OLD CODE:

668. When any person accused of an indictable offence is before a justice, whether voluntarily or upon summons, or after being apprehended with or without warrant, or while in custody for the same or any other offence, the justice shall proceed to inquire into the matters charged against such person in the manner hereinafter directed.

667. (3) For wording of this section see p. 739.

In *R. v. HERFORD*(1860), 3 E. & E.115, 121 E.R.387, an application was made for a writ of prohibition to restrain a coroner from holding an inquest into the origin of a fire and the Court granted the writ, holding that a prohibition lies to a Court of criminal, no less than to one of civil jurisdiction, and the following appears in the judgment:

"A coroner has no *ex officio* jurisdiction at common law to hold any other inquest than one on a dead body, *super visum corporis*. He cannot, therefore, hold an inquest to inquire into the origin of a fire by which no death has been occasioned."

It may be said generally that the duties of coroners under Canadian law are confined to the investigation of deaths. In Ontario, the *Coroners Act* referred to by Riddell, J., in *R. v. BARNES, supra,* besides dealing with deaths, formerly empowered the Lieutenant-Governor in Council to appoint provincial coroners with special powers including that of investigating fires. This, however, was repealed by the *Coroners Act* 1948, c.17, which deals only with deaths. In Newfoundland, the office of coroner was abolished in 1875.

In Quebec, the *Coroners Act* deals only with deaths, but under the *Fire Investigations Act* (R.S.Q. 1941, c.150), the coroner is required to investigate the cause and origin of fires occurring outside the cities of Quebec and Montreal. It may be said, however, that he exercises this power as *persona designata* and not by virtue of his office as coroner.

S.448 applies only where there is an inquest.

PART XV.
PROCEDURE ON PRELIMINARY INQUIRY.

Jurisdiction.

INQUIRY BY JUSTICE.

449. Where an accused who is charged with an indictable offence is before a justice, the justice shall, in accordance with this Part, inquire into that charge and any other charge against that person.

This covers matters which appeared in the former ss.668 and 667(3). The latter formed part of the new s.568 in the Code of 1892, and s.668 was s.577 in that Code. Similar provision was contained in s.445 of the E.D.C.

The following is quoted from *Re R. v. ISBELL*(1929), 51 C.C.C.362:

"Whether, were the appearance before the magistrate effected by illegal force, and against the will and protest of the accused, the magistrate would be precluded from proceeding, it is not necessary in this case to decide; were it to call for a decision I should have no hesitation

Section 449—*continued*

in holding that *R. v. HUGHES* (1879), 4 Q.B.D. 614 applied, and that the objection and protest of the accused made no difference. It is unnecessary to quote or criticize the cases in the different provinces on that point, although they were all brought to our attention; . . . . . The proposition that the defendant being present in Court, the illegality of the process by which he was brought there is immaterial, has long been textbook law: Snow's Cr. Code, 4th ed., p.16; it being our function to find out and declare the existing and not make new law, we should not try to modify what is well established."

cf. R. v. BOTTLEY(1929), 51 C.C.C.387 and see also *R. v. WEISS and WILLIAMS,* noted under s.442 *ante.*

In *ISBELL'S* case the Court refused the application of the accused that his committal for trial be set aside. It may be said that in the majority of the cases in which this question has been discussed, the ruling has been to the effect that "the manner of getting the accused before the Magistrate cannot go to the root of the Magistrate's jurisdiction", but it should be emphasized that the cases are not all in accord.

The following, quoted from *Re SCHOFIELD and CITY OF TORONTO*(1913), 22 C.C.C.93, deals with general policy:

"It is plain that the policy of the criminal law is to require a somewhat thorough preliminary investigation of every indictable offence. That is very apparent from many of the provisions of the *Criminal Code,* and the purposes of it are obvious. For one thing, it lays the facts in a proper manner before this Court so that they can be in a proper manner laid before the grand jury. It has been the practice in some cases not to make such an investigation, but to do what is called 'waive examination'. I find no warrant for any practice of that character; it seems to me to be quite improper. What the law requires is a preliminary investigation; and it is only upon the facts thus brought out that ordinarily an indictment can be laid. The Code provides that there may be an indictment for the offence for which the accused has been committed for trial; and that there may be an indictment for any other offence founded on the facts disclosed in the preliminary inquiry. The policy of the law plainly is, that cases should pass through an inquiry of that sort before being presented to the grand jury. It is true that power is given to the Attorney General and to the Judges, to permit an indictment in cases which have not come up in that manner; but I cannot think that the power was intended to be exercised in any but unusual cases. . . . . (*e.g.* When magistrates have not done their full duty.) There is no royal road for anyone; every one must take the common road up to this Court."

REMAND BY JUSTICE TO MAGISTRATE IN CERTAIN CASES.—Election before justice in certain cases.—Procedure when accused elects trial without jury.

450. (1) Where an accused is before a justice other than a magistrate as defined in Part XVI charged with an offence over which a magistrate, under that Part, has absolute jurisdiction, the justice shall remand the accused to appear before a magistrate having absolute jurisdiction over that offence in the territorial division in which the offence is alleged to have been committed.

OLD CODE:

796. Whenever any person is charged before any justice or justices, with any offence mentioned in section seven hundred and seventy-three, and in the opinion of such justice or justices the case is proper to be disposed of summarily by a magistrate, as in this Part provided, the justice or justices before whom such person is so charged may, if he or they see fit, remand such person for trial before the nearest magistrate in like manner in all respects as a justice or justices are authorized to commit an accused person for trial at any court: Provided, that no justice or justices, in any province, shall so remand any person for trial before any magistrate in any other province.

(2) Any person so remanded for trial before a magistrate in any city, may be examined and dealt with by the said magistrate or any other magistrate in the same city.

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(2) Subject to subsection (1), where an accused is before a justice charged with an offence other than an offence that is mentioned in subsection (2) of section 413 the justice shall, if

***(a)* he is a justice other than a magistrate as defined in Part XVI, and**

***(b)* he orders the accused to appear for trial or commits the accused for trial,**

inform the accused of the offence in respect of which the order or committal is made and put the accused to his election in the following words:

You have the option to elect to be tried by a judge without a jury or by a court composed of a judge and jury. How do you elect to be tried?

(3) Where an accused is put to his election under subsection (2) the justice shall

***(a)* endorse on the information a statement showing the nature of the election or that the accused did not elect, and**

***(b)* state in the warrant of committal, if any, that the accused**

(i) elected to be tried by a judge without a jury,

(ii) elected to be tried by a court composed of a judge and jury, or

(iii) did not elect.

This is largely new and is complementary to the trial procedure provided in Part XVI. It does, however, replace the former s.796, which was s.804 in the Code of 1892 and ss.28-30 in R.S.C. 1886, c.176, and widens it and makes mandatory what was discretionary there. Thus the principal changes effected by this section are (1) the justice, if he is not himself a magistrate as defined in Part XVI, and the offence charged is one over which such a magistrate has absolute jurisdiction under s.468 *post*, must remand the accused to be taken before the magistrate; (2) otherwise, unless the offence charged is one that must be tried by judge and jury, he will, if he decides that there is a case to be tried, put the accused to his election as required by subsec.(2).. The election taken at this early opportunity, will assist in preparing lists for trial. Note that this election does not refer to trial before a magistrate.

As to re-election see s.474(5) *post*. See also ss.475-481.

POWERS OF JUSTICE.

BAIL.—Adjournment.—Remand by order.—Remand by warrant.—Resuming inquiry.—Issue of warrant.—Permission to sum up.—Further evidence.—Inquiry may be private.—Regulating course of inquiry.

451. A justice acting under this Part may

(a) order that an accused, at any time before he has been committed for trial, be admitted to bail

(i) upon the accused entering into a recognizance in Form 28 before him or any other justice, with sufficient sureties in such amount as he or that justice directs,

(ii) upon the accused entering into a recognizance in Form 28 before him or any other justice and depositing an amount that he or that justice directs, or

(iii) upon the accused entering into his own recognizance in Form 28 before him or any other justice in such amount as he or that justice directs without any deposit;

(b) adjourn the inquiry from time to time and change the place of hearing, where it appears to be desirable to do so by reason of the absence of a witness, the inability of a witness who is ill to attend at the place where the justice usually sits, or for any other sufficient reason, but no such adjournment shall be for more than eight clear days unless the accused

(i) is at large on bail and he and his sureties and the prosecutor consent to the proposed adjournment, or

(ii) is remanded for observation under subparagraph (i) of paragraph *(c)*;

(c) remand an accused,

(i) by order in writing, to such custody as the justice directs for observation for a period not exceeding thirty days where, in his opinion, supported by the evidence of at least one duly qualified medical practitioner, there is reason to believe that

(A) the accused is mentally ill, or

(B) the balance of the mind of the accused is disturbed, where the accused is a female person charged with an offence arising out of the death of her newly-born child, or

(ii) orally, to the custody of a peace officer or other person, where the remand is for a period not exceeding three clear days;

(d) remand an accused to custody in a prison, by warrant in Form 14;

(e) resume an inquiry before the expiration of a period for which it has been adjourned with the consent of the prosecutor and the accused or his counsel;

(f) order in writing, in Form 26, that the accused be brought before him, or any other justice for the same territorial division, at any time before the expiration of the time for which the accused has been remanded;

(g) issue a warrant in Form 8 or 9, as the case may be, for the arrest of an accused

(i) who does not appear pursuant to service of a summons upon him, if service is proved, or

OLD CODE:

679. A justice holding a preliminary inquiry may in his discretion
(a) permit or refuse permission to the prosecutor, his counsel or attorney, to address him in support of the charge, either by way of opening or summing up the case, or by way of reply upon any evidence which may be produced by the person accused;
(b) receive further evidence on the part of the prosecutor after hearing any evidence given on behalf of the accused;
(c) adjourn the hearing of the matter from time to time, and change the place of hearing, if from the absence of witnesses, the inability of a witness who is ill to attend at the place where the justice usually sits, or from any other reasonable cause, it appears desirable to do so, and may remand the accused, if required, by warrant in Form 17: Provided that no such remand shall be for more than eight clear days, the day following that on which the remand is made being counted as the first day, but nothing herein contained shall be construed as prohibiting an adjournment for more than eight days in any case where the accused is on bail, and he and his surety or sureties and the prosecutor or complainant consent, or when the accused is remanded for observation under paragraph (f);
(d) order that no person other than the prosecutor and accused, their counsel and solicitors shall have access to or remain in the room or building in which the inquiry is held, if it appears to him that the ends of justice will be best answered by so doing;
(e) regulate the course of the inquiry in any way which may appear to him desirable, and which is not inconsistent with the provisions of this Act.
(f) where in his opinion, supported by the evidence of at least one duly qualified medical practitioner, there is reason to believe that the accused person is mentally ill, order that the accused be remanded in such custody as he directs for observation for a period not exceeding thirty days.
(2) If any remand under this section is for a time not exceeding three clear days the justice may verbally order the constable or other person in whose custody the accused then is, or any other constable or person named by the justice in that behalf, to keep the accused person in his custody and to bring him before him or such other justice as shall then be acting at the time appointed for continuing the examination.

680. The justice may order the accused person to be brought before him, or before any other justice for the same territorial division, at any time before the expiration of the time for which such person has been remanded, and the gaoler or officer in whose custody he then is shall duly obey such order.

681. If the accused is remanded as aforesaid, the justice may discharge him, upon his entering into a recognizance in form 18, with or without sureties in the the discretion of the justice, conditioned for his appearance at the time and place appointed for the continuance of the examination.

(ii) who does not appear at the time and place to which an inquiry has been adjourned;

(h) **grant or refuse permission to the prosecutor or his counsel to address him in support of the charge, by way of opening or summing up or by way of reply upon any evidence that is given on behalf of the accused;**

Section 451—*continued*

(*i*) receive evidence on the part of the prosecutor or the accused, as the case may be, after hearing any evidence that has been given on behalf of either of them;

(*j*) order that no person other than the prosecutor, the accused and their counsel shall have access to or remain in the room in which the inquiry is held, where it appears to him that the ends of justice will be best served by so doing; and

(*k*) regulate the course of the inquiry in any way that appears to him to be desirable and that is not inconsistent with this Act.

This combines matter formerly appearing in ss.679, 680 and 681. S.679 was s.586 in the Code of 1892, amended by 1939, c.30, s.15, and 1943-44, c.23, s.13. It came from R.S.C. 1886, c.174, s.67. Corresponding provisions were contained in s.453 of the E.D.C. S.680 was s.588 in the Code of 1892 and s.66 of R.S.C. 1886, c.174. S.681 was s.587 in the Code of 1892 and s.67 in R.S.C. 1886, c.174.

The section contains new provisions as follows:

1. Under par.(a) the power of the justice to grant bail before committal is clarified, especially by insertion of the words "without any deposit." This, however, is subject to ss.464 and 465, *post*.

2. Cash bail may be taken.

In *MOYSER v. GRAY*(1636), Cro. Car. 446, 79 E.R. 987, it was said that "A justice of the peace may take money to lie *in deposito* for the security of the peace, and the money shall be forfeited to the King if he doth not keep the peace."

The merits and demerits of cash bail are discussed in an article by Eric Armour, K.C., 47 C.C.C. at p.6.

3. Par.(c)(i)(B) is new. See ss.204 and 570 and notes thereto.

4. Par.(e) will enable a justice to resume an inquiry which has been adjourned for more than eight days, with consent of parties or counsel.

5. Par.(i) will apply both ways. Under s.679(1)(b) it permitted evidence on the part of the prosecutor, after evidence had been given for the accused.

As will be seen in par.(k), the justice has wide powers in the conduct of the inquiry and, as long as he acts within those powers, a superior Court will not interfere to direct him as to the manner in which he should exercise them: *R. v. MARTIN*(1910), 18 C.C.C.107; *R. v. SOLLOWAY and MILLS*(1930), 53 C.C.C.180. He may permit or refuse to allow the prosecutor or his counsel to address him, he may exclude the public and the witnesses, he may remand the accused for mental examination, and adjourn the hearing from place to place, or, again within limitations, from time to time. However, all the proceedings must take place in the presence of the accused and be carried on in the name of the Sovereign.

As to compelling attendance of witnesses, see Part XIX, *post*. The justice has no authority to issue a warrant for a witness unless the accused is "before the justice" within the meaning of s.449, *ante*: *Ex. p. COYLE*(1927), 49 C.C.C.91.

CORPORATION.

452. Where an accused is a corporation, subsections (1) and (2) of section 470 apply, *mutatis mutandis*.

This is new.

The following cases illustrate the criminal liability of corporations:

In *R. v. GREAT NORTH OF ENGLAND RAILWAY*(1846), 2 Cox, C.C.70, it was said that:

> "Some dicta occur in old cases, that a corporation cannot be guilty of treason or felony; it might be added, nor of perjury or offences against the person. In the Court of Common Pleas lately, it was held that a corporation might be sued in trespass. (*MAUND v. THE MONMOUTHSHIRE CANAL COMPANY*, 4 Man. & G. 452), but nobody has sought to fix them with acts of immorality: these derive their character from the corrupted mind of the person who commits them, and are in violation of the social duties; but though a corporation which, as such, has no such duty, cannot be so guilty, they may be guilty, as a body corporate, of commanding acts to be done to the nuisance of the community at large."

In *R. v. FANE ROBINSON LTD.*, [1941]2 W.W.R.235 (Alta), it was held that a corporation can commit a criminal offence, such as conspiracy to defraud or obtaining money by false pretences, in which *mens rea* is an essential element. Ford, J.A., referred to s.37(2) of the *Interpretation Act*, s.2(13), also ss.498A, 499 and 1035(3) of the *Criminal Code* and said (p.239):

> "I find it difficult to see why a corporation which can enter into binding agreements with individuals and other corporations, cannot be said to entertain *mens rea* when it enters into an agreement which is the gist of conspiracy, and if by its corporate act it can make a false pretence involving it in liability to pay damages for deceit why it cannot be said to have the capacity to make a representation involving criminal responsibility."

R. v. FANE ROBINSON LTD., was applied in *R. v. NATIONAL CAFE LTD.*(1942), 78 C.C.C.322, where it was held that the person in charge of the premises was not shown to have been an officer or servant of the company.

In *DIRECTOR OF PUBLIC PROSECUTIONS v. KENT CONTRACTORS*, [1944]1 All E.R.119, a corporation was charged under the Defence Regulations that, with intent to deceive, it produced documents and furnished information which was false in material particulars. It was held that the knowledge and intentions of its servants were to be imputed to the body corporate.

Hallett, J., quoted a dictum of Bowen, L.J., in *R. v. TYLER and INTERNATIONAL COMMERCIAL LTD.*, [1891]2 Q.B.588, that:

> "I take it to be clear that in the ordinary case of a duty imposed by statute, if the breach of the statute is a disobedience to the law punishable in the case of a private person by indictment, the offending corporation cannot escape from the consequences which would follow in the case of an individual by showing that they are a corporation."

Section 452—*continued*

DIRECTOR OF PUBLIC PROSECUTIONS v. KENT was followed in *R. v. I.C.R. HAULAGE LTD.*, [1944]1 All E.R.691, in which the corporation was charged with conspiring to defraud. The following appears in the judgment (p.695):

"Whether in any particular case there is evidence to go to a jury that the criminal act of an agent, including his state of mind, intention, knowledge or belief is the act of the Company, and in cases where the presiding Judge so rules, whether the jury are satisfied that it has been so proved, must depend on the nature of the charge, the relative position of the officer or agent and the other relevant facts and circumstances of the case."

The above citations deal with offences in which *mens rea* is a necessary element.

The case of *R. v. PIGGLY WIGGLY CAN. LTD.*(1933), 60 C.C.C. 104, although a prosecution under the *Weights and Measures Act*, is authority for the proposition that a corporation can be convicted of an offence in which *mens rea* is not an element. A similar conviction was made in *R. v. SAFEWAY STORES LTD.*, but was set aside for lack of the Minister's consent to the prosecution, ([1938]2 W.W.R.488).

See also s.389 *ante*, concerning carriage of animals by rail and s.2(15) by which "everyone" and other expressions are declared to include a body corporate.

The criminal liability of corporations is discussed at length in a chapter by Sir Roland Burrows in the *Journal of Criminal Science*, p.1 (MacMillan and Co. Ltd. 1948). He sets out the position as being largely in accord with that stated in *R. v. GREAT NORTH OF ENGLAND RAILWAY, supra*, but observes (p.18) that manslaughter and other felonies that may be punished by fine will be found to be exceptions to the general rule. As to manslaughter, see *UNION COLLIERIES v. R.* (1900), 4 C.C.C.400.

Taking Evidence of Witnesses.

EVIDENCE FOR PROSECUTION TO BE TAKEN ON OATH.—Depositions in writing or by stenographer.—Reading and signing depositions.—Authentication by justice.—Stenographer to be sworn.—Authentication of transcript.

453. (1) When the accused is before a justice holding a preliminary inquiry, the justice shall

(a) **take the evidence under oath, in the presence of the accused, of the witnesses called on the part of the prosecution and allow the accused or his counsel to cross-examine them; and**

(b) **cause a record of the evidence of each witness to be taken by a stenographer appointed by him, or in legible writing, in the form of a deposition, in Form 27.**

(2) Where a deposition is taken down in writing, the justice shall, in the presence of the accused, before asking the accused if he wishes to call witnesses,

(a) **cause the deposition to be read to the witness,**

(b) **cause the deposition to be signed by the witness, and**

OLD CODE:

682. When the accused is before a justice holding an inquiry, such justice shall take the evidence of the witnesses called on the part of the prosecution.

(2) The evidence of the said witnesses shall be given upon oath and in the presence of the accused; and the accused, his counsel or solicitor, shall be entitled to cross-examine them.

(3) The evidence of each witness shall be taken down in writing in the form of a deposition, which may be in form 19, or to the like effect.

(4) Such deposition shall in the presence of the accused, and of the justice, at some time before the accused is called on for his defence, be read over to and signed by the witness and the justice.

(5) The signature of the justice may either be at the end of the deposition of each witness, or at the end of several or of all the depositions in such a form as to show that the signature is meant to authenticate each separate deposition.

683. Every justice holding a preliminary inquiry shall cause the depositions to be written in a legible hand and on one side only of each sheet of paper on which they are written: Provided that the evidence upon such inquiry or any part of the same may be taken in shorthand by a stenographer who may be appointed by the justice and who before acting shall, unless he is a duly sworn official court stenographer, make oath that he shall truly and faithfully report the evidence.

(2) Where evidence is so taken, it shall not be necessary that such evidence be read over to or signed by the witness, but it shall be sufficient if the transcripts be signed by the justice and be accompanied by an affidavit of the court stenographer, or if the stenographer is a duly sworn court stenographer by the stenographer's certificate that it is a true report of the evidence.

684. After the examination of the witnesses produced on the part of the prosecution has been completed, the justice, unless he discharges the accused person, shall ask him, if the evidence has not been taken in shorthand, whether he wishes the depositions to be read again, and unless the accused dispenses therewith shall read or cause them to be read again.

(c) sign the deposition himself.

(3) Where depositions are taken down in writing the justice may sign

(a) at the end of each deposition, or

(b) at the end of several or of all the depositions in a manner that will indicate that his signature is intended to authenticate each deposition.

(4) Where the stenographer appointed to take down the evidence is not a duly sworn court stenographer he shall make oath that he will truly and faithfully report the evidence.

(5) Where the evidence is taken down by a stenographer appointed by the justice, it need not be read to or signed by the witnesses, but the evidence shall be transcribed by the stenographer and the transcript shall be signed by the justice and shall be accompanied by

(a) an affidavit of the stenographer that it is a true report of the evidence, or

(b) a certificate that it is a true report of the evidence if the stenographer is a duly sworn court stenographer.

Section 453—*continued*

This comes from the former ss.682, 683 and 684(1). These were ss.590 and 591 in the Code of 1892, which modified R.S.C. 1886, c.174, ss.69, 70 and 71. The Code provisions were taken from ss.454 and 455 in the E.D.C., which were based upon 11 & 12 Vict., c.42, ss.18 and 21, and 14 & 15 Vict., c.93, s.14.

Under this section the depositions need be read only once. Under s.684(1) the accused might require them to be read a second time.

In *R. v. TRAYNOR*(1901), 4 C.C.C.410, in which witnesses were sworn by the magistrate and then taken into another room where their examination-in-chief was taken by a stenographer out of the presence of the magistrate, the committal of the accused was set aside, despite the fact that an opportunity had afterwards been afforded the prisoner's counsel to cross-examine the witnesses in the magistrate's presence. In *R. v. LEPINE*(1900), 4 C.C.C.145, evidence was taken upon the preliminary hearing of a charge of theft against certain accused. Later, one Lepine was similarly charged. Upon the preliminary hearing of the charge against him the same witnesses were called, but instead of their being examined anew, their evidence given in the former case was read to them and they were asked if it was correct. The committal of Lepine, based upon this procedure, was held to be illegal as he had not had an opportunity to hear the evidence as it was given and to observe the expression and demeanour of the witnesses during their testimony. The deposition of each witness is to be taken down in writing, read over to him and signed by him. He may be committed for refusal to sign, just as he may be committed for refusing to be sworn or to answer relevant questions (s.457). The Justice may sign each deposition or sign at the end in such a manner as will authenticate them all. If a stenographer be present to take down the evidence in shorthand, the reading of the depositions is not required. The stenographer must be appointed by the Justice and sworn to the faithful performance of his duty, unless he is an official Court stenographer in which event he will already have been so sworn.

See also s.440 (duty of justice) and s.454 (accused's witnesses).

ACCUSED TO BE ADDRESSED.—Form of address.—Statement of accused.—Witnesses for accused.—Depositions of such witnesses.

454. (1) When the evidence of the witnesses called on the part of the prosecution has been taken down and, where required by this Part, has been read, the justice shall address the accused as follows or to the like effect:

> **Having heard the evidence, do you wish to say anything in answer to the charge? You are not bound to say anything, but whatever you do say will be taken down in writing and may be given in evidence against you at your trial. You must clearly understand that you have nothing to hope from any promise of favour and nothing to fear from any threat that may have been held out to you to induce you to make any admission or confession of guilt, but whatever you now say may be given in evidence against you at your trial notwithstanding the promise or threat.**

(2) Where the accused says anything in answer to the address made by the justice pursuant to subsection (1), his answer shall be

OLD CODE:

Section 684—continued

(2) The justice shall then address the accused in these words, or to the like effect: —Having heard the evidence, do you wish to say anything in answer to the charge? You are not bound to say anything, but whatever you do say will be taken down in writing and may be given in evidence against you at your trial. You must clearly understand that you have nothing to hope from any promise of favour and nothing to fear from any threat which may have been held out to you to induce you to make any admission or confession of guilt, but whatever you now say may be given in evidence against you at your trial notwithstanding such promise or threat.

(3) Whatever the accused then says in answer thereto shall be taken down in writing in form 20, or to the like effect, and shall be signed by the justice and kept with the depositions of the witnesses and dealt with as hereinafter provided.

686. After the proceedings required by section six hundred and eighty-four are completed the accused shall be asked if he wishes to call any witnesses.

(2) Every witness called by the accused who testifies to any fact relevant to the case shall be heard, and his deposition shall be taken in the same manner as the deposition of the witnesses for the prosecution.

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taken down in writing and shall be signed by the justice and kept with the evidence of the witnesses and dealt with in accordance with this Part.

(3) When subsections (1) and (2) have been complied with the justice shall ask the accused if he wishes to call any witnesses.

(4) The justice shall hear each witness called by the accused who testifies to any matter relevant to the inquiry, and for the purposes of this subsection, section 453 applies, *mutatis mutandis*.

This combines matter appearing in the former ss.684 (for origin see s.453) and s.686 which was s.593 in the Code of 1892 and s.456 in the E.D.C. The warning there ended with the words "at your trial", the Commissioners remarking that they thought this caution all that was necessary. This section in the draft Bill shortened the warning similarly, but the old form was restored in Parliament: Senate Committee, June 11, 1952, p.31.

The warning set out in subsec.(2) is not to be confused with that used by the police. With reference to that and to statements made to them, see notes to s.455.

As to use of statement at trial see s.564.

It is clear that the statement made by the accused under s.454 is separate from his testimony if given as a witness. He is, of course, a competent witness in his own defence by virtue of s.4(1) of the *Canada Evidence Act*. Paley on Summary Convictions, 9th ed., p.lxxxvi, is perhaps more explicit in this respect where, dealing with indictable offences, it says:

"Immediately after complying with the above requirements relating to the statement of the accused, and whether the accused has or has not made a statement, the examining justices are to ask the ac-

Section 454—*continued*

cused whether he desires to give evidence on his own behalf and whether he desires to call witnesses."

In *R. v. BERRIMAN*(1854), 6 Cox,C.C.388, after the investigation before a magistrate on a charge of concealment of birth, and after the accused had been cautioned in the usual manner, and had stated that she had nothing to say, but before her actual committal, the presiding magistrate asked her what she had done with the body of the child. *Per* Erle, J.:

"I shall certainly refuse to allow any such evidence to be given. The question ought never to have been put, and it would be very unfair towards the prisoner to receive in evidence an answer so irregularly elicited."

In *R. v. BIRD*(1898), 19 Cox,C.C.180, the magistrate reversed the usual procedure. After the witnesses for the prosecution had been called he asked the accused if he wished to call any witnesses. The accused said he had no witnesses to call, but wished to give evidence himself. He was then sworn and gave evidence. After that he was cautioned, and in reply said "What I have already said is true".

It was held on a case stated to the Queen's Bench Division that this proceeding was regular and that the effect of his reply to the question addressed to him was to make that reply and the whole of the evidence referred to, admissible as a statement under the *Indictable Offences Act*, 11 & 12 Vict., c.42, s.18.

In *R. v. SKELTON*(1898), 4 C.C.C.467, accused was addressed in the terms of the first part of the statutory warning. He made a statement, but before making it he was sworn at his own request. The trial judge permitted the statement to be given in evidence, holding that it was none the less a statement under s.591 (as it then was), because the defendant had been sworn at his own request, and if it was not a statement under that section, accused was a competent witness under s.4 of the *Canada Evidence Act*. This was upheld on a reserved case. See report pp.471, 478 and 483.

In *R. v. SOUCIE*(1878), 17 N.B.R.611, it was held that the provisions regarding the reading of the warning were only directory. The judgment is not very clear as to whether or not the Court thought that the magistrate had complied with the statute, but it held that "there was no evidence of any promise or threat to the prisoner in this case, and therefore his statement would have been admissible at common law, independent of the Statute."

In *R. v. KALABEEN*(1867), 1 B.C.R.(Pt.1), 1, it was again held that the provisions (32-33 Vict., c.30, s.32) are directory, and a statement not prefaced with the statutory words made by a prisoner to the justice, was admitted upon the justice testifying that the caution had been given, although not in the statutory words.

In *R. v. WRIGHT*(1939), 73 C.C.C.80, it was argued that a statement made under s.684 was inadmissible *because it was not made on oath*, but the Court of Appeal rejected this contention:

"There is nothing in the sections in the *Criminal Code* . . . . . ss.684 (with Form 20), 685, and 1001, nor in s.4 of the *Canada Evidence Act*, R.S.C. 1927, c.59, that would justify the restriction of such statements

OLD CODE:

685. Nothing herein contained shall prevent any prosecutor from giving in evidence any admission or confession, or other statement, made at any time by the person accused or charged, which by law would be admissible as evidence against him.

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to those made on oath, nor can we find expressions in the cases that were cited . . . . . that support such a curtailment of the Statute."

An editorial note points out that "the practice hitherto seems to have been in accord with this judgment" and cites *R. v. GOLDEN* (1905), 10 C.C.C.278.

In *R. v. IRWIN*(1943), 80 C.C.C.314, the Court refused to set aside a committal for trial on the ground that the magistrate failed to afford the accused an opportunity of calling evidence before committing for trial. He had, after objection of counsel for the accused, given him an opportunity to call evidence which he declined:

"While the procedure is irregular yet what the Magistrate did does not go to the question of jurisdiction."

CONFESSION OR ADMISSION OF ACCUSED.

455. Nothing in this Act prevents a prosecutor giving in evidence at a preliminary inquiry any admission, confession or statement made at any time by the accused that by law is admissible against him.

This is the former s.685. It was s.592 in the Code of 1892 and s.72 in R.S.C. 1886, c.174. This provision appears as a proviso in s.xviii of 11 & 12 Vict., c.42 (Imp.), an *Act respecting Duties of Justices,* &c., which embodies provisions as to warning, &c., similar to the former s.684. It appears in our Act 32-33 Vict., c.30, s.33. In *R. v. SANSOME*(1850), 19 L.J.M.C.143, it was held that the provision in the English Act was directory only and that it is not a condition precedent to the admission of the prisoner's statement that the Magistrate should have given him the caution directed.

Following this it was held in *R. v. SOUCIE*(1878), 17 N.B.R.611 that a statement made by a prisoner as provided by 32-33 Vict., c.30, may be used in evidence against him although the justice has not complied with the provisions of s.32 if it appears that the prisoner was not induced to make the statement by any promise or threat:

"There was no evidence of any promise or threat to the prisoner in this case, and therefore his statement would have been admissible at common law independent of the Statute."

Reams of controversial material have been written concerning the admissibility in evidence of statements made by accused persons. The law in Canada may be taken to be settled by *BOUDREAU v. R.* and *R. v. MURAKAMI,* quoted *infra,* but first it may be noted that the general rule is that a statement, to be admissible, must be voluntary in the sense that it was not made as a result of a threat or inducement held out by a person in authority: *IBRAHIM v. R.,* [1914]A.C. 599. The burden of proving that it was voluntary is on the prosecution: *SANKEY v. R.*(1927), 48 C.C.C.97.

Section 455—*continued*

The threat or inducement must refer to temporal matters; exhortations such as "Don't run your soul into more sin, but tell the truth", will not exclude a confession: *R. v. SLEEMAN*(1853), Dears. C.C.245.

The following rules among others, were laid down by the judges in England for guidance of the police and are often quoted:

1. When a police officer is endeavouring to discover the author of a crime there is no objection to his putting questions in respect thereof, to any person or persons whether suspected or not, from whom he thinks useful information can be obtained.
2. Whenever a police officer has made up his mind to charge a person with a crime he should first caution such person before asking any questions, or any further questions as the case may be.
3. Persons in custody should not be questioned without the usual caution being first administered.
4. If the prisoner wishes to volunteer any statement, the usual caution should be administered. It is desirable that the last two words of such caution should be omitted and that the caution should end with the words "be given in evidence". The latter part of this rule is subject to modification in Canada. The last two words referred to are the words "against you", and it will be noted that they are included in the caution as enacted in s.454(1).

In *BOUDREAU v. R.*(1949), 94 C.C.C.1, the Supreme Court followed *IBRAHIM v. R., supra,* and *PROSKO v. R.*(1922), 63 S.C.R.226 to uphold a judgment that statements in question were voluntary. The following is quoted, *per* Kerwin, J.:

"I think it advisable that it should now be stated clearly what this Court considers the law to be. My view is that it has not been changed from that set out in *IBRAHIM v. R.* and *PROSKO v. R.* the fundamental question is whether a confession of an accused offered in evidence is voluntary. The mere fact that a warning was given is not necessarily decisive in favour of admissibility but, on the other hand, the absence of a warning should not bind the hands of the Court so as to compel it to rule out a statement. All the surrounding circumstances must be investigated and, if upon their review the Court is not satisfied of the voluntary nature of the admission, the statement will be rejected. Accordingly, the presence or absence of a warning will be a factor and, in many cases, an important one."

Per Rand, J.:

"The cases of *IBRAHIM v. R., R. v. VOISIN,* [1918]1 K.B.531, and *PROSKO v. R.,* lay it down that the fundamental question is whether the statement is voluntary. No doubt arrest and the presence of officers tend to arouse apprehension which a warning may or may not suffice to remove, and the rule is directed against the danger of improperly instigated or induced or coerced admissions. It is the doubt cast on the truth of the statement arising from the circumstances in which it is made that gives rise to the rule. What the statement should be is that of a man free in volition from the compulsions or inducements of authority and what is sought is assurance that that is the case. The underlying and controlling question then remains: is the statement

freely and voluntarily made? Here the trial judge found that it was. It would be a serious error to place the ordinary modes of investigation of crime in a strait jacket of artificial rules; and the true protection against improper interrogation or any kind of pressure or inducement is to leave the broad question to the court. Rigid formulas can be both meaningless to the weakling and absurd to the sophisticated or hardened criminal; and to introduce a new rite as an inflexible preliminary condition would serve no genuine interest of the accused and but add an unreal formalism to that vital branch of the administration of justice.

I do not mean to imply any right on the part of officers to interrogate or to give countenance or approval to the practice; I leave it as it is, a circumstance frequently presented to courts which is balanced between a virtually inevitable tendency and the danger of abuse."

The following appears in *R. v. MURAKAMI,* [1951] S.C.R.801:

"The case of *R. v. BOUDREAU,* [1949] S.C.R. 262, has laid down the rule to be applied in the case of confessions: Was the statement freely and voluntarily made: That means, I think, was it made by one whose mind and will were directed to the making of it free from any real influence exerted upon them by any direct or indirect inducement of hope or fear held out by a person in authority. We have not complicated that by consideration of the relevant weights of the inducement and its alternatives in producing a false as distinguished from a truthful admission."

While it is not strictly in point, it may be noted that in *R. v. DICK* No. 2 (1947), 89 C.C.C.312, the Ontario Court of Appeal was highly critical of the use in a trial for murder of statements secured while an accused was being held on a charge of vagrancy.

It remains to be added that sometimes a confession, although it has not been properly obtained, leads to the discovery of other evidence. Evidence so discovered is admissible, despite the fact that the confession itself is not. "For instance, if a man by a promise of favour is induced to confess that he knowingly received certain stolen goods, and that they are in such a room in his house, and the goods are found there accordingly, although the confession itself cannot in that case be given in evidence, yet it may be proved that in consequence of something the witness heard from the defendant, he found the goods in question in the defendant's house." (Archbold's Criminal Pleadings, 24th ed., p.397.) Some of the cases go rather further and hold that, although a statement is inadmissible yet so much of it as refers to the discovery later made may be received on the ground that the discovery has proven that part of it to be true.

See ss.10 and 11 of the *Canada Evidence Act.*

Remand Where Offence Committed in Another Jurisdiction.

ORDER THAT ACCUSED BE TAKEN BEFORE JUSTICE WHERE OFFENCE COMMITTED.—Procedure.—Duty of peace officer.—Receipt.—Effect of recognizance.—Deposition.

456. (1) Where an accused is charged with an offence alleged to have been committed out of the limits of the jurisdiction in which

Section 456—*continued*

he has been charged, the justice before whom he is brought may, at any stage of the inquiry after hearing both parties, order that the accused be taken before a justice having jurisdiction in the place where the offence is alleged to have been committed, who shall continue and complete the inquiry.

(2) Where a justice makes an order pursuant to subsection (1) he shall deliver to a peace officer

(a) **a warrant in Form 10, and**

(b) **the information, evidence and recognizances, if any.**

(3) The peace officer shall produce the accused to a justice having jurisdiction in the place where the offence is alleged to have been committed and shall deliver to that justice all the writings received by the peace officer pursuant to subsection (2).

(4) A peace officer who complies with subsection (3) and who proves, under oath, the handwriting of the justice who subscribed the writings referred to therein is entitled to receive from the justice to whom he delivers the writings a receipt in respect thereof.

(5) A recognizance that is delivered by a peace officer to a justice having jurisdiction in the place where the offence is alleged to have been committed shall be deemed to have been taken by the justice to whom it is delivered, and continues in force, unless that justice requires a new recognizance, until the accused is committed for trial or discharged, as the case may be.

(6) The evidence that, pursuant to subsection (3), is delivered by a peace officer to a justice shall be deemed to have been taken by that justice.

This combines the former s.665(2) and (3) and s.666. These were s.557 in the Code of 1892 and s.446 in the E.D.C., based upon 11 & 12 Vict., c.42, s.22, and 14 & 15 Vict., c.93, s.15(2).

It has been held that the provisions of subsec.(1) are permissive only: *R. v. BURKE*(1900), 5 C.C.C.29. See s.439 *ante*, as to jurisdiction of the justice to receive the information.

S.665(1) has been dropped. If two justices sat and disagreed it would be necessary to reconstitute the court.

PROCEDURE WHERE WITNESS REFUSES TO TESTIFY.

WITNESS REFUSING TO BE EXAMINED.—Further commitment.—Saving.

457. (1) Where a person, being present at a preliminary inquiry and being required by the justice to give evidence,

(a) **refuses to be sworn,**

(b) **having been sworn, refuses to answer the questions that are put to him,**

(c) **fails to produce any writings that he is required to produce, or**

(d) **refuses to sign his deposition,**

without offering a reasonable excuse for his failure or refusal, the justice may adjourn the inquiry and may, by warrant in Form 16, commit the person to prison for a period not exceeding eight clear days or for the period during which the inquiry is adjourned, whichever is the lesser period.

OLD CODE:

665. The preliminary inquiry may be held either by one justice or by more justices than one.

(2) If the accused person is brought before any justice charged with an offence committed out of the limits of the jurisdiction of such justice, such justice may, after hearing both sides, order the accused at any stage of the inquiry to be taken by a constable before some justice having jurisdiction in the place where the offence was committed.

(3) The justice so ordering shall give a warrant for that purpose to a constable, which may be in form 9, or to the like effect, and shall deliver to such constable the information, depositions and recognizances, if any, taken under the provisions of this Act, to be delivered to the justice before whom the accused person is to be taken, and such depositions and recognizances shall be treated to all intents as if they had been taken by the last-mentioned justice.

666. Upon the constable delivering to the justice the warrant, information, if any, depositions and recognizances, and proving on oath or affirmation, the handwriting of the justice who has subscribed the same, such justice, before whom the accused is produced, shall thereupon furnish such constable with a receipt or certificate in form 10, of his having received from him the body of the accused, together with the warrant, information, if any, depositions and recognizances, and of his having proved to him, upon oath or affirmation, the handwriting of the justice who issued the warrant.

(2) If such justice does not commit the accused for trial, or hold him to bail, the recognizances taken before the first mentioned justice shall be void.

678. Whenever any person appearing, either in obedience to a summons or subpœna, or by virtue of a warrant, or being present and being verbally required by the justice to give evidence, refuses to be sworn, or having been sworn, refuses to answer such questions as are put to him, or refuses or neglects to produce any documents which he is required to produce, or refuses to sign his depositions without in any such case offering any just excuse for such refusal, such justice may adjourn the proceedings for any period not exceeding eight clear days, and may in the meantime by warrant in form 16, or to the like effect, commit the person so refusing, to gaol, unless he sooner consents to do what is required of him.

(2) If such person, upon being brought up upon such adjourned hearing, again refuses to do what is required of him, the justice, if he sees fit, may again adjourn the proceedings, and commit him for the like period, and so again from time to time until such person consents to do what is required of him.

(3) Nothing in this section shall prevent such justice from sending any such case for trial, or otherwise disposing of the same in the meantime, according to any other sufficient evidence taken by him.

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(2) Where a person to whom subsection (1) applies is brought before the justice upon the resumption of the adjourned inquiry and again refuses to do what is required of him, the justice may again adjourn the inquiry for a period not exceeding eight clear days and commit him to prison for the period of adjournment or any part thereof, and may adjourn the inquiry and commit the person to prison from time to time until the person consents to do what is required of him.

Section 457—*continued*

(3) Nothing in this section shall be deemed to prevent the justice from sending the case for trial upon any other sufficient evidence taken by him.

This is the former s.678. It was s.585 in the Code of 1892, and s.63 of R.S.C. 1886, c.174. It appeared also as s.452 in the E.D.C. with which are cited 13 & 14 Vict., c.93, s.13, subsecs.(5) and (6), substituted for 11 & 12 Vict., c.42, s.16.

See notes to s.453 *ante*, and as to failure of witness to attend or remain in attendance, s.612 *post*.

The following cases show the interpretation which has been placed on s.678.

At the trial, the witness refusing to answer is punishable for contempt as in *Ex p. LUNAN*(1951), 99 C.C.C.136.

In *Re MORRISON*(1907), 3 E.L.R.154:

"The intention (of s.678) is plain, to commit the witness during the adjournment or adjournments, and to keep him a prisoner in the meantime 'unless he sooner consents to be examined'. I see no power or authority in the magistrate to punish him as for a contempt for a specified period of time and beyond the date of adjournment."

In *Re SIMS*(1907), 3 E.L.R.157 (same judge):

"If I have read the statute aright, the detention is intended to be for no longer a period than the time between the several adjournments, with a clear provision requiring the prisoner to be brought up upon each such adjournment, in order that he may have an opportunity of answering.....

The statute in my view of it, purposely safeguards the witness as to the length of time he can be imprisoned, *viz.*, from one adjournment to another: none being for more than eight days, and each fresh imprisonment being upon a continuing refusal to testify.

If a Magistrate can so issue his warrant as to detain a witness over an adjournment without giving him an opportunity to testify, this safeguard is gone, and the purpose of the statute is defeated. He has no right to commit a witness for eight days, if the adjournment is for a shorter period of time."

REMEDIAL PROVISIONS.

IRREGULARITY OR VARIANCE NOT TO AFFECT VALIDITY.

458. The validity of any proceeding at or subsequent to a preliminary inquiry is not affected by

***(a)* any irregularity or defect in the substance or form of the summons or warrant,**

***(b)* any variance between the charge set out in the summons or warrant and the charge set out in the information, or**

***(c)* any variance between the charge set out in the summons, warrant or information and the evidence adduced by the prosecution at the inquiry.**

This is the former s.669. It was s.578 in the Code of 1892, and s.58 in R.S.C. 1886, c.174. It appeared also as part of s.445 in the E.D.C. with which 11 & 12 Vict., c.42, s.10 is cited.

OLD CODE:

669. No irregularity or defect in the substance or form of the summons or warrant, and no variance between the charge contained in the summons or warrant and the charge contained in the information, or between either and the evidence adduced on the part of the prosecution at the inquiry, shall affect the validity of any proceeding at or subsequent to the hearing.

670. If it appears to the justice that the person charged has been deceived or misled by any such variance in any summons or warrant, he may adjourn the hearing of the case to some future day, and in the meantime may remand such person, or admit him to bail as hereinafter mentioned.

687. When all the witnesses on the part of the prosecution and the accused have been heard the justice shall, if upon the whole of the evidence he is of opinion that no sufficient case is made out to put the accused upon his trial, discharge him.

(2) In such case any recognizances taken in respect of the charge shall become void, unless some person is bound over to prosecute under the provisions of the next following section.

690. If a justice holding a preliminary inquiry thinks that the evidence is sufficient to put the accused on his trial, he shall commit him for trial by a warrant of commitment, which may be in form 22, or to the like effect.

See notes to s.451 *ante*, and s.460 *post*, and s.459 as to adjournment if accused misled.

ADJOURNMENT IF ACCUSED MISLED.

459. Where it appears to the justice that the accused has been deceived or misled by any irregularity, defect or variance mentioned in section 458, he may adjourn the inquiry and may remand the accused or admit him to bail in accordance with this Part.

This is the former s.670. It was s.579 in the Code of 1892, and s.59 in R.S.C. 1886, c.174. It appeared also as part of s.445 in the E.D.C.

The unreasonable or arbitrary refusal of an adjournment may amount to a denial of justice. For general principles in this connection, see notes to s.710 *post*.

ADJUDICATION AND RECOGNIZANCES.

COMMITTAL.—Dismissal.

460. When all the evidence has been taken by the justice he shall,

(*a*) if in his opinion the evidence is sufficient to put the accused on trial,

(i) commit the accused for trial by warrant in Form 17, or

(ii) order the accused, where it is a corporation, to stand trial in the court having criminal jurisdiction; or

(*b*) discharge the accused, if in his opinion upon the whole of the evidence no sufficient case is made out to put the accused on trial.

This comes from the former ss.687 and 690. These were ss.594 and 596 in the Code of 1892, and s.73 in R.S.C. 1886, c.174. They were ss.457 and 459 in the E.D.C., with the former of which were cited 11 & 12

Section 460—*continued*

Vict., c.62, s.22 (proviso), and 14 & 15 Vict., c.93, s.15(1). The new section adds provisions applicable to corporations.

The preliminary hearing does not result in a verdict. Even should the Justice hold that no case was made out and discharge the accused, another information may be laid and the proceedings begun again; the accused is not considered to be in jeopardy, because, at this stage, he could not be convicted nor sentenced. The Justice is not trying the case —indeed, it is not too much to say that his attitude should be almost the reverse of that which he would adopt if he were trying it.

It is not his function to give the accused the benefit of doubts, nor, where there is contradictory evidence, to say that he believes one witness or set of witnesses in preference to the other. If the evidence for the prosecution is such that a jury, believing it, might convict the accused, the Justice ought not to discharge him. He is, however, justified in doing so if the evidence for the defence explains away apparently damaging facts adduced by the prosecution so as to make it clear that no offence has been committed, or if the case made out by the prosecution is so weak that the prospect of a conviction is remote, as in the case *R. v. DU GUAY*(1928), 50 C.C.C.318, from which the following is quoted. The magistrate there was discharging the accused upon the preliminary hearing of a charge of murder:

> "My duty on a preliminary hearing is to take the whole evidence on behalf of the Crown and interpret it where there is no contradiction (in this case there was none). If there is a *prima facie* case I must commit, otherwise dismiss. I do not find any evidence of malice. The accused's attitude towards the deceased, both before and after the fatal act, excludes that idea. I am satisfied from the evidence submitted on behalf of the Crown, together with her statement to the police, that what she did was in self-defence in an effort to save her own life. I do not think, at a trial, that if the defence called no evidence, any jury would be justified in finding a verdict of guilty, but that a proper verdict would be one of justifiable homicide, which means a verdict of not guilty."

It may be observed here that the procedure provided by the former ss.688 and 689 whereby the prosecutor might be bound over to prosecute if the justice discharged the accused, has been dropped in view of the provisions of ss.487-489 *post*. It may be considered too that since indictable offences are prosecuted in the name of the Sovereign, there should not be an unrestricted right in a private prosecutor to prosecute where the justice has discharged the accused.

In *R. v. THOMPSON*(1950), 99 C.C.C.89, it was held that on an application for *certiorari* the court may examine the evidence taken on a preliminary hearing to determine whether there was any evidence to justify committal for trial. The law is otherwise where it is sought to quash a summary conviction. There the evidence is not subject to examination except on a question of jurisdiction.

RECOGNIZANCE OF WITNESS.—Form.—Sureties or deposit for appearance of witness.—Witness refusing to be bound.—Discharge.

461. (1) Where an accused is committed for trial or is ordered to stand trial the justice who held the preliminary inquiry may re-

OLD CODE:

692. When any one is committed for trial the justice holding the preliminary inquiry may bind over to prosecute some person willing to be so bound, and bind over every witness whose deposition has been taken, and whose evidence in his opinion is material, to give evidence at the court before which the accused is to be indicted.

(2) Every recognizance so entered into shall specify the name and surname of the person entering into it, his occupation or profession, if any, the place of his residence and the name and number, if any, of any street in which it may be, and whether he is owner or tenant thereof or a lodger therein.

(3) Such recognizance may be either at the foot of the deposition or separate therefrom, and may be in form 23, 24 or 25, or to the like effect, and shall be acknowledged by the person entering into the same, and be subscribed by the justice or one of the justices before whom it is acknowledged.

(4) Every such recognizance shall bind the person entering into it to prosecute or give evidence, both or either as the case may be, before the court by which the accused shall be tried.

(5) If it is made to appear to the justice that any person to be so bound over as a witness is without means or without sufficient means, or if other reasons therefor satisfactory to him are shown, the justice may require that a surety or sureties be procured and produced and join in the recognizance, or that a sum of money be deposited with the justice, sufficient in his opinion to insure the appearance of such person at the trial and the giving of his evidence.

694. Any witness who refuses to enter into or acknowledge any such recognizance as aforesaid may be committed by the justice holding the inquiry by a warrant in form 26, or to the like effect, to the prison for the place where the trial is to be had, there to be kept until after the trial, or until the witness enters into such recognizance as aforesaid before a justice having jurisdiction in the place where the prison is situated.

(2) If the accused is afterwards discharged any justice having such jurisdiction may order any such witness to be discharged by an order which may be in form 27, or to the like effect.

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quire any witness whose evidence is, in his opinion, material, to enter into a recognizance to give evidence on the trial of the accused.

(2) The recognizance may be in Form 28, and may be set out at the end of a deposition or be separate therefrom.

(3) A justice may, for any reason satisfactory to him, require any witness entering into a recognizance pursuant to this section

***(a)* to produce one or more sureties in such amount as he may direct, or**

***(b)* to deposit with him a sum of money sufficient in his opinion to ensure that the witness will appear and give evidence.**

(4) Where a witness does not comply with subsection (1) or (3) when required to do so by a justice, he may be committed by the justice, by warrant in Form 21, to a prison in the territorial division where the trial is to be held, there to be kept until he does what is required of him or until the trial is concluded.

(5) Where a witness has been committed to prison pursuant to subsection (4), the court before which the witness appears or a justice having jurisdiction in the territorial division where the pris-

Section 461—*continued*

on is situated may, by order in Form 35, discharge the witness from custody when the trial is concluded.

This combines the former ss.692 and 694, without the reference to binding over the prosecutor. S.692 was s.598(1) to (4) in the Code of 1892, with which 48 and 49 Vict., c.7, s.9 is cited, and s.463 in the E.D.C. S.694 was s.599 in the Code of 1892, and ss.78 and 79 in R.S.C. 1886, c.174. It appeared also as s.464 in the E.D.C. with which are cited 11 & 12 Vict., c.42, s.20, and 14 & 15 Vict., c.93, s.13(6).

See also notes to s.457.

TRANSMISSION OF RECORD.

TO CLERK OF COURT.

462. Where a justice commits an accused for trial or orders an accused to stand trial, he shall forthwith send to the clerk or other proper officer of the court by which the accused is to be tried the information, the evidence, the exhibits, the statement, if any, of the accused, the recognizances entered into, and any evidence taken before a coroner, that are in the possession of the justice.

This is the former s.695(1). It was s.600(1) in the Code of 1892, and R.S.C. 1886, c.174, s.77. The corresponding provision in the E.D.C. was s.465, with which are cited 11 & 12 Vict., c.42, s.20, and 21 & 22 Vict., c.100, s.8(3).

When the justice has authenticated the depositions as required by s.453 and has complied with this section, his duty is finished unless the sureties wish to be relieved of their obligation where accused is on bail, and make an application to him under s.672, *post*.

BAIL.

BY JUDGE OR MAGISTRATE.—By superior court judge.—Notice of application.—With sureties.—Deposit without sureties.—Recognizance of accused.—Order for discharge.—Form.—Procedure.

463. (1) The following provisions with respect to bail apply where an accused has been committed for trial, namely,

***(a)* where an accused is charged with an offence other than an offence punishable with death, or an offence under sections 50 to 53, he may apply to a judge of a county or district court, or a magistrate as defined in section 466, who has jurisdiction in the territorial division in which the accused was committed for trial or is confined; and**

***(b)* where an accused is charged with any offence, or where bail has been refused by a judge of a county or district court or by a magistrate, he may apply to a judge of, or a judge presiding in, a superior court of criminal jurisdiction for the province.**

(2) Where an accused makes an application under subsection (1) he shall give notice thereof to the prosecutor.

(3) The judge or magistrate may, upon production of any material that he considers necessary upon the application, order that the accused be admitted to bail

OLD CODE:

695. (1) The information, if any, the depositions of the witnesses, the exhibits thereto, the statement of the accused, and all recognizances entered into, and also any depositions taken before a coroner if any such have been sent to the justice, shall as soon as may be after the committal of the accused, be transmitted to the clerk or other proper officer of the court by which the accused is to be tried.

697. Where the offence is one triable by the court of general or quarter sessions of the peace and the justice is of opinion that it may better or more conveniently be so tried, the condition of the recognizance may be for the appearance of the accused at the next sittings of that court notwithstanding that a sitting of a superior court of criminal jurisdiction capable of trying the offence intervenes.

698. (1) In case of any offence other than treason or an offence punishable with death, or an offence under any of the sections seventy-six to eighty-six, inclusive, where the accused has been finally committed as herein provided, any judge of any superior or county court or a magistrate as defined by section seven hundred and seventy-one, having jurisdiction in the district or county within the limits of which the accused is confined, may, in his discretion, on application made to him for that purpose, order the accused to be admitted to bail on entering into a recognizance with sufficient sureties before a justice in such amount as the judge or magistrate directs, and thereupon the justice shall issue a warrant of deliverance as hereinafter provided, and shall attach thereto the order of the judge or magistrate directing the admitting the accused to bail.

(2) Such warrant of deliverance shall be in form 29.

(3) The recognizance entered into by the accused shall, notwithstanding any election made under Part XVIII, continue to bind the accused and his sureties for his appearance at the appropriate court for his trial and for his then surrendering and taking his trial and not departing the court without leave, in like manner as if the recognizance had been originally entered into with respect to such appearance, and it shall not be necessary, unless otherwise ordered by the judge under the said Part, for the accused or his sureties to enter into a new recognizance upon such an election: Provided that at the time of entering into the recognizance the justices specifically advise the sureties that they will continue to be bound under the recognizance notwithstanding such an election in like manner as if same had been entered into with reference to such appearance and that they will not be entitled to receive from the Crown further notice of such an election or trial.

700. 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 committed, or one of the judges thereof, or the judge of the county court, if it is intended to apply to such judge, under section six hundred and ninety-eight, for an order to the justice to admit such prisoner to bail.

(2) Such committing justice shall, as soon as may be, after being so notified, 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

Section 463—*continued*

(*a*) on entering into a recognizance before a justice with sufficient sureties in such amount as the judge or magistrate directs,

(*b*) on entering into his own recognizance before a justice and depositing with the justice such sum of money as the judge or magistrate directs, or

(*c*) on entering into his own recognizance before a justice in such amount as the judge or magistrate directs without any deposit,

and where the order is complied with the justice shall issue an order for discharge in Form 35, and shall attach to it the order of the judge or magistrate.

(4) The recognizance mentioned in subsection (3) shall be in Form 28.

(5) A justice who issues an order for discharge under this section shall send it to the keeper of the prison in which the accused is confined and the keeper shall thereupon discharge the accused if he is not in custody for any other reason.

This covers matters dealt with in the former ss.697, 698, 700 and 702 but with changes noted below.

S.697 was 1900, c.46, s.3.

S.698 came into the Code of 1892 as s.602 from s.82 of R.S.C. 1886, c.174. It was amended by 1938, c.44, s.37, and 1947, c.55, s.21, in the latter instance to extend the power of magistrates in regard to bail. In the E.D.C. the general provision as to bail was in s.467.

S.700 was s.604 in the Code of 1892, citing R.S.C. 1886, c.174, s.93. S.472 of the E.D.C. dealt with bail after committal and empowered a justice to grant it on the certificate of another justice in cases where sureties were not available at the time of committal.

S.702 was s.605 in the Code of 1892, and s.84 in R.S.C. 1886, c.174. In the E.D.C., s.472 made provision for a warrant of deliverance.

The new section embodies the following changes:

Subsec.(3)(b) makes it clear that cash bail may be taken.

A judge of a superior court may review the refusal of a county or district court judge or magistrate to grant bail after committal.

The notice of application for bail is to be given to the prosecutor instead of to the justice.

BAIL IN CERTAIN CASES.

464. Notwithstanding anything in this Act, no court, judge, justice or magistrate, other than a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in which an accused is charged with an offence punishable with death or an offence under sections 50 to 53 may admit that accused to bail before or after committal for trial.

This comes from the former s.699. It was s.603 in the Code of 1892. This was adapted from R.S.C. 1886, c.174, s.83 which had appeared in slightly different form in 32-33 Vict., c.30, s.54 (Can.).

OLD CODE:

Section 700—continued

shall be certified on the outside thereof to contain the information concerning the case in question.

(3) If any justice neglects to comply with the foregoing provisions of this section, according to the true intent and meaning thereof, the court, to whose officer any such information, examination, other evidence, or warrant of commitment ought to have been delivered, shall upon examination and proof of the offence in a summary manner, impose such fine upon said justice as the court thinks fit.

702. 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 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 to or lodged with such keeper, he shall forthwith obey the same.

699. No judge of a county court or justices shall admit any person to bail accused of treason or an offence punishable with death, or an offence under any of the sections, seventy-six to eighty-six inclusive, nor shall any such person be admitted to bail, except by order of a superior court of criminal jurisdiction for the province in which the accused stands committed, or of one of the judges thereof, or, in the province of Quebec, by order of a judge of the Court of King's Bench or Superior Court.

A direct conflict of authority upon this section appears in two recent cases, *R. v. ARTISS*(1950), 96 C.C.C.229 (Man.), and *R. v. AUGUSTINO* (1950), 96 C.C.C.391 (B.C.). The former was an application for bail pending preliminary hearing of a charge of rape. Beaubien, J., refused bail saying that, upon examination of all the cases cited, he could not find any holding that he could grant the relief asked for, and that he must conclude that s.699 of the Code deprived him of jurisdiction to deal with the application. He held, also, that the words "stands committed" mean, and are intended to mean "stands committed after the preliminary hearing". In this respect he expressly disagrees with *R. v. HAWKEN*(1944), 81 C.C.C.80, and the effect of his decision would appear to be that bail cannot be granted at all prior to committal for trial in the cases specified in s.699.

R. v. AUGUSTINO was an application for bail made in precisely similar circumstances. Coady, J., granted bail and stated his disagreement with *R. v. ARTISS*. After considering ss.691, 698 and 700, along with the marginal notes, he proceeds (at p.395):

"There is a certain ambiguity and uncertainty in the language used here and I cannot think that by the language used in this section it was intended to interfere with the inherent right of the Court to grant bail before committal, nor the accused's common law right to apply for bail. Only the most explicit, definite, unambiguous and intractable language could be held to have taken away these rights. In 31 Hals., 2nd ed., p.502, it is said: 'Statutes which limit or extend common law rights must be expressed in clear unambiguous language.' A con-

Section 464—*continued*

siderable list is then given, including (a) those which invade the liberty of the subject, and (b) those which take away the jurisdiction of the High Court of Justice.

In my opinion the language of s.699 does not, nor was it intended to, do either. Where there is ambiguity the section should certainly not be interpreted as invading the liberty of the subject, or as taking away the jurisdiction of the High Courts of Justice.

If again the section, being ambiguous, as I believe it to be, is considered as of its reasonableness or unreasonableness, it should be noted that in every class of case other than covered by s.699, the accused person is entitled in a proper case to bail before committal. There would appear to be no good reason why bail in a proper case should be denied an accused before committal when charged with an offence under s.699."

The two judges agreed upon one point. At the conclusion of his judgment Beaubien, J., says: "I would respectfully suggest that in the revision of the *Criminal Code* now under consideration, provision could be made granting the Superior Court Judge jurisdiction to grant bail under circumstances such as here exist," and Coady, J., concludes his judgment with the words "I agree with Beaubien, J., that in the revision of the Code consideration should be given to the amending of this section in question."

It may be noted here that the two Judges agree also that *R. v. HAWKEN, supra,* is the only reported case in which bail was granted in a capital case before committal for trial. In that case, Farris, C.J.S.C. (B.C.), approved the course followed by Bird, J., in granting bail before committal to a person charged with murder. Dealing with the application immediately before him, he said:

"Now comes the question whether or not bail should be granted to the accused after he has been committed on the charge of murder. The authorities seem to distinguish between the granting of bail before the preliminary hearing and after committal, and the general rule is that when a person has been properly committed for trial, bail will not be granted. . . . . There is clearly, however, a distinction between granting bail prior to preliminary hearing and granting bail after committal." (That distinction seems to rest on a perusal of the depositions.)

See also *R. v. IWANACHUK*(1918), 30 C.C.C.139, on which Coady, J., relied (at p.141) where the following appears:

"I need not refer specifically to the other instances of a pending appeal mentioned, further than to say that *the Cr. Code has expressly dealt in relation to some of them with the power of granting bail or its equivalent. Personally I am inclined to think that these express provisions do not exclude any inherent power of the court with respect to granting bail inasmuch as the Code is not exclusive of the common law.*" (Italics added.)

R. v. SALLY(1919), 27 B.C.R.419, although an appeal under a provincial statute, proceeded on the same principle, and bail was granted.

OLD CODE:

701. Upon application for bail as aforesaid 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. v. CLARKE(1945), 84 C.C.C.93, was an application for bail after committal for trial on a charge of murder. *Per* Robertson, C.J.O.:

"There is no question of the discretionary power to admit to bail in a case where the charge is murder, under s.699 of the Criminal Code."

In *Re N.*(1945), 87 C.C.C.377, Campbell, C.J. P.E.I., says: "Sec.698 of the Criminal Code makes the granting of bail, after committal, permissive and in the discretion of the Judge."

R. v. HAWKEN, supra, was followed in *R. v. STEWART*(1946), 86 C.C.C.318, upon an application for bail after committal for trial on a charge of murder. Major, J., referred to ss.699 and 700 of the Code and said: "These two cases and the cases on record in this country and in Great Britain establish beyond any doubt the power of the Court to grant bail in capital cases." Bail was granted.

The new section is designed to resolve the conflict and to make clear the right of a judge of the superior court.

JUDGE OF SUPERIOR COURT MAY VARY.—No application by way of *habeas corpus*.

465. (1) A judge of, or a judge presiding in a superior court of criminal jurisdiction may, upon application,

***(a)* before an accused is committed for trial,**

(i) admit the accused to bail if a justice has no power to grant bail or if bail has been refused by a justice, or

(ii) vary the amount of bail fixed by a justice, or

***(b)* where an accused is committed for trial, vary an order for bail fixed under subsection (3) of section 463 by a judge of a county or district court or a magistrate.**

(2) No application shall be made by way of *habeas corpus* for the purpose of fixing, reviewing or varying bail.

This replaces the former s.701 which was s.604(2) in the Code of 1892 and s.94 in R.S.C. 1886, c.174. It sets out in detail instead of by reference, the power of a judge of the superior court to review bail. In *R. v. IWANACHUK*(1918), 30 C.C.C.139, the opinion was expressed that the provisions of the Code do not exclude any inherent power of the superior court with respect to the granting of bail. See note to s.464.

The following is quoted from Short & Mellor's Crown Practice, p.284:

"R. III. Applications for bail in felony or misdemeanour where the party is in custody shall be in the first instance by summons before a judge at Chambers for a writ of habeas corpus, or to show cause why the defendant should not be admitted to bail either before a judge at Chambers, or before a justice of the peace, in such an amount as the judge may direct."

This appears to refer to cases in which justices or coroners "have refused to admit prisoners to bail in cases of commitment for murder, and in all other cases", and a note states:

Section 465—*continued*

"It will be seen that this rule contemplates two modes of procedure: the one by habeas corpus, the other by a simple application to admit to bail.

The one by habeas corpus is the one by which alone the Court originally exercised its jurisdiction in matters of bail, but which, on account of its being so cumbersome and of the expense of bringing prisoners from a distance, gradually gave place to the more convenient practice of disposing of the matter upon a simple application to admit to bail."

The same text (p.329, n.5) says that the writ of habeas corpus "for the purpose of discharging prisoners on criminal charges from illegal custody really issues at common law, and not under statute."

It appears that the application for *habeas corpus* is an *alternative*.

PART XVI.

INDICTABLE OFFENCES—TRIAL WITHOUT JURY.

INTERPRETATION

"JUDGE."—"Magistrate."

466. In this Part,

(a) **"judge" means,**

(i) in the province of Ontario, a judge or a junior judge of a county or district court,

(ii) in the province of Quebec, a judge of the sessions of the peace or a district magistrate,

(iii) in the provinces of Nova Scotia, New Brunswick and Prince Edward Island, a judge of a county court,

(iv) in the province of Manitoba, the Chief Justice, or a puisne judge of the Court of Queen's Bench, or a judge of a county court,

(v) in the province of British Columbia, the Chief Justice or a puisne judge of the Supreme Court, or a judge of a county court,

(vi) in the provinces of Saskatchewan and Alberta, a judge of the superior court of criminal jurisdiction of the province, or of a district court, and

(vii) in the province of Newfoundland, a judge of the Supreme Court or of a district court,

(viii) in the Yukon Territory, a judge of the Territorial Court, and

(ix) in the Northwest Territories, a judge of the Territorial Court; and

(b) **"magistrate" means**

(i) a person appointed under the law of a province, by whatever title he may be designated, who is specially authorized by the terms of his appointment to exercise the jurisdiction conferred upon a magistrate by this Part, but does not include two or more justices of the peace sitting together,

(ii) with respect to the Yukon Territory, a police magistrate

OLD CODE:

823. In this Part, unless the context otherwise requires,
(a) "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 any judge of the sessions of the peace or any district magistrate,
(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,
(vi) in the provinces of Saskatchewan and Alberta, a judge of the Superior Court of criminal jurisdiction of the province, or of any district court;
(vii) in the province of Newfoundland, any judge of the Supreme Court or of a district court;

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appointed under the *Yukon Act*, and
(iii) with respect to the Northwest Territories, a police magistrate appointed under the *Northwest Territories Act*.

Par.(a) comes from the former s.823. Par.(b) is new and replaces the definition which appeared in the former s.771(1)(a). In effect, it will render it necessary for the provinces to make special appointments of magistrates for the purposes of this Part.

The new Part combines the former Parts XVI and XVIII into one Part governing the non-jury trial of indictable offences.

Part XVI came from the *Summary Trials Act*, 32 and 33 Vict., c.32, which became R.S.C. 1886, c.176, and was embodied in ss.782 *et seq.*, of the Code of 1892.

In 1948 a bill to amend the *Criminal Code* included a revision of Part XVI based upon a revision prepared by the Criminal Law Section of the Commissioners on Uniformity of Legislation. It passed as 1948, c.39. That revision did away with the absolute jurisdiction of magistrates and provided for an election in every case within the Part, but it met with such vigorous opposition, especially from county councils and other municipal bodies, that it was never brought into force.

Previously to that a large extension of the jurisdiction of magistrates had been brought into operation by 1932-33, c.53.

Part XVIII came from the *Speedy Trials Act*, 52 Vict., c.47, which became Part 54, ss.762, *et seq.*, in the Code of 1892. It was said in Hansard 1892, Vol. II, col. 4529, that the reason for it was:

> "to get rid of the expense of maintaining a prisoner for a long term in gaol, or keeping an innocent party who may have been accused, for a long period before his trial began; and so the trial was allowed to take place before a judge."

However, the two Parts have come increasingly to be regarded as affording an accused person the right to choose alternative modes of trial. This right is preserved with an important change in s.451(2) whereby a

Section 466—*continued*

justice holding a preliminary hearing, puts the accused to his election.

It will be observed that the somewhat involved provisions in the former ss.774 to 778, relating principally to territorial jurisdiction, are not reproduced, also that the jurisdiction conferred upon magistrates is not to be exercised by two justices of the peace sitting together.

JURISDICTION OF MAGISTRATES.

Absolute Jurisdiction.

THEFT, ETC., NOT OVER FIFTY DOLLARS.—Obstructing public or peace officer.—Common gaming or betting house.—Book making, pool-selling etc.—Lotteries, etc.—Cheating at play.—Keeping common bawdy-house.—Assaults.—Assaulting public or peace officer.—Fraud in relation to fares.

467. The jurisdiction of a magistrate to try an accused is absolute and does not depend upon the consent of the accused where the accused is charged in an information

(a) **with**

(i) theft,

(ii) obtaining or attempting to obtain money or property by false pretences, or

(iii) unlawfully having in his possession anything, knowing that it was obtained by the commission in Canada of an offence punishable by indictment,

where the property is not a testamentary instrument and where the alleged value of what is alleged to be stolen, obtained, had in possession or attempted to be obtained, does not exceed fifty dollars;

(b) **with attempted theft; or**

(c) **with an offence under**

(i) paragraph *(a)* of section 110,

(ii) section 176,

(iii) section 177,

(iv) section 179,

(v) section 181,

(vi) section 182,

(vii) section 231,

(viii) paragraph *(a)* of subsection (2) of section 232, or

(ix) section 336.

This comes from the former s.773 but there are some changes. In par.(a) the limit of value has been increased from twenty-five to fifty dollars and the paragraph has been adapted to the new s.296, *ante*.

In *R. v. GIDALEWICZ*(1951), 99 C.C.C.343, it was held that theft from the person, irrespective of amount, was not within s.773(a). The case notes a conflict of authority between *R. v. CONLIN*(1897), 1 C.C.C. 41, and *R. v. ARNETT*, [1947]1 W.W.R.144, but in view of the condensation of the sections relating to theft, as noted under s.280 *ante*, these three decisions will now be inapplicable.

Par.(b) is as it was. See notes to s.24, *ante*, p.67. Par.(c)(iv) adds lottery offences to the absolute jurisdiction of magistrates, who already had it in

OLD CODE:

773. Whenever any person is charged before a magistrate,
(a) with theft, or obtaining money or property by false pretences, or unlawfully receiving or retaining in his possession stolen property, where the value of the property does not, in the judgment of the magistrate, exceed twenty-five dollars;
(b) with attempt to commit theft;
(c) with unlawfully wounding or inflicting grievous bodily harm upon any other person, either with or without a weapon or instrument;
(cc) with committing an assault which occasions actual bodily harm;
(d) with indecent assault upon a male person whose age does not, in the opinion of the magistrate, exceed fourteen years, when such assault is of a nature which cannot, in the opinion of the magistrate, be sufficiently punished by a summary conviction before him under any other Part; or with indecent assault upon a female, not amounting, in the magistrate's opinion, to an assault with intent to commit a rape;
(e) with assaulting or obstructing any public or peace officer engaged in the execution of his duty, or any person acting in aid of such officer;
(f) with keeping a disorderly house or with being an inmate of a common bawdy house under section two hundred and twenty-nine;
(g) with any offence under section two hundred and thirty-five;
(h) with any offence under subsection two of section four hundred and twelve; or
(i) with any offence under paragraph (b) of section four hundred and forty-two;
the magistrate may, subject to the subsequent provisions of this Part, hear and determine the charge in a summary way, but only with the consent of the party so charged, subject to the exceptions provided in section seven hundred and seventy-seven.

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respect of book-making etc. (former s.235). Par.(c)(v) adds also the offence of cheating at play.

The offences of indecent assault specified in the former s.773(d) have been removed from the absolute jurisdiction.

The limitation of sentence to six months under the former s.779 has been removed. There seemed to be some incongruity in the fact that a magistrate who might impose punishment of imprisonment for life and whipping for armed robbery, was restricted to a penalty of six months' imprisonment when he acted under s.773. However, none of the offences specified in the new section carries a heavier penalty than two years with the exception of (b), when value can be assigned.

MAGISTRATE'S JURISDICTION WITH CONSENT.

TRIAL BY MAGISTRATE WITH CONSENT.—Election.—Procedure where accused does not consent.—Procedure where accused consents.

468. (1) Where an accused is charged in an information with an indictable offence other than an offence that is mentioned in subsection (2) of section 413, and the offence is not one over which a magistrate has absolute jurisdiction under section 467, a magistrate may try the accused if the accused elects to be tried by a magistrate.

(2) An accused to whom this section applies shall, after the information has been read to him, be put to his election in the following words:

You have the option to elect to be tried by a magistrate with-

Section 468—*continued*

out a jury; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. How do you elect to be tried?

(3) Where an accused does not elect to be tried by a magistrate, the magistrate shall hold a preliminary inquiry in accordance with Part XV, and if the accused is committed for trial or, in the case of a corporation is ordered to stand trial, the magistrate shall

***(a)* endorse on the information a statement showing the nature of the election or that the accused did not elect, and**

***(b)* state in the warrant of committal, if any, that the accused**

(i) elected to be tried by a judge without a jury,

(ii) elected to be tried by a court composed of a judge and jury, or

(iii) did not elect.

(4) Where an accused elects to be tried by a magistrate, the magistrate shall

***(a)* endorse on the information a record of the election, and**

***(b)* call upon the accused to plead to the charge, and if the accused does not plead guilty the magistrate shall proceed with the trial or fix a time for the trial.**

Subsecs.(1) and (2) are derived from the formers s.781(1) and (2).

Subsec. (3) comes from s.785 and subsec.(4) from s.781(4).

It will be noticed that the form of election has been considerably changed, that it now contains a reference to a trial without jury under this Part, but omits the alternatives to consent, namely, "or to remain in custody or under bail, as the court decides". It is here that a point of practice arose under the old Code, which is quite as pertinent to the new. There was some difference of opinion whether the exact wording of s.781(2)(b) had to be followed (*R. v. JAMES*(1918), 31 C.C.C.4), or whether a substantial compliance was sufficient (*R. v. CROOKS*(1911), 4 Sask. L.R.335; *R. v. TRESEGNE*(1926), 45 C.C.C.270), and in *R. v. DURLING*(1936), 65 C.C.C.247, a conviction was quashed because the magistrate had failed to inform the accused of the possibility of his being released on bail while he awaited trial, if he did not elect summary trial.

The safe course is for the magistrate to address the accused in the exact words of the section, and to supplement them, through an interpreter, if necessary, with such explanation as the accused may require. The magistrate should make sure that the accused understands the charge against him, the choice that is open to him, and that he is free to choose as he thinks best.

The following quotations are in point, although the second refers to the plea rather than to the election: *R. v. BELTON*(1947), 89 C.C.C. 356, at page 358:

> "I think the section (781) must be interpreted as requiring, in addition to the reading of the formal charge, that some explanation or description of the offence charged shall be made to the accused either by the magistrate or by his clerk before the accused is called upon either to elect or plead."

OLD CODE:

781. 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.

(2) If the charge is not one that can be tried summarily without the consent of the accused, the magistrate shall state to the accused that he

(a) is charged with the offence, describing it;

(b) has the option to be forthwith tried by the magistrate 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.

785. 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 XIII and XIV, and if the person charged is committed for trial, shall state in the warrant of committal the fact of such election having been made.

781. (4) 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.

784. 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.

In *R. v. MILINA*(1946), 86 C.C.C.374, at p.381, it was said that "what the quoted language does mean is that upon a plea of guilty the magistrate should satisfy himself that the accused knows exactly what he is doing when he so pleads, and knows and understands the exact nature of the offence with which he is charged."

See also ss.469, 470, 474, 475, 477-481.

MAGISTRATE MAY DECIDE TO HOLD PRELIMINARY INQUIRY.—Where value more than fifty dollars.—Continuing proceedings.

469. (1) Where an accused elects to be tried by a magistrate, but it appears to the magistrate that for any reason the charge should be prosecuted by indictment, he may, at any time before the accused has entered upon his defence, decide not to adjudicate and shall thereupon inform the accused of his decision and continue the proceedings as a preliminary inquiry.

(2) Where an accused is before a magistrate charged with an

Section 469—*continued*

offence mentioned in paragraph *(a)* of section 467, and, at any time before the magistrate makes an adjudication, the evidence establishes that the value of what was stolen, obtained, had in possession or attempted to be obtained, as the case may be, exceeds fifty dollars, the magistrate shall put the accused to his election in accordance with subsection (2) of section 468.

(3) Where an accused is put to his election pursuant to subsection (2), the following provisions apply, namely,

***(a)* if the accused does not elect to be tried by a magistrate, the magistrate shall continue the proceedings as a preliminary inquiry under Part XV, and, if he commits the accused for trial, he shall comply with paragraphs *(a)* and *(b)* of subsection (3) of section 468; and**

***(b)* if the accused elects to be tried by a magistrate, the magistrate shall endorse on the information a record of the election and continue with the trial.**

Subsec.(1) is the former s.784. While this discretion rests with the magistrate he must exercise it before the evidence for the defence is entered upon; if he starts to hear the defence he must dispose of the case, and he cannot, after hearing both sides, decide to send the accused for trial.

Subsecs.(2) and (3) are new and apply, for example, to a charge of theft where the property in question is alleged in the information to be of a value of fifty dollars or less, the case therefore being within the absolute jurisdiction of the magistrate under s.467, but the evidence shows the property to be of greater value than fifty dollars. In such a case the magistrate will be required to proceed as if the charge had been so laid in the first place.

CORPORATION.—Non-appearance of.—Corporation not electing.

470. (1) An accused that is a corporation shall appear by its counsel or agent.

(2) Where an accused corporation does not appear pursuant to a summons and service of the summons upon the corporation in accordance with subsection (4) of section 441 is proved, the magistrate

***(a)* may, if the charge is one over which he has absolute jurisdiction, proceed with the trial of the charge in the absence of the accused corporation, and**

***(b)* shall, if the charge is not one over which he has absolute jurisdiction, hold a preliminary inquiry in accordance with Part XV.**

(3) Where an accused corporation appears but does not make any election under subsection (2) of section 468, the magistrate shall hold a preliminary inquiry in accordance with Part XV.

This comes from the former s.782. Note that it refers only to magistrates. Inasmuch as s.484 imports the provisions of Part XVIII, ss.528 to 531 will govern the procedure when a corporation is charged before a judge acting under this Part. Indeed, except for the provisions in respect of cases within the magistrate's absolute jurisdiction, this section,

OLD CODE:

782. (1) When a corporation is to be charged, the summons may be served on the mayor or chief officer of such corporation or branch thereof, or upon the clerk or secretary, or the like officer thereof, and may be in the same form as if the defendant were a natural person.

(2) The corporation in such case shall appear by attorney, who shall on its behalf, where the charge cannot be tried summarily without the consent of the accused, elect, as in the next preceding section provided in respect of a natural person, and thereupon the case shall proceed as if the defendant were a natural person.

(3) If the corporation does not so appear, or, so appearing does not, where consent is required as aforesaid, by its attorney elect to be tried summarily, the magistrate may

(a) where the charge is one that can be tried summarily without the consent of the accused, proceed with the trial in the absence of the accused;

(b) where the charge is one that requires consent as aforesaid, proceed, in the absence of the accused or upon its attorney not so electing to be tried as aforesaid, as upon a preliminary investigation.

781. (4) For wording of this subsection see page 775.

825. Every person committed to gaol for trial on a charge of being guilty of any of the offences which are mentioned in section five hundred and eighty-two as being within the jurisdiction of the general or quarter sessions of the peace, may, with his own consent, be tried in any province of Canada, and, if convicted, sentenced by the judge.

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in view of the other sections mentioned, would appear to be unnecessary, but it does make clear the duty of the magistrate when a corporation is before him, whether or not the charge is within his absolute jurisdiction.

TAKING EVIDENCE.

471. Where an accused is tried by a magistrate in accordance with this Part, the evidence of witnesses for the prosecutor and the accused shall be taken in accordance with the provisions of Part XV relating to preliminary inquiries.

This section is derived from the former s.781(4). Note, however, that, as a result of the incorporation of Part XV, it will be necessary for the witnesses to sign their depositions. "We thought that the general requirement that, where a witness' evidence is not taken down in shorthand, his deposition should be signed, should be retained": Senate Committee, December 15-16, 1952, page 71. This requirement was not in the former Part XVI.

JURISDICTION OF JUDGES.

TRIAL BY JUDGE WITH CONSENT.

472. An accused who is charged with an indictable offence other than an offence that is mentioned in subsection (2) of section 413 shall, where he elects under section 450, 468 or 475 to be tried by a judge without a jury, be tried, subject to this Part by a judge without a jury.

This is derived from s.825(1). The judge acts under this Part only

Section 472—*continued*

with the consent of the accused. The absolute jurisdiction set out in s.467 does not attach to him.

COURT OF RECORD.—Custody of records.

473. (1) A judge who holds a trial under this Part shall, for all purposes thereof and proceedings connected therewith or relating thereto, be a court of record.

(2) The record of a trial that a judge holds under this Part shall be kept in the court over which the judge presides.

This is derived from s.824.

ELECTION.

DUTY OF JUDGE.—Notice by sheriff.— Notice by clerk of court.—Notice by sheriff, when given.—Duty of sheriff when date set for trial.—Duty of accused when not in custody.—Further election.

474. (1) Where an accused elects, under section 450 or 468, to be tried by a judge without a jury, a judge having jurisdiction shall,

***(a)* upon receiving a written notice from the sheriff stating that the accused is in custody and setting out the nature of the charge against him, or**

***(b)* upon being notified by the clerk of the court that the accused is not in custody and of the nature of the charge against him,**

fix a time and place for the trial of the accused.

(2) The sheriff shall give the notice mentioned in paragraph *(a)* of subsection (1) within twenty-four hours after the accused is committed for trial, if he is in custody pursuant to that committal or if, at the time of the committal, he is in custody for any other reason.

(3) Where, pursuant to subsection (1), a time and place is fixed for the trial of an accused who is in custody, the accused

***(a)* shall be notified forthwith by the sheriff of the time and place so fixed, and**

***(b)* shall be produced at the time and place so fixed.**

(4) Where an accused is not in custody the duty of ascertaining from the clerk of the court the time and place fixed for the trial, pursuant to subsection (1), is on the accused, and he shall attend for his trial at the time and place so fixed.

(5) Where an accused has elected under section 450 or 468 to be tried by a judge without a jury he may, at any time before a time has been fixed for his trial or thereafter with the consent in writing of the Attorney General or counsel acting on his behalf, re-elect to be tried by a judge and jury by filing with the clerk of the court an election in writing and the consent, if consent is required, and where an election is filed in accordance with this subsection the accused shall be tried before a court of competent jurisdiction with a jury and not otherwise.

This modifies the provisions of the former ss.826 and 827, and provides a procedure for fixing the date of trial. Subsec.(5) has been added to give to an accused who has elected trial under this Part, the right to re-elect

OLD CODE:

824. 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 in the province of Quebec, and except as hereinafter provided, 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) In the provinces of Saskatchewan, Alberta and Newfoundland, and in the provisional judicial districts of the province of Ontario, such courts shall be called the district court judge's criminal court of the district in which the same is held.

(3) 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.

826. 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.

(2) Where the judge does not reside in the county or district in which the prisoner was committed, the judge having received the notification may forward it to the prosecuting officer with instructions to cause the prisoner to be brought before him instead of the judge, naming as early a day as possible for the trial in case the prisoner shall elect to be tried by the judge, without a jury, and the prosecuting officer shall, in such case, with as little delay as possible cause the prisoner to be brought before him.

827. The judge or the prosecuting officer, as the case may be, shall state to the prisoner

(a) that he is charged with the offence, describing it;

(b) that he has the option to be tried forthwith 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, the trial shall proceed on the day named by the judge in the manner provided by the next following subsection.

(3) In such case or if the prisoner has been brought before the judge and consents to be tried by him without a jury, the prosecuting officer shall prefer a formal statement in writing, setting forth as separate counts therein the charge or charges against him for which he has been committed for trial and any charge or charges founded on the facts or evidence disclosed in the depositions and any charge or charges preferred against him pursuant to the provisions of section eight hundred and thirty-four.

(4) No charge for an offence for which a greater punishment may be inflicted by reason of a previous conviction or convictions shall contain any reference to such previous conviction or convictions.

(5) If upon being arraigned the prisoner pleads guilty to any count, the prosecuting officer shall draw up a record as nearly as may be in Form 60, and 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 a court having jurisdiction to try the offence in the ordinary way.

Section 474—*continued*

trial by jury. For the converse situation, *i.e.*, where the accused who has elected trial by jury wishes to re-elect trial under this Part, see ss.475 and 476.

Subsec.(4) is new and casts a duty on an accused person who is on bail to keep himself informed.

Where two or more accused elect differently see s.479.

NOTICE OF INTENTION TO RE-ELECT.—Duty of sheriff.—Election.—Procedure.—Limit of time for re-election.

475. (1) Where an accused elects under section 450 or 468 to be tried by a court composed of a judge and jury, the accused may notify the sheriff in the territorial division in which he is to be tried that he desires to re-elect under this section.

(2) A sheriff who receives notice pursuant to subsection (1) shall forthwith inform a judge having jurisdiction and the judge shall fix a time and place for the accused to re-elect and shall cause notice thereof to be given to the accused.

(3) The accused shall attend or, if he is in custody, shall be produced at the time and place fixed under subsection (2) and shall, after the charge upon which he has been committed for trial or ordered to stand trial has been read to him, be put to his election in the following words:

> **You have elected to be tried by a court composed of a judge and jury. Do you now elect to be tried by a judge without a jury?**

(4) Where an accused elects under this section to be tried by a judge without a jury, the judge shall proceed with the trial or fix a time and place for the trial.

(5) Where an accused does not notify the sheriff in accordance with subsection (1) more than fourteen days before the day fixed for the opening of the sittings or session of the court sitting with a jury by which he is to be tried, no election may be made under this section unless the Attorney General or counsel acting on his behalf consents in writing.

This is derived from the former ss.828 and 830.

Although it refers to the procedure in Alberta (s.417), the following may be quoted from *R. v. BERCOV*(1950), 96 C.C.C.168 at p.176, in point of principle:

> "But it is said that once the accused has given his consent and jurisdiction is thus conferred on a Judge alone, he has taken an irrevocable step and his consent cannot be withdrawn in the absence of apt statutory authority. But the cases cited above establish that notwithstanding consent the Judge may refuse to try the case without a jury. Furthermore, I see no valid basis for such a proposition. It does not seem to accord with the course followed in *R. v. RELF*(1927), 47 C.C.C. 38. . . . . Our Appellate Division allowed the Attorney-General to withdraw his request for a jury and directed the District Court Judge to try the accused on all the counts contained in the charge. It would appear, then, that the fact that something is done which confers jurisdiction on a particular tribunal does not mean that, in the absence of

OLD CODE:

828. If the prisoner on being brought before the prosecuting officer or before the judge as aforesaid demands a trial by jury, he shall be remanded to gaol.
(2) 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 eight hundred and twenty-six.
(3) Thereafter, unless the judge, or the prosecuting officer acting under subsection two of section eight hundred and twenty-six, 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.
(4) If an indictment has been preferred against the prisoner the consent of the prosecuting officer shall be necessary to a re-election, and in such case the sheriff shall take no action upon being notified of the prisoner's desire to re-elect unless such consent is given in writing.
(5) Except in the County of York, in the Province of Ontario, no prisoner shall have a right to re-elect later than thirty days before the day fixed for the next sittings of the court at which trials by jury can be had, unless the prisoner was committed for trial within forty days before the said date, in which event he must re-elect not later than ten days before the day fixed for the next sittings of the court at which trials by jury can be had.

830. If under Part XVI or Part XVII, any person has been asked to elect whether he would be tried by the magistrate or justices, as the case may be, or before a jury, and he has elected to be tried by a jury, and if such election is stated in the warrant of committal for trial, the sheriff, prosecuting officer or judge shall not be required to take the proceedings directed by this Part.
(2) 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.
(3) In such case it shall be the duty of the sheriff to proceed as directed by section eight hundred and twenty-six, and thereafter the person so committed shall be proceeded against as if his said election in the first instance had not been made.

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express authority, the step taken is irrevocable and can never be recalled."

Cf. GIROUX v. R.(1917), 56 S.C.R.63, where the following appears at p.7:

"I see nothing in any provision of the Code, as it now stands, which precludes an election for trial under Part XVIII by an accused under indictment, no matter how or when presented, if he comes within the comprehensive terms of section 825."

See also ss.476 & 478-481.

CONSENT BY CROWN TO RE-ELECTION IN CERTAIN CASES.

476. Where an accused, being charged with an offence that, under this Part, may be tried by a judge without a jury, is committed

Section 476—*continued*

for trial or, in the case of a corporation, is ordered to stand trial, within fourteen days of the opening of the sittings or session of the court composed of a judge and jury by which the accused is to be tried, the accused is not entitled to elect, under section 475, to be tried under this Part by a judge without a jury unless the Attorney General or counsel acting on his behalf consents in writing.

This section also is derived from s.828 and fixes the time within which re-election may be made, the purpose being that the Crown may know a sufficient time in advance what cases are to be tried at the assizes.

ELECTION DEEMED TO HAVE BEEN MADE IN CERTAIN CASES.

477. Where an accused is committed for trial or ordered to stand trial for an offence that, under this Part, may be tried by a judge without a jury, he shall, for the purposes of the provisions of this Part relating to election and re-election, be deemed to have elected to be tried by a court composed of a judge and jury if

***(a)* he did not elect when he was put to his election under section 450 or 468, or**

***(b)* he elected under section 468 to be tried by a magistrate and the magistrate, pursuant to section 469, continued the proceedings as a preliminary inquiry.**

Par.(b) is derived from the former s.832. Par.(a) is new. The effect of the section as a whole is that, in the circumstances stated, the accused still has a right to elect.

TRIAL.

PREFERRING CHARGE.—What offences may be included.—Consent of Attorney General or accused in certain cases.

478. (1) Where an accused elects, under section 450, 468 or 475, to be tried by a judge without a jury, an indictment in Form 4 shall be preferred by the Attorney General or his agent, or by the Deputy Attorney General, or by any person who has the written consent of the Attorney General, and in the province of British Columbia may be preferred by the clerk of the peace.

(2) An indictment that is preferred under subsection (1) may contain any number of counts, and there may be joined in the same indictment

***(a)* counts relating to offences in respect of which the accused elected to be tried by a judge without a jury and for which the accused was committed for trial, whether or not the offences were included in one information, and**

***(b)* counts relating to offences disclosed by the evidence taken on the preliminary inquiry, in addition to or in substitution for any offence for which the accused was committed for trial.**

(3) An indictment that is preferred under subsection (1) may include an offence that is not referred to in paragraph *(a)* or *(b)* of subsection (2) if the accused consents, and that offence may be dealt with, tried and determined and punished in all respects as if

OLD CODE:

828 For wording of this section see page 781.

832. If, on the trial under Part XVI or Part XVII of any person charged with any offence triable under the provisions of this Part, the magistrate or justices 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.

827. (3) For wording of this subsection see page 779.

834. The prosecuting officer may, with the consent of the judge, prefer against the prisoner a charge for any offence for which he may be tried under the provisions of this Part other than the charge for which he has been committed to jail for trial or bound over, although such charge does not appear or is not mentioned in the depositions upon which the prisoner was committed or is for a wholly distinct and unconnected offence: Provided that the prisoner shall not be tried under this Part or upon any such additional charge unless with his consent obtained as hereinbefore provided.

(2) Any such charge may thereupon be dealt with, prosecuted and disposed of, and the prisoner may be remanded, held for trial or admitted to bail thereon, in all respects as if such charge had been the one upon which the prisoner was committed for trial.

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the offence were one in respect of which the accused had been committed for trial, but if that offence was committed wholly in a province other than that in which the accused is before the court, subsection (3) of section 421 applies.

This section is derived from the former ss.827(3) and 834. The provisions of subsec.(2) are designed to bring the procedure into accord with that of the assize courts. It had been held in *R. v. JOHNS*(1945), 84 C.C.C. 213, at p.224, that s.825 (see now s.472) was in conflict with the former s.856 (now 501(1)), because it was limited to offences within the jurisdiction of the Court of quarter sessions. While that limitation remains, it is submitted that whatever conflict there was has been removed.

Support for the change is to be found in *R. v. DEUR*(1945), 82 C.C.C.289, in which the following appears at p.295:

"By the common law rule, an indictment could in general contain any number of counts. In felonies, when it appeared that they did not all arise out of the same body of facts, the court, not as a matter of jurisdiction but of judicial discretion followed this practice: if the discreteness was detected before the prisoner pleaded, the Court would quash the indictment; if it did not appear until after plea, the prosecutor was called upon to elect upon which count he would proceed, but after verdict the joinder was not available on a writ of error. So long, however, as the counts were statements of different offences arising out of what was in substance a single transaction, there was no misjoinder and all could be tried together: *R. v. LOCKETT*, [1914]2 K.B.720; and in this background both the purpose of s.856 and the interpretation of Part XVIII are clarified. If a joinder of two or more counts, arising as in this case, were not allowed, then either speedy trials would be limited to commitments on a single charge or a separate

Section 478—*continued*

trial would be necessary for each of any number of charges although they all arose out of the same transaction, and the real object of Part XVIII would, in large measure, be defeated. Sec.710 in Part XV shows with what specific language such a limitation of trial has been prescribed."

The new section will supersede the decision in *R. v. CLIFTON*, [1949]1 D.L.R.796, that the formal statement in writing must contain the charge against the prisoner for which he was committed for trial. It has already been noticed that the justice of the peace at a preliminary inquiry is not bound by the information but may commit the accused for trial upon any charge disclosed by the depositions.

However, the foregoing remarks as to joinder of counts may be taken as being subject to the principles against the inter-mixing of trials set out in *CRANE v. R.*(1921), 90 L.J.K.B.1160 noted under s.696 *post*.

Under the former s.781 it has been held that the requirement that the charge be reduced to writing after election was sufficiently complied with by reading the written information already before the court: *R. v. JAMES*(1915), 32 W.L.R.528; *R. v. GRAF*(1909), 15 C.C.C.193.

GENERAL.

DISCRETION OF JUDGE OR MAGISTRATE WHERE MORE THAN ONE ACCUSED.

479. Where two or more persons are charged with the same offence the following provisions apply, namely,

(a) **if one or more of them, but not all, elect under section 450 to be tried by a judge without a jury, a judge may, in his discretion, decline to fix a time for the trial pursuant to section 474 and may require all the persons to be tried by a court composed of a judge and jury;**

(b) **if one or more of them, but not all, elect under section 468 to be tried by a magistrate or by a judge without a jury, as the case may be, the magistrate may, in his discretion, decline to record the election and if he does so, shall hold a preliminary inquiry; and**

(c) **if one or more of them, but not all, elect under section 475 to be tried by a judge without a jury the judge may, in his discretion, require all the persons to be tried by a court composed of a judge and jury.**

This is derived from the former s.829. It extends to magistrates the right to decline an election in the circumstances described.

ATTORNEY GENERAL MAY REQUIRE TRIAL BY JURY.

480. The Attorney General may, notwithstanding that an accused elects under section 450, 468 or 475 to be tried by a judge or magistrate, as the case may be, require the accused to be tried by a court composed of a judge and jury, unless the alleged offence is one that is punishable with imprisonment for five years or less, and where the Attorney General so requires, a judge has no jurisdiction to try

OLD CODE:

829. 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.

825. (5) Where an offence charged is punishable with imprisonment for a period exceeding five years, the Attorney General may require that the charge be tried by a jury, and may so require notwithstanding that the person charged has consented to be tried by the judge under this Part, and thereupon the judge shall have no jurisdiction to try or sentence the accused under this Part.

775. Where an offence charged is punishable with imprisonment for a period exceeding five years the Attorney General may require that the charge be tried by a jury, and may so require notwithstanding that the person charged has consented to be tried by a magistrate under section seven hundred and seventy-four, and thereupon the magistrate shall have no jurisdiction to try or sentence such person under said section.

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the accused under this Part and a magistrate shall hold a preliminary inquiry.

This comes from the former ss.825(5) and 775 which were to the same effect. S.825(5) came into the Code by 1909, c.9, s.2, and s.777 was amended at the same time by a provision which later became s.775. In this connection the following appears in Hansard, 1909, Vol. IV, Col. 6402:

"HON. MR. AYLESWORTH: The object of the proposed amendment is plain. A magistrate may be unduly friendly to the accused and the accused may desire to be tried by that magistrate, especially in a case where the punishment would be more than five years, and it is to prevent such a thing that the discretion is vested in the Attorney-General of the province."

The following cases are relevant:

In *MINGUY v. R.*(1920), 34 C.C.C.324 (S.C.Can.), the question turned principally on the validity of the election. The nature of the charge does not appear. *COLLINS v. R.*(1921), 35 C.C.C.390 turned on a question of the right to re-elect.

In *R. v. RELF*(1926), 23 A.L.R.454, a number of counts of theft of post letters were added to the charge when accused came to trial. His counsel objected that accused had not consented to be tried summarily upon the added charges. A document signed by the Attorney General was then filed requiring trial by jury.

R. v. CUMMINGS(1928), 50 C.C.C.375: Accused charged with several counts of theft. Held, right of Attorney General to demand jury trial is absolute even after election of speedy trial by accused.

ASTROFF v. R.(1931),56 C.C.C.263: This was a case under the *Opium and Narcotic Drug Act*. Police had seized narcotics valued at $40,000-$50,000 in a room of which accused was occupant, but he was arrested in New York more than two years after the charge was laid. It was held on appeal that the accused had no right to elect summary trial when the Attorney General has demanded trial by jury under s.825(5).

Section 480—*continued*

ARCADI v. R.(1931), 57 C.C.C.117: Accused was charged with selling narcotic drugs. He elected speedy trial and pleaded guilty. He was remanded for sentence but before sentence was pronounced the Attorney General intervened and required the charge to be tried by jury. On trial in the King's Bench he pleaded *autrefois convict* but the plea was disallowed and he was convicted. On appeal it was argued that the words "try or sentence" in s.825 should be read "try *and* sentence" but it was held that the Attorney General was within his rights in intervening before sentence.

R. v. VALADE(1932), 58 C.C.C.156: This case, also under the *Opium and Narcotic Drug Act,* is similar in effect to *ASTROFF v. R.*

R. v. ARMITAGE(1939), 72 C.C.C.57 (Ont.C.A.): In this case accused was convicted on an indictment containing four separate counts, one for theft and three under s.405. The Attorney General indicated in writing pursuant to ss.775 and 825(5) that he required the charge to be tried by jury. It was said that "what is more important (*i.e.* than the form in which the requirement is stated) is the fact that as the indictment then stood three of the offences charged were not punishable with imprisonment for a period exceeding five years." This point was not decided as the conviction was quashed on other grounds.

SAYERS & HALL v. R.(1941), 76 C.C.C.1 (S.C.Can.): In this case accused were indicted for conspiracy to commit theft, the Attorney General exercising his right under s.825(5). It appears from the report that one of the accused had lost his right to elect, while the other had not, and that it was only by the Attorney General exercising his right that the two could be brought to trial together for the conspiracy.

Reference may also be made to *Re ECCLESTONE & DALTON*(1952), 102 C.C.C.305, in which it was held that although a magistrate on preliminary inquiry dismissed certain charges against an accused, the Crown was entitled to invoke s.873 and to prefer an indictment against him on the same charges.

The consideration that a magistrate might feel that an offence could be more appropriately punished on indictment would not apply under the new Code as fully as formerly since it does not continue the limitation formerly provided by s.779 upon the sentence which he can impose in certain cases.

CONTINUANCE OF PROCEEDINGS WHEN JUDGE OR MAGISTRATE UNABLE TO ACT.—Where adjudication made.—Where no adjudication by judge.—Where no adjudication by magistrate.

481. (1) Where an accused elects, under section 450, 468 or 475 to be tried by a judge or magistrate, as the case may be, and the judge or magistrate before whom the trial was commenced dies or is for any reason unable to continue, the proceedings may, subject to the provisions of this section, be continued before another judge or magistrate, as the case may be, who has jurisdiction to try the accused under this Part.

(2) Where an adjudication was made by a judge or magistrate before whom the trial was commenced, the judge or magistrate, as

OLD CODE:

831. 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.

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the case may be, before whom the proceedings are continued shall, without further election by the accused, impose the punishment or make the order that, in the circumstances, is authorized by law.

(3) Where the trial was commenced before a judge but he did not make an adjudication, the judge before whom the proceedings are continued shall, without further election by the accused, commence the trial again as a trial *de novo*.

(4) Where the trial was commenced before a magistrate but he did not make an adjudication, the magistrate before whom the proceedings are continued shall put the accused to his election in accordance with section 468, and the proceedings shall, in all respects, be continued in accordance with this Part as if the accused were appearing before a magistrate for the first time upon the charge laid against him.

This is derived from the former s.831. It is, however, extended to apply to magistrates, and sets out in detail the procedure to be followed where the judge or magistrate is unable to continue. It should be noted that under subsec.(4) the accused is to be put to his election again in a case where a trial, commenced before a magistrate who did not make an adjudication, is brought on again. Under s.831 the judge who continued the proceedings might "cause such portion of the proceedings to be repeated before him as he shall deem necessary". It was held in *R. v. McLEOD*(1941), 76 C.C.C.343, that in a case where a county court judge died during the course of a trial under Part XVIII, another judge, before whom the trial was continued, was not authorized under s.831 to deprive himself of the opportunity to judge the credibility of witnesses previously heard, by causing the shorthand notes of their evidence taken before the deceased judge to be read without the witnesses themselves being called.

Under the new section it will be necessary for the magistrate or judge who continues the trial to hear *all* the evidence.

This section gives explicit directions. It may be said generally that if a judge dies during a trial, the hearing must be recommenced: Hals. 2nd ed., vol. 26, p.87, n.(a), citing *COLESHILL v. MANCHESTER CORPORATION*, [1928]1 K.B.776 and *Re BRITISH REINFORCED CONCRETE &c. CO. LTD.*(1929), 45 T.L.R.186. This situation arose in *R. v. BERTRAND*, tried at Hull, Quebec, reported (although not in this connection) on appeal after subsequent trial (1953), 17 C.R.189 and, [1953]1 S.C.R.503.

Section 481—*continued*

Taschereau's edition of the Code of 1892, p.964, notes that "of course, when possible, it seems better that the sentence of death, and, in fact, any sentence, be passed by the judge who held the trial; but it is not an absolute necessity, and any judge of the same court may pronounce the sentence: 2 Hale P.C., 405; 1 Chit. 697; *R. v. CAMPLIN*(1845), 1 Den.89, as cited in *R. v. FLETCHER*(1859), Bell, C.C.65."

"Absence" connotes physical non-presence from whatever cause: Anglin, J., in *BRUNET v. R.*(1918), 30 C.C.C.16 at p.24. This refers to Art. 3262(a) R.S.Q. enacted by 5 Geo. V., c.52, s.3 "in case of the absence or inability to act of one or more of the judges". The judgment contains further discussion from which it appears that absence may be "constructive" (see p.28). However, in this context it was held to mean actual absence.

RECORD OF PLEA OR VERDICT OF GUILTY.—Discharge and record of acquittal.—Transmission of record by magistrate.—Proof of conviction or dismissal.—Warrant of committal.

482. (1) Where an accused who is tried under this Part pleads guilty to or is found guilty of an offence with which he is charged, the judge or magistrate, as the case may be, shall cause a conviction in Form 31 to be drawn up and shall sentence the accused or otherwise deal with him in the manner authorized by law, and upon request shall make out and deliver to the prosecutor or to the accused a certified copy of the conviction.

(2) Where an accused who is tried under this Part is found not guilty of an offence with which he is charged, the judge or magistrate, as the case may be, shall immediately discharge him in respect of that offence and shall cause an order in Form 33 to be drawn up, and upon request shall make out and deliver to the accused a certified copy of the order.

(3) Where an accused elects to be tried by a magistrate under this Part, the magistrate shall transmit the written charge, the memorandum of adjudication and the conviction, if any, into such custody as the Attorney General may direct.

(4) A copy of a conviction or of an order, certified by the judge or by the proper officer of the court, or by the magistrate, as the case may be, or proved to be a true copy, is, upon proof of the identity of the person, sufficient evidence in any legal proceedings to prove the conviction of that person or the dismissal of a charge against him, as the case may be, for the offence mentioned therein.

(5) Where an accused other than a corporation is convicted, the judge or magistrate, as the case may be, shall issue or cause to be issued a warrant of committal in Form 18, and section 447 applies in respect of a warrant of committal issued under this subsection.

This covers provisions which appeared in the former ss.781(4), 790, 793, 794, 799 and 827(5). Note that under subsec.(1) the certified copy of the conviction need only be supplied if it is requested.

As to subsec.(3) it may be observed that there appears to be a good deal of variation in the practice followed in the provinces.

OLD CODE:

781. (4) For wording of this subsection see page 775.

790. 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.

793. 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.

794. A copy of such conviction, or of such certificate of dismissal, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction or dismissal for the offence mentioned therein in any legal proceedings.

799. A conviction or certificate of dismissal under this Part may be in the form 55, 56 or 57 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.

827. (5) If upon being arraigned the prisoner pleads guilty to any count, the prosecuting officer shall draw up a record as nearly as may be in Form 60, and 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 a court having jurisdiction to try the offence in the ordinary way.

781. (5) Whenever a magistrate proposes to dispose of a case summarily, as in this section provided, he may, from time to time, adjourn the hearing, remand the person charged, and, in his discretion, admit such person to bail to appear at the time and place to which such hearing is adjourned in accordance with the provisions of paragraph (c) of subsection one of section six hundred and seventy-nine, subsection two of section six hundred and seventy-nine and section six hundred and eighty-one, which provisions shall apply mutatis mutandis thereto.

838. The judge may adjourn any trial from time to time until finally terminated.

ADJOURNMENT.

483. A judge or magistrate acting under this Part may from time to time adjourn a trial until it is finally terminated.

This is derived from the former ss.781(5) and 838. As to adjournment generally see notes to s.459 *ante*.

APPLICATION OF PARTS XV, XVII AND XX.

484. The provisions of Part XV relating to bail and transmission

Section 484—*continued*

of the record by the magistrate where he holds a preliminary inquiry and the provisions of Parts XVII and XX, in so far as they are not inconsistent with this Part apply, *mutatis mutandis*, to proceedings under this Part.

Note that this section is *inclusive* and not *exclusive*. Its effect is to reverse the former s.798 which expressly excluded certain provisions of the Code from the operation of Part XVI. S.484 not only obviates the need of repetition, *e.g.*, by making it unnecessary to include the provisions of the former ss.786 and 787, but in general, approximates the trial procedure under this Part to the procedure applicable to trials in the superior courts.

PART XVII.

PROCEDURE BY INDICTMENT.

Preferring Indictment.

FINDING INDICTMENT.

485. For the purposes of this Part, finding an indictment includes

***(a)* preferring an indictment, and**

***(b)* presentment of an indictment by a grand jury.**

This is the former s.5(1)(a) without the reference to exhibiting an information, as to which see s.488 *post*, and notes thereto. It was s.2(j) in the Code of 1892 and R.S.C. 1886, c.174, s.2(d) amended.

An indictment is a written accusation of crime, made at the suit of the King, against one or more persons, and preferred to, and presented upon oath by, a grand jury; a "bill of indictment" is such written accusation before it is so presented: Archbold's Cr. Pl. 24th ed., p.1.

PROSECUTOR MAY PREFER INDICTMENT.

486. The prosecutor may prefer, before a court constituted with a grand jury, a bill of indictment against any person who has been committed for trial at that court in respect of

***(a)* the charge on which that person was committed for trial, or**

***(b)* any charge founded on the facts disclosed by the evidence taken on the preliminary inquiry.**

This comes from the former s.872 and such extension as is made, which is unlikely to have much practical application apart from prosecutions for criminal libel, is due to the definition of "prosecutor" in s.2(33). S.872 referred only to "the counsel acting on behalf of the Crown". The original provision which appeared in subsec.(1) of s.641 in the Code of 1892, referred to "any one who is bound over to prosecute" but this was changed by 63 and 64 Vict., c.46, s.3. At all events, this Code does not continue the old procedure for binding over some one to prosecute: see notes to s.460, *ante*.

OLD CODE:

798. Except as specially provided for in this Part, neither the provisions of this Act relating to preliminary inquiries before justices, nor of Part XV, shall apply to any proceedings under this Part.

786. 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.

787. Every court held by a magistrate shall be an open public court.

5. In this Act, unless the context otherwise requires,
(a) finding the indictment includes also exhibiting an information and making a presentment;

. . . . . .

872. 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.

873. 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.
(2) Any person may prefer any bill of indictment before any court of criminal jurisdiction by order of such court.
(3) It shall not be necessary to state such consent or order in the indictment and 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.

ATTORNEY GENERAL MAY PREFER INDICTMENT.—Other person with consent.—Or by order.—Consent need not be averred.—Saving.

487.(1) A bill of indictment may be preferred

(*a*) by the Attorney General or anyone by his direction, before the grand jury of any court constituted with a grand jury,

(*b*) by anyone who has the written consent of the Attorney General, or the written consent of a judge of a court constituted with a grand jury, before the grand jury of the court specified in the consent, or

(*c*) by order of a court constituted with a grand jury, before the grand jury of that court.

(2) No reference is necessary in an indictment to a consent that is given or an order that is made under this section.

(3) No objection shall be taken to an indictment for want of a consent or order required by this section unless it is taken by motion to quash the indictment before the accused is given in charge to the jury.

This is the former s.873(1), (2) and (3), *i.e.* those parts of the section referring to the provinces where there is a grand jury. They came from s.641(2) and (3) of the Code of 1892.

The following appears in the judgment of Anglin, J., in *Re THE CRIMINAL CODE AND LORD'S DAY ACT*(1910), 16 C.C.C.459 at p.477:

Section 487—*continued*

"Under sub-section 1, of section 873, of the Criminal Code, applicable to the other provinces (*scil.*, other than Saskatchewan and Alberta), a bill of indictment may be preferred in respect of a charge as to which there has been no preliminary inquiry. This section is the legitimate successor of part of section 28 of 32 and 33 Vict., c.29—other parts of which are replaced in a modified form by sections 871 and 872. Under section 28 the preferring of an indictment by the Attorney-General or Solicitor-General was in certain cases an alternative to its being preferred by a person who had been bound over to prosecute (section 871 of the Code), or to its being preferred by a Crown prosecutor (section 872 of the Code), or by the grand jury *suâ sponte* against a person who had been committed for trial." (After quoting s.28) "Under this section it cannot, I think, be questioned, that a preliminary investigation before a magistrate was not a prerequisite to the preferring of an indictment by the Attorney-General or the Solicitor-General. It must not be forgotten that these provisions were restrictive of the former absolute and unqualified right of grand juries *propria motu* to present indictments against any person whomsoever."

This judgment is quoted further under s.489.

NO INDICTMENT EXCEPT AS PROVIDED.—Criminal information abolished. —No trial on Coroner's inquisition.

488. (1) Except as provided in this Part no bill of indictment shall be preferred.

(2) No criminal information shall be laid or granted.

(3) No person shall be tried upon a coroner's inquisition.

Subsec.(1) is the former s.873(4). It was s.641(4) in the Code of 1892 where it was new.

Subsec.(2) is new. Apart from other considerations, the provisions of s.487(1)(b) render this procedure unnecessary.

The following appears in Stephen's History, Vol. I, p.296:

"Whatever may have been its origin, the power to file criminal informations in the Court of King's Bench was used, not merely by the Attorney and Solicitor General in cases of public importance, but also by the Master of the Crown Office, who appears to have lent his name to any one who wished to use it. Thus all private persons were able to prosecute criminally any person who had offended them by any act which could be treated as a misdemeanour, without the sanction of a grand jury. This led to abuses in the way of frivolous malicious prosecutions, in which the defendants recovered no costs. This abuse was effectually remedied by 4 Will. & Mary, c.18 (A.D. 1692), *which enacts that the Master of the Crown office shall file no criminal information 'without express order to be given by the said Court in open court'* and upon certain conditions as to costs. It is usually resorted to in cases of a grave public nature, as, for instance, where a person holding an official position is libelled and wishes to have, not only a speedy remedy for the wrong done to him, but the opportunity of justifying his conduct and character upon affidavit."

The rule stated in the concluding portion of this quotation was much

OLD CODE:

Section 873—continued

(4) Except as in this Part previously provided no bill of indictment shall be preferred in any province of Canada.

940. No one shall be tried upon any coroner's inquisition.

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criticized in *R. v. WILSON*(1878), 43 U.C.Q.B.583. The following are extracts from the judgment, *per* Hagarty, C.J.:

"In this country there need be no delay in promptly seeking the vindication of character, either by action or indictment, the latter of course preceded by a prompt application to a Police Court, or ordinary magistrate's Court.

We feel that we are, perhaps for the first time in this Province, expressing an opinion which limits the facilities heretofore allowed for this proceeding."

Armour, J., is reported as follows:

"I think the practice of granting leave to file criminal informations in this country, having regard to the social conditions of its inhabitants and the liberties which they enjoy, is, to say the least of it, of very doubtful expediency, and should, in my opinion, be discontinued and, if necessary, abolished by legislative enactment.

The very rule adopted in England, that it will only be granted to what I may call a 'superior person', is the strongest reason, to my mind, why in this country it should never be granted at all.

Whatever may be deemed desirable in England, I do not think it desirable that in this country there should exist a remedy for the superior person which is denied to the inferior."

Cameron, J., said in part as follows:

"It appears to me very undesirable that any distinction of persons should exist. Our Courts ought to be open to all alike, high and low, and it is invidious to have it said that one man may secure a remedy for a wrong, criminal or civil, in a way denied to another. Yet there is no doubt it has been the practice in England, in the case of persons holding positions connected with the Administration of Justice, and official positions, and sometimes in the case of private individuals, to grant criminal informations, while the privilege has been denied to others. There is no reason for perpetuating these distinctions in this country, and therefore in the present instance I think the application should be denied....."

Subsec.(3) is the former s.940. See notes to s.448 *ante*.

PREFERRING INDICTMENT IN CERTAIN PROVINCES.—Who may prefer.

489. (1) In the provinces of Quebec, Manitoba, Saskatchewan, Alberta and British Columbia and in the Yukon Territory and Northwest Territories it is not necessary to prefer a bill of indictment before a grand jury, but it is sufficient if the trial of an accused is commenced by an indictment in writing setting forth the offence with which he is charged.

(2) An indictment under subsection (1) may be preferred by

Section 489—*continued*

the Attorney General or his agent, by the Deputy Attorney General, or by any person with the written consent of a judge of the court or of the Attorney General or, in any province to which this section applies, by order of the court.

This comes from the former s.873(5), (6) and (7). Under subsec.(3) the Deputy Attorney General in each of the provinces may act; formerly this applied only to Quebec.

The following appears in *Re THE CRIMINAL CODE AND LORD'S DAY ACT*(1910), 16 C.C.C.459 at p.478:

"While the territory now included in the Provinces of Alberta and Saskatchewan was, as part of the North-West Territories, subject in all matters to the legislative jurisdiction of the Dominion Parliament, the statute in force provided that 'no grand jury shall be summoned or sit in the Territories.' R.S.C. (1886), c.50, s.65.

The Courts of criminal jurisdiction of the Territories were constituted without grand juries. The provincial legislatures of these two provinces have seen fit to continue this constitution of their Courts. Having to deal with Courts so constituted, Parliament found itself obliged to provide some substitute for the methods of commencing criminal trials prescribed for other parts of Canada in which grand juries form part of the criminal Courts as constituted by the provincial legislatures. In the North-West Territories trials were begun 'by a formal charge in writing setting forth as in an indictment the offence . . . . . charged' (54 and 55 Vict., c.22, s.11).

When the Provinces of Alberta and Saskatchewan were created Parliament thought proper to make a more formal and definite provision, and for this purpose enacted in 1907 what is now clause 873A of the Criminal Code. This provision is a re-enactment of s.11 of c.22 of 54 and 55 Vict., and an application of subsec.1, of s.873, of the Criminal Code to the criminal Courts as constituted in these provinces."

The judgment adds that in these provinces the proceedings are commenced by a formal charge which is preferred not before a grand jury, but directly to the Court and petit jury by the Attorney General or his agent, or by any person with the written consent of the Attorney General.

The provisions of cl.873A were incorporated into s.873 and were re-enacted in the form in which they appeared in the repealed Code by 1932-33, c.53, ss.12, 13 and 14. This followed the abolition of the grand jury in Quebec. See also notes to s.506.

ATTORNEY GENERAL MAY DIRECT STAY.

490. The Attorney General or counsel instructed by him for the purpose may, at any time after an indictment has been found and before judgment, direct the clerk of the court to make an entry on the record that the proceedings are stayed by his direction, and when the entry is made all proceedings on the indictment shall be stayed accordingly and any recognizance relating to the proceedings is vacated.

This is the former s.962. It was s.732 in the Code of 1892 where it is described in Taschereau's edition as being new. It was s.537 in the E.D.C.

OLD CODE:

873. (5) In the provinces of Quebec, Manitoba, Saskatchewan, Alberta and British Columbia, it shall not be necessary to prefer any bill of indictment before a grand jury, but it shall be sufficient that the trial of any person charged with a criminal offence be commenced by a formal charge in writing setting forth as an indictment the offence with which he is charged.

(6) Such charge in the provinces of Manitoba, Saskatchewan, Alberta and British Columbia may be preferred by the Attorney General or an agent of the Attorney General, or by any person with the written consent of the judge of the court or of the Attorney General, or by order of the court.

(7) Such charge in the province of Quebec may be preferred by the Attorney General, or the Deputy Attorney General, or by any person with the written consent of the judge of the Court or of the Attorney General.

962. 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.

In *R. v. SPENCE*(1919), 31 C.C.C.365, it was said that "The Attorney-General formally exercised his power to stay proceedings by entering a *nolle prosequi*. Note he does this under the authority of and in the manner indicated in the said section 962, of the Code." The judgment at p.371 quotes Archibold's Cr. Pl., 24th ed., p.146, as follows:

> "A *nolle prosequi* puts an end to the prosecution . . . . . but does not operate as a bar or discharge or an acquittal on the merits; . . . . . and the party remains liable to be re-indicted."

At p.372 it quotes 9 Hals., 1st ed., par.350 as follows:

> "Proceedings on an indictment may be stayed at any time after the finding of the indictment and before judgment by the entry of a *nolle prosequi*, which can only be entered by the authority of the Attorney-General. The effect of this is that all proceedings on the indictment are stayed, and the defendant, if he is in custody, is discharged, but may be indicted afresh on the same charge."

In *R. v. WEISS*(1915), 23 C.C.C.460 (Sask.), in consideration of s.962 it was said:

> "It must be admitted that there is not a complete analogy between a stay of proceedings or *nolle prosequi* and what has been done here. The practical result in this case is that the Attorney-General, on consideration of the whole matter, has instructed his agent not to lay a charge. . . . . there is nothing in the Criminal Code to prevent me from consenting to a charge being preferred by any person. But I think that very strong reasons should be shewn to justify me in taking such a step, in face of the deliberate action of the Crown authorities."

In *R. v. EDWARDS*(1919), 31 C.C.C.330 (Alta.) it was pointed out at p.333 that the Attorney General could enter a stay of proceedings in a case in which a judge consented to the laying of a charge of criminal libel and that the defendant could then have judgment for his costs. *R. v. BLACKLEY*(1904), 8 C.C.C.405 cited.

FORM OF INDICTMENT.

491. An indictment is sufficient if it is on paper and is in Form 3 or 4, as the case may be.

This covers matters formerly appearing in ss.843, 844 and 845(1) and (2).

GENERAL PROVISIONS AS TO COUNTS.

SUBSTANCE OF OFFENCE.—In popular language.—In words of enactment.—Or otherwise.—Details of circumstances.—Indictment for treason.—Reference to section.—General provisions not restricted.

492. (1) Each count in an indictment shall in general apply to a single transaction and shall contain and is sufficient if it contains in substance a statement that the accused committed an indictable offence therein specified.

(2) The statement referred to in subsection (1) may be

***(a)* in popular language without technical averments or allegations of matters that are not essential to be proved,**

***(b)* in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence, or**

***(c)* in words that are sufficient to give to the accused notice of the offence with which he is charged.**

(3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.

(4) Where an accused is charged with an offence under section 47 or sections 49 to 53, every overt act that is to be relied upon shall be stated in the indictment.

(5) A count may refer to any section, subsection, paragraph or subparagraph of the enactment that creates the offence charged, and for the purpose of determining whether a count is sufficient, consideration shall be given to any such reference.

(6) Nothing in this Part relating to matters that do not render a count insufficient shall be deemed to restrict or limit the application of this section.

Subsec.(1) comes from the former ss.852(1) and 853(3); subsec.(2) from s.852(2) and (3); subsec.(3) from s.853(1). Ss.852 and 853 were s.611 in the Code of 1892 and s.482 in the E.D.C.

Subsec.(4) comes from the former s.847(1). It was s.614 in the Code of 1892 and s.489 in the E.D.C. Subsec.(5) comes from the former s.853(2).

Subsec.(6) comes from the former s.855(2). It was s.616(3) in the Code of 1892 and part of s.486 in the E.D.C. It means that subsecs.(1) to (5) must be complied with, no matter what lack is excused by other sections, *e.g.*, s.493.

As to amendment see s.510, as to omissions in indictment see s.493.

Concerning the general intent of this section and others relating to the statement of the offence, the following is quoted from *R. v. ADDUONO*(1940), 73 C.C.C.152, at p.155:

OLD CODE:

843. It shall not be necessary for any indictment or any record or document relative to any criminal case to be written on parchment.

844. 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.
(2) If local description is required such local description shall be given in the body of the indictment.

845. 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 according to form 63, or to the like effect.

847. Every indictment for treason, or for an offence against any of the sections, seventy-six to eighty-six inclusive, shall 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.

. . . . . .

852. 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) Form 64 affords examples of the manner of stating offences.

853. Every count of an indictment 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.
(2) A count may refer to any section or subsection of any statute creating the offence charged therein, and in estimating the sufficiency of such count the court shall have regard to such reference.
(3) Every count shall in general apply only to a single transaction.

855.(2) No provision 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 sections eight hundred and fifty-two and eight hundred and fifty-three.

"My study of the existing provisions of the Code ss.853 and following, and including s.908 (now s.517) leads me to the view that their spirit and purpose is to secure to the accused, when preparing for trial such exact and reasonable information respecting the charge against him as will enable him to establish fully his defence. At the same time these sections are directed to a second purpose, namely, to nullify the old procedure with the purpose of ameliorating its extreme technicality and facilitating the administration of justice in accordance with the very right of the case. In that aspect they ought to receive 'such fair,

Section 492—*continued*

large and liberal construction and interpretation as will best secure the attainment of both of the two purposes above noted'."

It was held in *R. v. MacDONALD*(1952), 102 C.C.C.337 that on a charge of seduction under s.211(1), now s.143, it is essential to allege that accused was over eighteen years of age, and that the omission is not cured by a reference to the section. But in *R. v. KEELER*(1952), 103 C.C.C. 92, where there was reference to the section, it was held that omission of the word "unlawfully" was not a matter of substance.

In *R. v. BROOKS*(1951), 100 C.C.C.164, it was held that omission of the word "knowingly" where the statute required it as an ingredient of the offence, was not cured by a reference to the section nor by a statement that the act was done unlawfully.

CERTAIN OMISSIONS NOT GROUNDS FOR OBJECTION.

493. No count in an indictment is insufficient by reason of the absence of details where, in the opinion of the court, the count otherwise fulfils the requirements of section 492 and, without restricting the generality of the foregoing, no count in an indictment is insufficient by reason only that

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

(b) **it does not name the person who owns or has a special property mentioned or interest in property mentioned in the count.**

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

(d) **it does not set out any writing that is the subject of the charge,**

(e) **it does not set out the words used where words that are alleged to have been used are the subject of the charge.**

(f) **it does not specify the means by which the alleged offence was committed,**

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

(h) **it does not, where the consent of a person, official or authority is required before proceedings may be instituted for an offence, state that the consent has been obtained.**

This is the former s.855(1). It was s.613 in the Code of 1892 and s.484 in the E.D.C. Par.(5) came from s.42 of the *Forgery Act* 1861, (Imp.) and 14 and 15 Vict., c.100, s.5 (Imp.).

Special Provisions as to Counts.

SUFFICIENCY OF COUNT CHARGING LIBEL.—Specifying sense—Proof.

494. (1) No count for publishing a blasphemous, seditious or defamatory libel, or for selling or exhibiting an obscene book, pamphlet, newspaper or other written matter, is insufficient by reason only that it does not set out the words that are alleged to be libellous or the writing has alleged to be obscene.

(2) A count for publishing a libel may charge that the published matter was written in a sense that by innuendo made the publication thereof criminal, and may specify that sense without any in-

OLD CODE:

855. No count shall be deemed objectionable or insufficient for the reason only
(a) that it does not contain the name of the person injured, or intended, or attempted to be injured;
(b) that it does not state who is the owner of any property therein mentioned;
(c) that it charges an intent to defraud without naming or describing the person whom it was intended to defraud;
(d) that it does not set out any document which may be the subject of the charge;
(e) that it does not set out the words used where words used are the subject of the charge;
(f) that it does not specify the means by which the offence was committed;
(g) that it does not name or describe with precision any person, place or thing;
(h) that it does not in cases where the consent of any person, official or authority is required before a prosecution can be instituted, state that such consent has been obtained.

. . . . . .

861. 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.
(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.
(3) On the trial it shall be sufficient to prove that the matter published was criminal either with or without such innuendo.

862. 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.

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troductory assertion to show how the matter was written in that sense.

(3) It is sufficient, on the trial of a count for publishing a libel, to prove that the matter published was libellous, with or without innuendo.

This is the former s.861 with the addition of "innuendo". S.861 was s.615 in the Code of 1892, and s.485 in the E.D.C. See notes to ss.150 and 248 *ante*.

SUFFICIENCY OF COUNT CHARGING PERJURY, ETC.

495. No count that charges
***(a)* perjury,**
***(b)* the making of a false oath or a false statement,**
***(c)* fabricating evidence, or**
***(d)* procuring the commission of an offence mentioned in paragraph *(a)*, *(b)* or *(c)*,**

Section 495—*continued*

is insufficient by reason only 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 that it does not expressly negative the truth of the words used.

This comes from the former s.862 which was part of s.616 in the Code of 1892 and ss.107 and 108 in R.S.C., 1886, c.174. It was part of s.486 in the E.D.C., based upon 14 and 15 Vict., c.100, ss.20 and 21 (Imp.).

This section is altered to conform to the new ss.112, 114 and 116 *ante*. Subornation of perjury is not mentioned specifically as this Code leaves it to the operation of ss.22, 406 and 407. See notes to s.112.

SUFFICIENCY OF COUNT RELATING TO FRAUD.

496. No count that alleges false pretences, fraud or an attempt or conspiracy by fraudulent means, is insufficient by reason only that it does not set out in detail the nature of the false pretence, fraud or fraudulent means.

This is the former s.863. It was part of s.616 in the Code of 1892 and of s.486 in the E.D.C.

PARTICULARS.

WHAT MAY BE ORDERED.—Regard to evidence.—Copy to accused.—Recording.—Effect of.

497. (1) The court may, where it is satisfied that it is necessary for a fair trial, order the prosecutor to furnish particulars and, without restricting the generality of the foregoing, may order the prosecutor to furnish particulars

(*a*) of what is relied upon in support of a charge of perjury, the making of a false oath or of a false statement, fabricating evidence or counselling or procuring the commission of any of those offences;

(*b*) of any false pretence or fraud that is alleged;

(*c*) of any alleged attempt or conspiracy by fraudulent means;

(*d*) setting out the passages in a book, pamphlet, newspaper or other printing or writing that are relied upon in support of a charge of selling or exhibiting an obscene book, pamphlet, newspaper, printing or writing;

(e) further describing any writing or words that are the subject of a charge;

(*f*) further describing the means by which an offence is alleged to have been committed; or

(*g*) further describing a person, place or thing referred to in an indictment.

(2) For the purpose of determining whether or not a particular is required, the court may give consideration to any evidence that has been taken.

(3) Where a particular is delivered pursuant to this section,

(*a*) a copy shall be given without charge to the accused or his counsel,

OLD CODE:

863. 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.

859. The court may, if satisfied that it is necessary for a fair trial, order that the prosecutor shall furnish a particular
(a) of what is relied on in support of any charge of perjury, the making of a false oath or of a false statement, fabricating evidence or subornation, or procuring the commission of such offences;
(b) of any false pretenses or any fraud charged;
(c) of any attempt or conspiracy by fraudulent means;
(d) stating what passages in any book, pamphlet, newspaper or other printing or writing are relied on in support of a charge of selling or exhibiting an obscene book, pamphlet, newspaper, printing or writing;
(e) further describing any document or words the subject of a charge;
(f) further describing the means by which any offence was committed;
(g) further describing any person, place or thing referred to in any indictment.

860. When any 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.

(b) **the particular shall be entered in the record, and**
(c) **the trial shall proceed in all respects as if the indictment had been amended to conform with the particular.**

This combines the former ss.859 and 860 with the addition of the words "without restricting the generality of the foregoing". The reference to subornation has been dropped from par.(a)—see note to s.495.

Ss.859 and 860 comprised part of s.613, part of s.615, part of s.616, and s.617 in the Code of 1892. Corresponding provisions were in ss.484 to 487 of the E.D.C.

As to amendment see s.510.

Concerning the ordering of particulars, the following is quoted from *ROSE v. R.*(1946), 88 C.C.C.114, at p.121:

"That is a matter which is left to the discretion of the trial Judge and it is for the defendant to show, if he objects, that that discretion has not been exercised judicially. There are limits to the right of a defendant to obtain particulars. The particulars to which he is entitled should not in principle give him more information than a special count would give. In this case there are special counts incorporated into the charge of conspiracy. The Judge too has to take the circumstances of the case into consideration. The circumstances of this case are exceptional. The arrest of the accused and the indictment were preceded by an inquiry before a Royal Commission. This fact is established throughout the present record and the findings of that Com-

Section 497—*continued*

mission were, and in my opinion unfortunately, well known to the public at large including the Judge. Of all these proceedings the accused must have been well aware. There was also a preliminary inquiry. The depositions then taken were read by the trial Judge. He so states. These depositions are not before this Court. The learned trial Judge was entitled to take these depositions into consideration, as well as all the pertinent circumstances, and this Court cannot now say, with the material before it, that he did not exercise his discretion judicially in refusing particulars."

The following extracts from the judgment in *R. v. McGAVIN BAKERIES No.* 2(1950), 99 C.C.C.330, at pp.335 to 337, are also in point:

"The function of particulars in a criminal case is stated in the opening lines of s.859 of the *Code, supra,* and is (as it is succinctly put by a strong Court of Appeal in Ontario) 'to give further information to the accused of that which it is intended to prove against him so that he may have a fair trial'. On the other hand, their purpose is not to fetter the prosecutor in the conduct of his case against the accused. . . . . ."

"Particulars are a pleading independent of the formal charge and on delivery the trial proceeds as if the charge had been amended in conformity, but as I read s.859, *supra,* it is a prerequisite of ordering delivery by the Crown of this additional pleading, that the Court must be satisfied that the particulars ordered are, in fact, necessary for a fair trial. Therefore, in the circumstances here, I felt it incumbent on me before making any such order, to ascertain and to take into account the details of reasonable information and identification of the transaction intended to be brought against the accused bakery corporations already within the knowledge of the defence. Toward this end under s.860(2), I am entitled to 'have regard' to the depositions taken at the preliminary inquiry: *R. v. LEVERTON* (1917), 34 D.L.R. 514 at pp.519-20, 28 Can. C.C. 61 at p.67, 11 A.L.R. 355.

The main purpose, of course, of any preliminary inquiry is to ascertain if there be a *prima facie* case against the accused requiring the presiding Magistrate or Justice to commit. To my mind, a second and almost equally important and legitimate purpose why the Crown may decide to hold a preliminary inquiry . . . . . is thereby to furnish to the accused sufficient reasonable information as to and identification of the transaction intended to be proved by the Crown."

OWNERSHIP OF PROPERTY.

OWNERSHIP.

498. The real and personal property of which a person has, by law, the management, control or custody shall, for the purposes of an indictment or proceeding against any other person for an offence committed on or in respect of the property, be deemed to be the property of the person who has the management, control or custody of it.

This is a re-draft of the former s.865 which was s.620 in the Code of 1892 and s.122 of R.S.C. 1886, c.174. A note to s.122 in Taschereau's

OLD CODE:

865. 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.

856. Any number of counts for any offences whatever may be joined in the same indictment, and shall be distinguished in the manner shown in form 63, or to the like effect: Provided that to a count charging murder no count charging any offence other than murder shall be joined.

854. 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, or on the ground that it is double or multifarious.

Criminal Acts, p.735, says that the section, in its reference to bodies corporate, is not in English statutes but is only declaratory of the common law. This section when read with s.2(15) *ante*, places bodies corporate on the same footing as natural persons.

JOINDER OR SEVERANCE OF COUNTS.

COUNT FOR MURDER TO STAND ALONE.

499. No count that charges an offence other than murder shall be joined in an indictment to a count that charges murder.

This is part of the former s.856, the rest of which is in s.501(1). It was part of s.626 in the Code of 1892, and part of s.493 in the E.D.C. It was said to be new as statutory law although not in practice: Taschereau p.687, citing *THEAL v. R.*(1882), 7 S.C.R.397. In *R. v. EVANS*(1950), 34 Cr.App.R.72 at p.76, it was said that "Although two charges of murder can be included in one indictment, this court has strongly expressed the view that not more than one murder should be included in one indictment."

OFFENCES MAY BE CHARGED IN THE ALTERNATIVE.—Application to amend or divide counts.—Order.

500. (1) A count is not objectionable by reason only that

(a) **it charges in the alternative several different matters, acts or omissions that are stated in the alternative in an enactment that describes as an indictable offence the matters, acts or omissions charged in the count, or**

(b) **it is double or multifarious.**

(2) An accused may at any stage of his trial apply to the court to amend or to divide a count that

(a) **charges in the alternative different matters, acts or omissions that are stated in the alternative in the enactment that describes the offence or declares that the matters, acts or omissions charged are an indictable offence, or**

(b) **is double or multifarious,**

on the ground that, as framed, it embarrasses him in his defence.

(3) The court may, where it is satisfied that the ends of justice require it, order that a count be amended or divided into two or

Section 500—*continued*

more counts, and thereupon a formal commencement may be inserted before each of the counts into which it is divided.

Subsec.(1) is the former s.854. It was part of s.612 in the Code of 1892 and part of s.483 in the E.D.C. Subsecs.(2) and (3) are the former s.891. It also was part of s.612 in the Code of 1892, and of s.483 in the E.D.C. It deals with the same principle as that contained in s.703 *post,* in relation to summary convictions.

Although as a rule the statement of an offence will be, by virtue of s.492(2)(b), sufficient in the terms of the statute creating the offence, there may be times when it will be a question whether the section creates different offences or whether it describes different modes of committing the same offence. For an instance of the former sort, see *R. v. KITCHENER NEWS CO.* noted *ante,* p.256, and for an instance of the latter sort, see *R. v. COULOMBE*(1912), 20 C.C.C.31, decided under what is now s.353(b). However, subsec.(3) provides that the court may divide a count where it is satisfied that the interests of justice require that to be done, and the words of Cameron, J.A., in *R. v. PARKIN*(1922), 37 C.C.C.35, may usefully be noticed, that "The practice of confining a count to one offence should in fairness to the accused be followed, unless there are strong reasons for departing from it".

The "formal commencement" referred to in subsec.(3) is that set out in Form 3 in Part XXVI.

JOINDER OF COUNTS.—Each count separate.—Separate trial.—Order for severance.—Subsequent procedure.

501. (1) Subject to section 499, any number of counts for any number of indictable offences may be joined in the same indictment, but the counts shall be distinguished in the manner shown in Forms 3 and 4.

(2) Where there is more than one count in an indictment, each count may be treated as a separate indictment.

(3) The court may, where it is satisfied that the ends of justice require it, direct that the accused be tried separately upon one or more of the counts.

(4) An order for the separate trial of one or more counts in an indictment may be made before or during the trial, but if the order is made during the trial the jury shall be discharged from giving a verdict on the counts on which the trial does not proceed.

(5) The counts in respect of which a jury is discharged pursuant to subsection (4) may subsequently be proceeded upon in all respects as if they were contained in a separate indictment.

Subsec.(1) is the former s.856 in part. Subsec.(2) is the former s.857(1). Subsec.(3) is the former s.857(2) in part. The proviso which required the courts to try together any number of distinct charges of theft to the number of three committed within six months from first to last, unless there were special reasons to the contrary, has been dropped, and the courts are given full discretion as to the counts that may be tried together.

Subsec.(4) is the former s.858(1) and subsec.(5) is the former s.858(2). All of these provisions were contained in s.626 in the Code of 1892, and in s.493 of the E.D.C.

OLD CODE:

891. The accused may at any stage of the trial apply to the court to amend or divide any count of an indictment which charges in the alternative different matters, acts or omissions, stated in the alternative in the enactment describing the offence or declaring the matters, acts or omissions charged to be an indictable offence, or which is double or multifarious on the ground that it is so framed as to embarrass him in his defence.

(2) The court, if it is satisfied that the ends of justice require it, may order any such 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.

856. Any number of counts for any offences whatever may be joined in the same indictment, and shall be distinguished in the manner shown in form 63, or to the like effect: Provided that to a count charging murder no count charging any offence other than murder shall be joined.

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

(2) 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: 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.

858. Any order for trial upon one or more counts of an indictment separately 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.

(2) The counts in the indictment as to which the jury are so discharged shall be proceeded upon in all respects as if they had been found in a separate indictment.

Although two indictments cannot be tried together whether they concern the same person or more than one person, questions of severance arise usually where persons are charged jointly. In this connection it is pointed out in vol. V Journal of Criminal Law, Jan., 1941, in an article on joint trials, p.75, at p.78, that "Occasions on which, although the defendants are strictly joint offenders, the judge's discretion may be exercised in favour of separate trials would be where evidence admissible against one of the accused would not be admissible against the others, where separate trials would enable the accused to call for the defence persons jointly indicted with him and where persons jointly indicted refuse to join in their challenges".

See also notes to s.696 *post*, especially *CRANE v. R.*, [1921]A.C.299, there cited.

It may be said generally that the right of the Crown to prefer joint indictments is subject to the right of the accused to move for separate trials.

JOINDER OF ACCUSED IN CERTAIN CASES.

ACCESSORIES AFTER THE FACT.

502. Any one who is charged with being an accessory after the fact to any offence may be indicted, whether or not the principal or any other party to the offence has been indicted or convicted or is or is not amenable to justice.

This was part of the former s.849(1); s.627 in the Code of 1892, and s.497 in the E.D.C. It was a rule at common law that an accessory could not be convicted unless his principal had been convicted.

The provision in principle, comes from the *Accessories and Abettors Act*, 24 and 25 Vict., c.94, s.1 as to which it is said in Greaves' Cons. Acts, p.14:

"Where the principal in such cases had not been apprehended, the accessory would not have been triable at all under the former enactment."

Foster, 3rd Discourse, at p.347:

"The distinction between principals in the first and second degrees, or, to speak more properly, the course and order of proceeding against offenders founded on that distinction, seemeth to have been unknown to the most ancient writers on our law; who considered the persons present aiding and abetting in no other light than as accessories *at* the fact, and consequently not liable to be brought to trial till the principal offenders should be convicted or outlawed."

TRIAL OF PERSONS JOINTLY FOR HAVING IN POSSESSION.—Conviction of one or more.

503. (1) Any number of persons may be charged in the same indictment with an offence under section 296 or paragraph *(b)* of subsection (1) of section 298, notwithstanding that

(a)* the property was had in possession at different times; *or

***(b)* the person by whom the property was obtained**

(i) is not indicted with them, or

(ii) is not in custody or is not amenable to justice.

(2) Where, pursuant to subsection (1), two or more persons are charged in the same indictment with an offence referred to in that subsection, any one or more of those persons who separately committed the offence in respect of the property or any part of it may be convicted.

Subsec.(1) comes from the former s.849(1) and (2) which referred to receiving stolen goods. Those provisions were part of s.627 in the Code of 1892, and of s.497 in the E.D.C., the wording there being "knowing it to have been dishonestly obtained". The subsection here is changed to adapt it to the new s.296 *ante*.

Subsec.(2) is the former s.954. It was s.715 in the Code of 1892 and s.200 in R.S.C. 1886, c.174, and s.94 of the *Larceny Act*, 1861 (Imp.).

In *R. v. MESSINGHAM*(1830), 1 Mood. C.C.357, it was held that a joint count where there were two separate acts of receiving by different parties at different times, was invalid at common law. To avoid this, in *R. v. HAYES*(1838), 2 Mood. & R.155, two counts were drawn, one in

OLD CODE:

849. 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.

954. 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.

874. 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.

875. 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.

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reference to the act of each prisoner, and this was held to be good. In a later case *R. v. PARR*(1841), 2 Mood. & R.346, the accused directed his servant to receive goods which both knew had been stolen and the servant afterwards received them in the absence of his employer. A joint indictment against them was held to be good.

PROCEEDINGS BEFORE GRAND JURY.

EVIDENCE UNDER OATH.

504. Every person who appears before a grand jury to give evidence in support of a bill of indictment shall be examined touching the matters in question upon oath to be administered by the foreman of the grand jury or by any member who acts on his behalf.

This replaces the former ss.874 and 875 which were ss.643 and 644 in the Code of 1892, and ss.173 and 174 in R.S.C. 1886, c.174. They came from 19 and 20 Vict., c.54 (Imp.). The new section is explicit that witnesses are to be sworn.

See notes following s.506.

ENDORSING BILL OF INDICTMENT.

505. The name of every witness who is examined or whom it is intended to examine shall be endorsed on the bill of indictment and

Section 505—*continued*

submitted to the grand jury by the prosecutor, and no other witnesses shall be examined by or before the grand jury unless the presiding judge otherwise orders in writing.

See notes following next section.

FOREMAN TO INITIAL NAMES.

506. The foreman of the grand jury or any member of the grand jury who acts on his behalf shall write his initials against the name of each witness who is sworn and examined with respect to the bill of indictment.

Ss. 505 and 506 are the former ss.876 and 877 which were ss.645 and 646 in the Code of 1892 and ss.175 and 176 in R.S.C. 1886, c.174. S.876 came from 19 and 20 Vict., c.54. See also s.534(2) *post.*

The grand jury system continues in Ontario and the four eastern provinces. It has been abolished in Manitoba, British Columbia and Quebec. It was never introduced in Saskatchewan or Alberta. In 1939 Mr. F. H. Barlow, K.C. (now Mr. Justice Barlow), made a survey of the administration of justice in Ontario. His report upon the Grand Juries, which may be found in the Ontario Weekly Notes dated March 8th, 1940, is in part as follows:

"The grand jury is an institution which in English jurisprudence has had a gradual development from shortly after the Norman Conquest. Originally the jury was composed of men in the immediate neighbourhood of the crime who of their own personal knowledge and without taking evidence decided whether the accused was or was not guilty of the crime with which the accused was charged. As the years passed and as provision came to be made for a person known as a Judge to preside at the investigations into crime, it was decided that an accused was entitled to have his evidence submitted to a jury who had no first hand knowledge of the crime committed. With this development those in the immediate neighbourhood who had a first hand knowledge of the alleged crime came to be known as the 'accusers' and they decided whether or not the accused should be put upon his trial. If they decided the accused should stand a trial, he was then tried by another twelve men who heard the evidence and on the evidence brought in a verdict. These latter came to be known as the 'triers'. Thus in brief, out of a development running over a great many years arose the grand jury and the petit jury as we know them today. The method of choosing the grand jury has changed from time to time. One principle, however, has prevailed, namely, that the grand jury should be chosen from the more intelligent men in the community."

The matter of abolition, favoured in the report just quoted, has been under discussion in Canada at least since 1880, but came before Parliament first in 1889. In that year the Hon. Mr. Gowan made in the Senate an extensive analysis and criticism of the system.

The outcome of the discussion was a suggestion that opinions upon the merits of the system be asked from judges and others concerned with criminal law administration.

Pursuant to this suggestion, the Minister of Justice asked in 1890 for

OLD CODE:

876. 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.

877. 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.

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the opinion upon this subject of all the judges in Canada who were charged with judicial functions in criminal matters, as well as of the Attorney General of each province. Of the replies, 48 favoured abolition of the Grand Jury, 41 opposed it, and 12 were doubtful.

Referring to the opinions so collected, Sir John Thompson spoke as follows upon moving the second reading of the Criminal Code Bill in 1892, (Hansard 1892, Vol. I, col. 1314):

". . . . . The opinions upon that subject by those who were thus addressed were very divided indeed. Most of the judges who are accustomed to administer justice without juries, in ordinary proceedings, were in favour of the change. The others were divided in opinion, and it is impossible to deny, in view of so strong a division of opinion on the subject, that it seems unwise, in connection with this measure, to force that provision on the attention of Parliament at present. I must say that I concur personally in the opinion expressed in another place by the learned gentleman to whom I have reference, and I think that in many respects the administration of justice would be improved if we dispensed with the intervention of grand juries.

There are two strong reasons that induce me to delay any request to Parliament to alter the law with regard to this system. One is the opinion expressed by high authority, that for the present at least, a continuance of the functions of grand jurors leads to a large body of respectable persons in the community being present at the exercise of the functions of the court and leads to their assistance in the exercise of those functions, the result of which is said to be, and I believe it to be, that these persons have their confidence in the system of justice as administered in this country increased, they feel a greater cooperation and sympathy with its administration, and to some extent additional publicity among the best classes of the community is, in that way, given to the proceedings in our courts of justice. Another consideration which has had great weight with the judges who desire that the change should not be made at present, is the uncertainty as to what procedure would take the place of that before the grand jury. I can suggest no other as likely to take its place, except something like this: The requirement that every person, before being tried, should be committed for trial after a preliminary investigation or an examination by some competent authority."

It may be said that these reasons, with the opinion expressed at the

Section 506—*continued*

same time by Mr. (later Sir Wilfrid) Laurier to the effect that the grand jury is a safeguard for the citizen against unjust accusation, are the governing factors in those jurisdictions in which the grand jury is retained.

PROCEEDINGS WHEN PERSON INDICTED IS AT LARGE.

BENCH WARRANT.—Execution.

507. (1) Where an indictment has been found against a person who is at large, and that person does not appear or remain in attendance for his trial, the court before which the accused should have appeared or remained in attendance may, whether or not he is bound by recognizance to appear, issue a warrant for his arrest.

(2) A warrant issued under subsection (1) may be in Form 15 and may be executed anywhere in Canada.

This is the former s.879 with the addition of the words "or remain in attendance". It was s.648(1)(a) in the Code of 1892, adapted from s.509(a) in the E.D.C. Somewhat similar provision was contained in R.S.C. 1886, c.174, s.33.

Cf. s.610 *post.*

CHANGE OF VENUE.

APPLICATION, HOW MADE.—Conditions as to expense.—Transmission of record.

508. (1) A court before which an accused is or may be indicted, at any term or sittings thereof, or a judge who may hold or sit in that court, may at any time before or after an indictment is found, upon the application of the prosecutor or the accused, order the trial to be held in a territorial division in the same province other than that in which the offence would otherwise be tried if

***(a)* it appears expedient to the ends of justice, or**

***(b)* a competent authority has directed that a jury is not to be summoned at the time appointed in a territorial division where the trial would otherwise by law be held.**

(2) The court or judge may, in an order made upon an application by the prosecutor under subsection (1), prescribe conditions that he thinks proper with respect to the payment of additional expenses caused to the accused as a result of the changes of venue.

(3) Where an order is made under subsection (1), the officer who has custody of the indictment, if any, and the writings and exhibits relating to the prosecution, shall transmit them forthwith to the clerk of the court before which the trial is ordered to be held, and all proceedings in the case shall be held or, if previously commenced, shall be continued in that court.

(4) Where the writings and exhibits referred to in subsection (3) have not been returned to the court in which the trial was to be held at the time an order is made to change the place of trial, the person who obtains the order shall serve a true copy thereof upon the person in whose custody they are and that person shall thereupon transmit them to the clerk of the court before which the trial is to be held.

OLD CODE:

879. 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, 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.
(2) The officer of the court at which said indictment is found or, if the place of 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 which may be in form 65, or to the like effect.

884. 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.
(2) 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.

885. Forthwith upon such order 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.

887. (1) Whenever, in the province of Quebec, it has been decided by the competent authority that no jury is to be summoned at the appointed time in any district in the province within which a term of the Court of King's Bench holding criminal pleas should be then held, the Attorney General or his agent, or 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, at any time after the decision not to summon the jury has been rendered, an order that the trial be proceeded with in some other district within the said province named by the court or judge.
(2) All provisions contained in the three last preceding sections shall apply to the case of a person so applying for and obtaining a change of venue as aforesaid.

695. (2) When any order changing the place of trial is made the person obtaining it shall serve it, or an office copy of it, upon the person then in possession of the said documents, who shall thereupon transmit them and the indictment, if found, to the officer of the court before which the trial is to take place.

Section 508—*continued*

Subsec.(1) comes from the former ss.884(1) and 887. S.884(1) was s.651(1) in the Code of 1892, and R.S.C. 1886, c.174, s.102(1). S.887 referred only to Quebec but has been made general. See s.418 *ante*, and notes thereto. Subsec.(2) is the former s.884(2) of similar origin. See *Re SPROULE*(1886), 12 S.C.R.140, upholding order where provision for expense not included.

Subsec.(3) is the former s.885. It was s.651(2) in the Code of 1892, and R.S.C. 1886, c.174, s.102(2).

Subsec.(4) is the former s.695(2). It was s.600(2) in the Code of 1892 and was based upon R.S.C. 1886, c.174, s.102(2).

The common law rule as to venue is changed by s.419 *ante*. That rule is set out in 1 Chit. Cr. Law, pp.176, 177 as follows:

> "At common law, the venue should always be laid in the county where the offence is committed, although the charge is in its nature transitory, as seditious words or battery.
>
> The venue was always regarded as a matter of substance, and therefore, at common law, when the offence was commenced in one county and consummated in another, the venue could be laid in neither, and the offender went altogether unpunished. Thus under the statute of 8 Hen. 6, c.12 against stealing records, it was holden, that if the offence were committed partly in one county, and partly in another, the offender could be punished in neither, except for the misprision of felony."

With regard to venue generally, see also s.421, the general rule being that the venue should be laid in the territorial division where the offence is committed. It would, however, be ground for an application for change of venue on the part of the accused that there existed such prejudice against him as to render it unlikely that he would receive a fair trial. It is much more difficult for the Crown to obtain a change of venue on the ground of widespread public sympathy for the accused: *R. v. PONTON*(1898), 2 C.C.C.192; *R. v. STAUFFER*(1911), 19 C.C.C.205.

ORDER IS AUTHORITY TO REMOVE PRISONER.

509. An order that is made under section 508 is sufficient warrant, justification and authority to all sheriffs, keepers of prisons and peace officers for the removal, disposal and reception of an accused in accordance with the terms of the order, and the sheriff may appoint and authorize any peace officer to convey the accused to a prison in the territorial division in which the trial is ordered to be held.

This is the former s.886(1). It was s.651(3) in the Code of 1892, and s.102(3) in R.S.C. 1886, c.174.

AMENDMENT.

AMENDING DEFECTIVE INDICTMENT OR COUNT.—Amendment where variance.—Indictment under wrong Act.—Amending defective statement.—Defect in substance.—Defect in form.—What to be considered.—Adjournment if accused prejudiced.—Question of law.—Endorsing indictment.—Mistakes not material.—Limitation.

510. (1) An objection to an indictment or to a count in an indictment for a defect apparent on the face thereof shall be taken by motion to quash the indictment or count before the accused has

OLD CODE:

886. The order of the court, or of the judge, made as aforesaid 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.

898. 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.

(2) No motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act.

889. If on the trial of any 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 furnished as provided in section eight hundred and fifty-nine, 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.

. . . . . .

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pleaded, and thereafter only by leave of the court or judge before whom the trial takes place, and a court or judge before whom an objection is taken under this section may, if it is considered necessary, order the indictment or count to be amended to cure the defect.

(2) A court may, upon the trial of an indictment, amend the indictment or a count thereof or a particular that is furnished under section 497, to make the indictment, count or particular conform to the evidence, where there appears to be a variance between the evidence and

(a) the charge in a count in the indictment as found; or

(b) the charge in a count in the indictment

(i) as amended, or

(ii) as it would have been if it had been amended in conformity with any particular that has been furnished pursuant to section 497.

Section 510—*continued*

(3) A court shall, upon the arraignment of an accused, or at any stage of the trial, amend the indictment or a count thereof as may be necessary where it appears

(a) **that the indictment has been preferred**

(i) under another Act of the Parliament of Canada instead of this Act, or

(ii) under this Act instead of another Act of the Parliament of Canada;

(b) **that the indictment or a count thereof**

(i) fails to state or states defectively anything that is requisite to constitute the offence,

(ii) does not negative an exception that should be negatived,

(iii) is in any way defective in substance,

and the matters to be alleged in the proposed amendment are disclosed by the evidence taken on the preliminary inquiry or on the trial; or

(c) **that the indictment or a count thereof is in any way defective in form.**

(4) The court shall, in considering whether or not an amendment should be made, consider

(a) **the matters disclosed by the evidence taken on the preliminary inquiry,**

(b) **the evidence taken on the trial, if any,**

(c) **the circumstances of the case,**

(d) **whether the accused has been misled or prejudiced in his defence by a variance, error or omission mentioned in subsection (2) or (3), and**

(e) **whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.**

(5) Where, in the opinion of the court, the accused has been misled or prejudiced in his defence by a variance, error or omission in an indictment or a count thereof, the court may, if it is of opinion that the misleading or prejudice may be removed by an adjournment, adjourn the trial to a subsequent day in the same sittings or to the next sittings of the court and may make such an order with respect to the payment of costs resulting from the necessity for amendment as it considers desirable.

(6) The question whether an order to amend an indictment or a count thereof should be granted or refused is a question of law.

(7) An order to amend an indictment or a count thereof shall be endorsed on the indictment as part of the record and the trial shall proceed as if the indictment or count had been originally found as amended.

(8) A mistake in the heading of an indictment shall be corrected as soon as it is discovered but, whether corrected or not, is not material.

(9) The authority of a court to amend indictments does not authorize the court to add to the overt acts stated in an indictment for treason or for an offence against any provision in sections 49, 50, 51 and 53.

OLD CODE:

893. Where, before trial, or at any stage of a trial, it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the Court thinks fit.

889. (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.
(4) If the court is of the 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 discretion 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.
(5) 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.
(6) The propriety of making or refusing to make any such amendment shall be deemed a question for the court, and the decision of the court upon it may be reserved for the Court of Appeal, or may be brought before the Court of Appeal by appeal like any other question of law.

890. In case an order for amendment as provided for in the last 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.

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

847. (2) The power of amending indictments in this Part contained shall not extend to authorize the court to add to the overt acts stated in the indictment.

1007. (1) The accused may at any time before sentence move in arrest of judgment on the ground that the indictment does not, after amendment, if any, state any indictable offence.

This puts into one comprehensive section the provisions dealing with the amendment of indictments.

Subsec.(1) comes from the former s.898(1). See notes below. It is changed by omitting the reference to demurrer. An objection to an indictment for a defect apparent on its face must be taken by motion to quash the indictment. In *LEYMAN v. LATIMER*(1878), 14 Cox, C.C.51 at p.57, the following appears:

"Then as to the demurrers. As to them I must first say that they are both bad as being against the spirit, if not the letter, of the Judicature Acts. Demurrers are now an idle waste of time, and if warranted in any shape, it is only when they are in the largest and most general form, and demur to the whole of the opponent's case."

As to objection before plea, see *R. v. KEELER*(1952), 103 C.C.C.92.

Section 510—*continued*

Subsec.(2) comes from the former s.889(1). See notes below, also *R. v. READ & READ*(1954), 12 W.W.R. (N.S.) 25, in which the trial judge allowed an amendment and offered an adjournment which defence counsel declined. It was held on appeal that s.889 (see now subsec. 3) did not require a new plea or election.

Subsec.(3) comes from ss.889(2) and 893. See notes below. The purpose of the provisions of pars.(b) and (c) is to resolve a conflict in the cases. Cases which hold that there is no power to amend where an essential averment has been omitted are *R. v. PHILPOTTS*(1843), 1 Car. & Kir. 112; *R. v. BAINTON*(1738), 2 Str. 1088; *R. v. HEWITT*(1809), Russ. & Ry. 158; *R. v. RIGBY*(1839), 8 C. & P.770; *R. v. LOFTUS*(1926), 45 C.C.C. 390; *R. v. GERSON*(1947), 89 C.C.C. 138. Cases *contra* are *R. v. FRASER*(1923), 93 L.J.K.B.236; *R. v. SIMMS*(1924), 43 C.C.C.28; *R. v. RYCER*(1946), 86 C.C.C.336.

As to what are essential averments see *R. v. BROOKS* and *R. v. MacDONALD* noted under s.492 *ante*. As to defects, the following appears in *R. v. SMITH et al.* (1950), 34 Cr. App.R. 168 at p.176:

> "The argument for the appellants appeared to involve the proposition that an indictment, in order to be defective, must be one which, in law, did not charge any offence at all and therefore is bad on the face of it. We do not take that view. In our opinion, any alteration in matters of description, and probably in many other respects, may be made in order to meet the evidence in the case so long as the amendment causes no injustice to the accused person."

In that connection it may be recalled that a test was suggested in *COOKE v. STRATFORD*(1844), 13 M. & W.379: "Supposing the defendant comes with evidence that would enable him to meet the case as it stands on the record unamended would the same enable him to meet it as amended." See also notes below.

Subsec.(4) comes from the former s.889(2) and (5).

Subsec.(5) comes from the former s.889(4). The Committee of the House of Commons added the words "to a subsequent day in the same sittings or to the next sittings of the court" to the subsection as presented in the draft Bill.

Subsec.(6) comes from the former s.889(6).

Subsec.(7) comes from the former s.890. That section was s.724 in the Code of 1892, and R.S.C.1886, c.174, s.240. It came from 14 and 15 Vict., c.100(Imp.).

Subsec.(8) comes from the former s.845(3). It was new as s.610(3) in the Code of 1892 and as part of s.481 of the E.D.C.

Subsec.(9) comes from the former s.847(2). It was s.614(2) in the Code of 1892, and part of s.489 in the E.D.C.

At common law an indictment after it had been found by the Grand Jury, could be amended only in formal matters, and then only with the consent of the Grand Jury. Taschereau's edition of the Code of 1892, in notes to s.629, (later s.898), says:

> "Who are the accusers on an indictment? The Grand Jury, and to their accusation only has a prisoner to answer. This accusation cannot be

Section 510—*continued*

changed into another one, at any time, without the consent of the accuser: I Chit. 298, 324. And if they have brought against the prisoner an accusation of an offence not known in law the court cannot turn it into an offence known at law by *adding* to the indictment."

It may be observed in passing that the English Act reads "formal defect" whereas our s.898 omitted the word "formal".

On this point Mr. Justice Idington in *EAD v. R.*(1908), 13 C.C.C.348, at p.364 said:

"In this instance, however, the Parliament of Canada went a great step in advance of the other. Instead of limiting the peremptory requirement for demurrer or motion to quash to any *formal* defect, our legislation dropped the word 'formal' and made the requirement apply to and prohibited the motion for arrest of judgment in any such case where demurrer might have been upheld or power to amend existed. At first blush there would appear to be some difficulty in reconciling s.898(2) with 1007(1), but my view is that the latter provides, in effect, that if the trial judge refuses the motion to quash or holds against the demurrer or amends in such a way as to disclose no indictable offence, the accused after verdict may move in arrest on the grounds that the indictment still discloses no indictable offence, for he has done all he can by way of protest. The words 'after indictment, if any' in s.1007(1) are significant. The result is that if he does not so protest he cannot move in arrest of judgment."

S.1007(1) does not appear in this Code in view of the provisions of s.510(6). As to the effect of the former section see *R. v. ANNUNZIELLO* (1948), 92 C.C.C.298.

S.889 had its origin in the Imperial Statute 14 and 15 Vict., c.100, s.1. It was first enacted in Canada in 1855 by 18 Vict., c.92, s.1, and was re-enacted successively in the Consolidated Statutes of Canada(1859), as c.99, s.78; in 1869 as s.238 of the *Criminal Procedure Act,* 32-33 Vict., c.29; in 1886 as s.238 of the *Criminal Procedure Act,* R.S.C. (1886), c.174; and in 1892 as s.723 of the *Criminal Code.* The provision is substantially the same throughout; the chief difference being that before the Code the enactments specified that the variance referred to was stated to be as to names, dates, places or other matters or circumstances mentioned in the indictment.

As to s.893. This section was passed in 1925 as s.983A. The following appears in Hansard 1925, Vol. IV, p.4011:

"MR. LAPOINTE: This explains itself. It is a section which is in the Imperial Act, 1915. Its purpose is to prevent any miscarriage of justice which might occur owing to the defective nature of the indictment as originally presented and the failure of the prosecuting authorities to apply for the necessary amendment. This gives to the court before trial or at any stage of a trial, when it appears the indictment is defective, power to make such order for the amendment of the indictment, as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and the court may make such order as to the payment of any costs incurred owing to the necessity for amendment as the court thinks fit.

Section 510—*continued*

MR. JACOBS: I always thought that was the law.

MR. LAPOINTE: No, it is not.

Section agreed to."

It appears to have resulted from the case of *R. v. FRASER*(1923), 93 L.J.K.B.236. The following is quoted from the judgment of Hewart, C. J., in that case:

"The appellant was convicted of obtaining £850 from various persons between July 8, 1922, and June 4, 1923, contrary to section 32, subsection 1 of the Larceny Act, 1916. It so happened that the words 'with intent to defraud' were omitted from the indictment, which otherwise faithfully followed Form 12 in the Appendix to the Rules under the Indictment Act, 1915.

Some discussion upon the form of the indictment took place at the trial, and the deputy chairman of the sessions, acting under section 5, subsection 1, of the Indictment Act, 1915, ordered the indictment to be amended by the insertion of the omitted words. The question which has been argued before this Court is whether or not that amendment was valid. It has been contended that no court can in effect alter the findings of a grand jury. That argument however involves the interpretation of the words in subsection 1, 'at any stage of the trial' as meaning 'at any stage of a trial which precedes the return of a true bill against the prisoner by the grand jury.'

It furthermore, proceeds in entire disregard of subsection 2 of section 5, which provides that where an indictment is amended, 'a note of the order for amendment shall be endorsed on the indictment, and the indictment shall be treated for the purposes of all proceedings in connection therewith, as having been found by the grand jury in the amended form'—a phrase which is superfluous if the argument of counsel for the appellant is correct. Section 5 indeed imposes a duty on the court to make such order for the amendment of an indictment as is necessary unless the required amendments cannot be made without injustice. No injustice resulted from the amendment which was made in the present case; on the contrary, there would have been a failure to procure justice if the amendment had not been directed. This appeal must be dismissed."

It will be observed however that the broad principle that amendments may be in form but not in substance still obtains.

The following is quoted from *R. v. LACELLE*(1905), 10 C.C.C.229, at p.233:

"The effect of the section in the Imperial Statute was discussed by Mr. Greaves, Q.C., the learned draughtsman of the Act in his notes on the Act in 1851. After pointing out that it would not allow one offence to be substituted for another he says, at p.6: 'Equally clear is it that the amendment ought not to be made so as to apply to a different transaction. Every offence, however simple it may be, consists of a number of particulars: it must have time and place, and its component parts, all of which constitute one individual transaction. Now the real meaning of the clause is that, provided you keep to the same identical transaction, you may amend any such error as is mentioned in the

clause as to one or more of the particulars included in such transaction . . . . . The proper mode to consider the question is this: the grand jury have had evidence of one transaction upon which they found the bill; the case before the petty jury ought to be confined to the same transaction but if it is, it may turn out that, either through insufficient investigation or otherwise the grand jury have been in error as to some particular or other, and upon the trial the error is discovered. Now this is just the case to which the clause applies.'

The learned writer proceeds to cite a number of cases in which proposed amendments came up, under like provisions applicable to such cases, in which similar language was used by a number of the most eminent Judges. Like utterances by Canadian Judges are to be found in cases since the Code. In *R. v. WEIR No. 3*(1889), 3 Can. Cr. Cas. 262, at p.268, Wurtele, J., says: . . . . . 'In fine, if the transaction is not altered by the amendment but remains precisely the same, the amendment ought to be allowed, but if the amendment would substitute a different transaction from that alleged or would render a different plea necessary it ought not to be made.'

In *R. v. CARRIERE*(1902), 6 C.C.C.5, Bain, J., in discussing sec.773 says, at p.7: 'I am satisfied that in practice a Judge should not, against the wish of the prisoner, give his consent to any charge being preferred against him unless it is clear that, while it may be more formally or differently expressed, it is substantially the same charge as the one on which he was committed for trial and on which he has been brought before a Judge and consented to be tried without a jury.'

The leading English text writers such as Archbold (Criminal Pleading, 22nd ed., p.58 and seq.) Roscoe (Criminal Evidence, 12th ed., p. 182), and Russell (Crimes, 6th ed., p.53) discuss and give a summary of the English cases on these variances and amendments from the first Imperial Statute on the subject, 9 Geo. IV, ch.15, down to the present time. Our Canadian commentators on the Code have also given under secs.723 and 773 the Canadian reported cases on the subject since the first Canadian Act in 1855. I have examined these with some care and I have been unable to find a single instance in which an amendment has been allowed beyond the limits laid down in the above quotations from the notes of Mr. Greaves."

In *R. v. LOFTUS*(1926), 45 C.C.C.390, it was held by the Court of Appeal that where an indictment as returned by the Grand Jury does not disclose an offence no amendment can be permitted to the indictment to cure the defect.

In *McNEIL v. R.*(1931), 55 C.C.C.253, (S.C.C.) it was held that to sustain a conviction for shop-breaking by night with intent (Code s.461) it is essential that the indictment allege intent to commit an indictable offence "therein". There was no evidence to show that there was at the time of breaking an intent to commit the particular assault alleged, and the Court pointed out that the terms of s.889(2) allow an amendment only when the matter omitted is proved by the evidence.

It was stated, however, that since the evidence did not afford the factual basis for an amendment under s.889(2), it was unnecessary to consider generally the extent to which amendment is permitted by the Code.

Section 510—*continued*

In *R. v. RYCER*(1946), 86 C.C.C.336, the British Columbia Court of Appeal (O'Halloran, J.A., dissenting) permitted an indictment for receiving stolen goods to be amended by adding "knowing the same to have been stolen". The following appears at p.351:

> "It may be useful to repeat the relevant words: 'If it appears . . . . . that there is in the indictment . . . . . an omission to state . . . . . anything requisite to constitute the offence . . . . . the court . . . . . shall amend the indictment . . . . . as may be necessary.'
> Where legislation is ambiguous it may be a good reason for construing it in a particular way, that some other way would lead to impossible or irrational results. But reading these words in their plain ordinary meaning leads to a result at once rational and intelligible. The object of this part of the subsection would appear to be to meet a case where an amendment is sought with the trial half completed. Then if, at that moment, there has already been proof given of the missing element, and if the accused cannot be prejudiced thereby, the amendment may, in the discretion of the Judge, be granted. It seems to me that such a provision offends neither against principle nor authority."

This appears to be in accord with *R. v. FRASER, supra.*

In *R. v. GERSON, supra,* where in response to a demand for particulars the Crown sought to amend the indictment by adding the names of conspirators, it was held in appeal that the amendment was one of substance and vitiated the indictment. It was held that in granting the amendment the Judge had usurped the functions of the Grand Jury. "The power to amend under the Code is a restricted one, not a general one and the provisions of the Code are not to be construed merely as setting out exceptions to a general power of amendment."

It is submitted that in s.510 the consolidation of the sections makes for clarity, and as well preserves, on the one hand, the principles that the amendment cannot cure a null indictment, cannot change the transaction referred to in the count, and must not result in injustice to the accused, and on the other hand, the principle that the accused is not to be permitted, after verdict, to raise for the first time technical objections to the indictment.

AMENDED INDICTMENT NEED NOT BE PRESENTED TO GRAND JURY.

511. Where a grand jury returns a true bill in respect of an indictment and the indictment is subsequently amended in accordance with section 510, it is not necessary, unless the judge otherwise directs, to present the amended indictment to the grand jury, but the indictment, as amended, shall be deemed to be as valid in all respects for all purposes of the proceedings as if it had been returned by the grand jury in its amended form.

This is new. In effect it gives the trial judge a discretion to proceed on the amended indictment (see s.510(7)) or to refer it back to the grand jury. It may be interpreted in the light of the following quotation from *R. v. GERSON*(1947), 89 C.C.C.138, at p.142:

> "In the case at bar the three names added to the indictment by the amendment had been disclosed as those of alleged participants in the

OLD CODE:

691. Every one who has been committed for trial, whether he is bailed out or not, shall be entitled at any time before the trial to have copies of the depositions, and of his own statement, if any, from the officer who has custody thereof, on payment of a reasonable sum not exceeding five cents for each folio of one hundred words.

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conspiracy before the Royal Commission which took place months before the trial. The Crown, however, failed to include the said names in the indictment presented to the grand jury upon which a true bill was returned. In the circumstances, one must consider whether or not there was any power in the Court to make the order of amendment which in fact was made. I am quite unable to find any such power in the Court. The very foundation of the trial was the indictment as laid before and passed upon by the grand jury, and upon that indictment the grand jury were not called upon to consider any evidence relative to Sokolov, Zheveinov and Harris. Unless the amendment was one for which authority is expressly conferred, and I can find no such express authority, the trial judge in granting the amendment usurped the function of the grand jury whose duty it is to deal with the bill of indictment as laid before them and to decide whether or not upon that indictment the accused should be put upon his trial.

The common law rule as to amendment of indictments is thus expressed by Lord Mansfield in *WILKES CASE*(1770), 19 How. St. Tr. 1075 at p.1120: 'There is a great difference between amending indictments and amending informations. Indictments are found upon the oaths of a jury; and ought only to be amended by themselves.'

The care of the Court in these matters is shown in the well-known formula and practice in securing the permission of the grand jury to amend in matters of form only. As stated . . . . . in *R. v. BAINBRIDGE* (1918), 42 D.L.R. 493 at p.508, 30 Can. C.C. 214 at p.230, 42 O.L.R. 203: 'The old formula "You are content the Court shall amend matter of form altering no matter of substance," is not an idle phrase, but indicates, in my opinion, precisely the respective duties of Court and Jury.' See also *R. v. LOFTUS*(1926), 45 Can. C.C. 390, 59 O.L.R. 65."

INSPECTION AND COPIES OF DOCUMENTS.

RIGHT OF ACCUSED.—To inspect.—To receive copies.

512. An accused is entitled, after he has been committed for trial or at his trial,

(a) **to inspect without charge the indictment, his own statement, the evidence and the exhibits, if any; and**

(b) **to receive, on payment of a reasonable fee not to exceed ten cents per folio of one hundred words, a copy**

(i) of the evidence,

(ii) of his own statement, if any, and

(iii) of the indictment,

but the trial shall not be postponed to enable the accused to se-

Section 512—*continued*

cure copies unless the court is satisfied that the failure of the accused to secure them before the trial is not attributable to lack of diligence on the part of the accused.

This section embodies matter appearing in the following sections of the repealed Code:

S.691, which was s.597 in the Code of 1892, and s.74 in R.S.C. 1886, c.174.

S.894, which was s.653 in the Code of 1892, and s.180 in R.S.C. 1886, c.174. It came from 6 and 7 Wm. IV., c.114, s.4 (Imp.).

S.895, which was s.654 in the Code of 1892, and s.181 in R.S.C. 1886, c.174. At common law the prisoner was not entitled to a copy of the indictment in cases of treason or felony: I Chit. Cr. Law, 403.

S.896, which was s.655 in the Code of 1892, and s.182 in R.S.C. 1886, c.174. It was based upon 11 and 12 Vict., c.42, s.27 (Imp.).

This section raises the fee for copies of the evidence, indictment etc., from five cents to ten cents per folio.

DELIVERY OF DOCUMENTS IN CASE OF TREASON, ETC.—Details.—Witnesses to delivery.—Exception.

513. (1) An accused who is indicted for treason or for being an accessory after the fact to treason is entitled to receive, after the indictment has been found and at least ten days before his arraignment,

(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 jurors who are to try him, returned by the sheriff.**

(2) The list of the witnesses and the copy of the panel of the jurors referred to in subsection (1) shall mention the names, occupations and places of abode of the witnesses and jurors respectively.

(3) The writings referred to in subsection (1) shall be given to the accused at the same time and in the presence of at least two witnesses.

(4) This section does not apply to the offence of treason by killing Her Majesty, or to the offence of treason where the overt act alleged is an attempt to injure the person of Her Majesty in any manner or to the offence of being an accessory after the fact in such a case of treason.

This is the former s.897. It was s.658 in the Code of 1892 and s.508 in the E.D.C. Subsec.(4) was drawn from 39 and 40 Geo. III, c.96, and 5 & 6 Vict., c.11. Concerning earlier legislation, the following appears in IV Bl. Com., p.345:

"In cases of high treason, whereby corruption of blood may ensue, or misprision of such treason, it is enacted by statute 7 W. III, c.3, first, that no person shall be tried for any such treason, except an attempt to assassinate the King, unless the indictment be found within three years after the offence committed: next, that the prisoner shall have a copy of the indictment, but not the names of the witnesses, five days

OLD CODE:

894. 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.

895. 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.

896. Every person indicted shall be entitled to a copy of the depositions returned into court on payment of five cents per folio of one hundred words for the same.

(2) If a copy is not demanded before the opening of the assizes, term, sittings or sessions, the person indicted shall be entitled to such copy if the court is of opinion that the same can be made without delay to the trial, but not otherwise.

(3) 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.

897. When any one is indicted for treason, or for being accessory after the fact to treason, there shall be delivered to him after the indictment has been found, and at least ten days before his arraignment.

(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 the 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.

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at least before the trial; that is, upon the true construction of the Act, before his arraignment; for then is his time to take any exceptions thereto, by way of plea or demurrer; thirdly, that he shall also have a copy of the panel of jurors two days before his trial; and lastly, that he shall have the same compulsive process to bring in his witnesses for him, as was usual to compel their appearance against him. And, by statute 7 Ann. c.21 (which did not take place till after the decease of the late pretender) all persons, indicted for treason or misprision thereof, shall have not only a copy of the indictment, but a list of all the witnesess to be produced, and of the jurors impanelled, with their professions and places of abode, delivered to him ten days before the trial, and in the presence of two witnesses; the better to prepare him to make his challenges and defence. But this last act, so far as it affected indictments for the inferior species of high treason, respecting coin and the royal seals, is repealed by the statute of 6 Geo. III, c.53,

Section 513—*continued*

else it had been impossible to have tried those offences in the same circuit in which they are indicted: for ten clear days, between the finding and the trial of the indictment, will exceed the time usually allotted for any session of oyer and terminer. And no person indicted for felony is, or (as the law stands) ever can be, entitled to such copies, before the time of his trial."

In *R. v. WILLIAMS & JONES*(1840), 2 Mood. C.C.140, Sir J. Campbell, A.G., in the argument, at p.159 said:

"Now what was the object of the statute of 7 Will. III, and the statute of Anne? The object of these statutes was to enable the prisoner to prepare for his trial, to know the charge preferred against him, the jurors by whom he was to be tried, and by what witnesses the Crown would attempt to bring home the charge against him."

In 1 East, p.115 it is said that:

"Therefore, by fair construction of the whole law upon this subject, such opportunity ought to be afforded to the prisoner, as that he may, if he please, have counsel assigned to him so long before his trial as the law requires that he shall be furnished with a copy of the indictment, namely 10 days."

Holdsworth's Hist. Vol. VI, pp.232-234 regards the Act 7 Wm. III, c.3, as the outcome of a struggle between the peers and the commons concerning the privileges of the peerage.

Pike's History of Crime in England, Vol. I, p.324, speaks of it as "not the least remarkable effect of the attention directed, after the Revolution (of 1688) to the harshness of judges and of legal rules."

RELEASE OF EXHIBITS FOR EXAMINATION OR TEST.—Disobeying order.

514. (1) A judge of a superior court of criminal jurisdiction or of a court of criminal jurisdiction may, on summary application on behalf of the accused or the prosecutor, after three days' notice to the accused or prosecutor, as the case may be, order the release of any exhibit for the purpose of a scientific or other test or examination, subject to such terms as appear to be necessary or desirable to ensure the safeguarding of the exhibit and its preservation for use at the trial.

(2) Every one who fails to comply with the terms of an order that is made under subsection (1) is guilty of contempt of court and may be dealt with summarily by the judge or magistrate who made the order or before whom the trial of the accused takes place.

This is the former s.695 subsecs.(3) and (4) which were passed in 1950. The purpose of these provisions, as set out in an explanatory note to s.10 of the Criminal Code Amendment Bill of that year, is to enable a judge or magistrate to order the release of an exhibit for examination between the time of the preliminary inquiry and the time of the trial. "This provision could be applied, *e.g.*, to a firearm that it was desirable to have examined by a ballistic expert."

See s.462, *ante*.

OLD CODE:

695. (3) Any judge of a superior, district or county court or in the Northwest Territories or the Yukon Territory a stipendiary magistrate, may, on summary application on behalf of the accused or the Crown, after three days' notice to the accused or counsel acting for the Crown, as the case may be, order the release of any exhibit for the purpose of any scientific or other test or examination, subject to such terms as appear necessary or desirable to ensure the safeguarding of the exhibit and its preservation for use at the trial.

(4) Any person failing to comply with the terms of any such order is guilty of contempt of court and may be dealt with summarily by the judge who made the order or before whom the trial of the accused person takes place.

900. When the accused is called upon to plead he may plead either guilty or not guilty; or such special plea as is in this Part subsequently 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.

901. 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.

(2) 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 in 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 may seem meet, and may, in the case of adjournment to another session or sittings, respite the recognizances of the prosecutor and witnesses accordingly.

(3) In such cases the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at any subsequent session or sittings without entering into any fresh recognizances for that purpose.

PLEAS.

PLEAS PERMITTED.—Refusal to plead.—Allowing time to plead.

515. (1) An accused who is called upon to plead may plead guilty or not guilty, or the special pleas authorized by this Part and no others.

(2) Where the accused refuses to plead or does not answer directly the court shall order the clerk of the court to enter a plea of not guilty.

(3) An accused is not entitled as of right to have his trial postponed but the court may, if it considers that the accused should be allowed further time to plead, move to quash, or prepare for his defence or for any other reason, adjourn the trial to a later time in the session or sittings of the court, or to the next or any subsequent session or sittings of the court, upon such term as the court considers proper.

This combines the former ss.900 and 901(1) and (2). Subsec.901(3) has been dropped as unnecessary in view of the fact that provisions for binding over the prosecutor have been dropped. S.669 *post*, covers the

Section 515—*continued*

case of a witness who is bound over. The words "and no others" in subsec.(1) were taken from s.905(1).

S.900 was s.657 in the Code of 1892, and ss.144 and 145 in R.S.C. 1886, c.174. Corresponding provisions were contained in s.516 of the E.D.C. and came from 7 and 8 Geo. IV, c.28, ss.1 and 2 (Imp.).

Subsecs.(1) and (2) of s.901 were in s.630 of the Code of 1892, and s.141 of R.S.C. 1886, c.174. These provisions came from 60 Geo. III and 1 Geo. IV, c.4, ss.1 and 2; 14 and 15 Vict., c.100, s.27 (Imp.).

In *R. v. BOYLE*(1954), 218 L.T.70 it was said that where an accused is charged in an indictment containing more than one count (whether they are of a different nature or merely alternative) each count should be put to him separately and his plea should be taken separately on each count.

Subsec.(2) is important, in that it raises the point that very often an accused will plead guilty with some qualifying words which are in effect exculpatory. A plea of guilty should be unequivocal, and the court should not accept it unless it is, but should direct the entry of a plea of not guilty. By way of illustration reference may be made to *R. v. RICHMOND*(1917), 29 C.C.C.89. In that case it appeared that there had been a plea of guilty to a charge of unlawful possession of opium, although there was some dispute as to what actually had taken place before the magistrate. However, before any penalty was imposed, the accused said to the magistrate that he did not know what was in the parcel when he received it from the express office. The following is quoted from the judgment on appeal:

> "Even though a prisoner has pleaded guilty, yet if while the case is still in course of being dealt with and the proceedings are not closed it plainly appears that the accused never intended to admit the truth of a fact which is an essential ingredient in his guilt and therefore pleaded guilty under a misapprehension of what constituted guilt it is, I think, clearly the duty of any presiding Judge or Magistrate to offer to allow him to withdraw his plea if he so desires and to enter a plea of 'not guilty'."

In *R. v. McNALLY*(1954), 217 L.T.Jo.315, it was held that the question whether or not a prisoner should be allowed to withdraw a plea of guilty before he is sentenced was a matter entirely within the discretion of the trial judge, but once judgment was pronounced a plea could not be withdrawn. *R. v. SELL*(1840), 9 C. & P.346; *R. v. PLUMMER*, [1902]2 K.B.339 referred to; *R. v. BLAKEMORE*(1948), 33 Cr. App.R.49, not followed.

The old words "traverse" and "imparl" used in s.901(1) are not continued. Taschereau's Code quotes Stephen's Commentaries as saying that to traverse properly signifies the general issue or plea of not guilty. It seems however to have had a secondary meaning as implying the need for a postponement. To imparl was said "to have license to settle a litigation amicably, to obtain delay for adjustment": Wharton's Law Lexicon.

Of the 14 and 15 Vict., c.100, s.27, Taschereau p.712 quotes Greaves to the effect that traverses were the occasion of much injustice which the section was designed to obviate.

OLD CODE:

905. (1) 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.

906. The plea 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.

(2) If every such plea is disposed of against the accused he shall be allowed to plead not guilty.

(3) 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.

"In felonies, the prisoner has no right to postpone his trial, but the court, on proper grounds, will always postpone the trial. Under this section, therefore, no defendant in a case of misdemeanour can insist on postponing his trial; but the court in any case, upon proper grounds being adduced, not only may, but ought to, order the trial to be postponed."

SPECIAL PLEAS.—In case of libel.—Disposal.—Pleading over.—Statement sufficient.

516 (1) An accused may plead the special pleas of

(*a*) *autrefois acquit*,

(*b*) *autrefois convict*, and

(*c*) pardon.

(2) An accused who is charged with defamatory libel may plead in accordance with sections 520 and 521.

(3) The pleas of *autrefois acquit*, *autrefois convict* and pardon shall be disposed of by the judge without a jury before the accused is called upon to plead further.

(4) When the pleas referred to in subsection (3) are disposed of against the accused he may plead guilty or not guilty.

(5) Where an accused pleads *autrefois acquit* or *autrefois convict* it is sufficient if he

(*a*) states that he has been lawfully acquitted or convicted, as the case may be, of the offence charged in the count to which the plea relates, and

(*b*) indicates the time and place of the acquittal or conviction.

This comes from the former ss.905(1) and 906. The former was s.631 (1) in the Code of 1892, the latter s.631(3) and (4). These provisions were in R.S.C. 1886, c.174, s.146, and s.631(3) came from 14 and 15 Vict., c.100, s.28 (Imp.). It may be said, however, that the provisions of the Code were based more directly upon ss.498 and 499 of the E.D.C.

This section effects a change in procedure in that the special pleas are to be tried by the judge alone, for the reason that questions of jurisdiction or of the identity of offences are primarily questions of law, depending upon the application of the rule that a person is not to be placed twice in jeopardy for the same cause.

Section 516—*continued*

The following appears in *R. v. TAYLOR*(1914), 22 C.C.C.234, at p. 237:

"In order to establish successfully a plea of *autrefois acquit* or *convict*, or of *res judicata*, it is necessary that the former conviction or decision must have been given by a court having jurisdiction to do so: *WEMYSS v. HOPKINS*(1875), L.R. 10 Q.B. 378, at p.381 . . . . . "

At p.239:

"I think the law is clear that in the present case the burden of proof was upon the accused. Upon a plea of *autrefois convict* or *acquit* or of *res judicata*, where the previous decision pleaded is that of an inferior Court, the burden of proving that that Court was a Court of competent jurisdiction rests upon the defence, *i.e.*, upon the party pleading the previous decision."

It was held too in *R. v. MacDONALD*(1942), 78 C.C.C.301 that the question of identity of offences may be decided by the judge without empanelling a jury where that is the only question and the facts are not in dispute.

See notes to s.11 *ante*, and s.518 *post*, also *Re McKENZIE*(1953), 105 C.C.C.252.

EVIDENCE OF IDENTITY OF CHARGES.

517. Where an issue on a plea of *autrefois acquit* or *autrefois convict* is tried, the evidence and adjudication and the notes of the judge and official stenographer on the former trial and the record transmitted to the court pursuant to section 462 on the charge that is pending before that court, are admissible in evidence to prove or to disprove the identity of the charges.

This is the former s.908. It was s.632 in the Code of 1892, and s.501 in the E.D.C. See ss.532 and 572 *post*.

WHAT DETERMINES IDENTITY.—Allowance of special plea in part.

518. (1) Where an issue on a plea of *autrefois acquit* or *autrefois convict* to a count is tried and it appears

***(a)* 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**

***(b)* that on the former trial, if all proper amendments had been made that might then have been made, he might have been convicted of all the offences of which he may be convicted on the count to which the plea *of autrefois acquit* or *autrefois convict* is pleaded,**

the judge shall give judgment discharging the accused in respect of that count.

(2) The following provisions apply where an issue on a plea of *autrefois acquit* or *autrefois convict* is tried, namely,

***(a)* where it appears that the accused might on the former trial have been convicted of an offence of which he may be convicted on the count in issue, the judge shall direct that the accused shall not be found guilty of any offence of which he might have been convicted on the former trial, and**

OLD CODE:

908. On the trial of an issue on a plea of autrefois acquit or autrefois 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.

907. 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.

(2) If it appear that the accused might on the former trial have been convicted of 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.

(b) **where it appears that the accused may be convicted on the count in issue of an offence of which he could not have been convicted on the former trial, the accused shall plead guilty or not guilty with respect to that offence.**

This is the former s.907. It was s.631(5) and (6) in the Code of 1892 and s.499 in the E.D.C.

To illustrate subsec.(2), suppose that a prisoner is charged in counts A. & B., and pleads *autrefois convict, i.e.*, that he was convicted of these offences on a previous occasion. The court finds that count A. is for an offence included in one of which he was convicted on the previous occasion, and of which he might then have been convicted. It will decide that he is not to be convicted on that count.

As to count B. the Court finds that this is new and that it was not involved in any issue previously before the court. It will therefore direct him to enter a plea of guilty or not guilty on the merits.

See also notes to ss.11 and 516, *ante*, and cases there cited esp. *R. v. BARROW*. Also *R. v. BIRD*(1851), 2 Den.C.C.94; *R. v. MITCHELL* (1911), 19 C.C.C.113.

CIRCUMSTANCES OF AGGRAVATION.—Effect of previous charge of murder or manslaughter.—Effect of previous charge of infanticide or manslaughter.

519. (1) Where an indictment charges substantially the same offence as that charged in an indictment on which an accused was previously convicted or acquitted, but adds a statement of intention or circumstances of aggravation tending, if proved, to increase the punishment, the previous conviction or acquittal bars the subsequent indictment.

Section 519—*continued*

(2) A conviction or acquittal on an indictment for murder bars a subsequent indictment for the same homicide charging it as manslaughter or infanticide, and a conviction or acquittal on an indictment for manslaughter or infanticide bars a subsequent indictment for the same homicide charging it as murder.

(3) A conviction or acquittal on an indictment for infanticide bars a subsequent indictment for the same homicide charging it as manslaughter, and a conviction or acquittal on an indictment for manslaughter bars a subsequent indictment for the same homicide charging it as infanticide.

This is the former s.909, altered to include infanticide. S.909 was s.633 in the Code of 1892, and s.500 in the E.D.C.

This section should be read with ss.516-518. As to subsec.(1) see *R. v. ELRINGTON* and *R. v. MILES* noted under s.11 *ante*, pp. 53 and 51.

Subsec.(2) has come into controversy in its relation to the former s.951(2) (now s.569) and s.1014(3) (now s.592(4)), in cases where charges of murder resulted in convictions for manslaughter. In *R. v. FERGUSON* (1945), 84 C.C.C.147, on appeal by the Crown, it was said:

> "To set aside a proper verdict of acquittal of murder in order that the accused might be re-tried and conceivably found guilty of manslaughter would amount to a circumvention of ss.(2) of s.909 of the Criminal Code (quoted). If a bar to a second indictment how can the Court order a re-trial on the first indictment, in order that the Crown may make out a case of manslaughter against him."

In *R. v. PASCAL*(1949), 95 C.C.C.288, O'Halloran, J.A., in a dissenting judgment said at p.294:

> "But if one concludes (as I do) that s.1014(3) confers jurisdiction to direct a new trial for manslaughter after setting aside a verdict for manslaughter upon an indictment for murder, then I read it as the master section, and s.909(2) is then required to be construed in a way that permits the operation of the master section. In other words, the indictment for manslaughter in such a case cannot be regarded as a 'second indictment' which Parliament intended when s.909(2) was enacted . . . . . In my judgment s.909(2) must be related to and read with s.951(1), (2) and (3) and s.1014(3), and its language interpreted flexibly to strengthen and not to defeat the legal policy dictated by the latter master sections."

In *WELCH v. R.*, [1950]S.C.R. 412, at p.422, Kerwin, J. (now C.J.), expressed the opinion that a previous conviction or acquittal mentioned in s.909(2) must mean a *general* conviction or acquittal. But it must be remembered that this again was in a dissenting judgment. The majority held, without referring to s.909(2), that under s.1014(3) it was mandatory upon the court of appeal either to direct a verdict of acquittal to be entered, or to direct a new trial.

LIBEL, PLEA OF JUSTIFICATION.—Where more than one sense alleged.—Plea in writing.—Reply.

520. (1) An accused who is charged with 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 matter should

OLD CODE:

909. 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.

910. 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.

(2) 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.

(3) 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.

(4) The prosecutor may reply generally denying the truth thereof.

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have been published in the manner in which and at the time when it was published.

(2) A plea that is made under subsection (1) may justify the defamatory matter in any sense in which it is specified in the count, or in the sense that the defamatory matter bears without being specified, or separate pleas justifying the defamatory matter in each sense may be pleaded separately to each count as if two libels had been charged in separate counts.

(3) A plea that is made under subsection (1) shall be in writing, and shall set out the particular facts by reason of which it is alleged to have been for the public good that the matter should have been published.

(4) The prosecutor may in his reply deny generally the truth of a plea that is made under this section.

This is the former s.910. It was s.634(1) and (2) in the Code of 1892, and part of s.502 in the E.D.C. Earlier provisions as to criminal libel were contained in R.S.C. 1886, c.168.

See ss.247-250 and 261 *ante*, and notes thereto.

See also s.521 (plea of justification).

PLEA OF JUSTIFICATION NECESSARY TO TRY TRUTH.—Not guilty in addition.—Effect of plea on punishment.

521. (1) The truth of the matters charged in an alleged libel shall not be inquired into in the absence of a plea of justification under section 520 unless the accused is charged with publishing the libel knowing it to be false, in which case evidence of the truth may

Section 521—*continued*

be given to negative the allegation that the accused knew that the libel was false.

(2) The accused may, in addition to a plea that is made under section 520, plead not guilty and the pleas shall be inquired into together.

(3) Where a plea of justification is pleaded and the accused is convicted, the court may, in pronouncing sentence, consider whether the guilt of the accused is aggravated or mitigated by the plea.

This is the former s.911. It was s.634(3) and (4) and part of s.502 in the Code of 1892, with which 6 and 7 Vict., c.96 is cited.

See ss.247-250 and 261 *ante*, and notes thereto.

PLEA OF NOT GUILTY.

522. Any ground of defence for which a special plea is not provided by this Act may be relied upon under the plea of not guilty.

This is the former s.905(2). It was s.631(2) in the Code of 1892, and part of s.498 in the E.D.C. See s.515 *ante*, especially subsec.(2).

DEFENCE OF INSANITY.

INSANITY OF ACCUSED WHEN OFFENCE COMMITTED.—Special finding.—Custody after finding.

523. (1) Where, upon the trial of an accused who is charged with an indictable offence, evidence is given that the accused was insane at the time the offence was committed and the accused is acquitted,

***(a)* the jury, or**

***(b)* the judge or magistrate, where there is no jury,**

shall find whether the accused was insane at the time the offence was committed and shall declare whether he is acquitted on account of insanity.

(2) Where the accused is found to have been insane at the time the offence was committed, the court, judge or magistrate before whom the trial is held shall order that he be kept in strict custody in the place and in the manner that the court, judge or magistrate directs, until the pleasure of the Lieutenant-Governor of the province is known.

This is the former s.966, so worded as to be applicable to all trials of indictable offences, whether with or without jury. S.966 was s.736 in the Code of 1892 and part of R.S.C. 1886, c.174, s.252.

See ss.16 and 451(*c*) *ante*.

As to the raising of the issue reference may be made to *R. v. DASHWOOD*(1942), 28 Cr. App.R.167. In that case appellant was defended by counsel. He refused to allow counsel to raise a defence of insanity on his behalf and informed the Judge that he did not wish to be defended by counsel assigned to him. Counsel accordingly withdrew, but, at the suggestion of the Judge, remained in Court as *amici curiae* and called the attention of the Judge to evidence bearing on the question of insanity,

OLD CODE:

911. The truth of the matters charged in an alleged libel shall in no case be inquired into without the plea of justification aforesaid 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.

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

(3) 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.

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

966. Whenever evidence is given upon the trial of any person charged with an indictable offence, that such person was insane at the time of the commission of such offence, the jury, if they acquit such person, shall be required to find, specially, whether any 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.

(2) If the jury 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.

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but apart from this, that issue was not raised. After conviction, accused applied for leave to call fresh evidence on the question of insanity. The Court refused the application. *Per* Humphreys, J.:

> "It is the view of the appellant's counsel that he would have been well advised to raise the question of the appellant's sanity at the trial, but it was the express desire and indeed, the avowed determination, of the appellant that no such issue should be raised. This is, therefore, not a case in which some new evidence has come to light which was never dreamt of in the course of the trial. This is, in effect, an application that the Court should substitute itself for the jury as a tribunal of fact and try the case anew on a new issue and on new pleas which were never before the jury. This Court has no power to order a new trial and, dealing with the present case, it would indeed require some very remarkable circumstances to justify the Court in turning itself into a tribunal of fact to decide such an important matter, when that matter was deliberately withheld from the consideration of the jury by the person who is now asking the Court to embark on the inquiry."

INSANITY AT TIME OF TRIAL.—Trial of issue.—If sane, trial proceeds.—If insane, order for custody.—Subsequent trial.

524. (1) A court, judge or magistrate may, at any time before verdict, where it appears that there is sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence, direct that an issue be tried whether the accused is then, on account of insanity, unfit to stand his trial.

Section 524—*continued*

(2) For the purposes of subsection (1), the following provisions apply, namely,

***(a)* where the accused is to be tried by a court composed of a judge and jury,**

(i) if the issue is directed before the accused is given in charge to a jury for trial on the indictment, it shall be tried by twelve jurors, or in the Province of Alberta, by six jurors, and

(ii) if the issue is directed after the accused has been given in charge to a jury for trial on the indictment, the jury shall be sworn to try that issue in addition to the issue on which they are already sworn; and

***(b)* where the accused is to be tried by a judge or magistrate, he shall try the issue and render a verdict.**

(3) Where the verdict is that the accused is not unfit on account of insanity to stand his trial, the arraignment or the trial shall proceed as if no such issue had been directed.

(4) Where the verdict is that the accused is unfit on account of insanity to stand his trial, the court, judge or magistrate shall order that the accused be kept in custody until the pleasure of the Lieutenant-Governor of the province is known, and any plea that has been pleaded shall be set aside and the jury shall be discharged.

(5) No proceeding pursuant to this section shall prevent the accused from being tried subsequently on the indictment.

This is the former s.967, adapted similarly to s.523. It was s.736 in the Code of 1892 and part of R.S.C., 1886, c.174, s.252. Similar provisions were contained in s.517 of the E.D.C.

See ss.16 and 451(c) *ante*, also article on Unfitness to Plead, 216 L.T.Jo. 514 and 525.

INSANITY OF ACCUSED TO BE DISCHARGED FOR WANT OF PROSECUTION.

525. Where an accused who is charged with an indictable offence is brought before a court, judge or magistrate to be discharged for want of prosecution and the accused appears to be insane, the court, judge or magistrate shall proceed in accordance with section 524 in so far as that section may be applied.

This is the former s.968, adapted similarly to ss.523 and 524. It was s.739 in the Code of 1892, and R.S.C. 1886, c.174, s.256. It came almost verbatim from 39 and 40 Geo. III, c.94, the preamble of which reads in part as follows:

"Whereas persons charged with High Treason, Murder or Felony may have been or may be of unsound mind at the time of committing the offence . . . . . and by reason of such insanity may have been or may be found not guilty of such offence, and it may be dangerous to permit persons so acquitted to go at large: . . . . . "

CUSTODY OF INSANE PERSONS.

526. Where an accused is, pursuant to this Part, found to be insane, the Lieutenant-Governor of the province may make an order

OLD CODE:

967. 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, or in the province of Alberta, by any six jurors.

(3) 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.

(4) 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.

(5) 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.

(6) No such proceeding shall prevent the accused being afterwards tried on such indictment.

968. If any person charged with an indictable offence is brought before any court before which such person might be tried for such offence 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.

969. 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.

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for the safe custody of the accused in the place and in the manner that he may direct.

This is the former s.969. It was s.740 in the Code of 1892 and came from R.S.C. 1886, c.174, ss.253 and 257.

In *MURDOCH v. ATTORNEY GENERAL FOR BRITISH COLUMBIA*(1939), 73 C.C.C.222, it was argued that: "the verdict of the jury, 'not guilty on account of insanity', was a verdict of acquittal and in consequence the power of the Criminal Code was exhausted thereby and David Murdoch therefore left the domain of the criminal law and came within the domain of property and civil rights and that accordingly s.969 of the Criminal Code is ultra vires" to the extent that it was in conflict with the *Lunacy Act* of the Province. The constitutional question was not decided, and the matter in question was disposed of on other grounds.

It was held in *Re DUCLOS*(1907), 12 C.C.C.278, that the order may be made in respect of a prisoner found sane at time of trial but insane at the time of committing the offence.

PRISONER MENTALLY ILL.—Custody in safe keeping.—Order for imprisonment or discharge.—Order for transfer to custody of Minister of Health.—"Prison".

527. (1) The Lieutenant-Governor of a province may, upon evidence satisfactory to him that a person who is insane, mentally ill, mentally deficient or feeble-minded is in custody in a prison in that province, order that the person be removed to a place of safe-keeping to be named in the order.

(2) A person who is removed to a place of safe-keeping under an order made pursuant to subsection (1) shall, subject to subsections (3) and (4), be kept in that place or in any other place of safe-keeping in which, from time to time, he may be ordered by the Lieutenant-Governor to be kept.

(3) Where the Lieutenant-Governor is satisfied that a person to whom subsection (2) applies has recovered, he may order that the person

***(a)* be returned to the prison from which he was removed pursuant to subsection (1), if he is liable to further custody in prison, or**

***(b)* be discharged, if he is not liable to further custody in prison.**

(4) Where the Lieutenant-Governor is satisfied that a person to whom subsection (2) applies has partially recovered, he may, where the person is not liable to further custody in prison, order that the person shall be subject to the direction of the Minister of Health for the province, or such other person as the Lieutenant-Governor may designate, and the Minister of Health or other person designated may make any order or direction in respect of the custody and care of the person that he considers proper.

(5) In this section, "prison" means a prison other than a penitentiary, and includes a reformatory school or industrial school.

This is a re-draft of the former s.970. That section in different terms was s.741 in the Code of 1892 and came from R.S.C. 1886, c.174, s.258. It was put in the form in which it appeared in the repealed Code by 1935, c.56, s.15.

The purpose of the section is to provide for cases where persons mentally ill are in institutions as a result of criminality but who have not recovered sufficiently for it to be safe to discharge them when they have ceased to be liable to punishment. Under this section it is permissible to turn them over to provincial authorities to be detained on probation.

It was held in *CHAMPAGNE v. PLOUFFE and ATTORNEY GENERAL FOR QUEBEC*(1942), 77 C.C.C.87, that the discretion of the Lieutenant-Governor under s.970 is not subject to control by the courts.

It was held in *TRENHOLM v. ATTORNEY GENERAL FOR ONTARIO,* [1940]S.C.R.301, that this section did not authorize the issue of a warrant by the Lieutenant-Governor to detain after the expiration of the remand, a person who was charged with a criminal offence and remanded for mental examination. See s.451(c)(i)(A) *ante,* passed in 1950.

OLD CODE:

970. (1) The Lieutenant-Governor, upon evidence satisfactory to him that any person imprisoned in any prison other than a penitentiary for an offence, or imprisoned in safe custody charged with an offence, or imprisoned for not finding bail for good behaviour, or to keep the peace, is insane, mentally ill, or mentally deficient, may order the removal of such 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 person back to imprisonment, if then liable thereto, or otherwise to be discharged; provided that where such person is confined in a mental hospital or other provincial institution, he shall, if and when he is not liable to be returned to imprisonment, be subject to the direction of the provincial Minister of Health, or such other person as the Lieutenant-Governor in Council may designate, who may make such orders or directions in respect of such insane person as he may deem proper.

(2) Without limiting in any way the application of the provisions contained in the next preceding subsection of this section, the Lieutenant-Governor upon evidence satisfactory to him that a person imprisoned in a reformatory prison, reformatory school or industrial school, is feeble minded, mentally ill or mentally deficient, may order the removal of such person to a place of safe keeping; and the person so removed shall remain there or in such other place of safe keeping as the Lieutenant-Governor may from time to time order, until his complete or partial recovery is certified to the satisfaction of the Lieutenant-Governor who may then order the person back to imprisonment, if he is then liable thereto, or if otherwise, that he be discharged: Provided that where such person is confined in a mental hospital or other provincial institution he shall, if and when he is not liable to be returned to imprisonment, be subject to the direction of the provincial Minister of Health, or such other person as the Lieutenant-Governor in Council may designate, who may make such orders or directions in respect of such insane person as he may deem proper.

916. 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.

CORPORATIONS.

APPEARANCE BY ATTORNEY.

528. Every corporation against which an indictment is found shall appear and plead by counsel or agent.

This is the former s.916 with the words "counsel or agent" substituted for "attorney". "Counsel" is defined in s.2(7) *ante*. S.916 was s.635 in the Code of 1892, and R.S.C. 1886, c.174, s.155.

See s.452 *ante*, for note on the criminal liability of corporations, and s.623 *post*, as to penalty.

NOTICE TO CORPORATION.—Contents of notice.—How served.

529. (1) The clerk of the court shall, where an indictment is found against a corporation, cause a notice of the indictment to be served upon the corporation.

Section 529—*continued*

(2) A notice of an indictment referred to in subsection (1) shall set out the nature and purport of the indictment and advise that, unless the corporation appears and pleads within seven days after service of the notice, a plea of not guilty will be entered for the accused by the court, and that the trial of the indictment will be proceeded with as though the corporation had appeared and pleaded.

(3) Where a corporation to which this section applies

***(a)* is a municipal corporation, the notice shall be served by delivering it to the mayor, treasurer or clerk of the corporation, or**

***(b)* is a corporation other than a municipal corporation, the notice shall be served by delivering it to the manager, secretary or other executive officer of the corporation or of a branch thereof.**

This comes from the former s.918. It was s.637 in the Code of 1892, and s.157 in R.S.C. 1886, c.174. In subsec.(2) the length of notice is changed from two to seven days, and the provisions relating to service have been amplified in subsec.(3). See also ss.452 and 470 *ante*, and s.530 (default of appearance).

It was held in *R. v. CONTAINER MATERIALS LTD.*(1939), 72 C.C.C.383, that this applies to a corporation located in a province other than that in which the indictment is brought.

PROCEDURE ON DEFAULT OF APPEARANCE.

530. Where a corporation does not appear in the court in which an indictment is found and plead within the time specified in the notice referred to in section 529, the presiding judge may, on proof by affidavit of service of the notice, order the clerk of the court to enter a plea of not guilty on behalf of the corporation, and the plea has the same force and effect as if the corporation had appeared by its counsel or agent and pleaded that plea.

This is the former s.919 without the reference to demurrer. It was s.638 in the Code of 1892, and R.S.C. 1886, c.174, s.158.

TRIAL OF CORPORATION.

531. Where the corporation appears and pleads to the indictment or a plea of not guilty is entered by order of the court pursuant to section 530, the court shall proceed with the trial of the indictment and, where the corporation is convicted, section 623 applies.

This is the former s.920. It was s.638 in the Code of 1892 and R.S.C. 1886, c.174, s.159.

See also s.572(3) (previous convictions).

RECORD OF PROCEEDINGS.

HOW RECORDED.—Record of proceedings.

532. (1) It is sufficient, in making up the record of a conviction or acquittal on an indictment, to copy the indictment and the plea that was pleaded, without a formal caption or heading.

OLD CODE:

918. 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.

919. 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.

920. The court may, whether such corporation appears and pleads to the indictment, or 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.

914. 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.

(2) The statement of the arraignment and the proceedings subsequent thereto shall be entered of record in the same manner as heretofore, 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.

(3) Such rules shall also apply to such inferior courts of criminal jurisdiction as are therein designed.

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(2) The court shall keep a record of every arraignment and of proceedings subsequent to arraignment.

This is the former s.914. It was s.726 in the Code of 1892, and R.S.C. 1886, c.174, s.244, as to which Taschereau's Crim. Acts, p.940, observes that there is no corresponding provision in English legislation. It appears that under the earlier practice the record was a formal document and he lists twelve items that it was necessary to include in it. This provision seems to have been part of the design to simplify the highly technical procedure relating to indictments.

For the purposes of this Code, see also ss.473(2), 517, 572 and 574.

FORM OF RECORD IN CASE OF AMENDMENT.

533. Where it is necessary to draw up a formal record in proceedings in which the indictment has been amended, the record shall be drawn up in the form in which the indictment remained after the amendment, without reference to the fact that the indictment was amended.

Section 533—*continued*

This is the former s.915. It was s.725 in the Code of 1892, and R.S.C. 1886, c.174, s.243. It appears to have come from 14 and 15 Vict., c.100, (Lord Campbell's Act), and Taschereau's Crim. Acts, p.933 quotes Greaves to the effect that it was intended to prevent questions as to amendments being raised by writ of error. The writ of error does not exist under our procedure. See s.500(3), s.510(7) and notes to s.532 *ante*.

JURIES.

QUALIFICATION OF JUROR.—Seven may find bill.

534. (1) A person who is qualified and summoned as a grand or petit juror according to the laws in force for the time being in a province is qualified to serve as a grand or petit juror, as the case may be, in criminal proceedings in that province.

(2) Where the panel of grand jurors is not more than thirteen, seven grand jurors may find a true bill.

This is the former s.921. Subsec.(1) was s.662 in the Code of 1892, and came from R.S.C. 1886, c.174, s.160. It was taken into the Revised Statutes from 32-33 Vict., c.29.

Subsec.(2) was added by 57 and 58 Vict., c.57, s.1.

In 1898 by c.38 of the Acts of that year, the Legislature of Nova Scotia reduced the number of the panel of grand jurors to twelve. The constitutionality of the Act was questioned in *R. v. COX*(1898), 2 C.C.C. 207, and it was decided—(1) that it was competent for the local Legislature to pass an Act either fixing or altering the number of grand jurors who should constitute the Grand Jury, that being part of the organization or constitution of the Court; (2) that it was not competent for it to pass an Act fixing or altering the number of grand jurors who might find a bill, that being criminal procedure and exclusively within the powers of the Dominion Parliament.

R. v. COX was approved in *R. v. WALTON*(1906), 11 C.C.C.204 (Ont.):

> ". . . . . ever since the decisions of *R. v. O'ROURKE* (1882), 32 C.P. 388, and 1 O.R. 464, we have in this Province consistently held that the selection and summoning of jurors were not matters relating to the constitution of the Court; *R. v. COX*(1898), 2 C.C.C. 207; but came within section 91(27) of the B.N.A. Act as relating to procedure in criminal matters in respect of which Parliament alone has power to legislate."

It was referred to as an authority also in *R. v. HAYES*(1903), 11 B.C.R.4, at p.8, which case, however, dealt with a question concerning the qualification of a particular grand juror, and again in *R. v. FOUQUET* (1905), 14 Que. K.B.87, at p.91. It was considered also in the case of *R. v. IMPERIAL TOBACCO COMPANY*(1942), 77 C.C.C.199, at p.207.

With reference to the whole section the following is quoted from *R. v. O'ROURKE*(1882), 1 O.R.464, at p.475, upholding a previous judgment on a case reserved, 32 U.C.C.P.388:

> "It seems to me to be very clear that the Dominion Parliament by this Act of 1869, (*i.e.*, c.29, s.44, *now s.534(1)*, qualification of juror) adopted

OLD CODE:

915. If it becomes necessary to draw up a formal record, in any case in which an amendment has been made, such record shall be drawn up in the form in which the indictment remained after the amendment, without taking any notice of the fact of such amendment having been made.

921. Every person qualified and summoned as a 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.
(2) Seven grand jurors, instead of twelve, may find a true bill in any province where the panel of grand jurors is not more than thirteen.

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and as it were confirmed the existing Provincial jury laws, and also declared that future Provincial laws on that subject should be equally adopted and confirmed, subject, however, to their own right of control by any existing or future Act.

This need not be read as technically a delegation of their own authority but rather, in the language of Wilson, C.J., an acceptance of the Provincial law, and a legislation by relation and reference to that law.

But if it were directly a delegation of power, I am not prepared to hold it erroneous.

The Dominion Parliament is supreme in criminal law and procedure, and may, I assume, exercise its powers in such fashion as it may deem expedient.

The only question with me is, whether it has clearly sanctioned and adopted the statute law of Ontario, under which the jurors were brought into Court in this case.

I think this has been done, and that the Ontario Act must govern so long as the Dominion Parliament has not interposed or enacted any provision inconsistent therewith.

This, it is conceded, has not been done."

The enactment of 1869 referred to, was as follows:

"32-33 Vict., c.29 (Procedure in Criminal Matters):

44. And for avoiding doubt, it is declared and enacted that every person qualified and summoned as a grand juror or as a petty juror in criminal cases, according to the laws which may be then in force in any Province of Canada, shall be held to be duly qualified to serve as such juror in that Province, whether such were laws passed before or to be passed after the coming into force of the British North America Act, 1867 . . . . . subject always to any provision in any Act of the Parliament of Canada, and in so far as such laws are not inconsistent with any such Act."

Taschereau's Criminal Acts, 1875, Vol. 2, p.230, comments upon this that: "Instead of the words 'and for avoiding doubts' at the beginning of the section, ought to be inserted the words 'and for continuing the grave doubts, &c.'." He adds, that "it seems to be a matter of no easy solution to say where the powers of each begin and end on this subject."

However, in *R. v. PROVOST*(1885), 1 Mont. L.R.(Q.B.)477, referring to the same legislation, the Court said:

Section 534—*continued*

"During the sixteen years since the passing of that Act the question of its validity has not been raised. Judges throughout the whole Dominion have sat and tried cases, and prisoners have been convicted of murder and executed, under the authority of this Act. Even if there were no Dominion Statute authorizing the local legislatures to determine the qualification of Jurors, it would be very difficult, after the lapse of such a time, to say that the system which has all along been pursued is illegal. But here there is an express statute of the Dominion Parliament. Both legislatures have agreed that the lists shall be made under the Provincial laws. Under these circumstances we have no difficulty whatever in declaring the conviction good."

R. v. COX, and *R. v. O'ROURKE*, *supra*, were considered at length in *R. v. PREUSANTANZ*(1936), 65 C.C.C.129, but the case introduces no new principle.

MIXED JURIES.

MIXED JURIES IN QUEBEC.—Motion by accused.—Order for panel.

535. (1) 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 who speak the English language and one-half of persons who speak the French language, he shall in his return specify in separate lists those jurors whom he returns as speaking the English language and those whom he returns as speaking the French language, and the names of the jurors summoned shall be called alternately from those lists.

(2) In any district referred to in subsection (1) the accused may, upon arraignment, move that he be tried by a jury composed entirely of jurors who speak the language of the accused if that language is English or French.

(3) Where a motion is made under subsection (2), the judge may order the sheriff to summon a sufficient panel of jurors who speak the language of the accused unless, in his discretion, it appears that the ends of justice are better served by empanelling a mixed jury.

This is the former s.923.

Subsec.(1) was s.166 of R.S.C. 1886, c.174, and became s.664 in the Code of 1892. Subsecs.(2) and (3) were added in 1925. The Minister of Justice explained (Hansard, 1925, Vol. IV, p.4011) that the new provisions were suggested and asked for by the provincial authorities of Quebec. Asked whether it was not the practice now he replied: "It is the practice, but now we have to arrange it while the trial is going on. Now it will be the law." Section agreed to.

It is interesting to note that this section must still be read with subsec. (2) of s.7 of 27 & 28 Vict., c.41 (Lower Canada) quoted *infra*. Taschereau, p.772, has the following note:

"And though the Quebec Legislature, by 46 V. c.16, s.62, (1883), has repealed the said Act, this particular clause, giving the right to a mixed jury, must be considered as still in force, the Quebec Legislature not

OLD CODE:

923. 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.

(2) In any district, the prisoner may upon arraignment move that he be tried by a jury entirely composed of jurors speaking the English language, or entirely composed of jurors speaking the French language.

(3) Upon such motion the judge may order the sheriff to summon a sufficient panel of jurors speaking the English or the French language, unless in his discretion it appears that the ends of justice are better served by impanelling a mixed jury.

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having had the right to repeal it. Otherwise, there is no statute in the province giving the right to a mixed jury in any case whatever, s.664, *ante*, merely taking it for granted that the right exists. If the Quebec Legislature had the power to repeal that clause the Dominion Parliament had not the right to enact for Manitoba section 167 of the Procedure Act". (S.665 in the Code of 1892 and s.924 in the 1927 Code.)

Upon the original section the following appears in *R. v. YANCEY* (1899), 8 Que.Q.B.252, at p.255:

"As in the case of the alien where the privilege existed on account of a personal characteristic and in the case of the scholar where it exists for the same reason (*viz.* Oxford University) so, in the province of Quebec, the right to a mixed jury depends upon a characteristic of the accused person, and that is the fact that the language which he habitually speaks is either English or French."

In *DUVAL v. R.*(1938), 64 Que.K.B.270, a motion was made by an accused whose mother tongue was French for a jury composed exclusively of persons speaking English. The motion was refused. At p.272:

"The motion is based on s.923, subsection 2 of the Criminal Code, which states that in any district the prisoner may, upon arraignment, move that he be tried by a jury entirely composed of jurors speaking the English language or entirely composed of jurors speaking the French language. That this is not an absolute right is clear from the terms of the next following subsection (*i.e.* giving the judge a discretion); so that the only absolute right of the accused is to have at least six of the jury who speak the English or the French language as the case may be . . . . . .

The basic principle of the statute 27-28 Vict., chap. 41, sec. 7(2), is the right of the accused to have at least six persons on the jury skilled in his language. The interpretation which counsel for the accused wishes to put on section 923(2) is that a person whose language is French is entitled to have jurymen who are not familiar with that language. The intention of the Legislature to make such a radical change in the law and adopt such a peculiar principle would have to be very clearly expressed. That such was not the intention is clear from the terms of sec-

Section 535—*continued*

tion 937 of the Code which says that (quoted-ref. to 923 & 924). We have nothing to do with 924. Where in section 923 is it stated that a person may elect to be tried by a jury composed one-half of persons skilled in the language of the defence, if it be not in subsec.2 combined with subsec.3? And do these two subsections together not mean that the accused has a right to be tried by at least 6 persons skilled in his language, and to 12 persons skilled in his language if the judge in his discretion allows it? The conclusion that section 923(2) repealed 27-28 Vict., c.41, s.7, ss.2, is thereupon not inevitable; quite the contrary. Our Court has already so decided in *ALEXANDER v. R.*(1930), 49 Que.K.B. 215; *MOUNT v. R.*(1931), 51 Que.K.B. 482 and *BUREAU v. R.*(1931), 52 Que. K.B. 15. Not only do I feel bound to follow these decisions, but I fully concur therein."

More recently it was held in *R. v. TWYNDHAM*(1943), 79 C.C.C. 395, that in the province of Quebec where the accused moves that he be tried by a jury entirely composed of jurors speaking English or entirely composed of jurors speaking French, such motion should be granted unless there are special reasons for refusing it.

It was stated that if the judge refuses he must *still* give the accused a mixed jury by virtue of the statute of Lower Canada, 27-28 Vict., c.41, which enacts: "If any prosecuted party, upon being arraigned, demands a jury composed for the one-half at least of persons skilled in the language of his defence, if such language be English or French, he shall be tried by a jury composed for the one-half at least of the persons . . . . . who upon the panel . . . . . are found in the judgment of the Court to be skilled in the language of the defence." *Per* Langlois, J., at p.396:

"That statute is still binding because it refers to the criminal procedure and was never abrogated by the Parliament of Canada. It was never affected by 46 Vict., chap. 16, by which the Legislature of Quebec had it in mind to abrogate it in 1883."

This would be because the province has not the right to legislate upon criminal procedure.

The points to be specially noted are:

1. That if the judge refuses a mixed jury under this section, he must still give the accused a mixed jury by virtue of the Statute of Lower Canada, and
2. That the language of the defence means the language whether French or English, habitually used by the accused.

MIXED JURIES IN MANITOBA.—When panel exhausted.

536. (1) Where an accused who is arraigned before the Court of Queen's Bench for Manitoba demands a jury composed at least half of persons who speak the language of the accused, if that language is either English or French, he shall be tried by a jury composed at least one-half of the persons whose names stand first in succession upon the general panel and who, not being lawfully challenged, are found, in the judgment of the court, to speak the language of the accused.

(2) Where, as a result of challenges or any other cause there is, in proceedings to which this section applies, a deficiency of persons

OLD CODE:

924. 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.

899. No plea in abatement shall be allowed.

(2) 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.

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who speak the language of the accused, the court shall fix another time for the trial, and the sheriff shall remedy the deficiency by summoning, for the time so fixed, the additional number of jurors who speak the language of the accused that the court orders and whose names appear next in succession on the list of petit jurors.

This is the former s.924. It was s.665 in the Code of 1892, and R.S.C. 1886, c.174, s.167. In 1892, when the point was raised that there should be similar provision for Ontario, Sir John Thompson said (Hansard, Vol. II, col.4230):

"We formerly had that provision in all the provinces at common law, not only for the people in the localities, but for foreigners coming there, Spaniards, French and all others. . . . . That system has, however, been abolished for a number of years. As regards the people of our own country, if there are many French-speaking inhabitants, for instance, in the locality in which a prisoner is tried, there will be, in all probability, some of his fellow countrymen on the jury."

The Code makes no provision for a jury *de medietate linguae*, and the *Canadian Citizenship Act*, R.S.C. 1952, c. 33, s.25, provides that "An alien is triable at law in the same manner as if he were a natural born Canadian citizen."

See also s.544 as to peremptory challenges.

Challenging the Array.

OBJECTION TO CONSTITUTION OF GRAND JURY.

537. Where an objection is taken to the constitution of a grand jury it shall be taken by motion to the court, but an indictment shall be quashed pursuant thereto only if the judge is of opinion that

***(a)* the objection is well founded, and**

Section 537—*continued*

***(b)* the accused has suffered or may suffer prejudice in the circumstances of which he complains.**

This is the former s.899(2). It was part of s.656 in the Code of 1892 which reproduced verbatim s.515 of the E.D.C. *Cf.* R.S.C. 1886, c.174, s.142, and 7 Geo. IV, c.64, s.19 (Imp.).

In *R. v. HAYES*(1903), 11 B.C.R.4, it was held that an objection that a member of the grand jury was incompetent to act because he was the agent of the prosecutor in connection with the matter out of which the prosecution arose, was not an objection to the "constitution" of the grand jury as a body, but rather to an individual member.

In *VERONNEAU v. R.*(1916), 54 S.C.R.7, in which the informant who was a member of the grand jury, testified before it as a witness but did not take part in its deliberations in the particular case, three judges dissented and (*per* Anglin, J., at p.22) disapproved *R. v. HAYES,* but the majority held that the circumstances did not disclose an objection to the constitution of the grand jury within the meaning of s.899.

In *BUREAU v. R.*(1931), 51 Que. K.B.207, it was held that the grand jury was not properly constituted. It was found that its foreman, who signed the true bill, was not a British subject, and therefore, not qualified to act as a juror. It was held also that the objection that the proceedings were a nullity could be raised at any stage.

The former s.899(1) which abolished pleas in abatement, is not continued. These were pleas which, Bryne's Law Dictionary states, showed that the prosecutor had committed some informality which prevented him from succeeding. It is said too that they have long been obsolete as regards criminal proceedings.

This Code provides that objections are to be taken by motion to quash.

CHALLENGING THE ARRAY.—In writing.—Form.

538. (1) The accused or the prosecutor may challenge the array of petit jurors only on the ground of partiality, fraud or wilful misconduct on the part of the sheriff or his deputies by whom the panel was returned.

(2) A challenge under subsection (1) shall be in writing and shall state that the person who returned the panel was partial or fraudulent or that he wilfully misconducted himself, as the case may be.

(3) A challenge under this section may be in Form 36.

This is the former s.925. It was s.666(1) in the Code of 1892, and part of s.518 in the E.D.C. with which 39 and 40 Vict., c.78, s.17 is cited.

In *R. v. HAYES*(1903), 11 B.C.R. 4, at p.9, it is pointed out that challenges are of two kinds: (1) to the array, when exception is taken to the whole number empanelled; and (2) to the polls, when the exception is to individual jurymen. At p.10 there is a quotation from *R. v. EDMONDS* (1821), 4 B. & Ald.471, that a challenge to the array "is always grounded upon some matter personal to the officer by whom the jury has been summoned, and their names arrayed upon the parchment or panel whereon they are returned, in writing, to the Court." *O'CONNELL'S*

OLD CODE:

925. 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.

(2) Such challenge shall be by way of objection 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.

(3) Such objection may be in form 69, or to the like effect.

926. 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.

(2) 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.

CASE(1844), 11 C. & F.155, at p.247, is quoted to similar effect, and it is observed that this view of the law is embodied in the *Criminal Code*.

When the matter was before Parliament (Hansard (1892) Vol. II, col.4229) it was objected that s.666 did not introduce all the reasons for challenging the panel that existed at common law, *e.g.*, close relations with the sheriff, or the relationship of the sheriff with the prosecution, but the opinion was expressed that "partiality" covered such cases.

See s.539 as to procedure for trying the challenge.

TRYING GROUND OF CHALLENGE.

539. Where a challenge is made under section 538, the judge shall determine whether the alleged ground of challenge is true or not, and where he is satisfied that the alleged ground of challenge is true he shall direct a new panel to be returned.

This comes from the former s.926, which was s.666(2) in the Code of 1892, and part of s.518 in the E.D.C.

There is a change in this section in that the issue raised is to be tried by the judge instead of by triers appointed by him. There may be two views upon this matter, one, that the former procedure involves the participation of the public in the administration of justice and should be continued, the other, that, as the matter involves the conduct of officers of the court, it is best that the presiding judge should deal with it. This section embodies the latter opinion.

EMPANELLING JURY.

NAMES OF JURORS ON CARDS.—To be placed in box.—To be drawn by clerk of court.—Juror to be sworn.—Drawing additional names if necessary.

540. (1) The name of each juror on a panel of petit jurors that has been returned, his number on the panel and the place of his abode, shall be written on a separate card, and all the cards shall, as far as possible, be of equal size.

(2) The sheriff or other officer who returns the panel shall deliver the cards referred to in subsection (1) to the clerk of the court who shall cause them to be placed together in a box to be provided for the purpose and to be thoroughly shaken together.

Section 540—*continued*

(3) Where

(a) **the array is not challenged, or**

(b) **the array is challenged but the judge does not direct a new panel to be returned,**

the clerk of the court shall, in open court, draw out the cards referred to in subsection (2) one after another, and shall call out the name and number upon each card as it is drawn, until the number of persons who have answered to their names is, in the opinion of the judge, sufficient to provide a full jury after allowing for challenges and directions to stand by.

(4) The clerk of the court shall swear each member of the jury in the order in which the names of the jurors were drawn.

(5) Where the number of persons who answer to their names is not sufficient to provide a full jury, the clerk of the court shall proceed in accordance with subsections (3) and (4) until twelve jurors are sworn.

This comes from the former s.927(1)-(5). S.927 was s.667 in the Code of 1892 where Taschereau's edition describes it as new. It was part of s.419 in the E.D.C. with which is cited 39 and 40 Vict., c.78, s.19.

The only change in substance is that subsec.(3)(b) is drawn to conform to the change in s.539.

See also s.550 (calling jurors stood by) and s.552.

CHALLENGES BY ACCUSED IN ALBERTA AND TERRITORIES.

541. Notwithstanding anything in this Act, six jurors shall be sworn in the Province of Alberta and in the Yukon Territory and the Northwest Territories, and in that province and those Territories the accused is entitled to half the number of challenges provided for in section 542, and the prosecutor may not direct more than twenty-four jurors to stand by unless the presiding judge, for special cause to be shown, so orders.

This replaces the former ss.933A and 927(6). See ss.6 and 417 and notes thereto.

PEREMPTORY CHALLENGES BY ACCUSED.—Twenty in certain cases.—Twelve in certain case.—Four in other cases.

542. (1) An accused who is charged with an offence punishable with death is entitled to challege twenty jurors peremptorily.

(2) An accused who is charged with an offence other than 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) An accused who is charged with an offence that is not referred to in subsection (1) or (2) is entitled to challenge four jurors peremptorily.

This is the former s.932. It was s.668(1), (2) and (3) in the Code of 1892. Corresponding but not similar provisions were in s.520 of the E.D.C. where the numbers were thirty-five, twenty, and six respectively.

OLD CODE:

927. The name of each juror on a panel returned, with his number on the panel and the place of his abode, shall be written on a distinct piece of card, and all such pieces of card shall be as nearly as may be of equal size.

(2) 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.

(3) If the array is not challenged or if the triers find against the challenge, 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.

(4) 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.

(5) 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.

933A. Notwithstanding the provisions of any other section of this Act, everyone indicted for any offence in the province of Alberta shall, so long as subsection six of section nine hundred and twenty-seven provides that in the province of Alberta six jurors only shall be sworn, be entitled to half the number of challenges in each of the cases provided for in section nine hundred and thirty-two and the Crown may not direct any number of jurors to stand by in excess of twenty-four unless the judge presiding at the trial, upon special cause shown, so orders.

927. (6) Notwithstanding the provisions of subsections four and five of this section, in the province of Alberta six jurors only shall be sworn.

932. Every one indicted for treason or for 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.

There is a difference between a peremptory challenge, that is, a challenge for which no reason need be assigned, and a challenge for cause. As to the latter, see s.547.

CHALLENGE BY PROSECUTOR.—Direction to stand by.—Limitation.—Accused to challenge first if required.

543. (1) The prosecutor is entitled to challenge four jurors peremptorily, and may direct any number of jurors who are not challenged peremptorily by the accused to stand by until all the jurors have been called who are available for the purpose of trying the indictment.

Section 543—*continued*

(2) Notwithstanding subsection (1), the prosecutor may not direct more than forty-eight jurors to stand by unless the presiding judge, for special cause to be shown, so orders.

(3) The accused may be called upon to declare whether he challenges a juror peremptorily or for cause before the prosecutor is called upon to declare whether he requires the juror to stand by, or challenges him peremptorily or for cause.

This is the former s.933 with the term "prosecutor" which is defined in s.2(33) *ante*, substituted for the "Crown". S.933 was s.668(9) and (10) in the Code of 1892, and came from R.S.C. 1886, c.174, ss.163 and 164. The E.D.C. in s.520, made similar provisions as to standing aside, but declared that the prosecutor should have no power to challenge a juror peremptorily. This right was denied to the King by 33 Edw. I, st.4.

The right of the Crown to direct a juror to stand by has been called a deferred challenge for cause. That this is apt is shown by *R. v. CHURTON*, [1919]1 W.W.R.774, in which, with more particular reference to the former s.928, it was said at p.779:

> "In effect that section seems to me to mean that when such juror is called a second time he shall be sworn—unless one of two things happens—i.e., (1) He is challenged by the accused, and (2) Unless the prosecutor challenges him *and shows cause* why he should not be sworn."

PEREMPTORY CHALLENGES IN CASE OF MIXED JURY.

544. Where an accused who is charged with an offence for which he is entitled to twenty or twelve peremptory challenges in accordance with this Part is to be tried pursuant to section 535 or 536 by a jury composed one-half of persons who speak the language of the accused, he is entitled to exercise one-half of those challenges in respect of the jurors who speak English and one-half in respect of the jurors who speak French.

This is the former s.937. It was s.670 in the Code of 1892 and came from R.S.C. 1886, c.174, ss.166 and 167. Note that it applies only to the accused, that it applies in Quebec and Manitoba and that it does not apply to cases in which the accused is limited to four peremptory challenges. See notes to s.535.

CHALLENGES WHERE TRIED JOINTLY.

545. Where two or more accused persons are jointly charged in an indictment and it is proposed to try them together each may make his challenges in the same manner as if he were to be tried alone.

This comes from the former s.938 which was s.671 in the Code of 1892, and s.521 in the E.D.C. S.938 provided that accused jointly indicted might join in their challenges, but this was rarely if ever done and the provision has been dropped.

Chitty's Crim. Practice, p.535 says that "though several defendants are tried by the same inquest, each individual has a right to the full number of his challenges; but if they refuse to join in their challenges,

OLD CODE:

933. 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.

(2) The Crown may not direct any number of jurors to stand by in excess of forty-eight, unless the judge presiding at the trial, upon special cause shown, so orders.

(3) 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.

937. 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 nine hundred and twenty-three or nine hundred and twenty-four, 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 number from among the English-speaking jurors, and one-half from among the French-speaking jurors.

938. 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 challenge in the same manner as if he were intended to be tried alone.

934. 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.

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they must be tried separately, in order to prevent the delay which might arise from the whole panel being exhausted."

However, see s.551 for provision made by the Code for cases in which the panel is exhausted.

STANDING BY IN LIBEL CASES.

546. A prosecutor other than the Attorney General or counsel acting on his behalf is not entitled, on the trial of an indictment for the publication of a defamatory libel, to direct a juror to stand by.

This is the former s.934 unchanged in effect. It was s.669 in the Code of 1892, and R.S.C. 1886, c.174, s.165. *Cf.* a provision in s.520 of the E.D.C. that a private prosecutor might not direct a juror to stand by, but might challenge six jurors peremptorily.

Note the words in s.2(33) *ante*, that "prosecutor" means the person who institutes proceedings, or his counsel, in cases where the Attorney General does not intervene.

CHALLENGE FOR CAUSE.—No other ground.

547. (1) A prosecutor or an accused is entitled to any number of challenges on the ground that

***(a)* the name of a juror does not appear on the panel, but**

Section 547—*continued*

no misnomer or misdescription is a ground of challenge where it appears to the court that the description given on the panel sufficiently designates the person referred to,

***(b)* a juror is not indifferent between the Queen and the accused,**

***(c)* A juror has been convicted of an offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months,**

***(d)* a juror is an alien, or**

***(e)* a juror is physically unable to perform properly the duties of a juror.**

(2) No challenge for cause shall be allowed on a ground not mentioned in subsection (1).

This comes from the former s.935. It was s.668(4) and (5) in the Code of 1892 and formed part of s.520 in the E.D.C. Par.(e) is new but appears to be in accord with the common law, as Taschereau's edition of the Code, p.782, mentions deafness and present state of drunkenness as grounds of challenge.

As to aliens, see *BUREAU v. R.*, noted under s.537 *ante*. See also *R. v. WESTGATE*(1929), 51 C.C.C.52 (juror mentally ill; new trial ordered).

See also s.548 (challenge in writing).

CHALLENGE IN WRITING.—Form.—Denial.

548. (1) Where a challenge is made on a ground mentioned in section 547, the court may, in its discretion, require the party that challenges to put the challenge in writing.

(2) A challenge may be in Form 37.

(3) A challenge may be denied by the other party to the proceedings on the ground that it is not true.

This is the former s.936. It was s.668(6) in the Code of 1892, and part of s.520 in the E.D.C.

OBJECTION THAT NAME NOT ON PANEL.—Other grounds.—If challenge not sustained.—If challenge sustained.—Disagreement of triers.

549. (1) Where the ground of a challenge is that the name of a juror does not appear on the panel, the issue shall be tried by the judge on the *voir dire* by the inspection of the panel, and such other evidence that the judge thinks fit to receive.

(2) Where the ground of a challenge is one not mentioned in subsection (1), the two jurors who were last sworn, or if no jurors have then been sworn, two persons present whom the court may appoint for the purpose, shall be sworn to determine whether the ground of challenge is true.

(3) Where the finding, pursuant to subsection (1) or (2) is that the ground of challenge is not true, the juror shall be sworn, but if the finding is that the ground of challenge is true, the juror shall not be sworn.

(4) Where, after what the court considers to be a reasonable time, the two persons who are sworn to determine whether the

OLD CODE:

935. Every prosecutor and every accused person is entitled to any number of challenges on the ground
(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 person referred to;
(b) that any juror is not indifferent between the King and the accused;
(c) that any juror has been convicted for 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.
(2) No other ground of challenge for cause than those mentioned in this section shall be allowed.

936. If a challenge on any of the grounds aforesaid is made, the court may, in its discretion, require the party challenging to put his challenge in writing.
(2) The challenge may be in form 70, or to the like effect.
(3) The other party may deny that the ground of challenge is true.

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

931. 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 as hereinafter specified or is an alien, as the case may be.
(2) If the court or the triers find against the challenge, the juror shall be sworn.
(3) If they find for the challenge he shall not be sworn.
(4) 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.

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ground of challenge is true are unable to agree, the court may discharge them from giving a verdict and may direct two other persons to be sworn to determine whether the ground of challenge is true.

This combines the former ss.930 and 931 which were s.668(7) and (8) in the Code of 1892, and part of s.520 in the E.D.C.

Chitty's Crim. Practice, p.549, describes the procedure as follows:
"If this challenge is made to the first juror, and of course before any one has been sworn, then the court will direct two indifferent persons to try the question, and if they find the party challenged indifferent, he will be sworn and join with the triers in determining the next challenge. But when two jurors have been found impartial and have been sworn, then the office of the triers will cease, and every subsequent challenge will be referred to the decision of the jurymen. If the prisoner challenge ten and the Crown one, and the twelfth be sworn, one trier shall be chosen by each party and added to the juryman sworn, and the challenges be referred to their decision. But if several be sworn and the rest challenged, the court may assign any two of the persons

Section 549—*continued*

sworn to determine the challenges. To the triers thus chosen, no challenge can be admitted.

The triers being thus chosen the following oath is administered to them: "You shall well and truly try whether A.B. (the juryman challenged) stand indifferent between the parties to this issue, so help you God.' The trial then proceeds by witnesses before them. They may also examine the juryman challenged upon his *voire dire, ventatem dicere* as to the leaning of his own affections or the sufficiency of his estate; but he cannot be interrogated as to circumstances which may tend to his own disgrace, discredit, or the injury of his character, as whether he has stood in the pillory, been convicted of an infamous crime, outlawed, or even whether he has previously declared his opinion that the prisoner is guilty and would be executed."

It should be noted however, that by the *Criminal Justice Act,* 1948 (Imp.), s.35(2), it is provided that: "Upon the trial of any person for an offence on indictment, any challenge to jurors for cause shall be tried by the judge, chairman of quarter sessions, recorder or other person before whom the accused is to be tried."

Taschereau's Code, p.785 notes that in *R. v. FEORE*(1877), 3 Q.L.R. 219, it was held that there was a mistrial when Robert Crane by mistake answered when Robert Grant was called, and was sworn. The mistake was discovered after conviction but before the jury left the box. See, however, *Re ALBERTA JURY ACT*(1946), 86 C.C.C.296, in which it was held that the discovery, after verdict, that a juror had been sworn who was unqualified, was not a ground for setting the verdict aside.

CALLING JURORS WHO HAVE STOOD BY.—Other jurors becoming available.

550. (1) Where, as a result of challenges and directions to stand by, a full jury has not been sworn and no names remain to be called, the names of those who have been directed to stand by shall be called again in the order in which their names were drawn and they shall be sworn, unless challenged by the accused, or unless the prosecutor challenges them or shows cause why they should not be sworn.

(2) Where, before a juror is sworn pursuant to subsection (1), other jurors in the panel become available, the prosecutor may require the names of those jurors to be put into and drawn from the box in accordance with section 540, and those jurors shall be challenged, ordered to stand by or sworn, as the case may be, before the names of the jurors who where originally ordered to stand by are called again.

This is the former s.928. It was s.667(4) in the Code of 1892, and part of s.519 in the E.D.C., with which is cited 39 and 40 Vict., c.78, s.19.

See *R. v. CHURTON*(1919), 31 C.C.C.188, noted under s.543 *ante,* and s.552(3) *post.*

PANEL EXHAUSTED, SUMMONING OTHER JURORS. — Orally. — Adding names to panel.

551. (1) Where a full jury cannot be provided notwithstanding that the relevant provisions of this Part have been complied with, the

OLD CODE:

928. 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 or 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.

939. Whenever after the proceedings hereinbefore provided for 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 numbers 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.

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court may, at the request of the prosecutor, order the sheriff or other proper officer forthwith to summon as many persons, whether qualified jurors or not, as the court directs for the purpose of providing a full jury.

(2) Jurors may be summoned under subsection (1) by word of mouth, if necessary.

(3) The names of the persons who are summoned under this section shall be added to the general panel for the purposes of the trial, and the same proceedings shall be taken with respect to calling and challenging those persons and directing them to stand by as are provided in this Part with respect to the persons named in the original panel.

This is the former s.939. It was s.672 in the Code of 1892, and came from R.S.C. 1886, c.174, s.168, and 6 Geo. IV, c.50, s.37 (Imp.).

See *R. v. CHURTON, supra.*

WHO SHALL BE JURY.—Returning names to box.—Same jury may try another issue by consent.—Sections directory.

552. (1) The twelve jurors, or in the province of Alberta, the Yukon Territory and the Northwest Territories the six jurors, whose names are drawn and who are sworn in accordance with this Part, shall be the jury to try the issues of the indictment, and the names of the jurors so drawn and sworn shall be kept apart until the jury gives its verdict or until it is discharged, whereupon the names shall be returned to the box as often as occasion arises, as long as an issue remains to be tried before a jury.

Section 552—*continued*

(2) The court may try an issue with the same jury in whole or in part that previously tried or was drawn to try another issue, without the jurors being sworn again, but if the prosecutor or the accused objects to any of the jurors or the court excuses any of the jurors, the court shall order those persons to withdraw and shall direct that the required number of names to make up a full jury be drawn and, subject to the provisions of this Part relating to challenges and directions to stand by, the persons whose names are drawn shall be sworn.

(3) No omission to follow the directions of this section or section 540 or 550 affects the validity of a proceeding.

This comes from the former s.929 which first came into the Code as s.667(5) and (6) in 1892. It formed part of s.519 in the E.D.C. Subsec.(1) was amended in 1935 when the legislation in Manitoba and Saskatchewan provided for a six-man jury, in 1943 to delete the reference to Manitoba, in 1946 to add a reference to Alberta and omit Saskatchewan.

It was re-enacted by 1951, c.47, s.22, to replace the word "men" by the word "persons" to conform to the fact that in some of the provinces women might be jurors, this last being the word used in this section.

When the provisions of subsec.(2) were before Parliament in 1892 doubt was expressed as to the advisability of enacting them in Canada although it appeared that in London a jury was sometimes sworn to try several cases. It was pointed out, however, that this procedure can be followed only by consent.

Here the cases of *R. v. WONG O SANG*, [1924] 3 W.W.R.45, and *R. v. LUPARELLO*(1915), 24 C.C.C.24, may be compared. In the former a jury disagreed and there was a second trial. "In the case at bar three of the former jury were included in the new jury 'empanelled' despite the accused's objection, and in the absence of any authority cited to support such an inclusion, which is contrary to the spirit of a new trial, I think the objection should be upheld and a new trial ordered." The jury was not a "new jury" within the meaning of s.960.

In the latter the judge discharged the jury in a capital case because it had not been kept together overnight. When the fresh jury was empanelled it was found that eight of the first jury were members of it, they having been sworn without challenge. It was held on appeal that this did not indicate a substantial wrong or miscarriage of justice.

A new trial was refused on a similar ground in *R. v. McLACHLAN* (1924), 41 C.C.C.249.

JUROR UNABLE TO CONTINUE.—Trial may continue.

553. (1) Where in the course of a trial a member of the jury is, in the opinion of the judge, by reason of illness or some other cause, unable to continue to act, the judge may discharge him.

(2) Where in the course of a trial a member of the jury dies or is discharged pursuant to subsection (1), the jury, shall, if the prosecutor and the accused consent in writing and if the number of jurors is not reduced below ten, or in the province of Alberta, the Yukon Territory and the Northwest Territories below five, be

OLD CODE:

929. (1) The twelve persons, or in the province of Alberta the six persons, who in manner aforesaid are ultimately drawn and sworn shall be the jury to try the issues of the indictment, and the names of the persons 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.

(2) If 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.

(3) An omission to follow the directions of this or the two last preceding sections shall not affect the validity of the proceedings.

929A. Where in the course of a trial any member of a jury is, in the opinion of the judge, through illness or other cause, unable to continue to act, the judge may discharge him and in such case or where a member of the jury dies the jury shall, subject to consent being given in writing by or on behalf of both the Crown and the accused, and so long as the number of jurors is not reduced below ten, or in the province of Alberta five, be considered as remaining for all the purposes of the trial properly constituted and the trial shall proceed and a verdict may be given accordingly.

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deemed to remain properly constituted for all purposes of the trial and the trial shall proceed and a verdict may be given accordingly.

This is the former s.929A which was enacted by 1948, c.39, s.39, altered to include a reference to the North-West Territories and the Yukon. The procedure it provided was followed in *R. v. SWANSON*, [1950] 1 W.W.R.22, in which the foreman of the jury was taken ill after the jury retired to consider their verdict.

It was adopted also in *R. v. RODGERS, Re REYNOLDS*(1952), 103 C.C.C.168, in which a juryman came to court in a state of intoxication.

See also *VESCIO v. R.*(1949), 92 C.C.C.161.

TRIAL.

CONTINUOUS TRIAL.—Adjournment.—Formal adjournment unnecessary.—Questions reserved for decision.

554. (1) The trial of an accused shall proceed continuously subject to adjournment by the court.

(2) The judge may adjourn the trial from time to time in the same sittings.

(3) No formal adjournment of trial or entry thereof is required.

(4) The judge, in any case tried without a jury, may reserve his final decision on any question raised at the trial, and his decision, when given, shall be deemed to have been given at the trial.

Section 554—*continued*

Subsec.(1) is the former s.945(1). It was part of s.673 in the Code of 1892 and of s.532 in the E.D.C. Subsec.(2) is the former s.945(2) added by 55-56 Vict., c.40, s.1. Subsec.(3) is the former s.945(6), which was s.673 (2) in the Code of 1892, and part of s.532 in the E.D.C.

Subsec.(4) comes from the former s.579 which was s.753 in the Code of 1892, and R.S.C. 1886, c.174, s.269. The words "in any case tried without a jury" were added in Parliament, for the reason as stated that "otherwise we did not know how a judge was going to reserve his decision and give it later in a jury trial, and in the meantime the jury had brought in the verdict and it has been recorded:" (Senate Committee Dec. 15-16, 1952, p.73). This appears to alter the provision which, as it appeared in the 1892 Code began "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." The words "or other person" replaced the words "retired judge, or Queen's Counsel", which appeared in the Act respecting the High Court of Justice for Ontario, 1883, c.10, s.1, where the provision appeared originally. See also Treemear's Code 1919 ed., note to s.579.

TAKING EVIDENCE.

555. On the trial of an accused for an indictable offence the evidence of the witnesses for the prosecutor and the accused shall be taken by a stenographer in accordance with the provisions of Part XV relating to the taking of evidence by stenographers at preliminary inquiries.

This is new. Evidence in the superior courts is taken down by sworn court reporters, but the repealed Code contained no statement in that regard. See s.453 *ante*.

SEPARATION OF JURORS EXCEPT IN CAPITAL CASES.—Keeping in charge.—Saving.—Empanelling new jury in certain cases.—Refreshment and accommodation.

556. (1) The judge may, at any time before the jury retires to consider its verdict, permit the members of the jury to separate, but this subsection does not apply where an accused is liable, upon conviction, to be sentenced to death.

(2) Where permission to separate cannot be given or is not given the jury shall be kept under the charge of an officer of the court as the judge directs, and that officer shall prevent the jurors from communicating with anyone other than himself or another member of the jury without leave of the judge.

(3) Failure to comply with subsection (2) does not affect the validity of the proceedings.

(4) Where the fact that there has been a failure to comply with this section is discovered before the verdict of the jury is returned the judge may, if he considers that the failure to comply might lead to a miscarriage of justice, discharge the jury and

***(a)* direct that the accused be tried with a new jury during the same session or sittings of the court, or**

***(b)* postpone the trial on such terms as justice may require.**

OLD CODE:

579. 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.

945. 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, 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.

(4) Such direction shall be given in all cases with the exception of rape in which the accused may upon conviction be sentenced to death.

(5) In other cases, if no such direction is given, the jury shall be permitted to separate.

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

946. 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.

959. 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.

(3) If such disobedience is discovered before the verdict of the jury is returned the court, if it is of opinion that such disobedience might lead to a miscarriage of justice, 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.

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(5) The judge shall direct the sheriff to provide the jurors who are sworn with suitable and sufficient refreshment, food and lodging while they are together until they have given their verdict.

Subsecs.(1) and (2) come from the former ss.945(3) and 959(1). Subsec. (3) comes from the former s.959(2). Subsec.(4) comes from the former s.959(3). Subsec.(5) comes from the former s.946.

The corresponding provisions appear in ss.673, 674 and 727 of the Code of 1892 and in ss.527 and 532 of the E.D.C. *Cf.* also the provisions of the *Jurors Detention Act*, 1897 (U.K.).

Under this section the provision relating to capital cases has been retained, but as rape is no longer a capital offence, the general rule will apply to it. It had already been excepted from the operation of s.945(4) by amendment in 1948. That general rule, which is a change from the

Section 556—*continued*

former procedure, is that the jury will be kept together unless the Judge permits them to separate, but in view of the spirit of the legislation as indicated in the cases, *infra*, the change is, perhaps, not a matter of great practical importance.

The words in subsec.(2) "shall be kept under the charge of an officer of the court as the judge directs" recognize that in some provinces women may be jurors.

There is a change also in that the saving clause in subsec.(3) applies throughout. Formerly it applied only to s.959.

It has been pointed out in the note to s.561 that the conditions under which the jury acts are very different from those which obtained when *WINSOR v. R.*(1866), 10 Cox,C.C.276, was decided.

At common law the jury were permitted to separate in cases of misdemeanour, but after the accused was given in charge of the jury in a case of felony, the jury could not separate until they had given their verdict. There were, however, circumstances which tended to shorten trials. In 1702, the statute 1 Anne, st.2, c.9 permitted defence witnesses to give evidence under oath in treason and felony; until the year 1589 defence witnesses were not permitted at all. The statute 31 Eliz., c.4, relaxed that rule to some extent, but defence witnesses were not sworn. It was not until the *Prisoners Counsel Act* (1836, c.114) that a person accused of felony might have his case conducted by counsel, and it was not until 1898 in England (1893 in Canada), that a prisoner became a fully competent witness in his own defence, although in practice he was permitted to make statements unsworn.

It has been pointed out that, under the law as it existed in early times, it was but rarely that a trial lasted longer than a day, but it is interesting, with special reference to subsec.(5) above, that in moving second reading of a bill to amend the criminal law in 1890, Sir John Thompson said, (Hansard, Vol. II, col. 3164):

> "There is a provision in section 19 to relax the somewhat ancient law with regard to jurors deliberating on their verdict, and to permit that they may, in the discretion of the judge, be allowed to use a fire while deliberating out of court and to have reasonable refreshment. The law which makes it necessary that a jury, in order to hasten its deliberations, shall both shiver and starve at the same time, is too obsolete for the modern administration of justice, and we propose to have it amended."

The principles involved in the modern attitude appear in the following quotation from *R. v. TWISS*(1918), 26 Cox,C.C.325, at p.329:

> "The old rule was that in charges of felony the jury were not allowed to separate. The Legislature has, however, shown a tendency to trust jurymen more and to relax the former rule. Under the *Juries Detention Act,* 1897 (60 & 61 Vict., c.18), the court can allow jurymen to separate where the charge is one of felony, except where murder, treason, or treason felony is charged. It cannot be supposed that when the Legislature passed that statute they thought the jurymen, when they leave the court (the case being part heard) and go to luncheon, never mention the case to anyone. . . . . .

In the present case the trial went on and the juryman did what is well known jurymen often do—he left the precincts of the court and talked to other people. Under these circumstances what we have to consider is whether any injustice was done to the appellant by reason of what the juryman did."

The conclusion was that accused had not been prejudiced.

With reference to the provisions of the Code, the opinion was expressed in *R. v. WALTERS*(1926), 58 N.S.R.306, that the real object and intent of s.945 were:

"to be read in the light of the old common law, and as a method provided for preserving the purity of the administration of justice and for safeguarding the rights of accused persons against having a jury unduly or improperly affected by outside influences during the course of the trial."

In *R. v. NASH*(1949), 94 C.C.C.288, at p.291, it was observed on appeal that, "In modern years the feature of separation has been considerably relaxed, having regard to the ordinary habits of life, but the principle as to communication and the possibility as to influence upon the jury still maintains." In that case a new trial was ordered when it appeared that members of the jury had been in communication by telephone with their homes and business associates, had attended the showing of a film entitled "Sealed Verdict", and had mingled with the crowd in leaving the theatre.

This case was applied, with the same result, in *R. v. RYAN*(1951), 101 C.C.C.101, in which the facts were largely similar, except that the jury had gone to the theatre without the permission or knowledge of the Judge. See also *R. v. NEAL*, [1949]2 All E.R.438.

A strong judgment in which a new trial was ordered, is in the case of *R. v. MASUDA*(1953), 106 C.C.C.122. The following appears:

"Stripped to its bare essentials, there can be no escape from the fact that three Crown witnesses dined with the jury during a murder trial. It seems to me that to countenance such a situation as is thus presented, violates two essentials of justice. The one is that the jury must be kept completely free from any opportunity of communication during the trial, except under the most exceptional circumstances calling for a direction from the Court; and, secondly, that nothing must occur during the trial of a case from which a suspicion may arise that any taint attaches to the proper and meticulous fairness which must always surround the administration of public justice, more especially when a man is on trial for his life. . . . . .

Moreover, if Crown witnesses are permitted to join the jury in an atmosphere of sociability during the adjournment of a murder trial, the confidence of the public in our present system of trial by jury would be shaken. . . . . Thus it appears to us that the opportunity for communication, while a factor for consideration, is not the whole test to be applied in the circumstances."

A case in which it is pointed out that s.945 did not impose an absolute prohibition against juries communicating with anyone whatsoever, is *BERTRAND v. R.*(1953), 107 C.C.C.239. In that case the jury, at their own request and with the consent of the Judge, and of counsel for the

Section 556—*continued*

Crown and the accused, had attended confession in the court house where they were kept together. They were instructed not to speak of the trial and the priest who was to hear the confessions was sworn not to speak of it. An appeal from conviction was dismissed, and leave to appeal to the Supreme Court of Canada was refused.

What is surely an extreme case upon the principles embodied in this section appears in *R. v. SPIERS*(1952), 19 Sol. 13. There the main ground of appeal was that while appellant was on bail during trial, two jurymen had discussed the case with him while they were travelling home in the same compartment in a train. The jurymen said that they tried to avoid the conversation, that one of them was reading a newspaper report of a case where the judge had rebuked a juryman for talking about a case during the trial, and that when appellant forced the conversation, the juryman handed the newspaper to him.

The C.C.A. accepted the explanation of the jurymen and dismissed the appeal saying that, "The moral of the case showed that it was unwise to let prisoners out on bail during a trial."

ACCUSED TO BE PRESENT.—Exceptions.—To make defence.

557. (1) Subject to subsection (2), an accused other than a corporation shall be present in court during the whole of his trial.

(2) The court may

***(a)* cause the accused to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible, or**

***(b)* permit the accused to be out of court during the whole or any part of his trial on such conditions as the court considers proper.**

(3) An accused is entitled, after the close of the case for the prosecution, to make full answer and defence personally or by counsel.

This comes from the former ss.942 and 943(1). The former was s.659 in the Code of 1892. It came from R.S.C. 1886, c.174, s.178, and 6 & 7 Wm. IV, c.114 (Imp.). *Cf.* s.524 of the E.D.C. as to rights of accused at trial, to open his case, to examine his witnesses and to sum up.

S.943 was s.660 in the Code of 1892 and s.534 in the E.D.C. See also s.426 *ante*.

"Other than a corporation", a corporation appears by counsel or agent (s.528).

As to full answer and defence, it is relevant to refer to the case of *R. v. ROACH*(1914), 23 C.C.C.28, and to quote therefrom some general observations.

In that case the accused was not informed in any formal way of the charge against him. The evidence of the witnesses, who were school-girls, was not taken under oath. This evidence, moreover, was not given openly, but was whispered into the ear of the magistrate. When the accused asked for an adjournment in order that he might get counsel, the magistrate told him that a lawyer would do him no good, and refused

OLD CODE:

942. 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.

943. 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.

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his request. When these proceedings came to be reviewed on appeal, the Court expressed itself in the following terms:

"It ought not to be, and it may not be, necessary, even if excusable, to repeat again the oft-quoted words of the Lord Chief Justice of England, upon this subject, (*i.e.*, the right of the accused to make his full answer and defence), so forcibly expressed in the case of *MARTIN v. MACKONOCHIE*(1878), 3 Q.B.D.730, 775, but I do so lest we justices, whether of superior or inferior Courts, forget; and because that case is in point upon the main question involved in this case, as the first words I intend reading shew: 'It seems to me, I must say, a strange argument in a court of justice, to say that when, as the law stands, formal proceedings are in strict law required, yet if no substantial injustice has been done by dealing summarily with a defendant, the proceeding should be upheld. In a court of law such an argument *á convenienti* is surely inadmissible. In a criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law. All proceedings *in poenam* are, it need scarcely be observed, *strictissimi juris;* nor should it be forgotten that the formalities of the law, though here and there they may lead to the escape of an offender, are intended on the whole to insure the safe administration of justice and the protection of innocence, and must be observed. A party accused has a right to insist upon them as a matter of right, of which he cannot be deprived against his will; and the Judge must see that they are followed. He cannot set himself above the law which he has to administer, or make or mold it to suit the exigencies of a particular occasion. Though a murderer should be taken redhanded in the act, if there is a flaw in the indictment the criminal must have the benefit of it. If the law is imperfect, it is for the Legislature to amend. The Judge must administer it as he finds it. And the procedure by which an offender is to be tried, though but ancillary to the application of the substantive law and to the ends of justice, is as much part of the law as the substantive law itself.'
Amendments by the Legislature, from time to time, to the law have made escapes from substantial justice on mere technicality few and far between, if they ever need occur. And I may add that, as the provisions of the law exist for the purpose of making a case so plain that substantial justice can be done, how is it possible to assert that justice has been done when some of the means the Legislature has deemed necessary in reaching that end have been disregarded?"

In *R. v. LEMAY* (*No. 2*)(1951), 100 C.C.C.365 a rule was cited (p.367) restated by the Judicial Committee in *SENEVIRATNE v. R.*, [1936]

Section 557—*continued*

3 All E.R.36, at p.49: "Witnesses essential to the unfolding of the narrative on which the prosecution is based must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution," but it was held, on objection that the prosecution should have called a certain witness, that the defence had an oportunity to call him and that there is no general obligation on the part of the Crown to call every available witness regardless of number or reliability.

SUMMING UP BY PROSECUTOR.—Summing up by accused.—Accused's right of reply.—Attorney General's right to reply.—Prosecutor's right of reply where more than one accused.

558. (1) Where an accused, or any one of several accused being tried together, is defended by counsel, the counsel shall, at the end of the case for the prosecution, declare whether or not he intends to adduce evidence on behalf of the accused for whom he appears and if he does not announce his intention to adduce evidence, the prosecutor may address the jury by way of summing up.

(2) Counsel for the accused or the accused, where he is not defended by counsel, is entitled, if he thinks fit, to open the case for the defence, and after the conclusion of that opening to examine such witnesses as he thinks fit, and when all the evidence is concluded to sum up the evidence.

(3) Where no witnesses are examined for an accused, he or his counsel is entitled to address the jury last, but otherwise counsel for the prosecution is entitled to address the jury last.

(4) Notwithstanding subsection (3) the Attorney General or counsel acting on his behalf is entitled to reply.

(5) Where two or more accused are tried jointly and witnesses are examined for any of them, all the accused or their respective counsel are required to address the jury before it is addressed by the prosecutor.

This comes from the former s.944 which was s.661 in the Code of 1892. It varied R.S.C., c.174, s.179 which was based upon 28 Vict., c.18, s.2 (Imp.). Corresponding provision appeared in s.524 of the E.D.C. but it included the words "and if no counsel for any such accused person" evidently contemplating a case where accused jointly tried are defended by different counsel. This is the position referred to in subsec.(5), which is new. It was referred to (Hansard 1954, p.2859) as being a necessary change in the law where there is a joint trial, "otherwise such trial becomes all mixed up, with counsel addressing the jury with respect to one charge, and waiting for other counsel to address the jury on another charge."

Note the provision for the right of reply in subsec.(4). This was the subject of debate in the British House of Commons (Parl. Debates 1898, 4th Series, vol. 62, col.664). Mr. Swift McNeill said: "Upon this rule, or this practice, I told the Attorney General a piece of historical knowledge that he did not know. I asked the honourable and learned gentleman whether he knew that this rule is a rule which had its origin in the corrupt time of Scroggs and Jefferies."

OLD CODE:

944. 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, the counsel for the accused, or the accused if he is not defended by counsel, shall be allowed, if he thinks fit, to open the case for the defence, 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.

(3) If no witnesses are examined for the defence the counsel for the accused, or the accused in case he is not defended by counsel, 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.

It was said that the rule of practice was that this special right of reply could be exercised by the Attorney General or Solicitor General in person, but not by their representatives, and in reply to an objection that it was capable of abuse, Sir R. Finlay said (col.679):

> "There are cases of great public importance in which naturally and properly the counsel for the defence seek to introduce every topic which they think may possibly influence the mind of the jury to a verdict of acquittal. There are some cases in which, in the interests of the public, it is right and desirable that the attention of the jury should be recalled to the real state of the facts, and to what are the true issues upon which they must decide. It may be said in that case 'Why should not the privilege be extended to all prosecuting counsel?' The answer is that the privilege is one which is certainly capable of very great abuse. I have never heard it suggested that the privilege has been abused by any prosecuting counsel . . . . . but I think the consideration I have mentioned has some weight."

In 1884 the English judges passed a resolution intended to remove doubts as to the right of reply by counsel other than the Attorney General or Solicitor General. The resolution was:

> "In those cases in which the Attorney General 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 no others."

The 32-33 Vict.(Can), c.29, s.45 gave the right to the Attorney General or Solicitor General or to any Queen's Counsel acting on behalf of the Crown. This appears in the Code Bill of 1892, s.661, where the word "Queen's" is struck out.

In *R. v. MARTIN*(1905), 9 C.C.C.371, it was held that a Crown prosecutor instructed by a provincial Attorney General is a counsel "acting on behalf of the Attorney General" under Code s.661(2) and has

Section 558—*continued*

the right of reply although no witnesses are called for the defence, but McLaren, J.A., at p.389, said:

> "It is a relic of absolutism and high prerogative, and, while it stands on the statute-book, the representative of the Attorney-General has a right to claim it, and, when he does so, the judge must allow it.
>
> In the meantime I think it should be claimed only when there are special reasons for doing so, and that it would be more in consonance with modern enlightened ideas as to the relative rights of the Crown and the subject if it were entirely abrogated."

VIEW.—Directions to prevent communication.—Who shall attend.

559. (1) The judge may, where it appears to be in the interest of justice, at any time after the jury has been sworn and before they give their verdict, direct the jury to 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 shown to the jury, and may for that purpose adjourn the trial.

(2) Where a view is ordered under subsection (1), the judge shall give any directions that he considers necessary for the purpose of preventing undue communication by any person with members of the jury, but failure to comply with any directions given under this subsection does not affect the validity of the proceedings.

(3) Where a view is ordered under subsection (1) the accused and the judge shall attend.

This comes from the former s.958 which was s.722 in the Code of 1892, with which R.S.C. 1886, c.174, ss.171 and 172 are cited. Corresponding provisions appear, without the words "against this Act" in s.535 of the E.D.C., with which 39 and 40 Vict., c.78, s.11 (Ireland) is cited.

Subsec.(3) is new. There had previously been some difference of judicial opinion as to whether the accused should be present when a view was taken, and the revision makes it clear that he is to be present. This change renders it unnecessary to review the cases, but it may be mentioned that in *Re GRANT*(1950), 98 C.C.C.401, a new trial was ordered in a case in which the trial was adjourned over the weekend, and on the Sunday the jury, accompanied by the sheriff, two members of the R.C.M.P., and a matron were driven to the scene of the alleged murder. There had been no order made by the judge.

> "We are not prepared to say that no substantial wrong or miscarriage of justice has occurred. Moreover the accused had an inalienable right to be present at the view; natural justice requires that he should be present and for this reason alone the conviction should be quashed and there should be a new trial."

The earlier conflict appears in *R. v. PETRIE*(1890), 20 O.R.317; *R. v. BARBOUR*(1938), 13 M.P.R.203; and *R. v. MacDONALD*(1939), 72 C.C.C.182. This section accords with an opinion that a view, when ordered, is part of the trial.

DISAGREEMENT OF JURY.—Discretion not reviewable.

560. (1) Where the judge is satisfied that the jury is unable to agree upon its verdict and that further detention of the jury would

OLD CODE:

958. 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 shown to such jurors, and may for that purpose adjourn the trial, and the cost occasioned thereby shall be in the discretion of the court.

(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.

960. 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.

961. 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.

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be useless, he may in his discretion discharge that jury and direct a new jury to be empanelled during the sittings of the court, or may adjourn the trial on such terms as justice may require.

(2) A discretion that is exercised under subsection (1) by a judge is not reviewable.

This is the former s.960. It was s.728 in the Code of 1892, and s.528 in the E.D.C.

See notes to s.552 *ante*.

PROCEEDING ON SUNDAY, ETC., NOT INVALID.

561. The taking of the verdict of a jury and any proceeding incidental thereto is not invalid by reason only that it is done on Sunday or on a holiday.

This is the former s.961 with the addition of the words "and any proceeding incidental thereto," which would cover, *e.g.*, the discharge of the jury after verdict, or the discharge of the accused upon acquittal.

This provision appears as s.536 of the English Draft Code of 1878 without the words "or any other holiday" and similarly in the Code of 1892, s.729. Referring to it in their report (p.37) the Imperial Commissioners say:

> "Section 536 enables the court to take a verdict on Sunday. This provision was suggested by the case of *WINSOR v. R.*, in which it was stated as one reason for discharging the jury late on a Saturday night that if they agreed to their verdict on Sunday, the verdict could not be taken till the Monday."

The question arose only incidentally in *WINSOR v. R.*(1866), 10 Cox,C.C.276, since that case turned upon the right of the trial judge to discharge the jury. The trial was for murder and the following are ex-

Section 561—*continued*

tracts from the judgments. It is to be remembered, however, that the conditions which governed the deliberations of the jury were very different in those days from what they are now. *Per* Cockburn, C.J., (at p.311):

> "In this case it appeared that not only had the jury been five hours in deliberation, but it was within a few minutes of midnight of the Saturday, and on the eve of Sunday; and further, on the Monday the judges were bound to be at Bodmin in the discharge of their duties . . . . . the intervening day being Sunday, a great difficulty presented itself. In the first place arises the question whether the judge could adjourn till the Sunday and take the verdict of the jury on the Sunday? It is laid down in distinct terms by high authorities—Coke and Comyn—that Sunday is not a judicial day, and it is idle to contend that the taking of a verdict, the delivery of a verdict on the part of the jury, and the receiving it on the part of the judge, and the recording it, ... are not judicial acts; and I entertain the gravest doubt whether it would have been consistent with the validity of these acts as judicial acts for the verdict to be delivered, received and recorded on the Sunday."

Blackburn, J., (at p.318) did not wish to decide the question but added:

> "I do not think there can be the slightest doubt about this, that to sit judicially on Sunday on any business would be indecent and improper, and should never be done if it can be helped. This much no one can doubt."

Mellor, J., (at p.322) said:

> "Without absolutely deciding that it cannot, I quite agree with my brother Blackburn in his opinion upon that point, and I am free to confess that I think it cannot be done."

The following authorities are relevant to this subject:

Sunday is a *dies non* for the sittings of Courts (*MacKAILEY'S CASE* (1611), 9 Co. Rep.65b) . . . . . Process may not be served nor persons arrested except for crime (29 Car. II, c.7, s.6; 11 & 12 Vict., c.42, s.4; *RAWLINS v. ELLIS*(1846), 16 M. & W.172; Encyc. of the Laws of Eng. Vol. 13, p.707).

Sunday is *dies non juridicus*, a day on which no judicial act ought to be done. *ASMOLE v. GOODWIN*(1699), 2 Salk.624; *MacKAILEY'S CASE*(1611), 9 Co. Rep.65b (where an inquisition was held bad on its appearing that the inquest was held on Sunday). Ministerial acts may be lawfully executed on Sunday (*ibid.*); Hals. 2nd ed., Vol. 32, p.126.

The taking of sureties and commitment to prison in default are judicial acts, and cannot therefore be performed on Sunday. Hals. 2nd ed., Vol. 21, p.695. *R. v. RAMSAY*(1867), 16 W.R.191 referred to.

Blackstone's Com. Bk. III, p.275, says:

> "Throughout all Christendom, in very early times, the whole year was one continual term for hearing and deciding causes. For the Christian magistrates to distinguish themselves from the heathens, who were extremely superstitious in the observance of their *dies fasti et nefasti*, went into a contrary extreme, and administered justice upon all days alike. Till at length the Church interposed and exempted certain holy seasons from being profaned by the tumult of forensic

litigations. As, particularly, the time of advent and Christmas, which gave rise to the winter vacation; the time of Lent and Easter, which created that in the spring; the time of Pentecost, which produced the third; and the long vacation between Midsummer and Michaelmas, which was allowed for the hay time and harvest. All Sundays, also, and some particular festivals, as the days of Purification, Ascension and some others, were included in the same prohibition; which was established by a canon of the Church, A.D. 517."

Broom's Legal Maxims, 10th ed., p.13, citing *DRURY v. DEFONTAINE*(1807), 1 Taunt.131, *per* Lord Mansfield at p.135, says that "Except as regards judicial acts, Sunday is not a *dies non* at common law."

By the *Lord's Day Act*, 29 Car.II, c.7, s.6, the service or execution of any writ, process, warrant, order or judgment or decree (except in cases of treason, felony or breach of the peace) on Sunday was prohibited. It was argued in *SWANN v. BROOME*(1764), 3 Burr.1595, at p.1601, that this statute does not extend to giving judgments. To this Lord Mansfield answered:

"It was needless to restrain them from it by act of parliament. They could not do it, by the canons anciently received, and made a part of the law of the land: and therefore the restraining them from it by act of parliament would have been merely nugatory."

The following Canadian cases may be cited in this connection:

In *R. v. CAVELIER*(1896), 1 C.C.C.134 (Man.), the facts were that accused was arrested on Saturday evening, a preliminary hearing was begun about 2 a.m. Sunday and finished after daylight the same morning. The accused was discharged on *habeas corpus* on the ground that the preliminary hearing was a judicial proceeding which cannot legally be held on Sunday. It was held that s.729 (later s.961) is to be applied only to matters before a jury.

R. v. MURRAY(1897), 1 C.C.C.452 (Ont.), is based on the definition of holiday and is similar in effect to *R. v. CAVELIER*. A preliminary inquiry held on Dominion Day was held to be invalid. The judgment contains the following:

"A writ returnable on a Sunday or other *dies non* is a nullity; Chitty's Archbold's Practice, 12th ed., p.160; *MORRISON v. MANLEY*(1842), 1 Dowl. (N.S.) 773; *KENWORTHY v. PEPPIAT*(1820), 4 B. & Ald. 288; *SWANN v. BROOME*(1764), 3 Burr. 1595. And a judgment signed on a *dies non* is a nullity; *HARRISON v. SMITH*(1829), 9 B. & C. 243."

Re McGILLIVRAY(1907), 13 C.C.C.113 (N.S.), appears to be contrary to *R. v. CAVELIER* & *R. v. MURRAY*, *supra*. In that case it was held that if the magistrate before whom the accused is brought on Sunday on a warrant of arrest, accepts bail for the defendant's appearance on another day, and the defendant appears accordingly, the magistrate has jurisdiction whether or not what had been done on the Sunday was valid.

Weatherbe, C.J., was of opinion that the justice had no jurisdiction. Townshend, J., regarded the taking of bail as merely incidental to the arrest, the other three judges put their decision on the ground that if the taking of bail was illegal, the defendant was unlawfully at large and could be re-taken.

Section 561—*continued*

A previous judgment of the S.C.N.B., *Ex p. GARLAND*(1901), 8 C.C.C.385, was not referred to in *Re McGILLIVRAY*. In that case the accused was arrested on Sunday and after a preliminary hearing on the same day, was committed for trial. On motion for a writ of *certiorari* to quash the commitment, it was held that this was not the proper remedy and the motion was unsuccessful. Hannington, J., expressed the opinion that "the arrest and the proceedings before the justice were all right," but the other five judges expressed no opinion on that point.

In *R. v. SAWCHUK*, [1923]2 W.W.R.824, Dysart, J., was considering the validity of a trial held on New Year's Day and referred to the definition of "holiday" in the *Dominion Interpretation Act*. He held the conviction to be invalid and void. The judgment contains a long historical review of the law relating to Sunday in which he says (at p.826):

> "However, we have a starting point in this, that Sunday, one of these holidays, has been almost universally decided to be a non-judicial day"

and (at p.833):

> "The performance of ministerial duties on Sundays and *dies non* has been recognized as lawful ever since *MacKALLEY'S CASE*."

There is reason for stating that as a general rule Sunday is *dies non* and that, although the origin of the rule seems to have lain in religious observance, it is regarded as a matter of public policy.

Evidence on Trial.

ADMISSIONS AT TRIAL.

562. Where an accused is on trial for an indictable offence he or his counsel may admit any fact alleged against him for the purpose of dispensing with proof thereof.

This is the former s.978. It was s.690 in the Code of 1892, and s.526 in the E.D.C., where it was new. The Imperial Commissioners said of it:

> "At present if the accused is proved before his trial to have made an admission it is evidence against him, but though he offers to make the same admission in court it is thought that in cases of felony the judge is obliged to refuse to let him do so."

The rule in cases of misdemeanour appears to have been that in such cases evidence might be taken by consent: *R. v. ST. CLAIR*(1900), 3 C.C.C.551, where it was said that s.690 of the Code concedes the principle to a limited extent in all cases, provided that the admission was one of fact.

It was held in *R. v. CAMPBELL*(1946), 88 C.C.C.41, that a statement by the accused that he "had nothing to do with this woman" was a straight denial, and not an admission which, under s.978, narrowed the proof required on the part of the prosecution.

EVIDENCE OF STEALING ORES OR MINERALS.

563. In any proceeding in respect of theft of ores or minerals, the possession, contrary to any law in that behalf, of smelted gold or silver, gold-bearing quartz, or unsmelted or unmanufactured gold or silver, by an operator, workman or labourer actively engaged in or on a mine, is *prima facie* evidence that the gold, silver or quartz was stolen by him.

OLD CODE:

978. 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.

988. 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 operator, workman or labourer actively engaged in or on any mine, shall be prima facie evidence that the same has been stolen by him.

1001. 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.

This is the former s.988, which was s.707 in the Code of 1892, and s.30 of R.S.C. 1886, c.164 (the *Larceny Act*). See now s.280 (theft), s.337 (unlawful possession of precious metals &c), and s.338 (search).

USE IN EVIDENCE OF STATEMENT BY ACCUSED.

564. A statement made by an accused under subsection (2) of section 454 and purporting to be signed by the justice before whom it was made be given in evidence against the accused at his trial without proof of the signature of the justice, unless it is proved that the justice by whom the statement purports to be signed did not sign it.

This is the former s.1001. It was s.689 in the Code of 1892 and R.S.C. 1886, c.174, s.223. It was taken from 11 and 12 Vict., c.48, s.18 (Imp.).

See notes to s.455 *ante*. In connection with the rule relating to involuntary statements that lead to the discovery of things, the following should be noted from *R. v. DOWNEY*(1955), 14 W.W.R. (N.S.) 95, at p.96:

> "I agree with the learned Chief Justice in *R. v. ST. LAWRENCE* (1949), 93 C.C.C. 376, that those parts of the statement which are not confirmed by the finding of the articles are inadmissible; and that such statement is not confirmed because the finding of the articles is consistent with its truth if the result of the search be also consistent with a reasonable possibility that the statement is untrue."

CHILDREN AND YOUNG PERSONS.

PROOF OF AGE.—Inference from appearance.

565. (1) In any proceedings to which this Act applies an entry or record of an incorporated society or its officers who have had the control or care of a child or young person at or about the time the child or young person was brought to Canada is *prima facie* evidence of the age of the child or young person if the entry or record was made before the time when the offence is alleged to have been committed.

(2) In the absence of other evidence, or by way of corroboration of other evidence, a jury, judge, justice or magistrate, as the case

Section 565—*continued*

may be, may infer the age of a child or young person from his appearance.

This is the former s.984. It was brought into the Code as s.701A by 1900, c.46, s.3. It was explained (Hansard, 1900, 5272) that in the case of some children coming from abroad, there were no registers of birth possible, and in order to establish the age of a child, recourse is had to a record made by any incorporated society, such as the Children's Aid Society.

In *R. v. GOSSELIN*(1927), 47 C.C.C.318, a magistrate said that the section was broad enough to permit an inference that a person charged under s.211 (now s.143) was over eighteen years of age. It was held on appeal that s.984 did not apply to an accused under s.211.

This section has been widened to apply generally and not, as formerly, to cases of sexual offences.

Subsec.(2) applies "in the absence of other evidence". The *Canada Evidence Act*, R.S.C. 1952, c.307, s.35, makes provision for documentary proof. As to other evidence see *R. v. SPERA*, *ante*, p.245.

CORROBORATION.

UNSWORN EVIDENCE OF CHILD.

566. No person shall be convicted of an offence upon the unsworn evidence of a child unless the evidence of the child is corroborated in a material particular by evidence that implicates the accused.

This is the former s.1003(2). The section was s.685 in the Code of 1892 and came from 53 Vict., c.37, s.13 (Can.) and 48-49 Vict., c.69, s.4 (Imp.).

It was held in *R. v. BROWN*(1951), 99 C.C.C.305, that the fact that a child of tender years who was sworn had previously been instructed by her mother concerning the nature of an oath, was not a valid objection to her evidence.

S.1003(1) as to taking the evidence unsworn, is not continued but is left to the operation of s.16(1) of the *Canada Evidence Act*. Although a good deal has been written with reference to differences in wording between the two provisions, there is authority in the cases for considering them to be co-extensive: *R. v. SILVERSTONE*(1934), 61 C.C.C.258; *R. v. GEMMILL*(1924), 43 C.C.C.360. Apart from that, Bill No. 69 of 1892 (The *Canada Evidence Act*) gives 53 Vict., c.37, s.13 as the source, the same as the Code of 1892 shows for s.685.

As to corroboration, see notes to s.131 *ante*, also *PAIGE v. R.*(1948), 92 C.C.C.32, on the point that the requirement of corroboration is not satisfied by the unsworn evidence of a child received under the *Evidence Act*.

VERDICTS.

FULL OFFENCE CHARGED, ATTEMPT PROVED.

567. Where the complete commission of an offence charged is not proved but the evidence establishes an attempt to commit the offence, the accused may be convicted of the attempt.

OLD CODE:

984. To prove the age of a boy, girl, child or young person for the purposes of sections two hundred and eleven, two hundred and fifteen, two hundred and forty-two, two hundred and forty-three, two hundred and forty-five, two hundred and ninety-four, three hundred and one, three hundred and two, three hundred and fifteen and three hundred and sixteen, 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, shall be prima facie evidence of such age. (2) 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 therein is held, may infer the age from the appearance of the boy, girl, child or young person.

1003. (2) 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.

949. When the complete commission of an 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.

This is the former s.949. It was s.711 in the Code of 1892 and was identical with s.490 of the E.D.C. It replaced R.S.C. 1886, c.174, s.183, which, however, observed the distinction between felony and misdemeanour abolished by the Code. As to murder or infanticide see ss.569 and 570; otherwise, as to attempts generally, see ss.24 and 406 *ante*.

"To commit the offence". That is, the offence with which he is charged: *R. v. McPHERSON*(1857), Dears. & B.197. The words in the statute of 1886 were "the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanour charged, but is guilty of an attempt to commit the same."

In *R. v. BROWN*(1928), 49 C.C.C.334, a charge of carnal knowledge was dismissed for lack of corroboration but a conviction entered for an attempt. The conviction was set aside on appeal. "There is no evidence of an attempt to commit the offence except such, if any, as may be involved in the evidence of its actual commital." On the other hand in *R. v. CUTT*(1936), 67 C.C.C.240, where a conviction was made for an attempt to commit the offence against s.202, it was argued on appeal that, since the magistrate had held that there was not sufficient corroboration to warrant a conviction for the completed offence, the conviction for the attempt should be quashed for the same reason. The court, however, held that the offences were distinct and separate.

ATTEMPT CHARGED, FULL OFFENCE PROVED.—Conviction a bar.

568. (1) Where an attempt to commit an offence is charged but the evidence establishes the commission of the complete offence, the accused is not entitled to be acquitted, but the jury may convict him of the attempt unless the judge presiding at the trial, in his discre-

Section 568—*continued*

tion, discharges the jury from giving a verdict and directs that the accused be indicted for the complete offence.

(2) An accused who is convicted under this section is not liable to be tried again for the offence that he was charged with attempting to commit.

This is the former s.950 which was s.712 in the Code of 1892, with which R.S.C. 1886, c.174, s.184 is cited, and s.491 in the E.D.C.

It was explained in *R. v. LANDLOW*(1922), 38 C.C.C.54, that:

"At common law an attempt to commit an offence, whether the main offence was felony or misdemeanour, was merely a misdemeanour itself. Consequently, if the accused were indicted for an attempt and the evidence disclosed the full offence and the full offence was felony the accused was entitled to be discharged and *vice versa*. Section 950 abrogates the common law rule . . . . . This section, from its phraseology would appear to apply to criminal courts sitting with the assistance of a jury and does not apply to courts of summary jurisdiction."

OFFENCE CHARGED, PART ONLY PROVED.—Conviction for infanticide or manslaughter on charge of murder.—Conviction for concealing body of child where murder or infanticide charged.

569. (1) A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted

***(a)* of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved, or**

***(b)* of an attempt to commit an offence so included.**

(2) Subject to subsection (3), where a count charges murder and the evidence proves manslaughter or infanticide but does not prove murder, the jury may find the accused not guilty of murder but guilty of manslaughter or infanticide, but shall not on that count find the accused guilty of any other offence.

(3) Where a count charges the murder of a child or infanticide and the evidence proves the commission of an offence under section 215 but does not prove murder or infanticide, the jury may find the accused not guilty of murder or infanticide, as the case may be, but guilty of an offence under section 215.

This comes from the former ss.951(1) and (2) and 952. These were s.713 in part, and s.714 of the Code of 1892, the former an extension of R.S.C. 1886, c.174, s.191, by reason of the abolition of the distinction between felony and misdemeanour. It formed part of s.492 in the E.D.C. S.714 came from R.S.C. 1886, c.174, s.188, and 24 & 25 Vict., c.100, s.60 (Imp.).

Note that the former s.951(3) is not continued. In that connection see s.191 *ante* and notes thereto.

In this section, subsec.(1), has been altered to enable the court to convict of an included offence punishable on summary conviction. Previously that could not be done: *R. v. LOUIE YEE*(1929), 51 C.C.C.405;

OLD CODE:

950. 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) 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.

951. 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) On a count charging murder, if the evidence proves manslaughter or infanticide but does not prove murder, the jury may find the accused not guilty of murder but guilty of manslaughter or infanticide, but shall not on that count find the accused guilty of any other offence.
(3) Upon a charge of manslaughter arising out of the operation of a motor vehicle the jury, and in the province of Alberta a judge having jurisdiction and sitting without a jury, if satisfied that the accused is not guilty of manslaughter but is guilty of an offence under subsection six of section two hundred and eighty-five may find him guilty of that offence and such conviction shall be a bar to further prosecution for any offence arising out of the same facts.

952. 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 it might have passed if such person had been convicted upon an indictment for the concealment of birth.

R. v. GLENDAY et al.(1945), 85 C.C.C.385; *R. v. LEVESQUE*(1944), 83 C.C.C.278; *EAST CREST OIL CO. LTD. v. R.*(1945), 83 C.C.C.211. See also s.519 *ante*.

This change would also appear to vary what was said in *R. v. LETENDRE*(1928), 50 C.C.C.419, at p.422, that the power given by s.951 "must be deemed to be subject to the qualification that the included offence is one which the tribunal has jurisdiction to try, and no other view seems reasonable."

In subsec.(3) the inclusion of infanticide brings the section into conformity with the provisions relating to that offence and enables the jury to bring in a verdict of concealment of birth.

In *R. v. CHERRY*(1927), 48 C.C.C.180, the following appears at p.185: "I think that the framers of the Cr. Code had in mind that it was impossible for them to foresee the many grounds on which a charge might fail, that some of those grounds might be of such nature as to place an accused in an unfair position with respect to a lesser offence,

Section 569—*continued*

and that the safest course was to limit the section to the class of cases then suggesting itself to them as the only one where the accused, manifestly, could not be hampered in any circumstances."

NO ACQUITTAL UNLESS ACT OR OMISSION NOT WILFUL.

570. Where a female person is charged with infanticide and the evidence establishes that she caused the death of her child but does not establish that, at the time of the act or omission by which she caused the death of the child,

(a) **she was not fully recovered from the effects of giving birth to the child or from the effect of lactation consequent on the birth of the child, and**

(b) **the balance of her mind was, at that time, disturbed by reason of the effect of giving birth to the child or of the effect of lactation consequent on the birth of the child,**

she may be convicted unless the evidence establishes that the act or omission was not wilful.

This is new. See notes to s.204 *ante*.

PREVIOUS CONVICTIONS.

NO REFERENCE TO PREVIOUS CONVICTION.

571. No indictment in respect of an offence for which, by reason of previous convictions, a greater punishment may be imposed shall contain any reference to previous convictions.

This is new. See ss.222 and 223 *ante*, and s.660 *post*, and notes to next section. See also s.663 and notes to s.712 *post*.

PREVIOUS CONVICTION. — Procedure where previous conviction alleged. — Corporations.

572. (1) Where an accused is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed upon him by reason thereof unless the prosecutor satisfies the court that the accused, before making his plea, was notified that a greater punishment would be sought by reason thereof.

(2) Where an accused is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, the court shall, upon application by the prosecutor and upon being satisfied that the accused was notified in accordance with subsection (1), ask the accused whether he was previously convicted and, if he does not admit that he was previously convicted, evidence of previous convictions may be adduced.

(3) Where, pursuant to section 531, the court proceeds with the trial of an accused corporation that has not appeared and pleaded to an indictment, the court may, if the accused is convicted, make inquiries with respect to previous convictions whether or not the accused was notified that a greater punishment would be sought by reason thereof.

This replaces the former ss.851 and 963. The former was s.628 in the Code of 1892, and R.S.C. 1886, c.174, s.139. It came from the *Larceny*

OLD CODE:

851. In any indictment for an indictable offence, committed after a previous conviction or convictions for any indictable offence or offences, or for any offence or offences, for which a greater punishment may be inflicted by reason of such previous conviction, 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 offences, 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 or offences, without otherwise describing the previous offence or offences.

963. Upon any indictment for committing any offence after a previous conviction or convictions, the offender shall, in the first instance, be arraigned upon so much only of the 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.

(2) 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.

Act 1861 (Imp.), the *Offences against the Coin Act* 1861 (Imp.), and 34-35 Vict., c.112, s.9. S.963 formed part of s.676 in the Code of 1892, with which R.S.C. 1886, c.174, s.207, is cited. It was s.494 in the E.D.C.

By 1943-44, c.23, amendments were made to s.710(4) (Part XV), s.781A (Part XVI), s.827(5) and s.834A (Part XVIII) to the general effect that previous convictions were not to be mentioned in cases where a second offence carried a heavier penalty. There was no similar provision in Part XIX and s.963 contemplated that a previous conviction would appear in the indictment.

Under ss.571 and 572, the new procedure will be that the information or indictment will not refer to previous convictions but that if the prosecution wants the court to deal with the accused as a subsequent offender, *it will have to satisfy the court that it has notified the accused of its intention to make an application to that end.*

This provision for notice is designed to obviate the possibility of prejudice to the accused by reason of previous convictions coming to the knowledge of the jury or the court before accused is convicted of the charge on which he is brought before the court. It is in accord too with the judgment in *R. v. BENSON & STEVENSON*(1951), 100 C.C.C. 247, in which it was said, at p.256, that a convicted man ought to be informed of the substance of a pre-sentence report of a probation officer, insofar as it is detrimental to him, so that he may have an opportunity to agree therewith or explain or deny it if he chooses so to do.

EVIDENCE OF CHARACTER.

573. Where, at a trial, the accused adduces evidence of his good character the prosecutor may, in answer thereto, before a verdict is returned, adduce evidence of the previous conviction of the accused for any offences, including any previous conviction by reason of which a greater punishment may be imposed.

This comes from the former s.964 which formed part of s.676 in the Code of 1892, with which R.S.C. 1886, c.174, s.207 is cited. Similar provisions, taken from 6 and 7 Wm. IV, c.111, s.8, appeared as a proviso to s.494 in the E.D.C.

Under this section and s.572 there is a variance from the former procedure in that the Crown, even if it adduces evidence of previous convictions, must still make application for the increased penalty if one is sought.

In *R. v. SHRIMPTON*(1851), 2 Den.319, it was said that:

"It seems to me to be the natural and necessary interpretation to be put upon the words of the proviso in the statute, that if, whether by himself or by his counsel, the prisoner attempts to prove a good character, either directly, by calling witnesses, or indirectly, by cross-examining the witnesses for the Crown, it is lawful for the prosecutor to give the previous conviction in evidence for the consideration of the jury."

There are some differences to be noted between Canadian and English practice upon this matter of evidence. Under s.12 of the *Canada Evidence Act* the accused, if he makes himself a witness, may be questioned as to whether he has been convicted of any offence. This provision is not in English law. Again, the *Criminal Evidence Act* 1898 (Imp.), in s.1(f) includes the conditions set out in *R. v. SHRIMPTON*, and also cases where the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or his witnesses, or where he has given evidence against any other person charged with the same offence. These conditions are not set out in the *Canada Evidence Act*. With these qualifications in mind, the following rules, laid down by Viscount Simon in *STIRLAND v. D.P.P.*, [1944]A.C.315, may be quoted. After pointing out that it is difficult to trace the historical development of the rule that the prosecution may not, generally speaking, introduce evidence of previous bad character, but that the accused may call evidence of previous good character, he proceeds at p.326:

"The following propositions seem to cover the ground. (I am omitting the rule which admits evidence tending to prove other offences where this evidence is relevant to the issue being tried as helping to negative accident or to establish system, intent or the like). 1. The accused in the witness box may not be asked any questions 'tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless' one or other of the three conditions set out in para. (f) of s.1 of the Act of 1898 is fulfilled. 2. He may, however, be cross-examined as to any of the evidence he has given in-chief, including statements concerning his good record, with a view to testing his veracity or accuracy or to showing that he is not to be believed on his

OLD CODE:

964. 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.

982. 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.

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oath. 3. An accused who 'puts his character in issue' must be regarded as putting the whole of his past record in issue. He cannot assert his good conduct in certain respects without exposing himself to inquiry about the rest of his record so far as this tends to disprove a claim for good character. 4. An accused is not to be regarded as depriving himself of the protection of the section, because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses: *R. v. TURNER*, [1944] K.B. 463. 5. It is no disproof of good character that a man has been suspected or accused of a previous crime. Such questions as 'Were you suspected?' or: 'Were you accused?' are inadmissible because they are irrelevant to the issue of character, and can only be asked if the accused has sworn expressly to the contrary: see r. 2 above. 6. The fact that a question put to the accused is irrelevant is in itself no reason for quashing his conviction, though it should have been disallowed by the judge. If the question is not only irrelevant, but is unfair to the accused as being likely to distract the jury from considering the real issues and so lead to 'a miscarriage of justice' (Criminal Appeal Act, 1907, s.4, sub-sec.1), it should be disallowed, and, if not disallowed, is a ground on which an appeal against conviction may be based."

As to evidence of similar acts, see notes to s.149, *ante*, esp. *NOOR MOHAMMED v. R.*, [1949]1 All E.R.365. The distinction between English and Canadian law is discussed in *R. v. MULVIHILL*(1914), 22 C.C.C.354. See also s.663 and notes to s.712 *post*.

PROOF OF PREVIOUS CONVICTION.

574. In any proceedings,

(a) **a certificate setting out with reasonable particularity the conviction in Canada of an accused for an indictable offence, purporting to be signed by the person who made the conviction or by the clerk of the court, or**

(b) **a copy of the summary conviction in Canada of an accused, purporting to be signed by the person who made the conviction or by the clerk of the court to which it was returned,**

Section 574—*continued*

is, upon proof of the identity of the accused, *prima facie* evidence of the conviction of the accused without proof of the signature or official character of the person by whom it purports to be signed.

This comes from the former s.982 which was s.694 in the Code of 1892, and R.S.C. 1886, c.174, s.230.

In *R. v. STREATCH*(1950), 26 M.P.R.174, it was said that:

"There is nothing in s.982 itself, nor in any of the decided cases which I have been able to find, which says that the production of the original conviction, as at common law, is insufficient. Indeed, the trend of the cases would seem to lean to the view that the best evidence of all is the production of the conviction itself from the proper custody." (*R. v. BAT*(1926), 46 C.C.C. 151, at p.154 cited.

It was held too that the section is in accord with the common law in requiring proof of identity.

In *R. v. LALONDE*, [1951]O.W.N.15, at p.16, the following appears: "S.982 of the Code does not provide that proof of a previous conviction may only be made as contemplated therein. . . . . The Crown is not restricted to any one particular method of proof in adducing evidence of previous convictions: *R. v. BLACKSTOCK*(1950), 97 C.C.C. 201." (S.23 *Canada Evidence Act* also referred to.)

See also *Canada Evidence Act*, s.12 and ss.660 & 712 *post*.

SENTENCE.

ACCUSED FOUND GUILTY MAY SPEAK TO SENTENCE.—Saving.

575. Where a jury finds an accused guilty, or where an accused pleads guilty, the judge who presides at the trial shall ask the accused whether he has anything to say before sentence is passed upon him, but an omission to comply with this section does not affect the validity of the proceedings.

This is the former s.1004. It was s.733(1) in the Code of 1892 and part of s.529 in the E.D.C. It appeared also in the *Larceny Act* 1861, s.116, and the *Coin Act* 1861, s.37 (both Imp.).

This provision, called the allocutus is a survival of the time when the accused could not give evidence nor call witnesses. It gives him or his counsel an opportunity to plead for clemency, or (subject now to s.510(1) *ante*) to raise questions of law. It is, as well, correlative to the practice set out in the following quotation from Archbold's Cr. Pl., 28th ed., p.236, quoted and applied in *R. v. PILUK*(1933), 60 C.C.C.92 and *R. v MARKOFF*(1937), 67 C.C.C.308:

"As an aid to determining the appropriate punishment the Court will after verdict, hear evidence for the Crown or the defendant, either *viva voce* or by affidavit. . . . . It is now the practice after verdict, to hear evidence of character generally, and of previous convictions not included in the indictment. In *R. v. CAMPBELL* (1911), 6 Cr. App. R 131, the Court of Criminal Appeal considered that in all trials after conviction there should be given accurate information as to the general character and other material circumstances of the prisoner even though such information was not available in the form of evidence

OLD CODE:

1004. 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: Provided that the omission so to ask shall have no effect on the validity of the proceedings.

1005. If one sentence is passed upon any verdict of guilty on more counts of an indictment than one, the sentence shall be good if any of such counts would have justified it.

1008. If sentence of death is passed upon any woman she may move in arrest of execution on the ground that she is pregnant.

(2) If such 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.

(3) If upon the report of any of them it appears to the court that she is so with child, execution shall be arrested until she is delivered of a child, or until it is no longer possible in the course of nature that she should be so delivered.

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proper, and that such information when given could rightly be taken into consideration by the Judge in determining the quantum of punishment unless it was challenged and contradicted by or on behalf of the prisoner, in which case the Judge should either direct proper proof to be given or should ignore the information. It is important that there should be precision and accuracy in any such information. See *R. v. STRATTON*(1914), 10 Cr. App. R. 35; *R. v. ELLEY*(1921), 15 Cr. App. R. 143."

SENTENCE JUSTIFIED BY ANY COUNT.

576. Where one sentence is passed upon a verdict of guilty on two or more counts of an indictment, the sentence is good if any of the counts would have justified the sentence.

This is the former s.1005, which was s.626(5) in the Code of 1892, and formed part of s.493 in the E.D.C.

This section is illustrated by *R. v. MORGAN; MORGAN v. MALEPART*(1913), 25 C.C.C.192. Accused was convicted for two offences of forgery, and one sentence of five years in the penitentiary was passed without specific reference to either charge. Either would have rendered him liable to a penalty of that duration, and the sentence was held to be good under s.1005.

WOMAN SENTENCED TO DEATH WHILE PREGNANT.—Inquiry as to pregnancy.—Arresting execution.

577. (1) A female person who is sentenced to death may move in arrest of execution on the ground that she is pregnant.

(2) Where a motion is made under subsection (1), the court shall direct one or more registered medical practitioners to be sworn to examine the female person together or successively and to determine whether or not she is pregnant.

(3) Where, from the report of a medical practitioner sworn under subsection (2), it appears to the court that a female person to

Section 577—*continued*

whom this section applies is pregnant, execution shall be arrested until she is delivered of the child or until it is no longer possible in the course of nature that she should be so delivered.

This comes from the former s.1008, which was s.730 in the Code of 1892 and part of s.531 in the E.D.C. It has been re-drawn to make it unnecessary for the medical practitioners to certify whether the child is "a quick child".

See notes to ss.510 and 575 *ante*. Bryne's L.D. says that in two cases the Court is bound to grant a reprieve, namely, where a female prisoner under sentence of death is pregnant, and where a prisoner becomes insane after judgment.

The former s.1009 which abolished the jury *de ventre inspiciendo*, is omitted. That was a jury of matrons impanelled to try whether or not a female prisoner was pregnant.

FORMAL DEFECTS IN JURY PROCESS.

JUDGMENT NOT TO BE STAYED ON CERTAIN GROUNDS.

578. Judgment shall not be stayed or reversed after verdict upon an indictment

***(a)* by reason of any irregularity in the summoning or empanelling of the jury, or**

***(b)* because a person who served upon the jury was not returned as a juror by a sheriff or other officer.**

This comes from the former s.1010(1) and is expressed in general terms. S.1010 was s.734 in the Code of 1892 and came from R.S.C. 1886, c.174, s.246, and 7 Geo. IV, c.64, s.21 (Imp.).

Suggestion is not referred to. It was an allegation filed in the record of an action in the King's Bench Division referring to a change of parties.

Similiter has been dropped as being obsolete. It was a set form of words by which the plaintiff or defendant in an action signified his acceptance of the issue tendered by the adversary's pleading. "And the plaintiff (or defendant as the case might be) doth the like."

S.1010(2) (Indictment sufficient after verdict notwithstanding certain objections.) This came from 7 Geo. IV, c.64, s.21 (Imp.). It has been dropped as being covered by ss.853 and 854 (see now ss.492 and 500).

See notes to ss.510, 537 and 538 *ante*, and s.580 *post*.

DIRECTIONS AS TO JURY OR JURORS DIRECTORY.

579. No omission to observe the directions contained in any Act with respect to the qualification, selection, balloting or distribution of jurors, the preparation of the jurors' book, the selecting of jury lists, or the drafting of panels from the jury lists, is a ground for impeaching or quashing a verdict rendered in criminal proceedings.

This comes from the former s.1011, which was s.734 in the Code of 1892, as amended 1893, and came from R.S.C. 1886, c.174, s.247. The reference to special juries has been dropped. The Code contained no other reference to them. The E.D.C. by ss.477 *et seq*. made provision for

OLD CODE:

1009. No jury de ventre inspiciendo shall be empanelled or sworn.

1010. Judgment, after verdict upon an indictment for any offence against this Act, shall not be stayed or reversed.

(a) for want of a similiter;

(b) by reason that the jury process has been awarded to a wrong officer, upon an insufficient suggestion;

(c) for any misnomer or misdescription of the officer returning such process, or of any of the jurors; or

(d) because any person has served upon the jury who was not returned as a juror by the sheriff or other officer.

(2) 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.

1011. 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 of 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.

965. Nothing in this Act shall alter, abridge or affect any power or authority which any court or judge has hitherto had, or any existing practice or form in regard to trials by jury, jury process, juries or jurors, except in cases where such power or authority, practice or form is expressly altered by or is inconsistent with the provisions of this Act.

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them but these provisions were not adopted in Canada. Special juries were abolished in England, except for certain commercial cases in London, by 1949, c.27.

See also ss.556(3), 537, 538 and 580 and notes thereto.

SAVING POWERS OF COURT.

580. Nothing in this Act alters, abridges or affects any power or authority that a court or judge had immediately before the coming into force of this Act, or any practice or form that existed immediately before the coming into force of this Act, with respect to trials by jury, jury process, juries or jurors, except where the power or authority, practice or form is expressly altered by or is inconsistent with this Act.

This is the former s.965. It was s.675 in the Code of 1892 and came from R.S.C. 1886, c.174, s.170.

In *R. v. MULVIHILL*(1914), 22 C.C.C.354, at p.364, Martin, J.A., gave the following illustrations of matters of judicial discretion within the scope of this section (authorities cited by him are omitted):

"(1) The right of a judge to relax the general rule of evidence and allow the Crown to give further evidence after the close of the prisoner's case.

(2) The determination of the hostility of a witness, *i.e.*, 'in case the

Section 580—*continued*

witness shall in the opinion of the Judge prove adverse,' because the Judge's discretion must be principally, if not wholly, guided by the witness' behaviour and language in the witness box.

(3) The granting of a view under s.958 of the Criminal Code (now s.559).

(4) The discharging of the jury after disagreement and postponing the trial 'on such terms as justice may require' under s.960. . . . . , (now s.560) which discretion, by subsec.2 it is declared that 'it shall not be lawful for any court to review,' differing in this respect from the right to discharge for disobedience and postpone under the preceding s.959, subsec.(3) (now s.556(4)).

(5) The discharging of the jury without giving a verdict because of the illness or drunkenness of one of them, or otherwise.

(6) The keeping of the jury together under s.945(3), (see now s.556(1)) and

(7) I should think, the admission of the unsworn evidence of children under s.1003 Criminal Code and s.16 of the *Canada Evidence Act* (see now s.566), whereby the matter rests 'in the opinion of the Court' or justices, etc., which is the same expression as was held to confer an absolute discretion in my second illustration."

PART XVIII.

APPEALS—INDICTABLE OFFENCES.

"COURT OF APPEAL."—"Indictment."—"Registrar."—"Sentence".—"Trial court."

581. In this Part,

***(a)* "court of appeal" means the court of appeal, as defined by paragraph (9) of section 2, for the province or territory in which the trial of a person by indictment is held;**

***(b)* "indictment" includes an information or charge in respect of which a person has been tried for an indictable offence under Part XVI;**

***(c)* "registrar" means the registrar or clerk of the court of appeal;**

***(d)* "sentence" includes an order made under section 628, 629 or 630 and a direction made under section 638; and**

***(e)* "trial court" means the court by which an accused was tried and includes a judge or a magistrate acting under Part XVI.**

Provisions for appeal were contained in ss.742 *et seq.* in the Code of 1892 and embodied provisions set out in ss.538 *et seq.* of the E.D.C. The provisions in the Code were repealed in 1923 and replaced by ss.1012 to 1022. These were largely a re-enactment of provisions contained in the *Criminal Appeal Act* 1907 (Imp.), but with the notable exception of the power to grant a new trial.

S.581 comes from the former s.1012. The definition of appellant has been dropped as unnecessary. The definition of "sentence" has been changed and is designed to allow an appeal against the suspension of