854. Non-appearance of prosecutor.—If, upon the day and at the place so appointed, the defendant appears voluntarily in obedience to the summons in that behalf served upon him, or is brought before the justice by virtue of a warrant, then, if the complainant or informant, having had due notice, does not appear by himself, his counsel or attorney, the justice shall dismiss the complaint or information unless he thinks proper to adjourn the hearing of the same until some other day upon such terms as he thinks fit. R.S.C. c. 178, s. 41.

855. Proceedings when both parties appear.—If both parties appear, either personally or by their respective counsel or attorneys, before the justice who is to hear and determine the complaint or information such justice shall proceed to hear and determine the same. R.S.C. c. 178, s. 42.

Justice's duty to hear and determine.]—It is the duty of a magistrate in all cases to consider and decide any and all questions raised before him, whether relating to the constitutionality of a law or the reasonableness of a by-law. R. v. Russell (1883), 1 B.C.R., pt. 1, p. 256, per McCreight, J. Unless a by-law is just and equal in its operation it is void. Ibid.; R. v. Johnson, 38 U.C.Q.B. 549.

It is the duty of a magistrate, at a trial under his summary jurisdiction, to take the examination and evidence in writing. The absence, illness or death of the magistrate would present an insuperable obstacle to the evidence being obtained if it were called for by the court if it were not taken down in writing at the time it was given. R. v. Flannigan (1872), 32 U.C.Q.B. 593.

An amendment of the information should not be made which would substitute a different transaction or render it necessary to plead differently. Perry v. Watts, 3 M. & G. 775; Brashier v. Jackson, 6 M. & W. 549. Nor can an amendment be made by substituting a new party, as a corporation, instead of their officer. Oxford Tramways Co. v. Sankey, 54 J.P. 564.

The defendant's appearance by counsel upon the return of a magistrate's summons is a waiver of any irregularity in respect of the service not having been effected by a peace officer, although counsel objects on that ground to the hearing being proceeded with. R. v. Doherty (1899), 3 Can. Cr. Cas. 505, 32 N.S.R. 235.

On the return of a summons in a summary proceeding before justices of the peace, the person summoned must wait a reasonable time after the hour named in the summons, when the justices are at that hour engaged in other official business. R. v. Wipper (1901), 5 Can. Cr. Cas. 17 (N.S.).

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

2. If the defendant thereupon admits the truth of the information or complaint, and shews no sufficient cause why he should not be convicted, or why an order should not be made against

him, as the case may be, the justice present at the hearing shall convict him or make an order against him accordingly.

3. If the defendant does not admit the truth of the information or complaint, the justice shall proceed to inquire into the charge and for the purposes of such inquiry shall take the evidence of witnesses both for the complainant and accused in the manner provided by Part XLV. in the case of a preliminary inquiry: Provided that the prosecutor or complainant is not entitled to give evidence in reply if the defendant has not adduced any evidence other than as to his general character; provided further, that in a hearing under this section the witnesses need not sign their depositions. R.S.C. c. 178, ss. 43, 44 and 45.

In a summary prosecution in New Brunswick an attorney, who appeared for the defendant in the latter's absence, entered a plea of guilty and afterwards made affidavit that the defendant had given him no authority to plead guilty, but had instructed him to fight the case out. Several contradictory affidavits were read tending to shew that the defendant had authorized the attorney to plead guilty. It was held that the magistrate could not receive a plea of guilty from any person but the defendant himself. Ex parte Gale (1899), 35 C.L.J. 464 (N.B.).

As in the case of a preliminary enquiry, the justice may appoint a stenographer to take down the evidence, but the stenographer must be first sworn as provided by sec. 590 (7). And by sec. 843 the provisions of sec. 590 are again included as a portion of Part XLV. made applicable in regard to the taking of evidence under Part LVIII. Except where a stenographer is appointed, it is necessary that the depositions should be read over to and signed by the witness and the justice. Sec. 590, sub-ss. 4 and 5; Re Stanbro, 1 Man. R. 325.

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 summary trial or to be associated with the summoning justice, except at the latter's request. R. v. McRae (1897), 2 Can. Cr. Cas. 49.

857. Adjournment.—Before or during the hearing of any information or complaint the justice may, in his discretion adjourn the hearing of the same to a certain time or place to be then appointed and stated in the presence and hearing of the party or parties, or of their respective solicitors or agents then present, but no such adjournment shall be for more than eight days.

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

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

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

5. Whenever any defendant who is discharged upon recognizance, or allowed to go at large, does not appear at the time mentioned in the recognizance or to which the hearing or further hearing is adjourned the justice may issue his warrant for his apprehension. R.S.C. c. 178, ss. 48, 49, 50 and 51.

Adjournment.]—Notwithstanding earlier decisions to the contrary, it seems now to be settled that an adjournment sine die of summary proceedings before a magistrate for the purpose of delivering judgment is illegal, and a conviction thereafter made by the magistrate, in the absence of the accused, is void for want of jurisdiction. R. v. Quinn (1897), 2 Can. Cr. Cas. 153 (Ont.); Cairns v. Choquet (1900), 3 Que. P.R. 25.

In summary proceedings before justices they need not eo instanti set the penalty, but "may adjourn for a little time to consider the fine." R. v. Ellwell (1727), 2 Ld. Raym. 1514; Burn's Justice, 30th ed., vol 1, 1142. When the justice has commenced to hear the case he then has by the common law an inherent power of adjournment. R. v. Mayor of Clonmel (1858), 9 Ir. C. L. Rep. 267, 272, 278.

A limitation of time was first introduced by sec. 46 of 32-33 Vict. (Can.), ch. 31, by which it was enacted that no adjournment of the hearing should be made for more than one week, and the same provision was continued in the Summary Convictions Act, R.S.C. (1886), ch. 178, sec. 48. On the enactment of the Criminal Code in 1892 the time was made *eight* days instead of one week.

In R. v. French (1887), 13 Ont. R. 80, it was held by Rose, J., that an adjournment of the hearing for a time longer than the statutory limit avoided the conviction, although so adjourned with the consent of the accused, for the effect would be to read into the statute the qualifying words "except by consent of the defendant."

That decision was, however, disapproved in R. v. Hefferman (1887), 13 Ont. R. 616, where it was held by Robertson, J., that if the accused himself asks the adjournment for longer than the statutory period and attends on the date to which the adjournment is made and takes his chances of a dismissal on the evidence, he is estopped from afterwards urging a want of jurisdiction because of the adjournment. In some of the older cases it was said that the limitation applied only to an adjournment of the *hearing* or the further hearing of the information or complaint, and a distinction was made between that and the *adjudication* or determination of the charge. R. v. Hall (1887), 12 Ont. Pr. 142, and it was considered that when the witnesses and the evidence had been adduced (sec. 858) the adjournment is neither "before" nor "during" the hearing of the information or complaint, but

at its conclusion, in order to determine the case. R. v. Alexander (1889), 17 Ont. R. 458, 461; R. v. Hall, 12 Ont. Pr. 142.

The "eight days" should be computed from and exclusive of the day of the adjournment. Williams v. Burgess (1840), 12 A. & E. 635; R. v. Collins (1887), 14 Ont. R. 613, 617; Wharton's Law Lexicon, 6th ed., 267.

The section is not intended to prevent more than one adjournment. Messenger v. Parker (1885), 18 N.S.R. 237, 242, and in Nova Scotia in R. v. Morse (1890), 22 N.S.R. 298, it was held that where a justice adjourned the trial without day, stating in the presence of all the parties that he would make up his judgment and notify the parties affected, which he did in time for an appeal from the conviction, that no conviction could be made, the justice having lost jurisdiction by the adjournment without day.

The absence of defendant's counsel from the adjourned sittings at which the magistrate pronounced his judgment, the evidence having been closed at the former sittings at which counsel appeared, does not affect the power of the magistrate to convict, notwithstanding any irregularity in the service of the summons. R. v. Doherty (1899), 3 Can. Cr. Cas. 505, 32 N.S.R. 235.

A magistrate exceeds his jurisdiction who hears one of the parties and then pronounces sentence on a day to which the hearing was not adjourned as provided by sec. 857. Therrien v. McEachern (1897), 4 Rev. de Jur. 87; 4 Que. S.C. 87.

The provision that no adjournment shall be for more than eight days is matter of procedure, and may be waived, and a defendant who consents to an adjournment for more than eight days cannot afterwards complain in that respect. R. v. Hazen (1893), 20 Ont. App. 633.

The magistrate adjourned the hearing to Tuesday, December 28th, when Monday was in fact the 28th and Tuesday the 29th December, and on the latter day entered a conviction, the defendant not having appeared either on the return of the summons or on the day of conviction. It was held by the full court that the day of the week governed, and that the conviction was properly made on Tuesday, December 29th. Ex p. Rayworth (1897), 34 Can. Law Jour. 44 (N.B.).

A conviction in the form prescribed by the Criminal Code is not bad because it also contains recitals shewing certain adjournments of the hearing before the justice, but not shewing that no adjournment had been made for a longer period than the eight days allowed by Cr. Code sec. 857, sub-sec. 1, although more than three months had elapsed from the commencement to the end of the proceedings. The hearing may be adjourned from time to time under sec. 853 of the Code, although the accused be not present, provided the adjournments are made in the presence and hearing of his solicitor or agent. Proctor v. Parker (1899), 3 Can. Cr. Cas. 374 (Man.).

858. Adjudication by justice.—The justice, having heard what each party has to say, and the witnesses and evidence adduced, shall consider the whole matter, and, unless otherwise provided, determine the same and convict or make an order against the defendant, or dismiss the information or complaint, as the case may be. R.S.C. c. 178, s. 52.

Improper adjournment.]—As to illegal adjournments depriving the magistrate of jurisdiction, see note to sec. 857.

Finding of fact.]—In summary proceedings before a justice of the peace he is substituted for the jury, so far as relates to the conviction, that is, as to finding the party guilty or not guilty. It is sufficient to authorize a con-

viction that there is such evidence before the magistrate as might in an action on an indictment be left to a jury; and the Superior Court, when the conviction is brought before it, will not examine further to see whether the conclusion drawn by the magistrate be or be not the inevitable conclusion from the evidence. Burn's Justice of the Peace, 30th ed., 1142; R. v. Davis, 6 T.R. 177; R. v. Alexander (1889), 17 O.R. 458.

The conviction must be for one offence only and not for two or more offences. Sec. 845 (3); R. v. Farrar (1890), 1 Terr. L.R. 306.

A summary conviction for an offence under the Canada Temperance Act only covers the violation actually proved, and not any violation which might have been proved. Ex p. Whalen (1894), 32 N.B.R. 274; Ex parte McManus (1894), 32 N.B.R. 481. As said by Landry, J., in the former case:—Where the law permits the inclusion of several charges of offences in one summons or indictment, and the court has jurisdiction to convict on all the charges under that summons or indictment the judicial disposal, either by acquittal or conviction, will include all charges of which evidence could have been received on the trial of the charge disposed of. But where the law allows the charge of an offence describing it as having taken place during a period in which it is possible that many similar offences of the same nature have been committed, and the tribunal can deal with only one under the one summons or indictment, then evidence given of one offence will not affect the other offences committed during that space of time. Ex p. Whalen (1894), 32 N.B.R. 274, 276.

The dismissal of a prior charge under the Canada Temperance Act in which the offence was laid as between certain dates is not necessarily a bar to a subsequent prosecution for an offence committed within the same period of time, but the question of identity of offence is for the magistrate. The onus of proving the identity of the charge is upon the defendant. Ex parte Flanagan (1899), 5 Can. Cr. Cas. 82 (N.B.); R. v. Marsh, in Re Tennant (1886), 25 N.B.R. 371.

T. was committed on 16th May of selling liquor between 21st January and 18th April, he was subsequently convicted for unlawfully keeping liquor for sale between 14th February and 24th March in the same year. It was held that the onus was on him to prove that the two charges were identical —that the keeping for sale with which he was charged was in fact the selling of which he had been convicted, and that the mere fact that the days between which he was charged with keeping liquor for sale, were included within the times stated in the conviction for selling, did not sustain a defence of autrefois convict. R. v. Marsh, in Re Tennant (1886), 25 N.B.R. 371.

Two persons who were doing business as co-partners were jointly convicted before a magistrate for keeping for sale intoxicating liquors contrary to the Canada Temperance Act. The conviction was as follows:—"And I adjudge the said G. H. and J. C. for their said offence to forfeit and pay the sum of $50 to be paid and applied according to law, and also to pay to (the informant) the sum of $3.60 for his costs in this behalf; and if the said several sums be not paid forthwith, I order that the same be levied by distress and sale of the goods and chattels of the said G. H. and J. C.; and in default of sufficient distress, I adjudge each of them the said G. H. and J. C. to be imprisoned." It was held that the offence charged was not a joint offence, and that the conviction was bad, for the magistrate ought to have adjudged a separate penalty upon each defendant. Ex parte Howard and Cringle (1885), 25 N.B.R. 191.

Adverse witness.]—A party's own witness cannot be treated as adverse and cross-examined by him without the leave of the magistrate. Price v. Manning, 37 W. R. 785; Stone's Justices' Manual (30th ed.), p. 706. A witness is considered adverse when, in the opinion of the magistrate, he bears a hostile animus to the party calling him, and not merely when his testimony contradicts his proof. Cf. Greenough v. Eccles (1859), 5 C.B.N.S. 786.

Leave to withdraw the charge.]—After the evidence has been heard the justice is not bound either to convict or discharge the defendant; he may allow the prosecutor to withdraw the charge. Ex p. Wyman (1899), 5 Can. Cr. Cas. 58 (N.B.).

Such withdrawal may be allowed even when another information covering the same offence has been laid by the same prosecutor against the same defendant, and the determination thereof is still pending. Ibid.

But although the informant gives notice that he withdraws, the justice may in his discretion grant a certificate of dismissal at the request of the defendant. Bradshaw v. Vaughton, 30 L.J.C.P. 93.

859. Form of conviction.—If the justice convicts or makes an order against the defendant a minute or memorandum thereof shall then be made, for which no fee shall be paid, and the conviction or order shall afterwards be drawn up by the justice on parchment or on paper, under his hand and seal, in such one of the forms of conviction or of orders from VV to AAA inclusive in schedule one to this Act as is applicable to the case or to the like effect. R.S.C. c. 178, s. 53.

FORM VV.—

CONVICTION FOR A PENALTY TO BE LEVIED BY DISTRESS AND IN DEFAULT OF SUFFICIENT DISTRESS, BY IMPRISONMENT.

Canada,
Province of ,
County of ,

Be it remembered that on the day of , in the year , at , in the said county, A.B. is convicted before the undersigned , a justice of the peace for the said county, for that the said A.B. (*etc., stating the offence, and the time and place when and where committed*), and I adjudge the said A.B. for his said offence to forfeit and pay the sum of $ (*stating the penalty, and also the compensation, if any*), to be paid and applied according to law, and also to pay to the said C. D. the sum of , for his costs in this behalf; and if the said several sums are not paid forthwith, (*or* on or before the of next),* I order that the same be levied by distress and sale of the goods and chattels of the said A.B., and in default of sufficient distress,* I adjudge the said A.B. to be imprisoned in the common gaol of the said county, at , in the said county of , (there to be kept at hard labour, *if such is the sentence*) for the term of , unless the said several sums and all costs and

charges of the said distress (and of the commitment and conveying of the said A.B. to the said gaol) are sooner paid.

Given under my hand and seal, the day and year first above mentioned, at , in the county aforesaid.

J. S., [SEAL.]
J. P., (Name of County.)

* *Or when the issuing of a distress warrant would be ruinous to the defendant and his family, or it appears he has no goods whereon to levy a distress, then instead of the words between the asterisks* * * *say,* "inasmuch as it is now made to appear to me that the issuing of a warrant of distress in this behalf would be ruinous to the said A.B. and his family," (*or,* "that the said A.B. has no goods or chattels whereon to levy the said sums by distress").

FORM WW.—

CONVICTION FOR A PENALTY, AND IN DEFAULT OF PAYMENT IMPRISONMENT.

Canada,
Province of ,
County of ,

Be it remembered that on the day of , in the year , at , in the said county, A.B. is convicted before the undersigned, , a justice of the peace for the said county, for that he the said A.B. (*etc., stating the offence, and the time and place when and where it was committed*), and I adjudge the said A.B. for his said offence to forfeit and pay the sum of , (*stating the penalty and the compensation, if any*) to be paid and applied according to law; and also to pay to the said C.D. the sum of for his costs in this behalf; and if the said several sums are not paid forthwith (*or,* on or before next), I adjudge the said A.B. to be imprisoned in the common gaol of the said county, at , in the said county of (and there to be kept at hard labour) for the term of , unless the said sums and the costs and charges of conveying the said A.B. to the said common gaol are sooner paid.

Given under my hand and seal, the day and year first above mentioned at , in the county aforesaid.

J. S., [SEAL.]
J. P., (Name of County.)

FORM XX.—

CONVICTION WHEN THE PUNISHMENT IS BY IMPRISONMENT, ETC.

Canada,
Province of ,
County of ,

Be it remembered that on the day of , in the year at , in the said county, A.B. is convicted before the undersigned, , a justice of the peace in and for the said county, for that he the said A.B. (*etc., stating the offence, and the time and place when and where it was committed*); and I adjudge the said A.B. for his said offence to be imprisoned in the common gaol of the said county, at , in the county of , (and there to be kept at hard labour) for the term of ; and I also adjudge the said A.B. to pay to the said C.D. the sum of , for his costs in this behalf, and if the said sum for costs are not paid forthwith (*or* on or before next), then * I order that the said sum be levied by distress and sale of the goods and chattels of the said A.B.; and in default of sufficient distress in that behalf,* I adjudge the said A.B. to be imprisoned in the said common gaol (and kept there at hard labour) for the term of , to commence at and from the term of his imprisonment aforesaid, unless the said sum for costs is sooner paid.

Given under my hand and seal, the day and year first above mentioned at , in the county aforesaid.

J. S., [SEAL.]
J. P., (Name of County.)

* *Or, when the issuing of a distress warrant would be ruinous to the defendant and his family, or it appears that he has no goods whereon to levy a distress, then, instead of the words between the asterisks * * say,* "inasmuch as it is now made to appear to me that the issuing of a warrant of distress in this behalf would be ruinous to the said A.B. and his family," (*or,* "that the said A.B. has no goods or chattels whereon to levy the said sum for costs by distress").

FORM YY.—

ORDER FOR PAYMENT OF MONEY TO BE LEVIED BY DISTRESS AND IN DEFAULT OF DISTRESS IMPRISONMENT.

Canada,
Province of , }
County of , }

Be it remembered that on , complaint was made before the undersigned, , a justice of the peace in and for the said county of , for that (*stating the facts entitling the complainant to the order, with the time and place when and where they occurred*), and now at this day, to wit, on , at , the parties aforesaid appear before me the said justice (*or* the said C.D. appears before me the said justice, but the said A.B., although duly called, does not appear by himself, his counsel or attorney, and it is now satisfactorily proved to me upon oath that the said A.B. was duly served with the summons in this behalf, which required him to be and appear here on this day before me, or such justice or justices of the peace for the county, as should now be here, to answer the said complaint, and to be further dealt with according to law); and now having heard the matter of the said complaint, I do adjudge the said A.B. to pay to the said C.D. the sum of forthwith (*or* on or before next, *or as the Act or law requires*), and also to pay to the said C.D. the sum of for his costs in this behalf; and if the said several sums are not paid forthwith (*or* on or before next), then,* I hereby order that the same be levied by distress and sale of the goods and chattels of the said A.B., and in default of sufficient distress in that behalf * I adjudge the said A.B. to be imprisoned in the common gaol of the said county, at , in the said county of , (and there kept at hard labour) for the term of , unless the said several sums, and all costs and charges

Crim Code one hundred and twenty-three 123

of the said distress (and the commitment and conveyance of the said A.B. to the said common gaol) are sooner paid.

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.)

* *Or, when the issuing of a distress warrant would be ruinous to the defendant and his family, or it appears he has no goods whereon to levy a distress, then, instead of the words between the asterisks* * * *say,* "inasmuch as it is now made to appear to me that the issuing of a warrant of distress in this behalf would be ruinous to the said A.B. and his family," (*or* "that the said A.B. has no goods or chattels whereon to levy the said sums by distress").

FORM ZZ.—

ORDER FOR PAYMENT OF MONEY, AND IN DEFAULT OF PAYMENT IMPRISONMENT.

Canada,
Province of , }
County of , }

Be it remembered that on , complaint was made before the undersigned, , a justice of the peace in and for the said county of , for that (*stating the facts entitling the complainant to the order, with the time and place when and where they occurred*), and now on this day, to wit, on , at , the parties aforesaid appear before me the said justice (*or* the said C.D. appears before me the said justice, but the said A.B., although duly called, does not appear by himself, his counsel or attorney, and it is now satisfactorily proved to me upon oath that the said A.B. was duly served with the summons in this behalf, which required him to be and appear here this day before me, or such justice or justices of the peace for the said county, as should now be here, to answer to the said complaint, and to be further dealt with according to law); and now having heard the matter of the said complaint, I do adjudge the said A.B. to pay to the said C.D. the sum of forthwith (*or* on or before next, *or as the Act or law requires*), and also to pay to the said C.D. the sum of for his costs in this behalf; and if the said several sums are not paid forthwith (*or* on or before next), then I adjudge the said A.B. to be imprisoned in the common gaol of the said county at , in the said county of , (there to be kept at hard labour *if the Act or law authorizes this*) for the term of , unless the said several sums (and costs and

charges of commitment and conveying the said A.B. to the said common gaol) are sooner paid.

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 AAA.—

ORDER FOR ANY OTHER MATTER WHERE THE DISOBEYING OF IT IS PUNISHABLE WITH IMPRISONMENT.

Canada,
Province of ,
County of ,

Be it remembered that on , complaint was made before the undersigned, , a justice of the peace in and for the said county of , for that (*stating the facts entitling the complainant to the order, with the time and place where and when they occurred*); and now on this day, to wit, on , at , the parties aforesaid appear before me the said justice (*or* the said C.D. appears before me the said justice, but the said A.B., although duly called, does not appear by himself, his counsel or attorney, and it is now satisfactorily proved to me upon oath that the said A.B. was duly served with the summons in this behalf, which required him to be and appear here this day before me, or such justice or justices of the peace for the said county, as should now be here, to answer to the said complaint, and to be further dealt with according to law); and now having heard the matter of the said complaint, I do adjudge the said A.B. to (*here state the matter required to be done*), and if, upon a copy of the minute of this order being served upon the said A.B., either personally or by leaving the same for him at his last or most usual place of abode, he neglects or refuses to obey the same, in that case I adjudge the said A.B., for such his disobedience, to be imprisoned in the common gaol of the said county, at , in the said county of , (there to be kept at hard labour, *if the statute authorizes this*), for the term of , unless the said order is sooner obeyed, and I do also adjudge the said A.B. to pay to the said C.D. the sum of , for his costs in this behalf, and if the said sum for costs is not paid forthwith (*or* on or before next), I order the same to be levied by distress and sale of the goods and chattels of the said A.B., and in default of sufficient

distress in that behalf I adjudge the said A.B. to be imprisoned i the said common gaol (there to be kept at hard labour) for the space of , to commence at and from the termination of his imprisonment aforesaid, unless the said sum for costs is sooner paid.

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.)

At common law].—Where a form of conviction is not provided or mentioned by any express statute, it must be such as would be good on the face of it according to the principles of the common law. Therefore a conviction which did not shew on the face of it that the evidence was given in the presence of the defendant, nor that the defendant was summoned and did not appear is clearly bad on the face of it. Moore v. Jarron (1852), 9 U.C.Q.B. 233.

A summary conviction must be under seal. Haacke v. Adamson, 14 U.C.C.P. 201; Re Ryer and Plows (1881), 46 U.C.Q.B. 206; Bond v. Conmee, 16 Ont. App. R. 398.

Describing the party.]—A conviction must on the face of it shew sufficient identity of person to enable it to be pleaded to a second complaint against the same person for the same offence. R. v. Morgan (1881), 1 B.C.R. pt. 1, p. 245. The conviction of itself must contain the elements of identity and cannot be supplemented by the commitment. Ibid. A conviction against "Messrs. Harrison & Co." was held invalid even as against Harrison for the court could not tell upon the face of the proceedings but that the delinquency of Harrison's partners who were not before the court, might have been imputed to him. R. v. Harrison, 8 T.R. 508. If the accused person refuse to disclose his name he may be described as a person whose name is unknown to the magistrate, and he may be identified by some fact, ex gr. by describing him as having been personally brought before the magistrate by a certain constable. Anon. (1822), R. & R. 489. The magistrate is not bound to follow the information as to the name of the accused but may draw up the conviction with what appears to be the proper name, or with such other description as will enable identification. Whittle v. Frankland, 31 L.J.M.C. 81; but a summary conviction of "Mrs. Morgan" not described as of any particular local residence or occupation or as known by any other designation, is not sufficient. R. v. Morgan (1881), 1 B.C.R. pt. 1, p. 245, per Gray, J.

Where the members of a partnership firm are charged with an offence as to which each may be considered guilty the conviction should not describe them in the firm name alone, but should specifically name the persons adjudged guilty in the transaction. Re McDonald Bros. (1898), 34 C.L.J. 475 (B.C.).

Describing the offence.]—The charge in a conviction must be certain and must be so stated as to be pleadable in a second prosecution for the same offence. R. v. Haggard (1870), 30 U.C.Q.B. 152.

It is essential to the validity of a conviction that the party charged should be convicted of a single, distinct, positive and definite charge. Per Morrison, J., in R. v. Mabey (1875), 37 U.C.Q.B. 248.

A conviction for doing worldly labour on Sunday contrary to the Ontario Lord's Day Act is void for uncertainty unless the acts constituting the offence are specified. R. v. Somers (1893), 1 Can. Cr. Cas. 46 (Ont.).

A conviction for illegally practising medicine contrary to the Ontario Medical Act must shew the exercise of that calling upon more than one occasion within the prescriptive period within which a prosecution must be brought. The conviction must set out the particular acts of the accused which are held to constitute the illegal practising. R. v. Whelan (1900), 4 Can. Cr. Cas. 277 (Ont.).

Adjudging forfeiture.]—Convictions were held defective in R. v. Cyr (1887), 12 Ont. Pr. 24, and R. v. Burtress (1900), 3 Can. Cr. Cas. 536 (N.S.), because they did not contain an adjudication of forfeiture of the fine imposed, as well as an adjudication that the prisoner pay such sum. Reference was in the former case made to the statute 32 and 33 Vict. (Can.), ch. 31, sec. 50, whereby forms 1, 2, 3 in which the expression "forfeit and pay" is used are made applicable to all cases where no particular form is given by the law creating the offence; and that in cases where forfeiture is neither necessary nor proper and where only an order to pay money due by one person to another can be made (as in cases between master and servant) the statutory forms contain no expression of forfeiture. See Code Forms VV, WW and YY, and sec. 982. The opinion is also expressed in Paley on Convictions, 6th ed., 264, that a judgment of forfeiture is necessary under the corresponding Imperial statute, 11 and 12 Vict., ch. 34.

A minute of conviction which mentions no definite time for the payment of the penalty must be taken to mean that payment must be made forthwith. R. v. Butler (1896), 32 C.L.J. 594 (N.S.).

Conformity with adjudication.]—Where a minute of conviction stated that in default of payment of the fine and costs imposed the same was to be levied by distress, and in default of distress imprisonment, and a formal conviction was drawn up following the minute, and it appeared that distress was not authorized in the particular case, it was held that the fact of the minute containing such unauthorized provision did not prevent a conviction omitting such provision being drawn up and returned, in compliance with a certiorari granted. R. v. Hartley (1890), 20 Ont. R. 481; vide also R. v. Richardson (1891), 20 Ont. R. 514.

If the penalty in default of payment of the fine adjudged appears to be properly ascertained by the conviction the court will not enquire when it was fixed, for if determined at any time before the conviction is formally drawn up and returned that is sufficient. R. v. Smith (1881), 40 U.C. Q.B. 18).

Possibly the justices could not give any effect to a change of intention as regards the adjudication of guilt on the penalty without hearing the defendant. R. v. Brady, 12 Ont. R. 363; R. v. Hartley, 20 Ont. R. 485; but it is otherwise as regards the consequences which follow the infliction of the penalty. R. v. McAnn (1896), 3 Can. Cr. Cas. 110, 112, per Davie, C.J.

A conviction which illegally imposes imprisonment with hard labour in default of payment of a fine may be amended at any time before it is acted upon, by the return of an amended conviction omitting the award of hard labour but in other respects conforming to the adjudication. R. v. McAnn (1896), 3 Can. Cr. Cas. 110 (B.C.). But if the original adjudication had been acted upon, the defect could not have been cured by returning a valid conviction. Ibid, per Drake, J., p. 121.

A conviction in due form will not be quashed because it is founded upon a minute of adjudication which does not disclose an offence in law if the court is satisfied, upon perusal of the depositions, that the offence for which the formal conviction was made was in fact committed. R. v. Whiffin (1900), 4 Can. Cr. Cas. 141 (N.W.T.).

Code sec. 872 (*a*) provides for imprisonment unless the penalty and costs, if costs are ordered, "and the expenses of the distress and of conveying

the defendant to jail are sooner paid," while in form WW and the warrant of committment form FFF, the expression is "costs and charges" and not "expenses," as in sec. 872. In providing a form containing that expression, to carry out a provision where the word "expenses" alone is used Parliament must have considered that the two expressions were synonymous, or meant the same thing. It would presumably not provide a form which, if followed, the courts must immediately declare to be bad. R. v. Vantassel (No. 1) (1894), 5 Can. Cr. Cas. 128 (N.S.).

Amendment on certiorari.]—On the return to a certiorari the justices are not only entitled, but may be required, to amend their conviction in matters of form. Houghton's Case (1877), 1 B.C.R. pt. 1, p. 89. But as said by Begbie, C.J., in that case:—"He cannot be allowed to convict a man of one offence and then on certiorari inform the court that he convicted him of another;" he cannot be allowed to thrust into an "amended" conviction allegations of fact which the evidence disproves. Ibid., p. 92.

An amended conviction may be made out and returned under the certiorari at any time before the conviction has been quashed or the defendant released. R. v. McDonald, 26 N.S.R. 404; R. v. Lawrence, 43 U.C.Q.B. 168; R. v. Richardson, 20 Ont. R. 514; R. v. House, 2 Man. R. 58.

Under sec. 889 the court may, on certiorari, adjudicate de novo on the evidence given before the magistrate; but the court should not amend a conviction if in so doing it has to exercise the discretion of the magistrate. R. v. Whiffin (1900), 4 Can. Cr. Cas. 141 (N.W.T.).

860. Disposal of penalties on conviction of joint offenders.—When several persons join in the commission of the same offence, and upon conviction thereof each is adjudged to pay a penalty which includes the value of the property, or the amount of the injury done, no further sum shall be paid to the person aggrieved than such amount or value, and costs, if any, and the residue of the penalties imposed shall be applied in the same manner as other penalties imposed by a justice are directed to be applied. R.S.C. c. 178, s. 54.

861. First conviction in certain cases.—Whenever any person is summarily convicted before a justice of any offence against Parts XX. to XXX. inclusive or Part XXXVII. of this Act and it is a first conviction, the justice may, if he thinks fit, discharge the offender from his conviction upon his making such satisfaction to the person aggrieved, for damages and costs, or either of them, as are ascertained by the justice. R.S.C. c. 178, s. 55.

The omission of the magistrate to ask the accused whether he had been previously convicted does not deprive him of jurisdiction to receive proof of the prior conviction. R. v. Wallace, 4 Ont. R. 127, per Armour, J.; R. v. Brown, 16 Ont. R. 41.

862. Certificate of dismissal.—If the justice dismisses the information or complaint he may, when required so to do, make an order of dismissal in the form BBB in schedule one hereto, and he shall give the defendant a certificate in the

form CCC in the said schedule, which certificate, upon being afterwards produced, shall, without further proof, be a bar to any subsequent information or complaint for the same matter, against the same defendant. R.S.C. c. 178, s. 56.

FORM BBB.—

FORM OF ORDER OF DISMISSAL OF AN INFORMATION OR COMPLAINT.

Canada,
Province of ,
County of ,

Be it remembered that on , information was laid (*or* complaint was made) before the undersigned, a justice of the peace in and for the said county of , for that (*etc., as in the summons of the defendant*) and now at this day, to wit, on , at , (*if at any adjournment insert here:* "to which day the hearing of this case was duly adjourned, of which the said C.D. had due notice," both the said parties appear before me in order that I should hear and determine the said information (*or* complaint) (*or* the said A.B. appears before me, but the said C.D., although duly called, does not appear); [whereupon the matter of the said information (*or* complaint) being by me duly considered, it manifestly appears to me that the said information (*or* complaint) is not proved, and] (*if the informant or complainant does not appear, these words may be omitted*), I do therefore dismiss the same, and do adjudge that the said C.D. do pay to the said A.B. the sum of , for his costs incurred by him in defence in his behalf; and if the said sum for costs is not paid forthwith (*or* on or before), I order that the same be levied by distress and sale of the goods and chattels of the said C.D., and in default of sufficient distress in that behalf, I adjudge the said C.D. to be imprisoned in the common gaol of the said county of , at , in the said county of (and there kept at hard labour) for the term of , unless the said sum for costs, and all costs and charges of the said distress (and of the commitment and conveying of the said C.D. to the said common gaol) are sooner paid.

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 CCC.—

FORM OF CERTIFICATE OF DISMISSAL.

Canada,
Province of ,
County of ,

I hereby certify that an information (*or* complaint) preferred by C.D. against A.B. for that (*etc., as in the summons*) was this day considered by me, a justice of the peace in and for the said county of , and was by me dismissed (with costs).

Dated at , this day of , in the year .

J. S., [SEAL.]
J. P., (Name of County.)

This certificate of dismissal may be granted as well where the informant neglects to appear, and the complaint is dismissed on that ground, as where he does appear and the information is dismissed on the merits. Ex parte Phillips (1884), 24 N.B.R. 119. Upon the hearing of an information for an offence against the Canada Temperance Act the defendant in answer to the charge gave in evidence a certificate stating that an information against the defendant for the same offence had been considered and was dismissed, but the police magistrate gave no effect to the certificate of dismissal, on the ground that the original information had been dismissed on the default of the informant to appear and give evidence and not on the merits, and it was held that it was within the power of a magistrate, to whom a certificate of dismissal is tendered as a bar to his proceeding, to inquire whether such prosecution was real and bona fida, or was instituted fraudulently and collusively for the purpose of escaping the penalties of the Act. Ibid.

863. Disobedience to order of justice.—Whenever, by any Act or law, authority is given to commit a person to prison, or to levy any sum upon his goods or chattels by distress, for not obeying an order of a justice, the defendant shall be served with a copy of the minute of the order before any warrant of commitment or of distress is issued in that behalf; and the order or minute shall not form any part of the warrant of commitment or of distress. R.S.C. c. 178, s. 57.

This section originated with sec. 52 of the Summary Convictions Act, 32-33 Vict., ch. 31. It applies only to orders of justices as distinguished from convictions. R. v. Sanderson (1886), 12 Ont. R. 178, 181; R. v. O'Leary, 3 Pugsley (N.B.) 264: Paley on Convictions, 5th ed., 288. A defendant must take notice of a conviction at his peril. Ibid.

"The commitment must be to the common gaol of the county for which the justices shall be acting." Paley, p. 337. The warrant is bad if it only orders in general terms that the defendant be carried to prison. R. v. Smith, 2 Str. 934.

A warrant of commitment is bad if it simply directs the gaoler to "imprison" the defendant for the stated time, without specifying the place of imprisonment. Re J. W. King (1901), 4 Can. Cr. Cas. 426, per Forbes, Co. J.

The description of the place of imprisonment in a warrant of commitment is sufficient if the prison be described by its situation or some other definite description. Ibid.

Where a warrant of commitment which adjudges imprisonment is delivered to a constable, and the defendant then being at large deposits money with the constable as security for his appearance when required and procures the constable to delay the execution of the commitment for a time, the defendant cannot object to a subsequent arrest, accompanied by a return of his deposit, on the ground that it was illegal as being a second arrest under the same warrant. Ex parte Doherty (1899), 5 Can. Cr. Cas. 94 (N.B.).

Semble, an unreasonable delay in issuing a warrant of commitment may be a ground for discharge on habeas corpus if the delay works an injustice to the defendant. Ibid.

(Amendment of 1900.)

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

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

Before the Code, a magistrate could dispose summarily of any case of common assault. But under the Code either the complainant or the party complained against might refuse the magistrate the right to proceed, and the case had then to go before the grand jury and the party be indicted. The magistrate has by this amendment jurisdiction to summarily determine the complaint without regard to the desire of either the prosecutor or the defendant that it should be sent up for trial under indictment, and an indictment for *common* assault will only lie under the circumstances stated in sub-section 2.

The applicant C. having appeared to an information charging him with assault and praying that the case might be disposed of summarily under the statute, H., the complainant, applied to amend the information by adding the words "and falsely imprison"; this being refused H. offered no evidence, and a second information was at once laid, including the charge of false imprisonment. The magistrate refused to give a certificate of dismissal of the first charge, or to proceed further thereon, but endorsed on the information "Case withdrawn by the permission of the court, with the view of having a new information laid." It was held that the complainant could not, even with the magistrate's consent, withdraw the charge, the defendant being entitled to have it disposed of. R. v. Conklin (1871), 31 U.C.Q.B. 160. Under sub-sec. (2) the magistrate is, if he thinks the case a proper one for indictment, to proceed as upon a preliminary inquiry, and he may allow the information to be amended and re-sworn. See note to sec. 558.

865. Dismissal of complaint for assault.—If the justice, upon the hearing of any case of assault or battery upon the merits where the complaint is preferred by or on behalf of the person aggrieved, under the next preceding section, deems the offence not to be proved, or finds the assault or battery to have been justified, or so trifling as not to merit any punishment, and accordingly dismisses the complaint, he shall forthwith make out a certificate under his hand, stating the fact of such dismissal, and shall deliver such certificate to the person against whom the complaint was preferred. R.S.C. c. 178, s. 74.

866. Release from further proceedings.—If the person against whom any such complaint has been preferred, by or on behalf of the person aggrieved, obtains such certificate, or, having been convicted, pays the whole amount adjudged to be paid, or suffers the imprisonment, or imprisonment with hard labour, awarded, he shall be released from all further or other proceedings, civil or criminal, for the same cause. R.S.C. c. 178, s. 75.

This section does not apply to bar a civil action for assault, after conviction and payment of the fine, where such conviction is by a petit jury on a trial upon an indictment. Clermont v. Lagacé (1897), 2 Can. Cr. Cas. 1.

In Quebec it has been held that a conviction upon a charge of aggravated assault tried by a magistrate under sec. 783 (c) of the Criminal Code, with the consent of the accused, and the payment of the fine thereby imposed, will constitute a bar to a civil action for damages for such assault. Hardigan v. Graham (1897), 1 Can. Cr. Cas. 437 (Que.).

But in Ontario it is held on the contrary that the civil action is barred only where the charge is triable summarily under sec. 864 without regard to the consent of the accused, and that sec. 866 does not have that effect where the charge is under sec. 262 for the indictable offence of assault causing actual bodily harm. Nevills v. Ballard (1897), 1 Can. Cr. Cas. 434 (Ont.).

The injury to clothing or loss of property from the person by reason of the assault does not constitute a cause of action distinguishable from the civil action for assault, and any claim in respect of such injury or loss will likewise be barred where sec. 866 applies. Hardigan v. Graham, supra.

On a charge of shooting and wounding with intent, the justices holding a preliminary enquiry cannot, of their own motion, vary or reduce the charge to one of common assault and so acquire jurisdiction to adjudicate thereupon. Miller v. Lea (1898), 2 Can. Cr. Cas. 282.

A certificate of conviction by justices for common assault under those circumstances, and the payment of the fine imposed, do not bar a civil action by the injured party for damages against the wrongdoer, and this section does not apply. Ibid.

Where a magistrate invested with the powers of two justices tries a case of aggravated assault under the summary trials procedure with the consent of the accused (sec. 786), the conviction is a bar to further criminal proceedings for the same cause (sec. 799), but not to be a civil action for damages. The provisions of sec. 866 do not apply to such a case. Clarke v. Rutherford (1901), 5 Can. Cr. Cas. 13 (Ont.).

A summary conviction for assault has been held sufficient to bar a subsequent indictment, charging an assault and wounding with intent to murder, where the accused had been summoned before magistrates by the prosecutor of the indictment for the same assault, and had been imprisoned on his making default of payment of the fine imposed by the magistrates. R. v. Stanton (1851), 5 Cox C.C. 324, per Erle, J.

It was said by Coltman, J., in R. v. Walker (1843), 2 Moody & Rob. 446, that there is no difference in principle whether a party has been convicted or acquitted; and that on a complaint for a common assault the justices were to determine whether such assault was accompanied with any felonious intention, and on that question they are like any other court of competent jurisdiction, and their decision is of the same finality as if the party had been convicted by a jury. 2 Moody & Rob. 457.

The rule at common law is that where a person has been convicted for an offence by a court of competent jurisdiction, the conviction is a bar to all further criminal proceedings for the same offence; the principle is that no man shall be placed in peril of legal penalties more than once on the same accusation. R. v. Miles (1890), 17 Cox C.C. 9.

It is a well-established principal that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form. R. v. Elrington (1861), 1 Best & Smith 688, 696 (Cockburn, C.J., and Blackburn, J.).

It was held by the Court for Crown Cases Reserved in R. v. Morris (1867), L.R. 1 C.C.R. 90, that a conviction for assault and the imprisonment consequent thereon are not either at common law or under 24-25 Vict., ch. 100, sec. 45 (Can. Cr. Code 866), a bar to an indictment for manslaughter of the person assaulted, should he subsequently die from the effects of the assault. Per Martin, B., and Byles and Shee, JJ.; Kelly, C.B., dissenting.

In the last-mentioned case, Martin, B., considered the word "cause" in the statute, corresponding to sec. 866 of the Code, as used synonymously with the words "accusation" or "charge"; while Byles, J., said that the word "cause" may undoubtedly mean "act," but it is ambiguous, and it may also and, perhaps, with greater propriety be held to mean "cause for the accusation"; and in that view the cause for the indictment for manslaughter comprehended more than the cause in the summons before the magistrates, "for it comprehends the death of the party assaulted." L.R. 1 C.C.R. 95.

In a more recent case, at the Durham Assizes, November 23, 1895, the opposite view was taken by Grantham, J., the presiding judge. R. v. Hilton (1895), 59 J.P. (Eng.), 778. In that case it appeared that the defendant Hilton was indicted for the manslaughter of one Robert Jackson. The alleged assault which caused the death of Jackson occurred on the 12th of October. On the 21st of October cross-summonses for assault were heard by the justices and both cases were dismissed. At that time the deceased man's injuries were not considered serious, but on the 22nd of November he died from the effects of a clot of blood on the brain. Hilton was thereupon charged with manslaughter. Counsel for the prisoner produced a certificate of dismissal of the charge of assault by the justices under 24 & 25 Vict., ch. 100, sec. 45, and raised the plea that the prisoner had already been acquitted of the charge of assault and could not be tried again. The judge accepted this view, and the prisoner was discharged.

867. Costs on conviction or order.—In every case of a summary conviction, or of an order made by a justice, such justice may, in his discretion, award and order in and by the conviction or order that the defendant shall pay to the prosecutor or complainant such costs as to the said justice seem reasonable in that behalf, and not inconsistent with the fees established by law to be taken on proceedings had by and before justices. R.S.C. c. 178, s. 58.

A general power to award costs was first conferred by the statute 18 Geo. III., ch. 19, before which no such power existed except under special statutes. R. v. Brown (1888), 16 O.R. 41, 46.

The award of costs under a summary conviction should direct payment thereof to the informant and not to the justice. R. v. Roche (1900), 4 Can. Cr. Cas. 64.

868. Costs on dismissal.—Whenever the justice, instead of convicting or making an order, dismisses the information or complaint, he may, in his discretion, in and by his order of dismissal, award and order that the prosecutor or complainant shall pay to the defendant such costs as to the said justice seem reasonable and consistent with law. R.S.C. c. 178, s. 59.

869. Recovery of costs when penalty is adjudged.—The sums so allowed for costs shall, in all cases, be specified in the conviction or order, or order of dismissal, and the same shall be recoverable in the same manner and under the same warrants as any penalty, adjudged to be paid by the conviction or order, is to be recovered. R.S.C. c. 178, s. 60.

870. Recovery of costs in other cases.—Whenever there is no such penalty to be recovered, such costs shall be recoverable by distress and sale of the goods and chattels of the party, and in default of distress, by imprisonment, with or without hard labour, for any term not exceeding one month. R.S.C. c. 178, s. 61.

(Amendment of 1894.)

871. Fees.—The fees mentioned in the following tariff and no others shall be and constitute the fees to be taken on proceedings before justices in proceeding under this part:—

Fees to be taken by Justices of the Peace or their Clerks.

	$ cts.
1. Information or complaint and warrant or summons	0 50
2. Warrant where summons issued in first instance...	0 10
3. Each necessary copy of summons or warrant.....	0 10
4. Each summons or warrant to or for a witness or witnesses. (Only one summons on each side to be charged for in each case, which may contain any number of names. If the justice of the case requires it, additional summonses shall be issued without charge)	0 10
5. Information for warrant for witness and warrant..	0 50
6. Each necessary copy of summons or warrant for witness	0 10
7. For every recognizance	0 25
8. For hearing and determining case	0 50
9. If case lasts over two hours	1 00
10. Where one justice alone cannot lawfully hear and determine the case, the same fee for hearing and determining to be allowed to the associate justice.	
11. For each warrant of distress or commitment	0 25
12. For making up record of conviction or order where the same is ordered to be returned to sessions or on certiorari	1 00
But in all cases which admit of a summary proceeding before a single justice and wherein no higher penalty than $20 can be imposed, there shall be charged for the record of conviction not more than	0 50
13. For copy of any other paper connected with any case, and the minutes of the same, if demanded, per folio of 100 words	0 05
14. For every bill of costs when demanded to be made out in detail	0 10
(Items 13 and 14 to be chargeable only when there has been an adjudication.)	

Constables' Fees.

	$ cts.
1. Arrest of each individual upon a warrant	1 50
2. Serving summons.....	0 25

	$ cts.
3. Mileage to serve summons or warrant, per mile (one way) necessarily travelled	0 10
4. Same mileage when service cannot be effected, but only upon proof of due diligence.	
5. Mileage taking prisoner to gaol, exclusive of disbursements necessarily expended in his conveyance	0 10
6. Attending justices on trial for each day necessarily employed in one or more cases when engaged less than four hours	1 00
7. Attending justices on trial, for each day necessarily employed in one or more cases, when engaged more than four hours	1 50
8. Mileage travelled to attend trial (when public conveyance can be taken only reasonable disbursements to be allowed) one way, per mile	0 10
9. Serving warrant of distress and returning same...	1 00
10. Advertising under warrant of distress	1 00
11. Travelling to make distress or to search for goods to make distress, when no goods are found (one way), per mile	0 10
12. Appraisements, whether by one appraiser or more, 2 cents in the dollar on the value of the goods.	
13. Commission on sale and delivery of goods, 5 cents in the dollar on the net produce of the goods.	

52 V., c. 45, s. 2 and Sch.

Witnesses' Fees.

	$ cts.
1. Each day attending trial	0 75
2. Mileage travelled to attend trial (one way), per mile	0 10

Excessive costs.]—A justice's order dismissing an information under "The Summary Convictions Act," ordered the informant to pay as costs a sum which included items for "rent of hall," "counsel fee," "compensation for wages," and "railway fare." Held, that none of these items could legally be charged as costs. R. v. Laird (1889), 1 Terr. L.R. 179. In that case the court held that it had no power to amend the order by deducting the illegal items; though it could amend by striking out in toto all that part of the order relating to costs. R. v. Laird (1889), 1 Terr. L.R. 179; secs. 886 and 889 seem not to apply to "orders of dismissal," but to be limited to orders or convictions against the accused.

The allowance by the magistrate on a summary conviction, of excessive costs in respect of mileage to the constable for serving subpœnas upon witnesses, is not a ground for quashing the conviction. Ex parte Rayworth (1896), 2 Can. Cr. Cas. 230 (N.B.).

If the magistrate charges excessive costs, although he does so innocently, he is liable in a civil action to be made to refund the excess. Ex parte Howard (1893), 32 N.B.R. 237.

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

(Amendment of 1894.)

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

(Amendment of 1894.)

(*b*) that in default of payment of the said penalty, compensation or sum of money, and costs, if any, forthwith or within a limited time, the defendant be imprisoned in the manner and for the time mentioned in the said Act or law, or for any perod not exceeding three months, if the Act or law authorizing the conviction or order does not specify imprisonment, or does not specify any term of imprisonment, unless the said sums with the like costs and expenses are sooner paid.

(Amendment of 1900.)

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

2. The justice making the conviction or order mentioned in the paragraph lettered (*a*) of sub-section 1 of this section may issue a warrant of distress in the form DDD or EEE, as the case requires; and in the case of a conviction or order under the paragraph lettered (*b*) of the said sub-section, a warrant in one of the forms FFF or GGG may issue;

(*a*) if a warrant of distress is issued and the constable or peace officer charged with the execution thereof returns (form III) that he can find no goods or chattels whereon to levy thereunder, the justice may issue a warrant of commitment in the form JJJ.

3. Where by virtue of an Act or law so authorizing the justice by his conviction adjudges against the defendant payment of a penalty or compensation, and also imprisonment, as punishment for an offence, he may, if he thinks fit, order that the imprisonment in default of distress or of payment, as provided for in this section, shall commence at the expiration of the imprisonment awarded as a punishment for the offence.

4. The like proceeding may be had upon any conviction or order made as provided by this section as if the Act or law authorizing the same had expressly provided for a conviction or order in the above terms. R.S.C. c. 178, ss. 62, 66, 67 and 68.

FORM DDD.—

WARRANT OF DISTRESS UPON A CONVICTION FOR A PENALTY.

Canada,
Province of ,
County of ,

To all or any of the constables and other peace officers in the said county of .

Whereas A. B., late of , (*labourer*), was on this day (*or* on last past) duly convicted before , a justice of the peace, in and for the said county of , for that

(*stating the offence, as in the conviction*), and it was thereby adjudged that the said A. B. should for such his offence, forfeit and pay (*&c., as in the conviction*), and should also pay to the said C. D. the sum of , for his costs in that behalf; and it was thereby ordered that if the said several sums were not paid (forthwith) the same should be levied by distress and sale of the goods and chattels of the said A. B., and it was thereby also adjudged that the said A. B., in default of sufficient distress, should be imprisoned in the common gaol of the said county, at , in the said county of (and there kept at hard labour) for the space of , unless the said several sums and all costs and charges of the said distress, and of the commitment and conveying of the said A. B. to the said common gaol were sooner paid; *And whereas the said A. B., being so convicted as aforesaid, and being (now) required to pay the said sums of and has not paid the same or any part thereof, but therein has made default: These are therefore to command you, in His Majesty's name, forthwith to make distress of the goods and chattels of the said A. B.; and if within days next after the making of such distress, the said sums, together with the reasonable charges of taking and keeping the distress, are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale unto me, the convicting justice (*or* one of the convicting justices), that I may pay and apply the same as by law directed, and may render the overplus, if any, on demand, to the said A. B.; and if no such distress is found, then to certify the same unto me, that such further proceedings may be had thereon as to law appertain.

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 EEE.—

WARRANT OF DISTRESS UPON AN ORDER FOR THE PAYMENT OF MONEY.

Canada,
Province of ,
County of ,

To all or any of the peace officers in the said county of .

Whereas on , last past, a complaint was made

before , a justice of the peace in and for the said county, for that (*&c., as in the order*), and afterwards, to wit, on , at , the said parties appeared before (*as in the order*), and thereupon the matter of the said complaint having been considered, the said A. B. was adjudged to pay the said C. D. the sum of , on or before then next, and also to pay to the said C. D. the sum of , for his costs in that behalf; and it was ordered that if the said several sums were not paid on or before the said then next, the same should be levied by distress and sale of the goods and chattels of the said A. B.; and it was adjudged that in default of sufficient distress in that behalf, the said A. B. should be imprisoned in the common gaol of the said county, at , in the said county of , unless the said several sums, and all costs and charges of the distress (and of the commitment and conveying the said A. B. to the said common gaol) were sooner paid; *And whereas the time in and by the said order appointed for the payment of the said several sums of , and has elapsed, but the said A. B. has not paid the same, or any part thereof, but therein has made default: These are, therefore, to command you, in His Majesty's name, forthwith to make distress of the goods and chattels of the said A. B.; and if within the space of days after the making of such distress, the said last mentioned sums, together with the reasonable charges of taking and keeping the said distress, are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale unto me (*or some other of the convicting justices, as the case may be*), that I (*or* he) may pay or apply the same as by law directed, and may render the overplus, if any, on demand, to the said A. B.; and if no such distress can be found, then to certify the same unto me, to the end that such proceedings may be had therein, as to law appertain.

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 FFF.—

WARRANT OF COMMITMENT UPON A CONVICTION FOR A PENALTY 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 , and to the keeper of the common gaol of the said county of , at , in the said county of .

Whereas A. B., late of , (*labourer*), was on this day convicted before the undersigned , a justice of the peace, in and for the said county, for that (*stating the offence, as in the conviction*), and it was thereby adjudged that the said A. B., for his offence, should forfeit and pay the sum of (*&c., as in the conviction*), and should pay to the said C. D. the sum of , for his costs in that behalf; and it was thereby further adjudged that if the said several sums were not paid (forthwith) the said A. B. should be imprisoned in the common gaol of the county at , in the said county of (and there kept at hard labour), for the term of , unless the said several sums (and the costs and charges of conveying the said A. B. to the said common gaol) were sooner paid; and whereas the time in and by the said conviction appointed for the payment of the said several sums has elapsed, but the said A. B. has not paid the same, or any part thereof, but therein has made default: These are, therefore, to command you, the said peace officers, or any one of you, to take the said A.B., and him safely to convey to the common gaol at aforesaid, and there to 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 A. B. into your custody in the said common gaol, there to imprison him (and keep him at hard labour) for the term of , unless the said several sums (and costs and charges of carrying him to the said common gaol, amounting to the further sum of), are sooner paid unto you, the said keeper; and for your 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.)

FORM GGG.—

WARRANT OF COMMITMENT ON AN ORDER 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 , and to the keeper of the common gaol of the county of , at , in the said county of .

Whereas, on last past, complaint was made before the undersigned , a justice of the peace in and for the said county of , for that (*&c.; as in the order*), and afterwards, to wit, on the day of , at , A. B. and C. D. appeared before me, the said justice (*or as it is in the order*), and thereupon having considered the matter of the complaint, I adjudged the said A. B. to pay the said C. D. the sum of , on or before the day of then next, and also to pay to the said C. D. the sum of , for his costs in that behalf; and I also thereby adjudged that if the said several sums were not paid on or before the day of then next, the said A. B. should be imprisoned in the common gaol of the county of , at , in the said county of (and there be kept at hard labour) for the term of , unless the said several sums (and the costs and charges of conveying the said A. B. to the common gaol, *as the case may be*) were sooner paid; And whereas the time in and by the said order appointed for the payment of the said several sums of money has elapsed, but the said A. B. has not paid the same, or any part thereof, but therein has made default: These are, therefore, to command you, the said peace officers, or any of you, to take the said A. B. and him safely to convey to the said common gaol, 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, there to imprison him (and keep him at hard labour) for the term of , unless the said several sums (and the costs and charges of conveying him to the said common gaol, amounting to the further sum of), are

sooner paid unto you the said keeper; and for your 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.)

FORM III.—

CONSTABLE'S RETURN TO A WARRANT OF DISTRESS.

I, W. T., constable of , in the county of , hereby certify to J. S., Esquire, a justice of the peace in and for the county of , that by virtue of this warrant I have made diligent search for the goods and chattels of the within mentioned A. B., and that I can find no sufficient goods or chattels of the said A. B. whereon to levy the sums within mentioned.

Witness my hand, this day of , one thousand nine hundred and .

W. T.

FORM JJJ.—

WARRANT OF COMMITMENT FOR WANT OF DISTRESS.

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 of the said county of , at , in the said county.

Whereas (*&c., as in either of the foregoing distress warrants,* DDD or EEE, *to the asterisk,* and then thus*): And whereas, afterwards on the day of , in the year aforesaid, I, the said justice, issued a warrant to all or any of the peace officers of the county of , commanding them, or any of them, to levy the said sums of , and , by distress and sale of the goods and chattels of the said A. B.; And whereas it appears to me, as well by the return of the said warrant of distress, by the peace officer who had the execution of the same, as otherwise, that the said peace officer has made diligent search for the goods and chattels of the said A. B., but that no sufficient distress whereon to levy the sums above mentioned

could be found: These are, therefore, to command you, the said peace officers, or any one of you, to take the said A. B., and him safely to convey to the common gaol at , aforesaid, and there deliver him to the said keeper, 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, there to imprison (and keep him at hard labour) for the term of , unless the said several sums, and all the costs and charges of the said distress (and of the commitment and conveying of the said A. B. to the said common gaol) amounting to the further sum of , are sooner paid unto you, the said keeper; and for 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.)

Warrant of distress.]—It is not essential that a warrant of distress should be dated, and if it is not issued too soon, it is not material that it bears too early a date. R. v. Sanderson (1886), 12 O.R. 178; Newman v. Earl of Hardwicke, 3 N. & P. 368.

No warrants of distress for non-payment of penalties can be issued on a Sunday. R. v. Myers, 1 T.R. 265.

It is not necessary that the bailiff should go to the premises and search for goods on which he might distrain if he was otherwise satisfied that it would be useless to do so. R. v. Sanderson (1886), 12 O.R. 178.

A distress to enforce payment of a fine upon a conviction under the Canada Temperance Act is not a proceeding in right of the Crown, and goods seized under a distress warrant therefor are not repleviable unless the magistrate who issued it acted without jurisdiction. Hannigan v. Burgess (1888), 26 N.B.R. 99.

The court refused a mandamus to the mayor of a municipality to issue a distress warrant on a conviction made by him under the Canada Temperance Act where the by-law and conviction were open to grave objections, which had been taken on the trial before him, and which he claimed made it illegal for him to proceed. R. v. Ray (1878), 44 U.C.Q.B. 17.

Remand pending distress.]—See sec. 876.

Costs of distress.]—If the justice making a summary conviction adjudges a pecuniary penalty and a distress to realize same, and in default of sufficient distress that the defendant be imprisoned, the costs of the distress and of conveying the defendant to gaol are not in the discretion of the justice, but must be included in the formal conviction. R. v. Vantassel (No. 1) (1894), 5 Can. Cr. Cas. 128 (N.S.). The omission of that provision from the formal conviction will invalidate the conviction. R. v. Vantassel (No. 2) (1894), 5 Can. Cr. Cas. 133 (N.S.).

But it is unnecessary for the justice to insert in the *minute* of conviction any provision that the defendant shall pay such costs of distress and conveying to gaol, as a pre-requisite to his discharge from custody before the end of the term of imprisonment. R. v. Vantassel (No. 1), supra.

The formal conviction may provide under sec. 872 (*a*) for the payment of the costs both of the distress and of conveying to gaol, although the minute of conviction does not include the costs of distress but merely directs imprisonment unless the penalty and costs and the costs of conveying to gaol are sooner paid. Ibid.

The expression "costs and charges" used in Code forms WW and FFF has the same meaning as the term "expenses" in sec. 872 (*a*). Ibid.

The Summary Conviction Act, R.S.C. ch. 178, sec. 66, contained a provision that the costs of conveying should be imposed "if the justice thinks fit so to order."

Under it it was held that such costs were discretionary with the magistrate; Ex parte Whalen, 29 N.B.R. 146; R. v. McDonald, 26 N.S.R. 94; but a different rule prevails under sec. 872 as it does not contain the words of limitation just quoted. R. v. Vantassel (No. 2) (1894), 5 Can. Cr. Cas. 133 (N.S.).

False return to distress warrant.]—The court cannot in certiorari proceedings try the truth of the return on affidavits. R. v. Sanderson (1886), 12 O.R. 178.

The magistrate is justified in acting upon the bailiff's return that sufficient distress cannot be found if it should subsequently appear that the return was untrue. R. v. Sanderson (1886), 12 O.R. 178; Hill v. Bateman, 2 Strange 710; Moffat v. Barnard, 24 U.C.Q.B. 498, 502. But the bailiff will be liable to an action if he makes an untrue return knowing it to be false. Ibid.

But in New Brunswick it has been decided that on a habeas corpus application under Consol. Stat., N.B., ch. 41, sec. 4, it may be shewn that the constable's return to the warrant of distress, that there was not sufficient property to satisfy it, is false, and that therefore the commitment based thereon, under which the party is imprisoned, was improperly issued. Ex parte Fitzpatrick (1893), 5 Can Cr. Cas. 191; 32 N.B.R. 182.

Warrant of commitment.]—If the warrant does not set forth that the magistrate had adjudicated on the matter of imprisonment it does not shew jurisdiction to direct imprisonment and is therefore void. Ex parte Taylor (1898), 34 C.L.J. 176 (P.E.I.).

The warrant of commitment on a conviction for an offence less than a felony must be in the possession of the police officer at the time of the arrest. Ex parte McManus (1894), 22 N.B.R. 481; Codd v. Cabe (1876), 1 Exch. D. 352. But the arrest need not be by the hand of the officer executing the warrant if he is near at hand and acting in the arrest, although not actually in sight. Ex parte McManus (1894), 22 N.B.R. 481; Blatch v. Archer, 1 Cowp. 63. It is not sufficient if the officer holding the warrant be in sight but too far away to be assisting. R. v. Patience (1837), 7 C. & P. 775. Nor will the possession of the warrant by the constable's superior officer at the police station suffice. Galliard v. Laxton (1862), 2 B. & S. 363.

The convicted party was arrested on Sunday on a warrant of commitment issued by the parish court commissioner for the parish of Chatham, in the county of Northumberland, in default of payment of fine for violation of the Canada Temperance Act, and was sent to gaol. Held, that the arrest being on Sunday, was void, and that prisoner must be forthwith discharged from custody. The order was made exempting the gaoler form liability. Ex parte Frecker (1897), 33 Can. Law Jour. 248.

Imprisonment not exceeding three months.]—The word "penalty," although generally applied to pecuniary punishment, as by fine, includes also punishment by imprisonment. A conviction awarding ninety days' imprisonment as an alternative punishment on non-payment of a fine where the statute authorized three months' imprisonment is bad, as ninety days may

possibly be more than three months. R. v. Gavin (1897), 1 Can. Cr. Cas. 59 (N.S.).

Unless there be sufficient distress to cover the penalty and costs, the return upon the warrant of distress should state that fact, and upon that a warrant of commitment may issue, but if a portion of the penalty has been paid the amount should be returned before the alternative punishment of imprisonment is resorted to. Sinden v. Brown (1890), 17 Ont. App. 173, 176, per Burton, J.A.

If the punishment be a penalty of $50 and costs, or, in the alternative, if there was no distress from which the penalty and costs could be made, imprisonment for thirty days; and if one-half of the penalty had been made by distress, the party convicted cannot be made to suffer imprisonment for thirty days in addition; and there is no provision in the law to graduate or reduce the term of imprisonment in proportion to the amount paid upon the penalty. Sinden v. Brown (1890), 17 Ont. App. 173, 176, per Burton, J.A.

Hard labour.]—Before the amendment of this section in 1900 it was held that it did not authorize an award of imprisonment with hard labour in default of payment of the fine, unless the Act or law under which the conviction is had provides the same in respect of the non-payment of the penalty; and this notwithstanding such Act or law authorizes a punishment in the first instance by imprisonment with hard labour. R. v. Horton (1897), 3 Can. Cr. Cas. 84 (N.S.).

Costs of conveying to gaol.]—Section 66 of the Summary Convictions Act R.S.C. ch. 178, from which Code sec. 872 is adopted, provided that in that case on a return of "no goods and chattels" whereon to levy, the justice might issue his warrant of commitment requiring the constable to convey the defaulter to the gaol and the keeper to receive and imprison him for the time directed unless "the sum or sums adjudged to be paid and all costs and charges of the distress and also the costs and charges of the commitment and conveying of the defendant to prison, *if such justice thinks fit so to order* . . . are sooner paid." Under it the power to award the costs of conveying the defendant to gaol was held to be discretionary with the magistrate and that he might direct the payment of them or not as he saw fit. R. v. Hamilton 1 Terr. L.R. 172, 175. Wetmore, J., in that case said: "The forms of conviction and warrant provided for these cases are in keeping with this discretionary power: the form of conviction is J 1, the words 'and of the commitment and conveying of the said A. B. to the said gaol,' are in brackets, thus indicating that they are to be inserted or left out accordingly as the justice in his discretion directs that they shall be paid or not. The form of the warrant of commitment provided for in these cases N 5 is similar, the same or similar words are in brackets, and the form of this warrant is in accordance with the provisions of sec. 66. When, however, imprisonment is awarded in the first instance in default, there is nothing to be found in the body of the Act, or elsewhere, expressly vesting in the justice a discretionary power to award the costs of conveying the defendant to gaol. In looking at the form of conviction provided for in that case, J 2, it will be seen that the words 'and the costs and charges of conveying the said A. B. to the said common gaol' are not in brackets, but upon looking at the form of commitment applicable to such case, O 1, we find that the words 'and costs and charges of carrying him to the said common gaol amounting to the further sum of ,' are in brackets. Now, these words must be in brackets for some purpose, and the only conceivable purpose for so putting them in brackets is that in some cases they are to be inserted in the warrant and in other cases they are not. When then are they to be inserted? The magistrate has no discretion as in the other cases mentioned to insert them or not. The only conclusion to arrive at is that they are to be inserted when the substantive Act, which creates the offence and the punishment, authorizes it, otherwise they are not to be

inserted. That being so, the words in the form of conviction J 2, authorizing imprisonment unless the costs and charges of conveying the defendant to gaol are paid, can only be inserted when the substantive Act authorizes such imprisonment."

A warrant of commitment by justices in default of payment of a fine imposed under the Customs Act for smuggling, and under which the accused is required to pay also the expenses of being conveyed to gaol before he can obtain his liberty, is invalid if the amount of such expenses are not stated therein. R. v. Thomas McDonald (1898), 2 Can. Cr. Cas. 504 (N.S.).

It has been held that where on a prosecution under provincial law the costs of conveying the defendant to gaol cannot be legally awarded against him on a conviction, and the sum of such costs is stated in the warrant of commitment, the improper inclusion of same cannot be treated as surplusage, and will invalidate the warrant. Re J. W. King (1901), 4 Can. Cr. Cas. 426 (N.S.); R. v. Doherty (1899), 3 Can. Cr. Cas. 505, distinguished.

Where in a summary conviction it was adjudged that in default of payment of the fine and of the amount taxed to the prosecutor for his costs, and in default of sufficient distress therefor, the defendant be imprisoned for a term specified, unless such fine and costs, etc., and the costs of the commitment, were sooner paid, the words "costs of the commitment" irregularly included therein may be treated as surplusage, and their inclusion will not invalidate the conviction, if, in fact, there are no costs of commitment apart from the costs taxed and allowed in the conviction and warrant of commitment. R. v. Doherty (1899), 3 Can. Cr. Cas. 505 (N.S.).

Imprisonment without previous distress.]—A conviction under the Canada Temperance Act may by virtue of the above sec. 872 (*b*) direct imprisonment in default of payment of the fine and costs, without any award of a distress upon the defendant's goods. Ex parte Casson (1897), 2 Can. Cr. Cas. 483. This alters the prior law, and the decision in R. v. Sullivan, 24 N.B.R. 149, is no longer of authority.

A magistrate trying a case under the summary convictions clauses may, under this section, award imprisonment in default of payment of the fine without directing that a distress shall first be made upon the defendant's goods and chattels. Ex p. Gorman (1898), 4 Can. Cr. Cas. 305 (N.B.).

Upon a summary conviction and fine for keeping a bawdy-house the powers of a magistrate for enforcing payment of the fine are limited to directing imprisonment for a period not exceeding three months under subsec. 1 (*b*), although he might impose imprisonment for six months in the first instance instead of a fine under sec. 208. R. v. Stafford (1898), 1 Can. Cr. Cas. 239 (N.S.).

It was held in R. v. Horton, 3 Can. Cr. Cas. 84, by the Supreme Court of Nova Scotia, that sec. 872, before the 1900 amendment, did not authorize an award of imprisonment with hard labour in default of payment of the fine unless the Act or law under which the conviction was made provided the same in respect of the non-payment of the penalty; and this notwithstanding that such Act or law authorized a punishment in the first instance by either imprisonment with hard labour or fine.

The amendment does away with that anomaly and makes the procedure in this respect under the Summary Convictions clauses of the Code (Part LVIII.) conform with the Procedure under the Summary Trials clauses (Part LV). See R. v. Crowell (N.S.), 2 Can. Cr. Cas. 34, and R. v. Burtress (N.S.), 3 Can. Cr. Cas. 536.

873. Order as to collection of costs.—When any information or complaint is dismissed with costs the justice may issue a warrant of distress on the goods and chattels of the prosecutor or complainant, in the form KKK, for the amount of such costs; and, in default of distress, a warrant of commitment in the form LLL may issue: Provided, that the term of imprisonment in such case shall not exceed one month. R.S.C. c. 178, s. 70.

FORM KKK.—

WARRANT OF DISTRESS FOR COSTS UPON AN ORDER FOR DISMISSAL OF AN INFORMATION OR COMPLAINT.

Canada,
Province of , }
County of , }

To all or any of the constables and other peace officers in the said county of .

Whereas on last past, information was laid (*or* complaint was made) before , a justice of the peace in and for the said county of , for that (*&c., as in the order of dismissal*) and afterwards, to wit, on , at , both parties appearing before , in order that (I) should hear and determine the same, and the several proofs adduced to (me) in that behalf, being by (me) duly heard and considered, and it manifestly appearing to (me) that the said information (*or* complaint) was not proved, (I) therefore dismissed the same, and adjudged that the said C. D. should pay the the said A. B. the sum of , for his costs incurred by him in his defence in that behalf; and (I) ordered that if the said sum for costs was not paid (forthwith) the same should be levied on the goods and chattels of the said C. D., and (I) adjudged that in default of sufficient distress in that behalf the said C. D. should be imprisoned in the common gaol of the said county of , at , in the said county of , (and there kept at hard labour) for the space of , unless the said sum for costs, and all costs and charges of the said distress, and of the commitment and conveying of the said A. B. to the said common gaol, were sooner paid; * And whereas the said C. D., being now required to pay to the said A. B. the said sum for costs, has not paid the same, or any part thereof, but therein has made default: These are, therefore, to command you, in His

Majesty's name, forthwith to make distress of the goods and chattels of the said C. D., and if within the term of days next after the making of such distress, the said last mentioned sum, together with the reasonable charges of taking and keeping the said distress, shall not be paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale to (*me*) that (I) may pay and apply the same as by law directed, and may render the overplus (if any) on demand, to the said C. D., and if no distress can be found, then to certify the same unto *me* (*or* to any other justice of the peace for the same county), that such proceedings may be had therein as to law appertain.

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 LLL.—

WARRANT OF COMMITMENT FOR WANT OF DISTRESS.

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 of the said county of , at , in the said county of .

Whereas (*&c., as in form KKK to the asterisk,* and then thus*): And whereas afterwards, on the day of , in the year aforesaid, I, the said justice, issued a warrant to all or any of the peace officers of the said county, commanding them, or any one of them, to levy the said sum of , for costs, by distress and sale of the goods and chattels of the said C. D.: And whereas it appears to me, as well by the return to the said warrant of distress of the peace officer charged with the execution of the same, as otherwise, that the said peace officer has made diligent search for the goods and chattels of the said C. D., but that no sufficient distress whereon to levy the sum above mentioned could be found: These are, therefore, to command you, the said peace officers, or any one of you, to take the said C. D., and him safely convey to the common gaol of the said county, at , aforesaid, and there deliver him to the keeper

thereof, together with this precept: And I hereby command you, the said keeper of the said common gaol, to receive the said C. D. into your custody in the said common gaol, there to imprison him (and keep him at hard labour) for the term of , unless the said sum, and all the costs and charges of the said distress (and of the commitment and conveying of the said C. D. to the said common gaol, amounting to the further sum of), are sooner paid unto you the said keeper; and for your 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.)

874. Endorsement of warrant of distress.—If after delivery of any warrant of distress issued under this part to the constable or constables to whom the same has been directed to be executed, sufficient distress cannot be found within the limits of the jurisdiction of the justice granting the warrant, then upon proof being made upon oath or affirmation of the handwriting of the justice granting the warrant, before any justice of any other territorial division, such justice shall thereupon make an endorsement on the warrant, signed with his hand, authorizing the execution of the warrant within the limits of his jurisdiction, by virtue of which warrant and endorsement the penalty or sum and costs, or so much thereof as has not been before levied or paid, shall be levied by the person bringing the warrant, or by the person or persons to whom the warrant was originally directed, or by any constable or other peace officer of the last mentioned territorial division, by distress and sale of the goods and chattels of the defendant therein.

2. Such endorsement shall be in the form HHH in schedule one to this Act. R.S.C. c. 178, s. 63.

FORM HHH.—

ENDORSEMENT IN BACKING A WARRANT OF DISTRESS.

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, 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 therefore authorize W. T., who brings me this warrant, and all other persons to whom this warrant was originally directed, or by whom the same may be lawfully executed, and also all peace officers in the said county of , to execute the same within the said county.

Given under my hand, this day of , one thousand nine hundred and

O. K.,
J.P., (Name of County.)

875. Distress not to issue in certain cases.—Whenever it appears to any justice that the issuing of a distress warrant would be ruinous to the defendant and his family, or whenever it appears to the justice, by the confession of the defendant or otherwise, that he has no goods and chattels whereon to levy such distress, then the justice if he deems it fit, instead of issuing a warrant of distress, may commit the defendant to the common gaol or other prison in the territorial division, there to be imprisoned, with or without hard labour, for the time and in the manner he would have been committed in case such warrant of distress had issued and no sufficient distress had been found. R.S.C. c. 178, s. 64.

Under a warrant of distress upon a conviction for an offence against the second part of the Canada Temperance Act, the defendant's property must be levied on, though it consists of intoxicating liquors only, and is in a place where the second part of the Act is in force. Ex parte Fitzpatrick (1893), 5 Can. Cr. Cas. 191 (N.B.).

The Canada Temperance Act does not prohibit judicial sales of intoxicating liquors. Ibid.

876. Remand of defendant when distress is ordered.—Whenever a justice issues a warrant of distress as hereinbefore provided, he may suffer the defendant to go at large, or verbally, or by written warrant in that behalf, may order the defendant to be kept and detained in safe custody, until return has been made to the warrant of distress, unless the defendant gives sufficient security, by recognizance or otherwise, to the satisfaction of the justice, for his appearance, at the time and place appointed for the return of the warrant of distress, before him or before such other justice for the same territorial division as shall then be there. R.S.C. c. 178, s. 65.

877. Cumulative punishment.—Whenever a justice, upon any information or complaint, adjudges the defendant to be imprisoned, and the defendant is then in prison undergoing imprisonment upon conviction for any other offence, the warrant of commitment for the subsequent offence shall be forthwith delivered to the gaoler or other officer to whom it is directed; and the justice who issued the same, if he thinks fit, may award and order therein that the imprisonment for the subsequent offence shall commence at the expiration of the imprisonment to which the defendant was previously sentenced. R.S.C. c. 178, s. 69.

The prisoner was convicted on the 18th of February, 1895, for unlawfully keeping for sale intoxicating liquors in violation of the second part of the Canada Temperance Act, and he was adjudged to pay a fine of $50 and costs, and if not paid and in default of distress, that he should be imprisoned for eighty days. A warrant of commitment was issued on 19th July, 1895. On 17th June, 1895, he was convicted by the same justices for a second offence under the same Act, and fined $100 and costs, and in default of payment to be imprisoned for eighty days. A warrant of commitment was issued on 18th July, 1896. He was arrested on the 29th January, 1896, under the first warrant, and after eighty days imprisonment was discharged. On 8th September, 1896, he was arrested on the second warrant. An application was now made for his discharge on the ground that as the imprisonments were not expressed to be cumulative, they must be taken to have been concurrent by virtue of sec. 877 of the Code. Barker, J., in refusing the application, said there was an important distinction between the case of an offence for which the justice awards imprisonment as a punishment and one for which a penalty can only be imposed, and where the imprisonment is merely a means of enforcing payment of the penalty. Under sec. 100 of the C.T. Act any person violating the provisions of the second part of the Act is liable for the first and second offence to a fine, and it is only for the purpose of enforcing payment that imprisonment is awarded. In this respect the case was to be distinguished from R. v. Cutbush (1867), L.R. 2 Q.B. 379, and Castro v. R. (1881), 6 App. Cas. 229. He referred to secs. 872, 877 and 880 of the Code as recognizing this distinction. As the prisoner when in custody under the first warrant was not undergoing punishment, his imprisonment could not be said to refer to the second offence. R. v. Doherty (1896), 32 C.L.J. 595.

878. Recognizances.—Whenever a defendant gives security by or is discharged upon recognizance and does not afterwards appear at the time and place mentioned in the recognizance, the justice who took the recognizance, or any justice who is then present, having certified upon the back of the recognizance the non-appearance of the defendant, may transmit such recognizance to the proper officer in the province appointed by law to receive the same, to be proceeded upon in like manner as other recognizances; and such certificate shall be prima facie evidence of the non-appearance of the said defendant.

(Amendment of 1895).

2. Such certificate shall be in the form MMM in schedule one to this Act.

3. 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 of General Sessions of the Peace for such county shall, at its then next sitting, order all such recognizances to be forfeited and estreated, and the same shall be enforced and collected in the same manner and subject to the same conditions as any fines, forfeitures or amercements imposed by or forfeited before such court. 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 MMM.—

CERTIFICATE OF NON-APPEARANCE TO BE ENDORSED ON THE DEFENDANT'S RECOGNIZANCE.

I hereby certify that the said A. B. has not appeared at the time and place in the said condition mentioned, but therein has made default, by reason whereof the within written recognizance is forfeited.

J. S., [SEAL.]
J.P., (Name of County.)

"Acknowledge to A.B." is not equivalent to "acknowledge to owe to A.B." A recognizance taken before a police magistrate under 32 & 33 Vict., ch. 30, sec. 44, omitted the words "to owe"; it was held that the omission was fatal, and that an action would not lie upon the instrument as a recognizance. R. v. Hoodless (1881), 45 U.C.Q.B. 556.

British Columbia.]—In summary convictions under sec. 878 of the Cr. Code, the certificate of default of appearance, as in the preceding rule, shall be transmitted by the justice of the peace to the clerk of the County Court

having jurisdiction at the place wherein such recognizance is taken, and be proceeded upon by order of the County Court judge, if he thinks proper, in like manner as other recognizances. B.C. Rule 47.

879. Appeal. —Unless it is otherwise provided in any special Act under which a conviction takes place or an order is made by a justice for the payment of money or dismissing an information or complaint, any person who thinks himself aggrieved by any such conviction or order, the prosecutor or complainant, as well as the defendant, may appeal in the Province of Ontario, to the Court of General Sessions of the Peace; in the Province of Quebec, to the Court of King's Bench, Crown side; in the Provinces of Nova Scotia, New Brunswick and Manitoba, to the County Court of the district or county where the cause of information or complaint arose; in the Province of Prince Edward Island, to the Supreme Court; in the Province of British Columbia, to the County or District Court, at the sitting thereof which shall be held nearest to the place where the cause of the information or complaint arose; and in the North-West Territories, to a judge of the Supreme Court of the said Territories, sitting without a jury, at the place where the cause of the information or complaint arose, or the nearest place thereto where a court is appointed to be held.

2. In the District of Nipissing such person may appeal to the Court of General Sessions of the Peace for the county of Renfrew. 51 V., c. 45, s. 7; 52 V., c. 45, s. 6.

Right of appeal.]—An appeal under 879¶ from a summary conviction in the Province of Quebec to the Court of Queen's Bench of that province can only be taken where the offence charged is one within the legislative authority of the Parliament of Canada, and not where the offence is against a provincial statute. Code sec. 840; Lecours v. Hurtubise (1899), 2 Can. Cr. Cas. 521.

The appeal to the Quebec Court of Queen's Bench, Crown Side, provided in sec. 879, does not apply to a conviction by the Harbour Commissioners, in their capacity of the pilotage authority, depriving a pilot of his license. Such a conviction is subject, in the Province of Quebec, to proceedings by certiorari to the Superior Court on proof of due cause for evocation. Arcand v. Montreal Harbour Commissioners (1897), 4 Can. Cr. Cas. 491 (Que.).

One D.M. having been on 27th August, 1862, convicted before justices of the peace for allowing card playing at his inn was fined $20 and costs. On judgment being pronounced he remarked that he would pay the fine, but he would see further about it. It was held that the facts as set out did not amount to the waiver of the right to appeal, as the money was paid under protest, and the court stated its opinion that a party should not, on any doubtful ground, be deprived of a right of appeal against a summary conviction. In re Justices of the Counties of York and Peel, ex parte D. Mason (1863), 13 U.C.C.P. 15.

Where there is a right of appeal from a summary conviction, and it appears upon an application for a certiorari to bring up the conviction to

be quashed that the ground alleged therefor is more properly the subject of an appeal, the discretion of the court should be exercised by refusing the certiorari. R. v. Herrell (No. 2) (1899), 3 Can. Cr. Cas. 15 (Man.), per Dubuc, J.

The appeal from a summary conviction under the Seaman's Act of Canada for harbouring and secreting a deserting seaman is under this section (879) and not under sec. 742 of the Code, and in the Province of Quebec the appeal should be taken to the Crown side and not to the appeal side of the Court of Queen's Bench of that Province. R. v. O'Dea (1899), 3 Can. Cr. Cas. 402 (Que.).

All the provisions of secs. 879-880 are to be taken as embodied in the Act as to frauds against cheese factories, 52 Vict. (Can.), ch. 43, sec. 9, except as varied by or inconsistent with the latter Act, and confer the power to award costs on an appeal taken under sec. 9 thereof. R. v. McIntosh (1897), 2 Can. Cr. Cas. 114 (Ont.).

An appeal lies under this section from a conviction made under the Fisheries Act, R.S.C., ch. 95, sec. 18, notwithstanding the special appeal provided by that Act. R. v. Townsend (1901), 5 Can. Cr. Cas. 143 (N.S.).

The special appeal, which under the Fisheries Act may be made to the Minister of Marine and Fisheries, may be taken after the disposal of an appeal to a county court. Ibid.

Convictions by two justices of the peace under paragraph 7 of sec. 782 may be appealed in the same manner as under sec. 879, but it in no way affects other convictions on summary trial which, under sec. 879, are not susceptible of appeal. R. v. Portugais (1901), 5 Can. Cr. Cas. 100 (Que.).

It will be observed that in this and the following sections relating to appeals from summary convictions, a distinction is drawn between the "court" and the "sittings of the court."

Right of certiorari]—In matters coming under the provisions of the Code, the right to certiorari is taken away in respect of any conviction or order had or made before any justice of the peace if the defendant has appealed therefrom to any court to which an appeal is authorized by law (sec. 887) and also in respect of any conviction or order made upon such appeal, or the conviction or order affirmed, or affirmed and amended, in appeal. Secs. 886, 887.

It is well established that a provision taking away the certiorari does not apply where there was an absence of jurisdiction. Ex parte Bradlaugh (1878), 3 Q.B.D. 511; but although the writ is allowed to issue, the order removed will not be quashed in such a case except upon the ground either of a manifest defect of jurisdiction or a manifest fraud in procuring it. Colonial Bank v. Willan (1874), L.R. 5 P.C. 417.

The power of a Superior Court to remove proceedings before justices of the peace is incident to the superintending authority which that court possesses over inferior jurisdictions and it was held that the direction of a statute (22 Car. 2, ch. 1, sec. 6) which gave an appeal to the sessions and enacted that "no other court whatsoever shall intermeddle with any cause or causes of appeal upon this Act but they shall be *finally determined* in the quarter sessions *only*" did not prevent the removal of the order by certiorari. R. v. Morley, 2 Burrows 1040. Unless the intention to do away with the writ is shewn by express mention of certiorari, it will be inferred that the "determination" referred to is in reference to matters of fact only. R. v. Plowright, 3 Mod. 95, 2 Hawkins Pleas of the Crown, 6th ed., ch. 27, sec. 23.

It has, however, been held in New Brunswick that where a statute makes provision for an appeal from a summary conviction, the discretion of the court as to granting a certiorari should be exercised by refusing the latter unless special circumstances are shewn therefor. Ex parte Ross (1895), 1 Can. Cr. Cas. 153 (N.B.).

880. Conditions of appeal.—Every right of appeal shall, unless it is otherwise provided in any special Act, be subject to the conditions following, that is to say:—

(*a*) If the conviction or order is made more than fourteen days before the sittings of the court to which the appeal is given, such appeal shall be made to the then next sittings of such court; but if the conviction or order is made within fourteen days of the sittings of such court, then to the second sittings next after such conviction or order;

(*b*) the appellant shall give to the respondent, or to the justice who tried the case for him, a notice in writing, in the form NNN in schedule one to this Act, of such appeal, within ten days after such conviction or order;

(*c*) the appellant, if the appeal is from a conviction adjudging imprisonment, shall either remain in custody until the holding of the court to which the appeal is given, or shall enter into a recognizance in the form OOO in the said schedule with two sufficient sureties, before a justice, conditioned personally to appear at the said court, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as are awarded by the court; or, if the appeal is against any conviction or order, whereby only a penalty or sum of money is adjudged to be paid, the appellant (although the order directs imprisonment in default of payment), instead of remaining in custody as aforesaid, or giving such recognizance as aforesaid, may deposit with the justice convicting, or making the order such sum of money as such justice deems sufficient to cover the sum so adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal; and upon such recognizance being given, or such deposit being made, the justice before whom such recognizance is entered into, or deposit made, shall liberate such person, if in custody;

(*d*) in case of an appeal from the order of a justice, pursuant to section 571, for the restoration of gold or gold-bearing quartz, or silver or silver ore, the appellant shall give security by recognizance to the value of the said property to prosecute his appeal at the next sittings of the court, and to pay such costs as are awarded against him;

(*e*) the court to which such appeal is made shall thereupon hear and determine the matter of appeal and make such order therein, with or without costs to either party, includ-

ing costs of the court below, as seems meet to the court—and, in case of the dismissal of an appeal by the defendant and the affirmance of the conviction or order, shall order and adjudge the appellant to be punished according to the conviction or to pay the amount adjudged by the said order, and to pay such costs as are awarded—and shall, if necessary, issue process for enforcing the judgment of the court; and whenever, after any such deposit has been made as aforesaid, the conviction or order is affirmed, the court may order the sum thereby adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal, to be paid out of the money deposited, and the residue, if any, to be repaid to the appellant; and whenever after any such deposit the conviction or order is quashed, the court shall order the money to be repaid to the appellant;

(*f*) the said court shall have power, if necessary, from time to time, by order endorsed on the conviction or order, to adjourn the hearing of the appeal from one sittings to another, or others, of the said court;

(*g*) whenever any conviction or order is quashed on appeal, as aforesaid, the clerk of the peace or other proper officer shall forthwith endorse on the conviction or order a memorandum that the same has been quashed; and whenever any copy or certificate of such conviction or order is made, a copy of such memorandum shall be added thereto, and shall, when certified under the hand of the clerk of the peace, or other proper officer having the custody of the same, be sufficient evidence, in all courts and for all purposes, that the conviction or order has been quashed. 51 V., c. 45, s. 8; 53 V., c. 37, s. 24.

FORM NNN.—

NOTICE OF APPEAL AGAINST A CONVICTION OR ORDER.

To C. D., of , and *(the names and additions of the parties to whom the notice of appeal is required to be given)*.

Take notice, that I, the undersigned, A. B., of , intend to enter and prosecute an appeal at the next General Sessions of the Peace *(or other court, as the case may be)*, to be holden at , in and for the county of , against a certain conviction (*or* order) bearing date on or about the

day of , instant, and made by (you) J. S., Esquire, a justice of the peace in and for the said county of , whereby I, the said A. B., was convicted of having (*or* was ordered) to pay , (*here state the offence as in the conviction, information or summons, or the amount adjudged to be paid, as in the order, as correctly as possible*).

Dated at , this day of , one thousand nine hundred and .

A. B.

MEMORANDUM.—*If this notice is given by several defendants, or by an attorney, it may be adapted to the case.*

FORM OOO.—

FORM OF RECOGNIZANCE TO TRY THE APPEAL.

Canada,
Province of ,
County of

Be it remembered that on A. B., of (*labourer*), and L. M., of , (*grocer*), and N. O., of (*yeoman*), personally came before the undersigned , a justice of the peace in and for the said county of , and severally acknowledged themselves to owe to our Sovereign Lord the King, 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 money of Canada, to be made and levied on 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 acknewledged the day and year first above mentioned, at , before me.

J. S.,

J.P., (Name of County.)

The condition of the within (*or* the above) written recognizance is such that if the said A. B. personally appears at the (next) General Sessions of the Peace (*or other court discharging the functions of the Court of General Sessions, as the case may be*), to be holden at , on the day of , next, in and for the said county of , and tries an appeal

against a certain conviction, bearing date the day of , (*instant*), and made by (me), the said justice, whereby he, the said A. B., was convicted, for that he, the said A. B., did, on the day of , at , in the said county of , (*here set out the offence as stated in the conviction*); and also abides by the judgment of the court upon such appeal and pays such costs as are by the court awarded, then the said recognizance to be void, otherwise to remain in full force and virtue.

FORM OF NOTICE OF SUCH RECOGNIZANCE TO BE GIVEN TO THE APPELLANT AND HIS SURETIES.

Take notice, that you, A.B., are bound in the sum of , and you, L.M. and N.O., in the sum of , each, that you the said A.B. will personally appear at the next General Sessions of the Peace to be holden at , in and for the said county of , and try an appeal against a conviction (*or* order) dated the day of , (*instant*) whereby you A.B. were convicted of (*or* ordered, etc.), (*stating offence or the subject of the order shortly*), and abide by the judgment of the court upon such appeal and pay such costs as are by the court awarded, and unless you the said A.B. personally appear and try such appeal and abide by such judgment and pay such costs accordingly, the recognizance entered into by you will forthwith be levied on you, and each of you.

Dated at , this day of , one thousand nine hundred and .

Appeal generally.]—An appeal from a summary conviction to the General Sessions in a criminal case does not abate by the death of the informant. R. v. Fitzgerald (1898), 1 Can. Cr. Cas. 420.

The magistrate's finding in a summary conviction upon a question of fact within his jurisdiction will not be reviewed upon certiorari, and the same can be attacked only by way of appeal from the conviction. R. v. Urquhart (1899), 4 Can. Cr. Cas. 256 (Ont.).

As to proceedings in certiorari see note to sec. 887.

Notice within ten days.]—It is not safe for the magistrates to assume, or for the court to require them to assume the responsibility of determining whether or not the appeal was in time; to adjudicate upon a question as to their own default, and to refuse to transmit the papers. The safe way is for the magistrate, upon the recognizance being furnished, to transmit the papers leaving the judge to determine whether any delay which may have arisen is attributable to them or to the appellant. R. v. Slaven (1876), 38 U.C.Q.B. 557.

A conviction having been made within twelve days (now fourteen days) of the next sessions, notice of appeal was given to such sessions, instead of to the second sessions after the conviction, contrary to the 33 Vict., ch. 27,

sec. 1, and the appeal was not heard. Held, that such notice being inoperative, there had, in effect, been no appeal, and the right of certiorari was therefore not taken away. See sec. 887. Held, also, that under the circumstances notice to the chairman of the sessions of defendant's intention to move for the certiorari was not required. R. v. Caswell (1873), 33 U.C.Q.B. 303.

In R. v. Crouch, 35 U.C.Q.B. 433, at p. 439, Richards, J., says: "If as a matter of fact the notice of appeal had not been given in time, or the recognizance entered into, or other matter required to be done before the appellant could proceed with his appeal, the objection could probably be taken at any time, for it would shew that the court had no jurisdiction to try the appeal."

In the case of Kent v. Olds, 7 U.C.L.J. 21, it was decided, that an application to take the appellant's recognizance in court could not be entertained, on the ground that although the recognizance need not be entered into within ten days it must be entered into and filed before the sittings of the court in which the appeal is made. It was also decided in Re Myers & Wonnacott, 23 U.C.Q.B. 611, that a failure to comply with these conditions will not be waived by the respondent asking for a postponement after the appellant has proved his notice of appeal on the first day of the court.

After the court is opened for the hearing of the appeal, it is then too late for the appellant to file his recognizance. Bestwick v. Bell (1889), 1 Terr. L.R. 193.

A notice of appeal was addressed to the convicting magistrate only, and was served upon him only. The notice contained no intimation that it was served on the magistrate for the prosecutor or complainant, nor did it appear that the magistrate was otherwise notified to that effect. The notice of appeal was held to be insufficient. Keohan v. Cook (1887), 1 Terr. L.R. 125; In re Myers & Wonnacott, 23 U.C.Q.B. 611; Ex. p. Mason, 13 U.C.C.P. 159.

A notice of appeal from a summary conviction neither addressed to nor served upon the prosecutor, but addressed to and served upon one only of two convicting justices of the peace, is insufficient, though it appears that when the notice was so served the justice upon whom it was served was verbally informed that it was for the prosecutor. Hostetter v. Thomas (1899), 5 Can. Cr. Cas. 10 (N.W.T.).

In a recent British Columbia case, R. v. Jack (1902), 5 Can. Cr. Cas. 160, it was held by Bole, Co.J., that a notice of appeal from a summary conviction served upon the convicting justices is not invalid because it is not addressed to them. But the correctness of the decision is to be doubted. It was held by Bélanger, J., of the Quebec Court of the Queen's Bench, in Canadian Society v. Lauzon (1899), 4 Can. Cr. Cas. 354, that where a notice of appeal under the Summary Convictions clauses is served on the justice who tried the case, instead of on the respondent himself, such notice must shew on its face that it is so served on the justice *for* the respondent. The notice in that case had been directed to the justices alone, and did not specify on its face that it was intended for the respondent. Form NNN. begins as follows:—"To C. D., of , and , (the names and additions of the parties to whom the notice of appeal is required to be given)." In Cragg v. Lamarsh (1898), 4 Can. Cr. Cas. 246, referred to supra, the notice of appeal was not addressed to any person. The Supreme Court of the North-West Territories held (and it is submitted that their decision was correct) that the notice was invalid.

In Ex parte Doherty, 25 N.B.R. 38, the notice of appeal served on the justice was merely addressed to the justice, and not to the complainant or to the justice for the complainant, and it was held sufficient. The decision in R. v. Jack, supra, goes further, and holds that the notice is sufficient

although not addressed at all, and it is therefore directly contrary both to the decisions before mentioned in the Territories and to the case of Canadian Society v. Lauzon. The latter will probably not be generally followed, as it places an extreme construction on sub-section (*b*) which would make it equivalent to an enactment that the appellant should leave the written notice with the respondent or with the justice for delivery to him.

As the statute authorizes the giving of notice of appeal to the justice, it seems reasonable to suppose that the notice may be addressed to such justice and to him only, and that the words "for him," which follow, are intended to convey that such notice shall be good and sufficient notice to the respondent, who must necessarily become acquainted with the fact when the enforcement of the justice's decision is sought by him. There being no provision requiring the justice to deliver the notice to the respondent on demand or otherwise, it is submitted that the notice of appeal when served upon the justice becomes part of the record of the proceedings taken before him, and should be transmitted by him to the appellate court.

Where a notice is served personally upon the person required to be notified, a written direction or address is not usually necessary. Doe v. Wrightman, 4 Esp. 5; but Form NNN. is explicit in requiring the notice of appeal to be addressed. Sub-sec. (*b*) of sec. 880 is equally explicit in requiring that the notice shall be "in the form NNN." It is therefore submitted, with all deference, that where the address is omitted, the notice is no longer in a "form to the like effect" (sec. 982), nor can it be said that the omission is, in this instance, a variation "to suit the case," which sec. 982 allows. As was pointed out by Wetmore, J., in Cragg v. Lamarsh, the Imperial Act, under which R. v. Justices of Essex, [1892] 1 Q.B. 490, was decided, differs materially from the Code in that no form of notice is thereby prescribed.

Sub-sec. 44 of sec. 7 of the Interpretation Act, R.S.C. 1886, ch. 1, provides that "Whatever forms are prescribed slight deviations therefrom not affecting the substance or calculated to mislead shall not vitiate them." It is not a slight diviation, when the Act gives a form of notice and directs that it shall be addressed to certain persons, to issue a notice not addressed to any person. Cragg v. Lamarsh (1898), 4 Can. Cr. Cas. 246 (N.W.T.).

Recognizance or deposit.]—It is not necessary that the recognizance on an appeal from a summary conviction should be accompanied by affidavits of justification by the sureties, the sufficiency of the sureties being a matter entirely for the justice before whom the recognizance is given. Cragg v. Lamarsh, supra.

The question is quite different from that which arose in R. v. Richardson, 17 Ont. R. 729, and R. v. Petrie, 1 N.W.T.R., No. 2, p. 3. In those cases the statute and rule of court prohibited the court from entertaining a motion to quash a conviction unless the defendant was shewn to have entered into a recognizance with one or more sufficient sureties. That was held to be a provision that there must be affirmative evidence before the court in which the motion was made shewing the sufficiency of the sureties before the motion could be entertained. Cragg v. Lamarsh, supra.

Where on an appeal from a summary conviction the appellant does not make the deposit in lieu of recognizance until after the sittings of the appellate court at which he should have brought the appeal on for hearing, and for which notice was given, the appeal cannot be heard. McShadden v. Lachance (1901), 5 Can. Cr. Cas. 43 (B.C.).

It has been held that on an appeal to a court of general sessions in Ontario, a non-resident of the county for which such court is established is not a competent surety. R. v. Lyon, 9 C.L.T 6, per Jones, County Judge of Brant.

The failure of the magistrate to return into court the conviction appealed from or the deposit made by the appellant, if duly required to do so, has been held in British Columbia not to prevent the hearing of the appeal. Re Kwong Wo (1893), 2 B.C.R. 336, per Sir M. Begbie, C.J.

But in Toronto it has been decided that on an appeal from a summary conviction the appellant making a money deposit in lieu of recognizance must see to it that such deposit is returned by the justice into the court to which the appeal is taken, and in default, the appeal cannot be heard. The fact that the appellant had made such deposit is a matter of record and is not properly provable by affidavit. R. v. Gray (1900), 5 Can. Cr. Cas. 24. McDougall, Co. J.

The giving of a recognizance on an appeal from a summary conviction, operates as a stay of proceedings for the enforcement of any pecuniary penalty imposed by the conviction appealed from. Simington v. Colbourne (1900), 4 Can. Cr. Cas. 367 (N.W.T.).

Parties to 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 v. Lauzon (1899), 4 Can. Cr. Cas. 354 (Que.).

Adjournment of hearing.]—Under Con. Stat. U.C. ch. 114, an appeal from a conviction could only be heard at the Court of Quarter Sessions appealed to. In re McCumber and Doyle (1867), 26 U.C.Q.B. 516. Sub-sec. (*f*) gives an express power to the court to adjourn the hearing if necessary, i.e., on cause being shewn for the adjournment, or on consent.

Costs of appeal.]—Where an order is made allowing prosecutor's appeal and convicting the accused, the costs of the appeal may be included in the costs awarded by the conviction, and the payment thereof may be enforced by a distress warrant and imprisonment in default. R. v. Hawbolt (1900), 4 Can. Cr. Cas. 229 (N.S.).

Where an appeal to a Court of General Sessions of the Peace from a summary conviction is not proceeded with (see sec. 884), an order giving costs to the respondent can only be made at the same sittings for which notice of appeal was given; but where an appeal is heard, and determined against the appellant, the formal order need not be drawn up at the same sittings, and the respondent's costs may be taxed nunc pro tunc at the next sittings and included in a formal order then issued in pursuance of the direction therefor made at the previous sittings. Bothwell v. Burnside (1900), 4 Can. Cr. Cas. 450 (Ont.); and see McShadden v. Lachance (1901), 5 Can. Cr. Cas. 43 (B.C.).

Under sub-sections (*e*) and (*f*) there is no restriction of the power of the court to the same sittings of the court for which notice of appeal has been given, as there is in sec. 884. Ibid.

Order for costs out of deposit.]—Sub-section (*e*) is to be construed as giving the court no discretion to refuse the application of the party to be benefited by the making of the order. For, when a statute confers an authority to do a judicial act upon the occurrence of certain circumstances, and for the benefit of an interested party, the exercise of the judicial authority so conferred is imperative and not discretionary when applied for by the interested party. Fenson v. New Westminster (1897), 2 Can. Cr. Cas. 52.

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

881. Proceedings on appeal.—When an appeal against any summary conviction or decision has been lodged in due form, and in compliance with the requirements of this part the court appealed to shall try, and shall be the absolute judge, as well of the facts as of the law, in respect to such conviction or decision; and any of the parties to the appeal may call witnesses and adduce evidence, whether such witnesses were called or evidence adduced at the hearing before the justice or not, either as to the credibility of any witness, or as to any other fact material to the inquiry; but any evidence taken before the justice at the hearing below, signed by the witness giving the same and certified by the justice, may be read on such appeal, and shall have the like force and effect as if the witness was there examined: Provided, that the court appealed to is satisfied by affidavit or otherwise, that the personal presence of the witness cannot be obtained by any reasonable efforts. 53 V., c. 37, s. 25.

Power of court on appeal.]—This section gives the court power to deal with and consider the law as it affects the whole conviction, as well the validity of the conviction, as the admissibility of testimony and whether the evidence proves the offence charged, and the court may quash the conviction for defects or errors apparent on its face. R. v. Tebo (1889), 1 Terr. L.R. 196; but see contra McLellan v. McKinnon, 1 Ont. R. 219, 238, per Armour, J.

On an appeal to the Sessions the appellant may tender evidence and witnesses not heard on the trial before the magistrate, and if deprived of this right the order of Sessions should be quashed. R. v. Washington (1881), 46 U.C.Q.B. 221.

An appeal from a summary conviction is, in Ontario, to be taken to the Court of General Sessions of the Peace sitting without a jury; and sec. 881, constituting such court the absolute judge as well of the facts as of the law in respect of the conviction or decision appealed against, is intra vires of the Dominion Parliament. R. v. Malloy (1900), 4 Can. Cr. Cas. 116 (Ont.).

A statutory provision that the appellate court shall try the appeal without a jury is one relating to the procedure and not to the constitution of the court. Ibid.; R. v. Bradshaw (1876), 38 U.C.Q.B. 564.

882. Appeal on matters of form.—No judgment shall be given in favour of the appellant if the appeal is based on an objection to any information, complaint or summons, or to any warrant to apprehend a defendant issued upon any such information, complaint or summons, for any alleged defect therein, in substance or in form, or for any variance between such information, complaint, summons or warrant and the evidence adduced in support thereof at the hearing of such information or complaint, unless it is proved before the court hearing the appeal that such objection was made before the justice before

whom the case was tried and by whom such conviction, judgment or decision was given, or unless it is proved that notwithstanding it was shewn to such justice that by such variance the person summoned and appearing or apprehended had been deceived or misled, such justice refused to adjourn the hearing of the case to some further day, as herein provided. R.S.C. c. 178, s. 79.

See secs. 843-846 inclusive.

883. Judgment to be upon the merits.—In every case of appeal from any summary conviction or order had or made before any justice, the court to which such appeal is made shall, notwithstanding any defect in such conviction or order, and notwithstanding that the punishment imposed or the order made may be in excess of that which might lawfully have been imposed or made, hear and determine the charge or complaint on which such conviction or order has been had or made, upon the merits, and may confirm, reverse or modify the decision of such justice, or may make such other conviction or order in the matter as the court thinks just, and may by such order exercise any power which the justice whose decision is appealed from might have exercised, and such conviction or order shall have the same effect and may be enforced in the same manner as if it had been made by such justice. The court may also make such order as to costs to be paid by either party as it thinks fit.

2. Any conviction or order made by the court on appeal may also be enforced by process of the court itself. 53 V., c. 37, s. 26.

Before this enactment, an amendment of a conviction was not allowed after the time for hearing the appeal had arrived. R. v. Smith (1874), 35 U.C.Q.B. 518.

The term "merits" applied to criminal proceedings must mean the justice of the case in reference to the guilt or innocence of the accused of the offence with which he is charged. R. v. Cronin (1875), 36 U.C.Q.B. 342.

The powers of amending a defective summary conviction conferred by sec. 883 on an appeal do not extend to or apply to convictions made under an Ontario statute. R. v. Lee (1901), 4 Can. Cr. Cas. 416, per McDougall, Co.J. But if the conviction is brought before a superior court on certiorari, secs. 889 to 896 inclusive will apply. 1 Edw. VII., (Ont.) c. 13, s 1.

The court of general sessions has no authority to order a person to pay any part of the costs of an appeal to them from a conviction, after he has been acquitted on such appeal. R. v. Orr (1854), 12 U.C.Q.B. 57.

If the court of general sessions give the proper judgment, so that nothing remains to be done to dispose of the appeal except the issuing of the order, that, as a ministerial act, may be done by the clerk of the peace after the close of the session, and tested of the first day of the session, but no subsequent session of the court can interfere with the judgment of the previous session by way of amendment or otherwise. In re Rush and the Corporation of Bobcaygeon (1879), 44 U.C.Q.B. 199.

On an appeal from a summary conviction had upon a plea of guilty the case should not be re-opened and witnesses called as to the merits for the purpose of revising the punishment imposed, if the magistrate has not acted oppressively. R. v. Bowman (1898), 2 Can. Cr. Cas. 89 (B.C.).

The court of quarter sessions at which the appeal is heard must determine, on quashing a conviction, whether costs are to be paid; secondly, what costs, that is, costs of the court below, or magistrate's court, or costs of the appeal, or both, and when such costs should be paid. The clerk of the peace may tax the costs at any time during the then sitting of the sessions, or at any adjourned sitting thereof, but the court must adopt his taxation, and an order made without such adoption would be invalid. In re Rush and the Corporation of Bobcaygeon (1879), 44 U.C.Q.B. 201.

This section applies to an appeal by the prosecutor from the justice's order dismissing the complaint; and where an order is made allowing the prosecutor's appeal and convicting the accused, the costs of the appeal may be included in the costs awarded by the conviction, and the payment thereof may be enforced by a distress warrant and imprisonment in default. R. v. Hawbolt (1900), 4 Can. Cr. Cas. 229 (N.S.).

All the provisions of the Criminal Code with respect to amendment of convictions or orders either on appeal or when removed by certiorari and (subject to sec. 12 of the Ontario Summary Convictions Act) of any other Act of Parliament of Canada authorizing the amendment of a conviction or order shall apply to convictions or orders made under the authority of any Statute of Ontario or under any by-law passed by virtue of such authority. 2 Edward VII., Ont., ch. 12, sec. 15.

(Amendment of 1894.)

884. Costs when appeal not prosecuted.—The court to which an appeal is made, upon proof of notice of the appeal to such court having been given to the person entitled to receive the same, whether such notice has been properly given or not, though such appeal was not afterwards prosecuted or entered, may, if such appeal has not been abandoned according to law, at the same sittings for which such notice was given, order to the party or parties receiving the same such costs and charges as are thought reasonable and just by the court, to be paid by the party or parties giving such notice; and such costs shall be recoverable in the manner provided by this Act for the recovery of costs upon an appeal against an order or conviction. R.S.C. c. 178, s. 81.

Costs on want of prosecution.]—Under this section the costs would have to be taxed and included in the order of the court during the sittings of the court, unless taxed out of sessions by consent, and the amount afterwards filled in the order. But in sec. 880 (*e*) and (*f*) there is no restriction of the power of the court to the same sittings of the court for which notice of appeal has been given. Bothwell v. Burnside (1900), 4 Can. Cr. Cas. 450, 459.

There is no jurisdiction to award costs against the appellant who defaults in proceeding with the appeal at any other sittings than the one for which notice was given. McShadden v. Lachance (1901), 5 Can. Cr. Cas. 43 (B.C.).

885. Proceedings when appeal fails.—If an appeal against a conviction or order is decided in favour of the respondents, the justice who made the conviction or order, or any other justice for the same territorial division, may issue the warrant of distress or commitment for execution of the same, as if no appeal had been brought. R.S.C. c. 178, s. 82.

As if no appeal had been brought.]—A defendant committed to custody under a warrant issued by the convicting magistrate gave bail for an appeal and was discharged from custody, and on the appeal being heard, was found guilty and the conviction affirmed, and the prisoner directed to be punished according to the conviction. No process was issued by the sessions for enforcing the judgment of the court, but a new warrant was issued by the convicting magistrate under which the prisoner was retaken. Writs of habeas corpus and certiorari were issued, and on the return thereof a motion was made for the discharge of the prisoner. It was held that the prisoner was not in custody or confined under the judgment of the sessions, but under the warrant of the convicting magistrate; and that under the circumstances the convicting magistrate was functus officio, and therefore could not legally issue the warrant in question, which should have been issued by the sessions. The latter court could possibly have directed punishment for the unexpired term; but if no bail had been given and the prisoner had remained in custody, no further order of commitment would have been necessary; or, if no warrant of commitment had been issued prior to appeal, the magistrate could have issued one thereafter. R. v. Arscott (1885), 9 O.R. 541.

886. Conviction not to be quashed for defects of form.—No conviction or order affirmed, or affirmed and amended, in appeal, shall be quashed for want of form, or be removed by certiorari into any superior court, and no warrant or commitment shall be held void by reason of any defect therein, provided it is therein alleged that the defendant has been convicted, and there is a good and valid conviction to sustain the same. R.S.C. c. 178, s. 83.

An "order of dismissal" is not within this section. R. v. Laird (1889), 1 Terr. L.R. 179.

887. Certiorari not to lie when appeal is taken.—No writ of certiorari shall be allowed to remove any conviction or order had or made before any justice of the peace if the defendant has appealed from such conviction or order to any court to which an appeal from such conviction or order is authorized by law, or shall be allowed to remove any conviction or order made upon such appeal. R.S.C. c. 178, s. 84.

When appeal bars certiorari.]—In R. v. Starkey, 6 Man. R., p. 589, Taylor, C.J., said: "It is not necessary for the applicant to shew what has been done in the matter of the appeal. Even if an appeal is now pending and being proceeded with, his right to a writ of certiorari is not thereby affected. At all events, it is not so unless the question of jurisdiction is the one raised on the appeal." And in R. v. Starkey, 7 Man. R. 47, a case in which notice of appeal had been given before applying for the writ of certiorari

and abandoned, the same judge said: "By sec. 84 of the Summary Convictions Act, R.S.C., ch. 178, 'No writ of certiorari shall be allowed to remove any conviction or order had or made before any justice of the peace if the defendant has appealed from such conviction or order to any court to which an appeal from such conviction or order is authorized by law,' but it seems still open to the defendant to maintain the present proceeding upon any ground which impeaches the jurisdiction of the magistrates." See also R. v. Montgomeryshire, 15 L.T.N.S. 290; Paley on Convictions, 7th ed., pp. 358, 359.

An appeal is the creature of the statute law and never lies unless given by express terms, but the rule with respect to certiorari is the very reverse; it always lies unless expressly taken away. R. v. Todd, 1 Russ. & Ches. (N.S.) 66; R. v. Abbott, Doug. 553.

If the notice of appeal be void for irregularity, certiorari is not taken away. R. v. Caswell (1873), 33 U.C.Q.B. 303; R. v. Becker (1891), 20 Ont. R. 676.

Certiorari and not appeal is the appropriate remedy to raise the question of want of jurisdiction, ex. gr., whether proper service has been made and jurisdiction over the person acquired, or whether the justice was disqualified through interest. Re Ruggles (1902), 5 Can. Cr. Cas. 163 (N.S.).

A statutory provision taking away the right to a certiorari does not deprive the superior court of its power to issue the writ to quash a proceeding on the ground of want of jurisdiction; and when there is a defect in the jurisdiction of justices or inferior courts, the common law right of certiorari should not be refused merely because a new trial might be had by means of an appeal. Ibid.

Even where an appeal is pending, a certiorari for want of jurisdiction should not be refused unless the question of jurisdiction is being raised on the appeal. Ibid.

A writ of certiorari may be claimed by the Crown as a matter of right on application of the Attorney-General without the production of any affidavit; but except where applied for on behalf of the Crown, a certiorari is not a writ "of course," and the court must be satisfied that there is a sufficient ground for issuing it. Ibid.

No more latitude is given the court for the exercise of its discretion in granting or refusing a certiorari than in respect of other applications which are in the discretion of the court. Ibid.

Graham, E.J., in delivering the judgment of the court in Re Ruggles, supra, said: "I can find no English case in which the writ was ever refused when there was a want of jurisdiction in the inferior tribunal, whether an appeal was open to the applicant or not. There are cases of the other sort, namely, where there was an appeal and (in most of them, at least) the remedy by certiorari was taken away; then, when it was sought to review by way of appeal the merits of the case, the court has intimated that the writ was taken away, and there was an appropriate remedy by appeal. Such cases are R. v. Whitehead, Doug. 550; R. v. Cambridgeshire, 4 A. & E. 121; R. v. Middlesex, 9 A. & E. 548; and In re Blewett, 14 L.T.N.S. 598."

Semble, that, whether or not a conviction be good on its face, the court may on certiorari go into the facts, where the right of appeal to the General Sessions upon both law and fact has been taken away by statute. R. v. Hughes (1898), 2 Can. Cr. Cas. 5.

Justice's findings of fact.]—Findings of fact by the magistrate are not open to review on motion to quash conviction in certiorari proceedings, if there was evidence from which he might draw the conclusion he did. Ex parte Coulson (1895), 1 Can. Cr. Cas. 31 (N.B.).

But a conviction cannot be sustained without any evidence. The evidence required to support it is that which the court can see does and may

reasonably support it. If there be evidence which may support it, if considered in one view, the conviction will be maintained, although the magistrate has formed an opinion very different from that which the court would have formed, or although the court may think the magistrate has come to a wrong conclusion. Per Wilson, J., in R. v. Howarth (1873), 33 U.C.Q.B. 537, 549.

In Nova Scotia it is held that the court cannot entertain an objection that the magistrate erroneously found a fact which, though essential to the validity of his order, he was competent to try. R. v. Walsh (1897), 33 C.L.J. 537 (N.S.); R. v. McDonald, 19 N.S.R. 336, reversed.

In the Ontario case of R. v. Howarth, the defendant, a druggist of Toronto, sold five cents' worth of peppermint lozenges at his shop on a Sunday. The purchaser did not ask for them as medicine, he had no doctor's certificate, and he was asked no questions. It was shewn that peppermint lozenges were generally kept and sold by druggists as medicine. Defendant having been convicted on this evidence under C.S.U.C., ch. 104, and fined, the conviction was removed by certiorari. It was held that the finding of the magistrate as to whether the lozenges were or were not medicine was subject to review by the court. R. v. Howarth (1873), 33 U.C.Q.B. 537.

It was held by the Queen's Bench Division in Ontario that a conviction bad on its face for uncertainty should be amended by the court to which removed by certiorari, only when such court can conclude on the evidence that an offence is thereby proved. R. v. Coulson (1893), 1 Can. Cr. Cas. 114 (Ont.); 24 Ont. R. 246.

But in a subsequent case of R. v. Coulson (1896), 27 Ont. R. 59, the same defendant, coming before Meredith, C.J.C.P., and Rose, J., in 1896, sitting for the Common Pleas Division, dissent was expressed from the judgment above reported of the Queen's Bench Divisional Court. In the opinion of the Common Pleas judges the evidence should be looked at, when the proceedings are removed by certiorari, in order to see if there was any evidence whatever to sustain the magistrate's finding, even if no defect appeared on the face of the conviction; and if there was *any* evidence of that character the court should not review *all* the evidence or find as to the propriety of the magistrate's conclusion. R. v. Coulson (1896), 27 Ont. R. 59.

Certiorari generally.]—A certiorari is an original writ issuing out of chancery, or the King's Bench, directed in the King's name to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end that the party may have the more sure and speedy justice before him, or such other justices as he shall assign to determine the cause. Bacon's Abr. "Certiorari" title (*a*).

A certiorari will not be granted where the applicant has been convicted, but not sentenced. Ex parte Collins (1899), 63 J.P. 809.

Unless there is express statutory warrant for the application of the remedy of certiorari in cases of mere administrative proceedings, there is no jurisdiction to entertain it, as certiorari is a proceeding ordinarily applicable to judicial acts alone. R. v. Watermen's Company, [1897] 1 Q.B. 659.

A town council which has passed a resolution to pay informers, other than the inspector, the costs and a proportion of the fine, when collected in prosecutions under the Canada Temperance Act, does not thereby exercise a judicial function. Such a resolution is a ministerial or legislative act which the court has no jurisdiction to review or quash. Re New Glasgow (1897), 1 Can. Cr. Cas. 22 (N.S.).

The record of conviction may be said generally to consist of two adjudications; the one, the adjudication of guilt, and the other the adjudication

of punishment. The adjudication of guilt is an entire adjudication and cannot be quashed in part and stand good for the residue. McLellan v. McKinnon, 1 O.R. 219; R. v. Dunning (1887), 14 O.R. 52, 58.

A conviction which varies from the minute of adjudication in omitting to provide for the payment of the costs and charges of the distress, in the event of the defendant being imprisoned for non-payment, may, however, be amended if the costs of the distress are not in the discretion of the magistrate. Ex parte Conway (1892), 31 N.B.R. 405.

On an application to quash a conviction for something done contrary to a by-law, the legality of the by-law may be questioned, though it has not been quashed. R. v. Osler (1872), 32 U.C.Q.B. 324.

Where there is a right of review by other process a certiorari should not be granted except under exceptional circumstances. Ex parte Young (1893), 32 N.B.R. 178.

Where there is a right of appeal from a summary conviction, and it appears upon an application for a certiorari to bring up the conviction to be quashed that the ground alleged therefor is more properly the subject of an appeal, the discretion of the court should be exercised by refusing the certiorari. R. v. Henell (No. 2) (1899), 3 Can. Cr. Cas. 15 (Man.), per Dubuc, J.

Where a defendant applying for a certiorari knows that the minute of adjudication purported to be signed by three magistrates he should ask that the writ be directed to all of them, for by directing it to one only he affirms that the conviction was made by one justice only, and is estopped from taking the objection that it was made by three. R. v. Smith (1881), 46 U.C.Q.B. 442.

Where there are several convictions for assault against the applicant and others the rule nisi should not be a joint rule against all jointly; a separate rule should be taken out in each case. Ex parte Landry (1900), 36 C.L.J. 169 (N.B.).

On a motion for a certiorari it is necessary to produce a copy of the proceedings sought to be removed. Ex parte Emmerson (1895), 1 Can. Cr. Cas. 156 (N.B.).

It is the duty of the party who obtains a rule to have the papers on which it was granted filed in the clerk's office; and where this had not been done an order nisi for a certiorari granted at Chambers was discharged by the court. Ex parte Ryan (1885), 24 N.B.R. 528.

So soon as the return to the certiorari has been filed the cause is in the court, and the motion paper and the rule must be entitled in the cause. R. v. Morton (1867), 27 U.C.Q.B. 132.

Objections on account of any omission or mistake in a conviction made by a magistrate must be set forth in the rule nisi in certiorari proceedings, or the same will not be allowed. R. v. Beale (1896), 1 Can. Cr. Cas. 235 (Man.).

A single judge sitting in court cannot in Ontario hear a motion to quash a conviction under the Code, but application must be made at a sittings of the court en banc. R. v. Beemer (1888), 15 O.R. 266.

Certiorari for want of jurisdiction.]—A statute enacting that no conviction shall be removed by certiorari does not deprive the court of jurisdiction to grant the writ where the magistrate acted without jurisdiction. R. v. Hoggard (1870) 30 U.C.Q.B. 152.

An erroneous finding on the evidence by the magistrate is not such a want of jurisdiction as warrants the issue of a certiorari. R. v. Wallace (1883), 4 O.R. 127. That case is a clear affirmance of the view that certiorari cannot issue merely for the purpose of examining and weighing the evidence which was before the magistrate. Per Osler, J.A., in R. v. Sanderson (1886) 12 O.R. 178.

When there has been a plain excess of jurisdiction, this remedy of certiorari would be accessible even if a statute had declared that certiorari should not issue, because that prohibition would not be held to apply where the justices had entertained a matter not within their jurisdiction. Hespeler v. Shaw (1858), 16 U.C.Q.B. 104.

Where certiorari is taken away by statute the court will not look into the evidence to see if the date of the offence proved is subsequent to the date stated in the conviction, provided the magistrate had jurisdiction by virtue of a good information and summons. Ex p. Sarah McKinnon (1897), 33 C.L.J. 503 (N.B.).

Even though a statute purports to take away the right to certiorari, it may be granted where there has been improper conduct of the magistrate or the fundamental principle entitling the party to a fair trial has been overlooked. Re Sing Kee (1901), 5 Can. Cr. Cas. 86 (B.C.).

Notice to justices.]—The Imperial Statute, 13 Geo. II., ch. 8, sec. 5, is in force in British Columbia as well as in Ontario, and six days previous notice of the motion for a certiorari must be given to the justices; and a rule nisi for a certiorari made returnable six days or more after service thereof is not a sufficient compliance with the statute. Re Plunkett (1895), 1 Can. Cr. Cas. 365.

By that Act it is provided as follows:

(5) And for the better preventing vexatious delays and expense, occasioned by the suing forth writs of certiorari, for the removal of convictions, judgments, orders and other proceedings before justices of the peace, be it further enacted by the authority aforesaid that from and after the twenty-fourth day of June, which shall be in the year of our Lord, one thousand seven hundred and forty, no writ of certiorari shall be granted, issued forth or allowed to remove any conviction, judgment, order or other proceedings had or made by or before any justice or justices of the peace of any county, city, borough, town-corporate, or liberty, or the respective general or quarter-sessions thereof, unless such certiorari be moved or applied for within *six calendar months* next after such conviction, judgment, order or other proceedings shall be so had or made, and unless it be duly proved upon oath that the said party or parties suing for the same hath or have given *six days' notice* thereof in writing to the justice or justices, or to two of them (if so many there be) by and before whom such conviction, judgment, order, or other proceeding shall be so had or made, to the end that such justice or justices or the parties therein concerned, may shew cause, if he or they shall so think fit, against the issuing or granting such certiorari.

The effect of the statute 13 Geo. II., ch. 18, sec. 5, is to imperatively require that six days' notice shall be given, and to make the giving of it a *condition precedent* to the issuing of the writ, and the convicting justices are not driven to make an independent application to quash the certiorari for the want of such notice, but can set up the defect in answer to the rule nisi obtained by the defendant to quash the conviction. R. v. McAllan (1880), 45 U.C.R. 402, 406.

The magistrate may however waive the right to take the objection and if a preliminary fact affirmed on one side is intended to be denied by the other, the objection should be taken promptly. It was therefore held, where a certiorari had issued to a court of sessions on an affadavit of due service of notice on two magistrates sworn to have been present at the making of the order, and a whole term had elapsed after the making of the return to the certiorari without objection being made, that it was then too late to bring in proof on an application to quash the certiorari, that one of the magistrates so served was not in fact present at the time of the making of the order. R. v. Inhabitants of Basingstoke (1849), 19 L.J.M.C. 28.

The reason for giving the magistrate notice of the application for a certiorari is that he is exposed to an action if the conviction should be quashed. R. v. Peterman (1864), 23 U.C.Q.B. 516.

Application for the certiorari must be made within six calendar months next after the conviction. Imp. Stat. 1739-40, 13 Geo. II., ch. 18, sec. 5.

It is not necessary to serve notice of motion for a certiorari to remove a conviction on the private prosecutor; he has nothing to do with this proceeding; if the writ be granted he will then be served with a rule nisi; it is that alone with which he is interested. Re Lake (1877), 42 U.C.Q.B. 206; R. v. Murray (1867), 27 U.C.Q.B. 134.

An affidavit of service of notice of motion for a certiorari to remove a conviction made by justices of the peace was held insufficient in that it did not identify the justices served as the convicting justices, but as the time for moving for the certiorari had not expired, the applicant was allowed to amend his affidavit in this respect. Re Lake (1877), 42 U.C.Q.B. 206.

Quashing the certiorari.]—Where it is desired to take objection to some irregularity in obtaining the allowance of the certiorari or to the issue of the writ itself, the proper course is to move to quash the writ or the allowance of it and not to shew the defect as cause against quashing a bad conviction. R. v. Hoggard (1870), 30 U.C.Q.B. 152. This is in order that the court may, if it sees fit, direct an amendment.

In shewing cause to a rule nisi to quash a conviction, objection may be taken to the regularity of the certiorari, and a separate application to supersede it need not be made. Where, therefore, on an application made after notice to the convicting justices for a rule for a certiorari the rule was refused, and on a subsequent ex parte application on the same material the rule was obtained, it was held that the notice of the first application would not enure to the benefit of the defendant on his second application, and that the certiorari was irregularly obtained for want of notice to the convicting justices; and a rule to quash the conviction was therefore discharged. R. v. McAllan (1880), 45 U.C.Q.B. 402.

When a whole term has elapsed without objection being made after the case has been brought up, a preliminary objection is then too late. R. v. Basingstoke (1849), 19 L.J.M.C. 28; R. v. Whittaker (1894), 24 Ont. R. 437.

Where the objection to the allowance of the certiorari is a substantial one, and the conviction not manifestly bad, there is no reason why the party should be precluded from raising it on the return of the rule to quash the conviction, instead of being driven to incur the expense of a special motion to quash the allowance. Where, on the other hand, the objection is of a trivial or merely technical character (R. v. Hoggard, 30 U.C.Q.B. 152), the party may well be told that he would not be heard to raise it except in a strictly formal and technical way; and a fortiori of the conviction was clearly bad and must inevitably be quashed, for in that case the recognizance would be of no avail to the respondent. Per Osler, J. R. v. Cluff (1882), 46 U.C.Q.B. 565.

In Nova Scotia where no step has been taken within a year a rule absolute in the first instance will be granted to quash a certiorari. R. v. Renes (1884), 17 N.S.R. 87 (following City of Halifax v. Vibert, 3 R. & C. 54).

Where a party obtaining an order nisi for a certiorari was directed by the judge to serve the prosecutor with copies of his affidavits and grounds on which the order was granted but neglected to do so, the order was discharged. Ex parte Doherty (1887), 26 N.B.R. 390.

A writ of certiorari not signed by the prothonotary will be quashed. R. v. Ward (1888), 21 N.S.R. 19.

Return to certiorari.]—The return to the court by a convicting magistrate under a certiorari is conclusive, and the court cannot go behind it. In a case where defendant was convicted for selling liquor without license the depositions returned to the court by the convicting magistrate under a certiorari shewed that there was no evidence of a license produced before him, while the affidavits filed on the application to quash the conviction stated that the party had a license in fact and produced evidence of it before the magistrate, who, moreover, himself swore that he believed a license was produced, but that it was not either proved, or given in evidence; it was held that the return to the certiorari was conclusive, and that the court could not go behind it. R. v. Strachan (1870), 20 U.C.C.P. 182.

Where the first conviction drawn up and filed with the clerk of the peace was thought to be erroneous, and the justices drew up and returned an amended one, such amendment not being an amendment of the adjudication of punishment, but merely of the proceeding by which the payment of the fine adjudicated was to be enforced, it was held that the first conviction was amendable and that the amended conviction ought not to be quashed. R. v. Menary (1890), 19 Ont. R. 691.

A summary conviction which illegally imposes imprisonment *with hard labour* in default of payment of the fine, may be amended at any time before it is acted upon, by the return of an amended conviction omitting the words "with hard labour" but in other respects conforming to the adjudication. Such an amended conviction may be returned in answer to certiorari process although the first conviction has been transmitted by the magistrate, pursuant to a statutory requirement, to the court to which an appeal might be taken therefrom. R. v. McAnn (1896), 3 Can. Cr. Cas. 110 (B.C.).

Recognizance on certiorari.]—See sec. 892.

Lapse of proceedings.]—Where an order nisi to quash a conviction has been issued, but before service of same upon the informant prosecutor the latter died, the proceedings do not lapse and can be properly continued by serving the magistrates. R. v. Fitzgerald (1898), 1 Can. Cr. Cas. 420 (Ont.).

The informant in certiorari proceedings in criminal matters is not a party to the record although his name appears and although he is under liability for costs and has given a recognizance for same, and, semble, upon quashing a conviction in such a case, no cause of action in respect of its illegality survives against the representatives of the deceased informant. Ibid.

Habeas corpus with certiorari.]—In Ontario a single judge, sitting as a court in banc and exercising the powers of the court in banc, may issue a writ of habeas corpus, accompanied by a writ of certiorari, and may alone quash the conviction. In such cases it is no excess of jurisdiction in the court to look at the depositions regularly before it and see if there is any evidence of the offence charged, not rehearing the case, as on appeal, for, no matter how strong the evidence may be for the prisoner, no matter what the preponderance of evidence may be against the prosecution, if there is any evidence whatever, the court will refuse to interfere with the conviction. Per Strong, J., in Re Trepanier (1885), 12 Can. S.C.R. 111, 129.

Where it appears, on the return to a certiorari, that the convicted person is in close custody, the court may order a habeas corpus and hear together the motion to quash the conviction and the motion for the prisoner's discharge. R. v. Spooner (1900), 4 Can. Cr. Cas. 209 (Ont.).

The object of the statute of the late Province of Canada, which gave power to a judge in chambers in Ontario to issue a writ of certiorari, was to enable the judge to issue that writ together with the writ of habeas corpus, which enabled him, in the case of commitment for trial or for extradition, to have the depositions brought before him, or in the case of a summary commitment by a magistrate, to have the commitment brought before him, and if

the conviction was erroneous to release the prisoner as being in illegal custody, not, however, to quash the conviction. The courts in Ontario having, however, the general jurisdiction to quash convictions returned under writs of certiorari issued by judges at chambers, have exercised the power, and rightly enough, because they had power to do so without especially defining where the express statutory power ended and the common law jurisdiction conferred by the 31st Geo. III. began. Per Strong, J., in Re Trepanier (1885), 12 Can. S.C.R. 111, 128. The latter statute conferred upon the Court of King's Bench of Upper Canada the like jurisdiction as was exercised by the Court of King's Bench at Westminster.

If there was some evidence before the magistrate which would support a conviction unless he gave credence to the evidence given on behalf of the accused, the conviction will be sustained, the weight to be attached to the evidence not being a question reviewable upon habeas corpus and certiorari. R. v. St. Clair (1900), 3 Can. Cr. Cas. 551 (Ont.).

Costs on quashing conviction.]—Costs were refused where the defendant filed no affidavit denying his guilt, or casting doubt upon the correctness of the magistrate's conclusion upon the facts. R. v. Steele (1895), 26 Ont. R. 540. The Ontario practice is not to give costs on quashing a conviction. R. v. Somers, 1 Can. Cr. Cas. 46; R. v. Crandall (1896), 27 Ont. R. 63.

Costs of quashing a conviction by certiorari proceedings are not awarded except in cases of misconduct of the informant or of the justice. R. v. Banks (1895), 1 Can. Cr. Cas. 370 (N.W.T.).

Costs of quashing a conviction are recoverable by action where no order of protection is made. R. v. Somers (1893), 1 Can. Cr. Cas. 46 (Ont.).

If with the notice of motion for a certiorari, a notice is served by the defendant upon the prosecutor that unless the prosecution is forthwith abandoned so as to save the necessity for a further application to the court to be relieved therefrom, the costs of all the proceedings necessary to obtain relief will be asked—then the defendant will be in a better position to ask for costs in cases where the putting of the defendant to such costs is unjust and unfair. R. v. Westgate (1892), 21 O.R., p. 622.

Costs of unsuccessful application.]—Where the only record of conviction produced before the institution of certiorari proceedings to quash the same is bad, and a valid amended conviction is produced in such proceedings, the costs of opposing the motion to quash should not be awarded against the applicant. R. v. McAnn (1896), 3 Can. Cr. Cas. 110 (B.C.); R. v. Whiffin (1900), 4 Can. Cr. Cas. 141 (N.W.T.).

Procedendo.]—Where a conviction has been removed by certiorari and afterwards affirmed, the proper course is to send the record of the proceedings back to the magistrate in order that he may cause it to be enforced in the same way that he would have done if it had not been removed into the court. R. v. Grimmer (1886), 25 N.B.R. 480. It is not necessary to take out a rule to take the return off the file before applying for a procedendo, it being sufficient that leave has been granted to remove the return from the file. R. v. White & Perry (1886), 25 N.B.R. 483. Where a conviction has been removed by certiorari and affirmed, the court will not on an application for a procedendo to the convicting justice examine into the validity of the conviction on grounds not taken on the motion to quash it. Ibid.

After the quashing of a writ of certiorari and the issue of a writ of procedendo, and the return of the conviction to the magistrate, a second writ of certiorari will not be granted. R. v. Nichols (1889), 21 N.S.R. 288.

If the writ of certiorari issued to remove a summary conviction into the High Court of Justice was served only upon the clerk of the peace with whom the conviction was filed, and not upon the convicting magistrate, and the magistrate, having no knowledge that certiorari had been directed,

thereafter enforced the conviction, he is not guilty of contempt of court in so doing. R. v. Woodyatt (1895), 3 Can. Cr. Cas. 275 (Ont.).

Appeals from certiorari orders.]—An ex parte order made by a judge of the High Court of Justice (Ontario) in a certiorari proceeding in a criminal matter is not subject to review or to be set aside by another judge sitting in "weekly court," but is appealable to a Divisional Court of the High Court sitting en banc. R. v. Graham (1898), 1 Can. Cr. Cas. 405 (Ont.).

In Ontario there is no right of appeal to the Court of Appeal from a judgment quashing or affirming a summary conviction for an offence against a Dominion law. R. v. Eli (1886), 13 Ont. App. 526.

The constitution or continuation by statute of a court with jurisdiction to hear appeals in criminal cases does not involve the creation of the right of appeal. Ibid.

Order of protection to justices.]—See sec. 891.

British Columbia.]—Every application for a writ of certiorari at the instance of any person, other than the Attorney-General on behalf of the Crown, shall be made to a judge of the Supreme Court by summons to shew cause; unless, in the opinion of the judge, the writ should issue forthwith, in which case the order may be made absolute; or an order be made in the first instance either ex parte, or otherwise, as the judge may direct. B.C. Rule 2.

No writ of certiorari shall be granted, issued, or allowed, to remove any judgment, conviction, order, or other proceeding had or made before any justice or justices of the peace, unless such writ be applied for within six calendar months after such judgment, conviction, order, or other proceeding shall be so had or made, and unless it be proved by affidavit that the party suing for the same has given six days' notice thereof in writing to the justice or justices, or to two of them if more than one, by and before whom such judgment, order, conviction, or other proceedings shall be so had or made, in order that such justice or justices, or the parties therein concerned, may shew cause, if he or they shall so think fit, against the party issuing or allowing such writ of certiorari. The writ shall be in the Form No. 9. Appendix J., of the "Supreme Court Rules, 1890." B.C. Rule 3.

No order for the issuing of a writ of certiorari to remove any order, conviction, or inquisition, or record, or writ of habeas corpus ad subjiciendum shall be granted where the validity of any warrant, commitment, order, conviction, inquisition, or record, shall be questioned, unless at the time of moving a copy of any such warrant, commitment, order, conviction, inquisition, or record, verified by affidavit, be produced and handed to the officer of the court before the motion be made, or the absence thereof accounted for to the satisfaction of the court. B.C. Rule 4.

No writ of certiorari shall be allowed to remove any judgment, order, or conviction given or made by justices, unless the party (other than the Attorney-General acting on behalf of the Crown) prosecuting such certiorari before the allowance thereof, shall enter into a recognizance with one or more sufficient sureties before one or more justices, or before any judge of the Supreme Court or County Court, in the sum of $100, with condition to prosecute the same, at his own costs and charges, with effect without any wilful or affected delay, and to pay the party in whose favour or for whose benefit such judgment, order or conviction shall have been given or made within one month after the said judgment, order or conviction shall be conferred; his full costs and charges to be taxed according to the practice of the court; and in case the party prosecuting such certiorari shall not enter into such recognizance, or shall not perform the conditions aforesaid, it shall be lawful for the said justices to proceed and make such further order for the benefit of the party for whom such judgment shall be given, in such manner as if no certiorari had been granted. B.C. Rule 5.

Every such recognizance, with affidavit of justification and of due execution, shall be filed with the registrar of the court before the issue of any writ of certiorari. B.C. Rule 6.

When cause is shewn against an order nisi for a certiorari to remove any judgment, order or conviction upon which no special case has been stated, given, or made by justices of the peace for the purpose of quashing such judgment, order or conviction, the court, or a judge thereof, if it shall think fit, may make it part of the order absolute for the certiorari that the judgment, order or conviction shall be quashed on return without further order, and in such case, no such recognizance as is required by the last preceding rule, shall be necessary, and a memorandum to that effect shall be endorsed by the proper officer upon the issuing of the writ of certiorari. B.C. Rule 7.

No objection on account of any omission or mistake in any judgment or order of any justice of the peace or court of summary jurisdiction brought up upon a return of a writ of certiorari and filed in the Supreme Court, shall be allowed, unless such omission or mistake shall have been specified in the order for issuing the certiorari. B.C. Rule 8.

Offences under provincial jurisdiction in Ontario.]—By R.S.O. 1897, ch. 90, sec. 7, it is provided that any party who considers himself aggrieved by a conviction or order made by a justice of the peace, or by a police or stipendiary magistrate under the authority of any statute in force in Ontario and relating to matters within the legislative authority of the legislature of Ontario may, unless it is otherwise provided by the particular Act under which the conviction or order is made, appeal therefrom to the general sessions of the peace. But this is subject to the following limitation added as sub-sec. (2) to said sec. 7 by the provincial statutes of 1902:—

(2) No such conviction or order as aforesaid shall be removed into the High Court of Justice by writ of certiorari except upon the ground that an appeal to the court of general sessions of the peace as herein provided would not afford an adequate remedy. 2 Edw. VII. (Ont.), ch. 12, sec. 14.

888. Conviction to be transmitted to Appeal Court.—Every justice before whom any person is summarily tried, shall transmit the conviction or order to the court to which the appeal is herein given, in and for the district, county or place wherein the offence is alleged to have been committed, before the time when an appeal from such conviction or order may be heard, there to be kept by the proper officer among the records of the court; and if such conviction or order has been appealed against, and a deposit of money made, such justice shall return the deposit into the said court; and the conviction or order shall be presumed not to have been appealed against, until the contrary is shewn.

2. Upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence. R.S.C. c. 178, s. 86; 51 V., c. 45, s. 9.

Transmitting the conviction.—The conviction may be proved at any time during the hearing of an appeal therefrom to the general sessions, or, in the discretion of the chairman, even during an adjournment for judgment. In

re Ryer and Plows (1881), 46 U.C.Q.B. 206. And the discretion of the chairman will not be reviewed. Ib. But if a conviction has already been returned duly sealed, the justice cannot return another and more formal one. R. v. Smith, 35 U.C.Q.B. 518; Chaney v. Payne, 1 Q.B. 712; Re Ryer and Plows (1881), 46 U.C.Q.B. 206.

In R. v. Whelan, 45 U.C.R. 396, it was held that a conviction once regularly brought into and put upon the files of the court is there for all purposes. In that case Armour, J., states: "It is the fact of the conviction being on the file of this court regularly brought there that gives the right to move to quash it; how or at whose instance it was brought there so long as it was brought there regularly cannot in my opinion affect that right." He also agrees with the view expressed by Wilson, J., in R. v. Levecque, 30 U.C.R. 509, to the effect that the court might still be obliged to consider the conviction as upon a certiorari issued at common law if the conviction were found in court, however brought there, so long as it was regularly there.

But in the Territories the Supreme Court was equally divided on the point in R. v. Monaghan (1897), 2 Can. Cr. Cas. 488, Scott and Rouleau, JJ., holding that a conviction returned by justices in compliance with a statutory requirement to the office of a superior court is regularly before the court and can be dealt with on a motion to quash, without the necessity of a writ of certiorari.

Richardson and Wetmore, JJ., held the contrary view, i.e., that the conviction was not regularly before the court, and a writ of certiorari to bring it before the court was necessary before a motion to quash the conviction could be properly entertained. See also decision of Rouleau, J., in R. v. Ashcroft (1899), 2 Can. Cr. Cas. 385.

Deposit to be returned into appellate court.]—In Ontario it has been held that the appellant making a money deposit in lieu of recognizance must see to it that such deposit is returned by the justice into the court to which the appeal is taken, and in default, the appeal cannot be heard. And that the fact that the appellant had made such deposit is a matter of record and is not properly provable by affidavit. R. v. Gray (1900), 5 Can. Cr. Cas. 24 (McDougall, Co. J.). But the contrary has been held in British Columbia. Re Kwong Wo (1893), 2 B.C.R. 336, per Begbie, C.J.

When a public duty is imposed, and the statute requires that it shall be performed in a certain manner, or within a certain time, or under specified conditions, such prescriptions may well be regarded as intended to be directory only, when injustice or inconvenience to others who have no control over those exercising the duty, would result, if such requirements were essential and imperative. R. v. Read (1889), 17 O.R. 185.

889. Conviction not to be held invalid for irregularity.—No conviction or order made by any justice of the peace and no warrant for enforcing the same, shall, on being removed by certiorari be held invalid for any irregularity, informality or insufficiency therein, provided that the court or judge before which or whom the question is raised is, upon perusal of the depositions, satisfied that an offence of the nature described in the conviction, order or warrant, has been committed, over which such justice has jurisdiction, and that the punishment imposed is not in excess of that which might have been lawfully imposed for the said offence; and any statement

which, under this Act or otherwise, would be sufficient if contained in a conviction, shall also be sufficient if contained in an information, summons, order or warrant: Provided that the court or judge, where so satisfied as aforesaid, shall, even if the punishment imposed or the order made is in excess of that which might lawfully have been imposed or made, have the like powers in all respects to deal with the case as seems just as are by s. 883 conferred upon the court to which an appeal is taken under the provisions of s. 879. R.S.C. c. 178, s. 87; 53 V., c. 37, s. 27.

Insufficiency of conviction cured by the evidence.]—An omission to state scienter of the accused will not invalidate a conviction if the court upon perusal of the depositions is satisfied that an offence of the nature described in the conviction has been committed. R. v. Crandall (1896), 27 Ont. R. 63.

Where it does not appear upon the face of the conviction that the offence was committed within the territorial jurisdiction of the convicting justices but it is clear upon the depositions that such was the fact, the defect will be cured by this section. R. v. Perrin (1888), 16 O.R. 446.

But the powers of amendment conferred by this section do not apply where there is an inherent defect in procedure which has deprived the accused of a fair trial, ex gr., a view of the locus in quo taken by the magistrate in the absence of the parties. Re Sing Kee (1901), 5 Can. Cr. Cas. 86 (B.C.).

A commitment is not void on the face of it by reason of a variance between the original information and the conviction made after hearing evidence. If the prisoner had been charged with the information, and on being called on to answer had confessed the information, and then had been convicted of matter not contained in the information, the conviction could be quashed, but even in that case, while the conviction stood unreversed, it would warrant a commitment following its terms. R. v. Munro (1864), 24 U.C.Q.B. 44.

Amendment.]—To authorize the amendment of a conviction under this section the court or judge must from the depositions be satisfied that, if trying the defendant in the first instance, the court or judge would have convicted upon that evidence. R. v. Herrell (1898), 1 Can. Cr. Cas. 510 (Man.).

The provisions of this section respecting amendment in cases of summary convictions do not apply to cases of summary trial under part 55.

Nor do the provisions of sec. 800 as to amendments, etc., apply where there is the same infirmity in both the conviction and the commitment. R. v. Randolph (1900), 4 Can. Cr. Cas. 165 (Ont.).

An "order of dismissal" does not come within this section or sec. 886. R. v. Laird (1889), 1 Terr. L.R. 179.

Notwithstanding that the conviction is irregular, the court may adjudicate de novo on the evidence given before the magistrate; but the court should not amend a conviction if in so doing it has to exercise the discretion of the magistrate. R. v. Whiffin (1900), 4 Can. Cr. Cas. 141 (N.W.T.); Ex. p. Nugent (1895), 1 Can. Cr. Cas. 126.

Provincial offences in Ontario.]—Sections 889 to 896 inclusive are made applicable to convictions under Ontario statutes by 1 Edw. VII. (Ont.), ch. 13, sec. 1, and 2 Edw. VII. (Ont.), ch. 12, sec. 15. The latter statute (1902) enacts that all the provisions of the Criminal Code with respect to

amendment of convictions or orders either on appeal or when removed by certiorari and (subject to sec. 12 of the Ontario Summary Convictions Act) of any other Act of the Parliament of Canada authorizing the amendment of a conviction or order shall apply to convictions or orders made under the authority of any statute of Ontario or under any by-law passed by virtue of such authority.

Upon perusal of the depositions.]—Semble, the "depositions," upon perusal of which the court may be satisfied that an offence has been committed over which the justice has jurisdiction, and may, under this section, decline to quash a conviction for insufficiency, etc., will include the caption to the depositions; and if such caption states that the "charge" was read over to the accused, the court may refer to the statement of the charge contained in the "warrant to apprehend," in order to ascertain whether or not the evidence taken related to an alleged offence committed within the district for which the magistrate acted. R. v. McGregor (1895), 2 Can. Cr. Cas. 410 (Ont.).

If on the return to a certiorari the court is satisfied upon a perusal of the depositions that an offence of the nature described in the summary conviction has been committed, the court may hear and determine the charge upon the merits as disclosed by the depositions, and may vary, confirm, reverse or modify the decision of the justice. R. v. Murdoch (1900), 4 Can. Cr. Cas. 82 (Ont.).

Where the original conviction directed payment of a fine and the levy of same by distress and in default of sufficient distress adjudged imprisonment, the court exercising the power of amendment conferred by secs. 883 and 889 may substitute in lieu of the distress, etc., an award of imprisonment forthwith in case of non-payment of the fine. Ibid.

The court has power to so amend a summary conviction returned on certiorari whether the certiorari is one preliminary to a motion to quash the conviction or is in aid of a writ of habeas corpus. Ibid.

890. Irregularities within the preceding section.—The following matters amongst others shall be held to be within the provisions of the next preceding section:—

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

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

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

2. But nothing in this section contained shall be construed to restrict the generality of the wording of the next preceding section. R.S.C. c. 178, s. 88.

891. Protection of justice whose conviction is quashed.—If an application is made to quash a conviction or order made by a justice, on the ground that such justice has exceeded his jurisdiction, the court or judge to which or whom the application is made, may, as a condition of quashing the same, if the court or judge thinks fit so to do, provide that no action shall be brought against the justice who made the conviction, or against any officer acting under any warrant issued to enforce such conviction or order. R.S.C. c. 178, s. 89.

892. Condition of hearing motion to quash.—This court having authority to quash any conviction, order or other proceeding by or before a justice may prescribe by general order that no motion to quash any conviction, order or other proceeding by or before a justice and brought before such court by certiorari, shall be entertained unless the defendant is shewn to have entered into a recognizance with one or more sufficient sureties, before a justice or justices of the county or place within which such conviction or order has been made, or before a judge or other officer, as may be prescribed by such general order, or to have made a deposit to be prescribed in like manner, with a condition to prosecute such writ of certiorari at his own costs and charges, with effect, without any wilful or affected delay, and, if ordered so to do, to pay the person in whose favour the conviction, order or other proceeding is affirmed, his full costs and charges to be taxed according to the course of the court where such conviction, order or proceeding is affirmed. R.S.C. c. 178, s. 90.

Recognizance or deposit on certiorari.]—On November 17th, 1886, the High Court of Justice of Ontario passed the following general order under the authority of sec. 6 of 49 Vict. (Can.), ch. 49, [R.S.C., 1886, ch. 178, sec. 90, which on the codification of the criminal law was re-enacted as sec. 892 of the Code]:

"Whereas, by the Act passed in the 49th year of Her Majesty's reign, chaptered 49, and intituled, 'An Act to make further provision respecting summary proceedings before justices and other magistrates,' it is enacted as follows:

"SEC. 8.—The second section of the Imperial Act, passed in the fifth year of the reign of His Majesty King George II., and chaptered nineteen, shall no longer apply to any conviction, order or other proceeding by or before a justice of the peace in Canada, but the sixth section of this Act shall be substituted therefor, and the like proceedings may be had for enforcing the condition of a recognizance taken under this Act as might be had for enforcing the condition of a recognizance taken under the said Imperial Act."

"It is therefore ordered, under the authority of the said section, and in pursuance of the terms of the sixth section of the said Act, that no motion

shall be entertained by this court, or by any division of the same, or by any judge of a division sitting for the court, or in chambers, to quash a conviction, order, or other proceeding which has been made by or before a justice of the peace [as defined by the said Act] and brought before the court by certiorari, unless the defendant is shewn to have entered into a recognizance with one or more sufficient sureties in the sum of $100 before a justice or justices of the county, or place, within which such conviction or order has been made, or before a judge of the County Court of the said county, or before a judge of the Superior Court, and which recognizance with an affidavit of the due execution thereof, shall be filed with the registrar of the court in which such motion is made or is pending, or unless the defendant is shewn to have made a deposit of the like sum of $100 with the registrar of the court in which such motion is made, with or upon the condition that he will prosecute such certiorari at his own costs and charges and without any wilful or affected delay, and that he will pay the person in whose favour the conviction, order, or other proceeding is affirmed, his full costs and charges to be taxed according to the course of the court in case such conviction, order or proceeding is affirmed."

This rule of court remains in force as a rule under the Code without being re-passed. R. v. Robinet (1894), 2 Can. Cr. Cas. 382 (Ont.).

In Ontario a surety upon a recognizance filed on a motion to quash a summary conviction, must justify in the sum of $100 over and above any amount for which he may be surety as well as over and above his debts. R. v. Robinet (1894), 2 Can. Cr. Cas. 382.

This decision was not followed in the Territories, it being there held that a rule made under sec. 892 is complied with if the sureties justify as being possessed of property of the amount specified in the rule, and swear that they are worth the amount over and above all their just debts and liabilities, and over and above all exemptions allowed by law. R. v. Ashcroft (1899), 2 Can. Cr. Cas. 385.

A rule of court required that no motion to quash a conviction should be entertained unless the defendant were shewn to have entered into and deposited a recognizance in $300 with one or more sufficient sureties, or to have made a deposit of $200. On a motion to make absolute a rule nisi to quash a certain conviction, a recognizance had been entered into and deposited, but without an affidavit of justification of the sureties or other evidence of their sufficiency. It was held following R. v. Richardson, 17 O.R. 729, that the rule of court had not been complied with and that therefore the rule nisi must be discharged. But $200 having been deposited a day or two before the return day of the rule nisi, with the view of complying with the rule of court, the applicant was allowed to take a new rule nisi in the terms of the one discharged. R. v. Petrie (1889), 1 Terr. L.R. 191; R. v. Abergele (1836), 5 A & E. 795.

Where there is a rule of court that no motion "shall be entertained" to quash a conviction unless the defendant is shewn to have entered into a recognizance with one or more sufficient sureties to prosecute the certiorari (B. C. Rules 1890, p. 145), there must be an affidavit of justification before the court upon which it can judge of the sufficiency of the sureties or the court cannot even adjourn the motion. R. v. Ah Gin (1892), 2 B.C.R. 207.

In the absence of an affidavit of justification to the recognizance the court cannot entertain motions to quash convictions. "The sufficiency of the suretyship is not shewn by the mere production of the recognizance; the court must have some evidence upon which it can say that there were sufficient sureties." R. v. Richardson and R. v. Addison (1889), 17 O.R. 729.

893. Imperial Act, 5 Geo. II., c. 19, s. 2, superseded.—The second section of the Act of the Parliament of the United Kingdom, passed in the fifth year of the reign of His Majesty King George the Second, and chaptered nineteen, shall no longer apply to any conviction, order or other proceeding by or before a justice in Canada, but the next preceding section of this Act shall be substituted therefor, and the like proceedings may be had for enforcing the condition of a recognizance taken under the said section as might be had for enforcing the condition of a recognizance taken under the said Act of the Parliament of the United Kingdom. R.S.C. c. 178, s. 91.

894. Judicial notice of proclamation.—No order, conviction or other proceeding shall be quashed or set aside, and no defendant shall be discharged, by reason of any objection that evidence has not been given of a proclamation or order of the Governor in Council, or of any rules, regulations, or by-laws made by the Governor in Council in pursuance of a statute of Canada, or of the publication of such proclamation, order, rules, regulations or by-laws in the Canada Gazette; but such proclamation, order, rules, regulations and by-laws and the publication thereof shall be judicially noticed. 51 V., c. 45, s. 10.

See Canada Evidence Act secs. 7-11 inclusive.

895. Refusal to quash.—If a motion or rule to quash a conviction, order or other proceeding is refused or discharged, it shall not be necessary to issue a writ of procedendo, but the order of the court refusing or discharging the application shall be a sufficient authority for the registrar or other officer of the court forthwith to return the conviction, order and proceedings to the court or justice from which or whom they were removed, and for proceedings to be taken thereon for the enforcement thereof, as if a procedendo had issued, which shall forthwith be done. R.S.C. c. 178, s. 93.

Where the court granting the certiorari to remove the record from an inferior court has the power to execute the judgment of the inferior court, the record will not be remanded to the inferior court. R. v. Neville, 2 B. & Ad. 299. But where the superior court cannot enforce the execution of the judgment or cannot administer the same justice to the parties as the court below, or where it appears that there was no good cause for removing it the practice formerly was that the court ordered a writ of procedendo to issue to send the case back to the inferior court. R. v. Zickrick (1897), 11 Man. R. 452; R. v. Rushworth, 9 Jur. 161.

This section dispenses with the necessity of that writ when the conviction is affirmed but not otherwise. R. v. Zickrick (1897), 11 Man. R. 452. It is limited also to convictions, orders or proceedings in criminal matters

under Dominion jurisdiction (sec. 840), and applies to offences under provincial laws only in so far as provincial legislation has directed. Where a conviction was quashed on the ground that service of the summons had not been legally effected or waived, the information cannot be returned to the justice under this section to enable him to issue another summons even where it is too late for the prosecutor to lay a second information. R. v. Zickrick (1897), 11 Man. R. 452.

896. Conviction not to be set aside in certain cases.—Whenever it appears by the conviction that the defendant has appeared and pleaded, and the merits have been tried, and the defendant has not appealed against the conviction, where an appeal is allowed, or if appealed against, the conviction has been affirmed, such conviction shall not afterwards be set aside or vacated in consequence of any defect of form whatever, but the construction shall be such a fair and liberal construction as will be agreeable to the justice of the case. R.S.C. c. 178, s. 94.

897. Order as to costs.—If upon any appeal the court trying the appeal orders either party to pay costs, the order shall direct the costs to be paid to the clerk of the peace or other proper officer of the court, to be paid over by him to the person entitled to the same, and shall state within what time the costs shall be paid. R.S.C. c. 178, s. 95.

Proceedings by way of certiorari against a summary conviction do not constitute an "appeal" under this section. R. v. Graham (1898), 1 Can. Cr. Cas. 405 (Ont.).

Where a prosecution is instituted by a police officer in his own name as informant, in respect of an offence against a municipal by-law, the police officer is personally a party both to the proceedings before the magistrate and to the appeal from his decision, and the municipal corporation is not properly named as a party to such appeal, nor can costs be awarded in favour of the corporation. Bothwell v. Burnside (1900), 4 Can. Cr. Cas. 450.

898. Recovery of costs.—If such costs are not paid within the time so limited, and the person ordered to pay the same has not been bound by any recognizance conditioned to pay such costs, the clerk of the peace or his deputy, on application of the person entitled to the costs, or of any person on his behalf, and on payment of any fee to which he is entitled, shall grant to the person so applying, a certificate that the costs have not been paid; and upon production of the certificate to any justice in and for the same territorial division, such justice may enforce the payment of the costs by warrant of distress in manner aforesaid, and in default of distress may commit the

person against whom the warrant has issued in manner hereinbefore mentioned, for any term not exceeding one month, unless the amount of the costs and all costs and charges of the distress and also the costs of the commitment and conveying of the party to prison, if the justice thinks fit so to order (the amount thereof being ascertained and stated in the commitment), are sooner paid. The said certificate shall be in the form PPP, and the warrants of distress and commitment in the forms QQQ and RRR respectively in schedule one to this Act. R.S.C. c. 178, s. 96.

FORM PPP.—

CERTIFICATE OF CLERK OF THE PEACE THAT THE COSTS OF AN APPEAL ARE NOT PAID.

Office of the clerk of the peace for the county of .

Title of the appeal.

I hereby certify that a Court of General Sessions of the Peace, (*or other court discharging the functions of the Court of General Sessions, as the case may be*), holden at , in and for the said county, on last past, an appeal by A. B. against a conviction (*or* order) of J. S., Esquire, a justice of the peace in and for the said county, came on to be tried, and was there heard and determined, and the said Court of General Sessions (*or other court, as the case may be*) thereupon ordered that the said conviction (*or* order) should be confirmed (*or* quashed), and that the said (appellant) should pay to the said (respondent) the sum of , for his costs incurred by him in the said appeal, and which sum was thereby ordered to be paid to the clerk of the peace for the said county, on or before the day of (*instant*), to be by him handed over to the said (respondent), and I further certify that the said sum for costs has not, nor has any part thereof, been paid in obedience to the said order.

Dated at , this day of , one thousand nine hundred and .

G. H.,
Clerk of the Peace.

FORM QQQ.—

WARRANT OF DISTRESS FOR COSTS OF AN APPEAL AGAINST A CONVICTION OR ORDER.

Canada,
Province of , }
County of . }

To all or any of the constables and other peace officers in the said county of .

Whereas (*etc., as in the warrants of distress, DDD or EEE, and to the end of the statement of the conviction or order, and then thus*): And whereas the said A. B. appealed to the Court of General Sessions of the Peace (*or other court discharging the functions of the Court of General Sessions, as the case may be*), for the said county, against the said conviction or order, in which appeal the said A. B. was the appellant, and the said C.D. (*or* J. S., Esquire, the justice of the peace who made the said conviction *or* order) was the respondent, and which said appeal came on to be tried and was heard and determined at the last General Sessions of the Peace (*or other court, as the case may be*) for the said county, holden at , on ; and the said court thereupon ordered that the said conviction (*or* order) should be confirmed (*or* quashed) and that the said (appellant) should pay to the said (respondent) the sum of , for his costs incurred by him in the said appeal, which said sum was to be paid to the clerk of the peace for the said county, on or before the day of , one thousand nine hundred and , to be by him handed over to the said C. D.; and whereas the clerk of the peace of the said county has, on the day of (*instant*), duly certified that the said sum for costs had not been paid: * These are, therefore, to command you, in His Majesty's name, forthwith to make distress of the goods and chattels of the said A. B., and if, within the term of days next after the making of such distress, the said last mentioned sum, together with the reasonable charges of taking and keeping the said distress, are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale to the clerk of the peace for the said county of , that he may pay and apply the same as by law directed; and if no such distress can be found, then to certify the same unto me or any

other justice of the peace for the same county, that such proceeding may be had therein as to law appertain.

Given under my hand and seal this day of , in the year , at , in the county aforesaid.

O. K., [SEAL.]
J. P., (Name of County.)

FORM RRR.—

WARRANT OF COMMITMENT FOR WANT OF DISTRESS IN THE LAST CASE.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of .

Whereas (*etc., as in form QQQ, to the asterisk * and then thus*): And whereas, afterwards, on the day of , in the year aforesaid, I, the undersigned, issued a warrant to all or any of the peace officers in the said county of , commanding them, or any of them, to levy the said sum of , for costs, by distress and sale of the goods and chattels of the said A. B.; And whereas it appears to me, as well by the return to the said warrant of distress of the peace officer who was charged with the execution of the same, as otherwise, that the said peace officer has made diligent search for the goods and chattels of the said A. B., but that no sufficient distress whereon to levy the said sum above mentioned could be found: These are, therefore, to command you, the said peace officer, or any one of you, to take the said A. B., and him safely to convey to the common gaol of the said county of , at , 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 A. B. into your custody in the said common gaol, there to imprison him (and keep him at hard labour) for the term of , unless the said sum and all costs and charges of the said distress (and for the commitment and conveying of the said A. B. to the said common gaol, amounting to the further sum of), are sooner paid unto you, the said keeper; and for 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.

O. K., [SEAL.]
J. P., (Name of County.)

Recovery of costs on appeal.]—The proceedings for enforcement of an order for costs provided by sec. 898 apply only to costs dealt with by a Court of General Sessions on affirming or quashing a conviction or order on appeal to that court, and not to costs in certiorari proceedings. R. v. Graham (1898), 1 Can. Cr. Cas. 405 (Ont.).

Sec. 880 (*e*) and sec. 898 seem somewhat in conflict, as did sec. 27 of the Imperial Act, 11 & 12 Vict., ch. 43, and sec. 5 of the Imperial Act, 12 & 13 Vict., ch. 45; but in Freeman v. Read (1860), 9 C.B.N.S. 301, the court held that the clerk of the peace might grant his certificate that the costs had not been paid whether the person ordered to pay the same had been bound by any recognizance conditioned to pay such costs or not.

Where an appeal to a court of general sessions of the peace from summary conviction is not proceeded with, an order giving costs to the respondent can only be made at the same sittings for which notice of appeal was given; but where an appeal is heard, and determined against the appellant, the formal order need not be drawn up at the same sittings, and the respondent's costs may be taxed nunc pro tunc at the next sittings and included in a formal order then issued in pursuance of the direction therefor made at the previous sittings. Bothwell v. Burnside (1900), 4 Can. Cr. Cas. 450 (Ont.).

Where an appeal from a summary conviction has been heard and determined and a minute made by the chairmain of the sessions dismissing the same with costs and directing the clerk to tax the same, but no formal order was ever drawn up, the clerk's certificate of taxation and a subsequent order of the court of general sessions directing a distress for the costs taxed are irregular, and will be quashed. Ibid.

899. Abandonment of appeal.—An appellant may abandon his appeal by giving to the opposite party notice in writing of his intention six clear days before the sitting of the court appealed to, and thereupon the costs of the appeal shall be added to the sum if any adjudged against the appellant by the conviction or order, and the justice shall proceed on the conviction or order as if there had been no appeal. R.S.O. (1887), c. 74, s. 8.

The party who originally made the complaint need not always continue to be the party respondent to the appeal taken against the conviction; and some other person may take up the prosecution upon the complainant's death and may be held liable to pay costs if the appeal should be successful. Per Lush, J., R. v. Truelove (1880), 5 Q.B.D. 336, 340.

900. Statement of case by justices for review.—In this section the expression "the court" means and includes any superior court of criminal jurisdiction for the province in which the proceedings herein referred to are carried on.

2. Any person aggrieved, the prosecutor or complainant as well as the defendant, who desires to question a conviction, order, determination or other proceeding of a justice under this part, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to such justice to state and

sign a case setting forth the facts of the case and the grounds on which the proceeding is questioned, and if the justice declines to state the case, may apply to the court for an order requiring the case to be stated.

3. The application shall be made and the case stated within such time and in such manner as is, from time to time, directed by rules or orders under s. 533 of this Act.

4. The appellant at the time of making such application, and before a case is stated and delivered to him by the justice, shall in every instance, enter into a recognizance before such justice or any other justice exercising the same jurisdiction, with or without surety or sureties, and in such sum as to the justice seems meet, conditioned to prosecute his appeal without delay, and to submit to the judgment of the court and pay such costs as are awarded by the same; and the appellant shall, at the same time, and before he shall be entitled to have the case delivered to him, pay to the justice such fees as he is entitled to; and the appellant, if then in custody, shall be liberated upon the recognizance being further conditioned for his appearance before the same justice, or such other justice as is then sitting, within ten days after the judgment of the court has been given, to abide such judgment, unless the judgment appealed against is reversed.

5. If the justice is of opinion that the application is merely frivolous, but not otherwise, he may refuse to state a case, and shall on the request of the applicant sign and deliver to him a certificate of such refusal; provided that the justice shall not refuse to state a case where the application for that purpose is made to him by or under the direction of His Majesty's Attorney-General of Canada, or of any province.

6. Where the justice refuses to state a case, it shall be lawful for the appellant to apply to the court, upon an affidavit of the facts, for a rule calling upon the justice, and also upon the respondent, to shew cause why such case should not be stated; and such court may make such rule absolute, or discharge the application, with or without payment of costs, as to the court seems meet; and the justice upon being served with such rule absolute, shall state a case accordingly, upon the appellant entering into such recognizance as hereinbefore provided.

7. The court to which a case is transmitted under the foregoing provisions shall hear and determine the question or questions of law arising thereon, and shall thereupon affirm, reverse or modify the conviction, order or determination in respect of

which the case has been stated, or remit the matter to the justice with the opinion of the court thereon, and may make such other order in relation to the matter, and such orders as to costs, as to the court seems fit; and all such orders shall be final and conclusive upon all parties: Provided always, that any justice who states and delivers a case in pursuance of this section shall not be liable to any costs in respect or by reason of such appeal against his determination.

8. The court for the opinion of which a case is stated shall have power, if it thinks fit, to cause the case to be sent back for amendment; and thereupon the same shall be amended accordingly, and judgment shall be delivered after it has been amended.

9. The authority and jurisdiction hereby vested in the court for the opinion of which a case is stated may, subject to any rules and orders of court in relation thereto, be exercised by a judge of such court sitting in chambers, and as well in vacation as in term time.

10. After the decision of the court in relation to any such case stated for their opinion, the justice in relation to whose determination the case has been stated, or any other justice exercising the same jurisdiction, shall have the same authority to enforce any conviction, order or detemination which has been affirmed, amended or made by such court as the justice who originally decided the case would have had to enforce his determination if the same had not been appealed against; and no action or proceeding shall be commenced or had against a justice for enforcing such conviction, order or determination by reason of any defect in the same.

11. If the court deems it necessary or expedient any order of the court may be enforced by its own process.

12. No writ of certiorari or other writ shall be required for the removal of any conviction, order or other determination in relation to which a case is stated under this section or otherwise, for obtaining the judgment or determination of a superior court on such case under this section.

13. In all cases where the conditions, or any of them, in any recognizance entered into in pursuance of this section have not been complied with, such recognizance shall be dealt with in like manner as is provided by s. 878 with respect to recognizances entered into thereunder.

14. Any person who appeals under the provisions of this section against any determination of a justice from which he is

entitled to an appeal under s. 879 of this Act, shall be taken to have abandoned such last mentioned right of appeal finally and conclusively and to all intents and purposes.

15. Where, by any special Act, it is provided that there shall be no appeal from any conviction or order, no proceedings shall be taken under this section in any case to which such provision in such special Act applies. 53 V., c. 37, s. 28.

The following proposed amendment is now before Parliament (session of 1902) in a bill introduced by Mr. Russell, M.P.:

Sub-section 3 of sec. 900 of the Cr. Code, 1892, is repealed, and the following is substituted therefor;

"The application shall be made and the case stated within such time and in such manner as is from time to time directed by rules or orders under section five hundred and thirty-three of this Act. In default of any such rule or order, and until one is made, the application shall be in writing to the justice and a copy thereof left with him, and may be made at any time within seven clear days from the date of the proceeding to be questioned, and the case shall be stated within three calendar months after the date of the application, and after the recognizance hereinafter referred to has been entered into. The applicant shall within three days after receiving the case transmit it to the court named in the application, first giving notice in writing of such appeal, with a copy of the case as signed and stated, to the other party to the proceeding in which the determination was given."

Stated case.]—Section 900 of the Code makes provision for the review by way of "stated case" of a justice's decision in respect of error of law or excess of jurisdiction, and by its own terms is limited to the questioning of "a conviction, order, determination or other proceeding of a justice *under this part*," i.e., under Part LVIII. of the Code, which part deals with the subject of "summary convictions."

Then by the last section of Part LV., relating to "summary trials," it is enacted that the provisions of Part LVIII. shall not apply to any proceedings under Part LV. This indicates that the procedure by "stated case" does not apply to a conviction made under the "summary trials" procedure of Part LV., notwithstanding the dictum of the court in R. v. Hawes (1900), 4 Can. Cr. Cas. 529 (N.S.).

In R. v. Egan (1896), 1 Can. Cr. Cas. 112 (Man.), it was held by Killam, J., that a person convicted under sec. 783 (*a*) on a similar charge had no right of *appeal*, as the effect of sec. 808 is to prevent the application of any of the provisions of Part LVIII. in which are found the sections as to appeals from summary convictions, to convictions under Part LV. The decision of Wurtele, J., in R. v. Racine (1900), 3 Can. Cr. Cas. 446 (Que.), is to the same effect. The sections as to stating a case being likewise within Part LVIII., the same result would follow.

If, however, the summary trial takes place before *two justices* sitting together a right of appeal is given by sec. 782 (*a*) as amended by 58-59 Vict., ch. 40, "in the same manner as from summary convictions under Part LVIII." and sections 879 et seq. are by it expressly made applicable in that event. This was held in R. v. Nixon (1899), 35 C.L.J. 636 (Ont.), per Ferguson, J., to be an additional reason for holding that there is no right of appeal in other cases of summary trial.

It is to be observed that, although there is no appeal where the proceedings are taken under sec. 783, an appeal by way of reserved case may be had when the magistrate's jurisdiction is dependent upon sec. 785, which now applies to police magistrates of cities and towns in all the provinces (amendment of 1900), but was formerly limited to Ontario.

A person "appeals" when he formally gives notice to the opposite party of his intention to appeal, although he does not in fact comply with the conditions precedent required to bring the appeal on for hearing. Cooksley v. Toomaten Oota (1901), 5 Can. Cr. Cas. 26 (B.C.).

The procedure by way of "stated case" under this section is a form of appeal, and as the application of the Criminal Code to offences under Ontario statutes is declared by the Ontario Summary Convictions Act (R.S.O. 1897, ch. 90, sec. 2,) not to affect "procedure on appeals," there is no jurisdiction to proceed by "stated case" to review a decision of a magistrate in respect of such an offence, except where the constitutionality of Provincial Acts are involved. R.S.O. 1897, ch. 91. The appeal whether of the prosecutor or of the accused is, as regards such offences, to the Court of General Sessions under the provisions of the Ontario Summary Convictions Act. R. v. Robert Simpson Co. (1896), 2 Can. Cr. Cas. 272.

Defendant was convicted before a stipendiary magistrate under sec. 337 of stealing seven trees, the property of the plaintiff. The parties owned and occupied adjoining farms, in the rear of which the lands were covered with wood and the dividing line was not distinct. Defendant, while cutting wood on his own lot, cut seven trees over the line claimed by the plaintiff but within a line which he (defendant) alleged to be the dividing line, and hauled them away. The magistrate found that the criminal intent was proved and that the title to land did not bona fide arise. On a stated case under this section it was held that the conviction was "erroneous in point of law," if the title to land was bona fide in issue, and there was consequently no criminal intent. Robichaud v. La Blanc (1898), 34 C.L.J. 324 (N.B.).

A justice ought not to be ordered to state a case upon the ground that his decision was erroneous in point of law, when he has decided in accordance with a previous decision of the superior court upon the same point which was binding upon him, although it is desired to question such decision from which there was no right of appeal by an appeal to a higher tribunal in the proceedings by stated case. R. v. Shiel (1900), 19 Cox C.C. 507.

Recognizance on stated case.]—A cash deposit cannot be accepted in lieu of a recognizance on an appeal by way of "stated case" from a summary conviction. R. v. Geiser (1901), 5 Can. Cr. Cas. 154 (B.C.).

The recognizance required by Code sec. 900 is a condition precedent to the jurisdiction of the court to hear the appeal. Ibid.

British Columbia.]—All appeals from the verdict, judgment, or ruling of any court or judge having jurisdiction in criminal cases, or from the conviction, order or determination of a justice under Part LVIII. of the Criminal Code shall be by case stated, except where otherwise provided by statute. B.C. Rule 56.

Order XXXIV. of the Supreme Court Rules, as far as the same are applicable, shall apply to a special case under these rules. B.C. Rule 57.

If any justice of the peace declines for the space of one week after being requested, in writing, to state a case, the person aggrieved may apply to the court for an order requiring the case to be stated. B.C. Rule 58.

Every application by a party aggrieved to a justice to state a case shall be made within four days after the order, determination or other proceeding has been made or rendered. B.C. Rule 59.

The appellant at the time of making such application and before a case is stated by the justice, shall enter into a recognizance before some justice of the peace, with or without sureties, in the sum of $100, conditioned to prosecute his appeal without delay and to submit to judgment and pay such costs as shall be awarded by the court, and in default thereof the justices

may proceed and make any such order as if no application for a special case had been made. B.C. Rule 60.

Rules as to time and manner of application.]—The English Summary Jurisdiction Act of 1879, giving a right of appeal by way of stated case, provided that "the application shall be made and the case stated within such time and in such manner as may be from time to time directed by rules under this Act." 42 & 43 Vict. (Imp.), ch. 49, sec. 33. The rule made under it (S. J. Rules, 1886, No. 18), directed that "an application to a court of summary jurisdiction, under sec. 33 of the Summary Jurisdiction Act, 1879, to state a special case shall be made in writing, and a copy left with the clerk of the court." It was held by Lord Coleridge, C.J., and Denman, J., that where an oral application had been made to the justices at the hearing and granted by them, and afterwards a notice was served on the clerk, the justices had no power to state the special case, and the preliminary objection to its being heard was allowed. South Staffordshire Waterworks v. Stone (1887), L.R. 19 Q.B.D. 168.

This decision was approved and followed in Lockhart v. Mayor of St. Albans (1888), 21 Q.B.D. 188, in which no notice had been given to the magistrates themselves, although notice had been served on the magistrate's clerk. The Court of Appeal (Lord Esher, M.R., Lindley, and Lopes, L.JJ.,) held that compliance with the provisions of the rule was a condition precedent to the right of appeal, and that there had been a failure to comply with it, which barred the appeal.

Trimble v. Hill (1879), 5 App. Cas. 342, decides that where a colonial legislature has passed an Act in the same terms as an Imperial statute, and the latter has been authoritatively construed by a Court of Appeal in England, such construction should be adopted by the courts of the colony. See also, on the latter point, Paradis v. R., 1 Can. Exch. R. 191; Hollender v. Ffoulkes, 26 O.R. 61; Butler v. McMicken, 32 O.R. 422.

No other appeal allowed where case stated.]—Under a provincial enactment, similar to sub-sec. (14) of Code sec. 900, providing that a person appealing by way of stated case to a superior court shall be taken to have abandoned his right of appeal to a county court, it was held that the appellant by obtaining a case to be stated elects that mode of appeal and cannot revert to an appeal to the county court on the stated case being dismissed for non-compliance with statutory conditions. Cooksley v. Toomaten Oota (1901), 5 Can. Cr. Cas. 26 (B.C.).

In the case of R. v. Caswell (1873), 33 U.C.Q.B. 303, a notice of appeal to the sessions was given, but was irregular because given for the then next sessions instead of the second sessions thereafter, the conviction having been made within twelve days (now fourteen days, sec. 880 (*a*)) of the next sittings. The statute 33 Vict., ch. 27, sec. 1 (now Code sec. 887), prohibited the allowance of a certiorari if the defendant had appealed from such conviction or order to any court to which an appeal from such conviction or order was authorized by law. The appeal was in consequence not heard, the notice of appeal being held to be inoperative. It was held that there had, in effect, been no appeal and that the right to certiorari had not been taken away. In Cooksley's Case, supra, the granting of the application for a case stated took the place of a notice of appeal; and, in addition, the recognizance was entered into. But if the application for a stated case had been refused, quære whether the application alone would constitute an "appeal" under the provisions of sec. 900. Sub-sec. 6 seems to indicate that the recognizance is operative only upon a case being stated.

Where the grounds taken on a motion in certiorari proceedings to quash a conviction are the same as those taken and disposed of by a single judge on a stated case, the matter is res judicata. R. v. Monaghan (1897), 2 Can. Cr. Cas. 488 (N.W.T.).

901. Tender and payment.—Whenever a warrant of distress has issued against any person, and such person pays or tenders to the peace officer having the execution of the same, the sum or sums in the warrant mentioned, together with the amount of the expenses of the distress up to the time of payment or tender, the peace officer shall cease to execute the same. R.S.C. c. 198, s. 97.

2. Whenever any person is imprisoned for non-payment of any penalty or other sum, he may pay or cause to be paid to the keeper of the prison in which he is imprisoned, the sum in the warrant of commitment mentioned, together with the amount of the costs and charges and expenses therein also mentioned, and the keeper shall receive the same, and shall thereupon discharge the person, if he is in his custody for no other matter. He shall also forthwith pay over any moneys so received by him to the justice who issued the warrant. R.S.C. c. 198, s. 98.

902. Returns respecting convictions and moneys received.—Every justice shall, quarterly, on or before the second Tuesday in each of the months of March, June, September and December in each year, make to the clerk of the peace or other proper officer of the court having jurisdiction in appeal, as herein provided, a return in writing, under his hand, of all convictions made by him, and of the receipt and application by him of the moneys received from the defendants—which return shall include all convictions and other matters not included in some previous return, and shall be in the form SSS in schedule one to this Act.

2. If two or more justices are present and join in the conviction, they shall make a joint return.

3. In the Province of Prince Edward Island such return shall be made to the clerk of the Court of Assize of the county in which the convictions are made, and on or before the fourteenth day next before the sitting of the said court next after such convictions are so made.

4. Every such return shall be made in the said District of Nipissing, in the Province of Ontario, to the clerk of the peace for the county of Renfrew, in the said province. R.S.C. c. 178, s. 99.

5. Every justice, to whom any such moneys are afterwards paid, shall make a return of the receipts and application thereof, to the court having jurisdiction in appeal, as hereinbefore provided—which return shall be filed by the clerk of the peace or

the proper officer of such court with the records of his office. R.S.C. c. 178, s. 100.

6. Every justice, before whom any such conviction takes place, or who receives any such moneys, who neglects or refuses to make such return thereof, or wilfully makes a false, partial or incorrect return, or wilfully receives a larger amount of fees than by law he is authorized to receive, shall incur a penalty of eighty dollars, together with costs of suit, in the discretion of the court, which may be recovered by any person who sues for the same by action of debt or information in any court of record in the province in which such return ought to have been or is made. R.S.C. c. 178, s. 101.

7. One moiety of such penalty shall belong to the person suing, and the other moiety to His Majesty, for the public uses of Canada.

FORM SSS.—

RETURN of convictions made by me (*or* us, *as the case may be*), during the quarter ending , 19 .

Name of the Prosecutor.	Name of the Defendant.	Nature of the Charge.	Date of Conviction.	Name of Convicting Justice.	Amount of Penalty. Fine or Damage.	Time when paid or to be paid to the said Justice.	To whom paid over by the said Justice.	If not paid, why not, and general observations, if any.

J. S., Convicting Justice,
or
J. S. and O. K., Convicting Justices (*as the case may be*).

903. Publication, &c., of returns.—The clerk of the peace of the district or county in which any such returns are made, or the proper officer, other than the clerk of the peace, to whom such returns are made, shall, within seven days after the adjournment of the next ensuing General or Quarter Sessions, or of the term or sitting of such other court as aforesaid, cause the said returns to be posted up in the court house of the district or county, and also in a conspicuous place in the office of such clerk of the peace or other proper officer, for public inspection, and the same shall continue to be so posted up and exhibited until the end of the next ensuing General or Quarter Sessions of the Peace, or of the term or sitting of such other court as aforesaid; and for every schedule so made and exhibited by such clerk or officer, he shall be allowed such fee as is fixed by competent authority. R.S.C. c. 178, s. 103.

2. Such clerk of the peace or other officer of each district or county, within twenty days after the end of each General or Quarter Sessions of the Peace, or the sitting of such court as aforesaid, shall transmit to the Minister of Finance and Receiver-General a true copy of all such returns made within his district or county. R.S.C. c. 178, s. 104.

904. Prosecutions for penalties under section 902.—All actions for penalties arising under the provisions of section 902 shall be commenced within six months next after the cause of action accrues, and the same shall be tried in the district, county or place wherein such penalties have been incurred; and if a verdict or judgment passes for the defendant, or the plaintiff becomes non-suit, or discontinues the action after issue joined, or if, upon demurrer or otherwise, judgment is given against the plaintiff, the defendant shall, in the discretion of the court, recover his costs of suit, as between solicitor and client, and shall have the like remedy for the same as any defendant has by law in other cases. R.S.C. c. 178, s. 102.

905. Remedies saved.—Nothing in the three sections next preceding shall have the effect of preventing any person aggrieved from prosecuting by indictment, any justice, for any offence, the commission of which would subject him to indictment at the time of the coming into force of this Act. R.S.C. c. 178, s. 105.

906. Defective returns.—No return purporting to be made by any justice under this Act shall be vitiated by the fact of its including, by mistake, any convictions or orders had or made before him in any matter over which any Provincial Legislature has exclusive jurisdiction, or with respect to which he acted under the authority of any provincial law. R.S.C. c. 178, s. 106.

907. Certain defects not to vitiate proceedings.—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 section 508 of this Act it may be alleged that "the defendant unlawfully did cut, break, root up and otherwise destroy and damage a tree, sapling or shrub"; and it shall not be 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. R.S.C. c. 178, s. 107.

A charge of stealing "in or from" a building is for one offence only. R. v. Patrick White (1901), 4 Can. Cr. Cas. 430.

As to informations and complaints in matters of summary conviction under Part LVIII., sec. 845, sub-sec. (3), provides that every complaint shall be for one matter of complaint only and not for two or more matters of complaint, and every information shall be for one offence only and not for two or more offences. See note to that section, ante p. 728.

908. Preserving order in court.—Every judge of Sessions of the Peace, chairman of the Court of General Sessions of the Peace, police magistrate, district magistrate or stipendiary magistrate, shall have such and like powers and authority to preserve order in the said courts during the holding thereof, and by the like ways and meanh as now by law are or may be exercised and used in like cases and for the like purposes by any court in Canada, or by the judges thereof, during the sittings thereof. R.S.C. c. 178. s. 109.

Preserving order in justices' court.]—Justices of the peace as such have no power to commit for contempt. Stone's Justices' Manual (1902), 733; Ex parte Hyndman, 2 Times L.R. 345. But a justice may order that a person disturbing the proceedings in his court, and refusing to desist, be removed from the court. Clissold v. Machell, 26 U.C.Q.B. 422; R. v. Webb, ex parte Hawker (1899), referred to in Stone's Manual, p. 734; R. v. Brompton, [1893] 2 Q.B. 195; R. v. Lefroy, L.R. 8 Q.B. 134. If a person uses any disrespectful or unmannerly expressions in the face of the court, or uses any words which directly tend to a breach of the peace, he may be

required to find sureties for his good behaviour. 1 Lev. 107. And if more than one justice is sitting the proceedings against the offender should not be taken by the one specially attacked, but by one of the other justices. R. v. Lee, 12 Mod. 514.

In default of the offender finding sureties for his good behaviour the justice may commit him to prison, but it must clearly appear on the warrant that the committal is for want of sureties and not merely for contempt. Dean's Case, Cro. Eliz. 689.

The power given by sec. 908 to police magistrates and other named officials does not extend to proceedings for contempts committed out of court. Re Scaife, 5 B.C.R. 153.

A barrister and solicitor while acting as counsel for certain persons charged with a misdemeanour before a justice of the peace, holding court under the Summary Convictions Act, was arrested by a constable by the order of the justice, without any formal adjudication or warrant, excluded from the court room, and imprisoned for an alleged contempt and for disorderly conduct in court.

In an action by the counsel against the justice and the constable for assault and false arrest and imprisonment, it was held that the justice had no power summarily to punish for contempt in facie curiæ, at any rate without a formal adjudication and a warrant setting out the contempt. Armour v. Boswell, 6 U.C.O.S. 153, 352, 450, followed; Young v. Saylor, 20 Ont. App. R. 645.

He had the power to remove persons who, by disorderly conduct, obstructed or interfered with the business of the court; but, upon the evidence, the plaintiff there was not guilty of such conduct, and had not exceeded his privilege as counsel for the accused; and the proper exercise of such privilege could not constitute an interruption of the proceedings so as to warrant his extrusion. Ibid.

If the justice had issued his warrant for the commitment of the plaintiff and had stated in it sufficient grounds for his commitment, the court could not have reviewed the facts alleged therein; but, there being no warrant, the justice was bound to establish such facts upon the trial, as would justify his course. Ibid.

(Amendment of 1893).

909. Resistance to execution of process.—Every judge of the Sessions of the Peace, chairman of the Court of General Sessions of the Peace, recorder, police magistrate, district magistrate or stipendiary magistrate, whenever any resistance is offered to the execution of any summons, warrant of execution or other process issued by him, may enforce the due execution of the same by the means provided by the law for enforcing the execution of the process of other courts in like cases. R.S.C. c. 178, s. 110.

PART LIX.

RECOGNIZANCES.

SECT.

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910. Render of accused by surety.—Any surety for any person charged with an indictable offence may, upon affidavit showing the grounds therefor, with a certified copy of the recognizance, obtain from a judge of a superior court or from a judge of a county court having criminal jurisdiction, or in the Province of Quebec, from a district magistrate, an order in writing under his hand to render such person to the common gaol of the county where the offence is to be tried.

2. The sureties, under such order, may arrest such person and deliver him, with the order, to the gaoler named therein, who shall receive and imprison him in the said gaol, and shall be charged with the keeping of such person until he is discharged by due course of law. R.S.C. c. 179, ss. 1 and 2.

As to the right of Speedy Trial under Part LIV. of persons surrendered by their sureties, see sec. 765.

911. Bail after render.—The person rendered may apply to a judge of a superior court, or in cases in which a judge of a county court may admit to bail, to a judge of a county court, to be again admitted to bail, who may, on examination allow or refuse the same, and make such order as to the number of the sureties and the amount of recognizance as he deems meet—which order shall be dealt with in the same manner as the first order for bail, and so on as often as the case requires. R.S.C. c. 179, s. 3.

912. Discharge of recognizance.—On due proof of such render, and certificate of the sheriff, proved by the affidavit of a subscribing witness, that such person has been so rendered, a judge of the superior or county court, as the case may be, shall order an entry of such render to be made on the recognizance by the officer in charge thereof, which shall vacate the recognizance, and may be pleaded or alleged in discharge thereof. R.S.C. c. 179, s. 4.

913. Render in court.—The sureties may bring the person charged as aforesaid into the court at which he is bound to appear, during the sitting thereof, and then, by leave of the court, render him in discharge of such recognizance at any time before trial, and such person shall be committed to gaol, there to remain until discharged by due course of law; but such court may admit such person to bail for his appearance at any time it deems meet. R.S.C. c. 179, s. 5.

914. Sureties not discharged by arraignment or conviction.—The arraignment or conviction of any person charged and bound as aforesaid, shall not discharge the recognizance, but the same shall be effectual for his appearance for trial or sentence, as the case may be; nevertheless the court may commit such person to gaol upon his arraignment or trial, or may require new or additional sureties for his appearance for trial or sentence, as the case may be, notwithstanding such recognizance; and such commitment shall be a discharge of the sureties. R.S.C. c. 179, s. 6.

Where on a trial upon an indictment a verdict of guilty was returned, but a reserved case was granted upon a question of law, and the accused admitted to bail, the condition of the recognizance taken being that the accused would appear at the next sittings of the court "to receive sentence," the condition of the recognizance is not broken if the accused fails to appear after judgment is given on the reserved case quashing the conviction and ordering a new trial. The conviction having been set aside, the accused

was entitled to presume that he would not be called for sentence, and the sureties were not bound for his appearance for any other purpose than to receive sentence. R. v. Hamilton (1899), 3 Can. Cr. Cas. 1 (Man.).

915. Right of surety to render not affected.—Nothing in the foregoing provisions shall limit or restrict any right which a surety now has of taking and rendering to custody any person charged with any such offence, and for whom he is such surety. R.S.C. c. 179, s. 7.

916. Entry of fines, &c., on the record and recovery thereof.—Unless otherwise provided, all fines, issues, amercements and forfeited recognizances, the disposal of which is within the legislative authority of the Parliament of Canada, set, imposed, lost or forfeited before any court of criminal jurisdiction, shall, within twenty-one days after the adjournment of such court, be fairly entered and extracted on a roll by the clerk of the court, or in case of his death or absence, by any other person, under the direction of the judge who presided at such court, which roll shall be made in duplicate and signed by the clerk of the court, or in case of his death or absence, by such judge.

(Amendment of 1900.)

2. If such court is a superior court, having criminal jurisdiction, one of such rolls shall be filed with the clerk, prothonotary, registrar or other proper officer—

(*a*) in the Province of Ontario, of the High Court of Justice;

(*b*) in the Provinces of Nova Scotia, New Brunswick and British Columbia, of the Supreme Court of the province;

(*c*) in the Province of Prince Edward Island, of the Supreme Court of Judicature of that province;

(*d*) in the Province of Manitoba, of the Court of King's Bench of that province; and

(*e*) in the North-West Territories, of the Supreme Court of the said Territories,—

on or before the first day of the term next succeeding the court by or before which such fines or forfeitures were imposed or forfeited.

3. If such court is a Court of General Sessions of the Peace, or a county court, one of such rolls shall remain deposited in the office of the clerk of such court.

4. The other of such rolls shall, as soon as the same is prepared, be sent by the clerk of the court making the same, or in case of his death or absence, by such judge as aforesaid, with a writ of fieri facias and capias, according to the form TTT in schedule one to this Act, to the sheriff of the county in and for which such court was holden; and such writ shall be authority to the sheriff for proceeding to the immediate levying and recovering of such fines, issues, amercements and forfeited recognizances, on the goods and chattels, lands and tenements of the several persons named therein, or for taking into custody the bodies of such persons respectively, in case sufficient goods and chattels, lands and tenements cannot be found, whereof the sums required can be made; and every person so taken shall be lodged in the common gaol of the county, until satisfaction is made, or until the court into which such writ is returnable, upon cause shown by the party, as hereinafter mentioned, makes an order in the case, and until such order has been fully complied with.

5. The clerk of the court shall, at the foot of each roll made out as herein directed, make and take an affidavit in the following form, that is to say:

"I, A. B. (*describing his office*), make oath that this "roll is truly and carefully made up and examined, and "that all fines, issues, amercements, recognizances and "forfeitures which were set, lost, imposed or forfeited, at "or by the court therein mentioned, and which, in right "and due course of law, ought to be levied and paid, are, "to the best of my knowledge and understanding, inserted "in the said roll; and that in the said roll are also con- "tained and expressed all such fines as have been paid to "or received by me, either in court or otherwise, without "any wilful discharge, omission, misnomer or defect what- "soever. So help me God";

Which oath any justice of the peace for the county is hereby authorized to administer. R.S.C. c. 179, ss. 8, 9 and 15.

FORM TTT.—

WRIT OF FIERI FACIAS.

Edward the Seventh, by the Grace of God, &c.

To the sheriff of , Greeting:

You are hereby commanded to levy of the goods and chattels, lands and tenements, of each

of the persons mentioned in the roll or extract to this writ annexed, all and singular the debts and sums of money upon them severally imposed and charged, as therein is specified; and if any of the said several debts cannot be levied by reason that no goods or chattels, lands or tenements can be found belonging to the said persons respectively, then, and in all such cases, that you take the bodies of such persons, and keep them safely in the gaol of your county, there to abide the judgment of our court (*as the case may be*) upon any matter to be shown by them, respectively, or otherwise to remain in your custody as aforesaid, until such debt is satisfied, unless any of such persons respectively gives sufficient security for his appearance at the said court, on the return day hereof, for which you will be held answerable; and what you do in the premises make appear before us in our court (*as the case may be*), on the day of term next, and have then and there this writ. Witness &c., G. H., clerk (*as the case may be*).

See sec. 926 making special provisions as to the Province of Quebec. By that section sec. 916 is declared not to apply to that Province.

Where a convicted person, instead of being sentenced is discharged from custody upon entering into a recognizance with sureties to appear and receive judgment when called on, it is only on motion of the Crown that the recognizance can be estreated, or judgment moved against him. R. v. Young (1901), 4 Can. Cr. Cas. 580 (Ont.).

917. Officer to prepare lists of persons under recognizance making default.—If any person bound by recognizance for his appearance (or for whose appearance any other person has become so bound) to prosecute or give evidence on the trial of any indictable offence, or to answer for any common assault, or to the articles of the peace, makes default, the officer of the court by whom the estreats are made out, shall prepare a list in writing, specifying the name of every person so making default, and the nature of the offence in respect of which such person, or his surety, was so bound, together with the residence, trade, profession or calling of every such person and surety—and shall, in such list, distinguish the principals from the sureties, and shall state the cause, if known, why such person

did not appear, and whether, by reason of the non-appearance of such person, the ends of justice have been defeated or delayed. R.S.C. c. 179, s. 10.

918. Proceeding on forfeited recognizance not to be taken except on order of judge, &c.—Every such officer shall, before any such recognizance is estreated, lay such list before the judge or one of the judges who presided at the court, or if such court was not presided over by a judge, before two justices of the peace who attended at such court, and such judge or justices shall examine such list, and make such order touching the estreating or putting in process any such recognizance as appears just, subject, in the Province of Quebec, to the provisions hereinafter contained; and no officer of any such court shall estreat or put in process any such recognizance without the written order of the judge or justices of the peace before whom respectively such list has been laid. R.S.C. c. 179, s. 11.

Estreating recognizance.]—This section applies only to recognizances to appear and prosecute, or to give evidence, etc., (see sec. 917), and does not apply to a recognizance whereby the bail became bound for the appearance of their principal to stand his trial upon an indictment other than for common assault. Re Talbot's Bail (1892), 23 O.R. 65.

The proceedings to collect a debt due to the Crown under a recognizance after estreat are civil and not criminal proceedings. Re Talbot's Bail (1892), 23 O.R. 65.

British Columbia.]—No recognizance shall henceforth be forfeited or estreated without the order of the court or a judge, nor unless an order or notice shall have been previously served upon the parties by whom such recognizances shall have been given, calling upon them to perform the conditions thereof, and no default shall be considered to be made in performing the conditions of a recognizance by reason of the trial of any indictment or presentment, or the argument of any order or conviction or other proceeding having stood over, where such conviction has been made a remanet, or such indictment or order has stood over by order of the court, or by consent in writing of the parties. B.C. Rule 43.

Every recognizance to appear and answer to any indictment found in the Supreme Court or in the County Judges' Criminal Court, or to any ex-officio or criminal information shall, unless the court or a judge shall by order dispense therewith, contain besides any other condition which may be imposed, a condition that the defendant shall personally appear from day to day on the trial of such indictment or information and not depart until he shall be discharged by the court before whom such trial shall be had. B.C. Rule 44.

Whenever it has been made to appear to the court or a judge, that a party has made default in performing the condition of the recognizance into which he has entered, the court or a judge, upon notice to the defendant and his sureties, if any, may order such recognizance to be estreated without issuing any writ of scire facias. B.C. Rule 45.

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.

In summary convictions under sec. 878 of the Cr. Code, the certificate of default of appearance, as in the preceding rule, shall be transmitted by the justice of the peace to the clerk of the County Court having jurisdiction at the place wherein such recognizance is taken, and be proceeded upon by order of the County Court judge, if he thinks proper, in like manner as other recognizances. B.C. Rule 47.

919. Recognizance need not be estreated in certain cases.—Except in the cases of persons bound by recognizance for their appearance, or for whose appearance any other person has become bound to prosecute or give evidence on the trial of any indictable offence, or to answer for any common assault, or to articles of the peace, in every case of default whereby a recognizance becomes forfeited, if the cause of absence is made known to the court in which the person was bound to appear, the court, on consideration of such cause, and considering also, whether, by the non-appearance of such person the ends of justice have been defeated or delayed, may forbear to order the recognizances to be estreated, and with respect to all recognizances estreated, if it appears to the satisfaction of the judge who presided at such court that the absence of any person for whose appearance any recognizance was entered into, was owing to circumstances which rendered such absence justifiable, such judge may make an order directing that the sum forfeited upon such estreated recognizance shall not be levied.

2. The clerk of the court shall, for such purpose, before sending to the sheriff any roll, with a writ of fieri facias and capias, as directed by section 916, submit the same to the judge who presided at the court, and such judge may make a minute on the said roll and writ of any such forfeited recognizance and fines as he thinks fit to direct not to be levied; and the sheriff shall observe the direction in such minute written upon such roll and writ, or endorsed thereon, and shall forbear accordingly to levy any such forfeited recognizance or fine. R.S.C. c. 179, ss. 12 and 13.

By sec. 926 it is enacted that the provisions of secs. 916 and 919 to 924, both inclusive, shall not apply to the province of Quebec, and in lieu thereof the provisions of sec. 926 shall apply to that province.

920. Sale of lands by sheriff under estreated recognizance.—If upon any writ issued under section 916 the sheriff takes lands or tenements in execution, he shall advertise the same in like manner as he is required to do before the sale of lands in execution in other cases; and no sale shall take place in less than twelve months from the time the writ came to the hands of the sheriff. R.S.C. c. 179, s. 14.

921. Discharge from custody on giving security.—If any person on whose goods and chattels a sheriff, bailiff, or other officer, is authorized to levy any such forfeited recognizance, gives security to the said sheriff or other officer for his appearance at the return day mentioned in the writ, in the court into which such writ is returnable, then and there to abide the decision of such court, and also to pay such forfeited recognizance, or sum of money to be paid in lieu or satisfaction thereof, together with all such expenses as are adjudged and ordered by the court, such sheriff or officer shall discharge such person out of custody, and if such person does not appear in pursuance of his undertaking, the court may forthwith issue a writ of fieri facias and capias against such person and the surety or sureties of the person so bound as aforesaid. R.S.C. c. 179, s. 16.

922. Discharge of forfeited recognizance. — The court, into which any writ of fieri facias and capias issued under the provisions of this part is returnable, may inquire into the circumstances of the case, and may in its discretion, order the discharge of the whole of the forfeited recognizance, or sum of money paid or to be paid in lieu or satisfaction thereof, and maks such order thereon as to such court appears just; and such order shall accordingly be a discharge to the sheriff, or to the party, according to the circumstances of the case. R.S.C. c. 179, s. 17.

An order made under sec. 922 for the discharge of a forfeited recognizance is a civil and not a criminal proceeding. The discretionary order for the discharge of a forfeited recognizance authorized by this section to be made by the court into which any writ of fieri facias and capias issued under part LIX. of the Code is returnable, must be made by the court en banc, and not by a single judge. Re McArthur's Bail (1897), 3 Can. Cr. Cas. 195 (N.W.T.).

923. Return of writ by sheriff.—The sheriff, to whom any writ is directed under this Act, shall return the same on the day on which the same is made returnable, and shall state, on the back of the roll attached to such writ, what has been

done in the execution thereof; and such return shall be filed in the court into which such return is made. R.S.C. c. 179, s. 18.

924. Roll and return to be transmitted to Minister of Finance.—A copy of such roll and return, certified by the clerk of the court into which such return is made, shall be forthwith transmitted to the Minister of Finance and Receiver-General, with a minute thereon of any of the sums therein mentioned, which have been remitted by order of the court, in whole or in part, or directed to be forborne, under the authority of section 919. R.S.C. c. 179, s. 19.

925. Appropriation of moneys collected by sheriff.—The sheriff or other officer shall, without delay, pay over all moneys collected under the provisions of this part by him, to the Minister of Finance and Receiver-General, or other person entitled to receive the same. R.S.C. c. 179, s. 20.

926. In Quebec Province.—The provisions of sections 916 and 919 to 924, both inclusive, shall not apply to the Province of Quebec, and the following provisions shall apply to that Province only:—

2. Whenever default is made in the condition of any recognizance lawfully entered into or taken in any criminal case, proceeding or matter in the Province of Quebec, within the legislative authority of the Parliament of Canada, so that the penal sum therein mentioned becomes forfeited and due to the Crown, such recognizance shall thereupon be estreated or withdrawn from any record or proceeding in which it then is—or where the recognizance has been entered into orally in open court—a certificate or minute of such recognizance, under the seal of the court, shall be made from the records of such court;

(*a*) such recognizance, certificate or minute, as the case may be, shall be transmitted by the court, recorder, justice of the peace, magistrate or other functionary before whom the cognizor, or the principal cognizor, where there is a surety or sureties, was bound to appear, or to do that, by his default to do which the condition of the recognizance is broken, to the Superior Court in the district in which the place where such default was made is included for civil purposes, with the certificate of the court, recorder, justice of the peace, magistrate, or other functionary as aforesaid, of the breach of the condition of such recognizance, of which

and of the forfeiture to the Crown of the penal sum therein mentioned, such certificate shall be conclusive evidence;

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

(*c*) such execution shall issue upon fiat or præcipe of the Attorney-General, or of any person thereunto authorized in writing by him; and the Crown shall be entitled to the costs of execution and to costs on all proceedings in the case subsequent to execution, and to such costs, in the discretion of the court, for the entry of the judgment, as are fixed by any tariff.

(Amendment of 1894.)

(*d*) The cognizor shall be liable to coercive imprisonment for the payment of the judgment and costs.

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

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

(*g*) On petition of the cognizor, of which notice shall be given to the clerk of the Crown of the district, the court may inquire into the circumstances of the case, and may, in its discretion, order the discharge of the amount for which he is liable, or make such order with respect thereto and to

his imprisonment as may appear just, and such order shall be carried out by the sheriff.

3. Nothing in this section contained shall prevent the recovery of the sum forfeited by the breach of any recognizance from being recovered by suit in the manner provided by law, whenever the same cannot, for any reason, be recovered in the manner provided in this section;

(*a*) in such case the sum forfeited by the non-performance of the conditions of such recognizance shall be recoverable, with costs, by action in any court having jurisdiction in civil cases to the amount, at the suit of the Attorney-General of Canada or of Quebec, or other person or officer authorized to sue for the Crown; and in any such action it shall be held that the person suing for the Crown is duly empowered so to do, and that the conditions of the recognizance were not performed, and that the sum therein mentioned is, therefore, due to the Crown, unless the defendant proves the contrary.

(Amendment of 1894.)

(*b*) the cognizor for the recovery of the judgment in any such action shall be liable to coercive imprisonment in the same manner as a surety is in the case of judicial suretyship in civil matters.

4. In this section, unless the context otherwise requires, the expression "cognizor" includes any number of cognizors in the same recognizance, whether as principals or sureties.

5. When a person has been arrested in any district for an offence committed within the limits of the Province of Quebec, and a justice of the peace has taken recognizances from the witnesses heard before him, or another justice of the peace, for their appearance at the next session or term of the court of competent criminal jurisdiction, before which such person is to undergo his trial, there to testify and give evidence on such trial, and such recognizances have been transmitted to the office of the clerk of such court, the said court may proceed on the said recognizances in the same manner as if they had been taken in the district in which such court is held. R.S.C. c. 179, ss. 21, 22 and 23.

Where there are several cognizors the goods and lands of all of them must be proceeded against before enforcing the default by personal arrest of any of them. R. v. Ferris (1895), 9 Que. S.C. 376.

It is not essential to the validity of a recognizance that it should be signed by the cognizor. R. v. Corbett (1894), 7 Que. S.C. 465.

PART LX.

FINES AND FORFEITURES.

(Amendment of 1900.)

927. Application of fines, etc.—Whenever no other provision is made by any law of Canada for the application of any fine, penalty or forfeiture imposed for the violation of any such law or of the proceeds of an estreated recognizance, the same recovered, to be by him paid over to the municipal or local authority, if any, which wholly or in part bears the expenses of administering the law under which the same was imposed or recovered, or to be applied in any other manner deemed best adapted to attain the objects of such law and secure its due administration, except that—

(*a*) all fines, penalties and forfeitures imposed in respect of the breach of any of the revenue laws of Canada, or imposed upon any officer or employee of the Government of Canada in respect of any breach of duty or malfeasance in his office or employment, and the proceeds of all recognizances estreated in connection with proceedings for the prosecution of persons charged with such breaches or malfeasance, and

(*b*) all fines, penalties and forfeitures imposed for whatever cause in any proceeding instituted at the instance of the Government of Canada or of any department thereof in which that Government bears the cost of prosecution, and the proceeds of all recognizances estreated in connection with such proceedings, shall belong to His Majesty for the public uses of Canada, and shall be paid by the magistrate or officer receiving the same to the Receiver-General and form part of the Consolidated Revenue Fund of Canada.

Provided that nothing in this section contained shall affect any right of a private person suing as well for His Majesty as for himself, to the moiety of any fine, penalty or forfeiture recovered in his suit.

Secs. 806 and 827 which made partial provision in regard to the application of fines were repealed on the passing of this amendment, and this general provision is inserted to cover all fines, penalties and forfeitures in respect of any laws of Canada.

928. Application of fines, &c., by order in council.—The Governor in Council may from time to time direct that any fine, penalty or forfeiture, or any portion thereof, which would otherwise belong to the Crown for the public uses of Canada, be paid to any provincial, municipal or local authority, which wholly or in part bears the expenses of administering the law under which such fine, penalty or forfeiture is imposed, or that the same be applied in any other manner deemed best adapted to attain the objects of such law, and to secure its due administration. R.S.C. c. 180, s. 3.

929. Recovery of penalty or forfeiture.—Whenever any pecuniary penalty or any forfeiture is imposed for any violation of any Act, and no other mode is prescribed for the recovery thereof, such penalty or forfeiture shall be recoverable or enforceable, with costs, in the discretion of the court, by civil action or proceeding at the suit of His Majesty only, or of any private party suing as well for His Majesty as for himself—in any form allowed in such case by the law of that province in which it is brought—before any court having jurisdiction to the amount of the penalty in cases of simple contract—upon the evidence of any credible witness other than the plaintiff or party interested; and if no other provision is made for the appropriation of any penalty or forfeiture so recovered or enforced, one moiety shall belong to His Majesty and the other moiety shall belong to the private party suing for the same, if any, and if there is none, the whole shall belong to His Majesty. R.S.C. c. 180, s. 1.

930. Limitation of actions, &c.—No action, suit or information shall be brought or laid for any penalty or forfeiture under any such Act except within two years after the cause of action arises, or after the offence is committed, unless the time is otherwise limited by such Act. R.S.C. c. 180, s. 5.

TITLE VIII.

PROCEEDINGS AFTER CONVICTION.

PART LXI.

PUNISHMENTS GENERALLY.

SECT.

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931. Punishment after conviction only.—Whenever a person doing a certain act is declared to be guilty of any offence, and to be liable to punishment therefor, it shall be understood that such person shall only be deemed guilty of such offence, and liable to such punishment, after being duly convicted of such act. R.S.C. c. 181, s. 1.

Procedure by habeas corpus.]—The very name and tenor of the writ of habeas corpus indicates what, and what only, can be done under it. The writ is called the writ of habeas corpus cum causâ, that is to say, its tenor is to direct the officer to produce before the judge or court the body of the prisoner, together with the cause which he has for detaining him. Therefore, the only consideration which, on the return to the writ of habeas corpus, can be entered upon by the court or judge is the sufficiency of the commitment. If the officer returns to the writ a good commitment, whether it is in pursuance of a sentence of a common law court, that is a sentence following a conviction by a jury, or whether it is a commitment following a summary adjudication by a magistrate under a statutory jurisdiction, in either case that is conclusive. Re Trepanier (1885), 12 Can. S.C.R. 111, 125, per Strong, J.

In the absence of an affidavit by the prisoner or evidence shewing that he is so coerced as to be unable to make an affidavit, the application for the writ cannot be entertained. Re Parker, 5 M. & W. 32; Re Ross, 3 Ont. Pr. R. 301; R. v. Blach, 18 March, 1899, per Street, J.

On a petition for habeas corpus complaining of an illegal commitment, there should be produced a copy of the commitment or an affidavit that it was applied for and refused. Ex p. Pollock (1881), Ramsay's Cas. (Que.) 187.

Affidavits used in applications on the Crown side of the court must not be sworn before the prosecutor or his attorney. R. v. Marsh (1886), 25 N.B.R. 370; Gude's Crown Prac. 1.

It is a usual, convenient and established practice that a rule nisi to shew cause why a writ of habeas corpus should not issue should also require cause to be shewn why, in the event of the rule being made absolute, the prisoner should not be discharged without the actual issue of the writ of habeas corpus and without his being personally brought before the court, but, in order that the rule may be made absolute in this form, the magistrate, the keeper of the prisoner, and the prosecutor should all be served with the rule nisi, or at least be represented on its return. R. v. Farrar (1890), 1 Terr. L.R. 306; Ex parte Jacklin (1844), 13 L.J.M.C. 139; Re Bull (1846), 1 Saunders & Cole 141; Ex parte Eggington (1854), 2 E. & B. 717.

A person imprisoned may make fresh application for a writ of habeas corpus to every judge or superior court in turn, who are each bound to consider the question independently. Re George Bowack (1892), 2 B.C.R. 216, per Walkem, J.; Ex parte Partington 13 M. & W. 679.

Habeas corpus proceedings do not lie to inquire into the validity of a conviction made at a County Judge's Criminal Court as the latter is a court of record. R. v. Murray (1897), 1 Can. Cr. Cas. 452 (Ont.).

A habeas corpus will not be granted to bring up a prisoner who is under sentence upon a conviction for a criminal offence at the sessions. R. v. Crabbe (1854), 11 U.C.Q.B. 447.

The court cannot on a writ of habeas corpus revise on its merits the decision of the judge who has pronounced the conviction, nor adjudge on the culpability of the petitioner. R. v. Bougie (1899), 3 Can. Cr. Cas. 487 (Que.).

If the record of a superior court, produced on an application for a writ of habeas corpus, contains the recital of facts requisite to confer jurisdiction, such recital is conclusive and cannot be contradicted by extrinsic evidence. Re R. E. Sproule (1886), 12 Can. S.C.R. 140.

A return made by a sheriff to a writ of habeas corpus need not necessarily be made over the sheriff's signature and is sufficient if actually written by him or under his direction. Re Sproule (1886), 12 Can. S.C.R. 140.

If the defendant is remanded upon the first commitment when brought up on habeas corpus, and nothing has taken place equivalent to quashing the conviction, an amended conviction may be returned by the magistrate, and it may, if valid in itself, be used as a defence to an action brought against the magistrate for false imprisonment. Charter v. Graeme (1849), 13 Q.B. 216, 234.

The corrected statement must be conformable to the facts as they really took place, and the magistrates are liable, if they make a false return. Paley on Convictions, 7th ed., 235; R. v. Simpson, 10 Mod. 382.

Where the warrant of commitment recited a conviction for an alleged offence in January, 1888, and the conviction returned under a writ of certiorari in aid of habeas corpus proceedings, properly recited that it was for an offence committed in January, 1887, it was held to be the proper procedure to enlarge the habeas corpus proceedings so as to enable the magistrate to file a fresh warrant in conformity with the conviction returned. R. v. Lavin (1888), 12 Ont. Prac. 642 (MacMahon, J.). It is to be assumed prima facie that the commitment correctly recites the conviction, and those alleging it to be different are to bring the conviction into court. Ex parte Reynolds, 8 Jurist 192; Arscott v. Lilley, 11 Ont. R. 153, 165, 14 Ont. App. 297. So, if the magistrates are served with notice of motion for a prisoner's discharge from custody on the ground that the commitment set out in the return to a writ of habeas corpus was bad on the face of it, and although appearing by counsel do not produce the conviction, it is said that the defendant should not be held in custody under a commitment bad upon its face, nor the motion adjourned to give an opportunity to return a valid

conviction to accord with which the commitment might be amended. R. v. Timson (1870), L.R. 5 Exch. 257.

Where the warrant of arrest embodied in the return to a habeas corpus, on its face shews jurisdiction in the magistrate, affidavits are not admissible to controvert such fact if the offence charged be a criminal one. R. v. Defries (1894), 1 Can. Cr. Cas. 207 (Ont.).

Affidavits are not receivable which merely go to sustain objections as to the conduct of the magistrate in dealing with the case before him over which he had jurisdiction. R. v. Munro (1864), 24 U.C.Q.B. 44.

But a collateral extrinsic fact, confessing and avoiding the disputed order may be proved on affidavit to shew want of jurisdiction. Re Clarke (1842), 2 Q.B. 619, 634; R. v. Justices of Somersetshire, 5 B. & C. 816.

Proof by affidavit is admissible in habeas corpus proceedings to shew that the commitment took place on a Sunday, as proving an extrinsic fact in confession and avoidance of, but not contradicting, the return. R. v. Cavelier (1896), 1 Can. Cr. Cas. 134 (Man.).

A prisoner in custody under a verbal remand of a justice of the peace on a preliminary examination for an alleged offence, may be discharged on habeas corpus by a superior court if the information be so uncertain in its terms that it cannot be said to charge an offence known to the law, ex. gr. that the accused did counsel and procure a person named to violate the Liquor License Act (or the Customs Act or the Criminal Code) without further specifying the offence. R. v. Holley (1893), 4 Can. Cr. Cas. 510 (N.S.).

The 6th sec. of the Habeas Corpus Act, 31 Car. II., ch. 2, has no application to a case in which the prisoner is confined upon a warrant in execution. Arscott v. Lilley (1886), 11 O.R. 153, 179.

In Ontario it has been held that the fact that in the margin of the writ of habeas corpus it was marked "per 33, Car. II." does not prevent the judge from acting under either the Ontario Habeas Corpus Act or at common law. R. v. Arscott (1885), 9 O.R. 541.

The Ontario Habeas Corpus Act (originally 29-30 Vict. (1866), ch. 45), was taken from the Habeas Corpus Act of 56 Geo. III., ch. 100 (1816). R. v. St. Clair (1900), 3 Can. Cr. Cas. 551; In re Melina Trepanier (1885), 12 Can. S.C.R. 111, and R. v. Mosier (1867), 4 Ont. Pr. 64, and it is doubted whether it applies to criminal matters. Ibid; Carus Wilson's Case (1845), 7 Q.B. 984, 1010.

An application to the court to quash a writ of habeas corpus as improvidently issued may be entertained in the absence of the prisoner. Re R. E. Sproule (1886), 12 Can. S.C.R. 140.

Under ch. 95 of the Revised Statutes of Lower Canada of 1861, which is still in force in the province of Quebec the Superior Court has jurisdiction to issue a writ of habeas corpus, and decide upon it upon the petition of a person kept in jail in virtue of a conviction in a criminal matter. The court cannot on a writ of habeas corpus revise on its merits the decision of the judge who has pronounced the conviction, nor adjudge on the culpability of the petitioner. R. v. Bougie (1899), 3 Can. Cr. Cas. 487.

The jurisdiction of the Superior Courts of law in England to issue a writ of habeas corpus to Canada, was held not to have been taken away by the creation of an independent legislature in Canada. Ex parte Anderson (1860), 3 E. & E. 487, cited by Adam Wilson, J., in R. v. Amer (1877), 42 U.C.Q.B. at p. 395.

The court may on certiorari amend a summary conviction under the powers conferred by secs. 883 and 889 whether the certiorari is one preliminary to a motion to quash the conviction or is in aid of a writ of habeas corpus. R. v. Murdock (1900), 4 Can. Cr. Cas. 82 (Ont. C.A.).

Discharge upon terms.]—The court may as a condition to a prisoner's discharge impose the term that he shall undertake that no action shall be

brought by him against any person in respect of the prosecution and conviction or of his imprisonment thereunder. R. v. Horton (1897), 3 Can. Cr. Cas. 84 (N.S.).

A warrant having been issued for the arrest of Mrs. Quirke for non-payment of a fine, for breach of the Canada Temperance Act, her daughter disguised herself as her mother. The officer being deceived, arrested the daughter and lodged her in gaol. A writ of habeas corpus having been obtained, an order was granted discharging prisoner and exonerating those implicated in her arrest. Ex p. Quirke (1896), 32 C.L.J. 779.

In discharging a prisoner in habeas corpus proceedings under ch. 181, Revised Statutes of Nova Scotia, an order of protection in respect of a civil action by the prisoner, can be made only in favour of the gaoler and not in favour of the magistrate and prosecutor. R. v. Keeping (1901), 4 Can. Cr. Cas. 494 (N.S.).

Habeas Corpus jurisdiction of the Supreme Court of Canada.]—By sec. 23 of the Supreme Court Act R.S.C. 1886, ch. 135, it is provided that the Supreme Court of Canada shall have, hold and exercise an appellate, criminal as well as civil jurisdiction. And by sec. 32 of the same statute "Every judge of the court shall have concurrent jurisdiction with the courts or judges of the several Provinces, to issue the writ of habeas corpus ad subjiciendum, for the purpose of an inquiry into the cause of commitment, in any criminal case under any Act of the Parliament of Canada, but such judge shall not have such jurisdiction in habeas corpus matters arising out of any claim for extradition made under any treaty. If the judge refuses the writ or remands the prisoner, an appeal shall lie to the court."

In any habeas corpus matter before a judge of the Supreme Court, or on any appeal to the Supreme Court, in any habeas corpus matter, the court or judge has the same power to bail, discharge or commit the prisoner or person, or to direct him to be detained in custody or otherwise to deal with him as any court, judge or justice of the peace having jurisdiction in any such matters in any Province of Canada. R.S.C., ch. 135, sec. 33.

Nor shall an appeal be allowed in any case of proceedings for or upon a writ of habeas corpus arising out of any claim for extradition made under any treaty. Sec. 31 S. C. Act.

A judge of this court, Supreme Court of Canada, sitting in chambers, on the return to a writ of habeas corpus, if a proper commitment is returned, may remand the prisoner, or, if the prisoner appears to be only committed for trial, and if the depositions can be got before him without a writ of certiorari (which there is no jurisdiction to issue to bring up the proceedings before a single judge), may order the prisoner to be bailed, but that is the limit of the jurisdiction under a writ of habeas corpus so issued. Per Strong, J., in Re Trepanier (1885), 12 Can. S.C.R. 111, 129.

The jurisdiction of a judge of the Supreme Court of Canada in matters of habeas corpus in any criminal case under any statute of Canada is limited to an inquiry into the cause of commitment as disclosed by the warrant of commitment. Ex parte Macdonald (1896), 3 Can. Cr. Cas. 10 (Can.).

Its jurisdiction in matters of habeas corpus is not an appellate jurisdiction over provincial courts, nor does it extend further than to give such judge equal and co-ordinate power with a judge of the provincial court. R. v. Patrick White (1901), 4 Can. Cr. Cas. 430, per Sedgewick, J. (S.C. Can.).

Where the only ground is that the magistrate erred on the facts and that the evidence did not justify the conclusion as to the guilt of the prisoner arrived at by the magistrate, the Supreme Court of Canada has no jurisdiction to go behind the conviction and inquire into the merits of the case by the use of the writ of habeas corpus. Re Trepanier (1885), 12 Can. S.C.R. 113. But if the conviction shews a want of jurisdiction, or if it be

shewn that the magistrate had no jurisdiction, it would be a nullity, and the court would discharge the prisoner, because, in such a case he could not be held by process of any legal tribunal. Ibid.

932. Degrees in punishment.—Whenever it is provided that the offender shall be liable to different degrees or kinds of punishment, the punishment to be inflicted shall, subject to the limitations contained in the enactment, be in the discretion of the court or tribunal before which the conviction takes place. R.S.C. c. 181, s. 2.

This provision was first enacted in 1869 by sec. 1 of the Statute 32-33 Vict., ch. 29, and no similar enactment is to be found in the English or in the American statutes. Under this provision where a statute prescribes as the punishment for an offence both fine and imprisonment, the court which convicts has the right in its discretion to impose either a fine alone or an imprisonment alone or both, unless the statute declares a contrary intention and expressly overrides the general rule contained in this section. R. v. Robidoux (1898), 2 Can. Cr. Cas. 19 (Que.).

933. Liability under different provisions.—Whenever any offender is punishable under two or more Acts, or two or more sections of the same Act, he may be tried and punished under any of such Acts or sections; but no person shall be twice punished for the same offence. R.S.C. c. 181, s. 3.

When a statute makes that unlawful which was lawful before, and appoints a specific remedy, that remedy may be pursued and no other; and where an offence is not so at common law, but made an offence by act of parliament an indictment will lie where there is a substantive prohibitory clause in such act of parliament, though there be afterwards a particular provision and a particular remedy. When a new offence is created by an act of parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he may proceed on the prior clause, on the ground of its being an indictable offence. R. v. Mason (1867), 17 U.C.C.P. 534.

934. Fine imposed shall be in discretion of court.—Whenever a fine may be awarded or a penalty imposed for any offence, the amount of such fine or penalty shall, within such limits, if any, as are prescribed in that behalf, be in the discretion of the court or person passing sentence or convicting, as the case may be. R.S.C. c. 181, s. 33.

PART LXII.

CAPITAL PUNISHMENT.

SECT.

Punishment to be the same on conviction by verdict or confession. — Every one who is indicted as principal or accessory for any offence made capital by any statute, shall be liable to the same punishment, whether he is convicted by verdict or on confession, and this as well in the case of accessories as of principals. R.S.C. c. 181, s. 4.

936. Form of sentence of death.—In all cases where an offender is sentenced to death, the sentence or judgment to be pronounced against him shall be, that he be hanged by the neck until he is dead. R.S.C. c. 181, s. 5.

937. Sentence of death to be reported to Secretary of State.—In the case of any prisoner sentenced to the punishment of death, the judge before whom such prisoner has been convicted shall forthwith make a report of the case to the Secretary of State, for the information of the Governor-General; and the day to be appointed for carrying the sentence into exe-

cution shall be such as, in the opinion of the judge, will allow sufficient time for the signification of the Governor's pleasure before such day, and if the judge thinks such prisoner ought to be recommended for the exercise of the royal mercy, or if, from the non-decision of any point of law reserved in the case, or from any other cause, it becomes necessary to delay the execution, he, or any other judge of the same court, or who might have held or sat in such court, may, from time to time, either in term or in vacation, reprieve such offender for such period or periods beyond the time fixed for the execution of the sentence as are necessary for the consideration of the case by the Crown. R.S.C. c. 181, s. 8.

The report although made in pursuance of a statutory duty is considered to be of a confidential nature, and is not a public report.

938. Prisoner under sentence of death to be confined apart.—Every one who is sentenced to suffer death shall, after judgment, be confined in some safe place within the prison, apart from all other prisoners; and no person except the gaoler and his servants, the medical officer or surgeon of the prison and a chaplain or minister of religion, shall have access to any such convict, without the permission in writing, of the court or judge before whom such convict has been tried, or of the sheriff. R.S.C. c. 181, s. 9.

939. Place of execution.—Judgment of death to be executed on any prisoner shall be carried into effect within the walls of the prison in which the offender is confined at the time of execution. R.S.C. c. 181, s. 10.

940. Persons who shall be present at execution.—The sheriff charged with the execution, and the gaoler and medical officer or surgeon of the prison and such other officers of the prison and such persons as the sheriff requires, shall be present at the execution. R.S.C. c. 181, s. 11.

941. Persons who may be present at execution.—Any justice of the peace for the district, county or place to which the prison belongs, and such relatives of the prisoner or other persons as it seems to the sheriff proper to admit within the prison for the purpose, and any minister of religion who desires to attend, may also be present at the execution. R.S.C. c. 181, s. 12.

942. Certificate of death.—As soon as may be after judgment of death has been executed on the offender, the medical officer or surgeon of the prison shall examine the body of the offender, and shall ascertain the fact of death, and shall sign a certificate thereof, in the form UUU in schedule one hereto, and deliver the same to the sheriff.

2. The sheriff and the gaoler of the prison, and such justices and other persons present, if any, as the sheriff requires or allows, shall also sign a declaration in the form VVV in the said schedule to the effect that judgment of death has been executed on the offender. R.S.C. c. 181, ss. 13 and 14.

FORM UUU.—

CERTIFICATE OF EXECUTION OF JUDGMENT OF DEATH.

I, A. B., surgeon (*or as the case may be*) of the (*describe the prison*), hereby certify that I, this day, examined the body of C. D., on whom judgment of death was this day executed in the said prison; and that on such examination I found that the said C. D. was dead.

(Signed), A. B.

Dated this day of , in the year .

FORM VVV.—

DECLARATION OF SHERIFF AND OTHERS.

We, the undersigned, hereby declare that judgment of death was this day executed on C. D., in the (*describe the prison*) in our presence.

Dated this day of , in the year .

E. F., Sheriff of ———

L. M., Justice of the Peace for ———

G. H., Gaoler of ———

&c., &c.

(Amendment of 1900.)

943. Deputy sheriffs, gaolers, etc. — The duties imposed upon the sheriff, gaoler, medical officer or surgeon by the three sections next preceding, may be, and, in his absence, shall be performed by his lawful deputy or assistant, or other officer or person ordinarily acting for him, or conjointly with him, or discharging the duties of any such officer.

The amendment corrects an error whereby the preceding two sections were referred to instead of three.

944. Inquest to be held.—A coroner of a district, county or place to which the prison belongs, wherein judgment of death is executed on any offender, shall, within twenty-four hours after the execution, hold an inquest on the body of the offender; and the jury at the inquest shall inquire into and ascertain the identity of the body, and whether judgment of death was duly executed on the offender; and the inquisition shall be in duplicate, and one of the originals shall be delivered to the sheriff.

2. No officer of the prison, and no prisoner confined therein shall, in any case, be a juror on the inquest. R.S.C. c. 181, ss. 16 and 17.

945. Place of burial.—The body of every offender executed shall be buried within the walls of the prison within which judgment of death is executed on him, unless the Lieutenant-Governor in Council orders otherwise. R.S.C. c. 181, s. 18.

946. Certificate to be sent to Secretary of State and exhibited at prison.—Every certificate and declaration and a duplicate of the inquest required by this Act, shall in every case be sent with all convenient speed by the sheriff to the Secretary of State, or to such other officer as is, from time to time, appointed for the purpose by the Governor in Council; and printed copies of such several instruments shall as soon as possible, be exhibited and shall, for twenty-four hours at least, be kept exhibited on or near the principal entrance of the prison within which judgment of death is executed. R.S.C. c. 181, s. 20.

947. Omissions not to invalidate execution.—The omission to comply with any provision of the preceding sections of this part shall not make the execution of judgment of death illegal in any case in which such execution would otherwise have been legal. R.S.C. c. 181, s. 21.

948. Other proceedings in executions not affected.—Except in so far as is hereby otherwise provided, judgment of death shall be carried into effect in the same manner as if the above provisions had not been passed. R.S.C. c. 181, s. 22.

949. Rules and regulations as to execution.—The Governor in Council may, from time to time, make such rules and regulations to be observed on the execution of judgment of death in every prison, as he, from time to time, deems expedient for the purpose as well of guarding against any abuse in such execution, as also of giving greater solemnity to the same, and of making known without the prison walls the fact that such execution is taking place.

2. All such rules and regulations shall be laid upon the tables of both Houses of Parliament within six weeks after the making thereof, or, if Parliament is not then sitting, within fourteen days after the next meeting thereof. R.S.C. c. 181, ss. 44 and 45.

PART LXIII.

IMPRISONMENT.

SECT.

950. Offences not capital, how punished.—Every one who is convicted of any offence not punishable with death shall be punished in the manner, if any, prescribed by the statute especially relating to such offence. R.S.C. c. 181, s. 23.

(Amendment of 1893.)

951. Imprisonment in cases not specially provided for.—Every person convicted of any indictable offence for which no punishment is specially provided, shall be liable to imprisonment for five years.

2. Every one who is summarily convicted of any offence for which no punishment is specially provided, shall be liable to a penalty not exceeding fifty dollars, or to imprisonment, with or without hard labour, for a term not exceeding six months, or to both. R.S.C. c. 181, s 24.

If a statute merely directs imprisonment as the punishment of an offence, no court of justice can, in the absence of any general discretionary power to that effect, award hard labour in addition. It is an additional substantive punishment. Hard labour is in fact a statutable addition to imprisonment, generally to be found enacted in the Act creating the offence, sometimes in statutes giving it as a discretionary power to a court in awarding imprisonment. R. v. Frawley (1881), 46 U.C.Q.B. 153.

952. Punishment for offence committed after previous conviction.—Every one who is convicted of an indictable offence, not punishable with death, committed after a previous conviction for an indictable offence, is liable to imprisonment for ten years, unless some other punishment is

directed by any statute for the particular offence—in which case the offender shall be liable to the punishment thereby awarded, and not to any other. R.S.C. c. 181, s. 25.

953. Imprisonment may be for shorter term than that prescribed.—Every one who is liable to imprisonment for life, or for any term of years, or other term, may be sentenced to imprisonment for a shorter term of imprisonment than the minimum term, if any, prescribed for the offence of which he is convicted. R.S.C. c. 181, s. 26.

Where a statute of Canada imposes a fine and also imprisonment the punishment is in the discretion of the court, which is not bound to inflict both, but may inflict either one or the other of the two kinds of punishment by virtue of sec. 932. R. v. Robidoux (1898), 2 Can. Cr. Cas. 19 (Que.).

954 Cumulative punishments.—When an offender is convicted of more offences than one, before the same court or person at the same sitting, or when any offender, under sentence or undergoing punishment for one offence, is convicted of any other offence, the court or person passing sentence may, on the last conviction, direct that the sentences passed upon the offender for his several offences shall take effect one after another. R.S.C. c. 181, s. 27.

A prisoner convicted *at the one time* of two offences and sentenced on each to three months' imprisonment without specification as to the terms being concurrent or otherwise, is not entitled to a discharge on a habeas corpus after three months' imprisonment. There is no presumption that sentences passed at the one time are to be concurrent. Ex parte Bishop (1895), 1 Can. Cr. Cas. 118 (N.B.).

955. Imprisonment in penitentiary, &c.—Every one who is sentenced to imprisonment for life, or for a term of years, not less than two, shall be sentenced to imprisonment in the penitentiary for the province in which the conviction takes place.

(Amendment of 1901.)

2. Every one who is sentenced to imprisonment for a term less than two years shall, if no other place is expressly mentioned, be sentenced to imprisonment in the common gaol of the district, county or place in which the sentence is pronounced, or if there is no common gaol there, then in that common gaol which is nearest to such locality, or in some lawful prison or place of confinement, other than a penitentiary, in which the sentence of imprisonment may be lawfully executed.

(*b*) in the Province of Manitoba any one sentenced to imprisonment for such a term may be sentenced to imprisonment in any one of the common gaols in that province, unless a special prison is prescribed by law.

(Amendment of 1900.)

3. Provided, that where any one is sentenced to imprisonment in a penitentiary, and at the same sittings or term of the court trying him is sentenced for one or more other offences to a term or terms of imprisonment less than two years each, he may be sentenced for such shorter terms to imprisonment in the same penitentiary, such sentences to take effect from the termination of his other sentence.

And provided further that where any one is sentenced for any offence who is, at the date of such sentence, serving a term of imprisonment in a penitentiary for another offence, he may be sentenced for a term shorter than two years to imprisonment in the same penitentiary, such sentence to take effect from the termination of his existing sentence or sentences.

4. Provided further that any prisoner sentenced for any term by any military, naval or militia court-martial, or by any military or naval authority under any Mutiny Act, may be sentenced to imprisonment in a penitentiary; and if such prisoner is sentenced to a term less than two years, he may be sentenced to imprisonment in the common gaol of the district, county or place in which the sentence is pronounced, or in such other prison or place of confinement as is provided by sub-section 2 of this section with respect to persons sentenced thereunder.

5. Imprisonment in a penitentiary, in the Central Prison for the Province of Ontario, in the Andrew Mercer Ontario Reformatory for females, and in any reformatory prison for females in the Province of Quebec, shall be with hard labour, whether so directed in the sentence or not.

6. Imprisonment in a common gaol, or a public prison, other than those last mentioned, shall be with or without hard labour, in the discretion of the court or person passing sentence, if the offender is convicted on indictment, or under the provisions of Parts LIV. or LV., or before a judge of the Supreme Court of the North-West Territories, and in other cases may be with hard labour, if hard labour is part of the punishment for the offence of which such offender is convicted—and if such imprisonment is to be with hard labour, the sentence shall so direct.

7. The term of imprisonment, in pursuance of any sentence, shall, unless otherwise directed in the sentence, commence on and from the day of passing such sentence, but no time during which the convict is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced.

8. Every one who is sentenced to imprisonment in any penitentiary, gaol, or other public or reformatory prison, shall be subject to the provisions of the statutes relating to such penitentiary, gaol or prison, and to all rules and regulations lawfully made with respect thereto. R.S.C. c. 181, s. 28; 53 V., c. 37, s. 31.

The proviso at the end of sub-sec. 3 is intended to provide for cases of escapes, attempts to escape, assaults on officers, etc., so that a person may be condemned to imprisonment in the same penitentiary after the expiration of his sentence, for a further term in respect of the escape, etc., although such further term is less than two years, the limit of punishment under sec. 159. Under the general law imprisonments for terms of less than two years are made in the common gaols and in prisons other than penitentiaries. Sec. 955 (2).

The judges of the Supreme Court of New Brunswick have the exclusive right to issue writs of habeas corpus to enquire into the legality of the imprisonment of a person confined in the Dominion penitentiary at Dorchester (within that province) though he was committed there by a Nova Scotia court. Ex parte Strather (1886), 25 N.B.R. 375.

The Penitentiary Act, 46 Vict., ch. 37, sec. 40, now R.S.C., 1886, sec. 42, directs that a copy of the sentence taken from the minutes of the court by which the prisoner was tried, certified by the judge or clerk of the court, shall be delivered to the warden of the penitentiary with any prisoner committed to his custody. The warrant in Stather's case was as follows:—"Whereas R. S., of H., was, during the March sittings of the Supreme Court at Halifax, indicted for making fraudulent entries and fraudulent returns, and was found guilty upon said indictment, and thereupon sentenced by the court to be imprisoned at hard labour in the penitentiary of Dorchester for the space of four years. Now, therefore, these are to require and command you to receive the said R. S. into your custody and him to detain in the said penitentiary for the said period of four years, in conformity with the terms of his said sentence, and for which this shall be your sufficient warrant. Dated at H. this —— day of ——, 1884." It was held that the warrant was not a compliance with the statute, there being other counts in the indictment not mentioned in the warrant, and the date when the prisoner was sentenced not being mentioned; and that the prisoner should be discharged on a habeas corpus issued in New Brunswick. Ex parte Strather (1886), 25 N.B.R. 375.

956. Imprisonment in reformatories.—The court or person before whom any offender whose age at the time of his trial does not, in the opinion of the court, exceed sixteen years, is convicted, whether summarily or otherwise, of any offence punishable by imprisonment, may sentence such offender to imprisonment in any reformatory prison in the province in which such conviction takes place, subject to the pro-

visions of any Act respecting imprisonment in such reformatory; and such imprisonment shall be substituted, in such case, for the imprisonment in the penitentiary or other place of confinement by which the offender would otherwise be punishable under any Act or law relating thereto: Provided, that in no case shall the sentence be less than two years' or more than five years' confinement in such reformatory prison; and in every case where the term of imprisonment is fixed by law to be more than five years, then such imprisonment shall be in the penitentiary.

2. Every person imprisoned in a reformatory shall be liable to perform such labour as is required of such person. R.S.C. c. 181, s. 29.

PART LXIV.

WHIPPING.

SECT.

(Amendment of 1900.)

957. Sentence of whipping.—Whenever whipping may be awarded for any offence, the court may sentence the offender to be once, twice or thrice whipped, within the limits of the prison, under the supervision of the medical officer of the prison, or if there be no such officer, or if the medical officer be for any reason unable to be present, then, under the supervision of a surgeon or physician to be named by the Minister of Justice, in the case of prisons under the control of the Dominion, and in the case of other prisons by the Attorney-General of the province in which such prison is situated.

2. The number of strokes shall be specified in the sentence; and the instrument to be used for whipping shall be a cat of nine tails, unless some other instrument is specified in the sentence.

3. Whenever practicable, every whipping shall take place not less than ten days before the expiration of any term of imprisonment to which the offender is sentenced for the offence.

4. Whipping shall not be inflicted on any female.

PART LXV.

SURETIES FOR KEEPING THE PEACE AND FINES.

SECT.

(Amendments of 1893 and 1900.)

958. Imprisonment and fine.—Every court of criminal jurisdiction, and every magistrate under Part LV. before whom any person is convicted of an offence and is not sentenced to death, shall have power in addition to any sentence imposed upon such person, to require him forthwith to enter into his own recognizances, or to give security to keep the peace, and be of good behaviour for any term not exceeding two years, and that such person, in default shall be imprisoned for not more than one year after the expiry of his imprisonment under his sentence, or until such recognizances are sooner entered into or such security sooner given, and any person convicted by any such court or magistrate of any indictable offence punishable with imprisonment for five years or less may be fined in addition to or in lieu of any punishment otherwise authorized, in which case the sentence may direct that in default of payment of his fine the person so convicted shall be imprisoned until such fine is paid, or for a period not exceeding five years, to commence at the end of the term of imprisonment awarded by the sentence, or forthwith, as the case may require.

2. Any person convicted of an indictable offence punishable with imprisonment for more than five years may be fined, in addition to, but not in lieu of, any punishment otherwise ordered, and in such case, also, the sentence may in like manner direct imprisonment in default of payment of any fine imposed.

The first part of the former section read "any person convicted of an indictable offence punishable, etc," and this is now varied to read "any person convicted by any such court or magistrate of an indictable offence punishable, etc." The court referred to is a court of criminal jurisdiction, and the word "magistrate" has the meaning given to it by Part LV. re-

lating to Summary Trials of indictable offences. See sec. 782. This amendment is intended to remove a doubt as to whether a magistrate under the Summary Trials (Part LV.), could impose a fine in lieu of imprisonment in a case within sec. 787.

The second sub-section is new and is designed especially for the Yukon Territory where the expense of maintaining long term prisoners is large.

(Amendment of 1893.)

959. Recognizance to keep the peace.—Whenever any person is charged before a justice with an offence triable under Part LVIII., which, in the opinion of such justice, is directly against the peace, and the justice, after hearing the case, is satisfied of the guilt of the accused, and that the offence was committed under circumstances which render it probable that the person convicted will be again guilty of the same or some other offence against the peace, unless he is bound over to good behaviour, such justice may, in addition to, or in lieu of, any other sentence which may be imposed upon the accused, require him forthwith to enter into his own recognizances, or to give security to keep the peace, and be of good behaivour, for any term not exeeding twelve months.

2. 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 do him, his wife, or child, some personal injury, or 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.

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

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

5. The forms WWW, XXX and YYY, with such variations and additions as the circumstances may require, may be used in proceedings under this section.

FORM WWW.—

COMPLAINT BY THE PARTY THREATENED, FOR SURETIES FOR THE PEACE.

Canada,
Province of , }
County of , }

The information (*or* complaint of C. D., of , in the said county of , (*labourer*), (*if preferred by an attorney or agent, say*—by D. E., his duly authorized agent (*or* attorney), in this behalf), taken upon oath, before me, the undersigned, a justice of the peace, in and for the said county of , at , in the said county of , this day of , in the year , who says that A. B., of , in the said county, did, on the day of (instant *or* last past), threaten the said C. D. in the words or to the effect following, that is to say: (*set them out, with the circumstances under which they were used*); and that from the above and other threats used by the said A. B. towards the said C. D., he, the said C. D., is afraid that the said A. B. will do him some bodily injury, and therefore prays that the said A .B. may be required to find sufficient sureties to keep the peace and be of good behaviour towards him, the said C. D.; and the said C.D. also says that he does not make this complaint against nor require such sureties from the said A. B. from any malice or ill-will, but merely for the preservation of his person from injury.

FORM XXX.—

FORM OF RECOGNIZANCE FOR THE SESSIONS.

Canada,
County of , }
Province 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 Lord the King 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 money of Canada, to be made and levied of their 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 us.

J. S.,
J. T.,
J. P.'s, (Name of County.)

The condition of the within (*or* above) written recognizance is such that if the within bound A. B. (of, etc.,) * appears at the next Court of General Sessions of the Peace, (*or other court discharging the functions of the Court of General Sessions*), to be holden in and for the said county of , to do and receive what is then and there enjoined him by the court, and in the meantime * keeps the peace and is of good behaviour towards His Majesty and his liege people, and specially towards C. D. (of, etc.), for the term of now next ensuing, then the said recognizance to be void, otherwise to stand in full force and virtue.

* The words between the asterisks * * to be used only where the principal is required to appear at the sessions or such other court.

FORM YYY.—

FORM OF COMMITMENT IN DEFAULT OF SURETIES.

Canada,
Province of ,
County of ,

To all or any of the other peace officers in the county of , and to the keeper of the common gaol of the said county, at , in the said county.

Whereas on the day of (*instant*), complaint on oath was made before the undersigned (*or* J. L., Esquire, a justice of the peace in and for the said county of , by C. D., of , in the said county, (*labourer*), that A. B., of (etc.), on the day of , at aforesaid, did threaten (*etc., follow to the end of complaint, as in form above, in the past tense, then*): And whereas the said A. B. was this

day brought and appeared before me, the said justice (*or* J. L., Esquire, a justice of the peace in and for the said county of), to answer unto the said complaint; and having been required by me to enter into his own recognizance in the sum of , with two sufficient sureties in the sum of , each, * as well for his appearance at the next General Sessions of the Peace (*or other court discharging the functions of the Court of General Sessions, or as the case may be*), to be held in and for the said county of , to do what shall be then and there enjoined him by the court, as also in the meantime * to keep the peace and be of good behaviour towards His Majesty and his liege people, and especially towards the said C. D., has refused and neglected, and still refuses and neglects, to find such sureties: These are, therefore, to command you, and each of you, to take the said A. B., and him safely to convey to the (common gaol) 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), there to imprison him until the said next General Sessions of the Peace (*or the next term or sitting of the said court discharging the functions of the Court of General Sessions, or as the case may be*), unless he, in the meantime, finds sufficient sureties as well for his appearance at the said Sessions (*or* court) as in the meantime to keep the peace 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.)

* The words between the asterisks * * to be used when the recognizance is to be so conditioned.

The justice of the peace must fix the amount of the recognizance to be given. A justice's order that the accused give security to keep the peace for one year, but not fixing any amount nor a term of imprisonment, in default, will not support a commitment thereunder. A warrant of commitment under this section and Form YYY can only be issued after the defendant's refusal or neglect to furnish the required security, proved and recorded subsequently to the order requiring the security, and it must recite such refusal or neglect. Re John Doe (1893), 3 Can. Cr. Cas. 370 (Que.).

A warrant of commitment by a justice under sub-section 4 for default in finding sureties to keep the peace must shew on its face that the complainant feared bodily injury because of the defendant's threat, and that the complaint was not made nor sureties required by the complainant from any malice or ill-will, but merely for the preservation of his person from injury. Code Form WWW; R. v. John McDonald (1897), 2 Can. Cr. Cas. 64.

Threats verbally made to burn the complainant's buildings are not indictable under the 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.).

960. Proceedings for not finding sureties to keep the peace.—Whenever any person who has been required to enter into a recognizance with sureties to keep the peace and be of good behaviour has, on account of his default therein, remained imprisoned for two weeks, the sheriff, gaoler or warden shall give notice, in writing, of the facts to a judge of a superior court, or to a judge of the county court of the county or district in which such gaol or prison is situate, and in the cities of Montreal and Quebec to a judge of the sessions of the peace for the district, or, in the North-West Territories to a stipendiary magistrate—and such judge or magistrate may order the discharge of such person, thereupon or at a subsequent time, upon notice to the complainant or otherwise, or may make such other order as he sees fit, respecting the number of sureties, the sum in which they are to be bound and the length of time for which such person may be bound. R.S.C. c. 181, s. 32; 51 V., c. 47, s. 2.

PART LXVI.

DISABILITIES.

SECT.

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961. Consequences of conviction of public official.—If any person hereafter convicted of treason or any indictable offence for which he is sentenced to death, or imprisonment for a term exceeding five years, holds at the time of such conviction any office under the Crown or other public employment, or is entitled to any pension or superannuation allowance payable by the public, or out of any public fund, such office or employment shall forthwith become vacant, and such pension or superannuation allowance or emolument shall forthwith determine and cease to be payable, unless such person receives a free pardon from His Majesty, within two months after such conviction, or before the filling up of such office or employment, if given at a later period; and such person shall become, and (until he suffers the punishment to which he is sentenced, or such other punishment as by competent authority is substituted for the same, or receives a free pardon from His Majesty) shall continue thenceforth incapable of holding any office under the Crown, or other public employment, or of being elected, or sitting, or voting, as a member of either House of Parliament, or of exercising any right of suffrage or other parliamentary or municipal franchise. 33-34 V. (U.K.) c. 23, s. 2.

2. The setting aside of a conviction by competent authority shall remove the disability herein imposed.

PART LXVII.

PUNISHMENTS ABOLISHED.

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962. Outlawry.—Outlawry in criminal cases is abolished.

963. Solitary confinement; pillory.—The punishment of solitary confinement or of the pillory shall not be awarded by any court. R.S.C. c. 181, s. 34.

964. Deodand.—There shall be no forfeiture of any chattels, which have moved to or caused the death of any human being, in respect of such death. R.S.C. c. 181, s. 35.

965. Attainder.—From and after the passing of this Act no confession, verdict, inquest, conviction or judgment of or for any treason or indictable offence or felo de se shall cause any attainder or corruption of blood, or any forfeiture or escheat: Provided that nothing in this section shall affect any fine or penalty imposed on any person by virtue of his sentence, or any forfeiture in relation to which special provision is made by any Act of the Parliament of Canada. 33-34 V. (U.K.) c. 23, ss. 1, 6 and 5.

PART LXVIII.

PARDONS.

SECT.

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966. Pardon by Crown.—The Crown may extend the royal mercy to any person sentenced to imprisonment by virtue of any statute, although such person is imprisoned for non-payment of money to some person other than the Crown.

2. Whenever the Crown is pleased to extend the royal mercy to any offender convicted of an indictable offence punishable with death or otherwise, and grants to such offender either a free or a conditional pardon, by warrant under the royal sign manual, countersigned by one of the principal Secretaries of State, or by warrant under the hand and seal-at-arms of the Governor-General, the discharge of such offender out of custody, in case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon of such offender, under the great seal, as to the offence for which such pardon has been granted; but no free pardon, nor any discharge in consequence thereof, nor any conditional pardon, nor the performance of the condition thereof, in any of the cases aforesaid, shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced, on a subsequent conviction for any offence other than that for which the pardon was granted. R.S.C. c. 181, ss. 38 and 39.

Pardon.]—There is an essential difference between pardons, as universally understood, and the remission or commutation of a term of imprisonment, or of a pecuniary mulct. The discharge of a prisoner from further endurance of his sentence, which may occur for various cogent reasons, cannot properly be looked upon or described as a pardon. Per Hagarty, C.J.O., in Attorney-General for Canada v. Attorney-General of Ontario (1892), 19 Ont. App. 31, 35.

The term of imprisonment in pursuance of any sentence runs from the day of the passing of such sentence, without interruption, except when especially provided otherwise by law. Sec. 955 (7).

The license issued under the authority of the Ticket of Leave Acts, and by which a convict while undergoing a term of imprisonment in penitentiary is conditionally allowed at large, may be revoked by the Governor-General either with or without cause assigned. R. v. Johnson (1901), 4 Can. Cr. Cas. 178 (Que.).

But the revocation by the Crown, without cause assigned, of such license works no interruption in the running of the sentence, which shall terminate at the same time as if such license had never been granted. Ibid.

Ticket of leave.]—The Ticket of Leave Acts, Statutes of Canada, 1899, ch. 49, and 1900, ch. 48, providing for the conditional liberation of convicts in certain cases, enact as follows:—

(1) *License to be at large.*]—It shall be lawful for the Governor-General by an order in writing under the hand and seal of the Secretary of State to grant to any convict under sentence of imprisonment in a penitentiary a license to be at large in Canada, or in such part thereof as in such license shall be mentioned, during such portion of his term of imprisonment, and upon such conditions in all respects as to the Governor General may seem fit; and the Governor-General may from time to time revoke or alter such license by a like order in writing.

(2) *Effect of license.*]—So long as such license continues in force and unrevoked such convict shall not be liable to be imprisoned by reason of his sentence, but shall be allowed to go at large according to the terms of such license.

(3) *Effect of revocation and proceedings thereon.*]—If any such license is revoked it shall be lawful for the Governor General by warrant under the hand and seal of the Secretary of State to signify to the Commissioner of the Dominion Police at Ottawa that such license has been revoked, and to require the said commissioner to issue his warrant under his hand and seal for the apprehension of the convict to whom such license was granted, and the said commissioner shall issue his warrant accordingly, and such warrant shall and may be executed by the constable to whom the same is given for that purpose in any part of Canada, and shall have the same force and effect in all parts of Canada as if the same had been originally issued or subsequently endorsed by a justice or other lawful authority having jurisdiction in the place where the same is executed, and such convict, when apprehended under such warrant, shall be brought as soon as conveniently may be before a justice of the peace of the county in which the same is executed, and such justice shall thereupon make out his warrant under his hand and seal for the recommitment of such convict to the penitentiary from which he was released by virtue of the said license, and such convict shall be so recommitted accordingly, and shall thereupon be remitted to his original sentence, and shall undergo the residue thereof as if such license had been not granted.

[3] Provided that if the place where such convict is apprehended is not within the province, territory or district for which such penitentiary is the penitentiary, such convict shall be committed to the penitentiary for the province, territory or district within which he is so apprehended and shall there undergo the residue of his sentence.

(4) *Form of license.*]—A license under sec. 1 may be in the Form A in the schedule to this Act, or to the like effect, or may, if the Governor-General thinks proper, be in any other form different from that given in the schedule which he may think it expedient to adopt, and contain other and different conditions.

2. A copy of any conditions annexed to any such license, other than the conditions contained in Form A, shall be laid before both Houses of Parliament within twenty-one days after the making thereof, if Parliament be then in session, or if not, then within fourteen days after the commencement of the next session of Parliament.

(5) *Conviction to forfeit license.*]—If any holder of a license under this Act is convicted of any indictable offence his license shall be forthwith forfeited.

(6) *Holder of license to notify his address and all changes thereof.*]—Every holder of such a license who is at large in Canada shall notify the place of his residence to the chief officer of police or the sheriff of the city, town, county or district in which he resides, and shall, whenever he changes such residence within the same city, town, county or district, notify such change to the said chief officer of police or sheriff, and whenever he is about to leave a city, town, county or district he shall notify such his intention to the chief officer of police or sheriff of that city, town, county or district, stating the place to which he is going, and also, if required, and so far as is practicable, his address at that place, and whenever he arrives in any city, town, county or district he shall forthwith notify his place of residence to the chief officer of police or the sheriff of such last-mentioned city, town, county or district.

2. Every male holder of such a license shall, once in each month, report himself at such time as may be prescribed by the chief officer of police or sheriff of the city, town, county or district in which such holder may be, either to such chief officer or sheriff himself, or to such other person as he may direct, and such report may according as such chief officer or sheriff directs be required to be made personally or by letter.

3. If any person to whom this section applies fails to comply with any of the requirements of this section, he shall in any such case be guilty of an offence against this Act, unless he proves to the satisfaction of the court before whom he is tried, either that being on a journey he tarried no longer in the place in respect of which he is charged with failing to notify his place of residence than was reasonably necessary, or that, otherwise, he did his best to act in conformity with the law; and on summary conviction of such offence he shall be liable in the discretion of the justice either to forfeit his license or to imprisonment with or without hard labour for a term not exceeding one year.

4. The Governor-General may, by order under the hand of the Secretary of State, remit any of the requirements of this section either generally or in the case of any particular holder of a license.

(7) *Offences with respect to license.*]—Any holder of a license under this Act who—

(*a*) fails to produce the same whenever required so to do by any judge, police or other magistrate or justice of the peace before whom he may be brought charged with any offence or by any peace officer in whose custody he may be, and fails to make any reasonable excuse for not producing the same; or

(*b*) breaks any of the other conditions of his license by an act which is not of itself punishable either upon indictment or upon summary conviction is guilty of an offence, upon summary conviction of which he shall be liable to imprisonment for three months with or without hard labour.

(8) *Arrest without warrant in certain cases.*]—Any peace officer may take into custody without warrant any convict who is the holder of such a license.

(*a*) whom he reasonably suspects of having committed any offence, or

(*b*) if it appears to such peace officer that such convict is getting his livelihood by dishonest means;

and may take him before a justice to be dealt with according to law.

2. If it appears from the facts proved before the justice that there are reasonable grounds for believing that the convict so brought before him is getting his livelihood by dishonest means such convict shall be deemed guilty of an offence against this Act, and his license shall be forfeited.

3. Any convict so brought before a justice of the peace may be convicted of getting his livelihood by dishonest means although he has been brought before the justice on some other charge, or not in the manner provided for in this section.

(9) *Certificate of conviction.*]—When any holder of a license under this Act is convicted of an offence punishable on summary conviction under this or any other Act the justice or justices convicting the prisoner shall forthwith forward by post a certificate in the form B in the schedule to this Act to the Secretary of State, and thereupon the license of the said holder may be revoked in manner aforesaid.

(10) *Conviction and sentence to remain in force.*—The conviction and sentence of any convict to whom a license is granted under this Act shall be deemed to continue in force while such license remains unforfeited and unrevoked, although execution thereof is suspended.

(11) *Further imprisonment when license forfeited.*]—When any such license as aforesaid is forfeited by a conviction of an indictable offence or other conviction, or is revoked in pursuance of a summary conviction or otherwise, the person whose license is forfeited or revoked shall, after undergoing any other punishment to which he may be sentenced for any offence in consequence of which his license is forfeited or revoked, further undergo a term of imprisonment equal to the portion of the term to which he was sentenced that remained unexpired at the time his license was granted, and shall for the purpose of undergoing such last mentioned punishment be removed from the jail or other place of confinement in which he is, if it be not a penitentiary, to a penitentiary by warrant under the hand and seal of any justice having jurisdiction at the place where he is confined; and if he is confined in a penitentiary shall undergo such term of imprisonment in that penitentiary, and in every case such convict shall be liable to be dealt with in all respects as if such term of imprisonment had formed part of his original sentence.

(12) *Administration of statute.*]—It shall be the duty of the Minister of Justice to advise the Governor General upon all matters connected with or affecting the administration of this Act.

SCHEDULE.

Form A.

LICENSE.

OTTAWA,.....day of.....19....

His Excellency the Governor-General is graciously pleased to grant to ....., who was convicted of.....at the..... for the.....on the....., and was then and there sentenced to imprisonment in the.....penitentiary for the term of ....., and is now confined in the....., license to be at large from the day of his liberation under this order during the remaining portion of his term of imprisonment, unless the said..... .....shall before the expiration of the said term be convicted of an indictable offence within Canada, or shall be summarily convicted of an offence involving forfeiture, in which case such license will be immediately forfeited by law, or unless it shall please His Excellency sooner to revoke or alter such license.

This license is given subject to the conditions endorsed upon the same upon the breach of any of which it will be liable to be revoked whether such breach is followed by a conviction or not.

And His Excellency hereby orders that the said..... ..... be set at liberty within thirty days from the date of this order.

Given under my hand and seal at ..... the ..... day of ..... 19.... } *Secretary of State.*

CONDITIONS.

1. The holder shall preserve his license and produce it when called upon to do so by a magistrate or a peace officer.

2. He shall abstain from any violation of the law.

3. He shall not habitually associate with notoriously bad characters, such as reputed thieves and prostitutes.

4. He shall not lead an idle and dissolute life without visible means of obtaining an honest livelihood.

If his license is forfeited or revoked in consequence of a conviction for any offence he will be liable to undergo a term of imprisonment equal to the portion of his term of ..... years which remained unexpired when his license was granted, viz.:—the term of ..... years.

Form B.

FORM OF CERTIFICATE OF CONVICTION.

I do hereby certify that A. B., the holder of a license under the *Act to provide for the conditional liberation of Penitentiary Convicts* was on the ..... day of ..... in the year ..... duly convicted by and before ..... of the offence of .... and sentenced to .....

.....

J.P., Co.....

The Ticket of Leave Amendment Act, 1900 (Statutes of Canada, 63-64 Viet., ch. 48), is as follows:

(1) *Convicts in gaols.*—The provisions of ch. 49 of the statutes of 1899, intituled an Act to provide for the conditional liberation of penitentiary convicts, shall apply to all persons convicted of any offence and being under sentence of imprisonment in any gaol or other public or reformatory prison; and the Governor-General may grant to any person so convicted and being under imprisonment in any gaol or other public or reformatory prison a license to be at large in Canada upon the like terms and conditions as are by the said Act prescribed and authorized with respect to penitentiary convicts.

(2) The said Act and this Act may be cited respectively as the Ticket of Leave Act, 1899, and the Ticket of Leave Amendment Act, 1900, and may be cited collectively as the Ticket of Leave Acts.

Release of first offenders in certain cases.]—See Code, sec. 971.

967. Commutation of sentence.—The Crown may commute the sentence of death passed upon any person convicted of a capital offence to imprisonment in the penitentiary for life, or for any term of years not less than two years, or to imprisonment in any gaol or other place of confinement for any period less than two years, with or without hard labour; and an instrument under the hand and seal-at-arms of the Governor-General, declaring such commutation of sentence, or a letter or other instrument under the hand of the Secretary of State or of the Under-Secretary of State, shall be sufficient authority to any judge or justice, having jurisdiction in such case, or to any sheriff or officer to whom such letter or instrument is addressed, to give effect to such commutation, and to do all such things and to make such orders, and to give such directions, as are requisite for the change of custody of such convict, and for his conduct to and delivery at such gaol or place of confinement or penitentiary, and his detention therein, according to the terms on which his sentence has been commuted. R.S.C. c. 181, s. 40.

The power of commuting and remitting sentences for offences against the laws of the Province (Ontario), or offences over which the legislative authority of the Province extends, which by the terms of the Act 51 Vict., ch. 5 (Ont.), is included in the powers which were vested in or exercisable by the governors or lieutenant-governors of the several provinces before Confederation, and are now by that Act vested in and exercisable by the Lieutenant-Governor of this Province, does not affect offences against criminal laws which are the subject of Dominion legislation, but refers only to offences within the jurisdiction of the Provincial Legislature, and in that sense the Act is intra vires the Provincial Legislature. Attorney-General for Canada v. Attorney-General for Ontario (1892), 19 Ont. App. 31; 23 Can. S.C.R. 458.

968. Undergoing sentence equivalent to a pardon.—When any offender has been convicted of an offence not punishable with death, and has endured the punishment to which such offender was adjudged,—or if such offence is punishable with death and the sentence has been commuted, then if such offender has endured the punishment to which his sentence was commuted,—the punishment so endured shall, as to the offence whereof the offender was so convicted, have the like effect and consequences as a pardon under the great seal; but nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced, on a subsequent conviction for any other offence. R.S.C. c. 181, s. 41.

969. Satisfying judgment.—When any person convicted of any offence has paid the sum adjudged to be paid, together with costs, if any, under such conviction, or has received a remission thereof from the Crown, or has suffered the imprisonment awarded for non-payment thereof, or the imprisonment awarded in the first instance, or has been discharged from his conviction by the justice of the peace in any case in which such justice of the peace may discharge such person, he shall be released from all further or other criminal proceedings for the same cause. R.S.C. c. 181, s. 42.

970. Royal prerogative.—Nothing in this part shall in any manner limit or affect His Majesty's royal prerogative of mercy. R.S.C. c. 181, s. 43.

(Amendment of 1900.)

971. Release on suspended sentence.—In any case in which a person is convicted before any court of any offence punishable with not more than two years' imprisonment and no previous conviction is proved against him, if it appears to the court before which he is so convicted, that, regard being had to the age, character, and antecedents of the offender, to the trivial nature of the offence, and to any extenuating circumstances under which the offence was committed, it is expedient that the offender be released on probation of good conduct, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a recognizance, with or without sureties, and during such period as the court directs, to appear and receive judgment when called upon, and in the meantime to keep the peace and be of good behaviour.

2. Where the offence is punishable with more than two years' imprisonment the court shall have the same power as aforesaid with the concurrence of the counsel acting for the Crown in the prosecution of the offender.

3. The court may, if it thinks fit, direct that the offender shall pay the costs of the prosecution, or some portion of the same, within such period and by such instalments as the court directs.

The former sec. 971 enacted that in the case of an offence "punishable with not more than two years' imprisonment" (that is, two years being the maximum punishment for the offence) the court might under certain circumstances and on certain conditions, instead of sentencing the offender at once, direct his release on probation of good conduct. Previous to the statutory enactment the court had this power in the case of offences with-

out the restriction as to two years. The power of releasing on a suspended sentence in the case of an offence punishable (as a maximum) with more than two years' imprisonment is reinstated by the addition of sub-sec. 2, but with the proviso that the prosecuting counsel concur.

Sub-sec. 3, supra, is the former sub-sec. 2 re-numbered.

Another change made is the substitution in the first sub-section of the word "age" for "youth" in the recital of the circumstances having regard to which the power of conditional release is to be exercised.

See also sec. 966 and the note to same.

972. Conditions of release.—The court, before directing the release of an offender under the next preceding section, shall be satisfied that the offender or his surety has a fixed place of abode or regular occupation in the county or place for which the court acts, or in which the offender is likely to live during the period named for the observance of the conditions. 52 V., c. 44, s. 4.

973. Proceeding on default of recognizance.—If a court having power to deal with such offender in respect of his original offence or any justice of the peace is satisfied by information on oath that the offender has failed to observe any of the conditions of his recognizance, such court or justice of the peace may issue a warrant for his apprehension.

2. An offender, when apprehended on any such warrant, shall, if not brought forthwith before the court having power to sentence him, be brought before the justice issuing such warrant or before some other justice in and for the same territorial division, and such justice shall either remand him by warrant until the time at which he was required by his recognizance to appear for judgment, or until the sitting of a court having power to deal with his original offence, or admit him to bail (with a sufficient surety) conditioned on his appearing for judgment.

3. The offender when so remanded may be committed to a prison, either for the county or place in or for which the justice remanding him acts, or for the county or place where he is bound to appear for judgment; and the warrant of remand shall order that he be brought before the court before which he was bound to appear for judgment, or to answer as to his conduct since his release. 52 V., c. 44, s. 3.

Where the jury convicted the defendant and the verdict was recorded and the offender was, by order of the court, released on bail to appear for judgment, it is only upon motion by the Crown that the recognizance of the defendant and his bail can be estreated in Ontario or that judgment can be moved against the offender. R. v. Young (1901), 4 Can. Cr. Cas. 580 (Ont.).

A contract by the accused to indemnify a surety against liability under his recognizance is illegal; but where a deposit of money is made by the accused with the surety by way of indemnity, the accused cannot recover it back. Herman v. Jenchner, 15 Q.B.D. 561.

974. Interpretation.—In the three next preceding sections the expression "court" means and includes any superior court of criminal jurisdiction, any "judge" or court within the meaning of Part LV., and any "magistrate" within the meaning of Part LVI. of this Act. 52 V., c. 44, s. 1.

TITLE IX.

ACTIONS AGAINST PERSONS ADMINISTERING THE CRIMINAL LAW.

SECT.

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975. Time and place of action.——Every action and prosecution against any person for anything purporting to be done in pursuance of any Act of the Parliament of Canada relating to criminal law, shall, unless otherwise provided, be laid and tried in the district, county or other judicial division, where the act was committed, and not elsewhere, and shall not be commenced except within six months next after the act committed. R.S.C. c. 185, s. 1.

976. Notice of action.—Notice in writing of such action and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action. R.S.C. c. 185, s. 2.

The statute, 13 Geo. II., ch. 18, sec. 5, imperatively requires that notice of an application for a certiorari be given to the justice or justices by or before whom a conviction has been made, to the end that such justice or the parties therein concerned may shew cause against the granting of such certiorari, and makes the giving of it a condition precedent to the issuing of the writ. R. v. McAllan (1880), 45 U.C.Q.B. 402.

The affidavit of service of notice of motion for a certiorari to remove a conviction made by justices of the peace must identify the justices served as the convicting justices. Re Lake (1877), 42 U.C.Q.B. 206.

Where an order nisi to quash a conviction has been issued, but before service of same upon the informant prosecutor the latter died, the proceedings do not lapse and can be properly continued by serving the magistrates, and upon quashing a conviction in such a case, no cause of action in respect of its illegality survives against the representatives of the deceased informant. R. v. Fitzgerald (1898), 1 Can. Cr. Cas. 420 (Ont.).

977. Defence.—In any such action the defendant may plead the general issue, and give the provisions of this title and the special matter in evidence at any trial had thereupon. R.S.C. c. 185, s. 3.

978. Tender or payment into court.—No plaintiff shall recover in any such action if tender or sufficient amends is made before such action brought, or if a sufficient sum of money is paid into court by or on behalf of the defendant after such action brought. R.S.C. c. 185, s. 4.

979. Costs.—If such action is commenced after the time hereby limited for bringing the same, or is brought or the venue laid in any other place than as aforesaid, a verdict shall be found or judgment shall be given for the defendant; and thereupon or if the plaintiff becomes nonsuit, or discontinues any such action after issue joined, or if upon demurrer or otherwise judgment is given against the plaintiff, the defendant shall, in the discretion of the court, recover his full costs as between solicitor and client, and shall have the like remedy for the same as any defendant has by law in other cases; and although a verdict or judgment is given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge, before whom the trial is had, certifies his approval of the action. R.S.C. c. 185, s. 5.

980. Other remedies saved.—Nothing herein shall prevent the effect of any Act in force in any province of Canada, for the protection of justices of the peace or other officers from vexatious actions for things purporting to be done in the performance of their duty. R.S.C. c. 185, s. 6.

Where the justices have a general jurisdiction over the subject matter upon which they have issued a warrant of commitment to a gaoler, the gaoler is not liable to an action, though their proceedings are erroneous; but it is otherwise if the justices were acting wholly out of their jurisdiction. Ferguson v. Adams (1848), 5 U.C.Q.B. 194.

A conviction made by a magistrate protects him from an action of trespass in respect to the enforcement of the same, so long as it has not been set aside. Gates v. Devenish (1849), 6 U.C.Q.B. 260.

In an action against a magistrate for trespass and illegal seizure of goods, in order to shew a good justification it is necessary that the defendant should give in evidence a conviction not illegal on the face of it, and a warrant of distress supported by the conviction, and not on the face of it an illegal warrant. In a case where a magistrate's conviction was for "wilfully damaging, spoiling and taking away six bushels of apples of A.B., whereby C.D. committed an injury to the said goods and chattels of the said A.B." and the warrant recited that "judgment was given against C.D. in *a suit* of A.B. v. C.D. for a *misdemeanour* in taking apples by force and violence off and from the presence of A.B.," it was held that the conviction did not support the warrant; and also that neither the conviction nor the warrant contained *a statement of an offence* for which such a conviction could take place. Eastman v. Reid (1850), 6 U.C.Q.B. 611.

TITLE X.

REPEAL, ETC.

SECT.

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981. Statutes repealed.—The several Acts set out and described in schedule two to this Act shall, from and after the date appointed for the coming into force of this Act, be repealed to the extent stated in the said schedule.

(Amendment of 1893.)

2. The provisions of this Act which relate to procedure shall apply to all prosecutions commenced on or after the day upon which this Act comes into force, in relation to any offence whensoever committed. The proceedings in respect of any prosecution commenced before the said date otherwise than under the Summary Convictions Act, shall, up to the time of committal for trial, be continued as if this Act had not been passed, and after committal for trial shall be subject to all the provisions of this Act relating to procedure so far as the same are applicable thereto. The proceedings in respect of any prosecutions commenced before the said day, under the Summary Convictions Act, shall be continued and carried on as if this Act had not been passed.

By an express provision contained in sec. 2 the Code did not come in force until the 1st of July, 1893.

SCHEDULE TWO.

ACTS REPEALED.

ACTS REPEALED.	TITLE.	EXTENT OF REPEAL.
C.S.L.C., c. 10	An Act respecting seditious and unlawful Associations and oaths.	Secs. 1, 2, 3 & 4.
R. S. C., c. 32	An Act respecting the Customs.	Sec. 213.
" 34	An Act respecting the Inland Revenue.	Secs. 98 & 99.
" 35	An Act respecting the Postal Service.	Secs. 70 to 81, 83, 84, 88, 90, 91, 96, 103, 107, 110 & 111.
" 38	An Act respecting Government Railways.	Sec. 62.
" 41	An Act respecting the Militia and Defence of Canada.	Sec. 109.
" 43	An Act respecting Indians.	Secs. 106 (s.s. 2) & 111.
" 65	An Act respecting Immigration and Immigrants.	Sec. 37.
" 81	An Act respecting Wrecks, Casualties and Salvage.	Secs. 35 to 37.
" 141	An Act respecting Extra-judicial oaths.	Secs. 1 & 2.
" 145	An Act respecting Accessories.	The whole Act.
" 146	An Act respecting Treason and other offences against the King's authority.	The whole Act, except Secs. 6 & 7.
" 147	An Act respecting Riots, unlawful assemblies and breaches of the peace.	The whole Act.
" 148	An Act respecting the improper use of firearms and other weapons.	The whole Act, except Sec. 7.
" 149	An Act respecting the seizure of arms kept for dangerous purposes.	The whole Act, except Secs. 5 & 7.
" 150	An Act respecting Explosive Substances.	The whole Act.
" 152	An Act respecting the preservation of peace at Public Meetings.	The whole Act, except Secs. 1, 2 & 3.
" 153	An Act respecting Prize-fighting.	The whole Act, except Secs. 6, 7 & 10.
" 154	An Act respecting Perjury.	The whole Act, except Sec. 4.
" 155	An Act respecting Escapes and Rescues.	The whole Act.
" 156	An Act respecting offences against Religion.	The whole Act.
" 157	An Act respecting offences against Public Morals and Public Convenience.	The whole Act, except Sec. 8, (s.s. 4, thereof).
" 158	An Act respecting Gaming-houses.	The whole Act, except Secs. 9 & 10.
" 159	An Act respecting Lotteries, Betting and Pool-selling.	The whole Act.
" 160	An Act respecting Gambling in public conveyances.	The whole Act.
" 161	An Act respecting offences relating to the Law of Marriage.	The whole Act.

ACTS REPEALED.	TITLE.	EXTENT OF REPEAL.
" 162	An Act respecting offences against the Person.	The whole Act.
" 163	An Act respecting Libel.	The whole Act, except Secs. 6 & 7.
" 164	An Act respecting Larceny and similar offences.	The whole Act.
" 165	An Act respecting Forgery.	The whole Act.
" 167	An Act respecting offences relating to the Coin.	The whole Act, except Secs. 26 & 29 to 34 inclusive.
" 168	An Act respecting malicious injuries to Property.	The whole Act.
" 169	An Act respecting offences relating to the Army and Navy.	The whole Act, except Sec. 9.
" 171	An Act respecting the protection of Property of Seamen in the Navy.	The whole Act.
" 172	An Act respecting Cruelty to Animals.	The whole Act, except Sec. 7.
" 173	An Act respecting Threats, Intimidation and other offences.	The whole Act, except Sec. 12 (s.s. 5).
" 174	An Act respecting Procedure in Criminal Cases.	The whole Act.
" 176	An Act respecting the summary administration of Criminal Justice.	The whole Act.
" 177	An Act respecting Juvenile Offenders.	The whole Act.
" 178	An Act respecting summary proceedings before Justices of the Peace.	The whole Act.
" 179	An Act respecting Recognizances.	The whole Act.
" 180	An Act respecting Fines and Forfeitures.	The whole Act.
" 181	An Act respecting Punishments, Pardons and the Commutation of Sentences.	The whole Act.
" 185	An Act respecting Actions against persons administering the Criminal Law.	The whole Act.
50-51 V., c. 33	An Act to amend the Indian Act.	Sec. 11.
" 45	An Act respecting Public Stores.	The whole Act.
" 46	An Act respecting the conveyance of liquors on board His Majesty's Ships in Canadian Waters.	The whole Act.
" 48	An Act to amend the Act respecting offences against Public Morals and Public Convenience.	The whole Act.
" 49	An Act to amend the Revised Statutes, Chapter one hundred and seventy-three, respecting Threats, Intimidation and other offences.	The whole Act.
" 50	An Act to amend the Law respecting Procedure in Criminal Cases.	The whole Act.
51 V., c. 29	An Act respecting Railways.	Sec. 297.
" 40	An Act respecting the advertising of Counterfeit Money.	The whole Act.
" 41	An Act to amend the Law relating to Fraudulent Marks on Merchandise.	The whole Act, except Secs. 15, 18 & 22, 16 & 23.
" 42	An Act respecting gaming in Stocks and Merchandise.	The whole Act.

ACTS REPEALED.	TITLE.	EXTENT OF REPEAL.
" 43	An Act further to amend the Law respecting Procedure in Criminal Cases.	The whole Act.
" 44	An Act further to amend *The Criminal Procedure Act*.	The whole Act.
" 45	An Act to amend Chapter one hundred and seventy-eight of the Revised Statutes of Canada: *The Summary Convictions Act*.	The whole Act.
" 47	An Act to amend the Revised Statutes of Canada, Chapter one hundred and eighty-one, respecting Punishments, Pardons and the Commutation of Sentences.	The whole Act.
52 V., c. 22	An Act to amend the Revised Statutes, Chapter seventy-seven, respecting the safety of Ships.	Sec. 3.
" 25	An Act to amend the Revised Statutes respecting the North-West Mounted Police Force.	Sec. 4.
" 40	An Act respecting Rules of Court in relation to Criminal Matters.	The whole Act.
" 41	An Act for the prevention and suppression of Combinations formed in restraint of Trade.	The whole Act, except Secs. 4 & 5.
" 42	An Act respecting Corrupt Practices in Municipal Affairs.	The whole Act.
" 44	An Act to permit the conditional release of first offenders in certain cases.	The whole Act.
" 45	An Act to amend *The Summary Convictions Act*, Chapter one hundred and seventy-eight of the Revised Statutes, and the Act amending the same.	The whole Act.
" 46	An Act to amend *The Summary Trials Act*.	The whole Act.
" 47	An Act to make further provision respecting the Speedy Trial of certain Indictable Offences.	The whole Act.
53 V., c. 10	An Act to prevent the disclosure of official documents and information.	The whole Act.
" 31	An Act respecting Banks and Banking.	Sec. 63.
" 37	An Act further to amend the Criminal Law.	The whole Act, except Secs. 1, 2, 32, to end.
" 38	An Act to amend the Public Stores Act.	The whole Act.
54-55 V., c. 23	An Act respecting Frauds upon the Government.	The whole Act.

982. Forms in schedule 1 to be valid.—The several forms in schedule one to this Act, varied to suit the case or forms to the like effect, shall be deemed good, valid and sufficient in law.

A similar provision was contained in the statute 32-33 Vict., ch. 30, and it was held by Taylor, J., of the Manitoba Court of Queen's Bench that they were not imperative. R. v. Connor (1885), 2 Man. R. 235, 1 Terr. L.R. 4.

The several forms referred to will be found distributed under the sections to which they respectively relate. See title "Forms" in Index.

983. Application of Act.—The provisions of this Act extend to and are in force in the North-West Territories and the District of Keewatin, except in so far as they are inconsistent with the provisions of the North-West Territories Act or The Keewatin Act and the amendments thereto.

2. Nothing in this Act shall affect any of the laws relating to the government of His Majesty's land or naval forces.

3. Nothing herein contained shall affect the Acts and parts of Acts in the appendix to this Act. And in construing such parts reference may be had to the repealed portions of the Acts of which respectively they form parts, as well as to any sections of this Act which have been substituted therefor, or which deal with like matters.

APPENDIX.

The following are the Acts and parts of Acts which are not affected by the Criminal Code, 1892, set forth in the Appendix thereto. (Reference is made in this treatise to the more important of those Acts under the respective sections of the Code which deal with their subject matter):—

Of R.S.C. (1886), ch. 50 (respecting the North-West Territories), sec. 101.

Of R.S.C. ch. 146 (Treason, etc.), secs. 6 and 7.

Of R.S.C. ch. 148 (Firearms), sec. 7.

Of R.S.C. ch. 149 (Seizure of Arms), secs. 5 and 7.

Of R.S.C. ch. 151 (respecting the Peace near Public Works), secs. 1 to 24 inclusive.

Of R.S.C. ch. 152 (respecting the Peace at Public Meetings), secs. 1, 2 and 3.

Of R.S.C. ch. 153 (Prize-fighting), secs. 6, 7 and 10.

Of R.S.C. ch. 154 (Perjury), sec. 4.

Of R.S.C. ch. 157 (Public Morals), sub-sec. 4 of sec. 8.

Of R.S.C. ch. 167 (Coin Offences), secs. 29 to 34 inclusive.

Of R.S.C. ch. 169 (Army and Navy), sec. 9.

Of R.S.C. ch. 172 (Cruelty to Animals), sec. 7.

Of 51 Vict., ch. 41 (Merchandise Marks), secs. 15, 16, 18, 22, 23.

Of 52 Vict., ch. 41 (Trade Combinations), secs. 4 and 5.

Of 53 Vict., ch. 37 (Criminal Law Amendment), sec. 1; (Escapes and Rescues), sec. 2, and 32 to 40 inclusive; (Industrial Schools and Reformatories).

END OF CODE.

THE CANADA EVIDENCE ACT.

An Act respecting Witnesses and Evidence. (56 Vict. (Can.), c. 31, as amended.)

(Original Act assented to 1st April, 1893.)

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

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

1. Short title.—This Act may be cited as *The Canada Evidence Act,* 1893.

2. Application. — This Act shall apply to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf.

A coroner's court is a criminal court and is, therefore, one in which the evidence would be subject to this Act. A deposition made at a coroner's inquest after objection taken under sec. 5 would, therefore, not be admissible in a subsequent criminal proceeding against the witness other than a charge of perjury in giving such evidence. See R. v. Hendershott, 26 O.R. 678; R. v. Hopkins (1896), 32 C.L.J. 592, Desnoyers, P.M., Montreal.

In a civil action brought to recover from the constable and clerk of the peace moneys seized in a common gaming house under the powers conferred by sec. 575 of the Code, it was held that the rules of evidence in force in the province in civil matters applied and not the Canada Evidence Act. O'Neil v. Attorney-General (1896), 1 Can. Cr. Cas. 303 (Can.), affirming (s.c.), O'Neil v. Tupper, R.J.Q. 4 Q.B. 315. But it was held also that a judgment of forfeiture in a criminal proceeding is not subject to collateral attack in a civil action brought to recover the moneys. Ibid.

WITNESSES.

3. No incompetency from crime or interest. — A person shall not be incompetent to give evidence by reason of interest or crime.

4. Competency of accused and of wife and husband. —Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness, whether the person so charged is charged solely or jointly with any other person. Provided, however,

that no husband shall be competent to disclose any communication made to him by his wife during their marriage, and no wife shall be competent to disclose any communication made to her by her husband during their marriage.

2. The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge or by counsel for the prosecution in addressing the jury.

Defendant as a witness.]—The result of this section is to empower (but not to compel) one of two persons jointly indicted to give evidence incriminating the other without the necessity of resorting to the old procedure of either taking a plea of guilty or pardoning the prisoner to be called.

When a person on trial claims the right to give evidence on his own behalf he comes under the ordinary rule as to cross-examination. He may be asked all questions pertinent to the issue, and cannot refuse to answer those which may implicate him. R. v. Connors (1893), 3 R.J.Q., 3 Q.B. 100, 5 Can. Cr. Cas. 70 (Que.).

Comment on failure to testify.]—Comment by the prosecuting counsel before the jury in respect of the failure of prisoner's wife to testify is error entitling the prisoner to a new trial. R. v. Corby (1898), 1 Can. Cr. Cas. 457 (N.S.).

The rule is to be applied, notwithstanding a subsequent withdrawal of the comment and notwithstanding the judge's direction to the jury to disregard it. The objection is not waived, because not taken at the time, and it is sufficient if drawn to the attention of the trial judge after the jury have retired to deliberate. Ibid.

It is the duty of the court to carefully protect the accused from damaging insinuations, cunningly devised, which may not in terms invite a consideration of prisoner's failure to testify but make indirect and covert allusion to the defendant's silence. Dawson v. State (1893), 24 S. W. Rep. 414 (Texas App.). So where counsel for the prosecution stated a conversation between defendant and a witness, to which the latter had testified, and then exclaimed, "Who has denied it?" such was held to be a comment on defendant's failure to testify, for the defendant was the only person who could deny it. Dawson v. State, Ibid. But comment on the failure to contradict testimony, where it does not appear that the accused is the only person who can contradict it, is not prohibited. State v. Weddington, 103 N. Car. 372.

Where the prosecuting counsel, in his address to the jury, after referring to evidence of the prisoner's whereabouts at the time of the offence, turned to the prisoner, and said, "Now, where does he say he was, if he was not there?" such was held good ground for reversing the conviction, although the prosecuting counsel was promptly admonished by the presiding judge to refrain from remarks of that nature, and the jury instructed not to consider them. Brazell v. State (1894), 26 S. W. Rep., 723 (Tex. App.).

Husband and wife.]—A letter written by the accused to his wife and intrusted to but opened by a constable was held inadmissible. R. v. Pamenter (1872), 12 Cox C.C. 177. Conversations between husband and wife at which a third party was present or which he overheard may be proved by such third person. R. v. Smithie, 5 C. & P. 332; R. v. Simons (1834), 6 C. & P. 540; R. v. Bartlett, 7 C. & P. 832.

(Amendment of 1898.)

5. Incriminating answers. — No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown, or of any person; provided, however, that if with respect to any question the witness objects to answer upon the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this section the witness would therefore have been excused from answering such question, then, although the witness shall be compelled to answer yet the answer so given shall not be used or 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.

(Amendment of 1901.)

2. The proviso to sub-section 1 of this section shall in like manner apply to 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 the said sub-section, and which, but for the enactment, he would upon such ground have been excused from answering.

The fifth section of the Canada Evidence Act, 1893, as amended by 61 Vict., ch. 53, removes the ground for the differences of opinion, which prevailed as to the proper construction of the section as it originally stood. See R. v. Hendershott and Welter (1895), 26 Ont. R. 678; R. v. Williams, 28 Ont. R. 583; R. v. Hammond (1898), 29 Ont. R. 211, 1 Can. Cr. Cas. 373.

If when called upon to testify, that witness does not object to do so on the ground that his answers may tend to criminate him, his answers are receivable against him, except in the case the section provides for) in any criminal trial or other criminal proceeding against him thereafter. If, on the other hand, he does object, he is protected. R. v. Clark (1901), 5 Can. Cr. Cas. 235 (Ont.); R. v. McLinehy, 2 Can Cr. Cas. 416 (Que.).

A person accused of the offence, whether indicted and tried alone or jointly with others, cannot be required to give evidence although he may do so of his own accord. R. v. Connors (1893), R.J.Q. 3 Q.B. 100, 5 Can. Cr. Cas. 70. But on an indictment for theft, a witness who is not a party to the indictment being tried but who is indicted as a receiver of the stolen goods, is not excused from answering, but if he takes objection his evidence cannot be used against him on his trial. R. v. McLinehy, 2 Can. Cr. Cas. 416 (Que.).

Before the amendment made to this section by the addition of sub-sec. (2) it had been held that evidence given in a civil proceeding, whether under compulsion or not, might be used against the witness in a subsequent

criminal proceeding. R. v. Douglas (1896), 1 Can. Cr. Cas. 221 (Man.); R. v. Chisholm (1896), 32 C.L.J. 591 (Que.).

Under the old law an admission of guilt made by a witness on his examination was admissible only if made freely and voluntarily and after proper caution that he was not bound to criminate himself. R. v. Garbett (1847), 1 Den. C.C. 236; R. v. Mercoron (1812), 2 Stark. N.P. 366.

6. Evidence of mute. — A witness who is unable to speak, may give his evidence in any other manner in which he can make it intelligible.

6A. See page 881

7. Judicial notice of statutes, etc. — Judicial notice shall be taken of all Acts of the Imperial Parliament, of all ordinances made by the Governor in Council, or the Lieutenant-Governor in Council of any province or colony which, or some portion of which, now forms or hereafter may form part of Canada, and of all the Acts of the Legislature of any such province or colony, whether enacted before or after the passing of *The British North America Act*, 1867.

Under this section it was held in a Quebec case that the court should take judicial notice of the Ontario Companies' Act in proof that the accused charged as a director of a trading company with fraudulently publishing a false statement of its affairs, was in fact a director because he was the president of the company, and by the Ontario Companies' Act, under which the company was incorporated, the president must be chosen from the directors. R. v. Gillespie (1898), 1 Can. Cr. Cas. 551 (Que.)

8. Proof of proclamations, etc. — Evidence of any proclamation, order, regulation or appointment, made or issued by the Governor-General or by the Governor in Council, or by or under the authority of any minister or head of any department of the Government of Canada, may be given in all or any of the modes hereinafter mentioned, that is to say:—

(*a*) By the production of a copy of the *Canada Gazette* or a volume of the Acts of Parliament of Canada purporting to contain a copy of such proclamation, order, regulation, or appointment or a notice thereof;

(*b*) By the production of a copy of such proclamation, order, regulation or appointment, purporting to be printed by the King's Printer for Canada; and

(*c*) By the production, in the case of any proclamation, order, regulation or appointment made or issued by the Governor-General or by the Governor in Council, of a copy or extract purporting to be certified to be true by the clerk, or assistant or acting clerk of the King's Privy Council for Canada,—and in the case of any order, regulation or appoint-

ment made or issued by or under the authority of any such minister or head of a department, by the production of a copy or extract purporting to be certified to be true by the minister, or by his deputy or acting deputy, or by the secretary or acting secretary of the department over which he presides.

9. Proof of proclamations, etc. — Evidence of any proclamation, order, regulation or appointment made or issued by a Lieutenant-Governor or Lieutenant-Governor in Council of any province, or by or under the authority of any member of the Executive Council, being the head of any department of the Government of the province, may be given in all or any of the modes hereinafter mentioned, that is to say:—

(*a*) By the production of a copy of the Official Gazette for the province, purporting to contain a copy of such proclamation, order, regulation or appointment, or a notice thereof;

(*b*) By the production of a copy of such proclamation, order, regulation or appointment, purporting to be printed by the Government or King's Printer for the province;

(*c*) By the production of a copy or extract of such proclamation, order, regulation or appointment, purporting to be certified to be true by the clerk or assistant or acting clerk of the Executive Council, or by the head of any department of the Government of a province, or by his deputy or acting deputy, as the case may be.

10. Proof of judicial proceedings, etc.—Evidence of any proceeding or record whatsoever of, in, or before any court in the United Kingdom, or the Supreme or Exchequer Courts of Canada, or any court, or before any justice of the peace or any coroner, in any province of Canada, or any court in any British colony or possession, or any court of record in the United States of America, or of any state of the United States of America, or any other foreign country, may be made in any action or proceeding by an exemplification or certified copy thereof, purporting to be under the seal of such court, or under the hand or seal of such justice or coroner, as the case may be, without any proof of the authenticity of such seal or of the signature of such justice or coroner, or other proof whatever; and if any such court, justice or coroner, has no seal, or so

certifies, then by a copy purporting to be certified under the signature of a judge or presiding magistrate of such court or of such justice or coroner, without any proof of the authenticity of such signature or other proof whatsoever.

11. Proof of Imperial Acts, etc. — Imperial proclamations, Orders in Council, treaties, orders, warrants, licenses, certificates, rules, regulations or other Imperial official records, acts or documents may be proved (*a*) in the same manner as the same may from time to time be provable in any court in England, or (*b*) by the production of a copy of the *Canada Gazette,* or a volume of the Acts of the Parliament of Canada purporting to contain a copy of the same or a notice thereof, or (*c*) by the production of a copy thereof, purporting to be printed by the King's Printer for Canada.

12. Proof of official or public documents. — In every case in which the original record could be received in evidence, a copy of any official or public document of Canada or of any province, purporting to be certified under the hand of the proper officer or person in whose custody such official or public document is placed, or a copy of a document, by-law, rule, regulation or proceeding, or a copy of any entry in any register or other book of any municipal or other corporation, created by charter or statute of Canada or any province, purporting to be certified under the seal of the corporation, and the hand of the presiding officer, clerk or secretary thereof, shall be receivable in evidence without proof of the seal of the corporation, or of the signature or of the official character of the person or persons appearing to have signed the same, and without further proof thereof.

13. Copies of public books or documents admissible in evidence.—Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no other statute exists which renders it contents provable by means of a copy, a copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before a person having, by law or by consent of parties, authority to hear, receive and examine evidence, provided it is proved that it is a copy or extract purporting to be certified to be true by the officer to whose custody the original has been entrusted.

14. Proof of handwriting, etc., not requisite.—No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, regulation, appointment, book or other document; and any such copy or extract may be in print or in writing, or partly in print, and partly in writing.

15. Order signed by Secretary of State. — Any order in writing, signed by the Secretary of State of Canada, and purporting to be written by command of the Governor-General, shall be received in evidence as the order of the Governor-General.

16. Copies of notices, etc., in Canada Gazette. — All copies of official and other notices, advertisements and documents printed in the *Canada Gazette* shall be prima facie evidence of the originals, and of the contents thereof.

17. Copies of entries in books of government departments.— A copy of any entry in any book kept in any department of the Government of Canada, shall be received as evidence of such entry and of the matters, transactions and accounts therein recorded, if it is proved by the oath or affidavit of an officer of such department that such book was, at the time of the making of the entry, one of the ordinary books kept in such department, that the entry was made in the usual and ordinary course of business of such department, and that such copy is a true copy thereof.

18. Proof of notarial acts in Quebec. — Any document purporting to be a copy of a notarial act or instrument made, filed or enregistered in the Province of Quebec, and to be certified by a notary or prothonotary to be a true copy of the original in his possession as such notary or prothonotary, shall be received in evidence in the place and stead of the original, and shall have the same force and effect as the original would have if produced and proved: Provided, that it may be proved in rebuttal that there is no such original, or that the copy is not a true copy of the original in some material particular, or that the original is not an instrument of such nature as may by the law of the Province of Quebec be taken before a notary or be filed, enrolled or enregistered by a notary in the said province.

19. Notice to be given to adverse party. — No copy of any book or other document, as provided in sections 10, 12, 13, 14, 17 and 18 of this Act, shall be received in evidence upon any trial unless the party intending to produce the same has before the trial given to the party against whom it is intended to be produced reasonable notice of such intention. The reasonableness of the notice shall be determined by the court or judge, but the notice shall not in any case be less than ten days.

20. Construction of this Act. — The provisions of this Act shall be deemed to be in addition to and not in derogation of any powers of proving documents given by any existing statute or existing at law.

21. Application of provincial laws of evidence. — In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpœna or other document, shall, subject to the provisions of this and other Acts of the Parliament of Canada, apply to such proceedings.

In the Province of Quebec, relationship must be established by the production of extracts from the registers of civil status, as required by the provincial laws of evidence made applicable to criminal proceedings by this section unless the absence of such registers is proved; and it is not too late for the accused to object that oral evidence is insufficient proof, after the case for the prosecution has been closed. R. v. Garneau (1899), 4 Can. Cr. Cas. 69 (Que.).

OATHS AND AFFIRMATIONS.

22. Who may administer oaths.—Every court and judge, and every person having, by law or consent of parties, authority to hear and receive evidence, shall have power to administer an oath to every witness who is legally called to give evidence before that court, judge or person.

23. Affirmation of witness instead of oath. — If a person called or desiring to give evidence, objects, on grounds of conscientious scruples, to take an oath, or is objected to as incompetent to take an oath, such person may make the following affirmation:—

"I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth."

And upon the person making such solemn affirmation, his evidence shall be taken and have the same effect as if taken under oath.

24. Affirmation instead of oath. — If a person required or desiring to make an affidavit or deposition in a proceeding or on an occasion whereon or touching a matter respecting which an oath is required or is lawful, whether on taking office or otherwise, refuses or is unwilling to be sworn, on grounds of conscientious scruples, the court or judge, or other officer or person qualified to take affidavits or depositions, shall permit such person instead of being sworn, to make his solemn affirmation in the words following, viz.: "I, A. B., do solemnly affirm," &c.; which solemn affirmation shall be of the same force and effect as if such person had taken an oath in the usual form.

2. Any witness whose evidence is admitted or who makes an affirmation under this or the next preceding section shall be liable to indictment and punishment for perjury in all respects as if he had been sworn.

25. Evidence of child. — In any legal proceeding where a child of tender years is tendered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, such child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

2. But no case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence.

STATUTORY DECLARATIONS.

26. Statutory declaration. — Any judge, notary public, justice of the peace, police or stipendiary magistrate, recorder, mayor, commissioner authorized to take affidavits to be used either in the Provincial or Dominion courts, or any other functionary authorized by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making the same before him, in the form in the schedule A to this Act, in attestation of the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing.

The permission granted by this section to receive the declaration includes an authorization to the declarant to make the same, and the declarant is consequently a person "authorized by law to make a solemn declaration" under sec. 147 of the Code. R. v. Skelton (1898), 4 Can. Cr. Cas. 467 (N.W.T.).

27. Affidavits required by insurance companies. — Any affidavit, affirmation or declaration required by any insurance company authorized by law to do business in Canada, in regard to any loss of, or injury to, person, property, or life insured or assured therein, may be taken before any commissioner or other person authorized to take affidavits, or before any justice of the peace, or before any notary public for any province of Canada; and such officer is hereby required to take such affidavit, affirmation or declaration.

28. Repeal.—The Acts mentioned in schedule B to this Act are hereby repealed.

29. Commencement of Act. — This Act shall come into force on the first day of July, one thousand eight hundred and ninety-three.

SCHEDULE A.

I, A. B., do solemnly declare that (*state the fact or facts declared to*), and I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath, and by virtue of *The Canada Evidence Act, 1893*.

Declared before me , at , this day of , A.D. 19 .

SCHEDULE B.

ACTS REPEALED.	TITLE.	EXTENT OF REPEAL.
R.S.C., c. 139	An Act respecting Evidence.	The whole Act.
R.S.C., c. 141	An Act respecting Extra-judicial Oaths.	The whole Act.

STATUTES OF CANADA, 1902.

(2 Edw. VII., chapter 9).

An Act to further amend the Canada Evidence Act, 1893.

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

1. *The Canada Evidence Act, 1893*, is amended by inserting, after section 6 thereof, the following section:—

"**6. Expert witnesses.**—Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called upon either side without the leave of the court or judge or person presiding, such leave to be applied for before the examination of any of the experts who may be examined without such leave."

INDEX.