committed to gaol before trial, may be committed to the common gaol of the county in which the offence was committed, or may, in law, be deemed to have been committed, and if tried before the Court of King's Bench, he shall be so tried at the sitting of such Court held in the county to the gaol of which he has been committed, and if imprisoned in the common gaol after trial he shall be so imprisoned in the common gaol of the county in which he has been tried. R.S.C. c. 174, s. 15.

557. Offence committed out of justices' jurisdiction.—The preliminary enquiry may be held either by one justice or by more justices than one: Provided that if the accused person is brought before any justice charged with an offence committed out of the limits of the jurisdiction of such justice, such justice may, after hearing both sides, order the accused at any stage of the inquiry to be taken by a constable before some justice having jurisdiction in the place where the offence was committed. The justice so ordering shall give a warrant for that purpose to a constable, which may be in the form A in schedule one hereto, or to the like effect, and shall deliver to such constable the information, depositions and recognizances, if any, taken under the provisions of this Act, to be delivered to the justice before whom the accused person is to be taken, and such depositions and recognizances shall be treated to all intents as if they had been taken by the last-mentioned justice.

2. Upon the constable delivering to the justice the warrant, information, if any, depositions and recognizances, and proving on oath or affirmation, the handwriting of the justice who has subscribed the same, such justice, before whom the accused is produced, shall thereupon furnish such constable with a receipt or certificate in the form B in schedule one hereto, of his having received from him the body of the accused, together with the warrant, information, if any, depositions and recognizances, and of his having proved to him, upon oath or affirmation, the handwriting of the justice who issued the warrant.

4. If such justice does not commit the accused for trial, or hold him to bail, the recognizances taken before the first mentioned justice shall be void.

FORM A.—

WARRANT TO CONVEY BEFORE A JUSTICE OF ANOTHER COUNTY.

Canada,
Province of , }
County of , }

Whereas information upon oath was this day made before the undersigned that A. B. of , on the day of , in the year , at , in the county of (*state the charge*).

And whereas I have taken the deposition of X. Y. as to the said offence.

And whereas the charge is of an offence committed in the county of .

This is to command you to convey the said (*name of accused*), of , before some justice of the last-mentioned county, near the above place, and to deliver to him this warrant and the said deposition.

Dated at , in the said county of , this day of , in the year .

J. S.,
J.P., (Name of County.)

To of .

FORM B.—

RECEIPT TO BE GIVEN TO THE CONSTABLE BY THE JUSTICE FOR THE COUNTY IN WHICH THE OFFENCE WAS COMMITTED.

Canada,
Province of , }
County of . }

I, J. L., a justice of the peace in and for the county of , hereby certify that W. T., peace officer of the county of , has, on this day of , in the year , by virtue of and in obedience to a warrant of J. S., Esquire, a justice of the peace in and for the county of , produced before me one A. B., charged before the said J. S. with having (*&c., stating shortly the offence*) and delivered him into the custody of , by my direction to answer to the said charge, and further to be dealt with according to law, and has also delivered unto me the said warrant, together with the information (*if any*) in that behalf, and the deposition (*s*) of C. D. (*and of*), in the said warrant mentioned, and that he has also proved to me, upon oath, the handwriting of the said J. S. subscribed to the same.

Dated the day and year first above mentioned, at , in the said county of .

J. L.,
J.P., (Name of County.)

The power conferred on a magistrate under this section of ordering the accused person brought before him, charged with an offence committed out of his territorial jurisdiction, to be taken before some justice having jurisdiction in the place where the offence was committed, is permissive only. R. v. Burke (1900), 5 Can. Cr. Cas. 29 (Ont.).

(Amendment of 1895).

557A.—District of Montreal.—In the district of Montreal the clerk of the peace or deputy clerk of the peace shall have all the powers of a justice of the peace under Parts XLIV. and XLV.

558. Information.—Any one who, upon reasonable or probable grounds, believes that any person has committed an indictable offence against this Act may make a complaint or lay an information in writing and under oath before any magistrate or justice of the peace having jurisdiction to issue a warrant or summons against such accused person in respect of such offence.

2. Such complaint or information may be in the form C, in schedule one, hereto, or to the like effect.

FORM C.—

INFORMATION AND COMPLAINT FOR AN INDICTABLE OFFENCE.

Canada,
Province of , }
County of , }

The information and complaint of C. D., of , (*yeoman*), taken this day of , in the year , before the undersigned (*one*) of His Majesty's justices of the peace in and for the said county of , who saith that (*etc., stating the offence*).

Sworn before (*me*), the day and year first above mentioned, at .

J. S.,
J. P., (Name of County.)

Information before justices.]—The Sovereign is supposed by law to be the person who is injured by every infraction of the criminal law, and criminal prosecutions which have for their object the well-being of the people, and not merely private redress, are therefore carried on in the name of the King. As the King cannot appear in person to demand the punishment of offences against the good order of the community, he has to be represented before the courts by a public officer, and that officer is the Attorney-General.

Before the criminal courts the Sovereign is therefore the prosecutor, and is represented either by the Attorney-General himself, or by crown prosecutors who are named by the Attorney-General as his substitutes.

But as offences generally affect some private individual in particular, the person so injured or affected usually commences the proceedings for bringing the offender to justice, although anyone who has reasonable or probable ground for believing that any person has been guilty of a crime may take proceedings and put the law in motion against him. R. v. St. Louis (1897), 1 Can. Cr. Cas. 141, 144 (Que.).

The information is the commencement of a criminal proceeding analogous to an indictment; the summons is the act of the magistrate on behalf of the public; the party who begins a criminal proceeding cannot withdraw from it leaving it pending, the party charged has the right to force it on to a conclusion; and if at the time for concluding the case, the informant offers no evidence in support of his charge, it ought to be dismissed, and such dimissal is a hearing. Vaughton v. Bradshaw, 9 C.B.N.S. 103; Re Conklin (1871), 31 U.C.Q.B. 160.

A summons may be issued upon an information before a justice of the peace for an offence punishable on summary conviction, although the information has not been sworn; but before a warrant can be issued to compel the attendance of the accused, there must be an information in writing and under oath. R. v. William McDonald (1896), 3 Can. Cr. Cas. 287 (Ont.).

The magistrate taking an information under oath ought not to receive from the complainant a mere affidavit made out in the words of the statute creating the offence; but he ought, in the first place, to swear the complainant and his witnesses, if any, and have their statements and answers written down in their own words and have them sign it. This when so completed is what is known as a "written information under oath." Ex parte Boyce (1885), 24 N.B.R. 347, 354. The practice of taking down the statements of the witnesses without their being sworn and afterwards swearing them to the truth of same is disapproved. Mills v. Collett (1829), 6 Bing. 85; R. v. Kiddy, 4 D. & R. 734; Caudle v. Seymour, 1 Q.B. 889.

An information should give a concise and legal description of the offence charged, and should contain the same certainty as an indictment, and the description of the charge must include every ingredient required by the statute to constitute the offence, and the statement of the offence may be in the words of the enactment describing it or declaring the transaction charged to be an indictable offence. R. v. France (1898), 1 Can. Cr. Cas. 321 (Que.).

The absence or the insufficiency of particulars does not vitiate either an indictment or an information; but if it be made to appear that there is a reasonable necessity for more specific information, the court or magistrate may, on application of the accused person, order that further particulars be given, but such an order is altogether within the judicial discretion of the judge or the magistrate. Ibid.

An information may be amended, but if on oath, it must be re-sworn. Re Conklin (1871), 31 U.C.Q.B. 160.

If a magistrate's summons is issued on an information purporting to have been sworn at a specified time and place, and the defendant appears thereon and pleads to the charge, the proceedings will not be quashed on certiorari because it is afterwards shewn that the information was not in fact sworn at such time and place. Ex parte Sonier (1896), 2 Can. Cr. Cas. 121 (N.B.).

Where an information was entitled in the name of an incorporated company but was signed in his own name by the manager of the company, and sworn to by him, it was held in an Australian case that it was the information of the manager individually and that a warrant might issue upon it. Colonial Mutual Life Co. v. Robertson (1897), 18 Australian Law Times 257.

Defect or irregularity in information.]—It is not a matter within the discretion of the magistrates whether a man shall be put on his trial without

any proper preliminary proceedings; and in administering justice summarily, strict regularity must be observed. Blake v. Beach (1876), L.R. 1 Ex. D. 320, 334, 335. A man is not to be put at the mercy of the magistrates in granting delay where he has a right not to be put upon his trial; if he waives the want of information and summons, and *by his own assent* is properly before the magistrates, it would be in their discretion to grant or refuse delay in order to prepare his defence. Ibid, p. 334.

It was established by the decision in R. v. Hughes, 4 Q.B.D. 614, by the Full Court of Criminal Appeal that when a person is before justices who have jurisdiction to try the case, they need not inquire how he came there, but may try it. In commenting upon that decision in Dixon v. Wells (1890), 25 Q.B.D. 249, Lord Coleridge, C.J., said (p. 256):—

"I do not, however, feel able to decide in his (appellant's) favour on that point alone (i.e., that objection had been taken before the magistrate), for, although the fact of his protest ought to be a complete answer to the assumed jurisdiction, I cannot disguise from myself the fact that from the language of many of the judges in R. v. Hughes, 4 Q.B.D. 614—although, perhaps, not necessary for the decision of the case—and the judgments of Erle, C.J., and Blackburn, J., in R. v. Shaw, 34 L.J.M.C. 169, they seem to assume that if the two conditions precedent, of the *presence of the accused* and *jurisdiction over the offence*, were fulfilled, his protest would be of no avail. It would have been easy to say that a protest would have made a difference; but I find no such qualification in R. v. Hughes, although something like that is said in one of the cases; it is an important question well worth consideration in the Court of Appeal."

The warrant of a magistrate is only prima facie evidence of the fact recited therein that an information on oath and in writing had been laid. Friel v. Ferguson (1865), 15 U.C.C.P. 584.

An information should include a statement of the following particulars: (1) the day and year when exhibited, (2) the place where exhibited, (3) the name and style of the justice or justices before whom it is exhibited, and (4) the charge preferred. Pritchard's Q.S. Prac. (1875), 1058.

A complaint or information is essential as the foundation of summary proceedings, and without it the justice is not authorized in intermeddling, except where he is empowered by statute to convict on view. Paley on Convictions, 7th ed., 72: 1 Wms. Saunders, 262, n. 1; R. v. Justices of Bucks, 3 Q.B. 800, 807; R. v. Bolton, 1 Q.B. 66; R. v. Fuller, 1 Ld. Raym. 509; R. v. Millard, 17 Jur. 400, 22 L.J.M.C. 108.

A complaint or information in matters to be summarily tried by a justice of the peace may be made either by the complainant personally or by his counsel or attorney or other person authorized in that behalf. Cr. Code 845 (3).

The proceeding which forms the groundwork of a "conviction" is termed laying or exhibiting an *information*, while the proceeding for the obtaining of an "order" of justices is termed making a *complaint*. Paley on Convictions, 7th ed., 73.

By Cr. Code, sec. 845 (2), an information or complaint for any offence or act "punishable on summary conviction" need not be under oath unless specially required by the particular Act or law. The statute which authorizes summary proceedings against a tenant for the fraudulent removal of goods is one of these, and specially requires that the complaint be made in *writing* by the landlord, his bailiff, servant, or agent; 11 Geo. II. (Imp.), ch. 19, sec. 4; and a conviction under that Act must shew that the complaint was so made. R. v. Fuller, 2 D. & L. 98; Coster v. Wilson, 3 M. & W. 411; R. v. Davis, 5 B. & Ad. 551.

A *variance* between the information and the evidence adduced in support thereof at the hearing, in a matter to which the summary convictions

clauses of the Code apply, will not invalidate a conviction based on the evidence unless (1) objection was made before the convicting justice, or (2) an adjournment of the hearing was refused notwithstanding that it was "shewn to such justice" that by such variance the defendant had been deceived or misled. Cr. Code 882. If any *variance* between the information and the evidence adduced in support thereof as to the place in which the offence is alleged to have been committed, or any *other* variance between the information and the evidence, appears to the justice to be such that the defendant has been thereby deceived or misled, the justice may upon such terms as he thinks fit adjourn the hearing of the case to some future day. Cr. Code 847. The intention of the adjournment is that the accused may be prepared to meet the varied charge disclosed by the evidence, and the better practice is to have the information amended and re-sworn by the complainant. These provisions as to variance do not, however, extend to a case where the information has been laid and the party summoned for one offence, and the justices have convicted him of another and different offence punishable in another and a different way. Martin v. Pridgeon (1859), 28 L.J.M.C. 179, 1 E. & E. 778; R. v. Brickhall, 33 L.J.M.C. 156.

And a conviction is not to be quashed on certiorari, although it does not describe an offence against the law, ex. gr., by reason of an omission to state scienter of the accused, if the court, upon perusal of the depositions, is satisfied that an offence of the nature described in the conviction has been committed. Code sec. 889; R. v. Crandall (1896), 27 Ont. R. 63.

In R. v. Hughes (1879), 4 Q.B.D. 614, the facts shewn were that the justice had issued a warrant of arrest informally and without oath. The defendant, having no knowledge of the defect, made no objection to the hearing of the charge.

The Queen's Bench Division (Lopes, Hawkins, Lindley, Manisty, Denman and Field, JJ., and Pollock, B., and Huddleston, B.), held that the irregularity in the progress of bringing the defendant before the court had no effect on the jurisdiction, and that the defendant and a person who committed perjury on the hearing were rightly convicted.

In many cases the word "charge" in no way involves a written information, and it is sufficient to shew that a person is brought before the magistrate somehow or other, and all that is necessary to give the magistrate jurisdiction is to shew that the person, being once before him, the crime with which the accused is charged is within the jurisdiction of the magistrate. Per Pollock, B., in Re Maltby (1881), 7 Q.B.D. 18 at page 28, citing R. v. Hughes, supra.

The case of R. v. Hughes, 4 Q.B.D. 614, was followed in Gray v. Commissioners of Customs (1884), 48 J.P. 343, by Lord Coleridge, C.J., and Pollock, B., the former referring to it as "a case of great authority, decided by no less than nine judges, and only one of those judges dissented from the judgment." In Gray's case the court affirmed the rule that "where a defendant is actually charged and appears before justices, and those justices have jurisdiction, and though the defendant may have been brought before the justices by illegal process, yet inasmuch as the justices have jurisdiction and they adjudicate on the case, that adjudication cannot afterwards be disputed by raising objections to the arrest." 48 J.P. 343, 344.

But where a summons for an offence under a statute relating to adulteration of food and drugs had been signed by a magistrate who had not actually heard the information, and the limitation of time within which the statute required that the summons under it should be served had expired before the hearing, and both parties appeared at the hearing, but the defendant objected to the irregularity, the conviction was quashed by the Queen's Bench Division upon the ground that there was no valid summons, and that,

as the provisions of the statute had not been complied with, there was no jurisdiction. Dixon v. Wells (1890), 25 Q.B.D. 249.

Although the irregularity of defendant's appearance may be waived, it is necessary that he should be told what the charge is before conviction. Re Daisy Hopkins (1892), 56 J.P. 263, 274.

In conformity with the decisions above referred to, it has been held by the Supreme Court of New Brunswick that if a magistrate's summons is issued on an information purporting to have been sworn at a specified time and place, and the defendant appears thereon and pleads to the charge, the proceedings will not be quashed on certiorari because it is afterwards shewn that the information was not in fact sworn at such time and place. Ex parte Sonier, 2 Can. Cr. Cas. 121.

Although an arrest has been illegally made under an invalid warrant, jurisdiction attaches to the magistrate when the person arrested is brought before him; and the subsequent detention and commitment may be justified under the order then made by the magistrate. McGuiness v. Dafoe (1896), 3 Can. Cr. Cas. 139 (Ont.).

An information under oath which on its face purports to be the information of a person other than the person who has signed and sworn to the same is bad. Where a warrant of arrest based upon such defective information has been issued to enforce the attendance of the accused before a magistrate, and the magistrate at the opening of the trial amends the information by inserting therein, in the presence of and with the consent of the person who had signed and sworn to the information, the latter's name in the place of the name so appearing on the face of the information, it is necessary that the information should be re-sworn. Where the defendant has been arrested under the warrant and when brought before the magistrate takes objection to the amended information upon the ground that it should be re-sworn after the amendment, and has the objection noted, he does not waive the objection by proceeding with the trial and cross-examining witnesses. R. v. McNutt, 3 Can. Cr. Case 184 (N.S.).

False accusation.]—Where an information for rape or other offence under Code sec. 405 is laid with the sole intent to extort money or property from the person against whom the charge is made, the informant thereby "accuses" such person with intent to extort or gain something from him under Cr. Code 405; and commits an indictable offence thereunder. R. v. Kempel, 3 Can. Cr. Cas. 481 Ont.).

559. Hearing on information.—Upon receiving any complaint or information the justice shall hear and consider the allegations of the complainant, and if of opinion that a case for so doing is made out he shall issue a summons or warrant, as the case may be, in manner hereinafter mentioned; and such justice shall not refuse to issue such summons or warrant only because the alleged offence is one for which the offender may be arrested without warrant. R.S.C. c. 174, s. 30.

Discretion as to warrant of arrest.]—The combined effect of secs. 559 and 843 of the Code is that it is discretionary with the magistrate to issue either a summons or a warrant as he may deem best. R. v. McGregor (1895), 2 Can. Cr. Cas. 410, 413.

The issue of a summons, whether in relation to an offence punishable summarily or to an indictable offence, is a judicial act. R. v. Ettinger (1899), 3 Can. Cr. Cas. 387, 32 N.S.R. 176.

Except where the charge is of a very serious nature a warrant ought not to be issued when a summons will be equally effectual. O'Brien v. Brabner, 4 J.P. 227, 78 Eng. L.T. 409.

A justice of the peace could always issue a warrant on the information of others having cause of suspicion, for the justice was competent to judge of the sufficiency of the evidence. 2 Hale P.C. 107. When he examined the complainant and his witnesses touching his reasons for the suspicion, it would if well founded become the justice's suspicion as well as that of the complainant. Ex parte Boyce (1885), 24 N.B.R. 347, 353. But the mere statement of a person, even under oath, that he suspects and believes that another person has committed a certain crime was not sufficient at common law to justify a warrant to apprehend, for unless the justice has the facts on which the informant's belief is founded, he has no proof at all on which he would be justified in founding his own belief. Ibid. p. 355, per Palmer, J.

Depositions taken ex parte by the magistrate on the application to him for process against the accused cannot be afterwards used as evidence on the preliminary enquiry and do not form a part of the record of proceedings against the accused. Weir v. Choquet, 6 Rev. de Jurisp. 121.

A magistrate is not under a legal obligation to issue a warrant of arrest upon an information in respect of an indictable offence, if on the consideration of the complainant's allegations he is of opinion that a case for so doing is not made out. A magistrate refusing to issue a warrant on an information for an indictable offence, is not bound to state his reason for so doing; he has merely to express his opinion, after a consideration of the complainant's allegations, as to whether a warrant should be issued or not. That a magistrate did not properly appreciate the evidence submitted upon an application for the issue of a warrant of arrest for an indictable offence is not a ground for a mandamus to compel him to grant a warrant against his opinion, formed in good faith. Thompson v. Desnoyers, 3 Can. Cr. Cas. 68, R.J.Q. 16 S.C. 253 (Que.).

Where a magistrate receives an information, and, after hearing and considering the allegations of the informant, decides that the statute invoked in support of the prosecution does not apply, and that what is charged does not constitute an offence, and therefore refuses to issue either a summons or warrant against the accused, a mandamus does not lie to compel him to do so. Re E. J. Parke, 3 Can. Cr. Cas. 122 (Ont.).

Time.]—As to the time within which certain prosecutions must be brought see secs. 551 and 841.

560. Warrant in cases of offences committed on the seas, etc.—Whenevever any indictable offence is committed the high seas, or in any creek, harbour, haven or other place in which the Admiralty of England have or claim to have jurisdiction, and whenever any offence is committed on land beyond the seas for which an indictment may be preferred or the offender may be arrested in Canada, any justice for any territorial division in which any person charged with, or suspected of, having committed any such offence, is or is suspected to be, may issue his warrant in the form D in schedule one hereto, or to the like effect, to apprehend such person, to be dealt with as herein and hereby directed. R.S.C. c. 174, s. 32.

D.—(*Section* 560.)

WARRANT TO APPREHEND A PERSON CHARGED WITH AN INDICTABLE OFFENCE COMMITTED ON THE HIGH SEAS OR ABROAD.

For offences committed on the high seas the warrant may be the same as in ordinary cases, but describing the offence to have been committed "on the high seas, out of the body of any district or county of Canada and within the jurisdiction of the Admiralty of England."

For offences committed abroad, for which the parties may be indicted in Canada, the warrant also may be the same as in ordinary cases, but describing the offence to have been committed "on land out of Canada, to wit: at , in the Kingdom of , *or,* at , in the Island of , in the West Indies, *or,* at , in the East Indies," *or as the case may be.*

561. Arrest of suspected deserter.—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. R.S.C. c. 169, s. 6.

2. 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 shall incur a penalty of eighty dollars, recoverable on summary conviction in like manner as other penalties under this Act. R.S.C. c. 169, s. 7.

562. Contents and service of summons.—Every one mons issued by a justice under this Act shall be directed to the accused, and shall require him to appear at a time and place to be therein mentioned. Such summons may be in the form E

in schedule one hereto, or to the like effect. No summons shall be signed in blank.

2. Every such summons shall be served by a constable or other peace officer upon the person to whom it is directed, either by delivering it to him personally or, if such person cannot be conveniently met with, by leaving it for him at his last or most usual place of abode, with some inmate thereof, apparently not under sixteen years of age.

3. The service of any such summons may be proved by the oral testimony of the person effecting the same, or by the affidavit of such person purporting to be made before a justice.

FORM E.—

SUMMONS TO A PERSON CHARGED WITH AN INDICTABLE OFFENCE.

Canada,
Province of , }
County of , }

To A. B. of , (*labourer*):

Whereas you have this day been charged before the undersigned , a justice of the peace in and for the said county of , for that you on , at , (*stating shortly the offence*): These are therefore to command you, in His Majesty's name, to be and appear before (*me*) on , at o'clock in the (fore) noon, at , or before such other justice or justices of the peace for the same county of , as shall then be there to answer to the said charge, and to be further dealt with according to law. Herein fail not.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (Name of County.)

Substitutional service.]—The proof of service of a magistrate's summons served substitutionally must shew that the defendant could not be conveniently served in person, and that the adult person substitutionally served for him at the defendant's place of abode is an inmate thereof. Re Barron (1897), 4 Can. Cr. Cas. 465 (P.E.I.).

Where proof of the substitutional service becomes necessary in order to enable the magistrate to proceed with the trial, and is defective in both of such particulars, the conviction will be quashed on certiorari, nor will evidence be received in the certiorari proceedings to supplement the proof of service given before the magistrate. Ibid.

Service of a summons to appear before a magistrate to answer a charge of having committed an offence punishable by summary conviction is not validly made although left with the defendant's wife at his usual place of abode, if the defendant was then absent from Canada and remained away until after the hearing. The magistrate in such a case acquires no jurisdiction over the person of the defendant, and a conviction made in the defendant's absence upon such service will be quashed. Ex parte Donovan (1894), 3 Can. Cr. Cas. 286 (N.B.).

In an English case a summons served at 8 a.m. to appear at a petty sessions eight miles distant on the following day to answer a charge of assault was held to be well served, although the defendant was not at home when the summons was left and did not return home until 11 p.m. of the day of service; and on the non-appearance of the accused the justices were justified in proceeding ex parte. Ex parte Williams, 21 Eng. L.J. 46. But where a summons was left on March 10th with defendant's mother at his usual place of abode, requiring him to appear on March 12th, but defendant, a fisherman, described in the summons as a stonemason, had gone to sea on March 9th and did not return until April 19th, a conviction made ex parte was quashed. Re William Smith, L.R. 10 Q.B. 604.

Summons against corporation.]—The procedure of the Criminal Code of Canada as to summary convictions applies as well to corporations as to natural persons. The fact that a portion of the remedy provided for the recovery of the penalty and costs is personal imprisonment, does not prevent the application of the summary procedure in other respects to corporations. R. v. Toronto Ry. Co. (1898), 2 Can. Cr. Cas. 471.

Notice to a corporation of a summons by justices may be given in a manner similar to a notice of indictment under Cr. Code 637. Ibid.

563. Warrant for apprehension in the first instance.—The warrant issued by a justice for the apprehension of the person against whom an information or complaint has been laid, as provided in s. 558, may in the form F in schedule one hereto, or to the like effect. No such warrant shall be signed in blank.

2. Every such warrant shall be under the hand and seal of the justice issuing the same, and may be directed, either to any constable by name, or to such constable and all other constables within the territorial jurisdiction of the justice issuing it, or generally, to all constables within such jurisdiction.

3. The warrant shall state shortly the offence for which it is issued, and shall name or otherwise describe the offender, and it shall order the officer or officers to whom it is directed to apprehend the offender and bring him before the justice or justices issuing the warrant, or before some other justice or justices, to answer the charge contained in the said information or complaint, and to be further dealt with according to law. It shall not be necessary to make such warrant returnable at any particular time, but the same shall remain in force until it is executed.

4. The fact that a summons has been issued shall not prevent any justice from issuing such warrant at any time before or after the time mentioned in the summons for the appearance of the accused; and where the service of the summons has been proved and the accused does not appear, or when it appears that the summons cannot be served, the warrant (form G) may issue. R.S.C. c. 174, ss. 43, 44 and 46.

FORM F.—

WARRANT IN THE FIRST INSTANCE TO APPREHEND A PERSON CHARGED WITH AN INDICTABLE OFFENCE.

Canada,
Province of , }
County of , }

To all or any of the constables and other peace officers in the said county of .

Whereas A. B. of ,(*labourer*), has this day been charged upon oath before the undersigned , a justice of the peace in and for the said county of , for that he, on , at , did (*&c., stating shortly the offence*): These are therefore to command you, in His Majesty's name, forthwith to apprehend the said A.B., and to bring him before (*me*) (or some other justice of the peace in and for the said county of), to answer unto the said charge, and to be further dealt with according to law.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S. [SEAL.]
J.P., (Name of County.)

FORM G.—

WARRANT WHEN THE SUMMONS IS DISOBEYED.

Canada,
County of , }
Province of , }

To all or any of the constables and other peace officers in the said county of .

Whereas on the day of , (instant *or* last past) A. B., of , was charged before (*me* or *us,*) the undersigned (*or name the justice or justices, or as the case may be*), (*a*) justice of the peace in and for the said county

of , for that (*&c., as in the summons*); and whereas I (*or* he *the said justice of the peace, or* we *or* they *the said justices of the peace*) did then issue (*my, our, his* or *their*) summons to the said A. B., commanding him in His Majesty's name, to be and appear before (*me*) on , at o'clock in the (fore) noon, at , or before such other justice or justices of the peace as should then be there, to answer to the said charge and to be further dealt with according to law; and whereas the said A. B. has neglected to be or appear at the time and place appointed in and by the said summons, although it has now been proved to (*me*) upon oath that the said summons was duly served upon the said A. B.: These are therefore to command you in His Majesty's name, forthwith to apprehend the said A. B., and to bring him before (*me*) or some other justice of the peace in and for the said county of , to answer the said charge, and to be further dealt with according to law.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J.P., (Name of County.)

A written and sworn information is essential before a warrant can be legally issued. Friel v. Ferguson (1865), 15 U.C.C.P. 584.

Where the information on which a warrant to arrest has been issued was in fact taken on oath, the omission to state that fact in the warrant is at most an irregularity only, which would be cured by sec. 578. Kingston v. Wallace (1886), 25 N.B.R. 573.

And if a warrant be irregularly issued without oath and the defendant on arrest thereon makes no objection to the hearing of the charge, the irregularity does not deprive the justice of jurisdiction to proceed thereunder, although the accused had no knowledge of the defect at the time. R. v. Hughes (1879), L.R. 4 Q.B.D. 614; Grey v. Commissioners, 48 J.P. 343.

564. Execution of warrant.—Every such warrant may be executed by arresting the accused wherever he is found in the territorial jurisdiction of the justice by whom it is issued, or, in the case of fresh pursuit, at any place in an adjoining territorial division within seven miles of the border of the first-mentioned division. R.S.C. c. 174, ss. 47 and 48.

2. Every such warrant may be executed by any constable named therein, or by any one of the constables to whom it is directed, whether or not the place in which it is to be executed is within the place for which he is a constable.

3. Every warrant authorized by this Act may be issued and executed on a Sunday or statutory holiday. R.S.C. c. 174, ss. 47 and 48.

It would seem that a warrant of commitment following a summary conviction is not within sub-sec. (3); and an arrest on Sunday for default in payment of a fine under the Canada Temperance Act was held void. Ex parte Frecker (1897), 33 C.L.J. 248 (N.S.).

565. Proceeding when offender is not within the jurisdiction of the justice issuing the warrant.—If the person cannot be found within the jurisdiction of the justice by whom the same was issued, but is or is suspected to be in any other part of Canada, any justice within whose jurisdiction he is, or is suspected to be, upon proof being made on oath or affirmation of the handwriting of the justice who issued the same, shall make an endorsement on the warrant, signed with his name, authorizing the execution thereof within his jurisdiction; and such endorsement shall be sufficient authority to the person bringing such warrant, and to all other persons to whom the same was originally directed, and also to all constables of the territorial division where the warrant has been so endorsed, to execute the same therein and to carry the person against whom the warrant issued, when apprehended, before the justice who issued the warrant, or before some other justice for the same territorial division. Such endorsement may be in the form H in schedule one hereto. R.S.C. c. 174, s. 49.

FORM H.—

ENDORSEMENT IN BACKING A WARRANT.

Canada,
Province of , }
County of , }

Whereas proof upon oath has this day been made before me, , a justice of the peace in and for the said county of , that the name of J. S. to the within warrant subscribed, is of the handwriting of the justice of the peace within mentioned: I do hereby authorize W. T., who brings to me this warrant and all other persons to whom this warrant was originally directed, or by whom it may be lawfully executed, and also all peace officers of the said county of , to execute the same within the said last mentioned county.

Given under my hand, this day of , in the year , at , in county aforesaid.

J. L.,
J. P., (Name of County.)

566. Disposal of person arrested on endorsed warrant.—If the prosecutor or any of the witnesses for the prosecution are in the territorial division where such person has been apprehended upon a warrant endorsed as provided in the last preceding section, the constable or other person or persons who have apprehended him may, if so directed by the justice endorsing the warrant, take him before such justice, or before some other justice for the same territorial division; and the said justice may thereupon take the examination of such prosecutor or witnesses, and proceed in every respect as if he had himself issued the warrant. R.S.C. c. 174, s. 50.

A person summoned but not arrested for trespassing on a railway track, is not liable to be tried elsewhere than in the local jurisdiction wherein the offence was committed. R. v. Hughes (1895), 2 Can. Cr. Cas. 332.

Section 283 of the Railway Act (Can.), 51 Vict., ch. 29, authorizing a railway constable to "take" persons offending against the provisions of that Act, and punishable summarily, before a justice for any county, etc., within which such railway passes, and giving such justice jurisdiction to deal with such a case, as though the offence had been committed "within the limits of his own local jurisdiction," applies only were the offender has been *arrested* by railway constable. Ibid.

Semble, the provisions of sec. 283 of the Railway Act apply only to arrests made by a railway constable without a warrant under the provisions of that Act, and not to a case where an information is laid and a warrant is issued instead of a summons to bring the offender before the justice to answer the charge. Ibid.

567. Disposal of person apprehended on warrant.—When any person is arrested upon a warrant he shall, except in the case provided for in the next preceding section, be brought as soon as is practicable before the justice who issued it, or some other justice for the same territorial division, and such justice shall either proceed with the inquiry or postpone it to a future time, in which latter case he shall either commit the accused person to proper custody or admit him to bail, or permit him to be at large on his own recognizance, according to the provisions hereinafter contained.

568. Coroner's inquisition.—Every coroner, upon any inquisition taken before him whereby any person is charged with manslaughter or murder, shall (if the person or persons, or either of them, affected by such verdict or finding be not already charged with the said offence before a magistrate or justice), by warrant under his hand, direct that such person be taken into custody and be conveyed, with all convenient speed, before a magistrate or justice; or such coroner may direct such person to enter into a recognizance before him, with or without

a surety or sureties, to appear before a magistrate or justice. In either case it shall be the duty of the coroner to transmit to such magistrate or justice the depositions taken before him in the matter. Upon any such person being brought or appearing before such magistrate or justice, he shall proceed in all respects as though such person had been brought or had appeared before him upon a warrant or summons.

Coroner's inquisitions.]—A coroner's inquisition or the finding of a coroner's jury is no longer sufficient to alone place the accused on trial before a petit jury for the offence charged in such finding. Sec. 642. There must first be a true bill found by a Grand Jury before that can be done.

A coroner's court is a court of record, and the coroner is a judge of a court of record. Thomas v. Churton (1862), 2 B. & S. 475; Jervis on Coroners, 5th ed., p. 62; Boys on Coroners, 2nd ed., pp. 2, 208; Davidson v. Garrett (1899), 5 Can. Cr. Cas. 200 (Ont.), 35 C.L.J. 502; but a coroner is not a "justice" within the meaning of sec. 687, which provides for using upon a trial the depositions of a witness absent from Canada taken by a justice in the preliminary or other investigation of any charge. R. v. Graham (1898), 2 Can. Cr. Cas. 388 (Que.).

A coroner's court is a criminal court, as well as a court of record, and proceedings before the coroner are within the jurisdiction of the Federal Parliament, although no one is there charged with the offence of causing the death of the deceased. R. v. Hammond (1898), 1 Can. Cr. Cas. 373 (Ont.); R. v. Herford (1860), 3 E. & E. 115.

A coroner has power to himself summon the coroner's jury by a mere verbal direction to the jurors. Davidson v. Garrett (1899), 5 Can. Cr. Cas. 200 (Ont.).

A post-mortem examination may be directed by the coroner, and proceeded with under such direction, before the impanelling of the jury; the matter is one of procedure to be determined on the facts of each case by the coroner in the exercise of his discretion. Ibid.

Although the surgeon making the post-mortem examination may not be bound to do so without the coroner's written direction, yet if he proceeds on a verbal direction the latter constitutes a legal justification. Ibid.

Disqualification of coroner.]—In a recent case in the Territories an application was made on behalf of M. J. Haney, manager of construction of the Crows' Nest Railway, for a writ of prohibition to prohibit Dr. H. R. Mead, of Pincher Creek, from further proceeding with an inquest in connection with the deaths of two men from diphtheria, employed by a contractor on the said railway. The grounds upon which the application was made were: (1) That the coroner had no jurisdiction to hold such inquest. (2) That he was a necessary and material witness upon said investigation and inquest. (3) That he was directly and personally interested in said inquest and investigation. The facts as set out in the affidavits read on the application were that the two men in question were brought in the company's ambulance to the end of the track, and Dr. Mead, the said coroner, was immediately called in to attend them. Both men died the night after their arrival while under Mead's care. Mead then proceeded to hold an inquest upon the said deaths, although it had been pointed out to him by counsel (C. E. D. Wood) for applicant that having been in professional attendance upon the men at the time of their death, he would be a necessary witness, and it was not proper for him to act in the dual capacity of judge and witness. It was held that Mead was disqualified from acting as coroner and a writ of prohibition was granted. The same person cannot be both a witness and a judge in a cause which is on trial before him; and that in this case the coroner was a necessary

witness. In delivering judgment Rouleau, J., said: "In this case there is a dangerous precedent to be avoided. A physician, who is at the same time a coroner, in order to avoid prosecution for malpractice, would have only to call a jury and hold an inquest on the body of his victim and the law would be powerless to prevent him." Re Haney v. Mead (1898), 34 C.L.J. 330.

See also R. v. Farrant, 57 L.J.M.C. 17; Greenleaf on Evidence, 14th ed., s. 369; R. v. Sproule, 14 O.R. 375; R. v. Brown, 16 O.R. 41; People v. Miller, 2 Park. Crim. Rep. 197; People v. Dohring, 59 N.Y. 374.

569. Search warrant.—Any justice who is satisfied by information upon oath in the form J in schedule one hereto, that there is reasonable ground for believing that there is in any building, receptacle, or place—

(*a*) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed; or

(*b*) anything which there is reasonable ground to believe will afford evidence as to the commission of any such offence; or

(*c*) anything which there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which the offender may be arrested without warrant—

may at any time issue a warrant under his hand authorizing some constable or other person named therein to search such building, receptacle or place, for any such thing, and to seize and carry it before the justice issuing the warrant, or some other justice for the same territorial division, to be by him dealt with according to law. R.S.C. c. 174, ss. 51 and 52.

2. Every search warrant shall be executed by day, unless the justice shall by the warrant authorize the constable or other person to execute it at night.

3. Every search warrant may be in the form I in schedule one hereto, or to the like effect.

4. When any such thing is seized and brought before such justice he may detain it, taking reasonable care to preserve it till the conclusion of the investigation; and, if any one is committed for trial, he may order it further to be detained for the purpose of evidence on the trial. If no one is committed, the justice shall direct such thing to be restored to the person from whom it was taken, except in the cases next hereinafter mentioned, unless he is authorized or required by law to dispose of it otherwise. In case any improved arm or ammunition in respect to which any offence under section 116 has been committed has been seized, it shall be forfeited to the Crown. R.S.C. c. 50, s. 101.

5. If under any such warrant there is brought before any justice any forged bank note, bank note-paper, instrument or other thing, the possession whereof in the absence of lawful excuse is an offence under any provision of this or any other Act, the court to which any such person is committed for trial or, if there is no commitment for trial, such justice may cause such thing to be defaced or destroyed. R.S.C. c, 174, s. 55.

6. If under any such warrant there is brought before any justice any counterfeit coin or other thing the possession of which with knowledge of its nature and without lawful excuse is an indictable offence under any provision of Part XXXV. of this Act, every such thing as soon as it has been produced in evidence, or as soon as it appears that it will not be required to be so produced, shall forthwith be defaced or otherwise disposed of as the justice or the court directs. R.S.C. c. 174, s. 56.

7. Every person acting in the execution of any such warrant may seize any explosive substance which he has good cause to suspect is intended to be used for any unlawful object,—and shall, with all convenient speed, after the seizure, remove the same to such proper place as he thinks fit, and detain the same until ordered by a judge of a Superior Court to restore it to the person who claims the same. R.S.C. c. 150, s. 11.

8. Any explosive substance so seized shall, in the event of the person in whose possession the same is found, or of the owner thereof, being convicted of any offence under Part VI. of this Act, be forfeited; and the same shall be destroyed or sold under the direction of the court before which such person is convicted, and, in the case of sale, the proceeds arising therefrom shall be paid to the Minister of Finance and Receiver-General, for the public uses of Canada. R.S.C. c. 150, s. 12.

9. If offensive weapons believed to be dangerous to the public peace are seized under a search warrant the same shall be kept in safe custody in such place as the justice directs, unless the owner thereof proves, to the satisfaction of such justice, that such offensive weapons were not kept for any purposes dangerous to the public peace; and any person from whom any such offensive weapons are so taken may, if the justice of the peace upon whose warrant the same are taken, upon application made for that purpose, refuses to restore the same, apply to a judge of a Superior or County Court for the restitution of such offensive weapons, upon giving ten days' previous notice

of such application to such justice, and such judge shall make such order for the restitution or safe custody of such offensive weapons as upon such application appears to him to be proper. R.S.C. c. 149, ss. 2 and 3.

10. If goods or things by means of which it is suspected that an offence has been committed under Part XXXIII. are seized under a search warrant, and brought before a justice, such justice, and one or more other justice or justices shall determine summarily whether the same are or are not forfeited under the said Part XXXIII.; and if the owner of any goods or things which, if the owner thereof had been convicted, would be forfeited under this Act, is unknown or cannot be found, an information or complaint may be laid for the purpose only of enforcing such forfeiture, and the said justice may cause notice to be advertised stating that unless cause is shown to the contrary at the time and place named in the notice, such goods or things will be declared forfeited; and at such time and place the justice, unless the owner, or any person on his behalf, or other person interested in the goods or things, shows cause to the contrary, may declare such goods or things, or any of them forfeited. 51 V., c. 41, s. 14.

FORM I.—

WARRANT TO SEARCH.

Canada,
Province of , }
County of , }

Whereas it appears on the oath of A. B., of , that there is reason to suspect that (*describe things to be searched for and offence in respect of which search is made*) are concealed in , at .

This is, therefore, to authorize and require you to enter between the hours of (*as the justice shall direct*) into the said premises, and to search for the said things, and to bring the same before me or some other justice.

Dated at , in the said county of , this day of , in the year

J. S.,

J.P., (Name of County.)

To of .

FORM J.—*(As amended 1900.)*

INFORMATION TO OBTAIN A SEARCH WARRANT.

Canada,
Province of , }
County of , }

The information of A. B., of
in the said county (*yeoman*) taken this
day of , in the year
before me, J. S., Esquire, a justice of the peace, in and for the district (*or* county, *etc.*,) of , who says that (*describe things to be searched for and offence in respect of which search is made*), and that he has just and reasonable cause to suspect, and suspects, that the said goods and chattels, or some part of them, are concealed in the (*dwelling-house, etc.*) of C. D., of , in the said district (*or* county,, *etc.*) (*here add the causes of suspicion, whatever they may be*): Wherefore (*he*) prays that a search warrant may be granted to him to search the (*dwelling-house, etc.*), of the said C. D., as aforesaid, for the said goods and chattels so stolen, taken and carried away as aforesaid (*or as the case may be*).

Sworn (*or* affirmed) before me the day and year first above mentioned, at , in the said county of

J. S.,
J. P., (*name of district or county, etc.*)

The amended form merely corrects a manifest slip in the position of the words ("*describe things to be searched for and offence in respect of which search is made*" which were printed after the words "in and for the county" in the Code of 1892.

Search warrants.]—In a recent English case it was held that the goods for which search is to be made under the warrant need not be stated in detail and with particularity in the warrant or in the information therefor. Jones v. German, [1896] 2 Q.B. 418; [1897] 1 Q.B. 374; 66 L.J.Q.B. 281. Action was there brought against a justice of the peace for trespass for having issued a search warrant under which the plaintiff's goods were searched. It was claimed that the warrant was illegaly issued because the information did not allege that the goods had been stolen, or shew that the informant believed they had been stolen, nor state specifically the goods believed to be in the possession of the suspected person. Lord Russell, C.J., before whom the action was tried, held that the information was sufficient as shewing reasonable grounds for suspecting that the goods in question were being feloniously dealt with by the plaintiff, and that it was unnecessary to specify the goods. This section of the Code requires the justice to be satisfied by information "that there is reasonable ground for believing that there is in any building, receptacle or place, anything upon or in respect of which any offence against the Act has been or is suspected to have been committed," and form J demands a description of the things to be searched for, and also a statement of the cause of suspicion. The English case would probably on that account be held inapplicable to the Code.

There is no procedure for "endorsing" a search warrant so as to make it effective outside of the territorial jurisdiction of the magistrate granting it. If it be desired to search in another county or district a new search warrant should be applied for upon oath.

Where, under a search warrant of a justice of the peace of the county of Haldimand, the constable seized and conveyed the horse, in respect of which it was issued, into the adjoining county of Brant, it was held that the taking was tortious; and that the constable was a trespasser ab initio, and could neither justify the detention, nor resist replevin of the animal in Brant. Hoover v. Craig, 12 Ont. App. 72.

Lord Hale in his Pleas of the Crown, vol. 2, p. 150, says: "I do take it that a general warrant to search in all suspected places is not good, but only to search in such particular places where the party assigns before the justice his suspicion and the probable cause thereof; for these warrants are judicial acts and must be granted on an examination of the fact."

A search warrant directing the constable to search a particular house "or any other house at ——— if there is any suspicion that said goods, etc., be in such house," is bad as it delegates to the constable the duties of the justice, by enabling him to act on suspicions arising in his mind after the issue of the warrant, and it is also void for uncertainty. McLeod v. Campbell (1894), 26 N.S.R. 458.

Building, receptacle or place.]—An enclosed yard or ground, whether roofed over or not and however large its dimensions may be, is a "place": Stroud's Judicial Dictionary. Eastwood v. Miller, L.R. 9 Q.B. 440; R. v. McGarry (1893), 24 Ont. R. 52.

Disqualification of constable.]—In Condell v. Price, 1 Han. 333, it was held that a constable could not act or hold a defendant in arrest in his own case. Allen, J., says: "It is true that the defendant may in fact have been a constable, but the alleged acting as a constable was in a case where he was the plaintiff, and therefore he could not act as constable." And he was therefore held not entitled to notice of action. That case decided that he had no jurisdiction to act; had he had jurisdiction, and reasonably thought he was acting as constable, he would have been entitled to notice of action. In Hamilton v. Calder, 23 N.B.R. 373, it is said that some one (the owner, if he is complainant), who can point the goods out, usually accompanies the officer in the execution of the warrant for the purpose that on his own pointing and declaration the officer may judge whether or not they are the goods mentioned in the warrant. The constable's duty is to judge and determine them to be such goods before he takes or removes them.

In the case of Reg. v. Hefferman, 13 O.R. 616, Robertson, J., held that, though objectionable, the informer, if a police officer, may execute his own warrants of search and destruction under The Canada Temperance Act. His reasons for holding such a case to be outside the principles, which at common law prevent officers, such as sheriffs, etc., from executing their own processes or those obtained by their kin, are that he, acting in an official and public capacity, had no private or pecuniary interest to serve, and he should suppose that the fact of his being the chief constable of the city would afford some guarantee that he would discharge the duty imposed upon him with decorum and in the least offensive way possible. Hanington, J., in a recent New Brunswick case, Ex parte McCleave (1900), 5 Can. Cr. Cas. 115, thus comments on the decision in the Hefferman case: "I can not agree that any such supposed guarantee is enough to allow any prosecutor (personally liable to costs if his prosecution fails, and for damages if his conduct is illegal, either of which facts would disqualify any high sheriff) to say that they do not disqualify an officer of the police of the city. If he, as such public officer, undertakes the prosecution, he could have no difficulty in getting a sheriff or constable to execute the warrants and orders,

and I think he should do so. If, as Mr. Justice Robertson says, it is objectionable, it is well, I think, to adhere to the common law principles, which, if followed, would leave nothing to be objected to. Under a warrant of this description the executive officer has great powers, even to breaking outside doors, has to exercise discretion, and to determine and adjudge that he has found the liquor complained of. Any official clothed with such powers and duties should, I think, be entirely free from interest, bias or prejudice, which he in law can not be when he is interested in fact, executing his own warrants and orders."

570. Search for public stores.—Any constable or other peace officer, if deputed by any public department, may, within the limits for which he is such constable or peace officer, stop, detain and search any person reasonably suspected of having or conveying in any manner, any public stores defined in section 383, stolen or unlawfully obtained, or any vessel, boat or vehicle in or on which there is reason to suspect that any public stores stolen or unlawfully obtained may be found.

2. A constable or other peace officer shall be deemed to be deputed within the meaning of this section is he is deputed by any writing signed by the person who is the head of such department, or who is authorized to sign documents on behalf of such department.

571. Search warrant for gold, silver, etc.—On complaint in writing, made to any justice of the county, district or place, by any person interested in any mining claim, that mined gold, gold-bearing quartz or mined or unmanufactured silver or silver ore, is unlawfully deposited in any place, or held by any person contrary to law, a general search warrant may be issued by such justice, as in the case of stolen goods, includiug any number of places or persons named in such complaint; and if, upon such search, any such gold or gold-bearing quartz, or silver, or silver ore is found to be unlawfully deposited or held, the justice shall make such order for the restoration thereof to the lawful owner as he considers right.

2. The decision of the justice in such case is subject to appeal as in ordinary cases coming within the provisions of Part LVIII. R.S.C. c. 174, s. 53.

572. Search for timber, etc., unlawfully detained.—If any constable or other peace officer has reasonable cause to suspect that any timber, mast, spar, saw-log, or other description of lumber, belonging to any lumberman, or owner of lum-

ber, and bearing the registered trade mark of such lumberman or owner of lumber, is kept or detained in any saw-mill, mill-yard, boom or raft, without the knowledge or consent of the owner, such constable or other peace officer may enter into or upon the same, and search or examine, for the purpose of ascertaining whether such timber, mast, spar, saw-log or other description of lumber is detained therein without such knowledge and consent. R.S.C. c. 174, s. 54.

573. Search for liquors near His Majesty's vessels.—Any officer in His Majesty's service, any warrant or petty officer of the navy, or any non-commissioned officer of marines, with or without seamen or persons under his command, may search any boat or vessel which hovers about or approaches, or which has hovered about or approached any of His Majesty's ships or vessels mentioned in section 119, Part VI. of this Act, and may seize any intoxicating liquor found on board such boat or vessel, and the liquor so found shall be forfeited to the Crown. 50-51 V., c. 46, s. 3.

574. Search for women in house of ill-fame.—Whenever there is reason to believe that any woman or girl mentioned in section 185, Part XIII., has been inveigled or enticed to a house of ill-fame or assignation, then, upon complaint thereof being made under oath by the parent, husband, master or guardian of such woman or girl, or in the event of such woman or girl having no known parent, husband, master or guardian in the place in which the offence is alleged to have been committed, by any other person, to any justice of the peace, or to a judge of any court authorized to issue warrants in cases of alleged offences against the criminal law, such justice of the peace or judge of the court may issue a warrant to enter, by day or night, such house of ill-fame or assignation, and if necessary use force for the purpose of effecting such entry, whether by breaking open doors or otherwise, and to search for such woman or girl, and bring her and the person or persons in whose keeping and possession she is, before such justice of the peace or judge of the court, who may, on examination, order her to be delivered to her parent, husband, master or guardian, or to be discharged, as law and justice require. R.S.C. c. 157, s. 7.

(Amendments of 1894 and 1895.)

575. Search in gaming house.—If the chief constable or deputy chief constable of any city, town, incorporated village, or other municipality or district, organized or unorganized, or place, or other officer authorized to act in his absence, reports in writing to any of the commissioners of police, or to the mayor or chief magistrate, or to the police magistrate of such city, town, incoroporated village, or other municipality, district, or place, or to any police magistrate having jurisdiction there, or if there be no such mayor, or chief magistrate, or police magistrate, to any justice of the peace having such jurisdiction, that there are good grounds for believing, and that he does believe that any house, room or place within the said city or town, incorporated village or other municipality, district or place is kept or used as a common gaming or betting house, as defined in Part XIV., sections 196 and 197, or is used for the purpose of carrying on a lottery, or for the sale of lottery tickets, or for the purpose of conducting or carrying on any scheme, contrivance or operation for the purpose of determining the winners in any lottery contrary to the provisions of part XIV., section 205, whether admission thereto is limited to those possessed of entrance keys or otherwise, the said commissioners or commissioner, mayor, chief magistrate, police magistrate or justice of the peace may, by order in writing, authorize the chief constable, deputy chief constable, or other officer as aforesaid, to enter any such house, room or place, with such constables as are deemed requisite by him, and, if necessary, to use force for the purpose of effecting such entry, whether by breaking open doors or otherwise, and to take into custody all persons who are found therein, and to seize, as the case may be (1) all tables and instruments of gaming or betting, and all moneys and securities for money, and (2) all instruments or devices for the carrying on of such lottery, or of such scheme, contrivance or operation, and all lottery tickets, found in such house or premises, and to bring the same before the person issuing such order or some other justice, to be by him dealt with according to law.

2. The chief constable, deputy chief constable or other officer making such entry, in obedience to any such order, may, with the assistance of one or more constables, search all parts of the house, room or place which he has so entered, where he suspects that tables or instruments of gaming or betting, or any

instruments or devices for the carrying on of such lottery, or of such scheme, contrivance or operation, or any lottery tickets, are concealed, and all persons whom he finds in such house or premises, and seize all tables and instruments of gaming or betting, or any such instruments or devices or lottery tickets as aforesaid, which he so finds.

3. The justice before whom any person is taken by virtue of an order or warrant under this section, may direct any cards, dice, balls, counters, tables or other instruments of gaming, or used in playing any game, or of betting, or any such instruments or devices for the carrying on of a lottery, or for the conducting or carrying on of any such scheme, contrivance or operation, or any such lottery tickets so seized as aforesaid, to be forthwith destroyed, and any money or securities so seized shall be forfeited to the Crown for the public uses of Canada.

4. The expression "chief constable" includes the chief of police, city marshal, or other head of the police force of any such city, town, incorporated village, or other municipality, district or place, and in the Province of Quebec, the high constable of the district, and means any constable of a municipality, district or place which has no chief constable or deputy chief constable.

5. The expression "deputy chief constable" includes deputy chief of police, deputy or assistant marshal or other deputy head of the police force of any such city, town, incorporated village, or other municipality, district or place, and in the Province of Quebec, the deputy high constable of the district; and the expression "police magistrate" includes stipendiary and district magistrates.

The Parliament of Canada has the constitutional power to authorize a magistrate to adjudge forfeiture to the Crown of moneys, etc., found in a common gaming house, and to declare the keeping of a gaming house a criminal offence; and the judgment of confiscation is not an interference with "property and civil rights," the jurisdiction in regard to which belongs to the provinces, although the party claiming the money was not a party to the proceedings in which the confiscation was decreed. O'Neil v. Attorney-General (1896), 1 Can. Cr. Cas. 303 (S.C. Can.).

In an action to recover from the constable and the clerk of the peace the moneys so seized, the rules of evidence in force in the province in civil matters will apply, and not the Canada Evidence Act. Ibid.

It never was intended that after a complaint made and an order for search given, the order should be filed away without any attempt to enforce it for years, and yet it remain operative. The premises may no longer be used for an improper purpose and "it would be contrary to justice that the stringent provisions of this section should be put in force when or how the police thought proper." Per Drake, J., in R. v. Ah Sing (1892), 2 B.C.R. 167.

Compelling evidence of persons found in gaming house on search.]—Sections 9 and 10 of R.S.C. 1886, ch. 158, are excepted from the repeal of that chapter, Code sec. 981, and schedule thereto. They provide as follows:—

(9.) The police magistrate, mayor or justice of the peace, before whom any person is brought who has been found in any house, room or place, entered in pursuance of any warrant or order issued under this Act, may require any such person to be examined on oath and to give evidence touching any unlawful gaming in such house, room or place, or touching any act done for the purpose of preventing, obstructing or delaying the entry into such house, room or place, or any part thereof, of any constable or officer authorized as aforesaid; and no person so required to be examined as a witness shall be excused from being so examined when brought before such police magistrate, mayor or justice of the peace, or from being so examined at any subsequent time by or before the police magistrate or mayor or any justice of the peace, or by or before any court, on any proceeding, or on the trial of any indictment, information, action or suit in any wise relating to such unlawful gaming, or any such acts as aforesaid, or from answering any question put to him touching the matters aforesaid, on the ground that his evidence will tend to criminate himself; and any such person so required to be examined as a witness who refuses to make oath accordingly, or to answer any such question, shall be subject to be dealt with in all respects as any person appearing as a witness before any justice or court in obedience to a summons or subpœna and refusing without lawful cause or excuse to be sworn or to give evidence, may, by law, be dealt with; but nothing in this section shall render any offender, under the sixth section of this Act, liable on his trial to examination hereunder.

(10). Every person so required to be examined as a witness, who, upon such examination, makes true disclosure, to the best of his knowledge, of all things as to which he is examined, shall receive from the judge, justice of the peace, magistrate, examiner or other judicial officer before whom such proceeding is had, a certificate in writing to that effect, and shall be freed from all criminal prosecutions and penal actions, and from all penalties, forfeitures and punishments to which he has become liable for anything done before that time in respect of the matters regarding which he has been examined; but such certificate shall not be effectual for the purpose aforesaid, unless it states that such witness made a true disclosure in respect to all things as to which he was examined; and any action, indictment or proceedings pending or brought in any court against such witness, in respect of any act of gaming regarding which he was so examined, shall be stayed, upon the production and proof of such certificate, and upon summary application to the court in which such action, indictment or proceeding is pending, or any judge thereof, or any judge of any of the superior courts of any province.

Prima facie evidence.]—See secs. 702 and 703.

576. Search for vagrant.—Any stipendiary or police magistrate, mayor or warden, or any two justices of the peace, upon information before them made, that any person described in Part XV. as a loose, idle or disorderly person, or vagrant, is or is reasonably suspected to be harboured or concealed in any disorderly house, bawdy-house, house of ill-fame, tavern or boarding-house, may, by warrant, authorize any constable or other person to enter at any time such house or tavern, and to apprehend and bring before them or any other justices of the peace, every person found therein so suspected as aforesaid. R.S.C. c. 157, s. 8.

PART XLV.

PROCEDURE ON APPEARANCE OF ACCUSED.

SECT.

577. Inquiry by justice.—When any person accused of an indictable offence is before a justice, whether voluntarily or upon summons, or after being apprehended with or without warrant, or while in custody for the same or any other offence, the justice shall proceed to inquire into the matters charged against such person in the manner hereinafter defined.

The matters charged.]—It is essential that whatever words may be used in the information they should be sufficient to give the accused notice of the offence with which he is charged, and to identify the transaction referred to. The absence or the insufficiency of particulars does not vitiate an indictment nor an information; but if it should be made to appear that there is a reasonable necessity for more specific information, the court or magistrate may, on the application of the accused person, order that further particulars be given, but such an order is altogether within the judicial discretion of the judge or magistrate. R. v. France (1898), 1 Can. Cr. Cas. 321, 329 (Que.).

It is not competent for magistrates where an information charges an offence under the Code, which they have no jurisdiction to try summarily, to convert the charge into one against a municipal by-law, which they have jurisdiction to try summarily, and to so try it on the original information. R. v. Dungey (1901), 5 Can. Cr. Cas. 38 (Ont.).

When an accused person is summoned to appear before a justice of the peace having jurisdiction to conduct the proceedings without associate justices, other justices of the peace are not entitled to interfere in the preliminary enquiry, or to be associated with the summoning justice, except at the latter's request. R. v. McRae (1897), 2 Can. Cr. Cas. 49.

Until the prisoner is brought before the magistrate, he has no absolute right to the assistance of counsel; but it is usual for the Crown to accede the privilege except under very peculiar circumstances.

578. Irregularity in procuring appearance.—No irregularity or defect in the substance or form of the summons or warrant, and no variance between the charge contained in the summons or warrant and the charge contained in the information, or between either and the evidence adduced on the part of the prosecution at the inquiry, shall affect the validity of any proceeding at or subsequent to the hearing. R.S.C. c. 174, s. 58.

The omission to state in a warrant of arrest that the information was taken under oath is merely an irregularity and would be cured by this section. Kingston v. Wallace (1886), 25 N.B.R. 573.

Where a warrant charges no offence known to the law, neither it nor a remand thereon is validated by this section. R. v. Holley (1893), 4 Can. Cr. Cas. 510 (N.S.).

579. Adjournment in case of variance.—If it appears to the justice that the person charged has been deceived or misled by any such variance in any summons or warrant, he may adjourn the hearing of the case to some future day, and in the meantime may remand such person, or admit him to bail as hereinafter mentioned. R.S.C. c. 174, s. 59.

580. Procuring attendance of witnesses.—If it appears to the justice that any person being or residing within the Province is likely to give material evidence either for the prosecution or for the accused on such inquiry, he may issue a summons under his hand, requiring such person to appear before him at a time and place mentioned therein, to give evidence respecting the charge, and to bring with him any documents in his possession or under his control relating thereto.

2. Such summons may be in the form K in schedule one hereto, or to the like effect. R.S.C. c. 174, s. 60.

FORM K.—*(As amended 1895.)*

SUMMONS TO A WITNESS.

Canada,
Province of , }
County of , }

To E. F., of , (*labourer*):

Whereas information has been laid before the undersigned , a justice of the peace in and for the said county of , that A. B. (*etc., as in the summons or warrant against the accused*), and it has been made to appear to me that you are likely to give material evidence for (*the prosecution or for the accused*): These are therefore to require you to be and to appear before me, on next, at o'clock in the (fore) noon, at , or before such other justice or justices of the peace of the same county of , as shall then be there, to testify what you know concerning the said charge so made against the said A. B. as aforesaid. Herein fail not.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (Name of County.)

581. Service of summons for witness.—Every such summons shall be served by a constable or other peace officer upon the person to whom it is directed, either personally, or, if such person cannot conveniently be met with, by leaving it for him

at his last or most usual place of abode with some inmate thereof apparently not under sixteen years of age.

582. Warrant for witness after summons.—If any one to whom such last-mentioned summons is directed does not appear at the time and place appointed thereby, and no just excuse is offered for such non-appearance, then (after proof upon oath that such summons has been served as aforesaid, or that the person to whom the summons is directed is keeping out of the way to avoid service) the justice before whom such person ought to have appeared, being satisfied by proof on oath that he is likely to give material evidence, may issue a warrant under his hand to bring such person at a time and place to be therein mentioned before him, or to any other justice in order to testify as aforesaid.

2. The warrant may be in the form L in schedule one hereto, or to the like effect. Such warrant may be executed anywhere within the territorial jurisdiction of the justice by whom it is issued, or, if necessary, endorsed as provided in section 565, and executed anywhere in the province, but out of such jurisdiction. R.S.C. c. 174, s. 61.

3. If a person summoned as a witness under the provisions of this part is brought before a justice on a warrant issued in consequence of refusal to obey the summons, such person may be detained on such warrant before the justice who issued the summons, or before any other justice in and for the same territorial division, who shall then be there, or in the common gaol, or any other place of confinement, or in the custody of the person having him in charge, with a view to secure his presence as a witness on the day fixed for the trial; or in the discretion of the justice such person may be released on recognizance, with or without sureties, conditioned for his appearance to give evidence as therein mentioned, and to answer for his default in not attending upon the said summons as for contempt; and the justice may, in a summary manner, examine into and dispose of the charge of contempt against such person, who, if found guilty thereof, may be fined or imprisoned, or both, such fine not to exceed twenty dollars, and such imprisonment to be in the common gaol, without hard labour, and not to exceed the term of one month, and may also be ordered to pay the costs incident to the service and execution of the said summons and warrant and of his detention in custody. 51 V., c. 45, s. 1.

(The conviction under this section may be in the form PP in schedule one hereto.)

FORM L.—

WARRANT WHEN A WITNESS HAS NOT OBEYED THE SUMMONS.

Canada,
Province of , }
County of . }

To all or any of the constables and other peace officers in the said county of .

Whereas information having been laid before , a justice of the peace, in and for the said county of , that A. B. (*etc., as in the summons*); and it having been made to appear to (*me*) upon oath that E. F. of , (*labourer*), was likely to give material evidence for (*the prosecution*), (*I*) duly issued (*my*) summons to the said E. F., requiring him to be and appear before (*me*) on , at , or before such other justice or justices of the peace for the same county, as should then be there, to testify what he knows respecting the said charge so made against the said A. B., as aforesaid; and whereas proof has this day been made upon oath before (*me*) of such summons having been duly served upon the said E. F.; and whereas the said E. F. has neglected to appear at the time and place appointed by the said summons, and no just excuse has been offered for such neglect: These are therefore to command you to bring and have the said E. F. before (*me*) on , at o'clock in the (fore) noon, at , or before such other justice or justices for the same county, as shall then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (Name of County.)

FORM PP.—

CONVICTION FOR CONTEMPT.

Canada,
Province of , }
County of . }

Be it remembered that on the day of , in the year , in the county of , E. F. is convicted

before me, for that he, the said E. F., did not attend before me to give evidence on the trial of a certain charge against one A. B., of (*theft, or as the case may be*), although duly subpœnaed (*or* bound by recognizance to appear and give evidence in that behalf, *as the case may be*), but made default therein, and has not shewn before me any sufficient excuse for such default, and I adjudge the said E. F., for his said offence, to be imprisoned in the common gaol of the county of , at , for the space of , there to be kept at hard labour (*and in case a fine is also intended to be imposed, then proceed*), and I also adjudge that the said E. F. do forthwith pay to and for the use of His Majesty a fine of dollars, and in default of payment, that the said fine, with the cost of collection, be levied by distress and sale of the goods and chattels of the said E. F. (*or in case a fine alone is imposed, then the clause of imprisonment is to be omitted*).

Given under my hand at , in the said county of , the day and year first above mentioned.

O. K.,
Judge.

583. Warrant for witness in first instance.—If the justice is satisfied by evidence upon oath that any person within the Province, likely to give material evidence either for the prosecution or for the accused, will not attend to give evidence without being compelled so to do, then instead of issuing a summons, he may issue a warrant in the first instance. Such warrant may be in the form M in schedule one hereto, or to the like effect, and may be executed anywhere within the jurisdiction of such justice, or, if necessary, endorsed as provided in section 565, and executed anywhere in the Province, but out of such jurisdiction. R.S.C. c. 174, s. 62.

FORM M.—

WARRANT FOR A WITNESS IN THE FIRST INSTANCE.

Canada,
Province of , }
County of . }

To all or any of the constables and other peace officers in the said county of .

Whereas information has been laid before the undersigned , a justice of the peace, in and for the said county

of , that (*etc., as in the summons*); and it having been made to appear to (*me*) upon oath, that E. F. of , (*labourer*), is likely to give material evidence for the prosecution, and that it is probable that the said E. F. will not attend to give evidence unless compelled to do so: These are therefore to command you to bring and have the said E. F. before (*me*) on , at o'clock in the (fore) noon, at , or before such other justice or justices of the peace for the same county, as shall then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (Name of County.)

A warrant against a witness is not wholly a civil process or subject to the limitations which attach to civil process, but is a substitute for an attachment. Messenger v. Parker (1885), 6 N.S.R. 237. The constable executing it is justified, if the witness escapes after his arrest, in breaking into a dwelling house where he is and re-arresting him if done in fresh pursuit. Ibid.

584. Procuring attendance of witnesses beyond justice's jurisdiction.—If there is reason to believe that any person residing anywhere in Canada out of the Province and not being within the Province, is likely to give material evidence either for the prosecution or for the accused, any Judge of a Superior Court or a County Court, on application therefor by the informant or complainant, or the Attorney-General, or by the accused person or his solicitor or some person authorized by the accused, may cause a writ of subpœna to be issued under the seal of the Court of which he is a Judge, requiring such person to appear before the justice before whom the inquiry is being held or is intended to be held at a time and place mentioned therein to give evidence respecting the charge and to bring with him any documents in his possession or under his control relating thereto.

2. Such subpœna shall be served personally upon the person to whom it is directed and an affidavit of such service by a person effecting the same purporting to be made before a justice of the peace, shall be sufficient proof thereof.

3. If the person served with a subpœna as provided by this section, does not appear at the time and place specified therein, and no just excuse is offered for his non-appearance, the justice holding the inquiry, after proof upon oath that the subpœna has

been served, may issue a warrant under his hand directed to any constable or peace officer of the district, county or place where such person is, or to all constables or peace officers in such district, county or place, directing them or any of them to arrest such person and bring him before the said justice or any other justice at a time and place mentioned in such warrant in order to testify as aforesaid.

4. The warrant may be in the form N in schedule one hereto or to the like effect. If necessary, it may be endorsed in the manner provided by section 565, and executed in a district, county or place other than the one therein mentioned.

FORM N.—

WARRANT WHEN A WITNESS HAS NOT OBEYED THE SUBPOENA.

Canada,
Province of }
County of }

To all or any of the constables and other peace officers in the said county of .

Whereas information having been laid before , a justice of the peace, in and for the said county, that A. B. (*etc., as in the summons*); and there being reason to believe that E. F., of , in the Province of ,(*labourer*), was likely to give material evidence for (*the prosecution*), a writ of subpœna was issued by order of , Judge of (*name of Court*), to the said E. F., requiring him to be and appear before (*me*) on , at , or before such other justice or justices of the peace for the same county, as should then be there, to testify what he knows respecting the said charge so made against the said A. B., as aforesaid; and whereas proof has this day been made upon oath before (*me*) of such writ of subpœna having been duly served upon the said E. F.; and whereas the said E. F. has neglected to appear at the time and place appointed by the said writ of subpœna, and no just excuse has been offered for such neglect: These are therefore to command you to bring and have the said E. F. before (*me*) on , at o'clock in the (fore) noon, at , or before such other justice or justices for the same county as shall then be there, to testify what he knows

concerning the said charge so made against the said A. B. as aforesaid.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (Name of County.)

585. Witness refusing to be examined.—Whenever any person appearing, either in obedience to a summons or subpœna, or by virtue of a warrant, or being present and being verbally required by the justice to give evidence, refuses to be sworn, or having been sworn, refuses to answer such questions as are put to him, or refuses or neglects to produce any documents which he is required to produce, or refuses to sign his depositions without in any such case offering any just excuse for such refusal, such justice may adjourn the proceedings for any period not exceeding eight clear days, and may in the meantime by warrant in form O in schedule one hereto, or to the like effect, commit the person so refusing to gaol, unless he sooner consents to do what is required of him. If such person, upon being brought up upon such adjourned hearing, again refuses to do what is so required of him, the justice, if he sees fit, may again adjourn the proceedings, and commit him for the like period, and so again from time to time until such person consents to do what is required of him.

2. Nothing in this section shall prevent such justice from sending any such case for trial, or otherwise disposing of the same in the meantime, according to any other sufficient evidence taken by him. R.S.C. c. 174, s. 63.

FORM O.—

WARRANT OF COMMITMENT OF A WITNESS FOR REFUSING TO BE SWORN OR TO GIVE EVIDENCE.

Canada,
Province of , }
County of . }

To all or any of the constables and other peace officers in the county of , and to the keeper of the common gaol at , in the said county of .

Whereas A. B. was lately charged before , a justice of the peace in and for the said county of , for that

(*etc., as in the summons*); and it having been made to appear to (*me*) upon oath that E. F. of , was likely to give material evidence for the prosecution, (*I*) duly issued (*my*) summons to the said E. F., requiring him to be and appear before me on , at , or before such other justice or justices of the peace for the same county as should then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid; and the said E. F. now appearing before (*me*) (*or* being brought before (*me*) by virtue of a warrant in that behalf), to testify as aforesaid, and being required to make oath or affirmation as a witness in that behalf, now refuses so to do (*or* being duly sworn as a witness now refuses to answer certain questions concerning the premises which are now here put to him, and more particularly the following) without offering any just excuse for such refusal: These are therefore to command you, the said constables or peace officers, or any one of you, to take the said E. F. and him safely to convey to the common gaol at , in the county aforesaid, and there to deliver him to the keeper thereof, together with this precept: And (*I*) do hereby command you, the said keeper of the said common gaol to receive the said E. F. into your custody in the said common gaol, and him there safely keep for the space of days, for his said contempt, unless in the meantime he consents to be examined, and to answer concerning the premises; and for you so doing, this shall be your sufficient warrant.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. P., (Name of County.)

586. Discretionary powers of the justice.—A justice holding the preliminary inquiry may in his discretion—

(*a*) permit or refuse permission to the prosecutor, his counsel or attorney to address him in support of the charge, either by way of opening or summing up the case, or by way of reply upon any evidence which may be produced by the person accused;

(*b*) receive further evidence on the part of the prosecutor after hearing any evidence given on behalf of the accused;

(*c*) adjourn the hearing of the matter from time to time, and change the place of hearing, if from the absence

of witnesses, the inability of a witness who is ill to attend at the place where the justice usually sits, or from any other reasonable cause, it appears desirable to do so, and may remand the accused if required by warrant in the form P in schedule one hereto: Provided that no such remand shall be for more than eight clear days, the day following that on which the remand is made being counted as the first day; and further provided, that if the remand is for a time not exceeding three clear days, the justice may verbally order the constable or other person in whose custody the accused then is, or any other constable or person named by the justice in that behalf, to keep the accused person in his custody and to bring him before the same or such other justice as shall be there acting at the time appointed for continuing the examination. R.S.C. c. 174, s. 65.

(*d*) order that no person other than the prosecutor and accused, their counsel and solicitor shall have access to or remain in the room or building in which the inquiry is held (which shall not be an open court), if it appears to him that the ends of justice will be best answered by so doing;

(*e*) regulate the course of the inquiry in any way which may appear to him desirable, and which is not inconsistent with the provisions of this Act.

FORM P.—

WARRANT REMANDING A PRISONER.

Canada,
Province of , }
County of . }

To all or any of the constables and other peace officers in the said county of , and to the keeper of the common gaol at , in the said county.

Whereas A. B. was this day charged before the undersigned , a justice of the peace in and for the said county of , for that (*etc., as in the warrant to apprehend*), and it appears to (*me*) to be necessary to remand the said A. B.: These are therefore to command you, the said constables and peace officers, or any of you, in His Majesty's name, forthwith to convey the said A. B. to the common gaol at , in the said county, and there to deliver him to the keeper thereof, together with this precept: And I hereby command you the said keeper to receive the said A. B. into your custody in the

said common gaol, and there safely keep him until the day of (*instant*), when I hereby command you to have him at , at o'clock in the (fore) noon of the same day before (*me*) or before such other justice or justices of the peace for the said county as shall then be there, to answer further to the said charge, and to be further dealt with according to law, unless you shall be otherwise ordered in the meantime.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. P., (Name of County.)

Verbal remand.]—Where on a preliminary enquiry a remand is desired for a time exceeding three clear days, the justice may remand only by warrant (Code Form P.), declaring that it appears to be necessary to remand the accused; and an informal remand endorsed upon the warrant is insufficient. R. v. Holley (1893), 4 Can. Cr. Cas. 510, per Townshend, J. (N.S.).

(*c.*)—*Remand before another justice.*]—Where the evidence on a preliminary inquiry was commenced before one justice of the peace and finished before him and another justice who joined in the hearing of the case after the evidence of a material witness had been taken and the case adjourned to a subsequent day, a committal made by the two justices jointly was held to be irregular, as both had not heard all of the evidence. Re Nunn (1899), 2 Can. Cr. Cas. 429 (B.C.), per Walkem, J.

The case of Re Guerin (1888), 16 Cox C.C. 596, was an extradition matter in which some of the depositions were taken before one magistrate and the inquiry was continued and the remaining depositions taken before another magistrate, who made the commitment.

The illegality of a commitment made after such a change of magistrates is not cured by a statute empowering justices, in cases where it is necessary or advisable to defer the examination or further examination of witnesses, to remand the accused and to order him to be brought before "the same or such other justice or justices as shall be there acting at the time appointed for continuing such examination." Such an enactment is to be construed merely as providing for the case of the first magistrate dying or resigning and it does not enable one magistrate in ordinary cases to take up a case where another left off; he must hear the case de novo. Re Guerin (1888), 16 Cox C.C. 506, 601.

The Code form P. gives, in the form of warrant remanding a prisoner, a direction that he be brought before the remanding justice "or before such other justice or justices of the peace for the said county as shall then be there, to answer further to the said charge," etc. And by sec. 588 the justice may, before the expiry of the time of remand, order the accused person to be brought before him or *before any other justice* for the same territorial division. So also under the special provision contained in Cr. Code 586 (*c*) regarding verbal remands for a time "not exceeding three clear days," the accused may be brought "before the same or such other justice as shall be there acting at the time appointed for continuing the examination." These provisions must, therefore, on the principle enunciated in Re Guerin, supra, be construed as allowing another magistrate to continue the proceedings without rehearing the depositions already taken, only in case of the death or resignation of the first magistrate.

This will, however, not prevent the use at the trial, under Cr. Code 687, of the deposition of an ill or absent witness taken before a magistrate having jurisdiction to hold the preliminary enquiry, other than the one before whom the charge was laid and the committal made, if the deposition was taken in the presence of the prisoner and with full opportunity of cross-examining, and if the formalities of the Code are complied with as to the manner of taking and signing depositions. R. v. De Vidal (1861), 9 Cox C.C. 4 (Blackburn, J.), approved in Re Guerin (1888), 16 Cox 596 (Wills and Grantham, JJ.).

Substituting another charge.] — Magistrates conducting a preliminary enquiry in respect of an indictable offence, may not on its conclusion convict of a lesser offence, over which they have summary jurisdiction, although proved by the evidence adduced, if no complaint was laid before them, nor the accused called upon to defend in respect of such lesser offence. R. v. Mines (1894), 1 Can. Cr. Cas. 217 (Ont.).

587. Bail on remand.—If the accused is remanded under the next preceding section the justice may discharge him, upon his entering in a recognizance in the form Q in schedule one hereto, with or without sureties in the discretion of the justice, conditioned for his appearance at the time and place appointed for the continuance of the examination. R.S.C. c. 174, s. 67.

FORM Q.—

RECOGNIZANCE OF BAIL INSTEAD OF REMAND ON AN ADJOURNMENT OF EXAMINATION.

Canada,
Province of , }
County of . }

Be it remembered that on the day of , in the year , A. B., of , (*labourer*), L. M., of , (*grocer*), and N. O., of , (*butcher*), personally came before me, , a justice of the peace for the said county, and severally acknowledged themselves to owe to our Sovereign Lord the King, his heirs and successors, the several sums following, that is to say: the said A. B. the sum of , and the said L. M., and N. O., the sum of , each, of good and lawful current money of Canada, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Lord the King, his heirs and successors, if he, the said A. B., fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned, at before me.

J. S.,
J. P., (Name of County.)

CONDITION.

The condition of the within (*or* above) written recognizance is such that whereas the within bounden A. B. was this day (*or* on last past) charged before me for that (*etc., as in the warrant*); and whereas the examination of the witnesses for the prosecution in this behalf is adjourned until the day of (*instant*): If, therefore, the said A. B. appears before me on the said day of (*instant*), at o'clock in the (fore) noon, or before such other justice or justices of the peace for the said county as shall then be there, to answer (*further*) to the said charge, and to be further dealt with according to law, the said recognizance to be void, otherwise to stand in full force and virtue.

Every individual may in criminal cases become bail who is a housekeeper and possessed of property equal to the responsibility incurred. Petersdorff on Bail, 505. A justice may, as a substitute for bail, take money in deposito. Moyser v. Gray, Cro. Car. 446; Petersdorff on Bail, 506.

Any indemnity given to the bondsmen, whether by the prisoner or by a third person, is illegal. Consolidated Exploration & Finance Co. v. Musgrave, [1900] 1 Ch. 37.

588. Hearing may proceed during time of remand.—The justice may order the accused person to be brought before him, or before any other justice for the same territorial division, at any time before the expiration of the time for which such person has been remanded, and the gaoler or officer in whose custody he then is shall duly obey such order. R.S.C. c. 174, s. 66.

(Amendment of 1900).

589. Breach of recognizance on remand.—If the accused person does not afterwards appear at the time and place mentioned in the recognizance the said justice, or any other justice who is then and there present, having certified upon the back of the recognizance the non-appearance of such accused person, in the form R in schedule one hereto, may transmit the recognizance to the proper officer appointed by law, to be proceeded upon in like manner as other recognizances; and such certificate shall be prima facie evidence of the non-appearance of the accused person.

2. The proper officer to whom the recognizance and certificate of default are to be transmitted in the Province of Ontario, shall be the clerk of the peace of the county for which such

justice is acting; and the Court General Sessions of the Peace for such county shall, at its then next sitting, order all such recognizances to be forfeited and estreated, and the same shall be enforced and collected in the same manner and subject to the same conditions as any fines, forfeitures or amercements imposed by or forfeited before such court. In the Province of British Columbia, such proper officer shall be the Clerk of the County Court having jurisdiction at the place where such recognizance is taken, and such recognizance shall be enforced and collected in the same manner and subject to the same conditions as any fines, forfeitures or amercements imposed by or forfeited before such County Court; and in the other Provinces of Canada such proper officer shall be the officer to whom like recognizances have been heretofore accustomed to be transmitted under the law in force before the passing of this Act, and such recognizances shall be enforced and collected in the same manner as like recognizances have heretofore been enforced and collected.

FORM R.—

CERTIFICATE OF NON-APPEARANCE TO BE ENDORSED ON THE RECOGNIZANCE.

I hereby certify that the said A. B. has not appeared at the time and place in the above condition mentioned, but therein has made a default by reason whereof the within written recognizance is forfeited.

J. S.,
J.P., (Name of County.)

By the amendment made in 1900 the practice upon breach of recognizances given on remands is made similar to the practice as to forfeited recognizances in summary conviction matters: see sec. 878.

In proceedings under sec. 589 of the Cr. Code, for breach of recognizance on remand, the certificate of the justice of the peace of non-appearance of the accused, indorsed on the back of the recognizance, shall be transmitted by the justice of the peace to the registrar of the court where if committed the accused would be bound to appear, and be proceeded upon by order of the judge presiding at the Assizes, if he thinks proper, in like manner as other recognizances. B.C. Rule 46.

The change made by the addition of the second sub-section in 1900, adopts the practice under the Summary Convictions clauses of the Code. See Code sec. 878, as amended in 1895.

See note to sec. 586.

590. Evidence for the prosecution. — When the accused is before a justice holding an inquiry, such justice shall take the evidence of the witnesses called on the part of the prosecution.

2. The evidence of the said witnesses shall be given upon oath, and in the presence of the accused; and the accused, his counsel or solicitor, shall be entitled to cross-examine them.

3. The evidence of each witness shall be taken down in writing, in the form of a deposition, which may be in the form S in schedule one hereto, or to the like effect.

4. Such deposition shall, at some time before the accused is called on for his defence, be read over to and signed by the witness and the justice, the accused, the witness and justice being all present together at the time of such reading and signing.

5. The signature of the justice may either be at the end of the deposition of each witness, or at the end of several or of all the depositions in such a form as to show that the signature is meant to authenticate each separate deposition.

6. Every justice holding a preliminary inquiry is hereby required to cause the depositions to be written in a legible hand, and on one side only of each sheet of paper on which they are written. R.S.C. c. 174, s. 69.

7. Provided that the evidence upon such inquiry or any part of the same may be taken in shorthand by a stenographer, who may be appointed by the justice, and who before acting shall make oath that he shall truly and faithfully report the evidence; and where evidence is so taken, it shall not be necessary that such evidence be read over to or signed by the witness, but it shall be sufficient if the transcript be signed by the justice, and be accompanied by an affidavit of the stenographer that it is a true report of the evidence.

FORM S.—

DEPOSITION OF A WITNESS.

Canada,
Province of , }
County of , }

The deposition of X. Y., of , taken before the undersigned, a justice of the peace for the said county of , this day of , in the year , at (*or* after notice to C. D., who stands committed for) in the presence and hearing of C. D., who stands

charged that (*state the charge*). The said deponent saith on his (*oath or affirmation*) as follows: (*Insert deposition as nearly as possible in the words of witness.*)

(*If depositions of several witnesses are taken at the same time, they may be taken and signed as follows*):

The depositions of X., of , Y., of , Z., of , &c., taken in the presence and hearing of C. D., who stands charged that

The deponent X. (*on his oath or affirmation*) says as follows:

The deponent Y. (*on his oath or affirmation*) says as follows:

The deponent Z. (*on his oath, etc., etc.*)

(*The signature of the justice may be appended as follows*):

The depositions of X., Y., Z., &c., written on the several sheets of paper, to the last of which my signature is annexed, were taken in the presence and hearing of C. D., and signed by the said X., Y., Z., respectively, in his presence. In witness whereof I have in the presence of the said C. D. signed my name.

J. S.,
J.P., (Name of County.)

The magistrate is not required to take down the evidence himself, but the law requires in effect that the witnesses must be before him, and that he must see them and hear them when testifying, and then their testimony may be taken down either at length by a clerk or in shorthand by a stenographer. R. v. Traynor (1901), 4 Can. Cr. Cas. 410 (Que.).

Non-compliance with this section as to the signing of the depositions by the witness is not a matter affecting the jurisdiction of the magistrates to convict. Ex parte Doherty (1894), 3 Can. Cr. Cas. 310, 32 N.B.R. 479.

It was held in the Manitoba case of R. v. Hamilton (1898), 2 Can. Cr. Cas. 390, per Killam, J., that the deposition of a deceased witness may be used in evidence apart from sec. 687, Cr. Code, although it does not "purport to be signed by the justices by or before whom the same purports to have been taken," but, where it is not admissible by virtue of sec. 687, it must be affirmatively shewn that all the formalities required to be observed in taking depositions (Cr. Code 590) have been complied with.

Where on a preliminary inquiry before a magistrate the witnesses were sworn by him and were then taken into another room and their evidence in chief taken by a stenographer and not in the presence of the magistrate, such depositions are illegally taken, although the prisoner's counsel had the opportunity of afterwards cross-examining the witnesses before the magistrate. R. v. Traynor (1901), 4 Can. Cr. Cas. 410 (Que.); R. v. Watts, 33 L.J.M.C. 63.

The objection to the irregularity is not waived by the cross-examination of the witnesses on the prisoner's behalf on their return to the magistrate's presence, if the objection is taken by the prisoner's counsel before he proceeds to cross-examine. Ibid.

Both the commitment for trial and the indictment founded on such illegal depositions are invalid and should be set aside. Ibid.

The expressions "entitled to cross-examine" and "full opportunity to cross-examine" as used in secs. 590 and 687, imply for the accused the right to hear the evidence delivered in his presence, to catch the words as they fall from the lips of the witness, and to mark his expression and demeanor while testifying. R. v. Lepine (1900), 4 Can. Cr. Cas. 145 (Que.).

When depositions in a preliminary enquiry, to which the accused was not a party, and, consequently, taken in his absence, are read to the same witness in a case against the accused, and the witness, after being sworn in the presence of the accused, either affirms that his former deposition contains the truth, or makes corrections, as the case may be, and then affirms its truth as corrected, the prosecutor, being then given permission to ask further questions, and the accused to cross-examine, such proceeding does not afford the accused the full and complete opportunity to cross-examine contemplated by law. Ibid.

Principal rules of evidence.]—The following statement of the leading rules of evidence applicable to proceedings before justices of the peace is taken from Stone's Justices' Manual, 34th ed. (1902), p. 263:—

That a person is presumed to be innocent until the contrary is proved;

That a party shall not be allowed to put leading questions, that is, questions in such a form as to suggest the answer desired, to his own witness;

That hearsay evidence is inadmissible;

That the statement of one prisoner is not evidence either for or against another prisoner;

That conversations which have taken place out of the hearing of the party to be affected cannot be given in evidence;

That the evidence of an accomplice is admissible, but ought not to be fully relied upon, unless it be corroborated by some collateral proof;

That in general, the opinion of a witness as to any fact in issue is inadmissible, unless upon questions of skill and judgment;

That the onus probandi lies upon the party asserting the affirmative;

That the best evidence should be given of which the nature of the case is capable;

That secondary evidence is, therefore, inadmissible unless some ground be previously laid for its introduction by shewing the impossibility of procuring better evidence;

That parol testimony is not receivable to vary or contradict the terms of a written instrument;

That a person shall not be allowed to speak to the contents of a written instrument, unless it be first proved that such document is lost or destroyed (or out of the jurisdiction of the court, e.g., in a foreign country. Tichborne Case, November 27th, 1873), or if in the possession of the adverse party, that notice has been given for its production;

That a witness may be allowed to refresh his memory by reference to an entry or memorandum made by himself shortly after the occurrence of which he is speaking, although the entry or memorandum could not itself be received in evidence;

That a witness may also refresh his memory from entries made by another person, if those entries were referred to in prisoner's presence at the time of the occurrence in question. R. v. Langton, 41 J.P. 134; 46 L.J. 136; 2 Q.B.D. 296; 35 L.T. 527; 13 Cox C.C. 345;

That when positive evidence of the facts cannot be supplied, circumstantial evidence is admissible;

That circumstantial evidence should be such as to produce nearly the same degree of certainty as that which arises from direct testimony, and to exclude a rational probability of innocence;

That a witness speaking two languages should be examined in the one he understands best. Tichborne Case, April 30th, 1873.

591. Evidence to be read to the accused.—After the examination of the witnesses produced on the part of the prosecution has been completed, and after the depositions have been signed as aforesaid, the justice, unless he discharges the accused person, shall ask him whether he wishes the depositions to be read again, and unless the accused dispenses therewith shall read or cause them to be read again. When the depositions have been again read, or the reading dispensed with, the accused shall be addressed by the justice in these words, or to the like effect:

"Having heard the evidence, do you wish to say anything in answer to the charge? You are not bound to say anything, but whatever you do say will be taken down in writing and may be given in evidence against you at your trial. You must clearly understand that you have nothing to hope from any promise of favour, and nothing to fear from any threat which may have been held out to you to induce you to make any admission or confession of guilt, but whatever you now say may be given in evidence against you upon your trial, notwithstanding such promise or threat."

2. Whatever the accused then says in answer thereto shall be taken down in writing in the form T in schedule one hereto, or to the like effect, and shall be signed by the justice and kept with the depositions of the witnesses, and dealt with as hereinafter mentioned. R.S.C. c. 174, ss. 70 and 71.

FORM T.—

STATEMENT OF THE ACCUSED.

Canada,
Province of , }
County of , }

A. B. stands charged before the undersigned , a justice of the peace in and for the county aforesaid, this day of , in the year , for that the said A. B., on , at (*&c., as in the captions of the depositions*); and the said charge being read to the said A. B., and the witnesses for the prosecution, C. D. and E. F., being severally examined in his presence, the said A. B. is now

addressed by me as follows: "Having heard the evidence, "do you wish to say anything in answer to the charge? You "are not obliged to say anything unless you desire to do so; "but whatever you say will be taken down in writing, and may "be given in evidence against you at your trial. You must "clearly understand that you have nothing to hope from any "promise of favour, and nothing to fear from any threat "which may have been held out to induce you to make any "admission or confession of guilt, but whatever you now say "may be given in evidence against you upon your trial, not-"withstanding such promise or threat." Whereupon the said A. B. says as follows: (*Here state whatever the prisoner says, and in his very words, as nearly as possible. Get him to sign it if he will*).

A. B.

Taken before me, at , the day and year first above mentioned.

J. S., [SEAL.]
J.P., (Name of County.)

An information was laid charging the applicant with an assault causing actual bodily harm. A warrant having been issued, and the applicant arrested, the magistrate conducted the hearing as a preliminary examination under the provisions of part 45 of the Code, binding over all the witnesses to give evidence in a superior court, and at the conclusion of the examination of the witnesses for the prosecution addressing the defendant as provided by this section. Then after hearing evidence in behalf of the defendant, the magistrate, without objection by the defendant or his counsel, convicted the defendant of a common assault and fined him. It was held on motion to make absolute a rule nisi for certiorari, that the conviction was bad. Ex parte Duffy (1901), 37 C.L.J. 202 (N.B.).

592. Confession or admission of accused.—Nothing herein contained shall prevent any prosecutor from giving in evidence any admission or confession, or other statement, made at any time by the person accused or charged, which by law would be admissible as evidence against him. R.S.C. c. 174, s. 72.

Confessions and admissions as evidence.]—An admission of guilt made by a party charged with a crime to a person in authority under the inducement of a promise of favour, or by reason of menaces or under terror, is inadmissible in evidence. R. v. Pah-cah-pah-ne-capi (1897), 4 Can. Cr. Cas. 93 (N.W.T.).

The Indian Agent, appointed under the Indian Act, R.S.C. 1886, ch. 43, for the Indian Reserve upon which an accused Indian lives, is a person in authority; and to allow in evidence a confession made to him it must appear that no inducement was offered to the accused to make it. Ibid.

The onus of proving that the alleged confession was not made under an inducement or threat is on the Crown. Ibid.

Smith was a clerk in a post office. Stephen J. King was inspector of this office. He discovered irregularities and questioned Smith about them. Smith admitted that he delayed letters. The inspector said, "If you have tampered with the contents it will go hard with you." Smith then made a confession. The trial judge (McLeod, J.,) refused to allow evidence of confessions subsequent to the threat. R. v. Smith (1897), 33 C.L.J. 331.

Admissions made by a prisoner to a police officer in respect of the charge upon which he is in custody, are admissible in evidence although made in response to questions put by the officer, if the trial judge finds that the answers were not unduly or improperly obtained having regard to the circumstances of the particular case. R. v. Elliott (1899), 3 Can. Cr. Cas. 95 (Ont.).

In the course of conversation between the prisoner and a detective relative to the purchase of counterfeit money, the prisoner asked the detective whether he had received a letter written by the prisoner stating his desire to purchase counterfeit money, and upon the detective shewing the prisoner the letter he admitted it was his; it was held that the letter was properly received in evidence, as part of the history of the case, and as, in a sense, forming part of the subject matter of conversation. R. v. Attwood (1891), 20 Ont. R. 574.

Where a prisoner made an admission of guilt, being induced to do so by a police officer who said "The truth will go better than a lie. If any one prompted you to do it you had better tell about it," it was held (following R. v. Fennell (1881), 7 Q.B.D. 147) that the inducement invalidated the admission. R. v. Romp (1889), 17 Ont. R. 567; R. v. Bates, 11 Cox 606.

The reason why the statement of a prisoner under oath is to be rejected rests upon two grounds: first, that the confession must be voluntary, and it is contended that a statement under oath is not so; secondly, that a prisoner shall not be compelled to criminate himself; and to this it may be added that it is harsh and inquisitorial, and for that reason an examination of the prisoner so had should be rejected. But after the examination of the charge against the prisoner has been concluded, and he has been committed for trial on it, if he is allowed to make a charge against another person, and his testimony is properly receivable against such other person, and no inducements have been held out to him to make any statement whatever in relation to the matter, no principle of law is violated in receiving the statements so made as evidence against himself. R. v. Field (1865), 16 U.C. C.P. 98.

In the last mentioned case the prisoner after his committal for trial, and while in the custody of a constable, made a statement, upon which the latter took him before a magistrate, when he laid an information on oath charging another person with having suggested the crime, and asked him to join in it, which he accordingly did. Upon the arrest of the accused the prisoner made a full deposition against him, at the same time admitting his own guilt. Both information and deposition appear to have been voluntarily made, uninfluenced by either hope or threat; but it also appeared that the prisoner had not been cautioned that his statements as to the other might be given in evidence against himself, though he had been duly cautioned when under examination in his own case. Held, that both the information and deposition were properly received in evidence as being statements which appeared to have been voluntarily made, uninfluenced by any promises held out as an inducement to the prisoner to make them, and that, too, though they had been made under oath, for that the rule of law excluding the sworn statements of a prisoner under examination applied only to his examination on a charge against himself, and not when the charge was against another; for that in the latter case a prisoner was not obliged to say anything against himself, but if he did volunteer such a statement it would be admissible in evidence against him. R. v. Field (1865), 16 U.C.C.P. 98.

Prisoner was convicted of arson. On the trial the judge allowed a confession or admission of the prisoner to be read. The evidence of the confession was that of a constable who stated that after prisoner had been in a second time before the coroner he stated there was something more he could tell; the constable asked what it was, but not to say what was not true; he said he went over to the house, got in at the window and set the place on fire; the constable did not recollect any inducement being held out; the constable asked him if he wanted to go in and state that before the jury; he said he did. It further appeared that on the third day after he had been taken into custody he told the jury he wished to confess; the coroner said to him that anything he said might be used against him, not to say anything unless he wished, just the ordinary caution. He then made a second statement. He had only been absent a few minutes when he returned and made the last written confession, after the constable had informed the coroner of the prisoner's desire. Held, that the statement made to the constable was prima facie receivable, and that the judge was warranted in receiving as voluntary the confession made to the coroner after due warning by him. R. v. Finkle (1865), 15 U.C.C.P. 453.

But another essential element that has to be considered in deciding whether a confession is voluntary or not is the position of the person who held out the inducement, for it is now clearly established that it is only an inducement held out by a person in authority that will make a confession involuntary. In R. v. Thompson, [1893] 2 Q.B. 12, Cave, J., said a confession must be free and voluntary. "If it flows from hope or fear, excited by a person in authority, it is inadmissible."

A person in authority means, generally speaking, anyone who has authority or control over the accused or over the proceedings or the prosecution against him. And the reason that it is a rule of law that confessions made as the result of inducements held out by persons in authority are inadmissible is that the authority that the accused knows such persons to possess may well be supposed in the majority of instances both to animate his hopes of favour on the one hand and on the other to inspire him with awe, and so in some degree to overcome the powers of his mind; Greenleaf on Evidence, sec. 222. If, therefore, the prisoner when he made the admission was without notice or knowledge of any facts that could constitute either of two men to whom it was made persons in authority, it could not be contended that as to the prisoner they were persons in authority. R. v. Todd (1901), 4 Can. Cr. Cas. 514, 527, per Bain, J.

In R. v. Row (1809), R. & R. 153, where a prisoner had been arrested for theft and some of his neighbours had admonished him to consider his family and tell the truth, the judges were of the opinion that evidence of a confession he afterwards made was admissible, "because the advice to confess was not given or sanctioned by any person who had any concern in the business." However, in R. v. Spencer (1835), 7 C. & P. 776, Parke, B., said there was a difference of opinion among the judges whether a confession made to one who had no authority ought to be received; and the cases shew that there was no uniformity in the practice in admitting or excluding evidence of such confessions. But in R. v. Taylor (1839), 8 C. & P. 733, Patteson, J., said that it was the opinion of the judges that evidence of any confession is receivable unless there has been some inducement held out by some person in authority; and in R. v. Moore (1852), 2 Den. C.C. 522, this opinion was embodied in a considered judgment. There it was held that where an inducement in reference to the charge was held out to the accused by the wife of the person in whose house an offence was committed that did not concern the master or mistress and that was in no way connected with the management of the house, the mistress was not a person in authority, and that evidence of the confession was admissible. Parke, B., in delivering the judgment of the court, said: "One element in the consideration of the question as to the confession being voluntary is, whether the threat or

inducement was such as to be likely to influence the prisoner. Perhaps it would have been better to have held (when it was determined that the judge was to decide whether the confession was voluntary) that in all cases he was to decide that point upon his own view of all the circumstances, including the nature of the threat or inducement and the character of the person holding it out together, not necessarily excluding the confession on account of the character of the person holding out the inducement or threat. But a rule has been laid down by which we are bound that, if the inducement or threat has been held out, actually or constructively, by a person in authority, it cannot be received, however slight the threat or inducement; and the prosecutor, magistrate and constable is such a person, and so the master or mistress may be. If not held out by one in authority, they are clearly admissible." In 6 A. & E. Ency. of Law 548, it is said "The doctrine in England at present and the prevailing doctrine in the United States, is that evidence of any confession is receivable unless there has been some inducement held out by some person who had, or was supposed to have authority to secure the accused the promised good."

The well known rule as to the admission or rejection of a confession made by a prisoner is to the effect that no confession by the prisoner is admissible which is made in consequence of any threat or inducement of a temporal nature, having reference to the charge against the prisoner, made or held out by a person in authority; and, as stated by Roscoe, in his work on Criminal Evidence, the tendency of the present decisions seems to be to admit any confessions which do not come within this proposition. But the strict application of that rule is more or less influenced by the peculiar circumstances of each case; and in each instance a good deal is left to the discretion of the judge trying the cause. Taylor on Evidence, sec. 796; Russell on Crimes, 4th ed., vol. 3, p. 368; R. v. Todd (1901), 4 Can. Cr. Cas. 514, 519, per Dubuc, J.

The general rule is that a free and voluntary confession made by a person accused of an offence is receivable in evidence against him as the highest and most satisfactory proof of guilt, because it is fairly presumed that no man would make such a confession against himself if the facts confessed were not true. R. v. Lambe (1791), 2 Leach C.C. 625.

While the general principle is clear that a confession by a prisoner is not admissible against him unless it is shewn that it was made freely and voluntarily, it is not possible to settle as a rule of law the facts and circumstances that shall be deemed sufficient in all cases to make a confession a voluntary one or the reverse; and, as the question must always be a mixed one of law and fact, the reported cases are not always consistent, and do not mark out precisely the grounds of admission and rejection. It may be taken to be settled, however, as a general proposition, that no confession is admissible which is made in consequence of an inducement of a temporal nature, having reference to the charge against the prisoner, held out by a person in authority.

Sir James Stephen, in his Digest of the Laws of Evidence (Article 22), says: "A confession is not involuntary only because it appears to have been caused by an inducement collateral to the proceedings, or by inducements held out by a person not in authority."

A confession is not involuntary only because it was brought about by an inducement that is not connected with the charge; but, as pointed out by Bain, J., in R. v. Todd (1901), 4 Can. Cr. Cas. 514, 525, this still leaves the question an open one, whether the judge, if he considers that the inducement, though it did not refer to the charge, was of such a nature as to be likely to produce an untrue confession, should reject the evidence of the confession as an involuntary one, or must he admit the evidence and leave the jury to decide as to its credibility?

In R. v. Day (1890), 20 O.R. 209, the prisoner, who was charged with murder, had been first cautioned by the detectives against saying anything, and had then been questioned by them, and evidence of the statements made by him in answer to such questions was admitted at the trial before Rose, J., who reserved a case for the consideration of the Queen's Bench Division of the High Court (Armour, C.J., Falconbridge, and Street, JJ.). In delivering the judgment of the court, Armour, C.J., said:—

"We think, although we reprehend the practice of questioning prisoners, that we cannot come to the conclusion that evidence obtained by such questioning is inadmissible. The great weight of authority in England and Ireland, and all the cases in which the point has been considered by a court for Crown cases reserved, go to shew that the evidence is admissible. We must leave it to the Legislature to determine whether the practice of cross-examining prisoners is legally to obtain hereafter. We hold the evidence admissible and affirm the conviction."

R. v. Miller (1895), 18 Cox C.C. 54, was a decision by Hawkins, J., at the Liverpool Assizes. Miller was not in custody at the time that the questions were put to him. The charge was one of murder, and evidence was given in support of the indictment, proving that a detective had called upon Miller and had said to him, "I am going to ask you some questions on a very serious matter, and you had better be careful how you answer." The detective had then questioned Miller as to all his movements on the night of the murder and on the following morning, and had asked him to produce his clothes, and when they were produced, to account for blood-stains upon them; and had, at the end of the conversation, taken the accused into custody upon the charge of murder. The prosecution then proposed to give evidence of the answers which were given by Miller to the questions asked him by the detective, and also to give evidence that subsequent inquiries which had been made tended to shew that the statements made by him in answer to the detective's questions were untrue. Counsel for the prisoner objected to the evidence being received, upon the authority of R. v. Brackenbury (1893), 17 Cox 628; R. v. Thompson (1893), 2 Q.B. 12; and R. v. Male and Cooper (1893), 17 Cox 689.

Hawkins, J., admitted the evidence, and held that no inducement was held out to the prisoner to make any admission, and no threat uttered or any duress exercised towards him, and that therefore his answers were admissible, and that they were voluntary statements which the prisoner was under no obligation to make. It was impossible to discover the facts of a crime without asking questions, and these questions were properly put. He did not express dissent from any of the cases cited for the prisoner, but every case must be decided according to the whole of its circumstances. The evidence to the effect that the prisoner's answers were untrue was also admitted, and the prisoner was found guilty.

In R. v. Morgan (1895), 59 J.P. 827, Mr. Justice Cave held that answers to questions by the police could not be given in evidence. He also ruled that where prisoners are taken into custody at their house, what they said, in answer to the charge at the police station, could not be given in evidence against them, as it was not right, when once a prisoner was in custody, to charge him again at the police station in the hope of getting something out of him. 59 J.P. 827.

But where one of two prisoners in custody on a charge against them jointly, offers while in custody to make a statement, and voluntarily makes and signs a statement implicating the other, and such statement is read over to the prisoner implicated, and the latter, after being cautioned, makes a confession which is taken down in writing and is signed by him, such confession is a voluntary one and is admissible in evidence against the person making it. R. v. Hirst (1896), 18 Cox C.C. 374 (per Dugdale, Q.C., Special Commissioner at Manchester Assizes, after conferring with Cave, J.).

The onus of proving that admissions made by the accused were made voluntarily and without improper inducement or threats is upon the prosecution. R. v. Thompson, [1893] 2 Q.B. 12; R. v. Rose (1898), 67 L.J.Q.B. 289; R. v. Jackson (1898), 2 Can. Cr. Cas. 149.

Beyond the right the accused person undoubtedly has to have the whole of the conversation in which the alleged admission was made given in evidence (Roscoe, 11th ed., p. 51), to make a confession by a prisoner admissible it must be affirmatively proved that such confession was free and voluntary, that it was not preceded by any inducements to the prisoner to make a statement held out by a person in authority or that it was not made until after such inducement had clearly been removed. R. v. Ockerman (1898), 2 Can. Cr. Cas. 262.

Admissions on interrogation by person in authority.]—In R. v. Thompson, [1893] 2 Q.B. 12, it was held on a case reserved by a court consisting of Coleridge, C.J., Hawkins, Day, Wills and Cave, JJ., that before a confession can be received in evidence of criminality, it must be proved *affirmatively* that it was free and voluntary, and was not preceded by any inducement held out by any person in authority. The onus is upon the Crown of proving that the statement was free and voluntary and not as has heretofore been frequently supposed upon the prisoner to prove that the statement was given not voluntarily but under pressure of threats or inducements. The rule was there stated to be that a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.

The inducement need not be held out to the prisoner direct, and, where it was held out by his employer to the relatives of the prisoner, it may be inferred that it was communicated to the prisoner. R. v. Thompson, [1893] 2 Q.B. 12. If, however, there is no suggestion of threat or inducement, or of a disposition on the part of the prosecutor to manufacture evidence, the evidence is admissible. Rogers v. Hawken, 1898, 33 Eng. Law Jour. 174. (Russell, L.C.J., and Mathew, J.).

In a case where the person in authority to whom the admission was made would not swear that he did not hold out any threat or inducement to the prisoner to make the statement, it was held that such onus is not satisfied by the evidence of the interpreter who said that he remembered that "any statement the prisoner made was voluntary," since it was not shewn that the interpreter knew what was in law a voluntary statement. R. v. Charcoal (1897), 34 C.L.J. 210 (N.W.T.).

A confession induced by false statements of the officer as to the knowledge already obtained in regard to the alleged offence is not a free and voluntary confession. So where an accused was charged with stealing a post letter, and had made admissions in presence of a detective and a post office inspector, after the latter had said to him, "There is no use your denying it. You were seen taking the letters out of the box. You may as well tell us what you did with them, as have it brought out in a court of law," and it was admitted by the Crown that there was no evidence that accused was seen taking letters, it was held that the evidence was inadmissible, not only because of the threat implied in the statement of the inspector, but because the admission had been improperly obtained by means of a false statement by a person in authority. R. v. McDonald (1896), 32 C.L.J. 783 (per Scott, J., S.C. N.W.T.).

When a statement of one accused of murder is induced by words of a police officer which, under all the circumstances of the case, must give rise to some fear or hope of favour in the mind of the accused, such statement is not properly admitted in evidence against him. Bram v. United States, (1898), 18 S.C.R. (U.S.) 183. In that case, Bram was convicted of murder on the high seas. His arrest was effected on the arrival of the vessel at

Halifax, and he was taken to the office of a police detective, and stripped and searched. In the course of the search, the detective said to him: "Bram, we are trying to unravel this horrible mystery; your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder." Bram replied: "He could not have seen me; where was he?" The detective said: "He states he was at the wheel." Bram then said: "Well, he could not see me from there." The detective then said: "Now, look here, Bram. I am satisfied that you killed the captain, from all I have heard from Mr. Brown; but some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders." Bram replied; "Well, I think—and many others on board the ship think—that Brown is the murderer; but I don't know anything about it." Bram was extradited to the United States; and evidence of the detective as to the above admissions having been admitted at the trial, the Supreme Court of the United States held that a new trial should be granted, and that the alleged admissions were obtained by undue influence, although the strict meaning of the detective's words were neither to threaten nor to promise.

There is much conflict of authority in England as to the admission of statements made by a prisoner to a police officer in answer to the latter's enquiries. It was held by Mr. Justice Smith in R. v. Gavin (1885), 15 Cox Cr. Cas. 656, that when a prisoner is in custody the police have no right to ask him questions. The same view was expressed by Cave, J., in R. v. Male (1893), 17 Cox Cr. Cas. 689, in which he said that the law does not allow the judge or jury to put questions in open court to a prisoner, and it would be monstrous if it permitted a police officer, without anyone present to check him, to put a prisoner through an examination and then produce the effects of it against him. The police officer should keep his mouth shut and his ears open, should listen and report, neither encouraging nor discouraging a statement, but putting no questions. The same learned judge is also reported as having stated at a nisi prius trial that he would exclude all evidence obtained by a system of private interrogation of accused persons by the police, and that he believed most of the judges agreed with his opinion. 20 Montreal Legal News 272.

The opposite view is, however, taken by Day, J., in R v. Brackenbury (1893), 17 Cox Cr. Cas. 628, where he admitted evidence of statements made by the accused in answer to questions put by the police immediately prior to the arrest, and expressed his dissent from the decision in R. v. Gavin, supra. See also R. v. Jarvis (1867), L.R. 1 C.C.R. 96, and R. v. Reeve (1872), L.R. 1 C.C.R. 362.

593 Evidence for the defence.—After the proceedings required by section 591 are completed the accused shall be asked if he wishes to call any witnesses.

2. Every witness called by the accused who testifies to any fact relevant to the case shall be heard, and his deposition shall be taken in the same manner as the depositions of the witnesses for the prosecution.

594. Discharge of accused.—When all the witnesses on the part of the prosecution and the accused have been heard, the justice shall, if upon the whole of the evidence he is of opinion that no sufficient case is made out to put the accused

upon his trial, discharge him; and in such case any recognizances taken in respect of the charge shall become void, unless some person is bound over to prosecute under the provisions next hereinafter contained. R.S.C. c. 174, s. 73.

Justices of the peace have no power on a preliminary investigation before them of a charge of unlawfully wounding, to reduce the charge to one of common assault, over which they would have summary jurisdiction. R. v. Lee (1897), 2 Can. Cr. Cas. 233.

A conviction recorded by justices in such a case upon a plea of guilty to the charge as reduced, is not a bar to an indictment for unlawfully wounding, based upon the same state of facts, and does not support a plea of autrefois convict. Ibid.

In Lee's case the complainant had objected to the charge being "reduced," and the justices had therefore no summary jurisdiction in the matter, and were bound to either discharge the accused, if upon the whole of the evidence they were of opinion that no sufficient case was made out to put the accused upon his trial (sec. 594), or commit him for trial by a warrant of commitment (Code form V., sched. 1) if they thought that the evidence was sufficient "to put the accused on his trial." Sec. 596.

595. Copy of depositions.—If the justice discharges the accused, and the person preferring the charge desires to prefer an indictment respecting the said charge, he may require the justice to bind him over to prefer and prosecute such an indictment, and thereupon the justice shall take his recognizance to prefer and prosecute an indictment against the accused before the court by which the accused would be tried if such justice had committed him, and the justice shall deal with the recognizance, information and depositions in the same way as if he had committed the accused for trial.

2. Such recognizance may be in the form U in schedule one hereto, or to the like effect.

3. If the prosecutor so bound over at his own request does not prefer and prosecute such an indictment, or if the grand jury do not find a true bill, or if the accused is not convicted upon the indictment so preferred, the prosecutor shall, if the court so direct, pay to the accused person his costs, including the costs of his appearance on the preliminary inquiry.

4. The court before which the indictment is to be tried or a judge thereof may in its or his discretion order that the prosecutor shall not be permitted to prefer any such indictment until he has given security for such costs to the satisfaction of such court or judge. R.S.C. c. 174, s. 80.

FORM U.—

FORM OF RECOGNIZANCE WHERE THE PROSECUTOR REQUIRES THE JUSTICE TO BIND HIM OVER TO PROSECUTE AFTER THE CHARGE IS DISMISSED.

Canada,
Province of ,
County of ,

Whereas C. D. was charged before me upon the information of E. F. that C. D. (*state the charge*), and upon the hearing of the said charge I discharged the said C. D., and the said E. F. desires to prefer an indictment against the said C. D. respecting the said charge, and has required me to bind him over to prefer such an indictment at (*here describe the next practicable sitting of the court by which the person discharged would be tried if committed*).

The undersigned E. F. hereby binds himself to perform the following obligation, that is to say, that he will prefer and prosecute an indictment respecting the said charge against the said C. D. at (*as above*). And the said E. F. acknowledges himself bound to forfeit to the Crown the sum of $ in case he fails to perform the said obligation.

E. F.

Taken before me.

J. S.,
J.P., (Name of County.)

The person filling the office of Commissioner of the Dominion Police has, as such, no legal capacity to represent and act on behalf of Her Majesty the Queen, and in laying an information in which he designated himself as such Commissioner of the Dominion Police he acted as a private individual and not as the legal representative of the Crown, although he declared that he was acting as such commissioner on behalf of Her Majesty the Queen. R. v. St. Louis (1897), 1 Can. Cr. Cas. 141 (Que.).

The accused having been discharged, and the commissioner having bound himself by recognizance to prefer and prosecute an indictment on the charge contained in his information, and the grand jury having thrown out the bill of indictment, the commissioner was held, under sec. 595 of the Code, to be personally liable for the costs incurred by the accused on the preliminary inquiry and before the court of Queen's Bench.

An order made by the presiding judge of a criminal superior court awarding costs against the private prosecutor in respect of an indictment for assault on which the grand jury found no bill, is not subject to review by or appeal to the court en banc. R. v. Mosher (1899), 3 Can. Cr. Cas. 312; 32 N.S.R. 139.

Where the application for such an order has been made on the last day of the term of the criminal court and judgment reserved thereon the order may be legally made out of term nunc pro tunc as of the date of application, the delay in such case being the act of the court and not being due to the neglect or fault of the applicant. Ibid.

596. Committal of accused for trial.—If a justice holding a preliminary inquiry thinks that the evidence is sufficient to put the accused on his trial, he shall commit him for trial by a warrant of commitment, which may be made in the form V in schedule one hereto, or to the like effect. R.S.C. c. 174, s. 73.

FORM V.—

WARRANT OF COMMITMENT.

Canada,
Province of , }
County of , }

To the constable of , and to the keeper of the (*common gaol*) at , in the said county of .

Whereas A. B. was this day charged before me, J. S., one of His Majesty's justices of the peace in and for the said county of , on the oath of C. D., of , (*farmer*), and others, for that (*&c., stating shortly the offence*): These are therefore to command you the said constable to take the said A. B., and him safely to convey to the (*common goal*) at aforesaid, and there to deliver him to the keeper thereof, together with this precept: And I do hereby command you the said keeper of the said (*common gaol*) to receive the said A. B. into your custody in the said (*common gaol*), and there safely keep him until he shall be thence delivered by due course of law.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S. [SEAL.]

* *J.P., (Name of County.)*

When the accused is committed for trial and the offence is one of a public nature, the prosecution is then carried on by the Government, acting through the Attorney-General or his substitutes; but where the offence is not so much against public order as against the interest of a private individual, the management of the case may be left in his hands as a private prosecutor, although it still remains under the supervision of the law officers of the Crown.

By the Act of Confederation, the administration of justice in each of the Provinces is entrusted to the Provincial Government, and it is therefore the provincial law officers of the Crown whose duty it is to conduct or to supervise, as the case may be, all criminal prosecutions. R. v. St. Louis (1897), 1 Can. Cr. Cas. 141, 145 (Que.).

Depositions taken before one magistrate should not be considered by another magistrate sufficient evidence to commit a prisoner upon, without having seen the demeanour of the witnesses when they were giving their

evidence, and so being in a position to judge for himself of the truth of their statements. Re Guerin, 16 Cox C.C. 596.

Committal for trial.]—The phrase "committed to prison" does not necessarily mean "received into prison," but, both in common parlance and in legal phraseology, means "when the order is made under which the person is to be kept in prison." Lord Blackburn in Mullins v. Surrey (1882), 51 L.J., Q.B. 145, 149.

The word "committal" signifies the act of the magistrate who issues the warrant of committal, and not the act of the officer who executes it by delivering the person therein named into the custody of the gaoler. Mews v. The Queen (1882), 8 App. Cas. 332, 344 (H.L.).

Sec. 765 makes provision for the speedy trial under Part LIV. with the prisoner's consent before the "County Court Judge's Criminal Court" (see sec. 764) of any person "committed to gaol for trial" on a charge of being guilty of any of the offences which are mentioned in sec. 539 as being within the jurisdiction of the Court of General Sessions, and for such purpose a person who has been bound over by a justice under sec. 601 and has either been unable to find bail or has been surrendered by his sureties and is in custody on such a charge, or who is otherwise in custody awaiting trial on such a charge, shall be deemed to be committed for trial. Sec. 765 (2).

597. Copy of depositions.—Every one who has been committed for trial, whether he is bailed or not, may be entitled at any time before the trial to have copies of the depositions, and of his own statement, if any, from the officer who has the custody thereof, on payment of a reasonable sum, not to exceed five cents for each folio of one hundred words. R.S.C. c. 174, s. 74.

The object of a statutory provision giving prisoners the right to a copy of the depositions is to enable them to know what they have to answer on their trial, and the magistrate should therefore take down all that took place before him with respect to the charge. R. v. Grady (1836), 7 C. & P. 650; R. v. Thomas, 7 C. & P. 718.

598. Recognizances to prosecute or give evidence.—When any one is committed for trial the justice holding the preliminary inquiry may bind over to prosecute some person willing to be so bound, and bind over every witness whose deposition has been taken, and whose evidence in his opinion is material, to give evidence at the court before which the accused is to be indicted.

2. Every recognizance so entered into shall specify the name and surname of the person entering into it, his occupation or profession, if any, the place of his residence and the name and number, if any, of the street in which it may be, and whether he is owner or tenant thereof or a lodger therein.

3. Such recognizance may be either at the foot of the deposition or separate therefrom, and may be in the form W, X or Y in schedule one hereto, or to the like effect, and shall be acknowledged by the person entering into the same, and be sub-

scribed by the justice or one of the justices before whom it is acknowledged.

4. Every such recognizance shall bind the person entering into it to prosecute or give evidence (both or either as the case may be), before the court by which the accused shall be tried.

5. All such recognizances and all other recognizances taken under this Act shall be liable to be estreated in the same manner as any forfeited recognizance to appear is by law liable to be estreated by the court before which the principal party thereto was bound to appear. R.S.C. c. 174, ss. 75 and 76.

6. Whenever any person is bound by recognizance to give evidence before a justice of the peace, or any criminal court, in respect of any offence under this Act, any justice of the peace, if he sees fit, upon information being made in writing, and on oath, that such person is about to abscond, or has absconded, may issue his warrant for the arrest of such person; and if such person is arrested any justice of the peace, upon being satisfied that the ends of justice would otherwise be defeated, may commit such person to prison until the time at which he is bound by such recognizance to give evidence, unless in the meantime he produces sufficient sureties; but any person so arrested shall be entitled on demand to receive a copy of the information upon which the warrant for his arrest was issued. 48-49 V., c. 7, s. 9.

FORM W.—

RECOGNIZANCE TO PROSECUTE.

Canada,
Province of , }
County of , }

Be it remembered that on the day of , in the year , C. D., of , in the of , in the said county of , (*farmer*), personally came before me , a justice of the peace in and for the said county of , and acknowledged himself to owe to our Sovereign Lord the King, his heirs and successors, the sum of , of good and lawful current money of Canada, to be made and levied of his goods and chattels, lands and tenements, to the use of our Sovereign Lord the King, his heirs and successors, if the said C. D. fails in the condition endorsed (*or* hereunder written)

Taken and acknowledged the day and year first above mentioned at , before me.

J. S.,
J.P., (Name of County.)

CONDITION TO PROSECUTE.

The condition of the written (*or* above) written recognizance is such that whereas one A. B. was this day charged before me, J. S., a justice of the peace within mentioned, for that (*&c., as in the caption of the depositions*); if, therefore, he, the said C. D., appears at the court by which the said A. B. is or shall be tried * and there duly prosecutes such charge, then the said recognizance to be void, otherwise to stand in full force and virtue.

FORM X.—

COGNIZANCE TO PROSECUTE AND GIVE EVIDENCE.

(*Same as the last form, to the asterisk,* and then thus*): And there duly prosecute such charge against the said A. B. for the offence aforesaid, and gives evidence thereon, as well to the jurors, who shall then inquire into the said offence, as also to them who shall pass upon the trial of the said A. B., then the said recognizance to be void, or else to stand in full force and virtue.

FORM Y.—

COGNIZANCE TO GIVE EVIDENCE.

(*Same as the last form but one, to the asterisk,* and then thus*):—And there gives such evidence as he knows upon the charge to be then and there preferred against the said A. B., for the offence aforesaid, then the said recognizance to be void, otherwise to remain in full force and virtue.

599. Witness refusing to be bound over.—Any witness who refuses to enter into or acknowledge any such recognizance as aforesaid may be committed by the justice holding the inquiry by a warrant in the form Z in schedule one hereto, or to the like effect, to the prison for the place where the trial is to be had, there to be kept until after the trial, or until the witness enters into such a recognizance as aforesaid before a justice of the peace having jurisdiction in the place where the prison is situated: Provided that if the accused is afterwards discharged any justice having such jurisdiction may order any such witness to be discharged by an order which may be in the form AA in the said schedule, or to the like effect. R.S.C. c. 174, ss. 78 and 79.

FORM Z.—

COMMITMENT OF A WITNESS FOR REFUSING TO ENTER INTO THE RECOGNIZANCE.

Canada,
Province of , }
County of , }

To all or any of the peace officers in the said county of , and to the keeper of the common gaol of the said county of , at , in the said county of .

Whereas A. B. was lately charged before the undersigned (*name of the justice of the peace*), a justice of the peace in and for the said county of , for that (*&c., as in the summons to the witness*), and it having been made to appear to (*me*) upon oath that E. F., of , was likely to give material evidence for the prosecution, (*I*) duly issued (*my*) summons to the said E. F., requiring him to be and appear before (*me*) on , at or before such other justice or justices of the peace as should then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid; and the said E. F. now appearing before (*me*) (or being brought before (*me*) by virtue of a warrant in that behalf to testify as aforesaid), has been now examined before (*me*) touching the premises, but being by (*me*) required to enter into a recognizance conditioned to give evidence against the said A. B., now refuses so to do: These are, therefore, to command you, the said peace officers, or any one of you, to take the said E. F. and him safely convey to the common gaol at , in the county aforesaid, and there deliver him to the said keeper thereof, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said E. F. into your custody in the said common gaol, there to imprison and safely keep him until after the trial of the said A. B. for the offence aforesaid, unless in the meantime the said E. F. duly enters into such recognizance as aforesaid, in the sum of before some one justice of the peace for the said county, conditioned in the usual form to appear at the court by which the said A. B. is or shall be tried, and there to give evidence upon the charge

which shall then and there be preferred against the said A. B. for the offence aforesaid.

Given under my hand and seal this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J.P., (Name of County.)

FORM AA.—

SUBSEQUENT ORDER TO DISCHARGE THE WITNESS.

Canada,
Province of ,
County of ,

To the keeper of the common gaol at , in the county of , aforesaid.

Whereas by (*my*) order dated the day of (*instant*) reciting that A. B. was lately before then charged before (*me*) for a certain offence therein mentioned, and that E. F. having appeared before (*me*) and being examined as a witness for the prosecution on that behalf, refused to enter into recognizance to give evidence against the said A. B., and I therefore thereby committed the said E. F. to your custody, and required you safely to keep him until after the trial of the said A. B. for the offence aforesaid, unless in the meantime he should enter into such recognizance as aforesaid; and whereas for want of sufficient evidence against the said A. B., the said A. B. has not been committed or holden for bail for the said offence, but on the contrary thereof has been since discharged, and it is therefore not necessary that the said E. F. should be detained longer in your custody: These are therefore to order and direct you, the said keeper, to discharge the said E. F. out of your custody, as to the said commitment, and suffer him to go at large.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S. [SEAL.]
J. P., (Name of County.)

600. Transmission of documents.—The following documents shall, as soon as may be after the committal of the accused, be transmited to the clerk or other proper officer of the court by which the accused is to be tried, that is to say, the information, if any, the depositions of the witnesses, the

exhibits thereto, the statement of the accused, and all recognizances entered into, and also any depositions taken before a coroner, if any such have been sent to the justice.

2. When any order changing the place of trial is made the person obtaining it shall serve it, or an office copy of it, upon the person then in possession of the said documents, who shall thereupon transmit them and the indictment, if found, to the officer of the court before which the trial is to take place. R.S.C. c. 174, s. 77.

It has been held by the Supreme Court of Nova Scotia that where the accused is admitted to bail under Cr. Code 601 without being committed for trial, the depositions need not be transmitted by the justice, under sec. 600, to the officer of the court in which an indictment is to be preferred. R. v. James Gibson (1896), 3 Can. Cr. Cas. 451.

Semble, an accused person may, upon a preliminary enquiry, waive the preliminary examination into the charge and consent to be committed for trial without any depositions being taken; but as the "charge" in the County Judges' Criminal Court must be prepared from the depositions (Cr. Code 767), the accused, committed without depositions having been taken, has no right to elect to be tried at the County Judges' Criminal Court. Ibid.

601. Rule as to bail.—When any person appears before any justice charged with an indictable offence punishable by imprisonment or more than five years other than treason or an offence punishable with death, or an offence under Part IV. of this Act, and the evidence adduced is, in the opinion of such justice, sufficient to put the accused on his trial, but does not furnish such a strong presumption of guilt as to warrant his committal for trial, the justice, jointly with some other justice, may admit the accused to bail upon his procuring and producing such surety or sureties as, in the opinion of the two justices, will be sufficient to insure his appearance at the time and place when and where he ought to be tried for the offence; and thereupon the two justices shall take the recognizances of the accused and his sureties, conditioned for his appearance at the time and place of trial, and that he will then surrender and take his trial and not depart the court without leave; and in any case in which the offence commited or suspected to have been committed is an offence punishable by imprisonment for a term less than five years any one justice before whom the accused appears may admit to bail in manner aforesaid, and such justice or justices may, in his or their discretion, require such bail to justify upon oath as to their sufficiency, which oath the said justice or justices may administer; and in default of such person procuring sufficient bail, such justice or justices may com-

mit him to prison, there to be kept until delivered according to law.

2. The recognizance mentioned in this section shall be in the form BB in schedule one to this Act. R.S.C. c. 174, s. 81. *(Amendment of 1900.)*

3. Where the offence is one triable by the Court of General or Quarter Sessions of the Peace and the justice is of opinion that it may better or more conveniently be so tried, the condition of the recognizance may be for the appearance of the accused at the next sittings of that court, notwithstanding that a sittings of a superior court of criminal jurisdiction capable of trying the offence intervenes.

FORM BB.—*(As amended 1900.)*

RECOGNIZANCE OF BAIL.

Canada,
Province of ,
County of ,

Be it remembered that on the day of , in the year , A. B., of (*labourer*) L. M., of , (*grocer*), and N. O., of , (*butcher*), personally came before (*us*) the undersigned, (*two*) justices of the peace for the county of , and severally acknowledged themselves to owe to our Sovereign Lord the King, his heirs and successors, the several sums following, that is to say: the said A. B. the sum of , and the said L. M. and N. O. the sum of , each, of good and lawful current money of Canada, to be made and levied of their several goods and chattels, land and tenements respectively, to the use of our said Sovereign Lord the King, his heirs and successors, if he, the said A. B., fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned, at before us.

J. S.,
J. N.,
J.P., (Name of County.)

The condition of the within (*or* above written recognizance, is such that whereas the said A. B. was this day charged before (*us*), the justices within mentioned for that (*etc., as in the warrant*); if, therefore, the said A. B. appears at the next superior court of criminal jurisdiction (*or* court of gen-

eral or quarter sessions of the peace) to be holden in and for the county of , and there surrenders himself into the custody of the keeper of the common gaol (*or* lock-up house) there, and pleads to such indictment as may be found against him by the grand jury, for in and respect to the charge aforesaid, and takes his trial upon the same, and does not depart the said court without leave, then the said recognizance to be void, otherwise to stand in full force and virtue.

Before the addition of the third sub-section in 1900, it was doubtful whether the procedure thereby adopted could formerly be followed, and as a consequence petty cases were frequently sent to the Assizes which might very well be tried by the Sessions.

To deny or obstruct a party from being bailed where that security ought to be accepted and has been actually tendered is an offence punishable by indictment as well as by action at law. Petersdorff on Bail, 513.

Where the accused was committed for trial, and bail taken for his appearance at the next sittings of a court of competent jurisdiction, but he was not called at that sittings, but at the next following, when he failed to appear, it was held that an estreat of the bail was invalid. Re Cohen's Bail (1896), 32 C.L.J. 412 (Armour, C.J., Falconbridge and Street, JJ.).

A defendant charged with offering money to a person to swear that A., B. or C. gave him a certain sum of money to vote for a candidate at an election, was admitted to bail and the recognizance taken by one justice of the peace. It was held that the offence was not an attempt to commit the crime of subornation of perjury, but something less, being an incitement to give false evidence or particular evidence regardless of its truth or falsehood, and was a misdemeanour at common law, and that the recognizance was properly taken by one justice, who had power to admit the accused to bail at common law, and that section 601 of the Code did not apply. R. v. Cole (1902), 38 C.L.J. 266 (Ont.).

The common law jurisdiction as to crime is still operative, notwithstanding the Code, and even in cases provided for by the Code, unless there is such repugnancy as to give prevalence to the later law. Ibid.

See also note to secs. 600 and 603.

602. Bail after committal.—In case of any offence other than treason or an offence punishable with death, or an offence under Part IV. of this Act, where the accused has been finally committed as herein provided, any judge of any superior or county court, having jurisdiction in the district or county within the limits of which the accused is confined, may, in his discretion, on application made to him for that purpose, order the accused to be admitted to bail on entering into recognizance with sufficient sureties before two justices, in such amount as the judge directs, and thereupon the justices shall issue a warrant of deliverance as hereinafter provided, and shall attach thereto the order of the judge directing the admitting of the accused to bail.

2. Such warrant of deliverance shall be in the form CC in schedule one to this Act. R.S.C. c. 174, s. 82.

FORM CC.—(*As amended 1900.*)

WARRANT OF DELIVERANCE ON BAIL BEING GIVEN FOR A PRISONER ALREADY COMMITTED.

Canada,
County of , }
Province of , }

To the keeper of the common gaol of the county of
at , in the said county.

Whereas A. B., late of , (*labourer*), has before (*us*) (*two*) justices of the peace in and for the said county of , entered into his own recognizance, and found sufficient sureties for his appearance at the next superior court of criminal jurisdiction (*or* court of general or quarter sessions of the peace), to be holden in and for the said county of , to answer our Sovereign Lord the King, for that (*etc., as in the commitment*), for which he was taken and committed to your said common gaol: These are, therefore, to command you, in His Majesty's name, that if the said A. B. remains in your custody, in the said common gaol for the said cause, and for no other, you shall forthwith suffer him to go at large.

Given under our hands and seals, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. N., [SEAL.]
J. P., (Name of County.)

The old courts of Oyer and Terminer and General Gaol Delivery have been done away with in most of the provinces. The amendment consists in the substitution of the expression "superior court of criminal jurisdiction" for the words "court of oyer and terminer or general gaol delivery" which were used in the old forms BB. and CC.

603. Bail by Superior Court.—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 committed, 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. R.S.C. c. 174, s. 83.

See note to sec. 604.