604. Application for bail after committal.—When any person has been committed for trial by any justice the prisoner, his counsel, solicitor or agent may notify the committing justice, that he will, as soon as counsel can be heard, move before a superior court of the Province in which such person stands commited, or one of the judges thereof, or the judge of the County Court, if it is intended to apply to such judge, under section 602, for an order to the justice to admit such prisoner to bail,—whereupon such committing justice shall, as soon as may be, transmit to the clerk of the Crown, or the chief clerk of the Court, or the clerk of the County Court or other proper officer, as the case may be, endorsed under his hand and seal, a certified copy of all informations, examinations and other evidence, touching the offence wherewith the prisoner has been charged, together with a copy of the warrant of commitment, and the packet containing the same shall be handed to the person applying therefor, for transmission, and it shall be certified on the outside thereof to contain the information concerning the case in question. R.S.C. c. 174, s. 93.

2. Upon such application to any such court or judge the same order concerning the prisoner being bailed or continued in custody, shall be made as if the prisoner was brought up upon a *habeas corpus*. R.S.C. c. 174, s. 94.

3. If any justice neglects or offends in anything contrary to the true intent and meaning of any of the provisions of this section, the court to whose officer any such examination, information, evidence, bailment or recognizance ought to have been delivered, shall, upon examination and proof of the offence, in a summary manner, impose such fine upon every such justice as the court thinks fit. R.S.C. c. 174, s. 95.

Admitting to bail.]—Where there is danger that accused persons, committed for trial, may purposely allow their bail to be forfeited with the view of avoiding scandal, the court, on an application to admit them to bail, should require the bail to be of a substantial amount. R. v. Stewart (1900), 4 Can. Cr. Cas. 131 (Man.).

The propriety of admitting to bail a prisoner charged with an offence which was formerly a felony is to be determined with the probability of his appearing to take his trial and not with reference to the guilt or innocence of the party. Short & Mellor's Crown Prac. 376.

Where a prisoner committed for trial on a charge of manslaughter would ordinarily be admitted to bail, bail will not be refused because the Crown prosecutor swears to a belief that he can prove the offence to have been murder. R. v. Spicer (1901), 5 Can. Cr. Cas. 229.

Bail is a delivery or bailment of a person to his sureties, upon their joining, together with himself, in sufficient security for his appearance, he being supposed to continue in their friendly custody instead of going to jail. Blackstone's Com. Vol. 4, p. 296: "He that is bailed is, in supposition

of law, still in custody, and the parties that take him to bail are in law his keepers, and may re-seize him to bring him in at any time." 2 Hawkins, P.C. 124.

"If a person be bailed by insufficient sureties he may be required, either by him who took the bail, or by any one who hath power to bail him, to find better sureties, and on his refusal may be committed, for insufficient sureties are as none." Bacon's Abridg., title "bail." So, where it was sworn that bail was fictitious and utterly worthless, and the accused refused to state who they were, or where they were to be found, or that they had any existence, an order was made requiring him to find other sureties within four days, and put in good and sufficient bail before the judge making the order, and that otherwise the accused should be recommitted to jail. R. v. Mason (1869), 5 Ont. Pr. 125, per Morrison, J.

The reason for committing persons to prison before trial is for the purpose of ensuring their appearance to take their trial, and the same principle is to be adopted on an application for bailing a person committed to take his trial, and it is not a question as to the guilt or innocence of the prisoner. Hughes, Co. J., Elgin, in R. v. Brynes (1862), 8 U.C.L.J. 76; R. v. Scaife, 9 Dowl. P.C. 553. But it is necessary to see whether the offence is serious, and whether the evidence is strong, and whether the punishment for the offence is heavy. So where on a charge of arson the evidence was strongly presumptive of guilt, and there was evidence that the prisoner had endeavoured to purchase his escape from the custody of the constable who had arrested him, the judge's discretion is properly exercised by refusing bail. Ibid. The probability of the accused voluntarily appearing to take his trial does not, in contemplation of law, exist when the crime charged is of the highest magnitude, the evidence in support of the charge strong, and the punishment the highest known to the law. In such case the judge will not interfere to admit to bail. Baronnet's Case (1852), 1 E.&B. 1; but when either of these ingredients is wanting, the judge has a discretion which he will exercise. Ex parte Maguire (1857), 7 L.C.R. 57, per Power, Circuit Judge, for the district of Quebec. But if these elements be combined in any case bail will be refused. Ex parte Corriveau (1856), 6 L.C.R. 249; Ex parte Robinson (1854), 25 Eng. Law & Eq. R. 215.

If a true bill has been found by the grand jury, that fact will have great weight in the question of admitting to bail, but it is not conclusive as to the prisoner's right to bail; and if upon reading the depositions against him, they are found to create but a very slight suspicion of the prisoner's guilt, he should be admitted to bail, notwithstanding the refusal of the Crown officers to consent. Ex parte Maguire (1857), 7 L.C.R. 57.

If the depositions afford a presumption of guilt, at least so strong that a grand jury would in the opinion of the judge hearing the application for bail, find a true bill for murder against the accused, the application should be refused. R. v. Mullady and Donovan (1868), 4 Ont. Pr. 314, per Draper, C.J. Prisoners charged with murder will not be admitted to bail unless it be under very extreme circumstances, as where facts are brought before the court to shew that the indictment cannot be sustained. R. v. Murphy (1853), 2 N.S.R. 158. But the court has undoubted power to admit to bail in cases of murder. Re Bartlemy (1852), 1 E. & B. 8.

The object to be kept in view is the ensuring the appearance of the parties and not the punishment, but the court cannot overlook the magnitude of the crime charged, and the probable testimony to be adduced in support. And in Newfoundland some of the persons charged with murder alleged to have been committed during a riot were admitted to bail on the postponement of their trial, where the witnesses for the defence, numbering about seventy, were engaged to prosecute their employment in the sea fishery and their detention would deprive them of their means of livelihood at the only season when they could earn it for themselves, the court discriminating as

to the parties to be liberated on an analysis of the testimony. R. v. Coady (1885), Morris' Newfoundland Decisions 58.

In Ex parte Baker (1872), 3 Revue Critique (Que.) 46, a verdict of wilful murder has been returned at a coroner's inquest, and a true bill subsequently found by the grand jury against the accused. He was tried and the jury differed in opinion and were discharged. It did not appear how the jury were divided, or what was the precise obstacle to their unanimity. Application was made by the prisoner's counsel for permission to give bail for his appearance to take another trial, and on the return of a writ of habeas corpus before the full Court of Queen's Bench (Duval, C.J., Caron, Drummond, Badgley and Monk, JJ.,) the accused was admitted to bail, himself in £500, and two sureties for £250 each.

The mere circumstance that the accused is able to give any reasonable amount of bail which may be asked of him is not per se a ground for the application. R. v. McCormick, 17 Irish Common Law Rep. 411.

It is for the court to exercise a sound discretion, and if satisfied that notwithstanding the ordering of bail, the prisoners are, in view of all the circumstances, likely to be forthcoming at the proper time to answer the charge, bail may be ordered. R. v. Keeler (1877), 7 Ont. Pr. 117, 120, per Harrison, C.J.; R. v. Wood, 9 Ir. L.R. 71; R. v. Gallagher, 7 Ir. C.L. 19; R. v. McCartie, 11 Ir. C.L. 188.

If the offence be not very serious and the depositions disclose no more than slender grounds of suspicion, bail may be allowed. R. v. Jones, 4 U.C.R. (O.S.) 18.

The court should not, on an application for bail, weigh and decide the question of credibility of witnesses. R. v. Keeler (1877), 7 Ont. Pr. 117, 123.

Where a habeas corpus has been issued, the court has power to admit persons to bail when accused of any felony, including murder. R. v. Fitzgerald, 3 U.C.R. (O.S.) 300; R. v. Higgins, 4 U.C.R. (O.S.) 83.

By 32 & 33 Vict. (Can.), ch. 30, secs. 61 and 62 (now Cr. Code 604), any judge of a court of superior criminal jurisdiction in Ontario was empowered to act on an application for bail as if the party were brought before the full court for that purpose under a writ of habeas corpus. R. v. Chamberlain, 1 C.L.J. 157. In habeas corpus proceedings, when the prisoner, with the depositions and warrant of commitment and the habeas corpus, are duly returned, the court are to consider whether they will discharge, bail, or remand him; and they may take a reasonable time for that purpose, and may bail him de die in diem, or direct him to be detained in custody until they shall have come to decision. Chitty's Criminal Law, Vol. 3, p. 128. And if the court ascertain that there was no pretence for imputing to the prisoner any indictable offence, they will discharge him. Ibid. A judge cannot ascertain if there was a pretence for imputing an indictable offence unless the depositions are before him that he may judge whether the charge of the prisoner having committed such offence is well or ill founded; and a writ of habeas corpus should not issue where no depositions have as yet been taken by the magistrate, and the accused remains in custody on remand pending a preliminary inquiry before the magistrate, such remand having been granted to enable the prosecution to supply evidence in support of the charge. R. v. Cox (1888), 16 Ont. R. 228, per McMahon, J. In the same case it was held that, although the statutory power of superior court judges to admit any person accused of felony or misdemeanour to bail "when they think it right to do so" (Criminal Procedure Act, R.S.C. 174, sec. 83), gives authority to admit to bail in cases where the accused has not been finally committed for trial, bail should not be granted after the refusal of the magistrate to grant same, unless the court can say that he had not exercised a sound discretion in refusing it, or unless the depositions of the witnesses have been taken, by a perusal of which the court could judge of the nature of the case likely to be presented at the trial in case the prisoner were commited for trial. R.

v. Cox (1888), 16 Ont. R. 228, 232, per McMahon, J. Sec. 83 of the Criminal Procedure Act was the basis of the present sec. 603 of the Code, and although the saving clause, containing the words quoted, has not been repeated in the Code enactment, it would seem that its omission had made no change in the law.

The Habeas Corpus Act, 31 Car. II., ch. 2, sec. 7, provides as follows:—

"That if any person or persons shall be committed for high treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court, the first week of the term, or first day of the sessions of oyer and terminer and general gaol delivery to be brought to his trial, shall not be indicted some time in the next term, sessions of oyer and terminer or general gaol delivery after such commitment, it shall and may be lawful to and for the judges of the Court of King's Bench and justices of oyer and terminer or general gaol delivery, and they are hereby required upon motion to them made in open court the last day of the term, sessions or general gaol delivery, either by the prisoner or anyone on his behalf, to set at liberty the prisoner upon bail, unless it appears to the judges and justices upon oath made, that the witnesses for the King could not be produced the same term, sessions or general gaol delivery, and if any person committed as aforesaid, upon his prayer or petition in open court the first week of the term or first day of the sessions of oyer and terminer and general gaol delivery, to be brought to his trial shall not be indicted and tried the second term, sessions of oyer and terminer and general gaol delivery after his commitment, or upon his trial shall be acquitted, he shall be discharged from his imprisonment."

Under this statute the Crown is not obliged to do more than indict at the first assize after commitment, and have the prisoner tried at the second assize thereafter. R. v. Bowen, 9 C. & P. 509; R. v. Keeler (1877), 7 Ont. Pr. 117, 123.

The assignment of that period by the statute is a declaration that in the absence of any special reason to the contrary, the prosecutor having had his vigilance excited by the prayer of the defendant in open court, should be allowed that period for preparing and getting up the case for the Crown, without having the safe custody of the prisoner interfered with. R. v. McCartie, 11 Ir. C.L. 194.

605. Warrant of deliverance.—Whenever any justice or justices admit to bail any person who is then in any prison charged with the offence for which he is so admitted to bail, such justice or justices shall send to or cause to be lodged with the keeper of such prison, a warrant of deliverance under his or their hands and seals, requiring the said keeper to discharge the person so admitted to bail if he is detained for no other offence, and upon such warrant of deliverance being delivered or lodged with such keeper, he shall forthwith obey the same. R.S.C. c. 174, s. 84.

606. Warrant for the arrest of a person about to abscond.—Whenever a person charged with any offence has been bailed in manner aforesaid, it shall be lawful for any justice, if he sees fit, upon the application of the surety or of either of the sureties of such person and upon information being

made in writing and on oath by such surety, or by some person on his behalf, that there is reason to believe that the person so bailed is about to abscond for the purpose of evading justice, to issue his warrant for the arrest of the person so bailed, and afterwards, upon being satisfied that the ends of justice would otherwise be defeated, to commit such person when so arrested to gaol until his trial, or until he produces another sufficient surety, or other sufficient sureties, as the case may be, in like manner as before.

607. Delivery of accused to prison.—The constable or any of the constables, or other person to whom any warrant of commitment authorized by this or any other Act or law is directed, shall convey the accused person therein named or described to the gaol or other prison mentioned in such warrant, and there deliver him, together with the warrant, to the keeper of such gaol or prison, who shall thereupon give the constable or other person delivering the prisoner into his custody, a receipt for the prisoner, setting forth the state and condition of the prisoner when delivered into his custody.

2. Such receipt shall be in the form DD in schedule one hereto. R.S.C. c. 174, s. 85.

FORM DD.—

GAOLER'S RECEIPT TO THE CONSTABLE FOR THE PRISONER.

I hereby certify that I have received from W. T., constable, of the county of , the body of A. B., together with a warrant under the hand and seal of J. S., Esquire, justice of the peace for the said county of , and that the said A. B. was sober (*or as the case may be*), at the time he was delivered into my custody.

P. K.,
Keeper of the common gaol of the said county.

PART XLVI.

INDICTMENTS.

SECT.

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608. Indictments need not be on parchment.—It shall not be necessary for any indictment or any record or document relative to any criminal case to be written on parchment. R.S.C. c. 174, s. 103.

609. Statement of venue.—It shall not be necessary to state any venue in the body of any indictment, and the district, county or place named in the margin thereof, shall be the venue for all the facts stated in the body of the indictment; but if local description is required, such local description shall be given in the body thereof. R.S.C. c. 174, s. 104.

Venue.]—The visne of the place of trial—the venue—is regularly the visne of the place of the crime, i.e., the same county, district or place; and the trial then takes place by a jury of that county or district taken from a panel summoned by the sheriff of the same. Malott v. R. (1886), 1 B.C.R., pt. 2, p. 212; Sproule v. R., 1 B.C.R., pt. 2, p. 219, and sub-nom; Re Sproule, 12 Can. S.C.R. 140. But by reason of the extended jurisdiction of justices to hold preliminary enquiries in certain cases although the offences were not within the territory for which they were commissioned to be justices (see secs. 553-556), a committal for trial, and consequently the trial itself may be in another district. A justice has under sec. 554 jurisdiction to compel the attendance of an accused person for the purpose of a preliminary inquiry to be held by him if the charge against the person accused is that he has committed an indictable offence in any part of the same province, and is, or is suspected to be, or resides, or is suspected to reside, within the territorial limits of the justice's district. Sec. 554. Jurisdiction also attaches on a charge of receiving stolen property, if the theft took place within the justice's limits, or if the accused has the stolen property within such limits in his possession, although stolen or unlawfully acquired or unlawfully received elsewhere. Sec. 554. If, however, an accused person is brought before a justice charged with an offence committed out of the limits of the latter's jurisdiction but over which he has jurisdiction by reason only of such special provisions, the justice has a discretion after hearing both the prosecution and the defence on the question of removal, and at any stage of the preliminary enquiry, to order the accused to be taken by a constable before a justice whose territorial jurisdiction extends over the place where the offence was committed. Sec. 557.

Objection to venue.]—An objection to the jurisdiction in respect of venue had formerly to be raised by a special plea to the indictment. R. v. O'Rourke, 1 O.R. 464, which plea was required to be duly verified by affidavit or otherwise. R. v. Malott (1885), 1 B.C.R., pt. 2, p. 207; Malott v. R. (1886), 1 B.C.R., pt. 2, p. 212; but sec. 631 abolishes that form of special plea, and any such ground of defence may now be relied on under the plea of not guilty. Sec. 631 (2).

Change of venue.]—See sec. 609.

610. Heading of indictment.—It shall not be necessary to state in any indictment that the jurors present upon oath or affirmation.

2. It shall be sufficient if an indictment begins in one of the forms EE in schedule one hereto, or to the like effect.

3. Any mistake in the heading shall, upon being discovered, be forthwith amended, and whether amended or not, shall be immaterial.

FORM EE.—

In the (*name of the court in which the indictment is found*).

The jurors for our Lord the King present that

(*Where there are more counts than one, add at the beginning of each count*):

"The said jurors further present that ."

611. Form and contents of counts.—Every count of an indictment shall contain, and shall be sufficient if it contains, in substance a statement that the accused has committed some indictable offence therein specified.

2. Such statement may be made in popular language without any technical averments or any allegations of matter not essential to be proved.

3. Such statement may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence or in any words sufficient to give the accused notice of the offence with which he is charged.

4. Every count shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him, and to identify the transaction referred to: Provided that the absence or insufficiency of such details shall not vitiate the count.

5. A count may refer to any section or sub-section of any statute creating the offence charged therein, and in estimating the sufficiency of such count the court shall have regard to such reference.

6. Every count shall in general apply only to a single transaction.

FORM FF.—

EXAMPLES OF THE MANNER OF STATING OFFENCES.

(*a*) A. murdered B. at , on .

(*b*) A. stole a sack of flour from a ship called the , at , on .

(*c*) A. obtained by false pretenses from B. a horse, a cart, and the harness of a horse at , on .

(*d*) A. committed perjury with intent to procure the conviction of B. for an offence punishable with penal servitude, namely robbery, by swearing on the trial of B. for the robbery of C. at the Court of Quarter Sessions for the county of

Carleton, held at Ottawa, on the day of , 1879; first that he, A. saw B. at Ottawa, on the day of ; secondly, that B. asked A. to lend B. money on a watch belonging to C.; thirdly; &c.

or

(*e*) The said A. committed perjury on the trial of B. at a Court of Quarter Sessions, held at Ottawa, on for an assault alleged to have been committed by the said B. on C., at Ottawa, on the day of by swearing to the effect that the said B. could not have been at Ottawa, at the time of the alleged assault, inasmuch as the said A. had seen him at that time in Kingston.

(*f*) A., with intent to maim, disfigure, disable or do grievous bodily harm to B., or with intent to resist the lawful apprehension or detainer of A. (*or* C.), did actual bodily harm to B. (*or* D.).

(*g*) A., with intent to injure or endanger the safety of persons on the Canadian Pacific Railway, did an act calculated to interfere with an engine, a tender, and certain carriages on the said railway on , at , by (*describe with so much detail as is sufficient to give the accused reasonable information as to the acts or omissions relied on against him, and to identify the transaction*).

(*h*) A. published a defamatory libel on B. in a certain newspaper called the , on the day of , A.D. , which libel was contained in an article headed or commencing (*describe with so much detail as is sufficient to give the accused reasonable information as to the part of the publication to be relied on against him*), and which libel was written in the sense of imputing that the said B. was (*as the case may be*).

Sufficiency of the indictment.]—The examples in Code Form FF, of the description of offences in indictments are intended to illustrate the provisions of Code sec. 611, relating to the form of counts; and the operative effect of Form FF under sec. 982 is not restricted to the validating of counts in respect only of the particular offences for which examples are given in the Form, but extends to counts for other offences. R. v. Skelton (1898), 4 Can. Cr. Cas. 467 (N.W.T.).

An indictment only states the legal character of the offence and does not profess to furnish the details and particulars. These are supplied by the depositions and the practice of informing the prisoner or his counsel of any additional evidence not in the depositions what it may be intended to produce at the trial. Mulcahey v. R. (1868), L.R. 3, H.L. 306. Per Willes, J.; Downie v. R. (1888), 15 Can. S.C.R. 358, 375.

Each count of an indictment must contain a statement of all the essential ingredients which constitute the offence charged. R. v. Weir (No. 5) (1900), 3 Can. Cr. Cas. 499 (Que.).

An indictment is sufficient in form if it contains all the allegations essential to constitute the offence and charges in substance the offence created by the statute; and it is immaterial in what part of the same the averment is contained, or that words of equivalent import are used instead of the language of the statute. An indictment charging bank officials with having made a monthly report, etc., "a wilful, false and deceptive statement" of and concerning the affairs of the bank, with intent to deceive, sufficiently charges the offence, under section 99 of The Bank Act, of having made "a wilfully false or deceptive statement *in* any return or report" with such intent. R. v. Weir (No. 1), 3 Can. Cr. Cas. 102, R.J.Q. 8 Q.B. 521.

A count in an indictment charging that the defendant acting under a power of attorney fraudulently sold certain bank shares and fraudulently converted the proceeds "and did thereby steal the said proceeds" is not bad as charging two offences, and the reference to the fraudulent sale and fraudulent conversion are to be taken as descriptive of the means whereby the offence of stealing under a power of attorney was committed. R. v. Fulton (1900), 5 Can. Cr. Cas. 36 (Que.).

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

Where two or more names are laid in an indictment under an alias dictus it is not necessary to prove them all. R. v. Jacobs (1889), 16 Can. S.C.R. 433. J. was indicted for the murder of A.J., otherwise called K.K. On the trial it was proved that the deceased was known by the name of K.K., but there was no evidence that she ever went by the other name. Held, that this variance between the indictment and the evidence did not invalidate the conviction of J. for manslaughter. Ibid.

As a general rule the name of the person against whom an offence has been committed should be given, and any property which has been the subject of an offence should be described. But to prevent a crime going unpunished where it is impossible to give the name of the party, it is in such cases sufficient, as an exception to the general rule, for the grand jury to state that it has been committed against a person to the jurors unknown. R. v. Taylor (1895), R.J.Q. 4 Q.B. 226.

An indictment charging that the accused unlawfully attempted to steal from the person of an unknown person the property of such unknown person without giving the name of the person against whom the offence was committed or the description of the property the accused attempted to steal, is sufficient. R. v. Taylor (1895), R.J.Q. 4 Q.B. 226.

An indictment that does not set up in the statement of the charge all the essential ingredients, is defective and cannot be sustained. So where an indictment charging the publication of a defamatory libel, did not state that the same was likely to injure the reputation of the libelled person by exposing him to hatred, contempt or ridicule, or was designed to insult him, it was held bad by reason of the omission of an essential ingredient of the offence. Such an indictment cannot be amended and must be set aside and quashed as the defect is a matter of substance. R. v. Cameron (1898), 2 Can. Cr. Cas. 173 (Wurtele, J.).

It is not necessary to allege in an indictment facts which the law will necessarily infer from the proof of other facts which *are* alleged. So where an indictment for unlawfully writing and publishing a defamatory libel omitted to allege that the libel was published maliciously, it was held that the indictment was nevertheless good inasmuch as, upon proof of the publication of the libel, the legal inference, until rebutted by the defendant, was that it was published maliciously; and the allegation that the publication

was malicious was not, therefore, a necessary averment. R. v. Munslow (1895), 18 Cox C.C. 112 (Lord Russell, C.J., Pollock, B., Wills, Charles and Lawrence, JJ.).

Where a person charged before a court of summary jurisdiction has a right to elect to be tried by a jury in respect of an offence punishable summarily and not originally indictable, and by statute the court is thereupon to deal with the case as if the accused were charged with an indictable offence and not with an offence punishable on summary conviction, it has been held that, upon an indictment being preferred accordingly, the fact that the indictment is preferred in consequence of the defendant's claim to be tried by a jury is not a necessary averment therein. R. v. Chambers (1896), 18 Cox C.C. 401, 75 Eng. L.T. 76 (Lord Russell, C.J., Pollock, B., Hawkins, Grantham and Lawrance, JJ.).

The absence or the insufficiency of particulars does not vitiate an indictment; but if it should be made to appear that there is a reasonable necessity for more specific information, the court may, on the application of the accused person, order that further particulars be given, but such an order is altogether within the judicial discretion of the judge. R. v. France (1898), 1 Can. Cr. Cas. 321, 329 (Q.B. Montreal).

Judge Taschereau, in his book on the Criminal Code (1893), p. 675-678, says: "The first sub-section of this sec. 611 cannot probably bear the construction that the wording of it, taken literally, would at first suggest. The whole Act, taken together, does not seem to allow of such a construction. . . . Sub-sec. 2 of sec. 611 may perhaps dispense with, for instance, the word "burglariously" in indictments for burglary, but leaves it necessary to aver all matter necessary to be proved. . . . Sub-sec. 3 will probably not receive a wider construction than the same enactment as reproduced in sec. 734, as to indictments for any offence against this Act, has heretofore received. . . . Sub-sec. 2 of this sec. 611 assumes negatively that all matter of fact necessary to be proved must be alleged in the indictment. It still remains the rule that an indictment which does not substantially set down all the elements of the offence is void."

There is a difference between an indictment which is bad for charging an act which as laid is no crime, and an indictment which is bad for charging a crime defectively; the latter may be aided by verdict, the former cannot. R. v. Waters (1848), 1 Den. C.C. 356. If a substantial ingredient of the offence does not appear on the face of the indictment, the court will arrest the judgment. Sec. 733 (2); R. v. Carr, 26 L.C. Jur. 61; R. v. Lynch, 20 L.C. Jur. 187. If the indictment is in such a form that it does not charge an offence, the court cannot allow an amendment to remedy the defect. R. v. Flynn, 18 N.B.R. 321; R. v. Norton (1886), 16 Cox C.C. 59; R. v. James (1871); 12 Cox C.C. 127; R. v. Morrison, 18 N.B.R. 682. Nor is an amendment to be made if it change the nature and quality of the offence. R. v. Wright (1860), 2 F. & F. 320.

If the indictment charges no crime, the defect is a matter of substance and not amendable, and the court is obliged to arrest the judgment. R. v. Carr, 26 L.C. Jur. 61; R. v. Wheatley (1761), 2 Burr. 1127; R. v. Turner (1830), 1 Moo. 239; R. v. Webb (1848), 1 Den. C.C. 338. And a plea of guilty is not a waiver, and does not prevent the defendant from moving in arrest of judgment as to defects apparent on the record. R. v. Brown (1890), 24 Q.B.D. 357.

But if the defect is one which the court has the power to amend, sec. 629 of the Code then applies, and the objection must be raised before plea. R. v. Mason, 22 U.C.C.P. 246.

Amending the indictment.]—See sec. 723.

612. Offences may be charged in the alternative.—A count shall not be deemed objectionable on the ground that it charges in the alternative several different matters, acts or omissions which are stated in the alternative in the enactment describing any indictable offence or declaring the matters, acts or omissions charged to be an indictable offence, on the ground that it is double or multifarious: Provided that the accused may, at any stage of the trial, apply to the court to amend or divide any such count on the ground that it is so framed as to embarrass him in his defence.

2. The court, if satisfied that the ends of justice require it, may order any count to be amended or divided into two or more counts, and on such order being made such count shall be so divided or amended, and thereupon a formal commencement may be inserted before each of the counts into which it is divided.

613. Certain objections not to vitiate counts.—No count shall be deemed objectionable or insufficient on any of the following grounds; that is to say:—

(*a*) that it does not contain the name of the person injured, or intended, or attempted to be injured; or

(*b*) that it does not state who is the owner of any property therein mentioned; or

(*c*) that it charges an intent to defraud without naming or describing the person whom it was intended to defraud; or

(*d*) that it does not set out any document which may be the subject of the charge; or

(*e*) that it does not set out the words used where words used are the subject of the charge; or

(*f*) that it does not specify the means by which the offence was committed; or

(*g*) that it does not name or describe with precision any person, place or thing:

(Amendment of 1893).

(*h*) Or in cases where the consent of any person, official or authority is required before a prosecution can be instituted, that it does not state that such consent has been obtained.

Provided that the court may, if satisfied that it is necessary for a fair trial, order that a particular further describing such document, words, means, person, place or thing be furnished by the prosecutor.

Sufficiency of indictment.]—See note to sec. 611, and as to alleging property in one of several joint owners named "and others" and other details of description in certain cases specified, see sec. 619.

Particulars.]—In determining whether "a particular" is required or not and whether a defect in the indictment is material to the substantial justice of the case or not, the court may have regard to the depositions. Sec. 617 (2). When a particular is delivered in pursuance of an order, the accused is entitled to have a copy supplied to himself or to his solicitor without charge therefor. Sec. 617. The trial proceeds as if the indictment had been amended in conformity with the particulars delivered. Ibid.

614. Indictment for treason.—Every indictment for treason, or for any offence against Part IV. of this Act, must state overt acts and no evidence shall be admitted of any overt act not stated unless it is otherwise relevant as tending to prove some overt act stated.

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

615. Indictments for libel.—No count for publishing a blasphemous, seditious, obscene or defamatory libel, or for selling or exhibiting an obscene book, pamphlet, newspaper or other printed or written matter, shall be deemed insufficient on the ground that it does not set out the words thereof: Provided that the court may order that a particular shall be furnished by the prosecutor, stating what passages in such book, pamphlet, newspaper, printing or writing are relied on in support of the charge.

2. A count for libel may charge that the matter published was written in a sense which would make the publishing criminal, specifying that sense without any prefatory averment showing how the matter was written in that sense. And on the trial it shall be sufficient to prove that the matter published was criminal either with or without innuendo.

Particulars.]—The power here given to order the delivery of particulars in cases of libel, etc., is in addition to the general powers conferred by sec. 613.

616. Indictment for perjury and certain other offences.—No count charging perjury, the making of a false oath or of a false statement, fabricating evidence or subornation, or procuring the commission of any of these offences, shall be deemed insufficient on the ground that it does not state the nature of the authority of the tribunal before which the oath or statement was taken or made, or the subject of the inquiry, or the words used, or the evidence fabricated, or on the ground that it does not expressly negative the truth of the words used: Provided that the court may, if satisfied that it is necessary for a fair trial, order that the prosecutor shall furnish a particular of what is relied on in support of the charge.

2. No count which charges any false pretense, or any fraud, or any attempt or conspiracy by fraudulent means, shall be deemed insufficient because it does not set out in detail in what the false pretenses or the fraud or fraudulent means consisted: Provided that the court may, if satisfied as aforesaid, order that the prosecutor shall furnish a particular of the above matters or any of them.

3. No provision hereinbefore contained in this part as to matters which are not to render any count objectionable or insufficient shall be construed as restricting or limiting in any way the general provisions of s. 611. R.S.C. c. 174, s. 107.

It is submitted that the second sub-section does not mean that the false pretence need not be set out at all. While Meredith, C.J., in his judgment in R. v. Patterson (1895), 2 Can. Crim. Cas. 339, speaks of the "addition of the words unnecessarily setting out in what the false pretences consisted," and expresses the view that the indictment would have been fully authorized by sec. 641 if laid "without alleging in what the false pretence consisted," it will be observed that Rose, J., limits his opinion to the case of an indictment in which the false pretence is not set out in detail. See note to sec. 611.

617. Particulars.—When any such particular as aforesaid is delivered a copy shall be given without charge to the accused or his solicitor, and it shall be entered in the record, and the trial shall proceed in all respects as if the indictment had been amended in conformity with such particular.

2. In determining whether a particular is required or not, and whether a defect in the indictment is material to the substantial justice of the case or not, the court may have regard to the depositions.

See secs. 613 and 615.

618. Indictment for pretending to send money, etc., in letter.—It shall not be necessary to allege, in any indictment against any person for wrongfully and wilfully pretending or alleging that he inclosed and sent, or caused to be inclosed and sent, in any post letter, any money, valuable security, or chattel, or to prove on the trial, that the act was done with intent to defraud. R.S.C. c. 174, s. 113.

619. Indictments in certain cases.—An indictment shall be deemed insufficient in the cases following:

(*a*) If it be necessary to name the joint owners of any real or personal property, whether the same be partners, joint tenants, parceners, tenants in common, joint stock companies or trustees, and it is alleged that the property belongs to one who is named, and another, or others, as the case may be;

(*b*) if it is necessary for any purpose to mention such persons and one only is named;

(*c*) if the property in a turnpike road is laid in the trustees or commissioners thereof without specifying the names of such trustees or commissioners;

(*d*) if the offence is committed in respect to any property in the occupation or under the management of any public officer or commissioner, and the property is alleged to belong to such officer or commissioner, without naming him;

(*e*) if, for an offence under section 334, the oyster-bed, laying or fishery is described by name or otherwise, without stating the same to be in any particular county or place. R.S.C. c. 174, ss. 118, 119, 120, 121 and 123.

620. Property of body corporate.—All property, real and personal, whereof any body corporate has, by law, the management, control, or custody, shall for the purpose of any indictment or proceeding against any other person for any offence committed on or in respect thereof, be deemed to be the property of such body corporate. R.S.C. c. 174, s. 122.

621. Indictment for stealing ores or minerals.—In any indictment for any offence mentioned in sections 343 or 375 of this Act, it shall be sufficient to lay the property in His Majesty, or in any person or corporation, in different counts in such indictment; and any variance in the latter case, between

the statement in the indictment and the evidence adduced, may be amended at the trial; and if no owner is proved the indictment may be amended by laying the property in His Majesty. R.S.C. c. 174, s. 124.

622. Indictment for offences in respect to postal cards, etc.—In any indictment for any offence committed in respect of any postal card, postage stamp or other stamp issued or prepared for issue by the authority of the Parliament of Canada, or of the Legislature of any Province of Canada, or by, or by the authority of, any corporate body for the payment of any fee, rate or duty whatsoever, the property therein may be laid in the person in whose possession, as the owner thereof, it was when the offence was committed, or in His Majesty if it was then unissued or in the possession of any officer or agent of the Government of Canada, or of the Province by the authority of the Legislature whereof it was issued or prepared for issue. R.S.C. c. 174, s. 125.

623. Indictments against public servants.—In every case of theft or fraudulent application or disposition of any chattel, money or valuable security under ss. 319 (*c*) and 321 of this Act, the property in any such chattel, money or valuable security may, in any warrant by the justice of the peace before whom the offender is charged, and in the indictment preferred against such offender, be laid in His Majesty, or in the municipality, as the case may be. R.S.C. c. 174, s. 126.

624. Indictments for offences respecting letter bags, etc.—When an offence is committed in respect of a post letter bag, or a post letter, or other mailable matter, chattel, money or valuable security sent by post, the property of such post letter bag, post letter, or other mailable matter, chattel, money or valuable security may, in the indictment preferred against the offender, be laid in the Postmaster-General; and it shall not be necessary to allege in the indictment, or to prove upon the trial or otherwise, that the post letter bag, post letter or other mailable matter, chattel or valuable security was of any value.

2. The property of any chattel or thing used or employed in the service of the post office, or of moneys arising from duties of postage, shall, except in the cases aforesaid, be laid in His Majesty, if the same is the property of His Majesty, or if the

loss thereof would be borne by His Majesty, and not by any person in his private capacity.

3. In any indictment against any person employed in the post office of Canada for any offence against this Act, or against any person for an offence committed in respect of any person so employed, it shall be sufficient to allege that such offender or such other person was employed in the post office of Canada at the time of the commission of such offence, without stating further the nature or particulars of his employment. R.S.C. c. 35, s. 111.

625. Indictment for stealing by tenant or lodger.— An indictment may be preferred against any person who steals any chattel let to be used by him in or with any house or lodging, or who steals any fixture so let to be used, in the same form as if the offender was not a tenant or lodger, and in either case the property may be laid in the owner or person letting to hire. R.S.C. c. 174, s. 127.

626. Joinder of counts and proceedings thereon.— Any number of counts for any offences whatever may be joined in the same indictment, and shall be distinguished in the manner shown in the form EE in schedule one hereto, or to the like effect: Provided that to a count charging murder no count charging any offence other than murder shall be joined.

2. When there are more counts than one in an indictment each count may be treated as a separate indictment.

3. If the Court thinks it conducive to the ends of justice to do so, it may direct that the accused shall be tried upon any one or more of such counts separately. Such order may be made either before or in the course of the trial, and if it is made in the course of the trial the jury shall be discharged from giving a verdict on the counts on which the trial is not to proceed. The counts in the indictment which are not then tried shall be proceeded upon in all respects as if they had been found in a separate indictment.

4. Provided that, unless there be special reasons, no order shall be made preventing the trial at the same time of any number of distinct charges of theft not exceeding three, alleged to have been committed within six months from the first to the last of such offences, whether against the same person or not.

5. If one sentence is passed upon any verdict of guilty on more counts than one, the sentence shall be good if any of such counts would have justified it.

FORM EE.—

HEADING OF INDICTMENT.

In the (*name of the Court in which the indictment is found*).

The jurors for our Lord the King present that

(*Where there are more counts than one, add at the beginning of each count*):

"The said jurors further present that ."

Joinder of counts.]—Offences of the same character, though differing in degree, may be united in the same indictment, and the prisoner tried on both at the same time, and on the trial he may be convicted on the one and not on the other. Theal v. R. (1882), 7 Can. S.C.R. 397, 405.

The former rule was that if different felonies were stated in several counts of an indictment, while no objecion could be made to the indictment on that account in point of law, the judge, in his discretion, might quash the indictment, or require the counsel for the prosecution to select one of felonies and confine himself to that. That was technically termed putting the prosecutor to his election, and was done when the prisoner, by reason of two charges being inquired into at the same time, would be embarrassed in his defence, or, as it has been said, lest it should "confound" him in his defence, a matter however only of prudence and discretion, to be exercised by the judge. Per Ritchie, C.J., in Theal v. R. (1882), 7 Can. S.C.R. 397, 405. A separate trial may now be directed under this section in respect of any of the counts instead of putting the prosecutor to his election.

Upon the trial at the same time and upon the same indictment of three distinct charges of theft alleged to have been committed within six months of one another by a prisoner, the jury must necessarily be placed in possession of the evidence upon all the charges before being required to find the verdict upon any of them, notwithstanding the danger that a jury might not separate and properly apply the evidence upon the different charges in dealing with them. See Re A. E. Cross (1900), 4 Can. Cr. Cas. 173 (Ont.).

An indictment may now be laid under secs. 626 and 713, charging rape and also assault with intent to commit rape. Taschereau's Cr. Code (1893), p. 273.

Directing separate trial of persons jointly indicted.] — Where several persons are indicted jointly, the Crown has the option of having them tried separately instead of together, and none of them can demand a separate trial as a matter of right. R. v. Weir (No. 4) (1899), 3 Can. Cr. Cas. 351 (Que.).

But if the trial of the defendants jointly instead of separately would work an injustice to any of them, the presiding judge may, on due cause being shewn, exercise his discretionary right to direct a separate trial. Ibid.

Whether or not a separate trial shall be granted on the application of a defendant is a matter in the discretion of the court. R. v. Littlechild (1871), L.R. 6 Q.B. 293. The accused persons are not entitled as of right to severance of trial; R. v. McConohy (1874), 5 Revue Legale (Que.) 746, per Monk, J., Q.B., Montreal; but the Crown is so entitled if the case is one in which a severance is practicable; 2 Hawkins, P.C., ch. 41, sec. 8; 1 Bishop's Crim. Prac. 1034. A severance is not allowed in the trial of indictments for conspiracy or for riot. Starkie's Crim. Plead. 36. And

separate trials were refused where the charge was subornation of perjury; R. v. Gravel (1877), per Ramsay, J., Court of Queen's Bench, Montreal; (not reported) referred to in Taschereau's Criminal Code of Canada page 696.

On an indictment of three persons jointly, for publishing blasphemous libels in certain numbers of a newspaper, two of them whose names were on it as editor and publisher respectively, having already been convicted on a charge of publishing similar libels in another number of the paper, it was held that the third, whose case was that he was not connected with the paper at all, ought (on his application) to be tried separately, as his trial with the others might possibly prejudice him in his defence, especially as he desired to call them as witnesses, while it did not appear that his separate trial could at all embarrass the case for the prosecution as the prosecutor would be entitled to give any evidence in his power to fix the defendant with a joint liability for the acts of the others. R. v. Bradlaugh and others (1883), 15 Cox C.C. 217 (Coleridge, L.C.J.).

The trial judge has a discretion at the close of the case for the prosecution to submit the case of one of the defendants separately to the jury, if no evidence is to be given on his behalf; but he is not bound to do so. R. v. Hambly (1859), 16 U.C.Q.B. 617, (Robinson, C.J., McLean and Burns, JJ.). When either the defendant or the prosecution desire to call one of the accused to give evidence for or against a co-defendant, a separate trial should be asked for. Where persons are jointly indicted but are tried separately, one of them is a competent witness against the other although the defendant so called has not been tried and has not been discharged on a nolle prosequi, and although he has not pleaded to the indictment. R. v. Winsor, 10 Cox C.C. 276.

Before the Canada Evidence Act, where prisoners were indicted jointly, and all pleaded not guilty, but having severed in their challenges, the Crown elected to proceed against three of them leaving the fourth to be tried *separately*, it was held that he was a competent witness on behalf of the other prisoners; R. v. Jerrett (1863), 22 U.C.Q.B. 499. (Hagarty, J., and Adam Wilson, J.). But if several prisoners jointly indicted were *jointly* tried and had been given in charge to the jury the former rule was that one of them while in such charge could not be called as a witness for another. R. v. Payne (1872), 12 Cox C.C. 118 (Court for Crown Cases Reserved).

Since the Canada Evidence Act, 1893, every person charged with an offence is a *competent* witness whether the person so charged is charged solely, or jointly with any other person (sec. 4). That section does not make the accused person a *compellable* witness in circumstances under which he was under the prior law neither competent nor compellable, ex. gr. after being given in charge to the jury when being jointly tried with others on the same indictment. It, however, makes it possible for the accused to go into the witness box if he so desires, at the same time providing that the failure of the person charged to testify shall not be made the subject of comment by the judge or by counsel for the prosecution in addressing the jury (sub-sec. 2 of sec. 4).

Where persons are jointly indicted and one pleads guilty and is sentenced before the trial of the other is concluded, the prisoner so sentenced is rendered not only a competent but a compellable witness for or against the other. R. v. Jackson (1855), 6 Cox C.C. 525; R. v. Gallagher (1875), 13 Cox C.C. 61.

Where the accused person becomes a witness either by reason of his own election to give evidence or his obligation to testify as having been rendered a compellable witness, he is not excused from answering any question upon the ground that the 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; (Canada Evidence Act sec. 5, amendment of 1898) provided, however, that if the witness objects to answer upon that ground and if but for sec. 5 of the Canada Evidence Act he would upon such objection have been excused from answering the question then, although the witness shall be compelled to answer, yet the answer so given shall not be used or be receivable in evidence against him in "any criminal trial, or other criminal proceeding against him, *thereafter* taking place" other than a prosecution for perjury in giving such evidence; Canada Evidence Act sec. 5 (amendment of 1898). See also R. v. McLinehy (1899), 2 Can. Cr. Cas. 416.

627. Accessories after the fact, and receivers.—Every one charged with being an accessory after the fact to any offence, or with receiving any property knowing it to have been stolen, may be indicted, whether the principal offender or other party to the offence or person by whom such property was so obtained has or has not been indicted or convicted, or is or is not amenable to justice, and such accessory may be indicted either alone as for a substantive offence or jointly with such principal or other offender or person.

2. When any property has been stolen any number of receivers at different times of such property, or of any part or parts thereof, may be charged with substantive offences in the same indictment, and may be tried together, whether the person by whom the property was so obtained is or is not indicted with them, or is or is not in custody or amenable to justice. R.S.C. c. 174, ss. 133, 136 and 138.

Accessories after the fact.]—See secs. 63 (definition); 67 (in treason); 235 (in murder); 531 and 532 (punishment).

Receivers.]—See secs. 314-318 (punishment), and 715-717 (procedure and evidence).

If it be proved that one of the persons charged with jointly receiving, separately received any part of the property, the jury may convict him separately under the indictment against two or more. Sec. 715.

628. Indictment charging previous conviction.—In any indictment for any indictable offence, committed after a previous conviction or convictions for any indictable offence or offences or for any offence or offences (and for which a greater punishment may be inflicted on that account), it shall be sufficient, after charging the subsequent offence, to state that the offender was at a certain time and place, or at certain times and places, convicted of an indictable offence, or of an offence or offences, as the case may be, and to state the substance and effect only, omitting the formal part of the indictment and conviction, or of the summary conviction, as the case may be, for

the previous offence, without otherwise describing the previous offence or offences. R.S.C. c. 174, s. 139.

See secs. 478, 676 and 694.

629. Objections to an indictment.—Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer, or motion to quash the indictment, before the defendant has pleaded, and not afterwards, except by leave of the Court or Judge before whom the trial takes place, and every Court before which any such objection is taken may, if it is thought necessary, cause the indictment to be forthwith amended in such particular, by some officer of the Court or other person, and thereupon the trial shall proceed as if no such defect had appeared; and no motion in arrest of judgment shall be allowed for any defect in the indictment wihch might have been taken advantage of by demurrer, or amended under the authority of this Act.

What defects are amendable.]—There is a difference between an indictment which is bad for charging an act which as laid is no crime, and an indictment which is bad for charging a crime defectively; the latter may be aided by verdict, the former cannot. R. v. Waters (1848), 1 Den. C.C. 356. If a substantial ingredient of the offence does not appear on the face of the indictment, the court will arrest the judgment. Cr. Code, sec. 733 (2); R. v. Carr, 26 L.C. Jur. 61; R. v. Lynch, 20 L.C.J. 187. If the indictment is in such a form that it does not charge an offence, the court cannot allow an amendment to remedy the defect. R. v. Flynn, 18 N.B.R. 321. R. v. Norton (1886), 16 Cox C.C. 59; R. v. James (1871), 12 Cox C.C. 127; R. v. Morrison, 18 N.B.R. 682. Nor is an amendment to be made if it change the nature and quality of the offence. R. v. Wright (1860), 2 F. & F. 320.

If the indictment charges no crime, the defect is a matter of substance and not amendable, and the court is obliged to arrest the judgment. R. v. Carr, 26 L.C. Jur. 61; R. v. Wheatley (1761), 2 Burr. 1127; R. v. Turner (1832), 1 Moo. 239; R. v. Webb (1848), 1 Den. C.C. 338. And a plea of guilty is not a waiver, and does not prevent the defendant from moving in arrest of judgment as to defects apparent on the record. R. v. Brown (1890), 24 Q.B.D. 357.

But if the defect is one which the court has the *power to amend*, sec. 629 of the Code then applies, and the objection must be raised before plea. R. v. Mason (1872), 22 U.C.C. P. 246.

With the exception of the added words "except by leave of the court or judge before whom the trial takes place," this section is a re-enactment of R.S.C. (1886), ch. 174, sec. 143, which was derived from 32-33 Vict. (Can.), ch. 29, sec. 32.

The court is not ousted of its power to quash an indictment because a plea has been pleaded. If it is made apparent either on the face of the record or by extrinsic evidence that there is a want of jurisdiction, the court will quash the indictment after plea pleaded, for at the time of pleading a man might not be aware of the defect of jurisdiction. R. v. Heane (1864), 4 B. & S. 947. In ordinary cases the defect in jurisdiction would appear on the face of the indictment; but it is not necessary to allege in the indictment that the preliminaries required by statute before preferring it, have

been complied with; and in such cases the defect *must* be brought to the knowledge of the court by affidavit. Ibid.; R. v. Burke (1893), 24 Ont. R. 64.

Where the defendants had elected to be tried by the County Court judge under the Speedy Trial clauses, they cannot be deprived of such right because indictments were found against them at the assizes for the offences for which they had so elected to be tried, although through the mistake or error of their junior counsel a plea of "not guilty" was by him entered on each of the indictments. R. v. Burke (1893), 24 Ont. R. 64, 68.

An objection to an indictment against a corporation upon the ground that it does not disclose any offence in respect of which the defendant corporation could be liable, must be taken by demurrer and not by motion to quash. R. v. Toronto Ry. Co. (1900), 4 Can. Cr. Cas. 4 (Ont.).

Section 629 applies only to formal defects, and the reason is that the grand jury are the accusers on the indictment, and the accusation cannot be changed into another one without their consent, and, if they have brought an accusation of an offence not known to the law, the court cannot turn it into an offence known to the law by adding to the indictment.

In the Territories the Crown prosecutor is the accuser, and has the right under section 11 of the North-West Territories Act amendment (54-55 Vict. ch. 22) to substitute another charge in respect to the same offence, and having that right it has been held that he may amend the original charge instead of substituting a new one. R. v. Skelton (1898), 4 Can. Cr. Cas. 467 (N.W.T.).

Strictly, a notice to quash an indictment cannot be made after plea, yet in furtherance of substantial justice the court will sustain an objection, though in strict law a prisoner may be too late in making it. R. v. Dowey (1869), 1 P.E.I. Rep. 291. But where the objection is merely technical, where the prisoner cannot be injured by the irregularity of which he complains, and it is evidently made merely in delay of justice, the court will not use its power to assist him. Sir William Withpole's Case, Cro. 134; R. v. Sullivan, 8 A. & El. 831. And a motion in arrest of judgment of guilty in a murder case was refused on this principle, where it was objected that one of the grand jury who found the indictment had also been on the coroner's jury. R. v. Dowey (1869), 1 P.E.I. Rep. 291, per Peters, J.

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

In charging the offence of uttering a forged instrument, the indictment must aver that the defendants made use of or uttered the instrument knowing it to have been forged. A count of an indictment charging the defendant with having, with intent to defraud, unlawfully made use of and uttered a promissory note, alleged to have been made and signed by one of the defendants by procuration, without lawful authority or excuse and with intent to defraud, is defective if it does not also allege that the defendants knew it to have been so made and signed. Such a defect is one of substance and cannot be amended under this section. R. v. Weir (No. 5), 3 Can. Cr. Cas. 499 (Que.).

Where to an indictment for libel a plea of justification was held to be insufficient because it did not set out the particular facts upon which the defendant intended to rely, it was held that the court should in the exercise of its jurisdiction quash the plea upon a summary motion, without requiring a demurrer. R. v. Creighton (1890), 19 O.R. 339.

As to powers of amendment see sec. 723.

630. Postponing the trial.—No person prosecuted shall be entitled as of right to traverse or postpone the trial of any indictment preferred against him in any Court, or to imparl, or to have time allowed him to plead or demur to any such indictment: Provided always, that if the Court before which any person is so indicted, upon the application of such person or otherwise, is of opinion that he ought to be allowed a further time to plead or demur or to prepare for his defence, or otherwise, such Court may grant such further time and may adjourn the trial of such person to a future time of the sittings of the Court or to the next or any subsequent session or sittings of the Court, and upon such terms, as to bail or otherwise, as to the Court seem meet, and may, in the case of adjournment to another session or sitting, respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session or sittings without entering into any fresh recognizances for that purpose. R.S.C. c. 174, s. 141.

Application to postpone trial.]—An application to postpone a trial by jury in consequence of the absence of material witnesses must be supported by special affidavit shewing that the witnesses are material. R. v. Dougall (1874), 18 L.C. Jur. 85.

It is no ground of "surprise" that the prisoner had no knowledge of the evidence to be produced against him, for no one is obliged, by pleading, or otherwise, to disclose the evidence by which his case is to be supported. It is sufficient that the party is fully apprised of the case or charge which it is proposed to prove against him, and he must then, being so informed, prepare himself to repel it. R. v. Slavin (1866), 17 U.C.C.P. 205.

Where it appears by affidavit that a necessary witness for the prisoner is ill (R. v. Hunter, 3 C. & P. 591), or that a witness for the prosecution is ill (R. v. Bowen, 9 C. & P. 509), or unavoidably absent, or is kept out of the way by the contrivance or at the instigation of the prisoner, the court will postpone the trial, unless it appear that the requirements of justice can be satisfied by reading the witness's depositions before a magistrate. Roscoe Cr. Evidence, 11th ed., 185.

If the application is made on the ground of the absence of a material witness, the judge will require an affidavit stating the points which the witness is expected to prove, in order to form a judgment whether the witness is a material one or not. R. v. Savage, 1 C. & K. 75. An affidavit of a surgeon, that the witness is the mother of an unweaned child afflicted with an inflammation of the lungs, who could neither be brought to the assize town nor separated from the mother without danger to life, is a sufficient ground on which to found a motion to postpone the trial. Ib. Where a prisoner's counsel moved to postpone a trial for murder, on an affidavit which stated that one of the witnesses for the prosecution, who had been bound over to appear at the assizes, was absent, and that on cross-examination this witness could give material evidence for the prisoner, Cresswell, J., after consulting Patteson, J., held that this was a sufficient ground for postponing the trial, without shewing that the prisoner had at all endeavoured to procure the witness's attendance, as the prisoner might reasonably expect, from the witness having been bound over, that he would

appear. R. v. Macarthy, Carr. & M. 625. In R. v. Palmer, 6 C. & P. 652, the judges of the Central Criminal Court postponed until the next session the presentment of a bill for a capital offence to the grand jury, upon the affidavit of the attorney for the prosecution, that a witness, whose evidence was sworn to be material, was too ill to attend, and they refused to refer to the deposition of the witness to ascertain whether he deposed to material facts. Where, in a case of murder committed in Newcastle-upon-Tyne, which had created great excitement, a newspaper published in the town had spoken of the prisoner as the murderer, and several journals down to the time of the assizes had published paragraphs, implying or tending to shew his guilt, and it appeared that the jurors at such assizes were chosen from within a circle of fifteen miles round Newcastle, where such papers were chiefly circulated, but that at the summer assizes they would be taken from the more distant parts of the county of Northumberland (into which the indictment had been removed), Alderson and Parke, BB., postponed the trial until the following assizes. Alderson, B., however, said: "I yield to the peculiar circumstances of the case, wishing it to be understood that I am by no means disposed to encourage a precedent of this sort." R. v. Bolam, Newcastle Spring Ass. 1839, M.S.; 2 Moo. & R. 192. See also R. v. Joliffe, 4 T.R. 285. And in R. v. Johnson, 2 C. & K. 354, the same learned judge refused to postpone the trial of a prisoner charged with murder, on the ground that an opportunity might be thereby afforded of investigating the evidence and characters of certain witnesses who had not been examined before the committing magistrate, but who were to be called for the prosecution to prove previous attempts by the prisoner on the life of the deceased. A trial for murder was postponed till the next assizes by Channell, B., upon an affidavit of a medical man as to a witness being unable to travel, although such witness was not examined before the magistrate, and although the trial had been fixed for a particular day. R. v. Lawrence (1866), 4 F. & F. 901.

In general, a trial will not be postponed to the next assizes before a bill is found. R. v. Heesom, 14 Cox C.C. 40. But where it was shewn that the attendance of witnesses, inmates of a workhouse in which smallpox had broken out, was necessary, Baggallay, L.J., did not require any bill to be sent up before the grand jury, but postponed the trial to the next assizes, admitting the prisoner to bail in the meantime. R. v. Taylor (1882), 15 Cox C.C. 8.

In no instance will a trial be put off on account of the absence of witnesses to character. R. v. Jones (1806), 8 East 34.

Where the prisoner applies to postpone the trial, he will be remanded and detained in custody till the next assizes or sessions, or will be admitted to bail, but he is never required to pay the costs of the prosecutor. R. v. Hunter, 3 C. & P. 591. Where the application is by the prosecutor, the court in its discretion will either detain the prisoner in custody, or admit him to bail, or discharge him on his own recognizances. R. v. Beardmore (1836), 7 C. & P. 497; R. v. Parish (1837), id. 782; R. v. Osborne (1837), id. 799; see also R. v. Crowe, 4 C. & P. 251.

631. Special pleas.—The following special pleas and no others may be pleaded according to the provisions hereinafter contained, that is to say, a plea of autrefois acquit, a plea of autrefois convict, a plea of pardon, and such pleas in cases of defamatory libel as are hereinafter mentioned.

2. All other grounds of defence may be relied on under the plea of not guilty.

3. The pleas of autrefois acquit, autrefois convict, and pardon may be pleaded together, and if pleaded shall be disposed of before the accused is called on to plead further; and if every such plea is disposed of against the accused he shall be allowed to plead not guilty.

4. In any plea of autrefois acquit or autrefois convict it shall be sufficient for the accused to state that he has been lawfully acquitted or convicted, as the case may be, of the offence charged in the count or counts to which such plea is pleaded, indicating the time and place of such acquittal, or conviction. R.S.C. c. 174, s. 146.

5. On the trial of an issue on a plea of autrefois acquit or autrefois convict to any count or counts, if it appear that the matter on which the accused was given in charge on the former trial is the same in whole or in part as that on which it is proposed to give him in charge, and that he might on the former trial, if all proper amendments had been made which might then have been made, have been convicted of all the offences of which he may be convicted on the count or counts to which such plea is pleaded, the Court shall give judgment that he be discharged from such count or counts.

6. If it appear that the accused might on the former trial have been convicted on any offence of which he might be convicted on the count or counts to which such plea is pleaded, but that he may be convicted on any such count or counts of some offence or offences of which he could not have been convicted on the former trial, the Court shall direct that he shall not be convicted on any such count or counts of any offence of which he might have been convicted on the former trial, but that he shall plead over as to the other offence or offences charged.

Previous acquittal or conviction for same offence.]—It is a well-established rule that when a man has once been indicted for an offence, and acquitted, he cannot afterwards be indicted for the same offence. If he be thus indicted a second time he may plead autrefois acquit, and it will be a good bar to the second indictment; and this plea is clearly founded on the principle that no man shall be placed in peril of legal penalties more than once upon the same accusation—nemo debet bis puniri pro uno delicto. Broom's Legal Maxims.

A conviction recorded by justices on a plea of guilty of common assault, to which offence they had illegally reduced the charge on a preliminary enquiry for unlawful wounding, is not a bar to an indictment for unlawfully wounding, based upon the same state of facts, and does not support a plea of autrefois convict. R. v. Lea (1897), 2 Can. Cr. Cas. 233; and see Miller v. Lea, 2 Can. Cr. Cas. 282.

When a competent tribunal, having had a case before it, has given a final judgment, the matter is res judicata. The object of the rule is always put upon two grounds—the one, public policy, that it is the interest of the

State that there should be an end of litigation; and the other, the hardship on the individual that he should be vexed twice for the same cause. Lockyer v. Ferryman (1877), L.R. 2 App. Cas. 519, 528, 530, per Lord Blackburn. A judicial decision is conclusive until reversed, and its verity cannot be contradicted; res judicata pro veritate accipitur. But the prior decision does not prevent the court from considering matters which have arisen subsequently. Heath v. Overseers of Weaverham, [1894] 2 Q.B. 108.

A conviction for obtaining goods under false pretences is a bar to a subsequent indictment for theft on the same facts. R. v. King, [1897] 1 Q.B. 214, 218, 18 Cox C.C. 447.

A previous summary conviction or acquittal by justices after a hearing on the merits is a defence if the justices had jurisdiction over the person and offence. Wemyss v. Hopkins (1875), L.R. 10 Q.B. 378. But a certificate of dismissal by justices of a charge of assault given on the withdrawal of the charge before the hearing of same is not a bar to a subsequent indictment in respect of the same assault. Reed v. Nutt (1890), 24 Q.B.D. 669.

Sec. 864 provides that if the justice, in summary proceedings for common assault, (1) finds the assault complained of to have been accompanied by an attempt to commit some other indictable offence, or (2) is of opinion that the same is from any other circumstances 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.

It would seem, however, that if the justice finds that there are no such circumstances aggravating the offence his decision on that point may, with his certificate of conviction or acquittal for the assault, form the basis of a plea of autrefois convict or autrefois acquit when a charge is subsequently brought for the aggravated offence. R. v. Stanton (1851), 5 Cox C.C. 324; R. v. Elvington (1861), 1 B. & S. 688, 31 L.J.M.C. 14.

A conviction for assault will not, however, bar a subsequent indictment for manslaughter upon the death of the man assaulted consequent upon the same assault. R. v. Friel (1890), 17 Cox C.C. 325; R. v. Morris (1867), L.R. 1 C.C.R. 90.

And where on an indictment containing counts for inflicting grievous bodily harm, unlawful wounding, assault occasioning actual bodily harm, and common assault, the jury convicted of common assault and disagreed on the other counts, it was held that the conviction for common assault would support a plea of autrefois convict as to a re-trial on the other counts. R. v. Greenwood, 60 J.P. 809.

Variance as to intent or aggravating circumstances.]—See sec. 633.

Murder and manslaughter.]—On a count charging murder, if the evidence proves manslaughter, but does not prove murder, the jury may find the accused not guilty of murder, but guilty of manslaughter, but they cannot on that count find the accused guilty of any other offence. Sec. 713 (2).

On an indictment for an assault, defendant pleaded that he had been lawfully acquitted of the offence charged in the indictment, and proved an acquittal on an indictment for murder of the same person, which indictment did not charge an assault; the County Court judge directed a verdict for the Crown and a case was reserved for the opinion of the court whether the prisoner could have been lawfully indicted for assault after having been acquitted on the indictment for murder. It was held that as the prisoner could not have been convicted of the assault on the indictment for murder as framed, his plea failed, and he could be tried and convicted of the assault, and his conviction was upheld. R. v. Smith (1874), 34 U.C.Q.B. 552.

A count charging any offence other than murder cannot now be joined with a count charging murder. Sec. 626 (1).

Exemplification as evidence.]—By sec. 10 of the Canada Evidence Act it is provided that evidence of any proceeding or record whatsoever of, in or before any court or before any justice of the peace or any coroner, in any province of Canada may be made in any 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 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.

Plea of autrefois acquit.]—This plea may be made ore tenus; 1 Russ. Cr. 6th ed. 49 (*n*); but is ordinarily made in writing and signed by counsel for the accused. The following form of plea is given by Archbold, 22nd ed., p. 157:—

"And the said J.S. in his own proper person cometh into court here, and having heard the said indictment read, saith that our Lord the King ought not further to prosecute the said indictment against the said J.S., because he saith, that heretofore, to wit, at the general quarter sessions of the peace holden at ——, in and for the county of ——, he the said J.S. was lawfully acquitted of the said offence charged in the said indictment. And this he the said J.S., is ready to verify; wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the premises in the present indictment specified."

Identity of the charges.]—See sec. 632.

Plea of pardon.]—A plea of pardon, other than by statute, should be pleaded at the first opportunity which offers, for if a person has obtained a pardon before he is arraigned and instead of pleading it in bar he pleads not guilty he will thereby waive the benefit of the pardon and cannot use it by way of arrest of judgment. R. v. Norris (1615), 1 Rolle Rep. 297.

Pardons are either free or conditional, and are granted in Canada by warrant under the hand and seal-at-arms of the Governor-General. See also sec. 966.

Unconditional pardons by statute need not be specially pleaded. 2 Hale P.C. 252; R. v. Louis, 2 Keb. 25.

British Columbia.]—The following rules of procedure apply in British Columbia:—

Every pleading, other than a plea of guilty or not guilty, to an indictment, information or inquisition shall be intituled "In the Supreme Court of British Columbia," and shall be dated on the day, month, and year when the same was pleaded, and shall bear no other date. A copy shall be delivered to the opposite party, and a copy filed with the Registrar of the Court. B.C. Rule 48.

All proceedings shall be entered on the record made up for trial, and on the judgment roll under the respective dates at which the same took place. B.C. Rule 49.

Every special plea or demurrer shall be in writing, and signed by counsel, or by the solicitor or party, if he defends in person. B.C. Rule 50.

One order only to plead, reply, join in demurrer, or in error, or plead subsequent pleadings in all prosecutions by way of indictment, inquisition, or information shall be given; and every such order shall limit the time from service in which the pleading is to be delivered. B.C. Rule 51.

Time to plead may be extended on application by summons to a Judge at Chambers, on such terms as to the judge appears right. B.C. Rule 52.

632. Depositions and judge's notes on former trial.—On the trial of an issue on a plea of autrefois acquit or convict the depositions transmitted to the Court on the former trial, together with the judge's and official stenographer's notes if available, and the depositions transmitted to the Court on the subsequent charge, shall be admissible in evidence to prove or disprove the identity of the charges.

633. Second accusation.—When an indictment charges substantially the same offence as that charged in the indictment on which the accused was given in charge on a former trial, but adds a statement of intention or circumstances of aggravation tending if proved to increase the punishment, the previous acquittal or conviction shall be a bar to such subsequent indictment.

2. A previous conviction or acquittal on an indictment for murder shall be a bar to a second indictment for the same homicide charging it as manslaughter; and a previous conviction or acquittal on an indictment for manslaughter shall be a bar to a second indictment for the same homicide charging it as murder.

(Amendment of 1893).

634. Plea of justification in case of libel.—Every one accused of publishing a defamatory libel may plead that the defamatory matter published by him was true, and that it was for the public benefit that the matters charged should be published in the manner and at the time when they were published. Such plea may justify the defamatory matter in the sense specified, if any, in the count, or in the sense which the defamatory matter bears without any such specification; or separate pleas justifying the defamatory matter in each sense may be pleaded separately to each as if two libels had been charged in separate counts.

2. Every such plea must be in writing, and must set forth the particular fact or facts by reason of which it was for the public good that such matters should be so published. The prosecutor may reply generally denying the truth thereof.

3. The truth of the matters charged in an alleged libel shall in no case be inquired into without such plea of justification unless the accused is put upon his trial upon any indictment or information charging him with publishing the libel knowing the same to be false, in which case evidence of the truth may be given in order to negative the allegation that the accused knew the libel to be false.

4. The accused may, in addition to such plea, plead not guilty, and such pleas shall be inquired of together.

5. If, when such plea of justification is pleaded, the accused is convicted, the Court may, in pronouncing sentence, consider whether his guilt is aggravated or mitigated by the plea. R.S.C. c. 174, ss. 148, 149, 150 and 151.

Defamatory libel.]—See secs. 285-302.

Justification.]—The defendant may plead not guilty, as well as a justification that the words are true, and that it was for the public benefit that they should be published. The defence of not guilty permits the defendant to shew that the alleged libel was a fair and bona fide comment on a matter of public interest, or that the occasion of publication was privileged, or any other defence permitted by law, except that the alleged libel is true. Odgers on Libel, 3rd ed. (1896), 330.

Form of plea.]—The following form of plea of justification following a plea of not guilty under the corresponding English Act (6 and 7 Vict. ch. 96, sec. 6,) is provided by the English Crown Office Rules of 1886, form No. 81:

"And for a further plea the said A. B., pursuant to the statute in that behalf, says that our said Lord the King ought not further to prosecute the said indictment [*or* information] against him, because he says that it is true that [*here allege the truth of every libellous part of the publication set out in the indictment*].

"And the said A. B. further says that before and at the time of the publication in the said indictment [*or* information] mentioned [*here state facts which rendered the publication of benefit to the public*]; by reason whereof it was for the public benefit that the said matters so charged in the said indictment [*or* information] should be published; and this he, the said A. B., is ready to verify. Wherefore he prays judgment, and that by the Court here he may be dismissed and discharged from the said premises in the said indictment [*or* information] above specified."

A plea of justification to an indictment for defamatory libel must allege that the defamatory matter published is true and that it was for the public benefit that the alleged libel was published. R. v. Grenier (1897), 1 Can. Cr. Cas. 55 (Que.).

Such plea must then set forth concisely the particular facts by reason of which its publication was for the public good, but it must not contain the evidence by which it is proposed to prove such facts, nor any statements purely of comment or argument. Ibid.

A plea of justification, which embodies a number of letters which it is proposed to use as evidence, and contains paragraphs of which the matter consists merely of comments and argument, is irregular and illegal; and the plea itself should be struck from the record, or the illegal averment should be struck out, and the defendant allowed to plead anew. Ibid.

To an indictment for libel, the language of which was couched in general terms, the defendant pleaded that the words and statements complained of in the indictment were true in substance and in fact, and that it was for the public benefit, etc. It was held that the plea was insufficient because it did not set out the particular facts upon which the defendant intended to rely. R. v. Creighton (1890), 19 (Ont.) 339.

Evidence.]—The intention of the section is that the right to justify and give the truth on an indictment or information for libel should be limited to defamatory libels on individuals; it was intended not to permit a prosecutor to obtain an advantage over his adversary by complaining of a

defamatory libel in the form of an indictment or information thus instituted in the name of the Crown. While, on the one hand, he was not driven to bring a civil action to vindicate his character, on the other, if he sought to vindicate it by a prosecution, he was not to have the right to prevent the defendant shewing that what had been published was true, and that it was for the public benefit that the matter complained of should be published. R. v. Pattison (1875), 36 U.C.Q.B. 129, per Richards, C.J.

The existence of rumours cannot be proved in justification of the libel. R. v. Dougall (1874), 18 L.C. Jur. 85.

In a prosecution for an alleged defamatory libel contained in a newspaper article, condemning an employer's dismissal of employees belonging to a trade union and charging that the distribution of certain gratuities by the employer to his employees was impelled by motives of selfishness on his part and was for the purpose of winning public approval and favourable public comment through press notices thereof, a plea of justification will not be struck out on the objection that the facts therein alleged do not shew that it was for the public benefit that the publication should be made, if such plea contains a charge that the press notices favourable to the complainant were published at his instance. If the complainant in a prosecution for defamatory libel has himself called public attention to the subject matter of the alleged libel by obtaining the publication of newspaper articles commending his conduct therein, he thereby invites public criticism thereof and cannot object that the answer to his own articles is not a publication in the public interest. R. v. Brazeau (1899), 3 Can. Cr. Cas. 89 (Que.).

"Wherever a man calls public attention to his own grievances or those of his class, whether by letters in a newswaper, by speeches at public meetings, or by the publication of pamphlets, he must expect to have his assertions challenged, the existence of his grievances denied, and himself ridiculed and assailed." Odgers on Libel, 3rd ed., 57; Odger v. Mortimer, 28 Eng. L.T. 472; Kœnig v. Ritchie, 3 F. & F. 413; R. v. Veley (1867), 4 F. & F. 1117; O'Donoghue v. Hussey, Ir. R. 5 C.L. 124; Dwyer v. Esmonde, 2 L.R. Ir. 243.

But where the defendant, in answering a letter which the plaintiff had sent to the paper, does not confine himself to rebutting the plaintiff's assertions, but retorts upon the plaintiff by inquiring into his antecedents, and indulging in other uncalled-for personalities, the defendant will be held liable, for such imputations are neither a proper answer to nor a fair comment on the plaintiff's speech or letter. Murphy v. Halpin, Ir. R. 8 C.L. 127.

Comments, however severe, on the advertisements or handbills of a tradesman will not be libellous, if the jury find that they are fair and temperate comment not wholly undeserved, on a matter to which public attention was expressely invited by the plaintiff. Paris v. Levy, 9 C.B.N.S. 342; Morrison v. Harmer, 3 Bing. N.C. 759, 4 Scott 524.

What are matters of public interest.]—Matters of public interest may be classified as follows:—

1. Affairs of State.

Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice and slander. Parmiter v. Coupland (1840), 6 M. & W. 108; Seymour v. Butterworth, 3 F. & F. 376; Kelly v. Sherlock, L.R. 1 Q.B. 689.

2. The administration of justice.

3. Public institutions and local authorities.

4. Ecclesiastic matters.

5. Books, pictures and architecture.

6. Theatres, concerts and other public entertainments.

7. Other appeals to the public.

A man who has commenced a newspaper warfare cannot complain if he gets the worst of it; but if such answer goes further, and touches on fresh matter in no way connected with the plaintiff's original letter, or unnecessarily assails the plaintiff's private character, then it ceases to be an answer; it becomes a counter-charge, and, if defamatory, will be deemed a libel. And, generally, when a man puts himself prominently forward in any way, and acquires for a time a quasi-public position, he cannot escape the necessary consequence—the free expression of public opinion. Odgers on Libel (1896), 3rd ed., p. 56.

It is a question for the judge, and not for the jury, whether a particular topic was or was not a matter of public interest. Weldon v. Johnson (1884), per Coleridge, C.J., cited in Odgers on Libel, 3rd ed., page 46.

It has been held that the sanitary condition of a large number of cottages let by the proprietors of a colliery to their workmen is a matter of public interest. South Hetton Coal Co. v. N.E. News Association, [1894] 1 Q.B. 133 (C.A.).

Where on the trial of a criminal information for libel the judge in substance told the jury that the defendant, under the pleas of justification, was bound to shew the truth of the whole of the libel to which the plea is pleaded, and that in his opinion, the evidence fell far short of the whole matter charged; such a direction is not so much a direction on the law as a strong observation on the evidence, which may be made in a proper case without being open to the charge of misdirection. R. v. Port Perry, etc., Co., 38 U.C.Q.B. 431; R. v. Wilkinson (1878), 42 U.C.Q.B. 492, 505 (per Harrison, C.J., Wilson. J., diss.).

PART XLVII.

CORPORATIONS.

SECT.

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635. Corporations may appear by attorney.—Every corporation against which a bill of indictment is found at any Court having criminal jurisdiction shall appear by attorney in the Court in which such indictment is found and plead or demur thereto. R.S.C. c. 174, s. 155.

Indictment of corporation.]—An obiter dictum of Sedgewick, J., in Union Colliery v. R. (1900), 4 Can. Cr. Cas. 400, 31 Can. S.C.R. 81, is as follows:—"I am strongly inclined to the view that where the Code specifies an offence and provides for the punishment by imprisonment only, it does not necessarily follow that a corporation may not be indicted and fined for the offence so described."

In a Manitoba case it was held that a corporation is not subject to indictment upon a charge of any crime the essence of which is either personal criminal intent or such a degree of negligence as amounts to a wilful incurring of the risk of causing injury to others, and that secs. 213 and 220, as to want of care in the maintenance of dangerous things, do not extend the criminal responsibility of corporations beyond what it was at common law. There being no power under sec. 639 or otherwise to impose a fine or any other punishment, in lieu of imprisonment, for the offence of manslaughter, it was held that there is consequently no judgment or sentence applicable to a conviction of a corporation for that offence. R. v. Great West Laundry Co. (1900), 3 Can. Cr. Cas. 514 (Man.).

But it has been held in Ontario that a corporation may be indicted under sec. 448 for selling goods to which a false trade description has been applied; and that the proceedings upon such a charge should be instituted by indictment under secs. 635-639, and not by a preliminary inquiry before a magistrate. R. v. T. Eaton Co. (1898), 2 Can. Cr. Cas. 252.

A municipal corporation may be indicted for a nuisance in respect of their non-repair of a highway. Sec. 193; but the consent or order of the judge or the consent of the Attorney-General must first be obtained to the preferring of the indictment. Sec. 641 (3); R. v. City of London (1900); 37 C.L.J. 74.

A justice of the peace cannot compel a corporation to appear before him in respect of an indictable offence, nor can he bind the corporation over to appear and answer to an indictment; and he has no jurisdiction to bind over the prosecutor to present an indictment against the corporation. Re Chapman v. City of London (1890), 19 Ont. R. 33.

As there is no jurisdiction to bind over the prosecutor to prefer a bill of indictment before the grand jury against a corporation, it is necessary that such an indictment should be preferred—(1) by the Attorney-General, or (2) by some one preferring the indictment by the direction of the Attorney-General, (3) or with the written consent of the Attorney-General, (4) or with the written consent of a judge of any court of criminal jurisdiction, or (5) by a person authorized to do so by the court of criminal jurisdiction before which the indictment is sought to be preferred. Sec. 641 (3). It is not necessary that the consent or order should be stated in the indictment. Sec. 641 (4). In default of the corporation appearing by attorney the trial may proceed in the absence of the defendant. Sec. 639. By sec. 641 an objection to an indictment for want of the consent or order required by law in order to prefer an indictment, must be taken by motion to quash the indictment before the accused *person* is *given in charge*. Sub-sec. 4. By sec. 3 of the Code the word "person" includes, unless the context requires otherwise, a body corporate, societies, companies, etc., in relation to such act and things as they are capable of doing and owning respectively. Sec. 3, sub-sec. (*t*). It may be considered as doubtful whether or not a corporation can be properly said to be "given in charge" of the jury, and consequently whether the time limited by sub-sec. 4 of sec. 641 applies to indictments of corporations.

Whether liable to summary conviction.]—It has been held by the Supreme Court of New Brunswick that the procedure of the Criminal Code as to summary convictions does not apply to corporations. A magistrate making a summary conviction and directing a distress to levy the fine imposed, is bound to award imprisonment for want of sufficient distress (Code Forms and Code sec. 982), and the summary convictions procedure is, therefore, held not applicable to corporations, as a conviction cannot be made in the terms of the Code Forms (Code schedule 1). The New Brunswick Court held that as regards charges of a criminal nature, a corporation is not within the statutory term "person," which by The Interpretation Act, R.S.C. 1886, ch. 1, is declared to include "any corporation to whom the context can apply," etc. Ex parte Woodstock Electric Light Co. (1898), 4 Can. Cr. Cas. 107 (N.B.).

But a different conclusion was arrived at by a Divisional Court of the High Court of Justice of Ontario in R. v. Toronto Ry. Co. (1898), 2 Can. Cr. Cas. 471, in which it was held that the procedure of the Code as to summary convictions applies as well to corporations as to natural persons, and that the fact that a portion of the remedy provided for the recovery of the penalty and costs is personal imprisonment does not prevent the application of the summary procedure in other respects to corporations.

See note to sec. 634.

636. Certiorari, etc., not required. — No writ of certiorari shall be necessary to remove any such indictment into any Superior Court with the view of compelling the defendant to plead thereto; nor shall it be necessary to issue any writ of distringas, or other process, to compel the defendant to appear and plead to such indictment. R.S.C. c. 174, s. 156.

637. Notice to be served on corporation.—The prosecutor, when any such indictment is found against a corporation, or the clerk of the Court when such indictment is founded on a presentment of the grand jury, may cause a notice thereof to

be served on the mayor or chief officer of such corporation, or upon the clerk or secretary thereof, stating the nature and purport of such indictment, and that, unless such corporation appears and pleads thereto in two days after the service of such notice, a plea of not guilty will be entered thereto for the defendant by the Court, and that the trial thereof will be proceeded with in like manner as if the said corporation had appeared and pleaded thereto. R.S.C. c. 174, s. 157.

Notice of a summons by justices under the Summary Convictions clauses of the Code may be given in a manner similar to a notice of indictment under this section. R. v. Toronto Ry. Co. (1898), 2 Can. Cr. Cas. 471.

638. Proceedings on default.—If such corporation does not appear in the Court in which the indictment has been found, and plead or demur thereto within the time specified in the said notice, the Judge presiding at such Court may, on proof to him by affidavit of the due service of such notice, order the clerk or proper officer of the Court to enter a plea of "not guilty" on behalf of such corporation, and such plea shall have the same force and effect as if such corporation had appeared by its attorney and pleaded such plea. R.S.C. c. 174, s. 158.

639. Trial may proceed in absence of defendant.—The Court may—whether such corporation appears and pleads to the indictment, or whether a plea of "not guilty" is entered by order of the Court—proceed with the trial of the indictment in the absence of the defendant in the same manner as if the corporation had appeared at the trial and defended the same; and in case of conviction, may award such judgment and take such other and subsequent proceedings to enforce the same as are applicable to convictions against corporations. R.S.C. c. 174, s. 159.

A fine is the punishment which must be substituted under this section in the case of a corporation charged with causing grievous bodily injury through its failure to maintain a bridge in a safe condition (sec. 252), in lieu of the imprisonment mentioned in sec. 252, and the amount is in the discretion of the court (sec. 934). R. v. Union Colliery Co. (1900), 3 Can. Cr. Cas. 523 (B.C.), affirmed 4 Can. Cr. Cas. 400, 31 Can. S.C.R. 81.

PART XLVIII.

PREFERRING INDICTMENT.

SECT.

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640. Jurisdiction of courts.—Every Court of criminal jurisdiction in Canada is, subject to the provisions of Part XLII., competent to try all offences wherever committed, if the accused is found or apprehended or is in custody within the jurisdiction of such Court, or if he has been committed for trial to such Court or ordered to be tried before such Court, or before any other Court the jurisdiction of which has by lawful authority been transferred to such first mentioned Court under any Act for the time being in force: Provided that nothing in this Act authorizes any Court in one Province of Canada to try any person for any offence committed entirely in another Province, except in the following case:

2. Every proprietor, publisher, editor or other person charged with the publication in a newspaper of any defamatory libel, shall be dealt with, indicted, tried and punished in the Province in which he resides, or in which such newspaper is printed.

Common law offences.]—It has never been contended that the Criminal Code of Canada contains the whole of the common law of England in force in Canada. Parliament never intended to repeal the common law, except in so far as the Code either expressly or by implication repeals it. Union Colliery Co. v. The Queen (1900), 4 Can. Cr. Cas. 400, 405; 31 Can. S.C.R. 81, per Sedgewick, J. If the facts stated in an indictment constitute an indictable offence at common law, and that offence is not dealt with in the Code, then an indictment will lie at common law; even if the offence has been dealt with in the Code, but merely by way of statement of what is law, then both are in force.

Venue.]—Whenever the accused has been committed by a magistrate or justice of the peace for trial before the court in any district, the court sitting in such district has jurisdiction to try the case. R. v. Hogle (1896), 5 Can. Cr. Cas. 53 (Que.).

The power conferred on a magistrate under sec. 557 of ordering the accused person brought before him, charged with an offence committed out of his territorial jurisdiction (but over which the magistrate still has jurisdiction because of the arrest of the accused within his district), to be taken before some justice having jurisdiction in the place where the offence was committed, is permissive only. Re The Queen v. Burke (1900), 5 Can. Cr. Cas. 29 (Ont.).

See also sec. 609.

(Amendment of 1900.)

641. Who may prefer an indictment.—Any one who is bound over to prosecute any person, whether committed for trial or not, may prefer a bill of indictment for the charge on which the accused has been committed, or in respect of which the prosecutor is so bound over, or for any charge founded upon the facts or evidence disclosed on the depositions taken before the justice. The accused may at any time before he is given in charge to the jury apply to the court to quash any count in the indictment on the ground that it is not founded on such facts or evidence, and the court shall quash such count if satisfied that it is not so founded. And if at any time during the trial it appears to the court that any count is not so founded and that injustice has been or is likely to be done to the accused in consequence of such count remaining in the indictment, the court may then quash such count and discharge the jury from finding any verdict upon it.

2. The counsel acting on behalf of the Crown at any court of criminal jurisdiction may prefer against any person who has been committed for trial at such court a bill of indictment for the charge on which the accused has been so committed or for any charge founded on the facts or evidence disclosed in the depositions taken before the justice.

3. The Attorney-General, or any one by his direction, or any one with the written consent of a judge of any court of criminal jurisdiction, or of the Attorney-General, may prefer a bill of indictment for any offence before the grand jury of any court specified in such consent; and any person may prefer any bill of indictment before any court of criminal jurisdiction by order of such court.

4. It shall not be necessary to state such consent or order in the indictment. An objection to an indictment for want of such consent or order must be taken by motion to quash the indictment before the accused person is given in charge.

5. Save as aforesaid, no bill of indictment shall after the commencement of this Act be preferred in any Province of Canada.

The only amendment consists in the insertion of sub-sec. 2. The subsequent sub-sections are renumbered to accord with this change. This amendment was suggested by B. M. Britton, Esq., Q.C., M.P. (now Mr. Justice Britton of the King's Bench, Toronto), who pointed out that under the strict interpretation of the former law there was no power for the prosecutor to lay an indictment, except by the written consent of a judge, unless he had taken the precaution at the preliminary investigation of being bound over to prosecute, and that in the majority of cases the prosecutor was not asked by the magistrate to submit himself to be bound over. Commons Debates 1900, p. 5269.

The grand jury.]—There is at common law inherent power in a superior court of criminal jurisdiction to order one or more grand juries to be summoned; and the sheriff or coroner may be directed by the one order to summon both a grand and a petit jury. R. v. McGuire (1898), 4 Can. Cr. Cas. 12 (N.B.).

Mr. Justice Wurtele, of the Court of King's Bench, Montreal, in his charge to the grand jury at that city on November 2, 1898, since published in pamphlet form, said:

"Under the common law of England, which was extended to this country in criminal matters in 1774, the panel of a grand jury consisted of twenty-four jurors, but one was struck off at the opening of the court, so that twelve jurors might form the majority of the grand jury; and then it was necessary that twelve at least should concur in finding a charge well founded. It was not necessary that all the twenty-three jurors should be sworn to form the grand jury or that they should all be present at its sittings, but it was necessary that twelve jurors, whatever number was sworn or was present, should join in every finding, and consequently that twelve at least should attend. The constitution of the grand jury and the qualification of the jurors are matters which appertain to the organization of a court of criminal jurisdiction, and which therefore fall under the jurisdiction of the Provincial legislatures, but on the other hand the regulation of the number of jurors who may be required to say if a charge is well founded, is a matter of criminal procedure and it comes within the legislative power of the Parliament of Canada. In order to lessen the expense of the administration of criminal justice, and tc reduce the number of persons taken from time to time from their ordinary occupations to serve as grand jurors, it was thought expedient to diminish the number of jurors composing a grand jury and the number of its members who should have to concur in a finding. With this end in view the Parliament of Canada in 1894, by an amendment to the Criminal Code which is contained in the statute 57-58 Vict., ch. 57, enacted that 'seven grand jurors, instead of twelve, might find a true bill in any province where the panel of grand jurors is not more than thirteen;' and the legislature of Quebec in 1895, by the statute 59 Vict., ch. 25, diminished the panel of grand jurors from twenty-four to twelve jurors. . . . The rule, however, as to the attendance of the grand jury, is analogous to the rule which existed when it was composed of twenty-three jurors. It is not necessary, to constitute the grand jury, that all the twelve jurors summoned should be sworn, and it is not necessary either that twelve should be present at the sittings or when the grand jury come into court, but it is necessary that seven at least should always be in attendance.

"The principal duty of the grand jury is to inquire into the accusations that are brought for indictable offences which are alleged to have been committed in the district, or over which it is alleged that the court has juris-

diction. Formerly the grand jury proceeded either upon bills of indictment, which are written statements of the charges against the accused prepared in precise and technical language by the crown prosecutors, or by the presentment of offences which might be within the knowledge of the grand jurors themselves; in the first case, the action of the grand jury was taken on the suggestion of the Crown, and in the other it arose of its own motion from the knowledge of one or more of the jurors. Now, however, the faculty of proceeding by presentment has been taken away, and the grand jury can only proceed on the indictments which are laid before it, and indictments can only be preferred for charges on which a preliminary inquiry has been made before a magistrate, or, when there has been no preliminary inquiry, by the direction of the Attorney-General, or on the written consent of a judge, or by order of the court."

Orangemen, as such, are not disqualified to act as grand jurors on an indictment for a riot during which an Orange lodge had been attacked and damaged. R. v. Collins (1878), 2 P.E.I. 249.

A bill of indictment.]—The expressions "indictment" and "count" respectively include information and presentment as well as indictment. Sec. 3 (*l*). Finding the indictment includes also exhibiting an information and making a presentment. Sec. 3 (*j*).

The proceedings are generally commenced by a private prosecutor, who lays his complaint before a magistrate; but in cases which concern the Government of the country or affect public interests, the prosecution may be commenced by the provincial Attorney-General himself or a Crown prosecutor duly authorized by him, directly preferring a bill of indictment before the grand jury. R. v. St. Louis (1897), 1 Can. Cr. Cas. 141, 145 (Que.).

An indictment is an accusation at the suit of the King by the oaths of twelve men of the same county wherein the offence was committed returned to inquire of all offences in general in the county. R. v. Connor (1885), 2 Man. R. 235; 1 Terr. L.R. 4. When such accusation is found by a grand jury without any bill brought before them and afterwards reduced to a formal indictment it is called a presentment. And when it is found by jurors returned to inquire of that particular offence only which is indicted, it is called an inquisition.

Upon the summons of any sessions of the peace, and in case of commissioners of oyer and terminer and gaol delivery, there issues a precept either in the name of the King or two or more justices, directed to the sheriff, upon which he is to return twenty-four or more out of the whole county. 1 Chitty Cr. Law 309.

The summoning of more than twenty-four does not vitiate the panel; but no more than twenty-three can be properly sworn. R. v. McGuire (1898), 4 Can. Cr. Cas. 12 (N.B.). The justice presiding at a court may reform a panel, and the sheriff is bound to return a panel so reformed. Ibid.

It has been the ancient rule, that every indictment should, when found, have indorsed on it the words "a true bill," and be signed by the foreman of the grand jury, as the proper and authentic record of the fact that the grand jury had, before them, sufficient evidence to put the accused on his trial for the offence charged therein. That which was termed a bill of indictment before, becomes, on the finding of the jury, evidenced by these words, the indictment, and the words "a true bill" form part of that indictment on which the prisoner is to be tried.

The indorsement is, if the bill is rejected, "not a true bill," or, which is the better way, "not found," in which case the party is discharged without further answer. The indorsement, "a true bill," made upon the bill becomes part of the indictment, and renders it a complete accusation against the prisoner. When the jury have made their indorsement on the

bills, they bring them publicly into court, and the clerk of the peace at sessions, or the clerk of assize on circuit, calls all the jurymen by name, who severally answer, to signify that they are present, and then the clerk of the peace or assize asks the jury whether they have agreed upon any bills, and have them to present them to the court, and then the foreman of the jury hands the indictments to the clerk of the peace or assize, who asks them if they agree the court shall amend matter of form, altering no matter of substance, to which they signify their assent. This form is necessary to enable the court to alter any clerical mistake, because they have no authority to change the form of the accusation without the assent of the accusers. After this is done, the clerk of the peace reads over the names of the offenders and offences in every indictment, and whether the bill be found or thrown out *as indorsed by the grand jury*, and makes a private mark or cross upon those which are rejected, and usually files the bill, though this is not necessary." Chitty's Criminal Law, 324; 4 Black Com. 302-3; Archbold Crim. Prac. 98-99.

By sub-sec. 2 of sec. 651, where the place of trial is changed, all proceedings in the case are to be had, or if previously commenced, are to be continued in the district, county or place in which the trial is directed to take place, "as if the case had arisen or the offence had been committed therein." This authorizes an indictment being preferred also for another offence disclosed in the depositions. R. v. Coleman (1898), 2 Can. Cr. Cas. 523 (Ont.).

As to objections to indictments against corporations, see note to sec. 635.

Where consent required.]—Before the adoption of the Criminal Code, except in cases to which section 140 of the Criminal Procedure Act applied, there was no such limitation of the right to prefer an indictment as is now contained in section 641 of the Code, but in accordance with the recommendations of the report of the Royal Commissioners on the English Draft Code, 1878, pp. 32, 33, the Parliament of Canada, in codifying the criminal laws of the Dominion, extended the substance of the provisions of section 140 to the case of all indictments. R. v. Patterson (1895), 2 Can. Cr. Cas. 339, 344.

As pointed out by the Royal Commissioners, their recommendation was based upon what they deemed the manifest injustice of permitting an indictment to be preferred to a grand jury sitting in secret and without any opportunity to the accused of being heard, and a bill being found, and the accused placed upon trial upon what might turn out to be a wholly unfounded charge, without any preliminary investigation or even notice of the nature of the charge which was intended to be preferred against him.

As there is no jurisdiction to bind over the prosecutor to prefer a bill of indictment before the grand jury against a corporation, it is necessary that such an indictment should be preferred under sub-section 3.

Attorney-General.]—The expression "Attorney-General" in the third sub-section means the Attorney-General or Solicitor-General of any province in Canada in which the proceedings are taken; and with respect to the North-West Territories and the District of Keewatin it means the Attorney-General of Canada. Sec. 3 (*b*).

A superior court should not make an order that an indictment be preferred against a party accused of an offence if the two justices before whom the preliminary investigation was held signed a declaration to the effect that they were unable to agree. In such a case the prosecutor should be left to his recourse to an application to the Attorney-General, who can either prefer an indictment himself or direct one to be preferred. Ex p. Hanning (1896), 4 Can. Cr. Cas. 203, 5 Que. Q.B. 549.

Whether or not the Crown should assume the expense incidental to a prosecution is more particularly a question for the Attorney-General as a part of his executive functions, and is not one to be decided by a court. Ibid.

The preferring of an indictment by an agent of the Attorney-General acting under a general appointment to attend to all criminal cases at a session of the court without having obtained the special direction of the Attorney-General or an order or consent under sec. 641, is not a compliance with the section, and, if the person who was bound over by recognizance to prefer an indictment fails to appear, the indictment should be quashed. R. v. Hamilton (1898), 2 Can. Cr. Cas. 178 (N.S.).

Where the preferring of an indictment is authorized solely upon the ground that a direction of the Attorney-General, under sub-sec. 3, has been given therefor, the written consent or direction must be one with regard to the particular case, and the offence must be specified therein; and a general direction in writing by the Attorney-General authorizing counsel to take charge of the criminal prosecutions for the Crown at the sittings of the court will not suffice. R. v. Townsend (1896), 3 Can. Cr. Cas. 29 (N.S.).

Motion to quash indictment.]—Where the depositions before the magistrate have not been taken according to law, and a material provision of the law has not been complied with, the indictment may be quashed under sec. 641 upon motion at any time before the accused is given in charge to the jury. R. v. Lepine (1900), 4 Can. Cr. Cas. 145 (Que.).

An accused person cannot be said to have been "given in charge" to the jury until the jury are sworn, and his arraignment and the pleading of not guilty to the indictment do not constitute a "giving in charge." Ibid.

An indictment may be valid as being founded on the evidence disclosed on "the depositions taken before the justice," although the preliminary enquiry was held jointly, in respect of the party indicted and of two others separately charged with the same offence, and the depositions were given in respect of all of them in the one proceeding. R. v. Skelton (1898), 4 Can. Cr. Cas. 467 (N.W.T.).

An indorsement made and signed by the judge upon an indictment by which he "directs" that the indictment be submitted to the grand jury, is a sufficient "consent" of the judge to the preferring of the indictment. R. v. Weir (No. 2), 3 Can. Cr. Cas. 155 (Que.).

An accused against whom an indictment is preferred, under the authority of a judge's consent under sec. 641, is not entitled to have the indictment quashed by reason of the fact that a preliminary enquiry in regard to the same offence was at the same time pending before a justice of the peace upon which the latter had not given his decision for or against committal for trial. Ibid.

After a true bill had been found on an indictment for libel the defendant moved to have same quashed on the ground that one of the grand jurors was of affinity to him in the seventh degree, this was held not to be a sufficient ground for the application. R. v. Lawson (1881), 2 P.E.I. Rep. 398.

Habeas Corpus Act.]—The Habeas Corpus Act, 31 Car. II., ch. 2, still applies in Ontario. R. v. Keeler, 7 Ont. Pr. Rep. 124. It was particularly directed to the securing the discharge from imprisonment of persons tried and acquitted, and the avoidance of wilful delays in bringing prisoners to trial. By it the person in custody might apply in open court in the first week of the term, or first day of the session of oyer and terminer and general gaol delivery to be brought to his trial; and if, having made such application, he were not indicted and tried during the second term or sessions of oyer and terminer and general gaol delivery after his commitment, he was entitled to be discharged from his imprisonment. 31 Car. II., ch. 2, sec. 7.

The Crown by this is not obliged to do more than indict at the first assize after commitment and have the prisoner tried at the second assize thereafter. R. v. Bowen (1840), 9 C. & P. 509.

642 Coroner's inquisition.—After the commencement of this Act no one shall be tried upon any coroner's inquisition.

643. Oath in open court not required.—It shall not be necessary for any person to take an oath in open court in order to qualify him to give evidence before any grand jury. R.S.C. c. 174, s. 173.

644. Oath may be administered by foreman.—The foreman of the grand jury, or any member of the grand jury who may, for the time being, act on behalf of the foreman in the examination of witnesses, may administer an oath to every person who appears before such grand jury to give evidence in support of any bill of indictment; and every such person may be sworn and examined upon oath by such grand jury touching the matters in question. R.S.C. c. 174, s. 174.

645. Names of witnesses to be endorsed on bill of indictment.—The name of every witness examined, or intended to be examined, shall be endorsed on the bill of indictment; and the foreman of the grand jury, or any member of the grand jury so acting for him, shall write his initials against the name of each witness sworn by him, and examined touching such bill of indictment. R.S.C. c. 174, s. 175.

The provisions of sec. 645, requiring the foreman of the grand jury to initial upon the bill of indictment the names of witnesses sworn is directory only and not imperative. An indictment should not be quashed because of the omission of the foreman in that respect. R. v. Buchanan (1898), 1 Can. Cr. Cas. 442 (Man.); R. v. Townsend (1896), 3 Can.Cr. Cas. 29, 28 N.S.R. 468.

The grand jury may send for and look at any deposition and act upon it as they think proper. R. v. Bullard, 12 Cox 353; R. v. Gerrans, 13 Cox 158. And in a British Columbia case where the grand jury reported that without the evidence of an absent witness they had no materials to find a bill, Crease, J., held that they were entitled to peruse the depositions without proof that the witness was absent from Canada or was too ill to travel. R. v. Howes (1886), 1 B.C.R. pt. 2, p. 307.

646. Names of witnesses to be submitted to grand jury.—The name of every witness intended to be examined on any bill of indictment shall be submitted to the grand jury by the officer prosecuting on behalf of the Crown, and no others shall be examined by or before such grand jury unless upon the written order of the presiding judge. R.S.C. c. 174, s. 176.

647. Fees for swearing witnesses.—Nothing in this Act shall affect any fees by law payable to any officer of any court for swearing witnesses, but such fees shall be payable as if the witnesses had been sworn in open court. R.S.C. c. 174, s. 177.

648. Bench warrant and certificate.—When any one against whom an indictment has been duly preferred, and has been found, and who is then at large, does not appear to plead to such indictment, whether he is under recognizances to appear or not—

(*a*) the court before which the accused ought to have been tried may issue a warrant for his apprehension, which may be executed in any part of Canada;

(*b*) the officer of the court at which the said indictment is found or (if the place or trial has been changed) the officer of the court before which the trial is to take place, shall, at any time after the time at which the accused ought to have appeared and pleaded, grant to the prosecutor, upon application made on his behalf, and upon payment of twenty cents, a certificate of such indictment having been found. The certificate may be in the form GG in schedule one hereto, or to the like effect. Upon production of such certificate to any justice for the county or place in which the indictment was found, or in which the accused is or resides, or is suspected to be or reside, such justice shall issue a warrant to apprehend him and to cause him to be brought before such justice, or before any other justice for the same county or place, to be dealt with according to law. The warrant may be in the form HH in schedule one hereto, or to the like effect.

2. If it is proved upon oath before such justice that any one apprehended and brought before him on such warrant is the person charged and named in such indictment, such justice shall, without any further inquiry, or examination, either commit him to prison by a warrant, which may be in the form II in schedule one hereto, or to the like effect, or admit him to bail as in other cases provided; but if it appears that the accused has, without reasonable excuse, broken his recognizance to appear he shall not in any case be bailable as of right.

3. If it is proved before the justice upon oath that any such accused person is, at the time of such application and production of the said certificate as aforesaid, confined in any prison for any other offence than that charged in the said indictment,

such justice shall issue his warrant directed to the warden or gaoler of the prison in which such person is then confined as aforesaid, commanding him to detain him in his custody until by lawful authority he is removed therefrom. Such warrant may be in the form JJ in schedule one hereto, or to the like effect. R.S.C. c. 174, ss. 33, 34 and 35.

FORM GG.—

CERTIFICATE OF INDICTMENT BEING FOUND.

Canada,
Province of , }
County of , }

I hereby certify that at a Court of (Oyer and Terminer, *or* General Gaol Delivery *or* General Sessions of the Peace) holden in and for the county of , at , in the said (county), on , a bill of indictment was found by the grand jury against A. B., therein described as A. B., late of (*labourer*), for that he (*&c., stating shortly the offence*), and that the said A. B. has not appeared or pleaded to the said indictment.

Dated this day of , in the year .

Z. X.
(Title of officer.)

FORM HH.—

WARRANT TO APPREHEND A PERSON INDICTED.

Canada,
Province of , }
County of }

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

Whereas it has been duly certified by J. D., clerk of the (*name the court*) (*or* E. G., deputy clerk of the Crown *or* clerk of the peace, *or as the case may be*), in and for the county of , that (*&c., stating the certificate*). These are therefore to command you in His Majesty's name forthwith to apprehend the said A. B., and to bring him before (*me*) or some other justice or justices of the peace in and for the said county to be dealt with according to law.

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

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

FORM II.—

WARRANT OF COMMITMENT OF A PERSON INDICTED.

Canada,
Province of ,
County of .

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

Whereas by a warrant under the hand and seal of , (*a*) justice of the peace in and for the said county of , dated , after reciting that it had been certified by J. D., (*&c., as in the certificate*), the said justice of the peace commanded all or any of the constables or peace officers of the said county, in His Majesty's name, forthwith to apprehend the said A. B., and to bring him before (*him*) the said justice of the peace, or before some other justice or justices in and for the said county, to be dealt with according to law; and whereas the said A. B. has been apprehended under and by virtue of the said warrant, and being now brought before (*me*) it is hereupon duly proved to (*me*) upon oath that the said A. B. is the same person who is named and charged as aforesaid in the said indictment: These are, therefore to command you, the said constables and peace officers, or any of you, in His Majesty's name, forthwith to take and convey the said A. B. to the said common gaol at , in the said county of , and there to deliver him to the keeper thereof, together with this precept; and (*I*) hereby command you the said keeper to receive the said A. B. into your custody in the said gaol, and him there safely to keep until he shall thence be delivered by due course of law.

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

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

FORM JJ.—

WARRANT TO DETAIN A PERSON INDICTED WHO IS ALREADY IN CUSTODY FOR ANOTHER OFFENCE.

Canada,
Province of ,
County of ,

To the keeper of the common gaol at , in the said county of .

Whereas it has been duly certified by J. D., clerk of the (*name of the court*) (*or* deputy clerk of the Crown *or* clerk of the peace of and for the county of , *or as the case may be*) that (*&c., stating the certificate*); and whereas (*I am*) informed that the said A. B. is in your custody in the said common gaol at , aforesaid, charged with some offence, or other matter; and it being now duly proved upon oath before (*me*) that the said A. B., so indicted as aforesaid, and the said A. B., in your custody as aforesaid, are one and the same person: These are therefore to command you, in His Majesty's name, to detain the said A. B. in your custody in the common gaol aforesaid, until by a writ of *habeas corpus* he shall be removed therefrom, for the purpose of being tried upon the said indictment, or until he shall otherwise be removed or discharged out of your custody by due course of law.

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

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

A bench warrant directed to a sheriff and to all constables, etc., requiring them to arrest a man and bring him before the court to find securities for his appearance, was signed by the clerk of the peace, but had no seal. It was tested in open sessions at the court house, and was delivered by the clerk of the peace in court to the sheriff, who handed it to his deputy. It was held that the want of a seal did not make the warrant invalid. Fraser v. Dixon (1848), 5 U.C.Q.B. 231.

PART XLIX.

REMOVAL OF PRISONERS—CHANGE OF VENUE.

SECT.

649. Removal of prisoners.—The Governor-in-Council or the Lieutenant-Governor-in-Council of any Province may, if, from the insecurity or unfitness of any gaol of any county or district for the safe custody of prisoners, or for any other cause he deems it expedient so to do, order any person charged with an indictable offence confined in such gaol, or for whose arrest a warrant has been issued, to be removed to any other place for safe keeping or to any gaol, which place or gaol shall be named in such order, there to be detained until discharged in due course of law, or removed for the purpose of trial to the gaol of the county or district in which the trial is to take place; and a copy of such order, certified by the clerk of the King's Privy Council for Canada, or the clerk of the Executive Council, or by any person acting as such clerk of the Privy Council or Executive Council, shall be sufficient authority to the sheriffs and gaolers of the counties or districts respectively named in such order, to deliver over and to receive the body of any person named in such order. R.S.C. c. 174, s. 97.

2. The Governor in Council or a Lieutenant-Governor in Council, may, in any such order, direct the sheriff in whose custody the person to be removed then is, to convey the said person to the place or gaol in which he is to be confined, and in case of removal to another county or district shall direct the sheriff or gaoler of such county or district to receive the said person, and to detain him until he is discharged in due course of law, or is removed for the purpose of trial to any other county or district. R.S.C. c. 174, s. 98.

3. The Governor in Council or a Lieutenant-Governor in Council may make an order as hereinbefore provided in respect of any person under sentence of imprisonment or under sentence of death,—and, in the latter case, the sheriff to whose

gaol the prisoner is removed shall obey any direction given by the said order, or by any subsequent order in council, for the return of such prisoner to the custody of the sheriff by whom the sentence is to be executed. R.S.C. c. 174, s. 100.

650. Indictment after removal.—If after such removal a true bill for any indictable offence is returned by any grand jury of the county or district from which any such person is removed, against any such person, the court into which such true bill is returned, may make an order for the removal of such person, from the gaol in which he is then confined, to the gaol of the county or district in which such court is sitting, for the purpose of his being tried in such county or district. R.S.C. c. 174, s. 99.

651. Change of venue.—Whenever it appears to the satisfaction of the court or judge hereinafter mentioned, that it is expedient to the ends of justice that the trial of any person charged with an indictable offence should be held in some district, county, or place other than that in which the offence is supposed to have been committed, or would otherwise be triable, the court before which such person is or is liable to be indicted may, at any term or sitting thereof, and any judge who might hold or sit in such court, may, at any other time, either before or after the presentation of a bill of indictment, order that the trial shall be proceeded with in some other district, county or place within the same Province, named by the court or judge in such order; but such order shall be made upon such conditions as to the payment of any additional expense thereby caused to the accused, as the court or judge thinks proper to prescribe.

2. Forthwith upon the order of removal being made by the court or judge, the indictment, if any has been found against the prisoner, and all inquisitions, informations, depositions, recognizances and other documents relating to the prosecution against him, shall be transmitted by the officer having the custody thereof to the proper officer of the court at the place where the trial is to be had, and all proceedings in the case shall be had, or, if previously commenced, shall be continued in such district, county or place, as if the case had arisen or the offence had been committed therein.

3. The order of the court, or of the judge, made under this section, shall be a sufficient warrant, justification and authority,

to all sheriffs, gaolers and peace officers, for the removal, disposal and reception of the prisoner, in conformity with the terms of such order; and the sheriff may appoint and empower any constable to convey the prisoner to the gaol in the district, county or place in which the trial is ordered to be had.

4. Every recognizance entered into for the prosecution of any person, and every recognizance, as well of any witness to give evidence, as of any person for any offence, shall, in case any such order, as provided by this section, is made, be obligatory on each of the persons bound by such recognizance as to all things therein mentioned with reference to the said trial, at the place where such trial is so ordered to be had, in like manner as if such recognizance had been originally entered into for the doing of such things at such last mentioned place: Provided that notice in writing shall be given, either personally or by leaving the same at the place of residence of the persons bound by such recognizance, as therein described, to appear before the court, at the place where such trial is ordered to be had. R.S.C. c. 174, s. 102.

(Amendment of 1894.)

5. Whenever, in the Province of Quebec, it has been decided by competent authority that no term of the Court of King's Bench, holding criminal pleas, is to be held, at the appointed time, in any district in the said Province within which a term of the said court should then be held, any person charged with an indictable offence whose trial should by law be held in the said district may, in the manner hereinbefore provided, obtain an order that his trial be proceeded with in some other district within the said Province, named by the court or judge; and all the provisions contained in this section shall apply to the case of a person so applying for and obtaining a change of venue as aforesaid.

Changing place of trial.]—To effect a change of venue, or, more correctly, to change the place of trial, the court must be specially moved for the purpose. It does not rest with the Crown to select the place for trial by suggestion or otherwise, as it may desire. And the court will refuse or grant the motion as it may see fit. But it will be granted when there is a reasonable probability that a fair and impartial trial cannot be had in the place where the cause would otherwise be tried. Per Sir Adam Wilson, C.J., in R. v. Carroll (1880), (the Biddulph murder case), cited in 2 Can. Cr. Cas. at p. 200.

The power to change the venue is purely discretionary and should be used with great caution. R. v. Russell (1878), Ramsay's Cases (Que.) 199. But where the application was made on the part of the accused it was held

sufficient to justify the change, that persons might be called on the jury whose opinions might be tainted with prejudice and whom the prisoner could not challenge. Ibid.

Under the fifth sub-section, which applies only to Quebec, and which is taken from 32-33 Vict., ch. 29, sec. 11, the power to change the venue appears not to be limited to a judge sitting in the district where the offence is alleged to have been committed. Ex p. Brydges (1874), 18 L.C. Jur. 141.

A change of venue should not be made in a criminal case whereby the trial would be transferred from the county in which the crime is alleged to have been committed, unless facts are proved, as distinguished from sworn opinions, plainly indicating that a fair and important trial cannot be had in that county. R. v. Ponton (No. 1) (1898), 2 Can. Cr. Cas. 192 (Ont.).

A change of venue should not be granted on the ground of popular sympathy with the prisoner and prejudice against the prosecution, where there is nothing to shew that the class of citizens from whom the jury would be drawn are likely to be prejudiced except by those feelings which arise from the nature of the offence and which are common in all counties. Ibid.

But a change of venue may be ordered under this section on the application of the Crown, where at an abortive trial, at which the jury disagreed, a hostile demonstration was made against the judge by a mob assembled in the streets during a short adjournment of the trial. R. v. Ponton (No. 2) (1899), 2 Can. Cr. Cas. 417.

The change is rendered "expedient to the ends of justice" because the conduct of the mob tended to bring the administration of justice into contempt, and because of its possible influence on a jury at the next trial; and this notwithstanding the sworn statements of every juror at the abortive trial that they were in no way intimidated or influenced by the mob demonstration, part of which took place within hearing of the jury during their deliberations. Ibid.

Affidavits from the jurors denying intimidation are properly admissible in evidence on a motion to change the venue where such intimidation is charged. R. v. Ponton (No. 2) (1899), 2 Can. Cr. Cas. 417.

An order for change of the place of trial is not open to objection on the ground that it makes no provision for the additional expense to which the accused might be put by the change, if the judge making such order was not asked to make an order as to such additional expense, and if it was not shewn to such judge that additional expense would be occasioned. R. v. Coleman (1898), 2 Can. Cr. Cas. 523.

Where, after a committal for trial for an offence under the Criminal Code, an order is made changing the place of trial to another county, an indictment may be preferred in the latter county not only for the offence for which the accused was committed for trial, but for any other offence disclosed in the depositions taken before the committing justice. Ibid.

In order to obtain a change of venue in a prosecution for defamatory libel such facts must be shewn as will satisfy the court that a fair trial cannot be had at the present venue, and it is not sufficient that the applicant's solicitor swears to a belief that a fair trial is impossible there because of the prosecutor's interest in political affairs.

The fact that two abortive trials of the cause have already taken place at both of which the jury disagreed, is not of itself a ground for ordering a change of venue. R. v. Nicol (1900), 4 Can. Cr. Cas. 1 (B.C.).

PART L.

ARRAIGNMENT.

SECT.

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652. Bringing prisoner up for arraignment.—If any person against whom any indictment is found is at the time confined for some other cause in the prison belonging to the jurisdiction of the court by which he is to be tried, the court may, by order in writing, without a writ of *habeas corpus,* direct the warden or gaoler of the prison or sheriff or other person having the custody of the prisoner, to bring up the body of such person as often as may be required for the purposes of the trial, and such warden, gaoler, sheriff or other person shall obey such order. R.S.C. c. 174, s. 101.

653. Right of accused to inspect deposition and hear indictment.—Every accused person shall be entitled at the time of his trial to inspect, without fee or reward, all depositions, or copies thereof, taken against him and returned into the court before which such trial is had, and to have the indictment on which he is to be tried read over to him if he so requires. R.S.C. c. 174, s. 180.

Challenge of grand juror.]—There exists the same right of challenging for favour the grand jury as the petit jury. R. v. Kirwan, 31 State Trials 543; R. v. Gorbet (1866), 1 P.E.I. Rep. 262. If a grand juror who is disqualified be returned, he may be challenged by the prisoner before the bill is presented; or if it be discovered after the finding, the prisoner had formerly to plead in avoidance. Ibid.; but may now under sec. 656 take the objection by motion to the court to quash the indictment. On a trial for riot and conspiracy in obstructing the recovery of rents and service of process relating thereto, the indictment was quashed on its being shewn that the manager for and agent of the person entitled to the rents sat on the grand jury on the finding of the bill. R. v. Gorbet (1866), 1 P.E.I. Rep. 262.

Arraignment.] — The arraignment of prisoners against whom true bills for indictable offences have been found by the grand jury consists of three parts: first, calling the prisoner to the bar by name; secondly, reading the indictment to him; and thirdly, asking him whether he is guilty or not of the offence charged. As soon as the indictment has been read over to the prisoner, the clerk of the arraigns or officer of the court demands of him:

"How say you, are you guilty or not guilty?"

If the prisoner pleads guilty, and it appears to the satisfaction of the judge that he rightly comprehends the effect of his plea, his confession is recorded and sentence is forthwith passed, or he is removed from the bar to be again brought up for judgment. Archbold's Crim. Pleadings, 20th ed., 159. If the prisoner pleads "not guilty," his plea is recorded by the officer of the court, and the prisoner is said to have "put himself upon the country." If the accused wilfully refuses to plead or will not answer directly, the court may order the proper officer to enter a plea of not guilty. Sec. 657 (2).

654. Copy of indictment.—Every person indicted for any offence shall, before being arraigned on the indictment, be entitled to a copy thereof on paying the clerk five cents per folio of one hundred words for the same, if the court is of opinion that the same can be made without delay to the trial, but not otherwise. R.S.C. c. 174, s. 181.

Certified record of acquittal.]—A person tried for felony and acquitted at a Court of Oyer and Terminer in Ontario, can only obtain a copy of the indictment and record of acquittal, to be used in an action of malicious prosecution, on the fiat of the Attorney-General; and the granting or referring of such application cannot be reviewed by the court. R. v. Ivy (1874), 24 U.C.C.P. 78.

In a recent case it was, however, held by Boyd, C., and Ferguson, J., that the judgments of the Courts of General Sessions in Ontario are public records, and the clerk of the peace holds them as their statutory custodian in the interests of the public generally and not as a deputy officer of the Crown; that any person interested in the indictments and records of the Court of General Sessions is entitled of right to inspect them; and that an accused person tried and acquitted in such court is entitled to a copy of the record of such acquittal and of the indictment without the fiat of or intervention by the Attorney-General of the province, and a mandamus will lie to the clerk of the peace to compel the delivery to him of certified copies. R. v. Scully (1901), 5 Can. Cr. Cas. 1 (appeal pending).

It was held in Caddy v. Barlow (1827), 1 Manning and Ryland, 275, by the Court of King's Bench that although the copy of indictment offered in evidence in an action for malicious prosecution may have been granted by the court of quarter sessions for a different purpose than that for which it was used at the trial, the copy was receivable in evidence without inquiry into the circumstances under which it was granted. The words of the statute 46 Edw. III. are as follows:—

"Also the Commons pray that whereas records and whatsoever is in the King's Court ought of reason to remain there for perpetual evidence and aid of all parties thereto, and of all those whom in any manner they reach, when they have need, and yet of late they refuse, in the court of our said Lord to make search or exemplification of anything which can fall in evidence against the King or in his disadvantage. May it please you to ordain by statute that search and exemplification be made for all persons of whatever record touches them in any manner, as well as that which falls against the King as other persons. Le roy le voet."

The first restriction of this general right appears to have been imposed in the reign of Charles II. by an order made for the regulation of the Old Bailey sessions by the judges. (Directions for justices at the Old Bailey, Kelyng's Rep. 3). That order directed "that no copies of any indictment for felony be given without special order upon motion made in open court at the general gaol delivery, for the late frequency of actions against prosecutors which cannot be without copies of the indictment, deterreth people from prosecuting for the King upon just occasions."

In Leggatt v. Tollervey, 14 East 302, the practice was thus stated by Lord Ellenborough, C.J.:—"It is very clear that it is the duty of the officer charged with the custody of the records of the court not to produce a record but upon competent authority, what at the Old Bailey is obtained upon application to the court pursuant to the order that has long prevailed there; and, with respect to the general records of the realm, upon application to the Attorney-General." Manning and Ryland in their note to the report of Caddy v. Barlow, supra, say:—"It appears that originally all judicial records of the King's courts were open to the public without restraint and were preserved for that purpose." In Hewitt v. Cane (1894), 26 Ont. R. 133, 142, Rose, J., referring to the Old Bailey rule, said:—"That was a rule passed by the judges to regulate and govern their own action, and merely was that while the record or indictment remained in the court during its session, and before it had been sent out as directed by statute, no copy should be given out unless on motion as therein provided, and did not, as indeed it could not, affect the custody or control of the indictment after it had been sent to the proper officer as directed by statute."

The distinction made in the Old Bailey rule between cases of felony and misdemeanour as regards the certifying of the proceedings, would seem not to apply after the record or indictment has been returned to the proper office. Hewitt v. Cane (1894), 26 Ont. R. at p. 144. In Ontario the practice has been to apply to the Attorney-General for a fiat in cases tried at the assizes. R. v. Ivy, 24 U.C.C.P. 78; O'Hara v. Doherty, 25 Ont. R. 347. This practice is based upon the theory that after the criminal records are returned pursuant to the statute to the officer named therein they must be taken to be in the custody of the Crown, and that the Crown, acting through the Attorney-General, its agent general, is the only person competent to give any directions as to the same. The custody of the records in criminal cases by the clerk of the Crown and pleas at Toronto (see 14-15 Vict. (Can.) ch. 118, and C.S.U.C. ch. 11, sec. 10), after the return of the indictments to him is not as a record of the High Court of Justice, but as an officer of the Crown acting under the supervision of the Attorney-General. Hewitt v. Cane (1894), 26 Ont. R. 133. If the bill of indictment has been ignored by the grand jury its production will be evidence of the termination of the criminal proceedings. R. v. Smith, 8 B. &C. 341; R. v. Ivy, 24 U.C.C.P.; McCann v. Preneveau, 10 Ont. R. 573; but in all other cases a formal record of acquittal must be produced; and, semble, the certified record should shew whether or not an appeal had been taken under Code secs. 743-746. Hewitt v. Cane, 26 Ont. R., at p. 140.

655. Copy of deposition.—Every person indicted shall entitled to a copy of the depositions returned into court on payment of five cents per folio of one hundred words for the same, provided, if the same are not demanded before the opening of the assizes, term, sittings, or sessions, the court is of opinion that the same can be made without delay to the trial, but not otherwise; but the court may, if it sees fit, postpone the trial

on account of such copy of the depositions not having been previously had by the person charged. R.S.C. c. 174, s. 182.

656. Pleas in abatement abolished.—No plea in abatement shall be allowed after the commencement of this Act. Any objection to the constitution of the grand jury may be taken by motion to the court, and the indictment shall be quashed if the court is of opinion both that such objection is well founded and that the accused has suffered or may suffer prejudice thereby, but not otherwise.

Objection to the grand jury.]—An order of a superior court to a coroner to summon a grand jury need not shew on its face all the facts which made it necessary that a coroner, instead of the sheriff, should be directed to summon the jury. Where a grand jury has been summoned by a sheriff who is disqualified from acting because of his relationship to a prosecutor, a new grand jury may be summoned on a venire to a coroner, without formally discharging the jury summoned by the sheriff or disposing of the indictment found by it. The indictment found by the sheriff's grand jury is in such case void, and it is open to the coroner summoning another jury to summon persons already summoned by the sheriff. R. v. McGuire (1898) 4 Can. Cr. Cas. 12 (N.B.).

See also note to sec. 653.

657. Plea; refusal to plead.—When the accused is called upon to plead he may plead either guilty or not guilty, or such special plea as is herein provided for.

2. If the accused wilfully refuses to plead, or will not answer directly, the court may order the proper officer to enter a plea of not guilty. R.S.C. c. 174, s. 145.

Plea of not guilty.]—The defendant has the right to raise the question of jurisdiction under a plea of not guilty. R. v. Hogle (1896), 5 Can. Cr. Cas. 53 (Que.).

As to the time for pleading in Ontario, see secs. 756-759.

Inability to plead.]—If at any time after the indictment is found, and before the verdict is given, it appears to the court that there is sufficient reason to doubt whether the accused is then, on account of insanity, capable of conducting his defence, the court may direct that an issue shall be tried whether the accused is or is not then, on account of insanity, unfit to take his trial. Sec. 737 (1).

If such issue is directed before the accused is given in charge to a jury for trial on the indictment such issue shall be tried by any twelve jurors. If such issue is directed after the accused has been given in charge to a jury for trial on the indictment such jury shall be sworn to try this issue in addition to that on which they are already sworn. Sec. 737 (2).

If the verdict on this issue is that the accused is not then unfit to take his trial the arraignment or the trial shall proceed as if no such issue had been directed. Sec. 737 (3). If the verdict is that he is unfit on account of insanity the court shall order the accused to be kept in custody till the pleasure of the Lieutenant-Governor of the province shall be known, and any plea pleaded shall be set aside and the jury shall be discharged. Sec. 737 (3).

No such proceeding shall prevent the accused being afterwards tried on such indictment. Sec. 737 (4).

If a person be found to be mute ex visitatione Dei, the court in its discretion will use such means as may be sufficient to enable the prisoner to understand the charge and make his answer; and if this be found impracticable, a plea of not guilty should be entered and the trial proceed. 1 Chit. Crim. L. 417.

The following form of oath may be administered to the jury: "You shall diligently inquire and true presentment make, for and on behalf of our sovereign lord the King, whether A. B , the defendant who now stands indicted, is or is not on account of insanity unfit to take his trial, and a true verdict give according to the best of your understanding; so help you God."

In R. v. Berry (1876), 1 Q.B.D. 447; 45 L.J. (M.C.) 123, a deaf mute being arraigned for felony, the jury who had been impanelled to try the case were sworn to try whether the prisoner stood mute of malice or by the visitation of God. The jury found that he was mute by the visitation of God. The judge then ordered that a plea of not guilty should be entered, and the trial proceeded. The jury found the prisoner guilty of the felony charged against him, but also found that he was incapable of understanding, and did not understand, the proceedings at the trial. Upon this finding it was held that the prisoner could not be convicted, but must be detained as a non-sane person during the Queen's pleasure. In R. v. Wheeler, Central Criminal Court, May 12, 1852, where the prisoner was indicted for the murder of his mother, and on his arraignment said he was "not guilty," Platt, B., on the motion of the prisoner's counsel, directed the jury to be sworn to inquire whether the prisoner was in a fit state of mind to plead to the indictment, and it appearing from the evidence that the prisoner seemed to understand the nature of the crime for which he was indicted, but that he seemed unable to understand the distinction between a plea of "guilty" and of "not guilty," the jury, at the suggestion of the learned judge, returned a verdict that the prisoner was of unsound mind and incompetent to plead. Archbold Cr. Ev. (1900), 168.

658. Special provisions in the case of treason.—When any one is indicted for treason, or for being accessory after the fact to treason, the following documents shall be delivered to him after the indictment has been found, and at least ten days before his arraignment; that is to say:

(*a*) a copy of the indictment;

(*b*) a list of the witnesses to be produced on the trial to prove the indictment; and

(*c*) a copy of the panel of the jurors who are to try him returned by the sheriff.

2. The list of witnesses and the copy of the panel of the jurors must mention the names, occupations, and places of abode of the said witnesses and jurors.

3. The documents aforesaid must all be given to the accused at the same time, and in the presence of two witnesses.

4. This section shall not apply to cases of treason by killing His Majesty, or to cases where the overt act alleged is any attempt to injure his person in any manner whatever, or to the offence of being accessory after the fact to any such treason.

PART LI.

TRIAL.

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659. Right to full defence.—Every person tried for any indictable offence shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto by counsel learned in the law. R.S.C. c. 174, s. 178.

Full answer and defence.]—The object of the Crown being not to find the prisoner guilty, but to do justice, it is the duty of the prosecution to bring out the whole of the facts both in the prisoner's favour and against him.

Every witness on the back of the indictment need not be called. R. v. Thompson (1876), 13 Cox 181. That is in the discretion of the prosecuting counsel, but he should have all these witnesses in attendance in case the prisoner should desire to call them. R. v. Woodhead (1847), 2 C. & K. 520; R. v. Cassidy (1858), 1 F. & F. 79.

In R. v. Simmonds (1823), 1 C. & P. 84, it was laid down that the judge would himself sometimes call the omitted witnesses. In 1830, in R. v. Beezley, 4 C. & P. 220, Mr. Justice Littledale held that all witnesses named on the back of the indictment ought to be called by the prosecution, not necessarily to give evidence in chief, but to afford the defence an opportunity of cross-examination. This ruling went further than R. v. Simmonds, which left the matter in the judge's discretion. R. v. Bodle (1833), 6 C. & P. 186, followed the ruling of R. v. Simmonds.

In R. v. Edwards (1848), 3 Cox C. C. 82, Mr. Justice Erle said that, though the judge had power to interfere with counsel's discretion as to calling the witnesses on the back of the indictment, that power would only be exercised in extreme cases.

In 1838, in R. v. Holden, 8 C. & P. 609, on a trial for murder, it was laid down that at a murder trial, every person present at the transaction giving rise to the charge ought to be called by the prosecution, even though they were brought to the assizes by the other side and were not on the back of the indictment, as even if they gave different accounts the jury ought to hear their evidence and draw their own conclusions. Lord Abinger, in a murder case, R. v. Orchard (1838), 8 C. & P. 558, note, commented in his summing up on the prosecution not calling two persons who were in the house at the time of the alleged murder, though they were near relatives of the accused, and would naturally be prejudiced in their favour.

These decisions seem to shew that in murder cases those persons who were present at the occurrence giving rise to the charge, or in such immediate proximity as to make it likely that they could give relevant evidence, ought to be called by the prosecution, even though they were not named on the back of the indictment.

At common law in criminal cases as well as in civil a co-defendant against whom no evidence whatever is given ought to be acquitted at the end of the prosecutor's or plaintiff's case. R. v. Hambly (1858), 16 U.C.Q.B. 617.

But it is in the discretion of the judge, at the close of the prosecution, to submit separately to the jury the case of one of several prisoners against whom no evidence appears; he is not bound to do so, and whether he has rightly exercised his discretion or not cannot be reserved as a point of law. R. v. Hambly (1858), 16 U.C.Q.B. 617.

The admission of evidence in reply which was admissible in chief is as a general rule in the discretion of the judge, subject to being reviewed by the court. R. v. Jones (1869), 28 U.C.Q.B. 416, per Richards, C.J.

One co-defendant cannot be called as a witness by another co-defendant and compelled to give evidence, but a co-defendant may testify if he chooses to do so. R. v. Connors (1893), 5 Can. Cr. Cas. 70 (Que.).

On a joint indictment the evidence adduced by the witnesses for any one of the defendants is effective as regards the others either beneficially or adversely, and, therefore, before the counsel for the prosecution cross-examines, each of the other defendants has the right to cross-examine such witnesses and in doing so to bring out fresh facts which may be advantageous for his defence. R. v. Barsalou (No. 3) (1901), 4 Can. Cr. Cas. 446 (Que.).

The prisoner is entitled to a trial free from comment or observation upon the fact that he did not tender himself as a witness. He has the right to refrain from giving evidence without his failure to testify being made the subject of comment. 56 Vict. (Can.), ch. 31, sec. 4. The infringement of that right is a substantial wrong, which is not removed or remedied by the judge calling back the jury and telling them that he had done wrong. R. v. Coleman (1898), 2 Can. Cr. Cas. 523 (Ont.).

And the fact that the attention of the trial judge was called to the error by the prisoner's counsel does not deprive the prisoner of his right to move the court for a new trial. Ibid. R. v. Gibson (1887), 18 Q.B.D. 537; R. v. Petrie (1890), 20 Ont. R. 317; Martin v. Mackonochie (1878), 3 Q.B.D. 775.

Proof of official 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. Can. Evid. Act, 1893, sec. 12.

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 render its 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. Ibid, sec. 13.

No proof is required of the handwriting or official position of any person so certifying 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. Ibid, sec. 14.

Any order in writing, signed by the Secretary of State of Canada, and purporting to be written by command of the Governer-General, shall be received in evidence as the order of the Governor-General. Ibid, sec. 15.

Copies of official and other notices, advertisements and documents printed in The Canada Gazette are prima facie evidence of the originals, and of the contents thereof. Ibid, sec. 16.

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. Idid, sec. 17.

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. Ibid, sec. 18.

But no copy of any such book or other document 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. Ibid, sec. 19.

These provisions are in addition to and not in derogation of any powers of proving documents given by any existing statute or existing at law. Sec. 20.

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. Sec. 21.

660. Presence of the accused at the trial.—Every accused person shall be entitled to be present in court during the whole of his trial, unless he misconducts himself by so interrupting the proceedings as to render their continuance in his presence impracticable.

2. The court may permit the accused to be out of court during the whole or any part of any trial on such terms as it thinks proper.

See note to sec. 626.

661. Prosecutor's right to sum up.—If an accused person, or any one of several accused persons being tried together, is defended by counsel, such counsel shall, at the end of the case for the prosecution, declare whether he intends to adduce evidence or not on behalf of the accused person for whom he appears; and if he does not thereupon announce his intention to adduce evidence, the counsel for the prosecution may address the jury by way of summing up.

2. Upon every trial for an indictable offence, whether the accused person is defended by counsel or not, he or his counsel shall be allowed, if he thinks fit, to open his case, and after the conclusion of such opening to examine such witnesses as he thinks fit, and when all the evidence is concluded to sum up the evidence. If no witnesses are examined for the defence the counsel for the accused shall have the privilege of addressing the jury last; otherwise such right shall belong to the counsel for the prosecution: Provided, that the right of reply shall be always allowed to the Attorney-General or Solicitor-General, or to any counsel acting on behalf of either of them. R.S.C. c. 174, s. 179.

Prosecuting counsel.]—The position of prosecuting counsel is not that of an ordinary counsel in a civil case, but he is acting in a quasi judicial capacity and ought to regard himself as part of the court; that, while he is there to conduct his case, he is to do it at his discretion, but with a feeling of responsibility, not as if trying to obtain a verdict, but to assist the judge in fairly putting the case before the jury and nothing more. Blackburn, J., in R. v. Berens, 4 F. & F. 842, 853. He is to regard himself as a minister of justice and not to "struggle for a conviction." R. v. Puddick, 4 F. & F. 497; R. v. Patterson (1875), 36 U.C.Q.B. 129, 146.

Joint indictments.]—Where several persons are jointly indicted the order in which each of them shall enter upon his defence is generally subject to the discretion of the trial judge. R. v. Barsalou (No. 3), 4 Can. Cr. Cas. 446 (Que.).

Where there is a difference in degree of criminality with respect to the charge made against several persons jointly indicted, they should be called upon for their defence the greater before the less according to the seriousness of the charge against each as disclosed both by the indictment and the evidence for the prosecution, ex gr., the principal before the accessory, and the thief before the receiver. Ibid.

Where there appears no such difference in degree of criminality in respect of several persons jointly indicted, the order of defence is the order in which their names appear in the indictment. Ibid; R. v. Barber, 1 C. & K. 434; R. v. Meadows, 2 Jurist N.S. 718.

On a joint indictment for one offence, when the evidence for the one would enure to the benefit of the other, the right to a general reply is with the prosecution, though only one defendant called witnesses in defence. R. v. Connolly (1894), 1 Can. Cr. Cas. 468 (Ont.).

This is in accordance with the practice prior to the Code. R. v. Hayes (1838), 2 M. & R. 155; R. v. Jordan (1839), 9 C. & P. 118.

Right to begin.]—In criminal cases the prosecution always begins. If the prisoner is defended the counsel for the prosecution opens the case; if, however, he is undefended it is not usual to make any opening statement unless there is some peculiarity in the facts. Phipson Evid., 2nd ed., 42. If there is no prosecuting counsel there can be no opening, the prosecutor not being allowed to address the jury. Roscoe Cr. Evid. 201; R. v. Brice, (1824), 2 B. & Ald. 606; R. v. Gurney (1869); 11 Cox C.C. 414.

Opening the case.]—The existence of a previous conviction against the accused should not be referred to in the opening although the charge is for a second offence. Sec. 676. The arraignment must in the first instance be upon so much only of the indictment as charges the subsequent offence, and after that is disposed of the accused is to answer as to the fact of the previous conviction. Ibid.

When the prisoner is given in charge to the jury, the counsel for the prosecution or, if there be more than one, the senior counsel, opens the case to the jury stating the leading facts upon which the prosecution rely. In doing so he ought to state all that it is proposed to prove, as well declarations (other than confessions) of the prisoners as the facts, so that the jury may see if there be a discrepancy between the opening statements of counsel and the evidence afterwards adduced in support of them. R. v. Edward (1833), 1 M. & Rob. 257; R. v. Hartel (1837), 7 C. & P. 773; R. v. Davis (1837), 7 C. & P. 785.

A confession should not be referred to in the opening further than to state its general effect only for the circumstances under which it was made may render it inadmissible in evidence. Archbold Cr. Pl. (1900) 187; R. v. Swatkins (1831), 4 C. & P. 548; R. v. Davis, 7 C. & P. 786; R. v. Orrell (1835), 7 C. & P. 774; and see note to sec. 552 as to evidence of admissions made by the accused.

In opening a case for murder, the counsel for the prosecution may put hypothetically the case of an attack upon the character of any particular witness for the Crown and say that should any such attack be made he will be prepared to meet it. R. v. Courvoisier (1840), 9 C. & P. 362.

If any additional evidence not mentioned in the opening speech of counsel is discovered in the course of a trial the prosecuting counsel is not allowed to state it in a second address to the jury. Ibid; R. v. Creau (1861), 8 Cox C.C. 509.

Witnesses for the prosecution.]—The witnesses for the prosecution are called and examined viva voce after the opening address, each witness being cross-examined in turn by the prisoner's counsel. Although the prosecution is not in strictness bound to call every witness named on the back of the indictment, it is usual to do so in order to afford the prisoner's counsel an opportunity to cross examine them; and, if the prosecution will not call them, the judge in his discretion may do so. R. v. Simmonds (1823), 1 C. & P. 84; R. v. Bull (1839), 9 C. & P. 22; Phipson Evid., 2nd ed., 476.

In charges of homicide witnesses who were present at the transaction have been called by the judge for the furtherance of justice, although not named on the back of the indictment. R. v. Holden, 8 C. & P. 609; R. v. Stroner, 1 C. & K. 650; R. v. Chapman, 8 C. & P. 558; R. v. Orchard, 8 C. & P. 558 (*n*). But if this is done at the instance of the prisoner and no question is put to them by the prosecution they become so far the prisoner's witnesses that though he may cross-examine he cannot contradict them; R. v. Bodle, 6 C. & P. 186; and the prosecution can only re-examine as a matter arising out of the cross-examination; R. v. Beezley, 4 C. & P. 220; and perhaps if there has been a refusal by the prosecution to call the witness not even then. R. v. Harris (1836), 7 C. & P. 581.

Where a prisoner is not defended by counsel he cross-examines the witnesses for the prosecution if he thinks fit, or the judge does so on his behalf. Archbold Cr. Pl. (1900) 188.

Defence.]—If the defendant decides to adduce evidence he may now, if he desires, open his case to the jury, call his witnesses and sum up, which latter process usually extends in practice to a complete commentary on the case. Sub-section (2) supra. Phipson Evid., 2nd ed., 46.

The defendant may be allowed to reserve to himself the right to address the jury and to examine and cross-examine witnesses, and to have his counsel argue any points of law that arise in the course of the trial and to suggest questions to him for the cross-examination of witnesses; R. v. Parkins, Ry. & M. 166; but the defendant will not be allowed to have counsel to examine and cross-examine the witnesses, and to reserve to himself the right of addressing the jury. R. v. White (1811), 3 Camp. 98. Nor can a prisoner have counsel to speak for him and also make a speech for himself other than to make his statement of facts (see that heading, infra). He will be strictly confined in that case to a statement of facts and not allowed to put forward mere matter of argument. R. v. Everett, cited Archbold Cr. Pl. (1900) 188.

See also note to sec. 659.

Right of reply.]—The meaning of the last proviso in the above section has been held in Manitoba not to be that the Attorney-General or his representative shall have the last word with the jury where the defendant calls no witnesses, but only that he shall have the right to again address the jury at the close of the evidence, after which the defendant's counsel could make his address. R. v. Le Blanc, 29 C.L.J. 729, per Taylor, C.J. But there is much reason to doubt the correctness of that decision. How can an address made before that of the prisoner's counsel be called a "reply"? The proviso seems rather to be an extension of the statute 32-33 Vict. (Can.) ch. 29, sec. 45, and of the rule referred to in 5 St. Tr. N.S. 3 (*n*), as a "resolution of the judges" and which was intended to remove doubts which formerly existed as to the right of reply in such cases by counsel other than the Attorney-General or Solicitor-General. 2 St. Tr. N.S. 1019. The resolution was as follows:—"In those Crown cases in which the Attorney or Solicitor-General is personally engaged, a reply where no witnesses are called for the defence is to be allowed as of right to the counsel for the Crown, and in no others."

So in R. v. Marsden, M. & M. 439, it was held that the Attorney-General has the right of reply even though the defendant call no witnesses; and in R. v. Toakley, 10 Cox C.C. 406, the same right was accorded to the Solicitor-General appearing on behalf of the Attorney-General in a post-office prosecution. The statute 32-33 Vict., (Can.) ch. 29, sec. 45, gave the right of reply to the Attorney or Solicitor-General or to any Queen's Counsel acting on behalf of the Crown. It had previously been held in Ontario that the Crown counsel not being the Attorney-General or Solicitor-General had no right of reply where no witnesses were called for the defence. R. v. McLellan, 9 U.C.L.J. 75.

In Quebec the rule was to allow the reply in cases of public prosecutions for felony whether the Attorney-General appeared personally or by a representative. R. v. Quatre Pattes, 1 L.C.R. 317.

Phipson in his work on Evidence (1898), 2nd ed., p. 47, says:—"In Ireland all prosecuting counsel in public prosecutions represent the Attorney-General and have the same privilege." See also Eng. L.T., March 4, 1893, and April 24, 1897; 6 Law Magazine (1881), 101; Nineteenth Century (1895), 304.

It is not usual to exercise the right of reply where the only evidence adduced by the defendant is as to character. R. v. Dowse (1865), 4 F. & F. 492.

Prisoner's statement.]—The prisoner is entitled to make a statement of facts to the jury whether he is defended by counsel or not, provided he calls no witnesses. R. v. Millhouse (1885), 15 Cox C.C. 622. In that case and in R. v. Shimmin (1882), 15 Cox C.C. 123, it was held that the statement may be

made after his counsel has addressed them, but in R. v. Doherty (1887), 16 Cox C.C. 306, it was allowed to be made before the counsel's address. Counsel for the prosecution has the right of reply if the defendant makes a statement. R. v. Rogers (1884), 1 B.C.R., pt. 2, p. 119, per Crease, J.

In R. v. Maybrick, Liverpool Assizes, Aug., 1889, the prisoner was allowed to make a statement to the jury although witnesses were called by her. Phipson Evid., 2nd ed., 47.

662. Qualification of a juror.—Every person qualified and summoned as grand or petit juror, according to the laws in force for the time being in any Province of Canada, shall be duly qualified to serve as such juror in criminal cases in that Province. R.S.C. c. 174, s. 160.

(Amendment of 1894.)

2. Notwithstanding any law, usage or custom to the contrary, seven grand jurors instead of 12, as heretofore, may find a true bill in any Province where the panel of grand jurors is not more than thirteen: Provided, that this sub-section shall not come into force until a day to be named by the Governor by his proclamation. (Proclaimed from 1 January, 1895.) Vol. 28, Can. Gazette, 1172.

Where panel not more than thirteen.]—It is within the power of a Provincial Legislature to fix the number of the grand jurors, who should compose the panel, that being part of the organization or constitution of the court. R. v. Cox (1898), 2 Can. Cr. Cas. 207 (N.S.).

But a Provincial Legislature has no power to fix the number of grand jurors necessary to find a good bill of indictment, that being a matter of criminal procedure and exclusively within the powers of the Dominion Parliament. Ibid.

Where by the provincial law the number of grand jurors summoned has been reduced to less than thirteen, and some of those summoned fail to appear, seven of those who appear may find a bill of indictment. R. v. Girard (1898), 2 Can. Cr. Cas. 216 (Que.).

And see note to sec. 641.

Juror's knowledge of facts in issue.]—If a juryman has knowledge of any matter of evidence in the case being tried he ought not to impart the same privily to the rest of the jury, but should state to the court that he had such knowledge, and thereupon be examined and subjected to cross-examination as a witness. R. v. Bushell, 6 Howell 1012 (*n*); R. v. Reading, 7 Howell 259; R. v. Rosser, 7 C. & P. 648. But there are grave objections to a juror sworn to try being sworn and examined as a witness for if his evidence be contradicted or his credibility be impeached he is placed in the position of joining in the determination of his own credibility. R. v. Petrie (1890), 20 O.R. 317.

663 Jury de medietate linguæ abolished.—No alien shall be entitled to be tried by a jury *de medietate linguae*, but shall be tried as if he was a natural born subject. R.S.C. c. 174, s. 161.

664. Mixed juries in the province of Quebec.—In those districts in the Province of Quebec in which the sheriff is required by law to return a panel of petit jurors composed one-half of persons speaking the English language, and one-half of persons speaking the French language, he shall in his return specify separately those jurors whom he returns as speaking the English language, and those whom he returns as speaking the French language respectively; and the names of the jurors so summoned shall be called alternately from such lists. R.S.C. c. 174, s. 166.

Mixed juries in Quebec.]—A prisoner arraigned for trial in Quebec has the right to claim a jury composed for one-half at least of persons speaking his language if French or English. After having claimed a mixed jury and the recording of the order therefor by the Court, the prisoner has no absolute right to relinquish such claim and to have the order for a mixed jury superseded, but revocation may be ordered on such an application in the discretion of the Court. R. v. Sheehan (1897), 1 Can. Cr. Cas. 402 (Que.).

The right to a mixed jury in the Province of Quebec, conferred by 27-28 Vict., ch. 41, Statutes of the Province of Canada, still exists in criminal cases, notwithstanding the statute 46 Vict., ch. 16 (Que.), purporting to repeal the former Act. R. v. Yancey (1899), 2 Can. Cr. Cas. 320. A statute of the former Province of Canada in force at the time of Confederation, which conferred the right to a mixed jury in Lower Canada, now the Province of Quebec, remains in force thereafter as a matter of "criminal procedure" as to that province, and can be varied or repealed only by the Parliament of Canada. B.N.A. Act, sec. 91 (27). Ibid; R. v. Sheehan (1897), 1 Can. Cr. Cas. 402 (Que.). The prosecuted party may, upon arraignment, demand a jury composed for the one-half at least of persons skilled in "the language of his defence," whether French or English; but this does not give the accused an option to choose either language as the language of the defence, nor to have at least one-half of the jurors drawn from those skilled in the language in which counsel for the accused proposes to conduct the defence. The "language of the defence" in that connection means the language habitually spoken by the accused. R. v. Yancey (1899), 2 Can. Cr. Cas. 320.

Where six English jurors had been sworn after several jurors had been directed to stand aside at the instance of the Crown and the clerk recommenced to call the panel alternately from the English and the French lists and one of them previously ordered to stand aside was again called, it was held that the previous "stand aside" stood good and did not need to be withdrawn until the panel was exhausted. R. v. Dougall (1874), 18 L.C. Jur. 242.

665. Mixed juries in Manitoba.—Whenever any person who is arraigned before the Court of King's Bench for Manitoba demands a jury composed, for the one-half at least, of persons skilled in the language of the defence, if such language is either English or French, he shall be tried by a jury composed for the one-half at least of the persons whose names stand first in succession upon the general panel and who, on appearing and not being lawfully challenged, are found in the judgment of the court, to be skilled in the language of the defence.

2. Whenever, from the number of challenges or any other cause, there is in any such case a deficiency of persons skilled in the language of the defence, the court shall fix another day for the trial of such case, and the sheriff shall supply the deficiency by summoning, for the day so fixed, such additional number of jurors skilled in the language of the defence as the court orders, and as are found inscribed next in succession on the list of petit jurors. R.S.C. c. 174, s. 167.

The subsequent discovery that one of the jurors sworn did not thoroughly understand the English language is not a ground for a new trial. R. v. Earl (1894), 10 Man. R. 303.

666. Challenging the array.—Either the accused or the prosecutor may challenge the array on the ground of partiality, fraud, or wilful misconduct on the part of the sheriff or his deputies by whom the panel was returned, but on no other ground. The objection shall be made in writing, and shall state that the person returning the panel was partial, or was fraudulent, or wilfully misconducted himself, as the case may be. Such objection may be in the form KK in schedule one hereto, or to the like effect.

2. If partiality, fraud or wilful misconduct, as the case may be, is denied, the court shall appoint any two indifferent persons to try whether the alleged ground of challenge is true or not. If the triers find that the alleged ground of challenge is true in fact, or if the party who has not challenged the array admits that the ground of challenge is true in fact, the court shall direct a new panel to be returned.

FORM KK.—

CHALLENGE TO ARRAY.

Canada,
Province of ,
County of ,
The King } The said A. B., who prosecutes
v. } for our Lord the King (*or* the said
C.D. } C. D., *as the case may be*) challenges the array of the panel on the ground that it was returned by X.Y., sheriff of the county of (*or* E. F., deputy of X. Y., sheriff of the county of , *as the case may be*), and the said X. Y. (*or* E. F., *as the case may*

be) was guilty of partiality (*or* fraud, *or* wilful misconduct) on returning said panel.

See note to sec. 667.

667. Calling the panel.—If the array is not challenged or if the triers find against the challenge, the officer of the court shall proceed to call the names of the jurors in the following manner: The name of each juror on the panel returned, with his number on the panel and the place of his abode, shall be written on a distinct piece of card, such cards being all as nearly as may be of an equal size. The cards shall be delivered to the officer of the court by the sheriff or other officer returning the panel, and shall, under the direction and care of the officer of the court, be put together in a box to be provided for that purpose, and shall be shaken together.

2. The officer of the court shall in open court draw out the said cards, one after another, and shall call out the name and number upon each such card as it is drawn, until such a number of persons have answered to their names as in the opinion of the court will probably be sufficient to provide a full jury after allowing for challenges of jurors and directions to stand by.

3. The officer of the court shall then proceed to swear the jury, each juror being called to swear in the order in which his name is so drawn, until after subtracting all challenges allowed and jurors directed to stand by, twelve jurors are sworn. If the number so answering is not sufficient to provide a full jury, such officer shall proceed to draw further names from the box, and call the same in manner aforesaid, until, after challenges allowed and directions to stand by, twelve jurors are sworn.

4. If by challenges and directions to stand by the panel is exhausted without leaving a sufficient number to form a jury, those who have been directed to stand by shall be again called in the order in which they were drawn, and shall be sworn, unless challenged by the accused, or unless the prosecutor challenges them, and shows cause why they should not be sworn: Provided that if before any such juror is sworn other jurymen in the panel become available the prosecutor may require the names of such jurymen to be put into and drawn from the box in the manner hereinbefore prescribed, and such jurors shall be sworn, challenged, or ordered to stand by, as the case may be, before the jurors originally ordered to stand by are again called.

5. The twelve men who in manner aforesaid are ultimately

sworn shall be the jury to try the issues on the indictment, and the names of the men so drawn and sworn shall be kept apart by themselves until such jury give in their verdict or until they are discharged; and then the names shall be returned to the box, there to be kept with the other names remaining at that time undrawn, and so *toties quoties* as long as any issue remains to be tried.

6. Provided that when the prosecutor and accused do not object thereto, the court may try any issue with the same jury that has previously tried or been drawn to try any other issue, without their names being returned to the box and redrawn, or if the parties or either of them object to some one or more of the jurors forming such jury, or the court excuses any one or more of them, then the court may order such persons to withdraw, and may direct the requisite number of names to make up a complete jury to be drawn, and the persons whose names are so drawn shall be sworn.

7. Provided also, that an omission to follow the directions in this section shall not affect the validity of the proceedings.

Impanelling the petit jury.]—When a sufficient number of prisoners have pleaded and put themselves upon the country the clerk of arraigns addresses the jurors who have been summoned, thus:

"You good men, who are returned and impanelled to try the issue joined between our sovereign lord the King and the prisoners at the bar, answer to your names and save your fines," (*then calling the jurors by name.*)

The Clerk of the arraigns, before proceeding to call the jurors to the jury box, addresses the prisoners thus:

"Prisoners, these good men that you shall now hear called are the jurors who are to pass between our sovereign lord the King, and [you upon your respective trials, [or, in a capital case, 'upon your life and death']; if therefore you or any of you will challenge them or any of them you must challenge them as they come to the book to be sworn, and before they are sworn, and you shall be heard."

Sub-section (4) directs that when the panel has been exhausted, only the jurors who had been directed to stand by, and such other jurymen as have since become available, shall be called and may be sworn on the jury. A challenge once allowed excludes a juror from serving on the jury being formed; for in cases of a peremptory challenge the other party might afterwards exhaust his peremptory challenges and the privilege of withdrawing it might therefore operate as a fraud upon him. Then in the case of a challenge for cause the withdrawal of the challenge would not change the decision of the triers that the juror did not stand indifferent, and that he, therefore, was an improper person to serve on the jury. R. v. Lalonde (1898), 2 Can. Cr. Cas. 188.

When the accused does not challenge, the Crown may either challenge peremptorily, or may challenge for cause, or direct the juror to stand by. The direction to stand by is really a challenge by the Crown for cause without it being necessary to shew and establish the ground on which it is founded until the panel has been exhausted without twelve jurors having been accepted and sworn. It is in fact a deferred challenge for cause; and the term "to stand by" means that the Crown shall have time to shew the

cause of challenge. R. v. Barsalou (No. 1) (1901), 4 Can. Cr. Cas. 343. In the case of R. v. Leach (1839), 9 C. & P. 499, Baron Parke said: "The Crown may challenge without shewing cause till the panel is gone through, and then if there is not a full jury they must shew cause. The order to stand by means that on the prayer of the counsel for the Crown, a juror shall stand by until the time when it becomes incumbent on the Crown to shew cause of challenge."

The Crown may direct any number of jurors to stand by, but when the panel is exhausted they cannot be stood by a second time. R. v. Boyd (1896), 4 Can. Cr. Cas. 219; 5 Que. Q.B. 1; R. v. Morin (1890), 18 Can. S.C.R. 407.

The panel having been gone over without a jury having been procured, the practice is to call over those who were directed to stand by in the order in which they were drawn, and then for the Crown Prosecutor to state the Crown's cause of challenge; if the ground of challenge is not allowed and the juror is not challenged by the accused, he is sworn. If, however, when the panel has been exhausted, jurymen who had made default or who were impanelled on another petit jury, become available, the names of such jurymen should be put in the box and drawn out, and such jurors should be challenged, be ordered to stand by or be sworn, before the jurors originally ordered to stand by are again called. Sec. 667 (4). The direction to stand by is practically a challenge for cause, and such being the case, the order to stand by must be given at a time when a challenge could be made. R. v. Barsalou (No. 1) (1901), 4 Can. Cr. Cas. 343. The right to challenge must be exercised before the juror has taken the book, by direction of the clerk of the court, to be sworn. Ibid.; and sufficient time is always allowed before this order is given to allow the parties to exercise the right of challenge. After the book has been taken, the taking of the oath is deemed to have commenced, and then it is too late to challenge, and also to direct the juror to stand by. In the case of R. v. Frost (1839), 9 C. & P. 129, Chief Justice Tindal said: "The rule is that challenges must be made as the jurors come to the book and before they are sworn. The moment the oath is begun it is too late, and the oath is begun by the juror taking the book, having been directed by the officer of the court to do so."

The fact that the jurors were set aside, rejected or sworn as they were drawn, without first calling the full number required for a jury, does not invalidate the trial, nor constitute a deprivation of the full right of challenge. R. v. Weir (No. 3) (1899), 3 Can. Cr. Cas. 262 (Que.).

Where, after the jury were sworn, it was learned that one of the Crown witnesses had disappeared and the prosecution could not proceed the judge discharged the jury and remanded the prisoner. It was held that the judge had a discretion to discharge the jury, and that the discharge under such circumstances was not equivalent to an acquittal, and that the prisoner might again be put on trial. Jones v. R. (1880), 3 Leg. News, Montreal, 309.

668. Challenges and directions to stand by.—Every one indicted for treason or any offence punishable with death is entitled to challenge twenty jurors peremptorily.

2. Every one indicted for any offence other than treason, or an offence punishable with death, for which he may be sentenced to imprisonment for more than five years, is entitled to challenge twelve jurors peremptorily.

3. Every one indicted for any other offence is entitled to challenge four jurors peremptorily.

4. Every prosecutor and every accused person is entitled to any number of challenges on any of the following grounds; that is to say:

(*a*) that any juror's name does not appear in the panel: Provided that no misnomer or misdescription shall be a ground of challenge if it appears to the court that the description given in the panel sufficiently designates the persons referred to; or

(*b*) that any juror is not indifferent between the King and the accused; or

(*c*) that any juror has been convicted of any offence for which he was sentenced to death, or to any term of imprisonment with hard labour, or exceeding twelve months; or

(*d*) that any juror is an alien.

5. No other ground of challenge than those above mentioned shall be allowed.

6. If any such challenge is made the court may in its discretion require the party challenging to put his challenge in writing. The challenge may be in the form LL in schedule one hereto, or to the like effect. The other party may deny that the ground of challenge is true.

7. If the ground of challenge is that the jurors' names do not appear in the panel, the issue shall be tried in the court on the *voir dire* by the inspection of the panel, and such other evidence as the court thinks fit to receive.

8. If the ground of challenge be other than as last aforesaid the two jurors last sworn, or if no jurors have then been sworn then two persons present whom the court may appoint for that purpose shall be sworn to try whether the juror objected to stands indifferent between the King and the accused, or has been convicted, or is an alien, as aforesaid, as the case may be. If the court or the triers find against the challenge the juror shall be sworn. If they find for the challenge he shall not be sworn. If after what the court considers a reasonable time the triers are unable to agree, the court may discharge them from giving a verdict, and may direct other persons to be sworn in their place.

9. The Crown shall have power to challenge four jurors peremptorily, and may direct any number of jurors not peremptorily challenged by the accused to stand by until all the jurors have been called who are available for the purpose of trying that indictment.

10. The accused may be called upon to declare whether he challenges any jurors peremptorily or otherwise, before the prosecutor is called upon to declare whether he requires such juror to stand by, or challenges him either for cause or peremptorily. R.S.C. c. 174, ss. 163 and 164.

FORM LL.—

CHALLENGE TO POLL.

Canada,
Province of .)
County of .)

The King v. C.D. — The said A. B., who prosecutes, &c., (*or* the said C. D., *as the case may be*) challenges G. H., on the ground that his name does not appear in the panel, (*or* "that he is not indifferent between the King and the said C. D.," *or* "that he was convicted and sentenced to ('death' *or* 'penal servitude,' *or* 'imprisonment with hard labour,' *or* 'exceeding twelve months,'" *or* "that he is disqualified as an alien."

Challenge of jurors.]—Challenges are of two kinds: (1) *To the array*, i.e. when exception is taken to the whole number impanelled (Code sec. 666); and (2) *To the polls*, i.e., when individual jurymen are excepted against.

Challenges to the polls are either *peremptory*, or *for cause*. Peremptory challenges are those which are made without any reason assigned and which the court is bound to allow to the number here limited.

On the demand of the Crown any juror may be directed to "stand by," the consideration of the challenge being postponed until it can be seen whether a full jury can be mdae without him. Mansell v. R. (1857), 8 E. & B. 54, Dears. & B. 375. The Crown is not bound to shew any cause of challenge until the panel has been gone through and exhausted, so that there are no more jurors in the panel whose attendance can be procured. Mansell v. R., 8 E. & B. 54; Code sec. 668. The Crown's right to have a juror "stand by" is additional to a power to challenge four jurors peremptorily.

A challenge to the polls for cause may be either *principal* or *for favour*. A *principal* challenge for cause is one based upon, (*a*) an objection to the qualification of the person to be a juror, such as alienage, or that the juror's name does not appear in the panel, or (*b*) an objection on the ground of some presumed partiality such as would be a good ground for a principal challenge to the array in the case of the sheriff, i.e., affinity to or employment by either party, or having an interest in the result of the trial; or where an actual partiality is shewn to exist.

A challenge *for favour* is where, although the juror is not so manifestly partial as to render him liable to a principal challenge, there are, nevertheless, reasonable grounds for suspicion that he will act under some prejudice or undue influence; as where he has been entertained in the house of the

party, or has been arbitrator in the same matter, or where the juror and the party are fellow-servants, or where any other cause exists such as would constitute in the case of the sheriff a ground of "challenge to favour" to the whole panel. Archbold's Crim. Pl. 175.

It has been held that before the prisoner is put to his challenges, he has the right to have the whole panel called over to ascertain which of the persons summoned as jurors appear and which are exempt or are to be excused; R. v. Frost (1839), 9 C. & P. 129, 135; Roscoe's Cr. Evid., 11th ed., 197; but this is now subject to the provisions of sec. 667 of the Criminal Code, by sub-s. 7 of which the names of the jurors on the panel are to be called "until such a number of persons have answered to their names as, in the opinion of the court, will probably be sufficient to provide a full jury after allowing for challenges of jurors and directions to stand by."

The practice is not uniform as to the time of swearing the jurymen; in some courts the first juryman who answers is sworn as soon as he enters the box, and in others it is the practice to get a full jury into the box, and then to commence swearing them. Roscoe's Cr. Evid., 11th ed., 197.

The challenge must be before the juryman is sworn, and he cannot be challenged afterwards except by consent. R. v. Mellor (1858), 4 Jur. N.S. 5, 214, (per Wightman, J.); R. v. Coulter (1863), 13 U.C.C.P. 299, 301. This rule will apply although the ground for challenge was not known at the time. R. v. Earl (1894), 10 Man. R. 307.

"The rule is that challenges must be made as the jurors come to the book, and before they are sworn. The moment the oath is begun it is too late, and the oath is begun by the juror taking the book, having been directed by the officer of the court to do so. If the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby." R. v. Frost (1839), 9 C. & P. 129, 137, (per Tindal, C.J.).

The withdrawal of an unqualified or disqualified person who has been sworn as a juror, at the request of the prisoner and by the consent of the Crown, before the whole jury is completed and sworn does not re-open the right of challenge as to those previously sworn nor make it necessary that such jurors should be re-sworn. R. v. Coulter (1863), 13 U.C.C.P. 299 (Draper, C.J., Richards and Morrison, JJ.).

That the juror has visited the prisoner as a friend since he has been in custody, is not a good cause of challenge for cause, on the ground of being "not indifferent" between the Crown and the accused. R. v. Geach (1840), 9 C. & P. 499.

It is not allowable to ask a juryman when called if he has not previously to the trial expressed himself hostile to the prisoner, but statements made by the juryman which are relied on as cause for challenge must be proved by some other evidence. R. v. Edmonds (1821), 4 B. & Ald., 471; R. v. Cooke, 13 How. St. Trials, 333.

The prisoner must shew all his causes of objection before the Crown is called upon to shew cause; Chitty, Cr. Law, Vol. I., 534; Whelan v. The Queen (1868), 28 U.C.Q.B. 2, 49; and as between different prisoners whichever begins to challenge must finish all his challenges before the other begins. Ibid, p. 49; Co. Lit. 158a. A prisoner is entitled to challenge for cause before he has made all or any of his peremptory challenges. Whelan v. The Queen (1868), 28 U.C.Q.B. 2. "He had the right to deal with them when and in what manner he pleased, subject only to those necessary and convenient rules for the conduct of business, which the court might have seen fit to adopt." Per Adam Wilson, J., Ibid, p. 50.

If the prisoner whose challenge of a juror for favour has been disallowed, chooses then to challenge the juror peremptorily, he waives the benefit of any exception to the disallowance of his challenge for favour. Stewart v. The State (1853), 13 Arkansas Rep. 720; approved in Whelan v. The Queen, 28 U.C.Q.B., at p. 55; Freeman v. People (1847), 4 Denio, N.Y., 61.

A peremptory challenge of a juror when once taken must be counted against the party making it, and cannot be withdrawn when the panel is being called over a second time. R. v. Lalonde (1898), 2 Can. Cr. Cas. 188.

Where several persons are jointly indicted and tried, the Crown is restricted to the number of peremptory challenges allowed on the trial of one person. Ibid.

If a defendant omit to challenge a juror on the ground that such juror entertains a hostile feeling against him, he cannot, after a verdict of guilty, ask on that ground to have the verdict quashed and for a new trial. R. v. Harris (1898), 2 Can. Cr. Cas. 75.

When a defendant and one of the impanelled jurors have had an unpremeditated and innocent conversation, which could not bias the juror's opinion nor affect his mind and judgment, although such conversation is improper, it cannot have the effect of avoiding the verdict and constituting ground for a new trial. Ibid.

The ordinary course of proceeding when the prisoner challenges for cause is that the juror is tried for cause at once; but he may be required to stand aside for a time, and the cause be tried at a later stage, if it be more convenient as a matter of practice and procedure that it should be so, or the challenge for cause may be postponed until the peremptory challenges have been exhausted. After challenging for cause and failing to support his challenge, the prisoner may desire to exclude that juror in case he might be influenced against the prisoner by reason of the challenge for cause, and if he had been compelled to exhaust the whole of his peremptory challenges before that, he would then be unable to exclude the juror he had challenged for cause, whom he might have excluded if his peremptory challenges had not been completed. Per Adam Wilson, J., in R. v. Smith (1876), 38 U.C.Q.B. 218.

The fact that one of the jury sworn in a trial in Manitoba did not thoroughly understand the English language is no ground after trial and conviction for holding that there has been a mistrial or for granting a new trial. R. v. Earl (1894), 10 Man. R. 303. Had the trial judge's attention been called to the fact he might have in his discretion directed the juror to be set aside, and this he may do under any circumstances which contribute a reasonable ground for believing that the juror is unfit to fulfil the functions of a juryman. Ibid; Mansell's Case (1857), 8 E. & B. 54.

It is a good ground of challenge of a petit juror that he was on the grand jury by which the indictment was found, the reason being that he may have been one of the twelve who found the indictment and then if he sat on the trial a criminal would be convicted by only twenty-three instead of twenty-four of his peers. R. v. Dowey (1869), 1 P.E.I. 291, per Peters, J.

The improper disallowance of any challenge for the defence is an absolute ground for a new trial. Sec. 746 (1).

The right of a prisoner to challenge for cause, though he has not exhausted his peremptory challenges, is fully recognized; but the right of postponing the hearing and trial of that cause is discretionary with the judge. Whelan v. The Queen, 28 U.C.Q.B. 132; R. v. Smith (1876), 38 U.C.Q.B. 218.

The Crown has the right to require the judge to set aside any juror till the panel is perused; and consistently with this the judge may in his discretion for sufficient cause further postpone the time of assigning cause, either for the Crown or the prisoner, but not as a matter of right on a mere request without sufficient cause. Mansell v. R. (1857), 8 E. & B. 54, 111.

Jurors stood aside.]—The Crown at common law had the right to challenge any number of jurors peremptorily without alleging any other reason than "quod non sunt boni pro rege," 2 Hawkins, P.C., ch. 43, sec. 23. This power was first controlled by the Stat. 33 Edw. I. Stat. 4, and later on by 32 & 33 Vict. (Can.) 29, sec. 38.

Jurors ordered to stand aside by the Crown are not called again till the panel has been gone through, and the jury is yet incomplete. In that case the panel is called over, omitting those challenged by the prisoner peremptorily, and the Crown may still have the jurors standing aside so remain so long as the panel can be made up by the requisite number of those who are not so ordered to stand aside, or who are not so challenged for cause and found not indifferent. If the panel cannot be completed otherwise than by calling those standing aside at the instance of the Crown, the Crown must then shew cause to each juror as he is called. Mansell v. The Queen, 8 E. & B. 54, 72; R. v. Smith (1876), 38 U.C.Q.B. 218.

The phrase "to stand aside" merely means that the juror being challenged by the Crown, the consideration of the challenge shall be postponed till it be seen whether a full jury can be made without him. Ibid.

When a panel had been gone through and a full jury had not been obtained the Crown on the second calling over the panel was permitted to direct eleven of the jurymen on the panel to stand aside a second time. It was held that the Crown could not without shewing cause for challenge direct a juror to stand aside a second time. (R. v. Lacombe, 13 L.C. Jur. 259 over-ruled.) R. v. Morin (1890), 18 Can. S.C.R. 407; R. v. Boyd (1896), 5 Que. Q.B. 1, 4 Can. Cr. Cas. 219.

669. Right to cause jurors to stand aside in cases of libel.—The right of the Crown to cause any juror to stand aside until the panel has been gone through shall not be exercised on the trial of any indictment or information by a private prosecutor for the publication of a defamatory libel. R.S.C. c. 174, s. 165.

Standing jurors aside in libel cases.]—The words of this section include all cases of defamatory libels upon individuals as distinguished from seditious or blasphemous libels; and in all cases of indictment for defamatory libels within the statute, the right of the Crown which previously existed to cause jurors to stand aside is taken away. R. v. Patteson (1875), 36 U.C.Q.B. 129.

Compare Code sec. 833 as to costs in libel cases. The latter section also contains the phrase "indictment or information by a private prosecutor for the publication of a defamatory libel." The words referring to the indictment and prosecutor being identical in the two sections they ought to have the same application. R. v. Patteson (1875), 36 U.C.Q.B. 129, 155.

The "private prosecutor," as the term is here used, means the person who puts the criminal law in motion; and if there is a criminal proceeding to which the term private prosecutor is more applicable than another, it is in the case of a defamatory libel—a prosecution, as said by Lord Campbell, uniformly instituted by the party injured. Per Morrison, J., in R. v. Patteson (1875), 36 U.C.Q.B. 129, at p. 141.

The fact that the Attorney-General or his representative conducts the prosecution in respect of a private defamatory libel does not make it a public proceeding or withdraw it from the operation of this section. R. v. Patteson (1875), 36 U.C.Q.B. 129, 143; R. v. Marsden (1829), 1 M. & M. 439; R. v. Bell, 1 M. & M. 440.

670. Peremptory challenges in case of mixed jury.—Whenever a person accused of an offence for which he would be entitled to twenty or twelve peremptory challenges as hereinbefore provided, elects to be tried by a jury composed one-half of

persons skilled in the language of the defence under sections 664 or 665, the number of peremptory challenges to which he is entitled shall be divided, so that he shall only have the right to challenge one-half of such a number from among the English-speaking jurors, and one-half from among the French-speaking jurors. R.S.C. c. 174, ss. 166 and 167.

See note to sec. 664.

671. Accused persons joining and severing in their challenges.—If several accused persons are jointly indicted, and it is proposed to try them together, they or any of them may either join in their challenges, in which case the persons who so join shall have only as many challenges as a single person would be entitled to, or each may make his challenges in the same manner as if he were intended to be tried alone.

Under these provisions each defendant has a right to the full number of his peremptory challenges; but a corresponding privilege is not given to the Crown, and therefore the Crown is restricted, in the case of the trial of several defendants jointly, to the number of peremptory challenges allowed to it in the case of the indictment of a single person. But if the joint defendants refuse to join in their challenges, the Crown has the right to try them separately, and then the Crown has its four peremptory challenges at the trial of each defendant. R. v. Lalonde (1898), 2 Can. Cr. Cas. 188 (Que.)

672. Ordering a tales.—Whenever after the proceedings hereinbefore provided the panel has been exhausted, and a complete jury cannot be had by reason thereof, then, upon request made on behalf of the Crown, the court may order the sheriff or other proper officer forthwith to summon such number of persons whether qualified jurors or not, as the court deems necessary, and directs, in order to make a full jury; and such jurors may, if necessary, be summoned by word of mouth.

2. The names of the persons so summoned shall be added to the general panel for the purposes of the trial, and the same proceedings shall be taken as to calling and challenging such persons, and as to directing them to stand by as are hereinbefore provided for with respect to the persons named in the original panel. R.S.C. c. 174, s. 168.

(Amendment of 1895.)

673. Adjournment; jury separating.—The trial shall proceed continuously, subject to the power of the court to adjourn it.

2. The court may adjourn the trial from day to day, and if, in its opinion, the ends of justice so require, to any other day in the same sittings.

3. Upon every adjournment of a trial under this section, or under any other section of this Act, the court may, if it thinks fit, direct that during the adjournment the jury shall be kept together, and proper provision made for preventing the jury from holding communication with any one on the subject of the trial. Such direction shall be given in all cases in which the accused may upon conviction be sentenced to death. In other cases, if no such direction is given, the jury shall be permitted to separate.

4. No formal adjournment of the court shall hereafter be required, and no entry thereof in the Crown book shall be necessary.

Jury separating.]—An objection to a verdict on the ground that the jury in a capital case had separated, should be taken before the verdict is given. R. v. Peter (1869), 1 B.C.R., pt. 1, p. 2; but it would seem that if any communication or other misconduct is negatived by affidavit, and it appears that the separation was by the removal of a juryman to his residence when taken with a fit and that he remained in charge of a physician and of the sheriff until rejoined by the other jurymen, the verdict would stand. Ibid.

674. Jurors may have fire and refreshments.—Jurors, after having been sworn, shall be allowed at any time before giving their verdict the use of fire and light when out of court, and shall also be allowed reasonable refreshment. 53 V., c. 57, s. 21.

This section abrogates the common law rule that a jury should have no refreshments during the period of their deliberation, as to which see Winsor v. R. (1865), L.R. 1 Q.B. 308.

675. Saving of power of court.—Nothing in this Act shall alter, abridge or affect any power or authority which any court or judge has when this Act takes effect, or any practice or form in regard to trials by jury, jury process, juries or jurors, except in cases where such power or authority is expressly altered by or is inconsistent with the provisions of this Act. R.S.C. c. 174, s. 170.

Impanelling new jury.]—The illness of a juror or the illness of the prisoner will constitute a sufficient ground for discharging the jury. Winsor v. R., L.R. 1 Q.B. 390. But if a juryman has merely fainted because the court room is hot and close, it would be proper to wait a short time for his recovery so as to proceed with the same jurors; but if a juror be taken so ill that there is no likelihood of his continuing to discharge his duties without danger to his life, the jury should be discharged. Ibid.

Where during the course of a trial it was discovered that one of the jurors had come from a house infected with smallpox, the jury were discharged and a new jury impanelled. R. v. Considine, 8 Montreal Legal News, 307.

A jury sworn and charged may be discharged at the desire of the accused and with the assent of the prosecution. R. v. Charlesworth, 2 F. & F. 326;

or because they are unable to agree on a verdict and the accused may be tried anew, the discharge of the first jury without a verdict not being equivalent to an acquittal. Ibid; Winsor v. R. (1865), L.R. 1 Q.B. 390.

Where the jury cannot agree the judge should not delay discharging them until they are exposed to the dangers which arise from exhaustion or prostrated strength of body and mind or until there is a chance of conscience and conviction being sacrificed for personal convenience and to be relieved from suffering. R. v. Charlesworth (1860), 2 F. & F. 326.

And it is now expressly enacted by Code sec. 728 that if the court is satisfied that the jury are unable to agree upon their verdict, and that further detention "would be useless," it may, in its discretion, discharge them and direct a new jury to be impanelled during the sittings of the court, or may postpone the trial on such terms as justice may require. The exercise of that discretion is not subject to review. Sec. 728 (2).

General verdict.]—The right of the jury to find a general verdict in a criminal case, and to decline to find the facts specially, cannot be questioned, especially where their verdict is one of acquittal. R. v. Spence (1855), 12 U.C.Q.B. 519, per Robinson, C.J.

And counsel are not entitled to question the jury directly as to grounds of their verdict; but the judge may ask them if he sees fit. R. v. Ford, 3 U.C.C.P. 217.

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

Except as by this section provided, a certificate to prove a prior conviction is not properly admissible as to character.

Evidence of character.]—Evidence of character can only be as to general reputation. R. v. Rowton (1865), 10 Cox C.C. 25; R. v. Triganzie (1888), 15 Ont. R. 294.

Where evidence is adduced on behalf of the accused as to his general good character, the witnesses may be cross-examined by the prosecution as to the grounds of their belief and as to the particular facts on the question of character of which they have knowledge. R. v. Barsalou (No. 2) (1901), 4 Can. Cr. Cas. 347.

677. Attendance of witnesses.—Every witness duly subpœnaed to attend and give evidence at any criminal trial before any court of criminal jurisdiction shall be bound to attend and remain in attendance throughout the trial. R.S.C. c. 174, s. 210.

Competency of witness.]—The Canada Evidence Act, 1893, applies to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf. 56 Vict., ch. 31. sec. 2. By it a person shall not be incompetent to give evidence by reason of interest or crime. Ibid., sec. 3.

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, thut 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. Can. Evid. Act, 1893, sec. 4.

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. Ibid., sec. 4, sub-sec. 2.

A witness who is unable to speak, may give his evidence in any other manner in which he can make it intelligible. Can Evid. Act, 1893, sec. 6.

By section 5 of the Canada Evidence Act as amended in 1898, ch. 53, sec. 1, the following provision is made:—"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."

Evidence obtained by the unauthorized execution of an illegal process, ex gr., a search warrant illegally issued, is not necessarily inadmissible, so long as the fact so wrongly discovered is as a fact—apart from the manner in which it was discovered—admissible against the party. R. v. Doyle (1886), 12 O.R. 347.

As to the evidence of young children in cases of indecent assault, etc., see sec. 685.

Confidential communications.]—A client cannot be compelled and a legal adviser will not be allowed, without the express consent of his client, to disclose oral or documentary communications made or obtained in professional confidence. Phipson Evid., 2nd ed., 181. The same privilege does not extend to physicians. R. v. Duchess of Kingston (1776), 20 How. St. Tr. 540; R. v. Gibbons (1823), 1 C. & P. 97. Communications made to clergymen are not protected. R. v. Gilham (1828), 1 Moo. 186; Wheeler v. Le Marchant, 17 Ch. D. 681; Normanshaw v. Normanshaw, 59 Eng. L.T. 468; but some eminent judges have expressed opinions against compelling such disclosure.. R. v. Griffin (1853), 6 Cox 219, per Alderson, B.; Broad v. Pitt (1828), 3 C. & P. 518, per Best, J.

Those who cause criminal proceedings to be instituted are not bound to disclose the sources of their information. The offence charged has to be proved, and the person who makes an unfounded criminal charge may have to suffer in damages to compensate the person injured in an action for malicious prosecution. In the civil action if he should decline to disclose the source of his information, his refusal might be accepted by the jury as evidence of malice. But in the criminal case, giving the source of information would not tend to prove or disprove the charge. R. v. Sproule (1887), 14 Ont. R. 375, 380.

Credibility of witnesses.]—It is a well established rule that the jury must judge of the credibility of the witness. The nature of the story he tells, the manner of telling it, the probability of its being true, his demeanour, his readiness to answer some questions, his unwillingness to answer others, and his whole conduct indicating favour to one side or the other, must and ought to raise doubts as to his telling the truth. On the other hand, a frank, straightforward manner of answering questions without regard to consequences to either party, a desire to state all the facts, no unwillingness or hesitation to answer—these are calculated to impress jurors favourably; and in fact the superiority of oral over written examination of witnesses in extracting the truth is the opportunity it affords of judging how far you may rely on the mere statements of a witness, when unaccompanied by such other concurrent circumstances as give weight to such statements or facts. R. v. Jones (1869), 28 U.C.Q.B. 416, per Richards, C.J.

The answer of a prisoner examined as a witness on his own behalf to a question in cross-examination foreign to the issue, must be accepted as final; and the prosecution is not entitled to call rebuttal evidence to contradict it for the mere purpose of impeaching the credit of the witness. R. v. Lapierre (1897), 1 Can. Cr. Cas. 413 (Que.).

Evidence of accomplice.]—The rule that the evidence of an accomplice requires corroboration is not a rule of law, but a rule of general and usual practice, the application of which is for the discretion of the judge by whom the case is tried; and in the application of the rule much depends upon the nature of the offence, and the extent of the complicity of the (accomplice) witness in it. R. v. Boyes (1861), 1 B. & S. 320; R. v. Seddons (1866), 16 U.C.C.P. 389.

Principals in the first degree are those who have actually and with their own hands committed the fact. Principals in the second degree are those who were present, aiding and abetting, at the commission of the fact. They are generally termed aiders and abettors, and sometimes accomplices; but the latter term will not serve as a term of definition, as it includes all the participes criminis, whether they are considered, in strict legal propriety, as principals in the first or second degree, or merely as accessories before or after the fact. R. v. Smith (1876), 38 U.C.Q.B. 218, 228.

The direction commonly given to the jury is, that they are not bound to convict on the unsupported testimony of an accomplice, or even an accessory after the fact; that it is not safe to do it; that they should not give credit to such unsupported testimony; but that he cannot withdraw such

evidence from their consideration; it is legal evidence, and, being so, they may act upon it or not as they please, bearing in mind the caution and advice which they have received. Per Adam Wilson, J. R. v. Smith (1876), 38 U.C.Q.B. 218; Re Mennier, [1894] 2 Q.B. 415.

When the jury have been cautioned as to acting upon the unconfirmed testimony of accomplices, no fault can be found with the admission of this evidence. R. v. Seddons (1866), 16 U.C.C.P. 389.

The omission of a judge to tell the jury that the evidence of an accomplice required to be corroborated, does not entitle a prisoner to a reversal of the conviction. R. v. Beckwith, 8 U.C.C.P. 277, followed in R. v. Andrews (1886), 12 O.R. 184.

Identification of criminals.]—By the Criminals' Identification Act, 1898, the Bertillon system is authorized. That Act provides that any person in lawful custody, charged with, or under conviction of an indictable offence, may be subjected, by or under the direction of those in whose custody he is, to the measurements, processes and operations practised under the system for the identification of criminals commonly known as the Bertillon Signaletic System, or to any measurements, processes or operations sanctioned by the Governor-in-Council having the like object in view. Such force may be used as is necessary to the effectual carrying out and application of such measurements, processes and operations; and the signaletic cards and other results thereof may be published for the purpose of affording information to officers and others engaged in the execution or administration of the law. Ibid. Sec. 1.

No one having the custody of any such person, and no one acting in his aid or under his direction, and no one concerned in such publication shall incur any liability, civil or criminal, for anything lawfully done under the provisions of sec. 1 of this Act. Ibid. Sec. 2.

Hypothetical questions.]—On a trial for murder the Crown having made out a prima facie case by circumstantial evidence the prisoner's daughter, a girl of 14, was called on his behalf, and swore that she herself killed the deceased, without the prisoner's knowledge, with two blows from a stick of certain dimensions. It was held that a medical witness previously examined for the Crown was properly allowed to be recalled to state that in his opinion, the injuries found on the body could not have been so occasioned. R. v. Jones (1869), 28 U.C.Q.B. 416.

A skilled witness cannot in strictness be asked his opinion respecting the very point which the jury are to determine; but he may be asked a hypothetical question which in effect will determine the same question. In R. v. Jones the skilled medical witness was not asked respecting the very point which the jury were to determine, namely, whether the prisoner caused the death of the deceased, nor even the question whether in his opinion the girl had killed the deceased (as sworn to by her), but simply whether the blows as she described them could produce the fractures, etc., found on the head of deceased. R. v. Jones (1869), 28 U.C.Q.B. 416.

Doctrine of res gestæ.]—In a pamphlet published by Cockburn, C.J., commenting upon the case of R. v. Bedingfield (1879), 14 Cox 341, tried before him, the following passage occurs: "Whatever act or series of acts constitute or in point of time immediately accompany and terminate in the principal act charged as an offence against the accused from its inception to its consummation or final completion, or its prevention or abandonment, whether on the part of the agent or wrongdoer in order to its performance, or on that of the patient or party wronged in order to its prevention, and whatever may be said by either of the parties during the continuance of the transaction with reference to it, including herein what may be said by the suffering party, though in the absence of the accused, during the continuance of the action by the latter, actual or constructive, as e.g. in the case of flight or applications for assistance, form part of the

principal transaction, and may be given in evidence as part of the res gestæ or particulars of it; while, on the other hand, statements made by the complaining party after all action on the part of the wrong doer, actual or constructive, has ceased through the completion of the principal act or other determination of it by its prevention or its abandonment by the wrong-doer, such as e.g. statements made with a view to the apprehension of the offender, do not form part of the res gestæ, and should be excluded." Cited by Armour, C.J., in R. v. McMahon (1889), 18 O.R. 502, 516.

The expression "res gestæ" includes everything which may be fairly considered an "incident of the event under consideration. Taylor on Evidence, 1897, sec. 583.

The circumstances or declarations need not be contemporaneous with the main fact under consideration if so connected therewith as to illustrate its character, to further its object, or to form in conjunction with it one continuous transaction. Rouch v. Great Western Ry. (1841), 1 Q.B. 51, 61; Bateman v. Bailey, 5 T.R. 512; Ridley v. Gyde, 9 Bing. 349; Rawson v. Haigh (1824), 2 Bing. 104. Taylor on Evidence, 1897, sec. 588. "Although concurrence of time cannot but be always material evidence to shew the connection, yet it is by no means essential." Per Lord Denman, C.J., in Rouch v. Great Western Ry., supra.

It is in the discretion of the judge to admit or reject evidence of other offences of the same class which form the subject of other indictments, if all of the offences constituted parts of the same transaction, and such discretion will be guided by the evidence appearing necessary or unnecessary in support of the indictment on which the prisoner is being tried. Russell on Crimes, 5th ed., Vol. 3, 375; R. v. McDonald (1886), 10 O.R. 553.

Expert evidence.]—No evidence of matters of opinion is admissible except where the subject is one involving questions of a particular science in which persons of ordinary experience are unable to draw conclusions from the facts. The jury, as a general rule, draw all inferences themselves, and witnesses must speak only as to facts. R. v. Preeper (1888), 15 Can. S.C.R. 409. Per Strong, J.

On some particular subjects, positive and direct testimony may often be unattainable; and, in such cases, a witness is allowed to testify as to his belief or opinion, or even to draw inferences respecting the fact in question from other facts, providing these facts be within his personal knowledge. Nor is this course fraught with much danger; because a witness who testifies falsely as to his belief, is equally liable to be convicted of perjury with the man who swears positively to a fact which he knows to be untrue. Taylor on Evidence, 8th ed., sec. 1416; Code sec. 145.

Where a witness states that a wound was inflicted with a certain kind of instrument it is permissible to test that witness's credibility by calling a medical man to testify whether a wound of the kind described can be inflicted by such an instrument. R. v. Jones (1869), 28 U.C.Q.B. 416.

Evidence of insane persons.]—The general rule is that a lunatic or a person affected with insanity is admissible as a witness, if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of matters which he has seen or heard, in reference to the questions at issue, and whether he have that understanding is a question to be determined by the court, upon examination of the party himself, and any competent witnesses who can speak to the nature and extent of his insanity. Columbia v. Armes, 107 U.S. 419; R. v. Hill (1851), 5 Cox 259.

Dying declaration.]—In trials for murder or manslaughter the dying declarations of the deceased, made under a sense of impending death, are admissible to prove the circumstances of the crime; but the deceased must be proved, to the satisfaction of the judge, to have been at the time of making the declaration in actual danger of death and to have abandoned all hope of recovery. Phipson Evid. 299.

In deciding the preliminary question as to whether the deceased was under a sense of impending death the trial judge must have regard to the whole of the surrounding circumstances, including the nature and extent of the gun charge and the immediate result of the wound. R. v. Davidson (1898), 1 Can. Cr. Cas. 351 (N.S.).

A statement made by a person who had been shot was held to be inadmissible in evidence as a dying declaration on an indictment for murder, in the absence of proof that the deceased at the time he made the statement was under "a settled hopeless expectation of death." R. v. McMahon (1889), 18 O.R. 502.

The result of the decisions is that there must be an unqualified belief in the nearness of death; a belief, without hope, that the declarant is about to die. As said by Chief Baron Kelly:—"If we look at reported cases and at the language of learned judges we find that one has used the expression, "every hope of this world gone"; another, "settled, hopeless expectation of death"; another, "any hope of recovery, however slight, renders the evidence of such declarations inadmissible." We, as judges, must be perfectly satisfied beyond all reasonable doubt that there was no hope of avoiding death; and it is not unimportant to observe that the burden of proving the facts that render the declaration admissible is upon the prosecution." Per Kelly, C.B., in R. v. Jenkins (1869), L.R. 1 C.C. 187 (cited by Hagarty, C.J., in R. v. Smith (1873), 23 U.C.C.P. 312). It is to be noted that in the case of R. v. Jenkins the declaration was rejected, the words being that she had no hope of recovery *at present*.

A dying declaration of the deceased that he was shot in the body and was "going fast" was held in Nova Scotia to be sufficient proof of a settled and hopeless consciousness that he was in a dying state, so as to make the declaration admissible. R. v. Davidson (1898), 1 Can. Cr. Cas. 351 (N.S.).

Character evidence.]—Evidence is not admissible in proof that the defendant committed the crime charged, either that he bore a bad reputation or that he had a disposition to commit crimes of that particular class. R. v. Cole (1810), 1 Phil. Evid. 508; Phipson Evid. 154.

In criminal cases, involving punishment as distinguished from penalty, A.-G. v. Bowman, 2 B. & P. 532; A.-G. v. Radloff, 10 Ex. 84; the prisoner is, on grounds of humanity, allowed the privilege of proving his good character, for the purpose of raising a presumption of his innocence of the crime charged.

The character proved must be of the specific kind impeached—e.g., honesty where dishonesty is charged, good character in other respects being irrelevant. Tay., sec. 351. And it must be general, and not relate to particular instances of such honesty, etc. Ibid. In strictness, also, it seems that the witness should depose to the prisoner's reputation (i.e., the estimate formed of him by the community), and not to his own individual opinionof the prisoner's character or disposition. R. v. Rowton, 34 L.J.M.C. 57. But "this distinction is seldom, if ever, acted on in practice, the question always put to a witness to character being, What is the prisoner's character for honesty, morality, or humanity? as the case may be. Nor is the witness ever warned that he is to confine his evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction." Steph., note xxvi. As the best character is often the least talked of, the witness may even give negative as well as affirmative evidence on the subject—e.g., that he has never heard anything against the prisoner. R. v. Rowton, supra. Finally, the character proved must relate to a period proximate to the date of the charge. R. v. Swendsen, 14 How. St. Tr. 559, 596.

Evidence to character must be evidence to general character in the sense of reputation; evidence of particular facts, although they might go far more strongly than the evidence of general reputation to establish that the

disposition and tendency of the man's mind was such as to render him incapable of the act with which he stands charged, must be put out of consideration altogether. Rebutting evidence to meet evidence of character brought forward by the prisoner must be of the same character and kept within the same limits. While you can give evidence of general good character, the evidence called to rebut it must be evidence of the same general description, shewing that the evidence which has been given to establish a good reputation on the one hand is not true because the man's general reputation was bad. Per Cockburn, C.J., in R. v. Rowton (1865), L. & C. 520; 10 Cox C.C. 25; R. v. Triganzie (1888), 15 O.R. 294.

Except in rebuttal to evidence of good character, it is not competent to give evidence of a prisoner's bad character, or the bad character of his associates, as that does not in any manner tend to establish the particular offence for which the prisoner is being tried. But if the conduct or character of his associates has a bearing upon the particular charge forming a link, near or remote, in the chain that connects the accused with the offence, it may be admissible in evidence. Per Cameron, C.J., in R. v. Bent (1886), 10 O.R. 557.

Documentary evidence.]—The contents of a document material to the issue should be proved by primary evidence; but if the production of such evidence is out of the power of the party desiring to place it in evidence, secondary evidence may be admissible. Phipson Evid. 484, 502. See also the Canada Evidence Act, 1893, as to secondary evidence of the contents of official documents by certified copies or exemplifications thereof.

Where the defence to a summary prosecution for selling liquor without a license is that the accused was entitled to do so under a statutory exception respecting registered druggists, and by statute the onus is expressly cast on the accused to prove himself within the exception, and provision made for proving the register by the production of a printed copy thereof, the viva voce testimony of the accused that he is a duly registered druggist is not competent evidence of the fact, and the magistrate may disregard the same, although no objection was taken to the admission of such testimony. R. v. Herrell (No. 2) (1899), 3 Can. Cr. Cas. 15 (Man.).

The Canada Temperance Act does not per se make the sale of intoxicating liquor an offence; it is only after the second part of the Act has been brought into force by the proceedings indicated for that purpose in the first part of the Act that such sale becomes prohibited, and the subject of a penalty; these proceedings cannot be judicially noticed, they must be proved, and in the absence of such proof the magistrate acts without jurisdiction. R. v. Walsh (1883), 2 Ont. R. 206. Proof may be made by the production of the official Gazette. R. v. Bennett, 1 Ont. R. 445.

Parol evidence of a son of the alleged administratrix that his mother is administratrix is insufficient proof. R. v. Jackson (1869), 19 U.C.C.P. 280.

The answer of a witness stating for whom he voted is not secondary evidence because the vote was by mark upon a paper not produced upon which the candidates' names were printed, and on which there was or should be nothing to identify the ballot as that marked by the voter; and such evidence is admissible without production of the ballots. R. v. Saunders (1897), 3 Can. Cr. Cas. 278 (Man.).

An error in receiving in evidence a document insufficiently proved may be cured by the subsequent evidence in the case; and it is not necessary to again tender the document after the evidence necessary to complete its proof has been disclosed. R. v. Dixon (No. 2) (1897), 3 Can. Cr. Cas. 220 (N.S.).

Inadmissible evidence.]—It is the duty of the judge in criminal trials to take care that the verdict of the jury is not founded upon any evidence except that which the law allows. If a mistake has been made by counsel

that does not relieve the judge from the duty to see that the proper evidence only was before the jury. R. v. Gibson (1886), 18 Q.B.D. 537; R. v. Hagerman, 15 Ont. R. 598; R. v. Becker, 20 Ont. R. 676. In the latter case an objection to the admissibility of certain evidence taken for the first time on an appeal from an order refusing a certiorari was held not too late.

Upon a charge of causing grievous bodily harm to a child under defendants' care with intent to bring about the child's death, evidence of acts of cruelty by defendants to another child also in defendants' care are irrelevant to the case and inadmissible. R. v. Lapierre (1897), 1 Can. Cr. Cas. 413 (Que.).

Where an alleged confession is received in evidence after objection by the accused, and the trial judge before the conclusion of the trial reverses his ruling and strikes out the evidence of the alleged confession, at the same time directing the jury to disregard it, the jury should be discharged and a new jury impanelled. R. v. Sonyer (1898), 2 Can. Cr. Cas. 501 (B.C.).

678. Compelling attendance of witnesses.—Upon proof to the satisfaction of the judge of the service of the subpœna upon any witness who fails to attend or remain in attendance, or upon its appearing that any witness at the preliminary examination has entered into a recognizance to appear at the trial, and has failed so to appear, and that the presence of such witness is material to the ends of justice, the judge may, by his warrant, cause such witness to be apprehended and forthwith brought before him to give evidence, and to answer for his disregard of the subpœna; and such witness may be detained on such warrant before the judge, or in the common gaol, with a view to secure his presence as a witness, or, in the discretion of the judge, he may be released on a recognizance, with or without sureties, conditioned for his appearance to give evidence and to answer for his default in not attending or not remaining in attendance; and the judge may, in a summary manner, examine into and dispose of the charge against such witness, who, if he is found guilty thereof, shall be liable to a fine not exceeding one hundred dollars, or to imprisonment, with or without hard labour, for a term not exceeding ninety days, or to both. R.S.C. c. 174, s. 211.

Witness fees.]—At common law witnesses in criminal cases were not entitled to reimbursement for their expenses; Roscoe Cr. Evid., 11th ed., 104; R. v. Cousens, 3 Russ., Cr. 5th ed., 599; but the court might refuse to grant an attachment in the case of a poor witness if his expenses were not paid. Ibid. 105. The court has no authority to order the defendant to pay a witness his expenses though he has been subpœnaed by such defendant. R. v. Cooke (1824), 1 C. & P. 321.

Where a witness is financially unable to pay his expenses of attending, it is usual for the Department of the provincial government charged with the administration of justice to pay the same; and in the more serious offences, the Crown will subpœna the witnesses for the accused, if the latter is financially unable to pay the expenses of service of process.

Witnesses in summary conviction matters before justices are entitled to witness fees under sec. 871.

The erroneous decision of a magistrate as to whether or not a defaulting witness was bound to attend his court in respect of a trial for an offence against a provincial statute without pre-payment of witness fees, and as to the liability of such witness to arrest has been held not to be reviewable upon habeas corpus, although the accused was deprived of such witness's testimony through the refusal of the magistrate to issue a warrant for his arrest. R. v. Clements (1901), 4 Can. Cr. Cas. 553 (N.S.). Such refusal will not deprive the magistrate of jurisdiction to convict, and the defendant's remedy is by way of appeal only. Ibid. Per Meagher, J.

Protection of witness from arrest.]—Whether subpœnæd or attending by consent without a subpœna, the witness is protected from arrest eundo, morando et redeundo. Meekins v. Smith, 1 H. Bl. 636; Smith v. Stewart, 3 East 89. The courts are disposed to be liberal in regard to the allowance of a reasonable time for going and returning. 1 Stark. Evid., 2nd ed., 90. If the witness is improperly arrested the court out of which the subpœna issued will order him to be discharged. Archbold Cr. Ev., 9th ed., 161.

But where the witness was summoned before a court sitting in another judicial district from that in which he lived, the privilege was held not to apply to a charge of a criminal offence committed by him during the time he was in the former district for the purpose of giving evidence. Ex p. Robert Ewan (1897), 2 Can. Cr. Cas. 279 (Que.).

(Amendment of 1900.)

678A. Warrant for material witness.—Either before or during the sittings of any court of criminal jurisdiction, the court, or any judge thereof, or any judge of any superior or county court, if satisfied by evidence upon oath that any person within the Province likely to give material evidence, either for the prosecution or for the accused, will not attend to give evidence at such sittings without being compelled so to do, may by his warant cause such witness to be apprehended and forthwith brought before such court or judge, and such witness may be detained on such warrant before such court or judge, or in the common gaol, with a view to secure his presence as a witness, or, in the discretion of the court or judge, may be released on a recognizance, with or without sureties, conditioned for his appearance to give evidence.

This is intended to meet the case of absconding witnesses. Sec. 583 provides a similar means of securing the attendance of a witness upon a preliminary investigation, but there was no corresponding provision as to witnesses required at the sessions or assizes. An unwilling witness served with a subpœna might abscond, and there was formerly no way of enforcing his attendance until the trial upon proof of default. Sec. 678. See also sec. 679.

679. Witness in Canada but beyond jurisdiction of court.—If any witness fn any criminal case, cognizable by indictment in any court of criminal jurisdiction at any term, sessions or sittings of any court in any part of Canada, resides

in any part thereof, not within the ordinary jurisdiction of the court before which such criminal case is cognizable, such court may issue a writ of subpœna, directed to such witness, in like manner as if such witness was resident within the jurisdiction of the court; and if such witness does not obey such writ of subpœna the court issuing the same may proceed against such witness for contempt or otherwise, or bind over such witness to appear at such days and times as are necessary, and upon default being made in such appearance may cause the recognizances of such witnesses to be estreated, and the amount thereof to be sued for and recovered by process of law, in like manner as if such witness was resident within the jurisdiction of the court. R.S.C. c. 174, s. 212.

(Amendment of 1900.)

2. The courts of the various provinces and the judges of the said courts respectively shall be auxiliary to one another for the purposes of this Act; and any judgment, decree or order made by the court issuing such writ of subpœna upon any proceeding against any witness for contempt or otherwise may be enforced or acted upon by any court in the Province in which such witness resides, in the same manner, and as validly and effectually as if such judgment, order or decree had been made by such last mentioned court.

It was found to be extremely difficult, if not impossible, for a court in one province to enforce in another province the proceedings for contempt under the first sub-section, and it is sought by this amendment to get over the difficulty. A portion of sub-sec. (2) is modelled from sec. 84 of the Winding Up Act, R.S.C. 1886, ch. 129.

(Amendment of 1900.)

680. Bringing up a prisoner as witness.—When the attendance of any person confined in any prison in Canada, or upon the limits of any gaol, is required in any court of criminal jurisdiction in any case cognizable therein by indictment, the court before whom such prisoner is required to attend may, or any judge of such court or of any superior court or county court, or any chairman of General Sessions, may, before or during any such term or sittings at which the attendance of such person is required, make an order upon the warden or gaoler of the prison, or upon the sheriff or other person having the custody of such prisoner—

(*a*) to deliver such prisoner to the person named in such order to receive him; and such person named shall, at the time prescribed in such order, convey such prisoner to the place at which such person is required to attend, there to receive and obey such further order as to the said court seems meet; or

(*b*) to himself convey such prisoner to such place, there to receive and obey such further order as to the said court seems meet; and in such latter case, on being served with the order and being paid or tendered his reasonable charges, such warden, gaoler, sheriff or other person shall convey the prisoner to such place and produce him there according to the exigency of the order.

The only change made by the amendment is in the insertion of the words "or any chairman of General Sessions," and the addition of paragraph (*b*). See Imp. Act, 16 & 17 Vict., ch. 30; Taylor on Evidence, 9th ed., secs. 1275, 1276.

Paragraph (*b*) was suggested by the late Chief Justice Davie, of British Columbia, and is intended to effect a considerable saving of expense, especially in that province.

681. Evidence of person dangerously ill may be taken under commission.—Whenever it is made to appear at the instance of the Crown, or of the prisoner or defendant, to the satisfaction of a judge of a superior court, or a judge of a county court having criminal jurisdiction, that any person who is dangerously ill, and who, in the opinion of some licensed medical practitioner is not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, such judge may, by order under his hand, appoint a commissioner to take in writing the statement on oath or affirmation of such person.

2. Such commissioner shall take such statement and shall subscribe the same and add thereto the names of the persons, if any, present at the taking thereof, and if the deposition relates to any indictable offence for which any accused person is already committed or bailed to appear for trial shall transmit the same, with the said addition, to the proper officer of the court at which such accused person is to be tried; and in every other case he shall transmit the same to the clerk of the peace of the county, division or city in which he has taken the same, or to such other officer as has charge of the records and proceedings of a superior court of criminal jurisdiction in such county, division or city,

and such clerk of the peace or other officer shall preserve the same and file it of record, and upon order of the court or of a judge, transmit the same to the proper officer of the court where the same shall be required to be used as evidence. R.S.C. c. 174, s. 220.

682. Presence of prisoner when such evidence is taken.—Whenever a prisoner in actual custody is served with or receives notice, of an intention to take the statement mentioned in the last preceding section, the judge who has appointed the commissioner may, by an order in writing, direct the officer or other person having the custody of the prisoner, to convey him to the place mentioned in the said notice for the purpose of being present at the taking of the statement; and such officer or other person shall convey the prisoner accordingly, and the expenses of such conveyance shall be paid out of the funds applicable to the other expenses of the prison from which the prisoner has been conveyed. R.S.C. c. 174, s. 221.

683. Evidence may be taken out of Canada under commission.—Whenever it is made to appear at the instance of the Crown, or of the prisoner or defendant, to the satisfaction of the judge of any superior court, or the judge of a county court having criminal jurisdiction, that any person who resides out of Canada is able to give material information relating to any indictable offence for which a prosecution is pending, or relating to any person accused of such offence, such judge may, by order under his hand, appoint a commissioner or commissioners to take the evidence upon oath, of such person.

(Amendment of 1895.)

2. Until otherwise provided by rules of court the practice and procedure in connection with the appointment of commissioners under this section, the taking of depositions by such commissioners, and the certifying and return thereof, and the use of such depositions as evidence shall be, as nearly as practicable, the same as those which prevail in the respective courts in connection with like matters in civil causes. 53 V., c. 37, s. 23.

3. The depositions taken by such commissioners may be used as evidence as well before the grand jury as at the trial.

(Amendment of 1900.)

3. Subject to such rules of court or to such practice or procedure as aforesaid, such depositions by the direction of the presiding judge may be read in evidence before the grand jury.

This provision first appeared in the Criminal Law Amendment Act of 1890 (53 Vict. (Can.), ch. 37, sec. 23).

The latter sub-section should properly be numbered as 4, as the other sub-sec. 3 had been added in 1895. The words "by direction of the presiding judge" were inserted in order to impose upon the judge the duty of seeing that the commission had been regularly taken, before directing that the deposition should be used. Commons Debates 1900, p. 6321. But the application of the procedure in civil cases by the second sub-section does not confer a like right of appeal as in civil cases from the order appointing the commissioners. R. v. Johnson (1892), 2 B.C.R. 87.

Any evidence taken under commission may be objected to at the trial on the ground of the irregularity of the commissioners' appointment. Ibid.

Acting under ch. 37, Stat. Can. 1890, sec. 23, a judge made an order for the examination in Boston of witnesses on behalf of the Crown residing out of Canada, and that the evidence so taken should be read before the grand jury. On appeal to the court the order was held valid so far as it related to the taking of the evidence, but the majority of the court held that the judge went beyond his powers in directing that the depositions taken under the order should be read before the grand jury. R. v. Chetwynd (1891), 23 N.S.R. (11 R. & G.) 332. The grand jury have a right to decide for themselve upon what evidence they will find a bill, and the court cannot enquire into the proceedings before them or as to the nature of the evidence which they took into consideration. Ibid, per Ritchie, J., p. 338. The above sub-sec. (3) now provides that such depositions *may* be used as evidence as wel. before the grand jury as at the trial.

Foreign commission.]—An order for a commission to take the evidence of any person residing out of Canada who is able to give material information relating to an indictable offence, or relating to any person accused thereof, may ordinarily be made any time after an information is laid charging such offence, and such evidence may be used at any stage of the inquiry at which evidence may be given. Such order ought to provide that the commission be returned to the court out of which it issues, and ought not to limit the use of the evidence. R. v. Chetwynd (1891), 23 N.S.R. 332, and R. v. Gibson, 16 Ont. R. 704, referred to. R. v. Verral, 17 Ont. P.R. 61, affirming 16 Ont. P.R. 444.

A commission to take the evidence of witnesses abroad in a libel prosecution is properly ordered at the trial where the evidence relates wholly to a plea of justification just entered of record. R. v. Nicol (1898), 5 Can. Cr. Cas. 31 (B.C.).

An order for a commission to take such evidence should not be made in such case before plea. Ibid.

(Amendment of 1893.)

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

(*a*) Treason, Part IV., section 65.

(*b*) Perjury, Part X., section 146;

(*c*) Offences under Part XIII., sections 181 to 190, inclusive;

(*d*) Procuring feigned marriage, Part XXII., section 277;

(*e*) Forgery, Part XXXI., section 423.

Where corroboration is required.]—This section originated with 32 & 33 Vict., ch. 19, sec. 54 (D.), which abolished the incapacity of interested witnesses, but with a proviso that the evidence should be insufficient unless corroborated by "other legal evidence in support of the prosecution." The corroboration required by that statute was held not to be the corroboration of the evidence of the person interested in every material particular, but the corroboration of it in some material particular tending to support the prosecution. R. v. Bannerman (1878), 43 U.C.Q.B. 547.

On an indictment for forgery of prosecutor's name as endorser of a promissory note, prosecutor swore that he had not endorsed the note; that it was not his writing; that he had never authorized the prisoner to sign his name to the note, and that he himself was unable to write his name, being in fact a marksman. A son of his also swore that his father was unable to write his name and was a marksman. Another witness also proved that he had known the prosecutor three or four years, and knew that he could not write. It was held that the evidence of the son and of the other witness to the effect that the prosecutor was unable to write his name was "other legal evidence in support of the prosecution within the meaning of the section, and that it sufficiently corroborated the evidence of the prosecutor to sustain the conviction, and that the burden was then on the prisoner to shew as a defence that he was authorized to use or write the prosecutor's name. R. v. Bannerman (1878), 43 U.C.Q.B. 547.

In a charge of forgery, it was held that the corroboration must be that of another witness, and not merely the evidence of the same witness on another point. R. v. McBride (1895), 2 Can. Cr. Cas. 544, 26 Ont. R. 639.

In R. v. Giles (1856), 6 U.C.C.P. 84, the prisoner, Elizabeth Giles, was charged with forging an order for the delivery of goods. The only persons who gave evidence at the trial were the person whose name was alleged to have been forged, and the person to whom the order was addressed. The person whose name was alleged to have been forged denied the signature and also swore that he could not write; but the person to whom the order was presented by the prisoner, and who had supplied her with goods on the faith of same, was not aware of that, and accepted the order in good faith. The order purported to be a request to let "the bearer" have goods, and the prisoner, on presenting it, gave a fictitious name. In delivering the judgment of the Court of Common Pleas (Draper, C.J., Richards and Hagarty, JJ.) the Chief Justice said:—"The false representation made by prisoner as to her own name would be a very material fact to establish a guilty knowledge on her part, if the fact that the note was forged were established; but, until that is done, this false statement wants significance, and I think it would be going too far to treat [it] as a corroboration of the statement of Aikenhead [the party whose name was alleged to have been forged] that the order was a forgery. . . . There is no corroboration of his testimony, i.e., there is no material fact proved by him which is proved either by other direct testimony, or by the proof of other facts which go to establish the truth of any material part of his statements."

The corroborative evidence "implicating" the accused which is made necessary to sustain a charge of seduction of a girl under sixteen may con-

sist of the prisoner's admission made after she attained sixteen that he had had connection wits her. R. v. Wyse (1895), 1 Can. Cr. Cas. 6 (N.W.T.).

A statement made by the accused before he was charged with the offence that he had been advised that if he could get the girl to marry him he would escape "punishment," is corroborative evidence "implicating" the accused and proper to be considered by a jury or by a judge exercising the functions of a jury. R. v. Wyse (1895), 1 Can. Cr. Cas. 6 (N.W.T.).

It has been held that evidence of defendant's subsequent conduct in seeking to continue his illicit relation with the seduced person may be received as connected with and tending to corroborate the principal charge in a civil action for damages, as well as being matter of aggravation. Russell v. Chambers (1883), 31 Minn. 54, 16 N.W. Rep. 458.

The reception of such evidence, in a criminal prosecution before a jury, is to be largely controlled by the judge who tries the cause, and the evidence is to be submitted to the jury, with proper explanation of its purpose and effect. State v. Witham (1881), 72 Me. 531.

Both prior and subsequent acts to that charged in the indictment are admissible, if indicating a continuousness of illicit intercourse. State v. Witham (1881), 72 Me. 531, 535.

If, however, the acts are too remote in point of time to afford any reasonable inference of guilt as to the offence charged, proof thereof should be rejected. Stewart v. State (1887), 64 Miss. 626, 2 So. Rep. 73.

Evidence of the girl's pregnancy, and of her having been employed in domestic service at the defendant's residence and of facts shewing merely a strong probability of there having been no opportunity at which any other man could have been responsible for her condition, does not constitute corroborative evidence "implicating the accused" required by this section in order to sustain a conviction. R. v. Vahey (1899), 2 Can. Cr. Cas. 258 (Ont.).

Apart from statutory enactment, it was a general rule that the testimony of one witness was insufficient to convict on a charge of perjury. Roscoe's Cr. Evid., 11th ed., 807. It is not, however, imperative that there should be two witnesses to disprove the fact sworn to by the accused, for if any other material circumstance be proved by other witnesses in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale and warrant a conviction. R. v. Lee (1766), 3 Russell on Crimes, 5th ed., 72. Two witnesses are not essentially necessary to contradict the oath on which the perjury is assigned, but there must be something more than the oath of one, to shew that one party is more to be believed than the other. R. v. Boulter (1852), 5 Cox C.C. 543; 3 Car. & Kir. 236. And it has been held that a letter written by the accused contradicting his statement upon oath would be sufficient to make it unnecessary to have a second witness. R. v. Mayhew (1834), 6 C. & P. 315.

It was seen that this section does not apply to the offence of making a false statutory declaration under sec. 147.

It is not a rule of law that an accomplice must be corroborated, but one of practice merely. It is usual for judges to tell the jury that they may act as they please upon the uncorroborated evidence of an accomplice, but that it is safer to require corroboration. Per Jarvis, C.J. R. v. Stubbs (1855), Dears. 555; 7 Cox 48; 1 Jur. N.S. 1115. "Judges, in their discretion, will advise a jury not to believe an accomplice unless he is confirmed, or only in so far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts to which he deposes. It is allowed that he is a competent witness, and the consequence is inevitable that if credit is given to his evidence it requires no confirmation from another witness." Per Lord Ellenborough. R. v. Jones (1809), 2 Camp 132, 11 R.R. 680. An accomplice stands in a situation differing from one

whose character is bad. He is immediately connected with the crime, the subject of enquiry, and has an obvious interest in obtaining the conviction of those whom he represents to have acted with him in committing it; but it cannot be treated as a point of law that the evidence of an accomplice must be corroborated. Per Draper, C.J. R. v. Beckwith (1859), 8 U.C.C.P. 274. A conviction of a prisoner for horse stealing upon the uncorroborated evidence of an accomplice was held to be legal, although the judge did not caution the jury as to the weight to be attached to the evidence. Ibid.

The testimony of an accomplice ought not to be relied upon unless corroborated both as to the circumstances of the crime and the identity of the accused. R. v. Farlar (1837), 8 C. & P. 106; R. v. Stubbs (1855), Dears. 555, 25 L.J.M.C. 16; Phipson on Evidence, 2nd ed. (1898), 482. There should be some fact deposed to, independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference, not only that a crime has been committed, but that the prisoner is implicated in it. Roscoe's Crim. Evid., 11th ed., 124.

The corroboration should be as to some material fact or facts which go to prove that the accused was connected with the crime charged. Russell on Crimes, 6th ed. (1896), vol. 3, p. 646; R. v. Webb (1834), 6 C. & P. 595; R. v. Addis (1834), 6 C. & P. 388; R. v. Wilkes (1836), 7 C. & P. 272.

685. Evidence not under oath of child in certain cases.—Where, upon the hearing or trial of any charge for carnally knowing or attempting to carnally know a girl under fourteen, or of any charge under section 259 for indecent assault, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received, though not given under oath if, in the opinion of the court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

2. But no person shall be liable to be convicted of the offence, unless the testimony admitted by virtue of this section, and given on behalf of the prosecution, is corroborated by some other material evidence in support thereof implicating the accused.

3. Any witness whose evidence is admitted under this section is liable to indictment and punishment for perjury in all respects as if he or she had been sworn. 53 V., c. 37, s. 13.

Child's evidence.]—Section 25 of the Canada Evidence Act, 1893, provides that 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; but that

no case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence.

In a case prior to the Canada Evidence Act it was held that where the conviction on a charge of indecent assault was for common assault only, but the evidence was corroborated as here required, the conviction would be valid although the child's evidence would not at that time have been admissible on a charge of common assault. R. v. Grantyers (1893), 2 Que. (Q.B.) 376.

It will be observed that while, under the Canada Evidence Act, the corroboration is required to be only "by some other material evidence," the corroboration under sec. 685 of the Code must in the cases to which it applies be "by some other material evidence in support thereof implicating the accused." See also note to sec. 684.

686. Deposition of sick witness may be read in evidence.—If the evidence of a sick person has been taken under commission, as provided in section 681, and upon the trial of any offender for any offence to which the same relates, the person who made the statement is proved to be dead, or if it is proved that there is no reasonable probability that such person will ever be able to attend the trial to give evidence, such statement may, upon the production of the judge's order appointing such commissioner, be read in evidence, either for or against the accused, without further proof thereof,—if the same purports to be signed by the commissioner by or before whom it purports to have been taken, and if it is proved to the satisfaction of the court that reasonable notice of the intention to take such statement was served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person, or his counsel or solicitor had, or might have had, if he had chosen to be present, full opportunity of cross-examining the person who made the same. R.S.C. c. 174, s. 220.

(Amendment of 1900.)

687. Depositions as evidence.—If upon the trial of an accused person such facts are proved upon oath or affirmation of any credible witness that it can be reasonably inferred therefrom that any person whose deposition has been theretofore taken in the investigation of the charge against such person is dead, or so ill as not to be able to travel, or is absent from Canada, and if it is proved that such deposition was taken in the presence of the person accused, and that his counsel or solicitor had a full opportunity of cross-examining the witness, then, if the deposition purports to be signed by the judge or justice before whom the same purports to have been taken, it shall be read as evidence in the prosecution without further proof

thereof, unless it is proved that such deposition was not in fact signed by the judge or justice purporting to have signed the same.

2. In this section the word "deposition" includes the evidence of a witness given at any former trial upon the same charge.

Using depositions as evidence.]—The section as it formerly stood provided that the deposition might be used if it were proved that it was taken in the presence of the person accused "and that *he*, his counsel or solicitor, had a full opportunity of cross-examining," etc. The word "he" is now left out. In the debate upon this amendment the Hon. David Mills, then Minister of Justice, said:—"It sometimes happens that an ill-informed man is without counsel before a magistrate, and evidence is taken and he is incapable of cross-examining the party. He is unrepresented by counsel. The witness who appeared before him may have left the country before the trial and may not be present at the trial. The evidence is frequently not well taken, and it may be very different from what it would have been if the witness had been cross-examined. It is, nevertheless, used against him without any opportunity of bringing out those facts which might have completely altered the complexion of the evidence had he been subjected to cross-examination; so where there is no cross-examination I think it is better that the evidence should not be produced." Senate Debates, 1899, p. 554.

Sub-section 2 is new. Under the former sec. 687 it was doubtful whether depositions taken at a former trial could be used at a second trial necessitated by a disagreement of the jury at the first trial or directed on a case reserved, although the witness had died or left the country meanwhile. 35 C.L.J. (1899), pp. 91 and 212.

The original statute 32-33 Vict., ch. 30, sec. 30, was passed to prevent the obstruction of justice by the absence of witnesses. The question as to whether or not the witness is unable to travel must in the main be left to the judgment and discretion of the trial judge. R. v. Wellings (1878), L.R. 3 Q.B.D. 42; R. v. Stephenson (1862), L. & C. 167. And the same rule will be applied where the absence from Canada is not positively proved but is a matter of inference from circumstances. R. v. Nelson (1882), 1 Ont. R. 500.

Evidence of a custom's clerk that the captain of a schooner had cleared from a Canadian port a week before the trial is not sufficient evidence of his being out of Canada to satisfy this section. R. v. Morgan (1893), 2 B.C.R. 329. Semble, there should have been evidence that the schooner actually left the harbour.

The following proof of absence of a witness from Canada was held sufficient to allow of the reading of his deposition taken on the preliminary enquiry; a witness was called who said that he saw the absent witness ten days previously, that he was then employed on a certain boat and on leaving him had said he was going on board the boat and that the boat's route had now been changed to foreign waters. R. v. Pescaro (1884), 1 B.C.R., pt. 2, p. 144, per Begbie, C.J., Gray and Walkem, JJ.

Depositions may also be proved by the magistrate, or his clerk, and in important cases it is better to have the magistrate present at the trial. R. v. Hamilton (1866), 16 U.C.C.P., p. 353.

As to the meaning of the phrase "full opportunity to cross-examine," see note to sec. 590.

A deposition read over to and signed by the deponent may be admissible in evidence as a dying declaration, although irregular as a deposition under this section because taken in the absence of the accused. R. v. Woods (1897), 2 Can. Cr. Cas. 159 (B.C.).

In order that this section should apply to make admissible as evidence at the trial the deposition of a witness, since deceased, taken on a preliminary inquiry or other investigation of a charge against the accused before a justice of the peace, the document containing the deposition is alone to be looked at to ascertain if the deposition "purports to be signed by the justice," as is required by that section. R. v. Hamilton (1898), 2 Can. Cr. Cas. 390 (Man.).

Where the deposition sought to be used had been signed by both the witness and the magistrate, and was attached at the end of depositions taken by the magistrate on a previous date named, but did not itself contain a new "caption," or the date when taken, or any record by the magistrate certifying that such added deposition had been *taken* by him, and the first depositions formed in themselves a complete document concluding with the magistrate's note of the remand of the case, it is not to be presumed that the informal deposition following the formal document is a continuation of the first deposition (in which appeared no reference to the added deposition), or that it relates to the same charge, and it was held that such added deposition did not "purport to be signed by the justice by or before whom the same purports to have been taken." Ibid.

A deposition, the caption of which sets out the name of the justice and describes him as one of the justices of the peace for a named county, "purports to be signed by the justice by or before whom the same purports to have been taken," if the same is signed by the justice with his name only, without adding to it, as in form S of the Code, the initials "J.P." and the name of the county for which he is a justice; and such a deposition is prima facie admissible in evidence. Ibid.

The deposition must be a verbatim record of the witness's evidence. R. v. Graham (1898), 2 Can. Cr. Cas. 388 (Que.).

Notes of evidence taken by the coroner at an inquest which do not contain the precise expressions of the witness, but a summary only of the evidence, are not admissible in contradiction of the witness's testimony in a subsequent proceeding unless signed by the witness, or unless read over to and acquiesced in by him. R. v. Ciarlo (1897), 1 Can. Cr. Cas. (Que.).

But the witness may in such case be cross-examined as to any material statements made by him at the inquest, and witnesses may be called to shew that he then made a different and contradictory statement. Ibid.

The deposition of an ill or absent witness taken before a magistrate having jurisdiction to hold the preliminary enquiry, other than the one before whom the charge was laid and the committal made, may be used at the trial if the deposition was taken in the presence of the prisoner and with full opportunity of cross-examining, and if the formalities of the Code are complied with as to the manner of taking and signing depositions. R. v. De Vidal (1861), 9 Cox C.C. 4 (Blackburn, J.), approved in Re Guerin (1888), 16 Cox 596 (Wills and Grantham, JJ.); although a commitment can only be made by the magistrate who has himself heard all the evidence upon which it is based. Re Nunn (1899), 2 Can. Cr. Cas. 429 (B.C.).

Depositions of a witness speaking in French taken down by the translator in English at a preliminary inquiry but not read over and explained to the witness or signed by him are not admissible to contradict his testimony on a subsequent proceeding, but the witness may be cross-examined as to material statements then made, and witnesses called to shew a contradiction with his former testimony. R. v. Ciarlo (1897), 1 Can. Cr. Cas. 157 (Que.).

688. Depositions may be used on trial for other offences.—Depositions taken in the preliminary or other investigation of any charge against any person may be read as evidence in the prosecution of such person for any other offence, upon the like proof and in the same manner, in all respects, as they may, according to law, be read in the prosecution of the offence with which such person was charged when such depositions were taken. R.S.C. c. 174, s. 224.

689. Evidence of statement by accused.—The statement made by the accused person before the justice may, if necessary, upon the trial of such person, be given in evidence against him, without further proof thereof, unless it is proved that the justice purporting to have signed the same did not in fact sign the same. R.S.C. c. 174, s. 223.

Although the magistrate's record of proceedings does not shew on its face that a statement made by the accused to him in answer to the charge was made after due caution in accordance with the Act, the fact that it was so made may be proved at the trial and the statement may then be put in evidence by the prosecution. R. v. Kalabeen (1867), 1 B.C.R., pt. 1, p. 1, per Begbie, C.J.

See also note to sec. 687.

690. Admission may be taken on trial.—Any accused person on his trial for any indictable offence, or his counsel or solicitor, may admit any fact alleged against the accused so as to dispense with proof thereof.

691. Certificate of trial at which perjury was committed.—A certificate containing the substance and effect only, omitting the formal part, of the indictment and trial for any offence, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court whereat the indictment was tried, or among which such indictment has been filed, or by the deputy of such clerk or other officer, shall, upon the trial of an indictment for perjury, or subornation of perjury, be sufficient evidence of the trial of such indictment without proof of the signature or official character of the person appearing to have signed the same. R.S.C. c. 174, s. 225.

692. Evidence of coin being false or counterfeit.—When, upon the trial of any person, it becomes necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same

to be false and counterfeit by the evidence of any moneyer or other officer of His Majesty's mint, or other person employed in producing lawful coin in His Majesty's dominions or elsewhere, whether the coin counterfeited is current coin, or the coin of any foreign prince, state or country, not current in Canada, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness. R.S.C. c. 174, s. 229.

693. Evidence on proceedings for advertising counterfeit money.—On the trial of any person charged with the offences mentioned in section 480, any letter, circular, writing or paper offering or purporting to offer for sale, loan, gift, or distribution, or giving or purporting to give information, directly or indirectly, where, how, of whom or by what means any counterfeit token of value may be obtained or had, or concerning any similar scheme or device to defraud the public, shall be *prima facie* evidence of the fraudulent character of such scheme or device.

694. Proof of previous conviction.—A certificate containing the substance and effect only, omitting the formal part of any previous indictment and conviction for any indictable offence, or a copy of any summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court before which the offender was first convicted, or to which such summary conviction was returned, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of such conviction without proof of the signature or official character of the person appearing to have signed the same. R.S.C. c. 174, s. 230.

Proving previous conviction.]—A previous conviction must be proved by evidence in legal form, which may be done (*a*) by the production from the proper custody of the conviction itself, and (*b*) by a copy of the conviction certified by the clerk of the peace or other officer having charge of the records of same. R. v. Yeoveley (1838), 8 A. & E. 806; R. v. Ward (1834), 6 C. & P. 366.

If the certificate or exemplification be that of a court having a seal it must be certified under such seal; if the proceeding to be certified be before a justice of the peace or coroner, the proceeding may be under the hand *or* seal of such justice or coroner; and, if any such court, justice or coroner has no seal, *or* so certifies, then a copy purporting to be certified under the signature of a judge or presiding magistrate of such court or of such justice or coroner is admissible without any proof of the authenticity of such signature or other proof whatsoever. Canada Evidence Act, 1893, sec. 10.

Certificates of previous convictions of a defendant of the same name and description as the accused are admissible as evidence without further proof that the accused was the person formerly convicted. Ex parte Dugan (1893), 13 C.L.T. 249 (Sup. Ct. New Brunswick).

The accused is entitled to adduce evidence to prove that he is not the party previously convicted, and the onus is upon him if the name and description correspond with his own, such being prima facie evidence of identity. Ex parte Dugan, 13 C.L.T. 249.

The question whether the defendant had been previously convicted or not is within the jurisdiction of the magistrate, and his finding thereon on competent evidence is conclusive. R. v. Brown, 16 Ont. R. 41 (Q.B.D.).

It is said that where no particular circumstance tends to raise a question as to the party being the same, even identity of name is in civil cases something from which an inference of identity may be drawn in proof of a signature to a document, but that, in a criminal case, the mere fact that a person of the same name as the prisoner signed a document, or the like, would not be considered sufficient. Russell on Crimes, 6th ed. (1896), vol. 3, 470 (*n*).

In the Irish case of R. v. Ellen Murtagh (1854), 6 Cox C.C. 447, the prisoner was indicted for a misdemeanour in making a false declaration before a magistrate. The magistrate, who had taken the declaration, and a clerk from the police office, were examined, and proved that the declaration produced was made by a woman describing herself as Ellen Murtagh, and who signed by making her mark to it, but were unable to identify the prisoner. It was attempted to prove identity by means of alleged admissions in prisoner's examination upon a subsequent statutory inquiry under oath, but such being held inadmissible it was held there was no evidence to support the indictment.

695. Proof of previous conviction of witness.—A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction; and a certificate, as provided in the next preceding section, shall, upon proof of the identity of the witness as such convict, be sufficient evidence of his conviction, without proof of the signature or the official character of the person appearing to have signed the certificate. R.S.C. c. 174, s. 231.

A witness may be cross-examined as to whether he has been convicted of any offence, i.e., a criminal offence. If he denies it or refuses to answer the cross-examining party may prove such conviction as affecting his credit although the fact of the conviction may be wholly irrelevant to the issue. Ward v. Sinfield, 49 L.J.C.P. 696.

A defendant in a criminal case tendering himself as a witness on his own behalf is subject to such cross-examination. Phipson Evid., 2nd ed., 164.

696. Proof of attested instrument.—It shall not be necessary to prove by the attesting witness any instruments to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise as if there had been no attesting witness thereto. R.S.C. c. 174, s. 232.

697. Evidence at trial for child murder.—The trial of any woman charged with the murder of any issue of her body, male or female, which, being born alive, would, by law, be bastard shall proceed and be governed by such and the like rules of evidence and presumption as are by law used and allowed to take place in respect to other trials for murder. R.S.C. c. 174, s. 227.

698. Comparison of disputed writing with genuine.—Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute. R.S.C. c. 174, s. 233.

Comparison of handwriting.]—This section is in the same terms as the Imperial Statute 28-29 Vict., ch. 18, sec. 8, under which it has been held that both the genuine and the disputed writings must be produced in court. Arbon v. Fussell, 3 F. & F. 152.

Experts may without a comparison of handwriting give opinion evidence from their general knowledge of the subject, as to whether the writing produced is in a feigned or natural hand; R. v. Coleman, 6 Cox C.C. 163; or as to whether interlineations were written contemporaneously with the rest of the document. Re Hindmarsh, L.R. 1 P. & D. 307.

A jury may properly make a comparison of disputed handwriting although no witness has been called to prove the handwriting to be the same in both, and may draw their own conclusions as to its authenticity, if an admittedly genuine handwriting and the disputed handwriting are both in evidence for some purpose in the case. R. v. Dixon (1897), 3 Can. Cr. Cas. 220 (N.S.).

If the witness proves adverse.]—A witness is "adverse" when in the opinion of the judge he bears a hostile animus to the party calling him and not merely when his testimony contradicts the proof of such party. Greenough v. Eccles (1859), 5 C.B.N.S. 786; Reed v. King, 30 Eng. L.T. 290; Taylor Evid., sec. 1426.

Whether or not the witness is adverse is a matter wholly for the court, and a party though called by his opponent cannot as of right be treated as hostile. Price v. Manning, 42 Ch.D. 372 (C.A.).

The discretion of the judge in that respect is not subject to appeal. Rice v. Howard, 16 Q.B.D. 681.

699. Party discrediting his own witness.—A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given, the circumstances of the supposed statement,

sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement. R.S.C. c. 174, s. 234.

Apart from this enactment a party may, as of right, without obtaining the opinion or leave of the court, *contradict* his own witness, whether the latter is adverse or not, by other evidence relevant to the issue and thus indirectly discredit him. Roscoe Cr. Evid., 97, 98; Phipson Evid., 2nd ed., 475.

700. Evidence of former written statements by witness.—Upon any trial a witness may be cross-examined as to previous statements made by him in writing, or reduced to writing, relative to the subject-matter of the case, without such writing being shewn to him; but if it is intended to contradict the witness by the writing his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; and the judge, at any time during the trial, may require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he thinks fit: Provided that a deposition of the witness, purporting to have been taken before a justice on the investigation of the charge and to be signed by the witness and the justice, returned to and produced from the custody of the proper officer, shall be presumed prima facie to have been signed by the witness. R.S.C. c. 174, s. 235.

Former written statements.]—If a witness has been examined before a magistrate or coroner, under such circumstances that these officers respectively have in pursuance of their duty, taken down his statement in writing, parol evidence of his examination cannot be given in the event of his death so long as the deposition itself can be produced; for the law having constituted the deposition as the authentic medium of proof, will not permit the admission of any inferior species of evidence. If, indeed, it can be shewn that the deposition is lost or destroyed, or is in the possession of the opposite party, who, after notice, refuses to produce it, the statement of a witness who was present at the examination will then be admissible, as well as a copy of the deposition. Taylor on Evidence, sec. 552, approved in R. v. Troop (1898), 2 Can. Cr. Cas. 28 (N.S.).

This section of the Code is a re-enactment of sec. 235, Rev. Stat. Canada, ch. 174, originally taken from sec. 5, Imperial Statute, 28 and 29 Vict., ch. 18.

As to a statement made orally by a witness and reduced to writing, his statement, if the writing can be produced, must be proved by the writing; but failing the writing, the provision of the law can be carried out by proving the statement in the way which would be the obvious and the legal method if the reduction to writing had never taken place, namely, by the evidence of a witness or witnesses, who heard the statement as it was originally made. R. v. Troop (1898), 2 Can. Cr. Cas. 29 (N.S.).

This view is, of course, not applicable to the case of a statement made in writing by the witness himself, which, obviously could be proved only

by the production of the writing itself, or failing that, by proof of its contents. Ibid.

The statement of the accused made upon the preliminary enquiry and certified by the justice, may be given in evidence against him upon the trial without further proof thereof, unless it is proved that the justice purporting to have signed the same did not in fact do so. Sec. 689.

And depositions taken in the preliminary or other investigation of any charge against any person may be read as evidence in the prosecution of such person for *any other* offence upon the like proof and in the same manner in all respects, as they may, according to law, be read in the prosecution of the offence with which such person was charged when such depositions were taken. Sec. 668.

701. Proof of contradictory statements by witness.—If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness and he shall be asked whether or not he did make such statement. R.S.C. c. 174, s. 236.

Previous inconsistent statement.]—Questions respecting the relevancy of testimony to the matter in issue often arise when a counsel in cross-examination of a witness uses a license, which the practice allows him, of asking a variety of questions having no apparent connection with the matter to be tried, in the hope of involving the witness in some contradiction. He is not in such cases obliged to explain the object of his questions, because that might defeat his object, but he must be content to take the answer which the witness gives to any question that is irrelevant, and is not allowed to call witnesses to disprove the statements he makes in reply, because that would lead to the trial of innumerable issues irrelevant to the case, and would distract the attention of the jury; and besides, which is a better reason, it would be unsafe, and would be unjust towards the witness, to infer from any contradiction that might be given by another witness that the one who has been cross-examined has sworn falsely, and is unworthy of belief, since he could not have contemplated that he would be questioned upon points unconnected with the facts to be tried, and could not therefore be expected to be able, on the sudden, to support his testimony by the evidence of other persons, though it might be perfectly true in itself notwithstanding the contradiction. R. v. Brown (1861), 21 U.C.Q.B. 330.

But whether the witness admit or deny the alleged contrary statement he may if he state certain facts connected with such former statement relevant to the cause, be contradicted with regard to such facts. R. v. Jerrett (1863), 22 U.C.Q.B. 499, 511 (A. Wilson, J.).

A witness for the Crown gave evidence quite different from a previous written statement made by him to the prosecutor's counsel; he admitted such statement when shewn to him, but said it was all untrue and made to save himself. Hagarty, J., inclined to the opinion that the witness having fully admitted his previous inconsistent statement, no further evidence relating to it should have been received. Adam Wilson, J., held that the prosecutor's counsel was properly admitted to disprove the witness's assertion as to how this statement came to be made, for the fact of its being

obtained as he stated would tend very much to prejudice the prosecution, and was therefore not a collateral matter, but relevant. R. v. Jerrett and others (1863), 22 U.C.Q.B. 499.

The present section applies only where the witness is being cross-examined.

Evidence given by the official stenographer to the effect that the prisoner resembled the party of same name as prisoner, whose depositions he had taken, and that he believed him to be the same man, but could not sufficiently remember to swear positively to his identity, is properly submitted to a jury. R. v. Douglas (1896), 1 Can. Cr. Cas. 221 (Man.).

See also note to sec. 700.

(Amendment of 1900).

701A. Proving age of juvenile.—In order to prove the age of a boy, girl, child or young person for the purposes of ss. 181, 186, 210, 211, 216, 261, 269, 270, 283, 284 and 934A, the following shall be sufficient prima facie evidence:—

(*a*) Any entry or record by an incorporated society or its officers having had the control or care of the boy, girl, child or young person, at or about the time of the boy, girl, child or young person being brought to Canada, if such entry or record has been made before the alleged offence was committed.

(*b*) In the absence of other evidence, or by way of corroboration of other evidence, the judge or, in cases where an offender is tried with a jury, the jury before whom an indictment for the offence is tried, or the justice before whom a preliminary inquiry thereinto is held, may infer the age from the appearance of the boy, girl, child or young person.

This section is intended to facilitate proof of age, particularly in the cases of children coming from abroad in charge of charitable institutions, for registers or other proof of date of birth are not usually available in such cases.

There is no clause 934A. in the Code and the reference thereto is an error. A clause bearing that number was introduced and passed in the Senate, providing for the whipping of boys between the ages of ten and sixteen years in certain cases; but it did not pass the Commons.

Proof of age.]—A register is evidence of the particular transaction which it was the officer's duty to record, even though he had no personal knowledge of its occurrence. Doe v. Andrews, 15 Q.B.D. 756. But it is doubtful how far a register can be received to prove incidental particulars regarding the main transaction, even where these are required by law to be included in the entry. Phipson Evid., 2nd ed., 317; Huntley v. Donovan, 15 Q.B. 96.

Proof of the date of birth may be made from the recollection of a person then present. R. v. Nicholls (1867), 10 Cox C.C. 476; but not by the testimony of the person himself. R. v. Rishworth, 2 Q.B. 476. And the oral testimony of a father who was absent for a few days at the time of the birth and was only told of it on his return was held insufficient to fix the date where a very few days difference would be material to the case. R. v. Wedge (1832), 5 C. & P. 298.

Where the charge was one of cruelty to children under sixteen the testimony of a school teacher that the children attended her school and that she believed they were under sixteen was held admissible, as well as similar evidence by policemen and others who had seen the children. R. v. Cox, [1898] 1 Q.B. 179, 14 Times L.R. 122, 18 Cox 672.

By sub-sec. (*b*) supra, the court or jury may infer the age from the appearance of the child, but this, of course, only applies where the child is produced in court.

702. Evidence of common gaming house.—When any cards, dice, balls, counters, tables or other instruments of gaming used in playing any unlawful game are found in any house, room or place suspected to be used as a common gaming house, and entered under a warrant or order issued under this Act, or about the person of any of those who are found therein, it shall be prima facie evidence, on the trial of a prosecution under section 198 or section 199, that such house, room or place is used as a common gaming house, and that the persons found in the room or place where such tables or instruments of gaming are found were playing therein, although no play was actually going on in the presence of the officer entering the same under such warrant or order, or in the presence of those persons by whom he is accompanied as aforesaid."

The only material change made by the amendment was the insertion after the words "section 198" of the words "or section 199." This was to make a certain class of evidence sufficient on the trial of a prosecution under sec. 199 as it already was on the trial of a prosecution under sec. 198.

See secs. 198 and 575.

(Amendment of 1900.)

703. Evidence of unlawful gaming.—In any prosecution under section 198 for keeping a common gaming house, or under section 199 for playing or looking on while any other person is playing in a common gaming house, it shall be prima facie evidence that a house, room or place is used as a common gaming house, and that the persons found therein were unlawfully playing therein—

(*a*) if any constable or officer authorized to enter any house, room or place, is wilfully prevented from, or obstructed or delayed in entering the same or any part thereof; or

(*b*) if any such house, room or place is found fitted or provided with any means or contrivance for unlawful gaming, or with any means or contrivance for concealing, removing or destroying any instruments of gaming.

The object of this amendment was the same as that of the amendment of 702, supra, the only change being that the provision is made applicable to sec. 199 as well as to sec. 198.

See secs. 198, 199 and 575.

704. Evidence in case of gaming in stocks, etc.—Whenever, on the trial of a person charged with making an agreement for the sale or purchase of shares, goods, wares or merchandise in the manner set forth in section 201, it is established that the person so charged has made or signed any such contract or agreement of sale or purchase, or has acted, aided or abetted in the making or signing thereof, the burden of proof of the bona fide intention to acquire or to sell such goods, wares or merchandise, or to deliver or to receive delivery thereof, as the case may be, shall rest upon the person so charged.

See sec. 201.

(Amendment of 1893.)

705. Evidence in certain cases of libel.—In any criminal proceeding commenced or prosecuted for publishing any extract from, or abstract of, any paper containing defamatory matter, and which has been published by, or under the authority of, the Senate, House of Commons, or any Legislative Council, Legislative Assembly or House of Assembly, such paper may be given in evidence, and it may be shown that such extract or abstract was published in good faith, and without ill-will to the person defamed, and if such is the opinion of the jury a verdict of not guilty shall be entered for the defendant. R.S.C. c. 163, s. 8, as amended.

See sec. 289.

706. Evidence in case of polygamy, etc.—In the case of any indictment under section 278 (*b*), (*c*) and (*d*), no averment or proof of the method in which the sexual relationship charged was entered into, agreed to, or consented to, shall be necessary in any such indictment, or upon the trial of the person thereby charged; nor shall it be necessary upon such trial to prove carnal connection had or intended to be had between the persons implicated. 53 V., c. 37, s. 11.

See sec. 278.

707. Evidence of stealing ores or minerals.—In any prosecution, proceeding or trial for stealing ores or minerals the possession, contrary to the provisions of any law in that behalf, of any smelted gold or silver, or any gold-bearing quartz, or any

unsmelted or otherwise unmanufactured gold or silver, by any operative, workman or labourer actively engaged in or on any mine, shall be prima facie evidence that the same has been stolen by him. R.S.C. c. 164, s. 30.

See sec. 343.

(Amendment of 1901.)

707A. Cattle brands as evidence.—In any criminal prosecution, proceeding or trial, the presence upon any cattle of a brand or mark, which is duly recorded or registered under the provisions of any Act, ordinance or law, shall be prima facie evidence that such cattle are the property of the registered owner of such brand or mark; and where a person is charged with theft of cattle, or with an offence under paragraph (*a*) or paragraph (*b*) of section 331A respecting cattle, possession by such person or by others in his employ or on his behalf of such cattle bearing such a brand or mark of which the person charged is not the registered owner, shall throw upon the accused the burden of proving that such cattle came lawfully into his possession or into the possession of such others in his employ or on his behalf, unless it appears that such possession by others in his employ or on his behalf was without his knowledge and without his authority, sanction or approval.

Section 707A, introduced in 1900, was repealed and the above substituted in 1901, 1 Edw. VII., c. 42.

See sec. 331A.

708. Evidence of stealing timber. — In any prosecution, proceeding or trial for any offence under section 338, a timber mark, duly registered under the provisions of the *Act respecting the Marking of Timber*, on any timber, mast, spar, saw-log or other description of lumber, shall be prima facie evidence that the same is the property of the registered owner of such timber mark; and possession by the offender, or by others in his employ or on his behalf, of any such timber, mast, spar, saw-log or other description of lumber so marked, shall in all cases, throw upon the offender the burden of proving that such timber, mast, spar, saw-log or other description of lumber came lawfully into his possession, or into the possession of such others in his employ or on his behalf. R.S.C. c. 174, s. 228.

See sec. 338.

709. Evidence in cases relating to public stores.—In any prosecution, proceeding or trial under sections 385 to 389 inclusive for offences relating to public stores, proof that any soldier, seaman or marine was actually doing duty in His Majesty's service shall be prima facie evidence that his enlistment, entry or enrolment has been regular.

2. If the person charged with the offence relating to public stores mentioned in article 387 was, at the time at which the offence is charged to have been committed, in His Majesty's service or employment, or a dealer in marine stores, or a dealer in old metals, knowledge on his part that the stores to which the charge relates bore the marks described in section 384 shall be presumed until the contrary is shown. 50-51 V., c. 45, s. 13.

See secs. 385-389.

710. Evidence in case of fraudulent marks on merchandise.—In any prosecution, proceeding or trial for any offence under Part XXXIII. relating to fraudulent marks on merchandise, if the offence relates to imported goods evidence of the port of shipment shall be prima facie evidence of the place or country in which the goods were made or produced. 51 V., c. 41, s. 13.

2. Provided that in any prosecution for forging a trade mark the burden of proof of the assent of the proprietor shall lie on the defendant.

The sub-section applies only to cases coming under the definition laid down by sec. 445 as follows:—

Every one is deemed to forge a trade mark who either,—

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

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

If the offence charged be under sub-sec. (*b*) of sec. 447 of the Code, for falsely *applying* to any goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, it is necessary for the prosecution to negative the assent of the proprietor. R. v. Howarth (1898), 1 Can. Cr. Cas. 243 (Ont.).

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

And see secs. 445 and 447.

711. Full offence charged, attempt proved.—When the complete commission of the offence charged is not proved, but the evidence establishes an attempt to commit the offence, the accused may be convicted of such attempt and punished accordingly. R.S.C. c. 174, s. 183.

See sec. 64 as to attempts.

712. Attempt charged, full offence proved.—When an attempt to commit an offence is charged, but the evidence establishes the commission of the full offence, the accused shall not be entitled to be acquitted, but the jury may convict him of the attempt, unless the court before which such trial is had thinks fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for the complete offence:

2. Provided that after a conviction for such attempt the accused shall not be liable to be tried again for the offence which he was charged with attempting to commit. R.S.C. c. 174, s. 184.

Where a prisoner is indicted for an attempt to steal, and the proof establishes that the offence of larceny was actually committed, the jury may convict of the attempt, unless the court discharges the jury and directs that the prisoner be indicted for the complete offence. R. v. Taylor (1895), 5 Can. Cr. Cas. 89 (Que.). This is a departure from the rule which prevailed before the Code, as to which see Leblanc v. R., 16 Montreal Legal News 187.

See also note to sec. 64.

713. Offence charged, part only proved.—Every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence, or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or he may be convicted of an attempt to commit any offence so included.

2. Provided, that on a count charging murder, if the evidence proves manslaughter, but does not prove murder the jury may find the accused not guilty of murder but guilty of manslaughter, but shall not on that count find the accused guilty of any other offence.

Conviction for lesser offence.]—It is not necessary that the lesser offence should be expressly charged on the face of the indictment. It will be sufficient if the offence charged must of necessity include it. Per Richards, C.J., R. v. Smith (1874), 34 U.C.Q.B. 552, following R. v. Bird (1850), 5 Cox C.C. 1, 2 Den. C.C. 94.

An indictment for rape includes the lesser charge of assault, and a verdict thereon of guilty of common assult is properly followed by a conviction although the information was laid more than six months after the offence was committed. R. v. Edwards (1898), 2 Can. Cr. Cas. 96 (Ont.).

The essential elements of the offence of receiving stolen goods are not included in the offence of "housebreaking and theft," and a conviction for receiving stolen goods cannot be rendered on the summary trial of a person charged only with housebreaking and theft. R. v. Lamoureux (1900), 4 Can. Cr. Cas. 101 (Que.).

As to what constitutes an attempt to commit an offence see sec. 64.

An assault with intent to commit an offence is an attempt to commit such an offence. R. v. John (1888), 15 Can. S.C.R. 384.

714. On indictment for murder conviction may be of concealment of birth.—If any person tried for the murder of any child is acquitted thereof the jury by whose verdict such person is acquitted may find, in case it so appears in evidence, that the child had recently been born, and that such person did, by some secret disposition of such child or of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the court may pass such sentence as if such person had been convicted upon an indictment for the concealment of birth. R.S.C. c. 174, s. 188.

The offence of "concealment of birth" is dealt with by sec. 240, which provides that "every one is guilty of an indictable offence and liable to two years' imprisonment who disposes of the dead body of any child in any manner, with intent to conceal the fact that its mother was delivered of it, whether the child died before or during or after birth."

(Amendment of 1901.)

714A. Cattle frauds.—When an offence under section 331 is charged and not proved, but the evidence establishes an offence under section 331A, the accused may be convicted of such latter offence and punished accordingly.

See secs. 331 and 331A.

715. Trial of joint receivers.—If, upon the trial of two or more persons indicted for jointly receiving any property, it is proved that one or more of such persons separately received any part or parts of such property, the jury may convict, upon such indictment, such of the said persons as are proved to have received any part or parts of such property. R.S.C. c. 174, s. 200.

See notes to secs. 314 and 317.

716. Proceedings against receivers.—Wheh proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings, that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property which forms the subject of the proceedings taken against him to be stolen: Provided, that not less than three days' notice in writing has been given to the person accused that proof is intended to be given of such other property, stolen within the preceding period of twelve months, having been found in his possession; and such notice shall specify the nature or description of such other property, and the person from whom the same was stolen. R.S.C. c. 174, s. 203.

Finding other stolen goods in receiver's possession.]—This section does not apply to admit proof in respect of other property stolen within the twelve months and disposed of by the prisoner; it must be found in his possession at the time when he was found in possession of the property in respect of which the charge is laid. R. v. Carter (1884), 12 Q.B.D. 522; R. v. Drage (1878), 14 Cox 85; although other stolen property could be shewn to have been disposed of by him within that period at half its value. R. v. Drage (1878), 14 Cox C.C. 85.

This section is similar to the Imperial Act, 34-35 Viet., ch. 112, sec. 19. It would appear not to extend to admit such evidence in respect of a charge of theft although joined in the same indictment with a charge of receiving. In such a case arising under the English statute the prosecution was not allowed, on an indictment charging both stealing and receiving, to give evidence of other stolen property found in the prisoner's possession at the same time as that which was the subject of the indictment. Anon. June 22nd, 1898, 33 L.J. (Eng.) 365.

Apart from the provisions of this section other instances of receiving similar goods which had been stolen from the *same* party may be proved. R. v. Dunn (1826), 1 Mood. C.C. 146; R. v. Davis (1833), 6 C. & P. 177; R. v. Nicholls (1858), 1 F. & F. 51.

And see notes to secs. 314 and 317.

717. The same after previous conviction.—When proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then, if such person has, within five years immediately preceding, been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was

proved to be in his possession to have been stolen: Provided, that not less than three days' notice in writing has been given to the person accused that proof is intended to be given of such previous conviction; and it shall not be necessary, for the purposes of this section, to charge in the indictment the previous conviction of the person so accused. R.S.C. c. 174, s. 204.

Service of the notice and proof of a previous conviction does not, however, dispense with the necessity of proving that the prisoner knew that the goods had been stolen, but is merely a circumstance to be taken into consideration in conjunction with other evidence tending to prove guilty knowledge. R. v. Davis (1870), L.R. 1 C.C.R. 272.

718. Trial for coinage offences.—Upon the trial of any person accused of any offence respecting the currency or coin, or against the provisions of Part XXXV., no difference in the date or year, or in any legend marked upon the lawful coin described in the indictment, and the date or year or legend marked upon the false coin counterfeited to resemble or pass for such lawful coin, or upon any die, plate, press, tool or instrument used, constructed, devised, adapted or designed for the purpose of counterfeiting or imitating any such lawful coin, shall be considered a just or lawful cause or reason for acquitting any such person of such offence; and it shall, in any case, be sufficient to prove such general resemblance to the lawful coin as will show an intention that the counterfeit should pass for it. R.S.C. c. 174, s. 205.

See secs. 460 et seq.

719. Verdict in libel case. — On the trial of any indictment or information for the making or publishing of any defamatory libel, on the plea of not guilty pleaded, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed, by the court or judge before whom such indictment or information is tried, to find the defendant guilty merely on the proof of publication by such defendant of the paper charged to be a defamatory libel, and of the sense ascribed to the same in such indictment or infomation; but the Court or Judge before whom such trial is had shall, according to the discretion of such Court or Judge, give the opinion and direction of such Court or Judge to the jury on the matter in issue as in other criminal cases; and the jury may, on such issue, find a special verdict if they think fit so to do; and the defendant, if found guilty, may move in

arrest of judgment on such ground and in such manner as he might have done before the passing of this Act. R.S.C. c. 174, s. 152.

This section originated in the English Act of 1792, 32 Geo. III. ch. 60 which became part of the law of the Province of Canada. Under it, it is for the jury to say whether, under the facts proved, there is libel and whether the defendant published it. R. v. Dougall (1874), 18 L.C. Jur. 85.

And see secs. 301 and 302 as to the punishment for defamatory libel.

720. Impounding documents.—Whenever any instrument which has been forged or fraudulently altered is admitted in evidence the Court or the Judge or person who admits the same may, at the request of any person against whom the same is admitted in evidence, direct that the same shall be impounded and be kept in the custody of some officer of the Court or other proper person for such period and subject to such conditions, as to the Court, Judge or person admitting the same seems meet. R.S.C. c. 174, s. 208.

Documents filed as exhibits in a civil case may be impounded on the application of the Crown if a charge of forgery is laid in respect thereof. Couture v. Fortier, 7 Que. S.C. 197.

721. Destroying counterfeit coin.—If any false or counterfeit coin is produced on any trial for an offence against Part XXXV., the Court shall order the same to be cut in pieces in open Court, or in the presence of a justice of the peace, and then delivered to or for the lawful owner thereof, if such owner claims the same. R.S.C. c. 174, s. 209.

722. View by jury.—On the trial of any person for an offence against this Act, the Court may, if it appears expedient for the ends of justice, at any time after the jurors have been sworn to try the case and before they give their verdict, direct that the jury shall have a view of any place, thing or person, and shall give directions as to the manner in which, and the persons by whom, the place, thing or person shall be shewn to such jurors, and may for that purpose adjourn the trial and the costs occasioned thereby shall be in the discretion of the court. R.S.C. c. 174, s. 171.

2. When such view is ordered, the Court shall give such directions as seem requisite for the purpose of preventing undue communication with such jurors: Provided that no breach of any such directions shall affect the validity of the proceedings. R.S.C. c. 174, s. 171.

View by jury.]—Taking a view of the locality of the offence is receiving evidence, in a sense, and the prisoner's counsel should have the opportunity of attending. R. v. Petrie (1890), 20 O.R. 317, 324. In that case the prisoner was indicted for feloniously displacing a railway switch and was tried by a judge without a jury under the "Speedy Trials Act." After hearing the evidence and the speeches of counsel the judge reserved his decision, and before giving it he examined the switch in question, neither the prisoner, nor any one on his behalf being present; it was held that there was no authority for the judge acting under that statute to take a view of the place, and that the manner of his doing so (in the absence of the prisoner) was unwarranted and the conviction was quashed.

The judge may adjourn the court to enable the jury to have the view, even after the summing up; but the jury must not communicate with the witnesses during such view. R. v. Martin (1881), 12 Cox C.C. 204.

On an indictment for theft the court usually insists upon the stolen property, if found, being produced before the jury unless it is of a perishable nature, or its exhibition would be inconvenient or offensive. Best Evid., s. 197; Phipson Evid., 2nd ed., 4.

723. Variance and amendment.—If on the trial of indictment there appears to be a variance between the evidence given and the charge in any count in the indictment, either as found or as amended, or as it would have been if amended in conformity with any particular supplied as provided in ss. 615 and 617, the Court before which the case is tried may, if of opinion that the accused has not been misled or prejudiced in his defence by such variance, amend the indictment or any count in it or any such particular so as to make it conformable with the proof.

2. If it appears that the indictment has been preferred under some other Act of Parliament instead of under this Act, or under this instead of under some other Act, or that there is in the indictment, or in any count in it, an omission to state or a defective statement of anything requisite to constitute the offence, or an omission to negative any exception which ought to have been negatived, but that the matter omitted is proved by the evidence, the Court before which the trial takes place, if of opinion that the accused has not been misled or prejudiced in his defence by such error or omission, shall amend the indictment or count as may be necessary.

3. The trial in either of these cases may then proceed in all respects as if the indictment or count had been originally framed as amended: Provided that if the Court is of opinion that the accused has been misled or prejudiced in his defence by any such variance, error, omission or defective statement, but that the effect of such misleading or prejudice might be removed by adjourning or postponing the trial, the Court may in its dis-

cretion make the amendment and adjourn the trial to a future day in the same sittings, or discharge the jury and postpone the trial to the next sittings of the Court, on such terms as it thinks just.

4. In determining whether the accused has been misled or prejudiced in his defence the Court which has to determine the question shall consider the contents of the depositions, as well as the other circumstances of the case.

5. Provided that the propriety of making or refusing to make any such amendment shall be deemed a question for the Court, and that the decision of the Court upon it may be reserved for the Court of Appeal, or may be brought before the Court of Appeal like any other decision on a point of law. R.S.C. c. 174, ss. 237, 238, 239.

Amendment of indictment.]—The court may, at the trial, amend an indictment if the amendment does not change the character or nature of the charge, and if the accused cannot be prejudiced by the change either as regards the evidence applicable or the defence raised. If the amendment asked would substitute a different transaction from that first alleged, or would render a different plea necessary, it ought not to be made. R. v. Weir (No. 3), 3 Can. Cr. Cas. 262 (Que.).

But, on an indictment for perjury alleged to have been committed on a trial for burning a barn, an amendment was allowed to charge that such trial was for firing a stack. R. v. Neville (1852), 6 Cox C.C. 69.

Where the ownership of stolen property is wrongly stated an amendment may be allowed. R. v. Vincent (1852), 2 Den. 464; R. v. Marks (1866), 10 Cox C.C. 367. And on a charge of theft of money the amount thereof may be amended to conform with the evidence. R. v. Gumble (1872), L.R. 2 C.C.R. 1.

When the false pretence in a charge of obtaining money under false pretences was erroneously laid in the indictment as being that there was in store "a large quantity of beans, to wit, 2,680 bushels of beans," instead of that there were in store "2,680 bushels of beans," as appeared from the depositions taken on the preliminary inquiry, the trial judge may allow an amendment of the indictment to conform with the proof. Although upon the indictment in its original form the charge would be merely upon a false pretence that there was in store "a large quantity of beans," and the number of bushels would not be required to be proved, the variance by reason of the amendment is not such as would mislead or prejudice the accused in his defence. R. v. Patterson (1895), 2 Can. Cr. Cas. 339 (Ont.).

A person may be described either by his real name or by that by which he is usually known. R. v. Norton (1823), R. & R. 510; R. v. Williams (1836), 7 C. & P. 298.

If there be several different species of goods enumerated on a charge of theft and the prosecutor prove theft of any one or more it will be sufficient, although he fails in his proof of the rest, except in a case where value is essential to constitute the offence and the value is ascribed to all the articles collectively but not separately, in which case an amendment would seem to be essential. R. v. Forsyth (1814), R. & R. 274.

The day and year on which the acts charged are alleged to have occurred are not, in general, material to an indictment. Archbold Cr. Pl. (1900) 272. But when the precise date of any fact is necessary to ascertain and deter-

mine with precision the offence charged, or the matter alleged in excuse or justification, any variance between it and the evidence will be fatal unless amended. Ibid.

In a charge of burglary, the offence must be proved to have been committed in the night time, although it may be proved to have been committed on any other day previous to the preferring of the indictment. R. v. Brown (1828), M. & M. 315.

Where the place at which the offence is alleged to have been committed is stated as matter of local description and not as venue merely, an amendment should be made if there is a variance between the description in the indictment and the evidence. 3 Russ. Cr. 6th ed., 436. So on a charge of burglary, a variance between the indictment and evidence in the name of the place where the house is situate or in any other description given of it may be fatal unless amended. R. v. St. John (1839), 9 C. & P. 40; 1 Taylor Evid., 9th ed., 209.

The amendment must be made before verdict; R. v. Frost (1855), Dears, 474; R. v. Larkin (1854), Dears. 365; but it is doubtful whether it can be made after the prisoner's counsel has addressed the jury; R. v. Rymes (1853), 3 C. & K. 326; but see R. v. Fullarton (1853), 6 Cox C.C. 194.

See also sec. 629.

724. Amendment to be endorsed on the record.—In case an order for amendment as provided for in the next preceding section is made it shall be endorsed on the record; and all other rolls and proceedings connected therewith shall be amended accordingly by the proper officer and filed with the indictment, among the proper records of the Court. R.S.C. c. 174, s. 240.

725. Form of formal record in such case.—If it becomes necessary to draw up a formal record in any case in which an amendment has been made as aforesaid, such record shall be drawn up in the form in which the indictment remained after the amendment was made, without taking any notice of the fact of such amendment having been made. R.S.C. c. 174, s. 243.

726. Form of record of conviction or acquittal.—In making up the record of any conviction or acquittal on any indictment it shall be sufficient to copy the indictment with the plea pleaded thereto, without any formal caption or heading; and the statement of the arraignment and the proceedings subsequent thereto shall be entered of record in the same manner as before the passing of this Act, subject to any such alterations in the forms of such entry as are, from time to time, prescribed by any rule or rules of the superior Courts of criminal jurisdiction respectively—which rules shall also apply to such inferior Courts of criminal jurisdiction as are therein designated. R.S.C. c. 174, s. 244.

As to pleas of autrefois acquit and autrefois convict, see sec. 631; and as to certifying the indictment and proceedings thereon, see note to sec. 654.

727. Jury retiring to consider verdict.—If the jury retire to consider their verdict they shall be kept under the charge of an officer of the Court in some private place, and no person other than the officer of the Court who has charge of them shall be permitted to speak or to communicate in any way with any of the jury without the leave of the Court.

2. Disobedience to the directions of this section shall not affect the validity of the proceedings: Provided that if such disobedience is discovered before the verdict of the jury is returned the Court, if it is of opinion that such disobedience has produced substantial mischief, may discharge the jury and direct a new jury to be sworn or empanelled during the sitting of the Court, or postpone the trial on such terms as justice may require.

"A jury after retiring may desire to ask a question of the court for their satisfaction, and it shall be granted so it be in open court," Hale P.C., p. 296. But it is not unlawful, though it is inadvisable, for a judge to proceed to the jury-room, on the request of the jury for further instruction, and to there give further directions in presence of the prisoner and sheriff, the Crown counsel being absent. Greer v. R. (1892), 2 B.C.R. 112.

Before the Code the effect of allowing the jury to go at large in a charge of felony was to nullify the trial. R. v. Denick (1879), 2 Leg. News, (Montreal), 214. (Dorion, C.J., Monk, Ramsay, Tessier and Cross, JJ.)

It was held in 1886 by the Supreme Court of British Columbia that in that province a prisoner is not entitled as of right to have the jury polled; and that the trial court properly refused a poll where it saw nothing to create a doubt as to the concurrence of the whole jury. Sproule v. R. (1886), 1 B.C.R. pt. 2, p. 219 (same case sub. nom. Re Sproule in S.C. of Canada, 12 Can. S.C.R. 140); and see R. v. McClung, 1 N.W.T. Rep. pt. 4. p. 1.

Where during a trial an adjournment is ordered the court may if it thinks fit direct that during the adjournment the jury shall be kept together and proper provision made for preventing the jury from holding communication with any one on the subject of the trial. Sec. 673 (3). Such direction is obligatory in capital cases. Ibid.

728. Jury unable to agree.—If the Court is satisfied that the jury are unable to agree upon their verdict, and that further detention would be useless, it may in its discretion discharge them and direct a new jury to be empanelled during the sittings of the Court, or may postpone the trial on such terms as justice may require.

2. It shall not be lawful for any Court to review the exercise of this discretion.

See note to sec. 675.

(Amendment of 1900).

729. Verdict, etc., on holiday. —The taking of the verdict of the jury or other proceeding of the Court shall not be invalid by reason of its happening on Sunday or on any other holiday.

The amendment is in the addition of the words "or any other holiday" at the end of the section. It was intended to remove doubt as to the validity of proceedings in jury cases, the trial of which continues until after midnight of a day preceding a statutory holiday.

In Manitoba it has been held that sec. 729 applies only to matters before a jury and not to a preliminary enquiry before a magistrate. R. v. Cavelier (1896), 1 Can. Cr. Cas. 134. In Ontario it has been held that a preliminary inquiry held by a magistrate and a commitment made thereon on a statutory holiday are invalid. R. v. Murray (1897), 1 Can. Cr. Cas. 452.

Sundays and holidays.]—This section is to be applied only to matters before a jury. The conduct of a preliminary inquiry before a magistrate is a judicial proceeding which cannot be legally taken on Sunday. R. v. Cavelier (1896), 1 Can. Cr. Cas. 134 (Man.); Re Cooper, 5 Ont. P.R. 256.

A preliminary inquiry held by a magistrate and a commitment for trial made on a statutory holiday are bad in law; but if after such commitment the accused elects to be tried at the County Judge's Criminal Court and pleads there to the charge and is convicted, the conviction is not invalidated because of the invalidity of the commitment for trial. R. v. Murray (1897), 1 Can. Cr. Cas. 452 (Ont.).

At common law Sunday was a dies non juridicus, and all judicial proceedings on that day were therefore void. 2 Coke's Inst. 264-5, 1 Bishop on Crim. Proc., sec. 207.

Only ministerial acts, and not acts which are judicial could be legally performed in court on a Sunday, and the taking of a verdict is a judicial act, for it might be a verdict which could not be received being bad in law, or it might be a special verdict which required the guidance of the judge in framing it. R. v. Winsor (1866), 10 Cox C.C. 276, 305, 322.

The court will take judicial notice that a certain day was Sunday. Wharton on Evidence, 3rd ed., sec. 335; Tutton v. Darke, 5 H. & N. 645; Hanson and Shackelton, 4 Dowl, 48; Pearson v. Shaw, 7 Ir. L.R. 1.

730. Woman sentenced to death while pregnant. —If sentence of death is passed upon any woman she may move in arrest of execution on the ground that she is pregnant. If such a motion is made the Court shall direct one or more registered medical practitioners to be sworn to examine the woman in some private place, either together or successively, and to inquire whether she is with child of a quick child or not. If upon the report of any of them it appears to the Court that she is so with child execution shall be arrested till she is delivered of a child, or until it is no longer possible in the course of nature that she should be so delivered.

731. Jury de ventre inspicendo abolished.—After the commencement of this Act no jury de ventre inspiciendo shall be empanelled or sworn.

732. Stay of proceedings.—The Attorney-General may, at any time after an indictment has been found against any person for any offence, and before judgment is given thereon, direct the officer of the Court to make on the record an entry that the proceedings are stayed by his direction, and on such entry being made all such proceedings shall be stayed accordingly.

2. The Attorney-General may delegate such power in any particular Court to any counsel nominated by him.

Nolle prosequi.]—This section provides a procedure which is substantially the same as that formerly known as nolle prosequi. It may be taken in lieu of an application by the Crown to discharge the recognizances of the prosecutor and witnesses. R. v. Treakley (1852), 6 Cox C.C. 75.

The Attorney-General may stay the proceedings ex parte and without calling on the prosecutor to shew cause why he should not do so. R. v. Allen (1862), 1 B. & S. 850.

A stay is proper where any improper and vexatious attempts are made to oppress the defendant, as by repeatedly preferring defective indictments for the same supposed offence; 1 W. Bl. 545; or if it be clear that an indictment is not sustainable against the defendant. 1 Chitty Cr. Law 479. It was also commonly granted in cases of misdemeanor where a civil action was depending for the same cause. R. v. Fielding (1759), 2 Burr. 719; Jones v. Clay (1798), 1 B. & P. 191.

The party accused will remain liable to be again indicted upon the charge. Archbold Cr. Pl. (1900), 127.

733. Motion in arrest of judgment on verdict of guilty.—If the jury find the accused guilty, or if the accused pleads guilty, the Judge presiding at the trial shall ask him whether he has anything to say why sentence should not be passed upon him according to law: but the omission so to ask shall have no effect on the validity of the proceedings.

2. The accused may at any time before sentence move in arrest of judgment on the ground that the indictment does not (after any amendment which the Court is willing to and has power to make) state any indictable offence.

3. The Court may in its discretion either hear and determine the matter during the same sittings or reserve the matter for the Court of Appeal as herein provided. If the Court decides in favour of the accused, he shall be discharged from that indictment. If no such motion is made, or if the Court decides against the accused upon such motion, the Court may sentence the accused during the sittings of the Court, or the Court may in its discretion discharge him on his own recognizance, or on that of such sureties as the Court thinks fit, or both, to appear and receive judgment at some future Court or when called upon. If sentence is not passed during the sitting,

the Judge of any superior Court before which the person so convicted afterwards appears or is brought, or if he was convicted before a Court of general or quarter sessions, the Court of general or quarter sessions at a subsequent sitting may pass sentence upon him or direct him to be discharged.

4. When any sentence is passed upon any person after a trial had under an order for changing the place of trial, the Court may in its discretion, either direct the sentence to be carried out at the place where the trial was had or order the person sentenced to be removed to the place where his trial would have been had but for such order, so that the sentence may be there carried out.

Arrest of judgment.]—A motion in arrest of judgment is not the proper manner to raise the question of jurisdiction, for such a motion can only avail when the indictment does not state any indictable offence. R. v. Hogle (1896), 5 Can Cr. Cas. 53 (Que.).

If a defendant omit to challenge a juror on the ground that such juror entertains a hostile feeling against him, he cannot, after a verdict of guilty, ask on that ground to have the verdict quashed and for a new trial. R. v. Harris (1898), 2 Can. Cr. Cas. 75 (Que.).

When a defendant and one of the impanelled jurors have had an unpremeditated and innocent conversation, which could not bias the juror's opinion nor affect his mind and judgment, although such conversation is improper, it cannot have the effect of avoiding the verdict and constituting ground for a new trial. Ibid.

An indictment for stealing under a power of attorney which charges that the money appropriated was the proceeds of a sale made by the defendant while acting under a power of attorney will not be quashed for failure to allege that the power of attorney was one for the sale or disposition of property (sec. 309), but particulars will be ordered as to the date, nature or purport of the alleged power of attorney. The defect, being only a partial one, was cured by verdict, and cannot be given effect to upon a motion in arrest of judgment. R. v. Fulton (1900), 5 Can. Cr. Cas. 36 (Que.).

That a jury may correct their verdict, or that any of them may withhold assent and express dissent therefrom at any time before it is finally entered and confirmed is clear from numerous authorities; and the judge presiding over a criminal court cannot be too cautious in being assured that, when a result so serious to the party accused as a verdict of guilty is arrived at, all the jury understand the effect and concur in the decision; and if at any moment, before it is too late, anything occurs to excite suspicion on this subject, he should carefully assure himself that there is no misapprehension in the matter. R. v. Ford (1853), 3 U.C.C.P. 209, 217, per Macaulay, C.J.

There is no legislative authority for amending the verdict of a jury in a criminal case, though an erroneous judgment may be in certain cases made right, when the case is being reviewed in a court of appeal. R. v. Ewing (1862), 21 U.C.Q.B. 523.

Where the misconduct of a jury can be so far impeached as to warrant the court in interposing to relieve against the verdict, application should be made to stay the judgment, for, after sentence pronounced, judgment cannot be arrested. R. v. Smith (1853), 10 U.C.Q.B. 99; R. v. Justices of Leicestershire, 1 M. & S. 442.

734. Judgment not to be arrested for formal defects.—Judgment, after verdict upon an indictment for any offence against this Act shall not be stayed or reversed for want of a similiter—nor by reason that the jury process has been awarded to a wrong officer, upon an insufficient suggestion—nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors—nor because any person has served upon the jury who was not returned as a juror by the sheriff or other officer; and where the offence charged is an offence created by any statute, or subjected to a greater degree of punishment by any statute, the indictment shall, after verdict, be held sufficient, if it describes the offence in the words of the statute creating the offence, or prescribing the punishment, although they are disjunctively stated or appear to include more than one offence, or otherwise. R.S.C. c. 174, s. 246.

See note to preceding section.

(Amendment of 1893).

735. Verdict not to be impeached for certain omissions as to jurors.—No omission to observe the directions contained in any Act as respects the qualification, selection, balloting or distribution of jurors, the preparation of the jurors' book, the selecting of jury lists, the drafting panels from the jury lists or the striking of special juries, shall be a ground for impeaching any verdict, or shall be allowed for error upon any appeal to be brought upon any judgment rendered in any criminal case. R.S.C. c. 174, s. 247, amended.

This section does not cure defects in the procedure by which the jury is chosen from the panel returned. R. v. Boyd (1896), R.J.Q. 2 Q.B. 284.

A panel returned contained the names of Robert Grant and Robert Crane, and Robert Grant was called but Robert Crane by mistake answered to the name and was sworn without challenge. Before the jury left the box the mistake was discovered. It was held that a conviction was invalid because the prisoner had not had an opportunity to challenge Robert Crane. R. v. Feore (1877), 3 Que. Law Rep. 219.

It has long been an established rule of law that no affidavit of a juror or of what a juror has said can be received for the purpose of upsetting the verdict of a jury. R. v. Lawson (1881), 2 P.E.I. Rep. 403 (following Lord Mansfield in Owen v. Warburton, 1 N.R. 326, and Lord Abinger and Parke and Alderson, BB., in Straker v. Graham, 3 M. & W. 721.

736. Insanity of accused at time of evidence.—Whenever it is given in evidence upon the trial of any person charged with any indictable offence, that such person was insane at the time of the commission of such offence, and such person

is acquitted, the jury shall be required to find, specially, whether such person was insane at the time of the commission of such offence, and to declare whether he is acquitted by it on account of such insanity; and if it finds that such person was insane at the time of committing such offence, the Court before which such trial is had, shall order such person to be kept in strict custody in such place and in such manner as to the Court seems fit, until the pleasure of the Lieutenant-Governor is known.

As to insanity as a ground of defence to a criminal charge, see sec. 11 and note to same.

737. Insanity of accused on arraignment or trial.—If at any time after the indictment is found, and before the verdict is given, it appears to the Court that there is sufficient reason to doubt whether the accused is then, on account of insanity, capable of conducting his defence, the Court may direct that an issue shall be tried whether the accused is or is not then on account of insanity unfit to take his trial.

2. If such issue is directed before the accused is given in charge to a jury for trial on the indictment such issue shall be tried by any twelve jurors. If such issue is directed after the accused has been given in charge to a jury for trial on the indictment such jury shall be sworn to try this issue in addition to that on which they are already sworn.

3. If the verdict on this issue is that the accused is not then unfit to take his trial the arraignment or the trial shall proceed as if no such issue had been directed. If the verdict is that he is unfit on account of insanity the Court shall order the accused to be kept in custody till the pleasure of the Lieutenant-Governor of the Province shall be known, and any plea pleaded shall be set aside and the jury shall be dicharged.

4. No such proceeding shall prevent the accused being afterwards tried on such indictment. R.S.C. c. 174, ss. 252 and 255.

See sec. 11.

738. Custody of persons formerly acquitted for insanity.—If any person before the passing of this Act, whether before or after the first day of July, one thousand eight hundred and sixty-seven, was acquitted of any such offence on the ground of insanity at the time of the commission thereof, and has been detained in custody as a dangerous person by order

of the Court before which such person was tried, and still remains in custody, the Lieutenant-Governor may make a like order for the safe custody of such person during pleasure. R.S.C. c. 174, s. 254.

739. Insanity of person to be discharged for want of prosecution.—If any person charged with an offence is brought before any Court to be discharged for want of prosecution, and such person appears to be insane, the Court shall order a jury to be empanelled to try the sanity of such person, and if the jury so empanelled finds him insane, the Court shall order such person to be kept in strict custody, in such place and in such manner as to the Court seems fit, until the pleasure of the Lieutenant-Governor is known. R.S.C. c. 174, s. 256.

740. Custody of insane person.—In all cases of insanity so found, the Lieutenant-Governor may make an order for the safe custody of the person so found to be insane, in such place and in such manner as to him seems fit. R.S.C. c. 174, ss. 253 and 257.

741. Insanity of person imprisoned. — The Lieutenant-Governor, upon such evidence of the insanity of any person imprisoned in any prison other than a penitentiary for an offence, or imprisoned for safe custody charged with an offence, or imprisoned for not finding bail for good behaviour or to keep the peace, as the Lieutenant-Governor considers sufficient, may order the removal of such insane person to a place of safe keeping; and such person shall remain there, or in such other place of safe keeping, as the Lieutenant-Governor from time to time orders, until his complete or partial recovery is certified to the satisfaction of the Lieutenant-Governor, who may then order such insane person back to imprisonment, if then liable thereto, or otherwise to be discharged. R.S.C. c. 174, s. 258.

PART LII.

APPEAL.

SECT.

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742. Appeal in criminal cases.—An appeal from the verdict or judgment of any Court or Judge having jurisdiction in criminal cases, or of a magistrate proceeding under s. 785, on the trial of any person for an indictable offence, shall lie upon the application of such person if convicted, to the Court of Appeal in the cases hereinafter provided for, and in no others.

2. Whenever the judges of the Court of Appeal are unanimous in deciding an appeal brought before the said Court their decision shall be final. If any of the judges dissent from the opinion of the majority, an appeal shall lie from such decision to the Supreme Court of Canada as hereinafter provided.

Criminal appeals.]—The general rule is laid down by Anson (Law of the Constitution II. 445) as follows: "The Queen has authority by virtue of the prerogative to review the decisions of all colonial courts, whether the proceedings be of a civil or criminal nature, unless Her Majesty has parted with such authority." But no appeal lies to the Privy Council in criminal cases, for sec. 751 of the Code enacts that "notwithstanding any royal prerogative, or anything contained in the Interpretation Act or in the Supreme and Exchequer Courts Act, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any Court of Appeal or authority, by which in the United Kingdom appeals or petitions to Her Majesty in Council may be heard."

The Canadian legislation respecting Crown Cases Reserved is borrowed from the Imperial Statute, 11 & 12 Vict. ch. 78, which enacts, like ours, that when any person has been convicted, any question of law which may have arisen on the trial may be reserved. Harris, in commenting on this statute (p. 451), says that a point may be reserved, provided, of course, that a conviction has taken place, for otherwise there is no need for further consideration; and Shirley, in his sketch of Criminal Law, p. 118, says: "If

the judge thinks that the objection is one entitled to considerable weight and that his own opinion may possibly not be the correct one on the subject, he will, at the request of the prisoner's counsel, reserve the point and let the case go to the jury. If the jury then convict, sentence will be postponed till after the point of law has been decided. Of course, if the jury acquit on the merits, nothing more is heard of the point of law."

Any question of law which has arisen on the trial or any of the proceedings preliminary, subsequent or incidental to the trial, may be reserved either during or after the trial, and when a question is reserved during the trial, the case proceeds, and when a verdict of guilty is rendered or a conviction is pronounced, the judge prepares a case and transmits it to the Court of Appeal. There must have been a trial, an adverse ruling or judgment on a question of law, and a verdict of guilty or a conviction to give jurisdiction to the Court of Appeal. R. v. Lalanne (1879), 13 Montreal Legal News 16; and a verdict of guilty or a conviction is, under the provisions of this section, a condition precedent to the right of appeal, by an accused person from a ruling or judgment on a question of law.

The dictum of Lord Campbell in the case of R. v. Faderman (1850), 1 Den. 573, gives the reason why there must be a ruling or judgment on the question of law raised: "If judgment," he said, "has not been given, we have nothing to consider, for we only sit here to consider something which has been decided, not to give advice prior to a decision by some other tribunal."

A reserved case cannot be had where there has been neither trial nor verdict of guilty, nor conviction; and when a question of law has been reserved during a trial and there is an acquittal, the reservation is no longer of any utility and lapses. R. v. Trepanier (1901), 4 Can. Cr. Cas. 259; (Que.); R. v. Paxton, 2 L.C.L.J. 160.

After a conviction on indictment by a court having general jurisdiction over the offence charged, a writ of habeas corpus is an inappropriate remedy. Re R. E. Sproule (1886), 12 Can. S.C.R. 140. And by sec. 743 no proceeding "in error" shall be taken in any criminal case begun after the Criminal Code.

Even before the Code a writ of error did not lie in cases of summary conviction, R. v. Powell (1861), 21 U.C.Q.B. 215.

The appeal from a summary conviction under the Seamen's Act of Canada for harboring and secreting a deserting seaman is under section 879 and not under this section (742), 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 King's Bench of that province. R. v. O'Dea (1899), 3 Can. Cr. Cas. 402 (Que).

Except where specially authorized by statute, an appeal does not lie in Ontario to the Court of Appeal from an order of the High Court of Justice quashing a summary conviction made under a provincial statute. R. v. Cushing (1899), 3 Can. Cr. Cas. 306 (Ont. C.A.).

A magistrate trying a charge of theft of goods of the value of less than $10 under the summary trials procedure (Code sec. 783 and 786) with the consent of the accused, is not a "court or judge having jurisdiction in criminal cases" within sec. 742 allowing an appeal by way of a case reserved. R. v. Hawes (1900), 4 Can. Cr. Cas. 529 (N.S.).

Appeals to Supreme Court of Canada.]—The right of appeal in criminal cases to the Supreme Court of Canada from the decision of a Court of Criminal Appeal is restricted to cases where the conviction has been affirmed by the Court of Appeal, and then only in case one or more of the judges of the latter court has dissented from the decision of the majority of the court. If by the decision of the Court of Appeal, the conviction is set aside and a new trial ordered, there is no appeal therefrom to the Supreme Court of Canada. Vlau v. R., 2 Can. Cr. Cas. 540 (S.C.C.).

The dissent from the "opinion" of the majority (Code 742) by any of the judges of the Court of Appeal which is necessary in order to confer the right of a further appeal to the Supreme Court of Canada has reference to the "decision" or "judgment" of such majority in affirmance of a conviction (Code 750); and where a majority of the Court of Appeal in directing a new trial also expressed their concurrence (two of them dissenting) with that part of the decision appealed from by which it was held that certain evidence was properly admitted, the latter decision was held to be not reviewable by the Supreme Court of Canada. Ibid.

Where on a criminal trial a motion for a reserved case made on two grounds is refused and on appeal the Appellate Court unanimously affirms the decision of the trial judge as to one of such grounds but not as to the other, an appeal to the Supreme Court of Canada can only be based on the one as to which there was a dissent. McIntosh v. R. (1894), 23 Can. S.C.R. 180.

743. Reserving questions of law.—No proceeding in error shall be taken in any criminal case begun after the commencement of this Act:

2. The court before which any accused person is tried may, either during or after the trial, reserve any question of law arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the Judge, for the opinion of the Court of Appeal in manner hereinafter provided.

3. Either the prosecutor or the accused may during the trial either orally or in writing apply to the Court to reserve any such question as aforesaid, and the Court, if it refuses so to reserve it, shall nevertheless take a note of such objection.

4. After a question is reserved the trial shall proceed as in other cases.

5. If the result is a conviction, the Court may in its discretion respite the execution of the sentence or postpone sentence till the question reserved has been decided, and shall in its discretion commit the person convicted to prison or admit him to bail with one or two sufficient sureties, in such sums as the Court thinks fit, to surrender at such time as the Court directs.

6. If the question is reserved, a case shall be stated for the opinion of the Court of Appeal.

Reserved case.]—The provisions relating to Crown cases reserved are founded upon the Canadian Statute, 14-15 Vict., ch. 13, which was substantially a transcript of the Imperial Act, 11-12 Vict., ch. 78. R. v. Gibson (1889), 16 Ont. R. 704.

A case may be reserved for the opinion of the court after verdict. R. v. Patterson, 36 U.C.Q.B. 129; R. v. Corcoran (1876), 26 U.C.C.P. 134.

The general rule in civil cases where there is a jury is not to entertain a motion for a new trial upon a ground of misdirection or nondirection, unless the particular point in controversy was raised at the trial and pressed upon the consideration of the judge. The rule rests upon considerations of convenience and good sense, which are as much applicable to a criminal as a civil trial,

especially when the parties to the litigation are represented by counsel. R. v. Fick, 16 U.C.C.P. 379; R. v. Wilkinson (1878), 42 U.C.Q.B. 492, 500; R. v. Seddons, 16 U.C.C.P. 389. But see contra R. v. Theriault (1894), 2 Can. Cr. Cas. 444, 460 (N.B.), a manslaughter case, in which Hanington, J., said: "In such cases as the present the aim of the court as well as of the Crown should be to see that the prisoner has a full and complete trial and that a conviction is based on such points as reasonably arise upon the evidence; and it appears to me that if a most important and substantial ground of defence clearly disclosed by the evidence is not submitted to the jury, justice demands that such a conviction shall not stand." See also R. v. Bain (1877), 23 L.C. Jur. 327, infra.

Notice of an application by the Crown for a new trial, and of the hearing of a case reserved on the Crown's application where the accused has been acquitted at the trial, should be served upon the accused personally. The authority of the solicitor acting for the accused in the trial proceedings is prima facie to be presumed to have terminated upon the latter's acquittal; and proof of service upon the solicitor is insufficient in the absence of evidence rebutting such presumption. R. v. Williams (1897), 3 Can. Cr. Cas. 9 (Ont.).

A case reserved at the instance of the accused may at his request be amended during the argument thereon by adding the evidence taken at the trial. R. v. Bain (1877), 23 L.C. Jur. 327; R. v. Ross (1884), Montreal L.R. 1 Q.B. 227.

On the hearing of a reserved case it is not necessary that the prisoner should be present, and he may be kept locked up in gaol to prevent his being present while his case is being argued. R. v. Glass (1877), 21 L.C. Jur. 245, 1 Montreal Leg. News 212.

A reserved case may be granted at any time, however remote from the date of the trial or judgment, if it is still possible that some beneficial result may accrue to the prisoner by a decision in his favour. R. v. Paquin (1898), 2 Can. Cr. Cas. 134.

Whether or not the judge presiding at the trial had jurisdiction to summarily try the defendants is a "question of law" and may be the subject of a reserved case. Ibid.

A reserved case should not be granted by the trial judge unless he has some doubt in the matter upon which it is suggested that a question be reserved for the opinion of a Court of Appeal. R. v. Létang (1899), 2 Can. Cr. Cas. 505 (Que.).

Any question of law.]—A question depending upon the weight of evidence cannot properly be made the subject of a reserved case. R. v. McIntyre (1898), 3 Can. Cr. Cas. 413 (N.S.).

But if the evidence merely points to a suspicion of guilt and lacks the material ingredients necessary to constitute proof of the offence, this is not a question of weight of evidence but of want of evidence, and a conviction will be quashed if there is no legal evidence to support it. R. v. Winslow (1899), 3 Can. Cr. Cas. 215 (Man.).

Where on a case reserved or a case stated by direction of a Court of Appeal the sole question is whether there was evidence of guilt, and no leave has been obtained to apply for a new trial on the ground that the verdict is against the weight of evidence, the finding of a jury, or of the trial judge trying the case without a jury, cannot be disturbed as to conclusions or inferences justly capable of being drawn from the evidence, or as to the credibility of the witnesses. R. v. Clark (1901), 5 Can. Cr. Cas. 235 (Ont.).

Nor is the question as to the order of addresses to the jury by counsel at the close of the evidence a question of law proper to be reserved for the opinion of a Court of Appeal under sec. 743. R. v. Connolly (1894), 1 Can. Cr. Cas. 468 (Ont.).

Whether the judge cautions the jury that the evidence of an accomplice requires to be corroborated or not, is not a matter for the court to review, as it is not a question of law, but one of mere practice. R. v. Stubbs (1855), Dears. 555, 7 Cox C.C. 48, cited by Cameron, C.J., in R. v. Andrews (1886), 12 Ont. R. 184.

On proceedings preliminary, subsequent or incidental.]—The sufficiency of an indictment upon a motion to quash it is a question of law which arises in a proceeding preliminary to the trial and not on the trial and therefore could not be reserved under R.S.C., ch. 174, sec. 259, which applied only to questions of law arising "on the trial." R. v. Gibson (1889), 16 Ont. R. 704.

The "trial" is not terminated until sentence is rendered, and a question which "has arisen" on the trial does not necessarily mean a question that was *raised* at the trial, but one that took its rise at the trial. R. v. Bain (1877), 23 L.C. Jur. 327. And it was held under the former law that a point might be reserved by the court although not mentioned by the defence. Ibid.

Bail pending a reserved case.]—Where under sub-section 5 the accused was 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.)

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.

(Amendment of 1900).

744. Appeals.—If the Court refuses to reserve the question the party applying may move the Court of Appeal as hereinafter provided.

2. The Attorney-General or party so applying may on notice of motion to be given to the accused or prosecutor, as the case may be, move the Court of Appeal for leave to appeal. The Court of Appeal may upon the motion and upon considering such evidence (if any) as they think fit to receive, grant or refuse such leave.

3. If leave to appeal is granted, a case shall be stated for the opinion of the Court of Appeal as if the question had been reserved.

4. If the sentence is alleged to be one which could not by law be passed, either party may without leave, upon giving notice of motion to the other side, move the Court of Appeal to pass a proper sentence.

5. If the Court has arrested judgment, and refused to pass any sentence, the prosecutor may without leave make such a motion.

Under the former law an application had first to be made to the Provincial Attorney-General for his consent to apply to the Court of Appeal. The second step, if the Attorney-General granted leave to apply, was an application to the court for the leave to appeal; and lastly the appeal itself was argued before the court in cases in which the court granted the leave. The amendment of sub-secs. (1) and (2) does away with the first application. It was suggested as a reason for this being done that, in some cases at least, the Attorney-General of a province was averse to giving his consent to appeal on account of a desire to avoid having the view of the law which he had upheld for the prosecution declared to be erroneous, and reversed on appeal. Another difficulty was the fact that in many instances the Attorney-General depends on the local County Crown Attorney for any information in the case not apparent on the record, and the fate of the application might be practically dependent upon the report of the local Crown prosecutor.

Leave to appeal.]—Leave to appeal to the Court of Appeal under sec. 744, as amended in 1900 should not be granted to a private prosecutor except under exceptional circumstances. R. v. Burns (No. 1), (1901), 4 Can. Cr. Cas, 324 (C.A. Ont.).

Leave to appeal will not be granted to a private prosecutor from the decision of a police magistrate holding a summary trial by consent, merely upon the ground that the magistrate erred in rejecting certain evidence which was properly admissible but corrobative only. Ibid.

By the third sub-section if the Court of Appeal grants the leave, a case shall be stated for the opinion of the Court of Appeal "as if the question had been reserved." The Code is not explicit as to whether the form of the stated case is to be settled by the Court of Appeal or by the trial court. In R. v. Coleman (1898), 2 Can. Cr. Cas. 523, 539 (Ont.) the Court of Appeal made an order for leave which included in detail the form of the case to be stated and a direction to the trial judge, in this case a chairman of a Court of General Sessions, to state the case so set forth.

745. Evidence for Court of Appeal.—On any appeal or application for a new trial, the Court before which the trial was had shall, if it thinks necessary, or if the Court of Appeal so desires, send to the Court of Appeal a copy of the whole or of such part as may be material of the evidence or the notes taken by the Judge or presiding justice at the trial. The Court of Appeal may, if only the judge's notes are sent and it considers such notes defective, refer to such other evidence of what took place at the trial as it may think fit. The Court of Appeal may in its discretion send back any case to the Court by which it was stated to be amended or restated. R.S.C. c. 174, s. 264.

Reference to notes of evidence.]—The forwarding of the whole of the evidence taken at the trial does not dispense with the necessity for the trial judge to certify his findings of fact and to specify the points of law as to which he entertains the doubt. R. v. Giles (1894), 31 Can. Law Jour. 33; R. v. Létang (1899), 2 Can. Cr. Cas. 505 (Que.).

746. Powers of Court of Appeal.—Upon the hearing of any appeal under the powers hereinbefore contained, the Court of Appeal may—

(*a*) confirm the ruling appealed from; or

(*b*) if of opinion that the ruling was erroneous, and that there has been a mis-trial in consequence, direct a new trial; or

(*c*) if it considers the sentence erroneous or the arrest of judgment erroneous, pass such a sentence as ought to have been passed or set aside any sentence passed by the Court below, and remit the case to the Court below with a direction to pass the proper sentence; or

(*d*) if of opinion in a case in which the accused has been convicted that the ruling was erroneous, and that the accused ought to have been acquitted, direct that the accused shall be discharged, which order shall have all the effects of an acquittal; or

(*e*) direct a new trial; or

(*f*) make such other order as justice requires: Provided that no conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned on the trial: Provided that if the Court of Appeal is of opinion that any challenge for the defence was improperly disallowed a new trial shall be granted.

2. If it appears to the Court of Appeal that such wrong or miscarriage affected some count only of the indictment the court may give separate directions as to each count and may pass sentence on any count unaffected by such wrong or miscarriage which stands good, or may remit the case to the Court below with directions to pass such sentence as justice may require.

3. The order or direction of the Court of Appeal shall be certified under the hand of the presiding chief justice or senior puisne judge to the proper officer of the Court before which the case was tried, and such order or direction shall be carried into effect. R.S.C. c. 174, s. 263.

Substantial wrong or miscarriage.]—The intention is that the improper admission of evidence shall not in itself constitute a sufficient reason for granting a new trial, and that it is not necessarily a "substantial wrong or miscarriage." (Makin v. New South Wales (1894) A.C. 57, distinguished.) R. v. Woods (1897), 2 Can. Cr. Cas. 159 (B.C.).

But in the absence of a direct and unmistakable enactment, the Court should not, upon a case reserved, affirm a conviction, where material evidence has been improperly received, because, in the opinion of the Court, there is sufficient good evidence to support a verdict. R. v. Dixon, 29 N. S.R. 462.

On a trial for murder, if the trial judge directs the jury that imminent peril of the prisoner's own life or of the lives of his family is a ground of justification for killing, in defence of his household, one of a party committing an unprovoked assault upon him, but does not direct them that a reasonable apprehension of immediate danger of grievous bodily harm to the prisoner or to his wife and family is an equal justification, such omission constitutes a substantial wrong or miscarriage occasioned on the trial (Cr. Code 746 (*f*), and a new trial should be ordered, where the circumstances shewn in evidence are such as to point much more to the latter ground of justification than to the former. R. v. Theriault (1894), 2 Can. Cr. Cas. 444 (N.B.).

If a most important and substantial ground of defence clearly disclosed by the evidence is not submitted to the jury by the judge's charge, the conviction cannot stand, although the prisoner's counsel did not ask at the trial for any other or fuller direction. Ibid.

The strictness of the rule applied in civil cases in some of the provinces by which an objection not raised at a time when it could have been remedied, cannot afterwards be allowed, should not be applied to cases of misdirection in criminal cases. R. v Fick (1866), 16 U.C.C.P. 379, disapproved. Ibid.

Where a deposition of a deceased witness taken on an enquiry before a magistrate has been improperly admitted in evidence at the trial, and is of such a nature that it must have influenced the jury in their verdict, its improper admission is a "substantial wrong" entitling the accused to a new trial. R. v. Hamilton (1898), 2 Can. Cr. Cas. 390 (Man.).

Where an alleged confession is received in evidence after objection by the accused, and the trial judge before the conclusion of the trial reverses his ruling and strikes out the evidence of the alleged confession, at the same time directing the jury to disregard it, the jury should be discharged and a new jury impaneled. R. v. Sonyer (1898), 2 Can. Cr. Cas. 501.

If the trial judge refuses to impanel a new jury in such a case, a new trial will be ordered by a court of appeal; but the court of appeal will not determine the question of the admissibility of the alleged confession. Ibid.

An accused person has the right to have his case submitted to the jury without any comment on his failure to testify being made by the trial judge, and although such comment is afterwards withdrawn, the making of same is a substantial wrong to the accused, and if he is convicted he is entitled to a new trial by reason thereof. R. v. Coleman (1898), 2 Can. Cr. Cas. 523 (Ont.).

Co-defendants.]—In R. v. Saunders, [1899] 1 Q.B. 490, 63 J.P. 150, two prisoners were indicted together for conspiracy, one of them defended by counsel and the other defended in person. In the course of the trial certain questions were asked of the prosecutor, which the counsel for the prisoner who defended by counsel objected to, and as to the admissibility of which a case was reserved at his request. The prisoners were both convicted. On the case reserved the court was of opinion that the evidence objected to was held inadmissible; and the court (Lord Russell, C.J., and Wills, Lawrance, Bruce and Kennedy, JJ.,), further held that it could properly deal with both convictions, notwithstanding that the objection was raised by only one of the prisoners, and the conviction was quashed as to both.

Time of hearing appeal.]—A reserved case upon an objection taken before pleading, that the charge, upon which the accused was arraigned for a

"speedy trial," was not founded upon the evidence adduced at the preliminary enquiry should not be heard by the appellate court to which it is referred until after the trial has been concluded, and then only in case of conviction. R. v. Trepanier (1901), 4 Can. Cr. Cas. 259 (Que.).

Re-sentence on appeal.]—The Court of Appeal hearing a case reserved as to the validity of the sentence has power under sec. 746 (*c*) to correct a sentence in excess of that authorized by law and should in such case reduce the same to the maximum limit. R. v. Dupont (1900), 4 Can. Cr. Cas. 566 (Que.).

747. Application for a new trial.—After the conviction of any person for any indictable offence the Court before which the trial takes place may, either during the sitting or afterwards, give leave to the person convicted to apply to the Court of Appeal for a new trial on the ground that the verdict was against the weight of evidence. The Court of Appeal may, upon hearing such motion, direct a new trial if it thinks fit.

2. In the case of a trial before a Court of General or Quarter Sessions such leave may be given, during or at the end of the session, by the Judge or other person who presided at the trial.

New trial on the facts.]—In deciding whether there should be a new trial on the ground that the verdict against the accused was against the weight of evidence, the question is whether or not the verdict is one which the jury, as reasonable men, ought not to have found. A new trial will not be granted merely because the trial judge is dissatisfied with the verdict and favours an acquittal. R. v. Brewster (1896), 4 Can. Cr. Cas. 34 (N.W.T.).

The application to the court under this section is authorized only upon the ground that the verdict was against the weight of evidence, and, as was said in Mellin v. Taylor, 3 Bing. N.C. 109, the court ought to exercise not merely a cautious, but a strict and sure judgment before it sends the case to a second jury. R. v. Chubbs (1864), 14 U.C.C.P. 32, 43, per Richards, C.J. If the application be upon other grounds as for example the discovery of fresh evidence the application should be made to the Minister of Justice under sec. 748.

When there is divergence between the evidence adduced by the Crown and that adduced by the defence, and the jurors have exercised the discretion which is allowed to them by rejecting the evidence given on one side or on the other, and their verdict is supported by and founded on the evidence which they believed and accepted, the verdict is not against the weight of evidence. R. v. Harris (1898), 2 Can. Cr. Cas. 75 (Que.). In forming their opinion as to the credibility of the witnesses, the jurors are not bound to accept the evidence given on any side because there are more witnesses on that side than on the other. To oblige them to do so would infringe on their function to consider, weigh and pass upon any evidence adduced, and then to accept or to reject it in their discretion. Ibid.

The failure of the trial judge, ex mero motu to direct the jury to give to the prisoner the benefit of any reasonable doubt, is not a good ground for interfering with the verdict in a case where the evidence does not point to any reduced or lesser offence. R. v. Riendeau (1900), 3 Can. Cr. Cas. 293 (Que.).

Before verdict all presumptions will be in favour of the innocence of the prisoner, after verdict all presumptions will be against it. The court is not justified in setting aside the verdict unless it can say the jury were wrong in the conclusion they arrived at. It is not sufficient that the

appellate court would not have pronounced the same verdict. R. v. Hamilton (1866), 16 U.C.C.P. 353.

Where the verdict is not perverse, nor contrary to law and evidence, though it may be somewhat against the judge's charge, that is no reason for interfering if there be evidence to sustain the finding, because the jury are to judge of the sufficiency and weight of the evidence. R. v. Seddons (1866), 16 U.C.C.P. 389.

The former rule was that the court would not in criminal cases grant a new trial unless the verdict was clearly wrong, even though the evidence on which a prisoner was convicted would equally justify his acquittal, for the jury are to judge of the preponderance of the evidence, and their finding will not be disturbed. R. v. McIlroy (1864), 15 U.C.C.P. 116, following R. v. Chubbs, 14 U.C.C.P. 32.

A new trial should be ordered, if the judge's charge was so ambiguous that the jury may have been misled into thinking that a material issue of fact was withdrawn from their consideration as being a matter of law. R. v. Collins (1895), 1 Can. Cr. Cas. 48 (N.B.).

A new trial in a criminal case should not be granted unless after an examination of the evidence given at the trial, and of the grounds of the application, the court sees some apparent reason for doubting the propriety of the conviction, especially where the judge before whom the prisoner was convicted did not feel it necessary to reserve any question of law which arose at the trial for the consideration of one of the superior courts. R. v. Craig (1858), 7 U.C.C.P. 241.

Where affidavits were made by some of the jurors who tried the case that the jury were not in fact unanimous, but the belief among them was that unanimity was not necessary, and that a verdict could be given according to the opinion of the major part of them, they cannot be received and acted upon by the court as ground for a new trial. R. v. Fellowes and others (1859), 19 U.C.Q.B. 48.

In R. v. Chubbs, 14 U.C.C.P. 32, in which the prisoner had been convicted of a capital offence, Wilson, J., said, "In passing the Act, giving the right to the accused to move for, and the court to grant, a new trial, I do not see that it was intended to give courts the power to say that a verdict is wrong, because the jury arrived at conclusions which there was evidence to warrant, although from the same state of facts other and different conclusions might fairly have been drawn and a contrary verdict honestly given." Richards, C.J., before whom the case had been tried, said, "If I had been on the jury, I do not think I should have arrived at the same conclusions, but as the law casts upon them the responsibility of deciding how far they will give credit to the witnesses brought before them, I do not think we are justified in reversing their decision, unless we can be *certain* that it is wrong."

In R. v. Greenwood, 23 U.C.Q.B. 255, a case in which the prisoner had been convicted of murder, Hagarty, J., said, "I consider that I discharge my duty as a judge before whom it is sought to obtain a new trial on the ground of the alleged weakness of the evidence, or of its weight in either scale, in declaring my opinion that there was evidence proper to be submitted to the jury; that a number of material facts and circumstances were alleged properly before them—links, as it were, in a chain of circumstantial evidence—which it was their especial duty and province to examine carefully, to test their weight and adaptability each to the other . . . To adopt any other view of the law would be simply to transfer the conclusion of every prisoner's guilt or innocence from the jury to the judges."

R. v. Hamilton, 16 U.C.C.P. 340, was also a case in which the prisoner had been convicted of murder. Richards, C.J., who delivered the judgment of the court, said, "We are not justified in setting aside the verdict, unless we can say the jury were wrong in the conclusion they arrived at. It is not

sufficient that we would not have pronounced the same verdict; before we interfere we must be *satisfied* they have arrived at an erroneous conclusion." So, in R. v. Seddons, 16 U.C.C.P. 389, it was said, "The verdict is not perverse, nor against law and evidence; and although it may be somewhat against the judge's charge, that is no reason for interfering, if there be evidence to sustain the finding, because the jury are to judge of the sufficiency and weight of the evidence."

In R. v. Slavin, 17 U.C.C.P. 205, the law on the subject was thus stated: "We do not profess to have scanned the evidence with the view of saying whether the jury might or might not, fairly considering it, have rendered a verdict of acquittal. We have already declared on several occasions that this is not our province under the statute. It is sufficient for us to say that there was evidence which warranted their finding."

All that the court is required to do is to see if there is any evidence to support the finding of the jury. R. v. Riel (No. 2) (1885), 1 Terr. L.R. 23, per Taylor, J.; sed quære per Killam, J., ibid., page 63.

It has been said that the discovery of new evidence, which amounts to nothing more than corroborative testimony, is no ground for granting a new trial. Scott v. Scott, 9 L.T.N.S. 456; R. v. Mellroy (1864), 15 U.C.C.P. 116.

A new trial was refused in a murder case, where the application was based solely on an affidavit of a witness that he had misapprehended a question put to him, which had led to his answer producing a wrong impression. R. v. Crozier (1858), 17 U.C.Q.B. 275.

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.

Circumstantial evidence.]—In cases where there is direct and positive evidence of the fact charged, and that evidence is contradicted, it may be said that no question but the credibility of the witness is presented, and that as credibility and weight of evidence are entirely questions for the jury, their decision may well be deemed final, unless the judge who tried the case should express himself to be dissatisfied with the verdict; but that where the evidence is merely circumstantial there is, first the question whether the facts relied upon were established by the evidence; and second, whether the fact of guilt was properly inferable from them; and that in the latter case the court should review the correctness of the deduction of the jury. It was held, however, in the murder case of R. v. Greenwood (1864), 23 U.C.Q.B. 255, that there is no reason for applying a different rule where the evidence is circumstantial. Admitting that "they must decide, not whether these facts are consistent with the prisoner's guilt, but whether they are inconsistent with any other rational conclusion" (Tay. Ev. sec. 60), where they have so decided it certainly cannot prevent a less obstacle to the interference of the court than where they have simply decided that they give credit to the witnesses for the prosecution, and not to those for the defence Per Draper, C.J. R. v. Greenwood (1864), 23 U.C.Q.B. 255.

New Evidence.]—An application on the ground of the discovery of new evidence would seem not to be warranted under this section. In R. v. Oxentine (1858), 17 U.C.Q.B. 295 it was held that such an application was not upon a "question of fact" and the latter phrase was construed as meaning only a question of fact arising from or suggested by the evidence which was given. But an order for a new trial on that ground may be made by the Minister of Justice under sec. 748. R. v. Sternaman (1898), 1 Can. Cr. Cas. 1.

Co-defendants.]—It is the established practice in criminal cases where all the defendants have been convicted, and it is found that one or more of them have a just claim to a new trial, that a new trial shall be granted to all, in order that the whole case may be tried as at first. R. v. Fellowes and others (1859), 19 U.C.Q.B. 48; see also R. v. Saunders, [1899] 1 Q.B. 490.

Second trial.]—Upon a new trial, everything must be begun de novo, and the prisoner asked to plead again. "There is no court continuing all the time before which he has pleaded; there must be a new court established for the trial of each charge, and the proceedings upon the first trial cannot be incorporated with those upon the second." Per Killam J. in R. v. Riel (No. 2), (1885), 1 Terr. L.R. at page 60.

In Attorney-General v. Bertrand (1867), L.R. 1 P.C. 520, the facts were that a prisoner had been tried in New South Wales for felony, after a previous trial and disagreement of the jury thereat. On the second trial some of the witnesses were re-sworn, and their evidence given at the first trial was read over to them from the judge's notes at the instance of the presiding judge, who informed each witness that he intended to read over the notes which he, the judge, had taken of the evidence given by the witness at the former trial, and that if the witness wished to add anything to the evidence he had then given, or to alter or correct it in any way, he could do so. The judge also then informed the counsel for the prisoner and the counsel for the crown that if either of them wished to ask the witness any questions he could do so. No specific or definite consent was given by the prisoner or his counsel as to the proposed course being adopted, or as to any specific witness being thus examined, but no objection was then made by the prisoner or his counsel, and they were considered by the court to have assented to the course proposed. The Judicial Committee expressed the opinion that such a mode of laying the evidence before the jury was to be discouraged, although not amounting in law to a mis-trial.

748. New trial by order of Minister of Justice.—If upon any application for the mercy of the Crown on behalf of any person convicted of an indictable offence, the Minister of Justice entertains a doubt whether such person ought to have been convicted, he may, instead of advising His Majesty to remit or commute the sentence, after such inquiry as he thinks proper, by an order in writing direct a new trial at such time and before such Court as he may think proper.

A new trial was granted by the Minister of Justice under this section on the discovery of new evidence in R. v. Sternaman (1898), 1 Can. Cr. Cas. 1.

749. Intermediate effects of appeal.—The sentence of a Court shall not be suspended by reason of any appeal, unless the Court expressly so directs, except where the sentence is that the accused suffer death, or whipping. The production of a certificate from the officer of the court that a question has been reserved, or that leave has been given to apply for a new trial, or of a certificate from the Attorney-General that he has given leave to move the Court of Appeal, or of a certificate from the Minister of Justice that he has directed a new trial, shall be a sufficient warrant to suspend the execution of any sentence of death or whipping.

2. In all cases it shall be in the discretion of the Court of Appeal in directing a new trial to order the accused to be admitted to bail.

See sec. 744 as amended.

750. Appeal to Supreme Court of Canada.—Any person convicted of any indictable offence, whose conviction has been affirmed on an appeal taken under s. 742, may appeal to the Supreme Court of Canada against the affirmance of such conviction; and the Supreme Court of Canada shall make such rule or order thereon, either in affirmance of the conviction or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect: Provided that no such appeal can be taken if the Court of Appeal is unanimous in affirming the conviction, nor unless notice of appeal in writing has been served on the Attorney-General within fifteen days after such affirmance or such further time as may be allowed by the Supreme Court of Canada or a judge thereof.

2. Unless such appeal is brought on for hearing by the appellant at the session of the Supreme Court during which such affirmance takes place, or the session next thereafter if the said court is not then in session, the appeal shall be held to have been abandoned, unless otherwise ordered by the Supreme Court or a judge thereof.

3. The judgment of the Supreme Court shall, in all cases, be final and conclusive. 50-51 V., c. 50, s. 1.

Supreme Court of Canada.]—The dissent from the "opinion" of the majority (Cr. Code 742) by any of the judges of the Court of Appeal, which is necessary in order to confer the right of a further appeal to the Supreme Court of Canada, has reference to the "decision" or "judgment" of such majority in affirmance of a conviction (Cr. Code 750); and where a majority of the Court of Appeal in directing a new trial also expressed their concurrence (two of them dissenting) with that part of the decision appealed from by which it was held that certain evidence was properly admitted, the latter decision is not reviewable by the Supreme Court of Canada. Viau v. R. (1898), 2 Can. Cr. Cas. 540 (S.C. Can.).

In Michaelmas Term, 1877, certain questions of law reserved, which arose on the trial of the appellants, were argued before the Court of Queen's Bench for Ontario, composed of Harrison, C.J., and Wilson, J., and in February, 1878, the said court composed of the same judges delivered judgment affirming the conviction of the appellants for manslaughter. The Court of Queen's Bench for Ontario when full is composed of a Chief Justice and two puisne judges. On appeal to the Supreme Court of Canada it was held that the conviction of the Court of Queen's Bench, although affirmed by only two judges, was unanimous, and therefore not appealable. R. v. Amer (1878), 2 Can. S.C.R. 592.

Where the decision is in favour of the prisoner the Supreme Court of Canada, exercising the ordinary appellate powers of the court, may give the judgment which the court whose judgment is appealed from ought to have given, and may order prisoner's discharge. R. v. Laliberté (1877), 1 Can. S.C.R. 117.

By Rule 48, of the Supreme Court of Canada, in criminal appeals and in appeals in cases of habeas corpus, and unless the court or judge shall otherwise order, the "case" must be filed as follows:—

(1.) In appeals from any of the provinces other than British Columbia, at least one month before the first day of the session at which it is set down to be heard.

(2.) In appeals from British Columbia, at least two months before the said day.

Rule 49 is as follows:—

In matters of criminal appeals, and appeals in matters of habeas corpus, notice of hearing shall be served the respective times hereinafter fixed before the first day of the general or special session at which the same is appointed to be heard, that is to say:

(1.) In appeals from Ontario and Quebec, two weeks.

(2.) In appeals from Nova Scotia, New Brunswick and Prince Edward Island, three weeks.

(3.) In appeals from Manitoba, one month.

(4.) In appeals from British Columbia, six weeks.

Contempt of court is a criminal proceeding and, unless the court appealed from was not unanimous in affirming the conviction, an appeal does not lie to the Supreme Court of Canada from a judgment in proceedings therefor. Ellis v. R. (1893), 22 Can. S.C.R. 7; O'Shea v. O'Shea, 15 P.D. 59. And it is questionable whether a contempt in respect of the publication of improper newspaper comment on a pending cause is an indictable offence under this section so as to permit an appeal in any case. Strong, J., in Ellis v. R. (1893), 22 Can. S.C.R. at p. 12.

751. Appeals to Privy Council abolished.—Notwithstanding any royal prerogative, or anything contained in *The Interpretation Act* or in *The Supreme and Exchequer Courts Act*, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal or authority, by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard. 51 V., c. 43, s. 1.

See note to sec. 742.

PART LIII.

SPECIAL PROVISIONS.

SECT.

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752. Further detention of person accused.—Whenever any person in custody charged with an indictable offence has taken proceedings before a judge or criminal court having jurisdiction in the premises by way of *certiorari, habeas corpus* or otherwise, to have the legality of his imprisonment inquired into, such judge or court may, with or without determining the question, make an order for the further detention of the person accused, and direct the judge or justice under whose warrant he is in custody, or any other judge or justice to take any proceedings, hear such evidence, or do such further act as in the opinion of the court or judge may best further the ends of justice.

Further detention on habeas corpus, etc.]—It was held in Re Timson (1870), L.R. 5 Exch. 257, that where a prisoner is brought up on a writ of habeas corpus, and the return shews a commitment bad on the face of it, the court will not, on the suggestion that the conviction is good, adjourn the case for the purpose of having the conviction brought up, and amending the commitment by it in a case where the magistrates had not brought the conviction before the court, although served with notice and appearing by counsel.

In R. v. Fife (1889), 17 Ont. R. 710, a warrant of commitment for trial, issued in a preliminary enquiry upon a charge of having "wilfully and maliciously" burned down a fence, was quashed by MacMahon, J., as insufficient because it did not charge also that the act was done "unlawfully." The prosecution was there taken under the Malicious Injuries to Property Act, R.S.C. 1886, ch. 168, sec. 58, under which section the injury must have been done "unlawfully and maliciously" in order to constitute an offence thereunder.

In R. v. Chaney (1838), 5 Dowl. 281, the commitment was likewise defective in not alleging matter essential to the offence, and the right to certiorari on the part of the accused had been taken away by statute, but not the right to habeas corpus. The court held that unless the Crown brought up the conviction, the commitment, although defective, would be considered as a true recital of it.

Where, however, the application is one upon affidavits for a writ of habeas corpus, the usual practice is to require that the conviction be brought up, before the court will take any notice of a defect in the warrant; and for this purpose a certiorari is taken to bring up the record, and a writ of habeas corpus to bring up the defendant. R. v. Taylor, 7 D. & R. 622.

The inclusion of the process of certiorari in Code sec. 752, supra, leads to the inference that the powers thereby conferred are to apply as well after as before the conviction, and that a person convicted still remains a person "charged" with an indictable offence.

If the evidence as to the commission of the alleged offence is conflicting, and the term of imprisonment imposed by the conviction, is in excess of that authorized by law, the judge before whom the case is brought on habeas corpus should not exercise the powers conferred by sec. 752 of ordering further detention, but should discharge the prisoner. R. v. Randolph (1900), 4 Can. Cr. Cas. 165 (Ont.). The warrant of commitment can be amended only where there is a "valid conviction to sustain the same." Code sec. 800.

If the conviction is by a court of record having general jurisdiction of the offence charged, habeas corpus will not lie. Re Sproule, 12 Can. S.C.R. 140; Re D. C. Ferguson, 24 N.S.R. 106. In such case the right to hold the prisoner is founded on the *fact* of a sentence having been passed by such a court. Ibid. A decision of a County Court Judge's criminal court under the Speedy Trials procedure can only be reviewed by reserved case or appeal as provided by the Code, and not by habeas corpus. R. v. Burke (1898), 1 Can. Cr. Cas. 539 (N.S.).

Where the conviction itself was lodged with the gaoler as his authority for the detention in lieu of a warrant of commitment, the judge before whom the prisoner is brought upon habeas corpus may properly order the further detention of the prisoner for a limited time until a warrant in due form can be obtained from the magistrate. R. v. Morgan (1901), 5 Can. Cr. Cas. 63 (Ont.).

Where the evidence as to the commission of the alleged offence is conflicting, and the term of imprisonment imposed by the conviction is in excess of that authorized by law, the judge before whom the case is brought on habeas corpus should not exercise the powers conferred by sec. 752, of making an order for the further detention of the accused. R. v. Randolph (1900), 4 Can. Cr. Cas. 165 (Ont.).

A court of one province has no jurisdiction to direct an inquiry before a justice or a judge in another province, or the hearing of further evidence in another province, to controvert the allegation of jurisdiction. This section is to be applied only to cases where the habeas corpus issues in the same province in which the commitment is made. R. v. Defries (1894), 1 Can. Cr. Cas. 207 (Ont.).

753. Question raised at trial may be reserved for decision.—Any judge or other person presiding at the sittings of a court at which any person is tried for an indictable offence under this Act, whether he is the judge of such court or is appointed by commission or otherwise to hold such sittings, may

reserve the giving of his final decision on questions raised at the trial; and his decision, whenever given, shall be considered as if given at the time of the trial. R.S.C. c. 174, s. 269.

754. Practice in High Court of Justice of Ontario.—The practice and procedure in all criminal cases and matters in the High Court of Justice of Ontario which are not provided for in this Act, shall be the same as the practice and procedure in similar cases and matters heretofore. R.S.C. c. 174, s. 270.

755. Commission of Court of Assize, etc.—If any general commission for the holding of a court of assize and *nisi prius*, oyer and terminer, or general gaol delivery is issued by the Governor-General for any county or district in the Province of Ontario, such commission shall contain the names of the justices of the Supreme Court of Judicature for Ontario, and may also contain the names of the judges of any of the county courts in Ontario, and of any of His Majesty's counsel learned in the law duly appointed for the Province of Upper Canada, or for the Province of Ontario, and if any such commission is for a provisional judicial district, such commission may contain the name of the judge of the district court of the said district.

2. The said courts shall be presided over by one of the justices of the said Supreme Court, or in their absence by one of such county court judges or by one of such counsel, or in the case of any such district by the judge of such district court. R.S.C. c. 174, s. 271.

The Governor-General of the Dominion of Canada, exercising the prerogative right of the Crown, can issue a commission to hold a Court of Oyer and Terminer, and General Gaol Delivery, already established in a province. R. v. Amer (1878), 42 U.C.Q.B. 391. And the Lieutenant-Governor of a province, as well as the Governor-General, has the power to issue commissions to hold Courts of Assize. Ib., p. 403.

756 Court of General Sessions.—It shall not be necessary for any Court of General Sessions in the Province of Ontario to deliver the gaol of all prisoners who are confined upon charges of theft, but the court may leave any such cases to be tried at the next court of oyer and terminer and general gaol delivery, if, by reason of the difficulty or importance of the case, or for any other cause, it appears to it proper so to do. R.S.C. c. 174, s. 272.

The Court of General Sessions is not properly an inferior court; it is a Court of Oyer and Terminer. R. v. McDonald (1871), 31 U.C.Q.B. 337; Campbell v. R., 11 Q.B. 799, 814. It is, however, a court which does not possess any greater powers than are conferred upon it by statute. It has a general jurisdiction over offences attended with a breach of the peace, and has also such other powers as are conferred upon it by statute. R. v. Dunlop, 15 U.C.Q.B. 118; R. v. McDonald (1871), 31 U.C.Q.B. 337.

757. Time for pleading to indictment in Ontario.—If any person is prosecuted in any division of the High Court of Justice for Ontario for any indictable offence, by information there filed, or by indictment there found or removed into such court, and appears therein in term time in person, or, in case of a corporation, by attorney, to answer to such information or indictment, such defendant, upon being charged therewith, shall not imparl to a following term, but shall plead or demur thereto, within four days from the time of his appearance; and in default of his pleading or demurring within four days as aforesaid judgment may be entered against such defendant for want of a plea. R.S.C. c. 174, s. 273.

758. Rule to plead.—If such defendant appears to such information or indictment by attorney, he shall not imparl to a following term, but a rule, requiring him to plead, may forthwith be given and served, and a plea to such information or indictment may be enforced, or judgment in default may be entered in the same manner as might have been done formerly in cases in which the defendant had appeared to such information or indictment by attorney in a previous term; but the court, or any judge thereof, upon sufficient cause shown for that purpose, may allow further time for such defendant to plead or demur to such information or indictment. R.S.C. c. 174, s. 274.

759. Delay in prosecution.—If any prosecution for an indictable offence, instituted by the Attorney-General for Ontario in the said court, is not brought to trial within twelve months next after the plea of not guilty has been pleaded thereto, the court in which such prosecution is depending, upon application made on behalf of any defendant in such prosecution of which application twenty days' previous notice shall be given to such Attorney-General, may make an order authorizing such defendant to bring on the trial of such prosecution; and thereupon such defendant may bring on such trial accordingly unless a *nolle prosequi* is entered to such prosecution. R.S.C. c. 174, s. 275.

760. Procedure in Nova Scotia.—In the Province of Nova Scotia a calendar of the criminal cases shall be sent by the Clerk of the Crown to the grand jury in each term, together with the depositions taken in each case and the names of the different witnesses.

This section applies only to Nova Scotia. The amendment consists in striking out the last two lines of the section which read thus: "And the indictment shall not be made out, except in Halifax, until the grand jury so directs." The distinction thus made between Halifax and the country was found to be very inconvenient in practice. The decision of the Supreme Court of Nova Scotia in R. v. Townsend, 3 Can. Cr. Cas. 29, as to the validity of an indictment in Nova Scotia without the words "true bill" being endorsed by the foreman of the grand jury, must now be viewed in the light of this amendment.

761. Criminal sentence in Nova Scotia.—A judge of the Supreme Court of Nova Scotia may sentence convicted criminals on any day of the sittings at Halifax, as well as in term time. R.S.C. c. 174, s. 277.

PART LIV.

SPEEDY TRIALS OF INDICTABLE OFFENCES.

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762. Application of Part LIV.—The provisions of this part do not apply to the North-West Territories or the District of Keewatin. 52 V., c. 47, s. 3.

(Amendments of 1895 and 1900.)

63. Definitions.—In this part, unless the context otherwise requires—

(*a*) the expression "judge" means and includes—

(i.) in the Province of Ontario, any judge of a county or district court, junior judge or deputy judge authorized to act as chairman of the General Sessions of the Peace;

(ii.) in the Province of Quebec, in any district wherein there is a judge of the sessions, such judge of sessions, and in any district wherein there is no judge of sessions but wherein there is a district magistrate, such district magistrate, and in any district wherein there is neither a judge of sessions nor a district magistrate, the sheriff of such district;

(iii.) in each of the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, any judge of a county court;

(iv.) in the Province of Manitoba the chief justice, or a puisne judge of the Court of King's Bench, or any judge of a county court;

(v.) in the Province of British Columbia the chief justice or a puisne judge of the Supreme Court, or any judge of a county court;

(*b*) the expression "county attorney" or "clerk of the peace" includes, in the Province of Ontario, the county Crown attorney, in the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, any clerk of a county court, and in the Province of Manitoba, any Crown attorney, the prothonotary of the Court of King's Bench, and any deputy prothonotary thereof, any deputy clerk of the peace, and the deputy clerk of the Crown and pleas for any district in the said province. 52 V., c. 47, s. 2.

The Speedy Trials Act, 52 Vict., ch. 47 (D.), from which Part 54 is derived, is not a statute conferring jurisdiction, but is an exercise of the power of Parliament to regulate criminal procedure. In re County Courts of British Columbia (1892), 21 Can. S.C.R. 446.

Whether the judge presiding at the trial had jurisdiction to summarily try the defendants under this part of the Code is a "question of law" under sec. 743 and may be the subject of a reserved case. R. v. Paquin (1898), 2 Can. Cr. Cas. 134 (Que.).

764. Judge to be a court of record.—The judge sitting on any trial under this part, for all the purposes thereof and proceedings connected therewith or relating thereto, shall be a court of record, and in every province of Canada, except the Province of Quebec, such court shall be called "The County Court Judge's Criminal Court" of the county or union of counties or judicial district in which the same is held.

2. The record in any such case shall be filed among the records of the court over which the judge presides, and as part of such records. 52 V., c. 47, s. 4.

One of the consequences of a district magistrate in Quebec acting under the Speedy Trials sections being a court of record is that his judgment cannot be enquired into on habeas corpus. Ex p. O'Kane, Ramsay's Cases (Que.) 188.

The Habeas Corpus Act, 29-30 Vict., 1866 (Prov. of Can.), ch. 45, now R.S.O. 1897, c. 83, precludes the right to a writ of habeas corpus where the judgment conviction or decree is that of a "court of record."

The County Judges Criminal Court in Ontario was constituted by 37 Vict., 1873 (Ont.), ch. 8, sub-sec. 57 and 58. By sec. 57, now R.S.O. 1897, ch. 57, sec. 1, the judge of every county court, or the junior or deputy judge thereof, authorized to act as chairman of the general sessions of the peace for any county, is constituted "a court of record for the trial out of sessions and without a jury, of any persons committed to gaol on a charge of being guilty of any offence for which such person may be tried at a court of general sessions of the peace, and for which the person so committed consents to be tried out of sessions and without a jury"; and by sec. 58, now R.S.O. 1897, ch. 57, sec. 2, the court so constituted was styled "The County Judge's Criminal Court" of the county in which the same is held.

The court so constituted has all the powers and duties which secs. 763-781 of the Code purport to give, so far as the Legislature of Ontario can confer the same. R.S.O. 1897, ch. 57, sec. 1.

Being a court of record its judgment cannot be reviewed on a writ of habeas corpus. R. v. St. Denis (1875), 8 Ont. Pr. 16; R. v. Murray (1897), 1 Can. Cr. Cas. 452 (Ont.).

(Amendment of 1900.)

765. County judge's criminal court.—Every person committed to gaol for trial on a charge of being guilty of any of the offences which are mentioned in section 539 as being within the jurisdiction of the General or Quarter Sessions of the Peace, may, with his own consent (of which consent an entry shall be made of record), and subject to the provisions herein, be tried in any province under the following provisions out of sessions and out of the regular term or sittings of the court, whether the court before which, but for such consent, the said person would be triable for the offence charged, or the grand jury thereof, is or is not then in session, and if such person is convicted, he may be sentenced by the judge.

2. A person who has been bound over by a justice under the provisions of section 601 and has either been unable to find bail or been surrendered by his sureties, and is in custody on such a charge, or who is otherwise in custody awaiting trial on such a charge, shall be deemed to be committed for trial within the meaning of this section.

The amendment is in the addition of the second sub-section. The Supreme Court of Nova Scotia had held that the former section only applied where the person was actually and formally "committed for trial," and not to the other cases to which it is now extended. R. v. James Gibson, 3 Can. Cr. Cas. 451, and R. v. Smith, 3 Can. Cr. Cas. 467.

Election of speedy trial.]—In a British Columbia case before the amendment of this section it was held by McColl, J., that the words "committed to gaol for trial" should be construed as including any case where the accused is found in custody charged with an offence in respect of which he has the right to elect in favour of a speedy trial, and although he is so in custody by reason of his surrender for the purpose of appearing before the judge to elect a speedy trial after being admitted to bail by the magistrate under sec. 601, the magistrate declining to commit him for trial. R. v. Lawrence (1896), 1 Can. Cr. Cas. 295. But in Nova Scotia a more limited construction was placed upon it, and it was held that a person not committed by the magistrate, but admitted to bail by him under sec. 601, was not a person "committed to gaol to trial," although he had given himself into custody. R. v. James Gibson (1896), 3 Can. Cr. Cas. 451; R. v. Smith (1898), 3 Can. Cr. Cas. 467. In consequence of these conflicting decisions subsec. (2) was introduced in 1900.

The prisoner's reply upon arraignment that "for the present" he elected to be tried without a jury is a sufficient election. R. v. Ballard (1897), 1 Can. Cr. Cas. 96, 28 Ont. R. 489.

Consent does not confer jurisdiction, and the accused may, upon an appeal by way of case reserved, object to the jurisdiction of the tribunal he has himself selected if the case does not properly come within the provisions of this Part. R. v. Smith (1898) 3 Can. Cr. Cas. 467 (N.S.).

Semble, an accused person may, upon a preliminary enquiry, waive the preliminary examination into the charge and consent to be committed for trial without any depositions being taken; but as the "charge" in the County Judges' Criminal Court must be prepared from the depositions (sec. 767), the accused, committed without depositions having been taken, has no right to elect to be tried at the County Judges' Criminal Court. R. v. James Gibson (1896), 3 Can. Cr. Cas. 451 (N.S.); but see note to sec. 767.

The surrender by a defendant himself out on his own bail, has the effect of remitting him to custody, and enables him to avail himself of the Speedy Trials clauses, and to elect to be tried summarily; and where a defendant had so elected an indictment subsequently laid against him at the assizes was held bad and quashed even after plea pleaded where the plea was made through inadvertence. R. v. Burke (1893), 24 Ont.R. 64.

In that case MacMahon, J., said:—"The defendants were by the police magistrate 'committed to gaol for trial;' they gave bail to appear for trial, so that when they were rendered by their bail, they stood in the same position as if they had never been bailed, and were therefore 'committed to gaol for trial;' and, if so committed, they were confined, as far as it was necessary for the sheriff so to do, when they were almost immediately brought before the judge to elect as to the mode of their trial. The date for proceeding under the Speedy Trials Act was fixed by the judge, and the defendants having appeared, they had a right to be tried by the forum, which the statute said should be theirs if they so elected. They cannot be deprived of that right because the Crown Counsel had determined on presenting bills and having them found by the grand jury; for the statute says they may elect to be tried, although the grand jury is sitting."

If the accused, after electing in favour of a speedy trial, his right to which is disputed by the Crown, takes no further steps to obtain that right and is then indicted at the next court of Oyer and Terminer, his plea to such indictment will conclude him as to the mode of trial, and he cannot afterwards elect for a speedy trial without a jury. R. v. Lawrence (1896), 1 Can. Cr. Cas. 295 (B.C.). In the latter case the Crown consented to the withdrawal of the plea to the indictment, upon a statement by the counsel for the accused that the plea was made inadvertently. See also R. v. Burke, supra.

If imprisonment in a common gaol is ordered on a conviction under this part (LIV.) it shall be with or without hard labour in the discretion of the court or person passing sentence, and if it is to be with hard labour the sentence shall so direct. Sec. 955 (6).

766. Duty of sheriff after committal of accused.—Every sheriff shall, within twenty-four hours after any prisoner charged as aforesaid is committed to gaol for trial, notify the judge in writing that such prisoner is so confined, stating his name and the nature of the charge preferred against him, whereupon, with as little delay as possible, such judge shall cause the prisoner to be brought before him.

(Amendment of 1900.)

2. Where the judge does not reside in the county in which the prisoner is committed, the notification required by this section may be given to the prosecuting officer, instead of to the judge, and the prosecuting officer shall in such case, with as little delay as possible, cause the prisoner to be brought before him.

Sub-section (2), added in 1900, was intended to remedy an inconvenience which exists particularly in the maritime provinces, where a judge's jurisdiction extends sometimes over three or four counties. Under the section as it formerly was, it was necessary for the judge to receive notice for the purpose of going to where the prisoner was, to call the prisoner before him to make his election, and he was obliged to go back on another day for the purpose of holding the trial.

By the amendment it is provided that in such cases notice shall be given to the prosecuting officer. He will then notify the judge, and the judge will come on the day fixed for the trial, so that he will not be obliged to make two trips for the purpose of holding the trial.

See notes to sections 765 and 767.

(Amendment of 1900.)

767. Arraignment before county judge.—The judge or such prosecuting officer upon having obtained the depositions on which the prisoner was so committed, shall state to him—

(*a*) that he is charged with the offence, describing it;

(*b*) that he has the option to be forthwith tried before a judge without the intervention of a jury, or to remain in custody or under bail, as the court decides, to be tried in the ordinary way by the court having criminal jurisdiction.

2. If the prisoner has been brought before the prosecuting officer, and consents to be tried by the judge, without a jury, such prosecuting officer shall forthwith inform the judge, and the judge shall thereupon fix an early day for the trial, and communicate the same to the prosecuting officer; and in such case the trial shall proceed in the manner provided by sub-section 3.

3. If the prisoner has been brought before the judge and consents to be tried by him without a jury, the prosecuting officer shall prefer the charge against him for which he has been committed for trial, and if, upon being arraigned upon the charge, the prisoner pleads guilty, the prosecuting officer shall draw up a record as nearly as may be in one of the forms MM or NN in schedule one, such plea shall be entered on the record, and the judge shall pass the sentence of the law on such prisoner, which shall have the same force and effect as if passed by any court having jurisdiction to try the offence in the ordinary way.

4. If the prisoner demands a trial by jury, he shall be remanded to gaol.

5. Any prisoner who has elected to be tried by jury, may, notwithstanding such election, at any time before such trial has commenced, and whether an indictment has been preferred against him or not, notify the sheriff that he desires to re-elect, and it shall thereupon be the duty of the sheriff and judge, or prosecuting officer to proceed as directed by section 766, and thereafter, unless the judge, or the prosecuting officer acting under sub-section 2 of that section, is of opinion that it would not be in the interests of justice that the prisoner should be allowed to make a second election, the prisoner shall be proceeded against as if his said first election had not been made.

FORM MM.—

FORM OF RECORD WHEN THE PRISONER PLEADS NOT GUILTY.

Canada,
Province of , }
County of . }

Be it remembered that A. B. being a prisoner in the gaol of the said county, committed for trial on a charge of having on day of , in the year stolen, &c. (*one cow, the property of* C. D., *or as the case may be, stating briefly*

the offence) and having been brought before *me* (*describe the judge*) on the day of , in the year , and asked by me if he consented to be tried before me without the intervention of a jury, consented to be so tried; and upon the day of , in the year , the said A. B., being again brought before me for trial, and declaring himself ready, was arraigned upon the said charge and pleaded not guilty; and after hearing the evidence adduced, as well in support of the said charge as for the prisoner's defence (*or a sthe case may be*), I find him to be guilty of the offence with which he is charged as aforesaid, and I accordingly sentence him to (*here insert such sentence as the law allows and the judge thinks right*), (*or* I find him not guilty of the offence with which he is charged, and discharge him accordingly).

Witness my hand at , in the county of , this day of , in the year .

O. K.,
Judge.

FORM NN.—

FORM OF RECORD WHEN THE PRISONER PLEADS GUILTY.

Canada,
Province of , }
County of . }

Be it remembered that A. B., being a prisoner in the gaol of the said county, on a charge of having on the day of , in the year , stolen &c. (*one cow, the property of C. D., or as the case may be, stating briefly the offence*), and being brought before me (*describe the judge*) on the day of , in the year , and asked by me if he consented to be tried before me without the intervention of a jury, consented to be so tried; and that the said A. B. being then arraigned upon the said charge, he pleaded guilty thereof, whereupon I sentenced the said A. B. to (*here insert such sentence as the law allows and the judge thinks right*).

Witness my hand this day of , in the year .

O. K.,
Judge.

It had been held that the technical effect of a prisoner's having once elected to be tried by jury was that his power to elect was thereby exhausted. That rule delayed a trial uselessly, involved increased expense to the Crown and to the prisoner, and prolonged the time of imprisonment of a man who on the trial might be found not guilty. Sub-section 5 is a new

sub-section intended to obviate the difficulty by providing that the prisoner may re-elect. The other changes were necessitated by the change of procedure under section 766.

Preferring the charge.]—Inasmuch as the "charge" in the County Judge's Criminal Court must, under that section, be prepared from "the depositions," it is doubtful whether an accused person, committed by consent upon a preliminary inquiry at which no evidence was taken, such evidence being waived by the prisoner, has a right to elect in favour of a speedy trial without a jury. In R. v. Gibson (1896), 3 Can. Cr. Cas. 451, it was held that he had not, but quære whether the sworn information is not a part of the depositions sufficient in such case for the drawing of the "charge."

The record is properly framed if it states the offence charged in such form as the depositions or evidence shewed it should have been; and the judge's jurisdiction was not confined to the trial only of the charge as stated in the commitment. Cornwall v. R. (1872), 33 U.C.Q.B. 106.

Where no amendment is made (sec. 778) and no new charge is substituted (sec. 773) the prisoner cannot be tried for any offence with which he is not charged or which is not included in the charge against him. The judge is in the same position as a jury would occupy if the prisoner were on trial before them. R. v. Morgan (1893), 2 B.C.R. 329. So where the charge was forgery and there was no evidence to convict of that offence, the judge cannot record a conviction for obtaining money by false pretences, although the evidence adduced would support such a charge. Ibid.

A reserved case upon an objection taken before pleading, that the record or charge, upon which the accused was arraigned for a "speedy trial," was not founded upon the evidence adduced at the preliminary enquiry, should not be heard by the appellate court to which it is referred until after the trial has been concluded, and then only in case of conviction. R. v. Trepanier (1901), 4 Can. Cr. Cas. 259 (Que.).

Election against jury trial.]—See note to sec. 765.

Changing his election.]—Where a prisoner on arraignment before the County Court Judge elects *in favour of* a speedy trial under Part LIV. of the Code, he cannot withdraw the election so made and obtain a trial by jury. Sub-sec. 5 of sec. 767, as amended 1900, gives the accused the right of re-election only in case his first election was for trial by jury. R. v. Keefer (1901), 5 Can. Cr. Cas. 122 (Ont.).

Before the amendment of 1900 it had been held in Ontario that a prisoner arraigned before a county judge under secs. 766 and 767, and who had thereupon demanded a trial by jury and elected not to be tried forthwith by such judge without a jury, had no absolute right after remand to goal to change the election so made; and this notwithstanding that the election made by him was made under mistake. R. v. Ballard (1897), 1 Can. Cr. Cas. 96 (Ont.).

But in R. v. Prevost (1895), 4 B.C.R. 326, it was held by Crease, J., that a prisoner who had elected to be tried by a jury, might afterwards re-elect in favour of a speedy trial on application for leave to abandon his former election, and that the court would have inherent jurisdiction over the sheriff, as its officer, to direct him to produce the prisoner. Parliament then passed the amending statute, which, however, is limited to cases where the prisoner has elected to be tried "by jury," and under the maxim "expressio unius, etc.," it must be taken that the power of re-election so given shall not apply in cases of election of trial without a jury.

See also secs. 769-771.

Persons jointly accused.]—See sec. 768.

Amendment of charge.]—The judge has all the powers of amendment which any court mentioned in sec. 763 would have if the trial were before such court. See. 778.

Substituting new charge.]—See sec. 773.

Adjournment.]—Notwithstanding sec. 777 authorizing the adjournment of a trial, it is not competent for a judge trying a charge under this section to postpone his decision on the first charge until he has heard the evidence on several other charges against the same accused party, and to then decide the question of guilt in all. To interject one trial into another trial of the same accused person for another offence is a proceeding which prejudices his defence and entitles him to a new trial on both charges. If time be required in the first case for deliberation on the question of guilt after hearing the evidence, an adjournment may be made, but the trial of the subsequent charges must likewise be postponed. R. v. McBerny (1897), 3 Can. Cr. Cas. 339 (N.S.).

768. Persons jointly accused.—If one of two or more prisoners charged with the same offence demands a trial by jury, and the other or others consent to be tried by the judge without a jury, the judge, in his discretion, may remand all the said prisoners to gaol to await trial by a jury. 52 V., c. 47, s. 8.

769. Election after refusal to be tried by judge.—If, under Part LV. or Part LVI., any person has been asked to elect whether he would be tried by the magistrate or justices of the peace, as the case may be, or before a jury, and he has elected to be tried before a jury, and if such election is stated in the warrant of committal for trial, the sheriff and judge shall not be required to take the proceedings directed by this part. 52 V., c. 47, s. 9.

2. But if such person, after his said election to be tried by a jury, has been committed for trial he may, at any time before the regular term or sittings of the court at which such trial by jury would take place, notify the sheriff that he desires to re-elect; whereupon it shall be the duty of the sheriff to proceed as directed by section 766, and thereafter the person so committed shall be proceeded against as if his said election in the first instance had not been made. 53 V., c. 37, s. 30.

770. Continuance of proceedings before another judge.—Proceedings under this part commenced before any judge may, where such judge is for any reason unable to act, be continued before any other judge competent to try prisoners under this part in the same judicial district, and such last mentioned judge shall have the same powers with respect to such proceedings as if such proceedings had been commenced before

him, and may cause such portion of the proceedings to be repeated before him as he shall deem necessary. 53 V., c. 37, s. 30.

771. Election after committal under Part LV. or LVI.—If, on the trial under Part LV. or Part LVI. of this Act, of any person charged with any offence triable under the provisions of this part, the magistrate or justices of the peace decide not to try the same summarily, but commit such person for trial, such person may afterwards, with his own consent, be tried under the provisions of this part. 52 V., c. 47, s. 10.

772. Trial of accused.—If the prisoner, upon being so arraigned and consenting as aforesaid, pleads not guilty, the judge shall appoint an early day, or the same day, for his trial, and the county attorney or clerk of the peace shall subpœna the witnesses named in the depositions, or such of them and other such witnesses as he thinks requisite to prove the charge, to attend at the time appointed for such trial, and the judge may proceed to try such prisoner, and if he be found guilty sentence shall be passed as hereinbefore mentioned; but if he be found not guilty the judge shall immediately discharge him from custody, so far as respects the charge in question. 52 V., c. 47, s. 11.

View.]—Provision is made by sec. 722 for a "view" by a jury of the locality of the crime, under the direction of the court, but it would seem that a judge exercising jurisdiction under the "speedy trials" clauses is not warranted in taking a view except by consent of the parties. R. v. Petrie (1890), 20 Ont. R. 317. At common law there could be no view in a criminal prosecution without consent. R. v. Redman, 1 Kenyon 384.

Where the preliminary enquiry was held and the committment made on a statutory holiday, and both were therefore invalid, and the accused was arraigned at the County Court Judge's Criminal Court under this Part of the Code and there pleaded to the charge and was convicted, it was held that the conviction was not bad because of the invalidity of the preliminary enquiry and committment. R. v. Murray (1897), 1 Can. Cr. Cas. 452 (Ont.).

As to adjournment, see sec. 777 and note to same.

773. Trial for offences other than those for which accused is committed.—The county attorney or clerk of the peace or other prosecuting officer may, with the consent of the judge, prefer against the prisoner a charge or charges for any offence or offences for which he may be tried under the provisions of this part other than the charge or charges for which he has been committed to gaol for trial, although such charge or charges do not appear or are not mentioned in the

depositions upon which the prisoner was so committed. 52 V., c. 47, s. 12.

Substituted charge.]—This provision was introduced in 1879 by 42 Vict. ch. 44, sec. 3. In case of a substitution of another charge for which the law permits a heavier punishment the prisoner's consent should be distinctly obtained, not to the substitution, but to the waiving of the right of trial by jury. Goodman v. R. (1883), 3 Ont. R. 18.

Where a man consents to waive his right to a jury, and to be tried summarily by the judge on a charge which on its face would only warrant an imprisonment for less than a year, he ought not by any implication to be held as assenting to waive such right as to any charge that the law may allow to be substituted therefor which might render him liable to a larger punishment, and his assent to be summarily tried on the substituted charge should be obtained and recorded. Ibid.

774. Powers of judge.—The judge shall, in any case tried before him, have the same power as to acquitting or convicting, or convicting of any other offence than that charged, as a jury would have in case the prisoner were tried at a sitting of any court mentioned in this part, and may render any verdict which may be rendered by a jury upon a trial at a sitting of any such court. 52 V., c. 47, s. 13.

Where prisoners were charged at the County Judges' Criminal Court with obtaining money ($50) by false pretences with intent to defraud, and by a second count with fraud, unlawful device and ill practice in betting, unlawfully obtaining money with intent to cheat, and by a third count with obtaining by false pretences appropriating to their own use money the property of the prosecutor; and the county judge was of opinion that there was not sufficient evidence to support any of the charges as laid, and that a charge of larceny could not be sustained, but found that the prisoners with intent to defraud, by pretending that they were betting, got possession of the money of the prosecutor, and with like intent applied the same to their own use, and convicted them under 32 & 33 Vict., ch. 21, sec. 110 D., the court held that the county judge had the like authority to find the defendants guilty of an offence under that section upon the accusation in the case in like manner as a jury could have done. R. v. Haines (1877), 42 U.C.Q.B. 208.

But where after an acquittal for larceny, but before the accused had been formally discharged out of custody, the prosecuting counsel asked leave to prefer another charge upon which there had not been a committal, and the accused elected a speedy trial on the same, it was held that a conviction thereon could not be sustained and that the proceedings with respect to the second charge were wholly without jurisdiction. R. v. Lonar, 25 N.S.R. 124.

775. Admission to bail.—If a prisoner elects to be tried by the judge without the intervention of a jury the judge may, in his discretion, admit him to bail to appear for his trial, and extend the bail, from time to time, in case the court be adjourned or there is any other reason therefor; and such bail may be entered into and perfected before the clerk. 52 V., c. 47, s. 14.

776. Bail in case of election of trial by jury.—If a prisoner elects to be tried by a jury the judge may, instead of remanding him to gaol, admit him to bail, to appear for trial at such time and place and before such court as is determined upon, and such bail may be entered into and perfected before the clerk. 52 V., c. 47, s. 15.

777. Adjournment.—The judge may adjourn any trial from time to time until finally terminated. 52 V., c. 47, s. 16.

Adjournment of speedy trial.]—An adjournment of a speedy trial may be made in order to obtain the attendance of a material witness, although the party applying for same had elected to proceed without such witness, and although the trial had commenced. R. v. Gordon (1898), 2 Can. Cr. Cas. 141 (B.C.).

But a speedy trial should not be adjourned at the request of the Crown, simply to enable the prosecution to obtain better evidence that a witness examined on the preliminary enquiry is absent from Canada so as to admit his deposition in evidence. R. v. Morgan (1893), 2 B.C.R. 329.

Notwithstanding this section, it is not competent for a judge trying a charge without a jury under the Speedy Trials Clauses of the Code to postpone his decision on the first charge until he has heard the evidence on several other charges against the same accused party, and to then decide the question of guilt in all. To interject one trial into another trial of the same accused person for another offence is a proceeding which prejudices his defence and entitles him to a new trial upon both charges. If time be required in the first case for deliberation on the question of guilt after hearing the evidence, an adjournment may be made, but the trial of the subsequent charges must likewise be postponed. R. v. McBerny, 3 Can. Cr. Cas. 339 (N.S.).

This section applies only to "speedy trials" held under the provisions of secs. 762-781, with the prisoner's consent for trial thereunder without a jury.

The result would appear to be that, although these sections were intended to give the prisoner the benefit of a trial at an earlier date than if he took his trial with a jury (sec. 772), the exercise of the power of adjournment may place him under the disadvantage of having to remain in custody awaiting trial, for a longer period than would be possible if his trial were before a jury.

The following cases indicate the common law practice, in jury trials, after the trial proceedings have commenced:

In R. v. Wenborn (1842), 6 Jurist 267, the prisoner was indicted for stealing a grate. All the witnesses for the prosecution having been examined, it was discovered that the stolen property was not ready to be produced for the inspection of the jury, it having been deposited at an inn at some distance from the court house, but in the same town. Gurney, B., directed that a messenger be sent to bring the stolen article and that another case be proceeded with, but that the prisoner be not taken from the dock. On the return of the messenger with the stolen article, the trial was resumed, several other cases having been tried in the meantime.

And where, owing to the detention of a train, the witnesses for the prosecution had not arrived, and the case for the prosecution had been opened, the trial was adjourned and the jury locked up. R. v. Foster, 3 Car. & K. 206.

On a trial for bigamy before Willes, J., and a jury in 1864, the jury were sworn, and counsel for the prosecution opened the case and called and examined the first witness. The other witnesses, on being called, did not answer, being temporarily absent, and Willes, J., said: "I could have adjourned the case, if no evidence had been called, but not after evidence called. If the witnesses do not appear, the prisoner is entitled to be acquitted for want of evidence." R. v. Robson (1864), 4 F. & F. 360.

In R. v. Tempest (1858), 1 F. & F. 381, Watson, B., held that without statutory authority such as had been enacted in respect to civil causes there was no power to adjourn a criminal trial, even until a later part of the same day, after the jury had been sworn and the case opened for the prosecution; but in a note to the report of that case an instance is stated where Willes, J., in a case where the prosecutrix had not appeared waited until the next case was ready.

The case of R. v. Tempest was, however, disapproved of by Cockburn, C.J., in R. v. Fernandez, Q.B. (1861), referred to in a note to R. v. Parr (1862), 2 F. & F. 861, where a distinction is drawn between an adjournment, which in strictness means to another day, and a mere suspension of proceedings for a short time on the same day, not necessitating the jury leaving the box nor locking up the jury, which would be improper for a mere default on the part of the prosecution or for a mere defect in the proof.

In R. v. Parr (1862), 2 F. &. F. 861, it was held by Wightman, J., that on a jury trial for felony the judge has no authority to order an adjournment to another day, because of the absence of the prosecutor and his witnesses, after the prisoner had been arraigned and given in charge of the jury; and in a note to the report a similar ruling is referred to as having been made by Alderson, B. (2 F. & F. 862).

778. Powers of amendment.—The judge shall have all powers of amendment which any court mentioned in this part would have if the trial was before such court. 52 V., c. 47, s. 17.

779. Recognizance to prosecute or give evidence to apply to proceedings under this Part.—Any recognizance taken under section 598 of this Act, for the purpose of binding a prosecutor or a witness, shall, if the person committed for trial elects to be tried under the provisions of this part, be obligatory on each of the persons bound thereby, as to all things therein mentioned with reference to the trial by the judge under this part, as if such recognizance had been originally entered into for the doing of such things with reference to such trial: Provided, that at least forty-eight hours' notice in writing shall be given, either personally or by leaving the same at the place of residence of the persons bound by such recognizance as therein described, to appear before the judge at the place where such trial is to be had. 53 V., c. 37, s. 29.

780. Witnesses to attend throughout trial.—Every witness, whether on behalf of the prisoner or against him, duly summoned or subpœnaed to attend and give evidence before such judge, sitting on any such trial, on the day appointed for the same, shall be bound to attend and remain in attendance throughout the trial; and if he fails so to attend he shall be held guilty of contempt of court, and may be proceeded against therefor accordingly. 52 V., c. 47, s. 18.

781. Compelling attendance of witnesses.—Upon proof to the satisfaction of the judge of the service of subpœna upon any witness who fails to attend before him, as required by such subpœna, and upon such judge being satisfied that the presence of such witness before him is indispensable to the ends of justice, he may, by his warrant, cause the said witness to be apprehended and forthwith brought before him to give evidence as required by such subpœna, and to answer for his disregard of the same; and such witness may be detained on such warrant before the said judge, or in the common gaol, with a view to secure his presence as a witness; or, in the discretion of the judge, such witness may be released on recognizance, with or without sureties, conditioned for his appearance to give evidence as therein mentioned, and to answer for his default in not attending upon the said subpœna, as for a contempt; and the judge may, in a summary manner, examine into and dispose of the charge of contempt against the said witness who, if found guilty thereof, may be fined or imprisoned, or both, such fine not to exceed one hundred dollars, and such imprisonment to be in the common gaol, with or without hard labour, and not to exceed the term of ninety days, and he may also be ordered to pay the costs incident to the execution of such warrant and of his detention in custody.

2. Such warrant may be in the form OO and the conviction for contempt in the form PP in schedule one to this Act, and the same shall be authority to the persons and officers therein required to act to do as therein they are respectively directed. 52 V., c. 47, s. 19.

FORM OO.—

WARRANT TO APPREHEND WITNESS.

Canada,
Province of ,
County of ,

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

Whereas it having been made to appear before me, that E. F., of , in the said county of , was likely to give material evidence on behalf of the prosecution (*or* defence, *as the case may be*) on the trial of a certain charge of (*as theft, or as the case may be*), against A. B., and that the said E. F. was duly subpœnaed (*or* bound under recognizance) to appear on the day of , in the year , at , in the said county at o'clock (forenoon *or* afternoon, *as the case may be*), before me, to testify what he knows concerning the said charge against the said A. B.

And whereas proof has this day been made before me, upon oath, of such subpœna having been duly served upon the said E. F. (*or* of the said E. F. having been duly bound under recognizance to appear before me, *as the case may be*); and whereas the said E. F. has neglected to appear at the trial and place appointed, and no just excuse has been offered for such neglect: These are therefore to command you to take the said E. F. and to bring him and have him forthwith before me, to testify what he knows concerning the said charge against the said A. B., and also to answer his contempt for such neglect.

Given under my hand this day of , in the year .

O. K.,
Judge.

FORM PP.—

CONVICTION FOR CONTEMPT.

Canada,
Province of ,
County of .

Be it remembered that on the day of , in the year , in the county of , E. F., is convicted bofore me, for that he the said E. F. did not attend before me to give evidence on the trial of a certain charge against one A. B. of (*theft, or as the case may be*), although duly sub-

pœnaed (*or* bound by recognizance to appear and give evidence in that behalf, *as the case may be*) but made default therein, and has not shown before me any sufficient excuse for such default, and I adjudge the said E. F., for his said offence, to be imprisoned in the common gaol of the county of , at , for the space of , there to be kept at hard labour (*and in case a fine is also intended to be imposed, then proceed*) and I also adjudge that the said E. F. do forthwith pay to and for the use of His Majesty a fine of dollars, and in default of payment, that the said fine, with cost of collection, be levied by distress and sale of the goods and chattels of the said E. F. (*or in case a fine alone is imposed, then the clause of imprisonment is to be omitted*).

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

O. K.,
Judge.

PART LV.

SUMMARY TRIAL OF INDICTABLE OFFENCES.

SECT.

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782. Definitions.—In this part, unless the context otherwise requires—

(*a*) the expression "magistrate" means and includes—

(i.) in the Provinces of Ontario, Quebec and Manitoba, any recorder, judge of a county court, being a jus-

tice of the peace, commissioner of police, judge of the sessions of the peace, police magistrate, district magistrate, or other functionary or tribunal, invested by the proper legislative authority, with power to do alone such acts as are usually required to be done by two or more justices of the peace, and acting within the local limits of his or of its jurisdiction;

(ii.) in the Provinces of Nova Scotia and New Brunswick, any recorder, judge of a county court, stipendiary magistrate or police magistrate, acting within the local limits of his jurisdiction, and any commissioner of police and any functionary, tribunal or person invested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more justices of the peace;

(iii.) in the Provinces of Prince Edward Island and British Columbia, and in the District of Keewatin, any two justices of the peace sitting together, and any functionary or tribunal having the powers of two justices of the peace;

(iv.) in the North-West Territories, any judge of the Supreme Court of the said Territories, any two justices of the peace sitting together, and any functionary or tribunal having the powers of two justices of the peace;

(Amendment of 1895.)

(v.) in all the Provinces, where the defendant is charged with any of the offences mentioned in paragraphs (*a*) and (*f*) of section 783, any two justices of the peace sitting together; provided that when any offence is tried by virtue of this sub-paragraph an appeal shall lie from a conviction in the same manner as from summary convictions under Part LVIII., and that section 879 and the following sections relating to appeals from such summary convictions shall apply to such appeal.

(*b*) the expression "the common gaol or other place of confinement," in the case of any offender whose age at the time of his conviction does not, in the opinion of the magistrate, exceed sixteen years, includes any reformatory prison provided for the reception of juvenile offenders in the province in which the conviction referred to takes place, and

to which by the law of that province the offender may be sent; and

(*c*) the expression "property" includes everything included under the same expression or under the expression "valuable security," as defined by this Act, and in the case of any "valuable security," the value thereof shall be reckoned in the manner prescribed in this Act. R.S.C. c. 176, s. 2.

Appointment and jurisdiction of police magistrates.]—The appointment of police magistrates in the several provinces of Canada comes within the jurisdiction of the provincial legislatures. Sec. 1 of the Ontario Act respecting police magistrates, R.S.O. 1897, ch. 87, declares as to that province that every police magistrate shall be appointed by the Lieutenant-Governor and shall hold office during pleasure; and by sec. 18 of the same Act, where the Lieutenant-Governor-in-Council is of opinion that the due administration of justice requires the temporary appointment of a police magistrate for a county or district, the Lieutenant-Governor-in-Council may appoint a police magistrate accordingly. Every police magistrate in Ontario is, ex officio, a justice of the peace for the whole county or union of counties or district, for which or for part of which he has been appointed. R.S.O. 1897, ch. 87, sec. 27.

A town police magistrate in Ontario may, in respect of an offence under a provincial statute committed in a part of the same county for which there is no police magistrate, take the information at a city or town (within the county) having a separate police magistrate; and may there try the case as an ex-officio justice of the peace, having the powers of two justices of the peace under the Ontario Police Magistrates' Act. R. v. McLean (1899), 3 Can. Cr. Cas. 323 (Ont.).

In case of the absence or illness or at the request of a police magistrate in Ontario, any two or more justices of the peace may act in his place in any matter within the jurisdiction of the police magistrate. R.S.O. 1897, c. 87, s. 29.

A person was convicted before the police magistrate for Ottawa, of unlawfully and feloniously wounding M.K. with intent to do her grievous bodily harm, and was sentenced to be imprisoned for one year at hard labour in the Central Prison. It was contended on behalf of the prisoner that the assignment of the jurisdiction to try the offence to the police magistrate was unauthorized by the Constitution, the magistrate being appointed by the provincial government, and under the authority of a provincial statute. This was put as a violation either of sec. 91, sub-sec. 27 of the B.N.A. Act as being legislation by the local legislature respecting criminal law, or the procedure in criminal matters; or of sec. 92, sub-sec. 14, as being an assumption by the Dominion Parliament to constitute a Court of criminal jurisdiction in the province. The court held that it had the concurrent Act of both legislatures, the tribunal being constituted by the statute of the province, and the jurisdiction over the offence assigned to it as an existing tribunal by the laws of the Dominion. Re Boucher (1879), 4 Ont. App. R. 191.

In Re County Courts of British Columbia, 21 Can. S.C.R. 446, Chief Justice Strong said: "The powers of the federal government respecting provincial courts are limited to the appointment and payment of the judges of those courts, and to the regulation of their procedure in criminal matters. The jurisdiction of parliament to legislate as regards the jurisdiction of criminal courts is, I consider, excluded by sub-sec. 14 of sec. 92, before referred to, inasmuch as the constitution, maintenance and organization of provincial courts plainly includes the power to define the jurisdiction of such courts, ter-

ritorially as well as in other respects. This seems to me too plain to require demonstration. Then, if the jurisdiction of the courts is to be defended by the provincial legislations, that must necessarily also involve the jurisdiction of the judges who constitute such courts."

Following this reason and conclusion it was held by the Supreme Court of New Brunswick that the Parliament of Canada cannot give jurisdiction to parish court commissioners in that province which otherwise they would not have.

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

As to Appeal.]—No appeal lies from the decision of a judge of the sessions, police magistrate, district magistrate or other functionary mentioned in sec. 782 (*a*1), holding a "summary trial" under this section. R. v. Racine (Que.), 3 Can. Cr. Cas. 446.

But where two justices of the peace exercise jurisdiction under this Part under sec. 783 sub-secs. (*a*) and (*f*) a special right of appeal in like manner as under Part LVIII. is conferred by sub-sec. (*a* 5), supra.

Though 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. Sec. 742.

Recorders in Quebec and Montreal.]—By Article 2489 R.S.P.Q., all powers and jurisdiction conferred upon the Judges of the Sessions of the Peace for the cities of Quebec and Montreal, or upon two or more justices of the peace, by the provisions of the sec. 2490 of the same statute were vested in and may be exercised by the Recorders and by the Recorder's Courts of and for the said cities, and by those who by law act in the absence on account of sickness or otherwise of the said Recorders, or when there is no Recorder, and discharge the duties of that office.

The effect of this provision of the law is to bring the Recorder's Court under and within the meaning of sec. 782 (*a* i), and to give to its decisions the same character as those of a "magistrate." R. v. Portugais (1901), 5 Can. Cr. Cas. 100 (Que.).

No appeal lies from the decision of the Recorder's Court of Montreal holding a "Summary trial" under sec. 783. R. v. Portugais (1901), 5 Can. Cr. Cas. 100 (Que.).

The recorder of the City of Montreal may, as a "magistrate" under sec. 782, summarily try and condemn a person keeping a disorderly house in a manner constituting a nuisance, to a period of imprisonment of six months and to a fine of $100, or, in default of payment of this fine, to six other months. R. v. Bougie, 3 Can. Cr. Cas. 487 (Que.).

783. Offences to be dealt with under this Part.—Whenever any person is charged before a magistrate—

(*a*) with having committd theft, or obtained money or property by false pretenses, or unlawfully received stolen property, and the value of the property alleged to

have been stolen, obtained or received, does not, in the judgment of the magistrate, exceed ten dollars; or

(*b*) with having attempted to commit theft; or

(*c*) with having committed an aggravated assault by unlawfully and maliciously inflicting upon any other person, either with or without a weapon or instrument, any grievous bodily harm, or by unlawfully and maliciously wounding any other person; or

(*d*) with having committed an assault upon any female whatsoever, or upon any male child whose age does not, in the opinion of the magistrate, exceed fourteen years, such assault being of a nature which cannot, in the opinion of the magistrate, be sufficiently punished by a summary conviction before him under any other part of this Act, and such assault, if upon a female, not amounting, in his opinion, to an assault with intent to commit rape; or

(*e*) with having assaulted, obstructed, molested or hindered any peace officer or public officer in the lawful performance of his duty, or with intent to prevent the performance thereof; or

(*f*) with keeping or being an inmate, or habitual frequenter of any disorderly house, house of ill-fame or bawdy-house; or

(*g*) with using or knowingly allowing any part of any premises under his control to be used—

(i.) for the purpose of recording or registering any bet or wager, or selling any pool; or

(ii.) keeping, exhibiting, or employing, or knowingly allowing to be kept, exhibited, or employed, any device or apparatus for the purpose of recording or registering any bet or wager, or selling any pool; or

(*h*) becoming the custodian or depositary of any money, property, or valuable thing staked, wagered or pledged; or

(*i*) recording or registering any bet or wager, or selling any pool, upon the result of any political or municipal election, or of any race, or of any contest or trial of skill or endurance of man or beast—

the magistrate may, subject to the provisions hereinafter made, hear and determine the charge in a summary way. R.S.C. c. 176, s. 3.

Procedure.]—Sec. 783 is one relating to procedure only, and has reference to various offences, the illegality of which is declared by other sections of the Code. Its object is to provide a summary method of disposing of certain classes of offences for which, in the interests of justice, the utmost expedition is required in bringing them to trial, and which were thought not to be of too serious a nature to entrust to the judgment of the selected officials designated by Code sec. 782, when hedged about with the limitations of sec. 786 et seq.

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

No appeal lies from the decision of a judge of the sessions, police magistrate, district magistrate, or other functionary mentioned in sec. 782 (*a* 1), holding a "summary trial" with the consent of the accused under sec. 783. R. v. Racine, 3 Can. Cr. Cas. 446 (Que.); R. v. Nixon (1900), 4 Can. Cr. Cas. 32 (Ont.). But where the jurisdiction is absolute without consent, habeas corpus will lie. R. v. St. Clair (1900), 3 Can. Cr. Cas. 551 (Ont.).

Although secs. 782 and 783 appear under the general heading given to Part LV., i.e. "Summary trial of indictable offences," the inclusion therein of the offences of being an inmate of a bawdy-house or being an habitual frequenter of same, must be taken as referring to the vagrancy clauses, secs. 207 and 208, and as providing an alternative procedure for the enforcement of those sections as well under the "summary trials" procedure (Part LV.), as under the procedure by "summary convictions by justices" (Part LVIII.), as there are no other sections of the Code dealing with "inmates" and "frequenters."

Theft not exceeding $10.]—An appeal does not lie from the decision of a police magistrate who tries a charge of theft summarily with the consent of the accused, for sec. 808 prevents the application of any of the provisions as to appeals from summary convictions (secs. 879-884), to convictions under Part LV. (secs. 782-808). R. v. Egan (1896), 1 Can. Cr. Cas. 112 (Man.).

It is competent for a magistrate upon the summary trial before him of a prisoner charged under sec. 783 (*a*) with having committed theft to convict him of the offence of attempting to commit it provided for in sec. 783 (*b*). R. v. Morgan (1901), 5 Can. Cr. Cas. 63 (Ont.).

In R. v. Conlin (1897), 1 Can. Cr. Cas. 41, it was held by Boyd, C., Ferguson, J., and Robertson, J., of the Ontario High Court of Justice, that a prisoner summarily tried, with his own consent, by a police magistrate in Ontario, on a charge of theft from the person, where the value of the property stolen was under $10, was properly sentenced to three years' imprisonment. Mr. Justice Ferguson there held that stealing *from the person* constituted what was formerly known as "aggravated larceny," and that the omission to include in Code section 783 "stealing from the person" as well as "theft," left the former offence punishable only under section 344. That section is taken from the Larceny Act, R.S.C. ch. 164, sec. 32, which was taken from 32-33 Vict. ch. 21, sec. 39. Mr. Justice Robertson also held that theft from the person was not within section 783. Boyd, C., however, favoured the argument that the word "theft" in section 783 is of generic import, and would include a case of "stealing from the person," but that a *police* magistrate trying an accused person, with his own consent, under the special powers conferred by section 785 was not limited by section 787 as to the punishment he might impose. The latter view is now embodied in the amendment of the Code.

By the Criminal Code Amendment Act of 1900 the present sub-section 3 of section 785 was added, which declared that sections 787 and 788 do not extend to or apply to cases tried under section 785. By the same Act these special powers exercisable by police and stipendiary magistrates in Ontario were extended to "police and stipendiary magistrates of cities and incorporated towns in every other part of Canada, and to recorders where they exercise judicial functions." (Now sub-section 2 of section 785.)

It would therefore appear that if the accused be charged with

(1) Theft, under $10;
(2) Receiving stolen property, under $10;
(3) Obtaining money or property, under $10, by false pretences; or
(4) Attempt to commit theft (any amount);

he may, on "summary trial" in Ontario, before

(*a*) a County Court Judge (being a J.P.);
(*b*) a Judge of Sessions; or
(*c*) a District Magistrate;

exercising the powers of a "magistrate," under sections 782 and 783, be punished only under the provisions of section 787, and the sentence will be limited to six months' imprisonment (with or without hard labour).

But if the accused comes before

(*d*) a Police Magistrate; or
(*e*) a Stipendary Magistrate;

section 787 no longer applies, and he may, on summary trial in Ontario, be sentenced to the same punishment as might be imposed on a trial before the General Sessions on indictment, viz.:

(1) In the special cases referred to in sections 319-355 inclusive, the punishment therein specified.
(2) Theft (not over $200) in cases not otherwise provided for, and where there is no charge of a previous conviction for theft—seven years.
(3) Theft as above, where offender has been previously convicted *of theft*—ten years.
(4) Theft (over $200), the above punishments and two years additional. (Cr. Code, sec. 357.)
(5) Receiving—fourteen years. (Cr. Code, sec. 314.)
(6) Obtaining money or property by false pretences—three years. (Cr. Code, sec. 359.)
(7) Attempt to commit theft—one-half of the term to which a person who actually committed the theft would be liable to be sentenced. (Cr. Code, sec. 529.)

Aggravated assault.]—In order to constitute "grievous bodily harm" it is not necessary that the injury should be either permanent or dangerous; and an injury is within the meaning of the term if it be such as seriously to interfere with comfort or health. R. v. Archibald (1898), 4 Can. Cr. Cas. 159 (Ont.); R. v. Ashman (1858), 1 F. & F. 88; R. v. Clarence (1888), 22 Q.B.D. 23.

On a charge under sec. 783 (*c*) of aggravated assault with grievous bodily harm before a police magistrate in Ontario trying the case on the consent of the accused to be tried summarily, the sentence which the magistrate may impose is not limited to six months' imprisonment, but may be as great as can be imposed therefor on a trial on indictment at General Sessions. R. v. Archibald (1898), 4 Can. Cr. Cas. 159 (Ont.).

A summary conviction for "assault occasioning bodily harm" and the payment of the fine imposed has been held in Ontario not to bar a civil action. Nevills v. Ballard (1897), 1 Can. Cr. Cas. 434; but in the Province of Quebec it was held by Archibald, J., that upon a conviction by a magistrate

under sec. 783, on a charge of having committed an "aggravated assault by unlawfully and maliciously inflicting upon another person grievous bodily harm," the civil action was barred on payment of the fine. Hardigan v. Graham (1897), 1 Can. Cr. Cas. 437.

If the complaint is not preferred by or on behalf of the person aggrieved, but by a constable of his own motion, and the person assaulted merely gives evidence at the hearing, his right of action will not be barred. Miller v. Lea (1898), 2 Can. Cr. Cas. 282 (Ont.).

Disorderly house cases.]—The term "disorderly house" in 783 (*f*) is held in British Columbia to be governed by the statutory definition of that term given in Cr. Code 198; and upon a charge under secs. 783 and 784 of keeping a 'disorderly house' in that the accused is alleged to be keeping a gaming house, the police magistrate was held to have jurisdiction to hear and determine the charge summarily without the consent of the accused. Ex p. John Cook, 3 Can. Cr. Cas. 72, 4 B.C.R. 18, per Drake, J.

But in R. v. France, 1 Can. Cr. Cas. 321, decided by the Court of Queen's Bench for Quebec (appeal side), it was held that it is governed by the rule "noscitur a sociis," and is therefore restricted to houses of the nature and kind of a house of ill-fame or bawdy house and, that it is immaterial whether the generic term precedes or follows the specific terms which are used; in either case the general word must take its meaning, and be presumed to embrace only things or persons of the kind designated in the specific words.

A prosecution before a magistrate for the offence of being an inmate of a house of ill-fame is none the less a "summary trial" proceeding, although the magistrate's jurisdiction is absolute and is exercisable without the consent of the accused. R. v. Roberts (1901), 4 Can. Cr. Cas. 253 (N.S.). In the same case it was held that the extended jurisdiction by which magistrates and certain other functionaries are empowered to summarily try that and other offences under Part LV., and to impose imprisonment up to six months and a fine not exceeding, with costs, $100, is not restricted as to the offence of being an inmate of a house of ill-fame by the fact that, if the accused had been prosecuted before such magistrate in his capacity of justice of the peace, under the "summary convictions" clauses for the similar offence of being a "vagrant" by reason of being such inmate, the fine could not have exceeded $50 in addition to six months' imprisonment. Ritchie, J. Sed quære.

It has been held in Nova Scotia that an information charging the accused, for that she was "the keeper of a disorderly house, that is to say, a *common* bawdy house," must be taken to be a charge under sec. 198, for the indictable offence of keeping a common bawdy house, and is not cognizable under the special jurisdiction given to magistrates by sec. 783 (*f*), because not laid in the exact language of the latter section; and that such charge could not be summarily tried by a city stipendiary magistrate without the consent of the accused under sec. 785 (amendment of 1900). R. v. Keeping (1901), 4 Can. Cr. Cas. 494 (N.S.).

But there does not seem to be any real distinction between a "bawdy house" and a "common bawdy house," as those terms are used in the Code, and it is submitted that the decision in Keeping's Case was not well founded in that respect.

There may be a joint conviction against husband and wife for keeping a house of ill-fame; the keeping has nothing to do with the ownership of the house, but with the management of it. R. v. Warren (1888), 16 Ont. R. 590.

A conviction for keeping a house of ill-fame was held defective in R. v. Cyr (1887), 12 Ont. Pr. R. 24, per O'Connor, J., because it did not contain an adjudication of forfeiture of the fine imposed, as well as an adjudication that the prisoner pay such sum.

On a charge of being an inmate of a bawdy house it is competent for accused or her counsel to consent that the evidence which had been given before the magistrate upon a concluded trial of another person for keeping the bawdy house, should be read as evidence in the case. R. v. St. Clair (1900), 3 Can Cr. Cas. 551 (Ont. C.A.).

Indecent assault.]—Where the girl alleged to have been indecently assaulted makes a complaint not of her own initiative but in answer to a question, the particulars of such complaint although otherwise admissible within the rule in R. v. Lillyman, [1896] 2 Q.B. 167, cannot be given in evidence; a conversation is not a complaint. R. v. Merry (1900), 19 Cox C.C. 442, per Bruce, J., at the Worcester Assizes.

784. When magistrate shall have absolute jurisdiction.—The jurisdiction of such magistrate is absolute in the case of any person charged with keeping or being an inmate or habitual frequenter of any disorderly house, house of ill-fame or bawdy-house, and does not depend on the consent of the person charged to be tried by such magistrate, nor shall such person be asked whether he consents to be so tried; nor do the provisions of this part affect the absolute summary jurisdiction given to any justice or justices of the peace in any case by any other part of this Act. R.S.C. c. 176, s. 4.

2. The jurisdiction of the magistrate is absolute in the case of any person who, being a seafearing person and only transiently in Canada, and having no permanent domicile therein, is charged, either within the city of Quebec as limited for the purpose of the police ordinance, or within the city of Montreal as so limited, or in any other seaport city or town in Canada where there is such magistrate, with the commission therein of any of the offences hereinbefore mentioned, and also in the case of any other person charged with any such offence on the complaint of any such seafaring person whose testimony is essential to the proof of the offence; and such jurisdiction does not depend on the consent of any such person to be tried by the magistrate, nor shall such person be asked whether he consents to be so tried. R.S.C. c. 176, s. 5.

(Amendments of 1895 and 1900.)

3. The jurisdiction of the magistrate in the Provinces of Prince Edward Island and British Columbia, and in the North-West Territories and the District of Keewatin, under this part, is absolute, without the consent of the party charged, except in cases coming within the provisions of section 785, and except in cases under sections 789 and 790, where the person charged is not a person who under section 784, sub-section 2, can be tried summarily without his consent.

There is no right of appeal from a conviction by a police magistrate under this section although the offence is one which the magistrate may try thereunder without the consent of the accused. R. v. Nixon (1900), 5 Can. Cr. Cas. 32 (Ont.).

Where the jurisdiction of the magistrate to try under Part LV. is absolute and not dependent upon the consent of the accused it is probably subject to be set aside on motion on proper grounds. R. v. St. Clair (1900), 3 Can. Cr. Cas. 551 (C.A.).

Such a conviction, although a record or matter of record in the sense in which all summary convictions by justices are so (Paley on Convictions, 5th ed., pp. 157, 158), is of a different character from the judgment of the court of record expressly constituted as such under Part LIV. of the Code, and may be enquired into upon habeas corpus and certiorari in the same manner and to the same extent as any other summary conviction, notwithstanding sec. 798, which says that such a conviction shall have the same effect as a conviction upon an indictment for the same offence. Ibid; Cremetti v. Crom (1879), 4 Q.B.D. 225; In re Frankland (1872), L.R. 8 Q.B. 18; Best v. Pembroke (1873), L.R. 8 Q.B. 363.

Sub-sec. 3 making the jurisdiction of the magistrate under Part LV. absolute in British Columbia, Prince Edward Island, etc., without the consent of the accused, with certain exceptions, has not the effect of preventing an appeal when two justices of the peace exercise the powers of a magistrate under sec. 782 (*a*3) and (*a*5). R. v. Wirth, 1 Can. Cr. Cas. 231 (B.C.).

(Amendment of 1900.)

785. Magistrate may try with consent.—If any person is charged in the Province of Ontario before a public magistrate or before a stipendiary magistrate in any county, district or provisional county in such province, with having committed any offence for which he may be tried at a Court of General Sessions of the Peace, or if any person is committed to a gaol in the county, district or provisional county, under the warrant of any justice of the peace, for trial on a charge of being guilty of any such offence, such person may, with his own consent, be tried before such magistrate, and may, if found guilty, be sentenced by the magistrate to the same punishment as he would have been liable to if he had been tried before the Court of General Sessions of the Peace.

2. This section shall apply also to police and stipendiary magistrates of cities and incorporated towns in every other part of Canada, and to recorders where they exercise judicial functions.

3. Sections 787 and 788 do not extend or apply to cases tried under this section; but where the magistrate has jurisdiction by virtue of this section only, no person shall be summarily tried thereunder without his own consent.

The only change made by the amendment was in the addition of subsecs. 2 to 3. Section 785 formerly applied to Ontario only, and it is by this amendment extended to cities and incorporated towns elsewhere.

Sub-section 3 is intended to make it clear that where a prisoner elects to be tried under this section the punishment, if he is found guilty, is to be the same as if he were tried otherwise. Sections 787 and 788 provide for the punishment by the magistrate in ordinary cases under the Summary Trials Part. Section 785 declares that in cases under that section a prisoner may be sentenced to the same punishment to which he would have been liable if he had been tried before the Court of General Sessions of the Peace, and at such general sessions a greater punishment might by law be inflicted than where the magistrate convicts under secs. 787 and 788. A doubt having been expressed whether, notwithstanding the terms of the former sec. 785, the punishment to be imposed thereunder was not limited by secs. 787 and 788, it was thought expedient to remove any such possible doubt. See R. v. Conlin (Ont.), 1 Can. Cr. Cas., 41.

A police magistrate trying a prisoner by virtue of this section with his own consent for an offence triable at a court of general sessions, is not a "court of record" within the meaning of the Ontario Habeas Corpus Act. R. v. Gibson (1898), 2 Can. Cr. Cas. 302.

786. Proceedings on arraignment of accused.—Whenever the magistrate before whom any person is charged as aforesaid, proposes to dispose of the case summarily under the provisions of this part, such magistrate, after ascertaining the nature and extent of the charge, but before the formal examination of the witnesses for the prosecution, and before calling on the person charged for any statement which he wishes to make, shall state to such person the substance of the charge against him, and (if the charge is not one that can be tried summarily without the consent of the accused) shall then say to him these words, or words to the like effect: "Do you consent that the charge against you shall be tried by me, or do you desire that it shall be sent for trial by a jury at the (*naming the court at which it can probably soonest be tried*);" and if the person charged consents to the charge being summarily tried and determined as aforesaid, or if the power of the magistrate to try it does not depend on the consent of the accused, the magistrate shall reduce the charge to writing, and read the same to such person, and shall then ask him whether he is guilty or not of such charge. If the person charged confesses the charge the magistrate shall then proceed to pass such sentence upon him as by law may be passed in respect to such offence, subject to the provisions of this Act; but if the person charged says that he is not guilty, the magistrate shall then examine the witnesses for the prosecution, and when the examination has been completed, the magistrate shall inquire of the person charged whether he has any defence to make to such charge, and if he states that he has a defence the magistrate shall hear such defence, and shall then proceed to dispose of the case summarily. R.S.C. c. 176, ss. 8 and 9.

A conviction on a summary trial to which the consent of the accused is required will be quashed if the magistrate fail to inform the prisoner of his right to be tried by a jury. R. v. Cockshott, [1898] 1 Q.B. 582. In that case, after the trial had proceeded, the prisoner pleaded guilty and was convicted; but the omission to give him the notice required by the Imperial Statute, 42 & 43 Vict., ch. 49, sec. 17, sub-sec. 2, corresponding with Code sec. 786, was held to be fatal, it being considered immaterial whether the prisoner did or did not know of his right to be tried by a jury, or whether or not the court knew before the proceedings commenced that the prisoner intended to plead guilty.

If after election of summary trial the charge is amended so as to charge a different or distinct offence the accused must be again asked to elect. R. v. Woods (1898), 19 Can. L.T. 18.

The defendant on being charged before a stipendiary magistrate with felonious assault, pleaded guilty to a common assault, but denied the more serious offence. The magistrate, without having asked the defendant whether he consented to be tried before him or desired a jury, proceeded to try and convicted the defendant on the charge of the felonious assault. It was held that the defendant was entitled to be informed of his right to trial by a jury, and that the conviction must be quashed. R. v. Hogarth (1893), 24 O.R. 60.

Where a statute requires something to be done in order to give a magistrate jurisdiction, it is advisable to shew, on the face of the proceedings, a strict compliance with such direction. Ibid.

The magistrate must take down the depositions of the witnesses both for the prosecution and for the defence. Sec. 801. The provision of sec. 590 (7) for the taking of the evidence in shorthand by a stenographer does not apply to proceedings under Part LV. Sec. 808. And quære whether the depositions as taken down by the magistrate's clerk or otherwise than by the magistrate himself noting the evidence, can be properly authenticated.

The provisions of sec. 144 fixing the punishment for which anyone guilty of obstructing a peace officer shall be liable "on summary conviction," are controlled by secs. 783 and 786, and the charge cannot be summarily tried by a magistrate except with the consent of the accused given in conformity with sec. 786. R. v. Crossen (1899), 3 Can. Cr. Cas. 152 (Man.).

787. Punishment for certain offences under this Part.—In the case of an offence charged under paragraph (*a*) or (*b*) of section 783, the magistrate, after hearing the whole case for the prosecution and for the defence, shall, if he finds the charge proved, convict the person charged, and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labour, for any term not exceeding six months. R.S.C. c. 176, s. 10.

By the Code Amendment Act of 1900, which came in force January 1, 1901, it was declared that secs. 787 and 788 do not extend to or apply to cases tried under sec. 785. The decision to the contrary in R. v. Randolph (1900), 4 Can. Cr. Cas. 165, no longer applies.

A conviction which declares that the convicted person is condemned to be imprisoned during the space of six months to be computed from the day of her arrival as a prisoner in the common gaol of the district is sufficient, and the day from which the term of the sentence is to be commuted is thereby sufficiently expressed. R. v. Bougie (1899), 3 Can. Cr. Cas. 487 (Que.).

Where the limit of punishment fixed by statute in respect of an offence is "imprisonment not exceeding one month," a sentence for a term of thirty days commencing in the month of February, and therefore exceeding a calendar month, is invalid. R. v. Lee (1901), 4 Can. Cr. Cas. 416, per McDougall, Co. J.

788. Punishment for certain other offences.— In any case summarily tried under paragraph (*c*), (*d*), (*e*), (*f*), (*g*), (*h*) or (*i*) of section 783, if the magistrate finds the charge proved, he may convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labour, for any term not exceeding six months, or may condemn him to pay a fine not exceeding, with the costs in the case, one hundred dollars, or to both fine and imprisonment not exceeding the said sum and term; and such fine may be levied by warrant of distress under the hand and seal of the magistrate, or the person convicted may be condemned, in addition to any other imprisonment on the same conviction, to be committed to the common gaol or other place of confinement for a further term not exceeding six months, unless such fine is sooner paid. R.S.C. c. 176, s. 11.

This section applies to authorize six months' imprisonment in default of payment of a fine only in cases in which a fine and imprisonment are conjointly imposed in the first instance. R. v. Stafford (1898), 1 Can. Cr. Cas. 239 (N.S.).

Section 955 (6) directs that imprisonment in a common gaol awarded under this section shall be with or without hard labour in the discretion of the person passing sentence.

A fine under this section must not be in the full sum allowed for fine and costs; and where a fine of $100 is imposed the conviction should disclose that there were no costs. R. v. Perry (1899), 35 C.L.J. 174 (N.B.); R. v. Cyr, 12 Ont. P.R. 24.

A conviction whereby it is adjudged that, in addition to the imprisonment ordered, the accused do "pay a fine of $5 to be paid and applied according to law," is invalid for want of any adjudication of forfeiture of the fine, and the accused imprisoned under a warrant of commitment based thereon should be discharged upon habeas corpus. R. v. Crowell (1897), 2 Can. Cr. Cas. 34; R. v. Burtress (1900), 3 Can. Cr. Cas. 536 (N.S.).

On a charge under sec. 783 (*c*) of aggravated assault with grievous bodily harm, a police magistrate in Ontario trying the case on the consent of the accused to be tried summarily, the sentence which the magistrate may impose is not limited to six months imprisonment, but may be as great as can be imposed therefor on a trial on indictment at General Sessions. R. v. Archibald (1898), 4 Can. Cr. Cas. 159 (Ont.).

By a part of the Criminal Code Amendment Act of 1900, now embodied in sec. 785 as sub-sec. (3), any doubt as to the application of Code sec. 788, to summary trials by police or stipendiary magistrates in Ontario under sec. 785 was removed, and the law declared in accordance with the decision in R. v. Archibald.

Before the amendment it had been held in R. v. Randolph (1900), 4 Can. Cr. Cas. 165, per Ferguson, J., that a person accused of the theft of a sum

of money less than $10, not charged as a "stealing from the person" (Cr. Code, sec. 344), was liable, on his summary trial with his own consent before a police magistrate, to no greater term of imprisonment than six months (Cr. Code, sec. 787), but that decision is no longer applicable.

A magistrate summarily trying, with the consent of the accused, a charge of aggravated assault has jurisdiction to award costs against the accused as well as to impose both fine and imprisonment. R. v. Burtress (1900), 3 Can. Cr. Cas. (N.S.).

It has been held in Nova Scotia by Ritchie, J., that the extended jurisdiction by which magistrates and certain other functionaries are empowered to summarily try that and other offences under part LV. of the Code, and to impose imprisonment up to six months and a fine not exceeding, with costs, $100, is not restricted as to the offence of being an *inmate* of a house of ill-fame by the fact that, if the accused had been prosecuted before such magistrate in his capacity of justice of the peace, under the "summary convictions" clauses for the similar offence of being a "vagrant" by reason of being such inmate, the fine could not have exceeded $50 in addition to six months' imprisonment. R. v. Roberts (1901), 4 Can. Cr. Cas. 253 (N.S.). Sed quære; see 4 Can. Cr. Cas. 499.

(Amendment of 1900.)

789. False pretences, theft or receiving.—When any person is charged before a magistrate with theft or with having obtained property by false pretences, or with having unlawfully received stolen property, and the value of the property stolen, obtained or received exceeds ten dollars, and the evidence in support of the prosecution is, in the opinion of the magistrate, sufficient to put the person on his trial for the offence charged, such magistrate, if the case appears to him to be one which may properly be disposed of in a summary way, shall reduce the charge to writing, and shall read it to the said person, and, unless such person is one who, under section 784, sub-section 2, can be tried summarily without his consent, shall then put to him the question mentioned in section 786, and shall explain to him that he is not obliged to plead or answer before such magistrate, and that if he does not plead or answer before him, he will be committed for trial in the usual course.

One amendment consists in striking out the words "and may be adequately punished by virtue of the powers conferred by this Part," which in the original followed the words "appears to him to be one which may properly be disposed of in a summary way." That section gave the magistrate, under certain circumstances, jurisdiction to try theft, etc., where the value of the property exceeded $10, if he thought the offence might be adequately punished under this Part. The words struck out were considered to be no longer necessary and as liable to mislead, because since the passing of the Act of 52 V., c. 46, the magistrate may in such cases impose the same punishment as if the accused had been convicted upon indictment.

The latter part of the section formerly read "unless such person is one who can be tried summarily without his consent" and in this the words "under section 784, sub-section 2" are now inserted.

(Amendment of 1900.)

790. Punishment on plea of guilty.—If the person charged as mentioned in the next preceding section consents to be tried by the magistrate, the magistrate shall then ask him whether he is guilty or not guilty of the charge, and if such person says that he is guilty, the magistrate shall then cause a plea of guilty to be entered upon the proceedings, and sentence him to the same punishment as he would have been liable to if he had been convicted upon indictment in the ordinary way; and if he says that he is not guilty, he shall be remanded to gaol to await his trial in the usual course.

The amendment consists in the substitution of the words "he shall be remanded to gaol to await his trial in the usual course" for "the magistrate shall proceed as provided in sec. 786." The section formerly provided that if a person charged under the preceding section with theft, etc., where the value of the property *exceeds* $10, pleads not guilty, the magistrate shall proceed as provided in sec. 786. So proceeding, he could, in case of conviction, impose a sentence of only six months' imprisonment (sec. 787), while if the prisoner pleaded guilty, he could, under sec. 790, impose the same punishment as if the case had been tried in the ordinary way. The amendment does away with this anomaly. It takes away the jurisdiction of the magistrate to try such cases at all where the prisoner says he is not guilty. This makes the law as it was up to the time the Code was passed. It was thought best that in such serious cases as may arise under these sections, the magistrate should have jurisdiction to try only where the accused pleads guilty. It will be seen, however, that so far as magistrates in cities and towns are concerned, this Act largely extends their jurisdiction, making it the same in all the provinces as that of magistrates in Ontario under sec. 785.

The direction in this section that the accused shall be "remanded to gaol to await his trial" does not take away the right of the accused to apply for and be granted bail. Senate Debates 1899, p. 547.

791. Magistrate may decide not to proceed summarily.—If, in any proceeding under this part, it appears to the magistrate that the offence is one which, owing to a previous conviction of the person charged, or from any other circumstance, ought to be made the subject of prosecution by indictment rather than to be disposed of summarily, such magistrate may, before the accused person has made his defence, decide not to adjudicate summarily upon the case; but a previous conviction shall not prevent the magistrate from trying the offender summarily if he thinks fit so to do. R.S.C. c. 176, s. 14.

Where the offence is one which may be summarily tried by a police magistrate on consent, and the accused has consented and made his defence to the charge and been acquitted, it is no longer competent for the magistrate to turn the proceedings into a preliminary inquiry and to accept the prosecutor's recognizance to prefer an indictment. R. v. Burns (No. 2) (1901), 4 Can. Cr. Cas. 330 (Ont.).

792. Election of trial by jury to be stated on warrant of committal.—If, when his consent is necessary, the person charged elects to be tried before a jury, the magistrate shall proceed to hold a preliminary inquiry, as provided in Parts XLIV. and XLV., and if the person charged is committed for trial, shall state in the warrant of committal the fact of such election having been made. R.S.C. c. 176, s. 15.

793. Full defence allowed.—In every case of summary proceedings under this part the person accused shall be allowed to make his full answer and defence, and to have all witnesses examined and cross-examined by counsel or solicitor. R.S.C. c. 176, s. 16.

The police are not officers of the Crown, and have no right to take over a prosecution not instituted by them, nor has a police officer any right to act as an advocate except where he is the informant. Webb v. Catchlove, 50 J.P. 795.

Full answer and defence.]—See note to sec. 659 at p. 580.

794. Proceedings to be in open court.—Every court held by a magistrate for the purposes of this part shall be an open public court.

As to excluding the public from the court room in certain cases, see sec. 550A.

795. Procuring attendance of witnesses. — The magistrate before whom any person is charged under the provisions of this part may, by summons, require the attendance of any person as a witness upon the hearing of the case, at a time and place to be named in the summons, and such magistrate may bind, by recognizance, all persons whom he considers necessary to be examined, touching the matter of such charge, to attend at the time and place appointed by him and then and there to give evidence upon the hearing of such charge; and if any person so summoned, or required or bound as aforesaid, neglects or refuses to attend in pursuance of such summons or recognizance, and if proof is made of such person having been duly summoned as hereinafter mentioned, or bound by recognizance as aforesaid, the magistrate before whom such person should have attended may issue a warrant to compel his appearance as a witness. R.S.C. c. 176, s. 18.

See also secs. 581-585.

796. Service of summons.—Every summons issued under the provisions of this part may be served by delivering a copy of the summons to the person summoned, or by delivering a copy of the summons to some inmate of such person's usual place of abode apparently over sixteen years of age; and every person so required by any writing under the hand of any magistrate to attend and give evidence as aforesaid, shall be deemed to have been duly summoned. R.S.C. c. 176, s. 19.

To raise the question whether proper service has been made and jurisdiction over the person acquired, certiorari is an appropriate remedy. R. v. Smith L.R. (1875), 10 Q.B. 604. Appeal is not an adequate remedy, because the defendant, in order to assert his appeal, gives the court jurisdiction over his person. Re Ruggles (1902), 5 Can. Cr. Cas. 163 (N.S.); Rand v. Rockwell, 2 N.S.D. 199.

In R. v. Farmer, [1892] 1 Q.B. 637, a certiorari was granted because service of a summons was made at a house which the defendant had left for a residence in America, the former not being "his last place of abode." Lord Esher, M.R., said: "If there was no service of the summons, the magistrate had no jurisdiction to make an order on it."

See also sec. 562.

797. Dismissal of charge.—Whenever the magistrate finds the offence not proved, he shall dismiss the charge, and make out and deliver to the person charged a certificate under his hand stating the fact of such dismissal. R.S.C. c. 176, s. 20.

798. Effect of conviction.—Every conviction under this part shall have the same effect as a conviction upon indictment for the same offence. R.S.C. c. 176, s. 22.

A summary conviction by a magistrate in respect of a charge under Part LV. of the Code, of an indictable offence which the magistrate has absolute jurisdiction to try without the consent of the accused, is subject to be enquired into upon habeas corpus and certiorari proceedings, notwithstanding this provision. R. v. St. Clair (1900), 3 Can. Cr. Cas. 551 (Ont. C.A.).

799. Certificate of dismissal a bar to further proceeding.—Every person who obtains a certificate of dismissal, or is convicted under the provisions of this part shall be released from all further or other criminal proceedings for the same cause. R.S.C. c. 176, s. 23.

This section, formerly sec. 45 of 32 & 33 Vict., ch. 20, was held not to be ultra vires as interfering with civil rights. Wilson v. Codyre (1886), 26 N.B.R. 516. That was an action of damages for assault and the defendant pleaded that an information had been laid against him by plaintiff before a magistrate in respect to the trespass declared on, and that the magistrate, after hearing, dismissed the information and gave the defendant a certificate of dismissal, whereby, and by force of the statute, he was released from the action. It was held on demurrer that the plea was insufficient in not stating that the complainant had prayed the magistrate to proceed summarily. Ibid.

800. Proceedings not to be void for defect in form.—No conviction, sentence or proceeding under the provisions of this part shall be quashed for want of form; and no warrant of commitment upon a conviction shall be held void by reason of any defect therein, if it is therein alleged that the offender has been convicted, and there is a good and valid conviction to sustain the same. R.S.C. c. 176, s. 24.

This section does not validate a defective commitment if it recites a conviction which is on its face invalid. R. v. Gibson (1898), 2 Can. Cr. Cas. 302, per Rose, J.

A summary conviction by a magistrate in respect of a charge in which he has jurisdiction only upon the consent of the accused to a summary trial, is not invalid merely because it omits to state that the accused so consented, if in fact the consent was given. The omission to state the consent in the conviction is a "want of form" which is cured by this section. R. v. Burtress (1900), 3 Can. Cr. Cas. 536 (N.S.).

Where a conviction by a police magistrate on a "summary trial" of the accused under Part 55 imposes a longer term of imprisonment than is authorized by law, the warrant of commitment cannot be amended, as in such case there is not "a valid conviction to sustain the same." R. v. Randolph (1900), 4 Can. Cr. Cas. 165 (Ont.).

(Amendments of 1900 and 1901.)

801. Transmitting depositions, etc.—The magistrate adjudicating under the provisions of this part shall transmit the conviction, or a duplicate of the certificate of dismissal, with the written charge, the depositions of witnesses for the prosecution and for the defence, and the statement of the accused, to the clerk of the peace or other proper officer for the district, city, county or place wherein the offence was committed, there to be kept by the proper officer among the records of the General or Quarter Sessions of the Peace, or of any court discharging the functions of a court of general or quarter sessions of the peace.

The former provision was that the records were to be sent to the next court of General or Quarter Sessions. The amendment is adapted from sec. 822 in Part LVI, "Juvenile Offenders." A former sub-section (2) which excepted from the enactment police magistrates, etc. (1900, ch. 46), was repealed as of January 1, 1901, by the Code Amendment Act of 1901, 1 Edw. VII., ch. 42.

In the Territories it was held by Rouleau, J., that if a conviction has been filed by the magistrate under sec. 801 in a court of superior criminal jurisdiction, a motion may be made to quash the same without the necessity of a writ of certiorari. R. v. Asheroft (1899), 2 Can. Cr. Cas. 385; but in R. v. Monaghan (1897), 2 Can. Cr. Cas. 488, the full court of the Territories was equally divided on the point.

recognizances; and such certificate shall be prima facie evidence of such non-appearance without proof of the signature of the magistrate thereto. R.S.C. c. 176, s. 31.

806. Application of fines.—Repealed 1900.

807. Forms to be used.—Every conviction or certificate may be in the form QQ, RR, or SS in schedule one hereto applicable to the case or to the like effect; and whenever the nature of the case requires it, such forms may be altered by omitting the words stating the consent of the person to be tried before the magistrate, and by adding the requisite words, stating the fine imposed, if any, and the imprisonment, if any, to which the person convicted is to be subjected if the fine is not sooner paid. R.S.C. c. 176, s. 33.

FORM QQ.—

CONVICTION.

Canada,
Province of , }
County of , }

Be it remembered that on the day of , in the year , at , A. B., being charged before me, the undersigned, , of the said (*city*) (and consenting to my trying the charge summarily), is convicted before me, for that he, the said A. B. (*&c., stating the offence, and the time and place when and where committed*), and I adjudge the said A. B., for his said offence, to be imprisoned in the , (and there kept to hard labour) for the term of .

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

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

FORM RR.—

CONVICTION UPON A PLEA OF GUILTY.

Canada,
County of ,
Province of ,

Be it remembered that on the day of , in the year , at , A. B., being charged before me, the undersigned, , of the said (*city*) (and consenting to my trying the charge summarily), for that he, the said A. B. (*&c., stating the offence, and the time and place, when and where committed*), and pleading guilty to such charge, he is thereupon convicted before me of the said offence; and I adjudge him, the said A. B., for his said offence, to be imprisoned in the (and there kept to hard labour) for the term of .

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

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

FORM SS.—

CERTIFICATE OF DISMISSAL.

Canada,
Province of ,
County of .

I, the undersigned, of the city (*or as the case may be*) of , certify that on the day of , in the year , at aforesaid, A. B., being charged before me (and consenting to my trying the charge summarily), for that he, the said A. B., (*&c., stating the offence charged, and the time and place when and where alleged to have been committed*), I did, after having summarily tried the said charge, dismiss the same.

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

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

The conviction should be framed in such terms as will shew upon the face of it that what was charged came under some statute which gives power to convict summarily. R. v. Clark (1862), 21 U.C.Q.B. 552.

808. Certain provisions not applicable to this Part—The provisions of this Act relating to preliminary inquiries before justices, except as mentioned in sections 804 and 805 and of Part LVIII., shall not apply to any proceedings under this part. Nothing in this part shall affect the provisions of Part LVI., and this part shall not extend to persons punishable under that part so far as regards offences for which such persons may be punished thereunder. R.S.C. c. 176, ss. 34 and 35.

This section prevents the application of any of the provisions as to appeals from summary convictions (secs. 879-884), to convictions under Part LV. (secs. 782-808). An appeal, therefore, does not lie from the decision of a police magistrate who tries a charge of theft summarily with the consent of the accused. R. v. Egan (1896), 1 Can. Cr. Cas. 112 (Man.); with the exception of the special appeal from two justices now given by the amendment to sec. 782 (*a* 5).

Under somewhat similar sections of the English Summary Jurisdiction Act of 1879, the practice was that there should be no appeal. In R. v. Justices of London (1892), 17 Cox C.C., 526, 528, Lawrance, J., says the result is "that the person who consents to be dealt with summarily, makes a bargain with the magistrate that he will leave the decision of the case to him, instead of having the case tried by a jury."

Where a prosecution for being an inmate of a house of ill-fame has taken place before a police magistrate under section 783, and not under the part known as the Vagrancy Act, an appeal is precluded. R. v. Nixon (1900), 5 Can. Cr. Cas. 33 (Ont.).

PART LVI.

TRIAL OF JUVENILE OFFENDERS FOR INDICTABLE OFFENCES.

SECT.

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809. Definitions.—In this part, unless the context otherwise requires—

(*a*) The expression "two or more justices," or "the justices" includes

(i.) in the Provinces of Ontario and Manitoba any judge of the county court being a justice of the peace, police magistrate or stipendiary magistrate, or any two justices of the peace acting within their respective jurisdictions;

(ii.) in the Province of Quebec any two or more justices of the peace, the sheriff of any district, except Montreal and Quebec, the deputy sheriff of Gaspe, and any recorder, judge of the Sessions of the Peace, police magistrate, district magistrate or stipendiary magistrate acting within the limits of their respective jurisdictions;

(iii.) in the Provinces of Nova Scotia, New Brunswick, Prince Edward Island, and British Columbia, and in the District of Keewatin, any functionary or tribunal invested by the proper legislative authority with power to do acts usually required to be done by two or more justices of the peace;

(iv.) in the North-West Territories, any judge of the Supreme Court of the said Territories, any two justices of the peace sitting together, and any functionary or tribunal having the powers of two justices of the peace;

(*b*) the expression "the common gaol or other place of confinement" includes any reformatory prison provided for the reception of juvenile offenders in the province in which the conviction referred to takes place, and to which, by the law of that province, the offender may be sent. R.S.C. c. 177, s. 2.

If the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the corpus delicti brought under investigation. Cave v. Mountain, 1 M. & G. 257. And on a habeas corpus to which a proper commitment in execution is returned, the court never enters into the question whether the magistrate has drawn the right conclusion from the evidence, when there was evidence. R. v. Munro (1864), 24 U.C.Q.B. 44.

810. Punishment for stealing.—Every person charged with having committed, or having attempted to commit any offence which is theft, or punishable as theft, and whose age, at the period of the commission or attempted commission of such offence, does not, in the opinion of the justice before whom he is brought or appears, exceed the age of sixteen years, shall, upon conviction thereof in open court, upon his own confession or upon proof, before any two or more justices, be committed to the common gaol or other place of confinement within the jurisdiction of such justices, there to be imprisoned, with or without hard labour, for any term not exceeding three months, or, in the discretion of such justices, shall forfeit and pay such

sum, not exceeding twenty dollars, as such justices adjudge. R.S.C. c. 177, s. 3.

The power of determining the age or apparent age of the accused is given exclusively to the justice; and a conviction will not be held bad for the omission to state that the accused is under the age of sixteen years. R. v. Quinn (1900), 36 Can Law Jour. 644 (N.S.).

811. Procuring appearance of accused.—Whenever any person, whose age is alleged not to exceed sixteen years, is charged with any offence mentioned in the next preceding section, on the oath of a credible witness, before any justice of the peace, such justice may issue his summons or warrant to summon or to apprehend the person so charged, to appear before any two justices of the peace, at a time and place to be named in such summons or warrant. R.S.C. c. 177, s. 4.

812. Remand of accused.—Any justice of the peace, if he thinks fit, may remand for further examination or for trial, or suffer to go at large, upon his finding sufficient sureties, any such person charged before him with any such offence as aforesaid.

2. Every such surety shall be bound by recognizance conditioned for the appearance of such person before the same or some other justice or justices of the peace for further examination, or for trial before two or more justices of the peace as aforesaid, or for trial by indictment at the proper court of criminal jurisdiction, as the case may be.

3. Every such recognizance may be enlarged, from time to time, by any such justice or justices to such further time as he or they appoint; and every such recognizance not so enlarged shall be discharged without fee or reward, when the person has appeared according to the condition thereof. R.S.C. c. 177, ss. 5, 6 and 7.

813. Accused to elect how he shall be tried.—The justices before whom any person is charged and proceeded against under the provision of this part before such person is asked whether he has any cause to show why he should not be convicted, shall say to the person so charged, these words, or words to the like effect:

"We shall have to hear what you wish to say in answer to the charge against you; but if you wish to be tried by a jury, you must object now to our deciding upon it at once."

2. And if such person, or a parent or guardian of such person, then objects, no further proceedings shall be had under the provisions of this part; but the justices may deal with the case according to the provision set out in Parts XLIV. and XLV., as if the accused were before them thereunder. R.S.C. c. 177, s. 8.

Or a parent or guardian.]—As to the trial of juveniles see secs. 550 and 550A.

814. When accused shall not be tried summarily.—If the justices are of opinion, before the person charged has made his defence, that the charge is, from any circumstance, a fit subject for prosecution by indictment, or if the person charged, upon being called upon to answer the charge, objects to the case being summarily disposed of under the provisions of this part, the justices shall not deal with it summarily, but may proceed to hold a preliminary inquiry, as provided in Parts XLIV. and XLV.

2. In case the accused has elected to be tried by a jury, the justices shall state in the warrant of commitment the fact of such election having been made. R.S.C. c. 177, s. 9.

815. Summons to witness.—Any justice of the peace may, by summons, require the attendance of any person as a witness upon the hearing of any case before two justices, under the authority of this part, at a time and place to be named in such summons. R.S.C. c. 177, s. 10.

816. Binding over witness.—Any such justice may require and bind by recognizance every person whom he considers necessary to be examined, touching the matter of such charge, to attend at the time and place appointed by him and then and there to give evidence upon the hearing of such charge. R.S.C. c. 177, s. 11.

817. Warrant against witness.—If any person so summoned or required or bound, as aforesaid, neglects or refuses to attend in pursuance of such summons or recognizance, and if proof is given of such person having been duly summoned, as hereinafter mentioned, or bound by recognizance, as aforesaid, either of the justices before whom such person should have attended, may issue a warrant to compel his appearance as a witness. R.S.C. c. 177, s. 12.

818. Service of summons.—Every summons issued under the authority of this part may be served by delivering a copy thereof to the person, or to some inmate, apparently over sixteen years of age, at such person's usual place of abode, and every person so required by writing under the hand or hands of any justice or justices to attend and give evidence as aforesaid, shall be deemed to have been duly summoned. R.S.C. c. 177, s. 13.

819. Discharge of accused.—If the justices, upon the hearing of any such case deem the offence not proved, or that it is not expedient to inflict any punishment, they shall dismiss the person charged—in the latter case on his finding sureties for his future good behaviour, and in the former case without sureties, and then make out and deliver to the person charged a certificate in the form TT in schedule one to this Act, or to the like effect, under the hands of such justices, stating the fact of such dismissal. R.S.C. c. 177, s. 14.

FORM TT.—

CERTIFICATE OF DISMISSAL.

Canada, Province of , County of } , justices of the peace for the of , (*or if a recorder, &c.*, I, a of the of at , in the said , of *as the case may be*), do hereby certify that on the day of , in the year , at , in the said , of , A. B. was brought before us, the said justices (*or* me, the said), charged with the following offence, that is to say (*here state briefly the particulars of the charge*), and that we, the said justices, (*or* I, the said) thereupon dismissed the said charge.

Given under our hands and seals (*or* my hand and seal) this day of , in the year at aforesaid.

J. P. [SEAL]
J. R. [SEAL.]
or S. J. [SEAL.]

820. Form of conviction.—The justices before whom any person is summarily convicted of any offence hereinbefore mentioned, may cause the conviction to be drawn up in the form UU in schedule one hereto, or in any other form to the same effect, and the conviction shall be good and effectual to all intents and purposes.

2. No conviction shall be quashed for want of form, or removed by *certiorari* or otherwise into any court of record; and no warrant of commitment shall be held void by reason of any defect therein, if it is therein alleged that the person has been convicted, and there is a good and valid conviction to sustain the same. R.S.C. c. 177, ss. 16 and 17.

FORM UU.—

CONVICTION.

Canada,
Province of , }
County of , }

Be it remembered that on the day of , in the year , at , in the county of , A. B. is convicted before us, J. P. and J. R., justices of the peace for the said county (*or* me, S. J., *recorder*, of the , of , *or as the case may be*) for that he, the said A. B., did (*specify the offence and the time and place, when and where the same was committed, as the case may be, but without setting forth the evidence*), and we, the said J. P. and J. R. (*or* I, the said S. J.), adjudge the said A. B., for his said offence, to be imprisoned in the (*or* to be imprisoned in the , and there kept at hard labour), for the space of , (*or* we) (*or* I) adjudge the said A. B., for his said offence, to forfeit and pay (*here state the penalty actually imposed*), and in default of immediate payment of the said sum, to be imprisoned in the (*or* to be imprisoned in the , and kept at hard labour) for the term of , unless the said sum is sooner paid.

Given under our hands and seals (*or* my hand and seal), the day and year first above mentioned.

J. P. [SEAL.]..

J. R. [SEAL.]

or S. J. [SEAL.]

Defendant was convicted before the stipendiary magistrate of the City of Halifax of the offence of stealing the sum of $30 and was sentenced to be imprisoned for the term of three years in the Halifax Industrial School, a reformatory for boys of the Protestant faith. His discharge was sought upon habeas corpus on the grounds that the conviction did not shew that defendant was a Protestant or that he was under the age of sixteen years. The application was refused, the court holding that the intention of sec. 820 was to dispense with recitals and averments in the particulars mentioned and that the words "shall be good and effectual to all intents and purposes" might be regarded as the equivalent of a legislative declaration that it should not be necessary to refer in the conviction to the age of the party, or to the justice's opinion on that subject. R. v. Quinn (1900), 36 Can. Law Jour. 644.

821. Further proceeding barred.—Every person who obtains such certificate of dismissal, or is so convicted, shall be released from all further or other criminal proceedings for the same cause. R.S.C. c. 177, s. 15.

This section is similar to sec. 799 in Part LV. as to summary trials. See note to sec. 799.

822. Conviction and recognizances to be filed.—The justices before whom any person is convicted under the provisions of this part shall forthwith transmit the conviction and recognizances to the clerk of the peace or other proper officer, for the district, city, county or union of counties wherein the offence was committed, there to be kept by the proper officer among the records of the court of General or Quarter Sessions of the Peace, or of any other court discharging the functions of a court of General or Quarter Sessions of the Peace. R.S.C. c. 177, s. 18.

823. Quarterly returns.—Every clerk of the peace, or other proper officer, shall transmit to the Minister of Agriculture a quarterly return of the names, offences and punishments mentioned in the convictions, with such other particulars as are, from time to time, required. R.S.C. c. 177, s. 19.

824. Restitution of property.—No conviction under the authority of this part shall be attended with any forfeiture, except such penalty as is imposed by the sentence; but whenever any person is adjudged guilty under the provisions of this part, the presiding justice may order restitution of property in respect of which the offence was committed, to the owner thereof or his representatives.

2. If such property is not then forthcoming, the justices, whether they award punishment or not, may inquire into and ascertain the value thereof in money; and, if they think proper,

order payment of such sum of money to the true owner, by the person convicted, either at one time or by instalments, at such periods as the justices deem reasonable.

3. The person ordered to pay such sum may be sued for the same as a debt in any court in which debts of the like amount are, by law, recoverable, with costs of suit, according to the practice of such court. R.S.C. c. 177, ss. 20, 21, and 22.

See also secs. 837 and 838.

Crown witnesses in Ontario.]—By R.S.O. 1897, c. 105, it is provided that in case of a prosecution for treason or felony (*i.e.* an offence which would have been designated a felony before the Code, see sec. 535), or any offence which is punishable by imprisonment only, or any offence for which whipping may be imposed, the judge who holds the court before which the prosecution or trial for the offence takes place, may grant to any one who attends on recognizance, or subpœna, or on request of the Crown Counsel, to give evidence, or who gives evidence on the part of the Crown, an order for payment of such sum of money as to the judge seems reasonable and sufficient to compensate the witness for his costs and charges in attending as such witness; but such sum shall not exceed the amount then payable to the like witnesses in civil cases in the High Court, R.S.O. c. 105, s. 3. But this is not to be construed as entitling a witness in any case to which the Act applies to require payment of any sum of money previous to the determination at such court of the prosecution or trial at which he attends as a witness. Ibid., sec. 17.

Where no bill of indictment has been preferred, or where the trial has not been proceeded with, the court may make a similar order in favour of any person who, in the opinion of the court, bona fide attended the court in obedience to a recognizance or subpœna. Ibid., sec. 4.

The order is not to be made except on a certificate by the counsel, if any, for the Crown in the case, and by the County Crown Attorney (unless the County Crown Attorney is also the counsel for the Crown, and certifies as such); and the certificate shall contain the particulars necessary in the affidavit required in civil cases to entitle a party to disbursements to witnesses and shall be to the like effect; but the court may require further evidence, and shall have a discretion to grant or refuse the order. If the County Crown Attorney is absent, and for this or for some other reason some other person is acting for him, the certificate of the latter may be given instead of the certificate of the County Crown Attorney. Ibid., sec. 5.

The order may embrace any number of witnesses and any number of cases, or may be for one witness only. Ibid., sec. 6.

Every order for payment shall be forthwith made out and delivered by the proper officer of the court, and shall be directed to the treasurer of the county in which the offence was committed, or was supposed to have been committed; or if the offence was committed or was supposed to have been committed in a city, or in a town separated for municipal purposes from the county, the order shall be directed to the treasurer of the city or town. Ibid., sec. 7.

In case the trial takes place in a county other than the county in which the offence was committed, the treasurer of the county in which the trial takes place, if applied to by the witnesses, shall forthwith pay the money in the first instance out of the funds of the municipality in his hands, and shall forthwith be reimbursed by the treasurer to whom the order is directed. Ibid., sec. 9.

In case witness fees paid under the provisions of this Act are, by virtue of the judgment of the court, afterwards recovered from the prosecutor or

defendant, the same shall be repaid to the municipality, and one-third accounted for by the municipality to the Crown. Ibid., sec. 13.

Criminal justice accounts in Ontario.]—The expenses of the administration of justice in criminal matters in the Province of Ontario and the amount of fees payable to public officers in respect thereof out of county or other public funds are regulated by the Ontario Statutes. R.S.O. 1897, ch. 101 to 104, inclusive.

825. Proceedings when penalty imposed on accused is not paid.—Whenever the justices adjudge any offender to forfeit and pay a pecuniary penalty under the authority of this part, and such penalty is not forthwith paid they may, if they deem it expedient, appoint some future day for the payment thereof, and order the offender to be detained in safe custody until the day so appointed, unless such offender gives security to the satisfaction of the justices, for his appearance on such day; and the justice may take such security by way of recognizance or otherwise in their discretion.

2. If at any time so appointed such penalty has not been paid, the same or any other justices of the peace may, by warrant under their hands and seals, commit the offender to the common gaol or other place of confinement within their jurisdiction, there to remain for any time not exceeding three months, reckoned from the day of such adjudication. R.S.C. c. 177, ss. 23 and 24.

826. Costs.—Repealed 1900.

827. Application of fines.—Repealed 1900.

828. Costs to be certified by justice.—The amount of expenses of attending before the justices and the compensation for trouble and loss of time therein, and the allowances to the constables and other peace officers for the apprehension and detention of the offender, and the allowances to be paid to the prosecutor, witnesses and constables for attending at the trial or examination of the offender, shall be ascertained by and certified under the hands of such justices; but the amount of the costs, charges and expenses attending any such prosecution, to be allowed and paid as aforesaid, shall not in any one case exceed the sum of eight dollars.

2. Every such order of payment to any prosecutor or other person, after the amount thereof has been certified by the proper justices of the peace as aforesaid, shall be forthwith made out

and delivered by the said justices or one of them, or by the clerk of the peace or other proper officer, as the case may be, to such prosecutor or other person, upon such clerk or officer being paid his lawful fee for the same, and shall be made upon the officer to whom fines imposed under the authority of this part are required to be paid over in the district, city, county or union of counties in which the offence was committed, or was supposed to have been committed, who, upon sight of every such order, shall forthwith pay to the person named therein, or to any other person duly authorized to receive the same on his behalf, out of any moneys received by him under this part, the money in such order mentioned, and he shall be allowed the same in his accounts of such moneys. R.S.C. c. 177, ss. 28 and 29.

829. Application of this Part.—The provisions of this part shall not apply to any offence committed in the Provinces of Prince Edward Island or British Columbia, or the District of Keewatin, punishable by imprisonment for two years and upwards; and in such provinces and district it shall not be necessary to transmit any recognizance to the clerk of the peace or other proper officer. R.S.C. c. 177, s. 30.

830. No imprisonment in reformatory under this Part.—The provisions of this part shall not authorize two or more justices of the peace to sentence offenders to imprisonment in a reformatory in the Province of Ontario. R.S.C. c. 177, s. 31.

831. Other proceedings against juvenile offenders not affected.—Nothing in this part shall prevent the summary conviction of any person who may be tried thereunder before one or more justices of the peace, for any offence for which he is liable to be so convicted under any other part of this Act, or under any other Act. R.S.C. c. 177, s. 8, part.

PART LVII.

COSTS AND PECUNIARY COMPENSATION—RESTITUTION OF PROPERTY.

SECT.

(Amendment of 1900.)

832. Costs.—Any court by which any judge under Part LIV., or magistrate under Part LV., by whom judgment is pronounced or recorded, upon the conviction of any person for treason, or any indictable offence, in addition to such sentence as may otherwise by law be passed, may condemn such person to the payment of the whole or any part of the costs or expenses incurred in and about the prosecution and conviction for the offence of which he is convicted, if to such court or judge it seems fit so to do; and the court or judge may include in the amount to be paid such moderate allowance for loss of time as the court or judge, by affidavits or other inquiry and examination, ascertains to be reasonable; and the payment of such costs and expenses, or any part thereof, may be ordered by the court or judge to be made out of any moneys taken from such person on his apprehension (if such moneys are his own), or may be enforced at the instance of any person liable to pay or who has paid the same in such and the same manner (subject to the provisions of this Act) as the payment of any costs ordered to be paid by the judgment or order of any court of competent jurisdiction in any civil action or proceeding may for the time being so enforced: Provided, that in the meantime, and until the recovery of such costs and expenses from the person so convicted as aforesaid, or from his estate, the same shall be paid and provided for in the same manner as if this section had not

been passed; and any money which is recovered in respect thereof from the person so convicted, or from his estate, shall be applicable to the reimbursement of any person or fund by whom or out of which such costs and expenses have been paid or defrayed.

833. Costs in libel case.—In the case of an indictment or information by a private prosecutor for the publication of a defamatory libel if judgment is given for the defendant, he shall be entitled to recover from the prosecutor the costs incurred by him by reason of such indictment or information, either by warrant of distress issued out of the said court, or by action or suit as for an ordinary debt. R.S.C. c. 174, ss. 153 and 154.

The mere fact that the Crown prosecutes in this country by a counsel it appoints for the purpose will not necessarily make it a proceeding not carried on by or for a private prosecutor, within the proper meaning of the statute, otherwise every criminal prosecution in Ontario would be a Crown prosecution, and this enactment be of no kind of use. Adam Wilson, J., in R. v. Patteson (1875), 36 U.C.Q.B. 129, 150.

See also note to sec. 669.

834. Costs on conviction for assault.—If a person convicted on an indictment for assault, whether with or without battery and wounding, is ordered to pay costs as provided in section 832, he shall be liable, unless the said costs are sooner paid, to three months' imprisonment, in addition to the term of imprisonment, if any, to which he is sentenced for the offence, and the court may, by warrant in writing, order the amount of such costs to be levied by distress and sale of the goods and chattels of the offender, and paid to the prosecutor, and the surplus, if any, arising from such sale, to the owner; and if such sum is so levied, the offender shall be released from such imprisonment. R.S.C. c. 174, ss. 248 and 249.

835. Taxation of costs.—Any costs ordered to be paid by a court pursuant to the foregoing provisions shall, in case there is no tariff of fees provided with respect to criminal proceedings, be taxed by the proper officer of the court, according to the lowest scale of fees allowed in such court in a civil suit.

2. If such court has no civil jurisdiction, the fees shall be those allowed in civil suits in a superior court of the province according to the lowest scale.

Taxation of costs.]—The person filling the office of Commissioner of the Dominion Police has, as such, no legal capacity to represent and act on behalf of the Crown, and in laying an information in which he desig-

nated himself as such Commissioner of the Dominion Police he acted as a private individual and not as the legal representative of the Crown, although he declared that he was acting as such commissioner on behalf of the Sovereign. The accused having been discharged, and the commissioner having bound himself by recognizance to prefer and prosecute an indictment on the charge contained in his information, and the grand jury having thrown out the bill of indictment, the commissioner was held to be personally liable under sec. 595 for the costs incurred by the accused on the preliminary enquiry and before the Court of Queen's Bench. R. v. St. Louis (1897), 1 Can. Cr. Cas. 141 (Que.).

The costs allowed were not the fees and disbursements paid by the accused to his counsel, such payment being a matter between client and counsel, but such costs as were held by analogy with the costs allowed in civil suits to be costs recoverable from a losing party. Such costs should be taxed according to a tariff made for criminal proceedings, and in the absence of such tariff they are to be taxed in the discretion of the judge, by implication, according to the spirit of the provisions contained in this section. Ibid.

The inference from the last mentioned case is that sec. 835 applies only to costs awarded under sections 832 to 834 inclusive, the only sections preceding it in part LVII.

But quære whether the words "foregoing provisions" are not in themselves wide enough to include all preceding sections of the Code, instead of being applied to the preceding sections of part LVII. alone.

The word "foregoing" is synonymous with the word "preceding" (Century Dict.); and the latter word is not confined to the next preceding sections. Attorney-General v. Temple (1896), 29 N.S.R. 279.

In all proceedings under these rules the party entitled to costs shall tax the same according to the scale in force in the Supreme Court, and if no provision is made for work done under these rules, then the taxing officer shall allow such reasonable amount according to scale in force, or as near thereto as circumstances will admit of. B.C. Rule 61.

836. Compensation for loss of property.—A court on the trial of any person on an indictment may, if it thinks fit, upon the application of any person aggrieved, and immediately after the conviction of the offender, award any sum of money, not exceeding one thousand dollars, by way of satisfaction or compensation for any loss of property suffered by the applicant through or by means of the offence of which such person is so convicted; and if the amount awarded for such satisfaction or compensation shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and the order for payment of such amount may be enforced in such and the same manner as in the case of any costs ordered by the court to be paid under section 832. 33-34 V. (U.K.) c. 23, s. 4.

Compensation or restitution.]—See note to sec. 838.

837. Compensation to bona fide purchaser of stolen property.—When any prisoner has been convicted, either summarily or otherwise, of any theft or other offence, including the stealing or unlawfully obtaining any property, and it appears to the court, by the evidence, that the prisoner sold such property or part of it to any person who had no knowledge that it was stolen or unlawfully obtained, and that money has been taken from the prisoner on his apprehension, the court may, on application of such purchaser and on restitution of the property to its owner, order that out of the money so taken from the prisoner (if it is his) a sum not exceeding the amount of the proceeds of the sale be delivered to such purchaser. R.S.C. c. 174, s. 251.

838. Restitution of stolen property.—If any person who is guilty of any indictable offence in stealing, or knowingly receiving any property, is indicted for such offence, by or on behalf of the owner of the property, or his executor, or administrator, and convicted thereof, or is tried before a judge or justice for such offence under any of the foregoing provisions and convicted thereof, the property shall be restored to the owner or his representative.

2. In every such case, the court or tribunal before which such person is tried for any such offence, shall have power to award, from time to time, writs of restitution for the said property, or to order the restitution thereof in a summary manner; and the court or tribunal may also, if it sees fit, award restitution of the property taken from the prosecutor, or any witness for the prosecution, by such offence although the person indicted is not convicted thereof, if the jury declares, as it may do, or if, in case the offender is tried without a jury it is proved to the satisfaction of the court or tribunal by whom he is tried, that such property belongs to such prosecutor or witness, and that he was unlawfully deprived of it by such offence.

3. If it appears before any award or order is made, that any valuable security has been bona fide paid or discharged by any person liable to the payment thereof, or being a negotiable instrument, has been bona fide taken or received by transfer or delivery, by any person, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had, by any indictable offence, been stolen, or if it appears that the property stolen has been transferred to an innocent purchaser for value who has acquired a lawful title

thereto, the court or tribunal shall not award or order the restitution of such security or property.

(Amendment of 1893.)

4. Nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker or other agent intrusted with the possession of goods or documents of title to goods, for any indictable offence under sections 320 or 363 of this Act. R.S.C. c. 174, s. 250.

Awarding restitution of stolen property.]—To entitle the aggrieved party to an order for the restitution to him of money found on the prisoner convicted of stealing money from the person, proof must be adduced identifying the money so found as the money which was stolen. R. v. Haverstock (1901), 5 Can. Cr. Cas. 113, per Wallace, Co.J., at Halifax.

Where the accused was convicted of the theft of bank notes but there was no evidence to identify the same with the bank notes found on and taken from the prisoner at the time of arrest, and no application was made immediately after the conviction for an order of compensation to the prosecutor for his loss, an order may be properly made ex parte for the restoration to the prisoner of the money so taken from him. Ibid.

Where it is impossible to identify the money found on the prisoner as the stolen money, and the prisoner claims the money as his own, the proper course for the prosecutor to take is to apply, under sec. 836, immediately after the conviction of the prisoner, for compensation for loss of property, and thus obtain an order that the money of the prisoner shall be paid to him to such extent as will compensate him for the loss sustained.

The summary power of the court under this section exists only where the prisoner is convicted. The criminal court had by the common law no power to order restitution to the owner of the property where the prisoner is acquitted. R. v. McIntyre (1877), 2 P.E.I. 154, 157. And it does not extend in cases of conviction to property other than that in respect of which the charge was brought. R. v. Corporation of London (1858), E. B. & E. 509; R. v. Pierce (1858), Bell C.C. 235.

Current coin stolen and passed as currency to innocent persons is not subject to restitution. Moss v. Hancock, [1899] 2 Q.B. 111. But a coin which was sold by the thief as an article of vertu and which had not been passed into circulation as current coin may be ordered to be returned to the owner in like manner as other stolen property. Ibid.

Where money taken from a prisoner on his arrest is admitted by the Crown authorities not to be required for the purpose of evidence at the trial the court may order it to be restored to the prisoner. R. v. Harris, 1 B.C.R., pt. 1, p. 255.

Property.]—The expression property includes not only such property as was originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged and anything acquired by such conversion or exchange whether immediately or otherwise. Sec. 3 (*v*).

PART LVIII.

SUMMARY CONVICTIONS.

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839. Interpretation.—In this part unless the context otherwise requires—

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

(*b*) the expression "clerk of the peace" includes the proper officer of the court having jurisdiction in appeal under this part, as provided by section 879;

(*c*) the expression "territorial division" means district, county, union of counties, township, city, town, parish, or other judicial division or place;

(*d*) the expression "district" or "county" includes any territorial or judicial division or place in and for which there is such judge, justice, justice's court, officer or prison as is mentioned in the context;

(*e*) the expression "common gaol" or "prison" means any place other than a penitentiary in which persons charged with offences are usually kept and detained in custody. R.S.C. c. 178, s. 2.

Disqualification of justices.]—A justice of the peace is not disqualified by the fact that he and the counsel for the prosecution are partners in the business of attorneys provided they have no joint interest in the fees earned by the counsel for the prosecution or in any fees payable to the justice on the trial of the information. Neither is it a ground of disqualification that the justice was appointed and paid by the town council at whose instance the complaint was made and the prosecution carried on, his salary being a fixed sum, not dependent on the amount of fines collected. R. v. Grimmer, in Re Macdonald (1886), 25 N.B.R. 424.

Every person having a personal interest in any litigation, or having a direct or indirect motive for desiring a particular decision to be come to, should abstain from putting himself in such a position as that unconsciously to himself a bias adverse to the due administration of justice might take possession of his mind. R. v. Justices of Great Yarmouth (1881), L.R. 8 Q.B.D. 525; R. v. Chapman (1882), 1 Ont. R. 582.

A magistrate who is engaged in the same kind of business as a trader prosecuted under a transient traders' license law is thereby disqualified from adjudicating upon the charge. R. v. Leeson (1901), 5 Can. Cr. Cas. 184 (Ont.).

Defendant was convicted of a breach of a by-law in selling land by auction without license; two of the four convicting justices were licensed auctioneers for the county and persisted in sitting after objection taken on account of interest, though the case might have been disposed of by one justice. It was held that they were indirectly interested in the result of the case, in so far as it was to their interest either to limit the number of persons acting as auctioneers in the town, or to confine the business of selling lands by auction to persons holding, as they did, auctioneer's licenses, and the conviction was quashed with costs against the two justices. R. v. Chapman (1882), 1 Ont. R. 582.

The magistrate must not unite in his own person the functions of judge and prosecutor. Monson's Case, [1894] 1 Q.B. 750.

If a prosecution be brought for the benefit of a small class of privileged persons, of whom the magistrate is one, the conviction will be quashed on the ground of the pecuniary interest of the justice. R. v. Huggins, [1895] 1 Q.B. 563. But if the ordinary members of the society or association on whose behalf the prosecution is brought have no control over or responsibility for any prosecution brought by the society, the fact that the magistrate is one of the ordinary members will not suffice to disqualify him. Allinson

v. General Council, [1894] 1 Q.B. 750. So where a prosecution was brought at the instance of the Incorporated Law Society, and a conviction obtained for falsely pretending to be a solicitor, but no part of the fine was payable to the society, it was held that the fact of one of the magistrates being a member of the society furnished no reasonable ground for supposing that he was biased, nor did it constitute him a party on whose behalf the prosecution was taken or give him a pecuniary interest therein, although the society was under the liability of having an order for costs made against it. R. v. Burton, [1897] 2 Q.B. 468; R. v. Mayor of Deal, 45 L.T. 439.

It has been held by the Supreme Court of New Brunswick that a stipendiary magistrate is not disqualified from trying cases brought under the Canada Temperance Act, by reason of his being a ratepayer of the town into whose treasury the fines collected under the Act were payable. Ex parte Gorman (1898), 4 Can. Cr. Cas. 305, 34 C.L.J. 175; Ex parte Driscoll, 27 N.B.R. 216, followed; Town of Moncton v. Hebert (1897), (N.B.), not reported, overruled.

That one of the convicting magistrates held the office of Liquor License Inspector in an adjoining district to that in which he adjudicated upon a charge under the Liquor License Act (N.B.) is no evidence of bias. Ex parte Michaud (1896), 32 C.L.J. 779.

The fact that a qui tam action is pending against the magistrate at the suit of the father of the accused is not a sufficient ground of bias. Ex parte Thomas Gallagher (1897), 33 C.L.J. 547.

The relationship, subsisting because of being married to sisters, between the magistrate and the chief inspector of licenses, who was the informant and prosecutor in the proceedings in which the conviction was made, will not disqualify the magistrate from hearing the case. R. v. Major (1897), 33 C.L.J. 162 (S.C.N.S.).

Where one of the magistrates trying several connected charges of assault was married to a first cousin of one of the complainants, and the other complainants were acting as servants of the related complainant in the matter in which the assault arose, all the convictions were set aside on the ground of affinity. Campbell v. McIntosh (1872), 1 P.E.I. Rep. 423, per Hensley, J.

The justice of the peace before whom the information was laid, and who issued the summons was alleged to be interested; but the hearing took place before, and the adjudication and conviction were made by another justice whose qualification was not attacked, while the defendant pleaded to the charge and raised no objection to the validity of the proceedings until the application for a certiorari; it was held that the conviction could not be impugned. (R. v. Gibbon, 6 Q.B.D. 168, distinguished); R. v. Stone (1892), 23 Ont. R. 46.

Where the defendant's wife was the widow of the committing magistrate's deceased son, it was held that there was no relationship by affinity between the magistrate and the defendant to disqualify the magistrate from hearing the case. Ex parte William Wallace (1887), 25 N.B.R. 593.

A magistrate is not disqualified from trying a case by reason of the fact that his salary is paid out of a municipal fund largely made up of fines imposed for the infraction of the statute under which the charge is laid; nor because of his being a ratepayer of the municipality to which, in case of conviction, the fine would be payable. Ex parte Gorman (1898), 4 Can. Cr. Cas. 305 (N.B.); R. v. Fleming, 27 Ont. R. 122; Ex parte McCoy (1896), 1 Can. Cr. Cas. 410 (N.B.); R. v. Hart (1887), 2 B.C.R. 264.

The fact that a convicting justice for an offence against the provisions of the Liquor License Act, 1896, is an inspector under the Act, but not for the district where the offence is alleged to have been committed, is not such an interest as to disqualify him. Ex parte Michaud (1896), 4 Can. Cr. Cas. 569 (N.B.).

When the magistrate's position would be a good ground of challenge to a juror for favour, he is disqualified to act. Ex parte Wallace, 27 N.B.R. 174; Ex parte Jones, 27 N.B.R. 552; Ex parte Hannah Gallagher (1898), 4 Can. Cr. Cas. 486 (N.B.).

It is sufficient to shew that the magistrate might have been influenced, and it need not appear that he was in fact influenced. R. v. Milledge, 4 Q.B.D. 332; R. v. Gaisford, [1892] 1 Q.B. 383.

A magistrate is disqualified from trying an information for an offence punishable on summary conviction where there is a bona fide action pending against him brought by the husband of the accused for alleged malicious conduct as a judicial officer and for assault. Ex parte Hannah Gallagher (1898), 4 Can. Cr. Cas. 486.

If the action against the justice is not bona fide but a mere sham to attempt to disqualify him, its pendency will not operate as a disqualification. Ibid.; Ex parte Scribner, 32 N.B.R. 175.

The disqualification of a justice arising from an action pending against him ceases when he has recovered judgment, though an execution has issued which is unsatisfied. Ex parte Ryan (1894), 4 Can. Cr. Cas. 485 (N.B).

With the exception of where a magistrate acts upon view of an offence, he should not be a promoter of the prosecution, or be interested personally in the matter he is called on magisterially to investigate. It is contrary to natural justice that the judge should be interested in securing the conviction of the accused, or be influenced by any bias other than that produced by the evidence on the mind of one unpredisposed by any kind of interest to have his judgment so warped as to prevent his giving an impartial decision. If such an interest exists, the magistrate is disqualified from acting judicially, be the interest never so small. The court cannot weigh the interest or estimate its force. R. v. Sproule (1887), 14 Ont. R. 375, 381.

The mere fact of a magistrate being a druggist, and in that capacity filling medical prescriptions containing small quantities of liquor, would not constitute a disqualifying interest in a prosecution for unlawfully selling intoxicating liquor without al icense. R. v. Richardson (1891), 20 Ont. R. 514.

The connection of the magistrate with a society, which supplied funds part of which were used to make the purchase upon which the prosecution of illegal sale of liquor was based, because of his being an honorary member of the society but not entitled to take any part in its affairs, is not a ground of disqualification. R. v. Herrell (1898), 1 Can. Cr. Cas. 510 (Man.).

Where a conviction is set aside on the ground of disqualification of the magistrate costs are not generally given against him. R. v. Meyer, 1 Q.B.D. 173; but they may be if he has been guilty of some gross impropriety in the exercise of his summary jurisdiction. R. v. Goodall, L.R. 9 Q.B. 557, per Cockburn, C.J.; R. v. Klemp (1885), 10 Ont. R. 143, 158.

Powers of two justices.]—The Parliament of Canada has not the power to give to a provincial court a jurisdiction which is not within the scope of such court's powers as established by the Provincial Legislature. Sec. 103 of the Canada Temperance Act, R.S.C. 1886, ch. 106 (amended by 51 Vict., ch. 34, sec. 6) is therefore ultra vires of the Dominion Parliament in so far as it purports to confer jurisdiction upon parish court commissioners in New Brunswick to entertain prosecutions thereunder. Ex p. Flanagan (1899), 5 Can. Cr. Cas. 82 (N.B.).

A stipendiary magistrate is none the less a justice of the peace because he receives a stipend, nor is he any the less a justice because the policy of the legislature has been to give him the powers of two justices in order to facilitate the transaction by him of the business which would otherwise fall on the other justices. R. v. McFadden (1885), 6 N.S.R. 426.

And the Canada Temperance Act, 1878, which provides that trials may be had before a stipendiary magistrate *or* any two *other* justices of the peace for the county, does not by the use of the word "other" disqualify a stipendiary magistrate from sitting with another justice to try a case under that Act. R. v. Graham, 6 N.S.R. 455.

840. Application.—Subject to any special provision otherwise enacted with respect to such offence, act or matter, this part shall apply to—

(*a*) every case in which any person commits, or is suspected of having committed, any offence or act over which the Parliament of Canada has legislative authority, and for which such person is liable, on summary conviction, to imprisonment, fine, penalty, or other punishment;

(*b*) every case in which a complaint is made to any justice in relation to any matter over which the Parliament of Canada has legislative authority, and with respect to which such justice has authority by law to make any order for the payment of money or otherwise. R.S.C. c. 178, s. 3.

Jurisdiction of justices.]—The Dominion Parliament has jurisdiction to confer upon justices of the peace appointed under provincial authority jurisdiction to summarily try criminal offences. R. v. Wipper (1901), 5 Can. Cr. Cas. 17 (N.S.).

Section 103 of the Canada Temperance Act, R.S.C. (1886), ch. 106, as amended by 51 Viet. ch. 34, sec. 6, enabling any two justices of the peace to adjudicate upon prosecutions under that Act, is therefore intra vires of the Parliament of Canada. Ibid.

If the accused is in fact present before the magistrate, and the magistrate has jurisdiction over the person and the offence, he may lawfully proceed with the hearing of the charge, notwithstanding that the warrant on which the accused was arrested was executed by a person not legally qualified for that purpose. Ex parte Giberson (1898), 4 Can. Cr. Cas. 537 (N.B.).

As to cases of assault or battery in which a question of title to land arises, see sub-section 8 of section 842.

Corporations.]—It has been held by the Supreme Court of New Brunswick that the procedure of the Criminal Code as to summary convictions does not apply to corporations, and that as regards charges of a criminal nature, a corporation is not within the statutory term "person," which by the Interpretation Act, R.S.C. 1886, ch. 1, is declared to include "any corporation to whom the context can apply," etc. Ex parte Woodstock Electric Light Co. (1898), 4 Can. Cr. Cas. 107.

But a different conclusion was arrived at by a Divisional Court of the High Court of Justice of Ontario in R. v. Toronto Ry. Co. (1898), 2 Can. Cr. Cas. 471, in which it was held that the procedure of the Code as to summary convictions applies as well to corporations as to natural persons, and that the fact that a portion of the remedy provided for the recovery of the penalty and costs is personal imprisonment does not prevent the application of the summary procedure in other respects to corporations.

841. Time within which proceedings shall be commenced.—In the case of any offence punishable on summary conviction if no time is specially limited for making any complaint, or laying any information in the Act or law relating to the particular case, the complaint shall be made, or the information shall be laid within six months from the time when the matter of complaint or information arose, except in the North-West Territories, where the time within which such complaint may be made, or such information may be laid, shall be extended to twelve months from the time when the matter of the complaint or information arose. 52 V., c. 45, s. 5.

This section was originally sec. 5 of 52 Vict., ch. 45 (Can.), an Act to amend the Summary Convictions Act, and its provisions apply only to cases arising, and in which proceedings are had, under the provisions regarding summary convictions. R. v. Edwards (1898), 2 Can. Cr. Cas. 96 (Ont.).

An information may be laid and proceedings taken thereon for the prosecution by indictment of an indictable offence, although the case is one which might have been summarily tried by a justice had the information been laid within the six months' limit provided by Cr. Code sec. 841, and although that period had expired before the laying of the information. R. v. Edwards (1898), 2 Can. Cr. Cas. 96. And as an indictment for rape includes the lesser charge of assault, a verdict thereon of common assault is properly followed by a conviction although the information was laid more than six months after the offence was committed. Ibid.

A prosecution under the revenue tax laws of a province to enforce payment of the tax is a proceeding for the recovery of a Crown debt, and is not governed by a general statute of limitation, not expressly applying to the Crown, but requiring complaints in matters of summary conviction to be made within three months from the time when the matter of the complaint arose. R. v. Lee How (1901), 4 Can. Cr. Cas. 551 (B.C.).

842. Jurisdiction.—Every complaint and information shall be heard, tried, determined and adjudged by one justice or two or more justices as directed by the Act or law upon which the complaint or information is framed or by any other Act or law in that behalf.

2. If there is no such direction in any Act or law then the complaint or information may be heard, tried, determined and adjudged by any one justice for the territorial division where the matter of the complaint or information arose: Provided, that every one who aids, abets, counsels or procures the commission of any offence punishable on summary conviction, may be proceeded against and convicted either in the territorial division or place where the principal offender may be convicted, or in that in which the offence of aiding, abetting, counselling or procuring was committed.

3. Any one justice may receive the information or complaint, and grant a summons or warrant thereon, and issue his

summons or warrant to compel the attendance of any witnesses for either party, and do all other acts and matters necessary preliminary to the hearing, even if by the statute in that behalf it is provided that the information or complaint shall be heard and determined by two or more justices.

4. After a case has been heard and determined one justice may issue all warrants of distress or commitment thereon.

5. It shall not be necessary for the justice who acts before or after the hearing to be the justice or one of the justices by whom the case is to be or was heard and determined.

6. If it is required by any Act or law that an information or complaint shall be heard and determined by two or more justices, or that a conviction or order shall be made by two or more justices, such justices shall be present and acting together during the whole of the hearing and determination of the case.

8. No justice shall hear and determine any case of assault or battery, in which any question arises as to the title to any lands, tenements, hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice. R.S.C. c. 178, ss. 4, 5, 6, 7, 8, 9, 12 and 73.

Territorial limits.]—Defendant was tried at Belleville before the police magistrate of the county of Hastings and convicted on a charge of fraud on a cheese factory in Hastings, an offence under a provincial law. It was proved that the milk (alleged to have been fraudulently handled) had been supplied in the county of Lennox and Addington. It was held that as the supplying was not within Hastings it was not within the jurisdiction of the police magistrate of Hastings. R. v. Dowling (1889), 17 O.R. 698.

A justice of the peace cannot exercise his judicial functions outside the limits of his territorial jurisdiction. Where, therefore, defendant was brought before the stipendiary magistrate for the county of Halifax charged with an assault committed on the high seas, and tried and convicted at the office of the stipendiary magistrate in the city of Halifax, which was outside the limits of the county, the conviction was held bad; but the opinion was expressed that if the conviction had been made at the dwelling house of the magistrate, though outside the limits of his jurisdiction, the conviction might have been covered by the Imperial Act 9 Geo. I., ch. 7, which enacts that "if any justice of the peace shall happen to dwell in any city or other precinct that is a county of itself, situate in the county at large for which he shall be appointed a justice, although not within the same county, it shall be lawful for any such justice to grant warrants, take examinations, and make orders, for any matters which one or more justices of the peace may act in, at his own dwelling house, although such dwelling house be out of the county where he is authorized to act as a justice, and in some city or other precinct adjoining, that is a county of itself." R. v. Hughes (1884), 17 N.S.R. (5 R. & G.) 194.

Every complaint and information.]—The words "every complaint or information" mean a complaint or information under the summary convictions clauses. R. v. Edwards (1898), 2 Can. Cr. Cas. 96, 100 (Ont.).

Notwithstanding this section where a prosecution for an offence under the Canada Temperance Act is to be proceeded with before two justices of the peace, the information must be laid before two justices. Ex parte White (1897), 3 Can. Cr. Cas. 94 (N.B.). Both justices must concur in directing the issue of the summons, but it is not necessary that the information or the summons issued thereon should be signed by more than one of such justices. R. v. Ettinger (1899), 3 Can. Cr. Cas. 387 (N.S.).

In cases where a magistrate has authority to hear and determine a matter, but refuses to do so to the frustration of justice, the court has jurisdiction in the exercise of its mandatory authority to direct him to hear and determine. But while the case is under consideration by him the court will not issue a mandamus to control his conduct of the case, or to prescribe to him the evidence which he shall receive or reject as the case may be. R. v. Carden (1879), 5 Q.B.D. 1, 5; R. v. Connolly (1891), 22 Ont. R. 220, 226.

Associate justices.]—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 (Ont.).

A summary conviction by the magistrate who summoned the accused and heard the charge will be supported, although three other magistrates attended the hearing and purported to dismiss the charge, if the latter magistrates sat without the request or consent of the summoning magistrate. Ibid.

Question of title to lands.]—The general rule of law applicable to justices exercising summary jurisdiction is that they are not to convict where a real question as to the right to property is raised between the parties; then their jurisdiction ceases, and the question of right must be settled by a higher tribunal; for the justices, by convicting, would be settling a question of property, conclusively and without remedy, if their decision happened to be wrong. Per Blackburn, J., in R. v. Stimpson, 4 B. & S. 301, cited by Galt, J., in R. v. Davidson, 45 U.C.Q.B. 91.

It is not within the province of the magistrate to decide on the title to lands (sec. 842 (8)) but merely on the good faith of the parties alleging that the title is called in question. R. v. Davidson (1880), 45 U.C.Q.B. 91.

Petty trespasses.]—The Code does not deal with the offence of petty trespass, that being left to be dealt with by the respective provincial legislatures under their powers to legislate regarding property and civil rights. The Ontario Act respecting trespasses is cap. 120 of R.S.O. 1897, and makes the following provisions:

(1) Any person who unlawfully enters into, comes upon, or passes through or in any way trespasses upon any land or premises whatsoever, being wholly enclosed, and being the property of another person, shall be liable to a penalty of not less than $1 nor more than $10 for any such offence, irrespective of any damage having or not having been occasioned thereby; and such penalty may be recovered, with costs, in every case of conviction before any one justice of the peace, who shall decide the matter in a summary way, and award costs in case of conviction, which may be had either on view or on confession of the party complained against, or on the oath of one credible witness; but nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, or to any case within the meaning of sec. 511 of the Criminal Code 1892.

(2) Any person found committing such trespass as aforesaid, may be apprehended without a warrant by any peace officer, or by the owner of the

property on which it is committed, or the servant of, or any person authorized by such owner, and be forthwith taken to the nearest justice of the peace, to be dealt with according to law.

(3) Except as herein otherwise provided, all proceedings under this Act shall be subject to and in accordance with the provisions of the Ontario Summary Convictions Act, which shall apply to cases arising under this Act.

(4) Nothing in this Act contained shall authorize any justice of the peace to hear and determine any case of trespass in which the title to land, or any interest therein or accruing thereupon, shall be called in question or affected in any manner howsoever; but every such case of trespass shall be dealt with according to law in the same manner, in all respects, as if this Act had not been passed.

The question of a fair and reasonable supposition of right to do the act complained of (e.g. removing a gate) is a fact to be determined by the justice, and his decision upon a matter of fact will not be reviewed; R. v. Malcolm (1883), 2 Ont. R. 511; but the rule does not apply where all the facts shew that the matter or charge is one in which such reasonable supposition exists, that is, where the case and the evidence are all one way and in favour of the defendant. R. v. McDonald (1886), 12 O.R. 381.

843. Hearing before justices.—The provisions of Parts XLIV. and XLV. of this Act relating to compelling the appearance of the accused before the justice receiving an information under section 558 and the provisions respecting the attendance of witnesses on a preliminary inquiry, and the taking of evidence thereon, shall, so far as the same are applicable, except as varied by the sections immediately following, apply to any hearing under the provisions of this part: Provided, that whenever a warrant is issued in the first instance against a person charged with an offence punishable under the provisions of this part, the justice issuing it shall furnish a copy or copies thereof, and cause a copy to be served on the person arrested at the time of such arrest.

2. Nothing herein contained shall oblige any justice to issue any summons to procure the attendance of a person charged with an offence by information laid before such justice whenever the application for any order may, by law, be made ex parte. R.S.C. c. 178, ss. 13 to 17 and 21.

Compelling appearance of accused.]—The magistrate acquires no jurisdiction over the person of the defendant while he is out of the province, and a conviction made on service of the summons upon his wife at his last place of abode in the province (sec. 562 (2)), will be removed by certiorari and quashed on an affidavit made by the defendant that from a date prior to the laying of the information until after the hearing he had been continuously out of the province. Ex parte Donovan (1894), 3 Can. Cr. Cas. 286 (N.B.); Ex parte Fleming, 14 C.L.T. 106; Ex parte Simpson (N.B.), 37 C.L.J. 510. Where substitutional service is relied on, there must be proof that the person served for the defendant was an inmate of the defendant's last or most usual place of abode, and that such person was apparently of the age of sixteen years or upwards, and service on a hotel

clerk at the hotel of which the defendant was the proprietor and in which the proprietor usually resided was held insufficient without proof that the hotel clerk made the hotel his place of residence. Ex parte Wallace, 19 C.L.T. 406. But service on a person proved to be of the required age and to be employed at the defendant's residence as a domestic servant would seem to be sufficient. R. v. Chandler, 14 East 267.

If the summons is not served personally the nature of it must be explained to the person with whom it is left. R. v. Smith (1875), L.R. 10 Q.B. 604. It must also be shewn by affidavit or oral testimony that the defendant could not be conveniently met with, so as to effect personal service. R. v. Carrigan, 17 C.L.T. 224.

A summons may be issued upon an information before a justice of the peace for an offence punishable on summary conviction, although the information has not been sworn; but before a warrant can be issued to compel the attendance of the accused, there must be an information in writing and under oath. Sec. 558. R. v. William McDonald (1896), 3 Can. Cr. Cas. 287 (N.S.).

It is discretionary with the magistrate to issue either a summons or a warrant as he may deem best. R. v. McGregor (1895), 2 Can. Cr. Cas. 413.

If a magistrate's summons is issued on an information purporting to have been sworn at a specified time and place, and the defendant appears thereon and pleads to the charge, the proceedings will not be quashed on certiorari because it is afterwards shewn that the information was not in fact sworn at such time and place. Ex p. Sonier (1896), 2 Can. Cr. Cas. 121 (N.B.).

A person who appears in answer to a summons, and takes his trial and his chance of acquittal, is considered as having waived any objection to the summons. R. v. Justices of Carrick-on-Suir, 16 Cox C.C. 571; R. v. Hazen (1893), 20 Ont. App. 633.

The fixing of an inconvenient place for hearing is improper, but within the jurisdiction of the justice of the peace and therefore not reviewable on motion for prohibition. R. v. Chipman (1897), 1 Can. Cr. Cas. 81 (B.C.).

844. Backing warrants.—The provisions of section 565 relating to the endorsement of warrants shall apply to the case of any warrant issued under the provisions of this part against the accused, whether before or after conviction, and whether for the apprehension or imprisonment of any such person. R.S.C. c. 178, s. 22; 52 V., c. 45, s. 4.

845. Informations and complaints.—It shall not be necessary that any complaint upon which a justice may make an order for the payment of money or otherwise shall be in writing, unless it is so required by some particular Act or law upon which such complaint is founded.

2. Every complaint upon which a justice is authorized by law to make an order, and every information for any offence or act punishable on summary conviction, may, unless it is herein or by some particular Act or law otherwise provided, be made or had without any oath or affirmation as to the truth thereof.

3. 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; and every complaint or information may be laid or made by the complainant or informant in person, or by his counsel or attorney or other person authorized in that behalf. R.S.C. c. 178, ss. 23, 24 and 26.

Irregularities in informations.]—If a magistrate's summons is issued on an information purporting to have been sworn at a specified time and place, and the defendant appears thereon and pleads to the charge, the proceedings will not be quashed on certiorari because it is afterwards shewn that the information was not in fact sworn at such time and place. Ex parte Sonier (1896), 2 Can. Cr. Cas. 121 (N.B.).

It is not a matter within the discretion of the magistrates whether a man shall be put on his trial without any proper preliminary proceedings; and in administering justice summarily, strict regularity must be observed. Blake v. Beach (1876), L.R. 1 Ex. D. 320, 334, 335. A man is not to be put at the mercy of the magistrates in granting delay where he has a right not to be put upon his trial; if he waives the want of information and summons, and by his own assent is properly before the magistrates, it would be in their discretion to grant or refuse delay in order to prepare his defence. Ibid, p. 334.

It was established by the decision in R. v. Hughes (1879), 4 Q.B.D. 614, by the full Court of Criminal appeal that when a person is before justices who have jurisdiction to try the case, they need not inquire how he came there, but may try it. In commenting upon that decision in Dixon v. Wells (1890), 25 Q.B.D. 249, Lord Coleridge, C.J., said (p. 256):—

"I do not, however, feel able to decide in his (appellant's) favour on that point alone (i.e., that objection had been taken before the magistrate), for although the fact of his protest ought to be a complete answer to the assumed jurisdiction, I cannot disguise from myself the fact that from the language of many of the judges in R. v. Hughes, 4 Q.B.D. 614—although, perhaps, not necessary for the decision of the case—and the judgments of Erle, C.J., and Blackburn, J., in R. v. Shaw (1865), 34 L.J.M.C. 169, they seem to assume that if the two conditions precedent, of the presence of the accused and jurisdiction over the offence, were fulfilled, his protest would be of no avail. It would have been easy to say that a protest would have made a difference; but I find no such qualification in R. v. Hughes, although something like that is said in one of the cases; it is an important question well worth consideration in the Court of Appeal."

The warrant of a magistrate is only prima facie evidence of the fact recited therein that an information on oath and in writing had been laid. Friel v. Ferguson (1865), 15 U.C.C.P. 584.

An information should include a statement of the following particulars: (1) the day and year when exhibited; (2) the place where exhibited; (3) the name and style of the justice or justices before who it is exhibited, and (4) the charge preferred. Pritchard's Q.S. Prac. (1875), 1058.

A complaint or information is essential as the foundation of summary proceedings, and without it the justice is not authorized in intermeddling, except where he is empowered by statute to convict on view. Paley on Convictions, 7th ed., 72; 1 Wms. Saunders, 262, n. 1; R. v. Justices of Bucks, 3 Q.B. 800, 807; R. v. Bolton, 1 Q.B. 66; R. v. Fuller, 1 Ld. Raym. 509; R. v. Millard (1853), 17 Jur. 400, 22 L.J.M.C. 108.

The proceeding which forms the groundwork of a "conviction" is termed laying or exhibiting an information, while the proceeding for the obtaining

of an "order" of justices is termed making a complaint. Paley on Convictions, 7th ed., 73.

By sub-section 2, an information or complaint for any offence or act "punishable on summary conviction" need not be under oath unless specially required by the particular Act or law. The statute which authorizes summary proceedings against a tenant for the fraudulent removal of goods is one of these, and specially requires that the complaint be made in writing by the landlord, his bailiff, servant or agent; 11 Geo. II. (Imp.), ch. 19, sec. 4; and a conviction under that Act must shew that the complaint was so made. R. v. Fuller, 2 D. & L. 98; Coster v. Wilson, 3 M. & W. 411; R. v. Davis, 5 B. & Ad. 551.

A variance between the information and the evidence adduced in support thereof at the hearing, in a matter to which the summary convictions clausse of the Code apply, will not invalidate a conviction based on the evidence unless (1) objection was made before the convicting justice, or (2) an adjournment of the hearing was refused notwithstanding that it was "shewn to such justice" that by such variance the defendant had been deceived or misled. Sec. 882. If any variance between the information and the evidence adduced in support thereof as to the place in which the offence is alleged to have been committed, or any other variance between the information and the evidence, appears to the justice to be such that the defendant has been thereby deceived or misled, the justice may upon such terms as he thinks fit adjourn the hearing of the case to some future day. Sec. 847. The intention of the adjournment is that the accused may be prepared to meet the varied charge disclosed by the evidence, and the better practice is to have the information amended and re-sworn by the complainant. These provisions as to variance do not, however, extend to a case where the information has been laid and the party summoned for one offence, and the justices have convicted him of another and different offence punishable in another and a different way. Martin v. Pridgeon (1859), 28 L.J.M.C. 179, 1 E. & E. 778; R. v. Brickhall, 33 L.J.M.C. 156.

One matter of complaint only.]—In the case of Hamilton v. Walker, [1892] 2 Q.B. 25, two informations were laid before justices of the peace, charging defendant (1), with delivering to a certain person indecent advertisements, and (2), with aiding and abetting this person in exhibiting the same. The justices heard the evidence on the first information, and without deciding on the defendant's guilt or innocence, heard the evidence on the second, and committed him on both. The court held that, as the evidence on the second charge was substantially the same as on the first, "each case ought to have been decided on the evidence given with relation to the particular charge, and, therefore, the justices were wrong in hearing the evidence on the second information, before deciding on the first, and both convictions were bad. Vaughan Williams, J., puts his reasons as folllows: "I am of opinion that this course of procedure makes both convictions bad, the first, because the magistrates were bound to decide on the evidence given with respect to that particular charge, and the second, because the defendant had a right to set up the defence that he had already been convicted, or acquitted, as the case might be, on the same facts."

If an information can only be laid for one offence, it is very evident that a person can only be convicted of one offence. A person cannot be charged with one offence and convicted of two offences. R. v. Farrar (1890), 1 Terr. L.R. 308.

Defendant was summoned to appear before two justices of the peace to answer two charges for violations of the Canada Temperance Act, one for selling intoxicating liquor contrary to the provisions of the Act, and the other for keeping such liquor for sale. After hearing evidence on the first charge, the justices heard formal evidence of the service of the second summons. They then dismissed the second charge and convicted defendant on the first.

Held, that the case was sufficiently distinguished from Hamilton v. Walker, [1892] 2 Q.B. 25, by the fact that no evidence was heard on the second charge that would be likely to prejudice the minds of the justices in the consideration of the first. R. v. Butler (1896), 32 C.L.J. 594 (N.S.).

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

It is essential to the validity of a conviction that the party charged should be convicted of a single, distinct, positive and definite charge. A conviction under 37 Vict., ch. 32 (Ont.), that defendant attempted to compound a certain offence with which defendant was charged "with a view of stopping *or* having the said charge dismissed for want of prosecution," was quashed on the ground that the charge was laid, in the alternative, of two distinct offences by the 30th section, and the conviction was not of one of the offences, but of one or the other of them. R. v. Mabey (1875), 37 U.C.Q.B. 248 (following R. v. Hoggard, 30 U.C.Q.B. 152).

In R. v. Hazen, 20 Ont. App. 633, it was held that the disclosure of two offences in the information and evidence taken in reference to both at the trial did not invalidate the conviction for a single offence; or, to put it in another way, for one of the offences alleged in the information.

The information there charged that the defendant "within the space of 30 days last past, to wit on the 30th and 31st days of July, 1892, did unlawfully sell liquor," etc. The court was divided in opinion as to whether the information charged two several offences, or only the single offence of selling unlawfully within the thirty days, but it was held that the defect was one "in substance or form" within the meaning of section 847, and did not invalidate an otherwise valid conviction for a single offence. R. v. Hazen (1893), 20 Ont. App. R. 633.

If objection is taken before the magistrate all but one charge should be struck out and evidence heard as to that one only. R. v. Alward (1894), 25 Ont. R. 519.

A conviction for keeping a house of ill-fame on a date named, "and on other days and times before that day," is sufficiently certain as to time and does not constitute a charge of a distinct offence upon each of those days. R. v. Williams (1876), 37 U.C.Q.B. 540; Onley v. Gee, 30 L.J.M.C. 222.

In R. v. Fry, 19 Cox 135, there were several separate charges against the same defendant, but the justices stated that, in adjudicating on each case, they applied to that case the evidence that was given in reference to it and no other. It was held that the postponement by the justices of their decision in the first case until they had disposed of the other cases did not, under the circumstances, render the conviction in the first case bad in law. And see Re A. E. Cross (1900), 4 Can. Cr. Cas. 175 (Ont.).

Where a liquor license statute expressly provides that several charges may be included in the one information, and the magistrate adjudges the accused guilty upon each charge, it is not necessary that separate convictions should be drawn up; and the fines may be imposed in and by the one conviction adjudging a forfeiture in respect of each offence. R. v. Whiffin (1900), 4 Can. Cr. Cas. 141 (N.W.T.).

(Amendment of 1900.)

846. Objections.—No information, complaint, warrant, conviction or other proceeding under this part shall be deemed objectionable or insufficient on any of the following grounds, that is to say—

(*a*) that it does not contain the name of the person injured, or intended or attempted to be injured; or

(*b*) that it does not state who is the owner of any property therein mentioned; or

(*c*) that it does not specify the means by which the offence was committed; or

(*d*) that it does not name or describe with precision any person or thing:

Provided that the justice may, if satisfied that it is necessary for a fair trial, order that a particular, further describing such means, person, place or thing, be furnished by the prosecutor.

2. The description of any offence in the words of the Act, or any order, by-law, regulation or other document creating the offence, or any similar words, shall be sufficient in law.

This section as amended is adapted from the Imperial Act, 42 and 43 V. (1879), c. 49, s. 39. As to the former law see R. v. Coulson, 1 Can. Cr. Cas. 114, 117.

A conviction is not to be quashed on certiorari, although it does not describe an offence against the law, ex. gr., by reason of an omission to state scienter of the accused, if the court, upon perusal of the depositions, is satisfied that an offence of the nature described in the conviction has been committed. Sec. 889. R. v. Crandall (1896), 27 O.R. 63.

And see note to sec. 845.

847. Variance.—No objection shall be allowed to any information, complaint, summons or warrant 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 on the part of the informant or complainant at the hearing of such information or complaint.

2. Any variance between the information for any offence or act punishable on summary conviction and the evidence adduced in support thereof as to the time at which such offence of act is alleged to have been committed, shall not be deemed material if it is proved that such information was, in fact, laid within the time limited by law for laying the same.

3. Any variance between the information and the evidence adduced in support thereof, as to the place in which the offence or act is alleged to have been committed, shall not be deemed material if the offence or act is proved to have been committed within the jurisduction of the justice by whom the information is heard and determined.

4. If any such variance, or any other variance between the information, complaint, summons or warrant, and the evidence adduced in support thereof, appears to the justice present and acting at the hearing to be such that the defendant has been thereby deceived or misled, the justice may, upon such terms

as he thinks fit, adjourn the hearing of the case to some future day. R.S.C. c. 178, s. 28.

A magistrate hearing a charge for a second offence cannot, in the absence of the defendant or his solicitor, and without notice to them, hear a motion to amend the summons by changing the date of the previous conviction. R. v. Grant (1898), 34 C.L.J. 171 (N.S.).

Where an information in a prosecution under the Canada Temperance Act stated a sale of liquor by the defendant on the 2nd of March, but the summons stated the sale to have been on the 7th of April, and the evidence proved sales on both days, and the conviction was for selling on the 7th April, and no objection was taken at the trial that the defendant was misled by the variance, an application for a rule nisi for a certiorari to remove the conviction was refused, and the court expressed the opinion that if such an objection had been taken the variance might have been amended under sec. 116 of the Can. Temperance Act. Ex p. Groves (1887), 26 N.B.R. 437.

See also note to sec. 845.

848. Execution of warrant.—A summons may be issued to procure the attendance, on the hearing of any charge under the provisions of this part, of a witness who resides out of the jurisdiction of the justices before whom such charge is to be heard, and such summons and a warrant issued to procure the attendance of a witness, whether in consequence of refusal by such witness to appear in obedience to a summons or otherwise, may be respectively served and executed by the constable or other peace officer to whom the same is delivered or by any other person, as well beyond as within the territorial division of the justice who issued the same. 51 V., c. 45, ss. 1 and 3.

No warrant or other process can be issued on a Sunday for offences punishable only on summary conviction. 63 J.P. 755. R. v. Winsor (1866), L.R. 1 Q.B. 289.

Where a warrant was issued by one magistrate for the apprehension of the defendant to be brought before him or a justice of the peace for the county and the accused was brought before another magistrate thereon, convicted and fined, and subsequently the magistrate who had issued the warrant caused the defendant to be summoned before him for the same offence, and convicted and fined him, refusing to receive evidence of the prior conviction, the court quashed the second conviction with costs. R. v. Bernard (1884), 4 O.R. 603.

849. Hearing to be in open court.—The room or place in which the justice sits to hear and try any complaint or information shall be deemed an open and public court, to which the public generally may have access so far as the same can conveniently contain them. R.S.C. c. 178, s. 33.

Exclusion of public in certain cases.]—An order that the public be excluded during the trial from the room or place in which the court is held may be made if the justice is of opinion that such order will be in the interests of public morals. Sec. 550A. The latter section is not to be con-

strued by implication or otherwise as limiting any power heretofore possessed at common law by the presiding judge or other presiding officer of any court of excluding the general public from the court room in any case when such judge or officer deems such exclusion necessary or expedient. Sec. 550A.

View.]—In a summary proceeding for an illegal sale of liquor under the Indian Act, a conviction was quashed where, after the close of the evidence, the magistrate went alone and took a view of the place of sale, and so stated when giving his judgment, and this notwithstanding that the defendant was present when the view was had. Re Sing Kee (1901), 5 Can. Cr. Cas. 86 (B.C.).

850. Counsel for parties.—The person against whom the complaint is made or information laid shall be admitted to make his full answer and defence thereto, and to have witnesses examined and cross-examined by counsel or attorney on his behalf.

2. Every complainant or informant in any such case shall be at liberty to conduct the complaint or information, and to have the witnesses examined and cross-examined by counsel or attorney on his behalf. R.S.C. c. 178, ss. 34 and 35.

Full answer and defence.]—The accused is not denied the right to make "full answer and defence" to the charge by reason of the magistrate having stated, after hearing the evidence for the prosecution, that a denial on oath by the accused would not alter his opinion as to her guilt. R. v. McGregor (1895), 2 Can. Cr. Cas. 410.

Where one of two magistrates hearing an information was called as a witness for the defence but refused to be sworn and give evidence, and the associate magistrate refused to use his authority to require him to be sworn, it was held that the defendant was thereby deprived of the right of making a full defence, and his conviction was quashed on this ground. It was also held that his being called as a witness did not of itself disqualify him from further acting in the case. R. v. Sproule (1887), 14 O.R. 375. That case was, however, disapproved in R. v. Brown (1888), 16 O.R. 375, where it was held that the defendant is not entitled to shew by witnesses at the hearing that the magistrate had a disqualifying interest in the case. (Per Armour, C.J., and Street, J.).

Where in summary proceedings it is desired to call the presiding magistrate as a witness, the application should be supported by an affidavit stating not only that the magistrate is a necessary and material witness, and that the application is made in good faith, but disclosing specifically what the party proposes to prove by the magistrate's testimony. Ex p. Hebert (1898), 4 Can. Cr. Cas. 153 (N.B.).

Where the presiding magistrate is called as a witness for the defence but refuses to be sworn a summary conviction made without his evidence should not be quashed unless it is shewn that the request to have the magistrate called as a witness was made in good faith by the defence, that the magistrate could give material evidence and that the accused was therefore prejudiced. Ex p. Flannagan (1897), 2 Can. Cr. Cas. 513 (N.B.).

The prosecutor must answer questions relative to the disqualification of the magistrate to sit on account of interest, and must state on cross-examination whether he saw the magistrate about the matter before laying the information. R. v. Sproule (1887), 14 O.R. 375, (Cameron, C.J. C.P.).

The fact that a magistrate is sworn as a witness will not disqualify him from resuming his seat as one of the adjudicating justices. Bacon's Abridgment, 7th ed., vol. III., p. 206; Morth v. Champernoon, 2 Ch. Cas. 79.

A solicitor appearing for the accused at a trial before a magistrate of a charge of a second or subsequent offence against the Canada Temperance Act represents his client for the purpose of being interrogated as to the previous conviction although the client is not then present; and the magistrate on his failure to answer, is justified in receiving evidence of the previous conviction. R. v. O'Hearon (1901), 5 Can. Cr. Cas. 187 (N.S.).

851. Witnesses to be on oath.—Every witness at any hearing shall be examined upon oath or affirmation, and the justice before whom any witness appears for the purpose of being examined shall have full power and authority to administer to every witness the usual oath or affirmation. R.S.C. c. 178, s. 47.

It is a principle and rule of the first consequence in every system of jurisprudence which assumes to decide fairly the rights of a controversy, that both parties shall be heard. Re Holland, 37 U.C.Q.B. 214. In the absence of any provision expressly taking away the right to examine them, witnesses for the defence are admissible as a matter of unquestionable right. R. v. Washington (1881), 46 U.C.Q.B. 221, 233; R. v. Sproule (1887), 14 Ont. R. 375.

And see note to preceding section.

852. Negativing exceptions.—If the information or complaint in any case negatives any exemption, exception, proviso or condition in the statute on which the same is founded it shall not be necessary for the prosecutor or complainant to prove such negative, but the defendant may prove the affirmative thereof in his defence if he wishes to avail himself of the same. R.S.C. c. 178, s. 38.

In prosecutions under liquor license laws magistrates have not the right when the formal existing license is produced to go behind it for the purpose of enquiring, not into the simple issue is the defendant licensed or unlicensed, but whether certain preliminary requisites have or have not been complied with before the license produced had been given to the tavern keeper. R. v. Stafford (1872), 22 U.C.C.P. 177. Where, therefore, a certificate had been granted and a license issued for the sale of spirituous liquors under a by-law which was subsequently quashed, it was held that such quashing did not nullify the license, so as to support a conviction for selling liquors without license. Ibid.

(Amendment of 1893.)

853. Non-appearance of accused.—In case the accused does not appear at the time and place appointed by any summons issued by a justice on information before him of the commission of an offence punishable on summary conviction then, if it

appears to the satisfaction of the justice that the summons was duly served a reasonable time before the time appointed for appearance, such justice may proceed ex parte to hear and determine the case in the absence of the defendant, as fully and effectually, to all intents and purposes, as if the defendant had personally appeared in obedience to such summons, or the justice, may, if he thinks fit, issue his warrant as provided by s. 563 of this Act and adjourn the hearing of the complaint or information until the defendant is apprehended. R.S.C. c. 178, s. 39.

This section originated in sections 7 and 32 of the Canadian statute 32-33 Vict., c. 31. In R. v. Smith, L.R. 10 Q.B. 604, Cockburn, C.J., said: "To convict an accused person unheard is a dangerous exercise of power, there being an alternative mode of procedure by issuing a warrant to apprehend him. Justices ought to be very cautious how they proceed in the absence of a defendant, unless they have strong grounds for believing that the summons has reached him and that he is wilfully disobeying it." L.R. 10 Q.B. 607.

By sec. 562 it is provided that the summons shall be served by a constable or other peace officer upon the person to whom it is directed, either (*a*), by delivering it to him personally, or (*b*), if such person cannot conveniently be met with, by leaving it for him at his last or most usual place of abode with some inmate thereof apparently not under sixteen years of age.

The hearing before a justice trying a person for an offence punishable on summary conviction may be adjourned from time to time under this section, 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.).

The authority of a magistrate to determine the case in the defendant's absence on his default in appearance, must be restricted to the particular charge in the original information and cannot cover a distinct offence. Ex parte Doherty (1894), 1 Can. Cr. Cas. 84 (N.B.). And see sec. 847 (4).

Service of a summons to appear before a magistrate to answer a charge of having committed an offence punishable by summary conviction is not validly made although left with the defendant's wife at his usual place of abode (sec. 562), if the defendant was then absent from Canada and remained away until after the hearing. The magistrate in such a case acquires no jurisdiction over the person of the defendant, and a conviction made in the defendant's absence upon such service will be quashed. Ex parte Donovan (1894), 3 Can. Cr. Cas. 286 (N.B.).

A defendant who has once had the opportunity to defend and has appeared and obtained an adjournment cannot by his failure to appear at the adjourned hearing defeat the administration of justice, and may be found guilty in his absence. R. v. Kennedy (1889), 17 O.R. 159; R. v. Mabee (1889), 17 O.R. 194.

Notice of a summons by justices under the Summary Convictions clauses of the Cr. Code may be given to a corporation in a manner similar to a notice of indictment under Cr. Code 637. R. v. Toronto Ry. Co. (1898), 2 Can. Cr. Cas. 471.