PART IX.

WILFUL AND FORBIDDEN ACTS IN RESPECT OF CERTAIN PROPERTY.

INTERPRETATION.

"PROPERTY."

370. In this Part, "property" means real or personal corporeal property.

This definition is new and is necessary in view of the elimination of the particulars set out in the sections now covered by s.372. Its generality is justified by the references to "any property, real or personal, corporeal or incorporeal" in the former s.510(d)(v) and (e) and s.539.

Property, to be damaged, must be corporeal. Byrne's L.D. says that: "In its largest sense 'property' signifies things and rights considered as having a money value, especially with reference to transfer or succession, *and to their capacity of being injured.*"

"WILFULLY."—Colour of right.—Partial interest.—Total interest.

371. (1) Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.

(2) No person shall be convicted of an offence under sections 372 to 387 where he proves that he acted with legal justification or excuse and with colour of right.

(3) Where it is an offence to destroy or to damage anything,

(a) **the fact that a person has a partial interest in what is destroyed or damaged does not prevent him from being guilty of the offence if he caused the destruction or damage, and**

(b) **the fact that a person has a total interest in what is destroyed or damaged does not prevent him from being guilty of the offence if he caused the destruction or damage with intent to defraud.**

Subsec.(1) is the former s.509 altered to apply also to a wilful omission. For general discussion of the words "wilful" and "wilfully" see notes to s.24, *ante* p.70. S.509 was s.481(1) in the Code of 1892 and formed part of s.381 in the E.D.C.

In *R. v. ENTWHISTLE*(1926), 47 C.C.C.121, it was held that proof that the accused did an act causing damage to personal property which he knew would probably cause the damage, being reckless whether damage occurred or not, is sufficient proof that his act was wilful within ss.509 and 510.

In *R. v. SLUSAR*(1935), 65 C.C.C.91:

"It is to be noted that the cans of paint were in the window, so that the idea of breaking them and spilling their contents would be present to the mind of the appellant, from which it follows that the dam-

OLD CODE:

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

541. Nothing shall be an offence under any of the foregoing provisions of this Part unless it is done without legal justification or excuse, and without colour of right.

(2) Where the offence consists in any injury to anything in which the offender has an interest, the existence of such interest, if partial, shall not prevent his act being an offence, and if total, shall not prevent his act being an offence if done with intent to defraud: Provided however, that in any prosecution for any offence under sections five hundred and eleven, five hundred and twelve, five hundred and thirteen, five hundred and fourteen or five hundred and sixteen, where the accused is the holder of or is named as a beneficiary under a fire insurance policy in respect to the property in connection with which the offence is alleged, such facts shall be prima facie evidence of intent to defraud.

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age to the office premises was part of the event which, according to the above definition of 'wilfully' (*i.e.*, in s.509) the appellant must be held to have known that he would probably cause by throwing the rock through the window."

In *R. v. PETERSON*, [1928]3 W.W.R.516, it was held that the act of the accused in shooting a silver black fox which had escaped was not done wilfully within the meaning of s.509 since it was done in protection of his own property.

Subsecs.(2) and (3) are derived from the former s.541. The proviso in s.541(2) referring to the holders of insurance, is s.376, *post*. Otherwise s.541 came from s.481(2) and (3) in the Code of 1892 which were part of s.381 in the E.D.C. There was a saving as to colour of right in 24 and 25 Vict., c.97 (Imp.) also.

With reference to what now appears as s.371(3), Taschereau's Code of 1892 quotes Greaves as saying that it will apply to tenants who injure demised premises or anything growing on or annexed to them, for the purpose of injuring their landlords.

In subsec.(2) the words "where he proves" effect a change by making it clear that the provision creates a *defence*. On this point, there seems previously to have been some doubt.

In *R. v. KOZAK*(1947), 88 C.C.C.350, which is directly in point, Bird, J.A., delivering the judgment of the British Columbia Court of Appeal in a case of arson, referred to the omission of a reference to Code section 509 from the judge's charge and proceeded:

"The omission to refer to *Criminal Code* s.541, more particularly subsec.(1) thereof, has caused me more difficulty, as I take it that subsec.(1) cast an added burden upon the Crown, i.e., to prove, in addition to the elements of the offence prescribed by s.511, the absence of legal justification or excuse, and of colour of right."

On the other hand in *R. v. GILL*(1908), 14 C.C.C.294, a case in which the accused was convicted under s.521, of wilful damage by breaking insulators forming part of the telegraph line of the C.P.R., Anglin, J., said (at p.301):

Section 371—*continued*

"I think section 541 makes a provision in the nature of a proviso or exception, and, being in a subsequent clause and not in the enacting part of the section creating the offence, *such proviso or exception is a matter of defence or excuse* which need not be noticed in the information or conviction."

This case points out also the difference in procedure when the offence is indictable and not punishable under summary conviction sections. To understand the difference in procedure, reference should be made to certain statements which appear in Paley on Summary Convictions. At page 324 of the 9th ed., of that work, the following appears:

"The general rule of law dispenses with proof of a negative, and casts the burden of establishing the exception in the affirmative upon the party seeking to protect himself under it. . . . . The duty of magistrates, however, in this particular seemed, by the effect of decided authorities, to be governed by a different rule from that which prevails in trials at common law, and to require the production of some evidence to negative the existence of such exemptions as are incorporated with the offence, or at least to authorize a conclusion of their non-existence."

R. v. JARVIS(1757), 1 Burr.148; *R. v. MARRIOTT*(1718), 1 Stra. 66; *R. v. STONE*(1801), 1 East 639 are cited as authorities in this connection, but there does not seem to be a unanimous opinion, and it is said (p.325) that "two of the learned Judges of the Court of Queen's Bench in the same case (*i.e., R. v. STONE*) were of opinion that the general rule of law, as acted upon in courts of justice, ought to govern the proceedings of justices; and therefore, that no evidence of the want of qualification ought to be required from the prosecutor." At p. 516 of the same work, the following rule is quoted:

"Where the enacting clause of a statute constitutes an act to be an offence under certain circumstances and not under others, then as the act is an offence only *sub modo,* the particular exceptions must be expressly specified and negatived; but where a statute constitutes an act to be an offence generally, and in a subsequent clause makes a proviso or exception in favour of particular cases or in the same clause, but not in the enacting part of it, by words of reference or otherwise, *there the proviso is a matter of defence or excuse,* which need not be noticed in the information or conviction."

It may be noted here that the first part of this rule as to the statement of the offence, was applied in *R. v. EDMONTON BREWING CO.* (1923), 40 C.C.C.236, with the added comment that "not all limitations of the generality of the offence are included under the words exception, exemption, proviso, excuse or qualification", and it was held that the charge should have referred to the sections of the Alberta *Liquor Act* regarding brewers. This, however, does not refer to the burden of proof.

Paley again quotes from the judgment in *SIMPSON v. READY*(1844), 12 M. & W.736 at p.740:

"There is a manifest distinction between a proviso and an exception. If an exception occurs in the description of the offence in the statute, the exception must be negatived, or the party will not be brought with-

in the description. But if the exception comes by way of proviso and does not alter the offence, but merely states what persons are to take advantage of it, *then the defence must be specially pleaded, or may be given in evidence under the general issue,* according to circumstances."

This rule was followed in Canada in *R. v. STRAUSS*(1897), 1 C.C.C. 103.

Paley's discussion, in the end, comes back to a section of the English *Summary Jurisdiction Act,* which is identical with s.717 (now s.702) of the *Criminal Code* of Canada. With reference to summary convictions, s.541 must be read with s.717 and also with s.1125(c) (now s.684(c)). S.717 read as follows:

"Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, by-law, regulation or other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint and whether it is or is not so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant."

It should be noted that this section, which formerly read "any exemption, exception, proviso or condition", was re-enacted in 1909 with the words "excuse or qualification" substituted for the word "condition" and that the clause "whether it does or does not accompany in the same section the description of the offence" did not appear in the earlier section. In *BELGO-CANADIAN PULP AND PAPER COMPANY v. COURT OF SESSIONS*(1919), 33 C.C.C.310, a prosecution under the *Lord's Day Act,* the new and old sections 717, were referred to, and it is said:

"The complaint should contain all that is required to constitute a breach. Now in our case, the complaint contains all that sec. 5 (*Lord's Day Act*) requires in order to constitute the breach therein mentioned. *This is all that the complainant had to do; it is all that he had to prove. It remained to the accused or to the prisoner to plead all the reasons for exemption or exceptions which are in his favour.*"

And Mr. Justice Letellier added that:

"all the authorities cited by the applicant do not apply, or no longer apply since the coming into force of ss. 717 and 1125 of the Criminal Code." [Italics added.]

Colour of Right.

The E.D.C. contained, in s.381, the following:

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

and a marginal note explains that "this renders the word 'unlawfully' superfluous in many sections of this Part."

The interpretation of this expression contained in the New Zealand case of *R. v. FETZER*(1900), 19 N.Zeal.L.R.438, quoted below, has been generally adopted.

Section 371—*continued*

In *R. v. JOHNSON*(1904), 7 O.L.R.525, at p.530, Boyd, C., said:
"According to Sir John Thompson's exposition of this clause in the House of Commons, legal justification and colour of right must both be absent in order to make the accused liable: Crankshaw's Criminal Code, 1st ed., p.871.

I find a further and a judicial exposition of this sub-section in a New Zealand case, where the Criminal Code is in much the same lines and words as the Canadian Code. The discussion is on the meaning of the phrase 'colour of right,' and Mr. Justice Edwards says: 'The context of the words shews the sense in which they are used in this section. Legal justification or excuse is an answer to a criminal charge under this part of the Act as it would be in a civil action. Then follow the words 'and without colour of right'. This means, I think, an honest belief in a state of facts which, if it existed, would be a legal justification or excuse. This would not be an answer to a civil action, but it is properly made an answer to a criminal charge, because it takes away from the act its criminal character. Less than this, in my opinion, cannot be held to be "colour of right":' p.443. And to like tenour Mr. Justice Williams, who says at p.442: 'The act was done wilfully; and, being done without legal justification or excuse, the accused would be properly convicted unless he acted under some colour of right . . . . . To do an act in ignorance that it is prohibited by law is not to do it with colour of right. There must be at least an honest belief in the existence of a state of facts which, if it actually existed, would at law justify or excuse the act done:' *R. v. FETZER*(1900), 19 N.Zeal.L.R.138.

These words commend themselves to me as a satisfactory definition of the phrase used in the Code, and I adopt them in disposing of this case."

This was followed in *R. v. SPEIGAL*(1932), 58 C.C.C.297, a case of theft by conversion, in which however, it was held that there was no colour of right.

There is a review of authorities in *R. v. WATIER*(1910), 15 W.L.R. 427(Y.T.). At page 431, Craig, J., said:
"The question is, what is a bona fide claim or right which would relieve the accused from criminal liability? In the case of *R. v. JOHNSON*(1904), 7 O.L.R.525, Chancellor Boyd said (p.530): 'There is no criminal offence unless the act of damages is done "without legal justification or excuse" and without "colour of right".' And he cites a New Zealand case and adopts the language of the learned Judges there, who said, referring to the words 'without colour of right': 'This means, I think, an honest belief in a state of facts which, if it existed, would be a legal justification or excuse. This would not be an answer to a civil action, but it is properly made an answer to a criminal charge, because it takes away from the act its criminal character . . . . . There must be at least an honest belief in the existence of a state of facts which, if it actually existed, would at law justify or excuse the act done.' And in *REGINA v. DAIGLE*(1909), 15 C.C.C. 55, it was

held: 'The question to be put to the jury is this: did the defendants do what they did in the exercise of a supposed right?' I do not think that definition is as clear and as good as the one already cited. In the case of *REGINA v. DAVEY*(1900), 4 C.C.C.28, the rule there laid down by Lister, J. A., who delivered the judgment of the Court, was: 'It is, I think, settled that an honest belief on the part of the person charged that he has the right to do the act does not oust the magistrate's jurisdiction. What the section of the Code requires in order to oust the jurisdiction of the magistrate is that the act shall be done under a fair and reasonable supposition of right. Whether such supposition is warranted is for the magistrate to determine on the evidence.' "

After some further discussion of the section the judgment proceeds:

"This is not a reasonable view to take of his legal rights, and I would go further, perhaps, than the authorities cited, and say this, that a man must be reasonable, in view of all that he ought to know and does know, in coming to the conclusion that he has any legal right to do what he does. Stupidity in regard to his legal rights will not excuse, and a hazy belief that he has a mixed legal and moral right will not excuse."

In *R. v. DAIGLE*(1909), 15 C.C.C.55, the defendants were charged with wilful damage in the removal of a fence. *R. v. JOHNSON* and *R. v. FETZER, supra,* were quoted at length. The defendants set up a right which was held to exist, but it was found that they had gone further than was necessary for the assertion of that right and they were held liable for the excess.

Legal Justification or Excuse.

"Justification is an affirming or showing good reason in court why he did such a thing as he is called to answer" (Cowel), cited Stroud's Judicial Dictionary. "Justification. In pleading. The allegation of matter of fact by the defendant establishing his legal right to do the act complained of by the plaintiff." Bouvier's Law Dictionary.

Roscoe's Criminal Evidence, 14th ed., p.811, refers to the provision now under discussion as in substance a plea of self defence.

Interpreting the proviso in the *Malicious Injuries to Property Act,* 24 & 25 Vict., c.97 (Imp.), that "nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of", Cockburn, C.J., in *WHITE v. FEAST*(1872), L.R. 7 Q.B.353, used these words:

"By the proviso such *prima facie* wrongdoer is not entitled to call upon the magistrates to hold their hands, *unless he gives them sufficient evidence* to convince them that he acted under a fair and reasonable supposition that he had a right to do the act although he may have honestly believed that he was justified in doing the act."

Blackburn, J., said:

"As the proviso expressly says that the claim of right must be founded on reasonable grounds, the ordinary proviso usually implied as to mere *bona fides,* is superseded."

Section 371—*continued*

There have been other cases but they do not appear to raise any difference in principle. For example, it was held in *R. v. MALCOLM* (1883), 2 O.R.511, following *WHITE v. FEAST, supra,* that the existence of a fair and reasonable supposition of right was a fact to be adjudicated upon by the convicting justice upon the evidence. This dictum was approved in *R. v. McDONALD*(1886), 12 O.R.381, but was distinguished as follows:

> "But that means, firstly, that the defendant has given evidence to that effect, and secondly, that there is a conflict of testimony on the point. It does not apply where the whole facts show that the matter of charge itself is one in which such reasonable supposition exists; or, in other words, that the case and the evidence are all one way in that respect, and in favour of the defendant, which is the case here."

R. v. DAVEY(1900), 4 C.C.C.28, is to the same effect.

Again, the words "without lawful excuse" have been applied, especially in cases of non-support under the former s.242 where these words appear in the section creating the offence. For example, in *R. v. NASMITH*(1877), 42 U.C.Q.B.242, it was said that "It must not be overlooked that the prosecution is a criminal one, and that unless the presumption of innocence is overthrown by clear proof of such facts as are necessary to constitute criminal responsibility under the Act, there should be an acquittal." This requirement that the presumption of innocence must be displaced would appear to be in accord with the rule above quoted from Paley, that some evidence must be produced to negative the existence of such exemptions as are incorporated with the offence. *R. v. NASMITH* was followed in *R. v. ROBINSON*(1897), 1 C.C.C.28. Another case, *R. v. ROBINSON*(1907), 12 C.C.C.447, turned upon the words "without lawful cause" in Code section 185, by which it was an offence for a person under sentence of imprisonment to be at large. That section, however, threw the burden of proof on the accused. It was held that the accused had lawful cause in that the magistrate, although erroneously, had released him on recognizance.

MISCHIEF.

DESTRUCTION OR DAMAGE.—Rendering property dangerous, etc.—Obstructing use of property.—Obstructing person in use of property.—Punishment.—Offence.—Saving.

372. (1) Every one commits mischief who wilfully

(*a*) destroys or damages property,

(*b*) renders property dangerous, useless, inoperative or ineffective,

(*c*) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property, or

(*d*) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

(2) Every one who commits mischief that causes actual danger to life is guilty of an indictable offence and is liable to imprisonment for life.

OLD CODE:

96. All persons are guilty of an indictable offence and liable to imprisonment for life who, being riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force demolish or pull down, or begin to demolish or pull down, any building, or any machinery, whether fixed or movable, or any erection used in farming land, or in carrying on any trade or manufacture, or any erection or structure used in conducting the business of any mine, or any bridge, wagonway or track for conveying minerals from any mine.

97. All persons are guilty of an indictable offence and liable to seven years' imprisonment who, being riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force injure or damage any of the things mentioned in the last preceding section.

(2) It shall not be a defence to a charge of an offence against this or the last preceding section that the offender believed he had a right to act as he did, unless he actually had such a right.

238. Every one is a loose, idle or disorderly person or vagrant who,

. . . . . .

(h) tears down or defaces signs, breaks windows, or doors or door plates, or the walls of houses, roads or gardens, or destroys fences;

. . . . . .

510. Every one is guilty of the indictable offence of mischief who wilfully destroys or damages any of the property in this section mentioned, and is liable to the punishment in this section specified, that is to say:—

(a) To imprisonment for life if the object damaged is

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

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

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

(iv) a railway damaged with the intent of rendering and so as to render such railway dangerous or impassable;

(b) To fourteen years' imprisonment if the object damaged is

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

(ii) any cattle or the young thereof, and the damage is caused by killing, maiming, poisoning or wounding;

(c) To seven years' imprisonment if the object damaged is

(i) a ship damaged with intent to destroy or render useless such ship, or

(ii) a signal or mark used for purposes of navigation, or

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

Section 372—*continued*

(3) Every one who commits mischief in relation to public property is guilty of an indictable offence and is liable to imprisonment for fourteen years.

(4) Every one who commits mischief in relation to private property is guilty of an indictable offence and is liable to imprisonment for five years.

(5) Every one who wilfully does an act or wilfully omits to do an act that it is his duty to do is, if that act or omission is likely to constitute mischief causing actual danger to life, or to constitute mischief in relation to public property or private property, guilty of an indictable offence and is liable to imprisonment for five years.

(6) No person commits mischief within the meaning of this section by reason only that

(a) **he stops work as a result of the failure of his employer and himself to agree upon any matter relating to his employment,**

(b) **he stops work as a result of the failure of his employer and a bargaining agent acting on his behalf to agree upon any matter relating to his employment, or**

(c) **he stops work as a result of his taking part in a combination of workmen or employees for their own reasonable protection as workmen or employees.**

(7) No person commits mischief within the meaning of this section by reason only that he attends at or near or approaches a dwelling house or place for the purpose only of obtaining or communicating information.

Subsecs.(1) to (5) combine the former ss.96, 97, 238(h), 510, 516B, 517 to 522, 525 and 533 to 535. See notes to ss.269 and 370 *ante*. See also s.371 (colour of right).

The former Part VIII covered all kinds of damage which might wilfully be caused to property, with punishments varying according to the kind of property, its public or private nature, the danger that was caused, the intention of the wrongdoer, and the value of the thing damaged. Some of the sections *e.g.*, 520(e) and 521(b) dealt with such acts as rendered property useless or inoperative or prevented the performance of services, but even had that not been so, it would seem to be justifiable to punish as criminal acts such wilful interference with property as will render it dangerous or useless, or prevent the use or enjoyment of it. Accordingly, s.372 has been drawn so as to cover in general terms such wilful acts as are intended or likely to result in damage or in interference with persons carrying out services where that interference is likely to result in damage.

Subsecs.(6) and (7) are new. See notes on s.365(2).

The E.D.C. s.406 proposed to create an offence in general terms similar to the former s.510(e) where damage to the value of £5 was done, and proposed whipping if the offender was a male under sixteen.

OLD CODE:

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(iv) a navigable river or canal damaged by interference with the flood gates or sluices thereof or otherwise, with intent and so as to obstruct the navigation thereof, or

(v) the flood gate or sluice of any private water with intent to take or destroy, or so as to cause the loss or destruction of, the fish therein, or

(vi) a private fishery or salmon river damaged by lime or other noxious material put into the water thereof with intent to destroy fish therein or to be put therein, or

(vii) the flood gate of any mill-pond, reservoir or pool cut through or destroyed, or

(viii) goods in process of manufacture damaged with intent to render them useless, or

(ix) agricultural or manufacturing machines, or manufacturing implements, damaged with intent to render them useless, or

(x) a hop-bind growing in a plantation of hops, or a grape vine growing in a vineyard;

(d) To five years' imprisonment if the object damaged is

(i) a tree, shrub or underwood growing in a park, pleasure ground or garden, or in any land adjoining or belonging to a dwelling-house, injured to an extent exceeding in value five dollars, or

(ii) a post letter bag or post letter, or

(iii) any street or other letter box or any receptacle, article, machine or device established or used by authority of the Postmaster General in connection with the business of the Post Office Department, or

(iv) any parcel sent by parcel post, any packet or package of patterns or samples of merchandise or goods, or of seeds, cuttings, bulbs, roots, scions or grafts, or any printed vote or proceeding, newspaper, printed paper or book or other mailable matter, not being a post letter, sent by mail, or

(v) any property, real or personal, corporeal or incorporeal, for damage to which no special punishment is by law prescribed, damaged by night to the value of twenty dollars;

(e) To two years' imprisonment if the object damaged is any property, real or personal, corporeal or incorporeal, for damage to which no special punishment is by law prescribed, damaged to the value of twenty dollars.

516B. Every one who wilfully damages or interferes with any fire protection or fire safety equipment or device so as to render it inoperative or ineffective is guilty of an indictable offence and liable to one year's imprisonment, or to a fine not exceeding five hundred dollars, or to both imprisonment and fine.

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

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

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

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

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

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Section 517—continued
(e) wilfully omits to do any act which it is his duty to do; or
(f) does any other unlawful act.
(2) Every one who does any of the acts in this section mentioned with intent to cause such danger is liable to imprisonment for life.

518. Every one is guilty of an indictable offence and liable to two years' imprisonment who, by any act or wilful omission, obstructs or interrupts, or causes to be obstructed or interrupted, the construction, maintenance or free use of any railway or any part thereof, or any matter or thing appertaining thereto or connected therewith.

519. Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the value of the goods or liquors so destroyed or damaged or to one month's imprisonment with or without hard labour, or to both, who
(a) wilfully destroys or damages anything containing any goods or liquors in or about any railway station or building or any vehicle of any kind on any railway, or in any warehouse, ship or vessel, with intent to steal or otherwise unlawfully to obtain or to injure the content, or any part thereof; or
(b) unlawfully drinks or wilfully spills or allows to run to waste any such liquors, or any part thereof.

520. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, with intent to injure a mine, oil or gas well, or obstruct the working thereof,
(a) causes any water, earth, rubbish or other substance to be conveyed into the mine, oil or gas well or any subterranean channel communicating with such mine or well; or
(b) damages any shaft or any passage of the mine or well; or
(c) damages, with intent to render useless, any apparatus, building, erection, bridge or road belonging to the mine or well, whether the object damaged be complete or not; or
(d) hinders the working of any such apparatus; or
(e) damages or unfastens, with intent to render useless any rope, chain or tackle used in any mine or well or upon any way or work connected therewith.

521. Every one is guilty of an indictable offence and liable to two years' imprisonment who wilfully
(a) destroys, removes or damages anything which forms part of, or is used or employed in or about any electric or magnetic telegraph, electric light, telephone or fire-alarm, or in the working thereof, or for the transmission of electricity for other lawful purposes; or
(b) prevents or obstructs the sending, conveyance or delivery of any communication by any such telegraph, telephone or fire-alarm, or the transmission of electricity for any such electric light, or for any such purpose as aforesaid.
(2) Every one who wilfully, by any overt act, attempts to commit any such offence is guilty of an offence and liable, on summary conviction, to a penalty not exceeding fifty dollars, or to three months' imprisonment with or without hard labour.

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

OLD CODE:

(a) casts away or destroys any ship, whether complete or unfinished;
(b) does any act tending to the immediate loss or destruction of any ship in distress; or
(c) interferes with any marine signal, or exhibits any false signal, with intent to bring a ship or boat into danger.

523. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who attempts to cast away or destroy any ship, whether complete or unfinished.

525. Every one is guilty of an indictable offence and liable to two years' imprisonment who wilfully
(a) breaks, injures, cuts, loosens, removes or destroys, in whole or in part, any dam, pier, slide, boom or other such work, or any chain or other fastening attached thereto, or any raft, crib of timber or sawlogs; or
(b) impedes or blocks up any channel or passage intended for the transmission of timber.

533. Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty-five dollars over and above the amount of the injury done, or to two months' imprisonment with or without hard labour, who wilfully destroys or damages the whole or any part of any tree, sapling or shrub, or any underwood, wheresoever the same is growing, the injury done being to the amount of twenty-five cents, at the least.
(2) Every one who, having been convicted of any such offence, afterwards commits any such offence is liable, on summary conviction, to a penalty not exceeding fifty dollars over and above the amount of the injury done, or to four months' imprisonment with hard labour.
(3) Every one who, having been twice convicted of any such offence, afterwards commits any such offence, is guilty of an indictable offence and liable to two years' imprisonment.

534. Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the amount of the injury done, or to three months' imprisonment with or without hard labour, who wilfully destroys, or damages with intent to destroy, any vegetable production growing in any garden, orchard, nursery ground, house, hothouse, green-house or conservatory.
(2) Every one who, having been convicted of any such offence, afterwards commits any such offence is guilty of an indictable offence, and liable to two years' imprisonment.

535. Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding five dollars over and above the amount of the injury done, or to one month's imprisonment with or without hard labour, who wilfully destroys, or damages with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard or nursery ground.
(2) Every one who, having been convicted of any such offence, afterwards commits any such offence is liable, on summary conviction, to three months' imprisonment with hard labour.

DAMAGE NOT MORE THAN FIFTY DOLLARS.—Compensation.—Imprisonment in default.

373. (1) Every one who wilfully destroys or damages property is, where actual danger to life is not involved, guilty of an offence punishable on summary conviction if the alleged amount of destruction or damage does not exceed fifty dollars.

(2) Where an accused is convicted of an offence under subsection (1) the summary conviction court may, in addition to any punishment that is imposed, order the accused to pay to a person aggrieved an amount not exceeding fifty dollars that appears to the summary conviction court to be reasonable compensation for the destruction or damage.

(3) The summary conviction court may order that where an amount that is adjudged to be paid as compensation under subsection (2) is not paid forthwith or within the period that the summary conviction court appoints at the time of the conviction, the accused shall be imprisoned for a term not exeeding two months.

(4) The summary conviction court may order that terms of imprisonment that are imposed under this section shall take effect one after the other.

This comes from the former ss.539 & 740. The limit of amount has been increased from twenty to fifty dollars, and by subsec.(4) imprisonment in default may be made cumulative. S.539 came from s.511(1) in the Code of 1892, R.S.C. 1886, c.168, s.59, and 53 Vict., c.37, s.18. The corresponding section in English law is s.52 of the *Malicious Injuries to Property Act,* 1861. While the same considerations as to colour of right etc., apply here as to other cases of wilful damage, this section is designed to provide a procedure whereby the whole matter may be disposed of at once where the damage is slight.

See s.714 *post,* with reference to cases where there are joint offenders. See also s.371 (colour of right).

Arson and Other Fires.

ARSON.—Fraudulently burning personal property.

374. (1) Every one who wilfully sets fire to

(*a*) a building or structure, whether completed or not,

(*b*) a stack of vegetable produce or of mineral or vegetable fuel,

(*c*) a mine,

(*d*) a well of combustible substance,

(*e*) a vessel or aircraft, whether completed or not,

(*f*) timber or materials placed in a shipyard for building, repairing or fitting out a ship,

(*g*) military or public stores or munitions of war,

(*h*) a crop, whether standing or cut down, or

(*i*) any wood, forest, or natural growth, or any lumber, timber, log, float, boom, dam, or slide,

is guilty of an indictable offence and is liable to imprisonment for fourteen years.

OLD CODE:

539. Every one who wilfully commits any damage, injury or spoil to or upon any real or personal property, either corporeal or incorporeal, and either of a public or private nature, for which no punishment is hereinbefore provided, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars, and such further sum, not exceeding twenty dollars, as appears to the justice to be a reasonable compensation for the damage, injury or spoil so committed, to be paid in the case of private property to the person aggrieved.

(2) If such sums of money, together with the costs, if ordered, are not paid either immediately after the conviction, or within such period as the justice, at the time of the conviction appoints, the justice may cause the offender to be imprisoned for any term not exceeding two months, with or without hard labour.

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

(2) The like proceeding may be had upon any conviction or order made in accordance with this or the last preceding section as if the Act, or law authorizing the conviction or order had expressly provided for a conviction or order in the terms permitted by this or the last preceding section.

511. (1) Every one is guilty of the indictable offence of arson and liable to imprisonment for a term not exceeding fifteen years who wilfully sets fire to any building or structure, whether such building or structure is completed or not, or to any stack of vegetable produce or of mineral or vegetable fuel, or to any mine or well of oil or other combustible substance, or to any ship or vessel, whether completed or not, or to any timber or materials placed in any shipyard for building or repairing or fitting out any ship or to any of His Majesty's stores or munitions of war.

(2) Every one is guilty of an indictable offence and liable to five years' imprisonment who, wilfully and for any fraudulent purpose, sets fire to any chattel having a greater value than twenty-five dollars.

513. Every one is guilty of an indictable offence and liable to five years' imprisonment who wilfully sets fire to

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

(b) any tree, lumber, timber, logs or floats, boom, dam or slide, and thereby injures or destroys the same.

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(2) Every one who wilfully and for a fraudulent purpose sets fire to personal property not mentioned in subsection (1) is guilty of an indictable offence and is liable to imprisonment for five years.

This combines the former ss.511 and 513. S.511(1) was ss.482 and 484 in the Code of 1892. In the E.D.C. these were ss.382 and 384 and were adapted there from 24 & 25 Vict., c.97, ss.1-7, 16, 17 and 26.

At common law, arson, which consists of the "malicious and voluntary burning of the house of another," is a felony. It is not arson at common law to burn one's own house, but burning one's own house in a

Section 374—*continued*

town or so near to another house as to create danger to it, is a misdemeanour at common law. To burn barns with hay or grain within them, though distant from a house and no part of the mansion, is a felony at common law. (Russell on Crimes; 9th ed., 1274.)

By statute in England this crime and the setting of other fires, are dealt with in the *Malicious Damage Act,* 1861, and the *Dock-yards, etc., Protection Act,* 1772. It may be noted in passing that in the Union of South Africa, arson is a common law crime, confined to the burning of immovables, but is drawn rather from Roman-Dutch law than from the common law of England. (Pittman, Criminal Law, p.137). The setting fire to movables is dealt with as malicious injury to property. (Pittman, p.141).

In Canada, the Act 1869, c.22, *An Act respecting Malicious Injuries to Property,* consolidated previous colonial legislation in Acts of Nova Scotia and New Brunswick, *Offences against the Habitation,* and *Malicious Injuries to Property* (N.S. 3rd Series 166-169, N.B. Chap.153), and of Canada, Chap.93, under the latter title. The Act of 1869, ss.1 to 7, declared it a felony to set fire to buildings, vessels, docks and ship yards, etc. Although the term "arson" is not used, its common law meaning seems apparent in s.8, which makes it a felony to set fire to "any matter or thing being in, against, or under any building, under such circumstances that if the building were thereby set fire to, the offence would amount to felony".

S.9 (setting fire by negligence to forest, tree, lumber, etc.) is in effect s.515(1) of the repealed Code. S.10, whereby the Magistrate might impose a fine where the consequences of the fire were not serious, is s.515(3) of the repealed Code. S.21 (setting fire to stacks of grain, etc.) and s.30 (setting fire to coal mine, oil well, etc.) were absorbed into s.511(1).

Subsec.(2) of s.511, was added in 1921. As introduced, it made it an indictable offence punishable with 14 years' imprisonment, to set fire wilfully and for any fraudulent purpose, to a chattel having a greater value than $25.00. The Minister of Justice said (Hansard 1921, Vol, 4, p.3922):

> "It is at the request of the Attorney General of Ontario, who points out that the crime of arson can only be committed with regard to the burning of something in the nature of real property. There does not seem to be any good reason why it should not be susceptible to be committed by the burning of chattels or movable things. I think the cases especially brought to his attention were the burning of automobiles."

In the Senate (1921, pp.715, 716) objection was taken that $25.00 was too small an amount. Comparison was made also with s.510(c):

> "For destroying property to the extent of $20.00, the extreme penalty is 2 years; but for destroying property to the value of $25.00, the penalty is 14 years—the difference is 12 years for $5.00."

It was argued that the offence contemplated by the new subsection was covered by Code s.510(c), but it was pointed out that the former deals with fraudulent destruction, the latter with mischievous destruction, and the subsection was passed with the amount raised to $200.00 and the penalty reduced to 5 years.

This was criticized in an article "A Critique of Canadian Criminal Legislation" by George H. Crouse (12 C.B. Rev., p.623), as containing two degrees of arson and as creating a distinction that was "unfortunate and arbitrary".

In 1938 the subsection was again amended by restoring the amount of $25.00 in substitution for $200.00. There was no specific mention of s.511(2), but it appears that the Fire Marshals were of opinion that $200.00 was too high a figure to cover secondhand furniture and secondhand automobiles. It was explained that ss.29 to 33 inclusive of the amended bill were suggested by the Fire Marshals, both federal and provincial, the purpose being "to provide for uniform punishment and to see that the maximum terms are consistent with the punishments usually provided for the offences in question. There is no new crime; it is just that the penalties are made more uniform for the same kind of offence." The effect was to reduce penalties as follows:

S.511 — life to 15 yrs.
S.512 — 14 yrs. to 5 yrs.
S.513 — 14 yrs. to 5 yrs.
S.514 — 7 yrs. to 5 yrs.
S.516 — 10 yrs. to 3 yrs.

S.541(2) (now s.376) was also amended by a proviso that in any prosecution under ss.511, 512, 513, 514 and 516, where the accused held or was named beneficiary in a fire insurance policy, such facts would be *prima facie* evidence of intention to defraud. This was included at the strong urging of the Fire Marshals in view of cases in which juries had been charged that intent to defraud was negatived by the fact that no claim had been made on the policy.

It may be said here that it is in the mention of fraud that the Canadian law differs from the English statute. In 1864 it was pointed out in the case of *R. v. GREENWOOD*(1864), 23 U.C.Q.B.250, that the Canadian statute (differing from the English Act) did not make an intent part of the crime, and that consequently it was not necessary to charge any intent. The Court said:

> "We have not seen any reason to dissent from the law as stated in *R. v. BRYANS*((1862), 12 U.C.C.P.161), in the words following: '*Prima facie* the setting fire to any house is unlawful and malicious, and consequently a felony; when it comes out that the house was the property of the person setting fire to it, something more must be proved to make the act unlawful and malicious, and proof that the act might or would be an injury to, or a fraud upon any person, and that the accused acted with that intent, would establish the unlawfulness and maliciousness of the act.' "

The Court held that in the case before it there was evidence from which it might be inferred that the prisoner's intent in setting the fire was to destroy evidence of a murder, and that in this view his act was unlawful and malicious.

In the *BRYANS* case, Richards, J. said: "I cannot doubt that charging the substantive offence of unlawfully and maliciously setting fire to a dwelling house in an indictment would be sufficient without adding the intent thereby to injure and defraud A.B."

Section 374—*continued*

In *R. v. CRONIN*(1874), 36 U.C.Q.B.342, it was held that although the indictment in such a case is sufficient without alleging any intent, there being no such averment in the statutory form, an intent to injure or defraud must be shown on the trial.

Although the words "unlawfully and maliciously" in the former code are replaced by the word "wilfully" in the present code, it is submitted that the reasoning of these cases still applies and that an indictment under ss.374(1), 375(a) and 377, would be sufficient in the terms of the sections without alleging an intent to defraud, since the main offence consists in the wilful setting of fire without further qualification.

Reverting to the amendments of 1938, it is interesting to note that by the statute of Upper Canada, 3 Wm. IV, c.3, s.11 (1833), it was provided that to set fire to any church or chapel, ... or to any house, stable, coach-house, out-house, warehouse, office, ship, mill, malt-house, barn or granary, or to any building or erection used in trade or manufacture, with intent to injure or defraud, was a felony for which the offender "shall suffer death as a felon".

In 1841 by a statute of the Province of Canada, 4 & 5 Vict., c.26, s.3, it was provided that to set fire to the premises aforesaid (omitting the intent to injure or defraud) was a felony for which the offender should be liable at the discretion of the court to be imprisoned in the penitentiary "for the term of his natural life or for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years." By s.2 of the same Act the death penalty was provided for anyone who "shall unlawfully and maliciously set fire to any dwelling house, any person being therein".

These provisions re-appear in the Consolidated Statutes of Canada, 1859, c.93, ss.2 & 4, with the exception that the minimum penalty was placed at 2 years instead of 7 years.

Other reported Canadian cases (*R. v. WEBB*(1914), 22 C.C.C.424; *R. v. UPTON*(1915), 25 C.C.C.28; *R. v. PEEL, No. 1*(1920), 34 C.C.C.390; *R. v. SHAPIRO* (1922), 40 C.C.C.14, and especially *KOUFIS v. R.*(1941), 76 C.C.C.161) turn on points of evidence rather than of interpretation.

See also s.371 (colour of right), s.375 (setting fire to other substance) and s.376 (insurance and intent to defraud).

SETTING FIRE TO OTHER SUBSTANCES.

375. Every one who

(a) **wilfully sets fire to anything that is likely to cause anything mentioned in subsection (1) of section 374 to catch fire; or**

(b) **wilfully and for a fraudulent purpose sets fire to anything that is likely to cause personal property not mentioned in subsection (1) of section 374 to catch fire,**

is guilty of an indictable offence and is liable to imprisonment for five years.

Par.(a) combines the former ss.512 and 514 without the reference to attempts, these being covered by s.406. There is some change in word-

OLD CODE:

512. (1) Every one is guilty of an indictable offence and liable to five years' imprisonment who wilfully attempts to set fire to anything mentioned in the last preceding section, or who wilfully sets fire to any substance so situated that he knows that anything mentioned in the last preceding section is likely to catch fire therefrom.

514. Every one is guilty of an indictable offence and liable to five years' imprisonment who wilfully attempts to set fire to anything mentioned in the last preceding section, or who wilfully sets fire to any substance so situated that he knows that anything mentioned in the last preceding section is likely to catch fire therefrom.

541. Nothing shall be an offence under any of the foregoing provisions of this Part unless it is done without legal justification or excuse, and without colour of right.

(2) Where the offence consists in an injury to anything in which the offender has an interest, the existence of such interest, if partial, shall not prevent his act being an offence, and if total, shall not prevent his act being an offence if done with intent to defraud: Provided however, that in any prosecution for any offence under sections five hundred and eleven, five hundred and twelve, five hundred and thirteen, five hundred and fourteen or five hundred and sixteen, where the accused is the holder of or is named as a beneficiary under a fire insurance policy in respect to the property in connection with which the offence is alleged, such facts shall be prima facie evidence of intent to defraud.

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ing, but since the provision is governed by the word "wilfully" as defined in s.371, it is submitted that there is no change in effect. Ss.512 and 514 were ss.483 and 485 in the Code of 1892, and were taken from ss.383 and 385 of the E.D.C., these being ss.27 and 18 of 24 & 25 Vict., c.97, in amended form.

Par.(b) is new and is intended to clarify a point on which there might be doubt.

See also s.371 (colour of right) and s.376 (insurance and intent to defraud).

PRESUMPTION AGAINST HOLDER OF INSURANCE.

376. Where a person is charged with an offence under section 374 or 375, evidence that he is the holder of or is named as the beneficiary under a policy of fire insurance relating to the property in respect of which the offence is alleged to have been committed is, where intent to defraud is material, *prima facie* evidence of intent to defraud.

This was formerly a proviso to s.541(2). See notes to s.374.

SETTING A FIRE BY NEGLIGENCE.—Presumption against person in control of premises.

377. (1) Every one who causes a fire

(*a*) wilfully, or

(*b*) by violating a law in force in the place where the fire occurs,

is, if the fire results in loss of life or destruction of or damage to

Section 377—*continued*

property, guilty of an indictable offence and is liable to imprisonment for five years.

(2) For the purposes of this section, the person who owns, occupies or controls property in which a fire that results in loss of life or destruction of or damage to property originates or occurs shall be deemed wilfully to have caused the fire if he has failed to comply with any law that is intended to prevent fires or that requires the property to be equipped with apparatus for the purpose of extinguishing fires or for the purpose of enabling persons to escape in the event of fire, and if it is established that the fire, or the loss of life, or the whole or any substantial portion of the destruction of or damage to the property would not have occurred if he had complied with the law.

Subsec.(1) is the former s.515(1) in more general terms. It was s.486(1) in the Code of 1892 and came from the *Malicious Injuries to Property Act,* R.S.C. 1886, c.168, s.11. The corresponding English statute did not contain a similar provision.

Subsec.(2) is the former s.515(2) which was added in 1919 as s.515(1A). In the Senate Debates (1919, p.171), it was said that "This bill is drafted along the lines of similar legislation in Europe . . . . . The fundamental purpose of the bill is to attach personal responsibility to fires, and to make applicable the criminal law" and in the House of Commons it was said (Hansard, 1919, p.157) that "This makes what before was negligence that was not criminal, negligence that is criminal."

It is submitted that this section should be read with the new provisions concerning criminal negligence (ss.191-193). Apart from the presumption raised against the owner or occupant, it should be noticed that s.191 makes it criminal negligence to do anything that shows wanton or reckless disregard for the lives or safety of others, and it would appear to be a question of fact whether, in a particular instance, for example, careless smoking as in *R. v. BECK, infra,* fell within those terms.

There have been the following cases under s.515:

R. v. ELLIS(1939), 73 C.C.C.120, turned upon a legislative conflict between s.515(4) and certain provincial legislation. It does not appear to have arisen out of a fire.

R. v. SIMON(1941), 76 C.C.C.289, arose out of an hotel fire. The trial judge pointed out that "the finding of criminal negligence is much harder arrived at than civil negligence," and acquitted the accused in the absence of proof beyond a reasonable doubt that loss of life would not have occurred had fire prevention laws been observed.

The Ontario Court of Appeal made a similar point in *R. v. BECK* (1951), 99 C.C.C.325. This prosecution arose out of a fire caused by careless smoking in a toy factory. The Court of Appeal held further that the accused had not broken a by-law under which smoking was prohibited in certain premises.

See also s.371 (colour of right or justification).

OLD CODE:

515. Every one is guilty of an indictable offence and liable to two years' imprisonment, who

(a) by such negligence as shows him to be reckless or wantonly regardless of consequences, or in violation of a provincial or municipal law of the locality, sets fire to any forest, tree, manufactured lumber, square timber, logs or floats, boom, dam or slide, on the Crown domain, or on land leased or lawfully held for the purpose of cutting timber, or on private property on any creek or river, or rollway, beach or wharf, so that the same is injured or destroyed;

(b) by negligence causes any fire which occasions loss of life or loss of property.

(2) The person owning, occupying or controlling the premises in which a fire occurs, which occasions loss of life or loss of property, or on which such fire originates, shall be deemed to have caused the fire through negligence if such person has failed to obey the requirements of any law intended to prevent fires or which requires apparatus for the extinguishment of fires or to facilitate the escape of persons in the event of fire, if the jury finds that such fire, or the loss of life, or the whole or any substantial portion of the loss of property, would not have occurred if such law had been complied with.

516A. Every one is guilty of an indictable offence and liable to one year's imprisonment who wilfully or knowingly, without reasonable cause, by outcry, ringing bells, using any fire alarm or telegraph, or in any other manner, makes or circulates, or causes to be made or circulated, an alarm of fire.

OTHER INTERFERENCE WITH PROPERTY.

FALSE ALARM OF FIRE.

378. Every one who wilfully, without reasonable cause, by outcry, ringing bells, using a fire alarm, telephone or telegraph, or in any other manner, makes or circulates or causes to be made or circulated an alarm of fire is guilty of an offence punishable on summary conviction.

This is the former s.516A with the addition of the word "telephone". The section came into the Code in 1931, by c.28, s.11. The offence is made punishable on summary conviction instead of on indictment as formerly. This, however, does not mean that it is regarded lightly—it has been pointed out, in fact, that firemen incur a good deal of danger in answering alarms. See also s.371.

INTERFERING WITH SAVING OF WRECKED VESSEL.—Interfering with saving of wreck.

379. (1) Every one who wilfully prevents or impedes, or who wilfully endeavours to prevent or impede,

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

***(b)* a person who attempts to save a vessel that is wrecked, stranded, abandoned or in distress,**

is guilty of an indictable offence and is liable to imprisonment for five years.

(2) Every one who wilfully prevents or impedes or wilfully en-

Section 379—*continued*

deavours to prevent or impede the saving of wreck is guilty of an offence punishable on summary conviction.

This is the former s.524 changed to make the offences punishable on summary conviction only. S.524 was s.496 in the Code of 1892 and came from R.S.C. 1886, c.81, ss.36(b) and 37(c).

See also s.2(43) where wreck is defined, s.227 (impeding attempt to save life) and s.371 (colour of right and justification).

INTERFERING WITH MARINE SIGNAL, ETC.

380. (1) Every one who makes fast a vessel or boat to a signal, buoy or other sea mark that is used for purposes of navigation is guilty of an offence punishable on summary conviction.

(2) Every one who wilfully alters, removes or conceals a signal, buoy or other sea mark that is used for purposes of navigation is guilty of an indictable offence and is liable to imprisonment for ten years.

This is the former s.526. It was s.495 in the Code of 1892 and came from R.S.C. 1886, c.168, ss.52 and 53, and 24 and 25 Vict., c.97, s.48 (Imp.).

Note that there is in subsec.(1) no adverb specifying intent, but see s.371 *ante*, and notes thereto.

REMOVING NATURAL BAR WITHOUT PERMISSION.

381. Every one who wilfully and without the written permission of the Minister of Transport, the burden of proof of which lies on the accused, removes any stone, wood, earth or other material that forms a natural bar necessary to the existence of a public harbour, or that forms a natural protection to such a bar, is guilty of an indictable offence and is liable to imprisonment for two years.

This is the former s.527, altered by substituting the Minister of Transport for the Minister of Marine and Fisheries, by requiring that his permission be in writing, and by making the offence indictable. As to penalty, see s.622, *post*, and see also s.371 *ante*.

S.527 came from 1893, c.32, s.1.

OCCUPANT INJURING BUILDING.

382. Every one who, wilfully and to the prejudice of a mortgagee or owner, pulls down, demolishes or removes, all or any part of a dwelling house or other building of which he is in possession or occupation, or severs from the freehold any fixture fixed therein or thereto is guilty of an indictable offence and is liable to imprisonment for five years.

This is the former s.529. It was s.504 in the Code of 1892 and is based upon R.S.C. 1886, c.168, s.15, and 24 and 25 Vict., c.97 s.13 (Imp.). See also s.371(2) and (3). Although "fixtures" may be taken in a broad sense as meaning things affixed to the realty to be used as part of the premises, the word is not capable of short, comprehensive definition. In *REYNOLDS v. ASHBY & SON*, [1904]A.C.466, involving a dispute over certain factory machinery fixed to concrete beds in the floor, Lord James

OLD CODE:

524. Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully prevents or impedes, or endeavours to prevent or impede.

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

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

(2) Every one who wilfully prevents or impedes, or endeavours to prevent or impede, the saving of any wreck is guilty of an offence punishable on indictment or on summary conviction and liable, on conviction on indictment, to two years' imprisonment, and, on summary conviction before two justices, to a fine of four hundred dollars or six months' imprisonment with or without hard labour.

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

(2) Every one who makes fast any vessel or boat to any such signal, buoy, or sea mark is liable, on summary conviction, to a penalty not exceeding ten dollars, and in default of payment to one month's imprisonment.

527. Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding fifty dollars, who wilfully and without the permission of the Minister of Marine and Fisheries, the burden of proving which permission shall lie on the accused, removes any stone, wood, earth or other material forming a natural bar necessary to the existence of a public harbour, or forming a natural protection to such bar.

529. Every one is guilty of an indictable offence and liable to five years' imprisonment who, being possessed of any dwelling-house or other building, or part of any dwelling-house or other building, which is built on lands subject to a mortgage or which is held for any term of years or other less term, or at will, or held over after the termination of any tenancy, wilfully and to the prejudice of the mortgagee or owner,

(a) pulls down or demolishes, or begins to pull down or demolish the same or any part thereof, or removes or begins to remove the same or any part thereof from the premises on which it is erected; or

(b) pulls down or severs from the freehold any fixture fixed in or to such dwelling-house or building, or part of such dwelling-house or building.

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said that the question of chattel or fixture was one of fact, and Lord Lindley said that in dealing with cases on fixtures attention must be paid not only to the nature of the thing and to the mode of attachment, but to the circumstances under which it was attached, to the purpose to be served, and to the position of the rival claimants to the things in dispute.

See s.371 (colour of right and justification).

INTERFERING WITH BOUNDARY LINES.

383. Every one who wilfully pulls down, defaces, alters or removes anything planted or set up as the boundary line or part of the boundary line of land is guilty of an offence punishable on summary conviction.

Section 383—*continued*

This is the former s.530, omitting the reference to subsequent offences. It was s.507 in the Code of 1892 and was based upon R.S.C. 1886, c.168, s.27, and 24 and 25 Vict., c.97, s.25 (Imp.).

See s.371 and notes thereto especially *R. v. DAIGLE*.

In *GOFF v. PEASLEY*(1942), 78 C.C.C.237, a conviction under s.530 was quashed on appeal when it was found that the appellant had gone upon the land in question to repair a fence, believing that he had a valid lease of the land.

INTERFERING WITH INTERNATIONAL BOUNDARY MARKS, ETC.—Saving.

384. (1) Every one who wilfully pulls down, defaces, alters or removes

(a) **a boundary mark lawfully placed to mark an international, provincial, county or municipal boundary, or**

(b) **a boundary mark lawfully placed by a land surveyor to mark a limit, boundary or angle of a concession, range, lot or parcel of land,**

is guilty of an indictable offence and is liable to imprisonment for five years.

(2) A land surveyor does not commit an offence under subsection (1) where, in his operations as a land surveyor, he takes up, when necessary, a boundary mark mentioned in paragraph *(b)* of subsection (1) and carefully replaces it as it was before he took it up.

This combines the former ss.531 and 532 with the addition of international boundaries. These sections were ss.505 and 506 in the Code of 1892 and came from R.S.C. 1886, c.168, ss.56 and 57.

In *MORISSETTE v. ST. FRANCOIS XAVIER PARISH*(1911), 18 C.C.C.291, it was held that there had been no reasonable ground for an information under s.532 as the boundary marks in question were not lawfully placed.

In *R. v. FISH, ex p. SOBEY*(1932), 4 M.P.R.390, it was held that the omission of the word "wilfully" from a charge under s.532 was fatal to a conviction.

See also s.371 (colour of right and justification).

Cattle and Other Animals.

KILLING OR INJURING CATTLE.—Placing poison.

385. Every one who wilfully

(a) **kills, maims, wounds, poisons or injures cattle, or**

(b) **places poison in such a position that it may easily be consumed by cattle,**

is guilty of an indictable offence and is liable to imprisonment for five years.

This comes from the former s.536 which was s.500 in the Code of 1892, and s.44 of R.S.C. 1886, c.168. The former section read "attempts to kill" &c, but in this section the killing has been made the offence, as

OLD CODE:

530. Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the amount of the injury done, who wilfully destroys or damages any fence, or any wall, stile or gate, or any part thereof respectively, or any post or stake planted or set up on any land, marsh, swamp or land covered by water, on or as the boundary or part of the boundary line thereof, or in lieu of a fence thereto.

(2). Every one who, having been convicted of any such offence, afterwards commits any such offence is liable, on summary conviction, to three months' imprisonment with hard labour.

531. Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully pulls down, defaces, alters or removes any mound, land mark, post or monument lawfully erected, planted or placed to mark or determine the boundaries of any province, county, city, town, township, parish or other municipal division.

532. Every one is guilty of an indictable offence and liable to five years' imprisonment, who wilfully defaces, alters or removes any mound, land mark, post or monument lawfully placed by any land surveyor to mark any limit, boundary or angle of any concession, range, lot or parcel of land.

(2) It is not an offence for any land surveyor in his operations to take up such posts or other boundary marks when necessary, if he carefully replaces them as they were before.

536. Every one is guilty of an indictable offence and liable to two years' imprisonment who wilfully

(a) attempts to kill, maim, wound, poison or injure any cattle, or the young thereof; or

(b) places poison in such a position as to be easily partaken of by any such animal.

393. Every one who unlawfully and wilfully kills, wounds or takes any housedove or pigeon, under such circumstances as do not amount to theft, is guilty of an offence and liable upon complaint of the owner thereof, on summary conviction, to a penalty not exceeding ten dollars over and above the value of the bird.

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it was in s.43 of the statute of 1886. Attempt is covered by s.406. See s.2(5) for definition of "cattle" and the general provision as to justification or excuse in s.371(2). See also *R. v. KROESING*(1909), 16 C.C.C.312, and *R. v. ENGLAND*(1925), 43 C.C.C.11, in both of which the charges were laid under the former s.510(b)(ii) for wilful damage caused by maiming cattle.

KILLING OR INJURING OTHER ANIMALS.—Placing poison.

386. Every one who wilfully and without lawful excuse

(a) **kills, maims, wounds, poisons or injures dogs, birds or animals that are not cattle and are kept for a lawful purpose, or**

(b) **places poison in such a position that it may easily be consumed by dogs, birds or animals that are not cattle and are kept for a lawful purpose,**

is guilty of an offence punishable on summary conviction.

This comes from the former s.537(1)(a) and (b), of which the former was s.501(1)(a) in the Code of 1892 and s.45(1) in R.S.C. 1886, c.168. S.537

Section 386—*continued*

(1)(c) has been placed in s.316 along with other provisions relating to threats. The words "without lawful excuse" were added to this section in the House of Commons committee (1953) following discussion concerning the worrying of sheep by dogs, a matter that is dealt with by legislation in some of the provinces.

Before 1930, the section contained the words "who wilfully kills, maims, wounds" etc. In that year a new section was passed which made it an offence to attempt to kill, but not actually to kill, and which did not contain any qualifying adverb such as "unlawfully" or "wilfully". Par.(a) was altered in both respects by 1931, c.28, s.12.

It was held in *R. ex. rel. STEEL v. STEWART*, [1937]1 W.W.R. 400, that the onus was on the accused to show justification or colour of right. The mere fact that a dog was trespassing was not sufficient excuse for shooting it, in the absence of proof that the shooting was necessary to defend the property of the accused. *R. v. KOKATT*(1944), 81 C.C.C. 101, also turned upon the point that the mere fact of trespass did not bring accused within the protection of s.541 (now 371(2)). Cases in which the accused was found to be protected by that provision are *O'LEARY v. THERRIEN*(1915), 25 C.C.C.110; *R. v. FUSELL*(1920), 34 C.C.C.57, and *R. v. PETERSON*, [1928]3 W.W.R.516.

See also s.371 (colour of right and justification).

Cruelty to Animals.

CAUSING UNNECESSARY SUFFERING.—Causing injury by negligence.—Abandoning.—Baiting.—Poisoning.—Field trials.—Punishment.

387. (1) Every one commits an offence who

(a) **wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or bird,**

(b) **by wilful neglect causes damage or injury to animals or birds while they are being driven or conveyed,**

(c) **being the owner or the person having the custody or control of a domestic animal or bird or an animal or bird wild by nature that is in captivity, abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it,**

(d) **in any manner encourages, aids or assists at the fighting or baiting of animals or birds,**

(e) **wilfully, without reasonable excuse, administers a poisonous or injurious drug or substance to a domestic animal or bird wild by nature that is kept in captivity or being the owner of such an animal or bird, wilfully permits a poisonous or injurious drug or substance to be administered to it, or**

(f) **promotes, arranges, conducts, assists in, receives money for, or takes part in a meeting, competition, exhibition pastime, practice, display, or event at or in the course of which captive birds are liberated by hand, trap, contrivance or any other means for the purpose of being shot when they are liberated, or**

OLD CODE:

537. (1) Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding five hundred dollars over and above the amount of injury done, or to one year's imprisonment with or without hard labour, who

(a) unlawfully kills, or attempts to kill, or maims, wounds, poisons or injures, or attempts to maim, wound, poison or injure any dog, bird, beast or other animal not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or kept for any lawful purpose; or

(b) places poison in such a position as to be easily partaken of by any such dog, bird, beast or other animal not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or kept for any lawful purpose; or

. . . . . .

542. Every one is guilty of an offence and liable, on summary conviction before two justices, to a penalty not exceeding five hundred dollars and not less than five dollars or to imprisonment, with or without hard labour, for a term not exceeding one year and not less than one month, or to both, who

(a) wantonly, cruelly or unnecessarily beats, binds, ill-treats, abuses, over-drives, tortures or abandons in distress any cattle, poultry, dog, domestic animal or bird, or wild animal or bird in captivity, or, being the owner, permits any such animal to be so used, or, who by wantonly or unreasonably doing or omitting to do any act, or causing or procuring the commission or omission of any act, causes any unnecessary suffering, or, being the owner, permits any unnecessary suffering to be so caused to any such animal;

(b) while driving any cattle or other animal is, by negligence or ill-usage in the driving thereof, the means whereby any mischief, damage or injury is done by any such cattle or other animal;

(c) conveys, carries, causes, procures or, being the owner, permits to be conveyed or carried any cattle, domestic animal or bird or any other animal of whatsoever kind or species, and whether a quadruped or not, which is tame, or which has been or is being sufficiently tamed to serve some purpose for the use of man, in such a manner or position as to cause any such animal any unnecessary suffering; or

(d) in any manner encourages, aids or assists at the fighting or baiting of any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature;

(e) wilfully, without any reasonable cause or excuse, administers, or causes or procures or, being the owner, permits such administration of any poisonous or injurious drug or substance to any cattle, poultry, dog, domestic animal or bird, or wild animal or bird in captivity, or who wilfully, without any reasonable cause or excuse, causes any such substance to be taken by any such cattle, poultry, dog, domestic animal or bird, or wild animal or bird in captivity;

(f) promotes, arranges, conducts, assists in, receives money for, or takes part in, any meeting, competition, exhibition, pastime, practice, display, or in any event whatever, at or in the course of which captive birds are liberated by hand or by trap, contrivance or other means for the purpose of being shot at the time of their liberation, or who being the owner or occupier, or person in charge of any premises, permits the same, or any part thereof, to be used for any such purpose.

Section 387—*continued*

(g) being the owner, occupier, or person in charge of any premises, permits the premises or any part thereof to be used for a purpose mentioned in paragraph *(f)*.

(2) Every one who commits an offence under subsection (1) is guilty of an offence punishable on summary conviction.

This replaces the former s.542. The corresponding section in the Code of 1892 was s.512 and is noted as coming from R.S.C. 1886, c.172, s.2. The limitation of three months for the commencement of prosecutions has been dropped, and the general limitation will apply under this section as to other summary conviction offences. Subsec.(1)(b) has been altered to refer to damage or injury done *to* animals, not *by* them. Subsec.(1)(c) is new in part. See also s.371 as to justification.

Subsec.(1)(a) is expressed in terms more general than those of s.542(a). As it appeared in the Code of 1892, it read "wantonly, cruelly or unnecessarily beats, binds, ill-treats, abuses, overdrives or tortures any cattle, poultry, dog, domestic animal or bird; or . . . . . ."

The wording may be compared with that of the Imperial Act, 12 & 13 Vict., c.92, s.2:

> "If any person shall, from and after the passing of this Act, cruelly beat, ill-treat, over-drive, abuse or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal,"

the word "animal" being defined in s.29 as covering domestic animals.

It has been amended several times to include certain specific acts or omissions, but with all the amendments, it is notable that the cases invariably return to general principles. Before referring to the cases, it will be useful to state three propositions drawn from them:

1. Cruelty is a question of fact (*DEE v. YORKE*(1914), 30 Times L.R. 552); Hals. Stat., Vol. I, p.906.
2. Intention is immaterial if there is cruelty in fact (*DUNCAN v. POPE*(1899), 19 Cox,C.C.241.). In this connection see s.371(1), in which "wilfully" is defined, and *R. v. GOODMAN*, noted under s.24.
3. The offence consists in causing unnecessary substantial suffering to any animal (*R. v. LINDER*(1950), 97 C.C.C.174);

and it is equally to be noted that although few are reported, the Canadian cases of which *R. v. LINDER* is the most recent to reach the reports, return to the principles laid down in the English decisions.

In *DEE v. YORKE*(1914), 30 Times L.R.552, the respondent, who was the Director of a Research Laboratory and licensed under the *Cruelty to Animals Act*, 1876, to perform experiments on living animals, in the course of experiments to find a cure for sleeping sickness, administered to an ass a drug that had the effect of bringing on gradual paralysis without pain. He had the animal put in a field where it was found after some days unable to rise and to protect itself from flies. It was painlessly destroyed as soon as the experiment was complete. The justices found as a fact that the respondent could not be regarded as having knowingly or intentionally caused unnecessary suffering to the animal and dismissed the information. On a case stated to the Court of King's Bench, *the*

judges said that they had no power to interfere with a finding of fact and that no question of law was involved. Mr. Justice Ridley said:

"If the reasoning of the justices had depended upon the fact that the respondent was Director of the Runcorn Research Laboratories and therefore could not be convicted, he would have decided that it was wrong, because the Act was directed against anybody who wantonly or unreasonably caused unnecessary suffering to an animal."

From this case, it appears that the law as to cruelty does not apply to experimentation upon animals in any way differently from its application to other cases. (It may be noted that in England experimentation on animals is regulated under licence by the *Cruelty to Animals Act,* 1876 (Hals. Stat., Vol. I, p.897). The general provision is now in the *Protection of Animals Act,* 1911 (Hals. Stat., Vol. 1, p.905).

In *DUNCAN v. POPE*(1899), 19 Cox, C.C.241, the Queen's Bench Division, on a case stated by justices, said:

"In this case the magistrates have taken an entirely erroneous view. They have considered whether there was an intention to commit cruelty. *The question is, whether there was cruelty in fact.* This act was about as cruel as one could conceive, and there is no doubt that there was gross and brutal cruelty. *Intention does not matter.*"

The Canadian case of *R. v. LINDER*(1950), 97 C.C.C.174, in the British Columbia Court of Appeal, may be cited upon the third proposition. The case arose out of the use of a bucking strap in a rodeo, and the conviction was quashed on the ground that no suffering was caused to the horse. The following is quoted from the judgment:

"In my opinion the intent of the section is to make it an offence to cause unnecessarily substantial suffering to any animal. Support is to be found for this conclusion in the following decisions under 12 & 13 Victoria, c.92. In *FORD v. WILEY*(1889), 16 Cox, C.C.683 at p.689, Lord Coleridge, C.J., defined the term 'abuse' as used in that statute to mean 'substantial pain inflicted upon it'; and 'unnecessary' as 'inflicted without necessity'. In the same case, Hawkins, J., at p.693, said two things must be proved: first, that pain and suffering has been inflicted in fact, and secondly, without necessity, or, in other words, without good reason. Grove, J. (Lindley, J., concurring), in *SWAN v. SAUNDERS*(1881), 14 Cox,C.C.566 at p.570, defined these terms as 'unnecessary ill-usage by which the animal substantially suffers'."

In addition to what is quoted from *FORD v. WILEY, supra,* the following from the same case is relevant:

"That without which an animal cannot attain its full development, or be fitted for its ordinary use, may fairly come within the term necessary, and if it is something to be done to the animal it may fairly and properly be done. What is necessary, therefore, within these limits I should be of opinion may be done, even though it causes pain, but only such pain as is reasonably necessary to effect the result. Necessary pain, therefore, thus limited, we may fairly inflict on those animals over which we have secured or have assumed dominion. But I adopt the language of Wightman, J. in *BUDGE v. PARSONS*((1863), 7 L.T. 784; 1 New Rep. 436; 3 B. & S. 382), as, for the purposes of interpreting the statute, complete and satisfactory and his language is that 'the

Section 387—*continued*

cruelty intended by the statute is the unnecessary abuse of the animal'. His language is approved of by the Court of Exchequer in *MURPHY v. MANNING* (*ubi sup.*). I do not think that the definition given by Grove, J. in *SWAN v. SAUNDERS* (*ubi sup.*)—'unnecessary ill-usage by which the animal substantially suffers'—though longer adds anything to the terse language of Wightman, J. 'Abuse' of the animal means substantial pain inflicted without necessity, under which word, as I have already said, I should include adequate and reasonable object."

And although the Irish cases of *R. v. M'DONAGH*(1891), 28 L.R. Ir. 204, and *CALLAGHAN v. S.P.C.A.*(1885), 16 Cox,C.C.101, differ from *FORD v. WILEY, supra,* as to the justifiable necessity of dishorning cattle, there is no difference in principle. In *R. v. M'DONAGH*, it was said at p.211:

"But to go back to the word 'unnecessary', so frequently used in the attempted definitions to which I have referred, it cannot, with any show of reason, be contended that the question of necessity is to be determined by regard merely to what is necessary for the animal itself."

The word "cruelly" was interpreted in *R. v. M'DONAGH, supra,* as follows:

"On the true construction of section 2, the word 'cruelly' is to be read as if repeated before each of the words which follow it, thus impressing on the 'beating' or other act the penal character which brings it within the scope of the statute. But in coming to a conclusion whether an offence has been committed within the statute, consideration must be given, not only to the circumstances of the particular case, but also to the object and purpose of the act complained of."

In *LEWIS v. FERMOR*(1887), 16 Cox,C.C.179, it was said:

"The meaning of 'cruelty', like that of many other words, is uncertain; and it is for the court to ascertain what was the meaning which the Legislature intended to attribute to it. It cannot be used merely in the sense of inflicting pain, or even torture, for there are operations which could well be defined as torture, and which are performed even on human beings, such as cauterising wounds, and firing in the case of horses, which are attended with beneficial results; such are torture in one sense, they are cruel torture while they last. Cruel torture within the statute must be taken to be that which is inflicted for no legitimate purpose, and which cannot be justified. The word 'wanton', it is true, has been omitted in the later statute. I do not profess to know the reason for its omission, but that word has a double meaning, and was perhaps left out for that very reason. I would define 'cruel torture' to be the infliction of grievous pain without some legitimate object existing in truth, or honestly believed in. I do not believe that a person who inflicts pain in the honest belief that it is conferring a benefit upon man can be punished under this section on the motion of those who do not agree with him that his acts are beneficial."

In Canada, it was said in *R. v. CORNELL*(1904), 8 C.C.C.416 at p.422:

"It is true that the information has only the words 'did unlawfully abuse a mare'. But while the words 'wantonly, cruelly or unnecessarily'

OLD CODE:

543. (1) Every one is guilty of an offence and liable on summary conviction before two justices, to a penalty not exceeding two hundred dollars, or to one year's imprisonment, with or without hard labour, or to both, who builds, makes, maintains or keeps a cock-pit on premises belonging to or occupied by him, or allows a cockpit to be built, made, maintained or kept on premises belonging to or occupied by him.

(2) All cocks found in any such cock-pit, or on the premises wherein such cock-pit is, shall be confiscated and shall be ordered to be destroyed.

544. No railway company, within Canada whose railway forms any part of a line of road over which cattle are conveyed from one province to another province, or from the United States to or through any province, or from any part of a province to another part of the same, and no owner or master of any vessel carrying or transporting cattle from one province to another province, or within any province, or from the United States to or through any province, shall confine the same in any car, or vessel of any description, for a longer period than thirty-six hours without unlading the same for rest, water and feeding for a period of at least five consecutive hours, unless prevented from so unlading and furnishing water and food by storm or other unavoidable cause, or by necessary delay or detention in the crossing of trains; and no such railway company, and no owner or master of any vessel plying from one province to another province, or within any province or from the United States to or through any province, shall convey or transport any calves under the age of three weeks other than calves at foot of milch cows or pure-bred calves on or over any of its lines of railway or on any such vessel.

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in the said section 512 must be taken as qualifications of the beating and binding therein provided, they add really nothing to what is conveyed by the word 'abuses' and may well be considered idle in this respect."

KEEPING COCK-PIT.—Confiscation.

388. (1) Every one who builds, makes, maintains or keeps a cock-pit on premises that he owns or occupies, or allows a cock-pit to be built, made, maintained or kept on such premises is guilty of an offence punishable on summary conviction.

(2) A peace officer who finds cocks in a cock-pit or on premises where a cock-pit is located shall seize them and take them before a justice who shall order them to be destroyed.

This comes from the former s.543 amended by 1930, c.11, s.12, and further amended by 1948, c.39, s.16. The corresponding section in the Code of 1892 was s.513, which came from R.S.C. 1886, c.172, s.3. In this section, subsec.(2) has been altered to clarify the procedure.

The section applies to the person who may be described as the keeper of the place. It was held in *R. v. HAYES*(1943), 79 C.C.C.358, that a person who pays an admission fee for the purpose of seeing a cock-fight, "encourages" it within the meaning of s.542(d), now s.387(1)(d), and was guilty of an offence.

TRANSPORTATION OF CATTLE BY RAIL OR WATER.—Saving.—Transportation of calves.—Time how reckoned.—Saving.—Lien for food.—Sanitary precautions.—Overcrowding.—Conveying bulls.—Punishment.

389. (1) Except as provided in this section, no railway company or owner or master of a vessel shall confine cattle in a railway car or vessel in which they are conveyed in Canada or between Canada and the United States for more than thirty-six hours without unloading the cattle for rest, water and feeding for a period of at least five consecutive hours.

(2) No offence is committed under subsection (1) where compliance with that subsection is prevented by storm or by necessary delay or detention or by other unavoidable cause.

(3) No railway company or owner or master of a vessel shall convey in a railway car or vessel calves that are under the age of three weeks except calves at foot of milch cows or pure-bred calves.

(4) For the purposes of subsection (1) the period of confinement of cattle includes the time during which the cattle have been confined without rest, food or water on a connecting railway or vessel from which the cattle are received, whether in the United States or in Canada.

(5) This section does not apply in respect of cattle that are carried in a car or vessel in which they have proper space and opportunity for rest and in which they are provided with proper food and water.

(6) The owner of cattle to which this section applies or the person who has custody of them shall properly feed and water them during the periods of rest required by this section, but if he does not do so, the railway company or the owner or master of the vessel that carries them shall properly feed and water them at the expense of the owner or of the person who has custody of them, and the railway company or owner or master of the vessel, as the case may be, has a lien in respect thereof upon the cattle and is not liable for any detention of the cattle.

(7) When cattle are unloaded from cars for rest, food and water as required by this section, the railway company that has, at that time, charge of the cars in which the cattle have been carried, shall, except during a period of frost, clean the floors of the cars and litter them with clean sawdust or sand before they are again loaded with livestock.

(8) No railway company shall permit a railway car or other vehicle that carries cattle or other domestic animals or birds on the railway to be overcrowded so that unnecessary suffering is caused to the cattle or other domestic animals or birds therein.

(9) No railway company shall permit a bull of mature age to be carried on its railway in the same railway car with other cattle unless the bull is securely tied by the head.

(10) Every one who knowingly and wilfully violates or wilfully fails to comply with this section is guilty of an offence punishable on summary conviction.

This is the former s.544. The corresponding section in the Code of 1892 was s.514, which came from R.S.C. 1886, c.172, ss.8-11. What now

OLD CODE:
Section 544—continued

(2) In reckoning the period of confinement, the time during which the cattle have been confined without such rest, and without the furnishing of food and water, on any connecting railway or vessel from which they are received, whether in the United States or in Canada, shall be included.

(3) The foregoing provisions as to cattle being unladen shall not apply when cattle are carried in any car or vessel in which they have proper space and opportunity for rest, and proper food and water.

(4) Cattle so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof or, in case of his default in so doing, by the railway company, or owner or master of the vessel transporting the same, at the expense of the owner or person in custody thereof; and such company, owner or master shall in such case have a lien upon such cattle for food, care and custody furnished and shall not be liable for any detention of such cattle.

(5) Where cattle are unladen from cars for the purpose of receiving food, water and rest, the railway company then having charge of the cars in which they have been transported shall, except during a period of frost, clear the floors of such cars, and litter the same properly with clean sawdust or sand before reloading them with livestock.

(5A) No railway company shall allow any railway truck, horse-box or other vehicle used for carrying cattle or other domestic animals or birds on the railway to be overcrowded so as to cause unnecessary suffering to such cattle, or other domestic animals or birds therein.

(5B) No railway company shall permit any bull of mature age to be carried on its railway in the same railway car with other cattle unless the said bull is securely tied by the head.

(6) Every person who knowingly and wilfully fails to comply with the provisions or otherwise violates any of the provisions of this section shall be guilty of an offence and liable for every such offence on summary conviction, to a penalty not exceeding one hundred dollars.

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appear as subsecs.(8) and (9) were added in 1930 as subsecs.(5A) and (5B) of s.544. A subsection which permitted cattle to be kept for thirty-six hours without unloading, was added in 1909, but repealed by 1945, c.55, s.17.

There have been prosecutions under these provisions but they do not appear to have reached the reports.

As to right to search vehicle or vessel see s.390.

SEARCH.—Obstruction.

390. (1) A peace officer who believes on reasonable and probable grounds that a person has failed to comply with section 389 in respect of a vehicle or vessel may at any time enter the vehicle or go on board the vessel.

(2) Every one who refuses to admit a peace officer acting under subsection (1) to a vehicle or vessel or to any premises where the vehicle or vessel is located is guilty of an offence punishable on summary conviction.

Section 390—*continued*

This is the former s.545. It was s.515 in the Code of 1892, and came from R.S.C. 1886, c.171, s.12.

The former s.545A, which dealt with offences of cruelty committed during a journey or voyage, has been omitted. S.419 will apply to these as to other cases.

PART X.

OFFENCES RELATING TO CURRENCY.

This part is a re-draft of the former Part IX (ss.546 to 569) and, although some changes have been made, none of them effects any basic change in the law.

At an earlier period of English history counterfeiting was treason, as infringing upon a royal prerogative, whether in relation to national coinage, or in the regulation of the use of foreign money as currency, but the modern history of the Part may be said to begin with the *Offences against the Coinage Act*, 1861, 24-25 Vict., c.99 (Imp.), of which Stephen (History, Vol. II, p.171) remarks that the offences are all statutory. An Act very largely based upon it was passed in Canada in 1869, c.18.

The Imperial Act was incorporated in Part XXXIII of the E.D.C. of which the Commissioners said (Report, p.30):

"The existing law as to offences against the Coin . . . . . is contained in the 24-25 Vict., c.99. We have slightly altered the definition of Counterfeit Coin so as to meet some difficulties which have arisen in practice. (This refers to *R. v. HERMANN*, noted *infra*). And we have in ss.367 and 371 inserted provisions for punishing the making of fillets of metal for the purpose of being coined elsewhere, which at present is actually done with impunity. The rest of this Part is substantially a re-enactment of the existing law."

The provisions of the E.D.C. came into the Code of 1892 as ss.460-480, the changes in ss.367 and 371, which dealt with the preparation of metal for counterfeiting, being covered in ss.462 and 473.

INTERPRETATION.

"COPPER COIN."—"Counterfeit money."—"Counterfeit token of value."—"Current."—"Utter."

391. In this Part,

(a) **"copper coin" means a coin other than a gold or silver coin;**

(b) **"counterfeit money" includes**

(i) a false coin or false paper money that resembles or is apparently intended to resemble or pass for a current coin or current paper money,

(ii) a forged bank note or forged blank bank note, whether complete or incomplete,

(iii) a genuine coin or genuine paper money that is prepared or altered to resemble or pass for a current coin or current paper money of a higher denomination,

(iv) a current coin from which the milling is removed by

OLD CODE:

545. Any peace officer or constable may, at all times enter any premises where he has reasonable grounds for supposing that any car, truck or vehicle as to which any company or person has failed to comply with the provisions of the last preceding section, is to be found, or enter on board any vessel in respect whereof he has reasonable grounds for supposing that any company or person has, on any occasion, so failed.

(2) Every one who refuses admission to such peace officer or constable is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars and not less than five dollars, and costs, and in default of payment, to thirty days' imprisonment.

2. (8) "copper coin" includes any coin of bronze or mixed metal and every other kind of coin other than gold or silver;

546. In this Part, unless the context otherwise requires,—
(a) "counterfeit" means false, not genuine;
(b) "counterfeit token of value" means any spurious or counterfeit coin, paper money, inland revenue stamp, postage stamp, or other evidence of value, by whatever technical, trivial or deceptive designation the same may be described, and includes also any coin or paper money, which although genuine has no value as money;
(c) "current copper coin" includes copper coin coined in any of His Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of His Majesty's dominions;
(d) "current gold or silver coin" includes any gold or silver coin of any of His Majesty's mints, or gold or silver coin of any foreign prince or state or country, or other gold or silver coin lawfully current, by virtue of any proclamation or otherwise, in any part of His Majesty's dominions;
(e) "gild" and "silver" applied to coin, include casing with gold or silver respectively, and washing and colouring by any means whatsoever with any wash or material capable of producing the appearance of gold or silver respectively;
(f) "utter" includes "tender" and "put off".

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filing or cutting the edges and on which new milling is made to restore its appearance,

(v) a coin cased with gold or silver, as the case may be, that is intended to resemble or pass for a current gold or silver coin, and

(vi) a coin or a piece of metal or mixed metals washed or coloured by any means with a wash or material capable of producing the appearance of gold or silver and that is intended to resemble or pass for a current gold or silver coin;

***(c)* "counterfeit token of value" means a counterfeit excise stamp, postage stamp or other evidence of value, by whatever technical, trivial or deceptive designation it may be described, and includes genuine coin or paper money that has no value as money;**

***(d)* "current" means lawfully current in Canada or elsewhere by virtue of a law, proclamation or regulation in force in Canada or elsewhere as the case may be; and**

***(e)* "utter" includes sell, pay, tender and put off.**

Section 391—*continued*

Par.(a) is the former s.2(8).

Par.(b) embodies descriptive matter taken from the former ss.546, 547 and 552 and alters the former provisions by including paper money, which was to only a limited extent covered by Part IX. It was, and of course still might be, covered by the provisions relating to forgery, but the change is justified for various reasons.

Forgery includes documents of all kinds. This Part deals with the currency, the making, issue and standards of which are under the control of the state, so that offences against it are more directly offences against the state.

Paper money circulates so widely that confidence in it may be said to be fundamental in the economic life of the country.

Counterfeiters nowadays are more likely to imitate paper money than coins because of the greater profit that may be gained.

Money itself is not defined. A definition from Walker on "Money, Trade and Industry" was quoted with approval by Darling, J., in *MOSS v. HANCOCK*, [1899]2 Q.B.111 as follows:

> "That which passes freely from hand to hand throughout the community, in final discharge of debts and full payment for commodities: being accepted equally without reference to the character or credit of the person who offers it, and without the intention of the person who receives it to consume or apply it to any other use than in turn to tender it in discharge of debts or payment for commodities."

The essential functions of money have been said (1) to be a common denominator of value; (2) to be a medium of exchange; (3) to be a standard of deferred payments (quoted Nussbaum, "Money in the Law", p.2).

Par.(b)(iv) is in accord with *R. v. HERMANN*(1879), 14 Cox,C.C.279, in which a Court of Appeal by a majority affirmed the conviction of a man who had filed the original milling from two sovereigns and had then made new milling so as to make them resemble genuine sovereigns.

As to par.(b)(v) it was held in *LAMBERT v. R.*(1926), 47 C.C.C.159 (Que.), that a conviction of uttering upon an information for silvering pieces of copper with intent to pass them as currency is void. The two offences are distinct.

The word "trivial" in par.(c) has reference to the use of such expressions as "green goods" or "green groceries" in advertisements of counterfeit money.

It was held in *R. v. COREY*(1895), 1 C.C.C.161, that a paper which is a spurious imitation of a government treasury note (in this case of the U.S.A.) is a counterfeit, or what purports to be a counterfeit token of value although there is no original of its description.

MAKING.

MAKING.

392. Every one who makes or begins to make counterfeit money is guilty of an indictable offence and is liable to imprisonment for fourteen years.

OLD CODE:

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

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

552. Every one is guilty of an indictable offence and liable to imprisonment for life who

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

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

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

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

(e) gilds or silvers any current copper coin, or files or in any manner alters such coin, with intent to make the same resemble or pass for any current gold or silver coin.

568. Every one who, after a previous conviction for any offence relating to the coin under this or any other Act, is convicted of any offence specified in this Part is liable

(a) to imprisonment for life, if fourteen years is the longest term of imprisonment to which he would have been liable had he not been so previously convicted;

(b) to fourteen years' imprisonment, if seven years is the longest term of imprisonment to which he would have been liable had he not been so previously convicted;

(c) to seven years' imprisonment, if he would not have been liable to seven years' imprisonment had he not been so previously convicted.

550. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, without lawful authority or excuse, the proof whereof shall lie on him, purchases or receives from any person, or has in his custody or possession, any forged bank note, or forged blank bank note, whether complete or not, knowing it to be forged.

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

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

. . . . . .

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

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

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

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

Section 392—*continued*

This, with the definition in s.391, is designed to cover matter appearing in the former ss.550, 562(a) and 563.

The making of the legal money of Canada is governed by the *Currency, Mint and Exchange Fund Act*, R.S.C. 1952, c.315, and the *Bank of Canada Act*, R.S.C. 1952, c.13.

In *R. v. TUTTY*(1905), 9 C.C.C.544, at p.549, the following appears: "The document in this case (*i.e.*, an imitation of a ten-dollar bill of the Bank of Montreal) is certainly a forged bank note within the meaning of section 430 (later 550). It may also be a 'counterfeit token of value' and I think it is such under section 480 of the Code (later 569). The taking possession of it may have been made punishable inadvertently or advisedly under section 480, and yet the having of it in the defendant's possession and custody, may still be an offence and punishable as such under sec. 430."

POSSESSION.

BUYING.—Having.—Importing.

393. Every one who, without lawful justification or excuse, the proof of which lies upon him,

***(a)* buys, receives or offers to buy or receive,**

***(b)* has in his custody or possession, or**

***(c)* introduces into Canada,**

counterfeit money is guilty of an indictable offence and is liable to imprisonment for fourteen years.

This and the following ss.394 and 395 contain matter formerly appearing in ss.552-5.

It will be observed that knowledge is not made an essential element under s.393. However, the words "without lawful justification or excuse" should afford protection to the person who receives counterfeit money in change or otherwise without noticing it.

"Having in possession" is defined in s.3(4), *ante*.

The words "at or for a lower rate or value than the same imports, or was apparently intended to import", which appeared in s.553(a) have been omitted. In this connection, see *BRUNET v. R.*, cited under s.395.

It may be noted that the former ss.624 and 625, which dealt with procedure and penalties in relation to offences involving copper coin, have been dropped. Ss.392 and 393 cover the unlawful manufacture or importation of coins, and s.627 provides for penal actions.

HAVING CLIPPINGS, ETC.

394. Every one who, without lawful justification or excuse, the proof of which lies upon him, has in his custody or possession

***(a)* gold or silver filings or clippings,**

***(b)* gold or silver bullion, or**

***(c)* gold or silver in dust, solution or otherwise,**

produced or obtained by impairing, diminishing or lightening a current gold or silver coin, knowing that it has been so produced or obtained, is guilty of an indictable offence and is liable to imprisonment for five years.

OLD CODE:

Section 563—continued

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

(c) utters any such counterfeit coin; or

(d) makes any counterfeit coin resembling, or apparently intended to resemble or pass for, any copper coin of any foreign prince, state or country, not being current coin.

552. Every one is guilty of an indictable offence and liable to imprisonment for life who

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

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

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

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

(e) gilds or silvers any current copper coin, or files or in any manner alters such coin, with intent to make the same resemblance or pass for any current gold or silver coin.

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

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

(b) imports or receives into Canada any counterfeit coin resembling or apparently intended to resemble or pass for, any current gold or silver coin knowing the same to be counterfeit.

554. Every one who manufactures in Canada any copper coin, or imports into Canada any copper coin, other than current copper coin, with the intention of putting the same into circulation as current copper coin, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars for every pound troy weight thereof; and all such copper coin so manufactured or imported shall be forfeited to His Majesty.

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

624. If it appears, to the satisfaction of such justices, that the person in whose possession such copper coin was found, knew the same to have been so unlawfully manufactured or imported, they may condemn him to pay the penalty provided by Part IX, for manufacturing or importing copper coin, with costs,

Section 394—*continued*

See notes to s.393. The unlawful possession of bullion or clippings was dealt with in the former s.560. Concerning the latter a note to the corresponding section in the Act of 1861 (Greaves' Cons. Acts, p.265) says that:

"It has frequently happened that filings and clippings have been found under such circumstances as to leave no doubt that they were produced by impaired coin, but there has been no evidence to prove that any particular coin had been impaired. This clause is intended to meet such cases."

UTTERING.

UTTERING COUNTERFEIT MONEY.—Exporting.

395. Every one who, without lawful justification or excuse, the proof of which lies upon him,

***(a)* utters or offers to utter counterfeit money or uses counterfeit money as if it were genuine, or**

***(b)* exports, sends or takes counterfeit money out of Canada,**

is guilty of an indictable offence and is liable to imprisonment for fourteen years.

This and the next section embody matter contained in the former ss.563-567. See notes to s.393 as to lawful justification or excuse. When the Act of 1861 was before the British Parliament the only question that was raised concerned a provision that a private person might arrest without warrant anyone found committing an offence. It was objected that a person might easily make a mistake in the value of a coin, but the answer was that it was the intention to deal with traffickers in counterfeit coin who would probably escape if they were not apprehended at once.

In *BRUNET v. R.*(1929), 46 Que. K.B.534, it was held that accused was properly convicted on a charge of selling or putting off counterfeit American 50 cent pieces, without the words "at or for a lower rate or value than the same imports, or was apparently intended to import", and that the indictment was sufficient by virtue of s.852.

The law was originally passed in England by 2 Wm. IV, c.34, s.6, and was reproduced in the consolidating statute respecting offences relating to coin, 32 & 33 Vict., c.18, s.6.

In *BRUNET v. R.* Hall, J., said:

"Under the procedure then in force it was, undoubtedly, essential that the indictment should allege that the accused did bring or sell the counterfeit coin at or for a lower rate or value than the same imports.

This would seem to imply that one who is successful in disposing of counterfeit coin at its full face value would be guilty of no crime, while another who was satisfied with a smaller profit out of his criminal transaction, and sold the counterfeit coin at less than its face value, would be guilty of an indictable offence, which, in my opinion, would be a most illogical conclusion. The offence is virtually the same,

OLD CODE:

Section 624—continued

and may cause him to be imprisoned for a term not exceeding two months, if such penalty and costs are not forthwith paid.

625. If it appears to the satisfaction of such justices, that the person in whose possession such copper coin was found was not aware of it having been so unlawfully manufactured or imported, the penalty may be recovered from the owner thereof by any person who sues for the same in any court of competent jurisdiction.

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

561. Every one is guilty of an indictable offence and liable to three years' imprisonment who has in his custody or possession, knowing the same to be counterfeit, and with intent to utter the same or any of them.
(a) any counterfeit coin resembling or apparently intended to resemble or pass for, any current gold or silver coin; or
(b) three or more pieces of counterfeit coin resembling, or apparently intended to resemble or pass for, any current copper coin.

563. Every one is guilty of an indictable offence and liable to three years' imprisonment who,
(a) makes, or begins to make, any counterfeit coin or silver coin resembling, or apparently intended to resemble or pass for, any gold or silver coin of any foreign prince, state or country, not being current coin;
(b) without lawful authority or excuse, the proof of which shall lie on him,
(i) brings into or receives in Canada any such counterfeit coin, knowing the same to be counterfeit,
(ii) has in his custody or possession any such counterfeit coin, knowing the same to be counterfeit, and with intent to put off the same;
(c) utters any such counterfeit coin; or
(d) makes any counterfeit coin resembling, or apparently intended to resemble or pass for, any copper coin of any foreign prince, state or country, not being current coin.

564. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who utters any counterfeit coin resembling, or apparently intended to resemble or pass for, any current gold or silver coin, knowing the same to be counterfeit.

565. Every one is guilty of an indictable offence and liable to three years' imprisonment who
(a) utters, as being current, any gold or silver coin of less than its lawful weight, knowing such coin to have been impaired, diminished or lightened, otherwise than by lawful wear;
(b) with intent to defraud utters, as or for any current gold or silver coin, any coin not being such current gold or silver coin, or any medal, or piece of metal or mixed metals, resembling, in size, figure and colour, the current coin as or for which the same is so uttered, such coin, medal or piece of metal or mixed

Section 395—*continued*

whether the counterfeit coin be sold or put off at its ostensible face value or for a lower rate .....

The general offence of uttering any counterfeit coin intended to resemble foreign coin is provided for by sec.563, and it is evident, therefore, that sec.553 is intended to provide for the individual who supplies the utterer with the counterfeit coin, although it may be difficult to make a distinction between one who sells or puts off a counterfeit coin, and one who utters any such coin."

UTTERING COIN NOT CURRENT.—Uttering false coin.

396. Every one who, with intent to defraud, knowingly utters

(a) **a coin that is not current, or**

(b) **a piece of metal or mixed metals that resembles in size, figure and colour a current gold or silver coin and is of less value than the current coin for which it is uttered,**

is guilty of an indictable offence and is liable to imprisonment for two years.

See notes to s.395.

As to par.(b), a note to s.13 of the Act of 1861 (Greaves' Cons. Acts, p.271) said:

"This is new. It is intended to meet the cases of uttering foreign coin or medals as and for the current coin of the realm. In order to bring a case within this clause, the coin or medal uttered must be of less value than the coin for which it was uttered, and must have been uttered with intent to defraud."

FRAUDULENT USE OF SLUGS, ETC.

397. Every one who fraudulently inserts or uses in a machine that vends merchandise or services or collects fares or tolls, any thing that is intended to pass for the coin or the token of value that the machine is designed to receive in exchange for the merchandise, service, fare or toll, as the case may be, is guilty of an offence punishable on summary conviction.

This is new. It will cover, for example, the use of metal slugs in pay telephones or machines vending subway tokens, and will supplement s.336(3).

Defacing or Impairing.

CLIPPING COIN.—Uttering clipped coin.

398. Every one who

(a) **impairs, diminishes or lightens a current gold or silver coin with intent that it should pass for a current gold or silver coin, or**

(b) **utters a coin, knowing that it has been impaired, diminished or lightened contrary to paragraph *(a)*,**

is guilty of an indictable offence and is liable to imprisonment for fourteen years.

This and the following section embody matters formerly appearing in ss.558-9. Note that the former s.598, which required the consent of the Attorney General to a prosecution under s.559, has been dropped.

OLD CODE:
Section 565—continued

metals so uttered being of less value than the current coin as for which the same is so uttered; or

(c) utters any counterfeit coin resembling or apparently intended to resemble or pass for any current copper coin, knowing the same to be counterfeit.

566. Every one who utters any coin defaced by having stamped thereon any names or words is guilty of an offence, and liable, on summary conviction before two justices, to a penalty not exceeding ten dollars.

567. Every one who utters, or offers in payment, any copper coin, other than current copper coin, is guilty of an offence and liable, on summary conviction, to a penalty of double the nominal value thereof, and in default of payment of such penalty to eight days' imprisonment.

558. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who impairs, diminishes or lightens any current gold or silver coin, with intent that the coin so impaired, diminished, or lightened may pass for current gold or silver coin.

559. Every one is guilty of an indictable offence and liable to one year's imprisonment who defaces any current gold, silver or copper coin by stamping thereon any names or words, whether such coin is or is not thereby diminished or lightened.

598. No proceeding or prosecution for the offence of uttering any coin defaced by having stamped thereon any names or words, shall be taken without the consent of the Attorney General.

Under s.143 of the *Bank Act*, 1954, it is an offence punishable on summary conviction to cut, tear or otherwise mutilate, or in any way to deface a Bank of Canada note or a bank note. This section has been invoked where a person, with patience and dexterity worthy of better direction, has "split" bills and then pasted together, *e.g.*, half of a dollar bill and half of a ten-dollar bill. It will be observed, however, that when this is followed by an attempt to use the result as a ten-dollar bill, several sections of this Part will have been broken.

DEFACING CURRENT COIN.—Uttering defaced coin.

399. Every one who

(a) **defaces a current gold, silver or copper coin, or**

(b) **utters a current gold, silver or copper coin that has been defaced,**

is guilty of an offence punishable on summary conviction.

See note to s.398. Former s.559 originally contained the words "and afterwards tenders the same". These were struck out in 1938 in order to prevent coins being put to other than monetary use, *e.g.*, in souvenirs.

PRINTING CIRCULARS, ETC., IN LIKENESS OF NOTES.

400. (1) Every one who designs, engraves, prints or in any manner makes, executes, issues, distributes, circulates or uses a business or professional card, notice, placard, circular, handbill or advertisement in the likeness or appearance of

(a) **a current bank note or current paper money, or**

Section 400—*continued*

(*b*) any obligation or security of a government or a bank,

is guilty of an offence punishable on summary conviction.

(2) Every one who publishes or prints anything in the likeness or appearance of

(*a*) all or part of a current bank note or current paper money, or

(*b*) all or part of any obligation or security of a government or a bank,

is guilty of an offence punishable on summary conviction.

(3) No person shall be convicted of an offence under subsection (2) where it is established that, in publishing or printing anything to which that subsection applies,

(*a*) no photography was used at any stage for the purpose of publishing or printing it, except in connection with processes necessarily involved in transferring a finished drawing or sketch to a printed surface,

(*b*) except for the word 'Canada', nothing having the appearance of a word, letter or numeral was a complete word, letter or numeral,

(*c*) no representation of a human face or figure was more than a general indication of features, without detail,

(*d*) no more than one colour was used, and

(*e*) nothing in the likeness or appearance of the back of a current bank note or current paper money was published or printed in any form.

Subsec.(1) comes from the former s.551.

Subsec.(2) is new. The reason for it appears in a letter from the deputy governor of the Bank of Canada of record in Hansard, 1954, at p.3919. The following is quoted:

"We have noticed an increasing tendency for people to produce photographs and other reproductions of Bank of Canada notes, either for use in connection with commercial advertising or for some other purpose or just as a matter of interest or curiosity. In such cases the makers and users of the reproduction have no intention of passing off the pictures as currency or of making any wrongful use of the negatives or plates used in producing them. We believe, however, that it would be highly desirable if reproduction of Canadian currency in this way could be prevented. For one thing, every such action tends to encourage others to imitate them or to think up new ways of making representations of currency, and generally cheapens the position of bank notes in the public eye. For another thing, once plates have been made, though for the most innocent purpose, they may pass into wrongful hands and be put to a wrongful purpose by persons who would not be able to produce the plates themselves."

Instruments or Materials.

MAKING, HAVING OR DEALING IN INSTRUMENTS FOR COUNTERFEITING.

401. Every one who, without lawful justification or excuse, the proof of which lies upon him,

OLD CODE:

551. Every one is guilty of an offence and liable, on summary conviction before two justices, to a fine of one hundred dollars or three months' imprisonment, or both, who designs, engraves, prints or in any manner makes, executes, utters, issues, distributes, circulates or uses any business or professional card, notice, placard, circular, hand-bill or advertisement in the likeness or similitude of any bank note, or any obligation or security of any government or any bank.

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

(a) any puncheon, counter puncheon, matrix, stamp, die patterns or mould, in or upon which there is made or impressed or which will make or impress, or which is adapted and intended to make or impress, the figure, stamp or apparent resemblance of both or either of the sides of any current gold or silver coin, or of any coin of any foreign prince, state or country, or any part or parts of both or either of such sides;

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

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

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

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

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

(i) makes, or mends, or begins or proceeds to make or mend, or buys or sells, or has in his custody or possession, any instrument, tool or engine adapted and intended for counterfeiting any current copper coin,

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

(a) **makes or repairs,**
(b) **begins or proceeds to make or repair,**
(c) **buys or sells, or**
(d) **has in his custody or possession,**

a machine, engine, tool, instrument, material or thing that he knows has been used or that he knows is adapted and intended for use in making counterfeit money or counterfeit tokens of value is guilty of an indictable offence and is liable to imprisonment for fourteen years.

This comes from the former ss.556 and 562(b).

Section 401—*continued*

In *R. v. HAGGARTY*(1946), 88 C.C.C.254, a mould capable of being used in the manufacture of counterfeit coins was found in an ice-cream freezer buried in the garden of the home occupied by the accused, his wife, his brother and his mother. *Per* Sloan, C.J.B.C.:

"The mere finding of an article buried in the garden of a householder does not, in itself, and in the absence of some evidence indicating his knowledge of its existence, or consent to its remaining in that place, or some other surrounding circumstances from which a reasonable inference could be drawn inculpating the householder, discharge the burden of proof of possession resting upon the Crown and thrust upon him the necessity of furnishing evidence of his own innocence."

R. v. BAKER(1912), 7 Cr.App.R.217, also involved the possession of moulds, but the appeal turned upon an equivocal plea entered by the accused.

CONVEYING INSTRUMENTS FOR COINING OUT OF MINT.

402. Every one who, without lawful justification or excuse, the proof of which lies upon him, knowingly conveys out of any of Her Majesty's mints in Canada,

(*a*) a machine, engine, tool, instrument, material or thing used or employed in connection with the manufacture of coins,

(*b*) a useful part of anything mentioned in paragraph (*a*), or

(*c*) coin, bullion, metal or a mixture of metals,

is guilty of an indictable offence and is liable to imprisonment for fourteen years.

This is the former s.557.

Advertising and Trafficking in Counterfeit Money or Counterfeit Tokens of Value.

ADVERTISING OFFER TO DEAL IN COUNTERFEIT MONEY, ETC.—Dealing in counterfeit tokens of value.—Fraudulent use of money genuine but valueless.

403. (1) Every one who

(*a*) by an advertisement or any other writing offers to sell, procure or dispose of counterfeit money or counterfeit tokens of value or to give information with respect to the manner in which or the means by which counterfeit money or counterfeit tokens of value may be sold, procured or disposed of, or

(*b*) purchases, obtains, negotiates or otherwise deals with counterfeit tokens of value, or offers to negotiate with a view to purchasing or obtaining them,

is guilty of an indictable offence and is liable to imprisonment for five years.

(2) No person shall be convicted of an offence under subsection (1) in respect of genuine coin or genuine paper money that has no value as money unless, at the time when the offence is alleged to have been committed, he knew that the coin or paper money had no value as money and he had a fraudulent intent in his dealings with or with respect to the coin or paper money.

OLD CODE:

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

549. In the case of coin or paper money which, although genuine, has no value as money, it is necessary in order to constitute an offence under this Part that there should be knowledge on the part of the person charged that such coin or paper money was of no value as money, and a fraudulent intent on his part in his dealings with or with respect to the same.

(2) Such intent shall not be necessary to constitute such offence in case such coin or paper money is made or issued with the intention, the disproof whereof shall lie on the accused, of entitling the holder thereof to receive therefor, to the extent of the value denoted thereon goods or merchandise from the person so charged as aforesaid.

569. Every one is guilty of an indictable offence and liable to five years' imprisonment who

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

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

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

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

981. On the trial of any person charged with any of the offences mentioned in section five hundred and sixty-nine, any letter, circular, writing or paper offering or purporting to offer for sale, loan, gift or distribution, or giving or purporting to give information, directly or indirectly, where, how, of whom or by what means any counterfeit token of value may be obtained or had, or concerning

Section 403—*continued*

This section is drawn from matter appearing in the former ss.549(1) and 569(1). It is considered also to cover s.981.

The following cases refer to the word "negotiate" which appeared in the former s.569(1)(d).

R. v. GRAVELINE(1938), 69 C.C.C.366: In this case the Ontario Court of Appeal, relying on *R. v. ATTWOOD* dismissed an appeal by the Crown from a judgment holding that the word "negotiate" in s.569 of the Criminal Code refers to tokens of value that are *in esse;* hence to constitute an offence under s.569(d) it is necessary that the counterfeit tokens of value for the purchase of which accused negotiated must be *in esse* at the time of the alleged offence.

The Statute 51 Vict., c.40, under which *R. v. ATTWOOD*(1891), 20 O.R.574, was decided, did not include the word "negotiate". Rose, J., said (p.580):

> "So far as I have seen there is no clause in terms making the desire or intention to purchase counterfeit money, an offence, no such money being in existence."

The subject matter of the charge was notes of the Canadian Bank of Commerce, genuine but incomplete because not signed.

In the *GRAVELINE* case the judgment appealed from, referring to the *ATTWOOD* case, contains the sentence:

> *"In view of this decision it would seem reasonable, if this were the intention, that the words 'whether such counterfeit tokens of value are in existence or not', would be inserted in s.569 of the Code."*

SPECIAL PROVISIONS AS TO PROOF.

COUNTERFEIT WHEN COMPLETE.

404. Every offence relating to counterfeit money or counterfeit tokens of value shall be deemed to be complete notwithstanding that the money or tokens of value in respect of which the proceedings are taken are not finished or perfected or do not copy exactly the money or tokens of value that they are apparently intended to resemble or for which they are apparently intended to pass.

This section is drawn from the former ss.548 and 955. The latter was s.718 in the Code of 1892 and s.31 in the 32-33 Vict., c.18 (Can.).

FORFEITURE.

OWNERSHIP.—Seizure.

405. (1) Counterfeit money, counterfeit tokens of value and anything that is used or is intended to be used to make counterfeit money or counterfeit tokens of value belong to Her Majesty.

(2) A peace officer may seize and detain

(a) **counterfeit money,**

(b) **counterfeit tokens of value, and**

(c) **machines, engines, tools, instruments, materials or things that have been used or that have been adapted and are in-**

OLD CODE:
Section 981—continued

any similar scheme or device to defraud the public, shall be prima facie evidence of the fraudulent character of such scheme or device.

548. Every offence of making any counterfeit coin, or of buying, selling, receiving, paying, tendering, uttering or putting off, or of offering to buy, sell, receive, pay, utter or put off, any counterfeit coin is deemed to be complete, although the coin so made or counterfeited, or bought, sold, received, paid, tendered, uttered or put off, or offered to be bought, sold, received, paid, tendered, uttered or put off, was not in a fit state to be uttered or the counterfeiting thereof was not finished or perfected.

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

569. (2) Counterfeit money or coin and tokens of value, and instruments or materials of any kind used or intended to be used for the making of counterfeit money or coin or tokens of value, shall belong to His Majesty, and all counterfeit money or coin or tokens of value and all such instruments or materials which come into the possession or under the control of any person or court shall be forthwith forwarded to the Minister of Finance, to be destroyed or otherwise disposed of as he may direct: Provided that where any such counterfeit money or coin or tokens of value, instruments or materials, are required as evidence in any court they shall not be forwarded to the Minister until such time as they are no longer required for such purpose.

957. If any false or counterfeit coin is produced on any trial for any offence against the provisions of Part IX relating to coin, the court shall cause the same to be disposed of pursuant to the provisions of subsection two of section five hundred and sixty-nine.

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tended for use in making counterfeit money or counterfeit tokens of value,

and anything seized shall be sent to the Minister of Finance to be disposed of or dealt with as he may direct, but anything that is required as evidence in any proceedings shall not be sent to the Minister until it is no longer required in those proceedings.

This covers the former ss.569(2) and 957, the latter of which was s.721 in the Code of 1892. It will be observed that it gives a peace officer the right to seize the offending material. Of course the methods used by counterfeiters are better known to the police than to an outsider, but it is understood that it is customary for them to use "passers" who do not take a great quantity of the counterfeit at any one time.

Section 405—*continued*

In view of the provisions of this section, the former s.632 has been dropped. It provided for the destruction of forged bank notes, etc., and for the disposal of counterfeit coin and other things seized under search warrant. Ss.623 and 626 have been dropped also. The former appeared to be inconsistent with s.569(2) in that it required the justice to place the coin in safe custody to await the order of the Governor General. S.626 is unnecessary since the importation of counterfeit money is an offence under s.393 of this Part, and a Customs officer is a peace officer by definition in s.2(30).

PART XI.

ATTEMPTS—CONSPIRACIES—ACCESSORIES.

ATTEMPTS, ACCESSORIES.—Where offence punishable with death or life imprisonment.—Where offence punishable with fourteen years or less.—Where offence punishable on summary conviction.

406. Except where otherwise expressly provided by law, the following provisions apply in respect of persons who attempt to commit or are accessories after the fact to the commission of offences, namely,

(a) **every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, upon conviction, an accused is liable to be sentenced to death or to imprisonment for life, is guilty of an indictable offence and is liable to imprisonment for fourteen years;**

(b) **every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, upon conviction, an accused is liable to imprisonment for fourteen years or less, is guilty of an indictable offence and is liable to imprisonment for a term that is one half of the longest term to which a person who is guilty of that offence is liable; and**

(c) **every one who attempts to commit or is an accessory after the fact to the commission of an offence punishable on summary conviction is guilty of an offence punishable on summary conviction.**

This section is drawn from the former ss.570, 571, 572, 574 and 575. They were ss.528-532 in the Code of 1892 and came from ss.423-426 of the E.D.C. Subsec.(3) effects a change.

Attempts are defined in s.24. Express provision concerning them is contained in ss.46 (treason), 100 (judicial corruption), 104 (municipal corruption), 137 (rape), 184 (procuring), and 210 (murder). As to procedure see s.413.

Accessories after the fact are defined in s.23. As to procedure, see ss.413 and 502. In 4 Bl. Com. at p.37, accessories after the fact are described as follows:

> "An accessory after the fact may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. Therefore, to make an accessory *ex post facto,* it is in the first place requisite that he knows of the felony committed. In the next place he must receive, relieve, comfort, or assist him. And gen-

OLD CODE:

632. If under any such warrant there is brought before any justice any forged bank note, bank note-paper, instrument or other thing, the possession whereof in the absence of lawful excuse is an offence under any provision of this or any other Act, the court to which any such person is committed for trial or, if there is no commitment for trial, such justice may cause such thing to be defaced or destroyed.

(2) If under any such warrant there is brought before any justice, any counterfeit coin or other thing the possession of which with knowledge of its nature and without lawful excuse is an indictable offence under any provision of Part IX, every such thing so soon as it has been produced in evidence, or so soon as it appears that it will not be required to be so produced, shall forthwith be disposed of pursuant to the provisions of subsection two of section five hundred and sixty-nine.

570. Every one is guilty of an indictable offence and liable to seven years' imprisonment who attempts, in any case not hereinbefore provided for, to commit any indictable offence for which the punishment is imprisonment for life, or for fourteen years, or for any term longer than fourteen years.

571. Every one who attempts to commit any indictable offence for committing which the longest term to which the offender can be sentenced is less than fourteen years, and no express provision is made by law for the punishment of such attempt, is guilty of an indictable offence and liable to imprisonment for a term equal to one-half of the longest term to which a person committing the indictable offence attempted to be committed may be sentenced.

572. *Every one is guilty of an indictable offence and liable to one year's imprisonment who attempts to commit any offence under any statute for the time being in force and not inconsistent with this Act, or incites or attempts to incite any person to commit any such offence, and for the punishment of which no express provision is made by such statute.*

574. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, in any case where no express provision is made by this Act for the punishment of an accessory, is accessory after the fact to any indictable offence for which the punishment is, on a first conviction, imprisonment for life, or for fourteen years, or for any term longer than fourteen years.

575. *Every one who is accessory after the fact to any indictable offence for committing which the longest term to which the offender can be sentenced is less than fourteen years, if no express provision is made for the punishment of such accessory, is guilty of an indictable offence and liable to imprisonment for a term equal to one-half of the longest term to which a person committing the indictable offence to which he is accessory may be sentenced.*

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erally, any assistance whatever given to a felon, to hinder his being apprehended, tried or suffering punishment, makes the assistor an accessory. As furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him. So likewise to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man an accessory to the felony. But to relieve a felon in gaol with clothes or other necessaries, is no offence; for the crime imputable to this species of accessory is the

Section 406—*continued*

hindrance of public justice, by assisting the felon to escape the vengeance of the law."

COUNSELLING, ETC., OFFENCE WHICH IS NOT COMMITTED.

407. Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel, procure or incite other persons to commit offences namely,

***(a)* every one who counsels, procures or incites another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and is liable to the same punishment to which a person who attempts to commit that offence is liable; and**

***(b)* every one who counsels, procures or incites another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction.**

This is derived from the former s.69 (see now s.21) and s.572, the latter of which was s.530 in the Code of 1892, and s.424 in the E.D.C. The new section, it will be observed, makes specific reference to summary conviction offences, and makes the counselling, etc., of such an offence punishable on summary conviction if the offence is not committed.

It provides for cases covered by the former s.69(d) where it was immaterial whether the offence was committed. Again, it was an offence at common law to counsel or procure another to commit an offence even though it was not committed, or to incite another to commit an offence: see *R. v. BROUSSEAU*, noted *ante* p.63, and *R. v. STEWART*, noted under s.22, *ante* p.65.

A person who counsels or procures another to commit an offence that is committed, is, by virtue of s.22, a party to the offence and chargeable as a principal.

In *R. v. LEBEDOFF (No. 2)* (1950), 98 C.C.C.117, the accused were convicted for seditious conspiracy in signing a document exhorting Doukhobors to refuse to obey many of the laws of Canada, provincial as well as Dominion.

CONSPIRACY TO MURDER.—Conspiracy to bring false accusation.—Conspiracy to defile.—Conspiracy to commit other offences.—Common law conspiracy.

408. (1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy, namely,

***(a)* every one who conspires with any one to commit murder or to cause another person to be murdered, whether in Canada or not, is guilty of an indictable offence and is liable to imprisonment for fourteen years;**

***(b)* every one who conspires with any one to prosecute a person for an alleged offence, knowing that he did not commit that offence, is guilty of an indictable offence and is liable**

(i) to imprisonment for ten years, if the alleged offence is one for which, upon conviction, that person would be liable to be sentenced to death or to imprisonment for life or for fourteen years, or

OLD CODE:

69. Every one is a party to and guilty of an offence who
(a) actually commits it;
(b) does or omits an act for the purpose of aiding any person to commit the offence;
(c) abets any person in commission of the offence; or
(d) counsels or procures any person to commit the offence.
(2) If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose.

266. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who
(a) conspires or agrees with any person to murder or to cause to be murdered any other person, whether the person intended to be murdered is a subject of His Majesty or not, or is within His Majesty's dominions or not; or
(b) counsels or attempts to procure any person to murder such other person anywhere, although such person is not murdered in consequence of such counselling or attempted procurement.

178. Every one is guilty of an indictable offence who conspires to prosecute any person for any alleged offence, knowing such person to be innocent thereof, and shall be liable,
(a) to imprisonment for fourteen years if such person might, upon conviction for the alleged offence, be sentenced to death or imprisonment for life;
(b) to imprisonment for ten years if such person might, upon conviction for the alleged offence, be sentenced to imprisonment for any term less than life.

218. Every one is guilty of an indictable offence and liable to two years' imprisonment who conspires with any other person by false pretenses, or false representations or other fraudulent means to induce any woman to commit adultery or fornication.

573. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, in any case not hereinbefore provided for, conspires with any person to commit any indictable offence.

(ii) to imprisonment for five years, if the alleged offence is one for which, upon conviction, that person would be liable to imprisonment for less than fourteen years;

(c) **every one who conspires with any one to induce, by false pretences, false representations or other fraudulent means, a woman to commit adultery or fornication, is guilty of an indictable offence and is liable to imprisonment for two years; and**

(d) **every one who conspires with any one to commit an indictable offence not provided for in paragraph *(a)*, *(b)* or *(c)* is guilty of an indictable offence and is liable to the same punishment as that to which an accused who is guilty of that offence would, upon conviction, be liable.**

(2) Every one who conspires with any one

(a) **to effect an unlawful purpose, or**

Section 408—*continued*

***(b)* to effect a lawful purpose by unlawful means,**

is guilty of an indictable offence and is liable to imprisonment for two years.

This section gathers together a number of conspiracies formerly scattered throughout the Code, and adds in subsec.(2) a codification of common law conspiracy.

Subsec.(1)(a) comes from the former s.266(a). It was s.234(a) in the Code of 1892 and s.180 in the E.D.C. It comes from the *Offences against the Person Act,* 1861, c.100, s.4 (Imp.), and Greaves' Cons. Acts, p.19, says of it:

> "The words 'whether he be a subject of Her Majesty or not and whether he be within the Queen's dominions or not', were inserted in order to make it perfectly clear that this clause included a case where the conspiracy was to murder a foreigner in a foreign country. The words were introduced *ex abundanti cautela* only. . . . . having with no small care examined all the authorities to be found on the subject, ... it is perfectly clear to me that the killing of any person anywhere in the world, whether on land or sea, under such circumstances that if the killing had been in England it would have amounted to the crime of murder, has ever been murder in contemplation of the law of England."

Subsec.(1)(b) comes from the former s.178. It was s.152 in the Code of 1892 where Taschereau describes it as new and formed part of s.126 in the E.D.C. It was a misdemeanour at common law.

Subsec.(1)(c) comes from the former s.218. It was s.188 in the Code of 1892, where Taschereau describes it as new, and s.149 in the E.D.C. Under this Code corroboration will not be required.

Subsec.(1)(d) comes from the former s.573 with a change in penalty. It was s.527 in the Code of 1892, where Taschereau describes it as new, and s.419 in the E.D.C.

Criminal conspiracy generally is described in the words of subsec.(2). The rest of that section, as well as ss.409, 410 and 411, deals with special sorts of conspiracy. The offence is deeply embedded in the criminal law although, in *ALLEN v. FLOOD,* [1898]A.C.1, at p.123, it was said to be "anomalous in more than one respect".

The anomalies may be said to consist in the facts that

1. The agreement constitutes the crime;
2. no overt act is necessary. It does not matter that nothing is done, or, as it is put in Kenny's Outlines of Criminal Law, 15th ed. p.334, "a person may be convicted of a conspiracy as soon as it has been formed and before any overt act has been committed";
3. it is unnecessary to show that the conspiracy resulted in prejudice to anyone. This distinguishes it from civil conspiracy, which is criminal conspiracy with resultant damage to someone;
4. what is lawful if done by one person may be unlawful if done under an agreement between two or more. For example, A may persuade others not to deal with B, but if A and C conspire for that purpose there is an offence. However, the Code provides an exception to this in favour of trade unions.

In *SORRELL v. SMITH*, [1925]A.C.700, the following propositions appear:

1. A combination of two or more persons wilfully to injure a man in his trade is unlawful and if it results in damage to him it is actionable.
2. If the real purpose of the combination is not to injure another but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues.

In *CROFTER HARRIS TWEED COMPANY v. VEITCH*, [1942] 1 All E.R.142, at p.157, the following appears:

"The concept of a civil conspiracy to injure has been in the main developed in the course of the last half century, particularly since *MOGUL S.S. CO. v. McGREGOR GOW & CO.* ([1892]A.C. 25). Its essential character is described by Lord Macnaghten in *QUINN v. LEATHEM*([1901]A.C. 495), at p.510, basing himself on the words of Lord Watson in *ALLEN v. FLOOD*, at p.108: 'A conspiracy to injure others might give rise to civil liability even though the end were brought about by conduct and acts which by themselves and apart from the element of combination or concerted action could not be regarded as a legal wrong.' In this sense the conspiracy is the gist of the wrong, though damage is necessary to complete the cause of action."

Concerning the history of the crime, the following is quoted from *ECREMENT v. CUSSON*(1919), 30 Que. K.B.55, at p.63:

"There is at common law the crime of conspiracy, and if the Code has not legislated to the contrary, that common law has full application .....

I could begin with Coke in the 16th Century, and go to Hale in the 17th, and from these to Sir Michael Foster, the great jurist, and from him to Roscoe, and from Roscoe to Stephen, and I would find perfect unanimity in the definition and appreciation of the crime. I take Roscoe as an example: 'A conspiracy is a crime between two or more persons to do that which is unlawful. Of course it makes no difference whether the final object be unlawful or the means be unlawful, in either case the conspiracy is equally indictable.'

Lord Coke in *POULTERERS' CASE* said: 'A man shall have a writ of conspiracy, although they do nothing but conspire together, and he shall recover damages, and they may also be indicted thereof.'

Also it should be pointed out, that the intention to conspire is not the offence. It is the agreement, and when that agreement is made the offence is committed, or, as Russell states in his work on the Law of Crimes (7th Eng. ed. and 1st Can. ed. vol. 1, p.146): 'From the highest and best authorities the conclusion upon the subject is simply to this effect, that an agreement made between two parties to do an unlawful act to the detriment of another is an indictable offence. In England, under the common law, men were indicted for conspiring to do unlawful things, almost without number, even to the extent of conspiring to hiss an actor on the stage of a theatre.' "

In the same connection the following appears in *R. v. CAMERON* (1935), 64 C.C.C.224, in which the accused were charged with conspiracy to prevent law enforcement and so to effect a public mischief:

Section 408—*continued*

"The modern law of criminal conspiracy was formulated in the 17th century as a result of the decision in the *POULTERERS' CASE*(1610), 9 Coke's Rep.55 b; Moore, K.B. 814, where it was held that the mere act of combination to commit the crime of conspiracy was punishable, and is familiarly known as the 17th Century Rule. This was deduced from the general rule of criminal law that the gist of the crime was in the criminal intent, although it could not be punished until the intent was manifested by some act done in furtherance of it, and that in conspiracy the criminal intent was the intent to combine to indict falsely, and that this intent was sufficiently manifested by the act of combination, that by the agreement itself, without any carrying out of the objects of the agreement. This originated the common law offence of criminal conspiracy, for once it was established that a conspiracy to indict falsely had been committed by the mere act of combination for that purpose, without any act of furtherance of the object of the combination, it followed that nothing had been done which amounted to a complete crime under the statute, as had formerly been the case, therefore the agreement or act of combination must be in some sense criminal at common law. If such combination to indict falsely was criminal at common law, it followed that other combinations, containing some wrongful element, were also criminal, and became the accepted proposition that a combination to commit any crime was a criminal conspiracy, although such crime may not have been executed.

The earliest decided case that a combination to do that which is not an indictable offence, may yet be criminal, and upon which the very wide definitions of conspiracy subsequently propounded are built, is the classic *STARLING'S CASE*(1663), 1 Sid. 174; 82 E.R. 1039.

This is the foundation of all modern law on the subject, and that the conspiracy, as opposed to the criminal objective, has always been a common law crime, since, as between the combination to commit a crime and the crime itself, the gist of the offence is the combination.

In 1762 the Courts went further still, Lord Mansfield, in *R. v. RISPAL* (1762), 3 Burr. 1320; 97 E.R. 852, holding that it was sufficient to establish a criminal conspiracy to prove a combination to extort by accusing of 'a false act', defined as 'whether it be to charge a man with criminal acts, or such only as affect his reputation'.

It was at this time that there is a suggestion that a combination to design [*sic*—defeat?] or pervert justice might be a criminal conspiracy. This extension is intelligible, as the real purpose of the ancient law was to prevent justice being defeated.

In 1825 a further extension was made in *R. v. HOLLINGBERRY*, 4 B. & C. 329, 107 E.R. 1081, where it was held that it was immaterial whether the charge was true or false, so long as the purpose was to extort money.

A still wider extension was made by Lord Denman in *R. v. JONES* (1832), 4 B. & Ad. 345, when he declared:- 'That a criminal conspiracy consists in a combination to accomplish an unlawful end or a lawful end by unlawful means,' leaving open the meaning of 'unlawful', and was adopted by Lord Brampton in 1901 in *QUINN v. LEATHEM*,

[1901] A.C. 495, and, as has been said by a learned writer, (Sir R. S. Wright), 'no doubt contributed greatly to the vague notions which have been prevalent in modern times as to the exact limit of criminal conspiracy'.

Up to the present time there exists no definite and all-embracing definition which is universally accepted and recognized as such.

The one most frequently quoted is that given by Willes, J., on behalf of the Judges to whom the question was referred by the House of Lords in *MULCAHY v. REGINA*(1868), L.R. 3 H.L.306:- 'A conspiracy consists not merely in the intention of the two or more but in the agreement of two or more to do an unlawful act or to do a lawful act by an unlawful means.'

Considerable time has been taken up in dealing with the history of this offence, but the obvious difficulties confronting the Court make it necessary, as the authorities show how wide and varied is the scope of the offence of conspiracy and how difficult it is to arrive at an adequate definition embracing the particular offence of conspiracy to effect a public mischief by perverting the course of justice, for which the accused stand indicted.

Criminal conspiracy, as has been defined, is made up of three ingredients, the persons, the agreement and the unlawful purpose."

As to agreement, the Court referred to *MULCAHY v. R., supra; R. v. BRAILSFORD,* [1905]2 K.B.730; *R. v. SINCLAIR*(1906), 12 C.C.C.20.

As to the unlawful purpose, the Court continued (at p.230):

"This is the third ingredient, that of the unlawful purpose, and this element is of importance in that it is the purpose of the agreement which determines whether it is a criminal conspiracy or not.

The first suggestion that a combination to defeat the course of public justice is criminal was developed by Lord Hardwicke in *CHETWYND v. LINDON* in 1752, 2 Ves. Sen. 450, 29 E.R. 288. In this and subsequent cases great difficulty was had by the Courts in applying the rule of criminal conspiracy to combinations to defeat or pervert public justice, where the act of the individual was not criminal in itself, or doubtful, and it was not until 1910 that Lord Alverstone finally decided the question by declaring such acts to be a public mischief in the case of *R. v. PORTER,* [1910]1 K.B.369, when he upheld the argument of the Crown that 'an agreement to do an act which tends to produce a public mischief is an illegal agreement, the parties to which are guilty of criminal conspiracy even though they may in fact have had no wrongful intent,' by declaring 'it is, in our opinion, difficult to conceive any act more likely to produce a public mischief than that which was done in this case,' (which was a case of indemnification against the liability for bail) and 'without any necessity for a finding by the jury that there was an intent to pervert or obstruct the course of justice.' See also *R. v. DE BERENGER*(1814), 3 Mau. & Sel. 67, 105 E.R. 536.

Though it is difficult to say what constitutes a conspiracy to effect a public mischief, as is charged in this indictment, there can be no doubt that those cases establish that such a combination is indictable, whether the act complained of constitutes a crime in the individual or not.

Section 408—*continued*

In a late case on the subject Lord Chief Justice Hewart, in *R. v. MEYRICK*((1929), 45 L.T.421) said:- ' . . . . . The matter to be ascertained was whether the acts of the accused were done in pursuance of a criminal purpose common to all of them.' "

A somewhat contentious point has arisen in connection with the procedure to be followed in cases of conspiracy. It was said in *R. v. BOULTON*(1871), 12 Cox,C.C.87, at p.93:

"I am clearly of the opinion that where the proof intended to be submitted to a jury is proof of the actual commission of crime, it is not the proper course to charge the parties with conspiring to commit it; for that course operates, it is manifest, unfairly and unjustly against the parties accused; the prosecutors are thus enabled to combine in one indictment a variety of offences, which, if treated individually, as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudice of others and deprive defendants of the advantage of calling their co-defendants as witnesses."

Although this has been followed in Canada, there is, on the other hand, an opinion expressed in *ECREMENT v. CUSSON, supra,* that there are "many eminent jurists who are of opinion that the charge of conspiracy most justly reached many an offender who would otherwise have escaped on the charge of having committed the overt act".

The distinction seems to lie between a case where the *sole evidence* of the conspiracy consists in proof of the commission of the crime which was its object, and a case where the commission of the crime is only one of several acts which go to prove the existence of the agreement. Thus in *R. v. GRAHAM*(1954), 108 C.C.C.153, where the accused were charged with conspiracy to steal automobiles and to receive and retain stolen automobiles, and in the same indictment with stealing and receiving, it was said that:

"The indictment in this matter contained nine counts. It was an indictment joining a count for conspiracy with counts on charges which themselves formed the subject of the conspiracy. In ordinary cases such joinder has been frowned upon by successive Judges but never held to be wrong. Where, however, as here, that which is alleged goes far beyond the performance of the individual acts, the end of the conspiracy being of a more far-reaching character than such acts themselves, the joinder is not to be criticized: *R. v. MEYRICK and RIBUFFI* (1929), 21 Cr. App. R. 94 at p.103; *R. v. GIMBLE* (1939), 71 C.C.C. 303."

Nevertheless, the matters of evidence referred to in *R. v. BOULTON* constitute a real objection to the joinder of such counts. It is well established that once the agreement is proved, acts and declarations made by any one of the conspirators in furtherance of the common object, is evidence against the others: *R. v. KOUFIS*(1941), 75 C.C.C.39. This is true of documents also: *R. v. RUSSELL*(1920), 33 C.C.C.1; *R. v. SMITH*, [1941]2 W.W.R.128. It is unnecessary that the conspirators should ever have seen each other or even have communicated with each other: *R. v. MEYRICK and RIBUFFI, supra.* However, objections of this sort could no doubt be overcome by separating the trial of the counts.

Any attempt to brief the scores of cases of conspiracy would require a volume in itself. The common law conspiracy now codified in subsec. (2) is, it is submitted, sufficiently covered for practical purposes in the foregoing notes, and the cases which follow are cited as being representative for the purpose of illustration.

Two English cases which are often cited are *R. v. ASPINALL*(1876), 2 Q.B.D. 48, and *R. v. DE BERENGER*(1814), 3 M. & S.67. The latter was a case in which there was a conspiracy to raise the price of public funds on a particular day by false rumours. The former was a case of conspiracy to register the shares of a company on the Stock Exchange at an unreal value. The following is quoted from the judgment at p.58:

> "The conspirators may repent and stop, or may have no opportunity, or may be prevented, or may fail. Nevertheless, the crime is complete; it was completed when they agreed. It is not, of course, every agreement which is a criminal conspiracy. It is difficult, perhaps, to enunciate an exhaustive or a complete definition; but agreements may be described which are undoubtedly criminal. An agreement to accomplish an end forbidden by law, though by means which would be harmless if used to accomplish an unforbidden end, is a criminal conspiracy. An agreement to accomplish, by means which are if done by themselves forbidden by law, an end which is harmless if accomplished by unforbidden means, is a criminal conspiracy. An agreement made with a fraudulent or wicked mind to do that which, if done, would give to the prosecutor a right of suit founded on fraud, or on violence exercised on or towards him, is a criminal conspiracy: see *R. v. WARBURTON*(1870), L.R. 1 C.C.R. 274. There may be and probably are others."

PARADIS v. R., [1934]S.C.R.165 was a conspiracy to commit the indictable offence of arson.

In *Re REGAN*(1939), 71 C.C.C.221, there was a conspiracy to defraud His Majesty The King. It was held that a joint charge against all is not necessary and that one party to the conspiracy may be charged separately.

In *R. v. SIMPSON AND SIMMONS*(1943), 79 C.C.C.344 the accused were convicted of a conspiracy to defraud the province of British Columbia by false invoices. In *R. v. MELNYK*(1947), 90 C.C.C.257, the accused gave a soldier a false invoice for furniture and received a cheque from the Department of Veterans' Affairs. This he cashed and gave to the soldier part of the proceeds. An argument that the prosecution should have been under the *War Services Grants Act*, 1944-45, c.51, was rejected.

In *R. v. O'BRIEN*(1954), 11 W.W.R. (N.S.) 657, the accused was charged with conspiring with others to kidnap a woman. His defence was that he had given only a feigned consent, without any intention of carrying out the plot. It was held that *mens rea* (a guilty mind) is an essential element of the crime.

In *R. v. FANE ROBINSON LTD.*(1941), 76 C.C.C.196, it was held that a corporation can be guilty of criminal offences of which *mens rea* is an element (in this case conspiracy to defraud).

In *R. v. SMITH*(1947), 89 C.C.C.8, the accused was charged with conspiring to publish official secrets to be used by Russia. It was held

Section 408—*continued*

that such facts were disclosed as entitled the judge reasonably to infer that the accused was a party to the conspiracy. In this connection see also *ROSE v. R.*(1946), 88 C.C.C.144; *R. v. GERSON*(1947), 89 C.C.C.138; *R. v. BENNING, ib.* 33 and *R. v. HARRIS, ib.* 231. In *R. v. BALDWIN et al.*(1934), 40 Rev. de Jur., 326 the accused were charged with conspiracy to commit an offence indictable under the *Excise Act*. See also *R. v. ADDUONO*(1940), 73 C.C.C.152, and *R. v. GALLANT*(1944), 83 C.C.C.55. In *MILLER v. R.*(1932), 52 Que. K.B.376, the accused were convicted of conspiracy to commit the indictable offence of smuggling into Canada goods subject to Customs duty of the value of over two hundred dollars. In *R. v. BINDER*(1948), 92 C.C.C.20, the accused were charged with conspiring first, to unlawfully import automobiles into Canada from the United States and second, to unlawfully receive automobiles stolen in the United States. In connection with conspiracy to evade the *Customs Act*, see also *R. v. W. NATANSON*(1927), 49 C.C.C. 80.

In *FORSYTHE v. R.*, [1943]S.C.R.98, the accused was charged along with B and C in a number of counts of conspiracy to commit offences against the *Opium and Narcotic Drug Act*. C was separately tried and acquitted. The accused and B were convicted. It was held that the accused was not entitled to be acquitted by reason of C's acquittal.

In *R. v. GOTTSELIGG*(1951), 102 C.C.C.166, a conviction for conspiracy to break and enter was affirmed.

As to subsec.(1)(b).

In *R. v. BAUGH*(1917), 28 C.C.C.146, the accused were charged with conspiring to prosecute one S for an alleged offence. It was said that "the jury were entitled to draw, and no doubt did draw, the most adverse inference from Baugh's failure to deny participation in such a malicious conspiracy".

As to subsec.(1)(c).

In Wright on Conspiracy, a note referring to *LORD GREY'S CASE* (1682), 9 State Tr.127, is as follows:

> "1682. Lord Grey; To commit abduction and procure adultery. (This case appears not to have been prosecuted as a case of conspiracy; but, assuming that it was so prosecuted, it was prosecuted as a combination to commit the offence mentioned.)"

By way of comment on the rule that what may be lawful if done by one person may become unlawful if done by two or more, reference may be made again to the very lengthy judgment in *CROFTER HARRIS TWEED CO. v. VEITCH,* [1942]1 All E.R. 142. While one of the Law Lords expressed himself as having no difficulty in seeing the distinction between the conduct of one man and that of two or more, the others did not agree with him on that point. For example, Lord Wright said (p.161):

> "The distinction between conduct by one man and conduct by two or more may be difficult to justify . . . . . The special rule relating to the effect of the combination has been explained on the ground that it is easier to resist one than two. That may be true if a crude illustration is taken such as the case of two men attacking another, but even there

OLD CODE:

496. A conspiracy in restraint of trade is an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade.
497. The purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful within the meaning of the last preceding section.
2. (41) "trade combination" means any combination between masters or workmen or other persons for regulating or altering the relations between any person being masters or workmen, or the conduct of any master or workman in or in respect of his business or employment, or contract of employment or service;
590. No prosecution shall be maintainable against any person for conspiracy in refusing to work with or for any employer or workman, or for doing any act or causing any act to be done for the purpose of a trade combination, unless such act is an offence punishable by statute

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it would not always be true—for instance, if the one man was very strong and the other two were very weak—and the power of a big corporation may be greater than that of a large number of smaller fry in the trade. This explanation of the rule is not very satisfactory. The rule has been explained on grounds of public policy. The common law may have taken the view that there is always the danger that any combination may be oppressive, and may have thought that a general rule against combinations was desirable on broad grounds of policy. Again, any combination to injure involves an element of deliberate concert between individuals to do harm. Whatever the moral or logical or sociological justification, the rule is as well established in English law as I here take to be the rule that motive is immaterial in regard to the lawful act of an individual, a rule which has been strongly criticised by some high legal authorities, who would solve the apparent antinomy by holding that deliberate action causing injury is actionable whether done by one or several."

It is quite possible that further development of the law of conspiracy may see this distinction discarded.

See also notes to s.131.

CONSPIRACY IN RESTRAINT OF TRADE.—Trade union, exception.

409. (1) A conspiracy in restraint of trade is an agreement between two or more persons to do or to procure to be done any unlawful act in restraint of trade.

(2) The purposes of a trade union are not, by reason only that they are in restraint of trade, unlawful within the meaning of subsection (1).

SAVING.—"Trade combination."

410. (1) No person shall be convicted of the offence of conspiracy by reason only that he

(*a*) refuses to work with a workman or for an employer, or

(*b*) does any act or causes any act to be done for the purpose of a trade combination, unless such act is an offence expressly punishable by law.

(2) In this section, "trade combination" means any combination between masters or workmen or other persons for the purpose of

Sections 409 & 410—*continued*

regulating or altering the relations between masters or workmen, or the conduct of a master or workman in or in respect of his business, employment or contract of employment or service.

S.409 combines the former ss.496 and 497. S.410 combines the former ss.590 and 2(41).

An examination of them cannot begin better than by quoting the following summary of the subject with which they deal, from Stephen's History of Criminal Law, Vol. 3, p.226:

"It is one of the most characteristic and interesting passages in the whole history of the criminal law.

First, there is no law at all, either written or unwritten. Then a long series of statutes aim at regulating the wages of labour, and end in general provisions preventing and punishing, as far as possible, all combinations to raise wages. During the latter part of this period an opinion grows up that to combine for the purpose of raising wages is an indictable conspiracy at common law. In 1825 the statute law is put upon an entirely new basis, and all the old statutes are repealed, but in such a way as to countenance the dictum about conspiracies in restraint of trade at common law. From 1825 to 1871 a series of cases are decided which give form to the doctrine of conspiracy in restraint of trade at common law, and to carry it so far as to say that any agreement between two people to compel anyone to do anything he does not like is an indictable conspiracy independently of statute. In 1871 the old dictum as to agreements in restraint of trade being criminal conspiracies is repealed by statute. But the common law expands as the statute law is narrowed, and the doctrine of a conspiracy to coerce or injure is so interpreted as to diminish greatly the protection supposed to be afforded by the Act of 1871. Thereupon the Act of 1875 specifically protects all combinations in contemplation of furtherance of trade disputes, and, with respect to such questions at least, provided positively that no agreement shall be treated as an indictable conspiracy unless the act agreed upon would be criminal if done by a single person. . . . . ."

S.496 is Article 497 in the 8th ed. of Stephen's Digest, and s.497 is quoted as s.2 of the *Trade Unions Act*, 1871, and appears as Article 498. The two are respectively Articles 608 and 609 in Burbidge's Digest of Canadian Criminal Law. S.497 appeared in Canada as s.2 of the *Trade Unions Act* 1872 (35 Vict., c.30). The English *Conspiracy and Protection of Property Act* 1875, c.86, provided by s.3 that an agreement or combination by two or more persons to do or procure to be done any act in furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime. Ss.4 & 5 deal with breaches of contract and from them we derived ss.499 and 500 of the former Code. S.7 deals with intimidation and from it we derived s.501.

Canadian legislation parallels that of England by the *Trade Unions Act* of 1872, and by 1872, c.31, an *Act to Amend the Criminal Law relating to Violence, Threats and Molestation.*

S.2 of the *Trade Unions Act* 1872 provided that the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise. In the latter Act, subsec.(4) of s.1 contains provisions now appearing in s.366. The latter Act was further amended in 1876 by c.37, similarly entitled, and the present s.410(2) appears as s.4.

In 1877 there was passed the *Breaches of Contract Act*, c.35, which contained the provisions of the former ss.499 and 500. (They appeared, as ss.516 and 517 of the Code of 1892.) The following discussion upon them appears in Hansard, 1892, Vol. II, col.3644:

"Mr. DAVIES (P.E.I.): There is no definition of conspiracy in restraint of trade in the English Code?

Sir JOHN THOMPSON: I think not.

Mr. DAVIES: Of course, it is very hard to give a definition which would carry out what every one desires, and what would not involve restrictions upon trade unions. This definition seems to be rather fair on its face, but after all I question whether it would not be better to leave the matter to the common law. The existing law lays it down that the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, which practically protects them from being prosecuted; but for that we substitute the next section which provides that the purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful.

Sir JOHN THOMPSON: I understand the effect of that to be the same. It does not make lawful what may be done by a trade union in other respects; for example, conspiracy to commit such an offence as doing bodily harm. It seems to me that so little is included in the definition that it is harmless, and it is convenient to retain it. It only defines what conspiracy in restraint of trade is, and the next section, instead of saying that this shall not extend to trade unions, provides that the purposes of a trade union are not unlawful within the meaning of the definition. . . . . .

Mr. DAVIES: I suppose the provisions of the Trade Unions Act has been incorporated in the present Criminal Code?

Sir JOHN THOMPSON: Yes."

It should be noted that the sections dealing with trade disputes were in juxtaposition in the Code of 1892, that is to say, that ss.516 to 526 included what in the Code of 1927 became ss.496-503, and 590, as well as s.2, par.41, and par.(a) of s.335, and in this Code, so far as they are continued, are ss.365, 366, 409, 410 and 411.

Constitutional Question.

In *ATT'Y GEN. OF ONTARIO v. CANADIAN WHOLESALE GROCERS ASSOCIATION*(1923), 39 C.C.C.272, at p.290, Hodgins, J.A., expressed the opinion that, ss.496 and 498 were not unconstitutional by reason of the decision of the Privy Council in *Re BOARD OF COMMERCE ACT*, [1922]1 A.C.191. Meredith, C.J.O., was inclined to take the opposite view (p.282).

In *GORDON v. IMPERIAL TOBACCO SALES COMPANY*(1939), 71 C.C.C.322, it was held that the *Combines Investigation Act*, and ss.496

Sections 409 & 410—*continued*

and 498 of the *Criminal Code* are purely criminal legislation and create no civil rights enforceable by action, which are exclusively within the legislative jurisdiction of the provinces.

As to s.498 there cannot now be any question, since it was held by the Privy Council in *ATT'Y GEN. FOR BRITISH COLUMBIA v. ATT'Y GEN. FOR CANADA*(1937), 67 C.C.C.193, to be *intra vires.*

It may be observed that the provisions of s.497 are contained in s.29 of the *Trade Unions Act,* R.S.C. 1952, c.267. Apart from the fact that that Act applies only to unions registered under it, it was pointed out by Duff, J., in *STARR v. CHASE,* [1924]S.C.R.495, at p.508, that the Canadian Act has not been adopted in the provinces, "and as to many of its provisions there is, to say the least, doubt as to the authority of the Dominion to enact them." In *AMALGAMATED BUILDERS COUNCIL v. HERMAN*(1930), 65 O.L.R.296, it was held by Middleton, J.A., that the *Trade Unions Act* is a statute dealing wholly with property and civil rights, and is, therefore, *ultra vires* of the Dominion Parliament. The judgment refers to ss.496 and 497 and adds:

> "This is of great importance from the constitutional viewpoint, because it renders it unnecessary to consider whether the provisions of the *Trade Unions* Act are capable of being supported by reference to the criminal law. The provisions deemed proper for the protection of trade unions from the harsh operation of the criminal law are found in the *Criminal Code* and not in the *Trade Unions Act.*"

In another view of the same question, it is to be observed that in *TOLTON MANUFACTURING COMPANY v. ADVISORY COMMITTEE*(1940), 74 C.C.C.252, it was held that the Ontario *Industrial Standards Act* was *intra vires,* and that the scheme of it whereby wages and working hours were regulated, did not encroach upon Code ss.496 and 498. At p.260, s.498(2) was quoted with the comment:

> "Therefore, the employees engaged in this industry, independently of the Act, could have combined to enforce a schedule similar to the one authorized by the Act."

Interpretation.

In this regard there is a cautionary note in *WILLIAMS v. LOCAL UNION U.M.W.A.*(1919), 45 D.L.R.150, where it was pointed out by Beck, J., that "English legislation in regard to trade unions differs somewhat in its course, character and extent from that in Canada", and Harvey, C.J., said "I am of opinion that, because of our different legislation affecting trade unions and industrial disputes, the authorities in the English courts, or even our own earlier authorities, are not wholly applicable." This would have particular reference to s.411 which, like s.409(1), is not in English legislation.

While the Canadian cases generally agree that s.496 is to be read with s.498, it must be noticed that there has been some difference of opinion as to the joint application of the two sections.

Before the Code it was held in *R. v. GIBSON*(1889), 16 O.R.704, that defendants, members of a union of bricklayers and masons, in conspiring to injure a non-union workman by depriving him of his employment, were guilty of an indictable misdemeanour and that what they

conspired to do was not for the purposes of their trade combination within the protection of what is now s.410(1).

In *LEFEBVRE v. KNOTT*(1907), 14 R.L.N.S.99, at p.106, the former ss.516, 517 and 520 were cited but not discussed, beyond a remark that if it was lawful for workmen to combine, in logic it was equally lawful for the employers to resist.

It may be observed that c.41 of 52 Vict., in which s.498 (now s.411) first appears, says that "Whereas it is expedient to *declare* the law relating to conspiracies and combinations formed in restraint of trade, etc.". The offences are set out in s.1, and s.6 says that "The foregoing provisions of this Act shall be construed as if s.22 of the *Trade Unions Act* had not been enacted". (S.22 of R.S.C.1886, c.131 is similar to s.410(1).)

The above was noted in *R. v. CLARKE*(1907), 1 A.L.R.358, at p.372. The judgment proceeds:

> "It is true that the offences specified in subsecs.(a), (c) and (d), are, in effect, combinations in restraint of trade but if they meant no more than (b), they might as well be left out altogether, and as they are not described as 'conspiracies in restraint of trade' I see no reason why the definition of that term in s.496 should apply to them.
>
> A consideration of subsec.(2) of s.498 appears to me to support this view. It declares: (quoted). In my opinion it cannot be successfully contended that such a combination could come within the definition contained in s.496, and their need for excepting it from the provisions of s.498 indicates to my mind that that section covers a much wider field than s.496."

In *R. v. GAGE*(*No. 2*)(1908), 13 C.C.C.428, Howell, C.J.A., expressed the opinion that s.498, cls.(a), (c) and (d) create new statutory crimes and that cl.(b) together with s.496 continues the old law of conspiracy in restraint of trade. On the other hand, Phippen, J.A., was inclined to think that cl.(b):

> "relates to those restraints . . . . . which are mere malicious restraints unconnected with any business relations of the accused."

And Perdue, J.A., said:

> "The words 'conspires, combines or arranges' used in section 498, when taken either singly or collectively with par.(b), refer to the one offence of conspiracy in restraint of trade defined in s.496. These words, taken either collectively or individually, or any one of them, express the act of agreeing to do the unlawful thing, the doing of which would constitute the conspiracy."

S.496 came into consideration in the Supreme Court of Canada in *WEIDMAN v. SHRAGGE*(1912), 20 C.C.C.117, where Anglin, J., (at p.149) interpreted it as follows:

> "As the Code was originally drawn, sec. 516 (now sec. 496) did not govern sec.520 (now s.498). The latter section was complete in itself. Since it contained the word 'unlawfully' there could be no occasion to import that restriction from s.516. I see no good reason now for giving to s.496, which is an exact reproduction of s.516, an effect which the latter did not have, and obviously was not meant to have, in the original Act.
>
> If, however, s.496 should be held to modify or qualify anything in sec.498, I would incline to the view that it would be the principal or in-

Sections 409 & 410—*continued*

troductory clause. If so, it would apply to each of the sub-clauses of s.498 and no change would have been effected by striking out the word 'unlawfully'."

The sections were mentioned again in the Supreme Court of Canada in *STINSON-REEB v. R.*(1929), 52 C.C.C.66. This case upheld a conviction of an association of plasterers under s.498. Ss.496 and 497 are quoted but only as part of a group including s.498 "dealing with what is known as restraint of trade".

In *R. v. SINGER*(1931), 56 C.C.C.68 (plumbers' case), Wright, J., stated at p.83:

"It was contended by counsel for the Crown, *and I think rightly*, that the provisions of s.497 relate only to offences charged under s.498(b).

It will be noted also that s.497 of the Criminal Code is in practically the same language as s.29 of the Trade Unions Act, ...

It is quite evident that it was never intended by Parliament that s.497 should operate as a complete defence to charges of all the offences created by s.498 of the Code.

As already stated, it is not the purposes of the trade unions that are attacked in these proceedings, but the acts and operations of some of the members which are entirely outside the ambit of a trade union, and in this view s.497 cannot avail as a defence."

(This case was partly reversed on appeal but not on these points.)

In *R. v. IMPERIAL TOBACCO COMPANY,* [1940] 1 D.L.R.397, MacGillivray, J.A., (p.405) said: "In my view this par. (b) (*i.e.* of s.498) must be read with section 496 of the Code."

In *R. v. CONTAINER MATERIALS*(1940), 74 C.C.C.113, Hope, J., after remarking that there has been considerable difference in judicial opinion expressed as to the interpretation to be placed upon cl. 498(b), reviewed the case of *R. v. GAGE, supra.* He then quoted the judgment of Anglin, J., in *WEIDMAN v. SCHRAGGE* as quoted above, and proceeded as follows:

"Again in *ATT'Y GEN. OF ONTARIO v. CAN. WHOLESALE GROCERS ASSOCIATION*(1923), 39 C.C.C.272, Hodgins, J.A. (p.291) stated: 'I take it that s.496 defines such a conspiracy and that s.498 really amplifies and expands that definition. I venture to suggest that the reason why, in sub-sec. (b) the word 'unduly' or 'unlawfully' is not found, is because what is there described is really identical with s.496 and is only another way of stating the general offence by adding the word 'injure', which, on the hypothesis that all trade must operate free from improper restraint, only formulates the same idea by employing a different word'."

CONSPIRACY.—To limit commercial facilities.—To restrain commerce.—To lessen production.—To lessen competition.—"Article."—Saving.

411. (1) Every one who conspires, combines, agrees or arranges with another person

***(a)* to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article,**

***(b)* to restrain or injure trade or commerce in relation to any article,**

OLD CODE:

498. (1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article,

(b) to restrain or injure trade or commerce in relation to any article,

(c) to prevent, limit or lessen, unduly, the manufacture or production of an article, or to enhance unreasonably the price thereof, or

(d) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of an article, or in the price of insurance upon persons or property,

is guilty of an indictable offence and is liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding two years or to both.

(2) For the purposes of this section, "article" means an article or commodity which may be a subject of trade or commerce.

(3) This section does not apply to combinations of workmen or employees for their own reasonable protection as workmen or employees.

(c) to prevent, limit or lessen, unduly, the manufacture or production of an article, or to enhance unreasonably the price thereof, or

(d) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of an article, or in the price of insurance upon persons or property,

is guilty of an indictable offence and is liable to imprisonment for two years.

(2) For the purposes of this section, "article" means an article or commodity that may be a subject of trade or commerce.

(3) This section does not apply to combinations of workmen or employees for their own reasonable protection as workmen or employees.

This is the former s.498 as re-enacted by 1952, c.39, s.11. As to trial, see ss.413 & 416, *post*. See also s.32 of the *Combines Investigation Act* as enacted by 1952, c.39, s.3. Under that section it is an indictable offence to take part in the formation or operation of a combine, and it is provided that no person shall be charged with an offence against that section on the same information or indictment as that on which he is charged with an offence against s.498 of the *Criminal Code*.

This section has developed from s.520 of the Code of 1892, which came from 1889, c.41, and was amended by 1899, c.46, and 1900, c.46. It has been attacked as unconstitutional but its validity in that respect may be taken to be established by *PROPRIETARY ARTICLES TRADE ASSOCIATION v. A.G. CANADA*, [1931]A.C. 310, 55 C.C.C.241, where it is said that:

"Criminal law in s.91(27) of the B.N.A. Act, means the criminal law in its widest sense. It is not confined to what was criminal by the law of England or of any province in 1867. It connotes only the quality of such acts or omissions as are prohibited under appropriate penal

Section 411—*continued*

provisions by authority of the state. There is only one standard of reference for that quality, *viz.* 'is the act prohibited with penal consequences.' New crimes can be made by legislation."

The purpose of the legislation was stated in *WAMPOLE & CO. v. KARN*(1906), 11 O.L.R.619 at p.628 as follows:

"The history of the law shews that it was passed at a time when the law relating to the protection of native industries was being introduced. As an objection to the protective tariff it was argued that combinations might be formed which would destroy competition and so enhance the price; that while upon the one hand foreign goods were excluded, the introduction of which might moderate the price of the article in question, upon the other hand trade combinations might be formed which would destroy competition and greatly raise the price of the commodity to the consumers. To meet that objection the law against restraint of trade was passed."

The evil that it was intended to prevent appears at its worst in *R. v. CENTRAL SUPPLY ASSOCIATION LTD.*(1906), 12 C.C.C.371. The following is quoted from the judgment (at p.381):

"One hardly knows how to express one's self in the face of the disclosures . . . . . A number of hitherto reputable firms, meeting round a table, and under the pretence of sending in invited tenders, deliberately adopt a method by which, apparently without the slightest compunction, they took from the public, that portion of the public who happened to be interested, money to which they had no possible claim, no more claim than any person has when meeting another in the street he by force robs him of his money. Indeed, I think of the two offences the robbery is the less offensive.

Here they adopted a system of misrepresentation and fraud in order to induce persons inviting tenders to believe that the tenders were reasonable and fair, when from first to last, for at least the last 2 or 3 years, it was admitted in the box that not one single honest tender had come from that association. . . . . and in many instances it was evidenced that . . . . . they put in an additional sum, which was called a rake-off or bonus, to cover, forsooth, what was called the time and trouble of these gentlemen assembling together to do what they had done, and this rake-off was distributed among themselves. I can call it by no other name than so much plunder."

As already pointed out in the notes to s.408, this section contains but one of the several forms of conspiracy against which the *Criminal Code* strikes. With particular reference to this section, the following quotations from the many voluminous judgments on it, are selected as indicating its nature and scope. In *WEIDMAN v. SHRAGGE*(1912), 46 S.C.R.1, the following appears:

"Parliament has not sought to regulate the prices of commodities to the consumer, but it is the policy of the law to encourage trade and commerce and Parliament has declared illegal all agreements and combinations entered into for the purpose of limiting the activities of individuals for the promotion of trade; and preventing or lessening unduly that competition which is the life of trade and the only effective regulator of prices is prohibited."

At p.37:

"I have no hesitation in holding that as a rule an agreement having for one of its direct and governing objects the establishment of a virtual monopoly in the trade in an important article of commerce throughout a considerable extent of territory by suppressing competition in that trade, comes under the ban of the enactment."

In *STINSON-REEB v. R.*, [1929] S.C.R.276, it was said that:

"What is the true test was laid down by this court in *WEIDMAN v. SHRAGGE,* as above stated. Injury to the public by the hindering or suppressing of free competition, notwithstanding any advantage which may accrue to the business interests of the members of the combine, is what brings an agreement or a combination under the ban of section 498 Cr. C.

Counsel for the appellants contend that this is merely a case of a manufacturer freely choosing or changing his selling agents. It is very much more. It is a combination of manufacturers and dealers to control an important market wherein the goods in which they deal can be obtained only through them and at prices which they determine, free competition by others in the same market being suppressed."

In the latest case, *EDDY MATCH COMPANY v. R.*(1954), 109 C.C.C.1, at p.20, the following appears:

"The appellants concede that 'the policy of the law has been stated by the Supreme Court of Canada to be the preservation of free competition'. I do not quarrel with this statement but in dealing with a problem such as the present one, and at the risk of making a distinction without a difference, I prefer to take as my starting point the fundamental principle that everyone is entitled to the benefits that flow from free competition. This is what was stated or assumed in *R. v. ELLIOTT*(1905), 9 C.C.C. 505, 9 O.L.R. 648; *WEIDMAN v. SHRAGGE, supra; STINSON-REEB BLDRS. SUPPLY CO. v. R.,* [1929] 3 D.L.R. 331, S.C.R. 276, 52 C.C.C.66 and *CONTAINER MATERIALS LTD. v. R., supra.* From this it follows that anything which limits or restricts this freedom of competition is an encroachment on the public right."

It will be observed that not all combinations are prohibited. The word "unduly" is the key word, and upon it the following appears in *WEIDMAN v. SHRAGGE,* at p.42:

"The prime question certainly must be, does it (the agreement alleged to be obnoxious to section 498), however advantageous or even necessary for the protection of the business interests of the parties, impose improper, inordinate, excessive or oppressive restrictions upon that competition the benefit of which is the right of every one?"

In *R. v. ASH TEMPLE CO.*(1949), 93 C.C.C.267, it was held that where it is the companies who are charged and no one else, the criminal acts charged must be brought home to the companies as their acts. It was found that there was no evidence that any officer, servant or agent of any of the accused companies had any authority to act for the company in the matters complained of.

DISCRIMINATION IN TRADE.—Lower prices in particular area.—Lessening prices.—Defence.—Co-operative society not affected.

412. (1) Every one engaged in trade, commerce or industry who

(a) **is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of the purchaser, in that any discount, rebate, allowance, price concession or other advantage, is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage, available at the time of such sale to such competitors in respect of a sale of goods of like quality and quantity;**

(b) **engages in a policy of selling goods in any area of Canada at prices lower than those exacted by such seller elsewhere in Canada, having or designed to have the effect of substantially lessening competition or eliminating a competitor in such parts of Canada; or**

(c) **engages in a policy of selling goods at prices unreasonably low, having or designed to have the effect of substantially lessening competition or eliminating a competitor,**

is guilty of an indictable offence and is liable to imprisonment for two years.

(2) It is not an offence under paragraph *(a)* of subsection (1) to be a party or privy to, or assist in any sale mentioned therein unless the discount, rebate, allowance, price concession or other advantage was granted as part of a practice of discriminating as described in that paragraph.

(3) The provisions of paragraph *(a)* of subsection (1) shall not prevent a co-operative society returning to producers or consumers, or a co-operative wholesale society returning to its constituent retail members, the whole or any part of the net surplus made in its trading operations in proportion to purchases made from or sales to the society.

This is the former s.498A as re-enacted by 1952, c.39. It was first enacted by 1935, c.56, s.9, by way of implementing the recommendations of the Price Spreads Commission towards the end of "preserving fair competition among our trades and industries." It was the cause of much debate, doubts being expressed as to its constitutional validity, but those doubts were set at rest by the decision of the Privy Council in *ATTORNEY GENERAL FOR BRITISH COLUMBIA v. ATTORNEY GENERAL FOR CANADA,* [1937]A.C.368, that the whole section was within the legislative powers of the Parliament of Canada.

In *R. v. CONTAINER MATERIALS LTD.*(1940), 74 C.C.C.113 at p.120, it was said that s.498A was supplemental to the safeguards provided by s.498 (now s.411) for the preservation of that competition in trade to the benefit of which everyone is entitled.

In *BROWNE v. BRITISH AMERICAN OIL CO. LTD.*, [1941]1 D.L.R.799, it was held that the prohibitions contained in s.498A did not give rise to a civil right of action.

There is incidental mention of the section in *GEN. FILMS LTD. v. McELROY (No. 2),* [1939]3 W.W.R.491 at p.505.

OLD CODE:

498A. (1) Every person engaged in trade, commerce or industry is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding two years or to both, who
(a) is a party or privy to, or assists in, any sale that discriminates, to his knowledge, directly or indirectly, against competitors of the purchaser, in that any discount, rebate, allowance, price concession or other advantage, is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage, available at the time of such sale to such competitors in respect of a sale of goods of like quality and quantity;
(b) engages in a policy of selling goods in any area of Canada at prices lower than those exacted by such seller elsewhere in Canada, having or designed to have the effect of substantially lessening competition or eliminating a competitor in such part of Canada;
(c) engages in a policy of selling goods at prices unreasonably low, having or designed to have the effect of substantially lessening competition or eliminating a competitor.
(2) It is not an offence under paragraph (a) of subsection one to be a party or privy to, or assist in any sale mentioned therein unless the discount, rebate, allowance, price concession or other advantage was granted as part of a practice of discriminating as described in that paragraph.
(3) The provisions of paragraph (a) of subsection one shall not prevent a co-operative society returning to producers or consumers, or a co-operative wholesale society returning to its constituent retail members, the whole or any part of the net surplus made in its trading operations in proportion to purchases made from or sales to the society.

580. Every superior court of criminal jurisdiction and every judge of such court sitting as a court for the trial of criminal causes, and every court of oyer and terminer and general gaol delivery has power to try any indictable offence.

582. Every court of general or quarter sessions of the peace, when presided over by a superior court judge, or a county or district court judge, or in the cities of Montreal and Quebec by a recorder or judge of the sessions of the peace, and in the province of New Brunswick every county court judge has power to try any indictable offence except as hereinafter provided.

PART XII.
JURISDICTION.

GENERAL.

SUPERIOR COURT OF CRIMINAL JURISDICTION.—Court of criminal jurisdiction.—Treason.—Alarming or harming Her Majesty.—Intimidating Parliament or legislature.—Inciting to mutiny.—Sedition.—Piracy.—Piratical acts.—Bribery of officers.—Rape.—Causing death by criminal negligence.—Murder.—Manslaughter.—Threat to murder.—Combination restraining trade.—Accessories.—Corrupting justice.—Attempts.—Conspiracy.

413. (1) Every superior court of criminal jurisdiction has jurisdiction to try any indictable offence.

(2) Every court of criminal jurisdiction has jurisdiction to try an indictable offence other than

Section 413—*continued*

(a) **an offence under any of the following sections, namely,**
- **(i) section 47,**
- **(ii) section 49,**
- **(iii) section 51,**
- **(iv) section 53,**
- **(v) section 62,**
- **(vi) section 75,**
- **(vii) section 76,**
- **(viii) section 101,**
- **(ix) section 136,**
- **(x) section 192,**
- **(xi) section 206,**
- **(xii) section 207,**
- **(xiii) paragraph *(a)* of subsection (1) of section 316, or**
- **(xiv) section 411,**

(b) **the offence of being an accessory after the fact to treason or murder,**

(c) **an offence under section 100 by the holder of a judicial office,**

(d) **the offence of attempting to commit any offence mentioned in paragraph *(a)*, or**

(e) **the offence of conspiring to commit any offence mentioned in paragraph *(a)*.**

Subsec.(1) comes from the former s.580(1), which was s.538 in the Code of 1892 and was based upon R.S.C. 1886, c.174, s.3.

Subsec.(2) comes from the former ss.582 and 583 which were ss.539 and 540 in the Code of 1892. R.S.C. 1886, c.174, s.4 provided that only a superior court might try treason, felony punishable with death, or libel. Corresponding provisions in the E.D.C. were in s.434.

See definitions in s.2(10) and (38) *ante*, and see also the Introduction, *ante* p.13, par.36(f). Comparison will show also that criminal negligence has been added to subsec.(2) and that libels on foreign sovereigns and offences relating to seditious oaths, have been dropped.

A report prepared by the Commissioners on the general statute revision of 1927 contains the following:

"A consideration of the Criminal Code and other statutes of Canada shows that the administration of criminal justice has been entrusted to two main tribunals. First and highest to courts of superior jurisdiction, which in most provinces are designated as the Supreme Court of Judicature for the province. The judges of these courts are empowered to try all persons accused of crimes of whatever magnitude, and have all the authority of His Majesty the King, the grand justiciar of the Kingdom in criminal matters. Originally this court was styled the Court of King's Bench, which name is still retained in the provinces of Quebec and some other provinces.

Secondly, we have in some provinces Courts of General or Quarter Sessions of the Peace which also have cognizance of crime, but may not try those of serious consequence or involving capital punishment. These courts consist of a bench of the justices of the peace of each

OLD CODE:

583. (1) No court mentioned in the last preceding section has power to try any offence under sections,

(a) seventy-four, treason; seventy-six, accessories after the fact to treason; seventy-seven, seventy-eight, and seventy-nine, treasonable offences; eighty, assaults on the King; eighty-one, inciting to mutiny; eighty-five, unlawfully obtaining and communicating official information; eighty-six, communicating information acquired in office;

(b) one hundred and thirty, administering, taking or procuring the taking of oaths to commit certain crimes; one hundred and thirty-one, administering, taking or procuring the taking of other unlawful oaths; one hundred and thirty-four, seditious offences; one hundred and thirty-five, libels on foreign sovereigns; one hundred and thirty-six, spreading false news;

(c) one hundred and thirty-seven to one hundred and forty inclusive, piracy;

(d) one hundred and fifty-six, judicial, etc., corruption; one hundred and fifty-seven, corruption of officers employed in prosecuting offenders; one hundred and fifty-eight, frauds upon the Government; one hundred and sixty, breach of trust by a public officer; one hundred and sixty-one, municipal corruption; one hundred and sixty-two (a), selling offices;

(e) two hundred and sixty-three, murder; two hundred and sixty-four, attempt to murder; two hundred and sixty-five, threat to murder; two hundred and sixty-six, conspiracy to murder; two hundred and sixty-seven, accessory after the fact to murder; two hundred and sixty-eight, manslaughter;

(f) two hundred and ninety-nine, rape; three hundred, attempt to commit rape;

(g) three hundred and seventeen to three hundred and thirty-four, defamatory libel;

(h) four hundred and ninety-eight, combination in restraint of trade; or

(2) No such court has power to try any person

(a) for conspiring or attempting to commit, or being accessory after the fact to any of the offences in this section before mentioned; or

(b) indicted for bribery or undue influence, personation or other corrupt practice under the Dominion Elections Act.

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county, and sit every three months throughout the year. These two main tribunals—one superior and the other inferior—have existed from the earliest times in English history."

The report proceeds to outline the special jurisdiction of judges under Part XVIII, of magistrates under Part XVI and of justices under Parts XIV and XV of the repealed Code, and continues:

"The Court of General Quarter Sessions of the Peace is a court that must be held in every county, once in every quarter of the year. Their commission provides that if any case of difficulty arises they shall not pass judgment but in the presence of one of the Justices of the Court of King's Bench or Common Pleas or one of the Judges of the Assizes."

Upon the conquest of Canada the Commission and Royal Instructions given to Governor Murray empowered him "to make laws, statutes and ordinances for the people's welfare and the good government of the colony, and to erect and constitute Courts of Judicature for hearing and determining all causes as well criminal and civil as near as may be agreeable to the laws of England." Amongst other courts he, by an ordinance, established a Court of King's Bench and also appointed magis-

Section 413—*continued*

trates or justices of the peace with power to three justices as a quorum to hold quarterly sessions of the peace.

The *Quebec Act* of 1774 (14 George III) confirmed these ordinances.

In what is now Ontario the Court of General Sessions developed through statutory provisions in 1791 (31 Geo. III, c.31 (Imp.)); 1801 (41 Geo. III, c.6 Can.); 1890 (53 Vict., c.18) and 1909, 9 Edw. VII, c.30, s.3.

"In the Province of Ontario the Judge of the County Court is a Justice of the Peace and Chairman of the Court of General Sessions of the Peace. Any justice of the county is entitled to sit with him in the trials of offenders against the law, but he is authorized sitting *alone* to hear and determine all cases brought before him within the jurisdiction of the sessions."

The report points out too that in Quebec the old Court of General Sessions of the Peace has disappeared, that in New Brunswick its jurisdiction has been conferred on the County Courts, and concludes:

"In British Columbia the county court judge is by provincial statute given criminal jurisdiction over all offences except such as the Criminal Code has declared may not be tried by a Court of General or Quarter Sessions of the Peace. In Alberta and Saskatchewan, the Court of General or Quarter Sessions of the Peace is unknown."

Speaking in 1892 on ss.539 and 540, Sir John Thompson (Hansard, 1892, p.3800) referred to the fact that the committee had tried very hard to find out exactly what was the jurisdiction of the General Sessions, and after pointing out that murder and some other of the offences mentioned were already outside that jurisdiction, he proceeded:

". . . . . The others mentioned, such as selling offices, frauds on the government, official corruption and trade combinations, we thought should be removed from the jurisdiction (i.e. of the Quarter Sessions) on principle. The sessions of the peace, although presided over by the County Court judges, only had jurisdiction originally, under the statute of Edw. III, in matters relating to breaches of the peace; but their jurisdiction gradually became enlarged by statute. But we removed from it some of these minor offences, because they partake to some extent of a political character, and they certainly have not to do with the preservation of the peace. On these lines, the conclusion arrived at by the committee seemed to satisfy the gentlemen from all the provinces."

The new section is changed in subsec.(2)(a) by omitting descriptive words after the section numbers. It was held in *R. v. WATSON*(1953), 106 C.C.C.97 at p.100, that the descriptive words in s.583 were unnecessary and that the section numbers explicitly set forth must be given full effect.

JURISDICTION OVER PERSON.

414. Subject to this Act, every superior court of criminal jurisdiction and every court of criminal jurisdiction that has power to try an indictable offence is competent to try an accused for that offence

***(a)* if the accused is found, is arrested or is in custody within the territorial jurisdiction of the court; or**

OLD CODE:

577. Unless otherwise specially provided in the Act, every court of criminal jurisdiction in any province is competent to try any crime or offence within the jurisdiction of such court to try, wherever committed within the province, if the accused is found or apprehended or is in custody within the jurisdiction of such court or if he has been committed for trial to such court or ordered to be tried before such court, or before any other court, the jurisdiction of which has by lawful authority been transferred to such first mentioned court under any Act for the time being in force.

(b) **if the accused has been committed for trial to, or has been ordered to be tried by**

(i) that court, or

(ii) any other court, the jurisdiction of which has by lawful authority been transferred to that court.

This is the former s.577. It was s.640 in the Code of 1892 where it was new.

The Imperial Commissioners (report p.31) said:

"At present the jurisdiction of the criminal courts is strictly local, although a great number of statutory exceptions enable particular offenders, e.g., persons who commit crimes at sea, to be tried wherever they may happen to be found. We propose to extend this principle to all offences whatever."

Taschereau, p.728, followed s.640 with a note to similar effect, and, citing 1 Stephen's Hist. 278, explains it as meaning that a court, otherwise competent to try an offence shall be competent to try it regardless of the place where it was committed. *Cf.* ss.422 and 423.

In *R. v. ABBOTT*(1944), 81 C.C.C.174, accused, a resident of the County of York, was tried and convicted in the County of Simcoe. It was found that a material element of his offence had occurred in the latter county. The court applied s.577 and, following *R. v. THORNTON* (1915), 26 C.C.C.120, and *R. v. NEVISON*(1919), 31 C.C.C.116, held that he was properly tried there. "The offence charged in this case, and in respect of which the appellant was in custody at the time of his trial, is the same offence for which he was tried and of which he was convicted in that county."

An application of the section, differing in its circumstances although not in principle, appears in *R. v. TETREAULT*(1909), 17 C.C.C.259, and *R. v. HARRISON*(1917), 29 C.C.C.159, which followed it. In the latter case the Court said "In the case of *R. v. TETREAULT,* 17 Can. Cr. Cas. 259, this Court held that the place of election for speedy trial is the district to the gaol of which the accused has legally been committed on the preliminary inquiry."

See *R. v. ANDERSON and SPARKS*(1917), 29 C.C.C.176, in the same connection.

TRIAL BY JURY COMPULSORY.

415. Except where otherwise expressly provided by law, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury.

Section 415—*continued*

This is new in statutory form. The trial courts are ordinarily constituted by a judge and jury, and in some of the provinces with a grand jury as well. To this there are exceptions in ss.416 and 417, in Part XVI, and, for the trial *de novo* of appeals in summary conviction cases, in Part XXIV.

Trial by jury goes back to Magna Charta and to days when the jurors were actually witnesses. There has been a good deal of discussion concerning its abolition, but that discussion is academic so far as criminal cases are concerned. Whatever its merits or defects may be in civil cases, there is no serious movement to remove it from criminal law.

OPTION FOR TRIAL WITHOUT JURY IN TRADE CONSPIRACY CASES.—Part XVI applies.

416. (1) Where an indictment is found against an accused, other than a corporation, for an offence under section 411, the accused may elect to be tried without a jury and where he so elects he shall be tried by the judge presiding at the court at which the indictment is found, or the judge presiding at any subsequent sittings of that court, or at any court where the indictment comes on for trial.

(2) Where an accused makes an election under subsection (1), the proceedings subsequent to the election shall be in accordance with Part XVI in so far as that Part is capable of being applied.

This applies to offences under s.411. It is the former s.581, which came into the Code by 52 Vict., c.41, s.4, re-drawn to conform to subsec.(3) of s.40 of the *Combines Investigation Act* which was passed in 1946, c.12, s.2, and re-enacted in 1952, c.39, s.7. That subsection provides that notwithstanding anything in the Criminal Code or any other statute or law a corporation charged with an offence under s.498 or s.498A of the *Criminal Code* shall be tried without the intervention of a jury. See s.750, *post*, which repeals and replaces subsecs.(1) and (2) of s.40 of the *Combines Investigation Act* but leaves subsec.(3) untouched, except so as to refer to the sections of this Code.

TRIAL WITHOUT JURY IN ALBERTA.

417. Notwithstanding anything in this Act, an accused who is charged with an indictable offence in the Province of Alberta may, with his consent, be tried by a judge of the superior court of criminal jurisdiction of Alberta without a jury.

This is the former s.581A. After the erection of the Province of Alberta in 1905, the procedure in criminal cases continued to be governed by the *Northwest Territories Act* although the province abolished the Supreme Court of the Northwest Territories and constituted the Supreme Court of Alberta. In 1923 the Government of the province approached the Government of Canada with regard to the declaring inapplicable of some of the old procedure with particular reference to the summary trial without consent provided for by s.66 of the *Northwest Territories Act*.

In May 1929 an Order-in-Council was passed declaring this section inapplicable to the Supreme Court of Alberta. (Proclaimed, Can. Gazette,

OLD CODE:

581. Where an indictment is found against any person for any of the offences mentioned in section four hundred and ninety-eight, the defendant or person accused shall have the option to be tried before the judge presiding at the court at which the indictment is found, or the judge presiding at any subsequent sitting of such court, or at any court where the indictment comes on for trial, without the intervention of a jury; and in the event of such option being exercised the proceedings subsequent thereto shall be regulated in so far as may be applicable by part XVIII.

581A. Notwithstanding any other provision of this Act, any person charged with an indictable offence in the province of Alberta may, with his own consent, be tried by a judge of the superior court of criminal jurisdiction of Alberta without the intervention of a jury.

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vol. 62, p.4342.) This resulted in some confusion as appears from *R. v. SPEIDEL*(1930), 24 A.L.R.421, apparently from a feeling that as a result of the Order, there was no prescribed procedure for the class of cases referred to in s.66.

Subsequently, and at the request of the Attorney-General of Alberta, Parliament enacted "*An Act respecting Criminal Procedure in Alberta,*" 1930, c.12. This Act confirmed the Order-in-Council of May 29, 1929, and what had been done under it, by the words "and nothing heretofore done shall be objected to hereafter on the ground that the Order of the Governor in Council aforesaid was made without authority." The Act also declared that s.67 of the *Northwest Territories Act* should be read as if the word "other" had been omitted from it on May 29th, 1929. The effect of this is to make s.67 read:

> "When the person is charged with any criminal offence the same shall be tried, heard, and determined by the judge with the intervention of a jury of six; but in any such case the accused may with his own consent be tried by a judge in a summary way and without the intervention of a jury."

These special provisions regarding Alberta have been carried into the *Criminal Code* by 1946, c.20, in ss.581A, 927(6), 929(1), 933A, and 967(2); by 1947, c.55, s.29, amending sec.951(3), as to manslaughter and reckless driving; and by 1948, c.39, s.39 (illness or discharge of juror). See now ss.541, 552 and 553.

In the case of *R. v. BARRS*(1946), 86 C.C.C.9 (Alta.), counsel for the accused had demanded trial by a jury of 12, and a right of challenge as given by the *Criminal Code*. He had also objected to the Crown being conceded the right to stand jurors aside, as provided by the Code. The Appellate Division said "Section 9 makes it abundantly clear that the provisions of the *Northwest Territories Act* constitute the law in Alberta as respects criminal procedure, to the extent that they differ from provisions of the Criminal Code, and that where they do not so differ, the provisions of the Criminal Code apply."

In this context, s.9 of the Code formerly read:

> "9. The provisions of this Act shall extend to and be in force throughout Canada, except .....
>
> (c) in the province of Alberta in so far as they are inconsistent

Section 417—*continued*

with the Northwest Territories Act and amendments thereto as the same existed immediately before the first day of September, one thousand nine hundred and five, but with such changes as have been subsequently made by competent authority."

When 1946, c.20 incorporated in the Code the special provisions referring to Alberta, this subsection ceased to be necessary and it was repealed by that Act.

The application of s.581A was explained in *R. v. BERCOV*(1949), 96 C.C.C.168, at p.171. After quoting the section as enacted in 1946, Frank Ford, J.A., proceeds:

"By s.3 of the same amending statute, it is provided that on trials with a jury six jurors only shall be sworn.

These two provisions are relics of the procedure in criminal cases in the Supreme Court of the Northwest Territories, the first being not only a survival but an extension of part of that procedure. See as to this procedure R.S.C. 1886, c.50, ss.65, 66, 67; R.S.C. 1906, c.146, s.9, and R.S.C. 1927, c.36, s.9(c). By the Alberta Act, 1905 (Can.), c.3, and the Saskatchewan Act, 1905 (Can.) c.42, it was provided that on the abolition of the Supreme Court of the Northwest Territories and the constitution in either of the Provinces of a superior Court of criminal jurisdiction, the procedure in criminal matters which then obtained in respect of the Supreme Court of the Northwest Territories should, until otherwise provided by competent authority, continue to apply to such superior Court, and that the Governor in Council might at any time and from time to time declare all or any part of such procedure to be inapplicable to such superior Court. Section 66 of the Northwest Territories Act, R.S.C. 1886, c.50, as amended, curtailed the right of an accused person to a jury in certain cases therein set out. This section was as to Alberta declared inapplicable. This was confirmed by c.12 of 1930 and s.67 which had originally applied to cases not included in s.66 was made to read: (quoted as above).

Except as provided in s.581 of the Code, which is of general application, Alberta is the only Province in Canada in which, notwithstanding the existence of the District Court Judge's Criminal Court, trials on indictment, whether following a bill of indictment presented by a grand jury or the preferring of a charge as provided in s.873 of the Code, a trial of an indictable offence can be tried by a superior Court Judge without a jury."

The Court held that an election for trial by a judge alone does not conclude the question of manner of trial. The judge may refuse to proceed alone, or the accused may withdraw his consent at any time prior to commencement of trial.

ADJOURNMENT WHEN NO JURY SUMMONED.

418. Where the competent authority has determined that a panel of jurors is not to be summoned for a term or sittings of the court for the trial of criminal cases in any territorial division, the clerk of the court may, on the day of the opening of the term or sittings, if a judge is not present to preside over the court, adjourn the court and the business of the court to a subsequent day.

OLD CODE:

580. (2) Whenever, in the province of Quebec, it has been decided by the competent authority that no jury is to be summoned at the appointed time in any district in the province within which a term of the Court of King's Bench holding criminal pleas should be then held, the Clerk of the Crown may, on the date of the opening of such term, if there be no judge to preside over the Court,

(a) adjourn the Court and the appeals to any further day; or

(b) adjourn the appeals to the first day of the then next term of the Court; and renew the recognizances or bail bonds so as to secure the presence of all the accused and others who are bound to appear on the first day of the then next term or on the day to which he will have adjourned the Court or the appeals.

This is the former s.580(2), putting in general terms what formerly applied only to Quebec. It came into the Code as s.580A, enacted by 1925, c.88, s.14 and should be read with s.508(2) as to change of venue, and s.669 as to continuance of recognizances. The purpose of these provisions was to avoid the need to keep prisoners a long time in gaol, in cases where the Attorney General had directed that no jurors be summoned for a regular term of court.

When s.887, which has now become s.508(2), was before Parliament in 1894 it was objected that it would furnish a temptation to dispense with the regular term and force the prisoner either to remain in gaol or to stand his trial somewhere else. The answer was that it gave no additional power to the Attorney General who, since the province has full jurisdiction in the administration of justice, already had the power to dispense with a useless term. The provision proposed gave the incarcerated prisoner the right, if a regular term were dispensed with, to take his trial in an adjoining district. The same reasoning is applicable to the outlying regions of other provinces as well as Quebec.

SPECIAL JURISDICTION.

ON WATER BETWEEN JURISDICTIONS.—Near boundary between jurisdictions.—During course of journey in ship or vehicle.—Aircraft.—Door-to-door mail delivery.

419. For the purposes of this Act,

(a) **where an offence is committed in or upon any water or upon a bridge, between two or more territorial divisions, the offence shall be deemed to have been committed in any of the territorial divisions;**

(b) **where an offence is committed on the boundary of two or more territorial divisions or within five hundred yards of any such boundary, or the offence was commenced within one territorial division and completed within another, the offence shall be deemed to have been committed in any of the territorial divisions;**

(c) **where an offence is committed in or upon a vehicle employed in a journey, or on board a vessel employed on a navigable river, canal or inland water, the offence shall be deemed to have been**

Section 419—*continued*

committed in any territorial division through which the vehicle or vessel passed in the course of the journey or voyage on which the offence was committed, and where the centre or other part of the road, or navigable river, canal or inland water on which the vehicle or vessel passed in the course of the journey or voyage is the boundary of two or more territorial divisions, the offence shall be deemed to have been committed in any of the territorial divisions;

(d) **where an offence is committed in an aircraft in the course of a flight of that aircraft, it shall be deemed to have been committed**

(i) in the territorial division in which the flight commenced,

(ii) in any territorial division over which the aircraft passed in the course of the flight, or

(iii) in the territorial division in which the flight ended; and

(e) **where an offence is committed in respect of a mail in the course of the door-to-door delivery of the mail, the offence shall be deemed to have been committed in any territorial division through which the mail was carried on that delivery.**

This is taken from the former s.584.

Par.(a) is the former s.584(a). It was s.553(a) in the Code of 1892 and s.11 of R.S.C. 1886, c.174.

Pars.(b) and (c) were s.584(b) and (c). They were s.553(b) and (c) in the Code of 1892 and they also came from R.S.C. 1886, c.174. They were adapted from 7 Geo. IV, c.64 (Imp.), with the substitution of "five hundred yards" for "one mile".

Par.(d) is new and applies to aircraft the principles set out in the preceding paragraphs.

Par.(e) was enacted by 1951, c.47, s.20 to provide for cases where a carrier's route extends into two or more magisterial districts.

In view of the provisions of par.(c), the former s.545A which dealt with jurisdiction in cases of cruelty to animals in transit, has been dropped. This paragraph, as it now reads, would probably cover such a case as *R. v. NEVISON*(1919), 31 C.C.C.116, in which it was alleged that an offence was committed on a train travelling between Calgary and Vancouver. In the same connection see *R. v. LYNN* (No. 1) (1910), 17 C.C.C.354.

In *R. v. ALLEN*(1946), 87 C.C.C.253, which involved an assault at a ticket booth on a bridge connecting Vancouver and North Vancouver, it was said, at p.255:

"It is quite immaterial from the point of view of jurisdiction, whether (the ticket booth) is situate on the bridge proper or on the approach to the bridge. If the former, the Magistrate would have jurisdiction by virtue of the provisions of s.584(a) of the Cr. Code, ... if the latter, there could be no doubt of the offence having been committed within the Municipality of the District of North Vancouver."

In *R. v. CERNIUK*(1947), 91 C.C.C.56, a case involving the transport of narcotics from Toronto to Vancouver, the following appears at p.58:

"The Crown relies upon s-s.(b) of s.584 of the Code, which provides

OLD CODE:

584. For the purpose of this Act,
(a) where the offence is committed in or upon any water, tidal or other, or upon any bridge, between two or more magisterial jurisdictions, such offence may be considered as having been committed in either of such jurisdictions;
(b) where the offence is committed on the boundary of two or more magisterial jurisdictions, or within the distance of five hundred yards from any such boundary, or is begun within one magisterial jurisdiction and completed within another, such offence may be considered as having been committed in any one of such jurisdictions;
(c) where the offence is committed on or in respect to a mail, or a person conveying a post letter bag, post letter or anything sent by post, or on any persons, or in respect of any property, in or upon any vehicle employed in a journey, or on board any vessel employed on any navigable river, canal or other inland navigation, the person accused shall be considered as having committed such offence in any magisterial jurisdiction through which such vehicle or vessel passed in the course of the journey or voyage during which the offence was committed; and where the centre or other part of the road, or any navigable river, canal or other inland navigation along which the vehicle or vessel passed in the course of such journey or voyage, is the boundary of two or more magisterial jurisdictions, the person accused of having committed the offence may be considered as having committed it in any one of such jurisdictions.
(d) where the offence is committed in respect of a mail in the course of the door-to-door delivery of the mail, the offence shall be deemed to have been committed in any magisterial jurisdiction through which the mail was carried on that delivery.

545A. For the purpose of the trial of any offence under sections five hundred and forty-two and five hundred and forty-four of this Act, where the offence is committed upon any vessel, railway car, motor vehicle, cart, wagon or other vehicle, the accused may be tried by the justice in whose jurisdiction such vessel, railway car, motor vehicle, cart, wagon or other vehicle is unloaded, and any offence committed as aforesaid may be dealt with by such justice as if it had been wholly committed within the jurisdiction of such justice. The jurisdiction hereby conferred shall not be exercised by any justice outside the province in which the offence is alleged to have been committed, nor shall it be exercised in any case in which the justice considers it just that the prosecution should be laid before a justice having jurisdiction in the county or district in which the offence is alleged to have been committed.

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that where an offence is begun within one magisterial district and completed within another, such offence may be considered as having been committed in any of such jurisdictions. It is objected there is nothing to show that Toronto is in a magisterial jurisdiction.' The court took judicial notice of the Magistrates Act of the province of Ontario as showing that the City of Toronto is a magisterial district.

OFFENCES IN TERRITORIAL WATERS.—Consent.

420. (1) Where an offence is committed by a person, whether or not he is a Canadian citizen, on a part of the sea adjacent to the coast of Canada and within three nautical miles of ordinary low water

Section 420—*continued*

mark, whether or not it was committed on board or by means of a Canadian ship, the offence is within the competence of and shall be tried by the court having jurisdiction in respect of similar offences in the territorial division nearest to the place where the offence was committed, and shall be tried in the same manner as if the offence had been committed within that territorial division.

(2) No proceedings for an offence to which subsection (1) applies shall, where the accused is not a Canadian citizen, be instituted without the consent of the Attorney General of Canada.

S.240, of which subsec.(1) is new in the *Criminal Code,* enacts provisions of the *Territorial Waters Jurisdiction Act* 1878 (Imp.) to assert the jurisdiction of Canadian courts to try cases arising at sea within the three-mile limit. Subsec. (2) re-enacts the former s.591. In addition to these provisions, ss.691 and 692 of the *Canada Shipping Act* confer upon Canadian courts a jurisdiction supplementary to that conferred by the *Criminal Code,* in respect of offences committed on Canadian ships abroad, whether by Canadians or foreigners.

The Imperial Act was passed as a direct result of the case of *R. v. KEYN*(1876), 2 Ex. D. 63, following a collision between the German ship "Franconia" and a British ship about two and one-half miles off Dover. The collision cost the lives of several people. The captain of the German ship was brought to trial in England on a charge of manslaughter by negligence. The question of jurisdiction was argued and re-argued before a very strong bench, and in the end a majority of the judges concluded that, in the absence of legislation, the courts in England were without jurisdiction to try him. The British Parliament passed the new law upon the opinion of the minority. The interested reader will find the Debate upon it in the House of Lords reported at length in Halleck's International Law.

It would be impossible here to deal adequately with a subject upon which, apart from the judgment mentioned, volumes have been written. The three-mile limit is based upon the distance of a cannon shot from shore, and it is curious to read now that an Italian, writing in 1796, expressed the hope that the nations would agree on that distance as "without doubt it was the greatest distance cannon shot could ever be made to reach." Masterson (Jurisdiction in Marginal Seas, (1929), p.400) tells of an attempt by the League of Nations to secure a general agreement upon the extent of territorial waters and of the astonishing variations in the claims put forward. As it is, the limit is deemed to vary for different purposes, *e.g.,* revenue, public health and fisheries. The judgment of the Privy Council in *CROFT v. DUNPHY,* [1933]A.C.156, upheld the right of the Parliament of Canada to set a limit of twelve miles for purposes of the *Customs Act,* but internationally, the whole question is unsettled in view of the judgment of the International Court of Justice in the case of *UNITED KINGDOM v. NORWAY*(1951), (the Fisheries Case).

Meanwhile, until there is some general agreement, the limit set by s.420 is for purposes of the criminal law only. A suggestion that it should

OLD CODE:

591. Proceedings for the trial and punishment of a person who is not a subject of His Majesty, and who is charged with any offence committed within the jurisdiction of the Admiralty of England, shall not be instituted in any court in Canada except with the leave of the Governor General and on his certificate that it is expedient that such proceedings should be instituted.

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be extended to coincide with the limit as set out in the *Customs Act* for cases of "hovering", is met by the objection that to assert such a limit might be taken to involve an *undertaking* to enforce the criminal law to a distance of twelve miles.

It should be explained that the expression "the jurisdiction of Canadian courts" is used advisedly in this connection. It used to be said (as for example in *R. v. LOPEZ, R. v. SATTLER*(1858), Dears. & B., 525; 169 E.R. 1105) that "an English ship on the high seas is part of the territory of England," but that doctrine seems now subject to modification. In *R. v. GORDON FINLAYSON*, [1951]1 K.B.171, Humphreys, J., at p.184, quotes a judgment of Blackburn, J., as follows:

> "There are a vast number of cases which decide that when a ship is sailing on the high seas, and bearing the flag of a particular nation, the ship forms a part of that nation's country and all persons on board of her may be considered as within the jurisdiction of that nation whose flag is flying on the ship, in the same manner as if they were within the territory of that nation,"

and he adds:

> "If I am right in my understanding of the English language, the meaning of that passage is that *persons on board a British ship are within the jurisdiction of the British Courts, although they are not within the territory of Great Britain.*"

The effect of the section, as has been noted in connection with the Imperial legislation, is that if an alien commits a crime on board a foreign ship in territorial waters, he is liable to be tried in Canada with the consent of the Attorney General of Canada. The provision for consent has in view the possibility of diplomatic protest.

In *R. v. SCHWAB*(1907), 12 C.C.C.539, it was held that a charge of theft by foreigners upon or from a foreign ship while lying in a harbour forming part of the body of the county, may be prosecuted in the county without obtaining the leave of the Governor General under s.591. The judge said:

> "I decide that the harbour of Halifax (inclosed as it is within headlands) is within the body of the county of Halifax, and that section 591 of the Code is not applicable to this case."

In *R. v. NEILSON*(1918), 30 C.C.C.1, the following appears:

> "I prefer to adopt the view that, in copying into the Criminal Code s.3 of the English Act, almost verbatim, the Parliament of Canada intended that it should be adopted with the interpretation, the definitions, and the application to which it is subject in the original Act. If that view is correct, it applies only to offences committed within territorial waters and by persons on board a foreign ship; and has no

Section 420—*continued*

application to offences committed on board British ships on the high seas."

See also *R. v. ADOLPH*(1907), 12 C.C.C.413.

R. v. FLAHAUT(1934), 63 C.C.C.308: In this case the ship had put into a port in the county of Gloucester in the Province of New Brunswick. Held, that a magistrate has territorial jurisdiction over a ship within the body of the county over which he presides. The fact that such ship is a foreign vessel does not remove it from such jurisdiction. It is in general subject to the laws of the state of the county within whose body it lies. S.591 of the Code held not to apply to a person not a subject of His Majesty charged with an offence against a provincial statute. *R. v. SCHWAB, supra,* followed.

R. v. JOHANSON & LEWIS(1922), 38 C.C.C.60: The certificate of the Governor General giving leave for the prosecution of a person who is not a British subject for an offence committed within the Admiralty jurisdiction must be obtained before the accused is committed for trial on the preliminary enquiry.

R. v. FURUZAWA(1930), 53 C.C.C.398: S.591 of the Code requiring the leave of the Governor General to institute certain proceedings does not apply to an offence committed on a foreign boat in a Canadian harbour. At p.401:

"This offence is stated to have taken place, and beyond doubt, did take place, on a ship, while a Japanese boat was moored at Lapointe pier in Burrard Inlet, and within the County of Vancouver."

and at p.402:

"There is an old rule applied, when you are within inland waters forming an arm of the sea and can see from side to side, that such body of water is considered to be within the limits of the county."

R. v. CONRAD(1938), 12 M.P.R.588: Defendant was charged before two justices in and for the county of Lunenberg with being in charge of a boat equipped with an apparatus for making a smoke screen, contrary to s.285(5) of the Criminal Code. The boat (of Nfld. registry) was 1¼ miles eastward of Big Duck Island and it was held that since that island is part of the county, the jurisdiction of the magistrate extended over the 3-mile zone of the island.

The international boundary through the St. Lawrence channel and the Great Lakes to Rainy Lake and Lake of the Woods was settled by the *Treaty of Ghent*, 1814, and the *Ashburton Treaty*, 1842.

In *R. v. MEIKLEHAM*(1905), 10 C.C.C.382, the defendant was convicted before the police magistrate for the town of Goderich, in the county of Huron, for unlawfully allowing liquors to be sold on the steamer "*Greyhound*" of Detroit. It was held that a foreign vessel running an excursion from an Ontario port on Lake Huron out upon the lake and back without calling at any other port is, while so engaged, subject to the provincial Liquor License Law until it passes the international boundary, and that the offence was committed within the territorial limits of the province of Ontario.

See also Introduction, *ante* p.7.

OLD CODE:

888. Nothing in this Act authorizes any court in one province of Canada to try any person for any offence committed entirely in another province: Provided that every proprietor, publisher, editor or other person charged with the publication in a newspaper of any defamatory libel or with conspiracy to publish in a newspaper any defamatory libel, shall be dealt with, indicted, tried and punished in the province in which he resides, or in which such newspaper is printed.

2. (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;

OFFENCE COMMITTED ENTIRELY IN ONE PROVINCE NOT TRIABLE IN ANOTHER.—Exception.—Exception.—Writing not admissible.—"Newspaper."

421. (1) Subject to subsections (2) and (3), nothing in this Act authorizes a court in a province to try an offence committed entirely in another province.

(2) Every proprietor, publisher, editor or other person charged with the publication of a defamatory libel in a newspaper or with conspiracy to publish a defamatory libel in a newspaper shall be dealt with, indicted, tried and punished in the province where he resides or in which the newspaper is printed.

(3) Where an accused is in custody and signifies in writing before a magistrate his intention to plead guilty to an offence with which he is charged that is alleged to have been committed in Canada outside the province in which he is in custody, he may, if the offence is not an offence mentioned in subsection (2) of section 413, and the Attorney General of the province where the offence is alleged to have been committed consents, be brought before a court or person that would have had jurisdiction to try that offence if it had been committed in the province where the accused is in custody, and where he pleads guilty to that offence, the court or person shall convict the accused and impose the punishment warranted by law, but where he does not plead guilty, he shall be returned to custody and shall be dealt with according to law.

(4) No writing that is executed by an accused pursuant to subsection (3) is admissible in evidence against him in any criminal proceedings.

(5) In this section, "newspaper" has the same meaning that it has in section 247.

Subsec.(1) comes from the former s.888, which appeared as a proviso to s.640 in the Code of 1892.

Subsec.(2) also comes from the former s.888. It appeared originally as 51 Vict., c.44, s.2. It was amended by 1948, c.39 s.8 by insertion of the words "or with conspiracy to publish in a newspaper any defamatory libel" following the case of *R. v. COOKE and DINGMAN*(1948), 5 C.R.

of accused

Section 421—*continued*

58, in which persons resident in Ontario were charged with conspiracy to publish a criminal libel in Alberta. The report of the Royal Commission remarks of this that "the majority of the Commission is of the opinion that the provision is contrary to the well established principle of the criminal law that an accused should be indicted, tried and punished where the offence is committed and that there appears to be no good reason under modern conditions why this principle should not be preserved in relation to newspapers. However, in view of the fact that this section was recently before Parliament, it is retained in the draft Bill."

Subsec.(3) is new and adopts a practice which is common in England. It is designed to give a convicted person an opportunity if he wishes, to come out of prison with a clean sheet, and from the Crown's point of view, should have the effect of avoiding the necessity of his being rearrested and taken to another province for trial.

What is regarded as proper practice in England is shown by *R. v. FOSTER*(1939), 27 Cr.App.R.89, and *R. v. MARQUIS*(1951), 35 Cr. App. R.33. In the former the Lord Chief Justice said:

"When it is proposed that other cases should be taken into consideration the matter should be expressly and clearly put to the accused person. It should be ascertained with reference to each case whether he desires to admit the truth of the charge and desires that the offence should be taken into consideration. If he does, the indictment should be indorsed accordingly. A slack and casual treatment of such matters is not fair to anyone concerned."

In the latter, the Chief Justice said:

"I should like, for the guidance of quarter sessions, to repeat that where a prisoner asks for other offences to be taken into account, it is not enough for the court to be told that the prisoner has signed a form on which the other offences are mentioned. The prisoner should be told what those other offences are, and himself asked whether he admits them and desires them to be taken into consideration . . . . . Then he can say 'Yes' or 'No' as the case may be, or he can say 'Yes, I admit some, and I do not admit others'. That was not done in this case, and it ought to have been done, but it is not a rule of law that that must be done, for taking of cases into consideration is only what I may call a convention. It has been a device that has been put into force by the judges now for a great many years with a view to preventing a prisoner who has served his sentence from being arrested on the other charges immediately he comes out of prison. Therefore, if there are charges outstanding against him which are not before the Court when he is on indictment, he can ask the Court to take them into consideration, and so get a clean sheet when he comes out."

(In this case 19 other similar offences).

See also *SUMNER v. BUEL*(1815), 12 Johns. 475, and *R. v. SHEPPARD*, not reported, noted under s.166 *ante*.

OFFENCE IN UNORGANIZED TERRITORY.—New territorial division.

422. (1) Where an offence is committed in an unorganized tract of country in any province or on a lake, river or other water therein,

OLD CODE:

585. All offences committed in any of the unorganized tracts of country in the province of Ontario, including lakes, rivers and other waters therein, not embraced within the limits of any organized county, or within any provisional judicial district, may be laid and charged to have been committed and may be inquired of, tried and punished within any county of such province; and such offences shall be within the jurisdiction of any court having jurisdiction over offences of the like nature committed within the limits of such county, before which court such offences may be prosecuted; and such court shall proceed therein to trial, judgment and execution or other punishment for such offence in the same manner as if such offence had been committed within the county where such trial is had.

(2) When any provisional judicial district or new county is formed and established in any of such unorganized tracts, all offences committed within the limits of such provisional judicial district or new county, shall be inquired of, tried and punished within the same, in like manner as such offences would have been inquired of, tried and punished if this section had not been passed.

(3) Any person accused or convicted of any offence in any such provisional district may be committed to any common gaol in the province of Ontario.

586. All offences committed in any part of Canada not in a province duly constituted as such and not in the Yukon Territory may be inquired of and tried within any district, county or place in any province so constituted or in the Yukon Territory as may be most convenient.

(2) Such offences shall be within the jurisdiction of any court having jurisdiction over offences of the like nature committed within the limits of such district, county or place.

(3) Such court shall proceed to trial, judgment and execution or other punishment for any such offence in the same manner as if such offence had been committed within the district, county or place where the trial is had.

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not included in a territorial division or in a provisional judicial district, proceedings in respect thereof may be commenced and an accused may be charged, tried and punished in respect thereof within any territorial division or provisional judicial district of the province in the same manner as if the offence had been committed within that territorial division or provincial judicial district.

(2) Where a provincial judicial district or a new territorial division is constituted in an unorganized tract referred to in subsection (1), the jurisdiction conferred by that subsection continues until appropriate provision is made by law for the administration of criminal justice within the provisional judicial district or new territorial division.

This is taken from the former s.585 which was s.555 in the Code of 1892 and s.14 in R.S.C. 1886, c.174. S.585 applied only to Ontario, but it has been made general here to apply to outlying parts of other provinces.

OFFENCE NOT IN A PROVINCE.

423. Where an offence is committed in a part of Canada not in a province, proceedings in respect thereof may be commenced and the accused may be charged, tried and punished within any territorial

Section 423—*continued*

division in any province in the same manner as if that offence had been committed in that territorial division.

This replaces the former ss.586 and 587. The special reference to the Yukon has been omitted as well as the expression "province constituted as such" in view of the fact that by amendment of the *Interpretation Act* in 1947, c.64, s.8, "province" includes the Northwest Territories and the Yukon Territory.

The original sections were passed as part of a special Act, 1899, c.47, to apply to the territory east of Manitoba and Keewatin and north of Ontario and Quebec. It appears (Senate, 1899, pp.502-3) that the Act was passed to facilitate the trial of an Indian, then in custody, who was charged with a murder committed in the area.

The same provisions were carried into the Code in the revision of 1906 and were re-enacted in the more general terms in which they appeared in the repealed Code, by 1907, c.8, s.2. In introducing the Bill (Hansard 1906-7, Vol. III, p.5776) the Hon. Mr. Aylesworth said that the practical need of this clause had been shown by events, very possibly involving murder, committed a year before in the Arctic ocean aboard a ship which was lying up for the winter among the British islands there. He pointed to the manifest difficulty under the existing statute of trying the offence at any other place than where it was committed.

> "This Bill will provide that offences committed in any part of Canada not in any province or in the Yukon may be inquired of, tried and proceeded with to execution, either in the place where the offence was committed or in any other portion of Canada as may be most convenient, where the defendant may be found."

And in Vol. IV (p.7018), he added that:

> "the practical course for the trial of that offence, that would seem natural if the law permitted it, would be for the offender to be tried in such province of Canada as might be most convenient. None of the witnesses are locally identified with the place where the tragedy happened, and this amendment . . . . . is designed to permit that to be done in cases where it would be convenient to do so. For instance, in this case the offender might be tried in any port in Canada where the ship might call."

There was incidental reference to ss.586 and 587 in *Re R. v. SOLLOWAY AND MILLS*(1930), 54 C.C.C.214, at p.217, in which the Court was considering the right to execute a search warrant that had been issued in one province for execution in another, and endorsed in the latter.

Rules of Court.

POWER TO MAKE RULES.—Regulating duties of officers.—Regulating sittings.—Regulating practice.—Relating to appeals.—Rules to continue.—Publication.—Regulations to secure uniformity.

424. (1) Every superior court of criminal jurisdiction and every court of appeal, respectively, may, at any time with the concurrence of a majority of the judges thereof present at a meeting held for the purpose, make rules of court not inconsistent with this Act or

OLD CODE:

587. The several courts of criminal jurisdiction in the provinces aforesaid, and in Yukon Territory, including justices, shall have the same powers, jurisdiction and authority in case of such offences as they respectively have with reference to offences within their ordinary jurisdiction as provincial or territorial courts.

576. Every superior court of criminal jurisdiction may at any time, with the concurrence of a majority of the judges thereof present at any meeting held for the purpose, make rules of court, not inconsistent with any statute of Canada, which shall apply to all proceedings relating to any prosecution, proceeding or action instituted in relation to any matter of a criminal nature, or resulting from or incidental to any such matter, and in particular,

(a) for regulating the sittings of the court or of any division thereof, or of any judge of the court sitting in chambers, except in so far as the same are already regulated by law;

(b) for regulating in criminal matters the pleading, practice and procedure in the court, including the subjects of mandamus, certiorari, habeas corpus, prohibition, quo warranto, bail and costs, and the proceedings on application to a justice to state and sign a case for the opinion of the courts as to a conviction, order, determination or other proceeding before him; and

(c) generally for regulating the duties of the officers of the court and every other matter deemed expedient for better attaining the ends of justice and carrying the provisions of the law into effect.

(2) Copies of all rules made under the authority of this section shall be laid before both Houses of Parliament at the session next after the making thereof, and shall also be published in the Canada Gazette.

(3) In the province of Ontario the authority for the making of rules of court applicable to superior courts of criminal jurisdiction in the province is vested in the supreme court of judicature, and such rules may be made by the said court at any time with the concurrence of a majority of the judges thereof present at a meeting held for the purpose.

1017. The operation of any order for the restitution of any property to any person made on a conviction on indictment, and the operation in case of any such conviction, of the provisions of sections seven hundred and ninety-five, one thousand and forty-eight, one thousand and forty-nine, and one thousand and fifty of this Act, shall, unless the trial court has directed to the contrary in any case in which, in its opinion, the title to the property is not in dispute, be suspended

(a) in any case until the expiration of such time after the date of the conviction as may be directed by rules of court for giving notice of appeal or of application for leave to appeal; and

(b) in cases where such notice has been given within the time so directed, until the determination of the appeal; and in cases where the operation of any such order, or the operation of the said provisions, is suspended until the determination of the appeal, the order or provisions, as the case may be, shall not take effect as to the property in question if the conviction is quashed on appeal; and provision may be made by rules of court for securing the safe custody of any property, pending the suspension of the operation of any such order or of the said provisions.

. . . . . .

1020. (5) Rules of court may make such provision as is necessary for securing

Section 424—*continued*

any other Act of the Parliament of Canada, and any rules so made shall apply to any prosecution, proceeding, action or appeal, as the case may be, within the jurisdiction of that court, instituted in relation to any matter of a criminal nature or arising from or incidental to any such prosecution, proceeding, action or appeal.

(2) Rules under subsection (1) may be made

***(a)* generally to regulate the duties of the officers of the court and any other matter considered expedient to attain the ends of justice and carry into effect the provisions of the law;**

***(b)* to regulate the sittings of the court or any division thereof, or of any judge of the court sitting in chambers, except in so far as they are regulated by law;**

***(c)* to regulate in criminal matters the pleading, practice and procedure in the court including proceedings with respect to *mandamus*, *certiorari*, *habeas corpus*, prohibition, bail and costs, and the proceedings on an application to a summary conviction court to state a case for the opinion of the court with respect to a conviction, order, determination or other proceeding; and**

***(d)* to carry out the provisions of this Act relating to appeals from conviction, acquittal or sentence on indictment, and without restricting the generality of this paragraph,**

(i) for furnishing necessary forms and instructions in relation to notices of appeal or applications for leave to appeal to officials or other persons requiring or demanding them,

(ii) for ensuring the accuracy of notes taken at a trial and the verification of any copy or transcript,

(iii) for keeping writings, exhibits or other things connected with the proceedings on the trial,

(iv) for securing the safe custody of property during the period in which the operation of an order with respect to that property is suspended under subsection (1) of section 595, and

(v) for providing that the Attorney General and counsel who acted for the Attorney General at the trial be supplied with certified copies of writings, exhibits and things connected with the proceedings that are required for the purposes of their duties.

(3) Where in any province rules of court relating to criminal matters are in force when this Act comes into force, they shall continue in force except in so far as they may be amended or repealed from time to time by the court authorized by this section to make rules.

(4) Rules of court that are made under the authority of this section shall be published in the *Canada Gazette*.

(5) Notwithstanding anything in this section, the Governor in Council may make such provision as he considers proper to secure uniformity in the rules of court in criminal matters, and all uniform rules made under the authority of this subsection shall prevail and have effect as if enacted by this Act.

OLD CODE:
Section 1020—continued
the accuracy of the notes to be taken and for the verification of any transcript thereof.

1021. For the purposes of an appeal under this Part, the court of appeal may if it thinks it necessary or expedient in the interest of justice.

(a) order the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case: and

(b) if it thinks fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the court of appeal, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose, and allow the admission of any deposition so taken as evidence before the court of appeal; and

(c) if it thinks fit, receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such an application; and

(d) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in the opinion of the court of appeal conveniently be conducted before the court of appeal, order the reference of the question, in manner provided by rules of court, for inquiry and report to a special commissioner appointed by the court of appeal, and act upon the report of any such commissioner so far as the court of appeal thinks fit to adopt it; and

(e) appoint any person with special expert knowledge to act as assessor to the court of appeal in any case where it appears to the court of appeal that such special knowledge is required for the proper determination of the case;

and exercise in relation to the proceedings of the court of appeal any other powers which may for the time being be exercised by the court of appeal on appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentences of the court of appeal.

(2) Any documents, exhibits, or other things connected with the proceedings on the trial of any person on indictment, who, if convicted, is entitled or may be authorized to appeal under this Part, shall be kept in the custody of the trial court in accordance with rules of the court of appeal made for the purpose, for such time as may be provided by the rules, and subject to such power as may be given by the rules for the conditional release of any such document, exhibits, or other things from that custody.

(3) Provision shall be made by rules of court for furnishing to the Attorney General and to the counsel who acted for the Crown at the trial of certified copies of such documents, exhibits, and other things connected with the proceedings as they may require for the purposes of their duties in respect to appeals and applications for leave to appeal.

. . . . . .

(11) Rules of court may be made to provide for furnishing the necessary forms and instructions in relation to notices of appeal or notices of application under section one thousand and eighteen of this Act, to any person who demands the

Section 424—*continued*

This combines the rule-making powers of the superior court in the former s.576, and of the court of appeal in the former ss.1017, 1020 and 1021. S.576 was s.533 in the Code of 1892, amended by 63 and 64 Vict., c.46, s.3. It was an adaptation of ss.57-59 of the Criminal Code Bill 1880, No. 2 (U.K.) based on the E.D.C. The sections relating to the Court of Appeal were taken from the *Criminal Appeal Act*, 1907 (U.K.).

Subsec.(3) of s.576, referring to Ontario, has been dropped as unnecessary because the *Supreme Court Act* of Ontario created a new court known as the Supreme Court to replace the Supreme Court of Judicature.

The provisions of subsecs.1021(15) to (17) requiring approval and tabling of rules made by a Court of Appeal have not been continued as there was no similar provision relating to rules made under s.576.

In reference to s.576, it was said in *R. v. DEAN*(1917), 28 C.C.C.212, at p.214, that "the rules having been made by virtue of the power conferred by the Code, in my opinion, have themselves the same effect and must be construed as though embodied in the statute".

It has been held that the power to make rules does not include the right to make *substantive* law, *e.g.*, to create a right of appeal: *R. v. ASHTON*(1948), 92 C.C.C.137; or to award costs on *habeas corpus*, as distinct from the right to regulate the amount, taxation and mode of collection of costs: *Re CHRISTIANSON*(1951), 100 C.C.C.289. The latter case was approved in *R. v. CUNNINGHAM*(1953), 105 C.C.C. 377, where, however, it was held that the right to award costs on an application for *certiorari* was conferred by ss.576 and 1126 (now s.685).

The revision changes the former provisions by omitting a reference to *quo warranto*. This is a prerogative writ used where the right of persons to hold office, *e.g.*, as school trustees or councillors, is disputed. It is regarded as dealing with civil rather than criminal matters.

As to mandamus etc., see s.680 *post*, and as to stated case, ss.733 and 734 *post*.

PART XIII.

SPECIAL PROCEDURE AND POWERS.

General Powers of Certain Officials.

OFFICIALS WITH POWERS OF TWO JUSTICES.

425. Every judge or magistrate authorized by the law of the province in which he is appointed to do anything that is required to be done by two or more justices may do alone anything that this Act or any other Act of the Parliament of Canada authorizes two or more justices to do.

This comes from the former s.604. It appeared originally in two statutes of 1869, c.30, s.59, and c.36, s.8, the first relating to the duties of Justices, and the second to the repeal of certain pre-Confederation statutes. The provisions of those sections came into the *Criminal Procedure Act*, R.S.C. 1886, c.174, s.7 and thence into s.541 of the Code of 1892.

OLD CODE:

Section 1021—continued

same, and to the registrar, clerk, or other chief officer of every provincial court having jurisdiction to try indictable offences, to magistrates having such jurisdiction, to sheriffs, to the warden of the penitentiary for the province, to gaolers or keepers of prisons within the province, and to such other officers or persons as may be designated by such rules of court.

(13) In addition to the powers for making rules of court conferred upon every superior court of criminal jurisdiction by section five hundred and seventy-six of this Act, the court of appeal shall have power to make rules of court, not inconsistent with any statute of Canada or of any province of Canada, for the purposes of carrying out the provisions of this Part relating to appeals from convictions on indictment.

(14) Rules so made may make provision for the practice and procedure upon such appeals and upon all matters arising out of, resulting from or incidental to such appeals.

(15) In so far as rules so made affect the warden, keeper or other officers of any prison, or any officer having the custody of a person convicted on indictment, the rules shall, in the case of prisons under the administration and control of the Minister of Justice, be subject to the approval of the Minister of Justice, and in the case of provincial prisons shall be subject to the approval of the Lieutenant Governor in Council of the province.

(16) Copies of all rules made under the authority of this section shall be laid before both Houses of Parliament at the session next after the making, or making and approval thereof, and shall also be published in the Canada Gazette.

(17) If an address is presented to the Governor in Council by either House of Parliament, within the next subsequent thirty days on which that House has sat next after any such rule is laid before it, praying that the rule may be annulled, the Governor in Council may annul the rule, which shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder.

(18) The Governor in Council may make such provision as he deems fit for securing uniformity in rules made under the authority of this section by the several courts of appeal in the provinces.

604. The Judges of the Sessions of the Peace for the cities of Quebec and Montreal, and every recorder, police magistrate, district magistrate or stipendiary magistrate appointed for any territorial division, and every magistrate authorized by law of the province in which he acts to perform acts usually required to be done by two or more justices, may do alone whatever is authorized by this Act to be done by any two or more justices.

The words "or any other Act of the Parliament of Canada" are new and are designed to settle a question of the application of the section to statutes other than the *Criminal Code*. A group of cases held in effect against such application: *Ex p. JOHNSTON*(1930), 54 C.C.C.99; *R. v. DEAN*(1930), 55 C.C.C.11; *R. v. McNEILL*(1924), 42 C.C.C.158; *R. v. O'HALLORAN*(1928), 54 C.C.C.227; *R. v. KOLEMBER*(1914), 22 C.C.C. 341. Several cases in Quebec have come to the contrary conclusion, in part by applying s.28 of the *Interpretation Act*: *LAROSE v. R.*(1924), 37 Que. K.B.130; *PIUZE v. R.*(1931), 51 Que. K.B.498; *GOBEIL v. PARE* (1932), 38 R.L.N.S.175; *CAN. INTERNATIONAL PAPER CO. v. COUR DE MAGISTRAT*(1937), 62 Que. K.B.268.

Section 425—continued

These cases are not reviewed in detail because a case in the Supreme Court of Canada seems to lend support to the view taken by the Courts in Quebec. In *Re MANUEL*(1928), 51 C.C.C.60, the accused had been convicted under s.217 of the *Customs Act*, and appealed from the refusal of Lamont, J., to grant a writ of *habeas corpus*. The appeal was dismissed. Rinfret, J., at p.65 said:

> "The warrant therefore recites that Manuel was convicted of an offence which is described in terms strictly following those of s.219(1) of the Act. Then s-s.(2) enacts that 'every such person' guilty of the offence so described is 'liable on summary conviction before two justices of the peace . . . . . .'
>
> I fail to see how, under those circumstances, it can be said that, on its face, the warrant of commitment does not show jurisdiction in the stipendiary magistrate."

In this Code, s.466(b)(i) excludes from the definition of "magistrate" two justices of the peace sitting together. As to summary convictions, see ss.695 and 697, *post*.

PRESERVING ORDER IN COURT.

426. Every judge or magistrate has the same power and authority to preserve order in a court over which he presides as may be exercised by the superior court of criminal jurisdiction of the province during the sittings thereof.

This is the former s.606 with the words "superior court of criminal jurisdiction of the province" in place of the words "any court in Canada, or by the Judges thereof." S.606 was s.908 in the Code of 1892 and came from R.S.C. 1886, c.178, s.109. See also ss.8 and 9 *ante*, as to contempt of court, and notes to s.428 *post*.

It is indispensable to the administration of justice that the presiding officer shall have control of the proceedings before him. This was pointed out in *GARNETT v. FERRAND*(1827), 6 B. & C. 611, in which the following appears at p.628:

> "It will be, in many cases, impossible that a proceeding should be conducted with due order and solemnity, and with the effect that justice demands, if the presiding officer, whether he be judge, coroner, justice, or sheriff, has not the controul of the proceeding, and the power of admission or exclusion according to his own discretion. It is not to be expected that any person will act at the peril of being harassed by a multiplicity of actions, and of having his reasons and motives weighed and tried by juries at the suit of individuals who may be dissatisfied with his conduct. There are very few who will not prefer rather to admit disorder and a confusion, and all the evil consequences that may follow from the indiscriminate admission of those who may choose to intrude, than to place themselves in a situation of so great jeopardy. The power of exclusion is necessary to the due administration of justice."

GARNETT v. FERRAND, was held in *AGNEW v. STEWART* (1862), 1 U.C.Q.B.396, to be a complete answer to an action brought by a barrister against a coroner who had him put out of a room when he

OLD CODE:

606. Every judge of the sessions of the peace, chairman of the court of general sessions of the peace, police magistrate, district magistrate or stipendiary magistrate, shall have such and like powers and authority to preserve order in courts held by them during the holding thereof, and by the like ways and means as now by law are or may be exercised and used in like cases and for the like purposes by any court in Canada, or by the judges thereof, during the sittings thereof.

644. The trials of young persons apparently under the age of sixteen years, shall take place without publicity and separately and apart from the trials of other accused persons, and at suitable times to be designated and appointed for that purpose.

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insisted upon being present at an inquest and upon examining and cross-examining the witnesses, he having been, as he alleged, retained by certain clients to attend and to act on their behalf.

"The coroner is not limited in his discretion to exclude all those whose presence is not indispensable to the proper holding of the inquest, and we cannot hold that the plea discloses any ground on which the plaintiff can, consistently with the case of *GARNETT v. FERRAND*, rest a claim to an absolute right to take part in the proceedings, or to be present at them, against the consent of the coroner."

In *Re SCAIFE, POTTS v. VICTORIA* (1896), 5 B.C.R.153, it was said that:

"The powers given by s.606, to magistrates and others would seem to be wide enough to include a power to commit for contempt committed in the face of the court. They do not, however, extend to proceedings for contempt committed out of the court."

TRIAL OF JUVENILES TO BE WITHOUT PUBLICITY.

427. Where an accused is or appears to be under the age of sixteen years, his trial shall take place without publicity, whether he is charged alone or jointly with another person.

This section is a modification of the former s.644. These provisions do not appear in the English Draft Code, but appeared in s.550 of the Code of 1892, beginning: "The trials of all persons apparently under the age of sixteen years shall, *so far as it appears expedient and practicable* . . . . . " The new section, passed to replace s.550, was enacted as s.1 of 57-58 Vict., c.58, *An Act respecting arrest, trial and imprisonment of youthful offenders.* The Bill was first introduced in the Senate where its sponsor said that his object was "that these young offenders shall be kept entirely separate and shall not come in contact with older criminals or have the opportunity of conversing with them or being in their company in any way". The Bill as introduced read "seventeen years" but was amended in the Senate to sixteen years "so as to make the age correspond with that mentioned in the section in the Criminal Code which is to be amended by this Bill". The Bill contained other provisions which referred to Ontario and are now superseded by the *Juvenile Delinquents Act.*

In the House of Commons the objection was raised that as a rule it is unsound to withdraw the trial of accused persons from the eyes of the

Section 427—*continued*

public. In reply it was said that a great many magistrates declined to observe s.550 as obliging them to hold separate trials without publicity, and that the purpose of the change was to make it obligatory upon the justice in each case.

There were other comments to the effect that the Bill had been urged by persons interested in the care of children and with reference to the work of the Children's Aid Society but, with more particular reference to the criminal law, it was said that the Bill was intended also to "carry out more effectively the system of suspended sentence with regard to children".

It will be seen that the former section made it impossible to charge a juvenile jointly with an adult where the two were parties to the same offence. Under the new section it will not be necessary to hold separate trials in such a case, but the joint trial will be held without publicity.

The *Juvenile Delinquents Act*, R.S.C. 1952, c.160, s.12, contains provisions relating to trials under that Act. Subsec.(1) is similar.

EXCLUSION OF PUBLIC IN CERTAIN CASES.

428. The trial of an accused that is a corporation or who is or appears to be sixteen years of age or more shall be held in open court, but where the court, judge, justice or magistrate, as the case may be, is of opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the court room, he may so order.

This embodies the principle contained in the former ss.645, 714 and 787. S.714 was s.849 in the Code of 1892 and came from R.S.C. 1886, c.178, s.33. S.787 was s.794 in the Code of 1892 and was based upon R.S.C. 1886, c.176, s.17.

S.645 was not in the Code of 1892. What appeared as subsecs. 1 and 3 was enacted as s.550(a) in 1900. It was pointed out (Hansard 1900, Vol. II, col.5266) that under the general law, the courts were open to the general public, but that the trials of all persons under the age of sixteen, shall, so far as practicable, take place without publicity, and it was stated that the intention was to extend this provision substantially so as to apply to the specified cases, leaving it in the discretion of the judge to declare that for the purposes of such trials the court shall not be a public court, and to determine who shall have access. Asked whether the judge did not already have that power, the Solicitor General replied that he thought not, and cited a case in Quebec in which the judge restricted the area of the court room which was left open to the public, but said he could not go beyond that.

What appeared as subsec.(2) of s.645 was enacted in 1915.

At common law a trial on indictment or criminal information must be held in a public court with open doors. In dealing with certain classes of trials, the presiding judges, not infrequently, request women and young persons to leave the court, and there is unquestioned power to exclude or eject persons who disturb the proceedings: Archbold's Criminal Pleadings, 28th ed., p.209.

OLD CODE:

645. At the trial of any person charged with an offence under any of the following sections, that is to say:—Two hundred and two, two hundred and three, two hundred and four, two hundred and five, two hundred and six, two hundred and eleven, two hundred and twelve, two hundred and thirteen, two hundred and fourteen, two hundred and fifteen, two hundred and sixteen, two hundred and seventeen, two hundred and eighteen, two hundred and nineteen, two hundred and twenty, two hundred and twenty-nine in so far as it relates to common bawdy-houses, two hundred and thirty-nine in so far as it relates to paragraph (i) of section two hundred and thirty-eight, two hundred and ninety-two, two hundred and ninety-three, two hundred and ninety-nine, three hundred and three, three hundred and four, three hundred and five, three hundred and six, three hundred and thirteen and three hundred and fourteen, or with conspiracy or attempt to commit, or being an accessory after the fact to any such offence, the court or judge or justice may order that the public be excluded from the room or place in which the court is held during such trial.

(2) Such order may be made in any other case also in which the court or judge or justice may be of opinion that the same will be in the interests of public morals.

(3) Nothing in this section shall be construed by implication or otherwise as limiting any power heretofore possessed at common law by the presiding judge or other presiding officer of any court of excluding the general public from the court-room in any case when such judge or officer deems such exclusion necessary or expedient.

714. The room or place in which the justice sits to hear and try any complaint or information shall be deemed an open and public court, to which the public generally may have access so far as the same can conveniently contain them.

787. Every court held by a magistrate for the purposes of this Part shall be an open public court.

The matter is fundamental to the administration of justice, and several articles discussing trial *in camera* have appeared in Canadian publications: 25 Can. L.J.597, (1889); 26 Can. L.J.98, (1890); 16 D.L.R. 769, (1914); and 25 C.B.Rev.721 (1947). The subject has arisen mostly, although not exclusively, in matrimonial causes, and the two leading cases, the latter of which arose in Canada, are within that class. They are *SCOTT v. SCOTT*, [1913]A.C.417, in which the earlier cases are reviewed, and *McPHERSON v. McPHERSON*, [1936]A.C.177. In the former, Lord Haldane, L.C., said at p.438: "The mere consideration that the evidence is of an unsavoury character is not enough, any more than it would be in a criminal court, and still less is it enough that the parties agree in being reluctant to have their case tried with open doors."

The following is quoted from *R. v. LEWES PRISON (GOVERNOR)*, [1917]2 K.B.254.

> "It is in my judgment plain that inherent jurisdiction exists in any Court which enables it to exclude the public where it becomes necessary in order to administer justice. That is the true meaning of the language used by Earl Loreburn and by Viscount Haldane L.C. in *SCOTT v. SCOTT*. The general principle enunciated in those judgments is stated in a sentence by Earl Loreburn, who said that, 'the

Section 428—*continued*

Court may be closed or cleared if such a precaution is necessary for the administration of justice'.

His Lordship went on to state that it was impossible to enumerate all the possible contingencies, but that where the administration of justice would be rendered impracticable by the presence of the public, whether because the case could not be effectively tried or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court, the Court has the power to exclude the public. Those are only instances of the general principle."

In *REID v. AULL*(1914), 16 D.L.R.766, an action for nullity of marriage, Latchford, J., followed *SCOTT v. SCOTT* and said:

"In criminal trials in Canada, the right to exclude the public conferred upon the trial Judge by sec.645 of the Code is restricted to cases in which the Court considers the exclusion to be in the interest of public morals.

Other exceptions occur in the case of wards of Court, in lunacy proceedings, and in actions regarding secret processes, where the paramount object of securing that justice be done would be doubtful if not impossible of attainment if the hearing were not in camera."

R. ex. rel., HAYWOOD v. NEFF(1947), 88 C.C.C.199, and *SNELL v. HAYWOOD* (No. 2) (1947), 88 C.C.C.213, were both prosecutions under the *Income War Tax Act*. In the former, Clinton J. Ford, J., after quoting ss.645 and 714 proceeded (p.203):

"The principle on which the Court may act in excluding the public is, I think, well stated by Lush J. in *NORMAN v. MATHEWS*(1916), 85 L.J.K.B.857; affd 32 T.L.R.369. At p.859 he says: 'I do not think that the Court ought lightly to decide to hear a case in camera. It does not follow that if there is an application for a case to be heard in camera the order ought to be made as of course. The Court should consider for itself whether there is a *prima facie* ground for setting aside the ordinary method of the administration of justice; but if there are materials before the Court for concluding that it is necessary in order to secure that justice be done, the proceedings should be in camera. There is no question that the Court has power, apart from any particular regulation, to hear a case in camera upon such grounds as these . . . . . see *SCOTT v. SCOTT* (82 L.J.P.74; [1913]A.C.417). From the various speeches of the learned law lords in that case it appears that if it is necessary in the interests of justice that the public should be excluded, the Court has jurisdiction to exclude the public, and to hear and try the case in camera.

Thus far I have been dealing with the inherent jurisdiction of the Court at common law to exclude the public, because s.645(3) quoted above expressly reserves such power to the Judge or other presiding officer of the Criminal Court when such Judge or officer deems such exclusion necessary or expedient; that is to say, necessary or expedient for the administration of justice; since, as has appeared from the cases quoted from above, the inherent jurisdiction of the Court at common law is to exclude the public where it is necessary for such purpose."

In *R. v. GREENWOOD*(1948), 90 C.C.C.244, the accused, who was charged with attempted theft, was tried in a room to which access was

OLD CODE:

629. Any justice who is satisfied by information upon oath in form 1, that there is reasonable ground for believing that there is in any building, receptacle, or place,

(a) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed;

(b) anything which there is reasonable ground to believe will afford evidence as to the commission of any such offence; or

(c) anything which there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which the offender may be arrested without warrant;

may at any time issue a warrant under his hand authorizing some constable or other person named therein to search such building, receptacle or place, for any such thing, and to seize and carry it before the justice issuing the warrant, or some other justice for the same territorial division to be by him dealt with according to law.

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gained through a door marked "Private". On appeal, a new trial was ordered, and the court said:

> "The well-established common law right of the public to have access to Court trials was quite recently emphasized by the Judicial Committee in an appeal from this Province, *McPHERSON v. McPHERSON* (*supra*). That was a civil trial but the principle would seem to be as applicable to criminal as to civil trials, subject, of course, to any statutory revisions. Indeed as regards trials by Justices of the Peace and Magistrates our Code has made statutory the common law principle."

Under very similar circumstances the Manitoba Court of Appeal said: "These cases make it perfectly clear that it is a principle of the common law that a Court must be open and public, and that if those requirements are not met there is no Court and the proceedings are void. That applied to the Magistrate's Court by virtue of s.787 as well as by the common law." *R. v. JOSEPHSON*(1948), 93 C.C.C.136.

The most recent decision in which trials *in camera* are discussed, is that of *RIDEOUT v. RIDEOUT*(1950), 96 C.C.C.293, a case under the *Health and Public Welfare Act* of Newfoundland. In delivering the unanimous judgment of the Court on appeal, Walsh, C.J., applied *SCOTT v. SCOTT* and *McPHERSON v. McPHERSON*.

As a preliminary hearing is not a trial, this section does not apply to it, but see s.451(j) *post*.

See also notes to s.426.

INFORMATION FOR SEARCH WARRANT.—Endorsement of search warrant.—Form.—Effect of endorsement.

429. (1) A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place,

(*a*) anything upon or in repsect of which any offence against this Act has been or is suspected to have been committed,

(*b*) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act, or

Section 429—*continued*

(c) anything that there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,

may at any time issue a warrant under his hand authorizing a person named therein or a peace officer to search the building, receptacle or place for any such thing, and to seize and carry it before the justice who issued the warrant or some other justice for the same territorial division to be dealt with by him according to law.

(2) Where the building, receptacle, or place in which anything mentioned in subsection (1) is believed to be is in some other territorial division, the justice may issue his warrant in like form modified according to the circumstances, and the warrant may be executed in the other territorial division after it has been endorsed, in Form 25, by a justice having jurisdiction in that territorial division.

(3) A search warrant issued under this section may be in Form 5.

(4) An endorsement that is made upon a warrant pursuant to subsection (2) is sufficient authority to the peace officers to whom it was originally directed and to all peace officers within the jurisdiction of the justice by whom it is endorsed to execute the warrant and to take the things to which it relates before the justice who issued the warrant or some other justice for the same territorial division.

Subsecs.(1) and (3) are the former ss.629 and 630(2). They were subsecs.(1) and (3) of s.569 in the Code of 1892, and came from R.S.C. 1886, c.174, ss.51 and 52.

Subsec.(2) is the former s.629(2) which was added to the Code by 1909, c.9, s.2.

Subsec.(4) is an adaptation of the former s.662(2).

As presented in the draft Bill, pars.(1)(a) and (b) read "against this Act or any other Act of the Parliament of Canada". However, during the course of the Bill through Parliament the words "or any other Act of the Parliament of Canada" were struck out on the ground that their inclusion would extend the right of search to Acts not yet passed.

At common law the rule was that a search warrant could be issued only to search for stolen goods. "The case of searching for stolen goods", says one of the old reports (*JONES v. GERMAN*(1897), 66 L.J.Q.B.281), "crept into the law by imperceptible practice. It is the only case of the kind that is to be met with. No less a person than my Lord Coke denied its legality."

The case quoted was one in which a master had dismissed a servant and, finding that some tools were missing, suspected that the servant had taken them. He therefore applied to a Justice of the Peace for a warrant to search the servant's boxes. It was held that the Justice had, by virtue of his commission, inherent powers to issue a search warrant, and that he might do so although the information did not allege that a larceny had been committed "if the fair intendment of the allegations made in the information is that the informant has reasonable grounds to suspect, and does suspect, that a larceny has been committed."

OLD CODE:

Section 629—continued

(2) If the building, receptacle, or place in which such thing as aforesaid is reputed to be is in some other county or territorial division, the justice may nevertheless issue his warrant in like form modified according to the circumstances, and such warrant may be executed in such other county or territorial division upon being endorsed by some justice of that county or territorial division, such endorsement to be in form 2A, or to the like effect.

630. (2) Every search warrant may be in form 2, or to the like effect.

662. If the person against whom any warrant has been issued cannot be found within the jurisdiction of the justice by whom the same was issued, but is or is suspected to be in any other part of Canada, any justice within whose jurisdiction he is or is suspected to be, upon proof being made on oath or affirmation of the handwriting of the justice who issued the same, shall make an endorsement on the warrant, signed with his name, authorizing the execution thereof within his jurisdiction.

(2) Such endorsement shall be sufficient authority to the person bringing such warrant, and to all other persons to whom the same was originally directed, and also to all constables of the territorial division where the warrant has been so endorsed, to execute the same therein and to carry the person against whom the warrant issued when apprehended, before the justice who issued the warrant, or before some other justice for the same territorial division.

(3) Such endorsement may be in form 8.

(4) If the person against whom such warrant has been issued is then confined for some other cause in any prison within the province then, upon application to the judge of any superior, county or district court, and upon production to him of the warrant with an affidavit setting forth the above facts, such judge if he is satisfied that the ends of justice require it, may make an order in writing addressed to the warden or keeper of such prison, or to the sheriff or other person having the custody of the prisoner, to bring up the body of such person before the justice who is holding the preliminary inquiry, from day to day, as may be necessary for the purposes of such inquiry, and such warden, keeper, sheriff or other person, upon being paid his reasonable charges in that behalf, shall obey such order.

(5) If the person against whom such warrant is issued is then confined for some other cause in any prison within another province then, upon application to the judge of any superior, county or district court having jurisdiction in the place where the prisoner is confined, and upon production to him of the warrant with an affidavit setting forth the facts, such judge, if satisfied that the ends of justice require it, may, by order in writing addressed to the warden or keeper of such prison, or to the sheriff or other person having the custody of the prisoner, direct him to bring up the body of such person before the justice who is holding the preliminary inquiry from day to day as may be necessary for the purposes of such inquiry, and at the place and within the province wherein the warrant was issued, and such warden, keeper, sheriff or other person upon being paid his reasonable charges in that behalf shall obey the order: Provided that no such order shall be granted unless notice of the application therefor shall have been served upon the Attorney General of the province in which the prisoner is confined within a reasonable time before the making of the application.

(6) Where any order is granted under the provisions of the last preceding sub-

Section 429—continued

This decision was based upon an earlier case (*ELSEE v. SMITH* (1822), 1 Dow. & Ry. K.B. 97) from the report of which the following excerpt may usefully be noted, inasmuch as it has not been affected by the provisions of the *Criminal Code*.

> "It need not be a positive and direct averment upon oath that the goods are stolen in order to justify the magistrate in granting his warrant. There are many cases in which a cautious man might not choose to swear that his property is stolen, nevertheless, he might have great reason to suspect a particular party, and the magistrate would be well warranted in granting his search warrant. Suppose the case of a horse which has been lost by its owner, and it is found in the possession of another person, the owner might not like to take upon himself to swear that the horse had been stolen for it may have strayed; but when he finds his horse is concealed in the stable of another person, he may very naturally conclude that it must be stolen, from the circumstance of the concealment; and therefore he may very conscientiously swear that he suspects it to have been stolen. If, under such circumstances, the magistrate is not authorized in issuing his search warrant, it might happen in many cases that felonies would go undetected."

The relevant forms of information and warrant are set out as Nos. 1 and 5 in Part XXVI. It is important to notice in both the direction to "describe things to be searched for and offence in respect of which search is to be made", and in the information the further direction, "here add the grounds of belief, whatever they may be."

These directions came under the consideration of the Appeal Division of the Supreme Court of New Brunswick in a case in which the accused had been convicted of obstructing a peace officer in the execution of a search warrant. That Court quashed the conviction, holding that the peace officer was not acting in the execution of his duty when the warrant was defective on its face because it did not state any offence, and further that the information upon which it was issued was invalid because it did not state the cause of suspicion. The following is an extract from the judgment in *R. v. LA VESQUE* (1918), 30 C.C.C.190:

> "It will be noticed in this form that it distinctly provides that the things searched for must be described and the offence in respect of which the search is made must likewise be described to make the warrant valid and the procedure thereunder legal. In the warrant which was issued in this case this was entirely omitted, nothing further being done than describing the article which it was sought to recover. The offence in respect of which the warrant was issued was not stated, nor referred to in any respect so that I am of opinion that the warrant itself was not sufficient in law.
>
> Form 1 provides the following words, 'Here add the grounds of suspicion whatever they may be.' This has been omitted in the information. . . . . I am of the opinion, however, that it is a very serious defect so far as the information is concerned, and has not been overcome."

See also *R. v. FRAIN*(1915), 24 C.C.C.389.

OLD CODE:

Section 662—continued

section, the judge may, by such order or by such further or other order as he may deem requisite, from time to time, give directions as to the manner in which such person shall be kept in custody and returned to prison to serve the remainder of his original sentence, in case he be discharged or acquitted of the offence in respect of which such warrant was issued, or may make such other directions as in the circumstances of the case he may see fit.

In the matter of setting out the grounds of belief in the information, there is one objectionable practice which should be mentioned. Sometimes one sees an information which, in this connection, contains only the words "Information received". It is to be borne in mind that a search warrant is issued because of the *suspicions* of the informant. The justice or magistrate must be satisfied that those suspicions are reasonable; he should not substitute the judgment of the informant for his own in that respect.

Here, from a reported case (*R. v. SWARTS*(1916), 27 C.C.C.90) is an illustration of the way in which the information may be worded—the fact that the case was not under the Code does not affect its applicability:

> "The grounds of suspicion are that the deponent is told on reliable authority that a package or box was taken into the said dwelling-house which there is ground to believe contained intoxicating liquors."

This case is authority for the proposition that, if confidential information has been received, it is not necessary to name the person from whom it came:

> "It is argued that the name of the person who told Pellow should have been disclosed. But here we are concerned with suspicion only, and I see no reason for compelling the informant to disclose the names of his informants, unless the magistrate saw fit to do so."

The law concerning the execution of search warrants beyond the jurisdiction of the person issuing them has been dealt with in the following series of cases: *SOLLOWAY MILLS & CO. v. ATTORNEY GENERAL OF ALBERTA*(1930), 53 C.C.C.234; *R. v. SOLLOWAY & MILLS* (1930), 53 C.C.C.261; also at p.271; *SOLLOWAY MILLS & CO. v. ATTORNEY GENERAL OF ALBERTA*(1930), 53 C.C.C.306; *SOLLOWAY MILLS & CO. v. WILLIAMS et al.*(1930), 53 C.C.C.403; and *R. v. SOLLOWAY & MILLS*(1930), 54 C.C.C.214.

In the first mentioned of these, two warrants came into question, one issued in Alberta and backed by a justice in British Columbia, the other issued by the same justice in the latter Province under his own original power under s.629. The Court of Appeal held that *both* warrants might be executed, and expressed the view that "the jurisdiction exercised herein is not a trial one but inquisitional and ancillary to another trial in which the criminal machinery of Canada is to be regarded as a whole and not in pieces".

The decisions in Ontario also are to the effect that in the administration of the criminal law the Dominion of Canada is to be regarded as a unit, although in one of the cases the warrant was quashed because the

Section 429—*continued*

information did not sufficiently set out the cause of suspicion. The following may usefully be quoted from one of the judgments:

"The question which arises is, does the section of the Code relied upon authorize a justice of any Province to endorse the warrant, or is the action of the Alberta justice limited to the Province of Alberta only? . . . . . I can find nothing which justifies the giving of a narrow meaning to the words used. It is not hard to see why, with respect to the particular matter dealt with by s.629, the parliament of Canada may well have intended process to be executed in any part of the Dominion."

With regard to search of the person, the following appears in *R. v. ELLA PAINT*(1917), 28 C.C.C.171:

"What the warrant in this case authorized was a search of the 'shop and premises' of the complainant . . . . . In prosecuting his search the statute enables the constable to break doors, locks, closets, cupboards, etc. But nothing is said about searching the 'persons' of the occupants. If it were contemplated to authorize so unusual a proceeding, one would expect the legislature to say so definitely and precisely; for to search the person of the occupant is pushing further the invasion of one's privacy than breaking open a door or closet. It is not necessary to point out the results which would follow if the Court held that under a warrant to search a defined place or premises, the officer might search the 'person' of anyone who might at the time be found within such defined place or premises. I have been unable to find any case where so wide a construction has been given to the power of search. There are cases where express power to search the 'person' has been given . . . . . ; but Mr. Murray has not directed our attention to any case, probably because none can be found, where the right to search the person has been established by implication from the power to search the premises.

There are cases where parties under arrest have been searched: *R. v. O'DONNELL*(1835), 7 C. & P. 138. This is for the purpose of securing evidence of a crime already committed; or for the purpose of preventing further mischief by the prisoner or some like purpose. Such cases are quite distinguishable from a case where there has been no arrest, or where, as far as the evidence shows, no offence has been committed."

See however, *R. v. BREZACK*, [1949]O.W.N.776, noted *ante*, p.89. Again, search of the person is authorized in some instances, *e.g.*, in s.96(1) *ante*, and in the writs of assistance provided for by the *Customs Act* and the *Excise Act*.

See also ss.430-432.

EXECUTION OF SEARCH WARRANT.

430. A warrant issued under section 429 shall be executed by day, unless the justice, by the warrant, authorizes execution of it by night.

This is the former s.630(1). It was s.569(2) in the Code of 1892, and came from R.S.C. 1886, c.50, s.101. "Day" and "night" are defined in s.2

OLD CODE:

630. Every search warrant shall be executed by day, unless the justice shall by the warrant authorize the constable or other person to execute it at night.
(2) Every search warrant may be in form 2, or to the like effect.

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(11) and (28). As to issue and execution on Sunday or holiday see s.20. For authority that the Code authorizes execution of a search warrant on Sunday see *Ex p. WILLIS*(1916), 27 C.C.C.383; *R. v. POSTERNAK*(1929), 51 C.C.C.426; *R. v. WRIGHT*(1929), 52 C.C.C.285;*R. v. BOUGHNER* (1930), 53 C.C.C.170.

SEIZURE OF THINGS NOT SPECIFIED.

431. Every person who executes a warrant issued under section 429 may seize, in addition to the things mentioned in the warrant, anything that on reasonable grounds he believes has been obtained by or has been used in the commission of an offence, and carry it before the justice who issued the warrant or some other justice for the same territorial division, to be dealt with in accordance with section 432.

This is new and is designed to cover cases in which the police executing a search warrant, *e.g.* in a case of shop-breaking, find goods that are the proceeds of other offences, or things that have been used in the commission of other offences.

The change may be justified, if justification be needed, by the following quotation from *R. v. HONAN*(1912), 20 C.C.C.10:

"The question is not, by what means was the evidence procured; but it is whether the things proved were evidence; and it is not contended that they were not; all that is urged is that the evidence ought to have been rejected because it was obtained by means of a trespass . . . . . as it is asserted . . . . . upon the property of the accused by the police officials engaged in this prosecution. The criminal who wields the 'jimmy' or the bludgeon, or uses any other criminally unlawful means or methods, has no right to insist upon being met by the law only when in kid gloves or satin slippers; it is still quite permissible to 'set a thief to catch a thief'."

See also *DILLON v. O'BRIEN*(1887), 16 Cox,C.C.245, noted *ante* p.96. Note also that the exemption of telephone equipment, etc., created by s.171(6) extends to this section, and see also s.432 as to detention and disposal of things seized.

DETENTION OF THINGS SEIZED.—When accused committed for trial.—Disposal of things seized in other cases.—Detention pending appeal, etc.—Access to anything seized.—Conditions.—Appeal.

432. (1) Where anything that has been seized under section 431 or under a warrant issued pursuant to section 429 is brought before a justice, he shall, unless the prosecutor otherwise agrees, detain it or order that it be detained, taking reasonable care to ensure that it is preserved until the conclusion of any investigation or until it is required to be produced for the purposes of a preliminary inquiry or trial, but nothing shall be detained under the authority of this section for a period of more than three months after the time

Section 432—*continued*

of seizure unless, before the expiration of that period, proceedings are instituted in which the subject-matter of detention may be required.

(2) When an accused has been committed for trial the justice shall forward anything to which subsection (1) applies to the clerk of the court to which the accused has been committed for trial to be detained by him and disposed of as the court directs.

(3) Where a justice is satisfied that anything that has been seized under section 431 or under a warrant issued pursuant to section 429 will not be required for any purpose mentioned in subsection (1) or (2), he may

***(a)* if possession of it by the person from whom it was seized is lawful, order it to be returned to that person, or**

***(b)* if possession of it by the person from whom it was seized is unlawful,**

(i) order it to be returned to the lawful owner or to the person who is entitled to possession of it, or

(ii) order it to be forfeited or otherwise dealt with in accordance with law, where the lawful owner or the person who is entitled to possession of it is not known.

(4) Nothing shall be disposed of under subection (3) pending any proceeding in which the right of seizure is questioned, or within thirty days after an order is made under that subsection.

(5) Where anything is detained under subsection (1), a judge of a superior court of criminal jurisdiction or of a court of criminal jurisdiction may, on summary application on behalf of a person who has an interest in what is detained, after three clear days' notice to the Attorney General, order that the person by or on whose behalf the application is made be permitted to examine anything so detained.

(6) An order that is made under subsection (5) shall be made on such terms as appear to the judge to be necessary or desirable to ensure that anything in respect of which the order is made is safeguarded and preserved for any purpose for which it may subsequently be required.

(7) A person who considers himself aggrieved by an order made under subsection (3) may appeal from the order to the appeal court, as defined in section 719, and for the purposes of the appeal the provisions of sections 721 to 732 apply, *mutatis mutandis*.

Subsecs.(1) and (2) replace the former s.631 which was s.569(4) in the Code of 1892 and came from R.S.C. 1886, c.50, s.101.

Subsecs.(3) and (4) are new. The former, especially in relation to s. 431, was the subject of extended debate (Hansard 1954, p.2515, pp.2830 *et seq.*). It was amended to appear in its present form, and subsec.(7) was added also (*ib.* p.3009) to provide a right of appeal.

Subsec.(1) as it appeared in the Draft Bill was amended in Parliament and subsecs.(5) and (6) added. "We have provided the conditions under which the access may be had; and we have also provided for time limits within which, if a search warrant has been executed and certain things

OLD CODE:

631. When any such thing is seized and brought before a justice, he may detain it, taking reasonable care to preserve it till the conclusion of the investigation; and, if any one is committed for trial, he may order it further to be detained for the purpose of evidence on the trial.

(2) If no one is committed, the justice shall direct such thing to be restored to the person from whom it was taken, except in the cases hereinafter mentioned, unless he is authorized or required by law to dispose of it otherwise.

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seized by the police (and) no proceedings have been taken, the seized goods must be returned. . . . . .

There should be access while such documents are in the custody of the courts and they should be returned within a certain length of time, if no charges are proceeded with": Senate Committee on Banking and Commerce, Dec. 15-16, 1952, pp.68, 69.

In 1934 an action was brought against the Metropolitan Police in London, England, in which damages were claimed for an unlawful search (*ELIAS v. PASMORE*(1934), 103 L.J.K.B.223). The police in executing a search warrant, made a raid upon the headquarters of a certain organization and seized a large number of documents. Later, the secretary of the organization was convicted of a criminal offence, and some of the documents were used as evidence upon his trial. In the civil action, however, a verdict was given against the police, not because they had no right to seize documents, but because they had not, when the criminal trial was over, returned those which had not been used as evidence. This case is authority for two propositions:

1. If police officers, when lawfully on premises, seize property the seizure of which would otherwise be unlawful, the seizure is excused if such property is capable of being and is used as evidence in criminal proceedings against any person.
2. The police are entitled to retain property the taking of which is excused, until the conclusion of any charge on which the articles are material.

Considerations somewhat similar arose in Canada in the criminal prosecutions which followed the general strike at Winnipeg in 1919 (*R. v. RUSSELL*(1920), 51 D.L.R.1.). Counsel for the accused objected to the admission of seized documents falling under three headings:

1. Documents found in the possession of the accused.
2. Documents found in the possession of persons not named in the indictment.
3. Documents passing between persons other than those named in the indictment.

These documents, it was noticed, were of two mixed classes, one of which dealt with labour problems, the other with advanced radical ideas of the type referred to at the trial as "left" or "red flag" socialism of a revolutionary kind. All of the documents so tendered were received in evidence, the Court holding as follows:

"Documents found in the hands of the accused are clearly admissible in evidence and are *prima facie* evidence against him, it being inferred that he knows their contents and has acted upon them.

Section 432—*continued*

Documents found in the hands of persons whom the Crown charges with being parties to a conspiracy and relating to it, are admissible if they were intended for the furtherance of it, and become evidence against the accused.

Documents found in the hands of third parties are admissible in evidence if they relate to the actions and conduct of the persons charged with the conspiracy or to the spread of seditious propaganda."

SEIZURE OF EXPLOSIVES.—Forfeiture.—Application of proceeds.

433. (1) Every person who executes a warrant issued under section 429 may seize any explosive substance that he suspects is intended to be used for an unlawful purpose, and shall, as soon as possible, remove to a place of safety anything that he seizes by virtue of this section and detain it until he is ordered by a judge of a superior court to deliver it to some other person or an order is made pursuant to subsection (2).

(2) Where an accused is convicted of an offence in respect of anything seized by virtue of subsection (1), it is forfeited and shall be dealt with as the court that makes the conviction may direct.

(3) Where anything to which this section applies is sold, the proceeds of the sale shall be paid to the Attorney General.

This is the former s.633, altered in subsec.(3) to provide that the proceeds of sale go to the province, this in view of the fact that the criminal law is enforced by the provinces. S.633 was s.569(7) and (8) in the Code of 1892 and came from the *Explosive Substances Act*, 1885 (Can.).

See also ss.78-80 *ante*, pp.153-157.

PART XIV.

COMPELLING APPEARANCE OF ACCUSED BEFORE A JUSTICE.

Arrest Without Warrant.

BY ANY PERSON.

434. Any one may arrest without warrant a person whom he finds committing an indictable offence.

This is the former s.646 without the long enumeration of offences that appeared there. S.646 was part of s.552 in the Code of 1892, amended by 1909, c.9, s.2 and 1913, c.13, s.22. The reason for the enumeration was stated by Sir John Thompson (Hansard, 1892, Vol. II, col. 3801):

"I may explain at the outset that we understand this to be the existing law, not as laid down in any statute, but the graver offences which are laid down for which an arrest may be made are felonies now, and inasmuch as we are abolishing the distinction between felonies and misdemeanours, we must mention all these things which we intend to have the characteristics of felonies as regards arrest. That is the reason they are stated here."

OLD CODE:

633. Every person acting in the execution of any such warrant may seize any explosive substance which he has good cause to suspect is intended to be used for any unlawful object, and shall, with all convenient speed, after the seizure, remove the same to such proper place as he thinks fit, and detain the same until ordered by a judge of a superior court to restore it to the person who claims the same.

(2) Any explosive substance so seized shall, in the event of the person in whose possession the same is found, or of the owner thereof, being convicted of any offence under any provision of Part II, relating to explosive substances, be forfeited; and the same shall be destroyed or sold under the direction of the court before which such person is convicted.

(3) In the case of sale, the proceeds arising therefrom shall be paid to the Minister of Finance, for the public uses of Canada.

646. Any person may arrest without warrant any one who is found committing any of the offences mentioned in sections

(a) seventy-four, treason; seventy-six, accessories after the fact to treason; seventy-seven, seventy-eight and seventy-nine, treasonable offences; eighty, assaults on the King; eighty-one, inciting to mutiny; eighty-five and eighty-six, information illegally obtained or communicated;

(b) ninety-two, offences respecting the reading of the Riot Act; ninety-six, riotous destruction of property; ninety-seven, riotous damage to property;

(c) one hundred and thirty, administering, taking or procuring the taking of oaths to commit certain crimes; one hundred and thirty-one, administering, taking or procuring the taking of other unlawful oaths;

(d) one hundred and thirty-seven, piracy; one hundred and thirty-eight, piratical acts; one hundred and thirty-nine, piracy with violence;

(e) one hundred and eighty-five, being at large while under sentence of imprisonment; one hundred and eighty-seven, breaking prison; one hundred and eighty-nine, escape from custody or from prison; one hundred and ninety, escape from lawful custody;

(f) two hundred and two, unnatural offence;

(g) two hundred and sixty-three, murder; two hundred and sixty-four, attempt to murder; two hundred and sixty-seven, being accessory after the fact to murder; two hundred and sixty-eight, manslaughter; two hundred and seventy, attempt to commit suicide;

(h) two hundred and seventy-three, wounding with intent to do bodily harm; two hundred and seventy-four, wounding; two hundred and seventy-six, stupefying in order to commit an indictable offence; two hundred and seventy-nine and two hundred and eighty, injuring or attempting to injure by explosive substances; two hundred and eighty-two, intentionally endangering persons on railways; two hundred and eighty-three, wantonly endangering persons on railways; two hundred and eighty-six, preventing escape from wreck;

(i) two hundred and ninety-nine, rape; three hundred, attempt to commit rape; three hundred and one, defiling children under fourteen;

(j) three hundred and thirteen, abduction of a woman;

(k) three hundred and fifty-eight, theft by agents and others; three hundred and fifty-nine, theft by clerks, servants and others; three hundred and sixty, theft by tenants and lodgers; three hundred and sixty-one, theft of testamentary instruments; three hundred and sixty-two, theft of documents of title; three hundred and sixty-three, theft of judicial or official documents; three hundred

Section 434—*continued*

Taschereau's edition of the Code of 1892, p.620, quotes a lengthy discussion in support of the proposition that at common law a private individual might arrest any person whom he catches committing a misdemeanour.

As to powers of arrest generally see notes to s.25, *ante* p.74 and pp. 80 *et seq.*

BY PEACE OFFICER.

435. A peace officer may arrest without warrant

(a) **a person who has committed or who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence, or**

(b) **a person whom he finds committing a criminal offence.**

This comes from the former ss.647, 648 and 652 in part. S.647 was based upon s.552(3) in the Code of 1892, which was amended by 58 and 59 Vict., c.40, s.1, and 1913, c.13, s.23. S.648(1) is of similar origin. S.652(1) also came from s.552 of the Code of 1892.

In this section the omission of the reference to "night" extends the power of arrest to enable a peace officer to arrest where he reasonably believes that a person is about to commit an indictable offence.

The words "criminal offence" were interpreted in *PLESTED v. MacLEOD*(1910), 15 W.L.R.533, to include an offence punishable on summary conviction.

The following extract from the report of the Royal Commission on Espionage, 1946, pp.654 and 655, refers to par.4 of Order in Council P.C. 6444, which substantially reproduces s.11 of the *Official Secrets Act,* 1939, and to s.10 of that Act. It is quoted here by reason of its reference to the common law power of detention and to the Code:

"Section 10 is silent as to the length of time during which a person reasonably suspected of *being about to commit an offence,* may be detained by the constable who arrests him. It may be suggested, therefore, that the common law rule would apply and that the person detained must be brought before a judicial officer within a reasonable time. A 'reasonable time' within the meaning of the common law rule is such time as is reasonably necessary in the ordinary course to bring the person before a magistrate. The jurisdiction of the magistrate at common law, as under section 668 of the Code, (see now s.449) is limited to an inquiry into the matter 'charged'. In the case of a person arrested and detained on suspicion merely of being 'about to commit an offence', there is no charge and, therefore, nothing for the magistrate to inquire into. If it could be said, therefore, that in such case, there being no charge, the magistrate assuming a non-existent jurisdiction must direct the release of the person detained, the preventive purpose of the *Official Secrets Act* might well fail, as the person, by his release, would be then given an opportunity to commit the actual offence; and it is provided by section 15 of the *Interpretation Act,* R.S.C. 1927, c.1, that every act and every provision thereof shall be deemed remedial whether its immediate purport is to direct the doing of anything which Parliament deems to be for the public good, or to *prevent* or punish the doing of any

OLD CODE:

Section 646—continued

and sixty-four, three hundred and sixty-five and three hundred and sixty-six, theft of postal matter; three hundred and sixty-seven, theft of election documents; three hundred and sixty-eight, theft of railway tickets; three hundred and sixty-nine, theft of cattle; three hundred and seventy-one, theft of oysters; three hundred and seventy-two, theft of things fixed to buildings or land; three hundred and seventy-nine, stealing from the person; three hundred and eighty, stealing in dwelling-houses; three hundred and eighty-one, stealing by picklocks, etc.; three hundred and eighty-two, stealing from ships, docks, wharfs or quays; three hundred and eighty-three, stealing wreck; three hundred and eighty-four, stealing on railways; three hundred and eighty-six, stealing things not otherwise provided for; three hundred and eighty-seven, stealing where value over two hundred dollars; three hundred and eighty-eight, stealing in manufactories; three hundred and ninety, criminal breach of trust; three hundred and ninety-one, public servant refusing to deliver up chattels, money valuables, security, books, papers, accounts or documents; three hundred and ninety-six, destroying, cancelling, concealing or obliterating any documents of title; three hundred and ninety-eight, bringing stolen property into Canada;

(l) three hundred and ninety-nine, receiving property obtained by crime;

(m) four hundred and ten, personation of certain persons;

(n) four hundred and forty-six, aggravated robbery; four hundred and forty-seven, robbery; four hundred and forty-eight, assault with intent to rob; four hundred and forty-nine, stopping the mail; four hundred and fifty, compelling execution of documents by force; four hundred and fifty-one, sending letter demanding with menaces; four hundred and fifty-two, demanding with intent to steal; four hundred and fifty-three, extortion by certain threats;

(o) four hundred and fifty-five, breaking place of worship and committing an indictable offence; four hundred and fifty-six, breaking place of worship with intent to commit an indictable offence; four hundred and fifty-seven, burglary; four hundred and fifty-eight, housebreaking and committing an indictable offence; four hundred and fifty-nine, housebreaking with intent to commit an indictable offence; four hundred and sixty, breaking shop and committing an indictable offence; four hundred and sixty-one, breaking shop with intent to commit an indictable offence; four hundred and sixty-two, being found in a dwelling-house by night; four hundred and sixty-three, being armed, with intent to break a dwelling-house; four hundred and sixty-four, being disguised or in possession of housebreaking instruments;

(p) four hundred and sixty-eight, four hundred and sixty-nine and four hundred and seventy, forgery; four hundred and sixty-seven, uttering forged documents; four hundred and seventy-two, counterfeiting seals; four hundred and seventy-eight, using probate obtained by forgery or perjury; five hundred and fifty, possessing forged bank notes;

(q) four hundred and seventy-one, making, having or using instrument for forgery or having or uttering forged bond or undertaking; four hundred and seventy-nine, counterfeiting stamps; four hundred and eighty, injuring or falsifying registers;

(r) one hundred and twelve, attempt to damage by explosives; five hundred and ten, mischief; five hundred and eleven, arson; five hundred and twelve, attempt to commit arson; five hundred and thirteen, setting fire to crops; five hundred and fourteen, attempting to set fire to crops; five hundred and seventeen, mischief on railways; five hundred and twenty, mischief to mines; five

Section 435—*continued*

thing which it deems contrary to the public good and 'shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit'.

The release of a person reasonably suspected of being about to communicate information contrary to the statute merely because no charge has been made where no charge could in law be made, would not be in accord with the purpose of the authority given by section 10 to arrest and detain such a person."

See notes to preceding section.

BY ANY PERSON ON FRESH PURSUIT.

436. Any one may arrest without warrant a person who, on reasonable and probable grounds, he believes

(a) **has committed a criminal offence, and**

(b) **is**

(i) escaping from, and

(ii) freshly pursued by,

persons who have lawful authority to arrest that person.

This is the former s.649. It was s.552(4) in the Code of 1892.

As to escape, see notes to s.25 *ante*, pp.95 *et seq.*, and ss.124-127 *ante*.

As to fresh pursuit, the following appears in *HANWAY v. BOULTBEE*(1830), 1 Mood. & R.15, in a case in which the accused was arrested by an officer who had been sent for, about a mile from where he had been seen doing the act complained of:

"No greater diligence could be required; and that being the case, I think it must be treated as an 'immediate apprehension' for the offence which the plaintiff, assuming under the circumstances that it was an offence at all, was 'found committing'."

In *R. v. HOWARTH*(1828), 1 Mood. C.C.207, it was said that:

"It makes no difference that he was not seen getting out of the house and was found concealing himself to avoid apprehension on other premises near. To make such an arrest legal, it is not necessary that the person should have at the time he is arrested a continuing purpose to commit the felony; he may be arrested although that purpose is wholly ended. Where the circumstances are such that a man must know why a person is about to apprehend him, he need not be told, and the arrest will be legal, and the resistance illegal, as much as if he had been told."

R. v. WALKER(1854), 23 L.J.M.C.123, was a case in which it was held that arrest was not made on fresh pursuit:

"The assault for which the prisoner might have been apprehended, was committed some time before and there was no continued pursuit. The interference of the officer therefore was not for the purpose of preventing an affray or of arresting a person whom he had seen recently committing an assault. The apprehension was so disconnected from the offence as to render it unlawful."

In *R. v. MARSDEN*(1868), 37 L.J.M.C.80, a policeman, hearing a disturbance in a street, went to the place. After a struggle with the ac-

OLD CODE:
Section 646—continued
hundred and twenty-one, injuries to electric telegraphs, magnetic telegraphs, electric lights, telephones and fire alarms; five hundred and twenty-two, wrecking; five hundred and twenty-three, attempting to wreck; five hundred and twenty-six, interfering with marine signals;
(s) five hundred and fifty-two, counterfeiting gold and silver coin; five hundred and fifty-six, making instruments for coining; five hundred and fifty-eight, clipping current coin; five hundred and sixty, possessing clippings of current coin; five hundred and sixty-two, counterfeiting copper coin; five hundred and sixty-three, counterfeiting foreign gold and silver coin; five hundred and sixty-seven, uttering copper coin not current.

647. A peace officer may arrest, without warrant,
(a) any one who has committed any of the offences mentioned in the sections set forth in the last preceding section, or in section four hundred and five, obtaining by false pretense; subsection one of section four hundred and six, obtaining execution of valuable securities by false pretense; sections five hundred and twenty-five, injuring dams, etc., or blocking timber channel; five hundred and thirty-six, attempting to injure or poison cattle; five hundred and forty-two, cruelty to animals; five hundred and forty-three, keeping cock-pit; five hundred and fifty-five, exporting counterfeit coin; five hundred and sixty-one, possessing counterfeit current coin; five hundred and sixty-three, paragraph (b), bringing into Canada or possessing counterfeit foreign gold or silver coin; five hundred and sixty-three paragraph (d), counterfeiting foreign copper coin; or
(b) any person whom he has good cause to suspect of having committed or being about to commit any of the offences mentioned in section two hundred and sixteen.

648. A peace officer may arrest, without warrant, any one whom he finds committing any criminal offence.
(2) Any person may arrest, without warrant, any one whom he finds committing any criminal offence by night.

652. Any peace officer may, without a warrant, take into custody any person whom he finds lying or loitering in any highway, yard or other place during the night, and whom he has good cause to suspect of having committed or being about to commit, any indictable offence, and may detain such person until he can be brought before a justice to be dealt with according to law.
(2) No person who has been so apprehended shall be detained after noon of the following day without being brought before a justice.

649. Any one may arrest without warrant a person whom he, on reasonable and probable grounds, believes to have committed a criminal offence and to be escaping from, and to be freshly pursued by, those whom the person arresting, on reasonable and probable grounds, believes to have lawful authority to arrest such person.

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cused he went for assistance, and, about an hour later, returned to the accused's place with two other constables. They demanded admittance but it was refused. They sent for a sergeant, and when he arrived about twenty minutes later, the accused again refused to admit them. The peace officers thereupon broke into the house and arrested the accused after a struggle in which two of them were wounded. A conviction against the accused was quashed on appeal for the reason that "It was

Section 436—*continued*

impossible to say after this lapse of time that the policemen were in fresh pursuit. The hour was not accounted for and we cannot infer that so long a time was necessarily spent in obtaining fresh assistance."

It appears that fresh pursuit must be continuous pursuit conducted with reasonable diligence, so that pursuit and capture, along with the fact that someone saw the accused committing the offence, may be taken as forming one transaction: *R. v. LIGHT*(1857), 27 L.J.M.C.1; *R. v. SHYFFER*(1910), 17 C.C.C.191, *ante* p.86.

See also s.445 *post*.

BY OWNER OF PROPERTY.

437. Any one who is

***(a)* the owner or a person in lawful possession of property, or**

***(b)* a person authorized by the owner or by a person in lawful possession of property,**

may arrest without warrant a person whom he finds committing a criminal offence on or in relation to that property.

This comes from the former s.650. S.650 was s.552(5) in the Code of 1892, and was based upon R.S.C. 1886, c.174, s.24, and 24 & 25 Vict., c.97, s.61 (Imp.). In this section the words "or a person in lawful possession" have been added and may be compared with the words "or by his servant or any other person authorized by such owner" which appeared in R.S.C. 1886. The words "who shall forthwith be taken before a justice" etc., have been omitted in view of s.438(1).

DELIVERY TO PEACE OFFICER.—Taking before justice.

438. (1) Any one who arrests a person without warrant shall forthwith deliver that person to a peace officer, and the peace officer may detain the person until he is dealt with in accordance with this section.

(2) A peace officer who receives delivery of and detains a person who has been arrested without warrant or who arrests a person with or without warrant shall, in accordance with the following provisions, take or cause that person to be taken before a justice to be dealt with according to law, namely,

***(a)* where a justice is available within a period of twenty-four hours after the person has been delivered to or has been arrested by the peace officer, the person shall be taken before a justice before the expiration of that period; and**

***(b)* where a justice is not available within a period of twenty-four hours after the person has been delivered to or has been arrested by the peace officer, the person shall be taken before a justice as soon as possible.**

This comes from the former s.652 in part but is largely new. S.652 was s.552(7) in the Code of 1892 and was derived from R.S.C. 1886, c.174, s.28, and s.104 of the *Larceny Act*, 1861 (Imp.). Greaves' Cons. Acts., p.147, says that it was new with reference to the felonies under that Act, and that it was taken from the 9 and 10 Vict., c.25, s.13, relating to injuries maliciously caused by explosive substances.

OLD CODE:

650. The owner of any property on or with respect to which any person is found committing any criminal offence, or any person authorized by such owner, may arrest, without warrant, the person so found, who shall forthwith be taken before a justice to be dealt with according to law.

652. For wording of this section see p. 725.

653. Every justice may issue a warrant or summons as hereinafter mentioned to compel the attendance of an accused person before him, for the purpose of preliminary inquiry in any of the following cases:—
(a) If such person is accused of having committed in any place whatever an indictable offence triable in the province in which such justice resides, and is, or is suspected to be, within the limits over which such justice has jurisdiction, or resides or is suspected to reside within such limits;
(b) If such person, wherever he may be, is accused of having committed an indictable offence within such limits;
(c) If such person is alleged to have anywhere unlawfully received property which was unlawfully obtained within such limits;
(d) If such person has in his possession, within such limits, any stolen property.

The new section omits the reference to "night" and also provides a procedure for bringing the person arrested before a justice as soon as possible, whether the arrest was made with or without a warrant. In effect it continues the common law power to hold for investigation for a reasonable time, a person who is arrested on suspicion without warrant. In that connection, it is said in IV Comyn's Digest, sub-title 'Imprisonment' H 5:

"The law gives no authority to a justice of the peace to detain a person suspected but for a reasonable time until he may be examined. As, if he be detained above two days in the justice's house, and then sent to another, or delivered without examination."

In *CHENG FUN v. CAMPBELL*(1909), 16 C.C.C.508, it was held that a peace officer may be liable in damages for false imprisonment if he holds a prisoner unreasonably long before taking him before the Magistrate, and *FREY v. FEDORUK*, [1950]3 D.L.R.513, is to similar effect.

See also s.435 and notes thereto.

INFORMATION, SUMMONS AND WARRANT.

IN WHAT CASES JUSTICE MAY RECEIVE INFORMATION.—Form.

439. (1) Any one who, upon reasonable and probable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information where it is alleged that

(*a*) the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person

(i) is or is believed to be, or

(ii) resides or is believed to reside,

within the territorial jurisdiction of the justice;

Section 439—*continued*

(*b*) the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;

(*c*) the person has anywhere unlawfully received property that was unlawfully obtained within the territorial jurisdiction of the justice; or

(*d*) the person has in his possession stolen property within the territorial jurisdiction of the justice.

(2) An information that is laid under this section may be in Form 2.

This is a combination of the former ss.653 and 654. These were ss.554 and 558 in the Code of 1892. The former except as to 439(1)(d) came from s.435 in the E.D.C., the latter from R.S.C. 1886, c.174, s.30.

The new section omits the reference to a complaint. There could not be a complaint for an indictable offence, although a distinction between the two was drawn in reference to summary conviction matters. The words "under this Act" which appeared in s.654(1) are also omitted. It requires the justice to receive the information, but the next section preserves his discretion as to the issue of process.

In *R. v. WEISS and WILLIAMS*(1913), 22 C.C.C.42, it was held that the justice had the right to proceed with the preliminary hearing of several informations although a warrant had been issued on one only. But in *R. v. BERNARD*(1953), 16 C.R.341, where several counts were included in one information, it was held that there was nothing to prevent such a joinder as there was in the former s.710(3), which also is altered by this Code, s.696(1)(b).

JUSTICE TO HEAR INFORMANT OR WITNESSES.—Summons or warrant.—Process compulsory.—Procedure when witnesses attend.—No process in blank.

440. (1) A justice who receives an information shall

(*a*) hear and consider, *ex parte*,

(i) the allegations of the informant, and

(ii) the evidence of witnesses, where he considers it desirable or necessary to do so; and

(*b*) issue, where he considers that a case for so doing is made out, a summons or warrant, as the case may be, to compel the accused to attend before him.

(2) No justice shall refuse to issue a summons or warrant by reason only that the alleged offence is one for which a person may be arrested without warrant.

(3) A justice who hears the evidence of a witness pursuant to subsection (1) shall

(*a*) take the evidence upon oath, and

(*b*) cause the evidence to be taken in accordance with section 453 in so far as that section is capable of being applied.

(4) No justice shall sign a summons or warrant in blank.

This is the former s.655(1), (2) and (4) and subsec.(4) is the former s.659(2) and s.658(3). Of these, subsecs.(1) and (2) came from s.559 in the Code of 1892 and s.440 of the E.D.C. where subsec.(2) is explained by a marginal note that "an objectionable practice has hitherto existed of

OLD CODE:

654. Any one who, upon reasonable or probable grounds believes that any person has committed an indictable offence under this Act may make a complaint or lay an information in writing and under oath before any magistrate or justice having jurisdiction to issue a warrant or summons against such accused person in respect of such offence.

(2) Such complaint or information may be in form 3, or to the like effect.

655. Upon receiving any such complaint or information the justice shall hear and consider the allegations of the complainant and, if the justice considers it desirable or necessary, the evidence of any witness or witnesses; and if the justice is of opinion that a case for so doing is made out he shall issue a summons or warrant, as the case may be, in manner hereinafter provided.

(2) Such justice shall not refuse to issue such summons or warrant only because the alleged offence is one for which an offender may be arrested without warrant.

. . . . . .

(4) The evidence of witnesses, if any, at such hearing shall be given upon oath, and the evidence of each witness shall be taken down in writing in the form of a deposition, and, subject to the provisions of section six hundred and eighty-three, which, so far as applicable, shall apply to such hearing, shall be read over to and signed by the witness and signed by the justice.

659. (2) No such warrant shall be signed in blank.

658. (3) For wording of this section see p. 731.

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refusing a summons because the applicant might arrest on his own responsibility".

The provisions as to the hearing of witnesses in s.655(1), (3) and (4) were added by 1909, c.9, s.2, and the words "if the justice considers it desirable or necessary" were inserted in subsec.(1) by 1913, c.13, s.24.

The amendment of 1909 was introduced with this note:

"This is a desirable amendment in ordinary cases, inasmuch as the Justice may sometimes not feel justified in granting a summons or warrant without some further evidence than that of the applicant; but it is especially designed to give express authority, which is apparently now lacking, for compelling the attendance of witnesses and for the taking of their evidence upon oath upon application for warrant in extradition cases."

The foregoing was cited in *R. v. MITCHELL*(1911), 19 C.C.C.113, where it was said that:

"It is only when the allegations of the complainant do not convince the magistrate that a summons should issue, that there is any need of witnesses, and until that time there are no persons who are 'his witnesses'.

A magistrate would be ill-advised who would refuse a summons without hearing all witnesses whom the complainant produced or *bona fide* offered to produce."

In *R. v. HARRISON*(1918), 29 C.C.C.420 at p.422, it was said that: "It is not incumbent on the justice, although he may, if he sees fit to do so, and ought unless the information is laid by an apparently credible person . . . . . ought, I say, to make some investigation outside

Section 440—*continued*

of the mere allegation of the complaint itself . . . . . but it is within his jurisdiction and discretion if he sees fit, to accept only the allegation of the complainant as the foundation for the issuing of the warrant."

It was held in *Re TAIT*(1950), 98 C.C.C.241, at p.251, that it was entirely for the magistrate to say what evidence he wanted to hear before issuing a summons, that he could hear both sides before doing so, but that it is not the practice to hear the accused.

SUMMONS.—Form.—Service on individual.—Service on corporation.—Service on municipality.—Proof of service.

441. (1) A summons shall

***(a)* be directed to the accused,**

***(b)* set out briefly the offence in respect of which the accused is charged, and**

***(c)* require the accused to appear at a time and place to be stated therein.**

(2) A summons may be in Form 6.

(3) A summons shall be served by a peace officer who shall deliver it personally to the person to whom it is directed, or, if that person cannot conveniently be found, shall leave it for him at his last or usual place of abode with some inmate thereof who appears to be at least sixteen years of age.

(4) Subject to subsection (5), where an accused is a corporation the summons shall be served by delivering it to the manager, secretary or other executive officer of the corporation, or of a branch thereof.

(5) Where an accused is a municipal corporation, the summons may be served by delivering it to the mayor, secretary-treasurer or clerk of the corporation.

(6) Service of a summons may be proved by the oral evidence, given under oath, of the peace officer who served it or by his affidavit made before a justice.

Subsecs.(1), (2) and (3) cover matters appearing in the former s.658(1), (2), (3) and (5) and s.672. S.658 was s.562 in the Code of 1892 and ss.40-42 in R.S.C. 1886, c.174. It was s.441 in the E.D.C., being adapted from 11 and 12 Vict., c.42, ss.1 and 9, and 14 & 15 Vict., c.93, ss.11 and 12(2).

Subsecs.(4) and (5) are adapted from the former s.782(1), enacted originally as s.778A by 1909, c.9, s.2 and re-enacted by 1943-44, c.23, s.23. Part XIII of the repealed Code did not set out procedure in respect of corporations.

See s.20 *ante*, p.61, as to issue and service on Sunday or holiday.

The following appears in *Ex p. O'REGAN*(1909), 16 C.C.C.110, at p.114:

"By s.658 of the Code, made applicable to summary convictions by s.711 (see now s.700, *post*), it is provided that service of summons may be made by 'a constable or other peace officer', without requiring, or at least without in terms requiring, that the person serving shall be a peace officer of any particular county; while, on the other hand, s.660

OLD CODE:

658. Every summons issued by a justice under this Act shall be directed to the accused, and shall require him to appear at a time and place to be therein mentioned.

(2) Such summons may be in form 5, or to the like effect.

(3) No summons shall be signed in blank.

(4) Every such summons shall be served by a constable or other peace officer upon the person to whom it is directed, either by delivering it to him personally or, if such person cannot conveniently be met with, by leaving it for him at his last or most usual place of abode with some inmate thereof apparently not under sixteen years of age.

(5) The service of any such summons may be proved by the oral testimony of the person effecting the same or by the affidavit of such person purporting to be made before a justice.

672. Every such summons shall be served by a constable or other peace officer upon the person to whom it is directed either personally, or, if such person cannot conveniently be met with, by leaving it for him at his last or most usual place of abode with some inmate thereof apparently not under sixteen years of age.

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

. . . . . .

(see now s.443, *post*), also made applicable to summary convictions by s.711, requires every warrant to be addressed to a constable or constables 'within the territorial jurisdiction of the justice issuing it'.

The intention of the summons is to afford the person accused the means of making his defence. (*Per* Fraser, J., in *Ex parte CAMPBELL* (1887), 26 N.B.R.590, at p.592), and this purpose is effected equally well whether the defendant is served within or without the county where the offence occurred. Moreover, the law does not look with favour upon the arrest of the defendant under warrant, when a summons would probably have sufficed."

With reference to service of a summons, the following is quoted from *R. v. FORBES*(1953), 106 C.C.C.193, at pp.194-5:

"This (*i.e.*, s.658(4)), clearly leaves it to be understood that (a) the agent of the peace or serving officer must previously find out if the accused can easily be met with or inform himself where he can be found, and (b) it is only after finding out by such enquiry that the accused could not conveniently be met with personally, that he used this exceptional mode of service.

As a matter of course his signed and sworn to record of the service should indicate these facts in order to show that such service was not made at the caprice of the serving officer but simply and solely after having followed the provisions required by the Code. This seems to me, moreover, the meaning of the jurisprudence in point. Seager's Criminal Proceedings, 3rd ed., p.155, enunciates this principle: 'But it must be proved that some reasonable effort was made to serve the

Section 441—*continued*

accused personally; and when the summons was served upon an adult at the defendant's residence, but there was no proof whatever that such person was really an inmate, or that any effort had been made to serve the defendant personally, *it was held to be insufficient.*'

Re MUSIAL(1929), 51 C.C.C.142, [1929]1 D.L.R.708 (judgment of the Supreme Court of Nova Scotia): 'In order to prove proper service of a summons by leaving it with a grownup person at the accused's last known place of abode, the constable must do more than swear that the accused could not conveniently be met with, he must show that he made enquiries and what the result of those enquiries was and that it showed that the accused could not conveniently be met with.' (headnote).

Re BARRON(1897), 4 C.C.C.465 (judgment of the Supreme Court of Prince Edward Island): 'The proof of service of a magistrate's summons served *substitutionally* must shew that the defendant could not be conveniently served in person, and that the adult person *substitutionally* served for him at the defendant's place of abode is an inmate thereof.

Where proof of the *substitutional* service becomes necessary in order to enable the magistrate to proceed with the trial, and is defective in both of such particulars, the conviction will be quashed on *certiorari*. (headnote)"

In *R. v. MARLER*(1953), 8 W.W.R. (N.S.) 464, in which summons to accused had been delivered to his father, an application for *certiorari* was dismissed. "It cannot be said that (the magistrate) had no jurisdiction."

CONTENTS OF WARRANT TO ARREST.—No return day.—Form.

442. (1) A warrant shall

(a) **name or describe the accused,**

(b) **set out briefly the offence in respect of which the accused is charged, and**

(c) **order that the accused be arrested and brought before the justice who issued the warrant or before some other justice having jurisdiction in the same territorial division, to answer to the charge and to be further dealt with according to law.**

(2) A warrant remains in force until it is executed, and need not be made returnable at any particular time.

(3) A warrant may be in Form 7.

Subsec.(1) comes from the former s.660(2) and s.664. Subsec.(2) is the former s.660(3) and subsec.(4) is the former s.659(1).

S.659(1) was part of s.563 in the Code of 1892. S.660 also formed part of that section. It came from R.S.C. 1886, c.174, ss.31, 43, 44 and 46. Corresponding provisions appeared in s.442 of the E.D.C. and were based upon the Imperial statutes cited under s.441.

S.664 was s.567 in the Code of 1892 and s.44 in the E.D.C. Its imperative requirement is covered now by s.438 *ante*.

OLD CODE:

660. (2) The warrant shall state shortly the offence for which it is issued, and shall name or otherwise describe the offender, and it shall order the constable or constables to whom it is directed to apprehend the offender and bring him before the justice or justices issuing the warrant, or before some other justice or justices, to answer to the charge contained in the information or complaint, and to be further dealt with according to law.

(3) It shall not be necessary to make such warrant returnable at any particular time, but the same shall remain in force until it is executed.

659. (1) The warrant issued by a justice for the apprehension of the person against whom an information or complaint has been laid as provided in section six hundred and fifty-four may be in form 6, or to the like effect.

664. When any person is arrested upon a warrant he shall, except in the case provided for in the last preceding section, be brought as soon as is practicable before the justice who issued it or some other justice for the same territorial division, and such justice shall either proceed with the inquiry or postpone it to a future time, in which latter case he shall either commit the accused person to proper custody or admit him to bail or permit him to be at large on his own recognizance according to the provisions hereinafter contained.

660. (1) Every warrant shall be under the hand of the justice issuing the same, and may be directed, either to any constable by name, or to such constable and all other constables within the territorial jurisdiction of the justice issuing it, or generally to all constables within such jurisdiction.

. . . . . .

(4) The fact that a summons has been issued shall not prevent any justice from issuing a warrant at any time before or after the time mentioned in the summons for the appearance of the accused.

(5) In case the service of the summons has been proved and the accused does not appear, or when it appears that the summons cannot be served, a warrant in form 7 may issue.

FORMALITIES OF WARRANT.

443. A warrant that is authorized by this Part shall be signed by a justice and may be directed,

(a) **to a peace officer by name,**

(b) **to a peace officer by name and all other peace officers within the territorial jurisdiction of the justice, or**

(c) **generally to all peace officers within the territorial jurisdiction of a justice.**

This is the former s.660(1). It was s.563(2) in the Code of 1892. See notes to s.442 *supra*.

SUMMONS NOT TO PREVENT WARRANT.—Warrant in default of appearance.

444. (1) A justice may issue a warrant in Form 7 for the arrest of an accused notwithstanding that a summons has already been issued to require the appearance of the accused.

(2) Where

(a) **service of a summons is proved and the accused does not appear, or**

Section 444—*continued*

(b) **it appears that a summons cannot be served because the accused is evading service,**

a justice may issue a warrant in Form 8.

This is the former s.660(4) and (5) which were s.563 in the Code of 1892 and part of s.442 in the E.D.C. See further notes to s.442.

The justice cannot proceed in the absence of the accused: s.453(1) *post.*

EXECUTION OF WARRANT.—Where.—By whom.

445. (1) A warrant may be executed by arresting the accused

(a) **wherever he is found within the territorial jurisdiction of the justice by whom the warrant was issued, or**

(b) **wherever he is found in Canada, in the case of fresh pursuit.**

(2) A warrant may be executed by a person who is

(a) **the peace officer named in the warrant, or**

(b) **one of the peace officers to whom it is directed, whether or not the place in which the warrant is to be executed is within the territory for which the person is a peace officer.**

This comes from the former s.661(1) and (2). They were s.564(1) and (2) in the Code of 1892 and R.S.C. 1886, c.174, ss.47 and 48. The limitation of seven miles in the case of fresh pursuit has been dropped in view of modern means of rapid transportation.

Hals. 2nd ed., vol. 9, p.100, is authority for the proposition that a constable, having a warrant to arrest a person, may, after demanding and being refused admittance, break open doors to effect an arrest. This appears also in Kenny's Outlines of Criminal Law, 1952 ed., p.472.

In the case of *WAH KIE v. CUDDY* (No.2) (1914), 23 C.C.C.383, at pp.386 and 387, the following propositions were laid down in respect of the execution of a search warrant:

1. The police officer should have the warrant in his possession at the time of the search. (As to this see now s.29, *ante.*)
2. The second preliminary to the execution of a search warrant, generally speaking, when the place to be searched is a dwelling house, is a demand to open.

While these considerations are of general application, they may be especially material in reference to s.202 of the *National Defence Act,* R.S.C., 1952, s.184, under which a justice may issue a warrant to apprehend a deserter or absentee without leave. See also ss.52 and 56, *ante.*

As to fresh pursuit, the following appears in 1 Hale 94:

"If a person be charged to the constable for felony, or suspicion of felony in the county of A and the constable charge him in the King's name to yield himself, and he either before or after the arrest pursue him into another vill, nay into another county, the constable hath the same privilege and protection upon his pursuit and arrest, as if he were taken in the county of A though he must yet bring him before the justice of that county where he was taken.

But for this latter case I take the law to be all one in case of a con-

OLD CODE:

661. Every such warrant may be executed by arresting the accused wherever he is found in the territorial jurisdiction of the justice by whom it is issued, or, in the case of fresh pursuit, at any place in an adjoining territorial division within seven miles of the border of the first-mentioned division.

(2) Every such warrant may be executed by any constable named therein or by any one of the constables to whom it is directed, whether or not the place in which it is to be executed is within the place for which he is constable.

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stable having a warrant to arrest a felon, or not having one . . . . . namely, that if he hath or hath not a warrant from a justice of peace to arrest a felon, if the felon fly into another county before arrest, he is to be brought before a justice of that county, or to the gaol of that county, where he is arrested; but if he were once arrested and escape and upon fresh pursuit he is taken by the constable in another county, yet he may be brought back to the justice, or gaol of that county where he was first arrested; for in that case in supposition of law he is always in custody by force and authority of the first arrest as well where the arrest was *virtute officii*, as where done by a warrant."

See also s.436, *ante* and notes thereto.

As to subsec.(2)(a) see the remarks quoted from *R. v. BELYEA*, *ante* p.86, concerning the importance of the principle that public officers shall act without bias or prejudice.

See also s.447 as to endorsement of warrant.

PROCEDURE TO PROCURE ATTENDANCE OF A PRISONER.

FOR PRELIMINARY INQUIRY.—For trial.—As a witness.—Judge's order.—Magistrate's order.—Conveyance of prisoner.—Detention of prisoner required as witness.—Detention of prisoner in other cases.—Application of sections respecting sentence.

446. (1) Where a person who is confined in a prison is required

(*a*) to attend at a preliminary inquiry into a charge against him,

(*b*) to stand his trial upon a charge that may be tried by indictment or on summary conviction, or

(*c*) to attend to give evidence in a proceeding to which this Act applies,

a judge of a superior court of criminal jurisdiction or of a county or district court may order in writing that the prisoner be brought before the court, judge, justice, or magistrate before whom his attendance is required, from day to day as may be necessary, if

(*d*) the applicant for the order sets out the facts of the case in an affidavit and produces the warrant, if any, and

(*e*) the judge is satisfied that the ends of justice require that an order be made.

(2) A magistrate has the same powers for the purposes of subsection (1) as a judge has under that subsection, where the person whose attendance is required is confined in a prison within the province in which the magistrate has jurisdiction.

(3) An order that is made under subsection (1) or (2) shall

Section 446—*continued*

be addressed to the person who has custody of the prisoner, and on receipt thereof that person shall

(a) **deliver the prisoner to any person who is named in the order to receive him, or**

(b) **bring the prisoner before the court, judge, justice or magistrate, as the case may be, upon payment of his reasonable charges in respect thereof.**

(4) Where the prisoner is required as a witness, the judge or magistrate shall direct, in the order, the manner in which the prisoner shall be kept in custody and returned to the prison from which he is brought.

(5) Where the appearance of the prisoner is required for the purposes of paragraph *(a)* or *(b)* of subsection (1), the judge or magistrate shall give appropriate directions in the order with respect to the manner in which the prisoner is

(a) **to be kept in custody, if he is committed for trial; or**

(b) **to be returned, if he is discharged upon a preliminary inquiry or if he is acquitted of the charge against him.**

(6) Sections 621 and 634 apply where a prisoner to whom this section applies is convicted and sentenced to imprisonment by the court, judge, justice or magistrate.

This replaces the former ss.662(4), (5) and (6), 883, 941 and 977. Their history is as follows: s.662(4), (5) and (6) were enacted by 1909, c.9, s.2 and 1925, c.38, s.18.

S.883 was s.650 in the Code of 1892, and s.99 in R.S.C. 1886, c.174.

S.941 was s.652 in the Code of 1892. It was adapted from R.S.C. 1886, c.174, s.101, and 30-31 Vict., c.35, (Imp.).

S.977 was s.680 in the Code of 1892, amended by 63-64 Vict., c.46, s.3. It was s.213 in R.S.C. 1886, c.174 with slight changes. Provisions somewhat similar appear in the Imperial statutes 46 Geo. III, c.92, and 16-17 Vict., c.30, s.9. S.977 was re-enacted by 1950, c.11, s.16.

S.662 made provision for the attendance of a prisoner at the preliminary inquiry into a charge against him; s.883 for cases in which a prisoner was required to stand trial after a true bill had been found against him; s.941 provided for cases in which a prisoner, against whom an indictment had been found, was required to stand his trial.

S.977 made provision for securing the attendance of a prisoner in any court of criminal jurisdiction, but the amendment of 1950 extended to magistrates the power to require such attendance on a preliminary hearing, a summary trial or the hearing of a summary conviction matter. Subsec.(2) of the new section involves a change from s.977 in that the order cannot be made by a magistrate if the prisoner is confined in another province. It is thought preferable that in such a case the order should be made by a judge upon notice to the Attorney General as required in the new section. Subsecs.(5) and (6) are designed to provide for a case where a prisoner is produced for the purposes of a preliminary hearing in another province, and there elects summary trial and is sentenced. For example, if a prisoner in Ontario is taken to Manitoba for preliminary hearing of a charge and there elects summary trial and is

OLD CODE:

662. (4) If the person against whom such warrant has been issued is then confined for some other cause in any prison within the province then, upon application to the judge of any superior, county or district court, and upon production to him of the warrant with an affidavit setting forth the above facts, such judge if he is satisfied that the ends of justice require it, may make an order in writing addressed to the warden or keeper of such prison, or to the sheriff or other person having the custody of the prisoner, to bring up the body of such person before the justice who is holding the preliminary inquiry, from day to day, as may be necessary for the purposes of such inquiry, and such warden, keeper, sheriff or other person, upon being paid his reasonable charges in that behalf, shall obey such order.

(5) If the person against whom such warrant is issued is then confined for some other cause in any prison within another province then, upon application to the judge of any superior, county or district court having jurisdiction in the place where the prisoner is confined, and upon production to him of the warrant with an affidavit setting forth the facts, such judge, if satisfied that the ends of justice require it, may, by order in writing addressed to the warden or keeper of such prison, or to the sheriff or other person having the custody of the prisoner, direct him to bring up the body of such person before the justice who is holding the preliminary inquiry from day to day as may be necessary for the purposes of such inquiry, and at the place and within the province wherein the warrant was issued, and such warden, keeper, sheriff or other person upon being paid his reasonable charges in that behalf shall obey the order: Provided that no such order shall be granted unless notice of the application therefor shall have been served upon the Attorney General of the province in which the prisoner is confined within a reasonable time before the making of the application.

(6) Where any order is granted under the provisions of the last preceding subsection, the judge may, by such order or by such further or other order as he may deem requisite, from time to time, give directions as to the manner in which such person shall be kept in custody and returned to prison to serve the remainder of his original sentence, in case he be discharged or acquitted of the offence in respect of which such warrant was issued, or may make such other directions as in the circumstances of the case he may see fit.

883. If after removal by the Governor in Council or the lieutenant-governor in council of any province of any person confined in any gaol to any other place for safe keeping or to any other gaol, a true bill for any indictable offence is returned by any grand jury of the county or district from which any such person is removed against any such person, the court into which such true bill is returned may make an order for the removal of such person from the place for safe keeping or gaol in which he is then confined to the gaol of the county or district in which such court is sitting for the purpose of his being tried in such county or district.

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

Section 446—*continued*

sentenced to the penitentiary, he would serve the remainder of the sentence imposed in Ontario in the penitentiary in Manitoba to which he was sentenced in Manitoba, to be served concurrently or consecutively as the court in Manitoba might direct. This should clarify a situation which has given some difficulty in the past.

Endorsement of Warrant.

ENDORSING WARRANT.—Effect of endorsement.

447. (1) Where a warrant for the arrest of an accused cannot be executed in accordance with section 445, a justice within whose jurisdiction the accused is or is believed to be shall, upon application, and upon proof on oath or by affidavit of the signature of the justice who executed the warrant, authorize the execution of the warrant within his jurisdiction by making an endorsement, which may be in Form 25, upon the warrant.

(2) An endorsement that is made upon a warrant pursuant to subsection (1) is sufficient authority to the peace officers to whom it was originally directed, and to all peace officers within the territorial jurisdiction of the justice by whom it is endorsed, to execute the warrant and to take the accused before the justice who issued the warrant or before some other justice for the same territorial division.

This is the former s.662(1), (2) and (3). These provisions were s.565 in the Code of 1892 and s.49 in R.S.C. 1886, c.174. Provision for the backing of warrants was contained in s.443 of the E.D.C., based upon 11-12 Vict., c.42, ss.12 to 14, and 14-15 Vict., c.93, ss.27 to 29.

As to search warrants see s.429(2) and (4) *ante*.

This section as presented in the Draft Bill did not continue the requirement of proof of the signature of the issuing justice. It was felt that it might at times create inconvenience to send a police officer who was familiar with his signature and that it was not to be assumed that the signature upon a warrant presented by a police officer was otherwise than genuine. However, the original requirement was restored in Parliament; Senate Committee, June 11, 1952, p.30, Dec.15-16, 1952, p.69.

See also ss.482(5) and 713(2) (committal) and s.609 (absconding witness).

Coroner's Warrant.

CORONER'S WARRANT.—Recognizance.—Transmitting depositions.

448. (1) Where a person is alleged, by a verdict upon a coroner's inquisition, to have committed murder or manslaughter but he has not been charged with the offence, the coroner shall

***(a)* direct, by warrant under his hand, that the person be taken into custody and be conveyed, as soon as possible, before a justice, or**

***(b)* direct the person to enter into a recognizance before him with or without sureties, to appear before a justice.**

(2) Where a coroner makes a direction under subsection (1) he

OLD CODE:

977. (1) When the attendance of any person confined in any prison in Canada is required before any court of criminal jurisdiction, including a magistrate acting under Part XIV, XV or XVI, the court, or any judge thereof or such magistrate may make an order upon the warden or gaoler of the prison or upon the sheriff or other person having the custody of such prisoner,

(a) to deliver such prisoner to the person named in such order to receive him; or

(b) to himself convey such prisoner to such place.

(2) The warden, gaoler or other person aforesaid, having the custody of such prisoner, when so required by order as aforesaid, upon being paid his reasonable charges in that behalf, or the person to whom such prisoner is required to be delivered as aforesaid, shall, according to the exigency of the order, convey the prisoner to the place at which he is required to attend and there produce him, and then to receive and obey such further order as to the said court seems meet.

662. If the person against whom any warrant has been issued cannot be found within the jurisdiction of the justice by whom the same was issued, but is or is suspected to be in any other part of Canada, any justice within whose jurisdiction he is or is suspected to be, upon proof being made on oath or affirmation of the handwriting of the justice who issued the same, shall make an endorsement on the warrant, signed with his name, authorizing the execution thereof within his jurisdiction.

(2) Such endorsement shall be sufficient authority to the person bringing such warrant, and to all other persons to whom the same was originally directed, and also to all constables of the territorial division where the warrant has been so endorsed, to execute the same therein and to carry the person against whom the warrant issued when apprehended, before the justice who issued the warrant, or before some other justice for the same territorial division.

(3) Such endorsement may be in form 8.

. . . . . .

667. Every coroner, upon any inquisition taken before him whereby any person is charged with manslaughter or murder, shall, if the person or persons, or either of them, affected by the verdict or finding is not already charged with the said offence before a magistrate or justice, by warrant under his hand, direct that such person be taken into custody and be conveyed, with all convenient speed, before a magistrate or justice; or such coroner may direct such person to enter into a recognizance before him, with or without a surety or sureties, to appear before a magistrate or justice.

(2) In either case, it shall be the duty of the coroner to transmit to such magistrate or justice the depositions taken before him in the matter.

(3) Upon any such person being brought or appearing before any such magistrate or justice, he shall proceed in all respects as though such person had been brought or had appeared before him upon a warrant or summons.

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shall transmit to the justice the evidence taken before him in the matter.

This is the former s.667. It was s.568 in the Code of 1892 where it is noted as new. Other sections in which the coroner was mentioned were s.695(1) now covered by s.448(2) and s.940, now s.488(3). S.109, formerly s.166 deals with misconduct on his part. There may also be mentioned

Section 448—*continued*

ss.648 and 649 *post*, formerly ss.1070 and 1072 which deal with the coroner's inquest to be held following an execution.

S.667 in identical terms appears as s.568 in the Code of 1892.

S.695 appears as s.600 and s.940 appears as s.642.

S.568 was taken from the English Draft Code (s.439), and s.642, from s.506, which read as follows:

"506. After the commencement of this Act no grand jury shall present that any one has committed an indictable offence except upon a bill of indictment duly sent before them. After the commencement of this Act no one shall be tried upon any coroner's inquisition."

This was copied into the Canadian Code Bill of 1892, but after debate in the House of Commons (Hansard 1892, Vol. II, Col.4227) the first part was dropped in deference to the objection that it limited the jurisdiction of the grand jury simply to the finding of indictments, and the section was left as it appeared in s.940.

The report of the Commissioners on the English Draft Code contains the following at p.33:

"As to persons committed upon a coroner's inquisition, the common though not universal practice is to take a prisoner committed by the coroner before a magistrate. We do not undervalue the coroner's inquest, but we see no reason why in cases in which they result in a committal for murder or manslaughter, the suspected person should not have a right by law to be taken before a magistrate, and have the advantages which other accused persons possess; and upon the whole, we propose to extend the principle of the *Vexatious Indictments Act* to all offences whatever, except those which are tried on criminal informations. S.505 accordingly provides that no one except the Attorney General may prefer any bill of indictment unless he is bound over to prosecute, or unless he has the written consent of a judge of the High Court or of the Attorney General, or of the Court before which the bill is to be preferred to do so; and s.506 enacts that henceforth no one shall be tried upon a coroner's inquisition, and that no grand jury shall present except upon a bill of indictment duly sent before them. The effect of this will be that as a rule no one will, if the Draft Code becomes law, be liable to be indicted without a preliminary inquiry being first held before a magistrate. . . . . "

It will be observed that the outlines of ss.505 and 506 are substantially the provisions of the Canadian Code except as to the first part of s.506.

Jervis on Coroners, 8th ed., states at p.114:

"It is the duty of the jury (or of the coroner if he be sitting alone) after giving the verdict to certify it by an inquisition in writing . . . . . The inquisiton must be under the hands of the jurors who concur in it. An inquisition consists of three parts, the caption, the verdict and the attestation. . . . . Statements made in an inquisition may be in concise and ordinary language (*Coroners Act* 1887, s.18(2))."

and in the 4th edition at p.242:

"An inquisition, properly so called, is the written statement of the verdict or finding of a jury returned for the purpose of a particular inquiry, as distinguished from an indictment, which is an accusation

by the oaths of jurors returned to inquire generally of all offences within the county. When it contains the subject-matter of accusation it is equivalent to the findings of a grand jury, and the parties may be tried and convicted upon it."

and at p.264:

"When the coroner's jury return a verdict of murder or manslaughter, it is the duty of the coroner to issue his warrant for the apprehension of the party accused, and to commit him to prison, or, if he be already in prison, to issue a detainer to the gaoler in whose custody he is."

In *R. v. BARNES*(1921), 36 C.C.C.40, at p.53, Riddell, J., said:

"The coroner had some jurisdiction by the ancient statute law, which we would now call civil; the statute *De Officio Coronatoris*(1276), 4 Edw. I.: Statute 2, sec.2, directs the coroner to inquire of treasure trove: *ATT'Y GEN'L v. MOORE,* [1893]1 Ch.676: Our Coroner's Act R.S.O. 1914, c.92, s.7, gives jurisdiction in certain cases of fire, but, notwithstanding these facts, a coroner's inquisition *super visum corporis* is a criminal Court: Blackstone's Comm. Book IV, p.274; *THE QUEEN v. HAMMOND,* 29 O.R.211, especially at p.234. 'The Coroner's Court is a Court of record of very high authority,' *THOMAS v. CHURTON*(1862), 2 B & S. 475, at p.478, 121 E.R. 1150.

Being a criminal Court, a 'court of criminal jurisdiction' while its constitution is a matter of provincial control, B.N.A. Act sec.92(14)—its practice and 'procedure' come under the Dominion,—British North America Act, sec.91(27), 'as does all procedure in criminal matters'."

R. v. HAMMOND(1898), 29 O.R.211, reached the same conclusion. Meredith, J., at p.234, said:

"The fact that the results of such inquisition have been to some extent curtailed (see Criminal Code 1892, 55-56 Vict., c.29, ss.568, 642), cannot affect the character of the proceedings."

R. v. HENDERSHOTT(1895), 26 O.R.678, at p.682, is to similar effect.

In *R. v. PANTELIDIS*(1942), 79 C.C.C.46 at p.54:

"Even in a coroner's court which is at least quasi-judicial, persons suspected of homicide are often examined, and though they may now, by claiming the benefit of the *Canada Evidence Act,* R.S.C. 1927, c.59, prevent their answers from being used to convict them later, these answers may be made the basis of an inquisition, which at common law constitutes an indictment."

In *BIGAOUETTE v. R.*(1927), 46 C.C.C.311, accused was arrested on a coroner's warrant and was later convicted of murder. On appeal one of the objections was to a reference in the judge's charge to the action of the Crown in starting the prosecution; at p.326:

"He had a perfect right, in the course of his address to the jury, to refer to the fact that the coroner's jury had found a verdict. The record before the trial Court showed that the appellant had been arrested on the coroner's warrant—why should the presiding judge not refer to that fact? I do not hesitate to express the opinion that a coroner's verdict should not be produced before the jury trying a man for murder."

On appeal to the Supreme Court of Canada, a new trial was ordered (47 C.C.C.271) but on another ground.

Section 448—*continued*

There are certain other points of procedure in relation to coroners which may be noticed. There is a review of authorities in *BIRD v. KEEP*(1918), 118 L.T.R. p.633, from which the following is quoted:

> "The coroner's inquisition is not like a judgment *in rem*. Nothing is done which is conclusive upon any person affected by it. In *GARNETT v. FERRAND*(1827), 6 B. & C.611, it was laid down by the Court of King's Bench (at p.626) that an inquiry before a coroner ought, for the purposes of justice, in some cases to be conducted in secrecy; that cases may occur in which privacy may be necessary for the sake of decency; others in which it may be due to the family of the deceased. An inquiry before a coroner is merely in the nature of a preliminary investigation. It is not of any binding force. Hence, it was decided by the Court of Queen's Bench in *R. v. INGHAM*(1864), 5 B. & S.257 that, if evidence not on oath be received in a coroner's court, it is no ground for a *certiorari* to bring up the inquisition with a view to its being quashed. And a rule for a *certiorari* on the ground that the coroner had laid down the law to the jury improperly was also refused. And on the further ground that there was no evidence to warrant the finding of the jury it was also refused. The *Coroner's Act* 1887, s.4(1), now requires a coroner to examine on oath all persons tendering their evidence.
>
> Under these circumstances I am of opinion that the result of an investigation conducted by the coroner, however valuable for certain purposes, cannot in law be treated as *prima facie* evidence against any person of the facts found by the jury."

After certain citations in support of this last statement, the judgment quoted concludes as follows:

> "In my opinion the finding of the coroner's jury was not admissible in the present case. It merely amounted to the opinion of the coroner's jury as to the cause of death upon the evidence adduced before them. This is irrelevant to the issue involved in the present proceedings, ..."

Generally it does not appear that the Canadian practice is out of accord with the English practice.

It was held in *R. v. GRAHAM*(1898),2 C.C.C.388, that a coroner is not "a justice" within the meaning of the Cr. Code s.687 (now s.999) and s.3(n) (now s.2(19)) which provide for the use upon a trial of the depositions "taken by a justice in the preliminary or other investigation of any charge", of a witness absent from Canada.

In *ROBIN v. McMAHON*(1915), 27 C.C.C.407, a motion for a writ of *certiorari* to quash a verdict of manslaughter found by a coroner's jury by reason of certain technical omissions on the part of the coroner, was refused on the grounds *inter alia* that "the Coroner's Court is a common law tribunal charged with making an investigation to find out if a crime has been committed, that its proceedings are similar to those of the grand jury, that the examinations made by the coroner are not directed against any person in particular, and until the moment of the verdict there is no defendant accused in the proceedings."

OLD CODE:

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

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

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

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

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

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

S.448 applies only where there is an inquest.

PART XV.
PROCEDURE ON PRELIMINARY INQUIRY.

Jurisdiction.

INQUIRY BY JUSTICE.

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

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

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

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