

Section 167—*continued*

- held to be an offence to burn a body for the purpose of preventing an inquest: *R. v. STEPHENSON*(1884), 13 Q.B.D.331. And in *R. v. CLARK* (1883), 15 Cox.C.C.171, cited under s.165, the exposure of a dead body near a highway was held to constitute a nuisance.

Stephen, in his History of Criminal Law, Vol. III, p.127, says: "The dead body of a human being is almost the only movable object known to me which by our law is no one's property, and cannot, so long at all events, as it exists as such, become the property of any one. I suppose, however, that anatomical specimens and the like are personal property."

This statement was cited in *PHILLIPS v. MONTREAL GENERAL HOSPITAL*(1908), 4 E.L.R.477, but regarded as being subject to qualification, since the husband or wife or relatives of a deceased person are entitled to *possession* of the body for the purpose of burial. In that case and also in *EDMONDS v. ARMSTRONG FUNERAL HOME, LTD.*, [1931]1 D.L.R.676, it was held that the performance of an unauthorized autopsy was a ground for civil action.

Earlier cases relating to the sale of dead bodies for dissection are *R. v. LYNN*(1788), 1 Leach 497, *R. v. FEIST*(1858), Dears. & B.590, and *R. v. SHARPE*(1857), Dears. & B. 160.

## PART V.

## DISORDERLY HOUSES, GAMING AND BETTING.

## INTERPRETATION.

"BET."—"Common bawdy-house."—"Common betting house."—"Common gaming house."—"Disorderly house."—"Game."—"Gaming equipment."—"Keeper."—"Place."—Exception.—Charitable organizations.—Onus.—Effect when game partly played on premises.

## 168. (1) In this Part,

- (a) "bet" means a bet that is placed on any contingency or event that is to take place in or out of Canada, and without restricting the generality of the foregoing, includes a bet that is placed on any contingency relating to a horse-race, fight, match or sporting event that is to take place in or out of Canada;
- (b) "common bawdy-house" means a place that is
  - (i) kept or occupied, or
  - (ii) resorted to by one or more persons
 for the purpose of prostitution or the practice of acts of indecency;
- (c) "common betting house" means a place that is opened, kept or used for the purpose of
  - (i) enabling, encouraging or assisting persons who resort thereto to bet between themselves or with the keeper, or
  - (ii) enabling any person to receive, record, register, transmit or pay bets or to announce the results of betting;
- (d) "common gaming house" means a place that is
  - (i) kept for gain to which persons resort for the purpose

**OLD CODE:**

225. *A common bawdy house is a house, room, set of rooms or place of any kind kept for purposes of prostitution or for the practice of acts of indecency, or occupied or resorted to by one or more persons for such purposes.*

226. *A common gaming house is*

(a) *a house, room or place kept by any person for gain, to which persons resort to for the purpose of playing at any game of chance, or at any mixed game of chance and skill; or*

(b) *a house, room or place kept or used for playing therein at any game of chance or any mixed game of chance and skill, in which*

(i) *a bank is kept by one or more of the players exclusively of the others; or*

(ii) *the whole or any portion of the stakes or bets or other proceeds at or from such games is either directly or indirectly paid to the person keeping such house, room or place, or any direct or indirect fee is charged to or paid by the players or any of them for the right or privilege of participating, or for the purpose of enabling them or any of them to participate, in such games or for the use of any gaming appliances, tables, chairs or other paraphernalia employed in playing such games; but the provisions of this subparagraph shall not apply to any house, room or place while occupied and used by an incorporated bona fide social club or branch thereof if the whole or any portion of the stakes or bets or other proceeds at or from such games is not either directly or indirectly paid to the person keeping such house, room or place, and no fee in excess of ten cents per hour or fifty cents per day is charged to the players for the right or privilege of participating in such games, nor while occasionally being used by charitable or religious organizations for playing games therein for which a direct fee is charged to the players if the proceeds are to be used for the benefit of any charitable or religious object;*

(iii) *any game is played the chances of which are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the game is managed, or against whom the other players stake, play or bet.*

(2) *Any such house, room, or place shall be a common gaming-house, although part only of such game is played there and any other part thereof is played at some other place, either in Canada or elsewhere, and although the stake played for, or any money, valuables, or property depending on such game, is in some other place, either in Canada or elsewhere.*

227. *A common betting-house is a house, office, room or place*

(a) *opened, kept or used for the purpose of betting between persons resorting thereto, and*

(i) *the owner, occupier or keeper thereof,*

(ii) *any person using the same,*

(iii) *any person procured or employed by, or acting for or on behalf of any such person,*

(iv) *any person having the care or management, or in any manner conducting the business thereof; or*

(b) *opened, kept or used for the purpose of any money or valuable thing being received by or on behalf of any such person as aforesaid,*

(i) *all or any part of which money or valuable thing or its equivalent is to be paid or given to any other person on any event or contingency of or relating to any horse-race or other race, fight, game or sport, or*

(ii) *for securing the paying or giving by some other person of any money or*

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- of playing games; or
  - (ii) kept or used for the purpose of playing games
    - (A) in which a bank is kept by one or more but not all of the players,
    - (B) in which all or any portion of the bets on or proceeds from a game is paid, directly or indirectly, to the keeper of the place,
    - (C) in which, directly or indirectly, a fee is charged to or paid by the players for the privilege of playing or participating in a game or using gaming equipment, or
    - (D) in which the chances of winning are not equally favourable to all persons who play the game, including the person, if any, who conducts the game;
  - (e) "disorderly house" means a common bawdy-house, a common betting house or a common gaming house;
  - (f) "game" means a game of chance or mixed chance and skill;
  - (g) "gaming equipment" means anything that is or may be used for the purpose of playing games or for betting;
  - (h) "keeper" includes a person who
    - (i) is an owner or occupier of a place,
    - (ii) assists or acts on behalf of an owner or occupier of a place,
    - (iii) appears to be, or to assist or act on behalf of an owner or occupier of a place,
    - (iv) has the care or management of a place, or
    - (v) uses a place permanently or temporarily, with or without the consent of the owner or occupier; and
  - (i) "place" includes any place, whether or not
    - (i) it is covered or enclosed,
    - (ii) it is used permanently or temporarily, or
    - (iii) any person has an exclusive right of user with respect to it.
- (2) A place is not a common gaming house within the meaning of subparagraph (i) or clause (B) or (C) of subparagraph (ii) of paragraph (d) of subsection (1)
- (a) while it is occupied and used by an incorporated *bona fide* social club or branch thereof if
    - (i) the whole or any portion of the bets on or proceeds from games played therein is not directly or indirectly paid to the keeper thereof, and
    - (ii) no fee in excess of ten cents an hour or fifty cents a day is charged to persons for the right or privilege of participating in the games played therein; or
  - (b) while occasionally it is used by charitable or religious organizations for the purpose of playing games for which a direct fee is charged to persons for the right or privilege of playing, if the proceeds from the games are to be used for a charitable or religious object.

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valuable thing on any such event or contingency; or  
 (c) opened, kept or used for the purpose of recording or registering bets upon any contingency or event, horse-race, or other race, fight, game or sport, or for the purpose of receiving money or other things of value to be transmitted for the purpose of being wagered upon any such contingency or event, horse-race or other race, fight, game or sport, whether any such bet is recorded or registered there, or any money or other thing of value is there received to be so transmitted or not; or

(d) opened, kept or used or outfitted or equipped for the purpose of facilitating or encouraging or assisting in the making of bets upon any contingency or event, horse-race or other race, fight, game or sport, by announcing the betting upon, or announcing or displaying the results of any contingencies or events, of horse-races, or other races, fights, games or sports, or in any other manner, whether such contingency or event, horse-race or other race, fight, game or sport occurs or takes place in Canada or elsewhere.

(2) The word "place", as used in this section and in the preceding section, includes any place, whether inclosed or not, and whether it is used permanently or temporarily, and whether there is or is not exclusive right of user.

985. When any cards, dice, balls, counters, tables or other instruments of gaming used in playing any game of chance or any mixed game of chance and skill are found in any house, room or place suspected to be used as a common gaming house, and entered under a warrant or order issued under this Act, or about the person of any of those who are found therein, it shall be *prima facie* evidence, on the trial of a prosecution under section two hundred and twenty-eight or section two hundred and twenty-nine, that such house, room or place is used as a common gaming house, and that the persons found in the room or place where such instruments of gaming are found were playing therein, although no play was actually going on in the presence of the officer entering the same under such warrant or order, or in the presence of the persons by whom he is accompanied.

(3) The onus of proving that, by virtue of subsection (2), a place is not a common gaming house is on the accused.

(4) A place may be a common gaming house notwithstanding that

(a) it is used for the purpose of playing part of a game and another part of the game is played elsewhere; or

(b) the stake that is played for is in some other place.

The definitions in pars.(1)(a),(f),(g) and (h) are new in this form but are drawn from the former ss.226, 227, 229(2), 985 and 986. In particular, par.(g) is complementary to ss.169 and 171. It was held in *R. v. LEWIS*(1949), 97 C.C.C.268, that the word "equipped" referred to things related to the premises.

Par.(b) is the former s.225. It comes from s.195 in the Code of 1892, which Taschereau describes as new, as amended by 1917, c.14, s.3.

Par.(c) is taken from the former s.227(1). It comes from s.197 in the Code of 1892 and from the *Betting Act*, 16-17 Vict., c.119 (Imp.).

In *R. v. MARIN*(1937), 68 C.C.C.245, it was held that the accused was properly convicted by reason of his use of a poolroom for taking and

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settling bets although he had no interest in its business. *R. v. EAKINS* (1943), 79 C.C.C.256, decided with reference to a public room in a hotel, is *contra*, but the tendency seems to be to follow *R. v. MARIN*, as was done in *R. v. SOKOL*, [1949]2 W.W.R.1218, and *R. v. GIRONÉ and GENOE*(1953), 106 C.C.C.33. An English case, *R. v. PORTER*(1949), 33 Cr.App.R.76, is similar in effect. It appears, however, that a course of conduct must be proved. In *R. v. WEIDMAN*(1954), 11 W.W.R.(N.S.) 374, it was held that the recording of one or perhaps two bets on a certain day was not of itself conclusive proof that the premises were "opened, kept or used for the purpose of betting."

Par.(d) comes from the former s.226(1). Similar provisions appeared in s.196 of the Code of 1892, where Taschereau describes them as new but gives as their origin the *Gaming Act*, 1845, 8-9 Vict. c.109, s.2 (Imp.).

Par.(e) is the former s.2(9a) as enacted by 1948, c.39, s.(1).

Par.(h) is adapted from the former s.227(2) and s.229(3). In *R. v. GIRONÉ and GENOE*, *supra*, it was held that the word "keeper" in s.229 included, not only the keeper as defined in s.227(a)(i), but all the classes mentioned in sub-clauses (a)(i) to (a)(iv).

In *R. v. JUNG YORK*(1951), 99 C.C.C.313, it was held that a person assisting in the government, care or management was properly convicted as a keeper.

Par.(i) is the former s.227(2). See *SAUNDERS v. R.*(1907), 38 S.C.R. 382, quoted under s.178.

Subsec.(2), which now appears as an exception, was formerly part of s.226, to which it was added by 1938, c.44, s.12. Under the section as it stood before that amendment a conviction was quashed in the Supreme Court of Canada in *BAMPTON v. R.*(1932), 58 C.C.C.289, in respect of a club that interested itself in certain sports, but also provided tables for the playing of poker, at which each member paid into its funds the sum of ten cents for each half-hour he played. Duff, J. said:

" . . . . my mind is perfectly clear upon this point, namely that the payment of this fee is not a payment of 'the whole or any portion of the stakes or bets or other proceeds at or from' the games. . . . I think we are justified in saying that . . . . it (the word 'proceeds') . . . . is limited to the proceeds of a betting or gambling game as such, and proceeds similar in character to bets and stakes. . . . The section is aimed, I think, at the participation by the owner of the place where the game is carried on, in the profits or other proceeds accruing to members from the game itself."

In 1937, a prosecution in respect of the same club, which appeared in the meantime to have enjoyed a tremendous increase in membership, was upheld in *R. v. WILLIAMSON*(1937), 51 B.C.R.456. MacDonald, J.A., said at p.479:

"My conclusion is that whatever its status may have been a few years ago, it became in recent years in substance a proprietary club."

It will be observed that the word "occasionally" still appears. It was held in *R. v. McGEE*(1942), 77 C.C.C.302, where the accused sublet premises to various organizations for bingo, with the result that games were taking place on five evenings and two afternoons a week, that this was not occasional use on his part. In *R. v. PARROTT*(1946), 87 C.C.C.

**OLD CODE:**

986. In any prosecution under section two hundred and twenty-eight or under section two hundred and twenty-nine it shall be *prima facie* evidence that a house, room or place is a disorderly house if any constable or officer authorized to enter any house, room or place is wilfully prevented from or obstructed or delayed in entering the same, or any part thereof.

(2) If any house, room or place is found fitted or provided with any means or contrivance for playing any game of chance or any mixed game of chance and skill, gaming or betting, or with any device for concealing, removing or destroying such means or contrivance it shall be *prima facie* evidence that such house, room or place is a common gaming house or common betting house as the means or contrivance may indicate.

(3) In any prosecution under section two hundred and twenty-eight, subsection one, two hundred and twenty-nine, or two hundred and thirty, evidence that a person was convicted for being the keeper of a disorderly house shall be *prima facie* evidence that such house is a disorderly house as against any person charged with being or having been at the same time, an inmate or frequenter of the same disorderly house.

127, it was held that the use of premises by a service club at a carnival during which gaming was carried on during part of each day for six consecutive days, was occasional use within the exemption. In this case all the proceeds went to charity.

Subsec.(3) has been added to make clear where the onus lies. It was held in *R. v. HELLENIC COLONIZATION ASSOCIATION* (1942), 77 C.C.C.274, that the burden was on the person who claimed the exemption, but that he was not required to establish it beyond a reasonable doubt.

Subsec.(4) is derived from the former s.226(2).

**PRESUMPTIONS.**

**FROM OBSTRUCTION.**—From device for concealment.—From gaming equipment.—From previous conviction.

**169.** In proceedings under this Part,

- (a) evidence that a peace officer who was authorized to enter a place was wilfully prevented from entering or was wilfully obstructed or delayed in entering is *prima facie* evidence that the place is a disorderly house;
- (b) evidence that a place was found to be equipped with gaming equipment or any device for concealing, removing or destroying gaming equipment is *prima facie* evidence that the place is a common gaming house or a common betting house, as the case may be;
- (c) evidence that gaming equipment was found in a place entered under a warrant issued pursuant to this Part, or on or about the person of anyone found therein, is *prima facie* evidence that the place is a common gaming house and that the persons found therein were playing games, whether or not any person acting under the warrant observed any persons playing games therein; and

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(d) evidence that a person was convicted of keeping a disorderly house is, for the purpose of proceedings against any one who is alleged to have been an inmate or to have been found in that house at the time the person committed the offence of which he was convicted, *prima facie* evidence that the house was, at that time, a disorderly house.

This combines the former ss.985 and 986(1),(2) and (3) which came from ss.702 and 703 of the Code of 1892. The former had its origin in the *Gaming Act* of 1845 (Imp.) and the latter in the *Gaming Houses Act*, 1854, 17-18 Vict. c.38, s.2. It is to be read with s.168(1)(g) and s.171.

It was held in *R. v. WONG SIM*, [1928] 3 W.W.R.492 following *R. v. HONG GUEY*(1907), 12 C.C.C.366, that the presumption created by par.(c) does not apply where the charge is in respect of a lottery.

S.986(2) was invoked to sustain a conviction in *R. v. KNIGHT*(No. 2) (1951), 100 C.C.C.293.

In *R. v. OWAD*(1952), 102 C.C.C.155, it was held that evidence of the general reputation of the premises was receivable. On this point, see also notes to s.182, *post*.

## CONCLUSIVE PRESUMPTION FROM SLOT MACHINE.—“Slot machine.”

170. (1) For the purpose of proceedings under this Part, a place that is found to be equipped with a slot machine shall be conclusively presumed to be a common gaming house.

(2) In this section “slot machine” means any automatic machine or slot machine

(a) that is used or intended to be used for any purpose other than vending merchandise or services; or

(b) that is used or intended to be used for the purpose of vending merchandise or services if

(i) the result of one of any number of operations of the machine is a matter of chance or uncertainty to the operator,

(ii) as a result of a given number of successive operations by the operator the machine produces different results, or

(iii) on any operation of the machine it discharges or emits a slug or token.

This is the former s.986(4) as enacted by 1938, c.44, s.46.

The history of this provision is traced in *JOHNSON v. A.-G. ALBERTA*(1954), 108 C.C.C.1, at p.22. The first specific reference to automatic machines was added to s.986 by 1924, c.35. In the same year the Legislature of Alberta enacted the first of the provincial Slot Machines Acts. The provisions of the Code relating to automatic machines were replaced by 1930, c.11, s.27 in a form which remained until 1938, when by c.44, s.46, a new provision referring to slot machines was enacted.

Meanwhile, in 1935, Alberta replaced its Act of 1924, and Manitoba and Saskatchewan passed Slot Machine Acts. These were followed in 1936 by Acts dealing with the same subject in Nova Scotia, New Bruns-

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## Section 986—continued

(4) In any prosecution under section two hundred and twenty-nine any automatic or slot machine used or intended to be used for any purpose other than for vending merchandise or services shall, and any such machine used or intended to be used for vending merchandise shall, if the result of one of any number of operations of it is, as regards the operator, a matter of chance or uncertainty or if as a consequence of any given number of successive operations it yields different results to the operator or if on any operation it discharges or emits any slug or token, other than merchandise, be deemed to be a means or contrivance for playing a game of chance notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance and if any house, room or place is found fitted or provided with any such machine there shall be an irrebuttable presumption that such house, room or place is a common gaming house.

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wick and Prince Edward Island. "The statutes thus adopted by six of the Provinces of Canada, while differing in some respects in the language employed in defining what was a slot machine and in dealing with the matter of penalties, had one provision in common, namely, that such machines were declared to be incapable of ownership or of giving rise to property rights. The Province of Ontario enacted a Slot Machine Act in 1944 (c.57) and the Province of Quebec in 1946 (c.19)."

The constitutionality of this common provision has been challenged in several instances. The Alberta Act of 1935 was upheld by the Appellate Division in *R. v. STANLEY*(1936), 64 C.C.C.385; the provision in the Saskatchewan Act was held to be *ultra vires* in *R. v. KARMINOS* (1936), 65 C.C.C.165; but held by the Manitoba Court of Appeal in *R. v. MAGID*(1936), 65 C.C.C.78, to be *intra vires*.

Similar questions have arisen in several recent cases in which there has been reference also to s.986(4). In the *JOHNSON* case it was held that the *Alberta Slot Machine Act*, R.S.A. 1942, c.333 was wholly *ultra vires*. The Alberta Act was considered also in *REGENT VENDING MACHINES v. ALBERTA VENDING MACHINES*(1954), 108 C.C.C.61, but it was held that the machine in question was not within the definition there set out. The *Slot Machine Act* of New Brunswick, R.S.N.B. 1952, c.212, was before the Supreme Court in *DEWARE v. R.*(1954), 108 C.C.C.43. The Court divided on the constitutional question, but set aside an order for confiscation.

It was held in *LAPHKAS v. R.*(1942), 77 C.C.C.142, that an automatic machine that returned nothing to the operator but a chance of obtaining free amusement depending on his score, was not within the section. In *R. v. ADAM*(1953), 106 C.C.C.398, it was held (Que. Municipal Court) that a similar machine was not a gaming apparatus within the *Quebec Gaming Apparatus Act*, 1946, c.19, in which the definition is identical with s.986(4). And in *R. v. WEISS*(1954), 12 W.W.R. (N.S.)604 it was held that the Code does not prohibit a slot machine which provides a game of mixed chance and skill for amusement only.



## SEARCH.

**WARRANT TO SEARCH.**—Search without warrant, seizure and arrest.—Disposal of property seized.—When declaration or direction may be made.—Converting security into money.—Telephones exempt from seizure.

171. (1) A justice who receives from a peace officer a report in writing that he has reasonable ground to believe and does believe that an offence under section 176, 177, 179 or 182 is being committed at any place within the jurisdiction of the justice, may issue a warrant under his hand authorizing a peace officer to enter and search the place by day or night and seize anything found therein that may be evidence that an offence under section 176, 177, 179 or 182, as the case may be, is being committed at that place, and to take into custody all persons who are found in or at that place and requiring those persons and things to be brought before him or before another justice having jurisdiction, to be dealt with according to law.

(2) A peace officer may, whether or not he is acting under a warrant issued pursuant to this section, take into custody any person whom he finds keeping a common gaming house and any person whom he finds therein, and may seize anything that may be evidence that such an offence is being committed and shall bring those persons and things before a justice having jurisdiction, to be dealt with according to law.

(3) Except where otherwise expressly provided by law, a court, judge, justice or magistrate before whom anything that is seized under this section is brought may

(a) declare that any money or security for money so seized is forfeited, and

(b) direct that anything so seized, other than money or security for money, shall be destroyed,

if no person shows sufficient cause why it should not be forfeited or destroyed, as the case may be.

(4) No declaration or direction shall be made pursuant to subsection (3) in respect of anything seized under this section until

(a) it is no longer required as evidence in any proceedings that are instituted pursuant to the seizure, or

(b) the expiration of thirty days from the time of seizure where it is not required as evidence in any proceedings.

(5) Where any security for money is forfeited under this section, the Attorney General may, for the purpose of converting the security into money, deal with the security in all respects as if he were the person entitled to the proceeds thereof.

(6) Nothing in this section or in section 431 authorizes the seizure, forfeiture or destruction of telephone, telegraph or other communication facilities or equipment that may be evidence of or that may have been used in the commission of an offence under section 176, 177, 179 or 182 and that is owned by a person engaged in providing telephone, telegraph or other communication service to the public or forming part of the telephone, telegraph or other communication service or system of such a person.

**OLD CODE:**

641. (1) *If any constable or other peace officer of any city, town, incorporated village, or other municipality or district, organized or unorganized, or place, reports in writing to the mayor or chief magistrate, recorder or to a judge of the Sessions of the Peace, or to the police, stipendiary or district magistrate of such city, town, incorporated village or other municipality, district, or place, or to any police or stipendiary magistrate having jurisdiction there, or to any justice having such jurisdiction, that there are good grounds for believing, and that he does believe, that any house, room or place within the said city or town, incorporated village or other municipality, district or place is kept or used as a disorderly house, or for betting, wagering or pool selling contrary to the provisions of section two hundred and thirty-five, or for the purpose of carrying on a lottery or for the sale of lottery tickets, or for the purpose of conducting or carrying on of any scheme, contrivance or operation for the purpose of determining the winners in any lottery contrary to the provisions of section two hundred and thirty-six, whether admission thereto is limited to those possessed of entrance keys or otherwise; such mayor, chief magistrate, recorder, police, stipendiary or district magistrate or justice, may, by order in writing, authorize the constable or other peace officer to enter and search any such house, room or place with such other constables or peace officers as are deemed requisite by him, and such peace officer or peace officers may thereupon enter and search all parts of such house, room or place and if necessary may use force for the purpose of effecting such entry, whether by breaking open doors, or otherwise, and may take into custody all persons who are found therein, and may seize all tables and instruments of gaming, wagering, or betting and all moneys and securities for money and all instruments or devices for the carrying on of a lottery, or of any scheme, contrivance or operation for determining the winners in any lottery, and all lottery tickets and all intoxicating liquors and all circulars, advertisements, printed matter, stationery and things which may be found in such house or premises which appear to have been used or to be intended for use for any illegal purpose or business, and shall bring the same before the person issuing such order or any justice, to be by him dealt with according to law.*

(2) *If at any time a peace officer, although not having an order under subsection one of this section, finds any person in the act of keeping a gaming house or being present in a gaming house, such peace officer may seize all instruments of gaming and all other articles mentioned in subsection one of this section found in or on the premises where the above offence is taking place: Provided that as soon as possible thereafter a charge shall be laid according to law against the persons found committing an offence as above: Provided also that such objects so seized shall in due course be brought before the magistrate seized with the matter, to be dealt with in the manner provided for in subsection three of this section.*

(3) *The person issuing such order, or the justice before whom any person is taken by virtue of an order under this section, may direct that any money or securities for money so seized shall be forfeited, and that any other thing seized shall be destroyed or otherwise disposed of: Provided that nothing shall be destroyed or disposed of pending any appeal or any proceeding in which the right of seizure is questioned or before the time within which such appeal or other proceeding may be taken has expired.*

(4) *Nothing in this section contained shall be construed to authorize the seizure, forfeiture or destruction of any telephone, telegraph or communication instrument, facilities or equipment found in any such house, room or place and owned*

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This comes from the former s.641. It was s.575 in the Code of 1892, which, with amendments relating to lotteries, came from R.S.C. 1886, c. 158. This, in turn, consolidated 38 Vict., c.41, s.1, *An Act respecting Gaming houses*, and 40 Vict., c.33, s.1.

In subsec.(1) the reference to intoxicating liquor has been omitted, thus limiting the power of seizure to things that may afford evidence of the specified offences.

Subsecs.(3) and (4) embody a change to provide "a lag in time of thirty days" before there can be an order for forfeiture of things seized.

There is a new provision in subsec.(5) whereby the Attorney General may realize upon cheques, etc. that have been seized under this section. In *R. v. HALLINAN*, [1937] O.W.N.325, a motion to quash an order for confiscation of money, etc., was dismissed. "The proceedings, in so far as they relate to the sum of money and the articles which were ordered to be destroyed, are proceedings *in rem*. The order of the magistrate is against these things themselves and such order may be made without regard to anyone being convicted or even charged." *R. v. GLENFIELD*(1935), 62 C.C.C.334, and *R. v. DENABURG*(1935), 64 C.C.C. 216, referred to. But in *R. v. CHIN JUNG et al.*, [1938] 1 W.W.R.414, it was held that where a conviction was quashed, an order for forfeiture based upon it should be set aside, the foundation for it having failed.

In *R. v. BOURASSA*(1954), 109 C.C.C.44, the following appears:

"It seems to me that both s-s.(1) and (2) operate *in rem* and *in personam*. In both there are provisions leading not only to the forfeiture of goods—a proceeding *in rem*—but the arrest of persons either keeping or being in a gaming house—a proceeding *in personam*. These provisions are in the nature essentially distinct, both as to method of enforcement and consequence. Subsection (1) relates also to disorderly houses, but the distinction is, in this case, immaterial. In my view the 'appeal' contemplated by s-s.(3) in this context relates solely to the right of appeal against a conviction for keeping or being in a common gaming house and has no relation to an appeal from an order of forfeiture operating *in rem* under s-s. (1). The validity of that order may be questioned, e.g. in *certiorari* proceedings. That is, I think, what is meant by 'or any proceeding in which the right of seizure is questioned'."

Subsec.(6) widens the former s.641(4) so as to exempt telephone equipment, etc., from seizure under a search warrant issued under s.431, *post*. This matter is one which was the subject of controversy as long ago as 1888 when the Act against bucket shops, 51 Vict., c.42, was under discussion (Hansard, 1888, p.1405). It was considered also in *BELL TELEPHONE CO. v. R. and ROZON*(1937), 75 Que.S.C.250, and in *Re BELL TELEPHONE CO.*(1947), 89 C.C.C.196. It was as a result of the case last mentioned that s.641 was amended by 1950, c.11, s.8.

See also ss.173 and 174.

**SEARCH FOR WOMAN IN BAWDY-HOUSE.**

**172.** A justice who is satisfied by information upon oath that there is reasonable ground to believe that a female person has been enticed to or is concealed in a common bawdy-house may issue a warrant under his hand authorizing a peace officer or other person

**OLD CODE:***Section 641—continued*

by any telephone or telegraph company, or any government telephone or telegraph system, engaged in furnishing telephone, telegraph or communication service to the public, or forming part of the service or system of any such company or government system.

640. Whenever there is reason to believe that any woman or girl mentioned in section two hundred and sixteen of this Act, has been inveigled or enticed to a house of ill-fame or assignation, then upon complaint thereof being made under oath by the parent, husband, master or guardian of such woman or girl, or in the event of such woman or girl having no known parent, husband, master or guardian in the place in which the offence is alleged to have been committed, by any other person, to any justice or to a judge of any court authorized to issue warrants in cases of alleged offences against the criminal law, such justice or judge may issue a warrant to enter, by day or night, such house of ill-fame or assignation, and if necessary use force for the purpose of effecting such entry, whether by breaking open doors or otherwise, and to search for such woman or girl, and bring her and the person or persons in whose keeping and possession she is, before such justice or judge, who may, on examination, order her to be delivered to her parent, husband, master or guardian, or to be discharged, as law and justice require.

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**named therein to enter and search the place, by day or night, and requiring her and the keeper of the place to be brought before him or another justice having jurisdiction to be kept in custody or released as he considers proper.**

This is the former s.640. It was s.574 in the Code of 1892 which was taken from R.S.C. 1886, c.157, *an Act respecting offences against public morals and public convenience*. It came from 48-49 Vict., c.82, s.1, and from 48-49 Vict., c.69, s.10 (Imp.). The principle involved was considered in two civil actions, *HOPE v. EVERED* (1886), 17 Q.B.D.338, and *LEA v. CHARRINGTON* (1889), 23 Q.B.D.45, 272.

See also ss.173 and 174.

**USE OF FORCE.**

**173. A peace officer may, for the purpose of executing a warrant issued under section 171 or 172, use as much force as is necessary to effect entry into the place in respect of which the warrant is issued.**

This is taken from the former ss.640 and 641(1). See also ss.26 *ante* and 175 *post*.

**EXAMINATION OF PERSONS ARRESTED IN DISORDERLY HOUSES.—Person refusing to be examined.—Use of evidence.**

**174. (1) A justice before whom a person is taken pursuant to a warrant issued under section 171 or 172 may require that person to be examined on oath and to give evidence with respect to**

- (a) the purpose for which the place referred to in the warrant is or has been used, kept or occupied, and**
- (b) any matter relating to the execution of the warrant.**
- (2) A person to whom this section applies who**
  - (a) refuses to be sworn, or**

Section 174—*continued*

(b) refuses to answer a question,  
may be dealt with in the same manner as a witness appearing before  
a superior court of criminal jurisdiction pursuant to a subpoena.

(3) No evidence that is given by a person under this section may  
be used or received in evidence in any criminal proceedings against  
him, except proceedings for perjury in giving that evidence.

This is the former s.642.

The problem which arises under this provision concerns the use  
to be made of the examination under subsec.(1) of a person found in a  
disorderly house. Under the former subsection the judge, justice or magis-  
trate might give to such person on his examination a certificate stating  
that he made a full disclosure in respect of all things regarding which  
he was examined, and this certificate was a bar to any proceedings against  
himself in respect of the matters disclosed. This applied only to gaming.

The new Code alters this by providing that his answers shall not be  
used against him except in case of perjury, whether or not he claims  
protection, but otherwise puts him in the same position as any witness.  
It will be observed too that this section, when read with s.171(1) extends  
the law as explained in *R. v. SHAAK*, *infra*.

The root of the problem is in the common law principle that a man  
is not required to incriminate himself, but that principle has been  
abrogated in a variety of ways. The argument for and against its abroga-  
tion may be summarized in the following quotations:

Report of the Royal Commission on Espionage, 1946, p.673:

"We feel that it is too often lost sight of that the law is not designed  
to handicap society in its endeavour to protect itself against those of  
its members who commit offences against it nor to give advantage  
to such persons."

Riddell, J., in *R. v. BARNES*(1921), 49 O.L.R.374, at p.390 said:

"It is (however) to be hoped that we have not arrived at the point  
that one accused of crime has so many and so high rights that the  
people have none:"

On the other hand Lord Eldon, L.C., in *PAXTON v. DOUGLAS*  
(1812), 19 Ves. 225 at p.227:

"The strong inclination of my mind is to protect the party against  
answering any question, not only that has a direct tendency to crim-  
inate him, but that forms one step towards it."

Falconbridge, C.J.K.B., in *Re GINSBERG*(1917), 40 O.L.R.136:

"In fact, the proceedings would take the form of an examination for  
discovery in a criminal case, which cannot be:"

Lennox, J., in *R. v. BARNES*, *supra*, at p.393:

"I repeat that the guarantee of a fair trial, in its broadest sense, is  
the thing above all others to be kept steadily in mind in the adminis-  
tration of criminal justice:"

The provisions now being considered were not in the Code of 1892.  
They were brought in by the consolidation in 1906 of ss.9 and 10 of the  
R.S.C. 1886, c.158, *An Act for the Suppression of Gaming Houses*. The  
power of examination was contained in the *Gaming Act*, 1854, s.5 (Imp.).  
The original Canadian Act was c.41 of 1875, the relevant portion of  
which was explained in the House of Commons (Debates 1875, p.805),

*OLD CODE:*

642. *The person issuing such order or the justice before whom any person who has been found in any house, room or place, entered in pursuance of any order under the last preceding section, is taken by virtue of such order may require any such person to be examined on oath and to give evidence touching any unlawful gaming in such house, room or place, or touching any act done for the purpose of preventing, obstructing or delaying the entry into such house, room or place, or any part thereof, of any constable or officer authorized to make such entry; and any such person so required to be examined as a witness who refuses to make oath accordingly, or to answer any question, shall be subject to be dealt with in all respects as any person appearing as a witness before any justice or court in obedience to a summons or subpoena and refusing without lawful cause or excuse to be sworn or to give evidence, may by law, be dealt with.*

(2) *Every person so required to be examined as a witness, who, upon such examination, makes true disclosure, to the best of his knowledge, of all things as to which he is examined shall receive from the judge, justice, magistrate, examiner, or other judicial officer before whom such proceeding is had, a certificate in writing to that effect, and shall be freed from all criminal prosecutions and penal actions, and from all penalties, forfeitures and punishments to which he has become liable for anything done before that time in respect of any act of gaming regarding which he has been so examined, if such certificate states that such witness made a true disclosure in respect to all things as to which he was examined, and any action, indictment or proceedings pending or brought in any court against such witness in respect of any act of gaming regarding which he was so examined, shall be stayed, upon the production and proof of such certificate, and upon summary application to the court in which such action, indictment or proceeding is pending, or any judge thereof, or any judge of any of the superior courts of any province.*

(3) *The provisions of this and the last preceding section shall apply to searches in opium joints and to the seizure of devices, pipes or apparatus for preparing for smoking or inhaling, or for smoking or inhaling opium, and all couches, beds and chairs in such joints, and to the proceedings thereupon.*

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as follows:

"Mr. Moss: It was notorious that although the authorities were perfectly well aware that gambling was going on in a particular house, and although evidence of the most difficult kind reached them that the offence was actually being committed, when they had managed to obtain an entrance by the only way they could by the law as it stood at present, the only evidence of fault was generally the extreme innocence that persons engaged in the offence exhibited. . . .

The Act provided that persons arrested in the house would be required to give evidence as to what was going on, and should not be allowed to protect himself (sic) by the statement that his evidence would be incriminating. At the same time if he made a fair and full disclosure to the satisfaction of the court, he would receive a certificate that would prevent any of the facts being used to his injury. This vice might not be so prevalent in our country as in some other countries, but it was assuming proportions in this country, especially in some of the frontier towns and villages, where it was customary for persons to come from the other side to carry out gambling with im-

**Section 174—continued**

punish within our borders, because the arm of the law was too weak to reach them here. He hoped this Bill would pass, and it would have the effect of preventing them from continuing such practices."

There are two reported cases in which s.642 was applied. The first is a bawdy-house case, *R. v. SHAAK*(1918), 30 C.C.C.295(Alta. C.A.). The following appears at p.296:

"Until the year 1913, the authority to enter and search as given by the sections corresponding to the present section 641 had been confined to gaming and betting houses. There had been authority to 'take into custody all persons who are found therein', as well as to seize tables and instruments of gaming', etc. One of the things which could be done with the persons so arrested was shown by the provisions of section 642, which authorized the magistrate before whom they were brought to examine them under oath in regard to 'any unlawful gaming in the house' and there is a provision in subsection (2) for their protection. Then in 1913 the wording of section 641 was changed so as to give the authority to search in the case of suspicion of the existence of a 'disorderly house' generally as defined by section 228 which covers gaming and betting houses but also includes houses of ill-fame. But while this, in consequence, authorized the arrest of all persons found in such a house, no change was made in section 642, so that the authority to examine under oath is still confined to evidence of gaming. *Thus the purpose of arresting persons found in a house searched in consequence of suspicion that it is a bawdy-house is left rather obscure.* They cannot be examined under oath for evidence that the place was being kept as a bawdy house. Yet there is undoubtedly authority to take them into custody. *While there is no doubt a possibility that this was an oversight in not at the same time amending section 642,* still we must endeavour to attribute some sensible purpose to the provision for arrest. There would seem to be no other than that they may be held pending the laying of a charge against them, and I see no reason why this should not also apply to persons arrested in a gaming house although a special additional action by way of examination is provided in their case . . . . The arrest was duly authorized and as I have said the authority to arrest must have been given for some purpose. I can see no other purpose than that the arrested person may be held until a charge is laid. Until arrested his name may not be known and it seems reasonable that the laying of a charge should be postponed until the identity of the person is discovered."

In a gaming house case a magistrate applied s.642 to call as witnesses on the hearing of a charge, several persons who had been arrested in the house. In giving judgment, he stated that he did not believe this evidence, and made a conviction on the evidence of detectives. On appeal (*R. v. KING*(1925), 43 C.C.C.351) it was said:

"I am of opinion that where evidence is taken pursuant to section 642 on the hearing, it forms a part of the record and should be considered, as well as the other evidence in the case, according to its value, but it does not follow that the conviction should be quashed."

In the report of the Royal Commission on Espionage, 1946, p.672, there is a comment upon *WALKER v. R.*, [1939] S.C.R.214, and *R. v.*

SCOTT(1856), Dears. & B.47, leading to the conclusion by the Commissioners that to give a witness before them a warning that he was not obliged to speak but that what he said might be used at his trial would be inconsistent with the statutory obligation to answer imposed by the *Inquiries Act* (R.S.C. 1927, c.99). At p. 673:

"The privilege given by the Statute (*i.e.* the *Canada Evidence Act*), to a witness who wishes to claim it, is said by Phipson in his leading work on Evidence, 7th ed., at p.206, to be 'based on the policy of encouraging persons to come forward with evidence . . . .'. The author does not say that it is aimed against self-incrimination. We feel that it is too often lost sight of that the law is not designed to handicap society in its endeavour to protect itself against those of its members who commit offences against it nor to give advantage to such persons. The language of Riddell, J., in . . . . *R. v. BARNES* (report at p.390 quoted), may be studied with profit. . . .

The possibility that some charge may be laid in the courts against any person required to attend and testify pursuant to the *Inquiries Act*, or the fact that such a charge has already been laid at the time any person has been required to attend for the purpose of testifying does not affect the position of such person under the law, or create any immunity from testifying. The point is illustrated by the decision of the Appellate Division of the Supreme Court of Ontario in *R. v. BARNES*, 49 O.L.R. 374. In that case the obligation of Barnes to testify in the proceedings there in question arose in an Ontario statute in somewhat the same terms as section 5 of The *Inquiries Act* (quoted).

The language of the late Mr. Justice Riddell at p.390 *mutatis mutandis* applies: 'The fact, then, that it is possible, probable or certain that one has caused the death of another does not take away his right to give evidence of the facts before the coroner, and at the common law the right and duty to give evidence are correlative. If one who had the right to give evidence should for any reason refuse, he could be compelled.' Had Barnes been in fact arrested and detained under the warrant of the coroner there in question, the same principle applied. The court refused to set aside the warrant or prohibit its enforcement against Barnes, who at the time was evading arrest. . . .

It is of interest to observe that under the common law also, a person in the position of Barnes in the case above referred to, although committed for trial on a charge of manslaughter has no right to be represented by counsel in the coroner's court investigating the death of the person whose death was the subject of the charge against Barnes. This was decided in Ontario as long ago as *AGNEW v. STEWART*, 21 U.C.Q.B. 396. . . .

It is only 'if any charge' is made against any person in the course of such investigation (*i.e.* under the *Public Inquiries Act*) that such person is then entitled to counsel if he so requests."

The question then is this: Is the suppression of disorderly houses an end so desirable as to justify the use in criminal proceedings of statements made under compulsion of statute, as was done most notably in *R. v. SCOTT* and *WALKER v. R.*? Admittedly this is a question on which there may be sincere differences of opinion, but it is equally certain that the hope expressed by Mr. Moss concerning the effect of the legislation introduced by him in 1875 has not been realized.



**Section 174—continued**

From the practical side there is ample evidence of the difficulties encountered by the police in their efforts to cope with the subterfuges and shifting "setups" of professional gamblers.

**OBSTRUCTION.****OBSTRUCTING EXECUTION OF WARRANT.**

**175. Every one who, for the purpose of preventing, obstructing or delaying a peace officer who is executing a warrant issued under this Part in respect of a disorderly house or who is otherwise authorized to enter a disorderly house, does anything, or being the keeper of the disorderly house, permits anything to be done to give effect to that purpose is guilty of an offence punishable on summary conviction.**

This is the former s.230 in more general terms but without change in effect. It was s.200 in the Code of 1892 and it also came from R.S.C. 1886, c.158. See also s.169(a) and, as to obstruction generally, s.110.

**GAMING AND BETTING.**

**KEEPING GAMING OR BETTING HOUSE.—Person found in gaming or betting house.—Owner permitting use.**

**176. (1) Every one who keeps a common gaming house or common betting house is guilty of an indictable offence and is liable to imprisonment for two years.**

**(2) Every one who**

**(a) is found, without lawful excuse, in a common gaming house or common betting house, or**

**(b) as owner, landlord, lessor, tenant, occupier or agent, knowingly permits a place to be let or used for the purposes of a common gaming house or common betting house,**

**is guilty of an offence punishable on summary conviction.**

This combines the former ss.228 and 229(1) in so far as they related to gaming and betting houses, but omits the additional penalties for second or subsequent offences. The penalty for keeping a disorderly house was in s.198 of the Code of 1892, which Taschereau describes as new. S.199 of that Code took from R.S.C. 1886, c.158, a provision making it an offence to "play or look on whilst any other person is playing in a common gaming house", and this was altered by 1913, c.13, s.12 to the offence of being found in any disorderly house.

See notes to ss.168 and 179.

See also s.171 (search), s.178 (exception) and s.467 (jurisdiction).

**BETTING, POOL SELLING, BOOK-MAKING, ETC.—Punishment.**

**177. (1) Every one commits an offence who**

**(a) uses or knowingly allows a place under his control to be used for the purpose of recording or registering bets or selling a pool;**

**(b) imports, makes, buys, sells, rents, leases, hires or keeps,**

**OLD CODE:**

230. Every one is guilty of an offence and liable on summary conviction before two justices, to a penalty not exceeding one hundred dollars, and to six months' imprisonment with or without hard labour who,

- (a) wilfully prevents any constable or other officer duly authorized to enter any disorderly house, from entering the same or any part thereof; or
- (b) obstructs or delays any such constable or officer in so entering; or
- (c) by any bolt, chain or other contrivance secures any external or internal door of, or means of access to, any common gaming house so authorized to be entered; or
- (d) uses any means or contrivance whatsoever for the purpose of preventing, obstructing or delaying the entry of any constable or officer, authorized as aforesaid, into any such disorderly house or any part thereof;
- (e) being the owner or other person in control of premises occupied or used as a disorderly house, knowingly allows any contrivance whatsoever upon the said premises for the purpose of preventing, obstructing or delaying the entry of any constable or officer authorized as aforesaid into any such disorderly house, or any part thereof.

228. Every one who, without lawful excuse, is found in any disorderly house shall be liable on summary conviction to a penalty not exceeding one hundred dollars and costs and in default of payment to two months' imprisonment.

(2) Any one who, as landlord, lessor, tenant, occupier, agent or otherwise, has charge or control of any premises and knowingly permits such premises or any part thereof to be let or used for the purposes of a disorderly house shall be liable upon summary conviction to a fine of two hundred dollars and costs, or to imprisonment not exceeding two months, or to both fine and imprisonment.

229. Every one who keeps any common gaming-house, or common betting-house is guilty of an indictable offence and liable to one year's imprisonment.

(2) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding three years, and the provisions of section one thousand and thirty-five in so far as it authorizes the imposition of a fine in lieu of any punishment otherwise authorized, and of section one thousand and eighty-one of this Act, shall not apply in the case of a conviction for an offence under this subsection.

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exhibits, employs or knowingly allows to be kept, exhibited or employed in any place under his control a device or apparatus for the purpose of recording or registering bets or selling a pool, or any machine or device for gambling or betting;

- (c) has under his control any money or other property relating to a transaction that is an offence under this section;
- (d) records or registers bets or sells a pool;
- (e) engages in pool-selling or book-making, or in the business or occupation of betting, or makes any agreement for the purchase or sale of betting or gaming privileges, or for the purchase or sale of information that is intended to assist in book-making, pool-selling or betting;
- (f) prints, provides or offers to print or provide information intended for use in connection with book-making, pool-selling or betting upon any horse-race, fight, game or sport whether

Section 177—*continued*

or not it takes place in or out of Canada or has or has not taken place;

(g) imports or brings into Canada any information or writing that is intended or is likely to promote or be of use in gambling, book-making, pool-selling or betting upon a horse-race, fight, game or sport, and where this paragraph applies it is immaterial

(i) whether the information is published before, during or after the race, fight, game or sport, or

(ii) whether the race, fight, game or sport takes place in Canada or elsewhere,

but this paragraph does not apply to a newspaper, magazine or other periodical published in good faith primarily for a purpose other than the publication of such information;

(h) advertises, prints, publishes, exhibits, posts up, or otherwise gives notice of any offer, invitation or inducement to bet on, to guess or to foretell the result of a contest, or a result of or contingency relating to any contest;

(i) wilfully and knowingly sends, transmits, delivers or receives any message by telegraph, telephone, mail or express that conveys any information relating to book-making, pool-selling, betting or wagering, or that is intended to assist in book-making, pool-selling, betting or wagering; or

(j) aids or assists in any manner in anything that is an offence under this section.

(2) Every one who commits an offence under this section is guilty of an indictable offence and is liable to imprisonment for two years.

This is the former s.235(1), which developed from s.204(1) of the Code of 1892. That section came from R.S.C. 1886, c.159, and contained matter that now appears in s.177(1)(a) to (d). Par.(b) was put in its present form by 1913, c.13, s.13, by the addition of the words "imports, makes, buys, sells, rents, leases, hires or". What now appears as par.(1)(h) was put in that form by 1923, c.41, s.5, which added the words "or any result or contingency of or relating to any contest" to the paragraph as it appeared in 1922, c.16, s.13. What now appears as par.(1)(g) was added by 1923, c.41, s.3.

It was said in *BURLEY TOB. SOC. v. MONROE*(1912), 148 Ky.289 that the term "pool" means a surrender of certain individual rights and powers to the common holder for the benefit of all, on the theory that the accruing benefits gained by the joint venture outweigh the individual rights surrendered.

"To amount to gaming, the game played must involve the element of wagering, that is to say, that each of the players must have a chance of losing as well as of winning;" *LOCKWOOD v. COOPER*, [1903]2 K.B.428, cited in *R. v. WILKES*(1930), 55 C.C.C.1, at p.7. Thus to play whist for prizes donated by others than the players, is not gaming.

"Gaming and betting on horse races are different things; and the difference between them, under the Criminal Code, is marked, as secs.

**OLD CODE:**

235. Every one is guilty of an indictable offence, and liable to one year's imprisonment, and to a fine not exceeding one thousand dollars, who,

(a) uses or knowingly allows any part of any premises under his control to be used for the purpose of recording or registering any bet or wager, or selling any pool; or

(b) imports, makes, buys, sells, rents, leases, hires or keeps, exhibits, employs or knowingly allows to be kept, exhibited or employed in any part of any premises under his control any device or apparatus for the purpose of recording any bet or wager or selling any pool, or any gambling, wagering or betting machine or device; or

(c) becomes the custodian or depository of any money, property or valuable thing staked, wagered or pledged in any case or transaction in which such staking, wagering or pledging is itself contrary to the provisions of this Act; or

(d) records or registers any bet or wager, or sells any pool upon the results

(i) of any political or municipal election,

(ii) of any race,

(iii) of any contest or trial of skill or endurance of man or beast; or

(e) engages in pool-selling or book-making, or in the business or occupation of betting or wagering, or makes any agreement for the purchase or sale of betting or gaming privileges, or for the purchase or sale of information intended to assist in book-making, pool-selling, betting or wagering; or

(f) advertises, prints, publishes, exhibits, posts up, sells or supplies, or offers to sell or supply, any information intended to assist in, or intended for use in connection with book-making, pool-selling, betting or wagering upon any horse-race or other race, fight, game or sport, whether at the time of advertising, printing, publishing, exhibiting, posting up or supplying such news or information, such horse-race or other race, fight, game or sport has or has not taken place; or

(g) imports or brings into Canada any matter, whether printed or in writing, which from the nature of its contents or from other evidence adduced is not a newspaper published in good faith mainly for the purpose of supplying news and comment, other than information intended or likely to promote, assist in, or be of use in gambling, book-making, pool-selling, betting or wagering upon any race of any kind, fight, game or sport, whether held within or without Canada, and whether published before, during or after such race, fight, game or sport; or is not a magazine or other periodical published in good faith mainly for the purpose of supplying literature and comment, other than such information as aforesaid; but is intended or likely to afford such information as aforesaid; or

(h) advertises, prints, publishes, exhibits, posts up, or otherwise gives notice of any offer, invitation or inducement to bet on, to guess or to foretell the result of any contest, or any result or contingency of or relating to any contest; or

(i) wilfully and knowingly sends, transmits, delivers or receives any message by telegraph, telephone, mail or express conveying any information relating to book-making, pool-selling, betting or wagering, or intended to assist in book-making, pool-selling, betting or wagering; or

(j) aids or assists in any manner in any of the said acts which are by this section forbidden.

226 and 227 shew; the one is aimed against gaming, the other against betting, in the manner dealt with by them, and all of the provisions of the Criminal Code, touching the subject, indicate the intention of Parliament to steer clear of making mere betting a crime: see sec.235 es-

**Section 177—continued**

pecially:" *R. v. ELLIS*(1909), 15 C.C.C.379, at p.381.

Although the decision of the Supreme Court of Canada in *SAUNDERS v. R.*(1907), 38 S.C.R.382, was to some extent superseded by statutory definition of the word "place" (see now s.168(1)(i)), it is submitted that the following extracts are still apposite, bearing in mind that race-track betting is regulated under a particular system:

"Bets between individuals are not illegal at common law and the provisions of this section (204) do not extend to bets between individuals or to bets made on the race course of an incorporated association during the course of a race meeting . . . . .

In my opinion two distinct and separate offences are created by sections 197 and 204 (see now ss.176(1) and 177(1)(a)), and that which may be invoked successfully as a defence in one case cannot avail in the other. To keep a place for making bets which may be recorded at that place or elsewhere and to keep a place for recording bets wherever made are distinct and separate acts, each of which has been made an offence and each of which is declared to subject the offenders to a different penalty. The exception created by sub-section 2 of section 204 (now s.178) with respect to anything therein, does not apply to those places that are kept for the purpose of betting."

Although the case of *NOEL v. R.*(1951), 12 C.R.276, was decided without recorded reference to *SAUNDERS v. R.*, it makes a similar distinction. After a reference to s.235(1)(d)(ii) and s.229, the following appears at p.279:

"Thus, the accused may very well have committed the offence of recording or registering a bet under s.235 for which he was not charged but not have been guilty of keeping or assisting in keeping a common betting house under s.229."

See also *LEWIS v. R.*(1949), 97 C.C.C.268.

Sometimes there is a question whether the facts warrant a charge under this section or under the section dealing with lotteries. This is true especially in relation to gambling machines. As to these see s.170 and also the slot-machine cases noted under s.179. Again, *R. v. WOODWARD and WILLCOCKS*(1922), 38 C.C.C.154, noted under s.179, may be compared with *R. v. LUTES*(1923), 41 C.C.C.181, in which a somewhat similar scheme relating to baseball was held to be a lottery.

As to par.(g) it was held in *R. v. HEWITT*(1922), 38 C.C.C.264, in relation to a publication that was useful to breeders and others, that the fact that the information contained in it might and would be used in betting was not sufficient ground for a conviction, in the absence of evidence that the accused intended it so to be used. There was a similar result in *R. v. GENERAL NEWS BUREAU INC.*(1933), 60 C.C.C.66, where the charge related to the distribution of information in regard to racing. On the other hand, convictions in relation to the distribution of betting information through a publication called "Sports News" were upheld in *R. v. TAYLOR and SHAVER*, [1952] O.W.N.227, against its publisher and editor, and against a telegraph operator employed by him. See now s.177(1)(e) and (i).

See *R. v. JASPER*(1953), 103 C.C.C.393, (numbers racket), noted under s.179.

See also s.171 (search), s.178 (exception) and s.467 (jurisdiction).

**OLD CODE:***Section 235—continued*

(2) *The provisions of subsection one of this section, section two hundred and twenty-seven and subsections one and two of section two hundred and twenty-nine, do not extend to*

(a) *any person or association by reason of his or their becoming the custodian or depository of any money, property or valuable thing staked, to be paid to*

(i) *the winner of any lawful race, sport, game or exercise,*

(ii) *the owner of any horse engaged in any lawful race, or*

(iii) *the winner of any bets between not more than ten individuals;*

(b) *a private bet between individuals not engaged in any way in a business of betting;*

(c) *bets made or records of bets made through the agency of a pari-mutuel system only as hereinafter provided, upon the race course of any association*

(i) *incorporated before the nineteenth day of May nineteen hundred and forty-seven, if*

(A) *such association has conducted a race meeting with pari-mutuel betting under the supervision of an officer appointed by the Minister of Agriculture at any time after the first day of January, nineteen hundred and thirty-eight, but before the nineteenth day of May, nineteen hundred and forty-seven, or*

(B) *the Minister of Agriculture has, before the nineteenth day of May, nineteen hundred and forty-seven, made a determination under this section that the provisions of subsection one of this section, section two hundred and twenty-seven and subsections one and two of section two hundred and twenty-nine shall not extend to the operation of a pari-mutuel system with respect to running races at a race meeting conducted by such association on a race course of another association, or*

**EXEMPTION.—Operation of pari-mutuel system.—Purses.—Regulations.**

**178. (1) Sections 176 and 177 do not apply to**

(a) **any person or association by reason of his or their becoming the custodian or depository of any money, property or valuable thing staked, to be paid to**

(i) **the winner of a lawful race, sport, game or exercise,**

(ii) **the owner of a horse engaged in a lawful race, or**

(iii) **the winner of any bets between not more than ten individuals;**

(b) **a private bet between individuals not engaged in any way in the business of betting;**

(c) **bets made or records of bets made through the agency of a pari-mutuel system only as hereinafter provided, upon the race course of an association**

(i) **incorporated before May 19, 1947, if**

(A) **the association has conducted a race meeting with pari-mutuel betting under the supervision of an officer appointed by the Minister of Agriculture at any time after January 1, 1938, but before May 19, 1947, or**

(B) **the Minister of Agriculture has, before May 19, 1947, made a determination under this section that the provisions of sections 176 and 177 shall not extend to the operation of a parti-mutuel system with respect to run-**

Section 178—*continued*

- ning races at a race meeting conducted by the association on a race course of another association, or
- (ii) incorporated on or after May 19, 1947 by special Act of the Parliament of Canada or of the legislature of a province,
- during the actual progress of a race meeting conducted by the association upon races being run thereon and if, as to race meetings at which there are running races, the following provisions are complied with, namely,
- (iii) no race meeting shall continue for more than fourteen consecutive days on days on which racing may be lawfully carried on and there shall be not more than eight races on any of those days, and
- (iv) no association shall hold, and on any one track there shall not be held, except as hereinafter provided, in any one calendar year more than one race meeting, at which there are running races, of more than seven and not exceeding fourteen such days or two such race meetings having an interval of at least twenty days between them of not more than seven such days each;
- (d) race meetings at which there are trotting or pacing races exclusively where pool-selling, betting or wagering is permitted by an association incorporated in any manner before March 20, 1912, or incorporated after that day by special Act of the Parliament of Canada or of the legislature of a province, on a race course during the actual progress of the race meetings conducted by the association, if the following provisions are complied with, namely,
- (i) the race meetings shall not in any one calendar year be conducted for more than fourteen days or fourteen nights or a total of fourteen days and nights on which racing may be lawfully carried on,
- (ii) no more than eight races or dashes, or four heat races of three heats each, or six heat races of two heats each shall be held during any twenty-four hour period, and
- (iii) any pari-mutuel system of betting used upon the race course shall be used as hereinafter provided; or
- (e) the operation of a pari-mutuel system with respect to running races at a race meeting conducted by an association on a race course of another association, if
- (i) the provisions of sections 176 and 177 do not extend to the operation of a pari-mutuel system with respect to running races on the race courses of both associations,
- (ii) both race courses are in the same province, and
- (iii) the Minister of Agriculture so determines in a particular case.
- (2) Subsection (1) does not apply in respect of a race meeting conducted by an association mentioned in subparagraph (i) of paragraph (c) of that subsection in a province other than a province in

**OLD CODE:***Section 235—continued*

- (ii) incorporated on or after the nineteenth day of May, nineteen hundred and forty-seven, by special Act of the Parliament of Canada or of the legislature of any province of Canada, during the actual progress of a race meeting conducted by such association upon races being run thereon and if, as to race meetings at which there are running races, the following provisions are complied with, namely,
- (iii) no such race meeting shall continue for more than fourteen consecutive days on days on which such racing may be lawfully carried on and there shall be not more than eight such races on any of such days, and
- (iv) no such association shall hold, and on any one track there shall not be held, except as hereinafter provided, in any one calendar year more than one race meeting at which there are running races of more than seven and not exceeding fourteen such days or two such race meetings having an interval of at least twenty days between them of not more than seven such days each;
- (d) race meetings at which there are trotting or pacing races exclusively where pool-selling, betting or wagering is permitted by an association incorporated in any manner before the twentieth day of March, nineteen hundred and twelve, or incorporated after that day by special Act of the Parliament of Canada, or of the legislature of a province of Canada, on a race course during the actual progress of the race meetings conducted by the association, if the following provisions are complied with, namely,
- (i) such race meetings shall not in any one calendar year be conducted for more than fourteen days or fourteen nights or a total of fourteen days and nights on which racing may be lawfully carried on,
- (ii) no more than eight races or dashes, or four heat races of three heats each, shall be held during any twenty-four hour period, and
- (iii) any pari-mutuel system of betting used upon such race course shall be used as hereinafter provided; or
- (e) the operation of a pari-mutuel system with respect to running races at a race meeting conducted by an association on a race course of another association, if
- (i) such provisions do not extend to the operation of a pari-mutuel system with respect to running races on the race courses of both such associations,
- (ii) both race courses are in the same province, and
- (iii) the Minister of Agriculture so determines in a particular case.
- (3) No pari-mutuel system of betting shall be used upon any race course unless the system has been approved by and its operation is carried on under the supervision, at the expense of the association, of an officer appointed by the Minister of Agriculture, whose duty it shall be to stop the betting before each race and to see that no further amounts are deposited.
- (4) Where any person or association becomes a custodian or depository of any money, bet or stakes under a pari-mutuel system during the actual progress of a race meeting conducted by and on the race course of an association in accordance with this section, upon races being run thereon, the percentage deducted and retained by the person or association in respect of each race from the total amount of money so deposited, or of which the person or association becomes the custodian, shall not exceed nine per cent., and, in addition, the person or association may retain the remainder occurring in each calculation under the regulations of the amount payable in respect of each dollar wagered, and any odd cents over any multiple of five cents in the amount so calculated.
- (5) The Minister of Agriculture, if he is not satisfied that a proper proportion



Section 178—*continued*

which the association, before the 1st day of May, 1954, conducted a race meeting with pari-mutuel betting under the supervision of an officer appointed by the Minister of Agriculture.

(3) No pari-mutuel system of betting shall be used upon any race course unless the system has been approved by and its operation is carried on under the supervision, at the expense of the association, of an officer appointed by the Minister of Agriculture, whose duty it shall be to stop the betting before each race and to see that no further amounts are deposited.

(4) Where any person or association becomes a custodian or depository of any money, bet or stakes under a pari-mutuel system during the actual progress of a race meeting conducted by and on the race course of an association in accordance with this section, upon races being run thereon, the percentage deducted and retained by the person or association in respect of each race from the total amount of money so deposited, or of which the person or association becomes the custodian, shall not exceed nine per cent, and, in addition, the person or association may retain the remainder occurring in each calculation under the regulations of the amount payable in respect of each dollar wagered, and any odd cents over any multiple of five cents in the amount so calculated.

(5) Where the Minister of Agriculture is not satisfied that a proper proportion of gate receipts and percentages taken from the pari-mutuel pools is being given in purses to horses taking part in the race meeting or that the provisions of this section are being carried out in good faith by the person or association conducting the race meeting, he may at any time order the betting to be stopped for any period that he considers proper.

(6) The Minister of Agriculture may make regulations with respect to the carrying out of the provisions of paragraphs (c), (d) and (e) of subsection (1) and subsections (3) and (4), and may, by the regulations, impose such fines, not exceeding in any one case five hundred dollars for any violation of any such regulations, as he considers necessary to ensure compliance with the regulations.

This is the former s.235(2) to (6) with some changes. The words "six heat races of two heats each" are new. They do not increase the number of heats that can be run in one day. Subsec.(2) is new and was passed to ensure that a racing association that has been incorporated in one province shall not be entitled to conduct race meetings, with pari-mutuel betting, on race tracks that it acquires in another province. In order that it need not await the coming-into-force of this Code, it was passed as an amendment to the former s.235 and appears also as 1953-54 c.52. Subsec.(4) was passed as 1952, c.22, s.1, and struck out the table of percentages that previously appeared.

This section has had a long and disturbed legislative history. It has developed from subsec.(2) of s.204 of the Code of 1892, which was adapted from R.S.C. 1886, c.159, s.9. In s.204, which dealt with betting and pool-selling, the exemption created by subsec.(2) applied only to that section, but by 1910, c.10, s.3, it was extended to apply to s.227

**OLD CODE:***Section 235—continued*

*of gate receipts and percentages taken from the pari-mutuel pools is being given in purses to horses taking part in the race meeting or that the provisions of this section are being carried out in good faith by the association conducting the race meeting, may at any time order the betting to be stopped for such time as he may think fit.*

*(6) The Minister of Agriculture may make regulations with respect to the carrying out of the provisions of paragraphs (c), (d) and (e) of subsection two, and subsections three and four of this section, and may, by the regulations, impose such penalties, not exceeding in any one case five hundred dollars for any violation of any such regulations, as he deems necessary for ensuring the observance of the regulations.*

*236. Every one is guilty of an indictable offence and liable to two years' imprisonment and to a fine not exceeding two thousand dollars who*

*(a) makes, prints, advertises or publishes, or causes or procures to be made, printed, advertised or published, any proposal, scheme or plan for advancing, lending, giving, selling or in any way disposing of any property, by lots, cards, tickets, or any mode of chance whatsoever; or*

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(definition of common betting house) and s.228 (keeping disorderly house, now divided in ss.176(1) and 182(1)).

An amendment, 1922, c.16, s.12, introduced the words "between not more than ten individuals" as they now appear in subsec.(1)(a)(iii). Otherwise the many amendments may not improperly be described as dealing with administrative matters, in that their general effect has been to place the system of pari-mutuel betting on trotting, pacing and running races, under the control of the Minister of Agriculture.

In relation to the associations that are entitled to the benefit of the section, see, in addition to subsec.(4), *HEPBURN v. CONNAUGHT PARK etc. CLUB*(1916), 10 O.W.N.333; *R. v. WESTERN RACING ASSOCIATION*(1922), 38 C.C.C.234; *R. v. WINDSOR JOCKEY CLUB* (1922), 38 C.C.C.250, and *R. v. LONG BRANCH RACING ASSOCIATION*(1925), 43 C.C.C.283, especially with reference to the revival of some apparently dormant charters.

**LOTTERIES.**—Publishing lottery scheme.—Disposing of lottery tickets.—Conveyance of material for lottery. — Conducting lottery scheme. — Conducting scheme for disposal of property.—Disposal of goods by game of chance.—Inducing persons to stake money.—Playing three-card monte.—Receiving bets on three-card monte.—Permitting three-card monte.—"Three-card monte."—Exemption of Agricultural fairs.—Offence.—Lottery sale void.—*Bona fide* purchase.—Foreign lottery included.—Saving.—Dividing property by lot.—Raffles at church bazaars.—Rewards to promote thrift.—Recalling securities by lot.

**179. (1) Every one is guilty of an indictable offence and is liable to imprisonment for two years who**

**(a) makes, prints, advertises or publishes, or causes or procures to be made, printed, advertised or published, any proposal scheme or plan for advancing, lending, giving, selling or in any way disposing of any property, by lots, cards, tickets, or any mode of chance whatsoever;**

Section 179—*continued*

- (b) sells, barter, exchanges, or otherwise disposes of, or causes or procures, or aids or assists in, the sale, barter, exchange or other disposal of, or offers for sale, barter or exchange, any lot, card, ticket or other means or device for advancing, lending, giving, selling or otherwise disposing of any property, by lots, tickets or any mode of chance whatsoever;
  - (c) knowingly sends, transmits, mails, ships, delivers or allows to be sent, transmitted, mailed, shipped or delivered, or knowingly accepts for carriage or transport or conveys any article that is used or intended for use in carrying out any device, proposal, scheme or plan for advancing, lending, giving, selling or otherwise disposing of any property by any mode of chance whatsoever;
  - (d) conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the winners of any property so proposed to be advanced, loaned, given, sold or disposed of;
  - (e) conducts, manages or is a party to any scheme, contrivance or operation of any kind by which any person, upon payment of any sum of money, or the giving of any valuable security, or by obligating himself to pay any sum of money or give any valuable security, shall become entitled under the scheme, contrivance or operation, to receive from the person conducting or managing the scheme, contrivance or operation, or any other person, a larger sum of money or amount of valuable security than the sum or amount paid or given, or to be paid or given, by reason of the fact that other persons have paid or given, or obligated themselves to pay or give any sum of money or valuable security under the scheme, contrivance or operation;
  - (f) disposes of any goods, wares or merchandise by any game of chance or any game of mixed chance and skill in which the contestant or competitor pays money or other valuable consideration;
  - (g) induces any person to stake or hazard any money or other valuable property or thing on the result of any dice game, three-card monte, punch board, coin table or on the operation of a wheel of fortune;
  - (h) for valuable consideration carries on or plays or offers to carry on or to play, or employs any person to carry on or play in a public place or a place to which the public have access, the game of three-card monte;
  - (i) receives bets of any kind on the outcome of a game of three-card monte; or
  - (j) being the owner of a place, permits any person to play the game of three-card monte therein.
- (2) In this section "three-card monte" means the game commonly known as three-card monte and includes any other game that is

## OLD CODE:

## Section 236—continued

(b) sells, barter, exchanges or otherwise disposes of, or causes or procures, or aids or assists in, the sale, barter, exchange or other disposal of, or offers for sale, barter or exchange, any lot, card, ticket or other means or device for advancing, lending, giving, selling or otherwise disposing of any property, by lots, tickets or any mode of chance whatsoever; or

(bb) knowingly sends, transmits, mails, ships, delivers or allows to be sent, transmitted, mailed, shipped or delivered, or knowingly accepts for carriage or transport or conveys any article which is used or intended for use in the carrying out of any device, proposal, scheme or plan for advancing, lending, giving, selling or otherwise disposing of any property by any mode of chance whatsoever; or

(c) conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the winners of any property so proposed to be advanced, loaned, given, sold or disposed of; or conducts, manages or is a party to any scheme, contrivance or operation of any kind by which any person, upon payment of any sum of money, or the giving of any valuable security, or obligating himself to pay any sum of money or give any valuable security, shall become entitled under such scheme, contrivance or operation to receive from the person conducting or managing such scheme, contrivance or operation, or any other person, a larger sum of money or amount of valuable security than the sum or amount paid or given, or to be paid or given, by reason of the fact that other persons have paid or given, or obligated themselves to pay or give any sum of money or valuable security under such scheme, contrivance or operation; or

(d) disposes of any goods, wares or merchandise by any game or mode of chance or mixed chance and skill in which the contestant or competitor pays money or other valuable consideration; or

(e) induces any person to stake or hazard any money or other valuable property or thing on the result of any dice game, shell game, punch board, coin table or on the operation of any wheel of fortune;

Provided that the provisions of paragraphs (d) and (e) of this subsection in so far as they do not relate to any dice game, shell game, punch board or coin table, shall not apply to any agricultural fair or exhibition, or to any operator of a concession leased by any agricultural fair or exhibition board within its own grounds and operated during the period of the annual fair held on such grounds.

(2) Every one is guilty of an offence and liable on summary conviction to a penalty of twenty dollars, who buys, takes or receives any such lot, ticket or other device as aforesaid.

(3) Every sale, loan, gift, barter or exchange of any property, by any lottery, ticket, card or other mode of chance depending upon or to be determined by chance or lot, is void, and all property so sold, lent, given, bartered or exchanged, shall be forfeited to His Majesty.

(4) No such forfeiture shall affect any right or title to such property acquired by any bona fide purchaser for valuable consideration without notice.

(5) This section includes the printing or publishing, or causing to be printed or published, of any advertisement, scheme, proposal or plan of any foreign lottery, and the sale or offer for sale of any ticket, chance or share, in any such lottery, or the advertisement for sale of such ticket, chance or share, and the conducting or managing of any such scheme, contrivance or operation for determining the winners in any such lottery.

Section 179—*continued*

similar to it, whether or not the game is played with cards and notwithstanding the number of cards or other things that are used for the purpose of playing.

(3) Paragraphs (f) and (g) of subsection (1), in so far as they do not relate to a dice game, three-card monte, punch board or coin table, do not apply to an agricultural fair or exhibition, or to any operator of a concession leased by an agricultural fair or exhibition board within its own grounds and operated during the period of the annual fair on those grounds.

(4) Every one who buys, takes or receives a lot, ticket or other device mentioned in subsection (1) is guilty of an offence punishable on summary conviction.

(5) Every sale, loan, gift, barter or exchange of any property, by any lottery, ticket, card or other mode of chance depending upon or to be determined by chance or lot, is void, and all property so sold, lent, given, bartered or exchanged, is forfeited to Her Majesty.

(6) Subsection (5) does not affect any right or title to property acquired by any *bona fide* purchaser for valuable consideration without notice.

(7) This section applies to the printing or publishing, or causing to be printed or published, of any advertisement, scheme, proposal or plan of any foreign lottery, and the sale or offer for sale of any ticket, chance or share, in any such lottery, or the advertisement for sale of such ticket, chance or share, and the conducting or managing of any such scheme, contrivance or operation for determining the winners in any such lottery.

(8) This section does not apply to

- (a) the division by lot or chance of any property by joint tenants or tenants in common, or persons having joint interests in any such property;
- (b) raffles for prizes of small value at any bazaar held for any charitable or religious object, if permission to hold the same has been obtained from the city or other municipal council, or from the mayor, reeve or other chief officer of the city, town or other municipality wherein such bazaar is held, and the articles raffled for thereat have first been offered for sale and none of them has a value exceeding fifty dollars;
- (c) the distribution by lot of premiums given as rewards to promote thrift by punctuality in making periodical deposits of weekly savings in any chartered savings bank; or
- (d) bonds, debentures, debenture stock or other securities callable by drawing of lots and redeemable with interest and providing for payment of premiums upon redemption or otherwise.

Subsec.(1)(g)(h)(i) and subsec.(2) come from the former s.442(b). Otherwise, the section is the former s.236.

Lotteries are of great antiquity. To go no further back than Leviticus XVI, 9, it appears that Aaron was directed to "cast lots upon the two goats, one for the Lord and the other lot for the scapegoat."

*OLD CODE:**Section 236—continued*

(6) *This section does not apply to*

(a) *the division by lot or chance of any property by joint tenants or tenants in common, or persons having joint interests (droits indivis) in any such property;*

(b) *raffles for prizes of small value at any bazaar held for any charitable or religious object, if permission to hold the same has been obtained from the city or other municipal council, or from the mayor, reeve or other chief officer of the city, town or other municipality, wherein such bazaar is held, and the articles raffled for thereat have first been offered for sale and none of them are of a value exceeding fifty dollars;*

(c) *the distribution by lot of premiums given as rewards to promote thrift by punctuality in making periodical deposits of weekly savings in any chartered savings bank;*

(d) *bonds, debentures, debenture stock or other securities recallable by drawing of lots and redeemable with interest and providing for payment of premiums upon redemption or otherwise;*

(e) *the Art Union of London, Great Britain, or the Art Union of Ireland.*

442. *Every one is guilty of an indictable offence and liable to three years' imprisonment who,*

(a) *with intent to defraud any person, cheats in playing at any game or in holding the stakes, or in betting on any event;*

(b) *carries on or plays, or offers to carry on or to play, or employs any one to carry on or to play, in any public place or any place to which the public have access, the game known as "three-card monte," or any similar game, whether played with cards or any other instrument and whatever may be the number of cards or instruments employed, for any valuable consideration, or who receives bets, wagers or deposits of any kind on the outcome of any such game, or who permits in any such place that is under his control any person to carry on or to play any such game.*

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In Numbers XXVI, 55, Moses was directed to divide the land by lot " . . . . . according to the lot shall the possession thereof be divided between many and few,"—a direction which may well be the origin of the exemption in subsec.(8)(a) concerning joint tenants and tenants in common.

In England lotteries appear as early as 1569. The State intervened in 1699 and lotteries continued to be operated for State and other purposes for many years, but were the subject of a long series of statutory enactments.

In 1802 an Act was passed (*The Gaming Act*, 42 Geo. III, c.119) the preamble to which reads as follows:

"Whereas evil disposed Persons do frequently resort to Publick Houses and other Places, to set up certain mischievous Games or Lotteries, called Little Goes, and to induce Servants, Children, and unwary Persons to play at the said Games; and thereby most fraudently (sic) obtain great sums of Money from Servants, Children, and unwary Persons, to the great Impoverishment and utter Ruin of many Families; for remedy whereof, be it enacted . . . . . that all such Games or Lotteries, called Little Goes . . . . . are hereby declared common and publick Nuisances, and against Law."

**Section 179—continued**

Section II prohibited the keeping of places for "any Game or Lottery called a Little Goe, or any other Lottery whatsoever not authorized by Parliament."

They were finally prohibited in 1823. To illustrate the disrepute into which they fell, there may be quoted a verse written by Henry Fielding in 1732:

"A lottery is a taxation  
Upon all the fools in creation;  
And heaven be praised,  
It is easily raised,  
Credulity's always in fashion,  
For folly's a fund will never lose ground  
While fools are so rife in the nation."

Peterson, in his book "Gambling, Should it be Legalized?" (1951) gives a detailed history of lotteries in the United States. Legalized lotteries, he says, were commonplace there from Colonial times until they were abolished by various States, first by Massachusetts in 1833, and last by Louisiana in 1892. The notorious Louisiana Lottery was established in 1868 in the unsettled conditions following the Civil War. It drew money from all over the United States and also from Canada, and grew in wealth and arrogance until in 1890 it became the subject of a denunciatory message from the President to Congress, as a result of which a law was enacted making it a criminal offence to deposit lottery matter in the United States mails.

In Canada in *Ex p. ROUSSE*, 1 Stu.K.B.321, it was held that, by virtue of the English statutes, it was an offence in Lower Canada to sell tickets in a foreign lottery, and in *CRONYN v. WIDDER* (1858), 16 U.C.Q.B.356, it was said that the English statutes respecting gambling which were in force in 1792 were treated as being in force in Upper Canada.

"By the criminal law of England, as introduced in the Province of Quebec by the Royal Proclamation of 1763 and the Act 14 Geo. III, c.83, all lotteries were prohibited and punishable as public nuisances; 10 & 11 Wm. III, c.17; 8 Geo. I, c.2, s.36; and 12 Geo. II, c.28; *Ex p. ROUSSE*, 1 Stu.K.B.321; *CRONYN v. WIDDER*, 16 U.C.Q.B.356. . . . In 1856, the legislature of the Province of Canada passed a statute (19 Vict. ch.49; C.S.C.95), also prohibiting them under pain of penalties recoverable by summary conviction. That statute was in force as ch.159 R.S.C. till it was superseded by s.205 of the Criminal Code." *L'ASSOCIATION ST. JEAN-BAPTISTE v. BRAULT* (1900), 30 S.C.R.598.

A comparison of s.205 of the 1892 Code with the present section will show that subsecs.(1)(a) and (b), (4), (6) and (8)(a), the last being the exemption in favour of joint tenants and tenants in common, have continued unchanged, and that the exemption in subsec.(8)(b) has been changed only to extend to religious as well as charitable objects.

In 1901, s.205(6) was amended to cut out the exemption of the Credit Foncier du Bas-Canada. "The authorities of that institution say that they do not want their enterprise to be considered as connected in any way with lotteries." (Han. 1901, Vol. II, p.5801).

By 1895, c.40, s.1, s.205 was amended by adding to subsec.(1), par.(c) in the following terms:

" . . . . . or (c) conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the winners of any property so proposed to be advanced, loaned, given, sold, or disposed of."

By the same Act, subsec.(5) was amended by adding to it the words "and the conducting or managing of any such scheme, contrivance or operation for determining the winner in any such lottery."

By the same Act, s.196 defining a common gaming house, was also amended. The occasion appears in the reference (Han. 1895, p.515) to a prosecution which had excited some attention. "Hon. gentlemen may have observed that the provision of the Code was defeated by conducting part of the operation across the border, while the gaming house itself was within Canadian territory. It is to meet a difficulty of this kind that the Bill has been introduced."

In 1900 by c.46, s.2, a new subsec.(6) was enacted, the effect of which was to make par.(b) read "charitable or religious object" and to strike out par.(c) which exempted "any incorporated society for the encouragement of art."

By 1906, c.6, subsec.(6) was amended by adding:

"(c) the Art Union of London, Great Britain or the Art Union of Ireland."

This applied to the operation of certain draws for pictures without profit. It was passed over some objection that it introduced the gambling spirit. (Han. 1906, Vol. IV, pp.7660-4). Mr. Fielding said that the reason for the amendment was that Parliament had gone too far in amending the law to do away with the abuse which had arisen through the exemption of so-called art unions, and that the legitimate Art Unions were not lotteries in the ordinary sense. Mr. R. L. Borden said (p.7664): "While I am in sympathy with the objection to lotteries, this can hardly be construed a lottery in the ordinary sense." This provision is not continued in s.179. It appears to be obsolete in Canada.

Section 205 as so amended became s.236 in the Code of 1906.

In 1922, by c.16, s.11, there was added to subsec.(1), pars.(d) and (e) as follows:

"or (d) disposes of any goods, wares, or merchandise by any game or mode of chance or mixed chance and skill in which the contestant or competitor pays money or other valuable consideration;

"or (e) induces any person to stake or hazard money or other valuable property or thing on the result of any dice game, shell game, punch board, coin table or on the operation of any wheel of fortune."

In the Senate, 1922, p.443, it was said that there had been cases in Montreal where people were victimized by men operating on streets and in saloons who were filching money away from innocent people in the most cruel way. "This section has for its object the preventing of the ignorant public from being victimized by those games. They are generally managed by people who have moved from the United States and who go from one city to another and succeed in making a few hundred dollars illegally by smart tricks."

The particular reference is probably to "three card monte". In Hansard 1921, p.3921, it was stated that as the result of the judgment of the



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courts that under the law this was not *per se* a gambling game, all the experts in three card monte had swarmed into Montreal and were pilaging the unsuspecting citizens of that town at an appalling rate. The judgment referred to is *R. v. ROSEN*(1920), 37 C.C.C.381.

The exemptions appearing in s.179(3) and in subsec.(8)(c) and (d) were added by 1925, c.38, s.4. What now appears as subsec.(1)(c) was added by 1932, c.8, s.1, it being explained that in order to evade the prohibitions contained in the *Post Office Act*, persons concerned in such schemes were resorting to modes of transmission other than the mail.

What appears as subsec.(5) came into the Code by 1934, c.47, s.7 in substitution for the previous 236(3). The effect of this was to do away with the former provision under which a lottery winner was liable to forfeit his prize "to any person who sues for the same by action or information in any court of competent jurisdiction." This had been the subject of unfavourable comment in Parliament. For example, in 1931 (Han. Vol. IV, p.4143) there was discussion of the undesirability of friendly actions by relatives to forestall similar actions by informers, but it was inconclusive because of litigation pending at the time.

In 1935, by c.56, s.3, the following was added to s.236(1)(c):

" . . . . . conducts, manages, or is a party to any scheme, contrivance or operation of any kind of which any person, upon payment of any sum of money, or by obligating himself to pay any sum of money, shall become entitled under such scheme, contrivance or operation to receive from the person conducting or managing such scheme, contrivance or operation, or any other person, a larger sum of money than the amount paid or to be paid, by reason of the fact that other persons have paid or obligated themselves to pay any sum of money under such scheme, contrivance or operation; or . . . . ."

It was explained (Han. 1935), as referred to in *R. v. RANKINE*(1938), 70 C.C.C.354, that the amendment was for the purpose of checking "as far as possible, these gambling devices found in stores and places where the public resort, in regard to which the law is a little undecided at the present time."

The references to valuable security were added to the paragraph by 1943-44, c.23, s.8, apparently to forestall such "snowball" schemes as were before British courts in *BARNES v. STRATHERN*, [1929] S.C.(I.) 41, and *DIRECTOR OF PUBLIC PROSECUTIONS v. PHILLIPS*, [1935] 1 K.B.391.

*BARNES v. STRATHERN* concerned an elaborate scheme whereby what was called a bonus bond was issued to an applicant and became the "parent" of a family of similar bonds going down through successive generations in different colours. A completed set would consist of 5,461 bonds, and if completed the holder of the parent bond was to receive £150. Held, a lottery, in respect that the occurrence of the event upon which payment fell due could neither be approximately predicted nor materially influenced by the exercise of any knowledge, experience, art or skill on the part of the holder of the parent bond.

In *DIRECTOR OF PUBLIC PROSECUTIONS v. PHILLIPS*, Lord Hewart, C.J., said at p.401:

"Here, as it seems to me, it is quite obvious that the person who accepts the invitation contained in this leaflet is paying the sum of £1 in order that he may have the opportunity of setting a ball rolling, over whose revolutions, after the first four at any rate, he will have no control, and it is a pure matter of chance whether the return upon his money will prove to be a few shillings or a great many pounds."

Before making notes of cases on Code s.236, it may be well to remark a difference between English and Canadian legislation. Earlier English statutes have in large measure been replaced by the *Betting and Lotteries Act*, 1934, c.58 (U.K.). S.21 of that Act provides that "subject to the provisions of this part of this Act, all lotteries are unlawful". There is no statutory definition of lottery, but judicial definition describes a lottery as a scheme for distributing prizes by lot or chance. The exceptions are small lotteries incidental to bazaars, sales of work and similar other entertainments (s.23), private lotteries under prescribed conditions confined to members of societies or persons working or residing on the same premises (s.24), and others conducted by Art Unions under the *Art Unions Act* (s.25).

It is the lack of statutory definition and the acceptance of judicial definition that create a marked difference from Canadian law. Under the English law the winning of a prize must depend entirely upon chance: *TAYLOR v. SMETTEN* (1883), 11 Q.B.D.207; *SCOTT v. DIRECTOR OF PUBLIC PROSECUTIONS*, [1914]2 K.B.868; *HALL v. COX*, [1899]1 Q.B.198; *MOORE v. ELPHICK*, [1945]2 All E.R.155.

It is true that paragraphs (a), (b), (bb) and (c) of subsec.(1) of s.236 referred to a mode of chance only, but par.(d) forbade the disposing of goods, wares or merchandise by any game or mode of chance or mixed chance and skill in which the contestant or competitor pays money or other valuable consideration. The English cases have been followed in Canada where they are applicable.

It should be noted too that in *L'ASSOCIATION ST. JEAN BAPTISTE v. BRAULT* (1900), *supra*, it was held by the Supreme Court of Canada that the provincial legislatures have no jurisdiction to permit the operation of lotteries forbidden by the criminal statutes of Canada.

In 1934, speaking upon a Bill the purpose of which was to empower the Attorney General of any province to authorize a Committee to conduct hospital sweepstakes, the Hon. C. H. Cahan, Secretary of State, took the position that it was *ultra vires* of Parliament to authorize the Attorney General of a province to create a Committee to raise money for provincial purposes. "It is my opinion," he said, "that the legislature of the province of Quebec was acting within its exclusive legislative jurisdiction except for one aspect, namely, that by section 236 of the *Criminal Code* the Parliament of Canada has declared that the organization, maintenance and operation of lotteries is illegal and is a crime except for one or two conditions which are imposed by way of exceptions to that measure."

It would seem to be clear that any relaxation of the law in favour of provincial lotteries, to say nothing of federal lotteries, would require amendment of the existing provisions.

There have been civil actions in which s.236 was applied. In *BEDARD v. THE PHOENIX LAND IMPROVEMENT COMPANY* (1909), 10

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Que. P.R.278, a claim was struck out because the land in question was being bought for an illegal purpose, namely, a lottery.

*D'ORIO v. LEIGH & CUTHBERTSON LTD.*, [1929]2 W.W.R. 171, was an action for the price of certain punch-boards. Each person punching a board received a slip of paper setting out a problem in a game of checkers. The only element of chance was in the problem the person would draw—whether he solved it or not depended on his skill. It was held that the board did not contravene s.226 or s.236. *Per* Gallieher, J.A.: "The game is one of skill or one in which skill largely predominates, and into which the element of chance entering is negligible."

In *TELEGRAM etc., CO., v. FORTIN*(1938), 76 Que. S.C.369, the plaintiff alleged that it had rented a certain printing plant to the defendant and the defendant pleaded that to the plaintiff's knowledge all business carried on in the plant was the printing of lottery tickets and other matters pertaining to lotteries. The Court found that this was proved and dismissed the action "considering that plaintiff is an accessory to the illegal business carried on by defendant in contravention of Art. 236 of the *Criminal Code*."

*JARRY v. JOURDAIN*(1949), 99 C.C.C.376, was an action demanding delivery of an automobile (or its value) drawn for as an attendance prize. The prizes for bingo, were less than fifty dollars in value and there was an authorization from the Mayor, but the drawing for the car was illegal under s.236, and the action was dismissed. The following appears at p.381:

"Since such is the case, the undertaking assumed by the defendant, the organizer of the draw, to deliver the automobile or pay its equivalent, is equal to a compact to give effect to a criminal act contrary to the laws of public policy, as the Criminal Code, on the whole, contains provisions to preserve society from certain physical and moral disorders, to repress any conduct susceptible or contributing to either."

To be noted also is the fact that, by the repeal of subsec.(3) of s.236 (actions by informers) in 1934, several cases under it may be considered obsolete; *DINNING v. DINNING*(1931), 57 C.C.C.393; *BROWN v. KEELE*(1934), 62 C.C.C.84; *SAUNDERS v. MOLLISON*(1934), 62 C.C.C. 274 and *BROWN v. BONNYCASTLE*(1935), 65 C.C.C.57.

As to lotteries generally, it was held in *R. v. ROBINSON*(1917), 29 C.C.C.153, on the authority of *TAYLOR v. SMETTEN*, *supra*; *BARCLAY v. PEARSON*, [1893]2 Ch.154; 15 Hals. (1st ed.) 300, and *WILLIS v. YOUNG*, [1907]1 K.B.448, that:

"It would appear then, from the above authorities, that the three essential elements of a lottery are, consideration, prize and chance. I have carefully examined all the cases cited by counsel for the Crown, and find that in all these cases these three things were present, which are all absent from the case at bar."

In this case a canvasser gave an envelope to each person canvassed. One in three of these envelopes contained a certificate entitling the person drawing it to a credit of five dollars on an enlarged portrait, not in existence but to be made, and represented to be worth twelve

dollars. The person drawing paid nothing and was under no obligation to purchase. The conviction was quashed on appeal.

*There are the following cases under former s.236(1)(a), now s.179(1)(a).*

*R. v. HUDSON BAY COMPANY*(1915), 25 C.C.C.1. Every purchaser of goods worth one dollar or more received a numbered coupon. The person holding the coupon with the winning number which had been selected previously and deposited with a Bank Manager, was to receive an automobile. The obtaining of the winning number was entirely a matter of chance. It was held that the scheme was an offence under this paragraph and also under par.(c). It was said that the chances should be deemed to be paid for and not received without compensation. *TAYLOR v. SMETTEN*, *supra*, also applied, where it was held that included in the price paid for the tea, which admittedly was worth the price paid, was the price of the prize which was determined by chance.

*R. v. RODERICK*(1926), 45 C.C.C.110: a scheme whereby a purchaser of goods to a certain value obtains a ticket entitling him to membership in a "Club" through which prizes were to be distributed, is a mere shift to evade the law and to bring the transaction within s.236(6)(a), and will not avail as a defence to a charge of advertising and conducting a lottery.

*R. v. GRATTON*(1926), 46 C.C.C.41, is similar in effect.

*R. v. REGINA AGRICULTURAL, etc., ASSOCIATION*, [1932]2 W.W.R.131. The scheme here involved guessing the average temperature of seven cities on a future date and the attendance at the Regina Fair on certain days. An appeal from the dismissal of the charge under s.236(a) was dismissed. It was pointed out that under par.(a) the offence consisted in disposing of property by any mode of chance whatever, and that under par.(d) the offence consisted in disposing of goods, wares or merchandise by any mode of chance or mixed chance and skill in which the contestant pays money. There must be a disposal. Once the exercise of better judgment or power of observation enters, it cannot be said to be wholly chance.

*R. v. DOMINION NOVELTIES COMPANY*(1945), 83 C.C.C.324, (Ont. C.A.). A punch-board is a "proposal, scheme or plan" within 236(1)(a) and also a "device" within 236(1)(b) capable of being used for "advancing, selling or disposing of property by a mode of chance". The fact that they were made with that intention was inferred from the circumstances. "There is definitely no skill required in playing the board and the result obtained is mere chance." *R. v. HEISE*(1925), 45 C.C.C.30 followed.

*R. v. FREEMAN*(1889), 18 O.R.524. This case involved the sale of packages of tea containing prizes varying in value. The complainant bought two packages in succession which he handed back on finding prizes of small value. It was held that the real object was to obtain one of the more valuable prizes and that the transaction was an offence.

*R. v. PARKER*(1892), 9 Man. L.R.203, involved a drawing for money prizes along with the sale of fountain pens. This also was held to be an offence.

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*There are the following cases under s.236(1)(b) now s.179(1)(b).*

*R. v. PICARD*(1907), 17 Man. L.R.343. The Court of Appeal upheld a conviction under s.236(b) involving the sale of bonds of the Panama Canal Company issued in Paris. These gave to the purchaser a chance of winning a prize in a drawing. This case was referred to in *R. v. HENLEY*, *infra*, under 236(5).

*R. v. HEISE*(1925), 45 C.C.C.30. A conviction involving the sale of a punch-board by a wholesale dealer to a tobacconist was affirmed.

"(But) we think that . . . . the essential enquiry is this, what is the purpose or known intended use of the device? Is it a device for disposing of property by chance in the sense that such is its generally known and intended use? Upon the facts disclosed in the evidence we think it is clear that such is the case."

*R. v. McCARTHY*(1938), 70 C.C.C.401, involved the exemption in favour of church bazaars. It was held that "It was not a bazaar but a colourable offering of the articles for sale in the afternoon at a different place from that where the evening gathering took place, and the raffle taking place in the evening was not of articles offered for sale at a bazaar but a raffling of prizes." The exemption afforded by subsec.(6) of s.236, therefore, did not apply.

*R. v. O'MALLEY*(1941), 77 C.C.C.99. In this case the accused was discharged on *habeas corpus* on the ground that the charge on which he was convicted was defective in failing to state an essential in the offence, namely, consideration.

*R. v. DOMINION NOVELTIES CO.*, has been referred to above.

*R. v. HING LEE YEN*(1947), 88 C.C.C.404. Proof of sale of one ticket is sufficient. It is not necessary to state that some valuable consideration was given for the ticket since the word "sell" is used in the section and implies consideration.

*There is the following case under s.236(1)(bb) now s.179(1)(c).*

*R. v. LOUIE HOW*(1936), 66 C.C.C.250. A truck driver conveying lottery tickets contained in a shipment of goods without knowledge of their illegal character cannot be convicted under this paragraph for knowingly transporting articles intended for gaming, etc.

*There are the following cases under s.236(1)(c) now s.179(1)(d) & (e).*

*R. v. ROSS*(1924), 43 C.C.C.14. This involved a gum-vending machine which showed the next play. It was held that the accused was not properly convicted under 236(1)(c) but that the machine was a gambling machine or device under 235(b). Other cases involving similar machines are referred to *infra* under former s.236(1)(d).

*R. v. MURRAY*(1925), 44 C.C.C.346, was a case where persons joined a so-called "suit club". Each person was required to pay for a suit of clothes by instalments and drawings were held at certain intervals. The instalments remaining to be paid by the person whose name was drawn, were cancelled. This was held to be an offence within this paragraph. On similar facts the same result followed in *R. v. HARRISON*(1931), 55 C.C.C.238.

*R. v. HUDSON BAY COMPANY* has been referred to *ante* under par.(a).

*R. v. WONG SIM*, [1928]3 W.W.R.492. In this case an appeal was allowed because there was no direct evidence to show that the accused was operating a lottery. It was held, following *R. v. HONG GUEY* (1907), 12 C.C.C.366, that the presumptions raised by ss.985 and 986 do not apply to lotteries.

"Where the charge is laid as in this case, under s.236, no presumption amounting to a *prima facie* case, can be drawn from the finding upon the premises of the accused, of the paraphernalia and other equipment produced."

*R. v. BREWERTON*(1936), 67 C.C.C.60. This involved what was called "Bank nite" conducted in a moving picture theatre. It was held that it violated s.236(1)(c), that the word "property" also includes money and that the consideration for obtaining the chance for the prize was included in the price paid for admission. *Per* McGillivray, J.A., at p.69:

"In my view the word 'given' in subsection (c) of s.36 (sic) would be meaningless if proof of payment for the chance of securing the property offered were an essential part of the Crown's case."

And at p.70:

"The second part of subsection (c) added by amendment (1935, c.56, s.3) relates only to money and is in my view intended to cover so-called sweepstakes and other straight gambling schemes in which all competitors pay or promise to pay money into a common pot for the chance of obtaining a larger sum from the person conducting the scheme out of the fund so created."

*R. v. RANKINE*(1938), 70 C.C.C.354, (B.C.C.A.). A person selling tickets within the province for the Queensland State Lottery conducted by the government there in aid of hospitals, is not a party to the scheme within s.236(1)(c). The sale was effected by giving the purchaser an interim receipt and the ticket was later mailed from Australia. It was held that s.69 of the Code did not apply.

"A scheme for selection of the prize winners was carried on in Australia, and the final step in that scheme was the operation of the mechanical device under the control of the officials of the Queensland State Lottery. It was not any act of the appellant but theirs which determined who were the winners of prizes."

*ROE v. R.*(1949), 94 C.C.C.273, (S.C.C.). This was the "Barrel Derby" case. It was held that this paragraph must be read with those preceding so that "so proposed" in the first part means "by some mode of chance". If there is merely skill or a mixed element of skill and chance, there is no offence under the first part of the paragraph. On the other hand, the second part does not refer to chance or to mixed chance and skill and the receiving of money thereunder is not subordinate to these elements. The accused was held to be not guilty under the first part, because of an element of skill, but guilty under the second part because the winner would receive a larger sum because non-winners contributed to the scheme.

*R. v. BLAIN*(1950), 99 C.C.C.152, (Sask. C.A.). This was somewhat similar to *ROE v. R.*, *supra*, and involved the forecasting of the break-up of ice in the spring. A conviction under s.236(1)(c) was upheld. It was urged that the scheme was not within this clause because the prize was

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paid by the promoter, leaving the whole fund created by the scheme to go to its purpose, and that the case was not the same as *ROE v. R.* It was held, however, that the clause is not restricted to schemes where the prize comes from the fund created by the sale of tickets. The language of the section indicates that the larger sum may come from the person managing the scheme "or any other person" by reason of the fact that "other persons have paid, etc."

*R. v. MILLER*(1951), 99 C.C.C.79. It was held that a person found in possession of books of lottery tickets, lists of names and addresses, money orders, etc., where it is shown that one of the names of the persons to whom the money orders were payable was an alias for the possessor, and letters in connection with the lottery, could be convicted under s.236(1)(c). It was held too that if he were not actually conducting the scheme, Code s.69 would apply, and that in this respect *R. v. RANKINE*, *supra*, was distinguishable, because in that case the Queensland Lottery was not illegal at source. In this case seizure was made under an order issued under s.641, and it was held that paraphernalia, money and securities connected with the lottery could be seized and forfeited and that an order could be made for destruction of seized articles.

*There are the following cases under s.236(1)(d) now s.179(1)(f).*

*R. v. IRWIN*(1928), 50 C.C.C.159. In this case an automobile was to be given to the person making the estimate nearest to the number of passengers to be carried on the Edmonton Street Railway on a certain date. The chance was attached to a ticket for a dance, the proceeds of which were to go to the Red Cross. Held:

"The purpose of legislation is of course a matter for the legislature and only incidentally for the courts where the meaning of the language may not be clear, and it is to be noted that certain charitable and religious purposes are exempted under certain conditions from the operation of the whole section, while certain enterprises are exempted from the operation of the above provision, but it is clear that the defendant's case does not come within any of the exemptions, and the provision in question, which was enacted only a few years ago, seems very clear and definite in its terms."

*R. v. LONG*(1928), 50 C.C.C.169. In this case an automobile was to be given away in a contest to guess the number of grains of wheat in a jar. It was held to be contrary to s.236(1)(d):

"Before this particular provision was enacted it was held that where there was a substantial element of skill it could not be held to be a mere method of chance but this provision quite clearly changes the law in that respect and such cases as *R. v. DODDS*(1884), 4 O.R.390, and *R. v. JAMIESON*(1884), 7 O.R.149 cases of guessing the number of beans or buttons in a jar, have no authoritative value as regards this provision."

It is true that in the former case *Armour, J.*, (later C.J.) did say it was solely a matter of skill and judgment, and if that could be truly said about the present case no doubt the conviction could not stand, but the evidence does not in our opinion warrant such a conclusion. . . . . There is little doubt that it is the element of chance that

furnishes the great attraction in many cases, in such a contest, and it would appear that the object of the prohibition is to check the gambling instinct in its application to such cases as the present." (Italics added; Ed.)

*R. v. MARSHALL*, [1930]2 D.L.R.855, was a scheme for the sale of candy. At p.868:

"It appears to me quite obvious that there never was any serious or honest intention to select the winner or winners from the numerous body of contestants, by any other than an arbitrary selection nor was there any real basis for making the selection in any other manner. I am therefore of the opinion that such decision would be based on pure chance and that the whole scheme constituted a lottery within the meaning of the section."

This principle as to arbitrary selection, was laid down in *BLYTH v. HULTON & CO.*(1908), 24 T.L.R.719, at p.721, and in *SMITH'S ADVERTISING AGENCY v. LEEDS*(1910), 26 T.L.R.335 at p.337.

*R. v. SAM CHOW*(1938), 70 C.C.C.150. The sale of tickets bearing Chinese characters which entitle the holder to be paid certain sums of money according as its markings correspond with characters on balls drawn from a bag, is a disposal of property by mode of chance. Property includes money and need not be a specific sum. *R. v. BREWERTON* (1936), 67 C.C.C.60, "In my opinion the intention and purpose for which the tickets were sold is the proper test to be applied:" *R. v. ROBINSON* (1917), 29 C.C.C.153, distinguished as to there being no prize.

*BAILEY v. R.*(1938), 70 C.C.C.197, (S.C. Can.). Although a device (a punch-board with questions the answers to which gave prize-winning key letters) could be played and a successful result obtained with certainty as a result of research and skill, it was an admissible conclusion that in actual practice it would be operated so as to depend entirely on luck. It was not necessary that there should be evidence that it had been so operated by someone.

This case upheld a conviction for keeping a common gaming house under s.229, applying ss.985 and 986(2). It would appear however that it might also have been held to be a scheme for disposing of goods, wares and merchandise contrary to s.236.

There has been some difference of judicial opinion concerning slot machines whereon each operation discloses the result of the next. This appears to have been the uncertainty of the law to which reference was made when the amendment of 1935 was brought in. It would seem that in the case of the punch-board in *BAILEY v. R.*, *supra*, such a machine might be within this paragraph (*cf. R. v. ARNOLD, infra*), as well as being a gambling device such as to make the premises a common gaming house under s.229. In the former case the presumptions raised by ss.985 and 986 do not apply, in the latter they do.

In *R. v. STUBBS*(1915), 24 C.C.C.303, the accused was charged with keeping a gaming house. It was held that each operation was a separate game in which the result was a certainty.

*R. v. BLACK*(1924), 62 Que. S.C.401, citing *R. v. STUBBS*, held that such a machine was not a lottery, and there was a similar result in *R. v. LANGLOIS*(1914), 23 C.C.C.43.



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In *R. v. O'MEARA*(1915), 25 C.C.C.16, involving a similar gum-vending machine, a conviction was upheld for keeping a common gaming house. It was held that notwithstanding the fact that the next operation of the machine could be seen, the gaming element consisted in the inducement to keep on playing. See also *BAREHAM v. R.* (1916), 26 C.C.C.211 and *R. v. GERASSE*(1916), 26 C.C.C.246.

*R. v. ARNOLD*(1927), 48 C.C.C.101. A slot machine from which the customer in addition to receiving goods receives disks which can be re-played in the machine or exchanged for other merchandise, is a gaming device although the results of playing the machine are indicated in advance. *R. v. O'MEARA*, *supra* followed. At p.107:

"Section 236 of the Criminal Code, as it stood prior to legislation of 1922, dealt only with the promotion of lottery schemes, by prohibiting their advertisement (s-s.(a)), the sale etc., of tickets, etc., (s-s.(b)) and their conduct (s-s.(c)). The sale or disposal of the goods by such schemes was not made an indictable offence, though 236(3) declared every such sale was void. By 1922 (Can.), c.16, s.11, s.236(d) . . . . . was added."

In *R. v. WOLFE*(1928), 50 C.C.C.189, the accused was charged under s.229. It was held that an automatic vending machine, the operation of which as far as the general public is concerned is a game of chance or at best of mixed skill and chance, is not legalized by the fact that in the hands of an expert operator it may be a matter of skill. Subsec.(4) of s.986 was applied.

*R. v. CANADIAN MINT COMPANY*(1928), 50 C.C.C.384. The headnote in this case is identical with *R. v. WOLFE*, *supra*. The accused was charged under s.229 but subsec.(4) of s.986 was not mentioned.

*There are the following cases under s.236(1)(e) now s.179(1)(g).*

*R. v. BEASLEY*(1936), 65 C.C.C.337. The accused was convicted under the gaming and disorderly house provisions of the Code. He was the holder of a lease from the Royal Agricultural Winter Fair Association giving him the right to sell "TCM Amusements" in its premises during its fair. The Ontario Court of Appeal held that the devices which he operated were lotteries and were within the exemption created by s.236(1)(e) in favour of agricultural fairs, and the conviction was therefore quashed.

*NORMANDEAU v. LEROUX*(1927), 65 Que. S.C.473. In this case it was held that the exemption applied only to the Association or to a person holding a lease or concession from it.

*There is the following case under s.236(2) now s.179(4).*

*R. v. PILON*(1949), 96 C.C.C.144. This case involved an "attendance card" at a moving picture theatre, and the charge was dismissed on appeal. The case is inconclusive because the accused did not buy the ticket with which the card was issued, was not present and had not authorized its purchase for her. Perhaps all that the case decides is that there must be *mens rea*.

S.236(3), now s.179(5) has been mentioned above.

There does not appear to be any reported case under s.236(4), now s. 179(6).

*There is the following case under s.236(5) now s.179(7).*

*R. v. HENLEY*(1924), 42 C.C.C.11. In this case it was held that the sale of one of an issue of bonds of the City of Paris containing certain lottery features, is the sale of a share in a foreign lottery under s.236. There was reference to *R. v. PICARD*, *supra*, decided under s.236(1)(b), and the judge made his finding doubtfully on the undertaking of the Attorney General to bear the costs of an appeal. The result of the appeal does not appear to be reported.

*There are the following cases under s.236(6) now s.179(8).*

In addition to *R. v. RODERICK* and *R. v. McCARTHY*, *supra*, there are the following cases under this subsection.

On par.(a), *R. v. UNIACKE*(1944), 82 C.C.C.247. In this case members of an organization subscribed to a fund to provide new quarters for it, and a bond was given each month to some subscriber. A conviction under s.236 was upheld.

"The words 'joint tenant' and 'Tenants in common' have special meanings. A joint tenancy is created where the same interest in real or personal property is passed by the same conveyance to two or more persons in the same right or by construction or operation of law jointly, with a right of survivorship. . . . A tenancy or ownership in common arises when owners have community of possession but distinct and several titles to their shares which need not necessarily be equal; and there is no right of survivorship between owners in common: Wharton's Law Lexicon, pp.434 and 811; Stroud's Judicial Dictionary, 2nd ed., pp.1022 and 2025; 25 Hals. (2nd ed.), pp.210 and 211. The essential features of a joint tenancy or a tenancy in common are not present in the case of the subscribers to the fund to obtain new quarters in their relationship to the bonds which were given away by a mode of chance. Moreover, Parliament could not have intended the exception to be applied to property advertised to be given away by a mode of chance to induce persons to subscribe money or to purchase goods for if s-s(6)(a) were so construed the general provisions of s.236 would become nugatory."

On par.(b), *R. v. COSMOPOLITAN CLUB*(1948), 90 C.C.C.358, —Bingo. Accused had received permission from municipal authorities, a booth offered the prizes for sale, and they were of small value. It was charged under s.226 (gaming house) and also under s.236 (lottery). The court followed *R. v. PARROTT*(1946), 87 C.C.C.127, and held that defendant was within the exemption as to premises occasionally used for playing games for charitable purposes. It held also that even if bingo is a lottery, the circumstances in this case were within the exemption created by s.236(6)(b) as to raffles at a bazaar. At p.362:

"Section 226 covering the playing of bingo, according to all decisions, provides specifically that certain charitable organizations shall be exempt from the penalties under certain specific conditions, which in this case have been fulfilled. If then the accused can be convicted on the same facts under s.236, where the exemption in s.226 does not appear, it follows that the effect of s.226 is completely destroyed, and the exemption becomes meaningless. The logical interpretation of the

**Section 179—continued**

section is that s.236 applies to different acts from those covered by s. 226, and in this way an anomalous and contradictory situation is avoided."

With reference to bingo, it is relevant to note that in *BARRETT v. FLYNN*, [1916]2 Ir.R.1, the game of "House" which is really another name for bingo, was held to be a lottery. Cherry, L.C.J., said in part:

"The game of 'House'—if it can be called a game at all—is undoubtedly a game of pure chance. All that the player does is to cross out a number on his card when that number is called by the person who draws the numbers from the urn or box. This requires no skill whatever. It is only a record of the drawing; and the playing of the so-called game really consists in the drawing of the numbers from the urn. In my opinion, therefore, it is not a game at all, in the ordinary significance of the term, but a lottery, and, as such, is forbidden by the Lottery Acts. . . . .

Thus a sweepstake has been held to be a lottery: *ALLPORT v. NUTT* (1 C.B. 974). The so-called game of 'House' appears to me also to be nothing but a lottery, in which the drawing of the numbers is a little protracted, so as to keep up the excitement. If each of the players had on his card only one number instead of fifteen, and merely claimed his money when that number was called, no one could argue that the game was not a lottery. It seems to me to make no difference that there are fifteen numbers on the card instead of one, and that five in a row must be called before the prize is won."

But *R. v. McGEE*(1942), 77 C.C.C.302, did not agree with this. The magistrate, whose judgment was upheld by the Manitoba Court of Appeal, said, "He (*i.e.* Cherry, L.C.J.) appears to have assumed that the only definition of a game is something in the nature of a contest. Among the dictionary meanings of the word 'Game' are, an amusement, diversion or practice. Bingo comes within all these definitions and is therefore a game."

And McLaurin, J., in *R. v. COSMOPOLITAN CLUB*, *supra* at p.361 said:

"The decision appears to establish that the playing of this game is only an offence under s.226. In some measure this is confirmed by an examination of reported cases. In every instance where the game of bingo has been involved, the charges have, in fact, been laid under s.226, and in no judgment has it been suggested that s.236 could be used. Reported decisions dealing with charges that have been dealt with under s.236(1)(d) disclose that these are a different type of offence entirely." This is illustrated by *R. v. IRWIN*(1928), 50 C.C.C. 159, and *R. v. LONG*(1928), 50 C.C.C. 169."

**Football Pools**

*R. v. WOODWARD & WILLCOCKS*(1922), 38 C.C.C.154. In 1921 the One Big Union Bulletin, a weekly newspaper published in Winnipeg, launched a scheme whereby a coupon to be taken from the newspaper and containing a schedule of English and Scottish football matches to be played, could be filled in with the subscriber's forecast of the result of those matches and forwarded with the sum of twenty-five cents. Except

for some slight deductions to cover postage and advertising, all the money received was to be distributed in prizes. The editor and business manager were prosecuted for keeping a common betting house. The charge was dismissed by the Police Magistrate, who considered himself bound by the English case of *R. v. HOBBS*, [1898]2 Q.B.647. The Manitoba Court of Appeal reversed this decision on the ground that the facts in *R. v. HOBBS* constituted a lottery in that the result there depended upon the drawing of a numbered ticket, whereas in the scheme in the instant case, each subscriber was betting against all the other subscribers that his forecast would be more nearly correct than theirs. It was held that the statute does not require that there should be betting as between the keeper of the house and some outside party, and that what had been done brought the newspaper office within the definition of a common betting house.

However, Parliament with specific reference to the Police Magistrate's decision (Senate 1922, p.540 *et seq.*) amended par.(1)(b) by striking out the words "as or for the consideration" and substituting the following as paragraph (i):

"all or any part of which money or valuable thing or its equivalent, is to be paid or given to any other person on any event or contingency of or relating to any horse race or other race, fight, game, or sport, or".

*MOORE v. ELPHICK*, [1945]2 All E.R.155, by contrast with *R. v. WOODWARD et al.*, serves to emphasize the difference between English and Canadian law. That case also had to do with Football Pools. It was held that the selection of Football Pools conducted by a particular organization and the correct forecast of the result of matches on which the winning of prizes depended, not being entirely dependent on chance but on the skill exercised by the appellant, the business carried on by him was not therefore a lottery. There was evidence that the appellant had carefully studied the results of football matches for a number of years, that out of twelve matches to be played, he selected four likely winners and worked out the remaining eight on a mathematical basis.

#### *Numbers Game or Policy*

In *R. v. JASPER*(1953), 105 C.C.C.393, the accused was convicted under s.235(1)(c) of "unlawfully engaging in the business of betting." The following extracts are quoted from the magistrate's judgment at p.395:

"The expert testified this business preys upon the under-privileged—the have-nots who yearn for something. For that reason the bets are usually collected by runners in pennies, nickels, dimes and quarters. This gives the whole business a false appearance of being a minor evil—something similar to a penny-ante game in poker."

And at p.402:

"In the past Windsor has suffered from more than its share of the evils of rackets. The history of this particular one elsewhere makes it to be feared as a decided threat to peace and good order in any community. . . . those operating this game, into whose hands had poured nickels and dimes to an amount that they were operating an annual multi-million dollar racket."

The winning number was arrived at by selecting each of three digits from the totals of pari-mutuel prices paid in certain horse-races. A percentage

**Section 179—continued**

of each bet was retained by the "writer" who issued a betting slip to the bettor, and the winner, if any, was paid off at 500 to 1.

The so-called "give-away" programs that are so common on radio and television have not been the objects of prosecution in Canada. An attempt by the Federal Communications Commission in the United States to deal with them by regulation has been held to go beyond the powers of the Commission.

In *AMERICAN BROADCASTING CO. INC., v. U.S.; NATIONAL BROADCASTING CO, INC., v. U.S.; COLUMBIA BROADCASTING SYSTEM v. U.S.*(1953), 110 F.Supp.374, it was held also, as it has been held in Canada, that the elements of a lottery are chance, prize and consideration, but that radio and television "give-away" programs in which the contestants are selected either from the studio audience or by random selection of telephone numbers, do not constitute a lottery in the sense of a prize for a price, since the element of price is lacking. On appeal to the Supreme Court, this judgment was affirmed: *FEDERAL COMMUNICATIONS COMMISSION v. AMERICAN BROADCASTING CO.*(1954), 347 U.S.285. The Court held that the increased advertising value of a "give-away" program, resulting from the requirement, direct or indirect, that home contestants listen to the program, does not constitute a valuable consideration for the purpose of s.1304 of the *United States Criminal Code*. In so far as such programs involve the advertising of schemes for disposing of property, the judgment in *ROE v. R., supra*, would apply to them.

All of the foregoing is written with the fact in mind that, as pointed out in the Introduction, this subject is before a Parliamentary Committee. Its recommendations are still to be received but in the meantime there may be noted apparent inconsistencies in the existing law, as follows:

1. Pars. (a), (b), (c), (d), and (e) of subsec.(1) refer to methods of pure chance; par. (f) refers to methods of mixed chance and skill.
2. Under subsec. (4) there need not be any actual disposal; under subsec. (1)(f), as was pointed out in *R. v. REGINA AGRICULTURAL, etc., ASSOCIATION, supra*, there must be a disposal before the offence is complete. Of course, it may be said that the accused could be charged with an attempt, but there is no reported decision on this point.
3. Pars. (a), (b), (c), (d) and (e) of subsec.(1) refer to property, which includes money; par.(f) refers to goods, wares and merchandise in which money would not be included.
4. The judgment of the Supreme Court of Canada in *ROE v. R., supra*, shows that subsec. (1)(c) (now (1)(e)) contains two separate and unrelated offences. This comment goes rather to form than to substance.
5. If an accused charged with keeping a common gaming house would be entitled to the exemption provided by s.168(2)(a) it would be anomalous that he should lose the benefit of that exemption by being charged on the same facts under s.179. This was pointed out in *R. v. COSMOPOLITAN CLUB, supra*, in which the Court was careful to avoid such a situation.
6. It has been pointed out in several cases, e.g., *R. v. WONG SIM, supra*, that the presumptions raised by ss.985 and 986 (now s.169)

**OLD CODE:**

*234. Every one is guilty of an indictable offence and liable to one year's imprisonment who*

*(a) in any railway car or steamboat, used as a public conveyance for passengers, by means of any game of cards, dice or other instrument of gambling, or by any device of like character, obtains from any other person any money, chattel, valuable security or property; or*

*(b) attempts to commit such offence by actually engaging any person in any such game with intent to obtain money or other valuable thing from him.*

*(2) Every conductor, master or superior officer in charge of, and every clerk or employee when authorized by the conductor, master or superior officer in charge of, any railway train or steamboat, station or landing place in or at which any such offence, as aforesaid, is committed or attempted, shall, with or without warrant, arrest any person whom he has good reason to believe to have committed or attempted to commit any such offence, and take him before a justice, and make complaint of such offence on oath, in writing.*

do not apply to lotteries. It would seem to be logical that the finding of lottery equipment should be just as strong presumptive evidence as the finding of gaming equipment.

It is submitted that the present law is not properly accused of inconsistency or, as some of its critics say, hypocrisy, by reason of the provisions relating to pari-mutuel betting and of the exemptions created by ss.168(2) and 179(3) and (8) of the Code. These are rather concessions to the argument so often advanced that the gambling spirit is innate in every one, and that chance plays a large part in all the circumstances of our lives.

There may be applied some words of the Right Honourable Arthur Meighen in reference to the liquor traffic (Senate Debates, 1934, p.104): "We can never get the world perfect. Some argue that the sale of liquor should be entirely prohibited. They say that because liquor is not good for society we ought to make its manufacture and sale a crime and ban it wholly. Assuming their premises to be sound, it does not follow that their remedy is feasible. If the traffic cannot as a matter of practical executive authority be banned, it may be better to control it within certain limits."

See also s.171 (search) and s.167 (jurisdiction).

**GAMBLING IN PUBLIC CONVEYANCES.—Arrest without warrant.—Posting up section.**

**180. (1) Every one who obtains or attempts to obtain anything from any person by playing a game in a vehicle, aircraft or vessel used as a public conveyance for passengers is guilty of an indictable offence and is liable to imprisonment for two years.**

**(2) Every person in charge of a vehicle, aircraft or vessel and any person authorized by him may arrest, without warrant, a person who he has good reason to believe has committed or attempted to commit or is committing or attempting to commit an offence under this section.**

**(3) Every person who owns or operates a vehicle, aircraft or vessel to which this section applies shall keep posted up, in some conspicuous part thereof, a copy of this section or a notice to the like**

**Section 180—continued**

**effect, and in default thereof is guilty of an offence punishable on summary conviction.**

This comes from the former s.234. It is widened to include all forms of public conveyance. The section was s.203 in the Code of 1892, and came from R.S.C. 1886, c.160, ss.1, 3 and 6.

In the Code of 1892, subsec.(2) read "must arrest", and in the repealed Code the wording was "shall arrest". This has been changed to read "may arrest".

**CHEATING AT PLAY.**

**181. Every one who, with intent to defraud any person, cheats while playing a game or in holding the stakes for a game or in betting is guilty of an indictable offence and is liable to imprisonment for two years.**

This is the former s.442(a). It was s.395 in the Code of 1892 and came from R.S.C. 1886, c.164, s.80, and 8-9 Vict., c.109, s.17 (Imp.). Under the latter provision it was held in *R. v. GOVERNOR OF BRIXTON PRISON*, [1912] 3 K.B.568, that cheating at play was equivalent to obtaining by false pretences for the purposes of extradition. In *R. v. FORD* (1907), 12 C.C.C.555, accused, who believed that he had been cheated in a game, undertook to recover his money by force. The jury were charged that they might acquit him of robbery, but convict him of assault.

See also s.179(1)(g) and (h) and notes. This offence is within the absolute jurisdiction of a magistrate acting under Part XVI (s.467(c) (v)).

**BAWDY-HOUSES.**

**KEEPING COMMON BAWDY-HOUSE.—Inmate.—Person found.—Liability of landlord.—Notice of conviction to be served on owner.—Duty of landlord on notice.**

**182. (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and is liable to imprisonment for two years.**

**(2) Every one who**

**(a) is an inmate of a common bawdy-house,**

**(b) is found, without lawful excuse, in a common bawdy-house, or**

**(c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,**

**is guilty of an offence punishable on summary conviction.**

**(3) Where a person is convicted of an offence under subsection (1), the court shall cause a notice of the conviction to be served upon the owner, landlord or lessor of the place in respect of which the person is convicted or his agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.**

**(4) Where a person upon whom a notice is served under subsection (3) fails forthwith to exercise any right he may have to**

**OLD CODE:***Section 234—continued*

(3) Every conductor, master or superior officer in charge of any such railway car or steamboat, who makes default in the discharge of any such duty is liable, on summary conviction, to a penalty not exceeding one hundred dollars and not less than twenty dollars.

(4) It shall be the duty of every person who owns or works any such railway car or steamboat to keep a copy of this section posted up in some conspicuous part of such railway car or steamboat.

(5) Every person who makes default in the discharge of such duty is liable to a penalty not exceeding one hundred dollars and not less than twenty dollars.

442. (For wording of this section see p. 335.)

228. Every one who, without lawful excuse, is found in any disorderly house shall be liable on summary conviction to a penalty not exceeding one hundred dollars and costs and in default of payment to two months' imprisonment.

(2) Any one who, as landlord, lessor, tenant, occupier, agent or otherwise, has charge or control of any premises and knowingly permits such premises or any part thereof to be let or used for the purposes of a disorderly house shall be liable upon summary conviction to a fine of two hundred dollars and costs, or to imprisonment not exceeding two months, or to both fine and imprisonment.

229. (1) Every one who keeps any common gaming-house, or common betting-house is guilty of an indictable offence and liable to one year's imprisonment.

(2) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding three years, and the provisions of section one thousand and thirty-five in so far as it authorizes the imposition of a fine in lieu of any punishment otherwise authorized, and of section one thousand and eighty-one of this Act, shall not apply in the case of a conviction for an offence under this subsection.

(3) Every one who appears, acts or behaves as master or mistress, or as the person having the care, government or management of any disorderly house, or as assisting in such care, government or management, shall be deemed to be the keeper thereof and is liable to be prosecuted and punished as such although in fact he or she is not the real owner or keeper thereof.

(4) Every one who is an inmate of any common bawdy-house is guilty of an indictable offence and liable to a penalty not exceeding one hundred dollars and costs and, in default of payment, to imprisonment for a term not exceeding two months or to imprisonment for a term not exceeding twelve months.

(5) Every one who has been convicted three or more times of any of the offences mentioned in subsections one, two, three and four hereof is liable on the third or any subsequent conviction to imprisonment for a term of not less than three months and not exceeding three years.

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**determine the tenancy or right of occupation of the person so convicted, and thereafter any person is convicted of an offence under subsection (1) in respect of the same premises, the person upon whom the notice was served shall be deemed to have committed an offence under subsection (1) unless he proves that he has taken all reasonable step to prevent the recurrence of the offence.**

This combines the former ss.228 and 229(2), (4), (6) and (7). The provisions of ss.228 and 229 were developed from s.198 of the Code of 1892



**Section 182—continued**

by amendments in 1909, c.9, s.2; 1913, c.13, ss.10 and 11; 1915, c.12, ss.5 and 6; 1923, c.41, s.2. Its origin goes back to 1751, in the 25 Geo. II, c.36, s.8.

The whole section was re-enacted in the form in which it appeared in the repealed Code, by 1947, c.55, s.4, with the addition of subsec.(8) which now appears as s.183.

See also s.168(1)(b), (b) and (i) and s.184(1)(k).

The leading decision on this subject, as to the cumulative effect of circumstantial evidence, evidence of general reputation, and the presumption arising from obstruction (s.169), is that of the Supreme Court of Canada in *R. v. THEIRLYNCK*, [1931] S.C.R.478. On the offence of keeping, the following recent decisions may be referred to.

Evidence of a single act is not sufficient without further evidence of reputation or circumstances from which guilt may be inferred: *R. v. MARTIN*(1947), 89 C.C.C.385.

But where there are such additional circumstances as may indicate habitual use of the premises for the unlawful purpose, the evidence of a single act will be sufficient: *BOUCHARD v. R.*(1951), 12 C.R.305.

In *LEROY v. R.*(1952), 14 C.R.299, in which the evidence was that of two constables who visited the premises, it was held on appeal that there was sufficient proof by inference without direct proof.

See also *LECOURS v. R.*, [1949] R.L.142.

It has also been held that the general reputation of the accused may be a factor in the proof on a charge of keeping, although not sufficient by itself: *R. v. WEST*(1950), 96 C.C.C.349.

The case of *R. v. JACOBS*(1941), 75 C.C.C.337, bears upon subsecs. (3) and (4). In that case the accused, a real estate agent entrusted with the collection of the rent for certain premises, sent the tenant a notice to quit upon being advised that a conviction had been registered for keeping a common bawdy-house there. Some months later a similar conviction was made in respect of the same premises. It was held on appeal that this accused should not have been convicted because, in sending the notice to quit, he had exercised the only right he had in order to determine the tenancy or right of occupancy.

See also s.171 (search) and s.467 (jurisdiction).

**TRANSPORTING PERSON TO BAWDY-HOUSE.**

**183. Every one who knowingly takes, transports, directs, or offers to take, transport, or direct any other person to a common bawdy-house is guilty of an offence punishable on summary conviction.**

This is the former s.229(8) enacted by 1947, c.55, s.4.

See *CALVERT v. MAYES*, [1954] 1 All E.R.41.

**PROCURING.****PROCURING.—Presumption.—Corroboration.—Limitation.****184. (1) Every one who**

**(a) procures, attempts to procure or solicits a female person to have illicit sexual intercourse with another person, whether in or out of Canada,**

**OLD CODE:***Section 229—continued*

(6) If the owner, landlord, lessor or agent of premises in respect of which any person has been convicted as the keeper of a common bawdy-house fails, after such conviction has been brought to his notice, to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and subsequently any such offence is again committed on the said premises, such owner, landlord, lessor or agent shall be deemed to be a keeper of a common bawdy-house unless he proves he has taken all reasonable steps to prevent the recurrence of the offence.

(7) When any person has been convicted as the keeper of a common bawdy-house, the court shall cause a notice of such conviction to be served upon the owner, landlord, lessor or agent of the premises in respect of which such person was convicted and such notice shall contain a statement to the effect that it is being served pursuant to the provisions of subsection seven of section two hundred and twenty-nine of this Act.

(8) Every one who knowingly takes or transports or directs or offers to take or transport or direct any other person to any common bawdy-house is guilty of an offence and liable on summary conviction to a fine not exceeding two hundred dollars or to imprisonment for a term not exceeding twelve months or to both fine and imprisonment.

216. Every one is guilty of an indictable offence and shall be liable to ten years' imprisonment and on any second or subsequent conviction shall also be liable to be whipped in addition to such imprisonment who

(a) procures, or attempts to procure or solicits any girl or woman to have unlawful carnal connection, either within or without Canada, with any other person or persons; or

(b) inveigles or entices any woman or girl not being a common prostitute or of known immoral character to a common bawdy or assignation house for the purpose of illicit intercourse or prostitution; or

(c) knowingly conceals any woman or girl in any common bawdy or assignation house; or

(d) procures or attempts to procure any woman or girl to become, either within or without Canada, a common prostitute; or

(e) procures or attempts to procure any woman or girl to leave her usual place of abode in Canada, such place not being a common bawdy-house, with intent that she may become an inmate or frequenter of a common bawdy-house within or without Canada; or

(b) inveigles or entices a female person who is not a common prostitute or a person of known immoral character to a common bawdy-house or house of assignation for the purpose of illicit sexual intercourse or prostitution,

(c) knowingly conceals a female person in a common bawdy-house or house of assignation,

(d) procures or attempts to procure a female person to become, whether in or out of Canada, a common prostitute,

(e) procures or attempts to procure a female person to leave her usual place of abode in Canada, if that place is not a common bawdy-house, with intent that she may become an inmate or frequenter of a common bawdy-house, whether in or out of Canada.

Section 184—*continued*

- (f) on the arrival of a female person in Canada, directs or causes her to be directed, or takes or causes her to be taken, to a common bawdy-house or house of assignation,
  - (g) procures a female person to enter or leave Canada, for the purpose of prostitution,
  - (h) for the purposes of gain, exercises control, direction or influence over the movements of a female person in such manner as to show that he is aiding, abetting or compelling her to engage in or carry on prostitution with any person or generally,
  - (i) applies or administers to a female person or causes her to take any drug, intoxicating liquor, matter, or thing with intent to stupefy or overpower her in order thereby to enable any person to have illicit sexual intercourse with her,
  - (j) being a male person, lives wholly or in part on the avails of prostitution, or
  - (k) being a female person, lives wholly or in part on the avails of prostitution of another female person,
- is guilty of an indictable offence and is liable to imprisonment for ten years.

(2) Evidence that a male person lives with or is habitually in the company of prostitutes, or lives in a common bawdy-house or house of assignation is *prima facie* evidence that he lives on the avails of prostitution.

(3) No person shall be convicted of an offence under subsection (1), other than an offence under paragraph (j) of that subsection, upon the evidence of only one witness unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.

(4) No proceedings for an offence under this section shall be commenced more than one year after the time when the offence is alleged to have been committed.

This is the former s.216, altered by the addition of cl.(1)(k), and by omitting the requirement of corroboration in cases under subsec.(1)(j), as to which see note to s.131, *ante*.

Legislation against the White Slave Traffic first appears in s.50 of the *Offences Against the Person Act*, 1869, which made it a misdemeanour by false pretences, false representations or other fraudulent means, to procure any woman or girl under twenty-one, to have illicit carnal connection with any man other than the procurer. This was amended by 1885, c.82, which added the offence of enticing a girl under age to a house of ill-fame or assignation, and provided for the search of such premises under warrant for a person so enticed. It appears as s.7 of c.157, R.S.C. 1886.

By 1890, c.37, s.9, it was amended and widened to cover the transportation of women into or out of Canada for immoral purposes, and also the use of threats or intimidation towards the same end. S.185 of the Code of 1892 embodies these provisions, as does also R.S.C. 1906, c.146, s.216.

**OLD CODE:***Section 216—continued*

(f) on the arrival of any woman or girl in Canada, directs or causes her to be directed, takes or causes her to be taken, to any common bawdy-house or house of assignation; or

(g) procures any woman or girl to come to Canada, or to leave Canada, for the purpose of prostitution; or

(h) by threats or intimidation procures or attempts to procure any woman or girl to have any unlawful carnal connection, either within or without Canada; or

(i) for the purposes of gain, exercises control, direction or influence over the movements of any woman or girl in such manner as to show that he is aiding, abetting or compelling her prostitution with any person or generally; or

(j) by false pretenses, or false representations procures any woman or girl to have any unlawful carnal connection, either within or without Canada; or

(k) applies, administers to, or causes to be taken by any woman or girl any drug, intoxicating liquor, matter, or thing with intent to stupefy or overpower so as thereby to enable any person to have unlawful carnal connection with such woman or girl; or

(l) being a male person, lives wholly or in part on the earnings of prostitution.

(2) Where a male person is proved to live with or to be habitually in the company of a prostitute or prostitutes, or to live in a house of prostitution, he shall, unless he can satisfy the court to the contrary, be deemed to be living on the earnings of prostitution.

1002. No person accused of an offence under any of the hereunder mentioned sections shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused:—

(c) Offences under Part V, sections two hundred and eleven to two hundred and twenty inclusive, except subsections two to five inclusive of section two hundred and fifteen;

1140. No prosecution for an offence against this Act, or action for penalties or forfeiture, shall be commenced

(c) after the expiration of one year from its commission if such offence be

(v) seduction of a girl above sixteen and under eighteen—section two hundred and eleven.

(vi) seduction under promise of marriage—section two hundred and twelve,

(vii) seduction of a ward or employee—section two hundred and thirteen,

(viii) parent or guardian procuring defilement of girl—section two hundred and fifteen, subsection one,

(ix) unlawfully defiling women, procuring, etc.—section two hundred and sixteen,

(x) householders permitting defilement of girls on their premises—section two hundred and seventeen; or

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The Act 1909, c.9, raised the penalty from two to five years.

In 1913, by c.13, s.59, a new s.216, considerably widened, was passed without discussion at "Defining offences in connection with what is generally called, the White Slave Traffic". S.23 of the same Act provided for arrest without warrant, as it was said that "the necessity of getting

**Section 184—continued**

a warrant, it has been found, has facilitated numerous escapes".

In 1920, by c.43, s.18, the penalty was raised from five to ten years.

In 1939, a new subsec.(2) was substituted by c.30, s.5, in the form in which it now appears, as follows:

"Where a male person is proved to live with or to be habitually in the company of a prostitute or prostitutes, or to live in a house of prostitution, he shall, unless he can satisfy the court to the contrary, be deemed to be living on the earnings of prostitution."

The object of the amendment was to eliminate the necessity of the Crown proving that the accused has no visible means of support, and to prevent persons so charged, from avoiding the provisions of the subsection by "an alibi job", such as a sixth interest in a cigar stand or bootblack chair. The words 'and has no visible means of support' are stricken out." (Senate 1939, p.283).

The word "prostitution" as used in the section was held in *R. v. CARDELL*(1914), 323 C.C.C.271, to mean promiscuous sexual intercourse with men, and consequently it was held that the offence was not shown by a finding that it was the intention of the accused that the woman should become his mistress.

The word "habitually" in subsec.(2) as amended 1939, providing that a male person proved to be habitually in a prostitute's company, shall *prima facie* be deemed to be living on the earnings of prostitution, was interpreted in *R. v. JOHNSON*(1940), 74 C.C.C.324. It was held that the word is not used in the broad sense of the words "unlawfully", "continually", "customarily", and that it suffices to shift the onus if it is shown that for a period of about three weeks he was for the most part in the company of a prostitute. In this connection an earlier decision in *R. v. NYSHIMURA*, [1920]2 W.W.R.994, may be referred to. It was held on a case reserved that the offence of "living on the earnings of prostitution" required the habitual or continuous receipt of such earnings, and that the receipt on two occasions by a bell boy in a hotel, of tips from a prostitute living in the hotel was not sufficient to support the conviction. This case was distinguished from *R. v. HILL*, [1914]2 K.B.386, in which the accused was charged with a similar offence under the *English Vagrancy Act* (which also refers to male persons). The accused was there charged as for one specified day and it was held that evidence of his relations with the woman before or after that day was relevant to proving what were his relations with her on that day.

*Under former s.216(1)(a).*

In *R. v. QUINN*(1918), 30 C.C.C.372, a cab driver was held not guilty of procuring by reason of his conveying prostitutes and men accompanying them. It may be a question whether this case would now be decided in the same way in view of subsec.(8), which was added to s.229 in 1947, making "every one guilty of an offence who knowingly takes or transports or directs or offers to take or transport or direct, any other person to any common bawdy house." (See now s.183).

*R. v. SCOTT*(1932), 58 C.C.C.381, was an appeal from a conviction turning upon the question of corroboration. It was held that there was corroboration in the admission of the accused that he had taken the girl to another city and had registered with her at a cafe there.

The latest case upon this subsection is that of *R. v. ROBINSON* (1948), 92 C.C.C.223, which has been referred to at length with reference to the word "unlawful". This case is authority for the proposition that s.216(1)(a) applied to a person who arranges for sexual intercourse between a girl who consents thereto, and other men.

*Under former s.216(1)(e).*

*Re JOHNSON*(1904), 8 C.C.C.243. Accused was committed for trial and released on *habeas corpus*:

"The evidence, to my mind, clearly shows that the acts of procurement relied on by the prosecution, took place within the State of Washington, a place out of the jurisdiction, and it is not even suggested that the prisoner is a British subject."

*Under former s.216(1)(j).*

*R. v. WING*(1913), 22 C.C.C.426. In this case it was held that an attempt to commit the offence of procuring a girl by false pretences or false representations, was indictable under s.571 (see now s.406), notwithstanding that attempt is not mentioned in the paragraph but is mentioned in preceding paragraphs of the section.

*Under former s.216(1)(l).*

Several cases have been decided under this subsection. In *R. v. WILLIAMS*(1935), 63 C.C.C.360, it was held by a County Court Judge that inasmuch as only a male person can be charged under the paragraph, the women concerned were not accomplices so as to make it necessary for their evidence to be corroborated. In *R. v. RICHARD* (1935), 63 C.C.C.366, a conviction was quashed. In the judgment it is said that:

"there is no evidence that the acts of the prisoner, whatever may be thought of them, were for his gain. In fact, the evidence, slight as it is, shows that the woman wanted the money for herself and was personally attempting to make the bargains, which no doubt, have caused the prosecution. It is not shown in any way that the accused exercised control, direction or influence 'over the movements' of the woman in question."

In *R. v. JAMES*(1938), 69 C.C.C.320, it was held that par.216(1)(1) created only one offence and that the words "wholly or in part" had not the effect of creating two offences.

In *R. v. TURNER*(1938), 70 C.C.C.404, a charge under this paragraph was dismissed. At the time of his arrest accused had on his person the sum of seventy-three dollars, and it was held that he could not be said to have no visible means of support. An appeal by the Crown was dismissed on the ground that the question was not one of law alone. In *R. v. ZELKY*(1938), 71 C.C.C.143, an appeal from conviction was allowed on the ground that it was not sufficiently proved that accused was without visible means of support. He had money in his possession and had paid rent in advance. "The question as to what is visible means depends

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upon the circumstances of each case and the time within which that adjudication is to be made." It is doubtful, in view of the new subsec. (2), whether these cases would be decided now as they were.

*R. v. MAH CHEE*(1938), 71 C.C.C.63, was an appeal from sentence and the sentence was reduced in respect of the whipping which had been ordered.

*R. v. NOVASAD*(1939), 72 C.C.C.21. To sustain a conviction under this paragraph it is sufficient to show that accused receives profits or income produced directly from prostitution (in this case a payment for use of the room occupied by the prostitute). Contrasting the offence under this par. with the offence under 238(1)(j), the court said:

"The distinction between the two sections really seems to be that sec. 238(j) is intended for the transient who wanders about and occasionally falls back upon the avails of prostitution as a means of eking out a precarious existence, while 216(1) is aimed at the man who engaged himself in gleaning the earnings of prostitution as a business or stable means of livelihood. As supporting this view reference may be had to the second paragraph of s. 216".

*R. v. CAVANAUGH*(1941), 77 C.C.C.79, British Columbia Court of Appeal. It was held that accused was rightly convicted when it was shown that he had used for living expenses money given or lent to him by a prostitute. *R. v. JOHNSON* approved.

In *R. v. HONG*(1943), 80 C.C.C.343, the British Columbia Court of Appeal quashed a conviction and ordered a new trial of a man charged with living on the earnings of prostitution, on the ground that he had been prejudiced by the introduction of evidence to show that he had supplied and administered narcotics to the women.

In *R. v. DEAGLE*(1947), 88 C.C.C.247, the accused was arrested on a charge of illegal sale of liquor. He made a statement after being warned. It was held, following *R. v. DICK*(1947), 87 C.C.C.101, that the statement was not admissible against him on a charge of living on the avails of prostitution.

Since that part of the former s.238(j) that related to a person living on the avails of prostitution is now subject to the operation of s.184(1)(j) and (k), it is appropriate to refer, in addition to *R. v. NOVASAD*, *supra*, to the following cases decided under it. In *R. v. REHE*(1897), 1 C.C.C. 63, it was held that a woman who is kept by one man as his mistress cannot be convicted for vagrancy as supporting herself by the avails of her own prostitution. On the other hand, in the case of *BEDARD v. R.*(1916), 26 C.C.C.99, a woman was convicted under this paragraph for supporting herself for the most part by the avails of her own prostitution. This case was distinguished from *R. v. REHE* on the ground that "the morality officers tell us that the case here is one of matters which have taken the proportion of a public scandal."

*R. v. WELLER*(1917), 40 O.L.R.296, would appear to support the case of *R. v. REHE*. There it was held that the clause is not aimed at the prostitution but at the man or woman who supports himself or herself by the avails of the prostitution of another.

**OLD CODE:**

240. *In this Part, unless the context otherwise requires,*

- (a) *"abandon" or "expose" includes a wilful omission to take charge of any child referred to on the part of a person legally bound to take charge of such child, as well as any mode of dealing with it calculated to leave it exposed to risk without protection;*
- (b) *"form of marriage" includes any form either recognized as a valid form by the law of the place where it is gone through, or which, though not so recognized, is such that a marriage celebrated there in that form is recognized as binding by the law of the place where the offender is tried;*
- (c) *"guardian" includes any person who has in law or in fact the custody or control of any child referred to.*

## PART VI.

OFFENCES AGAINST THE PERSON AND  
REPUTATION.

## INTERPRETATION.

**"ABANDON." "EXPOSE."—"Child."—"Form of marriage."—"Guardian."**

**185. In this Part,**

- (a) **"abandon" or "expose" includes**
  - (i) **a wilful omission to take charge of a child by a person who is under a legal duty to do so, and**
  - (ii) **dealing with a child in a manner that is likely to leave that child exposed to risk without protection;**
- (b) **"child" includes an adopted child and an illegitimate child;**
- (c) **"form of marriage" includes a ceremony of marriage that is recognized as valid**
  - (i) **by the law of the place where it was celebrated, or**
  - (ii) **by the law of the place where an accused is tried, notwithstanding that it is not recognized as valid by the law of the place where it was celebrated; and**
- (d) **"guardian" includes a person who has in law or in fact the custody or control of a child.**

Par.(a) is the former s.240(a). It was s.216(2) in the Code of 1892, where it was new. It applies to s.189.

Par.(b) is new. At common law the father of an illegitimate child is under no obligation to provide for its maintenance and support, and it is pointed out in *R. v. GROENING*(1953), 107 C.C.C.234, that it is a well-established rule in English law that where the word "child" is used, either in a private document or in an Act of Parliament, it connotes, as a rule, a legitimate child only. But in *R. v. McREYNOLDS*, [1936] 2 W.W.R.449, it was held that a man who undertakes to care for an illegitimate child is under the same duty to provide necessaries as if the child were legitimate. This may be compared with *R. v. BARTHOUS*(1911), 17 C.C.C.459, in which it was held that the word "family" in the former s.238(b) included an illegitimate child. In England it was held in *LIVERPOOL SOCIETY v. JONES*, [1914] 3 K.B.813, that the



**Section 185—continued**

father of illegitimate children who is living with them and their mother, may be the person having custody of them within the meaning of the *Children Act*, 1908.

Par.(c) is the former s.240(b). It formed part of s.275(2) in the Code of 1892 and of s.216 in the E.D.C. It applies to s.240, *post*.

Par.(d) is the former s.240(c). It came into the Code as 1900, c.46, s.3, with specific reference to the offences now appearing in ss.145(1)(a), 155, and 186.

## DUTIES TENDING TO PRESERVATION OF LIFE.

**DUTY OF PERSONS TO PROVIDE NECESSARIES.—Offence.—Punishment.—Presumptions.**

- 186. (1) Every one is under a legal duty**
- (a) as a parent, foster parent, guardian or head of a family, to provide necessities of life for a child under the age of sixteen years;
  - (b) as a husband, to provide necessities of life for his wife; and
  - (c) to provide necessities of life to a person under his charge if that person
    - (i) is unable, by reason of detention, age, illness, insanity or other cause, to withdraw himself from that charge, and
    - (ii) is unable to provide himself with necessities of life.
- (2) Every one commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse, the proof of which lies upon him, to perform that duty, if**
- (a) with respect to a duty imposed by paragraph (a) or (b) of subsection (1),
    - (i) the person to whom the duty is owed is in destitute or necessitous circumstances, or
    - (ii) the failure to perform the duty endangers the life of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be endangered permanently; or
  - (b) with respect to a duty imposed by paragraph (c) of subsection (1), the failure to perform the duty endangers the life of the person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently.
- (3) Every one who commits an offence under subsection (2) is guilty of**
- (a) an indictable offence and is liable to imprisonment for two years; or
  - (b) an offence punishable on summary conviction.
- (4) For the purpose of proceedings under this section,**
- (a) evidence that a man has cohabited with a woman or has in any way recognized her as being his wife is *prima facie* evidence that they are lawfully married;
  - (b) evidence that a person has in any way recognized a child

**OLD CODE:**

241. Every one who has charge of any other person unable by reason either of detention, age, sickness, insanity or any other cause, to withdraw himself from such charge, and unable to provide himself with the necessaries of life, is, whether such charge is undertaken by him under any contract, or is imposed upon him by law, or by reason of his unlawful act, under a legal duty to supply that person with the necessaries of life, and is criminally responsible for omitting, without lawful excuse, to perform such duty if the death of such person is caused, or if his life is endangered, or his health has been or is likely to be permanently injured, by such omission.

242. Every one who as parent, guardian or head of a family is under a legal duty to provide necessaries for any child under the age of sixteen years is criminally responsible for omitting, without lawful excuse, to do so while such child remains a member of his or her household, whether such child is helpless or not, if the death of such child is caused, or if his life is endangered, or his health is or is likely to be permanently injured, by such omission.

(2) Every one who is under a legal duty to provide necessaries for his wife, is criminally responsible for omitting, without lawful excuse so to do, if the death of his wife is caused, or if her life is endangered, or her health is or is likely to be permanently injured, by such omission.

(3) Every one is guilty of an offence and liable upon indictment or on summary conviction to a fine of five hundred dollars, or to one year's imprisonment, or to both, who,

(a) as a husband or head of a family, is under a legal duty to provide necessaries for his wife or any child under sixteen years of age; or

(b) as a parent or guardian, is under a legal duty to provide necessaries for any child under sixteen years of age;

and who, if such wife or child is in destitute or necessitous circumstances, without lawful excuse, neglects or refuses to provide such necessaries.

(4) Upon any prosecution under this section

(a) evidence that a man has cohabited with a woman or has in any way recognized her as being his wife shall be *prima facie* evidence that they are lawfully married;

(b) evidence that a man has in any way recognized children as being his children shall be *prima facie* evidence that they are his legitimate children;

(c) evidence that a man has left his wife, and has failed, for a period of any one month subsequent to the date of his so leaving, to make provision for her maintenance or for the maintenance of any child of his under the age of sixteen years, shall be *prima facie* evidence that he has omitted or neglected or refused without lawful excuse to provide necessaries.

244. Every one is guilty of an indictable offence and liable to three years' imprisonment who, being bound to perform any duty specified in section two hundred and forty-one, subsections one and two of section two hundred and forty-two, and section two hundred and forty-three of this Act, without lawful excuse neglects or refuses to do so, unless the offence amounts to culpable homicide.

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as being his child is *prima facie* evidence that the child is his child;

(c) evidence that a man has left his wife and has failed, for a period of any one month subsequent to the time of his so leaving, to make provision for her maintenance or for the

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**maintenance of any child of his under the age of sixteen years, is *prima facie* evidence that he has failed without lawful excuse to provide necessities of life for them; and**  
**(d) the fact that a wife or child is receiving or has received necessities of life from another person who is not under a legal duty to provide them is not a defence.**

This combines matter that appeared in the former ss.241, 242 and 244. These came from ss.209, 210 and 215 in the Code of 1892 and from ss.159 and 160 in the E.D.C. The presumptions that appear in subsec.4 were added by 1913, c.13, s.14, and 1919, c.46, s.7, the latter, however, being replaced by 1948, c.39, s.5 in the form in which it now appears as s.186(4)(c). Par.(4)(d) is new.

It was pointed out in *R. v. STEELE*(1952), 102 C.C.C.273 that s.241 (now s.186(1)(c)) explicitly created duties, the breach of which was subject to the penalties prescribed by s.244, covered now by s.186(3).

In *R. v. FRIEND*(1802), Russ. & Ry. 20, it was held that it is an indictable offence to refuse or neglect to supply necessities to a child, servant or apprentice, whom a person is bound by duty or contract to provide for, if such child etc., be of tender years and unable to provide for itself.

This was a case of children received as apprentices. This case was referred to the Judges and the report states that:  
 "the general opinion was that it was an indictable offence as a misdemeanour to refuse or neglect to provide sufficient food, bedding, etc. to any infant of tender years unable to provide for and take care of itself (whether such infant was child, apprentice, or servant), whom a man was obliged by only a contract to provide for, so as thereby to injure its health; but that, in the present case, the indictment was defective in not stating the child to be of tender years and unable to provide for itself."

*R. v. RIDLEY*(1811), 2 Camp. 650, was an indictment against a woman for not providing food and sustenance for a servant, whereby the servant became sick and emaciated. *Per* Lawrence, J.:

"There is a clear distinction between treatment of this sort to a child and to an adult. The latter, if not provided with proper nourishment, may remonstrate, may leave the service, or may complain to a magistrate. The withholding of proper food from such a person may be a breach of contract; but it is not a crime of which the law will take cognizance. Doubts have been entertained how far an indictment can be supported from mere non-feasance towards a child of tender years. I am myself of opinion, that there are circumstances where non-feasance of this type may be an indictable offence. If Elizabeth Williams was of tender years, and under the dominion of the defendant, so that she could not have taken steps to relieve herself from the treatment she is supposed to have received, the defendant may be guilty of a misdemeanour. But you have not alleged this in the indictment; and it is, therefore, bad upon the face of it."

(It was said that the girl was 15 years old).

*R. v. MARRIOTT*(1838), 8 C. & P. 425, was an indictment for the murder of an aged and infirm woman by confining her against her will and not providing her with necessities, in breach of an alleged duty. Patterson, J. at p.563:

"This is the evidence on which you are called on to infer that the prisoner undertook to provide the deceased with necessities; and though, if he broke that contract, he might not be liable to be indicted during her life, yet, if by his negligence her death was occasioned, then he becomes criminally responsible.

If the prisoner was guilty of wilful neglect so gross and wilful that you are satisfied he must have contemplated the death of Mrs. Warner, then he will be guilty of murder. If, however, you think only that he was so careless, that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter." Guilty of manslaughter.

It has been noted also that the former s.242(3) (now in s.186(1)(a), (b) and (2)) did not declare a duty. The Draft Bill as presented to Parliament altered this to declare a duty, but the former provision was restored. Subsec.(2)(a) was amended also in cl. (i) to make it clear that destitution or necessity of the person injured is "a prime element in the offence." Senate Committee, Dec. 15-16, 1952, pp.87,88.

Eversley, on Domestic Relations, 6th ed., p.364, citing *COOPER v. MARTIN*(1803), 4 East 76, says that there was no legal obligation apart from the *Poor Law*, 43 Eliz. c.2, on the parent to support his children, or pay their debts, unless he contracted to do so. *R. v. HALL*(1941), 76 C.C.C.311, notes too that the legal duty of a father to maintain his children arose under that Act, and held it to be in force in British Columbia. Whether or not the statute of Elizabeth is in force elsewhere in Canada need not be examined, because the provinces have their own legislation declaring a duty to provide for wife and children and providing a remedy, civil in substance but quasi-criminal in form, for a breach of that duty.

The following authorities on the existence of the duty may, however, be noted. 1 Bl. Com. at p.430:

"The husband is bound to provide his wife with necessities by law, as much as himself; and if she contract debts for them, he is obliged to pay; but for anything besides necessities, he is not chargeable."

And at p.435:

"The duty of parents to provide for the *maintenance* of their children is a principle of natural law; an obligation, says Puffendorf, laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest degree injurious to their issue, if they gave the children life, that they might afterwards see them perish. By begetting them therefore they have entered into a voluntary obligation, to endeavour as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect *right* of receiving maintenance from their parents. And the president Montesquieu has a very just observation upon this head: that the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children."

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Hals. 2nd ed., Vol. 16, p.608:

"It is the duty of a husband to maintain his wife according to his means of supporting her. If he fails to perform this duty she has implied authority to pledge his credit for necessities suitable to his station in life. *READ v. LEGARD*, 1851, 6 Exch. 636; *JOHNSTON v. SUMNER*, 1858, 3 H. & N. 261; *MILLICHAMP v. MILLICHAMP*, 1931, 146 L.T. 96."

*R. v. BROWN*(1941), 75 C.C.C.285, at p.290 (D.C. Sask.):

"Sec. 242(3) of the Cr. Code does not create any legal duty to provide, but when such legal duty otherwise exists, this section of the Code provides punishment for failure to provide.

At common law 'It is the duty of a husband to maintain his wife according to his estate or condition in life, or according to his means of supporting her': Part of s.622 Hals. Vol. 16, 1st ed., Vol. 16, 2nd ed., s.951. This is the law in Saskatchewan.

In addition to the common law we have in Saskatchewan the *Deserted Wives' Maintenance Act*, which further emphasizes the duty of the husband."

And at p.293:

"Sec. 952 in 2nd ed., (Hals. Vol. 16) reads in part as follows: 'If a husband wilfully refuses or neglects to maintain his wife, having the means, by work or otherwise, so to do, so that she becomes chargeable to any union or parish under the poor law, he is criminally liable.' In Canada he would come under the section of the Cr. Code under which the charge is laid."

The *Vagrancy Act* 1824, ss. 3 & 4, is cited for the above statement from Halsbury.

Upon the question of lawful excuse the following may be quoted from *R. v. NASMITH*(1877), 42 U.C.Q.B.242:

"The obligation is not the absolute one under all circumstances to provide food, clothing or lodging, for the wife. The wilful refusal or neglect to do so without lawful excuse, is what constitutes the offence. If it appear that the refusal or neglect instead of being wilful is attributable solely to want of ability, that the wife is better able to support herself than the husband to support her, that she is in no need whatever of support, and does not ask for it or require it, that she is living with another man as his wife, or that without justification she absents herself from her husband's roof, and without excuse refuses to return . . . . in these, and similar cases, it would be absurd to convict the husband as a criminal. In such and similar cases it must be held that there is 'lawful excuse' for what otherwise might be held a wilful refusal or neglect."

With particular reference to subsec.(4)(d) the following cases are relevant:

In *R. v. McDONALD*(1942), 78 C.C.C.330, the Ontario Court of Appeal held that the fact that the wife is being maintained comfortably by her father negatives the existence of destitute or necessitous circumstances. The Court held that the case was distinguishable from the Alberta case of *R. v. WILSON*(1933), 60 C.C.C.309, in which it was held that the mere fact that the wife is being supported by the charity of

**OLD CODE:**

246. Every one who undertakes, except in cases of necessity, to administer surgical or medical treatment, or to do any other lawful act the doing of which is or may be dangerous to life, is under a legal duty to have and to use reasonable knowledge, skill and care in doing any such act, and is criminally responsible for omitting, without lawful excuse, to discharge that duty if death is caused by such omission.

248. Every one who undertakes to do any act, the omission to do which is or may be dangerous to life, is under legal duty to do that act, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform that duty.

relatives or others is not *per se* a defence to a prosecution against a husband for failure to provide necessities to his wife she "being in destitute or necessitous circumstances." However, this case appears to be in conflict with *ACOMSKY v. BLOOM*, [1945] R.L.N.S.536, in which it was held that the fact that the wife's father was supporting her was not a defence since it was shown that she was without means of her own and that her father was supporting her only because of the failure of the accused to do so.

**DUTY OF PERSONS UNDERTAKING ACTS DANGEROUS TO LIFE.**

**187. Every one who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.**

This is the former s.246. It was s.212 in the Code of 1892 and s.162 in the E.D.C. See also s.45, *ante*, and s.209(2), *post*.

The leading case involving the principle of this section is *R. v. BATEMAN*(1925), 19 Cr.App.R.8. It is noted under s.191, and is really the foundation of that section. In *R. v. GIARDINE*(1938), 71 C.C.C.295, it was held that a surgeon was not criminally negligent in administering a wrong drug to a patient when he had relied upon a nurse to supply him with the one that he had ordered.

**DUTY OF PERSONS UNDERTAKING ACTS.**

**188. Every one who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.**

This is the former s.248. It was s.214 in the Code of 1892 and s.164 in the E.D.C. Taschereau in his edition of the Code of 1892 says (p.149) that it is a common law rule and (p.206) that it is an addition to the definition of culpable homicide. It is now to be read with ss.191-193, *post*, according to the consequences of the omission.

In this connection it is not too remote to refer to *R. v. SHAW*(1938), 70 C.C.C.159. Accused, who persisted in driving an automobile, knowing that he was subject to periods of unconsciousness, was charged with manslaughter following the death of two passengers in his car. The charge was dismissed but a new trial was ordered on appeal. "Those operating motor cars must be impressed with the terrible danger there is not only to the passengers and themselves but to others using the high-

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way when one subject to attacks such as this does not refrain from driving cars at all." In other words, having assumed a duty to drive with proper care, he is criminally responsible for a failure to do so.

**ABANDONING CHILD.**

**189. Every one who unlawfully abandons or exposes a child who is under the age of ten years, so that its life is or is likely to be endangered or its health is or is likely to be permanently injured, is guilty of an indictable offence and is liable to imprisonment for two years.**

This is the former s.245 changed in being made to refer to a child under ten years of age, (instead of two years) and by including conduct likely to endanger or permanently injure its health. It was s.216 in the Code of 1892, and s.226 in the E.D.C., having been taken from the *Offences against the Person Act*, 1861, s.27 (Imp.). Greaves' Cons. Acts, p.36 says of it in the latter context "This clause is new. It is intended to provide for cases where children are abandoned or exposed under such circumstances that their lives or health may be, or be likely to be endangered," and he cites *R. v. HOGAN*(1851), 2 Den. 277; *R. v. COOPER* (1849), 1 Den. 459, and *R. v. PHILLPOT*(1853), Dears. C.C.179, as showing the need for it.

See s.185(a), *ante*, for definition of "abandon" or "expose".

**CAUSING BODILY HARM TO APPRENTICE OR SERVANT.—Master failing to provide necessities.****190. Every master who**

**(a) unlawfully does, or causes to be done, bodily harm to his apprentice or servant so that his life is endangered or his health is or is likely to be permanently injured, or**

**(b) omits, without lawful excuse, to provide necessities of life for an apprentice or servant in accordance with any contract that he has entered into with respect to that apprentice or servant, is guilty of an indictable offence and is liable to imprisonment for two years.**

This combines matter that appeared in the former ss.243,244 and 249. These were ss.211,215 and 217 in the Code of 1892. Ss.161 and 275 in the E.D.C. correspond to ss.243 and 249 and were taken from the *Offences against the Person Act*, 1861, (Imp.), s.26, (24 & 25 Vict., c.100).

Note that the section does not specify an age limit. The Imperial Commissioners in a note to s.161 said "24 & 25 Vict., c.100, s.26, does not limit the age of the apprentice or servant. The 14 & 15 Vict., c.11, s.1, from which that enactment was taken, was passed under such circumstances as to show that it was meant to apply to servants of all ages; but that we do not think reasonable," and they amplify the reference to 14 & 15 Vict., c.11, by saying that:

"That statute was passed in the excitement consequent on the case of *R. v. SLOANE* and was framed so as to embrace all cases where there was a contract to supply a servant of whatever age with food, clothing, and lodging. It has been thought better to limit it to servants and apprentices under the age of 16, but it is right to point out that this is not the existing law. Section 160 puts the head of a family under the

**OLD CODE:**

245. Every one is guilty of an indictable offence and liable to three years' imprisonment who unlawfully abandons or exposes any child under the age of two years, whereby its life is endangered or its health is permanently injured.

243. Every one who, as master or mistress, has contracted to provide necessary food, clothing or lodging for any servant or apprentice under the age of sixteen years is under a legal duty to provide the same, and is criminally responsible for omitting, without lawful excuse, to perform such duty, if the death of such servant or apprentice is caused, or if his life is endangered, or his health has been or is likely to be permanently injured, by such omission.

244. Every one is guilty of an indictable offence and liable to three years' imprisonment who, being bound to perform any duty specified in section two hundred and forty-one, subsections one and two of section two hundred and forty-two, and section two hundred and forty-three of this Act, without lawful excuse neglects or refuses to do so, unless the offence amounts to culpable homicide.

249. Every one is guilty of an indictable offence and liable to three years' imprisonment who, being legally liable as master or mistress to provide for any apprentice or servant, unlawfully does, or causes to be done, any bodily harm to any such apprentice or servant so that the life of such apprentice or servant is endangered or the health of such apprentice or servant has been, or is likely to be, permanently injured.

247. Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty.

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same criminal responsibility towards members of his household under the age of 16, as a master is to a servant or apprentice of the same age."

See *R. v. RIDLEY* (1811), 2 Camp.650, cited under s.186, *ante*, and for an interpretation of the word "health" see *R. v. COVENTRY* (1898), 3 C.C.C.541, in which a boy, held to be a servant of the accused, lost his toes as a result of exposure to cold. At p.549:

"It is quite true that the boy's toes were amputated or fell off, and there was evidence from which it might be found that this was the result of negligence on the part of the accused, and it is quite clear without the aid of expert testimony that the loss of the toes would be a permanent bodily injury, but the loss of the toes would not necessarily be a permanent injury to *health* as I understand the expression. A person may have a limb amputated but his organs of health may be perfect."

**CRIMINAL NEGLIGENCE.****"CRIMINAL NEGLIGENCE."—"Duty."**

191. (1) Every one is criminally negligent who

(a) in doing anything, or

(b) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.

(2) For the purposes of this section, "duty" means a duty imposed by law.



**Section 191—continued**

This is new in statutory form although not in law. The Royal Commissioners in their Report, said of it and the two following sections:

"A great deal of confusion has arisen, particularly in motor manslaughter cases, as to the degree of negligence required to sustain a conviction against an accused person. Much of the confusion arises by reason of the standard of care set forth in section 247 which reads as follows:

'247. Every one who has in his charge or under his control any thing whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty.'

This definition appears to impose criminal liability for what might be termed civil negligence, yet the weight of judicial authority is to the effect that in order to sustain a conviction, it must be shown that the negligence of an accused person went beyond a mere matter of compensation and showed such disregard for the lives and safety of others as to amount to a crime against the state and conduct deserving punishment.

There is also the difficulty with respect to cases involving so-called involuntary manslaughter and particularly motor manslaughter in which the jury is reluctant to convict an accused person notwithstanding that he may have been guilty of reckless conduct amounting to criminal negligence. This difficulty gave rise to the enactment of s.951(3) of the *Criminal Code* which enabled a court, upon a charge of manslaughter arising out of the operation of a motor vehicle, to acquit the accused of manslaughter and find him guilty under s.285(6) notwithstanding that the degree of negligence required to warrant a conviction for the major or minor offence was the same. In order to resolve these difficulties ss.247 and 951(3) have been dropped and a definition of criminal negligence added.

This definition is followed by ss.192 and 193 which provide that every one who by criminal negligence causes the death of another person is guilty of an indictable offence and is liable to imprisonment for life, and any person who by criminal negligence causes bodily injury to another person is guilty of an indictable offence and is liable to imprisonment for ten years.

The definition was put in its present form by the Senate Committee for the reason as stated (Proceedings, June 11th, 1952, p.24) that:

"Those tests present all sorts of difficulties, because there may be a civil proceeding pending, the judge is trying a criminal proceeding, and he is going to adjudicate in effect on the civil proceedings by telling the jury 'This man has committed an offence of which he may be found liable in civil proceedings.' That is an instruction he gives them before the civil case has ever been tried."

This, however, may be compared with a statement in the second report of the Criminal Law Commission (U.K.), dated 14th May, 1846, and

quoted in Taschereau's Criminal Acts, p.183:

"An injury resulting from an omission does not subject the person causing it to punishment, unless such omission be unlawful. An omission is deemed unlawful whensoever it is a breach of some duty imposed by law, or gives cause to a civil action."

In general the definition does not undertake to define negligence; what it says is that to constitute a criminal offence there must be such negligence as shows a wanton or reckless disregard of life or safety. Neither do these sections and s.221, *post*, preclude a charge of manslaughter.

It is recognized, of course, that it is impossible wholly to eliminate moral considerations from the concept of criminal negligence. In *R. v. GREISMAN*(1926), 46 C.C.C.172, it was said that:

"to constitute crime there must be a certain moral quality carried into the act before it becomes culpable. In each case it is a question of fact, and it is the duty of the court to ascertain if there was such wanton and reckless negligence as in the eyes of the law merits punishment."

Again, in *AMERICAN AUTO INSURANCE COMPANY v. DICKSON*, [1943]S.C.R.143, these expressions were adopted by Mr. Justice Taschereau, who said:

"In order to allow a court to see in Dickson's acts the distinguishing marks of criminality, there should be proved the high degree of negligence and a 'moral quality carried into the act' before it becomes culpable."

The definition is based upon the following cases: *R. v. BATEMAN* (1925), 19 Cr.App.R.8, was the prosecution of a medical doctor for manslaughter by negligence. Hewart, L.C.J., said at p.13:

"The foregoing observations deal with civil liability. To support an indictment for manslaughter the prosecution must prove the matters necessary to establish civil liability (except pecuniary loss), and, in addition, must satisfy the jury that the negligence or incompetence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment."

*ANDREWS v. D.P.P.*(1937), 26 Cr.App.R.34, (H.L.) was a case of motor manslaughter. *Per* Lord Atkin, at p.47:

"The principle to be observed is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established . . . . .

I cannot think of anything worse for users of the road than the conception that no one could be convicted of dangerous driving unless his negligence was so great that if he had caused death he must have been convicted of manslaughter. *It therefore would appear that in directing the jury in a case of manslaughter the Judge should in the first instance charge them substantially in accordance with the general law, that is, requiring the high degree of negligence indicated in BATEMAN (supra), and then explain that the degree of negligence is not necessarily the same as that which is required for the offence of dan-*

Section 191—*continued*

gerous driving, and then indicate to them the conditions under which they might acquit of manslaughter and convict of dangerous driving" (i.e. under provisions of the *Road Traffic Act*, 1930, similar to those of s.951(3) of our Code).

In *R. v. GREISMAN* (1926), 46 C.C.C.172 (Ont. C.A.) also a "running down" case, *R. v. BATEMAN* was quoted at length and the judgment contains the following at p.177:

"I think the great weight of authority goes to show that there will be no criminal liability unless there is gross negligence, or wanton misconduct. To constitute crime there must be a certain moral quality carried into the act before it becomes culpable. In each case it is a question of fact, and it is the duty of the Court to ascertain if there was such wanton and reckless negligence as in the eye of the law merits punishment. This may be found where a general intention to disregard the law is shown, or a reckless disregard of the rights of others."

*R. v. BAKER* (1929), 51 C.C.C.352, (S.C.Can.) was a case in which the hoistman in a mine was convicted of homicide by negligence. It was his duty to give warning to men working at the bottom of the shaft that the hoist or skip was descending. In this instance he did not do so because his attention was momentarily distracted by a noise made by a part of the apparatus which had gone out of order. The Court of Appeal quashed the conviction and the Supreme Court upheld that decision.

The Court of Appeal (51 C.C.C.71) discussed *BATEMAN* and *GREISMAN* at some length and concluded, at p.79:

"The law as it stands, must serve as the basis upon which, in the particular state of facts, the conviction or acquittal of an accused person shall rest. It is therefore incumbent upon this Court to inquire and determine whether or not, in the case at bar, there was on the part of the accused that negligence, going beyond a matter of compensation as between subjects, and which 'showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.'"

It has already been mentioned that the former ss.247 and 951(3) have been dropped in consequence of the inclusion of ss.191, 192 and 193. They cover also the former ss.283 and 284. S.283 (endangering the safety of persons on railways) was s.251 in the Code of 1892. It formed part of s.194 in the E.D.C., this being an expansion of s.34 of the *Offences against the Person Act*, 1861 (Imp.). S.284 was s.252 in the Code of 1892 and came from the *Offences against the Person Act*, R.S.C. 1886, c.162, s.33. It was not in the corresponding English Act, nor in the E.D.C.

**CAUSING DEATH BY CRIMINAL NEGLIGENCE.**

**192. Every one who by criminal negligence causes death to another person is guilty of an indictable offence and is liable to imprisonment for life.**

See notes to s.191 and also s.225(suspension of license) and s.413 (jurisdiction).

**OLD CODE:**

283. *Every one is guilty of an indictable offence and liable to two years' imprisonment who, by any unlawful act, or by any wilful omission or neglect of duty, endangers or causes to be endangered the safety of any person conveyed or being in or upon a railway, or aids or assists therein.*

284. *Every one is guilty of an indictable offence and liable to two years' imprisonment who, by any unlawful act, or by doing negligently or omitting to do any act which it is his duty to do, causes grievous bodily injury to any other person.*

250. *Homicide is the killing of a human being by another, directly or indirectly, by any means whatsoever.*

252. *Homicide may be either culpable or not culpable.*

(2) *Homicide is culpable when it consists in the killing of any person, either by an unlawful act or by an omission, without lawful excuse, to perform or observe any legal duty, or by both combined, or by causing a person, by threats or fear of violence, or by deception, to do an act which causes that person's death, or by wilfully frightening a child or sick person.*

(3) *Culpable homicide is either murder or manslaughter or infanticide.*

(4) *Homicide which is not culpable is not an offence.*

253. *Procuring by false evidence the conviction and death of any person by the sentence of the law shall not be deemed to be homicide.*

**CAUSING BODILY HARM BY CRIMINAL NEGLIGENCE.**

193. **Every one who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and is liable to imprisonment for ten years.**

See notes to s.191 and also s.225 (suspension of license).

**HOMICIDE.**

**HOMICIDE.—Kinds of homicide.—Non culpable homicide.—Culpable homicide.—Exemption.**

194. (1) **A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.**

(2) **Homicide is culpable or not culpable.**

(3) **Homicide that is not culpable is not an offence.**

(4) **Culpable homicide is murder or manslaughter or infanticide.**

(5) **A person commits culpable homicide when he causes the death of a human being,**

(a) **by means of an unlawful act,**

(b) **by criminal negligence,**

(c) **by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death, or**

(d) **by wilfully frightening that human being, in the case of a child or sick person.**

(6) **Notwithstanding anything in this section, a person does not commit homicide within the meaning of this Act by reason only that he causes the death of a human being by procuring, by false evidence, the conviction and death of that human being by sentence of the law.**

**Section 194—continued**

Subsec.(1) is the former s.250. It was s.218 in the Code of 1892, and s.165 in the E.D.C.

Subsec.(2) is the former s.252(1); subsec.(3) is the former s.252(4) and subsec.(4) is the former s.252(3) to which infanticide was added by 1948, c.39, s.6. Homicide by accident or misadventure, without negligence, is not culpable. Otherwise, for matters of justification or excuse, see ss.24-45, *ante*. S.252 was s.220 in the Code of 1892, and s.167 in the E.D.C.

Subsec.(5) comes from the former s.252(2). As to (a), it has been held that the unlawful act must be one *malum in se* and not merely *malum prohibitum*. For example, the case of *R. v. ADAMS*(1943), 80 C.C.C. 269, was decided upon that distinction. That was a case in which the accused was charged with causing bodily injury in wounding a woman when he shot at what he supposed was a moose. He alleged that he had shot in defence of his children from the danger of attack by the animal. To shoot at a moose was at the time a violation of provincial law. And in *R. v. D'ANGELO*(1927), 48 C.C.C.127, the following appears:

"The weight of authority and the proper view of the law is that where without intent to do injury to the person or property or another death results from the doing of an act which is not *malum in se* but is merely *malum prohibitum*, the wrongful act is not the kind of an act that the criminal law requires as a foundation for a charge of manslaughter unless the statute or prohibition violated is one designed and intended to prevent injury to the person, or the prohibited act is accompanied by negligence."

As to (5)(b) it may be noted that, in order to adapt the section to the new s.192, the words "by criminal negligence" replace the words "by an omission, without lawful excuse to perform or observe any legal duty, or by both combined," but this is rather a change of form than of substance.

Par.(5)(c) is illustrated by the case of *R. v. VALADE*(1915), 26 C.C.C. 233, in which accused was convicted of manslaughter following the death of a girl who had jumped from a window in order to escape his attentions, and was killed by the fall.

As to par.5(d), note the exception in s.200, *post*.

Subsec.(6). This provision was s.221 in the Code of 1892 and s.168 in the English Draft Code. The Report of the Imperial Commissioners at p.21 says:

"Perjury may be made the means of committing what amounts morally to murder or robbery of the worst kind, and it appears to us that in such cases the present maximum punishment (seven years' penal servitude) is not sufficiently severe."

They provided therefore in clause 120 that perjury committed to procure the conviction of any person for an offence punishable with death or penal servitude should be punishable with penal servitude for life. The Code of 1892 (s.146) adapted this to "any crime punishable by death or imprisonment for seven years or more" and this was the provision in the former s.174. This Code (s.113(1)) makes perjury punishable with imprisonment for life if it is committed to secure conviction of a capital offence, otherwise the penalty of fourteen years applies.

Blackstone (4 Comm. 196) says:

"There was also by the ancient common law, one species of killing held to be murder, which may be dubious at this day; as it hath not been an instance wherein it has been held to be murder for many ages past; I mean by bearing false witness against another with an express premeditated design to take away his life, so as the innocent person be condemned and executed. The Gothic laws punished in this case, both the judge, the witnesses and the prosecutor. . . . And among the Romans, the *lex Cornelia, de sicariis*, punished the false witness with death, as being guilty of a species of assassination. And there is no doubt that this is equally murder *in foro conscientiae* as killing with a sword; though the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the peril of their own lives) has not yet punished it as such."

Chitty's Blackstone, in a note to the above quotation says:

"Such a distinction in perjury would be more dangerous to society, and more repugnant to principles of sound policy, than in this instance the apparent want of severity in the law. Few honest witnesses would venture to give evidence against a prisoner tried for his life, if thereby they made themselves liable to be prosecuted as murderers."

Blackstone himself observes upon *M'DANIEL'S CASE* that "though the then Attorney-General declined to argue this point of law, I have good grounds to believe it was not from any apprehension of his that the point was not maintainable, but from other prudential reasons. Nothing therefore should be concluded from the waiving of that prosecution."

In *R. v. M'DANIEL and others* (1755), 19 State Tr. 745, the accused were indicted "for the wilful murder of Joshua Kidden, in maliciously causing him to be unjustly apprehended, falsely accused, tried, convicted and executed, well knowing him to be innocent of the fact laid to his charge, with an intent to share to themselves the reward, &c." At p. 813:

"This prosecution, I am satisfied, arose from a laudable zeal for keeping the fountains of justice pure and unpolluted and a just indignation against an offence of this signal enormity.

It must be confessed, that there are strong passages in our ancient writers, which greatly countenance a prosecution of this kind. But those writers must always be read with great caution upon the subject of homicide.

Bracton, whom the writers of that age for the most part follow, was a doctor of both laws before he came to the bench. It is no wonder, therefore, that having before him no tolerable system of the English law, then in its infant state, he should adopt what he found in the books of the civil and canon law . . .

Succeeding writers of that age refined upon him, and in their loose way wrote upon the subject rather as divines and casuists than as lawyers; and seem to have considered the offence merely in the light in which it might be supposed to be considered *in foro caeli*.

But the practice of many ages backwards doth by no means countenance their opinion.

And during all the violence and rage of the prosecution against Dr. Oates, it seemeth not to have entered into the imagination of those

Section 194—*continued*

concerned in it, or of the Court, who would not have spared him if they could have taken their full blow at him, that the offences of which he was convicted could have been so charged as to have reached his life."

East (Pleas of the Crown, c.5, s.94) quotes Blackstone and adds: "With respect to the offence '*in foro conscientiae*', it is without doubt as aggravated a species of murder as any that can be conceived," and in a note says that he had heard Lord Mansfield, C.J., make the same observation (*viz.*, that such an indictment was maintainable) and say that the opinions of several of the judges at that time, and his own, were strongly in support of the indictment. He says also:

"Where indeed the death of an innocent person has actually been the consequence of such wilful perjury, it falls within the guilt of deliberate murder and deserves an equal punishment: which our ancient law in fact inflicted. (Britton. c.5) 'Lord Coke said (3 Inst.48) It is not holden for murder at this day.'"

Stephen (Hist. Vol. III, pp.8 and 9), referring to the trials arising out of the so-called Popish plot, says:

"Oates directly and distinctly caused the death of several innocent persons by perjury, but the fact that the judges and juries who tried the cases acted upon their own responsibility and because they chose to believe Oates's testimony, so disconnected his perjury from the death which he caused that even in 1685 it was not thought possible to convict him of murder."

**WHEN CHILD BECOMES HUMAN BEING.—Killing child.**

**195. (1) A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother whether or not**

- (a) it has breathed,
- (b) it has an independent circulation, or
- (c) the navel string is severed.

**(2) A person commits homicide when he causes injuries to a child before or during its birth as a result of which the child dies.**

This is the former s.251. It was s.219 in the Code of 1892, and was taken from s.166 of the E.D.C.

It has been referred to in only one reported Canadian case. On the preliminary hearing of a charge of the murder of an infant (*R. v. KRUEGER*(1949), 93 C.C.C.245) there had been nothing said upon the question of live birth except a statement of counsel that a doctor, who was not present, was able to give certain evidence. On a motion for *habeas corpus* it was held that at the trial of the accused in order to establish the charge of murder the Crown must prove the killing of the child as a human being, and cited Code ss.250 and 251. The warrant of committal was set aside and the matter was remitted to the magistrate to take evidence on that point.

Killing an unborn child was dealt with in the former s.306 (now s.209), *q.v.* with notes thereto.

The following appears in Hansard, 1892, Vol. II, col. 3106:

"Mr. DAVIES (P.E.I.) If you eliminate the three tests, that the child

**OLD CODE:**

251. *A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother, whether it has breathed or not, whether it has an independent circulation or not, and whether the navel string is severed or not.*

(2) *The killing of such child is homicide when it dies in consequence of injuries received before, during or after birth.*

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breathed, that it had an independent circulation, and that the navel string was severed, what other tests will be applied?

Sir JOHN THOMPSON. Any other medical tests that are known. This section simply provides that the killing of such a child is homicide. These tests mentioned may be the only ones known to medical science, but the common law is flexible so as to admit the application of any other test that may be discovered from time to time.

Mr. MILLS (Bothwell). Why not omit the words defining the different tests, for there is apparently no necessity for mentioning them.

Sir JOHN THOMPSON. The test of the floating of the lungs is principally used in connection with civil cases, where it is necessary to prove that the child breathed, but it is not absolutely relied on as a test in criminal proceedings."

The law is based on the following cases:

*R. v. POULTON* (1832), 5 C. & P.329:

"With respect to the birth, the being born must mean that the whole body is brought into the world; and it is not sufficient that the child respire in the progress of the birth. Whether the child was born alive or not depends mainly upon the evidence of the medical men. None of them say that the child was born alive; they only say that it had breathed."

*R. v. SENIOR* (1832), 1 Mood.C.C.346:

"Accused charged with manslaughter. Giving a child, whilst in the act of being born, a mortal wound in the head as soon as the head appears, and before the child has breathed, will, if the child is afterwards born alive and dies thereof, and there is malice, be murder. In this case accused inflicted a wound while the child was being born and it died immediately after being born."

*R. v. ENOCH* (1833), 5 C. & P.539:

"If a child has breathed before it is born, this is not sufficiently life to make the killing of such child murder. There must be an independent circulation in the child, or the child cannot be considered as alive for this purpose."

In *R. v. BRAIN* (1834), 6 C. & P.349, two surgeons testified that the child, whose body was found, had never breathed. Park, J:

"A child must be actually wholly in the world in a living state to be the subject of a charge of murder; but if it has been wholly born and is alive, it is not essential that it should have breathed at the time it was killed; as many children are born alive, and yet do not breathe for some time after their birth. But you must be satisfied that the child was wholly born into the world at the time it was killed, or you ought not to find the prisoner guilty of murder." (*R. v. POULTON* followed).



Section 195—*continued*

*R. v. CRUTCHLEY*(1837), 7 C. & P.814, Parke, B:

"in order to convict on the first count of this indictment (*i.e.* murder), you must be satisfied that the whole body of the child had come forth from the body of the mother when the ligature was applied. If you think that the child was not killed after it had come forth, you will acquit. I think it is essential that it should have been wholly produced."

*R. v. SELLIS*(1837), 7 C. & P.850, Coltman, J:

"In order to justify a conviction for murder, you must be satisfied that the entire child was actually into the world in a living state. The fact of its having breathed is not a decisive proof that it was born alive: it may have breathed and yet died before birth. You must be satisfied that the child was wholly born into the world in a living state: and if you are not so satisfied, you ought not to convict the prisoner of murder."

*R. v. REEVES*(1839), 9 C. & P.25 (murder). In the argument of this case, reference was made to *R. v. CRUTCHLEY*, as not going so far as to hold "that the child must have a separate independent existence from that of the mother, in order to make the killing of it amount to murder."

Vaughan, J. said:

"I should have been very much surprised if it had; because, if that were the law, the child and the after-birth might be completely delivered, and yet, because the umbilical cord was not separated, the child might be knocked on the head and killed, without the party who did it being guilty of murder."

*R. v. TRILLOE*(1842), 2 Mood C.C.260 (murder).

"The learned Judge told the Jury that if they were satisfied that the child had been wholly produced from the body of the prisoner alive, and that the prisoner had wilfully, and of her malice aforethought, strangled the child after it had been so produced, and while it was alive, and while it had, according to the surgeon's evidence, an independent circulation of its own, the charges upon the second and third counts (*i.e.* of murder) were made out against the prisoner, although the child still remained attached to the mother by the navel string. This case was considered at a meeting of the Judges in Michaelmas term 1842, and they unanimously held the conviction right."

*R. v. WEST*(1848), 2 Car. & Kir.784—Murder—Headnote:

"If a person, intending to procure abortion, does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of living and afterwards dies, in consequence of its exposure to the external world, the person who, by this misconduct, so brings the child into the world and thereby puts it in a situation in which it cannot live, is guilty of murder, and the mere existence of a possibility that something might have been done to prevent the death, would not render it less murder."

*R. v. HANDLEY*(1874), 13 Cox, C.C.79, at p. 81, Brett, J:

"they would have to consider whether the child was born alive,—*i.e.*, whether it existed as a live child, breathing and living by reason of breathing through its own lungs alone, without deriving any of its living or power of living by or through any connection with its mother."

**OLD CODE:**

257. *Every one who, by any act or omission, causes the death of another, kills that person, although death from that cause might have been prevented by resorting to proper means.*

258. *Every one who causes a bodily injury, which is of itself of a dangerous nature to any person, from which death results, kills that person, although the immediate cause of death be treatment proper or improper applied in good faith.*

Although in *R. v. IZOD*(1904), 20 Cox.C.C.690, the report of this case was questioned concerning the issue of negligence resulting in death, it does not differ on the question of live birth. The jury was directed that a child must be completely born alive before it can be the subject of an indictment for either murder or manslaughter.

In *R. v. PRITCHARD*(1901), 17 T.L.R.310, the jury was directed that "the true test of separate existence in the theory of the law (whatever it might be in medical science) is the answer to the question 'whether the child is carrying on its being without the help of the mother's circulation?' If yes, then it had a separate existence, even though it might not be fully born; if no, it had no such separate legal existence." However, this is criticized by D. Seaborne Davies in the essay referred to in the notes to s.209 as seeming "to unsettle the law on a settled point." It seems certainly to be out of accord with the plain wording of this section.

**DEATH WHICH MIGHT HAVE BEEN PREVENTED.**

**196. Where a person, by an act or omission, does any thing that results in the death of a human being, he causes the death of that human being notwithstanding that death from that cause might have been prevented by resorting to proper means.**

**DEATH FROM TREATMENT OF INJURY.**

**197. Where a person causes to a human being a bodily injury that is of itself of a dangerous nature and from which death results, he causes the death of that human being notwithstanding that the immediate cause of death is proper or improper treatment that is applied in good faith.**

Ss.196 and 197 are the former ss.257 and 258. They were ss.225 and 226 in the Code of 1892 and came from ss.172 and 173 of the E.D.C. Both are based upon common law rules and complement each other in that they declare the criminal responsibility of a person who inflicts injury upon another from which death ensues, notwithstanding that the immediate cause of death may be something other than the injury. Hale, bk.1, p.428, deals with the rules as follows:

"If a man give another a stroke, which it may be, is not in itself so mortal, but that with good care he might be cured, yet if he die of this wound within the year and day, it is homicide or murder, as the case is, and so it hath been always ruled.

But if the wound or hurt be not mortal, but with ill applications by the party, or those about him, of unwholesome salves or medicines, the party dies, if it can clearly appear, that this medicine, and not the wound, was the cause of his death, it seems it is not homicide, but then that must appear clearly and certainly to be so.

Sections 196 & 197—*continued*

But if a man receives a wound, which is not in itself mortal but either for want of helpful applications, or neglect thereof, it turns to a gangrene or a fever, and that gangrene or fever be the immediate cause of his death, yet, this is murder or manslaughter in him that gave the stroke or wound, for that wound, though it were not the immediate cause of his death, yet, if it were the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so consequently is *causa causati*."

The following cases illustrate the application of these doctrines:

In *R. v. HOLLAND*(1841), 2 Mood. & R.351, it was held that where a wound is inflicted wilfully and without probable cause, and ultimately causes death, the party who inflicted it is guilty of murder, though life might have been preserved if deceased had not refused to submit to an operation. The fact was that accused had assaulted the deceased and inflicted injuries including a cut on one finger. A doctor advised amputation which deceased would not permit. Death was caused by lockjaw. The doctor testified that in his opinion, life might have been preserved had amputation taken place when first advised.

In *R. v. PYM*(1846), 1 Cox,C.C.339, in which accused, who has acted as second in a duel, was indicted as accessory to murder, Erle, J., said, at p.341:

"I am clearly of opinion, and so is my brother Rolfe, that where a wound is given, which, in the judgment of competent medical advisers, is dangerous, and the treatment which they bona fide adopt is the immediate cause of death, the party who inflicted the wound is criminally responsible, and of course those who aided and abetted him in it."

And at p.343, he said:

"I am of opinion therefore, that it need not be specially set forth in the indictment. The object of stating the cause of death is, that the prisoner may know for what he is to answer, but the wound is the act for which he is now made responsible."

In *R. v. DAVIS and WAGSTAFFE*(1883), 15 Cox,C.C.174, injury had been inflicted by a blow which doctors thought rendered an operation advisable, and, as a preliminary to the operation, chloroform was administered to the patient, who died while it was being administered. It was agreed that the patient would not have died but for its administration. It was held that the person who inflicted the injury was liable to be indicted for manslaughter.

In *R. v. BURGESS and McKENZIE*(1928), 49 C.C.C.243, it was argued that medical evidence should have been called to establish the facts as in *R. v. PYM*, *supra*, but this was held to be unnecessary for the reason that s.258 did not apply, "because there is no evidence from which it might be inferred that the injury (which at all times was of a 'dangerous nature' from any point of view) was in any way increased or its consequences accelerated by the 'treatment' that was given to the deceased . . . . ."

**OLD CODE:**

254. *No one is criminally responsible for the killing of another unless the death takes place within a year and a day of the cause of death.*

(2) *The period of a year and a day shall be reckoned inclusive of the day on which the last unlawful act contributing to the cause of death took place.*

(3) *Where the cause of death is an omission to fulfil a legal duty the period shall be reckoned inclusive of the day on which such omission ceased.*

(4) *When death is in part caused by an unlawful act and in part by an omission, the period shall be reckoned inclusive of the day on which the last unlawful act took place or the omission ceased, whichever happened last.*

256. *Every one who, by any act or omission, causes the death of another, kills that person, although the effect of the bodily injury caused to such other person be merely to accelerate his death while labouring under some disorder or disease arising from some other cause.*

**DEATH WITHIN YEAR AND A DAY.**

**198. No person commits culpable homicide or the offence of causing the death of a human being by criminal negligence unless the death occurs within one year and one day commencing with the time of the occurrence of the last event by means of which he caused or contributed to the cause of death.**

This is the former s.254, extended to cover cases where death is caused by criminal negligence. S.254 was s.222 in the Code of 1892 and s.169 in the E.D.C. It embodies a common law rule and concerning it the Imperial Commissioners said (report p.23), "It was thought desirable to fix some limit, and no sufficient reason occurred to us for departing from the ancient rule."

**ACCELERATION OF DEATH.**

**199. Where a person causes bodily injury to a human being that results in death, he causes the death of that human being notwithstanding that the effect of the bodily injury is only to accelerate his death from a disease or disorder arising from some other cause.**

This is the former s.256. It was s.224 in the Code of 1892, and s.171 in the E.D.C. In this connection the following appears in 1 Hale, 428: "If a man be sick of some such disease, which possibly by course of nature would end his life in half a year, and another gives him a wound or hurt, which hastens his end by irritating and provoking the disease to operate more violently or speedily, this hastening of his death sooner than it would have been is homicide or murder, as the case happens, in him, that gives the wound or hurt, for he doth not die *ex visitatione dei*, but the hurt that he receives hastens it, and an offender of such nature shall not apportion his own wrong."

In *R. v. BURDEE* (1916), 12 Cr.App.R.153, the following appears:

"She (*i.e.* the deceased) was suffering from a variety of very serious ailments, and it is highly probable that she would not have lived very long, but all the evidence goes to shew that she would have probably lived longer if she had not been attended by the appellant; that is to say that his treatment shortened her life. No one has a right to shorten by an hour the life of a human being except where there is lawful authority, as where sentence of death has been passed."

**Section 199—continued**

*Re WEIR*(1887), 14 O.R.389, an extradition case, is within the principle of this section, and in *R. v. HAMMOND*(1913), 22 C.C.C.120, a conviction for murder was affirmed in a case arising from the death of an infant, when it was found:

"that the infant in this case was not properly cared for by the accused after it was born, and that its negligent treatment by the accused probably caused its death, but in any event hastened death."

In *R. v. MURZAK*(1950), 100 C.C.C.275, the jury convicted of manslaughter on a charge of murder, after instruction upon this section where the question was whether accused had killed his wife or had accelerated her death from injuries that she had previously received in a fall.

**KILLING BY INFLUENCE ON THE MIND.**

**200. No person commits culpable homicide where he causes the death of a human being**

**(a) by any influence on the mind alone, or,**

**(b) by any disorder or disease resulting from influence on the mind alone,**

**but this section does not apply where a person causes the death of a child or sick person by wilfully frightening him.**

This is the former s.255. It was s.223 in the Code of 1892 and s.170 in the E.D.C. where, with reference to the words "save by wilfully frightening a child or sick person", it is said that "This obviates a possible doubt".

See also s.194(5)(d) *ante*.

In 1 Hale P.C. 429, it is said that:

"if a man either by working upon the fancy of another or possibly by harsh or unkind usage puts another into such passion of grief or fear, that the party either dies suddenly, or contracts some disease, whereof he dies, though, as the circumstances of the case may be, this may be murder or manslaughter in the sight of God, yet *in foro humano* it cannot come under the judgment of felony, because no external act of violence was offered, whereof the common law can take notice, and secret things belong to God."

This section and the one preceding were referred to in *R. v. HOWARD*(1913), 5 W.W.R.838, in which the accused was charged with manslaughter following an altercation in a street-car in which he struck the deceased. The latter appeared to be all right at the moment but collapsed and died shortly afterwards. There was medical evidence that the blow itself could not have caused death directly but that the deceased was in such a physical condition from hardening of the arteries, that anger or excitement or anything that quickened the flow of blood would have caused his death without a blow. It was held, applying s.255, that death was caused by an influence on the mind, and accused was discharged at a preliminary hearing. It was said too that "No matter how delicate his condition might have been, if you by your act so affected him physically as to hasten his death you are guilty of either murder or manslaughter, murder if there is malice or intent, manslaughter if there is not."

**OLD CODE:**

255. *No one is criminally responsible for the killing of another by any influence on the mind alone, nor for the killing of another by any disorder or disease arising from such influence, save in either case by wilfully frightening a child or sick person.*

259. *Culpable homicide is murder,*

- (a) if the offender means to cause the death of the person killed;*
- (b) if the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not;*
- (c) if the offender means to cause death, or, being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed;*
- (d) if the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.*

Two cases, decided at common law, illustrate the principle of this section. In *R. v. TOWERS* (1874), 12 Cox, C.C.530, which arose out of the death of an infant four and a half months old, Denman, J. charged the jury that "even though the teething might have had something to do with it," yet if the man's act in striking the girl who was holding the child brought on the convulsions from which it died, or brought them to a more dangerous extent, so that death would not have resulted otherwise, it would be manslaughter.

In *R. v. DUGAL* (1878), 4 Que.L.R.350, a verdict of manslaughter was upheld against a man who had so terrorized his father by threats which, however, he was prevented from carrying out, that the former died of syncope within a few minutes afterwards. The case of *R. v. TOWERS*, was considered and Dorion, C.J., in a dissenting judgment observed that Denman, J. had made a distinction between the rule relating to a child a few months old, and that applicable to a grown person "which distinction cannot be easily defended on principle." Ramsay, J. remarked that Denman, J. "seems to have thought that the reason of this was that it could not be believed that fright alone would cause the death of a grown up person."

## MURDER, MANSLAUGHTER AND INFANTICIDE.

**MURDER.**

**201. Culpable homicide is murder**

- (a) where the person who causes the death of a human being**
  - (i) means to cause his death, or**
  - (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;**
- (b) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or**
- (c) where a person, for an unlawful object, does anything that he**

Section 201—*continued*

**knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.**

This is the former s.259. It was s.227 in the Code of 1892, and s.174 in the E.D.C. In their report the Imperial Commissioners set out the theory of culpable homicide as follows:

"The common law definition of murder is 'unlawfully killing with malice aforethought'. Manslaughter may in effect be defined as 'unlawful killing without malice aforethought'. The objection to these definitions is that the expression 'malice aforethought' is misleading. This expression taken in a popular sense would be understood to mean that in order that homicide may be murder, the act must be premeditated to a greater or less extent, the jury having in each case to determine whether such a degree of premeditation existed as deserved the name. This definition if so understood would be obviously too narrow, as without what would commonly be called premeditation, homicide might be committed which would involve public danger and moral guilt in the highest possible degree. Of course it can be pointed out that every intentional act may be said to be done aforethought, for the intention must precede the action. But even with this explanation, the expression is calculated to mislead anyone but a trained lawyer. The inaccuracy of the definition is still more apparent when we find it laid down that a person may be guilty of murder who had no intention to kill or injure the deceased or any other person, but only to commit some other felony, and the injury to the individual was a pure accident. This conclusion was arrived at by means of the doctrine of constructive or implied malice. In this case as in the case of other legal fictions it is difficult to say how far the doctrine extended."

After pointing out that the matter had been considered in 1866 and again in 1874, the report proceeds:

"The present law may, we think, be stated with sufficient accuracy for our present purpose somewhat as follows:—Murder is culpable homicide by any act done with malice aforethought. Malice aforethought is a common name for all the following states of mind:—(a) An intent preceding the act to kill or to do serious bodily injury to the person killed or to any other person; (b) knowledge that the act done is likely to produce such consequences, whether coupled with an intention to produce them or not; (c) an intent to commit any felony; (d) an intent to resist an officer of justice in the execution of his duty. Whether (c) is too broadly stated or not is a question open to doubt, but Sir Michael Foster, perhaps the highest authority on the subject, says (p.258) 'A shooteth at the poultry of B, and by accident killeth a man; if his intention was to steal the poultry which must be collected from circumstances, it will be murder by reason of that felonious intent; but if it was done wantonly and without that intention, it will be barely manslaughter.'

It seems to us that the law upon this subject ought to be freed from the element of fiction introduced into it by the expression 'malice

aforethought,' although the principle that murder may under certain circumstances be committed in the absence of an actual intention to cause death ought to be maintained. If a person intends to kill and does kill another, or if, without absolutely intending to kill, he voluntarily inflicts any bodily injury known to be likely to cause death, being reckless whether death ensues or not, he ought in our opinion to be considered a murderer if death ensues.

For practical purposes we can make no distinction between a man who shoots another through the head, expressly meaning to kill him, a man who strikes another a violent blow with a sword, careless whether he dies of it or not, and a man who, intending for some object of his own, to stop the passage of a railway train, contrives an explosion of gunpowder or dynamite under the engine, hoping indeed that death may not be caused, but determined to effect his purpose whether it is so caused or not. This is the general object kept in view both in the Draft Code and in the Bill, but there is some difference in the extent to which they go. There is no difference as to the cases in which the death of the person killed or of some other person is intended. The Bill included in the definition of murder all cases in which the offender intended to cause, or knew that he probably would cause 'grievous bodily harm', to any person. The Draft Code would include all such cases, substituting the expression 'bodily injury known to the offender to be likely to cause death' for 'grievous bodily harm'; which to some extent narrows the definition given in the Bill. On the other hand, the Draft Code (s.175) includes all cases in which death is caused by the infliction of 'grievous bodily injury' for the purpose of facilitating the commission of certain heinous offences. All of these cases would fall within the definition of murder given in the Bill, according to which it is murder to kill by the intentional infliction of grievous bodily harm, irrespectively of the purpose for which it is used. Lastly, section 175, in sub-sections (b) and (c) provides that killing by the administration of stupefying things, or by wilfully stopping the breath, for the purpose in either case of committing any of the specified offences, shall be murder, whether the offender knows or not that death is likely to ensue. According to the provisions of the Bill these cases would amount to murder only if the offender knew their danger."

From this exposition it will be seen that ss.201 and 202 (which are the sections corresponding to s.175 of the Draft Code), perpetuate the provisions of the Draft Code. See further the next section, also ss.499 and 569 *post*.

In *R. v. BACKSTROM*(1950), 96 C.C.C.165, it was held that there was misdirection when the trial judge used "or" instead of "and" as it appears in s.201(a)(ii).

In a case before the Privy Council, *THABO MELI v. R.*, [1954] 1 W.L.R.228, it appeared that accused struck another man intending to kill. Mistakenly thinking his victim dead, he rolled him over a cliff to make it look like an accident and the victim died of exposure. It was argued that when accused struck he did not kill, and when he killed he did not realise that he was doing so. To this the Board answered that it "was really one transaction".



**MURDER IN COMMISSION OF OFFENCES.**—Intention to cause bodily harm.—Administering over-powering thing.—Stopping the breath.—Using weapon.

**202.** Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit treason or an offence mentioned in section 52, piracy, escape or rescue from prison or lawful custody, resisting lawful arrest, rape, indecent assault, forcible abduction, robbery, burglary or arson, whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if

- (a) he means to cause bodily harm for the purpose of
  - (i) facilitating the commission of the offence, or
  - (ii) facilitating his flight after committing or attempting to commit the offence,
 and the death ensues from the bodily harm;
- (b) he administers a stupefying or overpowering thing for a purpose mentioned in paragraph (a), and the death ensues therefrom;
- (c) he wilfully stops, by any means, the breath of a human being for a purpose mentioned in paragraph (a), and the death ensues therefrom; or
- (d) he uses a weapon or has it upon his person
  - (i) during or at the time he commits or attempts to commit the offence, or
  - (ii) during or at the time of his flight after committing or attempting to commit the offence,
 and the death ensues as a consequence.

This comes from the former s.260. Pars.(a),(b) and (c) were s.228 in the Code of 1892, to which the offence of indecent assault was added by 1947, c.55, s.6. Par.(d) was added by 1947, c.55, s.7, under circumstances that appear *infra*. It has been changed in the revision by omitting the words "of its use", thus giving full effect to the words "has it upon his person", and by altering the wording to conform to *ROWE v. R.*, *infra*.

The corresponding section in the E.D.C. was s.175 as to which see notes to preceding section. The report of the Imperial Commissioners as quoted there may be amplified by quoting words used by the Attorney General of Great Britain in introducing the Draft Code (Parl. Debates, 1878, 3 Series, Vol. 239, col. 1946):

" . . . . . let me explain what I mean by constructive murder. I use this expression, which I acknowledge is inaccurate, for the sake of brevity. At present, if a man is engaged in committing a felony, and he kills anyone, he is guilty of murder, although the killing might be accidental, and the offender may not have had the intention of inflicting even the slightest harm. For example, if a man endeavouring to break into a house were to push open a shutter, and the bar which had served as its fastening were to fall on the head of some person inside and kill him, the burglar would be guilty of murder. Again, to use a common illustration, if a man were to shoot at a barnyard fowl, intending to steal the body, and should accidentally hit some one hard by and kill him, the intended fowl-stealer would be guilty of murder. So, according to the present law, if a man resisting an officer of justice in

**OLD CODE:**

260. *In case of treason and the other offences against the King's authority and person mentioned in Part II, piracy and offences deemed to be piracy, escape or rescue from prison or lawful custody, resisting lawful apprehension, murder, rape, indecent assault, forcible abduction, robbery, burglary or arson, culpable homicide is also murder, whether the offender means or not death to ensue, or knows or not that death is likely to ensue.*

- (a) if he means to inflict grievous bodily injury for the purpose of facilitating the commission of any of the offences in this section mentioned, or the flight of the offender upon the commission or attempted commission thereof, and death ensues from such injury; or*
- (b) if he administers any stupefying or overpowering thing for either of the purposes aforesaid, and death ensues from the effects thereof; or*
- (c) if he by any means wilfully stops the breath of any person for either of the purposes aforesaid, and death ensues from such stopping of the breath.*
- (d) if he uses or has upon his person any weapon during or at the time of the commission or attempted commission by him of any of the offences in this section mentioned or the flight of the offender upon the commission or attempted commission thereof, and death ensues as a consequence of its use.*

the execution of his duty occasions his death by tripping him up and causing him to fall on his head on the curbstone, he will have committed murder. Now, I think the House will agree with me that such acts as I have described do not fall within the category of murders, and, though known as murders, they are merely murders by construction of law. It seems to me that murder by construction of law is a disgrace to the juridical system of the country, and should no longer be retained. A man who was found endeavouring to break into a house should be tried for the crime he intended to commit. So the fowl-stealer should be tried for that offence. And a man struggling with a policeman should be charged with resisting the police in the execution of their duty. To call those acts, which were done without the slightest intention to kill, murder, is monstrous. I would maintain that no one should be pronounced guilty of the atrocious crime of murder—a crime which, if it is brought home to a man, subjects him to the appalling punishment of an ignominious death—unless he has deliberately intended to take away life, or to inflict grievous bodily harm, or he has deliberately done an act likely in itself to cause death or grievous bodily harm, and has by such act caused death, having at the time a stolid indifference whether such result would follow the commission of his act or not. In the instance I have alluded to, of a man doing an act with the intention of killing or causing grievous bodily harm, and thereby destroying a fellow-creature, I think all will agree that he ought to be convicted of murder; and I think most hon. Members will also admit that the man who takes away life by an act likely to cause death or grievous bodily harm—for example, by exploding a barrel of gunpowder underneath a crowded room, utterly regardless of what the consequences of his act may be—should also be treated as having perpetrated this heinous crime."

Thus far, what he said is not out of accord with s.202, but his conclusion falls short of including s.202(d) when he continued:

"... but I submit, with confidence, that no acts which in atrocity

Section 202—*continued*

fall short of these should be considered murder. Accordingly, the code sweeps away all constructive murders, and pronounces the man to be alone guilty of this terrible crime who causes death by such acts as I have described, involving the intention or the utter indifference to results which I have indicated. . . . ."

What the departure is appears in *ROWE v. R.* (1951), 100 C.C.C. 97. Cartwright, J., although dissenting otherwise, agreed that s.260(d) changed the law as laid down in *R. v. HUGHES et al.*, [1942] S.C.R. 517 "with the result that now if an offender during or at the time of the commission thereof is using a revolver and death ensues as a consequence of its use this will be murder even although the actual discharge of such revolver was accidental in the sense above mentioned." Kerwin, J. (now C.J.) said in part:

" . . . . . The contention that he did not use ex. 13 at the London service station and that Galbraith's death did not ensue as a consequence of its use cannot be sustained. Section 260(d) was enacted as a result of the decision in *R. v. HUGHES et al.*, [1942] S.C.R. 517, and its provisions are met in this case by the facts that Rowe not only had the Colt upon his person but pulled it out and held it in his hand. That was a use, under any definition of that very ordinary word, and the death of Galbraith ensued as a consequence.

. . . . . It was contended that there was no evidence that the police had ever been notified of the Windsor robbery and that, there being no pursuer, it could not be said that Rowe was pursued and, therefore, in flight. That contention is unsound. The whole matter was subjective so far as Rowe was concerned. He knew that he had committed a robbery at Brown's house; he was anxious to dispose of the weapons taken from that house; he spent only 15 minutes endeavouring to find a purchaser in Windsor; it was Bechard who made the arrangements with the taxi driver but it was Rowe, who had not been seen by Mrs. Brown, who identified himself to Jolly when the latter was raising a question as to being paid for the trip to London. Rowe never let Jolly out of his sight, and coupled with this are the circumstances under which he pulled out ex. 13. The trial judge was correct in leaving it to the jury to find whether Rowe was in flight."

Kellock, J., interpreting the terms of the paragraph said:

" . . . . . One of the ordinary meanings of the word 'flight' is the 'action of running away from danger', and I think the danger (in such a case as the present, danger of loss of liberty) may be apprehended as well as present and actual. In other words, the subjective element in any case may be sufficient.

In *R. v. HUMPHERY* (1839), 10 Ad. & E. 335, Tindal, C.J. said, with relation to the use of the word 'upon' in statutes, at p.370, that it 'may undoubtedly either mean before the act done to which it relates, or simultaneous with the act done, or after the act done, according as reason and good sense require the interpretation, with reference to the context, and subject matter of the enactment'.

The Oxford Dictionary gives as one of the meanings of the word, 'following upon' as well as 'immediately after'.

The French text to the statute here in question reads: ' . . . . . ou au cours ou au moment de la fuite du délinquant après la perpétration. . . . . '

In the present instance, 'upon' cannot be given the meaning of either before or simultaneously with the commission of the offence, and as the word 'immediately' is not used in the statute, I think 'upon' should be interpreted in the sense of 'following'. The question as to whether or not in a given case flight exists is, of course, a question of fact.

In the case at bar, I think the circumstances, which I do not repeat, are sufficient to have enabled the jury, if they saw fit, to find that the appellant, at the time the fatal shot was fired, was in flight upon the commission of the Windsor robbery within the meaning of the statute."

The doctrine of the common law was re-stated in *R. v. JARMAN*, [1946] 1 K.B.74, in which accused was appealing his conviction for murder. He had engaged in robbing the office of a garage and pointed a loaded pistol at the cashier. In giving evidence he said that since the cashier had treated him with scorn he did not know what to do, and that "he was thinking what to do when the gun went off". He had not, he asserted, intended to press the trigger. Wrottesley, J., delivering the judgment of the Court said at p.80:

"We think that the object and scope of this branch of the law is at least this, that he who uses violent measures in the commission of a felony involving personal violence does so at his own risk, and is guilty of murder if those violent measures result even inadvertently in the death of the victim. For this purpose the use of a loaded firearm, in order to frighten the person victimized into submission is a violent measure. The recent case of *R. v. HULTON & JONES* decided in this court, is clear authority for this proposition."

(*R. v. HULTON & JONES* is said to be unreported).

**MURDER REDUCED TO MANSLAUGHTER.—**What is provocation.—Questions of fact.—Death during illegal arrest.

**203. (1)** Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

(2) A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted upon it on the sudden and before there was time for his passion to cool.

(3) For the purposes of this section the questions

(a) whether a particular wrongful act or insult amounted to provocation, and

(b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,

are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

Section 203—*continued*

(4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.

This is the former s.261. It was s.229 in the Code of 1892, and s.176 in the E.D.C. See also s.36, *ante*.

The following rules were laid down in *MANCINI'S CASE*, [1942] A.C. 1, at p.13:

"If the jury are left in reasonable doubt whether the act was 'unintentional', i.e. a pure accident without criminal negligence, the verdict should be not guilty. If they are left in reasonable doubt whether the act was 'provoked', i.e. perpetrated under the impulse of provocation as defined, the prisoner should be found guilty of manslaughter."

And at p.9:

"..... Provocation, to have that result (of reducing murder to manslaughter) must be such as temporarily deprives the person provoked of the power of self control, as the result of which he commits the unlawful act which causes death. .... The test to be applied is that of the effect of the provocation on a reasonable man ..... so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did."

In *R. v. LESBINI* (1914), 11 Cr. App.R.7 at p.9, the following appears: "..... we see no reason to dissent from the judgment delivered by Darling, J., in *Alexander* (9 Cr. App. R. 139) in which case a substantially similar argument was put forward that the Court ought to take into account the mental ability of the prisoners who came before it, and that if the mental ability of one of them is less than that of the other it ought to avail as a defence for him although it would not be open to the other. We agree with the view stated by Darling, J., and with the principles stated in *Welsh* (11 Cox C.C. 336): 'There must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion.' This Court is not minded in any degree to weaken the state of the law which makes a man who is not insane responsible for the ordinary consequences of his action."

*TAYLOR v. R.*, [1947] S.C.R.462, is to the same effect, "sufficient to deprive an ordinary person of the power of self-control, without taking drunkenness into account."

In the *Taylor* case the Supreme Court held too that the law in Canada respecting provocation, as set out in s.261 of the *Criminal Code*, differs from the English common law inasmuch as in Canada, having regard to the words "any wrongful act or insult" in s.261(2), provocation may result from either acts or words or a combination of both.

It is noted that our *Criminal Code* follows the English Draft Code and Bill, and the following is quoted from the report of the Commissioners:

"There is no substantial difference between the provisions of the

**OLD CODE:**

261. *Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.*

(2) *Any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool.*

(3) *Whether or not any particular wrongful act or insult deprived of the power of and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact: Provided that no one shall be held to give provocation to another by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.*

(4) *The illegality of an arrest shall not necessarily reduce an offence of culpable homicide from murder to manslaughter, but if the illegality was known to the offender it may be evidence of provocation.*

Draft Code and the Bill dealing with provocation, though the language and arrangement differ. Each introduces an alteration of considerable importance into the common law. By the existing law, the infliction of a blow, or the sight by the husband of adultery committed with his wife may amount to provocation which would reduce murder to manslaughter. It is possible that some other insufferable outrages might be held to have the same effect. There is no definite authoritative rule on the subject, but the authorities for saying that words can never amount to a provocation are weighty. We are of the opinion that cases may be imagined where language would give a provocation greater than any ordinary blow. The question whether any particular act falls or not within this line appears to us to be pre-eminently a matter of degree for the consideration of the jury."

In England the matter is still dealt with at common law.

*Gf. also R. v. LINTON*, [1949] O.R.100; *R. v. KRAWCHUK* (1941), 75 C.C.C.16, 219; *HOLMES v. D.P.P.*, [1946] A.C.588.

In *R. v. HLADY*, [1952] O.W.N.790, the following appears at p.792: "The trial judge also told the jury that 'an unlawful killing resulting from a deliberate act of violence is *prima facie* murder, but if it is established that the accused acted under . . . . (provocation), that presumption is rebutted, and the killing is then considered only manslaughter.' This left with the jury the impression that the accused had to establish something, and it was also objectionable in that it referred to a presumption of murder which was to be rebutted. While there was a presumption that a person intended the natural consequences of his acts, there was no presumption of murder. The law was also quite clear that the accused did not have to *establish* the fact that he acted in circumstances such as would deprive an ordinary person of the power of self-control; it was sufficient if a reasonable doubt was raised." New trial ordered.

In *BEDDER v. D.P.P.*, [1954] 2 All E.R.801 it was held that the test is the effect of the alleged provocation on the mind of a reasonable man; in applying it the hypothetical reasonable man does not have to

**Section 203—continued**

be invested notionally with the physical peculiarities of the accused.

The following illustration, referable to subsec.(4), appears in Stephen's Digest, p.273:

"Police officers in charge of a police-van have in custody D, a person charged with felony under 11 Vict., c. 12. A, B, and C, and others assault the van in concert, rescue the prisoner, and shoot one of the policemen dead with a pistol. The warrant under which D was in custody was informal, but not to the knowledge of A, B, and C. A, B, and C, and the others are guilty of murder, and it would have made no difference if they had known of the illegality of the arrest.

This is the case of *R. v. ALLEN and others*, the Fenians, who murdered Brett, the policeman."

A statement addressed by counsel for the accused in the above case was answered by Mr. Justice Blackburn. He pointed out that the accused had made a desperate attack to rescue the prisoners, intending even to shoot the police if necessary. He said in part (*ib* p.475):

"It was further manifest that they attempted the rescue in perfect ignorance of any defect in the warrant, and that they knew well if there was any defect in the warrant, or illegality in the custody, that the courts or law were open to an application for the release from custody. We think it would be monstrous to suppose that under such circumstances, even if the justice would make an informal warrant, it could justify the slaughter of an officer in charge of the prisoners, or reduce such slaughter to the crime of manslaughter."

**INFANTICIDE.**

**204. A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.**

This section replaces the former s.262(2). "Newly born child" is defined in s.2(27). Ss.195, 208, 451(c)(i)(B), 569 and 570 also deal directly with this offence. S.209 deals with the offence of killing an unborn child, s.214, with neglect to obtain assistance in childbirth, and s.215 with concealment of birth.

S.262(2) was brought into the Code by 1948, c.39, s.7, and was taken from the *Infanticide Act*, 1922, (U.K.). The present section, with the definition mentioned, is taken from the *Infanticide Act*, 1938, (U.K.).

The reader cannot do better than to consult the comprehensive study of this subject contained in the essay "Child-killing in English Law" by D. Seaborne Davies that appeared first in the *Modern Law Review*, Dec. 1937 and March 1938, and later in "The Modern Approach to Criminal Law," p.301. See also the discussion of it in the Report of the British Royal Commission on Capital Punishment 1949-53, pars.155-162, which advised no amendment to the Act of 1938.

It is pointed out by Mr. Davies that concealment of birth was the offence most pressed into service to fill part of the gap later to be largely closed by the *Infanticide Act*, and that it served conveniently because

**OLD CODE:**

262. (1) *Culpable homicide, not being infanticide and not amounting to murder, is manslaughter.*

(2) *A woman who by wilful act or omission causes the death of her newly born child shall be deemed not to have committed murder or manslaughter if at the time of the act or omission she had not fully recovered from the effect of giving birth to such child and by reason thereof the balance of her mind was then disturbed, but shall be deemed to have committed an indictable offence, namely, infanticide.*

it did not involve the same difficulties of proof of live birth as did homicide, and also because it became an alternative verdict on a charge of murder.

The crime of concealment of birth was created by 21 Jac.1, c.27. It related only to illegitimate children and provided that "in every such case the Mother soe offending shall suffer Death as in the case of Murther except such Mother can make proffe by one witnesse at the least, that the child (whose death was by her soe intended to be concealed) was born dead." This barbarous and unreasonable rule, as it was called by a later text-writer, was "found in sundry cases difficult and inconvenient to be put in practice," and was repealed by 43 Geo. III, c.58, which enacted also that the trials in such cases should take place in the same way as other trials for murder. This is mentioned because the provision last mentioned was s.983 in our 1927 Code, but is dropped from the present Code.

The E.D.C. contained in ss.185 and 186 new provisions corresponding generally to what appears as s.214 of this Code (neglect to obtain assistance in childbirth). The Bill appears to have contained originally a provision later removed, which would have permitted a jury to convict of manslaughter instead of murder in cases similar to those now described as infanticide. In introducing it, the Attorney General said (Parl. Debates 1878, 3 Series, Vol. 239, col. 1948):

"It is well known that the law is, in fact, unable to secure the punishment of such offences as I have alluded to, for a jury will not convict the offenders. . . . I own the provision of the code to which I have just alluded may be open to the objection of not being thoroughly logical; but if it is our lot to be obliged to choose between mercy and logic, let us not hesitate to give our votes in favour of the former."

It was the fact, not only that juries would not convict, but that the judges too were protesting against the "solemn mockery" of a law which required them to pass a sentence of death which everyone knew would never be carried out. The British Royal Commission in the Report to which reference has been made, points out that, between 1866 and 1909, a number of bills were introduced which included provisions dealing with infanticide, but that none of them ever reached the statute book. It was not until the Act of 1922 that the new substantive offence of infanticide was created.

Difficulties arose under that Act chiefly through lack of definition. The Court of Criminal Appeal in *R. v. O'DONOGHUE* (1927), 20 Cr.App. R.132, in which accused had been sentenced to death for the murder of her thirty-five days old infant, declined to undertake the task of defining the expression "newly-born child" but held that the trial judge had not



**Section 204—continued**

erred in holding, "with reference to a child of more than a calendar month of age, that there was no evidence upon which he could invite or permit a jury to find that the child was newly-born within the meaning of the Statute."

In a later case referred to by Davies, *R. v. HALE*, in which a mother had killed her three weeks old child, the famous physician, Lord Dawson of Penn, testified that it took a mother not less than three weeks, and in many cases longer, to recover from the conditions of birth. The accused was found guilty but insane.

In Canada, the provisions of s.262(2) were criticized in *R. v. MARCHELLO*, [1951] O.W.N.316, at p.319, as follows:

"The onus resting on the Crown to prove all these combined elements in the crime would appear to be so heavy as to make it almost impossible to convict an accused person on a charge of infanticide if laid as a single count in the indictment. On the one hand, the Crown must prove a negative, by showing that the accused 'had not fully recovered from the effects of giving birth to the child', and an affirmative that by reason of giving birth to the child the balance of her mind was at the time of the offence disturbed; while, on the other hand, on such a charge it would be a good defence to show that the accused had at the time of causing the death of the child by wilful act or omission fully recovered from giving birth to the child or that the balance of her mind was not then disturbed. In such case, if even a reasonable doubt was raised in the mind of the jury she would be entitled to be acquitted on the charge of infanticide and thereafter she could not be charged with murder or manslaughter as an accused person cannot be put in jeopardy twice for the same homicide."

*R. v. MARCHELLO*, was followed in *R. v. JACOBS*(1953), 105 C.C.C. 291.

The difficulties that arose in England were met by the passing of the *Infanticide Act*, 1938, 1&2 Geo. VI, c.36, from which, as already noted, s.204 was taken. Ss.451(c)(i)(B) and 570 are designed to meet the criticism expressed in *R. v. MARCHELLO*.

**MANSLAUGHTER.**

**205. Culpable homicide that is not murder or infanticide is manslaughter.**

This is the former s.262(1). It came from s.230 of the Code of 1892 and s.177 of the E.D.C. The reference to infanticide was added by 1948, c.39. See also s.569, *post*, and notes following ss.193,194 and 201.

**PUNISHMENT FOR MURDER.**

**206. Every one who commits murder is guilty of an indictable offence and shall be sentenced to death.**

This is the former s.263. It was s.231 in the Code of 1892 and s.178 in the E.D.C. See also s.413 (jurisdiction), s.464 (bail), s.642 (form of sentence).

**PUNISHMENT FOR MANSLAUGHTER.**

**207. Every one who commits manslaughter is guilty of an indictable offence and is liable to imprisonment for life.**

**OLD CODE:**

262. (1) *Culpable homicide, not being infanticide and not amounting to murder, is manslaughter.*

263. *Every one who commits murder is guilty of an indictable offence and shall, on conviction thereof, be sentenced to death.*

268. *Every one who commits manslaughter is guilty of an indictable offence and liable to imprisonment for life.*

268A. *Every one who commits infanticide is guilty of an indictable offence and liable to imprisonment for three years.*

306. *Every one is guilty of an indictable offence and liable to imprisonment for life who causes the death of any child which has not become a human being, in such a manner that he would have been guilty of murder if such child had been born.*

(2) *No one is guilty of any offence who, by means which he in good faith considers necessary for the preservation of the life of the mother of the child, causes the death of any such child before or during its birth.*

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This is the former s.268. It was s.236 in the Code of 1892 and s.182 in the E.D.C.

See also s.225 (order prohibiting driving) and s.413 (jurisdiction).

**PUNISHMENT FOR INFANTICIDE.**

**208. Every female person who commits infanticide is guilty of an indictable offence and is liable to imprisonment for five years.**

This is the former s.268A with an increase in the maximum penalty.

**KILLING UNBORN CHILD.—Saving.**

**209. (1) Every one who causes the death of a child that has not become a human being, in such a manner that, if the child were a human being, he would be guilty of murder, is guilty of an indictable offence and is liable to imprisonment for life.**

**(2) This section does not apply to a person who, by means that, in good faith, he considers necessary to preserve the life of the mother of a child that has not become a human being, causes the death of the child.**

This is the former s.306. It was s.274 in the Code of 1892 and was taken from s.212 of the E.D.C. where it is described as new. Of it the Commissioners stated (Report p.25): "(The changes) are not considerable. We may, however, observe that we provide by section 212 for the offence of killing a child in the act of birth and before it is fully born. This seems to be not an offence by the present law."

In 4 Bl. Com. p.198, it is said that "To kill a child in its mother's womb, is now no murder, but a great misprision: but if the child be born alive and dieth by reason of the potions or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them."

In accordance with this, Maule, J., charging the jury in *R. v. WEST* (1848), 2 Car. & Kir. 784, said that:

"if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time, that it was

**Section 209—continued**

born in a state much less capable of living and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder."

The jury acquitted the prisoner.

Subsec.(2), of course, protects the medical practitioner, who acts in good faith to preserve the life of the mother. It answers a question raised on s.237 of this Code: Hansard, 1954, pp.2482-3. There does not appear to be any reported case under the section.

See ss.237 and 238 and notes thereto.

**ATTEMPT TO COMMIT MURDER.**

**210. Every one who attempts by any means to commit murder is guilty of an indictable offence and is liable to imprisonment for life.**

This is the former s.264 in general terms, without change in effect since the former section, after an enumeration of various methods, added in par.(h) "by any other means attempts to commit murder". The corresponding sections were s.232 in the Code of 1892, and s.179 in the E.D.C., the latter drawn from the *Offences against the Person Act*, 1861 (Imp.) ss.14 and 15, and 7 Wm. IV and 1 Vict., c.85, s.3. Greaves' Cons. Acts, p.28, said of s.15 in the Act of 1861:

"It includes every attempt to murder not specified in any preceding section. It will therefore embrace all those atrocious cases where the ropes, chains or machinery used in lowering miners into mines have been injured with intent that they may break. . . . So also all cases where steam engines are injured . . . in order to kill any person, will fall within it. So also cases of sending or placing infernal machines. . . . Indeed the malicious may now rest satisfied that every attempt to murder, which their perverted ingenuity may devise, or their fiendish malignity suggest, will fall within some clause of this Act, and may be visited with penal servitude for life."

In the Preface (p.xii) he says on the same subject:

"It is so perfectly impossible to foresee all the circumstances that may happen to mitigate or aggravate any offence, that it is very advisable to leave a wide discretion to the Court, and where, as in attempts to murder, the same punishment may well be awarded by the statute to all cases, it would seem better to have only one general clause; and, had I been able to follow my own judgment, sec. 15, of the *Offences against the Person Act*, would have been made so general as to include all attempts to murder, and consequently all that are particularly enumerated in the preceding sections, and those sections would have been omitted."

**ACCESSORY AFTER FACT TO MURDER.**

**211. Every one who is an accessory after the fact to murder is guilty of an indictable offence and is liable to imprisonment for life.**

This is the former s.267. It was s.235 in the Code of 1892 and s.181 in the E.D.C. See also s.23 *ante*, and ss.406, 413(2)(b), and 502, *post*.

In *YOUNG v. R.* (1950), 10 C.R.142, in which accused went to a certain place and met two men suspected of murder and told them that the

**OLD CODE:**

264. Every one is guilty of an indictable offence and liable to imprisonment for life, who, with intent to commit murder,

(a) administers any poison or other destructive thing to any person, or causes any poison or destructive thing to be so administered or taken, or attempts to administer it, or attempts to cause it to be so administered or taken; or

(b) by any means whatever wounds or causes any grievous bodily harm to any person; or

(c) shoots at any person, or, by drawing a trigger or in any other manner, attempts to discharge at any person any kind of loaded arms; or

(d) attempts to drown, suffocate, or strangle any person; or

(e) destroys or damages any building by the explosion of any explosive substance; or

(f) sets fire to any ship or vessel or any part thereof, or any part of the tackle, apparel or furniture thereof, or to any goods or chattels being therein; or

(g) casts away or destroys any vessel; or

(h) by any other means attempts to commit murder.

267. Every one is guilty of an indictable offence and liable to imprisonment for life, who is an accessory after the fact to murder.

269. Every one is guilty of an indictable offence and liable to imprisonment for life who counsels or procures any person to commit suicide, actually committed in consequence of such counselling or procurement, or who aids or abets any person in the commission of suicide.

270. Every one who attempts to commit suicide is guilty of an indictable offence and liable to two years' imprisonment.

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police had their names and the license number of their car, it was held that he had given them such assistance as to make him an accessory after the fact.

**SUICIDE.****COUNSELLING OR AIDING SUICIDE.**

**212. Every one who**

(a) counsels or procures a person to commit suicide, or

(b) aids or abets a person to commit suicide,

whether suicide ensues or not, is guilty of an indictable offence and is liable to imprisonment for fourteen years.

This is the former s.269 widened to cover a case where suicide does not actually ensue. The former section was s.237 in the Code of 1892 and s.183 in the E.D.C. The Imperial Commissioners (Report, p.25) said:

"By the present law suicide is murder, and a person who assists another to commit suicide is an accessory before the fact to murder, and liable to capital punishment. It appears to us that the abetment of suicide and attempts to commit suicide ought to be made specific offences. We provide for this in sections 183 and 184."

See notes to next section, and also ss.21 and 22, *ante*, and s.502 *post*.

**ATTEMPT TO COMMIT SUICIDE.**

**213. Every one who attempts to commit suicide is guilty of an offence punishable on summary conviction.**

**Section 213—continued**

This is the former s.270. It was s.238 in the Code of 1892 and s.184 in the E.D.C. where a marginal note says "This is the existing law. See *R. v. BURGESS*, L. & C. 258."

The British Royal Commission on Capital Punishment 1949-1953 (Report, par.164) observes that under the law of England, suicide is a crime, *felonia de se* or "self-murder" and, citing *R. v. CROFT*(1944), 29 Cr. App. R.169, adds that:

"... if two persons enter into an agreement to commit suicide and one of them dies in pursuance of the agreement but the other survives, the survivor is guilty of murder, as a principal in the second degree to the murder of the other party if he is present at the time when it is committed, or, if he is absent, as an accessory before the fact."

Hale, bk.1, 412, says that:

"No man has the absolute interest of himself, but (1) God Almighty hath an interest and propriety in him, and therefore self-murder is a sin against God. (2) The King hath an interest in him, and therefore the inquisition in case of self-murder is *felonice et voluntarie seipsum interfecit et murderavit contra pacem domini regis*."

It is apparent that the s.183 as proposed in the E.D.C. and as adopted in s.269 and successive sections of the Canadian Code, altered the common law. It is interesting that the British Commission 1949-53 recommends (par.790(8)) that the law of England should be amended to provide that any person who aids, abets, or instigates the suicide of another person should be guilty, not of murder, but of that offence, and should be punishable with imprisonment for life, which is what the E.D.C. proposed.

With reference to the Code sections, Mignault, J., said in *LONDON LIFE INSURANCE CO. v. LANG SHIRT CO'S TRUSTEE*, [1929] S.C.R. 117:

"It is obvious, of course, that there can be no punishment under modern law when suicide is successful, except with regard to abettors of the crime, and it is clearly not 'homicide' within the Criminal Code (s.250). But it is an indictable offence to aid or abet a person in committing suicide (s.269)."

In *WHITELAW v. WILSON*(1934), 62 C.C.C.172, the defendant and his wife had entered into a suicide pact. She took arsenic in his presence and some hours later he also took the poison. He recovered but his wife died. Kingstone, J., said at p.174:

"There is no doubt in my mind that George Wilson was liable in law under the sections of the Code above referred to for counselling and procuring, or aiding his wife to commit suicide, or, at least, in failing to render, after she had taken the poison, the necessary medical help and assistance which if it had been rendered at the proper time would probably have saved her life."

NEGLECT IN CHILDBIRTH AND CONCEALING DEAD BODY.

**NEGLECT TO OBTAIN ASSISTANCE IN CHILDBIRTH.**

**214. A female person who, being pregnant and about to be delivered, with intent that the child shall not live or with intent to conceal the birth of the child, fails to make provision for reasonable**

**OLD CODE:**

271. Every woman is guilty of an indictable offence who, with either of the intents in this section mentioned, being with child and being about to be delivered, neglects to provide reasonable assistance in her delivery, if the child is permanently injured thereby, or dies, either just before, or during, or shortly after birth, unless she proves that such death or permanent injury was not caused by such neglect, or by any wrongful act to which she was a party, and is liable,

(a) if the intent of such neglect be that the child shall not live, to imprisonment for life;

(b) if the intent of such neglect be to conceal the fact of her having had a child, to imprisonment for seven years.

272. Every one is guilty of an indictable offence and liable to two years' imprisonment, who disposes of the dead body of any child in any manner, with intent to conceal the fact that its mother was delivered of it, whether the child died before, or during, or after birth.

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**assistance in respect of her delivery is, if the child is permanently injured as a result thereof or dies immediately before, during or in a short time after birth, as a result thereof, guilty of an indictable offence and is liable to imprisonment for five years.**

This comes from the former s.271. There is a consequential change in penalty and the insertion of the words "as a result hereof" in line 6 is consistent with s.195 (2) *ante*. S.271 was s.239 in the Code of 1892 and was adapted from ss.185 and 186 in the E.D.C. These were apparently designed to introduce intermediate offences between murder and concealment of birth.

A marginal note in the E.D.C. remarks that women found guilty of concealment of birth under the existing law were in most cases really guilty of the acts which ss.185 and 186 proposed to make substantive offences, and the following reference to them in the report (p.25) foreshadows the creation, much later, of the crime of infanticide:

"The subject of child murder is one as to which the existing law seems to require alteration. At present no distinction is made between the murder of a new-born infant by its mother and the murder of an adult. Practically, this severity defeats itself, and offences which are really cases of child murder are often treated as cases of concealment of birth simply. The Bill proposed to meet this by an enactment which (as amended by the Attorney General) would have enabled a jury to convict a woman of manslaughter instead of murder who caused her new-born child's death by an act done when her power of self-control was greatly weakened. On the whole we have preferred to substitute for it the provisions contained in sections 185 and 186."

See also ss.195 (killing child), 204 (infanticide), 209 (killing unborn child) and 215 (concealing body) and notes thereto.

**CONCEALING BODY OF CHILD.**

**215. Every one who in any manner disposes of the dead body of a child, with intent to conceal the fact that its mother has been delivered of it, whether the child died before, during or after birth, is guilty of an indictable offence and is liable to imprisonment for two years.**

**Section 215—continued**

This is the former s.272. It was s.240 in the Code of 1892 and s.187 in the E.D.C. It is s.60 in the *Offences against the Person Act*, 1861 (U.K.) where, however, the wording is "by any secret disposition". See also ss. 195 (killing child), 204 (infanticide), 209 (killing unborn child) and 214 (neglect to obtain assistance at childbirth), *ante*, and s.570 (verdict) *post*. S. 569, *post*, specifies cases in which there may be an alternative verdict for an offence under this section.

The concealment must be that of a dead body; the exposure of a living child is dealt with in s.189, *ante*.

Dealing with the term "secret disposition," the trial judge in *R. v. BENNETT* (1938), 2 J.C.L.530, pointed out to the jury that even an open exposure might be a secret disposition if the body were put in a place where the chances of its being found were obviously remote, as on a mountain top. In the instant case where a parcel containing the body was simply left in a railway carriage without being pushed out of sight, the jury would have to decide whether the accused had wanted only to get rid of the body, or had intended to place it so that it might never be traced to her. The jury returned a verdict of acquittal. It appears that the latter of the intents referred to, is relevant to s.215.

*R. v. MORTIMER* (1939), 3 J.C.L.38, was a case in which a man was convicted for concealing the birth of a child born to his wife.

BODILY HARM AND ACTS AND OMISSIONS CAUSING  
DANGER TO THE PERSON.

**CAUSING BODILY HARM WITH INTENT.**

**216. Every one who, with intent**

**(a) to wound, maim or disfigure any person,**

**(b) to endanger the life of any person, or**

**(c) to prevent the arrest or detention of any person,**

**discharges a fireman, air gun or air pistol at or causes bodily harm in any way to any person, whether or not that person is the one mentioned in paragraph (a), (b) or (c), is guilty of an indictable offence and is liable to imprisonment for fourteen years.**

This comes from the former s.273 which was s.241 in the Code of 1892. S.190 of the E.D.C. is similar in effect. There it was said to be new but there is reference to s.18 of the *Offences against the Person Act*, 1861, which came from 7 Wm. IV and 1 Vict., c.85, s.4 with the word "any" substituted for "such", the purpose being "to provide for cases where the prisoner wounds, etc., A when he intends to wound B, and the like."

The new section omits the word "grievous". As the gravamen of the offence is the intent, it would appear that the offence should be committed if bodily harm were caused. Again, the word "lawful" has been omitted in clause(c). Discharging a firearm at another should not be condoned even if the arrest was not lawful.

See notes to s.231, also *R. v. ALLEN*, noted in Stephen's Digest, 7th ed., p.467 at p.475, and cited under s.203 *ante*.

In *R. v. SMART* (1927), 49 C.C.C.75, the following appears:

"The fact having been clearly proven that the defendant did in fact

**OLD CODE:**

273. Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to maim, disfigure or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or ~~prevent the lawful apprehension or detainer of any person~~ unlawfully by any means wounds or causes any grievous bodily harm to any person, or shoots at any person, or by drawing a trigger, or in any other manner, attempts to discharge any kind of loaded arms at any person.

shoot in the direction of several persons, and wounded Chmilar, it would seem to me the Crown has established its case, and the onus would then shift to the accused to satisfy the Court that it was either an accident or that he did not intend to wound, which was one of the natural consequences of shooting in the direction of these persons."

*R. v. FRETWELL* (1864), 169 E.R.1465, applied.

See also *R. v. CASHMAN* (1951), 102 C.C.C.208, where there was a similar result. That case may be compared with *R. v. MacDONALD* (1944), 82 C.C.C.47, in which the following appears at p.51:

"The evidence of the complainant, however, is at least equally consistent with the inference that the accused fired the shot not at the complainant but into the ground or wide of him and in an effort to scare him away. This being so, the conviction should be quashed."

In *R. v. SLAUGHENWHITE* (No. 2) (1905), 9 C.C.C.173, (S.C. Can.) a case under s.241, the following appears in the majority judgment at p.174:

"Probably the jury could have returned a verdict under this section, or a verdict of common assault, but they have not done so. Their finding that the offense committed by the prisoner whatever it might be, was without 'malicious intent', removed the essential requirement of a crime, whether malice is to be inferred from the wrongful act or is 'express'."

This case was applied in *R. v. ROBERTSON* (1946), 86 C.C.C.353, upon the question of intent, to set aside a conviction under this section.

See also *THORNTON v. R.* (1951), 101 C.C.C.408 (leave to appeal to S.C. Can. refused).

**ADMINISTERING NOXIOUS THING.**—Causing bodily harm.—Intent to annoy.

**217. Every one who administers or causes to be administered to any person or causes any person to take poison or any other destructive or noxious thing is guilty of an indictable offence and is liable**  
**(a) to imprisonment for fourteen years, if he intends thereby to endanger the life of or to cause bodily harm to that person, or,**  
**(b) to imprisonment for two years, if he intends thereby to ag-grieve or annoy that person.**

This combines the former ss.277 and 278 but with some changes as appear in the following notes, namely, that under par.(a) the offender is punishable according to his intent, and that the word "injure" does not appear in par.(b).

Ss.277 and 278 go back to ss.23 and 24 of the *Offences against the Person Act*, 1861, 24 and 25 Vict., c.100, (Imp.) which in turn came from



**Section 217—continued**

23 and 24 Vict. c.8, ss.1 and 2 (Imp.). The relevant portions of the Act of 1861 are as follows:

"23. Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony. . . . .

24. Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person, shall be guilty of a misdemeanour. . . . ."

Although our sections did not come into the Code from the E.D.C., it may be noted that there they appear as follows:

**Section 197**

*Administering poison so as to endanger life.*

Every one shall be guilty of an indictable offence, and shall be liable . . . . . who, knowingly and with intent to injure aggrieve or annoy any person, administers or causes to be administered to or taken by such person any poison or other noxious or destructive thing, whereby the life of any person is endangered or grievous bodily harm is caused to any person. (This is stated to be 24 and 25 Vict., c.100, s.23 modified).

**Section 198**

*Administering poison with intent though no injury caused.*

Every one shall be guilty of an indictable offence and shall be liable . . . . . who knowingly and with intent to injure aggrieve or annoy any person, administers to or causes to be administered to or taken by such person any poison or other destructive or noxious thing, although no injury may be caused thereby.

In Canada the above sections of the Act of 1861 were taken into the *Offences against the Person Act*, 1869, and appear as ss.17 and 18, R.S.C. 1886, c.162. Thence they came into the Code of 1892 as ss.245 and 246. There was no change in the description of the offences except to omit the words "and maliciously." It was in this form that they appeared in the repealed Code.

In *R. v. WILKINS*(1861), L. & C.89, it was held that administering cantharides to a woman with intent to excite her sexual passion, is an administering with intent to injure, aggrieve or annoy. Conviction affirmed. "Cantharides taken internally in large quantities is poisonous; but is administered by medical men as a stimulant to the kidneys and bladder. It is also administered and taken to procure abortion, and to excite sexual passion and desire."

*TULLEY v. CORRIE* (1867), 16 L.T.796, was an action for arrest and false imprisonment. The plaintiff had been the defendant's cook and had been given into custody on a charge of having prepared a dish containing antimony. This action turned upon a plea of justification.

Speaking of the two sections now in question, Cockburn, C.J. said in his charge to the jury:

"I am of opinion that the distinction made in the two clauses is marked and intentional, and that the intention was that if a person admin-

**OLD CODE:**

277. *Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who unlawfully administers to, or causes to be administered to, or taken by any other person, any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm.*

278. *Every one is guilty of an indictable offence and liable to three years' imprisonment who unlawfully administers to, or causes to be administered to or taken by, any other person, any poison or other destructive or noxious thing, with intent to injure, aggrieve or annoy such person.*

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istered a noxious thing simply with the intent to injure, aggrieve and annoy, and the consequences prove to be more extensive than the intention, if consequences fatal to life or health result from the illegal act, then that which would otherwise be a misdemeanour becomes, in consequence of the results that take place, a felony."

The jury found that a noxious thing was administered to injure, aggrieve or annoy, but not with intent to do grievous bodily harm. Cockburn, C.J., held that this was a verdict for the defendant.

"Now my opinion is that, looking to the statute, if there is an administration of noxious matter with intent to injure, aggrieve and annoy, and the effect produced is not merely to injure, aggrieve and annoy, but to do more, namely, grievous bodily harm, that is felony within the statute, and consequently the defendant has established the felony." He informed counsel for the defendant that it was unnecessary for him to amend his pleading, and gave judgment for the defendant.

On appeal, (10 Cox, C.C.640) it was contended unsuccessfully that the administration of poison with intent only to injure and not to inflict grievous bodily injury, was a misdemeanour only, and that defendant had not established a felony. *Per Mellor, J.:*

"The mere administration of poison with intent only to injure or annoy is of itself only a misdemeanour, but its administration, if it actually causes grievous bodily harm, or with intent to cause such injury, is a felony."

*R. v. HENNAH* (1877), 13 Cox, C.C.547, is another case involving the administration of cantharides with intent to injure, aggrieve or annoy. The evidence was that the quantity administered was not sufficient to produce any effect. The accused was found not guilty. *Per Cockburn, C.J.:*

"The statute makes it an offence to administer, *although not with the intention of taking life or of doing any serious bodily harm*, any noxious thing with intent to cause injury or annoyance. But/unless the thing is a noxious thing in the quantity administered, it seems exceedingly difficult to say logically, there has been a noxious thing administered. . . . (but) here the quantity was incapable of mischief, and, therefore, we shall not be justified, although it was administered with the intent of producing inconvenience or annoyance, in saying that it is within the statute, seeing the thing is not, in the form administered, noxious."

*R. v. CRAMP* (1880), 14 Cox, C.C.401. Accused was convicted of caus-

**Section 217—continued**

ing a woman to take a noxious thing with intent to procure her miscarriage. On appeal it was said, *per* Coleridge, C.J.:

"The intent was proved, and it was further proved that oil of juniper is noxious when administered in the quantity proved to have been taken in this case. Then why was there not the administration of a noxious thing? It was said that 'noxious thing' in the statute means some kind of poison, and probably that is so. But what is a poison? It is something which when administered is injurious to health or life. There is hardly any active drug which taken in large quantities may not be so, and, on the other hand, there is hardly any poison, which may not in small quantities be useful and salutary. It is therefore in each case a question of the quantity and the circumstances under which the drug is administered. It is in each case a question for the jury whether the thing, administered as it was under the circumstances, is a 'noxious thing'. Here the thing as administered was proved to be noxious, and the intent was proved to be criminal."

*Per* Denman, J.:

"I never had any serious doubt that where a person administers, with the intent in the section, a thing in such a large quantity as to be noxious, though innocuous when taken in a small quantity, he commits an offence within the enactment."

*Per* Stephen, J.:

"As to the administration of 'poison', certain things are known as poisons, and as to these possibly the administration of a small quantity with the criminal intent would be within the statute."

This is *obiter* but it suggests that there may be a limitation upon the principle laid down by Cockburn, C.J., in *R. v. HENNAH*, *supra*.

In *R. v. TURNER*(1910), 4 Cr.App.R.203, the accused had supplied a girl with a quantity of bitter apple, the purpose being to bring about a miscarriage. The drug was labelled "an overdose is poisonous." Lord Alverstone, C.J., quoted *R. v. CRAMP*, *ante*, and in giving judgment said:

"The evidence was that the girl took about half-an-ounce in doses of about eight grains each, and that a dose of eight grains would be harmful. The question is, did the prisoner mean her to take or cause her to take a noxious thing? It was put to the jury by Mr. Justice Pickford in that way, and we think there was evidence to justify the verdict they returned."

*Per* Channel, J.:

"Is it not possible that an offence may fall under either section? If a man gets the noxious drug for a woman, he is under s.59; if he goes farther and causes her to take it he is under s.58," (*i.e.*, of the *Offences Against the Person Act*, 1861).

In Canada in *R. v. VOLL*(1920), 35 C.C.C.185, accused had been convicted of an indictment which, as amended, charged that "he did cause to be administered to or taken by Antoinette Ball certain poison, to wit, a mixture of whisky and carbolic acid, with intent thereby to injure, aggrieve or annoy." *Per* Mulock, C.J.Ex.:

"This amendment reduced the charge contained in the indictment of administering poison with intent to endanger the life of Antoinette

Ball, to one of administering poison with intent to injure, aggrieve or annoy Antoinette Ball.

In my opinion, *an act of one person which is intended to endanger the life of another person includes an act to injure, aggrieve or annoy such other person; and, therefore, by section 951 of the Code, the accused, if not proved guilty of the offence charged in the unamended indictment in question, might, without any amendment, have been convicted of the offence of administering poison with the intent to injure, aggrieve or annoy.*" (Italics added)

Per Masten, J. at p.192:

"The term 'injury' as used in sec. 278 of the Criminal Code, appearing as it does in collocation with the terms 'aggrieve' and 'annoy' does not mean mere physical injury, but has a much broader significance."

Riddell, J., dissented on the question of intent as appears from the following extracts from his judgment at p.189:

"The 'intent' referred to in s. 278 does not refer to the intent to do an act—it has no immediate reference to the quality of the act—it refers to the intended consequence of the act, the injuring, the aggrieving, the annoying of the victim. If an intention to endanger the life of a person necessarily connoted an intention to injure, to aggrieve, or to annoy him, the indictment would be good under s.278. But such is not at all the case, in my view. . . . In an offence under s. 278 there is an element other than those necessarily involved in the alleged offence stated in the original indictment. . . ."

And at p.191:

(So) "here the intent to injure, etc., contains elements which do not form part of the intent to endanger life."

It is apparent that the intention of the legislation was that the offence in s.278 was an "included offence" in s.277, or, to put it another way, that the offence under s.278, if carried a step further so as to endanger life or inflict grievous bodily harm, became an offence under s.277. There is explicit authority for this conclusion in what was said by Cockburn, C.J. in *TULLEY v. CORRIE*, and by Mulock, C.J.Ex., in *R. v. VOLL*.

There is further ground for this opinion in the fact that s.190 of the *Criminal Procedure Act*, 1869, (Can.) which came from s.25 of 24 & 25 Vict., c.100, (Imp.) provided that a person charged under the former s.277 might be convicted of an offence under s.278. That provision was not included in the Code, no doubt partly because of the abolition of the distinction between felony and misdemeanour, and partly because it was, as it has since been found to be, covered by s.951 (now s.569).

It appears further from the cases that s.278 meant that the offence was committed if the intent was to injure, aggrieve or annoy, whether or not that purpose is fulfilled in fact, in cases where the offence does not go so far as to endanger life or inflict grievous bodily harm. Again, the word "injure" when used in the broad sense attributed to it by Masten, J., *ante*, adds nothing to the terms "aggrieve" and "annoy".

#### OVERCOMING RESISTANCE TO COMMISSION OF OFFENCE.

**218. Every one who, with intent to enable or assist himself or another person to commit an indictable offence,**

(a) attempts, by any means, to choke, suffocate or strangle an-

Section 218—*continued*

other person, or by any means calculated to choke, suffocate or strangle, attempts to render another person insensible, unconscious or incapable of resistance, or

(b) administers, or causes to be administered to any person, or attempts to administer to any person, or causes or attempts to cause any person to take a stupefying or overpowering drug, matter or thing,

is guilty of an indictable offence and is liable to imprisonment for life and to be whipped.

This is the former s.276 in general terms. It was s.244 in Code of 1892 and came from ss.188 and 189 of the E.D.C. which were derived from the *Offences Against the Person Act*, 1861, ss.21, 22 and 44 (Imp.). Of what is now par.(a), Greaves' Cons. Acts, 1861, says at p.33: "This clause is new and is directed against those attempts at robbery which have been accompanied by violence to the throat." The Oxford dictionary, *verbo* "garrotte" says: "Highway robbery by throttling, 1852."

Consent is not a defence to a charge under s.276 (a): *R. v. CULLEN* (1948), 93 C.C.C.1.

As to "administering", see *R. v. CADMAN* (1825), 1 Mood.C.C.114, and other cases cited under s.238, *post*.

**TRAPS LIKELY TO CAUSE BODILY HARM.**—Permitting traps on premises.

219. (1) Every one who, with intent to cause death or bodily harm to persons, whether ascertained or not, sets or places or causes to be set or placed a trap, device or other thing whatsoever that is likely to cause death or bodily harm to persons is guilty of an indictable offence and is liable to imprisonment for five years.

(2) A person who, being in occupation or possession of a place where anything mentioned in subsection (1) has been set or placed, knowingly and wilfully permits it to remain there, shall be deemed, for the purposes of that subsection, to have set or placed it with the intent mentioned therein.

This is the former s.281 (1) and (2). Subsec.(3) has been dropped as being inconsistent with the intent required by subsec. (1). It was s.249 in the Code of 1892 and s.200 in the E.D.C.

It came from the *Offences against the Person Act*, 1861, s.31(Imp.) and from 7 & 8 Geo. IV, c.18. The English legislation had a proviso (not carried into the Canadian Code) excepting such things set out in a dwelling house at night for its protection.

The following cases are referable to this section:

*R. v. HEATON*(1896), 60 J.P.508:

Accused was in the habit of keeping pigeons and, in order to prevent their being stolen, fastened a loaded gun in such a position that it might discharge and hit anyone who opened the door. He told his family what he had done but about a fortnight later his son, who had forgotten about the gun, opened the door and received a wound of which he died. Accused was convicted of manslaughter.

*JORDIN v. CRUMP*(1851), 8 M. & W. 782:

This was a civil action arising out of injuries to a dog belonging to Plaintiff from a dog-spear placed by defendant on his own land.

**OLD CODE:**

276. Every one is guilty of an indictable offence and liable to imprisonment for life and to be whipped, who with intent thereby to enable himself or any other person to commit, or with intent thereby to assist any other person in committing, any indictable offence,

(a) by any means whatsoever, attempts to choke, suffocate or strangle any other person, or by any means calculated to choke, suffocate or strangle, attempts to render any other person insensible, unconscious or incapable of resistance; or

(b) unlawfully applies or administers to, or causes to be taken by, or attempts to apply or administer to, or attempts, or causes to be administered to or taken by, any person, any chloroform, laudanum or other stupefying or overpowering drug, matter or thing.

281. Every one is guilty of an indictable offence and liable to five years' imprisonment who sets or places, or causes to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy, or inflict grievous bodily harm upon, any trespasser or other person coming in contact therewith.

(2). Every one who knowingly and wilfully permits any such spring-gun, man-trap or other engine which has been set or placed by some other person, in any place which is in, or afterwards comes into, his possession or occupation, to continue to set or place shall be deemed to have set or placed such gun, trap or engine with such intent as aforesaid.

(3). This section does not extend to any gun or trap usually set or placed with the intent of destroying vermin or noxious animals.

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"The setting dog-spears is not in itself an illegal act, nor is it rendered such by the 7 & 8 Geo. 4, c.18, which prohibits the setting or placing of man-traps or other engines calculated to destroy human life or inflict grievous bodily harm, with intent that or whereby the same may destroy human life or inflict grievous bodily harm. Now, although . . . . . the instrument in question was one calculated to do grievous bodily harm to human beings, still it does not appear to have been set in the wood with that intention. . . . . with the exception of those cases, a man has a right to do what he pleases with his own land." Judgment for defendant.

*R. v. SMITH and YORK* (1902), Archbold, 24th ed., p.948:

"The prisoners were indicted under s.31 for causing to be set or placed in a field a spring-gun or engine calculated, etc. The gun in question was an alarm gun stuck in the ground and was loaded with a cartridge containing shot, but there was no evidence to show that the prisoners knew that the gun contained shot. It was contended that the evidence disclosed no offence because the engine must be calculated, etc., and the gun was merely intended to give an alarm, and the fact of its being loaded did not alter its character or the object with which it was set. These contentions were overruled."

There is a newspaper account (Sept. 20, 1952) of the case of *R. v. TAYLOR* in which accused was committed for trial for manslaughter. He had set a booby trap in a trunk in such a way that a person standing up would have been shot in the legs. It appeared, however, that the deceased had been shot in the stomach as he knelt to open the trunk. This

**Section 219—continued**

case illustrates the proviso referred to as it was pointed out that the shooting occurred in mid-morning.

**INTERFERING WITH TRANSPORTATION FACILITIES.**

**220. Every one who, with intent to endanger the safety of any person, places anything upon or does anything to any property that is used for or in connection with the transportation of persons or goods by land, water or air that is likely to cause death or bodily harm to persons is guilty of an indictable offence and is liable to imprisonment for life.**

This is the former s.282, which referred only to railways, put in more general terms to apply to other forms of transportation as well. It will apply to private railways operating in connection with mines, timber cuttings and industrial plants.

S.282 was s.250 in the Code of 1892, and s.194 of the E.D.C. It came from the *Offences against the Person Act*, 1861, s.32 (Imp.) which, substituting the word "unlawfully" for "wilfully" was derived from 14 and 15 Vict., c.19, s.6. The new section simply specifies the intent.

A case reported May 21, 1951, in which some unknown person had shot at an aeroplane in flight, wounding the pilot, would appear to fall within the new section.

**AUTOMOBILES.****DANGEROUS PLACES AND UNSEAWORTHY SHIPS.**

**CRIMINAL NEGLIGENCE IN OPERATION OF MOTOR VEHICLE.—Failing to stop at scene of accident.—Prima facie evidence.**

**221. (1) Every one who is criminally negligent in the operation of a motor vehicle is guilty of**

- (a) an indictable offence and is liable to imprisonment for five years, or
- (b) an offence punishable on summary conviction.

(2) Every one who, having the care, charge or control of a vehicle that is involved in an accident with a person, vehicle or cattle in charge of a person, with intent to escape civil or criminal liability fails to stop his vehicle, give his name and address and, where any person has been injured, offer assistance, is guilty of

- (a) an indictable offence and is liable to imprisonment for two years, or
- (b) an offence punishable on summary conviction.

(3) In proceedings under subsection (2), evidence that an accused failed to stop his vehicle, offer assistance where any person has been injured and give his name and address is *prima facie* evidence of an intent to escape civil and criminal liability.

Subsec. (1) is new and is to be read with s.191. It will cover cases where there is criminal negligence although the consequences contemplated by ss.192 and 193 do not follow. It replaces the former s.285(6). Note that the former s.951(3), which permitted an alternative verdict under that subsection in a case where manslaughter was charged, has been omitted in view of the new provisions mentioned.

**OLD CODE:**

282. Every one is guilty of an indictable offence and liable to imprisonment for life who unlawfully,

(a) with intent to injury or to endanger the safety of any person travelling or being upon any railway,

(i) puts or throws upon or across such railway any wood, stone or other matter or thing,

(ii) takes up, removes or displaces any rail, railway switch, sleeper or other matter or thing belonging to such railway, or injures or destroys any track, bridge or fence of such railway, or any portion thereof,

(iii) turns, moves or diverts any point or other machinery belonging to such railway,

(iv) makes or shows, hides or removes any signal or light upon or near to such railway,

(v) does or causes to be done any other matter or thing with such intent; or

(b) throws, or causes to fall or strike at, against, into or upon any engine, tender, carriage or truck used and in motion upon any railway, any wood, stone or other matter or thing, with intent to injure or endanger the safety of any person being in or upon such engine, tender, carriage or truck, or in or upon any other engine, tender, carriage or truck of any train of which such first mentioned engine, tender, carriage or truck forms part.

285. (6) Every one who drives a motor vehicle on a street, road, highway or other public place recklessly or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the street, road, highway or place, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on such street, road, highway or place, shall be guilty of an offence and liable

(a) upon indictment to imprisonment for a term not exceeding two years or to a fine not exceeding one thousand dollars or to both such imprisonment and fine; or

(b) on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding one hundred dollars or to both such imprisonment and fine.

285. Every one is guilty of an indictable offence and liable to two years' imprisonment who, having the charge of any carriage or motor vehicle, automobile, or other vehicle, by wanton or furious driving, or racing or other wilful misconduct, or by wilful neglect, does or causes to be done any bodily harm to any person.

(2) Whenever, owing to the presence of a motor vehicle on the highway, an accident has occurred to any person or to any horse or vehicle in charge of any person, any person driving the motor vehicle is guilty of an offence and liable, either on indictment or on summary conviction to a fine not exceeding one thousand dollars and costs or to imprisonment for a term not exceeding twelve months if, with intent to escape liability either civil or criminal, he fails to stop his vehicle, tender assistance, and give his name and address. Such failure shall be prima facie evidence of an intent as aforesaid.

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Subsecs. (2) and (3) are the former s.285(2) and are aimed at the "hit-and-run" driver. "Motor vehicle" is defined in s.2(25).

In *R. v. ROBITAILLE* (1945), 84 C.C.C.208, it was held that evidence that accused did not know that he had caused an accident rebutted the presumption that he was attempting to escape liability.

It was held previously in the same case, 1944, 81 C.C.C.333, that a charge under s.285 (2) was distinct from a charge under s.285 (6) and



**Section 221—continued**

that it was not included in a charge of manslaughter. It followed that acquittal on a charge of manslaughter did not bar a subsequent charge under s.285(2).

In *R. v. LAING*(1946), 85 C.C.C.249, accused had stopped his car and rendered assistance, but gave a fictitious name and address. On appeal by way of stated case it was held that:

"Once it is found that the accused has failed to do any one of these things, the offence is complete in that it shews an intent to escape liability, either civil or criminal. In my opinion if it is proved that the accused failed to give his name and address, then he is guilty under the section of the Criminal Code in question."

*R. v. LAING* was followed in *R. v. GRASS*(1953), 17 C.R.166, where it was held that the omission to do any one of the three requirements constituted the offence.

In *ROZON v. R.*, [1951] S.C.R.248, the appellant was tried for manslaughter and the jury found him guilty of criminal negligence. On appeal, the Court substituted a verdict of reckless driving under s.285(6). An appeal to the Supreme Court of Canada was dismissed on a question of jurisdiction, a majority holding that no disagreement on a question of law was involved.

Order in Council P.C. 314 dated February 10th, 1939, and made under the *Canada Shipping Act*, is a regulation concerning the operation of motor vessels in the minor waters of Canada. It is in terms almost identical with the former s.285(6).

See also s.225 (order prohibiting driving).

**DRIVING WHILE INTOXICATED.**

**222. Every one who, while intoxicated or under the influence of a narcotic drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of**

**(a) an indictable offence and is liable**

- (i) for a first offence, to imprisonment for not more than three months and not less than thirty days, and**
- (ii) for each subsequent offence, to imprisonment for not more than one year and not less than three months; or**

**(b) an offence punishable on summary conviction and is liable**

- (i) for a first offence, to imprisonment for not more than thirty days and not less than seven days,**
- (ii) for a second offence, to imprisonment for not more than three months and not less than one month, and**
- (iii) for each subsequent offence, to imprisonment for not more than one year and not less than three months.**

This is the former s.285 (4). See also ss.224 and 225, and definition of "motor vehicle" in s.2 (25).

Provision making it a criminal offence for "a man in any degree of intoxication that affects his perfect carefulness undertaking to run a motor car," as it was put by the Minister of Justice at the time, first appears in 1921, c.25, s.3 by which "Every one who while intoxicated drives any motor vehicle or automobile" became punishable on summary conviction.

**OLD CODE:**

285. (4) *Every one who, while intoxicated or under the influence of any narcotic, drives any motor vehicle or automobile, or has the care or control of a motor vehicle or automobile, whether it is in motion or not, shall be guilty of an offence, and shall be liable,*

*(a) upon indictment, for a first offence to imprisonment for a term not exceeding three months and not less than thirty days, and for each subsequent offence to any term not exceeding one year and not less than three months; or*

*(b) upon summary conviction, for a first offence to a term of imprisonment not exceeding thirty days and not less than seven days, for a second offence to a term of imprisonment not exceeding three months and not less than one month, and for each subsequent offence to a term of imprisonment not exceeding one year and not less than three months. And the provisions of section ten hundred and thirty-five, in so far as it authorizes the imposition of a fine in lieu of any punishment otherwise authorized, and of section ten hundred and eighty-one of this Act shall not apply in the case of a conviction for an offence under this subsection.*

These provisions were replaced by 1925, c.38, s.5, which enacted a new section as follows:

*"Every one who while intoxicated or under the influence of narcotics, drives any motor vehicle or automobile, or has the care or control of a motor vehicle or automobile, whether it is in motion or not, shall be guilty", etc., as in the former section except that the words "of imprisonment" were added by way of clerical correction.*

These provisions in turn were replaced by 1930, c.11, s.6, which commences as follows:

*"Every one who, while intoxicated or under the influence of any narcotic, drives any motor vehicle or automobile, or has the care or control of a motor vehicle or automobile, whether it is in motion or not, shall be guilty of an offence."*

The section proceeds to declare the offence triable on indictment, the punishment for a first offence to be not more than three months and not less than thirty days, and for each subsequent offence not more than one year nor less than three months, or upon summary conviction, with the penalty for a first offence not more than thirty days nor less than seven days, for a second offence not more than three months nor less than one month, and for a subsequent offence not more than one year nor less than three months. As presented the section read: "Every one who, while under the influence of liquor", but this expression was objected to in the House of Commons and the word "intoxicated" was restored.

As to procedure, it was stated (Hansard 1930, Vol.III, p.2755) that the change was requested by Ontario, and as to the summary conviction procedure, the Minister of Justice said:

*"I will give my hon. friend the reason why it is there. As it is, if a man is prosecuted for having caused bodily injury, the jury cannot convict him for any lesser offence, but with this enactment the offence may be reduced to the one provided for in section 16," (i.e., of the Bill).*

The subsection as enacted in 1930 was amended by 1935, c.56, s.4, by adding:

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"And the provisions of sec. 1035, in so far as it authorizes the imposition of a fine in lieu of any punishment otherwise authorized, and of s.1081 of this Act shall not apply in the case of a conviction for an offence under this subsection."

The Minister of Justice said (Hansard, 1935, Vol.III, p.3164).

" . . . . . It has been held by magistrates in various parts of Canada that under the provisions of sec. 1035 of the Act they are still permitted to impose a fine instead of the penalty of imprisonment, and fines have been imposed in some cases that have been brought to the attention of the Department. In one part of Canada it has been decided by magistrates that under the provisions of sec. 1081 they are entitled to suspend sentence altogether . . . . . I am satisfied that it was not the intention that these sections should apply to the offence mentioned in s.285, ss.4, and in order to clear up the matter and make it definite this amendment to the criminal code is proposed. If the amendment is adopted it will not lie within the power of magistrates either to impose a pecuniary penalty or to impose what we call suspended sentence."

In 1947 the subsection was again amended (c.55, s.10) by adding the proviso:

"Provided that any person who while intoxicated or under the influence of any narcotic occupies the seat ordinarily occupied by a person driving a motor vehicle shall be deemed to have the care or control of the said vehicle unless the said person establishes that he did not enter or mount the said vehicle for the purpose of putting it in motion."

This proviso was agreed to after considerable debate. The Minister of Justice pointed out that it took away the defence "I was too drunk to be guilty," there having been recent court decisions that a man might be too drunk to have the care or control of a motor vehicle. He referred also to a recent judgment of the Supreme Court of New Brunswick "which is most caustic in its reference to the law-makers." (Hansard, 1947, vol.VI, 5046).

The word "intoxicated" is not defined. It has been, however, the subject of much discussion in the cases and what emerges is, it is submitted, less a definition than a test. It has been pointed out that the word may not have a uniform meaning in every context, but, for the purposes of s.285(4), the explanation most commonly quoted is that given by Boyle, J., in the case of *McRAE v. McLAUGHLIN MOTOR CAR COMPANY*, [1926] 1 D.L.R. 372. He said:

"Intoxication, it must be remembered, is a mental and physical condition caused by the consumption of alcohol in some form or another. Some people believe that a man who takes any alcohol thereby becomes intoxicated. In my opinion, the degree of intoxication contemplated by Parliament in enacting section 285(C) is a state of intoxication during which, if permitted to drive a motor car, it would be a danger to the public".

This has been followed in *R. v. OUELLETTE*(1931), 55 C.C.C.389; *R. v. LEVESQUE*(1938), 44 Rev. de Jur.309; *R. v. LEAHY* (1939), 73 C.C.C.99; *GIDDINGS v. R.*(1947), 89 C.C.C.346 and *R. v. ZASADNY* (1948), 92 C.C.C.103.

In *R. v. OUELLETTE* it was held that a charge of having the care or control of an automobile while under the influence of liquor disclosed no offence under s.285 (4) and was not the same thing as "while intoxicated".

*R. v. LEVESQUE* is to similar effect, holding that to be intoxicated is different from being under the influence of liquor.

In 33 Corpus Juris 479, "intoxicated" is said to mean "drunk; drunk from use of spirituous liquor."

An American authority, Gray's Attorney's Text Book of Medicine, 3rd ed., Vol. 1, p.617, says:

"Common legal phrases are 'in an intoxicated condition', 'in a drunk or partly drunken condition', and 'under the influence of liquor'. Black's Law Dictionary considers these provisions to be essentially synonymous, but not with the phrase 'while intoxicated' which represents a more advanced stage of alcoholism."

In *McKNIGHT v. GENERAL CASUALTY INSURANCE CO.*, [1931] 3 D.L.R. 476, the following appears, *per* MacDonald, J.A., at p.480:

"One is, in my view, 'intoxicated' within the meaning of this statutory condition, when he is not in a fit state to drive a car because of the too free use of liquor."

In *GENERAL CASUALTY INSURANCE CO. v. LAMBERT & VANCE*, [1930] 3 D.L.R. 1007 (at p.1008), 33 C.J. 802 is quoted as follows:

"Intoxication is a broad and comprehensive term, having a different meaning to different persons. . . . In the absence of any controlling definition, the word should be given a reasonable interpretation, having reference to the purpose of the instrument in which it is used."

The judgment proceeds at p.1009:

"According to some definitions the word may be applied to any mental exhilaration however slight, produced by alcohol without regard to its effect on the judgment or reasoning process. . . ."

Then a portion of the judgment in *ELKIN v. BUSCHNER*, 16 Atlantic 102, is pertinent, as follows: "Whenever a man is under the influence of liquor, so as not to be entirely himself, he is intoxicated; although he can walk straight, although he may attend to his business, and may not give any outward and visible signs to the casual observer that he is drunk, yet if he is under the influence of liquor so as not to be himself, so as to be excited from it and not to possess that clearness of intellect and that control of himself that he otherwise would have, he is intoxicated."

In *R. v. CONSTABLE* (1936), 66 C.C.C. 206, at p.208, Harvey, C.J. A., quoted the New Oxford Dictionary as defining "intoxication" to be "The action of stupefying with a drug or alcoholic liquor; the making drunk or intoxicated; the condition of being so stupefied or made drunk." He adds: "The last portion of the definition is the one applicable", there having been evidence that accused "was under the influence of liquor, that he appeared drowsy and went to sleep soon after he was locked up. As the trial Judge points out, that is a different thing from saying that he was intoxicated." Words similar to those used by Boyle, J., in *McRAE v. McLAUGHLIN* have been used in other cases.

In *LINDAL v. U.S. FIDELITY &c. COMPANY*, [1933] 2 D.L.R. 148 (S.C.C.), at p.180, intoxication was referred to as "A condition in which

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a person is unable to drive a motor car with safety by reason of the quantity of alcohol which he has consumed."

In *AMERICAN AUTO INSURANCE CO. v. DICKSON*, [1943] S.C.R. 143, at p.149, Taschereau, J., adopts the finding of the Courts below on the question of intoxication, quoting the words of the trial judge: "So affected in his mental, physical and nervous process that he lacked to an appreciable degree the ability to function properly in relation to the operation of his automobile." It may be remarked in passing that these insurance cases are relevant because *EARNSHAW v. DOMINION OF CANADA GENERAL INSURANCE CO.* (1943), 80 C.C.C.35, is authority for the proposition that the fact of intoxication must be proved by evidence which is not capable of explanation on any other theory.

In *R. v. MAYOSKY*, [1946] O.R. 126, at p.131, Robertson, C.J.O., said:

"It cannot be too strongly emphasized, however, that something less than intoxication may make driving a motor vehicle dangerous . . . . . In the case of this appellant, he had, beyond question, got into a condition through drink, that made him, if not incapable of driving properly, at least indifferent as to how he drove."

In *GIDDINGS v. R.* (1947), 89 C.C.C.346, Campbell, C.J.P.E.I., said: "Since its passing in 1921, the provisions of *Criminal Code* s. 285 (4) . . . . . regarding intoxicated driving has received very little reported interpretation. Appellant's counsel cited a group of cases which adopted the definition of intoxication as 'a state of intoxication during which, if permitted to drive a motor car, it would be a danger to the public.' This definition was used by Boyle, J., in an Alberta civil case—*McRAE v. McLAUGHLIN MOTOR CAR COMPANY*, [1926] 1 D.L.R. 372—and is no doubt correctly stated and correctly applied to the facts of that case. . . . . I do not consider that Parliament in using the word 'intoxicated' *simpliciter*, intended it to be refined into degrees, or intended that only an advanced state of alcoholic inebriation would constitute an offence. 'Under the influence of liquor' in ordinary language means under the intoxicating influence of intoxicating liquor. Not only the drunk is a menace on the highway. It is common knowledge that even mild intoxication has the effect of relaxing normal caution and inducing the taking of chances, while judgment of speed and distance are impaired and reactions to situations are retarded.

It therefore seems clear to me that a driver who is to any degree under the influence of liquor comes within the definition of Boyle, J. as being a potential danger to the public. . . . . The question appears to be not what degree of intoxication is proved, but what proof is required of any degree of intoxication."

This case was followed by a District Court Judge in Alberta in *R. v. POLLOCK*, [1947] 2 W.W.R.973.

In *R. v. McCAULEY* (1949), 96 C.C.C.355 (Co.Ct. N.S.), it was said (at p.364): "My conclusion is that the meaning of 'intoxicated' as used in s.285(4) of the Code is its common and ordinary meaning, viz., the condition of being stupefied or disordered in intellect with an alcoholic liquor." It was held also that it is not necessary that there be

evidence of danger to the public in an accused's driving, although the manner in which a motor vehicle is operated may be important evidence of its driver's condition.

This case was cited with approval in *DESBIENS v. R.*(1951), 103 C.C.C.36 (Que. S.C.) at p.41:

"Intoxication is the stupefied condition of a person who has imbibed alcoholic liquor in sufficient quantity to make him lose totally or partially the use of his mental or nervous faculties. To be intoxicated in the legal sense, it is not necessary to be dead drunk any more than to be ill it is necessary to be dying. It suffices that an individual be affected by alcohol to the point of no longer having his normal control, his judgment, or, in a word, that he no longer has the use of all his intellectual or physical faculties."

Before leaving this topic it may be mentioned that in an American case, *LAWRENCE v. THE CITY OF LOS ANGELES*(1942), 127 Pac. 2nd.931, it was held that the opinions of qualified medical doctors as to whether an individual was intoxicated, predicated upon the percentage of alcohol in an individual's blood, though not conclusive, are admissible when there is a proper preliminary showing that blood tests upon which the opinions have been predicated, have been properly conducted. In this case the percentage was 0.28, and it is noted that the consensus of medical opinion seems to be that 0.15% by weight is conclusive evidence that a driver is under the influence of alcohol.

This case may be compared with the Alberta case of *R. v. FORD*, [1948] 1 W.W.R. 404, in which the accused was charged with motor manslaughter. At his trial, evidence of a test of blood taken from him was admitted upon the question of intoxication. However, the Appellate Division ordered a new trial. Written reasons were not given, but the objection appears to have been that the evidence so furnished by the accused himself was not voluntary.

Similarly in *R. v. GAGNON*(1949), 100 C.C.C.262 (Que. S.C.) it was held that a blood test is a method of proof that may constitute an admission which is much more important than a declaration made by the accused. Evidence of the blood test was refused, it being held further that there had been an inducement held out to the accused to permit it. In rejecting the evidence the court followed *R. v. FRECHETTE*(1948), 93 C.C.C.111 (affirmed without written reasons (1949), 94 C.C.C.392), in which the Court refused to permit evidence of a blood test which had been made without the consent of the accused and without any warning being given to him. See also comments in *R. v. LEAHY*(1939), 73 C.C.C. 99 at p.102.

There has been conflict of judicial opinion on this question. In *R. v. McNAMARA* (1950), 99 C.C.C.107, the Ontario Court of Appeal held that there is no analogy between the taking of a blood sample without consent and the taking of a statement which was not voluntary. This was followed in *R. v. BAKER*(1952), 102 C.C.C.295, where it was held that evidence of the analysis of a blood sample taken from the accused while he was unconscious and therefore without his consent, is admissible on a charge of driving while intoxicated. These cases may be compared with *R. v. NOWELL*, [1948] 1 All E.R.794. In that case a motor-

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ist arrested on a charge under the *Road Traffic Act*, refused at first to be examined by a police doctor, but later upon being told by the doctor that it might be to his advantage, underwent an examination, after which he was certified to be in a state unfit to drive owing to his consumption of alcohol. It was held that the doctor was acting reasonably in the interests of the person he was examining, and that his statement could not be regarded as an inducement for the accused to do something so as to bring into operation the law which excludes confessions made as a result of persuasion, promises or threats.

Although this conflict has been resolved by amendments made in 1951, now s.224(3) and (4), questions still arise concerning the method of such tests and their weight as evidence. However, in *R. v. DONALD* (1954), 11 W.W.R. (N.S.) 188, the magistrate considered evidence of alcohol in the blood along with expert evidence regarding its effect, as corroborative of his findings on the other evidence.

Upon the matter of proof there is another point, and another conflict of opinion, that calls for notice. In the *Pollock* case, *supra*, it was held that where a policeman has testified to the actions, appearance, language and general condition of the accused at the time of his arrest, the policeman's statement "he was drunk" in answer to a question framed as a question of fact, is admissible in evidence. However, in *R. v. ZASADNY* (1948), 92 C.C.C.103, the Judge refused to follow *R. v. POLLOCK*, and *GRIMSTEIT v. McDONALD* (1949), 96 C.C.C.272, and *R. v. MARKS* (1952), 103 C.C.C.368, are also critical. On the other hand, *R. v. COX* (1948), 93 C.C.C.32, seems to support *R. v. POLLOCK*. The following is quoted:

"It seems clear, however, that the purpose of the prohibition of s.285 is for the protection of people on the highway, and that when a person is in such a state of intoxication that his driving is a menace to the public safety, he must be intoxicated within the intention, and therefore, the meaning, of the term as used in the section."

**CARE OR CONTROL**

The earliest case upon this subject appears to be *R. v. HIGGINS* (1928), 50 C.C.C.381. In that case the accused, while driving on a highway, ran into a ditch and so damaged his car that it could not be operated. While he was waiting for a repair truck to come, a passing motorist offered him liquor and he became intoxicated. When the repair truck came he stood on the running board of his car and guided it while it was being towed back to the highway. He was charged with being in charge of a motor vehicle while intoxicated, and convicted. There was an appeal by way of stated case and the conviction was quashed. The following is quoted from the judgment on appeal:

"I think it is clear that the provision as to care or control was intended as an alternative to the driving of the car, so as, for example, to provide for the conviction of an intoxicated driver sitting in his car while at rest, or of an intoxicated owner driven in his car by a chauffeur obliged to obey his orders.

But I think the section must be confined to a motor vehicle which is either being driven or is capable of being driven, and cannot apply

to a car which is out of commission and cannot be operated under its own power. The whole of s.285 deals with offences relating to the operation and driving of motor vehicles. The motor car here was not capable of being driven at the time of the alleged offence, and in my judgment the magistrate was wrong in holding that the accused was guilty of any offence under ss.4."

This case must be compared with *R. v. HENRY*(1934), 61 C.C.C.207, and it is impossible not to feel that the two are in conflict. In the latter case the magistrate, considering himself bound to follow *R. v. HIGGINS*, dismissed a charge of having care or control of a motor vehicle whilst intoxicated, and the Crown appealed by way of stated case. The facts were that the respondent, while intoxicated, was at the wheel of his car which was disabled and was being towed by a motor truck to which it was attached by a rope. Dennistoun, J.A. said (at p.211):

"In the case at bar we have the car of a drunken man being towed on the end of a rope along a main highway at night.

He has no control over the motive force applied to the car, but he has control of the steering-wheel and the brakes. He may sway, or "yaw", to use a nautical term, to the right or left of the line of travel for distances varying with the length of his tow-rope. He is a menace to passing traffic and has it in his power to inflict serious injury to persons or vehicles passing upon the highway.

Moreover he has control of the brakes, and unless he closely observes the speed of the towing car, and conforms to it, he may collide with it and damage both cars, or cause injury to their occupants.

That a vehicle which is incapable of proceeding under its own power under such circumstances is no longer a motor car within the meaning of the Cr. Code, I cannot concede."

And at p.212:

"In my opinion Parliament, when using the word 'control', did not intend to restrict the word to cases in which self-propulsion was in the power of the driver, but intended to include control of any mechanism of the car, which, if misapplied, might endanger the public safety."

*R. v. HENRY* was followed in *R. v. BOIVIN*(1950), 96 C.C.C.234. In *R. v. YOUNG*(1939), 71 C.C.C.340, it was held that an intoxicated person occupying the driver's seat of an automobile which has stalled and is incapable of motion under its own power, cannot be convicted under s.285(4); the words "whether in motion or not" relate only to a motor vehicle which *can* be set in motion. This case of course would be affected by the proviso added in 1947.

Another case which would be so affected, is that of *R. v. BUTLER* (1939), 73 C.C.C.86, in which it was held on appeal that a person sitting behind the wheel of a car cannot be convicted on a charge under s.285 (4) of having care or control of the car if he is so intoxicated as to be totally incapable of setting the car in motion even though it is capable of being set in motion by the ordinary means.

The New Brunswick case to which the Minister of Justice referred when introducing the proviso in 1947, was probably that of *R. v. THOMSON*(1940), 15 M.P.R.300. In that case, the defendant, while intoxicated, entered his motor car and sat, not directly behind the steering wheel, but in the middle of the seat. He began to sound the horn, and



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explained that he did so to attract the attention of his friends, who were in the vicinity, in order to get one of them to drive him home. It was held on appeal that the conviction must be quashed on the ground that, as the defendant had sworn that he had no intention of driving the car, and *mens rea* not having been excluded by statute, he must be given the benefit of the doubt. *Per* Baxter, C.J.N.B.:

"('Care') is probably intended to cover the possible omission, because of intoxication, of such acts of care as would or might occasion harm, such acts, in short, as would render any person liable in damages for negligence. 'Control' does not need definition. The man who is in a car and has within his reach the means of operating it, is in control of it. . . . .

It will be rare indeed that innocent intention can be made manifest in these cases but when that does occur it is impossible by some mere technical quirk of language to punish it as if it were a guilty intention. Until Parliament says definitely that *mens rea* is to be excluded from this section such cannot be the attitude of the Courts."

*R. v. THOMSON* and *R. v. BUTLER* were followed in Nova Scotia in the case of *R. v. MANNING*(1941), 75 C.C.C.283, where it was held that a person asleep over the wheel of a car, so drunk as to be incapable of actively caring for or controlling the car, is not guilty of an offence under s.285(4).

These three cases were reviewed at length in Nova Scotia on an appeal from conviction under similar circumstances in *R. v. CROWE*(1941), 16 M.P.R.101, in which the Court arrived at a different conclusion and held that *mens rea* was excluded. *Per* Chisholm, C.J., at p.105:

"Parliament felt obliged to deal drastically with the conditions under which so much loss of life and damage to property took place. Hence the rigid prohibition against permitting intoxicated persons to have control of a motor vehicle. Not only were persons who were intoxicated penalized for driving a motor vehicle, but they were made liable to punishment if found in charge of a motor vehicle not in motion. The prohibition was made absolute in terms."

*Per* Hall, J. (p.115):

"I have reached the conclusion that sec. 285(4) of the Code absolutely prohibits any intoxicated person to have the control of a motor vehicle whether it is in motion or not. It is not an offence in which any mental element such as knowledge or intent must be shown in order to convict."

In *ARSENAULT v. R.*(1946), 86 C.C.C.43, at p.48, it was said:

"As to the control of the car, it is unnecessary to decide whether an owner, who turns over the actual driving of a motor vehicle to a friend but continues to ride in the front seat with him, does or does not retain the care and control of the car. The appellant in this case actually set the motive power in action; and if the police constable had not been on the spot, with his arm through the window of the car, the appellant might very well have driven away. Such a situation is fraught with grave potential danger and seems to be clearly contemplated by the words 'whether it is in motion or not' in s.285(4). (As to subsequent offence) The offence of intoxicated control con-

tains no elements which are not present in the offence of intoxicated driving."

In *R. v. LITTLE*(1947), 21 M.P.R.17, it was held that on a charge of driving a motor vehicle while intoxicated, it is not enough for the Crown to show that accused was sitting, intoxicated, in the front seat of his car when another car collided with it. It may be observed, however, that the offence in this case was alleged as of March 31st, 1947. The proviso added in 1947 was assented to on July 17th, 1947.

There have been the following reported decisions since that amendment:

In *R. v. McLEOD*(1948), 91 C.C.C.224, it was held that an indictment charging that accused on a named day "did have the care or control of a motor vehicle in the public street" is wide enough to cover care and control in any street in the place named on the day alleged including care and control after parking the car, leaving it for a short while and then re-entering and falling asleep while the car is still stationary.

In *R. v. CONLIN*(1948), 92 C.C.C.58, the judgment of a County Court in British Columbia, it was held that a person who is so intoxicated as to be incapacitated and who is found slumped under the steering wheel of a motor car in the seat ordinarily occupied by the driver, may be found guilty of an offence under s.285(4) notwithstanding the absence of *mens rea*. However, no conviction can be made of having care or control of a motor vehicle while intoxicated if the car could not be set in motion under its own power:

"I am of the opinion that the amendment (*i.e.*, of 1947) takes the principle of *mens rea* completely out of the subsection so that if an accused while intoxicated sits behind the steering wheel of an automobile he has the care and control of that motor vehicle, subject however to the limitation as to whether or not the automobile can be set in motion."

Upon the question of *mens rea*, this is in accord with *R. v. MacKAY*, [1949] O.W.N.471, from which the following is quoted:

"The fact is . . . . . that (accused) was intoxicated, and that he occupied the seat of a motor vehicle ordinarily occupied by the person driving such motor vehicle while such motor vehicle was stationary on a private driveway. . . . . In my view the section . . . . . is an absolute prohibition of anyone while intoxicated or under the influence of any narcotic to have the care or control of a motor vehicle or automobile whether it is in motion or not. I am somewhat strengthened in this view by the decision of my brother Kelly in the case of *R. v. HYATT* (1945), 84 C.C.C.253."

*R. v. HYATT*, *supra*, was a departure from two earlier cases decided in Ontario, *FORBES v. R.*(1943), 79 C.C.C.116, and *R. v. ARMSTRONG* (1943), 80 C.C.C.322. These followed *R. v. BUTLER* and held (as stated in *R. v. ARMSTRONG*) that accused could not be convicted although he was found slumped over the steering wheel, because he was "so intoxicated as not to be conscious that he had the care or control of the car." (It may be noted that someone else had driven Armstrong to the place where he was found, and had left him there because the car had developed engine trouble.)

**Section 222—continued**

On the point of law as to *mens rea*, Kelly, J., in *R. v. HYATT*, at pp.259-260, came to a different conclusion. He said:

"As the operation of a motor vehicle, because of its great momentum and the speed with which it can be operated, is a potential danger to the public, and especially so in the hands of an intoxicated person, I believe that Parliament in passing s.285(4) of the Code, intended absolutely to prohibit intoxicated persons being in control of motor vehicles. . . . .

In the present case the accused, according to his own evidence, was able to get into the front seat of his motor truck and was apparently able to insert the ignition key in the ignition lock of the truck and turn the ignition on, although he stated he got into his truck to sleep. It is quite evident that he was in a position to control the movement of the truck except for the degree of his intoxication that would render a driver incapable of controlling his movements, and I cannot believe that it was ever intended to put a premium on that degree of intoxication that would render a driver totally incapable of controlling his movements. Such a condition of stupor would be a potential danger to the public, because such a driver on being aroused is likely to attempt to operate the vehicle, which admittedly would be an offence against the section."

In *R. v. TAIT*(1951), 101 C.C.C.337, it was held on appeal that an automobile standing in a traffic lane on a highway and unable to go because its supply of gasoline was exhausted, was a motor vehicle within the meaning of s.285(4) and that an intoxicated person who was in charge of it might be convicted. This case was followed in *R. v. McLEAN* (1953), 107 C.C.C.32.

The English *Road Traffic Act*, 1930, s.15(1) uses the words "Any person who when driving or attempting to drive, or when in charge of a motor vehicle on a road or other public place is under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle shall be liable" to fine or imprisonment on indictment or on summary conviction.

In a case reported without name, (1931), 95 J.P.544, on the words "in charge" of a motor car, it was held that while the chauffeur was away from the car and the employer was seated in it awaiting his return, the employer was in charge and liable to conviction if under the influence of drink to such an extent as to be incapable of having proper control of the car.

In another case reported without name, (1933), 97 J.P.656, defendant was stooping in front of a motor lorry as if trying to start the engine. Drunkenness was admitted, but it was argued that the fact of his stooping in front of the radiator did not imply that he was in charge of the car. It was held that while a car was on the road, the owner was responsible whether actually inside or not.

In *R. v. HAWKES*(1931), 22 Cr.App.R.172, it was held that:

"The jury ought to have been asked whether they meant by their last answer that the appellant was under the influence of drink to such an extent as to be incapable of having proper control of the vehicle, and we cannot reject the view that if that question had been

pointedly put, they might have answered in the negative or said that they were not agreed on that point."

In 77 Sol.Jo.786, there is comment upon a case in which the accused was found in a heavy sleep lying right across the front seat of a stationary car. He admitted that he was drunk, but said that he had no intention of driving the car, the driver of which was inside a nearby house. The Magistrate accepted his story, but held that he was in charge of the car within the meaning of the Act. See also *R. v. PRESDEE*(1927), 20 Cr. App.R.95.

While the great majority of the reported cases turn upon the application of the words "intoxicated" and "care or control", questions of procedure have arisen. Of these, the case of *McDONALD v. DOWN* (1939), 71 C.C.C.179, is the most important. In that case the plaintiff had been convicted under s.285(4) and the police had taken possession of his motor truck under the provisions of a provincial statute. The plaintiff took proceedings for the return of his truck on the ground that the provincial statute was *ultra vires*. The application was refused and it was held, following *BEDARD v. DAWSON & A.-G. Que.*(1921), 39 C.C.C.175, and 40 C.C.C. 404:

"That the provincial legislation in question is not legislation in criminal matters, nor legislation with respect to procedure in criminal matters; that the statute simply declares what, in Ontario, will be the civil effect with respect to the use of a car in which a particular offence against the criminal law has been committed; that the Statute is in no way repugnant to Federal legislation; that it does not create an offence already created; that it does not add to or vary the punishment already decreed by the Criminal Code; that it does not change or vary the procedure to be followed in the enforcement of any provision of the Criminal Code; and finally, that it is legislation purely and simply to determine the civil consequences of a criminal act."

It was held too, that what the Legislature had provided was part of its general plan of regulating the use of motor vehicles on provincial roads. It is to be noted that this civil consequence might fall upon a person other than the one convicted (*e.g.*, a parent who has allowed his child to drive his car).

*R. v. BIXEI*.(1933), 60 C.C.C.83 (Ont.), was a police magistrate's decision that he had no jurisdiction to try an accused on a charge of being intoxicated while in charge of a motor car without first obtaining the consent of the accused, the offence being one triable either on indictment or on summary conviction.

This was disapproved of in *R. v. FANNING*(1935), 9 M.P.R.376 (Sup.Ct. N.S. *en banco*). The following is quoted from the judgment:

"It is contended by counsel for the appellant that the Magistrate had no jurisdiction to try the case without the consent of the accused . . . . I think there can be no doubt that under the section a Magistrate has absolute jurisdiction to proceed by way of summary conviction, and that an accused has no option in the matter. The section is plain, and I think can have no other meaning. It stipulates that one charged with this offence may be tried and convicted by the Magistrate, or that the Magistrate may proceed by way of preliminary inquiry, and this court cannot read something else into the statute."

**Section 222—continued**

But again, it is impossible to reconcile *R. v. FANNING* with *R. v. CUMMINGS*(1939), 71 C.C.C.391, in which the same Court held that it had no jurisdiction to hear an appeal from the decision of a County Court Judge, delivered on appeal from summary conviction under s.285(4), which was precisely what it had done in *R. v. FANNING*. It is observed however, that the question of jurisdiction of the Court *en banco* does not appear to have been raised in *R. v. FANNING* and that case was not referred to in *R. v. CUMMINGS*.

**DRIVING WHILE ABILITY TO DRIVE IS IMPAIRED.**

**223. Every one who, while his ability to drive a motor vehicle is impaired by alcohol or a drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of an indictable offence or an offence punishable on summary conviction and is liable**

- (a) for a first offence, to a fine of not more than five hundred dollars and not less than fifty dollars or to imprisonment for three months or to both,
- (b) for a second offence, to imprisonment for not more than three months and not less than fourteen days, and
- (c) for each subsequent offence, to imprisonment for not more than one year and not less than three months.

This is the former s.285(4a).

See also ss.224 and 225.

The reader cannot fail to have noticed the several conflicts of judicial opinion on points arising in connection with the offence of driving while intoxicated. Partly in recognition of these conflicts, but principally in an endeavour to cope with the growing menace to the safety of highway traffic that is involved in the use of liquor, Parliament created this offence by 1951, c.47.

In *R. v. MARKS*(1952),103 C.C.C.368, a case under s.285(4a) as passed 1951, c.47, s.14(2), the following appears at p.375:

"In my view there must be tangible physical evidence of actual driving impairment in the form of one or more of the usual indications of such impairment from alcoholic or drug influence."

However, in *HURLEY v. TAYLOR*(1953), 107 C.C.C.220, Winter, J., of the Supreme Court of Newfoundland, took this as not meaning that there must be evidence of actual driving. In upholding a conviction he said (at p.222):

"If his condition is such that he is found on examination to be unquestionably 'intoxicated' (under s.285(4)) or short of that, genuinely impaired in his ability to drive, what need should there be to prove that he actually drove erratically or dangerously?"

**CONVICTION UNDER SECTION 223 WHEN CHARGED WITH OFFENCE UNDER SECTION 222.—Presumption of care or control.—Chemical analysis.—No obligation to give sample.**

**224. (1) Where an accused is charged with an offence under section 222, and the evidence does not establish that he committed an offence under that section, but establishes that he committed an offence under section 223, the accused may be convicted of an of-**

**OLD CODE:**

285. (4a) Every one who, while his ability to drive a motor vehicle or automobile is impaired by alcohol or any drug, drives any motor vehicle or automobile, or has the care or control of a motor vehicle or automobile, whether it is in motion or not, is guilty of an offence and liable upon summary conviction or upon conviction under indictment

(a) for a first offence, to a fine not exceeding five hundred dollars and not less than fifty dollars or to imprisonment for a term not exceeding three months or to both fine and imprisonment;

(b) for a second offence, to imprisonment for a term not exceeding three months and not less than fourteen days; and

(c) for each subsequent offence, to imprisonment for a term not exceeding one year and not less than three months

and section one thousand and thirty-five, in so far as it authorizes the imposition of a fine in lieu of any punishment otherwise authorized and section one thousand and eighty-one do not apply where a person is convicted for a second offence or any subsequent offence under this subsection.

(4b) In proceedings under subsection four of this section the court may, if it is satisfied that the accused is not guilty of that offence but is guilty of an offence under subsection four a, find him guilty of an offence under subsection four a, and a conviction under that subsection bars further proceedings for any such offence arising out of the same facts.

(4c) For the purposes of subsections four and four a, where a person occupies the seat ordinarily occupied by the driver of a motor vehicle or automobile he shall be deemed to have the care or control of the vehicle unless he establishes that he did not enter or mount the vehicle for the purpose of setting it in motion.

(4d) In any proceedings under subsection four or four a the result of a chemical analysis of a sample of the blood, urine, breath or other bodily substance of a person may be admitted in evidence on the issue whether that person was intoxicated or under the influence of a narcotic drug or whether his ability to drive was impaired by alcohol or a drug, notwithstanding that he was not, before he gave the sample, warned that he need not give the sample or that the results of the analysis of the sample might be used in evidence.

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fence under section 223 and the conviction bars further proceedings for any such offence under section 222 or 223.

(2) For the purpose of sections 222 and 223, where a person occupies the seat ordinarily occupied by the driver of a motor vehicle he shall be deemed to have the care or control of the vehicle unless he establishes that he did not enter or mount the vehicle for the purpose of setting it in motion.

(3) In any proceedings under section 222 or 223, the result of a chemical analysis of a sample of the blood, urine, breath or other bodily substance of a person may be admitted in evidence on the issue whether that person was intoxicated or under the influence of a narcotic drug or whether his ability to drive was impaired by alcohol or a drug, notwithstanding that he was not, before he gave the sample, warned that he need not give the sample or that the results of the analysis of the sample might be used in evidence.

(4) No person is required to give a sample of blood, urine, breath or other bodily substance for chemical analysis for the purposes of this section and evidence that a person refused to give such

Section 224—*continued*

**a sample or that such a sample was not taken is not admissible nor shall such a refusal or the fact that a sample was not taken be the subject of comment by any person in the proceedings.**

This was the former subssecs.(4b) to (4e) of s.285.

These provisions also were added to the Code by 1951, c.47. It should be noted that the presumption as to care or control and the provision as to chemical analysis apply to offences under both ss.222 and 223, also that on a charge of driving while intoxicated, there may be a conviction for driving with faculties impaired, if the evidence establishes the latter offence but not the charge as laid. This provision was invoked in *DOYLE v. R.*(1953), 107 C.C.C.375.

**ORDER PROHIBITING DRIVING.**—Copy of order for registrar.—Driving while disqualified.

**225. (1) Where an accused is convicted of an offence under section 192, 193 or 207 committed by means of a motor vehicle or of an offence under subsection (1) of section 221 or under section 222 or 223, the court, judge, justice or magistrate, as the case may be, may, in addition to any other punishment that may be imposed for that offence, make an order prohibiting him from driving a motor vehicle on the highway in Canada**

**(a) during any period that the court, judge, justice or magistrate considers proper, if he is liable to imprisonment for life in respect of that offence, or**

**(b) during any period not exceeding three years, if he is not liable to imprisonment for life in respect of that offence.**

**(2) Where an order is made pursuant to subsection (1), a copy of the order certified under the hand of the justice or magistrate or under the hand of the judge or the clerk of the court and sealed with the seal, if any, of the court, shall**

**(a) where the accused holds a permit or licence to drive a motor vehicle, be sent to the registrar of motor vehicles for the province in which the licence or permit was issued, or**

**(b) where the accused does not hold a permit or licence to drive a motor vehicle, be sent to the registrar of motor vehicles for the province in which the accused resides.**

**(3) Every one who drives a motor vehicle in Canada while he is disqualified or prohibited from driving a motor vehicle by reason of**

**(a) the legal suspension or cancellation, in any province, of his permit or licence to drive a motor vehicle in that province, or**

**(b) an order made pursuant to subsection (1), is guilty of an offence punishable on summary conviction.**

This is a combination of the former s.285(7) and (8) as enacted in 1947 but extends the power to make an order to prohibit driving to cases where the accused is convicted of driving with faculties impaired. Note however that the offence under s.221(2) is not included.

**MOTOR VEHICLE EQUIPPED WITH SMOKE SCREEN.**

**226. Every one who, without lawful excuse, owns or has the care, charge or control of a motor vehicle or vessel equipped with an ap-**

**OLD CODE:***Section 285—continued*

(4e) No person is required to give a sample of blood, urine, breath or other bodily substance for chemical analysis for the purposes of this section and evidence that a person refused to give such a sample or that such a sample was not taken is not admissible nor shall such a refusal or the fact that a sample was not taken be the subject of comment by any person in the proceedings.

285. (7) (a) Where any person is convicted of an offence under the provisions of subsection one, two, four or six of this section the court or justice may, in addition to any other punishment provided for such offence, make an order prohibiting such person from driving a motor vehicle anywhere in Canada during any period not exceeding three years.

(b) Where any person is convicted of manslaughter arising out of the operation of a motor vehicle the court may, in addition to any other punishment provided for such offence, make an order prohibiting such person from driving a motor vehicle anywhere in Canada for such period as the court deems proper.

(c) In the event of such an order being made under paragraph (a) or (b) hereof, the court or justice shall forward a copy thereof to the registrar of motor vehicles for the province wherein a permit or licence to drive a motor vehicle was issued to such person. Such copy shall be certified under the seal of such court or justice or, if there be no such seal, under the hand of a judge or presiding magistrate of such court or of such justice.

(8) Every one is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding five hundred dollars or to both such imprisonment and fine who, whilst disqualified from driving a motor vehicle or an automobile by reason of the legal suspension or cancellation in any province of his permit or licence to drive therein, or by reason of an order made under the provisions of subsection seven of this section, drives any motor vehicle or automobile anywhere in Canada.

285. (5) Every person who owns, drives or is in charge of an automobile, motorcycle, boat or other vehicle of transport equipped with an apparatus for making a smoke screen, is guilty of an offence and liable on summary conviction to a fine not exceeding five hundred dollars and costs, and not less than fifty dollars and costs, or to imprisonment for any term not exceeding twelve months and not less than one month, or to both fine and imprisonment.

**paratus for making a smoke screen is guilty of an offence punishable on summary conviction.**

This is the former s.285(5) enacted in 1934, as amended in 1947, with the addition of the words "without lawful excuse". These recognize that vehicles or vessels of the armed forces may be equipped with such apparatus.

The only reported case under the section is *R. v. CONRAD*(1938), 70 C.C.C.100 in which the following appears in the judgment of Chisholm, C.J.N.S.:

"In construing subs. 5, the purpose of the enactment must be kept in view. Smoke screens, when used, are used for the purpose of concealing the identity or exact position of the carriage or craft, equipped with the apparatus for making them. Only in warfare or in attempts to commit crime, such as smuggling, have they any purpose, so far as I know. When, therefore, the word boat was included in the subsection, it must surely have been intended to mean any craft afloat, which



**Section 226—continued**

carries goods or passengers. It would, I think, be very unreasonable to suppose that any particular style of boat was intended, and that boats of one kind, having the appliances for making a smoke screen should be liable, and other boats with the same appliances, but of a different style, should be free to carry on with impunity. The term boat in this subsection is to be understood in its broad sense, and, so understood, it will include within its scope the motor vessel which was (here) seized."

**IMPEDING ATTEMPT TO SAVE LIFE.**

**227. Every one who**

**(a) prevents or impedes or attempts to prevent or impede any person who is attempting to save his own life, or**

**(b) without reasonable cause prevents or impedes or attempts to prevent or impede any person who is attempting to save the life of another person,**

**is guilty of an indictable offence and is liable to imprisonment for ten years.**

This is the former s.286, which referred to shipwrecks, widened to apply in other circumstances. S.286 was s.254 in the Code of 1892 (amended in 1893). It was s.195 in the E.D.C. into which it was taken from the *Offences against the Person Act*, 1861, s.17. Greaves' Criminal Law Acts, p.31 says of it:

"This clause is taken from the 7 Will. 4 & 1 Vict., c. 89, s.7.

Under the 7 Will. 4 & 1 Vict., c.89, s.7, if A. were pulling B. out of the water, and C. prevented A. from doing so, C. would have been guilty of no offence, except an assault; the words in *italics* were introduced to meet this and similar cases."

The words in italics are "or shall unlawfully and maliciously prevent or impede any person in his endeavour to save the life of any such person as in this section first aforesaid."

**DUTY TO SAFEGUARD DANGEROUS PLACES.—Idem.—Offences.**

**228. (1) Every one who makes or causes to be made an opening in ice that is open to or frequented by the public is under a legal duty to guard it in a manner that is adequate to prevent persons from falling in by accident and is adequate to warn them that the opening exists.**

**(2) Every one who leaves an excavation on land that he owns or of which he has charge or supervision is under a legal duty to guard it in a manner that is adequate to prevent persons from falling in by accident and is adequate to warn them that the excavation exists.**

**(3) Every one who fails to perform a duty imposed by subsection (1) or (2)**

**(a) is guilty of manslaughter, if the death of any person results therefrom,**

**(b) is guilty of an offence under subsection (2) of section 231, if bodily harm to any person results therefrom, or**

**(c) is guilty of an offence punishable on summary conviction.**

This is the former s.287 re-drawn. It was s.255 in the Code of 1892 and ss. 29,30 and 31 in the *Offences against the Person Act*, R.S.C. 1886,

**OLD CODE:**

286. Every one is guilty of an indictable offence and liable to seven years' imprisonment

(a) who prevents or impedes, or endeavours to prevent or impede, any shipwrecked person in his endeavour to save his life; or

(b) who without reasonable cause prevents or impedes, or endeavours to prevent or impede, any person in his endeavour to save the life of any shipwrecked person.

287. Every one is guilty of an offence and liable, on summary conviction, to a fine or imprisonment with or without hard labour, or both, who

(a) cuts or makes, or causes to be cut or made, any hole, opening, aperture or place, of sufficient size or area to endanger human life, through the ice on any navigable or other water open to or frequented by the public, and leaves such hole, opening, aperture or place, while it is in a state dangerous to human life, whether the same is frozen over or not, uninclosed by bushes or trees or unguarded by a guard or fence, of sufficient height and strength to prevent any person from accidentally riding, driving, walking, skating or falling therein; or

(b) being the owner, manager or superintendent of any abandoned or unused mine or quarry or property upon or in which there is any excavation of a sufficient area and depth to endanger human life, leaves the same unguarded and uninclosed by a guard or fence of sufficient height and strength to prevent any person from accidentally riding, driving, walking or falling therein; or

(c) omits within five days after conviction of any such offence to so guard or inclose the same or to construct around or over such exposed opening or excavation a guard or fence of such height and strength.

(2) Every one whose duty it is to guard such hole, opening, aperture or place is guilty of manslaughter if any person loses his life by accidentally falling therein while the same is so unguarded or uninclosed.

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c.162. The duties created are not changed but the criminal liability is changed by subsec.(3)(b), which is new.

The following comment on s.287 appears in a civil action, *LITTLE v. SMITH*(1914), 20 D.L.R.399:

"While the purpose of this enactment was the safeguarding of human life, I have no doubt that a hole, opening, aperture or place left unguarded in contravention of it (i.e. s.287), in a public highway, as the Bay of Quinté is, is a nuisance; and, if it be a nuisance, the respondent, having suffered damage different in kind from that which was suffered by the public at large, is entitled to maintain an action for the recovery of the damages which he has sustained. . . . .

. . . . . I am unable to find any ground upon which the appellants can escape liability if the hole which they had made in the ice was not guarded as the Code requires, and the absence of the guard was the cause of the respondent's horse being drowned, notwithstanding that the horse had escaped from the control of his owner and was running away when he met his death. . . . ."

Concerning the duty imposed by s.287(b), (now s.228(2)), it was said in *EAST CREST OIL CO. LTD. v. R.*, [1945]S.C.R. 191, at p.203(per Taschereau, J.):

"The duty imposed by this section is, therefore, to fence the excavation in such a manner that a person riding, driving or walking shall not fall therein accidentally.

**Section 228—continued**

We would, I believe, unduly stretch the scope of this section . . . . . if we held that the fence must be built in such a way that entrance to the premises is made impossible.

The law contemplates to protect a motorist or a pedestrian from a danger of which he is unaware, and which may accidentally cause his death. It does not apply, as in this case, to a trespasser who succeeds in making his way to the excavation where the danger is obvious . . . ."

**SENDING OR TAKING UNSEAWORTHY SHIP TO SEA.—Defences.—Consent of Attorney General.**

**229. (1) Every one who sends or attempts to send or being the master knowingly takes a Canadian ship**

**(a) on a voyage from a place in Canada to any other place, whether that voyage is by sea or by coastal or inland waters, or**

**(b) on a voyage from a place on the inland waters of the United States to a place in Canada,**

**in an unseaworthy condition from any cause, and thereby endangers the life of any person, is guilty of an indictable offence and is liable to imprisonment for five years.**

**(2) An accused shall not be convicted of an offence under this section where he proves**

**(a) that he used all reasonable means to ensure that the ship was in a seaworthy state, or**

**(b) that to send or take the ship in that unseaworthy condition was, under the circumstances, reasonable and justifiable.**

**(3) No proceedings shall be instituted under this section without the consent in writing of the Attorney General of Canada.**

Subsecs. (1) and (2) combine the former ss.288 and 289 which were ss.256 and 257 in the Code of 1892. They were taken from s.202 of the E.D.C. which in turn came from 39 & 40 Vict.,c.80,s.4.

Subsec.(3) is the former s.595 with the substitution of the Attorney General of Canada for the Minister of Marine and Fisheries. It was s.547 in the Code of 1892 and was explained by Sir John Thompson (Hansard, 1892, Vol. II, Col. 3646) as follows:

"Prosecutions in England are very often carried on vexatiously by single seamen or some other irresponsible parties, which delay the sailing of the vessels, and that is a matter of vast importance. For the purpose of making the prosecution in England the consent of the Board of Trade is required. As the officers of the Minister of Marine examine into the seaworthiness of vessels it is but fair that they should be notified before any such prosecution is taken."

**ASSAULTS.****"ASSAULT."**

**230. A person commits an assault when, without the consent of another person or with consent, where it is obtained by fraud,**

**(a) he applies force intentionally to the person of the other, directly or indirectly, or**

**(b) he attempts or threatens, by an act or gesture, to apply force**

**OLD CODE:**

288. *Every one is guilty of an indictable offence and liable to five years' imprisonment who sends, or attempts to send, or is a party to sending, a ship registered in Canada to sea, or on a voyage from any port or place on the inland waters of Canada to any port or place on the inland waters of the United States, or on a voyage from any port or place on the inland waters of the United States to any port or place on the inland waters of Canada in such an unseaworthy state, by reason of overloading or underloading or improper loading, or by reason of being insufficiently manned, or from any other cause, that the life of any person is likely to be endangered thereby, unless he proves that he used all reasonable means to ensure her being sent to sea or on such voyage in a seaworthy state, or that her going to sea or on such voyage in such unseaworthy state was, under the circumstances reasonable and justifiable.*

289. *Every one is guilty of an indictable offence and liable to five years' imprisonment who, being the master of a ship registered in Canada, knowingly takes such ship to sea, or on a voyage on any of the inland waters of Canada, or on a voyage from any port or place on the inland waters of Canada to any port or place on the inland waters of the United States, or on a voyage from any port or place in the United States to any port or place on the inland waters of Canada, in such an unseaworthy state, by reason of overloading or underloading or improper loading, or by reason of being insufficiently manned, or from any other cause, that the life of any person is likely to be endangered thereby, unless he proves that her going to sea or on such voyage in such unseaworthy state was, under the circumstances, reasonable and justifiable.*

595. *Without the consent of the Minister of Marine and Fisheries, no person shall be prosecuted for the offence of sending an unseaworthy ship to sea on a voyage.*

290. *An assault is the act of intentionally applying force to the person of another, directly or indirectly, or attempting or threatening, by any act or gesture, to apply force to the person or another, if the person making the threat has, or causes the other to believe, upon reasonable grounds, that he has present ability to affect his purpose, in either case, without the consent of the other or with such consent, if it is obtained by fraud.*

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**to the person of the other, if he has or causes the other to believe upon reasonable grounds that he has present ability to effect his purpose.**

This is the former s.290. It was s.258 in the Code of 1892 and s.203 in the E.D.C.

The definition as it came into statutory form, recognizes, but obviates, the common law distinction between assault and battery. Hawkins' P.C., Bk. 1, p.107 says:

"It seems that an assault is an attempt, or offer, with force and violence, to do a corporal hurt to another; as by striking at him with or without a weapon; or presenting a gun at him at such a distance within which the gun will carry; or pointing a pitch-fork at him, standing within the reach of it; or by holding up one's fist at him; or by any other such-like act done in an angry threatening manner; and from hence it clearly follows, that one charged with assault and battery, may be found guilty of the former and yet acquitted of the latter. But every battery includes an assault; therefore on an indict-

Section 230—*continued*

ment of assault and battery, in which the assault is ill laid, if the defendant be found guilty of the battery, it is sufficient. Notwithstanding the many ancient opinions to the contrary, it seems agreed at this day, that no words whatever can amount to an assault.

It seems that any injury whatsoever, be it never so small, being actually done to the person of a man in an angry, revengeful, rude, or insolent manner, as by spitting in his face, in any way touching him in anger, or violently jostling him out of the way, are batteries in the eye of the law."

A physical examination of a woman in custody upon a charge of concealment of birth, made by a doctor pursuant to the order of a magistrate but without the woman's consent was held to be an assault as the magistrate had no right to make the order: *AGNEW v. JOBSON* (1877), 13 Cox, C.C.625.

Although the definition contemplates the use of force with a hostile intent, and although consent will ordinarily be a defence, consent will not excuse an act that in itself constitutes an offence. This appears in *R. v. DONOVAN* (1934), 103 L.J.K.B.683, a case in which a man, with a woman's consent, whipped her with a cane. The following is quoted (p.687):

"If an act is unlawful, in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it was done consents to it. No person can license another to commit a crime. So far as the criminal law is concerned therefore, where the act charged is in itself unlawful, it can never be necessary to prove absence of consent on the part of the person wronged in order to obtain the conviction of the wrong-doer. There are however, many acts in themselves harmless and lawful which become unlawful only if they are done without the consent of the person affected. What is in one case an innocent act of familiarity or affection, may in another be an assault, for no other reason than that in the one case there is consent and in the other consent is absent. As a general rule, although it is a rule to which there are well-established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial. . . . .

There are, as we have said, well-established exceptions to the general rule that an act likely or intended to cause bodily harm is an unlawful act. One of them is dealt with by Sir Michael Foster . . . . . where he refers to the case of persons who in perfect friendship engaged by mutual consent in contests such as 'cudgels, foils, or wrestling,' which are capable of causing bodily harm. The learned author emphasizes two points about such contests: (1) that bodily harm is not the motive on either side, and (2) that they are 'manly diversions, they intend to give strength, skill and activity, and may fit people for defence, public as well as personal, in time of need.' For these reasons he says that he cannot call these exercises unlawful.

Another exception to the general rule, or rather, another branch of the same class of exceptions, is to be found in cases of rough and un-

disciplined sport or play, where there is no danger and no intention to cause bodily harm. An example of this kind may be found in *R. v. BRUCE* (1847), 2 Cox, C.C. 262. In such cases the act is not in itself unlawful, and it becomes unlawful only if the person affected by it is not a consenting party. It is not necessary to deal in this judgment with other exceptions to the rule which are wholly remote from the present case, such as the reasonable chastisement of a child by a parent or by a person *in loco parentis*."

Conviction quashed because of misdirection, because the case had been left to the jury on the basis that "consent or no consent" was the whole issue, whereas they should have been directed that if they were satisfied that the blows struck by the prisoner were likely or intended to do bodily harm to the prosecutrix, they ought to convict him, and that it was only if they were not so satisfied, that it became necessary to consider the further question whether the prosecution had negatived consent.

As to consent, see also notes to s.135, *ante*, and as to the unlawful nature of the act, see s.160(a), *ante*.

Any crime involving the use of force may be regarded as including an assault either directly, as in kidnapping, rape or robbery, or indirectly as in the use of explosives, or offensive volatile substances, or perhaps in the infliction of bodily harm by criminal negligence (s.192, *ante*). However, the Table on p.432 is an attempt to show how assault, considered by itself, is dealt with in this Code.

In addition to consent, a charge of assault may be met by the following three defences:

1. Correction—ss.43 and 44, *ante*.

2. Defence of person or property—ss.34-42, and s.73, *ante*. In this connection it may be observed that the right to defend the possession of property is clear enough, but that the right to re-take property in the actual possession of another has created some difficulty. S.73 covers the matter in relation to real property, but in relation to personal property, there are some decisions to which reference should be made:

*BLADES v. HIGGS* (1861), 10 C.B.N.S.713—gamekeepers employed by English peer taking dead rabbits from poachers by force. Action for assault dismissed. "If the owner was compellable by law to seek redress by action for a violation of his property, the remedy could be often worse than the mischief, and the law would aggravate the injury instead of redressing it." Carried to House of Lords on a question of title to property—20 C.B.N.S.214, and affirmed.

In Canada we have the case of *PHILLIPS v. MURRAY*, [1929] 2 W.W.R.314—dispute at elevator over grain tickets, retaking by assault under claim of right.

"In my opinion there was no justification or excuse for the assault . . . . . It is a rather startling doctrine, and not at all conducive to the King's peace, to hold that, in order to recover property, however unjustifiably retained, the owner may injure the wrongdoer in the way the defendant injured the plaintiff."

See also *R. v. FORD* (1907), 12 C.C.C.555, noted under s.181, *ante*.

3. Advancement of justice—ss.25-33 and 173, *ante*.

Section 230—*continued*

**ASSAULT**  
(Definition, Section 230)

<b>Common Assault</b> .....	section 231
<b>Aggravated Assault:</b>	
Attempts to commit more serious crime:	
Murder .....	section 210
Rape .....	" 137
Causing bodily harm .....	" 231(2)
Discharging firearm .....	" 216
Pointing firearm .....	86
Indecent assault .....	sections 141, 148
Intent to commit indictable offence .....	" 218, 232(1)
Kidnapping .....	section 233
<b>On certain Occasions:</b>	
Fighting etc. in or near public place .....	" 160
Prize fights .....	" 81
To resist arrest .....	" 232
<b>On certain Persons:</b>	
Abduction of females or children .....	sections 234-236
Apprentices & Servants .....	section 190
Minister of religion .....	" 161
Peace Officers & Public Officers .....	" 232(2)
Persons making lawful distress or seizure .....	" 232(2)
The Sovereign .....	" 49

**PUNISHMENT FOR COMMON ASSAULT.—Causing bodily harm by assault or otherwise.**

- 231. (1) Every one who commits a common assault is guilty of**  
    **(a) an indictable offence and is liable to imprisonment for**  
    **two years, or**  
    **(b) an offence punishable on summary conviction.**  
**(2) Every one who unlawfully causes bodily harm to any person**  
**or commits an assault that causes bodily harm to any person is guilty**  
**of an indictable offence and is liable to imprisonment for two years.**

This combines the former ss.274, 291 and 295 with an increase in the maximum penalty for common assault and a reduction otherwise. These sections were ss.242, 265, and 262 in the Code of 1892.

See also s.228(3)(b) and s.467(jurisdiction).

It may be mentioned here that the former s.292(c), assault occasioning bodily harm to wife or other female, is left to the operation of this section. In *R. v. HOY*, [1950] 1 W.W.R.520, accused was charged with as-

**OLD CODE:**

274. *Every one is guilty of an indictable offence and liable to three years' imprisonment who unlawfully wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument.*

291. *Every one who commits a common assault is guilty of an indictable offence and liable, if convicted upon an indictment, to one year's imprisonment, or to a fine not exceeding one hundred dollars, and on summary conviction to a fine not exceeding twenty dollars and costs, or to two months' imprisonment, with or without hard labour.*

292. (c) *assaults and beats his wife or any other female and thereby occasions her actual bodily harm.*

295. *Every one who commits any assault which occasions actual bodily harm is guilty of an indictable offence and liable to three years' imprisonment.*

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sault occasioning actual bodily harm to a woman whom the evidence disclosed to be his wife. It was argued on appeal that the matter should have been dealt with under s.292(c) and not, as it was, under s.295, but it was held that the charge might be laid under the general section notwithstanding the presence of an applicable special section.

What the new section really does is to eliminate s.274. As will appear, the line between the two degrees of assault was never clearly defined and in any event they were subject to the same penalty. Although grievous bodily harm has been considered to be the more serious, there has been confusion in that respect. Actual bodily harm is said to include any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient or trifling: *R. v. DONOVAN* (1934), 103 L.J.K.B. 683. Strangely enough, almost identical terms have been used to describe grievous bodily harm. *R. v. ASHMAN* (1858), 1 F. & F. 88; *R. v. COX* (1818), Russ. & Ry. 362, cited Archbold Cr.Pl., 24th ed. p.937, 28th ed., p.960.

In *R. v. LETENDRE* (1928), 50 C.C.C.419, Harvey, C.J.A., said:

"These two sections and the manner in which they are dealt with in the Code, have given Judges, magistrates and lawyers much concern, but they still remain as they have stood for many years. They first appear in much the same form as they are at present in R.S.C. 1886, c.162, as ss. 14 and 35, each of the offences there being described as a misdemeanour.

Those sections appear to have been taken from 1869 (Can.) c.20, ss.19 and 47, but though c.162 purports to be only a consolidation or revision a very substantial change is made in at least the latter of these sections. The original s.47 did not create an offence at all, but simply provided a punishment. Its words were:—'Whosoever is convicted upon an indictment of any assault occasioning actual bodily harm, shall be liable to be imprisoned in the Penitentiary for any term not exceeding three years . . . . . ' And continues:—'And whosoever is convicted upon an indictment for a common assault, shall be liable to be imprisoned . . . . . ' The section follows several other sections dealing with varieties of assault with different elements of aggravation.



Section 231—*continued*

But I see no reason for thinking that by its term it intended to create any new offence or offences.

However, since 1886 we have had the two separate sections each defining a special offence."

It is interesting to note that s.199 of the English Draft Code read: "Everyone shall be guilty of an indictable offence, and shall be liable upon conviction thereof to five years' penal servitude, who assaults any person so (as) to wound him or to cause him actual bodily harm." However, in the Bill of 1880, the words "to wound him or" were omitted and the penalty reduced to three years (s.192).

Probably the leading case upon these sections is that of *R. v. CLARENCE* (1888), 16 Cox, C.C. 511. The following are quotations from the judgment *per* Stephen, J. at p.525:

"Sect. 20 (of 24 & 25 Vict. c.100, Offences against the Person) punishes 'every one who unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument:—It is said that . . . . . the word 'unlawfully' must here be construed to mean 'unlawfully' in the wide general sense in which the word is used with reference to acts which if done by conspirators are indictable, though not if they are done by individuals. This general sense may, I think, be said to be 'immoral and mischievous to the public'. I do not agree with the doctrine that the word 'unlawfully' is used here in this wide general sense. The use of the word in relation to conspiracy appears to me to be exceptional. I think that no act can for this purpose be regarded as unlawful merely because it is immoral. It must I think be forbidden by some definite law; but I pass this over, for I think that in this case the word 'unlawfully' applies because the act done is forbidden by the law relating to marriage, according to which it constitutes cruelty. . . . . But is there 'infliction of bodily harm, either with or without any weapon or instrument'? . . . . . The words appear to me to mean the direct causing of some grievous injury to the body itself with a weapon, as by a cut with a knife, or without a weapon as by a blow with the fist or by pushing a person down. Indeed, though the word 'assault' is not used in the section, I think the words imply an assault and battery of which a wound or grievous bodily harm is the manifest immediate and obvious result."

Hawkins, J., one of the dissenting Judges, after quoting s.20, *supra*, said at p.531:

"I must now refer to sec. 47, which enacts that 'whosoever shall be convicted upon an indictment of an assault 'occasioning' actual bodily harm shall be liable, &c.' Here it will be observed that where the Legislature intends that an assault shall be the foundation of the offence it says so in express terms. If, in using the word 'inflict' in s.20, it had intended that it should be interpreted as 'caused by means of an assault', s.47 would have been superfluous; for by merely substituting the word 'actual' for 'grievous' in s.20, the whole object of both sections would have been attained; for the punishment awarded in each is the same, and 'actual' harm of necessity includes 'grievous' harm, and if for any reason, which I am unable to discover, the legislature had

thought fit to separate the two sections, applying one to an assault causing 'grievous', the other to an assault causing 'actual', bodily harm, I should at least have expected it to use the same phraseology in each. If, on the other hand, it intended the 20th section to bear the construction I put upon it, I should expect to find that which I do, viz., difference in the language.

As the sections now stand, construing them as I do, it looks as if the framers of the Act intended, as I think they did, that where grievous bodily harm was maliciously caused by *any* means, the offender should be liable to a punishment of five years' penal servitude, and that the same punishment might follow upon a conviction for occasioning any actual injury, though short of that which could be termed 'grievous', if such injury was caused by an assault."

Thus the difference of opinion arose upon a question whether the offences of unlawful wounding or inflicting grievous bodily harm could be committed without an assault. It may be noted in passing that the words of Hawkins, J., that "'actual' harm of necessity includes 'grievous' harm" are not in accord with the interpretation which regards the latter as the more serious. (*e.g.* *R. v. ADONCHUK*(1919), 30 C.C.C.301, cited *infra*). However, in saying that "by merely substituting the word 'actual' for 'grievous' in s.20, the whole object of both sections would have been attained," Hawkins, J., anticipated the comment of Harvey, C.J.A., in *R. v. LETENDRE, supra*, as follows:

"It is to be noted that the punishment is the same for each offence and in that sense neither can be said to be a less offence than the other, but it seems equally clear that the act which would make the actor guilty of the offence under s.274 would render him liable under s.295, because the latter section is much broader, the offence of s.274 comprising that of s.295 with some elements of aggravation added and inasmuch as the penalty is the same for each if s.295 were eliminated from the Code it would not affect the question of offence or punishment." [Italics added].

By way of definition of terms, nothing better can be done than to quote from the judgment in *BAZINET v. BERNARD*(1946), 89 C.C.C. 201, at p.202:

"What distinction does our criminal law make between the provisions of ss. 290, 291, 295 and 274?

The expression 'actual bodily harm' is defined by certain authors and the jurisprudence. Archbold's Criminal Pleading, Evidence & Practice, 31st ed., p.928, states that : 'Actual bodily harm includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor: it need not be an injury of a *permanent* character; nor need it amount to what would be considered to be grievous bodily harm.'

Harris and Wilshire's Criminal Law, 17th ed., p.281, formulates the same definition.

Words and Phrases, Legal Maxims, Canada, at p.103, reports certain definitions enounced in the jurisprudence:

'(N.W.T.) Section 262 of the Criminal Code provides for punishment for any assault which occasions 'actual bodily harm.' 'Actual bodily harm', does not imply a wounding or breaking of the skin, and necessarily implies beating and covers the least bodily harm (C.A.):

Section 231—*continued*

*R. v. HOSTETTER*(1902), 7 C.C.C. 221, 5 Terr. L.R. 363.

(Ont.) 'Actual bodily harm,' in s.295 of the Criminal Code, dealing with assault occasioning 'actual bodily harm,' means little if anything more than the old term 'battery' (C.A.): *R. v. TRESEGNE*(1926), 45 C.C.C. 270 at p.274, 58 O.L.R.634.

(Sask.) An assault causing actual bodily harm or bodily harm within the meaning of s.295 of the Criminal Code, may not amount to causing grievous bodily harm under s.274 of the Criminal Code: *R. v. ZYLA* (1910), 17 W.L.R. 258.

Russell on Crimes and Misdemeanours, 8th ed., vol. 1, p.812, points out that the expression: 'Bodily harm' is not defined. It may mean internal as well as external injuries and need not be permanent, nor dangerous, nor amount to maiming, disfigurement, or disablement. It is not grievous unless it seriously interferes with health or comfort.'

Byrne's Law Dictionary defines 'bodily harm' thus: 'This, without more, seems sometimes to mean any injury which is merely technical or trivial, as distinguished from the more serious injury.'

Our legislators have defined assault in s.290, of the *Cr. Code* (quoted). Harris and Wilshire's Criminal Law, 17th ed., at p.279, states that: 'A battery 'includes every touching and laying hold (however trifling) of another's person or clothes in an angry, revengeful, rude, insolent, or hostile manner,' or even an act such as striking a horse on which a man is riding so that he is thrown.'

The same author indicates the difference between 'battery' and 'assault', at p.278: 'An assault is an attempt, offer, or threat to use any unlawful force to another. Battery is the actual use of any unlawful force. Every battery includes an assault. Thus, if A throws a stone at B and hits him it is a battery; if he misses him it is an assault.'

To better distinguish between the offences of common assault and assault with bodily harm, we can turn to s.733 of the *Cr. Code* which permits a judge to dismiss a complaint if he finds the assault or battery 'so trifling . . . . .'

To complete this argument, it may be useful to refer to s.274 of the *Cr. Code* which creates the offence of inflicting grievous bodily harm.

We can conclude that if anyone uses violence with intent, without causing injury or suffering to the person of another, or merely makes threats which he has the ability to carry out, the offence will come under ss. 290, 291, of the *Cr. Code*.

If the victim suffers wounds or bodily injuries that are not serious, but are of a nature to interfere with his health or well-being, the offence will fall under s.295. But if the victim receives grave and serious injuries, s.274 will be applicable."

The meaning of the terms is discussed further in *R. v. ARCHIBALD* (1898), 4 C.C.C.159, at p.161 as follows:

"Then what amounts to grievous bodily harm . . . . . ? In *R. v. ASHMAN*(1858), 1 F. & F. 88, Willes, J., says that in order to constitute grievous bodily harm 'it is not necessary that the injury should be either permanent or dangerous, if it be such as seriously to interfere with the comfort or health it is sufficient.' And in the much discussed

case of *R. v. CLARENCE*(1888), 22 Q.B.D. 23, where the effect of sec. 20 of 24-25 Vict., c.100 (Imp.)—our Act R.S.C. ch. 162, sec. 14— . . . . (quoted above) was considered by Mr. Justice Wills, at p.36, who expressed the opinion that 'the section points to the infliction of direct and intentional violence, whether with a weapon or the fist or the foot, or any other part of the person or in any other way not involving the use of a weapon, as for instance by creating a panic at a theatre whereby people trampled on one another. *R. v. MARTIN*, 8 Q.B.D. 54.' And Mr. Justice Stephen, in the same case . . . . . furnishes this further illustration as to what constitutes an assault which might result in grievous bodily harm: 'If a man laid a trap for another into which he fell after an interval, the man who laid it would during the interval be guilty of an attempt to assault, and of an actual assault as soon as the man fell in'."

Again by way of interpretation, it may be noted that in *R. v. TREADWELL*(1902), 5 C.C.C.461, the following appears:

"In my opinion section 242 describes two separate offences, that is to say, an 'unlawful wounding' and 'the infliction of any grievous bodily harm'. The disjunctive 'or' indicates in this connection a purpose to cover either two separate offences, or, if not, to admit two modes of stating that kind of offence, otherwise the word 'unlawfully' would necessarily be repeated before the word 'inflict'. Again, if not so intended, the word 'and' and not 'or' would have been used."

Tremear's Code does not agree with this interpretation. A note to s.274 says "Such does not appear to be the correct reading of the section. The English Act from which it is taken uses the phrase 'unlawfully and maliciously wound or inflict any grievous bodily harm': and under it the bodily harm must clearly have been unlawful and malicious." However, from the following words of Lord Coleridge, C.J., in *R. v. MARTIN*(1881), 14 Cox.C.C.633 at p.637, it would appear that the inclusion of the word "maliciously" in the English section creates no substantial difference between it and s.274 of the Canadian Code. In that case the prisoner had put out the lights on a theatre stairway and had put an iron bar across the door at the bottom. There was a panic in which persons were injured. He was charged with inflicting grievous bodily harm.

"*The prisoner must be taken to have intended the natural and probable consequences of what he did.* And what he did was that which would certainly alarm and frighten a number of persons and also obstruct their exit from the theatre and cause them to run against the iron bar he placed before the door and do themselves serious injury."

Lord Coleridge said also:

"The words 'with or without any weapon or instrument' are worthy of attention, because those familiar with the old law know that difficulties often arose as to the construction of the word 'weapon' and the words 'with or without any weapon or instrument' were introduced to meet those difficulties."

Upon the question of *mens rea*, it was held in *R. v. WHITE*(1934), 62 C.C.C.76, that on a charge of unlawful wounding under s.274 proof of *mens rea* is not essential. *Per* McPhillips, J.A.:

"It is not part of the Crown's case to prove 'intent' under s.274. The

**Section 231—continued**

'unlawful wounding' raises a presumption of *mens rea* or of intent and it was incumbent on the accused to displace it by establishing, *e.g.* self-defence as was attempted in this case. When the trial judge stated that s.274 'does not involve intent at all', he meant, as the context shows, that the burden was not upon the Crown to establish it."

In *SLAUGHENWHITE v. R.*(1905), 35 S.C.R.607, the facts were that the accused was charged that "with intent to disable one W.H., did unlawfully wound the said W.H., by shooting at him with a loaded gun." The jury returned a verdict of "guilty without malicious intent". A majority of the Court held that this was an acquittal. *Per* Girouard, J., at p.610: "Probably the jury could have returned a verdict under this section (i.e. 242, later 274) or a verdict of common assault, but they have not done so. Their finding that the offence committed by the prisoner, whatever it might be, was without 'malicious intent' removed the essential requirement of a crime, whether malice is to be inferred from an unlawful act, or is 'express'." Idington, J., dissenting, was of opinion that "if the intent had been stricken out, the indictment would have been a perfectly good indictment charging the accused with 'unlawful wounding'."

From these two decisions it would appear that s.274 is to be contrasted with ss.273 (wounding, etc., with intent) 280 and 281 (use of explosives, mantraps, etc., with intent) rather than with 295.

*R. v. HOSTETTER*, *R. v. ZYLA* and *R. v. TRESEGNE*, have already been cited, but upon the question of degree, the following may be added.

In *R. v. HOSTETTER*(1902), 7 C.C.C.221, it was held that a charge "that he did make an assault upon and did beat and occasion actual bodily harm" was valid as a charge under s.262 (later 295).

"The question was raised as to whether the offence charged also comes under section 242 (later 274) of the Code. It surely does not come under the first part of the section dealing with wounding, for wound means a breaking of the skin, which is in no way necessarily implied by the words 'actual bodily harm' used in the charge. Neither do I think that the charge comes under the second part of said section 242. The words, 'actual bodily harm' in the charge, as I take it, would be fully covered by the least bodily harm, whilst the offence provided in section 242 has added to it an aggravating element which makes bodily harm grievous."

It was held that the offence of actual bodily harm was a lesser offence included in an offence under s.242. This was doubted in *R. v. LAW*(1915), 25 C.C.C.251, which followed *R. v. SHARPE*(1911), 18 C.C.C.132 in preference on a point of procedure. As to the offences themselves, the judgment in *R. v. SHARPE* contains the following:

"The two offences (i.e. in ss. 274 and 295) are closely alike and the maximum punishment prescribed in each case identical. It may well be said that section 274 is wider than, and, therefore, inclusive of section 295.

It is not easy to imagine a case where an assault occasioning actual bodily harm would not be included in the phrase 'unlawfully inflicting any grievous bodily harm'. Possibly such a case may arise. All

that, however, was a matter for the consideration of Parliament and we have no option to take the statute otherwise than as it reads."

In *R. v. ZYLA*(1910), 17 W.L.R.258, Wetmore, C.J., said: "A person may cause actual bodily harm, or bodily harm, and it may not be grievous bodily harm."

*R. v. ADONCHUK*(1919), 30 C.C.C.301 (Headnote):

"On an information for inflicting grievous bodily harm by an assault, the magistrate exercising the power of summary trial under 773(c) may convict of the lesser offence of assault occasioning bodily harm."

In *R. v. TAYLOR & YOUNG*(1923), 40 C.C.C.307, the accused were charged with unlawful wounding with intent to murder. The jury returned a verdict that "the defendants are guilty of assault and caused grievous bodily harm." On a case reserved, Russell, J., delivering the judgment of the Court, said:

"I think we must assume that the jury by their verdict negatived the intent to murder. That being so it appeared to me that the question is whether the charge of 'wounding' includes or involves the infliction 'of grievous bodily harm'. If it be possible to wound a man without doing him 'grievous bodily harm' it is not the case of a greater including the less but an attempt to make the less cover the greater. It is certain that one may do grievous bodily harm to another without wounding him for it seems that every bone in his body might conceivably be broken without his being wounded. In order to constitute a wound the continuity of the skin must be broken. Russell, on Crimes, 8th ed., Vol. I, at pp.803 *et seq.* On the other hand, the term 'grievous bodily harm' is not actually defined. It seems to be agreed that one may cause to another 'actual bodily harm' without occasioning 'grievous bodily harm'. Any and every 'wounding' it seems to me must cause 'actual bodily harm' but the verdict in this case cannot be supported if it is possible that there might be a wounding without 'grievous bodily harm'. I think there may be such a possibility. In any case the two expressions are not synonymous."

New trial ordered.

In *R. v. TURNER*, [1946] 2 W.W.R.400, the following appears:

"There is ample evidence to justify a conviction for common assault, and the magistrate no doubt had the power to convict of the lesser offence if he was of the opinion that the evidence did not warrant a conviction for the more serious offence of occasioning actual bodily harm."

The foregoing is not an attempt to set out all the cases which bear upon ss.274 and 295. A number of them dealing with summary trial under 773 are obsolete as the offences under both sections, since 1932-33, c.53, were included in s.773. Again, a number of earlier cases dealing with the duty of Justices in summary conviction proceedings are obsolete since s.732, which formerly began "Whenever any person unlawfully assaults or beats any person" was altered in 1900 to read "Whenever any person is charged with common assault". See now s.699.

Authority for the inclusion of s.86 in the Table on p.432 is found in the recent decision of the Privy Council in *KWAKU MENSAH v. R.*, [1946] A.C. 83, at p.91:

**Section 231—continued**

"Pointing a gun at a person is an assault unless done in protection of person or property. If it is pointed at a person without legal excuse, and there was none here, as the dead man was running away, it is an unlawful act."

"The dead man was running away." This was a considerable feat in itself. Cf. *Tam O'Shanter*, by Robert Burns, and *The Legend of Sleepy Hollow*, by Washington Irving.

Concerning aggravated assaults generally, the following may be quoted from the Amer. & Eng. Encyc. of Law, 2nd ed., Vol. II, p.965:

"An aggravated assault has been defined to be, at the common law, one that has, in addition to the mere intent to commit it, another object which is also criminal, but it may be doubted whether at common law the term had a technical and definite meaning. It seems rather to have been a phrase used by the commentators and text-writers (e.g. East, 1 P.C. 406) in contradistinction to 'common assault', to include all those species of assault which, for various reasons, had come to be regarded as more heinous than common assaults, or had been singled out and made the subject of special legislative provision."

The expressions of Harvey, C.J.A., in *R. v. IETENDRE*, *supra*, are authority for the suggestion that s.295 might be eliminated, although what has been done is rather to eliminate s.274.

**ASSAULT WITH INTENT.—Other assaults.**

**232. (1) Every one who assaults a person with intent to commit an indictable offence is guilty of an indictable offence and is liable to imprisonment for five years.**

**(2) Every one who**

**(a) assaults a public officer or peace officer engaged in the execution of his duty, or a person acting in aid of such an officer;**

**(b) assaults a person with intent to resist or prevent the lawful arrest or detention of himself or another person; or**

**(c) assaults a person**

**(i) who is engaged in the lawful execution of a process against lands or goods or in making a lawful distress or seizure, or**

**(ii) with intent to rescue anything taken under a lawful process, distress or seizure,**

**is guilty of an indictable offence and is liable to imprisonment for two years.**

This combines the former ss.275(b) and 296(a) to (d). S.296(e), assault on election day, is left to the operation of s.231. The former sections were ss. 243(b) and 263 in the Code of 1892 and may be compared with s.205 of the E.D.C. S.232(2)(a) and (b) came from s.38 of the *Offences against the Person Act*, 1861 (U.K.) which was derived from 9 Geo. IV, c.31, s.25, and 10 Geo. IV, c.34, s.31(I). These were extended to cover obstructing and resisting a peace officer.

"Peace officer" and "public officer" are defined in s.2(30) and (35) *ante*. See also s.110 (obstructing police officers) and s.467 (jurisdiction).

**OLD CODE:**

275. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who wilfully

. . . . .  
(b) maims or wounds any public officer engaged in the execution of his duty or any person acting in aid of such officer.

296. Every one is guilty of an indictable offence and liable to two years' imprisonment who

(a) assaults any person with intent to commit any indictable offence; or  
(b) assaults any public or peace officer engaged in the execution of his duty, or any person acting in aid of such officer; or

(c) assaults any person with intent to resist or prevent the lawful apprehension or detainer of himself, or of any other person, for any offence; or

(d) assaults any person in the lawful execution of any process against any lands or goods, or in making any lawful distress or seizure, or with intent to rescue any goods taken under such process, distress or seizure; or

(e) on any day where on any poll for an election, parliamentary or municipal, is being proceeded with, within the distance of two miles from the place where such poll is taken or held, assaults or beats any person.

297. Every one is guilty of an indictable offence and liable to twenty-five years' imprisonment who, without lawful authority,

(a) kidnaps any other person with intent

(i) to cause such other person to be secretly confined or imprisoned in Canada against his will, or

(ii) to cause such other person to be unlawfully sent or transported out of Canada against his will, or

(iii) to cause such other person to be sold or captured as a slave, or in any way held to service against his will; or

(b) forcibly seizes or confines or imprisons any other person within Canada.

(2) Upon the trial of any offence under this section the non-resistance of a person so unlawfully kidnapped or confined shall not be a defence unless it appears that it was not caused by threats, duress or force, or exhibition of force.

**KIDNAPPING AND ABDUCTION.****KIDNAPPING.—Forcible confinement.—Non-resistance.**

233. (1) Every one who kidnaps a person with intent

(a) to cause him to be confined or imprisoned against his will,

(b) to cause him to be unlawfully sent or transported out of Canada against his will, or

(c) to hold him for ransom or to service against his will, is guilty of an indictable offence and is liable to imprisonment for life.

(2) Every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of an indictable offence and is liable to imprisonment for five years.

(3) In proceedings under this section the fact that the person in relation to whom the offence is alleged to have been committed did not resist is not a defence unless the accused proves that the failure to resist was not caused by threats, duress, force or exhibition of force.



**Section 233—continued**

This is the former s.297, modified in that par.(1)(c), holding for ransom, is new, and in that subsec.(3) makes clear where the burden of proof lies. S.297 was s.264 in the Code of 1892 and came into the Code from R.S.C. 1886, c.162, s.46.

The form of abduction described in subsec.(1) differs from the abduction forbidden by the three sections that follow in that this section contains no limitation of age or sex.

Kidnapping is a common law misdemeanour. In 4 Bl. Com. 219, it is said that kidnapping, which consisted in the forcible stealing away of a man, woman or child from their own country, and sending them into another, was capital by the Jewish and also by the civil law, and he remarks that it is "unquestionably a very heinous crime, as it robs the King of his subjects, banishes a man from his country and may in its consequences be productive of the most cruel and disagreeable consequences."

It is apparent that the modern definition of the crime is much wider than that of the common law.

*R. v. O'BRIEN*(1954), 11 W.W.R.(N.S.)657, was a prosecution alleging a conspiracy to kidnap a woman with intent to cause her to be secretly confined within Canada against her will. The accused said that he had given only a feigned consent to the conspiracy and that he had no intention of carrying out its purpose. However, the case turns upon the essential elements of conspiracy rather than on the crime of kidnapping.

The offences set out in subsec.(2) differ from those described in subsec.(1). That subsec.(2) sets out more than one offence, appears from the case of *R. v. LENTON*(1947), 88 C.C.C.1. There the accused was convicted on a charge that he did "unlawfully seize *and* confine" one N. The seizure had taken place before the matter came to the attention of the accused, but when it did he made himself a party to the continued detention of N. It was held that it was an offence unlawfully to seize *or* confine *or* imprison, and the court of appeal substituted a verdict of unlawfully confining N.

**ABDUCTION OF FEMALE.**

**234. Every one who takes away or detains a female person, against her will, with intent**

**(a) to marry her or to have illicit sexual intercourse with her, or**

**(b) to cause her to marry or to have illicit sexual intercourse with a male person,**

**is guilty of an indictable offence and is liable to imprisonment for ten years.**

This is the former s.313. It was s.281 in the Code of 1892 and s.218 in the E.D.C. It was taken from the *Offences against the Person Act*, 1861 (Imp.), s.54, which was a re-enactment of 10 Geo. IV, c.34, s.22(1). Although the words "whether married or not", which were new in the E.D.C., are not continued, the section will continue to apply regardless of the marital status or age of the victim.

See s.749 *post*, amending s.2 of the *Canada Evidence Act*. If the intent to marry the woman were carried out, she would still be a competent

**OLD CODE:**

313. Every one is guilty of an indictable offence and liable to ten years' imprisonment who, against her will takes away or detains any woman of any age and whether married or not, with intent to marry or carnally know such woman or to cause her to be married or carnally known by any other person.

315. Every one is guilty of an indictable offence and liable to five years' imprisonment who unlawfully takes or causes to be taken any unmarried girl, who is under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her.

(2) It is immaterial whether the girl is taken with her own consent or at her own suggestion or not.

(3) It is immaterial whether or not the offender believed the girl to be of or above the age of sixteen.

and compellable witness upon a charge under this section. See also *R. v. O'BRIEN*, cited under the preceding section, and s.408(1)(c) *post*.

The former s.314 (abduction of heiress) which was s.282 in the Code of 1892, and s.219 in the E.D.C., is not continued. The gravamen of the offence was the abduction as described in the preceding section and the effect of s.314 was to introduce an additional motive for the criminal act. The provisions relating to property rights dealt with a civil matter.

**ABDUCTION OF FEMALE UNDER SIXTEEN.—Consent immaterial.—Belief as to age immaterial.**

235. (1) Every one who, without lawful authority, takes or causes to be taken an unmarried female person under the age of sixteen years out of the possession of and against the will of her parent or guardian or of any other person who has lawful care or charge of her is guilty of an indictable offence and is liable to imprisonment for five years.

(2) For the purpose of proceedings under this section it is not material whether

(a) the female person is taken with her own consent or at her own suggestion, or

(b) the accused believes that the female person is sixteen years of age or more.

This is the former s.315. It was s.283 in the Code of 1892 and s.221 in the E.D.C., being there an adaptation of s.55 of the *Offences against the Person Act, 1861* (Imp.), with the addition of what now appears as subsec.(2) which codified the law as laid down in the cases. Since the section is for the protection of parents, an intent similar to that specified in the preceding section is not required: *R. v. ROBINS*(1844), 1 C. & K. 456; *R. v. OLIFIER*(1866), 10 Cox.C.C.402; *R. v. MYCOCK*(1871), 12 Cox.C.C.28; and in *R. v. PRINCE*(1875), 13 Cox.C.C.138, the leading case, it was held to be no defence that accused believed and had reasonable ground for believing that the girl was over sixteen.

In *R. v. JOE*(1928), 50 C.C.C.152, a conviction under s.315 was quashed on appeal in a case where a girl had left home to work, but, without any persuasion on the part of the accused, had left her employer of her own volition and, as the court found, had assumed control of her own movements and the determination as to where and how she would

**Section 235—continued**

live. This is in accord with the case of *R. v. MILLER*(1876), 13 Cox, C.C. 179, in which it was held that the girl was in the possession of the master by whom she was employed and therefore was not taken from her father's possession.

In *R. v. BLYTHE*(1895), 1 C.C.C.263, accused wrote from Victoria, B.C., to a girl who was under sixteen and living with her parents in the United States, asking her to join him there. When she agreed to do so, he sent her money for her expenses, and she came to him. It was held that the accused had not committed an offence under this section in *Canada* but that it took place where she received the letters written by the accused that induced her to leave her home.

**ABDUCTION OF CHILD UNDER FOURTEEN.—Bonafide claim of right.**

**236. (1) Every one who, with intent to deprive a parent or guardian or any other person who has lawful care or charge of a child under the age of fourteen years of the possession of that child, or with intent to steal anything on or about the person of such a child, unlawfully**

**(a) takes or entices away or detains the child, or**

**(b) receives or harbours the child,**

**is guilty of an indictable offence and is liable to imprisonment for ten years.**

**(2) This section does not apply to a person who, claiming in good faith a right to possession of a child, obtains possession of the child.**

This is the former s.316. It was s.284 in the Code of 1892 and s.222 in the E.D.C. It was an adaptation of s.56 of the *Offences against the Person Act*, 1861 (U.K.) leaving out the words "either by force or fraud" which appear there. The Act of 1861 reenacted 9 Geo. IV, c.31, s.21, raising the age from ten to fourteen years, and adding the word "guardian".

For definitions see s.168(b) and (d), and as to proof of age see s.565, *post*.

In *R. v. HAMILTON*(1910), 17 C.C.C.410, a father was convicted for taking a child from the custody of its mother from whom he was divorced. It was held that he was not entitled to the protection of subsec.(2), at least in the absence of evidence that he believed the decree of divorce to be invalid.

The section was applied against the father also in *R. v. WATTS* (1902), 5 C.C.C.246, and against the mother in *Re LORENZ*(1905), 9 C.C.C.158.

Subsec.(2) as it appears in the English legislation, and as it appeared in R.S.C. 1886, c.162, s.45, contains the words "No person who has claimed any right to the possession of such child, or is the mother, or has claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof on account of getting possession of such child" etc. Taschereau's *Canada Criminal Acts* cites *R. v. JOHNSON* (1884), 15 Cox, C.C.481, and *R. v. BARTLETT*(1885), 15 Cox, C.C.658, and at p.216, says that this exempts all those claiming a right to possession of the child, but Tremear's Code, 1919 ed. p.391, expresses the opinion

**OLD CODE:**

316. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, with intent to deprive any parent or guardian of any child under the age of fourteen years, of the possession of such child, or with intent to steal any article used on or on the person of such child, unlawfully,

(a) takes or entices away or detains any child; or

(b) receives or harbours any such child, knowing it to have been unlawfully taken, enticed away or detained with intent aforesaid.

(2) Nothing in this section shall extend to any one who gets possession of any child, claiming in good faith a right to the possession of the child.

303. Every one is guilty of an indictable offence and liable to imprisonment for life, who with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully administers to her or causes to be taken by her any drug or other noxious thing, or unlawfully uses on her any instrument or other means whatsoever with the like intent.

304. Every woman is guilty of an indictable offence and liable to seven years' imprisonment who, whether with child or not, unlawfully administers to herself or permits to be administered to her any drug or other noxious thing, or unlawfully uses on herself or permits to be used on her any instrument or other means whatsoever with intent to procure miscarriage.

305. Every one is guilty of an indictable offence and liable to two years' imprisonment who unlawfully supplies or procures any drug or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she is or is not with child.

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that the subsection as it now appears enlarged both the character and scope of the legislation, citing *R. v. HAMILTON*, *supra*.

**ABORTION.**

**PROCURING MISCARRIAGE.**—Woman procuring her own miscarriage.—“Means” defined.

237. (1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life.

(2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years.

(3) In this section, “means” includes

- (a) the administration of a drug or other noxious thing,
- (b) the use of an instrument, and
- (c) manipulation of any kind.

**SUPPLYING NOXIOUS THINGS.**

238. Every one who unlawfully supplies or procures a drug or other noxious thing or an instrument or thing, knowing that it is intended to be used or employed to procure the miscarriage of a female person, whether or not she is pregnant, is guilty of an indictable offence and is liable to imprisonment for two years.

**Sections 237 & 238—continued**

S.237 comes from the former ss.303 and 304 but alters them so as to express the gravamen of the offences in the terms used in *R. v. DOUCETTE*, *infra*, and to avoid the technical position taken in *R. v. DALE*, *R. v. CAMPBELL* and *R. v. POZNANSKY*, all of which are cited later.

S.238 is the former s.305.

**Historical.**

It is not clear that abortion was a crime at common law (see *R. v. WHITCHURCH*(1890), 24 Q.B.D.420) although it appears to have been an offence against ecclesiastical law. It became a statutory offence in 1803 by 43 Geo. III, c.58, s.3.

Ss.303 and 304 came from s.58 of the *Offences against the Person Act*, 24 & 25 Vict., c.100 (Imp.), which was framed from 7 Wm. IV & 1 Vict. c.85, s.6. S.305 came from s.59 of the Act of 1861 where it was new. Greaves' Cons. Acts, p.56, says that "It is intended to check the obtaining of poison . . . . by making both the person who supplies and the person who procures it guilty of misdemeanour." They were re-enacted into the *Offences against the Person Act*, 32 & 33 Vict., c.20, (Can.), and appear as ss.47 and 48 in R.S.C. 1886, c.162. They appear as ss.213, 214 and 215 of the English Draft Code, but, with reference to the offence by the woman herself, the words "being with child" are replaced by "whether with child or not". They appear in the same form as ss.271, 272 and 273 in the Canadian Criminal Code Bill of 1892, but as passed the word "drug" is substituted for the word "poison".

In *R. v. COOK*(1908), 15 C.C.C.40, (Ont. C.A.), Meredith, J.A., referring to s.303, said:

"This enactment is taken word for word from the Imperial Act, 1 Vict. ch. 85, or the enactment 24 & 25 Vict. c.100, s.58. In an earlier Imperial enactment the words were 'any medicine or other thing', and in a case in which the prisoner was charged with having administered a decoction of savin, Lawrence, J., is reported to have said that it was immaterial whether the drug was savin or not, or whether it was capable of causing an abortion, if the prisoner believed at the time that it would cause it, and administered it with that intent: *R. v. PHILLIPS*(1811), 3 Camp. 73, 76; and in a somewhat similar case, Vaughan, J., is reported to have said: 'It is with the intention the jury have to do; and, if the prisoner administered a bit of bread merely with intent to procure abortion, it is sufficient to constitute the offence contemplated by the Act of Parliament': *R. v. COE*(1834), 6 C. & P. 403."

This quotation, especially that part of it which was taken from *R. v. COE*, answers a question which was raised in the House of Commons (Hansard, 1954, pp.2482-3). See also *R. v. PETTIBONE*, *infra*.

There has been criticism of these sections. Taschereau in his Code of 1892 at p.276 remarks of s.273 (later s.304) that "Section 273, as it reads, is an absurdity. It ought to read as in the English Act and s.47 c.172, R.S.C., 'Every woman being with child'."

In *R. v. CAMPBELL*(1946), 88 C.C.C.41, (B.C.C.A.) O'Halloran, J.A., in a dissenting judgment, said:

"In *R. v. DALE*(1939), 72 C.C.C.181, it was said that the 'other means whatsoever' included in s.303, cannot sustain a charge which is con-

fined to the use of an instrument. *Sec. 303 is so unfortunately phrased that even if the crime of abortion is conclusively established by the testimony as it is here, nevertheless the accused may be acquitted if the technical evidence of actual method employed is weak.* The phraseology of s.303 as examined in *R. v. DALE* seems to permit confusion between a charge which is imperfectly stated, and a charge wherein an averment of an essential circumstance is wholly omitted; . . . . .” (The italics are added).

#### Interpretation

The questions arising in cases under these sections, as well as upon charges of murder and manslaughter arising from criminal operations, have been chiefly questions of evidence concerning the admissibility of evidence of similar acts (see in particular *BRUNET v. R.*(1918), 30 C.C.C.16, (S.C. Can.) and *R. v. BOND*(1906), 21 Cox, C.C.252); the need for corroboration of accomplice evidence (*GOUIN v. R.*(1926), 46 C.C.C.1, (S.C. Can.)), and the admissibility of dying declarations (*SCHWARTZENHAUER v. R.*(1935), 64 C.C.C.1 (S.C. Can.)). However, it is the intention here to deal rather with the interpretation of the sections.

A note by Greaves in Russell on Crimes, 9th Ed., p.518, is in part as follows:

“It is submitted that the true meaning of the words ‘poison or other noxious thing’ is such things as in their nature are poisonous or noxious; and that it is a misapprehension to suppose that the statute requires such a quantity of a poison or other noxious thing to be administered as shall be obnoxious. If a person administers any quantity of a poison, however small, it has never yet been doubted, that, if it were done with intent to murder, the offence of administering poison with intent to murder was complete; and *R. v. CLUDERAY*(1850), 1 Den. 514, shows that if poison be administered in such a way that it cannot injure, the offence is nevertheless complete. . . . . It is submitted, therefore, that if there be an intent to procure abortion, it is quite immaterial how small the quantity be of the poison or other noxious thing that is administered.”

He notes too, that the words “other means whatsoever” in s.58 of the *Offences Against the Person Act*, 1861, are governed by the word “use” and not by “administer” so that they cannot be extended to apply to such things as are not poisonous or noxious. This comment would apply to Code ss.303 and 304.

In *R. v. COOK*, *supra*, it was held that where a prisoner was charged on separate counts, firstly, with using an instrument to procure an abortion, and secondly, with “operating” for that purpose, a conviction on the second count will be set aside if the jury acquitted on the first and there was no reasonable evidence to be left to the jury that the accused had illegally used other means than an instrument. Meredith, J.A., after referring to *R. v. PHILLIPS* and *R. v. COE* as quoted above, continued as follows:

“The words there in question were very different from those contained in that part of the enactment now in question respecting the *administration*, which must now be of a ‘drug or other noxious thing;’ but are very like that part of it relating to the *use* which may be made of ‘any instrument or other means whatsoever;’ so that these two cases

Sections 237 & 238—*continued*

are very much in point here. Dr. Greaves's comments upon them, and upon the effect of the subsequent amendment of the enactment, in *Russell on Crimes* . . . . . are very pertinent, and seem to me to deal with the subject with substantial accuracy; see also *R. v. HOLLIS*(1873), 12 Cox, C.C.463; and *COMMONWEALTH v. SNOW*(1874), 116 Mass. 47. The cases of *R. v. PHILLIPS* and *R. v. COE* went very much further than is necessary in this case, and quite apart from any assistance they might give, it is plain that under the enactment in question, it is not a necessary ingredient in the crime that the thing administered, or the means used, should be likely to cause, or indeed capable of causing, the effect intended; though of course the character of the thing administered, or the means used, may have a great bearing upon the essential question of fact, the intention of the accused. If the prisoner, an experienced physician, had administered bread pills, or used the 'rest cure' only, he could hardly have been found guilty of intending to procure an abortion; . . . . . Ineffectual means, in the case of an unskilled person, might well be looked upon differently."

In *R. v. SCOTT*(1912), 19 C.C.C.370, the same Judge said:  
 "In the Imperial enactment the words are 'any poison or other noxious thing;' under the enactment in force here—see the Criminal Code, s.305, and also s.303—the words now are, 'any drug or other noxious thing,' though originally they were as in the Imperial enactment, 'any poison or other noxious thing'; and the change from the word 'poison' to the word 'drug' was not made for the purpose of narrowing the effect of the enactment: it may have been for the purpose of enlarging it, in consequence of the cases in England upon which this appeal, against the refusal of the chairman of the Wentworth General Sessions to state a case for the opinion of this Court, is based . . . . ."

In my opinion, the requirements of the enactment in question are satisfied if the substance administered or supplied be a drug; if not a drug, it must, of course, be proved to be a noxious thing, and, in my opinion, noxious in the quantity administered or to be taken.

In this case there was reasonable evidence that the substance in question was not only a drug—a drug commonly called yellow jasmine, technically gelsemium—but also a poison: in its alkaloid—which was found in the analysis—a very powerful poison, and a recognized poison prescribed in several diseases, one of which is dysmenorrhoea; and also that it was a noxious substance: and so this motion for leave to appeal fails, being based entirely upon the contention that there was no reasonable evidence that the substance, as supplied, was a 'drug or other noxious thing'."

In *R. v. DALE*(1939), 72 C.C.C.181, it was held that s.303 of the Criminal Code specifies at least three distinct prohibited means of "Intent to procure miscarriage", and where an indictment alleges the use of one such prohibited means only, it is misdirection for the Judge, after telling the jury that the evidence does not support the use of such means, to instruct them to treat the case as one for using another of the prohibited means specified in the section.

This was followed in *R. v. CAMPBELL*(1946), 88 C.C.C.41, quoted *supra*, in which a conviction for unlawful use of an instrument was set

aside for want of conclusive proof that what was used was an instrument. It was held that the Crown, once having elected to try the accused for the unlawful use of one means specifically described, must establish the use of that means. *R. v. DOUCETTE*(1949), 93 C.C.C.202, indicated a departure from that position. In that case it was held that: "The gravamen of the offence in s.303 is the purpose and intention to bring about a miscarriage."

However, the later case of *R. v. POZNANSKY*(1950), 97 C.C.C.208, followed *R. v. DALE* and *R. v. CAMPBELL*.

In *R. v. PETTIBONE*, [1918]2 W.W.R.806, a conviction for attempt to commit an offence under s.303 was affirmed on appeal. The woman had not taken any of what the accused supplied to her and there was no analysis to say what it was. Stuart, J. delivering the judgment of the Court, said (at p.809):

"Now even if the doctor deceived the accused and gave him innocuous material yet if the accused really tried, as I think the jury could reasonably infer that he did, to get a noxious material, believed that he had got it and tried to get the woman to take it, in my view there was much more than mere preparation, there was a real attempt to commit the offence and the fact that owing to the doctor's deceit it was impossible for him to commit it, would not make any difference."

Earlier cases decided upon the statutory offence in England are as follows:

*R. v. CADMAN*(1825), 1 Mood.C.C.114. Accused charged with administering white arsenic and sulphate of copper to a woman with intent to murder her. The indictment was founded on 43 Geo. III, c.58. The evidence was that the woman put some of the substance into her mouth but did not swallow it. The Judges were of opinion that "a mere delivery to the woman did not constitute an administering, and that upon a statute so highly penal they ought not to go beyond what was meant by the word administering." But if any part is taken, it is not necessary that it be swallowed. This case was questioned in *R. v. HARLEY*, cited with *R. v. WILSON*, *infra*.

*R. v. GOODHALL*(1846), 1 Den.187. Indictment under 1 Vict. c.85, for using an instrument with intent to procure miscarriage. Held, immaterial whether or not the woman was pregnant at the time the instrument was used. In fact, she was not.

*R. v. PERRY*(1847), 2 Cox.C.C.223. Charge under 7 Wm. IV and 1 Vict., c.85, s.6. Held that a small quantity of savin, not sufficient to do more than produce a little disturbance in the stomach, is not a "noxious thing" within the meaning of the statute.

*R. v. WILSON*(1856), Dears. & B.127. Prisoner was convicted under 7 Wm. IV. and 1 Vict. c.85 for administering and causing to be taken by E.C. certain poison with intent to procure her miscarriage. E.C. being pregnant, had asked accused to get her something to procure miscarriage and accused gave her a drug which, out of the presence of accused, she took for that purpose. Miscarriage resulted. Held, that the conviction was right inasmuch as there was a "causing to be taken" within the meaning of the statute. See also *R. v. HARLEY*(1830), 4 C. & P.369, 172 E.R.744 (servant putting poison into coffee).



Sections 237 & 238—*continued*

*R. v. FARROW*(1857), Dears. & B.164. Prisoner convicted under the same statutes as in *R. v. WILSON*. The Court held the case could not be distinguished from that case and confirmed the conviction.

The first case decided under 24 & 25 Vict. c.100, appears to be *R. v. ISAACS*(1862), 9 Cox,C.C.228, in which it was held that the thing supplied with intent to procure the miscarriage of a woman with child must be noxious in its nature. In this case there was evidence of analysis, resulting in the opinion of the analyst that the liquid supplied was some vegetable decoction of a harmless character, and such as would not procure miscarriage.

It is to be noted that the gravamen of s.305 is identical with 24 & 25 Vict., c.100, s.59, under which *R. v. ISAACS* was decided.

*R. v. HILLMAN*(1863), Lc. & Ca.343. Appeal from conviction. The jury had found in answer to questions of the Court, that the prosecutrix did not intend to take the substance in question, nor did any other person except only the defendant himself intend that she should. Erle, C.J. said:

"The statute (24 & 25 Vict., c.100, s.59) is directed against the supplying of any substance with the intent that it shall be employed to procure abortion. The prisoner, in this case, supplied the substance, and intended that it should be employed to procure abortion. He knows of his own intention that it should be so employed, and is, therefore, within the words of the statute, as we construe them."

*R. v. HOLLIS & BLAKEMAN*(1873), 12 Cox,C.C.463. Charge under 24 & 25 Vict., c.100, s.58. Conviction affirmed. In this case prisoners had given a woman some stuff and after taking it she miscarried. It was not shown what the stuff was. Held that there was evidence that it was a noxious thing within the meaning of the Act. Bramwell, B.:

"A noxious thing within the statute means a thing that will produce the effect mentioned in the statute—that is, a miscarriage. This appears to have produced that effect."

*R. v. HENNAH*(1877), 13 Cox,C.C.547. The following is quoted from the judgment of Cockburn, C.J., acquitting the accused:

"I think there must be a distinction between a thing only noxious when given in excess, and a thing which is a recognized poison and is known to be a thing noxious and pernicious in effect. . . . What is important in the present case is that the quantity administered was incapable of producing any effect . . . here the quantity was incapable of doing any mischief, and, therefore, we shall not be justified, although it was administered with the intent of producing inconvenience or annoyance, in saying that it is within the statute, seeing the thing is not, in the form administered, noxious." But cf. *R. v. STITT*, *infra*.

*R. v. CRAMP*(1880), 5 Q.B.D. 307. Appeal from conviction for causing a noxious thing to be taken to procure miscarriage. It was in evidence that quantities of oil of juniper considerably less than half an ounce are commonly taken medicinally without bad effect, but that half an ounce produces ill effect, and is to a pregnant woman, dangerous. The conviction was affirmed.

*R. v. HILLMAN* was followed in *R. v. TITLEY* (1880), 14 Cox.C.C. 502. In this case a trap was laid by the police into which the accused fell by supplying two bottles of liquid. Stephen, J. said that the *HILLMAN* case was precisely in point and said:

"You have first to consider whether the medicine was supplied by the prisoner to Stroud; secondly, whether such medicine, if so supplied, was a noxious thing. In case you find both these issues in the affirmative, you have further to consider: What was the intention of the prisoner when he supplied it? If the intention in his mind was that it should be used for the purpose of procuring the miscarriage of Marthe Difley's daughter, you must convict him."

The case of *TITLEY* does not appear to have been mentioned in *R. v. YOUNG* (1949), 94 C.C.C.117, which resembles it in being the result of a police trap. In the latter case the accused had his instruments sterilized and ready for use and received money for the pretended abortion, but the police broke in and arrested him before he did anything. He was convicted of attempting to commit an offence under s.303.

*R. v. HENNAH*, *supra*, was referred to in the Canadian case of *R. v. STITT* (1879), 30 U.C.C.P.30, which may be compared also with *R. v. ISAACS*, *supra*.

In the *STITT* case the prisoner, with intent to procure abortion, supplied a pregnant woman with certain pills containing oil of savin with directions to take 25 at a dose. It was in evidence that such a quantity would be greatly irritating to a pregnant woman, and might possibly procure an abortion, and that oil of savin in any dose would be most dangerous to give to a woman in that condition. Held, that there was a supplying of a noxious thing with intent to procure an abortion. Wilson, C.J. said (at p. 34):

"If it were not for the doubtful language attributed to the Lord Chief Justice of England, in the case of *R. v. HENNAH* . . . . I should not have doubted of the matter at all. For it appears to me that administering a thing in a *concentrated* form so as to be plainly noxious in that form, is just the same as administering an excessive quantity of the article in its primitive form."

It would appear that the line of English cases beginning with *R. v. ISAACS*, resulted in the word "drug" being substituted for "poison" in the *Criminal Code* as mentioned by Meredith, J.A. in *R. v. SCOTT*, *supra*.

The following cases have arisen from these sections but do not assist in their interpretation:

1. Previous similar acts—*R. v. DALE* (1889), 16 Cox.C.C.703; *R. v. CAMPBELL* (1946), 86 C.C.C.410; *R. v. POLLARD* (1909), 15 C.C.C.74; *R. v. ANDERSON* (1935), 64 C.C.C.205.
2. On dying declaration—*R. v. GLOSTER* (1888), 16 Cox.C.C.471; *R. v. INKSTER* (1915), 24 C.C.C.294; *R. v. BUCK* (1940), 74 C.C.C.314; *R. v. McINTOSH*, [1937] 4 D.L.R.478.
3. On corroboration—*R. v. SADICK BEY* (1914), 25 C.C.C.259; *R. v. REYNOLDS*, 1 Sask L.R.480; *R. v. BETCHEL* (1912), 2 W.W.R.624.
4. On circumstantial evidence and expert testimony—*R. v. HISLOP* (1925), 43 C.C.C.384.

Sections 237 & 238—*continued*

5. On conspiracy or counselling to commit offence in foreign country—*R. v. BACHRACK*(1913), 21 C.C.C.257; *Re McCREADY*(1909), 14 C.C.C.481 (extradition); *R. v. WALKEM*(1908), 14 C.C.C.122.  
 6. On Canada Evidence Act, s.5,—*TASS v. R.*(1946), 87 C.C.C.97 (S.C. Can.).

## VENEREAL DISEASES.

**VENEREAL DISEASE.—Defence.—Corroboration.—“Venereal disease.”**

**239. (1) Every one who, having venereal disease in a communicable form, communicates it to another person is guilty of an offence punishable on summary conviction.**

(2) No person shall be convicted of an offence under this section where he proves that he had reasonable grounds to believe and did believe that he did not have venereal disease in a communicable form at the time the offence is alleged to have been committed.

(3) No person shall be convicted of an offence under this section upon the evidence of only one witness, unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.

(4) For the purposes of this section, “venereal disease” means syphilis, gonorrhea or soft chancre.

This is the former s.307 which was enacted by 1919, c.46, s.8 as s.316A and created a new criminal offence. At that time the effect of the proviso (now subsec.(2)) was explained (Hansard, 1919, Vol. V, p.4362), to be that “if he had reasonable grounds to believe that he was free, and proves that, then he escapes, although possibly the Crown had been able to prove in the first place that at some time shortly before he knew that he was so afflicted.” The Minister was asked if the mention of the various diseases was interpretative or limitative, and answered “I would say that it was limitative.”

The section came into consideration in *R. v. LEAF*(1926), 45 C.C.C. 236. It was shown that the accused had committed an offence against this section and that as a result the woman had died. The charge against him was therefore one of manslaughter. It was held on appeal that he was properly convicted of the latter offence, but the sentence was reduced.

See also notes to s.131 on Corroboration.

## OFFENCES AGAINST CONJUGAL RIGHTS.

**“BIGAMY.”—Matters of defence.—Belief that spouse dead.—Absence for seven years. — Divorce. — Annulment. — Incompetency no defence. — Validity presumed.—Act or omission by accused does not invalidate.**

**240. (1) Every one commits bigamy who**

(a) in Canada,

(i) being married, goes through a form of marriage with another person,

(ii) knowing that another person is married, goes through a form of marriage with that person, or

**OLD CODE:**

307. Any person who is suffering from venereal disease in a communicable form, who knowingly or by culpable negligence communicates such venereal disease to any other person shall be guilty of an offence, and shall be liable upon summary conviction to a fine not exceeding five hundred dollars or to imprisonment for any term not exceeding six months, or to both fine and imprisonment:

*Provided that a person shall not be convicted under this section if he proves that he had reasonable grounds to believe that he was free from venereal disease in a communicable form at the time the alleged offence was committed:*

*Provided, also, that no person shall be convicted of any offence under this section upon the evidence of one witness, unless the evidence of such witness be corroborated in some material particular by evidence implicating the accused.*

(2) For the purpose of this section "venereal disease" means syphilis, gonorrhea, or soft chancre.

## 308. Bigamy is

(a) the act of a person who, being married, goes through a form of marriage with any other person in any part of the world; or

(b) the act of a person who goes through a form of marriage in any part of the world with any person whom he or she knows to be married; or

(c) the act of a person who goes through a form of marriage with more than one person simultaneously, or on the same day.

(2) The fact that parties would, if unmarried, have been incompetent to contract marriage shall be no defence upon a prosecution for bigamy.

(3) No one commits bigamy by going through a form of marriage

(a) if he or she in good faith and on reasonable grounds believes his wife or her husband to be dead; or

(b) if his wife or her husband has been continually absent for seven years then last past and he or she is not proved to have known that his wife or her husband was alive at any time during those seven years; or

(c) if he or she has been divorced from the bond of the first marriage; or

(d) if the former marriage has been declared void by a court of competent jurisdiction.

(iii) on the same day or simultaneously, goes through a form of marriage with more than one person; or

(b) being a Canadian citizen resident in Canada leaves Canada with intent to do anything mentioned in subparagraphs (i) to (iii) of paragraph (a) and, pursuant thereto, does outside of Canada anything mentioned in those subparagraphs in circumstances mentioned therein.

(2) No person commits bigamy by going through a form of marriage if

(a) that person in good faith and on reasonable grounds believes that his spouse is dead,

(b) the spouse of that person has been continuously absent from him for seven years immediately preceding the time when he goes through the form of marriage, unless he knew that his spouse was alive at any time during those seven years,

(c) that person has been divorced from the bond of the first marriage, or

Section 240—*continued*

(d) the former marriage has been declared void by a court of competent jurisdiction.

(3) Where a person is alleged to have committed bigamy, it is not a defence that the parties would, if unmarried, have been incompetent to contract marriage under the law of the place where the offence is alleged to have been committed.

(4) Every marriage or form of marriage shall, for the purpose of this section, be deemed to be valid unless the accused establishes that it was invalid.

(5) No act or omission on the part of an accused who is charged with bigamy invalidates a marriage or form of marriage that is otherwise valid.

This comes from the former s.308. It was s.275 in the Code of 1892 and s.216 in the E.D.C. The following quotation from *R. v. TAYLOR* (1950), 34 Cr.App.R.138 at p.143, bears upon the history of the offence:

"The offence of bigamy, so far as it is a temporal offence, was created in the first place by the statute 2 Jac. I, c. 11, which the industry of Mr. Havers has discovered for us. It is there provided: 'If any person or persons within His Majesty's Dominions of England and Wales, being married, or which hereafter shall marry, do at any time after the end of the session of this present Parliament, marry any person or persons, the former husband or wife being alive; that then every such offence shall be felony'. It is perfectly clear from that first section which I have read that what is aimed at there is what I may call polygamy and not merely bigamy, not merely a second marriage but any number of marriages, because the words are 'shall marry any person or persons'. Then there is a proviso: 'Provided always that this Act nor any thing therein contained shall extend to any person or persons whose husband or wife shall be continually remaining beyond the seas by the space of seven years together, or whose husband or wife shall absent him or herself the one from the other by the space of seven years together, in any parts within His Majesty's Dominions, the one of them not knowing the other to be living within that time'.

It is perfectly clear that under that statute the defence of absence for seven years without knowledge of the spouse being alive was a defence, however many times the ceremony of marriage had been gone through. I need not take up time by reading the next statute, the *Offences against the Person Act*, 1828, because the section in the *Offences against the Person Act* with which we are immediately concerned, that is to say, section 57 of the *Offences against the Person Act*, 1861, is in substance in the same form."

Subsec.(1)(b) is the result of conflicting decisions in *R. v. BRIERLY* (1888), 14 O.R.525, and *R. v. PLOWMAN* (1894), 25 O.R.656. Earlier with particular reference to the case of *MACLEOD v. A.-G. for N.S. WALES*, [1891] A.C. 455, the following discussion took place in Parliament (Hansard 1892, Vol. II, Col.3463):

"MR. FRASER: Could a citizen of Canada visit a foreign country and go through such form of marriage and return here, and not come within the jurisdiction of Canada for purposes of prosecution?

SIR JOHN THOMPSON: Yes.

**OLD CODE:***Section 308—continued*

(4) *No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such person being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage.*

(5) *Every form of marriage shall for the purpose of this section be valid, notwithstanding any act or default of the person charged with bigamy, if it is otherwise a valid form.*

MR. FRASER: Does the Minister say that Parliament would have no power in such a case?

SIR JOHN THOMPSON: Yes. We are following, in that respect, the decision given with respect to the jurisdiction of the Australian Parliament, that although the words used covered beyond the territorial jurisdiction of the Parliament, the Parliament had no authority and its legislation must be confined to its jurisdiction and interpreted accordingly. While it is morally the same offence to commit the offence outside our jurisdiction, all we can do is to punish any person who leaves this country for the purpose of committing it."

However, in 1897 the question of the validity of the bigamy sections was referred to the Supreme Court of Canada. That Court held that the Parliament of Canada has jurisdiction to constitute the leaving Canada of a British subject resident therein with intent to perform elsewhere a prohibited act, an indictable offence, upon the act itself being performed. The Court held also, that a British subject domiciled in Canada, and only temporarily absent, continues to owe to Her Majesty in relation to her government of Canada, an obligation to refrain from the completion, whilst absent without any *animus manendi*, of a prohibited act, a material part of which is committed by him in Canada: *Re BIGAMY SECTIONS*(1897), 1 C.C.C.172.

Notwithstanding the power of Parliament, by virtue of *the Statute of Westminster*, 1931, to pass laws having extra-territorial effect, it has not been thought advisable to extend the law as previously established.

Subsec.(2) sets out various defences that are open to a person accused. Clause (a) which appeared first in the E.D.C., was the result of another conflict of decision. A note in Parl. Paper No. 140, (1879, U.K.) says that "As the law now stands it is doubtful whether a person who marries a second time during the life of his wife, believing her to be dead, but within seven years of the last occasion on which he saw or heard of her, is guilty of bigamy. The case of *R. v. GIBBONS* (12 Cox,C.C.237) decides that he is. The case of *R. v. MOORE* (13 Cox,C.C.544) decides that he is not. Section 216 (of the Draft Code) is framed in accordance with *R. v. GIBBONS*." See also *R. v. TOLSON*(1889), 16 Cox,C.C.629, to the latter effect.

It was held in England in *R. v. CURGENWEN*(1865), 10 Cox,C.C.152, that it was for the prosecution to prove that the accused knew that his wife was living at the time of the second marriage. *R. v. LUMLEY* (1869), 11 Cox,C.C.274, is similar in effect. A Canadian case, *R. v. WELCH*(1931), 57 C.C.C.202, is the same in principle but there it was held that the circumstances were such as to leave no reasonable doubt

**Section 240—continued**

that accused knew. And in *R. v. BROOKS*(1944), 81 C.C.C.240, it was found that accused had readily available means of knowledge that her husband was alive.

As to clause(c), it was held in *R. v. MORGAN*(1942), 78 C.C.C.129, that it is not a defence that accused *bona fide* (although mistakenly), believed that he had been divorced from the first marriage.

As to clause(d) it was held in *R. v. TUCKER*(1953), 8 W.W.R. (N.S.) 184, that the burden is on the accused to prove that the first marriage was dissolved by a decree that Canadian courts recognize as valid.

The proof of the offence is affected by a new provision in subsec.(2) of the next section, concerning the receipt in evidence of a certificate of marriage. It may be illustrated by a reference to *WYER v. WYER*, [1947] 3 D.L.R.579, in which a certificate of entry made in England was received in evidence under the *Evidence Act*, 1851, (Imp.) which was held still to be in force in Ontario. However, it would appear that, where the first marriage, as distinguished from the "form of marriage" gone through on the second occasion, is a foreign marriage, the words "issued under the authority of law" will still make evidence necessary to show the law of the jurisdiction in which it took place.

**PUNISHMENT.—Certificate of marriage.**

**241. (1) Every one who commits bigamy is guilty of an indictable offence and is liable to imprisonment for five years.**

**(2) For the purposes of this section a certificate of marriage issued under the authority of law is *prima facie* evidence of the marriage or form of marriage to which it relates without proof of the signature or official character of the person by whom it purports to be signed.**

Subsec.(1) comes from the former s.309 with changes in penalty. It was s.276 in the Code of 1892, and s.217 in the E.D.C., being adapted there from s.57 of the *Offences against the Person Act*, 1861 (Imp.).

Subsec.(2) is new. See note to s.240 above.

As to evidence of wife or husband, see s.749, *post*.

**PROCURING FEIGNED MARRIAGE.—Corroboration.**

**242. (1) Every male person who**  
**(a) procures, or**  
**(b) knowingly aids in procuring,**  
**a feigned marriage between himself and a female person is guilty of an indictable offence and is liable to imprisonment for five years.**

**(2) No person shall be convicted of an offence under this section upon the evidence of only one witness unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.**

Subsec.(1) is the former s.309(2) unchanged except as to penalty. It was s.277 in the Code of 1892, and s.1 in the R.S.C. 1886, c.161, an *Act respecting offences relating to the Law of Marriage*, where it was adapted from pre-Confederation statutes of Upper Canada, Nova Scotia, and New Brunswick.

As to evidence, see s.749, *post*.

Subsec.(2) is the former s.1002(d). See notes to s.131, *ante*.

**OLD CODE:**

309. Every one is guilty of an indictable offence and liable to seven years' imprisonment for the first offence, and fourteen years for a second or subsequent offence, who commits bigamy.

(2) Every one is guilty of an indictable offence and liable to seven years' imprisonment who procures a feigned or pretended marriage between himself and any woman, or who knowingly aids and assists in procuring such feigned or pretended marriage.

1002. No person accused of an offence under any of the hereunder mentioned sections shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused:—

. . . . .  
(d) Offences under Part VI, section three hundred and one and subsection two of section three hundred and nine;

310. Every one is guilty of an indictable offence and liable to imprisonment for five years, and to a fine of five hundred dollars

(a) who practises, or, by the rites, ceremonies, forms, rules, or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by any other method whatsoever, and whether in a manner recognized by law as a binding form of marriage or not, agrees or consents to practise or enter into

(i) any form of polygamy,

(ii) any kind of conjugal union with more than one person at the same time, or

(iii) what among the persons commonly called Mormons is known as spiritual or plural marriage; or

(b) who lives, cohabits, or agrees or consents to live or cohabit in any kind of conjugal union with a person who is married to another or with a person who lives or cohabits with another or others in any kind of conjugal union; or

(c) celebrates, is a party to, or assists in any rite or ceremony which purports to make binding or to sanction any of the sexual relationships mentioned in paragraph (a) of this section; or

(d) procures, enforces, enables, is a party to, or assists in the compliance with, or carrying out of, any form, rule or custom which so purports; or

(e) procures, enforces, enables, is a party to, or assists in the execution of, any form of contract which so purports, or the giving of any consent which so purports.

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**POLYGAMY.—Conjugal union.—Celebrating rite.—Evidence in case of polygamy.**

**243. (1) Every one who**

**(a) practises or enters into or in any manner agrees or consents to practise or enter into**

**(i) any form of polygamy, or**

**(ii) any kind of conjugal union with more than one person at the same time,**

**whether or not it is by law recognized as a binding form of marriage; or**

**(b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (i) or (ii) of paragraph (a),**

**is guilty of an indictable offence and is liable to imprisonment for five years.**



**OLD CODE:**

309. Every one is guilty of an indictable offence and liable to seven years' imprisonment for the first offence, and fourteen years for a second or subsequent offence, who commits bigamy.

(2) Every one is guilty of an indictable offence and liable to seven years' imprisonment who procures a feigned or pretended marriage between himself and any woman, or who knowingly aids and assists in procuring such feigned or pretended marriage.

1002. No person accused of an offence under any of the hereunder mentioned sections shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused:—

• • • • •  
(d) Offences under Part VI, section three hundred and one and subsection two of section three hundred and nine;

310. Every one is guilty of an indictable offence and liable to imprisonment for five years, and to a fine of five hundred dollars

(a) who practises, or, by the rites, ceremonies, forms, rules, or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by any other method whatsoever, and whether in a manner recognized by law as a binding form of marriage or not, agrees or consents to practise or enter into

(i) any form of polygamy,

(ii) any kind of conjugal union with more than one person at the same time, or

(iii) what among the persons commonly called Mormons is known as spiritual or plural marriage; or

(b) who lives, cohabits, or agrees or consents to live or cohabit in any kind of conjugal union with a person who is married to another or with a person who lives or cohabits with another or others in any kind of conjugal union; or

(c) celebrates, is a party to, or assists in any rite or ceremony which purports to make binding or to sanction any of the sexual relationships mentioned in paragraph (a) of this section; or

(d) procures, enforces, enables, is a party to, or assists in the compliance with, or carrying out of, any form, rule or custom which so purports; or

(e) procures, enforces, enables, is a party to, or assists in the execution of, any form of contract which so purports, or the giving of any consent which so purports.

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**POLYGAMY.—Conjugal union.—Celebrating rite.—Evidence in case of polygamy.**

**243. (1) Every one who**

**(a) practises or enters into or in any manner agrees or consents to practise or enter into**

**(i) any form of polygamy, or**

**(ii) any kind of conjugal union with more than one person at the same time,**

**whether or not it is by law recognized as a binding form of marriage; or**

**(b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (i) or (ii) of paragraph (a),**

**is guilty of an indictable offence and is liable to imprisonment for five years.**

Section 243—*continued*

(2) Where an accused is charged with an offence under this section, no averment or proof of the method by which the alleged relationship was entered into, agreed to or consented to is necessary in the indictment or upon the trial of the accused, nor is it necessary upon the trial to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse.

Subsec.(1) is the former s.310 omitting cl.(a)(iii), "what among the persons commonly called Mormons is known as spiritual or plural marriage."

Subsec.(2) is the former s.948.

These were ss.278 and 706 in the Code of 1892, and came from 53 Vict., c.37, s.11(Can.).

Of this legislation it was said (Hansard 1892, Vol. II, col. 3322):

"It was inserted the first time three years ago, when an attempt was made to put down offences connected with Mormonism and plural marriages, and after considering the laws of each state in the United States, which attempted to deal with this question, we found that that was the best way we could express it, and the section received very careful attention on both sides of the House."

Taschereau's Code of 1892, p.288, cites the case of *R. v. LISTON* (unreported), Toronto, April 1893, in which Armour, C.J., held that adultery is not indictable under this section.

The section seems to apply only in the case of some sort of contract to live together, and not to a living together of one person with a married person of the opposite sex without any such contract: *R. v. EASTMAN*(1932), 58 C.C.C.218 at p.229.

"We think the crucial words of s-s.(b) are 'any kind of conjugal union;' that these words predicate some form of union under the guise of marriage, and that Parliament had no intention in this section of the Code of dealing with the question of adultery. The section is headed 'Polygamy and Spiritual Marriages, . . . . . and was aimed at prohibition of polygamy under any guise:" *R. v. TOLHURST et al.*(1937), 68 C.C.C.319.

See also notes to s.157, *ante*.

Where an Indian according to tribal custom, took two women as his wives at the same time, he was convicted under this section: *R. v. BEAR'S SHIN BONE*(1899), 3 C.C.C.329.

## UNLAWFUL SOLEMNIZATION OF MARRIAGE.

## PRETENDING TO SOLEMNIZE MARRIAGE.—Procuring unlawful marriage.

## 244. Every one who

(a) solemnizes or pretends to solemnize a marriage without lawful authority, the proof of which lies upon him, or

(b) procures a person to solemnize a marriage knowing that he is not lawfully authorized to solemnize the marriage,

is guilty of an indictable offence and is liable to imprisonment for two years.

**OLD CODE:**

948. *In the case of any indictment under section three hundred and ten (b), (c) and (d), no averment or proof of the method in which the sexual relationship charged was entered into, agreed to or consented to, shall be necessary in any such indictment, or upon the trial of the person thereby charged; nor shall it be necessary upon such trial to prove carnal connection had or intended to be had between the persons implicated.*

311. *Every one is guilty of an indictable offence and liable to a fine, or to two years' imprisonment, or to both, who,*

*(a) without lawful authority, the proof of which shall lie on him, solemnizes or pretends to solemnize any marriage; or*

*(b) procures any person to solemnize any marriage knowing that such person is not lawfully authorized to solemnize such marriage, or knowingly aids or abets such person in performing such ceremony.*

312. *Every one is guilty of an indictable offence and liable to a fine, or to one year's imprisonment, who, being lawfully authorized, knowingly and wilfully solemnizes any marriage in violation of the laws of the province in which the marriage is solemnized.*

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This is the former s.311. It was s.279 in the Code of 1892 and came from R.S.C. 1886, c.161, s.2.

See s.749, *post*, and notes following next section.

A limitation previously existing in s.1140(1)(b)(iii) is not continued.

**MARRIAGE CONTRARY TO LAW.**

**245. Every one who, being lawfully authorized to solemnize marriage, knowingly and wilfully solemnizes a marriage in violation of the laws of the province in which the marriage is solemnized is guilty of an indictable offence and is liable to imprisonment for two years.**

This is the former s.312. It was s.280 in the Code of 1892 and s.3 of R.S.C. 1886, c.161.

S.244 deals with those who, without authority, purport to perform marriages; s.245 deals with those who, although authorized, perform marriages otherwise than in accordance with the law. The authority is derived from the provinces.

In 1912 the Judicial Committee of the Privy Council had occasion to consider the marriage laws of Canada upon appeal from opinions given by the Supreme Court in answer to certain questions submitted to it in relation thereto. The following appears in [1912] A.C. 880, at p.887:

"Their Lordships have arrived at the conclusion that the jurisdiction of the Dominion Parliament does not, on the true construction of ss. 91 and 92 (of the B.N.A. Act, 1867), cover the whole field of validity. They consider that the provision in s.92 conferring on the provincial Legislature the exclusive power to make laws relating to the solemnization of marriage in the province operates by way of exception to the powers conferred as regards marriage by s.91, and *enables the provincial Legislature to enact conditions as to solemnization which may affect the validity of the contract.*" [Italics added].

In *R. v. DICKOUT* (1893), 24 O.R.250, the Court considered the words "church and religious denomination" in a provincial act in rela-

**Section 245—continued**

tion to "The Reorganized Church of Jesus Christ of Latter Day Saints." Armour, C.J., said:

"The statute should receive a wide construction. It does not say 'Christian,' but 'religious'. If it said 'Christian,' it would exclude Jews. The fundamental law of the Province makes no distinction between churches or denominations. Every person is at liberty to worship his Maker in the way he pleases. We have, or ought to have, perfect freedom of speech and perfect freedom of worship."

*R. v. DICKOUT* was considered in *R. v. BROWN* (1908), 14 C.C.C. 87 in relation to "The First Christian Chinese Church, Toronto" an independent body. The history of the provincial legislation is traced (p.95) from 1792 when marriages were performed by Church of England clergymen and certain military officers, through legislation in 1798, 1831, 1847, 1857, 1883 and 1891, which successively widened it to include bodies that were able to satisfy the authorities concerning their status. The conclusion was that the congregation in question, being without affiliation and without rites and ceremonies of ordination, was not qualified as a church and religious denomination within the statute. Meredith, J.A., at p.99, pointed to the special provisions made for the Disciples of Christ, the Salvation Army, and the Quakers, and said:

"It is obvious that the clergymen and ministers who may perform the religious ceremony of marriage are the clergymen and ministers of established and generally recognized churches and religious denominations."

A conviction under s.311 was affirmed.

**BLASPHEMOUS LIBEL.**

**OFFENCE.—Question of fact.—Saving.**

**246. (1) Every one who publishes a blasphemous libel is guilty of an indictable offence and is liable to imprisonment for two years.**

**(2) It is a question of fact whether or not any matter that is published is a blasphemous libel.**

**(3) No person shall be convicted of an offence under this section for expressing in good faith and in decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion upon a religious subject.**

This is the former s.198. It was s.170 in the Code of 1892, where it was said to be new, and s.141 in the E.D.C., where a marginal note ascribes it to 9 & 10 Wm. III, c.35, and 53 Geo. III, c.100, "somewhat altered in conformity with an opinion said to have been expressed by Coleridge, J., in *R. v. POOLEY*." This reference was amplified in the report (p.22): "Section 141 provides a punishment for blasphemous libels, which offence we deem it inexpedient to define otherwise than by the use of that expression. As, however, we consider that the essence of the offence (regarded as a subject for criminal punishment) lies in the outrage which it inflicts upon the religious feelings of the community, and not in the expression of erroneous opinions, we have added a proviso to the effect that no one shall be convicted of a blasphemous libel only for expressing in good faith and decent language any opinion whatever upon any religious subject."

**OLD CODE:**

198. Every one is guilty of an indictable offence and liable to one year's imprisonment who publishes any blasphemous libel.

(2) Whether any particular published matter is a blasphemous libel or not is a question of fact: Provided that no one is guilty of a blasphemous libel for expressing in good faith and in decent language, or attempting to establish by arguments used in good faith and conveyed in decent language, any opinion whatever upon any religious subject.

2. par.(23) "newspaper," in the sections of the Act relating to defamatory libel, means any paper, magazine or periodical containing public news, intelligence or occurrences, or any remarks or observations thereon, printed for sale and published periodically or in parts or numbers, at intervals not exceeding thirty-one days between the publication of any two such papers, parts or numbers, and also any paper, magazine or periodical printed in order to be dispersed and made public, weekly or oftener, or at intervals not exceeding thirty-one days, and containing only or principally advertisements;

There follows the reference to *R. v. POOLEY*, as to which, however, Stephen's Criminal Law, Vol. II, p.475 says: "I am disposed to think that in the case in question, Mr. Justice Coleridge laid down the law too favourably to Pooley."

It has been held in England that it is blasphemy to publish matter which is calculated to hold up to ridicule or contempt the theology or tenets of the Christian religion: *R. v. RAMSAY and FOOTE*, 15 Cox, C.C.231; *R. v. BRADLAUGH*(1883), 15 Cox,C.C.217.

In *R. v. RAHARD*, [1936]3 D.L.R.230, a clergyman was convicted under this section when it was found that he had expressed opinions on a religious question in such a way as to offend the religious convictions of others whose beliefs were different, and in such a way as possibly to lead to a breach of the peace.

It may be a question whether an attack on a faith other than Christianity would also fall within the section. In *BOWMAN v. SECULAR SOCIETY*, [1917]A.C.406, Lord Sumner said, at p.460:

"After all, to insult a Jew's religion is not less likely to provoke a fight than to insult an Episcopalian; and, on the other hand, the publication of a dull volume of blasphemies may well provoke nothing worse than throwing it into the fire."

This may be compared with the expressions quoted from *R. v. DICKOUT*, under s.244 *ante*, and see also the notes on group libel following s.166, *ante*.

**DEFAMATORY LIBEL.****"NEWSPAPER."**

247. In sections 248 to 267, "newspaper" means any paper, magazine or periodical containing public news, intelligence or reports of events, or any remarks or observations thereon, printed for sale and published periodically or in parts or numbers, at intervals not exceeding thirty-one days between the publication of any two such papers, parts or numbers, and any paper, magazine or periodical printed in order to be dispersed and made public, weekly or more often, or at intervals not exceeding thirty-one days, that contains advertisements, exclusively or principally.

**Section 247—continued**

This is the former s.2(23). It was s.3(p-1) in the Code of 1892 and was derived from the *Newspaper Libel and Registration Act*, 1881, 44 & 45 Vict., c.60. That Act, together with *Fox's Libel Act*, 32 Geo. III, c.60, and *Lord Campbell's Act*, 6 & 7 Vict., c.96, are the main sources of the law relating to defamatory libel as it was codified in ss.227-243 of the E.D.C. and enacted in the Code of 1892. In Canada, the subject was dealt with in R.S.C. 1886, c.163, and as to procedure, in R.S.C. 1886, c.174.

As to procedure, see s.421(2), place of trial; s.494, indictment; s.497, particulars; s.546, selection of jury; ss.631 and 632, costs.

In 1 Hawk. P.C. 543 there is a note that a grand jury should not find an indictment unless the offence be of such signal enormity that it may reasonably be construed to have a tendency to disturb the peace and harmony of the community. It is for this reason that criminal libel is usually regarded as a private matter and left to the person defamed to prosecute as a private prosecutor.

**DEFINITION.—Mode of expression.**

**248. (1) A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.**

**(2) A defamatory libel may be expressed directly or by insinuation or irony**

- (a) in words legibly marked upon any substance, or**
- (b) by any objects signifying a defamatory libel otherwise than by words.**

This is the former s.317. It was s.285 in the Code of 1892 and s.227 in the E.D.C. with a note that "This is the existing law, the criminality of libel depending on the tendency to produce a breach of the peace." See also notes to s.166.

The words "insinuation or irony" refer to what is otherwise known as the innuendo, a meaning not apparent on the face of the words, connecting them with the person defamed.

Although the word "libel" is used in criminal law with various adjectives, "seditious", "obscene", "blasphemous", "defamatory", it is only for defamatory libel that there is a statutory definition, and only for it a defence of truth or justification: *R. v. BRADLAUGH*(1883), 15 Cox, C.C.217, and see s.261, *post*.

**"PUBLISHING."**

**249. A person publishes a libel when he**

- (a) exhibits it in public,**
- (b) causes it to be read or seen, or**
- (c) shows or delivers it, or causes it to be shown or delivered, with intent that it should be read or seen by the person whom it defames or by any other person.**

This is the former s.318. It was s.286 in the Code of 1892, and s.228 in the E.D.C. Publication may be made to the person defamed: *R. v. COYER*(1917), 27 C.C.C.10.

**OLD CODE:**

317. A defamatory libel is matter published, without legal justification or excuse, likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or designed to insult the person of or concerning whom it is published.

(2) Such matter may be expressed either in words legibly marked upon any substance whatever, or by any object signifying such matter otherwise than by words, and may be expressed either directly or by insinuation or irony.

318. Publishing a libel is exhibiting it in public, or causing it to be read or seen, or showing or delivering it, or causing it to be shown or delivered, with a view to its being read or seen by the person defamed or by any other person.

333. Every one is guilty of an indictable offence and liable to two years' imprisonment, or to a fine not exceeding four hundred dollars, or to both, who publishes any defamatory libel knowing the same to be false.

334. Every one is guilty of an indictable offence and liable to one year's imprisonment, or to a fine not exceeding two hundred dollars, or to both, who publishes any defamatory libel.

**PUNISHMENT OF LIBEL KNOWN TO BE FALSE.**

**250. Every one who publishes a defamatory libel that he knows is false is guilty of an indictable offence and is liable to imprisonment for five years.**

**PUNISHMENT FOR DEFAMATORY LIBEL.**

**251. Every one who publishes a defamatory libel is guilty of an indictable offence and is liable to imprisonment for two years.**

Ss.250 and 251 are the former ss.333 and 334 with increases in penalty. As to fines on individuals see s.622, *post*, and on corporations, s.623, *post*.

In *MENARD v. R.*(1933), 55 Que. K.B.98 it was held that a judgment against a defendant for damages in a civil action for libel, was not a bar to a criminal prosecution for the same libel.

In *R. v. UNWIN*(1938), 69 C.C.C.197, Harvey, C.J.A., quoted from *R. v. WICKS*(1936), 25 Cr.App.R.168, the observation that "the best and often the only way of proving that a statement was known to be false by the person who made it is to prove that he had the means of such knowledge."

**EXTORTION BY LIBEL.—Punishment.**

**252. (1) Every one commits an offence who, with intent**  
**(a) to extort money from any person, or**  
**(b) to induce a person to confer upon or procure for another person an appointment or office of profit or trust,**  
**publishes or threatens to publish or offers to abstain from publishing or to prevent the publication of a defamatory libel.**

**(2) Every one commits an offence who, as the result of the refusal of any person to permit money to be extorted or to confer or procure an appointment or office of profit or trust, publishes or threatens to publish a defamatory libel.**

**(3) Every one who commits an offence under this section is guilty of an indictable offence and is liable to imprisonment for five years.**

Section 252—*continued*

This is the former s.332. It was s.300 in the Code of 1892 and s.241 in the E.D.C., where it was adapted from *Lord Campbell's Act*, 6 & 7 Vict., c.96. As to other forms of blackmail, see s.291 and *R. v. CAMERON*, noted under s.408, *post*, and, as to threats generally, s.316, *post*.

**PROPRIETOR OF NEWSPAPER PRESUMED RESPONSIBLE.**—General authority to manager when negligence.—Selling newspapers.

253. (1) The proprietor of a newspaper shall be deemed to publish defamatory matter that is inserted and published therein, unless he proves that the defamatory matter was inserted in the newspaper without his knowledge and without negligence on his part.

(2) Where the proprietor of a newspaper gives to a person general authority to manage or conduct the newspaper as editor or otherwise, the insertion by that person of defamatory matter in the newspaper shall, for the purposes of subsection (1), be deemed not to be negligence on the part of the proprietor unless it is proved that

(a) he intended the general authority to include authority to insert defamatory matter in the newspaper, or

(b) he continued to confer general authority after he knew that it had been exercised by the insertion of defamatory matter in the newspaper.

(3) No person shall be deemed to publish a defamatory libel by reason only that he sells a number or part of a newspaper that contains a defamatory libel, unless he knows that the number or part contains defamatory matter or that defamatory matter is habitually contained in the newspaper.

This is the former s.329. It was s.297 in the Code of 1892, and was contained in s.238 of the E.D.C. where a marginal note, referring to the general authority contemplated by subsec.2, called attention to the fact that the section contained some alteration of the provisions of *Lord Campbell's Act*, in view of a difference of opinion concerning it in *R. v. HOLBROOK*(1878), L.R. 4 Q.B.D. 42. In that case a majority held that the editor's general authority must be taken to mean authority to conduct the newspaper according to law, and, therefore, not to authorize the publication of a libel.

In *R. v. MOLLEUR*(1905), 12 C.C.C.8, where the accused set up the defence provided by subsec.(1), it was held that the Crown might prove the publication of similar libels by the same editor in order to establish liability on the part of the accused from his continuing the editor's authority.

Subsec.(3) was referred to in *MAIDNEY v. FILDES*(1932), 60 C.C.C. 7 at p.15.

See s.247 for definition of newspaper.

**SELLING BOOK CONTAINING DEFAMATORY LIBEL.**—Sale by servant.—Exemption of master.

254. (1) No person shall be deemed to publish a defamatory libel by reason only that he sells a book, magazine, pamphlet or other thing, other than a newspaper that contains defamatory matter if, at the time of the sale, he does not know that it contains the defamatory matter.



**OLD CODE:**

332. Every one is guilty of an indictable offence and liable to two years' imprisonment, or to a fine not exceeding six hundred dollars, or to both, who publishes or threatens to publish, or offers to abstain from publishing, or offers to prevent the publishing of, a defamatory libel with intent to extort any money, or to induce any person to confer upon or procure for any person any appointment or office or profit or trust, or in consequence of any person having been refused any such money, appointment or office.

329. Every proprietor of any newspaper is presumed to be criminally responsible for defamatory matter inserted and published therein, but such presumption may be rebutted by proof that the particular defamatory matter was inserted in such newspaper without such proprietor's cognizance, and without negligence on his part.

(2) General authority given to the person actually inserting such defamatory matter to manage or conduct, as editor or otherwise, such newspaper, and to insert therein what he in his discretion thinks fit, shall not be negligence within this section unless it be proved that the proprietor, when originally giving such general authority, meant that it should extend to inserting and publishing defamatory matter, or continued such general authority knowing that it had exercised by inserting defamatory matter in any number or part of such newspaper.

(3) No one is guilty of an offence by selling any number or part of such a newspaper, unless he knew either that such number or part contained defamatory matter, or that defamatory matter was habitually contained in such newspaper.

330. No one commits an offence by selling any book, magazine, pamphlet or other thing, whether forming part of any periodical or not, although the same contains defamatory matter, if, at the time of such sale, he did not know that such defamatory matter was contained in such book, magazine, pamphlet or other thing.

(2) The sale by a servant of any book, magazine, pamphlet or other thing, whether periodical or not, shall not make his employer criminally responsible in respect of defamatory matter contained therein, unless it be proved that such employer authorized such sale knowing that such book, magazine, pamphlet or other thing contained defamatory matter, or, in case of a number or part of a periodical, that defamatory matter was habitually contained in such periodical.

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(2) Where a servant, in the course of his employment, sells a book, magazine, pamphlet or other thing, other than a newspaper, the employer shall be deemed not to publish any defamatory matter contained therein unless it is proved that the employer authorized the sale knowing that

- (a) defamatory matter was contained therein, or
- (b) defamatory matter was habitually contained therein, in the case of a periodical.

This is the former s.330. It was s.298 in the Code of 1892, and s.239 in the E.D.C. See s.247 for definition of newspaper.

**PUBLISHING PROCEEDINGS OF COURTS OF JUSTICE.**

255. No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter

- (a) in a proceeding held before or under the authority of a court exercising judicial authority, or

Section 255—*continued*

**(b) in an inquiry made under the authority of an Act or by order of Her Majesty, or under the authority of a public department or a department of the government of a province.**

This is the former s.320. It was s.288 in the Code of 1892, and s.230 in the E.D.C. This section is closely linked with the provisions relating to contempt of court, as to which see s.9, *ante* and notes thereto. The following cases also are relevant. Lopes, L.J., in *HUNT v. CLARKE* (1889), 58 L.J.Q.B.490, at p.494 said:

"I am of opinion that the reports in newspapers of pending cases in Court, with comments upon those cases, are to be discouraged, and I think it is the duty of the Court to exercise its summary jurisdiction if it is of opinion that any such reports are calculated to prejudice a litigant in a trial then pending."

*HOPE v. LENG* (1907), 23 L.T.R.243, was an action for defamation in respect of a newspaper report of an action in the County Court. The Plaintiff in that action was alleged to have said, not in his evidence, that statements made by H. were "false and a pack of lies from beginning to end". A jury returned a verdict for £100 damages. On appeal this was set aside, it being held that the report was fair and accurate. Collins, M.R.:

"The report was a report in a daily newspaper, and it was not to be judged by the same standard of accuracy which would be adopted if they were criticizing a law report of a professional law reporter. It must be regarded from the standpoint of persons whose function it was to give the public a fair account of what had taken place in a court of justice. . . ."

It was contended that an observation made by Mr. Wilson was not made by him in the witness-box, and that therefore the report of it did not come within the protection accorded to reports of legal proceedings. He was not prepared to hold that an observation made by a litigant in a case when he was not actually in the witness-box could not be reported without risk of liability on the part of the reporter, if it was in fact made in Court in the course of legal proceedings. It might be that a more liberal view of the immunity of reporters was taken now than used to be taken in former times. The law had accommodated itself to prevailing conditions, and common sense was allowed a larger share in determining the rights of parties to litigation of this sort."

*LYNAM v. GOWLING* (1880), 6 L.R.Ir.259, was an action for libel involving a question of publication, although not in a newspaper. The defendant, a coroner, pleaded that at an inquest held by him, the plaintiff was examined as a witness and that, at the close of his testimony, one C., a clergyman, stated in open Court that part of the plaintiff's testimony was "very little short of perjury". The defendant reported the inquest, including this circumstance, to the Chief Secretary for the Lord Lieutenant of Ireland. Fitzgerald, B., said:

"Assuming that the fourth paragraph of the defence can be treated as pleading a fair report, for the public good, of the proceedings in a court of justice, that would not warrant the report of slander concerning the plaintiff uttered by a by-stander in the course of such pro-

**OLD CODE:**

320. *No one commits an offence by publishing any defamatory matter, in any proceeding held before or under the authority of any court exercising judicial authority, or in any inquiry made under the authority of any statute or by order of His Majesty, or of any of the departments of government, Dominion or provincial.*

ceedings."

It was held too that the slander uttered was "no part of such proceedings" nor was it shown that the person to whom it was communicated "had any interest in the clergyman's opinion of the veracity of the plaintiff as a witness on his oath."

This case was referred to in *FARMER v. HYDE*, [1937]1 All E.R. 773, an action for libel. During the hearing a person who was neither a party nor a witness (but whose conduct had been commented upon) interrupted and said, "May I make an application? I want to correct the many lies that have been told in this court." Only one witness had given evidence before the interruption and he brought an action for libel against several newspapers which had reported it. Slessor, L.J., at p.778:

"In such a case, we should be brought within the ambit of cases which are constantly happening in the courts, in which parties, either by themselves or by counsel, seek, either with or without success—and generally, I think, without—to get the judge to allow a statement to be made on their behalf. Strictly speaking, although the judge may have jurisdiction to hear them, he has no jurisdiction to decide anything, because there is no issue and no *lis* in which they are concerned. Nevertheless, it is clear, to my mind, that such an application would be made 'in the course of the proceedings', and it does not, to my mind, make any difference that, in the course of the application, defamatory matter is published about somebody else, which is the matter with which the section deals (Law of Libel Amendment Act, 1888, s. 3), or that it is done with a malicious mind. . . . .

It is sufficient to consider whether this application, which was made to the judge by Mr. Davidson—not interposed by a by-stander in the court, as in the Irish case—was in the nature of proceedings publicly heard before any court. I think it was, and, so far as these newspapers are concerned, it was a fair and accurate report of those proceedings, and, consequently, the statute affords to the owners of those newspapers a complete protection."

**PARLIAMENTARY PAPERS.**

**256. No person shall be deemed to publish a defamatory libel by reason only that he**

- (a) publishes to the Senate or House of Commons or to a legislature, defamatory matter contained in a petition to the Senate or House of Commons or to the legislature, as the case may be,
- (b) publishes by order or under the authority of the Senate or House of Commons or of a legislature, a paper containing defamatory matter, or

Section 256—*continued*

(c) publishes, in good faith and without ill-will to the person defamed, an extract from or abstract of a petition or paper mentioned in paragraph (a) or (b).

This is the former s.321. It was s.289 in the Code of 1892 and s.231 in the E.D.C. See also the next section, and s.266, *post*, as to publication under authority of a legislature.

**FAIR REPORTS OF PARLIAMENTARY OR JUDICIAL PROCEEDINGS.—**Divorce proceedings an exception.

257. (1) No person shall be deemed to publish a defamatory libel by reason only that he publishes in good faith, for the information of the public, a fair report of the proceedings of the Senate or House of Commons or a legislature, or a committee thereof, or of the public proceedings before a court exercising judicial authority, or publishes, in good faith, any fair comment upon such proceedings.

(2) This section does not apply to a person who publishes a report of evidence taken or offered in any proceeding before the Senate or House of Commons or any committee thereof, upon a petition or bill relating to any matter of marriage or divorce, if the report is published without authority from or leave of the House in which the proceeding is held or is contrary to any rule, order or practice of that House.

Subsec.(1) is the former s.322(1). It was s.290 in the Code of 1892 where its origin is given as 51-52 Vict. c.64 (Imp.). It does not differ from s.232 of the E.D.C. in any substantial way.

Subsec.(2) is the former s.322(2) which came into the Code as 1923, c.11, s.1. See also s.151, *ante*.

This section again touches the matter of contempt of court if publication may result in prejudice to parties litigant. On this point reference should be made to s.9, *ante*, but with that limitation, the following may be quoted as showing the general policy of the law.

In addressing the Grand Jury in *R. v. SULLIVAN*(1868), 11 Cox, C.C.44, at p.49 (a trial for seditious libel), Fitzgerald, J. said:

"With respect to the question of the freedom of the press, I feel bound to say a few words. Since 1692 there was complete liberty of the press in Great Britain and Ireland. By liberty of the press I mean complete freedom to write and publish without censorship and without restriction, save such as was absolutely necessary for the preservation of society. Our civil liberty is largely due to a free press, which is the principal safeguard of a free State, and the very foundation of a wholesome public opinion. Every man is free to write as he thinks fit, but he is responsible to the law for what he writes; he is not, under the pretence of freedom, to invade the rights of the community, or to violate the constitution, or to promote insurrection, or endanger the public peace, or create discontent, or bring justice into contempt, or embarrass its functions. In dealing with the case before me, I will tell you that political or party writing, when confined within proper and lawful limits, is not only justifiable, but is protected for the public good, and such writings are to be regarded in a free and liberal spirit. A writer may criticize or censure the conduct of the servants of the

**OLD CODE:**

321. No one commits an offence by publishing to either the Senate, or House of Commons, or to any Legislative Council, Legislative Assembly or House of Assembly, defamatory matter contained in a petition to the Senate, or House of Commons, or to any such Council or Assembly, or by publishing by order or under the authority of the Senate, or House of Commons, or of any such Council or Assembly, any paper containing defamatory matter or by publishing, in good faith and without ill-will to the person defamed, any extract from or abstract of any such paper.

322. No one commits an offence by publishing in good faith, for the information of the public, a fair report of the proceedings of the Senate or House of Commons, or any committee thereof, or of any council or assembly aforesaid, or any committee thereof, or of the public proceedings preliminary or final heard before any court exercising judicial authority, nor by publishing, in good faith, any fair comment upon any such proceedings.

(2) Nothing in this section shall make it lawful to publish a report of any evidence taken or offered in any proceeding had before the Senate or the House of Commons, or any committee of the Senate or the House of Commons, upon any petition or bill relating to any matter of marriage or divorce, if the report is published without authority from or leave of the House in which the proceeding was had or contrary to any rule, order or practice of that House.

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Crown or the acts of the Government—he can do it freely and liberally, but it must be without malignity, and not imputing corrupt or malicious motives; with the same motives a writer may freely criticize the proceedings of courts of justice and of individual judges—nay, he is invited to do so, and to do so in a free and fair and liberal spirit. The law does not seek to put any narrow construction on the expressions used, and only interferes when plainly and deliberately the limits are passed of frank and candid and honest discussion.”

In *WASON v. WALTER* (1868), L.R. 4 Q.B.73 at pp.93, 94, Cockburn, C.J., said:

“Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both Houses of Parliament, on Judges and other functionaries are now made every day, which half a century ago would have been the subject of actions or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties.”

and again, with reference to the report of *ex parte* proceedings:

“It would probably be held that the true criterion of the privilege is not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected.”

**FAIR REPORT OF PUBLIC MEETING.**

**258. No person shall be deemed to publish a defamatory libel by reason only that he publishes in good faith, in a newspaper, a fair report of the proceedings of any public meeting if**

- (a) the meeting is lawfully convened for a lawful purpose and is open to the public,
- (b) the report is fair and accurate,
- (c) the publication of the matter complained of is for the public benefit, and
- (d) he does not refuse to publish in a conspicuous place in the newspaper a reasonable explanation or contradiction by the person defamed in respect of the defamatory matter.

This is the former s.323. It was s.291 in the Code of 1892 where Taschereau's edition describes it as new. It does not appear in the E.D.C., but it does adapt s.4 of the *Law of Libel Amendment Act, 1888* (U.K.).

See notes to preceding section.

**PUBLIC BENEFIT.**

**259. No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter that, on reasonable grounds, he believes is true, and that is relevant to any subject of public interest, the public discussion of which is for the public benefit.**

This is the former s.324. It was s.292 in the Code of 1892 and s.233 in the E.D.C.

The general considerations relating to this and other grounds of privilege in the accompanying sections are covered by the notes following ss.166, 248 and 257, *ante*. They require, of course, to be applied to many varying states of fact.

In *R. v. BRAZEAU* (1899), 3 C.C.C.89, at p.91, the following appears: "In placing himself before the public as a public benefactor and a model master, the complainant has provoked criticism as well as admiration. If the criticism is proved to be unfair . . . . his vindication will be the more complete. If, on the contrary, it be fair and reasonable, and founded on facts substantially true, the complainant will have to bear with it."

Public interest: See annotation 3 C.C.C.92. Odgers on Libel and Slander, 6th ed. p.169, cites *SOUTH HETTON COAL CO. LTD. v. NORTH EASTERN NEWS ASS'N.*, [1894] 1 Q.B.133 at p.141, and *DAKHYL v. LABOUCHERE*, The Times, July 29, 1904, as authority for the proposition that the Court decides whether the matter commented on is one of public interest.

**FAIR COMMENT.—On public person.—On work of art or literature.**

**260. No person shall be deemed to publish a defamatory libel by reason only that he publishes fair comments**

- (a) upon the public conduct of a person who takes part in public affairs, or
- (b) upon a published book or other literary production, or on any composition or work of art or performance publicly ex-

**OLD CODE:**

323. *No one commits an offence by publishing in good faith, in a newspaper, a fair report of the proceedings of any public meeting if the meeting is lawfully convened for a lawful purpose and open to the public, and if such report is fair and accurate, and if the publication of the matter complained of is for the public benefit, and if the defendant does not refuse to insert in a conspicuous place in the newspaper, in which the report appeared a reasonable letter or document of explanation or contradiction by or on behalf of the prosecutor.*

324. *No one commits an offence by publishing any defamatory matter which he, on reasonable grounds, believes to be true, and which is relevant to any subject of public interest, the public discussion of which is for the public benefit.*

325. *No one commits an offence by publishing fair comments upon the public conduct of a person who takes part in public affairs.*

(2) *No one commits an offence by publishing fair comments on any published book or other literary production, or on any composition or work of art or performance publicly exhibited, or on any other communication made to the public on any subject, if such comments are confined to criticism of such book or literary production, composition, work of art, performance or communication.*

331. *It shall be a defence to an indictment or information for a defamatory libel that the publishing of the defamatory matter in the manner in which it was published was for the public benefit at the time when it was published, and that the matter itself was true.*

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**hibited, or on any other communication made to the public on any subject, if the comments are confined to criticism thereof.**

This is the former s.325. It was s.293 in the Code of 1892, and s.235 in the E.D.C.

The section does not protect personal attacks. In *SIR JOHN CARR v. HOOD* (1808), 1 Camp. 355, n, the following appears:

"Show me an attack upon the moral character of the plaintiff, or any attack upon his character unconnected with his authorship, and I should be as ready as any Judge who ever sat here to protect him. But I cannot hear of malice on account of turning his works into ridicule."

Although this refers in terms to authors, the principle would apply to par.(a) also. As to this, it may be noticed that the remedy of criminal information is abolished by this Code (s.488(2)).

**WHEN TRUTH A DEFENCE.**

**261. No person shall be deemed to publish a defamatory libel where he proves that the publication of the defamatory matter in the manner in which it was published was for the public benefit at the time when it was published and that the matter itself was true.**

This is the former s.331. It was s.299 in the Code of 1892, and s.240 in the E.D.C.

This is a special plea. See ss.520 and 521, *post*. Under the latter, if justification is not pleaded, the truth of the published matter is not to be inquired into unless the accused is charged with publishing it *knowing it to be false*. In such a case evidence that it was true may be given to rebut that allegation.

**Section 261—continued**

In *R. v. GRENIER* (1897), 1 C.C.C.55, a plea of justification was struck out. The following appears at p.57:

"Instead of being a concise pleading setting forth simply the truth of the libel, its publication for the public benefit and the facts which rendered its publication for the public good, his plea is verbose and covers twenty-six pages of printed matter, contains paragraphs which are purely statements of comment and argument, and embodies letters which are referred to as evidence of his pretensions. In its present state it is therefore irregular and illegal."

**PUBLICATION INVITED OR NECESSARY.**

**262. No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter**

- (a) on the invitation or challenge of the person in respect of whom it is published, or
  - (b) that it is necessary to publish in order to refute defamatory matter published in respect of him by another person,
- if he believes that the defamatory matter is true and it is relevant to the invitation, challenge or necessary refutation, as the case may be, and does not in any respect exceed what is reasonably sufficient in the circumstances.

This is the former s.319. It was s.287 in the Code of 1892, and s.229 in the E.D.C.

**ANSWER TO INQUIRIES.**

**263. No person shall be deemed to publish a defamatory libel by reason only that he publishes, in answer to inquiries made to him, defamatory matter relating to a subject matter in respect of which the person by whom or on whose behalf the inquiries are made has an interest in knowing the truth or who, on reasonable grounds, the person who publishes the defamatory matter believes has such an interest, if**

- (a) the matter is published, in good faith, for the purpose of giving information in answer to the inquiries,
- (b) the person who publishes the defamatory matter believes that it is true,
- (c) the defamatory matter is relevant to the inquiries, and
- (d) the defamatory matter does not in any respect exceed what is reasonably sufficient in the circumstances.

This is the former s.327. It was s.295 in the Code of 1892, and s.236 in the E.D.C.

**GIVING INFORMATION TO PERSON INTERESTED.—Conditions.**

**264. No person shall be deemed to publish a defamatory libel by reason only that he publishes to another person defamatory matter for the purpose of giving information to that person with respect to a subject matter in which the person to whom the information is given has, or is believed on reasonable grounds by the person who gives it to have, an interest in knowing the truth with respect to that subject matter if**



**OLD CODE:**

319. No one commits an offence by publishing defamatory matter on the invitation or challenge of the person defamed thereby, nor if it is necessary to publish such defamatory matter in order to refute some other defamatory statement published by that person concerning the alleged offender, if such defamatory matter is believed to be true, and is relevant to the invitation, challenge or required refutation, and the publishing does not in manner or extent exceed what is reasonably sufficient for the occasion.

327. No one commits an offence by publishing in answer to inquiries made of him, defamatory matter relating to some subject as to which the person by whom, or on whose behalf, the inquiry is made has, or on reasonable grounds is believed by the person publishing to have, an interest in knowing the truth, if such matter is published for the purpose, in good faith, of giving information in respect thereof to that person, and if such defamatory matter is believed to be true, and is relevant to the inquiries made, and also if such publishing does not in manner or extent exceed what is reasonably sufficient for the occasion.

328. No one commits an offence by publishing to another person defamatory matter for the purpose of giving information to that person with respect to some subject as to what he has, or is, on reasonable grounds, believed to have, such an interest in knowing the truth as to make the conduct of the person giving the information reasonable under the circumstances, if such defamatory matter is relevant to such subject, and is either true, or is made without ill-will to the person defamed, and in the belief, on reasonable grounds, that it is true.

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- (a) the conduct of the person who gives the information is reasonable in the circumstances,
  - (b) the defamatory matter is relevant to the subject matter, and
  - (c) the defamatory matter is true, or if it is not true, is made without ill-will towards the person who is defamed and is made in the belief, on reasonable grounds, that it is true.

This is the former s.328. It was s.296 in the Code of 1892, and s.237 in the E.D.C. where reference is made to *COXHEAD v. RICHARDS* (1846), 15 L.J.C.P.278. In that case the defendant received a letter derogatory of a ship's captain, which he showed to the owner in the belief that it was his duty to do so, although he knew nothing of the matter apart from the letter. The trial judge charged the jury that the publication was privileged, and they found that there was no malice.

**PUBLICATION IN GOOD FAITH FOR REDRESS OF WRONG.**

265. No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter in good faith for the purpose of seeking remedy or redress for a private or public wrong or grievance from a person who has, or who on reasonable grounds he believes has the right or is under an obligation to remedy or redress the wrong or grievance, if

- (a) he believes that the defamatory matter is true,
- (b) the defamatory matter is relevant to the remedy or redress that is sought, and
- (c) the defamatory matter does not in any respect exceed what is reasonably sufficient in the circumstances.

**Section 265—continued**

This is the former s.326. It was s.294 in the Code of 1892, and s.235 in the E.D.C. It is declaratory of the common law: Hansard, 1892, col. 3325.

**PROVING PUBLICATION BY ORDER OF LEGISLATURE.—Directing verdict.**  
**—Certificate of order.**

**266. (1)** An accused who is alleged to have published defamatory libel may, at any stage of the proceedings, adduce evidence to prove that the matter that is alleged to be defamatory was contained in a paper published by order or under the authority of the Senate or House of Commons or a legislature.

**(2)** Where at any stage in proceedings referred to in subsection (1) the court, judge, justice or magistrate is satisfied that matter alleged to be defamatory was contained in a paper published by order or under the authority of the Senate or House of Commons or a legislature, he shall direct a verdict of not guilty to be entered and shall discharge the accused.

**(3)** For the purposes of this section a certificate under the hand of the Speaker or clerk of the Senate or House of Commons or a legislature to the effect that the matter that is alleged to be defamatory was contained in a paper published by order or under the authority of the Senate, House of Commons or legislature, as the case may be, is conclusive evidence thereof.

This combines the former ss.912, 913 and 947. They come from R. S.C. 1886, c.163, 1868, c.23, and 3 & 4 Vict., c.9 (Imp.). See s.256, *ante*, and notes thereto.

## VERDICTS.

### VERDICTS IN CASES OF DEFAMATORY LIBEL.

**267.** Where, on the trial of an indictment for publishing a defamatory libel, a plea of not guilty is pleaded, the jury that is sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon the indictment, and shall not be required or directed by the judge to find the defendant guilty merely on proof of publication by the defendant of the alleged defamatory libel, and of the sense ascribed thereto in the indictment, but the judge may, in his discretion, give a direction or opinion to the jury on the matter in issue as in other criminal proceedings, and the jury may, on the issue, find a special verdict.

This is the former s.956. It was s.719 in the Code of 1892, am. 1908, c.18, s.12. It was taken from R.S.C. 1886, c.174, s.152 and 32 Geo. III, c.60 (Imp.).

## OLD CODE:

326. No one commits an offence by publishing defamatory matter for the purpose, in good faith, of seeking remedy or redress for any private or public wrong or grievance from a person who has, or is reasonably believed by the person publishing to have, the right or to be under obligation to remedy or redress such wrong or grievance, if the defamatory matter is believed by the person publishing the same to be true, and is relevant to the remedy or redress sought, and such publishing does not in manner or extent exceed what is reasonably sufficient for the occasion.

912. Every person against whom any criminal proceedings are commenced or prosecuted in any manner for or on account of or in respect of the publication of any report, paper, votes or proceedings, by such person or by his servant, by order or under the authority of any legislative council, legislative assembly or house of assembly, may submit to the court in which such proceedings are so commenced or prosecuted, or before any judge of the same, upon twenty-four hours' notice of his intention so to do, to the prosecutor in such proceedings, or to his attorney or solicitor, a certificate under the hand of the speaker or clerk of such legislative council, legislative assembly or house of assembly, as the case may be, verified by affidavit stating that the report, paper, votes or proceedings, as the case may be, in respect whereof such criminal proceedings are commenced or prosecuted, was or were published by such person, or by his servant, by order or under the authority of the legislative council, legislative assembly or house of assembly, as the case may be.

(2) Such court or judge shall, upon such certificate being so submitted, immediately stay such criminal proceedings, and the same shall thereupon be deemed finally ended, determined and superseded.

913. In any criminal prosecution for or on account or in respect of the publication of any copy of such report, paper, votes or proceedings, the defendant may submit to the court or judge before which or whom such prosecution is pending a copy of such report, paper, votes or proceedings, verified by affidavit, and the court or judge shall immediately stay such criminal prosecution, and the same shall thereupon be deemed to be finally ended, determined and superseded.

947. In any criminal proceeding commenced or prosecuted for publishing any extract from, or abstract of, any paper containing defamatory matter, which has been published by order or under the authority of the Senate, House of Commons or any legislative council, legislative assembly or house of assembly, such paper may be given in evidence, and it may be shown that such extract or abstract was published in good faith and without ill-will to the person defamed, and if such is the opinion of the jury, a verdict of not guilty shall be entered for the defendant.

956. On the trial of any indictment or information for the making or publishing of any defamatory libel, on the plea of not guilty pleaded, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed, by the court or judge before whom such indictment or information is tried, to find the defendant guilty merely on the proof of publication by such defendant of the paper charged to be a defamatory libel, and of the sense ascribed to the same in such indictment or information; but the court or judge before whom such trial is had shall, according to the discretion of such court or judge, give the opinion and direction of such court or judge to the jury on the matter in